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No-Poach

CPI COMPETITION POLICY™ INTERNATIONAL

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LETTER FROM THE EDITOR

Dear Readers,

Competition law and policy are classically concerned with consumer welfare. In other words, lower prices, regardless of the consequences for other actors in the supply chain, have classically been the primary concern of the rules and their application.

However, there is no reason, in principle, why antitrust rules cannot apply to other aspects of the market process, including labor supply. As such, illegal agreements in labor markets that would prevent competitors from being able to hire each others' (ex-) employees are not automatically immune from the application of the rules.

Recently, antitrust authorities, litigants, and courts have increasingly shown a tendency to target employers for their actions in labor markets. This typically takes the form of condemning so-called "no-poach" or "wage-fixing" agreements, whereby competitors agree not to attempt to hire each others' workforces. This can take place in sectors as diverse as fast-food franchises and high technology.

So-called "no poach" agreements have seen greater prominence in recent days. The authors of the pieces in this Chronicle highlight the issues raised by these categories of agreements, in light of current enforcement practice worldwide.

As **Dee Bansal, Jacqueline Grise, Beatriz Mejia & Julia Brinton** point out, antitrust enforcement of conduct in labor markets has continued to ramp up over the past decade, with particularly intense scrutiny on "no-poach" agreements — agreements between or among employers of different companies not to recruit or solicit each other's employees. The U.S. DOJ has committed to protect competition in labor markets, and the Biden administration has signaled that competition in the labor markets would be a priority. Specifically, discusses the DOJ's recent actions and policy statements, and discusses how companies and employees should avoid conduct that may raise red flags and should consider implementing a robust antitrust compliance policy, including antitrust training for employees, and engaging antitrust counsel to review current non-solicitation provisions and non-compete clauses.

Richard May places no-poach agreements in context. In essence, they are a form of of buyers' cartel in which employers explicitly collude to increase their purchasing power over their employees. In this sense, they are the mirror image of market allocation of customers by sellers. The article makes three key observations: First, depending on market structure, purchasing power can be either monopsony or bargaining power. Second, no-poach agreements are a form of explicit collusion which recent increased enforcement should deter, but strong enforcement may also have increased the risk of tacit collusion. Finally, given competition authorities' significant experience of sellers' cartels, there are interesting lessons to learn from them for the enforcement of buyers' cartels (including no-poach agreements). The article highlights this potential with two examples.

Courtney Dyer, Courtney Byrd & Laura Kaufmann look at the specific issue of President Biden's 2021 executive order as the clearest signal to date that labor-related enforcement will likely become a centerpiece of U.S. antitrust policy. U.S. antitrust agencies are now focused on updating the Horizontal Merger Guidelines (and they will no doubt include labor-market considerations in merger analysis). This development prefigures the fact that merger review in the U.S. is likely to come with more rigorous investigations into the labor-market effects of proposed transactions and more challenges to transactions on the grounds of substantially lessening competition in labor markets.

Gregory Asciolla & Jonathan Crevier examine the specific area of no-poach agreements in the field of franchising. Franchise businesses in various industries long employed "no-poach" provisions to restrict employees from moving among locations within the same franchise system. While these provisions have not traditionally garnered much antitrust scrutiny; recently they come to the attention of enforcers. attention, Economists increasingly point to them as a possible source of wage stagnation and as potentially illegal restraints of trade. As the article sets out, U.S. Attorneys General (and private litigants) are increasingly putting this theory inro practice.

Finally, **Tilman Kuhn, Strati Sakellariou-Witt & Cristina Caroppo** address the issue from a European perspective. Specifically, the authors shed light on the roots of the discussion, ongoing enforcement activities, and open competition law questions, such as how labor issues should be dealt with in light of the distinction between "by object" and "by effect" restrictions under EU competition rules.

In sum, the contributions to this Chronicle provide timely and key insight to this novel and emerging area of antitrust law and policy.

As always, many thanks to our great panel of authors.

Sincerely,

CPI Team

SUMMARIES

SUMMARIES

WHAT'S NEXT?

For June 2022, we will feature an Antitrust Chronicle focused on issues related to (1) **FDI** ; and (2) **Intermediaries**.

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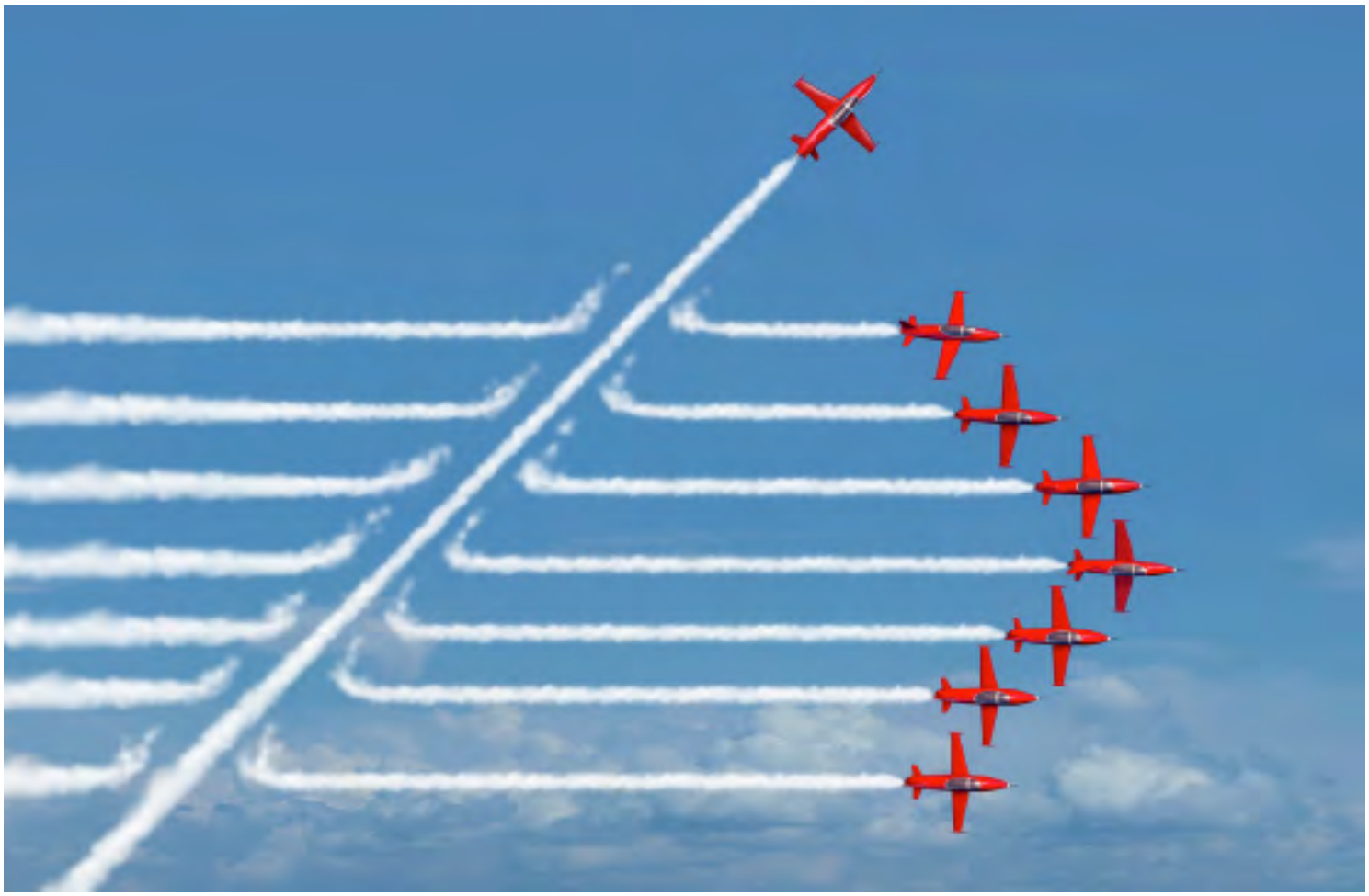
CPI ANTITRUST CHRONICLES April 2022

For July 2022, we will feature an Antitrust Chronicle focused on issues related to (1) **Values & Harms**; and (2) **LeadershIP**.

Contributions to the Antitrust Chronicle are about 2,500 – 4,000 words long. They should be lightly cited and not be written as long law-review articles with many in-depth footnotes. As with all CPI publications, articles for the CPI Antitrust Chronicle should be written clearly and with the reader always in mind.

Interested authors should send their contributions to Sam Sadden (ssadden@competitionpolicyinternational.com) with the subject line "Antitrust Chronicle," a short bio and picture(s) of the author(s).

The CPI Editorial Team will evaluate all submissions and will publish the best papers. Authors can submit papers on any topic related to competition and regulation, however, priority will be given to articles addressing the abovementioned topics. Co-authors are always welcome.



THE "NO-POACH" APPROACH: UPDATE ON THE ANTITRUST AGENCIES' ENFORCEMENT OF EMPLOYMENT AGREEMENTS

BY DEE BANSAL, JACQUELINE GRISE, BEATRIZ MEJIA & JULIA BRINTON[1]




1 Dee Bansal and Jackie Grise are partners, and Julia Brinton is an associate, in Cooley's antitrust & competition practice group, all residing in the firm's Washington, D.C. office. Beatriz Mejia is a partner in Cooley's antitrust & competition practice group, residing in the firm's San Francisco office.

I. INTRODUCTION

Antitrust enforcement of conduct in labor markets has continued to ramp up over the past decade, with particularly intense scrutiny on agreements between or among employers of different companies not to recruit or solicit employees of the other, often called "no-poach" agreements.

President Biden signaled that competition in the labor market would be a priority for his administration, issuing an executive order in July 2021 entitled, "Promoting Competition in the American Economy," which includes 72 initiatives by more than a dozen federal agencies in an aim to address competition issues across the economy.[2] In furtherance of one such initiative, the Department of Justice ("DOJ") and Department of Labor signed a Memorandum of Understanding on March 10, 2022, putting into writing commitments by both agencies to exchange information to assist with investigations into possible antitrust violations in labor markets.[3]

Consistent with these priorities, we have seen a significant increase in the number of investigations, criminal indictments, and private litigation based on alleged no-poach agreements. Below, we summarize the legal landscape and recent developments and highlight key trends. Specifically, after an introduction to the legal standard and how antitrust laws apply to employment agreements, we discuss DOJ's recent criminal indictments, DOJ's latest statements on its position regarding the legal standard applied to franchisee/franchisor agreements, the question of whether criminal prosecutions present a "due process" issue, and international developments.

II. ANTITRUST ISSUES ASSOCIATED WITH NO-POACH AGREEMENTS

A. Types of Agreements Subject to Antitrust Enforcement in the Employment Context

This article is focused on no-poach agreements, but we will start by providing an overview of the types of agreements that are generally subject to antitrust scrutiny in the labor context.

Agreements subject to antitrust scrutiny may be between or among employers of different companies or may be between an employer and its employees.[4]

Agreements between employers typically raise more antitrust risk and include: (i) *wage-fixing* agreements, which are a form of price fixing, and include agreements to set salaries at a certain level; (ii) *no-poach* or *non-solicit* agreements, which are agreements not to recruit another company's employees; and (iii) *no-hire* agreements, which are agreements not to hire another company's employees.

Critically, in analyzing such agreements under the antitrust laws, the term "competitor" includes *any* firm that competes to hire the same employees, regardless of whether the firm makes similar products or provides similar services.[5] This broad definition of "competitor" distinguishes the competitive analysis from the analysis applied in other antitrust contexts where the focus is more on current, future, or potential competition for goods sold and services offered.

As a result, firms may be subject to antitrust liability for entering into certain agreements with firms in different industries (e.g. entertainment and high-tech), if the agreement concerns the same types of employees (e.g. software engineers).

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

3 Press Release, *Departments of Justice and Labor Strengthen Partnership to Protect Workers* (Mar. 10, 2022).

4 An agreement between an employer and its employees that may raise antitrust risk is a *non-compete* agreement, which is an agreement that limits the ability of an employee to join or start a competing firm after a job separation.

5 See Dep't of Justice & Fed. Trade Comm'n, *Antitrust Guidance for Human Resource Professionals*, at 2 (Oct. 2016), https://www.justice.gov/atr/file/903511/download ("From 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.").

B. Antitrust Laws Applied to Agreements in the Employment Context

The relevant antitrust laws that apply to no-poach and other employment agreements are Section 1 of the Sherman Antitrust Act ("Sherman Act"), which prohibits contracts that unreasonably restrain trade,[6] and Section 5 of the Federal Trade Commission Act, which prohibits unfair methods of competition and unfair or deceptive acts or practices.[7]

Under the Sherman Act, there are two fundamental standards of review: (i) the "per se" standard, which applies to certain acts or agreements that are deemed so harmful to competition with no significant countervailing procompetitive benefit that illegality is presumed; and (ii) the "rule of reason," which applies to all other conduct and agreements and pursuant to which the factfinder weighs the procompetitive benefits of the restraint against its potential harm to competition to determine the overall competitive effect.[8]

The Supreme Court has stated that the rule of reason is "presumptively" applied and there is a "reluctance" to adopt the *per se* standard.[9] Historically, agreements between competitors (i.e. "horizontal" agreements) to engage in hard core conduct, such as price fixing, market allocating, or bid rigging are treated as *per se* illegal, while other conduct, including "vertical" agreements, (i.e. between two firms at different levels in the chain of distribution) and ancillary restraints i.e. those that are "reasonably necessary" to a separate, legitimate, procompetitive integration are subject to the rule of reason.[10]

Depending on the circumstances, no-poach agreements may be analyzed under either the per se or rule of reason standard. Whether the *per se* or rule or reason standard applies has significant implications for the outcome of an enforcement action or litigation. If an agreement is found to be a "naked" no-poach agreement, meaning there is no purpose for the agreement other than to restrict competition, the per se standard applies. As such, neither the court nor the DOJ or Federal Trade Commission (collectively, the "Antitrust Agencies") will consider any proposed justifications for the agreement; it is illegal on its face. If, however, the rule of reason standard applies, such as if a non-solicitation provision is found to be ancillary to a larger agreement, then the factfinder will consider the business justifications for the restraint.

