Reform of Non Compete Clauses in Employment Contracts

Response from the Employment Lawyers Association

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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 7,400 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. 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, chaired by Jonathan Chamberlain, Gowling WLG (UK) LLP, was set up by the Legislative and Policy Committee of ELA to respond to the Reform Of Non Compete Clauses in Employment Contracts. Members of the Working Party are listed at the end of this paper.

3. References in this paper to the views of ELA are intended to be inclusive of the views of the minority as well as the majority of ELA members. Whilst not exhaustive of every possible viewpoint of every ELA member on the matters dealt with in this paper, the members of the Working Party have striven to reflect in a proportionate manner the diverse views of the ELA membership. Further, unless stated otherwise references to paragraph numbers in this document are to paragraph numbers in the consultation paper.

EXECUTIVE SUMMARY

4. The Working Paper seeks views on several proposals for the review of non-compete clauses in employment contracts, marking the third time in ten years that reform in this area has been considered. Neither of the previous reviews did in fact result in any legislative change.

5. The obvious questions now therefore are what has changed in policy since those consultations and what evidence, if any, has emerged to support such a change.

6. In compiling this response ELA has been mindful of two developments: the growth in importance and capability of artificial intelligence and the apparent growth in usage of non-compete clauses as set out in the Working Paper.

7. ELA's view is that the current evidence base, including that gleaned from the US and Austria, does not support either general reform in this area or the specific proposition that non-compete clauses reduce job mobility and limit innovation spillovers, potentially hindering channels that support productivity such as job matching, competition and

knowledge transfers. Research outside the US is "*scarce*", as noted by the OECD in their Five Facts Paper. [1] There are only up to date studies in the UK (CMA and Alves et al), both of which we refer to below. The US and international evidence is of limited relevance to the UK.

8. A comprehensive review of the relevant research is set out below and particularly in the response to Question 12. By way of summary here, in the absence of detailed and econometrically robust UK-specific studies measuring the effects of non-competes on wage growth, job mobility, innovation spillovers, productivity, job matching, competition, firm training, firm investment in R&D and knowledge transfers, ELA's view is that:

   (a) There is scarce causal evidence: The international examples are typically descriptive of institutional arrangements; they do not amount to strong causal evidence on wage growth, job mobility, innovation spillovers, productivity, job matching, competition, knowledge transfers, inward investment or training spend;
   (b) Institutional context matters: Labour-market institutions, enforcement norms and collective bargaining regimes differ across countries, which influence how non-compete clauses are used and how they impact on wage growth, job mobility, innovation spillovers, etc; and
   (c) There are attribution challenges: Large economic outcomes like innovation, wage growth, job mobility, training investment, etc. are influenced by many factors beyond the law regulating NCCs (tax, skills pipelines, regulatory environment), making clean and clear attribution difficult.

9. Nor does the advent of new technology itself necessitate or even suggest changing the careful balance between employers and employees worked out by the common law.

10. However, ELA would strongly support reform to prevent abuse of non-competes for low-paid employees in sectors such as fast-food, health and child-care. Such non-competes are unenforceable on current principles, but if they are growing in these scenarios as the government believes then vulnerable employees need protection, even aside from any economic implications for the labour market. ELA's view is the government should consider regulatory reform: see paragraph 6.8 below.

11. Moreover, ELA repeats the views it set out in 2020 as to how procedural reforms might improve fairness of outcome between employers and employees and improve flexibility in the labour market.

12. ELA accepts however, that policy decisions are not ultimately for it to make and we remain apolitical. If policy makers do choose to reform the law of non-compete clauses then we set out, in detail, the problems that such reform will create in our view and why, on legal grounds, we suggest that it may be ill considered.

<u>Introduction</u>

13. The Conservative government in 2018 (following a consultation in 2016 (the **2016 Consultation**)) specifically rejected any change to the law on restrictive covenants on the basis such change was unnecessary:

[1] Andrews, D. and A. Garnero (2025), "Five facts on non-compete and related clauses in OECD countries", OECD Economics Department Working Papers, No. 1833, OECD Publishing, Paris, https://doi.org/10.1787/727da13e-en.

14. "*the common 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*."

15. However, in December 2020, the Conservative government launched a further consultation on reform of non-competes in employment contracts: BEIS' Consultation on "Measures to Reform Post-Termination Non-Compete Clauses in Contracts of Employment", to which ELA responded in February 2021 (the **2020 Consultation**). Its rationale for revisiting the issue was that, following the economic impact of the COVID-19 pandemic, the government was reconsidering reform of non-competes to "unleash innovation, create the conditions for new jobs and increase competition".

16. In its 2023 response to the 2020 Consultation, the government announced plans to introduce a three-month limit on the duration of non-competes. In addition, the government promised to publish guidance on non-competes to raise awareness and improve transparency. However, no action was taken towards implementation of these proposals before the July 2024 general election.

17. ELA responded to both the 2016 and the 2020 Consultations. Each time, we have cautioned against hasty or drastic reform of the law in this area. As we explain in more detail below, the law forms part of the common law in general, and the doctrine of restraint of trade in particular. This law has developed and been refined by the courts over centuries. The courts' aim is to strike a balance between the competing public interests of the employer in protecting its business, the employee in working as they wish, and both parties in seeing their contractual bargain upheld.

18. The common law has to date, in our view, functioned well in striking this balance (as was recognised by the government in 2016). It allows the courts flexibility to respond to the individual facts and circumstances of particular cases. The law is not inherently anti-competitive: the courts actively seek to weigh the benefits of competition against other aspects of public policy. We have previously expressed the view that, while restricting the use of non-competes may have a positive effect on employee mobility, substantial legal change risks adversely affecting business stability and investor confidence, which could in turn negatively affect innovation and job creation.

19. Since 2023, economic conditions have not significantly improved. However, the labour market is in a state of flux. A revolution is underway in the use of AI, transforming how businesses operate and recruit. Further, with the passing of the Employment Rights Act 2025 (**ERA 2025**) in December 2025, UK employment law is about to undergo the biggest upgrade to workers' rights in a generation. The government has itself estimated that the cost to business of the new measures introduced by the ERA 2025 will be around £1 billion per year.

20. Against this backdrop, reform of the law relating to non-competes is again being considered as a possibility. The government's stated objectives for reform are boosting labour market dynamism, reducing barriers to recruitment, promoting competition and innovation and protecting workers from extended periods out of the market. We note that, aside from the new objective of protecting workers, these objectives are essentially the same as those pursued by the Conservative government in the 2020 Consultation.

21. Our position remains that reform in this area of law risks unintended adverse consequences which may undermine the government's objectives rather than helping to achieve them. It is for that reason that we caution against it. ELA is not aware of any UK commercial or industrial sector agitating for change. A restriction in employers' ability to make use of non-competes in employment contracts will inevitably alter the current balance in UK law between employer and employee in favour of the latter. It will not be cost-neutral to employers, who are already shouldering a significant burden preparing for the raft of new employment legislation over coming years. Ultimately, of course, this is a decision for policy makers but they should be aware of the consequences of such actions.

22. However, as in ELA's response to the 2020 Consultation, we acknowledge that certain aspects of the current legal framework are perhaps not working as effectively as they should. In particular, our members' experience suggests that unreasonable non-competes are sometimes imposed on employees, including junior or lower-paid employees, for deterrent effect. In addition, we believe that aspects of the enforcement process favour the employer and disincentivise challenge by employees of non-competes, even where they are likely to be unenforceable. These issues are rightly identified in the Working Paper and explored further below.

23. In our view, these problems are not caused by the law itself, as ultimately a court would not enforce any unreasonable non-compete. Rather, they are primarily caused by lack of employer transparency and employee awareness (since employees do not always understand the effect of a non-compete at the time it is entered into) and the enforcement procedure (which is technical and involves significant cost risk which individuals can rarely shoulder). Junior and lower-paid employees are disproportionately affected by both issues. Therefore, while we accept that there may be a case for some change, our suggestions for reform focus on ways to address these issues specifically.

24. Our response to the Working Paper is structured as follows:

- A brief overview of the current law.
- Consideration of the advantages and disadvantages of the current legal framework.
- Consideration of whether reform in this area is likely to achieve the government's stated objectives.
- Alternative suggestions for reform.
- Responses to the government's specific questions.

EXAMINATION OF THE CURRENT LEGAL POSITION

25. Clearly, the reforms proposed in the Working Paper will alter the doctrine of restraint of trade that has been in place for centuries and consequently will affect the balance between the two relevant, competing elements of public policy that the courts have achieved to date. Before the case for reform can be properly analysed, it is essential to understand how the current legal framework underpins this balance.

25.1 How does the existing law operate?

(a) A non-compete is a contractual clause which seeks to restrict an employee's ability to work for a business which competes with their former employer

(including a business the employee sets up themselves) for a certain period after termination of their employment.

(b) 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 and is not only relevant in an employment context. Many of the fundamental principles of the doctrine are applicable in all contexts.

(c) As noted above, the doctrine of restraint of trade aims to strike a balance between competing aspects of the public interest. On the one hand, there is the public policy in favour of upholding contracts. 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 the latter.

(d) 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.

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

(f) The categories of legitimate business interest capable of protection is not closed, but include trade secrets and confidential information, client relationships, workforce stability and goodwill. A non-compete which seeks purely to restrict competition, as opposed to protecting a specific legitimate business interest, will be unenforceable.

(g) In the employment context, the burden of proving that a non-compete is reasonable falls on the employer. It is therefore the employer's task to convince the court to shift from the position that the non-compete **should not** be enforced.

(h) 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 severe effect of a non-compete, which may prevent an employee from earning a living, means that it is the hardest type of restrictive covenant for an employer to enforce. The courts will not enforce a non-compete where a restrictive covenant of a different type would provide the employer with sufficient protection for its legitimate interests.

(i) The enforceability of a non-compete is judged as at the date it is entered into. If a restrictive covenant was unreasonable when it was agreed, it cannot be saved simply because a subsequent change of circumstances (such as the employee's promotion) mean that it is reasonable when it is enforced.

(j) 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 breach of their employment contract will not be bound by any non-compete contained in that contract.

25.2 How are non-competes currently used in the employment context?

(a) A non-compete is a contractual term. Therefore, in England and Wales, it must be supported by the usual elements of a contract: offer, acceptance and consideration. It will usually be difficult for an employer to demonstrate offer, acceptance and consideration unless the non-compete is documented expressly.

(b) In practice, employers often include restrictive covenants in employment contracts signed before or at the start of employment, when consideration will take the form of the employee's regular salary, benefits and any other remuneration. Where restrictive covenants are introduced later in the relationship (for example, where the employee is promoted), the employer should allocate specific consideration to them (*Re-Use Collections Ltd v Sendall and another* [2015] IRLR 226).

(c) Non-competes are therefore usually imposed on an employee at an early stage of their employment, but as they only kick in on termination of employment, they often do not become relevant or meaningful to the employee until termination of employment is either envisaged (for example, if the employee is considering resignation) or has already occurred. The gap between signing up to a non-compete (when the relationship with the employer is usually friendly) and termination (when the relationship may have deteriorated, and the employee is keen to sever ties and move on as quickly as possible) can be long. The fact of being bound by a non-compete, and discovering that the employer intends to hold them to it, can therefore come as an unwelcome surprise to an employee who did not appreciate the meaning and significance of the clause when the contract was signed.

(d) Non-competes are rarely used in isolation. They are often combined with other forms of restrictive covenants which seek to limit the employee's activities post-termination, such as clauses which restrict the employee's ability to solicit the employer's clients or staff, or clauses which prevent the employee dealing with the employer's customers on behalf of a new employer. These clauses are also subject to the doctrine of restraint of trade.

(e) In addition, non-competes are often used as well as garden leave, which allows the employer to withhold work from the employee during their notice period. The employee remains employed during the garden leave period, meaning they may be significantly more restricted 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.

(f) 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 if the total period of pre- and post-termination restraint is unreasonable.

(g) As non-competes are the most draconian form of restrictive covenant, and the hardest to enforce, the experience of ELA members is that employment lawyers will often advise their employer clients:

i. That they should only use non-competes for key staff or where absolutely necessary (for example, senior or strategic employees, sales staff, engineers or product developers, and other employees with access to sensitive or proprietary information).

ii. That employers should restrict the scope of a non-compete, and tailor it towards the individual employee, as much as possible. There are several ways in which this can be achieved, such as by limiting the duration of the non-compete, varying the duration by seniority or role of the employee, or by limiting the applicability of the clause to specific competitors.

(h) In practice, we acknowledge that some employers prefer to include blanket non-competes in employment contracts which apply across the workforce. Legally, there is a significant risk of this approach: if a blanket non-compete is challenged and found by the courts to be unenforceable, which (applying the legal principles set out above) is likely if the non-compete applies equally to the most junior employees as well as the most senior, this could effectively invalidate the non-competes of the entire workforce, leaving the employer with no protection in respect of its key staff.

(i) However, for reasons that we examine in greater detail below, such a challenge (particularly from a junior employee, who is most likely to be able to demonstrate that a non-compete is unreasonable) may be unlikely. Therefore, despite the legal risk, some employers can be attracted to the simplicity and the deterrent effect of a blanket approach, on the (often correct) assumption that employees are more likely to comply with a non-compete than risk costly legal proceedings defending their breach of it.

(j) Alternatively, if challenged and advised that an employee's non-compete is likely to be unenforceable, an employer can opt to waive the restriction at that point, thus avoiding the wider implications of litigation.

(k) Non-competes and other restrictive covenants are not only found in employment contracts. Employers sometimes include restrictive covenants in documentation relating to incentive schemes (such as share plans or LLP agreements) as well, or instead. There can be advantages for an employer of doing so, as the courts draw a distinction between covenants entered into by employees and covenants entered into in a more commercial context. A stricter approach is taken to the enforcement of covenants in employment contracts, meaning that those contained in other types of agreement can potentially be enforceable for a much longer period.

(l) We also see non-competes and other restrictive covenants used in long-term incentive schemes such as share plans and stock option plans for high earners. While some such schemes contain blanket non-competes as mentioned in the preceding paragraph, others seek to prevent competition by more indirect means and can include a mechanism which allows employees to forfeit the benefit of long-term incentive arrangements if they choose to resign and work for a

competitor (often with associated good/bad leaver provisions). In the UK, these restrictions are subject to the restraint of trade doctrine. See further at 0 below where we consider the "Employee Choice Doctrine" used in New York.

25.3 How are non-competes enforced?

(a) The Working Paper expresses concern over there being few constraints on employers including unreasonable restrictive covenants in employment contracts. In fact, there is a genuine legal disincentive for this behaviour, in that an unreasonable restriction will ultimately be unenforceable. Nevertheless, we accept that the consequences of including unenforceable restrictions in employment contracts are currently only suffered by employers at the end of an enforcement process which few employees are willing or able to undertake. It is therefore right to examine whether changes could be made to this process.

(b) Usually, it will be the employer who takes proactive steps to enforce a restrictive covenant, either because they have become aware that the employee intends to breach it or may already have done so. This generally involves several stages of escalation.

(c) First, the employer will write to the employee to remind them of the obligations in their employment contract and to request confirmation that the employee intends to comply, or has complied, with them. Depending on the employee's response, further correspondence may be entered into in relation to the employee's obligations which will usually culminate in the employer requesting formal undertakings from the employee regarding their compliance.

(d) If the employee refuses to comply with the employer's request for confirmation that they will comply with the relevant restrictive covenants, the employer can proceed to issuing proceedings in the High Court to enforce the terms of the contract. The employee must then decide whether to defend these proceedings or whether to agree a settlement with the employer.

(e) The first step in the legal process is usually an application by the employer for an interim injunction to restrain the employee from breaching covenants until trial. An injunction is a discretionary remedy, and the courts will determine whether to grant it 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 test (known as the "*American Cyanamid*" test) for the grant of interim injunctive relief. This involves determining whether:

(i) the employer has demonstrated a serious issue that needs to be tried (that is, that the covenant is enforceable and that they would be granted a final injunction at trial); and

(ii) the "balance of convenience" favours the grant of interim relief.

Both (i) and 0 must be satisfied for the court grant an interim injunction.

(f) However, the *American Cyanamid* test generally favours the employer. A "serious issue that needs to be tried" is a low hurdle: the employer does not have to show they would be likely to win. Further, in ELA's experience, there is an

understandable tendency for the 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. (The maintenance of the status quo is indeed a factor referred to in *American Cyanamid*, albeit one that is 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.)

(g) A full trial will be scheduled to take place after the court has determined whether to grant an interim injunction. At trial, the court finally determines the enforceability of the covenant and, if enforceable, the appropriate remedy for breach.

(h) It is also possible for an employee or an employer to issue proceedings for a declaration as to whether the covenant is enforceable. However, in practice, it is extremely rare for an employee to start legal proceedings relating to restrictive covenants for the following reasons.

(i) Proceedings relating to disputes about the enforceability of a restrictive covenant must be brought in the High Court. As is rightly highlighted in the Working Paper, the High Court is a highly 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 tens of thousands of pounds.

