

Drawing international lessons for South Africa on the treatment of non-compete clauses under competition law and labour law

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Abstract

This paper explores the intersection of competition law and labour law in South Africa, specifically concerning non-compete clauses. While South African competition law views these as potential market restrictions, labour law assesses their enforceability as restraints of trade based on common law and constitutional principles. The research aims to strike a balance between fostering a competitive environment and respecting business interests and individual employment opportunities, aligning with the public interest mandate of the South African Competition Act 89 of 1998 (SA Competition Act).

The paper draws insights from various international jurisdictions, including Egypt, Nigeria, the European Union (EU), the United Kingdom (UK), and the United States of America (USA), to offer a comprehensive comparative analysis for South Africa. The paper highlights diverse legal approaches and reveals a global trend towards increased scrutiny of labour market practices by competition authorities, as exemplified by the USA Federal Trade Commission's (FTC) recent rule banning most non-competes.

Based on this analysis, the paper proposes guidelines, advocacy initiatives, and further research for South Africa. The recommendations for the South African Competition Commission (SA Commission) include developing guidance on labour market agreements, conducting empirical research on their economic effects and leveraging its public interest mandate to address anti-competitive effects on employment, SMEs and historically disadvantaged persons. These efforts aim to inform policy and enforcement, supporting a more competitive, inclusive and industrially dynamic economy. While initially intending to cover both non-compete and no-poach clauses, this paper focuses solely on non-compete clauses due to their complexity, with no-poach clauses to be addressed in a subsequent paper.

Keywords: non-compete clauses, competition law, labour law, restraint of trade and public interest.

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1. Introduction

The authors intended to address both non-compete and no-poach clauses in this research. However, upon deeper examination, they discovered the considerable complexity inherent in each type of clause. Given this complexity and the nuances involved in their legal and economic implications, the authors decided to dedicate the current paper exclusively to non-compete clauses. They plan to explore no-poach clauses comprehensively in a subsequent paper, allowing for a more focused and thorough analysis of each distinct area.

Non-compete clauses in South Africa are viewed under, *inter alia*, constitutional law, competition law, contract law, and labour law. From a competition law perspective, a non-compete agreement can be viewed as an agreement between firms² that restricts competition by preventing one party from entering or operating in a specific market for a certain period.³ These clauses can arise in various contexts, including, *inter alia*, shareholders' agreements⁴, sale of business agreements⁵, joint venture agreements⁶, commercial lease agreements⁷ and distribution agreements.⁸

From a labour law perspective, a non-compete agreement (also referred to as a restraint of trade) is a contractual clause between an employee and an employer, where the employee agrees not to join a rival employer or start a competing business for a specified period after their employment ends.⁹

This paper proposes that the Competition Commission of South Africa (SA Commission) publishes guidelines, undertake advocacy initiatives and additional research to navigate the intersection of competition law and labour law in South Africa. The objective of this paper is to foster a competitive environment while acknowledging the legitimate interests of businesses, contractual freedom¹⁰ and the employment opportunities of individuals, particularly considering the public interest mandate of the South African Competition Act 89 of 1998 (as amended) (SA Competition Act), which includes the effect on employment and the advancement of social and economic welfare.¹¹

² Section 1 (xiii) of the SA Competition Act defines that a "firm" includes a person, partnership or a trust.

³ Ropes & Gray "CJEU judgment" available at [CJEU judgment provides guidance on non-compete clauses | Insights | Ropes & Gray LLP](#) (Accessed on 16 January 2025).

⁴ *Dawn Consolidated Holdings (Pty) Ltd and others v Competition Commission* [2018] 1 CPLR 1 (CAC).

⁵ *Ibid.*

⁶ *Nedschroef Johannesburg (Pty) Ltd (Nedschroef) / Teamcor Ltd and Others* Case 95/IR/Oct05.

⁷ Marumogae, M "Anticompetitive consequences of exclusivity clauses contained in shopping centres' lease agreements" accessible at [Marumogae, M.C---"Anticompetitive Consequences of Exclusivity Clauses Contained in Shopping Centres' Lease Agreements" \[2024\] PER 71](#) at page 6 (Accessed on 20 January 2025).

⁸ *The Competition Commission v Zip Heaters (Australia) (Pty) Ltd* [2007] 1 CPLR 106 (CT).

⁹ OECD, "Competition Issues in Labour Markets – Note by Finland", available at [https://one.oecd.org/document/DAF/COMP/WD\(2019\)38/en/pdf](https://one.oecd.org/document/DAF/COMP/WD(2019)38/en/pdf) at para 7 (Accessed on 15 October 2024).

¹⁰ *G4S Secure Solutions (SA) (Pty) Ltd v Chetty and Another* (J1328/23) [2024] ZALCJHB 135 (22 March 2024) para 41

¹¹ ENSafrica "Watch out employers: your non-compete and no-poaching agreements may also be considered anti-competitive in South Africa" accessible at [ENS - News - Watch out employers: your non-compete and no-poaching agreements may also be considered anti-competitive in South Africa](#) (Accessed on 20 January 2025).

The SA Commission, as an independent organ of state¹², is obligated to exercise its functions in accordance with the Constitution of the Republic of South Africa of 1996 (SA Constitution), which is the supreme law of the Republic of South Africa. The interpretation of the SA Competition Act must be consistent with the SA Constitution and give effect to its distinct socio-economic purposes.¹³ This mandate includes fostering fundamental constitutional principles such as the right to freedom of association¹⁴ and the right to freely choose one's trade, occupation, and profession.¹⁵

The research undertaken in this paper aligns with the objectives of the Department of Trade, Industry and Competition's (DTIC's) Annual Performance Plan (APP) by seeking to promote a more competitive economy that supports industrialisation, builds dynamic firms and promotes economic inclusion.¹⁶

To achieve its aim, the paper draws on lessons from the approaches taken in various African and international jurisdictions, including Egypt, Nigeria, the European Union (EU), the United Kingdom (UK) and the United States of America (USA). By comparing the legislative frameworks, case law developments and the focus of competition authorities in these regions with the South African context, the paper seeks to identify potential best practices and areas for improvement in South Africa's approach to non-compete clauses.

2. South African legislative framework for non-compete clauses

The legislative framework for non-compete clauses differs between competition and labour law in South Africa. The main piece of legislation underpinning competition law in South Africa is the SA Competition Act.¹⁷ The SA Commission is the statutory body responsible for enforcing the SA Competition Act and the South African Competition Tribunal (SA Tribunal) and the South African Competition Appeal Court (CAC) adjudicate competition matters.¹⁸

From a competition law perspective, a non-compete agreement can be viewed as an arrangement between actual or potential competitors, wherein an employee, after leaving such employment, is restricted from starting a competing business against their employer.

¹² Section 19(1) of the SA Competition Act.

¹³ Prins, D "Assessing the nature of competition law enforcement in South Africa" accessible at [6.pdf](#) at page 141 (Accessed on 20 June 2025).

¹⁴ *National Union of Public Service & Allied Workers obo Mani and Others v National Lotteries Board* (CCT 75/13) [2014] ZACC 10; 2014 (3) SA 544 (CC); 2014 (6) BCLR 663 (CC); [2014] 7 BLLR 621 (CC); (2014) 35 ILJ 1885 (CC) (10 April 2014) at paras 27 and 28 (Accessed on 20 June 2025).

¹⁵ Post Judgment Media Summary of *Coca-Cola Beverages Africa (PTY) LTD v The Competition Commission and Another* CCT 192/22 [2024] ZACC 3 accessible at [Coca-Cola Beverages Africa \(Pty\) Ltd v Competition Commission and Another CCT192/22](#) (Accessed on 20 June 2025).

¹⁶ Marumogae, M "Anticompetitive consequences of exclusivity clauses contained in shopping centres' lease agreements" accessible at [Marumogae, M.C---"Anticompetitive Consequences of Exclusivity Clauses Contained in Shopping Centres' Lease Agreements" \[2024\] PER 71](#) at page 29 (Accessed on 20 January 2025).

¹⁷ *Dawn Consolidated Holdings (Pty) Ltd and others v Competition Commission* [2018] 1 CPLR 1 (CAC) at para 1.

¹⁸ Marumogae, M "Anticompetitive consequences of exclusivity clauses contained in shopping centres' lease agreements" accessible at [Marumogae, M.C---"Anticompetitive Consequences of Exclusivity Clauses Contained in Shopping Centres' Lease Agreements" \[2024\] PER 71](#) at page 3 (Accessed on 20 January 2025).

Section 4 of the SA Competition Act prohibits restrictive horizontal practices, such as market division.¹⁹

Additionally, non-compete agreements can also be classified as prohibited vertical arrangements under section 5 of the SA Competition Act. If the employer holds a dominant position in the market, such agreements may constitute an abuse of dominance according to section 8 of the SA Competition Act. Suppose the non-compete agreement substantially lessens or prevents competition in the labour market and prevents competitors of the employer from accessing talent. In that case, it raises significant concerns from a competition law perspective. Consequently, this may have negative implications for employees seeking employment, particularly when the agreement is overly broad.²⁰

The DTIC published Draft Vertical Restraints Regulations on 3 June 2024 for comment on how non-compete clauses are viewed from a competition law perspective, aiming to provide greater clarity on assessing conduct under section 5 of the SA Competition Act.²¹ The public comment period for these Draft Vertical Restraints Regulations was extended until 15 August 2024.²² The SA Commission, through the accompanying memorandum, highlights that vertical restraints can harm competition by foreclosing rivals, raising barriers to entry, reducing inter-brand and intra-brand competition and facilitating collusion.²³

There is no single statute explicitly governing non-compete clauses, their enforceability is primarily determined by common law principles, balanced against constitutional considerations, labour law, in particular the right to choose a trade, occupation, or profession freely.²⁴ The Labour Relations Act 66 of 1995 governs the relationship between employers and employees, but does not directly address the enforceability of post-employment restraints of trade.²⁵

2.1. *How non-compete clauses are viewed from a competition law perspective in SA*

A non-compete clause might be viewed in, *inter alia*, the following ways under South African competition law:

¹⁹ ENSafrica "Watch out employers: your non-compete and no-poaching agreements may also be considered anti-competitive in South Africa" accessible at [ENS - News - Watch out employers: your non-compete and no-poaching agreements may also be considered anti-competitive in South Africa](#) (Accessed on 20 January 2025).

²⁰ Ibid.

²¹ ENSafrica "Draft Vertical Restraints Regulations published in the Government Gazette for comment" accessible at [ENS - News - Draft Vertical Restraints Regulations published in the Government Gazette for comment](#) (Accessed on 20 May 2025).

²² South African Department of Trade and Industry "Notice 2629 of 2024" accessible at [18a662_6116a7eb71154592bbc1c6f8464f8075.pdf](#) (Accessed on 20 June 2025).

