

Global Workplace Law & Policy

Non-compete clauses and worker mobility in the EU

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Labour shortage

Labour markets across Europe have become tight quite quickly after the pandemic with unemployment rates at record-low levels. Eurozone businesses are confronted with unprecedented and widespread shortages of workers. According to the classical economic theory, in tight labour markets, workers gain bargaining power. However, wages have been stagnating for many decades now. Moreover, with the high inflation, we are constantly warned of the dangers of a wage-price spiral. In other words, workers are not benefitting from the labour shortage.

In tight labour markets, workers are also more likely to switch for better job opportunities. Millions of Americans left their jobs during the pandemic, a trend called ‘the great resignation’, and there is a smaller, but notable trend in Europe as well to reconsider one’s job. Mobility on the labour market is not only to the benefit of workers, it can also benefit the economy in terms of productivity and innovation.

Mobility constraints

However, it is not easy for everyone to change their job, let alone quit. There can exist all kinds of labour market and financial constraints. For example, employees who hold office jobs will often be able to search for other jobs during the workday, while workers who are actively engaged in a task – like child care workers – have less such possibilities. Some of the constraints have a direct legal footing in labour and social security law. An employee who terminates her employment contract without the consent of the employer will probably be refused unemployment benefits. In the Netherlands, for example, such a person has become ‘culpably unemployed’. This employee will most likely also lose the right to severance payment. These important financial claims can only be retained if the employee had very good reasons to unilaterally terminate the contract. In the Netherlands, the employee only has ‘good reasons to quit’ when the employer has behaved with ‘serious misconduct’ or culpability. Currently, there is very little insight into what is considered to be a good reason for an employee to quit her job, since (comparative) research on this topic is scarce.

Contractual constraints

Another type of constraint on worker mobility can be found in different forms of clauses or provisions in employment agreements that hinder employee efforts to change jobs. These clauses are usually detrimental to the employee, since they only serve the interests of the employer. That is why they are usually regulated by national (labour) laws, but certainly not always and not in a consistent manner.

For example, the employee can be bound by the employment contract to repay training costs in case she terminates her employment contract within a certain timeframe after finishing or being engaged in a training course paid by the employer. This – in some countries rather standard – clause can discourage the employee from changing jobs, especially if the training costs are high. Any regulation of such clauses will probably boil down to the need for the clause to be proportionate to the interests of the employer^[1] and the freedom of the employee to choose an occupation. Some countries, like France and Netherlands, only have principles developed through case law. The exact rules (e.g. on the retention period, the type of training, the way of termination of employment) vary greatly across countries. Questions such as how such contractual mobility barriers relate to the lifelong learning policies, are still open.

Non-compete clauses

However, there are more evident – and perhaps better-known – examples of contractual worker-mobility constraints, and they are the non-compete clauses (also called covenants not to compete). Non-compete clauses prohibit the employee from moving to jobs at competitor firms for a specific period of time after the employment has ended. The rationale for non-compete clauses is similar to repayment-clauses: they are there to protect specific investment in the employment relationship by the employer. In addition, non-compete clauses traditionally aim to protect trade secrets.

Non-compete clauses are widespread. It is not only high-paid employees who might be bound by non-compete clauses. More and more evidence is emerging of non-compete clauses being used in employment contracts for low-wage workers as well. In the Netherlands, for example, the non-compete clause has become a standard clause in the employment contract where one in three employers uses a non-compete clause.^[2] Between 28% and 47% of US private-sector workers are

subject to non-compete clauses.[3] They are frequently used in many countries even when the employee has no access to the employers' trade secrets or other intangible assets.

