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EDITORIAL: Faulty market measure

From July 3rd EU member state governments have been obliged to have in force effective mechanisms to comply with Regulation 596/2014 on a framework to prevent market abuse in the financial services sector. Such abuse largely consists of unlawful insider dealing and disclosure of inside information, together with the manipulation of financial markets.

In fact, the regulations actually go beyond the financial sector as they apply to anyone who, or corporate body that, carries out activities that are regulated by financial services rules, such as the issuing and dealing in shares. Employers must put in place “internal procedures for their employees to report infringements” and provide “appropriate protection for persons working under a contract of employment, who report infringements or are accused of infringements, against retaliation, discrimination or other

types of unfair treatment” including the protection of their personal data. Moreover, if individuals do not have a contractual duty to report infringements of the regulations then governments may introduce a system of financial incentives to encourage whistleblowing.

It would appear that not every EU country has met the required deadline or implemented the regulation correctly. For instance, although an amendment has been made to the German Act on Financial Services Supervision it falls short on potential application by excluding accountants, tax consultants and attorneys who may – at least in part – be in a position to be involved in “insider trading” or the passing on of insider information. This is an especially important omission as attempted breaches and cancelling a share purchase order (Art 16.1) are now within the scope of the regulations. In fact, Directors and senior

managers of public companies will be generally bound by the new regulations – even to the point of informing family members and close associates of their duties under the regulations (in spite of the fact that the timing of such a declaration might be, in itself, a tip off).

One peculiarity of the regulations is that it actually encourages insider trading by introducing rules under which it can take place (Article 11). Therefore the practice of informing investors about new issues into capital markets - called “market sounding” - must be subject to a procedure that first asks the investor if they would like to receive insider information, then obliges the informant to tell them about the regulations and then obtains from the recipient an agreement to treat the data as confidential. It is also necessary for managers purchasing such instruments as equities (Article 19) to notify the issuer and competent authorities of their purchase and for the purchase to be made public within three days – thus opening up insider trading to anyone who interprets such purchases as an indication of the future improvement in the value of a company’s shares. This is over and above any scope that exists for insiders to hint to others what they should do without actually directly informing them.

These glaring loopholes simply avoid market abuse by setting out a mechanism by which it may take place. Greater transparency is not, in itself, any guarantee of greater market integrity as it may simply open up abuse to a wider community. Thus the actions of any whistleblower are likely just to unearth the incompetence of market players who are not astute enough to use the regulations to achieve their unethical ends.

EUROPEAN UNION: Headscarf ban

The growth of multiculturalism is clashing increasingly against company dress codes, particularly in Europe. For some the hijab (muslim headscarf) is seen as an important symbol of cultural and religious identity, whilst for others it expresses an unwillingness to integrate into mainstream culture, gives the impression that a company adopts a particular religious stance or simply constitutes a health and safety risk.

There are, of course, countries that enforce strict religious dress codes – especially for women. In northern Sudan, for instance, failure to cover the face can lead to a woman being flogged. But, in direct contrast, the issue in the USA has not become contentious because the first amendment has been interpreted by the courts to include clothing. Lying in between are countries that apply partial religious dress restrictions. In France and some Lander of Germany there has been for some years a ban on the hijab in schools and in Denmark it applies to the dress of judges. Further restrictions, particularly in Germany, can now be anticipated.

Company dress codes in Europe frequently include bans on the wearing of religious symbols. However, such restrictions can easily infringe discrimination laws and must therefore be objectively justified. But what about the argument for religious neutrality, especially for those in client-facing roles?

Two cases currently before the European Court of Justice (ECJ) illustrate how confusing legal opinions can be on this issue. In a Belgian case (Achbita and another vs G4S solutions NV: C-157/15) Advocate-General Kokott advised the court at the end of May

that the company was not directly discriminating when it banned a receptionist from wearing the hijab and that indirect discrimination was not unlawful because it could be justified. However in a subsequent French case (Bouagnaoui and another v Microplote Univers: C-188/15) Advocate General Eleanor Sharpston has informed the court that the preventing of a female IT engineer from wearing a hijab when at work was a clear case of religious discrimination.

