

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

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- The contracting process

- The content

- Non-compete clauses and LM concentration

- Other restrictions

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Introduction

Many sources of monopsony power (concentration, collusion, frictions, ...).

A non-compete agreement (NCC) is a contract or a clause of a contract where an employee agrees not to compete with an employer after the employment time period is over.

- ▶ It is justified to protect trade secrets and specific investments in the employment relationship (e.g. training).
 - ▶ Mostly workers with trade secrets or requiring specific training and both parties better off.
- ▶ But it can also be used to restrict workers' mobility limiting their outside options and bargaining power as well as restricting competitors to enter in the market.
 - ▶ More widespread and not associated to higher wages or training.

These competing hypotheses can be tested empirically.

Introduction

In the US Starr et al. (2021) and others have shown that NCC are widespread and also cover low-wage/low-skilled workers with negative effects on wages at the bottom.

Little evidence for the EU (and none for Italy).

This report → first comprehensive panorama of the regulation and the use of non-compete clauses in Italy:

- ▶ Extensive analysis of the law, collective agreements and case law.
- ▶ Empirical assessment based on a novel survey of 2,000 private-sector employees.

NCC in the United States

Significant literature in the US which also exploits differences in enforceability across states:

- ▶ Starr et al. (2021): 18% of private-sector and public health care workers are bound by NCC (38% have agreed to one in the past)
- ▶ Colvin and Shierholz (2019): between 27.8% and 46.5% of private-sector workers could be subject to NCC
- ▶ NCC not confined to high-skilled workers: 30% among hair-stylists (Johnson and Lipsitz, 2022); less than half have access to trade secrets (Starr et al. 2021)
- ▶ NCC associated with lower job mobility and lower wages (Garmaise, 2009; Marx et al., 2009; Starr et al., 2021)...
- ▶ ...fewer knowledge spillovers (Belenzon and Schankerman, 2013) and brain drain (Marx et al., 2015)

NCC in the United States

Also a significant policy debate, at federal level:

- ▶ 2016: Obama proposed a ban for certain categories, an increase in transparency and the elimination of unenforceable provisions
- ▶ 2021: Biden signed executive order encouraging FTC to ban or limit NCC

and state level:

- ▶ 2018: Massachusetts capped duration to 1 year
- ▶ 2021: Washington D.C. banned NCC
- ▶ 2022: Limitations effective in Oregon, Nevada and Illinois.

NCC in Europe

In many EU countries NCC are enforceable (under certain conditions) but no comprehensive evidence as for the United States:

- ▶ Austria: Since 2006, NCC not possible for “low-wage workers” (today 3,480€): the ban increased mobility among low earners but not wages (Young, 2021).
- ▶ Netherlands: 18.9% covered in 2015 (11% without secondary education).
- ▶ Finland: 37% among high-skilled workers.
- ▶ Denmark: scattered evidence from trade unions.
- ▶ United Kingdom: in 2020-21 consultation on proposals to reform NCC but no info on results.

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The Italian regulatory framework

Three layers of LM regulation in Italy: the law, collective agreements and case law.

The law: Since 1942 the Civil Code introduced the possibility to restrict post-employment activities. Non-compete clauses must:

- ▶ be based on a written deed
- ▶ set a compensation
- ▶ be limited in scope, time and area
- ▶ be limited to 5 years for executives and 3 in other cases

But no details.

Collective agreements: Practically no role. Even among those specific to managers, only three mention NCC but add little to the provisions of the law.

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Case law: much space for case-by-case decisions. General principle: the NCC cannot excessively compress workers' future employment opportunities.

Cases when most likely unenforceable:

- ▶ *Duration:* if >5 years for executives or >3 other employees duration reduced. If duration not specified: null and void.
- ▶ *Sectoral scope:* If not specified or blanket exclusion (no "garden leave" in Italy).
- ▶ *Geographical scope:* If not clearly defined.
- ▶ *Compensation:* If absent. A 100% compensation for no work whatsoever also not possible ("garden leave").
- ▶ *Right to withdraw:* Not possible for employers (but activation clause yes).

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Cases when courts have to decide on a case-by-case basis:

- ▶ *Sectoral scope*: If too large to *de facto* prevent completely any job opportunity or if it also covers sectors in which the employer does not operate.
- ▶ *Geographical scope*: If too large to *de facto* prevent completely any job opportunity.
- ▶ *Compensation*: If not determinable or manifestly unfair/disproportionate (in the past often reference to 10% of the salary has been mentioned). If the compensation is part of the monthly salary, the absence of a minimum amount may invalidate the clause depending on the specific duration of the employment relationship.

These three criteria have to be assessed together.

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- ▶ Survey of 2,000 private-sector employees 16+ using a panel of 150,000 active members maintained by a survey company
 - ▶ Quotas by age (15-29; 30-49; 50+) and gender (men/women) + geo area (NW, NE, C, S) using data from Istat
- ▶ Oversample of workers with a NCC to reach 1,000 respondents with a NCC in total
- ▶ LOI: 21 minutes for respondents with a NCC; 11 for those without (respondents receive some points as a reward)
- ▶ Questionnaire cognitively tested and piloted before fieldwork
- ▶ Fieldwork: May 25th - June 20th 2022
- ▶ Real-time checks: individual link + 3 types of misbehaviours (“speeders”, “straight-liners” and “happy clickers”) identified, blocked and sanctioned.

Sources of potential selection bias

Online surveys are widely used but potential selection bias:

- ▶ Not the entire Italian population is online
 - ▶ but 89% are among those in the labour force
- ▶ Not all internet users sign up to be part of online panels
 - ▶ but no reason to believe that they self-select based on their NCC status
- ▶ Non-response bias
 - ▶ 26.4% response rate
 - ▶ 90.7% completion rate

