

大成 DENTONS

Global Employment Webinar Series
Employee restrictive covenants

Webinar 2: Europe

13 October 2022

6am PST | 9am EST | 2pm GMT | 3pm CET | 10pm HKT

Grow | Protect | **Operate** | Finance

Welcome

Your speakers today



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Agenda

- **Types of restrictive covenant**
- **Overview of approach and enforceability across Europe**
- **Practical tips and trends**
- **How can Dentons help?**
- **Q&A**



Primary Types of Restrictive Covenants

**Non-
Competition**

**Non-
Solicitation
Non-Deal
Clients,
customers,
suppliers etc.**

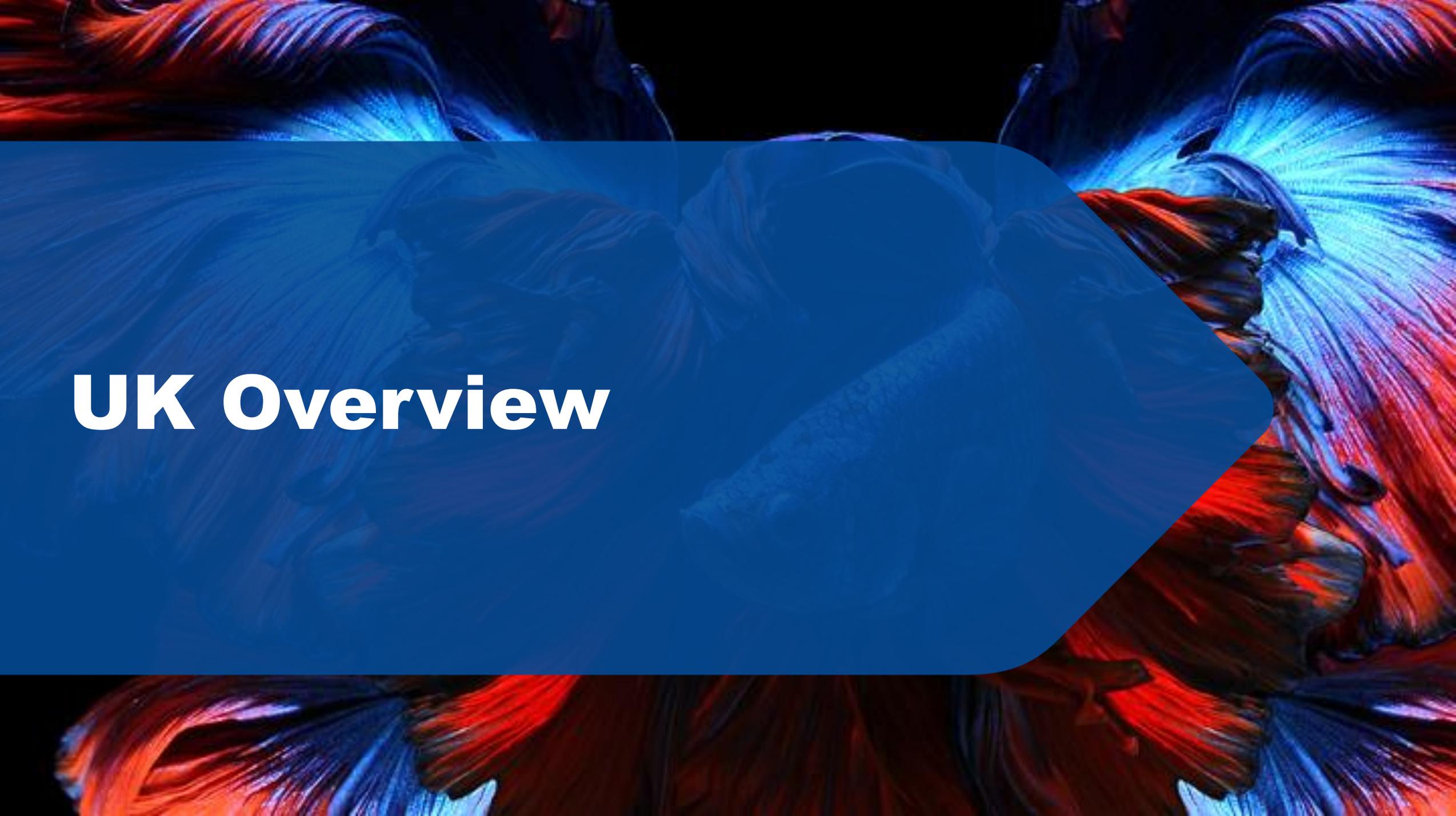
**Non-Poach
Employees**

Other Types of Restriction

**Non-
Disparagement**

Confidentiality

**Return of
Property**



UK Overview

UK - Overview

VOID unless

Protects legitimate
business interest

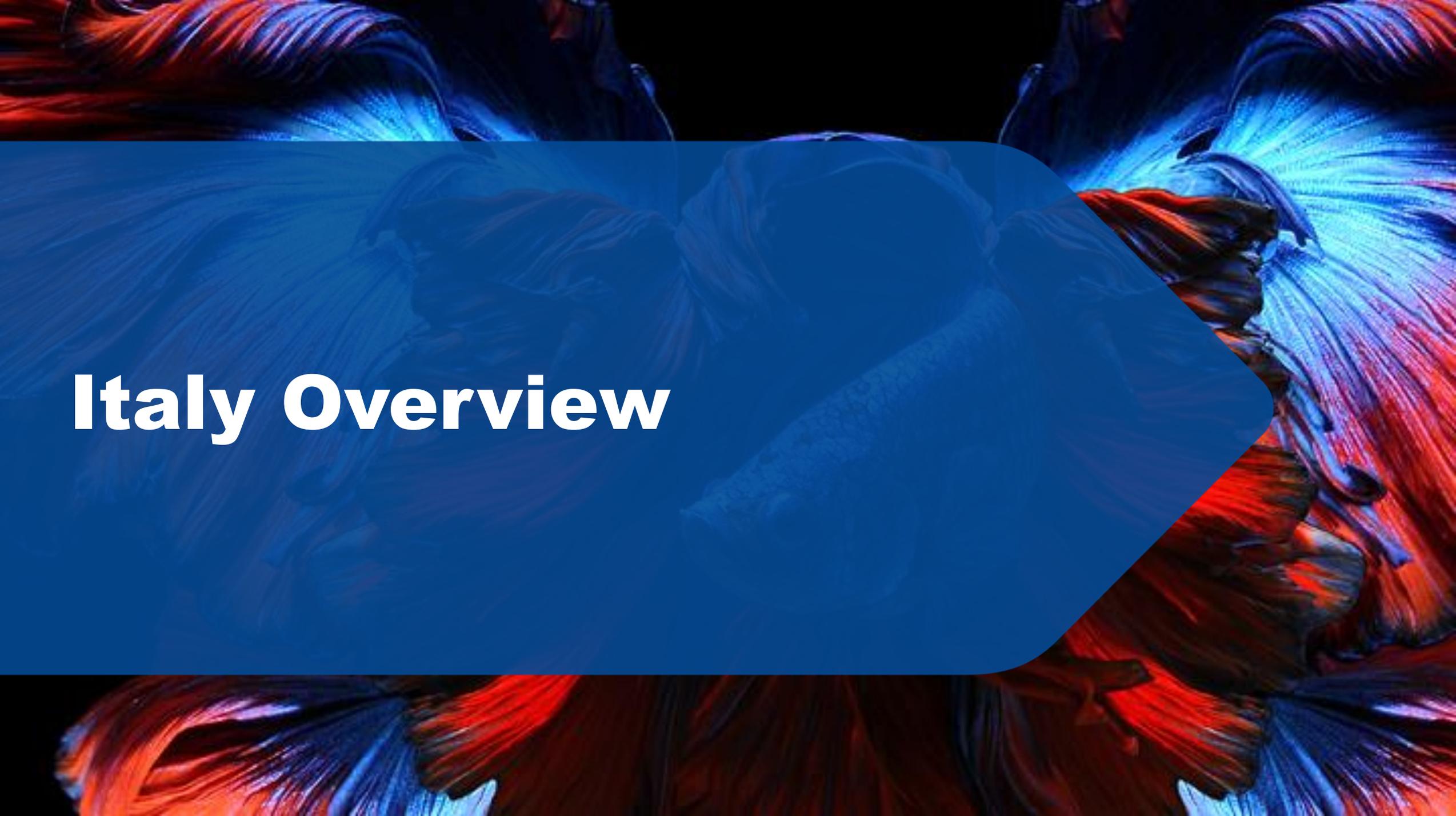
AND

Extends no further than is
reasonably necessary to
protect interests

Legitimate interests

- ✓ Trade secrets and other
confidential information
- ✓ Trade connections
(e.g.: customers, clients or suppliers)
- ✓ Stability of the workforce

