Post contractual non-competition clauses

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• **Article 20**
  – Definition of the post-contractual non-competition clause, therein named “restraint of trade clause”
  – Enumeration of requirements/conditions to be met
“For the purposes of this Directive, an agreement restricting the business activities of a commercial agent following termination of the agency contract is hereinafter referred to as a restraint of trade clause.”
a) It must be concluded **in writing**;
b) it must relate to:
   • the **geographical area** or the **group of customers and the geographical area** entrusted to the commercial agent; AND
   • to the **kind of goods** covered by his agency under the contract;
c) It shall be valid for no more than **two years** after termination of the agency contract.
Autonomy of the Member States in transposing the Directive (art. 20.4)

National law may freely regulate the post-contractual non-competition clause:

- By imposing **further restrictions** on the validity or enforceability of the clause;
- By **enabling the courts to reduce** the obligations on the parties resulting from such an agreement.
Post-contractual non-competition clauses are invalid / not allowed.
Requirements:

- **Validity period**: six months
- “Same kind of goods” is replaced by “same kind of activities”
- **presumptions** attached to presence of clause:
  - contribution of clients by the commercial agent
  - obtainment of substantial gains by the principal
- A clause that does not comply: will be declared null and void and the court may not alter it.
- The clause has no effect when the **principal** terminates the contract granting to the agent the period of notice or the **agent** terminates the contract referring to a substantial breach by the principal or the occurrence of exceptional circumstances.
<table>
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<tr>
<th>Country</th>
<th>Condition</th>
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<tbody>
<tr>
<td><strong>Croatia</strong></td>
<td>Provided if the contract is terminated for reasons attributable to the principal</td>
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<td><strong>Germany</strong></td>
<td>The court decides what amount is reasonable as compensation case by case</td>
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<tr>
<td><strong>Italy</strong></td>
<td>Provided unless the principal waives his right to request the agent to observe the clause</td>
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| **Poland**  | Provided if:  
|             | • the parties did not agree otherwise  
|             | • the termination of the contract is not due to the agent                   |
| **Portugal**| Provided                                                                  |
Member States providing minor deviations from the Directive (some examples)

• **Denmark**

A non-competition clause may be held invalid if and to the extent the committed party will be *unreasonably* restricted in the exercise of his profession and/or the restriction *goes beyond* what is required to protect the beneficiary from compensation.

• **France**

The limitation (in time, area, product) must be in connection with the *interest of the principal*. Excessive restrictive clauses may not be tempered by the court, but will be invalidated.
Member States providing minor deviations from the Directive (some examples)

- The Netherlands
  - The court *can limit* the duration and/or scope of the clause if the commercial agent is deemed to be *unreasonably restricted* in comparison to the interests of the principal
  - The principal *cannot invoke* a non-competition clause if (a) the principal has terminated the agreement irregularly or (b) the agent has terminated the agreement as a result of an urgent valid reason for which the principal is to blame or (c) the agreement is terminated by means of a Court order on the basis of circumstances attributable to the principal.
Member States providing minor deviations from the Directive (some examples)

- **Spain**
  When the contract lasts for less than two years the duration of the clause cannot exceed 1 year (instead of two)

- **United Kingdom**
  Restriction will only be enforceable if it is only so wide as necessary to protect the principal’s legitimate business interests. Otherwise it should be declared void.

  In practice: clause generally does not exceed 1 year (often less). Clauses usually drafted in many different separate categories so that if one clause is void, the rest should remain enforceable.
An interesting case outside the EU: Switzerland

- **Requirements**:
  - *in writing*
  - agent acquired *information* about principal's customer list or manufacturing or business secrets
  - the use of it could inflict substantial *damage*
  - prohibition *limited in terms of place, time and subject*
  - limited to the principal's field of business and the agent’s current sales territory
  - may exceed *3 years* under special circumstances

- **Compensation** : agent has *inalienable right to adequate special compensation* upon termination of the contract