(j) 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 before the court.

(k) 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 against 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.

26. WHAT ARE THE ADVANTAGES AND DISADVANTAGES OF THE CURRENT LEGAL FRAMEWORK?

Before making significant changes to the law relating to non-competes, which would represent a major departure from the system that has prevailed for centuries, it is necessary to examine the benefits and drawbacks of the current system.

26.1 Disadvantages

(a) The Working Paper argues that there are several potential disadvantages of the existing framework surrounding non-competes, namely:

(i) unenforceable non-competes can be used for deterrent effect particularly because of the potential cost ramifications for junior employees;

(ii) employees may not be aware of, or understand, the effect of non-competes when they agree to them;

(iii) the enforcement process may deter employees from challenging non-competes which are not enforceable;

(iv) non-competes are widely used in the UK and affect low, as well as high, earners;

(v) non-competes limit worker mobility and may put downward pressure on wages and

(vi) non-competes can act as a brake on entrepreneurial activity, making it harder for smaller businesses to scale up.

(b) We deal first with points (i) to 0. As reflected in this response, we acknowledge that some employers impose non-competes across the workforce, from the most junior to the most senior employees. This is not in accordance with the spirit of the applicable law, and such a non-compete is unlikely to be enforceable. However, in practice there is currently little to prevent it, since key aspects of the enforcement process generally favour the employer. Therefore, employees are reluctant to defend action brought by employers to enforce non-competes, and even more reluctant to seek their own declaration that a non-compete is unenforceable, even where the employee has a good chance of succeeding.

(c) However, we reiterate that the problem here is not the law itself, which provides that non-competes would not be enforceable in this scenario. Rather, the issues are caused by lack of employee awareness of the law and defects in how the law is enforced. ELA's view, as expressed in 2020 and restated in this response, is that it is possible to address these issues and protect more vulnerable, junior or lower-paid workers with targeted action which does not fundamentally alter the delicately balanced legal landscape around non-competes.

(d) In relation to points 0 and 0, it is undoubtedly true that non-competes can operate to limit the mobility of the workers who are subject to them. The studies cited by the Working Paper from other jurisdictions provide some support to the suggestion that the removal of non-competes could result in wage increases and increased innovation. However, it is not at all clear whether these conclusions are transferable to the UK. Restricting the use of non-competes may perhaps result in increased job mobility, higher wages and increased innovation, but this

outcome is far from a certainty. On the other hand, however, increased job mobility risks adversely affecting business stability and investor confidence, which could in turn negatively affect innovation and job creation. Substantive reform remains a leap into the unknown. We explore this in further detail below.

26.2 Advantages

(a) The Working Paper identifies two advantages of the present framework around non-competes:

(i) they can provide employers with confidence to invest in training and upskilling their workforce; and

(ii) they can incentivise employers to share access to valuable information and invest in innovation activities.

(b) It appears that the Working Paper views these advantages through the perspective of determining how the current legal framework benefits workers. We suggest that, as a result, the Working Paper does not attribute sufficient weight to the value of these advantages, which are linked to the labour market and economy as a whole.

(c) To understand our thinking, it is first necessary to understand how non-competes give rise to these advantages. This requires brief consideration of the interaction between the law of confidence and the doctrine of restraint of trade.

(d) The law recognises 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 this duty, let alone be able to prove it. Second, it is notoriously difficult to draw the line between what is and what is not confidential information. Such disputes have generated complex case law. Therefore, while the law of confidence exists to prohibit an employee from misusing their employer's confidential information, in practice it is not sufficient to prevent this happening, or to provide an effective remedy if it does happen.

(e) Non-competes alleviate this difficulty. They are only enforceable if they protect an employer's legitimate business interest. However, protection of confidential information may amount to a legitimate business interest. A reasonable non-compete therefore avoids the disadvantage and uncertainty to employers of relying on the law of confidence because it removes the need for the employer to prove each item of confidential information. All that is necessary is for an employer to 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.

(f) 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)*."*

(g) Reasonable non-competition covenants are therefore 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 polices etc. which they may be able to recall from memory even though they are not contained in documents.

(h) There is no doubt that non-competes prevent employees from doing exactly as they please on termination of employment, which includes working for or setting up a competing business. It is only natural that employees would prefer to be free from such restraints. However, as set out above, the doctrine of restraint of trade seeks to balance two aspects of public policy. Against the employee's right to freedom it is necessary to balance the position of the employer, who has a contractual relationship with the employee and who has invested in them, shared valuable confidential information and trade secrets with them, and who has a business – and other employees – still to protect.

(i) A point made in both our responses to the 2016 and 2020 Consultations therefore remains valid now: an entrepreneurial employee of today is an employer of tomorrow. An individual who believes it is unfair for their employer to impose a non-compete which prevents them starting a new business is likely to have a different perspective when they have started that business, bearing all the risk and cost that entails, and understand the damage that a departing employee could do if they set up in competition immediately.

(j) The Working Paper also refers to the fact that small businesses (such as start-ups) may find themselves at a disadvantage in the labour market because their access to talent is restricted by larger companies' use of non-competes. In fact, the law prevents larger companies using non-compete clauses to stifle competition in this way. Where the only aim of a non-compete is to prevent competition, it will be void. Even where there is a legitimate interest to protect, in a David and Goliath situation of this type, it may in practice be difficult for the larger employer to demonstrate that their employee would be a genuine threat if they moved to a start-up, and therefore the larger employer may struggle to enforce a non-compete.

(k) The reality is that non-competes are a valuable way for all businesses (including innovative, young businesses) to protect themselves, especially in circumstances where bigger rivals with deeper pockets seek to poach trail-blazing employees. Indeed, the more niche, novel or specialised the nature of an employer's

business, the more likely it is that a non-compete will be justified (see *Boydell v NZP Ltd [2023] EWCA Civ 373*).

(l) Reasonable non-competes therefore give employers confidence that:

(i) Their confidential information and trade secrets are safeguarded for at least the duration of the non-compete.

(ii) Their business interests are protected, allowing time to cement relationships with clients and other employees in the event of a key departure.

(iii) They can continue to invest in staff and share valuable information with them, safe in the knowledge that a competitor will not be able to swoop in to poach staff and obtain the advantage of this investment without having paid for it.

Without the comfort of knowing that their trade secrets and confidential information are sufficiently protected, there is a very real danger that employers and entrepreneurs will take a more cautious approach to developing and commercialising new ideas, stifling the very innovation that the government seeks to promote.

27. WILL THE GOVERNMENT'S PROPOSED REFORMS ACHIEVE THE STATED OBJECTIVES?

The Working Paper states four specific objectives for reform. 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 stated objectives for the proposals with a view to considering whether the proposed reforms are likely to meet those objectives.

27.1 Objective 1: boosting labour market dynamism

(a) The Working Paper states that this objective encompasses "making it easier for employees to change jobs or build their own start-up business, with the potential to earn a pay rise, putting more money in people's pockets and supporting the cost of living".

(b) We first clarify one point: non-competes do not prevent workers from moving employer or from setting up a new business. The effect of a reasonable non-compete is to temporarily (not permanently) restrict an employee from **competing with** their former employer. Even where a non-compete exists, it is therefore possible for workers to move to any employer which does not compete with their former employer, and even in some cases to work for a competing employer provided that they do not work in a competitive role. It is also possible for employees to take preparatory steps to compete with their former employer while a non-compete is in force.

(c) Yet, as we acknowledge earlier in this response, a non-compete is a restriction on an employee's freedom on termination of employment. Therefore, restricting the use of non-competes in employment contracts will mean that workers are more freely able to move to a competing employer or set up a business which competes with their former employer. However, we suggest that it is not certain

in practice that the outcome will be increased job mobility or higher wages, and even if increased job mobility does materialise, this could have negative as well as positive consequences.

(d) We deal first with the likelihood of increased job mobility. If employers are restricted in their ability to use non-competes in employment contracts, they are likely to find other ways of protecting their business interests. There are many options for doing so, which could include (but are not necessarily limited to) extending notice periods; making increased use of garden leave; strengthening other types of restrictive covenants (such as non-solicitation, non-dealing and non-poaching restrictions) or tying employees to non-competes in incentive or transactional agreements falling outside the scope of the statutory restriction. These measures may leave workers even more restricted, and consequently even less mobile, than they are under the current system.

(e) To avoid this outcome, the Working Paper envisages the government needing to take action to prevent employers working around any measure to restrict the use of non-competes in the ways identified above. However, it is unrealistic to think that the government can legislate for all possible workarounds. Addressing each of them would be extremely difficult and time consuming, requiring complex legislation which would impose severe restrictions on employers and extend far beyond the government's primary aim of reforming non-compete clauses.

(f) Next, we turn to the possibility that increased job mobility could improve wages. The Working Paper suggests that restricting non-competes could benefit employees if employers respond by improving employees' terms and conditions across the board so that there is less incentive to leave. However, in tough economic conditions such as those the UK is currently experiencing, employers may not (or may not be able to) respond in this way.

(g) Employers are already dealing with a vast increase in the level of employment regulation due to the ERA 2025 and the government's own impact assessment indicates that this will involve significant extra cost. Any restriction on the use of non-competes will have an additional financial impact, in that employers will at least have to audit their current contracts and replace any which are non-compliant. If businesses are further destabilised by an increase in job instability among key workers or teams, a positive effect on remuneration may be even less likely to materialise.

(h) In any event, under the current system, employers do not generally rely solely on non-competes to ensure that key employees are loyal. Non-competes are important to employers because they help ensure protection for proprietary information and buy time to stabilise their business and custom in the event of a key departure. However, enforcing a non-compete is always last resort, given the uncertainties and cost involved in litigation. Employees who are valuable to an employer are therefore usually already well-incentivised to remain with salary, bonuses and benefits so that enforcement of non-competes is not essential.

(i) Finally, we observe that while increased job mobility may have the positive effects that the government is aiming for, it could also result in labour market instability. For employers, it will be harder to retain key talent, leading to a lack of stability within key teams. This could dent business confidence and impact upon service

delivery. This effect might be most acute for smaller, recently established start-ups, with better established rivals having a more stable foundation. Notably, under the current legal framework, workforce stability is a legitimate interest which would justify a reasonable non-compete, with the courts recognising that instability could cause considerable damage to businesses.

27.2 Objective 2: reducing barriers to recruitment

(a) This objective aims to ensure that "high productivity, innovative businesses, particularly scale-ups at critical stages of growth, can access the talent they need".

(b) For the DWP Employer Survey 2024,[2] employers were surveyed on what they considered to be the biggest barriers to recruitment. The results of the survey demonstrated a reduced hiring demand among employers compared to the same survey in 2022. This is borne out by ONS data[3] showing that the number of job vacancies decreased by 9.6% during 2025, so that they are now 66,000 below pre-pandemic levels. Several recent studies have examined the reasons for this. For example:

(i) A report[4] by KPMG and REC suggests that uncertainty around the economic outlook and rising labour costs have contributed to a slowdown in recruitment activity.

(ii) The DWP Employer Survey shows that, of employers who had tried to recruit, the biggest barriers to recruitment were the low number of applicants with the required skills or attitude and the fact that there was not enough interest in the type of job available. Other key issues were a lack of relevant work experience and the low number of applicants for vacancies generally. However, the report by KPMG and REC notes that candidate availability has risen, suggesting that there is not a shortage of supply. A key issue therefore appears to be the gap between the skills employers want and the skills that candidates can offer.

(iii) A study[5] by Kings College London notes that firms with high exposure to AI reduced total employment by 4.5% and were also posting fewer vacancies, with junior level roles particularly affected.

(c) Notably, none of these studies cite non-competes (or any other contractual restriction) as a barrier to recruitment. Further, restricting the use of non-competes is unlikely, in and of itself, to address the issues that **are** cited as barriers to recruitment. We therefore believe that there is insufficient data to support either the suggestion that non-competes are a significant barrier to recruitment, or the suggestion that restricting their use will have a significant impact on the ability of businesses to access the talent they need.

[2] See DWP Employer Survey 2024: Labour Market
[3] See Vacancies and jobs in the UK - Office for National Statistics
[4] See KPMG and REC, UK Report on Jobs January 2026
[5] See Generative AI and Labor Market Outcomes: Evidence from the United Kingdom by Bouke Klein Teeselink :: SSRN

(d) It is of course possible that a restriction on non-competes will permit employees with the desired skills, but who are already employed, to move more easily between specialised roles at different employers. However, this does not necessarily improve access to talent for employers, as it will still mean they are competing for the same people. It would likely make more difference to employers' ability to access talent if there were a bigger pool of talent.

(e) Our members' experience is that sought after employees usually remain sought after regardless of restrictive covenants. By definition, non-competes only bite between competitors. Most competitors in a given industry will impose similar restrictive covenants on their key staff. If an employer wants a particular employee, they are therefore likely to understand that covenants will apply (and usually what the covenants will look like) and are generally willing wait them out or alternatively, fund a challenge.

(f) A further striking statistic from the DWP Employer Survey is that SMEs were more likely than large employers to say they had **not** had any instances where they had been unable to find suitable candidates when they had tried to recruit. Therefore, access to talent appears to be less of a problem for the types of businesses that the government's policy is most aimed at supporting.

(g) It is also important to bear in mind that employees are less likely to move jobs when economic conditions are difficult. The Working Paper measures employee mobility since 2008. This covers a period of 18 years of extraordinary flux, which have included the financial crisis, austerity, Brexit, COVID, the war in Ukraine, the cost-of-living crisis and now the threat of AI. Over this period, it is unclear how much employees' lack of willingness to move from a stable job with one employer to a new job with a competitor (where they will be subject to a probationary period when their employment can be terminated at short notice) is truly due to the potential for the employer to enforce a non-compete, and therefore how much potential there is for a restriction in the use of non-competes to make a significant difference.

27.3 Objective 3: promoting competition and innovation

(a) In our response to the 2020 Consultation, ELA expressed the view that there was insufficient evidence to demonstrate that non-competes pose a significant barrier to innovation or that restricting their use will boost innovation. We remain of this view.

(b) Recent research on barriers to innovation in the UK suggests that the use of non-competes in employment contracts is not one of the most significant issues. In particular:

(i) A BEIS report[6] on innovation in the UK suggests that various barriers exist, including greater focus on research and development than on implementation and adoption of innovation; the lack of a suitably skilled workforce; and a lack of funding (particularly for start-up businesses looking to scale up).

[6] See Making Innovation Matter: how the UK can benefit from spreading and using innovative ideas

(ii) A report[7] by the University of Cambridge similarly highlights several issues including a skills and qualification mismatch among workers, lack of funding for scale-ups, insufficient vocational education and challenges within the manufacturing industry.

(iii) An article[8] in the Industrial Law Society considering the labour market aspects of innovation concludes that it can be difficult and potentially unattractive for individuals to work in the start-up industry for various reasons, including because business founders can lack experience, the work can be demanding and uncertain, and equity investment prioritises rapid growth over diversity and ethics.

(c) The existence of non-compete clauses is not referred to in any of these reports. Rather, the reports consider a multifaceted set of structural barriers to innovation that need to be addressed. Without clear evidence that non-competes operate as a significant barrier to competition or innovation, it is difficult to see how the effect of restricting non-competes could be measured as having a positive impact on innovation.

(d) There is, however, a risk that restricting the use of non-competes could reduce innovation. As explored above, implementing any government reforms will result in significant cost to employers who will need to ensure that their contracts and policies are compliant. Unless other ways to protect their business interests can be found, employers will lose comfort that their trade secrets and proprietary information is sufficiently protected under UK law. Their businesses will be under greater competitive threat, and their workforces will be less stable.

(e) The Working Paper recognises that, in response to such a change, employers may reduce or cease investment in the training and upskilling of staff, in the knowledge that a competitor is able to benefit from this investment immediately after it is made. Employees may lose access to career opportunities because their employers can no longer trust them with confidential information. The result may be a less skilled workforce and an even greater deficit between the skills that individuals can offer and the skills that employers need.

(f) Further, as the studies above highlight, funding is a critical aspect of innovation. Both established businesses and start-ups value their ability to protect their research and development, trade secrets, customer connections and skilled workforces from being undermined following significant investment. Non-competes provide greater protection than the law of confidence in this respect. Private equity and venture capital investors therefore value non-competes when making investment decisions because they provide a limited period during which a business can stabilise itself following a key departure. If these valuable protections are lost, UK businesses may be a less attractive option for investment, and reduced funding may result in reduced innovation.

(g) An additional, but critical, factor to bear in mind is that a significant difference in the UK labour market between our response to the 2020 Consultation and now is the explosion of AI. This merits consideration in the context of this objective because previously, employers' only option was for work to be done by the

[7] See PowerPoint Presentation
[8] See Pursuing the Innovation Economy: Implications for Startup Labour | Industrial Law Journal | Oxford Academic

workforce. Therefore, if the workforce lacked the necessary skills it had to be upskilled. Now, however, employers have another option: invest in AI which can do the jobs that the workforce cannot. AI may become an increasingly attractive option in circumstances where employees cannot effectively be prevented from using an employer's proprietary information for the benefit of a competitor. Consequently, employment opportunities may decrease further as employers reduce their reliance on humans they cannot control.

