Preliminary remarks

In this questionnaire, “plaintiff” refers to the employer with whom the employee signs the labour contract. “Defendant” refers to the employee who signed the labour contract. Sometimes the new employer can also be a defendant.

The law governing covenants not to compete in labour contracts relates to many areas of the law (such as freedom of occupation, freedom of contracts, etc.) and may be taken into consideration when replying to the questionnaire. This subject also relates to theories of economics and freedom of trade and competition, which can also be taken into account.

1. What clauses, if any, are in your country’s constitution relating to covenants not to compete in labour contracts? Are there clauses relating to the freedom of occupation; protection of property (if so, does this include intellectual property and trade secrets); freedom of contract, etc. If there are such clauses, how are they applied relating to covenants not to compete? Which, if any, of the EU Directives relating to this subject are applied in your country?

The Spanish Constitution, passed on 1978, does not contain any section directly related to non competition covenants in employment contracts. Anyway, there are some sections indirectly related to the subject. The most important Sections are: Section 35.1 (“all Spaniards have the duty to work and the right to work, to the free choice of profession or trade, to advancement through work, and to a sufficient remuneration for the satisfaction of their needs and those of their families. Under no circumstances may they be discriminated on account of their sex.”), and Section 38, which recognizes free enterprise within the framework of a market economy.

Of course, our Constitution recognizes the right of private property under section 33. Section 20 provides the right to literary, artistic, scientific and technical production and creation. This right includes intellectual property rights. There is no applicable section for trade secrets, but the Constitution establishes that freedom of speech and information is limited by professional secrecy. There are no EU Regulations and/or Directives
regarding non competition covenants or statutory employer rights related to the issue under Labor and Employment Law.

2. Is there a statute in your country that governs the enforceability of covenants not to compete? Or, is the law governed solely by case law?

There are many regulations under Commercial Law, protecting the freedom of trade. Nevertheless, the Commercial Law does not provide regulations on Labor and Employment Law. Non competition in private contracts is strongly related to the principle of good faith, regulated into the Spanish Civil Code as well into the Employment Law.

The Labor and Employment Law specific regulation on the matter is contained into the Act num 1/1995, of march, 24th, passing the Workers’ Statute Act (Estatuto de los Trabajadores), but the regulation on the matter has been substantially the same since the first Statute of Workers’ Act passed on 1980. It is one of the most important Labor and Employment Acts in the country. Section 5.a) establishes the obligation of the employee to perform his duties under the organization and management of the employer, according to good faith. Section 5.d) establishes a general clause of non competition, according to what is provided by the Act (see below). Section 20.2 provides that the employment relationship shall be governed by the principle of good faith. According to the Workers’ Statute Act, one of the most important consequences of goof faith regarding the employees’ obligations is that unfair competition is forbidden by Law.

More in concrete, Section 21 regulates the main specific regulations regarding non competition in employment contracts:

1) First of all, a general principle establishing that an employee shall not perform his duties under an employment contract for several employers if this implies unfair competition. This principle, that seems to be limited to employment performed by employee for other employers, shall be extended, according to the good faith principle, to unfair competition activities outside the employment relationship. Therefore, unfair competition obligations apply as well to professional or entrepreneurial activities carried out by the employee [SSTS, Soc. 4-11-1982 (RJ 1982\7283), 2-7-1985 (RJ 1985\3658), 7-3-1990 (RJ 1990\1773)].

Only unfair competition is prohibited. This means that there is the chance that the employee shall fairly compete. Every kind of competition could potentially cause damages to the employee: unfair competition should be only referred to any behavior of the employee that imply competition to the area in which he performs his duties for the employer and that also imply an intention to profit the employer organization of his business by the employee. Causing damages is not always a requirement. A misconduct that potentially would damage the employer interest is also forbidden; showing evidence of the potential damage and of the willful misconduct is sufficient to proof an unfair competition breach of contract.