Both cases have yet to receive rulings from the ECJ itself, but whatever the outcome employers will be looking for clear guidance on how far dress codes may go in the application of bans on the wearing of religious symbols and costume. There are still no hard and fast rules that will remove vulnerability to a challenge under anti-discrimination legislation, although some useful guidance exists from the UK's NHS employers <http://goo.gl/l2WNoF>.

EUROPEAN UNION: EU rules ignored

How good are EU member states at complying with their obligations? Each Summer a report is compiled by the European Commission about compliance during the previous year - and the picture it reveals is appalling.

The Commission launched 742 new procedures and sent 248 reasoned opinions to Member States during 2015 and at year end 1368 infringement cases remained open. These concerned the incorrect transposition and/or bad application of EU laws or late transposition of required measures. Spain, Germany and Italy were the principal countries with unresolved cases. Although Greece and Cyprus had the most infringement cases for late transposition. Yet in spite of the

high volume of infringements, the Commission only took 18 such cases to the European Court of Justice. Maybe this was because even when the court made a ruling it was often still ignored. In fact, at the end of the year 85 infringement procedures were still open after a court ruling because the Commission considered that the Member States concerned had not yet complied with the judgments. Those ignoring a court decision were principally Greece (10), Poland (8) and Spain (7).

During 2015 there were 612 new complaints from the public about employment, social affairs and inclusion – the single biggest specific category for such complaints. Yet this category did not rank heavily in the fields under which the Commission took its own infringement proceedings. This was perhaps because the Commission took a narrow view of employment-related compliance by concentrating largely on specific health and safety fields.

INDIA: The curate's egg

A nationwide Goods and Services tax has been debated for years in India, but held up by infighting between the national and state governments. Now, at long last, India's Upper house has given its go ahead to a tax that will replace 11 local and central sales taxes. The result may be a significant reduction in company transaction costs that could boost the economy, but equally could raise overall taxation levels.

A new Labour Market Information System has recently been launch by the Indian President offering "world class labour market information". However, employers accessing the site will find it distinctly lacking on information that is not available elsewhere and

when visiting the dedicated section for employers it will be discovered that the government web developers have, according to a pop-up message on firefox, “configured their website improperly” so that it presents a significant security risk.

On a more positive note the 29 million Indian diaspora across the world can now sign up to India’s National Pension Scheme (NPS) online on both a repatriable and a non-repatriable basis. This will be a valuable benefit for any Indian expatriate intending to return to India as the NPS offers good rates of return, flexibility and prudent regulation.

UNITED KINGDOM: Applicable law?

Employers of staff in different jurisdictions are often faced with a dilemma about what laws apply in particular cases. Under UK law there have been a number of legal challenges and it is now generally accepted by the courts that UK employment protection rights may be valid in unfair dismissal cases where the individual is a UK expatriate or works in different locations for short periods, but has a principal base in the UK. For UK law to apply in other cases it would be necessary to show that there is a stronger connection with the UK as an appropriate jurisdiction than any other jurisdiction.

A recent case brought before the Court of Appeal by several interpreters working for the UK government in Afghanistan has sought to extend the coverage of UK law to alleged contraventions of the Equality Act. Although the court dismissed the Appeal because the appellants had no connection with the UK - other than being employed by the UK government on a local contract - they did accept that discrimination cases had the same

status as unfair dismissal where a valid claim is brought. [Hottack & Ors vs FCO)

There are numerous factors that need to be taken into account when staff are deployed abroad. For instance, the Rome Convention allows a company to use an employment contract written under any EU jurisdiction when hiring or deploying a staff member, but does not remove the employee’s rights to statutory protection in their home state. Likewise, statutory rights may be claimed in the host state by any EU posted worker. But now the question of applicable law may – at least for UK companies – extend more generally to other international jurisdictions even where the individual is neither an expatriate nor in a peripatetic role.

USA: Employer-unfriendly state

The last year has been a difficult time for employers in California who pay their employees on a piece-rate basis. The Piece Rate Law (AB 1513) came into force on January 1st 2016 and then employers had to choose whether to avoid indefinite retrospective claims about payments for rest, recovery and other non-productive time by opting for a “safe harbor” formula.