27.4 Objective 4: protecting workers

(a) The Working Paper explains that this objective aims to ensure that workers "do not have to face extended periods of time out of the labour market in their area of expertise, often as long as six to 12 months, unable to afford the burden of challenging a non-compete clause in the courts – or so that they can afford to move job in the first place".

(b) As set out above, non-competes do not automatically result in time out of the market for employees to whom they apply. Non-competes will only have the effect of preventing employees from working if they intend to work in a new role which is in direct competition with their former employer. Even then, it may be possible for them to work for their chosen employer in some capacity, such as in a non-competitive role in a different part of the business, while the non-compete winds down.

(c) Further, non-competes are not the only way in which employers are able to keep employees out of the market for extended periods. In some industries reliant on client or customer connections, covenants which prevent employees from soliciting and dealing with their former employer's customers (which can often be justified for longer periods than a non-compete) may have the same effect as a non-compete. In addition, if the employment contract allows, employees can be placed on garden leave during their notice period keeping them out of the market entirely. If non-competes are restricted, it is highly likely that employers will strengthen and extend these alternative restrictions. This will undermine the objective of protecting workers from being kept out of the market, and amount to as much, if not more, of a barrier to the government's other objectives of mobility, recruitment and innovation as non-competes do now.

(d) We do not deny that there is mischief in the current system whereby employees bound by unreasonable non-competes may be led to believe that these restrictions are enforceable. Even where employees suspect non-competes are not enforceable, the risk of breaching the restriction and being forced to defend themselves against costly injunctive proceedings is too great for many. However, this response identifies several ways in which these issues could be addressed.

28. SOME ALTERNATIVE SUGGESTIONS FOR REFORM

ELA made a number of suggestions for reform in response to the 2020 Consultation. They were not taken up. ELA's view is that these reforms would also help to meet the government's current policy objectives and it states them again here.

They 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 promote the use of 'garden leave'; and outlaw post termination restraints for those on zero hours contracts.
In addition, we comment on ideas which would have a greater impact on the substantive position as the law currently stands.

Finally, we set out some alternatives to a salary cap for non-competes in our replies to Question 0, which addresses it directly, below at 0.

28.1 Procedural changes - background

(a) There is a case for bespoke litigation rules in this field. 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 promote competition and increase labour-market flexibility. 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.

(b) 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.

(c) 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.[9] 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.

(d) In consequence, many cases settle if the court grants relief. Relatively few cases proceed to the full trial envisaged by this procedure.

(e) 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:

(i) 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

[9] 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.

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.

(ii) 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.

(f) 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.

(g) 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.

28.2 Procedural changes – suggestions for reform

(a) 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, 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.

(b) 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.

(c) Dealing with each in turn:

(i) Providing security for the employee

(A) ELA considered the possibility of 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, unless they have secured alternative employment or income.

(B) 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.

(C) In practice, there can be difficulties in enforcing this. Either the court could order payment to the employee pending trial or that the employer pay into court or escrow the damages that might be suffered by the employee should the interim injunction turn out to have been wrongly granted.

(D) Either would carry benefits and risks. They upend 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.

(E) Further, actually paying the employee is in effect to introduce payment for non-competes and fundamentally re-write the law in this area. ELA does not favour such a radical change, preferring (if anything) the payment into escrow approach.

(d) In any event if the government were minded to legislate for payment of employees subject to an injunction enforcing a non-compete covenant, it should:

(i) 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.

(ii) 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.

(iii) 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.

(iv) Consider carefully the interplay between this payment and other sums payable on termination, for example notice pay and any award for unfair dismissal. There is a risk of double payment here if the payments relate to an overlapping time period.

(e) Setting the employer a higher hurdle

(i) 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.

(ii) 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.

(iii) 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.

(f) Costs

(i) 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.

(ii) 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.

(iii) 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.

(iv) 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.

(v) 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.

(g) Changes to contracts of employment: Garden Leave

(i) One approach that might merit further consideration would be to legislate for a general automatic set off of garden leave against any post-termination non-compete. 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.

(ii) 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 non-compete imposed on the employee even if that non-compete 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.

28.3 Additional options for change

(a) Payment for non-compete period

(i) As was explored more fully as part of the 2020 Consultation, the government could insist that employers choose between paying the departing individual for the period of the non-compete, or not enforcing the non-compete against the individual. This would mean that there was less of a disincentive for an individual in deciding to move on, but that the employer could still choose to enforce the non-compete if it was truly concerned about protecting its confidential information. It may also push the employer to think about the restrictions it actually needs in place, and whether something lesser than a non-compete may actually suffice.

(ii) However such an arrangement would not be without difficulty: (i) there would need to be clear guidance as to whether payment would automatically "cure" a defective non-compete or whether the non-compete would still need to be reasonable and enforceable; (ii) the cost burden on particularly smaller business and start-ups could be crippling and a regular disincentive to enforcing the restriction and thus protecting its confidential information; (iii) there are difficulties in calculating appropriate "pay" for the non-compete period; and (iv) issues for employers arising from inconsistencies in enforcing some but not all non-competes across the workforce. This type of approach may also cause challenges for a new employer which will not know with certainty when an employee may begin new employment with them. The incumbent employer may only decide at the last minute whether to enforce, making planning by the employee and new employer very difficult and disincentivising active recruitment.

(b) Statutory sign off at employment commencement

(i) The 2023 YouGov survey referenced in the previous government's consultation on non-competes[10] (indicated that over a quarter of employees were unaware of the non-compete clause in their contract before signing. One option to assist in supporting those above the threshold to ensure they are fully aware of full contractual terms could be to oblige 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. This would be a mandatory first step requirement similar to that to which settlement agreements are currently subject.

(ii) The benefits of this approach are that:

(A) employees enter into the non-compete informed as to the impact on their post-termination activities; and
(B) they are therefore afforded an opportunity to discuss the covenant with the employer in advance of entering into the contract,

[10] https://assets.publishing.service.gov.uk/media/645e2770ad8a03001138b3b7/non-compete-clauses-impact-assessment-.pdf

thus seeking to address the imbalance between the parties' negotiating positions. However, again this is not without significant cost to the employer and particularly felt by entrepreneurial start-ups and such a mandatory step would likely delay and create obstacles to efficient hiring. It is unlikely that the employment lawyer instructed would be able to advise with any degree of certainty as to the likelihood of enforceability, which exercise usually requires a more in-depth analysis. So the exercise would likely be limited to simply highlighting that the non-compete exists which may diminish the value of the exercise.

(iii) If however such a highlight is thought worthwhile, it could be expanded to include a reasonable explanation from the employer as to:

(A) what legitimate interest was being protected; and

(B) why the duration is justified.

Whilst that does impose an additional burden on employers, if the aim of policy is to reduce non-competes to where they are truly necessary or highly desirable then that burden may support that aim.

(c) "Employee choice doctrine"

(i) Another option to support higher earners may be to consider giving the option to departing employees as to whether to comply with a non-compete, or risk forfeiting potentially valuable benefits. As noted in the 2020 Consultation the *Employee Choice Doctrine* in New York allows employees to forfeit post-employment compensation if they choose to resign and work for a competitor, thereby waiving their rights to certain benefits.

(ii) 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.

(iii) 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 and allows employees earning over the salary threshold the choice as to how to proceed, again mitigating the risk of a non-compete being a disincentive to movement.

(iv) However, such an arrangement is only likely to be relevant where more complex incentives are offered, and noting the government is not suggesting banning non-competes outside of employment contracts, may be less relevant. Further such an option is likely to disproportionately adversely affect some employers which again cannot proceed with certainty

as to protection of confidential information through a non-compete, compliance with which is at the whim of the employee. Further, for higher earning and sought after individuals, it is likely that any new employer would offer to "buy out" any benefits forfeited by the departing employees for choosing not to comply with the non-compete, again causing the current employer to lose out. In any event, there would still be issues around how long such arrangements might be permitted to be effective: query if an employer should be able to buy out of the public policy principles in favour of competition and a free labour market.

(v) Another disadvantage of this arrangement would be that there is little deterrent to the departing employee if the company's share price is falling/options are under water, and this may be just the time where the employer needs to shore up the workforce and stop people walking out of the door to competitors.

(d) Curbing innovation and market competition

(i) Whilst the above are some options which could provide further protections to higher earners, it is likely that policies that rely on paid non-competes, pre-commencement legal advice, post-employment benefits, or an employee-choice framework are far more accessible to larger businesses, which can more afford to pay employees during lengthy restraint periods or to offer substantial deferred compensation. Smaller businesses, by contrast, are less likely to be able to meet these costs.

(ii) Industry leaders will thus be able to recruit talent from SMEs and start-ups (who will also be less equipped to pay all employees above a salary threshold), so those smaller businesses lose expertise and confidential information which could result in a disincentive to start up in the first place. For start-ups and SMEs that currently rely on non-compete protection when developing sensitive and innovative strategies, particularly in highly competitive markets, banning non-competes for lower earners, coupled with the advantage of larger businesses to better deal with the consequences, the unintended result could be slower innovation and less competition.

29. CONCLUSION

29.1 As we have explored above, the current legal framework is not free from disadvantage. However, as is recognised in the Working Paper, all the government's proposals for reform come with advantages and disadvantages, too. It is therefore important to consider whether any of the proposals set out in the Working Paper will result in a system that is better than the one that is currently in place.

29.2 While the current system includes a level of uncertainty over whether a particular covenant is enforceable, in that each non-compete is dealt with on a case by case basis, there is at least total clarity over the legal principle that the court will apply: namely, that a non-compete is unenforceable unless it goes no further than necessary to protect an employer's legitimate business interest. Any of the reforms proposed by the government risk adding complexity to this simple legal principle. Further, any form of statutory intervention will introduce rigidity into a system which can currently flex to accommodate specific facts and circumstances. If reform results in a better system,

then these trade-offs may not matter. However, they are factors to consider before change is implemented.

29.3 Over centuries, the law has reached a level of balance between the interests of employer and employee that any reform will alter. The courts have recognised that there is a danger in prioritising employee freedom over the rights of employers to protect their business and indeed vice versa. While we acknowledge that adjusting the current balance in some respects may be desirable, any policy shift must be considered in context. The measures introduced by the ERA 2025 already mark a significant upgrade in employee rights which employers must absorb. Any reform of employers' ability to use non-competes to protect their business interests moves the dial even further towards the interests of employees. The question must therefore be asked whether drastic reform in this area could risk tipping the scales too far.

QUESTIONS 0 AND 0

Views on:

30. INTRODUCING RESTRICTIONS ON NON-COMPETE CLAUSE; AND,

A STATUTORY LIMIT ON THE LENGTH OF NON-COMPETE CLAUSES

30.1 The introduction to ELA's working party's response makes clear that the law has to date functioned well in striking a balance the competing public interests of the employer in protecting its business, the employee in working as they wish, and both parties in seeing their contractual bargain upheld. The current law is flexible and responsive to public policy at any given point.

30.2 Against that backdrop, any significant reform in this area could undermine the government's objectives. Furthermore, in reality, judicial decisions already point to the probable limits of non-compete provisions in different sectors, taking into account the employee's role within the business. The courts currently consider cases on their own facts and take into account the legitimate business interest that is being protected, the nature of confidential information retained by the employee and the likely shelf-life of confidential information. For example, there will be situations where, having considered all of the circumstances, the court will conclude that a 12 month non-compete is necessary to protect business interests and others where only a much shorter period would be appropriate and enforceable. The introduction of a statutory cap on the length of non-competes would operate as a blunt instrument blind to the specific nature of the business interest and employee's role and responsibilities. Furthermore, were a cap to be imposed, the court would still have to undertake the same assessment it currently performs in circumstances where a dispute arises.

30.3 As is highlighted above, non-competes and other restrictive covenants are not only found in employment contracts. If a cap were to be introduced, businesses may well use other structures which are not subject to the cap to achieve the same outcome. This might include a combination of longer notice periods and garden leave provisions in employment contracts or non-compete clauses in shareholder agreements. These restrictions would continue to be subject to the current legal principles.

30.4 Furthermore, depending how any time limit might be introduced, a statutory cap may amount to a change to a fundamental term of the contract after the parties have entered into the contract. This could lead to significant business disruption.

QUESTIONS 0 AND 0

Views on:

31. A STATUTORY LIMIT THAT DIFFERED ACCORDING TO COMPANY SIZE

THE LENGTH AND COMPANY SIZE THRESHOLDS SHOULD BE SET AT, FOR EXAMPLE:

(a) A statutory limit of 3 months for companies with more than 250 employees and a limit of 6 months for companies with 250 or fewer employees
(b) A statutory limit of 3 months for companies with more than 50 employees and a limit of 6 months for companies with 50 or fewer employees

(c) Other – please explain

31.2 Introduction

(A) As is clear from the Introduction to this paper, the working party's view is that simplicity in any reform to the law of non-compete clauses in employment contracts is preferable. Although clear parameters on the length of a non-compete that a company could legally rely on according to its size would provide clarity in this area and address the current ambiguity employers face when considering whether the non-compete they are seeking to rely on is fully enforceable, it fundamentally overlooks that the need to protect legitimate business interests is not solely linked to the size of the company. The working party has addressed this point throughout its responses to Questions 0 and 0.

(B) A statutory limit that differs according to company size will present challenges. The working party is of the opinion that there is a fundamental misalignment between the existing common law jurisprudence on restraint of trade and non-competes and the various small company tests proposed by the government. The common law in this area is case specific and adaptive, whereas a small company test could act a blunt instrument, cutting through that jurisprudence which has been built up over hundreds of years. A specific example of how this misalignment could present practical challenges is set out at paragraph 0 below.

(C) Even with the introduction of statutory limits, uncertainty would persist regarding the enforceability of restraints under the existing common law framework. This could lead to confusion among employers and employees as to whether a restraint with a duration below the applicable threshold is automatically enforceable. To address this, the working party would welcome clear statutory guidance from the government to accompany any new legislation, and requests that a separate consultation process be undertaken in respect of any such proposed guidance.

(D) This proposal would cut across the well-established common law tests for the enforceability of a restrictive covenant. The working party expresses concern

about any proposal to use a blunt instrument to establish enforceability, replacing centuries of considered case law and the right of both parties to the covenant to ask the courts to determine enforceability based on the specific facts of the case: to carefully balance the interests of the parties and to determine the suitability of the covenant in the circumstances.

31.3 Assumption that smaller companies are more likely to innovate

(A) The working party accepts the government's position that the statutory limits proposed could benefit start-ups and scale-ups. These smaller companies would have an advantage over larger companies in being able to use longer non-compete clauses to retain talent at a critical stage in their growth journey. However, the proposed thresholds assume that smaller companies are more likely to innovate than companies with larger headcounts, and it follows that there is an implicit proposition that their legitimate interests should have greater protection than those of larger companies. The working party is of the view that this overlooks the importance of protecting legitimate interests in industries at the forefront of innovation (in line with the government's stated objectives). For example, large companies in the life sciences and "big tech" sectors contribute significant innovation to the UK economy, and the proposed small company test could deter such companies from hiring in the UK if their business interests are not adequately protected.

(B) Continuing with the life sciences example, the UK government recently held a life sciences investment inquiry and opened a call for written evidence to examine the competitiveness of the UK's life sciences sector and barriers to innovation for medicines in the UK. This was against the backdrop of MSD cancelling its £1 billion ongoing manufacturing site in Kings Cross and AstraZeneca pausing its £200 million investment in its Cambridge site. Noting the UK government's desire to increase the competitiveness of the life sciences sector, it is likely that under the proposed thresholds, many large life sciences employers in the UK would be unable to protect some of their legitimate business interests adequately in respect of key employees performing research and development and innovation type roles. This is likely to be counter-productive to the government's policy aim of encouraging further growth and innovation in the UK life sciences sector.

(C) In addition and more broadly, the assumption that smaller companies are more likely to innovate overlooks the following considerations:

(i) a rapidly growing and quick hiring start-up could quickly pass the thresholds proposed and lose the ability to rely on the length of a non-compete needed to sufficiently protect its business interests, while still in the early development stages of its business. This could inadvertently hamper growth if key talent is lost to competitors.

(ii) companies which have a headcount below 250 (or even 50) can still be very established businesses – potentially with a significant headcount globally – who therefore do not require the same level of protection that is provided as a rationale by the government for introducing the thresholds for smaller companies (i.e. to support growth for startups at a critical stage in their journey). This could have an inadvertent effect of being detrimental to UK headquartered companies with a larger headcount, yet more favourable to

companies with a significant global headcount but a relatively small headcount in the UK.