²³ ENSafrica "Draft Vertical Restraints Regulations published in the Government Gazette for comment" accessible at [ENS - News - Draft Vertical Restraints Regulations published in the Government Gazette for comment](#) (Accessed on 20 May 2025).

²⁴ Section 22 of the Constitution of the Republic of South Africa, 1996.

²⁵ Danka, A. (2017). "A discussion surrounding restraint of trade in employment law" LLM Thesis. University of KwaZulu-Natal. Available at [content \(ukzn.ac.za\)](#) at page 2 (Accessed on 18 January 2025).

- Firstly, as a potential agreement not to compete between actual or potential competitors, particularly if an employee is restricted from starting a business that would directly compete with their former employer.²⁶
- Secondly, in the context of mergers and acquisitions, non-compete clauses within shareholder agreements can be scrutinised if they lead to a division of markets by allocating customers, suppliers, or specific types of goods or services, potentially contravening section 4(1)(b)(ii) of the SA Competition Act.²⁷

The Draft Vertical Restraints Regulations propose a non-exhaustive list of relevant factors for determining whether a restrictive vertical practice contravenes section 5(1) of the SA Competition Act.²⁸

2.2. *How non-competes are assessed in terms of sections 4, 5 and 8 of the SA Competition Act*

The *Shoprite Checkers Proprietary Limited v Massmart Holdings Limited*²⁹ case involved a complaint filed with the SA Commission.³⁰ Massmart alleged that the firms owning Shoprite, Pick 'n Pay and Spar were using exclusivity clauses in shopping centre lease agreements with landlords to prevent Massmart's Game stores from selling fresh food and groceries in those centres.³¹ Although Massmart argued this conduct violated section 5(1) of the SA Competition Act by preventing or lessening competition,³² the SA Commission chose not to investigate the complaint under Section 5 of the SA Competition Act.³³ Instead, the SA Commission decided to conduct a market inquiry into the retail grocery sector.³⁴

Massmart decided to refer the complaint directly to the SA Tribunal, arguing/alleging that major supermarkets were enforcing exclusivity clauses in shopping centre leases, preventing Massmart's Game stores from selling groceries. Massmart alleged contraventions of sections 5(1), 8(1)(c), and 8(1)(d) of the SA Competition Act.³⁵ Section 5(1) of the SA Competition Act

²⁸ ENSafrica "Draft Vertical Restraints Regulations published in the Government Gazette for comment" accessible at [ENS - News - Draft Vertical Restraints Regulations published in the Government Gazette for comment](#) (Accessed on 20 May 2025).

²⁹ *Shoprite Checkers Proprietary Limited v Massmart Holdings Limited* (CRP034Jun15, EXC088Jul15, EXC107AUG15, EXC109AUG15, STA204DEC15) ZACT 74 (1 September 2016).

³⁰ Marumogae, M "Anticompetitive consequences of exclusivity clauses contained in shopping centres' lease agreements" accessible at [Marumogae, M.C---"Anticompetitive Consequences of Exclusivity Clauses Contained in Shopping Centres' Lease Agreements" \[2024\] PER 71](#) at para 6.1 (Accessed on 20 January 2025).

³¹ Ibid.

³² Marumogae, M "Anticompetitive consequences of exclusivity clauses contained in shopping centres' lease agreements" accessible at [Marumogae, M.C---"Anticompetitive Consequences of Exclusivity Clauses Contained in Shopping Centres' Lease Agreements" \[2024\] PER 71](#) at page 24 (Accessed on 20 January 2025).

³³ Marumogae, M "Anticompetitive consequences of exclusivity clauses contained in shopping centres' lease agreements" accessible at [Marumogae, M.C---"Anticompetitive Consequences of Exclusivity Clauses Contained in Shopping Centres' Lease Agreements" \[2024\] PER 71](#) at para 6.1 (Accessed on 20 January 2025).

³⁴ Ibid.

³⁵ Marumogae, M "Anticompetitive consequences of exclusivity clauses contained in shopping centres' lease agreements" accessible at [Marumogae, M.C---"Anticompetitive Consequences of Exclusivity Clauses Contained in Shopping Centres' Lease Agreements" \[2024\] PER 71](#) at para 6.1 (Accessed on 20 January 2025).

prohibits vertical agreements that substantially prevent or lessen competition unless outweighed by efficiency gains. Section 8 of the SA Competition Act prohibits dominant firms from engaging in exclusionary acts prohibited by section 8(1)(c) of the SA Competition Act or refusing access to an essential facility, prohibited by section 8(1)(d) of the SA Competition Act.³⁶

The *Shoprite Checkers v Massmart*³⁷ case, occurring amidst persistent complaints about exclusivity clauses that the SA Commission had previously investigated but felt it lacked sufficient evidence to prosecute³⁸, contributed directly to the decision to launch the Grocery Retail Market Inquiry (GRMI) in 2015.³⁹ The GRMI was undertaken, based on allegations that these clauses created⁴⁰ barriers to entry and expansion in the grocery retail market.⁴¹

The GRMI's findings highlighted that non-compete/exclusivity clauses precluded other retailers from opening stores and limited the growth and competitive ability of tenants, preventing them from trading in certain goods.⁴² They were found to negatively impact smaller tenants, exclude competitors, limit consumer choice and distort competition.⁴³ The GRMI concluded that these clauses have the effect of preventing and lessening competition.⁴⁴ Consequently, the GRMI recommended that major supermarkets stop enforcing these clauses and not include them in new leases, leading to consent agreements being concluded with the SA Commission and confirmed by the SA Tribunal.⁴⁵

2.3. South African competition case law developments

South African competition law, particularly the SA Competition Act, has been applied to non-compete clauses in various contexts, although it does not contain express provisions specifically prohibiting them.⁴⁶ The SA Commission has scrutinised non-compete clauses,

³⁶ Blumenthal, R LLM thesis titled "The Competition Commission's Non-Referral of Exclusivity Clauses in the Shopping Centre Lease Context: A Monumental Misjudgement - A Section 5(1) Analysis of Anticompetitiveness" at page 19 (Accessed on 15 March 2025).

³⁷ *Shoprite Checkers Proprietary Limited v Massmart Holdings Limited* (CRP034Jun15, EXC088Jul15, EXC107AUG15, EXC109AUG15, STA204DEC15) ZACT 74 (1 September 2016).

³⁸ Marumogae, M "Anticompetitive consequences of exclusivity clauses contained in shopping centres' lease agreements" accessible at [Marumogae, M.C---"Anticompetitive Consequences of Exclusivity Clauses Contained in Shopping Centres' Lease Agreements" \[2024\] PER 71](#) at para 4.4 (Accessed on 20 January 2025).

³⁹ Marumogae, M "Anticompetitive consequences of exclusivity clauses contained in shopping centres' lease agreements" accessible at [Marumogae, M.C---"Anticompetitive Consequences of Exclusivity Clauses Contained in Shopping Centres' Lease Agreements" \[2024\] PER 71](#) at pages 18, 19 and 20 (Accessed on 20 January 2025).

⁴⁰ Ibid.

⁴¹ Ibid.

⁴² Ibid.

⁴³ Ibid.

⁴⁴ Marumogae, M "Anticompetitive consequences of exclusivity clauses contained in shopping centres' lease agreements" accessible at [Marumogae, M.C---"Anticompetitive Consequences of Exclusivity Clauses Contained in Shopping Centres' Lease Agreements" \[2024\] PER 71](#) at pages 19 and 20 (Accessed on 20 January 2025).

⁴⁵ Ibid.

⁴⁶ Ibid.

especially in agreements between firms that could potentially restrict competition or divide markets, which is prohibited under section 4(1)(b)(ii) of the SA Competition Act.⁴⁷

In the *Natal Wholesale Chemists* case⁴⁸, Natal Wholesale Chemists (NWC), a full-line pharmaceutical wholesaler, brought an application for interim relief before the SA Tribunal against Astra Pharmaceuticals (AZ), Merck Pharmaceutical Manufacturers (Merck), and Pharmaceutical Healthcare Distributors (PHD). NWC alleged that the exclusive distribution system used by AZ and Merck, who contracted with PHD for distribution services, constituted a prohibited practice under section 5(1) of the SA Competition Act.⁴⁹ This system represented a departure from the traditional wholesaler model⁵⁰.

The assessment of the alleged section 5 of the SA Competition Act contravention centred on determining if these vertical agreements substantially prevented or lessened competition in the market.⁵¹ The key question was whether the exclusive right granted PHD the power to raise prices above the competitive level, as competition would only be harmed if this were possible⁵². For interim relief, NWC needed to demonstrate a restrictive practice based on the same standard of proof as an SA High Court interim interdict⁵³.

Ultimately, the SA Tribunal denied the application for interim relief.⁵⁴ It concluded that NWC had not provided sufficient evidence to prove, even on the lower standard required for interim relief, that the vertical agreements constituted a restrictive practice, meaning it did not demonstrate a substantial prevention or lessening of competition.⁵⁵ Because the existence of a restrictive practice was not established, the SA Tribunal did not need to examine potential pro-competitive gains or other requirements for interim relief. A separate claim under section 9 of the SA Competition Act (price discrimination) was not pursued by NWC and was dismissed.⁵⁶

The *Nedschroef Johannesburg (Pty) Ltd v Teamcor Ltd*⁵⁷ case involved an application for interim relief brought before the SA Tribunal by Nedschroef Johannesburg (Pty) Ltd (Nedschroef) against Teamcor Limited and other respondents. Nedschroef challenged a restraint of trade clause contained in a sale of business agreement, alleging it contravened

⁴⁷ *Dawn Consolidated Holdings (Pty) Ltd and others v Competition Commission* [2018] 1 CPLR 1 (CAC).

⁴⁸ *Natal Wholesale Chemists v Astra Pharmaceuticals and Others* [2001] ZACT 7 (12 March 2001)

⁴⁹ *Natal Wholesale Chemists v Astra Pharmaceuticals and Others* [2001] ZACT 7 (12 March 2001) at para 3.

⁵⁰ *Natal Wholesale Chemists v Astra Pharmaceuticals and Others* [2001] ZACT 7 (12 March 2001) at para 7.

⁵¹ *Natal Wholesale Chemists v Astra Pharmaceuticals and Others* [2001] ZACT 7 (12 March 2001) at paras 77, 78 and 79.

⁵² *Natal Wholesale Chemists v Astra Pharmaceuticals and Others* [2001] ZACT 7 (12 March 2001) at para 31.

⁵³ *Natal Wholesale Chemists v Astra Pharmaceuticals and Others* [2001] ZACT 7 (12 March 2001) at paras 55 and 56.

