fondazione Ing. **R**ODOLFO **D**E**B**ENEDETTI

The use of non-compete agreements in the Italian labour market

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12 September 2022

Acknowledgments

We are very much indebted to Evan Starr, Norman Bishara and J.J. Prescott for sharing their survey instrument and advice that provided much inspiration for this report. We would also like to thank Andrea Bassanini, Federico Cingano, Francesco D'Amuri, Claudio Lucifora, Luca Marcolin, Emanuele Menegatti and Paolo Sestito for their very useful feedbacks and suggestions on the draft questionnaire during the expert meeting on the questionnaire on 18th March 2022. Our work also benefitted from the support of several colleagues. Fausta Faini skilfully supervised the work by CE&Co in scripting, testing, piloting and fielding the survey. At the Fondazione Rodolfo de Benedetti, Roberta Marcaletti provided precious administrative support, Paola Monti was essential in designing and testing the questionnaire and revising the draft report while Federico Mattei provided invaluable research assistance. All remaining errors are ours. Most of Andrea's work has been done while he was visiting the Joint Research Centre of the European Commission. The opinions expressed in this paper are those of the authors and cannot be attributed to the OECD, the European Commission or any of their member countries.

Key findings

An increasing body of evidence shows that firms have some degree of monopsony power over workers, which allows them to set wages below labour productivity levels and hire less employees than in a competitive environment. There are many possible sources of monopsony power. One is the use of legal provisions to limit workers' mobility, such as non-compete agreements. A non-compete agreement is a contract, or a clause of a contract, by which an employee agrees to not compete with her employer after the employment time period is over. In most countries, non-compete agreements are lawful (under certain conditions) and justified by the need to protect trade secrets and specific investment in the employment relationship by the employer (such as certain types of training and investment in knowledge). However, non-compete clauses can also be used to unduly restrict workers' mobility, therefore limiting their outside options and bargaining power.

This report provides the first comprehensive panorama on non-compete clauses in Italy with an analysis of the regulatory framework and an empirical assessment building on a representative survey of 2,000 private sector employees. Its main findings are:

- In Italy, non-compete clauses are regulated by the Civil Code but the law only foresees minimal requirements, without providing a very detailed framework. Over the years, the case law has clarified some aspects but, beyond the respect of the basic formal requirements, courts retain a significant margin of freedom in evaluating each case.
- Despite their importance in regulating many aspects of employment relationships, collective agreements play no role in regulating the use of non-compete clauses in Italy.
- About 16% of private sector employees are currently bound by a non-compete agreement, which corresponds to almost 2 million employees. The share of private sector employees who have agreed to a non-compete agreement at least once in their career is 22% and there is no sign of an increasing use of non-compete clauses over the last decades.
- Consistent with the idea that non-compete agreements are used to protect legitimate business interests, they are more common among managers and professionals and among highly educated and higher earning employees. They are also more common in mid-sized companies than in small ones or in multinational companies than in national ones.
- However, non-compete agreements are also relatively frequent among employees in manual and elementary occupations and low educated and lower earning ones. Moreover, non-compete clauses also cover employees without access to any type of confidential information.
- Non-compete clauses are not the only legal instrument to regulate post-employment activity: 39% of private sector employees in Italy are covered by a non-disclosure agreement; 12% by a pre-assignment agreement (a contract which assigns to the employer ownership over any invention created while employed); 11% by a clause of non-solicitation of clients; 10% by a

repayment of benefits and bonuses clause; 8% by a clause of non-solicitation of colleagues; and, 7% by a repayment of training costs clause.

- The majority of employees currently bound by a non-compete clause discovered about the clause before the beginning of the job, either at the moment of signing the contract (40%) or even before, when the worker was offered the job (28%). However, 15% of the clauses were introduced after the signature of the contract but in exchange for a promotion, a pay rise or an increase in responsibilities while 5.6% have been introduced after the signature of the contract with no change in the work performed.

- Among the employees bound by a non-compete agreement, 44% read it very carefully before signing it while 28% read it only quickly. Only 21% of the employees with a non-compete agreement tried to negotiate it. Most employees did not try to negotiate it because they found it reasonable or they took for granted that the clause was not negotiable.

- When looking at the content of the non-compete clauses, a large share appears not to comply with the minimum requirements established by law (i.e. specifying a compensation as well as time, sectoral and geographical limits). This means that a large share of the clauses are likely unenforceable and/or that workers are unaware of their content (even those who are sure to have signed one and declare to have read it carefully before signing).

- The perception about the risk of being taken to court and being found liable by a judge is totally uncorrelated with the likely enforceability of the clause. Non-compete clauses may therefore have an effect even when unenforceable.

- The probability of being bound by a non-compete clause is negatively correlated with local labour market concentration, in particular for middle-skilled workers. This suggests that non-compete agreements, as a tool to restrict competition in the labour market, matter less in a more concentrated local labour market because there are already less competitors.

- Two other clauses can affect workers' mobility in the Italian labour market: the notice period that employees with a permanent contract have to give if they intend to quit and the penalty that employees with a temporary contract may have to pay in case they want to quit before the end of the contract. The large majority of permanent workers has a notice period that is in line with the maximum foreseen in the collective agreement of reference and having a notice period is negatively correlated with having a non-compete clause. On the contrary, 12% of temporary workers have a penalty clause (whose actual enforceability is unclear) and this tends to go hand-in-hand with a non-compete clause.

- The findings of these report suggest there may be scope to promote a fairer use of non-compete clauses and enhance the transparency and fairness of the negotiation process without imposing an excessive burden on employers or blocking them from protecting their legitimate business interests. A number of policy options are discussed in the report.

1. Introduction

A large body of recent empirical research has documented the presence of monopsony power, i.e. the ability of a buyer to set the price of the goods and services it buys, in modern labour markets (see, among the most recent analyses, Yeh et al., 2022).[1] Monopsony is not a recent idea: the term itself was coined in 1933 by Joan Robinson (Robinson, 1933) and an influential book was published in 2003 by Alan Manning (Manning, 2003). Competition laws in most countries already include provisions that could be applied to monopsonists just as much as to monopolists (Manning, 2020). However, in practice, there was almost no action taken on monopsony in any OECD country (Posner, 2021) and also relatively little research until recently. Things began to change a few years ago when in the United States, it became apparent that some well-known companies were engaging in practices to restrict the ability of workers to change employers, either through no-poaching agreements (i.e. refraining from hiring employees employed by others companies) and/or through non-compete clauses (i.e. contract clauses preventing workers from working for a competitor after they separate from the employer).

There are many possible sources of monopsony power, ranging from market concentration, to employers' collusion, to the use of various provisions limiting workers' mobility, to "search costs" and labour market frictions (Council of Economic Advisers, 2016). In this report, we focus on "non-compete" agreements in employment contracts. A non-compete agreement is a contract, or a clause of a contract, where an employee agrees to not compete with an employer after the employment time period is over. In most countries, non-compete agreements are lawful (under certain conditions) and justified by the need to protect trade secrets and specific investment in the employment relationship by the employer (such as certain types of training and investment in knowledge). However, non-compete clauses can also be used to restrict workers' mobility as such, therefore limiting their outside options and bargaining power.

These competing hypotheses can be tested empirically. If non-compete clauses are used only to protect trade secrets, then, they should apply only to a limited share of workers, mostly the medium/high-skilled ones. However, the evidence available for the United States shows that non-compete clauses are rather widespread (30 million workers in the United States according to Starr et al., 2021) and also cover low-wage/low-skilled workers such as sandwich makers or hairdressers

[1] Under monopsony, rather than facing an infinitely elastic labour supply, employers can cut wages without losing all workers to competitors. Profit maximizing monopsonists can therefore set wages below labour productivity levels and hire less employees than in a competitive environment. The resulting equilibrium is inefficient as the additional surplus attributed by market power is lower than the surplus lost by workers. Also working conditions can be inefficient under asymmetric market power as employers extract too much effort from workers and expose them to excessive job related health risk. The presence of monopsony can contribute to explain declining labour shares in total incomes, persistently high levels of workplace accidents and the exposition of workers to job related epidemiological risk in most OECD countries. It also could explain why, contrary to common wisdom, minimum wage hikes have been found to be associated to an increase in employment in some cases (Boeri and van Ours, 2020)

(Lipsitz and Johnson, 2022). This suggests that employers use these clauses in order to limit effectively the outside options of their workers (OECD, 2019) with a clear negative effect on wages at the bottom of the wage distribution – e.g. Lipsitz and Johnson (2022) and Starr (2019). There is no comprehensive evidence on the diffusion of non-compete clauses and their impact on workers outside the United States. Yet, the scattered evidence suggests that their increasing use is not just a US phenomenon.

In this report, we provide a detailed assessment of the regulation and the use of non-compete clauses in Italy. We start by analysing the Italian legislation on non-compete clauses as well as the provisions set in sector-level collective agreements and the case law. We then provide the first empirical assessment of the incidence and characteristics of non-compete clauses in Italy using an *ad hoc* survey of 2,000 private sector employees.

In Italy, the Civil Code provides the general framework for the use of non-compete clauses, in particular it states that the clause must specify a compensation as well as time, sectoral and geographical limits but does not provide stringent indications on these limits nor on the workers who can be covered. Over the years, the case law has clarified some of these conditions, but the enforceability and appropriateness of a non-compete clause must still be assessed on a case-by-case basis. Despite their importance in regulating many aspects of the employment relationship, collective agreements play virtually no role in regulating the use of non-compete clauses in Italy.

Our survey shows that about 16% of private sector employees in Italy are bound by a non-compete clause, which corresponds to about 2 million employees. These are not restricted to high-skilled professionals or managers or to workers with access to confidential information, but are much more widespread. Non-compete agreements are relatively frequent also among workers employed in manual and elementary occupations and low educated and lower earning ones even without access to any type of confidential information. Moreover, when we look at the content of the clauses, more than half of non-compete clauses appear not to comply with the minimum requirements set by law, i.e. specifying a compensation as well as time, sectoral and geographical limits. This suggests that more than half of the clauses are likely not unenforceable and/or that workers, even those who are sure to have signed one and have read it carefully, are not aware of their content. In any case, workers appear largely unaware of the actual enforceability of the non-compete clause. Given that what matters for workers' behaviour is their belief about the likelihood of a resulting trial and court enforcement and not the actual likelihood, unenforceable non-compete clauses may still be effective in curtailing workers' bargaining power.

In addition, we connect two streams of literature on monopsony by exploring the link between non-compete clauses and labour market concentration. We show that the probability of being bound by a non-compete clause is negatively correlated with local labour market concentration, in particular

for middle-skilled workers. This suggests that non-compete agreements, as a tool to restrict competition in the labour market, matter less in a more concentrated local labour market because there are already less competitors.

Finally, we explore two other clauses which can affect workers' mobility in the Italian labour market: the notice period that employees with a permanent contract have to give if they intend to quit and the penalty that employees with a temporary contract may have to pay in case they want to quit before the end of the contract. We show that the large majority of workers has a notice period aligned with the maximum foreseen in the collective agreement of reference. Interestingly, having a notice period seems negatively correlated with having a non-compete clause suggesting that the two instruments may be partial substitutes. On the contrary, 12% of temporary workers have a penalty clause and this tends to go hand-in-hand with a non-compete clause.

All in all, the evidence emerging from this report suggests that because of the relatively light regulation and a mix of abuse by employers and lack of awareness by workers, non-compete clauses may contribute to distort competition in the Italian labour market. Efforts to increase a fair use of non-compete clauses may require some changes to the Italian legislation but also a considerable investment to foster knowledge and awareness on this issue among employers, workers and social partners. In the conclusions, we discuss some policy options ranging from a ban for low-wage workers to efforts aimed at increasing awareness of the use of non-compete clauses among both employers and employees.

The rest of the report is organised as follows: Section 2 summarises the evidence on the use of non-compete clauses in other OECD countries. Section 3 discusses in detail the Italian regulatory framework looking at the law, the collective agreements and the case law. Section 4 describes the survey design. Section 5 presents the results of the survey. Section 6 concludes and provides some policy pointers for the debate.

2. Non-compete clauses and their use in other OECD countries

2.1 Non compete-clauses: what are they for?

Non-compete clauses (also known as non-compete agreements or non-compete covenants) are contract clauses (or stand-alone agreements) which prevent employees from working for a competitor or starting a competing enterprise after they separate from their employer. Such clause can be part of the initial employment contract or it can be added at a later stage, and it typically specifies the time and geographic boundaries within which it applies.

Generally, such clause comes in exchange for additional compensation (see Section 3 for a detailed discussion of the specific regulatory framework in Italy) but the exact regulation varies greatly across OECD countries (OECD, 2019). In particular, the so-called "garden leave contracts" constitute a variant of non-competes agreements. While a non-compete agreement limits the post-employment opportunities, garden leave contracts provide that the employee remains on the employer's payroll – receiving the 100% of the previous salary – but she is required not to work, hence the reference to the garden, which the worker is supposed to tend (Sullivan, 2016). Non-compete agreements should not be confused with other clauses such as non-solicitation of clients, non-poaching of co-workers and non-disclosure agreements, which also have the effect to limit post-employment workers' activity (see Box 1).

Box 1: Other clauses regulating post-employment activity

Non-disclosure agreement (also known as confidentiality agreements): a contract or clause that establishes that the sensitive information an employee may obtain during the employment relationship will not be made available to any other employer. A non-disclosure agreement between an employer and an employee can be valid for the duration of the employment contract but also after its termination.

Non-poaching of co-workers or non-solicitation of colleagues: a contract or clause that prevents employees from reaching back to their former colleagues and recruit them in their new business.

Non-solicitation of clients: a contract in which an employee agrees not to solicit or otherwise attempt to establish any business relationship with the company's clients or customers after leaving the company.

Repayment of training costs clause: a contract or clause which provides for the employee to repay the costs associated with attending training courses – that the employer has paid for – if the employee ceases employment within a certain period of time.

Repayment of benefits and bonuses clause: a contract or clause which provides for the employee to repay certain benefits and bonuses (for instance, a signing bonus) if the employee ceases employment within a certain period of time.

Pre-assignment agreement: a contract or clause which assigns to the employer property rights (e.g., intellectual property rights) over any invention created while employed. While this clause ceases to have an effect with the end of the contract, it may still have an indirect effect on post-employment job opportunities, especially in tech companies.

In most countries, non-compete agreements are allowed and regulated by law and, according to the "traditional" view, they are justified by the need to protect legitimate employer interests such as trade secrets, client relationships or specific investment in the employment relationship such as training (Starr et al., 2021 and Posner, 2021). By protecting these interests, a non-compete clause would help solving a "hold-up problem", i.e. when a firm makes a costly and irreversible investment, for instance in training, but the employees can "hold up" the employer, for instance by threatening to leave or strike in the absence of a substantial pay rise and hence spoiling the value of the entire investment.

On the other hand, according to an alternative view, non-compete agreements can also be used as an instrument to reduce competition in the product market – by restraining the ability of competitors to hire workers or deterring departing employees from creating a new competing company – and competition in the labour market (i.e. limiting workers' outside options), further limiting employees' bargaining power.[2]

If protection of trade secrets or investment in training were the main explanations for non-compete agreements, they should be found only among employees in occupations which involve trade secrets, access to clients' lists or that require or benefit from occupation- or industry-specific training. Moreover, in this case a non-compete clause should be the result of a negotiation between the employer and employee aimed at making both parties better off. In particular, an employee would sign a non-compete agreement only in exchange of an *ad hoc* compensation or through higher wage growth over time. Finally, if non-compete agreements solve a "hold-up problem", then employees with a non-compete clause should have higher access to confidential information and receive more training as well as earning higher wages.

If, on the other hand, non-compete clauses are used (also) to restrain workers' market power, then they can be much more pervasive and they may be found also among low skilled workers or employees with no particular access to trade secrets. Moreover, in this case, non-compete clauses may come in exchange for little or no compensation and not be the result of a negotiation with the employer.

To understand the role that non-compete clauses play in the labour market, it is therefore important not only to measure their incidence but also the characteristics of the workers who are bound by them and the conditions in which they have been signed.

2.2 Non-compete clauses in the United States

[2] Job-to-job moves are major drivers of wage growth (Moscarini and Postel-Vinay, 2016 and Berson et al, 2020), not just for "movers" but also for "stayers" as employers respond to other firms' poaching by increasing the wages of their workers in order to retain them.

The incidence and the characteristics of non-compete clauses in the United States have been the focus of an increasing number of studies and surveys.

