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Wake-up call: recruiting and hiring practices may be anti-competitive

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It is time for companies and their HR professionals to wake up to the potential anti-competitive risks of their recruiting and hiring practices. When it comes to employment-related agreements, companies that do not compete with each other in their day-to-day business may still be regarded as competitors on the employment market. Competition authorities across the globe are actively examining anti-competitive arrangements between employers, such as non-poaching, wage-fixing and non-hiring agreements. Companies should check their recruiting and hiring practices for compliance with the relevant competition rules. Don't forget to invite HR staff to in-house antitrust compliance training: HR professionals might inadvertently cross the line, but pleading ignorance won't work.

United States

The U.S. Department of Justice Antitrust Division (DOJ) seems to have set the trend in targeting non-poaching agreements. Its 2010 civil settlement of non-poaching agreements between six high-tech companies in Silicon Valley should have alerted the market to the potential anti-competitive risks involved in employee-related arrangements. The DOJ found that the Silicon Valley agreements not to cold call each other's employees "reduced the companies' ability to compete for high-tech workers and interfered with the proper functioning of the price-setting mechanism that otherwise would have prevailed in competition for employees".

The subsequent 2016 guidance for HR professionals should have served as further caution against entering into these type of agreements. In the guidance, the DOJ mentions a shift in its enforcement policy from civil to criminal when it comes to these arrangements. Companies or individuals involved in naked wage-fixing or non-poaching agreements concluded or continued after publication of the 2016 guidance will be subject to criminal investigation and prosecution. According to the DOJ, these types of agreements can be compared to price-fixing and customer allocation agreements and should therefore be deemed illegal without the need for any inquiry into their anti-competitive effects. The first civil enforcement action following the 2016 guidance, a non-poaching agreement between rail equipment producers Knorr-Bremse and Wabtec, may be regarded as a final call. In its 2018 Spring update mentioning this case, the DOJ states: "Market participants are on notice: the Division intends to zealously enforce the antitrust laws in labor markets and aggressively pursue information on additional violations to identify and end anticompetitive no-poach agreements that harm employees and the economy".

Active antitrust enforcement of these employment-related practices is not limited to the United States. Quite a number of competition authorities have these practices on their radar.

Asia

The Hong Kong Competition Commission recently published an Advisory Bulletin for HR professionals highlighting the potential competition risks relating to employment practices. Similar to the DOJ, the Competition Commission considers that companies involved in non-poaching agreements are effectively engaging in market sharing by allocating sources of supply, and thus have the object of harming competition. Interestingly, the Competition Commission indicated that it is likely to prioritise enforcement of anti-competitive employment practices agreed between companies which are also competitors (or potential competitors) on the market downstream from the relevant employment market.

In Japan, a report by the Japanese Fair Trade Commission's Study Group on Human Resource and Competition Policy shows that the potential anti-competitive risks of non-poaching and wage-fixing arrangements are also a hot topic at the Fair Trade Commission.

Europe

In Spain, the national competition authority has imposed fines on several companies participating in a freight forwarding cartel which involved coordinating their competitive strategies, including the conditions for hiring workers. According to the competition authority, this coordination was 'objectively capable of distorting competition'. The British, French and Italian competition authorities recently investigated wage-fixing agreements in the fashion-modelling sector and qualified the agreements as object infringements. A Dutch civil court of appeal looked into a covenant between 15 hospitals which prevented the hospitals from re-hiring, for a 12-month period, employees who had terminated their contract with one of the hospitals, to become self-employed. The court considered that, although not concluded with the object to restrict competition, the clause did have an anti-competitive effect because it prevented these former employees from finding a job at a significant number of hospitals.

As to enforcement and policy actions at EU level, the European Commission seems to lag behind – but looks can be deceiving. The Commission's Ancillary Restraints Notice may suggest that the Commission considers non-solicitation clauses between competitors and between non-competitors to be at least potentially anti-competitive. However, such clauses can fall outside the scope of the EU cartel prohibition if they qualify as "ancillary restrictions". For non-solicitation clauses which cannot be regarded as ancillary, an assessment of their anti-competitive object or effect is still required.