31.4 Use of small company tests elsewhere in employment law

(A) Tests relating to the size of a company to determine the applicability of regulations (described here as a **Small Company Test**) are used broadly across various aspects of employment law. We have set out a selection of these below and considered their rationale. Broadly speaking, across these regimes, Small Company Tests are intended to operate to reduce compliance burdens where fixed costs would fall disproportionately on smaller organisations, and to tailor disclosure duties to where they are most meaningful.

(b) In respect of gender pay gap reporting, there are two different Small Company Tests used in the private and public sectors. The regime requires employers with more than 250 employees on a specified snapshot date to publish pay gap data for the preceding year. The rationale is to focus on larger employers while avoiding disproportionate burdens and risks for smaller employers.

(c) The off-payroll working rules (IR35) adopt the Small Company Test in section 382 of the Companies Act 2006, under which a company is "small" if it meets at least two of three size criteria. This approach was chosen to minimise administrative burdens for most engagers.

(d) Micro businesses may consult employees directly on TUPE transfers where there is neither a recognised independent union nor existing appropriate representatives. A micro business is an employer with fewer than 50 employees, or any size employer where fewer than 10 employees are transferring, with the change intended to avoid unnecessary bureaucracy.

(e) Other relevant examples include employers with fewer than five employees being exempt from keeping written health and safety risk assessments (though an assessment is still required); listed companies with an average of 250 or more UK employees needing to publish CEO pay ratios (those with fewer are not subject to this requirement); and smaller employers being able to recover a higher percentage of statutory maternity and other family pay, a policy aimed at supporting smaller employers with associated costs.

(f) Taken together, these regimes are generally used to reduce administrative burden and costs for small employers, target disclosure or compliance where it is most effective, and maintain proportionality of process and cost.

(g) They are not used to diminish or abridge core substantive rights or negotiated protections, and they are typically crafted with careful attention to measurement mechanics, corporate group structures and the risk of intended manipulation. They are not designed to modify the content or enforceability of private contractual terms between employer and employee; such a purpose of Small Company Tests is, in our view, untested and would be unprecedented.

31.5 Defining company size

(a) Using employer size to calibrate non-compete enforceability would require a definition of "small company" that is both administratively workable and legally certain. Experience from adjacent regimes (some examples of which are highlighted above and in **Error! Reference source not found.**) shows that apparently simple tests frequently conceal difficult boundary questions. When the intention and consequence of this definition is to vary a party's substantive contractual protection, these potential weaknesses could translate into greater uncertainty and more litigation.

(b) Any Small Company Test in respect of the length of non-competes would need to consider carefully:

(i) the timeframe over which such a test would be determined; and

(ii) how it would deal with often complex group and international structures.

(c) In respect of timeframe, the example Small Company Tests explored above take varying approaches, including:

(i) taking a single assigned snapshot date in a year to determine company size;

(ii) applying the test as at the date the obligation arises; and

(iii) annual average headcount retrospectively on the date the obligation arises.

(d) A snapshot headcount is easy to administer but produces cliff-edges and invites tactical behaviour around the relevant date. Employers hovering around the threshold may defer hires, re-time fixed-term contracts, or use contractors to fill roles which would otherwise be filled by permanent employees. Employees may dispute the inclusion or exclusion of leavers, joiners and absentees on the snapshot day. By contrast, a rolling average (e.g., across 6 or 12 months) smooths volatility but increases complexity, record-keeping burdens (which is generally sought to be avoided by Small Company Tests) and scope for error. Either approach creates scope for disputes about methodology, reference periods, and the treatment of atypical workers, generating new preliminary litigation issues before the court can consider the non-compete obligations under the usual common law framework.

(e) In respect of group structures, the Small Company Tests also take differing approaches:

(i) on a group-wide basis by reference to employees employed in the UK only;

(ii) on a single entity basis, for employees in the UK only; or

(iii) on a single entity basis, for employees in the UK only, but a parent company must also qualify as 'small' for the subsidiary employer to be classed as small.

(f) Aggregating group structures captures economic reality and avoids the use of complex group structures to ensure longer non-compete protection, but raises difficult questions: treatment of intermediate holding companies, partially-owned

subsidiaries, joint ventures, special purpose vehicles, and cross-border groups with UK branches. Divergent accounting perimeters and control tests could generate different outcomes for the same organisation. If a parent company's size has the effect of changing the covenant enforceability for a small UK subsidiary, that may appear arbitrary to local employees and invite challenges; conversely, entity-level tests incentivise fragmentation to stay "small". Any anti-avoidance rule would likely itself be fact-sensitive and contested.

(g) Another option could be to import a Companies Act style financial threshold to determine whether a company is small. This may appear to be a tidy solution, but would add accounting judgement into a restraint of trade dispute. Revenue recognition policies, exceptional items, foreign exchange effects and post-balance sheet events could all move an employer across a boundary. Disputes about which accounting period applies to a covenant signed mid-year, or how to deal with rapidly scaling or distressed businesses, would generate costly satellite dispute issues unrelated to the covenant's enforceability through the traditional (existing) lens.

(h) Company size tests are used relatively successfully in the above scenarios; however, as explained, their purpose has not to date been to govern potentially contentious situations. We consider that using a Small Company Test for non-compete enforcement would therefore lead to greater uncertainty and further points of disagreement between employers and their employees, leading overall to increased litigation and likely greater costs to businesses on both sides of a Small Company Test.

(i) Employees carrying out identical roles for economically similar businesses may face different covenant limits purely due to technical size calculations, accounting cut-offs or group structuring – outcomes that appear arbitrary and are harder to justify under common law restraint of trade principles, which are applied in a fact sensitive and case-by-case manner.

(j) There is also an important issue to consider around what happens to existing covenants if an employer ceases to meet any Small Company Test. Currently the common law regime considers enforceability at the point at which the restriction is entered into by the parties. It is highly feasible that an employee could therefore enter into a restriction at the early stages of a company's growth, but by the time they leave (and any non-compete obligation is engaged) the company is much larger. Under the current common law framework, it would appear that the restriction entered into at the earlier stage should remain enforceable, however this would appear contrary to the government's stated policy intention. To avoid this scenario, it would appear necessary for employers to require employees to enter into new restrictions (of the appropriate maximum length) each time the organisation changes its company size status. This would create a very significant new compliance burden for employers both large and small, and almost certainly generate further satellite disputes as already indicated above. As enforceable covenants require valuable consideration, the costs to businesses could be huge. It is also unclear how employees would know whether a covenant is enforceable without testing it in court.

(k) A further issue that we anticipate with this proposal is the information asymmetry between employer and employee. It is difficult to see how the employee is to

know whether their employer falls into the definition of a small company, however it is defined. The scope for litigation of this point is plainly significant, leading to increased uncertainty and more costs for the employee seeking to challenge a non-compete covenant, both of which are contrary to the stated aims of the Working Paper.

(l) In light of the above, we have not engaged in the detail of the scenarios envisaged in Question 0 as we consider each of those proposed thresholds would be vulnerable to the numerous (practical and legal) weaknesses highlighted.

31.6 Unintended consequences

(a) Using a Small Company Test to determine the length of enforceability for non-competes could create incentives and distortions that may cut across the policy goals of innovation and economic growth.

(b) There would be a clear commercial advantage in being deemed a small company: enhanced contractual protection against threats to legitimate business interests from departing employees. This may result in situations that are counterproductive to the government's stated aims in the Working Paper, in that organisations are not in fact incentivised to grow.

(c) Companies might also seek to 'game' the system in order to fall below the small company threshold. This may manifest itself in a number of ways, all of which would appear starkly contrary to the government's stated policy aims of incentivising businesses to invest in their own innovation and boosting economic growth:

(i) Mindful that they may only be able to benefit from three month non-competes in the UK, larger employers may offshore key talent or technical employees in whom they entrust their most confidential information. This could therefore cause a so-called 'brain drain' from the UK.

(ii) Employers may seek to suppress employee numbers by having only key talent engaged as employees, instead relying on atypical working relationships (workers, contractors, agency workers, umbrella companies) for other members of the workforce. This would also deplete workers' protections, which again appears contrary to the policy aims of recent legislative developments such as the ERA 2025.

(iii) Employees may prefer to join larger employers, cognisant of being subject to shorter post-employment restrictions when they wish to move on, thereby reducing the talent pool available to smaller start up / scale up / fast growth businesses.

(iv) A glass ceiling to growth and scaling may arise for employers hovering just below the threshold, acting as a blunt disincentive for any further growth.

(d) On the other hand, small companies benefiting from longer non-compete restrictions post-employment may be more attractive for private equity or venture capitalist investment in the short term (while they are still 'small'), given that the

companies may benefit from longer post-termination restrictions. Concern will however remain among investors as to that company's ability to protect its interests as it grows.

31.7 Conclusion

In conclusion, while Small Company Tests are a familiar and often effective tool for calibrating proportionality in administrative obligations for businesses, in the working party's view they are ill-suited to determining the enforceability of substantive contractual restraints. Applying a Small Company Test to non-competes would introduce avoidable complexity, arbitrariness and litigation risk, and could distort business behaviour in ways that run counter to the policy aims of promoting innovation and growth.

QUESTION 0:

32. VIEWS ON A BAN ON NON COMPETE CONTRACTS

32.1 Neither ELA members nor their clients – employers and employees – are calling for a ban on non-competes. This may be contrasted with many other areas of employment law which are highly contentious from the perspective of at least one of these constituencies and where either or both may have and express strong views.

32.2 Indeed, ELA is not aware of any constituency within the UK which is calling for such a ban. ELA understands anecdotally that tech companies in the US have expressed dissatisfaction at the UK's regime to the extent it differs from California's where most of them are based. ELA members practice employment law in the UK and so necessarily their experience in California is limited in practice to ancillary proceedings or issues in that State. However, in that experience, companies can organise themselves in such a way as to silo employees so as to minimise any leak of confidential information should an employee leave and there is extensive litigation over the use of non-disclosure agreements, and misuse of confidential information generally. The economic eco-system that gave rise to tech companies in California is complex and ELA strongly cautions against adopting one aspect of it, the import of which is highly controversial in any event.

32.3 ELA's extensive introduction to this response sets out in detail why, based on the evidence, it considers that a ban on non-compete clauses is not supported by the evidence.. Its concern is that reform in this area risks unintended consequences that could undermine rather than advance the government's objectives. Restricting employers' use of non-competes would alter the carefully established balance between employers and employees under common law, which has functioned relatively well in striking this balance (as the government recognised in 2016) and allows the courts flexibility to respond to individual cases. Substantial legal change poses risks which could adversely affecting business stability and investor confidence, which could in turn undermine innovation and job creation.

QUESTION 0:

33. VIEWS ON A BAN ON NON-COMPETE CLAUSES IN CONTRACTS OF EMPLOYMENT BELOW A CERTAIN SALARY THRESHOLD

33.1 As set out above, under the existing common law framework, post-termination restrictions are void as restraints of trade unless the employer can demonstrate both a legitimate business interest requiring protection and that the restriction extends no further than reasonably necessary to protect that interest. The courts' analysis has traditionally focused on the risk to the business absent the restriction, rather than on the employee's salary level. A blanket prohibition on non-competes for workers below a specified salary threshold would represent a fundamental departure from this approach, disregarding the operational realities and sector-specific requirements of different businesses.

33.2 In practice, certain industries – hospitality, care-giving and beauty being obvious examples - typically operate with salary structures that would fall below any realistic threshold. Employers in these sectors would consequently be denied access to non-compete protection altogether, leaving them reliant on alternative contractual mechanisms such as confidentiality provisions and other restrictive covenants. Meanwhile, employers in higher-paying industries would retain the full armoury of protections, including non-competes. This disparity in available protection risks bearing no relation to the actual business interests at stake or the competitive risks posed by departing employees.

33.3 A classic example of the problems that might be caused is the start-up where the founders elect to pay themselves modest salaries in exchange for equity stakes in the business. This is the kind of innovation and entrepreneurship that government might seek to encourage but such a business would be vulnerable to losing its confidential information to a larger business that was at that point able to pay more. Effectively the new employer could acquire the core value in the start-up by paying one employee more and cutting out the other founders.

33.4 However, there is a growing trend in the UK, US and Europe: the extent to which non-competes feature heavily in the employment contracts of low-skilled workers. For example, the evidence available for the United States shows that non-competes cover low-wage/low-skilled workers such as sandwich makers or hairdressers, limiting their outside options and labour mobility with a negative effect on wages at the bottom of the wage distribution.

33.5 In Europe, the evidence suggests that non-competes are also rather widespread and their increasing use is not just a US phenomenon. For example, a paper focusing on Italy showed that non-competes are not limited to high-skilled/high-paid jobs but also cover low skilled/low-paid employees who have no access to the confidential information of their employer.

33.6 As for the UK, the position is very similar. As the government is aware, the CMA report suggests that around 20% of UK workers have a non-compete clause in their contract in retail, food services and education and about 27% in health and social care. In the same way as the US evidence, this is very likely to have an adverse effect on the labour mobility of these workers and their wages.

33.7 As such, in light of these studies and the evidence showing the consequent adverse effects on wages (as well as potentially consumers and would-be firm competitors), we would recommend measures to curb this obvious abuse: the argument that non-competes are necessary in order for an employer to maintain its trade secrets,

business connections and confidential information in the context of such low-skilled workers is spurious at best, and misconceived, at worst.

33.8 Query though whether a salary cap is the most effective means of addressing this. The issue is not one of law – these clauses are already unenforceable - but of knowledge of the law. Measures such as robust ACAS guidance and a punitive costs regime in respect of any employer who tries to enforce a manifestly unenforceable covenant may achieve the government's objective. More radical measures might include a 'naming and shaming policy', with powers given to the Directorate of Labour Market Enforcement, the Competition and Markets Authority or the government's forthcoming Fair Work Agency to list companies whose restrictions were in its reasonable view abusive. The most radical option would be as (with the National Minimum Wage) for the Directorate to be able to issue fines, increasing in amount if the employer does not take all reasonable steps to make it clear the restrictions do not apply.

33.9 International comparators

(a) In addressing Question 0, we have examined the international examples of Luxemburg and Austria that are referred to in the Working Paper.

(b) The Working Paper notes that Luxembourg and Austria introduced a ban on non-compete clauses below a salary threshold. However, the Austrian and Luxembourg legal frameworks differ materially from the UK's in a number of respects, which makes a direct comparison with these countries as to the effect of banning non-competes below a certain salary threshold difficult. A meaningful comparison would require comprehensive analysis of each jurisdiction's full legal framework, not simply the existence of a salary threshold. For example:

(i) Both jurisdictions impose a one-year maximum on non-compete duration. In Austria, non-competes are generally void where the employer initiates dismissal and must not unreasonably block an employee's career.[11] In contrast to the position under English law, the Austrian courts may also limit the scope of a non-compete clause, or the contractual penalty.

(ii) In Luxembourg, non-competes require adequate financial compensation to be valid. In addition, the court allows a non-compete clause if the employee intends to sign an employment contract with a direct competitor of the former employer. However, such a clause must be subject to adequate financial compensation for the employee to be valid[12].

(c) The Working Paper refers to a paper examining the reform implemented in Austria in 2006, "Noncompete Clauses, Job Mobility, and Job Quality: Evidence from a Low-Earning Noncompete Ban in Austria" (the **Austria Paper**). The Austria Paper summarises its findings as follows:

"the ban increased the types of job transitions restricted by noncompetes (e.g., within-industry transitions). These increased transitions were disproportionately to higher-quality firms and higher-paying jobs. I do not, however, detect effects of the ban on workers' overall earnings growth rates. Together, this evidence shows that noncompetes in Austria restricted low-earning workers' job mobility

[11] https://cms.law/en/int/expert-guides/cms-expert-guide-to-dismissals/austria
[12] https://cms.law/en/int/expert-guides/cms-expert-guide-to-dismissals/luxembourg

and prevented them from moving to better jobs. However, the magnitude of the job mobility effect was small, so the ban did not substantially affect macro trends in job mobility or earnings."

(d) The Austrian Paper does not provide evidential support that a salary threshold ban would achieve the Working Party's objectives. We note that:

(i) The Austrian Paper found that while the ban increased job mobility, the effect was only marginal, and it did not *"detect effects of the ban on workers' overall earnings growth rates".*

(ii) The Austrian Paper focused on low earners. The government has not specified what threshold it would adopt.

(iii) While the Austrian Paper notes that *"noncompetes could prevent the spread of company trade secrets or intellectual property This would increase workers revenue productivity by reducing product market competition"* it also acknowledges that *"stopping the flow of company trade secrets might decrease overall productivity by preventing knowledge spillovers or deterring startup activity*".

(e) If there is to be a comparison of the business landscape and economic performance in these countries, and the impact of their respective approaches to restrictive covenants, a fuller comparative exercise should be undertaken – not just consideration of the salary threshold. Alongside this, careful thought should be given to the following considerations.