“Established categories” not fixed



Italy Overview

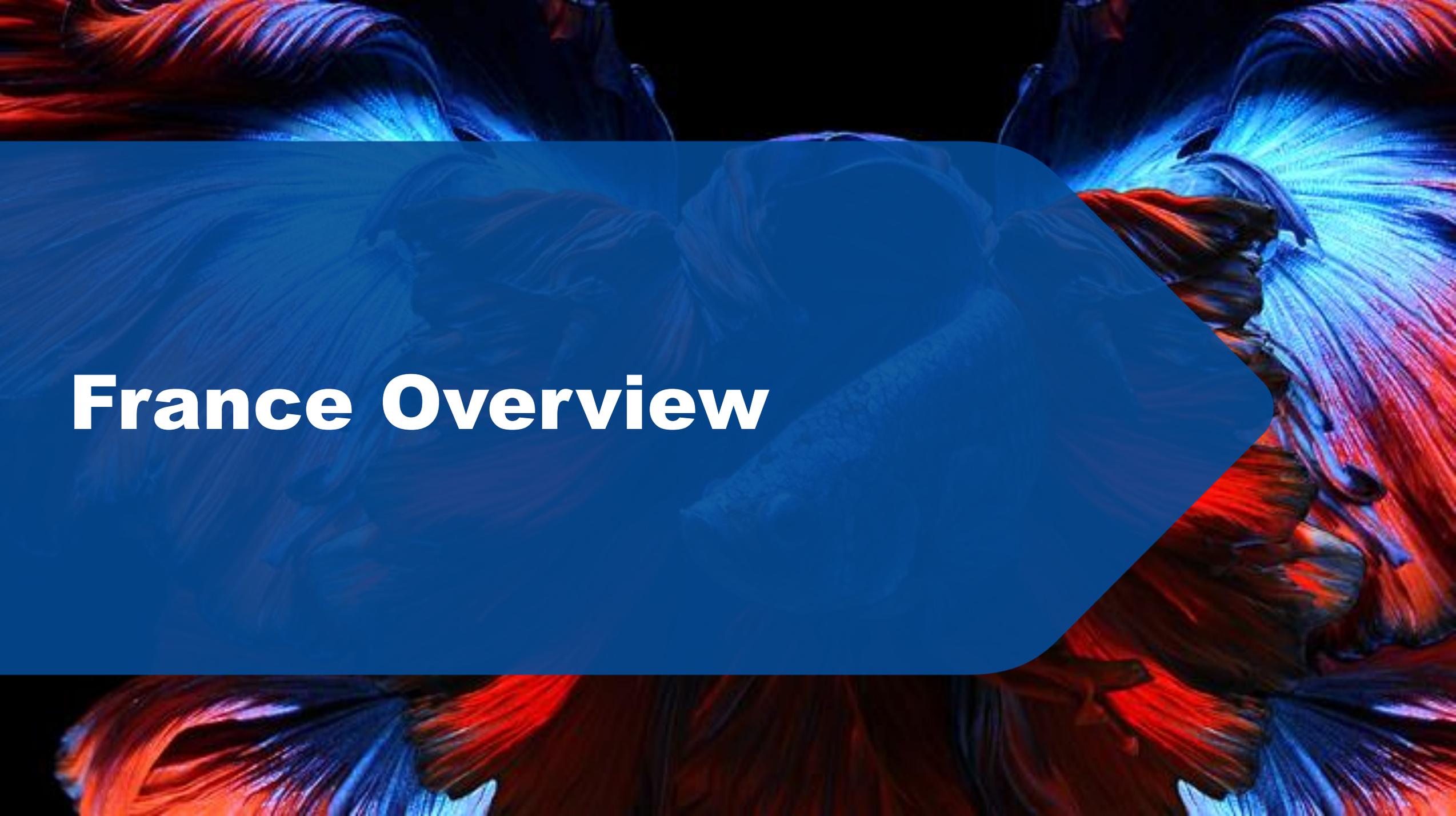
Italy - Non-Compete

- **Form**: written form is necessary
- **Maximum length**: 3 years for employees (non-executives) and 5 years for executives
- **Territory**: must refer to a specific area/territory
- **Subject**: must cover any work activity that may be in competition with the employer's business sector and therefore it is not limited only to the tasks performed by the employee during the relationship
- **Compensation**: must provide for the payment of a specific consideration that must be reasonable and fair in relation to the extension of the forbidden area (according to case-law, 30/40% of the annual salary for each year of non-compete)
- **Penalty**: the parties can agree a penalty in the event the employee breaches the non-compete covenant

Italy - Non-Solicitation

- Unlike a non-competition covenant, non-solicitation does not have to be financially compensated by the employer
- A penalty may be included in case of breach





France Overview

France - Basics

Non-compete must:

- Be in employment contract / CBA
- Protect the legitimate interests of the company and be specific in the activity covered
- Be limited in duration and geographical area
- Take into account specific nature of employee's role
- Include financial payment

The same conditions apply to non-solicitation of clients / customers including financial compensation. This is not the case for non-poaching clauses.



Non-competition clause can include conditions for waiving the clause
(and a corresponding release from the compensation payment)

