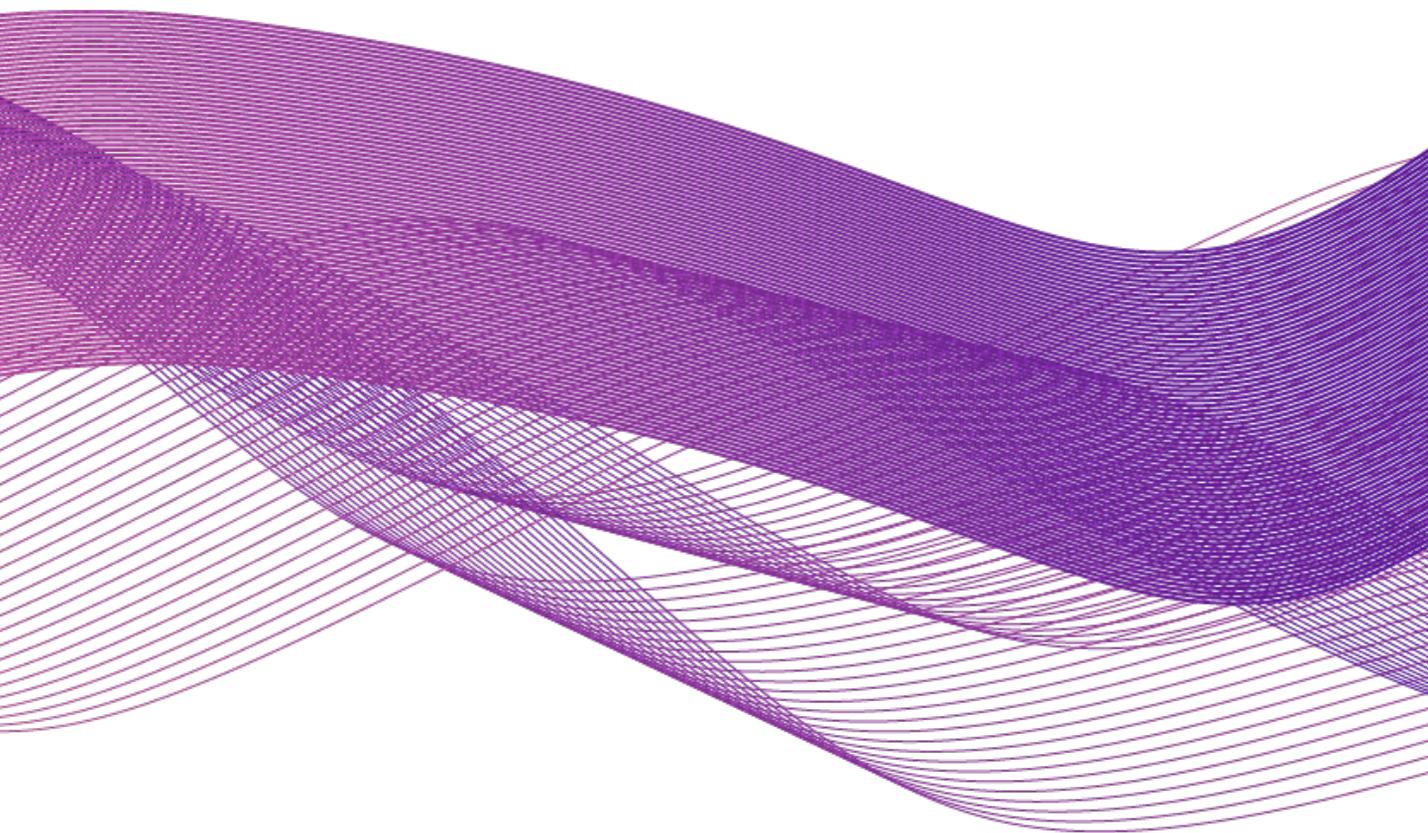


# Non-compete covenants under Italian Civil Code

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Short guide



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# Non-compete covenants

## General non-compete restraints

The Italian civil code ("ICC") includes a series of provisions that expressly prohibit the affected parties to carry out competitive activities. More specifically, the ICC includes the following provisions:

- Article 2301, non-compete covenant concerning the quotholder of a collective partnership company (so called "*società in nome collettivo*");
- Article 2318, non-compete covenant concerning the quotholder of a simple limited partnership company (so called "*società in accomandita semplice*");
- Article 2390, non-compete covenant concerning company directors of a shareholding company (so called "*società per azioni*"), associations (so called "*cooperative*"), or shareholding limited partnership company (so called "*società in accomandita per azioni*");
- Article 2557, first paragraph, non-compete covenant concerning the seller of a going concern.

