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New Year Resolution for EU Antitrust Compliance Teams: "Putting HR Practices on My Radar Screen"

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In this briefing, we describe how certain employment practices, such as no-poach or wage-fixing agreements, may infringe competition law, a topic that has recently taken centre stage in the US and is also firmly, although more discretely, on the radar of antitrust authorities in Europe, but perhaps not yet on that of companies. Here is why it should be.

HR Practices Are Already an Antitrust Enforcement Priority in the US

HR practices are already high on the enforcement agenda of US antitrust agencies. In 2010, in a highly publicized move, the US DOJ brought civil enforcement actions against eight high-tech companies (including Google, Apple, Pixar, eBay, Intel, Adobe) which had entered into "*no cold call*" agreements. More precisely, in the midst of a talent war raging in the Silicon Valley, companies agreed not to solicit or hire each other's highly skilled and sought-after employees, such as hardware engineers and web developers. The DOJ concluded that these agreements were *per se* antitrust violations. The US FTC also brought cases against similar practices.

The situation took a new turn in 2016 when both agencies published a joint Antitrust Guidance for Human Resources Professionals. In these guidelines, the US regulators stated that, going forward, this type of practices would be prosecuted criminally.

In 2018, the DOJ investigated two major rail equipment suppliers, including German group Knorr-Bremse (and its newly acquired former French competitor Faiveley), for having agreed to not solicit, recruit or hire each other's employees without a prior approval of the current employer. However, since the violations took place and ended before the issuance of the 2016 guidance, the DOJ did not criminally pursue them, but brought a civil action which was ultimately settled. In 2018, various US States also investigated no-poach clauses in contracts between fast food companies and their franchisees.

There is Also Concrete – But More Discreet – Enforcement in the EU

Turning to the EU, (i) neither the European Commission nor the National Competition Authorities

appear to have made policy statements about antitrust enforcement against employment practices and (ii) no enforcer has had the opportunity to date to investigate a case turning solely on employment-related issues. However a closer look at national enforcement reveals more activity than first meets the eye and infringing HR practices, broadly falling into three categories, have been addressed and sanctioned in various cases:

- **No-poach agreements**: As described above, a no-poach agreement is a horizontal agreement between two companies not to solicit/hire each other's employees. These covenants can occur in high specialized working environments where there is a shortage of skilled workers and employers want to preserve the investments made in training their personnel; they could also conceivably occur for less skilled positions in local markets with low unemployment rates. Examples of enforcement in the EU include a case in the Netherlands, where fifteen hospitals entered into a joint agreement named "Working and Educating together", according to which, among other things, when an anaesthesiologist stops working for one hospital part of the agreement, he/she had to wait at least 12 months before working for a competing hospital. In another case in Spain, eight companies in the road transport freight forwarding industry entered into no-poach agreements which provided that the involved parties could not hire employees working for a competitor without prior approval. Other cases of no-poach enforcement have also been reported in France (PVC flooring, see below) and Croatia (IT services).
- **Wage fixing agreements:** In a real competitive labour market, companies should set their own salaries and employment conditions; wages-fixing between competitors would therefore be treated similarly to price fixing. These agreements may also tackle different types of compensation other than salaries. For instance, in the above mentioned Dutch case, the hospitals did not only arrange not to poach each other's anaesthesiologists, but they also agreed to fix the overtime payment due to their employees.
- **Exchanges of sensitive HR information:** While in the antitrust focus is generally on exchanges of commercially sensitive information (such as prices or production costs), recent cases confirm that the exchange of sensitive personnel-related information may also raise competition concerns. For instance, in 2017, the French Competition Authority fined three leading PVC and linoleum floor coverings manufacturers for having, in addition to entering into a gentleman's agreement not to solicit each other's employees, exchanged confidential information related to salaries and bonuses of their staff.

Five Take-Aways for European Companies

1. Antitrust enforcers in the US or in the EU (or for that matter in Asia, where the Japanese and Hong-Kong authorities have made specific policy statements) will treat labour markets as any other market. In the words of the DOJ, "*the same rules apply when employers compete for talent in labor markets as when they compete to sell goods and services*."
2. The list of competing employers with whom a company should not engage in the above practices can go beyond direct business competitors and expand to companies with which you may compete for a particular talent pool. This makes the monitoring of HR practices all the more delicate.
3. Antitrust enforcers will not think twice before sanctioning HR-related antitrust infringements that come to their attention: you should treat this as an established infringement and ensure compliance on a worldwide basis.
4. This is not to say that all HR practices with competitors are prohibited. There might still be some

scope in specific circumstances to agree with a competitor on a non-solicitation of employees (e.g. where such agreement qualifies as an ancillary restraint in the context of an acquisition or of a joint venture) or to exchange employment-related information as part of a benchmarking exercise provided that it is structured in a competition law compliant manner.

5. At a minimum, going forward, HR professionals and managers in charge of recruitment should be systematically included in your antitrust compliance programme and initiatives and the specific prohibitions applying to their function should be covered in existing compliance materials. If you feel that further steps might be warranted for in the form of drafting specific guidance, conducting further internal reviews or risk mapping assessments, we will be happy to assist you in devising and implementing an appropriate action plan.

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