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Non-Compete Provisions in Employment Contracts

Disposições de não concorrência nos contratos de trabalho

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ABSTRACT: This article examines the legal framework and practical implications of non-compete provisions in employment contracts under Turkish law, while drawing comparisons with other legal systems. It highlights the critical balance between protecting employers' legitimate interests and safeguarding employees' economic freedom. The article explores the legal basis of non-compete clauses, including their scope, duration, geographical limitations, and the necessity for proportionality to ensure validity. Emphasis is placed on the principle of interpretation in favor of employees, reflecting the constitutional right to work. The discussion includes key provisions of the Turkish Code of Obligations and the Turkish Labor Code, as well as mandatory rules in private international law, such as the application of directly applicable rules and public policy intervention under Turkish Private International and Procedural Law No. 5718. The study also reviews case law and doctrinal debates, presenting practical recommendations for drafting enforceable non-compete clauses. It concludes that while a "perfect" non-compete clause may be unattainable due to the need for case-specific judicial evaluation, careful drafting that balances both parties' interests can significantly reduce the risk of invalidity.

KEY WORDS: Non-compete provisions; private international law; employment contracts; employee's habitual place of work; the freedom of employees to work; validity.

RESUMO: Este artigo analisa o quadro jurídico e as implicações práticas das disposições de não concorrência nos contratos de trabalho ao abrigo da legislação turca, estabelecendo comparações com outros sistemas jurídicos. Destaca o equilíbrio crítico entre a proteção dos interesses legítimos dos empregadores e a salvaguarda da liberdade económica dos trabalhadores. O artigo explora a base jurídica das cláusulas de não concorrência, incluindo o seu âmbito, duração, limitações geográficas e a necessidade de proporcionalidade para garantir a sua validade. A ênfase é colocada no princípio da interpretação a favor dos trabalhadores, reflectindo o direito constitucional ao trabalho. A discussão inclui as principais disposições do Código das Obrigações turco e do Código do Trabalho turco, bem como as regras obrigatórias do direito internacional privado, tais como a aplicação de regras diretamente aplicáveis e a intervenção da ordem pública ao abrigo da Lei Internacional Privada e Processual Turca n.º 5718. O estudo também analisa a jurisprudência e os debates doutrinários, apresentando recomendações práticas para a redação de cláusulas de não concorrência executórias. Conclui que, embora uma cláusula de não concorrência "perfeita" possa ser inatingível devido à necessidade de uma avaliação judicial específica de cada caso, uma redação cuidadosa que equilibre os interesses de ambas as partes pode reduzir significativamente o risco de invalidade.

PALAVRAS-CHAVE: Disposições de não concorrência; direito internacional privado; contratos de trabalho; local de trabalho habitual do trabalhador; liberdade de trabalho dos trabalhadores; validade.

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1. Basis for The Problem

With recent technological advancements, it has become possible for companies that cannot be considered large-scale in terms of equity capital and even the number of employees to be competitive in the sectors in which they operate and to even become leaders in these sectors in a short time. It is possible to say that some of the most important factors enabling this are: human resources and trade secrets of such companies, and the information and know-how held by key people in the company. In fact, there are many examples where companies which started their commercial journey as a startup with a good business model, idea or qualified human resource, have become global giants operating in many geographies and have crossed the borders of their country in a short time.

In these journeys which can be labelled as "success stories", one of the practices that generates success in companies and aims to make this success permanent is the non-compete obligation placed in employment contracts of the employees of the company or those brought about under a standalone contract.[1] The articles introducing this obligation generally require employees not to compete with their employer during their employment and after the termination of the employment relationship; limited to a certain period of time and geographical area in the field in which the employer operates.

While employers try to keep these provisions as broad as possible in line with their interests, employees are in favour of limiting them in a way that is equitable and that does not jeopardise their economic future.[2] In order to ensure a balance between these two competing interests, various legal regulations and case law have emerged. Since competition clauses must not lead to an unreasonable burden on the employee in the utilization of her labor.

In order to achieve this balance, the "interpretation in favour of the employee" principle adopted by the Court of Cassation of Türkiye, the relative mandatory nature of labour law and the legitimate interests of employers, which are deemed legally worthy of protection, should be taken into consideration. In most of the civil law countries, non-compete clauses are regulated with mandatory rules such as Swiss OR Art. 340. In cases where it is deemed that this contractual balance is not achieved, the judiciary may intervene in the contractual provisions stipulating non-compete obligations, and as a result, such provisions may be deemed null and void or their scope may be limited by partial nullity sanctions. This may have detrimental results for employers as they may face the risk of encountering commercially unforeseen loss items.

For this reason, these provisions should be drafted with great sensitivity at the outset, before a dispute arises. This is because the risk that a non-compete clause, which (allegedly) protects the employer "too much", may be deemed completely invalid, is both imminent and serious in

[1] DAVID HEEB, *The Non-Competition Clause in the Employment Contract According to Art. 340-340c OR.*, 2016, p. 29.
[2] DAVID HEEB, *The Non-Competition Clause in the Employment Contract According to Art. 340-340c OR.*, cit., p. 30.

terms of its consequences.[3] This may lead to unforeseen costs on the part of the employee and/or the employer. Therefore, while drafting these clauses, the balance of interests between the employee and the employer should be ensured and certain principles should be followed in order for these to be considered valid in the eyes of courts.

Non-compete clauses to which a Turkish citizen is a party, wherever he/she may be located in the world, must fulfil the following validity conditions. Since the issue in question is regulated by mandatory employee protection provisions rather than the principle of freedom of contract, rules regulating this issue may be deemed directly applicable[4] pursuant to Article 6 of the Turkish Private International and Procedural Law No. 5718. ("PIPL") and may be subject to public order intervention pursuant to Article 5 of the PIPL. As per Article 6 of the PIPL, "*where a competent foreign law is applied, in cases falling within the scope of the directly applicable rules of Turkish law in terms of the purpose of regulation and scope of application, that rule shall be applied.*" Pursuant to Article 5 of the PIPL, "*in the event that the provision of the competent foreign law applicable to a particular case is clearly contrary to Turkish public order, this provision shall not be applied; in cases deemed necessary, Turkish law shall be applied.*"

In terms of employment contracts, Article 27 of the PIPL, addresses this issue. As per the said article, "(*1) Employment contracts shall be governed by the law selected by the parties, without prejudice to the minimum protection which the parties shall have in accordance with the mandatory provisions in the employee's habitual place of work (...)*".