Moreover, the ICC provides non-compete covenants applicable to

employees (Article 2105) and agents (Article 1743), during the execution of their respective contracts.

## Non-compete covenants included in commercial contracts

In addition to the abovementioned non-compete covenants, the ICC regulates non-compete covenants entered into by means of a contract between the parties.

More specifically, the ICC includes a general provision of non-compete covenant under Article 2596 and specific provisions concerning non-compete covenants applicable to employees (Article 2125) and agents (Article 1751 *bis*), entered into after the termination of their respective contracts.

Lastly, the second paragraph of the previously mentioned Article 2557 provides the possibility that the seller may undertake wider non-compete covenants, in terms of object, than the ones provided in the first paragraph, as long as its professional activity is not entirely limited.

Non-compete covenants, included in commercial contracts, under Italian Civil Code



## General considerations

The non-compete covenant is a clause under which one party agrees to refrain from carrying out activities in competition against another party.

Non-compete covenant can present itself as:

- an autonomous agreement, or
- an accessory clause;

We find ourselves in presence of an autonomous non-compete covenant, (even if included in a main contract) if the interests pursued by the parties in the main operation can be fulfilled also in absence of the non-compete covenant and such absence does not alter the conditions, costs and risks of the operation.

An accessory non-compete covenant, instead, presents itself as necessary in order to execute the related main operation and it is irrelevant whether such clause is included either in the main contract or an annex.

The distinction is relevant due to the fact that only an autonomous non-compete covenant is subject to the provisions of Article 2596.

## Scope of application

Article's 2596 scope of application includes a wide range of contractual relationships entered into by:

- companies;
- professional collaborators;
- generic collaborators;
- para subordinates etc.

Therefore, both individuals and legal entities may be parties to a

non-compete covenant under Article 2596.

## Requirements

The non-compete covenant under Article 2596 shall necessarily include the following requirements, on pain of being void:

- written form;
- limitation to a certain territory or business activity, and
- term of maximum five years.

The written form is prescribed *ad probationem*. In other words, such form is required in order to prove the existence of the non-compete covenant.

As for the territory or business activity requirement, it has to be limited to a certain territory or business activity.

It is also possible to indicate the territory (or business activity) *per relationem*, by expressly referring to the territory in which one of the parties carries out its activity or to its business activity.

The important thing to remember, while drafting a non-compete covenant, is that such covenant shall not prohibit entirely to the other party the possibility to carry out business activities in the relevant business sector, on pain of being void (Italian Supreme Court, decision of 1 December 2001, no. 16026).

As for the term, Article 2596 provides a maximum term of five years. It is a pre-emptory rule from which the parties cannot derogate.

