

When Protection Becomes Suppression: Non-Compete Clauses and the Restriction of Market Competition in the Labour Market

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Abstract

While confidentiality obligations and the avoidance of conflicts of interest are legitimate concerns for employers, modern employment contracts are increasingly found to contain restrictive clauses which may extend far beyond these justifications. Non-compete and No-Poach clauses are often imposed as standard terms, on a 'take-it' or 'leave it' basis leaving employees who due to varying circumstances, find themselves in positions with little practical choice but to accept limitations regardless of whether it jeopardizes their economic future. Such clauses may prohibit former employees from engaging in similar businesses within defined geographic areas, for specified periods, or altogether in competing enterprises raising a general concern for competition in the labour market, innovation, and economic freedom. This is so considering that competition is a core driver of entrepreneurial growth and the protection of consumer welfare. By constraining post-employment opportunities for employees, overly restrictive contractual provisions risk suppressing innovation and distorting market dynamics. This paper will critically examine restrictive clauses in employment contracts, interrogating their justification, enforceability, and economic impact. This paper further situates the discussion on the role of competition law in the labour market and exploring justifications on application of competition principles to contracts in the employment sector. The paper will adopt a doctrinal and comparative methodology analysing statutory frameworks governing employment contracts, non-compete clauses and reviewing relevant judicial decisions, and evaluate the enforceability and the extent of such restrictions. This paper makes the proposition that while employers are justified in protecting legitimate business protections, any restrictions on labour mobility should not be at the cost of competition and concludes that there is a need for competition regulators to take a keen interest in labour market restraints.

Keywords: Non-Compete Clauses, Employment Contracts, Restraint of Labour, Restrictive Covenants, Labour Markets Competition.

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1. INTRODUCTION

1.1. Context and Background

Non-Compete clauses in employment contracts are restrictions which may limit ability of an employee during or after a working relationship from engaging in a competing activity(ies)¹. The terms of the contract vary and may limit the employee from either joining a competing firm, establishing a competing business or working within a defined geographical location or period². Contrary to confidentiality and non-solicitation clauses which protect the interests of business without limiting an employer, restrictive clauses limit the employee which may eventually limit competition and consequently innovation.

For decades, and across the enforcement of competition law, significant attention has been paid to prices paid by consumers, competition in product markets, merger reviews, abuse of buyer power and cartel conduct among entities. On the other hand, agreements that restrict employees' mobility have been predominantly confined to employment law and human resource management. However, this position is evolving significantly across jurisdictions in countries such as the United States (US), the United Kingdom (UK), and the European Union (EU), providing leading precedents on recognizing labor markets as a critical frontier in competition enforcement and on the application of competition principles. For example, the US, has increasingly scrutinized conduct that restricts mobility of workers including wage-fixing and non-compete agreements, on the basis that such arrangements may reduce employers' competition for labour and consequently suppress wages and employment opportunities. The actions undertaken by the aforesaid jurisdictions acknowledge that indeed collusion may occur over wages, employee mobility, and recruitment practices, and will have as much negative effect as price-fixing, geographic market allocation, and the abuse of buyer power over suppliers in the competitive market³.

Historically, competition laws, also known as anti-trust laws in other jurisdictions, did not serve the protection of employees but against them with legislations such as the Sherman Act often being used as a sword against trade unions fighting for employee rights. Case scenario would be in *Re Debs (1895)* and *Loewe v. Lamlor (1908)*, where the courts made the determination that the union of employees was an 'unlawful combinations' thus prompting the legislation of the Clayton Act of 1914. Section 6 of the said Act famously went on to declassify labour of a human being as a form of commodity or an article of commerce. This approach effectively insulated any labour activities from the scrutiny of competition/anti-trust regulators⁴. It did not last long though! The US Supreme Court in *United States v. Hutcheson (1941)* established a broad view of protection of union workers⁵. However, in the 20th century, competition enforcement in labour markets was still rare as *economists at the time carried the*

