A Competition Law Perspective on Why Non-Compete Clauses in Employment Contracts Should be Banned

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Abstract: This article examines the status of non-compete clauses (NCCs) in employment contracts through the lens of competition law. Although traditionally governed in England and Wales by the common law restraint of trade doctrine, NCCs have attracted increasing scrutiny amid concerns about their labour market effects. While competition authorities have treated wage-fixing and no-poach agreements as restrictions of competition by object under Article 101 TFEU and the Competition Act 1998, NCCs generally fall outside competition where they are applied to employment contracts. The article argues, however, that NCCs share material similarities with labour market cartels and generate comparable distortions, including suppressed wages and reduced mobility. Applying the principle of ancillary restraints, it contends that employment NCCs are equivalent to practices that have as their object the significant restriction of competition. Given the availability of less restrictive means to protect legitimate employer interests, the article concludes that incremental reform is inadequate and advocates a comprehensive statutory ban in the UK.

1. Introduction

Non-compete clauses (NCCs) are contractual provisions restricting an employee's ability to work for a competitor or establish a competing business, for a specified period after their employment ends. These provisions have become common across many jurisdictions, including the United Kingdom, and have traditionally aimed to protect the legitimate interests of the employer. Proponents of NCCs argue they are necessary to achieve a number of benefits to the business and the employee, including the incentivising of

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specialist training, the safeguarding of proprietary information, and preserving customer relationships.[1] Under English common law, NCCs are assessed under the *restraint of trade* doctrine. This treats NCCs as an unlawful restraint of trade, unless an employer can demonstrate it is reasonable in scope and necessary to protect a specific, legitimate business interest. This represents a balance between the individual's right to pursue their livelihood with another trade (or indeed to set up their own trade), and the employer's legitimate need to protect their commercial assets.

This conventional view of NCCs has come under increasing scrutiny in recent years, with a growing concern among some economists, lawyers and policymakers about the prevalence and true effects of these provisions. There is a particular concern that NCCS are having significant distortive effects on labour markets, in suppressing wages, creating a barrier to labour mobility, and preventing smaller businesses and potential new start-ups from contributing to economic growth and innovation in the economy.[2] A number of jurisdictions have either introduced restrictions or outright bans of NCCs in an attempt to address this concern. In the UK, a 2020 consultation on NCCs resulted in a government recommendation in May 2023 that a 3-month limit be placed on their duration, so as to reduce any restrictive effect.[3] This never made it into law and in November 2025 a second consultation was launched by Kier Starmer's government, which considered options for reform a second time, including the possibility of an outright ban [4]

In recent years, competition authorities have shown increased scrutiny of labour markets in their enforcement of competition law. They have focused in particular on wage-fixing and no-poach agreements, both of which typically amount to a restriction of competition by object under Article 101 of the Treaty on the Functioning of the European Union (TFEU) and Chapter I, Competition Act 1998 (CA98) in the UK. This means they are deemed unlawful regardless of their effects, unless they can be justified on efficiency grounds. NCCs usually fall outside the scope of competition law, unless they are the product of some coordination

[1] Norman D Bishara, 'Covenants Not To Compete in a Knowledge Economy: Balancing Innovation from Employee Mobility Against Legal Protection for Human Capital Investment' (2006) Berkley Journal of Employment & Labor Law, 27(2), 1187; Harrison Frye, 'The Ethics of Noncompete Clauses' (2020) Business Ethics Quarterly, 30(1), 229.
[2] Dan Andrews and Andrea Garnero, 'Five facts on non-compete and related clauses in OECD countries' (2025) OECD Economics Department Working Paper No. 1833; Iain Ross, 'Non-compete clauses in employment contracts: The case for regulatory response' (2024) The Economic and Labour Relations Review, 35(4), 806.
[3] Department for Business and Trade, *Measures to reform post-termination non-compete clauses in contracts of employment* (4 December 2020) Available: https://www.gov.uk/government/consultations/measures-to-reform-post-termination-non-compete-clauses-in-contracts-of-employment; Department for Business and Trade, *Non-Compete Clauses: Response to the Government consultation on measures to reform post-termination non-compete clauses in contracts of employment'* (12 May 2023). Available: https://assets.publishing.service.gov.uk/media/645e27612c06a30013c05c57/non-compete-government-response.pdf; Matt Marx and Lee Fleming, 'Non-compete Agreements: Barriers to Entry …and Exit?' (2012) Innovation Policy and the Economy, 12
[4] Department for Business and Trade, *Working paper on options for reform of non-compete clauses in employment contracts* (26 November 2025); Available: https://www.gov.uk/government/publications/reform-of-non-compete-clauses-in-employment-contracts-working-paper/working-paper-on-options-for-reform-of-non-compete-clauses-in-employment-contracts

between competitors, or possibly form part of exclusionary or exploitative abusive behaviour by a dominant firm. Prohibitions on anti-competitive agreements require the involvement of at least two independent business (or *undertakings*, as they are known in EU and UK competition law). Employees entering into employment contracts do not satisfy this requirement, meaning that NCCs are usually beyond the reach of competition authorities and are instead a matter of employment law.

This paper argues that while NCCs generally fall outside the scope of competition law, they have strong similarities to no-poach and wage-fixing cartels, in significantly distorting and restricting competition in labour markets, to the detriment of employees and the wider economy. Applying the principles of *ancillary restraints* which deal with non-compete clauses in the context of commercial transactions between businesses, it is argued that NCCs in employment contracts would amount to restrictions of competition by object, were they to fall within competition law. This is because they create significant distortions to the labour market and are neither necessary nor proportionate given that legitimate business interests can be adequately protected through other, less restrictive means.

Section 2 of this paper provides an overview of the policy debate, with a focus on the issues raised by the 2025 UK consultation. Section 3 discusses the application of competition law to labour markets, then Section 4 critically analyses why NCCs are likely to be as harmful as no-poach agreements under competition law. They create monopsonistic power in labour markets, that restrict labour mobility, supress wages and make it harder for actual and potential competitors to challenge the established incumbents. Those on middle- and lower-income roles are likely to be particularly disadvantaged, because they lack the means to decline an NCC, challenge its legality, or endure a period of unemployment in order to move to another employer or start their own business. Section 5 considers the treatment of NCCs in competition law outside the context of an employment contract. It contrasts the *restraint of trade* doctrine with that of *ancillary restraints* in competition law, where for NCCs to be justified they must be inherent to achieving the legitimate objective and be necessary and proportionate. Section 6 illustrates that while legitimate employer interests (such as trade secrets and client relationships) warrant protection, non-compete clauses are an overly broad and disproportionate mechanism to achieve this. Less restrictive measures to achieve the same outcome include non-solicitation clauses, non-disclosure agreements, garden leave provisions, and training repayment agreements. It is argued these more targeted measures can effectively safeguard employer interests without imposing the onorous distortive effects associated with NCCs. The overall recommendation of this paper is that limits on NCCs are insufficient in addressing their distortive effects (especially in relation to middle and lower income employees) and that more robust and decisive intervention is needed, in the form of a complete ban, to make the UK labour market more competitive.

