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QUICK LINKS

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POST-CONTRACTUAL RESTRICTIONS ON COMPETITION IN EMPLOYMENT RELATIONSHIPS IN THE UK, FRANCE AND GERMANY

Introduction

This briefing addresses the ways in which employers may restrict the competitive activities of employees, with a focus on post-contractual restrictions. These types of restrictions are a key concern for many of our clients. Although there are many similarities in their operation across the UK, France and Germany, this briefing will also highlight some important differences, as well as the practical issues which employers need to be aware of.

I. How are restrictions imposed?

In the UK, restrictions on employee competitive activity are imposed by express contractual terms. There is no statutory provision for the prevention of competitive activity.

In Germany, while restrictions on competition in ongoing employment relationships apply as a matter of law, post-termination restrictions must be specifically agreed between employer and employee. They are regulated by the German Commercial Code (*Handelsgesetzbuch* – "**HGB**").

In France, whilst restrictions on competition are not addressed by the Labour Code, courts will uphold the principle of such restrictions in ongoing employment on the basis of an employee's obligation of loyalty to the employer, even in the absence of any written contract of employment.

II. Do restrictions apply during employment?

Restraints on competitive activity **in the UK** during the ongoing employment relationship are imposed through the contract itself. Whilst the common law implies some duties (acting in good faith, confidentiality and maintaining a relationship of trust and confidence between employer and employee) employers prefer to draft express terms into the contract of employment or in

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standalone agreements. Many employees will have express contractual non-compete provisions during employment, especially senior or key employees, or employees who are likely to have access to key company confidential information. Such employees will usually be prevented from taking part in any competitive activity or engaging in activity which would damage the employer. They are also often limited in what preparations they can make for future competitive activity before leaving employment.

In Germany, in ongoing employment relationships, employees are bound by non-compete obligations as a matter of law. The relevant obligation applies to all employees as part of the general duty of mutual consideration applicable to the parties to any contract (sec. 241 German Civil Code (*Bürgerliches Gesetzbuch* – "**BGB**"), sec. 60 HGB). The effect is that, without explicit permission from their employer, employees may not found or operate, become an employee or a significant shareholder of, or make a substantial contribution to, a business that is active in the business fields and markets in which the employer is active. However, job applications to a competitor of the employer are permissible.

Similarly, the general obligation of loyalty to the employer **in France** means that providing services to a competitor or being involved in the management of a competing company during employment is usually found to be incompatible with the loyalty and non-compete obligation, while applying for a job with a competitor or even taking a majority stake in a competing company is not (as long as the employee does not actually influence the management of the competing company).

III. Who do restrictions apply to?

In all three jurisdictions, post-termination restrictions ("**PTRs**") and the legal principles governing them apply to all employees although they are typically aimed at more senior staff.

In Germany, different rules apply to managing directors (*Geschäftsführer*) and members of executive boards (*Vorstände*) who legally do not qualify as employees, but with whom it is customary to agree PTRs. Stricter rules apply to trainees. **In the UK**, executive directors who have an employment relationship with the company are frequently required to enter into PTRs. However, non-executive directors have no such employment relationship; their role requires a degree of independent

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oversight, and therefore they do not usually enter into express PTRs. They will however be bound by duties of good faith as a result of their fiduciary office as director. **In France**, where, like in Germany, officers and directors do not qualify as employees, it is also very common for CEOs to enter into PTRs.

IV. What type of PTRs are there?

In all three jurisdictions, there are three main types of PTRs: non-compete, non-solicitation and non-dealing covenants. The range of contractual restrictions applied varies, depending on the role, nature and level of seniority of the employee. **In the UK**, not all senior contracts will impose restrictions on taking up employment with a competitor, but most will impose restrictions on competitive activity such as approaching customers or poaching employees. **In Germany**, on the other hand, restrictions on employment with a competitor and on the founding of or acquisition of a substantial shareholding in a competitor is the most common form of PTR. **In France**, PTRs focus mostly on prohibitions to join a competitor and/or found a competing entity.

