Webinar

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

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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