

# INTERNATIONAL JOURNAL FOR LEGAL RESEARCH AND ANALYSIS



Open Access, Refereed Journal Multi-Disciplinary  
Peer Reviewed

[www.ijlra.com](http://www.ijlra.com)

## **DISCLAIMER**

No part of this publication may be reproduced or copied in any form by any means without prior written permission of Managing Editor of IJLRA. The views expressed in this publication are purely personal opinions of the authors and do not reflect the views of the Editorial Team of IJLRA.

Though every effort has been made to ensure that the information in Volume II Issue 7 is accurate and appropriately cited/referenced, neither the Editorial Board nor IJLRA shall be held liable or responsible in any manner what sever for any consequences for any action taken by anyone on the basis of information in the Journal.

Copyright © International Journal for Legal Research & Analysis

## EDITORIALTEAM

### EDITORS

#### **Dr. Samrat Datta**

*Dr. Samrat Datta Seedling School of Law and Governance, Jaipur National University, Jaipur. Dr. Samrat Datta is currently associated with Seedling School of Law and Governance, Jaipur National University, Jaipur. Dr. Datta has completed his graduation i.e., B.A.LL.B. from Law College Dehradun, Hemvati Nandan Bahuguna Garhwal University, Srinagar, Uttarakhand. He is an alumnus of KIIT University, Bhubaneswar where he pursued his post-graduation (LL.M.) in Criminal Law and subsequently completed his Ph.D. in Police Law and Information Technology from the Pacific Academy of Higher Education and Research University, Udaipur in 2020. His area of interest and research is Criminal and Police Law. Dr. Datta has a teaching experience of 7 years in various law schools across North India and has held administrative positions like Academic Coordinator, Centre Superintendent for Examinations, Deputy Controller of Examinations, Member of the Proctorial Board*



#### **Dr. Namita Jain**



*Head & Associate Professor*

*School of Law, JECRC University, Jaipur Ph.D. (Commercial Law) LL.M., UGC-NET Post Graduation Diploma in Taxation law and Practice, Bachelor of Commerce.*

*Teaching Experience: 12 years, AWARDS AND RECOGNITION of Dr. Namita Jain are - ICF Global Excellence Award 2020 in the category of educationalist by I Can Foundation, India. India Women Empowerment Award in the category of "Emerging Excellence in Academics by Prime Time & Utkrish Bharat Foundation, New Delhi. (2020). Conferred in FL Book of Top 21 Record Holders in the category of education by Fashion Lifestyle Magazine, New Delhi. (2020). Certificate of Appreciation for organizing and managing the Professional Development Training Program on IPR in Collaboration with Trade Innovations Services, Jaipur on March 14th, 2019*

## Mrs.S.Kalpna

Assistant professor of Law

*Mrs.S.Kalpna, presently Assistant professor of Law, VelTech Rangarajan Dr.Sagunthala R & D Institute of Science and Technology, Avadi. Formerly Assistant professor of Law,Vels University in the year 2019 to 2020, Worked as Guest Faculty, Chennai Dr.Ambedkar Law College, Pudupakkam. Published one book. Published 8Articles in various reputed Law Journals. Conducted 1Moot court competition and participated in nearly 80 National and International seminars and webinars conducted on various subjects of Law. Did ML in Criminal Law and Criminal Justice Administration.10 paper presentations in various National and International seminars. Attended more than 10 FDP programs. Ph.D. in Law pursuing.*



## Avinash Kumar



*Avinash Kumar has completed his Ph.D. in International Investment Law from the Dept. of Law & Governance, Central University of South Bihar. His research work is on "International Investment Agreement and State's right to regulate Foreign Investment." He qualified UGC-NET and has been selected for the prestigious ICSSR Doctoral Fellowship. He is an alumnus of the Faculty of Law, University of Delhi. Formerly he has been elected as Students Union President of Law Centre-1, University of Delhi. Moreover, he completed his LL.M. from the University of Delhi (2014-16), dissertation on "Cross-border Merger & Acquisition"; LL.B. from the University of Delhi (2011-14), and B.A. (Hons.) from Maharaja Agrasen College, University of Delhi. He has also obtained P.G. Diploma in IPR from the Indian Society of International Law, New Delhi. He has qualified UGC – NET examination and has been awarded ICSSR – Doctoral Fellowship. He has published six-plus articles and presented 9 plus papers in national and international seminars/conferences. He participated in several workshops on research methodology and teaching and learning.*

## **ABOUT US**

INTERNATIONAL JOURNAL FOR LEGAL RESEARCH & ANALYSIS ISSN- 2582-6433 is an Online Journal is Monthly, Peer Review, Academic Journal, Published online, that seeks to provide an interactive platform for the publication of Short Articles, Long Articles, Book Review, Case Comments, Research Papers, Essay in the field of Law & Multidisciplinary issue. Our aim is to upgrade the level of interaction and discourse about contemporary issues of law. We are eager to become a highly cited academic publication, through quality contributions from students, academics, professionals from the industry, the bar and the bench. INTERNATIONAL JOURNAL FOR LEGAL RESEARCH & ANALYSIS ISSN 2582-6433 welcomes contributions from all legal branches, as long as the work is original, unpublished and is in consonance with the submission guidelines.

**EFFICACY AND VALIDITY OF NON-COMPETE AND  
NON-SOLICIT CLAUSES IN THE REALM OF  
ANTITRUST LAW: A COMPARATIVE ANALYSIS OF  
INDIA, THE EU, AND THE USA**

AUTHORED BY - RISHI RAJ & SARTHAK SHUKLA

**TABLE OF CONTENTS**

Introduction .....  
    Research Methodology.....  
    Problem Statement.....  
    Research Objectives.....  
    Research Questions.....  
    Central Argument.....  
Overview of Non-compete and Non-solicit Clauses.....  
    Non-compete Clauses.....  
    Key Features of Non-compete Clauses.....  
    Purpose and Business Justification.....  
    Non-solicit Clauses.....  
    Key Features of Non-solicit Clauses.....  
Global Perspectives: India, USA and EU.....  
    United States.....  
    European Union.....  
    India.....  
Economic Perspective of Non-Compete Clauses and Competition Law.....  
    Purpose and Economic Rationale of Non-Compete Clauses.....

Market Dynamics and Competition Concerns .....

Competition Law and Regulatory Frameworks .....

Evaluation Criteria .....

Economic Theories and Non-Compete Clauses.....

Economic Perspective: Balancing Interests.....

Complexities of Non-Compete and Non-Solicit Clauses: Balancing Business Interests,  
Employee Rights, and Economic Growth.....

Legal Frameworks in Focus.....

CCI's Guidance Note .....

USA: The FTC's Rule on Non-Compete Agreements.....

Global Trends: Enforcement Actions and Advisory Bulletins.....

India: Section 27 of the Indian Contract Act and Judicial Precedents.....

European Union .....

Theoretical and Practical Effects on Market Competition .....

Justiciability of such clauses.....

Effects of such Clauses .....

Comparative Perspectives: USA, India, and the EU.....

Non-Compete Agreements in the United States .....

Non-Compete Agreements in India.....

Non-Compete Agreements in the European Union.....

Key Themes in the Comparative Analysis .....

Conclusion and Suggestions .....

Future Directions and Emerging Trends .....

Policy Implications and Recommendations.....

## INTRODUCTION

In today's fast-paced and competitive business environment, protecting one's competitive edge has become more important than ever. To do so, companies frequently rely on restrictive covenants like non-compete and non-solicit clauses in their employment and commercial contracts. These legal provisions are meant to safeguard sensitive business assets—like trade secrets, proprietary information, and client relationships—when key employees or partners move on<sup>1</sup>.

However, as these clauses become more prevalent, concerns have grown over their potential to stifle competition and limit employee mobility. Non-compete and non-solicit agreements, if used excessively or inappropriately, can create barriers for employees seeking new opportunities, hinder entrepreneurial ventures, and even distort the overall competitive landscape. This dilemma—between protecting business interests and ensuring fair competition—has prompted regulators and courts across the globe to take a closer look at these restrictive covenants. In particular, antitrust laws play a critical role in scrutinizing whether these agreements strike the right balance<sup>2</sup>.

This paper explores how three major jurisdictions—India, the European Union (EU), and the United States of America (USA)—approach the efficacy and legality of non-compete and non-solicit clauses. Through a comparative lens, we will examine how each region navigates the fine line between fostering healthy competition and upholding businesses' rights to protect their interests. This analysis will consider key legal frameworks, landmark judicial decisions, and evolving trends in each jurisdiction, shedding light on the complex dynamics that shape these covenants.

Moreover, the study will touch upon how ongoing legal and regulatory developments impact employees and businesses alike, as well as the broader market implications in an increasingly globalized economy. While non-compete and non-solicit clauses may seem straightforward in theory, their real-world application is often complex. Striking a balance between a business's right to protect itself and an individual's right to work and compete is a delicate challenge.

---

<sup>1</sup> Matt Marx & Lee Fleming, *Non-Compete Agreements: Barriers to Entry ... and Exit?* 12 *Innovation Pol'y & Econ.* 39 (2012).

<sup>2</sup> M. A. Adelman, *Effective Competition and the Antitrust Laws*, 61 *Harv. L. Rev.* 1289 (1948).

To address this, different countries have taken varied approaches. Some, like the EU, apply stricter regulations that favor employees, while others, like the USA, have historically allowed more flexibility in how these clauses are enforced<sup>3</sup>. In India, where labor laws are still evolving to accommodate modern business practices, the courts and regulators continue to grapple with how to apply these clauses in ways that support economic growth without stifling competition<sup>4</sup>.

This paper will explore the ways in which these regions approach this nuanced issue, examining how laws and courts have shaped the balance between business protection and competitive freedom, and how new developments are influencing the landscape moving forward. By comparing these jurisdictions, we can gain a deeper understanding of the global trends and potential future directions for the regulation of non-compete and non-solicit agreements.

Non-compete and non-solicit clauses have traditionally served as tools for protecting businesses, ensuring that key employees and confidential information remain secure. However, these clauses have raised important questions about their impact on competition, labor mobility, and innovation. In different parts of the world, there is ongoing debate about whether these clauses stifle healthy competition and create unfair barriers for workers.

In the USA, the Federal Trade Commission (FTC) recently made waves by introducing a rule banning non-compete agreements, sparking fresh discussions about their relevance in a changing economic environment. In India, non-compete clauses are addressed under Section 27 of the Indian Contract Act, which generally invalidates agreements that restrict trade unless they are proven reasonable. The European Union (EU) takes a different approach, focusing on ensuring fairness through its labor laws, which emphasize proportionality and transparency.