1. Non-compete

A non-competition restriction will be harder to enforce **in the UK** than either a non-solicitation or non-dealing restriction. This is because of the general principle that covenants in restraint of trade will not be upheld unless they are reasonable and proportionate. To be proportionate, a non-compete, rather than a non-solicit or non-dealing restriction, must be necessary to achieve the employer's legitimate aim (see section VI. below).

Any employee is restricted as a matter of general law from disclosing confidential information amounting to a trade secret (for example, a manufacturing process) after his employment ends. He can also be made subject to more wide-ranging express confidentiality provisions. This may mean that an additional restrictive covenant preventing employment with a competitor will be regarded as unnecessary in order to protect the information. That said, a non-competition restriction may be enforced in certain circumstances. It may not be possible to protect sufficiently the legitimate proprietary interest, for example a manufacturing process or confidential trade secret, by implied and express confidentiality terms or other restraints. Another possibility is that the individual's influence over customers or suppliers is so great that the only effective protection would be to ensure that he is not engaged in a competing business in any way.

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In Germany and France, a non-compete will be the most common form of a PTR. Such post-contractual non-competes are subject to a number of requirements of form and substance, including the obligation to pay PTR-compensation. If these are not strictly adhered to, there is a substantial risk that the PTR will be considered non-binding or void if challenged in court. If a non-compete is non-binding, once the PTR takes effect (i.e. in **Germany**, when the employment relationship ends, and in **France** at the earlier of the end of the employment relationship or when the employee in fact ceases to work for the employer (see section XII. below)), the employee may choose either to adhere to the obligation and receive PTR-compensation or not to be bound by the obligation.

2. Non-solicitation

In the UK, non-solicitation clauses are generally viewed more favourably than non-compete and non-dealing clauses on the basis that they are the least restrictive of the three main types of restraint. The restrictions which they impose can apply to solicitation of customers, suppliers or of other employees.

One of the main issues with enforcing non-solicitation clauses is proving that "solicitation" has occurred. Solicitation can include both approaches by the restricted employee to staff and/or customers, but also pursuing opportunities in circumstances where the customers make first contact with the restricted employee. Social media is creating particular issues for employers trying to prove that an ex-employee has deliberately sought to encourage a client or colleague to move with him.

A non-solicitation covenant should generally be restricted by reference to customers or key employees with whom the employee had contact during a specified period before the date of termination. A clause which seeks to prevent a former employee from soliciting *any* employees or customers of the company is not generally justifiable as being necessary to protect the employer's legitimate interests.

In France, non-solicitation obligations are usually entered into between the employer and another company, commonly e.g. a customer who shall not solicit the employer's employees. However, if non-solicitation agreements are included in a contract of employment, they will be regarded as

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non-compete obligations (and subject to the same conditions of validity) when their impact restricts the employee's employment possibilities.

In Germany, non-solicitation clauses (*Abwerbeverbote*) are commonly agreed as an ancillary obligation to non-compete clauses, and are generally subject to the same legal requirements (see sections V. and VIII. below).

3. Non dealing

Non-dealing restraints, which aim to prevent any dealings with clients or customers, regardless of how they are instigated, are often used **in the UK** partly because dealing may be easier to prove than solicitation. Non-dealing covenants may therefore prove to be more valuable, even if the more restrictive nature of such a covenant means that courts are generally willing to enforce it for a shorter time period. As they also affect third parties, a court is more likely to be cautious about enforcing them and they need to be narrowly and carefully drafted. The customers with whom the employee must not deal must be carefully defined.

In France, non-dealing restraints are also considered to be subject to the same non-compete regime because of the restriction imposed on the employee's reemployment possibilities.

Under German law, non-dealing restraints (*Kundenschutzklauseln*) are commonly agreed together with non-competes, and are principally subject to the same legal requirements (see sections V. and VIII. below).