In this respect, the issue gains special importance in terms of the international labour market. This is because, in today's world, remote working has become so widespread, and the number of legislations under which citizens of different countries work and the requirements under such legislations have increased, adding to the existing legal debates on the matter. This proves especially true in software, accounting, consultancy and other similar sectors, where it is now very easy to work remotely and even from another country.

Such employment relationships mostly arise within the scope of a written employment contract. Pursuant to the Turkish Labour Law No. 4857, an employment contract is a contract between the employer and the employee, whereby the employee undertakes to perform work and the employer undertakes to pay a wage for the work performed.[5] A natural consequence

[3] Same in Swiss law, according to Swiss OR Art. 340. For more information please see DAVID HEEB, *The Non-Competition Clause in the Employment Contract According to Art. 340-340c OR.*, cit., p. 28.
[4] Pursuant to Art. 31 of the PIPL, "*When applying the law governing the contractual relationship, the directly applicable rules of the law of a third state may be given effect if they are closely related to the contract. The purpose, nature, content and consequences of such rules shall be taken into account in giving effect to such rules and whether or not to apply them.*" Accordingly, directly applicable rules (intrusive norms) may be considered as a situation that prevents the application of foreign law. For detailed explanations on intrusive norms, see. F. ASLI BAYATA CANYAŞ, "5718 Sayılı Yeni MÖHUK Uyarınca Doğrudan Uygulanan Kurallar ve Özellikle Üçüncü Devletin Doğrudan Uygulanan Kuralları" (Directly Applicable Rules and Especially the Directly Applicable Rules of the Third State in light of the New Turkish Private International Law No. 5718) in *Haluk Konuralp Anısına Armağan (Haluk Konuralp Memorial)*, vol. 3, Ankara, 2009, pp. 141-166. For a detailed research paper regarding non compete clauses in employment contracts containing foreign element please see FARUK KEREM GIRAY, "Yabancılık Unsuru İçeren İş Sözleşmesinin Sona Ermesine Bağlı Rekabet Yasağındaki Süre Şartının Hukuki Niteliği ve Sonuçları" (The Legal Nature and Consequences of the Non-Competition Period Due to the Termination of the Employment Contract Containing a Foreign Element) in *Rekabet Yasağı (Non-Compete Clauses),* editors: Özel, Sibel/Pürselim, Hatice Selin/Doğrusöz Koşut, Hanife, İstanbul, 2024, pp. 1-28.
[5] Article 8 of the Turkish Labour Code.

of the employment relationship established by the employment contract is the duty of care and loyalty imposed on the employee, regulated under Article 396 of the Code of Obligations numbered 6098 ("TCO"). As per this article, the employee is obliged to "*perform the work undertaken diligently and act loyally in protecting the legitimate interest of the employe*r" and "*as long as the service relationship continues*, he/she *may not provide services to a third party for a fee in violation of the duty of loyalty, and in particular may not engage in competition with his own employer*". It is therefore an expression of the continuing duty of confidentiality for an employment contract.[6] In this respect, employment contracts differ from contracts of work, where such an obligation does not exist (in principle).

Accordingly, a software developer for example, working under an employment contract will be bound by the obligations of loyalty and non-competition, while a software developer working under a contract of work will not have such obligations -as a rule- in the absence of a provision to the contrary in the contract.

Similarly, in practice, in mergers/acquisitions, there are cases where a former shareholder, as an employee, is employed by the relevant company after the transaction. In such cases, since the former shareholder will now be bound to the company with the bond of employment, it is possible to state that the obligation of loyalty and non-competition will also exist for this shareholder.

2. Approach to Non-Compete Clauses in The Doctrine, Legislation and Case Law

While evaluating the non-compete clauses in employment contracts under Turkish law, the provisions of the sixth chapter titled "Service Contracts" of the TCO, which is a general law, and the provisions of the Labour Code numbered 4857 ("TLC"), which is a special law, as well as the decisions of the Court of Cassation on the subject and the opinions in the doctrine should be considered. In the following parts of this work, the legal basis of non-compete clauses and the criteria on which the established jurisprudence is based will be discussed and an attempt will be made at drafting a "perfect" non-compete clause.

2.1. The Legal Basis of Non-Compete Clauses

Article 396 of the TCO, titled "*Duty of care and loyalty*", stipulates that, as long as the employment relationship continues, the employee "*shall not render services to a third party for a fee in violation of the duty of loyalty, and in particular shall not engage in competition*

[6] DAVID HEEB, *The Non-Competition Clause in the Employment Contract According to Art. 340-340c OR.*, cit., p. 29.

with his own employer". In this respect, the non-compete obligation that exists during the term of the employment relationship can be considered to be a reflection of the duty of loyalty in a broad sense. The loyalty obligation in question is "*based on the principle of truthfulness and honesty and expresses the obligation to protect the legitimate interests of the employer in the best way and to refrain from any behaviour that may harm these interests*".[7]

In this context, even if the employment contract does not include non-compete clause, the employee will be under a legal obligation and will not be able to compete with his/her employer during the term of the employment contract, due to Article 396 of the TCO, as explained above. Therefore, it is not necessary for the employment contract to explicitly stipulate the non-compete obligation for the period during which the employment relationship continues. However, an explicit contractual provision is required for the existence of such an obligation for the period after the termination of the employment relationship.

In this respect, in order to fully protect the interests of the employer and to prevent the economic future of the employee from being restricted more than necessary, it is deemed beneficial to include a provision outlining the scope of the non-compete clause in the employment contracts. In other words, it would be in the best interest of both parties to the employment contract to regulate such an obligation as a contractual obligation for the period after the termination of the employment contract.