France - The Risk of Invalidity

Legitimate
interest not
sufficient

Non-competes should be
used restrictively

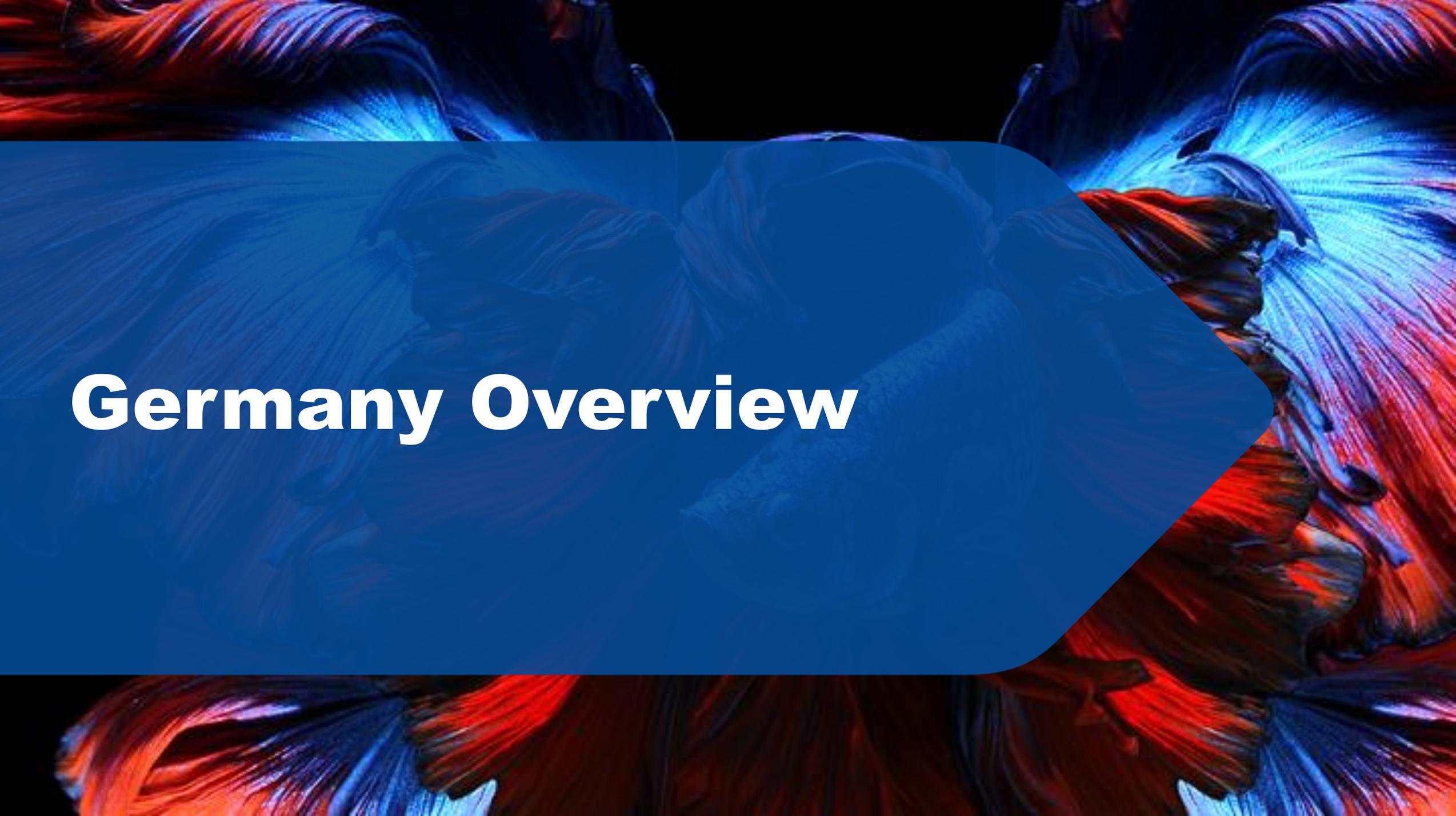
No financial
compensation or
insufficient amount

Geographical
scope too broad

Restrictions on employee's
ability to find a job must be
adapted to his/her diplomas,
skills and professional
experiences



Where a non-compete is determined to be void, the judge may also award damages to the employee



Germany Overview

Germany - Basics

Employees

Regulated by Commercial Code

- ✓ Written agreement
- ✓ Delivery of the agreement
- ✓ Max term: 2 years
- ✓ Compensation: 50% recent remuneration

- ✓ Must relate to justified interest of the employer
- ✓ Must not constitute unreasonable impediment to employee's advancement
- ✓ Scope must be tailored to each case

Legitimate interest
not sufficient

Restrictions on
employee's
professional
advancement

**High risk
of
invalidity**

Compensation
incorrectly
calculated

Invalid content



Managing Directors

Commercial Code does not apply but case law must be observed

Germany - Right to Waive

Waiver by employer

- Only possible until last day of employment
- Waiver effective immediately but compensation obligations cease to exist 12 months later

Dismissal of employee due to employer's conduct in breach of contract

- Employee may withdraw from non-competition clause by written declaration
- Where no written declaration is made, non-competition clause enters into force
- Declaration must be made within one month

Dismissal by employer due to, or in absence of, employee's misconduct

- *Misconduct*: employer may withdraw from non-competition clause within one month by written declaration
- *No misconduct*: employee also has right to withdraw from non-competition clause. Employer can require acceptance of non-compete by offering 100% remuneration



Tips and Trends

Italy – Tips and Trends

❑ Fairness of compensation – often litigated, if too low the non-compete is null and void