2. The policy debate on whether NCCs should be restricted

Both the 2020 and 2025 UK government consultations on non-compete clauses in employment contracts reflect growing concern about their distortive effects on the UK's labour market. They both considered restrictions or outright bans of NCCs to enhance labour mobility, support new business formation and entrepreneurship, and promote the diffusion of knowledge and skills in the economy.[5]

A key problem with NCCs in the UK is how unlikely it is that their legality will be challenged by employees. This generally involves a legal challenge through the county courts and high court, subject to the loser pays cost principle. This means if the employee is unsuccessful in their challenge they will bear some or all of their employer's legal costs, making it significantly less attractive. Even if greater controls were introduced on costs, there is also a strong reputational deterrent to bringing such challenges, as individuals might fear it would negatively impact their future employment prospects in the industry. The UK consultations also expressed concern about possible behavioural effects of NCCs, in that employees are likely to view them as binding regardless of enforceability. These factors suggest there is little constraint on employers imposing NCCs, and indeed their use appears to have increased significantly in recent decades. According to research from the CMA, around a quarter of the UK workforce believe they are subject to non-compete clauses and these can typically be 6 months in duration.[6] While these are common in industries where one would expect there to be particular concern about proprietary interests (such as professional and scientific services), they are also common in retail, food services and education, and appear across all income categories, including in 20% of low income workers.[7] This means they are common even in industries and among employee groups where one would generally expect the need to protect proprietary interests to be low.[8]

In tackling NCCs, the government is seeking to reduce barriers for businesses, entrepreneurs and investors who are boosting growth. Startups, scale-up and other small businesses drive competition and innovation and are important to growth in the UK economy.[9] Indeed, the UK has low job mobility despite having a flexible labour market, and NCCs could be a key

[5] See Andrews and Garnero (n2).
[6] CMA Microeconomics Unit, *Competition and market power in UK labour markets* (25 January 2024) at 6.43
[7] Ibid, at 2.7, 6.37 and Figure 39. On distribution between industries and professions see: Evan P Starr, *et al.,* 'Noncompete Agreements in the US Labor Force' (2021) Journal of Law and Economics, 64(1), 53; Tito Boeri *et al*., 'Non-Compete Agreements in a Rigid Labour Market: The Case of Italy' (2023) IZA Institute of Labor Economics Discussion Paper Series, No 16021.
[8] On the creep in scope and use of NCCs in the US, see Norman D Bishara, 'An Empirical Analysis of Noncompetition Clauses and Other Restrictive Postemployment Covenants' (2015), Vanderbilt Law Review, 68(1), 1. See also, Eric A Posner, 'The Antitrust Challenge to Covenants Not to Compete in Employment Contracts' (2020) Antitrust Law Journal, 83(1), 165.
[9] Scaleup Institute, *Scaleups in the UK* (June 2024), cited by Department for Business and Trade 2025, (n 4), para 5.

cause of this.[10] Removing or controlling NCCs could ease downward pressure on wages[11], and reduce the prospect of workers facing forced periods of time outside of the labour market. The US FTC estimated a ban on non-compete clauses at federal level would lead to 8,500 new businesses, an increase in 2.7%, while also significantly increasing the number of patents registered.[12]

The UK consultations coincide with a rise in controls for NCCs around the world. In the US, The Federal Trade Commission (FTC) passed a rule in April 2024 aimed at banning non-compete clauses in employment contracts, as unfair methods of competition under Section 5 of the FTC Act.[13] Some States, including California, had already implemented a ban. Washington state banned non-compete clauses for those earning under USD 123,384.17. In May 2025, the Australian government proposed a ban on non-compete clauses for workers earning less than a high-income threshold of AUD 175,000.[14] There have also been greater controls introduced across the EU, including bans below salary thresholds in Austria and Luxembourg, and a requirement of mandatory compensation for the non-compete period in France, Germany and Italy.

3. The application of competition law to labour markets

The core purpose of competition law is to prevent, restrict, or distort competition across the economy, with a particular focus on the impact on consumers. Article 101 TFEU and Chapter I CA98 only apply to agreements and concerted practices between *undertakings*. These have a deliberately broad definition in competition law, encompassing an entity (whether public or private) engaged in an economic activity, regardless of its legal status, or whether it is profit making.[15] Employment contracts (including those that contain NCCs) fall outside the scope of Article 101 because employees act under the direction and control of the

[10] Lithuania Free Market Institute, 2020 Employment Flexibility Index: EU and OECD Countries and Nye Cominetti *et al*, Changing Jobs? Change in the UK labour market and the role of worker mobility (January 2022), cited by Department for Business and Trade 2025, (n 4) para 8.

[11] This is supported by public engagement activity undertaken by the US FTC in support of its ban on NCCs. See: Non-Compete Clause Rule, 2024-09171. Federal Register, Vol. 89, No 89 (May, 7, 2024). The noted for example that even temporary bar staff and warehouse workers were made to sign mandatory NCCs. See FN 32, giving examples in the media: Dave Jamieson, *Jimmy John's Makes Low-Wage Workers Sign `Oppressive' Noncompete Agreements,* HuffPost, Oct. 13, 2014, *https://www.huffpost.com/entry/jimmy-johns-non-compete_n_5978180;* Spencer Woodman, *Exclusive: Amazon Makes Even Temporary Warehouse Workers Sign 18-Month Non-Competes,* The Verge, Mar. 26, 2015, *https://www.theverge.com/2015/3/26/8280309/amazon-warehouse-jobs-exclusive-noncompete-contracts*; See also discussion in Jacqueline A Carosa, 'Employee Mobility and The Low Wage Worker: The Illegitimate Use of Non-Compete Agreements' (2019) Buffalo Law Review, 67(2), D1.

[12] Federal Trade Commission, (n 12)

[13] Ibid; for a discussion see Stephen M Hendricks, 'Breaking the Bind: Rethinking Non-Compete Agreements in a Federal Framework' (2025) Chapman Law Review, 28(2), 241.

[14] Australian Government, 'Cracking down on non-compete clauses to boost wages and productivity' (25 March 2025). Available: https://ministers.dewr.gov.au/chalmers/cracking-down-non-compete-clauses-boost-wages-and-productivity

[15] *Höfner and Elser v Macrotron GmbH* [1991] ECR I-1979; *Pavlov and Others v Stichting Pensioenfonds Medische Specialisten* [2000] ECR I-6451.

employer, who is vicariously liable for the actions of their employees.[16] Also it was thought that labour markets require specific protections for employees (such as the ability to form trade unions), who are typically the weaker party in the employment relationship.[17] It is important to note that self-employed individuals, such as freelancers and others who bear some commercial risk from undertaking work, are generally considered undertakings.

While it is conceivable that the imposition of an NCC could amount to an abuse of a dominant position under Article 102 TFEU / Chapter II CA98, defining and establishing a company's dominance in a labour market would be challenging. An exclusionary abuse might involve making it difficult for other firms to compete for essential labour, thereby constraining their ability to grow or enter the market. An exploitative abuse might be imposing NCCs as unfair terms.[18] In *International Skating Union*, eligibility rules restricting athletes' ability to participate in rival competitions was found to amount to a restriction by object under Article 101. As this concerned the decision of an association of undertakings that might also amount to a dominant firm, such practices might also amount to an abuse.[19] NCCs are more likely to feature as part of a broader theory of harm in relation to an abuse of dominance, than in isolation.