¹ Ross, I. (2024). Non-compete clauses in employment contracts: The case for regulatory response. *The Economic and Labour Relations Review*, 35(4), 806–830. doi:10.1017/elnr.2024.40

² Ibid

³ Andrijašević B. 'Competition law and labour markets: emerging enforcement trends'. Accessed on 12th March 2026 <<https://bdkadvokati.com/competition-law-and-labour-markets-emerging-enforcement-trends>>

⁴ Laura Alexander & Steven C. Salop, 'Antitrust Worker Protections: Rejecting Multi-Market Balancing as a Justification for Anticompetitive Harms to Workers' (2023) 90(2) *University of Chicago Law Review* 273.

⁵ *United States v. Hutcheson*, 312 U.S. 219 (1941). The decision exempted activities such as boycotts, and peaceful picketing or strikes provided that they were acting in their own interests.

*assumption that labour markets were competitive and workers were protected through Collective bargaining and minimum wage laws*⁶.

Contemporary competition enforcement in labour markets has nonetheless experienced a shift towards employer Monopsony Power, “A mirror image of Monopoly power”, where the employers exercise high bargaining position as a buyer of labour⁷. It is against this evolving global backdrop that the significance of competition enforcement in labour markets is particularly acute in developing and emerging countries.

This paper will focus on Kenya which enjoys the privilege of being a regional commercial and financial hub and as a result has experienced a consistent economic growth. This growth is evidenced by the expansion of key sectors including telecommunications, finance, technology and tourism⁸; and that Kenya is driven by a vibrant labour force that is well trained, highly sophisticated and innovative thereby being the main factor of production in the economy. Notably, the Competition Act underscores the gravity of consumer welfare, innovation and efficiency in economic prosperity⁹. To maintain such an environment, significant attention has to be paid to labour mobility as it plays a huge role in rising of new enterprises, diffusion of skills and the reallocation of talents which has the effect of increased innovative products or services and improved quality as they aim at consumer satisfaction for retention and business growth.

1.2. Scope

The crux of this paper stems from the evolution of modern contracts from simple contractual agreements to control of labour emanating from restrictive covenants: and that while employers may have legitimate concerns regarding the protection of trade secrets, the scope of such covenants may far extend beyond said justifications and limit mobility of labour. Some of the key restrictive practices this paper addresses includes ‘the No-Poach agreements’, and ‘Non-Compete Clauses’.

1.3. Problem Statement

The central dilemma arises from the imbalance of bargaining position found in employment relationships where employers in a bid to protect their trade secrets include restrictive clauses which are termed as non-negotiable thereby, constraining labour mobility leading to several market distortions such as (i) stifled innovation which relies on reallocation of talent and diffusion of skills, and (ii) market entry barriers from covenants which may prevent entrepreneurship or limiting talents required to compete with already existing businesses.

1.4. Methodology

The paper will adopt a doctrinal and comparative methodology to evaluate current regulatory landscapes. It will analyse fundamental principles from other jurisdictions such as the US, EU and the

⁶ *Supra*, n2

⁷ LANGLOIS D'ESTAINOT, I. (2024). *Antitrust policy and EU labour markets: lessons from the US and comparative prospects* (Doctoral dissertation, European University Institute).

⁸ Macharia, J. (2019). Sustainable development in Kenya. *Horizons: Journal of International Relations and Sustainable Development*, (13), 172-183.

⁹ Cap. 504 of the Laws of Kenya -An Act of Parliament to promote and safeguard competition in the national economy; to protect consumers from unfair and misleading market conduct.

UK and emerging frameworks in Kenya and eventually evaluate the threshold which business protection evolves into market suppression.

