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Competition policy brief

Antitrust in Labour Markets

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Introduction

In the past few years, enforcement against restrictive labour market agreements[1] has become a priority for many competition authorities worldwide. Like other enforcers, the Commission has warned against the harm that can stem from wage-fixing and no-poach agreements. In two recent guidelines, the Commission expressed its view that wage-fixing and no-poach agreements are likely to infringe Article 101 TFEU by object.[2]

The Commission is investigating such cases and recently carried out unannounced inspections in the sector of online ordering and delivery of food, groceries and other consumer goods involving, *inter alia*, a suspected no-poach agreement.[3] As a part of the European Competition Network (ECN), the Commission usually deals with cases that concern several Member States. Since labour markets are often national, regional or local, national competition authorities are more likely than the Commission to deal with wage-fixing and no-poach agreements. However, as in other areas of competition enforcement, the well-established cooperation in the network of European competition enforcers ensures consistent application of EU competition law.

Although the Commission has not yet adopted a decision concerning a self-standing labour market agreement, this brief outlines how such labour market agreements should be dealt with under EU competition law. Both wage-fixing and no-poach agreements will in most cases qualify as restrictions by object under Article 101 TFEU and are unlikely to meet the requirements to qualify as ancillary restraints; moreover they are unlikely to meet the requirements for an exemption under Article 101(3) TFEU. For an overview of relevant precedents or recent developments in the EU Member States and/or non-EU jurisdictions, we refer to the guidance papers and reports issued by several enforcers.[4]

In a nutshell

Wage-fixing and no-poach agreements generally qualify as restrictions by object under Article 101(1) TFEU.

While the pro-competitive effects of such agreements must be considered if demonstrated and significant, net efficiencies are uncertain and less restrictive means of achieving them are generally available.

Most of the cases are likely to be dealt with by National Competition Authorities due to the geographic scope.

However, the Commission is actively investigating cases in this sector and will remain coordinated within the European Competition Network.

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[1] Whenever we use the term "agreement" in this article we refer to both agreements and concerted practices.

[2] Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements ("Horizontal Guidelines"), OJ C 259, 21.7.2023, pp. 1-125, paragraph 279, and 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, pp. 2-13, paragraph 17, example 2. This brief concerns the application of Article 101 TFEU to wage-fixing and no-poach agreements, altogether "labour market agreements", and does not concern the assessment of the same agreements in the context of a concentration, for which we refer to the Commission Notice on restrictions directly related and necessary to concentrations, OJ C 56, 5.3.2005, 5.3.2005, p. 24–31. Collective bargaining agreements between organizations representing employers and employees are also outside the scope of this brief.

[3] See press release of 21 November 2023, Antitrust: Commission carries out unannounced inspections in the online food delivery sector, IP/23/5944.

[4] See, among others, Autoridade da Concorrencia, "Labour market agreements and competition policy – Issues Paper – Final Version", September 2021; Konkurranse Tilsynet, Konkurrensverket, Konkurrence- Og Forbrugerstyrelsen, Samkeppniseftirlitið, Finnish Competition and Consumer Authority, Joint Nordic Report, Competition and Labour Markets, 2024.

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Wage-fixing and no-poach agreements: definitions

In wage-fixing agreements, employers agree to fix wages or other types of compensation or benefits.

In no-poach agreements employers agree not to "steal" employees[5] from each other. There are various types of no-poach agreements. In "no-hire" agreements, employers agree not to hire actively *or* passively employees of other parties to the agreement. In "non-solicit" (also called "no-cold-calling") agreements, employers only agree not to *actively* approach another employer's employees with a job opportunity. Such agreements may be sector-wide or only involve a few parties, bilateral or multilateral, one-way or two-way, i.e., bind only one party or be reciprocal. In our view, these distinctions do not have any influence on the conclusion that such agreements can be restrictions by object.

Economic harm caused by wage-fixing and no-poach agreements

From an economic point of view, wage-fixing is detrimental to employees, whose wages and other benefits are depressed. Wage-fixing firms maximize joint profits by setting wages equal to the monopsony wage level via a reduction of labour demand, with the side effect of reducing output and increasing downstream prices to the detriment of consumers.[6] Monopsony wage setting in concentrated labour markets has been found to lead to lower wage levels both in the US and the EU[7] and has also been linked to sluggish GDP growth.[8]

No-poach agreements have similar detrimental effects to wage-fixing agreements. They are likely to reduce labour market dynamism with resulting negative effects on employee compensation, firm productivity, and innovation.

