A NEW SENSE OF UNEASE: THE RISE OF NO-POACH AND WAGE-FIXING CONCERNS UNDER EU COMPETITION LAW

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A new hot topic has emerged in antitrust discussions around the world and it is here to stay: Wage-fixing and "no-poach" agreements between employers are perceived as a threat not only for affected employees, but also for innovation in general. Competition authorities worldwide have initiated numerous investigations and are using their investigative measures, including dawn raids, to fight this new threat to competition that in the authors' view may be more of a non-properly specified "sense of unease" rather than a genuine antitrust issue. The authors shed light on (i) the roots of the discussion, (ii) the ongoing enforcement activities and (iii) the most relevant – largely still open – competition law questions, such as the distinction between "by object" and "by effect" restriction and the ambiguities around the theory of harm of such competition law concerns. They also provide an overview of measures that companies should take to address potential complaints raised by stakeholders or competition authorities.

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I. INTRODUCTION

The discussion around wage-fixing and so-called "no-poach" agreements is a new hot topic in (EU) competition law.[2] Last year, the EU Competition Commissioner Margrethe Vestager put the topic on the EU Commission's ("EC") dawn raid agenda. Speaking at the Italian Antitrust Association's Annual Conference in October 2021, Commissioner Vestager revealed that new types of anticompetitive conduct, such as "'*no-poach agreements' as an indirect way to keep wages down, restricting talent from moving where it serves the economy best*" will be in the spotlight of the EC's investigative work – and could be part of the scope of the EC's dawn raids. The Commissioner also emphasized that such agreements can be a threat to innovation competition – another area of interest for the EC in recent years – as "[t]*here are markets where you can only compete if you have expensive machinery, or costly IP. And then there are those where the key to success is finding staff who have the right skills. So in these cases, a promise not to hire certain people can effectively be a promise not to innovate, or not to enter a new market.*"[3] In April 2022, Maria Jaspers, the head of the European Commission's cartel directorate, confirmed at a recent conference that the EC is currently looking at this type of conduct.[4]

In the same vein, former head of the French Autorité de la Concurrence, Isabelle de Silva, included the topic in her farewell speech in October last year as an agenda item for the French watchdog going forward, and praised the work the U.S. authorities had already done on this.[5] In the U.S., Lina Khan, chair of the U.S. Federal Trade Commission ("FTC"), announced during an event at the White House in early March 2022 that the FTC would focus on assessing whether mergers can have negative effects on labor markets. The announcement came after a study by the U.S. Department of Treasury focusing on issues in the American labor market caused by, *inter alia*, no-poach agreements and lack of wage transparency.[6]

This article sheds light on (i) the roots of the discussion in the U.S., (ii) recent enforcement activities in the EU and elsewhere, (iii) the main – and largely still open – competition law questions around these arrangements, and (iv)practical guidance for businesses.

II. U.S. CASE LAW SPANNED THREE CONSECUTIVE U.S. ADMINISTRATIONS

In the U.S., enforcement against and private litigation related to no-poach agreements is a common phenomenon and heating up.[7] More than ten years ago, the issue become popular through a number of high-profile cases enforced by the U.S. Department of Justice's ("DOJ") Antitrust Division in the tech industry,[8] where the companies allegedly engaged in "naked" no-poach agreements to prevent poaching of high-tech animators and other sophisticated engineers.[9]

These and other cases led the DOJ and FTC to release a joint "*Antitrust Guidance for Human Resource Professionals*" in October 2016.[10] *Inter alia*, the paper establishes that "[n]*aked wage-fixing or no-poaching agreements among employers, whether entered into directly*

2 The discussion focuses on so-called "naked" agreements, i.e. agreements entered into between employers absent M&A deals, collaborations, or any other form of "legitimate" reasons for non-compete agreements that could be covered by, e.g. the ancillary restraints doctrine.

3 https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/speech-evp-m-vestager-italian-antitrust-association-annual-conference-new-era-cartel-enforcement_en.

4 "*Although we have not pursued a [no-poach] case so far, these cases are certainly on our radar. We have a few cases that we are actively looking into and let's see what comes out of that.*" American Bar Association Antitrust Spring Meeting 2022. Washington, DC. April 5-8, 2022.

5 https://globalcompetitionreview.com/de-silva-says-french-authority-could-take-tougher-stance-in-labour-markets?utm_source=Top%2BSouth%2BAfrican%2Bcourt%2Breinstates%2Bprivate%2Bhospital%2Bdeal%2Bblock&utm_medium=email&utm_campaign=GCR%2BAlerts.

