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By email: frederick.everitt@beis.gov.uk

26 February 2021

Dear Frederick,

Re: Response to Non-Compete Clauses Consultation on measures to reform post termination non-compete clauses in contracts of employment

We are writing on behalf of the British Private Equity and Venture Capital Association ("BVCA"), which is the industry body and public policy advocate for the private equity and venture capital industry in the UK. With a membership of over 700 firms, we represent the vast majority of all UK based private equity and venture capital firms, as well as their professional advisers and investors. Between 2015 and 2019, BVCA members invested over £43bn into nearly 3,230 UK businesses, in sectors across the UK economy. Companies backed by private equity and venture capital currently employ 972,000 people in the UK and the majority of the businesses our members invest in are small and medium-sized businesses.

We view non-compete clauses as vital 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.

Market practice in our industry has evolved alongside the legal position to regulate the use of non-competes in a way which provides for the right balance between maintaining a dynamic and competitive market which is attractive for investors, members and employees and providing workforce mobility. The market our members operate in is an attractive and fluid one with active and healthy competition. Non-competes are typically targeted at more senior employees who commonly have the advantage of material reward structures and investment opportunities which may already provide for material ongoing payments and returns post termination of employment.

This submission has been prepared by the BVCA's Legal & Accounting Committee, which represents the interests of BVCA members in legal and accounting matters relevant to the private equity and venture capital industry. We have limited our responses to those questions that we believe are of particular relevance to our members.

Option 1: Mandatory Compensation

The Government is considering the option of making post-termination, non-compete clauses in contracts of employment enforceable only when the employer provides compensation during the term of the clause.

Q1. 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.
- **Non-competes only or**
- **Non-compete clauses and other restrictive covenants**

We believe that mandating compensation for non-competes is neither necessary nor desirable. See answer 4.

Our view is that the scope of this review should be limited to considering non-competes only and not "other covenants".

The Government's stated rationale for requiring compensation to be paid for a non-compete covenant is that the former employee should "receive a fair settlement if they are restricted from joining or starting a business within their field of expertise". This rationale does not apply to other forms of restrictive covenant and in particular: non-solicitation of client clauses, non-deal with client clauses, non-solicitation of employee clauses, non-interfere with supply chain clauses and anti-team move clauses. These types of "other" covenant 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. Our members investors rely on these protections as part of their investment thesis and the contribution of key personnel and importance of key customer relationships.

Such covenants are therefore vital to protect the investment made by an employer and its investors but also to protect the prospects of former colleagues retained in the business. We do not see it as necessary or equitable to pay for such protections where they would not preclude an employee from joining or starting a business within their field of expertise and competing. We do not agree that a payment should be due for agreeing not to exploit the resources or customer connections of the former employer in circumstances where the employee could avoid doing so and earn a living in their field. 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 legal guidance also restricts the enforceable application of such "other" covenants in practice covering the nature of the protectable interest and scope. They are not arbitrarily included in contracts but carefully considered with legal advice 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).

Q2. If you answered 'non-compete clauses and other restrictive covenants', please explain which other restrictive covenants and why.

Not applicable.

Q3. Do you foresee any unintended consequences of limiting the scope of reform to non-compete clauses? If yes, please explain your answer.

It might be the case that employees argue in pre joining employment negotiations that payment should be extended to all covenants if the concept becomes accepted for non-competes.

Q4. Do you agree with the approach to apply the requirement for compensation to contracts of employment?

Our view is that mandating compensation for non-compete clauses is neither necessary nor desirable. Such regulation could also lead to a number of negative unintended consequences both for our members, their investors and portfolio companies as well as retained and departing employees.

We do not agree that there is an employee, employer, or market driven case for this. The market in which our members operate is attractive and dynamic for investors and employees. There is healthy competition and the market for new business and for employees is active and employees are mobile.