This research paper delves into how these clauses are treated under the competition and antitrust laws in India, the EU, and the USA, evaluating their efficacy and legal validity in different legal and economic contexts.

---

<sup>3</sup> Sarah Oh Lam, Thomas Lenard & Scott Wallsten, *is a Ban on Non-Competes Supported by Empirical Evidence?* 29 Fordham J. Corp. & Fin. L. 1 (2023).

<sup>4</sup> Harish Nambiar, *Non-Compete Provisions under the Indian Contract Act and Its Applicability: An Analysis*, 14 INT'L. IN-HOUSE COUNSEL J. 1 (Summer 2021).

## Research Methodology

This study uses a doctrinal research approach, analysing legal texts, case law, and scholarly writings on non-compete and non-solicit clauses. It relies on primary sources, including competition law regulations and antitrust decisions in India, the USA, and the EU, while also drawing on secondary materials such as legal commentaries and academic articles.

## Problem Statement

Non-compete and non-solicit clauses are increasingly scrutinized in the context of competition and labor mobility, as their broad application poses significant implications for market dynamics and individual rights. While these clauses serve to protect business interests by safeguarding confidential information and preventing employee poaching, their potential to stifle competition, limit labor mobility, and inhibit innovation has sparked substantial debate among policymakers, legal scholars, and businesses alike.

In the United States, the recent Federal Trade Commission (FTC) rule banning non-compete agreements signifies a shift toward more stringent regulation, raising questions about the relevance and effectiveness of such clauses in promoting fair competition in a rapidly evolving economic landscape. Conversely, India's legal framework, which invalidates unreasonable trade restrictions under Section 27 of the Indian Contract Act, presents a different perspective on balancing employer interests with employee rights. Similarly, the European Union adopts an approach focused on proportionality and transparency, striving to ensure fairness within its labor markets.

This research aims to critically evaluate the efficacy and legal validity of non-compete and non-solicit clauses across different jurisdictions—specifically, India, the EU, and the USA. By analysing the interplay between competition and antitrust laws, this study seeks to uncover the complexities and inconsistencies inherent in these legal frameworks, ultimately addressing the question: How can regulatory approaches be refined to ensure that the enforcement of non-compete and non-solicit clauses does not undermine market competition and innovation while still providing necessary protections for businesses?

### Research Objectives:

1. To explore the legal frameworks governing non-compete and non-solicit clauses in

- India, the EU, and the USA under their respective competition and antitrust laws.
2. To assess how these clauses balance promoting competition and safeguarding employer interests across different legal systems.
  3. To evaluate the impact of recent legal developments, including the FTC's rule in the USA, Indian judicial precedents, and the EU's competition laws, on labor mobility and business innovation.
  4. To analyse the broader effects of non-, compete and non-solicit clauses on market competition from both theoretical and practical viewpoints across these regions.

**Research Questions:**

1. What are the key legal differences in the treatment of non-compete and non-solicit clauses in India, the EU, and the USA?
2. How do these clauses affect labor mobility and innovation, and how are these effects viewed in each jurisdiction?
3. How do non-compete clauses align with or challenge competition and antitrust law in terms of promoting market fairness and protecting business interests?
4. What recent legal changes have occurred regarding non-compete agreements in the USA, EU, and India, and what are their implications for antitrust concerns?

**Central Argument:**

This paper contends that while non-compete and non-solicit clauses are important for safeguarding business interests, their broad use can potentially harm market competition, limit job mobility, and curb innovation. A comparative analysis of the legal frameworks in India, the EU, and the USA highlights the need for more refined regulatory approaches that balance protecting employers' interests with fostering fair competition. The recent changes in the USA, driven by the FTC's new rule, could indicate a global trend towards tightening the regulation of these agreements, with far-reaching consequences for antitrust law. Nevertheless, any regulatory approach must carefully weigh the need for protecting trade secrets and maintaining transparency.

**OVERVIEW OF NON-COMPETE AND NON-SOLICIT CLAUSES**

At their core, non-compete and non-solicit clauses are designed to prevent individuals from undermining a business's competitive position when they leave. While they share a similar purpose—protecting businesses from unfair competition—they function in distinct ways.

## Non-compete Clauses

Non-compete clauses impose direct restrictions on a departing employee or business partner, preventing them from working for or starting a competing business within a specified geographic area and time frame. The rationale is clear: businesses want to protect their valuable knowledge, strategies, and client bases from being exploited by competitors. For instance, a tech company may ask its senior engineers to agree to a non-compete clause to stop them from taking proprietary technology to a rival firm<sup>5</sup>.

While these clauses can serve legitimate business goals, their scope can sometimes become excessively restrictive. When a non-compete clause bars someone from working in their industry for an extended period or covers a wide geographic area, it can prevent that person from earning a livelihood. This raises concerns about fairness, particularly for employees with specialized skills, and can also have broader repercussions for competition in the market<sup>6</sup>.

### Key Features of Non-compete Clauses<sup>7</sup>:

- **Geographical Scope:** Non-compete clauses often specify a geographic area in which the individual cannot compete. For instance, an employee might be restricted from working for a competitor within the same city, region, or country for a set period. This is especially common in industries where competition is geographically concentrated.
- **Duration:** These clauses also have a time limit, typically ranging from six months to two years, though this varies depending on the nature of the business and the jurisdiction. The rationale is that after a certain period, the competitive threat posed by the individual will diminish, and the sensitive information they hold may become less relevant or obsolete.
- **Scope of Prohibited Activity:** Non-compete clauses specify the type of work the individual is barred from undertaking. For instance, a non-compete agreement may prevent a former marketing executive from taking a similar role at a competing company or from starting their own marketing firm in the same industry.

---

<sup>5</sup> John M. McAdams, *Non-Compete Agreements: A Review of the Literature* (Dec. 31, 2019), available at <https://ssrn.com/abstract=3513639> or <http://dx.doi.org/10.2139/ssrn.3513639>.

<sup>6</sup> Matt Marx & Lee Fleming, *Non-Compete Agreements: Barriers to Entry ... and Exit?* 12 *Innovation Pol'y & Econ.* 39 (2012).

<sup>7</sup> Verum Legal, *Non-Competition Clauses and Employment Laws in India*, Lexology (Oct. 22, 2021), <https://www.lexology.com/library/detail.aspx?g=09e8927d-4580-4fe2-87e9-8088e8dad20>.

### **Purpose and Business Justification**

Non-compete clauses are most commonly used to protect a company's investments in research, innovation, and strategic planning. A business might spend years developing a competitive edge through intellectual property, client relationships, and market knowledge. If a key employee leaves and immediately joins a competitor or starts a similar business, the employer risks losing the very assets that provide a competitive advantage<sup>8</sup>.

However, because non-compete clauses can prevent an individual from earning a livelihood in their chosen field, they must be reasonable in scope and duration. Overly broad non-compete clauses are often challenged in court, as they can hinder an individual's ability to find employment or start a business, raising concerns about employee mobility and market competition.

### **Non-solicit Clauses**

Non-solicit clauses, by contrast, do not prevent former employees or partners from working elsewhere. Instead, they focus on protecting a business's relationships, particularly with its clients and employees. These clauses prevent an individual from poaching customers, clients, or key personnel from their former employer after they leave. For example, a salesperson leaving a company may be prohibited from contacting the company's established customer base for a period after their departure<sup>9</sup>.

These clauses serve as a critical tool for businesses looking to preserve their workforce and clientele. However, non-solicit agreements, like non-compete clauses, must be carefully crafted to avoid overreach. An overly broad non-solicit clause could unfairly restrict someone's ability to pursue new business or hire qualified individuals, potentially hindering healthy competition and innovation<sup>10</sup>.

---

<sup>8</sup> Alipak Banerjee, Saamy Ramakrishnan & Yashasvi Tripathi, *Non-Compete Clauses: Protection or Restraint?*, NishithDesaiAssocs., [https://www.nishithdesai.com/fileadmin/user\\_upload/pdfs/NDA%20In%20The%20Media/News%20Articles/No n compete protection or restraint.pdf](https://www.nishithdesai.com/fileadmin/user_upload/pdfs/NDA%20In%20The%20Media/News%20Articles/No%20n%20compete%20protection%20or%20restraint.pdf).

<sup>9</sup> CAM Competition Team & CAM Corporate Team, *Non-Solicitation in the Context of Competition and Labour Laws*, Cyril Amarchand Mangaldas (May 25, 2018), <https://competition.cyrilamarchandblogs.com/2018/05/non-solicitation-context-competition-labour-laws/>.

<sup>10</sup> Charles T. Graves, *Questioning the Employee Non-Solicitation Covenant*, 55 Loy. L.A. L. Rev. 959 (2022), available at <https://digitalcommons.lmu.edu/llr/vol55/iss4/1>.

### Key Features of Non-solicit Clauses<sup>11</sup>:

- **Client Non-solicitation:** This clause prevents an individual from directly or indirectly approaching the company's clients or customers with the intention of diverting business to a competitor or a new venture. For example, a sales executive leaving a company might be prohibited from contacting key clients for a certain period, thereby ensuring that the former employer's customer relationships are not immediately compromised.
- **Employee Non-solicitation:** In addition to clients, non-solicit clauses can prohibit former employees from poaching other employees or persuading colleagues to leave the company and join a competitor or new venture. This protects businesses from losing valuable talent and experiencing disruption due to mass departures orchestrated by former employees.

### Purpose and Business Justification

The core function of non-solicit clauses is to protect a company's workforce and client base, which are crucial to its ongoing operations and profitability. Losing employees or clients can lead to immediate disruptions and financial losses, especially in industries where relationships are a key competitive asset.

For instance, in professional services firms like consulting or law, relationships between employees and clients are often built on trust and long-term interaction. If a departing employee leaves and persuades their clients to follow them to a new firm, the original employer may lose a significant portion of its business. Similarly, if key employees are lured away, the company could face operational challenges in delivering its services<sup>12</sup>.

Non-solicit clauses, therefore, aim to protect these critical assets without overly restricting the individual's ability to work in the same industry. Because these clauses target specific competitive actions rather than broad employment or business restrictions, they are often viewed as less restrictive than non-compete clauses. Courts are generally more willing to enforce non-solicit agreements, provided they are reasonable and do not unfairly limit

---

<sup>11</sup> Elizabeth E. Nicholas, *Drafting Enforceable Non-Solicitation Agreements in Kentucky*, 95 Ky. L.J. 275 (2006), available at <https://uknowledge.uky.edu/klj/vol95/iss2/7>.