6 https://globalcompetitionreview.com/gcr-usa/treasury-says-workers-underpaid-20.

While this article focuses on agreements entered into by employers absent merger transactions or collaborations, such as R&D or purchasing cooperation agreements, it is remarkable that the topic has found its way into merger control, too.

7 See New York Times article of April 14, 2022, "*U.S. Tries New Tactic to Protect Workers' Pay.*"

8 E.g. see U.S. DOJ press release of September 24, 2010, related to settlements with six high technology companies, available at: https://www.justice.gov/opa/pr/justice-department-requires-six-high-tech-companies-stop-entering-anticompetitive-employee.

9 "Justice Department Requires Six High Tech Companies to Stop Entering into Anticompetitive Employee Solicitation Agreements," Sept. 24, 2010; https://richmond.com/news/local/updated-mayor-stoney-releases-statement-on-failure-of-the-casino-gaming-referendum/article_1a9294a1-2744-5242-aea4-438dabfd09e4.html#tracking-source=home-top-story-1.

10 Available at https://www.justice.gov/atr/file/903511/download.

or through a third-party intermediary, are per se illegal under the antitrust laws" (emphasis added). The investigators emphasize their agenda "*to proceed criminally against naked wagefixing or no-poaching agreements*."

There are plenty of examples of recent investigations and lawsuits in the U.S., e.g.:

- In February 2020, three former employees in the so-called "high fashion" segment brought about a class action against their former employer and other high fashion retailers for allegedly entering into a no-hire agreement.[11]

- In 2021 the DOJ filed its first criminal antitrust prosecution in the healthcare sector that led to two more indictments in July 2021 against a healthcare company and its former CEO.[12] Another indictment followed in November of the same year alleging unlawful conduct concerning an additional company active in the sector.[13] In January 2022, the defendants' motion to dismiss was rejected. A federal judge of the U.S. District Court for the District of Colorado found the case to be a "new fact pattern" for existing case law on market allocation and reminded the defendants that the DOJ Antitrust Division had warned businesses in 2016 that such behavior would be prosecuted criminally (for more details, see IV.A below).[14]

- In November 2021, a Texas Federal Court declined a motion to dismiss the DOJ's first criminal charges case related to alleged wage-fixing agreements in the physical therapist staffing sector (see IV.A below). On April 14, 2022, the Eastern District of Texas jury found the defendants (a former owner and former clinical director of a physical therapist staffing company) not guilty of the antitrust charges.[15]

- In December 2021, six aerospace executives and managers were indicted for leading roles in labor market conspiracy that allegedly affected thousands of engineers and other workers in the aerospace business.[16]

- In early 2022, four individuals were indicted on wage-fixing and labor market allocation charges in the home healthcare sector.[17]

In parallel, U.S. President Biden signed an Executive Order in July 2021, considering whether to revise the 2016 Antitrust Guidance to strengthen employee protection.[18] It is to be expected that there will be more cases to come, in particular since the enforcers have not been slowed down by any major court challenge so far, as most accused firms settled with the U.S. Government or State Attorneys General.[19]

III. ENFORCEMENT IN THE EU AND ELSEWHERE

The EU enforcement activities have only heated up recently and only at national level. The best-known cases relate to the professional sports segment, such as the Portuguese Autoridade da Concorrência's investigation into the Professional Football League initiated in 2020. Allegedly, more than 30 teams of the country's top leagues agreed not to hire a player that unilaterally terminated its contract due to the

11 See https://www.classaction.org/media/giordano-et-al-v-saks-incorporated-et-al.pdf.

12 See https://www.justice.gov/opa/pr/davita-inc-and-former-ceo-indicted-ongoing-investigation-labor-market-collusion-health-care.

13 https://www.justice.gov/atr/case-document/file/1454056/download.

14 https://globalcompetitionreview.com/gcr-usa/department-of-justice/dojs-criminal-no-poach-claims-survive.

15 See https://www.law360.com/competition/articles/1484191/doj-s-1st-wage-fixing-suit-ends-with-not-guilty-verdicts?nl_pk=8c25d350-b21f-44fc-a1ea-2307fe596e45&utm_source=newsletter&utm_medium=email&utm_campaign=competition&utm_content=2022-04-15.

16 https://www.justice.gov/opa/pr/six-aerospace-executives-and-managers-indicted-leading-roles-labor-market-conspiracy-limited.

