ELA L&P Committee: Measures to Reform Post-Termination Non-Compete Clauses in Contracts of Employment: BEIS Consultation

Response from the Employment Lawyers Association

26 February 2021
INTRODUCTION

1. The Employment Lawyers Association (ELA) is an unaffiliated and non-political group of specialists in the field of employment law. We are made up of about 6,000 lawyers who practice in the field of employment law. We include those who represent Claimants and Respondents/Defendants in the Courts and Employment Tribunals and who advise both employees and employers. ELA's role is not to comment on the political merits or otherwise of proposed legislation or calls for evidence. Nothing in this document is intended to do so. We make observations from a legal standpoint. ELA's Legislative and Policy Committee is made up of both Barristers and Solicitors who meet regularly for a number of purposes, including to consider and respond to proposed new legislation and regulation or calls for evidence.

2. A Working Party co-chaired by Paul Goulding QC and Jonathan Chamberlain was set up by the Legislative and Policy Committee of ELA to respond to this consultation. Members of the Working Party are listed at the end of Part 1 this paper.

3. If it is of value, ELA offers to assist BEIS further in this exercise, as it has from time to time in other areas of regulatory and legislative reform. If the Department wants to take-up this offer, they should please contact ELA's Secretary, Lindsey Woods.

4. This response is structured as follows:

4.1. Part One consists of an Introduction; Executive Summary; the Current Law; The Stated Objectives of the Reform and Empirical Evidence of the Impact of Non-Compete Clauses; and Some Suggestions for Reform.

4.2. Part Two consists of our responses to the 37 consultation questions. We strongly recommend it is read in conjunction with Part One.
4.3. Part Three is a Comparative Table showing the approach to post-termination restraints in various jurisdictions, a number of which are referenced specifically in the consultation document. In preparing its response, ELA organised a webinar with experts from some of the jurisdictions referenced in the consultation as to how non-competes worked in their countries. That webinar can found here and on the ELA website.

4.4. Part Four summarises the responses to a survey some ELA members conducted of corporate clients. That survey has informed, but not determined, our response. Those surveyed answered the questions the consultation document directed specifically at employers.

EXECUTIVE SUMMARY

5. We refer the Department to our detailed comments below. By way of summary, we emphasise the following points:

5.1. Whilst COVID continues to have a massive impact on the economy overall, we have not seen any evidence of any material change of circumstances relevant to post-termination restraints since the Government’s 2018 response to the 2016 Call for Evidence on Non-Compete Clauses. This was:

“The consensus view across the majority of responses was that restrictive covenants are a valuable and necessary tool for employers to use to protect their business interests and do not unfairly impact on an individual’s ability to find other work. Common law has developed in this area for over a century and is generally acknowledged to work well. Having built up a picture of the UK experience via this call for evidence, we have decided it is not necessary to take any further action in this area at this stage.”

5.2. We are not aware that any business groups or employee representative organisations disagreed with this conclusion, either at the time or since. ELA’s membership, which represents both employers and employees, have not reported any new concerns from their clients or the organisations (both employers and trades unions) in which they work. The survey (see Part 4) that ELA has conducted for the purposes of this consultation of interested businesses revealed no appetite for substantial reform, even though it was conducted after the current pandemic began and whilst those employers were preparing for business life after it has ended. It is worth repeating the conclusion of that survey here:
"66% of employers that answered our survey believe that they would not be able to sufficiently protect their business interests if the Government introduced a ban on non-competes. A substantial majority of 78% (100 employers) believed that a ban on non-compete clauses would have a negative impact on their business, with only 17 respondents (13%) believing that the impact would be positive. When we analyse the responses further, we see that entrepreneurs/start-ups are slightly more inclined to consider that the impact would be positive, but 72% still believed the impact would be negative”.

Businesses have identified barriers to innovation (see 7.14 below) but these do not include non-competes in any form.

5.3. ELA believes that this lack of appetite for change reflects neither conservatism nor complacency but that this is an area of law in which the judiciary are acutely aware of commercial concerns and where the foundational principle of the law is to promote competition in the labour market. It is perhaps helpful to restate that all non-compete clauses are unenforceable unless the employer proves that (1) the clause protects a legitimate business interest (such as the protection of confidential information and trade secrets), and (2) the clause is no wider than reasonably necessary to protect that interest.

5.4. This law forms part of the common law in general, and the doctrine of restraint of trade in particular. It has been developed by the application, development and refinement of principles in light of the facts and circumstances of individual cases. The courts aim to strike a balance between competing public interests of the employer in protecting its business, the employee in working as he or she wishes, and both parties in seeing their contractual bargain upheld.

5.5. The law itself is therefore not necessarily an impediment to innovation or employee mobility or job creation. ELA believes the reforms may increase employee mobility and indeed remuneration, but that substantial legal change risks adversely impacting business efficiency and investor confidence, which could in turn negatively affect innovation and job-creation.

5.6. Clearly, without non-competes, employees would be more free to move employers. This may push up their remuneration: without non-competes, it is arguable that employers may have to give their employees a greater incentive to stay. However, query what a new employer might be getting for their money if they offer to pay more. They would be acquiring the
benefit of their new hire's skill and knowledge, but arguably they might be paying a premium not just for that but to get the benefit of the former employer's trade secrets.

5.7. The law draws a clear line between the employee's skill and knowledge and the employer's trade secrets, but policing that line is very difficult in practice. It is rarely obvious what belongs to whom. A non-compete clause helps largely avoid these ambiguities by setting out clearly for whom the employee can and cannot work, in order to protect the employer's trade secrets. That clarity is of value not just to employers and employees but also investors, who see non-competes for example as protecting the employer's assets (and therefore their investment) in the crucial stage before formal intellectual property rights are crystallised.

5.8. To put it at its lowest, there is therefore a risk that reform might create greater inefficiency. A view from our counterparts in California is that non-compete litigation is there to some extent displaced into disputes about trade secrets and employees' duties of fidelity. Those concepts both exist in UK law, but over here post-termination restraints are deployed by employers and accepted by employees at least in part to avoid having to engage with the legal and factual uncertainty inherent in them. The consequences of those uncertainties are regularly played out in the California courts.

5.9. The formal research on the economic impact of non-competes, much of which originates in the different legal and business contexts of the United States of America, is far from consistent or clear. Some of the push for reform in the US, for example, comes from the practice of fast-food chains imposing non-competes on customer-service staff. This does not occur in the UK not least because it would be so clearly unlawful and ineffective here.

5.10. It remains of course a legitimate policy objective to seek to alter the balance in the current UK law between employer and employee in favour of the latter. However, ELA believes that it would most benefit employees if the Government were to concentrate its reforms on the process of enforcement rather than seeking to alter the substantive law. Some complexity and expense is inevitable in the process as the Courts seek to do right by both employer and employee, but it can be the employee who is put more at a disadvantage if they do not have the support of a new employer.

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1 Press release, 9 July 2018, Office of the Attorney General of the State of New Jersey
5.11. Indeed, ELA does not detect any sense of unfairness on the part of employees as to the basic structure of the law but members have material concerns both about transparency and, the efficiency and fairness of the enforcement process. Our answer to question 21 suggests a number of steps that the Government may like to consider to increase transparency. We have also identified some procedural reforms that the Department or the Civil Procedure Rule Committee may want to consider to ensure greater clarity and equality of arms in non-compete litigation. In addition, we set out in Section E some ideas for reform which may assist the Government’s aim of rebalancing, albeit all carry risk and cost and should be approached very carefully. The Department should consider each reform incrementally until it believes it has rebalanced law and procedure to its preferred level. Our particular concern is that, should the Government adopt a suite of reforms of which ELA’s suggestions form only part, it runs a very strong risk of not merely failing to achieve its objectives but positively damaging them.

5.12. In any event, we strongly advise that reforms should not be introduced without considering the wider context in which non-compete clauses operate. In particular, careful consideration would need to be given to (1) the definition of a non-compete clause (for example, whether it includes other forms of restrictive covenants such as those against soliciting or dealing with clients and poaching employees); (2) the multiplicity of contracts in which non-compete clauses are found (for example, not only employment contracts but also shareholders’ agreements, partnership agreements, Limited Liability Partnership agreements, joint venture agreements, franchise agreements, remuneration agreements (such as share option agreements, bonus agreements and long-term incentive plans), and agency contracts).

5.13. It is necessary to consider the consequences, often unintended, of the proposed reforms, including the potential for greater use of garden leave (which could inhibit employee mobility) and shareholder agreements to circumvent restrictions on non-competes in employment contracts. The introduction of the proposed reforms into a common law system would involve costs to businesses in the form of uncertainty (with the likely increase of litigation in the short to medium-term), and the need to review and redraft existing and future employment contracts and other agreements.

5.14. The requirements of compensation for non-competes in Germany, Italy and France, referred to in the consultation paper, apply in very different contexts than the UK, being civil (rather than common) law systems,
where the law has (for example in Germany) been longstanding and where (for example in France) collective bargaining plays a widespread role that is unfamiliar in the UK. Some civil law systems, for example, allow their courts to rewrite non-competes. The Courts in the UK do not, placing the onus on the employer to get it right at the outset. These are different approaches to protecting employees’ interests. The UK approach discourages better employers from drafting draconian provisions with the aim of deterring employees from joining a competitor, knowing that they are likely to have some protection in any event.

5.15. That is not to say there is no problem whatsoever in the UK with some employers imposing restrictions whilst remaining indifferent to whether or not they are enforceable, the intent being (at least in part) for the restrictions to act as a deterrent to employees from moving to a competitor. Nor does ELA seek to downplay the psychological impact of such purported restrictions on employees, some of whom in our members’ experience have been seriously concerned about contravening provisions which on investigation are most likely unenforceable. However, we repeat, the problem here is not the law itself, which would not enforce the non-competes, but transparency (are employees aware of and do they understand their obligations?) and the enforcement process (is it too difficult and costly for employees to contest the restrictions?). We address these issues in our suggestions for possible reform.

5.16. Whilst California bans non-competes, the evidence for any causal link between such a ban and the existence of tech start-ups is far from clear. It is clear that California has been more successful in tech than other states, but not necessarily in other sectors. Since the prohibition of non-competes applies regardless of sector, this suggests that the relative success of the tech sector is due at least in some part to other factors. It should also be noted that only 3 US states ban non-competes, despite the proclaimed economic benefits of such a ban.²

THE CURRENT LAW

6. It is essential, when considering whether to reform the law on non-competes clauses, to understand how they currently operate, and the limitations to which

² The consultation document makes passing reference to the law relating to non-competes in Israel. Having spoken to Israeli counsel, ELA finds it difficult to fully reconcile that reference to the advice we received on the relevant Israeli law. In the absence of more detail, it is unnecessary and perhaps unhelpful to comment further.
their enforcement is subject, under the current law. We summarise below the legal principles relevant to this consultation.

**General principles of the doctrine of restraint of trade**

6.1. As set out in the consultation paper, a non-compete is a contractual clause which seeks to restrict an employee’s ability to work for a business (including a business the employee sets up themselves) which competes with their former employer for a certain period after termination of their employment.

6.2. A non-compete is rarely used in isolation and frequently appears in employment contracts alongside other types of post-termination restrictive covenants, including:

6.2.1. non-solicitation clauses (which prevent the employee enticing away clients of their former employer);

6.2.2. non-dealing clauses (which prevent the employee dealing with clients of their former employer);

6.2.3. non-poaching clauses (which prevent the employee poaching staff of their former employer).

6.3. As well as general non-competes, which prevent employees working for any competitive business following termination of employment, it has become increasingly common for employers to include provisions in employment contracts which seek to prevent teams of employees leaving together to work for a competitor. Such clauses, often referred to as team move covenants, usually provide that employees may not work for a competing business for which other former employees are working for a specified period of time following termination. Though narrower in scope than a general non-compete, team move covenants have a broadly similar effect as non-competes.

6.4. The legal principles relevant to non-competes and other restrictive covenants form part of the common law doctrine of restraint of trade. This doctrine has developed over several centuries. A particular strand relates to employment contracts, but this is not the only context in which the doctrine is relevant (for example, it also applies to contracts for the sale of a business and to other agreements related to employment, such as shareholders’ agreements, LLP agreements and joint venture
agreements). Many of the fundamental principles of the doctrine are applicable in all contexts.

6.5. The aim of the doctrine of restraint of trade is to strike a balance between two competing aspects of the public interest. On the one hand, there is the public policy in favour of upholding contracts: where two parties have entered into a contract, public policy favours that those contracts should be complied with, not broken. On the other hand, there is the public policy in favour of allowing individuals the freedom to work as they please, without restriction on trade which would deprive the economy of skilled workers. In relation to restrictive covenants in an employment context, the employer's interest is in the former, whereas the employee's is in the latter.

6.6. The doctrine of restraint of trade has been, and continues to be, developed by the courts on a case-by-case basis. In doing so, the courts have developed, refined and applied legal principles in the light of the particular facts and circumstances of individual cases and in response to the changing needs of employers and employees. This approach is both principled and flexible.

6.7. The UK Supreme Court has recently reaffirmed the advantages of the common law when it comes to restrictive covenants. In *Peninsula Securities Ltd v Dunnes Stores (Bangor) Ltd* [2020] UKSC 36, the Court endorsed the following description of the common law, developed over seven centuries, as:

"a living system of law, reacting to new events and new ideas, and so capable of providing the citizens of this country with a system of practical justice relevant to the times in which they live."

6.8. In the same case, the Court cited with approval the following remarks of Lord Macmillan in a 1934 case:

"It is no doubt true that the scope of a doctrine which is founded on public policy necessarily alters as economic conditions alter. Public policy is not a constant. More especially is this so where the doctrine represents a compromise between two principles of public policy, in this instance, between, on the one hand, the principle that persons of full age who enter into a contract should be held to their bond and, on the other hand, the principle that every person should have unfettered liberty to exercise his powers and capacities for his own and the community's benefit."
6.9. The doctrine of restraint of trade is founded upon a presumption of unenforceability. All restraints of trade, including non-competes and other types of restrictive covenants, are considered by the courts to be unenforceable unless they are demonstrated to be reasonable.

6.10. A non-compete will be unreasonable unless the court is satisfied that it protects a legitimate business interest of the employer and it is no wider than reasonably necessary to protect that legitimate business interest.

6.11. In the employment context, the burden of proving that a non-compete is reasonable falls on the employer. This is a significant burden, since it is the employer's task to convince the court to shift from the position that the non-compete should not be enforced.

6.12. The courts draw a distinction between covenants entered into by employees and covenants entered into in a more commercial context, for example on the sale of a business. A stricter approach is taken to the enforcement of employee covenants, such that a heavier onus is borne by an employer in establishing the reasonableness of the covenant.

6.13. In addition, the courts recognise that non-competes are "the most powerful weapon in an employer's armoury" (Patsystems Holdings Ltd v Neilly [2012] EWHC 2609, 44). The effect of a non-compete, which may prevent an employee from earning a living during the period of restriction, means that it is the hardest type of restrictive covenant for an employer to enforce.

6.14. The courts will not enforce a non-compete where a restrictive covenant of a different and less onerous type would provide the employer with sufficient protection for its legitimate interests. This well-established principle was reaffirmed by the High Court recently in Quilter Private Client Advisers Ltd v Falconer [2020] EWHC 3294.

6.15. The enforceability of a non-compete is judged as at the date it is entered into. The covenant must be reasonable from its inception. If a restrictive covenant was unreasonable at the time when it was agreed, it cannot be saved simply because a subsequent change of circumstances (such as the employee's promotion) mean that it would have been reasonable at the time that it fell to be enforced.

6.16. An employer who commits a repudiatory breach of an employee's employment contract is not entitled to rely on any restrictive covenants contained within the contract, even if those restrictions are otherwise
reasonable. Therefore, an employee who has been wrongfully dismissed by their employer or had remuneration reduced or withheld in fundamental breach of their employment contract will not be bound by any non-compete contained in that contract.

**Enforcing a non-compete**

6.17. There are different circumstances in which a court may be faced with a dispute as to the enforceability of a non-compete. These include:

6.17.1. An employer may seek an interim injunction to restrain an employee from breaching a restrictive covenant until trial. An injunction is a discretionary remedy which the courts will determine whether to grant based on all the facts of a given case. Provided that a trial can take place before the period of the restraint has substantially expired, the court applies a familiar test for the grant of interim injunctive relief, namely whether (i) the employer has demonstrated a serious issue that the covenant is enforceable and he would be granted a final injunction at trial, and (ii) the “balance of convenience” favours the grant of interim relief. Only if both (i) and (ii) are satisfied will the court grant an interim injunction.

6.17.2. An employer may seek a final injunction or damages at trial. Here, the court finally determines the enforceability of the covenant and, if enforceable, the appropriate remedy for breach.

6.17.3. An employer or (more commonly) an employee may issue proceedings for a declaration as to the enforceability of the covenants. Some employees seek, and obtain, such declaratory relief at a speedy trial so that they have certainty as to the enforceability of covenants before taking up a new job or starting a new business.

6.18. Proceedings relating to disputes about the enforceability of a restrictive covenant must generally be brought in the High Court. As is rightly highlighted in the Consultation, the High Court is a heavily procedural jurisdiction in which the losing party generally pays the winner's legal costs as well as their own. On top of this, since non-competes are usually of limited duration (typically between three to 12 months), timing is of the essence in relation to applications for an injunction or declaration. The intense work necessary to prepare a High Court
application in a short space of time means that legal costs for both sides can rapidly escalate into thousands of pounds.

6.19. Naturally, an employee is less likely to be able to bear the initial cost outlay (as well as the risk of having to pay both sides' costs in the event of losing the application) than a corporate employer. An employee would usually prefer to reach a negotiated settlement involving some form of restriction than risk a costly court battle, even where there is a good chance of succeeding in an argument that their contractual restrictions are unenforceable. It is therefore rare that a dispute about enforceability of a non-compete will end up in court.

6.20. In view of the costs obstacle, prospective employers with significant financial means who are keen to sign up employees they consider to be business-critical quicker than a non-compete would allow will, in some cases, undertake to fund the cost of an employee’s legal action with their former employer. This arrangement is not without difficulty and, if not handled carefully, may expose the prospective employer to liability for a claim that they have induced the employee to breach their contract with the former employer. It is therefore by no means a solution (or even a possibility) in all cases. Rather, the fact that this occurs at all serves to underline the flaws in an enforcement process which undoubtedly benefits the party with the deepest pockets.

6.21. In disputes which proceed to a hearing, however, the court will conduct a meticulous balancing exercise. The court will generally apply a three-stage test in determining whether a covenant is reasonable:

6.21.1. Stage 1: What does the non-compete mean? The court will apply well-established principles of contractual interpretation.

6.21.2. Stage 2: Does the non-compete protect a legitimate business interest of the employer? An employer is not entitled to protect itself against competition per se. It must identify some proprietary asset that merits protection by a reasonable covenant. This has been stated time and again by the courts.

6.21.3. Stage 3: Is the non-compete wider than reasonably necessary to protect the legitimate interests in question? At this stage, the court will balance the respective interests of the employer and the employee and (where appropriate) the public, having regard to all relevant facts and circumstances including the scope and duration of the covenant.
6.22. The Consultation states that non-competes "are used to protect the former employer's confidential information or customer relations". In fact, the categories of legitimate business interests which may justify a reasonable non-compete are not closed. However, the courts have confirmed that trade secrets and confidential information, client relationships, and the stability of the workforce are examples of legitimate business interests that may support a reasonable covenant.

6.23. We note that the Consultation is not seeking views on the law relating to confidential information. However, since protection of confidential information may amount to a legitimate business interest, it is necessary to consider briefly the interaction between the law of confidence and the doctrine of restraint of trade.

