

Application of the Principle of Balance in Non-Competition Clauses in Indonesia Based on German Law

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Abstract: *The objectives of this study are, first, to identify and analyze the existence of the principle of balance in employment agreements containing non-competition clauses; and second, to determine fair and balanced non-competition regulation in Indonesia based on German law. This study uses a normative legal research method with a doctrinal research type and is analytically prescriptive. The approaches employed are a legislative approach, a conceptual approach, and comparative law. The legal materials used consist of primary, secondary, and tertiary legal materials collected through literature review and then analyzed qualitatively. The results of the study indicate that, first, the existence of the principle of balance in the application of non-competition clauses in employment agreements is not sufficient simply by having a formal agreement; it is also measured by the substance of the clause. Non-competition clauses can only be maintained if they meet certain reasonable criteria. Second, for the application of non-competition clauses to reflect the principle of balance, clear and measurable legal regulations are required, as stipulated in German law. These arrangements need to contain written conditions, the existence of a legitimate business interest, limitations on the time period, area and scope of work, and the obligation to provide compensation to workers during the restriction period.*

Keywords: *employment agreement; non-competition clause; principle of balance*

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INTRODUCTION

To establish the rights and obligations of each party during the employment relationship, the employer and employee enter into an employment agreement. These rights and obligations are regulated in the employment agreement to create a good working relationship between the

employer and employee during and after the employment relationship ends.¹ In practice, to protect trade secrets and advantages owned by the company from being used by other parties or competitors in similar fields, the company and workers often make work agreements containing non-competition clauses which prohibit working or establishing a business in the same field after the termination or end of the employment relationship between the employer and the worker. However, non-competition agreements are often considered unfair from the worker's point of view because they are considered to limit the basic right to freedom of work and earn a decent income, which is protected in Article 27 paragraph (2) of the 1945 Constitution of the Republic of Indonesia.

Disputes between parties regarding how to interpret a non-competition clause in an employment agreement can create legal issues for both employers and employees. Employees argue that the wording of the provision limits their ability to choose and obtain ideal employment, and that the provision does not meet the standards of a legally valid agreement. Employers, on the other hand, argue that employees who violate the non-competition clause have violated the agreed-upon employment agreement and are considered to have committed a breach of contract.²

First, non-competition clauses are not specifically regulated in Indonesian positive law. The requirements, format, and limitations of these articles are not found in Law Number 13 of 2003 concerning Manpower and the latest amendment employment Law in Indonesia currently refers to Law Number 6 of 2023. Due to this legal vacuum, some companies implement non-competition clauses without considering the principle of proportional balance. This situation not only creates legal uncertainty, but can also disrupt the balance of interests between employers and employees, creating tension between the interests of employees to earn income to support their lives and the interests of employers as employers to protect trade secrets and company advantages from being used by other parties or competitors in the same industry.

The concept of the principle of balance is more in line with business realities because it is not based on the equal bargaining position of the parties. The principle of balance is defined as a balance of interests between the parties and the interests of society, in accordance with a sense of social propriety or appropriateness. The principle of balance is based on the goal of achieving a balanced condition or one party not being too disadvantaged.³ The contract or agreement is satisfactory and profitable for all parties and to avoid losses or disputes in the future.⁴

Second, the use of non-competition clauses can lead to actions that violate the values of justice and balance if there are no clear and strict guidelines. Therefore, it is crucial to conduct research on the principle of balance in employment agreements containing non-competition clauses. This is in addition to understanding the existence of the principle of balance in

¹ Ria Sutarko and Sudjana, "Klausul Non-Kompetisi dalam Perjanjian Kerja Dikaitkan dengan Prinsip Kerahasiaan Perusahaan dalam Perspektif Hak untuk Memilih Pekerjaan Berdasarkan Hukum Positif Indonesia," *Al-Amwal* 1, no. 1 (2018): 93.

² Levy Yuda Suryadinata, "Penegakan Klausula Non-Kompetisi di Indonesia," *Jurnal Hukum Tribuere* 1, no. 1 (2022): 43.

