



Drafting and enforcing non-compete agreements in the European Union: the examples of France, Germany and Italy

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Introduction

- Non-competition in the relations between employers and employees is not specifically governed by the law of the European Union.
- The only text which can be regarded as dealing with non-compete obligations concerning employees is the Charter of Fundamental Rights of the European Union, which became effective on December 1, 2009. Article 15 of this text provides that :
 - *“Everyone has the right to engage in work and to pursue freely chosen or accepted occupation”*.



Introduction

- In this context, global companies doing business in Europe cannot rely on a common set of rules governing the validity and the implementation of non-compete provisions. They must act on a case-by-case basis and take into consideration the specifics of local laws where their workforce is located.
- This presentation will provide an overview of the issues that may arise in three Member States of the European Union: France, Germany and Italy.



1. Is the employee entitled to compete with his/her employer during the period of employment contract?

- During the term of the employment contract, the obligation not to carry out activities that may compete with the employer is generally regarded as an implied term of the employment contract:
 - In **France**, the general duty of loyalty prohibits employee to compete during the term of employment (article L. 1222-1 of the Labor Code);
 - In **Germany**, article 60 of the Commercial Code, which initially applied to ‘commercial employees’, provides a non-competition principle that was extended to all kinds of employees;
 - In **Italy**, the duty of loyalty prescribed by article 2105 of the Civil Code also prevents the employee from competing against its employer during the term of the employment.



2. What are the general legal constraints on non-compete covenants in France, Germany and Italy?

- As a general principle, a balance has to be struck between the freedom of occupation, which is a fundamental right enshrined in the constitutions of all of the three states and the legitimate interest of the employer to protect its business.
- France, Germany and Italy share the same reasoning that, whereas the non-compete is justified by the interest of the company the non-compete covenant cannot forbid the employee to have a job which corresponds to its skill and experience.
- The non-compete obligation is understood widely, irrespective of the labeling of the clause. Therefore, the specific requirements of each jurisdiction cannot be avoided by labeling the clause as a 'non-solicitation of clients' clause or as a 'protection of clients' clause.



2. What are the general legal constraints on non-compete covenants in France, Germany and Italy?

- Under German law, a customer or client protection clause (*i.e.* the clause that prohibits the employee from soliciting or enticing away customers of clients) is considered as a non-compete obligation and must provide for a compensation;
- The same was held in France, where a non-solicitation of clients clause was characterized as a non-compete clause (French Supreme Court, May 19, 2009).



3. How to draft a non-compete in France, Germany and Italy.

- What are the minimum requirements in each jurisdiction?
 - France
 - Non-compete covenants are not regulated by statute.
 - To guarantee the fundamental principle of freedom of occupation, case-law sets stringent conditions for non-compete covenants to be valid. The non-compete covenant must:
 - be essential to protect the company's legitimate interest;
 - be limited in its geographical scope and in its duration;
 - take into account the specificities of the duties performed by the employee;
 - provide for a sufficient financial compensation.



3. How to draft a non-compete in France, Germany and Italy.

- What are the minimum requirements in each jurisdiction?
 - Germany
 - Non-compete clauses are regulated for all employees by articles 74 et seq. of the Commercial Code.
 - Non-compete obligations after the employment contract must meet the following conditions:
 - be in writing;
 - be provided to the employee;
 - serve legitimate business interest of the employer;
 - not exceed 2 years;
 - provide for financial compensation for the agreement.



3. How to draft a non-compete in France, Germany and Italy.

- What are the minimum requirements in each jurisdiction?
 - Italy
 - According to article 2125 of the Italian Civil Code, the non-compete covenant must:
 - be in writing;
 - be restricted to a specific activity and a specific area;
 - be limited in time;
 - provide for a financial compensation.



3. How to draft a non-compete in France, Germany and Italy.

- How to demonstrate the employer's legitimate interest?
- The need to protect the legitimate interest is an express requirement for the validity of non-compete covenants both in France and Germany:
 - The mere interest of the employer to keep the employee away from the market does not characterize a legitimate interest;
 - It is incumbent on the employer to establish that if the employee works for a competitor, this is going to have a detrimental impact upon the company's business.



3. How to draft a non-compete in France, Germany and Italy.

- What are the geographical limits of non-compete covenants?
- France
 - French courts are generally restrictive as to the geographical scope of non-compete covenants:
 - except in certain specific cases, the geographical scope of a non-compete agreement has to be limited to a region of France.
 - If the non-compete covers the French territory or several countries, French courts are inclined to conclude that the employer cannot require the employee to expatriate in order to perform work corresponding to his/her skills.



3. How to draft a non-compete in France, Germany and Italy.

- What are the geographical limits of non-compete covenants?
- A wide geographic scope may be admitted for senior employees but it will be closely scrutinized by the court. Therefore, the employer should adapt the other elements of the covenant, namely duration and financial compensation to ensure, as much as possible, the validity of the non-compete.
 - **Illustration:** a one-year non-compete duty covering the European Common Market (which at the time was not so broad as the European Union is today) for a Marketing Director of L'Oréal was upheld, the financial compensation being 2/3 of his salary (French Supreme Court, January 30, 2002).



3. How to draft a non-compete in France, Germany and Italy.

- What are the geographical limits of non-compete covenants?
- Germany
 - The covenant must not go beyond the area where the employee can be in competition with the employer. If an employee worked in Germany only, a worldwide post-contractual non-compete clause would not be enforceable.
- Italy
 - Italian courts may allow non-compete clauses with a broad geographic scope.