6.24. It has long been recognised that an employee’s duty not to misuse confidential information provides inadequate protection for an employer. This is for two reasons. First, it is impossible to police an ex-employee’s compliance with the duty of confidence. An employer will often simply not know whether an ex-employee has breached his duty of confidence. The ex-employee can disclose his former employer’s confidential information – for example business plans, pricing structures, sales strategies – to his new employer without the former employer ever knowing, let alone being able to prove it. Second, it is often difficult to draw the line between what is and what is not confidential information. There is a grey area around the boundary. A reasonable non-compete obviates the necessity of proving each item of confidential information, provided that the employer can demonstrate that, when the covenant was entered into, it was reasonably contemplated that the employee would have access to confidential information and that use of that information by a competitor would be injurious to the employer. This two-fold justification for non-competition covenants has long been recognised by the law, and was explained with clarity by Lord Denning in this oft-repeated passage:

“It is thus established that an employee can stipulate for protection against having his confidential information passed on to a rival in trade. But experience has shown that it is not satisfactory to have simply a covenant against disclosing confidential information. The reason is because it is so difficult to draw the line between information which is confidential and information which is not and it is very difficult to prove a breach when information is of such a character that a servant can carry it away in his head. The difficulties are such that the only practicable solution is to take
a covenant from the servant by which he is not to go to work for a rival in trade. Such a covenant may well be held to be reasonable if limited to a short period." (Littlewoods Organisation Ltd v Harris [1977] 1 WLR 1472 (CA), 1478)

6.25. The Consultation states that "the law of confidence will protect current or former employees from personally using their employer’s trade secrets or confidential information". For the reasons explained by Lord Denning in the 1970s (see above), and applied by many courts since, in practical terms, this is not so. Whilst the law of confidence prohibits an employee from misusing his employer’s confidential information, it is not sufficient to prevent this happening in practice, or to provide an effective remedy if it does happen. Reasonable non-compete clauses are necessary, in practice, to protect an employer’s trade secrets and confidential information from misuse by an ex-employee, particularly senior employees who may have detailed knowledge of the inner workings of the company, its plans, strategies, reward policies etc. which he is able to recall from memory even though they are not contained in documents. As these restrictions can have the effect of preventing a person from working, the general approach of the courts, however, has been not to enforce non-compete clauses if, as is often the case, restrictions on soliciting or dealing with customers would give the employer the protection he reasonably needs.

6.26. As to the protection of client relationships and workforce stability, these both form part of the goodwill of the business. The departing employee may well have built up very close connections with customers and staff as a result of having been paid to do so by his employer, and may consequently be in a good position to entice them away from the employer following termination. However, since these interests can generally be protected by way of non-solicitation, non-dealing and non-poaching covenants, it is harder – though not impossible – for an employer to argue that a non-compete is necessary on one of these grounds alone.

6.27. It is self-evident that to legislate for the reform of restrictive covenants would involve a major and historic departure from the common law framework which has prevailed in the UK over the past seven centuries. Before such a significant change is introduced, it is necessary to consider whether there is compelling evidence that (i) the current arrangement is deficient, (ii) the proposed statutory reforms would remedy any such deficiencies, (iii) those reforms would not bring with
them any new disadvantages, and (iv) the new system would represent a marked improvement on that which has applied until now.

**Compensation and non-competes**

6.28. The Consultation states that the proposal to make non-competes unenforceable unless compensation is paid will ensure that employees receive a "fair settlement" if they are restricted from starting a business or joining a competitor.

6.29. It is worth noting in this context that receiving a fair settlement for a non-compete is rarely uppermost in an employee's mind at the point at which they are seeking to leave their employer and find another job. The priority is to avoid being kept out of the market (and the atrophy of skills that may result) and to be able to set a start date with a new employer as quickly as possible. Employees are often nervous that a long period of restriction will reduce their attractiveness to a future employer. However, assuming that the prospective employer is willing to wait, we accept that a period of restriction is likely to be more palatable to an employee, and they are arguably more likely to abide by the relevant restriction, if they are being paid for it.

6.30. Although compensation is not currently payable in respect of non-competes under the common law, the use of such clauses post-termination is only one option open to an employer when seeking to restrict the activities of a departing employee. An alternative is to put the employee on garden leave, which allows the employer to withhold work from the employee during their notice period. The employee remains employed during this period, meaning they may be significantly more restricted in terms of their activities than they would be under a post-termination non-compete (for example, they may be unable to work for any other business, rather than just a competing business). However, they are entitled to be paid the full amount of their normal salary, with or without benefits depending on the wording of the clause.

6.31. Employers are generally not able to impose garden leave unilaterally where the employment contract does not contain an express garden leave clause. Such clauses usually provide the employer with a discretion to place the employee on garden leave during notice, rather than giving the employee a contractual right to be placed on garden leave. Where an employer imposes garden leave without having a contractual right to do so, this may amount to a repudiatory breach of the
employee's contract which would invalidate any post-termination restrictions that the employer may otherwise wish to rely on.

6.32. In addition, garden leave is often offset against any period of post-termination non-compete. Where it is not, the employer risks losing the protection of the non-compete where the total period of pre- and post-termination restraint is unreasonable.

6.33. Where garden leave clauses prevent employees from working for any other employer, they are subject to the doctrine of restraint of trade (Symbian Ltd v Christensen [2001] IRLR 77). However, the court has more flexibility when enforcing garden leave than in the case of post-termination non-competes. This is because garden leave relates to a period when the contract remains in force. The court is therefore not limited to enforcing just the garden leave clause: it can also enforce the prohibition on working for anyone else during the term of the contract, either by reference to an express contractual provision or the general duty of good faith. Rather than declaring a garden leave clause void in its entirety because it is unreasonably wide, the court can whittle down the obligations owed by an employee during a garden leave period to make them reasonable.

6.34. When considering whether to introduce compensation for non-competes, or indeed whether to ban them altogether, it is necessary to consider the relationship between non-competes and garden leave. Currently, employers often impose garden leave where they are concerned about the enforceability of a non-compete. Although there is no guarantee that a garden leave period will be upheld by the court, it is more likely that garden leave will be upheld than a defective or unreasonable non-compete.

6.35. Although there have been cases where garden leave clauses of up to 12 months have been declared enforceable, most employees do not currently have 12-month notice periods. However, as the Consultation recognises, any strengthening of the regime relating to non-competes may prompt employers to make greater use of garden leave. This could include introducing garden leave clauses to more contracts as well as lengthening notice periods to increase the period of restriction available. Although employees would be paid during this period, the result may be a stricter and longer restriction than would have been applicable under the current regime.

6.36. If compensation for non-competes is introduced, rather than a complete ban, an alternative outcome is possible. The Consultation envisages that
payment for non-competes will likely be a percentage of the employee's salary rather than their full salary. If so, employers may prefer to rely on a non-compete since it will cost less than garden leave. This would reduce the "fair settlement" an employee receives for their restrictions, leaving them worse off than under the current system. Employers could also reduce garden leave and extend a non-compete to get the same restriction for a cheaper cost.

6.37. Related to the latter point, it is worth noting that the Consultation identifies a key aim of statutory intervention to be to disincentivise employers to use unreasonably long non-competes. It is for this reason that a maximum duration is being considered. In fact, a disincentive for unreasonably long restrictions already exists, in that they will not be enforced by the courts. Setting this aside, however, where a maximum duration is imposed, we believe it is likely – as envisaged by the Consultation – that employers will adopt it as standard. Indeed, we understand this is the case in Germany, where employers routinely impose non-competes for the statutory maximum period of 24 months when shorter non-competes would have provided adequate protection.

6.38. Returning to issues of compensation, it is not currently clear from the Consultation whether it is proposed that (i) payment by the employer will render enforceable non-competes that would be unenforceable under the common law principles; (ii) non-competes must still be reasonable under the common law principles even if compensation is paid for them; or (iii) there will be a new statutory system determining whether a non-compete is reasonable when compensation is paid. Inevitably, each of these approaches has potential difficulties. For example: under (i), the benefit of any payment received by the employee is likely to be outweighed by the unreasonable restrictions which will surely be imposed; under (ii), the regime is likely to remain almost identical as it is currently but with the addition of a requirement that the employer should pay compensation; and under (iii), in order to capture the complexities of the current law, any statutory system introduced is likely to end up extremely complex.

6.39. It is also necessary to consider the remedies that will be available to employers in the event that an employee accepts compensation for a non-compete and breaches it anyway. At present, the courts recognise that damages are unlikely to be an adequate remedy for the employer for the harm that an employee could do to its business if they act in breach of their non-compete. If there is evidence that an employee has breached a restriction with time left to run, or intends to breach a restriction, the employer can seek an injunction to enforce it. It would
therefore naturally be of concern to employers if the existence of an obligation to pay compensation for a non-compete effectively operates as a liquidated damages clause which limits their losses in the event of breach to the value of the compensation due to the employee.

Incorporation

6.40. The Consultation identifies transparency as a key issue in relation to non-competes in employment contracts. It suggests that an option to tackle this issue could be to introduce an obligation on employers to disclose the exact terms of any non-compete at the start of the employment relationship, with any failure to do so rendering the clause unenforceable.

6.41. We acknowledge that restrictive covenants, including non-competes, are often misunderstood (or not understood at all) by employees when they enter into employment contracts. It is right to consider ways in which this issue could be addressed, and our suggestions are set out in our responses to questions 18 to 21 of the Consultation. However, it is important to bear in mind that basic contract law already requires the court to consider, at the point of determining the enforceability of a non-compete, the extent to which that non-compete was incorporated into the employee's contract.

6.42. A non-compete clause is a contractual provision. In England and Wales, such a clause must therefore be supported by the usual elements of a contract: offer, acceptance and consideration. Where the covenants are contained in a contract of employment signed at the start of the employment relationship, consideration will take the form of the employee's regular salary, benefits and any other remuneration paid by the employer. Where restrictive covenants are introduced later in the relationship, for example where the employee is promoted, an employer should allocate specific consideration to the restrictive covenants (Re-Use Collections Ltd v Sendall and another [2015] IRLR 226).

6.43. It is difficult for employers to show offer, acceptance and consideration unless a non-compete is documented expressly. In practice, employers often include restrictive covenants in employment contracts signed prior to or at the start of employment. If employers choose to include restrictive covenants in a document which is separate to the employment contract, they must be able to demonstrate offer, acceptance and consideration in respect of the restrictions contained in that document specifically. Salary, benefits and other remuneration under the
employment contract may not be sufficient to demonstrate consideration in these circumstances, though this will depend upon all the facts.

6.44. Employers seeking to enforce restrictions will also be expected to show that the employee consented to the restriction. The easiest way of doing so is to provide a signed copy of the document (usually the employment contract) containing the restrictions. Where a covenant is signed by an employee, it is presumed to be binding, subject to the employer demonstrating that the covenant is reasonable. Conversely, where the covenant has not been signed by the employee, it is presumed not to be binding.

6.45. Precision is paramount in relation to the drafting of restrictive covenants. A court will not re-write a covenant to make it enforceable if it is too broad. Nor will it construe a wide (and void) restriction as having implied (and valid) limitations: to do so would mean that employers would have no incentive to pay attention to the accurate drafting of restrictive covenants. Where a non-compete is unclear or is drafted too widely, the employer therefore risks losing the protection of the clause altogether.

6.46. The Supreme Court has recently confirmed that in certain limited circumstances, it may be possible to sever provisions which are unenforceable from the rest of the terms of an otherwise enforceable restrictive covenant. However, where this is the outcome of an application before the court, it is likely to have adverse costs consequences for the employer (Tillman v Egon Zehnder Ltd [2019] UKSC 32).

**Start-ups and non-competes**

6.47. The Consultation expresses concern that non-competes act as a "barrier" to innovation and jobs by "preventing individuals from working for a competing business, or from applying their entrepreneurial spirit to establish a competing business". This is of course a familiar complaint to employers, since it is often used by employees to argue that such clauses are unfairly restrictive on their ability to work as they please following termination of their employment.

6.48. There is no doubt that non-competes do prevent employees from doing exactly as they please following termination of their employment, which includes working for, or setting up, a competing business. It is only natural that individuals leaving their former employer would prefer to be able to work without restraint when their employment ends.
However, as we have summarised above, the doctrine of restraint of trade seeks to balance two competing aspects of public policy. The employees' freedom is one of these aspects, but is not the only one that must be considered. Against the employee's desire for freedom, it is necessary to balance the position of the former employer, who has a contractual relationship with the departing employee, has invested in them and trusted them with confidential information, intellectual property and/or client relationships, and who also has a business – and other employees – to protect.

We here reiterate a point made in our response to the 2016 Call for Evidence: an entrepreneurial employee of today is an employer of tomorrow. An individual who believes that it is unfair for their employer to impose a non-compete may well have a very different perspective on the situation after they have themselves started a business (bearing all of the cost and risk this entails, particularly in an economic downturn) and understand the damage a departing employee could do if there were nothing to prevent them setting up in competition immediately.

Further, where finance is needed to establish the new business, an investor will not be encouraged if the people that it has invested in are free to leave and establish a competing business without any hindrance if, for example, having used the money to successfully establish the business, they become dissatisfied at the returns required by the investor.

Non-compete clauses are not simply used by large companies to stifle competition from new businesses set up by creative individuals (indeed, in a David and Goliath scenario of this type, it may be difficult for the employer to demonstrate that their former employee would be a genuine competitive threat, and therefore it may struggle to enforce a non-compete in the courts). In fact, non-competes are a valuable way for young businesses to protect themselves, particularly in circumstances where bigger and better-established rivals seek to capitalise on new areas of business by poaching key employees from innovative newcomers who blazed the first trail.

Some recent case law examples of young businesses relying upon non-competes to protect against competition include:

This case concerned the sales director of a company supplying medical equipment. The company was incorporated
in 2017 as a spin-off from another company incorporated in Gloucestershire in 2012. The director resigned with immediate effect in May 2020, at the height of the COVID-19 pandemic, and started work with a direct competitor of the employer the next day. The court upheld a six-month non-compete, taking into account the small size of the sales team and the director’s pivotal role.

6.53.2. *Square Global Ltd v Leonard* [2020] EWHC 1008 (QB)
In this case, a broking business established in London in 2012 sought (and was granted) an injunction to uphold a six-month garden leave clause followed by a six-month non-compete. This prevented a broker, who had been with the employer since 2015 and whose job it had been to build up and exploit customer connections for four years, from joining a market-leading, global competitor.

The employer in this case was a newly established UK branch of a group of companies dealing in cryptocurrencies. Its managing director, who had moved to lead the employer’s expansion into Europe in 2019 after co-founding a new online bank in the UK, resigned to take up a position as CEO of one of the world’s longest running cryptocurrency exchanges three days later. The employer was granted an injunction to enforce the employee’s nine-month non-compete.

6.54. Importantly, non-competes will only be enforced where they are reasonable. The courts will not permit an employer to use non-competes to stifle competition generally, but instead require the employer to identify a genuine interest that is capable of protection and to impose the minimum restriction possible to achieve that protection. The court’s aim is not to prevent employees competing with their employer indefinitely, but rather to afford an employer an opportunity to shore up its business before an attack can be launched.

6.55. The law has for seven centuries recognised that there is a danger in prioritising the freedom of employees over the rights of employers to protect their businesses and indeed vice versa. It has painstakingly sought to ensure a balance between these competing interests. Recognising the multitude of strands which feed into this balancing exercise, we would strongly caution against ill-thought out reform in a
complex area of law which may risk tipping the scales too far in one direction.

THE STATED OBJECTIVES OF THE REFORM, AND EMPIRICAL EVIDENCE OF THE IMPACT OF NON-COMPETE CLAUSES

7. It is not ELA’s role to comment on the political merits or otherwise of proposed legislation. However, it is worth noting some observations on the Government’s stated objectives for the proposals, including evidence from academic research, with a view to considering whether the proposed reforms are likely to meet those objectives.

Rationale for the Consultation proposals

7.1. The Government’s rationale for the reforms centres around three stated objectives: (i) exploring avenues to boost innovation; (ii) creating the conditions for new jobs; and (iii) increasing competition. The overarching theme appears to be a policy desire to boost innovation, given the current economic situation caused by the COVID-19 pandemic.

7.2. The Consultation does not cite any evidence on which it relies to suggest that the reform proposals would boost innovation or achieve the objectives of creating new jobs and increasing competition.

Rationale for the 2016 Call for Evidence

7.3. In its 2016 Call for Evidence on non-compete clauses, the Government stated that the rationale for the review of non-competes was to prevent the hindrance of workers from moving freely between employers, “and from developing innovative ideas, translating those ideas into a start-up, and growing their business” (BIS, 2016, p.3).

7.4. The Call for Evidence referenced the economic situation of 2016, which of course differs significantly from the economic situation of December 2020 and beyond. In particular, the 2016 economic situation is described by reference to “the [thriving] UK labour market” and “record levels of employment and low levels of unemployment”.

7.5. In the Call for Evidence, the Government cited the Social Market Foundation’s 2014 report, ‘Venturing Forth: Increasing high value entrepreneurship’ (Social Market Foundation, 2014) (the “Report”). The Report recommended that non-compete clauses are banned in employment contracts. However, the Report’s rationale focused on the individual worker hardship inflicted as a result of non-compete clauses,
stating “Existing companies would still be able to manage the risk of competition through paid notice periods or shares in the company to align incentives: the important point is that this eliminates the important gap in income that otherwise increases the financial risk of setting up a business.”

7.6. We note that the Social Market Foundation published a further report in 2020, ‘Unlocking Britain: Recovery and renewal after COVID-19’, in which it does not repeat its recommendation that non-compete clauses in employment contracts should be banned.3

7.7. In contrast to the above, the Consultation policy objective appears to target specifically the interests of unborn businesses and entrepreneurs, as opposed to any particular hardship suffered by (for example) lower paid workers as a demographic, or established businesses in relation to protection of their intangible assets.

**Will the measures boost innovation?**

7.8. The above overall policy objective gives rise to the following key questions: does the existing common law regime regarding non-competes stand in the way of the Government’s innovation agenda? If so, will reform of the regime have the intended effect of boosting innovation?

7.9. We consider that there is insufficiently clear evidence for either of these propositions. Specifically:

7.9.1. as set out in further detail below, the empirical research and literature on this area is inconsistent to date and there is a lack of robust evidence (internationally, or within the UK) that tests the real impact of non-compete restrictions on innovation; and

7.9.2. by contrast, and as set out below, there is evidence that there are other potentially more significant structural barriers to innovation (particularly, access to capital).

7.10. There is therefore no clear evidence that reform of the common law in this area would be an effective means of achieving the desired policy objective. This is significant because, for the reasons outline below, the

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3 Unlocking Britain: Recovery and renewal after COVID-19
reforms are not cost neutral on other stakeholders including existing employers (of all sizes) and investors.

Financial impact – impact on funding

7.10.1. Both established businesses and early stage or young start-up businesses place high value on their ability to protect their research and development, trade secrets, confidential information, customer connections and skilled workforces from being undermined following significant investment. The protections afforded under the current regime for enforcement of non-competes make the UK an attractive jurisdiction for private equity and venture capital investment.

7.10.2. Private equity and venture capital investors value these restrictions when making investment decisions, as they are aimed at preventing abuse by departing employees of young, vulnerable companies in the early stages of developing and exploiting a new business idea. The short term and limited nature of the restrictions allows the affected companies to shore up their business in the period after a team member with critical knowledge has left. As explained above, these intangible assets are best protected through non-compete restrictions given the difficulties in proving that an ex-employee has in fact misused confidential information or trade secrets.