An individual-level survey in 2014 (Starr et al., 2021) found that 18% of US private sector and public health care workers are currently covered by a non-compete agreement, while 38% have agreed to at least one in the past. An establishment-level survey in 2017 (Colvin and Shierholz, 2019) found a significantly higher incidence: roughly half, 49.4%, of establishments have at least some employees with a non-compete agreement with nearly a third indicating that *all* employees in their establishment have such clause, meaning that between 27.8% and 46.5% of private-sector workers could be subject to a non-compete clause.[3]

A number of other studies measured the incidence of non-compete clauses among specific groups of employees ranging from executives (Schwab and Thomas, 2006; Garmaise, 2009; Bishara et al. 2015), to electrical and electronics engineers (Marx, 2011), physicians (Lavetti et al., 2019) and hair stylists (Johnson and Lipsitz, 2022). In these studies, the share of workers bound by a non-compete agreement is much higher than that found in the general surveys mentioned above: it is as high as 70-80% among executives, 45% among physicians, 43% among electrical engineers and 30% among hair stylists.

These surveys, combined with significant variation in regulation and enforcement of non-compete clauses across US states[4], have allowed gaining a good understanding on the use of non-compete clauses and to test some of the competing hypothesis discussed above.

As the "traditional" view would suggest, Starr et al. (2021) show that workers who report access to trade secrets are indeed much more likely to be bound by a non-compete clause and to receive more training while Colvin and Shierholz (2019) find that they are more common in establishments with high pay or high levels of education.

However, non-compete clauses in the United States appear to go well beyond the protection of legitimate employer interests: first, they are not only associated with significant lower job mobility but also to lower wages, contrary to what could be expected from a "traditional" view – see Garmaise (2009), Marx et al. (2009), Starr et al. (2021) and US Treasury (2016 and 2022).

[3] Colvin and Shierholz (2019) attribute the (sizeable) difference between the two surveys to the fact that the two surveys were three years apart (and hence to an increase in the use of non-compete clauses) and to the fact that businesses know whether their workers are subject to non-compete agreements while workers may not know or remember.

[4] In several US states non-compete clauses are allowed and strictly enforced. In others, notably California, non-compete agreements are completely banned. According to Carosa (2019), the prohibition of non-compete agreements may have been a crucial factor explaining its technological development while Barnett and Sichelman (2020) dismiss this proposition arguing that, in fact, the prohibition has been bypassed in various ways, in particular with a strategic use of pension plans.

Second, non-compete clauses are not a prerogative of high-skilled workers: the share of workers without a college degree reporting a current non-compete agreement is about 15 percent, only slightly below the 18 percent share for all workers (Starr et al., 2021). Lipsitz and Johnson (2018) show that non-compete clauses are more common among minimum wage hairdressers than among those working for a higher wage. Non-compete clauses have been found also among entry-level workers at fast food restaurants (O'Connor, 2014) where access to trade secrets or company tacit knowledge is highly unlikely. In fact, only less than half of all US workers with a non-compete clause declare having access to trade secrets (Starr et al., 2021).

In addition, non-compete clauses are rarely the result of a negotiation: only 10% of employees negotiate over their non-compete agreements, with 38% of the non-bargainers not even knowing that they could negotiate and about one-third of employees presented with non-compete agreements after having already accepted job offers (Starr et al., 2021).

Finally, non-compete agreements are common across the United States, including in states that do not enforce them (Starr et al., 2021 and Colvin and Shierholz, 2019). Companies appear to introduce non-compete clauses in individual contracts even when they are not legally enforceable because they know, or at least they hope, that the *in terrorem* effects of the contract will still block workers (Sullivan, 2009; Starr et al., 2022). Indeed, the data show that non-compete clauses are effective, i.e. they reduce mobility, even in states where they would not stand up if challenged in courts (Starr et al., 2022).

Non-compete clauses matter not only for individual workers and companies, but they also have potential aggregate effects for the economy. In fact, their stated objective is to offer the protection that companies need to carry out investments and hence promote innovation. However, the evidence on non-competes as a tool to solve a hold-up problem is far from conclusive (OECD, 2019). In fact, by restricting mobility, non-compete clauses may actually stifle knowledge spillovers – i.e., the diffusion of skills and ideas[5] –, reduce labour market dynamism and limit competition, with a negative effect on innovation and ultimately growth. Belenzon and Schankerman (2013), for instance, show that non-competes lead to fewer local knowledge spillovers in the United States while Marx et al. (2015) demonstrate that, within the US, workers tend to move from enforcing to non-enforcing states leading to a potentially damaging "brain drain". Mueller (2022) shows that stronger non-compete enforcement in the United States leads to an inefficient reallocation of human capital, with inventors forced to move in another sector where they are less productive. Calibrating a search and matching model with data on non-compete agreements for executives in public-listed US firm, Shi (2022) weights the potential social gains in terms of higher firms' investment against the social cost of lower worker

[5] An important facilitator of the diffusion of ideas is, perhaps unsurprisingly, the movement of workers across firms within industry (US Treasury, 2016).

mobility and she finds that non-compete arrangements generate sizeable distortions in job mobility and only relatively mild effects on firm investment. She concludes that, from a social point of view, the optimal policy is close to a ban on non-compete clauses.[6] All in all, it seems that even the societal benefits of non-compete clauses are far from clear.

The recent evidence on monopsony power and, more specifically, on the overuse and misuse of non-compete clauses has reignited the debate in the Unites States.[7] In 2016, the Obama Administration proposed a ban for certain categories of workers, an increase in transparency and the elimination of unenforceable provisions.[8] In 2021, the Biden Administration signed an executive order encouraging the Federal Trade Commission to ban or limit non-compete agreements.[9] At the state level, some states have reformed their non-compete laws. In 2018, Massachusetts restricted the use of non-compete agreements, including capping duration at one year.[10] In 2021, Washington D.C. passed a comprehensive ban on non-compete agreements[11]. Finally, in 2022 restrictions to non-compete agreements became effective in Oregon[12], Nevada[13] and Illinois[14].

2.2 Non-compete clauses in the European Union

The use of non-compete clauses is not limited to the United States. In many EU countries non-compete agreements are enforceable under employment or civil law when their duration, geographic scope and activities covered are reasonably limited (OECD, 2019 and Posner and Volpin, 2020). There are no comprehensive surveys or studies on their extent as for the United States. Yet, the scattered evidence suggests that some of the features found in the United States, notably the fact that they are not limited to high-skill, high-pay employees, are likely to be found in European Union countries too.

In Austria, before 2006, non-compete agreements were enforceable for all adult employees. In 2006, the Austrian Parliament changed the legislation such that non-compete agreements were not enforceable for employees who signed their contract after March 2006 and whose earnings were

[6] Potter et al. (2022) are a bit more nuanced than Shi (2022) but also find that non-compete agreeements are socially ineffective.

[7] The debate in the United States goes beyond non-compete agreements and includes the overuse of non-disclosure agreements, non-solicitation agreements, which prohibit employees from soliciting former clients, and non-recruitment agreements, which prohibit employees from recruiting former co-employees. These restrictions often come in a bundle (Balasubramanian et al., 2022).

[8] See https://obamawhitehouse.archives.gov/sites/default/files/competition/noncompetes-calltoaction-final.pdf (accessed on 22 August 2022)

[9] See https://www.whitehouse.gov/briefing-room/statements-releases/2021/07/09/fact-sheet-executive-order-on-promoting-competition-in-the-american-economy/ (accessed on 22 August 2022)

[10] See https://www.mass.gov/info-details/mass-general-laws-c149-ss-24l (accessed on 22 August 2022)

[11] See https://lims.dccouncil.us/downloads/LIMS/43373/Meeting2/Enrollment/B23-0494-Enrollment1.pdf (accessed on 22 August 2022)

[12] See https://olis.oregonlegislature.gov/liz/2021R1/Downloads/MeasureDocument/SB169/Enrolled (accessed on 22 August 2022)

[13] See https://www.leg.state.nv.us/App/NELIS/REL/81st2021/Bill/7300/Text (accessed on 22 August 2022)

[14] See https://legiscan.com/IL/text/SB0672/2021 (accessed on 22 August 2022)

below 2,100 euros[15] per month (Young, 2021). According to a 2005 survey, over 30% of low-earning workers had a non-compete in their employment contract (Klein and Leutner, 2006).

In the Netherlands, a 2015 survey (Streefkerk, Elshout and Cuelenaere, 2015) shows that, on average, 18.9% Dutch employees are covered by a non-compete agreement. The share goes up to 25.3% among those who have been with the same employer for more than 5 years and to 33.8% among those who are currently self-employed but previously worked as employees. Like in the United States, such clauses are not limited to high-skill workers: 11% of the employees without secondary diploma are bound by non-compete agreements. Non-compete clauses are especially concentrated among workers aged 25-34 (26.6%) and, in fact, they are more often found in temporary contracts (24%) than in permanent ones (19%). However, 89% of employees who signed a non-compete clause in the past believe that this did not represent a major obstacle in finding a new job.

In Finland, a 2017 survey of professional and managerial staff (Akava, 2017) finds that 37% of these high-skilled Finnish workers have a non-compete clause in their contract. Interestingly, the use of non-compete clauses tripled for this group in the last twenty years, going from 14% of contracts signed before 2000 to 45% of contracts signed by 2015.

There is some evidence for Denmark as well (Dahl and Stamhus, 2013): *Business Danmark*, the trade union in sales and marketing, conducted a survey in 2012 and found that about 20% of its members are subject to a non-compete clause. Another survey run in 2012 among HK/Privat members (a union for administrative staff and the retail sector) finds an incidence of non-compete clauses of 11%, mostly in non-managerial position. Data from the Engineers' Association, IDA, shows that, in 2012, 14% of private sector members had a non-compete clause. Finally, a survey among LO members (one of the three national trade union confederations in Denmark) shows that in 2004 one in 15 private sector employees was bound by a non-compete clause.

[15] Currently the threshold is set at 3,480 euros per month pre-tax and excluding any special payment.

3. The regulatory framework

In Italy, the regulation of the labour market is defined by three main layers: the first is represented by the national law, the second by collective agreements negotiated between trade unions and employers organisations and the third is the interpretation and the actual enforcement of the law and collective agreements by judges (i.e., case law).

The national legislation, in particular the Civil Code, provides the reference framework for all employment relationships in Italy (the role of EU law is discussed in Box 2). However, a large number of sectoral and local collective agreements, on top of defining detailed pay scales applicable in each sector at various levels of seniority and occupations, also provide extensive provisions regulating the employment relationships ranging from working time to dismissal regulation, paid leave, training, remote work, performance pay, etc. Finally, the case law is essential to understand the interpretation and the application of the provisions established in the law and in collective agreements[16] and their evolution over time.

In what follows, we will, therefore, analyse the regulation of non-compete agreements in each of these three layers. For a brief discussion of the regulation of non-compete clauses for self-employed workers see Box 3 at the end of the section.

3.1 The law

Before the introduction of the Civil Code in 1942, non-compete clauses were regulated by the Private Employment Act ["*legge sull'impiego privato*" n. 1825/1924] which stated that the employer "*will not be permitted, through special agreements, to restrict the further professional activity of his or her employee after the termination of the employment relationship*".

In 1942, Article 2125 of the Civil Code, which is still the applicable one today, reversed entirely the course and introduced the possibility to restrict post-employment job opportunities[17] under certain conditions:

> *"The agreement by which the work of the employee is limited, for the period following the termination of the contract, is null if it does not result from a written deed, if no compensation is agreed in favour of the employee, and if the restriction is not limited within certain limits of*

[16] The most notable case is the regulation of wage floors in Italy in the absence of a statutory minimum wage. Collective agreements define the wage floor for each level of seniority in each occupation in each sector but there is no formal legal extension such as in France and other European countries. Therefore, to fulfil the Constitutional requirement (art. 36) that states that '*workers have the right to a remuneration commensurate to the quantity and quality of their work and in any case such as to ensure them and their families a free and dignified existence*', Italian judges use industry collective agreements as a reference (D'Amuri and Nizzi, 2017).

[17] Non-compete clauses refer to post-employment competition. In Italy, competition during the employment relationship is subject to a duty of loyalty, which restricts any form of competition throughout the employment relationship. Of course, the line between what an employee can and cannot do during the employment relationship is not always clearly defined and complex cases may arise when the employee is planning to start its own business after the termination of the employment relationship (Graves, 2020).

*scope, time and area. The duration of the obligation cannot exceed five years for executives ["*dirigenti*"] and three years in the other cases. If a longer duration is agreed, it is reduced to the extent indicated above".*

The law, therefore, requires a non-compete clause to be based on a written deed (i.e. oral agreement is not sufficient) and to specify a compensation as well as time, sectoral and geographical limits. The law also provides specific provisions in terms of the maximum duration of the clause (three years except for executives whose clauses can last up to five years). On the opposite, the amount of the compensation as well as the sectoral and geographical limits are not defined in detail. They are therefore left to the two other layers of regulation, in particular to the courts which, in Italy, are those that traditionally have been called to fill the gap and specify the minimum requirements in terms of compensation and the maximum sectoral and geographical limits.

Box 2: Non-compete agreements and the EU law

Non-compete clauses are regulated at the national level but they may interfere with fundamental principles of the European Union as well as the competition legislation (Hyde and Menegatti, 2015). The EU legislation does not regulate non-compete clauses between an employer and an employee but non-compete agreements might violate EU law when they disproportionately limit a worker's ability to move within the European Single Market since the free movement of workers (Article 45 TFEU) and the freedom of establishment (Article 49 TFEU) are fundamental principles of EU law.

In the words of European Commissioner for Competition Mario Monti who in July 2002 answered to a Parliamentary question related to non-compete clauses, "*as regards free movement of workers, it is important that a balance exists, on the one hand, between the fundamental rights of a worker to work and to exercise his right to free movement and, on the other hand, the right of the employer to protect his legitimate interests against competitors. When such a balance exists and the clause is proportionate to its aim and does not unnecessarily limit the right of the worker to free movement, the clause seems not to be contrary to the provisions of free movement for workers within the Community. […] Any rule that may hinder or make less attractive the exercise of a fundamental freedom guaranteed by the EC Treaty, such as the freedom to provide services must, according to the established case-law of the Court of Justice, fulfil four requirements: they must be applied in a non-discriminatory manner; they must be justified by imperative requirements in the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain it.*" (Monti, 2002)

To date, as far as we know, no case on non-compete clauses between an employer and an employee has been brought before the European Court of Justice.

3.2 Collective agreements

Collective agreements in Italy not only regulate pay but also a wide range of dimensions of the employment relationship, including dismissal regulation, the notice period, the trial period, the use of temporary contracts.

There are currently 985 collective agreements in force in Italy but less than a third have been signed by representative unions and employers' organizations. The remaining ones have been signed by smaller, and sometimes fictitious, unions and employers' associations, in some cases with the explicit purpose to establish wage floors below the existing ones (Lucifora and Vigani, 2021) with the consent of a poorly representative union or a 'yellow' union (a workers' organisation set up or influenced by an employer).

Most of these agreements cover only a handful of workers (more than half of the agreements for which we know the number of workers to whom they apply cover less than 1,000 workers) and the distribution in terms of coverage is very skewed. According to the data by Cnel and Inps, the 29 collective agreements with at least 100,000 workers each cover 79.5% of the private sector employees while the 44 collective agreements with at least 50,000 workers each cover about 87% of the private sector employees.

In our analysis, we therefore restrict our focus to the 44 agreements covering at least 50,000 workers. Among these 44 collective agreements, only four mention non-compete clauses and they simply make a reference to Article 2125 of the Civil Code without adding any specific provision. This suggests that collective agreements do not play any role in the regulation of non-compete clauses in Italy.

Even when looking specifically at collective agreements for executives and managers, there is no indication that collective bargaining in Italy plays any role in the regulation of non-compete clauses. There are 19 collective agreements dedicated specifically to executives, covering 108,868 workers in total. 16 of these agreements do not include any reference to non-compete clauses, while three[18] provide a detailed regulation of non-competes clauses that, interestingly, goes beyond what is foreseen in the Civil Code.

These three agreements are very small, they cover 1,863 workers in total, which is a tiny share of the total number of employees, but also a very small share of the executives. However, they add three additional elements to what is foreseen in the Civil Code (all three agreements have exactly the same provisions). First, they state that in unclear cases, the executive is invited to carry out a prior

[18] The three collective agreements are: the "CCNL per Dirigenti, Quadri, Impiegati e Operai dipendenti dei Settori Metalmeccanico, Installazione d'Impianti e Odontotecnico" signed by Alim, Anap, Anpit, Aifes, Cepi, Cidec, Confimprenditori, Federodontotecnica, Unica, Cisal Metalmeccanici, Cisal Terziario, Ciu, which accounts for 1,728 workers; the "CCNL per Dirigenti, Quadri, Impiegati e Operai dipendenti di Enti, Imprese e Cooperative Sociali del Terzo Settore, Sport e altri Enti senza scopo di lucro", signed by Fenalc, Opes, Anpit, Cidec, Unica, Alim, Anap, Cepi, Confimprenditori, Aifes, Cisal Terziario, Cisal, Ciu, which accounts for 133 workers; the "CCNL per dirigenti, quadri, impiegati e operai dipendenti da aziende che producono, installano o gestiscono macchine, impianti, apparecchi o componenti per il freddo industriale, commerciale, alimentare o di laboratorio", (also called "CCNL Frigoristi"), signed by Assofrigoristi, Anpit, Cisal Metalmeccanici, Cisal, Confedir, which accounts for only 2 workers.

verification with her current employer, i.e. discuss the intention to leave and the potential obstacles before taking the formal step, in order to avoid or limit any potential litigation. Second, according to these collective agreements, the non-compete clause is to be considered as terminated if the executive has been dismissed because of workforce reduction[19] or firm closure (these same rules apply to middle managers and to the rest of the employees in the sector). Finally, they also specify that the compensation for the non-compete clause should be paid either on a monthly basis during the course of the employment relationship (and hence subject to social security contributions and payroll taxes), or at the time of termination of the employment relationship (in this case, it is specified that it will be subject to taxation at the rate of the severance pay) in a single instalment or in several ones, or, finally, in one instalment at the end of the period foreseen by the non-compete clause subject to compliance with it (and, in this case, subject only to separate taxation).