Autonomous non-compete covenant vs. accessory non-compete covenant

Written form

Territory or business activity

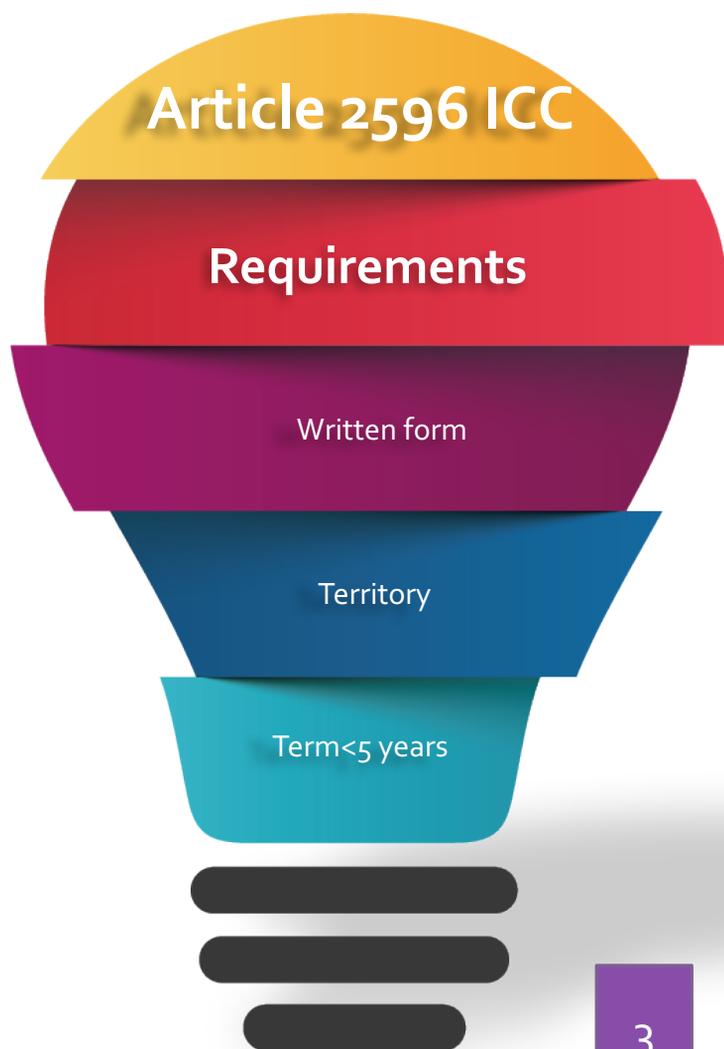
Term

## What happens if the parties did not include the term?

If the non-compete covenant does not include any term indication, the five-year term of Article 2596 will automatically apply.

Upon expiration of the non-compete covenant, the parties may choose to renew it.

Nonetheless, the clauses that provide for automatic renewal upon expiration of the non-compete covenant are to be considered void (Italian Supreme Court, decision of 2 June 1992, no. 6707).



## General considerations

Protection of business know-how, information regarding specific markets, information regarding key clients are just some of the reasons that drive an employer to negotiate a with its employees a non-compete covenant, enforceable upon termination of the employment contract.

Article 2125 ICC ensures a balance between the opposite interests of the employer to protect its immaterial assets, information and its business value, and of the employee to avoid excessive compression of its personality and professional freedom. As previously mentioned, Article 2105 ICC prescribes a general loyalty duty of the employee, during the execution of the employment contract.

Article 2125 allows to extend such duty, following the termination of the employment contract, protecting, therefore, the employer from eventual competitive activities carried out by the employee and, at the same time, prescribing the compliance of the non- compete covenant to some essential requirements.

As for the legal nature, according to the Italian Supreme Court, the non-compete covenant is to be considered an autonomous clause, either if it is signed at the same time as the employment contract or as a covenant that presents its own cause, even if subject to the employment contract by means of a functional dependence. (Italian Supreme Court, decision of 30.July 1987, no. 6618).

## Scope of application

The parties to the non-compete covenant, under Article 2125 are the employer and the employee (so called "*prestatore di lavoro*").

Article 2125 applies only to the non-compete covenants entered into with subordinate employees and does not apply to autonomous workers, para subordinate workers, or project contract workers. For these other professional individuals, Article 2596 remains applicable.



Autonomous clause

## When may the parties enter into a non-compete covenant under Article 2125 ICC?

Article 2125 does not provide any term limitation concerning the entering into a non-compete covenant.

The important aspect is whether there is a competition situation between the business activities of the employer and the eventual professional activities that the employee may carry out, following the termination of the employment contract.

Therefore, the non-compete covenant may be entered into:

- at the same time as the employment contract is entered into;
- during the execution of the employment contracts, or
- following the termination of the employment contract.

The united sections of the Italian Supreme Court solved a case law contrast concerning the applicability of Article 2125 to the non-compete covenants, entered into after the termination of the employment contract.

The Supreme Court considered such covenant enforceable each time its origin and cause is to be found in the termination event of the employment contract and is related to it thanks to a functional connection (Italian Supreme Court 10 April 1965, no. 630).

