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NON-COMPETITION COVENANTS IN CASE OF A BUSINESS TRANSFER

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Abstract. *The validity (probability) of non-competition covenants which are typical for business transfer transactions is one of those issues on which discussions go in the international business transfer theory and practice. On one hand, such covenants help ensure the business interests of the buyer, on the other hand, by their nature, they can mean a restriction of competition, which is prohibited by law. This article, based on the analysis of the European Union, the Lithuanian and foreign legislation, case-law and doctrine, is designed for a disclosure of the concept of non-competition covenants, which are concluded by the parties in the context of a business transfer as well as for the identification of the conditions of the validity (admissibility) of those covenants.*

Keywords: *transfer of business, non-competition covenants (commitments), conditions of validity (admissibility) of non-competition covenants.*

Introduction

The objects of this research are the non-competition covenants concluded between the seller and the purchaser of a business. The relevance of the chosen theme is determined by the fact that recently the last wave of mergers has been finished, which could result in an increase of the number of disputes and legal cases related to the transfer of business, including the non-competition covenants.

The Lithuanian legal basis lacks deep traditions on the matters of a business transfer; also, the recent regulation is not clear enough. The case-law is not rich, too. The questions related to non-competition covenants had not been examined in the Lithuanian jurisprudence. Therefore, the Lithuanian law does not give fully clear assessment of the legality of non-competition covenants, which are typical for the transactions of a business transfer. Because of the lack of the traditions of business and legal regulation, Lithuanian entrepreneurs and law practitioners are absorbing and actively using the experience and samples of foreign countries. However, the appropriateness and admissibility of such practice are not 'examined' by the Lithuanian courts and the legal doctrine.

The purpose of this research is to investigate the non-competition covenants concluded by the parties in the context of a business transfer and to identify (to diagnose) the conditions of the validity (admissibility) of those covenants. Various scientific methods have been applied during the research: linguistic, document (content of source), logical, systematic, comparative, critical analysis, etc.

1. The Conception of Non-Competition Covenants (Commitments)

What is peculiar about business transfer transactions is the fact that besides the main agreement regarding the subject-matter of the transaction (i.e. purchase–sale of shares or an enterprise) the seller and the buyer of a business often conclude various additional covenants. The purpose of such additional covenants is, firstly, to strengthen the position of the parties in the transaction and, secondly, to allow a significant raise of the value of the transaction,[1] because in such a case, the buyer of the business is minded to pay a bigger price for the business being acquired. Such covenants are much more typical for share deals, because, differently from the sale of an enterprise, the seller of shares has no statutory obligation to transfer an enterprise to the buyer (Article 6.407 of the Civil Code of the Republic of Lithuania[2] (the Civil Code)) or to introduce the buyer into the economical activity of the enterprise[3]. Particular actions of the seller after the

1 Ershova, E. A.; Ovchinnikov, K. D. *Predprijatie (Biznes) v sovremennom ehkonomiko-pravovom oborote* [Enterprise (Business) in the Modern Economical-Juridical Turnover]. Moskva: Statut, 2006, p. 247.

2 Civil Code of the Republic of Lithuania. *Official Gazette*. 2000, No. 74-2262 (edition of 04-01-2011).

3 See more: Kiršienė, J.; Kerutis, K. Verslo perleidimas akcijų ar įmonės pardavimo būdu: teisinio reglamentavimo ir praktikos lyginamoji analizė [Business Trasfer in the Manner of Sale of Shares or Enterprise: A Comparative Analysis of Legal Regulation and Practice]. *Jurisprudencija*. 2006, 3(81): 24–31, p. 28–29.

conclusion of transaction may cause considerable harm to the possibilities of the buyer to successfully develop the acquired business and to reduce the value of the acquired object. For example, there always remains a risk that the seller will reinvest the money received for the shares sold in a competitive business and, advantaging from the knowledge already acquired in that sphere, push out the buyer (the enterprise acquired by the buyer) from the market. Such a risk is especially high when the seller of the business has a substantial know-how, clientele and distribution network in the market, whereas the buyer is a newcomer in that market.

The law does not protect the buyer from such actions of the seller enough. Even an obligation of the seller of an enterprise as an object not to compete with the transferred enterprise is not legally established in Lithuania. However, the legislators of some continental law countries (such as Italy, France, etc.) have indicated such an obligation.[4] Therefore, the interests of buyers are protected under additional covenants concluded by the parties regarding the restriction of the sellers' actions in the market. In international practice, such restrictions are called *restrictive covenants* and their several types—*non-compete*, *non-deal*, *non-solicit*, *non-poach* covenants, etc.[5] These normally include all or some of the following elements:[6] a) an undertaking not to solicit the customers of a company (*non-solicitation*), which may extend to an undertaking not even to have any dealings with any such customers (*non-dealing*)[7]; b) an undertaking not to interfere with the sources of supply to a company; c) an undertaking not to solicit away a company's key employees; d) an undertaking not to be involved in a competing business. In addition to the obligations of the seller not to carry out certain actions, the parties may enter into additional agreements obliging the seller to perform certain specific actions (e.g. to continue the intellectual property license, supply and other contracts with the enterprise sold, etc.). However, the most prevalent commitments are non-solicitation of employees and customers commitments; in particular, non-competition obligations of the seller (usually the seller commits not to compete with the company sold in its operation field for a certain period of time).

It is clear that such covenants are not legally necessary for the conclusion of the purchase and sale transaction, but their existence is supported by economic considerations, such as, for example, the legitimate buyer's wish that the acquired business operated no worse than before the acquisition, as well as to prevent the seller from the misuse of knowledge about the business of the enterprise sold, etc. The purpose of those covenants is to protect the buyer of a business (company) from the seller's unfair competition. True, the laws prohibit unfair competition and provide the buyer of a business

4 See Whalley, M.; Semler, F.-J. (eds). *International Business Acquisitions: Major Legal Issues and Due Diligence.* 3rd ed. The Hague London: Kluwer Law International, 2007, p. xi, 169, 268.

5 *Ibid.*, p. 229.

6 Stilton, A. *Sale of Shares and Businesses: Law, Practice and Agreements*. London: Sweet & Maxwell, 2006 (with Supplement to the First Edition. London: Sweet & Maxwell, 2008), p. 104.

7 For more information see Beswick, S.; Wine, H. *Buying and Selling Private Companies and Businesses*. 5th ed. London: Butterworths, 1996, p. 197.

some protection against the seller's unfair competition,[8] but such a protection is not considered sufficient, thus, written non-competition covenants are concluded.