³ Herlien Boediono, *Asas Keseimbangan bagi Hukum Perjanjian Indonesia: Hukum Perjanjian Berlandaskan Asas-Asas* (Bandung: PT Citra Aditya Bakti, 2006), 5.

⁴ Hadian Indrawan Putra et al., "Asas Keseimbangan dalam Kontrak Pengadaan Barang dan Jasa," *Locus: Jurnal Konsep Ilmu Hukum* 3, no. 3 (2023): 179.

employment agreements containing non-competition clauses, as well as how to apply non-competition clauses to achieve the principle of balance for the parties in a proportional and legally certain employment agreement.

To achieve balance and prevent conflicting circumstances within non-competition clauses in employment agreements, clear, measurable, and fair legal regulations are necessary for all parties. Non-competition clauses need to be defined by clear parameters, including economic compensation, legitimate business interests, a reasonable timeframe, geographic boundaries, and transactions involving specific positions. These parameters are crucial to prevent non-competition clauses from excessively restricting workers' rights. If a clause conflicts with these requirements, it can be declared void and legally ineffective based on based primarily on Indonesian contract law, particularly Articles 1320 and 1337 of the Indonesian Civil Code.

METHOD

This study is normative, or doctrinal, legal research: it examines the statutory rules bearing on non-competition clauses from the standpoint of contract law and employment law in Indonesia. It employs statutory, conceptual, comparative, and case approaches. The legal materials are primary and secondary. The primary materials comprise the 1945 Constitution of the Republic of Indonesia; the *Burgerlijk Wetboek* (Civil Code, Staatsblad 1847 Number 23); Law Number 13 of 2003 on Manpower together with its latest amendment, Law Number 6 of 2023; and, from German law, the *Handelsgesetzbuch* (HGB) and the *Gewerbeordnung* (GewO). The secondary materials, which explain the primary ones, consist of books, law journals, legal opinions, and other documents connected to the legal problem under study. These materials were gathered through a literature study that inventoried and identified the relevant legislation, literature, articles, and journals, and were then analyzed qualitatively.

ANALYSIS AND DISCUSSION

The Existence of the Principle of Balance in Employment Agreements Containing Non-Competition Clauses

The principle of balance occupies a crucial position in contract law because it ensures that contractual relationships are not solely based on a formal agreement of wills, but also on a fair distribution of rights and obligations. In the context of employment contracts, the meaning of this principle becomes more complex. Employment relationships do not arise from a position of complete equality from the outset. Employers possess capital, organizational control, access to information, and the ability to draft standard contracts, while workers generally find themselves in a situation where they need work to support their livelihoods. Therefore, the existence of the principle of balance in an employment contract cannot be assessed solely on the fact that the parties have signed the contract, but rather on whether the contents of the contract truly reflect the proportionality of the parties' interests.⁵

The existence of this principle of balance is inseparable from the reality of the practice of making agreements, which often shows inequality, both in the legal status of the parties and

⁵ A. Y. Hernoko, *Hukum Perjanjian: Asas Proporsionalitas dalam Kontrak Komersial* (Jakarta: Kencana, 2014), 14.

in bargaining power. Where one party bears a heavier burden than the other. In employment relationships, this condition is generally experienced by workers, who are in a weaker position than employers. This principle refers to the appropriateness of position, level, and burden of obligations between the parties bound by the contract. The principle of balance does not stand alone but is a manifestation of the principles of good faith and justice that should be the basis of every agreement.⁶

Although the Civil Code (*Burgerlijk Wetboek*) does not specifically mention the principle of balance in Indonesian contract law, this principle is recognized by the general principles underlying contract law, such as the principle of freedom of contract (Article 1338 of the Civil Code), the principle of good faith (Article 1338 paragraph (3) of the Civil Code), and the principle of justice and fairness.⁷