Nevertheless, Article 101 and Chapter I, Competition Act 1998 can apply where competitors coordinate their behaviour with the object or effect of restricting the labour market, including through the use of NCCs. In this context they are acting as a *buyer cartel* that unfairly restricts workers' wages and mobility, as opposed to a *seller cartel* where output and price are manipulated to maximise profits at the expense of consumers. For instance, a group of fifteen hospitals in the Netherlands were found to have breached competition law when they agreed to observe a 12 month no-poach commitment in relation to the recruitment of anaesthesiologists.[20]

There has been notable increased scrutiny of labour markets by competition authorities in recent years and this in part reflects the extent to which competition in this area was neglected by regulators. In June 2025, the European Commission imposed its first fine in a cartel that involved a no-poach agreement between two major food delivery companies.[21] In addition to the Dutch hospitals case mentioned above, enforcement action has been taken by various national competition authorities in the EU, including against Portuguese

[16] See Firat Cengiz, 'The conflict between market competition and worker solidarity: moving from consumer to a citizen welfare standard in competition law'(2020) Legal Studies 41(1), 73.
[17] Case C-67/96 *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* [1999] ECR I-5751
[18] See Alan Manning, 'Monopsony in Labor Markets: A Review' (2020) ILR Review, 74(1).
[19] Case C-124/21 P *International Skating Union v European Commission* EU:C:2023:1012.
[20] Court of Appeal, 's-Hertogenbosch, 5 April 2010, LJN: BM3366; G Gurkaynak, 'Competition Law Issues in the Human Resources Field' (2013) *Journal of European Competition Law & Practice* vol 4, issue 3,
[21] European Commission, *Commission fines Delivery Hero and Glovo €329 million for participation in online food delivery cartel* (2 June 2025).

football clubs[22], and engineering and technical consulting firms[23]. Similarly, the US Department of Justice has prosecuted a number of criminal antitrust cases, including the use of no-poach agreements among major technology firms[24], and wage-fixing arrangements in healthcare[25]. Enforcement action has been taken by other competition authorities, including in Turkey Canada, Japan, South Korea, Brazil and Australia.[26]

The main distinction between NCCs and no-poach agreements is that the latter tend to be a clandestine attempt by a cartel to distort the labour market, whereas an NCC is a transparent clause contained in the worker's employment contract. This means that, in principle at least, an employee has the option to turn down the opportunity of employment with a business requiring an NCC, negotiate the terms of the NCC, or agree a salary level that reflects its inclusion in the employment contract. However, as the following section will demonstrate, employees may have little or no power to resist and NCC, and where these clauses are commonplace in an industry among major employers, they amount to serious restrictions of competition.

4. Why NCCs are serious distortions of labour competition

While NCCs fall outside the scope of competition law, this paper argues that their effects are very similar to serious anticompetitive practices, such as no-poach and wage-fixing agreements. Just like product markets where businesses compete for consumers, well-functioning labour markets compete for workers, driving up wages and improving working conditions, while also allowing businesses to secure the skilled workers they need to grow.[27] Non-compete clauses fundamentally distort this competitive dynamic, contributing to the creation of *monopsony* power. This is the inverse of monopoly power. It allows powerful buyers (in this case employers) to artificially depress the price paid for employees below competitive levels.[28] This is because just as exclusionary practices by seller cartels and dominant firms restrict consumers' ability to switch to a cheaper or better-quality alternative, NCCs artificially restrict workers' ability to switch to another employer in pursuit

[22] Autoridade da Concorrência, 'AdC fines 31 football clubs for anticompetitive agreement in the labour market' (Decision PRC/2020/1, 9 June 2022).
[23] Autorité de la concurrence, Decision 23-D-06 (11 April 2023)
[24] *United States v Adobe Systems Inc* (D DC 2010) Case No 1:10-cv-01629.
[25] *United States v Jindal* (ED Tex 2022) Case No 4:20-cr-00358; *United States v DaVita Inc* (D Colo 2022) Case No 1:21-cr-00229.
[26] Private Schools Association Case No. 11 –12/226 –76, 3 March 2011; *Competition Act*, RSC 1985, c C-34, s 45 (as amended by Budget Implementation Act 2022, No 1, SC 2022, c 10, s 244; in force 23 June 2023); Japan Fair Trade Commission, *Cease and Desist Order against Staffing Service Providers for Unreasonable Restraint of Trade* (2023); Korea Fair Trade Commission, *KFTC Sanctions Delivery Platform Operators for No-Poach Agreement* (Press Release, 2022); Administrative Council for Economic Defense (CADE), *Investigation into No-Poach Agreements in the Healthcare Sector* (Administrative Proceeding No 08700.004455/2021-59).
[27] Julian Alves *et al*, 'Labour market power : New evidence on Non-Compete Agreements and the effects of M&A in the UK' (January 2024) Centre for Economic Performance Discussion Paper No 1976, p8.
[28] Ioana Marinescu and Eric A Posner, 'Why has Antitrust Law Failed Workers?' (2020), Cornell Law Review 105(5), 1343.

of higher wages or better working conditions.[29] It also prevents them from using their skills and entrepreneurship to start a new business.

Even in the absence of coordination between employers, where unilaterally imposed NCCs become commonplace, de facto horizontal restraints are created, which empower employers to set wages below the competitive level and dictate terms of employment that are more favourable to the firm than the employee.[30] No explicit coordination is needed, where NCCs become a standard contractual term employed across the industry. Moreover, these can be used to great effect because of the inherent frictions that exist within the labour market, when it comes to matching employers with the workers they require.[31] The collective effect of many employers utilising NCCs is analogous to a cartel among buyers of labour. The rest of this section summarises the key effects that NCCs are likely to contribute to.

Suppression of wages and reduced worker bargaining power

By restricting an employee's ability to move to a competing employer or start their own business, NCCs reduce both their ability to secure higher paid employment elsewhere and to negotiate a salary with their current employer that reflects their competitive value as they develop.[32] With the prospect of staff departures reduced, the employer will feel less compelled to set wages at competitive levels or improve working conditions within the business.[33] Indeed, a number of studies appear to suggest that NCCs reduce average worker earnings in most industries.[34] The ways in which NCCs disadvantage workers beyond the suppression of wages, can be summarised as follows:

- **Information asymmetry and coercion**. New employees will not necessarily be aware of the existence of an NCC and the vast majority will have limited or no opportunity for negotiation on the standard employment terms, which are typically offered on a 'take-it-or-leave-it' basis. Faced with the immediate prospect of employment and the financial necessity of being in work, most individuals are in no position to reject such a clause. The disadvantage of an NCC may be remote, abstract and heavily discounted against the cost of refusing a job offer. NCCs are rarely, if ever, the genuine product of negotiation between two equal parties. This is demonstrated by

[29] Matthew Johnson *et al*., 'Innovation and the Enforceability of Noncompete Agreements: Evidence from State Law Changes'
[30] Satoshi Araki, *et al.,* 'Labour Market Concentration and Competition Policy Across the Atlantic' (2025) IZA Institute of Labor Economics Discussion Paper Series, No 15641.
[31] Alves *et al.*, (n27) p7.
[32] David Card *et al.,* 'Firms and Labor Market Inequality: Evidence and Some Theory' (2018) Journal of Labor Economics, 36(51); Tito Boeri *et al*. (n 7).
[33] See findings in Matthew S Johnson *et al*., 'The Labor Market Effects of Legal Restrictions on Worker Mobility' (2023) NBER Working Paper 31929.
[34] For a summary and discussion, see Kurt Lavetti, 'Noncompete agreements in employment contracts' (2021) IZA Institute of Labor Economics Discussion Paper Series, No 15185.

the fact they are generally introduced by employers with minimal cost.[35] Even top earners who enjoy less of a power imbalance with the employer, will only have a one-shot opportunity to negotiate a higher salary or other terms to mitigate for the NCC, at the point of recruitment.