The penalties for violating the antitrust laws are severe and apply at both the company and the individual level. For *per se* criminal violations, companies face a maximum fine of up to $100 million or twice the gross gain or gross loss suffered, while an individual may be fined up to $1 million or face a ten-year prison sentence.[11] For civil matters, the DOJ or plaintiffs may seek treble (three times) damages against companies.[12] This is in addition to reputational damage, the potential for required changes to business practices and oversight monitoring as a result of a government consent decree, and significant time and effort to defend against an investigation and/or lawsuit.

III. RECENT NO-POACH TRENDS

Below we highlight four recent trends relating to no-poach agreements: (1) criminal indictments alleging no-poach agreements are broadening beyond the healthcare industry; (2) the apparent reversal in position by DOJ with respect to the legal standard applied to franchisee/franchisor no-poach agreements; (3) whether DOJ's decision to prosecute no-poach agreements criminally presents a due process issue; and (4) the international expansion of investigating no-poach agreements.

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6 15 U.S.C. § 1. "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."

7 15 U.S.C. § 45(a)(1). "Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful."

8 There is also a third standard of review, called the "quick look," which is a truncated rule of reason analysis and may be applied when "the great likelihood of anticompetitive effects can easily be ascertained." *California Dental Ass'n v. FTC*, 526 U.S. 756, 770, 779 (1999).

9 *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997).

10 *NCAA v. Bd. of Regents*, 468 U.S. 85, 100-03 (1984).

11 18 U.S.C. § 3571.

12 15 U.S.C. § 15(a) (". . . any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue . . . and shall recover threefold the damages by him sustained").

A. Recent Criminal Indictments Indicate Intent to Prosecute No-Poach Agreements Beyond Healthcare Industry

The Antitrust Agencies first took the position that DOJ would criminally prosecute no-poach agreements in 2016, when the Antitrust Agencies issued joint guidance, "*Antitrust Guidance for Human Resource Professionals*,"[13] regarding the application of the federal antitrust laws to hiring practices and certain employment agreements.[14] The Antitrust Agencies warned the business community: "Going forward, the DOJ intends to proceed criminally against naked wage-fixing or no-poaching agreements."[15]

The first wave of criminal indictments focused on the healthcare industry,[16] but recent indictments show DOJ is not limiting its criminal enforcement to healthcare and will be probing hiring practices in other labor markets. Attorney General Merrick Garland recently said, "we continue to aggressively prosecute antitrust violations that undermine competition in labor markets or otherwise harm workers – no matter the industry, no matter the company, no matter the individual."[17]

For example, in December 2021, DOJ indicted six aerospace-industry executives and managers for allegedly engaging in a conspiracy to "suppress competition . . . by agreeing to restrict the hiring and recruiting of engineers and other skilled-labor employees."[18] The individuals worked for Pratt & Whitney, part of Raytheon Technologies Corp., QuEST Global Services NA Inc., Belcan Engineering Group, Cyient Inc., and Parametric Solutions Inc., all aerospace companies.

To support its allegations of the conspiracy not to poach each other's employees, DOJ's indictment includes several examples of communications among the executives and managers regarding the alleged agreement:[19]

- One participant emailed Company A's hiring contact, explaining, "I checked with [Company B], They absolutely do not want to release [the employee]. Please do not extend offer to him. [Company A] has committed to [Company B] that we will not hire any more of their employees this year."

- Upon hearing that one of the companies had made an employment offer to one of its engineers, a participant stated by email, "[Company C] is not allowed to poach any of our employees and I will plan to block this immediately."

- The participant then emailed another participant, "I am very concerned that [Company C] believes they can hire any of our employees….Could you please stop this person from being hired by [Company C]?"

- One participant wrote an email to a manager participant at another company, "[w]e must not poach each other['s] partner['s] employee[s]. Please communicate to [Company C] HR not to hire or interview or hire active employees working on [Company A] work."

Within days of DOJ announcing its December 2021 indictment, two class action lawsuits were filed against Raytheon, Belcan, Cyient, Parametric, and QuEST, alleging a conspiracy among the aerospace engineering firms to not solicit, recruit, hire without prior approval, or otherwise compete for employees of the other firms, including engineers.[20] The complaints mirror many of the allegations in DOJ's indictments, and both cases are pending.

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13 Dep't of Justice & Fed. Trade Comm'n, *Antitrust Guidance for Human Resource Professionals* (Oct. 2016), https://www.justice.gov/atr/file/903511/download.

14 Press Release, *DOJ Criminally Prosecutes First No-Poach Agreement on Heels of First Criminal Wage-Fixing Indictment* (Jan. 12, 2021), https://www.cooley.com/news/insight/2021/2021-01-12-doj-criminally-prosecutes-first-no-poach-agreement.

15 *Id.*

16 Press Release, *Health Care Company Indicted for Labor Market Collusion* (Jan. 7, 2021), https://www.justice.gov/opa/pr/health-care-company-indicted-labor-market-collusion; Press Release, *Health Care Staffing Company and Executive Indicted for Colluding to Suppress Wages of School Nurses* (Mar. 30, 2021), https://www.justice.gov/opa/pr/health-care-staffing-company-and-executive-indicted-colluding-suppress-wages-school-nurses; Press Release, *DaVita Inc. and Former CEO Indicted in Ongoing Investigation of Labor Market Collusion in Health Care Industry* (July 15, 2021), https://www.justice.gov/opa/pr/davita-inc-and-former-ceo-indicted-ongoing-investigation-labor-market-collusion-health-care.

17 Attorney General Merrick B. Garland Delivers Remarks at the White House Roundtable on the State of Labor Market Competition in the U.S. Economy (Mar. 7, 2022), https://www.justice.gov/opa/speech/attorney-general-merrick-b-garland-delivers-remarks-white-house-roundtable-state-labor.

18 Indictment, https://www.justice.gov/opa/press-release/file/1457091/download.

19 *Id.* at 5-6.

20 *Granata v. Pratt & Whitney, et al.*, Class Action Complaint, No. 3:21-cv-01657 (Conn., Dec. 14, 2021); *Conroy et al. v. Agilis Engineering, Inc., et al.*, Consolidated Class Action Complaint, No. 3:21-cv-01659 (Conn., Dec. 14, 2021).

The goal of protecting labor markets has manifested in the merger space, too, most recently in the book publishing industry. The DOJ filed a complaint in federal court to block Penguin Random House's proposed $2.2 billion acquisition of Simon & Schuster, alleging in part that the combination of the world's largest book publisher with the fourth-largest U.S. book publisher would "likely result in authors earning less for their books [and] likely lead to fewer authors being able to make a living from writing…"[21]

B. Per Se or Rule of Reason? Recent DOJ Statement Suggests Position Reversal on Franchisee/Franchisor Agreements

The change in administration has prompted DOJ to seemingly change its view on the appropriate legal standard to apply in evaluating no-poach agreements in the franchise context.

A few years ago, state Attorneys General conducted investigations concerning no-poach agreements in the franchise industry, including, for example, a 2018 investigation into the use of no-poach agreements by many national fast-food franchises.[22] As a result of this investigation and later settlement, several major fast-food chains agreed to stop using no-poach agreements.[23]

As follow-on civil litigation brought by former employees proceeded against these companies, DOJ filed statements of interest in March 2019, clarifying that no-poach agreements between a franchisor and franchisee typically merit the rule of reason analysis because, even though they compete for labor, the vertical relationship between the parties and the potential that franchise-based no-poach agreements are ancillary to legitimate business interests.[24]

In response, the Washington Attorney General filed their own statement of interest, asserting: "to the extent a franchise agreement restricts solicitation and hiring among franchisees and a corporate-owned store — which is indisputably a horizontal competitor of a franchisee for labor — the agreement must properly be analyzed as a per se restraint."[25]

It appears DOJ is now trying to move away from its prior stance and adopt a stricter view of no-poach restraints used by franchises. In February 2022, in *Deslandes v. McDonald's USA, LLC*, the DOJ sought to file a statement of interest in a lawsuit by former McDonald's managers about the company's prior policy[26] that restricted the hiring or soliciting of employees from other franchises.[27] McDonald's, in its motion for summary judgment, cited to one of DOJ's earlier statements of interest that said, "most franchisor-franchisee restraints are subject to the rule of reason."[28] In DOJ's motion for leave to file its statement of interest, DOJ claimed that the "Statement of Interest in Stigar, however, does not fully and accurately reflect the United States' current views."[29] The motion did not provide details about the government's current views.

In response, McDonald's argued DOJ's motion was "untimely," coming "four-and-a-half years after this case began," and the judge agreed, denying DOJ's motion, though the judge did "note that there's a change in [DOJ's] position."[30] While the case remains pending, it appears the DOJ may no longer believe the rule of reason standard should be used in evaluating no-poach agreements in the franchise industry.

C. Due Process Concerns with Criminal Prosecutions?

The recent wave of criminal indictments for alleged no-poach agreements has prompted defendants to raise a due process question — can DOJ prosecute no-poach agreements criminally in the absence of federal precedent by the courts? As noted, historically, *per se* treatment and

21 Complaint, *United States v. ViacomCBS, Inc.*, et al., No. 1:21-cv-02886 (D.D.C. Nov. 2, 2021), https://www.justice.gov/opa/press-release/file/1445916/download.

22 Press Release, *AG Racine Announces Four Fast Food Chains to End Use Of No-Poach Agreements* (Mar. 13, 2019), https://oag.dc.gov/release/ag-racine-announces-four-fast-food-chains-end-use.

23 *Id.*

24 Dep't of Justice, No-Poach Approach (Sept. 30, 2019), https://www.justice.gov/atr/division-operations/division-update-spring-2019/no-poach-approach.

25 Amicus Curiae Brief at 6-7, *Stigar v. Dough Dough, Inc.*, No. 18-CV-244 (E.D. Wash. Mar. 11, 2019), ECF No. 36, https://storage.courtlistener.com/recap/gov.uscourts.waed.82231/gov.uscourts.waed.82231.36.0.pdf.

26 See Memorandum Opinion & Order at 2, *Deslandes et al. v. McDonald's USA, LLC, et al.*, No. 1:17-cv-04857 (N.D. Ill. July 28, 2021) for the text of the former policy.

27 Complaint, *Deslandes et al. v. McDonald's USA, LLC, et al.*, No. 1:17-cv-04857 (N.D. Ill. June 28, 2017).

28 Corrected Statement of Interest, *Stigar v. Dough Dough, Inc, et al.*, No. 2:18-cv-00244-SAB (E.D. Wash. Mar. 8, 2019).

29 Mot. for Leave to File Statement of Interest, *Deslandes v. McDonald's USA, LLC, et al.*, No. 1:17-xcv-04857 (E.D. Ill. Feb. 17, 2022).

30 Defendants' Opposition to United States' Motion for Leave to File Statement of Interest, *Deslandes v. McDonald's USA, LLC, et al.*, No. 1:17-xcv-04857 (E.D. Ill. Feb. 18, 2022).

criminal prosecutions under the Sherman Act have been limited to "hard core" cartel conduct — price-fixing, market allocation, and bid rigging — virtually all other conduct is subject to the rule of reason standard. And, before 2016, there was no indication that the DOJ aimed to treat "naked" no-poach agreements criminally.