Before explaining the validity requirements arising from the law, one requirement must be mentioned which arising from the nature of the issue: "the existence of competing business". The term economic competition is used in theory and case law in connection with non-competition clauses "if the two competitors have a completely or partially identical customer base and customer base and offer similar services that satisfy the same or similar needs."[8] Swiss Federal Court even required that competing businesses could only be considered to exist if both companies actually offer similar services that directly satisfy the same need.[9] In other words, a competitive relationship exists when the competitors try to win over the same customers. A competitive relationship therefore always requires that the competitors are active at the same economic market segment or level. According to Swiss law, if the above requirements are not met, the non-competition clause is ineffective and non-binding.[10] We believe the same result shall be accepted under Turkish law as well. For example, the customer bases of IKEA and Migros are not identical, as they offer different product segments. However, Migros and Getir shall be accepted as similar practices. On the other hand,

[7] KENAN TUNÇOMAĞ/ TANKUT CENTEL, *İş Hukukunun Esasları* (Principles of Labour Law), 3rd Edition, İstanbul, 2003, p.98; A. CAN TUNCAY, "İşçinin Sadakat (Bağlılık) Yükümlülüğü" in *Prof. Dr. Hayri Domaniç'e 80. Yaş Günü Armağanı* (Employee's Obligation of Loyalty. Prof. Dr. Hayri Domaniç 80th Birthday Tribute), vol. 2, İstanbul, 2001, pp. 1043-1086, p. 1043; A. EDA MANAV ÖZDEMIR, "Güncel Yargı Kararları Işığında Rekabet Yasağı Sözleşmesinin Geçerli Olması İçin Gerekli Koşullar" (Validity Conditions of Non-Competition Agreement in the Light of Recent Judicial Decisions) in *Rekabet Yasağı (Non-Compete Clauses),* editors: Özel, Sibel/Pürselim, Hatice Selin/Doğrusöz Koşut, Hanife, İstanbul, 2024, pp. 67-80, p. 73.
[8] ADRIAN STAEHELIN, Art 319-330a OR. Der Arbetisvertrag in *Zürcher Kommentar,* 2006, Art. 340 OR N 20; DAVID HEEB, *The Non-Competition Clause in the Employment Contract According to Art. 340-340c OR.*, cit., p. 30. Also please see BGE 51 II 438, 442 E. 3 und 4; BGE 91 II 25 ff.; BGE 92 II 22, 25 f. E. 1.d.
[9] BGE 92 II 22, 26 E. 1d.
[10] DAVID HEEB, *The Non-Competition Clause in the Employment Contract According to Art. 340-340c OR.*, cit., p. 31.

a business that deals exclusively with human resources software and a business that also deals with software but provides personal data tracking software services may not be considered similar and thus they are not competitors.

2.2. Validity Requirements and Limits

a) General Requirements

Apart from the form requirement and some special conditions that will be explained below, the most important limit regarding non-compete obligations arises from Article 23 of the Turkish Civil Code ("TCC"), which protects the person, even against the limitations of his/her personal rights that he/she has consented to, through the contracts he/she has concluded, within the scope of the protection of personal rights in the most general sense. The conditions arising from this basis are explained under this heading by referring to the relevant provisions.

Firstly, it is accepted that a non-compete clause cannot be agreed through a representative or with the approval of such a representative.[11] In fact, this limitation arises from the fact that the signing of a non-compete agreement is a transaction that is strictly tied to the person itself, as the signing of a such an agreement may severely limit her personal rights pursuant to Article 23 of the TCC.

Secondly, pursuant to Article 445 of the TCO, non-compete clauses cannot be agreed in a manner that would unfairly jeopardise the economic future of the employee. This is directly related to the freedom of employees to work and contract in a field of their choice, which is protected by Article 48 of the Turkish Constitution. In this respect, it is argued in the doctrine that "*since the freedom to work and contract is a constitutional right, it would be appropriate to narrowly interpret the rules of law limiting this right and the provisions of the contract regarding non-competition in favour of the employee in case of doubt*".[12] As stated above, the basis for this is Article 23 of the TCC.

There is some controversy in theory as to whether the non-competition clause in an employment contract can only be violated by "paid employee" for a competitor.[13] However, the prevailing legal opinion assumes that the agreement of a non-competition clause is also permissible for unpaid competitive behavior.[14] According to the view expressed here, and we

[11] SARPER SÜZEK, *İş Hukuku* (Labour Law), 18th Edition, İstanbul, 2019, p. 339.
[12] SARPER SÜZEK, *İş Hukuku* (Labour Law), cit., p.338; SARPER SÜZEK, "Yeni Borçlar Kanunu Çerçevesinde İşçinin Rekabet Etmeme Borcu", *Prof. Dr. Berin Ergin'e Armağan* (Employee's Non-Compete Obligation under the New Code of Obligations - A Gift to Prof. Dr. Berin Ergin), İÜHFM, İstanbul, 2014, pp. 457-468, p. 457; MANFRED REHBINDER, *Droit Suisse du Travaile* (Swiss Labour Law), Berne, 1979, p. 115.
[13] More information regarding this, please see ULLIN STREIFF/ ADRIAN VON KAENEL/ ROGER RUDOLPH, *Arbeitsvergtrag Praxiskommentar zu Art. 319-362 OR*, 7th Edition, Zürich, 2012, Art. 340 OR N. 7.
[14] ADRIAN STAEHELIN, Art 319-330a OR. Der Arbetisvertrag in *Zürcher Kommentar*, cit., Art. 340 OR N 22; DAVID HEEB, *The Non-Competition Clause in the Employment Contract According to Art. 340-340c OR.*, cit., p. 34.

agree as well, the only relevant factor is whether the employee could significantly damage the former employer through her competitive activity.