→ **suggestion:** carefully consider amount including in relation to concrete needs of the company (NB shorter length = more limited consideration)

❑ Place – for example, the covenant covers Italy, the former employee is hired in France but works remotely for the Italian market

→ **suggestion:** draft the covenant to apply irrespective of the place of actual work

❑ Timing of payment – payment during (rather than after) the relationship has been determined to be null and void in some important cases

→ **suggestion:** covenant remains valid if the parties agree a fixed cap to the compensation (e.g., employee will be paid €XXX on a monthly basis but, if the contract ends, total compensation cannot be lower than XX% of annual salary plus lump-sum to cover gap)



France – Tips and Trends

- ❑ **Define reasonable financial compensation** (if not specified in applicable CBA). No statutory minimum but case law generally recommends minimum 1/3 of monthly remuneration
- ❑ **Consider applicable CBA terms** (e.g.: some CBAs require payment for a certain period of time even if employer waives the covenant at termination)
- ❑ **Adapt geographical scope** to level of employee's responsibilities
- ❑ **Negotiate contract amendment** if the company's activities change or evolve



Germany – Tips and Trends

- ❑ Where restriction is limited to poaching for the benefit of third parties, this does not amount to a post-contractual non-competition obligation
- ❑ Market standard to agree contractual penalty in the event of breach
- ❑ Alternatives, such as long notice periods and releasing employee from work

UK – Tips and Trends

□ Scope

- Length

□ “General Billposting” rule

- Employer terminates in breach = employee released of post termination restrictions
- Constructive dismissal

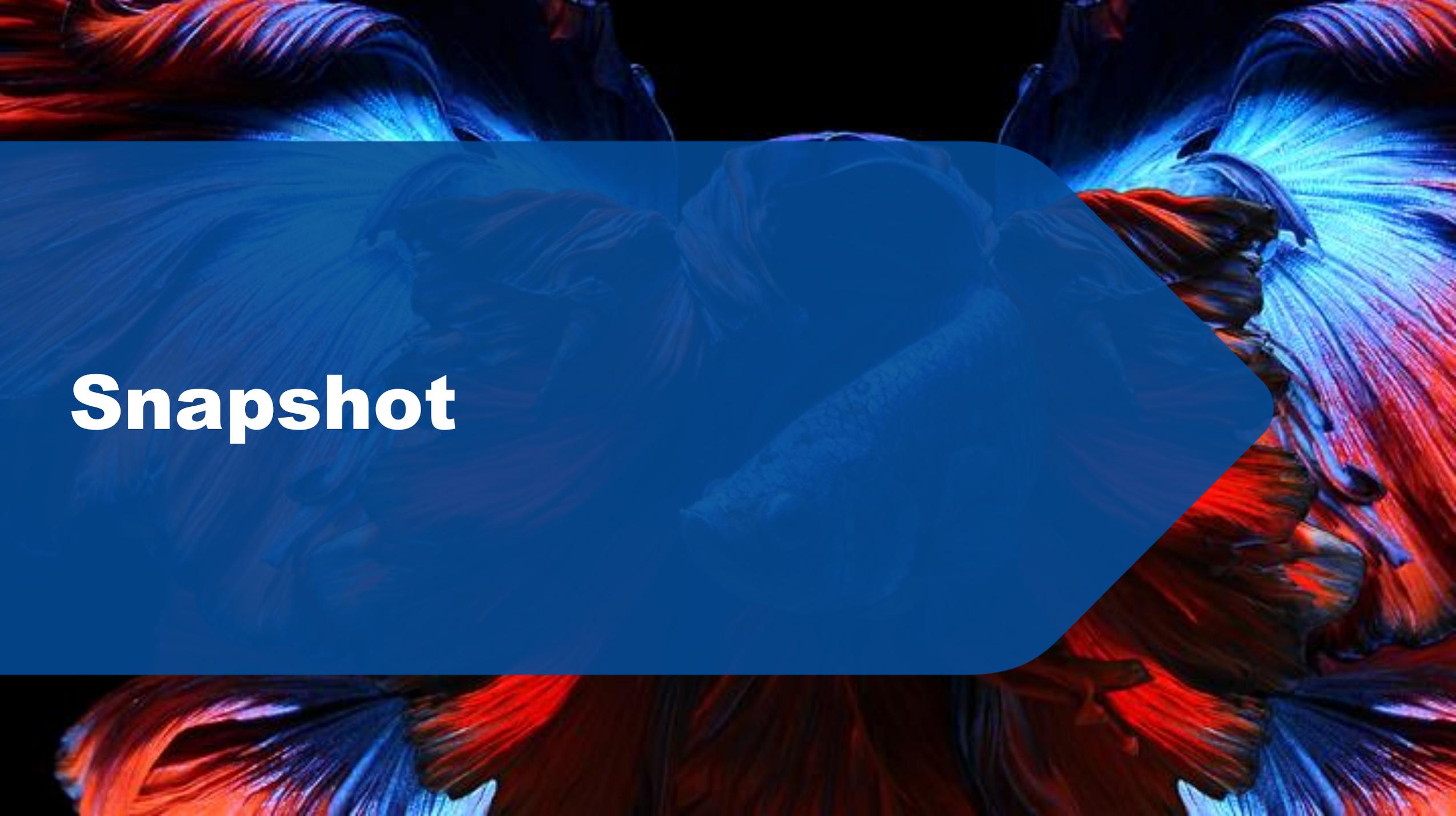
□ “Consideration”