Financial impact – costs

7.10.3. There are also significant implementation costs for the measures which will materially impact businesses of all sizes. By way of initial scoping, we anticipate the following key steps would be required by employers to implement replacement contractual obligations:

7.10.4. obtain specialist guidance and/or legal advice on their new statutory obligations and carry out a risk assessment of implications for the business;

7.10.5. set up a project team to undertake implementation, obtain necessary internal funding and senior management approvals;

7.10.6. a complete audit of all employment contracts to identify those that contain restrictions that would no longer be enforceable
and an audit of any other commercial arrangements that could be affected by the measures (e.g. outsourcing agreements or recruitment agency terms and conditions);

7.10.7. prepare new contracts or addendums that comply with any new statutory regime, including management of the consideration needed to ensure that those restrictions are binding;

7.10.8. undertake employee consultation to agree the new restrictions, which could involve a collective consultation process for employers that are (a) bound by collective bargaining obligations; and/or (b) where the proposals may otherwise trigger statutory collective consultation obligations. Such consultations (whether individual or collective) inevitably require significant internal project management by HR teams and senior management, as well as planning and implementing a clear communications process with the workforce.

7.11. These all require financial investment and management time and input.

**Other financial implications**

7.12. Under Option 1 employers will clearly be subject to balance sheet liabilities in terms of the costs of paying any mandatory compensation for restrictions. These may be a material business cost for start-ups and young businesses. Further, under either option, where employers make greater use of longer notice periods and garden leave (as we anticipate and have addressed elsewhere) this will also increase businesses’ wage bills.

7.13. The economic and practical costs of implementing a new regime, together with the lower levels of business protections that will be enjoyed, will inevitably destabilise existing businesses (including early stage start-ups) at a stage in the economic cycle and recovery from the impact of the pandemic when it is widely acknowledged that many businesses of all sizes are struggling to survive.

**The UK industry view on barriers to innovation**

7.14. According to UK industry, there are other barriers to innovation than the use of non-competes, which need to be addressed:
7.14.1. BEIS’ Innovation Survey of 2019\(^4\) notes that the 2017 Industrial Strategy sets the target of raising public and private sector investment in Research & Development from 1.4% to 2.4% by 2027. At section 7.2, finance availability is identified as the top of several “Barriers to Innovation”. “Lack of qualified personnel” is identified as a “highly important” barrier by nearly 15% of those surveyed in 2016-2018. The BEIS Small Business Survey for 2019\(^5\) did not refer to non-compete restrictions.

7.14.2. In 2019, GEN Global surveyed 157 entrepreneurship support organisations to ask what they perceived as being the top barriers standing in the way of entrepreneurs. The findings are summarised in the article Barriers to Entrepreneurship: Views from Support Organizations.\(^6\) 29% of those surveyed identified “access to capital” as the top barrier to start-ups. 10% identified “access to markets” as the principal barrier and 14% identified “regulatory or policy barriers”. Non-compete restrictions are not mentioned.

7.14.3. The Federation of Small Businesses 2020 report “Unlocking Opportunity - The value of ethnic minority firms to UK economic activity and enterprise”\(^7\) suggests there are cultural barriers to entrepreneurship and innovation, including lack of access to funding for BAME-led start-ups as a potential barrier to innovation. The report calls for dedicated funding (such as the now defunct Aspire Fund) to overcome this. It also argues that the furtherance of schemes such as the Research & Development tax credit and Innovate UK Grant Programmes will assist small start-ups as a whole, not just those led by BAME entrepreneurs.

7.14.4. The Kaufmann Foundation recognised in 2019 the barrier of access to capital in a specific “Access to Capital for Entrepreneurs” report in their campaign to have “Zero Barriers” to entrepreneurship.\(^8\) This US organisation identified that 65% of US entrepreneurs relied on personal or family

\(^4\)BEIS’ Innovation Survey of 2019
\(^5\)The BEIS Small Business Survey for 2019
\(^6\)Barriers to Entrepreneurship: Views from Support Organizations
\(^7\)Unlocking Opportunity - The value of ethnic minority firms to UK economic activity and enterprise
\(^8\)“Access to Capital for Entrepreneurs” report
savings and 10% of entrepreneurs carry balances on their personal credit cards.

7.14.5. “Barriers to Innovation” published by the (sector-specific) Traffic Technology Foundation in 2018 found that a “lack of funding [is] the most significantly strongest barrier”9.

US LITERATURE AND RESEARCH ON THE IMPACT OF NON-COMPETES

8. The US provides a good comparative study on the impact of non-competes for the UK because it is a common law legal system and the approach to the enforceability of non-competes varies from state to state.10 The focus of the literature is on the impact of the enforcement or otherwise of non-competes, rather than the impact of requiring compensation for non-competes. However, if the objective of imposing compensation for non-competes is to dis-incentivise their use (thus leading to less enforcement), then it is our view that the commentary is relevant to both of the Government’s options.

The US perspective

8.1. There has been an increased focus on non-compete clauses in US policy in recent years. One pledge of the Biden administration is to prohibit non-compete and non-poaching clauses on a federal level, because they are considered to hinder employees’ ability to seek higher wages, better benefits and working conditions, by changing employment.11 The statistics on which this policy objective is based are from a paper on non-compete clauses issued by the US Department of Treasury in 2016,12 which led to a Call to Action by the Obama administration (in which President Biden served as Vice-President) for states to “reduce the misuse of non-compete agreements”.13 The Biden proposal goes further than the 2016 Call to Action, in that it proposes an outright ban on non-poaching agreements, and a ban on non-compete agreements “except the very few that are absolutely necessary to protect a narrowly defined category of trade secrets”. It is of note that the focus of this policy objective is to increase employee mobility and welfare,
which aligns with just one of the Government’s three stated objectives in the Consultation ("to create the conditions for new jobs").

8.2. There are critics of the proposals for a federal ban on non-compete agreements in the US.\textsuperscript{14} Although the first study attributing the success of Silicon Valley to the fact that non-competes are not legally enforceable in California, was published in 1999,\textsuperscript{15} as of today, only 3 US states have banned non-competes entirely. The vast majority of the states still follow a common law approach in determining enforceability of non-competes, similar to the UK.

8.3. The commentary from recent US literature suggests that it is not at all clear that the conditions for success in Silicon Valley can be easily replicated by a simple prohibition on non-competes.\textsuperscript{16} The commonly-held view is that the empirical research on the impact of non-competes is incomplete and not sufficiently robust to inform federal policy in this area, while ensuring there are no unintentional negative consequences for employee or consumer welfare.

**Does the US research support the Government’s objectives?**

8.4. There is no consensus in the literature that banning non-competes would help achieve the three primary objectives the Government is seeking to pursue.

**Innovation**

8.4.1. The general outcome is that, while non-competes may tend to reduce innovation, studies have shown that, in states where non-competes are enforced, new firms that are established tend to experience more extreme successes and extreme failures than those in lower enforceability states. This is attributed to firms in those states being better able to take on

\textsuperscript{14} Seyfarth Shaw LLP, *Will Biden Ban Non-competes?* (9 December 2020); Beck Reed Riden LLP, *President Biden’s Proposed Ban of (Most) Noncompetes: Protection Strategies and Steps to Take Now* (2 December 2020);

\textsuperscript{15} Ronald J. Gilson, *The Legal Infrastructure of High Technology Industrial Districts: Silicon Valley, Route 128, and Covenants Not to Compete*, 74 New York University Law Review 575 (June 1999).

risky research and development tasks, and appropriate their innovations, which can lead to better longer term success.17

Create conditions for new jobs

8.4.2. Similarly, studies show that non-competes do tend to have a negative impact on entrepreneurship and employee mobility, which create the conditions for new jobs. However, there are studies which indicate that:

8.4.2.1. While non-competes might impede the proliferation of newly established businesses in the short term, they may not hinder the establishment of more robust businesses in the longer term.18

8.4.2.2. Firms may be incentivised to invest more in their employees, in particular in relation to employee training, and employees tend to have longer tenure.19 There appear to be no studies to date that suggest that employees value their mobility over the positive impact that non-competes can have on other aspects of their welfare. Also, their perspective on which of these options they value more may change, depending on the economic climate at the time.

8.4.2.3. The negative impact of non-competes on wages is mitigated in states where sufficient consideration for non-competes is a requirement for enforceability (which is the case under the common law in the UK) and where employees are shown the non-competes at an

early stage before they sign-up to them (which would support an argument for increased transparency about the terms and effects of non-competes).

8.4.3. There is not a high degree of employee mobility in industries outside the IT sector in California (despite the same policy on non-competes applying to all industries), which indicates there are other factors at play in that sector, which would need to be replicated to encourage the same degree of employee mobility in the UK.

Competition

8.4.4. While there is some evidence to suggest that the use of non-competes can hinder entrepreneurship (as set out above), there is no clear evidence that restricting or prohibiting non-competes leads to better outcomes for consumers, which is the primary objective of competition and anti-trust policies.20

8.4.5. For example, the use of non-competes tends to result in decreased employee mobility and wages, which leads to lower business costs, which can in turn lower prices for the consumer. Also, for firms that are encouraged to innovate or invest in riskier R&D as a result of the protection that higher enforcement of non-competes offers, consumers may benefit from higher quality products and a greater rate of innovation. One study suggests that not enforcing non-competes resulted in more misconduct of employees, fewer employees being disciplined, and an increased cost passed on to clients, which was attributed to the greater risk of loss to the business due to increased employee mobility (e.g. employees taking clients with them).21


Gaps in the research

8.5. It has also been highlighted that there are some significant gaps in the research on the impact of non-competes that make it difficult to draw any systemic conclusions from their findings.²²

8.6. Most significantly, there has been little data gathered on the use and impact of non-competes before they get to enforcement stage (i.e. which employers are using them in their contracts) and also on their relative prevalence across a broad range of industries.²³ Without further data, it is therefore difficult to assess:

8.6.1. whether any legislative reform on non-competes would have the same positive or negative impacts on each industry in order to justify any particular kind of reform (or if, for example, there would be winners and losers and, if so, who they would be); and

8.6.2. the “psychological effect” of non-competes on employees, referred to in the Consultation. Interestingly, of the research carried out so far, there does not appear to be much less use of non-competes in contracts in states with low or no enforceability of non-competes, despite the fact that it is well known that they are unlikely to be enforced in practice.²⁴

8.7. Further gaps that have been identified in the research are: What are the reasons that different employers or industries have for wanting to impose non-competes? Do those motivations change, depending on whether the employer is established in a higher or lower enforcement jurisdiction? To what extent do employees who sign up to non-competes understand their effect when they agree to them? How do non-competes affect end consumers?

8.8. Some progress has been made in seeking to plug these gaps since the US Treasury Report in 2016 but, due to the fact that the effect of non-competes on employees, competition and consumer welfare is still

²² See, for example, Bishara and Starr, supra note 8 at 501.
²³ McAdams, supra note 7, and Bishara and Starr, supra note 8. McAdams refers to just four surveys of non-compete use in the US, one national survey covering a broad range of occupations, and three surveys covering specific occupations only.
²⁴ McAdams, supra note 7, at 3.
ambiguous, the empirical research does not yet appear to definitively support a ban, or targeted ban, on non-competes.

SOME IDEAS FOR REFORM

9. In addition to its suggestions as to improving transparency (see the answer to Q21), ELA believes the following measures might be considered. If properly and carefully implemented, the Government could go some way to meeting its objectives without requiring commercial bargains to be reworked or compromising the effectiveness of the current law: either risks creating material uncertainty which itself is likely to harm the dynamism the Government seeks to promote.

10. ELA's ideas fall into two categories: changes to the legal process which, despite this categorisation, could lift substantial burdens that currently fall on employees and ex-employees; and, change to contracts of employment to (a) promote the use of 'garden leave' and (b) outlaw post termination restraints for those on zero hours contracts.

Procedural changes - background

10.1. Given the Government has specific policy objectives in this field then ELA sees a case for bespoke litigation rules in order to meet those objectives. The Government could achieve substantial change without primary legislation. At the moment, the enforcement of post-termination restraints is subject to the same rules that apply in civil litigation in general. The Courts do recognise other policy objectives, hence for example the special rules that apply to injunctions where freedom of speech concerns are engaged. Government could alter the rules to take into account its objective of promoting competition and easing the labour market for talent. It could thus improve performance considerably not by tinkering with the mechanics, which risks breaking the machine altogether, but by oiling the cogs. In any event, ELA makes a number of specific suggestions below which might be implemented without a wholesale review of the process.

10.2. In order to enforce a post-termination restraint, an employer must first at an interim hearing persuade the Court that: there is a serious issue to be tried; and, the balance of convenience favours restraining the employee. This is the so called 'American Cyanamid' test. The Court directs there should be a 'speedy trial' at which the issues may then be fully determined.
10.3. Generally, this process favours the employer. A 'serious issue to be tried' is a low hurdle: the employer does not have to show they would be likely to win. Moreover, in ELA’s experience, there is an understandable tendency for Courts at an interim hearing to favour the status quo, the effect of which is that the employee does not get to compete until after a full trial. Sometimes a 'speedy trial' can take place in a short number of weeks, but not always. The expense of fighting one is in any event often prohibitive for individuals, unless backed by their new employer.

10.4. In consequence, many cases settle if the Court grants relief. Relatively few cases proceed to the full trial envisaged by this procedure.

10.5. Moreover, under the usual rules of litigation in the higher courts, employees who wish to dispute the restrictions at an early stage risk having to pay their employer’s costs if they fail to persuade the court not to grant an interim injunction. This is a particularly important practical point. It is also one of some uncertainty. There have been two different lines of authority:

10.5.1. There is one line of authority, in which the most recent Court of Appeal case is *Digby v Melford Capital Partners* [2020] EWCA Civ 1647, suggesting that costs orders should not be routinely made after the grant or refusal of interim injunctive relief. On this analysis, the trial judge should determine where the costs of the interim relief application should fall, along with (but not necessarily in the same way as) the costs of the case generally. *Digby* is, however, not a case concerning restrictive covenants.

10.5.2. There is another line of authority, most identified with the Court of Appeal decision in *Lawrence David v Ashton* [1989] ICR 123, suggesting that a defendant to an interim relief application should offer undertakings (i.e. effectively agree the terms of an injunction) pending a 'speedy trial'. On this analysis, an employee who refuses undertakings is at risk of a costs order being made against them should the court grant interim relief.

10.6. To date, the latter line of authority has prevailed more often than not in employee competition cases. In *Visage Limited v Mehan* [2017] EWHC

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25 The maintenance of the status quo is, indeed, a factor referred to in *American Cyanamid* albeit one not relevant where either party is advancing a case that fails to meet the ‘serious issue to be tried’ test. Where that test is met, an injunction is, in ELA’s experience, more likely than not to be granted.
2734 it was held that the ‘modern authorities’ favoured an approach whereby the winner of an interim application will commonly be awarded their costs there and then, regardless of what happens at the trial.

10.7. There is thus powerful incentive for the ex-employee to agree to the restrictions until the speedy trial, a process known as ‘giving undertakings’. Where an ex-employee takes the risk of not agreeing undertakings they can face a situation where interim injunctive relief is ordered against them and they are ordered to pay an interim costs award within 14 days. That can put a swift end to litigation, as few ex-employees have the financial resources to take the case forward to trial from that point unless supported financially by a recruiting employer.

10.8. As well as disincentivising the ex-employee from contesting injunctive relief applications, this feature of civil procedure has also had the effect of seeing a proliferation of decisions not as to whether covenants are or are not enforceable, but as to whether they are arguably enforceable. That may give a somewhat skewed view of the law in this area.

Procedural changes – suggestions for reform

10.9. If the government is minded for policy reasons to make it more challenging to enforce non-compete restrictions, ELA suggests that, rather than a wholesale ban or making compensation mandatory, the Government might consider adjusting rules of civil procedure in a bespoke manner for cases involving non-compete restrictions. There is also the possibility of requiring that the employee is paid until full trial, perhaps subject to repayment if the injunction is upheld.

10.10. As to potential adjustments to civil procedure rules, we see two options. The first would be to require the employer to clear a higher hurdle than the ‘serious issue to be tried’ test to secure interim relief. The second would be to change costs rules to favour employees. Neither of these changes would be straightforward and both require further discussion, as below.

10.11. Dealing with each in turn:

Paying the employee

10.11.1. ELA advances this, with some misgivings, as a variation on an option the Government is already considering. What could be legislated for is a provision whereby an employer that secured
an injunction enforcing a non-compete covenant pending trial should have to pay the employee their ordinary remuneration pending that trial, despite employment having terminated.

10.11.2. At present, an employer must give what is termed a ‘cross-undertaking in damages’. As a condition of obtaining an interim order enforcing the restraints until trial, the employer must promise to pay the employee anything the latter might lose should the Court determine at the later stage that the restraints were in fact unenforceable. Thus, if the employee is prevented from starting with his new employer for several weeks, their old employer would have to pay them what they or their new employer would have done had they worked those weeks.

10.11.3. In practice, there can be difficulties in enforcing this. It also places the onus on the individual and, if they are not supported by a new employer, risks them being out of pocket. Our proposal reverses the cash-flow.

10.11.4. Such a change would carry benefits and risks. It upends a well-understood approach and risks introducing additional complexity for perhaps not much practical advantage. While there would be a benefit to the ex-employee, there would be a corresponding detriment to the ex-employer. It must in this respect be remembered that some ex-employees will be financially supported by recruiting employers and therefore that the effect of such a provision in practice might be taken simply to rebalance the scales of business-to-business litigation. Further, ex-employers are not necessarily businesses readily able to pay such remuneration alongside their own potentially substantial legal fees. That is particularly likely to be the case where the ex-employer is a small or start-up business.

10.12. ELA recommends that were the government minded to legislate for payment of employees subject to an injunction enforcing a non-compete covenant, it should:

10.12.1. Include clear provisions for repayment of remuneration so received should the injunction be upheld at trial. We see no reason for forcing an ex-employer to pay for having
successfully enforced a covenant that has been proved enforceable.

10.12.2. Define the payment to be made by reference to pay received over a suitably lengthy reference period, such as the last 12 months with the previous employer. Formulations such as 'basic salary' or 'a week's pay' risk injustice or unnecessary complexity.

10.12.3. Confer upon the court a power to make a different order, i.e. not to order payment. A cross-undertaking in damages might suit the employee whose new employer was proposing to pay them much more than the old one did. The principles in which that discretion would be exercised can be developed by case-law. They are likely to include circumstances where there is a strong *prima facie* case of wrongdoing by the ex-employee.

**Setting the employer a higher hurdle**

10.12.4. Another approach to be considered would be setting the employer a higher hurdle at interim stage. The Courts do this already where a speedy trial is not practicable and its decision at the supposed interim hearing is likely to end the matter one way or another. There are other circumstances too in which the so-called *Lansing Linde* test is applied: see *Forse & Ors v Secarma Ltd & Ors* [2019] EWCA Civ 215. This practice could become the norm, where the Court has to take account of the relative strengths of the parties' cases.

10.12.5. Were this approach adopted, its advantage would lie in dissuading employers from making applications that do give rise to a serious issue for trial, but where the case advanced is no stronger than that. Its disadvantage would be to make interim hearings something of a ‘mini-trial’. That is likely to lead to fewer but much more complex and bitterly fought hearings. Employers may be disinclined to go to Court, but those that do will have to fight much harder. That in turn will impose a commensurate burden on those employees who find themselves fought against. Further, it would be harder to justify not making an interim costs order in favour of the party who prevailed after such a hearing.
10.12.6. Nor are the Courts themselves likely to welcome this approach. It goes against the trend of encouraging parties to use alternative dispute resolution. By turning the process into a mini trial, it consumes more judicial resources, Court time and administration. Perhaps fundamentally, because neither side could deploy their full case, it risks uncertainty at the outset.