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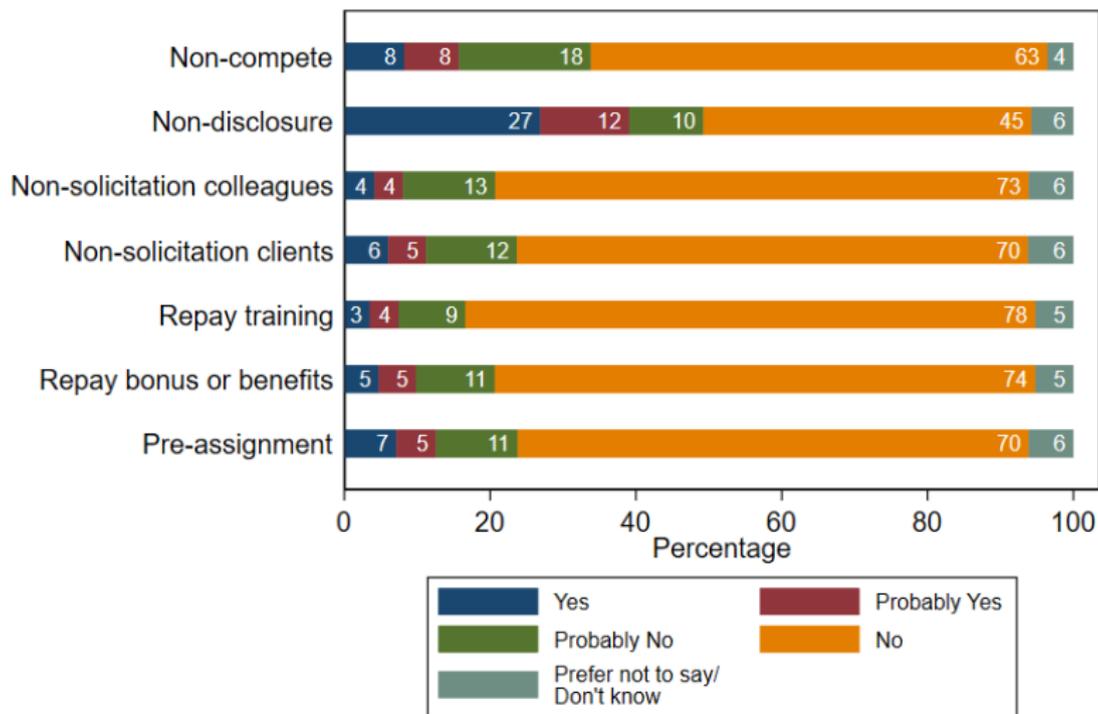
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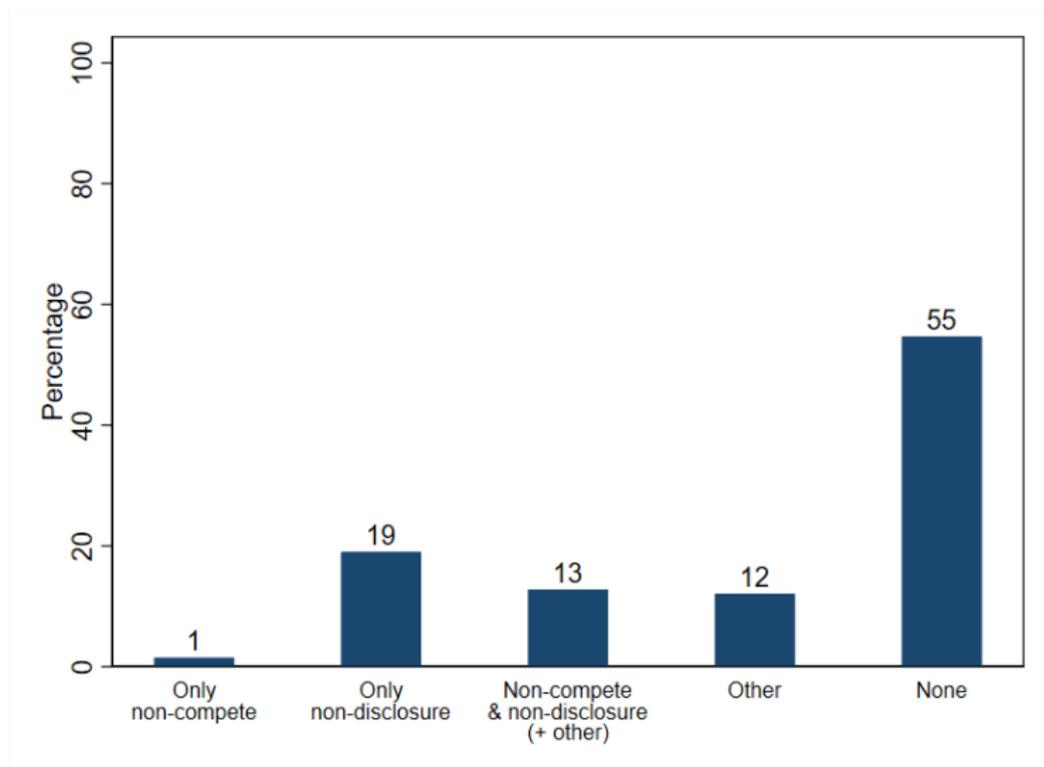
About 16% of Italian employees are bound by a NCC

Figure 1: % of private-sector employees



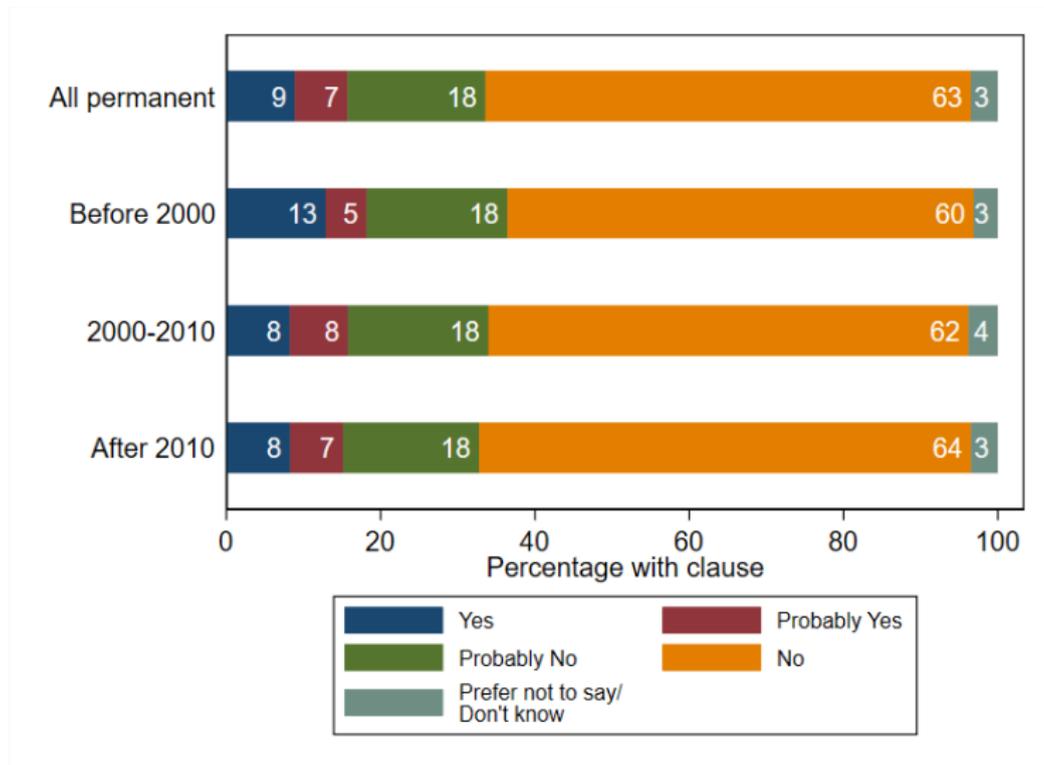
Clauses often come in a bundle

Figure 2: % of private-sector employees covered by different bundles



No sign of an increased use over time

Figure 3: % of private-sector employees by year of hiring



Note: Workers with an open-ended contract only.