All in all, these additional clauses do not add much new on the most contentious issues (for instance, they do not define a minimum compensation). Moreover, it is unclear whether the automatic termination in case of workforce reduction or firm closure can be upheld in court. Usually, non-compete clauses are valid also in case of dismissal which means that workers have some limitations in the search of a new job, but also that companies are bound to pay the compensation on top of the severance pay and other dismissal costs. However, by recalling openly the issue of non-compete clauses and the main legal principles and rules, these three collective agreements help workers in their respective sectors being more aware of these provisions.

3.3 Case law

As discussed above, neither the law nor the collective agreements provide a precise definition of the criteria to be used when assessing the sectoral and geographical scope of the non-compete clause as well as of the financial compensation. These issues are typically dealt with in courts. In this section, we will therefore review the case law in the field.[20]

Before delving into specific cases, it is useful to recall the main principles that the Court of Cassation, the highest court in Italy, stated in a recent decision[21]. First, a non-compete agreement is a contract (or a clause in a contract) in which the employer commits to pay a certain amount of money (or other benefits) to the employee who, in exchange, agrees not to carry out activities in competition with the employer for a period following the termination of the employment relationship. Second, while the aim of a non-compete agreement is to safeguard the employer from an undue transfer of its

[19] Intended as part of a collective dismissal.

[20] To date, conducting a quantitative analysis of case law in Italy so as to understand the number of cases decided per year, or other trends is very difficult given the absence of a comprehensive database, especially with regard to local and lower courts decisions. Therefore, in this section, we analyze the available and most cited decisions in this field delivered by the Court of Cassation and some lower courts. Our main source has been *Dejure*, one of the most comprehensive legal database in Italy.

[21] The following principles are recalled in Court of Cassation, decision No. 5540/2021.

intangible assets to a competing firm, such a clause cannot compress excessively the employee's ability to find and accept another job opportunity. Finally, since after the termination of an employment relationship, a worker typically recovers the full and absolute freedom to join any employer or start her own business, this freedom, although conditioned by the non-compete clause, cannot be limited such as to jeopardise the professional skills and undermine the earnings ability of the employee.

Beyond these general principles that guide the evaluation of the judges in each specific case, the case law provides some pointers in the definition of the sectoral and geographical scope of a non-compete clause as well as the minimum amount.

3.3.1 Sectoral scope

According to the Civil Code, a non-compete agreement must provide a definition of its scope, i.e. which sectors or companies fall under the clause. The Court of Cassation in 2014[22] further clarified that a non-compete agreement aimed not at restricting private economic initiative, but at completely precluding one contractual party (the worker) from using her professional skills is null as it infringes the Constitutional provisions (in particular, Articles 4 and 35 of the Italian Constitution). Thus, agreements such as the so-called "garden leave" (Sullivan, 2016) – whereby an employee is instructed to stay away from work during the non-compete period while remaining on the payroll – is not valid in Italy. Indeed, even a compensation equal to the previous salary does not entitle the employer to restrict completely the employee's right to use her professional skills and to prevent her from any other earning opportunity.

Apart from this somewhat extreme case, it is more challenging to understand how courts deal with the vast majority of more standard cases. In the past, it seemed that non-compete clauses could not go beyond the tasks carried out by the employee (i.e., a pact was considered null if not confined to the tasks previously performed), while, more recently, the Court of Cassation repeatedly stated[23] that non-compete agreements can legitimately cover any work activity that may compete against the employer. Therefore, lower courts must evaluate case by case whether the scope of the agreement is such that it excessively restricts the actual earnings and professional perspectives of the worker or if it is fairly defined. Usually, courts consider that business activities unrelated to those pursued by the employer cannot be subject to a non-compete clause. Equally, business activities which may be pursued in the future by the employer should not be part of a non-compete clause, even if, in this case, it is less clear where the line between current and future activities should be drawn (for instance, in the case of an employee working on business development).

[22] Court of Cassation, decision No. 24159/2014.

[23] *See* for example Court of Cassation, decision No. 13282/2003.

All in all, there are no precise indications on the sectoral scope of a non-compete clause in the case law either. Courts have to assess each case with respect to its specificities. For instance, excluding an entire economic sector is likely to be considered as fair if the worker performs tasks that are transferable to companies operating in other economic sectors. On the other hand, if a worker's skills are highly technical and specific to an economic sector, excluding the entire sector would probably be considered an excessive restriction.

3.3.2 Geographic scope

The geographical boundaries within which a non-compete agreement can be applied have been progressively extended in recent decades. Several factors can explain this trend, but certainly the globalisation and the development of the European Single Market have led to an expansion of the geographical scope of (labour) markets, at least with regard to high-skilled workers (less for the low skilled). Firms' interest in enforcing wider non-compete agreements has grown up consequently.

Two relevant and well-known cases were decided by the Court of Cassation in the early 2000s. A first case involved a non-compete agreement which covered Italy, France, Switzerland, Germany and Austria[24] and which was considered as valid since it had not prevented the employee from joining – just 15 days after the termination of the employment relationship – another employer in the same occupation, and with a salary that was congruous, if not higher than the previous one (then, after one year, the former employee moved to a competitor of the first employer, thus violating the non-compete agreement). In a second case, the Court of Cassation upheld a non-compete agreement which covered the entire European Union[25]: in this case, the creation of a new competing firm (established in Italy) by the former employee was judged to be unlawful.

Several other cases have followed this doctrine: for instance, the Labor Court in Milan has repeatedly affirmed the validity of non-compete agreements whose geographic scope was extended to the entire European Union[26]. Interestingly, in one of its rulings, the Court in Milan even affirmed that "*with regard to the alleged excessive width of the object and the territory, it seems clear that in today's globalised dimension of the economy and, in particular, of the companies involved in this affair, a non-compete agreement can almost never usefully be limited to the national territory but must cover at least the European dimension*"[27].

[24] Court of Cassation, decision No. 15253/2001.

[25] Court of Cassation, decision No. 13282/2003.

[26] Milan Labor Court decision 22.10.2003; Milan Labor Court decision 3.05.2005; Milan Labor Court decision 16.07.2013 (the clause was restricted to a list of six competing companies, but in deciding the case the Court was not required to deepen this issue in detail).

[27] Milan Labor Court decision 3.05.2005.

Therefore, as for the sectoral scope, courts must assess the geographic scope of a non-compete clause on a case-by-case basis in light of how much the agreement restricts the earning and professional ability of the worker involved. Hence, the sectoral and the geographic scope of a non-compete agreement are strictly correlated and must be analysed jointly by judges.

3.3.3 Compensation

The third important dimension that is left to the judgment of the courts when evaluating non-compete clauses is the compensation. Neither the Civil Code nor collective agreements provide any reference as to what amount can be considered as fair, nor they indicate how the compensation should be paid (with the exception of the three minor agreements for executives discussed above). Again, it is worth recalling the main principles established by the Court of Cassation in a recent decision[28].

First, any non-compete clause must specify a compensation to be considered valid. Second, the compensation must be adequate. Therefore, not only clauses with a symbolic compensation must be considered null but also those that entail a clearly unfair or disproportionate compensation. The adequacy of the compensation must be judged with respect to the costs imposed to the worker in terms of reduced earning potential, regardless of the hypothetical benefits for the company (i.e. even if the benefits are limited, the compensation must be proportionate to the restriction imposed on the worker). As a consequence, the nullity test is twofold: first the compensation must be determined or determinable just as for every contract in accordance with Article 1346 of the Civil Code (for the sake of convenience, this can be intended as a "general" contractual requirement).[29] Second, the compensation must be agreed and it cannot be symbolic, manifestly unfair or disproportionate ("specific" requirement set by Article 2125 as interpreted in case law).

In practice, the compensation can vary depending on the duration of the employment relationship, as it can be determined using objective criteria. On the opposite, there is no sufficient compensation that can justify the restriction of any employment opportunity for a worker (the so called "garden leave") as this would be contrary to other constitutional provisions[30], as explained before.

A second important dimension is the form of the compensation. Usually the compensation takes two forms: the first is a payment during the employment relationship (usually on a monthly basis); the second is a payment after termination of the employment relationship either in a single instalment or at regular intervals. Although both forms are admitted, the first one may generate some

[28] Court of Cassation, decision No. 5540/2021.

[29] The compensation may vary depending on the duration of the employment relationship and this does not infringes the general requirement that the compensation must be determined or determinable since it can still be defined using objective parameters.

[30] Court of Cassation, decision No. 24159/2014.

controversies especially when the employment relationship terminates after a short period of time and the compensation – even if determined or determinable – is therefore to be considered inadequate. This has led some employers to include clauses that guarantee a minimum amount of compensation[31] regardless of the relationship's duration.[32]

In conclusion, even if there have been attempts to infer from case law a minimum threshold or amount of compensation which can be considered as adequate – something that would be particularly useful for employers –, this is not possible at the moment. A compensation equal to 10% of the salary has been repeatedly considered adequate in past cases, as far as the sectoral and geographical scope is concerned. However, any decision must still be based on a case-by-case assessment of the specific circumstances. The general principle remains that the broader the limitations (but not enough to limit any future work activity), the higher the compensation should be.

3.3.4 Additional clauses

In the analysis so far, we have discussed the specifications that a non-compete clause must include. There are however a number of additional ("ancillary") clauses that can also be added. These additional clauses do not affect the entire agreement, i.e. if they are considered invalid, they do not lead to the nullity of the entire non-compete agreement but just to a partial nullity (Article 1419(2) of the Civil Code)[33].

The "penalty clause" is probably the most common among such ancillary provisions. With a penalty clause, the parties agree that in case of breach of contract or delay in performance, the party in breach has to pay a compensation. This clause is a sort of pre-agreement, which has the effect of predetermining the reparation in case of breach. As far as non-compete clauses are concerned, a

[31] Lower courts have delivered decisions in different directions on this aspect. For example, the Labor Court of Rieti (decision 17.11.2020) affirmed that the provision of the payment during the employment relationship without the specification of a minimum amount is not predictable thus violating Article 2125. In contrast, the Labor Court of Rome (decision 2.10.2020) stated that the unpredictability of the specific amount of the compensation (when it is linked to the duration of the employment relationship) cannot lead to the nullity of the agreement, since the Article 2125 does not specify anything in this regard. The recent Court of Cassation decision cited above (decision No. 5540/2021) appears to clarify that the lack of a guaranteed minimum in itself is not a cause of nullity (when the compensation is determined or determinable) provided that the final compensation is adequate.

[32] A difficult issue may arise when the compensation is paid as a percentage of the salary but the employer underpays the employee (like when workers receive an "envelope wage", in Italian *salari fuoribusta*, to reduce tax liabilities). In this case, the burden of proof is on the employee who has to prove that a portion of the salary is not the compensation for her abstention from future competition but for work already carried out in her professional capacities. This is qualified as a simulation of the non-compete agreement (Court of Cassation, decision No. 16183/2005).

[33] *See* for example Court of Cassation, decision No. 10536/2020. The entire agreement might be affected by nullity only when the null ancillary clause is shown to have been decisive and essential for the agreement's negotiation.

penalty clause is usually included in order to establish how much the worker must pay in case of non-compliance. An interesting aspect to highlight is that recently the Court of Cassation[34] pointed out that the penalty clause can be reduced (by courts) when its amount is manifestly excessive (in accordance with Article 1384 of the Civil Code), but the party who has an interest in doing so has the duty to provide supporting evidence (in other words, a Court cannot examine it on its own motion).

A more controversial issue is whether the employer has a legitimate right to withdraw from the non-compete clauses, i.e. free the worker to take up any new job without paying the compensation foreseen in the non-compete clause. Although in the past the right to withdraw was commonly admitted, nowadays the case law stands against it. Recently the Court of Cassation recalled that a clause according to which the termination of the non-compete agreement is left to the employer's discretion is null due to conflict with mandatory rules (Article 1418(1) of the Civil Code)[35]. The right to withdraw is also not admitted in the course of the employment relationship since the obligations of a non-compete clause start at the time of signing the agreement and, therefore, limit the search of future job opportunities of an employee at any stage of the employment relationship.

Finally, non-compete agreements may include an "option clause". Article 1331 of the Civil Code provides that when the contractual parties agree that one of them remains bound to its own declaration and the other one has the possibility to accept it or not, the proposal by the first one is irrevocable. Therefore, it has been discussed whether the parties in a non-compete clause can grant the employer the right to choose at a later time to give effect to the agreement or not. In a recent decision[36] concerning a worker who had granted her employer an option clause to be exercised within thirty days after the termination of the employment relationship, the Court of Cassation stated that this practice is legitimate: if the option clause has not been called for, the agreement is not in force and, therefore, no withdrawal occurs. While the distinction between the right to withdraw and the option clause is clear from a legal point of view, in practice the two may have the same effect. Both may give the employer the power not to give effect to the clause and hence not to pay the compensation while leaving the employee in a limbo as regard her future employment opportunities.

3.4 Wrap-up

To wrap up, this section has shown that Italian courts retain a significant margin of freedom in evaluating each case, but we can safely assume that non-compete clauses in Italy are not enforceable in the following instances:

- *Form*: When the agreement is not in a written form;

[34] Court of Cassation, decision No. 9790/2020.
[35] Court of Cassation, decision No. 10536/2020.
[36] Court of Cassation, decision No. 25462/2017.

- *Duration*: When the duration exceeds 5 years for executives and 3 years for the other employees (if a longer duration is foreseen, it is reduced; if the duration is not specified the non-compete is not enforceable);
- *Sectoral scope*: When the sectoral scope is not specified or it is so large as to prevent completely the employee's earning opportunities and professional skills or if it includes an economic sector in which the employer does not operate (this requirement is to be assessed in relation to the geographical area and the compensation);
- *Geographical scope*: in the absence of any territorial limit or if the geographical area covered by the agreement is so large as to prevent completely the employee's earnings and professional skills (this requirement is to be assessed in relation to the sectoral scope and the compensation);
- *Compensation*: in the absence of compensation or if the compensation is not determinable (it is considered determinable also when it is not pre-determined, for example because it is paid on a monthly basis) or when the compensation is symbolic or manifestly unfair/disproportionate (the adequacy of the compensation has to be assessed in relation to the sectoral scope and the compensation);
- *Right to withdraw*: if the agreement provides that the employer may withdraw from the agreement at a time after it is signed (on the contrary, a non-compete agreement may include an option clause which allows the activation of the clause at a later stage after the signature).

Box 3: Non-compete agreements for self-employed workers

While the focus of this work is on private sector employees, it must be noted that, in Italy, non-compete clauses may also cover self-employed workers, i.e. an agreement not to compete against each other. This is regulated by article 2596 of the Civil Code and the main differences with respect to non-compete clauses between an employer and an employee are the following: a compensation is not formally required; the maximum duration is five years (without further specifications); and the agreement is valid if it is limited to a specific area or economic activity (not necessarily both as for employees). There are very few cases in jurisprudence on non-compete agreements among self-employed workers and it is unclear how common they are.

Of greater interest are the non-compete clauses for a specific group of self-employed workers: the commercial sales agents, i.e. self-employed sales persons who sell the goods or services of one or more companies in return for a commission. Given the hybrid status of these workers (they are self-employed but they work for another company), it was initially unclear whether they fell under article 2125 (the one regulating non-compete clauses for employees) or article 2596 (the one for self-employed) of the Civil Code. The issue was clarified with the entry into force of article 1751 bis of the Civil Code in 1994 which provides a detailed regulation of non-compete agreements for commercial sales agents. In this case, a non-compete agreement must respect the following requirements: it must be in writing; it must involve the same area, client base and goods or services covered by the agency contract; its duration cannot exceed two years after the termination of the contract. Moreover, Article 1751 bis establishes certain rules to calculate the compensation that must be paid: first, the amount must be commensurate to the duration and the nature of the agency contract and the severance payment. Second, its actual amount is defined by the parties, considering national collective economic agreements. Finally, in the absence of an agreement, the compensation will be determined by the judge, also with reference to the average commission collected by the agent during the term of the contract and their incidence on the total turnover in the same period, the causes of termination of the agency contract, the scope of the area assigned to the agent and the existence (or not) of exclusivity rights.

