Constitutional Aspects of Prohibition of competition in Slovenian labour Law

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The objective of this article is to emphasize the complexity of constitutional dimensions of the notion of prohibition of competition, primarily within the Slovenian labour legislation framework. The prohibition of competition encompasses significant restrictions, particularly affecting workers[1], in terms of freedom to choose employment, engage in independent entrepreneurial activities, and even utilise their free time and rest periods. The author first presents and analyses the legislative provisions in place before Slovenia's independence, which were annulled as unconstitutional, and then outlines the key elements of the current labour legislation governing both dimensions of the competition prohibition-statutory and contractual. Throughout, the author highlights solutions that the legislature implemented following guidance from the Constitutional Court, which played a pivotal role in shaping the now-applicable legal framework on the prohibition of competition.

Key words: *Prohibition of Competition, Competition Clause, Freedom of Work, Freedom of Economic Initiative, Constitiutional Court*

Introduction

The Employment Relationships Act (*Zakon o delovnih razmerjih* – ZDR-1; hereinafter referred to as: ERA-1),[2] in effect since April 2013, extensively addresses the issue of the prohibition on competition between workers and employers in Chapter on the Obligations of Contracting Parties, under the subsection detailing the Obligations of the Worker, specifically Articles 39-42. The Act addresses this area under the heading of "Prohibition of Competition." It is a typical provision aimed primarily at safeguarding the interests of the employer, which underscores the fact that labour law does not always solely protect workers, even though the protection of their rights remains its primary aim and core purpose.[3]

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[1] To begin, let us underscore that in this article, we will consistently use the term "worker" rather than "employee." Our legal system, both in the Constitution and across entire labour legislation, rigorously and systematically applies the concept of "worker" to encompass all individuals performing dependent work under an employment contract. The term "employee," which occasionally appears in practice, can be understood as a synonym for "worker." For more detail on the terminological nuances of "worker" and "employee," see Končar, P:, The concept of »Employee«: The position in Slovenia, in Wass, B., van Voss, G. (eds.), Restatement of Labour Law in Europe, Vol.I: the concept of employee, Hart Publishing, 2017, pp. 645, 646.

[2] Official Gazette RS, Nos. 21/13, 78/13 – popr., 47/15 – ZZSDT, 33/16 – PZ-F, 52/16, 15/17 – odl. US, 22/19 – ZPosS, 81/19, 203/20 – ZIUPOPDVE, 119/21 – ZČmIS-A, 202/21 – odl. US, 15/22, 54/22 – ZUPŠ-1, 114/23 in 136/23 – ZIUZDS.

[3] For a detailed discussion on the purpose of labour law, both historically and in the contemporary context, particularly as labour law faces the challenges of its own relevance, refer to Tičar, L., *Primerno in učinkovito delovnopravno varstvo – izziv za sedanjost in prihodnost*, Ljubljana: Litteralis, 2020, pp. 15, 88, 89.

An employer, whose primary objective is to achieve successful economic outcomes, has a vested interest in ensuring that their activities are not undermined by competition from their workers. Consequently, workers are restricted in their freedom of economic initiative and freedom of work, primarily in order to protect the employer's economic interests, both during the course of their employment and, potentially, after its termination. Workers are generally bound, without exception, by a non-compete obligation during the employment relationship. In this case, we are referring to a "statutory prohibition of competition" that is inherently tied to the very existence of the employment relationship itself. However, the non-compete obligation after the termination of employment is contractual in nature, meaning that it only applies to those workers who explicitly agree, via their employment contract, not to engage in activities that compete with the former employer's business for a specified period after the termination of their employment. Such a non-compete obligation is therefore often referred to as a "competition clause".

