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**BELGIUM**

# Non-competition clauses in labour contracts

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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?

Belgian law is governed by the principles of freedom of occupation, freedom of trade and industry, and freedom of competition.

Having left his employer, the worker is in principle free to exercise the occupation of his choice, even if it competes with the former one.

Without prejudice to the honest execution of contracts (article 1134, third paragraph, of the Civil Code), which is the corollary of the principle of the autonomy of the will, to the general obligation for cautiousness, to be observed by everyone (articles 1382 and 1383 of the Civil Code) and to the observation of specific legislation such as article 309 of the Penal Code, which imposes penalties for the malevolent or fraudulent revelation of manufacturing secrets, the freedom of the worker is however restricted by some articles of the act of 3 July 1978 respecting contracts of employment.

On one hand, article 17, 3°, b) of this act compels the worker to refrain, both during the contract and after its termination, from engaging or co-operating in any form of disloyal competition. This is the entrance into the matter of contracts of employment which is used by the act of 14 July 1991 regarding trade practices and consumer information and protection.

On the other hand, the same act rules precisely the covenant not to compete, which can be agreed on by the employer and the worker during their employment relationship and which forbids the worker, after termination of the contract of employment, to engage in loyal competition.

The Court of Cassation decided that the principle of the worker's freedom does not forbid the legislator to regulate this freedom and, if necessary, to restrict it by e.g. the covenant not to compete. With regards to this covenant, the Court observed that the legislator, by adopting these articles of the act of 3 July 1978, has preferred to substitute the autonomy of the will, even under control of the judge, by a legal regulation in order to reinforce employment protection with more safeguards (Cass., 30 June 2003, Pasicrisie, 2003, nr. 387, with conclusions of advocate-general Jean-François Leclercq, and 2 May 1988, ibid., 1988, I, nr. 530).

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?

   If there is a statute, does the statute relate to specific professions or industries?

   The covenant not to compete concerning the blue-collar worker is governed by article 65 of the act of 3 July 1978, and by article 86 of this act, concerning the employee, and by the articles 104 to 106 of this same act, concerning the commercial traveller.

   These articles are enclosed.

   After termination of the contract of employment, the parties can still agree on a covenant not to compete, in which case it is no longer governed by this regulation but solely by the autonomy of the will.

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.

   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.

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

   By virtue of the principle contained in article 1134, first paragraph, of the Civil Code, a covenant not to compete which is agreed on according to the abovementioned articles of the act of 3 July 1978, has force of law between the parties.

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

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

   The covenant not to compete is legally defined by three essential characteristics:

   a) By agreeing, the worker promises, on his departure from the undertaking, not to engage in <u>similar activities</u>, either by running his own undertaking or by entering the service of a competitor;

b) By engaging in competitive activities, the worker must be able to harm the undertaking that he has left, and

c) He needs to have acquired special industrial or commercial knowledge which may harm the undertaking when put into practice.

These characteristics allow to define the employer's interests which are protected by the covenant not to compete.

Whereas this covenant mainly aims at protecting the employer's interests, the conditions of validity have been established in favour of the worker solely, as the covenant restricts his freedom (Cass., 30 June 2003, above).

The Court of Cassation decided that the legislator has not intended to make the legislation ruling the covenant not to compete of public order, with the result that a covenant which does not meet the legal conditions, is not absolutely void. These provisions are imperative and cause relative voidability, which may be invoked by the protected party (Cass., 30 June 2003 et 2 May 1988, abovementioned).

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?

On penalty of voidness, the covenant not to compete must be set down in writing. It can be drawn up at any moment: during the conclusion of a contract of employment, during its execution or on termination.

Even if this covenant is included in a collective labour agreement, it only binds the worker when stated in the individual contract (Cl. Wantiez, La clause de non-concurrence dans le contrat de travail, Bruxelles, Larcier, 2nd ed., 2001, n° 30).

(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?

As stated above, the worker must have acquired <u>special</u> industrial or commercial knowledge about the undertaking.

The covenant may be imposed on workers with financial or administrative tasks, who may possess special knowledge about the undertaking concerning its industrial or commercial activity (knowledge of cost price structures or particular IT systems, knowledge of special legal problems, etc.) (Cl. Wantiez, op. cit., n° 9).

(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?

The covenant must provide for a single lump sum compensation to be paid by the employer, unless he agrees, within fifteen days after the termination of the contract, to forgo the effective application of the covenant.

