Top Ten Considerations for Non-compete Clauses in Europe
(The Netherlands, Belgium, Spain, Germany, France, Italy)
Non-compete clauses are an essential part of any contemporary employment contract. When conducting business in foreign jurisdictions, it is imperative that you understand and are aware of current employment laws concerning the implementation and use of non-competes. Below are ten points you should consider when executing a non-compete in The Netherlands, Belgium, Spain, Germany, France and Italy.

1. Form of the Non-compete Clauses

**The Netherlands:** The non-compete clause has to be concluded in writing. The activities which an employee is prohibited from must be described as clearly as possible.

**Belgium:** The non-compete clause must, under penalty of nullity, be established in writing. It has to be drawn up for every employee individually (but not necessarily at the moment of the conclusion of the employment contract).

**Spain:** It is essential that non-compete clauses are expressly agreed, but it is not required to conclude them in writing. However, writing form could make it easier to prove its existence, as well as the conditions agreed.

**Germany:** The non-compete clause must be in writing in order to be valid. The scope of non-compete should be described in detail if possible.

**France:** A non-competition clause must be in writing and must be explicitly approved by the employee. If the non-competition clause is governed by the provisions of the collective bargaining agreement, the employer shall secure the proof that the employee was aware of its content, in writing.

**Italy:** The non-competition clause must be in writing and must be explicitly approved by the employee.

2. Be Aware of the Age and Status of the Employee

**The Netherlands:** The non-compete clause has to be concluded with an employee who is of age (at least 18 years old).

**Belgium:** There are no restrictions regarding age. There are however earning-related restrictions. In general, a non-compete clause can only validly be agreed upon if the employee's remuneration exceeds 64,508 EUR per annum, benefits included (amount valid for 2013) at the time of termination of the employment contract. For employees earning between 38,665 EUR and 64,508 EUR per annum (amounts valid for 2013), a non-compete clause can only be validly inserted in a limited number of cases.

**Spain:** The non-compete clause has to be concluded with an employee who is legal of age to work (at least 16 years or older).

**Germany:** The non-compete clause may be agreed with both employees and non-employees (in particular Managing Directors). Certain differences apply with respect to non-employees.

**France:** There are no limitations concerning age and status of the employees.

**Italy:** There are no limitations concerning age and status of the employee.

3. Non-competes Must Be Limited in Time, Area or Region

**The Netherlands:** The prohibition must be limited to a certain period of time (e.g. one year). The non-compete clause must also define the territory within which the employee is prohibited from carrying out those activities.

**Belgium:** The non-compete clause must contain the conditions of validity such as: similar activities, limitation as to the territory (the territory of Belgium is considered to be the largest possible geographic area where in a general non-competition clause is valid), limitation in time (the non-competition restriction is not to exceed 12 months after termination of the employment relationship) and the payment of a compensatory indemnity.

**Spain:**
- Geographical: The non-compete agreement should be limited to a particular territory; a very broad scope could be considered invalid by the Courts.
- Functional: The prohibition should be referred to the performance of similar duties as those carried out in the former company, and related to a similar professional sector.
- Temporary: The maximum duration is 2 years for top managers and technical employees (those with business technique knowledge) and 6 months for other employees.
Germany: The prohibition cannot be extended beyond a period of two years following the end of the employment relationship. The territorial scope has to be justified by legitimate interest of the company.

France: According to case law, the non-compete clause must be essential to the protection of the company’s interests, shall be limited in terms of time, territory, activity and shall provide for a financial compensation of the employee during its whole term. The principles set forth by case shall apply unless the applicable collective bargaining agreement provides other specific limitations.

Italy: According to art.2125 of the Civil Code, non-competition clauses must also be limited in terms of duration (the maximum duration is three years for employees and five years for executives), territory (geographical reach), and subject (e.g. prohibited from working in a specific industry or for named competitors). However limitations by territory and subject matter should not effectively prevent the employee from working at all during the duration of the non-compete restriction.

4. Renewal/Change of Circumstances

The Netherlands: In the event the position of the employee within the corporation changes significantly during the employment as a result of which the non-compete clause becomes more burdensome, the employee may petition the Court to mitigate or annul the non-compete clause. This is based on case law of the Supreme Court.

