International antitrust onslaught against HR practices: Act now to stay ahead of the game

The HR/antitrust intersection

In the past few years, enforcement against restrictive labor market agreements has become a priority for many competition authorities worldwide. As a result, certain HR practices are in the spotlight of antitrust enforcers and may result in significant fines or even criminal liability. While antitrust practitioners may have seen this coming (in the light of US enforcement practices[1]), this may come as a surprise for HR practitioners.

In any event, the US no longer dominates. Our global enforcement snapshot heat map shows that major enforcers in all regions have investigated and imposed fines.

While the European Commission has been less active than national EU Member State competition authorities in this area, that appears to be changing. Last year, the European Commission raided the premises of food delivery companies and extended its investigation to cover no-poach arrangements. It is thought to have as many as five cases in the pipeline. The Commission also published a 'policy brief' on antitrust issues in labor markets which foreshadows the strict approach that it is likely to take towards wage-fixing and no-poach agreements, which it likens to illegal price-fixing and market-sharing arrangements.[2] Consequently, companies and staff who agree not to poach employees from others, or who agree to fix wages, are in clear and present danger of serious financial and even criminal penalties.

Naturally, effective HR departments and policies remain critical to the success of any company. Data from legitimate benchmarking surveys and the use of non-solicitation clauses enables companies to attract, train and retain the best staff available on the market. It is therefore crucial to know where the boundary lies between legitimate and risky HR practices and how to avoid crossing it.

[1] United States: The FTC bans nearly all employer-employee noncompetes except those given as part of a bona fide sale of business - Baker McKenzie InsightPlus; United States: DOJ obtains first successful criminal penalties against individual in criminal no-poach collusion case - Baker McKenzie InsightPlus; United States: Six defendants acquitted in DOJ Antitrust Division criminal no-poach trial - Baker McKenzie InsightPlus; United States: DOJ Antitrust Division suffers another no-poach loss following acquittal of Maine home healthcare owners and managers - Baker McKenzie InsightPlus; United States: DOJ's Antitrust Division prioritizes health care collusion and monopolies with new Task Force - Baker McKenzie InsightPlus

[2] https://competition-policy.ec.europa.eu/document/download/adb27d8b-3dd8-4202-958d-198cf0740ce3_en?filename=kdak24002enn_competition_policy_brief_antitrust-in-labour-markets.pdf

We cover below:

- The global tipping point for competition enforcement in relation to HR practices
- Compliance pitfalls when it comes to HR practices
- Managing the HR/antitrust intersection: a risk mitigation checklist

The global tipping point for competition enforcement in relation to HR practices

Anticompetitive practices in HR have become a new frontier. This new front has opened up as enforcers seek to protect worker mobility as part of post-pandemic recovery and to ensure better wages (as household expenditures increase). Tension (and the risk of a competition infringement) is perhaps greatest when businesses are focused on retaining talent, e.g., where there is a 'war for talent' amid skill shortages.

Enforcers have broadened their focus, looking beyond the competition that takes place between companies supplying the same products and services, to the competition that takes place between them on the labor market, i.e., in their capacity as employers seeking to recruit and retain employees. By doing so, enforcers are identifying "markets" and "competitors" from a (fairly) novel perspective, which meant that HR practitioners tended not to have this on their radar. Until now.

Labor issues are now tightly entwined with antitrust – including in the merger control context where competition authorities have begun to look more closely at the impact of transactions on the market for attracting employees. This is consistent with a wider trend where competition authorities look beyond the consumer-facing side of markets to check there is a healthy degree of competition wherever competitors might coordinate their activities, such as in the procurement of inputs or in sector-wide ESG initiatives.

The risk profile regarding HR/antitrust violations is also changing due to a 'positive enforcement loop'. The more the authorities investigate, the more they familiarize themselves with the key issues. As a result, businesses and third parties increasingly conduct internal investigations (and find it easier to identify violations which affect them). This results in a greater chance of violations being reported via internal and agency whistleblowing mechanisms. In one case, we are aware of an authority having received more than 30 detailed testimonies from individual engineers via an authority's whistleblowing platform. The consequences of infringement are serious. Companies can be fined and sued. Individuals may also be fined and in some countries can be subject to criminal penalties or director disqualification orders.

Compliance pitfalls in HR practices

Broadly speaking, there are five categories of HR practices that attract scrutiny of the enforcers (though, as explained below, they raise different levels of risk and may be prioritized and treated differently by global antitrust agencies).