Which workers are bound by a NCC?

On average, NCC more likely among men, high educated, earning more than 2,000€/month, employed in a high-skilled occupation, in a medium-large company, operating both in Italy and abroad.

But:

- ▶ 9.4% with less than secondary education
- ▶ 12% earning <2,000€/month
- ▶ 13% in elementary occupations

Which workers are bound by a NCC?

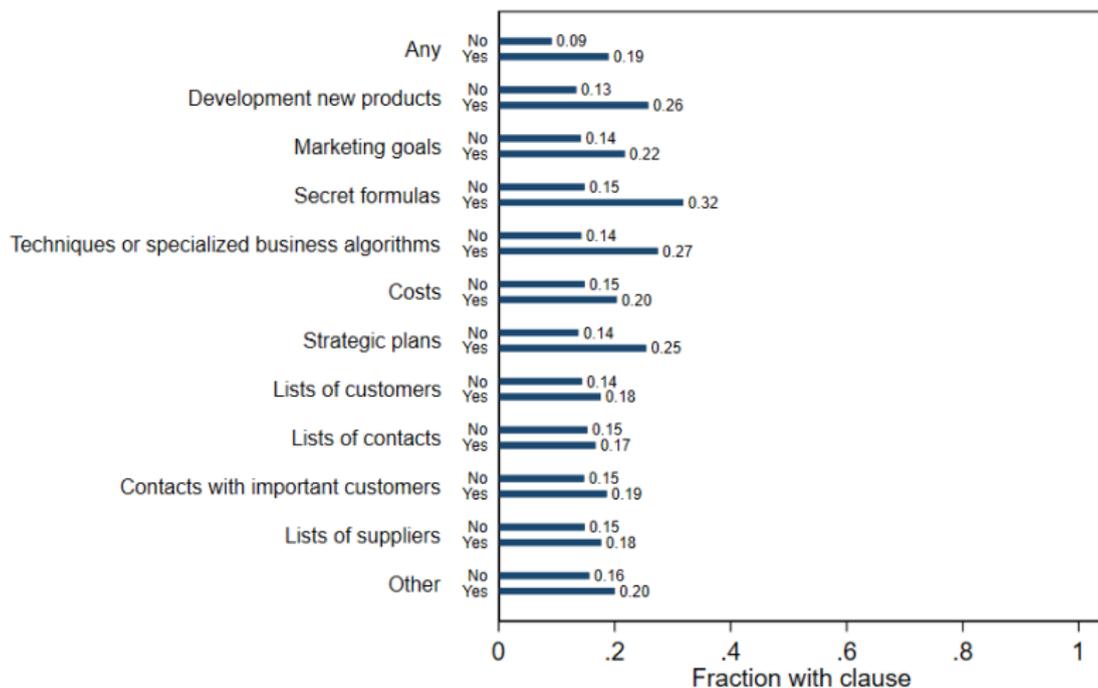
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NCC are used also among employees with no access to trade secrets

Figure 4: % of private-sector employees



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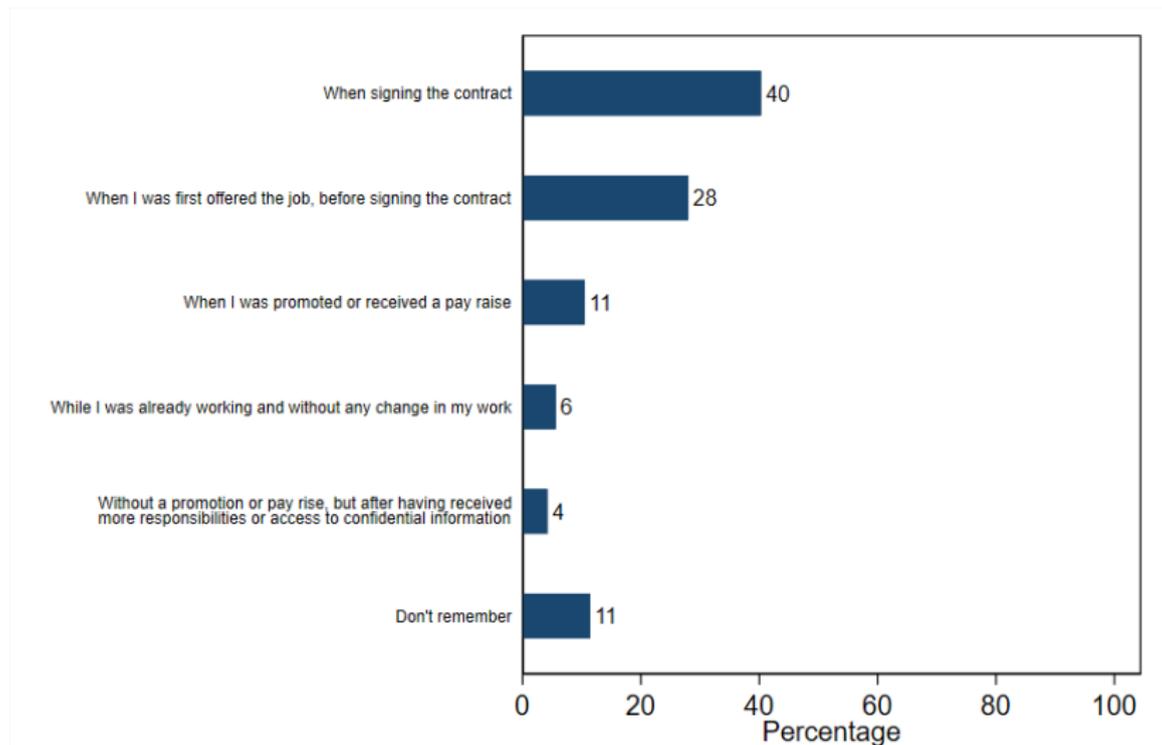
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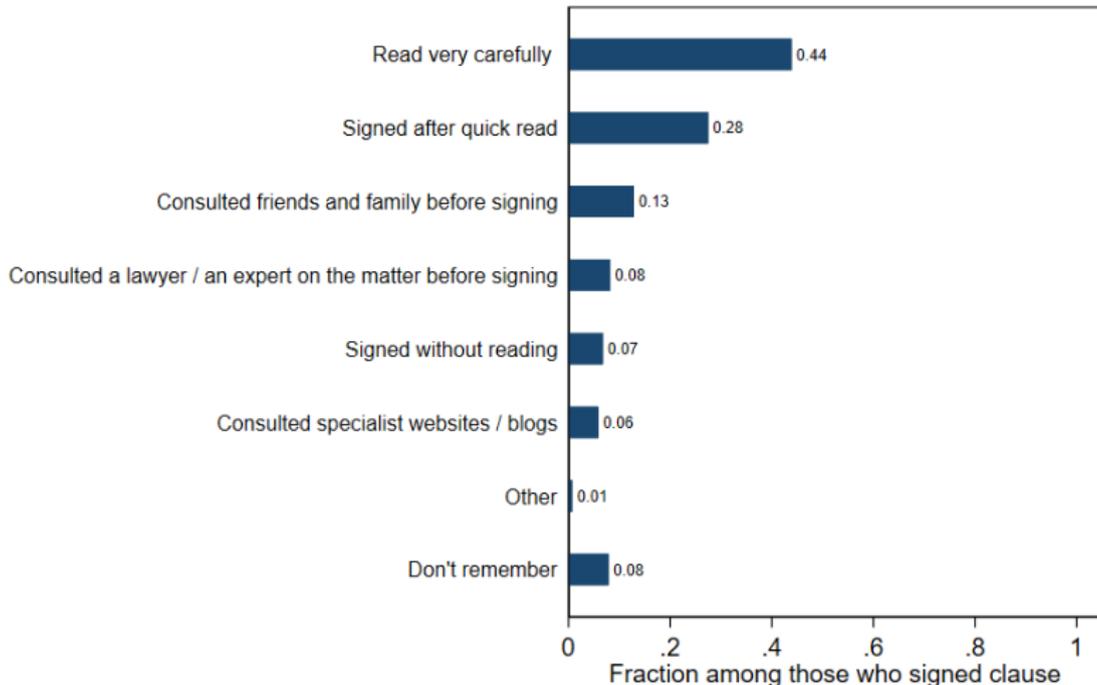
The majority of employees with NCC discovered it before beginning their job...