## When will the non-compete covenant be enforceable?

The non-compete covenant shall be effective following the termination of the employment contract.

Therefore, it is to be considered a contract with deferred execution.

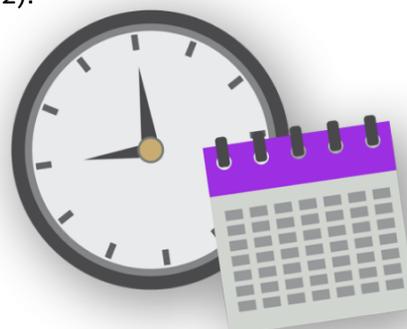
An interesting point, that concerned both the Italian legal theory and case law, is the possibility for the parties to enter into an agreement that provides an option right to the employer (Article 1331 ICC), by means of which the employer may decide to enforce the non-compete covenant, even after the termination of the employment contract.

The case law agrees with a solution that considers such an option right void, due to violation of Article 2125 (Court of Perugia, 26 April 2005).

Nonetheless, there are also intermediate case law solutions, according to which, an option right is valid if it provides a term for the exercising of its right, before the termination of the employment contract.

Another controversial point is the lawfulness of a unilateral withdrawal clause in favour of the employer, provided by the non-compete covenant.

Initially, a unilateral withdrawal was considered valid by the case law (Italian Supreme Court, 8 March 1980, no. 1980). Nonetheless, later on, it was considered valid only if enforceable prior to the termination of the employment contract (Italian Supreme Court, 16 August 2004, no. 15952).



Option right

Unilateral withdrawal in favour of the employer

## Requirements

Article 2125, first paragraph provides that the non-compete covenant shall comply with the following requirements, on pain of being void:

- written form;
- term;
- object limitation;
- territory, and
- consideration.

The written form is required *ad substantiam*, which means that it is required in order to prove its enforceability.

As for the material collocation of the non-compete covenant, it may be included in a separate contract, or as a clause of the main employment contract, as an annex to the employment contract, or as an exchange of correspondence between the parties.

As for the term, the non-compete covenant shall have a maximum term of five years for the managers and three years for the other employees.

## What happens if the non-compete covenant provides a term higher than legally permitted?

If the term is higher than the maximum legal term provided by Article 2125, it shall automatically reduce to such term (Italian Supreme Court, 22 July 1978, no. 3687).

The same rule applies also in case of extension of the non-compete covenant's term that exceeds the abovementioned legal term.

## What happens if the parties did not include any term?

If the parties did not indicate any term of the non-compete covenant, it shall be considered void, without any power of the judge to integrate it under Article 1374 ICC.

A decision of the Supreme Court, nonetheless, affirmed that if the parties do not indicate any term, it shall be presumed that the parties intended to make reference to the legal term provided by Article 2125 (Italian Supreme Court, 22 July 1978, no. 3687). As for the subject limitation, the parties have to provide a sufficiently clear and precise description of the activities prohibited to the employee, during the execution of the non-compete covenant.

The suitability of the subject limitation abovementioned is determined discretionally by the judge that will determine, case by case, if the equal balance between the employer and employee's interests has been reached. The restraint from carrying out activities in competition with the employer's activities concerns both the future activities carried out on behalf of third parties and the independent activities (Italian Supreme Court, 2 November 1994, no. 10062).

As for the territory, it has to be precisely indicated, on pain of being void and without the possibility to be determined.

Written form

Term

Subject

Territory

The territory corresponds to the actual or potential territories within which the employer operates when entering into the non-compete covenant.

When defining the territory, the following elements have to be considered: company's business activity, level of the technologies adopted by the company, the range of the company's operability (local, national or multinational).

Nonetheless, the employee's capacity of generating income has to be preserved and it shall not be limited too incisevely.

Consideration The non-compete covenant under Article 2125 is qualified as a bilateral contract with pecuniary interest. Therefore, the employer undertakes to pay a certain consideration or other type of utility in favour of the employee and the employee undertakes not to carry out competitive activities after the termination of the employment contract.

The considerations' purpose is to indemnify the employee of the partial renouncement to its work right.