Because of the aforementioned, if the employee obtains a new position within the corporation, the employer has to check whether a new non-compete clause has to be concluded.

Belgium: In cases of extension and/or renewal of an employment contract or an important change to the job, it is advisable to make sure that the non-compete clause from the previous contract remains applicable.

Spain: Renewals are possible, but just within the temporary limitations noted above.

Germany: Generally any amendment must be agreed upon by the parties.

France: The change of position of the employee does not affect the non-competition clause.

Italy: While the position of the employee within the company normally determines the decision to enter into a non-competition clause or not, the change of position does not affect the covenant.

5. Know When the Non-compete Clause Will Take Effect

The Netherlands: The non-compete clause takes effect as soon as the employment agreement has come to an end.

Belgium: A non-compete clause will only be effective if the employee is dismissed for serious cause, after the trial period. If the employment contract is terminated by the employee with a notice period or with payment in lieu of notice, the clause will normally take effect.

Spain: The non-compete clause takes effect as soon as the employment agreement has come to an end.

Germany: The post contractual non-compete clause takes effect as soon as the employment agreement has come to an end.

France: The non-competition clause takes effect after the termination of the employment relationship, regardless of the ground of termination.

Italy: The non-competition clause takes effect after the termination of the employment relationship, regardless of the reason for termination.

It is also possible to provide that the employer has the option to withdraw from the covenant, thus releasing the parties from their obligations. However, such an option must be exercised before the termination of employment or before the employee resigns; in other words it is not possible for the employer to avoid paying the consideration by exercising the option after the termination of the employment contract (e.g. during the notice period) or after the employee has resigned.

6. Are the Employees Entitled to Compensation?

The Netherlands: The law requires no compensation to be paid to the employee but the Court may order that the employer shall compensate the employee during the period in which the non-compete clause is maintained if the non-compete clause prevents the employee in a material way from being employed by someone other than the employer.
**Belgium:** The non-compete clause must provide for the payment by the employer of lump sum compensation. The minimum amount is equal to half the gross salary of the employee corresponding to the effective period of application of the clause. The compensation is not due to the employee when the employer renounces to the application of the clause within fifteen days following the termination of the employment contract.

**Spain:** The law requires for the validity of the agreement to fix a suitable compensation, otherwise the agreement would be invalid.

The amount should be determined by the parties by mutual agreement. In case of conflict, the Courts may value whether the compensation is adequate or not, but cannot set a specific amount.

**Germany:** The prohibition of competition shall only be binding if the company is obliged, for the term of the prohibition, to pay compensation equal to at least one-half of the employees most recent remuneration, including all benefits in cash or in kind. For managing directors, this may be modified to some extent, although this is not recommended as no fixed rules exist which would provide legal certainty.

**France:** According to case law, a non-competition clause that does not provide for a financial compensation is null and void.

This financial compensation is due to the employee regardless of the ground of termination, as long as the employee complies with the non-competition clause.

Its amount is usually defined by the applicable collective agreement. If the latter does not provide anything, the financial compensation shall be freely defined by the parties, as long as it is reasonable.

**Italy:** According to art. 2125 of the Civil Code, the non-competition clause is null and void unless a fair consideration (paid on top of normal salary) is granted to the employee.

The consideration must be calculated taking into account the combined factors: geographical scope, duration and subject matter and is generally evaluated on a case by case basis. In practice the consideration varies from between 20% and 40% of the gross annual remuneration paid to the employee.

The consideration can be either a fixed sum or a percentage of the annual salary and can be paid: i) during the relationship, ii) as a lump sum at the end of the relationship, or iii) in monthly installments following the termination.

According to case law, the consideration of a non-compete clause can be paid either during the employment relationship (in this case it is subject to social security contributions and must be taken into account for the purposes of calculating the TFR i.e. statutory severance payment) or after the termination of employment (in this case it will not be subject to social security contributions and it will not impact on the TFR calculation).

