SQUIRE PATTON BOGGS

Competition Enforcement in Labour Markets

The Recent European Commission and CMA Investigations and European Update

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As of recently, employment practices have come on the radar of cartel enforcement in Europe. Today, on 21 November 2023, the Commission has announced that it carried out dawn raids for a suspected cartel infringement relating inter alia to no poach agreements. This follows an investigation by the CMA into hiring practices among broadcasters. By focusing on such agreements, the EU and the UK are following in the footsteps of the US, which has been looking at anticompetitive practices among companies in the hiring of employees for some years.

As expected, those developments have caused several national authorities to pay closer attention to the topic, with the UK's Competition and Markets Authority (CMA) being no exception – Brexit notwithstanding. The latest big swing came in October 2023, as the CMA opened its second investigation into suspected fixing of staff rates by broadcasters.

Areas of Concern

Competition law infringements arising in the employment field could include agreements between (groups of) companies (i) not to hire each other's staff members at all (called the no-poaching agreements), or (ii) not to offer them a higher salary to move (called the wage-fixing agreements). Such agreements reduce the employees' mobility and can negatively affect competition by preventing new companies from breaking into markets where their success is dependent upon being able to hire employees with the right skill sets. In Ms. Vestager's words, no-poaching agreements between employers are "*an indicated way to keep wages down, restricting talent from moving where it serves the economy best*".

Interestingly, in its recently updated Horizontal Guidelines, the European Commission expressly listed wage-fixing agreements among "by object" restrictions, meaning that they are automatically illegal without the need to show negative effects. This is similar to a purchasing cartel, except that the object is not a raw material or a manufactured product but the employees.

An important aspect of cartel enforcement is information exchange, which reduces uncertainty among competitors in sensitive areas, such as their purchasing price. Applied to the world of employment, this means that exchanges on individual (non-tariff) salaries – including indirectly through publications – are problematic.

Essentially, the terms and conditions of employment should be treated as similar to pricing information, and their exchanges as similar to a price fixing cartel. Of course, there is difficulty with this approach because terms and conditions of employment are not information that purely "belongs" to the company, but also to the employee.

Enforcement Trends

European national authorities have developed further principles through enforcement action and guidelines, with countries like the UK and France being the first-movers. We discuss below the notable trends in select jurisdictions, although there is enforcement happening in other jurisdictions as well (e.g. Hungary and Portugal). As enforcement priorities of the major antitrust enforcement authorities tend to harmonise, it is probably only a matter of time before other authorities also focus on employment practices.

EU

Already in 2021, the EU Competition Commissioner Margrethe Vestager delivered a speech on the EU's cartels policy during which she announced an increased EU interest in anticompetitive hiring practices. Today, on 21 November 2023, the Commission has, for the first time, announced that it carried out dawn raids for a suspected cartel infringement relating inter alia to no poach agreements. This investigation may have the same effect as previously the first Commission investigation into purchasing cartels and put employment cartel law on top of the agenda. Already in the recent past we have seen companies extending their compliance programs to include HR personnel and review internal policies with regard to providing information on compensation levels.

UK

The UK's CMA is at the forefront of developments. On 9 February 2023, the CMA published guidance for employers on how to avoid anticompetitive behaviour. This outlines the three main ways in which anticompetitive behaviours can arise in labour markets. No-poaching agreements are the first example of anticompetitive behaviour that the CMA warns against. The guidance also discusses the anticompetitive nature of wage-fixing agreements, which are agreements between two or more employers to fix employee pay or any other employee benefits. The final key anticompetitive behaviour warned against by the CMA is information sharing, i.e. two or more entities sharing sensitive commercial information with anticompetitive ramifications, because of its impact on recruitment and retention in the labour market.