Labour legislation governs both forms of non-compete restrictions in different ways, but in all cases, it must take into account the position of the worker as well. This is achieved by permitting only a proportionate interference with the worker's rights and freedoms, which are typically guaranteed by the constitution. The fundamental aim and purpose of the legislator in regulating the non-compete provision within the ERA-1 is to ensure that only a proportionate restriction is imposed on the worker's position. In doing so, the legislator has drawn upon the reasoning found in the rulings of the Constitutional Court, which annulled the majority of the previous legislation governing this area (which was in force until 1 January 2003)[4] as excessively restrictive.

The constitutional and legal aspects of the non-compete regulation have already been mentioned. This will be the central focus of the article, but for a clearer understanding of the constitutional doctrine regarding prohibition of competition, we will first examine the purpose and characteristics of the current legal framework governing this institute. By doing so, we aim to provide a more comprehensive and nuanced understanding of the complexity of constitutional rights and the interference with them through prohibiting of competition.

The article will primarily address the issue within the context of Slovenian law, as the key source for the development of legislation and doctrine in the field of non-competition is the practice of the Constitutional Court of the Republic of Slovenia.[5] In its work, the

[4] Until 1 January 2003, the area of individual employment relationships was governed by a law that had been enacted during the existence of the former common state, Yugoslavia. This was the Employment Relationships Act, passed in 1990 (Official Gazette of the Republic of Slovenia, No. 14/90, with amendments and supplements). Therefore, when referring to this law in the following discussion, we will use the abbreviation ERA/90.

[5] It is noteworthy that in Slovenian labour law scholarship and professional circles, the constitutionality of legislative regulation regarding the prohibition of competition has scarcely been addressed or discussed. This scarcity renders it challenging to support one's views through sources other than the Constitutional Court's doctrine, which itself has only considered this issue in the early 1990s and has not revisited it since. Scholarly and especially scientific literature in this area is therefore lacking in Slovenia, undeniably due to the extremely limited number of scholars who engage in scientific labour law research. Given that the prohibition of competition is shaped by specific national legislative and constitutional provisions, this article does not delve into comparative law perspectives.

Court bases its decisions on human rights and freedoms as enshrined in the Constitution of the Republic of Slovenia (*Ustava Republike Slovenije*; hereinafter referred to as: Constitution),[6] and in this context, it assesses the constitutionality of national labour legislation. Since the Constitutional Court developed the core of its jurisprudence and legal reasoning in its rulings concerning the constitutionality of the legislation in force prior to 2003 (ERA/90), we will draw upon the Court's reasoning in these decisions, which annulled the regulation under ERA/90, to demonstrate the constitutional conformity of the current legislation on non-compete obligation.

It is evident that the legislator, in drafting the current ERA-1, fully adhered to the Constitutional Court's findings, thereby ensuring that the provisions of the current law are constitutionally sound. In analysing and presenting the Constitutional Court's decisions and reasoning, we will also gain insight into the previous, unconstitutional, and therefore annulled, legal regulation of prohibition of competition.

2. Statutory prohibition of competition

Statutory prohibition of competition, as part of the broader concept of the prohibition on competition, stipulates that the worker is forbidden from engaging in certain activities or entering into business transactions that fall within the scope of the employer's operations during a specified period, that is, during the term of the employment contract or employment relationship. This non-compete obligation reflects the subordinate position of the worker, who, by signing the employment contract, agrees to perform the tasks entrusted to them personally and under the employer's direction, while simultaneously respecting and safeguarding the employer's interests. Therefore, the prohibition of competition underscores the worker's loyalty to their employer.

The statutory prohibition of competition is referred to as the statutory, because it is typically the law itself that prohibits a worker, during the course of the employment relationship, from engaging in business activities that could compete with the employer's operations. Given that this prohibition is statutory, it applies to every worker in an employment relationship, irrespective of their personal consent or will. This means that the non-compete obligation is essentially a consequence of the subordinate position of the worker, which is one of the fundamental characteristics of the employment relationship, or perhaps its most defining element.

