HERBERT SMITH FREEHILLS

NEW DEVELOPMENTS IN HONG KONG AND US HIGHLIGHT NEED FOR COMPETITION LAW COMPLIANCE IN THE EMPLOYMENT CONTEXT

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Legal Briefings

In October, the US competition authorities (the Department of Justice (**DOJ**) and the Federal Trade Commission (**FTC**)) published competition law compliance guidelines aimed at HR professionals involved in recruitment and remuneration decisions for their firms (the US Guidelines).

This development is of particular interest from a Hong Kong competition law perspective. Since the introduction of the Competition Ordinance in 2012 (the **Ordinance**), the Chairperson of the Hong Kong Competition Commission (**HKCC**) Anna Wu has been eager to emphasise HR as an area of potential concern. Indeed, we understand that the HKCC has recently advised the city's two largest human resources management institutes against publishing industry-specific salary forecasts. The publication of such forecasts is likely to raise issues under the First Conduct Rule under the Ordinance, which prohibits anti-competitive agreements, including anti-competitive information exchanges.

These developments are a useful reminder of the importance of competition compliance in the employment context and of the behaviours that can potentially infringe antitrust law prohibitions, wherever businesses are located. Companies should therefore take steps to audit their HR practices and ensure that all relevant individuals receive appropriate compliance training.

1. The US Guidelines

The US Guidelines (available here) reflect the US authorities' high profile enforcement action against Apple, Google and various other Silicon Valley companies in recent years in relation to no-poaching agreements (followed by class action damages claims on behalf of affected employees), as well as previous enforcement in the healthcare sector.

Although the US Guidelines are targeted at HR professionals, the antitrust prohibitions apply equally to other parts of business, and it is notable that very senior executives were allegedly involved in the recent technology and media no-poaching cases.

The US Guidelines focus on two key areas:

Agreements with other employers not to recruit certain employees (no-poach or no-hire agreements) or not to compete on terms of compensation (wage-fixing agreements).

Sharing commercially sensitive employment information with competitors.

These are also the key "danger areas" under the Ordinance in Hong Kong.

2. Information sharing agreements

The US Guidelines flag the sharing with competitors of sensitive employment information, such as salaries and other terms and conditions of employment, as a potential risk area. This area in particular has been repeatedly emphasised as a key area of potential concern by the HKCC, and is the very issue raised in recent discussions between the HKCC and human resources management institutes.

Participating in meetings, such as trade association meetings, where such information is discussed is also high risk, as is any discussion of these topics with colleagues at other companies, including where this takes place in a non-professional, social context.

The rules on sharing commercially sensitive information (including sensitive employment information) with competitors are even more strict under EU competition law, on which the Ordinance in Hong Kong is based. Any sharing of information with competitors in relation to future pricing intentions is a hard-core restriction under EU competition law. Other instances are to be assessed on an effects basis, taking into account the nature of the information and the structure of the market.

The US Guidelines recognise that in some cases it may be necessary to exchange commercially sensitive information between competitors, for example in the context of a proposed merger. In those instances care should be taken to ensure that this is done in a way which complies with competition laws (equally necessary for Hong Kong competition law purposes), for example through an independent third party or subject to appropriate confidentiality and ring-fencing restrictions.

3. No-poach agreements and wage-fixing agreements

Agreements with other employers to refrain from soliciting or recruiting each other's employees will generally be treated as "per se" illegal in US antitrust terms. Whereas employers are free to make their own decisions regarding soliciting or recruiting employees, they should not agree with other employers on whether to target or employ a particular individual or group of individuals.

The US Guidelines recognise that there may be circumstances in which such agreements can have legitimate aims and be justified under competition law, for example in the context of a merger or joint venture. This is in line with the EU Commission's approach in its guidance on "ancillary restraints", which allows certain non-solicitation agreements (generally those whose duration and geographic scope is limited).

Agreements with other employers to fix employees' terms of compensation are also treated as per se illegal in the US Guidelines. Compensation for this purpose relates not only to salaries but also covers all forms of benefits (e.g. health insurance or transport benefits) and other terms of employment.

The US Guidelines and previous cases make it clear that "naked restrictions" such as no-poach and wage-fixing agreements would be regarded as problematic even if entered into between non-competitors.

In future, the DOJ intends to bring criminal proceedings against these types of agreements, which it compares to cartel-type activity such as price fixing and customer sharing. It is notable that in a number of previous cartel cases the EU Commission has identified evidence of collusion in employment practices as part of wider cartel conduct (for example "collusive poaching" of a non-cartelist rival's staff in the Pre-insulated Pipes case, and no-poaching agreements in Roofing Felt). On this basis, it is reasonable to expect that in the Hong Kong context, such agreements will be treated as serious infringements of the First Conduct Rule under the Ordinance. In particular, if viewed as analogous to price-fixing, it seems likely that wage-fixing agreements will be treated as Serious Anti-Competitive Conduct by the HKCC. Serious Anti-Competitive Conduct is conduct that is so serious that it is not necessary for the HKCC to first issue a Warning Notice (allowing the parties to rectify their conduct before proceedings are brought by the HKCC in the Competition Tribunal).

4. Business impact

In the context of these recent developments, ideally businesses should conduct internal audits in order to ensure their HR practices are compliant with competition laws. HR specific competition compliance training should also be rolled-out to ensure that all relevant individuals are aware of the issues and do not inadvertently engage in practices which are in breach of competition laws.

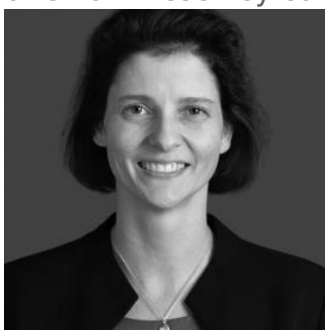
The issue of information sharing with competitors in particular can be a high risk area in practice, as the individuals involved will not always realise that their conduct may infringe competition laws. Many HR professionals regularly attend meetings and working groups at which competitors are present, and discussions can easily stray into areas they should not. The line between what can legitimately be discussed and what amounts to anti-competitive conduct is not always clear. It is important for anyone who attends meetings where competitors are present to understand the issues and to receive some clear “do’s and don’ts” guidance.

HR professionals may also participate in benchmarking exercises, where sensitive information (e.g. on salaries) from various competitors is gathered by a third party and presented to participants in a final report. Even information shared through a third party can breach competition laws - for example the UK competition authority previously investigated the sharing of information between motor insurers via a third party IT provider. Companies must make sure that any such benchmarking exercises in which they participate are carried out in a way that is compliant with competition laws. Most importantly, there should be a sufficient number of participants, and any data published or shared should be sufficiently historic and/or in aggregated, anonymised format.

Herbert Smith Freehills can provide in-person training or alternatively offer an online competition compliance programme which focuses on the above issues and can be used as an integral part of your compliance strategy. Please contact any of the contacts listed, or your usual Herbert Smith Freehills contact, for further details or if you would like to arrange a demo of the programme.

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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