No-poach agreements reduce wages, because the participating firms no longer offer higher wages to induce employees of other participating firms to switch and/or counteroffer to induce their own employees to stay.[9] No-poach agreements are typically secret, and employees are unaware of them. Therefore, they also cannot negotiate ex-ante to be compensated for the reduced future job prospects. These agreements therefore increase employees' search costs and reduce employees' incentives to invest in training.

No-poach agreements also prevent the efficient allocation of productive employees to productive firms. First, firms have an incentive to hire more employees if it is profitable to expand output. Empirically, productive firms offer higher wages, have a larger workforce, and poach more employees than less productive firms.[10] Second, firms have an incentive to poach employees from rival firms if these employees are more productive than unemployed employees (including recent graduates). Empirically, employees searching on the job tend to move up a "job ladder" by switching to more productive firms over time. Furthermore, more productive employees are more likely to search for new positions, because they stand to gain more from switching.[11] Declining job reallocation rates have been linked to declining productivity and hence slower GDP growth.[12] No-poach agreements also reduce

[5] In this document we use the term "employee" to refer to both employees in the strict sense, i.e., individuals performing their duties on the basis of an employment agreement and under the direction of their employer, and to "false self-employed" persons, i.e., service providers in a situation comparable to that of employees (see Judgment of the Court of 4 December 2014 in Case C-413/13 - *FNV Kunsten Informatie en Media v Staat der Nederlanden*, EU:C:2014:2411, paragraphs 31-34 and case-law cited).

[6] A monopsony is an input market with a single buyer. In the standard monopsony setting, all employees receive the same wage per hour, output increases with the increase of input labour, there is an upward sloping labour supply curve and a downward sloping demand curve. In this setting, the monopsonist can exert market power by reducing labour demand. This implies that using less labour leads the wage paid to employees to decrease. At the same time, lower labour input implies that less output can be produced and sold on the downstream market, so *ceteris paribus* prices go up. As a result, consumers are harmed. These findings can be generalized to any situation where the exertion of buyer power distorts labour demand and hence output. Also see Suresh Naidu, Eric A. Posner, "Labor Monopsony and the Limits of the Law", Journal of Human Resources, April 2022, Vol. 57(S), pp. S284-S323; Alan B. Krueger, and Orley Ashenfelter, "Theory and Evidence on Employer Collusion in the Franchise Sector". Journal of Human Resources, April 2022, Vol. 57(S), pp. S324-S348.

[7] See for example, Ioana Marinescu, Ivan Ouss, Louis-Daniel Pape, "Wages, hires, and labor market concentration", Journal of Economic Behavior & Organization, April 2021, Vol. 184, pp. 506-605; Efraim Benmelech, Nittai K. Bergman, and Hyunseob Kim, "Strong Employers and Weak Employees – How Does Employer Concentration Affect Wages? Journal of Human Resources, April 2022, Vol. 57(S), pp. 200-250; Satoshi Araki, Andrea Bassanini, Andrew Green, Luca Marcolin and Cristina Volpin, "Labor Market Concentration and Competition Policy Across the Atlantic", University of Chicago Law Review, 2023, Vol. 90(2) p. 339-378, at p. 341, pp. 347-348.

[8] David Berger, Kyle Herkenhoff, Simon Mongey, "Labor Market Power", American Economic Review, April 2022, Vol. 112(4), pp. 1147-1193; Rüdiger Bachmann, Christina Bayer, Heiko Stüber, Felix Wellschmied, "Monopsony Makes Firms Not Only Small but Also Unproductive: Why East Germany Has Not Converged", 2023, Working Paper, University of Bonn and University of Mannheim.

[9] A growing body of empirical literature suggests that no-poaching agreements depress wages, see Matthew Gibson, "Employer Market Power in Silicon Valley", 2022, IZA Discussion Paper No. 14843; Francine Lafontaine, Saattvic Saattvic and Margaret Slade, "No-Poaching Clauses in Franchise Contracts", April 2023, available at SSRN 4404155, https://ssrn.com/abstract=4404155 or http://dx.doi.org/10.2139/ssrn.4404155; Brian Callaci, Matthew Gibson, Sergio Pinto, Marshall Steinbaum and Matthew Walsh, "The Effect of Franchise No-Poaching Restrictions on Worker Earnings", July 2023, available at SSRN 4155577, https://ssrn.com/abstract=4155577 or http://dx.doi.org/10.2139/ssrn.4155577.

