

NON-COMPETE DEED GUIDANCE NOTE AND TEMPLATE DEED

When a consultant or employee works for your social enterprise you need to consider protecting your business interests in the event of that employee or consultant using knowledge/information they have gained to compete with your business. You may need to protect against poaching of your customers or employees, interfering with your supply arrangements or setting up in competition. This protection can be achieved by using a non-compete deed.

By reading this guidance note on non-compete deeds you will understand the typical provisions that should go in the deed and be able to consider how best this can protect your social enterprise. A template non-compete deed is also included to give you an outline of the deed and you should adapt this for your circumstances or seek specific legal advice.

For further information also see our confidentiality guidance note and confidentiality agreement template.

NON-COMPETE DEED GUIDANCE NOTE

This guidance note should be read in conjunction with the Non-Compete Deed (“**Deed**”). References to clauses are to clauses within that Deed.

Please note that the non-compete agreement is referred to as a deed rather than a contract. It’s important to understand the difference here to ensure that the agreement is enforceable. In law when creating a contract, an offer is made by one party and this is accepted by another. The contract however only becomes legally binding and enforceable if consideration is also given e.g. money is paid for the service provided. In a deed this is different, no consideration is required.

Therefore for an efficient and enforceable non-compete agreement a deed is used which allows you to:

- * Enforce the non-compete provisions whilst someone is employed by you or engaged by you to provide services.
- * Enforce without needing to pay someone or offer an additional benefit (consideration) for complying with these non-compete requirements.

1. PARTIES

This clause should identify the parties to the agreement. If the “employer” is not a company, the term should be amended as appropriate. For the purposes of this note the terms ‘Company’ and ‘Executive’ are used to describe the parties.

2. BACKGROUND

A summary of the relationship between the Company and the Executive should be included. It may be that the individual is not an employee of the Company, but is engaged as a consultant to provide services. This should be reflected at clause 1.1 so that the agreement is tailored to apply between the Company and the Executive

3. PROTECTION OF THE COMPANY'S LEGITIMATE BUSINESS INTERESTS

Clause 2 contains a comprehensive set of the post-termination restrictive covenants that may be put in place. These include:

- not to solicit/canvass any Customers of the Company (clause 2.1.1)
- not to solicit/canvass any Potential Customer of the Company (clause 2.1.2)
- not to deal with any Customer of the Company (clause 2.1.3)
- not to deal with any Potential Customer of the Company (clause 2.1.4)
- not to solicit or entice away any Restricted Employee of the Company (clause 2.1.5)
- not to offer to employ/enter into partnership with any Restricted Employee (clause 2.1.6)
- not to compete with the business of the Company (clause 2.2.1)
- not to interfere with the supply arrangements that were in place with the Company (clause 2.2.2)

Definitions of "Customer", "Potential Customer" etc are set out at clause 3 (see notes below).

In each case, consideration must be given to whether the restrictions are necessary for the particular individual who is to be a party to the agreement.

In relation to each of the restrictions at clauses 2.1 and 2.2, the period of time in which the individual is to be restrained must be inserted (as indicated by _____). The general position with post-termination restrictions is that they are void on the basis that they seek to restrain an individual from earning a living and therefore constitute an unlawful restraint of trade. In order to be enforceable therefore it is essential that the covenants go no further than is necessary to protect the legitimate business interests of the Company. Therefore in the case of senior individuals who have had access to significant levels of confidential information and hold significant relationships, and who could harm the business if they left, the Company may be able to justify why a 12 month restriction is necessary.

For more junior employees, or those with less access to confidential information, or who may not have key relationships which could be used to damage the business

of the Company, a shorter period of restrictions is more likely to be justifiable. Examples of the restrictive periods could be, for example, 3 months or 6 months.

A blanket approach to the length of the restrictive periods for all individuals, irrespective of their position or seniority, may risk undermining the effectiveness of the covenants.

4. DEFINITIONS AND INTERPRETATIONS

This clause is essential as it specifies exactly what the Company is seeking to protect.

The definitions of "Appointment" "Board" "Group Company" "Group" and "Subsidiary" are standard definitions. If however, the entity entering into the agreement with the individual is not a company, references to the "Board" "Group Company" "Group" and "Subsidiary" should be deleted. Likewise, if there are no group companies, then this reference could also be deleted.

