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The Pan-European Lifeline of a Labour Non-Compete Clause. Protecting Competition in Labour Markets through a Human Rights Narrative: The Example of Serbia

Abstract: This article sets out to present the constituent elements of a labour law-specific non-compete clause through the example of legislative solutions from several EU jurisdictions and by considering the popularity of an extreme pole of thought that has emerged as a result of tendencies to restrict the enforceability of labour non-competes. The authors focus on the EU concept of the non-compete clause, providing an overview of legislative solutions in EU Member States, and by drawing on insights from competition law, they suggest that through the implementation of the requirement of the employer's legitimate interest, competition in the labour market is indirectly protected through a human rights narrative and framework. The authors present examples from case law, illustrating solutions that apply strict EU conditions and that also employ a proportionality-based analysis. They argue for preserving the enforcement of non-compete clauses under EU-style conditions, which include a rights-based proportionality assessment; a good model solution for a non-compete clause must be based on the principle of legal certainty (attained by explicit normative codification of clearly defined constituent elements), applied in a manner that includes a proportionality-based analysis, on a case-by-case basis. The paper also provides insight into Serbian jurisprudence and regulation on this subject, and formulates suggestions for alignment with current tendencies.

Keywords: non-compete clauses, labour law, competition law, employers' legitimate interests

Introduction

Non-compete clauses have been a significant subject of legal, economic, and policy debate worldwide. When included within employment agreements, these covenants are traditionally used as a mechanism to prevent employees from engaging in activities in competition with their current employers, and subsequently their former employers, for a specified period, within a defined geographic area, and, in most cases, in exchange for adequate compensation. While their primary justification lies in protecting legitimate business interests, such as trade secrets and the confidentiality of essential information, non-compete clauses also affect employee mobility, labour market competition, and fundamental rights, including the right to work and the free development of one's personality. The enforceability and scope of non-compete clauses vary considerably across jurisdictions. While the EU approach to such clauses is rather traditional, requiring a maximum duration, a defined territorial scope, and adequate financial compensation, the United States by contrast has shown a tendency to shift toward approaches advocating a ban on non-compete clauses at the federal level.

Studies have shown that non-compete clauses are common across different types of occupations and income levels, not only among highly skilled, high-level, or managerial employees but also among lower-wage workers. Arguments *pro et contra* exist, varying between those supporting the position that non-compete clauses are used as a means of restricting worker mobility and competition in the market as a whole, to those arguing that non-compete clauses are justified due to the importance of protecting employers' interests and their investments in high-skilled workers. This is where the intersection of competition law and labour law, as reflected through the institution of non-compete clauses, is of particular interest.

This paper adopts a critical and comparative approach to the regulation of non-compete clauses, with a particular focus on Serbia, an EU candidate country. Accordingly, it examines the different legal frameworks in selected EU Member States and the United States for the purpose of identifying the key elements of non-compete clauses and the role of jurisprudence in identifying a possible path toward a balanced solution. By placing Serbian law and jurisprudence within this broader context, the article aims to identify possible avenues for alignment with emerging trends.

1. Method and scope

We have selected the legislative solutions of Austria, Germany, Italy, France, Poland, and the Netherlands for presentation, taking into account the availability of sources and because they collectively represent a sample of the Romance, Germanic, and Slavic legal traditions within the continental (civil law) family, in order to illustrate key national variations of the model, which represent a selection criteria for the jurisdictions considered in this paper. For the purposes of the article, we consider a 'good model solution' to be a legislatively anchored and judicially developed framework for labour non-compete clauses that regulates each of the constituent elements of the non-compete clause in sufficient detail, but also includes a rights-based proportionality test applicable to the core elements of the restraint, including a legitimate business interest, necessity, and strict proportionality (reasonableness), in light of the employee's freedom and right to work, supported within that framework by adequate compensation during the restraint.

We argue for the balancing of employers' interests against the worker's freedom to choose an occupation using a rights-based proportionality test, drawing on the framework of Articles 15 and 52(1) of the EU Charter (European Parliament, Council & Commission, 2012). As for Serbia, we argue for the same approach, drawing on the principles that govern limitations on human and minority rights (National Assembly of the Republic of Serbia, 2006), operationalized through more detailed regulation of the non-compete clause's duration, territorial reach, and scope of activity, and complemented by adequate compensation. The Republic of Serbia is included in the comparative analysis due to its status as an EU candidate country, the ongoing process of EU accession, and its obligation to harmonize its legislation with the legislation of the European Community and the European Atomic Energy Community, as set out in the Stabilisation and Association Agreement between the European Communities and their Member States on the one part and the Republic of Serbia on the other (European Communities and Member States, 2013). The research question that we set out to explore is whether the 'good model' – namely, the enforcement of non-compete clauses through a human rights-based proportionality analysis – indirectly safeguards competition in the labour market, considering that individual labour law agreements fall outside the scope of EU competition law.