V. What are the formal requirements for PTRs?

German law requires that PTRs be made in writing, provide for the requisite PTR-compensation (see section VIII. below), be signed by both parties on the same document, and an executed original has to be given to the employee (sec. 74 para. 1 HGB). It is advisable to have the employee sign a confirmation on the employer's copy stating that he did receive a signed original. Commonly, a PTR will be included in the relevant employment agreement, although it is also not unusual to use a separate document. Failure to comply with the formal requirements make the PTR non-binding with the consequence that the employee is free to choose either to adhere to the non-compete and be paid the PTR-compensation or not to be bound by the non-compete.

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French law requires that PTRs be made in writing. They are usually provided for in the contract of employment or in a separate document. The position is the same **in the UK**: if a non-compete is not clearly set out and the contract signed by the employee, the clauses are likely to be challenged by the employee. **In all three jurisdictions**, since PTRs are contractually agreed, they cannot be modified without the consent of both parties.

VI. What is the geographical and material scope of PTRs?

In all three jurisdictions, PTRs will only be enforceable if (i) the employer has a legitimate interest to protect; and (ii) the PTR is reasonable in all the circumstances. The approach to each of these limbs is considered in more detail below.

1. Legitimate interests of the employer

In the UK, there are three generally-recognised categories of potentially legitimate interests to be protected by PTRs:

(A) trade connections (i.e. the employer's relationship with his customers, clients and suppliers);

(B) the stability of the workforce (i.e. the employer's interest in retaining his employees); and

(C) trade secrets and other confidential information (e.g. chemical formulae or design features).

Under German law, the employer must be aiming to protect himself specifically against the exploitation of know-how, experience and personal relationships gained by the employee during the employment relationship. A non-compete agreed with a view to safeguarding business secrets or ensuring that a former employee will not exploit the employer's client or supplier relationships with the help of know-how or personal relationships developed during his employment will likely be considered justified. Whereas, the mere interest to curb competition will not be deemed legitimate. In light of this, the material scope of a non-compete must be limited to the essential fields of business (and geographical locations) in which the employer is active. Justification of a worldwide non-compete would require that the company has substantial business worldwide, which is usually impossible to establish.

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In France, there is no legal definition of legitimate interests. It is therefore recommended to clearly set out in the written PTR what legitimate interests the employer is seeking to protect. The geographic scope of a PTR must be (i) limited to the areas where the employee could actually compete against his former employer (worldwide restrictions are not permissible), (ii) precisely defined ("wherever the company will operate" is not considered to be an acceptable definition), and (iii) must comply with the limitations set out by an applicable collective bargaining agreement, if any. In practice, an admissible geographic scope will vary greatly depending on the particulars of the case, and can range from a 1-km-radius around the former place of work to all of France. Restrictions applying to all of France and several other jurisdictions are more at risk of being cancelled, but can still be found valid if, in practice, they do not prevent the former employee from performing a professional activity that is in line with his qualifications, training and professional experience.

2. Reasonableness

In the UK, a restraint which is unreasonable – perhaps because drafted too widely, or too imprecisely, or covering matters with which the employee has had no real involvement during employment – is likely to be struck down as being in restraint of trade and unreasonable in scope. The balance will always be considered between the employer's need to protect his business and the detrimental impact on the individual employee who may be unable to market his skills and his expertise freely. This balancing act will be dependent on the facts and although case law has developed a number of general guidelines, each set of circumstances means that drafting and enforcing restrictions needs to be carefully considered in every individual case.

Similar to the UK, **under German law**, PTRs have to achieve a reasonable balance between the employers' interests in protecting its business and the employees' interests in his professional advancement (*Fortkommen*). This is assessed by weighing all circumstances of the individual case: the geographical and material scope of the non-compete, its length and the amount of PTR-compensation payable, the position of the employee in the employer's business and the common degree of mobility in the relevant profession. A higher PTR-compensation may thus make a wider scope of a non-compete reasonable, whereas payment of the minimum amount may require a narrower scope.