⁵⁴ *Natal Wholesale Chemists v Astra Pharmaceuticals and Others* [2001] ZACT 7 (12 March 2001) at para 1.

⁵⁵ *Natal Wholesale Chemists v Astra Pharmaceuticals and Others* [2001] ZACT 7 (12 March 2001) at paras 78 and 79.

⁵⁶ *Natal Wholesale Chemists v Astra Pharmaceuticals and Others* [2001] ZACT 7 (12 March 2001) at para 1.

⁵⁷ *Nedschroef Johannesburg (Pty) Ltd and Teamcor Ltd Waco International Ltd CBC Fasteners (Pty) Ltd and Avlock International (Pty) Ltd* case number: IR0700Oct05.

section 4(1)(b) of the SA Competition Act.⁵⁸ This specific restraint, found in clause 16, limited Nedschroef's manufacturing activities to certain fasteners listed in an annexure and was enforceable by CBC Fasteners, which accepted its benefits.⁵⁹ Only CBC Fasteners opposed the application.

A key aspect of the assessment was the nature and effect of the restraint.⁶⁰ The SA Tribunal found the restraint to be disproportionate, noting it operated against the purchaser (Nedschroef) in favour of CBC, a party that was not the seller.⁶¹ Furthermore, its duration was extensive, exceeding 10 years.⁶² The SA Tribunal concluded that the restraint had the effect of dividing the market by precluding Nedschroef from trading in the restricted products.⁶³

The outcome was that the SA Tribunal granted the application for interim relief.⁶⁴ The SA Tribunal held that the restraint of trade clause, due to its disproportionate nature, extensive duration and market-dividing effect, contravened section 4(1) of the SA Competition Act.⁶⁵ This finding meant the restrictive practice was established, leading to the granting of the interim order.⁶⁶ This outcome highlights a need for competition law principles and the purpose of the SA Competition Act to be more explicitly considered when evaluating the enforceability of restraint of trade clauses, particularly where they might stifle new entrants or economic participation.

In the *Dawn Consolidated Holdings*⁶⁷ case, Dawn, a hardware distributor, acquired a 49% stake in Sangio, a pipe manufacturer. The shareholders' agreement included a non-compete clause preventing Dawn and its subsidiaries from manufacturing HDPE piping in South Africa and requiring them to procure their HDPE piping needs from Sangio as long as they held shares in the company.⁶⁸

The SA Commission alleged that this non-compete clause constituted market division in contravention of section 4(1)(b)(ii) of the SA Competition Act between 2007 and 2012. The final judgment by the CAC was that the appeal succeeded. The CAC set aside the SA

⁵⁸ *Nedschroef Johannesburg (Pty) Ltd and Teamcor Ltd Waco International Ltd CBC Fasteners (Pty) Ltd and Avlock International (Pty) Ltd* case number: IR070Oct05 at page 1.

⁵⁹ *Nedschroef Johannesburg (Pty) Ltd and Teamcor Ltd Waco International Ltd CBC Fasteners (Pty) Ltd and Avlock International (Pty) Ltd* case number: IR070Oct05 at paras 8, 9 and 10.

⁶⁰ Jukunda, U "Not all restraints of trade fall foul of the Competition Act" accessible at [Not all restraints of trade fall foul of the Competition Act - De Rebus](#) (Accessed on 15 May 2025).

⁶¹ Jukunda, U "Not all restraints of trade fall foul of the Competition Act" accessible at [Not all restraints of trade fall foul of the Competition Act - De Rebus](#) (Accessed on 15 May 2025).

⁶² Sithole, M LLM thesis titled "Restraint of trade clauses: does the enforcement thereof promote anti-competitive behaviour in South African law?" at page 43, accessed at [content](#) (Accessed on 15 May 2025).

⁶³ Ibid.

⁶⁴ *Nedschroef Johannesburg (Pty) Ltd and Teamcor Ltd Waco International Ltd CBC Fasteners (Pty) Ltd and Avlock International (Pty) Ltd* case number: IR070Oct05 at page 1.

⁶⁵ Sithole, M LLM thesis titled "Restraint of trade clauses: does the enforcement thereof promote anti-competitive behaviour in South African law?" at page 43, accessed at [content](#) (Accessed on 15 May 2025).

⁶⁶ *Nedschroef Johannesburg (Pty) Ltd and Teamcor Ltd Waco International Ltd CBC Fasteners (Pty) Ltd and Avlock International (Pty) Ltd* case number: IR070Oct05 at page 1.

⁶⁷ *Dawn Consolidated Holdings (Pty) Ltd and others v Competition Commission* [2018] 1 CPLR 1 (CAC).

⁶⁸ *Dawn Consolidated Holdings (Pty) Ltd and others v Competition Commission* [2018] 1 CPLR 1 (CAC).

Tribunal's decision and dismissed the complaint, finding that the SA Commission had not proven that the non-compete clause, when properly characterised within the context of the broader agreement, amounted to a contravention of section 4(1)(b)(ii) of the SA Competition Act. The CAC reasoned that the clause was a reasonable restraint necessary for the implementation of the shareholders' agreement, particularly to protect Sangio's confidential information and know-how.⁶⁹ This case demonstrates that non-compete clauses within shareholder agreements are not automatically *per se* prohibited under competition law, their legality depends on their characterisation⁷⁰ and whether they are reasonably required for the implementation of a legitimate transaction.

The *Zip Heaters*⁷¹ case, involved a distribution agreement between Zip Heaters (Australia) (Pty) Ltd and Kwikot (Pty) Ltd, where Kwikot was the exclusive manufacturer and distributor of Zip Heaters' products in South Africa. This agreement included a post-termination non-compete clause preventing Kwikot from manufacturing or selling competing products for two years after the agreement ended. After Kwikot terminated the agreement, the SA Commission concluded that Zip Heaters' enforcement of this non-compete clause was an engagement in the fixing of trading conditions and the division of markets, in contravention of section 4(1)(b)(ii), alternatively section 4(1)(b)(i), of the SA Competition Act.⁷²

The final judgment in this case was the confirmation of a consent agreement between the SA Commission and Zip Heaters by the SA Tribunal. In terms of this order, Zip Heaters agreed to refrain from enforcing the post-termination non-compete clause and from engaging in the fixing of trading conditions or division of markets contrary to section 4(1)(b)(i) of the SA Competition Act or section 4(1)(b)(ii) of the SA Competition Act. Zip Heaters also agreed to pay an administrative penalty of R 78,500 while explicitly denying any contravention of the SA Competition Act.⁷³

In *Competition Commission v Cobro Concrete Units*,⁷⁴ the SA Commission found that Cobro, along with other cartel members, divided the KZN market for the manufacture and sale of manholes by, among other things, "*agreeing to certain non-compete payments to be made*". This was part of a broader agreement involving the allocation of customers, contracts and territories. The conduct was investigated in terms of section 4(1)(b)(ii) of the SA Competition Act. Cobro admitted to contravening section 4(1)(b)(ii) of the SA Competition Act and a settlement agreement was confirmed as a consent order by the SA Tribunal. This case

⁶⁹ *Dawn Consolidated Holdings (Pty) Ltd and others v Competition Commission* [2018] 1 CPLR 1 (CAC).

⁷⁰ Cliffe Dekker Hofmeyr "Have we canned characterisation? The Dawn case" (Accessed on 20 June 2025).

⁷¹ *The Competition Commission v Zip Heaters (Australia) (Pty) Ltd* [2007] 1 CPLR 106 (CT).

⁷² *The Competition Commission v Zip Heaters (Australia) (Pty) Ltd* [2007] 1 CPLR 106 (CT).

⁷³ *The Competition Commission v Zip Heaters (Australia) (Pty) Ltd* [2007] 1 CPLR 106 (CT).

⁷⁴ *Competition Commission v Cobro Concrete Units (Pty) Ltd* 1 CPLR 68 (CT).

demonstrates that non-compete agreements can be a mechanism for market division, which is a *per se* prohibited practice.⁷⁵

In *Unilever South Africa (Pty) Ltd v Competition Commission*⁷⁶ the SA Commission investigated Unilever and Sime Darby for allegedly engaging in market division in contravention of section 4(1)(b)(ii) of the SA Competition Act through a series of agreements, including those involving non-compete clauses arising from the sale of businesses. Unilever brought an exception application, arguing that the SA Commission's complaint referral was vague and embarrassing. The Tribunal noted that when relying on a series of agreements with non-compete elements to prove market division, the context is critical to explain why they might constitute a concerted practice.

The SA Tribunal upheld Unilever's exception, ordering the SA Commission to file a supplementary affidavit to provide more clarity on the agreements relied upon and how they constituted a market division. This case highlights the importance of clearly pleading the link between commercial agreements containing non-compete clauses and the alleged contravention of market division.⁷⁷

These cases indicate that while non-compete clauses are not automatic contraventions under the SA Competition Act, they are subject to scrutiny, particularly when they appear to restrict competition between actual or potential competitors or within vertical relationships that could substantially lessen or prevent competition in a market.

These cases illustrate that non-compete clauses are not automatically considered contraventions under the SA Competition Act but are definitively subject to scrutiny by the SA Commission and the SA Tribunal. This scrutiny primarily arises when these clauses operate as restrictive agreements, potentially falling under sections 4, 5 and 8 of the SA Competition Act. The application of these sections depends on the specific context and characterisation of the clause within the broader agreement and its effects on competition.

3. How non-compete clauses are viewed from a labour law perspective in SA

This approach differs from the competition law perspective - from a labour law perspective, the focus is on the reasonableness of restraint of trade agreements within employment contracts, primarily governed by common law principles in South Africa. The landmark case of *Magna Alloys and Research (SA) (Pty) Ltd v Ellis*⁷⁸ (*Magna Alloys*) handed down by the

⁷⁵ *Competition Commission v Cobro Concrete Units (Pty) Ltd* 1 CPLR 68 (CT).

⁷⁶ *Unilever South Africa (Pty) Ltd v Competition Commission; In re: Competition Commission v Unilever South Africa (Pty) Ltd and another* [2017] 2 CPLR 897 (CT).

⁷⁷ *Ibid.*

⁷⁸ *Magna Alloys & Research (S.A.) (Pty) Ltd. v Ellis* (109/84) [1984] ZASCA 116; [1984] 2 All SA 583 (A); 1984 (4) SA 874 (A) (27 September 1984).