- **'Chilling effect' on mobility and progression.** Bound by the NCC, the power asymmetry becomes more pronounced when someone is an employee.[36] As many as 70% of employees subject to unfair NCCs believe they are binding.[37] Unable to actively look for better opportunities, employees subject to an NCC are then locked into that employer, who may later extract greater surplus from them in the form of below-market wages.[38] A key measure of harm here is the 'mark-down', which is equivalent to the overcharge in a seller cartel.[39] The NCC not only prevents the employee for exploring alternative opportunities of employment and starting their own business, they may also be disadvantaged when it comes to internal progression and promotion, because there is little credible threat of them leaving the organisation.[40] When the employment is terminated, the threat of enforcing the NCC might be used to impose unfavourable terms on the employee, or to discourage them from speaking out against unfair practices or discrimination.[41]
- **Vulnerability of middle- and low-income workers.** The main effect of NCCs, of reducing the demand side pressure on wages, is particularly pronounced for middle and lower-income workers where existing power asymmetries are likely to be exacerbated. These workers' wages and working conditions may already be poor, and they will lack the financial resources to endure a period of unemployment for the duration of the NCC, or to challenge its enforceability.[42]
- **Forced unemployment or underemployment.** Where an employee leaves a job with an enforced NCC, they may have to make the choice between unemployment, or a period of employment outside their field where they are less skilled and likely to

[35] Department for Business and Trade, Restricting the use of non-compete clauses: Impact Assessment (12 May 2023), para 30.
[36] Burdett, K., & Mortensen, D. T. (1998). Wage Differentials, Employer Size, and Unemployment. International Economic Reivew, 39(2), 257- 273; Erik Stam, 'The Case against Non-Compete Agreements' (2019), USE Research Institute, Working Paper Series 19-20.
[37] Starr *et al.,* (n 7).
[38] Jessica Jeffers, 'The Impact of Restricting Labor Mobility On Corporate Investment and Entrepreneurship' (2023) Working Paper.
[39] David Card, 'Who Set Your Wage?' (2022) America Economic Review, 112(4), 1075; Alan Manning, 'Imperfect Competition in the Labor Market' in Orley C Ashenfelter and David Card (eds), *Handbook of Labor Economics* (Vol 4B, Elsevier 2011) 973–1041.; See also Azar, J. A., Berry, S. T., & Marinescu, I. (2022). 'Estimating Labor Market Power' Working paper, who estimate the mark-down can be as much as 20%, discussed in Alves *et al.*, (n27) p7.
[40] Even Starr, 'Consider This: Training, Wages, and the Enforceability of Covenants not to Compete'(2019) ILR Review, 72(4), 783.
[41] Department for Business and Trade 2023, (n35), para 35.
[42] For the impact of NCCs on low income worker's job mobility, see Samuel Young, 'Noncompete Clauses, Job Mobility, and Job Quality: Evidence from a Low-Earning Noncompete Ban in Austria' (2020) Working paper.

earn significantly less. This amounts to a misallocation of resources within the labour market, and for lower income workers this will exacerbate already challenging financial situations, possibly leading to an inability to meet basic living expenses.[43] Where an NCC has a geographical dimension, some workers may be forced to move in order to circumvent it, incurring unnecessary cost. Unlike some other jurisdictions, there is no general legal requirement in the UK for employees to be compensated for the duration of the NCC. This means the employee is forced to bear the entire financial cost of protecting the employer's proprietary interests.

Artificial barriers to new entry and the growth of competitors

For anticompetitive behaviour to succeed, a cartel or dominant firm must be able to credibly prevent new entry into the industry or the growth of nascent competitors. Attracted by the monopoly profits created by the behaviour, these businesses will seek to challenge the cartel or dominant firm. Indeed, even a monopolist must charge a competitive price if there are very few barriers to competitors entering the market (known as competitive constraints). Labour is a key input required for entry and growth, and competitive constraints are significantly weakened where these businesses face barriers and distortions in the labour market. Just as dominant firms benefit from strategies that entrench their market power in selling products or services, incumbent employers can benefit from engaging in strategies that restrict labour mobility. NCCs and other devices that make it difficult for employees to secure higher wages and better working conditions, raise artificial barriers to actual and potential competitors, thereby weakening their ability to challenge the incumbents.[44] This means that labour market restrictions can make end-consumers worse off – especially if they are also used to reduce output so as to drive up higher prices where they also have market power in the product market.[45]

Stifling innovation and entrepreneurship

As well as disadvantaging workers and creating barriers to competition, NCCs are also a significant impediment to innovation and entrepreneurship.[46] A dynamic economy that drives growth relies on the free flow of ideas, knowledge and skilled labour. Some of this knowledge must rightly be protected so as not to undermine the incentive to develop it in the first place. Later in this paper, the purported benefits of NCCs will be discussed. However, unlike more targeted protections such as intellectual property rights or confidentiality, NCCs are an overwhelmingly blunt tool. By preventing employees from

[43] Ross (n 2); Alves *et al.*, (n27) citing N Balasubramanian *et al.,* 'Locked In? The Enforceability of Covenants Not to Compete and the Careers of High-Tech Workers' (2017) Center for Economic Studies, U.S. Census Bureau Working Paper

[44] See for example, Jeffers (n 38).

[45] Sarah Cardell, 'The CMA's research on competition and UK labour markets' Speech delivered at Durham University (25 January 2024).

[46] See for example, Sampsa Samila and Olav Soernson, 'Noncompete Covenants: Incentives to Innovate or Impediments to Growth' (2011) Management Science, 57(3), 425; Ege Can and Frank M Fossen, 'The Effects of Non-Compete Agreements on Different Types of Self-Employment: Evidence from Massachusetts and Utah' (2020) IZA Institute of Labor Economics Discussion Paper, no. 13414.

switching employers, they do not only prevent the transfer of legitimate proprietary information, but also the transfer of *any* ideas, information and skills, including entrepreneurship that might lead to a new business model and start-up.[47] Indeed, one of the key justifications for banning NCCs in California, was that any benefits of NCCs for the employer are outweighed by their chilling effect on broader, economy-wide innovation.[48] In principle, these chilling effects might include: human capital not being allocated to its most productive uses; viable economic growth through start-ups and scale-ups not being realised; and lower overall levels of employment.

5. The *restraint of trade* and *ancillary restraints* doctrines

NCCs are governed in the UK by the common law doctrine of *restraint of trade*. This also happens to also be the historical origin of Section 1 of the US Sherman Act – one of the first modern competition law prohibitions of cartels. Its modern formulation is set out in *Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co Ltd*[49] and *Herbert Morris Ltd v Saxelby*[50]. Essentially non-compete clauses are prima facie void unless an employer can demonstrate it is 'reasonable' (in scope, duration and geographic area) and is 'in no way injurious to the public'. In practice this means that the restraint must protect a legitimate interest and be reasonably necessary.