Collective economic agreements (this is how collective agreements for commercial sales agents are called) are expressly called by the law to further regulate non-compete clauses for commercial sales agents and indeed provide a very detailed regulation contrary to the collective agreements for employees. In particular, collective economic agreements include precise provisions concerning the calculation of the compensation as well as on when a non-compete agreement can be signed (only at the beginning of the contractual relationship).

As a consequence of the more detailed regulation provided by the collective agreements, case law plays a much smaller role for commercial sales agent and courts are typically called to decide only whether the non-compete agreement has been violated or not and not much on its provisions.

4. Survey design

To collect data on the incidence and the characteristics of non-compete clauses in Italy, we closely follow Starr et al. (2016) and we design an *ad hoc* online survey in the steps of that run in the United States but adapted to the Italian legal framework and labour market. The survey is aimed at gathering information on the incidence of non-compete clauses as well as employee experiences with and understanding of non-compete agreements.

4.1 Content of the survey

The survey focuses on six main aspects beyond the basic socio-demographic characteristics of the respondent:

- *Current employment relationship:* this section aims to understand the basic terms of employment (occupation, sector, type of contract, size of the company, etc.), the respondent's employment history with the employer, the notice required to leave the job and the potential financial penalty that it may entail[37], the training received (if any), the access to private information (if any), satisfaction with the job/employer and the intention to quit.
- *The presence and the content of the non-compete clause*: this section represents the core of the survey and it records the presence of a non-compete clause (as well as other clauses such as non-disclose, non-solicitation of colleagues and/or clients, etc.). For respondents who report being bound by a non-compete clause, the survey asks about its content (duration, sectoral and geographical scope, presence and amount of compensation and of a buyout clause).
- *Beliefs about non-competes*: All respondents are asked to report their views about the use of non-compete clauses in their own company as well as how justified these clauses are. Respondents bound by a non-compete agreement are also asked to report how likely they feel that the employer may sue them in case of breach and how it is likely that the Court will rule in favour of the employer.
- *The circumstances in which the non-compete clause has been signed:* this section asks respondents who report having a non-compete clause in their contract to provide some information on when and how their employer asked to sign the non-compete and if they tried to negotiate it.
- *Job search and mobility options:* in this section, all respondents are asked to report if they are considering to quit their job and why, if they are looking for a job and how

[37] In Italy, workers with a fixed-term contract must comply with the full term of the contract, i.e. they cannot resign before the end of the contract except for "just cause" (a serious breach of duty by the employer) or if their employer agrees. Therefore, unless the parties agree otherwise, the employer could claim damages from the former employee (although this is not expressly provided for by law but is the result of an interpretation of case law).

intensively and if they have been offered a job by another employer and what was the reaction of the current employer.

- *Prior experiences with non-competes*: a final section explores the respondent's history with non-competes with prior employers (having signed one, having refused one, having being sued for breaching it).

4.2 Survey implementation

To collect responses to the survey, we hired a survey and data collection firm, which runs a panel of 150,000 active members, representative of the entire Italian population.[38]

In a first phase, from this panel we randomly sample respondents to reach a target of 2,000 completed interviews by private sector employees aged 16+, therefore excluding from the sample all public sector employees, the self-employed, the unemployed and inactive (students, pensioners, etc.). Each prospective respondent is sent the survey via e-mail and only invited panellists[39] can respond to the survey as the link is individualised and cannot be re-used. Quotas, i.e. constraints on the numbers of respondents with particular characteristics or sets of characteristics, are used to control the characteristics of the final sample to align it with the distribution in terms of age, gender and geographical area of private sector employees in Italy using the information available in the *Registro Statistico Asia-occupazione* by Istat (see Table 1 and Table 2).

Table 1: Age and gender in the sample compared to the reference population

		Reference population		*Main sample*	
		#	%	#	%
men	15-29 y.o.	1,146,007	9.4	153	7.6
	30-49 y.o.	3,907,036	32.0	655	32.7
	50+ y.o.	2,175,359	17.8	363	18.1
women	15-29 y.o.	824,355	6.8	140	7.0
	30-49 y.o.	2,844,104	23.3	475	23.7
	50+ y.o.	1,272,391	10.4	214	10.7
Other		24,128	0.2	1	*
Total		12,193,379	100.0	2001	100.0

Source: the data on the reference population come from the Registro Statistico Asia-occupazione by Istat.

[38] The panellists are recruited via various sources, online and offline (advertisement, emailing, social network, etc.). Membership to the panel is voluntary, and is done through double consent. At the moment of the enrolment, panellists provide their basic socio-demographic information and a series of quality checks are implemented to ensure that only real individuals are enrolled.

[39] This means that this survey was not accessible to anyone on the web, and panellists could not volunteer to participate.

Table 2: Geographical area in the sample compared to the reference population

	Reference population		*Main sample*	
	#	%	#	%
North West	4,349,743	35.7	729	36.4
North East	2,898,755	23.8	483	24.1
Center	2,654,822	21.8	430	21.5
South and Islands	2,290,059	18.8	359	17.9
Total	12,193,379	100.0	2001	100.0

Source: the data on the reference population come from the Registro Statistico Asia-occupazione by Istat.

In a second phase, in order to have a wider sample of private sector employees with a non-compete clause[40], we oversample workers with a non-compete clause to reach a target of 1,000 respondents in total with a non-compete clause.

All respondents completing the interview are compensated for taking the survey, as it is typical in these kind of surveys.[41] The survey was conducted between between May 25, 2022, and June 20, 2022.[42] On average, it took 21 minutes to fill for respondents with a non-compete clause and 11 for respondents without a non-compete clause. A number of real-time checks were implemented to ensure the quality of responses. First, the link can be used only once to prevent multiple participation. Second, three recurrent types of misbehaviour are identified and blocked[43]: "speeders", i.e. participants who complete a questionnaire in less than 25% of the median length of interview (LOI); "straight-liners", i.e. respondents who in a series of questions, typically items with the same response scale or matrices, always clicks on the same step of the scale (e.g., provides answers all in the same column); and, finally, "happy clickers", i.e. panellists who provide mutually inconsistent responses, answering randomly without reading the question carefully.

Given that some of the questions in the survey are relatively cognitively demanding, prior to the fieldwork we undertook an in-depth cognitive test of the draft survey with six respondents (three

[40] We do so to strengthen the statistical power of the analyses based on respondents with a non-compete clause only, for example the analyses on the content of the clause and the circumstances in which it was negotiated and signed. Panellists sampled for individual surveys receive an invitation email, which always contains information about the expected time for filling out the questionnaire and the value of the incentive.

[41] Participants earn points in proportion to the length of the questionnaire and/or the complexity of the effort required. After reaching a certain amount of points, panellists can convert them into a prize (telephone recharges or gasoline vouchers, shopping vouchers at large-scale retail brands, electronic vouchers).

[42] Between May 25th and June 3rd for the main survey and between June 7th and June 20th for the oversampling.

[43] If the system detects one or more of the types of misbehaviour listed in the text, the answers are excluded from the list of completed interviews and the panellist is sanctioned in real time, i.e. she does not get the expected incentive and this is communicated at the end of the interview.

women and three men). During the cognitive test, the respondents were asked to fill the survey in the premises of the survey company and under the supervision of an expert, discussing in details the phrasing of the questions and the answer items which they were found to be unclear or ambiguous. Moreover, a pilot with 105 respondents was undertaken to validate the script of the survey, test the flow and check whether the questions were clear or understandable. The feedbacks received were reflected in the final version of the survey.

4.3 Sources of potential selection bias

Online surveys are by far the most widely used in market research, opinion surveys and social research[44] in all OECD countries, including in Italy. As discussed extensively by Starr et al. (2016) for the case of the United States, there are a number of pros and cons in using an online survey to study the incidence and content of non-compete clauses. The main advantage compared to other survey modes such as phone, mail or in-person interviews is that the cost is dramatically lower and the time to complete the fieldwork significantly shorter. However, these practical advantages may come at the cost of sample selection.

In our case, there are three sources of potential selection bias that may be at play: first, not the entire Italian population is active online; second, not all internet users sign up to be survey panellists; third, not all invited panellists respond to the invitation to complete the survey.[45] In what follows, we discuss in detail the likelihood and risk of each source of sample selection that may have an impact on our final estimates.

The first source of selection is that not the entire Italian population is online. The latest official data by Eurostat show that, in 2021, 90% of the households in Italy had access to internet (via computer, smartphone or tablet) and 82% individuals used internet in the last three months. The data, however, also show a strong age gradient: 95% of 16 to 24 year old used internet, 92% among the 25 to 34 year old, 89% among the 35 to 44 year old, 78% among the 55 to 64 year old and a mere 52% among the 65 to 74 year old. The specific target sample of our survey are private sector employees aged 16+. The publicly available data do not allow having an estimate of internet usage for the specific group targeted in our survey, but it is possible to see that internet usage increases to 89% among people in the labour force (employed and unemployed) and to 91% among employed individuals aged 25 to 64. Overall, it appears that this first type of selection bias should not be very

[44] See, for instance, the data on both buyers and suppliers in *Insights Practice - GreenBook Research Industry Trends Report – 2022 Edition.*

[45] A fourth source of bias mentioned by Starr et al. (2016) is linked to who receives the survey. However, as mentioned above, in our case respondents were randomly selected from the panel to participate in the survey using quota sampling. Therefore, the only selection at play in this case is the intended one, i.e. by quotas.

acute except for the 65+ who, however, represent only 2.9% of the employed individuals in Italy (the average effective retirement rate was 63.1 in 2020 according to OECD, 2021).

The second source of bias is that not all internet users sign up to be part of online panels. The panel is designed to reflect the observable characteristics of the Italian population and it is regularly used and maintained by the survey company to ensure that it can provide a useful and meaningful support to the clients' needs. However, some unobservable characteristics of the panel members may affect our results, in particular if people who are more likely to sign up to the panel are also more likely to have a non-compete agreement. This is not an issue that we can disregard out of hand, but the arguments for this specific type of sample selection are also not very strong. The online panel of our survey company has been developed mostly for the business sector to be used for marketing and product development purposes and it is seldom used for economic and labour market research. In the hiring phase that preceded by far the fieldwork of our survey, there was no reference to non-compete clauses or even to labour market issues in general.[46] Focus groups are conducted regularly by the polling company to test the reasons to join the panel and the motivations to remain part of it. The arguments reported by the panel members usually revolve around the following main areas:

- The rewards that can be achieved by filling properly the surveys;
- The management of the panel (respect of the commitments, the responsiveness of the company, the ability to solve problems);
- The quality of the questionnaires (from the respondents' point of view): the fact that they are well done, error-free, respectful of the respondent.

The final source of bias, as far as our survey is concerned, is the standard non-response bias that affects any survey: even if prospective respondents are randomly selected to take part in the interview, not all take part to it or complete it. And even if quotas ensure that the final sample reflects the composition of the reference population, there may still be selection along unobservable characteristics that cannot be controlled for. This is a concern also with probabilistic surveys where people are contacted by phone, mail or by a surveyor at their home door. In the case of these surveys, the invitation to take part to the survey was very general and it did not mention non-compete clauses

[46] Messages in the hiring phase vary depending on the channel used for hiring the prospective panellists but are usually very general. Some examples are the following:

- "*We will cover shopping and consumer habits; travel and vacations; technology and innovation; society, politics and the environment; fashion and wellness; culture and customs; sports and motors; and many other topics of interest*."
- "*The panel aims to gather ideas and suggestions from consumers and all citizens, many aspects on which the quality of our lives depends: new products and new services, our relationships with companies and institutions, work, what new things we expect from politics and in society*."
- "*The panel is an opportunity to facilitate the provision of better products and services, but also to express and enhance your ideas on economic issues and societal trends*."

or even labour market issues in general.[47] However, even if there is no selection based on the topic, non-response is never random: typically, younger, less educated, single and poorer populations tend to have higher non-response rates. According to Qualtrics (2022), the average response rate tends to fall between 20% and 30% and a survey response rate below 10% is considered very low. In our case, 26.4% of contacted panellists started the survey and, of those who started, 90.7% completed it.

All in all, there are no specific reasons to believe that selection is a major concern for the validity of our data and we believe that the measures taken during the implementation of the survey contribute to minimise this risk. However, we cannot entirely discount the issue because some factors remain inherently unobservable and, therefore, these results should be considered as a first estimate for Italy. Adding a question on non-compete clauses in standard social and labour market survey run by the national statistical office could provide a validation for these results.

[47] The invitation email reads as follows: "*Hi, we have launched a new survey. Please participate! The survey takes a maximum of 20 minutes. Those who complete it in full will be credited <number> points. To respond use the following link. Thank you for your cooperation!*".

5. The incidence and the characteristics of non-compete clauses in Italy

In this section, we present the main results of the survey. In particular, we show the incidence of non-compete clauses among Italian private sector employees and the characteristics of these employees and the companies employing them. Then, we analyse if and how much employers and employees negotiate the introduction of a non-compete clause in a contract and what they bargain about. Third, we describe the characteristics of the clauses, comparing their content to what is foreseen in the Italian civil code and case law. Finally, we look at other legal clauses such as the notice period for permanent employees and the penalty clause for temporary workers that may restrict the possibility to quit the current job and move to another one.

5.1 The incidence of non-compete agreements

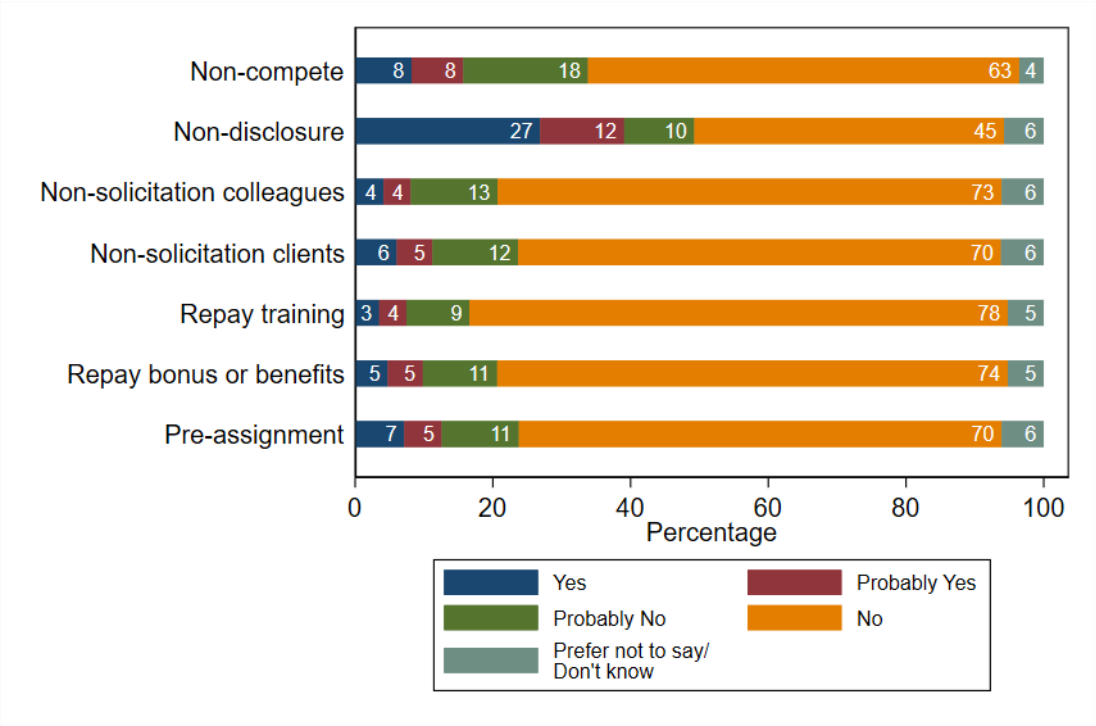
In Italy, the share of private sector employees who have agreed to a non-compete agreement at least once in their career is 22% while 15.7% of private sector employees are currently bound by a non-compete agreement[48], which corresponds to almost 2 million employees (Figure 1). The share of workers currently bound by a non-compete clause in Italy is lower but not very far from the one found in the United States for private sector and public health care workers where – according to Starr et al. (2021) – 18% of US private sector and public health care workers are covered by a non-compete agreement[49], while 38% have agreed to at least one in the past. Table 3 provides means – overall and by non-compete status – of the main variables in our sample.

Non-compete clauses are not the only legal tool to regulate post-employment activity, as discussed in Section 2, as shown in Figure 1. By far the most common clause in Italian employment contracts is the non-disclosure agreement (NDA): 39% of private sector employees in Italy are covered by a non-disclosure agreement. Other clauses are also quite widespread: 12% of private sector employees are bound by a pre-assignment agreement (a contract which assigns to the employer ownership over any invention created while employed); 11% by a clause of non-solicitation of clients; 10% by a repayment of benefits and bonuses clause; 8% by a clause of non-solicitation of colleagues; and, 7% by a repayment of training costs clause.