2) The Workers’ Statute Act regulates three standard covenants related to the non competition principle and that shall permit the employer to cover specific interests of avoiding fair competition –and also, in practice, strengthening unfair competition obligations- caused by the employee. All of those covenants are viewed as exceptions of the free choice of profession, so its interpretation is always strict:

a) a covenant that guarantees that the employee shall work exclusively for the employer who hired him; it always requires specific economic compensation in
favor of the employee. The employee is entitled to quit the covenant by giving 30 days previous notice in written and loosing his right to future economic compensation.

b) post-contractual non-competition agreements in order to protect competition after the termination of the employment contract. Its duration varies depending if the employee is skilled or not. For professionals, the maximum duration is two years; for non-skilled employees, the maximum duration is six months. It requires a specific employer interest in order to avoid competition and a proper economic compensation [a covenant without compensation is void (STS Social, de 10-7- 1991, rec. 1079/1990)]. It is not clear how much a proper or reasonable compensation could be. It seems that the compensation could cover the damages that the non competition agreement could cause to the employee during the time in which the agreement is effective [see STS Social, 2-1-1991, rec. 725/1990]. The Workers’ Statute Act does not regulate the consequences of the breach of the agreement by the employee, but it is clear that once the employer is aware of the misconduct, he can claim damages that shall cover the economic compensation due or paid [STS Social, 7-11-2005, rec. 5211/2004]. It seems to be possible to regulate into the agreement a punitive damages clause. The employer and the employee are not entitled to quit the covenant without agreement of both parties once it has been agreed; even if it is not effective yet [STTS Social, de 2-7-2003, rec. 3805/2002, 21-1-2004, rec.1707/2003; 5-4-2004, rec. 2486/2003]. Under the Workers’ Statute Act is not mandatory to sign the agreement in written, but in practice it is always made in that way.

c) a covenant of stay on the job, that guarantees that the employer shall maintain the employee under the employment contract when he has invested –or wants to invest- on employees’ professional qualifications or he has developed –or wants to develop- specific employee’s skills. The agreement covers deeper interests than those of non competition. It is mandatory that the agreement shall be signed in written and its maximum duration is two years. If the employee terminates the contract without good reason before the signed duration of the covenant, the employer will be entitled to compensation [STS Social 23-7-1990, rec. 201/1990].

If there is a statute, does the statute relate to specific professions or industries?
No in the field of Labor and Employment Law.

3. In general, are covenants not to compete in labour contracts enforceable in your country? Following are some possible answers:

(a) In my country covenants not to compete are not enforceable under any circumstances.

No.

If they are not enforceable, explain the legal and economic basis for this rule.

(b) In my country covenants not to compete are enforceable under certain conditions and to a certain extent.
Yes. As there is a statutory right that prohibits unfair competition of the employee during the life of the employment contract, the agreement is only possible to be effective after termination of the contract. As said above, non competition interests during the contract life can be strengthen through stay on the job agreements and exclusive work for one employer clauses.

(If the answer is yes, there are further questions about the condition required for the covenant to be enforceable.)

4. What are the employer’s protected interests and how are they defined?

According to the statutory right prohibiting unfair competition, the protected interest is the right to free running the business, protecting the employers from employees’ intention to use the employer organization at their own profit.

For post-contractual non competition covenants, the protected interest is the right to run the business without fair competition and to strengthen unfair competition statutory rights after the termination of the contract. (for other kind of agreements, see above, question 2).

What is the public’s interest in enforcing covenants not to compete? Is this a reason for statutes and case law?

Of course, the unfair competition statutory rights in employment contracts relates in a certain way to the free trade, but essentially the public interest is to protect the good faith principle in private contracts as a measure of balancing rights and obligations of the parties. It also gives the chance to the employer to protect his organization from insiders who leave the company looking for better economic conditions offered by a competitor. From the employee’s point of view, it guarantees fair compensation to the employee when he renounces his right to freely choose his profession.

5. If covenants not to compete are enforceable in your country: what must the plaintiff show to prove the existence of an enforceable covenant not to compete?

(a) Is a written contract required?

No for post-contractual non competition covenants, but in practice it is usually in written. Otherwise, showing evidence could be really hard [see SSTS 24-9-1990 (RJ 1990\7042) y 29-10-1990 (RJ 1990\7722)]. For other covenants, see above question 2.

