NATIONAL REPORT ITALY

1. Employment Law

1.1. Restrictive covenants

1.1.1. Is the principle of a POST TERMINATION RESTRICTIVE COVENANT known in your legal system? If yes how can this COVENANT be defined? Where does the principle have its origin? (Civil Code, case law, etc)

Restricting covenants upon termination are generally known also in Italy, although specific limits are set by the Law and Courts' precedents.

The post termination non-competition agreement is ruled by Art. 2125 of the Italian Civil Code and prevents the employee from engaging – directly or indirectly – in businesses which are meant to be competing with those of the employer.

To be compliant with the Law, such an agreement shall be entered into in writing, shall be limited to specific activities clearly identified in its wordings, shall be confined to determined geographical area and cannot exceed 3 years (in case of regular employees) or 5 years (in case of Managers) of duration (any greater duration being automatically reduced to the one set by the Law).

The agreement shall also contemplate a fair consideration for the employee, compensating the boundaries borne with the obligation not-to-compete; although the Law does not clarify what "fair" shall be meant, an amount equal to 8-15% of the gross annual salary is usually uphold by Courts.

In case of infringement of the non-competition covenant, the employer is entitled to act against the former employee for the reimbursement of damages; however, since the Italian legal system is not known to be the most speedy and efficient, the consideration is usually paid in instalments, leaving the grater amount to be paid upon completion of the non-competition period: this way, in case of breach, the former employer can immediately retain the amounts still due, as per the general rule of Exception of Non-Performance.

There is not statutory rule expressly governing the post termination "confidentiality" and "non-solicitation" covenants; Authors and Jurisprudence therefore usually frame these obligations within the general provisions on "duty not to compete" during the employment relationship (Art. 2105 of the Italian Civil Code) and "protection against unfair completion" (Art. 2598 of the Italian Civil Code).

Missing the specific regulation, the parties are therefore free to rule in good faith the covenant as it suits best.

The "garden leave" covenant allows the employer to instruct the employee to stay away from work during the notice period, while still remaining on the payroll.

This practice can be hardly enforced in Italy: upon termination the employee is either entitled to work the notice period and be paid his regular salary until its completion (his rights and duties towards his employer remaining the same), or to be immediately terminated and be paid with an indemnity in lieu (see Art. 2109 of the Italian Civil Code; Constitutional Court 616/87); in case a "garden leave" covenant is agreed upon, the employee would be still enrolled with the Company but would be prevented from performing his activity: this case is lacking of legal groundings (since paid permits and leaves are strictly ruled by National Collective Agreements) and could be judged against the regulation on notice period and/or Art. 2103 of the Italian Civil Code ("the employee is entitled to perform the activities he has been contracted for").

1.1.2. At what stage in the employment relationship between employee and employer are post termination restrictive covenants agreed upon in your jurisdiction? Is there any relevant case law?

Restrictive covenants can be agreed upon at any stage of the employment relationship, provided they are negotiated in good faith and in compliance with the Law.
However, it is common practice to rule also the post termination boundaries upon commencement and to include the specific regulation in the employment contract.

1.1.3. Once the employment contract is signed, is there a general obligation of non-compete also in the absence of an express agreement after the termination of the employment? Are there specific statutory provisions or precedents referring to this? Could whistle blowing be regarded as a part of the employee's post termination restrictive covenant?

Since, as commented before, one of the prerequisite provided for by the Law for the validity of the non-competition agreement is its written form, lacking the express wording the obligation not to compete will not be enforceable.
However, beside the specific field of the Employment Legislation, Art. 2598 of the Italian Civil Code will apply to any case of unfair competition.

1.1.4. Which obligations regarding post termination restrictive covenants exist on the employer's side in the absence of an express agreement? Are there any specific statutory provisions or precedents governing employer's duties after the termination of the employment in your jurisdiction?

Upon termination, there are no statutory restrictive covenants on the employer' side.

1.1.5. What kind of different restrictive covenants that may be available and can be agreed between employer and employee in your jurisdiction? (see the examples in the introduction). Please describe how these can be defined and how they work in your jurisdiction.

Please see under 1.1.1.

1.1.6. What are the conditions for a valid post termination restrictive covenant in your jurisdiction? (e.g. prerequisites like minimum age, minimum salary, minimum employment period; way of termination of employment, etc). Please describe the conditions applicable and how these work in your jurisdiction.