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In France, the material scope of a PTR can only be limited to the actual activity of the employer. In practice, this means that (i) it may be a secondary activity, as long as it is actually performed (boilerplate provisions referring to the corporate purpose of the company are unacceptable); and (ii) the PTR only covers the employee and the employing entity – in other words, it cannot extend to all group companies, which may be an issue in the case of an employee who is for instance seconded to another group company that carries out a different activity. The material scope does not, however, need to be restricted to the duties performed by the employee and it can include all activity or employment regardless of the capacity – so that, for example, a commercial director could not join a competitor in a technical role without being in breach of the PTR.

VII. Is there a maximum term for PTRs?

The maximum permissible term of PTRs **under German law** is two years from the end of the employment relationship (sec. 74a para. 1 phrase 3 HGB). In so far as this is exceeded, the non-compete is non-binding, giving the employee the choice between adherence to the PTR and payment of PTR-compensation on the one hand, or freedom to compete on the other.

There is no set maximum period **under UK law**, although as a general principle any restrictions in excess of one year are likely to be difficult to enforce and employers often opt for shorter terms (six months' non-compete, for example) to try to ensure that the provisions are reasonable.

Under French law, if the applicable collective bargaining agreement provides for a maximum duration, it is not possible to contractually agree to a longer one. Absent relevant provisions in the collective bargaining agreement, there is no maximum duration, although courts rarely allow a duration of more than two years.

VIII. Is any payment required for PTRs?

German law requires an annual PTR-compensation of at least 50% of the contractual benefits last payable to the employee under the employment contract, payable in monthly instalments (sec. 74 para. 2 HGB). All compensation elements under the employment contract have to be taken into account, including fixed compensation, bonus and commission payments, benefits and benefits

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in kind. For variable compensation elements such as performance-related payments, the average amount payable during the last three years of employment (or, if shorter, during the term of their existence) are taken into account. PTRs that fail to provide for compensation will be found void if brought before a court. If insufficient compensation is provided for, they are non-binding, meaning that the employee may decide either to adhere to the PTR and ask for compensation in the proper amount, or whether not to be bound.

In France, PTRs must (since 2002) offer employees financial compensation in order to be valid. However, the law does not prescribe a minimum amount of such financial compensation. In practice, it is necessary to distinguish between three main situations:

(A) The applicable collective bargaining agreement provides for a minimum amount of compensation, in which case the parties cannot agree to a lower amount. By way of example, the collective bargaining agreement for the Metal Industry, which is the most widely applied in France, requires that the monthly financial compensation to be paid for the duration of the PTR be no less than 60% of the average monthly total remuneration prior to the termination of employment.

(B) There are no relevant provisions in the applicable collective bargaining agreement and the contract of employment does not provide for financial compensation. In such a case, the PTR is not valid and is unenforceable. However, the employee can decide to abide by it nonetheless and ask the court to award him damages for the lack of financial compensation.

(C) There are no relevant provisions in the applicable collective bargaining agreement and the contract of employment does provide for financial compensation, but the employee claims that it is insufficient to be effective. If the courts side with the employee, the PTR will be considered unenforceable. The courts assess these situations on a case-by-case basis by taking into consideration all of the components of the PTR and the personal circumstances of the employee in order to determine whether the agreed compensation is sufficient. In practice, compensation of less than 15% of the employee's average remuneration is highly unlikely to be found sufficient to be valid.

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In the UK an employee must receive specific consideration in return for agreeing to a PTR; this need not necessarily be money, but can be, for example, the opportunity of employment or a new incentive scheme. There is no practice of payment for the term of a PTR, so an employee receives no payment while it is in force. Even where (unusually) a contract includes pay for the period the PTRs are intended to be in force, if the PTRs are not enforceable on normal principles (for example because they are too widely drafted), payment will not make them enforceable.