The statutory prohibition of competition, in the form we know it today, emerged in the early 1990s with the adoption of the Employment Relationships Act of 1990 (ERA/90). This law marked the beginning of the establishment of the employment relationship as a classic bilateral relationship, similar to those found in countries with clear property rights and market economies. Prior to the enactment of ERA/90, labour legislation already contained the beginnings of a non-compete prohibition, the violation of which, before the new ERA/2002 came into force, resulted in a breach of employment duties and, consequently, disciplinary responsibility. Today, however, a worker who

[6] Official Gazette of the Republic of Slovenia, No. 33/91, with amendments and supplements.

breaches the statutory non-compete obligation can be held liable for damages. Lastly, a consequence of the worker 's breach may also be the termination of the employment contract by the employer.

Prohibition of competition is regulated in Article 39 of the ERA-1. During the course of the employment relationship, the worker is prohibited, without the written consent of the employer, from performing work or entering into business transactions, either for themselves or on behalf of others, that fall within the scope of the employer's business activities and that could constitute, or potentially constitute, competition for the employer. If the worker acts in violation of this prohibition, they are liable for damages in the event that harm is caused. The law also sets forth both a subjective (3-month) and an objective (3-year) time limit within which the employer may seek compensation for any damage incurred.

A breach of the statutory non-compete obligation occurs when three conditions are cumulatively met:

- the worker performs work or enters into business transactions for themselves or on behalf of others, without the written consent of the employer,
- the work or transactions fall within the scope of the employer's actual business activities,
- the work or transactions represent, or could potentially represent, competition for the employer.

Of the three conditions, the third is the most important, as merely performing work or entering into business transactions, even without the written consent of the employer, which fall within the scope of the employer's business activities, does not, by itself, constitute a violation of the statutory non-compete obligation if there are no negative competitive effects or resulting damages. We can therefore conclude that while the occurrence of damage is an important factor in determining a breach of the non-compete obligation during the course of the employment relationship, it is not a prerequisite for establishing a violation in every case. In practice, there have already been instances where a violation of the non-compete obligation was determined without the occurrence of any specific damage. Even in cases where damage has not yet materialised, the mere possibility of such damage is sufficient for the employer to confront unlawful behaviour (a violation) by the worker and the failure to respect the duty of loyalty towards the employer.

The concept of a non-competition obligation also appears in regulations within the field of corporate law, specifically in the Companies Act (Zakon o gospodarskih družbah, ZGD-1; hereinafter referred to as: CA-1).[7] This law defines the non-compete obligation for shareholders of various personal and capital companies, as well as members of various governing bodies of these companies. However, the regulation in CA-1 does not directly interfere with the non-compete obligations that apply to individuals under labour law.

[7] Official Gazette of the Republic of Slovenia, No. 65/09 – officially consolidated text, 33/11, 91/11, 32/12, 57/12, 44/13 – Constitutional Court decision, 82/13, 55/15, 15/17, 22/19 – ZPosS, 158/20 – ZIntPK-C, 18/21, 18/23 – ZDU-1O, and 75/23.

3. Contractual Prohibition of Competitive Activity - competition clause

The competition clause is an institute within the broader prohibition on engaging in competitive activities by the worker, and it generally applies to employees who, during the course of their employment, acquire specific technical or production knowledge and business connections. The primary purpose of such clause is to prohibit the worker, after the termination of their employment, from engaging in activities that would compete with the former employer's business.

In contrast to the statutory prohibition of competition, the competition clause does not apply to all workers indiscriminately, but only to those who, by virtue of a specific clause in their employment contract, have agreed to refrain from competing with their employer's business after the termination of the employment relationship. Therefore, the competition clause may also be referred to as a contractual prohibition on competitive activities.