The due process issue was raised in DOJ's first no-poach criminal indictment, in *United States v. Surgical Care Affiliates (SCA)*. In the criminal indictment filed in January 2021, DOJ alleged that SCA and others "engaged in a conspiracy to suppress competition between them for the services of senior-level employees by agreeing not to solicit each other's senior-level employees," which DOJ characterized as "*per se* unlawful."[31]

In response, SCA filed a motion to dismiss the indictment, arguing in part that because there is no federal precedent that no-poach agreements are inherently illegal, "[f]undamental principles of due process and fair notice bar this prosecution."[32] SCA asserted that the plain language of the Sherman Act does not provide the necessary notice because it "does not, in clear and categorical terms, precisely identify the conduct which it proscribes."[33] In that case, "established judicial construction may supply the fair notice that the text lacks. But imposing criminal liability in the absence of judicial decisions plainly marking out conduct as categorically forbidden cannot be squared with due process."[34] It is thus the courts, and not the Antitrust Agencies, that typically define *per se* illegal conduct, according to SCA, and the "government cannot just announce a *per se* prohibition on a new category of market practices."[35]

In response, DOJ argued that the "the Supreme Court has long made clear that the Sherman Act applies equally to all industries and markets….[t]hus, agreements among buyers in a labor market not to solicit each other's employees are treated no differently than agreements among sellers in a product market not to solicit each other's customers."[36] The DOJ also argued that the text of Section 1 of the Sherman Act makes clear that violators may be charged criminally, and "judicial interpretations provide fair notice of the conduct that is prohibited."[37]

While the case against SCA remains pending, DOJ secured a significant win in a related case that may make the due process argument moot. In *United States v. DaVita Inc.*, DOJ alleges that SCA, DaVita, and one other as-yet-unnamed company, all owners of outpatient medical facilities, engaged in a *per se* unlawful conspiracy by agreeing not to solicit each other's employees.[38]

On January 28, 2022, in considering the *DaVita* defendants' motion to dismiss, Colorado District Court Judge Jackson ruled that naked horizontal non-solicitation agreements that allocate the market, i.e. those that are not ancillary to a legitimate procompetitive business purpose and have "no purpose except stifling competition," are *per se* violations of the Sherman Act.[39] Judge Jackson found that naked no-poach agreements belong to an existing category of *per se* treatment — market allocation — because, as alleged, the defendants agreed to "allocate senior-level employees by not soliciting each other's senior level employees." Such allegations, Judge Jackson ruled, made clear that "the agreement entered was a horizontal market allocation agreement carried out by non-solicitation."[40] As a result, Judge Jackson found that defendants had "ample notice" that entering into a naked agreement to allocate the market of employees would subject them to criminal liability.[41]

However, Judge Jackson made clear that his holding is "much more limited than the government's argument [that *all* non-solicitation agreements and *all* no-hire agreements are horizontal market allocation agreements and thus per se unreasonable]"; instead, "if naked non-solicitation agreements allocate the market, they are per se unreasonable."[42] Thus, rather than holding that all no-poach agreements are per se

31 Indictment, *United States v. Surgical Care Affiliates LLC*, No. 3:2021-cr-00011 (N.D. Tex. Jan. 5, 2021).

32 Mot. to Dismiss, *United States v. Surgical Care Affiliates LLC*, No. 3:2021-cr-00011 (N.D. Tex. Mar. 26, 2021), ECF No. 38 ("SCA MTD").

33 *U.S. v. U.S. Gypsum Co.*, 438 U.S. 422, 439 (1978).

34 SCA MTD at 16.

35 *Id.* at 17.

36 Opp. to Defs' Mot. to Dismiss at 1, *U.S. v. Surgical Care Affiliates, LLC, et al.*, No. 3:21-cr-00011-L (Apr. 30, 2021).

37 *Id.*

38 Indictment, *U.S. v. DaVita Inc. et al.*, No: 1:21-cr-00229-RBJ (D. Colo. July 14, 2021).

39 Order Denying Motion to *Dismiss, U.S. v. DaVita, Inc. et al.*, Case No. 1:21-cr-00229-RBJ, ECF No. 132 (D. Colo. Jan. 28, 2022).

40 *Id.* at 6.

41 *Id.* at 17.

42 *Id.* at 15-16.

illegal, Judge Jackson found that, as alleged in this particular case, DOJ had sufficiently alleged the defendants allocated the market via the no-poach agreements, which is a *per se* violation of the Sherman Act.

The DOJ has since filed notices of supplemental authority in other pending cases about Judge Jackson's ruling, asserting that with Judge Jackson's opinion, "the argument that no federal court has held a no-poach agreement to be a per se criminal violation under the Sherman Act is foreclosed."[43]

The defendants have noted that it is rare for a motion to dismiss an indictment to be granted, downplaying Judge Jackson's ruling. It is also possible another court could come out differently on the due process issue or on how to characterize no-poach agreements under the Sherman Act. Moreover, on April 15, 2022, the jury voted to acquit the defendants on all counts, and this acquittal came only one day after another acquittal relating to alleged wage-fixing in a case in Texas.[44] While the recent acquittals are clear setbacks for the DOJ, a DOJ official said: "In no way should the verdict today be taken as a referendum on the Antitrust Division's commitment to prosecuting labor market collusion, or on our ability to prove these crimes at trial."[45] Assistant Attorney General Jonathan Kanter, head of DOJ's Antitrust Division, echoed that sentiment, saying, "We're going to continue to bring the cases — we're not backing down."[46] With other cases pending, including one case set for trial in July and another in January 2023, it remains to be seen how other courts will treat the due process issue, and whether juries will continue to side with the defense.

D. No-Poach Issues Continue to Expand Internationally

The heightened antitrust scrutiny of no-poach agreements is increasingly a worldwide phenomenon, with many jurisdictions piggy-backing on the Antitrust Agencies' enforcement of no-poach agreements.

- **Canada**. In February 2022, Canada's Minister of Innovation, Science, and Industry announced that the Canadian government is considering significant amendments to Canada's Competition Act. In connection with this review, the Competition Bureau published a paper, *Examining the Canadian* Competition Act *in the Digital Era*, which sets forth recommendations for reform, including that "no-poaching and wage-fixing agreements are examples of harmful buy-side conspiracies that should be subject to the criminal provisions of the Act."[47] No amendments have been made as of the date of publication of this article.

- **European Unio**n. In October 2021, Margrethe Vestager, Executive Vice-President and Commissioner for Competition of the European Commission, spoke about no-poach agreements in the context of cartel enforcement.[48] Ms. Vestager noted that in industries where "the key to success" is hiring employees with the "right skills," "a promise not to hire certain people can effectively be a promise not to innovate, or not to enter a new market." As of the date of publication of this article, no investigations have been launched.

The national competition authorities of individual EU member states have also opened their own investigations into alleged no-poach agreements, e.g. **Hungary** (fined a recruitment association €2.8 million in January 2021 for membership rules that set minimum prices for their services and prevented them from recruiting each other's employees[49]), **Poland** (opened investigation in April 2021 into potential collusion among basketball clubs to set terms of player contracts and reduce player salaries[50]), and **Portugal** (sent a statement of objections to the Portuguese Professional Football League and 31 football teams for their alleged use of no-hire agreements[51]).

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43 Notice of Supplemental Authority, *United States v. Hee*, et al., 2:21-cr-00098 (D. Nev. Feb. 3, 2022).

44 Verdict, *United States v. DaVita Inc., et al.*, No. 1:21-cr-00229 (D. Colo. Apr. 15, 2022); Verdict, *United States v. Neeraj Jindal, et al.*, No. 4:20-cr-00358-ALM-KPJ (E.D. Tex. Apr. 14, 2022).

45 https://news.bloomberglaw.com/daily-labor-report/jindal-found-guilty-in-dojs-first-criminal-wage-fixing-case.

46 https://www.reuters.com/legal/litigation/after-doj-antitrust-losses-employment-trials-defense-lawyers-urge-rethink-2022-04-22/.

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

48 Speech by EVP M. Vestager at the Italian Antitrust Association Annual Conference – "A new era of cartel enforcement" (Oct. 22, 2021), https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/speech-evp-m-vestager-italian-antitrust-association-annual-conference-new-era-cartel-enforcement_en.

49 Hungary fines recruitment association for price-fixing and no-poach agreements (Jan. 7. 2021), https://globalcompetitionreview.com/price-fixing/hungary-fines-recruitment-association-price-fixing-and-no-poach-agreements.

50 The President of UOKiK brings charges of limiting competition against basketball clubs (Apr. 12, 2021), https://uokik.gov.pl/news.php?news_id=17405.

51 https://www.competitionpolicyinternational.com/portugal-regulator-issues-1st-statement-of-objections-in-the-labor-market/.

- **Peru**. In February 2022, in its first ever no-poach investigation, Peru's competition authority launched an investigation into six construction companies for allegedly agreeing not to hire each other's employees.[52]

IV. CONCLUSION: EXPECT MORE CRIMINAL ENFORCEMENT AND AGGRESSIVE TREATMENT OF EMPLOYMENT AGREEMENTS UNDER ANTITRUST LAWS

Over a year has passed since DOJ announced its first criminal indictment relating to no-poach agreements. Since that time, grand juries across several states have returned additional criminal indictments, private class action litigation has been initiated relating to such indictments, the DOJ has defeated a motion to dismiss, and President Biden and other administration officials have emphasized the importance of preserving competition in America's labor markets.

In short, antitrust scrutiny of no-poach agreements has intensified and will continue to do so. Companies should implement a robust antitrust compliance policy,[53] including antitrust training for employees, and engage antitrust counsel to review current non-solicitation provisions and non-compete clauses to help mitigate their antitrust risk and to try to keep out of the Antitrust Agencies' crosshairs.

52 https://globalcompetitionreview.com/no-poach-agreements/peru-probes-construction-companies-over-no-poach-agreements.

53 The DOJ announced in July 2019 that it will consider the existence of a corporation's compliance program at both the charging and sentencing stages in criminal investigations, which includes the potential for reduced fines. *See* Press Release, *Antitrust Division Announces New Policy to Incentivize Corporate Compliance* (July 2019), https://www.justice.gov/opa/pr/antitrust-division-announces-new-policy-incentivize-corporate-compliance.

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

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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.

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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.*"

USING THE HORIZONTAL MERGER GUIDELINES TO EVALUATE LABOR MARKET EFFECTS OF MERGERS

BY COURTNEY DYER, COURTNEY BYRD & LAURA KAUFMANN[1]



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I. MERGER REVIEW AND THE HORIZONTAL MERGER GUIDELINES

Following growing calls for antitrust enforcement from economists, legal scholars, and the White House,[2] the Department of Justice ("DOJ") and Federal Trade Commission ("FTC") (together, the "agencies") have begun to scrutinize more closely anticompetitive conduct in labor markets, including by assessing the effects of mergers on competition for labor. The DOJ's recent challenge to a merger based on its labor market effects and the inclusion of labor-related requests for documents in merger investigations suggest that labor market effects, including the presence of no-poach agreements, are likely to become a more important fixture of merger review going forward.

Merger review is a critical means by which the antitrust agencies prevent anticompetitive conduct and increases in market concentration. When firms merge (and meet certain dollar thresholds for the size of the transaction and the size of the parties involved), the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended ("HSR Act") requires the merging parties to notify the FTC and DOJ of the transaction and wait at least 30 days for the agencies to complete their review before they can close.[3] During this initial 30-day waiting period, the agencies will decide whether they will clear the transaction and permit it to go forward (by letting the waiting period expire) or initiate a formal investigation by issuing a "Second Request" and possibly seeking to block the transaction pursuant to the Clayton Act. Section 7 of the Clayton Act prohibits mergers and acquisitions if "the effect of such acquisitions may be substantially to lessen competition, or to tend to create a monopoly."[4]

In assessing strategic transactions, the agencies are guided by the Horizontal Merger Guidelines, which set forth the agencies' "analytical techniques, practices, and the enforcement policy" with respect to mergers between competing firms.[5] The Merger Guidelines generally endorse a market definition and concentration approach to merger review, using the Herfindahl-Hirschman Index ("HHI") to calculate the level of market concentration resulting from a merger.[6] Mergers that result in a small change in concentration or that result in unconcentrated markets are generally unchallenged.[7] The agencies will scrutinize more closely mergers that result in moderately or highly concentrated markets with increases in HHI of at least 100 points.[8] Mergers that result in highly concentrated markets and involve an HHI increase of more than 200 points are presumptively anticompetitive.[9] Agencies will scrutinize applicable mergers for unilateral effects on competition, such as increased prices, reduced output, or diminished innovation, that may result from the elimination of competition between the merging parties.[10] The agencies will also assess coordinated effects of the proposed merger to determine whether it will result in an increased risk of coordination or collusion among remaining competitors in the relevant market after the transaction.[11]

2 See *Executive Order on Promoting Competition in the American Economy*, https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/ (last visited April 1, 2022) (directing the Office of Economic Policy to submit a report on the effects of lack of competition on labor markets).

3 See Fed. Trade Comm'n, *Premerger Notification and the Merger Review Process*, https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/mergers/premerger-notification-merger-review-process (last visited Mar. 21, 2022).

4 15 U.S.C. § 18.

5 See U.S. Dep't of Justice & Fed. Trade Comm'n, *Horizontal Merger Guidelines* (2010), https://www.justice.gov/atr/horizontal-merger-guidelines-08192010 (the "Merger Guidelines").

6 Merger Guidelines at Section 5.3 ("Market Concentration"). The agencies calculate the HHI by adding the squares of the individual firms' market shares (and those of their competitors) and consider both the post-merger HHI and the increase in the HHI resulting from the merger.

7 *Ibid.*

8 *Ibid.*

9 *Ibid.*

10 Merger Guidelines at Section 6 ("Unilateral Effects").

11 Merger Guidelines at Section 7 ("Coordinated Effects").

II. EXPANDING THE MERGER GUIDELINES TO REACH COMPETITION FOR LABOR

Notably, the Merger Guidelines say nothing about a merger's impact on labor markets.[12] Merger analysis has traditionally been focused on product markets rather than labor markets. And as noted in the Introduction to the Merger Guidelines, the agencies have historically evaluated mergers based on their impact on consumers, both direct customers and final, end consumers.[13]

Using the Merger Guidelines to assess the competitive effects of mergers on labor markets requires analyzing competition between merging firms for the hiring of the same types of workers, regardless of whether the merging firms compete in the same product markets. Merging firms can arguably compete to hire the same types of workers in the same geographic markets. A merger between employers could lead to a lessening of competition through unilateral effects and/or coordinated effects. Unilateral effects could result when the merger results in less competition for the types of employees the merged firm hires, possibly resulting in depressed wages or incentives to lower wages. Coordinated effects could arise if the number of firms competing to hire a specific type of employees is reduced, possibly resulting in collusive behavior among the remaining firms, such as wage-fixing or no-poach agreements.