IX. How can PTRs be terminated or waived?

Under German law, PTRs can be terminated by mutual agreement at any time, during or after the end of an employment relationship. As for unilateral terminations (or waivers), the requirements and consequences depend on the issuing party.

Unilateral termination by an employee requires that he has rightfully terminated the employment relationship for cause, or that the employment relationship was terminated by the employer, but the employee has not given substantial grounds for such termination (sec. 75 paras. 1 and 2 HGB). In such case, the PTR and the payment obligation end upon receipt of the employee's declaration by the employer.

An employer can only unilaterally terminate or "waive" a PTR prior to the end of the employment relationship (sec. 75a HGB). This must be done by written declaration to the employee. From the time of receipt of the declaration of waiver, the employee is free from the PTR, whereas the employer must continue paying the PTR-compensation for another year (although the remaining term of the employment relationship, including any notice period, counts toward that one-year period). If however the employer terminates the employment relationship for cause, he may be able to waive the PTR with immediate effect.

Under French law, the parties can mutually agree to amend or cancel a PTR at any time during the performance of the contract. Some collective bargaining agreements, however, provide that such changes or cancellation cannot be effective immediately.

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The unilateral termination of a PTR by the employer post-termination of employment can be made only if (i) it is expressly provided for in the contract of employment, (ii) it is made in writing, and (iii) it takes place within a short period of time on or around termination of the employment. In practice, it is recommended to communicate the decision to waive the PTR in the dismissal letter in case of involuntary termination, and within days of receipt of the resignation letter otherwise. If the PTR is waived, and unless the applicable collective bargaining agreement provides differently, the employee is not entitled to the financial compensation.

In the UK, as in the other jurisdictions, non-compete obligations can be terminated by mutual agreement at any time, during or after the end of an employment relationship. The employer may also unilaterally waive the obligation at any time. In either case the employment contract would usually determine how this would be achieved (and typically, the agreement to terminate and/or the waiver would need to be communicated in writing).

X. What happens to PTRs on the employer's breach of contract?

Since PTRs **in the UK** depend upon the contractual relationship, a breach of contract by the employer will mean that the PTRs fall away. If it is important to retain PTRs, this means that care must be taken over the way in which the employment is terminated and in disputes, employees may allege wrongful termination (resulting in a breach of contract) to try to escape PTRs.

The position is different **in France**, where it is common practice to provide that the PTRs will apply irrespective of the manner in which the employment is terminated, so that PTRs would normally apply even in a case of breach of contract by the employer.

Under German law, if the employee has rightfully terminated the employment relationship due to breach of contract by the employer, or if the employment relationship was terminated by the employer, but the employee has not given substantial grounds for such termination (sec. 75 paras. 1 and 2 HGB), the employee may unilaterally waive PTRs (see section IX. above).

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XI. What can an employer do if the employee breaches a PTR?

In the UK, the primary remedy for breach of a PTR would be an application for an injunction to enforce the covenant and restrain the competing behaviour. The employer may alternatively seek damages from the employee to compensate it for the loss suffered as a result of the breach. The employer may also bring action against the employee's new employer or business venture, for inducing or conspiring with the employee to breach their PTR. Penalty payments prescribed by the contract are not common in the UK, as they can risk being unenforceable unless they represent a genuine pre-estimate of the employer's loss (often difficult to achieve in this context although recent case law suggests there may be some scope for them).

In Germany, for the duration of a breach of the PTR by the employee, the employer does not have to pay any PTR-compensation. The employer may also apply for a cease and desist injunction (secs. 823, 1004 BGB). Additionally, if the employer has reason to assume that an employee who is subject to a PTR has started (or intends to start) a job in breach of the PTR, the employer has a legal claim for provision of information by the employee on his new employer and position. If the employer can prove that the new employer knew about the PTR but recklessly hired the employee regardless, a cease and desist order and damages can be raised against the new employer. Finally, the employer can raise a damages claim against the employee (based on sec. 280 BGB) and claim (reasonable) penalty payments, if so agreed in the PTR-agreement.