Appellate Division of the Supreme Court of South Africa (as it was known then) shifted the approach, holding that restraint agreements contained in employment contracts are valid unless proven unreasonable and contrary to public policy, with the onus of proof resting on the party challenging the restraint.⁷⁹ The courts assess reasonableness by considering whether the party seeking enforcement has a proprietary interest worthy of protection and by weighing the interests of both parties and the public interest. This involves evaluating factors such as the nature, extent, and duration of the restraint, the geographical area, and the parties' bargaining power.⁸⁰

The *Reddy v Siemens Telecommunications (Pty) Ltd*⁸¹ case (*Reddy*) is cited as a significant judgment regarding the enforceability of restraint of trade agreements.⁸² It highlights that the principles set out in *Magna Alloys* remain influential, emphasising the need to consider constitutional values when applying contract law.⁸³ The Supreme Court of Appeal of South Africa (SCA) in *Reddy* reiterated that the onus is on the employee to prove the unreasonableness of the restraint.⁸⁴

These cases, among others, demonstrate the courts' ongoing application of common law principles, as shaped by *Magna Alloys* and constitutional considerations, to determine the reasonableness and enforceability of restraint of trade agreements in employment contracts.

The following paragraphs will delve deeper into a comparative analysis of these competition law and labour law perspectives on non-compete clauses within the South African context. This comparison aims to highlight the nuances and potential overlaps, ultimately leading to a proposal for the development of specific guidelines and encouraging further research tailored to the unique legal and economic landscape of South Africa.

The focus on promoting competition and economic inclusion through the SA Competition Act directly links with the DTIC's APP⁸⁵, which aims to foster a more competitive and equitable economy. By addressing potentially anti-competitive uses of non-compete clauses, particularly those that hinder the entry of small and medium-sized enterprises (SMEs) and limit employment opportunities, the development of guidelines and further research in this area can

⁷⁹ Danka, A. (2017). "A discussion surrounding restraint of trade in employment law" LLM Thesis. University of KwaZulu-Natal. Available at [content \(ukzn.ac.za\)](https://content.ukzn.ac.za) at page 21 (Accessed on 18 January 2025).

⁸⁰ Danka, A. (2017). "A discussion surrounding restraint of trade in employment law" LLM Thesis. University of KwaZulu-Natal. Available at [content \(ukzn.ac.za\)](https://content.ukzn.ac.za) at page 19 (Accessed on 18 January 2025).

⁸¹ *Reddy v Siemens Telecommunications (Pty) Ltd* (251/06) [2006] ZASCA 135; 2007 (2) SA 486 (SCA); (2007) 28 ILJ 317 (SCA) (30 November 2006).

⁸² Danka, A. (2017). "A discussion surrounding restraint of trade in employment law" LLM Thesis. University of KwaZulu-Natal. Available at [content \(ukzn.ac.za\)](https://content.ukzn.ac.za) at page 10 (Accessed on 18 January 2025).

⁸³ Danka, A. (2017). "A discussion surrounding restraint of trade in employment law" LLM Thesis. University of KwaZulu-Natal. Available at [content \(ukzn.ac.za\)](https://content.ukzn.ac.za) at page 11 (Accessed on 18 January 2025).

⁸⁴ Danka, A. (2017). "A discussion surrounding restraint of trade in employment law" LLM Thesis. University of KwaZulu-Natal. Available at [content \(ukzn.ac.za\)](https://content.ukzn.ac.za) at page 11 (Accessed on 18 January 2025).

⁸⁵ The DTIC (Department of Trade, Industry and Competition) uses an Annual Performance Plan (APP), available at [2024/25 APP](https://2024/25.app) (Accessed on 15 March 2025).

contribute to the DTIC's broader objectives of industrialisation, job creation, and economic transformation.⁸⁶

4. Treatment of non-compete agreements in Africa

In Africa, non-compete clauses are frequently assessed under common law principles or labour legislation rather than explicitly under national competition law regimes, although some jurisdictions do apply competition law to these agreements.⁸⁷ Countries that assess non-compete clauses or similar restrictive practices under their competition law frameworks, besides South Africa, include Egypt under its Egyptian Competition Law and Executive Regulations,⁸⁸ and Nigeria under its Federal Competition and Consumer Protection Act.⁸⁹

5. How non-compete clauses are viewed from a competition law perspective in Egypt

In Egypt, non-compete clauses are relevant under competition law, particularly within the framework of vertical agreements. Vertical agreements are those between parties in a vertical relationship, such as producers, suppliers, and distributors.

The primary legislation governing anti-competitive vertical agreements is Article 7 of the Egyptian Competition Law No. 3 of 2005 (ECL) and Article 12 of its Executive Regulations (ER).⁹⁰ Article 7 of ECL prohibits agreements or contracts between a person and any of its suppliers or clients that result in a reduction in competition.⁹¹ Article 12 of the ER elaborates that agreements or contracts between a person and any of its suppliers or clients are prohibited if they are intended to restrict competition.⁹² The ECA's guidelines on the assessment of vertical agreements list “Non-Compete Clause” under the category of “Vertical agreements that are less severe”.⁹³

In early 2024, the Egyptian Competition Authority (ECA) found an undertaking in the dairy sector to have concluded contracts between 2020 and 2022 with four distributors. These contracts stipulated non-compete clauses, along with a prohibition of passive sales and resale price maintenance (RPM). The issue was whether these practices restricted competition between the distributors. The outcome was that the ECA found these practices restricted

⁸⁶ Objectives of the South African Competition Act are set out in section 2.

⁸⁷ Dentons ACAS-Law, Lagos “Employment agreement and non-compete clauses: topical issues to consider in Nigeria” available at [Employment agreement and non-compete clauses: topical issues to consider in Nigeria | International Bar Association](#) (Accessed 16 May 2025).

⁸⁸ Egyptian Competition Authority “Guidelines on the Assessment of Vertical Agreements 2024” available at [ECA Guidelines on the assessment of Vertical Agreement - 3.12.2024-comments](#) (Accessed 16 May 2025).

⁸⁹ Dentons ACAS-Law, Lagos “Employment agreement and non-compete clauses: topical issues to consider in Nigeria” available at [Employment agreement and non-compete clauses: topical issues to consider in Nigeria | International Bar Association](#) (Accessed 16 May 2025).

⁹⁰ Egyptian Competition Authority “Guidelines on the Assessment of Vertical Agreements 2024” available at [ECA Guidelines on the assessment of Vertical Agreement - 3.12.2024-comments](#) (Accessed 16 May 2025).

⁹¹ Ibid.

⁹² Ibid.

⁹³ Ibid.

competition between the distributors and concluded that the dairy undertaking and the distributors were in violation of Article 7 of ECL.⁹⁴

6. How non-compete clauses are viewed from a labour law perspective in Egypt

From an employment law perspective in Egypt, non-compete clauses are a type of restrictive covenant that employers may impose on former employees.⁹⁵ These clauses are designed to protect the employer's legitimate business interests following the termination of the employment relationship.⁹⁶

The main sources of employment law in Egypt are the Egyptian Labour Law (ELL) No. 120 of 2003 and Articles 674 to 698 of the Egyptian Civil Code (ECC).⁹⁷ Restrictive covenants, including non-compete clauses, are recognised and regulated by provisions within the ELL and ECC, and are also subject to the agreement between the parties.⁹⁸

A non-compete clause in this context is defined as a provision that prohibits employees from competing with the employer for a certain period and within a defined area, either on their own or by working with another party in the same business.⁹⁹ These clauses can be included in employment contracts and are often used to help protect trade secrets and confidential information.¹⁰⁰

6.1. *Applicable Tests and Enforceability*

Non-compete agreements in Egypt are considered legal and enforceable,¹⁰¹ but their enforceability is subject to meeting strict conditions.¹⁰² They must be reasonable and must comply with Egyptian labour standards.¹⁰³ For restrictive covenants, including non-compete clauses, to be enforceable, especially if they extend beyond the duration of the contract, certain key requirements must be met.¹⁰⁴

⁹⁴ UNCTAD "Voluntary peer review of competition law and policy of Egypt" available at [Voluntary peer review of competition law and policy of Egypt](#) (Accessed 16 May 2025).

⁹⁵ ICLG "Employment & Labour Laws and Regulations - Egypt Chapter" available at [Employment & Labour Laws and Regulations Report 2025 Egypt](#) (Accessed 16 May 2025).

⁹⁶ CXC Global "End of Employment and Notice Period in Egypt" available at [End of Employment and Notice Period in Egypt | CXC](#) (Accessed 16 May 2025).

⁹⁷ ICLG "Employment & Labour Laws and Regulations - Egypt Chapter" available at [Employment & Labour Laws and Regulations Report 2025 Egypt](#) (Accessed 16 May 2025).

⁹⁸ ICLG "Employment & Labour Laws and Regulations - Egypt Chapter" available at [Employment & Labour Laws and Regulations Report 2025 Egypt](#) (Accessed 16 May 2025).

⁹⁹ Ibid.

¹⁰⁰ Anderson, "How to Protect Trade Secrets in the Egyptian Market", available at [How to Protect Trade Secrets in the Egyptian Market](#) (Accessed 16 May 2025).

¹⁰² Ibid.

¹⁰³ Anderson, "How to Protect Trade Secrets in the Egyptian Market", available at [How to Protect Trade Secrets in the Egyptian Market](#) (Accessed 16 May 2025).

¹⁰⁴ Ibid.

7. How non-compete clauses are viewed from a competition law perspective in Nigeria

The Federal Competition and Consumer Protection Act 2018 (FCCPA) has introduced a statutory perspective on restrictive covenants.¹⁰⁵ Section 59 of the FCCPA 2018 expressly prohibits agreements in restraint of competition.¹⁰⁶ However, section 68(e) of the FCCPA 2018 provides an exception: a contract of service containing provisions restricting the work a person may engage in during or after the termination of the contract is not prohibited if the restriction period does not exceed two years.¹⁰⁷

While the FCCPA sets a maximum duration, the enforceability of a clause within these two years is still subject to the courts' determination of its reasonableness based on the specific facts and the need to protect a proprietary interest.¹⁰⁸

8. How non-compete clauses are viewed from a labour law perspective in Nigeria

Under Nigerian law, which has followed the common law position from England, covenants in restraint of trade are generally considered *prima facie* unenforceable.¹⁰⁹ However, such clauses can be enforced if they are proven to be reasonable with reference to the interests of all parties concerned (employer and employee) and the interests of the public.¹¹⁰ Nigerian courts are tasked with balancing the conflicting interests between the employer's right to protect their business and the employee's right to earn a living.¹¹¹

The tests applied by the courts in determining the enforceability of restrictive covenants, including non-competes, generally involve assessing their reasonableness. In *Koumoulis v Leventis Motors Ltd*¹¹², the Supreme Court established a foundational principle in Nigeria regarding covenants in restraint of trade contained in an employment relationship.¹¹³ The key

¹⁰⁵ Bridgefort Attorneys "Has restraint of trade become enforceable in Nigeria?" available at [BFA-Article-Has-Restraint-of-Trade-Become-Enforceable-in-Nigeria-003-2.pdf](#) (Accessed 19 May 2025).