The current body of law built up by the courts over a number of years limits the application of non-competes both in area and scope and to circumstances where there is a legitimate protectable interest and the drafting, and enforceability, only goes so far as to protect those interests. Accordingly, our members tend to include non-competes mainly for more senior employees or those who have particular access to investor relations and existing and potential investments. Scope of application is therefore already limited in terms of extent and seniority.

Non-compete clauses are typically subject to set-off and so reduced by time spent on garden leave where enforced and employees are of course paid during time spent on garden leave. Employees dismissed by their employer would commonly agree departure arrangements which may often include a payment in lieu of notice and could include a relaxation of covenants where appropriate. Where a non-compete is not relaxed and a payment in lieu of notice is made, the non-compete will run from the termination date and so the employee receives a payment for that period without having to work. Payment for a non-compete during that period would amount to double recovery.

Non-competes are most likely to be enforced in circumstances where an employee has resigned to go to a competitor. The competitor will typically factor in timing for the employee's start date to address the duration of the non-compete or include an incentive to address any perceived loss. Non-competes usually include a consent provision which the parties may also seek to negotiate on exit. It is at that time, when the new employer is identified, that the parties can properly debate the enforceability and scope of the covenant and consider whether any agreed variation is the right course of action having regard to all the facts.

Our members' senior employees commonly participate in additional reward opportunities and investments outside the employment contract, which may continue to give them a payment or return following the termination of their employment. These typically include equity or MIPs (management incentive plans) or co-investment opportunities. These opportunities are commonly material in value and are typically conditional on post termination behaviours. As such, there is often already a material ongoing reward post termination that the employee takes the benefit of.

Payments for non-competes could create a number of adverse consequences. As referred to above there are various scenarios where payment would amount to a duplicate payment and there is alternative reward or returns.

Our members would incur higher employment termination costs, and this may make our market less attractive to investors, employers and to new ventures who start up business. There is already a clearly recognised protectable interest which they are investing in where the common law already materially limits the degree of restriction that can be imposed in a balanced way. A new venture is particularly exposed to senior departing employees and would face the burden of this additional cost to enforce and protect its investors.

Lack of certainty could be damaging for all parties involved and consequentially on the marketplace for investors, see answer 7 below. If a set percentage of salary is included as payment and this is mandatory without waiver, then non-competes will have to be enforced reducing market consent flexibility.

If a right to waive payment is included, it will be very difficult for the employee and new employer to know in advance when seeking new employment whether they will be subject to the payment and covenant or not. The employee could negotiate a start date for the expiry of the convent and then find it is not enforced and they will not be paid for the intervening period.

If the non-compete is challenged applying common law principles and held void, it raises the question as to whether the payment is then void and whether any payments made to date are repayable.

We suspect that employers will be more inclined to impose and enforce a longer notice period or period of garden leave which is far more restrictive, than to pay for a non-compete where in practice an employee ceases to be an employee and is likely to spend their time preparing to compete without the ongoing duty of good faith and fidelity applying. This could create a market change on termination to be less flexible and more restrictive.

Q5. Do you think the Government should consider applying the requirement for compensation to wider workplace contracts?

Our view is no.

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.

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.

Contracts for services remain subject to common law protections and are entered into at arms' length. In addition, the considerations at answer 4 above apply.

Q6. 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.

Our members already often have leaver provisions in separate reward and commercial investment opportunities outside the contract of employment. Given these arrangements already provide for

payments or returns, they should not be impacted by any such proposals. Such changes could lead to a greater use of injunctable non-compete covenants in such schemes as opposed to commercial consequence clauses where there is a choice to compete and forfeit a payment or return, but there is no right to injunct.

There could be a greater demand to negotiate in non-compete covenants as part of settlement agreement arrangements, if payments are mandated at law for non-competes in the contract of employment, but not in settlement agreements. Our view is that 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.