2. ECONOMIC IMPLICATION OF RESTRICTIVE CLAUSES, THEORY AND ENFORCEMENT

“The broader lesson is that innovation is not generated by isolated firms alone. It emerges from networks of people and ideas, recombining knowledge across organizations and sectors. When legal rules fracture those networks by restricting worker movement, innovation weakens.”¹

2.1. Economic Implications of Restrictive Clauses

As observed in the foregoing section, restrictive clauses have been justified on the grounds that it serves to protect legitimate business interests: however, these covenants operate on a cumulative sense, in that they cannot be assessed from an individual perspective but on a broader scale. The cumulative effect of the enforcement of said clauses shape the dynamics in the labour markets affecting innovation, economic welfare and competition at large revealing a more complex impact which eventually result in adverse consequences.

2.1.1. *Suppression of Labour Mobility*

Restrictive clauses such as non-compete, and no-poach agreements effectively function as a core suppressor to labour mobility given their limiting effects the movement of an employee from one institution to another. The said clauses reduces, limits or entirely curtails an employee ‘outside-options’, and prevents job switching from the credible threat of consequences in the case of exit. This limitation creates a ‘lock-in’ of employees confining them to a certain market and limiting their skills and potential to that particular market effectively denying the market of talent and/or skills which may have been necessary in improving production and quality, which eventually have the domino effect on the consumers².

In the instance an employee decides to change environment, the said clauses, limiting in their nature, forces them to take a detour from their initial career path shifting to other markets or sectors which may not utilize their skill to the advantage of the larger consumers³. Adam Smith critiques this suppression caused by restrictive clauses terming them as constraints which have the effect of preventing the optimal allocation of talent and skills where demand for said talent and skills are a necessity.⁴

2.1.2. *Impact on Innovation and Market Entry*

Suppression of labour mobility can have adverse effects on innovation and entry of employees into the market and in particular in sectors where knowledge or skill is an essential resource⁵. With restrictive clauses in play, ambitious employees may have to postpone their entrepreneurial dreams at the costs of avoiding legal battles that may stem from any breach that may occur as a result of pursuing

¹ Lipsitz, Johnson, and A. C. (2026). ‘How Stronger Non-Compete Agreements Slow Innovation’. *Promarket*. Accessed on 28th March 2026 <<https://www.promarket.org/2026/02/13/how-stronger-non-compete-agreements-slow-innovation/#:~:text=When%20non%2Dcompetes%20get%20stronger,delay%20invention%20but%20reduce%20it>>

² Dan Andrews and Andrea Garnero, 'Five facts on non-compete and related clauses in OECD countries' (2025) *OECD Economics Department Working Papers* No. 1833.

³ Id.

⁴ *Supra*, n9. Book 1 Chapter 10.

⁵ *Supra*, n25.

said dream. Similarly, the clauses indirectly act as a barrier to start-ups seeking to recruit necessary talent as employees are locked within firms exercising the enforcement of said clauses. Further, innovation depends on circulation of ideas, talent and skill across industries and restrictive clauses effectively bar such circulation thereby constraining market output, product development, and customer/consumer satisfaction⁶.

These implications are particularly pronounced in developing countries such as Kenya where key consideration include the efficient allocation of human resources and technological advancement. Restrictive clauses therefore will constrain the required labour force possessing the vital skills within incumbent dominant firms thus slowing entrepreneurial growth, denying markets of innovative products and effective consumer welfare.

2.1.3. Wage Suppression and Inequality

Noting the afore-stated limiting nature of restrictive clauses, employers will maintain a relaxed atmosphere where they control wage rates as they face a reduced competitive pressure from alternative employment institutions⁷. Recent econometric studies show a wage markdown where employees in certain sectors earn only 65% of their marginal product value. This markdown is largely attributed to restrictive clauses whose effect is limited labour mobility which, dampens ‘outside-options’ and therefore less competitive pressure⁸.

From an efficient standpoint, Adam Smith, argues that restrictions which limits the freedom of workers operates as tool to distort markets and interferes with the ‘invisible hand’ from which prices are meant to gravitate towards their ‘natural price’ which reflects the true price of production costs. He terms said clauses as a ‘conspiracy against the public’ as its general effect is misallocated resource, reduced productivity and finally diminishes the economic welfare which deprives the public/customers/consumers of quality products or services⁹.