In regulating the relationship between the employer and the worker after the termination of the employment relationship, the ERA-1, in terms of protecting the worker, somewhat limits the autonomy of the parties, particularly that of the employer. ERA-1 establishes the following conditions for the validity of a competition clause, aimed at safeguarding the worker:

- the existence of a written agreement prohibiting the worker from engaging in competitive activities, which also, to some extent, prohibits the exploitation of technical, production, or business knowledge, as well as business connections, acquired by the worker during their employment with the employer (the written form is required by the fifth paragraph of Article 40 of ERA-1),
- the non-compete clause can be agreed upon for a maximum period of two years after the termination of the employment contract (second paragraph of Article 40 of ERA-1),
- the obligation to provide compensation to the worker for adhering to the competition clause (third paragraph of Article 41 of ERA-1).

Despite the considerable limitation on the autonomy of the parties' will, the ERA-1 allows for greater contractual freedom when defining the purposes for which the acquired knowledge and connections may not be exploited. The law merely stipulates a prohibition on engaging in competitive activities.[8] In determining the specific scope of the prohibition on engaging in competitive activities after the termination of the employment relationship,

[8] Although this issue will be further discussed later in the contribution, it is important to highlight the previous legal framework at this point, as the current regulation on the competition clause deviates significantly from it. The old ERA/90 stipulated that a worker could not, without the employer's consent, establish a business or engage in independent activities that were the same as, or similar to, those of the employer. Furthermore, the worker was prohibited from entering into an employment relationship, work contract, or author's contract with a competing company. This provision effectively restricted the worker's labour rights and severely limited the contractual freedom of both parties. Under this regime, the parties themselves could not freely determine the scope of the competition clause, as it was predefined by the law.

the parties, particularly the employer, must adhere to the principle of proportionality. The law permits only a reasonable time limit for the duration of the non-compete obligation, which must not effectively exclude the possibility of the worker finding suitable employment in the future (fourth paragraph of Article 40 of ERA-1).

Another very important feature of the regulatory framework for the non-compete clause is the requirement to provide compensation to the worker for adhering to the competition clause, particularly in cases where the worker, due to the restriction, is unable to earn an income comparable to their previous salary (first paragraph of Article 41 of ERA-1). The law also specifies a minimum amount for this compensation,[9] which must be stipulated in the employment contract. As mentioned, if no monetary compensation is specified in the employment contract, the non-compete clause is considered invalid.

Considering that the competition clause is primarily a contractual provision, both its creation and termination depend on the agreement of both parties. The ERA-1 only provides for unilateral termination of the clause in the case where the employee declares that they are no longer bound by the clause after having extraordinary terminated the employment contract for cause.[10] This means that the employer cannot unilaterally terminate the competition clause, which underscores the fact that such a clause not only protects the employer's position but also safeguards the worker ‘s rights. Ultimately, the constitutive element for the validity of the clause is the establishment and payment of appropriate compensation to the worker.

It is important to remember that a properly agreed and defined competition clause is legally relevant only in the case of certain modes of termination of the employment contract. According to the second paragraph of Article 40 of the ERA-1, these modes are: i) mutual termination, ii) regular termination by the worker, iii) regular dismissal by the employer for a fault reason, and iv) extraordinary termination by the employer. This means that if the employment contract is terminated in any other manner provided by law, the obligation to adhere to the competition clause is not triggered, even if the clause was lawfully agreed upon in the employment contract.

The law does not explicitly specify the consequences in the event of a breach of the non-compete clause by the worker. However, it is generally understood that if the breach causes damage to the employer, the worker is liable for compensation, similar to the situation where the statutory prohibition of competition is violated.

4. Constitutional Foundations of the Prohibition of competition

It has already been mentioned that when establishing the normative framework for competition bans, the protection of rights and freedoms guaranteed by the Constitution,

[9] The monetary compensation for adhering to the competition clause must amount to at least one-third of the employee’s average monthly salary over the last three months prior to the termination of the employment contract.

[10] The worker may extraordinary terminate the employment contract for cause (with not notice period) in the specific instances exhaustively defined by law, all of which involve a serious breach of the employer’s obligations.

particularly those of workers, is of paramount importance. Primarily, this concerns the freedom of work and the freedom of economic initiative. In these two freedoms, the worker is significantly restricted. The role of the legislator in this context is to ensure that such a limitation is necessary, appropriate, and proportionate.