Figure 5: % of private-sector employees bound by NCC



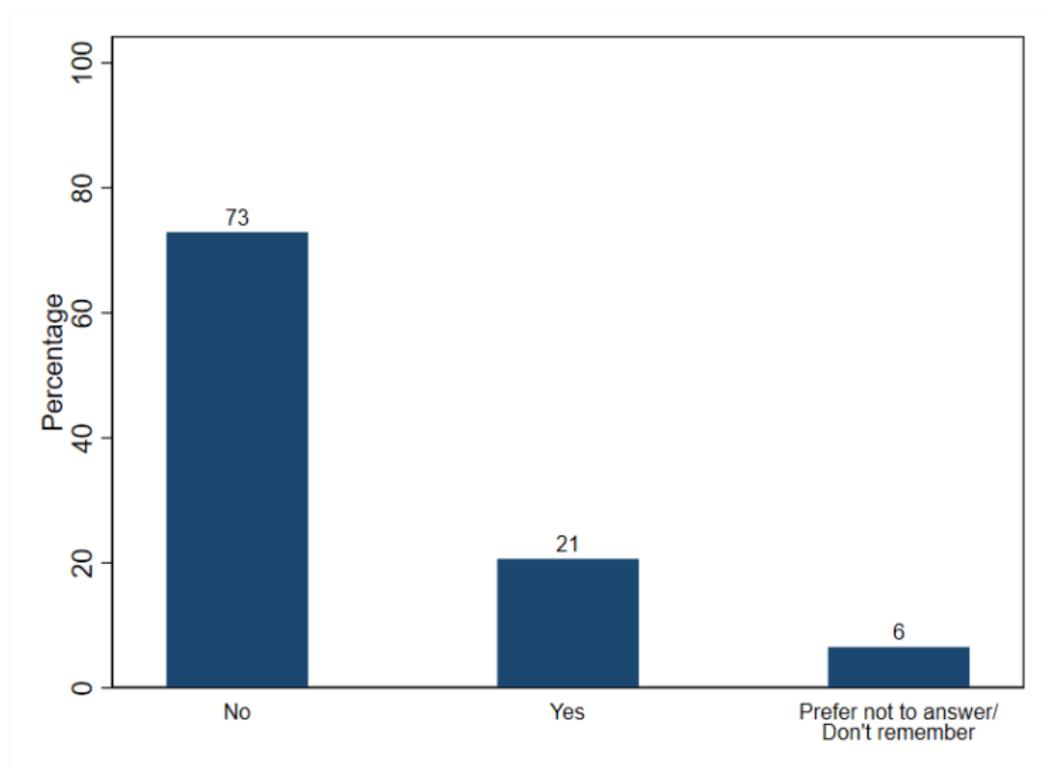
...but not all read it carefully

Figure 6: % of employees bound by NCC



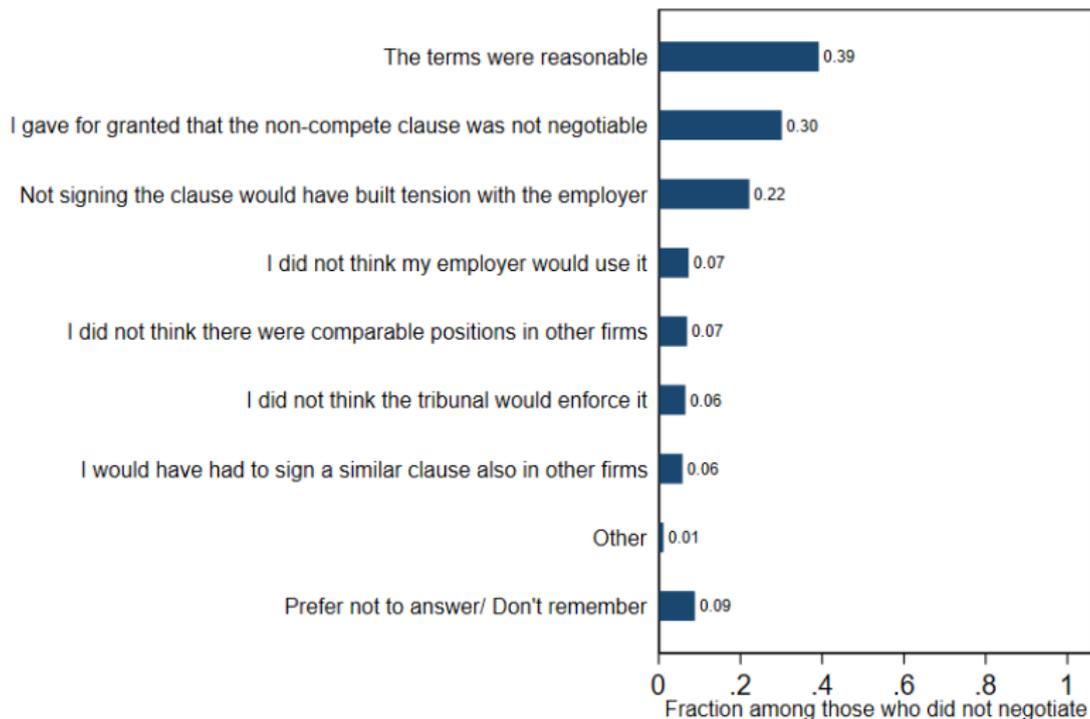
A large majority did not try to negotiate it...