Over the past few years, economists, law practitioners, and policy analysts have highlighted the problem of concentrated labor-market power and the lack of government enforcement to counter it. Recent economic studies have indicated that local labor markets, on average, tend to be highly concentrated.[14] Higher concentration in labor markets is, in turn, associated with significantly lower wages for posted jobs.[15] For example, Elena Prager and Matt Schmitt have found evidence of reduced wage growth among hospital workers following hospital mergers.[16] The results of Prager and Schmitt's work "suggest that increased employer labor market power via mergers may indeed contribute to wage stagnation, but that such effects may apply in relatively narrow circumstances," i.e. where the increase in concentration following the merger is large and the workers' skills are industry-specific.[17] Findings of this kind have led commentators to challenge what they see as a lack of government enforcement and to call for a more robust enforcement and regulatory regime, with many suggesting the agencies already have the tools to do so.[18]

As referenced above, merger analysis has traditionally been focused on product and service markets rather than labor markets, and the agencies generally analyze the merger's effect on the prices and supply of products and services rather than on wages.[19] But many argue that the Merger Guidelines might still be the right tool to evaluate a merger's impact on labor markets. Eric Posner has characterized the agencies' lack of antitrust enforcement of mergers impacting labor markets as "a serious mistake, for which there is no justification" and has argued that the agencies can use the Merger Guidelines to evaluate the effects of mergers on labor markets.[20] Ioana Marinescu has advocated for more scrutiny of mergers between employers of similar types of employees by using HHIs based on U.S. vacancy data and the existing Merger Guidelines.[21] Nancy Rose has suggested that the agencies devote greater attention to labor market impacts in "select merger investigations" where the firms

12 See Eric A. Posner, *How Antitrust Failed Workers* 76 (1st ed. 2021); U.S. Dep't of Justice & Fed. Trade Comm'n, *Horizontal Merger Guidelines* (2010), https://www.justice.gov/atr/horizontal-merger-guidelines-08192010.

13 Merger Guidelines at Section 1 ("Overview"). See also Ioana Marinescu, The Other Side of a Merger: Labor Market Power, Wage Suppression, and Finding Recourse in Antitrust Law, 53 Wharton Public Policy Initiative Briefs (2018).

14 See e.g. Elena Prager & Matt Schmitt, *Employer Consolidation and Wages: Evidence from Hospitals*, 111 Am. Econ. R. 397 (Feb. 2021); José Azar, Ioana Marinescu, Marshall I. Steinbaum, & Bledi Taska, *Concentration in US Labor Markets: Evidence From Online Vacancy Data* (National Bureau of Economic Research, Working Paper No. 24395, Feb. 2019), https://www.nber.org/papers/w24395; Efraim Benmelech, Nittai Bergman, & Hyunseob Kim, *Strong Employers and Weak Employees: How Does Employer Concentration Affect Wages* (National Bureau of Economic Research, Working Paper No. 24037, Feb. 2018), https://www.nber.org/papers/w24307; Ioana Marinescu, José Azar, & Marshall Steinbaum, *Labor Market Concentration* (National Bureau of Economic Research, Working Paper No. 24147, Dec. 2017), https://www.nber.org/papers/w24147; See Ioana Marinescu, The Other Side of a Merger: Labor Market Power, Wage Suppression, and Finding Recourse in Antitrust Law, 53 Wharton Public Policy Initiative Briefs (2018).

15 *Ibid.*

16 Elena Prager & Matt Schmitt, *Employer Consolidation and Wages: Evidence from Hospitals*, 111 Am. Econ. R. 397-427 (2021), https://www.aeaweb.org/articles?id=10.1257/aer.20190690.

17 *Ibid.* at 399.

18 See e.g. Eric A. Posner, *How Antitrust Failed Workers* (1st ed. 2021); Hiba Hafiz, *Why a "Whole-of-Government" Approach is the Solution to Antitrust's Current Labor Problem*, Promarket (Nov. 18, 2021), https://promarket.org/2021/11/18/antitrust-monopsony-government-labor.

19 See Ioana Marinescu, *The Other Side of a Merger: Labor Market Power, Wage Suppression, and Finding Recourse in Antitrust Law*, 53 Wharton Public Policy Initiative Briefs (2018).

20 Posner, *How Antitrust Failed Workers* at 76, 78, 84–85.

21 See Ioana Marinescu, *The Other Side of a Merger: Labor Market Power, Wage Suppression, and Finding Recourse in Antitrust Law*, 53 Wharton Public Policy Initiative Briefs 7 (2018).

"are significant employers of the same type of specialized labor (including senior management talent), but their products may not be sell-side substitutes, or may not overlap enough to hit the guideline concentration thresholds on the product side."[22]

Similarly, Rose has suggested subjecting merging parties that have entered into labor market agreements with one another, such as no-poach agreements, to antitrust scrutiny under the Merger Guidelines even when the parties do not compete in the traditional product market sense, since "these labor market agreements suggest competition for a common pool of employees."[23] Rose has also opined that the agencies could design remedies in the merger context, such as divestitures, "with attention to the geography of labor markets as well as product markets."[24] For example, while the agencies may review product market competition between merging firms at a national level, they could still examine labor market effects at a local level, such as in proximity to the merging parties' facilities. In the more general monopsony context, C. Scott Hemphill & Nancy Rose have argued for a rethinking of how the agencies treat mergers that harm sellers (e.g. workers selling their labor) and have opined that harm to sellers in an input market resulting from a merger is sufficient to support antitrust liability and that harm to the merging firms' downstream purchasers or final consumers is not necessary.[25]

III. INCREASED ANTITRUST AGENCY FOCUS ON THE LABOR MARKET EFFECTS OF MERGERS

Although the current Merger Guidelines say nothing about a merger's impact on wages, the growing chorus of criticism from economists, academics, and practitioners may be bringing about change to the enforcement policies of the antitrust agencies. Specifically, the Merger Guidelines include a section on monopsony power generally, noting that the agencies review mergers of competing buyers (which would ostensibly include employers as "buyers" of labor) by employing an approach analogous to its review of mergers of competing sellers, but are otherwise silent on the issue.[26]

In an executive order issued in July of last year, President Biden delivered a clear signal to the antitrust agencies that a focus on labor-related enforcement should be a centerpiece of his administration's antitrust policy.[27] The order, "Promoting Competition in the American Economy," encouraged the FTC and the DOJ to, among other things, incorporate an examination of the mergers' impacts on labor markets into the Merger Guidelines.[28] Since then, the agencies have taken up the mantle. In January of this year, the FTC and the DOJ announced a joint, public inquiry the goal of which is to strengthen enforcement against illegal mergers by ensuring that the "merger guidelines accurately reflect modern market realities and equip [the agencies] to forcefully enforce the law against unlawful deals."[29] The agencies noted that "[r]ecent evidence indicates that many industries across the economy are becoming more concentrated and less competitive—imperiling choice and economic gains for consumers, *workers*, entrepreneurs, and small businesses . . . Illegal mergers can inflict a host of harms, from higher prices and *lower wages* to diminished opportunity, reduced innovation, and less resiliency," clearly signaling that the calls for an increased focus on the labor-market effects of mergers have not fallen on deaf ears.[30] Specifically, one of the areas of inquiry on which the agencies are seeking public input is the:

Impact of monopsony power, including in labor markets: The agencies seek input on how to address the issue of buyer power in more detail in the guidelines. Labor markets are a key example of buyer power, and the agencies seek information regarding how the guidelines should analyze labor market effects of mergers.[31]

22 Nancy L. Rose, *Thinking Through Anticompetitive Effects of Mergers on Workers* 6, Continuing Legal Education Material for American Bar Association 2019 Antitrust Spring Meeting (Feb. 2019), https://economics.mit.edu/files/20284.

23 *Ibid.*

24 *Ibid.* at 7.

25 C. Scott Hemphill & Nancy L. Rose, *Mergers that Harm Sellers*, 127 Yale L. J. 2079 (2018).

26 See U.S. Dep't of Justice & Fed. Trade Comm'n, *Horizontal Merger Guidelines* Section 12 ("Mergers of Competing Buyers") (2010). Using the market definition and concentration approach of the Guidelines could add substantial work to the merger review process because while product markets tend to be national, labor markets are almost always local. See Posner, *How Antitrust Failed Workers* at 79.

27 See *Executive Order on Promoting Competition in the American Economy*, https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/ (last visited April 4, 2022).

28 *Ibid.*

29 See Fed. Trade Comm'n, *Fed. Trade Comm'n and U.S. Dep't of Justice Seek to Strengthen Enforcement Against Illegal Mergers*, https://www.ftc.gov/news-events/news/press-releases/2022/01/federal-trade-commission-justice-department-seek-strengthen-enforcement-against-illegal-mergers (last visited Mar. 25, 2022).

30 *Ibid.* (emphasis added).

31 *Ibid.*

Put simply, this indicates the potential for a notable change in course on the part of the agencies vis-à-vis changes to the Merger Guidelines, or at least an expansion of the current Guidelines to address labor market effects of mergers.[32] Previously, the agencies had exhibited some interest in the effect on non-competition agreements in the context of merger review, but not more broadly the labor-market effects of mergers.[33] Indeed, the FTC has challenged non-competition agreements submitted in conjunction with HSR notification in the past.[34] What is more, its interest in the effects of non-competition agreements shows no signs of flagging.[35]

Similarly, a recent DOJ action to block a merger also signals that the agency is not afraid to challenge a transaction that it believes may have labor-market effects.[36] In late 2021, the DOJ challenged a proposed merger between the publishing companies Penguin Random House and Simon & Schuster under Section 7 of the Clayton Act because the DOJ alleged that the merger "would likely result in substantial harm to authors of anticipated top-selling books."[37] According to the DOJ's complaint, the proposed transaction would "likely cause author income to be less than it would be otherwise" and "make it harder for authors to earn a living by writing books."[38]

IV. CONCLUSION

Although the antitrust agencies have been signaling a focus on strengthening efforts around antitrust enforcement in labor markets since their revision of the Antitrust Guidance for Human Resource Professionals in 2016,[39] President Biden's clear directive in the form of an executive order appears to have brought the chorus of calls from economists, academics, and practitioners to a crescendo. Most notably, the antitrust agencies appear poised to adopt changes to the Merger Guidelines that would incorporate labor-market considerations into their analysis of the competitive effects of mergers going forward, separate and apart from their continued pursuit of anticompetitive conduct in labor markets in the form of wage fixing or no-poach agreements. If that happens, we can expect to see more rigorous investigations into labor market effects of proposed transaction and potentially more merger challenges to transactions substantially lessening competition in labor markets in the future.

32 In the interim, more and more merging parties are receiving Second Requests calling for documents related to competition for labor.

33 See Fed. Trade Comm'n, *"All" means All: Submit side agreements with an HSR filing*, https://www.ftc.gov/enforcement/competition-matters/2017/12/all-means-all-submit-side-agreements-hsr-filing (last visited Mar. 25, 2022) (reinforcing that the reporting requirements of the HSR Act require filers to submit to the agencies all non-compete agreements between the parties when notifying a reportable transaction).

34 See e.g. Complaint, *In the Matter of Oltrin Solutions, LLC; JCI Jones Chemicals, Inc; Olin Corp.; and Trinity Manufacturing, Inc.*, FTC File No. 111-0078 (Mar. 7, 2013); Complaint, *In the Matter of NEXUS Gas Transmission LLC. et al.*, FTC File No. 191-0068 (Sept. 13, 2019); Complaint, *In the Matter of Axon Enterprise, Inc. and Safariland, LLC*, FTC File No. 181-0162 (Jan. 3. 2020).

35 See Fed. Trade Comm'n, *Non-Competes in the Workplace: Examining Antitrust and Consumer Protect Issues*, https://www.ftc.gov/news-events/events/2020/01/non-competes-workplace-examining-antitrust-consumer-protection-issues (last visited Mar. 25, 2022) (The FTC held a public workshop to examine promulgating a rule that would restrict the use of non-competition clauses in employment contracts).

36 See U.S. Dep't of Justice, *Justice Department Sues to Block Penguin Random House's Acquisition of Rival Publisher Simon & Schuster*, https://www.justice.gov/opa/pr/justice-department-sues-block-penguin-random-house-s-acquisition-rival-publisher-simon (last visited Mar. 25, 2022) ("[T]his merger will cause harm to American workers, in this case authors, through consolidation among buyers . . . ").

37 See Complaint, *U.S. v. Bertelsmann SE & Co.*, No. 1:21-cv-2886 (D.D.C. Nov. 2, 2021) at para. 7.

38 See Complaint, *U.S. v. Bertelsmann SE & Co.*, No. 1:21-cv-2886 (D.D.C. Nov. 2, 2021) at paras. 60 and 9.

39 See U.S. Dep't of Justice, *Antitrust Guidance for Human Resource Professionals*, https://www.justice.gov/atr/file/903511/download (last visited Apr. 4, 2022).