[48] More precisely, 8.2% answered yes, 7.5% answered probably yes.

[49] But this has to be interpreted as a lower bound estimate as the survey only allowed to answer yes, no or maybe.

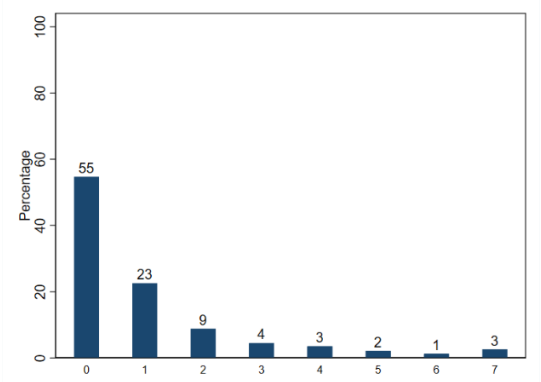
Figure 1: Share of employees bound by clauses regulating post-employment activity



Clauses regulating post-employment activity often come in a bundle (Balasubramanian et al. 2022): out of the total population of private sector employees, Panel A in Figure 2 shows that 55% are not covered by any clause, 23% are covered by one clause only (typically a non-disclosure agreement) while 22% are covered by more than one clause. Panel B in Figure 2 shows that about 1% are bound by a non-compete clause only, 19% by a non-disclosure agreement only, 13% by both a non-compete and at least a non-disclosure agreement and the rest (12%) have a number of other combinations of post-employment clauses.

Figure 2: Bundles of clauses regulating post-employment activity

Panel A: Share of employees covered by one or more clauses



Panel B: Share of employees covered by different bundles

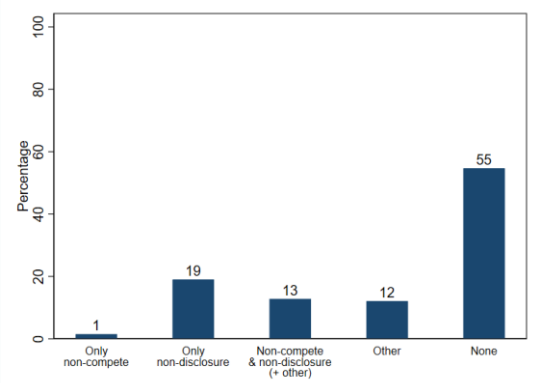


Table 3: Sample means by non-compete use

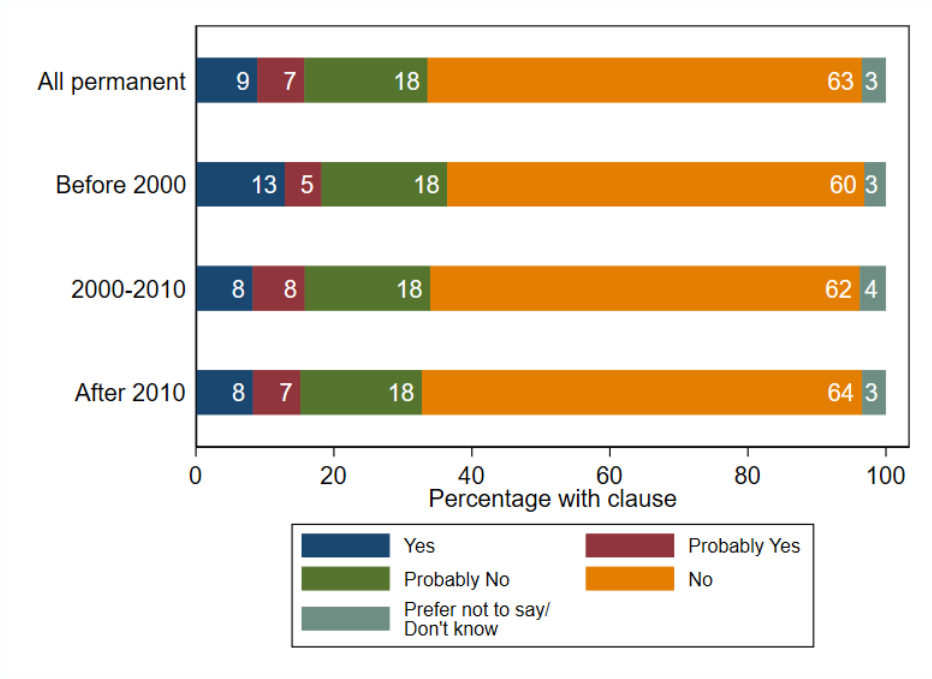
Variable	Overall	*With clause*	*Without clause*	*Difference*
Male	0.59	0.66	0.57	0.09***
Age	42.55	42.53	42.55	-0.02
Lower secondary school or less	0.07	0.04	0.07	-0.03***
Upper secondary school	0.56	0.5	0.57	-0.07**
Bachelor degree	0.12	0.13	0.12	0.01
Higher than bachelor degree	0.25	0.33	0.23	0.1***
Wage >=2000 euro	0.21	0.39	0.17	0.22***
High-skilled	0.32	0.44	0.3	0.14***
Medium-skilled	0.49	0.39	0.51	-0.12***
Low-skilled	0.18	0.17	0.19	-0.02
Employer size: < 15	0.22	0.11	0.24	-0.13***
Employer size: 16-50	0.16	0.14	0.16	-0.03
Employer size: 51-100	0.12	0.17	0.11	0.06***
Employer size: 101-250	0.1	0.13	0.1	0.04*
Employer size: > 250	0.36	0.42	0.34	0.07***
Employer size not known	0.04	0.03	0.04	-0.01
Operational area: only Italy	0.68	0.57	0.7	-0.12***
Operational area: both Italy and abroad	0.31	0.42	0.29	0.12***
Operational area not known	0.01	0.01	0.01	0
Area: North West	0.36	0.35	0.37	-0.02
Area: North East	0.24	0.25	0.24	0.01
Area: Center	0.21	0.22	0.21	0
Area: South and Islands	0.18	0.19	0.18	0.01
Permanent contract	0.82	0.82	0.82	0

Note: Low-skill workers are those with jobs in sales and services and elementary occupations (CP11 5 and 8). Middle-skill workers hold jobs as clerks, craft workers, plant and machine operators and assemblers (CP11 4, 6 and 7). High-skill workers are those who have jobs in managerial, professional, technical and associated professional occupations (ISCO 1, 2 and 3). *** p< 0.01, ** p<0.05, * p<0.1.

When looking at the incidence of non-compete clauses by year of hiring among employees with a permanent contract (Figure 3), the incidence has been constant since 2000 while it was slightly higher before 2000. Differently from Finland (Akava, 2017) where, however, the survey covered only a very specific segment of the workforce, there is no sign of an increasing use of non-compete clauses overtime. However, these findings have to be interpreted with caution as they may just reflect a composition effect given that we only observe employment relationships which have lasted more than

20 years for the period before 2000 and which, therefore, may not be comparable to the wider set of contracts signed in more recent years.

Figure 3: Share of employees bound by a non-compete clause by year of hiring



The use of non-compete agreements differs significantly across types of workers. Table 4 shows that non-compete agreements are more common among men than women while they are evenly spread across age groups. Non-compete clauses are used also for workers with a temporary contract, even if the average expected duration of a temporary contract is just one year.

Consistent with the idea that non-compete agreements are used to protect legitimate business interests, they are more common among managers and professionals and among highly educated and higher earning employees. However, non-compete agreements are also relatively frequent among workers employed in manual and elementary occupations and low educated and lower earning ones: 9.4% of the employees with less than secondary education are currently bound by a non-compete agreement, 12% among those earning less than 2,000 euros/month, 8% among those employed in craft and related trade, 9% among plant and machine operators and 13% in elementary occupations.

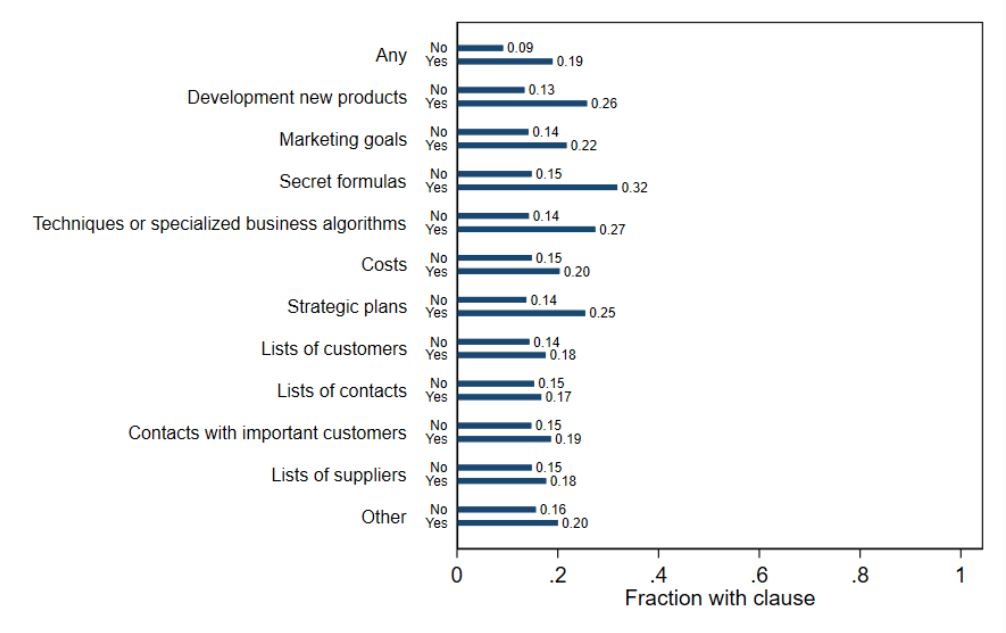
Table 4: Share of employees bound by a non-compete clause by characteristics of the employee

Variable	Fraction with clause
Age	
19-30	0.16
31-40	0.16
41-50	0.16
51-65	0.14
Gender	

Female	0.13
Male	0.18
Education	
Lower secondary school or less	0.09
Upper secondary school	0.14
Bachelor degree	0.17
Higher than bachelor degree	0.21
Wage	
<2000 euro	0.12
>=2000 euro	0.31
Occupation	
Managers	0.32
Professionals	0.21
Technicians and Associate Professionals	0.20
Clerical Support Workers	0.14
Services and Sales Workers	0.15
Craft and Related Trades and Agriculture Workers	0.08
Plant and Machine Operators and Assemblers	0.09
Elementary Occupations	0.13
Duration of the position	
Temporary	0.16
Permanent	0.16

According to the "traditional view", non-compete clauses are necessary to protect legitimate business interests. However, if we look at the incidence of non-compete clauses by access to confidential information (such as secret formulas, strategic plans, the development of new products, list of important clients or suppliers, etc.) we observe that this is not always the case. Figure 4 shows that while clauses are indeed more prevalent among employees who have access to some kind of confidential information, 9.1% of the employees who do not have access to any kind of confidential information also have a non-compete agreement.

Figure 4: Share of employees bound by a non-compete clause, by access to confidential information



The use of non-compete agreements differs also across types of employers (Table 5). In particular, the incidence of non-compete agreements is higher in mid-sized companies (50-250 employees) than in small ones. It is also higher in multinational companies (i.e. companies which have establishments both in Italy and abroad) than in national ones. Moreover, non-compete agreements are more common in services than in manufacturing, with a non-negligible share of employees bound by a clause also in relatively low-skilled service sectors such as household activities and hotels and restaurants. Finally, we find very little variation across geographical areas, and non-compete clauses appear to be quite evenly spread across the entire country despite the high heterogeneity in terms of economic structure of Italian regions.

Table 5: Share of employees bound by a non-compete clause by characteristics of the firm

Variable	Incidence clause
Size firm	
Less than 15	0.08
16-50	0.13
51-100	0.22
101-250	0.20
More than 250	0.19
Don't know	0.14
Operational area of the firm	
Only in Italy	0.13
Both in Italy and abroad	0.21
Don't know	0.17
Sector	

Primary	0.13
Secondary	0.13
Tertiary	0.17
Geographical area	
North West	0.15
North East	0.16
Centre	0.16
South and Islands	0.17

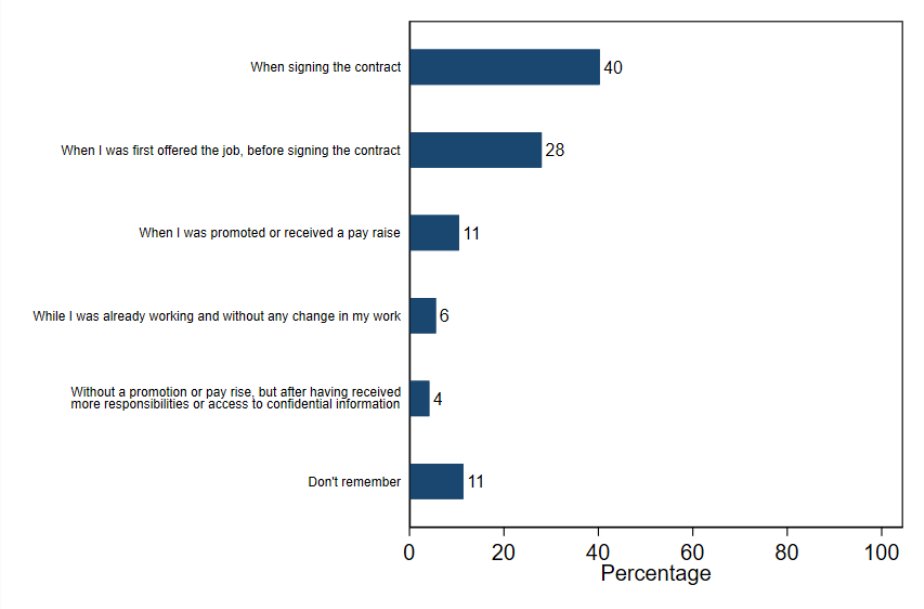
Note: Geographical area refers to the place of residence of the respondent. Primary refers to Agriculture, forestry and fishing and Mining and quarrying; *Secondary* to Manufacturing and Construction, Tertiary to all remaining business sectors.

5.2 The non-compete contracting process

We now turn to analyse the contracting process between employers and employees to understand when employees were first told about the clause, if and how much they negotiated it and what was negotiated. To increase the number of observations and therefore the precision of our estimates, we use the "extended sample" that results from the merging of the randomly selected main sample with the oversampling of employees with a non-compete clause (see the survey methodology section).

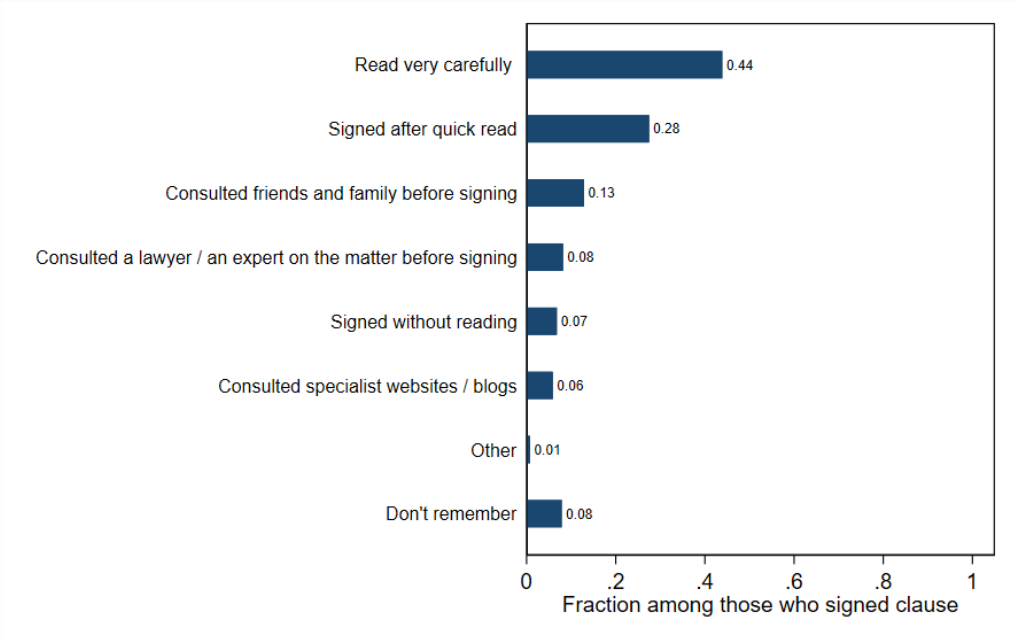
Figure 5 shows that the majority of employees currently bound by a non-compete clause discovered about the clause before the beginning of the job, either at the moment of signing the contract (40%) or even before, when the worker was offered the job (28%). 15.2% of the clauses were introduced after the signature of the contract but in exchange for a promotion, a pay rise or an increase in responsibilities. 5.6% have been introduced after the signature of the contract with no change in the work performed.

