

NON-COMPETE CLAUSE LIMITATIONS AND THIRD PARTIES' INVOLVEMENT

Non-compete obligation requires a party to refrain from operating in other party's field of work, in a particular geographic area, for a specific period of time. While this obligation may arise from an agreement between parties, it may also arise from the law. Turkish law obliges persons with certain legal status to refrain from competing, in view of managing potential conflicts of interest.

An employee's duty of loyalty containing the obligation not to compete with the employer, as long as the employment agreement is in force, is an example of a statutory non-compete obligation. Similarly, under Turkish law, a joint stock corporation's board member cannot compete with the company during the membership. In both scenarios, the non-compete obligation directly arises from the law. However, it is also possible to impose a contractual non-compete obligation on a party. In the face of this obligation's alleged violation, the competent Turkish courts to hear this dispute may decide that an overly broad non-compete commitment is invalid. For this reason, it is essential to set the limitations of a non-compete provision, so that it is considered valid.

1. Non-Compete Clause Limitations on Place, Time and Subject

As to the limitation in terms of place, the non-compete obligation must be limited to a particular city or geographic area. Unlike some other legal systems, in Turkish law, provisions containing the countrywide non-compete obligation is invalid, in accordance with the Cassation Court's jurisprudence. With regard to the limitation in terms of time, the non-compete obligation cannot be drafted to cover a long period of time. The appropriate period to draft non-compete obligation can be determined case by case. The Cassation Court states that an employee can only undertake not to compete for one year or a few years, after the employment relationship. The Cassation Court further states that the employee may face an unbearable economic burden if the period of

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prohibition is too long. Apart from these two, the limitation in terms of subject is also vital. Indeed, the Cassation Court states that even the sectors included in the company registration documents may have been broadly expressed and for this reason, it is necessary to determine in which field the company actually operates.

Turkish law may also include provisions relating to the limitations that cannot be agreed otherwise. For instance, under the Labor Law, the duration of non-compete commitments an employee can validly undertake is limited to two years after the employment agreement. However, this provision does not apply to a former member of the company's board of directors' non-compete obligation.

Each case's own characteristics determine how the limitations should be phrased. For example, to consider a provision of non-compete obligation valid, the Cassation Court examines whether there is a possibility of significant harm to the employer. If an ordinary employee, who is not in a position to know the company's secrets or clientele, is at issue, the provision of non-compete obligation may be deemed invalid. Therefore, validity discussions must consider certain factors, such as the company's or employer's interest in imposing this obligation in first place, the burden on the person undertaking a non-compete obligation, whether the employee can have access to company secrets and clientele.

2. Third-Party Involvement in Violations of Non-Compete Clauses

The non-compete obligation does not impose any duties or obligations on third parties. However, third parties' actions may sometimes show that the person under the commitment not to compete violates its obligations.

In practice, the persons under the non-compete commitment may try to mask their competitive actions by presenting them as their relatives' or family members'. The Cassation Court does not endorse the cover-up efforts, such as transferring shares to relatives to give the impression that a relative operates the activity, while keeping the organic ties with the management; or establishing a company or a workplace on behalf of relatives. Nevertheless, clear provisions in the non-compete agreements prohibiting competition through relatives and family members help prevent discussions that may arise on this issue in a possible dispute.

The non-compete obligation can be violated with a third party's involvement, if the person under the non-compete commitment makes transactions on the account of a third party or if a third party's transactions are on the account of the person under the commitment. These may occur as a result of representation or agency relationship or brokerage agreement between the person under the commitment and a third party. In determining whether such relationships constitute competition, some factors must be considered, e.g. (1) the nature of the relationship between the third party and the person under the commitment, (2) whether they operate in the same field, and (3) whether the activities have an impact on the ability to compete of the obligation-imposing party. As a result, if the conditions are met, it is not possible to argue that a commercial activity

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that constitutes competition does not constitute a violation, simply by bringing forward the relationship with the third party.

3. Conclusion

The non-compete commitment limits the enjoyment of constitutional right to work and freedom of contract of the person under the commitment. Therefore, parties must ensure that the non-compete obligation does not constitute a disproportionate interference with the individual's right to work and freedom of contract in each case. Otherwise, the provision may be deemed invalid. On the other hand, the fact that our legal system imposes limitations in favor of the person under the commitment does not mean that this person will be protected under all circumstances. If the non-compete obligation is violated by a fraudulent act; on the account of a third party, or by a third party's acts on the account of the person under the commitment, the employer's or the company's interests outweigh.

That being said, evaluating parties' interests from a legal perspective is important to determine the non-competition obligation's legally-allowed scope. There is no one-size-fits-all non-compete provision, as an agreement's validity will be ensured by drawing equitable boundaries, after the interests' examination from a legal perspective.

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