"WELCOME TO MCDONALD'S…MAY I TAKE YOUR CASHIER?" — A REVIEW OF RECENT FRANCHISE NO-POACH CLASS ACTION LAWSUITS

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I. INTRODUCTION

For years, cashiers, fry-cooks, managers, and other employees working for the biggest restaurant chains across the country have been blocked from seeking higher wages and better positions at competing restaurants in the same chain due to restrictions placed in franchise agreements. These "no poach" clauses could prevent a cashier at a McDonald's in Brooklyn, for example, from accepting a higher paying manager position at a McDonald's in Manhattan. That same cashier would not be barred from taking a job at a Burger King or Carl's Jr., however. In recent years these clauses have garnered much attention, with economists pointing to them as a possible source of wage stagnation and antitrust practitioners challenging them as illegal restraints of trade.

Antitrust enforcement in this area exploded in 2018 when state attorneys general across the country announced that they were investigating franchise agreements of several fast-food restaurants which they claimed contained no-poach clauses.[2] While the investigation began with a handful of restaurant chains, the number of companies under scrutiny grew quickly and went beyond fast-food to include other industries that use a franchise model, such as automotive services and tax preparation.[3] Enforcement initiatives by the state of Washington were particularly strong. As a result of Washington's investigation, by 2020, 237 corporate franchisors agreed to end no-poach practices *nationwide*, covering nearly 200,000 locations around the country.[4] Companies included major chains like Arby's, Burger King, Domino's, Jiffy Lube, and La Quinta, to name a few.[5]

The enforcement efforts by the various state attorneys general kicked off a slew of private class action lawsuits based on these same no-poach clauses. While the states' efforts have stopped no-poach practices at hundreds of franchise businesses going forward, the victims of these no-poach practices did not receive compensation for past wrongs. Victims have still not received meaningful compensation, as these private lawsuits have faced a variety of challenges.

Below we provide a survey of the recent litigation. First, we will give an overview of why these clauses may present an antitrust issue. Then, we will describe the various cases that have been filed and will discuss the unique issues these cases present, including the type of scrutiny (i.e. *per se* or rule of reason) that courts have applied and issues that have arisen related to class certification.

II. NO POACH CLAUSES IN FRANCHISE AGREEMENTS MAY RAISE AN ANTITRUST PROBLEM

Employers may be violating the antitrust laws if the employer agrees with another firm to set wages at a specific level or within a range ("wage fixing agreements"), or if the employer agrees with another firm to refuse to recruit or hire the other firm's employees ("no-poach agreements").[6] "From an antitrust perspective, firms that compete to hire or retain employees are competitors in the employment marketplace[,] . . . . [and] [i]t is unlawful for competitors to expressly or implicitly agree not to compete with one another" for employees.[7]

The no-poach agreements discussed here are provisions in franchise agreements— "agreements between a franchisor and a legally distinct and independent franchisee"—that restrict employees moving among locations within the same franchise system.[8] Because these no-poach agreements typically exist in contracts between franchisor and franchisee rather than in employment contracts, workers are often unaware

2 Jeff Stein, "States launch investigation targeting fast-food hiring practices," Washington Post (July 9, 2018), https://www.washingtonpost.com/news/wonk/wp/2018/07/09/11-states-launch-investigation-targeting-fast-food-hiring-practices/; Press Release, "AG Ferguson announces fast-food chains will end restrictions on low-wage workers nationwide," Washington State Office of the Attorney General (July 12, 2018), https://www.atg.wa.gov/news/news-releases/ag-ferguson-announces-fast-food-chains-will-end-restrictions-low-wage-workers.

3 Report, Washington State Attorney General's Office No Poach Initiate (June 2020), https://agportal-s3bucket.s3.amazonaws.com/uploadedfiles/Another/News/Press_Releases/NoPoachReport_June2020.pdf.

4 Press Release, "AG Report: Ferguson's initiative ends no-poach practices nationally at 237 corporate franchise chains," Washington State Office of the Attorney General (June 16, 2020), https://www.atg.wa.gov/news/news-releases/ag-report-ferguson-s-initiative-ends-no-poach-practices-nationally-237-corporate.

5 For the full list, see Report, Washington State Attorney General's Office No Poach Initiate (June 2020), https://agportal-s3bucket.s3.amazonaws.com/uploadedfiles/Another/News/Press_Releases/NoPoachReport_June2020.pdf.

6 Department of Justice Antitrust Division & Federal Trade Commission, Antitrust Guidance for Human Resource Professionals (Oct. 2016), https://www.justice.gov/atr/file/903511/download.

7 *Id.*

8 Written Testimony of Assistant Attorney General Rahul Rao Office of the Attorney General of the State of Washington Antitrust Division (October 29, 2019), https://agportal-s3bucket.s3.amazonaws.com/uploadedfiles/Another/News/Press_Releases/WA%20AAG%20Rahul%20Rao%20-%20Written%20Testimony_0.pdf.

of their existence.[9] Moreover, no-poach provisions in franchise agreements are not uniform in what they prohibit. For instance, one franchisor's provision may flat out prohibit the hiring of another franchisee's employee, but another company's provision may only prohibit *recruitment* from another store in the same system. Other no-poach provisions "only prevent the poaching of a franchisor's employees. Some protect only company- owned locations. Some only restrict franchisees from hiring or recruiting other franchisee employees."[10]

Regardless of the specific prohibition, commentators say that the effects are the same: "all no-poach provisions . . . artificially restrict competition for labor."[11] "This decrease in competition for labor has the potential to lead to reduced opportunities and stagnant wages."[12] Studying such clauses, economists have found that such provisions were "ubiquitous" among franchises and "appeared to exist mainly to limit both competition and turnover, which can keep labor costs low."[13]

III. OVERVIEW OF RELEVANT CLASS ACTIONS

Many class action lawsuits have been filed on behalf of workers subject to no-poach clauses at franchises. Below we provide an overview of the various challenges these cases have faced.

A. Courts Have Found That Plaintiffs Alleged Plausible Antitrust Claims

As we will discuss in the next section, while there is uncertainty about which standard of antitrust analysis — *per se*, quick look, or rule of reason — to apply, most courts agree with plaintiffs that a no-poach provision in a franchise agreement may constitute an anticompetitive restraint under the Sherman Act. In 2018 and 2019, "six district courts . . . faced motions to dismiss raising . . . whether a 'no-poach' provision in a franchise agreement (that prevents one franchisee from hiring another's employees for a set period) can constitute an anticompetitive restraint under the Sherman Act. Five of the six denied those motions to dismiss." [14]

The one case from this period where the motion to dismiss was granted was *Ogden v. Little Caesar Enterprises, Inc*, a class case filed on behalf of employees of the pizza chain Little Caesar.[15] Here, the court found that under any standard of analysis, the plaintiff failed to plead an antitrust claim. The court made a noteworthy observation that potentially "for a tactical reason" the plaintiff did not even "advance allegations or arguments supporting any claim under the rule-of-reason standard."[16] That "tactical reason" put forward by the court: defining a nationwide relevant market for fast-food employees could be difficult, as "[m]ost employees who hold low-skill retail or restaurant jobs are looking for a position in the geographic area in which they already live and work, not a position requiring a long commute or a move."[17]

Putting aside the finding that the plaintiff alleged no illegal restraint, the court also found that the complaint failed to allege an antitrust injury. The court found that the plaintiff had not "offered any facts to show that the agreement precipitated any specific wage or opportunity loss to him" nor was he ever "subjected to any invocation of the clause by either his former or any prospective employer."[18] Regarding the latter, the court compared the allegations to other cases where plaintiffs alleged the no poach agreements were "explicitly . . . invoked to bar the plaintiffs from transferring to other stores."[19] While the plaintiff did appeal the district court's decision, the parties ultimately stipulated a dismissal.[20]

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9 *Id.*

10 *Id.*

11 *Id.*

12 *Id.*

13 Rachel Abrams, "Why Aren't Paychecks Growing? A Burger-Joint Clause Offers a Clue," The New York Times (Sept. 27, 2017), https://www.nytimes.com/2017/09/27/business/pay-growth-fast-food-hiring.html.

14 See *Fuentes v. Royal Dutch Shell PLC*, No. CV 18-5174, 2019 WL 7584654, at *1 (E.D. Pa. Nov. 25, 2019).

15 *Ogden v. Little Caesar Enterprises, Inc.*, 393 F. Supp. 3d 622 (E.D. Mich. 2019)

16 *Id.* at 631.

17 *Id.* at 631-32 (quoting *Deslandes v. McDonald's USA, LLC*, No. 17-4857, 2018 WL 3105955, at *8 (N.D. Ill. June 25, 2018))

18 *Id.* at 638.

19 *Id.*

20 *Ogden v. Little Caesar Enterprises, Inc.*, No. 19-1986, 2020 WL 948507, at *1 (6th Cir. Jan. 28, 2020)

B. Rule of Reason, Quick Look, or Per Se?

Although courts are mostly in agreement that these clauses may violate the antitrust laws, there is a great deal of uncertainty about what level of scrutiny to use when analyzing the restraints. Recognizing that this issue is complex and deeply factual, several courts at the motion to dismiss stage have decided to defer a decision until after a factual record is developed.[21] There are two factual issues that make it difficult for courts to decide the level of scrutiny without a developed factual record. Specifically, (1) whether the agreements are between horizontal or vertical competitors; and (2) whether the franchisees are truly independent from their franchisors.

Regarding the first issue, defendants typically argue that the agreements are purely vertical restraints between corporate franchisors and their franchisees. Plaintiffs, on the other hand, contend that the agreements are horizontal agreements between the various franchisees not to hire each other's employees with the franchisor at the center orchestrating the entire scheme — in antitrust parlance, a "hub-and-spoke" conspiracy.[22] In the *Jimmy John's Franchise* case, the court found that plaintiffs plausibly pled a horizontal hub-and-spoke conspiracy which could give rise to *per se* liability.

Specifically, the court found that the franchisees "tacitly agree amongst each other to enforce the no-hire provision through austere enforcement of the employee non-compete contracts. And most damningly, the franchise agreements give the franchisees a contractual right to enforce the no-hire agreements directly against each other through the third-party beneficiary provision. That is a horizontal agreement."[23] Unfortunately for the plaintiffs in that case, the court could not determine on the pleadings the level of independence that franchisees had and, therefore, could not rule on the appropriate level of antitrust scrutiny. According to the court, if the evidence showed that the franchisees were truly independent, then *per se* or quick look analysis would apply, but, if the evidence of independence was weak, rule of reason would be applicable.[24]

Two decisions have rejected per se treatment on the pleadings but determined that quick look analysis may apply.[25] In both cases — one brought against McDonald's, the other against Cinnabon — the respective courts found that the plaintiffs plausibly alleged horizontal or partly-horizontal restraints.[26] The courts found *per se* treatment was still improper, however, because the agreements were not "naked" agreements not to hire. Instead, the agreements were ancillary to legitimate franchise agreements,[27] and it was not clear that the agreements lacked "any redeeming virtue."[28] Nevertheless, both courts found that quick look analysis might be appropriate given that "[e]ven a person with a rudimentary understanding of economics would understand that if competitors agree not to hire each other's employees, wages for employees will stagnate."[29] Both courts recognized, however, that the evidence in the case might not actually support quick look analysis.

In the *McDonald's* case, the court was able to conclude after the close of discovery that quick look analysis would actually be improper and that it must apply the rule of reason.[30] Citing the recent Supreme Court case, *NCAA v. Alston*, 141 S. Ct. 2141 (2021), the court acknowledged that "quick-look condemnations should be rare."[31] The court continued: "This Court cannot say that it has enough experience with no-hire provisions of franchise agreements to predict with confidence that they must always be condemned, which means, under *Alston*, that the Court

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21 See e.g. *Fuentes*, 2019 WL 7584654, at *1; *Butler v. Jimmy John's Franchise, LLC*, 331 F. Supp. 3d 786, 797 (S.D. Ill. 2018); *In re Papa John's Emp. & Franchisee Emp. Antitrust Litig.*, No. 3:18-CV-00825-JHM, 2019 WL 5386484, at *9 (W.D. Ky. Oct. 21, 2019); *Robinson v. Jackson Hewitt, Inc.*, No. 19-9066 (SDW) (LDW), 2019 WL 5617512, at *7 (D.N.J. Oct. 31, 2019)

22 For an illustration of both sides of the argument, see *Butler v. Jimmy John's Franchise*, LLC, 331 F. Supp. 3d 786, 795 (S.D. Ill. 2018).

23 *Id.* at 796.

24 *Id.* at 797.

25 *Deslandes v. McDonald's USA, LLC*, No. 17 C 4857, 2018 WL 3105955, at *7 (N.D. Ill. June 25, 2018); *Yi v. SK Bakeries, LLC*, No. 18-5627 RJB, 2018 WL 8918587, at *4 (W.D. Wash. Nov. 13, 2018).

26 *Deslandes*, 2018 WL 3105955 at *6 ("McDonald's, by including the no-hire provision in its agreement with franchisees, was protecting its own restaurants (i.e., **itself**) from horizontal competition for employees."); *Yi*, 2018 WL 8918587 at *4 ("While a part of the restraint at issue in the agreements is a vertical one (the franchisee agrees not to solicit or hire a Cinnabon employee), a part of the restraint is also a horizontal one (the franchisee agrees not to solicit or hire another franchisee's employee without permission).").

27 *Deslandes*, 2018 WL 3105955 at *7.

28 *Yi*, 2018 WL 8918587 at *4.

29 *Deslandes*, 2018 WL 3105955 at *7; Yi, 2018 WL 8918587 at *5.

