HUNGARIAN LABOUR LAW
E - J O U R N A L

Restrictive covenants from a comparative perspective

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1. Introduction

First of all it is necessary to have a common definition, concept about restrictive covenant to be able to compare this legal institution in the legal systems of different countries. Covenants not to compete are a post-employment restrictive covenant between an employer and the employee. The employee shall not engage in any business activities – for few months/years following termination of the employment relationship – by which to infringe upon or jeopardize the rightful economic interests of the employer.

Mostly, these agreements prohibit the employee from going to work for a competitor or otherwise compete with the former employer. Meaning this agreement can be used to reconcile the (obviously) conflicting employer and employee interests with each other, as these interests may otherwise be brought to conflict. From the employer's point of view, it is a basic expectation that the worker should not compromise, risk, reduce the company's competitive position, its appearance on the market, and the profit at all. Consequently, employees are often met with other restrictive covenants, such as nondisclosure agreements, nonsolicitation of client clauses, and nonsolicitation of former fellow employee provisions. The typical noncompete agreement will also restrict a worker from leaving to start a competing business.[1]

This paper is looking for some conclusive answers on crucial issues such as how, when, and why competitive restrictions are used in labour law and, ultimately the impact that they are having, for better or worse. Meaning whether they should be considered legitimate agreements at all or not? For example, where do we draw the line between fundamental rights (right to work on the one hand, and freedom to run a business, on the other hand), or what proportionality means with regard to restrictive covenants. Also, where and how is it examinable? According to our opinion, current practices do not take these issues into account, and, thus, do not examine them in depth.

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1 Norman D. Bishara – Evan Starr: The Incomplete Noncompete Picture. *Lewis & Clark L. Rev.*, Vol. 20., 2016. 497–546.

The purpose of the paper is to provide an analytical overview of some selected aspects of the regulation and practice of non-competition agreements in various countries (in particular, but not limited to the United Kingdom, Germany and France). The analysis is based on a pre-selected set of criteria, for instance, possible duration, geographical restrictions of such agreements, the amount of the compensation or the requirement of proportionality. The paper also aims at comparing the foreign practices to Hungarian regulation. The examined aspects have been selected in order to enrich the scope of Hungarian professional discussion on this matter. Comparative analysis can be useful for national theory and practice, as it points to the content elements and dilemmas that may be relevant to the non-competition agreement, even if the applicable labour law does not necessarily cover certain details.

We can observe very different conditions in every countries' legal system, certain differences can be observed in detail. In order to judge the fairness of restrictions within the professional career of a worker, and whether they disproportionately restrict establishing new employment relationships, the judicial practice generally examines the geographical scope, duration of the restriction, the variability of banned activities, the amount of compensation and whether this legal institution is needed at all for employers to restrict employees.

2. Fundamental rights dilemmas

Non-competition agreements impede the flow and use of knowledge by restricting an individual worker's otherwise free choice of leaving one employer to join another competing employer.[2] The constitution of most countries includes that everyone shall have the right to freely choose his or her work, in our opinion Germany and France were the most pronounced in this context, because special emphasis is also placed on the precise wording, since the freedom to pursue a profession is a fundamental right guaranteed by the Constitution, and thus the restriction must not impede the professional development of the employee in an unfair manner.[3] Fundamentally, allowing an employer to stop an employee from going to work for a competitor or to start a competing business – even for a limited time or within a limited geographic area – provides an advantage to the former employer. That advantage comes at a cost for the individual employee and harms specific business competitors by denying them access to valuable talent, ideas, and skills.

The effects on competition law also has to be considered, because this branch of law is also facing with the problem of gaining knowledge and experience during a legal relationship with a company and then becoming a competitor in economic life by using the competences acquired in the context of

2 Bishara–Starr op. cit. 504.

3 Manfred Weiss – Marlene Schmidt: *Labour Law and Industrial Relations in Germany.* Wolters Kluwer Law & Business, 2008. 147–148.

a self-employed business. It would be wise to compare noncompete agreements with competition law institutions such as abuse of a dominant position, boycott and breach of trade secrets.