2.2. Conceptual Framework

2.2.1. Defining the Relevant Labour Market

In any assessment when determining competition harm, competition authorities such as the Competition Authority of Kenya (CAK)¹⁰, would first have to define the market and will equally apply in the current circumstance when defining labour markets. Labour markets will in this instance be defined across two dimensions, (i) occupation, which reflect to the skillsets of individual workers, (ii) industry, which groups labourers based on the particular goods or services produced, and (ii) geography, which speak to the ability of the worker to commute¹¹. Notwithstanding, while other markets appear to have broader definitions, labour markets are often narrow with highly skilled employees having limited employment opportunities and curtailed geographic span caused by the

⁶ Erik Stam, 'The Case against Non-Compete Agreements' (December 2019) *U.S.E. Working Papers Series*, No. 19-20

⁷ *Supra*, n1.

⁸ *Supra*, n2.

⁹ Makris, Stavros. "Competition law in the 21st century-Is Adam Smith still relevant?." *Competition Law Insights. Is Adam Smith still relevant?* (2024).

¹⁰ Competition regulator in Kenya.

¹¹ *Supra*, n11.

restrictive clauses. As such, the limited definition, would showcase the greater impact restrictive clauses would have on individual employees due to their limited alternatives¹².

2.2.2. Employer Concentration and Monopsony Power

Monopsony power, ‘a mirror image’ of monopoly power, stands to be the primary concern of competition regulators. Monopsony power refers to the dominant power held by the buyer: meaning the buyer, in this instance the employer, holds all the cards and is the sole buyer of labour compared to the seller, in this instance the job seeker or the employee.¹³ Monopsony power affects the wages reducing the labour compensation and limits the number of opportunities for the employees¹⁴.

To assess this power, CAK, would have to utilize the Hypothetical Monopsonists Tests (HMT)¹⁵. This test would evaluate the employer’s market power by imposing Small but Significant Non-transitory Decrease in Wages (SSNDW): the workers would have limited choices in switching employment in response to the reduced wages, say 5% wage cut, and may also be due to restrictive covenants, the employer would then be said to hold a dominant position¹⁶. The general effect of the subject clauses herein is that it would increase job-switching costs reinforcing the dominance of the employer and as such distortion of the market.

2.2.3. Competing Welfare Standards

Over the decades, competition law has been focused on prices, output effects on the product markets and the general welfare of consumers¹⁷. Contemporary competition and Worker Welfare Standard (WWS) has nonetheless challenged this approach and recognizes labour as a distinct market that deserves to be protected. Further, competition authorities and WWS organizations have similarly challenged the approach where the competition regulators only look at the benefit to consumers at the expense of workers, thus restriction that has the effect of causing harm to employees should not be justified by low price claims (where Peter is paid by robbing Paul): this shift creates a holistic understanding of competition regulations recognizing workers not merely as production inputs but essential key players in the market and the improvement of economic welfare¹⁸.

The foregoing theoretical framework has not been an academic discourse as they are being utilized by jurisdiction across the world in regulating, as seen in section 2.3, enforcing and making judicial decisions.

2.3. Decisions and Enforcement Trends

Cartels and No-Poach Agreements

¹² *Supra*, n20.

¹³ Brian Albrecht, Dirk Auer, & Geoffrey A. Manne, 'Labor Monopsony and Antitrust Enforcement: A Cautionary Tale' (21 May 2025) 74(4) *DePaul Law Review* 1119

¹⁴ *Id.*

¹⁵ *Supra*, n20.

¹⁶ *Id.*

¹⁷ *Supra*, n2.

¹⁸ *Id.*

The European Commission in a landmark decision imposed a fine of €329 million to two major food delivery companies – Delivery Hero and Glovo for cartel conduct where they had an agreement that the other would not hire the others' key employees and later transitioned to all other employees. This decision marked the first of decisions affecting the labour markets¹⁹.

