



International Distribution Institute

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***

Definition (art. 20.1)

“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.”

Requirements (art. 20.2 and 20.3)

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.*



Austria

*Post-contractual non-competition clauses are **invalid / not**
allowed.*

Belgium

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.*



Special indemnity related to the presence of the clause

	INDEMNITY
<u>Croatia</u>	<i>Provided if the contract is terminated for reasons attributable to the principal</i>
<u>Germany</u>	<i>The court decides what amount is reasonable as compensation case by case</i>
<u>Italy</u>	<i>Provided unless the principal waives his right to request the agent to observe the clause</i>
<u>Poland</u>	<i>Provided if:</i> <ul style="list-style-type: none"><i>• the parties did not agree otherwise</i><i>• the termination of the contract is not due to the agent</i>
<u>Portugal</u>	<i>Provided</i>

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



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