The contribution of this paper lies not only in its descriptive mapping but also in its proposal of an appropriate legislative solution aligned with the standards adopted in EU Member States. It adopts a functional comparative approach within the civil law tradition. The comparison is organized around a common practical problem: how legal systems structure and constrain non-compete clauses to protect legitimate interests while safeguarding freedom to work. Based on predefined comparative dimensions – validity requirements, compensation, the intensity of judicial review, and remedies – the analysis develops a typology of regulatory regimes and maps selected jurisdictions within the Romance, Germanic, and Slavic civil law traditions.

2. The key principles of non-compete clauses: Definitions, comparison, similarities, and summary

While regulations vary in different countries, some of the constituent elements of non-compete clauses have been widely recognized by European legislatures, allowing for the development of working definitions. To begin from its essence, a non-compete clause is a form of agreement including a promise given by the employee to the employer to not engage in employer-related business activities for an agreed duration. In most cases, non-compete clauses are in writing (Bloomberg Law, 2023). Non-compete clauses as a sort of restriction of employee rights must be narrowed to the specific industry one cannot enter and the geographic area to which the restriction applies, and have a defined timespan (Barnett & Sichelman, 2020, p. 956). Because they restrict an individual's ability to engage in business activities, they are generally accompanied by adequate financial compensation for the worker bound by them.

A review of the most relevant regulations in EU countries reveals key shared principles governing provisions on non-compete clauses. In Austria, post-contractual non-competes for salaried employees are governed by the *Angestelltengesetz* (Salaried Employees Act), while the *Arbeitsvertragsrechts-Anpassungsgesetz* (Employment Contract Law Adaptation Act) applies to workers not covered by the Angestelltengesetz. Under both regimes, a restraint is valid only if the worker was an adult at the time of agreement and if it is confined to the employer's line of business, does not exceed one year, and does not unreasonably hinder the worker's professional advancement in light of the employer's legitimate interest (Parliament of Austria, 1921/2015, 1993/2015). The statute also addresses termination scenarios: if the employer has given justified cause for the employee's immediate resignation or termination through their culpable conduct, the employer may not invoke the non-compete; similarly, where the employer terminates the contract, the employer may not rely on the clause unless the employee was at fault or the employer declared it would pay the employee's last due remuneration for the duration of the restraint (Parliament of Austria, 1993/2015). Any contractual penalty agreed for a breach is worth only up to six times the worker's net monthly remuneration for the last month of the employment relationship, with special payments disregarded; where such a penalty is promised, the employer may only claim the forfeited penalty, with performance and additional damages excluded (Parliament of Austria, 1993/2015).

German law prescribes that the non-compete clause, as an agreement between the principal (employer) and the commercial employee, restricts the employee's business activities and must be concluded in writing, and imposes an obligation for the principal (employer) to provide such an agreement in the form of a document signed by them containing the agreed stipulations. Under the German legislation's approach, the non-compete clause shall be binding only if the principal (employer) undertakes to pay compensation. A legitimate business interest is the most important criterion, rendering the non-compete clause non-binding if it does not serve to protect the principal's legitimate business interest. There are other legally prescribed reasons that render a non-compete clause non-binding, such as cases in which the compensation granted constitutes an unreasonable obstacle to the employee's career prospects. The prohibition imposed by the non-compete clause cannot exceed two years from the termination of the employment relationship. German law also protects minors by prescribing that the clause shall be void if the employee is a minor at the time of the contract (German Federal Parliament, 2025).

Italian law offers a less detailed approach, prescribing that the non-compete clause shall be null and void if it is not concluded in writing, if no compensation is agreed, and if no restriction is set within certain limits as to subject matter, time, and place, with a maximum duration of five years for managerial positions and three years in other cases (Italian Parliament, 2025).

In France, the regulation of non-compete clauses has been shaped by jurisprudence. In one of its decisions, the French Court of Cassation identified the relevant criteria which are of primary importance for the validity of a non-compete clause, emphasizing that 'a non-compete clause is only lawful if it is essential to the protection of the legitimate interests of the company, limited in time and space, takes into account the specificities of the employee's job and includes an obligation for the employer to pay the employee financial compensation, these conditions being cumulative' (French Court of Cassation, 2002).

Polish law reflects key shared principles, such as the requirement that a non-compete clause must clearly define the scope of the restricted activity, establish the obligation to compensate the employee, and specify the amount of that compensation, and has the requirement that the non-compete clause must be in writing (Sejm of Poland, 2025).