As commented above, the only post termination agreement ruled by the Italian Legislation is the non-competition agreement provided for by Art. 2125 of the Italian Civil Code which also states its limits.
As already displayed, prerequisites of its validity are (i) written form; (ii) express indication of the prevented activities; (iii) express indication of the geographical area where the agreement will be enforceable; (iv) express indication of the consideration paid.
Furthermore, Courts have ruled the agreement shall also comply to an additional implicit prerequisite: the agreement itself shall not be construed in a way to prevent the employee from carrying on any activity at all.
For all the other restrictive covenants the Parties are free to rule, although complying with the general provisions on good faith, fair negotiation and validity of the contract itself.

1.1.7. What is the potential scope of a post termination restrictive covenant in your jurisdiction? (e.g. taking into consideration time, geographical scope, content, interest, activities, etc.). Please describe how that works in your jurisdiction and what pitfalls have to be observed for both employers and employees.

The final purpose of the restrictive covenants described above is to safeguard the employer from the activities carried out by its former employees upon termination, and potentially jeopardizing its business.

As far as the pitfalls are concerned, as described under 1.1.1., in case of breach of the agreement on the employee' side, the Company has limited powers.
In case the infringement meets the threshold of the "unfair competition conduct", then interim restricting injunctions can be claimed in Court; however, in all other circumstances, where the employee's conduct is simply in breach of the agreements, the Company can only act for damages.
It is therefore advisable to secure the complete performance of the restrictive covenant including a penalty clause (providing the pre-liquidation of the damages suffered) and the payment of the consideration by instalments (thus, allowing the retain of the sums still due in case of non-performance on the employee' side).

1.1.8. What are the possible sanctions against the employee in the event of a breach of a post termination restrictive covenant? Describe how that works in your jurisdiction and provide for pratical information about dos and don'ts.

In addition to the above (see 1.1.1 and 1.1.7), in case of breach of the agreement, the employer can sue the former employee in Court to obtain the judicial termination of the restrictive covenant agreement as per Art. 1453 of the Italian Civil Code, and the reimbursement of the damages suffered as an immediate consequence of the employee's conduct (these being the reimbursement of both the sums paid as consideration of the obligation not to compete, and the additional damage).
In a limited number of cases, when specific reasons of urgency occur, Courts have also granted the employer with the right to obtain a specific Court's Order preventing the employee from pursuing his conduct.

1.1.9. What are the possible sanctions against the new employer in the event of a breach of a post termination restrictive covenant by the employee of the former employer? Is it a matter of unfair competition in your jurisdiction?

As a general rule, provided that the new employer negotiated in good faith and he is not aware of the contents of the non-competition agreement, he will not suffer any consequence, nor sanction.
On the other side, should the new employer connive with the former employee, the hiring could be likened to "unfair transfer of employees", being it considered an act of unfair competition as per Art. 2598, n. 3 of the Italian Civil Code (which prevents "any direct or indirect use of any unfair mean able to cause a damage to the other company").
In a very limited number of cases, Courts have also forbidden the employee from performing the new activity.

1.1.10. When an employer has invested money in an employee's training, is there any possibility for the employer to get a refund from the employee, in case of breach of the post termination restrictive covenant, and under which conditions?

Provided that job training is generally considered a collateral duty on the employer' side, I hardly see possible any refund of the sums paid.
Moreover, I doubt a Judge would see a link between the money invested in the training of the employee and his breach of the non-competition agreement: as a matter of fact, in case the non-competition covenant is fulfilled, the employer would loose anyway the sums and the possibility to make use of the employee' skills but would not be entitled to any refund.
However, it will always be possible to include in the covenant a penalty in case of breach entitling the refund of a sum equal to the one invested.

1.1.11. What are the possibilities of lawsuit for the employee in case of the employer's disadvantageous actions during the period covered by a restrictive covenant (e.g.

the employer prevents the employee from finding a new job by spreading out rumors)?

In case the disadvantageous actions are brought on the basis of the post-termination covenant itself, the employee can claim for the termination of the restrictive covenant agreement and the burden of the proof (showing the legitimacy of the agreement and its fair negotiation) would be on the employer' side.