On the other hand, such covenants, especially concluded between competitors, often limit the party's (usually the seller's) freedom of action in the relevant market, or even may weaken, distort or otherwise adversely affect the competition. By nature, they can mean a restriction of competition, which is prohibited by law, and therefore may be regarded as invalid.[9] As a result, the legality (probability) of non-competition covenants concluded by the parties to the transaction of a business transfer is one of the issues on which discussions go in the international business transfer theory and practice. It should be noted that only in a couple of cases[10] judged by the Lithuanian courts such covenants concluded between a seller and a buyer of shares were mentioned, but they have not been analysed in greater detail. Sparse in this regard is also the practice of the Competition Council; so far it has passed only four resolutions[11] regarding the authorization of concentrations, in which non-competition obligations were examined as well. By referring to foreign legal doctrine and practice as well as the decisions of the European Commission, the Court of Justice of the European Union (the Court of Justice) and the Court of First Instance, an attempt will be made to formulate the conditions of the validity (admissibility) of such covenants (commitments).

2. Conditions of the Validity (Admissibility) of Non-Competition Covenants

Due to their primary effect of restricting competition, the prohibitions of competition can fall under the prohibition set out in Article 81(1) of the Treaty establishing the European Community[12] (the EC Treaty). The said norm indicates that all agreements which may affect trade between the Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market shall be prohibited as incompatible with the common market. Plus, if either of the parties has a dominant position on a relevant market, restrictions can in some circumstances also be judged under Article 82 of the EC Treaty, which prohibits the abuse of a dominant market position within the common market.

However, there are certain guidelines regarding the admissibility of such covenants. A permissible covenant is the one which contributes to the improvement of the

8 Article 16(1) Points 1, 3, 4 of the Law on Competition of the Republic of Lithuania. *Official Gazette*. 1999, No. 30-856 (edition of 10-10-2009).

9 *Ibid.*, Articles 3(3) and 54.

10 Judgement of the Court of Appeal of Lithuania of 09-02-2010 in case 2A-91/2010, *UAB "ZZZ Baltic" v A. M. F. B. L. and L. J. R. P.*; Judgement of the Supreme Court of Lithuania of 24-11-2008 in case 3K-3-573/2008, *K. S. v. M. T.*; Judgement of the Court of Appeal of Lithuania of 11-07-2008 in case 2A-401/2008, *K. S. v M. T.*

11 Competition Council of the Republic of Lithuania, resolutions No. 83 as of 18-07-2002, No. 106 as of 26-09-2002, No. 144 as of 19-12-2002, No. 1S-131 as of 13-11-2003.

12 Treaty Establishing the European Community (Nice consolidated version). [2002] OL C325/33.

production or distribution of goods or to the promotion of technical or economic progress while allowing consumers a fair share of the resulting benefit, and which does not impose restrictions which are not indispensable to the attainment of these objectives and which do not afford the possibility of eliminating competition in respect of a substantial part of the products in question.[13]

EU competition law allows parties to agree to additional restrictions (including non-competition) if they are necessary and directly related to the concentration implemented. The European Commission reports on the interpretation and conditions of the admissibility of these additional constraints. The first reports were published in 1990 and 2001. After the adoption of the new European Council Regulation on the control of concentrations between undertakings[14] in 2004, in 2005 the Commission adopted the new Notice on restrictions directly related to and necessary for concentrations (2005/C 56/03)[15] (the Notice on related restrictions).

Broadly speaking, the conditions of the validity (admissibility) of non-competition covenants were firstly indicated by the Court of Justice in *Remia BV and others v. Commission of the European Communities* case (1985)[16]. The Court distinguished two conditions:[17] 1) *necessity* for an appropriate transfer of the enterprise; and 2) *proportionality*—strict limitation of their duration and scope to that purpose. This position was taken over by both the European Commission in its reports and the Court of First Instance in its cases.[18] Also, the Court of First Instance has remarked that if the duration or the scope of the restriction exceeds what is necessary in order to implement the operation, it must be assessed separately under Article 85(3) of the EC Treaty.

Thus, under the EU law, a non-competition covenant (clause) is admissible if, firstly, the restriction is *objectively necessary for the implementation of the concentration* and, secondly, it is *proportional*, i.e. when its duration, subject matter, geographical field of application and the persons subject to them do not exceed what is reasonably necessary to the implementation of the concentration.[19]

Also, most continental law countries (for example, Austria, Belgium, Denmark, Spain, Italy, Norway, the Netherlands, Switzerland) recognize that non-competition covenants entered into between the seller and the buyer of a business are generally enforceable, provided that they are necessary to protect the legitimate interests of the buyer and are for limited duration, geographical extent and content.[20] The rules of the

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13 Article 81(3) of the Treaty Establishing the European Community, *supra* note 12.

14 Council Regulation (EC) No. 139/2004 of 20-01-2004 on the control of concentrations between undertakings (the EC Merger Regulation) (Text with EEA relevance). [2004] OL L024/1.

15 Commission Notice on restrictions directly related and necessary to concentrations (Text with EEA relevance). [2005] OL C056/24.

16 Case 42/84, *Remia BV and others v. Commission of the European Communities*. [1985] ECR 2545.

17 *Ibid.*, Point 20.

18 Case T-112/99, *Métropole télévision (M6), Suez-Lyonnaise des eaux, France Télécom et Télévision française 1 SA (TF1) Commission of the European Communities*. [2001] ECR II-02459, p. 106.

19 Points 13 and 19 of the Commission Notice on restrictions directly related and necessary to concentrations, *supra* note 15.

