The Bar Council

Bar Council response to the Department for Business, Energy & Industrial Strategy consultation on measures to reform post-termination non-compete clauses in contracts of employment

1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) to the Department for Business, Energy & Industrial Strategy (BEIS) consultation on 'Measures to reform post-termination non-compete clauses in contracts of employment'[1].

2. The Bar Council represents approximately 17,000 barristers in England and Wales. It promotes the Bar's high-quality specialist advocacy and advisory services; fair access to justice for all; the highest standards of ethics, equality and diversity across the profession; and the development of business opportunities for barristers at home and abroad.

3. A strong and independent Bar exists to serve the public and is crucial to the administration of justice. As specialist, independent advocates, barristers enable people to uphold their legal rights and duties, often acting on behalf of the most vulnerable members of society. The Bar makes a vital contribution to the efficient operation of criminal and civil courts. It provides a pool of talented men and women from increasingly diverse backgrounds from which a significant proportion of the judiciary is drawn, on whose independence the Rule of Law and our democratic way of life depend. The Bar Council is the Approved Regulator for the Bar of England and Wales. It discharges its regulatory functions through the independent Bar Standards Board (BSB).

4. The Bar Council welcomes the opportunity to respond to this consultation and any future consultation arising.

[1] https://www.gov.uk/government/consultations/measures-to-reform-post-termination-non-compete-clauses-in-contracts-of-employment

Responses to Consultation Questions

Question 1: do you think the Government should only consider requiring compensation for non-compete clauses or do you think the Government should consider requiring compensation where other restrictive covenants are used? Please indicate below.

5. The Bar Council does not support consideration by the Government of a proposal to require compensation for non-compete clauses or indeed any other form of restrictive covenant.

6. Plainly, post-termination restrictions (**'PTRs'**) in contracts of employment can take a number of forms, including non-solicitation, non-dealing and non-disclosure clauses. However, these are only enforceable if they do not offend against the common law doctrine of restraint of trade. They must be necessary and proportionate. Non-compete clauses of more than 12 months' duration are rarely enforced. There is a legitimate place for PTRs in certain industries and types of employment of which there is a wide spectrum. In particular, non-compete clauses are usually deployed only where other forms of restriction cannot be policed due to the nature of the industry, work, client connection or confidential information. Employers can and do have legitimate business interests to protect and requiring them to pay compensation for such protection may also have a chilling effect on recruitment and business in the UK, particularly in industries in which trade secrets or highly confidential information is likely to have to be shared with the employee in question. This might, by way of a single example, affect the bio-tech industry. There are many others.

7. If, however, the Government is minded to explore the proposal of mandatory compensation further, this should be restricted to non-compete clauses enduring beyond 12 months which are often regarded as the most draconian in any suite of PTRs. The Call for Evidence in 2016 does not appear to have prompted the need for any urgent steps to be taken, and the Bar Council is not aware of any obvious difficulties reported by its members as to the exploitative or improper use of PTRs in contracts of employment of a widespread nature. The Government's response to the Taylor Review, dated 7 February 2018, stated there was no case for this reform of non-compete clauses. The Bar Council is unaware of any change of circumstances between 2018 and the present date affecting this analysis save for the COVID-19 pandemic, which the Government cites.

Question 2: if you answered "non-compete clauses and other restrictive covenants", please explain which other restrictive covenants and why.

8. Not applicable.

Question 3: do you foresee any unintended consequences of limiting the scope of reform to non-compete clauses? If yes, please explain in your answer.

9. The Bar Council considers that any reform in relation to the legality of non-compete clauses cannot be considered in a vacuum. The Bar Council also agrees that to introduce mandatory compensation would be likely to increase the usage of 'garden leave' clauses and other indirect restraints as foreshadowed in the consultation. In the type of contract in which such PTRs exist, it is more likely that a suite of alternatives will also exist or may then be introduced in direct response to the proposed reform.

10. Taking an example from other jurisdictions, the Bar Council is aware that California's ban on non-compete and non-solicitation clauses operates against a backdrop of increased litigation in other related areas which operate to protect the same or similar interests.

Question 4: do you agree with the approach to apply the requirement for compensation to contracts of employment?

11. No, see response to question 1 above. If the requirement for compensation is to be applied, which the Bar Council does not regard as a necessary area of reform in this sphere, this should be limited to contracts of employment. It is often, though not always, the case that the employee is in a weaker bargaining position than the employer and less able to afford to litigate in the event of a dispute arising as to the applicability or enforceability of the PTR in question. Other agreements are far more likely to give rise to a greater equality of arms between the parties and a more commercial approach to be taken where a dispute arises.