In other words, the goal is always that a competitor in the same segment of the market shouldn't "seduce" quickly and without risk workers with serious experience, routine, personal and professional knowledge. The legitimacy of these agreements, both in legal literature and in practice, is the fact that if the employee had used his experience and expertise for the employer at the competing company, he would injure the business interests of the former employer. The most frequently-referred reason for the existence of these agreements is that if the employee's experience and expertise was used by the competing company, it would be detrimental to the business interests of the former employer.

There may also be costs for the economy and harm to the creation of positive spillovers, like innovation and new venture creation. So, post-employment covenants not to compete can be disfavoured because they are, by definition and by nature, anticompetitive agreement. These contracts function by restricting the otherwise free mobility of the worker.[4]

Because of the anticompetitive impact of these agreements, in our view, the courts have to use "reasonableness" test to evaluate whether the benefits of the agreement to protect a legitimate business interest outweighs the harm to the individual (and its fundamental 'right to work') and even to the public interest.

Before turning to the aspects to be examined, it is worth determining what the term, 'legitimate business/economic interest' means. This legal institution does not indicate a certain interest, but rather a specific centre of interest, which includes all essential, relevant facts, circumstances, actions, events, processes, etc., which is relevant to the employer's activity.

To examine that, we have to take into consideration three points of view. Firstly the restriction can't be greater than is required for the protection of legitimate business interest of the employer. Secondly, it does not impose undue hardship on the employee. Last but not least, is not injurious to the public.[5]

Further, the extent of the employer's legitimate business interest may be limited by type of activity, geographical area and time. The requirement of proportionality accompanies the entire legal institution, since both the geographical and the temporal restrictions, the amount of the compensation must be proportionate to each other.

3. Validity of non-competition agreements

In almost every country's legal system, we encounter a similar set of criteria, and we can only observe deviations at the scale of the criteria. In order to assess, whether the non-competition agreement

4 Bishara–Starr op. cit. 506.

5 Bishara–Starr op. cit. 507.

has an unfair influence on the professional career of an employee, or disproportionately restricts the establishment of a new employment relationship in comparison with the legitimate economic interest of the employer, the judicial practice generally examines the geographical scope, the duration of the restriction, the diversity of the forbidden scope of activity, the amount of compensation, and the fact whether the employer has a legitimate interest in limiting the employee for the purposes of the legal institution or not.

3.1. Formal requirements

In the regulation of the examined countries, it is a common point that the non-competition agreement has to be in written form. Without this the agreement is invalid, therefore, it cannot be enforced. The purpose of this formal requirement is to protect both parties in any dispute that may arise in the future about mutual rights and obligations in relation to a verbal non-competition agreement. Generally, conditions restricting competition can already be defined in the employment contract at the beginning of the employment relationship, but the parties may also agree any time during employment, under a separate agreement. Also, one of the primary formal criteria includes the "ability" to conclude such a non-competition agreement, which is bound to a given age in some countries.

In the Czech Republic, the validity condition is that a non-compete agreement can only be concluded with a worker who is at least 15 years old. This restriction can be attributed to the fact that the employment of a person under the age of 15 is not possible, so the employment itself would be unlawful.[6] By contrast, in Hungary, a person who has reached the age of 16 but has not yet reached the age of majority, is considered a young worker and special rules apply to people over the age of 15 who want to work during the school break. In the Netherlands a non-competition agreement is only valid if it is concluded with an adult worker.[7]

Hungary is one of the exceptions, where legal declarations can, in principle, be made verbally and by conduct, including the non-competition agreement.[8] However, according to the relevant provisions of the Civil Code[9], which is referred by the Labour Code itself, the penalty can only be made in written form and therefore the non-competition agreement has to also be in written form, if the parties have included a penalty into it. In the United Kingdom, Austria and Spain, a non-competition clause can also be concluded both verbally and in a written form. Compared to this, in the Czech Republic, Denmark, Belgium, Italy and Portugal,[10] a non-competition agreement can only be concluded in a

6 Ius Laboris (Global Human Resources Lawyers): *Non-Compete Clauses an International Guide*. 2011. 83.

7 Antoine Jacobs: *Labour Law in The Netherlands*. Wolters Kluwer Law & Business, 2015. 154–155.

8 A non-compete clause can only be concluded with conduct in Hungary among the examied states.

9 Act V of 2013.

10 Ius Laboris op. cit. 43-245.

written form. Germany and France[11] should also be emphasized in this regard, where, in addition to the requirement of literacy, special emphasis is placed by the judicial practice on the precise wording, because the freedom to exercise a profession is a fundamental right guaranteed by the Constitution, therefore. the restriction must not hinder the worker's career progression in an unfair way. In Ireland, the non-compete clauses should be defined in employment contracts, as this document will provide evidence that the employee was aware of the existence of the restriction and agreed with the clause to establish the obligation.[12]

In order to avoid disputes and ensure proof, the parties should also make a written agreement regardless of legal obligations.