- Start of employment
- During employment

□ Trends

- “Blue pencil” rule applies - severability is possible but beware “legal litter” and costs implications
- Emphasis on deterrence
- Impact of bad behaviour
- Government consultation on non-competes





Snapshot

Europe Snapshot

	NON-COMPETE	NON-SOLICIT CLIENTS	NON-DEAL CLIENTS	NON-POACH EMPLOYEES	NON-INTERFERE SUPPLIERS	PAYMENT REQUIRED FOR NON-COMPETE?	MAXIMUM LENGTH
BELGIUM	✓ ¹	✓	✓	✓	✓	✓	Between 1 and 2 years
CZECH REPUBLIC	✓	✓	✓	✓	✗	✓	1 year
FRANCE	✓	✓	✓	✓	✓	✓	Between 6 months and 2 years ²
FINLAND	✓	✓	✓	✓	✓	✓	Not limited by law
GERMANY	✓	✓	✓	✓	✓	✓	2 years
HUNGARY	✓	✓	✓	✓	✓	✓	2 years
ITALY	✓	✓	✓	✓	✗	✓	3 years for non-executive employees 5 years for executives
NORWAY	✓	✓	✗	✓	✓	✓	1 year (up to 2 years for non-poach employees)
POLAND	✓	✓	✓	✓	✓	✓	Not limited by law ³
ROMANIA	✓	✓	✓	✓	✓	✓	Up to 2 years
SLOVAKIA	✓	✗	✗	✗	✗	✓	1 year
SPAIN	✓	✓	✓	✓	✓	✓	Between 6 months and 2 years
SWEDEN	✓	✓	✓	✓	✓	✓	Non-compete – 1 year All other - 6 months
THE NETHERLANDS	✓	✓	✓	✓	✓	✗ ⁴	Not limited by law ⁵
TURKEY	✓	✗	✗	✗	✗	✗ ⁶	2 years ⁷
UK	✓	✓	✓	✓	✓	✗	1 year
UKRAINE	✗	✗	✗	✗	✗	✗	N/A

1. For employees above certain salary thresholds
2. Market practice
3. Although not limited in law the usual period is 6-12 months
4. Not required by law but court can grant the employee a payment

5. 1 year is often considered market practice
6. However payment is a factor in the assessment of reasonableness
7. Unless there are special conditions

How can Dentons help?