In its guidance, the CMA outlines a number of steps that businesses can take to ensure that they do not inadvertently engage in anticompetitive behaviour, including (i) understanding how competition law applies to no-poaching and wage-fixing agreements, (ii) ensuring that no sensitive wage or similar business information is shared with a competitor, (iii) ensuring that recruitment staff are provided with training on competition law and how it applies in the recruitment context and (iv) ensuring that they have robust internal reporting processes in place. The fundamental principles that (i) not all anticompetitive agreements are in writing and that some may take the form of informal practices and (ii) that anticompetitive agreements may also cover freelancers and contracted workers, as well as salaried staff is reiterated in the guidance. Finally, the CMA makes it clear that any anticompetitive behaviour within the labour market should be reported as soon as possible.

The CMA made a step further by opening two investigations into broadcasters of television content (one investigation covering sports and the other non-sports content). Both investigations are looking into possible agreements among broadcasters concerning the employment of staff and the purchase of freelance services and are in the information gathering phase.

France

Lately, Isabelle de Silva, former president of the French Competition Authority (**FCA**), has stated in her farewell speech that the FCA should take stronger action on anticompetitive behaviours in the labour markets in the future. Marriage between competition law and employment is, therefore, not new in France and is likely to raise more and more questions.

The FCA has also already taken an interest in potential antitrust harm in the labour markets. Since 2016, the French regulator has issued several decisions and an opinion related to the interplay between competition and employment. On the one hand, the FCA has qualified certain labour-related practices as anti-competitive, as part of the "wider" cartel cases. In 2016, for example, it sanctioned various modelling agencies for collaborating, together with their professional association, price-lists fixing and, in particular, the salary to be paid to the models. The following year, companies active in the floor-covering market were sanctioned by the FCA for price fixing, no-poach agreements and exchanges on wages. On the other hand, the French competition regulator has issued an opinion on the extension of "branch agreements" and the effects they have on competition. Branch agreements are collective labour agreements concluded between trade unions and at least one employers' association at the branch level. In France, such agreements can be expanded to make the provisions compulsory for all employees and employers included in its territorial and professional scope. However, since 2017, the French Minister of Labour has been able to refuse their extension for "*reasons of general interest, in particular for excessive harm to competition*". Asked for an opinion, the FCA noted the social benefits of branch agreements, but also stated that these agreements could be anticompetitive.

In regard to non-solicitation or no-poach agreements, the French *Cour de cassation* recognises the validity of such clauses provided that they are proportionate to the interests that are to be protected. From a competition law perspective, the FCA has not published guidelines on non-solicitation agreements or no-poach agreements (in contrast to its English counterpart). Nevertheless, in 2017, it sanctioned the competitors in the floor-covering sector for having adopted a "tacit non-aggression agreement" or a "gentleman's agreement". This agreement prohibited the companies from actively soliciting each other's employees for several years. The FCA stated that this agreement – effectively, a no-poach agreement – was a part of a complex and continuous infringement with an anticompetitive object.

Poland

In contrast to the UK, there are no general or specific guidelines available from the antitrust regulator in Poland (**UOKIK**) when it comes to non-solicitation or non-poaching agreements. However, this does not mean that such acts do not happen in practice, or that the Polish regulator is unaware or not concerned. UOKIK notes interest in such practices from the US, the UK and the EU regulators and looks at them from the perspective of agreements between entrepreneurs which prevent, restrict or distort competition but also possibly will allow some exceptions under doctrine of ancillary restraints (i.e. any restriction that is directly related and necessary to the implementation of a main agreement). Their specific focus would be on wage-fixing or no-poach agreements.

There are no provisions in the Polish Labour Code dealing with poaching of employees. However, under article 12 of the Fair Trading Act, it is considered an unfair trading practice to induce a person employed by an entrepreneur on the basis of an employment relationship or other legal basis to neglect or improperly perform their duties or other contractual obligations for personal gain or for the benefit of a third person, or to cause a disadvantage to the entrepreneur. This restriction assumes that inducing non-performance or improper performance of the contract is an unfair trading practice.