Therefore, the consideration has to be adequate and proportional to the sacrificed work activity.

The consideration will have to be proportional to the territory, term and subject limitations, in order to be considered adequate.

**In which form may the consideration be paid?**

According to the case law, the

consideration may be paid in the following forms:

- periodic payment during execution of the employment contract;
- *una tantum* payment following the termination of the employment contract, and
- periodic payment following the termination of the employment contract.

The most used payment form is the periodic payment during execution of the employment contract.

## General considerations

Article 1751 *bis* ICC has been introduced in order to offer a specific regulation of the non-compete covenants concerning agency contracts along the lines of Article 2125 and Article 2596.

## Requirements

The non-compete covenant under Article 1751 *bis*, entered into after the termination of the agency contract shall include the following requirements:

- written form;
- subject;
- term, and
- indemnity.

Written form

The written form is prescribed *ad substantiam*.

The parties are free to include the non-compete covenant as a clause of the agency contract or as a separate contract. In the first case, the non-compete covenant shall be separately and specifically approved as prescribed by Article 1341 ICC.

Subject

As for the subject matter, Article 1751 *bis* provides that the non-compete covenant shall be limited to the same territory, clientele and goods and services provided in the agency contract.

## What happens if the parties did not indicate the subject or they indicated a wider subject?

If the parties did not indicate the subject limitations, such absence does not alter the validity of the non-compete covenant. In fact, the

subject will be determined *per relationem* based on the agency contract.

If a wider subject was provided compared to the one provided in the agency contract, it will be automatically replaced by the subject provided in the agency contract (as provided by Article 1419, second paragraph).

Article 1751 *bis* provide a maximum term of two years. If the parties indicate a higher term, it will automatically be reduced to the legal term of two years. If no term is provided, it will be determined by means of an interpretation of the parties' intentions.

The second paragraph of Article 1751 *bis* indicates the following criteria for the determination of the indemnity to be paid to the agent:

- term of the non-compete covenant;
- contract's nature, and
- termination indemnity.

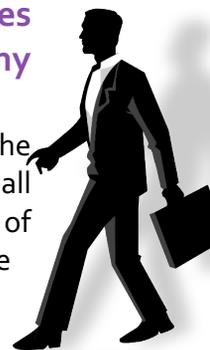
In addition, Article 1751 *bis* specifies that the indemnity is determined by the parties that shall consider also the relevant provisions of the National Collective Economic Agreements and is not commission based.

## What happens if the parties did not indicate any indemnity?

If the parties did not indicate the indemnity amount, the judge shall determine it on the basis of principles of fairness, in compliance with the criteria provided by

Term

Indemnity



Article 1751 *bis*:

- average of the amounts that the agent cashed during the execution of the agency contract, considering also the percentage of such average on the company's turnover achieved during the execution of the agency contract;
- contract termination reasons;
- width of the territory entrusted to the agent, and
- type of agent (one client agent or multiclient agent).

# Non-compete covenant related to going of concern or shareholdings sale and purchase contracts under Article 2557 ICC

## General considerations

The second paragraph of Article 2557 ICC provides the possibility to expand the subject of the non-compete covenant that the going of concern seller undertakes, as prescribed by the first paragraph of Article 2557.

In fact, such expansion is possible as long as the professional activity of the seller is not entirely prohibited.

also to the sale and purchase of company shares.

## Requirements

According to the legal theory, the non-compete covenant under Article 2557, second paragraph shall take written form *ad probationem*.

Written form

According to the case law majority, nonetheless, the *ad probationem* written form requirement is not applicable analogically considering the general principle of form freedom, unless expressly prescribed by law (Italian Supreme Court, 18 December 1991, no. 13623).

Term As for the five-year term, the parties may only reduce it.

Subject The subject matter may include, among the general covenant to not start new business activities, a covenant to not continue already existing business activities.

The content extension of the subject may also include territories or markets for which there is not an imminent clientele diversion danger or for which the buyer has not yet started any business activity.