20 Whalley, M.; Semler, F.-J., *supra* note 4, p. 48, 63, 117, 268, 353, 365, 450.

evaluation of such covenants formulated by the European Commission are followed. In Finland, the conditions are formulated more widely, and it is indicated that such a non-competition clause may be justified when the duration, the geographical field of application, its subject matter and the persons subject to it do not exceed what is necessary for the implementation of the concentration and it relates to the business of the company as it was when it was sold. Such a clause must also be economically effective and the benefits for competition must outweigh the damage.[21] In Germany, a non-competition covenant concluded without indicating the time limit, territorial boundaries and without the obligation to compensate the damage usually is considered to be inconsistent with the objective practice.[22] In Germany, the non-competition covenant may express a transaction contrary to public policy, if, upon reasonable consideration of those interests of the buyer worthy of protection, it is deemed to restrict the seller in an excessive manner and in a way contrary to good public policy, i.e. when the restriction goes too far in terms of duration, territorial application or content.[23] Generally, the German case-law indicates that a non-competition covenant is permissible if the acquired company is closely linked to the personality of the seller and restrictions focus on ensuring the proper transfer of the enterprise (the so-called *functional approach*).[24] The German courts have held that the higher is the significance of the seller for the continuation of the company's activity after the acquisition, the higher the restrictions may be,[25] as well as that the various fees for non-competition agreements have no impact on deciding whether it is permissible.[26]

The non-competition covenants are similarly assessed in common law countries where they can be invalidated on the basis of the common law doctrine of restraint of trade.[27] However, such covenants are generally enforceable, provided that their territorial extent, duration and content are reasonable and do not exceed what is required by the buyer to protect his/her legitimate business interests. The party which seeks to implement the covenant must prove that it has certain legitimate interests which should be protected and that the covenant is not too extensive. It is additionally noticed that specific restraints must not be contrary to the public interest.[28] In common law countries, the courts also consider such a factor as 'the quantum of the consideration received by the covenantor and the effect of the agreement upon the position of the covenantor'[29].

In some countries, particularly in common law countries, such non-competition covenants are compared to similar non-competition agreements concluded between

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21 Whalley, M.; Semler, F.-J., *supra* note 4, p. 147.

22 Judgement of the Supreme Court of Germany of 15-03-1989, Case VIII ZR 62/88 (BGH WM 1989, 954-956).

23 Picot, G. *Mergers & Acquisitions in Germany*. 2nd ed. New York: Juris Publishing, Inc., 2002, p. 63–64.

24 Ershova, E. A.; Ovchinnikov, K. D., *supra* note 1, p. 243.

25 Judgement of the Supreme Court of Germany of 13-03-1979, Case KZR 23/77 (BGH, NJW 1979, 1605).

26 Judgement of the Superior Court of Hamburg as of 06-06-1972, Case 4 U 83/71 (GRUR 1973, 421, 423).

27 Knight, W. J. L. *The Acquisition of Private Companies and Business Assets*. 7th ed. London: FT Law & Tax, 1997, p. 31.

28 Stone, R. *The Modern Law of Contract*. 6th ed. London: Cavendish Publishing, 2005, p. 378.

29 *Esso Petroleum Co Ltd v. Harper's Garage (Stourport) Ltd*. [1968] AC 269, [1967] UKHL 1.

employers and employees. It is stated that in business transfer cases, non-competition covenants will be construed by courts less stringently than the employee's covenants.[30] The explanation for this greater leniency is usually related to the greater wealth and greater bargaining power of the seller of a business in comparison to a former employee.[31] Furthermore, employment non-competition covenants have a more detrimental effect upon the public interest in maintaining competition: in case of every non-competition covenant signed by an employee the society is deprived of the valuable economic services of one of its members; and, on the contrary, every time a seller of a business signs a non-competition covenant, the society remains at *status quo* because the transferred business continues to operate under the new proprietor.[32]

In Lithuania, as a general rule, agreements which restrict competition are prohibited.[33] However, the analysis of the provisions of the Law on Competition of the Republic of Lithuania[34] (the Law on Competition) allows to allege that the arrangements having the symptoms of the restriction of competition and entered into in addition to a company's transfer transaction should be considered legitimate in two exceptional cases: 1) the covenant is in accordance with the exemption requirements indicated in Article 6(1) of the Law on Competition, i.e. promotes technical or economical progress or improves the production or distribution of goods, and thus creates conditions for consumers to receive additional benefit (*legitimate purpose*), also the covenant does not impose restrictions on the activity of the contracting parties, which are not necessary for the attainment of the mentioned goals and does not afford the contracting parties the possibility to restrict competition in a large share of the relevant market (*proportionality*); 2) restrictions are directly related and necessary in order to implement concentration (Article 14(2) of the Law on Competition). Relatively, to the lists of exceptions one may also attach the small influence of the covenant (Article 5(4) of the Law on Competition). The requirements and conditions in respect of such arrangements are indicated by the Competition Council.[35]

As mentioned before, so far the Competition Council has passed only four resolutions regarding non-competition commitments. In all cases, the commitments were recognized as permissible. The Competition Council authorized the recognition of such obligations of the parties as a non-competition, non-solicitation of employees and clients, non-disclosure of confidential information, rendering of certain transitional services.

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30 Myers, J. *The Acquisition of Business Assets*. London: Longman Group UK, 1993, p. 72.

31 Rubin, P. H.; Shedd, P. Human capital and covenants not to compete. *The Journal of Legal Studies*. 1981,10: 93–110, p. 107.

32 Kohn, G. P. A fresh look: lowering the mortality rate of covenants not to compete ancillary to employment contracts and to sale of business contracts in Georgia [Comment]. *Emory Law Journal*. 1982, 31(3): 635–706, p. 642.

33 Article 5(1) of the Law on Competition (n. 8) which coresponds to the mentioned Article 81(1) of the EU Treaty, *supra* note 12.

34 Law on Competition, *supra* note 8.

35 Resolution No. 1 as of 13-01-2000 of the Competition Council of the Republic of Lithuania (edited by Resolution No. 1S-172 as of 09-12-2004 of the Competition Council of the Republic of Lithuania). *Official Gazette*. 2004, No. 181-6732.

Unfortunately, the Competition Council did not explain in greater detail the conditions for the admissibility of such additional commitments. The Competition Council only indicated that such covenants are directly related to and necessary for the implementation of the concentration, whereas in the absence of the mentioned restrictions the concentration would be considerably more difficult or would not be implemented at all, or would be implemented at substantially higher cost or over a longer period. It was noted that the presence of non-competition clauses is justified by the need to ensure that the acquired assets including both tangible and intangible assets (such as the company's reputation, experience, knowledge or know-how) would not lose their value immediately after the acquisition, in addition, the content of the non-competition clause is a temporary ban to compete. Thus, the Competition Council, in principle, pointed out the legitimate purpose of such additional restrictions—to ensure the proper implementation of concentration. Among the additional conditions, only the temporality of the restrictions is mentioned, i.e. the criteria of the duration of restrictions.

Thus, one can state that in Lithuania, clear conditions of the legitimacy (admissibility) of non-competition covenants concluded by the parties to the business transfer transaction has not yet been developed. Considering the analysis given above, it is possible to state that the conditions of the legitimacy of non-competition covenants should be the following: 1) *legitimate purpose of restrictions*; and 2) *proportionality (reasonableness) of restrictions* regarding their duration, their subject-matter (content), their geographical field of application (territory) and the persons subject to them.