Experience in conducting global projects across multiple jurisdictions

Country specific
advice

Strategic advice on
protecting your
business

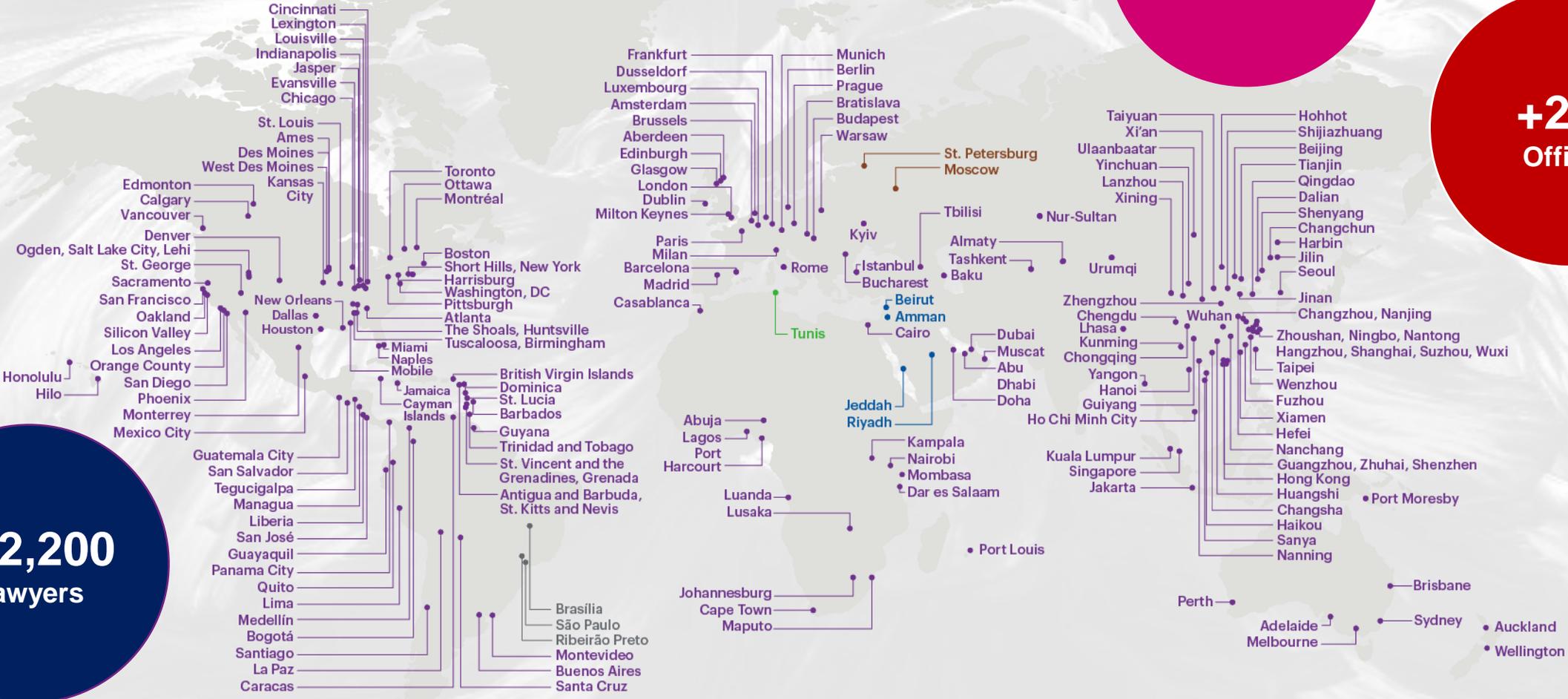
Global assessment
and uniformity

We are where you need us

82
Countries

+200
Offices

+12,200
Lawyers



- Locations in purple represent Dentons offices.
- Locations in blue represent associate firms, offices or special alliances as required by law or regulation.
- Locations in green represent approved combinations that have not yet been formalized.
- Locations in gray represent Brazil Strategic Alliance.
- Locations in brown represent offices from which Dentons is separating.

Thank you



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