33.10 The level of the salary threshold

(a) A key question for the government would be how to set and then define any salary threshold. The Working Paper does not specify the intended level, nor the proposed rationale - whether, for example, the threshold would target low earners (however they may be defined) or non-managerial roles, for example. Due to the disparity of salaries across industries and geographical regions within the UK, there is a risk that whatever salary threshold is implemented, it may have the polarising effect of capturing senior people in some businesses and only junior employees in others. There can be a mismatch between a worker's earnings and the potential exposure to the business. For example, a junior engineer or a tech developer with a salary of £50,000 and unfettered access to a company's core algorithms may pose a far greater risk to the business than a highly paid senior employee with limited access to such information.

(b) Taking the examples of Austria and Luxembourg, the salary thresholds are set in the region of 70-80% of average gross salary and the ban on non-competes in those countries is therefore targeted at lower earners. The salary threshold for the ban on non-competes in Austria is EUR 51,600 and in Luxembourg is EUR 64,382.45. This is as against the average gross salary of EUR 58,600 in Austria and EUR 83,000 in Luxembourg. [13]The median gross annual earnings for full time employees in the UK in April 2025 was £39,039[14]. If the UK were to take a

[13] https://www.luxtimes.lu/luxembourg/luxembourgs-average-salary-of-83000-still-highest-in-eu/104893155.html

[14] https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/earningsandworkinghours/bulletins/annualsurveyofhoursandearnings/2025

similar approach to Austria and Luxembourg, this would result in a salary threshold in the region of £27,300 - £31,000.

(c) Lower-paid employees, who would fall within this salary range, tend to be younger and work part-time, in elementary occupations and the hospitality industry[15]

(d) We also have strong reservations that a salary threshold at this level would protect workers from time out of the market that they are unable to afford. Many employees earning significantly above this threshold would still face financial hardship from a period out of work.

(e) If the government decided to set the salary threshold at a higher level, then careful should be given to the applicability of the findings of the Austria Paper (which focused on lower earners) to a different category of role, to appropriately balance any potential benefits as against the potential downsides noted further below.

33.11 What would constitute salary?

(a) Defining and calculating pay is already an area of great complexity in UK employment law. Defining salary by reference to pay received over a reference period, and other formulations such as 'basic salary' or 'a week's pay' could lead to an increase in complex and protracted litigation on this issue, or at least introduce uncertainty as to when the ban on non-compete clauses would apply. Employees could have their salary determined in different ways, due to different reference periods or formulations, for different purposes.

(b) Restrictive covenant matters are litigated in the High Court. The High Court has not historically had to grapple with how to determine "pay", which is the Employment Tribunal's domain. To do so risks a divergence of case law. The Employment Tribunal is reported to be struggling to dispose of cases at the rate they are being issued (in Q2 2025 the Employment Tribunal received 12,000 single claim receipts and disposed of 5,900 single claim cases, and 52,000 single claim cases remained open in September 2025), and is significantly under resourced[16]. Even without the crippling backlog in the Employment Tribunal, if the High Court were to refer these questions to the Employment Tribunal as a preliminary issue, there is a risk of significant delay.

33.12 Risk of inconsistency and an additional complexity for employers

(a) A salary threshold risks creating an inconsistency in contractual terms among roles, even within the same business. For example, part-time workers on a reduced salary or employees in different regions with different pay weighting for the same roles (such as the London Weighting Allowance) may be above and below the salary threshold, adding an additional layer of complexity and inconsistency within businesses, at a time when there is already a great deal of legal change for businesses to contend with as a result of ERA 2025 (and the upswing in litigation which practitioners are anticipating as a result of the legal changes introduced in that Act).

[15] ibid

[16] https://www.gov.uk/government/statistics/tribunals-statistics-quarterly-july-to-september-2025/tribunal-statistics-quarterly-july-to-september-2025#employment-tribunals

(b) In terms of recruitment, for those roles that attract salaries around the salary threshold level, the availability (or not) of a non-compete restriction would be another consideration for businesses when determining the appropriate pay for the role, on top of other considerations such as immigration pay thresholds, unfair dismissal protection etc.

33.13 Risk of unintended consequences

(a) A salary threshold creates cliff-edge effects that may drive unintended behaviours. Employees may factor the presence of a non-compete into decisions about seeking higher-paid roles, particularly given that other salary thresholds (such as income tax bands, benefit levels, and childcare funding) already influence employee behaviour. Any threshold would also need to keep pace with wage growth to remain effective.

(b) The Working Paper notes that many employees are unaware of non-compete restrictions in their contracts, suggesting such terms are unlikely to drive behaviour in most cases. However, for innovative businesses - particularly at critical growth stages or when seeking investment - securing maximum protection of business interests, including non-competes for key staff, is typically a priority.

(c) Consideration should also be given to whether employees without non-compete protection may be entrusted with less confidential information, potentially limiting their professional development. Additionally, managers unaware of the differing protections available at different salary levels could inadvertently expose the business to unrecognised risks.

(d) The Working Paper aims to reduce recruitment barriers for innovative businesses, particularly scale-ups at critical growth stages. Such businesses often offer shares or options as incentives, which frequently include non-compete restrictions outside the employment contract. It is unclear how a salary threshold would address this, potentially nullifying the ban's impact for these businesses. Furthermore, requiring higher base salaries to secure non-compete protection may reduce incentives to offer equity, commission, or other arrangements that attract top talent to start-ups. In practice, lower-paid employees who fall below any threshold may still be bound by non-compete restrictions in shareholders' agreements, particularly in start-up businesses where equity is often awarded to compensate for lower base salaries.

QUESTION 0:

34. HOW THE GOVERNMENT COULD ENSURE THAT A BAN BELOW A SALARY THRESHOLD ALSO SUPPORTS HIGHER PAID INNOVATORS, EXPERTS AND ENTREPRENEURS IN THE UK

34.1 If the government were to proceed with a ban on non-competes for lower paid employees (which ELA does not recommend for the reasons set out in its response to question 6 above), existing common law principles relating to post-termination non-competes in the UK must remained in place for those earning over the threshold. There should be no automatic assumption of enforceability.

34.2 It may be that if non-competes are banned below a certain salary threshold that a natural consequence is that employers are live to:

(a) the sudden discrepancy between those at the "middle" of the salary banding i.e. just under vs just over the threshold, being a disincentive; and/or

(b) issues with consistency or practical operation across their business and possibly cross-jurisdiction.

Employers may therefore of their own volition seek to reduce non-competes for higher earners and utilise other contractual protections such as longer garden leave clauses, tighter confidentiality obligations and use of other restrictive covenants they can apply across the board.

34.3 It is likely that it is employees in the "middle" salary brackets just above the threshold that are most disproportionately affected by a ban on non-competes below a salary threshold. They may find that new employers on recruiting sprees are more keen to recruit those just below the threshold, and thus not subject to a non-compete. Earning just above the threshold means such individuals are less likely to be minded to take the risk on court costs (noting as per the Working Paper that "*[e]nforcement of restrictive covenants is currently through the county courts or the High Court. Consequently, the losing party will generally bear the winner's legal costs*". They may also be less likely to benefit from new employers being prepared to support them with court costs or awards or "buy out" any lost benefits, as with higher earning and more senior hires. Further, it is open to employers to uplift the salaries of those earning just below the threshold so that the employer can impose a non-compete.

QUESTION 0:

35. A COMBINATION OF A BAN BELOW A SALARY THRESHOLD AND A STATUTORY LIMIT FOR THOSE WHO EARN ABOVE THE THRESHOLD

35.1 We address the proposal to impose a salary threshold in answer to Question 0 above. We address the suggested imposition of an arbitrary cap of 3 months on non-competes below in this section.

35.2 As to the interplay between these two concepts, we note that the international examples of a ban below a certain salary threshold (Austria and Luxembourg) also have a limit on the period of a non-compete for those who earn above the salary threshold. In both cases, however, the statutory limit is one year.

35.3 From the perspective of the employee, the middle earners referred to in the answer to Question 0 (i.e. those that sit just above any salary threshold that is set) are potentially disadvantaged if a salary threshold is put in place. They will be potentially less attractive in the market than those just below the threshold because they are subject to a non-compete. A statutory restriction on any non-compete will be of value to those employees.

35.4 In contrast, however, a statutory limit of 3 months as suggested in the Working Paper would be damaging to employers that genuinely require longer protection. As may be seen from the Introduction to this response, 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 polices etc. which they are able to recall from memory even though they are not contained in documents. When deciding to impose a non-compete, an employer will look carefully at the length of time in which the relevant information is likely to remain truly confidential before it may become "stale".

35.5 Imposing a statutory cap of 3 months takes no account of the likely length of time that information remains truly confidential (which will be different in each situation, for each organisation, for each level of seniority) and as noted, thus potentially negates the value of the non-compete. As a rule of thumb, the English courts will enforce a non-compete of up to around one year in length if it satisfies the legal tests set out earlier in this response.

35.6 Further, there is likely a danger of an automatic assumption of enforceability if a statutory cap is imposed: an assumption that as long as the restriction is limited to 3 months, then any other defects in enforceability (such as scope) are cured. This is in contrast to the careful drafting exercise which must currently be applied by an employer when deciding to impose a non-compete.

35.7 This is to say nothing of the difficulties of introducing such a limit. If it is brought in for all contracts of employment then it may alter a fundamental term of the contract after the parties have entered into it. 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.

35.8 It follows that if any limit is to be imposed, despite the strong reservations expressed in this response, it should only come into force for employment contracts or non-competes entered into after a certain date in the future.

QUESTION 0:

36. WHETHER RESTRICTIONS SHOULD BE LIMITED TO NON-COMPETE CLAUSES ONLY OR SHOULD ALSO APPLY TO OTHER RESTRICTIVE COVENANTS

36.1 If the government proceeds with introducing restrictions around the use of restrictive covenants in employment contracts, such restrictions should be limited to non-compete clauses only.

36.2 Non-compete clauses are widely recognised as the most restrictive category of post-termination covenant, as they may prevent an individual from working for or establishing a competing business for a period after termination. As such they impose a greater level of hardship on the employee. Other restrictive covenants, including non-dealing with clients/customers, non-solicitation of clients/customers and non-poaching of employees, limit the way in which an individual carries out their role (and are effectively "ring-fencing" provisions designed to protect the goodwill of the employer) but are generally more narrowly drawn and do not prevent an employee from continuing to perform their chosen profession, nor necessarily impact their earning potential or result in financial disadvantage for employees.

36.3 Looking at the global picture, where other jurisdictions have introduced limits on restrictive covenants, most have focused specifically on non-competes (see for example the position in several US states where non-competes have been banned, and the requirement for compensation for non-competes in France, Germany and Italy).

36.4 If the government extends reform to other restrictive covenants, consideration will need to be given to how other restrictive covenants will be defined and what will be captured. This is not straightforward and could result in complex litigation. Further, some restrictive covenants (for example those dealing with the misuse of confidential information) may be "business critical" and may not impose any obligation on the employee not to work but are still a form of restrictive covenant. While the government's working paper mentions some of the more established restrictive covenants like non-dealing clauses, other restrictions are becoming more common, including non-disparagement clauses and prohibitions on association with the former employer. Courts are regularly called upon by employers and employees to determine whether a particular provision actually amounts to a restraint of trade and engages the doctrine. In addition, the concept of what is a restraint of trade is not static - provisions continue to appear and develop in novel forms. For example team move covenants and garden leave clauses as well as "disguised" non competes like clauses requiring payment by/clawback from the employee if they work for a competitor. We therefore foresee an undesirable situation where a provision is included in a contract of employment and there is uncertainty and/or disagreement between an employer and employee over whether it is subject to a ban/restriction or not.

36.5 We do not consider that there are any grounds for government intervention to extend to other restrictive covenants.

QUESTION 0:

37. HOW THE GOVERNMENT CAN ENSURE THAT OTHER RESTRICTIVE COVENANTS, FOR EXAMPLE NON-DEALING CLAUSES, ARE NOT USED IN A WAY THAT WOULD HAVE A SIMILAR EFFECT AS A NON-COMPETE CLAUSE, IF RESTRICTIONS WERE LIMITED TO NON-COMPETE CLAUSES ONLY

37.1 We consider that it will be difficult, in practice, to "ensure" that other restrictive covenants, for example non-dealing clauses are not used in a way that would have a similar effect as a non-compete clause if a total ban on non-competes is introduced.

37.2 One of the unintended consequences of the government's proposals is likely to be that employers are forced to be more reliant on other available mechanisms to protect their interests. The Working Paper notes that this may be the case with non-dealing and non-solicitation covenants in particular. We consider this would also be the case for notice periods, and for garden leave, IP and confidentiality restraints. Limiting the effectiveness of non-competes may simply shift focus to other restrictions.

37.3 While in and of itself this is not necessarily a flaw in the proposed reform as it may encourage employers to use more targeted, proportionate protections where appropriate, ELA considers that the UK should allow the common law to continue developing appropriate standards for other restrictive covenants, with the continued oversight and adjudication of the courts as to the reasonableness and proportionality of restrictive covenants on a case-by-case basis.

37.4 There is a real risk that employers will seek to enforce other forms of restrictive covenants more readily if non-competes are banned as a matter of policy: the risk to employees is the distraction and cost of litigation as much as the outcome of that litigation.

QUESTION 0:

38. WHETHER RESTRICTIONS ON NON-COMPETE CLAUSES SHOULD BE LIMITED TO EMPLOYMENT CONTRACTS OR WHETHER THE GOVERNMENT SHOULD CONSIDER APPLYING THEM TO WIDER WORKPLACE CONTRACTS

38.1 We recommend that any restrictions on non-compete clauses should be limited to employment contracts only, for the reasons set out below.

38.2 The Working Paper indicates that 'wider workplace contracts' may include shareholder agreements, equity incentive award documents and LLP agreements. It should also be noted that restrictive covenants are also included in settlement agreements with departing employees. However, the boundaries of this category remain undefined, which would create significant legal uncertainty.

38.3 The courts apply a different approach to restrictive covenants in employment contracts compared with those entered into in a commercial context. A stricter test of what is reasonably necessary applies to employment contracts, reflecting the inherent imbalance of bargaining power between the parties at the time of contracting.

38.4 The reasonableness test in the employment context requires a careful balancing exercise between the employer's legitimate interests and the employee's freedom of movement and ability to earn a living. Notably, non-competes in employment contracts do not typically attract direct compensation for the employee.

38.5 In other workplace contexts, individuals typically have greater freedom of choice as to whether to enter into the contract. They are generally better positioned to negotiate the scope of any restraint and to ensure appropriate compensation, whether through the value of the contract itself (e.g. consultancy agreements) or through property or ownership rights that may outweigh the cost of compliance (e.g. LLP membership agreements, share purchase agreements). Alternatively, they may reject the commercial proposition entirely (e.g. an equity award scheme). In partnerships, LLPs and shareholder arrangements, all parties typically invest capital, share profits and losses, and have mutual interests in protecting the business they have collectively built. Such parties are also more likely to be represented by legal counsel and advised on the implications of any restrictions. However, there may be wider workplace contracts where the bargaining power, freedom of choice and other relevant factors in considering the reasonableness of applicable restrictions are akin to an employment relationship and therefore consideration should be given to applying any restrictions on non-competes (for example worker contracts, or certain franchise agreements).

38.6 In wider workplace contracts, the need for business protection may be even more pronounced. Partners and LLP members, for example, typically have access to the most sensitive business information, client relationships and strategic plans. Restricting non-competes in these contexts would fundamentally undermine the ability of professional partnerships to protect their legitimate business interests. Certain

sectors - notably professional services and private equity - rely heavily on non-compete provisions in wider workplace contracts, and extending any ban to such agreements could disproportionately impact these sectors.

38.7 However, this distinction is not straightforward in all scenarios. For example, where an employee enters into a non-compete within a shareholders' agreement at the same time as signing up to separate employment terms, or where restrictions are included in bonus or share plan rules - that apply exclusively to employees, employees may challenge these - on the basis that they circumvent any ban or statutory restriction on non-competes in employment contracts. It may also become impractical from an international competitiveness perspective because equity holdings may often be held in parent companies registered in different jurisdictions (for example the United States) potentially bringing UK law into conflict with international centres of commerce. Such conflict risks stifling investment in the UK.

QUESTION 0:

39. ANY EVIDENCE DEMONSTRATING THAT A BAN, OR RESTRICTIONS, ON NON-COMPETE CLAUSES COULD IMPACT INWARD INVESTMENT OR INVESTMENT IN TRAINING AND UPSKILLING

Our response below is divided into four separate sections.

(a) Section 1 provides an overview of ELA's stance on how a ban or restrictions on non-competes could impact inward investment or investment in training. This section also provides a perspective on the expected theoretical impact or effect of such a ban.

(b) Section 2 considers UK empirical data that provides evidence of how a ban or restrictions on non-competes could impact inward investment or employer investment in training, upskilling, reskilling, research and development, etc.

(c) Section 3 addresses the US empirical data that provides evidence of how a ban or restrictions on non-competes could impact inward investment or investment in training. It also examines the limitations of relying on this overseas experience as a basis, or justification, for particular reforms to the laws governing non-competes in the UK.