Theoretically, the principle of balance in employment agreements with non-competition clauses must be read alongside the principle of freedom of contract. Freedom of contract does indeed give the parties room to determine the contents of the agreement according to their wishes. However, in Indonesian contract law, this freedom is not absolute. The validity of an agreement remains subject to the conditions of Article 1320 of the Indonesian Civil Code, is limited by provisions regarding lawful causes, morality, and public order as in Article 1337 of the Indonesian Civil Code, and must be carried out in good faith according to Article 1338 paragraph (3) of the Indonesian Civil Code. In employment relations, the reading of these articles must be enriched with the protective character of employment law, because workers are not just ordinary contractual parties, but subjects who, from a socio-economic perspective, require stronger legal protection.⁸

A good employment relationship must be built on a proportional balance between the rights and obligations of workers and employers. The principle of balance plays a crucial role in maintaining stable and harmonious employment relations. Employers must not establish policies that solely benefit one party without considering the consequences for workers. On the other hand, workers are also required to carry out their duties professionally and must not abuse the legal protections afforded to them.⁹ This work restriction is illogical and clearly violates the principle of fairness for workers. This is a significant problem because job skills are not company secrets. It's natural for workers to possess skills acquired and trained during their time at the company. Job skills are a bargaining chip for workers in securing employment.¹⁰

Restrictions on an individual's economic mobility after an employment relationship have the potential to harm workers' human rights as guaranteed by the 1945 Constitution of the Republic of Indonesia, Article 27 paragraph (2) which guarantees the right to work and a decent life for all human beings. Article 28 paragraph (2) states that everyone has the right to work and receive fair and decent wages and treatment in employment relationships. This legal

⁶Eva Noviana et al., "Asas Keseimbangan dalam Perjanjian Kerja antara Pekerja dan Pengusaha dalam rangka Mewujudkan Keadilan bagi Para Pihak," *Jurnal Wawasan Yuridika* 6, no. 1 (2022): 89.

⁷Anastasia Regita Rintan Sahara and Imelda Martinelli, "Penerapan Asas Keseimbangan dalam Perjanjian," *Unis Law Review* 8, no. 1 (2025): 254.

⁸L. Husni, *Pengantar Hukum Ketenagakerjaan Indonesia* (Jakarta: RajaGrafindo Persada, 2016), 32.

⁹Sukhebi Mofea, *Hukum Ketenagakerjaan: Panduan Praktis untuk Pengusaha*, 1st ed. (Padang: CV Get Press Indonesia, 2025), 4–5.

¹⁰Dennis Atallah and Suherman, "Keadilan Hukum bagi Pekerja Berdasarkan Klausul Non-Kompetisi dalam Kontrak," *Jurnal USM Law Review* 8, no. 3 (2025): 2234.

dilemma is exacerbated by the fact that positive labor law in Indonesia, including through Law Number 13 of 2003 concerning Manpower and its amendment in Law Number 6 of 2023 concerning Job Creation, does not explicitly regulate the limitations or technical requirements for the validity of the clause. Therefore, the existence of the principle of balance in a non-competition clause is not sufficiently proven by a formal agreement, but must be tested through the substance of the clause. Non-competition clauses that apply to all workers, including operational level workers who do not have access to strategic trade secrets, show a tendency towards overreach or too broad a scope. In such conditions, it is difficult to say that the clause is balanced because it is not based on a concrete need for protection, but rather on the employer's desire to narrow the room for workers to move in the job market.¹¹ Non-competition clauses are considered a preventative measure to ensure business continuity and prevent unfair competition. However, in practice, non-compete clauses often cause problems, especially for workers. These clauses are often unilaterally included by companies in standard contracts, leaving workers with no opportunity to negotiate. As a result, after the employment agreement expires, workers lose the opportunity to find new jobs that match their skills.

