Are Your Employment Practices in Breach of Antitrust Law?

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Authorities in various jurisdictions are stepping up enforcement against no-poaching agreements between employers. From training their HR staff in antitrust rules to reviewing their hiring agreements, employers should take several steps to make sure that their hiring practices do not run afoul of anti-competition laws.

Human Resources managers who agree with competitors not to poach each other’s staff or to fix pay rates at specific levels may be undertaking illegal anti-competitive behaviour that could risk large fines and criminal convictions in several jurisdictions including the United States, the European Union and Hong Kong. In addition, the sharing of future salary levels, future bonuses/incentives, forecast hiring levels, and other similar information may constitute an infringement in the European Union and Hong Kong. Employers should now consider the current and historical practices in this area in conjunction with their legal team to ensure that they are in compliance with best practices and to minimise exposure in respect of any historical conduct.
The Likelihood of Growing Enforcement

In the United States, the Department of Justice (DOJ) is about to announce its first criminal charges involving “no poaching” agreements (see our recent LawFlash following the DOJ statement and our FAQs on the DOJ’s HR Guidance). Assistant Attorney General Makan Delrahim, head of the DOJ Antitrust Division, has been quoted as saying, “I've been shocked about how many of these [agreements] there are, but they're real.”

Competition (antitrust) enforcers talk to each other regularly about policy and enforcement actions, and it is just a matter of time before enforcers outside of the United States begin to investigate such arrangements, particularly if the companies indicted by the DOJ have cross-border operations. Indeed, there are reports that the Irish authorities are investigating allegations of a “no poach” agreement among Italian asset management firms prompted by a whistleblower at one of the firms.

The DOJ (jointly with the US Federal Trade Commission) issued its Antitrust Guidance for Human Resource Professionals in October 2016, signalling for the first time that the DOJ would “proceed criminally against naked wage-fixing or no-poaching agreements”. It is now following up on that warning, and employers must take note.

What’s the Problem?

The DOJ is focussing on the criminal prosecution of naked wage-fixing and non-poaching agreements. Such agreements constitute illegal cartels in most other major jurisdictions, including the European Union, and in some Asian jurisdictions, such as Hong Kong.

As part of a growing trend in which competition enforcers are focusing on no poaching and wage fixing issues, the Japan Fair Trade Commission announced last summer that it is studying the issue. Further announcements are expected in the coming months.

In light of the active bilateral or multilateral dialogues and collaboration among the DOJ and other competition authorities around the world, these regulators’ views on non-poaching agreements may be influenced by the DOJ’s announcement as they consider adopting the same enforcement approach in their respective jurisdiction. Accordingly, the risks of contravening competition law by entering into such agreements exist in not only every major jurisdiction but can arise in any and every industry context.

The sanctions for companies are potentially very high with the European Commission, for example, having the ability to impose maximum fines of up to 10% of worldwide annual group turnover for such infringements under EU law. In addition, there is the possibility of criminal sanctions for individuals, including jail terms under UK law.

Non-Poaching
Agreements between competitors that one will not solicit the other’s employees to join them are generally prohibited unless agreed in very specific circumstances. Under EU competition law, for example, non-poaching agreements may be valid where they prevent the seller of a company soliciting its employees to leave after the sale so as to protect the value of the company, although such an agreement would generally only be valid for up to three years and must be limited to reflect the scope of the business at the time of the transaction. Similarly, Chinese law does not prohibit non-poaching agreements between a seller and a buyer in an M&A deal. In practice, the non-poaching clause is commonly used to protect the interests of the buyer.

Joint venture agreements, whereby two parties agree not to poach each other’s staff for the duration of the joint venture, are also generally acceptable on the basis that they are necessary and directly related to the implementation of the joint venture.

Outside of these very limited circumstances, a mere agreement between competitors not to solicit each other’s employees would be a clear violation of competition law. As noted above, US authorities are becoming increasingly active in this area and significant criminal investigations are underway with prosecutions likely to follow.

Note that the concern is not with common contractual provisions (restrictive covenants) in agreements between employers and employees that restrict individual employees from working with competitors for a period following termination of employment (non-compete), or soliciting other employees to leave (non-solicit). These types of clauses may be permissible subject to the rules on enforceability under the applicable national law. Under English law, for example, such post-termination restrictions are generally acceptable where they are reasonable in duration and scope and seek to protect an identifiable, legitimate interest.

However, there may be more cause for concern, at least under EU competition law, in relation to deferred compensation agreements which require that an employee’s deferred compensation is forfeited if they move to a competitor or a particular class of competitors following termination.

Although not an agreement made directly between firms, the net effect of such agreements in one sector may be that competition between firms is limited. A disgruntled employee who forfeits compensation in this manner and is not made whole by his new employer may raise a formal complaint to a competition authority, which could result in an investigation. Whether the agreement in question constituted an infringement would then likely depend on an economic analysis of the market to determine (i) whether competitors were foreclosed from access to skilled employees in a particular sector as a result of the network of agreements; and then (ii) whether the individual agreement appreciably contributed to that foreclosure.