The approach of the courts has been fairly strict in considering NCCs, in that the employer must demonstrate a legitimate proprietary interest, such as trade secrets, confidential information, customer connections, or workforce stability. Mere protection from competition is insufficient.[51] Yet the UK government's 2025 consultation identifies a weakness in the protection afforded by the restraint of trade doctrine. The application of reasonableness is unpredictable and the cost of bringing a challenge is substantial. As a consequence, the threat of unreasonable NCCs being challenged is low. It should also be noted that the 'public interest' element of the restraints of trade doctrine is primarily focused on the legitimate proprietary interest of the employer and ensuring a skilled worker is not removed from the market completely.[52] It does not adequately account for the broader societal and economic harms associated with restraints of trade, such as wage suppression, reduced innovation, and decreased labour market dynamism. Indeed, it has been suggested that what amounts to a 'common sense' approach would benefit from a more economics based analysis, drawn from competition law.[53]

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[47] Andrews and Garnero (n2).
[48] REF
[49] [1894] AC 535
[50] [1916] 1 AC 688
[51] *Littlewoods Organisation Ltd v Harris* [1977] 1 WLR 1472 (CA); *Herbert Morris Ltd v Saxelby* [1916] 1 AC 688 (HL)
[52] See David Cabrelli, *Employment Law in Context: Text and Materials,* 5th edn. (OUP 2025), Chapter 6.
[53] Christopher McMahon and Alan Eustice, 'Nothing to Lose but Their Restraints of Trade: Lessons for Employment Non-Compete Clauses from EU Competition Law' (2023) Industrial Law Journal, 52(2).

Given the relatively narrow focus of the restraint of trade doctrine, it is helpful to consider how non-compete clauses are treated under competition law when entered into by rival businesses. Beyond their use in employment contracts, NCCs are routinely incorporated into commercial transactions such as, mergers and acquisitions, or the sale of particular operations to a rival. Their primary purpose in this context is to safeguard the legitimate commercial interests of the acquiring party, protecting the value of the assets being transferred. For instance, when a business owner sells their enterprise, the buyer typically insists on a NCC to prevent the seller from immediately re-entering the market and directly competing with the acquired entity. Such a clause ensures that the goodwill, client relationships, and proprietary knowledge that formed part of the purchase price are not instantly undermined by the seller's renewed competitive activity. Without such protections, the value of the acquired business would be severely diminished, and the transaction itself might not be commercially viable.

In these transactional settings, the NCCs form part of an agreement and therefore can fall within the scope of competition law prohibitions. However, NCCs are not necessarily incompatible with competition law, as they can be subject to the *ancillary restraints* doctrine. Not every agreement containing a restriction of competition automatically infringes Article 101 TFEU / CA98. Such agreements must be assessed within their overall legal and economic context to determine their true competitive impact.[54] The ancillary restraints doctrine acknowledges that certain restrictions on competition, while inherently anti-competitive, may be permissible if they are directly related and objectively necessary for the implementation of a broader, legitimate transaction. The underlying rationale is that without these essential restraints, the main transaction, which itself may be pro-competitive or competitively neutral, could be unfeasible or significantly impaired, thereby potentially leading to less overall competition or efficiency in the market.[55] As well as business transfers, NCCs are also considered important in the context of vertical agreements, where they are essential to the functioning and viability of arrangements such as franchise systems.[56]

There are competing definitions of ancillary restraints, but one of the clearest formulations comes from the European Commission's guidelines on Article 101(3),

> *In Community competition law the concept of ancillary restraints covers any alleged restriction of competition which is directly related and necessary to the implementation of a main non-restrictive transaction and proportionate to it… If on the basis of objective factors it can be concluded that without the restriction the main non-restrictive transaction would be difficult or impossible to implement, the*

[54] *Case 56/65 Société Technique Minière v Maschinenbau Ulm GmbH* [1966] ECR 235.
[55] *Case 42/84 Remia BV and Others v Commission of the European Communities* [1985] ECR 2545
[56] See for example, CMA Guidance, *Vertical Agreements Block Exemption Order* (12 July 2022) CMA166, p81-3

restriction may be regarded as objectively necessary for its implementation and proportionate to it (para 29-31).[57]

Thus for an NCC embedded in a transactional agreement to be successfully classified as an ancillary restraint, and therefore fall outside the scope of Article 101 TFEU and Chapter I, Competition Act 1998, three conditions must be satisfied:

1. **The restraint must be directly related to the main transaction**. This means it must be integral to that transaction and not independent of it. So for example, a clause preventing the seller from selling in the same specific geographic market might be considered directly related, whereas a restriction on selling in a different geographic market would not.

2. **The restraint must be objectively necessary for the implementation of the main transaction**. This means an analysis of the counterfactual (where the restriction is absent) would conclude that the transaction would be impossible to execute. It is not sufficient that the absence of the restriction would merely make the transaction harder to execute or less profitable. The necessity must therefore be genuine and the restriction cannot be relied upon for commercial convenience alone.

3. **The restriction must be strictly proportionate to the legitimate objectives it seeks to achieve**. This means it must not go further than what is absolutely necessary to protect the relevant commercial interests at stake. This restriction must therefore be of limited duration and geographic scope, and must only limit activities that are directly relevant to the assets being acquired.

There is also a related concept of *regulatory ancilliarity,* established in *Wouters* and subsequent case law.[58] While this does not directly concern NCCs, it allows for restrictions of competition to be justified where they are inherent to the pursuit of a legitimate objective of public interest. In *Wouters* this concerned the proper organisation of a regulated profession (the Dutch Bar preventing lawyers from forming direct partnerships with accountants). Regulatory ancilliarity is also relevant to the governance of sport, as set out in *Meca-Medina*[59], although *Superleague*[60] and other recent case law has clarified that Wouters and Meca-Medina type ancilliarity can only apply to restrictions of competition by effect, and not by object. As with NCCs, the question is whether the restriction is

[57] See also Case T-112/99, *Metropole III* [2001] ECR II-2459, para 107; For discussion, see Ioannis Lianos *et al., Competition Law: Analysis, Cases & Materials* (OUP 2019), at 6.3.4.
[58] Case C-309/99 J C J Wouters, J W Savelbergh and Price Waterhouse Belastingadviseurs BV v Algemene Raad van de Nederlandse Orde van Advocaten, intervenor: Raad van de Balies van de Europese Gemeenschap [2002] ECR I-1577
[59] Case C-519/04 P David Meca-Medina and Igor Majcen v Commission of the European Communities [2006] ECR I-6991
[60] Case C-333/21 European Superleague Company SL v Fédération Internationale de Football Association (FIFA) and Union of European Football Associations (UEFA) [2023] ECLI:EU:C:2023:1011; Case C-124/21 P International Skating Union v Commission of the European Communities [2023] ECLI:EU:C:2023:1012; Case C-680/21 UL, SA Royal Antwerp Football Club v Union royale belge des sociétés de football association ASBL and Union des associations européennes de football (UEFA) [2023] ECLI:EU:C:2023:188.

indispensable and proportionate to attain a legitimate objective, and whether the objective can be achieved by less restrictive means.