1 No poach agreements

So far, the main enforcement focus is 'naked' no-poach agreements: agreements between competitors not to hire one another's employees.[3] Naked no poach agreements can be contrasted with non-solicitation clauses which might be justified in the light of some wider commercial arrangement (see #5 below). Competitor means competitor for talent – which is not necessarily/only those companies with whom a company competes downstream. It can be a novelty for HR professionals to think about the notion of "competitor" in this way or to think about antitrust risks at all in this context.

Traditionally, agreements not to hire or solicit another's employees were mainly a question of civil enforceability. In focus was whether such agreements are legally binding and what remedies exist if they are not adhered to. At least that was the predominant issue from an HR/employment perspective, before being supplemented by the competition dimension.

No poach agreements (which can also be informal, such as handshake deals or other quick fixes) tend to arise in markets where there is a highly specialized workforce (or a shallow pool of available workers) or some other reason for high employee demand. They can also arise in markets where there is fierce competition to attract and retain talent or in respect of roles where companies invest significant resources in training and development.

Enforcement patterns so far suggest that the following sectors are high risk: Healthcare, Sports, Defense, IT/Tech, Financial Services, Consumer Goods, Engineering, Professional Services.

2 Wage-fixing agreements

Agreements between independent employers to limit wages, salaries or other employee benefits will be treated in a similar way to price-fixing cartels. For example, probes in Poland and Mexico uncovered salary caps in relation in professional sports.

Of course, collective bargaining agreements (CBAs) between unions or other employee representatives and employers or employer organizations remain perfectly lawful and are not considered an infringement of the labor market.

[3] The EU policy brief makes it clear that 'employee' will also cover 'false self-employed' persons, i.e., service providers in a situation comparable to that of employees. https://competition-policy.ec.europa.eu/document/download/adb27d8b-3dd8-4202-958d-198cf0740ce3_en - see footnote 5.

3 Information exchange/benchmarking of salary/benefits

Perhaps more common than explicit wage-fixing is the associated risk of employers sharing sensitive, forward-looking granular information on salaries and benefits that is not in the public domain. Information exchanges have been identified in investigations by antitrust agencies in Brazil and Switzerland. While the recent EU policy brief is silent on this area, the US FTC/DOJ guidance of 2016 specifically covers the sharing of information with competitors about terms and conditions of employment.[4]

Given that HR benchmarking initiatives are commonplace and often pro-competitive, this is a critical area to consider. The risk will be greater in sectors characterized by large and active HR networks which mean frequent competitor contacts, whether by ad hoc roundtable or trade associations. Less at risk are industries where salaries and benefits are regulated by CBAs but, even for those, the exchange of forward-looking information that is not predetermined by any tariff presents risks. Pay transparency laws around the world, particularly in the US and Europe, could add an interesting dimension to the availability of (current) compensation information and the approach of antitrust agencies.

4 Employer-employee non-competes

For now, this is primarily a US issue in employment contracts whereas the focus in Europe is still whether such agreements are actionable if not adhered to by the other party. For the US, however, the FTC recently proposed a ban on new non-competes with all workers, prohibiting employers from entering into noncompete clauses with workers on or after the final rule's effective date[5]. The rule also bans existing non-competes with most workers. Existing non-competes with senior executives are spared and remain enforceable-though new non-competes with senior executives are banned. The rule applies to workers in the US, regardless of where their legal employer is domiciled.

To some extent, the FTC's ban is a novelty, at least from a European perspective, as employer-employee agreements are typically not considered agreements between 'undertakings' and so do not fall within the scope of competition rules. In any event, the FTC's ban has already been challenged and it remains to be seen whether it will be upheld or whether State law will govern the fate of employer-employee non-competes.

5 Non-solicitation clauses

These are essentially no-poach agreements between competitors where the restriction is not the main purpose of the agreement and there is some legitimate interest to be protected, e.g., in the light of M&A/outsourcing, a joint venture, or some other customer/supplier relationship. The acid test is whether the scope of the non-solicitation clause is reasonable (who, what, where, when) in the circumstances.

