Webinar

A practical guide to the enforcement of non-competes in the EU

Julie Bouchard, Paul Callegari, Nicolas Roggel, Patrycja Zawirska
SPEAKERS

Paul Callegari  
Partner, London  
+44.(0)20.7360.8194  
paul.callegari@klgates.com

Nicolas Roggel  
Partner, Berlin  
+49.(0)30.220.029.305  
nicolas.roggel@klgates.com

Julie Bouchard  
Associate, Paris  
+33(0)1.58.44.15.10  
julie.bouchard@klgates.com

Patrycja Zawirska  
Of Counsel, Warsaw  
+48.(0)22.653.4274  
patrycja.zawirska@klgates.com
AGENDA

- Non-competes during employment
- Non-competes after termination
- Formal requirements
- Compensation during non-competes
- Unilateral waivers
- Enforcement – consequences of breaches
INTRODUCTION

- Non-compete obligations during and after employment are not governed by EU law

- There are no EU directives which would ensure consistency among jurisdictions

- Nonetheless, the rules in different jurisdictions are based on the same general principles and, therefore, similar in many areas – but not all
NON-COMPETES DURING EMPLOYMENT

 Employees are obliged not to compete during employment – consequence of the employment relationship

 This obligation can be further extended and/or defined (and usually is)

 As a rule, employees cannot be prevented from undertaking activities for another (non-competing) employer. However, there are exceptions
NON-COMPETE AFTER TERMINATION

- In the absence of express contractual restrictions employees are free to compete after termination.

- However, in all jurisdictions there are some duties that survive the end of the employment, most notably duties concerning business and trade secrets.

- These duties will only provide limited protection, hence express non-competes are usually desirable.
NON-COMPETE AFTER TERMINATION

- Post contractual non-competition covenants are permissible
- Legal restrictions throughout the EU are based on the same considerations and general principles but different in detail
- General standards: Is the contractually agreed upon covenant and its specific scope required to support the employer’s legitimate interests? Can it be justified in view of its impact on the employee?
FORMAL REQUIREMENTS

- In most jurisdictions, covenants must be in writing
  
  In Germany and Poland, a document signed by both parties is required
  
  In France, the non-compete can be agreed upon in a CBA – provided that an employment contract refers to the CBA
  
- Even where there is no strict form requirement (in the UK), the covenants are generally set forth in writing. (Otherwise it is very difficult for employers to enforce the non-compete)
VALID CONTENT (MAXIMUM PERIOD)

- Non-competes for an unlimited period are not permissible.
- The maximum period in Germany is 24 months. As a general rule the maximum in France and Poland is also 24 months.
- UK law is the most restrictive in this respect. As a rule, non-competes covenants are permitted for only 12 months.
VALID CONTENT (SCOPE)

- The covenant must be proportionate and reasonable in terms of...
  - Territory (in general terms: territories where the employer operates)
  - Industry areas (in general terms: activities in the employer’s business area)
  - Prohibited activities (in all jurisdictions: employment and contractual relationships; in some jurisdictions the non-competition obligation can be even broader)
COMPENSATION DURING NON-COMPETE

- Employers must compensate employees for post contractual non-competition; the required compensation is generally 25-50% of the last remuneration
  - In Poland, compensation amounting to 25% of the average salary is required
  - There is no statutory minimum in France; however, 30% of final salary can be considered as a threshold set by courts
  - In Germany, compensation shall be at least 50% of the total remuneration (including even voluntary gratifications) last received by the employee
COMPENSATION DURING NON-COMPETE

- No additional compensation is required in the UK, which could be linked to its more stringent rules regarding the maximum period.

- Consequences of providing no or less than the required compensation:
  - In Poland, the employee must receive the lowest permissible amount, i.e. 25% of the average salary.
  - In Germany, a covenant without compensation is void, while an agreement to provide compensation below the minimum makes the covenant non-binding for the employee. In France, a covenant is void in both cases.
UNILATERAL WAIVERS

- Regulations on unilateral waivers differ significantly in different jurisdictions.

- In the UK, the employer can waive at any time; since the employee is not entitled to any compensation, there is no need to restrict the employer’s rights in this regard.
UNILATERAL WAIVERS

- In France and Poland, the non-compete agreement may include a provision for employer waiver

  If there is such an agreement, a waiver has an effect that all obligations (*i.e.* non-compete *and* compensation obligations) lapse; otherwise, a waiver would affect only the non-compete obligation of the employee

- No agreement is permissible or required in Germany

  The employer can waive, but the effect is that the employee may compete *and* the obligation to pay compensation lapses in 12 months
UNILATERAL WAIVERS

- In France and Germany, immediate termination of the compensation obligation by a waiver declared after the termination of the employment is not permissible.

- In contrast, such a waiver is permissible in Poland if provided for in the non-competition agreement.
ENFORCEMENT

- Information obligations regarding activities during non-compete period
  - In Germany, the employer can ask to be informed by the employee on his professional activities if he has reason to believe that the employee is not complying with his non-compete obligations
- To be able to enforce the non-compete covenant, the employer must comply with its obligations in respect of the covenant
ENFORCEMENT: CONSEQUENCES OF BREACH

- The employer has several tools he can use against an employee in case of breach of the non-compete:
  - Verification that the activity + territory are actually forbidden as per the non-compete covenant
- Injunction
  - The employer has a claim for injunctive relief against the employee in order to have him stop the competing activity (under penalty in France and Germany)
ENFORCEMENT: CONSEQUENCES OF BREACH

- Cessation of non-compete compensation
  - The employer may stop paying the contractual non-compete indemnity further to injunction
- Damages and repayment of the compensation already paid
  - Damages are granted according to the prejudice suffered from the employer
ENFORCEMENT: CONSEQUENCES OF BREACH

- Contractual penalty
  - Except in the UK, non-compete agreements may provide for a penalty to be paid by the employee in case of non-compliance
  - In France, the Labor Courts can modify the contractual penalty, upon request of the employee, if the judges consider that it is too high/ not balanced with the employer’s prejudice
ENFORCEMENT: CONSEQUENCES OF BREACH

- Action against the employer hiring in breach of the non-compete in France
  - Hiring an employee in breach of a non-compete duty constitutes unfair competition
  - Damages
  - Claim for injunctive relief against the new employer, under penalty, to terminate employment contract