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### **Re: Working paper on options for reform of non-compete clauses in employment contracts**

UK Private Capital is the association of the UK private capital industry. We represent 600 firms including the wider ecosystem of professional advisers and investors. Private capital consists of private equity and venture capital which make long-term investments to grow British businesses and build a better economy. Private credit and venture debt provide active and engaged debt finance to businesses.

The private capital industry backs 13,000 UK businesses, nine in 10 of which are small or medium-sized enterprises. Businesses backed by the industry employ 2.5 million people across the UK and contribute 7% to GDP. In 2024, £29.4bn was invested by private capital into UK businesses in sectors across the UK economy, ranging from consumer products to emerging technology. This increased investment has fuelled the growth of businesses across the UK, with six in ten (58%) of the businesses backed in 2024, located outside of the capital. These investments are long term, with an average investment period of six years, in contrast to less than a year in public markets.

UK-based private capital specialists have raised £190bn of funds, known as dry powder, which is expected to be invested over the next three to five years. We support the ambitions of the Government to reduce barriers for the businesses, entrepreneurs and investors who are important to boosting economic growth and agree that start-ups, scale-ups and other small businesses drive the competition and innovation across the UK. We are a vital part of achieving that ambition. The industry invests for a better future by backing some of the UK's best loved businesses, developing the companies of the future and delivering solutions to global problems.

UK Private Capital welcomes the opportunity to respond to this consultation.

#### **Importance of non-competes in private capital**

Non-compete clauses are commonly used in our industry (venture capital, growth equity, private equity funds and their portfolio companies), in particular for the senior management team and other senior or business critical personnel in private capital firms. In portfolio companies/startups, founders/entrepreneurs, senior managers, senior sales staff, others with equity stakes and those with specific knowledge or expertise typically have non-compete provisions in their employment contracts.

As noted in our response to the 2021 consultation on non-compete provisions, the use of non-competes can be very important for providing business protection, retaining the value of the business, and preventing the loss of crucial intangible assets such as detailed knowledge and expertise, through employees moving to competitors. This can threaten the existence of a business and is seen by investors as a meaningful and significant risk.

Overall, the use of non-competes give our members the confidence to continue to invest in British business, because non-compete clauses are an important element of value protection when making investments and management teams are typically a material part of the investment thesis.

### **Variation in use of non-competes: venture capital**

In the UK venture capital market, non-competes play a focused but important role in safeguarding early-stage investment. They are most commonly applied to founders and key executives whose knowledge, relationships, and technical expertise are central to the value of the business.

For investors backing companies with limited tangible assets and high execution risk, non-competes provide assurance that critical know-how cannot immediately be used to establish a competing venture. These provisions are typically negotiated as part of a wider suite of protections, including confidentiality and IP assignment clauses, and non-solicitation and non-dealing restrictions, and are generally proportionate in scope and duration. Their availability contributes to the UK's attractiveness as a destination for international capital. Recognising this, a non-compete clause is included in the Model Shareholders' Agreement – a part of the UK Private Capital VC Model Documents, which are frequently used for investments in UK companies at Series A (and increasingly in respect of larger seed rounds) as well as subsequent rounds.

Importantly, non-competes are not used as blanket restrictions across the workforce; their application is targeted, commercially driven, and aligned with the legitimate need to protect early-stage innovation and investor confidence. Without them, there is a risk that key individuals may take customer insights, product knowledge, or technical expertise directly to a rival company. For example, many venture capital members invest in the deep tech and life sciences sectors where they have invested in a person's innovative idea as they are a leader in the subject matter. If investors cannot be confident that their investment in these individuals and their ideas cannot be adequately protected through non-competes, this may deter investment in these areas in the UK.

We note that comparisons are often drawn to the US, including in the working paper. It is important to highlight that in the US the use of non-competes varies. In California the use of employee non-competes is prohibited as against public policy. But instead, investors often rely on equity packages subject to vesting provisions to incentivise employees (in addition to, for example, confidential information and intellectual property protections). Non-competes are more readily enforceable in certain jurisdictions predominantly on the East Coast of the U.S. (e.g., New York) and are still frequently used in traditional industries and finance.

### **Conclusion**

In considering the role of non-compete provisions, it is important to assess them within the wider employment and investment environment. In the US, use of non-competes is widespread, but enforceability varies significantly by state and is becoming increasingly restricted. This sits within a labour market framework that has varying differences in approach to the UK.