2.1. Legitimate Purpose

Non-competition covenants must have a legitimate purpose, i.e. they must be designed to protect only the legitimate interests of the parties. The courts of various countries consider that a legitimate interest is goodwill, maintenance of a stable system of distribution, the preservation of secure outlets,[36] the protection of the buyer's trade,[37] customer or supplier relationship, confidential information, etc.[38] Moreover, non-competition covenants are usually justified only by the protection of the legitimate interests of the buyer.[39] It is argued that non-competition covenants from the buyer's perspective are unlikely to be protecting a legitimate business interest, because the seller of a business would often simply appear to be trying to protect itself from competition.[40]

In competition law, the striving to ensure the effective implementation of the concentration is generally considered as a legitimate purpose of non-competition covenants. In a sense, a legitimate purpose could also mean the promotion of technical or economic progress or the improvement of the production or distribution of goods, while allo-

36 *Esso Petroleum Co Ltd v. Harper's Garage (Stourport) Ltd., supra* note 29.

37 Christensen, S. A.; Duncan, W. D. *Sale of Businesses in Australia*. Annandale, NSW: Federation Press, 1997, p. 197.

38 Stilton, A., *supra* note 6, p. 104.

39 Judgement of the Supreme Court of Germany of 13/03/1979, Case KZR 23/77 (BGH, NJW 1979, 1605).

40 Stilton, A., *supra* note 6, p. 328.

wing consumers to receive additional benefit[41]. However, these circumstances are often expected consequences of non-competition covenants, in light of which the competition authority may accept the special covenants permitted, but not the targets of the parties. That goal can be achieved only if the non-competition obligations (additional constraints) satisfy two criteria of the objective nature—*direct relation* and *necessity* to the implementation of the concrete concentration. The first criterion means that restrictions must be closely linked to the concentration itself. Restrictions which are directly related to the concentration are economically related to the main transaction and intended to allow a smooth transition to the changed company structure after the concentration.[42]

The second criterion means that, in the absence of those covenants, the concentration could not be implemented or could only be implemented under considerably more uncertain conditions, at substantially higher cost, over an appreciably longer period or with considerably greater difficulty. Covenants necessary for the implementation of a concentration are typically aimed at protecting the value transferred, maintaining the continuity of supply after the break-up of a former economic entity or enabling the start-up of a new entity.[43] In such a case, it is necessary to examine what would be the status of competition if those clauses did not exist. If there were no non-competition clauses agreed and if the seller and the buyer remain competitors after the transfer, it is clear that the agreement for the transfer of the enterprise could not be given effect because the seller, with his/her particularly detailed knowledge of transferred enterprise, would still be in a position to win back his/her former clients immediately after the transfer and thereby drive the enterprise out of business. Thus, non-competition clauses incorporated in an enterprise transfer agreement in principle have the merit of ensuring that the transfer has the effect intended.[44]

The economic goal of the business transfer transaction is to obtain a functional, viable business, with not worse characteristics than it was during the reign of the seller. However, the seller, either directly or indirectly, in collaboration with the buyer's competitors, using his/her contacts, can quite easily recover (solicit) his/her former company's clients shortly after the transfer. What is more, he/she may enjoy an advantage over outsiders in possessing special information about the enterprise's production and sales situation and this makes him/her more dangerous than other competitors.[45] In this way, the company acquired would lose quite a significant part of its value. In order to obtain the full value of the business transferred, to gain the loyalty of customers and to assimilate and exploit the know-how, the buyer must be able to benefit from some protection against competition from the seller.[46]

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41 Article 6(1) of the Law on Competition, *supra* note 8.

42 Points 11 and 12 of the Commission Notice on restrictions directly related and necessary to concentrations, *supra* note 15.

43 Point 13 of the Commission Notice on restrictions directly related and necessary to concentrations, *ibid*.

44 Case 42/84, *Remia BV and others v. Commission of the European Communities, supra* note 16, p. 18–19.

45 Commission Decision as of 26-07-1976 (Case IV/28.996 – *Reuter/BASF*) (76/743/EEC). [1976] OL L254/40.

46 Point 18 of the Commission Notice on restrictions directly related and necessary to concentrations, *supra* note 15.

Thus, non-competition covenants are a measure designed to ensure a legitimate business interest of the buyer to receive (to absorb) the whole value of the object (business) transferred. As it was mentioned by the European Commission, compliance by the seller with such a non-competition clause means no more than that he/she must respect his/her contractual obligation to transfer the full value of the enterprise.[47] The buyer, while seeking the mentioned goal not to lose the value, often pays extra price for non-competition obligations assumed by the seller. The purpose of non-competition covenants is additionally grounded by the U.S. courts on the principle of avoiding unjust enrichment of the covenantor (*Reddy v. Community Health Found* (1982) case) the essence of which is that a person should not be able to sell his or her business and reap its 'going concern' value, then subsequently start a new competitive business and thereby jeopardize the value of the just-sold enterprise,[48] i.e. to gratuitously get a benefit for a second time. Finally, the legitimate purpose of non-competition covenants is also grounded by economical arguments—the prohibition of the seller's non-competition obligations would determine a reduction of the value of the business, thus fewer businesses would be sold and some would not be sold at all.[49]

A certain (often substantial) part of the value of the acquired business consists of the intangible, immeasurable worth, as goodwill. It is indicated that exactly the 'goodwill' in the business which has been built by the seller is the interest which the buyer is trying to protect in case of a sale of a business.[50] The seller transfers the goodwill of the business to the buyer by including a non-competition clause in the contract for the sale of the business.[51] It is difficult to scientifically define the concept of goodwill. In foreign literature, authors often cite the classical phrase pronounced by Lord Eldon in the *Cruttwell v. Lye* (1810) case under which goodwill was defined as 'the probability that the old customers will resort to the old place'[52]. Later, in the case-law of the courts of the United Kingdom, it has been said that it 'includes whatever adds value to a business' (*Inland Revenue Commissioner v. Muller & Co's Margarine Ltd* (1901) case)[53]. By its nature, it is something that generally conditions the business success and an opportunity to receive profit.[54] So, we can describe goodwill as a certain feature of an enterprise, its attractiveness which determines the good will of customers or consumers and 'affection' to a specific enterprise. Exactly because of the goodwill of a particular enterprise its customers (buyers) tend to buy goods or services from that particular enterprise.[55]

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47 Commission Decision as of 26-07-1976 (Case IV/28.996 - *Reuter/BASF*), *supra* note 45, p. 3(a).