The overarching principle that can be derived from the ancillary restraint and related regulatory ancilliarity principles, are that restrictive clauses (including an NCC), will only be considered ancillary if they are objectively necessary for the implementation of a legitimate objective and are proportionate in their scope and duration.

6. Why NCCs are neither necessary nor proportionate

As the main concern about NCCs is their distortive effect on labour markets, it is worth undertaking a competition law ancillary restraints type analysis to determine whether they are necessary and proportionate in protecting an employer's legitimate proprietary interests. We have seen how a critical problem with NCCs in the UK context, is their widespread and apparently indiscriminate application across various industries and job roles, going beyond those workers who genuinely have access to highly sensitive trade secrets, or who manage critical customer relationships. NCCs are particularly unlikely to serve a legitimate protective function in relation to lower wage workers (with some narrow exceptions such as within franchise systems), so as to justify suppressing competition in the labour market.

The key justifications for NCCs in employment contracts

We now turn to the most compelling justifications for the use of NCCs. In this context, it is helpful to look at the responses received to the 2020 UK consultation.[61] A majority of respondents (overwhelmingly employers and their advocates) opposed banning NCCs by identifying their key purported benefits. These can be summarised as follows:

- **Protecting trade secrets and other confidential information.** Businesses invest significant sums of money to develop proprietary information that is essential to their operations and which could easily be copied or stolen by competitors. This includes trade secrets, intellectual property, strategic business plans, research and development data, customer lists and financial models. The worry is that employees in key roles (especially very senior roles) gain detailed knowledge of these assets and can then share them with a new employer, thereby undermining the investment that led to those assets and conferring an unfair competitive advantage to the new employer. This might lead to a 'revolving door' employment market that has a chilling effect on employer's willingness to share these sensitive assets with new

[61] Department for Business and Trade 2020, (n 3).

employees. In this context, NCCs provide a cooling off period during which the information held by the employee becomes older and less sensitive. [62]

- **Safeguarding customer relationships and goodwill**. There are industries where income depends crucially on client relationships. This is especially important in client-facing professional services (solicitors, accountants etc), sales, and consultancy firms. These clients are typically managed by key individuals who build strong, personalised relationships with them on behalf of the firm. There is a fear that upon leaving the business, the individual might take the clients with them, undermining the former employer's investment in developing those relationships. An NCC gives the employer an opportunity to preserve the client goodwill by introducing new personnel and demonstrating their ongoing commitment to those clients.

- **Incentivising investment in employee training and development.** Employers play a key role in adding value to the labour market, by investing substantial sums in the training and development of their employees. This can represent a very significant investment the benefits of which will never be recouped if the employee is free to immediately move to another business, which effectively 'free-rides' on the investment of the former employer. This might be a particular concern in new or highly specialised fields where employees require a high degree of industry-specific technical knowledge. In this context, NCCs are said to be mutually beneficial, in that the employer gets to recoup the benefit of training its staff, while the employee benefits from the opportunity to develop new skills that would not otherwise be available to them.[63]

- **Fostering stability and team cohesion by lowering staff turnover in key roles.** While less prominent than the other justifications, some respondents contended that NCCs contribute to organisational stability and effectiveness. By reducing the likelihood of key employees in leadership roles (and in some cases entire teams) from being poached by competitors, NCCs can foster a more stable workforce that is able to better engage in long-term project planning and strategic change.[64] This benefit focuses on the cost and disruption associated with frequent employee turnover.

Proponents of NCCs argue they are essential to protecting these proprietary interests and that a complete ban on them would be harmful to employers and the wider economy for the reasons set out above.

Are NCCs inherent, necessary and proportionate to achieving legitimate objectives?

[62] See Norman D Bisra and Michelle Westermann-Behaylo, 'The Law and Ethics of Restrictions on an Employee's Post-Employment Mobility (2012) Ross School of Business Working Paper, No. 1172.
[63] Frye (n 1), p229.
[64] See for example, Raffaele Conti, 'Do Non-Competition Agreements Lead Firms to Pursue Risky R&D Projects?' (2014) Strategic Management Journal, 35, 1230.

Both the restraint of trade and ancillary restraint doctrines do little to achieve legal certainty. This is primarily because questions of what is inherent, necessary and proportionate will depend on a careful consideration of the circumstances in each individual case. Indeed, empirical research on NCCs and their alternatives is underdeveloped and the question of whether NCCs are necessary and proportionate will likely differ significantly between industries.[65] A case-by-case competition law type effects analysis would be a more accurate and thorough assessment of the effects of NCCs, than under the common law restraint of trade, but it would only make the exercise of challenging NCCs even more complicated and resource intensive.

While it is impossible to examine the precise effects of NCCs in all industries, it is possible to critically consider, in the round, whether they are necessary and proportionate to achieving the objectives championed by their proponents. To begin with, it is hard to characterise NCCs as indispensable to the protection of proprietary interests. They are in fact one of a range of measures used by employers, sometimes together, to protect their interests. What is more, the alternative measures available are more targeted and specific in what they seek to protect. The bluntness of NCCs makes them more akin to no-poach agreements in competition law, as will be discussed.[66]

Non-solicitation clauses (NSC). These are contractual provisions that restrict a departing employee from soliciting the former employer's clients, customers or employees (sometimes called a non-recruitment clause) for a specific period after their employment ends. These serve to mitigate against the loss of several proprietary interests, including client goodwill and wider teams within the organisation. The effectiveness of NSCs stems from their specificity. They do not prevent an employee from continuing to work in the same industry, either as a start-up or at a competitor. Neither do they force that individual into a period of unemployment and inactivity. Former employees subject to NSCs cannot actively recruit others or target clients of the former employer. But NSCs do not generally prevent them from *passively* recruiting others or being approached by former clients. This means others can apply for jobs advertised by the former employee's new firm and clients may choose to take their business there of their own volition, if they feel they will get a better product or service. Even if an NSC goes further in preventing the individual from recruiting staff or clients from their former employer altogether, this is still less restrictive than an NCC. NSCs generally strike a more proportionate balance, as they allow the employee to move on (with the benefits that might bring in terms of competition, innovation and growth), while giving the employer a reasonable opportunity to reinforce their client relationships with new representatives. NSCs, like other restrictive covenants in

[65] See John M McAdams, Non-Compete Agreements: A Review of the Literature (2019) Working paper; Sarah Oh Lam, *et al*., 'Is a Ban on Non-Competes Supported by Empirical Evidence?' (2023) Fordham Journal of Corporate and Financial Law, 29(1), 1.
[66] For a further overview of these, see Alves *et al.*, (n27).

the UK, must be reasonable in scope, duration and geographic reach to be lawful, but their less restrictive nature means they are more likely to be enforceable by the employer.