The recent EU policy brief explains that a restriction will only be viewed as ancillary (and therefore lawful) if it is "directly related, necessary, and proportionate" to a transaction that would not otherwise occur. The fact that the

[4] Antitrust Guidance for Human Resource Professionals, 2016

[5] United States: The FTC bans nearly all employer-employee noncompetes except those given as part of a bona fide sale of business - Baker McKenzie InsightPlus

underlying transaction would be more difficult to carry out without the restraint does not mean it is objectively necessary.

The Commission anticipates that parties may argue that non-solicitation agreements have a legitimate objective, for instance in addressing a so-called "investment hold-up" where the clause protects the companies' incentives to invest in training their employees (or safeguards trade secrets). But the Commission argues that these pro-competitive aims can be achieved by less restrictive means such as non-disclosure agreements, obligations to stay with an employer for a minimum amount of time, the repayment of proportionate training costs, garden leaves, etc... It is therefore very clear that the Commission wants to set a high bar for proving these sorts of justifications.

This is an area which needs to be monitored closely – both in terms of how antitrust agency scrutiny evolves over time and internally, within the business. Non-solicitation clauses should in any event be proportionate, including, for example, in respect of the individuals/teams subject to the clause and its duration, as well as invariably allowing for individual approaches pursuant to general recruitment announcements. Unduly broad coverage could bring them into the crosshairs of antitrust agencies or litigants.

Managing the HR/antitrust intersection: risk mitigation checklist

HR-related practices are clearly on the radar of many competition authorities. HR professionals will be very familiar with non-competes and non-solicitation clauses, but antitrust scrutiny means the stakes are higher: the consequences of non-compliance go far beyond the question of whether a clause will be enforceable in a civil or labor court. This checklist includes recommendations on how to be compliant while retaining your competitive edge.

Risk area

Naked 'no poach'

Risk Factors

- Specialized workforce
- High demand/shallow pool of workers
- Large investments needed to train/develop employees
- Higher risk sectors: Healthcare, Sports, Defense, IT/Tech, Financial Services, Consumer Goods, Engineering, Professional Services

Solutions

- Educate staff, particularly those in HR and senior management.
- Ensure training reaches C-suite-level executives to avoid handshake agreements and other risky quick fixes between business colleagues.
- Monitor competitive trends and activity in the job market. If there are skills that are in high demand but short supply, or if a particular competitor is on a hiring spree, those situations may create risky conditions leading to illicit discussions or agreements.
- Consider making "Legal" the owner of (legitimate) no poach/non-solicitation agreements and have HR check before hiring.

Risk area

Wage fixing, information sharing, benchmarking

Risk Factors

- Large and connected HR networks
- Frequent competitor contacts
- High degree of benchmarking
- Membership of trade associations

Solutions

- Health-check the HR team. Legal should be aware of which industry group meetings, conferences they attend, email & messaging groups they are on, to see whether they communicate with counterparts at rival employers.
- Ensure training reaches the right parts of the organization. Be prepared to map out key decision-makers in terms of talent hiring, as well as those responsible for salary and benefits setting, such as remuneration committees. Need to remind business that can be competitors in upstream talent market alone.
- Roll-out guidance and protocols on how legitimate benchmarking is carried out, e.g., obtain relevant data from third-party analysis firms for surveys of aggregated salary and job-related data.
- Consider educating external business partners. Especially head-hunters and employee-leasing companies.
- Provide guidance and protocols on other forms of legitimate data-gathering, such as interview of candidates, new recruits

Risk area

Non-competes (US)

Risk Factors

- Final rule bans new non-competes with all workers, prohibiting employers from entering into noncompete clauses with workers on or after the final rule's effective date.
- Also bans existing non-competes with most workers.
- Existing non-competes with senior executives are spared and remain enforceable-though new non-competes with senior executives are banned.

Solutions

- Create an inventory all non-competes.
- Check offer letters, employment agreements, proprietary information and invention assignment agreements (PIIAs), stock option and award agreements, and other compensation-related agreements.
- Prepare to give notice. Companies that have existing non-competes with workers who are not "senior executives" must provide such workers with notice that their non-competes are no longer enforceable as of the rule's effective date.

Risk area

Non-solicitation

Risk Factors

- Large number of supply contracts/joint ventures/services agreements

Solutions

- Review contracts for risk, tailor these clauses and agreements to adhere to the proper scope.
- Keep a register of non-solicitation clauses and underlying contracts. Review existing clauses for proportionality use, and regularly consider whether rationale is valid. Eliminate when duration lapses, or no longer enforced.

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