Non-compete agreements that do not fulfil these qualifications or those that are deemed to be excessively restrictive may be limited in scope or duration by the judges, by freely assessing the circumstances and conditions and taking into account the consideration that the employer may have undertaken in an equitable manner in exchange.[15]

b) Form Requirement

This obligation must be expressly stipulated in the employment contract or regulated by a special non-compete agreement separate from the employment contract. This issue is regulated under Article 444 of the TCO as follows:

> *"The employee who has the capacity to act, may undertake in writing to refrain from competing with the employer in any way after the termination of the contract, in particular from launching a competing enterprise on his own account, from working in another competing enterprise or from entering into any other kind of beneficial relationship with the competing enterprise."*

As can be seen, the law explicitly stipulates a written form requirement. In Turkish law, the written form requirement means that the document must be in writing and bear a wet signature.[16] In this respect, it will not be sufficient to refer to an article which can be categorized as a standardized term. The Court of Cassation is also of this opinion. According to the Court of Cassation, "*it is not possible to agree on a non-compete obligation by merely referring to the rules unilaterally organised by the employer under the names of personnel regulations or internal regulations*. *This is because the purpose of the form requirement is to ensure that the employee is fully informed about the scope of the obligation*." [17]

c) Time Limitations

Pursuant to Article 445 of the TCO, the duration of the agreed non-compete obligation cannot exceed two years[18] "*except for special circumstances and conditions*". The two-year period in question should start to be calculated as of the termination of the employment contract. As a matter of fact, as explained above, the non-compete obligation that exists during the term of the employment contract arises by virtue of law and is not subject to a time limitation.

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[15] TCO 445.
[16] Secure electronic signatures licensed by the Information Technologies and Communication Authority of Türkiye carry the same probative value as wet ink signatures. That said, as employees usually do not have such signatures, the practice is shapred around wet ink signed documents.
[17] Court of Cassation 9th Civil Chamber, dated 28.3.2013, 2010/25792, 2013/10539.
[18] The normal length of this period is determined as 3 years in Swiss law, 2 years in German law similar to Turkish law, and reasonable/appropriate period in Anglo-American law.

The doctrine discusses the "*special circumstances and conditions"* that may constitute an exception to the two-year limit stipulated under Article 445 of the TCO and exemplifies such circumstances as: the employee's high position in the company hierarchy, expertise, technical knowledge and knowledge of company secrets.[19] Additionally, when determining the duration of the non-compete obligation, the employee's relationship with his/her employer's customer portfolio, training and the type of activity carried out in the workplace should be taken into consideration.

In cases where the duration of the non-compete obligation exceeds 2 years due to the existence of special circumstances, the burden of proof regarding the existence and validity of these special circumstances will be on the employer.[20] In order to facilitate this burden of proof, it would be appropriate, in our opinion, to incorporate these special circumstances in the contract in which the non-compete obligation is agreed. In other words, instead of attempting to prove the special circumstances later on, we believe that it would be easier in terms of proof to regulate them clearly in the contract at the outset. In this respect, it would be more appropriate for the courts to be "broad-hearted" about the extension of the term in cases where, for instance, (i) the market in question is small, but the employee has a dominant power or portfolio in that market; (ii) it is possible to work from anywhere (for example, the software market), where these are also agreed in the contract with its justifications. However, it is important to point out here that there is no established case law on this issue.

Accordingly, the validity of the said period will be determined on a case-by-case basis by courts for each employee, according to the characteristics of the work, workplace and the employer. At this point, it should be noted that the duration of the non-compete obligation, which will start to run after the expiry of the employment contract, will not be interrupted due to a lawsuit to be filed during this period.[21]

In addition to this, although Turkish law stipulates a period of two years, considering that this obligation has been introduced to protect the employee, if a period shorter than two years is stipulated in the legal system to be applied according to the choice of law made by the parties, this period will be applied. However, if a period longer than two years is stipulated in the selected law, although it is considered that this rule is not a directly applicable rule pursuant to Article 6 of the PIPL, it is possible that the contractual provision in question may be subject to public order intervention pursuant to Article 5 of the PIPL. Since a non-compete obligation agreed for a period longer than 2 years is possible only if the judge determines the existence of special circumstances pursuant to Article 445/ I of the TCO, this rule cannot be considered

[19] SAVAŞ TAŞKENT/ MAHMUT KABAKÇI, "Rekabet Yasağı Sözleşmesi" (Non-Compete Agreement), *Sicil İş Hukuku Dergisi*, Issue: 16, 2009, pp. 21-46; HAMDI MOLLAMAHMUTOĞLU/ MUHITTIN ASTARLI/ ULAŞ BAYSAL, *İş Hukuku Ders Kitabı Cilt 1: Bireysel İş Hukuku* (Labour Law Textbook Volume 1: Individual Labour Law), 2nd Edition, Ankara, 2018, pp. 155-156.

[20] GÜLSEVIL ALPAGUT, "Türk Borçlar Kanununun Hizmet Sözleşmesinin Devri, Sona Ermesi, Rekabet Yasağı, Cezai Şart ve İbranameye İlişkin Hükümleri" (Provisions of the Turkish Code of Obligations on Transfer of Service Contract, Termination, Non-Compete, Penal Clause and Release), *Legal İş Hukuku ve Sosyal Güvenlik Hukuku Dergisi*, vol. 8, N.º 31, 2011, pp. 913-959, p. 951.

[21] SARPER SÜZEK, *İş Hukuku* (Labour Law), cit., p. 342.; M. POLAT SOYER, *Rekabet Yasağı Sözleşmesi* (Non-Compete Agreement), Ankara, 1994, p. 65.

as a directly applicable rule pursuant to Article 6 of the PIPL. However, as stated before, if a non-compete obligation of more than two years excessively restricts the economic future and economic freedom of the employee, it may be subject to Turkish public order intervention due to violation of fundamental rights and freedoms.

d) Scope of the Non-Compete Agreement

The scope of the non-competition clause depends primarily on the agreement between the parties in terms of location, time and content, whereby the scope of the non-competition clause must be limited to an appropriate level in accordance with Art. 340a para 1 of Swiss OR and art. 445 of TCO which is ultimately a result of the principle of proportionality. In this regard, it is crucial to ascertain the scope through using specific criteria. It is thought that the proportionality objective can be achieved by complying with these criteria. Since non-compete clauses were most likely not actually introduced with the free will of the employee, proportionality control has been implemented in order to protect the actual will of the employees. This control mechanism will be activated after the conclusion of the contract, i.e. ex post, and will not invalidate the whole contract. However, since the scope of the relevant provision may be narrowed through interpretation and by the court, the desired protection may be achieved. Turkish Supreme Court also examines the issue by explaining it in terms of balance and proportionality in the contract.[22]

i. Geographical Limitations

In order for the non-compete obligation to be imposed on the employee to be valid, the scope of this obligation must be limited in terms of location/geographical area.[23] There is no uniform approach in the doctrine and judicial decisions as to how wide this area may be. In the doctrine, it is generally considered that this area "shall not exceed the boundaries of the field of activity actually carried out by the employer"[24] and that "outside this area, the employer will not have a legitimate interest worthy of protection by the non-compete clause".[25]