Adopting safe harbor would limit past claims to July 1st 2012. As the deadline for the safe harbor decision neared one employer’s group managed to secure an injunction on the grounds that the measure was worded in vague terms and was unconstitutional. However, at a hearing last month the court appeared to be confused, did not sustain the order and the safe harbor application deadline eventually came on July 28th. The court has still to consider if the law was unconstitutional, but for now it remains in force.

Any company operating a payment by results reward system in California may wish to review whether it remains a viable system. In fact, California is rapidly approaching European levels of over-regulation and is now becoming far less attractive as an employment location.

USA: Recruitment becomes a charade

From July 1st 2018 employers in the US state of Massachusetts will not be permitted by law to ask a job applicant what they are currently earning. Neither will they be permitted to contact former employers to obtain pay information about candidates or prevent employees from revealing what they earn to others.

This is a further attempt by legislators to achieve gender pay parity now that the Paycheck Fairness Act is blocked in the Federal Congress. The wording of the new law, however, is curious as it forbids employers from screening “job applicants based on their wage, including benefits”. There are, of course, many ways that employers can respond to this – for instance by offering a fair labour market wage, minus a fixed percentage, during a job interview to see if the candidate will accept it, then bargaining up to no more than they believe is a candidate’s maximum worth.

Such legislative restrictions could also encourage employers to follow practices possibly to the detriment of employees by hiring at a wage the jobholder requires and then dismissing them when they later discover through personal tax data that their previous wage was substantially below the one offered. This, of course, may constitute a breach of the implied covenant of good faith and fair dealing under employment at will rules in

Massachusetts - but not in many other states if this law is replicated across the USA.

The recourse to prior pay confidentiality measures means that the reliance upon “comparable worth” equal pay legislation has failed. Its failure to produce pay parity may, however, be nothing to do with the complexities of job evaluation or the daunting nature of court procedures. The problem may lay in the modest expectations of women themselves and no law is going to stop that influencing career decisions. But even more effective would be the greater public availability of salary market data for male employees. This would, however, require public authorities to process pay statistics in a timely way – which in turn would mean that public employees would have to be far more productive. The likely impossibility of this is maybe why private sector employers in Massachusetts are being burdened by prior discovery prohibitions.

USA: Why less is more

For the last 25 years reports in the USA have been warning about the manufacturing skills gap, which is compounding as the “baby boom” generation hits retirement. Only 1% of manufacturing jobs in the USA are apprentices and the combined effect of offshoring production and automation in domestic plants has led to a belief that the demand for skilled workers is falling.

It is certainly true that a new, less numerous breed of multi-skilled engineers and production workers will be needed in the future, but it is equally true that the wage premium for skilled workers at all levels in manufacturing has now ended – just at a time when offshore costs are escalating and onshoring is becoming more attractive. The

new skilled worker of tomorrow will have to have far more technological know-how than in the past, but unfortunately few US companies are developing such a highly-gifted and well-paid technological elite.

One of the problems daunting the manufacturing sector is the counter-intuitive logic that although demand for skilled workers is falling the skill level and strategic value of those that remain is rising. Even the number of industrial production managers is set to fall by 4% by 2024. Their average current salary of \$US 95,000 a year remains at 221% of the US median wage. To attract the right calibre of manager and prevent them taking lucrative positions abroad this differential will have to rise to over 300% in the next decade.

Pay, Tax and Benefit Trends

BELARUS: The pattern of “real pay” outcomes is in practice nearly impossible to forecast with any accuracy because it means both the dynamics of aggregate wage rises and price movements must be totally understood and regulated. A great achievement even in that remnant of the USSR called Belarus. Yet that has not dissuaded the country’s Deputy Economy Minister from confidently announcing a real increase in wages of 1.5% in 2017.

CYPRUS: Employers have up to the end of November to repay any outstanding social security charges in order to avoid prosecution. This may be done without penalty if paid as a lump sum, but applications may also be made to pay in up to 54 installments – although this will include a 27% penalty charge. The government estimates that 39,000 companies and self-employed workers (17% of total) owe a total of 290M euros (\$US 312M) in unpaid

social security – a figure that will continue to grow with time as the courts do not have the capacity to handle the volume of necessary prosecutions. Many companies will also not be in a position to repay outstanding charges as many have gone out of business. The number of registered enterprises has fallen by 25% since 2013.