Q7. The Government is considering a level of compensation that is set as a percentage of the ex-employee's average weekly earnings prior to termination of employment for the duration of the non-compete clause. Please indicate the level of compensation you think would be appropriate:

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

We do not agree that any compensation is necessary or desirable. If it were to be mandated, in our view the employer should be able to unilaterally determine the level of compensation, or failing that, it should be subject to commercial agreement between the parties. This should be a % of annual salary (not average weekly earnings) and clearly exclude benefits, variable pay and other reward or commercial investment opportunities to provide for a simple calculation. Complex calculations can be subject to challenge and could result in a breach of contract which renders the non-compete clause unenforceable. Payment should cease to be applicable in the event of a lawful summary termination either under common law or the terms of the employment contract.

From the employer's perspective consideration will need to be given to the proposed tax treatment of such payments. Presumably, they will be earnings on which employer's NICs are payable and in relation to the pension auto-enrolment obligations that apply. Are they payment that count towards the apprenticeship payroll threshold? This could give rise to considerable additional 'payroll' costs for employers.

The higher the level of compensation the greater the incentivisation for an employer to give careful consideration to the blanket use of non-compete provisions as opposed to a tailored approach to address perceived risk. Compensation at the higher end of the proposed spectrum will potentially remove any incentive on the individual to source an alternative income stream during the period of restriction and effectively 'bankroll' a period of business development prior to the expiry of any applicable restrictive covenants. It will also disincentivise the employee to agree to waive the clause (see further below).

Q8. Do you think an employer should have the flexibility to unilaterally waive a non-complete clause or do you think that waiving a non-compete clause should be by agreement between the employer and the employee? Please indicate your answer below.

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

Our view is this should be an employer decision only. Otherwise the compensation obligation simply becomes another cost for the business.

Our understanding is that the parties currently may look at all the circumstances on termination and consider whether a revised agreement should be made or consent to waive a non-compete should be given. If there is no power to waive a non-compete without payment, then this is a disincentive on the parties to facilitate release or partial release and provide for greater market mobility. The outcome could be a less mobile workforce.

Waiver by agreement creates the difficulty that the employee may refuse to agree even in circumstances where they are not going to join a competitor or to set up in competition, but simply wish to take the financial value. The employee then has the advantage of payment from their former employer for no real value in return for the former employer, whilst starting new paid employment and gaining the windful of double payment. Any proposed solution that requires an analysis as to whether the employee really is going to a competitor or not or starting up in competition, could give rise to a protracted dispute and uncertainty in circumstances where action to protect the employer's interests is typically urgent if it is going to be effective.

Q9. Do you agree with this approach? If not, why not?

We do not agree. If the Government proceeds with the proposal that a defined period must elapse before all/part of the employer's obligation to pay compensation falls away, then from the employee's perspective this desire to achieve agreement within a timeframe that avoids payment will act as potential leverage for the employee. If the level of compensation is established at the upper ends of the compensation range outlined in the consultation paper, there may be little incentive for an individual to agree a waiver if they have no intention of competing; it effectively provides a free income stream.

In circumstances where an employee is summarily dismissed lawfully, where the employer has had to act swiftly and not had the opportunity to give the appropriate 'waiver notice', requiring it to pay non-compete compensation would amount to a windfall for the individual.

We also question whether redundancy situations should also be exempted particularly in the event of a severe economic crisis where long-term planning was not possible.

Q10. How long do you think the time period within which the employer must waive the restriction before the termination of employment should be?

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

In the event that an obligation to make payment is included, our view is that the employer should have complete flexibility.

Questions specifically for employers:

Q11. Do you use, or have you ever used, non-compete clauses in contracts of employment?

Within our members and portfolio companies of the funds our members manage, non-compete clauses are commonly used for the senior management team and other senior or business critical personnel, but not for junior or administrative staff. Members, who are fund managers/advisers, may use partnerships in their structures with certain individuals being partners rather than employees and, if so, non-compete clauses would be used in these partnership arrangements, as well as in the employment contracts of senior employees and investment professionals who are not partners. In portfolio companies, senior

managers, senior sales staff, and technical experts would typically have non-compete provisions in their employment contracts.