Especially in the technology sector, where geographical borders and areas are no longer important and it is more important where the software is used/licensed rather than where it is developed, it has become difficult to determine the concept of area and especially the area in which the employer's interest worthy of protection exists. In this respect, in our opinion, the requirement of geographical boundary is becoming less and less important. For example, the

[22] Court of Cassation 11nd Civil Chamber, dated 17.10.2018, 2017/745, 2018/6432.
[23] see TCO 445/1
[24] SARPER SÜZEK, *İş Hukuku* (Labour Law), cit., p. 342.
[25] M. POLAT SOYER, *Rekabet Yasağı Sözleşmesi* (Non-Compete Agreement), cit., p. 66; SAVAŞ TAŞKENT/ MAHMUT KABAKÇI, "Rekabet Yasağı Sözleşmesi" (Non-Compete Agreement), cit., p. 31.

fact that the non-compete obligation imposed on the employees of a software company established in Ankara covers only the provincial borders of Ankara will not make any sense if the product is sold/licensed in Istanbul or abroad.

The Court of Cassation has stated in many of its judgements that a non-compete clause cannot be agreed to cover the whole of Türkiye[26]. However, if the product in question is licensed and made available for use throughout Türkiye, in our opinion, there should be no problem in agreeing on the non-compete for the whole of Türkiye. In such a scenario, as the employer's field of activity covers the whole of Türkiye, the legitimate interest worthy of protection should be considered to exist for the whole of Türkiye. However, in this case, the obligation should be drafted in such a way that ensures that the economic future of the worker is not unfairly limited. If a non-compete which covers the whole of Türkiye is sought, the grounds for this restriction and the fact that the grounds have been agreed upon should be clearly included in the agreement.

On a separate matter, in practice, it is observed that such non-compete clauses usually have a financial counter-consideration. It is advisable to include such a provision in the employment contract (either as part of the salary or as a separate compensation). This way, it can be said that the criterion of "not restricting the economic future of the employee unfairly" is also met, in advance.

The Court of Cassation, in relation to a non-compete clause agreed between the parties, the scope of which is determined as "the whole world", argued that the sanction attached to a non-compete clause which includes the following wording "the whole world" as its geographical limit, should not be absolute nullity, and considered that it would be appropriate to apply the limitation procedure stipulated in TCO 445/2. It seems possible to conclude that the approach of the Court of Cassation, taking into consideration TCO 445/1, is that, the non-compete clauses that do not contain any limitation in terms of geographical area (location) are invalid, but the non-compete clauses which include the phrase "the whole world", which leads to the same result in terms of scope, are valid, but they should be subject to limitation. Assuming that this is a deliberate approach, it is possible to say that the Court of Cassation, in a way, "penalised" employers who did not include any geographical limitation, and sanctioned employers who included the phrase "all over the world", which leads to essentially the same result, only with a narrowing of scope sanction, since they at least made a determination regarding the scope. In the latter case, the provision is not struck out, but only its scope is reduced to a reasonable level that does not jeopardise the economic future of the employee. At this point, in our opinion, it is better fit for purpose to not invalidate the non-compete obligation completely, but to apply partial invalidity provisions or to interpret the established agreement narrowly, except in very exceptional cases. Although there is an employment relationship between the parties, it should not be forgotten that such non-compete agreements

[26] Court of Cassation 9th Civil Chamber, dated 15.04.2010, 2008/24493, 2010/10480; Court of Cassation 11th Civil Chamber, dated 2.11.2015, 2015/4311, 2015/11343; Court of Cassation 11th Civil Chamber, dated 22.5.2018, 2016/12456, 2018/3829.

are not made for ordinary workers, and that there is an important economic rationale behind this.

Another issue to be discussed in this context is how to draw the geographical limitations for remote working. The meaning of geographical limitation must change if the employee is not tied to a physical workplace. In this case, the regions in which the employer operates, markets where customers are located or digital access areas may be taken into account. However, the extension of such limits is controversial as it may restrict the employee's constitutional freedom to work. In this scenario, in order to create a valid non-compete clause, we may present three suggestions. First being the definition of the digital space. Instead of a geographical boundary, the non-compete obligation may be limited to the sector or customer groups that the employer serves digitally. The second is creating a hybrid limitation which may be set, covering both the employer's physical locations and its digital reach. And lastly, proportionality and duration might limit the "geographical" limitation: If a broad geographical limit is set for remote work, the duration of this limit may be shorter.

ii. Content of the Non-Compete Clauses

In addition to the foregoing, a limitation should also be stipulated in terms of the subject matter and field of activity of the non-compete agreement for it to upheld by courts. As such, "*non-compete agreements imposed on the employee in relation to all of the lines of business in which the employer is active shall be deemed invalid."*[27] Similarly, in order for the non-compete clause to be valid, it must be limited to the field of activity of the employee. Otherwise, the limit of the obligation may be contrary to equity and the balance of interests, and the employee may be prevented from continuing his/her professional activity as a whole.

That said, there is no doubt that these two limitations bring about uncertainty as to their application in practice. How will the line of business in which the worker and the employer operate be determined? Who defines it and how? The uncertainty surrounding these questions, faces non-compete agreements with the risk of invalidity from the outset. It must be said that this risk is not a low risk in the eyes of the Court of Cassation. In this respect, a a possible solution which would enable the parties to the employment contract to protect themselves as much as possible would be to define the field of activity, from the outset, in the agreement with the mutual will of the parties. Although such a definition does not remove the discretionary

[27] HAKAN KESER, "6098 Sayılı Türk Borçlar Kanunu'na Göre Rekabet Yasağı" (Non-Compete Obligation According to the Turkish Code of Obligations No. 6098), *Sicil İş Hukuku Dergisi*, vol. 6, Issue: 24, 2011, pp. 88-105, p.24; NURAY KOVANCI, "Türk İş Hukukunda Rekabet Yasağı Sözleşmesi" (Non-Compete Agreements in Turkish Labour Law), *Türkiye Adalet Akademisi Dergisi,* Issue: 31, 2017, pp. 769-800, pp.782-783.

authority of the judge in case of a dispute, it is clear that it will guide the judge and the court appointed expert[28].

