




**Between Freedom of Work and Business Protection:
The Non-Compete Clause in a Comparative Perspective**

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A hand is holding a red and blue horseshoe magnet over a row of wooden blocks. The magnet is positioned as if it is about to pick up one of the blocks. The background is a blurred white shirt.

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Publisher: JPM | Partners

Delta House, 8a Vladimira Popovića street

www.jpm.law

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Design and prepress: JPM | Partners

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General Overview

Post-employment non-compete clauses represent one of the most subtle and conceptually challenging issues in contemporary labour law, primarily due to the need to establish a precise balance between two fundamental interests: the protection of the employer's legitimate business interests and the employee's freedom to continue their professional and economic activity following the termination of an employment relationship.

From a historical perspective, non-compete clauses do not represent a new legal institute, but rather have their roots in the early stages of industrial law and commercial relations.

Their initial forms developed within the Anglo-Saxon legal tradition, where courts, as early as the XIX century, began to examine agreements restricting trade or professional activity, particularly in the context of protecting business secrets and client relationships. The principle established at that time was clear: such restrictions are, as a rule, void, unless they are reasonable in scope and necessary for the protection of a legitimate business interest.

Over time, parallel to industrial development, the evolution of corporate structures and the intensification of market competition, such restrictions gradually changed their legal nature. From an exception tolerated under strict conditions, they transformed into an accepted and legitimate legal instrument.

In continental legal systems, this transformation was institutionalised during the XX century, through the incorporation of such clauses into positive law, with a clearly defined objective: to establish a balance between the protection of the employer and the restriction of the employee's freedom.

In contemporary conditions, the non-compete clause represents a contractual obligation whereby the employee, following the termination of employment, undertakes to refrain from activities that could constitute competition to the former employer. However, its essence does not lie solely in the restriction itself, but in the conditions under which such restriction is legally permissible and economically justified.

Modern legal systems, despite their differences, converge around several essential criteria. First and foremost, the existence of a legitimate business interest, which is not presumed but must be specifically established. Furthermore, the restriction must be limited in time, territory, and scope of activity, i.e. it must not exceed what is necessary. Finally, the provision of appropriate compensation appears as a key corrective mechanism that balances the structural inequality between the parties.

It is particularly significant that these clauses today are not assessed in isolation, but within the broader context of the market economy, workforce mobility, and the dynamics of competitive relations. Courts and legislators are increasingly moving away from a formalistic approach and towards an analysis of economic reality, whereby the central question is not only whether the clause is formally valid, but whether it is functionally and economically justified.

Accordingly, expectations regarding such clauses in modern law have significantly evolved. They must not be generalised or template-based, but must reflect the specific business reality, the risk being protected, and the market context in which the parties operate. Their validity directly depends on their ability to withstand the test of reasonableness, necessity, and proportionality.

In practice, these clauses are not treated as a standard contractual element, but as an instrument for risk management, protection of know-how, business data and relationships, and maintenance of competitive advantage. In this regard, the essential question arises: is it possible to establish a unified approach to such clauses, or does each jurisdiction impose its own balance requiring a fully individualised approach?

The answer, as demonstrated by the comparison between North Macedonia, Spain, and Germany, is far from simple.

Comparative Analysis

Within the **Macedonian legal system**, non-compete clauses are permitted by law, but their legal fate largely depends on how they are formulated and the context in which they are applied. Although the Labour Relations Act provides for their contractual regulation, as well as a time limitation of up to two years, the essential elements remain insufficiently defined. Particularly problematic is the concept of “appropriate compensation”, which the legislator leaves open, without concrete parameters or guidance.

This normative openness, although at first glance offering flexibility, in practice creates significant legal uncertainty. Employers often incorporate clauses that formally meet the legal requirements, but fail to withstand judicial scrutiny. Courts, in an effort to protect the right to work, apply a markedly restrictive approach, paying particular attention to the proportionality of the restriction and the reality of the compensation. Clauses that are broadly formulated, without clear geographical or functional limitations, or which provide symbolic compensation, are regularly annulled.

