

IS YOUR HR FUNCTION IN COMPLIANCE WITH COMPETITION LAWS?

According to various sources, UK employers are currently struggling with the worst labour shortage since 1997.

In these challenging times, contacts between HR functions from different firms typically increase through lobbying initiatives to tackle the labour crisis or a desire to share information about the difficulties faced.

However, HR professionals must remain mindful of the competition rules when communicating with other businesses and HR professionals, not least because this is an area of competition law enforcement that is receiving increased focus from regulators across the globe.

Following the 2016 US Department of Justice's Antitrust Guidance for Human Resource Professionals, in 2020 the OECD published a detailed note on the implications of competition law on labour markets.

In parallel, a number of regulators launched individual investigations. In Hungary, the competition authority established that the internal rules of a trade association for HR consulting agencies led to fixed minimum fees for recruitment services. Moreover, member agencies agreed not to poach each other's agency employees. In 2021, the Polish competition authority opened a cartel investigation alleging that the basketball league agreed to (i) establish on what terms the players' contracts should be terminated; and (ii) withhold the players' remunerations (regardless of the financial circumstances of a given club).

In October 2021, Acting Assistant Attorney General Richard A. Powers from the US Department of Justice reiterated that, whilst recognising that "antitrust enforcement has historically not focused much on labor markets", the agency commits to enforcing, as a matter of a top priority, the antitrust

laws, including criminal enforcement, in labour markets.

Most recently, EVP M. Vestager in her speech on 22 October 2021 at the Italian Antitrust Association Annual Conference indicated that investigating buyer cartels is still a priority for the European Commission including:



When companies collude to fix the wages they pay; or when they use so-called "no-poach" agreements as an indirect way to keep wages down, restricting talent from moving where it serves the economy best

EVP M. Vestager, 22 October 2021

Whilst historically the US courts and agencies have demonstrated some, albeit limited, appetite for enforcement in this area, the increased (and novel) enforcement activity across the EU shows that, from a compliance perspective, the HR function is as important as any other market-facing division within a given organisation.

Firms and, in particular, HR professionals, should keep the following key competition law "dos and don'ts" front of mind. In doing so, it is important to recognise that, from an antitrust perspective, firms that compete to hire or retain employees are competitors in the employment marketplace, regardless of whether the firms compete on a market for the supply of goods of services.

TOP 5

COMPETITION LAW DO'S AND DON'TS

1. DO NOT

exchange (either share or receive) information with competing employers concerning the details of employee remuneration (including salary, bonus, certain types of benefits) without seeking legal advice first.

2. DO

instead use third parties' services (most often consulting firms) to conduct a benchmarking exercise/survey on your behalf.

The benchmarking exercise would need to meet certain conditions: (i) the data gathered and used in the report has to be historic (at least 6 months old); (ii) the results should be aggregated in a way that does not reveal the identity of the employer; (iii) a sufficient number of employers should have participated in the exercise and, thus, reverse-engineering the data is not possible.

3. DO NOT

enter into agreements regarding terms of employment with competing employers.

Agreements in relation to employee salary or other terms of compensation (either at a specific level or within a range), as well as an agreement to refuse to solicit or hire that other company's employees, will likely violate competition laws and could have serious ramifications to your business.

4. DO

keep track of all lobbying initiatives your business participates in, or trade associations they are member of (especially in light of the ongoing labour crisis). The bylaws or governing rules, as well as meeting agendas should be pre-screened; and the respective meetings minuted.

5. DO

include a tailored competition law angle in any mandatory compliance training your HR function usually undertakes.

If you would like to discuss these points further or have any questions, please contact:



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