3. How to draft a non-compete in France, Germany and Italy.

- What are the maximum permissible duration of non-compete covenants?
- France
 - In the absence of statutory provisions setting forth the maximum duration of a non-compete covenant, the duration is assessed on a case by case basis:
 - Generally the duration of 1 to 2 years will be considered reasonable.
 - Certain collective bargaining agreements set out a maximum duration.



3. How to draft a non-compete in France, Germany and Italy.

- What are the maximum permissible duration of non-compete covenants?
 - **chemical industries:** 2 years maximum and exceptionally up to 4 years (the 3 and 4th years are indemnified up to 100% of the last salary);
 - **metallurgy sector:** 1 year, renewable once for the executives of the.



3. How to draft a non-compete in France, Germany and Italy.

- What are the time limits of non-compete covenants?
- Germany
 - Pursuant to § 74a of the German Commercial Code, a non-compete covenant cannot be extended beyond a period of 2 years.
- Italy
 - Pursuant to article 2125 of the Italian Civil Code, a non-compete covenant cannot exceed 5 years for executives, and 3 years for other types of workers.



3. How to draft a non-compete in France, Germany and Italy.

- How to determine the compensation of the non-compete covenant?
- France
 - Compensation is mandatory in all non-compete agreements but is not determined by statutes:
 - The minimum amount can be determined by the applicable collective bargaining agreement;
 - If there is no provision in the applicable collective bargaining agreement, a financial compensation ranging from 30% to 50% of the employee's monthly salary is generally regarded as reasonable.



3. How to draft a non-compete in France, Germany and Italy.

- How to determine the compensation of the non-compete covenant?

- Germany

- According to article 74 of the Commercial Code, a non-compete covenant is binding only if it provides for financial compensation which amounts to at least half of the employee's most recent contractual remuneration paid during his employment.

- Italy

- A non-compete covenant is binding only if it provides for a financial compensation.
- Similar to French law, no amount is specified in the Civil Code:
 - The accepted practice is that the amount of the consideration ranges from 15 % to 35 % of the current salary of the employee.



3. How to draft a non-compete in France, Germany and Italy.

- What are the sanctions if the non-compete covenant does not meet the above requirements?
- France
 - A non-compete covenant that does not meet the requirements prescribed by case law cannot be enforced against the employee. However, the employee who complies with an illegal non-compete obligation must be indemnified by the employer.
 - If the non-compete complies with all four conditions, but the court considers it disproportionate, the judge can uphold the non-compete and modify it.



3. How to draft a non-compete in France, Germany and Italy.

- What are the sanctions if the non-compete covenant does not meet the above requirements?
- Germany
 - Failure to provide for any financial consideration renders the non-compete covenant null and void.
 - If the non-compete clause is too far reaching with respect to its duration or geographic scope, the court will reduce the scope of the non-compete to the permissible extent so as to enforce it.
- Italy
 - If the non-compete covenant fails to meet the requirements stated in the Civil Code, it will be deemed null and void.
 - An exception, however, is that if the duration exceeds the term provided for in the Civil Code, it will be reduced to the legal duration.



4. Can the employer waive the non-compete covenant in order to be discharged of the payment of the compensation?

- France

- French case law considers the non-compete covenant to be in favor of both the employee and the employer. As a consequence, the employer cannot unilaterally waive the non-compete obligation unless the clause or the applicable collective bargaining agreement provides so.
- The waiver is generally subject to a formal proceeding (e.g., the waiver should be made within a specific period of time after the termination [1 or 2 weeks]). Failure to comply with this formality makes the waiver ineffective and the employer will be liable to the employee for payment of the financial compensation.



4. Can the employer waive the non-compete covenant in order to be discharged of the payment of the compensation?

- Germany

- The employer can waive the non-compete unilaterally provided that notice of the waiver is given before the termination of the employment agreement (end of the notice period):
 - The employee is immediately released from complying with the non-compete;
 - The employer has still to pay the indemnity for 12 months.

- Italy

- the waiver provision is valid as long as it enables the employer to waive the non-compete no later than the time of termination of employment (communication of the termination letter).



5. What remedies are available in case of breach of the non-compete covenant?

- France

- In case of breach, the employer is entitled to:
 - stop the payment of the financial compensation and obtain reimbursement;
 - seek a preliminary injunction to forbid the employee to carry out any competitive activity, or order the employee to cease working for his new employer;
 - sue the employee for damages.
- The contract can provide for a penalty in case of breach of the non-compete by the employee.

5. What remedies are available in case of breach of the non-compete covenant?

- Germany

- If the employee is in breach of a valid non-compete provision, the employer may turn to the labor court for a temporary injunction against that employee.
- The labor court can order a former employee not to compete with its former employer and can also require the employee to pay damages to his/her former employer:
 - Penalty clauses are enforced by German Labor Courts.

5. What remedies are available in case of breach of the non-compete covenant?

- Italy

- If the employee is in breach of the non-compete covenant, the former employer is entitled to compensation for any damages suffered.
 - Generally, the damages are predetermined by the employment contract in a penalty clause.
- A former employer may also seek an injunction to stop the employee from performing the same activity for a competitor.



6. Non-compete and choice of law provisions in the European Union:

- In case of cross border employment relationship the employer will face the question of the choice of law applicable to the non-compete covenant.
 - Freedom of choice of the applicable law.
 - However, such choice of law may not deprive the employee of the protection afforded to him by the provisions that cannot be derogated from by agreement under the law that, in the absence of choice of law, would have been applicable .
 - **Illustration:**
 - Employment contract subject to US law.
 - Stock options plan subject to US law.



Thank You

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