Figure 5: Timing of discovery of the non-compete clause, percentage of employees bound by a non-compete clause



When asked to sign the non-compete agreement, not all respondents behave in the same way (Figure 5): 44% of the employees bound by a non-compete read it very carefully before signing it while 28% read it only quickly. 13% consulted friends and family, 8% asked a lawyer or an expert in the field while 6% consulted specialised websites or blogs. Finally, 7% signed it without reading.

Figure 6: Behaviour when discovering the non-compete clause, percentage of employees bound by a non-compete clause

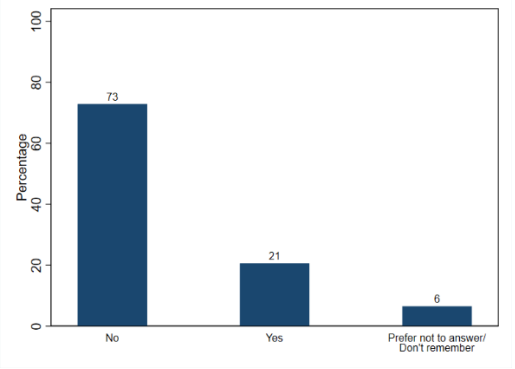


Notes: multiple options allowed.

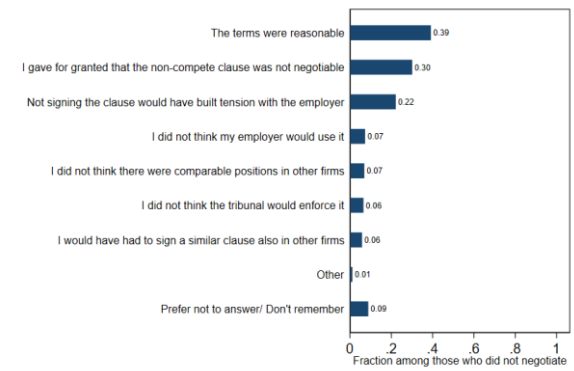
Only 21% of the employees with a non-compete agreement tried to negotiate it (Panel A in Figure 7) while 73% did not try to negotiate for a number of reasons (Panel B in Figure 7): 39% of those who did not try to negotiate the clause found it reasonable, while 30% took for granted that the clause was not negotiable. 22% feared that the clause would have generated tensions with the employer. Some of the employees did not negotiate because they thought that the clause would not be enforced by the employer (7%) or a tribunal (6%). Finally, few employees did not negotiate because they did not have alternative comparable offers (7%) or because in any case they would have had to sign a similar clause with another employer (6%).

Figure 7: Negotiation of the non-compete clause

Panel A: Share of employees who negotiated the clause, % of those with a non-compete clause



Panel B: Reasons why the employee did not try to negotiate



Notes: In Panel B multiple options were allowed.

Moreover, a majority of employees – except among those working in elementary occupations and in craft and related trades and agriculture – consider that there are good reasons to sign a non-compete clause in their current job (Figure 8).

Figure 8: Share of employees with a non-compete clause who think that the clause is justified in their firm, by occupation

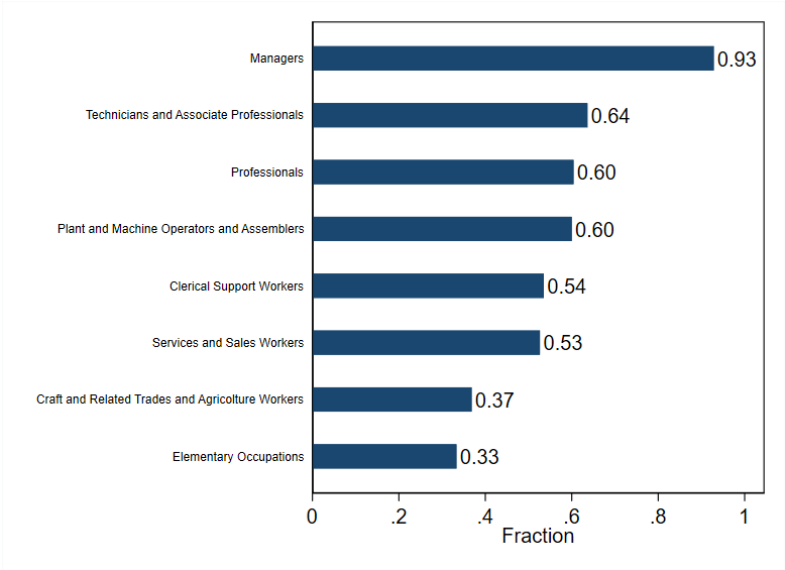
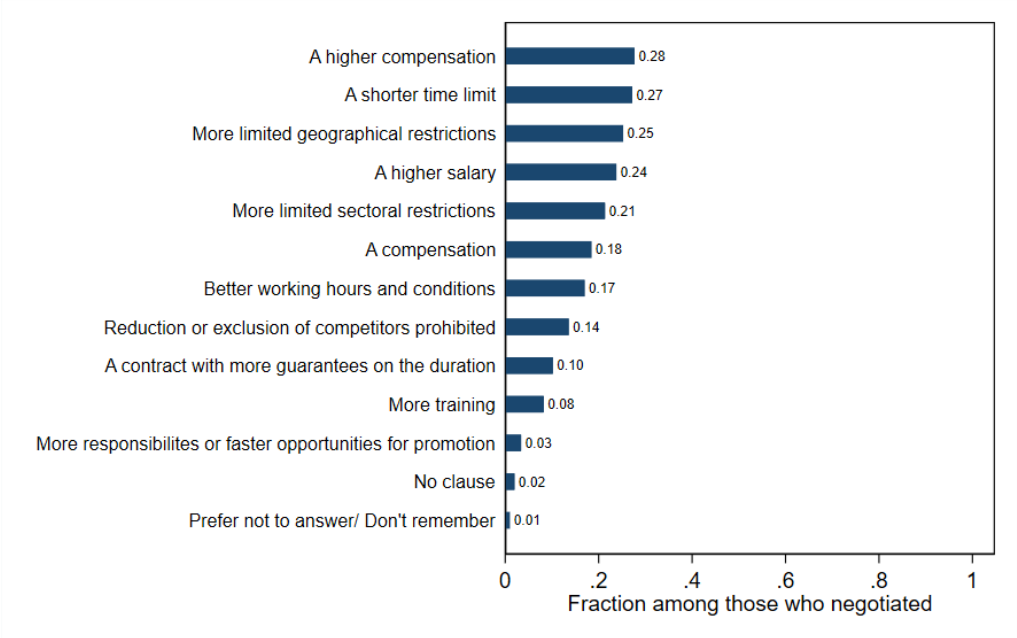


Figure 9 shows that when the employees tried to negotiate the clause, some asked for (more) money (28% asked for a higher compensation, 24% for a higher salary, 18% asked to add a compensation for the clause that was initially not foreseen). Other tried to negotiate less binding limitations (27% asked for a shorter duration, 25% for more limited geographical restrictions, 21% for more limited sectoral restrictions and 14% for a reduction or the exclusion of competitors covered by the clause). Finally, some tried to improve the quality of their job (17% asked for better working hours and conditions, 10% for more guarantees on the duration of the employment relationship, 8% for more training and 3% for more responsibilities). Only 2% of the employees asked to get rid of the clause itself. Interestingly, most of the employees who tried to negotiate with the employers obtained what they asked for, either in full (39%) or at least in part (48%).

Figure 9: Objectives of negotiation by the employees who tried to negotiate the non-compete clause



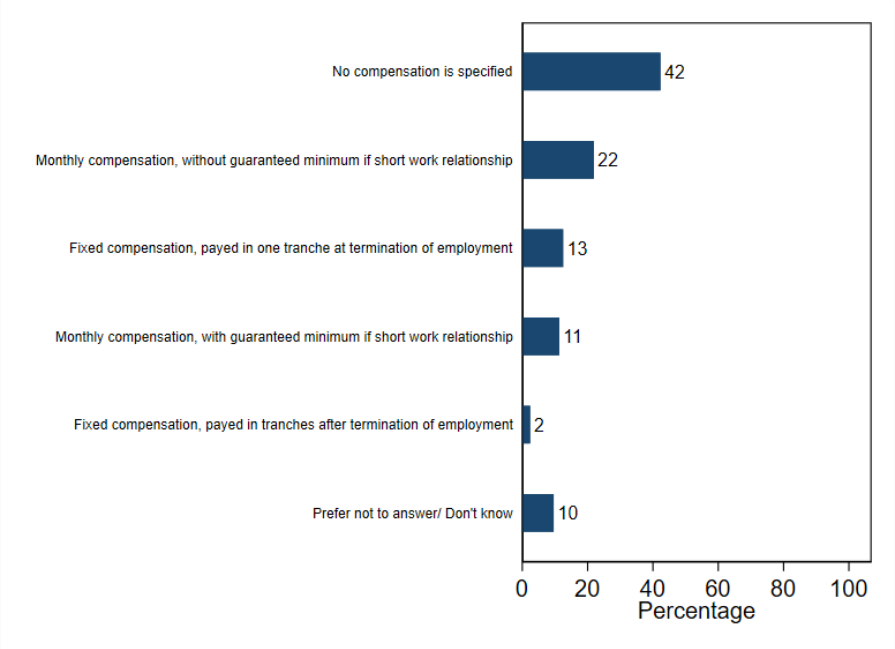
Notes: multiple options allowed.

5.3 The content of non-compete agreements

In this third part, we analyse the content of the non-compete clause, again using the "extended sample". As discussed in Section 3 on the regulatory framework, to be enforceable a non-compete agreement in Italy must be based on a written deed and it must specify a compensation as well as time (its duration cannot exceed three years except for executives whose clauses can last up to five years), sectoral and geographical limits. A "garden leave" whereby an employee is forbidden to do any kind of work is unlawful in Italy.

Figure 10 shows that 42% of the non-compete agreements do not foresee any specific compensation while 22% have a monthly compensation without a guaranteed minimum in case of short duration of the employment relationship, 13% have a fixed compensation paid in one single instalment at the end of the employment relationship, 11% have a monthly payment with a guaranteed minimum and a small share (2%) has a fixed compensation but paid in tranches after the end of the employment relationship.

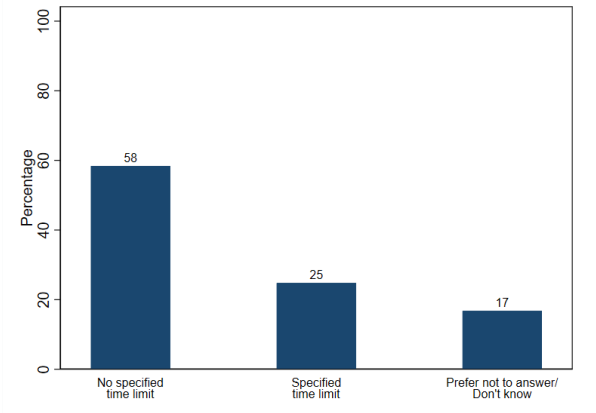
Figure 10: Share of non-compete clauses including a compensation, by type of compensation



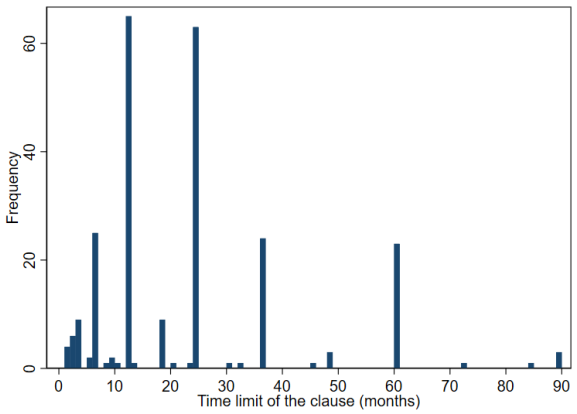
Moreover, 58% of the respondents state that their contract does not specify any time limit while 25% report a time limit and 17% do not know or prefer not to answer (Panel A in Figure 11). On average, when the time limit is specified and the worker reports the information, the non-compete agreement lasts for almost two years but with peaks at six months, one, two, three and five years (Panel B in Figure 11).

Figure 11: Duration of the non-compete clause

Panel A: Share of non-compete clauses including a time limit, percentage of workers bound by a non-compete clause



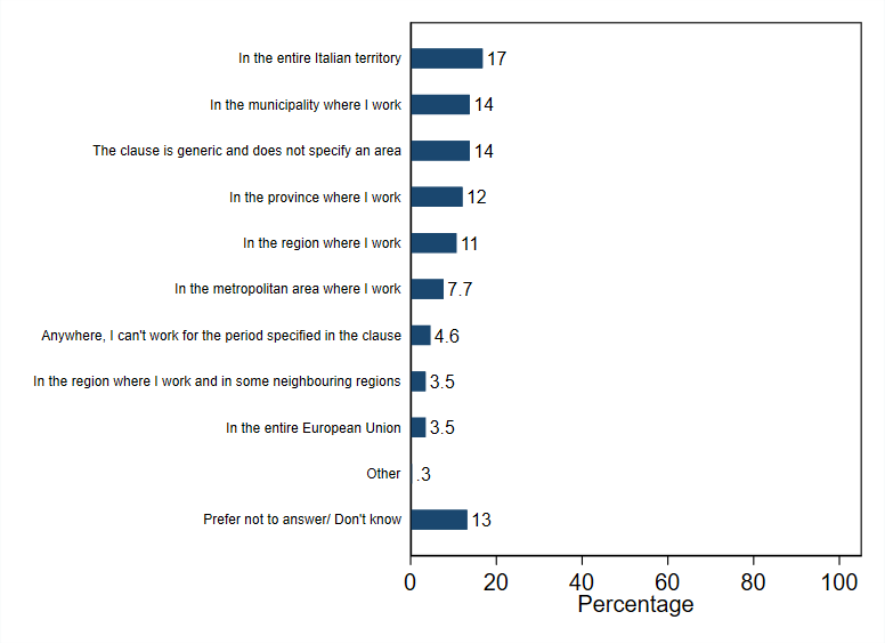
Panel B: Duration of the time limit, number of months



As for the geographical scope of the agreements, Figure 12 shows that 17% of employees with a clause are restricted from working in the entire Italian territory while for 14% of them the restriction applies only to the municipality where they work, 12% to the province and 11% to the region.

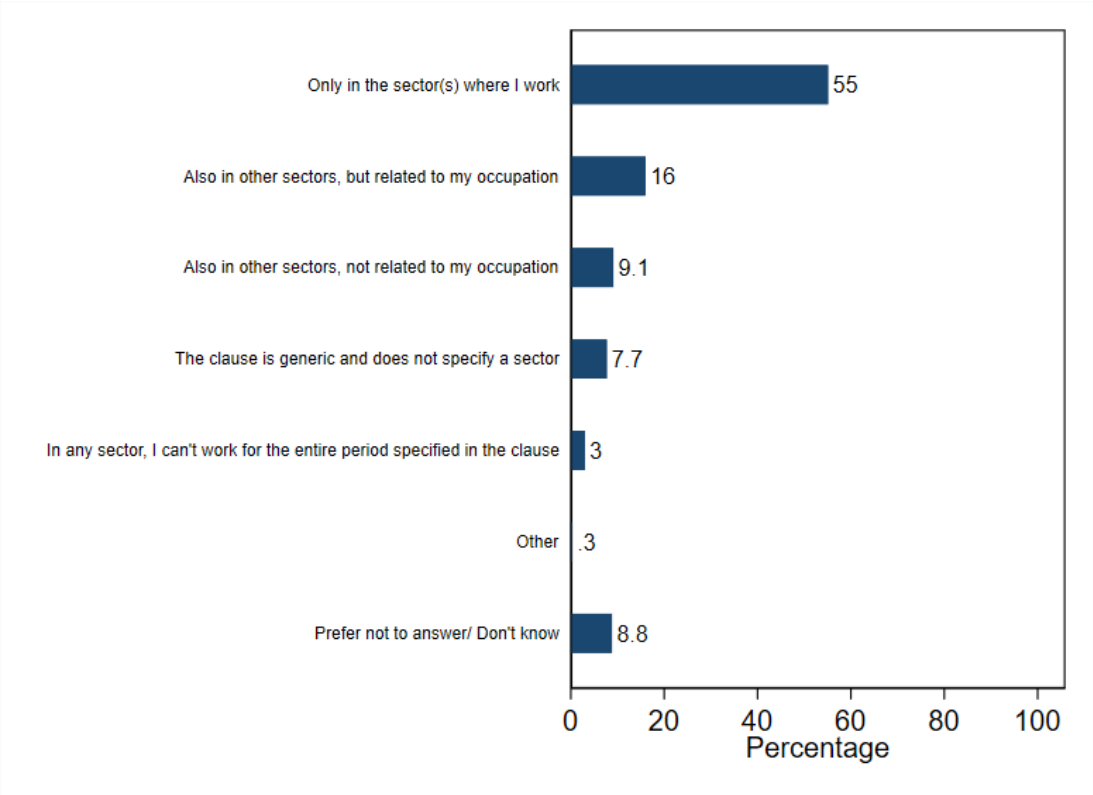
According to 14% of the respondents with a non-compete agreement, the restriction is generic and does not specify any geographical limit. Finally, for a small share of workers (3.5%), the restriction covers the entire European Union.