30 *DeSlandes v. McDonald's USA, LLC*, No. 17 C 4857, 2021 WL 3187668, at *11 (N.D. Ill. July 28, 2021).

31 *Id.* at *7.

must apply rule of reason analysis to this case."[32] The court cited two additional reasons as support for the rule of reason. First, it found that defendants provided sufficient evidence of pro-competitive effects of the hiring restriction to warrant full rule of reason analysis.[33]

More specifically, "the hiring restraint increases output in the hamburger market, because it encourages the very training that enhances the brand (by ensuring uniform food quality, customer service and building cleanliness) . . . . The hiring provision makes the training related to the brand specific to the franchisee (rather than just to the brand), because it prevents other outlets from free riding on that training. All that training leads to greater brand consistency, better food quality and customer satisfaction, which is to say a strong brand."[34] Second, the court concluded that the evidence did "not show that all of the plaintiffs faced horizontal restraints ancillary to output-enhancing agreements."[35] The court found that the plaintiff did not "put forth evidence that McOpCos [McDonald's locations owned by the McDonald's-brand franchisor] compete with franchisees in every part of the United States" and concluded that "[i]n locations where no McOpCos compete with franchisees, the hiring provision cannot be said to be horizontal . . . . the hiring provision is merely vertical."[36] Finding the restrictions were vertical, the court determined that it must apply the rule of reason.

C. DOJ's View on the Appropriate Level of Scrutiny

In 2019, the United States Department of Justice Antitrust Division ("DOJ") under the Trump administration filed a statement of interest in three cases pending in the Western District of Washington to present its view that the rule of reason should be applied.[37] Each of the complaints in these cases—one against Auntie Anne's, another against Arby's, and the third against Carl's Jr.— alleged that the franchise agreements for these brands contained no poach clauses. In its statement of interest, DOJ stated that "[t]he franchise relationship is in many respects a vertical one because the franchisor and the franchisee normally conduct business at different levels of the market structure. Restraints imposed by agreement between the two are usually vertical and thus assessed under the rule of reason."[38]

While articulating that the rule of reason would apply in most cases, DOJ stated that the per se rule could apply in limited situations where a franchisor and one of its franchisees actually compete in the same geographic market for labor. Additionally, DOJ stated that full rule of reason analysis would be necessary, *not quick look*. Stating that quick look only applies in the "rare cases" when "the great likelihood of anticompetitive effects can easily be ascertained," DOJ argued that franchise no-poach agreements fell outside of this category of cases because "they may indeed provide procompetitive benefits and promote interbrand competition."[39] Not long after DOJ filed its statement of interest, both cases were dismissed by stipulation of the parties.

In the same case against McDonald's discussed above, DOJ, now under the Biden administration, moved for leave to file another statement of interest following the court's decision to apply the rule of reason and after defendants' moved for summary judgment.[40] In its motion for leave, DOJ stated that its previous statement of interest "does not fully and accurately reflect the United States' current views."[41] DOJ said it wished to file its statement of interest to aid the court's disposition of defendants' summary judgment motion and to "set[] forth the government's position on the antitrust issues in this case, including the implications of the Supreme Court's decision in *NCAA v. Alston*, 141 S. Ct. 2141 (2021)." DOJ's motion, which was opposed by the defendants, was ultimately rejected by the court for reasons that have not yet been made public.[42] Given the timing and procedural history of the case, it is reasonable to speculate that DOJ's statement of interest would have been beneficial to the plaintiff's view of the case.

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32 *Id.*

33 *Id.* at *8.

34 *Id.* at *9.

35 *Id.* at *10.

36 *Id.*

37 Statement of Interest at 11, *Stigar v. Dough Dough, Inc.*, No. 2:18-cv-00244, ECF No. 34 (E.D. Wash. Mar. 8, 2019).

38 *Id.* at 12-13.

39 *Id.* at 17.

40 Motion for Leave to File Statement of Interest, *Deslandes v. McDonald's USA, LLC et al*, No. 17-cv-4857, ECF No. 446 (N.D. Ill. Feb. 17, 2022).

41 *Id.* at 1.

42 Minute entry, *Deslandes v. McDonald's USA, LLC et al,* No. 17-cv-4857, ECF No. 451 (N.D. Ill. Mar. 2, 2022)

D. Issues at Class Certification

To date there have only been a few class certification rulings in the actions discussed here, and the rulings that have been issued have been unfavorable to the plaintiffs. In the *McDonald's* case, the court found that it could not certify the proposed class because the class did not meet the predominance requirement of Rule 23(b).[43] The major issue that led the court to find there was predominance problem was that there was no national labor market for McDonald's employees. Instead, the evidence pointed to the existence of "hundreds or thousands of local relevant markets" where employees work near where they live.[44] Plaintiffs' own expert calculated that "only 8% of McDonald's employees commute ten or more miles to work."[45] Because "[a]ny given plaintiff can establish that the restraint is anticompetitive only by showing anticompetitive effects in the relevant market where she sells her labor," anticompetitive effects cannot be show in other markets where they do no work.[46] Thus, no predominance.

Class certification was also denied in the case brought against Jimmy John's. Like in *McDonald's*, the *Jimmy John's* court found that the predominance requirement was not met.[47] Relevant market was again an issue. The court was persuaded by defendants' experts that Jimmy John's workers compete in a labor market that is broader than just Jimmy John's—the market also includes other quick-service restaurants of which "99 percent of Jimmy John's branded stores have at least ten other [quick-service restaurant] brands within ten miles."[48] With such "varied and dynamic labor markets across the country," the court found that "individualized inquiries would still be needed to determine whether a given Jimmy John's employee could have been injured."[49]

Predominance was not the only issue that precluded class certification. The court also found that the sole class representative's claims were atypical. The class representative left Jimmy John's not because he was looking for higher wages or opportunities at a different location but because he was fired for calling his boss's niece an expletive.[50] Moreover, the court found that the class representative, a non-manager, was an inadequate representative of a class defined to include Jimmy John's managers and non-managers alike.[51]

E. Arbitration Clauses may Present Another Roadblock

Finally, another significant barrier for plaintiffs bringing franchise no-poach class actions has emerged: arbitration clauses. In the *Papa John's* case, defendants moved to compel arbitration against one of the named plaintiffs.[52] The arbitration agreement at issue stated that the plaintiff waived "all rights to a trial in court before a judge or jury on any 'claims, disputes or controversies arising out of or relating to her employment with Papa John's.'"[53] While the plaintiff argued that violations of the Sherman Act fell outside of the scope of the arbitration agreement, the court disagreed, citing "the policy of rigorous enforcement of arbitration agreements."[54] Notwithstanding, the other named plaintiffs were not subject to an arbitration clause, and the case was able to move forward.

Plaintiffs in the *Domino's* case were less fortunate. There, the district court granted defendants' motion to dismiss and compel arbitration and ordered the parties to go to arbitration.[55] The plaintiff appealed that decision to the Sixth Circuit, arguing that he did not agree to arbitrate "arbitrability." In other words, he argued that "*a court* must first determine whether the [arbitration] agreement covers a particular claim before

43 *Deslandes*, 2018 WL 3105955 at *14.

44 *Id.* at *12.

45 *Id.* at *13.

46 *Id.*

47 *Conrad v. Jimmy John's Franchise, LLC*, No. 18-CV-00133-NJR, 2021 WL 3268339, at *11 (S.D. Ill. July 30, 2021).

48 *Id.*

49 *Id.*

50 *Id.* at *5.

51 *Id.* at *7.

52 *In re Papa John's Emp. & Franchisee Emp. Antitrust Litig.*, No. 3:18-CV-00825-JHM, 2019 WL 5386484, at *3 (W.D. Ky. Oct. 21, 2019).

53 *Id.* at *4.

54 *Id.*

55 *Blanton v. Domino's Pizza Franchising LLC*, 962 F.3d 842(6th Cir. 2020), *cert. denied sub nom. Piersing v. Domino's Pizza Franchising LLC*, 141 S. Ct. 1268, 209 L. Ed. 2d 8 (2021).

the arbitrator has any authority to address its jurisdiction."[56] The Sixth Circuit disagreed and ordered plaintiff into arbitration for a determination of whether his claim is arbitrable.[57]

IV. CONCLUSION

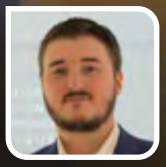
Thankfully for workers today, state enforcers have made substantial progress towards ending the practice of franchise no-poach agreements nationwide at thousands of franchise establishments. Still, this injunctive relief has done nothing to rectify the low, stagnant wages millions of workers received for years when the practices were in effect. Private enforcement efforts are ongoing in a number of cases where the law continues to develop, and if successful, may provide victims with compensation for their losses.

56 *Id.* at 847 (emphasis added).

57 *Id.* at 852.

NO-POACH AGREEMENTS: PURCHASING POWER TYPE, EXPLICIT v. TACIT COLLUSION, AND LESSONS FROM SELLERS' CARTELS

BY RICHARD MAY[1]



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I. INTRODUCTION

Traditionally, purchasing power has been in the shadows of competition policy. This may be changing, at least for purchasers in labor markets.[2] No-poach agreements in particular have received attention and increased enforcement action over the last decade. This is particularly true in the United States where there have been several high-profile cases, including against companies such as Google, Apple, Disney, and eBay. The Department of Justice ("DOJ") even launched its first criminal proceedings in relation to no-poach agreements recently.

The U.S. has not been alone. Other countries have had experience with no-poach agreements, including Brazil, Turkey, Hungary, Croatia, the Netherlands, and Spain among others. Some jurisdictions have also released public documents on the topic, such as Japan, Hong Kong, and Portugal.[3] However, many jurisdictions still appear to have taken neither public enforcement action nor provided clear statements of their intent to do so.

No-poach agreements have been detected in a wide range of industries, ranging from digital markets, movie production, healthcare, IT services, flooring production, railways, and fast-food franchises. Different industries, and different job profiles, give rise to the potential for purchasing power to affect labor markets differently. In particular, whether the agreement between employers produces monopsony or bargaining power. The first section of this article briefly introduces these concepts and explains why both appear to be relevant in the context of no-poach agreements.

Explicit collusion, such as agreeing not to poach each other's employees, is a risky business. If reaching an understanding without explicit communication, namely tacit collusion, could achieve the same outcomes then this would surely be preferred. The second section considers how the incentives to collude explicitly have been affected by recent developments, including increased scrutiny of non-compete clauses in employment contracts.

The final part of the article considers no-poach agreements as an analogy to the market allocation of customers by sellers. It argues that such an analogy is useful for future enforcement against no-poach agreements, and provides two stylized examples from past cases.

II. PURCHASING POWER DERIVED FROM COLLUSION

A. Monopsony power v. Bargaining Power

Collusion between purchasers may provide purchasing power, pushing prices paid for inputs (such as labor) down. Purchasing power for employers, here derived through reduced competition for existing workers, will lead to worse outcomes for workers. However, the effect of this derived purchasing power on overall welfare can depend on whether it is monopsony power or bargaining power.[4]

Under monopsony power, sellers face the mirror image of monopoly. Wages are set by the monopsonist, which faces an upward sloping supply curve. Thus, by reducing demand to lower wages, the quantity of labor falls.[5] As a result, in most situations monopsony power should be considered contrary to the goals of competition policy.[6]

There are of course multiple nuances to the theoretical models of monopsony and its overall effect on welfare, but perhaps two worth mentioning here are the possibility of "take it or leave it" offers and the extent of downstream market power. The first appears unlikely to apply in the context

2 The OECD Competition Committee considered competition in labor markets in a Roundtable in 2019 and again at the OECD Competition Open Day in 2020. Prior to an upcoming roundtable this June on Purchasing Power and Buyers' Cartels, the Committee considered Monopsony and Buyer Power in 2008. See OECD, *Monopsony and Buyer Power*, Background Paper (2008), ("OECD 2008").

3 For example: Autoridade da Concorrência, *Labour Market Agreements and Competition Policy*, Issues Paper - Final Version, September 2021; and Competition Commission Advisory Bulletin, Hong Kong Competition Commission, *Competition Concerns Regarding Certain Practices in the Employment Marketplace in Relation to Hiring and Terms and Conditions of Employment* (April 9, 2018).

4 For more on this distinction, see OECD (2008). Kirkwood (2014) also discusses a similar distinction, referring to bargaining power as countervailing power: Kirkwood, John B, *Collusion to Control a Powerful Customer: Amazon, E-Books, and Antitrust Policy*, University of Miami Law Review, Vol. 69, No. 1 (2014).

5 Assuming there is no wage discrimination.

6 Broadly defined as beneficial to consumers and society as a whole. Exactly what the goals of competition policy should be is itself a topic rich in discussion. A summary of some of this debate can be found in of OECD, *Competition in Labour Markets*, Background Note (2019) Section 2.3.

of labor markets.[7] Regarding the second, if a monopsonist also possesses downstream market power, reduced output and increased marginal costs are likely to lower quantity and raise prices downstream, harming consumers.[8] When there is no market power downstream however, there is unlikely to be a material effect of the monopsony power downstream other than shifting volume away from the monopsonist to downstream competitors.[9] Similarly though, there will not be a benefit to consumers through lower prices, just increased profits for employers at the expense of workers.

Purchasing power is bargaining power when both parties negotiate bilaterally and have some market power. In such situations, parties bargain over the economic rents available. Purchasers with bargaining power therefore seek to extract most of the economic rent, reducing profits to sellers but generally not affecting overall volumes. In the context of no-poach agreements, reducing the possibility for a current employee to move to a rival may reduce their outside option and lower the outcome of pay negotiations.