By contrast, several European jurisdictions adopt models that require employers to compensate employees for entering into non-competes. In Germany, non-competes are only enforceable if employers pay compensation – typically around 50% of salary – and in France, compensation is

also required, with courts frequently striking down broad clauses despite reasonable time limits. For many international investors, these regimes introduce significant cost and unpredictability.

The UK currently strikes a sensible middle ground on the use of non-competes, permitting their use in a reasonable and proportionate manner. The existing regime balances limited non-compete provisions with strong statutory employment protections, including notice periods and unfair dismissal rights.

We do not think that the current regime is hindering growth and therefore there is no clear policy rationale for disrupting the equilibrium. Any of the suggested reforms would create uncertainty, undermine start-ups, and erode the UK's competitive position. Statutory limits – whether based on duration, employer size, or salary thresholds – are blunt tools that fail to reflect the diverse risks and needs of different businesses and roles. They could also disadvantage certain employers, generate legal ambiguity, and incentivise artificial workforce structuring.

While we recognise the policy interest in supporting labour market mobility and growth in the UK economy, we would urge caution before introducing change.

This submission has been prepared by the UK Private Capital's Legal Committee, which represents the interests of UK Private Capital members in legal matters relevant to the private equity, private credit and venture capital industry. We have limited our responses (below) to those questions that we think are of particular relevance to our members.

Please do not hesitate to get in touch if you have any questions on any of the areas covered above, or if you would like to discuss it in more detail (please contact Ciaran Harris [charris@ukprivatecapital.co.uk](mailto:charris@ukprivatecapital.co.uk) / Tom Taylor [ttaylor@ukprivatecapital.co.uk](mailto:ttaylor@ukprivatecapital.co.uk)).

Yours sincerely,



Clare Gaskell

Chair, UK Private Capital Legal Committee

## Discussion questions

We have provided our members' views on the discussion questions, as set out on the consultation website page and Qualtrics survey.

### 1. Introducing restrictions on non-compete clauses

UK Private Capital's starting premise is that it is not in favour of changing the current common law regulation of non-compete covenants. The courts have recognised that non-compete covenants are a legitimate tool, where the employer can demonstrate they are reasonable, to restrict the ex-employee's opportunity to misuse and take unfair/accelerated advantage of the knowledge and confidential information obtained by virtue of their role.

We do not think that restrictions should be put on non-complete clauses. We view non-compete clauses as important business protection for both our members, the portfolio companies our members invest in and retained employees working in such businesses.

Such clauses protect the value of the business and prevent the loss of intangible assets through employees moving to competitors, or as part of a co-ordinated team move, which can threaten the existence of a business. Non-compete clauses, together with other restrictive covenants, are important for our members' own business, because investors are very focussed on key personnel in the fund manager team. Equally, they give our members the confidence to continue to invest in British business, because non-compete clauses are an important element of value protection when making investments and management teams are typically a material part of the investment thesis.

For our members and their investors and employees, we do not see any benefits, rather, overall, a material detriment and the risk of material damage to the UK market if there are excessive restrictions on non-compete clauses. They would likely discourage investors from investing and start-ups from setting up business in the UK.

### 2. A statutory limit on the length of non-compete clauses

We do not think that a statutory limit on the length of a non-compete clause is necessary or appropriate. The period over which a former employer could potentially be damaged through, for example, the misuse of confidential information or customer connections will vary according to the nature of the role, seniority of the individual and nature of their engagement. Therefore, a uniform maximum period of restriction is a blunt tool that could lead to certain employers being disadvantaged.

In particular, partners and very senior employees who are strategically fundamental to the business could be in a position to destroy its prospects on exit. Limited size or new private capital firms may not have the resource on hand to survive unfair competition, particularly in a team move situation. We think the courts are best placed to review the circumstances, protectable interest, and facts in issue at the relevant time (enforcement).

We also envisage that a maximum period could become the default period for all contracts and individuals might find themselves subjected to longer non-competes than would otherwise have been the case for their particular circumstances. At present when assessing the reasonableness (or otherwise) of a non-compete covenant the court considers the useful 'shelf life' of the confidential information or other legitimate interest (e.g. customer connections) that the employer is seeking to protect and whether the duration of the non-compete covenant is excessive in that context.

As it is the Government's stated intention that the existing common law principles would continue to apply to non-compete clauses shorter than the statutory limit, in practice the uncertainty around litigation risk would not be removed; i.e. a non-compete clause would still be susceptible to challenge as an unreasonable and unenforceable restraint of trade on the facts. As the Working Paper acknowledges, if a relatively short maximum threshold is established in practice a departing employee may be reluctant to litigate and may opt to refrain from working for a competitor for the statutory duration.