However, it should not be overlooked that the institution of the competition clause also carries constitutional and legal implications for the employer. The worker's loyalty, demonstrated through adherence to the competition ban, respects the economic function of property as enshrined in Articles 33 and 67 of the Constitution,[11] as well as the freedom of economic initiative in Article 74, which protects business entities from unfair competition. A detailed discussion of these two constitutional phenomena, particularly in relation to employers' interests, would exceed the scope of this contribution. The aim here is to highlight the position and obligations of the worker in relation to the competition ban, while considering both the legal framework and the corresponding obligations it imposes on employers.

4.1. Freedom of Work

The freedom of work under the Constitution of the Republic of Slovenia consists of several elements that have gradually developed over time, from a historical perspective.[12] Initially, the freedom of work meant the prohibition of forced and compulsory labour, as was known, for example, in colonial regions and less developed countries. The result of such efforts was the 1930 International Labour Organization (ILO) Convention No. 29 on Forced Labour, later supplemented by a new convention, No. 105, concerning the abolition of forced labour. A further step in the development of the concept of the freedom of work was the recognition of an individual's right to freely choose employment.[13] This element of the freedom of work is also addressed by a number of international documents, ranging from the Universal Declaration of Human Rights, the Revised European Social Charter (Article 1 – Right to Work), to ILO Convention No. 122 on Employment Policy, which aims to ensure full, productive, and freely chosen employment. A prerequisite for the exercise of the free choice of employment is the opportunity for non-discriminatory vocational guidance and training, which allows for the free selection of a profession.[14] The final, and equally important, aspect of the freedom to work is the principle of equal accessibility to any job for everyone, once again, without discrimination. The free choice

[11] For a more detailed discussion on property and its economic function, see Zobec, J., in Šturm, L. (ed.): *Komentar Ustave RS*, Fakulteta za podiplomske državne in evropske študije, 2011, pp. 457, 462, 477, and pp. 966-968.

[12] About freedom of work see Končar, in: Bele, I. (et.al.), Nova ustavna ureditev Slovenije, zbornik razprav, Uradni list RS, 1992, pp. 83, 84.

[13] For a more detailed discussion of this element of the freedom to work, see Blaha, M., in Šturm, L. (ed.): *Komentar Ustave RS*, Fakulteta za podiplomske državne in evropske študije, 2002, pp. 506-507.

[14] The right to freely choose a profession was explicitly provided for in several former Slovenian constitutions. However, this freedom is no longer directly included in the 1991 Constitution of the Republic of Slovenia. Nevertheless, considering the essential substantive connection between them, the free choice of profession is now doctrinal addressed within the broader context of the freedom to choose employment.

of employment, as the goal of the prohibition of forced labour, would often remain merely a dead letter in the constitutions of many countries if it were not accompanied by the possibility of accessing a job without discrimination.

4.1.1. The freedom of work through the lens of the repealed legal regulation of the competition clause in the ERA/90

From a constitutional perspective, the key issue in addressing the prohibition of competition is, first and foremost, the freedom to choose employment. Given that the worker is already in an employment relationship, which means that the freedom to choose employment has already been implemented and realised, this freedom becomes legally relevant primarily in the context of the competition clause. That is particularly when the employment contract is terminated, and the worker may be restricted in their ability to seek new employment. As noted in footnote 8, it is primarily the old labour legislation that directly and significantly interfered with the free choice of employment.