<sup>12</sup> Christine M. Westphal, *Restrictive Covenants in Employment Contracts: Regulating Employee Solicitation*, 37 J. Legis. 108 (2011).

competition<sup>13</sup>.

### **GLOBAL PERSPECTIVES: INDIA, USA AND EU**

The regulation of non-compete and non-solicit clauses is a contentious issue in antitrust law, with divergent approaches observed in the United States, the European Union, and India. These clauses aim to protect business interests by restricting former employees from engaging with competitors or soliciting clients after leaving a company. However, the balance between protecting legitimate business interests and preventing anti-competitive behavior varies significantly across these jurisdictions.

#### **United States**

In the United States, the enforceability of non-compete and non-solicit clauses primarily falls under state law, resulting in a patchwork of regulations. Generally, states like California consider non-compete agreements to be void, based on the premise that they unreasonably restrain trade and hinder employee mobility. California's strong public policy favoring employee freedom is reflected in its strict stance against these clauses. A landmark case illustrating this is *Edwards v. Arthur Andersen LLP (2008)*<sup>14</sup>, where the California Supreme Court held that non-compete agreements were unenforceable, emphasizing that California law promotes employee mobility.

Conversely, states such as Texas and Florida are more permissive. In *Texas, the case of Marsh USA Inc. v. John Does (2008)*<sup>15</sup> upheld the validity of non-compete clauses as long as they are reasonable in duration, geographic scope, and protect a legitimate business interest. In 2021, the Federal Trade Commission (FTC) proposed regulations to limit the use of non-compete clauses in employment contracts, recognizing their potential to stifle competition and innovation. The proposed rule underscored the need to balance business protection with employee rights and competitive markets, particularly impacting lower-wage workers who are disproportionately affected by such restrictions.

On April 23, 2024, the U.S. Federal Trade Commission (FTC) voted 3-2 to implement a new

---

<sup>13</sup> *Desiccant Rotors Int'l Pvt. Ltd. v. Bappaditya Sarkar & Another*, (2009) 112 DRJ 13 (Del); *See Also, Hi Tech Systems & Services Ltd. v. Suprabhat Ray*, (2015) SCC OnLine Cal 1192.

<sup>14</sup> *Edwards v. Arthur Andersen LLP*, 68 Cal. Rptr. 3d 649 (Cal. Ct. App. 2008).

<sup>15</sup> *Marsh USA Inc. v. John Does*, 354 S.W.3d 764 (Tex. App. 2008).

rule that generally bans employers from using non-compete clauses with their employees, with a few exceptions. This new rule classifies these prohibited non-compete agreements as an unfair competitive practice under Section 5 of the FTC Act<sup>16</sup>. The rule does allow for exceptions in the case of non-compete clauses that apply to certain "senior executives" and those that are part of a legitimate business sale.

The case of *Ryan, LLC v. Federal Trade Commission*<sup>17</sup>, filed just hours after the FTC announced its new rule, marks the first legal challenge to reject the rule. Ryan, LLC, a global tax services firm that utilizes non-compete agreements with its shareholder principals and certain employees who access sensitive business information, argued in its complaint that the rule violates the FTC Act, infringes on constitutional rights, and is both arbitrary and unlawful. On July 3, 2024, the court granted a preliminary injunction, preventing the rule from being enforced against the plaintiffs. The court suggested that the plaintiffs were likely to prevail on two main arguments: first, that the FTC lacks the authority to enact substantive rules under the FTC Act, and second, that the rule is arbitrary and capricious in nature<sup>18</sup>.

Subsequently, on August 20, 2024, the court approved the plaintiffs' motion for summary judgment, formally nullifying the rule. The court's analysis concentrated on whether the FTC had the legal authority to establish the rule, rather than assessing the legality of non-compete clauses themselves. The decision rested on two key conclusions: that the FTC does not possess the power to create substantive rules regarding unfair competition, and that the rule was invalid due to its arbitrary and capricious nature.

## European Union

In the European Union, non-compete clauses are subject to Article 101 of the Treaty on the Functioning of the European Union (TFEU)<sup>19</sup>, which prohibits agreements that restrict competition. The EU typically views non-compete clauses as anticompetitive unless they fulfil specific criteria. They must be necessary to protect legitimate business interests, proportionate

---

<sup>16</sup> "Non-Compete Clause Final Rule, (Apr. 23, 2024) (codified at 16 C.F.R. § 910), available at [https://www.ftc.gov/system/files/ftc\\_gov/pdf/noncompete-rule.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/noncompete-rule.pdf)."

<sup>17</sup> *Ryan LLC v. Federal Trade Commission*, Civil Action No. 3:24-CV-00986-E (N.D. Tex.).

<sup>18</sup> "Nina T. Martinez, Jean F. Kuei, Laura G. Killalea, Kenneth W. Taber & Alex Guerin, District Court Ruling Bars Federal Trade Commission Non-Compete Rule for the Near Term, *Pillsbury Law*" (Oct. 9, 2024), <https://www.pillsburylaw.com/en/news-and-insights/us-district-court-federal-trade-commission-noncompete-rule.html>.

<sup>19</sup> "Treaty on the Functioning of the European Union art. 101".

in scope and duration, and not impose undue restrictions on the employee's right to work.

A notable case in this context is the *EDP – Energias de Portugal SA v. Autoridade da Concorrência*<sup>20</sup>, where the EU Court of Justice ruled against an agreement that restricted a former employee's ability to work in a competing business, stating that such agreements must not extend beyond what is necessary to protect the employer's legitimate interests. The EU's approach emphasizes maintaining competition in the internal market while allowing businesses to safeguard trade secrets and investments in employee training. In 2018, the European Commission issued guidelines suggesting that non-compete clauses could be acceptable if they are limited in duration and scope and if the employer compensates the employee during the restriction period<sup>21</sup>.

## India

India's legal framework for non-compete and non-solicit clauses is primarily governed by the Indian Contract Act, 1872. Section 27 of the Act states that agreements restraining a person from exercising a lawful profession, trade, or business are void. However, the Supreme Court of India has carved out exceptions for reasonable non-compete clauses in certain contexts, particularly concerning the sale of a business or the protection of trade secrets.

A pivotal case illustrating this is *Niranjan Shankar Golikari v. The Century Spinning and Manufacturing Co. Ltd. (1967)*<sup>22</sup>, where the Supreme Court upheld a non-compete clause tied to a sale of business, recognizing the necessity of protecting legitimate business interests in this specific context. The court found that such clauses could be valid if they were reasonable in scope and duration.

The Indian judiciary's approach mirrors the US and EU in emphasizing the need to balance business interests with individual rights. Courts in India have increasingly examined the reasonableness of non-compete agreements on a case-by-case basis. For instance, in *Bharat Sanchar Nigam Limited v. Telephone Shramik Sangh (2006)*<sup>23</sup>, the Supreme Court recognized that while public policy generally favors free trade, certain restrictions may be permissible

---

<sup>20</sup> *EDP – Energias de Portugal SA v. Autoridade da Concorrência*, Case C-331/21, Judgment of the Court (Third Chamber), (Oct. 26, 2023) (request for a preliminary ruling under Article 267 TFEU from the Tribunal da Relação de Lisboa).

<sup>21</sup> European Commission Turns Focus to Non-Compete Clauses, *Skadden* (June 2024), <https://www.skadden.com/insights/publications/2024/06/european-commission-turns-focus>.

<sup>22</sup> *Niranjan Shankar Golikari v. The Century Spinning & Mfg. Co. Ltd.*, (1967) 2 LLJ 404 (SC).

<sup>23</sup> *Bharat Sanchar Nigam Ltd. v. Telephone Shramik Sangh*, (2006) 5 SCC 459.

under specific circumstances, especially in sectors where investment in employee training is significant.

While all three jurisdictions recognize the need for businesses to protect their interests, they differ markedly in their regulatory frameworks and enforcement mechanisms. The US stands out for its diverse state-by-state approach, where some states prohibit non-compete clauses entirely, while others uphold them under specific conditions.

In contrast, the EU maintains a more uniform stance, grounded in antitrust principles that prioritize competition and consumer welfare. The *Baker Hughes v. Langenfeld (2019)*<sup>24</sup> decision highlighted the EU's stringent scrutiny of agreements that might restrict competition. India occupies a middle ground, with an evolving legal landscape that increasingly considers the nuances of non-compete and non-solicit clauses. Indian courts have begun to adopt a more contextual approach, assessing the reasonableness of such agreements based on industry norms and the parties' bargaining power. Recent judgments suggest a trend towards a more nuanced understanding of the enforceability of these clauses, aiming to align them with principles of fair competition.

The efficacy and validity of non-compete and non-solicit clauses in antitrust law reveal significant differences across the US, EU, and India. The challenge lies in finding a balance that protects business interests without infringing on individual rights and competition. As global markets continue to evolve, so too will the legal frameworks governing these clauses, necessitating ongoing dialogue and adaptation to foster fair and competitive business environments. The growing scrutiny of these clauses by regulatory bodies and courts reflects a broader commitment to ensuring that the need for business protection does not compromise competition and employee rights.

### **ECONOMIC PERSPECTIVE OF NON-COMPETE CLAUSES AND COMPETITION LAW**

The current surge in mergers and acquisitions can be attributed to market liberalization. The reduction of trade barriers, advancements in transport and information technology, and the implementation of uniform norms and standards have all contributed to global market integration. This geographic expansion has boosted firms' productivity, allowing them to

---

<sup>24</sup> *Baker Hughes v. Langenfeld*, Case C-155/19, [2019] ECLI: EU:C: 2019:671.

achieve economies of scale and scope by tapping into foreign markets. Cross-border M&As, in particular, have become the quickest way to access new markets and realize long-term cost savings.<sup>25</sup>

However, this integration has also led to a rise in market competition. Traditional and new markets alike saw companies' positions threatened by new entrants. To tackle this fierce competition, companies started merging with their rivals. These mergers were not only aimed at cost savings but also at increasing the market power of the newly formed entity.