(d) Section 4 discusses the empirical data from countries and jurisdictions other than US and UK that provide evidence of how a ban or restrictions on non-competes could impact inward investment or investment in training. It also addresses the limitations applying such overseas experiences to the UK.

39.1 Section 1: How a ban or restrictions on non-competes could impact inward investment or investment in training

(a) One of the main aims of non-compete clauses in employment contracts is to safeguard confidential information by preventing departing employees from using it in a rival business. It is proposed in the Working Paper that such restrictions might encourage higher levels of investment in employee training and upskilling, as employers would have the security they need to invest in the development of human capital - which ultimately is the source of innovative ideas and technology.

Otherwise, employers might be disincentivised from investing in their employees' development if individuals could freely leave and compete, taking the benefit of their employer's investment with them. Investment, including inward investment (foreign direct investment, or **FDI**) 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, as well as assist start-ups to get off the ground. In an increasingly knowledge-based economy, people tend to be a company's most valuable asset, and private equity and venture capital investors customarily demand protection for their investment in the form of non-competes. If UK companies were prohibited from imposing non-competes on employees, that could potentially make UK companies less attractive to private equity and venture capital investors, which would in turn remove a major source of funding for inward investment and the development of innovative ideas.

(b) In addition to the potential beneficial impact of non-competes which incentivise firms to invest in employee training, private equity and venture capital investors also value non-competes when making investment decisions, as they are aimed at preventing abuse by departing employees of young, vulnerable companies in the early stages of developing from exploiting a new business idea. The short term and limited nature of non-competes enable the affected companies to shore up their business in the period after a team member with critical knowledge has left. Such intangible assets are best protected through non-competes given the difficulties of proving that an ex-employee has in fact misused the employer's confidential information or trade secrets.

(c) While the law draws a clear line between an employee's skill and knowledge (which s/he can freely use in a new job) and the employer's trade secrets, policing that line is very difficult in practice. It is rarely obvious what belonged to whom. A non-compete 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.

(d) In its response to the 2020 Consultation, ELA remarked that there was a record £11.2 billion pounds invested in UK technology companies by venture capital funding, indicating that the UK common law system regulating non-competes was highly attractive to investors.

(e) If legislation prohibited the use of non-competes, investors might be more cautious or reluctant to invest in UK businesses or at least cater for the attendant increased risk by demanding 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 in need of funding and could risk putting the UK at a competitive disadvantage in respect of attracting investment such as inward investment. As there are a significant number of countries where non-competes are enforceable, a change to the position in the UK could run the risk of foreign investors investing in business outside the UK as a result of the protections available in other countries.

39.2 Section 2: UK empirical data of how a ban or restrictions on non-competes could impact inward investment or employer investment in training etc

(a) As recognised in the Working Paper, there is a paucity of evidence that the presence of a non-compete actually results in employees getting more training. We would agree. This is consistent with the view of the OECD in 2019 that comprehensive evidence on the use, incidence, and impact of non-competes outside the United States is lacking.

(b) The Working Paper states at paragraph 21 that *"[a] 2019 study finds that moving from no enforcement of [non-competes] to average enforceability is linked to a 14% increase in training aimed at upgrading or teaching new skills."* This supports the theory discussed above: employers are more willing to invest in general training for their staff (rather than just company-specific training) when they can rely on non-compete clauses[17]. This is because non-competes reduce the 'holdup' problem, where employers are reluctant to invest in employees who might leave and take the benefit of that investment with them before the employer sees any return[18]. This suggests that weakening the enforcement of non-compete clauses would reduce employer investment in staff training. Such a reduction would be a step backwards, since, as the government notes at paragraph 23 of the Working Paper, *"[b]etween 2011 and 2022, the average number of training days for all employees in England fell by 19% (from 4.3 to 3.5 days), and the average per trainee dropped by 25% (from 7.9 to 5.9 days). At the same time, employers report growing recruitment challenges, with skill-shortage vacancies more than doubling between 2017 and 2022".*

(c) However, it should be stressed that the 2019 study on which this statement is predicated is one that draws exclusively from data sourced from the US (US Survey of Income and Program Participation). As such, it is not specific to the UK.

(d) The only UK-specific studies consist of the CMA report and a paper published by Alves and others in 2024[19]. As noted by the UK government, both of these pieces of evidence[20] provide that enforceable non-competes are associated with slightly higher levels of formal on-the-job training, but not other types of training, but that the relatively similar levels of training and the widespread prevalence across industries and across income levels suggest that not all non-competes in the UK necessarily protect substantial training or client relationship investments. Indeed, based on a survey of 2,713 employees in January 2023, Alves et al also concluded that *"without knowing the value of the training provided [by the employer ostensibly in exchange for the enforceable non-compete] it is impossible to know if [the absence of enforceable non-competes] is a genuine concern or just an excuse for the[ir] use [and e]ven when the training provided justifies the employer's concerns, there may be other ways to ensure proper*

[17] (Meccheri, N. (2009) 'A note on noncompetes, bargaining and training by firms', Economics Letters, 102(3), pp. 198–200)

[18] (P. H. Rubin & P. Shedd, "Human Capital and Covenants Not to Compete" (1981) 10 Journal of Legal Studies 93, 93 and 95-96)

[19] (*Competition and Market Power in UK Labour Markets*, 25 January 2024, available at Competition and market power in UK labour markets (publishing.service.gov.uk)); (Alves J., Greenberg J., Guo Y., Harjai R., Serra B., Van Reenen J. 2024. "Labour Market Power: New evidence on Non-Compete Agreements and the Effects of M&A in the UK." CEP Discussion Paper 1976).

[20] (see paragraphs 6.40-6.44 of the CMA report and page 20 of Alves et al)

investment in the workers rather than a blanket [non-compete]" (see Alves et al at page 22).

(e) A related question is whether the existence of non-competes in the contracts of employment of staff provide employers with greater encouragement to invest in riskier research and development projects. The theoretical literature suggests that they will do so[21]. The basis for this claim is that in the absence of non-competes, firms will not invest in research and development, because employees will be incentivised to behave opportunistically and capture for themselves the value of the firm's confidential information and trade secrets. However, once again, it is difficult to reach any conclusions as to whether the practice accords with the theory, since there is a dearth of data that measures the situation in the UK. Neither of the existing UK-based studies (the CMA report and the paper published by Alves et al) apply their mind to this specific question.

(f) Some research suggests that there is a negative correlation between the impact of enforceable non-competes on firm innovation and growth in employment[22]. However, there are no studies that focus specifically on whether the data applicable to the UK is consistent with this theory.

39.3 Section 3: The US empirical data: evidence of how a ban or restrictions on non-competes could impact inward investment or investment in training and any limitations of relying on this overseas experience

(a) This section considers the impact of non-competes in relation to investment and staff development in the US, with reference to a range of evidence-based studies and academic analysis reflecting the current developments in labour law, and in particular the reasons for the US government's policy position and action. In doing so it also considers what we can learn from the events in the US when looking to implement changes in UK law.

(b) In this section we refer to a number of studies and academic papers, the references for which can be found in 0 to this response.

39.4 Background

(a) As is well understood, individual States have individual positions in relation to the nature and enforceability of non-competes. Historically, they were seen as relevant to senior executives, and other employees who were of particular value to their employers because of their innovation, creativity and management skills. But of late, it has become apparent that their application is much wider, reaching across high and low paid workers.

(b) For the purpose of this submission, the focus is on non-competes. However, it will also be necessary to consider Training Repayment Agreement Provisions,

[21] (see Conti, R. (2014). Do non-competition agreements lead firms to pursue risky R&D projects? Strategic Management Journal, 35(8), 1230 and P. H. Rubin & P. Shedd, "Human Capital and Covenants Not to Compete" (1981) 10 *Journal of Legal Studies* 93, 93 and 95-96)

[22] (Samila S. and Sorensen O. (2011). 'Noncompete Covenants: Incentives to Innovate or Impediments to Growth' Management Science 57(3), 425; He. Z. (2025), 'Non-compete agreements, innovation value and efficiency' Journal of Corporate Finance (90) 102698; and see summary of the evidence in Starr, E. (2024), Noncompete Clauses: A Policymaker's Guide through the Key Questions and Evidence, Economic Innovation Group)

(**TRAP**s), also known as "Stay or Pay"[23]. These clauses require workers to reimburse employers for sign-on bonuses, relocation expenses, education, training, or other payments if their employment terminates before a specific time. They take various forms, and can include payment for training, via a tuition reimbursement agreement or training repayment agreement.[24] In cases where employers require specific credentialing or training there may be an agreement that the employer pays the fees and recoups the cost immediately on changing employment. Other clauses may include mandated relocation, through a specific agency stipulated by employers, which also require immediate repayment. In all of these elements, employers may require a debt, with interest, agreement separate from their employment contract, at a rate of interest and provider determined by the employer. TRAPs have been identified as a form of functioning non-compete clause in that they often limit or restrict employees' opportunities to move jobs.

(c) Some states have taken very proactive measures to remove these clauses, such as in New York with the Trapped at Work Act 2025, indicating that such clauses should only ever have very limited application. The limited application of these clauses arewhere they:[25]

(i) require a worker to repay money advanced to the worker by the employer (unless the money was used to pay for training related to the worker's employment with the employer);

(ii) require a worker to pay for property that the employer has sold or leased to the worker;

(iii) require educational personnel to comply with terms or conditions of sabbatical leave; or

(iv) are part of a collective bargaining agreement.

(d) The notion of bundling restraint clauses[26] also exists in the US. This is where employers use a range of restrictive covenants (usually non-disclosure agreements (NDAs), non-solicitation agreements (NSAs), non-recruitment agreements (NRAs), and non-compete agreements (NCAs)) as a method of limiting the movement of workers. Balasubramanian et al indicate "*that NDAs to be the most common, covering 57% of workers in the US and deployed by more than 75% of firms, while NCAs are the least common, covering 22% of workers*". They also indicate that this bundled approach was *"associated with reduced turnover and lower wages relative to firms that use just an NDA, suggesting that firms are able to use this bundle of restrictions to capture more value from human capital"*.[27]

[23] *Kelly L, 'The Employee Trap: Developments in Training Repayment Agreement Provisions and Towards a Labor Market Free of Snares Note' (2024) 49 Okla City U L Rev 155*
[24] *Rum v. HCA Healthcare, Inc., No. CV 23-5142-JFW(BFMx), 2023 WL 7107268, at *1 (C.D. Cal. Oct. 11, 2023).and Carmen v. Health Carousel, LLC, No. 1:20-cv-313, 2023 U.S. Dist. LEXIS 139403, at *5 (S.D. Ohio Aug. 9, 2023)*
[25] Article 37, N.Y. Lab. Law §§ 1050–55
[26] Balasubramanian N, Starr EP and Yamaguchi S, *Bundling postemployment restrictive covenants: New evidence from firm and worker surveys* (Academy of Management Briarcliff Manor, NY 10510 2021)
[27] Ibid 10

(e) In the recent attempt by the Federal Trade Commission (**FTC**) to provide a federal ban on non-competes, the claim was made by the Democrat chair at the time that this would create greater freedom of movement, opportunity for innovation and commercial growth. However, as a result of swift intervention by employers as well as the change of administration, the ban has now been revoked. This fact is not noted in the Working Paper. Its approach has been replaced by a selective approach to challenging the fairness of non-competes, and to leave the State legislature to regulate the matter. The reluctance to create federal limitations has been met with a mixed response.

(f) It has been suggested that the powers that the FTC, and the Department of Justice could be deployed using Sherman Antitrust laws to prosecute organisations on the basis of conspiracy to restrain trade. Such an offence is subject to significant penalties, including fines up to $100 million or up to 10 years in prison. Whilst there have been no successful prosecutions as yet, this may provide an alternative to the attempts by the FTC and the Senate to create protective legislation.[28]

39.5 Critical Evaluation of the FTC evidence supporting the ban on non-competes

(a) The studies which have been relied on greatly in the academic literature and policy-making circles are primarily provided by and on behalf of employers. When looking at the evidence used by the FTC, there are some clear concerns in relation to the recentness of the research and the claims which were made in relation to them. The BRG review does provide effective critical comment in relation to the FTC NPRM[29] and focuses on the potential impact on different aspects of employment.

(b) The studies by Bronars and others make some telling observations about the poor quality and reliability of some of the evidence which was relied upon by the FTC when deciding to ban non-competes. In addition, there is little systematic evaluation of the impact of the non-compete in relation to wages and role ranges and none which addresses the implications for innovation in product or service markets.

(c) The majority of studies suggested that where there were non-competes, there was reduced labour mobility as well as worker turnover. It also supported the claim that non-competes are the main causes of low income and that their use was likely to increase worker training and investment.

(d) A significant concern in the data analysis was the lack of effective or indeed recent empirical research systematically evaluating how non-competes affect low-wage versus high-wage workers, and no research directly measures the impact of non-competes on product or service markets. It is right to say however that there has been an increase in the analysis of case law within and across States, which indicate the depth and breadth of challenges to employers who implement[30] non-competes or bundled approaches to restrictions, in both high

[28] Can Non-Compete Agreements Lead to Jail Time? (OgleTree Deakins 2023)
[29] Notice of Proposed Rulemaking (NPRM): this is a formal document issued by U.S. federal agencies to announce and explain plans for new regulations, or to amend existing ones, in the Federal Register. In doing so it also invites public comment on proposed changes before they are finalised
[30] Eyasu Yirdaw, 'Preventing the Noncompete Apocalypse: Why the FTC Has It Wrong' (2024) 5 Corp & Bus LJ 124

and low paid employment. Often the premise of the application is linked to proprietary and confidential information.

(e) When looking at the range of research in further detail, the evidence used to support the decision was limited, and in one case it only identified "small differences in non-compete enforceability" or a focus on "Two statewide non-compete bans" which were limited to specific roles. In addition, there was truly little information about the way in which the studies were carried out, and no mention in some cases as to which, if any, of the subjects of the study were subject to non-compete provisions. There is also concern as to whether the claims drawn from the study were grounded in understanding the market, employers' needs and wider factors which may have impacted on the outcomes.

(f) In looking to extrapolate indicative findings from these studies, there are real concerns that the decision-making was founded on very limited reliable evidence. To rely on them to justify a national ban would appear to create more problems than it solves, given the quality of the research and evidence. This, in effect, means that some of the wider conclusions drawn in policy making are dependent on weak evidence and so need to be read with caution.[31]

(g) This paucity of information has led the new FTC commission to call for a public consultation in September 2025, the outcome of which has yet to be published. It should be noted, however, that it has only received 134 submissions at the time of writing.

39.6 How do non-competes work in the US?

(a) As these terms are contractual, it is probable that any US employee can be covered, whereas the FTC rule was selective in its approach. They can also be applied to franchisees via franchise agreements. For the purpose of this submission, we focus on employees, but note that CEOs were not subject to the FTC ban.

(b) The key function of a US non-compete is to stop a worker moving to another competing employer. Often, the non-competes are limited to a maximum period of 2 years and/or there will be a geographical limitation in place. A recent survey carried out by Bloomberg on the approaches of all 50 States in the US to non-competes reflected common features in relation to how these clauses would be interpreted if they were applicable, by reference to reasonableness and employment type and level.

(c) Often the content is determined in accordance with the strength or otherwise of the sector and the State where the contract was set. This means that employees of any role can be subject to significant restrictions and potential penalties, which may be prohibitive in terms of moving jobs or roles. Colvin and Shierholz, for the Economic Policy Institute in 2017, found that 49.4% of organisations that responded to their survey had some employees that were subject to a non-compete. 31.8% of the same organisations applied non-competes, irrespective of key elements of employment, such as pay or job roles and responsibilities.

[31] Kwok D, 'Blackmail and the Wrongful Non-Disclosure Agreement' (2025) 25 UC Davis Bus LJ 1 and Eyasu Yirdaw, 'Preventing the Noncompete Apocalypse: Why the FTC Has It Wrong' (2024) 5 Corp & Bus LJ 124

Greenberg indicated that there was no evidence that workers would seek higher pay where there was a non-compete in place.

(d) Balasubramanian et al, in 2022 and in further research carried out in 2024, indicate that where a contract adopts a "bundle" approach to non-competes, wages are likely to be reduced by as much as 5.4%, even over colleagues that only have 1 type of non-compete. In terms of coverage, according to Langefeld, 1 in 5 workers are covered by non-competes. Rothstein also indicates that 53% of workers who are covered by non-competes are hourly workers, who are often unaware of the restrictions.

(e) There have been suggestions that this is largely because the workers do not question the content of the contract, they need to work, and have limited options because of their poor education and limited qualifications. This is countered by the claim that where there is a ban on non-competes, this will increase mobility between competing employers, leading to a rise in earnings, in one reported case of between 12-16%. The types of clauses that sit within the bundles include non-competes, as discussed earlier, in addition to non-solicitation as well as confidentiality agreements. More recently, there has been a rise in TRAP (or "stay or pay") clauses in the US which seek to limit an employee from moving job role, where there has been direct employer investment in their training and development.