Article 31 of the Manpower Law states that every worker has the same rights and opportunities to choose, obtain, or change jobs and earn a decent income, whether domestically or internationally. This contradicts the inclusion of a non-competition clause, which limits individual freedom to choose a job. Likewise, Article 38 paragraph (2) of the Human Rights Law states that, "everyone has the right to freely choose a job and earn a decent income in or that they like and also has the right to fair employment conditions. As is known, the provisions of laws and regulations in Indonesia still do not expressly prohibit or allow the inclusion of a non-competition clause in an employment agreement. Therefore, although the inclusion of a non-competition clause is intended to prevent the disclosure of crucial company information such as trade secrets or other information that provides an advantage to competitors by former employees, it is only natural that the inclusion of this non-competition clause does not discriminate against workers' rights to obtain freedom in choosing a job. Therefore, there needs to be a review of the effectiveness of this clause by paying attention to the balance between the interests of the company and workers.¹² A healthy employment relationship must be based on a balance between the rights and obligations of workers and employers. This principle of balance is crucial to creating stable industrial relations.

Although the relationship between workers and employers is a relationship of mutual need, but in the Employment Law, it is stated that the position of workers is always below the employer, because the status of workers is not equal to that of employers. This imbalance is what sometimes makes employment agreements burdensome. Employment agreements are considered something that is coercive because the parties have the freedom to determine the conditions desired in the agreement.¹³

¹¹ Adinda Aurellia Salsabilla et al., "Menakar Keadilan Substantif dalam Enforceability Klausul Non-Kompetisi di Indonesia: Analisis Perbandingan Pasca-Putusan Mahkamah Agung Nomor 3549 K/Pdt/2023," *Al-Zyan: Jurnal Ilmu Sosial & Hukum* 4, no. 2 (2026): 2334.

¹² Syaira Ramanda Ismail and Nisrina Aliya Kamila, "Dilema Yuridis Klausul Non-Kompetisi: Mengurai Proporsionalitas Hak Kebebasan Bekerja dan Jaminan Perlindungan Rahasia Dagang," *Padjadjaran Law Review* 13, no. 2 (2025): 33.

¹³ Muhammad Dihariantio, Suartini, and Anas Lutfi, "Penyertaan Klausul Non-Kompetisi dalam Perjanjian Kerja dari Perspektif Hukum Indonesia," *JIHHP: Jurnal Ilmu Hukum, Humaniora dan Politik* 5, no. 1 (2024): 211.

Then, Supreme Court Decision Number 3549 K/Pdt/2023 emerged as a reference regarding the validity of non-competition clauses in employment agreements. This case was a settlement of a breach of contract between PT Berca Schindler Lifts as the plaintiff/applicant and Shara Agustina as the defendant/respondent in the cassation. The defendant previously worked as a salesperson at the company. Her employment agreement contained provisions regarding trade secret protection and a prohibition on employment with companies operating in a similar business sector for 12 months after the employment relationship ended. After resigning, the defendant worked for PT Citas Otis Elevator before the 12-month waiting period expired. The company operates in a similar business sector, namely the elevator and lift business. PT Berca Schindler Lifts subsequently filed a lawsuit, arguing that this action violated the terms of the employment agreement and potentially compromised the Company's sensitive information and trade secrets. The Supreme Court held that the clause prohibiting employment at a similar company for a specified period of time did not violate the Human Rights Law or the Employment Law, as the clause relates to the protection of trade secrets. The defendant was also deemed to have conscious knowledge of sensitive company information because he had worked for more than 10 years, but immediately joined a competitor without going through the agreed waiting period.¹⁴

Supreme Court Decision No. 3549 K/Pdt/2023 confirms that non-competition clauses in employment agreements can be binding and do not necessarily violate workers' rights to employment. As long as the clause is intended to protect trade secrets and is agreed upon within a specific timeframe, a violation can be classified as a breach of contract and result in an obligation to pay compensation. However, this decision must be understood based on the specific circumstances of the case and does not mean that every non-competition clause is automatically valid without testing its reasonableness and balance.