(b) Is a trade secret required to prove the employer’s case? If so, how is a trade secret defined? Does it include customer lists, price lists, systems of work?

There are not specific regulations for trade secrets under Employment Law. Having been effective until 1994, art. 72 of Employment Contract Act of 1944 said that “during the life of the contract and after its termination, the employee shall keep the secrets related to the employer business. After the termination of the employment contract, the employee shall use the secrets for his own profit only if its usage was justified by the development of his profession”. Today, in Employment Law, the obligation of keeping a trade secret is governed by the good faith principle.

(c) Does the employer need to give the employee consideration (in addition to a regular salary) as a condition for the covenant not to compete to be enforceable?

Yes (see above, question 2).
(d) Will geographical factors, time factors and the special characteristics of an industry be considered when deciding whether to enforce a covenant not to compete?

It depends on what parties agreed. It is possible to use these parameters when designing a non-competition post-contractual agreement. Anyway, it should be stressed that its maximum duration is statutorily limited. It is also possible to regulate more specifically into the employment contract what it could be considered unfair competition during the life of the contract, but anyway, it should be according to Law only if what is agreed reflects the unfair competition concept as it was defined in question 2.

(e) Must the covenant not to compete meet a “reasonable test”? If so, who has the burden of proof? How, if at all, does your case law balance between such rights as freedom of contract, property rights and freedom of occupation?

Yes, see answer to question d) above. The burden of proof depends on who is suing. Usually the burden of proof would be in employer hands (for example, if he dismiss the employee for unfair competition reasons or if he claims for damages). Under the Workers’ Statute Act non-competition covenants are seen as a limitation of freedom of profession and as a necessary consequence of the reasonable protection of the trade interests of the employer.

(f) May the new employer be sued for employing an employee who is violating the covenant not to compete in his labour contract with the former employer? If so, in which court? Is this hearing held jointly with the suit against the employee? Note: the new employer has no contract with the former employer and there is no employee-employer relation between them.

Under specific circumstances it is possible to claim for damages under the principle of that anyone who causes damage to others is responsible for the caused damage. Also, in some cases, it could be considered unfair competition under Commercial Law. As it is a suit between two employers (usually companies), civil jurisdiction would be in charge. Civil and Social jurisdictions are separated, so the hearing is not possible to be held jointly.

(g) If the employer terminates the labour contract, is the covenant not to compete enforceable? Does it matter what the reason for the dismissal is?

Yes, it could be enforceable, and if the parties do not regulate it specifically, it should be enforceable. Anyway, its enforceability depends on the content of the covenant and how the parties will is understood by the Judge in charge. The reason of the dismissal is not relevant unless the dismissal intends to break the fair use of the non-competition covenant.

7. If a covenant not to compete is held by a court in your country to be overly broad, will the court modify the covenant? What other flexibility do courts have relating to relief they can grant?

The Court cannot modify the covenant, but if it is broader than what is permitted by Law, the Court could not apply it or part of it to the concrete case. Under Spanish Employment Law there is a strong principle of conservation of what is into the contract. This means that the agreement might be applied in part if a part of it is deemed illegal. Only if the whole agreement is deemed unlawful or the covenant has no sense without the illegal part of the clause, it will be possible to totally avoid it. The Court
shall be able to compensate the parties if there is a breach of the non competition agreement and/or any of the other agreements, in the terms mentioned above, in question 2.

8. Do the courts issue preliminary (temporary) injunctions for violation of covenants not to compete in labour contracts?
   No.

9. What are the remedies which courts can and do grant when an employee has violated his/her covenant not to compete?
   See answers to question 7 and question 2.

10. Which court(s) in your country have jurisdiction over legal matters relating to covenants not to compete in labour contracts? (Labour Courts; Civil or Commercial Courts; Administrative Law Courts; Constitutional Court, etc.).
    Labour Courts are the only jurisdiction in charge. There will be a very narrow chance that the Constitutional Court could have jurisdiction if freedom of speech or freedom of information is affected.

11. Are there any leading or illustrative judgments that you would like to describe relating to covenants not to compete in labour contracts?
    See above.

Do you have any additional remarks on this subject?