For a more comprehensive understanding and clarification of the correlation between the competition clause and the free choice of employment, we provide the full text of the second point of the fifth paragraph of Article 7 of the ERA/90:

"The worker and the organisation, or the worker and the employer, may agree that if the worker, in the course of their work or in connection with their work, acquires knowledge as described in the previous paragraph, and their employment relationship ends through their own will or fault, they shall not, for a period of up to two years after the termination of the employment relationship, without the consent of the organisation or employer, be allowed to:

- *enter into an employment relationship, a work contract, or an author's contract with another organisation or employer engaged in the same activity, if such an arrangement would constitute competition for the organisation or employer."*

A key aspect in the consideration of the normative framework for the competition clause established by the ERA/90 was the fact that it did not include a requirement to provide compensation to the worker for the period during which the competition clause was in effect. This omission was a crucial element in the Constitutional Court's reasoning when it reviewed paragraphs five and six of Article 7 of ERA/90, leading to the annulment of both provisions in 1992. In its reasoning, the Constitutional Court relied on violations of two fundamental principles. On the one hand, it cited a breach of the principle of the rule of law, arguing that the unequal burden imposed on the contracting parties violated the principle of equivalence in bilateral contracts,[15] which is regarded as a core tenet of

[15] From the reasoning of the ruling U-I-51/90, dated 14 May 1992:

»...The contested legal provisions, which determine the components of a possible agreement between the worker and the employer regarding the prohibition of competitive activity, burden only the worker. His ability to secure employment is reduced, and his potential earnings, which he could otherwise gain through the use of acquired technical, production, or business knowledge, are hindered...« (Available at: https://www.uradni-list.si/glasilo-uradni-list-rs/vsebina/1992-01-1484)

legal civilisation and the rule of law. On the other hand, the annulled provision was found to infringe upon the principle of the social state, which obliges the state, through its legislation, to protect the legitimate interests of employers while also safeguarding the interests of workers, who are seen as the economically and socially weaker party in the employment contract or labour relationship.

In addition to the arguments presented by the Constitutional Court in support of its decision, it is also important to consider the arguments put forward in the dissenting opinion of the then-constitutional judge, Mag. Krivic, who agreed with the outcome but, unlike the majority of the court, introduced the frequently applied, though unwritten, constitutional principle of proportionality. Krivic's primary argument was that the use of the principle of equivalence in remunerated contractual relationships is not appropriate, as constitutional rights are not objects of legal transactions. He argued that this situation involved a conflict between two constitutional categories held by different parties—the worker and the employer. In such cases, it is necessary to apply the principle of proportionality to assess the legitimacy of interfering with one right in order to protect another.

The core »motto« of the principle of proportionality is the understanding that the permissibility of restricting one right, when necessary to protect another, does not mean that such a restriction can be unlimited in its scope or depth. An interference with one right is acceptable only to the minimal (i.e., most necessary) extent that still allows for effective and adequate protection of the other right. In this specific case, the legislative omission of the obligation to include compensation for the worker in the non-compete clause effectively provided absolute protection for the employer's rights and interests, thereby disproportionately—i.e., excessively—interfering with the worker's freedom to work.

An important aspect of the old, repealed, legal framework was that it not only established the competition clause but also fully determined its substantive content. The worker was not only prohibited from entering into an employment relationship with a competitor, but also from signing a work contract or an author's contract. Although the competition clause was a contractual element even then, the parties were not able to define its substantive scope themselves. As mentioned earlier, there was no autonomy of will in this aspect of the competition clause. Today, the ERA-1 does not provide for such detailed regulation, meaning that it is left to the discretion of both parties to determine what the worker can and cannot do during the period of the competition clause. The current legal framework, therefore, respects the freedom to work and only allows for its proportionate limitation.

4.1.2. The freedom of work through the lens of the repealed legal regulation of the statutory prohibition of competition in the ERA/90

In the previous point, we noted that the protection of freedom of work is legally significant primarily in the context of competition clauses, which, by their nature, directly restrict a worker's freedom of choice in seeking employment. However, for a correct and appropriate placement of the phenomenon of work freedom within the constitutional

context, it is also of exceptional importance to recognise that the freedom of work is not solely implemented and manifested through the individual's free decision to enter an employment contract. Rather, this freedom extends throughout the entire duration of the employment relationship, operating in the following dimension: within the framework of work freedom, the worker must, in addition to having the freedom to choose employment, also retain the autonomy to decide how to use the remainder of their time and working energy.