### 7. What is the Enforceability of the Non-compete Clause?

**The Netherlands:** In case the employee violates a valid non-compete clause, the employer may petition the Court with the request to condemn the employee to observe the clause. If the non-compete clause is violated, the employee must pay the penalty that is often mentioned in the non-compete clause. The Court can mitigate the amount of the penalty. If no penalty is agreed upon, the employer can claim damages, if any. The employer is not entitled to invoke his rights under a non-compete clause if he is liable for damages in respect of the termination of the employment contract (e.g. if the employment is ended without taking into account the applicable notice period or without due observance of the provisions applicable to termination).

The employee may petition the Court with the request to mitigate or annul the non-compete clause. The Court will assess whether the non-compete clause is too burdensome for the employee in relation to the interest of the employer in (fully) maintaining it.

**Belgium:** An employee who breaches the terms of a non-compete clause will be obliged to compensate the employer for any proven damage he or she has caused.
The penalty is fixed by law at double the compensation the employee receives for not competing. If the employer can prove higher actual harm, he may claim a higher indemnification.

A sales representative, who breaks a contractual obligation not to compete, must pay damages equal to three months’ remuneration. If the employer can prove higher actual harm, he may claim a higher indemnification.

**Spain:** Once the clause has been agreed none of the parties can unilaterally resign from it.

If the employee fails to comply with the non-compete clause the employer is entitled to request a refund of the compensation paid and require the employee to carry out his or her non-compete obligations.

In the event that the employer did not pay the agreed compensation, the employee cannot terminate unilaterally the agreement, but can require the employer to pay the agreed amount.

Penalty clauses are valid. The parties may determine the compensation the employee should pay in case of breach of the agreement. If the penalty compensation is inappropriate or disproportionate the Courts could consider the clause partially invalid.

The breach by the employee of the non-compete agreement entitles the employer to request for damages in Court, which must be proved.

**Germany:** In case the employee violates a valid non-compete clause, the employer may claim damages, contractual penalty (if agreed upon) or file for injunctive relief. The employer is not obliged to pay the compensation for the time of violation.

**France:** In case of breach by the employee, the employer can bring an action before the Industrial tribunal to seek compensation for the damages incurred.

The non-competition clause can provide for a penalty clause by which the employee undertakes, if he breaches the clause, to compensate his former employee with a prefixed amount.

The employer can renounce to the application of the non-competition clause. In such circumstance, he will not need to pay the financial compensation. The release has to be carried out according to the provisions of the applicable collective bargaining agreement or the employment contract. In any event this release shall be expressed and precise.

If neither the collective agreement nor the employment contract specify the time period during which the employer can renounce to its application, the renunciation shall be carried out at the same time as the termination of the contract. However, one shall bear in mind that the employment contract has to specify that the employer can renounce to its application.

**Italy:** In the event of breach by the employee, the employer can apply for a court injunction prohibiting the employee from taking the new job until the expiry of the non-compete obligation. Moreover, the employee may be ordered by the court to repay any amount already paid under the non-compete clause and, depending on what has been agreed upon, to pay a penalty, without prejudice to the right of the company to seek further damages.

The payment of the penalty and/or damages does not mean that the obligation is lifted: it remains in full force until its natural expiry date.

### 8. Insolvency and Transfer of Undertaking

**The Netherlands:** If the employer is bankrupt, the non-compete clause is still valid and has to be observed. However, the bankruptcy of the former employer can be taken into account if the employee petitions the Court with the request to mitigate or annul the non-compete clause. In the event of a transfer of undertaking (article 7:662 Dutch Civil Code) the non-compete clause will bind the transferee. In case the transfer cannot be regarded as a transfer of undertaking in the meaning of article 7:662 DCC, a new non-compete clause has to be concluded between the transferee and the employee.

**Belgium:** If an organization goes into liquidation, the administrator will in most cases terminate the contract of all employees. At the same time he will try to find a way to outsource valuable activities or start afresh. The administrator may therefore have an interest in holding the employees to their obligations pursuant to any non-compete clauses that exist.

Pursuant to CLA no 32bis all rights and obligations of both the employer and employee will transfer to the transferee by operation of law. This includes the rights and obligations pursuant to any non-compete clause.