Bargaining power for purchasers can be beneficial to competition and welfare overall, particularly if it offsets supplier market power to reduce the marginal costs for downstream sellers, potentially to be passed on to consumers.[10] However, bargaining power can also lead to results contrary to the goals of competition policy, even aside from the harm to workers. For example, bargaining power acquired through no-poach agreements could affect competition in downstream markets, including by facilitating downstream collusion.[11] Further, bargaining power could reduce dynamic and productive efficiencies, through its effect on upstream competition and on the incentives of sellers to innovate and manage risk. For no-poach agreements, a particular concern is the potential for workers to be precluded from new, and potentially more productive, employment opportunities.[12]

B. No-poach Agreements: Monopsony Power or Bargaining Power?

No-poach agreements provide a mechanism for employers to derive purchasing power, without the need to enter potentially complex agreements on wages or other employment terms.

It may be natural to initially consider no-poach agreements as providing bargaining power to employers, as they appear limited to restricting the outside option for current workers. However, by reducing the number of alternatives for workers, employers may become their only option, allowing them to set wages akin to a monopsonist facing an upward sloping supply curve. Therefore, while the welfare effects of both monopsony power and bargaining power will depend on the circumstances, it appears worthwhile considering which should apply to no-poach agreements. This article argues it could be either.

For simplicity, consider two broad categories of workers. Those with a broad set of skills that are applicable to a wide range of jobs, and those with specific, and harder to obtain or rarer, skills that suggest a particular job match.

In the former case, employer purchasing power from collusion appears likely to be closely associated with monopsony power. In such instances, employers may have many potential employees. These employees will differ, living in different locations, having different willingness to travel and different requirements for job satisfaction. The wages that they are willing to accept will therefore vary. This variation will represent itself as an upward sloping supply curve to the employer; raising the offered wage will induce more workers to offer their services but increase the wage for all.[13]

7 If the purchaser can make a "take it or leave it" offer to sellers to supply at a higher quantity at a price just covering average variable costs, then monopsony power may not reduce output and could lead to lower prices for consumers in downstream markets. In the context of labor markets, where the upward sloping supply curve is likely to reflect the reservation wages of workers, it is difficult to imagine monopsony power being successfully used with take it or leave it offers, at least beyond the short-term.

8 Assuming that labor costs rise with output, as the monopsonist raises wages to hire an additional worker the increased wage will need to be paid to all workers. Hence, the marginal cost of an extra worker is both their wage and the increased wages for the other workers, again assuming no wage discrimination.

9 This still may cause some harm to overall social welfare if it shifts production away from the most efficient firms, potentially increasing overall costs and prices.

10 Many assumptions are required to arrive at this outcome however, including the inability for upstream and downstream firms to contract efficiently and for downstream competition to be such that the costs are passed through. In the event of efficient contracting, such as a two-part tariff, purchasing power may shift the allocation of rents between parties but leave marginal costs unchanged (as the downstream firm will already face the true marginal cost of the product).

11 For example, if labor is highly differentiated such that it materially affects downstream products, market allocation upstream could facilitate a similar market allocation downstream by restricting the possibility of repositioning or entry.

12 Another factor to consider is the costs of workers switching jobs, and if these costs are high enough, these may be greater than lost productivity gains, suggesting the potential for no-poach agreements to be welfare enhancing. See Shy, O. & Stenbacka, R., Anti- Poaching Agreements in Labor Markets, Economic Inquiry, Western Economic Association International, vol. 57(1), pages 243-263, (January 2019).

13 A number of authors have argued that labor market frictions, such as costs of recruitment, can also cause employers to face upward sloping supply curves, for example: Krueger, A. B. & Posner, E. A., *A Proposal for Protecting Low-Income Workers from Monopsony and Collusion*, The Hamilton Project, Policy Proposal (February 2018).

Moreover, monopsony power is more likely when employers have a choice of workers, yet workers face insufficient choice of employment such that employers can lower wages by withholding demand (even if this may result in higher levels of vacancies).[14]

In the case where specific skills are required for a job, and hence finding a good match is more difficult, considering employer purchasing power through the lens of bargaining power appears more appropriate.[15] Certainly, many wages are influenced by a level of negotiation between the employer and employee, suggesting that bargaining power may be relevant here.[16]

Monopsony power and bargaining power seem plausible through no-poach agreements and, as explained above, both can lead to effects likely to fall foul of the aims of competition policy. Nevertheless, given the potential for no-poach agreements to affect a range of workers, competition authorities should at least be mindful of the type of purchasing power when considering enforcement. For instance, as some scholars have already argued, there may be reasons to be particularly concerned if no-poach agreements were prevalent in industries where monopsony power was involved, and this disproportionately affected low-wage workers.[17]

III. TACIT OR EXPLICIT COLLUSION BETWEEN EMPLOYERS

A. Colluding Tacitly or Explicitly

Collusion can be tacit or explicit. Both will reduce competition, but generally, explicit collusion is more likely to fall foul of antitrust laws.[18] No-poach agreements are examples of explicit collusion. Tacit collusion arises when firms can obtain mutually beneficial outcomes without the need for direct communication or agreement. In the current context, firms could individually realize that it is in their mutual interest not to poach rival's employees and punish severally those that try.[19]

As explicit collusion likely carries a higher risk of penalty, it has a higher expected cost for participants.[20] Therefore, for firms to choose explicit collusion over tacit collusion, the expected benefits must be higher. This would be the case if tacit collusion failed to deliver the same outcomes, for example if it was too difficult for firms to second-guess a mutually beneficial outcome or to monitor how others adhered to it. In the case of no-poach agreements, the feasibility of tacit collusion between employers will depend upon the specific circumstances of each market. However, not poaching rival employees appears a relatively simple focal point and reasonably easy to monitor, suggesting tacit collusion may be feasible.

B. Effect of Recent Developments

The recent attention on labor markets by some competition authorities must have affected how rational firms consider the relative pros and cons of tacit versus explicit collusion.[21] While just over a decade ago awareness of the potential for penalties from entering into a no-poach agreement may have been low, it is now implausible that awareness will not have risen significantly. All else equal, this will have risen the expected cost of participating in explicit collusion.

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14 The strength of the monopsony power will depend on how meaningfully the agreements decrease the ability for each firm's current workers to work elsewhere in search of higher wages. The existence of other employers not party to a no-poach agreement will only reduce monopsony power if employment there is attractive. This may not be the case even with higher wages if it included increased travel or worse working conditions to the worker concerned. Note also that if wage discrimination is not possible, then employers may be unwilling to fill vacancies, even if a pool of potential workers unaffected by no-poach agreements exists.

15 Genuine bilateral negotiation is more likely the greater the specific skills required and the harder those skills are to acquire. By definition, no-poach agreements most directly affect current workers, who may have acquired job specific skills or revealed information on their skill levels relative to potential replacements.

16 See, for example: Cahuc, P., Postel-Vinay, F. & Robin, J.M., *Wage Bargaining with On-the-Job Search: Theory and Evidence*, Econometrica, Vol. 74, No. 2 (March 2006), pp. 323-364.

17 For an example of an argument for increased enforcement in this direction, see Krueger & Posner (2018).

18 It is worth noting that currently not every competition authority may have the ability to take action against explicit collusion by employers (for example in New Zealand or Australia). This might provide an interesting "natural" experiment for future empirical economic research on the effects of enforcement action in this area.

19 A punishment strategy could be to poach significant numbers of staff or target the firm in another way, perhaps in a downstream market.

20 Assuming firms are aware of the law and consider that there is a risk of detection and punishment. The considerable efforts exerted by competition authorities to raise the awareness of cartel provisions and the need for compliance programs in their respective jurisdictions suggest this may not be a trivial assumption. See for example: OECD, *Competition Compliance Programmes*, OECD Competition Committee Discussion Paper (2021) http://oe.cd/ccp.

21 While there is debate about the size of the deterrence effect, it is undeniably an important rationale for intervention for many competition authorities.

However, as is rarely the case, all else is not equal. Notably, there has also been an increased interest in the existence of non-compete clauses in employment contracts, with several jurisdictions publicly stating their intentions to crackdown on the practice.[22] Non-compete agreements are vertical agreements that place restrictions on worker's short-term alternative employment prospects. They may deliver outcomes nearly identical to no-poach agreements without explicit collusion and there is evidence to suggest that non-compete clauses are reasonably prevalent.[23] Given the recent developments, they may be less attractive for employers in the future. If so, then explicit collusion could be more appealing to some firms as expected benefits rise relative to alternatives.

Going forward, competition authorities and policymakers should be mindful of the effects of different enforcement actions on the incentives of employers. If necessary, this could include considering how to tackle employer purchasing power acquired through tacit collusion, such as market studies or advocacy.

IV. LESSONS FROM CUSTOMER ALLOCATION CARTELS

No-poach agreements could be considered the mirror image of customer allocation agreements by sellers. Buyers' cartels and sellers' cartels are not identical; no two cartels will be. However, there is value from such an analogy due to the relative wealth of experience of sellers' cartels. For example, such experience may provide clues on buyers' cartels, including no-poach agreements, that may be of benefit for competition authorities in considering how to detect them. It could also offer insights into their prevalence. The final section of this article provides two examples from sellers' cartels and relates them to no-poach agreements. There are likely to be more lessons available.

A. "Do" Poach Agreements

The European Commission's pre-insulated pipe cartel case in Denmark offers an example of a potential mechanism that may have relevance to buyers' cartels.[24] The cartel, formed between sellers of pre-insulated pipes, faced a market entrant that was not part of the agreement. As part of their response, they agreed to collectively poach key staff from the entrant to weaken it.

While the focus of this piece has been on agreements not to poach employees, an important part of cartel formation is the ability to punish firms that deviate from, or externally threaten, the agreement. In this context, there is potential for cartelist employers to adopt a "do-poach" element in agreements. Entrants that experience a collective effort from rivals to poach their staff may have stumbled onto something, and competition authorities may wish to keep an eye out for such situations.[25]

B. Loser Fees and Burning Switchers

Another potentially interesting example, also from the 1990s, is from an Australian Freight cartel.[26] During the cartel period, part of the agreement between the firms was that they would not poach each other's customers. As noted previously, this is the mirror image of a no-poach agreement. The cartel also included provisions to deal with breaches of the agreement, for example if a customer insisted on switching. This included the payment of "loser fees" as compensation between cartelists to restore balance. Intriguingly, the cartelists also enacted a policy to "burn" switching customers by deliberately providing them with poor service. On at least one occasion, this caused delays to the freighting of a perishable good.

Such mechanisms have the potential to make cartels significantly more stable, so it is worth considering their applicability to no-poach agreements. On the face of it, it would appear easier for an employer to avoid suspicion by refusing to accept a new employee than for a seller to refuse a new customer. In some circumstances though, it may be better for employers to allow a switch if not to do so would raise suspicions. Therefore, if seeking to detect no-poach agreements, it may be worth monitoring the durability of job switches in addition to overall switching levels.

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22 For example, in July 2021, the Biden Administration issued an order encouraging the FTC to ban or limit non-compete agreements.

23 According to Starr (2021), 18 percent of U.S. workers have such clauses in their contract: Starr, E. et al, *Noncompetes in the U.S. Labor Force*, Journal of Law and Economics (2021).

24 1999/60/EC: COMP IV/35.691/E.4 - *Pre-Insulated Pipe Cartel* (1998).

25 While poaching staff from rivals is part of the competitive process, coordinated efforts to strategically poach staff from a new entrant could result in unusually high numbers of simultaneous departures evenly distributed among rivals.

26 Press release, Australian Competition and Consumer Commission, *Transport company, executives found guilty of attempted price fixing*, MR 039/98 (February 26, 1998).

CRIMINAL AND CIVIL LIABILITY FOR NO-POACH AGREEMENTS IN THE COVID-ERA

BY DAN M. FORMAN, ESQ.[1]

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In the COVID-era, employers seeking to protect their employee base and maintain compensation levels must be very careful not to run afoul of potential criminal and civil liability that can arise from no-poach or wage-fixing agreements reached with competitors. A no-poach agreement is an agreement among two or more employers not to hire each other's employees and/or to restrict compensation and/or benefits so that employees are not able to locate better compensation packages from the competition. Wage-fixing occurs when competitors agree to set salaries or wages or not to increase compensation. During the COVID-19 era, the United States Department of Justice ("DOJ") increased criminal prosecutions of employers in the health care arena with alleged no-poach agreements. In addition, many states have their own antitrust laws that provide for additional remedies, prosecution and litigation.

The first antitrust lawsuits related to no-poach agreements commenced in 2010 when the DOJ filed civil antitrust actions in the high-tech industry against Adobe, Pixar, Intel, Intuit and other name brand high-tech and entertainment firms arising from the employers' agreements not to recruit each other's employees. The non-recruitment agreements eliminated competition for employees and depressed compensation. The parties settled and the judgment enjoined the employers from entering into further agreements or restraining efforts to recruit or solicit the employees of competitors for five years. In 2013, a class-action case was filed against, essentially the same defendants, alleging violations of California's antitrust statute and right to compete law. By 2015, the Court approved over $400 million in settlements for the certified class of 65,000 employees.