[10] John C. Haltiwanger, Henry R. Hyatt, Lisa B. Kahn, and Erika McEntarfer, Cyclical Job Ladders by Firm Size and Firm Wage", American Economic Journal: Macroeconomics, April 2018, Vol 10(2), pp. 52-85 and Sabrina Di Addario, Patrick Kline, Raffaele Saggio and Mikkel Sølvsten, "It Ain't Where You're from, it's Where You're at: Hiring Origins, Firm Heterogeneity, and Wages", Journal of Econometrics, April 2023, Vol. 233(2), pp. 340-374.

[11] Jesper Bagger, and Rasmus Lentz, "An Empirical Model of Wage Dispersion with Sorting", The Review of Economic Studies, January 2019, Vol 86(1); David Card, "Who Set Your Wage?", American Economic Review, April 2022, Vol 112(4), pp.153-190.

[12] Ryan Decker, John Haltiwanger, Ron S. Jarmin, and Javier Miranda" Changing Business Dynamism and Productivity: Shocks versus Responsiveness", American Economic Review, December 2020, Vol 110(12), pp.3952-3990.

the dynamism of the labour markets concerned and may have detrimental effects on innovation since employees do not switch to the employers where they are most valuable.[13]

Wage fixing and no-poach agreements characterized as restrictions of competition by object

Applicable law

It is settled case-law that restrictions by object are those that "*reveal a sufficient degree of harm to competition*" so that there is no need to examine their effects.[14] This means that certain types of coordination between undertakings can be regarded, "*by their very nature*", as harmful to the proper functioning of competition.[15]

The Court has clarified that the concept of restriction by object should be interpreted restrictively[16] and provided a template to assess whether an agreement indeed "*reveals a sufficient degree of harm*". In particular, the Court listed a few criteria that one should consider to assess whether a possible infringement is a restriction by object: (i) the content of its provisions (i.e., its written or unwritten terms), (ii) its objectives and (iii) the "economic and legal context of which it forms a part", including: (a) the nature of the goods and services affected and (b) the real conditions of the functioning and structure of the market(s) in question.[17]

Concerning the "content" of the agreement, one must look at the language of the relevant clauses, or in the absence of a written document, assess the contemporaneous evidence to understand the applicable terms.

Concerning the analysis of the objectives, the case-law clarifies that the objective aim of an agreement must be clear from the measure in question, and must not be confused with the subjective intention or legitimate objectives purportedly pursued by the undertakings in question.[18] Moreover, it follows from settled case-law that the fact that a measure is regarded as pursuing a legitimate objective does not preclude that measure from being regarded as having an object that is restrictive of competition.[19] On the other hand, even if the parties' intention is not a necessary factor in concluding whether an agreement is restrictive, the Commission may take it into account to conclude that an agreement is indeed a restriction by object.[20]

The analysis of the legal and economic context differs in nature and intensity from the analysis of restrictive effects of competition, otherwise the notion of restriction by object would lose its *effet utile*.[21] Moreover, the judgments of the General Court in *Servier*[22] and of the Court of Justice in *Toshiba*,[23] read together with the opinion of Advocate General Wathelet in the same case,[24] clarified that restrictions that come within one of the categories specifically referred to in Article 101 TFEU, including market sharing "*do not require an in-depth analysis of the economic and legal context*" but this analysis may be "*limited to what is strictly necessary*" in order to establish the existence of a restriction of competition by object. The same concept was recently reiterated by the General Court precisely in the context of a buyers' cartel, in *Campine*[25] and by the Court of Justice in *EDP - Energias de Portugal*.[26]

Wage-fixing and no-poach agreements each fall "*within one of the situations referred to in Article 101 TFEU*", respectively, as a form of purchase price fixing under Articles 101(1)(a) TFEU and as a form of supply market sharing (supply-source sharing) under Article 101(1)(c) TFEU, and therefore the analysis of the legal and economic context can indeed be limited to what is strictly necessary.

It is also settled case-law that the pro-competitive effects of an agreement "*must, as elements of the context of that agreement, be duly taken into account for the purpose of its characterisation as a 'restriction by object'*" insofar as they are capable of calling into question the overall assessment of whether the agreement

[13] No-poach agreements reducing the efficient allocation of inputs will prima facie also harm consumers by reducing output and increasing downstream prices. In addition, consumers may be harmed by a reduction of innovation.