Dutch legislation prescribes that the clause is only valid, inter alia, if it is in writing and if the employee is an adult (Dutch Parliament, 2025). A distinction is made between the possibility of imposing this restriction on an employee who is engaged for an indefinite period and on one who is engaged under a fixed-term employment agreement; additional justification is required in the case of the latter due to the substantial importance of the business activities involved. Seriously culpable acts or omissions on the part of the employer in the termination or non-continuation of an employment agreement are sanctioned by the legislation, leaving the employer without the possibility of deriving any rights from this clause in such cases. An interesting aspect of the legislation's approach is that, in the case of seriously culpable acts or omissions by the employee that cause the termination or non-continuation of the employment agreement, the employee is not entitled to compensation (Dutch Parliament, 2025).

The examples of Austria, Germany, Italy, France, Poland, and the Netherlands reveal several key shared principles that are widely recognized by the respective legislatures, such as the requirement of a mandatory written form and the necessity of a legitimate business interest, which simultaneously represent the primary justification for imposing post-contractual restrictions. Most countries also require financial compensation for the employee during the period of restriction (e.g. Germany, France, and Poland). Furthermore, duration and spatial limitations are universally recognized, with maximum durations typically covering one to two years, except in Italy where managerial roles allow up to five years. The protection of vulnerable groups such as minors, as well as the prohibition of clauses that constitute an unreasonable obstacle to career advancement, are also emphasized. Several systems (e.g. Austria and the Netherlands) introduce sanctions for seriously culpable conduct by either party, which may render the clause unenforceable.

3. Core human rights and principles

The common trait of all of the above-mentioned elements of a non-compete clause is that they stand in tension with core human rights and the principles of labour law, including those recognized in the European Union. The freedom to choose an occupation and the right to engage in work and to pursue a freely chosen or accepted occupation are provided for in Article 15 of the EU Charter, along with the freedom to seek employment, to work, and to exercise the right of establishment and the freedom to provide services in any Member State, while Article 16 recognizes the freedom to conduct a business (European Parliament, Council & Commission, 2012). With regard to cross-border mobility, freedom of movement for workers within the EU is provided for in Article 45 of the TFEU; it entails the right to accept offers of employment actually made and to move freely within the territory of Member States for that purpose (European Union, 2012).

The above-mentioned freedoms of EU law do not contain any definitions pertaining to labour non-compete clauses, and there is no Europe-wide rule on non-compete clauses as such. As was confirmed approximately two decades ago, there has been no European legislation dealing specifically with non-compete clauses between employer and employee after the end of their contract, and the Commission has had no plans to make proposals for legislation in this respect (European Parliament, 2003).

Hence the tension has had to be resolved within the applicable framework, for which Article 52(1) of the EU Charter (European Parliament, Council & Commission, 2012) remains crucial. In operational terms, each of the constituent elements of a non-compete clause must be treated as an expression of a limitation on the guaranteed freedoms (the freedom to work and the freedom to exercise free movement on the one hand, and the right to conduct a business on the other), thus making the core principles of proportionality (taking into account the essence of the right that is limited), legitimate aim (taking into account the importance of the purpose of the limitation, its nature and scope, and the relationship between the limitation and its purpose), necessity (whether the purpose of the limitation can be achieved by this particular limitation), and the choice of the least restrictive means (whether the purpose of the limitation can be achieved by a narrower limitation of the right) fundamental to the assessment of the proportionality of a non-compete clause.

4. Defining 'legitimate business interests'

In the pursuit of determining the effect of an individual non-compete clause on the right to work as well as on competition, i.e. on the competitive setting of a (relevant) labour market, it is essential to understand the comparative approach toward one of the elements necessary for stipulating a legally enforceable non-compete clause: the element (or condition) of a 'legitimate business interest'. This is of particular interest due to its breadth and its capacity, which on the one hand serve as the limit for the effectuation of the employer's desires and on the other are the outer edge of the employees' right to work. As mentioned above, this condition is different and separate from the condition of proportionality and reasonableness, which usually concerns the requirement that the non-compete clause must not be an unreasonable impediment in terms of its subject matter, duration, and territorial scope. As noted above, in some comparable jurisdictions, the existence of a 'legitimate business interest' is not explicitly regulated. In others, its scope is either set and defined or is given as a legal standard, with its contents to be developed through case law.

In examining labour non-compete clauses from this perspective, it could be stated that their purpose is to limit the ability of an employee to compete with their former employer, although such a general interpretation (the prevention of all, i.e. ordinary, competition) is refused in US court practice (Judgment of the Supreme Judicial Court of Massachusetts, Middlesex, 1974; see Kesan & Hayes, 2013, p. 383). Rather, it is accepted that it is legitimate for the employer to prevent unfair competition, i.e. the employee's improper use of a business advantage or opportunity that the employee had gained through their previous employment (Kesan & Hayes, 2013, p. 384).

