

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

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Non-compete agreements as a source of monopsony power

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, ranging from market concentration, to employers' collusion, to the use of various provisions limiting workers' mobility, to 'search costs' and labour market frictions. 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 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.

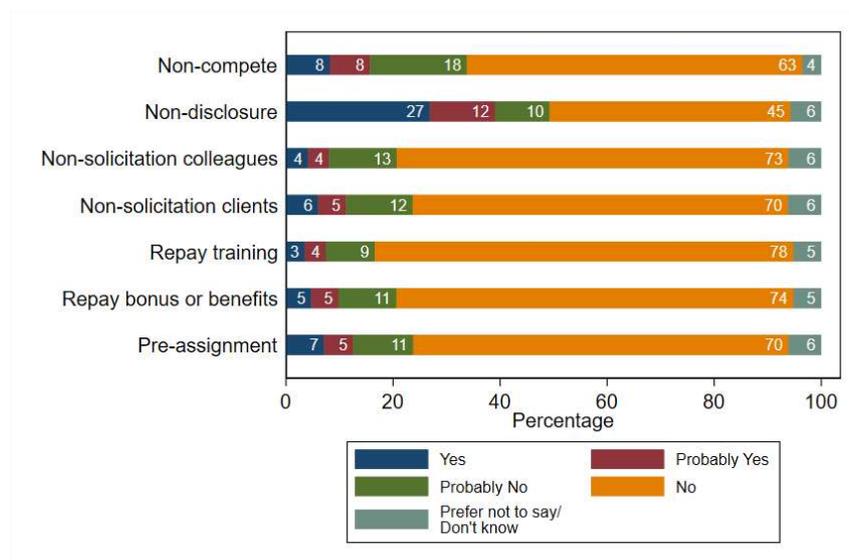
Building on the growing evidence on the use of non-compete clauses in the United States, this report provides the first comprehensive panorama on non-compete clauses in Italy, with an analysis of the regulatory framework and an empirical assessment based on a representative survey of 2,000 private sector employees.

Non-compete agreements in Italy

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.

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. 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.

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



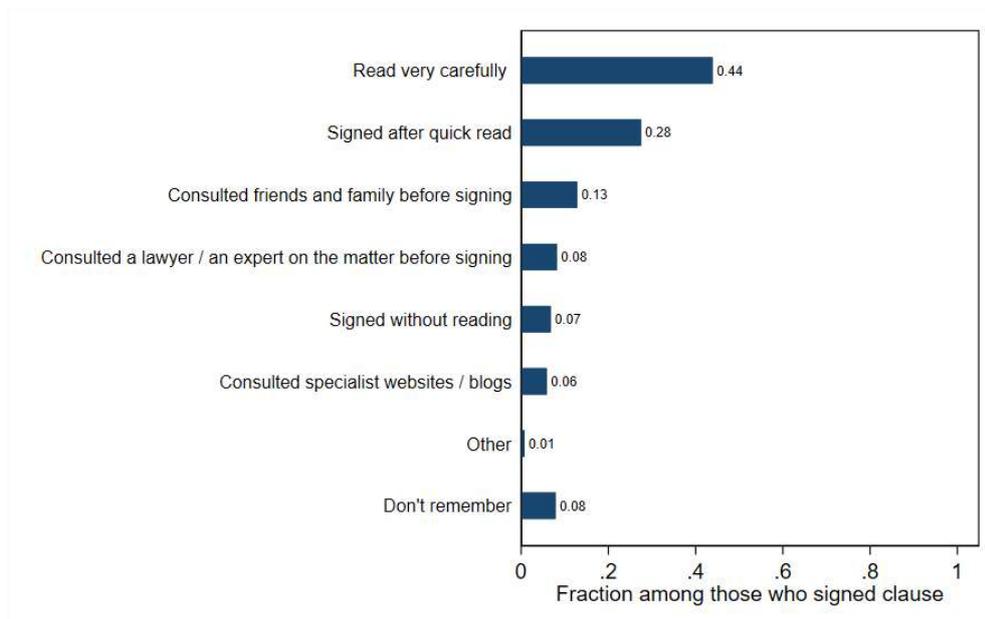
The share of private sector employees who have agreed to a non-compete agreement at least once in their career is 22% and there is no sign of an increasing use of non-compete clauses over the last decades. The probability of being bound by a non-compete clause is negatively correlated with local labour 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.

Contents of non-compete clauses and legal requirements

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 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 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.

Figure 2 - Behaviour when discovering the non-compete clause, percentage of employees bound by a non-compete clause



Conclusions and policy recommendations

Before this report, the only evidence available in Italy 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, 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. 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. 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.

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

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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.

To conclude the report and as a first contribution to the debate, we provide four policy options regarding non-compete agreements: banning them for certain categories of workers, including them in mandatory communications, improving their transparency and fairness and raising public awareness about the issue. 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.