[14] Judgment of the Court of 11 September 2014 in Case C-67/13 P - *CB v Commission*, EU:C:2014:2204, paragraph 49 ("Case C-67/13 P – *Cartes Bancaires*") and case-law cited. See also most recently judgment of the Court of 26 October 2023 in Case C-331/21 - *EDP – Energias de Portugal and Others*, EU:C:2023:812, paragraphs 98-100 ("Case C-331/21-*EDP*") and case-law cited.

[15] Case C-67/13 P – *Cartes Bancaires,* paragraph 50, recently confirmed in Judgments of the Court of 21 December 2023, in Case C-124/21 P - *International Skating Union v Commission*, EU:C:2023:1012, paragraph 105 ("Case C-124/21- *International Skating Union*"), in Case C-333/21 - *European Superleague Company,* EU:C:2023:1011, paragraph 165 ("Case 333/21 – *European Superleague*"), and in Case C-680/21 - *Royal Antwerp Football Club*, EU:C:2023:1010, paragraph 92 ("Case C-680/21 – *Royal Antwerp Football Club*"), and case-law cited.

[16] Case C-67/13 P – *Cartes Bancaires*, paragraph 58.

[17] Case C-67/13 P – *Cartes Bancaires*, paragraph 53, recently confirmed in Case C-124/21- *International Skating Union, paragraph 106*, Case 333/21 – *European Superleague*, paragraph 166, Case C-680/21 – *Royal Antwerp Football Club*, paragraph 93, and case-law cited.

[18] Case C-124/21- *International Skating Union, paragraph 107*, Case 333/21 – *European Superleague*, paragraph 167, Case C-680/21 – *Royal Antwerp Football Club*, paragraph 94, and case-law cited and Opinion of Advocate General Wahl of 27 March 2014, in *Cartes Bancaires,* Case C-67/13 P, *EU:C:2014:1958;* paragraph 117.

[19] Judgment of the Court of 2 April 2020 in Case C-228/18 - *Budapest Bank and Others,* EU:C:2020:265, paragraph 52 ("Case C-228/18 – *Budapest Bank*") and Case C-67/13 P – *Cartes Bancaires,* paragraph 70.

[20] Case C-67/13 P – *Cartes Bancaires,* paragraph 54; Case C-228/18 – *Budapest Bank*, paragraph 53, and case-law cited.

[21] Judgment of the Tribunal of 12 December 2018, in Case T-691/14 – *Servier SAS and Others v Commission*, EU:T:2018:922, paragraph 221, ("Case T-691/14 – *Servier*")

[22] *Ibid.*, paragraphs 327-328.

[23] Judgment of the Court of 26 February 2016 in Case C-373/14 P *Toshiba Corporation v. Commission*, EU:C:2016:26, paragraphs 27-29 ("Case C-373/14 P – *Toshiba*").

[24] Opinion of Advocate General Wathelet of 25 June 2015 in Case C-373/14 P - *Toshiba*, EU:C:2015:427, paragraphs 73, 74 and 88-90.

[25] Case T-240/17 – *Campine and Campine Recycling*, paragraphs 295-297 and case-law cited.

[26] Case C-331/21-*EDP*, paragraphs 100-102 and case-law cited.

at issue revealed a sufficient degree of harm to competition and, consequently, of whether it should be characterised as a restriction by object.[27] However, the mere fact that there are possible procompetitive effects is not sufficient to rule out the qualification as a restriction of competition by object. It is instead necessary for those pro-competitive effects to be "*demonstrated, relevant and specifically related*" to the agreement concerned, and "*sufficiently significant*", so that they raise a reasonable doubt as to whether the agreement concerned reveals a sufficient degree of harm to competition, and, therefore, as to its anticompetitive object.[28]

In *Budapest Bank*, the Court of Justice added that "*in order to justify an agreement being classified as a restriction of competition 'by object', without an analysis of its effects being required, there must be sufficiently reliable and robust experience for the view to be taken that that agreement is, by its very nature, harmful to the proper functioning of competition*."[29] Relevant experience already exists in decisions on buyers' cartels, which the Court has classified as by object infringements.[30] Furthermore, in a subsequent judgment in *Lundbeck*, the Court of Justice clarified that *"it is in no way necessary that the same type of agreement has already been censured by the Commission in order for such agreements to be considered to be restrictive of competition by object*".[31]

Application of the law to a set of facts

When applying the above-mentioned criteria to a set of facts, first one must analyse the "content" of the agreement to understand the applicable terms. Labour market agreements are akin to a buyers' cartel[32] since wage-fixing falls within the language of Article 101(1)(a) TFEU as a form of purchase price fixing and no-poach falls within the language of Article 101(1)(c) TFEU as a form of supply-source sharing. Past Commission practice and EU case-law have treated purchase price fixing[33] and supply-source sharing[34] as restrictions of competition by object.

