European Commission Turns Focus to Competition in Labour Markets, Targeting Wage-Fixing and No-Poach Agreements

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Key Points

As a new policy statement from the European Commission (EC) treats wage-fixing and no-poach agreements as inherently anticompetitive (restriction of competition "by object") with few possible defences, companies should consider:

- Ensuring their compliance tools reflect the risks of wage-fixing and no-poach agreements.
- Refraining from agreements and information exchanges on wages, compensation or benefits.
- Relying on alternative safeguards to retain talent, prevent disclosure of non-patent IP rights and protect investments in employee training (*e.g.*, nondisclosure agreements, gardening leave or other post-employment restrictions).
- Carefully tailoring agreements to achieve talent retention in the case of "acqui-hires" (*i.e.*, transactions where the main aim is to obtain the target's talent).

Until now, the EC's Directorate-General for Competition has not pursued enforcement actions involving a self-standing wage-fixing or no-poach agreement. That may change following a 3 May 2024 policy brief, which heralds a new focus on wage-fixing and no-poach agreements.

- The brief states that wage-fixing and no-poach agreements between competitors are so harmful that the agreements will be treated as automatically illegal (restrictions "by object") without the need for the EC to show anticompetitive effects.
- Such agreements will generally not qualify for exemption on the ground they provide business efficiencies or are legitimate ancillary restraints.
- The EC has several open cartel investigations into no-poach agreements.

Automatic 'by Object' Illegality

Despite the lack of EC decisional practice regarding wage-fixing and no-poach agreements, the brief classifies such agreements as so deleterious that they should be considered restrictions "by object," and therefore automatically illegal without proof of their effects on competition.

The brief compares such agreements to buyer cartels, which fall within the scope of Article 101 of the Treaty on the Functioning of the European Union (TFEU). Wage-fixing is considered a form of purchase-price fixing, and no-poach agreements are considered a form of supply-market sharing, each respectively treated as a "by object" violation in past EC decisions and case law of the EU courts.[1]

The brief further states that there will generally be no defence for labour market agreements. The EC will not accept arguments that an agreement is necessary because it protects a company's incentive to invest in training its employees or because the agreement protects non-patent intellectual property that employees could take with them when moving to a competing company. This rejection is because less restrictive means — such as nondisclosure agreements, obligations to stay with an employer for a minimum amount of time, the repayment of proportionate training costs, gardening leave or lawful employer-employee noncompete clauses — can achieve the same objectives.

[1] *See* the decisions and case law cited in footnotes 33 and 34 of the brief.

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By contrast, traditional employer-employee post-term noncompete covenants are generally outside the scope of EU competition law. Applicable legislation requires an agreement between at least two undertakings, and an employee is not considered an "undertaking" for EU competition law purposes. However, since agreements between self-employed persons are technically agreements between undertakings,[2] the EU competition law prohibition of wage-fixing and no-poach agreements applies to such agreements.

The fact that the companies are not competitors in any downstream market is irrelevant. The brief states the relevant market is the market for talent, regardless of whether the companies also compete in any product market(s). So companies in different industries (for example, gambling and insurance) may not agree not to poach each other's statisticians.

High Bar for Ancillary Restraints

Restrictions agreed upon in the context of other legitimate transactions — for example, outsourcing or R&D agreements — might be considered lawfully ancillary to the main transaction because companies might not want to risk collaboration if their employees could be poached by a partner. EU competition law recognizes the ancillary restraints doctrine where:

- The main transaction is nonrestrictive.
- The restraint is directly related to that transaction.
- The restraint is necessary for the implementation of the transaction.
- There are no less restrictive means to allow the transaction to take place.

While the EC's approach towards wage-fixing and no-poach agreements remains to be tested, standard nonsolicitation covenants in the context of an M&A transaction could, for example, be justified under the ancillary restraints doctrine if the criteria above are met.

National competition authorities have considered labour market agreements as ancillary restraints. For example, in 2018, the Croatian competition authority found that a no-poach agreement between two undertakings relating to the provision of IT services qualified as an ancillary restraint because the agreement was directly linked to the implementation of the main agreement, and the no-poach agreement was objectively necessary for the main agreement. However, the new EC brief signals that such arguments will rarely be accepted.

Efficiency Defence Unlikely

Also, a business justification exemption will generally not be available. Under EU competition law, agreements that restrict competition, even "by object" violations, may be exempted based on business efficiencies. Parties must show that (i) the agreement contributes to business efficiencies; (ii) consumers receive a fair share of the benefits; (iii) the restrictions are indispensable; and (iv) the agreement does not substantially eliminate competition.

The brief contests that wage-fixing agreements may generate pro-competitive effects. Similarly, while no-poach agreements might protect companies' incentives to invest in training employees without fear that competitors would later hire away those employees, net efficiencies remain uncertain. And a no-poach agreement will generally fail the indispensability requirement considering less restrictive means exist, such as nondisclosure agreements, obligations to stay with an employer for a minimum amount of time, repayment of proportionate training costs, gardening leave and noncompete clauses.

Growing Enforcement Around the World

In recent years, labour market agreements have become a priority for competition authorities around the world. At the EU member states level, regulators have issued guidance (*e.g.*, Danish, Norwegian, Swedish, Finnish and Icelandic competition authorities' January 2024 "Joint Nordic Report on Competition and Labour Markets") and opened numerous investigations. For example, in May 2024, the Portuguese competition authority opened an investigation against a global tech consultancy firm that allegedly agreed not to hire its rivals' employees. Also, the Slovakian competition authority opened an investigation into a potential labour cartel agreement to examine whether a national trade association restricted competition when hiring employees through a provision in the code of ethics it had adopted.

Authorities have also not hesitated to impose fines (*e.g.*, on real estate agencies in Lithuania (a €969,060 fine), football league clubs in Portugal (a €11.3 million fine) and tech consultancies in Portugal (a €1,323,000 and a €2,481,000 fine).

In the UK, in January 2024, the Competition and Markets Authority (CMA) published a "Competition and Market Power in UK Labour Markets" research report. The CMA currently has at least three investigations into alleged restrictive labour market agreements pending.

In the US, antitrust regulators at the Department of Justice and the Federal Trade Commission (FTC) have been focusing since the Obama administration on competition in labour markets,

[2] *See* Guidelines on the Application of Union Competition Law to Collective Agreements Regarding the Working Conditions of Solo Self-Employed Persons, OJ C 374, 30.9.2022, paragraph 6.

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both in the merger context and where noncompete agreements limit employees' freedom to change jobs. (See our March 2024 article "Antitrust Enforcers Are Increasingly Focused on Labor Markets, and Not Just in the Merger Context.")

However, the EU position set out in the new brief seems to be more lenient than the current Biden administration's policy in the US, where the FTC recently adopted a rule broadly banning new noncompete agreements and rendering existing noncompete agreements unenforceable other than for certain "senior executives." (That FTC rule is slated to take effect on 4 September 2024, assuming that the rule is not enjoined or otherwise delayed by legal challenges.)[3] In contrast, the EC brief suggests that noncompete clauses are a potentially valid alternative to no-poach and wage-fixing agreements, as long as the clauses comply with national laws. However, in addition to explicit agreements, which the US requires, the EU regime covers concerted practices, and thus is more stringent than the US is regarding implicit agreements.

[3] See our 8 May 2024 alert "FTC Ban on Noncompetes Now Slated To Take Effect on September 4."

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