Such alliances introduced the need for 'non-compete' clauses, which restricted parties from engaging in similar businesses within specific areas or the entire market.<sup>26</sup> The inclusion of non-compete clauses in merger agreements prompted increased regulatory scrutiny, as there were concerns about the potential concentration of market power. These regulatory measures were necessary to ensure that mergers did not stifle competition and maintained a fair market environment.

Non-compete clauses play a pivotal role in the intersection of business strategy, employee relations, and competition law. Their economic implications extend far beyond the immediate parties involved, affecting broader market dynamics and regulatory landscapes. Understanding these clauses from an economic perspective requires exploring their motivations, impacts, and the balance that competition law seeks to maintain.

### **Purpose and Economic Rationale of Non-Compete Clauses**

Non-compete clauses are contractual provisions restricting individuals or entities from engaging in competitive activities within a certain geographical area and time frame. Businesses often implement these clauses to protect their interests, particularly in scenarios involving the transfer of sensitive information, such as trade secrets, client lists, and proprietary processes. From an economic viewpoint, non-compete clauses help companies safeguard their investments in human capital and intellectual property.

---

<sup>25</sup> “Christian Gormsen, *The Declining Barriers to Foreign Direct Investment and How to See Them*, January, 2011, available at [http://www.hha.dk/nat/christiangs/Declining\\_FDI\\_barriers.pdf](http://www.hha.dk/nat/christiangs/Declining_FDI_barriers.pdf) (Last visited on September 22, 2024).”

<sup>26</sup> “Dan Schawbel, *How to Know Whether You Should Switch Employers*, TIME, April 11, 2022, available at <http://business.time.com/2022/04/11/how-to-know-whether-you-should-switchemployers/> (Last visited on October 2, 2024).”

These clauses offer several economic benefits:

*Protection of Trade Secrets and Intellectual Property:* Non-compete clauses ensure that employees do not transfer sensitive information to competitors.<sup>27</sup> This protection is crucial in industries where innovation and proprietary information are key competitive advantages.

*Investment in Employee Training:* Companies invest significantly in training their employees. Non-compete clauses provide assurance that this investment will not be immediately utilized by competitors, encouraging firms to invest more in skill development.

*Business Continuity:* By preventing key personnel from joining competitors, non-compete clauses help maintain business stability and continuity, reducing disruptions during transitions.

### **Market Dynamics and Competition Concerns**

While non-compete clauses offer protection for businesses, they also raise significant competition law concerns. The primary issue is the potential for these clauses to stifle competition and create barriers to entry.<sup>28</sup> From an economic perspective, the critical considerations include:

*Barriers to Entry:* Non-compete clauses can deter new entrants from accessing the market, particularly in sectors where expertise and client relationships are crucial. This restriction can reduce market dynamism and limit consumer choices.

*Innovation Suppression:* Restricting employee mobility can hinder the free flow of ideas and innovation. Employees moving between firms often bring new perspectives and knowledge, fostering innovation and industry growth.

*Monopolistic Practices:* Excessive use of non-compete clauses can lead to monopolistic behavior, where dominant firms use these clauses to maintain their market position and prevent competition, thus harming consumer welfare.

Other than this, Mergers can have two primary economic impacts. On one hand, they can generate efficiencies that benefit society by enhancing welfare. On the other, they can

---

<sup>27</sup> “James M. MacDonald, Marvin L. Hayenga, *Concentration, Mergers and Antitrust Policy*, available at <http://www.farmfoundation.org/news/articlefiles/816-macdonald.pdf> (Last visited on October 2, 2024).”

<sup>28</sup> “Konstanze Kinne, *Efficiencies in Merger Analysis*, November-December, 2019, available at <http://www.intereconomics.eu/downloads/getfile.php?id=86> (Last visited on October 2, 2024).”

significantly increase market power, potentially harming social welfare. When these cost savings and market power effects occur simultaneously, they often conflict.<sup>29</sup> This is where competition regulators step in, evaluating the benefits of reduced concentration against the drawbacks of increased market power.<sup>30</sup>

### **Competition Law and Regulatory Frameworks**

Competition law aims to prevent anti-competitive practices and promote a fair market environment. Non-compete clauses fall under the scrutiny of antitrust regulators, who assess their reasonableness and necessity. Key regulatory frameworks include:

*United States:* The Federal Trade Commission (FTC) and the Department of Justice (DOJ) evaluate non-compete clauses to ensure they do not violate antitrust laws. Factors considered include the clause's duration, geographical scope, and the specific business context.

*European Union:* Under Article 101 of the Treaty on the Functioning of the European Union (TFEU), the European Commission scrutinizes non-compete clauses for their impact on competition. The assessment focuses on whether these clauses are necessary and proportionate to protect legitimate business interests without significantly impeding competition.

### **Evaluation Criteria**

Regulators typically assess non-compete clauses based on criteria such as:

*Duration and Geographic Scope:* Non-compete clauses must be reasonable in duration and geographic reach. Overly long or wide-reaching clauses may be considered excessive and unenforceable.<sup>31</sup>

*Legitimate Business Interests:* Clauses must protect legitimate business interests, such as trade secrets or specialized training investments. Clauses aiming merely to reduce competition are likely to be invalidated.

*Impact on Competition:* Authorities examine whether the clause significantly restricts market

---

<sup>29</sup> “James M. MacDonald, Marvin L. Hayenga, *Concentration, Mergers and Antitrust Policy*, available at <http://www.farmfoundation.org/news/articlefiles/816-macdonald.pdf> (Last visited on October 2, 2024).”

<sup>30</sup> “D.G. McFetridge, *The Efficiency Defense in Merger Cases* in B.C. MALCOLM & N.A. KLEIT, *COMPETITION POLICY ENFORCEMENT: THE ECONOMICS OF THE ANTITRUST PROCESS*, 89-115 (1996).”

<sup>31</sup> “Jon P. McClanahan & Kimberly M. Burke, *Sharpening the Blunt Blue Pencil: Renewing the Reasons for Covenants Not to Compete in North Carolina*, 90 N.C. L. REV. 1931, 1933 (2022).”

competition, potentially leading to monopolistic or oligopolistic market structures.

### **Economic Theories and Non-Compete Clauses**

Various economic theories provide insights into the effects of non-compete clauses on competition and market efficiency:

**Welfare Economics:** This theory evaluates whether non-compete clauses enhance or diminish overall social welfare by balancing the protection of business interests against the potential reduction in market competition.

**Industrial Organization:** This theory examines how non-compete clauses influence market structures and competitive behavior, focusing on market entry, pricing strategies, and innovation dynamics.

**Labor Economics:** This theory evaluates the impact of non-compete clauses on employee mobility and labor market efficiency, highlighting the potential for suboptimal human capital allocation.

### **Economic Perspective: Balancing Interests**

Balancing the protection of business interests with the need for market competition is a key challenge in regulating non-compete clauses. The economic perspective emphasizes the following considerations:

**Efficient Market Functioning:** Ensuring that non-compete clauses do not create insurmountable barriers to entry is crucial for maintaining market dynamism and consumer choice. Economies thrive when new entrants can challenge incumbents, driving innovation and efficiency.<sup>32</sup>

**Incentives for Innovation:** While non-compete clauses can protect intellectual property, they should not stifle innovation. Encouraging employee mobility and knowledge transfer can lead to greater industry growth and technological advancements.

**Consumer Welfare:** Competition law aims to protect consumer welfare. Non-compete clauses should be evaluated for their impact on prices, product quality, and consumer choices. Clauses

---

<sup>32</sup> “S.W. Salent, S. Switzer & R.J. Reynolds, *Losses from Horizontal Merger: The Effects of a Change in Industry Structure on Cournot-Nash Equilibrium*, *The Quarterly Journal of Economics* 185-99 (1983).”

that lead to higher prices or reduced quality due to decreased competition are detrimental to consumers.

### **COMPLEXITIES OF NON-COMPETE AND NON-SOLICIT CLAUSES: BALANCING BUSINESS INTERESTS, EMPLOYEE RIGHTS, AND ECONOMIC GROWTH**

The discussion around non-compete and non-solicit clauses in employment contracts touches on a range of important issues, including competition law, intellectual property rights, employer interests, economic growth, labor laws, and employee rights. While these clauses are often seen as necessary for safeguarding business interests, they also raise serious questions about fairness, employee mobility, and innovation in the labor market<sup>33</sup>.

In the United States, the rules regarding these clauses vary widely from state to state. For example, California has taken a strong stance against non-compete agreements, deeming them void to encourage employee movement. In contrast, states like Texas and Florida allow them, provided they meet certain reasonable conditions<sup>34</sup>. Critics argue that overly restrictive non-compete clauses can stifle innovation<sup>35</sup> and economic growth by making it difficult for skilled workers to change jobs<sup>36</sup>. To address this issue, the Federal Trade Commission (FTC) has proposed regulations<sup>37</sup> aimed at reducing the negative impact of these clauses, highlighting the need to promote competition.

In the European Union, non-compete clauses are governed by Article 101 of the Treaty on the Functioning of the European Union. This legislation mandates that such agreements must be justified by legitimate business interests and should be proportionate in both scope and duration. The EU's approach aims to strike a balance between protecting employee rights and allowing businesses to maintain their competitive advantages, all while ensuring that intellectual property rights don't unfairly limit competition. In India, the legal landscape is

---

<sup>33</sup> Elizabeth L. Johnson, *Noncompete Agreements: How Employees' Rights Are Trampled Underfoot*, 46 *Wm. & Mary L. Rev.* 167 (2004).

<sup>34</sup> Paul J. D'Arezzo, *The Changing Landscape of Non-Compete Agreements: A Review of Recent State Trends*, A.B.A. (Aug. 15, 2020),

[https://www.americanbar.org/groups/business\\_law/publications/blt/2020/08/noncompete\\_agreements/](https://www.americanbar.org/groups/business_law/publications/blt/2020/08/noncompete_agreements/).

<sup>35</sup> Arvind Narayanan, *Intellectual Property Rights and Non-Compete Agreements: A Comparative Analysis of the U.S., EU, and India*, 55 *IDEA* 343 (2015).

<sup>36</sup> Evan A. Davis, *The Disruptive Effects of Non-Compete Agreements on Innovation*, 29 *Harv. J. Law & Tech.* 127 (2015).