Similarly, a Portuguese Competition Court fined Inetum, a multinational group active in technology consultancy services, a total of €3.1 million after Autoridade da Concorrência (AdC) (Portuguese Competition Authority) opened investigation in 2022 and found that Inetum group of companies had been participating in bilateral no-poach agreements with competing firms from the year 2014 with the participating firms committing not to recruit each other's employees²⁰.

Merger and their Effects on the Labour Market

In *FTC v. Kroger Co.*, in the proposed Kroger/Albertsons merger, the decision made by the FTC tested the boundaries of defining labour market with FTC arguing that the union would reduce the workers bargaining leverage when negotiating for better wages and benefits. However, despite the US District Court finding the definition tentatively plausible, they cited lack of sufficient economic analysis which then calls for verification and further market studies. This decision nonetheless set a forward-looking precedent on enforcement of competition in labour markets.

Labour Restraints

In the case of *NCAA vs Alison* (2021), the US Supreme Court found that the National Collegiate Athletic Association (NCAA) violated federal antitrust laws by limiting education-related benefits for student-athletes and that such benefits should be provided without undermining the distinction between college and professional sports. underscoring that there cannot be justifications that shield arrangements which are to the detriment of labourers through exercise of monopoly power.

The foregoing sections demonstrate that regardless of the claimed business benefits, restrictive clauses are more of control-related and is capable of distorting markets, suppressing wages, and limit innovation. Developing countries like Kenya, which depend on labour mobility to enhance their already growing economy need to advocate for free markets within the labour markets to nurture innovation, technological and financial growth.

¹⁹ Christian Ritz, Friedrich Preetz, and Florian von Schreitter, 'Table for none – European Commission serves fines for Labor Market Cartel' (17 June 2025) *Hogan Lovells*

²⁰ Portuguese Competition Authority (AdC), 'The Portuguese Competition Court upholds the Competition Authority's fine against 3 companies for a no-poach labour market cartel (Inetum)' (30 March 2026)

3. FOUNDATIONS AND LEGAL CHARACTERISATION OF RESTRICTIVE CLAUSES

*"It is not, however, difficult to foresee which of the two parties must, upon all ordinary occasions, have the advantage in the dispute, and force the other into a compliance with their terms. The masters, being fewer in number, can combine much more easily; and the law, besides, authorizes, or at least does not prohibit their combinations, while it prohibits those of the workmen."*³¹

3.1. Economic and Commercial Justifications

Restrictive covenants, such as non-compete clauses, and no-poach agreements have traditionally been justified grounds of economic and commercial objective and are more reflective of ancillary restraints. Employers and investors alike operate such restrictive clauses as a risk management tool to safeguard not only their business interests but also their investments on human and intellectual capital.³² Employers see the need to improve customer relationships and as such employ substantial investment into the improvement of the employees' skills by cultivating firm-specific skills, and providing or facilitating specialized training which also serve a critical role in giving the firm a competitive advantage.

Business enthusiasts argue that lack of said restrictive covenants may hesitate to facilitate specialized training on their employees knowing very well that they can be snatched by their rivals before recouping profits: this fear of rivals recruiting employees from other firms may occasion what economists would call a "hold-up problem". Additionally, employers utilize the non-compete clauses in a bid to preserve their trade secrets and proprietary information from competitors which may result from employee mobility³³. It is from this perspective that businesses perceive restrictive covenants as contractual instruments that serve to preserve the integrity of the business.

The Federal Trade Commission (FTC)³⁴ acknowledge that there is indeed empirical research to support that firms are way likely to invest in the training of their employees (investment in human capital) and research and development where there exists restrictive clauses.³⁵ Notwithstanding, this creates a vicious cycle where innovation, product development, and consumer welfare is held in abeyance at the cost of employers' fear of the effect of labour mobility, thereby limiting competitive market entry and insulating incumbents from competition³⁶. Subsequent sections of this paper will further argue that regardless of the business benefits that accrue from the said restrictions, they are not automatic, and are contingent upon the scope, duration and the manner of enforcement.