This compensation shall at least be equal to half the worker's gross remuneration for the period for which the covenant effectively applies.

(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?

The covenant must in geographical terms be limited to the places where the worker may effectively compete with his employer, given the nature of the undertaking and its area of business. It shall not extend outside Belgian territory. A covenant which does not precise its geographical extension, is therefore void.

The validity of the covenant shall not exceed twelve months, reckoned from the date on which the employment relationship ceased.

Regarding contracts of employment, an exception to the two abovementioned conditions may be made when the undertaking either has its own research service or has an international business or major economic, technical or financial interests on the international market. The exception, subject to the procedures and conditions to be fixed by agreement reached within the National Labour Council, may apply to employees engaged in work enabling them, either directly or indirectly, to become acquainted with the special practices followed by the undertaking and whose use outside the undertaking could be detrimental to its interests. In such cases, contrary to common law [infra, g)], the covenant may be provided to take effect even if the contract is terminated either during the trial period or thereafter by the employer without a serious reason.

(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?

Most conditions to be met by the covenant not to compete, must be evaluated by the judge.

Moreover, the covenant is deemed to be void if the annual remuneration does not exceed a certain amount which, on 1 January 2005, was equivalent to 26 912 euro.

When the annual remuneration does not exceed an amount which on 1 January 2005 was equivalent to 53 825 euro, the covenant can only be applied to certain duties or classes of duties that, as a rule, have been specified by a collective labour agreement concluded by a joint committee or subcommittee.

These articles must ensure the reasonable character of the covenant.

(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.

When the worker fails to observe the covenant not to compete, he shall reimburse his employer for any amount that the latter may have paid [supra, c)] and shall moreover pay him an equivalent amount. If the worker so requests, the judge may reduce the amount of compensation fixed by agreement, for which purpose he shall take account, inter alia, of the prejudice sustained and of the period for which the clause has been effectively observed. The judge may also award a higher amount by way of compensation if evidence is produced by the employer to show the existence and extent of the prejudice sustained.

According to doctrine, the employer is not authorised to ask the judge to forbid the worker to take up employment with a competitor and, even less, to act against the latter (Cl. Wantiez, op. cit., n° 104). This issue has not yet been decided by jurisprudence.

It would only be different if the non-observation of the covenant not to compete was deemed to be an act of disloyal competition. The former employer could in such case petition the president of the labour court, on the basis of article 17, 3°, b), of the act of 3 July 1978 (supra, n° 1) and article 584 of the Judicial Code, for an interdict against the worker and moreover pursue the cessation of the illegal deed on the basis of article 93 of the act of 14 July 1991 regarding trade practices and consumer information and protection.

(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?

Apart from what has been said regarding a possible exception [supra, d)], the covenant not to compete shall have no effect if the contract is terminated either during the trial period or thereafter by the employer without a serious reason or by the worker for a serious reason.

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?

See preceding number, sub f).

8. Do the courts issue preliminary (temporary) injunctions for violation of covenants not to compete in labour contracts?

See number 6, sub f).

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

See number 6, sub f).

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.).

The labour courts have jurisdiction over disputes between employers and workers relating to covenants not to compete.

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

Do you have any additional remarks on this subject?

ANNEX

ACT RESPECTING CONTRACTS OF EMPLOYMENT

3 JULY 1978

65 §1. The expression `non competition clause' means a clause whereby a Blue-Collar worker promises. on his departure from an undertaking, not to engage in similar activities either by running his own undertaking or by entering the service of a competitor, with the consequent possibility of harming the undertaking he has left by using, either on his own behalf or that of a competitor, the special industrial or commercial knowledge he has acquired with the initial undertaking.

§2. Any non-competition chasse in a contract of employment for which the annual remuneration does not exceed 650,000 francs shall be deemed void.

Where the annual remuneration is between 650,000 and 1,300,000 francs, the clause shall apply only to certain duties or classes of duties that have been specified by a collective bargaining agreement concluded by a joint committee or subcommittee. In the absence of any such, agreement, either because no committee or subcommittee is in operation or because an existing committee or subcommittee has been unable to reach agreement, and after the established conciliation procedure bas been of no avail, the duties or classes of duties may be specified at the level of the undertaking, if either of the parties so requests, by means of an agreement reached between the, employer and the organisations representing the workers.

Where disagreement persists between the employer and the organisations representing the workers, either of the parties may request an opinion from the mediation committee set up by the collective labour agreement of 12 February 1970 in connection with exceptions to the non-competition clause.