3.2. Temporal and geographical restrictions

In accordance with the overriding requirement of proportionality, the prohibition must always be limited to the "place" and the area, where there is reasonable possibility that the legitimate economic interest of the employer will be endangered, for example by making legal relationship with a competing employer or setting up a business with a similar profile. The requirement of proportionality pervades the whole legal institution, since both the geographical and the temporal limitation must be proportionate to each other, and to the amount of the compensation and the agreement must not cause greater interest grievance to the employee than it would have caused to the employer (or more precisely to its legitimate economic interest) without limiting the employee's new legal relationship. Accordingly, it would be expedient to examine both temporal and territorial requirements in relation to each other's influence.

Examining the various countries' legal provisions regarding restrictive covenants, it can be inferred, that the duration of a non-compete clause is generally freely determined by the parties, but the maximum limit is usually fixed at different levels by legislation (for example in Hungary) or by judicial practice (see in France).

The prohibition is often geographically limited (region, county, city etc.) by the parties depending on the concerned activity, the extent to which territorial scope is to be determined and having regard to that the restriction in a wide variety of fields cannot mean a significant restriction of competition on the market.

In our opinion, it is not appropriate to conceptually separate the maximum time limit and the territorial restriction, because in practice, the two are usually intertwined through the proportionality principle. It is also difficult to separate the criteria mentioned above from the requirement of proportionality

[11] Moreover in Norway, Romania, Portugal, and as we see in "Fundamental rights dilemmas" chapter.

[12] Kevin Costello: *Labour Law in Ireland.* Wolters Kluwer Law & Business, 2016. 200–203.

during the investigation of duration and territorial scope. Even though the restriction applies to a relatively narrow area with high compensation (even at full wages), the court may find it unreasonable if the prohibition results in an employee being unable to participate in a particular industry.[13] In support of this, for example, the Austrian rules expressis verbis state that the non-compete clause can only be regarded valid if the restriction applies to the same activity as the employer.[14] Accordingly, the Austrian Supreme Court did not maintain the restriction imposed on a former refrigerator distributor by a former employee and prevented the sale of dishwashers in the future.

By analyzing the specific regulations, the following categories can be created theoretically. In Belgium, Spain and Portugal, prohibition is adjusted to the value of the information and experience gained by the worker, and the information provided for the employee, which differences were implemented in legal regulations.

In Belgium, there are three different types of non-compete agreements and the maximum length of time and territorial scope vary depending on the type of the agreement. In the general non-compete agreement, the prohibition must be geographically limited to places where the employee can indeed compete with the employer and the territorial scope cannot extend Belgium's borders. The restriction is valid for up to 12 months after the termination of employment. A special non-compete agreement can only be concluded by employers belonging to certain business categories with a defined set of employees. The employers concerned must comply with one of the following conditions: operate in international markets or represent important economic, technical or financial interests or have their own research and development department. At least one of these conditions may impose a specific non-competition agreement with employees ('white-collar' employees), who have their job responsibilities directly or indirectly enabled them to become familiar with the organization's specific practice, whose usage of the specific practice outside the organization would harm the legitimate economic interests of the employer. If both the conditions for both employers and employees are met, it is possible to deviate from the general non-compete clause in the following points. As regards its territorial scope, it is possible to impose a restriction outside Belgium, meaning that the ban may also affect the cross-border areas of employment of the employer. Instead of a maximum of 12 months, a time limit of two or three years can be determined within the framework of reasonableness, but this has not been legally recorded. Separate categories include sales workers who are subject to less restrictive and strict rules in this field. In their case, the agreement is confined to non-Belgian territory (unlike the first one), but to the area where the employee has traded on a commercial basis and is governed by the general rules for a maximum of one year.[15]

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13 Sear v Invocare Australia Pty Ltd WASC 30; (2007) ATPR 42-149.