17 https://www.justice.gov/opa/pr/four-individuals-indicted-wage-fixing-and-labor-market-allocation-charges.

18 https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/.

19 The DOJ's interest in labor law matters is not limited to no-poach agreements between employers. For example, in a statement of interest filed in late February 2022 before a District Court of the State of Nevada, the DOJ found that contractual non-compete clauses preventing a group of anesthesiologists to work for a competing company could be a *per se* violation of Section 1 of the Sherman Act, see https://www.justice.gov/atr/case-document/file/1477091/download.

COVID-pandemic.[20] In April this year, the Autoridade da Concorrência fined the football clubs and the Professional Football League a total of EUR 11.3 million.[21] Similarly, the Polish Office of Competition and Consumer Protection opened an investigation into alleged collusion regarding clauses for the termination of players' contracts and exchanging competitively sensitive information in April 2021.[22] The Lithuanian competition authority Konkurencijos imposed fines of circa € 1,000 to €17,000 for similar conduct in the national basketball league in November 2021.[23]

But the sectors investigated are not limited to professional sports – competition authorities also investigate these types of agreements in a wide spectrum of other industries, such as consulting agencies (Hungary, December 2020),[24] supermarkets (Netherlands, November 2021),[25] or installation and maintenance of elevators (Greece, March 2022).[26]

As Commissioner Vestager vaguely anticipated for the EU – national competition authorities have already started conducting dawn raids related to alleged anticompetitive behavior in labor markets. For example, in January 2022, Romania's Competition Council launched its first investigation and raided various manufacturers of motor vehicles and components and related services. The Competition Council stated that "*[l]abor force recruitment is a competitive parameter between the parties involved, the same rules on competition apply when undertakings sell goods or provide services.*"[27]

In the EU, there is no case law yet related to no-poach, wage-fixing, or any of the other forms of labor law related agreements. While the EC looked at an infringement relating to labor force in the context of anticompetitive behavior in the past, this decision is outdated and thus likely not a reliable proxy for its future enforcement. Importantly the case concerned an agreement to poach as opposed to an agreement not to poach employees. Specifically, in its 1998 *Pre-Insulated Pipe Cartel* case,[28] the EC assessed the circumstances of hiring key employees of a competitor in the context of a larger market sharing and price fixing cartel. The EC found that competitors "*embarked on a systematic campaign of luring away key employees*" via extraordinary salaries and conditions, in order to weaken – and ultimately eliminate – a competitor. This was a form of predatory poaching agreeing to take away another competitor's "essential inputs" and does not seem to be a good case to draw conclusions on the legal standard and economic effects of no poaching agreements (indeed, in that case, it was poaching, not no-poaching, that was viewed as detrimental to competition).

In the same vein, outside the EU, competition authorities worldwide are actively pursuing no-poach or wage-fixing agreements and have put the topic on top of their agenda. For example, both the Colombian Superintendence of Industry and Commerce[29] and the Mexican Comisión Federal de Competencia Económica initiated such investigations into the football sector.[30] The Canadian government is currently undertaking a comprehensive review of the Competition Act focusing, *inter alia*, on no-poach or wage-fixing agreements as "*buy-side conspiracies*." In this context, the Canadian Competition Bureau refers to the various enforcement activities globally and "*the U.S.' commitment to criminally pursue*

20 See press release here: https://www.concorrencia.pt/en/articles/adc-issues-statements-objections-anticompetitive-agreement-labour-market-first-time. The Autoridade da Concorrência included investigations into no-poach and wage-fixing agreements in its competition policy priorities for 2022: https://www.concorrencia.pt/sites/default/files/Priorities%202022.pdf and published an issues paper on labor market agreements and competition law in 2021: https://www.concorrencia.pt/sites/default/files/Issues%20Paper%20Labor%20Market%20Agreements%20and%20Competition%20Policy%20-%20final.pdf.

21 See press release here: https://www.concorrencia.pt/en/articles/adc-issues-sanctioning-decision-anticompetitive-agreement-labor-market-first-time.

22 See press release here: https://uokik.gov.pl/news.php?news_id=17405.

23 See press release here: https://kt.gov.lt/en/news/by-agreeing-not-to-pay-players-salaries-lithuanian-basketball-league-and-its-clubs-infringed-competition-law. The Konkurencijos found that several clubs agreed to terminate the 2019–2020 championship due to the COVID-pandemic and not to pay salaries. While not all clubs explicitly agreed to these clauses, the Konkurencijos concluded that all clubs attending the extraordinary meeting of the board, during which the participants decided not to pay salaries, were part of the collusion as they did not expressly disagree.