EUROPE: the structure of middle incomes across Europe has come under the spotlight in recent figures published by Eurostat. The proportion of people with incomes at or above 130% of the median has remained remarkably stable over the period 2008-2014/15 (29.5%-30%). The lowest proportion has, however, been in Norway (22.6%) and highest in Estonia (34.7%) and Serbia (34.4%). But the most curious changes have been the few countries where the relative number of people experiencing at least modest affluence has been clearly on the rise - such as Denmark (22.6% to 25.8%), Sweden (23.6% to 25.2%) and, to a less extent, Germany (28.6% to 30.4%).

JAMAICA: The Sugar Producers Federation have reached a backdated agreement with the Bustamante Industrial Trade Union, National Workers Union and University and Allied Workers Union. This increases sugar workers’ wages by 4% in the first year and by 3% for the second year. Sugar is one of Jamaica’s primary export products, employing a significant number of skilled and unskilled manual workers.

THAILAND: Since August 10, 2016 skilled workers in 20 occupations across Thailand qualify to receive an increased minimum wage of 360-550 THB (\$US10.36-15.83) per day, subject to undertaking a test to ensure their skills meet with the occupational requirements. The fields of employment

covered include auto parts and repairs, electronics, jewelry production and logistics.

VIETNAM: There are four regional statutory wage rates in Vietnam. These are set to rise next year by 7.3%, the lowest annual increase since minimum wages were established in 1997. Workers in Region I (Hanoi) will see their wages rise to 3.75 million dong (US\$168) a month, whilst those in other regions will be entitled to between US\$ 115 and US\$ 148 a month.

Other Global HR News in Brief

BRAZIL: The Superior labour court in Brazil is holding series of public hearings to take submissions about several areas of legal precedent. These cover topics that have been the subject of past litigation, but where the case law needs clarification. Subject include compensation to telemarketing personnel for the continuous use of headphones, overtime for banking staff and the exacting of “moral damages” when an employer requires a copy of an individual’s criminal record.

CAMBODIA: Although a law has been in force for some years allowing for the establishment of a labour Court in Cambodia, only now is legislation being put in place to define court procedures and bring it into being by the end of 2017. The current system is based on general courts and an arbitration council, but the volume of cases handled has risen from just 2 a month in 2003 to around 30 today. It is also felt necessary for labour disputes to be resolved through binding settlements concluded by specialist and expertly trained judges.

CANADA: Around 6 - 7% of employees in Canada are categorized as federally-regulated because they work in certain sectors such as banking, air transport and telecommunications.

There has been some confusion in recent years whether an employer could dismiss federally- regulated employees who were non-union members (FRNU) with notice, but without cause. The Supreme Court of Canada has now resolved this dilemma by declaring that FRNU employees do have a right under Part III of the Labour Code to only be dismissed with just cause.

CZECH REPUBLIC: The Czech Labour and Social Affairs Ministry is committed to reducing long-term unemployment, in spite of a recent failed experiment aimed at making it pay to work rather than remain on state benefits. For the last three years 40% of all the unemployed have been on a long-term basis, yet in June the number of registered vacancies were at their highest point since September 2008. In April the ministry introduced a scheme in certain areas providing a bonus of 1,000-3,500 crowns (\$US 41 – 144) to the long-term unemployed if they took up a job within 12 kms of their home. But the scheme had few takers, so now the ministry is introducing a system requiring the persistent jobless to undertake 20 hours of community service a month. If they refuse their state benefits will be cut – with the loss of all benefits for those who totally refuse to cooperate with job centres.

GERMANY: Over a million refugees have poured into Germany in the last year and now the German government is becoming deeply concerned about their job prospects. Chancellor Angela Merkel is planning to invite top executives from the country’s largest companies to a “summit” next month in order to press them to train migrant workers. Meanwhile, Siemens, Evonik, Opel, VW and RWE have all taken part in recent pilot schemes, but according to the leading newspaper Frankfurter Allgemeine Zeitung the

30 top DAX-listed companies have to date only employed 54 migrants - 50 of whom have been hired by Deutsche Post. The biggest concern voiced by major companies is that few migrants have the language skills or education to undertake any vacant jobs.