48 Daugherty, D. A., Jr. Enforcement of covenants-not-to-compete against physicians: buying the practice and employing the physician - what rules apply? *DePaul Journal of Health Care Law*. 1996–1997, 1(1): 93–104, p. 94–95.

49 Rubin, P. H.; Shedd, P., *supra* note 31, p. 108.

50 Stone, R., *supra* note 28, p. 378.

51 Shadowen, S. D.; Voytek, K. Economic and critical analyses of the law of covenants not to compete. *Georgetown Law Journal*. 1983–1984, 72(4): 1425–1450, p. 1426.

52 Beswick, S.; Wine, H., *supra* note 7, p. 196.

53 Christensen, S. A.; Duncan, W. D., *supra* note 37, p. 80.

54 Ershova, E. A.; Ovchinnikov, K. D., *supra* note 1, p. 92.

55 For more about the conception and types of goodwill see Christensen, S. A.; Duncan, W. D., *supra* note 37, p. 80–82.

Notwithstanding that the protection of goodwill as the leading legitimate interest of the business buyer is most emphasized in the legal doctrine and case-law of common law countries, basically this position is also recognized in the European Commission's argumentation for non-competition covenants[56] as well as in all of the abovementioned resolutions of the Competition Council.

2.2. Proportionality (Reasonableness) of Restraint on Competition

For the non-competition covenant to be recognized as legitimate (acceptable) and enforceable, a legitimate purpose is not enough; the measures for reaching the purpose must be proportional (reasonable). Therefore, most jurisdictions recognize and enforce non-competition covenants provided they are reasonable.[57] It is argued that the buyer cannot prevent the seller from competing forever and (or) in any scope. A balance has to be struck between the public interest in allowing businesses to compete and the protection of the buyer's legitimate commercial interests. The seller's activities should not be restricted any further than is reasonably necessary to effectively protect the buyer's legitimate interests.

What is reasonable will depend on particular circumstances. Usually the following issues affecting the reasonableness (proportionality) of non-competition covenants are distinguished:[58] a) the nature of the seller's role (if the seller had close contacts with clients, a restriction is more likely to be reasonable than if he/she had little client contact); b) the scope of activities prohibited (if, for example, there are a number of sellers of a company which operates in several different business areas, it may be appropriate for each of them to be restrained only in connection with the particular area in which he/she has worked); c) where the restriction is limited to the clients with whom the individual concerned had personal dealings within a reasonable period immediately preceding termination; d) the geographical scope of the restriction; e) the period of time the restrictions are to last.

If a covenant is contested, it is for the party seeking to rely on the covenant to prove its reasonableness. In most countries, it is recognized that if a non-competition covenant goes beyond what is reasonable in the particular circumstances, it will be unenforceable and the courts will not enforce it to a lesser, more reasonable, extent, i.e. it will be considered invalid in its entirety.[59] However, in some countries (for example, Italy, Switzerland) it is indicated that a judge may reduce excessive non-competition clauses at his/her discretion (for example, regarding the duration of restrictions).[60] Also, in Germany it is held that in the case of invalidity of a non-competition covenant due to solely unreasonable duration, that duration could be reduced with the effect of making the covenant

56 See Point 18 of the Commission Notice on restrictions directly related and necessary to concentrations, *supra* note 15.

57 Whalley, M.; Semler, F.-J., *supra* note 4, p. xii.

58 Stilton, A., *supra* note 6, p. 105–106.

59 *Ibid*., p. 106.

60 Whalley, M.; Semler, F.-J., *supra* note 4, p. 268, 479.

valid.[61] In common law countries, the courts may apply the 'blue pencil test', i.e. if only part of a restriction is unreasonable and the unenforceable part can be severed from the rest of the clause, leaving what is left making independent sense, without modifying the wording or changing the sense of the contract, then (if the wording of the agreement permits this) a court may strike out individual words or phrases.[62] It looks like the provisions of Article 1.96 of the Civil Code provide for such a possibility in Lithuania, too.

Finally, we should agree with the five rules indicated by Gary P. Kohn, which should, in an ideal case, be followed by courts while applying the reasonableness standards to non-competition covenants:[63] 1) the ground for reasonableness analysis should be the purpose of non-competition covenants (to provide a necessary protection to party's business interests); 2) courts should determine whether the covenantee in fact has an interest that is in need of protection; 3) courts should clearly define what is a 'reasonable covenant' (ideally, a covenant is reasonable if its limitations on the covenantor are no greater than those necessary to achieve the mentioned purpose); 4) courts should give the equivalent and composite weight for all factors (subjects, territory, scope, duration), i.e. instead of addressing the reasonableness of each of the factors separately, the courts should view all factors as a composite and judge their reasonableness accordingly; 5) courts should clearly argue their decisions.

Thus, non-competition covenants (clauses) must be *reasonable*, *proportional* to the legitimate purpose. The reasonableness of the restrictions on competition is usually measured by analysing issues such as *subjects*, *content* (subject matter, scope), the geographical *territory* and the *duration* of application.

2.2.1. Subjects of Non-Competition Covenants

Non-competition covenants can only be regarded as proportional (reasonable) when they address a subject (subjects) whose competition should necessarily be restricted in order to achieve a legitimate aim (the buyer's interests). If the restrictions are also imposed on others who do not have any specific knowledge, relations, or the like, relating to the transferred enterprise, and therefore the competing of whom really cannot influence the value of the acquired business, the reasonableness of the non-competition covenant may be questioned.

Usually only the seller may be subject to non-competition obligations, because it is the buyer who needs to be assured that he/she will be able to acquire the full value of the acquired business. It is true that there is no absolute prohibition to set the restrictions which benefit the seller,[64] but they should be more rigorously evaluated and justified in more exceptional cases. Thus, as a general rule, neither the restrictions which benefit the seller are directly related to and necessary for the implementation of the concentration,

61 Stewart, Ch. E. *Mergers and Acquisitions: Germany*. Dobbs Ferry: Oceana Publications, Inc., 2000, p. 223.

62 Stilton, A., *supra* note 6, p. 106–107.

63 Kohn, G. P., *supra* note 32, p. 646–648.

64 The non-competition commitments beneficial to the seller of shares were recognized as admissible, for example, Commission Decision of 30-08-1993 (Case IV/M.319 – *BHF/CCF/Charterhouse*). [1993] OL C247/0, p. 16.

nor their scope and/or duration need to be more limited than that of the clauses which benefit the buyer.[65]

Furthermore, the subject of restriction can only be an active seller, not a mere shareholder having no influence on management. This is grounded on a rule that a non-competition covenant is invalid if the competition by the seller is no more injurious than the competition by any third party.[66] It is clear that non-competition clauses imposing certain restrictions on an inactive shareholder who did not directly participate in the management of the enterprise before the transfer and therefore does not have such specific knowledge of a particular business that his/her competitive actions could harm the buyer more than any other competitor in the market, would be a simple desire to reduce the number of potential competitors in the market, but not a legitimate goal—striving for an effective implementation of concentration (transfer of goodwill).