24 https://www.gvh.hu/en/press_room/press_releases/press-releases-2020/the-gvh-cracked-down-on-a-cartel-and-imposed-a-fine-of-huf-1-billion-on-hr-consultants.

25 https://www.acm.nl/en/publications/acm-suspends-investigation-possible-wage-fixing-cartel-between-supermarkets-after-conclusion-collective-agreement. The Dutch Authority for Consumers and Markets suspended the investigation into the alleged wage-fixing cartel, as employers and employees agreed on a new collective agreement.

26 https://www.epant.gr/en/enimerosi/press-releases/item/2140-press-release-decision-no-758-2021-ex-officio-investigation-in-the-market-for-the-installation-and-maintenance-of-elevators.html.

27 http://www.consiliulconcurentei.ro/wp-content/uploads/2022/01/investigatie-piata-muncii-ian-2022-English.pdf.

28 Commission decision of October 21, 1998, IV/35.691 – *Pre-Insulated Pipe Cartel*.

29 https://www.sic.gov.co/noticias/sic-opens-investigation-against-16-colombian-professional-soccer-teams-alleged-antitrust-behaviors.

30 https://www.cofece.mx/wp-content/uploads/2021/09/COFECE-028-2021_ENG.pdf.

no-poach or wage-fixing agreements" specifically that "*put Canada out of step with* [their] *largest trading partner, as the* [Canadian] *Act currently does not contemplate criminal sanctions for buy-side conspiracies*."[31]

These developments will likely foster the intensity of enforcement in the future and should be a wake-up call for companies – not only for future practices, but also to re-assess their existing hiring and HR practices. Notably, the EC has already included wage-fixing agreements as by object infringements in its recently published Draft Revised Horizontal Guidelines.[32]

IV. WHAT ARE THE – LARGELY OPEN – QUESTIONS UNDER EU ANTITRUST LAW?

While competition authorities around the globe seem to feel an urge for enforcement, it is worth taking a closer look at the – largely open – questions that arise under EU (and foreign) antitrust law.

As is evident from the recent enforcement activities, no-poach or wage-fixing agreements can be found in varying forms, starting from agreements not to "cold call" each other's employees, not to accept applications from employees ("no-hire agreements"), over to exchanging information about and agreeing on clauses how to terminate employment contracts, fixing wages, agreeing not to pay salaries at all, *etc*. These arrangements also concern different sectors and types of employees: while many prominent cases relate to high profile employees, such as top athletes, engineers, *etc*., there have also been a number of cases (especially in the U.S.) that relate to fast food franchising companies or (luxury) fashion retailers, too.

However, from a competition law perspective the same key questions arise: (i) Do such agreements amount to "by object" or "by effect" infringements under EU law?[33] (ii) To find an anticompetitive agreement or practice, do the employers engaging in such agreements have to compete on the downstream market or is it sufficient that they compete on an "upstream market for hiring labor force"? (iii) What is the core theory of harm related to competition? We examine these questions in the context of the various agreements below in turn.

A. "By Object" vs. "by Effect" Restriction of Competition?

The EC does not have a consistent set of precedents on the differentiation between "by object" and "by effect" infringements under competition law. The lines between these two categories are increasingly blurred in the EC's practice (and especially the EC's Draft Revised Horizontal Guidelines) leading to a broad interpretation of by object infringements, which seems difficult to square with the Court of Justice's finding in *Groupement des Cartes Bancaires v. Commission* that that the by object concept must be interpreted restrictively.[34] It is worth taking a closer look at the various types of agreements and whether they qualify as by object or by effect restrictions, in particular because the differentiation can make a practical difference, i.e. enforcing a by object infringement is way easier for competition authorities, as there

31 https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04621.html#sec05_1.

32 European Commission's Draft Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements of March 1, 2022 ("**Draft Revised Horizontal Guidelines**"), para. 316.

33 For the U.S., the question would be whether the agreements are *per se* illegal or whether the arrangements would be instead subject to "*the rule of reason*."