Figure 7: % of private-sector employees bound by NCC



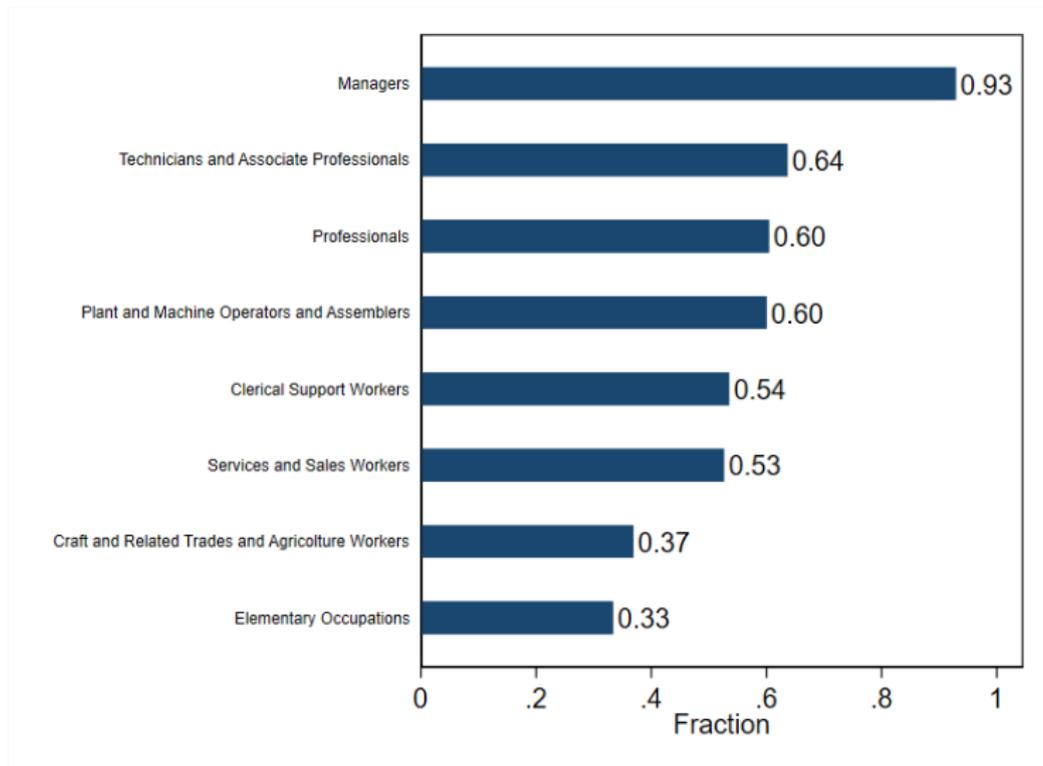
...for various reasons

Figure 8: % of private-sector employees bound by NCC



Many workers consider the NCC justified but not all

Figure 9: % of private-sector employees bound by NCC



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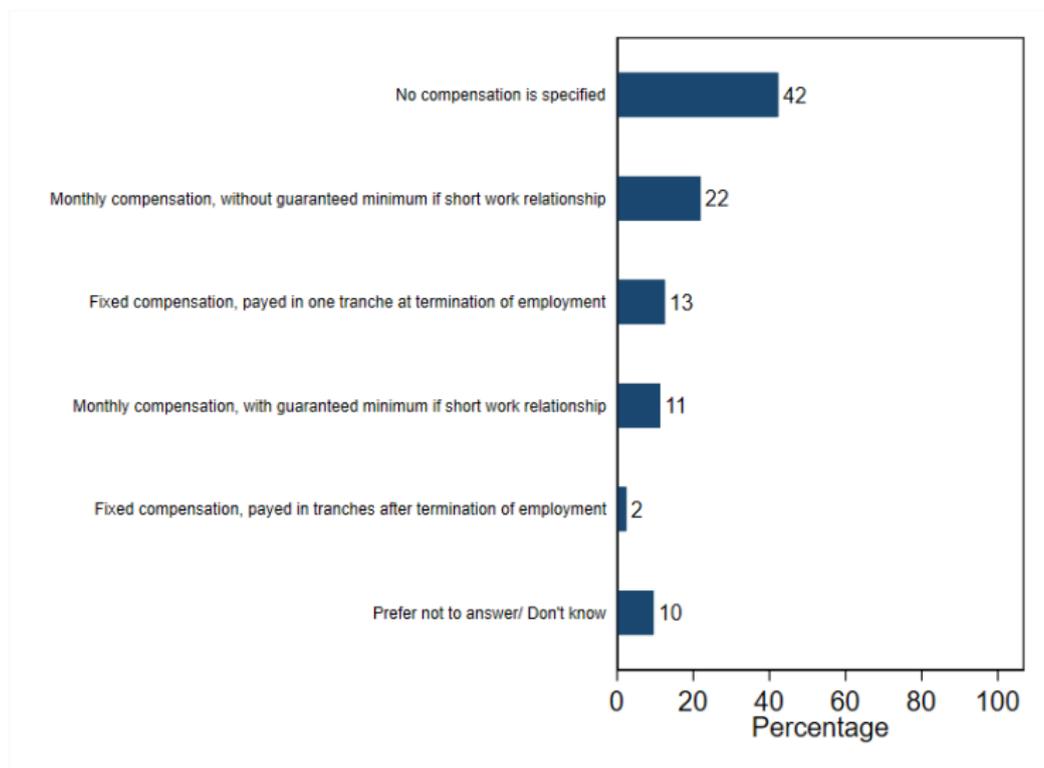
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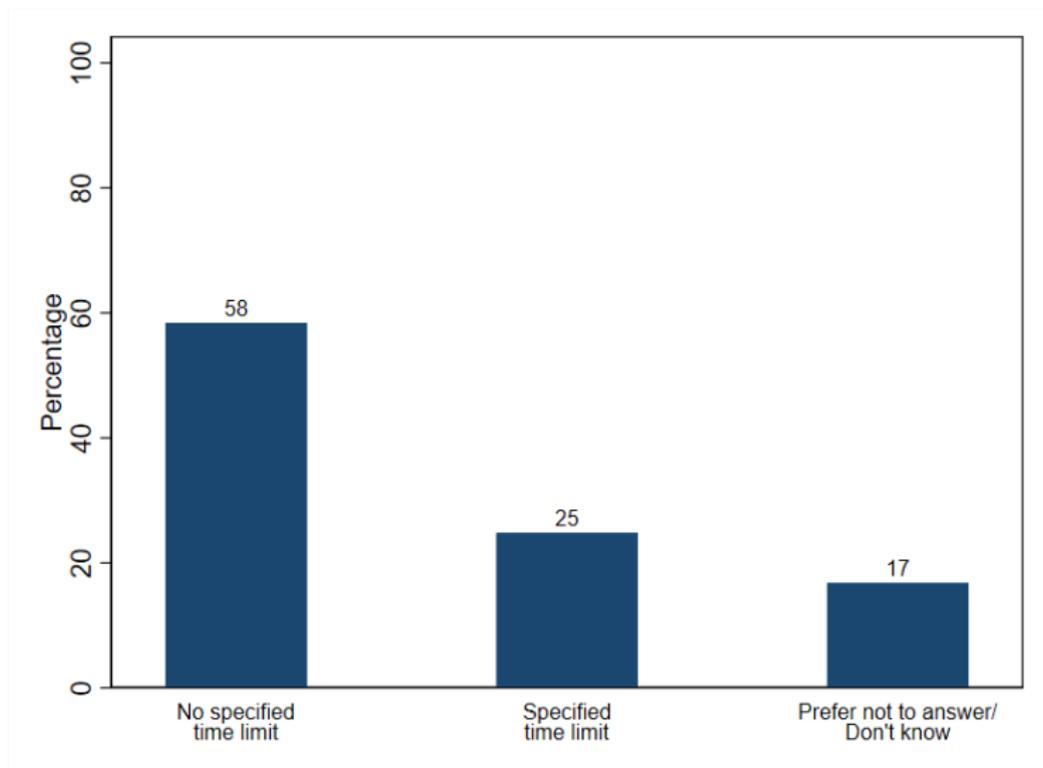
Not all clauses foresee a compensation