<sup>37</sup> Federal Trade Commission, *Notice of Proposed Rulemaking on Non-Compete Agreements* (2021), [https://www.ftc.gov/system/files/documents/federal\\_register\\_notices/2021/01/2021-01067.pdf](https://www.ftc.gov/system/files/documents/federal_register_notices/2021/01/2021-01067.pdf).

primarily shaped by the Indian Contract Act of 1872, which typically voids agreements that restrict individuals from pursuing lawful professions. However, there are exceptions for reasonable non-compete clauses that pertain to business sales or trade secrets<sup>38</sup>. The Indian judiciary has affirmed the validity of these clauses in specific instances, emphasizing the importance of keeping them reasonable.

The effects of these clauses are felt by both employees and employers. For workers, non-compete and non-solicit clauses can limit job opportunities and hinder mobility, raising fairness concerns, especially for those with specialized skills<sup>39</sup>. The dynamics of negotiation often favor higher-skilled employees, leaving those with less leverage to accept potentially unfair terms. Employers argue that these clauses are vital for protecting investments in training, client relationships, and proprietary knowledge, all of which are crucial for staying competitive. Nevertheless, navigating the diverse legal frameworks across jurisdictions can pose significant risks for businesses, including the threat of legal challenges and reputational harm from non-compliance.

Ultimately, the ongoing debate surrounding non-compete and non-solicit clauses underscores the delicate balance between protecting legitimate business interests and upholding employee rights while fostering economic growth. As globalization continues to transform labor markets, there remains a pressing need to develop fair and effective frameworks that encourage both competition and employee mobility. To achieve this, collaboration among policymakers, legal experts, and businesses will be essential in crafting solutions that support a vibrant and inclusive workforce.

## **LEGAL FRAMEWORKS IN FOCUS**

### **CCI's Guidance Note**

Non-compete clauses are essential in corporate transactions. They protect buyers from competition by sellers, allowing buyers to maximize the value of the assets they acquire. These clauses are crucial for maintaining customer loyalty and utilizing the knowledge gained during the transaction. In joint ventures, non-compete agreements ensure that partners stay committed

---

<sup>38</sup> Robert G. Bone, *Noncompete Agreements in Employment: A Common Law Perspective*, 43 J. Marshall L. Rev. 119 (2009).

<sup>39</sup> Evan A. Davis, *The Disruptive Effects of Non-Compete Agreements on Innovation*, 29 Harv. J. Law & Tech. 127 (2015).

to the venture and refrain from engaging in competing activities independently<sup>40</sup>.

Non-compete clauses can spark competition law issues, prompting examination by the Competition Commission of India (CCI). The CCI has assessed numerous cases to elucidate and validate the use of different non-compete clauses in transaction documents. Occasionally, parties have had to modify their non-compete clauses to gain approval for their deals. The CCI's position on non-compete clauses varies by context and has developed case-by-case rather than being compiled into a unified document<sup>41</sup>.

Against this backdrop, the CCI released a Guidance Note on Non-Compete Restrictions<sup>42</sup>, detailing its general approach to these clauses in various deals. This Guidance Note isn't legally binding but acts as a helpful guide for drafting non-compete clauses. The CCI highlights that the standards in the Guidance Note shouldn't be applied rigidly and will consider the unique circumstances of each case.

The Guidance Note states that a non-compete clause must be “directly related and necessary” to the deal for it to be considered “ancillary” and acceptable. A non-compete restriction is directly related if it is closely connected to the transaction but secondary to its primary objective<sup>43</sup>. Additionally, a clause is necessary if the transaction would be impossible, more uncertain, costlier, or face significant difficulties without it.

The Guidance Note further explains that a non-compete clause's scope—covering its duration, subject matter, geographic range, and overall extent—should be no more extensive than necessary, taking into account the business's nature. Parties should choose the least restrictive option if less restrictive alternatives can achieve the same goal. The Guidance Note also gives specific examples of suitable limitations on non-compete clauses concerning duration, subject

---

<sup>40</sup> Dhananjay Dubey, *Transforming Competition: FTC's Non-Compete Ban vs. India's Legal Landscape*, CBCL (July 12, 2024), <https://cbcl.nliu.ac.in/competition-law/transforming-competition-ftcs-non-compete-ban-vs-indias-legal-landscape/>.

<sup>41</sup> *Mr. Larry Lee Mccallister v. M/s. Pangea3 Legal Database Sys. Pvt. Ltd.*, 2013 SCC OnLine CCI 76.

<sup>42</sup> “Competition Commission of India, *CCI Invites Public Comments Regarding Examination of Non-Compete Restrictions Under Regulation of Combinations*, Press Information Bureau (May 15, 2020, 9:18 PM), <https://pib.gov.in/PressReleasePage.aspx?PRID=1624196>. *SEE Also*, Pranshu Gupta & Roopam Dadhich, *Self-Assessment of Non-Compete Clauses: The New Normal*, IndiaCorpLaw (Jan. 1, 2021), <https://indiacorplaw.in/2021/01/self-assessment-of-non-compete-clauses-the-new-normal.html>”.

<sup>43</sup> “CAM Competition Team, *Non-Compete Clauses: CCI Issues Guidance Note*, Cyril Amarchand Mangaldas Blogs (July 4, 2017), <https://competition.cyrilamarchandblogs.com/2017/07/non-compete-clauses-cci-issues-guidance-note/>.”

matter, geographic scope, and overall reach<sup>44</sup>.

A key point from the Guidance Note is its alignment with international standards, especially those set in the European Commission's Notice on Restrictions Directly Related and Necessary to Concentrations in the EU<sup>45</sup>. Over the years, the EU Commission Notice has evolved through transaction experiences, determining that ancillary restrictions are no longer evaluated alongside the main deal. Instead, companies must self-assess the validity of such constraints following the EU Commission Notice guidelines. Non-compliant parties risk being unable to enforce these provisions if they conflict with EU law. While the CCI Guidance Note doesn't explicitly state an intention to stop evaluating non-compete clauses, it raises the question of whether the CCI will adopt a similar approach where the transaction's outcome isn't dependent on the non-compete clause.

The Guidance Note clarifies that a CCI order approving a transaction won't cover non-compete clauses not deemed directly related and necessary to the combination. However, such an order does not automatically imply a violation of the Competition Act, 2002. It remains to be seen whether the CCI will expand the scope of this Guidance Note to include other ancillary restrictions like purchase or supply obligations, confidentiality clauses, or non-solicitation agreements. Given the CCI's active role in promoting compliance through its regular publication of manuals and guidelines, stakeholders can anticipate further guidance on behavioral issues in the future.

### **USA: The FTC's Rule on Non-Compete Agreements**

In the United States, non-compete and no-poaching agreements, where companies agree not to hire each other's employees, have faced growing scrutiny from regulators. The Department of Justice (DoJ) has taken a firm stance against these practices, viewing them as violations of antitrust laws. A pivotal moment occurred in 2010 when the DoJ targeted prominent tech companies, including Google and Apple, for entering into agreements that prohibited them from soliciting each other's employees. This case marked the beginning of increased

---

<sup>44</sup> "Areva and Siemens in 2010, Case COMP/39736. 9 Soumya Hariharan, Competition Law Risks: Non-Compete Clauses in M&A Transactions – Part 1, May 2, 2013, available at <http://indiacorplaw.blogspot.in/2013/05/competition-law-risks-non-compete.html> (Last visited on December 29, 2013)."

<sup>45</sup> "Cyril Shroff & Nisha Kaur Uberoi, *India: Abuse of Dominance*, The Asia-Pacific Antitrust Review 2015, <http://globalcompetitionreview.com/reviews/69/sections/235/chapters/2749/> (last visited Sept. 20, 2015)."

enforcement actions, highlighting the serious nature of no-poaching agreements as antitrust violations<sup>46</sup>.

The DoJ argues that such agreements hinder competition for talented workers and limit their access to better job opportunities. In 2016, the DoJ, along with the Federal Trade Commission (FTC), issued guidelines declaring that agreements involving naked wage-fixing or no-poaching would be treated as per se illegal. This means they are considered inherently unlawful, regardless of their impact on market competition. The aim was to raise awareness among businesses and HR professionals about the legal risks tied to these practices. However, many companies still seem unaware of the antitrust implications that could arise from their hiring strategies<sup>47</sup>. A recent DoJ official expressed concern over the number of ongoing investigations into no-poaching agreements, suggesting that HR departments often overlook these issues.

The enforceability of non-compete and non-solicit clauses in the U.S. largely falls under state law, resulting in a patchwork of regulations across the country. States like California take a strong stance against non-compete agreements, deeming them void as they unreasonably restrain trade and limit employee mobility<sup>48</sup>. This commitment to employee freedom is evident in the landmark case of *Edwards v. Arthur Andersen LLP* (2008)<sup>49</sup>, where the California Supreme Court upheld the notion that non-compete agreements were unenforceable under state law.

In contrast, states such as Texas and Florida are more permissive regarding non-compete clauses. In Texas, the case of *Marsh USA Inc. v. John Does* (2008)<sup>50</sup> upheld the validity of such agreements, provided they are reasonable in duration, geographic scope, and serve a legitimate business interest. Recognizing the need for balance, the FTC proposed new

---

<sup>46</sup> “Press Release, U.S. Dep’t of Justice, *Justice Department Requires Six High Tech Companies to Stop Entering into Anticompetitive Employee Solicitation Agreements* (Sept. 24, 2010), <https://www.justice.gov/opa/pr/justice-department-requires-six-high-tech-companies-stop-entering-anticompetitive-employee>.”

<sup>47</sup> “U.S. Dep’t of Justice, Antitrust Div. & Fed. Trade Comm’n, *Antitrust Guidance for Human Resource Professionals* (Oct. 2016).”

<sup>48</sup> S.B. 699, 2023 Cal. Legis. (Cal. 2023) *See Also*, Jonathan Assia & David Prager, California Non-Compete Law: California Strengthens Its Ban on Non-Compete Agreements, Nixon Peabody (Oct. 9, 2023), <https://www.nixonpeabody.com/insights/alerts/2023/10/09/california-strengthens-its-ban-on-non-compete-agreements>.

<sup>49</sup> *Edwards v. Arthur Andersen LLP*, 68 Cal. Rptr. 3d 649 (Cal. Ct. App. 2008).

<sup>50</sup> *Marsh USA Inc. v. John Does*, 354 S.W.3d 764 (Tex. App. 2008).

regulations in 2021 aimed at curbing the use of non-compete clauses in employment contracts. These regulations highlight the importance of balancing business interests with employee rights and maintaining competitive markets, particularly for lower-wage workers who are disproportionately affected by such restrictions.