In France, in the event of a breach of a PTR by the employee, the employer can (i) cease payment of the financial compensation (but cannot claim reimbursement of the compensation that was paid prior to the breach), (ii) seek an injunction against the employee and/or his new employer to cease the competing activity, (iii) claim damages for the loss suffered by the breach (which, in practice, is very difficult to obtain), and (iv) claim immediate payment of a contractual penalty if such penalty was expressly and precisely provided for in the contract of employment. It is therefore highly recommended to include such a penalty in the PTR. The amount of the penalty is not regulated by law and it can be modified by courts, but only if it is grossly excessive (or, more rarely, too insignificant). Typically, the amount of the penalty is similar or close to the amount of the financial compensation that is paid to the employee so as to mitigate the risk of reduction by a court.

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XII. Issues with PTRs in practice:

1. Business transfers

In the UK on a TUPE transfer, the transferee acquires the employee on the terms and conditions of the contract entered into by the transferor, and so all the rights and liabilities under that contract become those of the transferee. However, since PTRs must be construed as at the time they are entered into, they will continue to relate to the transferor's business, clients etc. rather than those of the transferee. This may not be problematic if the transferor and transferee have a similar client base, but to the extent there are discrepancies, the transferee will not be fully protected by the PTRs. The same applies **in France** but the approach is somewhat different **in Germany**, where a PTR will become non-binding if its scope is not justified by legitimate interests of the transferee, or is no longer reasonable in light of the transferee's business.

As a result, where there has been a transfer of a business the transferee is likely to want to agree new forms of PTRs with the transferred employees. However, **in the UK**, this is problematic given that any change of contractual terms is void if the sole or principal reason for the change is a TUPE transfer. It may be possible to make a valid change if the transferee has an economic, technical or organisational reason entailing changes in the numbers, functions or location of the workforce (which may be satisfied if there is a substantial reorganisation post-transfer). **In Germany and France** the making of such changes is no legal problem but requires the consent of the employee.

Another issue which may arise on a TUPE transfer as regards PTRs **in the UK** stems from the right of transferring employees to object to the transfer of their employment. The effect is that the objecting employee's employment terminates, and does not transfer to the transferee. The effect is the same **in France and Germany**, although an objection to transfer does not automatically result in the termination of employment. Even though the PTRs will technically remain in place, it may not be possible for either the transferor or the transferee to enforce them. The transferor, having sold its business, may no longer have any legitimate interest upon which to rely in enforcing the covenants. The transferee is unable to take enforcement action as it is not and never was a party to the contract with the employee. If employment does terminate before the transfer, the transferor can enforce the non-compete, but not the transferee.

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2. Restrictions in bonus / incentive schemes

As well as outright restrictions on competition, dealing and solicitation, it is possible to impose disincentives or offer incentives and thereby indirectly restrict employees' willingness to compete, deal or solicit (as the case may be). These can take the form of conditional bonuses, retention payments, deferred remuneration schemes, deferred bonus schemes or long term incentive plans. **In the UK**, if the loss of benefit is triggered by the employee joining a competitor, soliciting or dealing with clients etc., it will be treated as a PTR and its validity will be assessed accordingly. On the other hand, where the restriction applies simply to prevent payments where the employee is no longer employed by the company, it is more likely to be enforceable.

These kinds of remuneration schemes are not particularly common **in France** (although they are developing). Due to the requirement for compensation for PTRs under French law, and a prohibition on financial sanctions, it is highly unlikely that a court would validate the lapse of deferred remuneration in the event of an employee joining a competitor.