### 3. A statutory limit that differed according to company size

As stated above given that the period over which a former employer could potentially be damaged through the misuse of confidential information/trade secrets (etc) will vary according to the nature of the role, seniority of the individual and nature of their engagement, a uniform maximum period of restriction according to company size would be a blunt tool that could lead to certain employers being disadvantaged. Limiting non-compete length by reference to company size risks being misaligned with the actual degrees of risk, potentially over-protecting some employers and under-protecting others.

Accordingly, we do not think that this type of limit should be included. A size-defined limit fails to acknowledge that it could be just as damaging to a large company for a senior employee in possession of trade secrets and sensitive confidential information to go to a competitor as it could for a smaller company. This type of limit could also hamper growth, as companies approaching the cliff edge stop planned investment in jobs, so they do not reach the size threshold.

Differentiating statutory limits according to company size could also give rise to complexity and additional litigation risk to ascertain what size threshold applies and how employee numbers are calculated. In addition, the Government is understood to be consulting in due course on implementing a single 'employment' status that would potentially include those currently classified as workers. Is it intended that individuals currently classified as workers should count towards the number threshold? LLP partners in some cases, depending on the factual matrix, are regarded as 'workers' for statutory employment law purposes, but not employees.

A further potential area of uncertainty is at what point in time the statutory validity of a non-compete should be assessed. Will a statutorily valid (disregarding any common law enforceability) non-compete clause become invalid (or vice versa) at a later point in time as a consequence of the employing entity moving across the statutory threshold due to business growth, restructuring, insolvency, or acquisition? Similar considerations arise where an individual transfers under TUPE 2006 and becomes employed by an entity in a different threshold. At common law, the validity of a covenant is assessed at the time it is entered into. If the same approach is adopted in relation to statutory validity an employing entity could end up with a two-tier workforce if it moves between the thresholds.

A size-based test could introduce an incentive for employers to structure their workforce artificially (e.g. outsourcing, engagement on a contractor/worker basis) and to use corporate structures strategically (e.g. operating via multiple small subsidiaries). Restrictions on the use of/duration of non-competes based on company headcount gives rise to the risk of being 'gamed'.

If a longer statutory period is established for smaller companies it could act as a disincentive for individuals to start employment with startups and so on with the consequential risk of stifling innovation and labour mobility, contrary to the Working Paper's policy aims.

For all of these reasons, we do not consider a variable statutory limit based on employee headcount should be introduced. We consider that it would be likely to increase, rather than decrease, uncertainty over enforceability. Such lack of certainty could be damaging for all parties involved and consequentially on the marketplace for investors. Further, establishing a statutory limit according to company size would not remove the litigation uncertainty around the enforceability of a covenant as a matter of common law.

4. 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

As noted in our response to question 3, we do not think that these limits should be imposed.

5. A ban on non-compete clauses in contracts of employment

Our members regard non-compete clauses as an important business protection for their own businesses and also for the portfolio companies in which they invest. When investments in British businesses are being considered, account is typically taken of whether reasonable and enforceable non-compete provisions are in place for the key employees of a company. If they are not already in force, a change to the relevant employment agreements is typically sought.

While it is relatively straightforward to protect the tangible assets of a business from theft or misuse, it is much more difficult and complex to protect intangible assets. Yet these intangible assets – including confidential information, workforce stability, customer/client relationships, know-how, relationships with suppliers and intermediaries and goodwill in the business - are crucial for business success. It is important to appreciate that these intangible assets represent significant embedded cost for business, who may have invested large sums in research and development, market analysis and the time of well-paid employees to develop and maintain crucial business relationships as part of their role.

The loss of these intangible assets through employees moving to competitors or, worse, as part of a co-ordinated team move, can be seriously damaging or even life-threatening to a business. In certain sectors, particularly where knowledge and/or relationships are key business drivers (which includes our members' own business), a team move, individual with particular technical expertise, or senior departure can effectively transfer entire businesses or business units to third parties.

As such, non-compete clauses are an important protection for the investment made by an employer and its stakeholders. Intellectual property law and confidentiality clauses would not alone provide adequate protection to all businesses in the absence of a non-compete clause due to the serious difficulties in: (i) identifying precisely what is or is not confidential information; (ii) detecting or obtaining evidence of misuse of intellectual property and/or confidential information and customer connections; (iii) policing enforcement of non-solicit of

customers/clients/key employee and confidentiality covenants. These difficulties have been explicitly accepted by the courts as a legitimate rationale for the use of a non-compete clause.