As for wage-fixing, notable cases in Poland concern remuneration rates for sportsmen. In one of the cases, UOKIK found unlawful an agreement between the Polish Basketball League and basketball clubs on reducing the players' monetary benefits due to the COVID-19 pandemic. Another investigation targeted regulations adopted by the Polish Automobile and Motorcycle Federation providing for maximum rates of remuneration that sports clubs may pay to participants. The most recent case (November 2023) involved nurses who notified wage fixing by hospital directors in Wrocław, alleging that they keep the rates intentionally low to achieve overtime work.

Germany

The German competition authority has not published specific legal guidance. However, it is clear that no-poach and wage-fixing agreements could form a competition law infringement and be subject to investigations and fines.

Spain

The position in Spain is in line with that in Germany, as there have been no policy statements from the competition authority on the topic. Notable cases include two cartel decisions from 2010 and 2011, which, on top different price-fixing elements, addressed no-poaching and information exchange on wages.

Czech Republic

To date, the Czech competition authority (UOHS) has not issued any specific guidelines concerning inter-employer agreements and there is not yet any specific case law from the Czech courts regarding this issue. However, focus on labour markets is increasing, as UOHS closed its first labour market investigation in October 2023. In response to UOHS's objections, two Czech associations (Association of Czech Travel Agencies and Association of Used Cars Vendors) have agreed to stop promoting non-compete clauses among their members. In this respect, UOHS has also declared that it will be its priority to focus on wage-fixing and no-poaching agreements between employers, as these can interfere with fair competition. When assessing this type of agreements in the future, it is likely that the UOHS will also consider case law from other jurisdictions, especially other EU countries.

In the case of acquisitions and joint ventures, inter-employer arrangements are normally accepted by the competition authorities if they are part of the transaction, are necessary for its implementation and are limited in time and geography. This follows the practice of the European Commission, which has found a non-solicitation commitment for specific senior employees of the target company to be permissible in the context of a merger clearance. Outside the M&A area, a non-solicitation commitment may also be justified if it is part of a broader cooperation between the parties and is proportionate to that cooperation. In any event, the commitment should always be limited in time and should only apply to selected employees (e.g. those in whom the employer has invested a large amount of resources for training and know-how transfer, and so whose loss to a competitor would pose a particular threat to the business).

Belgium

In Belgium, there is no case law on this matter nor any guidelines. However, several investigations into the labour market appear to have been carried out by the Belgian Competition Authority. Furthermore, in 2022, the Belgian Regulator's budget was increased, allowing it to have more resources *"to deal with new challenges such as competition in the labour market"*. Further developments in this area seem only a matter of time.

No-poach agreements are legal in Belgium, if they are limited in time and space, restricted to a specific activity and grant the employee a level of financial compensation. It appears that the Belgian Regulator has not yet assessed the prospective antitrust harm of such clauses. However, the Belgian Competition Authority has indicated that it will take more stringent action on concentrated practices in the world of sport, with particular focus on no-poach agreements.

Switzerland

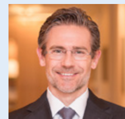
In December 2022, the Swiss competition authority (COMCO) investigated 34 banks for colluding on salaries, marking its first-ever probe into labour markets. The alleged practices consisted in banks sharing information about what they pay certain categories of their employees. COMCO stated that, if necessary, the procedure can be extended to other geographical regions and companies.

What Next?

The heightened attention of the European Commission and national authorities to this matter collides squarely with the war for talent that most employers are currently facing and that may encourage them to precisely consider those arrangements that have now come under scrutiny. They will need to tread a careful line between measures to retain their own staff and the information and connections they possess on the one hand and not unnecessarily restricting their own ability to hire exactly such people out of their competitors.

Companies will need to be extra careful when they discuss their approach on how to face the challenges in the employment market. Company policies and training may have to be revised to address situations where these discussions are taken outside the company to (informal) platforms organised on an industry level. Where the HR team may have traditionally not been included in competition training sessions, it is recommended to extend the invitation to them going forward. Lastly, this may be a suitable time to review the template employment and service agreements to ensure that they will be compliant.

Contacts



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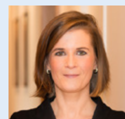

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