³¹ Smith, A. (1937). *The wealth of nations [1776]* (Vol. 11937). na. Book 1, Chapter VIII. Pg. 71

³² Brian Albrecht, Dirk Auer, & Geoffrey A. Manne, 'Labor Monopsony and Antitrust Enforcement: A Cautionary Tale' (21 May 2025) 74(4) *DePaul Law Review* 1119

³³ Motaz Al-Chanati, Johannes Böken, J.P. Bruno & Elisa Mariscal, 'Do We Have a Framework for Defining Labor Antitrust Markets? Guidance and Case Studies in the U.S., UK, and EU' (September 2025) *CPI Antitrust Chronicle*

³⁴ Accessed from <https://www.ftc.gov/> - an independent United States government agency mandated with the enforcement of civil antitrust law and the promotion of consumer protection.

³⁵ *Supra*, n10

³⁶ *Supra*, n11

3.2. Contractual Imbalance and Practical Realities

When Adam Smith, in his book, 'Wealth of Nations',³⁷ noted that, "*it is not from the benevolence of the butcher, the brewer, or the baker that we get our daily bread but from a regard of their own interests*", he underscored self-interest as being the driving force that compels agreements towards an exchange which align to one's economic advantage. By parity of reasoning, it would point to the existence of a contractual asymmetry between the employer, and a job-seeker (potential employer) – where the employer presents an agreement with restrictive clauses, which, unlike commercial agreements can be negotiated at an arm's length, are non-negotiable and marked by a power imbalance. The agreements are usually presented on a 'take-it or leave-it' basis, and in this instance, the job-seeker in desperate need of a job, acquiesces to the terms.

In other instances, employees may be introduced to the restrictive clauses post-recruitment when they have reduced or minimal bargaining leverage. In the United States (US), empirical data shows that nearly 30 million workers, which makes up roughly 18% of their workforce, are subject to these agreements including low-wage industries where trade secrets may be of rare concern³⁸.

The reality is that, the said clauses often serve as more as tools of labour control as compared to instruments of innovation and investment protection. The end goal of said clauses function as a restraint to labour mobility constraining employee's ability to pursue alternative or competitive employment, thereby preventing or limiting competition for talent and innovation, reducing worker mobility and depressing wage growth. This distortion ends up creating what economist would term as labour 'lock-in' which prevent employees from exploring future entrepreneurial opportunities, negotiating for fair market compensation, and/or maximizing their productivity.³⁹

3.3. Legal Status and Comparative Approaches

The Contracts in Restraint of Trade Act (Cap. 24 of the Laws of Kenya) primarily govern the enforcement of restrictive clauses found in covenants, and although it's a statute of colonial origin, it is still in force to date⁴⁰. Regardless of the statute sanctioning these restrictive clauses, they may be invalidated on grounds that they are unreasonable and are injurious to public interest, and places into consideration factors such as the nature of the business, duration, scope and circumstances surrounding their enforcement⁴¹.

³⁷ *Supra*, n9

³⁸ *Supra*, n11. There is currently no publicly available data in Kenya specifying the number of Kenyan employees subject to the restrictive clauses. However, case laws have pointed the increasing use of the said clauses, especially in niche sectors and high level positions. See the case of [Hotel Online Kenya Limited & 2 others v Kamau & another \[2024\] KEELRC 121 \(KLR\)](#).

³⁹ U.S. Department of Justice and Federal Trade Commission, 'Antitrust Guidelines for Business Activities Affecting Workers' (Revised January 2025)

⁴⁰ Contracts in Restraint of Trade Act. Cap. 24 of the laws of Kenya. Commenced in December, 31st, 1932.