In relation to the specific definitions:

- **"Customer"** it is important that this definition applies to those customers with whom the Executive either had direct responsibility for, or management responsibility for. The definition should only therefore apply to those customers with whom the Executive had a relationship. To include a general definition of any customers of the business risks undermining the effectiveness of the covenants. In addition, the definition should be time restricted so that it applies to those customer relationships in the period of, say, 12 months before the employment/engagement ended. 12 months will be the longest period that can generally apply. However, in some cases a shorter period may be appropriate. This will depend upon the period of time in which the particular individual dealt with customers.
- **"Potential Customer"** this definition is aimed to protect those customers with whom the Company was in negotiations shortly before the termination of the Appointment, and for whom the Executive had individual or management responsibility. As with the definition of "Customer" a time frame will need to be included. It is likely that this would be a shorter time frame as it seeks to protect any negotiations that were on-going at the date of termination.

- **“Restricted Business”** this definition seeks to clarify the “business” of the Company that is to be protected. There are potentially three elements to this:
 - The business that is being carried out at the date that the appointment terminates. This is self-explanatory and should not require any amendment;
 - Any business that was carried out immediately prior to the termination of the Appointment, or any period for which the Executive was placed on Garden Leave;
 - Any business that the Executive is aware is going to be commenced in a short period (usually no more than 6 months) after the termination of the Appointment.

The last two elements are optional and would depend upon factors such as whether the business is intending to diversify. In each case, the definition of the “Business” is restricted to those parts of the business with which the Executive either had direct responsibility or managerial responsibility for.

- **“Restricted Employee”** it is possible to protect the Executive from seeking to solicit, or employ any other employees of the Company. It is only possible to protect “key” employees, such as those in managerial or sales capacities, rather than have a general ban on soliciting/employing any employee. The square brackets contain suggested wording as to the types/classes of employee that are to be protected. This will however need tailoring to reflect the classes of employee that need to be protected in each particular case.
- **“Restricted Supplier”** as with the definition of “Customer” this seeks to protect suppliers with whom the Executive had a direct or managerial relationship with. This will also need to be further defined in terms of the period of time pre-termination that the Company is seeking to protect.
- **“Restricted Territory”** it is not generally possible to include a global ban on an individual acting in competition with the business. This does have to be restricted in terms of territory. At present, the current wording refers to England, Wales, Scotland and Northern Ireland, together with any other territory in which the Company conducts business. This should however be tailored to reflect the circumstances of the Company. If, for example, the Company only carries out business in England, then the definition should be limited to this territory. If the area is narrower than this, for example the Company only ever does business with customers based in Yorkshire, then the territory should be restricted to this area.

In addition to setting out the definitions, clause 3 also includes the following terms:

- If the Executive receives an offer of employment/provision of services during the currency of any of the restrictive covenants, he must provide a copy of the Deed to any potential employer/engager (clause 3.2);
- Any period of time that the Executive spends on Garden Leave prior to the termination of the Appointment will be deducted from the period of the restrictions (clause 3.3). By way of example, it is not possible to place an employee on three months’ Garden Leave prior to the termination of their employment and then enforce a further 6 month period of restriction. In this example, the three months’ Garden Leave would be deducted from the 6 month period of the restrictions, which would then only apply for three months post termination. The reason for this is that if the employee is on Garden Leave, they are effectively removed from the business and is not in a position to compete during this period.

5. THIRD PARTY RIGHTS

The Contracts (Rights of Third Parties) Act 1999 lets a person who is not a party to a contract enforce the contract against a party in some circumstances. This clause is intended to ensure that a person who is not party to the Deed has no right under the Act to enforce any terms of the contract against the employer. This clause does not affect any right or remedy of any person which exists or is available otherwise than under that Act.

The Contracts (Rights of Third Parties) Act 1999 does not apply in Scotland. Therefore this clause should be deleted for Scottish deeds.

6. GOVERNING LAW AND JURISDICTION

In clause 5 the parties agree that the law of England and Wales will govern the performance and interpretation of the Deed and any disputes arising under it. In clause 5.2 the parties agree that they will submit exclusively to the courts of England and Wales/Scotland. Submitting exclusively to the courts of one jurisdiction allows the parties to ensure that proceedings can only be brought in that jurisdiction (with limited exceptions).

7. COUNTERPARTS

It is possible for each individual party to the Deed to sign separate copies of the Deed, which are then exchanged.

NON-COMPETE DEED TEMPLATE

THIS DEED _____ **[2014]**

BETWEEN

- (1) **[NAME OF COMPANY]** (registered number _____) whose registered office is at _____ (“**Company**”); and
- (2) **[NAME OF INDIVIDUAL]** of _____ (“**Executive**”).