14 Section 36 para 1 no 2 of the AngG.

15 Roger Blanpain: *Labour Law in Belgium Law.* Wolters Kluwer Law & Business, 2012. 267–269.

In Spain, different rules also apply to workers employed in specified scope of activities. For example, technical experts[16], skilled workers, senior employees and commercial agents may have a non-competing agreement for up to two years, otherwise six months.[17]

The example of Portugal is also included in this category, because, according to the Labour Code, the non-compete clause is valid for a maximum of two years after termination of employment, unless the employee receives particularly sensitive or confidential information, in which cases this period may be increased to a maximum of three years.[18]

A further theoretical category can be created for countries where legislation indicates the maximum limit on these terms, but does not differ in terms of the scope of activity. In Germany, the maximum stipulated time is equal to the statutory limitations of Hungarian labour law, while the geographic area must be defined as narrowly as possible to protect the employer's legitimate economic interest in the circumstances. In general, the geographical area should be narrowed to the country or region where the worker actually worked during the employment relationship.[19] According to German judicial practice, the non-competition agreement should be proportionate both geographically and in relation to substance, which will take into account the role and responsibilities of the employee and the nature of the employer's activity.

In Switzerland it is possible to stipulate a 3-year non-compete agreement[20], and it is also mandatory to indicate the territorial scope of the agreement. In general, geographic constraints are acceptable for an area where the employee's specific knowledge can be used, and therefore, for example, the location of competitors should be taken into consideration. Accordingly, the geographic scope of a non-compete clause may be wider for example for a senior management global manager than a local leader. However, a non-compete clause covering not only the countries where the employee has worked but also any part of the world where the organisation directly or indirectly conducts its operations is likely to appear excessively broad. Such a broad clause will probably cover places, where the employee did not have access to specific confidential knowledge, and to that extent a non-compete obligation would in principle not be justified.[21]

Article 22 of the Romanian Labour Code provides for a maximum period of two years for restriction of competition. Geographically, the law restricts the prohibition to the place where there is reasonably the possibility that a former employer may be a competitor of the employee or the new employer.

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16 "Technical expert" is a qualified employee who knows about business techniques that are related to production or are related to business or strategic staff.

17 Innangard International Employment Law Alliance: *Innangard Restrictive Covenants Report.* 2016. 23–26.

18 Portugal Labor Code, arts. 136–138.

19 Weiss–Schmidt op. cit. 147–148.

20 Article 340a, para. 1, CO (Swiss Civil Code).

21 Alexandre Berenstein – Pascal Mahon – Jean-Philippe Dunand: *Labour Law in Switzerland.* Wolters Kluwer Law & Business, 2012. 489–491.

As it can be seen from the above examples, the requirement of reasonableness appears in the context of several conditions, but there are no statutory standards or guidelines for implementing this requirement.

The third category is made up of countries where there is no binding legislation on this subject, but practice has developed a general guideline. The first example is Sweden, where the duration of the non-compete clause cannot be longer than the "life expectancy" of the employer's know-how. In practice, this period may not exceed 24 months or if the estimated lifespan of the know-how is short, than it is 12 months.[22]

In Denmark, the geographic scope of the agreements restricting competition is the subject of the assessment of the court. Bearing in mind, that the main objective is to balance the interests of the parties, the employer must demonstrate that the prohibition does not go beyond what is necessary to avoid competition. In this case, the non-compete clause may also extend to areas other than geographic areas where the employee did not made work in employment during the employment relationship.[23]

Hungarian rules do not prescribe explicitely that the geographical scope has to be precisely defined in a non-compete agreement, in contrast to, for example, the French provisions where the agreement is invalid without the compulsory content element, a timeliness and proportional definition.[24]

In France, the prohibition must also be proportionate to the duties performed by the employee, so the duties of the job are closely monitored by the courts. While legal maximum is not stipulated in terms of maximum time constraints, parties should always respect collective bargaining agreements, which often include relevant provisions. The duration of the restriction is in practice a year or two, but if the court judges the duration excessive, it may reduce it.[25]