An indirect competition from the seller also may pose a threat for the legitimate interests of the buyer of the business (e.g. a competitive business may be carried out by the seller's family members, relatives or others 'protégé', and when the seller is a legal person—the seller's managers or shareholders as well as any other member of the seller's company group). Therefore, in practice the buyer tries to draft an exhaustive non-competition clause to prevent the seller from competing indirectly. For example, it is normal international practice to include either main parent company or other members of the seller's group of companies. In such cases, either the ultimate holding company should be made a party to the agreement and undertakes on behalf of all members of its group of companies or the appropriate group companies is added as a party.[67] Here, however, we face several problems. Firstly, if limits are set not only for the seller, it is more likely that such restrictions would not be considered necessary and directly related to the implementation of concentration. On the other hand, non-competition obligations assumed personally by the seller do not have any binding effect on the seller's family members or related company, if they are not parties to the covenant. Finally, in an event of indirect competition, there is a serious difficulty of proof of fact and circumstances of the breach of non-competition clauses.

2.2.2. Content of Non-Competition Covenants

The subject matter (content) of non-competition covenants must be proportional to the legitimate aim pursued. What content of the obligations can be considered to be reasonable must be determined on a case by case basis, taking into account all the circumstances of the specific case. However, some rules can be distinguished.

Firstly, the non-competition clause must cover only these economic–commercial activities that are relevant to the business sold, i.e. the condition of 'direct relation to the implementation of the concentration'. It means that non-competition clauses must

65 Point 17 of the Commission Notice on restrictions directly related and necessary to concentrations, *supra* note 15.

66 Stewart, Ch. E., *supra* note 61, p. 226.

67 For more see Beswick, S.; Wine, H., *supra* note 7, p. 168; Stilton, A., *supra* note 6, p. 107–108.

remain limited to products (including improved versions or updates of products as well as successor models) and services forming the economic activity of the enterprise transferred, including products and services at an advanced stage of development at the time of the transaction, or products which are fully developed but not yet marketed.[68] The European Commission also has indicated that protection against competition from the seller in product or service markets in which the transferred enterprise was not active before the transfer is not considered necessary.[69] A reasonable limitation of competing should be related with the actual type of business being sold and not what the buyer hopes it may develop into.[70] This means that the starting point must be the moment of the transaction of business transfer. The seller can commit not to compete only for those activities that were executed by the company before the transfer, because the seller simply has no specific knowledge of the buyer's expected new business usage of which is likely to prejudice the legitimate business interests of the buyer. Plus, the principle of reasonableness requires that the buyer actually has a protectable business interest. If the buyer does not execute a specific type of activity, the execution of such activity by any person might not violate any buyer's interest.

Finally, the specific competitive actions of the seller must correspond to the criteria of reasonableness. A non-competition clause may provide for the prohibition for the seller to compete with the enterprise transferred, both directly and through established or acquired legal entities. Such prohibitions as consulting of the transferred company's competitors, job in competing enterprises, acquisition or holding of shares in a company competing with the business transferred, and so on are also often identified. On the other hand, the restrictions which prevent the seller from purchasing or holding shares purely for financial investment purposes, without granting him/her, directly or indirectly, management functions or any material influence in the competing company, should not be considered directly related to and necessary for the implementation of concentration.[71]

2.2.3. Geographical Territory of the Application of Non-Competition Clauses

The geographical scope of a non-competition clause also has to be limited to the extent which is objectively necessary to achieve the abovementioned purpose. It is common practice not to expand the covenants beyond the territory where acts the business being sold at the completion of transaction, i.e. as a rule, the territory of the application of the covenants should therefore only cover the markets where the products concerned were manufactured or sold at the time of the agreements or in which it may be regarded

68 Point 23 the Commission Notice on restrictions directly related and necessary to concentrations, *supra* note 15.

69 Commission Decision as of 14-02-1997 (Case IV/M.884 – *KNP BT/Bunzl/Wilhelm Seiler*). [1997] OL C110/9, p. 17; Commission Decision as of 06-04-2001 (Case IV/M.2355 – *Dow/Enichem Polyurethane*). [2001] OL C138/11, p. 28.

70 Beswick, S.; Wine, H., *supra* note 7, p. 197.

71 Point 25 of the Commission Notice on restrictions directly related and necessary to concentrations, *supra* note 15.

as a potential competitor on the basis of its relevant and demonstrable activity, since the buyer does not need to be protected against competition from the seller in territories not previously penetrated by the seller. This view is shared by the Court of Justice (decision in the *Remia BV* case), the European Commission[72] and most countries.

Generally, the territory of the application of non-competition covenants is defined by the territory of a particular country (countries) or a specific area of one country (territorial administrative unit). The most important is the possibility to determine the boundaries of the geographic area that is subject to competitive constraints as well as the fact that the area should not exceed the area where the business was really conducted before the transfer. Concepts which involve large territories such as 'across Europe', 'all over the world', etc. cannot generally be regarded as a reasonable definition of the territory.[73] Actually, for example, in the *Nordenfelt v. Maxim Nordenfelt Guns and Ammunition Co Ltd* (1894) case, the House of Lords upheld a covenant which prevented the seller of a business from conducting the business anywhere in the world.[74] This confirms the possibility of identifying a geographically very wide-ranging territory for the application of restrictions, but such a non-competition covenant can be recognized as reasonable only in exceptional cases when it is supposed by the circumstances of a particular case (e.g. the business being transferred is very peculiar and rare in the world, and the market of the production (services) of the transferred enterprise is worldwide, and virtually there are no other competitors).

The geographical scope of a non-competition clause can be extended to territories which the seller was planning to enter at the time of the transaction, provided that he had already invested in preparing this move.[75] However, such cases are also exclusive.