HUNGARY: Companies that have operations in Hungary should review their use of customer and employee voice recordings in the light of recent guidance from the Country's Data Protection Authority (NAIH). Curiously the NAIH states that the person being recorded must not only be informed in advance of its making (as is normal when calling customer helpdesks) but given a unique "identifier" for the recording and must also give their consent to it being made. This would, no doubt, require the enquirer to use their telephone keypad to indicate consent or refusal. There is also a reminder that consent to recordings must equally be given by employees operating helpdesks and those attending meetings. Moreover, other useful advice is provided about procedures for responding to data subject access requests and the maximum time limits for holding recordings.

IRISH REPUBLIC: The Minister for public expenditure, Paschal Donohoe, has announced that the government is going to introduce measures to encourage private sector employees to delay their retirement. The cost of state pensions will grow by 1.6bn over the next ten years even though the normal retirement age will rise to 67 in 2021. One of the ways that employees could be kept out of the pensions system would be to allow those in their late 60s to claim job seekers allowance or to introduce bridging fixed-term contracts to deal with the current gap between retirement at 65 under many employment

contracts and the commencement of state pensions at age 66.

JAMAICA: Since 1968, Section 29 (b) of the Jamaican Interpretation Act has set a maximum fine for any infringement of an Act of Parliament or Regulation at \$1,000 (US\$7.90). This has meant that if politicians wished to allow for the imposition of realistic fines they had to exclude this section from any new legislation. Now the Senate has amended section 29 (b) and increased the maximum fine to \$1 M (US\$7,898). The amendment also includes a delegated ministerial power to further modify the limit whenever necessary.

SOUTH AFRICA: The Labour Court has recently ordered senior executives at the state broadcaster SABC to submit within 5 days papers that justify why they should not be personally liable for all the costs (at a punitive scale) arising from an unfair dismissal hearing concerning several SABC journalists. The dismissal came after the journalists had questioned why the SABC operated a new policy of not broadcasting film showing violent protests and had apparently told external media about the internal dissent. The court stated that not all employees could be excused such statements putting an employer in a bad light, but the position of journalists gave them special rights to freedom of expression and the SABC had also by-passed its own disciplinary procedures.

SRI LANKA: A draft bill on Regulation of Insurance Industry has just been approved by Sri Lanka's Cabinet of Ministers. This creates equal rules for both local and foreign insurance companies. The Cabinet has also approved funding for the establishment of a Human Resources Service Agency (HRSA). This will draw on experts "for national policy making and efficient implementation of development programmes".

UAE: A recent amendment to the cybercrime law (2012) makes it an offence for anyone in UAE to use a “fraudulent” IP address to commit a crime or prevent its discovery. This includes the use of VPN to make VOIP calls or view locally banned websites. The penalty is a prison sentence and/or a fine of up to Dh2M (\$US 544.551). For this reason it is unwise to log onto a VPN when present in a public place, or to reveal to anyone else that a VPN is being used. Public authorities could detect its use, but the risks are not very high - except at airports where laptops and other mobile devices could be examined for the presence of VPN software. There are legitimate reasons for using VPNs, such as accessing internal networks, and these should always be stated.

UNITED KINGDOM: The UK Department of Education has just issued guidance on the new apprenticeship levy scheme that will be introduced on April 6th 2017 (<https://goo.gl/RthrYZ>). The 0.5% levy will only be paid by those companies with wage and salary bills over £3M (\$US3.9M) a year. Once the levy has been paid, employers will be able to access funds for training through a new digital apprenticeship service account.

However, funds can only be spent on approved training providers and not contribute towards the costs of setting up a scheme, wages, travel costs, ongoing management of a scheme or work placement assignments.