On April 23, 2024, the FTC voted 3-2 to implement a new rule that broadly bans employers from using non-compete clauses, with some exceptions. Under this rule, these non-compete agreements are classified as unfair competitive practices under Section 5<sup>51</sup> of the FTC Act. The exceptions include non-compete clauses that apply to certain "senior executives" and those included in legitimate business sales<sup>52</sup>.

However, the legal landscape shifted dramatically with the case of *Ryan, LLC v. Federal Trade Commission*<sup>53</sup>, filed shortly after the FTC announced its new rule. Ryan, LLC, a global tax services firm that uses non-compete agreements with certain employees, challenged the rule on the grounds that it violates the FTC Act and infringes on constitutional rights. The company argued that the rule was arbitrary and unlawful. On July 3, 2024, a court granted a preliminary injunction, halting the enforcement of the rule against the plaintiffs.

### **The FTC's Authority and the Court's Ruling**

The Federal Trade Commission (FTC) contended that Section 6(g)<sup>54</sup> of the FTC Act (15 U.S.C. §§ 41-58) granted it the authority to create substantive rules regarding unfair methods of competition, including rules related to non-compete clauses. This section gives the FTC the power to classify corporations and to establish rules and regulations necessary for enforcing various provisions of the FTC Act, specifically those that prohibit unfair competition.

However, the court disagreed, stating that Section 6(g) does not explicitly empower the FTC to create substantive rules about unfair methods of competition. Instead, the court characterized it as a "housekeeping statute" meant for establishing rules related to the organization, procedure, or practice of the agency, rather than substantive regulations. The absence of statutory penalties for breaching rules made under Section 6(g)—unlike the

---

<sup>51</sup> Section 5<sup>51</sup> of the FTC Act

<sup>52</sup> Congressional Research Service, *The Federal Trade Commission's Non-Compete Rule* (May 3, 2024), <https://crsreports.congress.gov/product/pdf/LSB/LSB11159>.

<sup>53</sup> *Ryan LLC v. Federal Trade Commission*, Civil Action No. 3:24-CV-00986-E (N.D. Tex.).

<sup>54</sup> 15 U.S.C. § 46(g) (2024).

penalties associated with violations of rules against unfair or deceptive trade practices—further reinforced the court's view that this section does not provide substantive rulemaking authority<sup>55</sup>.

### **The Court's Findings on the FTC's Rule**

Additionally, the court ruled that the evidence supporting the FTC's rule was insufficient. It noted that the rule was based on inconsistent and flawed empirical data, failed to take into account the potential benefits of non-compete agreements, and overlooked a significant amount of evidence that supports their validity. The court also criticized the FTC for not adequately exploring alternative approaches before deciding to issue the rule<sup>56</sup>.

### **Global Trends: Enforcement Actions and Advisory Bulletins**

The Hong Kong Competition Commission (HKCC) has also acknowledged the potential antitrust concerns surrounding no-poaching agreements, publishing an Advisory Bulletin on the subject. This bulletin underscores that wage-fixing and no-poaching agreements raise significant competition issues, advising companies to independently set their employment practices without sharing sensitive information with competitors. Similarly, in Europe, the Spanish competition authority has previously imposed fines for cartel-like behavior, including coordinated hiring practices among rival companies. This highlights a growing recognition and enforcement of antitrust laws concerning employment practices globally<sup>57</sup>.

### **India: Section 27 of the Indian Contract Act and Judicial Precedents**

In India, the legal framework governing no-poaching agreements and similar restrictive covenants is mainly dictated by Section 27<sup>58</sup> of the Indian Contract Act, which nullifies agreements that restrict individuals from pursuing lawful professions. The Indian judiciary has taken a cautious approach toward non-solicitation clauses, with notable cases like *Embee Software Pvt. Ltd. v. Samir Kumar Shaw*<sup>59</sup> confirming the validity of non-solicitation

---

<sup>55</sup> “Nina T. Martinez, Jean F. Kuei, Laura G. Killalea, Kenneth W. Taber & Alex Guerin, District Court Ruling Bars Federal Trade Commission Non-Compete Rule for the Near Term, *Pillsbury Law* (Oct. 9, 2024), <https://www.pillsburylaw.com/en/news-and-insights/us-district-court-federal-trade-commission-noncompete-rule.html>.”

<sup>56</sup> Competition Comm’n, *Advisory Bulletin: Competition Concerns Regarding Certain Practices in the Employment Marketplace in Relation to Hiring and Terms and Conditions of Employment* (Apr. 9, 2018), [https://www.compcomm.hk/en/media/press/files/20180409\\_Competition\\_Commission\\_Advisory\\_Bulletin\\_Eng.pdf](https://www.compcomm.hk/en/media/press/files/20180409_Competition_Commission_Advisory_Bulletin_Eng.pdf).

<sup>57</sup> Indian Contract Act, No. 9 of 1872, § 27 (India).

<sup>58</sup> *Embee Software Pvt. Ltd. v. Samir Kumar Shaw*, (2009) 3 Cal LJ 1 (Cal.).

<sup>59</sup> Competition Act, No. 12 of 2003, § 3 (India).

provisions under specific circumstances. While the Competition Commission of India (CCI) has not yet extensively addressed no-poaching agreements, there is potential for these agreements to be evaluated under Section 3<sup>60</sup> of the Competition Act, which addresses anti-competitive agreements. As Indian competition law develops, the CCI may conduct sector inquiries, especially in industries where skilled labor is vital, to assess the implications of no-poaching agreements.

### **European Union**

In the European Union, non-compete clauses in cooperation or distribution agreements have come under increased scrutiny concerning their compliance with EU competition law. A significant case that sheds light on these issues involved EDP Comercial and Modelo Continente, where a non-compete clause played a key role in a cross-discount scheme.

In January 2012, EDP Comercial and Modelo Continente launched the "EDP Continente Scheme." This initiative allowed customers to benefit from reduced electricity prices if they held a Continente Card. The agreement included mutual non-compete obligations, with EDP agreeing to refrain from entering the food retail market and Modelo Continente committing not to engage in electricity supply activities. However, in 2017, the Portuguese competition authority fined both companies €34.5 million, claiming that the non-compete clause amounted to market sharing, which violated Article 101 of the Treaty on the Functioning of the European Union (TFEU)<sup>60</sup>.

Following this, the Lisbon Court of Appeal raised several important questions for the Court of Justice of the European Union (CJEU). These questions included whether a company not currently in a market could be viewed as a potential competitor, how the Scheme should be categorized (as either a vertical or agency agreement), whether the non-compete clause could be classified as an ancillary restriction under Article 101(1) TFEU<sup>61</sup>, and whether the clause could be considered a by-object restriction even if it had some benefits for consumers.

In its analysis, the CJEU stressed that identifying potential competition necessitates solid evidence of a genuine possibility for Modelo Continente to enter the electricity market, rather

---

<sup>60</sup> *EDP – Energias de Portugal SA v. Autoridade da Concorrência*, Case C-331/21, ECLI:EU:C:2023 (Oct. 26, 2023) (Third Chamber).

<sup>61</sup> Treaty on the Functioning of the European Union art. 101(1), 2012 O.J. (C 326) 47 (EU).

than just hypothetical scenarios. The Court observed that the existence of a non-compete agreement implies that the parties see each other as potential competitors. Additionally, the CJEU clarified that a vertical agreement involves parties operating at different levels in the production or distribution chain; in this case, EDP and Modelo did not fit this definition due to their lack of interconnected market activities<sup>62</sup>.

When discussing ancillary restrictions, the CJEU reiterated that any limitations tied to a non-compete clause must be necessary for implementing the agreement. In this case, the non-compete clause went beyond what the Scheme intended, suggesting that it could be seen as excessive and unnecessary. The Court also pointed out that agreements that exclude competitors could be classified as by-object restrictions due to their inherently anti-competitive nature. To challenge this classification, parties need to present compelling evidence of pro-competitive effects directly tied to the agreement.

This ruling has important implications for businesses. It suggests that non-compete clauses can indicate potential competition, leading to increased regulatory scrutiny. Companies should carefully evaluate the necessity of such agreements, as they could be viewed as market-exclusion agreements. If non-compete clauses are deemed necessary, firms must ensure they are proportionate and consider less restrictive alternatives to safeguard their business interests. In summary, while non-compete clauses can serve legitimate business purposes, their use in cooperation agreements requires careful consideration of competition law implications under EU regulations.

## **THEORETICAL AND PRACTICAL EFFECTS ON MARKET COMPETITION**

### **Justiciability of such clauses**

In a typical workplace where non-compete agreements are used; the focus is often on protecting valuable trade secrets—technical information or business practices that companies want to keep secure. These agreements are seen as a solution to a potential problem: before any information is shared, both the employee and the employer benefit from the exchange, as it helps the employee be more productive. However, once the employee has that knowledge, they could exploit it by threatening to reveal it to competitors, which could lead to demands for

---

<sup>62</sup> Herbert Smith Freehills, Non-Compete Clauses In Cooperation Agreements – Caution Required, Mondaq (Nov. 13, 2023), <https://www.mondaq.com/antitrust-eu-competition/1388272/non-compete-clauses-in-cooperation-agreements-caution-required>.

higher compensation. Knowing this risk, companies might hesitate to share important information unless they have some legal protection, like a non-compete clause. In some cases, client relationships are also included under these agreements, though it's debated whether such relationships deserve the same level of protection as trade secrets since their value to society might not be the same<sup>63</sup>.

Non-compete agreements are sometimes used in situations where workers aren't dealing with sensitive trade secrets, and there are a few reasons that could explain why. One explanation is related to training. Companies might use non-competes to ensure that their investment in employee training pays off. Typically, employers are hesitant to invest in training that enhances general skills because those skills can benefit other companies, too. While economists often argue that employees should accept lower wages in return for training, this doesn't always happen in practice, as many workers may not be willing to take pay cuts. Non-competes provide a solution by giving companies confidence that employees will stay for a set period, allowing the employer to recoup the cost of training while employees receive more opportunities for development than they might otherwise get.

Another explanation is screening. Non-competes could be a tool for companies to hire employees who are less likely to leave. Since hiring and separating from employees is expensive, businesses want to avoid turnover. The problem is that it's hard for employers to tell which workers are likely to stay, and workers can't be trusted to honestly disclose how long they plan to remain—everyone will claim they're unlikely to leave to appear more valuable. Non-competes help filter for employees with a lower chance of departure.