34 In *Groupement des Cartes Bancaires v. Commission* the Court of Justice's found that the concept of by object restriction of competition must be interpreted restrictively, i.e. "[t]*he concept of restriction of competition 'by object' can be applied only to certain types of coordination between undertakings which reveal a sufficient degree of harm to competition that it may be found that there is no need to examine their effects, otherwise the Commission would be exempted from the obligation to prove the actual effects on the market of agreements which are in no way established to be, by their very nature, harmful to the proper functioning of normal competition*," case C-67/13, *P Cartes Bancaires v. Commission* EU:C:2014:2204, para 58. See also case C-307/18 EU:C 2020:52, *Generics (UK) Ltd v. Competition and Markets Authority*, case C-591/16 P EU:C:2021:243, *Lundbeck v. Commission*, and the discussion regarding these judgements in *Whish/Bailey*, Horizontal Guidelines on Delineation between purchasing agreements: by object and by effect restrictions, Final report, available here: https://ec.europa.eu/competition-policy/system/files/2022-03/kd0722013enn_purchasing_agreements.pdf.

The Draft Revised Horizontal Guidelines do not shed any light on this long-lasting dilemma. On the contrary, the EC's draft states that "*it is sufficient that* [a by object infringement] *has the potential to have a negative impact on competition*" (para. 29; emphasis added) and at the same time it is sufficient for a by effect infringement to "*have, or be likely to have, an appreciable adverse impact on at least one of the parameters of competition on the market*" (para. 36; emphasis added). It is however unclear where to draw the line between "potential" and "likely" adverse effects.

is no need to establish any actual or potential anticompetitive effects arising from the conduct in question.[35] We look at the various types of agreements in turn.

- ***No-hire agreements:*** Employers agreeing not to hire certain of the other's employees, i.e. not even accept applications from certain employees, seem somewhat uncommon. Even where employers collaborate in certain fields and thereby expose their employees to other potential employers, outright no hire agreements seem somewhat extreme.

  Thinking in terms of traditional competition law theory, this comes close to a boycott scenario, in which employers decide not to "buy" certain input materials, i.e. hire certain employees from the upstream labor force market. As Whish & Bailey rightly point out, in the past the EC qualified such boycott cases as by object infringements, but there are good arguments against such qualification. In particular, where the boycott relates to the same market level, i.e. companies decide to foreclose a direct competitor, it is relatively obvious that this constitutes a by object infringement.[36] Where, however, the companies' (here the employers') conduct relates to an upstream market (here the labor force market), this amounts to a vertical purchasing restriction, "*where the detriment to competition is less obvious, and where, therefore, effects analysis would appear to be more appropriate than allocating the case to the 'object box'*."[37] Moreover, the effect on the downstream market becomes even less obvious, where the employers do not compete downstream (see discussion below).

  That said, in the U.S., the DOJ views naked no-hire agreements as per se violations of antitrust laws.[38] While this is still an open question in a number of courts, some courts held that these agreements can be *per se* violations of competition law. For example, a Federal District Court in Colorado recently denied a motion to dismiss a criminal indictment stating that "*if naked non-solicitation or no-hire agreements allocate the market, they are per se unreasonable*.[39] Similar cases are pending in other courts.[40]

- ***No-poach agreements:*** These are understood as agreements between competitors not to "cold call" each other's employees. Agreements between employers not to poach certain employees could be viewed as non-compete agreements and/or agreements to split up the "input" market. As with the non-hire agreements, in the U.S. naked no-poach agreements are assessed as *per se* infringements of competition.[41] However, typically, where employers agree not to poach each other's employees, they can at least accept incoming applications from such employees. Applying the traditional competition law theory, non-poach agreements resemble to an active sales ban, while passive sales (in this scenario hiring decisions regarding incoming applications) remain possible. Moreover, like no-hire agreements, this is far from a form of conduct that – in the Court of Justice's terminology – on its face "*reveal[s] a sufficient degree of harm to competition*."

- ***Exchange of information about wages/other contract terms:*** Where employers are seen as purchasers for labor force, wages would correspond to the prices paid for this "input" and thus potentially qualify as competitively sensitive information. Similarly, other contract terms (such as termination clauses) could be competitively sensitive. There have been cases in which the exchange of competitively sensitive information has been qualified as by object restriction of Art. 101 TFEU,[42] while in other cases, the conduct was

35 Further, where conduct is found to be an infringement of competition by object, the *de minimis* doctrine is not applicable (Case C-226/11 EU:C:2012:795, *Expedia Inc. v. Autorité de la concurrence and Others*, paras. 37 *et seq.*), the burden of proof under Article 101(3) TFEU lies with the parties to the agreement, and by object restrictions typically lead to fines imposed on the parties without looking at Article 101(3) justifications. For a more elaborate analyses of the distinction between by object and by effect infringements and its practical implications, *see Whish/Bailey*, Horizontal Guidelines on Delineation between purchasing agreements: by object and by effect restrictions, Final report, available here: https://ec.europa.eu/competition-policy/system/files/2022-03/kd0722013enn_purchasing_agreements.pdf.