Also, a limitation shall be made regarding the type of the competition. According to Art. 444 of TCO, the employee in particular, may undertake in writing to refrain from opening a competing business on her own account, working for another competing business or otherwise entering into any other beneficial relationship with the competing business. As seen, the legislator gives three examples of possible competing activities, in particular the establishment of a competing company by the employee, i.e. self-employment, acceptance of employment in a competing company or participation in such a company. Unless otherwise agreed, the agreed non-competition clause covers all three forms. Those examples are slightly different from each other but in order to group them one can say that there are mainly two types of competition: direct and indirect competition. So-called indirect competition with the former employer exists if the employee works for a rival company. This term also includes advisory activities for a rival company or participation with capital. A definition or at least clarification regarding this issue as well arise the chance of concluding a valid non-compete agreement, since the parties have the option of cumulatively prohibiting all conceivable forms of competitive activities or just individual ones. Also, as a principle, cautious employers include further competing activities in the non-competition agreement in order to protect themselves against possible competition. For example, they can prohibit the employee from working for a competing company after the employment relationship has ended, whether as an employee, consultant or agent.

Another limitation regarding the scope is that the non-competition clause in the employment contract only affects competition on the supplier side.[29] According to Swiss law, customers within the meaning of Art. 340 para. 2 Swiss OR can therefore only be buyers of goods or services. Also the Federal Supreme Court supports this result ruling that the demand-side non-competition clause is void in employment contract.[30] The non-competition clause in the employment contract therefore does not apply to competing demand for the same goods for further processing. The non-competition clause therefore does not extend to supplier relationships. This means that the employer and the employee who has left the company can easily have the same supplier despite a valid non-competition clause. The former employee consequently has the opportunity to work for the supplier despite an effective non-compete clause. The reason for the lack of protection of a supplier relationship through a non-compete clause is ultimately that there is no competitive relationship between the employer and the supplier.

[28] Since in most cases a civil judge will not be able to answer the question of where the boundary of the field of activity is drawn (since there is no boundary drawn by the rules of law), it is almost certain that the matter will come before the expert.
[29] DAVID HEEB, *The Non-Competition Clause in the Employment Contract According to Art. 340-340c OR.*, cit., p. 35.
[30] BGE 130 III 353, 358 E. 2.1.2; Urteil des BGer 4C. 338/2001 vom 5. April 2002, E. 4b.

iii. The Party on which the Obligation is Imposed

With the non-competition clause, the employer can, to a certain extent, protect his customer contacts, manufacturing and business secrets from competing activities by the employee after the employment relationship has ended. This means that a non-competition agreement is reasonable only if an employee actually has knowledge that is worth keeping secret.[31] Accordingly, under TCO Art. 444/2, a non-compete clause is only valid if the employment relationship provides the employee the opportunity to obtain information about the customer portfolio or production secrets or the employer's business, and at the same time, the use of this information is of such a nature that it would cause significant damage to the employer. [32] In other cases, since there is no necessity of concluding such a contract, it is not valid per se. Accordingly, it does not seem possible to impose a non-compete obligation on employees who are not in a position to know certain secrets that the employer has a legitimate interest in keeping confidential.

Thus, it would be inappropriate to impose a non-compete clause in the field of software, on an employee who is not related to and has no knowledge of the primary work performed at the employer's workplace and who works in secondary jobs, for example, as an employee responsible for catering. Since the purpose of the obligation in question is to protect the employer's reasonable interest worthy of protection, it cannot be said that there is an interest worthy of protection in imposing an obligation in such a field, on an employee who is not related to the main business conducted by the employer.

Another requirement under the same provision is that the use of the information described above must be likely to cause significant damage to the employer. Examples of this situation may include a decrease in the amount of earnings and/or orders, or a decrease in the employer's overall competitiveness. However, it should be noted that, since the non-compete obligation is a preventive measure, it is not necessary for such damage to have occurred at the time of the creation of the obligation. In this respect, the reasonable possibility of such damage is sufficient for the obligation to be valid. Accordingly, the need for a non-compete clause for a caretaker,[33] a cleaning lady, a landscape gardener, a shoe salesman or a snowboard instructor is generally not necessary.[34]

[31] DAVID HEEB, *The Non-Competition Clause in the Employment Contract According to Art. 340-340c OR.*, cit., pp. 29-30.
[32] TCO 444/2.
[33] Urteil des OGer ZH, I. ZK, vom 4. Juli 1997, in ZR 97/1998 Nr. 56, S. 166–169, JAR 1999, S. 337.
[34] DAVID HEEB, *The Non-Competition Clause in the Employment Contract According to Art. 340-340c OR.*, cit., p. 40.

2.3. Sanctions/Remedies

In the event of a breach of a valid non-compete clause, certain sanctions are imposed on the breaching party.

Pursuant to Article 446 of the TCO, "*the employee who violates the non-compete clause is obliged to compensate all damages incurred by the employer as a result thereof.*"

However, the main problem here is that the amount of the damages arising from the breach of the non-compete obligation is not clear.[35] Therefore, such agreements, due to the nature of the business, include a penalty clause. This is because the appetite in requesting "*specific performance*" is very high in complying with this obligation. As such, it is natural to stipulate high penalty clauses in order to ensure full performance, i.e. non-competition. At this point, the distinctive element of the penalty clause is to create a means of pressure on the employee in the position of a debtor, beyond the compensation of the damage.[36] Even in English law, which distances itself from penalty clauses, in cases where the interest of "specific performance" is high, in other words, in limited cases where specific performance can be requested under English law, it is permitted to agree on lump sum compensation, even though this is not named as a penalty clause.[37]

If the breach of the non-compete obligation is subject to a penalty clause and there is no provision to the contrary in the contract, the employee may be released from the non-competition obligation by paying the prescribed amount; however, the employee must compensate for the damage exceeding this amount in any case. [38]