¹⁰⁶ A02Lae "The Enforceability of Training Bonds, Non-Compete And Solicitation Clauses In Employment Contracts" available at [Enforceability-of-Training-Bonds-Non-Compete-Non-Solicitation-Clause.pdf](#) (Accessed 19 May 2025).

¹⁰⁷ A02Lae "The Enforceability of Training Bonds, Non-Compete and Solicitation Clauses in Employment Contracts" available at [Enforceability-of-Training-Bonds-Non-Compete-Non-Solicitation-Clause.pdf](#) (Accessed 19 May 2025).

¹⁰⁸ Ibid.

¹⁰⁹ Dentons ACAS-Law, Lagos "Employment agreement and non-compete clauses: topical issues to consider in Nigeria" available at [Employment agreement and non-compete clauses: topical issues to consider in Nigeria | International Bar Association](#) (Accessed 16 May 2025).

¹¹⁰ Bridgefort Attorneys "Has restraint of trade become enforceable in Nigeria?" available at [BFA-Article-Has-Restraint-of-Trade-Become-Enforceable-in-Nigeria-003-2.pdf](#) (Accessed 19 May 2025).

¹¹¹ Abubakri Y, "Non-compete Clauses in Contracts of Employment in Nigeria: A Critical Evaluation of the Decision in *Aprofim Engineering Ltd v Bigouret Anor* (2015)" available at [JLPG-Vol. 56 2016.pdf](#) (Accessed 19 May 2025).

¹¹² *Koumoulis v Leventis Motors Limited*, (1973) All N.L.R 789.

¹¹³ Dentons ACAS-Law, Lagos "Employment agreement and non-compete clauses: topical issues to consider in Nigeria" available at [Employment agreement and non-compete clauses: topical issues to consider in Nigeria | International Bar Association](#) (Accessed 16 May 2025).

issue was the enforceability of a restrictive covenant (a non-compete clause) in an employment contract.¹¹⁴

The Supreme Court held that while covenants in restraint of trade are *prima facie* unenforceable at common law, they are enforceable if they are reasonable with reference to the interests of the parties concerned and of the public.¹¹⁵ In the specific facts of this case, the Supreme Court found the covenant was reasonably necessary for the protection of the employer's business interest and thus valid and enforceable in law.¹¹⁶

In the case of *Overland Airways Ltd v Captain Raymond Jam*¹¹⁷, an airline sponsored a pilot to undergo training in the USA. The pilot was required to sign a bond, committing to serve the employer for a minimum period following the completion of the training. However, the pilot chose to repudiate the bond after obtaining the necessary qualifications.¹¹⁸

The key issues in this case were whether the training bond, which included a restrictive covenant, constituted an unreasonable restraint of trade, an unfair labour practice, and if it was contrary to public policy.¹¹⁹

The National Industrial Court (NIC) enforced the training bond and upheld the restrictive covenant. The court found it to be reasonable and enforceable after considering the specific terms and the state of the law in other jurisdictions.¹²⁰ This case demonstrates that training bonds linked to service periods can be enforced if deemed fair and reasonable.

9. Learnings for South Africa from Nigeria on the treatment of non-competes

9.1. Competition law perspective

While section 59 of the FCCPA prohibits agreements in restraint of competition generally, section 68(e) of the FCCPA offers a specific exception for contracts of service restricting work, provided the restriction period does not exceed two years. This introduces a statutory maximum duration for non-compete clauses within the competition law context, which differs from South Africa's approach, which currently lacks such explicit provisions in the SA Competition Act for employment non-competes.

¹¹⁴ Bridgefort Attorneys "Has restraint of trade become enforceable in Nigeria?" available at [BFA-Article-Has-Restraint-of-Trade-Become-Enforceable-in-Nigeria-003-2.pdf](#) (Accessed 19 May 2025).

¹¹⁵ Dentons ACAS-Law, Lagos "Employment agreement and non-compete clauses: topical issues to consider in Nigeria" available at [Employment agreement and non-compete clauses: topical issues to consider in Nigeria | International Bar Association](#) (Accessed 16 May 2025).

¹¹⁶ Bridgefort Attorneys "Has restraint of trade become enforceable in Nigeria?" available at [BFA-Article-Has-Restraint-of-Trade-Become-Enforceable-in-Nigeria-003-2.pdf](#) (Accessed 19 May 2025).

¹¹⁷ *Overland Airways Limited v. Captain Raymond Jam* [2015] 62 NLLR (Pt 219)525.

¹¹⁸ A02Lae "The Enforceability of Training Bonds, Non-Compete And Solicitation Clauses In Employment Contracts" available at [Enforceability-of-Training-Bonds-Non-Compete-Non-Solicitation-Clause.pdf](#) (Accessed 19 May 2025).

¹¹⁹ Ibid.

Although the enforceability within this two-year limit still depends on a court's assessment of reasonableness and the need to protect a proprietary interest, the existence of a legislative cap in the FCCPA offers a point of learning for the SA Commission, suggesting a potential avenue for considering more specific guidance or regulations regarding the temporal scope of non-competes that could have anti-competitive effects.

9.2. *Labour law perspective*

Regarding the labour law perspective, Nigeria's approach, like South Africa's, follows the common law principle that covenants in restraint of trade are generally *prima facie* unenforceable. However, they can be enforced if proven to be reasonable with reference to the interests of all parties involved (employer and employee) and the public interest. Nigerian courts, including the NIC, focus on balancing the employer's right to protect their business with the employee's right to earn a living.

The lesson for South Africa here lies in the reaffirmation of the established common law principles of reasonableness and interest balancing as a core component of assessing enforceability in the labour context.

10. **How non-compete clauses are viewed from a competition law perspective in the EU**

From a competition law perspective in the EU, non-compete clauses are assessed under Article 101(1) of the TFEU,¹²¹ which prohibits agreements that have as their object or effect the prevention, restriction, or distortion of competition within the internal market.

EU competition law distinguishes between agreements that restrict competition “by object” and those that do so “by effect”. Agreements restrictive by object are those that, by their very nature, have the potential to restrict competition. These can include market-sharing and market-exclusion agreements. Agreements restrictive by effect require an analysis of their impact on the market.¹²²

Non-compete clauses can sometimes be considered ancillary restraints to a main agreement. If they are directly related and necessary for the implementation of a pro-competitive main transaction and are proportionate, they may fall outside the scope of Article 101(1) of the TFEU.¹²³

¹²¹ *Dawn Consolidated Holdings (Pty) Ltd and others v Competition Commission* [2018] 1 CPLR 1 (CAC) at para 29.

¹²² *Dawn Consolidated Holdings (Pty) Ltd and others v Competition Commission* [2018] 1 CPLR 1 (CAC) at para 29.

¹²³ European Commission, Competition Policy Brief, available at [adb27d8b-3dd8-4202-958d-198cf0740ce3_en \(europa.eu\)](https://ec.europa.eu/competition/policy_briefs/adb27d8b-3dd8-4202-958d-198cf0740ce3_en) at page 1 (Accessed on 15 October 2024).

Even if a non-compete clause falls under Article 101(1) of the TFEU, it may be exempted under Article 101(3) of the TFEU if it contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit and which does not impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives, nor afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.¹²⁴

At the time of publication of this paper, a recent judgment by the Court of Justice of the European Union (CJEU) in the case C-331/21 (EDP - Energias de Portugal)¹²⁵ provides guidance on the treatment of non-compete clauses, particularly cross-market non-compete clauses between companies operating in different sectors.¹²⁶ The CJEU ruled that such clauses may constitute a restriction of competition by object, even if the underlying agreement can give rise to consumer benefits. This determination requires a close consideration of the economic and legal context of the clause, including the market positions of the parties, the nature and duration of the non-compete, and the occurrence of the restriction in a context like market liberalisation. The CJEU considered that an agreement with a non-compete clause between potential competitors is an indication of potential competition.¹²⁷

10.1. *Comparison of EU and SA's treatment of non-competes from a competition law perspective*

Both the EU and South Africa have competition law frameworks that scrutinise agreements which may restrict competition.¹²⁸ In the EU, non-compete clauses are assessed primarily under Article 101(1) of the TFEU, which prohibits agreements that have the object or effect of preventing, restricting, or distorting competition within the internal market.¹²⁹

EU competition law distinguishes between agreements that restrict competition “by object” (inherently restrictive) and those that do so “by effect” (requiring market analysis).¹³⁰ The concept of restriction “by object” in the EU has parallels in South Africa's analysis of conduct that inherently restricts competition, as seen in cases like *Dawn Consolidated Holdings*.¹³¹ South African law also distinguishes between conduct tested by the rule of reason and *per se* violations, akin to the EU approach. The rule of reason analysis in South Africa also considers

¹²⁴ Ibid.

¹²⁵ *Judgment - 26/10/2023 - EDP - Energias de Portugal and others* case C-331/21.

¹²⁶ Slaughter and May “Competition & Regulatory Newsletter” available at [Competition & Regulatory Newsletter: European Court of Justice rules non-compete clauses between companies in different sectors can be “by object” restriction](#) (Accessed on 16 January 2025).

¹²⁷ Ibid.

¹²⁸ *Dawn Consolidated Holdings (Pty) Ltd and others v Competition Commission* [2018] 1 CPLR 1 (CAC) at para 29.

¹²⁹ Ibid.

¹³⁰ *Dawn Consolidated Holdings (Pty) Ltd and others v Competition Commission* [2018] 1 CPLR 1 (CAC) at para 29.

¹³¹ Ibid.

the effects on competition within the specific market context, mirroring the EU's focus on economic and legal context.

However, a notable difference is South Africa's stronger explicit emphasis on public interest, including the effect on employment, within its SA Competition Act mandate. This may lead to a more direct consideration of labour market impacts in South Africa compared to the traditional focus on product markets in EU competition law, although the EU's focus is evolving to include labour market agreements.

The SA Commission has investigated exclusivity clauses in shopping centre leases as vertical restraints that prevent or lessen competition and create barriers to entry, leading to consent agreements.¹³² This scrutiny of vertical restraints for market foreclosure shares similarities with the EU's approach to non-competes.

10.2. *Comparison of EU and SA's treatment of non-competes from a labour law perspective*

Both the EU and South Africa have historically relied on common law principles to assess the enforceability of non-compete clauses in employment contracts, focusing on the protection of legitimate interests and the reasonableness of the restriction.¹³³

There are currently developments in the UK to limit the duration of non-competes,¹³⁴ indicating a move towards stronger restrictions, which can be contrasted with South Africa's more case-by-case approach based on reasonableness.¹³⁵ South Africa's Constitution, in section 22,¹³⁶ emphasising the right to choose a trade, occupation, or profession, also plays a role in SA's scrutiny of restraint of trade clauses in employment contracts.