The most common things that are cited as legitimate business interests are the protection of trade secrets, confidential information, and customer contracts (Kesan & Hayes, 2013, p. 384), with account also being taken of investments in training, which lead to the same result – the employee's possession of information that influences the employer's position. As such, it protects any interest in the non-disclosure of information that is market-sensitive in the relevant product market in which the employer competes. As for the labour market, market 'sensitivity' to the information acquired by the employee is displayed most strongly in the period immediately preceding the end of the employment relationship, when the employee's leverage is about to be utilized in relation to a new employer, thus making such sensitivity felt most vividly on the selling side of the labour market: the employee's market power is displayed most fully at the moment when they are in possession of this information and in a position to use it to obtain better working conditions, affecting the level and quality of supply in the market, in negotiations for employment with a competitor of the former employer. If observed at that moment through the prism of the purpose of the non-compete clause according to labour law, the 'legitimate business interest' requires that the employer must have a justification for limiting the employee's right to work, i.e. limiting competition on the supply side of the labour market. When viewed from the perspective of the employer's legitimate business interests, this information is protected by other measures, such as those mentioned above: data protection, trade secret rules, and competition law. However, although the parallels with these areas of law are clear, the subject of protection and the addressees of the norms contained in these rules differ. The proportionality and legitimate business interest elements of a non-compete clause tie into the analysis of whether well-drafted non-disclosure agreements may provide the protection required. All of the above makes the individual non-compete clause a tool that remains very attractive to employers, and with good reason. We will discuss this element further in relation to the overall impact of non-competes on the labour market.

5. Non-compete clauses influencing the right to work

Considering the nature of the restrictions that non-compete clauses impose on employees, affecting not only an individual's financial status directly but also their prospects for professional growth, the acquisition of new knowledge, and future income, which are closely linked to employment and are in most cases achievable through it, it is important to assess how and to what extent such restrictions affect employees' right to work. To what extent one's right will be restricted by a non-compete clause depends on the answer to the question of what position the prospective employee holds in the negotiation phase and whether they have a real influence to agree provisions that will mitigate the risk of harsh restrictions in the case of the non-compete clause being enforced. It is not uncommon that employees are faced with non-negotiable documents on a take-it-or-leave-it basis (Vaheesan & Buck, 2020, p. 116). When employees can negotiate employment terms individually, their bargaining typically focuses on the most immediate aspects of employment, such as working hours, pay, and benefits (Estlund; see Vaheesan & Buck, 2020, p. 134). Some scholars have opined non-compete clauses are too broad because they deprive workers of the freedom to use their full experience, knowledge, and skills', and in relation to that, 'employers, insofar as they need to protect their investment in intangibles, have several less restrictive alternatives, such as trade secret laws, improved employee retention policies, and employment contracts' (Vaheesan & Buck, 2020, pp. 117–118). Some authors follow this line of thought, stating that non-compete clauses deprive workers of labour market mobility (Marx & Fleming, 2012; see Vaheesan & Buck, 2020, p. 141). Most employees under a non-compete clause are typically faced with three choices: remaining with their current employer, seeking work in a field or location not covered by the non-compete clause, or waiting until the restriction period ends before finding new employment. These options are quite unpopular with workers. Even if employers do not enforce non-compete clauses, such provisions can still discourage employees from pursuing new job opportunities (Marx & Fleming, 2012; see Vaheesan & Buck, 2020, p. 141). Workers who have decent financial resources, such as an inheritance or substantial investments, may be able to remain unemployed for an extended period and wait for a non-compete clause to expire. For instance, to comply with his non-compete agreement with Microsoft, one tech executive took a year off before joining Google, using that time for philanthropic activities (Marx & Fleming, 2012; see Vaheesan & Buck, 2020, p. 142).

Non-compete clauses can significantly restrict employees' right to work, not only in the short term by restricting immediate employment opportunities but also by hindering long-term professional growth and financial prospects. While employers justify these clauses as necessary to protect their investments in training, the resulting constraints on labour mobility and bargaining power often outweigh the intended benefits for employees.

6. Bridging the rights-based and market-based perspectives

Non-compete clauses should be assessed on two analytically distinct yet closely connected planes. The first is the individual plane, on which such clauses restrict the employee's freedom to change employment, pursue professional development, and translate accumulated knowledge, skills, and experience into improved working conditions. At this level, the principal concern is the extent to which the clause limits the employee's right to work and weakens their bargaining position vis-à-vis the employer. The second is the market plane, on which the use of non-compete clauses may, when sufficiently widespread, affect labour mobility and the competitive conditions under which employers recruit and retain labour. Although a single clause is ordinarily examined under labour law standards – most notably legitimate business interest and proportionality – the aggregate use of such clauses may reduce workers' outside options, dampen inter-employer competition for labour, and thereby influence wages and working conditions, particularly in labour markets characterized by concentration, specialized skills, or limited geographic mobility.