However, the example proposed would only be proposed as a claim for damages; therefore the employee would be burden with the duty to show the unfairness of the conduct, the entity of the damage suffered and the link between the two.

1.2. Garden leave

1.2.1. Does the concept of "garden leave" exist in your jurisdiction? How does it work, what is the scope and what are the prerequisites?

See under 1.1.1

Talking about garden leave provisions: do employees-or certain types of employees – have a right to be "actively employed" in your jurisdiction, e.g. so that a garden leave provision would not – or not be fully- be enforceable for an employer and the employee would have a "right" to continue working until the end of the employment? What is the respective legal framework in your jurisdiction?

See under 1.1.1

1.2.2. Are there any other means to protect the employer's interest at the end of an employment contract in your jurisdiction? Please explain in detail and provide for practical guidance.

As described above under 1.1.1 and 1.1.6, parties are free to contract, although in compliance with the general provisions on good faith, fair negotiation and validity of the contract itself.

2. The World of Sports and Employment Law

2.1. General questions

2.1.1. Does employment law apply to the relation between athlete's and sports clubs/Association in your jurisdiction? Are there relevant differences between the kinds of sports and between professionals and amateurs?

According to Italian Legislation the relationship with an athlete is generally ruled as a regular employment relationship, although complying with the peculiar discipline set forth for this specific contract (see L. 91/1981).

In particular, according to Art. 3 of the Law 91/1981, the professional sport employment relationship is the one rendered on a continuous basis, after payment and not on unprofessional basis; as a consequence, every time the activity is rendered within a single performance (or in more than one performance, but in one single event which is held in a limited period of time), or the performance does not exceed a set threshold (8 hours per week, or 5 days per month or 30 days per year), or the athlete is subject to a set number of trainings, the employment relationship will be considered autonomous.

The professional athlete is granted with the same rights and subject to the same duties as a regular employee, although the L. 91/1981 sets a number of specific exceptions.

As a first aspect, the contract to be valid shall be in writing; its contents shall be drafted in compliance with the contractual template issued every three years by the relevant Italian

Federation (see art. 4 of the L. 91/1981); the individual contract shall then be lodged by the Club/Sport Association with the relevant National Federation for its approval.
Any detrimental clause included in the individual contract is considered null and void.
As a second aspect, the Parties cannot include any non-competition clause, or any other clause limiting the rights of the athlete for the time subsequent to the termination.
As a third significant aspect, the athlete is not subject to the extensive regulation on termination, nor on disciplinary dismissals.
However, it is to note that L. 91/1981 is applicable to the limited number of relationships entered into athletes enrolled with the Football National Federation, Cycle National Federation, Basketball National Federation, Boxing National Federation and Golf National Federation.
As a consequence, the relationships with the athletes enrolled with other National Federations as well as the relationships with unprofessional athletes (but please see also 2.2.5), although rendered on a regular basis and after payment, are not ruled by the L. 91/1981.
Those contracts are therefore ruled by the general discipline on employment relationships: thus, the real nature of the activity rendered by the athlete is subject to a case-by-case scrutiny by the Court that can also overrule the autonomous structure of the relationship, inferring the subordinate bond by the circumstance that the athlete (although contracted as unprofessional) renders its activity on a regular basis, being permanently included in the organization of the Club or Association, and receiving a payment for its activity.

2.1.2. Are there specific employment law provision (statutes, rules of sports associations) applicable for athletes in your jurisdiction? In particular regarding post termination restrictive covenants and/or garden leave provisions and/or the right to continue to work?

Please see under 2.1.1.
As far as the discipline upon termination of sport employment contracts is concerned, it is to remind that art. 4, paragraph 8 of the L. 91/1981 expressly excludes the applicability to the athletes of the general provisions on dismissals (and namely Art 18 L. 300/70 and L. 604/66).
It is therefore generally understood that when the relationship is for undetermined period of time, it can be terminated *ad nutum*, thus applying the general discipline provided for by Articles 2118 and 2119 of the Italian Civil Code, and therefore excluding the necessity of a justified reason or just cause grounding the termination itself.
To the contrary, the discipline set forth by L. 300/70 and L. 604/66 is considered applicable towards unprofessional athletes (although most of the times those provisions are overruled by a very detailed *ad hoc* negotiation between the parties); in addition, it is to notice that the majority of the relationships is set for a determined period of time: therefore upon expiring of the final term the relationship is over, while, before the final term, the dismissing party have to show a just cause for termination.
Finally, it is generally considered that both professional and unprofessional athletes can claim for a discriminatory reason of termination (the termination grounded by ideological reasons as well as religious, political, due to affiliation to a Union, race, gender), thus requesting that the termination issued is judged null and granting the athlete with the right to be reinstated in his place of work.