The Constitutional Court also invoked the freedom of work in its decision[16] to annul the first three paragraphs of Article 7 of ERA/90:

"During the period of employment, a worker must not, on their own or another's behalf, perform work or enter into business transactions that fall within the scope of the organisation's or employer's activity if such actions could potentially impact the interests of the organisation or employer.

A worker who acts contrary to the previous paragraph commits a serious breach of work obligations, for which the disciplinary measure of employment termination may be imposed.

The organisation or employer may claim compensation for any damage resulting from the worker's conduct."

In the reasoning of the decision, which also highlights the aforementioned dimension of the phenomenon of freedom of work, the Constitutional Court once again relied on the excessive restriction of work freedom. It primarily examined the following phrases:

- "Interests of the organisation or employer." The overly broad and expansive nature of this phrase allowed for the inclusion of not only material interests but also moral and, potentially, any other interests of the employer that might be affected. The scope of the employer's interests should be appropriately limited in legislation, for example, to economic interests, which form the core of market activity. In this regard, the ERA-1 specifies that the employee's actions or work for an employer represent or could represent competition.
- "Field of work or activity of the employer." This phrase meant that a breach of the non-compete obligation could be constituted by any work or business activity within the employer's registered business activity as stated in the court register. This interpretation could imply that an employee breached this obligation, even if the work or business fell under an activity that the employer neither intended nor was capable of undertaking but was listed as one of its activities in the court register. This was a clear infringement on the freedom of work. The ERA-1 now refers to the activities that the employer actually performs, significantly limiting and narrowing the scope of areas where an employee's work or business activities might be in conflict.
- "Serious breach of work obligations." In the old system of disciplinary responsibility, a serious breach of work obligations could form the basis for

[16] Decision U-I-81/97, dated 14 January 1999; Official Gazette of the Republic of Slovenia, No. 92/1999.

imposing a disciplinary measure resulting in termination of employment. The issue was that any work or business, regardless of its content, nature, or significance to the employer's interests, was *per se* considered a serious breach, often leading to employment termination with all its associated consequences. Once again, this constituted an excessive interference with the freedom of work.

These are merely some of the elements on which the Constitutional Court based its decision, and both aspects of the prohibition of competition are, as outlined, clearly connected to the freedom of work. It is the role of the legislature to shape the abstract norm in a way that allows the two to coexist, taking into account, above all, the findings of constitutional jurisprudence.

4.2. Freedom of economic initiative

The second constitutional phenomenon, also previously mentioned, is the freedom of economic initiative, considered here from a constitutional perspective in relation to the prohibition of competition. The Constitution addresses the issue of free economic initiative in Article 74 (Entrepreneurship). Here, we primarily focus on the employer as an entity operating in the market with the aim of generating added value through a certain profit-oriented activity. It is essential to recognise that the entirety of an employer's activities consists of various business decisions, in which they, whether as a natural or legal person, are entirely free. This freedom to make decisions at the entrepreneurial level represents the core dimension of free economic initiative as a special provision in relation to the constitutionally guaranteed general freedom of action. Although this general freedom is not explicitly mentioned in the Constitution, it derives from human dignity as the foundation of a democratic state.[17] This fact thus clearly highlights the value-based foundation of the phenomenon of free economic initiative.

It is important to emphasise that free economic initiative does not merely entail the freedom to make business decisions within a particular activity but also extends to an individual's right, as a current or future employer, to freely choose the activity itself. However, despite the apparent substantive correlation with an individual's freedom to choose an occupation as per Article 49 of the Constitution, the free choice of economic activity should not be entirely equated in value with this freedom.[18]

4.2.1. Freedom of economic initiative and competition clause

In close connection, we also encounter the prohibition of competition and the right of free economic initiative. The fact is that a worker, under both statutory and contractual

[17] Komentar Ustave RS, Fakulteta za podiplomske državne in evropske študije, 2002, p.714.

