Competition Law

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In this issue

SOUTH AFRICA

Don't show restraint! Will the Competition Commission join in global scrutiny of 'no poach', 'restraint of trade' and 'wage fixing' employment agreements?

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COMPETITION LAW ALERT

Don't show restraint! Will the Competition Commission join in global scrutiny of 'no poach', 'restraint of trade' and 'wage fixing' employment agreements?

First, there was a threat of criminal prosecution by the US Department of Justice. Then the European Commission announced it would start investigating *new* types of anti-competitive conduct. Now, a Las Vegas man has been convicted. Is this the start of a global competition law obsession with labour markets?

A flurry of relatively recent activity by certain competition regulators – in addition to the US and the EU, also the UK, Japan, Spain, France and Hong Kong – confirms that labour markets are on the agenda for competition regulation. There is a particular focus on 'no poaching' clauses (more eloquently, 'non-solicitation clauses'), restraints of trade (less eloquently, 'non competes'), and wage fixing agreements (not yet commonly known by any more stirring name). At its core, these types of conduct may affect employees' job-hunting prospects and remuneration.

Examples of the enforcement action in other jurisdictions include rulings against no poaching agreements in Spain, fines in France, and the first federal jury criminal conviction in the US for wage fixing.

The US Department of Justice (DOJ) has published its Antitrust Guidance for HR Professionals, warning that 'no poaching' clauses are against antitrust (competition) laws and are probably outright prohibited, subject to future case law. The DOJ also indicated that it intends to proceed criminally against naked no poaching agreements (those which are deemed not reasonably necessary to a separate, legitimate agreement).

In April 2024 the US Federal Trade Commission banned restraint of trade (non-compete) clauses in the labour context and in March 2025 the UK's Competition and Markets Authority fined some of the largest sports broadcast and production companies in the UK more than £4 million for sharing sensitive information about fees for freelance workers to avoid getting into a "*bidding war*" with one another.

The relevance to South African businesses lies in the fact that our Competition Commission (Commission) is an active regulator, with strong links to foreign competition regulators. If other leading regulators are detecting potential red flags around no-poach, restraint of trade and wage fixing agreements in the labour context, the Commission is bound to pay attention.

The concepts

A 'no poach' clause is an agreement or understanding between independent employers not to hire (or poach) each other's employees. In essence, employers agree not to compete for a certain class of employees (those employed by their counterpart), depriving those employees of bargaining power.

A 'restraint of trade' is an agreement between an employer and an employee that the latter will not take up employment with a competitor of the employer.

A 'wage fixing' arrangement involves an agreement or practice amongst competing employers to set, maintain, or manipulate employee remuneration (or other terms of employment).

What does the law say?

In South Africa, the Competition Act 89 of 1998 (Competition Act) is fundamentally concerned with conduct that significantly prevents or lessens competition to the detriment of consumers, although the promotion of employment is also squarely within its ambit as a public interest objective. The Competition Act distinguishes between *per se* prohibitions (where offenders are not able to rely on any pro-competitive effects to justify their conduct) and '*rule of reason*' prohibitions (where the pro- and anti-competitive effects of the conduct are weighed up to determine whether the conduct is justifiable).

Section 4(1)(b) of the Competition Act deals with *per se* offences between competitors, known as cartel conduct. This includes price fixing, market division and collusive tendering. Globally, the theories of harm around anti-competitive labour practices involving competitors usually fall within market division for 'no poach' agreements and price fixing for 'wage fixing'.

While the Commission has not yet focused on prosecuting these types of conduct, wage fixing is generally considered to be much closer to outright price fixing (employers are literally fixing an input cost) and competing businesses should not engage in practices or exchange information that could result in fixing the remuneration (or other terms of employment) of employees, contractors, or ad hoc labour. Similarly, competitors concluding 'no poach' agreements run the risk of being seen to divide markets. Based on global precedent, going forward, the Commission will likely have a greater appetite to prosecute such conduct.

Crucially, in South Africa only competitors can engage in cartel conduct. Therefore, any alleged anti-competitive agreement between parties who do not compete (or could not potentially compete)

cannot amount to cartel conduct. But it is still prohibited for non-competitors to enter into any agreement that substantially prevents or lessens competition. This would require a rule of reason assessment to determine whether the pro-competitive effects outweigh the anti-competitive effects. Since restraints of trade in the labour context are between an employer and an employee (not typically competitors), it is not cartel conduct and would be assessed on a '*rule of reason*' basis.

In certain circumstances restraints of trade have been accepted as legitimate protections under competition law in South Africa. Employers invest resources into employees, introduce them to key clients, and share business secrets with them. It is understandable that employers want to then protect against losing key employees to the competition.

One of the best-known competition law cases dealing with the test for a legitimate (non-employment) restraint of trade is *Dawn Consolidated Holdings v Competition Commission* [2018] 1 CPLR 1 (CAC). In this case the Competition Appeal Court presented a three-part test to determine whether a restraint of trade is lawful under the Competition Act:

1. Is the main agreement (i.e. absent the restraint) unobjectionable from a competition law perspective?
2. Is the restraint in question reasonably required for the conclusion and implementation of the main agreement (known in this context as an ancillary restraint)?
3. Is the restraint reasonably proportionate to the requirement served?

If the answer to all three questions is "*yes*", the restraint is permissible under competition law. This test was given in the context of restraints of trade flowing from a shareholders' agreement that prevented related firms from competing on certain products. Incidentally, these principles are similar to the approach in the EU for determining the competition law legitimacy of ancillary 'no poach' agreements and may inform the Commission or the Competition Tribunal's view on employee restraints in future.

Competitors should be careful when entering into 'no poach' agreements. Until there is case law from the competition authorities confirming that ancillary 'no poach' agreements are permissible between competitors, there is a risk that the Commission may wish to characterise this as market division, since it is no doubt alive to the global traction on this point.

What should businesses do?

The expanding global focus on anti-competitive conduct in the labour market by so many competition regulators spells more compliance for businesses. This is particularly apt for the SA Commission who is known as a custodian of public interest, including employment-related issues. Agreements that apply across borders must be carefully considered for compliance in the affected jurisdictions, and even in South Africa, employers must take care to ensure that any restrictive labour agreements comply with competition law.

In sum, in South Africa:

- 'No poach' agreements should, as a rule of thumb, not be entered into between competitors. Non-competitors could in certain circumstances lawfully agree not to poach if this is ancillary to a legitimate agreement that would not be viable if the restraint was not included.
- Restraints of trade are lawful if they are ancillary to a legitimate employment relationship with a protectable interest and if they are reasonably limited in duration and scope.
- Wage fixing is out. Just don't do it.

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