36 Whish & Bailey, Horizontal Guidelines on Delineation between purchasing agreements: by object and by effect restrictions, Final report, para. 2.31, available here: https://ec.europa.eu/competition-policy/system/files/2022-03/kd0722013enn_purchasing_agreements.pdf.

37 Whish & Bailey, Horizontal Guidelines on Delineation between purchasing agreements: by object and by effect restrictions, Final report, para. 2.34, available here: https://ec.europa.eu/competition-policy/system/files/2022-03/kd0722013enn_purchasing_agreements.pdf.

38 U.S. Dep't of Just. & Fed. Trade Comm'n, Antitrust Guidance for Human Resource Professionals (October 2016), https://www.justice.gov/atr/file/903511/download.

39 Order Denying Defendants' Motion to Dismiss, *U.S. v. DaVita, Inc. and Thiry*, 1:21-cr-00229 (D. Colo. Jan. 28, 2022).

40 E.g. *United States v. Hee et al.*, Case No. 2:21-cr-00098-RFB-BNW (D. Nev.) related to the healthcare industry. The DOJ alleges that defendants agreed to allocate nurses and fix wages.

41 The DOJ has been investigating no-poach agreements across a range of industries, with indictments brought in the healthcare and the aerospace sectors.

42 E.g. *T-Mobile Netherlands and Others*, C-8/08, EU:C:2009:343.

qualified as by effect infringement.[43] Under the current Horizontal Guidelines,[44] the exchange of information on wages (i.e. prices) could constitute an infringement by object, if wages were qualified as "future prices," i.e. as future purchasing prices on the purchasing market for labor force.[45] In the recent environment of stricter enforcement, the EC could take a stricter stance at such conduct and qualify these agreements as by object infringements. In the U.S., exchanges of competitively sensitive information between competitors are generally analyzed under the rule of reason and therefore information exchange in the context of labor force would likely be treated accordingly. The DOJ cautions, however, that sharing competitively sensitive information may lead to civil antitrust liability when it has an anticompetitive effect. In the past, the DOJ brought enforcement action against human resources professionals for conspiring to share nonpublic wage information, arguing that the information sharing artificially lowered pay.[46]

- ***Wage-fixing:*** The new Draft Revised Horizontal Guidelines mention "*agreements fixing wages*" as a category of a by object buyer cartel.[47] In the U.S., the DOJ views wage-fixing agreements as per se violations. While a Federal District Court in Texas agreed with this stance in November 2021, ruling that wage-fixing agreements are per se violations,[48] the jury ultimately found the defendants not guilty of the antitrust charges in April 2022.[49]

B. Is Competition on the Downstream Market Needed?

The recent enforcement activities on no-poach/no-hire agreements, etc. largely concern cases in which employers were competitors both on the labor market and on the downstream market, e.g. competing sports clubs or competing manufacturers of motor vehicles. On this basis, these cases could be compared with "traditional" cartels, whereby competitors on the downstream market collude to the detriment of their suppliers with a clear effect on their horizontal competitive relationship on the downstream market.

However, competition regarding labor forces also occurs between non-competitors. For example, high tech engineers, managers, consultants, etc. could easily become targets of no-poach/no-hire agreements between companies active in different sectors. This is similar to companies competing for a common input on the purchasing/upstream market or "shelf space" on the downstream market, even where they do not compete at the product/service level on the downstream market. Accordingly, the DOJ/FTC guidance paper makes clear that "[f]*rom an antitrust perspective, firms that compete to hire or retain employees are competitors in the employment marketplace, regardless of whether the firms make the same products or compete to provide the same services.*"[50] But can this be sufficient to find an infringement? Like with joint purchasing arrangements, competition on the downstream market is not required to find an infringement on an upstream market, although any anticompetitive effects should be more limited absent downstream competition.