39.7 Does the non-compete affect wage, movement or training and development in the US?

(a) Wages

(i) Starr reflects that there appear to be significant contradictions in terms of the impact of non-competes on salary/ wages in the US. National surveys indicate that workers that have non-competes earn more than those who do not. However, the evidence does seem to suggest that income is negatively affected, where States enforce the ban by between 4 and 5.6%. Whereas Shy and Stenbacka indicate that wages are suppressed, in particular for older workers, where there is evidence of non-competes. This level of suppression does not appear to take into account the implications of TRAP clauses.

(ii) Starr intimates that the reason for wage differentials is much deeper than whether or not there is an enforceable ban on non-competes. Garnero and Andrews assert that the nature of the work is different and more likely to be carried out by less skilled or less educated workers. Moreover, Cowgill et al initially report that there was no evidence that workers chose jobs with non-competes in return for higher pay, but rather that non-competes are simply more prominent in higher paid and more skilled workplaces. It was also reported that many workers did not know about the non-compete until after they had left employment.

(iii) When reviewing the SHRM study, many employers who submitted made it clear that in relation to wages, the view was that home-grown talent was often less expensive than buying-in expertise. The additional cost of

retraining, immersion within the sector and the organisation for an external member of staff was often expensive and far less efficient for the business.

(iv) Balasabramanian's simulation findings drawn from the 2017 survey suggest that it is not clear whether non-compete clauses are likely to reduce wages, as often these restrictions are also impacted by additional restrictive covenants.[32] In his most recent work Starr, while acknowledging that the evidence of the impact of banning non-competes in the US is still unclear, concludes that banning non-competes may increase mobility and average wages, but also notes that is was often driven by State-wide approaches which ban non-competes for workers earning under a set amount.[33]

(b) Implications for training and investment

(i) Staff training is becoming more important in the US and organisations are spending more focus and time in relation to understanding what they need to do to develop and maintain the quality of their workforce. The implications of investment in training relate to the improvement of morale, skills and practices which are of value to the organisation. As reported in many of the SHRM submissions, US employers felt that as they had spent time and money on developing workers, restricting their post-termination movement either by way of a repayment clause or non-competes had to be the most effective way to protect their business.

(ii) Shy and Sheinlock indicate that non-competes provide comfort to US employers to provide expansion opportunities and to improve training through inward investment. Starr and Lavetti also indicate that these offer significant skill development. This has also been seen as a commitment to the workforce to develop and create a loyalty impact, but there is little evidence to support this.

(iii) It is also interesting to note that as He reports, there is also an innovation trade off, e.g. that where companies appear to invest more in research and development, there is a concern that there is insufficient movement of workers, i.e. stagnation of ideas which reduces innovation. Johnson, Lipsitz and Pei also commented on the financial implications of this stagnation and indicated that this may reduce start-ups or innovative industries.

(iv) He also indicated that in States where there were strict non-competes, the value of patents, critical for investment and development, had a reduced and dropping market value.

39.8 Additional factors which impact on inward investment

(a) The rise in TRAP or so-called "functional non-competes" (clauses that, whilst not expressed as a non-compete, sufficiently reduce the workers capacity to move to alternate employment) is at least as harmful as the traditional non-compete. These clauses affect the capacity of the workers to look, seek, take and accept other work as well as restraining them from starting a business.

[32] Balasubramanian et al at 2528
[33] Ibid 13 at 146

(b) Several states are taking active positions in relation TRAP clauses these include California, Colorado, Nevada, Pennsylvania. . Where TRAPs are regulated, there are clear and well defined limitations as to what can be covered in relation to training expenses to the reasonable cost of actually training the employee, which decreases proportionally over two years.

39.9 Further Considerations

The reintroduction of the Workforce Mobility Act to Congress in June 2025 has reignited the development of State level powers of intervention in relation to non-compete and functional non-compete clauses. In seeking to create a Uniform National framework, this would create a federal law, rather than relying on the Agency powers of the FTC, which so significantly failed. The draft provisions look to remove non-compete clauses, subject to a reasonableness test[34]. As yet however there is no timeline for the Act to go to the Senate Committee on Health, Education, Labor, and Pensions (HELP).

39.10 Section 4: The empirical data from countries and jurisdictions other than US and UK that provide evidence of how a ban or restrictions on non-competes could impact inward investment or investment in training and any of the limitations of such overseas experiences for the UK.

39.11 International approaches to non-competes – evidence on inward investment and training

(a) **Overview of the international evidence base**

The available international evidence indicates that bans or restrictions on non-competes primarily affect labour mobility and job matching, rather than providing robust evidence of impacts on inward investment (FDI) or employer investment in training and upskilling. While some studies and policy frameworks suggest theoretical mechanisms through which enforceable non-competes could support firm-specific investment, particularly in knowledge-intensive sectors, the empirical literature outside the US does not provide evidence as to whether or not there is a correlation between the presence of non-competes and investment.

(b) **Austria: salary-threshold ban (empirical mobility evidence; no investment outcomes)**

Austria introduced a ban on non-competes for low-earning workers in 2006. The principal empirical evaluation is a quasi-experimental study by Steven Young's *Noncompete Clauses, Job Mobility, and Job Quality: Evidence from a Low-Earning Noncompete Ban in Austria* (Arizona State University Working Paper, 2024), which analyses the effects of this reform almost two decades later. The study finds that the ban increased job-to-job mobility by approximately 0.27–0.30% per year, equivalent to around a 2% increase relative to the baseline annual mobility rate. The increase is concentrated in within-industry moves and transitions to higher-quality firms, indicating improved job matching rather than increased labour market. The study finds no statistically detectable effect on overall earnings growth. Importantly for Question 0, the analysis does not measure employer investment in training or inward investment, and Young notes

[34] S.2031 Workforce Mobility Act of 2025(119th Congress, 2025–2026)

that the effects are modest and institution-specific, limiting the transferability of such evidence to the UK environment.

(c) **Italy: compensation-based regime (theoretical training mechanism only)**

Italy permits non-competes, but only subject to compensation and proportionality requirements. The Italian evidence most commonly cited in international discussions is a theoretical contribution by Nicola Meccheri, 'A Note on Noncompetes, Bargaining and Training by Firms' (2009) 102(3) *Economics Letters 198*. It is now over 15 years old, and models how non-competes may affect wage bargaining and incentives for general versus firm-specific training. While this work provides conceptual insights into potential training effects, it does not present empirical estimates of employer training investment and does not examine inward investment or firm-location decisions. It therefore does not provide direct evidence on the investment impacts of non-compete bans or restrictions.

(d) **France: regulation through proportionality and compensation (labour-market power, not investment)**

(i) The French labour code allows post-employment non-compete, provided employers pay mandatory compensation and the non-compete is limited in duration and geographical scope, all three of which must be deemed reasonable based on the employer's legitimate business interests. Focusing on the compensation, no value is defined by statute, but amounts are set by case law as "a reasonable amount" or specifically set in collective bargaining agreements negotiated at industry level which apply to all employers and employees operating in the relevant industry irrespective of whether they are unionised (for example, engineering, tech industries have such non-compete agreements). As a result, depending on the circumstances and the industry, the compensation can vary from 25%of average salary to as much as 60%. The non-compete must be agreed in the employment contract, but can be waived unilaterally by the employer provided it is done within a short period following termination, typically 8 to 15 days depending on the industry.

(ii) This complex system generates significant uncertainty for both employers and employees due to the subjectivity of the rules on interpretation of "reasonableness", their cost and the ability for an employer to waive a non-compete clause unilaterally at short notice. The range of circumstances make it difficult to assess the reliability and the effectiveness of the legislation, not least because the civil law litigation system does not require a judge to explain in their decision why the non-compete was reasonable or why the employer acted reasonably.

(iii) Recent empirical evidence from France focuses on labour-market dynamics rather than investment. Tito Boeri, Andrea Garnero and Lorenzo Luisetto in, *Regulating Non-Compete Clauses through Collective Bargaining: Evidence from France* (Centre for Economic Performance Discussion Paper No 2079, 2023) find that tighter regulation of non-competes is associated with reduced employer labour-market power, implying stronger competition for workers. However, the study does not report quantitative effects on employer training investment or inward investment, and does not attempt to isolate the impact of non-compete regulation on firm investment behaviour. While relatively recent, the evidence remains indirect for the purposes of Question 0.

(e) **Germany: mandatory compensation model (policy design evidence; limited causal evaluation)**

Germany allows post-employment non-competes, but only where employers pay mandatory compensation of at least 50% of total remuneration, with a maximum duration of two years. This framework is designed to ensure proportionality and to limit non-compete overuse by requiring employers to internalise the cost of restricting worker mobility. Comparative legal and economic analysis suggests that this model significantly constrains the prevalence and duration of non-competes while maintaining incentives for skills investment as mentioned in Stephen Hendricks, *'Breaking the Bind: Rethinking Non-Compete Agreements in a Federal Framework' (2025) 28 Chapman Law Review 241;* Wolfgang Däubler, Arbeitsrecht (12th edn, 2019). However, despite the longevity and maturity of the German regime, the literature does not provide robust causal estimates linking the compensation requirement to changes in inward investment or employer training expenditure, with the evidence remaining largely descriptive and institutional.

(f) **Australia: proposed non-compete ban below a high-income threshold (prevalence data; no ex post evidence)**

Australia has announced a proposed statutory ban on non-competes for workers earning below the high-income threshold ($175,000 pa / £87,202.50 pa), expected to take effect from 2027 if passed. The proposal is supported by official data showing that non-competes are widespread: approximately 46.9% of businesses report using them, and over 20% of workers - more than three million people - are covered by non-competes as referred to in the Australian government Treasury, *Competition Review Consultation Paper: Restraint and Non-Compete Clauses* (2025) and Le Global, 'Australia: Proposed Ban on Non-Compete Clauses in Employment Contracts' (22 May 2025). The paper indicated that these non-competes are particularly harmful to lower-paid workers with specialised skills, such as hairdressers, childcare workers, dental assistants and construction workers. While this highlights labour mobility concerns, particularly for lower-paid workers with specialised skills, the reform is forward-looking and there is no empirical evidence yet available on its effects on inward investment or employer investment in training and upskilling.

39.12 The historical and evidential gap: implications for policy decisions

(a) While international experience is frequently cited in support of reform, it is important to distinguish policy design precedents from robust, contemporary evidence on investment effects. Much of the non-US empirical literature used in international comparisons evaluates reforms that are now 15–25 years old, or focuses on outcomes other than inward investment or employer training expenditure.

(b) Austria's salary-threshold ban dates to 2006, and although recent analysis identifies modest improvements in labour mobility, the underlying reform occurred almost two decades ago, in a materially different labour market and investment context. The Stephen Young 2024 study does not measure inward investment or employer training, limiting its relevance to current UK policy decisions. Similarly, Italian research by Nicola Meccheri which is often cited in this debate is theoretical and was published in 2009, offering conceptual insights into training incentives but no empirical evidence on investment outcomes.

(c) More recent European evidence, such as studies from France (Tito Boeri, Andrea Garnero and Lorenzo Luisetto in 2023), focuses primarily on labour-market power and wage-setting, rather than on firm investment behaviour, and does not quantify impacts on training or FDI. Germany's compensation-based regime provides a well-established model of conditional enforceability, but despite its longevity there is no modern causal evaluation isolating its effects on inward investment or employer training spend, with the evidence base remaining largely descriptive in Stephen Hendricks *'Breaking the Bind: Rethinking Non-Compete Agreements in a Federal Framework'* (2025) 28 Chapman Law Review 241; Wolfgang Däubler, Arbeitsrecht (12th edn, 2019).

(d) Taken together, this means the international evidence base is both limited in scope and temporally misaligned with current policy challenges, including post-pandemic labour markets, remote and hybrid working, modern skills pipelines, and today's drivers of inward investment. International examples therefore provide illustrative guidance on regulatory approaches and trade-offs, rather than definitive or up-to-date evidence that bans or restrictions on non-competes will materially reduce inward investment or employer investment in training in the UK.

39.13 Limitations of International Evidence for UK Policy

(a) When using international approaches (as in paragraph 26 of the Working Paper) to inform the UK debate, several important limitations apply:

(i) **Different regulatory designs:** The reforms cited (e.g., salary-threshold bans in Austria, compensation models in France, Germany, Italy) are not identical to full bans or any of the other Working Paper proposals, so their outcomes may not easily predict UK effects.

(ii) **Scarce causal evidence:** The international examples are typically descriptive of institutional arrangements; they do not amount to strong causal evidence on inward investment or training spend following reforms.

(iii) **Institutional context matters:** Labour market institutions, enforcement norms and collective bargaining regimes differ across countries, which influence how non-compete clauses are used and how reforms play out.

(iv) **Substitution and enforcement effects:** Firms may shift to other restrictive covenants, confidentiality protections or garden leave provisions, mitigating the impact of any new legal restrictions on non-competes.

(v) **Attribution challenges:** Large economic outcomes like innovation, FDI and training investment are influenced by many factors beyond the law regulating non-competes (tax, skills pipelines, regulatory environment), making clean and clear attribution difficult.

39.14 Overview Conclusion

(a) The economic rationale for asserting that non-competes in employment contracts encourage employers to invest in staff training and upskilling is obvious: by

limiting an employee's mobility, employers can recoup the cost of training through that individual's productivity. In addition, theory suggests that non-competes prevent other firms and companies from "piggy backing" off an employer's training budget once an employee jumps ship. In addition, it would be logical to reach the conclusion that the level of inward investment in the form of FDI is directly correlated with the level of protection offered through non-competes: funding and investment, especially in start-ups, would dwindle if investors felt that a firm/company was not able to adequately protect its legitimate business interests because of the absence or non-enforceability of a non-compete.

(b) In terms of the position in the UK, the existing evidence base neither proves nor disproves the proposition that non-competes in practice do incentivise firms to invest in staff training, reskilling, upskilling, research and development, resulting in greater innovation in the UK. It would be prudent to commission a comprehensive empirical research project examining the link between firm investment in training, reskilling, upskilling, research and development and levels of innovation, etc. and the enforceability of non-competes that are purely dedicated to the UK's specific conditions. In fact, a number of economists in the UK are now looking closely (via their own research studies) on the effects of enforceable and non-enforceable non-competes on firm-specific training and general training in the UK, employer investment in research & development, levels of innovation in the economy, and inward investment, etc.[35]

(c) In the European sphere, not only do many studies date from 15-25 years ago, but their institutional contexts often differ materially from the modern UK labour market (in terms of collective bargaining structures, enforcement norms), making the applicability of any findings limited. The evidence reviewed gives no clear indication whether bans or restrictions on non-competes lead to reductions in inward investment or overall business investment. Where non-compete regimes differ significantly - ranging from salary-threshold bans (Austria) to compensation-based enforceability (Germany, France, Italy) - the available studies do not demonstrate a systematic decline in investment attributable to non-compete reform. Where empirical evidence exists, it does not isolate training effects from wider labour-market dynamics.

(d) The position in the USA is complex and often differentiated by economic, political and State-led perspectives. The reasons for the introduction of the ban on non-competes have been met with cautious optimism.[36] As Starr indicates, there do seem to be links between non-competes and increased mobility and average salaries. There is however further need to research the implications of "bundling", as well as the application of the conditional approach to non-competes, which appears to be finding favour in many US states, not least New York.[37]

(e) The implications for wage suppression in the US are unclear. And it is not evident that the non-compete has a significant impact on this across most levels of the workforce, since there are other factors which play an important part. Furthermore, it is evident that non-competes do not in reality stop worker

[35] See the work of Mike Elsby and Axel Gottfries: Axel Gottfries.
[36] Starr E, 'The Economics of Noncompete Clauses' (2026) 40 Journal of Economic Perspectives 139
[37] **United States Government Accountability Office**, *Noncompete Agreements: Use Is Widespread to Protect Business' Stated Interests, Restricts Job Mobility, and May Affect Wages* **GAO-23-103785** (May 2023) ‹https://www.gao.gov/assets/gao-23-103785.pdf›.

movement, but that there are, again, additional factors such as the bundling of restraining clauses that impact on outcomes. There is also insufficient information which relates to the impact of non-competes in relation to inward investment, and staff training and development.

(f) Since the 2024 and the FTC's failure to obtain a blanket ban, there have been more calls in relation to qualitative as well as quantitative research to explore the impact of non-competes, and to consider the inclusion of TRAP clauses in the research as well as looking at the implications of non-competes for part-time workers, independent contractors and more senior executives and CEOs. Where such research is beginning to be published, it is based on economic as well as public policy considerations and calls into question the need for non-competes. It is also evident that there is no clear evidence in the US which supports the suggestion that non-competes provide for increased mobility, inward investment or indeed increased wages.

QUESTION 0:

40. ANY OBSTACLES TO BRINGING CLAIMS ON RESTRICTIVE COVENANTS, INCLUDING NON-COMPETE CLAUSES, IN THE COURTS

40.1 There are few obstacles to employers bringing claims in reliance on restrictive covenants, including non-competes, in the courts, the two main considerations being:

(a) ability to pay the legal costs;

(b) 9merits of the claim; and

(c) the time spent by management.