## Analogical extension of the scope of application

The case law extended analogically the scope of application of Article 2557

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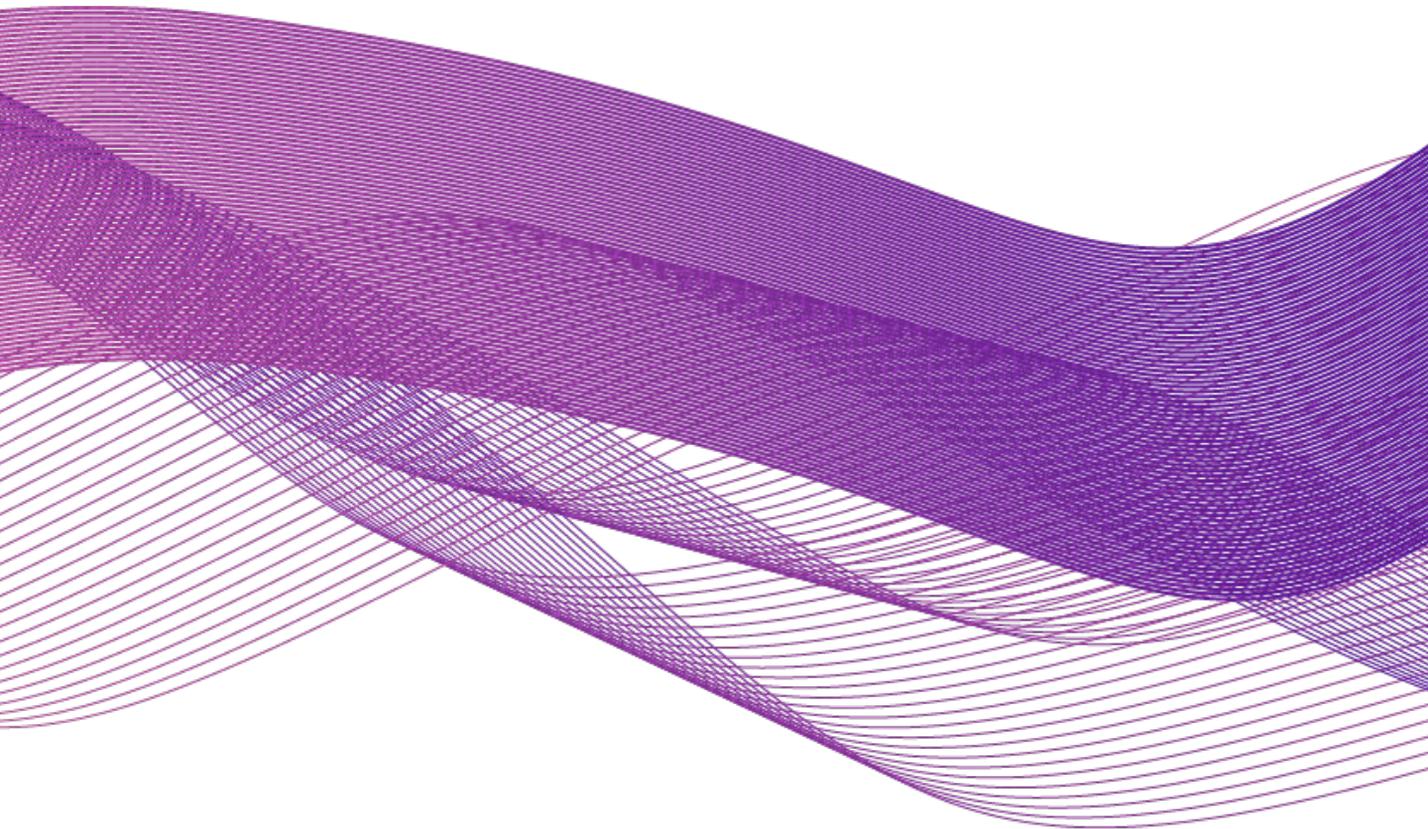


### About me

I am an Italian Law University graduate, specialized in drafting and review of national and international commercial contracts, either in Italian or English. For years I have worked for an Italian based company and, in 2018, I have collaborated with a primary Italian law firm, carrying on legal due diligence for M&A operations.

Thanks to the constant updating of the knowledge acquired and to the high reliability of my skills, I am the sole point of reference concerning commercial contracts for my clients.

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