Costs

10.12.7. One approach would be to amend the costs rule on the interim hearing such that the costs of the hearing would only be awarded in favour of either party if the conduct of the other party was manifestly unreasonable. The position would be analogous to the costs regime in the Employment Tribunal.

10.12.8. Another would be to recognise the fundamental imbalance between the parties and shift the costs entirely in favour of the employee, such that the employer always paid their own costs regardless of outcome. That though might have the unintended consequence of tilting the balance not in favour of the employee but their new employer. They might be leaving a start-up to go to a multi-national, which would in effect receive the benefit of this new approach to the detriment of the weaker, perhaps more entrepreneurial party.

10.12.9. A third approach would be to confer upon the court a broad discretion as to costs orders, but make it clear that that discretion is to be exercised by reference to the government’s policy objectives in this area, rather than the court’s general approach to costs.

10.12.10. ELA’s view is that these issues merit consideration by government, not least because the factors that will be relevant to the resolution of policy issues in this area will not be the same as those relevant to the courts’ handling of these cases at present. Thus, from the court’s perspective the question of an ex-employee’s resources and ability to pay a costs order, or whether a new employer is indemnifying a new or putative employee, are largely if not entirely irrelevant. Should government be minded to rebalance this field for policy reasons, it will therefore need to set out in secondary legislation the principles that it judges should be applied.
10.12.11. Were government minded to take this approach, the secondary legislation could be either narrowly prescriptive or contain statements of principle which could be given effect by the courts in subsequent case-law on narrower points. Our normal approach would be to favour the latter approach. While this may be challenging given the absence of previous case-law, we do not consider that this challenge displaces our concerns about settling a prescriptive list of factors. The latter approach is likely to prove rigid and to be open to criticism. We would suggest that – if minded to legislate in this area – the government instead follows an approach similar to that adopted in the most novel provisions of the Consumer Credit Act 1974 (those introduced in s. 140A). The approach would be to confer a broad power on the court to make a costs order by reference to those matters which it considers relevant. To avoid a situation where the court simply states that the factors it considers relevant are those contained in its normal costs rules, we suggest that any legislation refers simply to the objective of striking a fair balance between the interests of the ex-employer and the interests of the ex-employee insofar as the incidence of costs is concerned. The substantive law embodied by the restraint of trade doctrine of course already seeks to strike such a balance. We do not see an objection in principle to extending that principle to the determination of costs issues.

Changes to contracts of employment

Garden Leave

10.12.12. We suggest an automatic set off of garden leave against any post-termination restraint in the contract of employment. Whilst good practice is to draft restraints on the basis of such a set-off, it is not clear that the Court will always take garden leave into account in deciding whether to enforce restrictions.

10.12.13. It would be possible and perhaps desirable to draft the terms of the set off such that it applied in respect of any post termination restraint imposed on the employee even if that restraint were ostensibly outside the employment contract, such as in a share option scheme or bonus plan where awards were determined by reference to the employer’s parent or wider group.
Zero hours contracts

10.12.14. A problem with non-competes in the US is their application to drive down wages in sectors where employment is already precarious. For example, ELA is aware of fast food chains including provisions in contracts ostensibly preventing kitchen staff from leaving to join another chain (see paragraph 5.9).

10.12.15. It is very unlikely that such restrictions would be enforceable in the UK. ELA certainly believes that the practice is not widespread here, if it takes place at all. However, the Government might wish to consider the desirability of reform to expressly outlaw any such restrictions in so far as they purport to apply to zero hours workers, as defined in s27A(1) of the Employment Rights Act 1996.

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ELA has summarised their contributions in this report and therefore any reference in this document to the laws of these of these jurisdictions remains ELA’s sole responsibility.
PART 2: ELA RESPONSES TO CONSULTATION QUESTIONS ON NON-COMPETE CLAUSES

OPTION 1: MANDATORY COMPENSATION

QUESTION 1

Do you think the Government should only consider requiring compensation for non-compete clauses or do you think the Government should consider requiring compensation where other restrictive covenants are used? Please indicate below.

1. Leaving aside any unintended consequences as a result of limiting the scope of this proposal to non-compete clauses, which we describe in our response to Q3 below, we think the Government should only consider requiring compensation for non-compete restrictions for the following reasons.

2. First, there is the practical question of how to quantify the amount of compensation that should be imposed for other restrictive covenants. For non-compete clauses, it stands to reason that any compensation payable correlates in some form to an employee’s former salary, on the assumption that the non-compete restricts them from finding alternative employment for a period of time. For other restrictive covenants, it is a lot less clear what the appropriate compensation would be. For example, should the amount compensate the employee for the “opportunity cost” of not being able to solicit or deal with their former employer’s clients, or solicit or hire employees from their former employer? If so, how should that be quantified in each case? Such quantification would be a disproportionately complex, time consuming and contentious task. Alternatively, if the Government wants to set a nominal amount to be payable for other restrictive covenants, what nominal amount would be sufficient to disincentivise employers from using such clauses, considering the broad range of employers and industries of different sizes that routinely use these clauses?

3. Second, there is the question of whether the employee is compensated the same amount, regardless of whether the employer is seeking to impose the non-compete only or also impose any other restrictive covenants. If the latter approach is adopted (which would circumvent some of the practical difficulties highlighted above), we think it is likely that a significant proportion of employers will seek to impose as many restrictive covenants as possible because there will be no difference to them in terms of cost. It may also cause more employers to impose non-competes in circumstances where they might not otherwise have done, because they get more “value for money” when they pay the compensation. On the other hand, if compensation is payable for non-competes
only, certain employers are likely to consider removing non-competes and relying instead on other restrictive covenants to protect their business.

4. Third, leaving aside practical difficulties of quantifying the compensation (even if it is nominal), if compensation is payable for other restrictive covenants, there would be additional cost burden and balance sheet liability for the majority of employers, which, as highlighted in our response to Q3 below, would impact not just established firms, but also the entrepreneurs and innovative firms that the proposals are aimed at nurturing.

5. Fourth, it is not clear that the use of other restrictive covenants significantly hinders innovation, the creation of new jobs, and competition, such that a requirement to pay compensation for them is required in order to disincentivise their use. It is difficult to assess the extent to which these other restrictive covenants discourage employees entirely from moving jobs, or entrepreneurs from setting up their own businesses, because they do not in themselves seek to prevent such moves as such but only restrict the way in which employees do their new job, or run their new business, for a limited period of time. They impact for example only if the ex-employee wants to deal with their former employer’s clients or poach any former colleagues, which is not always the case. This suggests that these clauses are unlikely to significantly affect the Government’s stated objectives, albeit there is as far as ELA is aware no empirical evidence to support or contradict the proposition.

**QUESTION 2**

If you answered ‘non-complete clauses and other restrictive covenants’, please explain which other restrictive covenants and why.

6. See our response to Q1 above.

**QUESTION 3**

Do you foresee any unintended consequences of limiting the scope of reform to non-compete clauses? If yes, please explain your answer.

7. There is a real issue in defining a non-compete restriction, which is not capable of easy resolution, but which must be addressed carefully by legislators before the proposals are introduced, if at all. Failure to do so is likely to lead to the following unintended consequences.
DISPUTE ABOUT WHEN MANDATORY COMPENSATION OBLIGATION IS TRIGGERED

8. If mandatory compensation is limited to non-compete restrictions only (which, as explained at Q1 above, we consider more appropriate overall), we anticipate that employers will make greater use of other restrictive covenants.

9. The doctrine of restraint of trade applies to the substance of the restriction and not the form. Uncertainty or confusion as to when the obligation to pay compensation is triggered could arise where restrictive covenants are not described as non-compete restrictions but which, in practice, may have the effect (whether taken individually or as a whole) of preventing the individual from working for a competitor. For example, in some cases, a customer or supplier non-dealing restriction, particularly when taken together with other types of restriction such as business interference or goodwill protection restrictions, may result in an individual being unable to use their acquired skills at all in a competitive business for the duration of the restriction. Team move restrictions also have the implicit effect of preventing an individual from working with certain competitors for a period of time but are not the same as a pure non-compete restriction. Legislators should consider where these types of restrictions fall and, if they are to be subject to mandatory compensation, grapple with the issues highlighted at Q1 above on quantification of that compensation.

10. The consequences of uncertainty as to whether such a restriction (or suite of restrictions) would trigger any mandatory compensation obligations would likely create the following situations:

10.1. First, even more instability within businesses, at a time when many businesses of all sizes are already struggling given the economic conditions. This uncertainty will compound the initial burdens on employers of implementing any of the proposals, both in terms of (i) administrative processes for implementing replacement contractual obligations; and (ii) the balance sheet liabilities for employers of paying for the restrictions, which may be a material business cost particularly for the early-stage and young businesses, which these proposals are intended to foster.

10.2. Second, an increased volume of disputes between employees and employers as to whether the other restrictions are unenforceable because they are arguably in breach of mandatory compensation obligations. At present, the common law position on whether other types of restriction are enforceable is relatively well understood and, other than
in particularly principled disputes, tend to be less heavily litigated than non-competition disputes.

**INCREASED USE OF LONGER NOTICE PERIODS AND GARDEN LEAVE**

11. To avoid the above arguments about whether mandatory compensation obligations are triggered for other types of restrictions, employers may make greater use of longer notice periods and garden leave restrictions.

12. Longer notice periods may be required to make garden leave more effective, since the period of exclusion via garden leave will be most effective where there is a sufficiently long notice period to keep the employee away from confidential information, customer connections and skilled colleagues. Whilst long notice periods do give employees some protection (for example allowing them more time to find new employment if they are dismissed) they also keep an individual out of the job marketplace for longer and lengthen the period of time before they can start a new venture or join a new employer.

13. Garden leave is already generally considered easier for employers to implement and enforce than post-termination restrictions. The employee remains bound by most of their duties to their employer and they are usually prevented wholesale from undertaking any other professional activities during the garden leave period (not just competitive activities). Evidently, a breach of garden leave obligations can also be easier to demonstrate than breaches of post-termination restrictions. Garden leave can therefore be considered potentially more limiting on individuals than non-compete restrictions.

14. There are also potential financial consequences for individuals arising from employers’ increased use of garden leave (or wholesale replacement of all types of post-termination restrictions with garden leave):

   14.1. It is currently common practice for employers to pay full salary and benefits to an employee on garden leave, but not bonus or commission. Employees on garden leave are therefore financially disadvantaged to some extent given the opportunity cost on their ability to receive an accrued or prorated bonus/commission in a new (potentially non-competitive) role.

   14.2. We also envisage that employers may start to implement contractual garden leave clauses that not only exclude any entitlement to bonus/commission but also only allow for a percentage of basic salary to be paid out. This could, for example, mirror any financial obligations that may be imposed via mandatory compensation.
INCREASED USE OF OTHER RESTRAINTS

Other type of contractual restraints

14.3. Again, unless there is clear guidance on the kind of non-compete restrictions in employment contracts for which compensation would be payable, employers may make greater use of other types of agreements that are not linked to employment to impose non-competition restrictions. Examples include shareholders’ agreements, options schemes, long-term incentive plans (LTIPs) and other forms of non-employment incentivisation, as well as different contractual arrangements involving LLPs, joint ventures or franchise arrangements. Put another way, these alternative forms of contracts may simply become much more attractive to employers to avoid the uncertainty and complexity of a reformed employment regime.

14.4. As regards the Government’s stated intention to unleash innovation, it is our experience that many entrepreneurs who go on to start new ventures are often existing or recent shareholders in other (often start-up) businesses who are also subject to post-shareholding restrictions. Therefore, many of the individuals at whom these proposals are aimed would still be subject to restrictions on competition under shareholders’ agreements and so the stated aim would not be met.

14.5. More generally, we consider it problematic to legislate for one subset of contractual arrangements (employment contracts) and leave all other forms of contracts untouched. This will create a significantly unbalanced marketplace. Overall (and putting to one side the precise matter at Q3) we consider that legislators would need to reform all forms of non-compete restrictions across contracts (which would be an enormous task and subject to a much broader discussion about contract law) or none at all.

Forfeiture and clawback

14.6. As above, we anticipate that businesses may prefer to avoid the uncertainty, cost and complexity of a new employment regime by making greater use of other levers to achieve the same or a similar result. As noted in the Consultation, increased use of forfeiture provisions in deferred remuneration schemes is likely. We note that the Government considers that forfeiture would still enable the ex-employee “to benefit in some form”. We are unclear as to how an individual would still benefit in this circumstance. In any event, we also consider it likely that businesses will increase the use of clawback provisions in deferred
remuneration schemes as well as broader schemes that could significantly and/or disproportionately affect more junior employees, such as training funding programmes which would require the individual to repay the costs of training if they left and joined a competitor. We do not consider that these consequences could be said to benefit employees and indeed consider they would be particularly onerous for individuals.

**Broader enforcement strategies**

14.7. More generally, we anticipate that employers will turn to other enforcement strategies to protect, in particular, trade secrets and confidential information (which are currently best protected through non-compete restrictions) as well as greater enforcement of IP rights. In practice this could result in increased “warehousing” of staff in non-critical roles before their employment ends and/or silo-ing of staff who are in roles that deal in a business’ trade secrets and highly confidential information (as is common in, for example, California). This may in turn result in less innovation since even intra-employer colleagues are unable to share ideas with each other.

14.8. There may also be an increase in applications by employers for springboard relief, which can be obtained even where a departing employee is not subject to any non-competition obligations. Springboard injunctions are typically sought where an employee has misused confidential information and in doing so sought an unfair advantage against their ex-employer. Disputes that involve springboard applications are subject to the same cost considerations and implications as applications to enforce non-competition obligations and so it seems likely that an increase in these types of dispute would not assist in creating an environment that enabled innovation to flourish, as the Government intends.

**Portfolio of protections**

14.9. Overall, whilst our view remains that any mandatory compensation obligations should be limited to non-compete restrictions only, we anticipate that the measure will encourage employers to seek a broader portfolio of protections, using some or all of the above strategies.
QUESTION 4

Do you agree with the approach to apply the requirement for compensation to contracts of employment?

15. In our response to the 2016 Call for Evidence on Non-Competes, our members considered whether paying for the period of restriction could be a means of restricting the use of post-termination restrictions, including non-compete clauses. Broadly, by paying for a period of restraint, it could lift the financial barrier that might otherwise inhibit a departing employee’s ability to set up their own business after their employment has ended. It may also mean that employers seek to apply and enforce restrictions of more limited duration.

16. Whilst we acknowledge the potential advantages above, and that the system of compensating employees for the period that they are restrained is adopted in a number of European jurisdictions, we doubt that the imposition of mandatory compensation would help “maximise opportunities for individuals to start new businesses, find new work and apply their skills to drive the economic recovery”, on the following grounds.

17. We believe that requiring mandatory compensation for non-competes may more likely stifle, rather than stimulate, growth opportunities and innovation. Indeed, it could, unintentionally, create disadvantages for less economically established employers (such as “start-up” and “scale-up” businesses, which the reform is intended to support) who may not be able to afford to compensate departing employees, or could only do so at the expense of reducing investment in other areas of their nascent business, such as research and development, or the marketing of their goods and services. By contrast, richer employers could be unfairly advantaged, as they would be able to afford to protect their interests via the enforcement of the non-compete clause. This could effectively reduce healthy competition between established businesses and any new organisations seeking to challenge the status quo, and thus stifle innovation.

18. In 2020, there was a record £11.2 billion pounds invested into UK technology companies by venture capital funding, indicating the current system adopted under UK common law is highly attractive to investors. To many firms, mandatory compensation for non-competes is likely to be seen as an unfair imposition, effectively requiring employers to double-down on payments to

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The Guardian: [Venture Capital Funding Unicorns](https://www.theguardian.com/technology/2020/mar/18/venture-capital-funding-unicorns)
protect legitimate business interests. This, in turn, could make investment into UK business less attractive.

19. Changes to the existing system is likely to create an increased sense of uncertainty as to what is and is not enforceable, and with it, disputes and litigation between stakeholders. For example, if mandatory compensation is applied and paid by an employer, would the starting point be that the restriction is automatically enforceable, regardless of duration, fairness or clarity of the drafting, or would the current common law principles, developed over many centuries, still apply to ensure that the restriction was no wider than reasonably necessary to protect a legitimate business interest? Would the amount be payable regardless of the circumstances in which the employment ends, such as a summary dismissal? Whilst the litigation of non-compete clauses currently arises on an exceptional basis, where employers have paid to enforce non-compete clauses that have since been breached, we would anticipate a much greater appetite for seeking injunctive relief and/or some other remedy in the courts.

20. The question of fairness for the ex-employee is likely to be raised in support of the argument for mandatory compensation. However, in our experience, employees that are subject to post-termination non-compete provisions often have longer notice periods, garden leave and payment in lieu of notice clauses, and increasingly, other forms of deferred payment awards, payable post-termination. There is, accordingly, often some financial cushion for departing employees, which limits the need for the mandatory compensation.

21. As a concluding point on the question of fairness, we refer to our 2016 response: “there are in our view strong arguments that the body of law that has been developed by the courts is a proven and effective means of striking a fair balance between the interests of the employee and the employer and it is hard to see how legislative intervention could be of any benefit in making that balance fairer.”

**QUESTION 5**

**Do you think the Government should consider applying the requirement for compensation to wider workplace contracts?**

22. As above, our view is that the current system works adequately without the need for the introduction of mandatory compensation, and are mindful that making compensation mandatory could have certain unintended consequences, as considered in Question 4 above.
QUESTION 6

Do you think the proposed reform to non-compete clauses in contracts of employment could have an impact on the use of, and/or the enforceability of, non-compete clauses in wider contract law? If yes, please explain how and why.

23. Our members often advise on the inclusion and drafting of non-compete provisions in other, non-employment contracts, including incentive awards, share purchase agreements, limited liability partnership agreements and other commercial contracts. The inclusion of post-termination restrictions is often a crucial component of these contracts. They can be heavily negotiated terms and, for those that are subject to the restraint, accepted in exchange for potentially significant financial reward or incentive. The inclusion of the restraints is seen as a key aspect of ensuring that investment in the relevant business or venture is secure, and that trade secrets and other confidential information does not pass to competitors freely on termination or the departure of key individuals.

24. Notably, in California, where non-compete restrictions are banned in employment contracts, they are permitted in certain business agreements including where there is a departure of a partner/member or where a business is sold or dissolved. If mandatory payments were introduced, we would expect that employers would seek to sign up employees to more stringent non-compete measures in these forms of business agreements. Given that non-compete provisions in these types of contracts can be, and often are, for a longer duration than those commonly found in employment contracts (sometimes exceeding three years), it could result in employers resorting to using more draconian measures as a means of circumventing the proposed mandatory compensation rule.

25. Our view is that, if the mandatory compensation became a requirement for the non-competes in employment contracts, it would be unnecessary and inappropriate to expand the requirement more broadly to the other types of agreements referred to above. This is because the limited arguments in support of the mandatory compensation provisions, do not apply or are not relevant, at least not to the same extent, to the arrangements set out in these forms of commercial agreement.
QUESTION 7

Please indicate the level of compensation you think would be appropriate:

- 60% of average weekly earnings
- 80% of average weekly earnings
- 100% of average weekly earnings
- Other (please specify and explain why)

26. For the reasons stated above, we do not believe that mandatory compensation for non-compete clauses would be appropriate or that it would help stimulate the economy or promote innovation.

27. The reference to “average weekly earnings” creates a number of additional concerns. Firstly, it raises a question about how the average would be calculated, and over what period. Secondly, “average weekly earnings” suggests that additional remuneration beyond basic salary, such as bonus awards, would be included. A key aspect of paying bonuses is to recruit and retain talent; if bonus amounts were included in the mandatory payment calculation, there would be a loss of the incentive to remain with an employer, and could result in departing employees being rewarded without merit. We understand that in Germany, where compensation is mandatory, disputes arise as to what remuneration includes, for example whether stock options form part of remuneration for this purpose.