2.1.3. Is there a specific court or arbitration system for employment matters between athletes and clubs in your jurisdiction? Are those arbitration proceedings obligatory before going to court?

Art. 4 of the L. 91/81 expressly provides that the contract with the athlete includes also an Arbitration Clause.
Said clause shall include the appointment of Arbitrators or at least provide their number and the procedure to be followed for their appointment.
Should the clause be included in the contract, prevents the summon in front of the Tribunal.

2.2. Transfer Free System and termination of contracts.

2.2.1. a) For EU Member States: Describe how the Bosman case has changed the situation in your jurisdiction and if/how the sports associations and the legislator have responded to this judgement.

The impact of Bosman case and the relevant EU decision in the Italian jurisdiction is well represented by the L. 586/1996 that overruled (i.e. cancelled) the transfer fee paid as remuneration of the training and promotion of the athlete.
In addition to the above, the principles expressed by the Bosman Judgment have been embodied by the Federal Appeal Court that confirmed that the transfer fee as well as the Art. 40 of the Internal Organizational Regulation of the National Football Federation provide an obstacle to the free movement of people and services, as described by the EU Treaty.
Following this judgement, on April 10th 1996 the Football National Federation abolished the internal parameters and guidelines, therefore eventually taking to its end the transfer fee in Italy.

2.2.2. Are there specific laws or regulations of sports of associations (different from the general rules) dealing with the termination of athletes' employment contracts in your jurisdiction? Are such contracts usually open-ended or do they run for a fixed term? Are there any restrictions for fixed term contracts in your jurisdiction?

As mentioned before, contracts with athletes can be entered into for a determined or undermined period of time.
As far as the time contract is concerned, it is to note that Legislative Decree n. 368/2001 – setting the general regulation on employment contracts for determined period of time – is not applicable to sport agreements; therefore none of the limits set forth by the general discipline will be extended to the employment contracts with athletes.
Therefore, as a matter of fact, Art. 5 of the L.91/81 sets the maximum duration of 5 years to the sport contract – this way introducing an exception to the provisions applicable to general employment contracts; should the parties agree on a longer term, the limit is automatically reduced to the one provided for by the Law.
However, upon expiry of the term, the contract can be prolonged.
Before the limit expires, the contract can be transferred to third parties, but the agreement of both parties is necessary.

2.2.3. Can a player switch the club during the term of the employment contract for a certain transfer fee without the consent of the former club in the absence of a respective clause? Is it obligatory in your jurisdiction to agree on such a clause and a certain transfer fee?

According to Italian Legislation, a specific clause has to be agreed upon in the sport contract.
Missing it, the s.c. "sportive bond" prevents the athlete from switching from a Club to another before the contract has come to its natural end.

2.2.4. What are the remedies for the former club in your jurisdiction, if a player switches the club during the term of the employment contract without the consent od the former club and without the payment of an agreed transfer fee?

Please see under 2.1.3 and 2.2.3

2.2.5. Are there any further conflicts between employment law and the employment practice of sports clubs and associations in your jurisdiction? Please describe relevant cases or judgements.

A significant difference between the common rules applicable to employment contracts and those set forth for sport contracts relates to those with women.

In Italy, Federations are responsible for deciding whether a discipline, both for men and women, shall be considered professional or unprofessional: as a matter of fact, none of the female disciplines is considered professional.

This implies that in Italy there can be men contracted as professional football, basket, rugby players or cyclists, but there are no women treated the same.

As a consequence, this leads to the paradox that the same discipline is played as a professional or unprofessional player, simply because of the gender of the athletes.

The most relevant effect of this dichotomy is that women athletes cannot benefit of the same regulation provided for by the L. 91/81, ruling the relationship with men athletes, thus leaving to the contractual regulation the whole discipline of their relationship and – in fact – penalizing their negotiations.