As mentioned above, for no-hire and no-poach agreements, the effects on competition for such vertical purchase restriction are less obvious when the companies do not compete on the downstream market (see i above). Indeed, in its recently published issues paper the Portuguese competition authority emphasizes that "[n]*o-poach agreements between competitors in a downstream market are more likely to negatively affect competition in the downstream markets" while "horizontal agreements between companies hiring the same type of worker, but not competing in the same product market, will have a direct effect at the labor market level, with potential indirect effects downstream* (emphasis added)."[51] Moreover, drawing a parallel to joint purchasing cooperation arrangements (which typically have not been scrutinized when the purchasers did not compete on the downstream market), in the EU no hire/no poach agreements should be less closely scrutinized when employers do not compete on the downstream market.

43 For the relevant criteria, see *Deere v. Commission*, T-35/92, EU:T:1994:259.

44 Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements (2011/C 11/01) ("Horizontal Guidelines").

45 Horizontal Guidelines, paras 73 *et seq.* The Draft Revised Horizontal Guidelines, however, lack clarity in this regard, as they do not give clear guidance whether or not a qualification as by object infringement would be limited to future prices.

46 Compl. at 7-8, *U.S. v. Utah Society for Healthcare Human Resources Administration, et al.*, (94C282G) 1994 WL 16460700 (D. Utah Mar. 14, 1994).

47 Draft Revised Horizontal Guidelines, para. 316.

48 *United States v. Jindal*, No. 4:20-CR-00358, 2021 U.S. Dist. LEXIS 227474, at *3-4 (E.D. Tex. Nov. 29, 2021).

49 See https://www.law360.com/competition/articles/1484191/doj-s-1st-wage-fixing-suit-ends-with-not-guilty-verdicts?nl_pk=8c25d350-b21f-44fc-a1ea-2307fe596e45&utm_source=newsletter&utm_medium=email&utm_campaign=competition&utm_content=2022-04-15.

50 https://www.justice.gov/atr/file/903511/download.

51 See https://www.concorrencia.pt/sites/default/files/Issues%20Paper%20Labor%20Market%20Agreements%20and%20Competition%20Policy%20-%20final.pdf, p. 11.

When it comes to the exchange of information about wages/other contract terms and/or wage-fixing agreements the EC's 2020 buyer cartel *Ethylene*[52] decision could serve as guidance. In *Ethylene*, the EC fined four companies for exchanging sensitive commercial and pricing-related information and fixing a price element related to the purchase of the input material ethylene – but not all of these companies were actual competitors on the downstream market. By analogy employers in the labor market that exchange information about wages, contract terms, and/or even agree to fix wages for certain employees would not need to be competitors on the downstream market to infringe competition law. In the current era of enforcement in the labor market, it is likely that this will be the EC's path forward – even though it seems to be a stretch to establish a by object infringement where employers do not compete on the downstream market.

C. What is the Core Theory of Harm?

There are a few questions that are key to understand the nature of the theory of harm for no poach, no hire, and wage-fixing agreements or information exchanges. Is it necessary that the agreements/information exchange in question not only have obvious negative effects for employees (in the form of lower wages or less choice in jobs), but also for consumers? Moreover, do very distant indirect effects on innovation and therefore long-term product quality and choice downstream suffice to find anticompetitive effects?

For example, for wage-fixing agreements not to raise salaries, it is debatable whether there is a negative downstream effect – one could also argue that these lead to lower prices and thus benefit consumers. On the other hand, where wages are kept artificially low, employees would in a first step tend to move to other industries with higher wages, limiting the number of employees available and thus, ultimately, the output – but this does not automatically present harm to downstream customers. Or would the pertinent standard be that any form of anticompetitive behavior negatively affects effective competition between enterprises, and (direct) negative effects on consumers are irrelevant?[53]

In the EC's recent *Aurubis/Metallo Group Holding* merger control decision, the EC found that when it comes to buyer power *"the Merger Regulation and the Horizontal Merger Guidelines do not preclude the Commission from intervening in buyer power cases where direct harm to consumers cannot be demonstrated. The legal test of the Merger Regulation is whether the merger can significantly impede 'competition', which includes the protection of the competitive process, even if it cannot be demonstrated that such reduction of competition affects consumer welfare."*[54] The EC may be also inclined to apply this principle to an agreement between "particularly strong employers" (however how that would be measured?), who could have buyer power on the upstream market for labor force. Would the EC find that any negative effect on competition as such is sufficient for the conduct to be illegal?