28. If mandatory compensation were introduced, a more straightforward metric for calculation (such as a percentage of basic salary as at the date that notice is served) would be more appropriate and less likely to result in disputes.

29. In addition, we refer to our response above at Question 4 regarding the unfairness of imposing mandatory compensation on smaller, less economically stable businesses, who would inherently be less well equipped to compensate departing employees (especially if the calculation were to be a high percentage of average earnings).
QUESTION 8
Do you think an employer should have the flexibility to unilaterally waive a non-complete clause or do you think that waiving a non-compete clause should be by agreement between the employer and the employee? Please indicate your answer below.

- Employer decision only
- Agreement between employer and employee
- Not sure/Don’t know

30. Under ordinary principles of contract law, it is always possible to the parties to agree to vary terms so no specific legal provision would be required if that is to be the policy aim. Notwithstanding that principle, it would always be open to an employer, as the beneficiary of a non-compete clause, to waive compliance but not the employee without the employer’s agreement.

QUESTION 9
Do you agree with this approach? If not, why not?

31. This question seems predicated on a change to the law in the terms of Option 1 and asks whether an employer who chooses to waive compliance with a non-compete clause may only be relieved of the burden of paying the employee for the period of restriction if the waiver is given a minimum period before termination. The example period given is 6 months.

32. There is currently no widespread practice of an employer imposing post termination restrictions only to waive them on termination. As UK law currently stands, the employer does not have to pay the ex-employee during the period of restriction and therefore as a starting position has little reason to waive the covenants. That said, it is not uncommon for employers to agree to waive or agree to modified post-employment restrictions when the end of employment is in sight and the parties are agreeing terms of departure (and we are aware that some companies do this on a routine basis). It is most unusual for this to happen at any other time during employment.

33. The principal problem we see with this, therefore, is that, if the efficacy of the waiver is to be measured backwards from the point at which the employment ends, a period of 6 months (as given as an example) is unlikely to stimulate the employer to consider a waiver if he does not know when the employment is going to end.
34. The position would be clearer if the obligation to consider waiver were tied to the giving of notice, whether by the employer or employee. The employer would then have a period – say 14 days - within which to consider whether to waive compliance.

35. However, the problem with this approach is that an employee might resign in reliance on the payment of compensation during the non-compete period only for the employer to then waive the non-compete. This would be unfair on the employee. Perhaps more importantly, it seems unlikely to promote employee mobility if the employee arranges their next job to comply with the non-compete only for the financial incentive for compliance to be subsequently and unilaterally removed. The employer might in effect get the benefit of the non-compete but without having to pay for it.

QUESTION 10

How long do you think the time period within which the employer must waive the restriction before the termination of employment should be?

- 3 months
- 6 months
- 12 months
- Other (please specify)

36. As will be apparent from our comments above, we consider that a permitted waiver is highly problematic. Of the options presented, we favour 12 months because that would give the employee sufficient time to plan their next job knowing which jobs they were free to consider and what remuneration they would receive from their current employer.

QUESTION 11

Do you use, or have you ever used, non-compete clauses in contracts of employment?

37. The use of non-compete clauses and other post-termination restrictions within employment contracts is widespread and is part of normal business practice in the UK. This is across a broad range of sectors and levels of seniority.

38. Our members regularly advise employers and employees on the drafting of such restrictions within employment contracts, and their enforceability.

39. See also the industry responses summarised above and in the Appendix to this response.
**QUESTION 12**

Do you use, or have you ever used, non-compete clauses in limb (b) workers’ contracts?

40. The use of non-compete clauses and other post-termination restrictions within limb (b) workers’ contracts is widespread and is part of normal business practice in the UK. This is across a broad range of sectors and levels on seniority.

41. Our members regularly advise employers and employees on the drafting of such restrictions within limb (b) workers’ contracts, and their enforceability.

42. See also the industry responses summarised above and in the Appendix to this response.

**QUESTION 13**

If you were required to provide compensation for the period of the non-compete clause, do you think that you would continue to use them? If yes, what kind of employees/limb (b) workers (high/low paid) would you maintain non-compete clauses in place for? Please explain your answer.

43. Our members are aware that some businesses already provide compensation for the period of the non-compete.

44. Members consider that business would continue to use non-competes, where to do so is necessary to protect legitimate business interests.

45. See also the industry responses summarised above and in the Appendix to this response.

**QUESTION 14**

If you did not use non-compete clauses, would you be content to rely on other ‘restrictive covenants’ to protect your business interests? If yes, do you think there would be any unintended consequences to this? Please explain your answer.

46. It is important to note that other restrictive covenants are still subject to the doctrine of restraint of trade. Therefore, each business will have different interests that it will legitimately be seeking to protect. A business cannot impose a covenant simply because it does not want an outgoing employee/worker to compete with it. Non-competes are traditionally the hardest to enforce of all
restrictive covenants and so they are usually already included with other covenants to provide protection to a business.

47. The Courts have previously recognised that it may not be possible to protect a legitimate proprietary interest though implied and express confidentiality terms. An example of this is where a manufacturing process is used. It may be inevitable that the employee will use this information, and a restriction that stops them working for a competitor for a period of time is the only practicable means of protecting this confidential information.

48. Further, clients, customers or suppliers may simply have loyalty to that particular employee or worker and so would follow them regardless. Therefore, stopping the employee from competing for a period of time would be the only fire break to provide adequate protection of these legitimate business interests.

49. There is a risk that funding and investment in start-ups would dwindle, if investors felt that a business was not able to adequately protect its legitimate business interests because, absent a non-compete clause, other restrictive covenants may be insufficient to protect those interests.

50. Outside of traditional restrictive covenants, we anticipate there would be a significant increase in IP litigation, and litigation surrounding misappropriation of confidential information.

51. Employees are subject to ongoing duties not to compete during their employment, including as an express term, and also as an implied term. This includes the implied duty of fidelity. If there was a mandatory compensation introduced, we anticipate that one unintended consequence may be the greater use of garden leave clauses and a longer contractual notice period being introduced from employee to employer.

52. See also the industry responses summarised above and in the Appendix to this response.

**QUESTION 15**

If mandatory compensation were introduced, do you think you would increase your use of other ‘restrictive covenants’? If yes, please explain why and which ones.

53. We consider that there would of course be a cost benefit analysis necessary to be undertaken for a business. If the cost of the mandatory compensation outweighed the benefit to the business of protecting the legitimate business interest, then we expect businesses would rely on other covenants. This is
particularly the case if non-competes are still subject to the doctrine of restraint of trade. Thus, even though other restrictive covenants are often found in employment contracts alongside non-competes, we expect that mandatory compensation for non-competes would increase the use made by employers of other covenants, with a possible strengthening of those covenants.

54. However, non-competes (and other restrictive covenants) always come with a potential cost risk: prima facie these clauses are void for being in restraint of trade and contrary to public policy, unless the business can show that:

54.1. It has a legitimate business interest that it is appropriate to protect.

54.2. The protection sought is no more than reasonably necessary having regard to the interests of the parties and the public.

55. Enforcement of these clauses in the event of a breach requires costly Court action: enforcement is mainly by way of an injunction. There is always a risk therefore that a business will have to incur a cost to be able to rely on these clauses, in the event that the employee or worker breaches this clause.

56. One may consider that the reasonable business would only include these clauses in contracts if it was absolutely necessary to comply with the conditions set out above. One may believe that every business who uses these clauses would enforce them in the event of a breach. If mandatory compensation meant that the non-compete was guaranteed to be enforceable, without the need to rely on costly Court action whereby the business has the burden of demonstrating the conditions for enforcement, businesses may decide to front load this cost and pay the mandatory compensation to the employee rather than spend it on costly legal action.

57. However, in reality this is not the case. Many businesses do not pursue breaches of non-competes. This is for many reasons, including cost, to protect employee goodwill, management time, if they consider the clause may be held to be unenforceable, or simply because the business interest no longer needs protecting.

58. We expect that businesses may be more reluctant to rely on non-competes where there is a mandatory compensation requirement, and will instead look to protect their interests via “free” options.

59. There is also a tax consideration: mandatory compensation would presumably be taxable.
60. See also the industry responses summarised above and in the Appendix to this response.

**QUESTION 16**

If you use non-compete clauses in contracts of employment, do you already pay compensation/salary to employees for all or part of the duration of the noncompete clause? Please explain your answer.

61. We are aware that some business already pay compensation for all or part of the duration of the non-compete clause, however this is not commonplace, and tends to apply only to multinational companies who also operate in countries where compensation is mandatory.

62. See also the industry responses summarised above and in the Appendix to this response.

**QUESTION 17**

Do you think employees would be more likely to comply with the terms of a noncompete clause if mandatory compensation was introduced? If not, do you have any suggestions for increasing compliance.

63. There is no clear answer to this question.

64. In our experience, a key grievance of employees is that they are unable to work in competition for the duration of the restriction, thus being deprived of an income for that period. Mandatory compensation may alleviate this concern. However, an employee leaving for a much higher salary is unlikely to be deterred by this, assuming the mandatory compensation is set at a lower level.

65. Once a determined employee has decided that they are going to leave for a competitor or to set up their own business in competition, they are going to do so regardless of the consequences. For many it is not just about the salary, but also:

   65.1. better job prospects;
   65.2. better benefits;
   65.3. better culture/ fit;
   65.4. clash with current employer / becoming disillusioned with the employer;
   65.5. desire to work for themselves.
66. To those employees, the new role may well be more attractive than the mandatory compensation.

67. See also the industry responses summarised above and in the Appendix to this response.

**COMPLEMENTARY MEASURES**

**QUESTION 18**

Would you support this measure to improve transparency around non-compete clauses? If not, please explain why not.

68. We support transparency in this area. However, as described in the section on the current law in Part 1 of this response, non-compete clauses will only be enforceable if incorporated into the employment contract. It is difficult to conceive of a situation where a non-compete clause is incorporated into an employment contract where the employer has not disclosed its exact terms to the employee in writing before they enter into the employment relationship. Therefore, we are unclear as to the need for any reform in this respect or how this proposed measure would improve transparency in practical terms.

69. Some non-compete clauses are introduced during the employment relationship, either on a change of rule or promotion, or as a tightening up of terms of employment generally. Moreover, as stated above, the Courts will not in any event enforce post termination restraints where there is insufficient evidence that the former employee agreed to them. Whilst we see that increased transparency could benefit both employers and employees we do not anticipate this having a major impact on the use of non-competes by employers or making a difference to a material number of employees.

70. Not applicable.

71. Not applicable.

**QUESTION 21**

Do you have any other suggestions for improving transparency around non-compete clauses?

72. ELA has a number of suggestions. All inevitably impose additional burdens on employers and risk introducing further uncertainty in the crucial question of whether a non-compete is effective at the point of the enforcement.
73. In ELA's experience, even if employees are not surprised that their contract of employment or other document contains a non-compete restriction, they are often surprised that it may be enforceable against them. Query therefore whether well-publicised, clear and accurate BEIS guidance would help achieve the Government's objectives. ELA would be happy to assist with such guidance.

74. In any event, the following measures may increase transparency in the sense of a greater awareness by employees of the existence and potential impact of non-competes: including non-competes in the ERA s1 statement; obtaining independent legal advice; a cooling-off period; transparency wording analogous to consumer protection; geographically explicit territorial scope; and, annual statements.

Non competes in the s1 statement

74.1. BEIS is familiar with the statutory requirement for employers to itemise in writing key features of the employment relationship with individual employees. These features could easily be expanded to include details of any non-competes.

74.2. However, any such step must deal with the jurisdictional issues that arise or any gain in transparency will be more than eliminated by the increase in complexity. Employment Tribunals have the power to issue a declaration as to the contents of a 'Section 1 Statement', but have no powers in relation to the enforcement of non-competes. We doubt there is any appetite to change that in the current context, not least because it would reshape the Tribunals' role beyond the scope of this exercise and in so doing create a wave of complexity which may or may not subside.

74.3. That said, even this limited change to s1 would require substantial additional resources to be made available to the Tribunal to deal with the potential additional litigation. Tribunals would have to be able to dispose of these matters quickly. Even so, ELA would favour this route, as the ET's are a 'no cost' jurisdiction: if the purpose of the proposed reforms is to offer more protection to employees then being able to achieve a declaration that the provisions do or do not form part of the contract would be helpful, even though the Tribunal could not give a view as to their enforceability. The alternative would be to grant to the High Court the power to issue declaratory relief in respect of these specific provisions of s1. That is untidy, but workable if costly.
Obtaining independent legal advice

74.4. The problem of lack of transparency can be exacerbated because the employment relationship is created when there often exists an imbalance in bargaining power between employer and employee. That is not true of all situations and some contracts of employment are negotiated over a lengthy period of time. Despite that, many employees are not focused on the terms that may bind them after the employment relationship has ended, and do not have the financial heft to fight complex and bitterly fought proceedings in the High Court once the employment relationship has ended.

74.5. The government may therefore want to consider whether an employee should obtain independent legal advice before entering into a non-compete. There is perhaps an analogy with the requirement to have received such advice before a waiver of the individual's statutory rights under The Employment Rights Act 1996 or The Equality Act are valid. Such a requirement would lead, we envisage, to the practice already common if not universal in relation to settlement agreements compromising any claims on termination of employment whereby the employer pays for the individual to receive such advice, up to a commercially agreed limited, but requires evidence (normally in the form of a signature by the adviser) that the employee has received it.

74.6. The increase in transparency this may achieve would come with a commensurate increase in formalities and costs of entering into the non-completes. Nor would this process of itself mean that any uncertainty as to whether the restraints would be enforceable would be removed. We think it undesirable, for example, that the adviser be required to state that they had given advice that the restrictions were enforceable, since this is i) ultimately not a matter for them; ii) dependent upon the facts and circumstances at the time the relevant covenant may come into operation; and iii) would breach the important principle that legal advice is privileged. It also raises such complex issues of professional liability that few advisers may be willing to undertake the task.

Cooling-off period

74.7. The government could give those who had entered into non-competes a right to change their mind within, say, 30 days by notification to their employer. This would potentially give employees some protection whilst requiring less formality and expense than obtaining legal advice,
74.8. However, it is important to note the scope of this protection is limited. An employer could still insist on the provision as a condition of employment. An employee who changed their mind could be out of job.

74.9. Moreover, to avoid having to dismiss an employee once hired, an employer could insist that the employee not start employment until the cooling-off period had expired. That may impede hiring, which would suit neither party.

74.10. Again, we would suggest that this reform if adopted applied only to contracts entered into after a date in the future. The complex impact on existing employment relationships in our view outweighs any potential gain in transparency.

**Transparency wording**

74.11. The government could require that all non-compete provisions be subject to a transparency requirement, analogous to that in consumer contracts under the Consumer Rights Act 2015. At present that Act excludes employment contracts and ELA sees the risk in partially ending that exemption. Stand-alone legislation might be preferable.

74.12. In any event, on balance, ELA would suggest that other options should be explored in preference to this. The Courts have considered different forms of words in non-competes for many decades. The irony in introducing a transparency requirement is that it may raise a question-mark as to whether new forms of words might be effective, thereby largely defeating the point of the reform.

**Mandatory explicit territorial scope**

74.13. It may sometimes not be clear to an employee in which jurisdiction or territory they are restricted from competing post termination. Formulations which restrict the employee in competing 'in areas/countries/regions in which you were engaged in the [6] months prior to termination' sometimes fail to give the employee sufficient clarity, depending as they do on understanding (in the example given, but similar wording is often used) what it meant to be 'engaged'.

74.14. The government may want to consider: requiring territories to be described geographically in the body of the contract; or, requiring employers to warn employees in which territories the restrictions may apply, perhaps annually or on a change of role. That said, ELA queries
whether the complexity of conceptualising and enforcing either of these requirements may again outweigh the perceived benefit to employees.

**Annual statement**

74.15. The government could bring in a requirement for employers to remind employees annually of any non-competes that apply. Such a measure could apply to all non-competes in place currently: it would not only have to look forward to clauses introduced from a specified date in the future.

74.16. The requirement could be to draw attention to the relevant provisions or summarise them, with a proviso in each case that nothing in the notification itself affected the enforceability of the provisions. The notification might specify that the employee should take their own legal advice if they were in any doubt as to what the provisions meant or draw the employee's attention to authoritative and neutral guidance, perhaps to be provided by ACAS or BEIS directly (see above).

74.17. The risk in a summary is that if an employer overstates the potential impact of the provisions then it risks being in breach of the duty of good faith. If it understates, that may be a factor a court may take into account either in construing the clauses or in granting relief. Again, introducing more uncertainty into the situation risks creating opacity, not transparency. It is arguably better to let the drafting speak for itself.

**QUESTION 22**

Would you support the inclusion of a maximum limit on the period of non-compete clauses?

75. No. In practice, non-compete provisions rarely look to go beyond 12 months, that being the length of time beyond which most practitioners feel that a Court would be most unlikely to uphold the restriction. The evidential burden on a former employer to establish that they need a restriction beyond that time is so great that if they are able to bear it we see no reason in principle why they should not agree it with their employee.

76. ELA is not aware of any widespread practice of employers inserting non-competes of greater than 12 months length into contracts by way of cynical deterrent against their staff leaving to work for a competitor. An artificial absolute limit therefore seems unnecessary. A blanket prohibition would be unfair to businesses who, exceptionally, may need to rely on a lengthy non-compete restriction. However, BEIS guidance to the effect that non-competes of
greater than 12 months duration will rarely be enforceable might be welcome and would mitigate against such abuse.

**QUESTION 23**

If the government were to proceed be introducing a maximum limit on the period of non-compete clauses, what would be your preferred limited?

77. 24 months.

78. See our answer to 0 above. We consider that the maximum period should cater for businesses who, exceptionally, may need to rely legitimately on lengthy non-compete restrictions. We do have a concern that specifying a limit may erroneously suggest to readers of the statute that non-competes will be enforceable if they are of lesser duration than the statutory limit. We suggest that any legislation state that it is without prejudice to the common law doctrine of restraint of trade.

**QUESTION 24**

Do you see any challenges arising from introducing a statutory time limit on the period of non-compete clauses? If yes, please explain.

79. We see two challenges: employers’ expectations; and the mechanics of introduction.

**Employers’ expectations**

79.1. A statutory-time limit risks being read as an automatically effective duration. This is not desirable in itself, but may have the even more unfortunate effect of ratcheting-up the length of covenants. Employers may assume that, for example, a 12 or 24 month limit is effective regardless of the circumstances and insist on provisions of that duration.

79.2. We therefore suggest that any statutory time limit is expressly subject to the common-law doctrine of restraint of trade.

**Mechanics**

79.3. Whilst the statutory limit of 24 months risks injustice for a very small number of employers, any limit less than 12 months may require contracts to be renegotiated. Although depending how the time limit is introduced, this may not be a technical problem by altering a fundamental term of the contract after the parties have entered into it then other aspects of the wage work bargain may be affected. Query if
the mischief of the excessive length of non-competes is worth the commercial disruption that may occur if a limit is imposed on all existing contracts.

79.4. It follows that if any limit is to be imposed we suggest that it only comes into force for employment contracts or non-competes entered into after a certain date in the future.

**OPTION 2: BAN NON-COMPETE CLAUSES**

**QUESTION 25**

What do you think could be the benefits of a ban on non-compete clauses in contracts of employment? Please explain your answer.