One of the stated aims of potentially banning the use of non-compete clauses is that it would have a positive effect on competition and innovation by making it easier for individuals to start new businesses and enabling the diffusion of skills and ideas between companies and regions. We think banning non-competes could produce the opposite effect. Many innovative start-up businesses are in the technology and services sectors where their main assets are intangible. If businesses and investors cannot be confident that these intangible assets can be adequately protected through non-compete covenants (given the very real evidential difficulties in demonstrating misuse of confidential information which has been explicitly accepted by the courts on numerous occasions as a legitimate rationale for the use of a non-compete clause), this may deter investment or prevent start-up businesses from having the stability they need to grow.

In addition, start-up businesses are also more vulnerable to damage caused by departing employees than bigger and better resourced companies.

We think banning non-competes could have an adverse impact on innovation and competition by making it easier for individuals to exploit confidential information to start new businesses. In particular it could lead to a loss of fundamental protection for new businesses and investors and reduce the attractiveness of the market we operate in, to investors.

We think a ban on non-compete clauses could have a materially detrimental effect on our members' ability to attract investors and protect their business interests in a way that enables them to have a sustainable business with growth and longevity. The lifecycle of our members' investments often taking portfolio companies for example to a liquidity event, must be protected to be viable and achieve business turnaround. This takes time and the protection for the investment is a fundamental factor which investors consider when deciding to invest in a member's fund or not. We think this could damage the UK market as an attractive one for the business of our members. Given the international market for private capital, this could result in a greater focus in overseas investment to the detriment of the UK.

#### 6. A ban on non-compete clauses in contracts of employment below a salary threshold

As with the other options set out on the consultation, we think that the concept of linking non-competes to a salary threshold would not work in practice. Salary is not necessarily a reliable 'proxy' for an employee's ability to harm the employer. Junior and/or less well-paid employees may be privy to extremely sensitive commercial information that would be very valuable in the hands of competitors. We are concerned that this approach could create a labour market where freedom of movement depends more on pay than on the nature of the role or the sensitivity of the work.

Banning non-competes in contracts of employment below a salary threshold may give rise to modified behaviours in the workplace with information flow being much more restricted with attendant consequences on individual development and the loss of team culture and innovation.

Complexity may also arise in relation to the salary calculation. For example, it is unclear what would constitute pay for these purposes: would conditional bonuses and unvested share awards count? If variable remuneration is clawed back or subject to malus would those amounts be discounted and, if so, at what point in time is the legality of the non-compete then assessed? If the employee is paid in another currency, how should the sterling conversion be calculated?

As acknowledged in the Working Paper, a further potential issue is that if the salary threshold is annually updated it could lead to cases where an employee does not receive a pay rise, and an increase in the threshold means that a previously enforceable non-compete clause becomes unenforceable. Employers might then choose in future to factor non-compete clauses into their decision making around pay to a greater extent, particularly where the pay is close to the threshold.

Therefore, our view is that including arbitrary limits on the enforceability of non-competes based on an employee's pay would be a blunt tool. Existing legal guidance which has evolved over the years allows employers to apply tests which are adaptable to take account of the employment employee's role and all the circumstances.

UK Private Capital 's position is that there is no case for reforming the non-compete regime however if the Government intends to proceed with a form of restriction on the use of non-compete clauses, this option would in UK Private Capital's view have the least adverse impact.

7. How the government could ensure that a ban below a salary threshold also supports higher-paid innovators, experts and entrepreneurs in the UK

We do not have any views for this question.

8. A combination of a ban below a salary threshold and a statutory limit for those who earn above the threshold

See comments above in relation to complexity around what constitutes salary for these purposes and issues around time of assessment.

As stated above, given that the period over which a former employer could potentially be damaged through the misuse of confidential information (etc) will vary according to the nature of the role, seniority of the individual and nature of their engagement, a uniform maximum period of restriction is a blunt tool that could lead to certain employers being disadvantaged.

9. Whether restrictions should be limited to non-compete clauses only or should also apply to other restrictive covenants

Typically in our experience where a non-compete covenant is used in an employment contract by our members (venture capital, growth equity, private equity funds and their portfolio companies), it sits alongside a suite of other restrictive covenants (such as non-solicitation of clients, non-deal with clients, non-solicitation of key employees, non-interfere with supply chain, anti-team move provisions). These do not generally prevent an individual from joining or starting a business within their field of expertise and competing. In the case of an anti-team move covenant, the employee still retains the option of joining an alternative competitor or commencing business in competition without the particular advantage of joining with a colleague and thereby further damaging the outgoing employer's business and leveraging a relationship gained through the former employment.