In many cases these provisions are often replicated on equivalent or more extensive terms in investment agreements to which both the fund and the senior managers are party, which govern the terms on which the managers hold equity in the relevant portfolio company, alongside the fund. Accordingly often there is already and payment or return related to the investment which survives termination of employment and is conditional on "good leaver" behaviours that avoid damage to the investment.

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

Our members often have LLP partnerships in their structures and non-compete clauses would be used in these partnership arrangements. Such LLP members are technically limb 'b' workers, but their commercial investment will typically provide for a return often applicable after they have stepped down as partners.

Q13. If you were required to provide compensation for the period of the non-compete clause, do you think that you would continue to use them? If yes, what kind of employees/limb(b) workers (high/low paid) would you maintain non-compete clauses in place for? Please explain your answer.

Non-compete provisions are of vital importance to our members to protect their businesses and in turn their retained employees and partners and to protect investors and attract investors to invest. We therefore envisage that our members would continue to use them subject to a review of equivalent protections in any related investment agreements and any cost set-off options.

Q14. If you did not use non-compete clauses, would you be content to rely on other 'restrictive covenants' to protect your business interests? If yes, do you think there would be any unintended consequences to this? Please explain your answer.

We envisage that our members would continue to use them as per answer 13. We expect that given the importance of these restrictions, our members would only not choose to do so if they have equivalent provisions in investment agreements or LLP agreements.

Q15. If mandatory compensation were introduced, do you think you would increase your use of other 'restrictive covenants'? If yes, please explain why and which ones.

Typically in our experience where a non-compete covenant is used in an employment contract by our members, it sits alongside a suite of other restrictive covenants (non-solicit of/deal with clients/non-solicit of key employees etc); accordingly we do not believe that the imposition of mandatory compensation would lead to an increased use of covenants in the employment contract. It may lead to an increased use of alternative covenant mechanism e.g. bad leaver forfeiture provisions in relation to other investment agreements or LLP agreements.

Q16. If you use non-compete clauses in contracts of employment, do you already pay compensation/salary to employees for all or part of the duration of the noncompete clause? Please explain your answer.

It is our understanding that our members do not typically do so in an employment contract for a UK based employee. We understand that a member might provide for payment of compensation /salary to employees for all or part of the duration of the non-compete clause in the following circumstances: (i) where an employer may have to enforce the covenant in another jurisdiction where such payment is

mandatory in order for a covenant to be enforceable (e.g. France, Italy, Germany); (ii) where a client has a global employment contract which provides for such payment (this usually arises as a consequence of the law of the jurisdiction of the parent company requiring such payment and the desire to maintain consistency of contractual terms across the company); or (iii) where a new non-compete provision is included in a settlement agreement with a departing employee.

We have referred above to other investments and LLP agreements which may contain non-competes given in a different capacity and which may, in effect, include a payment or return post termination of employment/engagement subject to compliance.

Q17. Do you think employees would be more likely to comply with the terms of a non-compete clause if mandatory compensation was introduced? If not, do you have any suggestions for increasing compliance.

In our experience non-compliance typically occurs where: i) the individual has formed the view that the covenant would be unenforceable as a matter of law; or ii) the individual's new employer seeks a commercial advantage, or iii) the individual is heavily incentivised by their new employer; or iv) other investors or clients induce pressure to facilitate this. We do not believe that payment of ongoing salary as a percentage will change these behaviours materially. In the main, we believe that our members respect the application of covenants (given the impact on investors in particular) or seek to agree commercially sensible solutions or compromises to facilitate fair protection and a mobile market where it is appropriate to do so.

If it is suggested that the individual is legally precluded from challenging the covenant following payment of the non-compete compensation, that could impact on compliance. We do not see how that could be a condition without removing the impact of valuable case law which guides on the extent of the enforceable protectable interest and can then be applied to the specific facts in each case on exit.

Complementary Measures: The following measures are being considered in addition to mandatory compensation. 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.

