

Competition concerns regarding certain practices in the employment marketplace in relation to hiring and terms and conditions of employment

Background

- 1.1. Since the commencement of the Competition Ordinance (“**Ordinance**”) the Commission has encountered a number of situations where undertakings have engaged in employment-related practices that could give rise to competition concerns under the Ordinance.
- 1.2. The Commission is issuing this Advisory Bulletin to raise awareness of the potential competition risks relating to employment practices, in particular in the determination of employment terms and conditions and the hiring of employees. This Advisory Bulletin should be read in conjunction with the Commission’s Guideline on the First Conduct Rule (“**FCR Guideline**”).

The employment marketplace

- 2.1 In a free market economy, businesses compete with each other to offer the best range of products at the best price. A competitive market leads to better prices, products and choices for everyone. Likewise, competition among employers for employees leads to better employment terms (e.g., higher salaries or more favourable benefits) and increased opportunities for employees.
- 2.2 For the purpose of the Ordinance, the Commission considers there can be competition within a market for the procurement of labour. In the employment context, undertakings are purchasers who compete for a key input: labour.
- 2.3 The Commission considers that undertakings that compete with each other to hire employees are competitors in the relevant labour market, regardless of whether or not those undertakings compete in the provision of the same products or services, i.e., the downstream market. The Commission may choose to prioritise a matter if the undertakings are also competitors or potential competitors in the downstream market.

- 2.4 Arrangements between undertakings in respect of compensation or hiring related matters may take various forms. These range from agreements as to compensation or other employment terms (whether for existing or potential employees or both) to sharing competitively sensitive information, whether done directly or through a third party. Such arrangements may give rise to competition concerns and be at risk of contravening the First Conduct Rule (“FCR”).

Anti-competitive conduct regarding hiring and employment terms and conditions

- 3.1 Undertakings that compete to hire employees should refrain from entering into agreements or engaging in concerted practices in relation to the terms and conditions of employment and the hiring of employees. Such agreements or concerted practices are likely to impact the way in which undertakings compete for employees and can result in harm to employees in the form of suppressed wages, fewer benefits and/or reduced opportunities.
- 3.2 As set out in the Commission’s FCR Guideline, the term ‘agreement’ is a broad concept that can capture any arrangement, understanding, promise or undertaking, whether express or implied, written or oral, and whether or not enforceable or intended to be enforceable by legal proceedings.¹
- 3.3 The concept of a concerted practice captures any form of cooperation falling short of an agreement, where undertakings knowingly substitute practical cooperation for the risks of competition.² The sharing of competitively sensitive information, be it reciprocal or unilateral, directly between competitors or through a third party, would typically amount to a concerted practice.

Examples of practices that would contravene the Ordinance

- 3.4 The Commission considers that agreements and concerted practices in relation to compensation or solicitation or hiring of employees or certain classes of employees may contravene the FCR.

¹ Competition Commission, FCR Guideline, para. 2.22.

² Competition Commission, FCR Guideline, para. 2.27.

- Undertakings that reach an agreement in relation to any aspect or element of compensation or exchange information about their intentions in this respect are, effectively, fixing the price of labour. Compensation in this context is not limited to salaries and wages but can include benefits and allowances such as insurance benefits, housing allowances, relocation support, severance payments or long service payments.
- Undertakings that reach an agreement in relation to solicitation, recruitment or hiring of each other's employees or classes of employees (non-poaching or other arrangements) or exchange information about their intentions in this respect are, effectively, engaging in market sharing by allocating sources of supply.

3.5 The Commission's view, as set out in the FCR Guideline, is that price fixing and market sharing arrangements have the object of harming competition.³

The Commission's advice and further actions

- 4.1 To ensure compliance with the Ordinance, undertakings should independently determine the policies they intend to adopt regarding employment terms and conditions, in particular employee compensation and how they solicit or recruit/hire employees. Undertakings should avoid communicating such policies to other employers.
- 4.2 If you have information about anti-competitive employment practices, you should report this to the Commission by contacting us on 3462 2118. If you think you or your business may have contravened the Ordinance, you or your business may benefit from lenient treatment if you come forward and cooperate with the Commission in its investigations.
- 4.3 Where the Commission has reasonable cause to suspect that any undertakings have been engaging in anti-competitive practices in relation to hiring and terms and conditions of employment, the Commission will take the appropriate enforcement action in accordance with the Ordinance.

³ Competition Commission, FCR Guideline, para. 6.10 and 6.18.

Questions and Answers

Question 1: My friend and I are both HR managers in a growing industry where employees with a certain skill set are in high demand. Recently there has been a lot of employee movement between firms which has led to increased recruitment and training costs. To manage the instability in the market and minimise costs, my friend suggested we agree not to solicit or hire each other's employees. Will this raise issues under the Ordinance?

Answer 1: Your friend is suggesting that both firms enter into a non-poaching agreement. Undertakings that enter into a non-poaching agreement or exchange information about their intentions in this respect are, effectively, engaging in market sharing by allocating sources of supply. Such arrangements have the object of harming competition and if their existence is established, the Commission will take the appropriate enforcement action in accordance with the Ordinance.

Question 2: I am a board member of an industry association. Most of the industry players are also members of the association. To benchmark future compensation trends the association proposes to appoint an independent third party to conduct a survey amongst members with respect to their future salaries and benefits. Will this raise any competition concerns? If so, what steps should the association take to minimise the risk of contravening the Ordinance?

Answer 2: As the members of this association are likely to be considered competitors, they should avoid sharing information as to their future intentions with respect to salaries and benefits. Such exchanges, whether occurring directly between competitors or indirectly through an independent third party, will be considered to have the object of harming competition.

If the association and its members decide to proceed with a survey to benchmark compensation and benefits, it should be designed to minimise the risk of contravening the Ordinance. For example, this could be achieved through the appointment of an independent third party that will collect historical data from the members of the

association, collate them and distribute or publicise them in an aggregate and anonymised form.

Question 3: I am a member of a labour union. Can I exchange information related to salaries and benefits with other members?

Answer 3: Members of labour unions are employees. The Commission does not consider an employee (as distinct from a self-employed sole trader) to be an undertaking for the purpose of the Ordinance, therefore members of labour unions are outside of the scope of the First Conduct Rule of the Ordinance.

Question 4: I suspect my employer is trying to avoid paying me a severance payment. For the last week, my employer has been trying to persuade me to agree to voluntarily resign which means I will forgo any entitlements to severance pay. Given my hesitation to agree, my employer assures me that I will be re-employed in the same role at an unrelated company. Does this conduct raise concerns under the Ordinance?

Answer 4: On the face of it, your employer's proposal that you agree to voluntarily resign does not raise concerns under the Ordinance insofar as it was independently conceived.

However, your employer's assurance that you will be re-employed in the same role at another company may give rise to competition concerns insofar as it may suggest the existence of coordination between your employer and the other company as to their hiring decisions.