10.3. *How the SA Commission can draw learnings from a competition law perspective*

The SA Commission can draw several lessons from the EU's competition law perspective on non-compete clauses. The EU's growing attention to non-compete agreements¹³⁷ highlights

¹³² Marumogae, M "Anticompetitive consequences of exclusivity clauses contained in shopping centres' lease agreements" accessible at [Marumogae, M.C---"Anticompetitive Consequences of Exclusivity Clauses Contained in Shopping Centres' Lease Agreements" \[2024\] PER 71](#) at page 20 (Accessed on 20 January 2025).

¹³³ ENSafrica "Watch out employers: your non-compete and no-poaching agreements may also be considered anti-competitive in South Africa" accessible at [ENS - News - Watch out employers: your non-compete and no-poaching agreements may also be considered anti-competitive in South Africa](#) (Accessed on 20 January 2025).

¹³⁴ Ibid.

¹³⁵ Ibid.

¹³⁶ Section 22 of the South African Constitution guarantees the right to choose one's trade, occupation, or profession freely, but acknowledges that the practice of these can be regulated by law.

¹³⁷ ENSafrica "Watch out employers: your non-compete and no-poaching agreements may also be considered anti-competitive in South Africa" accessible at [ENS - News - Watch out employers: your non-compete and no-poaching agreements may also be considered anti-competitive in South Africa](#) (Accessed on 20 January 2025).

the potential for these clauses to restrict competition in labour markets, an area where the SA Competition Act also has a public interest mandate, including employment.¹³⁸

The CJEU's consistent emphasis on analysing the economic and legal context¹³⁹ when assessing non-competes is crucial. The SA Commission should continue to thoroughly investigate market structures, the positions of the firms involved, and the specific circumstances surrounding the use of non-compete clauses.

The EU's recognition that certain non-competes can be restrictions by object¹⁴⁰ suggests that the SA Commission should be vigilant about agreements that inherently aim to divide markets or exclude competitors, even if pro-competitive benefits are claimed. The *Dawn Consolidated Holdings*¹⁴¹ case shows that South African courts also engage in characterising the object of agreements.

The principles laid down in CJEU judgments, such as the consideration of potential competition and the impact on market liberalisation¹⁴², can inform the SA Commission's analysis of non-compete cases, even if the specific legal frameworks differ.

10.4. *Advocacy initiatives and learnings for the SA Commission*

The SA Commission can draw learnings by:

- Firstly, developing specific guidance on labour market agreements. The SA Commission could consider issuing guidelines or policy statements specifically addressing the application of competition law to non-compete agreements in the employment context. This would raise awareness among employers and employees about potential anti-competitive practices.
- Secondly, building on the experience with shopping centre leases and the GRMI, the Commission can continue engaging with businesses, industry associations, and labour organisations to discuss the competition implications of market restrictions and promote fair competition.
- Thirdly, monitoring compliance with commitments. As noted regarding the supermarket exclusivity clauses, monitoring compliance with any agreements or consent orders related to non-competes is crucial. The SA Commission should establish mechanisms for receiving and investigating complaints of non-compliance.

¹³⁸ Ibid.

¹³⁹ Ropes & Gray "CJEU judgment" available at [CJEU judgment provides guidance on non-compete clauses | Insights | Ropes & Gray LLP](#) (Accessed on 16 January 2025).

¹⁴⁰ Ibid.

¹⁴¹ *Dawn Consolidated Holdings (Pty) Ltd and others v Competition Commission* [2018] 1 CPLR 1 (CAC).

¹⁴² Ropes & Gray "CJEU judgment" available at [CJEU judgment provides guidance on non-compete clauses | Insights | Ropes & Gray LLP](#) (Accessed on 16 January 2025).

In conclusion, the treatment of non-compete clauses involves considerations from both competition and labour law perspectives, with approaches varying across jurisdictions. The EU, particularly with recent CJEU rulings, is increasingly scrutinising non-competes under competition law, while labour law treatment remains diverse among member states. South Africa, with its dual focus on competition principles and public interest, can learn from the EU's evolving approach and continue its advocacy efforts to ensure fair competition in all markets, including the labour market.

11. How non-compete clauses are viewed from a competition law perspective in the UK

In the UK, the assessment of standard post-termination non-compete clauses in employment contracts primarily falls under employment law and common law principles, rather than direct competition law.¹⁴³ The Competition and Markets Authority (CMA) is the primary competition regulator in the UK.¹⁴⁴ The CMA's focus in the labour market has been more on agreements between employers (undertakings) that restrict competition, such as no-poaching agreements, wage-fixing agreements, and information sharing, which they have noted may constitute business cartels and are subject to competition law.¹⁴⁵

There are key differences and similarities in competition law assessment between South Africa and the UK. In the UK, standard post-termination non-compete clauses in employment contracts are generally considered a matter of employment law rather than competition law. In South Africa, while traditionally viewed under labour law, there's a growing recognition and potential for assessment of these clauses under the broader scope of the Competition Act, particularly considering its public interest mandate and impact on employment.

12. How non-compete clauses are viewed from a labour law perspective in the EU

There are currently no statutory restrictions specifically on non-compete provisions in employment contracts in the UK.¹⁴⁶ Historically, the law on these clauses has been developed through common law.¹⁴⁷ Under common law, a non-compete clause will generally only be enforceable if it is no wider than reasonably necessary to protect a legitimate interest of the employer (such as confidential information or customer contacts) and is not contrary to the

¹⁴³ White & Case "White & Case Global Non-Compete Resource Center (NCRC)" accessible at [White & Case Global Non-Compete Resource Center \(NCRC\) | White & Case LLP](#) (Accessed on 16 March 2025).

¹⁴⁴ ENSafrica "Watch out employers: your non-compete and no-poaching agreements may also be considered anti-competitive in South Africa" accessible at [ENS - News - Watch out employers: your non-compete and no-poaching agreements may also be considered anti-competitive in South Africa](#) (Accessed on 20 January 2025).

¹⁴⁵ Ibid.

¹⁴⁶ White & Case "White & Case Global Non-Compete Resource Center (NCRC)" accessible at [White & Case Global Non-Compete Resource Center \(NCRC\) | White & Case LLP](#) (Accessed on 16 March 2025).

¹⁴⁷ ENSafrica "Watch out employers: your non-compete and no-poaching agreements may also be considered anti-competitive in South Africa" accessible at [ENS - News - Watch out employers: your non-compete and no-poaching agreements may also be considered anti-competitive in South Africa](#) (Accessed on 20 January 2025).

public interest.¹⁴⁸ The reasonableness is assessed with respect to the geographical area and duration of the restraint, as well as its clarity.¹⁴⁹

It is important to note that the UK government has proposed legislation to limit the duration of post-termination non-compete clauses in employment contracts to three months.¹⁵⁰ This proposal, outlined in the policy paper “*Smarter Regulation to Grow the Economy*,” aims to promote economic growth and innovation by making it easier for workers to switch jobs or start new businesses.¹⁵¹ However, this proposal is not yet law.

Both the UK and South Africa primarily assess the enforceability of employee non-compete clauses based on common law principles of reasonableness and restraint of trade. The UK is in the process of potentially introducing statutory limits on the duration of these clauses, whereas South Africa currently relies solely on common law.

12.1. *How the SA Commission can draw learnings from a competition law perspective*

While the UK traditionally treats employee non-competes primarily under employment law, the CMA's increasing interest in competition within labour markets, particularly concerning no-poaching and wage-fixing agreements. This trend of competition authorities worldwide scrutinising labour market practices is a crucial learning point for the SA Commission. The SA Commission can learn from the approaches and guidelines developed by other international authorities as they increasingly focus on the competitive implications of labour-related agreements.

12.2. *Advocacy initiatives and learnings for the SA Commission*

The CMA's practice of publishing research reports to inform policy, like the “*CMA research report on competition and market power in the UK labour market*” offers a valuable model for the SA Commission. The SA Commission could undertake more research into the dynamics of the South African labour market from a competition perspective and use these findings to advocate for policy changes or to raise awareness about potentially harmful practices.¹⁵² The SA Commission could follow the CMA's lead by issuing specific guidance to South African employers on what constitutes anti-competitive behaviour in the labour market, particularly

¹⁴⁸ White & Case “White & Case Global Non-Compete Resource Center (NCRC)” accessible at [White & Case Global Non-Compete Resource Center \(NCRC\) | White & Case LLP](#) (Accessed on 16 March 2025).

¹⁴⁹ ENSafrica “Watch out employers: your non-compete and no-poaching agreements may also be considered anti-competitive in South Africa” accessible at [ENS - News - Watch out employers: your non-compete and no-poaching agreements may also be considered anti-competitive in South Africa](#) (Accessed on 20 January 2025).

¹⁵⁰ White & Case “White & Case Global Non-Compete Resource Center (NCRC)” accessible at [White & Case Global Non-Compete Resource Center \(NCRC\) | White & Case LLP](#) (Accessed on 16 March 2025).

¹⁵¹ ENSafrica “Watch out employers: your non-compete and no-poaching agreements may also be considered anti-competitive in South Africa” accessible at [ENS - News - Watch out employers: your non-compete and no-poaching agreements may also be considered anti-competitive in South Africa](#) (Accessed on 20 January 2025).

¹⁵² Competition Markets Authority “CMA research report on competition and market power in UK labour market” accessible at [The CMA's research on competition and UK labour markets - GOV.UK](#) (Accessed on 16 March 2025).

concerning no-poaching and wage-fixing agreements. This would help businesses understand their obligations under competition law in the context of employment.

When focusing on labour markets, the SA Commission should leverage its mandate to consider the “*public interest, including the effect on employment*”.¹⁵³ Advocacy in this area could specifically highlight how anti-competitive labour practices may detrimentally affect job opportunities, wage levels, and the ability of individuals, especially historically disadvantaged employees, to obtain better employment or start their own businesses.

13. Treatment of non-compete agreements in the USA

The treatment of non-competes in the USA varies significantly between competition law and labour law perspectives, with different legislation, regulators, legal tests and case law at both the federal and state levels.