I. BACKGROUND

- 1.1 *[The Executive is [employed/engaged] by the Company to [insert details]]*
- 1.2 The Executive acknowledges that during and following termination of the Appointment he will be in a position to compete unfairly with the Company as a result of the confidential information, trade secrets and knowledge about the business, operations, customers, employees and trade connections of the Company *[and the Group]* he has acquired or will acquire and through the connections that he has developed and will develop during the Appointment.

- 1.3 The Executive therefore agrees to enter into the restrictions in this Deed for the purpose of protecting the Company’s legitimate business interests and in particular the confidential information, goodwill and the stable trained workforce of the Company *[and the Group]*.

2. PROTECTION OF THE COMPANY’S LEGITIMATE BUSINESS INTERESTS

- 2.1 The Executive covenants with the Company *[and each other Group Company]* that he shall not without the prior written consent of the Board *[(such consent not to be unreasonably withheld)]*, directly or indirectly, on his own behalf, or on behalf of any person, firm or company in connection with any business which is or is intended or about to be competitive with the Restricted Business (as defined below) *[or in relation to the provision of any goods or services similar to or competitive with those sold or provided by the Company [or any Group Company] in connection with the Restricted Business]:*
- 2.1.1 *[for a period of _____ months after the termination of the Appointment solicit or canvass the custom of any Customer (as defined below):]*

- 2.1.2 [for a period of _____ months after the termination of the Appointment solicit or canvass the custom of any Potential Customer (as defined below);]
 - 2.1.3 [for a period of _____ months after the termination of the Appointment deal with any Customer;]
 - 2.1.4 [for a period of _____ months after the termination of the Appointment deal with any Potential Customer;]
 - 2.1.5 [for a period of _____ months after the termination of the Appointment solicit or entice away, or attempt to entice away from the Company [or any Group Company] any Restricted Employee (as defined below);]
 - 2.1.6 [for a period of _____ months after the termination of the Appointment employ, offer to employ or enter into partnership with any Restricted Employee [with a view to using the knowledge or skills of such person in connection with any business or activity which is or is intended to be competitive with the Restricted Business].]
- 2.2 The Executive shall not without the prior written consent of the Board [(such consent not to be unreasonably withheld)] for a period of _____ months after the termination of the Appointment, directly or indirectly, on his own behalf, or on behalf of any person, firm or company:
- 2.2.1 within the Restricted Territory (as defined below) set up, carry on, be employed in, provide services to, be associated with, or be engaged or interested in, whether as director, employee, principal, shareholder, partner or other owner, agent or otherwise, any business which is or is intended or about to be competitive with the Restricted Business save as a shareholder of not more than three per cent of any public company whose shares or stocks are quoted or dealt in on any recognised investment exchange;
 - 2.2.1 endeavour to cause any person, firm or company who is at the date of termination of the Appointment or at any time during the [12] months immediately prior to such

termination was a Restricted Supplier (as defined below) to the Company [and/or any Group Company], to either cease to supply the Company [or any Group Company] or materially alter the terms of such supply in a manner detrimental to the Company [or any Group Company].

3. DEFINITIONS AND INTERPRETATION

- 3.1 In this Deed the following words and phrases shall have the following meanings:
- (i) **"Appointment"** shall mean the [employment/engagement] of the Executive by the Company;
 - (ii) **"Board"** means the Board of Directors of the Company from time to time or its duly authorised representative;
 - (iii) **"Customer"** shall mean any person, firm or company who at the date of termination of the Appointment or at any time during the [12] months immediately prior to such termination was a customer of the Company [or any Group Company] and from whom the Executive had obtained business on behalf of the Company [or any Group Company] or to whom the Executive had provided or arranged the provision of goods or services on behalf of the Company [or any Group Company] or for whom the Executive had management responsibility;
 - (iv) **"Garden leave"** means any period of time immediately prior to the termination of the Appointment during which the Executive is not required to attend work and/or perform any duties as required under the terms of his [contract of employment/terms of engagement];
 - (v) **"Group"** means the Company and all companies which are for the time being either a Holding Company of the Company or a Subsidiary of either the Company or any such Holding Company;
 - (vi) **"Group Company"** means any company within the Group;
 - (vii) **"Potential Customer"** shall mean any person, firm or company with whom [either] the Executive [or any other employee of the Company [or any Group Company] for

whom the Executive had, at the date of the negotiations, management responsibility] carried out negotiations on behalf of the Company [or any Group Company] at any time during the period of [three] months immediately prior either to the start of a period of Garden Leave or to the date of termination of the Appointment where there is no period of Garden Leave with a view to such person, firm or company becoming a customer of the Company [or of any Group Company];