80. Though the government believes a ban on non-compete clauses would have “the benefit of providing greater certainty for all parties and would make it easier for employees to start new businesses, find new work and apply their skills to drive the economic recovery”, we are of the view that the benefits would be much more limited than those cited due to the unintended consequences explained in response to question 26.

81. We accept however that there would be some limited benefits to a ban.

82. A total ban would indeed make it more clear cut for courts, employers, employees and their legal advisors, in that all such clauses in employment contracts would simply be unenforceable and of no legal effect. However, as the law would generally not have a retroactive effect, such ban would need to define how clauses inserted in existing employment contracts should be treated, and provide transitional rules to avoid confusion.

83. Employees would have the confidence that when their employment is terminated, they can join another employer or start their own business, without worrying about the potential enforceability of a non-compete clause in their previous employment contract or facing expensive litigation on such topic. Nevertheless, employees would still be restricted by other obligations from their employment contract such as confidentiality, intellectual property, non-solicitation of customers and staff, protection of trade secrets, to list just a few, so that the potential for dispute would still be high, and even enhanced if an employee were to join a direct competitor.
QUESTION 26

What do you think might be the potential risks or unintended consequences of a ban on non-competes clauses? Please explain your answer.

84. A ban on non-compete clauses may lead employers to protect their legitimate business interests in other ways that circumvent the ban, for example:

84.1. Make other clauses of the employment contract more stringent to protect company information, inventions and IP rights. This could include broader clauses, penalties, longer garden leave when employees are out of the market, etc.

84.2. Limit the share of information during employment by increasing employee monitoring, and restricting access to know-how and business information, which could hinder innovation.

84.3. Engaging staff on a different work model (contractors or consultants under a service agreement) to circumvent the ban applicable to employment contracts, which would make those individuals which the law intended to protect, more vulnerable to economic downturn.

84.4. Inserting non-compete clauses in other contracts such as share option or equity schemes, whether governed by English law or a foreign jurisdiction.

85. Multinational employers may choose to engage employees in other countries (Switzerland, Ireland, or any other EU country) which do not ban non-compete clauses. As an illustration, in California where there is a ban on non-compete clauses, employers often engage staff in other US States where non-compete clauses are lawful. In the context of Brexit where the government should be trying to make the UK an attractive and employer friendly jurisdiction, a ban on non-compete clauses could have the adverse effect of encouraging employers, particularly multinationals, to engage employees in neighbouring countries, or potentially to delay hiring in the UK.

86. A total ban on non-compete clauses could be particularly detrimental for start-up and FinTech companies as it would make it more difficult for them to protect their IP and inventions, at a point where their business is the most fragile. For example, if the “head of innovation” of a FinTech were to join a competitor, it would be very difficult for the former employer to protect their IP and invention without a non-compete clause due to the difficulty in proving the breach in a timely manner and acting swiftly. This could have a devastating impact on the business continuity of the former employer.
**QUESTION 27**

Would you support a ban on non-compete clauses in contracts of employment? Please explain your answer.

87. We do not support the ban on non-compete clauses in contracts of employment as we believe this blanket approach would not be well suited to the multiple types of employees and variety of businesses in this country. A more tailored approach to restricting non-compete clauses would be more appropriate and would allow English courts to continue playing a key role in regulating case law on non-compete clauses.

88. We do recognise that the enforcement of post-termination restrictions can impact most heavily in relative terms on certain groups of employees, such as mid-ranking sales-executives. Their connections with customers are sufficiently material to warrant protection by the Court but the cost of defending enforcement action is high compared to their likely income and net-worth. This group would gain materially from a ban on post-termination restraints altogether, although they are less likely to be affected by a ban on non-compete clauses because those restrictions are not widely imposed on such groups and, even when they are, they might not be enforceable against them in any event. Rather, it is provisions restricting dealings with customers that would affect them. It therefore seems disproportionate to ban non-competes altogether on behalf of this group, not least because whilst sales activity is crucial to business it is only indirectly related to the innovation the Government is seeking to promote. Instead, we urge Government to consider the procedural reforms we offer elsewhere in this response.

89. Considering the examples offered by neighbouring jurisdictions, we believe that the UK offers a balanced approach which is generally well understood by parties. We would however recommend that the Government consider the recommendations provided in response to questions 18 to 24 (Complementary measures).

**QUESTION 28**

If the Government introduced a ban on non-compete clauses, do you think the ban should extend to wider workplace contracts?

90. As explained above, we do not support a ban on non-compete clauses in employment contracts, nor would we support it for wider workplace contracts.
QUESTION 29

Do you think a ban should be limited to non-compete clauses only or do you think it should apply to other restrictive covenants? If the latter, please explain which and why.

91. We do not support a ban on non-compete clauses, nor do we support a ban on other restrictive covenants, as we believe that a more tailored and balanced approach is preferable to encompass the great variety of regions, businesses, industries, employee profiles and careers in workplaces across the UK. A ban on any clause would undoubtedly trigger unintended consequences and the reform would be likely to miss its mark.

QUESTION 30

If the Government introduced a ban on non-compete clauses in contracts of employment, do you think there are any circumstances where a non-compete clause should be enforceable? If yes, please explain.

92. We are unclear as to the meaning of this question.

93. Taking the question at face value, if there was a ban on non-compete clauses and the law was properly drafted, there should not be any circumstance where the clause should be enforceable, subject however to our comments in response to questions 25 and 26.

94. It might be that the question is directed at whether, if non-compete clauses in employment contracts are banned, should they be enforceable in other contracts related to employment? We have referred elsewhere in this response to the fact that non-compete clauses are found in a large variety of employment-related contracts which are not contracts of employment. For example, non-compete clauses are found in shareholder agreements, share sale and purchase agreements, partnership agreements, LLP agreements, deferred remuneration agreements, joint venture agreements and franchise agreements. The Government is not proposing to reform non-compete clauses in any agreements other than employment contracts. Accordingly, our response does not address that issue. In those circumstances, we consider that non-compete clauses should be enforceable in other such employment-related agreements even if they were to be banned in employment contracts. Indeed, we think that a ban on non-competes in employment contracts would be likely to have repercussions in terms of the greater use of non-competes in these other agreements.
95. It might be that the question is directed to whether, if non-compete clauses are generally banned in employment contracts, should they be enforceable against a limited category of employee, such as senior employees? We do not support such a distinction. Such an approach would run into considerable problems of definition as to the class of employee against whom non-competes are enforceable. Which employees? How are they to be defined? It is worth reiterating that the existing common law test for the enforceability of non-compete clauses draws the appropriate distinction between employees against whom non-competes are, or are not, enforceable. Non-competes are unenforceable against employees unless they are no wider than reasonably necessary to protect a legitimate business interest.

**QUESTION 31**

Are there options short of banning non-compete clauses which would limit their enforceability in the interests of spreading innovation? Please explain your answer.

96. The starting point is that the general view amongst practitioners and some employers is that non-compete clauses can foster, rather than hinder, innovation, as they provide employers with the security they need to invest in the development of human capital, which ultimately is the source of innovative ideas and technology. Employers may be disincentivized from investing in their employees’ development absent security that employees could not freely leave and compete, taking the benefit of the employer’s investment to a rival firm.

97. Investment by private equity and venture capital firms is crucial to innovation, as it frequently provides the funds necessary for companies to develop and expand new product lines and technologies and for start-ups to get off the ground. Particularly in an increasingly knowledge-based economy, people tend to be a company’s most valuable asset, and private equity and venture capital investors frequently demand protection for their investment in the form of non-compete clauses. If UK companies were prohibited from imposing non-compete obligations on employees, that would make UK companies less attractive to private equity and venture capital investors, which would in turn remove a major source of funding for the development of innovative ideas.

98. The majority of employers we asked said that banning non-compete covenants would be likely to have a negative impact on their business. The overwhelming majority said that non-compete covenants were reserved for only the most senior and highly paid employees so true non-compete covenants only impact a very small percentage of employees in any case. Many employers do not believe they will be able to sufficiently protect their businesses without non-compete covenants for those highly paid senior employees.
99. The law already strikes a balance between the employer’s interest in workforce stability and the employee’s interest in mobility by limiting the enforcement of non-competition covenants to situations in which the employer is able to prove that the covenant is narrowly tailored to protect legitimate business interests. One downside to the current state of the law on non-competition covenants is that the fact-specific nature of the analysis necessarily creates uncertainty as to the enforcement of a non-competition covenant until it is tested in court in the particular context. We have set out below three concepts which do not involve banning non-competes but which seek to mitigate some of that uncertainty:

99.1. Obliging employers who seek to impose non-compete covenants in new contracts of employment or variations of current contracts to require the employee, at the cost to the employer, to receive a statutory sign-off from an employment lawyer that they are aware of the non-compete to which they are subject under the contract. See our answer to Q21 beginning at 74.5 As discussed there, this would be a mandatory first step requirement similar to that to which settlement agreements are currently subject. The benefits of this approach are that (i) employees enter into the non-compete informed as to the impact on their post-termination activities; and (ii) they are therefore afforded an opportunity to discuss the covenant with the employer in advance of entering into the contract, thus seeking to address the imbalance between the parties’ negotiating positions. We repeat in summary that there are serious hurdles to this approach: (i) the cost to employers, particularly start-ups and small businesses, of paying for advice; (ii) employment lawyers are likely to be reluctant to advise with any degree of certainty on the enforceability of the covenant and certainly the Government should not seek to impose a requirement that they should.

99.2. Another potential alternative is akin to the so-called “employee choice doctrine”, which New York law recognizes as an alternative to the traditional analysis of non-competition covenants for reasonableness and restriction to protect legitimate interests. Under this model, the employer links payment of post-employment benefits to an obligation not to quit and compete. Customarily, this is made a provision of the plan providing the benefit, such as a stock option or incentive compensation plan. Under the employee choice doctrine, an employee who leaves the company may choose to accept those benefits from his or her employer, provided he or she promises not to work for a competitor. If the employee later changes his or her mind and accepts a position with a rival firm, he or she forfeits unpaid benefits and may even be required to pay back what was already received. Under this model, the restriction is enforced “without regard to its reasonableness if the employee has been
afforded the choice between not competing (and thereby preserving his benefits) and competing (and thereby risking forfeiture).” *Lucente v. International Business Machines Corp.*, 310 F.3d 243 (2d Cir. 2002). In this way, employers may tie post-employment benefits to restrictions on competition, without regard to trade secrets or unique services or whether the restraint is unreasonably burdensome to the former employee. This is similar to the situation of employers in the UK offering stock options or accrued post-employment contractual benefits which are usually tied to non-competes, the difference being that in the UK such non-competes are still subject to an analysis of enforceability. Removing that analysis, as in New York, gives more certainty to all parties. This is only relevant where such benefits, such as the right to stock under a stock option plan, are offered and to a certain extent depends on the success of the company. It is worth noting that although accrued contractual benefits, such as stock options or other incentives, relate and are connected to the employment relationship, their terms are usually embodied in documents outside of the employment contract per se, such as stock plans or incentive schemes. Drawing a distinction risks distorting the employment relationship to some extent and so given the complexity of this issue, we suggest that caution is exercised before considering this approach further.

99.3. If the concern is the deterrent effect on innovation of restrictions which overreach, particularly for start-ups, another option, rather than looking at altering the law may be focusing more on a programme of education to entrepreneurs in relation to the operation and enforceability of restrictions so they understand how finely balanced the preparation of covenants must be in order to be enforceable and can take a more considered view when deciding who to hire and when imposing covenants.

**QUESTION 32**

*Are you aware of any instances in which a non-compete clause has restricted the spread of innovation/innovative ideas? Please explain your answer.*

100. No, there does not appear to be any clear evidence which links an absence of non-compete provisions with increased innovation. As explained above, our view is that non-compete clauses foster innovation because they provide employers with the security they need to invest in the development of human capital and investors with the security they need to invest in the development of innovative ideas at companies. Our understanding is that foreign jurisdictions which ban non-competes (notably California), have other routes to achieve the same effect, for example, increased litigation relation to IP and confidentiality.
Our view is that the perceived unfairness of non-compete provisions arises from a lack of understanding on the part of the employee about what they are signing up to at the outset of the employment relationship rather than the provisions themselves. We believe there can be real benefit to the provisions and, as noted, to be enforceable the provisions must be heavily tailored to the business concerned and seniority of the individual.

**QUESTION 33**

If you are aware of any literature, research, or evidence from your own business experience that looks at the impact of non-competition clauses on competition, innovation, or economic growth, please list the publications below.


Abstract: We study the effects of noncompetition agreements by analyzing time-series and cross-sectional variation in the enforceability of these contracts across US states. We find that tougher noncompetition enforcement promotes executive stability. Increased enforceability also results in reduced executive compensation and shifts its form toward greater use of salary. We further show that stricter enforcement reduces capital expenditures per employee. These results are consistent with a model in which enforceable noncompetition contracts encourage firms to invest in their managers' human capital. On the other hand, our findings suggest that these contracts also discourage managers from investing in their own human capital and that this second effect is empirically dominant.


Abstract: Covenants not to compete (CNCs) are used in employment contracts to prevent employees from working for other employers. The legal enforcement of CNCs varies across jurisdictions in the U.S.: some states ban them (notably, California), while a majority of states enforce CNCs when they reasonably protect a legitimate interest of the employer. The discrepancy in the legal policy regarding CNCs is reflected in an academic debate over the economic efficiency of these covenants. One side argues that CNCs are bad because they restrict labor mobility; the other side argues that the restriction on the movement of workers is good because it prevents workers from appropriating
their employers’ human capital investments (and CNCs thereby encourage such investment). The paper addresses together the two objectives of ex post (labor mobility) and ex ante (human capital investment) efficiency. It compares CNCs with the alternative contract breach remedies of specific performance and liquidated damages. A given CNC may be analyzed as a hybrid that adopts specific performance with respect to attempted movements to employers within its scope and liquidated damages equal to zero with respect to movements outside its scope. Among the results of the paper is the finding that, where a CNC can be renegotiated, first-best performance and first-best investment can be induced. The appropriate choice of the CNC scope can balance perfectly the overinvestment tendency of specific performance against the underinvestment effect caused by zero liquidated damages. Contracting parties, however, have the incentive to agree to excessively broad CNCs that enable them to extract rents from prospective new employers within the CNC scope. The law should be wary of this incentive in policing CNCs.


Abstract: This Article examines a specific policy issue that goes to the heart of the larger debate surrounding the changing employment relationship: How should the law of covenants not to compete adapt to the changing landscape of the U.S. labor market and to the increasing importance of a knowledge-based economy? The author first argues that noncompete policy is of great importance to fostering economic growth and labor markets, and then discusses various theoretical approaches to noncompete enforcement in a knowledge economy. The preferred approach, the author contends, is a hybrid model of selective enforcement that differentiates among workers as “creative” or “service” employees, thereby enhancing the positive spillovers gained from policies at the extremes of the enforcement spectrum.

104. We also refer to the research summarized in Part 1 of our response at paragraphs 78 – 90.
QUESTION 34

If the Government introduced a ban on non-compete clauses in contracts of employment do you think you would be able to sufficiently protect your business interests through other means, for example through intellectual property law and confidentiality clauses? If not, why not?

105. Intellectual property (IP) and confidentiality clauses do very different things to non-compete clauses.

106. Contractual intellectual property provisions govern the ownership and assignment of IP belonging to a business, and what happens to those when an individual is no longer with a business. IP and confidential information will often be carefully defined in the contract.

107. Similarly, contractual confidentiality provisions govern the ownership and use of confidential information belonging to a business, and the protection and return of that information when an individual is no longer working for a business.

108. Restrictions on the use of IP/confidential information following the departure of an individual from a business are usually drafted without limitation in time.

109. IP and confidentiality restrictions cannot protect confidential information that is in an individual's head that s/he cannot “unknow”, such as business plans and pricing structures, and that is not capable of physical return.

110. Non-compete clauses can protect this information. The courts also accept that IP and confidentiality restrictions can be very difficult to police once an individual has left a business. In relation to IP, the employer would have to show that the relevant IP exists, that it owns that IP and that the former worker is infringing that IP. The law of confidence does not provide adequate protection in practice either. This is for three reasons. First, it is extremely difficult to police an ex-employee's compliance with the duty of confidence. The ex-employee can disclose his former employer's confidential information to his new employer without the former employer ever knowing, let alone being able to prove it. Second, it is often difficult to draw the line between what is and what is not confidential information. In brief, the boundary between the employee's own abilities, skill and aptitude, which the employee is permitted to take with them to their new employer, and information which can be regarded as, in some sense, the employer's property remains a grey area. Third, although businesses are theoretically able to protect information that is wider than a trade secret but narrower than confidential information by way of an express covenant, the line between the two remains unclear. This means that businesses do not have the...
security of knowing that the express confidentiality covenant will be effective in protecting the relevant information in practice.

111. Non-compete clauses can assist with this. For example it would be very difficult for a director or senior employee of a business to avoid using his or her in depth knowledge of confidential strategic, financial and commercial information about the former business to the advantage of a competitor. Imposing a short non-compete restriction allows for that information to go 'stale' before the director/senior employee can use it at a competitor, inadvertently or otherwise, where otherwise the former employer could not rely on the law of confidence nor would it have the protections available under IP law.

112. If the use of non-compete clauses was prohibited, businesses may be left without these protections. The use of non-competes is already restricted - the current law will not allow restrictive covenants to be enforced save to the extent that there is a legitimate interest to be protected and the scope of the restriction concerned does not go beyond what is reasonable. To date, the courts have refused to recognise pure "non-competition" as a legitimate interest.

113. Whilst the typical focus of non-compete clauses is to protect an employer’s confidential information, occasionally non-compete clauses may also be needed to protect an employer's trade connections, for which IP and confidentiality clauses are unsuited and other types of restrictive covenant may not be sufficient.

114. See also the industry responses summarised and in the Appendix to this response.

QUESTION 35

Do you think a ban on non-compete clauses in contracts of employment could benefit your business/organisation? If so, how?

115. See response to question 36 below.

116. See also the industry responses summarised above and in the Appendix to this response.
QUESTION 36

Do you think a ban on non-compete clauses in contracts of employment would impact your business/organisation? If yes, please explain in what ways and the severity of any impacts to your business/organisation.

117. A ban on non-compete clauses in contracts of employment would certainly affect businesses. Whilst it may be the case that a ban on non-competes would remove any barriers to hiring people, there is no real evidence to suggest that non-competes stifle innovation or that banning non-competes would have a beneficial impact on commerce or the job market. The availability of finance and investment for growing businesses may also be adversely affected if the investor has no means of preventing the people in whom the investment is being made being free to set up in competition at any time, thus tending to stifle enterprise rather than promote it. Similarly, a person looking to establish a business on the basis of an innovative idea may be reluctant to do so if he cannot retain some control over his employees leaving and setting up in competition.

118. Investors also want to ensure that key individuals within the business have adequate restrictive covenants in their employment and shareholders' agreements to prevent the risk of damage to the value of their investment. If legislation prohibited the use of non-competes, investors may be more cautious or reluctant to invest in UK businesses or at least build in the attendant increased risk by more onerous terms in respect of interest on loans or exit terms. This would have a particularly adverse impact on entrepreneurial and start-up businesses which need funding and, as noted above, stifling the very innovation which the Government is looking to promote and protect. It would also risk putting the UK at a competitive disadvantage in respect of attracting foreign investment. There are a significant number of countries where non-compete clauses are enforceable. A change to the position in the UK runs the risk of foreign investors investing in business outside of the UK as a result of the protections available in other countries.

119. See also the industry responses summarised above and in the Appendix to this response.

QUESTION 36

How do you think your business/organisation would respond to a ban on non-compete clauses in contracts of employment? Please explain.