From a competition law perspective, the primary regulator is the Federal Trade Commission (FTC), operating under section 5 of the Federal Trade Commission Act (FTC Act), which prohibits unfair methods of competition.¹⁵⁴ Labour law, on the other hand, is primarily governed at the state level through common law and state statutes. Generally, non-competes are not favoured and are enforceable only if they are reasonable in scope and duration and necessary to protect the employer's legitimate business interests. There have been recent state-level actions, including bans in Minnesota and restrictions in New York, demonstrating a trend toward limiting enforceability.¹⁵⁵

14. How non-compete clauses are viewed from a competition law perspective in the USA

From a competition law perspective, the primary piece of federal legislation dealing with non-compete agreements is section 5 of the FTC Act, which prohibits unfair methods of competition.¹⁵⁶ Leveraging this section, the FTC recently issued a final rule that largely bans non-compete clauses nationwide, defining a non-compete as any employment term that prohibits, penalises, or functions to prevent a worker from seeking other work in the USA or

¹⁵³ ENSafrica “Watch out employers: your non-compete and no-poaching agreements may also be considered anti-competitive in South Africa” accessible at [ENS - News - Watch out employers: your non-compete and no-poaching agreements may also be considered anti-competitive in South Africa](#) (Accessed on 20 January 2025).

¹⁵⁴ Federal Trade Commission “FTC Cracks Down on Companies That Impose Harmful Noncompete Restrictions on Thousands of Workers” accessible at [FTC Cracks Down on Companies That Impose Harmful Noncompete Restrictions on Thousands of Workers | Federal Trade Commission](#) (Accessed on 20 January 2025).

¹⁵⁵ ENSafrica “Watch out employers: your non-compete and no-poaching agreements may also be considered anti-competitive in South Africa” accessible at [ENS - News - Watch out employers: your non-compete and no-poaching agreements may also be considered anti-competitive in South Africa](#) (Accessed on 20 January 2025).

¹⁵⁶ ENSafrica “Watch out employers: your non-compete and no-poaching agreements may also be considered anti-competitive in South Africa” accessible at [ENS - News - Watch out employers: your non-compete and no-poaching agreements may also be considered anti-competitive in South Africa](#) (Accessed on 20 January 2025).

starting a business in the USA after their employment ends.¹⁵⁷ The rule prohibits entering into or attempting to enter into new non-competes with all workers except senior executives, and bans the enforcement of existing non-competes for workers other than senior executives after the rule's effective date.¹⁵⁸

The Sherman Act and the Clayton Antitrust Act of 1914 are broader antitrust laws that can also be relevant to non-compete agreements, particularly in the context of agreements between businesses.¹⁵⁹ The Department of Justice (DoJ) also plays a role in tackling anti-competitive labour practices.¹⁶⁰

Historically, scrutiny of non-competes under USA federal competition law was less frequent than under state labour law.¹⁶¹ However, in recent years, the FTC has intensified its focus, viewing non-compete clauses as an unfair method of competition that keeps wages low, suppresses new ideas, and stifles economic dynamism.¹⁶² This has led to enforcement actions against companies imposing non-compete restrictions on workers.¹⁶³

14.1. *Recent Developments from a competition law perspective*

A significant recent development is the FTC's final rule, issued on 3 April 2024, to ban most worker non-competition provisions nationwide.¹⁶⁴ This rule deems employee non-competes an “*unfair method of competition*” under section 5 of the FTC Act and applies to all employees, including senior executives, though with different treatment for existing non-competes for senior executives.¹⁶⁵ The rule became effective 120 days after its publication in the Federal Register.¹⁶⁶

14.1.1. *Legal tests*

The FTC determines whether a practice is an “*unfair method of competition*” by assessing if it is a method of competition (as opposed to a condition of the marketplace) and if it is unfair,

¹⁵⁷ Federal Trade Commission “Non-Compete Clause Rule” available at [Non-Compete Clause Final Rule](#) at page 2 (Accessed on 16 January 2025).

¹⁵⁸ Ibid.

¹⁵⁹ Federal Trade Commission “Non-Compete Clause Rule” available at [Non-Compete Clause Final Rule](#) (Accessed on 16 January 2025).

¹⁶⁰ ENSafrica “Watch out employers: your non-compete and no-poaching agreements may also be considered anti-competitive in South Africa” accessible at [ENS - News - Watch out employers: your non-compete and no-poaching agreements may also be considered anti-competitive in South Africa](#) (Accessed on 20 January 2025).

¹⁶¹ Federal Trade Commission “Non-Compete Clause Rule” available at [Non-Compete Clause Final Rule](#) at page 5 (Accessed on 16 January 2025).

¹⁶² Federal Trade Commission “FTC Announces Rule Banning Noncompetes” available at [FTC Announces Rule Banning Noncompetes | Federal Trade Commission](#) (Accessed on 16 January 2025).

¹⁶³ Federal Trade Commission “FTC Cracks Down on Companies That Impose Harmful Noncompete Restrictions on Thousands of Workers” available at [FTC Cracks Down on Companies That Impose Harmful Noncompete Restrictions on Thousands of Workers | Federal Trade Commission](#) (Accessed on 16 January 2025).

¹⁶⁴ Federal Trade Commission “FTC Announces Rule Banning Noncompetes” available at [FTC Announces Rule Banning Noncompetes | Federal Trade Commission](#) (Accessed on 16 January 2025).

¹⁶⁵ American Bar Association “FTC Votes to Ban Employee Noncompete Agreements and Policies” available at [FTC Votes to Ban Employee Noncompete Agreements and Policies](#) (Accessed on 16 January 2025).

¹⁶⁶ Ibid.

meaning it goes beyond legitimate business needs and tends to negatively affect competitive conditions.¹⁶⁷ This assessment doesn't necessarily require a full market definition or proof of market power.¹⁶⁸ The FTC's new rule signifies a move towards a broader prohibition rather than a case-by-case rule of reason analysis for most non-competes.¹⁶⁹

14.1.2. Case law from a USA competition law perspective

Early antitrust cases like *United States v. American Tobacco Co.* (1911)¹⁷⁰ recognised the use of non-competes as part of practices that violated antitrust laws.¹⁷¹ More recently, the FTC has brought cases directly challenging non-compete agreements as unfair methods of competition, such as the actions against *O-I Glass* and *Ardagh Group S.A.*, where these glass container manufacturers were forced to drop non-compete restrictions on thousands of workers.¹⁷² The FTC also took action against *Prudential Security, Inc.*, for imposing harmful non-compete restrictions.¹⁷³ The Prudential Command Inc., along with its owners, Greg Wier and Matthew Keywell, illegally imposed non-compete restrictions on workers in positions ranging from low-wage security guards to manufacturing workers to engineers.¹⁷⁴ These restrictions barred them from seeking or accepting work with another employer or operating a competing business after they left the companies.¹⁷⁵ The FTC highlighted that Prudential's conduct constituted an unfair method of competition under section 5 of the FTC Act.¹⁷⁶

14.1.3. Regional and state variations from a competition law perspective

While the FTC's new rule aims for a nationwide standard, historically, the enforceability of non-competes has varied significantly by state.¹⁷⁷ Some states, like California, North Dakota, and Oklahoma, have had long-standing prohibitions against most non-competes.¹⁷⁸ Others have taken recent legislative action, such as Minnesota's prohibition in 2023 and New York's recent

¹⁶⁷ Federal Trade Commission "Non-Compete Clause Rule" available at [Non-Compete Clause Final Rule](#) at page 226 (Accessed on 16 January 2025).

¹⁶⁸ Federal Trade Commission "FTC Announces Rule Banning Noncompetes" available at [FTC Announces Rule Banning Noncompetes | Federal Trade Commission](#) at page 54 (Accessed on 16 January 2025).

¹⁶⁹ Ibid.

¹⁷⁰ *United States v. American Tobacco Co.*, 221 U.S. 106 (1911).

¹⁷¹ Federal Trade Commission "Non-Compete Clause Rule" available at [Non-Compete Clause Final Rule](#) at page 5 (Accessed on 16 January 2025).

¹⁷² ENSafrica "Watch out employers: your non-compete and no-poaching agreements may also be considered anti-competitive in South Africa" accessible at [ENS - News - Watch out employers: your non-compete and no-poaching agreements may also be considered anti-competitive in South Africa](#) (Accessed on 20 January 2025).

¹⁷³ *In the Matter of Prudential Security, Inc., a corporation; Prudential Command Inc., a corporation; Greg Wier, a natural person; and Matthew Keywell, a natural person* at paras 27, 28, 29 and 30.

¹⁷⁴ Federal Trade Commission "FTC Cracks Down on Companies That Impose Harmful Noncompete Restrictions on Thousands of Workers" accessible at [FTC Cracks Down on Companies That Impose Harmful Noncompete Restrictions on Thousands of Workers | Federal Trade Commission](#) (Accessed on 20 January 2025).

¹⁷⁵ Ibid.

¹⁷⁶ ENSafrica "Watch out employers: your non-compete and no-poaching agreements may also be considered anti-competitive in South Africa" accessible at [ENS - News - Watch out employers: your non-compete and no-poaching agreements may also be considered anti-competitive in South Africa](#) (Accessed on 20 January 2025).

¹⁷⁷ OECD, "Competition Issues in Labour Markets – Note by Finland", available at [https://one.oecd.org/document/DAF/COMP/WD\(2019\)38/en/pdf](https://one.oecd.org/document/DAF/COMP/WD(2019)38/en/pdf) at para 7 (Accessed on 15 October 2024)

¹⁷⁸ Federal Trade Commission "Non-Compete Clause Rule" available at [Non-Compete Clause Final Rule](#) at page 289 (Accessed on 16 January 2025).

bill to prohibit non-competes.¹⁷⁹ The FTC rule does have a pre-emptive effect over state laws that would permit conduct deemed an unfair method of competition under the rule.¹⁸⁰

14.1.4. *Comparison with South African competition law*

Similar to the USA, South African competition authorities are increasingly scrutinising non-compete agreements for their potential anti-competitive effects in the labour market.¹⁸¹ The SA Competition Act also emphasises public interest considerations, including employment.¹⁸² However, South Africa does not currently have explicit provisions in its SA Competition Act specifically prohibiting these agreements.¹⁸³ Instead, they may be considered as agreements not to compete or as prohibited vertical arrangements or abuses of dominance that lessen competition in the labour market.¹⁸⁴ South African courts also apply a process of characterisation to determine if conduct contravenes competition law.¹⁸⁵

15. **Treatment of non-competes in the USA from a labour law perspective**

From a labour law perspective, there is no comprehensive federal law specifically regulating non-compete agreements. Instead, the treatment of these agreements has largely been governed by state common law and state statutes.¹⁸⁶ State courts play a primary role in interpreting and enforcing non-compete agreements based on principles of contract law and public policy.¹⁸⁷ State legislatures have also enacted laws to regulate or ban non-competes in certain contexts or for certain types of employees.¹⁸⁸

For a non-compete to be deemed enforceable under state labour law, it typically must satisfy criteria of reasonableness concerning its geographic scope, duration, and necessity to protect the employer's legitimate business interests, such as trade secrets, confidential information, and established customer relationships.¹⁸⁹

¹⁷⁹ ENSafrica "Watch out employers: your non-compete and no-poaching agreements may also be considered anti-competitive in South Africa" accessible at [ENS - News - Watch out employers: your non-compete and no-poaching agreements may also be considered anti-competitive in South Africa](#) (Accessed on 20 January 2025).