These perspectives are not mutually exclusive; rather, they are complementary and jointly inform the legal assessment of non-compete clauses. The rights-based perspective explains why post-employment restraints require strict justification at the level of the individual employment relationship. The market-based perspective explains why legal systems should remain cautious about the broader normalization of such restraints, even where they may be justified in particular cases. Accordingly, the doctrinal requirements of legitimate business interest and proportionality should be understood not only as instruments for balancing the interests of the employer and the employee in an individual case but also as safeguards against the wider market effects that may arise from the routine or excessive use of non-compete clauses.

7. Non-compete clauses may influence markets

While precise market delineation in labour markets is often difficult, the relevant concern for present purposes is narrower: non-competes are most likely to distort labour market conditions where workers possess specialized skills and face a limited number of realistic alternative employers within a defined occupational and geographic sphere. To assess whether non-compete clauses and the general coverage of a labour market with non-competes can have an impact on the supply and/or demand sides of that market, analysis should begin with determining the relevant market, i.e. to evaluate market impact, its scope and boundaries must be defined beforehand. As has been stated, 'absent differential job amenities, a perfectly competitive labour market delivers a uniform wage for a worker of a given skill type, so any attempt to cut the wage below this competitive wage will lead to all workers leaving the firm immediately', while 'in a monopsonistic labour market this is no longer the case (Alves et al., 2024, pp. 7). The specificity of an (imperfect) labour market, apart from the fact that information asymmetries are more pronounced for workers than they are for firms (Jäger et al., 2021, as cited in Alves et al., 2024, p. 8), means that the employer sets the price. The settings that demonstrate monopsony on labour markets are cases of single-firm monopsony (one company, one town) and a small number of companies, high market coverage and power, due to concentration or simple lack of options. In such a setting, the effect of individual labour non-compete clauses on labour markets is demonstrable, as employees cannot easily move across areas or have skills that are not easily transferable between industries and firms. Apart from pay, evidently, other factors, such as nature of the work, company culture, co-workers, managers, commute time and other work conditions are also considered. (Alves et al., 2024, pp. 7–8)

We infer that a labour market can be differentiated insofar as, and to the extent to which, the number and comparability of work positions can serve as substitutes for the subject's position in a particular industry, thus comprising a 'relevant labour market' as opposed to the labour market in general. The notion of a 'relevant labour market' is not established in literature or practice and represents an elusive concept. Inadvertently, labour markets bear the burden of being inherently differentiated.

Thus the problem for labour markets is that fragmentation is pervasive, if not universal (Naidu & Posner, 2018; as cited by OECD, 2020). This further implies that establishing determinable effects on the labour market is elusive, giving rise to further complexities in determining the effects of individual labour non-compete covenants on the relevant segments of the labour market.

To contribute to the above, when considering the influence of non-compete clauses, and especially taking into consideration legal-economic analysis, some authors state that the narrowing of outside options through non-compete clauses weakens an employee's bargaining power in relation to their employers, which creates a 'lock-in' effect, leading to reduced worker mobility, longer job tenure, and stagnant or declining wages (Balasubramanian et al., 2022; as cited in Alves et al., 2024, p. 5). On the other side, one of the main justifications employers offer for non-compete clauses is that they help protect their investment in employee training, espousing the view that non-compete clauses are necessary to keep employees who might otherwise leverage newly acquired skills and certifications, funded by the employer, to use that investment for a new role or opportunity (Alves et al., 2024, p. 13).

8. The convergence of competition law/antitrust and individual labour non-compete clauses

A clear distinction must be drawn between horizontal restraints in labour markets, such as wage-fixing and no-poach agreements between employers, and individual post-employment non-compete clauses contained in employment contracts. Competition law applies to wage-fixing and no-poach agreements between employers, as these represent horizontal restraints and involve coordination between undertakings. As these have been classified as restrictions by object, a (detailed) relevant market assessment is not required, thus sidelining discussion of the 'relevant labour market' in practice. By contrast, an individual non-compete clause is typically contained in an employment contract between an employer and an employee, meaning that, from a competition law perspective, it is not examined under EU competition law.

Under EU competition rules, individual employees are not classified as 'undertakings', and thus employment contracts cannot be scrutinized as agreements under Article 101 of the TFEU. EU competition law applies to undertakings, not employees, as they form part of the undertaking as the same economic unit (*Jean Claude Becu*; see Whish & Bailey, 2021, p. 92). In such a setting, EU competition law has been perceived to have little manoeuvring space as a tool for the protection of workers' interests via the context of the protection of the labour market. However, some authors state that this seems to be changing, notwithstanding wage-fixing and no-poaching, that is, non-solicit agreements, which have been definitively categorized as restrictions by object, that is, horizontal restrictive agreements (Aresu et al., 2024, p. 1; EU Commission, 2025, para. 75).