Additionally, in addition to collecting the above-mentioned penalty and additional damages, the employer may, if separately agreed in writing under the non-compete clause, demand the cessation of the non-competitive behaviour, provided that the employer proves (i) the importance of the interests violated or threatened and (ii) that the employee's conduct justifies such sanction. This is essentially a sanction that can be considered as a "compulsion to specific performance". This is because, in the first instance, the request for the cessation of the non-competitive behaviour is made through an enforcement order issued by the enforcement officer based on the decision of an enforcement court, and the employee, who is deemed to be the debtor in this relationship, is notified to cease the behaviour in violation of the non-compete within 7 days.[39] Subsequently, if the employee still has not ceased such behaviour, the

[35] MEHMET ÖZGÜR AVCI, "Rekabet Yasağında Cezai Şart" (Penaly Clauses in Non-Compete Agreements) in *Rekabet Yasağı (Non-Compete Clauses),* editors: Özel, Sibel/Pürselim, Hatice Selin/Doğrusöz Koşut, Hanife, İstanbul, 2024, pp. 137-151, p. 140.
[36] YEŞIM M. ATAMER, "Ceza Koşulu – Götürü Tazminat – Sorumsuzluk Anlaşması: Hangisi? Karşılaştırmalı Hukuk Işığında Sözleşmelerin Yorumlanmasında Bazı Tutamak Noktaları" in *Uluslararasi İnşaat Sözleşmelerinde Gecikme Ve Temerrüt, Değişmeyen Bir Soruna Yeni Yaklaşımlar (Delay and default in international construction contracts, New Approaches to an Unchanging Problem)*, editors: Atamer, Yeşim M./Baş Süzel, Ece/Geisinger, Elliott, İstanbul, 2018, pp. 87-131, p. 118.
[37] YEŞIM M. ATAMER, "Ceza Koşulu – Götürü Tazminat – Sorumsuzluk Anlaşması: Hangisi? Karşılaştırmalı Hukuk Işığında Sözleşmelerin Yorumlanmasında Bazı Tutamak Noktaları" in *Uluslararasi İnşaat Sözleşmelerinde Gecikme Ve Temerrüt, Değişmeyen Bir Soruna Yeni Yaklaşımlar (Delay and default in international construction contracts, New Approaches to an Unchanging Problem)*, cit., pp. 95-100.
[38] TCO Article 446.
[39] Turkish Enforcement and Bankruptcy Law Article 30.

employee, who is in violation of the judgement, may be punished with the compulsion imprisonment regulated under Article 343 of the Turkish Enforcement and Bankruptcy Law.

At this point, according to the Court of Cassation, in order for the employer to apply for sanctions, it is sufficient for the employer to prove the existence of a risk of damage, not the damages that has already occurred.[40] In another decision, Court of Cassation also decides that "Accordingly, it is not necessary for the employer to experience a substantial damage in the case of a non-competition clause; it is sufficient that there is a possibility that the employee may cause significant damage to the plaintiff employer by using the information he/she has acquired due to his/her work in another competing business."[41] This precedent shows that although the existence of damage in case of breach of the non-competition obligation is certain, there is uncertainty as to its amount.

3. Conclusion: Drafting a Valid Non-Compete Clause

In light of the above explanations, it becomes evident that there are many different issues to be considered when drafting a valid non-compete clause. At this point, when the approach of the Court of Cassation is evaluated, it is seen that provisions containing reasonable restrictions are generally upheld and are not subjected to limitation, and in cases where the scope is broad in terms of one criterion (e.g. duration), it is expected that the scope is significantly narrowed in terms of other criteria (e.g. geographical area). For instance, in one of its decisions, the Court of Cassation concluded that, with respect to a provision where the scope is broad in terms of geographical area, "*the non-compete clause is valid, considering that the agreement is limited in duration (for a period of 1 year)*".[42]

In the same decision it has been stated that:

> "*the non-compete clause contains limitations in terms of duration, location and subject matter. Although the provinces of Istanbul, Izmir, Ankara, Bursa, Adana, Trabzon, Samsun listed in the agreement are the provinces with the densest population, the area of use of a product such as a wallpaper is not limited to these provinces and there is a very wide geography left. Additionally, the limitation in terms of location is not against equity since the defendant, who is a sales specialist for dozens of sectors other than wallpapers and / or decoration products sector, is given the opportunity to work all over Türkiye, including the provinces listed*".

In addition to these, in a non-compete clause limited in terms of duration, geographical area, person and time, if a penalty is stipulated, it is essential that this is preferably agreed upon in

[40] Court of Cassation 11th Civil Chamber, dated 8.4.2019, 2018/390, 2019/2748.
[41] Court of Cassation 11th Civil Chamber, dated 19.10.2015, 2015/9892, 2015/10660.
[42] Court of Cassation 11th Civil Chamber, dated 13.12.2021, 2020/7241, 2021/7112.

return for a reasonable fee or similar benefit[43], and in general, an obligation that does not limit the freedom to work more than necessary should be agreed upon.

Accordingly, in order to draft a valid non-compete clause, in summary: (i) the duration of the obligation should not exceed 2 years (except in special circumstances), (ii) the geographical area should be preferably reasonably limited to cities or, where this is necessary, to national borders, (iii) the obligation should be agreed only in relation to the relevant person and in a manner that does not jeopardise the economic future of that person, (iv) the scope should be limited to a specific line(s) of business, and (v) the balance of interests should be observed, especially in cases where a penalty clause is agreed.

However, the answer to the question of whether it is possible to write a perfect non-compete clause is on the negative. This is because the courts will assess whether a non-compete clause is valid or not by evaluating all the circumstances of the concrete case. In this respect, it can even be said that there is a legal uncertainty under Turkish law. Nevertheless, the risk of invalidity may be minimised by taking the measures suggested above. Finally, it would be more in line with both the principle of *pacta sund servanda* and the will of the parties for the courts to limit these provisions with partial invalidity sanctions, instead of declaring them invalid.