Such "other" covenants are intended to protect legitimate interests that have been recognised by the courts (key talent, client relationships, supply networks etc) that have been the subject of significant investment by the employer, by restricting the ex-employee's opportunity to misuse and take unfair/accelerated advantage of the knowledge and relationships obtained by virtue of their role.

They are not arbitrarily included in contracts but carefully considered and drafted to apply only where the protectable interest is sufficient (for example customers or employees with whom the employee has had material dealings in a restricted period and where such employees are senior or have access to customer connections, trade secrets and/or confidential information).

As stated above, if businesses and investors cannot be confident that these intangible assets can be adequately protected through appropriate restrictive covenants, this may deter investment or prevent start-up businesses from having the stability they need to grow.

We do not agree that there is an employee, employer or market driven case for introducing restrictions on the use of 'other' restrictive covenants.

10. 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

We suspect that employers will be more inclined to impose and enforce a longer notice period or period of garden leave to provide a degree of protection that would otherwise have been afforded by a non-compete covenant. This of course gives rise to additional expense for the employer and a loss of productivity and in practice create a greater restriction in the market in an arbitrary way. We do not see this as in the interests of either employers or employees within the market in which our members (venture capital, growth equity, private equity funds and their portfolio companies) operate.

See response above in relation to the typical use of "other" restrictive covenants. We do not think that a ban or statutory restriction on the use of non-compete clauses would lead to a greater use of such 'other' restrictive covenants (given that such restrictions are, generally speaking, already included in addition to (not instead of) non-compete restrictions). We do not think it is appropriate to limit the use of such covenants, which protect recognised legitimate interests and will only be enforceable to the extent they are reasonable. These "other" covenants simply limit the way in which competition occurs to ensure it is not leveraged by an unfair advantage which is damaging to the former employer. The former employee is still able to earn a living in their field without exploiting the resources or customer connections of the former employer.

11. Whether restrictions on non-compete clauses should be limited to employment contracts or whether the government should consider applying them to wider workplace contracts

What is meant by wider workplace contracts is not fully articulated. In our view it would not be appropriate to fetter the use of non-compete provisions in other contexts such as LLP agreements and other partnership agreements, sale and purchase agreements; incentive arrangements or variable remuneration arrangements.

Restrictions contained in separate reward and commercial investment opportunities include their own payment and return factored in as part of participation, often applicable for an extended period post termination of employment or with timing related to the investment. It is our view that it would not be appropriate to seek to introduce legislative fetters on such provisions (e.g. bad leaver forfeiture provisions in relation to other investment agreements or LLP agreements).

In our view, the freedom to contract when negotiating a termination settlement agreement should be preserved. At that point the parties are able to negotiate compensation related to

the settlement and any post termination restriction variations or new obligations, having received advice from an employment lawyer on their rights in order to be enforceable. Indeed, the courts have recognised that the scope and duration of covenants contained in settlement agreements may be wider than those contained in employment contracts. However, the UK Private Capital view is that if restrictions on the use of non-competes in employment contracts are introduced there could be a greater demand to include non-compete covenants as part of settlement agreement arrangements, if the statutory restrictions do not apply to settlement agreements. Our view is that there should be no statutory restrictions on the use of non-competes in employment contracts; it is more desirable for the parties to agree non-competes on commencement of employment so that all parties and investors have a degree of commercial certainty up front and expectation relating to the protection of the employer's interests and business and the employee's ability to move within their chosen field.

Contracts for services remain subject to common law protections and are entered into at arms' length.

12. Any evidence demonstrating that a ban, or restrictions, on non-compete clauses could impact inward investment or investment in training and upskilling

We do not currently have evidence to share on this topic.

13. Any obstacles to bringing claims on restrictive covenants, including non-compete clauses, in the courts

We do not consider the current system interferes with the enforceability of non-compete clauses. Moreover, it is not clear that any of the proposals would materially impact any such obstacles that may exist (short of a full ban on non-competes, which we oppose for the reasons set out above). If non-competes were subject to a statutory limit, there is still significant scope for litigation. Indeed, our view is that some of the proposals may serve to increase the complexity of any such litigation as set out above.

14. 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)

We do not consider the current system interferes with the enforceability of non-compete clauses.

15. Any suggestions for what the most appropriate response would be, and how it might be implemented

We do not consider the current system interferes with the enforceability of non-compete clauses.