Individual labour non-competes are therefore unlikely to become the direct subject of EU anticompetitive analysis in the near future. Although discussion exists about theories of harm in regard to scrutinizing labour non-competes in general (limiting the mobility of employees or keeping wages artificially low, stifling competition, and creating downstream barriers to entry), as a definitive difference between the EU and US, US antitrust law has previously been keen to explore employment non-competes as a vertical restraint (lawful, but judged under the rule of reason, balancing anticompetitive effects and procompetitive benefits).

As stated by the Federal Trade Commission's (FTC) clear discourse on the use of post-employment non-competes, US legal thought has decisively stated that such clauses interfere with competitive conditions in the labour market. In justifying the categorical ban on non-competes, the FTC reasons that public policy leans in favour of employee mobility (Godfrey, 2024, pp. 3, 167; as cited by Lee, 2024, p. 247). The FTC has stated that 'non-competes, in their aggregate use, reduce the number of opportunities available to workers by restricting their ability to obtain jobs that are more suitable to their skillsets' (Non-Compete Clause Rule, 89 Fed. Reg. at 38380; see Lee, 2024, p. 228). However, the FTC announced that it would withdraw its appeals in *Ryan, LLC v. FTC* and *Properties of the Villages v. FTC*, and agreed to the vacatur of the Non-Compete Clause Rule, following a 3–1 vote, thereby effectively confirming that the rule will not take effect (Federal Trade Commission, 2025). Abandoning a nationwide ban, the FTC will pursue an individual, case-by-case approach when assessing non-compete clauses. Notwithstanding the outcome of the nationwide ban, the FTC's stance sparked consideration of potential reforms in this area, shifting the manner in which this matter is examined – not only in the examination of individual cases through case law but also through a broader, almost legislative approach to the topic. Turning to United States case law, although courts have consistently treated vertical restraints as warranting the rule of reason, this is not a bright-line rule under the Supreme Court's precedents, as the Court cautioned against the use of the per se rule because the judiciary may have insufficient experience with the restraint or conduct at issue (Judgment of the U.S. Supreme Court, 1972; see Lee, 2024, p. 246).

Accordingly, the relevance of competition law to individual labour non-compete clauses is primarily conceptual. It lies not in the direct application of antitrust prohibitions to employment contracts but in the use of labour market competition concerns as an interpretive lens. In that sense, competition law does not directly govern the validity of individual non-compete clauses; rather, it helps explain why courts should construe legitimate business interest narrowly and apply proportionality strictly when reviewing post-employment restraints.

9. Cases handling non-compete clauses in the USA and EU

9.1. United States cases

The enforceability of non-compete clauses in the United States differs from one state to another; each jurisdiction has its own approach to interpreting and upholding these agreements. In states that allow the enforcement of non-compete clauses, their legality is evaluated by the 'means of reasonableness' framework (Vaheesan & Buck, 2020, p. 125). The Restatement (Second) of Contracts serves as a benchmark test platform for this evaluation (Judgment of the Court of Appeals of the State of New York , 1999; Judgment of the Supreme Court of Vermont, 2005; ; see Vaheesan & Buck, 2020). Under the Restatement standard, a non-compete clause tied to a valid agreement is considered an unreasonable restraint of trade either if it imposes restrictions beyond what is necessary to safeguard the employer's business and goodwill or if the employer's interest is preponderated by the burden on the employee and the potential harm to the public (American Law Institute, 1981; see Vaheesan & Buck, 2020, p. 125).

A substantial body of case law in the United States has examined the enforceability of non-compete clauses. Many of these cases offer valuable insights into the reasoning and methodology that the courts apply, particularly when evaluating criteria that often prove difficult to apply in practice. For example, it was determined that geographical restrictions can lead to a certain level of ambiguity, while the same distance does not have the same meaning and implications in different states (Kesan & Hayes, 2013, p. 385). In one case, in the state of Oklahoma, the court assessed whether a 20-mile non-compete clause imposed on a cardiovascular surgeon in Tulsa was reasonable. Because all of the nearest hospitals were outside the radius of 20 miles, and since the nearest hospital outside that radius was more than 100 miles away, the court concluded that the limitation was unreasonable (Judgment of the Supreme Court of the state of Oklahoma, 2002; see Kesan & Hayes, 2013, p. 385).

In the context of ambiguity, the language of a non-compete clause can be confusing, which has its own consequences (Kesan & Hayes, 2013, p. 386). US federal states in general, including Alaska, Mississippi, Montana, Tennessee, Virginia, and Wyoming, interpret non-compete clauses in the employee's favour (Judgment of the Supreme Court of Virginia, 2005; see Kesan & Hayes, 2013, p. 386), while the legislation of the state of Floridaexplicitly provides that vague language contained in a non-compete clause should be construed in the employer's favour (Florida Legislature; see Kesan & Hayes, 2013, pp. 386–387).