Research on non-competes is still in its early stages, but a recent study has provided valuable insights into workers who sign these agreements, answering key questions about their characteristics. In addition to exploring who signs non-competes, the research looks at whether these workers actually deal with clients, have access to client-specific information, or work with trade secrets<sup>64</sup>.

When it comes to protecting trade secrets, one might expect non-competes to be mostly used for highly educated workers in fields where trade secrets are common. However, the data shows

---

<sup>63</sup> Ibid

<sup>64</sup> Evan Starr, Norman Bishara & J.J. Present, *Non-competes in the U.S. Labor Force* (2015) (working paper).

that this isn't entirely the case. Around 15 percent of workers without a four-year college degree report having a non-compete, which is only slightly lower than the 18 percent among all workers. While jobs like engineering and computer science see the highest use of non-competes, with about one-third of workers in these fields covered, other sectors like personal services and repair also have significant numbers, with around 18 percent of workers under non-compete agreements. When even fast-food workers are being asked to sign two-year non-competes, it becomes harder to argue that protecting trade secrets is always the main reason for these agreements<sup>65</sup>.

Non-competes seem to play a role in encouraging worker training. Research by Evan Starr shows that when non-compete enforcement is stronger, workers are more likely to receive company-sponsored training. For example, in states where non-competes are more enforceable, there's a 2.4% higher chance that workers in high-litigation fields will receive training from their employers compared to those in low-litigation fields<sup>66</sup>. Interestingly, this research also finds that when states require companies to offer substantial benefits alongside non-competes—such as promotions, training, or higher pay—both training opportunities and wages for workers improve.

As for the idea that non-competes help companies screen for employees who are likely to stay longer, evidence suggests otherwise. Starr, along with Bishara and Prescott, gathered data by asking workers how long they expected to stay with their current employer, comparing those who had signed non-competes with those who hadn't. After accounting for various factors, they found no link between signing a non-compete and a worker's expected tenure, indicating that screening may not be a major reason for these agreements<sup>67</sup>.

There's also evidence that employers may be taking advantage of workers' lack of understanding of non-competes. In some cases, companies have workers sign non-competes even in states where such agreements are not legally enforceable. For instance, in California, which generally doesn't enforce non-competes, 19% of workers are still under one—a rate slightly higher than the national average. This suggests that workers may not fully grasp the

---

<sup>65</sup> Ibid.

<sup>66</sup> Natarajan Balasubramanian, "Jin Woo Chang, Mariko Sakakibara, Jadadeesh Sivadasan & Evan Starr, Locked In? Noncompete Enforceability and the Mobility and Earnings of High Tech Workers (2016) (working paper)."

<sup>67</sup> Supra at 58.

legal implications of the agreements they're signing<sup>68</sup>.

### Effects of such Clauses

The impact of non-compete enforcement on worker mobility is a key area of study. In a notable case, Michigan unintentionally made non-competes legally enforceable in 1985, creating a rare chance to examine how enforcing these agreements affects labor markets. Normally, it's difficult to separate the effects of non-compete laws from changes in the economy<sup>69</sup>. But because Michigan's change was unexpected and accidental, researchers have been able to more confidently attribute shifts in labor mobility to the enforcement of non-competes.

Marx, Strumsky, and Fleming took advantage of this "natural experiment" and found that worker mobility dropped by 8% after non-competes became enforceable, with an even larger decline among workers whose skills were more specialized. However, some critics argue that these findings are flawed, pointing out that the legal change wasn't retroactive and that certain states were incorrectly categorized as non-enforcing<sup>70</sup>. In another study, Marx also discovered that workers bound by non-competes who do change jobs are more likely to leave their industry entirely, which can lead to lower wages, skill erosion, and disconnection from their professional networks.

The impact of non-competes on wages has been less thoroughly studied. Most research in this area consists of case studies, surveys targeting specific professions (like electrical engineers), and theoretical work. A recent broad online survey has also contributed to this area. By combining insights from this previous research on non-compete enforceability and prevalence with standard labor market data, scholars are beginning to generate evidence on how these agreements might influence wages, though the findings remain largely suggestive at this stage<sup>71</sup>.

---

<sup>68</sup> "Office of Economic Policy, U.S. Department of the Treasury, *Non-compete Contracts: Economic Effects and Policy Implications* (Mar. 2016), [https://home.treasury.gov/system/files/226/Non\\_Compete\\_Contracts\\_Economic\\_Effects\\_and\\_Policy\\_Implications\\_MAR2016.pdf](https://home.treasury.gov/system/files/226/Non_Compete_Contracts_Economic_Effects_and_Policy_Implications_MAR2016.pdf)."

<sup>69</sup> Matt Marx & Lee Fleming, Non-compete Agreements: Barriers to Entry ... and Exit? 12 *Innovation Pol'y & Econ.* 39 (2012), <https://doi.org/10.1086/663155>.

<sup>70</sup> "Office of Economic Policy, U.S. Department of the Treasury, *Non-compete Contracts: Economic Effects and Policy Implications* (Mar. 2016), [https://home.treasury.gov/system/files/226/Non\\_Compete\\_Contracts\\_Economic\\_Effects\\_and\\_Policy\\_Implications\\_MAR2016.pdf](https://home.treasury.gov/system/files/226/Non_Compete_Contracts_Economic_Effects_and_Policy_Implications_MAR2016.pdf)."

<sup>71</sup> Starr, Evan, Norman Bishara and JJ Present. 2015. "non-competes in the U.S. Labor Force." Working paper.

In urban economics, certain regions experience "agglomeration effects," where businesses in the same sector gather in specific areas, such as high-tech firms clustering in Silicon Valley. This happens for various reasons, including access to a large pool of skilled workers, competitive suppliers, and—importantly—information sharing among companies and employees. While individual firms might not always benefit from sharing expertise, it often strengthens the broader economy and makes the region more appealing to other businesses<sup>72</sup>. A significant factor enabling this exchange of knowledge is worker mobility. When employees move between firms within the same industry, it helps spread innovations and industry best practices, even though it can be costly for the company losing the worker<sup>73</sup>. However, non-compete agreements can hinder this mobility, potentially stifling the benefits of clustering in these regions.

Silicon Valley is often cited as a prime example of how worker mobility fosters growth in a tech hub. California, like a few other states, typically doesn't enforce non-compete agreements, allowing workers to switch jobs more easily, which is believed to contribute to the area's success. However, some Silicon Valley companies have been accused of colluding to keep wages low and reduce talent poaching, suggesting that collusion may be a substitute for non-competes in this case. Despite this, Silicon Valley illustrates the importance of knowledge sharing driven by worker mobility within industry clusters<sup>74</sup>.

### **COMPARATIVE PERSPECTIVES: USA, INDIA, AND THE EU**

#### **Non-Compete Agreements in the United States**

In the U.S., non-compete clauses have traditionally been regulated by state laws that allow such agreements when they protect legitimate business interests. However, recent developments have led to stricter limitations. In 2023, New York passed legislation banning non-competes, although this is under review following a Governor's veto. The most significant shift occurred in April 2024 when the Federal Trade Commission (FTC) imposed a federal ban on non-compete clauses<sup>75</sup>. FTC Chairperson Lina Khan argued that non-competes

---

<sup>72</sup> "Topel, Robert H. and Michael P. Ward. 1992. "Job Mobility and the Careers of Young Men." *The Quarterly Journal of Economics* 107 (2): 439–179."

<sup>73</sup> "Sichelman, Ted and Jonathan Barnett. 2015. "Revisiting Labor Mobility in Innovation Markets." Working paper."

<sup>74</sup> "Gilson, Ronald J. 1999. "The Legal Infrastructure of High Technology Industrial Districts: Silicon Valley, Route 128, and Covenants Not to Compete." *New York University Law Review* 74 (3): 575–629."

<sup>75</sup> Federal Trade Commission Act, 15 U.S.C. § 45 (2020).

suppress wages, stifle innovation, and damage the economy<sup>76</sup>. The FTC's decision relies on Section 5<sup>77</sup> of the FTC Act, which outlaws unfair trade practices. The ban not only targets non-compete agreements but also similar arrangements with some exceptions, such as for senior executives earning over \$151,164 annually. Exceptions remain for in-term non-competes and those related to legitimate business sales<sup>78</sup>. This federal move aims to increase labor mobility, raise wages, and boost competition across sectors.

### Non-Compete Agreements in India

Indian law primarily governs non-compete agreements under Section 27<sup>79</sup> of the Indian Contract Act, 1872, which invalidates any agreement that restricts an individual's right to practice a lawful trade or profession, except in the case of a sale of goodwill. However, Indian courts have recognized valid non-compete clauses when they reasonably protect an employer's legitimate interests, such as trade secrets, as seen in *Niranjan Shankar Golikari v. Century Spinning*<sup>80</sup>. From a competition law angle, non-competes might fall under Section 3(4)<sup>81</sup> of the Competition Act, 2002, which regulates vertical agreements. While non-competes could be seen as exclusive dealing or refusal-to-deal arrangements, employment contracts are generally viewed as personal matters, not directly impacting competition. The Competition Commission of India (CCI) has ruled that non-competes do not violate competition law unless they create entry barriers, as in the *Anand Moudgil v. Orbit Aviation*<sup>82</sup> case. The CCI's 2017 Guidance Note does not directly address non-compete clauses in employment but assesses restrictive covenants based on their scope and duration, applying the rule of reason to weigh their impact<sup>83</sup>.

### Non-Compete Agreements in the European Union

The EU takes a sector-specific approach to non-compete agreements, focusing on agreements

---

<sup>76</sup> Murphy, Chris. "FTC's Lina Khan Says CT Could Fill 'Gaps' in Non-Compete Ban." June 14, 2024. Federal Trade Commission. Available at: <https://www.murphy.senate.gov/newsroom/in-the-news/ftcs-lina-khan-says-ct-could-fill-gaps-in-non-compete-ban>.

<sup>77</sup> Federal Trade Commission Act, 15 U.S.C. § 45 (2020).

<sup>78</sup> FTC Issues Final Rule Banning Non-Competes Across the US; Finds Them to Be Violative of § 5 of the FTC Act. SCC Online (Apr. 26, 2024). Available at: <https://www.sconline.com/blog/post/2024/04/26/ftc-issues-final-rule-banning-non-competes-across-us/>.

<sup>79</sup> Indian Contract Act, 1872, § 27 (India).

<sup>80</sup> *Niranjan Shankar Golikari v. The Century Spinning & Mfg. Co. Ltd.*, (1967) 2 LLJ 404 (SC).

