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BLOG

China Begins Targeting Antitrust Issues in Labor Markets – Chinese Hog Farms Revoke "No-Poach" Initiative After SAMR Action

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Alex An, partner at YuandaWinston, Stephanie Wu, senior counsel at YuandaWinston, and Charlotte Monroe trainee solicitor at Winston & Strawn co-authored this blog post.

On July 31, 2023, China's antitrust law enforcement agency, the State Administration for Market Regulation (SAMR), summoned four hog-farming companies for a regulatory meeting, with concerns over a no-poach agreement among them. This marked the SAMR's first public action specifically targeting an alleged no-poach agreement, adding China to a growing list of countries that have recently focused on antitrust enforcement in labor markets with the intent to protect workers.

The four hog-farming companies announced the initiative at a forum held on June 20, 2023, according to which they agreed not to poach employees from one another. The No-Poach Initiative quickly received overwhelming public criticism after being reported by various media, with commentators expressing concern about potential harms to ordinary workers. Various legal professionals also raised antitrust concerns. Some of them even made reports to the SAMR and requested that the agency initiate an investigation into such a suspected violation of the PRC Anti-Monopoly Law.

After their meeting with the SAMR, the four companies immediately made a joint announcement to revoke the No-Poach Initiative on the same day.

According to a SAMR press release issued after its regulatory talk with the hog producers, the SAMR expressed the view that the protection and promotion of fair competition in labor markets is conducive to promoting the reasonable, smooth, and orderly flow of the labor force, and is of great significance in creating a fair employment environment, perfecting a unified and compliant labor market system, and promoting high-quality economic development. The SAMR clearly indicated that the No-Poach Initiative violated the spirit of the Anti-Monopoly Law and is not conducive to building a unified national market. In the regulatory talk, the SAMR required the four companies, among others, to take effective measures to make corrections, eliminate the harmful consequences, and enhance compliance in business operations.

Whereas the above development marks the first time that SAMR intervened against a no-poach agreement in the labor market, it is not the first time that no-poach agreements have come under the scrutiny of China's Anti-monopoly Law. As early as 2015, the Hunan Provincial Administration for Industry and Commerce fined 29 shale

brick operators for entering and implementing agreements to restrict output and allocate the market for shale brick in Mayang County, Hunan Province. According to the administrative penalty decisions, 26 of these operators also formulated so-called management rules whereby they agreed to "not take any other measures to poach labor forces from each other." Although the authority did not seem to pick specific issues with this clause at the time, the fact that this clause was particularly identified in the penalty decisions indicated that such a no-poach clause was considered problematic in the eyes of the authority.

CHINA'S ACTION JOINS A GROWING INTERNATIONAL TREND

Competition agencies in other jurisdictions have similarly prioritized antitrust enforcement in labor markets in recent years.

In 2016, the United States Department of Justice (DOJ) and Federal Trade Commission issued new *Antitrust Guidance for Human Resource Professionals*, stating that certain no-poach or wage-fixing agreements would be considered per se illegal and subject to criminal prosecution in the future. Following that guidance, the U.S. DOJ has, since 2020, brought several criminal prosecutions against no-poach and wage-fixing agreements. However, those U.S. DOJ efforts have had limited success to date. Although it has secured some legal victories establishing the possibility of criminal prosecution for certain labor antitrust violations and has obtained one guilty plea, the U.S. DOJ has also lost multiple cases on the merits, with juries finding that defendants did not reach an illegal agreement.

In Canada, an amendment to its Competition Act became effective in June 2023 that newly criminalized wage-fixing and no-poach agreements. The Canadian Competition Bureau has issued enforcement guidelines under the new law, and future actions are expected.

In Europe, while the European Commission has not previously dealt with no-poach agreements, it has made it clear that no-poach agreements are considered a serious concern and are coming into the spotlight of the Commission's investigative work. In a 2021 speech, European Commissioner for Competition Margrethe Vestager stated that "some buyer cartels do have a very direct effect on individuals, as well as on competition, 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. And that's not the only way that an agreement not to poach each other's staff can create a cartel." In its revised Horizontal Guidelines, the Commission referred to agreements to fix wages as an example of a hardcore restriction in the context of joint purchasing agreements.

Several national competition authorities in Europe (including France, Belgium, the Netherlands, Spain, Portugal, Croatia, and Hungary) have investigated no-poach agreements, including those made in the security services, PVC floor coverings, freight forwarding, hospitals, and IT employment sectors. The UK's Competition and Markets Authority (CMA) has also been viewing labor market-related agreements as an enforcement priority. In July 2022, the CMA launched an investigation in relation to wage fixing in the production and broadcasting of sports content in the United Kingdom, and issued a guidance note in February 2023 on the three main types of anticompetitive agreements that can have a negative impact on employees and labor markets, including no-poaching agreements. Similar to the approach under EU law, wage fixing is cited as a specific example of restrictions by object in the CMA's horizontal guidance published earlier this month, which confirms an increasing focus on employment-related behavior.

TAKEAWAYS

- This is the SAMR's first disclosed action that directly goes against a no-poach agreement. In the newsletter released by the SAMR, the China antitrust law enforcement agency clearly indicated that it would pay close attention to competition in the labor market. Enterprises with operations in China should mark this trend, especially those in industries facing fierce talent competition.
- Under the PRC Anti-Monopoly Law (as revised in 2022), no-poach agreements can fall under Article 17, prohibiting competitors from entering into or implementing agreements to allocate markets or collectively boycott. Conduct falling thereunder is presumed illegal, thus creating an extremely high burden for firms to rebut that presumption.

- The antitrust authority has the power to impose fines of up to 10% of the undertakings' sales value (globally or domestically, on a case-by-case basis) in the previous year, depending on the length and severity of the violation in question. Further, the antitrust authority retains discretion to increase such fines fivefold where "the circumstances [of the violation] are particularly serious, the impact is particularly heinous, and the consequences are particularly serious," according to the revised Anti-Monopoly Law. Worth highlighting is that the 2022 revision of the Anti-Monopoly Law also opened the gate for criminal liability for certain antitrust violations. A market allocation cartel could thus lead to criminal liability for the firm and its executives. On the other hand, firms could make use of the leniency system to eliminate or alleviate liabilities under the Anti-Monopoly Law.
- Global antitrust regulators have increasingly targeted labor restrictions for antitrust enforcement. Even in jurisdictions that have not previously taken action or adopted laws or guidelines specifically against labor-restricting agreements, enforcers may take action under existing law.
- Businesses should be highly cautious before entering into agreements that include terms limiting employee mobility—such as non-solicitation, no-poach, or wage-setting clauses—and consult with experienced antitrust counsel in any jurisdiction where affected employees work.

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Kevin B. Goldstein

Peter Crowther

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