In October 2016, the DOJ and the Federal Trade Commission published "Antitrust Guidance for Human Resource Professionals"[2] to warn employers against entering into formal or informal "no-poach" agreements. The DOJ's warning included notice that future matters will be subject to civil and criminal prosecution and threatened substantial fines and jail time. Criminal penalties associated with antitrust laws are significant. Corporations found guilty of criminal violations of antitrust laws may be liable for fines up to $100 million and individuals may be subject to $1 million in fines and up to 10 years in prison.

In 2018, the DOJ stepped up its commitment to combatting no-poach agreements when it promoted settlement of *USA v. Knorr-Bremse AG and Westinghouse Air Brake Technologies Corporation,* Case No. 1:18-cv-00747. The DOJ justified its civil settlement and lack of criminal prosecution because the no-poach agreements at issue had ceased before its 2016 guidance.

A significant civil antitrust settlement in excess of $50 million took place in 2019 against Duke University and the University of North Carolina Heath Care Systems' alleged agreement not to compete for certain employees with each other. The litigation was framed as a private class action on behalf of approximately 5,500 academic doctors and was supported, in part, by the DOJ as the settlement included injunctive relief to be monitored by the DOJ.

I. CRIMINAL PROSECUTIONS BY DOJ

At the end of 2020 and in early 2021, the DOJ fulfilled its long time promise to criminally prosecute parties to "no-poach" agreements as a criminal wage-fixing case, charging two employees of a Texas healthcare staffing company for colluding with another staffing company to decrease pay rates for physical therapists and physical therapist assistants.[3] A few months later, they filed three more no-poach criminal cases against other healthcare companies and their employees in Texas,[4] Nevada[5] and Colorado.[6] Each prosecution claims that the defendants reached agreements with their competitors not to recruit or hire each other's senior-level employees, and one of the cases involved wage-fixing claims, too, where the employers agreed to not only freeze wages, but actually agreed to decrease compensation.

The defendants in each case moved to dismiss the indictments and argued that no-poach agreements had not been criminally prosecuted before and that the agreements were not *per se* illegal.[7] Thus far, the Defendants have not been successful.[8] In November 2021, the Eastern District of Texas court denied the defendants' motion, and held that wage fixing fell within the *per se* rule against price fixing. And, of

2 See https://www.justice.gov/atr/file/903511/download.

3 United States v. Jindal, et al., No. 4:20-cr-00358 (E.D. Tex.).

4 United States v. Surgical Care Affiliates LLC et al., 3:21-cr-00011 (N.D. Tex.).

5 United States v. Hee, 2:21-cr-00098 (D. Nev.).

6 United States v. Thiry et al., 1:21-CR-00229 (D. Col.).

7 *See* https://www.pbwt.com/content/uploads/2022/02/Jindal-MTD-3.pdf.

8 *See* Jindal, 2021 WL 5578687 (E.D. Tex. Nov. 29, 2021); Thiry, 2022 WL 266759 (D. Colo. Jan. 28. 2022).

significance, the Court was not sympathetic and rejected defendants' argument that due process was violated even if the case was the first one to be prosecuted commenting on the stroke of bad luck for the defendants to be the first ones prosecuted criminally.

In Colorado, the Court also denied the defendants' motion to dismiss the criminal charges arising from the alleged no-poach agreements. The Court concluded that the no-poach agreements at issue constituted a standard horizontal market restriction long recognized as a per se Sherman Act violation and rejected the due process argument, too, siding with the DOJ.

More recently, on the East Coast, in January 2022, the DOJ brought forth criminal charges following a Portland, Maine, federal grand jury indictment of four individuals.[9] The defendants are owners and/or managers of home health care agencies that hire Personal Support Specialists ("PSS") workers and allegedly agreed not to hire each other's workers (no-poach agreements) and agreed to fix the wages of the workers. While the DOJ announced that it was the first indictment of antitrust prosecution in the PSS industry, it appears to continue the DOJ's COVID-era trend of focus on the greater health care industry and alleged attempts by certain employers to keep wages frozen and depress competition at a time of great demand on this sector.

II. THE FRANCHISOR-FRANCHISEE RULE OF REASON EXCEPTION

In 2018, three cases were filed by employees seeking damages and order to enjoin the enforcement of no-poach agreements in the United States District Court for the Eastern District of Washington.[10] The plaintiffs claimed that the no-poach agreements that each franchisee employer had executed, were unlawful per se antitrust violations because of the anticompetitive effects of the agreements and that horizontal competition for employees was being stifled. However, most antitrust cases, historically, have recognized that a franchise's no-poach agreement may be enforced under the "rule of reason." The rule of reason requires a fact finder to decide whether the questioned practice, here a no-poach agreement, imposed an unreasonable restraint on competition after accounting for a variety of factors.

The DOJ filed Statements of Interest confirming that it took the position that franchisor-franchisee agreements do not provide grounds for antitrust claims under either the "quick look" or *per se* antitrust analysis and that the rule of reason should continue to apply because the franchisor and the franchisee conduct business at different levels of the market structure. The DOJ concluded that intrabrand restrictions (i.e., geographical limits on franchisees ability to hire employees of other franchisees under the same franchisor) on competition promote competition against competitors, or interbrand competition. Thus, under the rule of reason, a plaintiff faces substantial hurdles to even raise a claim asserting improper market power in the relevant market when franchisee employees are not precluded from seeking other fast food jobs from competitors, and are only limited from seeking employment from other franchises of the same franchise. However, that same Statement of Interest points out that a different antitrust conclusion may apply if the franchisor also competes in the same market as its franchisee. Shortly thereafter, the Washington's Attorney General filed its own brief claiming that the *"per se"* standard applied under state law.

All three cases in the Eastern District of Washington settled and were dismissed and the Courts did not adopt or comment on either the DOJ or the Washington AG's positions.

III. CURRENT LEGISLATIVE CLIMATE

The legislative climate in Washington DC is not likely to support new legislation that would remove no-poach agreements from civil or criminal antitrust prosecution. To the contrary, future enforcement actions are likely as the DOJ puts more resources toward criminal prosecution of no-poach agreement parties.

Other signals demonstrate that the Congress will not support such legislation as "employee friendly" laws are getting support from the legislature and the Oval Office. HR 4445 passed the House and the Senate in a bi-partisan manner and was signed into law amending the Federal Arbitration Act to prohibit mandatory arbitration of employee claims of sexual harassment or sexual assault. The Biden administration has signaled support to restrict the use of non-compete agreements with employees, and the Federal Workforce Mobility Act (FWMA) is said to have bi-partisan support. The FWMA, if passed, will prohibit most non-compete agreements with employees. Moreover, while it might not survive in the Senate, the House passed the Forced Arbitration Injustice Repeal Act of 2022 (FAIR) which prohibits enforcement of arbitration agreements if the agreement requires arbitration of an employment, consumer, antitrust, or civil rights dispute.

9 https://www.pbwt.com/content/uploads/2022/02/Manahe-Indictment.pdf.

10 *Stigar v. Dough Dough Inc.*, No. 2:18-cv-00244; *Harris v. CJ Star LLC*, No.2:18-cv-00247; and *Richmond v. Bergey Pullman Inc.*, No. 2:18-cv-00246.

IV. THE JURIES ARE IN

On April 14 and 15, 2022, the jury in each of Jindal and Thiry returned not guilty verdicts on the anti-trust charges related to the no-poach agreements.[11] The DOJ found solace in the conviction of Jindal for obstructing the FTC's investigation.

V. CAUTION AHEAD

DOJ prosecutions are not limited to formalized documents entitled "No Poach" agreement but will prosecute cases based on email, verbal conversations and inferences drawn from such communications. Thus, employers should be diligent and train managers responsible for hiring and retention to be alert at all times and avoid situations that might imply a "no-poach" agreement. Such diligence should treat such communications with the same level of gravity as when working to prevent sexual harassment or other forms of discrimination. Moreover, an employer that utilizes third-party recruiters could be liable if the recruiters are considered complicit in a no-poach scenario among competitors.

Industry conferences, round tables and seminars provide a ripe environment for executives to reach a handshake agreement not to hire employees of competitors or to freeze wages for certain categories of employees. While such agreements might provide short term relief from employee departures, it also can bring long term expensive and costly civil litigation and potentially jail time for those involved.

In addition to training, employers should develop a written policy against no-poach agreements and what to do if a competitor implies or suggest that a no-poach agreement could be a "win-win."

The DOJ's history of criminal prosecution of no-poach agreements in the healthcare industry will continue as it promotes its prosecutions as good policy to support employee care givers at a time of a health crisis. However, other industries should stay alert because with increased funding for prosecuting these cases, it is expected that the DOJ will seek criminal prosecutions in other industries in the very near future. Also, even though the DOJ concluded that the Washington franchisor-franchisee no-poach agreements were not per se antitrust violations, given the change in administration and the caveats that the DOJ's statements included, the DOJ might take a very different position if it examines the franchisor-franchisee no-poach situation, especially where the franchisor competes with its franchisee.

And, while the District Courts have, to date, sided with the DOJ's criminal prosecution of no-poach agreement parties, it should be noted that the Courts of Appeal have not addressed a single case on this topic. Thus, there is no binding appellate or Supreme Court guidance that no-poach agreements are, indeed, per se, antitrust violations that come with criminal penalties and prison sentences. And, while the juries vindicated the defendants on the claims related to no-poach agreements, the DOJ, will learn lessons from these initial prosecutions from which future defendants will pay the price.

11 *See* https://www.justice.gov/opa/pr/former-health-care-staffing-executive-convicted-obstructing-ftc-investigation-wage-fixing; and https://coloradosun.com/2022/04/15/federal-jury-acquits-davita-ex-ceo-kent-thiry-in-antitrust-case/.

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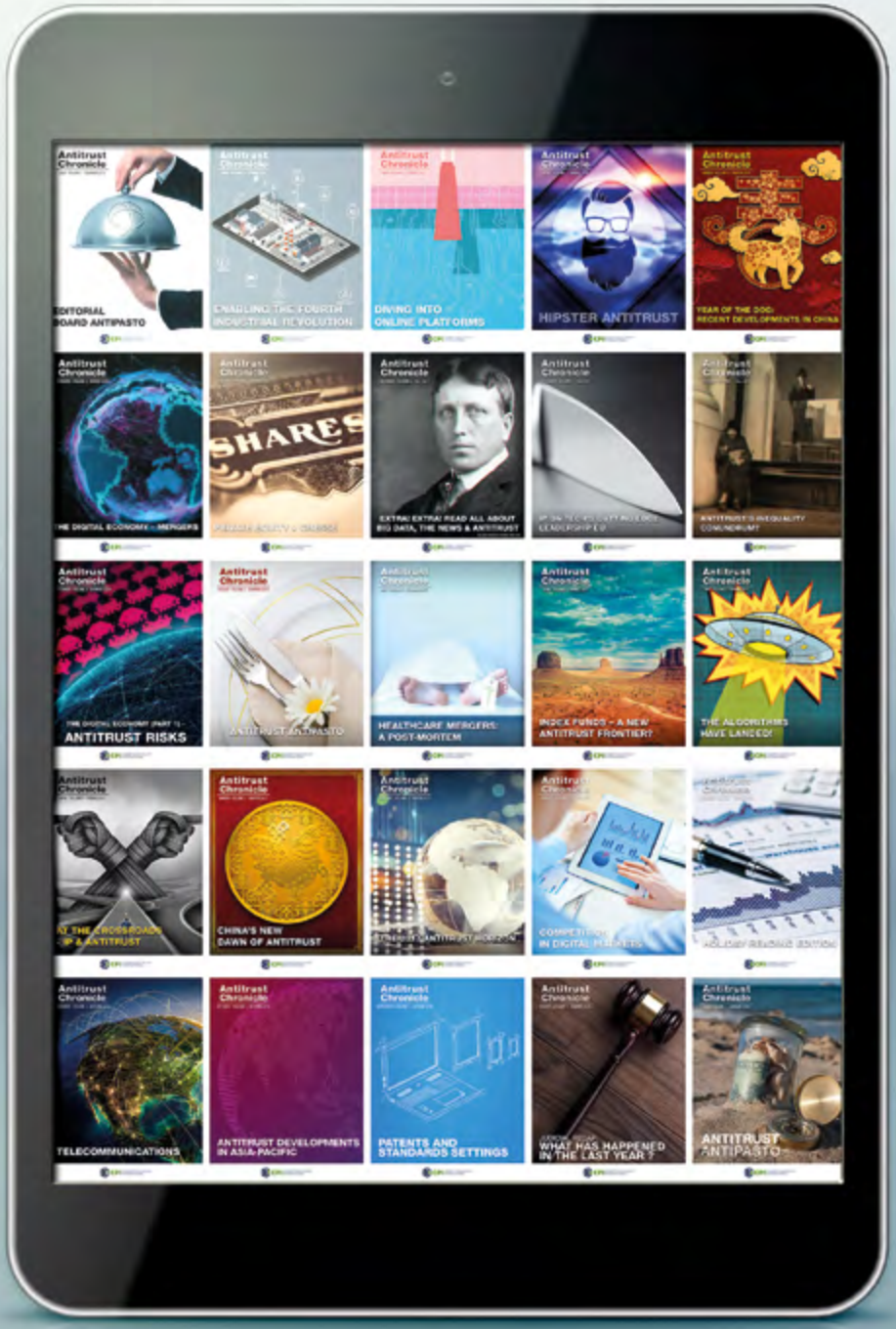


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