Figure 12: Share of non-compete clauses including a geographical limit, by scope of the limit



In terms of business sectors, Figure 13 shows that 55% of employees with a non-compete clause are restricted from working only in the sector where their company operates. For 16% of them, the restriction extends to other sectors as well but just for jobs related to their current occupation, while for 9% of employees the restriction also covers different occupations in other sectors. Finally, 7.7% of agreements do not specify sectoral limits and 3% cover the entire economy (and hence the employee cannot do any kind of work for the duration of the clause). In the case of few employees, the restriction applies to a precise list of companies.

Figure 13: Share of non-compete clauses including a sectoral limit, by scope of the limit



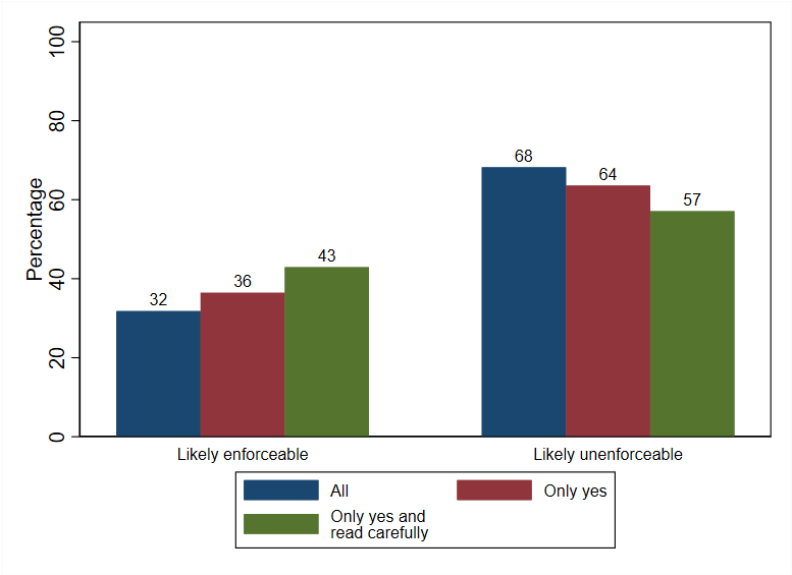
All in all, according to our respondents, just a third of non-compete agreements specifies a compensation as well as time, sectoral and geographical limits as foreseen in the Italian law, while two thirds of agreements do not mention one or more of these necessary elements. This suggests that two thirds of non-compete agreements are simply unenforceable[50] ("null and void" in the legal jargon) and/or that employees are not aware of their actual content (Figure 14). Another possibility is that workers are not aware of the exact limits defined by the contract. In the latter case, the mere existence of a clause of this type could hamper mobility well beyond its actual scope.

To shed some light on these two alternative explanations for the absence of reported limits to the non-competes, we redo the same analysis restricting the sample to workers who answered "yes" to the question on non-compete agreements (hence excluding those who answered "probably yes", who are less likely to correctly remember the content of the clause). The results in Figure 14 are almost unchanged: 36% of the clauses fulfil the formal requirements while 64% do not.

[50] In some countries, courts can redraft unreasonable or unlawful clauses in order to make them enforceable, under the so-called "blue-pencil" rule (OECD, 2019). This is not possible in Italy at least as far as the minimum formal requirements are concerned: when the nullity sanction applies, the clause is deemed as not included and therefore unenforceable.

Finally, we further restrict the sample to those workers who not only are sure to have signed a non-compete clause but also declare to have read it carefully: the share of likely unenforceable clauses in Figure 14 goes down to 57% but it remains very high.

Figure 14: Share of potentially unenforceable clauses across different samples



Notes: "All" refers to the entire sample of employees bound by a non-compete clause (i.e. employees who answer yes or probably yes to the question on the non-compete clause). "Only yes" refers to the sample of employees who answered "yes", excluding therefore those who answered "probably yes". "Only yes and read carefully" refers to the sample of employees who answered "yes" and declare to have read carefully the non-compete clause.

Interestingly, unenforceable clauses are not limited to a specific group of workers, to a type of company or to specific sectors, occupations or regions but they are spread quite across the board (Table 6). However, their incidence is higher among low educated/low skilled workers for whom a non-compete clause is generally less justified. This suggests that firms may be less careful about ensuring that the clause is fully compliant with the legal requirements if they use it mainly to scare workers away from looking for another job and are not really planning to go to court to enforce them. In alternative, or in addition, low educated/low skilled workers either are less aware of their rights and agree on a clause even when clearly unenforceable or tend to be less aware of its actual content.

Table 6: Share of potentially unenforceable clauses, by characteristics of workers and firms, percentages

Variable	Whole sample	Clause "Yes"	Clause "Yes" and read carefully
Gender			
Female	70	69	64
Male	67	60	53
Age			

19-30	69	68	62
31-40	69	60	54
41-50	65	62	55
51-65	71	68	62
Education			
Lower secondary school or less	89	93	*nd*
Upper secondary school	69	65	55
Bachelor degree	68	61	56
Higher than bachelor degree	64	61	58
Wage			
<2000 euro	70	67	58
>=2000 euro	67	62	55
Sector			
Primary	76	60	*nd*
Secondary	72	70	68
Tertiary	67	61	52
Occupation level			
High-skilled	67	62	61
Medium-skilled	68	62	48
Low-skilled	74	75	71
Size firm			
Less than 15	72	75	71
16-50	69	60	41
51-100	79	75	69
101-250	71	66	68
More than 250	63	59	51
Don't know	56	50	*nd*
Operational area of the firm			
Only in Italy	70	68	60
Both in Italy and abroad	65	57	54
Don't know	67	*nd*	*nd*
Geographical area			
North West	65	59	54
North East	64	59	46
Center	72	71	63
South and Islands	76	74	76
Duration of the position			
Temporary	82	78	76
Permanent	65	61	54

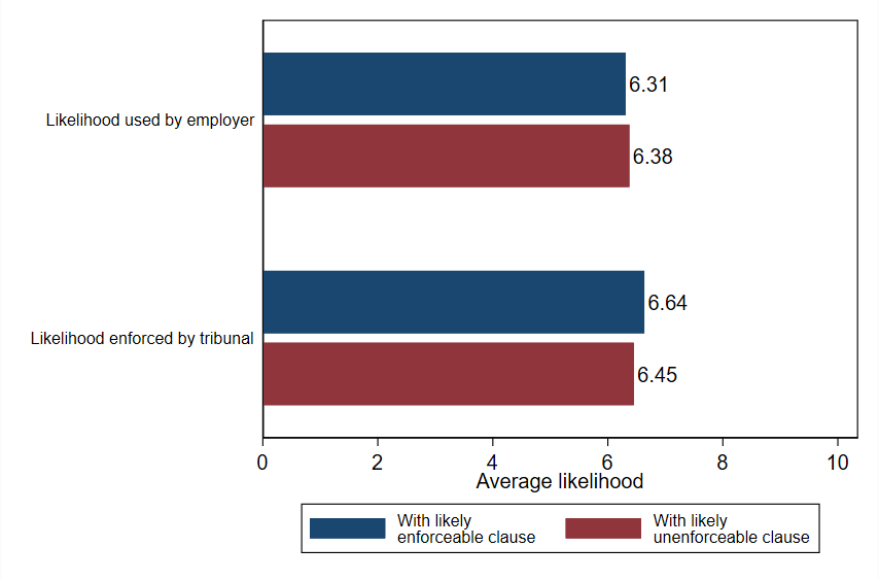
Notes: "Whole sample" refers to the entire sample of employees bound by a non-compete clause (i.e. employees who answer yes or probably yes to the question on the non-compete clause). "Clause yes" refers to the sample of employees who answered "yes", excluding therefore those who answered "probably yes". "Clause "Yes" and read carefully" refers to the sample of employees who answered "yes" and declare to have read carefully the non-compete clause. Primary refers to Agriculture, forestry and fishing and Mining and quarrying; *Secondary* to Manufacturing and Construction, Tertiary to all remaining business sectors. Low-skill workers are those with jobs in sales and services and elementary occupations (CP11 5 and 8). Middle-skill workers hold jobs as clerks, craft workers, plant and machine operators and assemblers (CP11 4, 6 and

7). High-skill workers are those who have jobs in managerial, professional, technical and associated professional occupations (ISCO 1, 2 and 3). *Nd:* not disclosed. Estimates are not disclosed when based on less than 10 observations.

Despite the fact that more than half of the clauses appear to be unenforceable, when asked to rate between 0 and 10 the likelihood that the employer takes legal action to try to enforce the non-compete clause if the worker was to leave the company, 51.6% of the respondents think that is likely or even sure (a rate between 6 and 10) while only 32.2% think that is unlikely or impossible (a rate between 0 and 4). And in case the employee is brought to court by the employer, 54.3% think that the tribunal will enforce the clause (a rate between 6 and 10) while 28.4% do not think so.

The perception about the risk of being taken to court and being found liable by a judge is uncorrelated with the likely enforceability of the clause (Figure 15): the average likelihood of a legal action by the employer is rated at 5.3 among employees with an enforceable clause and at 5.4 among employees with an unenforceable one. The likelihood of being found liable by a tribunal is rated at 5.6 among employees with an enforceable clause and at 5.4 among employees with an unenforceable one.

Figure 15: Perceived likelihood of being brought to court and being found liable, by enforceability of the clause



To put these results into context, it is useful to remember that in the United States non-compete clauses are present also in states where they are banned (Starr et al., 2021 and Colvin and Shierholz, 2019). The presence of unenforceable contracts is also not peculiar to the labour market as a matter of fact – Furth-Matzkin (2017) reports that as many as 73% of residential rental leases in the Greater Boston Area in the United States contain unenforceable clauses. And the behaviour of the parties is not necessarily influenced by the actual contract's enforceability: Starr et al. (2020) show that in the United States what matters in terms of workers' behaviour is their belief about the likelihood of a resulting trial and about court enforcement and not the *actual* likelihood (the so-called *in terrorem*

effect). As a result, non-compete clauses may be used even when the employer knows that they are unenforceable just to "scare" the employee.

While the estimates presented in this section have to be interpreted as an upper bound of the actual share of unenforceable clauses, they suggest that a non-negligible number of clauses in Italy are likely "null and void" but workers are unaware that they are unenforceable in Court. Since these information gaps are generally stronger at the low end of the skill distribution, non-compete clauses can be particularly effective in reducing workers mobility across jobs and hence increasing the bargaining power of employers vis-a-vis workers who are already in a vulnerable position within the firm.

5.5 Non-compete agreements and local labour market concentration

A recent and prolific literature has been looking at labour market concentration as another possible source of monopsony power.[51] This literature has looked at the impact of local labour market competition on wages as well as on non-wage attributes, showing that higher concentration tends to go hand in hand with lower wages as well as lower job security (i.e. a lower probability of being hired with a permanent contract).

No evidence is available to date on the link between labour market concentration and non-compete clauses. On the one hand, it is possible to argue that, as a tool to restrict competition in the labour market, non-compete agreements may matter less in a more concentrated local labour market because there are already less (or no) competitors. However, as argued in Section 2, non-compete clauses can also be used to restrict competition in the product market by restraining the ability of competitors to hire workers and enter the market or deterring departing employees from creating a new competing company. In this case, non-compete clauses may still be used even in a concentrated labour market.

To shed some light on the link between the use of non-compete clauses and labour market concentration, we match each employee in our sample to the labour market concentration of her local labour market as estimated by Bassanini et al. (2022).[52] We then estimate the probability of being bound by a non-compete clause for a given local labour market concentration using the following specification:

$$NCC_{i,l} = \beta \log(HHI_l) + \gamma X_{i,l} + \varepsilon_{i,l}$$

[51] Among the many papers, see Azar et al. (2022); Rinz (2022) and Benmelech et al. (2022) for the United States and Martins (2018); Marinescu et al. (2021); Bassanini et al. (2021); OECD (2021 and 2022) for other countries.

[52] We are very grateful to Giulia Bovini and Federico Cingano for kindly sharing their estimates on labour market concentration in Italy.

where *i* indexes the worker and *l* the local labour market defined as 1-digit CP-2011 occupations and NUTS3 geographical areas[53]; NCC denotes a dummy variable equal to 1 when the individual is bound by a non-compete clause and 0 otherwise; HHI is the Herfindahl-Hirschman index based on new hires;[54] and, *X* is a vector of individual and firm's characteristics.

The results in Table 7 show that the probability of being bound by a non-compete clause is negatively correlated with labour market concentration (even if only at the 10% significance level) suggesting that, on average, the two are imperfect substitutes one of another (less need of a non-compete clause in a more concentrated local labour market): an increase in labour market concentration by one standard deviation from the mean is correlated with a reduction in the probability of being bound by a non-compete clause of about 14%. The negative relationship seems to be driven in particular by middle-skilled workers[55] while it is not significant for high-skilled and low-skilled ones.

Table 7: Labour market concentration and probability of being bound by a non-compete clause

	(1)	(2)	(3)	(4)
	All	High skilled	Medium skilled	Low skilled
log(HHI)	-0.0210*	-0.00742	-0.0337**	-0.0446
	(0.0121)	(0.0227)	(0.0171)	(0.0292)
Constant	0.128**	0.161	0.0908	0.0531
	(0.0631)	(0.103)	(0.0773)	(0.146)
Observations	2,001	650	981	370
R-squared	0.068	0.074	0.062	0.093

Note: The dependent variable is a dummy equal to 1 when the individual is bound by a non-compete clause and 0 otherwise. Control variables include gender, age, education, (3 dummies), tenure, occupation (3 dummies), part-time, geographical area (4 dummies), wage (4 dummies), firm size (3 dummies), business sector (3 dummies), multinational. *** p< 0.01, ** p<0.05, * p<0.1.

5.6 Other restrictions to labour mobility

[53] The NUTS classification (Nomenclature of territorial units for statistics) is a hierarchical system for dividing up the economic territory of the EU and the UK for the purpose of collection, development and harmonisation of European regional statistics. NUTS-3 is the most disaggregate level of this classification. It has the advantage to cover the entire national territory but it does not necessarily take into account the fact that catchment areas of cities often go beyond the borders of NUTS-3 regions. See Bassanini et al. (2022) for an in-depth discussion.

[54] Bassanini et al. (2022) calculate an Herfindahl-Hirschman based on new hires based on 4-digit ISCO occupations and NUTS3 geographical areas between 2013 and 2018. Since in our survey we only have information on CP-2011 occupations at the 1-digit level and one year, we calculate an average Herfindahl-Hirschman index using a hand.-created crosswalk between ISCO and CP-2011 at the 1-digit occupation level and we weight for the number of hirings in each 4-digit occupation. Our average HHI index has mean 0.0709 and standard deviation 0.0737.

[55] Middle-skill workers hold jobs as clerks, craft workers, plant and machine operators and assemblers (ISCO 4, 7 and 8).

In the Italian legal system, (at least) two further contractual clauses can affect workers' mobility by restricting the possibility to quit and move to work for a competitor: the notice period that employees with a permanent contract have to give if they intend to quit and the penalty that employees with a temporary contract may have to pay in case they want to quit before the end of the contract.

In the case of workers with a permanent contract, the Italian law (Art. 2118 Civil Code) grants the employee the option to terminate the relationship subject to a notice period to allow the company to adjust to the "unforeseen event" and find a suitable replacement or readjust their activity. The notice is not due in the case of resignation for "just cause", for instance in the case of non-payment of wages (or, in some cases, late payment of wages), failure to pay social security contributions, sexual harassment by the employer, bullying, request to perform unlawful actions, demotion (outside the cases allowed by law). The employee and the employer can also come to an agreement for a shorter notice. The maximum number of days of notice in the case of resignation is determined by the collective agreement applied by the employer and varies by sector, occupation and seniority of the employee. The number ranges from a minimum of 5 days for an entry-level position in a relatively low skilled occupation to a maximum of one year for a manager with more than 10 years of tenure in the firm.[56] The median minimum notice established in collective agreements is one month, the median maximum is three months.