Q18. Would you support this measure to improve transparency around non-compete clauses? If not, please explain why not.

In our experience it would be very unusual for an employee of our members not to be provided with the terms of their employment contract in writing (including any non-compete clause) prior to entering into the employment relationship. Failure to do so exposes the employer to the risk that the employee refuses to agree to the non-compete clause which cannot simply be unilaterally imposed on the employee. However, there could be circumstances where an employer and employee need to get a basic offer agreed quickly. Given this observation, that it is mainly the employer's risk that the employee will then refuse to sign and given market practice in our industry of up-front transparency already, we would not be in favour of a mandatory obligation.

Non-compete clauses may also need to be introduced in future incentive schemes which may need to be varied, closed, or re-designed from time to time throughout the life of the employment or partnership for business reasons or to reflect market practice and legal guidance. They may also be required to protect a new investment as part of the portfolio they work on. There therefore needs to be a level of freedom to contract throughout the life of the employment or engagement.

Q19. Have you ever been subject to a non-compete clause as an employee or limb(b) worker? If yes, were you aware of the non-compete clause before you accepted the offer of employment?

N/A

Q20. Has a non-compete clause ever prevented you from taking up new employment in the past and/or prevented you from starting your own business? Please explain your answer.

N/A

Q21. Do you have any other suggestions for improving transparency around non-compete clauses?

No, see answers above.

Q22. Would you support the inclusion of a maximum limit on the period of non-compete clauses?

Given that the period over which a former employer could potentially be damaged through the misuse of confidential information/customer connections (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. 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 members or new members to the market may not have the resource on hand to survive unfair competition, particularly in a team move situation. We believe 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.

Q23. If the Government were to proceed by introducing a maximum limit on the period of non-compete clauses, what would be your preferred limit? Please explain in further detail the reasoning behind your preferred limit.

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

"Other" as stated above, given that the period over which a former employer could potentially be damaged through the misuse of confidential information/customer connections 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. 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 into investors.

Q24. Do you see any challenges arising from introducing a statutory time limit on the period of non-compete clauses? If yes, please explain.

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.

If a statutory maximum duration is established is it the intention that the courts will no longer be required to take into account 'duration' as a factor when assessing the reasonableness (and therefore enforceability) provided that the statutory maximum is not exceeded? If so, this could result in covenants that under the current common law would be regarded as unenforceable as a result of their duration being excessive, being enforceable under the new hybrid statutory/common law regime. This would have the unintended consequence of restraining individuals who would not otherwise have been bound by a non-compete clause. It could also push durations to the maximum as opposed to the current approach that requires the duration to be necessary for the protection of a legitimate interest.

Alternatively is the intention to preserve the existing common law approach to the enforceability of non-compete clauses but to impose a statutory ceiling on the duration of a non-compete clause?

Neither approach will avoid the risk of litigation to ascertain the enforceability of the non-compete covenant notwithstanding that it comes within any statutory parameters in respect of duration.

Option 2: Ban Non-Compete Clauses

Q25. What do you think could be the benefits of a ban on non-compete clauses in contracts of employment? Please explain your answer.

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 (see answer 26 below). This would likely discourage investors from investing and start-ups from setting up business in the UK.

Q26. What do you think might be the potential risks or unintended consequences of a ban on non-compete clauses? Please explain your answer.

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.

As described above, it is also customary for a member of senior management who acquires an equity stake as part of the investment to agree to restrictive covenants, including non-compete clauses, in the investment agreement to protect the private equity investor. These are typically more extensive (particularly in terms of duration) than non-compete clauses found in employment contracts and the law permits more extensive restrictions in an investment context than in an employment context.

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, 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 haves been explicitly accepted by the courts as a legitimate rationale for the use of a non-compete clause.

One of the stated aims of banning the use of non-compete clauses is that it would: "have a positive effect on innovation and competition 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.

Q27. Would you support a ban on non-compete clauses in contracts of employment? Please explain your answer.