Although courts and competition regulators in Europe (Spain, the Netherlands, and Croatia) have all made major findings in the last eight years against companies in relation to national non-poaching agreements made in the freight forwarding, hospitals, and IT employment sectors, the US initiative is likely to give further impetus to multinational investigations. As in the case of the Italian asset management firms based in Ireland, this is likely to be prompted by individual whistleblowers and by firms seeking immunity from prosecution, which may lead to a
wave of similar applications and a domino effect throughout a sector and across jurisdictions as in the case of the benchmark and forex investigations in the global financial services sector.

Even in jurisdictions where there have been no reported cases of companies being penalized for signing a non-poaching agreement, the legal landscape is likely to change. In Hong Kong, for example, the Competition Ordinance (Cap. 619) (CO) prohibits anti-competition conduct, such as pricing manipulation, market allocation, restriction or control of output, etc. Although the Competition Ordinance does not specifically address the legality of a non-poaching agreement, anti-competitive agreements in the HR context are viewed as unlawful and within the ambit of the Competition Commission’s authority to regulate.

Chinese law also does not specifically address the legality of a wage-fixing or non-poaching agreement among employers. Nonetheless, the Anti-Monopoly Law of the People’s Republic of China provides a broad definition of what constitutes “monopolistic agreement,” which refers to “any agreement, decision or concerted action to eliminate or restrict competition.” This broad definition leaves room for the regulators to penalize companies that enter into a non-poaching agreement based on its effect in eliminating or restricting competition among employers in the talent market.

Additionally, China’s Anti-Unfair Competition Law gives the regulators broad discretion to impose fines on companies that engage in any act that “disturbs the order of competition in the marketplace and prejudices the lawful rights and interests of other business operators or consumers.” Considering also that China is an “employee-friendly” jurisdiction where the government has focused on ensuring the employees’ right to work and upward mobility through wage increases, China’s competition authorities might begin to scrutinize non-poaching agreements, particularly in regulated industries such technology and life sciences industries or in R&D facilities, where professionals with specialized skills are in high demand and most affected by such agreements.

In view of the unusually high turnover in the employment market in China, there is considerable pressure on many companies to enter into a non-poaching agreement, given the high costs of retaining, recruiting, and training new talent. Therefore, it seems to be only a matter of time before China’s competition authorities turn their attention to non-poaching agreements and take enforcement action.

Information Sharing

Although the focus in the United States is on specific agreements, there is a general prohibition in the European Union on any forward-looking information sharing regarding levels of compensation between competitors, assuming it reduces strategic uncertainty in the market. Such illegal “concerted practices” can arise even where only one party discloses strategic information to a competitor who “accepts” it, in which case the competitor will be deemed to have accepted the information (and adapted its market strategy accordingly), unless it responds with a clear statement that it does not wish to receive the information.
In Hong Kong, the Competition Commission has already issued regulatory advice to human resources trade associations that publication of industry-specific salary forecasts could trigger liabilities under the Hong Kong Competition Ordinance.

Consequently, whilst the use of “round robin” emails and third-party market research organisation to provide competitive market analysis, as well as industry roundtable discussions to share views on market practice and set pro-competitive standards, should continue to be encouraged, companies should ensure that in doing so, they do not share information about future salary levels, future bonuses/incentives, and forecast hiring levels with their competitors. If in doubt, companies should consult their legal teams before sharing the information. Furthermore, in the event any communication with competitors includes such information, even inadvertently, participants would be advised to make a clear statement that they do not accept such information and cease to engage in the communication.

**Whistleblowing**

The recent investigation in Ireland involving Italian asset management firms appears to have been initiated by an individual whistleblower. This highlights the importance of such programs and more particularly of carefully structuring them so that the whistleblower can be confident that they will be initiating a prompt, confidential, independent, and effective process without fear of retaliation. This is very important to ensure that the company retains control over the process and that the individual is not forced to report directly to the authorities particularly when the authorities are often offering them significant financial incentives to do so.

**What Can You Do?**

- Train your HR staff in antitrust rules relevant to HR practices
- Conduct a legal review of any agreements that may have the effect of restricting the hiring of employees from competitors, or preventing competitors from being able to hire your employees, including deferred compensation arrangements. This should include any informal agreements in place
- Ensure any roundtable meetings or “round robin” emails have a clear agenda, an express pro-competitive purpose, and that no forward-looking information on salary levels, bonuses/incentives, and hiring levels is shared. If such information is shared, record that you refused to accept the information and walked out of the meeting/deleted the email
- Use third party-survey organisations but ensure all information shared is historical, anonymised, and not forward-looking
- Review whistleblowing program to ensure that it is prompt, confidential, independent, and effective, and that there is no risk of retaliation for the whistleblower
- Where potentially illegal agreements or practices are identified, consider whether you should admit wrongdoing to the regulator to apply for leniency before one of your competitors does

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