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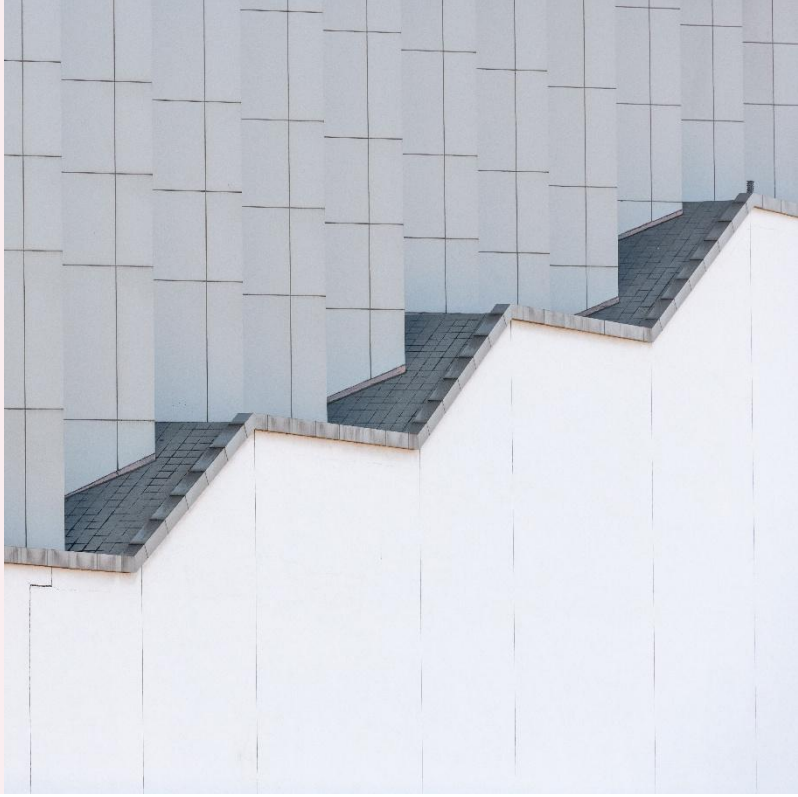
BRIEFING



Non-solicitation clauses in practice:

what they are, and how to use them

The Czech Office for the Protection of Competition ("**ÚOHS**") has issued an opinion clarifying the rules for the use of non-solicitation clauses in M&A practice. In line with European trends, the ÚOHS has reiterated that it will place greater scrutiny on agreements restricting the solicitation of employees. At the same time, the European Commission has already imposed significant fines in certain cases for improperly drafted non-solicitation clauses. So, when and how should a non-solicitation clause be correctly structured within transaction documentation?

Key points

1. Non-solicitation clauses in M&A practice may constitute a form of cartel.
2. The ÚOHS will increasingly focus on non-solicitation clauses.
3. How should non-solicitation clauses be properly structured in transaction documentation?
4. Non-solicitation clause must always meet four cumulative conditions.

Introduction

Non-solicitation clauses are a common provision not only in transaction documentation related to share deals, asset deals, and joint ventures. Their typical purpose is to protect the value of the transferred company, goodwill, and know-how by imposing an obligation not to approach the other party's employees for recruitment purposes. This usually involves a prohibition of active and targeted solicitation of employees.

From a competition law perspective, however, such provisions in M&A transactions cannot be used without limits as standard protective clauses.

The ÚOHS, in line with the decision-making practice of the European Commission and the Commission Notice on restrictions directly related and necessary to concentrations ("**Commission Notice**"), emphasizes that it is always necessary to assess their purpose, their connection to the main transaction, and their scope.

The basic rule for assessing these arrangements is relatively strict and must be interpreted narrowly: a non-solicitation clause is permissible only if it constitutes (i) an ancillary restriction to the main transaction, (ii) is directly related to it, (iii) is objectively necessary for its implementation, and (iv) is not disproportionate.

If these conditions are not met, a non-solicitation clause may amount to a market allocation agreement. As recently confirmed by the Court of Justice of the European Union in Case C-133/24, *CD Tondela and Others*, such agreements between employers may constitute a restriction of competition by object, which generally carries higher fines and significantly eases the burden of proof for competition authorities.

What must a non-solicitation clause meet?

An improperly drafted non-solicitation clause may be considered a cartel agreement and result in significant sanctions.