The use of non-compete clauses in resolving disputes between workers and companies in court has undergone a fundamental shift from a highly protective approach toward workers to one that is more accommodating to business interests and contract certainty. Supreme Court Decision No. 3549 K/Pdt/2023 affirms that non-compete clauses have a valid legal basis under Article 1338 of the Indonesian Civil Code and do not constitute a violation of human rights as long as it is intended to protect legitimate interests. This decision also shifts the burden of proof by emphasizing the worker's bad faith and establishing a precedent for concrete financial sanctions for contract violators. While formally, the procedural 2023 Supreme Court Decision provides legal certainty, its implementation still leaves gaps in serious substantive injustice. The absence of technical parameters regarding reasonableness and the absence of financial compensation obligations create an extreme imbalance in the burden.¹⁵ Workers risk losing their livelihoods without a safety net, while employers get asset protection at no cost.¹⁶

The Supreme Court held that an employment agreement containing a provision prohibiting an employee from working for another company in the same field for a certain period after the termination of the employment relationship was legally valid. The clause was deemed to have fulfilled the requirements for a valid agreement under Article 1320 of the

¹⁴ Mahkamah Agung Republik Indonesia, Putusan Nomor 3549 K/Pdt/2023, Direktori Putusan Mahkamah Agung Republik Indonesia, <https://putusan3.mahkamahagung.go.id/>.

¹⁵ Salsabilla et al., "Menakar Keadilan Substantif," 2345.

¹⁶ Salsabilla et al., "Menakar Keadilan Substantif," 2345.

Indonesian Civil Code and was not considered contrary to human rights, particularly those relating to legitimate interests such as the protection of trade secrets, sensitive information, or confidential interests belonging to the employer.¹⁷

This development indicates the emergence of a new legal orientation that recognizes the potential validity of such clauses and treats their violation as a breach of contract. Based on relevant legal provisions and developments in jurisprudence, non-competition clauses in employment agreements cannot automatically be deemed unlawful.

From a company's perspective, the implementation of a non-compete clause is considered a way to protect business interests, particularly with regard to company secrets, confidential information, business strategies, and client relationships that employees may become aware of or access during the course of their employment. However, from an employee's perspective, the enforcement of such clauses can be considered detrimental because it limits their freedom to seek new employment or establish an independent business. In this regard, an overly broad non-compete clause has the potential to interfere with an employee's right to work and may ultimately be considered contrary to human rights protections.¹⁸

So the principle of balance exists to apply reasonable and fair restrictions for both parties, employers and workers. If the restrictions are formulated narrowly, directed only at legitimate interests, and include restrictions on time, territory, and specific types of work, their impact can be minimized. Conversely, if the clauses are formulated broadly and generally, the consequences can conflict with the principle of fair and equitable treatment in industrial relations. Fair protection in employment relations does indeed cover the interests of employers, including company secrets, but such protection must not eliminate workers' rights to the results of their work and their status as subjects who must also be protected.

Fair and Balanced Non-Competition Regulation in Indonesia Based on German Law

Considering that in Indonesia there are no specific regulations governing non-compete clauses, it is based solely on the principle of freedom of contract as stipulated in Article 1338 of the Indonesian Civil Code. However, in the workplace, workers are in a weak position when dealing with companies as employers. Therefore, due to economic pressures, workers are often forced to accept the terms offered by the company without any opportunity to negotiate. From the employer's perspective, the inclusion of non-compete clauses generally aims to protect trade secrets, business strategies, and established business networks.

Employees who previously held certain positions often possess valuable information whose use could be detrimental to the company. In any employment agreement, confidentiality and non-compete clauses are crucial elements that should not be underestimated. These clauses aim to protect sensitive information and the company's competitive advantage. This information can include business strategies, customer data, and even unpublished product

¹⁷ Pengadilan Negeri Wamena, "Klausul Non-Kompetisi dalam Perjanjian Kerja: Apakah Sah secara Hukum?," Mahkamah Agung Republik Indonesia, August 12, 2025, <https://pn-wamena.go.id/new/content/artikel/page/1/20250812231840196890031689bcbd076224.html>.