Among the respondents with a permanent contract, only 9.2% do not have a notice period in their employment contract.[57] On average, for those who have one, the notice is 47 days but there is a huge variability across workers. Figure 16 plots the notice that each employee with a permanent contract has to give in case of resignation and her tenure in the company. Even for a given tenure, the notice period can vary a lot. This partly reflects differences across sectors, partly difference across occupations but also differences across individual employment contracts. If we compare the notice for each worker to the maximum notice applicable in the collective agreement valid in that sector of activity[58] and the tenure of that worker, only 3.4% of workers appear to have a notice exceeding the maximum number of days established in the collective agreement (the orange dots in Figure 16). This estimate is a lower bound of the degree of non-compliance to the maximum notice period[59] but overall the notice period does not appear to be misused.

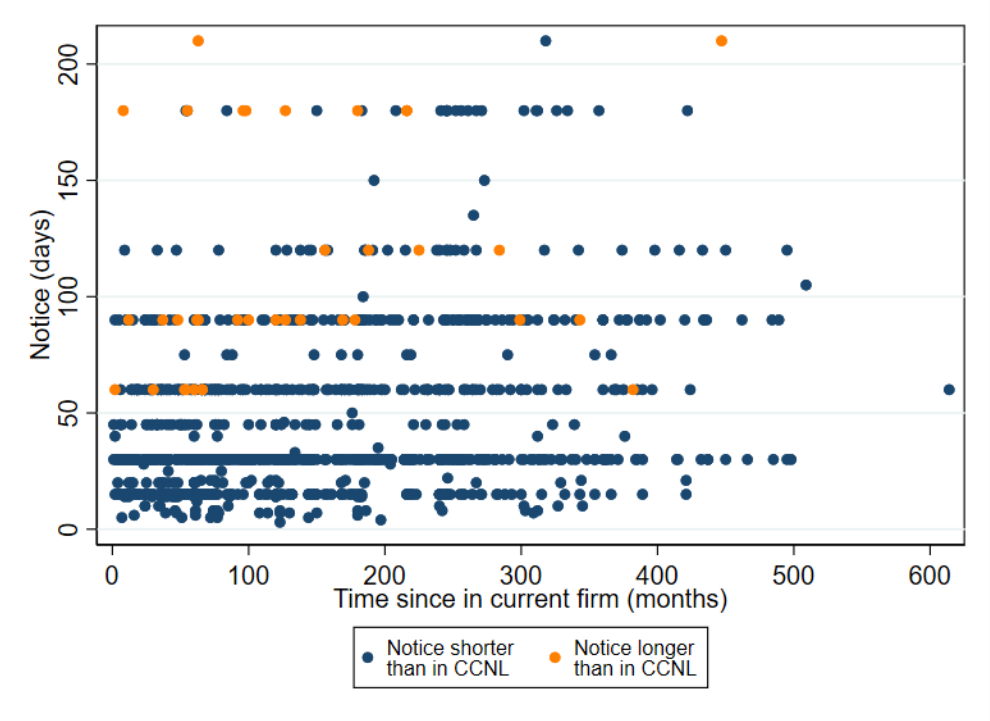
[56] For this analysis, we use the same sample of collective agreements used in Section 3 on the regulatory framework, i.e. the 44 collective agreements with at least 50,000 workers each covering 87% of the private sector employees.

[57] However, the minimum established in the collective agreement of reference applies unless the employer and the employee have explicitly agreed otherwise.

[58] We use the mapping by Cnel to assign each collective agreement to business sectors.

[59] We cannot precisely estimate the degree of non-compliance because we cannot match the occupation level of the worker with the occupational scales used in collective agreements. We follow the standard ISCO classification while collective agreements follow other groupings.

Figure 16: Notice period in case of resignation, by tenure



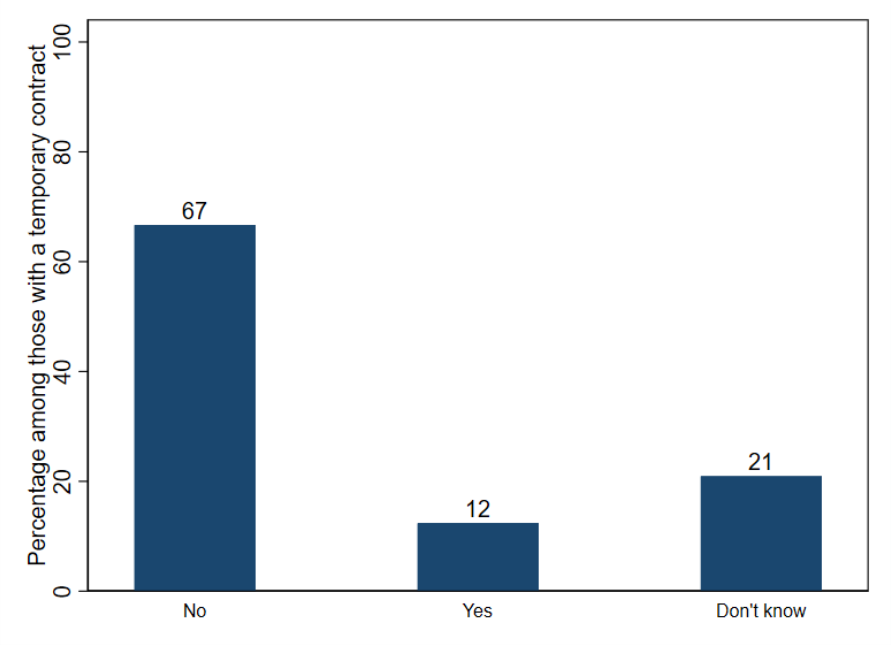
Note: CCNL are the sectoral collective agreements. Blue dots represent workers with a notice period equal or lower to the maximum established in their collective agreement. Orange dots represent workers with a notice period higher than the maximum established in their collective agreement.

We now turn to the penalty clause in case of resignation from a temporary contract. In the case of workers with a temporary contract, in Italy it is not possible to terminate the employment relationship before the date foreseen in the contract (except, again, for just cause or mutual consent). The employer cannot fire the worker and the worker cannot resign. Dismissal without just cause entails the employee's right to damages, which tend to be equal to all the (monthly) wages that would have been due to the employee up to the initially scheduled expiration. Similarly, if the employee decides to resign without just cause, the employer can claim a compensation equal to the period missed until the contract is completed. In practice, often the employer and the employee come to an agreement. However, employers could specify the compensation (in this analysis, we refer to it as the "penalty clause") due in case of early resignation in the employment contract so as to make clear from the onset the costs that the employee may incur. The enforceability of a penalty clause is unclear because any compensation must be commensurate to the damage generated and therefore it cannot be established beforehand. The penalty could be relatively high if the resignation happens well before the end or be small if it happens close to the foreseen end date of the contract. It is, therefore, plausible to consider that any penalty specified ex ante is mainly used to deter the worker from resigning rather than to actually establish the correct compensation due. Such clauses were considered very rare until

recently, when anecdotal evidence[60] showed that companies were using them in response to the increase in resignations after the peak of the COVID-19 pandemic.

Among the respondents with a temporary contract, 12% have a penalty clause in their contract (Figure 17). For those who remember its amount, the average penalty corresponds to 660 euros. This finding is therefore in line with anecdotal evidence in suggesting that such clauses are not as rare as most lawyers and practitioners may have thought. Moreover, given that, as discussed, a penalty clause is likely not enforceable as such (unless, by chance, the amount foreseen corresponds to the damage generated by the early resignation), we can conclude that it is used as a tool to limit workers' outside options more than as a tool to defend the employers' legitimate interests.

Figure 17: Share of employees with a temporary contract with a penalty clause



How do the notice and the penalty interact with non-compete clauses? Both can be used to reinforce the deterrent role played by a non-compete clause or be a "functional equivalent", *i.e.* an alternative, since in the presence of a non-compete clause, there is less need for a (longer) notice period/penalty or vice versa. Controlling for a range of workers' and firms' characteristics, Table 8 shows that, among permanent workers, having a non-compete clause is negatively associated with having a notice period in case of dismissal but not with the length of the notice. This suggests that the two tools are imperfect substitutes one of another (less need for a notice period in the presence of a non-compete clause and vice versa). Once the employee is covered by the notice period, the length of the notice is not shorter (nor longer) if she is already covered by a non-compete clause. Among

[60] See, for instance, https://tribunatreviso.gelocal.it/treviso/cronaca/2022/01/23/news/penali-di-mille-euro-per-chi-cambia-lavoro-decine-di-contratti-annullati-nella-marca-1.41160582 (accessed on 21 July 2022)

temporary workers, having a non-compete clause appears to be positively correlated with having a penalty clause. In this case, the two instruments seem to reinforce each other.

Table 8: Correlation between clause and notice and fine for leaving the firm

	(1) Notice (any)	(2) Notice (days)	(3) Penalty
Non-compete clause	-0.0460**	3.055	0.347***
	(0.0228)	(2.911)	(0.0567)
Observations	1,189	1,078	278
R-squared	0.037	0.174	0.216
Controls	yes	yes	yes
Sample	Permanent	Permanent	Temporary

Notes: The Table shows the correlation between being bound a non-compete clause and in column (1) having a notice period in case of resignation for employees with a permanent contract, in column (2) the number of days of notice and (3) the presence of a penalty clause in case of early resignation among employees with a temporary contract. Control variables include gender, age, education, (3 dummies), tenure, occupation (3 dummies), part-time, geographical area (4 dummies), wage (4 dummies), firm size (3 dummies), business sector (3 dummies), multinational. *** p< 0.01, ** p<0.05, * p<0.1.

6. Conclusions and policy discussion

Building on the growing evidence on the use of non-compete clauses in the United States, this report has provided the first comprehensive panorama on the regulation and use of non-compete clauses in Italy. Like in most OECD countries, non-compete clauses are lawful in Italy under certain conditions and they are aimed at protecting legitimate business interests such as trade secrets or investments in training. However, non-compete clauses can also be used to restrict competition in the labour and the product market.

In Italy, non-compete clauses are regulated by the Civil Code but the law only foresees minimal requirements, without providing a very detailed framework. Over the years, the case law has clarified some aspects but, beyond the respect of the basic formal requirements, courts retain a significant margin of freedom in evaluating each case.

Before this report, the only evidence available on their use and characteristics was based on case law. Given that the number of trials is limited and that they cover essentially high-skilled workers, this suggested that the phenomenon was relatively limited and of no major interest. However, as it is well known in the law and economics literature (Shavell, 2004), trial outcomes are not representative of the population of cases and they provide partial information since only a subsample of cases, often a very selected one, goes to Court.

To collect representative evidence on the use of non-compete clauses in the entire Italian private sector, we developed a survey with a representative sample of 2,000 employees in all private sectors and occupations in the country. The results show that, at 16%, the overall incidence of non-compete clauses in Italy is slightly lower than in the United States, but the main patterns across workers and companies are very similar between the two countries. In particular, the results of our survey show that non-compete clauses are not limited to high-skilled/high-paid job but also cover low skilled/low-paid employees. Moreover, the results of the survey show that a large share of clauses are likely unenforceable because they do not comply with the minimum formal requirements established in the law or that workers are largely unaware of their content (even those who are sure to have signed a non-compete clause and declare to have read it carefully before signing). All in all, the evidence emerging from the survey suggests that, because of a mix of abuse by employers and lack of awareness by workers, in a non-trivial number of cases non-compete clauses may lead to a distortion of the labour market, further restricting job-to-job mobility in Italy which is already relatively low by international standards (Bassanini and Garnero, 2013).

Do these novel findings call for restrictive measures to limit the use of non-compete clauses as it has happened in the United States and some European countries (see discussion in Section 2)? Until today, on the basis of the evidence available from case law, the Italian legal debate has mostly focused on issues related to the calculation of the compensation (the just amount but also how and when it

should be paid) and the extent of the geographical scope. However, these new results suggest that non-compete clauses are more pervasive than initially thought, covering also many employees who have no particular reasons to be covered and, besides, employees appear largely unaware of their actual enforceability. We believe, therefore, that there is scope to promote a fairer use of non-compete clauses and enhance the transparency and fairness of the negotiation process without imposing an excessive burden on employers or blocking them from protecting their legitimate business interests. Providing more transparent criteria to define the amount and form of the compensation as well as the geographical scope would certainly be helpful but it would not be enough to address the pervasiveness of unenforceable clauses and the general lack of awareness. The presence of non-compete clauses among many low skilled positions, and the fact that workers with low levels of education are often unaware of the fact that many of these clauses are not enforceable may contribute to increase earning inequalities. For low-skilled workers non-compete clauses can be a more powerful deterrent to quits than for highly skilled workers, who have a stronger bargaining power, can buy the rights to leave the firm, and overcome obstacles to mobility.

In what follows, we provide four policy options to open the debate:

1. *Banning non-compete agreements for certain categories of workers:* A number of countries have banned non-compete agreements for some categories of workers. This is an option that could be considered in Italy too. A ban could take several forms (OECD, 2019): the first one is to ban non-compete clauses among low-wage workers, by defining a wage threshold under which non-compete clauses are not allowed; the second is to ban non-compete clauses in selected occupations and/or sectors; the third is to limit non-compete clauses to workers who have access to trade secrets. The first option is likely the easiest to implement and enforce while, on the opposite, defining a list of occupations and/or sectors where a non-compete clause is not justified or ascertain whether an employee has really access to confidential information or not is more complicated and easier to bypass. Bans based on the salary exist elsewhere. Since 2006, in Austria, non-compete agreements are not enforceable below a given salary threshold (3,780 euros per month in 2022, special payments excluded). In Illinois, since 2017, non-compete agreements have been banned for low wage workers, initially defined as those earning less than 13 dollars per hour, while now, since 2022, as those workers who earn less than 75,000 dollars per year (actual or expected annualized rate).[61]

2. *Including non-compete agreements in mandatory communications:* In Italy when a company hires an employee or converts its contract from temporary to permanent, it must send a

[61] In Italy, it would also be advisable to use the gross annual salary (what is commonly known as "*R.A.L. - reddito annuale lordo*") given that the calculation of an hourly rate is not straightforward because of the complexity of the pay structure.

written communication ("*comunicazione obbligatoria*") to the Ministry of Labour and Social Policies stating the main terms of employment (place of work, type of contract, duration of the contract, occupation, collective agreement applied, etc.). The presence of a non-compete clause in the contract could be added to the list of items to be communicated. This may lead to a more careful use of non-compete clauses by the employers: in particular, it would make the introduction of a non-compete clause after the signature of the contract more costly and more salient as a new communication would have to be made. Moreover, adding non-compete clauses to the list of items to be communicated would also provide policy-makers, regulators, enforcement institutions and researchers with the information to better estimate the extent and characteristics of the phenomenon as well as guide the work of inspectors.

3. *Improving the transparency and fairness of non-compete agreements:* The survey has shown that most non-compete agreements are either not compliant with the basic formal requirements established by law (and employees do not know that they are unenforceable) or that employees are not aware of their content. This suggests that Italian employees tend to ignore the functioning of non-compete clauses and the minimum requirements established by the law. They may therefore feel bound by one and behave accordingly even when the clause is clearly unenforceable. Raising awareness on the regulation of non-compete clauses would help employees to know when the clause is enforceable and employers to write enforceable clauses. One option to increase the transparency would be to require to accompany any non-compete clause with the text of the Article 2125 of the Civil Code, which states the minimum requirements for the validity of such clause. Such explicit reference to the law would help at least those workers who read the contract before signing and it may also push the employer to ensure a higher degree of compliance with the law. Such measure is not uncommon in the Italian legislation: the Italian consumer protection legislation (so called "Consumer Code") contains several similar provisions aimed at improving the transparency and fairness of contracts' clauses. As shown in this report, collective agreements are silent with respect to non-compete clauses. An explicit mention of the cases where non-competes are not applicable could help to raise awareness among employers and workers' representatives. Finally a case could also be made for involvement of antitrust authorities in the monitoring of anti-competitive clauses: the fact that they concern the labor market does not mean that they are not relevant also in the product market.

4. *Raising public awareness:* To the best of our knowledge, there are no institutional or governmental websites (or other official sources) that provide basic information about non-compete agreements in Italy.[62] It is also not clear how much workers' representatives, trade

[62] See the example of France https://www.service-public.fr/particuliers/vosdroits/F1910#:~:text=La%20clause%20de%20non%2Dconcurrence,ou%20%C3%A0%

unionists and the services that provide support to workers (such as the *patronati*) know about non-compete clauses. Making the information on non-compete clauses more easily available may help both employers and employees. Furthermore, a hotline and/or an online form could be established to provide free and confidential advice to employers, employees and their representatives on employment rights, wages and workplace conflict (the experience in the United Kingdom[63] can provide a useful example).

These policy options are a first contribution to the debate. A wider debate within the academic community as well as with practitioners and social partners is needed to identify the most effective ways to ensure a fair and transparent use of non-compete clauses in Italy to protect legitimate business interests without unduly restricting workers' mobility.

20son%20propre%20compte or Belgium https://emploi.belgique.be/fr/themes/contrats-de-travail/fin-du-contrat-de-travail/clause-de-non-concurrence. (accessed on 28th July 2022)

[63] See https://www.gov.uk/pay-and-work-rights (accessed on 27th July 2022)

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