In the context of M&A transactions, competition authorities do not consider non-solicitation clauses problematic. The risk arises where the restriction goes beyond what is necessary to protect the legitimate purpose of the transaction. The clause must therefore be narrowly defined as an ancillary restriction and satisfy four cumulative conditions:

a) **Existence of a primary transaction**: The clause must exist exclusively in the context of a primary transaction that is not itself anti-competitive (e.g. acquisition of shares or assets, or the establishment of a joint venture).

b) **Direct link to the main transaction**: The clause must be economically connected to the transaction itself and must facilitate a smooth transition in the change of corporate structure. It must directly serve the protection of a specific transferred value. It is not sufficient that the clause is merely part of the transaction documentation.

c) **Objective necessity for the implementation of the transaction**: Without the clause, the transaction could not be carried out, or only under less certain conditions, with significantly higher costs, over a substantially longer period, or with considerably greater difficulty. Commercial convenience or additional comfort for the buyer is not sufficient justification; necessity must be objectively derived from the nature of the transaction itself.

d) **Proportionality of the clause**: The clause must be limited to what is strictly necessary. Proportionality is assessed in particular in relation to the duration of the restriction, the scope of affected employees, and the specific protected interest. A "just in case" approach is not acceptable by simply agreeing on the broadest possible restriction. Instead, it is necessary to clearly identify, and ideally document, what specific risk the clause addresses, why the restriction is necessary, and why the objective cannot be achieved through less restrictive means.

How should a non-solicitation clause be structured in practice?

To ensure that a non-solicitation clause is compliant, several key principles must be followed:

In M&A transactions, only clauses that are necessary, proportionate, and closely linked to the transaction itself are permissible.

a) **Duration**: The clause must be agreed only for the period objectively necessary to protect the value of the acquired business. The length must always correspond to the nature of the transaction and to how long the restriction is actually required.

The ÚOHS in its published opinion provides the following indicative benchmarks, from which it is possible to deviate in specific and well-justified cases:

- in the case of a transfer of both goodwill and know-how, a restriction of up to **3 years** is generally acceptable;
- in the case of a transfer of goodwill alone, a restriction of up to **2 years** is generally acceptable;
- in the case of a transfer of tangible assets or exclusive industrial and intellectual property rights, non-solicitation clauses are generally **not considered necessary**.

As confirmed by the ÚOHS, the duration must always be set on an individual basis for each category of employees. Within a single transaction, the clause should therefore distinguish between employees who are carriers of goodwill only (2 years) and employees who are carriers of both goodwill and know-how (3 years). The time limitation should therefore never be set on a general basis.

b) **Scope of employees**: The clause should be limited to a specific group of individuals with a clear link to the protected interest. This typically includes employees who are key to the functioning of the target company (e.g. due to customer relationships), employees who possess key know-how, or highly skilled employees who are difficult to replace. Importantly, these must always be employees employed by the target at the time of completion of the transaction, not future employees.

By contrast, protecting less qualified employees will rarely meet the above criteria, as explicitly highlighted by the ÚOHS in its guidance.

c) **Unilateral nature**: The clause is intended to protect the buyer against the seller. Reciprocal obligations where both parties agree not to solicit each other's employees are significantly more problematic from a competition law perspective, and the ÚOHS emphasizes that it will not generally consider them acceptable in an M&A context. However, the ÚOHS acknowledges that in cases where the buyer acquires only part of the seller's business, a non-solicitation obligation on the buyer may be permissible. In such cases, it must still be limited to employees of the seller who are, at the time of the transaction, key to the part of the business that is not being transferred.

d) **Exceptions**: A non-solicitation clause should not apply to situations where an employee independently approaches the other party (e.g. the seller or the other partner in a joint venture). It should also allow responses to general job advertisements rather than targeted recruitment.

Summary

1. In the first step, it is always necessary to consider what the non-solicitation clause is intended to protect and why. Can the transaction be completed without protecting key employees? Are key employees carriers of the value of the acquired business (goodwill, know-how)? What would happen if key employees were lost? Are these employees replaceable?

2. In the second step, it is necessary to assess whether there is a less restrictive measure that would achieve the same objective. For example, would a non-compete clause in the employment contract be sufficient? Would the employee agree to such an amendment?

3. The first two steps should determine whether a non-solicitation clause is an appropriate tool at all. Finally, it is necessary to consider how the restriction itself should be structured: which specific employees are key? How should their scope be properly defined? What is the shortest possible duration of protection? What other transaction-specific factors should be taken into account?

Ideally, all of the above considerations should be documented, with a clear rationale prepared for potential questions from competition authorities, and appropriate wording should also be used in internal communications.

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