We take it from the Working Paper that the government's concern is the behavioural impact of litigation on employee movement, innovation and flexibility in the labour market.

40.2 Employees litigate such cases most often as defendants: the overwhelming majority of covenants claims are brought by employers seeking to enforce covenants, rather than by employees seeking declarations that covenants are unenforceable. We take Question 0 as directed to obstacles or deterrents to employees contesting the validity of covenants.

40.3 It must be remembered that restrictive covenants serve a useful purpose in protecting legitimate interests (notably confidential information, workforce stability, customer connections). Nevertheless, there are good arguments that there are obstacles which deter many employees from contesting the enforceability of restrictive covenants. The legal costs associated with restrictive covenant litigation are significant. The costs burden is often, but not always, more keenly felt by the employee. Nevertheless the legal costs are, and the wider litigation risk is, no doubt, a significant obstacle. Many employees (and small organisations) are not prepared to take the risk of litigation and therefore offer undertakings agreeing to abide by covenants which may or may not have enforceable.

40.4 These issues are not new: they were addressed in ELA's response to the 2020 Consultation. Suggestions for procedural reform were also made in the 2020 Consultation response. This was on the basis that:

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.

40.5 The procedural framework

(a) The correct starting point is to address the practical framework for covenant enforcement. In short:

(i) Claims to enforce, or challenge, restrictive covenants are (overwhelmingly) brought in the High Court.

(ii) The most common scenario for such a claim being brought is that an employer becomes concerned that an employee is breaching, or intending to breach, a restrictive covenant. An employer with the resources and intention to litigate is likely first to demand an undertaking from the employee to cease doing so, failing which it will apply to the High Court for an immediate injunction. Some employers will decide not to seek an injunction and instead bring a damages claim, potentially up to six years later, but that is much less common due to the difficulties in showing loss. It is rare for employees to bring claims for declaratory relief in respect of covenants.

(iii) 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; that damages are not an adequate remedy and, the balance of convenience favours restraining the employee. This is the so called *'American Cyanamid'* test. The court often directs there should then be a 'speedy trial' at which the issues may then be fully determined.

(b) Generally, this process favours the employer, provided that it has the resources to bring a claim (which is by no means invariably the case – we note the position of smaller and start-up businesses). 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 (provided the employee is successful). Sometimes a 'speedy trial' can take place in a short number of weeks, but more often a number of months. The expense of contesting a speedy trial is in any event often prohibitive for individuals (with costs typically running into six figures, for each side), unless backed by their new employer.

(c) In consequence, most cases settle with undertakings before proceedings are issued or once the court grants interim relief. Relatively few cases proceed to the full trial envisaged by this procedure.

(d) Two further points have a significant practical impact on covenants litigation:

(i) In *Lawrence David v Ashton* [1989] ICR 123 the Court of Appeal gave guidance that a defendant to an interim relief application should offer undertakings (i.e. effectively agree the terms of an injunction) pending a 'speedy trial'. This guidance is frequently cited by employers seeking such undertakings, and by judges. It dissuades employees from contesting interim hearings, not least due to the costs risk (see below). However, a problem with it is that any assumption that an employee would duly vindicate their rights at a speedy trial is not backed by the evidence. Very few employees have the resources and determination to do so.

(ii) 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. There are two lines of cases:

(iii) In *Digby v Melford Capital Partners* [2020] EWCA Civ 1647, the Court of Appeal found that costs orders should not be routinely made after the grant or refusal of interim injunctive relief. *Digby* was, however, not a case concerning restrictive covenants.

(iv) In *Visage Limited v Mehan* [2017] EWHC 2734 it was held that the 'modern authorities' favoured an approach whereby the winner of an interim application may commonly be awarded their costs there and then, regardless of what happens at the trial. This was a covenants case.

(e) The most common approach in practice is the former. However, there is no certainty on this and an employee in receipt of a letter of claim threatening an application for injunctive relief and stating the intention to seek a costs order for the substantial costs of that application cannot be advised that there is no costs risk (if they take advice at all). There have been multiple awards of costs against defendants in injunctions. For example, in *Law By Design Ltd v Ali* [2021] EWHC 3010 (QB) the High Court made an award of costs against a defendant who had failed to offer undertakings, on the basis that the *Lawrence David* guidance was 'notorious'.

(f) There is thus powerful incentive for the ex-employee to agree to 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. For example, in *Law by Design* a costs award of £50,000 was made, payable within 28 days – that award is at the lower end of costs awards that can be seen (see below). In a context where the employee may already have had significant challenges financing their own representation such awards can put a swift end to litigation.

(g) 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 (where the hurdle is much lower). That may give a somewhat skewed view of the law in this area.

(h) 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.

(i) On a related note, the authors are aware of some threatened injunction applications which most lawyers would consider to be so tenuous and heavy-handed as to veer into SLAPP territory. In such scenarios, deep-pocketed employers can overawe employees whose non-competes would strike any competent employment lawyer as obviously unenforceable. Nevertheless, ELA would not want to suggest this to be a common problem.

40.6 Claims for declaratory relief by employees

(a) It is open to employees to bring claims seeking a declaration that restrictive covenants are invalid: *Greer v Sketchley Ltd* [1979] IRLR 445, CA. There are no particular obstacles of note to such a claim in law. Procedurally, however, there can be a challenge in securing a speedy trial: whilst an employer's injunction application brings a case urgently before the court, an employee's claim for declaratory relief does not. In principle such a claim is ripe for expedition and can be dealt with in a matter of months if issued in the High Court. The main obstacles in bringing such a claim are the costs of doing so coupled with the adverse costs risk. The dynamics referred to above apply, albeit that:

(i) There is a greater chance of the court controlling costs via costs budgeting;

(ii) Expenditure is, at least initially, slower to accrue;

(iii) Expenditure can, with party cooperation, be lower than in an injunctive scenario.

(b) It bears emphasis that such claims are rarely brought. That in itself is strongly suggestive that they are not perceived by employees as attractive.

QUESTION 0:

41. WHETHER THESE OBSTACLES ARE RELATED TO CONCERNS ABOUT THE COSTS OF BRINGING A CLAIM, AND WHETHER THERE ARE BARRIERS TO

PROSPECTIVE CLAIMANTS ACCESSING MECHANISMS TO REDUCE OR PREDICT COSTS (FOR EXAMPLE, FRC, LEI, CFA OR DBA)

41.1 Most of the funding models mentioned in Question 0 are regrettably not available or practically useful in the scenario where an employee wishes to challenge the validity of a restrictive covenant:

(a) Applications for urgent interim injunctive relief occur pre-allocation at a time when assessment of the value of the claim may be very difficult and dependent on the outcome of an application for interim relief. Claims tend to be allocated to the multi-track, meaning that the Fixed Recoverable Costs (**FRC**) model has no application.

(b) In law there is no claim in damages against an employer who has an unenforceable restrictive covenant in their contract. As such, a Damages Based Agreement (**DBA**) would be hopeless because there are no damages to justify the very significant outlay in litigating a covenants dispute.

(c) In our experience there is no appetite from funders for entering Conditional Fee Agreements (**CFAs**) in support of actions seeking declaratory relief that a covenant is unenforceable. It is hard to see how there would be a practical upside for a funder in such an action.

(d) Legal Expenses Insurance (**LEI**) can respond to claims brought by employers against employees. However, the practical utility of such policies is low in this field. First, legal expenses policies require an assessment of prospects of success before funding will be secured. That can be time-consuming and it is not often available at short notice. Injunction applications are often heard within a week, long before insurers have reacted. Second, the indemnity limit on common LEI policies is typically far lower than the costs of litigating a restrictive covenant dispute. Third, LEI policies are most commonly taken out as an add on to household insurance. Many employees are not householders. While the socio-economic profile of LEI policy holders is not within our knowledge, any view that LEI would be a valid route to a general solution in this field would likely benefit from (among other things) an impact assessment.

41.2 As such, it is our view that none of the funding routes referenced in Question 0 are of real assistance. Insofar as there is a concern in this field, the central issue is not one of funding but the relative ease with which interim injunctions may be obtained in the civil courts, and the consequent cost penalties for employees once they are.

QUESTION 0:

42. ANY SUGGESTIONS FOR WHAT THE MOST APPROPRIATE RESPONSE WOULD BE, AND HOW IT MIGHT BE IMPLEMENTED

ELA considers that two options for reform are worth exploring further:

(a) the rules concerning litigation costs; and

(b) the introduction of hardship considerations at relief stage.

42.1 Rules concerning litigation costs

(a) The costs faced by employees in actual or putative covenants litigation are undeniably extremely significant having regard to those employees' resources in the normal run of cases. It is the case that some covenants cases are, in substance, business to business disputes between corporate parties amply resourced to fight them. The concern about the present situation relates to the former category of cases. We consider there to be strong arguments for reform but recognise that this will entail striking a series of balances.

(b) One possible approach might be to limit the costs recoverable on interim applications (save in the category of cases referred to below) and add express provisions to the costs rules to govern the broader position including at trial. We note that this is not in form the same as the use of FRC: covenants cases are not suitable for the intermediate track. Query if something similar to FRC i.e. a banding of fixed recoverable costs for interim injunction applications based on non-competes might be adopted. These would be set at a reasonable level which would strike a balance between permitting businesses including SMEs to recover costs at a sensible rate whilst not hanging over employees a Sword of Damocles of six figure costs schedules. Such costs cap could be reviewed annually. That said, there are some covenant disputes which are, in substance, commercial litigation between well-resourced businesses and as such where there are good arguments for the ordinary rules for commercial litigation to apply. There may be a presumption that a fixed rate might apply but the court would have to retain discretion, not least because an ex-employee whose actions in seeking to evade the application of the covenant materially raise the employer's costs should not be able to shelter behind a cap. Otherwise the costs disincentive starts to work in reverse.

(c) Query if also there might be a provision that in exercising its discretion on costs in cases involving non-competes the court takes into account the hardship any order may cause for the paying party, taking into account any support from their potential new employer. Again, this might mitigate the possibility that the threat of an unpayable costs order in effect enforces the non-compete.

42.2 Conclusion

Should government be minded to review the approach to either costs recovery or the hurdle that the employer needs to meet to secure an interim injunction for policy reasons, it could quickly effect this through amendment of the Civil Procedure Rules 1998 setting out statements of principle which could be given effect by the courts in subsequent case law. The above proposals would meet the government's policy objectives in a balanced manner while protecting the assets vital to the success of many innovative and start-up businesses. These proposals also have the advantage of being readily adjustable by the government if they do not have the desired effect.

SMALL COMPANY TEST EXAMPLES AND ANALYSIS

Legislation and practical use	Test	Comment on rationale	How is the test applied in practice?
Private sector: Equality Act 2010 (Gender Pay Gap Information) Regulations 2017 (Private Sector Regulations), SI 2017/172 **Public sector:** Equality Act 2010 (Specific Duties and Public Authorities) Regulations 2017 (Public Sector Regulations), SI 2017/353 ***Practical use: Gender pay gap reporting***	Regulations (should they apply) require companies to publicly publish measures outlines differences in pay between male and female employees. Headcount is the number of individual employees for these purposes. Requirements only apply to employees with headcount of 250 or more employees on snapshot date (5 April for private sector; 31 March for public sector).	Excludes small employers to reduce administrative burden. The regime targets larger employers where reporting is expected to yield more meaningful and comparable data. The government was concerned that small and medium sized employers may find it difficult to comply owing to "system constraints and data protection".	Headcount threshold is tested on a single annual 'snapshot date' (5 April for private sector; 31 March for public sector). Each legal entity reports separately even if in a corporate group. This means each legal entity in a group which has at least 250 employees must calculate and publish separate reports. The test covers employees (and other certain types of workers) ordinarily working in Great Britain, so non-UK employees are out of scope.
Income Tax (Earnings and Pensions) Act 2003, Pt 2, Ch 10 (Off-Payroll Working) (ITEPA 2003) The Social Security Contributions (Intermediaries) Regulations 2000 (SI 2000/727) (Regulations) ***Practical use: Off-Payroll (IR35) Rules g***	Definition of 'small' company is taken from the small companies regime set out in s382 CA 2006. Small private companies exemption Companies to satisfy at least two	Minimises administrative burdens for small engagers. (*Set out in budget documentation from October 2018*)	For companies, the 'small companies' test is applied to the most recent financial year considered 'relevant' to the tax year in question. A financial year is

Legislation and practical use	Test	Comment on rationale	How is the test applied in practice?
	of the following three requirements to be 'small': (a) annual turnover is less than £10.2m (b) balance sheet total is not more than £5.1m, or (c) number of employees is not more than 50 For accounting periods beginning on or after 1 April 2025, thresholds (a) and (b) above increased to: (a) annual turnover is less than £15m (b) balance sheet total not more than £7.5m, or (c) number of employees is not more than 50 <u>Unincorporated clients</u> Unincorporated clients only need to meet a simplified turnover test which is that their annual turnover is less than £10.2m (or £15m as above). <u>Group structure</u> Where a business is in a group structure, the small business test will need to be		"relevant" if its accounts filing period ends before the start of that tax year. In practice, this means that once a company meets the size criteria, it must comply with the off-payroll IR35 rules starting from the 6 April following its accounts filing deadline. If a company is small but part of a corporate group, the group's parent company must also qualify as small for the end client to fall outside the off-payroll IR35 rules. This is because the size of the group is determined by the size of its parent company. When all or part of a small company is acquired, that company may no longer qualify as small for off-payroll IR35 purposes. Similarly for international

Legislation and practical use	Test	Comment on rationale	How is the test applied in practice?
	applied to the group as a whole.		groups, the entire group needs to be considered in this determination.
Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) Micro-business consultation rule (Reg 13A) ***Practical use: TUPE consultation***	Micro-businesses can choose to consult with individuals directly where there is neither a recognised independent union nor existing appropriate representatives. Micro-businesses consist of: • Employers with fewer than 50 employees. • Employers of any size, involved in the transfer of fewer than 10 employees.	Introduces flexibility and reduces unnecessary administrative and costs burden on businesses. Makes regulations easier for businesses to navigate. (*Set out in Impact Assessment by Department for Business and Trade*) Micro-businesses can also lack existing representatives and face disproportionate costs.	The headcount test is applied to the transferring employer at the time of the transfer/when consultation obligations arise. This means the assessment is made only in relation to the transferring employer's total employees.
Management of Health and Safety at Work Regulations 1999 (MHSWR) Size threshold is set out in s3(6) of MHSWR. ***Practical use: Risk assessment and H&S management documentation***	Employers with fewer than 5 employees are not required to keep a written record of the risk assessment (though assessment is still required).	Keeps documentation requirements proportionate by scaling with size/risk to avoid disproportionate record-keeping burdens for very small employers.	The threshold of 'fewer than 5 employees' relates to the employer's headcount on a practical, current basis. There is no group consolidation so only those employed by the employer in Great Britain are counted. Where international

Legislation and practical use	Test	Comment on rationale	How is the test applied in practice?
			staff are employed by non-UK entities, they are not counted as part of the UK employer for these purposes.
Companies Act 2006 The Companies (Miscellaneous Reporting) Regulations 2018 ***Practical use: Executive pay ratio disclosures***	Quoted companies with an average of 250 or more UK employees in the relevant financial year must publish CEO pay ratios.	The regulations were introduced to target the UK's largest companies, thus limiting disclosure obligation to larger employers to ensure meaningful ratios and avoid undue cost for small companies.	Applies to quoted companies with an average of 250 or more UK employees during the relevant financial year. This is an annual average headcount. Calculation is done on a group-wide basis by reference to UK employees only (so non-UK employees are not relevant).

Legislation and practical use	Test	Comment on rationale	How is the test applied in practice?
Social Security Contributions and Benefits Act 1992 Statutory Maternity Pay (General) Regulations ***Practical use: Reimbursement of SMP /SPP / ShPP***	"Small employer" relief applies where previous tax year's Class 1 NICs do not exceed £45,000. The percentage rate of compensatory amount increased to 8.5% from 6 April 2025. Prior to this, it was 3%. Small employers can recover 108.5% of statutory payments (Small Employers' Relief). Otherwise, the standard recovery rate (typically 92%) applies.	Compensates small employers for administrative costs associated with processing these payments, recognising that they often have tighter resources. In respect of maternity pay, this relief is specifically said to support smaller employers with the associated costs of having an employee on maternity leave. (*Set out in Explanatory Memorandum to Statutory Maternity Pay Regs 2025*)	Calculated against total Class 1 NICs in the previous tax year. Relief is determined per PAYE scheme or per employer basis as opposed to on a group-wide basis. The analysis is only applicable to the UK.

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ELA Contact

James Jeynes
Chief Operating Officer
Employment Lawyers Association

Email: jamesj@elaweb.org.uk
Tel: 020 4591 5209