[18] The free choice of profession was explicitly provided for in several former Slovenian constitutions; however, this freedom was omitted from the 1991 Constitution of the Republic of Slovenia. Nevertheless, given its essential substantive connection, the free choice of profession is considered within the framework of the free choice of employment.

non-competition clauses, is restricted not only in their freedom to work but also in their right to pursue free economic initiative. Let us further examine how this limitation is positioned within the framework of the competition clause. Once again, we will refer to the former legal provisions, which were superseded before the enactment of the new ERA-1. The first point of paragraph 5 in Article 7 of the ERA/90 read as follows:
"A worker and the organisation, or the worker and employer, may agree that if the worker acquires knowledge referred to in the previous paragraph through their work or in connection with it, and if their employment relationship is terminated by their own choice or due to their fault, they may not, without the organisation's or employer's consent, for a period of up to two years following the termination of employment:

- *establish a company or commence independent activities involving the same or similar operations as those of the organisation or employer, if the use of such knowledge would pose competition to the organisation or employer;"*

As noted in the section on freedom of work, we see here too that the parties to the employment contract had no role in determining the content of the competition clause. The law itself precisely defined the content of this clause to such an extent that a worker who had lost their job was prohibited from even establishing a company or economic entity that engaged in a competing activity, nor could they begin such an activity as a sole trader. This restriction affected both the free choice of activity - which we have identified as an element of free economic initiative - as well as the undertaking of the activity itself.

4.2.2. Freedom of economic initiative and statutory prohibition of competition

Similarly to the competition clause, free economic initiative was also restricted by the prohibition on competition, which limited workers during their free time, or at times when they were not available to their employer, from performing certain work or entering into business transactions. Everything discussed regarding the constitutional and judicial perspective on how the prohibition on competition impacts freedom of work applies equally to free economic initiative. In its reasoning for annulling the first three paragraphs of Article 7 of the ERA/90, the Constitutional Court justified its decision by highlighting the simultaneous infringement on both the worker 's freedom of work and their right to free economic initiative.

Conclusion

In this contribution, we primarily sought to highlight the close connection between the legal framework for the prohibition of competition and two constitutionally guaranteed and protected freedoms afforded to workers: freedoms of work and of free economic initiative. Our discussion has relied heavily on the Constitutional Court's jurisprudence, as the previous labour legislation regulated the prohibition on competition in a manner contrary to the principles of the Slovenian constitutional framework, which led to its annulment. Given the evident constitutional sensitivity of this issue, the task of

establishing the normative framework within the current ERA-1 was, to some extent, simplified for the legislature, as the Constitutional Court's decisions provided guidance on a constitutionally sound approach to the prohibition of competition. The current regulation is proof that the legislature has adequately followed the Constitutional Court's directions. The fact that every individual or worker is constitutionally guaranteed both freedom of work and of free economic initiative is crucial in ensuring the freedom of individuals to engage in economically beneficial activities even in their free time (or rest periods). It is also notable that, in Slovenia, workers are relatively often economically active in their spare time. Such activities are lawful as long as they do not fall within the employer's line of business or constitute competition for the employer. For a proper understanding of freedom of work, and thus free economic initiative within the context of the prohibition on competition, the following statement from the Constitutional Court is of utmost importance: a worker's freedom of work (particularly the aspect of free choice of employment) is undoubtedly exercised upon entering into an employment contract, but it is by no means exhausted by it.

Of course, the concept of a prohibition on competition is not of interest solely from the perspective of constitutionally guaranteed rights and freedoms. Much more active and dynamic is the case law from specialised labour courts of first and second instances and the Supreme Court of the Republic of Slovenia, which have dealt with numerous individual labour disputes between workers and employers, or individuals and former employers.

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