One component of the assessment of whether a non-compete clause is enforceable in the United States, that is often taken into account by courts is the assessment of public interest. For example, in North Dakota, public interest has served as the primary justification for courts and the reason non-complete clauses are almost always invalid in an employment law scenario, under the law of that state (Judgment of the Supreme Court State of North Dakota, 2001; see Kesan & Hayes, 2013, p. 385).

9.2. EU cases

EU cases also provide useful insights into how courts evaluate the key elements of non-compete clauses, on which enforceability often depends, adopting a different approach and holding that the non-compete clauses at issue were valid, even though at first glance they may seem to have a significant impact on the employee. In one case before the Italian Court of Cassation concerning a non-compete clause covering the territory of Italy, France, Switzerland, Germany, and Austria, the court upheld the validity of the clause on the ground that it had not prevented the employee from taking up employment with another employer in the same field and at an appropriate salary 15 days after the termination of the employment relationship (Judgment of the Court of Cassation (Italy), 2001; see Boeri et.al, 2022, p. 19). In another case, the same court upheld the validity a non-compete clause covering the entire territory of the EU, taking the position that the establishment of a new, competing firm was unlawful (Judgment of the Court of Cassation (Italy), 2003; see Boeri et al., 2022, p. 19).

The Milan Court upheld the extended geographic scope of a non-compete clause, holding that 'with regard to the alleged excessive width of the object and the territory, it seems clear that in today's globalized dimension of the economy and, in particular, of the companies involved in this affair, a non-compete agreement can almost never usefully be limited to the national territory but must cover at least the European dimension' (Judgment of the Milan Labour Court, 2005; see Boeri et al., 2022, p. 19). Comparing this decision with the Oklahoma case illustrates the contrast in what constitutes a justified geographic scope, even considering that the cases involved different facts and different legal systems: the EU court's position that the non-compete clause must cover at least the European dimension is in contrast to the Oklahoma case, in which a 20-mile limitation was regarded as unreasonable.

In one of its decisions, the Portuguese Court of Appeal placed emphasis on equality between the parties bound by the non-compete clause by stressing the onerous and bilateral nature of such clauses, contractual fairness, the principle of good faith, and the employer's legitimate interest (Judgment of the Lisbon Court of Appeal, 2023). In the same decision, the Court referred to the reasoning in one of its judgments in relation to the employer's waiver of the non-competition agreement, highlighting the part in which emphasis is placed on criticism of the employer's unilateral withdrawal, and stating that such a withdrawal violates the principle of good faith (Judgment of the Lisbon Court of Appeal, 2023).

10. Judicial practice and regulation in Serbia

Serbia is an EU candidate country, and its Constitution contains an explicit provision that Serbia is established on an affiliation to European principles and values (National Assembly of the Republic of Serbia, 2006). The Serbian Labour Law contains a provision regulating in-employment and post-employment non-compete clauses (National Assembly of Serbia, 2005). The phrasing is such that, as part of the employment contract and by the effect of this clause, certain activities, i.e. work, that the employee performs during the employment relationship cannot be performed for anyone other than the employer without the employer's consent. This prohibition can be established and stipulated in the employment contract only if there are conditions where the employee, by virtue of working for the employer, acquires new and particularly important technical knowledge, a wide array of business partners, or important business information and secrets, with a determination of territorial validity but dependent on the kind of work to which the prohibition is related. As for the post-employment non-compete obligation, it is stipulated that the employee and the employer may specify the conditions of the non-compete after a termination of employment, but it must be no longer than two years, with a statement that this can be stipulated only if, by virtue of the employment agreement, the employer pays monetary compensation to an agreed amount.

Serbian law does not use the term 'legitimate business interest', but it effectively requires it: a non-compete clause is valid only if the employee could, in the course of their employment, acquire particularly important know-how, a wide network of business partners, or access to confidential business information. Territorial limits are not specified, and it defaults instead to general contract law. Post-employment restrictions last two years, which is strict given Serbia's market size, with no set criteria for mandatory compensation. However, legislatively, no proportionality-based test exists. As for competition law and its application to non-compete clauses in individual (or collective) labour law agreements, the Serbian Law on Protection of Competition explicitly states that it does not apply to labour relations between employers and employees (National Assembly of Serbia, 2009), leaving no room for interpretation on whether competition law rules have a say in the matter of individual non-compete clauses.