No, see answer 26.

Q28. If the Government introduced a ban on non-compete clauses, do you think the ban should extend to wider workplace contracts?

No. The parties should remain free to negotiate non-competes as part of settlement agreements. Non-competes in investment agreements and LLP agreements are fundamental requirements to protect investments and entitlements that pay out often after termination of employment/engagement and need to be protected to retain their value. Extending any ban to this area could have a materially negative effect on the UK market as an attractive market for investment.

Q29. 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.

We do not agree with the concept of a ban at all and nor do we think that a ban on other restrictive covenants would be appropriate. In our view as a general proposition a company or partnership that has invested significant time and resources in its assets is entitled to protect those assets from unfair exploitation/appropriation by others. Where that company or partnership is dependent on investors as

is commonly the case for our members, the protection of those interests becomes even more essential to attract investment.

The courts have recognised that intangible assets in the form of confidential information, workforce stability, customer/client relationships, know-how, relationships with suppliers and intermediaries and so on are all legitimate interest worthy of protection by means of reasonable restrictive covenants. If non-solicit of customers/client/key employee covenants and so on were prohibited this would potentially have a greater impact on small start-up companies than larger corporates who are more able to financially entice employees to join them and exploit the customer connections and 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.

Q30. If the Government introduced a ban on non-compete clauses in contracts of employment, do you think there are any circumstances where a non-compete clause should be enforceable? If yes, please explain.

In circumstances where an employee is lawfully summarily dismissed without notice or terminates their employment in breach of their notice obligations and cannot consequently be placed on garden leave, a non-compete clause would provide the employer with the protection that the employee has circumvented through their breach.

Q31. Are there options short of banning non-compete clauses which would limit their enforceability in the interests of spreading innovation? Please explain your answer.

On the contrary, further limitations could stifle innovation as the market for our members is dependent on investors and on market and business analysis and strategies which must be protected for these businesses to remain viable and attractive investments.

Our view is that including arbitrary limits for example on the duration of a non-compete or the seniority of employee it could apply to, would be blunt tools. 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.

Q32. Are you aware of any instances where a non-compete clause has restricted the spread of innovation/innovative ideas? Please explain your answer

No

Q33. If you are aware of any literature, research, or evidence from your own business experience that looks at the impact of non-compete clauses on competition, innovation, or economic growth please list the publications below.

No.

Questions specifically for employers:

Q34. If the Government introduced a ban on non-compete clauses in contracts of employment do you think you would be able to sufficiently protect your business interests through other means, for example through intellectual property law and confidentiality clauses? If not, why not?

No, see answer 26. 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; or (iii) policing enforcement of non-solicit of customers/clients/key employee and confidentiality covenants. This has been explicitly accepted by the courts as a legitimate rationale for the use of a non-compete clause.

Q35. Do you think a ban on non-compete clauses in contracts of employment could benefit your business/organisation? If so, how?

We do not agree that this would benefit our members for the reasons stated above.

Q36. Do you think a ban on non-compete clauses in contracts of employment would impact your business/organisation? If yes, please explain in what ways and the severity of any impacts to your business/organisation.

Yes, see answer 26 above. We believe it would 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 members' fund or not. We believe this could damage the UK market as an attractive one for the business of our members. Given the international market for this work this could result in a greater focus in overseas investment to the detriment of the UK.

Q37. How do you think your business/organisation would respond to a ban on non-compete clauses in contracts of employment? Please explain.

We believe there is a material risk that our members would need to consider a greater concentration of work in overseas territories to remain attractive to investors. Our members would need to rely on non-competes in related investments or partnership agreements assuming not also banned. In addition they would need to rely on notice periods and the application of garden leave which could increase notice obligations 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 operate.

We would be very keen to discuss the contents of this letter with you and look forward to hearing from you in order to establish whether a meeting of this sort is possible.

Yours faithfully,

Amy Mahon
Chair, BVCA Legal & Accounting Committee