Reference List

ALPAGUT, GÜLSEVIL, "Türk Borçlar Kanununun Hizmet Sözleşmesinin Devri, Sona Ermesi, Rekabet Yasağı, Cezai Şart ve İbranameye İlişkin Hükümleri" *(*Provisions of the Turkish Code of Obligations on Transfer of Service Contract, Termination, Non-Compete, Penal Clause and Release*), Legal İş Hukuku ve Sosyal Güvenlik Hukuku Dergisi*, vol. 8, N.º 31, 2011, pp. 913-959

ATAMER, YEŞIM M., "Ceza Koşulu – Götürü Tazminat – Sorumsuzluk Anlaşması: Hangisi? Karşılaştırmalı Hukuk Işığında Sözleşmelerin Yorumlanmasında Bazı Tutamak Noktaları" in *Uluslararasi İnşaat Sözleşmelerinde Gecikme Ve Temerrüt, Değişmeyen Bir Soruna Yeni Yaklaşımlar (Delay and default in international construction contracts, New Approaches to an Unchanging Problem)*, editors: Atamer, Yeşim M./Baş Süzel, Ece/Geisinger, Elliott, İstanbul, 2018, pp. 87-131

AVCI, MEHMET ÖZGÜR, "Rekabet Yasağında Cezai Şart" (Penaly Clauses in Non-Compete Agreements) in *Rekabet Yasağı (Non-Compete Clauses),* editors: Özel, Sibel/Pürselim, Hatice Selin/Doğrusöz Koşut, Hanife, İstanbul, 2024, pp. 137-151

[43] For example, in a decision of the 11th Court of Cassation (dated 11.11.2019, 2019/148, 2019/7069), the Court ruled that the penalty clause was unjustified on the grounds that the penalty clause was issued unilaterally and that the employer did not compensate the economic difficulties that the employee would face as a result of the employee's 3-month absence of work with its own counter-performance.

BAYATA CANYAŞ, F. ASLI, "5718 Sayılı Yeni MÖHUK Uyarınca Doğrudan Uygulanan Kurallar ve Özellikle Üçüncü Devletin Doğrudan Uygulanan Kuralları" (Directly Applicable Rules and Especially the Directly Applicable Rules of the Third State in light of the New Turkish Private International Law No. 5718) in *Haluk Konuralp Anısına Armağan (Haluk Konuralp Memorial)*, vol. 3, Ankara, 2009, pp. 141-166

GIRAY, FARUK KEREM, "Yabancılık Unsuru İçeren İş Sözleşmesinin Sona Ermesine Bağlı Rekabet Yasağındaki Süre Şartının Hukuki Niteliği ve Sonuçları" (The Legal Nature and Consequences of the Non-Competition Period Due to the Termination of the Employment Contract Containing a Foreign Element) in *Rekabet Yasağı (Non-Compete Clauses),* editors: Özel, Sibel/Pürselim, Hatice Selin/Doğrusöz Koşut, Hanife, İstanbul, 2024, pp. 1-28

HEEB, DAVID, *The Non-Competition Clause in the Employment Contract According to Art. 340-340c OR.*, 2016

KESER, HAKAN, "6098 Sayılı Türk Borçlar Kanunu'na Göre Rekabet Yasağı" (Non-Compete Obligation According to the Turkish Code of Obligations No. 6098), *Sicil İş Hukuku Dergisi*, vol. 6, Issue: 24, 2011, pp. 88-105

KOVANCI, NURAY, "Türk İş Hukukunda Rekabet Yasağı Sözleşmesi" (Non-Compete Agreements in Turkish Labour Law)*, Türkiye Adalet Akademisi Dergisi,* Issue: 31, 2017, pp. 769-800

MANAV ÖZDEMIR, A. EDA, "Güncel Yargı Kararları Işığında Rekabet Yasağı Sözleşmesinin Geçerli Olması İçin Gerekli Koşullar" (Validity Conditions of Non-Competition Agreement in the Light of Recent Judicial Decisions) in *Rekabet Yasağı (Non-Compete Clauses),* editors: Özel, Sibel/Pürselim, Hatice Selin/Doğrusöz Koşut, Hanife, İstanbul, 2024, pp. 67-80

MOLLAMAHMUTOĞLU, HAMDI/ASTARLI, MUHITTIN/BAYSAL, ULAŞ, *İş Hukuku Ders Kitabı Cilt 1: Bireysel İş Hukuku* (Labour Law Textbook Volume 1: Individual Labour Law), 2nd Edition, Ankara, 2018

REHBINDER, MANFRED, *Droit Suisse du Travaile* (Swiss Labour Law), Berne, 1979

SOYER, M. POLAT, *Rekabet Yasağı Sözleşmesi* (Non-Compete Agreement), Ankara, 1994

STAEHELIN, ADRIAN, Art 319-330a OR. Der Arbetisvertrag in *Zürcher Kommentar,* 2006

STREIFF, ULLIN/VON KAENEL, ADRIAN/RUDOLPH ROGER, *Arbeitsvergtrag Praxiskommentar zu Art. 319-362 OR*, 7th Edition, Zürich, 2012

SÜZEK, SARPER, *İş Hukuku* (Labour Law), 18th Edition, İstanbul, 2019

SÜZEK, SARPER, "Yeni Borçlar Kanunu Çerçevesinde İşçinin Rekabet Etmeme Borcu", *Prof. Dr. Berin Ergin'e Armağan* (Employee's Non-Compete Obligation under the New Code of Obligations - A Gift to Prof. Dr. Berin Ergin), İÜHFM, İstanbul, 2014, pp. 457-468

TAŞKENT, SAVAŞ/KABAKÇI, MAHMUT, "Rekabet Yasağı Sözleşmesi" (Non-Compete Agreement), Sicil İş Hukuku Dergisi, Issue: 16, 2009, pp. 21-46

TUNCAY, A. CAN, "İşçinin Sadakat (Bağlılık) Yükümlülüğü" in *Prof. Dr. Hayri Domaniç'e 80. Yaş Günü Armağanı* (Employee's Obligation of Loyalty. Prof. Dr. Hayri Domaniç 80th Birthday Tribute), vol. 2, İstanbul, 2001, pp. 1043-1086

TUNÇOMAĞ, KENAN/CENTEL, TANKUT, *İş Hukukunun Esasları* (Principles of Labour Law), 3rd Edition, İstanbul, 2003

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