(viii) “**Restricted Business**” shall mean the business or any part of the business which in either case:

is carried on by the Company [or any Group Company] at the date of termination of the Appointment; [or]

[was carried on by the Company [or by any Group Company] at any time during the period of [six] months immediately prior either to the start of a period of Garden Leave or to the date of termination of the Appointment where there is no period of Garden Leave]; [or]

[is to the knowledge of the Executive to be carried out by the Company [or by any Group Company] at any time during the period of [six] months immediately following the date of termination of the Appointment];

and which the Executive was materially concerned with or had management responsibility for (or had substantial confidential information regarding) in either case at any time during the period of [12] months immediately prior to the date of termination of the Appointment;

(ix) “**Restricted Employee**” shall mean any [senior] employee of the Company [or any Group Company] employed at the date of termination of the Appointment in the capacity of [director or in any research, technical, IT, financial, marketing or sales function or other managerial role] whom the Executive has managed or with whom he has worked at any time during the period of [12] months immediately prior to the termination of the Appointment, and shall not include any employee employed in an administrative, clerical, manual or secretarial capacity;

(x) “**Restricted Supplier**” means any supplier to the Company [or to any Group Company] with whom the Executive has had material personal contact or for whom the Executive has had managerial responsibility during the period of [12] months immediately prior to the termination of the Appointment;

(xi) “**Restricted Territory**” shall mean [England, Scotland, Wales and Northern Ireland] together with any other country in which the Company [or any other Group Company]:

carried on any Restricted Business or provided any goods or services in connection with any Restricted Business at the date of termination of the Appointment; [or]

[carried on any Restricted Business or provided any goods or services in connection with any Restricted Business at any time during the period of [six] months immediately prior to the date of termination of the Appointment]; [or]

[is to the knowledge of the Executive to carry out any Restricted Business at any time during the period of [six] months immediately following the date of termination of the Appointment];

and regarding which country at any time during the period of [12] months immediately prior to the date of termination of the Appointment the Executive:

was materially concerned or worked in; [and/or] had management responsibility for; [and/or] [obtained confidential information];

(xii) “**Subsidiary**” and “**Holding Company**” shall have the meanings ascribed to them by section 1159 of the Companies Act 2006 or any statutory modification or re-enactment thereof but for the purposes of section 1159(1) Companies Act 2006 a company shall be treated as a member of another company if any shares in that other company are registered in the name of (i) a person by way of security (where the company has provided the security) or (ii) a person as nominee for the company.

3.2 In the event that the Executive receives an offer of employment or request to provide services either during the Appointment or during the currency of the restrictive periods set out in clauses 2.1 and 2.2 the Executive shall (and the Company may)

provide immediately to such person, company or other entity making such an offer or request a full and accurate copy of this Deed.

- 3.3 Any period of time that the Executive has spent on Garden Leave shall be taken into account and off set from the periods of restriction at clauses 2.1 and 2.2 above.
- 3.4 The restrictions contained in this clause are considered by the parties to be reasonable in all the circumstances. Each sub clause constitutes an entirely separate and independent restriction and the duration, extent and application of each of the restrictions are no greater than is necessary for the protection of the interests of the Company [*and any Group Company*].

4. CONTRACTS (RIGHTS OF THIRD PARTIES) ACT 1999

A person who is not party to this agreement shall have no right under the Contracts (Rights of Third Parties) Act 1999 to enforce any term of this agreement.

This clause does not affect any right or remedy of any person which exists or is available otherwise than pursuant to that Act.

5. GOVERNING LAW AND JURISDICTION

- 5.1 This Deed shall be governed by and construed in accordance with the law of England and Wales.
- 5.2 Each party irrevocably agrees to submit to the exclusive jurisdiction of the courts of England and Wales over any claim or matter arising under or in connection with this agreement.

6. COUNTERPARTS

This Deed may be executed in any number of counterparts each of which when executed by one or more of the parties hereto shall constitute an original but all of which shall constitute one and the same instrument.

IN WITNESS whereof the parties have executed this agreement as a deed on the date of this agreement.

Executed as a deed[, but not delivered until the first date specified on page 1,] by [**NAME OF COMPANY**] by a director in the presence of a witness:

Signature -----

Name (block capitals) -----

Director

Witness signature -----

Witness name
(block capitals) -----

Witness address -----

Signed as a deed[, but not delivered until the first date specified on page 1,] by [**FULL NAME OF INDIVIDUAL**] in the presence of:

Signature -----

Witness signature -----

Witness name
(block capitals) -----

Witness address -----

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