¹⁸ Lailatul Murod et al., "Konsekuensi Yuridis yang Timbul dari Perjanjian Kontrak Kerja yang Memuat Non-Competition Clause," *Yurijaya: Jurnal Ilmiah Fakultas Hukum Pengkajian Masalah Hukum dan Pembangunan* (2022): 60, https://yurijaya.unmerpas.ac.id/index.php/fakultas_hukum/article/view/69/28.

innovations. These clauses are expected to ensure the confidentiality of information that could harm the company if it falls into the hands of competitors.¹⁹

Unclear legal provisions regarding non-competition clauses create legal uncertainty, particularly for workers who could potentially be harmed by their implementation. Conversely, if regulated with clear boundaries and in accordance with statutory regulations, these clauses can protect legitimate business interests, particularly trade secrets, by preventing the dissemination of confidential information to competitors. Through reasonable restrictions on employment or the duration after the termination of the employment relationship, non-competition clauses can help maintain a company's competitive advantage without compromising the protection of workers' rights.²⁰

The problem with the application of non-competition clauses is the lack of legal certainty due to differing views among judges in the application and interpretation of non-competition clauses. Several court decisions have declared them invalid and non-binding because judges have focused on or emphasized only the protection of workers by limiting or ignoring the non-competition clause. The difference in judges' attitudes and interpretations of non-competition clauses is due to the absence of specific positive legal regulations that can serve as a benchmark for judges in deciding cases related to this clause, so that the existence of different judges' decisions further adds to the legal uncertainty in the application of non-competition clauses in the employment sector.

Economically, the position of workers is not free, because as people who are not free, they are categorized as people who have no other means of living, they are forced to work for other people, there is no job other than that job. On the other hand, an Employer is a person who basically determines the terms of employment. Considering that the position of workers/laborers is inferior to employers (superior), it is necessary for government intervention to create a conducive situation in protecting workers' rights.²¹

The government as the holder of power is responsible for the welfare of all its citizens. The state is responsible for fulfilling all basic rights of the people that cannot be obtained by itself. In this context, the state is obliged to provide protection, social security and so on. Fairly to realize social justice for all Indonesian people, as stated in the preamble to the 1945 Constitution of the Republic of Indonesia and Article 27 paragraph (2) and Article 28D paragraph (2) of the 1945 Constitution of the Republic of Indonesia. The existence of workers and their families is a priority for protection in order to raise their dignity and status as human beings. Therefore, the basic rights of workers and guarantees to get employment opportunities and treatment without discrimination on any basis to realize the welfare of workers/laborers is a government commitment through existing regulations.²²

Basically, in the relationship between workers and free people, according to the principles of the Indonesian state, no one may be enslaved or treated unfairly.²³ Labor

¹⁹ A. Rohendi, *Hukum Bisnis Digital: Regulasi, Etika, dan Perlindungan di Era Ekonomi Digital* ([AQ: place]: PT Kimhsafi Alung Cipta, 2025), 209.

²⁰ I Gusti Agung Mahendra et al., "Akibat Hukum Perjanjian Kerja yang Mencantumkan Non-Competition Clause untuk Melindungi Rahasia Dagang Bisnis," *Jurnal Analogi Hukum* 5, no. 3 (2023): 294–95.

²¹ Suci Flambonita, *Hukum Ketenagakerjaan: Telaah Keberlakuan Undang-Undang Ketenagakerjaan bagi Home Base Workers di Indonesia Perspektif Upah yang Layak* (Malang: Media Nusa Creative, 2020).

²² Flambonita, *Hukum Ketenagakerjaan*, 1–2.

²³ Saprudin, *Perkembangan Hukum Ketenagakerjaan di Indonesia* (Yogyakarta: Aura Pustaka, 2013), 73

protection aims to ensure a harmonious working relationship system without any pressure from the powerful on the weaker party. To this end, employers are required to implement these protection provisions in accordance with applicable laws and regulations. According to Iman Soepomo (2003), labor protection is divided into three types, which are economic protection, social protection, and technical protection.²⁴

The imbalance in the positions of the parties in an employment relationship, with workers consistently being at a disadvantage, has justified the state's intervention in contractual relationships. Thilo Ramm states that such state intervention is necessary for the purposes of justice and protection. This justification is implemented by the state by establishing labor laws and regulations that must be complied with by both employers and workers.²⁵

For this reason, it is the state's duty to create legal regulations that can serve as a positive legal basis for regulating the implementation of non-competition clauses by taking into account the interests of the Company as an employer and workers. As a basis for establishing a normative basis for the legal regulation of non-competition clauses in employment agreements, Indonesia can adopt from other countries that already have regulations on non-competition clauses in employment agreements. Germany can be used as reference material for existing legal provisions. Germany, according to the author, can be one of the most balanced examples in providing protection for Companies as employers and workers in providing regulations for non-competition clauses.