Accordingly, in the Macedonian context, the validity of the clause derives less from its formal existence and more from its persuasiveness. Practice indicates that courts tend to interpret the concept of competition narrowly, often based on formal criteria such as business activity codes, rather than actual competitiveness, which calls into question both the understanding and the practical purpose of the clause.

By contrast, the **Spanish legal system** offers a clearer and more practical framework. Non-compete clauses are widely accepted and regularly applied, but their validity is conditioned upon the existence of a real industrial or commercial interest, as well as the payment of adequate compensation. Although the legislation does not establish a fixed percentage, judicial practice has developed relatively stable standards, whereby compensation is determined in accordance with the intensity of the restriction imposed.

What distinguishes the Spanish model is its focus on economic reality. Courts are not satisfied with mere formal compliance, but analyse whether the clause genuinely creates a restriction and whether the compensation is proportionate to that restriction. The issue of competition is assessed concretely, in the context of the specific activity, market, and role of the employee, thereby enabling a functional and practical application of such clauses.

The **German system**, on the other hand, represents an example of maximum legal certainty achieved through strict formalism. The legislator leaves no room for interpretation in key aspects, particularly with regard to compensation, which must amount to at least 50% of the employee's last salary. This threshold constitutes an absolute condition for validity.

This approach has a dual effect. On the one hand, it significantly reduces legal uncertainty, as the parties can foresee in advance whether the clause will be enforceable. On the other hand, it increases the economic cost for employers, requiring them to carefully assess when such a clause is truly justified.

German courts, while strict in terms of formal requirements, provide a high level of protection for the clause once those requirements are fulfilled. In such cases, the clause does not function merely as a contractual restriction, but as a paid exclusivity mechanism, with clearly defined legal consequences in the event of breach.

Conclusion

From a comparative perspective, these 3 systems do not represent variations of the same model, but rather articulate fundamentally different regulatory paradigms with respect to the same legal issue. North Macedonia is characterised by normative openness which, in practice, is channelled through pronounced judicial restrictiveness; Spain develops a carefully balanced, economically sensitive approach oriented towards functional sustainability; while Germany establishes a high degree of legal certainty through a strictly structured and formalised model that virtually eliminates room for interpretation.

In such a context, non-compete clauses cannot be treated as universally applicable contractual constructs, nor as template solutions mechanically transposed from one jurisdiction to another. On the contrary, their validity and effectiveness depend on careful calibration that reflects the specific legal framework, economic logic, and judicial sensitivity of each individual system. It is precisely within this interaction between law and economics that their true value is determined. Accordingly, the significance of these clauses does not derive from their formal incorporation into contractual text, but from their ability to exist as legally sustainable and practically enforceable instruments. Modern legal practice increasingly draws a distinction between declarative restrictions and those that genuinely fulfil their protective function.

Ultimately, the real challenge lies not in the mere inclusion of a non-compete clause, but in its substantive design—ensuring that it withstands judicial scrutiny, provides proportionate and effective protection, and is economically justified. It is precisely in this subtle yet essential distinction that the boundary between a formally compliant contract and a strategically designed legal instrument is revealed.

Criterion	North Macedonia	Spain	Germany
Basic Legal Nature	Regulated under the Labour Relations Act; formally permitted but restrictively interpreted; treated as an exception to the freedom of work	Regulated under the Estatuto de los Trabajadores; clearly defined and functionally applicable; balance of interests	Regulated under the Handelsgesetzbuch; strictly regulated; highly formalized
Duration	Up to 2 years	6 months / up to 2 years (key positions)	Up to 2 years (strict)
Compensation for Compliance	Undefined → risk of nullity	Approx. 30–60% of last gross salary (case law)	Minimum 50% of last gross salary (mandatory)
Competition	Broad definition; risk of invalidation	Based on actual economic competition	Precisely defined
Judicial Approach	Restrictive	Balanced	Formal and predictable
Consequences	Limited enforceability	Repayment of compensation + damages	Repayment + injunction + damages
Practical Assessment	High risk	Balanced system	Gold standard

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