Judicial trends in Serbia encompass instances from the highest court that increasingly exclude general contract law principles from contractual relations in labour law, predominantly to the benefit of the employee, with the most important example being the general invalidity of contractual penalties imposed on the employee under the guise of its 'inappropriateness' in labour law matters. In a case before the Appellate Court of Novi Sad, the Court took the position that there is no statutory basis for providing for the institution of a contractual penalty in an employment contract according to the law of obligations, because the relationship between the employee and the employer is not one of debtor and creditor but rather a relationship governing rights, obligations, and liabilities arising from and in connection with work (Judgment of the Appellate Court in Novi Sad, 2017). In a decision of the Supreme Court of Cassation, the Court overruled the lower courts' decisions and took the position that, given that the Labour Law precisely defines the content of an employment contract, the employer does not have the freedom to unilaterally introduce sanctions that differ from those prescribed by law; it concluded that a contractual penalty is an institution of the law of obligations and does not apply to employment contracts (Supreme Court of Cassation, 2020). In another instance, the Supreme Court (formerly the Supreme Court of Cassation) took the position that stipulating a contractual penalty in the event of non-performance of a work obligation (remaining employed with the same employer) for a period twice the duration of the specialization cannot be enforced and such a clause is null and void (Supreme Court, 2023).

In Serbia, legal debate exists over whether employers can unilaterally waive non-compete clauses, with the predominant conclusion that this is possible but that it must be done in writing (Balšić, 2025, p. 25.) This is also reflected in case law (Judgments of the Supreme Court of Serbia, 2024; the Commercial Appellate Court of Serbia, 2021; the Appellate Court in Belgrade, 2021).

In a recent case that concerned the matter of enforcing a post-employment non-compete compensation payment and the unilateral waiver of the clause, the court of first instance reached the same conclusion by utilizing a human rights narrative – by rationalizing the standpoint that, by default, the non-compete clause represents a limitation of the employee's right to work (Judgment of the First Basic Court in Belgrade, 2024). The Court began its rationale by stating that the right to work is one of the basic human rights; that it entails the right of every person to freely choose and accept employment and to work for a living; that it is guaranteed by the Constitution of Serbia; that human rights guaranteed by the Constitution are directly applicable; that the provisions of human and minority rights must be interpreted for the benefit of promoting the values of a democratic society, in accordance with international standards of human and minority rights, as well as the practice of international institutions that supervise its implementation; and that, according to Article 20 of the Constitution, when limiting human and minority rights, all state bodies, especially courts, are obliged to consider the essence of the right that is limited, the importance of the purpose of the limitation, the nature and scope of the limitation, the relation of the limitation and its purpose, and whether there is a manner in which the purpose of the limitation can be attained with a lesser limitation. It stems from the reasoning of the decision that the Court concluded it is always in the best interests of the employee to be 'set free' from a particular non-compete clause, regardless of its wording, implying that non-compete clauses are inherently intended to be utilized only in the interest and for the benefit of employers, making whether a non-compete clause is effective always subject to the will of an employer, either by their simply not paying the compensation due or by declaring the clause ineffective by unilateral waiver. Simply put, the court established that it is generally preferable for employees to be released from such clauses and become ineligible for compensation, regardless of the clause wording. This approach treats non-compete clauses as primarily serving the employer's interests, with their validity dependent solely on the employer's actions, such as withholding compensation or unilaterally waiving the clause. Serbian jurisprudence has therefore now taken the clear stance that if an employer provides written notice of a waiver of the post-employment obligation during termination, both parties are released from their obligations, as the release of the employee in writing ends the tension with the right to work that is limited by the non-compete clause.

As competition law does not explicitly directly govern individual non-compete clauses in Serbia, the protection of competition in labour markets must operate indirectly through stricter labour law criteria: a legitimate business interest that would be tied to proportionality through a necessity to tailor the territorial scope, and through a minimum compensation requirement.

Conclusions

This paper has comparatively examined selected regulations and has showcased the effects of labour non-compete clauses by reviewing European jurisdictions and US legislative solutions in contrast with Serbian trends. We have highlighted that there are still strong tendencies for individual non-compete clauses to be used by employers, with complexities regarding their effects on the relevant labour market. Judicial authorities evaluate essential considerations: employee mobility, labour market competition, and employers' legitimate business interests, all within the framework of employees' fundamental rights. Comparative insight reveals a stricter approach and clearer requirements for non-compete clauses, such as mandatory compensation and proportionality, particularly within the EU. Serbian law reflects many European principles but would benefit from further alignment, especially regarding territorial scope and compensation standards, reflected in a minimum amount of compensation. In that sense, where competition law does not directly govern individual employment restraints, as in Serbia, protection of competition in labour markets can be pursued indirectly through labour law doctrines that subject non-compete clauses to a strict review of legitimate business interests, necessity, territorial tailoring, and adequate compensation, which would all need to be scrutinized through the lens of a proportionality-based analysis. We propose that Serbian legislation should introduce a rule that the territorial scope must reflect the territories in which the employee could use the knowledge acquired in the course of employment, particularly important know-how, a wide network of business partners, or access to confidential business information. As for the compensation standard, we propose that the minimum amount of compensation should be set higher than in most of the jurisdictions that were showcased, by tying it to the average of the three monthly salary payments preceding the termination of the employment relationship.

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