Figure 10: % of private-sector employees bound by NCC



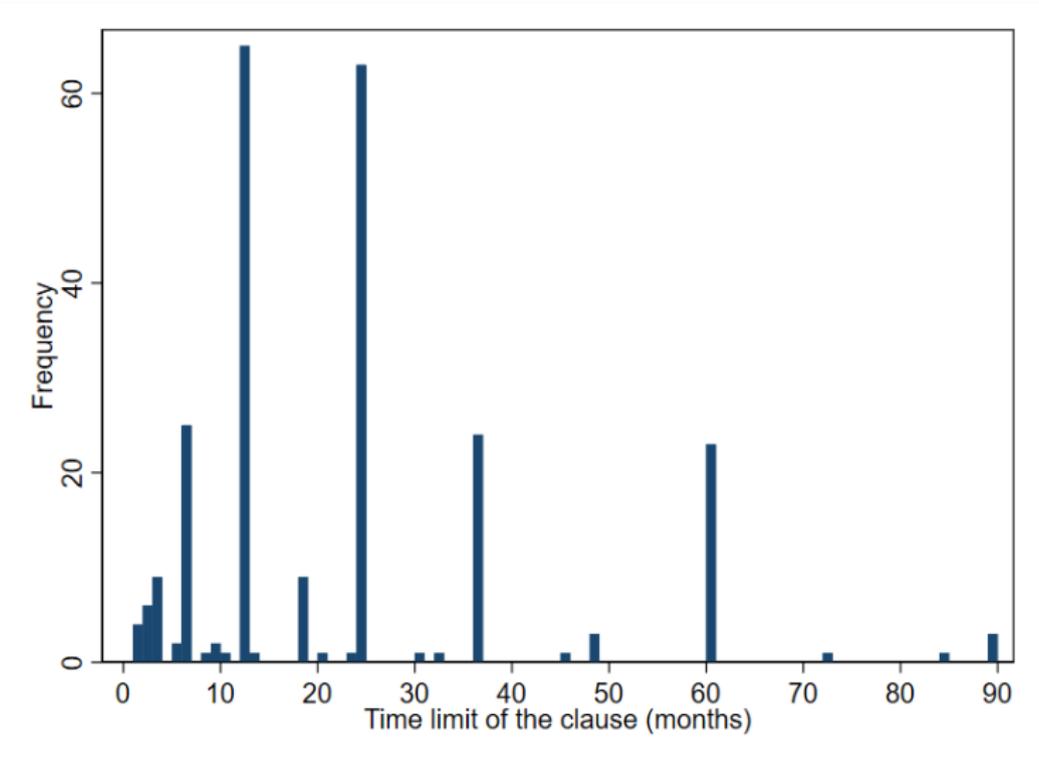
Many also do not specify a duration

Figure 11: % of private-sector employees bound by NCC



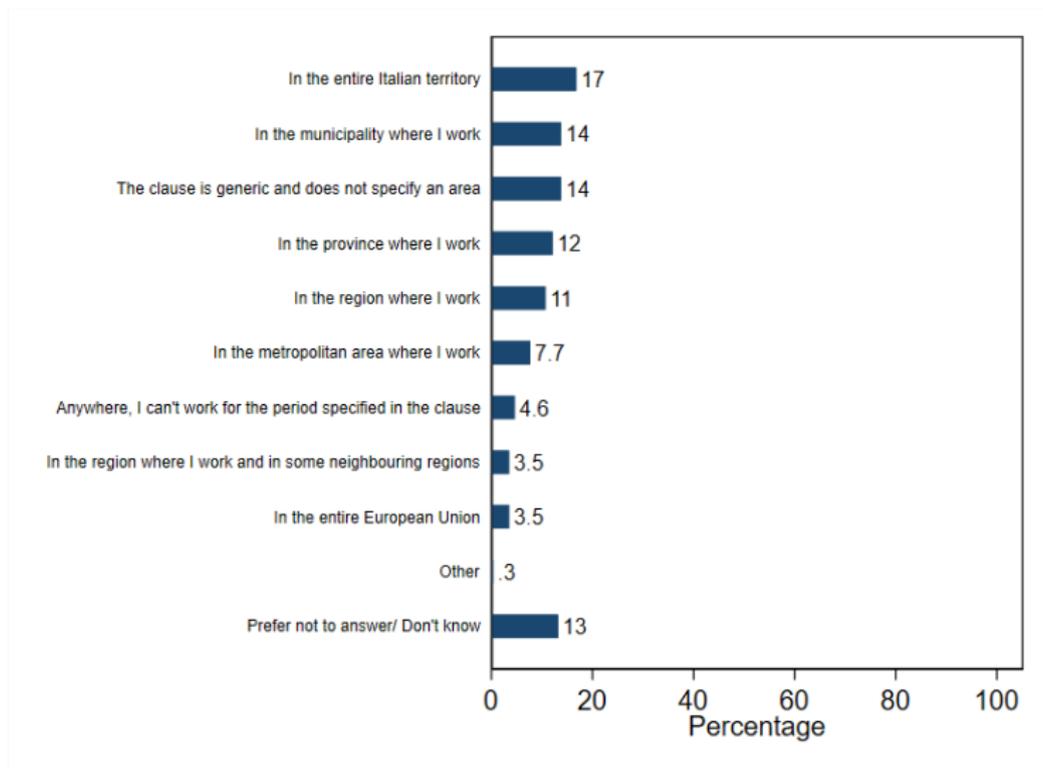
But when they do, they are mostly within the limits