Non-disclosure agreements (NDA) or confidentiality agreements are legally binding contracts that oblige an employee to protect an employer's confidential information and trade secrets, during and after their employment. Unlike NCCs, they do not restrict the work that the individual can engage in after leaving their employment. Rather, they restrict their freedom to disclose and use specific information obtained during their employment. This makes NDAs far less restrictive than NCCs, yet they are a routinely used and universally accepted mechanism for protecting proprietary interests, such as intellectual property and other trade secrets. The FTC noted that 95% of workers with NCCs in the US, already had an NDA in place.[67] A well-drafted NDA will clearly define the information that is to be protected, but will also be broad enough to cover various forms of proprietary data. Like NSCs, the strength of NDAs lies in their specificity, protecting proprietary information without completely depriving the employee of the right to seek alternative employment or starting their own businesses within the industry. NDAs cannot restrict the former employee from using their general skills and experience, making them significantly less restrictive. NCCs, by contrast are overly blunt in severely restricting an employee's livelihood and causing a significant distortion in labour markets, regardless of the level of risk of disclosure or misuse of the confidential information. This will vary significantly between industries and roles. NDAs are proportionate because they directly engage the legitimate proprietary interest – the information itself. However, it may be possible for some employers to attempt to draft NDAs so broadly, as to act as de facto NCCs.[68] While these are generally unenforceable because of their lack of specificity, any ban on NCCs will need to give regard to how such abusive NDAs might be prevented from taking their place.

Garden leave and remunerated NCCs. It was noted earlier in the paper that France, Germany, and Italy mandate that employers compensate workers for the duration of any NCC. There are actually two different approaches that employers can take in this regard. They can offer a remunerated NCC, which simply means employees receive compensation to mitigate being unemployed for its duration. An alternative approach is to incorporate a 'garden leave' provision. This is a contractual requirement whereby an employee, having resigned or given notice of termination of their employment, is instructed not to attend work, but remains formally employed for a defined period (typically 3-6 months). During this time, they remain fully bound by all contractual terms (including confidentiality) and continue to enjoy their full salary and benefits. The period is used to transition responsibilities, protect client goodwill, and allow any confidential information held by the individual to become less valuable. This is especially important in an R&D environment where the greatest risk relates to new and current confidential information. The period can

[67] Federal Trade Commission, (n 12)
[68] Camilla A Hrdy and Christopher B Seaman, 'Beyond Trade Secrecy: Confidentiality Agreements that Act Like Noncompetes' (2024) The Yale Law Journal, 133, 669.

also mitigate any negative effects to corporate structure and team building, allowing for better continuity, as it facilitates a more managed handover of responsibilities, with the ability to access the individual during the period of garden leave, to help support this process. It is effectively a less restrictive alternative to an NCC. Garden leave and remunerated NCCs mitigate the severe financial consequences of a forced period out of work. While they are more proportionate and ethical than NCCs (in generally providing full compensation to the employee), they lack the specificity of NSCs and NDAs. Workers still have no choice but to have a period of inactivity when they are not contributing to the labour market or applying their skills and entrepreneurship.[69] This may reduce the value of these workers to prospective employers, some of whom may not be willing to wait the duration of the garden leave or NCC. These provisions may therefore still have a chilling effect on the willingness of employees to move on to better opportunities. However, because the cost of the NCC is internalised by the employer, these provisions will generally be used more sparingly and will be far less likely to be rolled out in situations where the risk to proprietary interests is low.

Training repayment agreements (TRA). It might be argued that none of the abovementioned measures effectively deal with the danger of employers having weak incentives to invest in training and staff development, in the absence of an NCC. The implication is that an employee who has received expensive training will immediately take those newly acquired skills to a competitor (or start their own business), effectively subsidising a rival and conferring an unfair advantage. While this concern is legitimate, ir can be mitigated by the use of a training repayment agreement. This works by requiring an employee to work for a given period of time following the completion of a key training package, in order for the business to assume its entire cost. Employees are free to leave the business early, but in doing so are required to make a reasonable contribution to the cost of that training, either at their own cost or with the support of remuneration from the new employer. That contribution should decrease over the duration of the defined period. This offers a more targeted and less restrictive solution than a blanket non-compete, assuming both the period of work required and the contribution to cost are reasonable. The employee remains free to move to another company, utilise their newly acquired skills, and advance their career, but they must contribute to the former employer's cost of providing the training.[70] TRAs might be criticised for not typically recouping the full cost of the training, but this overlooks the fact employees will begin adding value to the business as their training improves the skills they employ in their everyday work. TRAs are more proportionate than NCCs because they recoup the cost of the training rather than restricting the employee's ability to move to a competitor or start their own business. It is down to the employee's freedom to choose. However, as with NDAs, there is a danger that employers

[69] Alcino Azevedo, 'Non-compete covenants, litigation and garden leaves' (2018) Journal of Business Research, 88, 197; Charles A Sullivan, 'Tending the Garden: Restricting Competition via "Garden Leave"' (2016) Berkley Journal of Employment and Labour Law, 37(2), 293.
[70] Alves *et al.*, (n27) p21.

will use restrictive TRAs as de fact facto NCCs, for example by making the staff contribution to training on early exit prohibitively high.[71]

Improving remuneration and working environment. As explained earlier in this paper, NCCs are an extremely blunt tool that in effect lock in employees and restrict their freedom to move on. The focus so far in this section has been on other, more proportionate, forms of restriction that have a similar, albeit narrower effect. Yet in a competitive labour market, employers should be competing to provide the best offering to workers, just as they compete to provide the best product or service to consumers. If employees are properly remunerated (including through bonuses, commissions and other benefits) and if they are happy with their working environment, then they are far less likely to leave the business. Indeed, offering staff training and genuine opportunities for development are both likely to promote staff retention. The CMA's report on labour markets found comparable levels of training among employers whether an NCC existed or not.[72] By contrast, NCCs create an artificial barrier to staff mobility and restrict the competitive constraints employers face in the labour market, thereby allowing them to disadvantage workers and the wider economy for their own gain.

The alternatives outlined above are summarised in Figure 1 and mapped against the employer concerns (in terms of protecting proprietary interests) forwarded by the proponents of NCCs.

Figure 1 – Summary of alternatives to NCCs

Concern addressed by NCC	**Less restrictive alternative**
Protecting trade secrets and other confidential information	Non-disclosure agreements; Garden leave
Safeguarding customer relationships and goodwill.	Non-solicitation clauses; Garden leave
Incentivising investment in employee training and development.	Training repayment agreements; Improving the working environment.
Fostering stability and team cohesion by lowering staff turnover in key roles	Non-solicitation clauses; Improving the working environment.

Collectively, these measures address the key concerns typically cited as justifications for NCCs, but do so in a manner that is significantly less restrictive and more proportionate. The use of these alternatives is more conducive to a competitive and dynamic labour market, and leaves employers with less scope to take advantage of any monopsony power.

[71] Stuart Lichten and Eric M Fink, '"Just When I Thought I Was Out…" Post-Employment Repayment Obligations' (2019) Washington and Lee Journal of Civil Rights and Social Justice, 25(1), 51.
[72] CMA Microeconomics Unit (n 6).

7. Should NCCs be subject to a partial or complete ban?

In light of the analysis in this paper, we now turn to the options for reform set out in the UK government's November 2025 working paper consultation. The first was a statutory limit on the length of non-compete clauses. As previously mentioned, this was the previous government's preferred option when it responded to its 2020 consultation.[73] It recommended a 3-month limit on NCCs, but this was never passed into law. That consultation highlighted YouGov polling that suggested 71% of NCCs were longer than 3 months and were known to last for up to 24 months.[74] One of the reasons why the 2025 working paper consultation came about, is because the new government was concerned a 3-month limit would not be enough to deal with the concerns associated with NCCs. Indeed, a 3-month limit risked becoming an 'industry standard' that might actually encourage greater use of NCCs, while making them too short for a legal challenge to be worthwhile. An additional problem is that an NCC of any duration is likely to have a significant chilling effect on the mobility of medium and low paid staff, as discussed in section 4 of this paper.

