# Employment practices

## Complying with international no poaching regulations

by **Omar Shah** and **Owen Hammond**

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 certain steps to ensure that their hiring practices do not infringe competition law.

### What's the problem?

HR managers who agree with competitors not to poach each other's staff or to fix pay rates at specific levels may be engaging in illegal anti-competitive behaviour that could result in large fines and even criminal convictions in several jurisdictions including the US, the EU and Hong Kong. In addition, the sharing of future salary levels, bonuses or incentives, forecast hiring levels and other similar information may constitute an infringement in the EU and Hong Kong. Employers should assess their current and historical practices in conjunction with their legal team to ensure that they are in compliance with best practices and to minimise exposure to any historical conduct.

In the US, the Department of Justice (DOJ) announced its first criminal charges involving "no poaching" agreements on 3 April 2018 and has confirmed that it has several ongoing investigations. 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*."

The risks of contravening competition law by entering into such agreements exist not only in every major jurisdiction but can arise in any and every industry context. For example, the DOJ recently took enforcement against rail equipment suppliers, including a privately owned company with its headquarters in Germany and wholly owned subsidiaries in the US, a US-based company with over 100 subsidiaries, and a rail equipment supplier based in France before it was acquired by the US company in November 2016. The DOJ's pending investigations relate to other industries, including healthcare.

The sanctions for companies are potentially also very high outside the US 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.

### The likelihood of growing enforcement

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 including in relation to businesses operating outside the US. The DOJ is focusing 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.

Competition enforcers talk to each other regularly about policy and enforcement actions, and increased enforcement of such arrangements outside of the US can be expected, particularly if the companies indicted by the DOJ have cross-border operations. For example, the Japan Fair Trade Commission announced last summer that it is studying the issue and reported on its work group's preliminary conclusions in February 2018. Further announcements are expected in the coming months. There are also 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.

### No poaching agreements

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, no 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 sold 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.

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 clause 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 (especially new entrants) 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 the 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 penalised for signing a non-poaching agreement[1], the legal landscape is likely to change. In Hong Kong, for example, the Competition Ordinance (Cap. 619) (CO) prohibits anti-competitive conduct, such as price manipulation, market allocation, restriction or control of output, etc.[2] Although the Competition Ordinance does not specifically address the legality of a no poaching agreement, anti-competitive agreements in the HR context are viewed as unlawful and within the ambit of the Competition Commission's enforcement authority.

Chinese law also does not specifically address the legality of a wage-fixing or non-poaching agreement among employers. However, 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."[3] This broad definition leaves room for the Chinese competition authorities to penalise companies that enter into a no poaching agreement based on its effect in eliminating or restricting competition among employers in the market for talent.

Additionally, China's Anti-Unfair Competition Law gives the competition authorities 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 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 scrutinise no poaching agreements, particularly in regulated industries such technology and life sciences industries or in R&D facilities, where professionals with specialised 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 no poaching agreements, 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 no poaching agreements and take enforcement action.

## Information exchange

Although the focus in the US is on specific agreements, there is also a prohibition in the EU on certain types of information exchange regarding eg future levels of compensation between competitors, resulting in them knowingly substituting practical cooperation for the risk of competition. Such illegal "concerted practices"[3] 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 issued advice to HR trade associations that publication of industry-specific salary forecasts could infringe the Hong Kong Competition Ordinance and on 9 April 2018, it published an advisory bulletin with a wider warning regarding concerted practices in the employment market.

Consequently, whilst the use of "round robin" emails and third-party market research organisations 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, 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 that 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 internal whistleblower programmes within companies 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.

## The future

Strict enforcement against anti-competitive behaviour in hiring practices is a relatively new, but increasingly prevalent contributor to competition law risks for employers. As detailed above, competition authorities continue to step up their focus on a range of activities, and are ensuring that they are elevated to board level consideration. As ever it is important that employers work closely with their legal and compliance teams to ensure that in efforts to retain and seek new talent, they are not in breach of competition laws.

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## Endnotes

1. In November 2016, 46 private schools in Wenzhou (Zhejiang Province) were found to have entered into an agreement containing a no poaching clause to restrict poaching of teachers who are still bound by their employment contracts. Any school that breaches this agreement would be liable for paying RMB 300,000 ($47,808) per each teacher to the school which lost the talent. This case has engendered a spirited debate on social media regarding the legality of such clause. Some legal professionals hold the view that such agreement is illegal because it violates China's anti-monopoly law. However, the local education bureau encouraged such agreements. There has not been any report indicating that the agreement is invalidated or that the private schools have been punished.
2. Article 6, Competition Ordinance of Hong Kong.
3. Article 13, Anti-Monopoly Law of the People's Republic of China.