It should be noted that in assessing the non-competition commitments the Competition Council does not consider the territorial aspect. Only one of the resolutions[76] indicates that a restriction on competition within the territory defined by the parties in the agreement is allowed. However, in the latter resolution this information is confidential, the areas covered are not specified and their reasonableness is not analysed. The wording of the resolutions implies that the parties either not indicated any territorial boundaries for the application of the restrictions or these boundaries were defined in the abstract way as the whole territory (the market) of Lithuania. The Competition Council, while solving the admissibility of specific competitive restrictions, should evaluate all aspects of the reasonableness of restrictions, including the territory of the application of restrictions. Of course, given the fact that the Lithuanian territory (market) is not large, the whole territory of Lithuania will often correspond to the reasonable definition of ter-

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72 Commission Decision as of 26-07-1976 (Case IV/28.996 - *Reuter/BASF*), *supra* note 45, p. 3(a). p. 3; Commission Decision as of 04-08-2000 (Case IV/M.1979 – *CDC/Banco Urquijo/JV*). [2001] OL C029/8, p. 18.

73 Commission Decision as of 12-12-1983 (Case IV/30.389 – *Nutricia/de Rooij* and IV/30.408 - *Nutricia/Zuid-Hollandse Conservenfabriek*) (83/670/EEC). [1983] OL L376/22, p. 33.

74 Christensen, S. A.; Duncan, W. D., *supra* note 37, p. 198.

75 Point 22 of the Commission Notice on restrictions directly related and necessary to concentrations, *supra* note 15).

76 Resolution No. 83 as of 18-07-2002 of the Competition Council of the Republic of Lithuania.

ritory. However, in specific cases, taking into account the specific nature of the business, territorial distribution and so on, only more limited areas (e.g. a specific region, county, city) can be considered reasonable.

2.2.4. Duration of Non-Competition Clauses

One of the most significant factors which determine the proportionality (reasonableness) of the non-competition covenant is its duration. The European Commission has indicated that the protection of the buyer's legitimate interests must be limited to the period required by an active competitive buyer for him to take over undiminished the enterprise's market position such as it was at the time of transfer.[77]

It is not possible to set any period of time as universally suitable as a period of restrictions on competition. In principle, a prohibition of competition may not exceed the period of time which the buyer requires, by making serious efforts, to consolidate the business in such a way that it can withstand challenges by the seller's competition without suffering serious effects.[78] Therefore, each non-competition period must be judged in its context. The European Commission in its decisions has given certain recommendations. In the mentioned *Nutricia* case, the Commission indicated the following relevant factors: a) the time it will take the buyer of a business to build up a clientele; b) how frequently consumers in the relevant market change brands and type (in relation to the degree of brand loyalty shown by them); c) how long it takes before new products entering the market or new trademarks are accepted by the consumer; d) for how long, after the sale of the business, the seller, without a restrictive clause, would be able to make a successful comeback to the market and regain his old customers. Later these recommendations were repeated by the Court of Justice in the abovementioned *Remia BV* case. Plus, the Commission had indicated that account must be taken of such organizational problems as may arise until the newly acquired firm has been integrated into the buyer's enterprise or group, as well as such factors as nature of transferred know-how, possibilities of its use and experience of the buyer.[79] The duration of accompanying arrangements such as the temporary right for the buyer to use the seller's trademarks or sales forces may also constitute a useful pointer.[80]

As discussed above, non-competition clauses are legitimate, if the buyer actually has protectable business interests. Therefore, if the buyer permanently leaves business without attempting to save the business' value, he no longer requires protection against the seller, and the seller can freely re-enter the market without violating his covenant.[81]

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77 Commission Decision as of 26-07-1976 (Case IV/28.996 - *Reuter/BASF*) (n. 45); Commission Decision as of 12-12-1983 (Case IV/30.389 – *Nutricia/de Rooij* and IV/30.408 - *Nutricia/Zuid-Hollandse Conservenfabriek*), *supra* note 73, p. 27.

78 Picot, G., *supra* note 23, p. 64.

79 Commission Decision as of 26-07-1976 (Case IV/28.996 - *Reuter/BASF*), *supra* note 45.

80 Commission Decision as of 12-12-1983 (Case IV/30.389 – *Nutricia/de Rooij* and IV/30.408 - *Nutricia/Zuid-Hollandse Conservenfabriek*), *supra* note 73, p. 29.

81 Kohn, G. P., *supra* note 32, p. 699.

Point 20 of the Notice on related restrictions indicates the specific time periods within the pale of which the Commission usually considers the non-competition clauses as justified: 1) two years period when the business transfer includes only the goodwill; and 2) a period of up to three years when the transfer includes the transfer of both goodwill and know-how. Those time limits set by the Commission, however, are indicative in nature and in exceptional cases a longer period of non-competition may be justified. For example, in the *Volvo/Renault* case the Commission, considering the relatively high degree of customer loyalty in the truck markets and the long life-cycles of heavy trucks, accepted a period of five years as admissible.[82] In another case, the Commission recognized that the digital technology being transferred appeared to deserve a special protection by taking account of the know-how incorporated and the life cycle of such technology (around 5–7 years), and reduced the seven-years non competition clause up to a period of five years.[83] However, if there are no circumstances (for example, the activity of the enterprise does not involve high technology) which would entitle the buyer to particular protection, the longer time periods will not be considered justifiable.

In other European countries, specific time limits in justifying the competing constraints are also indicated. Most states have in fact taken over the time periods proposed by the European Commission. For example, in Spain a non-compete on the seller may be considered justified for a period of two years (in exceptional cases, three years).[84] The Supreme Court of Germany in a 1989 decision spoke of a general two-year limitation.[85] On the other hand, in accordance with the opinions of the European Commission and the German Federal Cartel Office, non-competition obligations are in practice often agreed upon for a period of up to three years.[86] For example, the German case-law has held a five-year prohibition of competition admissible in a case involving the take-over and continuation of a manufacturing and distributing enterprise for the purpose of averting bankruptcy.[87] In some countries (such as Ireland, Italy, Sweden) the time period of two years is stipulated for acquisitions that only cover goodwill. However, for more complicated acquisitions (covering know-how, high tech, etc.) the longer term of five years is stipulated.[88] However, in the United Kingdom the concrete terms are not fixed. The courts prefer the time period which has been agreed to by two parties of equal bargaining power and the concrete period of time depends very much on the nature of the business (for example, it is recognized that in some instances a restraint for the whole of the life of the seller may be reasonable).[89]

An analysis of the resolutions of the Lithuanian Competition Council shows that the Competition Council, while recognizing non-competition obligations in case of a busi-