Where the annual remuneration is over 1,300,000 francs, a non-competition clause may be validly included in the contract of employment, unless it relates to duties or classes of duties excluded by collective bargaining agreement concluded by a joint committee or subcommittee. In the absence of an agreement concluded by a committee or subcommittee; and after the established conciliation procedure has been of no avail, such duties or classes of duties may be specified at the level of the undertaking in accordance with the procedure laid down in the second and third paragraphs of.§2.of this section.

To be valid a non-competition clause must: also fulfil the following conditions:

1. It must relate to similar activities;
2. It must he limited in geographical terms, to the places where the blue-collar workers may effectively compete, with his employer, given the nature of the undertaking and its area of business. It shall not in any circumstances extend outside Belgian territory;
3. It must not be valid for more than 12 months, reckoned front the date on which the employment relationship ceased
4. It must provide for the payment of a lump-sum compensation by the employer unless he agrees, within 15.days after the termination of the contract, to forgo the effective application of the non-competition clause. The minimum amount payable by way of compensation shall be equal to half the Blue-Collar worker's gross remuneration for the period for which the clause effectively applies. The amount shall be based on the Blue-Collar workers gross remuneration over the month preceding the date of termination of his contract.

In the case of Blue-Collar workers whose remuneration is liable to vary, either wholly or in part, the amount shall be calculated, for the purposes of the variable part, on the basis of the average gross remuneration for the 12 months preceding the date of termination of the contract. .

To be valid the clause must be set down in writing in a document specifying the procedures for applying the conditions indicated above. Bach joint committee or subcommittee may define such procedures in the light of the conditions obtaining in its: sector of activity.

A clause complying with the provisions of this section shall be without effect if the contract is terminated cither during the trial period or thereafter by the employer without a serious reason or by the Blue.-Collar worker for a serious reason.

Where a Blue-Collar worker fair to observe the non-competition clause, he shall reimburse his employer for any amount that the latter may have paid in accordance with the principle laid down in clause 4 of the fifth paragraph of §2 of this section and shall also pay him an equivalent amount. If the Blue-Collar worker so requests, however, a judge may reduce the amount of compensation fixed by agreement, for which purpose he shall take account, inter alia, of the prejudice sustained and of the period for which the clause has been effectively observed. 1f the employer so 'requests, the judge may also award a higher amount by way of compensation if evidence is produced to show the existence and extent of the prejudice sustained.

86. §1. The provisions of section 65 shall apply to white-collar worker' con-tracts of employment

§2. In the case of the undertakings and white-collar workers referred to hereinafter, exceptions may be made, subject. to certain: procedures and conditions to be fixed by agreement reached within the National Labour Council, to the provisions of clauses (2) and (3) of the fifth paragraph, of §2 of section 65 and to the provisions of the ninth paragraph of §2 of that section, in so far as they provide for the clause not to take effect if the contract is terminated cither during the trial period or thereafter by the employer without a serious reason. Any such exception shall entitle the white-collar worker to the payment of compensation by his employer, unless the latter agrees to forgo the effective application of the radius clause.

Such exceptions may be made in the case of undertakings fulfilling either or both of the following conditions:

a) that their business is international in scope or that they have major economic, technical or financial interests on the international market;

b) that they have their own research service.

Within such undertakings the exceptions may apply to salaried) employees engaged in work enabling them, either directly or indirectly, to become acquainted with the special practices followed by the undertaking and whose use outside the undertaking could be detrimental to its interests.

104. Any non-competition clause in a contract where the annual remuneration dues not exceed 650,000 francs sha11 be deemed to he void.

In contracts where the annual remuneration is over this amount, the validity of a non-competition clause shall be subject to the triple condition that it relates to similar activities, that it does not exceed 12 months and that it is limited to the area in which the commercial traveller works.

A non-competition clause shall be without effect if the contract is terminated either during the trial period or subsequently by the employer without a serious reason or by the commercial traveller for a serious reason.

To be valid a non-competition clause must be set down in writing.

105. The inclusion of a non-competition clause shah afford grounds for assuming that the commercial traveller has brought custom with him; the employer may where appropriate, submit proof to the contrary.

106. The lump-sum compensation provided for in the contract for violation of the non-competition clause shah not exceed an amount equal to three months remuneration:

Provided that the employer 'may' claim higher compensation if he can establish the existence and extent the prejudice he has sustained.