The second option was for a statutory limit of NCCs according to company size. Under this proposal, there would be a 3-month limit for companies with more than 250 employees, and 6 months for those with fewer. However, as the consultation noted, businesses with fewer than 250 employees account for 60% of UK employment. This option actually risks making the situation worse, by creating two-tier industry standards of 6 months for smaller businesses and 3 months for larger ones. Apart from the chilling effect on worker mobility being even more pronounced than in the 2023 recommendation, this option risks significantly disadvantaging smaller businesses, whose offering in the labour market could be inferior to that of larger employers if the 6-month NCC becomes an industry standard.

The third option, and the one supported by the findings of this paper, is for a complete ban on NCCs in employment contracts in the UK. This would remove a significant source of distortion to competition in the labour market, removing barriers to recruitment, growth and new entry, and promoting the diffusion of skills. Employers would still be able to use alternative, less restrictive measures to protect genuine proprietary interests, but would also be exposed to greater market pressures to provide positive incentives to retaining staff. This is preferable to a blunt tool used to restrict their mobility. As noted in the working paper, employers may respond by strengthening the use of other restrictive covenants, and some thought will need to be given to preventing these from becoming de facto NCCs. However, for the reasons explained in Section 6, these are inherently less restrictive than NCCs and are likely to be far less damaging overall.

The fourth option is a ban on non-compete clauses below a salary threshold, similar to that introduced in Washington state and proposed in Australia. This would provide an absolute protection to those middle- and low-income workers most vulnerable to the lock-in effects

[73] Department for Business and Trade 2023, (n 3)
[74] Ibid.

of an NCC. Top earners by contrast will have greater ability to negotiate their employment contracts and may be in a better financial position to absorb an NCC where it cannot be avoided. However, the salary threshold option means that the distortive effect of NCCs can continue to occur in the most valuable part of the labour market. Even if the salary threshold is set at £100,000, that still means some 1.8 million workers could be subject to NCCs.[75] These may be workers with the greatest propensity to engage in entrepreneurship, be involved in new start-ups and facilitate the diffusion of skills and knowledge. Also, while higher earners are likely to be more financially secure, their ability to negotiate the terms of their contracts may be limited in particular industries, and even a 3-6 month period of lost earnings could pose a significant disincentive to leaving an employer. Therefore, the worst of the distortive effects of NCCs (beyond the vulnerability of lower paid workers) could still be prevalent in the UK's labour market.

The fifth and final option is to combine a ban on non-compete clauses below a salary threshold with a statutory limit of 3 months. This would have some of the same limitations as the fourth option, but the negative effects of NCCs on high earners would be mitigated by the 3-month ban. However, as with any statutory limit, there is a risk that 3-month limit would become an industry standard and possibly result in NCCs becoming even more prevalent because of the perceived legal certainty provided by it and the low number of challenges.

It should be noted that the 2023 government recommendation not to ban NCCs appears to have been overwhelmingly influenced by the responses of businesses, which one would assume are more likely to have participated if they opposed the restriction of NCCs. 61% of these businesses thought a ban would tighten sharing of confidential information, lead to loss of staff and clients, disruption of the workforce, and a more challenging investment climate.[76] Yet it is important to remember that from the perspective of the employer, NCCs will always be preferable because they are a blunt and absolute tool. It is notable also, that despite these concerns and the likely response bias, 54% felt they could protect their business interests through other means.[77] The recommendation also appears to suggest that a ban on NCCs would be ineffective because businesses, in responding to the consultation, said they would 'strengthen their use of other restrictive covenants'.[78] However, this paper has demonstrated how these alternatives are generally less restrictive, more targeted and therefore more proportionate to protecting legitimate proprietary interests. It has also been suggested that greater dynamism in the labour market could force employers to invest more in the workplace and in their staff. Most incumbent employers would probably prefer not to be subject to these free market pressures, but that does not

[75] This figure relates to 2024-5 and is from a freedom of information request made to HMRC by Rathbones. See: https://www.rathbones.com/en-gb/wealth-management/media-centre/news-and-comment/100k-tax-trap-to-hit-2m-taxpayers
[76] Department for Business and Trade 2023, (n 3), p24
[77] Department for Business and Trade 2023, (n 3) , p23
[78] Department for Business and Trade 2023, (n 3) p25

mean they are not preferable in terms of efficiency, dynamism and growth. It is notable for example, that the US FTC in making its decision to ban NCCs, put far more focus on the use of the alternatives discussed in this paper and on the voice of workers subject to NCCs.[79]

8. Concluding remarks

This paper has explored why non-compete clauses constitute significant distortions of labour markets and are equivalent in their effects to no-poach agreements entered into by competitors, which are treated as serious breaches of competition law. While many businesses articulate the purported benefits of NCCs, these arguments are often outweighed by the severe problems they are likely to generate. These problems include wage suppression, and barriers to growth and the creation of new businesses, potentially imposing a significant economic and social cost on the UK economy. Moreover, the evidence that NCCs are necessary to achieve the purported benefits is far from clear. For example, in a truly competitive market the incentive on employers to invest in staff training becomes far more important to staff retention and there is limited evidence to suggest NCCs result in significantly higher levels of training. Regardless of this, NCCs give employers the ability to maintain sub-competitive wages, treating them as substitutes for competitive retention strategies, and therefore leading to a reduction in labour development across the market.

While NCCs are subject to careful scrutiny by the courts

under the restraint of trade doctrine, few workers have the resources or willingness to bring legal challenges. Absent these and any effective system of regulation, NCCs have become prevalent across the UK economy, including in industries and among lower paid workers, where we would not expect there to be a particular need to protect proprietary interests. In essence, NCCs are treated as de facto legal and will constrain the freedom of workers subject to them, regardless of whether they are actually enforceable or not. Where there are legitimate proprietary interests to be protected, there are other less restrictive tools that can be used, such as non-disclosure and non-solicitation clauses. Employing the idea of *ancillary restraints* in competition law, it has been argued that NCCs are not indispensable to the protection of legitimate proprietary interests; indeed, they are blunt instruments that are neither necessary nor proportionate to achieving this objective.

A ban on NCCs would remedy an unjust imbalance in the rights of workers and reduce employer's ability to exercise monopsony power, while promoting a more mobile, dynamic and entrepreneurial labour market. Anything short of a ban would allow significant distortions of the labour market to continue, and in some cases may actually make things

[79] Federal Trade Commission, (n 12) discussion in Orly Lobel, Why We Need a National Absolute Noncompete Ban: Restrictive Covenants from Innovation, Antidiscrimination & Competition Policy Perspectives' (2024) University of Florida Journal of Law and Public Policy, 34(2), 269.

worse. In particular, industries may gravitate towards a statutory maximum, treating 3 or 6 month NCCs as de facto legal industry standards. While the legality of NCCs within these limits would continue to be subject to the restraint of trade doctrine, the lack of effective challenges means their use will likely remain unconstrained. Their use may even become more widespread. An unremunerated NCC period of any length will pose a serious disincentive to staff mobility, possibly even for many high salary workers. A ban is therefore the preferable policy choice.