⁴¹ *Id*, n18. Section 2(i). Of significance to note is that the Act with colonial origins permits minors to enter into such contracts considering whether it was to their benefit. One may argue that the said statute is now obsolete and potentially inconsistent with the Constitution of Kenya, 2010, and as such should be amended or repealed. Further, the Constitution of Kenya, 2010 guarantees, under Article 41, a right to fair labour which may be constrained or limited by the said statute.

Across jurisdictions the enforceability of the restrictive clauses varies depending on the different economic or constitutional priorities⁴². In Mexico, restrictive covenants are largely unenforceable under Article 5 and 123 of the Mexican Constitution as they are considered an impediment to workers' rights guaranteeing a freedom of worker mobility. In the US, there exist a fragmented framework, with states such as California, North Dakota, and Oklahoma prohibiting the enforcement of non-compete clauses post-employment and prioritizes labour mobility and with other states applying the test of reasonableness⁴³. The FTC recently published guidelines on the implementation and enforcement of non-compete clauses directing that the duration restrictive clauses should be minimized or done away with completely⁴⁴. In the European Union (EU) and the United Kingdom (UK), restrictive clauses remain enforceable provided they are not 'naked' restraints – that is the restrictive clauses are legitimate, reasonable in duration, geography, scope and legitimate interests serving as a 'filtering' mechanism. The UK Competition and Markets Authority in an effort to balance the right of employee mobility and employer interests have proposed limiting the enforceability of enforceability clauses to three (3) months save for clauses on confidentiality, non-solicitation and gardening leave.⁴⁵

Accordingly, the regulatory environment is slowly evolving towards preservation of the right of employee/worker mobility across the aforementioned jurisdictions reflecting an emerging consensus towards the argument that indeed restrictive clauses have the effect of unduly suppressing competition and as such have a negative impact on the economy.

⁴² OECD, 'Competition in Labour Markets' (2020). Accessed on the 15th day of March 2026 from <https://www.oecd.org/daf/competition/competition-concerns-in-labour-markets.htm>

⁴³ Id, n20

⁴⁴ U.S. Department of Justice and Federal Trade Commission, 'Antitrust Guidelines for Business Activities Affecting Workers' (Revised January 2025)

⁴⁵ Nicholas Greenacre, Michael Engel & Peter Citron, 'UK Proposes Stricter Approach to Non-Compete Clauses' (23 May 2023) *White & Case*

4. RECOMMENDATION AND CONCLUSION

“The property which every man has in his own labour, as it is the original foundation of all other property, so it is the most sacred and inviolable. The patrimony of a poor man lies in the strength and dexterity of his hands; and to hinder him from employing this strength and dexterity in what manner he thinks proper, without injury to his neighbour, is a plain violation of this most sacred property.”⁴⁶

4.1. Evaluating Enforceability

Firms have legitimate interests to protect their businesses but when this protection becomes overly restrictive, it turns into market suppression and in the particular context of labour markets, covenants become overly restrictive if it is to the detriment of the employees and exceeds the initial intended protection of legitimate interests.

Under traditional common law, as well as Kenyan statutes, the Contracts in Restraint of Trade Act, courts have adjudicated over said restrictive clauses and determined that they should be legitimate, reasonable in duration, geography, and scope. While some may argue that competition law is not a necessary tool in regulating restrictive clauses considering the latter, courts may not have the ability to capture the broader economic impact of said clauses. Whereas the Act implements the test of reason, and protection of legitimate business interest, any clauses that is restrictive in their nature do not operate in isolation and when adopted widely, they collectively harm the competitive market through suppression of wages, innovation and entrenching employer market power. These effects fall entirely outside the scope of courts which may only deal in the law of contracts and are better addressed under competition law which has the capability to assess market-wide harm, distortions and preserve the competitive process⁴⁷.