120. Businesses would be likely to respond to a ban on non-compete clauses in the following ways:
INCREASED USE OF GARDEN LEAVE CLAUSES

121. Businesses are likely to place heavier reliance on the use of garden leave provisions in employment contracts. They may also seek to place employees on garden leave for longer periods of time. Garden leave is a contractual concept that allows an employer to put an employee on paid leave, usually during some or all of their notice period. Such clauses are subject to the doctrine of restraint of trade, so employers will need to bear this in mind if they are to increasingly rely on garden leave to protect their business. Employees should feel assured that the imposition of an unjustifiably long garden leave restraint will not be enforced by the courts.

122. If used properly, garden leave is an effective way of protecting (inter alia) confidential information as it ensures that exiting employees are unable to access confidential information for a period of time before joining a competitor, and at the same time ensures that the confidential information in their heads ‘goes stale’. Garden leave also allows employers to prevent exiting employees from interacting with colleagues, clients and suppliers throughout this period in the hope that they would have less influence over these individuals at the point at which they joined a competitor.

123. While garden leave clauses ensure employees get paid during the period that they are out of the market, they are not applicable or appropriate in all cases – for example where there has been serious misconduct for which the appropriate response of the employer is dismissal without notice. They also and do not usually let an employee start up a new business any earlier. Increased use of garden leave provisions will also increase a business’ costs because placing larger numbers of employees on garden leave for longer periods of time involves paying more to employees who are not working for the business or contributing to its success.

EXTENDING NOTICE PERIODS

124. Businesses may extend notice periods to ensure employees are tied into their employment contracts for longer periods of time. Longer notice periods could be used in conjunction with garden leave (subject to the doctrine of restraint of trade, see above) to protect businesses by preventing employees from joining a competitor or setting up a competing business for a prescribed period after giving notice and prohibiting access to confidential or relevant business information during that period.

125. While employees are protected financially as they are paid in full for any period of notice, this would be an expensive option for businesses considering imposing longer notice periods.
AMENDING "GOOD LEAVER" PROVISIONS

126. Businesses may amend the terms of any long term incentive arrangements so that employees are prevented from joining a competitor or setting up a competing business for a prescribed period after leaving the business in order to remain a "Good Leaver".

INCREASED EMPLOYEE MONITORING

127. A ban on non-compete clauses may also result in increased employee monitoring on the part of businesses. Without the security of a non-compete clause, businesses may seek to implement more robust systems to track confidential information and its dissemination throughout the business, particularly at the point at which an employee gives notice. This could include monitoring employees’ emails, internet use, phone records and printing history.

128. However, this approach will not always be effective as employees must be advised that they are being monitored and the more intrusive the monitoring, the more explicitly they must be told and the greater the information that must be provided about the monitoring. While notifying employees may act as a deterrent, it could also lead to employees opting to use non-work devices to take confidential information or deleting valuable evidence of the theft. This would both reduce the chance of the business being aware of the theft and make it more difficult for it to demonstrate that the theft had occurred in subsequent litigation.

INCREASED SCRUTINY OF OTHER POST-TERMINATION RESTRICTIONS

129. Businesses that have relied heavily on non-compete clauses to protect their interests will be likely to review the other post-termination restrictions in their employment contracts to identify any issues and ensure that the business is protected to the extent possible (for example, restrictions that prevent employees from poaching colleagues, clients or suppliers or having any dealings with clients or suppliers). Where issues are identified, businesses might seek to agree more robust post-termination restrictions. New restrictions cannot be imposed on employees, however. While this is positive for employees, it may leave businesses in the difficult position of having inadequate restrictions in place for existing employees.

130. However, such restrictions are not equivalent to a non-compete clause and are designed to protect different interests. In brief, they are unable to protect the confidential information that an employee cannot "unknow" and that they will take with them to a competitor.
FORWARD CONTRACTS

131. Some businesses may also respond to a ban on non-compete clauses by more aggressive use of arrangements to recruit new staff such as 'forward contracts'. These are contracts which do not offer someone immediate employment with a new employer, but rather employment which begins after their employment with their current employer has ended. Forward contracts typically lock the individual in to long fixed-term periods of employment with the new employer, offer substantial financial incentives for the individual to start at the new employer quickly, and impose onerous repayment obligations should the individual then leave their new employment early. The use of forward contract arrangements such as this can be expensive for an employer, and they may have a distorting effect on fostering competition and on the creation of a flexible and dynamic labour market.

OTHER AVAILABLE LEGAL REMEDIES

132. A ban on non-complete clauses is likely to result in businesses seeking to rely on other available legal remedies as a means of protecting their confidential information:

Protecting Trade Secrets

132.1. A trade secret is a specific form of confidential information which is commercially valuable, treated as a secret and gives the owner a competitive advantage. Examples of trade secrets include secret recipes or customer lists.

132.2. The common law of confidentiality and the Trade Secrets (Enforcement, etc) Regulations 2018/597 ("the Regulations") provide the current legal framework for protecting trade secrets.

132.3. Businesses must meet three requirements for trade secrets to be protected under the common law of confidentiality:

132.3.1. The information must be confidential. Factors such as whether the information is already in the public domain or whether it has been described as confidential will be relevant to determining this question;

132.3.2. The recipient of the information must have known, or ought to have known the information was confidential; and
132.3.3. There must be an unauthorised use of the information to the detriment of the rights holder.

132.4. Businesses can take legal action against former employees for the misuse or misappropriation of a trade secret under the common law of confidentiality and, if successful, they may be entitled to an injunction, an account of profits, an inquiry into damages or other protective measures.

132.5. The Regulations came into force on 9 June 2018 and supplement the protection given under the common law of confidentiality by establishing a regulatory regime. To qualify for protection under the Regulations, a business must establish that the information falls within the statutory definition of a trade secret and that there was an unlawful acquisition, use or disclosure of that trade secret. The Regulations define a trade secret as information which:

132.5.1. is secret in the sense that is not generally known among or readily accessible to persons within the circles that normally deal with that type of information;

132.5.2. has commercial value because it is secret; and

132.5.3. has been subject to reasonable steps to keep it secret.

132.6. If it qualifies for protection, a business can then apply for an injunction, compensation, damages or other protective measures. A business can apply for remedies under the common law of confidentiality in addition, or as an alternative, to the remedies provided under the Regulations.

132.7. Businesses will be increasingly likely to rely on the remedies offered by the common law of confidentiality and the Regulations following any ban on non-compete clauses because they will be unable to prevent employees taking confidential information to a competitor simply by prohibiting those employees from working for a competitor for a specified period. However, as outlined above, there are a number of legal hurdles that they will be required to meet before they can qualify for the relevant protections and not all confidential information can be defined as a trade secret.
Copyright and Rights in Databases Regulations 1997 (Database Regulations)

132.8. The Database Regulations, which came into force on 1 January 1998, introduced a hybrid regime that created the possibility of two separate intellectual property rights in a database: copyright and database right.

132.9. Copyright protection covers the structure of the database, while database right protects the data stored in the database. Database right is infringed if a person extracts or reutilises all or a substantial part of the contents of the database without the owner's permission. Extraction is defined as the permanent or temporary transfer of all or a substantial part of the contents of a database; and reutilisation is defined as making the contents of the database available to the public by any means. The remedies available for infringement of a database right include an injunction against further acts of infringement, damages, account of profits and delivery up or seizure of the infringing copies.

132.10. It is possible that there will be increasing reference to the Database Regulations in employment contracts and increased litigation surrounding the Database Regulations if non-compete clauses are banned, as businesses seek to rely on other means to protect their confidential information. However, this protection is limited to confidential information that is contained within a database.

Fiduciary duties

132.11. Businesses may also respond to a ban on non-compete clauses by seeking to codify senior employees’ fiduciary duties in their employment contracts. Codifying these fiduciary duties would serve as a means of clearly establishing that these individuals owe a duty of absolute good faith and a comprehensive duty of confidentiality to the business. This would enable the business to rely on these clauses in the event of breach, and to evidence that the employee had a clear understanding of their confidentiality obligations should future legal action be necessary against the individual.

132.12. It would also act as a warning to individuals about the way in which they conduct themselves in a move to a competitor by underlining the strict duties that they owe to their employer.

132.13. However, fiduciary duties do not extend beyond the employment relationship. This means that while a business can take legal action against an employee who discloses or uses its confidential information,
employees do not have ongoing fiduciary duties to the business once they leave.

132.14. In summary, the legal remedies outlined above would provide an imperfect alternative for businesses seeking to protect their confidential information following a ban on non-compete clauses. Non-compete clauses provide businesses with protection against an employee who would otherwise be able to leave the business and immediately join a competitor or set up in competition, with the benefit of confidential information that they acquired in their previous role. If non-competes were banned, businesses would be concerned about whether and to what extent employees are taking confidential information to new roles, and whether and how they will be able to prove the misuse of confidential information by a competitor.

132.15. Further, litigation is expensive and there is no guarantee that it will be successful. Moreover, the existence of non-compete clauses has meant that a number of the legal remedies have not been tested extensively by businesses, meaning that there is not always a clear precedent on which businesses can rely. Finally, the available remedies are costly to prosecute, not all such costs can be recovered even if the employer is successful in litigation, and often employees and start-ups do not have the financial means to pay the other side's costs if they lose. Finally, the losses in such cases are very hard to quantify, and the damages recovered may not be sufficient to compensate the business for its actual loss.

132.16. See also the industry responses summarized above and in the Appendix to this response.
<table>
<thead>
<tr>
<th>Jurisdiction type</th>
<th>California</th>
<th>Australia</th>
<th>Hong Kong</th>
<th>Ireland</th>
<th>Singapore</th>
<th>Switzerland</th>
<th>France</th>
<th>Germany</th>
<th>Italy</th>
<th>Sweden</th>
</tr>
</thead>
<tbody>
<tr>
<td>Gov. looking to change approach?</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Court’s approach to non-competes?</td>
<td>Void, unless legitimate interest and no further than necessary.</td>
<td>Void, unless legitimate interest and no further than necessary.</td>
<td>Void, unless legitimate interest and no further than necessary.</td>
<td>Void, unless legitimate interest and no further than necessary.</td>
<td>Void, unless legitimate interest and no further than necessary.</td>
<td>Legal only with mandatory payment, plus legitimate interest and no further than necessary</td>
<td>Legal only with mandatory payment, plus legitimate interest and no further than necessary</td>
<td>Legal only with mandatory payment, plus legitimate interest and no further than necessary</td>
<td>Legal only with mandatory payment, plus legitimate interest and no further than necessary</td>
<td></td>
</tr>
<tr>
<td>Focus of test to enforce</td>
<td>Duration; likely damage; employee’s ability to earn.</td>
<td>Duration; geographical scope; prohibited activities; nature of employees’ job; assessment of reasonableness</td>
<td>Duration; geographical scope.</td>
<td>Duration; geographical scope; prohibited activities; public policy</td>
<td>Duration; scope; potential damage; reasons for termination.</td>
<td>Duration; geographical scope; prohibited activities; payments.</td>
<td>Duration; geographical scope; prohibited activities</td>
<td>Duration; geographical scope; payments; reason for termination</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Are certain sectors more likely to impose / enforce non-competes?</td>
<td>No</td>
<td>Financial Services</td>
<td>Technology; Financial sector; pharma/biotech</td>
<td>Sectors with justifiable need to protect legitimate interest</td>
<td>Healthcare</td>
<td>Those with confidential products (eg pharma)</td>
<td>No</td>
<td>Technology; pharma; IP</td>
<td>Industries reliant on developed / patented products</td>
<td></td>
</tr>
<tr>
<td>Are certain functions more likely to attract non-competes?</td>
<td>Those with confidential information, close customer relationships and ability to</td>
<td>Sales; product development; employees who are important to the business</td>
<td>Sales; product development; employees who are important to the business</td>
<td>Employees holding trade secrets and customer connections or ability to</td>
<td>R&amp;D; sales; executives</td>
<td>Senior employees; executives</td>
<td>Sales; R&amp;D; senior employees with strategic understanding</td>
<td>Executives; employees with strategic understanding</td>
<td>R&amp;D; executives</td>
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</tbody>
</table>
## Part 3: International review of non-competes | a snapshot

<table>
<thead>
<tr>
<th>Available remedies</th>
<th>Injunctive relief; damages; account of profits</th>
<th>Injunctive relief; damages</th>
<th>Injunctive relief; contractual penalties.</th>
<th>Injunctive relief; clawback of payments made during breach.</th>
<th>Injunctive relief; damages; contractual penalties</th>
<th>Injunctive relief; damages</th>
<th>Injunctive relief; damages; contractual penalties</th>
</tr>
</thead>
<tbody>
<tr>
<td>Other options to protect business interests</td>
<td>IP and confidentiality agreements; federal service plans</td>
<td>Long notice periods; garden leave; defer compensation until after restrictions</td>
<td>Garden leave, forfeiture of deferred compensation</td>
<td>Long notice periods; garden leave; confidentiality and IP clauses</td>
<td>Long notice periods; garden leave; clawback regarding discretionary bonus</td>
<td>Long notice periods; garden leave; criminal sanctions (disclosure of business secrets a criminal offence)</td>
<td>Non-solicitation provisions; IP and confidentiality agreements.</td>
</tr>
<tr>
<td>Payment requirements</td>
<td>33-50% of average remuneration (calculated over a 12 month period)</td>
<td>50% of average remuneration (calculated over a 3 year period)</td>
<td>50-100% of base salary</td>
<td>60% of average remuneration (calculated over a 12 month period)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Can employer waive payment requirement?</td>
<td>Yes (usually 8-15 days' notice required). Consent of employee may be required.</td>
<td>Yes (12 months' notice required) Consent of employee not required.</td>
<td>No</td>
<td>Yes (no time limit) Consent of employee not required.</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
PART 4 - SUMMARY OF RESPONSES TO A SURVEY OF CLIENT OF ELA MEMBER-FIRMS CONDUCTED IN RESPONSE TO THE CONSULTATION

1. Several of our members surveyed their employer-clients to gather responses to the questions in the consultation directed at employers. We received 128 responses from a combination of established employers (106 responses) and businesses that we would characterise as entrepreneurs/start-up businesses (22 responses).

2. The results of the survey are set out in Appendix 1 Appended to this submission. We have presented the answers from all employers first, and we have then also included the data split by established employers and entrepreneurs/start-ups. Although the sample size for start-ups is smaller as we had fewer responses from this category of employer, we have included the data to examine whether innovative start-up businesses (i.e. those whom the Government believes the proposed changes would benefit) feel differently about non-compete clauses and the Government's proposals for change than established employers. Unless otherwise stated, references to 'employers' in the following summary are to the combined responses from all employers.

3. The vast majority of respondents use or have used non-compete clauses in their contracts of employment, but more than half said that they did not use non-compete clauses in contracts for limb (b) workers. Slightly fewer of the entrepreneurs use or have used non-competes (just over 80% against 91% of the more established employers we surveyed).

4. Our members were surprised at the number of employers confirming that they paid for some or all of a non-compete period in their contracts now (question 3). They had expected far fewer positive responses to this question. However, when our members analysed the comments made by respondents, it was clear that many employers were confusing such payments with garden leave payments. The vast majority of respondents who answered yes to question 3 went on to explain that they were referring to payments made for garden leave periods. Such periods have the effect of reducing the non-compete period, and often of extinguishing it altogether. In other cases, the comments clarified that these employers were international, and only did so in the jurisdictions where this is required by law. We therefore remain of the view that this practice is very rare amongst employers in this country.

5. A little over half of the employers surveyed considered that they would continue to use non-compete clauses if they were required to provide compensation for the period of the non-compete clause. In the main, employers would tend to use non-compete clauses for high paid employees and workers, and very few of our respondents said they would use them for low paid employees and workers.
6. 64% of respondents believed that their use of other restrictive covenants would increase if mandatory compensation were to be introduced. Restrictions on poaching staff, restrictions on soliciting customers or clients and restrictions on dealing with customers or clients were most frequently selected by respondents as the restrictive covenants that they would seek to rely on.

7. Just over 20% of our respondents said that they already pay compensation to employees for all or part of the duration of a non-compete restriction, and over 75% confirmed that they do not. Around two thirds of employers surveyed thought that employees would be more likely to comply with the terms of a non-compete clause if mandatory compensation were introduced.

8. 66% of employers that answered our survey believe that they would not be able to sufficiently protect their business interests if the Government introduced a ban on non-competes. A substantial majority of 78% (100 employers) believed that a ban on non-compete clauses would have a negative impact on their business, with only 17 respondents (13%) believing that the impact would be positive. When we analyse the responses further, we see that entrepreneurs/start-ups are slightly more inclined to consider that the impact would be positive, but 72% still believed the impact would be negative.
Type of respondent

- 106 (82.81%) Employer
- 22 (17.19%) Entrepreneur
Q11 Do you use, or have you ever used, non-compete clauses in contracts of employment?

- Employer: 115 (89.84%) Yes, 9 (8.49%) No, 9 (7.67%) Unanswered
- Entrepreneur: 97 (81.82%) Yes, 18 (15.11%) No, 4 (3.07%) Unanswered

Q12 Do you use, or have you ever used, non-compete clauses in limb(b) workers’ contracts?

- Employer: 67 (54.72%) Yes, 58 (49.63%) No, 39 (36.79%) Unanswered
- Entrepreneur: 13 (59.09%) Yes, 9 (40.91%) No, 1 (4.55%) Unanswered

Q13 If you were required to provide compensation for the period of the non-compete clause, do you think that you would continue to use them?

- Employer: 74 (62.26%) Yes, 48 (40.28%) No, 3 (3.43%) Unanswered
- Entrepreneur: 12 (59.09%) Yes, 13 (60.91%) No, 1 (4.55%) Unanswered
Q13 If yes, what kind of employees/limb(b) workers (high/low paid) would you maintain non-compete clauses in place for?

### Employer
- High paid employees: 70 (54.69%)
- Unanswered: 51 (39.84%)
- Other: 5 (3.91%)
- Low paid employees: 5 (3.91%)

### Entrepreneur
- High paid employees: 13 (59.09%)
- Unanswered: 8 (36.36%)
- Other: 1 (4.55%)
- Low paid employees: 1 (4.55%)
### Please explain your answer

Would probably reduce the groups of employees to whom restrictions apply and focus on the highest paid employees and those in roles with most risk of disclosure of key commercial/proprietary information.

We would likely still include in executive agreements, but we'd have a discussion on whether to invoke the clause and make the payment, on a case by case basis, considering risk to the Company of non-compete not being complied with.

We use it for all employees given the nature of our business (consultancy for IP creation).

We currently use them for all. If compensation were mandatory, we would likely reduce the number of employees who have them.

The compensation requirement serves also as a limitation of the use of non-compete clauses. It forces the employer to consider whether the restriction imposed on the employee is really worth the expenditure. By nature, only a fraction of the workforce could potentially harm the company if they were to join the competition right after separating from their employer. For such key employees non-compete obligations should remain a viable option; however, without the compensation requirement there would be no check limiting their use.

The above answer is inaccurate but the system won't let me select neither. For us, I don't think it would be a remuneration based decision, rather who we perceive could cause most damage by competing against us. One would hope that the higher paid would be higher calibre and therefore most likely to cause damage, but that is not necessarily an accurate yardstick.
Senior Executive, Regulatory roles/Underwriting Business Heads or Underwriter experts sought in market.

Our high paid employees are paid to build key relationships for the organisation but they are always tempted to build them for themselves. We train develop and support them through this process and if they can just leave and take all the information for themselves we will be incentivised to cut them out of the process and dumb down the roles using technology and off shoring.

Our business is built on relationships with our clients and the people who work in them. Our higher paid employees are entrusted with management of relationships that others in the business have worked hard to develop. We need to protect against people abusing this trust.

More likely to use non-compete clauses for more senior roles and/or those roles that have access to or influence strategic direction.