Labour market monopsony

There is some evidence that supports the view that non-compete clauses have a positive impact on employers' investment in employees.[4] However, they obviously limit labour market mobility and workers' freedom to choose an occupation. There is a recent strand of (economic) research that links the prevalence of non-compete clauses in employment agreements and non-poaching agreements between firms to labour market monopsony. Monopsony power exists when there are too few employers in a certain sector or occupation; this is sometimes referred to as a concentrated market. Monopsony power gives the employers the ability to keep the wages lower than they would have been in a competitive labour market. However, employers can have monopsony power even if markets are not concentrated. The co-recipient of the Nobel Prize in Economics for 2021, David Card, recently pointed to the prevalence of non-compete agreements as a cause for monopsony power.[5] The newest [OECD Employment Outlook](#) also mentions non-compete clauses as the main example of ways in which employers can limit workers' ability to look for alternative jobs, thereby increasing their monopsony power.[6] The [OECD Employment Outlook 2022](#) shows that monopsony power is in fact pervasive and substantial in OECD economies. In addition, some economist believe non-compete clauses may depress wages as well.[7]

Regulation of non-compete clauses

The legal frameworks of non-compete agreements vary greatly around the globe and within Europe as well.[8] There are countries with elaborate and clear statutory provisions on the admissibility of non-compete clauses; there are countries with only some general principles (further) developed through case law; and there are countries with a ban on non-compete clauses (with some exceptions aside). Non-compete agreements are generally a source of labour court cases, since the enforceability often depends on the circumstances of the individual case.

Despite a clear element of restraint of (cross-border) trade, the EU has made no attempt at harmonizing the national laws.[9] The result is that in some EU Member States it is much easier (and cheaper) for businesses to impose non-compete agreements on employees than in others. There is no level playing field for businesses in the EU in this area. In the Netherlands, for example, the only statutory requirement for non-compete clauses are formal: the clause needs to be in writing and signed by an adult employee.[10] Unreasonable non-compete clauses can be partly or entirely nullified by the court, but this requires (costly) litigation by employees. The result of a court case is usually hard to predict, since it depends on the circumstances of the case (and perhaps sometimes on the judge as well) whether or not the non-compete clause is found reasonable. In the best scenario for the worker, the clause is declared void by the court, but with no compensation for the worker for being bound to an excessive or unjustified non-compete clause. Compared to, for example, Germany or Belgium where financial compensation for the worker is required in order for the clause to be enforceable, the legal position of the worker in the Netherlands is much worse.

Missed chance for EU to create a level-playing field

The absence of EU involvement is notable.[11] Especially when we take into account that the EU has indeed taken some steps to unify the laws on non-compete clauses in a few specific areas.[12]

The [Directive 2008/104/EC on temporary agency work](#) is particularly important, since it requires from the Member States to ensure that any clauses prohibiting or having the effect of preventing the conclusion of an employment relationship between the user undertaking and the temporary agency worker after his assignment are null and void (Article 6 (2)). Furthermore, [Directive \(EU\) 2019/1152 on transparent and predictable working conditions](#) regulates the competition of employees working multiple jobs (i.e., parallel employment, Art. 9), explicitly aiming to diminish the employers' possibility of prohibiting workers to work for other employers *during* employment. Regulating (possible) competition *after* employment is, of course, a small step from there, but this step was not taken.

It would have been consistent to include the regulation of non-compete clauses in the Directive 2019/1152. It is hard to understand why parallel employment should be regulated, but not job-to-job transitions. In the Impact Assessment of Directive 2019/1152 the EU Commission departments reveal that the regulation of non-compete clauses was in fact proposed and discussed in the preparation of Directive 2019/1152.[13] The document does not explain why this idea was abandoned.

