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NETHERLANDS

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?

   Article 19 of the Dutch Constitution recognizes the right of every Dutch citizen to free choice of labour, subject to the restrictions under law. In the explanation to this article it has been made clear that measures which restrict the right to free choice of labour shall be realized by means of legislation, exercising utmost care. The non-competition clause as regulated by the Civil Code is considered to constitute no violation of article 19 of the Dutch Constitution, although it may restrict the right of free choice of labour.

   In July 1981 the Netherlands implemented Council Directive 77/187/EEC on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses; the revised version of the Directive (2001/23) has been implemented as well. The transfer of undertakings is currently regulated in articles 662–666 of the Dutch Civil Code. The Supreme Court decided in the ruling Ibes/Atmos that in the event of a transfer of undertaking, in addition to the safeguarding of the employee's rights, the non-competition clause will bind the transferee ipso jure (HR 23 October 1987, NJ 1988/235, Ibes/Atmos).

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?

   Article 653 of the Dutch Civil Code provides the possibility of a stipulation between the employer and the employee whereby the latter is restricted in his right to work in a given way after the end of the contract. Such a clause is valid only if the employer has so agreed in writing with an adult employee.

   However section 2 provides the possibility for the court to set aside all or part of such a stipulation on the ground that the employee is unfairly prejudiced by the stipulation having regard to the interest of the employer intended to be protected.

   Article 7 of the Copyright Act and article 12 of the Patents Act 1995 provide in addition to article 653 of the Dutch Civil Code tools to protect the employer's interests in the context of intellectual property rights. Furthermore the employer has the action arising from a wrongful or unlawful act in case of unlawful competition. Finally the employer's interests are protected with a confidentiality clause. All abovementioned rights can be exercised in addition to the non-competition clause.

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

   No.

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.)

   See the answer under 2.

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

   There is no specification of the employer's interests in the law.

   The interests of the employer are mainly related to: retaining the knowledge and skills of his employees within his enterprise; retaining the goodwill and customers for his enterprise.

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

   The public interest plays no explicit role.

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?

   Yes.

   (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?

No.

(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 law requires no compensation to be paid, but the Court can award a compensation to be paid by the employer, if the opportunities for the employee to find other work are too restricted (restricted "to an important degree").

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?

Yes; the Court can mitigate these factors or even annul the non-competition clause on grounds that the interests of the employee are overly offended in comparison to the interests of the employer.

(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?

See the answers under c) and d).

In principle it is for the plaintiff to provide evidence of the facts in which his claims are based, but the Court will lay the burden of proof on the defendant (employer) in so far as the facts lay within his domain (for example, economic data concerning the enterprise).

(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.

This may constitute a tort, for which the new employer can be sued in an ordinary court.

(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?

The covenant remains enforceable, unless the employer violates certain rules for dismissal (for example the notification period).

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 the answers under 5 (c) and (d).

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

Yes, they do.

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

The Court can (and in principle will) decide that the employee must pay the fine as mentioned in the non-competition clause. The Court can mitigate the amount of the fine.

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 Kantonrechter (unus chamber of the ordinary Court) is competent in all disputes related to an employment contract, including disputes about non-competition.

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

    The Supreme Court of the Netherlands has interpreted and given meaning to the non-competition clause in the following judgments:

    The Supreme Court decided in the ruling Brabant/van Uffelen (HR 9 March 1979, NJ 1979, 467) that the employer is obligated to readopt the non-competition clause – set out in writing – in the event that the non-competition clause will put significant pressure on the employee due to a drastic change in the working relationship. If the employer fails to do so, the non-competition clause is no longer valid. In the explanation to the ruling, the Supreme Court made it clear that the employee shall have the guarantee of the requirement to set the non-competition clause out in writing, especially since he/she shall have the opportunity to reconsider the onerous clause. Alteration of the status under employment law, alteration of the legal status, alteration of the social assessment and alteration of the content of duties are therefore considered decisive according to the Supreme Court. However, these elements should be put in perspective, since the reassignment of responsibilities and, to an increasing degree, the fulfillment of an executive position is insufficient in the application of the Brabant/van Uffelen criterion.

    In the judgment of TPTS/Visser (HR 5 December 1997, JAR 1998/17) the Supreme Court decided that in the event of a wrongful dismissal – which implicates that the employer can no longer derive rights from the non-competition clause – this does not imply that the employer has no action arising from a wrongful or unlawful act. As a result, in the event of a wrongful or unlawful act the judge can forbid competition although the employer has not adopted a non-competition clause or can no longer derive rights from it.

    The Supreme Court decided in the ruling Ibes/Atmos that in the event of a transfer of undertaking, in addition to the safeguarding of employee's rights, the non-competition clause will bind the transferee ipso jure (HR 23 October 1987, NJ 1988/235).

    Do you have any additional remarks on this subject?

    The Government has proposed an amendment to article 7:653 of the Civil Code concerning the non-competition clause. According to this proposal, a competition clause will not be valid if it does not contain an exact description of the prohibited activities of the employee. Also, the employer will always have to pay compensation. The proposal will probably not be adopted in its present form. It has suffered severe criticism, inter alia because its wording may give rise to the conclusion that it is applicable to temporary work agencies (although this was not the intention of the Government).