¹⁸⁰ Federal Trade Commission "Non-Compete Clause Rule" available at [Non-Compete Clause Final Rule](#) page 395 (Accessed on 16 January 2025).

¹⁸¹ ENSafrica "Watch out employers: your non-compete and no-poaching agreements may also be considered anti-competitive in South Africa" accessible at [ENS - News - Watch out employers: your non-compete and no-poaching agreements may also be considered anti-competitive in South Africa](#) (Accessed on 20 January 2025).

¹⁸² *Ibid.*

¹⁸³ *Ibid.*

¹⁸⁴ *Ibid.*

¹⁸⁵ *Dawn Consolidated Holdings (Pty) Ltd and others v Competition Commission* [2018] 1 CPLR 1 (CAC) at paras 13 and 14.

¹⁸⁶ OECD, "Competition Issues in Labour Markets – Note by Finland", available at [https://one.oecd.org/document/DAF/COMP/WD\(2019\)38/en/pdf](https://one.oecd.org/document/DAF/COMP/WD(2019)38/en/pdf) at para 7 (Accessed on 15 October 2024).

¹⁸⁷ Federal Trade Commission "Non-Compete Clause Rule" available at [Non-Compete Clause Final Rule](#) at page 4 (Accessed on 16 January 2025).

¹⁸⁸ ENSafrica "Watch out employers: your non-compete and no-poaching agreements may also be considered anti-competitive in South Africa" accessible at [ENS - News - Watch out employers: your non-compete and no-poaching agreements may also be considered anti-competitive in South Africa](#) (Accessed on 20 January 2025).

¹⁸⁹ Federal Trade Commission "Non-Compete Clause Rule" available at [Non-Compete Clause Final Rule](#) at page 566 (Accessed on 16 January 2025).

15.1. *How the USA deals with non-competes through a labour law lens*

Historically, under state common law, non-compete agreements are generally not favoured as they can restrict an individual's ability to earn a livelihood.¹⁹⁰ They are typically enforceable only if they are reasonable in scope (geographical area and duration) and are necessary to protect the employer's legitimate business interests, such as trade secrets, confidential information, and customer relationships.¹⁹¹ The specific requirements for reasonableness vary significantly from state to state. Some states, such as California, North Dakota, and Oklahoma, have long-standing statutory provisions that generally void most non-compete agreements.¹⁹²

15.2. *Comparison with South African labour law*

In both South Africa and the USA, the application of non-compete agreements in labour law has historically involved assessing their reasonableness in balancing the protection of the employer's legitimate business interests against the employee's right to work and earn a living.¹⁹³ Both legal systems recognise that employers may have valid proprietary interests, such as trade secrets and customer relationships, that warrant protection through carefully tailored restrictions. Furthermore, concerns about the potential for unequal bargaining power between employers and employees have influenced the scrutiny applied to these agreements in both jurisdictions.

The common law principles in South Africa and the state common law in the USA share a focus on ensuring that the scope, duration, and geographical reach of a non-compete are no broader than necessary to protect those legitimate interests.¹⁹⁴ However, significant differences exist in the application and legal landscape of non-competes in labour law between the two countries.

15.3. *Learnings for the SA Commission from a competition law perspective*

Firstly, the FTC's decision to issue a federal rule banning most non-competes demonstrates a proactive approach to addressing perceived widespread harm to competition in labour markets.¹⁹⁵ The SA Commission could explore the feasibility and benefits of developing

¹⁹⁰ Federal Trade Commission "Non-Compete Clause Rule" available at [Non-Compete Clause Final Rule](#) at page 5 (Accessed on 16 January 2025).

¹⁹¹ ENSafrica "Watch out employers: your non-compete and no-poaching agreements may also be considered anti-competitive in South Africa" accessible at [ENS - News - Watch out employers: your non-compete and no-poaching agreements may also be considered anti-competitive in South Africa](#) (Accessed on 20 January 2025).

¹⁹² OECD, "Competition Issues in Labour Markets – Note by Finland", available at [https://one.oecd.org/document/DAF/COMP/WD\(2019\)38/en/pdf](https://one.oecd.org/document/DAF/COMP/WD(2019)38/en/pdf) at paras 6 and 7 (Accessed on 15 October 2024)

¹⁹³ Federal Trade Commission "Non-Compete Clause Rule" available at [Non-Compete Clause Final Rule](#) at page 567 (Accessed on 16 January 2025).

¹⁹⁴ ENSafrica "Watch out employers: your non-compete and no-poaching agreements may also be considered anti-competitive in South Africa" accessible at [ENS - News - Watch out employers: your non-compete and no-poaching agreements may also be considered anti-competitive in South Africa](#) (Accessed on 20 January 2025).

¹⁹⁵ Federal Trade Commission "Non-Compete Clause Rule" available at [Non-Compete Clause Final Rule](#) at page 4 (Accessed on 16 January 2025).

guidelines or regulations specifically addressing the use of non-compete clauses that have significant anti-competitive effects.

Secondly, the FTC's increased focus on non-competes as a tool to suppress wages and limit worker mobility highlights the importance of considering labour markets as a critical area for competition enforcement.¹⁹⁶ The SA Commission can similarly prioritise investigations and advocacy efforts that examine how non-compete agreements impact market competition and public interest, including employment, as mandated by the Competition Act.¹⁹⁷

Lastly, there should be an evidence-based approach. The FTC's rulemaking was supported by extensive empirical research and public consultation. The SA Commission could similarly strengthen its understanding of the economic effects of non-compete agreements in the South African context through research and data analysis.

15.4. *Advocacy initiatives and learnings*

The FTC conducted hearings, workshops, and solicited public comments to gather information and build support for its rule.¹⁹⁸ The SA Commission could undertake similar initiatives to raise awareness about the competition implications of non-competes and engage with businesses, workers, and legal experts.

The FTC mentioned potential collaboration with other federal agencies.¹⁹⁹ The SA Commission could explore closer collaboration with labour departments and other relevant government bodies to develop a more holistic approach to the issue of non-competes. The FTC emphasised how non-competes harm workers and the economy.²⁰⁰ The SA Commission can similarly highlight the detrimental effects of overly broad or unnecessary non-competes on employment opportunities, skills development, and economic growth, aligning with the public interest mandate of the SA Competition Act.²⁰¹

¹⁹⁶ ENSafrica "Watch out employers: your non-compete and no-poaching agreements may also be considered anti-competitive in South Africa" accessible at [ENS - News - Watch out employers: your non-compete and no-poaching agreements may also be considered anti-competitive in South Africa](#) (Accessed on 20 January 2025).

¹⁹⁷ Ibid.

¹⁹⁸ Federal Trade Commission "Non-Compete Clause Rule" available at [Non-Compete Clause Final Rule](#) at page 7 (Accessed on 16 January 2025).

¹⁹⁹ Federal Trade Commission "Non-Compete Clause Rule" available at [Non-Compete Clause Final Rule](#) at page 378 (Accessed on 16 January 2025).

²⁰⁰ Federal Trade Commission "FTC Announces Rule Banning Noncompetes" available at [FTC Announces Rule Banning Noncompetes | Federal Trade Commission](#) at page 7 (Accessed on 16 January 2025).

²⁰¹ ENSafrica "Watch out employers: your non-compete and no-poaching agreements may also be considered anti-competitive in South Africa" accessible at [ENS - News - Watch out employers: your non-compete and no-poaching agreements may also be considered anti-competitive in South Africa](#) (Accessed on 20 January 2025).

16. Conclusion

In conclusion, the journey through the treatment of non-compete agreements across the EU, the UK, Egypt, Nigeria and the USA offers valuable insights for the SA Commission as it navigates the intersection of competition and labour law. The experiences and evolving approaches in these jurisdictions underscore the growing recognition that non-compete clauses, while traditionally viewed through a labour law lens, can have significant implications for competition, particularly in labour markets.

The EU's emphasis on analysing the economic and legal context of non-compete clauses, distinguishing between restrictions by object and effect, and considering their potential as market foreclosure mechanisms can inform the development of nuanced guidelines by the SA Commission. Lessons can also be drawn from Egypt's approach to vertical agreements, where non-compete clauses were found to restrict competition between distributors in the dairy sector. South African case law, such as *Dawn Consolidated Holdings*, demonstrates that the courts engage in characterising the object of agreements when assessing non-compete clauses, indicating they are not automatically prohibited but are subject to analysis.

The UK's CMA's initiative to publish guidance on anti-competitive labour market agreements provides a direct model for the SA Commission to develop specific guidelines on the assessment of non-compete and no-poaching agreements, detailing factors such as scope, duration, geographical area, industry nature, and effects on worker mobility and innovation.

The USA's FTC's recent federal rule banning most non-competes showcases a proactive stance that the SA Commission could consider when evaluating the feasibility and benefits of more direct interventions where widespread harm to competition in labour markets is evident. These guidelines should reflect South Africa's unique legal and economic landscape, particularly the public interest mandate of the SA Competition Act, including the effect on employment.

The EU's focus on potential competition and the impact on market liberalisation highlights the need for the SA Commission to delve deeper into the dynamics of South African markets. The UK's CMA's practice of publishing research reports to inform policy offers a strong example for the SA Commission to undertake more empirical research on the economic effects of non-compete agreements in the South African context. This research can help the SA Commission to better understand how these clauses affect wages, worker mobility, innovation, and the entry of small and medium-sized enterprises (SMEs). The FTC's evidence-based approach to

rulemaking, supported by extensive research and public consultation, underscores the importance of rigorous analysis to underpin any policy interventions or enforcement actions.

The UK's CMA's proactive advocacy by publishing guidance to employers provides a clear path for the SA Commission to raise awareness among businesses and employees about the competition implications of labour market restrictions. Building on its experience with exclusivity clauses in shopping centres, the SA Commission can continue engaging with businesses, industry associations, and labour organisations to discuss the competition implications of labour market restraints and promote fair competition. The FTC's emphasis on how non-competes harm workers and the economy highlights the importance for the SA Commission to articulate the detrimental effects of overly broad or unnecessary non-competes on employment opportunities, skills development, and economic growth, aligning with the public interest mandate of the SA Competition Act. Furthermore, the FTC's engagement through hearings, workshops, and public comments offers a model for the SA Commission to foster dialogue and build support for its initiatives in this area.

By constructively acknowledging and reflecting upon these diverse international experiences, the SA Commission can be better equipped to draft effective guidelines, conduct insightful research, and undertake impactful advocacy initiatives to foster a more competitive and inclusive economy, while balancing the legitimate interests of businesses and the employment opportunities of individuals.