Figure 12: % of private-sector employees bound by NCC



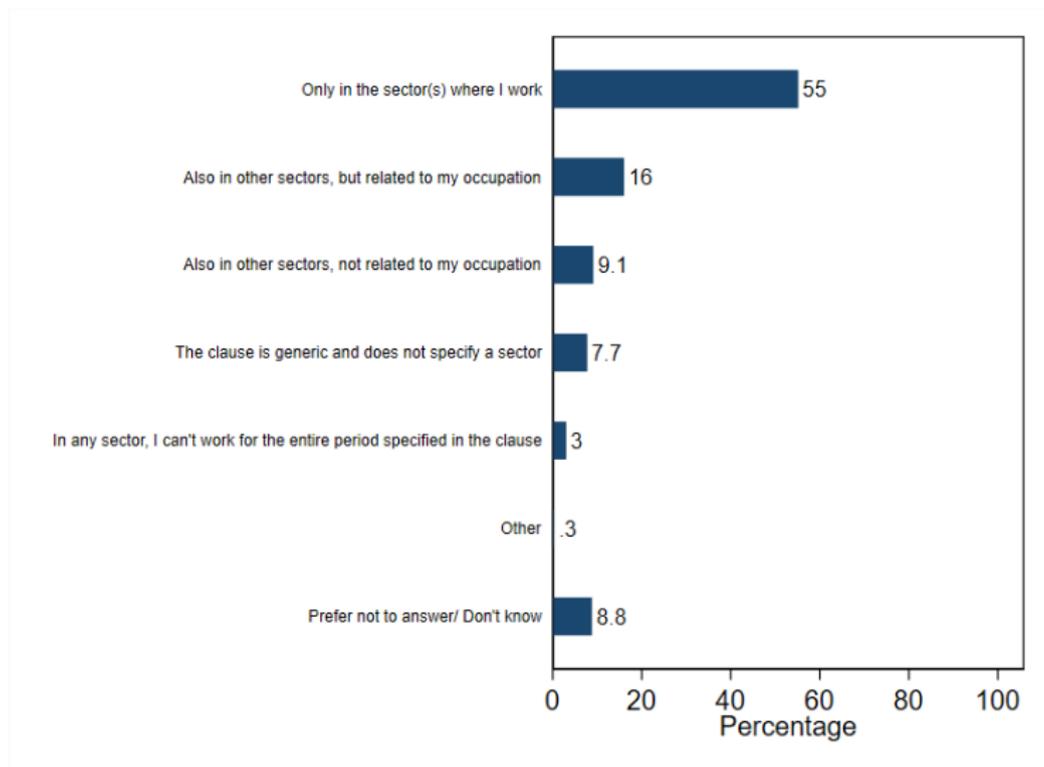
The geographical scope varies significantly...

Figure 13: % of private-sector employees bound by NCC



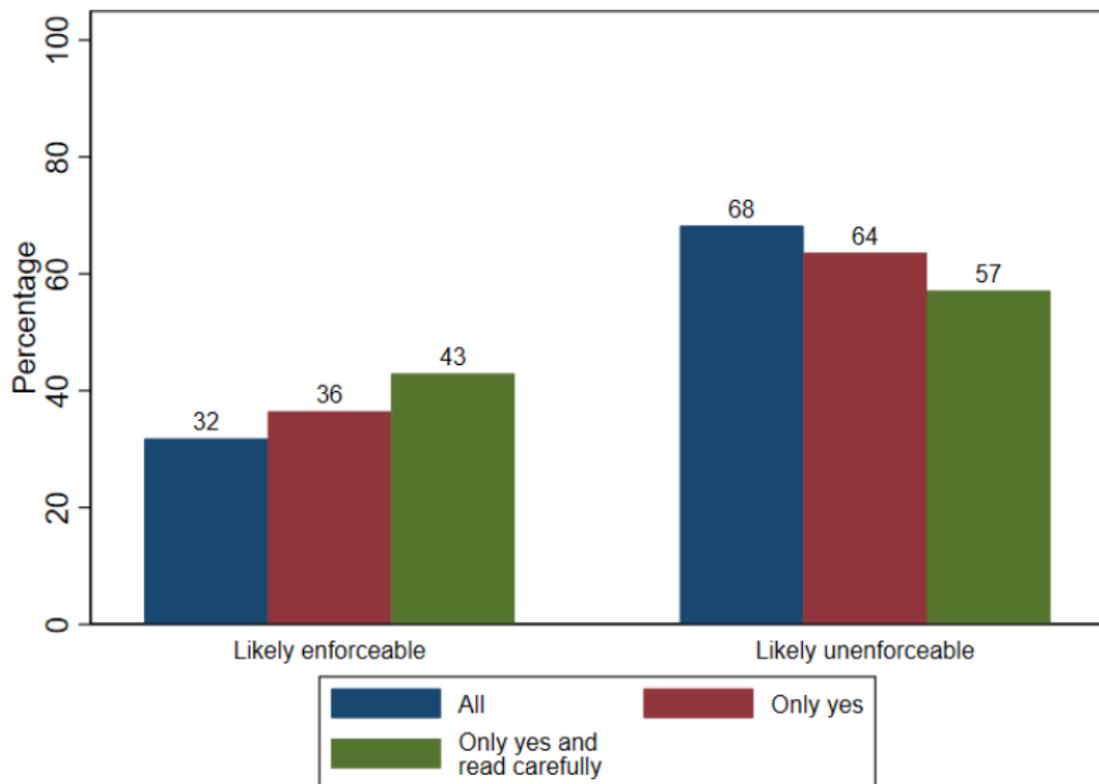
...but most concern the same sector or occupation