Second, one must analyse the "objective". In this context, the parties to a wage-fixing or no-poach agreement may argue that the agreement has a legitimate objective, for instance that: (i) it addresses a so-called "investment hold-up" as it protects the companies' incentives to invest in training their employees without fear that they would be later hired away by competitors, and (ii) it protects the companies' non-patent IP rights, for instance trade secrets, to which the employees covered by the agreement became privy and which they could take with them to the competition.

While these arguments may be raised, they are unlikely to support the conclusion that a no-poach of wage-fixing agreement does not qualify as a restriction by object. First, the case-law clarifies that the objective aim of an agreement must be clear from the measure in question and must not be confused with the subjective intention or any legitimate objectives purportedly pursued.[35] Second, wage fixing and no-poach agreements are a form of purchase price-fixing and supply-source sharing explicitly prohibited under Article 101(1)(a) and (c) TFEU as two of the most obvious restrictions of competition, i.e., buyers' cartels.[36] Even if the restriction of competition *also* has legitimate objectives this does not as such exclude it qualifies as a restriction by object.[37] Third, the same objective may be achieved by means which are not or less problematic under Article 101 TFEU, such as non-disclosure agreements, obligations to stay with an employer for a minimum amount of time, the repayment of proportionate training costs, gardening leaves, etc. Employers often insist on non-compete clauses, that is, employee

[27] Case C-307/18 *Generics (UK) Ltd v CMA* EU:C:2020:52, paragraphs 103-107.

[28] *Ibid.*, paragraph 107, also recently reiterated in Judgment of the Court of 12 January 2023 in Case C 883/19 P - *HSBC Holdings and Others v Commission*, EU:C:2023:11, paras. 139-140 and 196-197 ("Case C-883/19 – *HSBC Holdings*") and Case C-331/21- *EDP*, paragraph 104 and case-law cited.

[29] Case C-228/18 – *Budapest Bank*, paragraph 76

[30] See footnotes 33-34 below and related text.

[31] Judgment of the Court of 25 March 2021 in Case C-591/16 P - *Lundbeck* v Commission EU:C:2021:243, paragraph 131, ("Case C-591/16 P – *Lundbeck*").

[32] Horizontal Guidelines, paragraph 279: "*Buyer cartels are agreements or concerted practices between two or more purchasers which, without engaging in joint negotiations vis-à-vis the supplier: (a) coordinate those purchasers' individual competitive behaviour on the purchasing market or influencing the relevant parameters of competition between them through practices such as, but not limited to, the fixing or coordination of purchase prices or components thereof (including, for example, agreements to fix wages or not to pay a certain price for a product); the allocation of purchase quotas or the sharing of markets and suppliers; or (b) influence those purchasers' individual negotiations with suppliers or their individual purchases from suppliers, for example through coordination of the purchasers' negotiation strategies or exchanges on the status of such negotiations with suppliers.*"