German legal regulations are in line with our contract law system that although non-compete agreements are born from the principle of freedom of contract in employment agreements, it does not mean freedom of contract in the sense of being as free as possible, but there must be no abuse of circumstances that can harm one of the parties, especially the party that is economically or positionally weak. So that freedom of contract must also be accompanied by the principle of balance and justice and the protection of the weak party, therefore this clause can only be justified as long as it is truly necessary to protect the legitimate business interests of the employer and not to hinder workers in finding work and fulfilling their living needs after the employment relationship ends. So this approach is relevant to be developed, considering that so far there have been no regulations that specifically regulate it and have the potential to harm workers after the employment relationship ends. So that the principle of balance and the prohibition of abuse of circumstances can be realized in clear, measurable and fair legal regulations for both the employer and the worker.

In Germany, the legal system provides the most statutory model. §110 Gewerbeordnung (GewO) allows employers and employees to restrict the employee's professional activities after the termination of the employment relationship through a non-compete agreement, while confirming that the provisions of §§74–75f Handelsgesetzbuch (HGB) apply analogously.²⁶ From here, the main balancing devices are compensation and strict limitations. §74 HGB requires a written form and an obligation for the employer to pay compensation during the

²⁴ Saprudin, *Perkembangan Hukum Ketenagakerjaan*, 75.

²⁵ Budi Santoso and Ratih Dheviana Puru, "Eksistensi Asas Kebebasan Berkontrak dalam Perjanjian Kerja," *Arena Hukum* 6, no. 3 (2012): 207.

²⁶ "Trade Regulations for the German Reich of June 21, 1869, Section 110: Non-Compete Clause," Lexetius, <https://lexetius.com/GewO/110/wettbewerbsverbot>.

period of prohibition; the minimum compensation is at least half of the last benefits received by the employee for each year of prohibition.²⁷

Furthermore, §74a HGB states that a non-compete is not binding to the extent that it does not protect the employer's "legitimate business interests," or to the extent that the restriction, taking into account the compensation provided, improperly hinders the employee's career advancement; and expressly prohibits a non-compete period exceeding two years from the end of the employment relationship.²⁸

The framework of German labor law is principally oriented toward safeguarding workers without disregarding the legitimate interests of employers. Its regulation is built upon a model of cooperation involving employers, employees, and trade unions, so that employment relations can operate in a fair, balanced, and stable manner. German labor law covers various essential aspects, including the formation of employment contracts, the protection of workers' rights, and the legal rules concerning termination of employment. Within this framework, non-competition agreements are treated as one of the matters subject to strict regulation. Although such agreements are recognized under German law, their validity depends on the fulfillment of specific legal requirements. This approach is intended to preserve proportionality between the employer's business interests and the worker's freedom to remain active in their professional field. German law also draws a clear distinction between non-competition obligations that apply during employment and those that continue after the employment relationship has ended.²⁹ The German Constitutional Court has affirmed that contractual freedom cannot be separated from the requirement of fairness. On this basis, a non-competition clause must not be imposed merely by one party without a fair consensus between the parties. If such a clause is established in an unequal manner and is not accompanied by proper compensation, its legal validity may be called into question and it may be considered unenforceable.³⁰

The non-competition provisions of the German legal system that can serve as a basis for establishing legal arrangements in Indonesia are German legal regulations. Under German law, the freedom to include restrictive clauses in employment agreements is limited by statutory regulations. According to statutory regulations, post-contractual restrictive clauses are only binding if:³¹

- a. The agreement is made in writing (signed in wet ink) and the employee receives the original signed copy
- b. The employer has a legitimate commercial interest in the contents of the restrictive covenant;

²⁷ nwb Datenbank, "§ 74 Contractually Agreed Non-Compete Clause; Compensation," https://datenbank.nwb.de/Dokument/79172_74/.