Question 5: do you think the government should consider applying the requirement for compensation to wider workplace contracts?

12. No. In the workplace context, PTRs rarely arise other than in written contracts of employment. Where they do they are more likely to be the product of commercial negotiations both on agreement and in the event of a dispute. Applying a ban to wider workplace contracts is likely in our view to give rise to satellite litigation.

Question 6: do you think the proposed reform to non-compete clauses in contracts of employment could have an impact on the use of, and/or the enforceability of, non-compete clauses in wider contract law? If yes please explain how and why.

13. If the law is to be reformed for policy reasons in relation to contracts of employment alone, then, while this may be referred to in wider contractual disputes, it is unlikely to be particularly illuminating or have much impact. The central question to be assessed is whether the PTR(s) offend against the doctrine of restraint of trade according to well-established common law principles. The fact of the proposed reform (which the Bar Council does not support) would be equivocal at best.

Question 7: please indicate the level of compensation you think would be appropriate.

14. The Bar Council does not support the proposal to make compensation mandatory at any level. However, it observes that to impose percentages of 60-100% could have a chilling effect on recruiting employees. This potentially chilling effect would be ameliorated if the compensation related only to the period after 12 months when in reality it would take a compelling case for the Court to uphold such a PTR but the Bar Council recognises the front-ended high costs of litigating such disputes in the High Court.

15. The Government does not refer to any cap on such percentages when applied to earnings or define what will be included as earnings. The sums involved in senior executive contracts which are typically those which include negotiated PTRs could be very large. Conversely in the contract of a less well paid employee (which is less likely to contain such PTRs in the first place) the financial penalty of having to pay compensation for a term already negotiated at the outset of employment (and noting that the reasonableness of PTRs are assessed at the time they are agreed and a junior employee whose terms are unreasonable cannot 'grow into' the term as she or he gains seniority) is much less.

16. Were mandatory compensation to be introduced, the French example indicates that, absent a statutory formula for determining compensation, employees represented by trade unions or similar bodies and/or employees with legal representation at the point of contract would be more likely to secure advantageous compensation clauses by collective bargaining. Collective bargaining is widely reported to be at an all-time low in this country. We note also that, where

compensation is assessed in other jurisdictions as a percentage of salary, legal argument on the definition of "salary" and the extent to which it should include non-fixed sums (such as overtime or bonus payments) persists. Furthermore, other jurisdictions have sought to balance the compensation provided with the existence of penalty clauses to which a defaulting subject would be liable, for example in Italy. Again, any reasonable consideration of compensation would have to take into account whether and to what extent any mechanism operated to protect the interests of an employer where an employee (or worker) breaches the PTR. This would of itself give rise to a different type of litigation.

17. Other than in general terms, however, the Bar Council considers this is a question that is best answered by employers and employees, and their representative groups, as well as being informed by clear data and statistics.

Question 8: do you think an employer should have the flexibility to unilaterally waive a non-compete clause or do you think that waiving a non-compete clause should be by agreement between the employer and the employee?

18. We consider that unilateral waiver by an employer should remain possible. It is conceptually awkward to require agreement of two parties in order for one party to waive a right it has under normal principles of contract. Where an employer unilaterally waives a non-compete clause there is no detriment to the employee who is free to find other work without constraint. The consideration is provided at the outset of the contract, not at the point of giving notice of termination (on either side). There can be no legitimate expectation of compensation in such circumstances, but we acknowledge the point that the timing of the waiver will make all the difference to the employee's ability to find other work and indeed to compete. In some European jurisdictions, the employer is afforded a small window of opportunity to waive the right close to the time of notice of termination (by either party) being given. To fetter the right to waive implies that consideration for PTRs exists in the form of compensation and not at the time that the contract is entered into. This is anomalous and would need to be considered with care.

19. There is no difficulty in our view in maintaining a non-compete clause during the subsistence of the employment contract and waiving it at the point that it is most likely to bite i.e. on termination.

20. It should be borne in mind that an employee owes a duty of fidelity to his or her employer during the currency of the employment contract and the non-compete clause is designed for post termination protection.

Question 9: to disincentivise employers from inserting non-compete clauses and then unilaterally removing them at the end of the employment relationship, the Government could require that an obligation for the employer to pay compensation for some or all of the period of the non-compete clause is retained unless a defined period of time has elapsed between the waiving of the clause and the end of the employment relationship. Do you agree with this approach? If not, why not?