Figure 14: % of private-sector employees bound by NCC



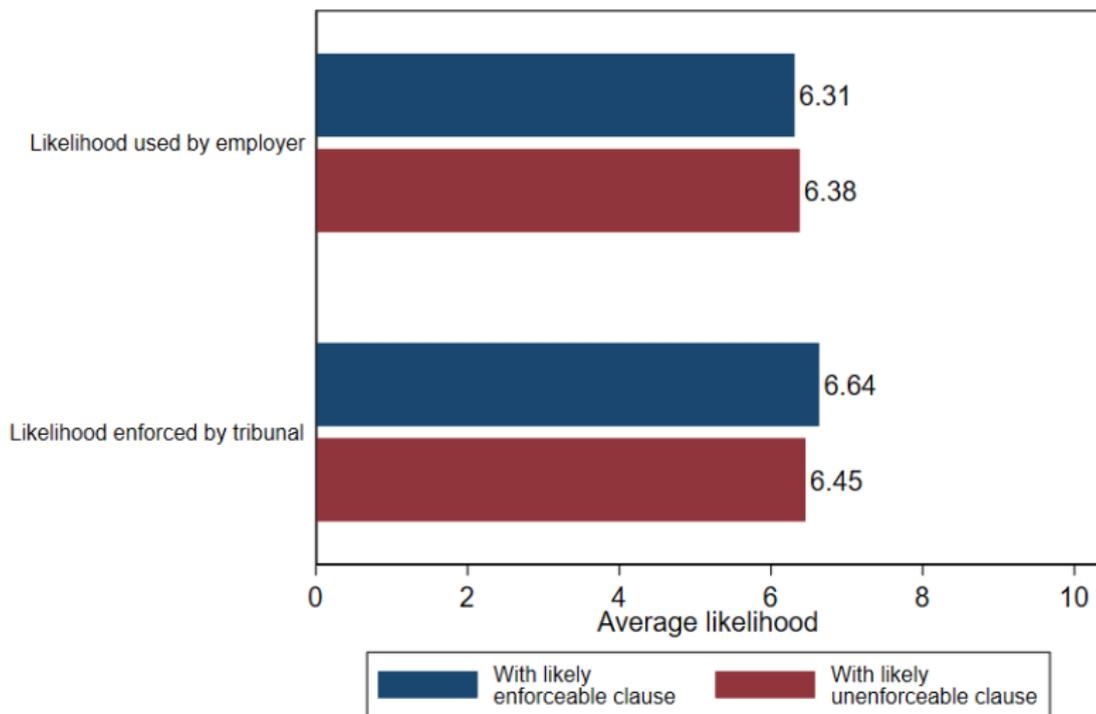
A large share of clauses appear unenforceable

Figure 15: % of private-sector employees bound by NCC



But this does not affect the *perceived* enforceability

Figure 16: % of private-sector employees bound by NCC



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Non-compete clauses and labour market concentration

Non-compete clauses and LM concentration: complements or substitutes?

- ▶ Substitute: No need of a NCC if no competitors
- ▶ Complement: NCC can also be used to restrict the entry of a competitor

We provide first evidence by

- ▶ Matching our data to estimates of LM concentration* in Italy by Bassanini et al. (2022)
- ▶ and then estimating
$$NCC_{i,l} = \beta \log(HHI_l) + \gamma X_{i,l} + \epsilon_{i,l}$$

* LM concentration defined at the 1-digit occupation level and NUTS3 region level.

Non-compete clauses and LM concentration

	(1) All	(2) High skilled	(3) Medium skilled	(4) Low skilled
log(HHI)	-0.0210* (0.0121)	-0.0074 (0.0227)	-0.0337** (0.0171)	-0.0446 (0.0292)
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_i 0.01, ** p_i0.05, * p_i0.1.

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Two other clauses which can affect workers' mobility:

- ▶ *Notice period* for permanent workers: very common and determined by the reference collective agreement. Very large variability, few appear above the limits but overall no sign of misuses.
 - ▶ Negative correlation with NCC but not with the duration of the notice.
- ▶ *Penalty for earlier dismissal* for temporary workers: considered as very rare and enforceability unclear but 12% of temporary workers in our survey have such a clause.
 - ▶ Positive correlation with NCC.

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- ▶ In Italy, NCC are only lightly regulated and courts retain significant margins to evaluate each case.
- ▶ So far not considered a phenomenon of great relevance.
- ▶ Our survey shows that
 - ▶ It is not a marginal phenomenon (% not very different from the one found in the US and other EU countries)
 - ▶ Not confined to high-skilled/high-paid jobs or to workers with access to trade secrets.
- ▶ A large share of NCC appear unenforceable or workers not aware.
- ▶ But this does not matter for perceived enforceability.

Policy options

1. Banning non-compete agreements for certain categories of workers.
 - ▶ Low-wage workers.
 - ▶ Selected sectors/occupations.
 - ▶ Limit to workers with access to trade secrets.
2. Including non-compete agreements in the *comunicazioni obbligatorie*.
3. Improving the transparency and fairness of non-compete agreements.
 - ▶ Report article of the Civil Code in employment contracts.
 - ▶ Increase role of collective agreements in information and/or regulation of NCC.
 - ▶ Involve antitrust authority.
4. Raising public awareness.
 - ▶ Official page on government website.
 - ▶ Information campaign among workers representative and support services (*patronati*).

Thank you!

The views expressed here are those of the authors and cannot be attributed to their respective institutions.