In Norway, the law does not stipulate the maximum stipulated time limit for these agreements, but in practice it is usually determined by one, rarely two years. For instance, the court considered valid the non-competition clause in which a ten-year prohibition was imposed on an engineer.[26]

In the United Kingdom, the legal institution of the non-compete agreement was developed under customary law. Although no maximum time limit is set, it is generally considered that the period of six to twelve months is justified.[27] It is also a requirement that the level of prohibition should not go beyond the boundaries required by the legitimate economic interests of the former employer. When considering this, the duration of the ban, its geographical scope and the scope of the activity concerned must be considered together, and generally the longer the prohibition period, the smaller

22 Ius Laboris op. cit. 288.

23 Ius Laboris op. cit. 99.

24 Wendi S. Lazar: *Confidentality, trade secret, and other restrictive covenants in a global economy.* Outten & Golden LLP, 2009. 59–93.

25 Mayer Brown: *A global guide to "restrictive covenants".* EMEA, 2014. 29–32.

26 Henning Jakhelln – Kristine Fremstad Moen – Maarten Brandsnes Faret: *Labour Law in Norway.* Wolters Kluwer Law & Business, 2016. 318.

27 Ius Laboris op. cit. 321–323.

the geographical dimension and the restricted scope of the prohibited activity is. In support of this principle, a life-long competition was found legitimate by the court in view of the narrow geographic area, while at other times the twelve-month ban across the country was unreasonably long.[28]

The Hungarian Labour Code states that the validity of the non-compete agreement is dependent on an appropriate remuneration compared to the restriction of the conduct of the employee, while keeping the fairness of the competition and not endangering the livelihood of the worker, and should not harm unfairly and excessively the free market competition.[29] Looking at the these rules, it can be stated that the parties are free to determine the content of the non-compliant agreement, but without an agreement on the scope of the restriction and the exact content of the restriction, the given covenant is invalid. As for the level of the remuneration, the parties are free to agree above the statutory minimum, if, however, the compensation is inappropriate, the agreement is invalid in the same way as if no compensation would have been granted at all. Thus, the agreement can be executed if it does not unreasonably and unnecessarily limit the livelihood of an employee, and does not exceed two years. Territorial restraint should also be considered in the light of reasonableness, taking into account the employer's activity and the location of potential competitors.

A shorter prohibition is, of course, a lesser impediment than the maximum two-year period during which certain occupations may have a significant impact on the profession or the professional relationships of the employee concerned may break off. In general, it is almost a complete limit for a qualification or profession that is only accessible to the employer or to the competitor (for example a mining engineer). For other employees (e.g. IT professionals), the scope of the previously mentioned prohibition is barely restricted. Following the same logic, it is necessary to define the exact scope of activities, the scope of the agreement and the specific geographical location (city, county, region, country, sometimes several countries).

In conclusion, it can be stated that in each of the above examples, the essential condition of the non-compete agreement is the employer's significant economic and business interest, and in this context the principle of purposiveness. The prohibition must serve to protect information and to avoid jeopardizing the employer's economic activity. The restriction that extends beyond the aim of the non-competition agreement, or is specifically intended to hinder the employee entails legal consequence of invalidity. Therefore, even if not mandatory in all states, it is necessary to define in the agreement the exact scope of activity, the field of expertise and the specific geographical scope of the prohibition.

Taking into account possible legal and judicial constraints, the parties should always consider the circumstances, proportionality and reasonableness. The difficulty lies in the fact that the requirement of proportionality is not only to be examined in terms of temporal and territorial scope, but also with regard to the legitimacy of the legitimate economic interest of the employer and the value of the

28 Greer v Sketchley Ltd (1979) IRLR 445.

29 Case law 2001.84.

compensation. In addition, when establishing reasonableness, the minimum knowledge of the market situation, the competition, the employee's opportunities are indispensable. In the countries examined, the period covered by the non-compete agreement was between six months and three years, a longer limitation was not considered valid by the court.