We know it is very hard to reach consensus on new directives in the social policy domain. However, a separate directive on non-compete clauses would in my opinion be viable. It would be a way to create a level-playing field for companies in the EU on the one hand and on the other hand a way to offer better protection for employees as weaker parties to employment contracts and in this way to enhance labour market mobility in EU-countries. There are indications that employers abuse non-compete agreements when it is easy for them to conclude such agreements. They use them, for example, to retain the workers[14] even when they do not possess any competitive information. It is perfectly normal that employees gain experience and skills during their employment, however their skills and expertise are their own. Furthermore, the [freedom to choose an occupation and the right to engage in work are fundamental rights](#). When employees *do* disclose trade secrets or compete with their former employer in another wrongful way, then they can be held liable (in court) for performing a wrongful act. In addition, there already exists the [EU Directive 2016/943](#) on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure.

Ban non-compete clauses or, at least, prevent abuse

Therefore, a progressive stance of the EU would be to ban non-compete clauses or at least to establish a legal framework for the use of non-compete clauses, which takes employees' freedom to choose employment as the starting point and prevents abuse of non-compete clauses.[15] In addition, it would be particularly important to exonerate workers below a specified earnings threshold, like it has been done in a number of US states and EU Member States.

References

[1] Legitimate interests of the employers would be to benefit of training being put into practice in their workplace.

[2] Pantea research report, *De werking van het concurrentiebeding*, Zoetermeer 2021: <https://www.rijksoverheid.nl/documenten/rapporten/2021/06/25/eindrappport-onderzoek-werking-van-het-concurrentiebeding-panteia>.

[3] A. Colvin and H. Shierholz (2019), Noncompete agreements: Ubiquitous, harmful to wages and to competition, and part of a growing trend of employers requiring workers to sign away their rights, Economic Policy Institute, <https://www.epi.org/publication/noncompete-agreements/>.

[4] E.g. E. Starr, ‘Consider This: Training, Wages, and the Enforceability of Covenants Not to Compete’, *Industrial and Labor Relations Review*, 2019 Vol. 72 No. 4, p. 783–817.

[5] D. Card, ‘Who set your wage?’, *American Economic Review* 2022, Vol. 112 No. 4, p. 1084.

[6] Also see N. Balasubramanian et al, ‘Locked In? The Enforceability of Covenants Not to Compete and the Careers of High-Tech Workers’, *Journal of Human Resources*, Vol. 57, Supplement 2022, p.349-396.

[7] OECD, Competition in Labour Markets, 2020, p. 31, <http://www.oecd.org/daf/competition/competition-concerns-in-labour-markets.htm>.

[8] See for a short overview of different countries: http://yust.ru/upload/iblock/4a5/meritas-guide-to-employee-non_compete-agreements-in-emea-2017.pdf.

[9] It is important to highlight that only agreements between undertakings fall within the scope of Article 101 (1) TFEU.

[10] For fixed-term contracts the employer needs to include specific and detailed written reasons as to why the provision is necessary ‘due to compelling business or service interests’. See Art. 7:653 (2) Dutch Civil Code.

[11] In 2003 the European Commission declared it had no plans to make proposals for legislation in this respect, see Mario Monti, Answer to a written question – Non-competition agreements and freedom of movement – E-1637/2002, p. 75, OJ C 92 E, European Parliament, 2003.

[12] E.g. Article 20 of the Directive 86/653/EEC, on the coordination of the laws of the Member states relating to self-employed commercial agents.

[13] Impact Assessment accompanying the document “Proposal for a Directive of the European Parliament and of the Council on transparent and predictable working conditions in the European Union”, Brussels 2017, SWD(2017) 478 fin., p. 14-15.

[14] E.g., Supreme Court of the Netherlands, 17 June 2022, ECLI:NL:HR:2022:894.

[15] In the OECD Employment Outlook 2022 it is proposed to establish a rebuttable presumption of abusive use of non-compete clauses. See OECD Employment Outlook 2022: Building Back More Inclusive Labour Markets, Par. 3.4; https://www.oecd-ilibrary.org/sites/1bb305a6-en/1/3/3/index.html?itemId=/content/publication/1bb305a6-en&_csp_=296f5ed49e92996368e2944737646de3&itemIGO=oecd&itemContentType=book#section-d1e16068

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