**Spain:** If the employer is bankrupt, the non-compete clause is still valid and has to be observed. However, should there no longer exist industrial or commercial interest that give rise to the clause, the company could rescind the agreement.
Pursuant to Article 44 of the Worker’s Statue on rights and obligations of the parties undergoing a transfer of undertaking, all rights and obligations of both employer and employee, would be automatically transferred to the transferee, including the non-compete agreement.

**Germany:** If the employer is bankrupt, the non-compete clause is still valid and has to be observed. Specific insolvency law applies, e.g. that the liquidator can opt for execution of the contract or refuse.

Generally, in the event of a transfer of undertaking (article 613a German Civil Code) the non-compete clause will bind the transferee.

**France:** In case of insolvency or transfer of undertaking, the non-competition clause remains enforceable. The employee is bound vis a vis the employer or transferee. Reciprocally, the employer, transferee and liquidator will also be bound by the clause and shall pay the financial compensation in case of termination, unless the employee is released from the non-competition clause.

**Italy:** In the case of insolvency or transfer of undertaking, the non-competition clause remains perfectly valid and the employee is bound vis-a-vis the employer (or the transferee).

**9. What is the Liability for the New Employer?**

**The Netherlands:** If the new employer profits from the employee that violates his non-compete clause, the new employer can be liable. The former employer can claim damages from the new employer based on unlawful action.

**Belgium:** In general a new employer is not liable for damages by the mere fact that he has hired an employee who knew to be restricted by a non-compete clause. Special circumstances can however implicate the new employer, e.g. if the new employer knew the employee was bound by a non-compete clause and actively hired the employee in order to approach its competitor’s customers by making use of trade secrets that the employee gained in his or her former position.

**Spain:** The new employer may be liable for the damages caused to the former employer if it knew of the existence of the non-compete clause. If the new employer does not know about the non-compete agreement between the employee and the former employer, the latter can inform of the existing agreement to the new employer as well as the potential liabilities that could derive from any breach of the clause.

**Germany:** The former employer can claim damages from the new employer based on unlawful action and file for injunctive relief.

**France:** The new employer who would have hired an employee knowing that he was bound by a non-compete clause could be held liable in solidarity with the employee to compensate the former employer for the damage incurred.

**Italy:** In addition to a possible injunction, which clearly prevents the new employer from hiring the employee, the new employer can be sued for unfair competition if it proceeds to hire anyway. The former employer can therefore claim for damages as a consequence of any unlawful action.

**10. Absence of a Non-compete Clause**

**The Netherlands:** The Supreme Court has ruled that an employee may not conduct himself in a way that is unlawful against his former employer, whether a valid non-compete clause has been concluded or not. In the event the employee abuses his former position to persuade clients of the former employer to come to his new employer, this
employee may act unlawful.

**Belgium:** When the employment contract is terminated the employee regains his freedom entirely. This freedom is however limited by a double restriction: (i) the employee may not abuse the knowledge he gained of trade secrets, commercial secrets, or any confidential or personal information and, (ii) he may not compete in a dishonest way, e.g. by systematically contacting all his former employer’s customers.

**Spain:** Unfair Competition is defined by Case Law as the worker’s activity aimed to carry out tasks of the same industry or activity while working in a company without the consent of the employer and causing actual or potential harm. Unfair competition is prohibited and considered iustacausa for disciplinary dismissal.

**Germany:** During the time of employment the employee is not allowed to work for a competitor if the employer has a legitimate interest (contractual non-compete).

For the time after employment a non-competition clause between the employee and the former employer has to be agreed (post contractual non-compete).

**France:** In the absence of a valid non-competition clause, the employee will be free, after the termination of his employment contract, to undertake any activity without limitations. However, the employer is entitled to bring an action against a former employee that would have carried out unfair competition (concurrence déloyale).

**Italy:** In the absence of a valid non-competition clause, after termination of the employment relationship, the employee will be free to work, without restrictions, but always adhering to the fair competition principles.

**Contact Us**

For more information about L&E Global, or an initial consultation, please contact one of our member firms or our corporate office. We look forward to speaking with you.

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