We believe that here lies a decisive and yet not thoroughly discussed question: How would buyer power be measured? Under Article 101 TFEU, to find negative effects on competition there must be some degree of appreciable effect on competition (unless there is a by object infringement),[55] i.e. the employers would need to have some kind of market power. But a hypothetical "purchasing market for labor force" would be so broad that no two companies would have significant market shares. Alternatively, one would need to define very narrow markets for specific employee profiles – such as high-profile athletes in a specific sports category like male football limited to a specific league – and then the question would be whether the no-poach agreements would be limited to these employees. In particular, any attempt for an economic analysis of potential price effects gets even more complicated where – as would typically be the case – the upstream purchasing market for labor force is significantly broader than the downstream selling market. And again, how should the employers' market share or market power be quantified in practice? Absent a by object infringement, companies would likely typically fall under the de minimis safe harbor of 10% to 15% market share.[56]

D. What are the efficiencies?

Another important question (on which there seems to be very little economic research), is whether no poach agreements can generate efficiencies that may outweigh any restrictive effects. For example, employment contracts – like any contract – are often imperfect and incomplete in that they do not thoroughly protect an employer's investment into the employee and hence the know-how (e.g. gained through trainings) and business secrets protection that a no poach agreement might try to provide. Moreover, employers might argue that minimizing fluctuation within their workforce leads to lower costs, which in turn leads to lower prices. However, it will likely be a challenge to demonstrate under Article

52 Commission decision of July 14, 2020, AT.40410 – *Ethylene*.

53 On this discussion, see also *Heinemann*, Kartellrecht auf Arbeitsmärkten in WuW 2020, 371-382.

54 Commission decision of May 4, 2020, M.9409 – *Aurubis/Metallo Group Holding*.

55 Case C-226/11 EU:C:2012:795, *Expedia Inc. v. Autorité de la concurrence and Others*, paras. 37 *et seq*.

56 Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union (De Minimis Notice).

101(3) that the no-poach/no-hire agreements are indeed indispensable to achieve these benefits. A less restrictive way to minimize the loss of workforce would, e.g. be to extend notice periods and trainings costs could easily be paid back by employees.[57]

In light of these open issues, one must ask the question whether recent enforcement activities have been thoroughly thought through or whether the theories behind them are too simplistic, and the antitrust framework is being bent to tackle something that should be dealt with by labor law legislation. Is this really a genuine antitrust issue or only a non-properly specified "sense of unease" in a "*new populist antitrust movement*"[58] that seems to have "infected" competition authorities around the globe?

V. WHAT SHOULD COMPANIES DO?

Since the topic of no-poach /no-hire/wage-fixing arrangements is widely discussed among enforcers, we anticipate that the EC (and more national authorities) will follow this new trend, and in the near future will open targeted investigations into such conduct. It is also possible that future merger control cases will examine whether deals can have negative effects on labor markets.

In light of such enforcement trends, companies should consider: (i) sensitizing their HR departments for future agreements and (ii) auditing/reviewing their existing – and in some cases dating back several years or decades – HR practices and agreements.

As a starting point, based on the recent enforcement activities, the following principles seem to be most relevant:

- Employers should refrain from any conduct that could be seen as a by object infringement, i.e. in particular any agreements with competitors on the downstream markets with respect to hiring or poaching decisions/strategies.
- Companies should avoid any exchange of information about their employees' wages that go beyond what is in the public domain (such as publicly known wages for top athletes or CEOs) – irrespective of whether they compete with the other company on the downstream market.
- Any agreement on setting a certain wage level must be avoided. If any such "consensus" is already in place, companies should make clear that they refrain from such understanding and decide on wages unilaterally.

Wherever companies envisage to engage in agreements related to hiring/poaching decisions, it is crucial to assess – and document –the procompetitive benefits of such an agreement and the fact that there is no less restrictive way to achieve these benefits. However, in light of the current enforcement trends, it is unclear how receptive competition authorities would be to arguments about procompetitive effects outweighing the perceived anticompetitive effects.

Finally, when it comes to future transactions, antitrust concerns in relation to labor law arising from the target's activity should be on the due diligence agenda in order for the acquirer to avoid potential antitrust liability. For avoidance of doubt, non-solicitation clauses in the context of transactions which are imposed on the seller to ensure that employees of the acquired business are not poached may be acceptable, if they are reasonable in terms of scope, duration, and geographic reach.

57 On this discussion, see also *Heinemann*, Kartellrecht auf Arbeitsmärkten in WuW 2020, 371-382.

58 See New York Times article of April 14, 2022, "*U.S. Tries New Tactic to Protect Workers' Pay.*"

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