USA: A group of former Continental Airline pilots has finally lost its putative class action they filed against the Airline Pilots Association (ALPA) back in February 2014. The case goes back to the merger between Continental and United Airlines and the pilot seniority list draw up by the union at the time. The Continental pilots claimed that the list was biased in favour of United pilots. This was not disputed by the District judge, but she concluded - rather curiously - that any favouritism was not, in itself, a breach of duty in respect to fair representation. The fact that United pilots controlled two-thirds of the votes that would ultimately determine if ALPA continue to represent pilots in the merged entity was not a factor the court was prepared to consider.

Dates for your diary:

September 1st 2016: Texas, USA. Kari’s Law comes into force. All businesses must adjust telephone systems to allow 9-1-1 calls to be made without having to dial 9 first.

September 29th 2016: Canada to introduce mandatory Electronic Travel Authorization (eTA) for all visa-free eligible nationals (excluding US citizens) arriving by air.

October 1st 2016: Brazil CRS international tax transparency rules take effect.

November 8th 2016: US Presidential Election

December 1st 2016: FLSA new overtime rules become effective in the **USA**.

April 6th 2017 Introduction of apprenticeship levy for large **UK** employers.

April 23rd and May 7th 2017: French Presidential Election.

May 25th 2018: Final effective date for **EU** General Data Protection Regulations.

Travel Warnings

Cayman islands: This is the latest hotspot for the zika virus, pregnant women should not travel to the Cayman Islands.

Congo (DR): Sporadic violence, robbery, kidnapping and murder all pose significant threats to travellers in North and South Kivu, Bas-Viele, Huri, Tanganyika and Haut Lomami.

France: Trade unions plan a day of action in protest against the new labour reforms on September 15th. All forms of transport are likely to be affected and city centres blocked by marches.

India: The Confederation of Central Government Employees and Workers will go on one-day strike on 2nd September 2016. This could disrupt some transportation and block the centre of New Delhi due to protest marches.

Indonesia: Gamalama, Rinjani and Sinabung volcanoes are all erupting and disrupting travel. Airports in Ternate and Lombok have been closed.

Lebanon: A constant threat of violence and Kidnapping persists throughout the country – especially in respect to western business executives.

Mexico: There are widescale reports of severe gastrointestinal infections linked to the parasite cyclospora affecting many areas, especially tourist areas. Great caution should be taken when consuming buffet-based meals, especially in resort hotels. Also the volcano Popocatepetl, which is 70 km from the capital, Mexico City, erupted on Monday and three subsequent times since then.

Thailand: Several tourist resorts have been hit by bombings by local dissidents in recent days. Travellers should anticipate significant delays at Phuket international airport, rail hubs and due to security road blocks almost anywhere in the country.

USA: Heavy rains and flooding have affected many areas in southern Louisiana. Communications will remain problematic for the next few days.

United Kingdom: A three-day strike by the UK RMT union on Eurostar train services is scheduled for the bank holiday weekend - starting on August 27. Eurostar is the high speed rail link between London, Brussels and Paris.

FedEE News

Global Employment Law Forum in Chicago: The Multilaw Employment Group will be hosting a Forum on 22 September. This will involve employment law experts from Russia, China, Mexico, Canada, UK and Netherlands. If any FedEE Member would like further details please contact the Membership Secretary on admin@fedee.com. There will be no charge for attending the event.

A programme of meetings and events is being planned for this Autumn and the coming Winter. This will include a “Going Global” Seminar in London at the end of October geared to helping companies that plan to expand internationally. The second meeting of our Data Management Forum will be held in Nicosia, Cyprus in November. This will review a code of practice being drawn up following our first forum meeting. Further events in the Netherlands, India and China will follow and details will be announced shortly.

Our regular Autumn forecasts for price inflation and employment growth, together with salary budgets for 2017, will be published in September. How did our forecast do last year? Although employment growth was reasonably accurate we generally overestimated the level of consumer price inflation. For the countries selected the average increase was predicted to be 2.55%, but the actual rise was 1.9%. Our most serious shot off the mark was in Germany where we predicted prices would rise by 1.9% over the year. However, the current annual rate is just 0.2%. Of course, if inflation picks up during the second half of 2016 we could still prove to be more accurate, but deflation persists in large national economies like Italy, Japan, the Netherlands, Poland and Spain.

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