4.2. Alternatives for Employers

Noting the need to protect legitimate business interests, entities cannot be left without a recourse. Employers, while protecting their commercial interest, should adopt alternatives which are less restrictive and do not curtail labour mobility. These may include tools such as:

- a. Non-Disclosure Agreements (NDAs);
- b. Non-Solicitation Clauses;
- c. Training Repayment Agreement Provisions (TRAPs); and
- d. Positive retention and competitive wages.
- e. Garden-leave provisions

These clauses serve to protect business secrets without constraining career progression, or labour mobility, while as for provisions such as garden-leave provisions, where an employee is paid during their notice period to allow for firms to get their business in order before the employee can re-enter the market, may be utilized to allow for period where the firm can secure its interests⁴⁸.

⁴⁶ *Supra*, n9.

⁴⁷ Linda Khaemba, 'Restrictive Covenants in Employment Contracts: A Kenyan Perspective' (2024) 23 *Wolverhampton Law Journal* 23

⁴⁸ *Supra*, n29.

4.3. Key Recommendations

In order to facilitate competitive markets, competition regulators need go beyond reactive enforcement and proactively anticipate conduct that may harm the competitive market, and in particular to this paper on labour markets. The primary focus of competition policies should be on reducing information asymmetry and correct any market advantages that allow for employers to exercise their undue monopsony powers on job seekers and employees⁴⁹. Additionally, in the long run, having a competitive labour market will greatly advantage employers, who will in-turn have access to other well-seasoned employees who have similarly acquired their skills and expertise from other firms and sectors.

Based on the foregoing, this paper invites the proactive approach by competition regulators to safeguard competition in the labour markets and therefore addressing issues which may entrench monopsony power and undue restrictions of labour mobility. Recommendations for competition regulators include;

a. Conducting competition advocacy and market studies

Competition Regulators should conduct a market-wide study specific to labour sector where the restrictive contracts are at play and assess on the impact of such contracts including on wages, mobility, and innovation. Advocacy would also serve to educate stakeholders on their rights and the need to balance between the protection of legitimate business interest and anti-competitive restraints, thus addressing the root causes of monopsony powers.

b. Shifting the burden of Proof on employers to justify the need for restrictive covenants

The regulator should require the employer to provide justification demonstrating that a restraint is necessary for protection of legitimate business interest and that such a restraint is objectively necessary, proportionate in duration and geographic scope. The consequence of such a justification is that it would limit the use of broad, standard form of contracts that act more as an employer 'leash' than legitimate protection of business interest.

c. Periodic assessment

In cases where firms/employers are exempted and are permitted to include restrictive clauses in their contracts, the regulator should conduct periodic reviews thus ensuring that the restraints remain objectively necessary, proportionate in duration and geographic scope.

d. Deterrent sanctions for employers who engage in restrictive agreements.

⁴⁹ *Supra*, n20.

Competition regulators should propose/impose appropriate fines/sanctions for employers who engage in anti-competitive conduct such as no-poach agreements and overly restrictive non-compete clauses that substantially serve to lessen competition.

Ultimately, the goal is ensure that while business move to protect their business interest, employees are also protected from being “imprisoned” to one employer, suppressing labour mobility thereby negatively affecting the freedom to compete and the need to have competition in the market. Maintaining a balanced framework that addresses legitimate protection of business interests while protecting employees from broad market restraints will encourage preservation of constitutional labour rights, a competitive market, innovation, customer satisfaction and long-term economic growth.

4.4. Conclusion

Adam Smith’s perspective that skill is one property of mankind that should not be limited is backed and modernized through worker welfare standard, decisions from regulatory authorities and studies rejecting the idea that labour is merely a unit of production and are justified by the benefits that accrue to consumer. The growing global trend shifting towards the competition enforcement of labour markets shows a global agreement that much as business interests need to the protected, the same should not be done at the detriment or suppression of economic freedom.

For emerging economies such as Kenya, encouraging employee mobility is essential to allow for sharing of ideas, diffusion of skills and the reallocation of talents. This will guarantee and foster entrepreneurial growth which in turn will aid in encouraging innovation and improvement on the quality of products and services being offered to consumers. The future of competition law lies in ensuring that labour remains open thus allowing for interaction of talent and skillset more than it being viewed merely as a tool for production.