In Germany, any provisions making payment of a bonus or other incentives dependent on the employee not joining a competitor, or soliciting or dealing with clients post-employment, would be considered as circumvention of rules on PTRs and therefore void. Further, any provision linking payment to continuation of employment would only be permissible for incentive schemes that are solely intended to serve as incentives to remain employed by the employer. They would be prohibited for bonuses that (also) reward performance.

3. Interaction with notice period and garden leave

In the UK, a PTR should always be drafted in light of the notice and garden leave provisions in the contract. A long notice period where there is a garden leave provision will reduce the chance of a court enforcing the PTR on the grounds that there are other means of protecting the employer's interests. Once sent on garden leave, an employee will not have day-to-day access to the employer's information, employees or business contacts. The courts consider this to be an effective restriction in and of itself. As a result, it is now usual to find that any period spent on garden leave is deducted from the length of the restrictive covenant. There is no automatic set-off period to reduce restrictive covenants by the amount of time spent on garden leave, so express provision must be made in the

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employment contact. If such a provision is included, this means that, although the employee is still employed while on garden leave, the restricted periods start running from the day on which he is put on garden leave. Attempting to start restricted periods from the date employment terminates after the employee has completed a lengthy period of garden leave may prompt a court to decide the PTR is unenforceable. This is not usually the case **in Germany**, although in some circumstances a court may be receptive to the argument that in light of a long notice period, the length of a PTR exceeds that which is legitimate.

In France, there is no concept of garden leave; in fact, the courts consider that an employee who is not required to work his notice period can freely take on a new employment, even though he is technically still on the payroll and is paid as usual by his former employer. In those circumstances, the PTR will start running from the end of the period of effective work for the former employer (i.e. before the end of the notice period). If however the employee works his notice period in full, the PTR will only start running on the expiry of the contract of employment (i.e. at the end of the notice period).

XIII. Tips for drafting and reviewing PTRs

In all three jurisdictions, courts tend to take a narrow approach to the interpretation of PTRs, which makes it vital to draft them carefully and precisely. **In the UK and France**, the PTR will be assessed as at the time it was signed (not when it comes to be enforced, often much later). **In Germany**, on the other hand, PTRs have to pass muster at both such points in time. This means that PTRs in all three jurisdictions must be kept under review, especially if an employee changes role or is promoted.

UK courts will not re-write terms of a PTR although they will delete parts of it if that is possible without altering the meaning or character of the restriction. PTRs in the UK therefore tend to be separated into clear sub-clauses or several separate restraints, to allow a court to uphold one clause (such as a non-dealing with clients) even if another (such as preventing employment with a competitor) is not held to be reasonable. A similar approach and practice applies **in France and in Germany**, although in Germany, further to the above, it is advisable to incorporate a separate severance clause in the PTR since this has been found to indicate the will of the parties to agree

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on a legally effective PTR. In one case, this led to the court upholding a non-compete although originally no compensation had been agreed. In Germany it is also recommended to strictly reiterate the wording of the law on payment of compensation, possibilities of a waiver, etc., and include an explicit reference to secs. 74 et seqq. HGB.

Conclusion

Common to all three jurisdictions is the idea that PTRs can be imposed by an employer on an employee, provided that he has a legitimate interest in doing so and goes no further than is reasonable in restricting the employee's freedom to work. However, this briefing illustrates the many divergences in approach each jurisdiction takes to that core principle. While **France and Germany** focus primarily on non-competes, other types of restriction are more common **in the UK**. Where **France and Germany** have established systems of compensation for PTRs, **the UK** does not (and PTRs are generally enforced for shorter periods). Business transfers give rise to similar issues, which employers in all three jurisdictions need to be aware of. Less uniform (but no less important) are the issues around incentive schemes and garden leave/notice periods. Fundamentally, PTRs require careful drafting and frequent review to ensure that the employer's business interests are adequately protected.

Further information

If you would like to find out more about any of the issues raised in this briefing, or require advice in relation to a specific matter, please contact:

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