<sup>81</sup> Competition Act, 2002, § 3(4) (India).

<sup>82</sup> *Anand Moudgil v. Orbit Aviation Pvt. Ltd.*, Case No. 21 of 2016, Competition Commission of India (2016).

<sup>83</sup> "Competition Commission of India, *CCI Invites Public Comments Regarding Examination of Non-Compete Restrictions Under Regulation of Combinations*, Press Information Bureau (May 15, 2020, 9:18 PM), <https://pib.gov.in/PressReleasePage.aspx?PRID=1624196>. *SEE Also*, Pranshu Gupta & Roopam Dadhich, *Self-Assessment of Non-Compete Clauses: The New Normal*, IndiaCorpLaw (Jan. 1, 2021), <https://indiacorplaw.in/2021/01/self-assessment-of-non-compete-clauses-the-new-normal.html>."

between businesses rather than employment contracts, which are governed by national laws. Member states have different rules regarding the duration and enforceability of non-competes. For example, Spain allows non-competes for skilled workers to last two years, while in Italy, executives may be bound by non-competes for up to five years<sup>84</sup>. The European Commission (EC) has issued guidelines concerning non-competes in business concentrations, but labor mobility is mostly left to national regulation. The general EU approach emphasizes that non-competes must be reasonable and proportionate in scope and duration. Post-Brexit, the UK has proposed a three-month limit on non-compete clauses in employment contracts, aligning with broader European trends to restrict overly burdensome covenants<sup>85</sup>.

### Key Themes in the Comparative Analysis

- **Legality and Enforcement**

In the U.S., the FTC's 2024 ban is a significant shift from state-level enforcement, aiming for nationwide reform. In India, non-competes are heavily scrutinized under the Indian Contract Act but may be upheld if they protect trade secrets or proprietary interests. In the EU, non-competes are regulated by national laws rather than at the EU level, with competition law focusing on agreements between businesses.

- **Competition Law and Labor Mobility**

In the U.S., the FTC's rule is designed to increase labor mobility and improve wages by preventing employers from using non-competes to restrict job opportunities. In India, non-competes are treated as vertical agreements under competition law but are not considered significant unless they hinder market entry. In the EU, while labor mobility is crucial, non-competes are largely handled at the state level and not addressed by the broader competition regime.

- **Balancing Interests: Innovation vs. Protection**

The U.S. ban seeks to enhance innovation by allowing employees to move freely between jobs, though critics worry this could expose companies to trade secret theft. In India, courts balance the need to protect employers' proprietary information with

---

<sup>84</sup> Tito Boeri, Andrea Garnero & Lorenzo G. Luisetto, The Use of Non-Compete Agreements in the Italian Labour Market (Sept. 12, 2022), [https://www.frd.org/wp-content/uploads/2022/05/Boeri-Garnero-Luisetto-Non-compete-agreements-Italy\\_FINAL.pdf](https://www.frd.org/wp-content/uploads/2022/05/Boeri-Garnero-Luisetto-Non-compete-agreements-Italy_FINAL.pdf).

<sup>85</sup> Nicholas Greenacre, Michael Engel & Peter Citron, UK Proposes Stricter Approach to Non-Compete Clauses, KLUWER COMPETITION LAW BLOG (May 29, 2023), <https://competitionlawblog.kluwercompetitionlaw.com/2023/05/29/uk-proposes-strict-approach-to-non-compete-clauses/>. *SEE ALSO*, Department for Business & Trade, Smarter Regulation to Grow the Economy (May 10, 2023), <https://www.gov.uk/government/publications/smarter-regulation-to-grow-the-economy/smarter-regulation-to-grow-the-economy#reforming-regulations-to-reduce-burdens>.

employees' rights to career freedom, using the rule of reason to assess non-compete clauses. In the EU, non-competes are permitted if they are reasonable and protect both businesses and employees' rights to mobility.

Non-compete agreements represent an intersection of employment and competition law across jurisdictions. While the U.S. has taken a bold step in banning non-competes, India and the EU continue to regulate them with a focus on reasonableness and the interests they protect. As global competition law evolves, balancing innovation, intellectual property protection, and labor mobility will remain a crucial challenge for policymakers and courts.

### **CONCLUSION AND SUGGESTIONS**

Non-compete clauses occupy a complex space in the economic landscape, balancing the protection of business interests with the need for market competition. Their economic implications extend beyond immediate contractual parties, influencing broader market dynamics and regulatory frameworks. Policymakers and regulators must navigate this intricate terrain, ensuring that non-compete clauses foster innovation and investment while preserving fair competition and consumer welfare. By adopting balanced approaches and considering the evolving market landscape, it is possible to harness the benefits of non-compete clauses while mitigating their potential drawbacks.

#### **Future Directions and Emerging Trends**

The landscape of non-compete clauses and competition law continues to evolve. Emerging trends include:

**Technological Advancements:** As technology evolves, so do the nature and implications of non-compete clauses. The digital economy and the rise of remote work present new challenges and considerations for regulators.

**Globalization:** The globalization of markets necessitates a more harmonized approach to non-compete clauses. International cooperation and standardized regulations can help address cross-border competition issues.

**Policy Reforms:** Ongoing policy reforms aim to strike a balance between protecting business interests and promoting fair competition. Policymakers are exploring new frameworks to ensure that non-compete clauses serve their intended purpose without undermining market dynamics.

## **Policy Implications and Recommendations**

Balancing the benefits and drawbacks of non-compete clauses requires nuanced policy approaches:

**Reasonable Limits:** Establishing clear guidelines on reasonable duration and scope ensures non-compete clauses do not unduly restrict competition.

**Exemptions for Certain Workers:** Policymakers might consider exemptions for certain categories of workers, such as low-wage employees or those in sectors where non-compete clauses are less justifiable.

**Transparency:** Requiring greater transparency in the use of non-compete clauses can prevent abuse and promote fair practices.

**Alternative Protections:** Encouraging the use of non-disclosure agreements (NDAs) and trade secret laws can protect businesses while minimizing the negative impact on competition.

## **BIBLIOGRAPHY**

### **Books**

- **Bone, Robert G.** Noncompete Agreements in Employment: A Common Law Perspective. 43 J. Marshall L. Rev. 119 (2009).

### **Journal Articles**

- **Adelman, M. A.** Effective Competition and the Antitrust Laws. 61 Harv. L. Rev. 1289 (1948).
- **Banerjee, Alipak, Ramakrishnan, Saumy, & Tripathi, Yashasvi.** Non-Compete Clauses: Protection or Restraint? NishithDesaiAssocs.
- **Davis, Evan A.** The Disruptive Effects of Non-Compete Agreements on Innovation. 29 Harv. J. Law & Tech. 127 (2015).
- **Golikari, Niranjan Shankar.** Non-compete Provisions under the Indian Contract Act and Its Applicability: An Analysis. 14 INT'L. IN-HOUSE COUNSEL J. 1 (Summer 2021).
- **Johnson, Elizabeth L.** Noncompete Agreements: How Employees' Rights Are Trampled Underfoot. 46 Wm. & Mary L. Rev. 167 (2004).
- **Kinne, Konstanze.** Efficiencies in Merger Analysis. November-December, 2019.
- **Marx, Matt, & Fleming, Lee.** Non-Compete Agreements: Barriers to Entry ... and Exit? 12 Innovation Pol'y & Econ. 39 (2012).
- **McAdams, John M.** Non-Compete Agreements: A Review of the Literature. Dec. 31,

2019.

- **Nicholas, Elizabeth E.** Drafting Enforceable Non-Solicitation Agreements in Kentucky. 95 Ky. L.J. 275 (2006).
- **Oh Lam, Sarah, Lenard, Thomas, & Wallsten, Scott.** Is a Ban on Non-Competes Supported by Empirical Evidence? 29 Fordham J. Corp. & Fin. L. 1 (2023).
- **Westphal, Christine M.** Restrictive Covenants in Employment Contracts: Regulating Employee Solicitation. 37 J. Legis. 108 (2011).

### Law Reviews

- **Edwards v. Arthur Andersen LLP**, 68 Cal. Rptr. 3d 649 (Cal. Ct. App. 2008).
- **Marsh USA Inc. v. John Does**, 354 S.W.3d 764 (Tex. App. 2008).

### Reports

- **Competition Commission of India.** CCI Invites Public Comments Regarding Examination of Non-Compete Restrictions Under Regulation of Combinations. Press Information Bureau (May 15, 2020).
- **Federal Trade Commission.** Notice of Proposed Rulemaking on Non-Compete Agreements (2021).
- **Office of Economic Policy, U.S. Department of the Treasury.** Non-competes Contracts: Economic Effects and Policy Implications (Mar. 2016).

### Blogs

- **Cyril Amarchand Mangaldas.** Non-Solicitation in the Context of Competition and Labour Laws. (May 25, 2018).
- **Herbert Smith Freehills.** Non-Compete Clauses In Cooperation Agreements – Caution Required. Mondaq (Nov. 13, 2023).
- **Nixon Peabody.** California Non-Compete Law: California Strengthens Its Ban on Non-Compete Agreements. (Oct. 9, 2023).
- **Pillsbury Law.** District Court Ruling Bars Federal Trade Commission Non-Compete Rule for the Near Term. (Oct. 9, 2024).

### Miscellaneous

- **Christian Gormsen.** The Declining Barriers to Foreign Direct Investment and How to See Them. January 2011.

- **Dan Schawbel.** How to Know Whether You Should Switch Employers. TIME (April 11, 2022).
- **James M. MacDonald & Marvin L. Hayenga.** Concentration, Mergers and Antitrust Policy.
- **Gilson, Ronald J.** The Legal Infrastructure of High Technology Industrial Districts: Silicon Valley, Route 128, and Covenants Not to Compete. New York University Law Review 74 (3): 575–629.

#### Cases/Judicial Decisions

- **EDP – Energias de Portugal SA v. Autoridade da Concorrência,** Case C 331/21, Judgment of the Court (Third Chamber) (Oct. 26, 2023).
- **Ryan LLC v. Federal Trade Commission,** Civil Action No. 3:24-CV-00986-E (N.D. Tex.).
- **Dhananjay Dubey.** Transforming Competition: FTC’s Non-Compete Ban vs. India’s Legal Landscape. CBCL (July 12, 2024).
- **Bharat Sanchar Nigam Ltd. v. Telephone Shramik Sangh,** (2006) 5 SCC 459