21. We do not agree with this approach. This is because it is an unjustifiable encroachment on freedom of contract, and because of the existence of the duty of fidelity as referred to in our response to question 8.

Questions 11 to 17

22. These questions are addressed to employers and we do not therefore respond to them.

Question 18: to improve transparency around non-compete clauses, the Government is considering a requirement for employers to disclose the exact terms of the non-compete agreement to the employee in writing before they enter into the employment relationship. Failure to do so would mean that the non-compete clause was unenforceable. Would you support this measure to improve transparency around non-compete clauses? If not, please explain why not.

23. Yes, we agree in principle that the exact terms of a non-compete clause should be explicitly provided to an employee before they enter into an employment relationship or as soon as possible thereafter (but please note paragraph 24 below and the issue as to whether an employee would be bound in the context of employment contracts in which the particulars required to be provided under s.1 Employment Rights Act 1996 are not required on day one and contracts are not always provided in written form on day one either). However, we note that a non-compete clause may not be required or desirable at the outset but upon the employee changing role or becoming more senior an agreed variation to the contract may be necessary.

24. We also observe that for the kinds of employment and indeed contracts of employment which contain non-compete clauses, the clause will be contained in the contract of employment provided in writing to the employee even if it is not within the terms of an offer letter. Where a contract is entered into (whether oral or implied) without a written contract containing a non-compete clause, in terms, it is difficult to see how the employee could be bound by it without it having been drawn to his or her attention and agreeing to it. However, we appreciate that an employee agreeing orally to a contract of employment who is then made aware of a non-compete clause through later provision of a written contract may feel less able to resist or negotiate in response to the clause. The measure proposed would appear to address some of this mischief.

Questions 19 to 20

25. We do not respond as these questions are directed at employees with experience of non-compete clauses being used by their employers.

Question 21: do you have any other suggestions for improving transparency around non-compete clauses?

26. We consider that the focus should be on ensuring that the employee has adequate notice of the proposed restraint and the ability to take advice on the contents of a term. This is more important than whether the employee has notice before they enter the employment relationship.

27. A focus on the start of the employment relationship does not address the fact that many restraints will be put in place during the course of the employment relationship through an amendment to the contract. This can be for legitimate reasons: in longstanding relationships, you would expect contracts to be redrafted to keep up to date with developments in the law. Furthermore, aspects such as the nature of the work, the employee's responsibilities, the business model and the customer base can change over time. What matters is that the employee is aware of the terms in advance and is given the opportunity to consider them, taking legal advice if necessary.

Question 22: would you support the inclusion of a maximum limit on the period of non-compete clauses?

28. No, although we would support the introduction of a rebuttable presumption of unenforceability for a non-compete clause that endures beyond 12 months.

Question 23: if the Government were to proceed by introducing a maximum limit on the period of non-compete clauses, what would be your preferred limit?

29. We would support a rebuttable presumption arising after, or alternatively a limit of, twelve months.

30. Twelve months is consistent with the outer limits of enforceability in most cases determined at common law by the courts.

Question 24: do you see any challenges arising from introducing a statutory time limit on the period of non-compete clauses? If yes, please explain.

31. Yes. While hard cases make for bad law, there will be cases in which a non-compete clause which lasts beyond 12 months does not offend the doctrine of restraint of trade and the employer has a legitimate basis for protecting its business interests in this way. A hard limit of whatever duration removes the fact sensitive nature of this assessment and is a blunt tool to address something that is not regarded as a problem in this area of law.

32. The Government has already alluded to the likelihood of a greater increase in the use of 'garden leave' and other restraints where non-compete clauses are made illegal or unenforceable by statute. We have already cited the potential chilling effect on recruitment particularly in industries in which highly sensitive and confidential information is entrusted to employees. There may be an increased number of applications for springboard injunctions to restrain competitors from making use of such information where an employee who would otherwise have been prevented by the non-compete clause from joining and divulging such information does so. These are also very expensive litigation tools. There may be complex cases in which employees who are subject to a non-compete clause are also directors and shareholders or own part of the business and thought should be given to whether a ban on non-compete clauses should be absolute or contain clear exemptions.

Question 25: what do you think could be the benefits of a ban on non-compete clauses in contracts of employment? Please explain your answer.

33. We do not consider that a ban on non-compete clauses would be beneficial save for protecting any extreme cases of exploitation in which the employee cannot afford legal advice or to resort to litigation and to have the situation addressed in court.

Question 26: what do you think might be the potential risks or unintended consequences of a ban on non-compete clauses? Please explain your answer.