²⁸ nwb Datenbank, "§ 74a Effectiveness of the Non-Compete Clause," https://datenbank.nwb.de/Dokument/79172_74a/.

²⁹ Madison Nicole Whiting, "The Federal Trade Commission, Germany, and Non-Compete Agreements: An Analysis of the Federal Trade Commission's Proposed Ban on Non-Compete Agreements and a Comparison to German Non-Compete Law," *South Carolina Journal of International Law and Business* 21, no. 2 (2025): 307–8.

³⁰ Whiting, "The Federal Trade Commission, Germany, and Non-Compete Agreements," 307–8.

³¹ L&E Global, "Restrictive Covenants in Germany," October 22, 2024, <https://leglobal.law/countries/germany/employment-law/employment-law-overview-germany/08-restrictive-covenants/>.

- c. The legitimate interests of workers are not unlawfully restricted;
- d. The agreement shall not last for more than two years.
- e. The employer pays compensation during the validity period of the post-contractual restriction agreement amounting to at least 50% of the total earnings previously earned by the employee.

An alternative step to protect trade secrets through contract law is through a confidentiality agreement. Confidentiality agreements are legally binding and can be used as a legal basis in the event of a trade secret violation. To safeguard company confidentiality, company owners use confidentiality agreements to bind employees to refrain from violating trade secret rights. With a confidentiality agreement, employees are not only bound while they are still employed but also after they leave the company.

When a company is unable to provide compensation for enforcing a non-compete clause, trade secret protection can still be sought through another contractual instrument, namely a written confidentiality agreement, which specifically regulates the obligation to maintain the company's confidential information. The existence of such regulations will limit and prevent the arbitrary use of non-compete clauses that could harm workers or employees after the employment relationship ends.³²

Therefore, if there is a non-competition clause in an employment agreement that does not meet the specified requirements, it can be declared null and void and has no legal force as an agreement even though it has been agreed upon by the company and the employee based on Indonesian contract law, particularly Articles 1320 and 1337 of the Indonesian Civil Code. Therefore, a fair non-competition clause is not a clause that is merely signed, but rather a clause that needs to be legally limited in employment law, and also balanced economically with compensation so as not to harm either party in an employment agreement.

CONCLUSION

Non-competition clauses must rest on the principle of balance, protecting the interests of employees as well as those of employers. Formal consent to an employment agreement does not establish the validity of such a clause, because the clause's content must also be fair, reasonable, and balanced. A clause that is unfair or excessively damaging to the employee should be declared invalid. A clause drawn fairly and narrowly, and accompanied by compensation, may be declared valid and binding on the parties.

Achieving balance and preventing an abuse of circumstances requires legal rules that are clear, measurable, and fair to both parties. The German regulation of non-competition clauses offers a reference point for drafting such rules in Indonesia. On the German model, the freedom to include a non-competition clause must be matched by economic compensation after the employment agreement ends, amounting to at least 50 percent of the employee's total income, and by a maximum duration of two years. Limits on the territory and the scope of work to which the clause may apply should be added, so that a clause plainly and seriously departing from these requirements can be declared null and void.

³² Ahsana Nadiyya, "Analisis Pengaturan Klausul Non-Kompetisi dalam Perjanjian Kerja: Studi Perbandingan Indonesia, Malaysia, dan Singapura," *Humani: Hukum dan Masyarakat Madani* 11, no. 2 (2021): 421–22.

Indonesia should therefore incorporate the validity requirements of the German model into the pending amendment of the Manpower Law. Such a provision would set clear conditions for the validity of a non-competition clause: a legitimate protective purpose, a defined duration, territory, and scope of work, the employee's position, the clause's connection to trade secrets or other significant company information, and economic balance through compensation. With standards of that kind in place, non-competition clauses would be neither void by default nor free to operate without regard to the protection of employees.

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