3.3. Functional limitations

The parties must also give consideration to the nature of activities that are purported to be restricted by the agreement. Additionally, these clauses should specify exactly what activities of the employee are forbidden after termination of the employment relationship, because the mere stipulation that the employee in question must not perform any gainful activity which would correspond to the activity of the employer or would compete with the employer's activity would be an overly wide prohibition. The scope of a general prohibition covering all activities conducted by the employer, but not related to the specific activities performed by the employee, is likely to be deemed excessive. So, the non-compete clause should not prohibit broad categories of work. Thus, an employee may not be completely banned from seeking employment for a certain period of time, not even in a very narrow territory and the restrictions set out in the non-compete clause should relate to the work performed under the former employer's control.

The most typical non-compete clause may take the following forms: performance of work for another competing employer, performance of activity by which the employee participates in the competition with the employer, e.g. in the form of a statutory body, a member of one or otherwise or performance of a business or other activity by the employee on his own behalf (e.g. as a freelancer) if that would compete with the activities of the employer.[30] In the Czech Republic they also distinguish the nature of the activity, because a gainful activity does not include the mere ownership of property (e.g. shares in a company running a competing business), unless the shareholding relates to the performance of active work. The grounds for this are that gainful activity relates only to active work.[31]

Practice distinguishes the non-compete (prohibiting the employee from setting up business in competition with their former employer or joining a competing business), non-dealing and non-solicitation (prohibiting the employee from approaching former clients or future, prospective clients, or accepting business from them), respectively non-poaching clauses (prohibiting the employee from encouraging other employees to leave the employer) in most countries.[32] Non-poaching clauses should specifically define the circle of employees who cannot establish a relationship with a future employer, such as those

30 Ius Laboris op. cit. 86.

31 Jan Pichrt – Martin Stefko: *Labour Law in The Czech Rebublic*. Wolters Kluwer Law & Business, 2015. 224.

32 E.g. United Kingdom, Ireland, Italy, The Netherlands.

who worked under the supervision of an employee who has contracted. In practice, it is difficult for employers to prove the violation of the agreement since the former employees' establishment of an employment relationship with a competing company does not in itself mean that a former employee has been "seduced" as a result of a new employment relationship with the competing company.[33]

The parties take into consideration which competitor are similar to the former employer, the restriction must be connected to what the employee actually did for the former employer and they should clearly specify what activities of the employee are forbidden. The parties have to limit the restrictions to the functions that the employee actually had, and through which they could obtain a competitive advantage that would not be available to someone else who had never worked for the former employer. The validity of the clause will be evaluated according to the actual activities of the organisation, and not by how it is defined, or by the activities of the group as a whole (if the organisation belongs to a group).[34]

To sum up, the scope of activity must be broad enough to protect the employer's legitimate economic interests, but it cannot be so extensive that it limits the worker's livelihood and generally fair competition in a disproportionate manner.

3.4. Amount of the compensation

As for the amount of compensation, a basic requirement is, that it shall be reasonable and proportionate, usually defined as a percentage of the wage. In some countries, the minimum amount is fixed in various laws, in other countries the judicial practice has determined the minimum amount of the compensation. For example, in Hungary the amount of compensation for the term of the agreement may not be less than one-third of the base wage due for the same period. The law also includes that in determining the amount of such compensation, the degree of impediment the agreement has on the employee's ability to find employment elsewhere - in the light of his education and experience - shall be taken into consideration.[35]

In Denmark the non-compete clause can only be valid if the employee shall be entitled to compensation equal to at least 50 percent of his total remuneration. They also have a rule concerning the method of payment, according to which the compensation for the three months (after the end of the employment) is payable as a lump sum upon the termination of employment, and compensation is paid monthly for the remaining part of the restriction period.[36]

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33 *Innangard*... op. cit. 7–26.

34 Ole Hasselbalch: *Labour Law in Denmark*. Wolters Kluwer Law & Business, 2012. 191.

35 Subsection 2, Section 228 of Hungarian Labor Code.

36 Brown op. cit. 20–25., 11–14.

Another example from Finland: the "fair" compensation is not defined by law, but case law has determined that the "fair" compensation generally amounted to between 50 percent and 100 percent of the employee's last monthly salary. The parties may agree that the compensation is paid as a lump sum or on a monthly basis.[37]

In France, one can see a similar system, because by reference to case law, from 30 percent to 50 percent of gross monthly remuneration is likely to be a reasonable consideration for such restrictions.[38] In Germany, one can observe similar conditions. The employee must receive compensation which is at least 50 percent of the previous year's total remuneration, but emphasizing that this includes all monetary and non-monetary benefits.[39]