34. We consider that banning non-compete clauses will force employers with legitimate business interests to protect to rely on other ways of doing so, including the use of garden leave and forfeiture provisions. This may have a chilling effect on recruitment particularly in industries in which highly sensitive and confidential information is entrusted to employees. There may be an increased number of applications for springboard injunctions to restrain competitors from making use of such information where an employee who would otherwise have been prevented by the non-compete clause from joining and divulging such information does so. These are also very expensive litigation tools.

35. There may also be a corresponding increase in claims for breaches of fiduciary duties, confidence, data protection rights, IP rights and database rights. Working for competitors may simply increase the likelihood of breaches of other PTRs and give rise to other disputes and litigation. We consider that the Californian example (see response to Question 3 above) is suggestive of a connection between a ban on non-compete clauses and a rise in litigation aimed at protecting the same or similar interests.

Question 27: would you support a complete ban on non-compete clauses in contracts of employment? Please explain your answer.

36. No, we do not support a ban on non-compete clauses. This is too blunt a measure to address the Government's policy aims of encouraging innovation, creating new jobs and increasing competition. In those industries in which PTRs are not common, the proposed reform will make little difference. In those industries in which non-compete clauses are used because of the difficulty of policing other lesser forms of restriction, the common law doctrine of restraint of trade has worked adequately for a long time to prevent abusive practices.

37. The Bar Council does recognise the concern that litigation around PTRs is notoriously expensive and employees may feel deterred in defending themselves or intimidated by pre-action correspondence, but that is a different policy concern to the ones stated and better met, in our view, by considering creating a rebuttable presumption that a non-compete which is said to endure for more than 12 months is not enforceable. Allowing restraint of trade cases arising from employment

relationships to be heard by Employment Tribunals, perhaps for claims commensurate with the limit for contract claims, may assist in this regard.

Question 28: if the Government introduced a ban on non-compete clauses, do you think the ban should extend to wider workplace contracts?

38. No. For wider workplace contracts of a more commercial nature, we consider it even more problematic to encroach upon freedom of contract. For atypical working relationships where employment status may well form an issue in dispute we do not consider that it is likely to yield sufficient benefit to make it worth doing. Work on exclusivity clauses in a separate consultation (further to the work on zero hours contracts) is more apt in the latter.

Question 29: do you think a ban should be limited to non-compete clauses only or do you think it should also apply to other restrictive covenants? If the latter, please explain which and why.

39. This should be restricted to non-compete clauses enduring beyond 12 months which are often regarded as the most draconian in any suite of PTRs. The Call for Evidence in 2016 does not appear to have prompted the need for any urgent steps to be taken, and the Bar Council is not aware of any obvious difficulties reported by its members as to the exploitative or improper use of PTRs in contracts of employment of a widespread nature.

Question 30: if the government introduced a ban on non-compete clauses in contracts of employment, do you think there are any circumstances in which a non-compete clause should be enforceable? If yes, please explain.

40. Where there is an exemption from an otherwise total ban on non-compete clauses, such as the exemption upon the sale of a business in California, we note that employers have developed practices seeking to abuse that exemption.

41. We consider that the correct balance to be struck, if at all, is by considering creating a rebuttable presumption that a non-compete clause which is said to endure more than 12 months is not enforceable. This would enable the employer to present reasons which could be at the threshold of exceptionality as to why the PTR should be enforceable. However, our primary position is that the common law is an adequate safeguard and allows cases to be assessed on a fact-specific basis.

42. We would add that many disputes around PTRs including non-compete clauses are in fact resolved through legal advice and assistance and do not get to court at all. Specialist practitioners are well-versed in advising as to enforceability on a fact-specific basis.

Question 31: are there options short of banning non-compete clauses which would limit their enforceability in the interests of spreading innovation? Please explain your answer.

43. Yes, creating a rebuttable presumption that a non-compete clause which is said to endure more than 12 months is not enforceable.

Question 32: are you aware of any instances where a non-compete clause has restricted the spread of innovation/ innovative ideas? Please explain your answer.

44. No. In general, non-compete clauses operate to protect genuine business interests or to prevent competition alone in circumstances in which the clause may be found to be unenforceable. Where the innovation arises from gaining a business advantage in using the protectable business information of one business which has invested in its resources, research and staff, for example, to benefit another, we do not see a proper policy reason for making this easier in the name of pure innovation.

Question 33

45. We do not respond to this question which is directed at business experience as opposed to legal professionals.

Questions 34 to 37

46. We do not respond to these questions which are directed at employers.

Bar Council[2]

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[2] Prepared for the Bar Council by the Law Reform Committee

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