82 Commission Decision as of 01-09-2000 (Case IV/M.1980 – *Volvo/Renault*). [2000] OL C301/23, p. 56.

83 Commission Decision as of 23-10-1998 (Case IV/M.1298 – *Kodak/Imation*). [1999] OL C017/2, p. 73.

84 Whalley, M.; Semler, F.-J., *supra* note 4, p. 450.

85 Stewart, Ch. E., *supra* note 61, p. 225.

86 Whalley, M.; Semler, F.-J., *supra* note 4, p. 187.

87 Picot, G., *supra* note 23, p. 64.

88 Whalley, M.; Semler, F.-J., *supra* note 4, p. 229, 268, 464–465.

89 Christensen, S. A.; Duncan, W. D., *supra* note 37, p. 199–200.

ness transfer, takes into account the temporality of the prohibition to compete. However, one[90] of four resolutions does not indicate any duration of non-competition clauses, while in other resolutions the different periods were recognized as admissible: two, three, five years. It seems that the Competition Council did not further analyse the reasonableness of the specific term or the grounds for the specific term but simply adopted the term agreed by the parties.

The Competition Council should follow the practice formed by the European Commission and consider the maximum duration of *two years* (when the transfer includes only goodwill) and *three years* (when the transfer includes both goodwill and know-how) of non-competition clauses reasonable. Longer time periods may be recognized only in exceptional cases, if the circumstances of a particular case (for example, the transaction involves a transfer of high technology, long economic life cycle of the products, etc.) justify the necessity of special protection of the buyer's interests.

Conclusions

1. Non-competition covenants should be recognized as lawful (allowable) if the following conditions are fulfilled: 1) *a legitimate purpose of restrictions*; and 2) *proportionality (reasonableness) of restrictions* regarding their *duration*, their *subject-matter (content)*, their geographical field of application (*territory*) and *the persons subject to them*.

2. The condition of a legitimate purpose requires that the goal of such covenants is the *protection of legitimate interests* of the parties (usually the *buyer of business*)—an aspiration to ensure the transfer to the buyer of the *full value* of the object (enterprise, business) transferred (criteria of *direct relation* and *necessity* for the implementation of the concentration).

3. The condition of proportionality (reasonableness) means that such covenants should not restrict the competitive actions more than it is *reasonably necessary* for the achievement of legitimate goal, i.e. in specific cases, the following aspects should correspond to the requirements of reasonableness (proportionality): a) *subjects* of restrictions (usually only *active seller of shares*); b) *content* (it should involve only *factual* and *related with* the business sold kinds of a company's economical-commercial activity); c) *territory* (usually only these markets, in which the *business was really executed* before the transfer); and d) *duration* (usually for periods of up to two years, when only goodwill is transferred, and for periods of up to three years, when the transfer includes both goodwill and know-how).

4. When solving cases related to non-competition covenants made by the parties of a business transfer the courts should give the *equivalent and composite* weight for all factors (subjects, territory, scope, duration) of the reasonableness (proportionality) of such covenants. Also, the courts should clearly *argue* and *motivate* their decisions in

90 Resolution No. 1S-131 as of 13-11-2003 of the Competition Council of the Republic of Lithuania.

such cases. It is also recommended for the Competition Council to follow all mentioned rules when assessing the admissibility of non-competition commitments assumed by the parties of concentration.

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NEKONKURAVIMO SUSITARIMAI VERSLO PERLEIDIMO ATVEJU

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Santrauka. *Šiame straipsnyje tiriami verslo pardavėjo ir pirkėjo sudaromi nekonkuravimo susitarimai. Temos aktualumą lemia tai, kad visai neseniai pasibaigė įmonių įsigijimų banga, todėl galima prognozuoti su verslo perleidimu, taip pat ir su sudarytais nekonkuravimo susitarimais susijusių bylų skaičiaus teismuose didėjimą.*

Lietuvos teisinė bazė verslo perleidimo klausimais neturi gilių tradicijų, o ir dabar galiojantis reglamentavimas nėra pakankamai aiškus. Negausi ir teismų praktika. Lietuvos teisės doktrinoje nekonkuravimo susitarimų klausimai nebuvo nagrinėti. Lietuvos teisėje nėra visiškai aiškus verslo perleidimo sandoriams būdingų nekonkuravimų susitarimų teisėtumo klausimas. Dėl to Lietuvos verslininkai bei teisininkai praktikai perėmė ir aktyviai taiko užsienio valstybių patirtį, šablonus sutarčių, kurių tinkamumas bei leistinumas Lietuvos teisinėje sistemoje dar nėra „patikrintas" teismų praktikos ir teisės doktrinos.

Šio tyrimo tikslas – ištirti verslo perleidimo šalių sudaromus nekonkuravimo susitarimus (įsipareigojimus), nustatyti (diagnozuoti) tokių susitarimų teisėtumo (leistinumo) sąlygas. Taikyti įvairūs moksliniai metodai, kurių pagrindiniai: lingvistinė, dokumentų (šaltinio turinio), loginė, sisteminė, lyginamoji, kritinė analizė.

Remdamasis atliktu tyrimu, autorius padarė išvadą, kad nekonkuravimo susitarimai turėtų būti pripažinti teisėtais (leistinais), jeigu atitinka dvi sąlygas: apribojimų tikslas yra teisėtas ir apribojimai yra proporcingi (protingi) jų trukmės, dalyko (turinio), geografinės taikymo srities (teritorijos) ir subjektų atžvilgiu. Pirmoji sąlyga reikalauja, kad tokių susitarimų tikslas būtų šalių (paprastai verslo pirkėjo) teisėtų interesų apsauga – siekis užtikrinti nesumažėjusios vertės objekto (įmonės, verslo) perdavimą pirkėjui (tiesioginės sąsajos su

vykdoma koncentracija ir būtinumo tą koncentraciją vykdyti kriterijai). Antroji sąlyga reiškia, kad tokie susitarimai neturi suvaržyti konkurencinių veiksmų daugiau, negu protingai būtina teisėtam tikslui pasiekti. Spręsdami atitinkamas bylas, teismai turėtų vertinti visus tokių susitarimų protingumo (proporcingumo) faktorius (subjektų, teritorijos, apimties, trukmės) ir teikti jiems lygiavertę reikšmę.

Reikšminiai žodžiai: *verslo perleidimas, nekonkuravimo susitarimai (įsipareigojimai), nekonkuravimo susitarimų teisėtumo (leistinumo) sąlygos.*

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