More likely to be used for senior staff who have insights into business strategy, or who hold proprietary information.

Employees with a high level of access and visibility of commercial terms with customers.

Employees in client facing and business development roles.

Both. I think this should be an option in your answers. The rationale for a non-compete is to avoid commercially sensitive information being used by competitors or for commercial gain against us. That can sit with highly or lower paid workers.
Any employees or workers who have access to confidential information will generally be subject to non-compete restrictions - these employees tend to be paid more than staff that do not have access to confidential information as part of their role.

Any employee who could inflict damage on the business.

Align to where there is access to valuable information.
Q14 If you did not use non-compete clauses, would you be content to rely on other ‘restrictive covenants’ to protect your business interests?

Employer

Entrepreneur
If yes, do you think there would be any unintended consequences to this? Please explain your answer

Yes, but it would depend entirely on the strength of them. Not hugely optimistic.

We would have to have non-compete clauses in the contract because otherwise all our training and effort would go to waste. An unintended consequence could be we charge our staff for training.

Our business (recruitment) is very relationship led. We hire recruiters for their network / black book and understand that they will use those contacts when they move to another employer. It therefore works both ways. The emphasis is on us as an employer to ensure that key relationships do not hinge around one point of contact who is a member of staff on a notice period. Instead, key clients have numerous points of regular contact at various levels from us thus removing individual personality-led relationships.

Non-compete clauses provide a specific protection to the business. If you start looking at other restrictive covenants all you will do is start a new debate over their enforceability.

A company has the right to protect its interests. To be mandated to provide compensation in return for a non-compete then it would rightfully expect to be able to enforce its rights. Employees and the new employer would need to be aware of that to avoid a case of having cake and eating it.
Q15 If mandatory compensation were introduced, do you think you would increase your use of other ‘restrictive covenants’?

Yes
No
Unanswered

**Employer**
- 31 (29.25%)
- 68 (64.15%)
- 7 (6.6%)

**Entrepreneur**
- 7 (31.82%)
- 14 (63.64%)
- 1 (4.55%)
Q15 If yes please explain which ones

- Restrictions on poaching staff: 80
- Restrictions on soliciting customers or clients: 76
- Restrictions on dealing with customers or clients: 73
- Team move restrictions: 49
- Restrictions on interfering with suppliers: 46
- Unanswered: 45
- Other (please specify): 6
- Protection of intellectual property and trade secrets: 1
- Restrictions from using any company IP and I would include almost all procedures in an IP agreement: 1
- Trading sector restrictions: 1
- We already use all of the above.: 1
Q16 If you use non-compete clauses in contracts of employment, do you already pay compensation or salary to employees for all or part of the duration of the non-compete clause?

Employer

Entrepreneur
<table>
<thead>
<tr>
<th>Feel free to give reasons</th>
</tr>
</thead>
<tbody>
<tr>
<td>Under Spanish employment law non-compete clauses cannot last more than 2 years and they have to be &quot;adequately&quot; compensated. This criteria is not defined in the relevant employment law but only in case law.</td>
</tr>
<tr>
<td>Employees are well compensated during their tenure. Non competes are narrow and generally there are many opportunities to work beyond the narrow restrictions.</td>
</tr>
<tr>
<td>Any period of restriction is offset against any period spent on garden leave. The majority of our workforce will spend their notice period on garden leave and the non-compete restrictions are generally the same length as notice periods. Employees therefore effectively receive compensation during the non-compete period.</td>
</tr>
<tr>
<td>Employees sign a contract with non-compete clauses that tend to strengthen the more senior people become and, in return, deliver greater reward and benefits. So the argument is that the 'compensation' is baked into the remuneration package for the role. If the departure of the employee is acrimonious then the non-compete clauses are required to protect the business (financial performance and people roles). If non acrimonious then 'compensation' is usually reflected in reduced periods, client, people carve outs.</td>
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<tr>
<td>Our company is too small to be able to afford it.</td>
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<tr>
<td>It would make it commercially not viable.</td>
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<tr>
<td>We use this type of clause in German employment contracts with certain key functions. German labour law allows such post-termination non-compete for a limited duration, but only if the employee affected is granted compensation for his/her loss of revenue during the cooling off period.</td>
</tr>
</tbody>
</table>
The wording of the contractual element is designed to encourage a leaver to be open towards us about their intended new employer, their duties, so that we can enter into an agreement or understanding between the employee, the new employer and ourselves that our commercial interests will not be abused.

It’s only fair.

Because the employee obtained knowledge and built relationships under our employ and was compensated through their remuneration. To allow an employee to immediately compete with an employer within 3-6 months is damaging!

Having worked hard over many years to build businesses, it is unfair that someone joins and then takes customers and contact details and then goes into competition. They have not invested money or time over the many years. Thereby in essence they are benefitting from someone else’s hard earned work / capital investment into a business. Why is this different from theft (direct or indirect)?

The employee has chosen to move to another organisation which is their choice. However, they have benefitted from learning our IP and frameworks which they can then use at a competitor which could immediately work against us.

We spend a lot of money and time in training people and we have some unique USP’s. It is not fair if an employee then can take advantage of that with a competitor.

It’s a contract. We can’t expect to ‘own the loyalty’ of a soon-to-be ex-employee in the form of a non-compete period without paying for the privilege.
Q17 Do you think employees would be more likely to comply with the terms of a non-compete clause if mandatory compensation was introduced?

- **Employee**
  - Yes: 68 (64.15%)
  - No: 38 (35.85%)

- **Entrepreneur**
  - Yes: 13 (59.09%)
  - No: 9 (40.91%)
If not, do you have suggestions for increasing compliance?

Boundaries on locations, services, general parameters.

Clearer legislation on what is appropriate and enforceable with regard to non-compete clauses.

Courts are insufficiently sensitive to how critical a non-compete is for knowledge industries where the assets walk out the door when the employee walks out the door.

I think the areas to look at are: duration - a non-compete for 12 months is too long and drives non-compliance. Maybe a restriction on duration to max 6 months? Terms – I have seen penalties that are grossly excessive in relation to the actual harm that could potentially be generated. Perhaps guidance on reasonableness i.e. if you worked with a client in the UK on one project (that generated £200k revenue to the UK entity) but the client worked across the world with the company (that generated £10m revenue) is it fair that the penalty is equivalent to 1 year’s global revenue. This is a real example. Is there a difference between the approach to clients, people and data non-competes?

If companies actually pursued the compliance through the law there would be more compliance.

Many employees are carefree with confidential information given the ease of moving data between systems nowadays. It should be much easier to ensure current employees do not breach data requirements or face penalties. At the moment all the risk seems weighted towards the employer.
More clarity from employers on what reasonable non-compete clauses look like, and reasonable duration (i.e. not to draw them too widely to be unenforceable, or too narrow as to be side-stepped easily).

Perhaps shifting liability for non-compete clauses to the incoming employer, so not just the individual.

Simplifying what is defined under the non-compete clause. Explaining at the point of hiring their existence. Demonstrating their value and how they are current and possibly future employers.

We believe that such restrictions are better placed in a shareholders’ agreement to give them added weight. We would consider – possibly – setting them to one side and not including them in an employment contract but appreciate this is a "bold step".

We find legal action is intermittently necessary. For us that does form some kind of deterrent.
Q34 If the Government introduced a ban on non-compete clauses in contracts of employment do you think you would be able to sufficiently protect your business interests through other means, for example through intellectual property law and confidentiality clauses?
If not, why not?

Being a UK company who invests considerably in intellectual property, changing the rules on restrictive covenants would have negative implications to either internal communications reducing sales effectiveness and/or where we would choose to recruit and base critical employees – i.e. we would consider moving outside of the UK jurisdiction. This is a standard practice that is not abused but does provide protection to companies wishing to protect their commercial and technical interests – any lessening of restrictive covenants undermines this basic employer right.

We will then have to rely on proof of commercial interference or breach of confidentiality which can be hard to prove.

Non-competes cover more than just IP and confidentiality, I would have to create a document that did basically the same thing as a non-compete and call it something else and word it differently so it would stand. Non-competes exist for a reason, employee theft and that will not stop just because they ban the use of non-competes. You cannot throw businesses under the bus to protect the individual employee, employees only have jobs because businesses exist and businesses can't exist if employees steal from them!

There is a risk that contracts would need to be too precise and specific about what an employer is trying to protect which could leave too much room for ambiguity and/or create hugely long and complicated employment contracts when trying to cover every possible eventuality.

Burden of proof is always difficult, at least with employment clauses a court can rule more easily on enforcement of the NCC.

It is often far easier to gather strong evidence that a former employee has been competing in breach of their restrictions (through social media, client notification etc.), than to obtain tangible evidence that they have stolen and misused confidential information. By definition, the fact that they have stolen confidential information with the intent to misuse it means they typically have gone to some effort to conceal that.

Removing non-competes allows ex-employees to enter the same marketplace delivering and undercutting.

IP / confidentiality clauses unlikely to go far enough to protect legitimate interests.

Because key commercial confidential information cannot be policed without a non-compete period. We wouldn't know or it would be too late to know when there had been a breach - which would then result in expensive and time consuming litigation to enforce the business' rights.
The cost of litigation to prove liability would be too great. At the end of the day you are trying to have enough time to protect your business. It should be remembered that the person/team leaving may have been planning for months/years to compete with their current employer. They then surprise the Employer with a departure. Would it be fair for the person to then immediately 'asset strip' their employer when they have no time to plan or risk manage the impact? This is why I feel that the duration is the key. Any business should be able to plan for a departure in order to manage the risk over a 6 month period, any longer is bordering on an unfair restriction to earn a living.

It would be very difficult to prove a breach of these.

Recruitment has low barriers to entry so non-competes prevent someone working for us for a short period, taking the knowledge and setting up shop – restrictive covenant breaches would be hard to identify for someone setup on their own, they are more generally used when someone moves to an established competitor, where they are enforceable.

The need to impose a large number of restrictions to achieve a similar protection would make compliance for the employee much more difficult and at the same time increase the risk of loopholes which could be exploited by the employee to the detriment of the former employer.

The increased use of social media and the difficulties with establishing ownership of business relationships developed during employment is already preventative. Taking away the ability to attempt to protect business interests with restrictions will only add to these issues.

Our business is highly competitive and our people are our most valuable asset and as such, if executives were to leave and poach key talent post their departure, it could be particularly damaging to our commercial viability.

We work in the knowledge economy.

The burden of proof would be on the ex-employer and the costs of litigation may be prohibitive. It would also create a huge distraction to the business.

If the government introduced a ban on non-compete clauses, we would not hire anyone in the UK. As it would represent an unacceptable risk for our knowledge based business.
Staff who leave would be able to go directly to a competitor and use their professional knowledge against their former employer, without breaching confidentiality. That knowledge would have been gained during their employment, and couldn't be protected by the former employer. This would undermine "knowledge-based businesses" who form a critically important part of UK industry.

It's too difficult to enforce confidentiality/non-solicit restrictions once an employee has started work with their new firm, especially if they're breaching them indirectly via colleagues.

My concern is ensuring the protection of confidential information, which is more difficult to protect for various reasons. I would not be as concerned about protection of IPRs.

Those other options wouldn't cover client contacts, knowledge of the company strategy, pricing knowledge etc. to be used in competition with us.

A professional business has to allow for trust and independence. If we started watching, listening, recording everything our employees did then we would lose our culture which would damage our business more!

If an employee was to resign and (whether or not during their notice period) began soliciting clients to their new position or firm - would find it difficult to stop this or prove that indeed this was happening. A period of 'quiet' prior to taking up employment with a competitor ensures we have the time to manage/rebuild our direct relationship without interference.

It can be significantly more difficult to prove confidentiality breaches and breaches of non-solicits. A non-compete is more clear-cut.

The risk of IP walking out the door is very high in staffing. The incentive for competitors to hire your staff would rise, the implicit protections would recede.

As explained previously many businesses are built on hard work and investment risk. This cannot be protected by IP. Thereby unfair for a person to join a business and simply learn and replicate. They have not invested or taken the risk that entrepreneurs are being encouraged in this COVID time to do. Rather hypercritical to ask an entrepreneur to make capital investment risk decisions if cannot be protected from own staff.
Q35 & 36 What type of impact would a ban on non-compete clauses have on your business?

Please note that questions 35 and 36 in the consultation have been combined to produce this question.
How would the impact be positive? Please feel free to comment

Employees would feel more empowered in that they would have flexibility to leave (and join) without the restrictions of a non-compete. However enforcing a non-compete can be difficult without stopping the person from earning a living so not sure how much use they actually are - except in very high profile or business development roles.

I would have answered "unsure" if that had been option. I think it could have positive and negative impacts.

It would allow us to hire from rival firms, where the staff are unhappy but can't leave - generally our staff are satisfied with our firm and we have a relatively low turnover.

It would be easier to hire people from our competition and benefit from their networks of contacts more quickly. It works both ways.

Looking for engagement with employees rather than compliance with contractual terms.

Non-competes are generally messy and take up lots of management time to negotiate an exit. Without them, everyone moves on faster. It would be a case of reviewing client contracts to protect the business rather than restrictions in employee contracts. The client contract reviews would be seen as positive as new a term and possible review of remuneration could be agreed.
People would be more motivated.

We are a growing business, it would make it easier to attract staff from competitors.

We could attract new employees with significant knowledge.
How would the impact be negative? Please feel free to comment on the potential severity.

Being a UK company who invests considerably in intellectual property, changing the rules on restrictive covenants would have negative implications to either internal communications reducing sales effectiveness and/or where we would choose to recruit and base critical employees – i.e. we would consider moving outside of the UK jurisdiction. This is a standard practice that is not abused but does provide protection to companies wishing to protect their commercial and technical interests – any lessening of restrictive covenants undermines this basic employer right.

It would expose the business to a loss of large accounts whenever staff leave.

We have a unique business and keeping our intellectual property safe is very important to us, especially as we are a small business.

In a small market segment, the ability to move to competitors easily would be commercially damaging for our company.

We operate in a highly competitive sales & IT environment and if our competitors had ‘inside’ confidential information on our strategies and pricing models they would gain advantages when we’re bidding against them for new sales opportunities.

I think that this would be reasonably severe. There is a huge shortage of vets in the UK at present with a large number qualifying here and then back to the US/Canada/Asia as university fees are much cheaper here. Add to this the impact of Brexit for recruitment from the EU and we are in a tricky position already. In addition to the many positive ways we can encourage employees to stay, making it more difficult for the younger generation to hop ship to competitors would provide a better client experience all round.

Additional time, resources and significant increase in costs to defend the IP and competitive advantage of our business with reduced odds of success.

There are low barriers to entry in our business sector for a former employee to set up a competing business. The current regime, with restrictions needing to be tightly drafted, reasonable and time bound, strikes the appropriate balance between allowing businesses to protect themselves through handing accounts over to new employees which are protected for a fair period before the former employee can try and engage with those client accounts again.
The protection of our business and our employees would be threatened by an ex-employee knowing too much about our products, customers and prices.

Less able to rely on key employees who develop deep understanding of clients so would need more rotation of employees (around clients) and more "double resourcing" with overlapping employees. These would add cost and reduce service levels.

A ban on non-compete clauses is likely to impact our ability to maintain our position in the market. Additionally, we spend a lot of time / resources investing in our people and so a ban on non-competes is likely to affect our ability to protect this investment whilst allowing competitors to potentially benefit.

Non-compete clauses are essential in the highly competitive recruitment industry to protect the proprietary information of each business and ensure best practice and a fair and level playing field. Existing common law principles established through case law need to be protected. It might be helpful to clearly indicate what level of seniority a non-compete clause could be enforced against - in the recruitment industry this isn't a concern for more junior employees for example.

For more junior employees or those in roles without material customer connections or involved in the creation of IP the impact is unlikely to be significant. However, the impact of banning non-competes could be very serious from the perspective of allowing senior executives, relationship managers, and software developers working on new products to start new employment with a competitor immediately after leaving the business could be costly and disruptive.

Our competitors would be more likely to obtain access to confidential business information.

Fee earners would be free to go to competitors and damage our valuable business

When this happens it is infrequent, but the more senior employees or sales personnel, present an obvious concern in terms of their knowledge. Although they may not directly share knowledge, it is virtually impossible to prove if they have, or how, but they can certainly easily share important information on how we work conversationally.

Because anything that increases business risk needs to be met with a way to manage the risk - this will drive creativity and innovation in alternative models that actually may drive bigger problems. Better to accept that non-competes are a valid mechanism to manage business risk but focus on defining restrictions on durations and penalties to avoid the unfair terms that are being drafted.
Commercial impact as well as competitive impact on our product pipeline and business USPs.

The non-compete clause is a deterrent to employees wanting to leave and if this is removed we are less likely to retain key personnel.

It would mean we would need to invest in much longer notice periods and thus increase the cost of staff turnover exponentially, inhibiting growth. We operate in markets with no non-compete clauses such as some US states. As a result we have to structure the business differently with multiple points of contacts with clients and much less efficiently. We also make sure we employ as few as people as possible in those states and get the work done in states and countries where we are protected. No restrictions will lead to a splintering and proliferation of small companies in a sector with too many small businesses that don’t train their staff or bring in fresh talent but just poach from people who do and try and take their clients. If you want to reduce training and investment in people get rid of non competes.

We are a global business where people can work anywhere in the world so if the UK was less attractive we would reduce UK headcount and grow overseas.

We operate a recruitment business where our consultants dedicate their time to developing relationships with our clients. If there is no way to protect the ownership of those relationships, for any length of time, there would be nothing stopping our higher earners walking away with a significant chunk of our revenue stream.

Individuals would leave and work for competitors taking fresh and valuable knowledge with them.

It would mean that I could no longer have Associates as my business would be too vulnerable if they chose to leave and compete against me, having been introduced to all of my clients.

The cost of time and money to protect the legitimate interests of the company could be very high.

Would materially alter the risk profile for knowledge businesses in the UK compared to knowledge businesses located in jurisdictions where the courts take non-competes seriously, and can be relied upon.

I actually think it would be neutral but I wasn't given the option. We currently pay our staff. on gardening leave so it would not make a difference.

There would be nothing to stop ex-employees using insights and knowledge gained from a former employer against them. The highest bidder could simply buy the knowledge and skills developed by other organisations, leaving them without any protections.
Non-competes are a useful retention tool - they act as a barrier to exit; Non-competes protect our business from losing valuable client relationships and business insights - they give us time to shore up such relationships and IP before the employee lands at their new firm.

Sales staff could leave and take the whole business with them with no ramifications.

In veterinary practice, Vet Employees could open a business near your existing business and clients will follow them.

There is clearly a cost implication but we can't assess at this stage what the scope of that would be. In the short term the biggest negative impact will be that the discussion of the subject in the press will cause employees to believe that no restrictive covenants are enforceable.

It would put us at risk commercially of former employees using their knowledge and other assets and connections to our detriment. The detriment could be reputational, commercial, strategic.

It would mean that we could not provide job security to other workers and suppliers. We have recently experienced such losses and the non-competes we currently have were impossible to enforce.

Would not encourage new potential business investments. Lawyers would have to detail contracts very specifically/tightly to protect business. Would mean more red tape. Again something the government should not be encouraging.

We are one of the best platforms on which to operate and we would be at risk of people using us simply as a springboard to set up their own businesses. We want people to join us for the long term and be part of our team building an ever stronger business, not working for us for short term reasons.

It would severely threaten our business turnover because of customer loss and would hamper our commercial advantage in terms of training, practices and procedures. We would significantly restrict training and development as it would not be cost effective.

Short non-competes are extremely useful for the fast moving sectors of advertising and comms. Longer ones are very important for our health clients who work on longer-term projects.