In Poland, the agreement should provide for compensation for the non-competition obligation at not on a lower level than 25 percent of the employee's monthly pay received during the period prior to the termination of employment and corresponding to the duration of the non-competition obligation.[40] By contrast, Italian law does not set a specific level of consideration or mode of payment required for restrictive covenants.[41]

Summarizing the above examples, the main considerations to be taken into account on this matter are the following: „how much" the agreement restricts the employee in establishing a new employment relationship (in the light of his education and experience etc.), what are the implications for the future professional and material existence and whether the restriction is proportional to the territorial and temporal limitations. The adequate amount must always be assessed in the light of the principle of proportionality as the parties are liable to proportionate the obligations imposed on the worker to the legitimate (defendable) economic interest of the employer.

4. Special restriction: the example of the so-called "garden leave"

The presentation of the cause and the process of the development of the so-called "garden leave" is not addressed in this paper, only the explanation of the essence, main rule of this unique Anglo-Saxon legal institution. The concept of garden leave has been developed in England by the employers. It is a variation of restrictive covenants, which means that the employees are paid their full salary during the period in which they are restrained from competing. This clause requires that the employee provides the employer with a specific, reasonably long period of notice before terminating the employment relationship. During this time, the employer cannot force the employee to do any work, but the employee

37 Brown op. cit. 20–25.

38 Brown op. cit. 26–31.

39 Weiss–Schmidt op. cit. 147–148.

40 Brown op. cit. 76–80.

41 Tiziano Treu: *Labour Law in Italy.* Wolters Kluwer Law & Business, 2014. 133.

is paid her full salary and benefits. "The employee remains an employee, however, she cannot go to work for a competitor or do anything else to harm the employer".[42] On the one hand, it provides the protection to the employers what they need, but on the other hand, it is fair to the employees as well.

Under the garden leave clause, the employee has a relatively long period of notice, usually three to twelve months, before terminating the employment relationship and moving on to a competing employer. In exchange, the employer do not require the employee to come to work.

The term of "garden leave" comes from this rule, because it assumes that the employee can stay at home and work in her garden during this period while remaining financially secure.[43] The requirement that the employer provides the employee with her contractual benefits during the period of garden leave will include her entitlement to holidays.[44] The aim of garden leave is that the employee will not have access to the employer's confidential information, and "hopefully" that information she had already had, will become obsolete or less valuable.

The main difference between restrictive covenants and garden leave is that the employee remains an employee of her former employer. In the Unites States and the United Kingdom, the courts refuse less applications to issue injunctions to enforce garden leave clauses than restrictive covenants, because garden leave is less objectionable than restrictive covenants. It means, that garden leave does not interfere with the ability to earn a living, it is less anti-competitive, does not necessarily involve unequal bargaining power and it is not antithetical to the free labour ideal.[45]

5. Concluding remarks

The paper was looking for answers on the general essential conditions of non-compete agreements in international practice: how can one examine the employer's observable, significant economic and business interest in accordance with the employee's fundamental right to work, and how did judicial practice develop consistent aspects for the sake of examination of these agreements?

Despite the long history of restrictive covenants, the debate over these legal mechanisms has grown recently. In the most countries, the validity of restrictive covenants relies upon some (mainly three or four) cumulative conditions, which must be expressly referenced in the clause. For example, it must protect a genuine legitimate interest of the company, it must be limited in time and space, financial compensation must be paid (with some exceptions) etc. It is not always emphasized enough, but the restriction must be proportionate to its purpose. It is also an essential condition that the activity of

42 Greg T. Lembrich: Garden leave: A possible solution to the uncertain enforeability of restrictive employment covenants. *Columbia Law Review*, 2002. 2292.

43 Lembrich op. cit. 2305.

44 Whittle Contractors Ltd v AR Smith, EAT 842/94, Judgment 1 November 1994.

45 Paul Goulding QC (editor): *Employee Competition Covenants, Confidentiality, and Garden Leave*. Oxford University Press, 2016. 5.148–5.176.

the worker could cause a damage to the employer, and must comply with the applicable collective bargaining agreements, if any.