[33] Commission Decision of 20 October 2005 in Case COMP/C.38.281/B.2, *Raw Tobacco - Italy*, recitals 141, 243-245 and 277-280, upheld on appeal in judgment of the Tribunal of 9 September 2011 in Case T-12/06 - *Deltafina v Commission*, EU:T:2011:441 ("Case T-12/06 – *Deltafina*") confirmed in Judgment of the Court in Case C-578/11 P - *Deltafina v Commission*, EU:C:2014:1742 ("Case C-578/11 – *Deltafina"*); Commission Decision of 10 October 2004 in Case COMP/C.38.238/B.2, *Raw Tobacco - Spain*, substantially upheld on appeal in judgment of the Tribunal of 27 October 2010 in Case T-24/05, *Alliance One International and Others v Commission*, EU:T:2010:453, confirmed in judgment of the Court of 19 July 2012 in Case C-628/10 P – *Alliance One International and Standard Commercial Tobacco v Commission*, EU:C:2012:479, judgments of the Tribunal of 8 September 2010 in Case T-29/05 Deltafina v Commission, EU:T:2010:355 and of 8 March 2011 in Case T-37/05 - *World Wide Tobacco España v Commission, ECLI:EU:T:2011:76*, confirmed in order of the Court of 3 May 2012 in Case C-240/11 P - *World Wide Tobacco España v Commission*, ECLI:EU:C:2012:269; Commission Decision of 8 February 2017 in Case COMP/AT.40018, *Car Battery Recycling*, recitals 233, 237-238, upheld in judgment of the Tribunal of 7 November 2019 in Case T-240/17 - *Campine and Campine Recycling v Commission*, EU:T:2019:778 ("Case T-240/17 – *Campine and Campine Recycling*"), paragraphs 295-306; Commission Decision of 14 July 2020 in Case AT.40410 - *Ethylene*; Commission Decision of 29 November 2022 in Case AT.40547 - *Styrene Monomer*.

[34] Case COMP/C.38.281/B.2, *Raw Tobacco - Italy*, recitals 246-249, 277-279 and 281, upheld on appeal in Case T-12/06 – *Deltafina*, confirmed in Case C-578/11 – *Deltafina*.

[35] See footnote 18 above and related text.

[36] See footnote 32 above and related text.

[37] See footnote 19 above and related text.

obligations not to switch to competitors. Under EU competition law, non-compete clauses are generally outside the scope of Article 101 TFEU, as they are not agreements between undertakings. From an antitrust point of view, and as long as they are compliant with national labour laws, non-compete clauses would be considered less restrictive ways of protecting the employers' investments in training or non-patent IP as, unlike no-poach agreements, they are transparent vis-a-vis employees, who can, at least, ask for an equitable compensation.

Finally, as mentioned, while it is not necessary to establish that the parties had the intention to restrict competition to conclude that an agreement is a restriction of competition by object, the Commission is free to take intentions into account in its assessment.[38] Therefore, evidence showing that the intention of the parties was, for instance, (i) limiting or distorting competition for talent between the parties; (ii) keeping salaries low; or (iii) preventing a competitor from entering the market by increasing its costs in recruiting the necessary talent, would indicate that a wage-fixing or no-poach agreement was indeed a restriction by object.

Third, one must analyse the economic and legal context, including the nature of the relevant (goods or) services, and the real conditions of the functioning and structure of the market. This assessment is inevitably fact-specific and must consider the circumstances of each case. However, since both wage-fixing and no-poach agreements fall into the categories of agreements prohibited by Article 101(1)(a) and (c) TFEU, this analysis can be limited to what is strictly necessary to determine if a specific wage-fixing or no-poach agreement reveals a sufficient degree of harm to competition.[39] In general terms, concerning the nature of the services, labour is a fundamental factor of production and the ability to attract talent is a key competitive parameter. Concerning the functioning and structure of the market the fact that the parties entered into an agreement restricting labour mobility may in itself suggest that there is talent scarcity. Moreover, following the Court's assessment of buyers' cartels, it should be sufficient to focus on whether the relevant wage-fixing or no-poach agreement reveals a "sufficient degree of harm" to the competitive process of the labour market concerned, and unnecessary to conduct a similar analysis in downstream product markets.[40] Moreover, once the parties compete for labour it is not necessary that they also compete in any product market. In this context the *Royal Antwerp Football Club* judgment[41] has suggested, in addition, that obstacles to hiring affect a key parameter of competition and this is likely to impact not only the "upstream or supply market" but also the "downstream market".

As mentioned, possible pro-competitive effects should be considered as part of the legal and economic context if they are demonstrated, relevant, sufficiently related to the restraint, and sufficiently significant to justify a reasonable doubt that the agreement caused a sufficient degree of harm to competition.[42] Starting from wage-fixing agreements, it seems difficult to argue that they may, even only in principle, have pro-competitive effects. No-poach agreements, on the other hand, as mentioned may at least in principle solve an "investment hold-up" problem.[43] However, based on the current literature, net efficiencies are at best uncertain.[44] In some cases, no-poach agreements may indeed strengthen the employers' incentives to invest in firm-specific training or R&D. On the other hand, the same agreements would also have the effect of decreasing the employees' incentives to invest in their own general-skills training, so the net effect is unclear.[45] Moreover, the alleged efficiencies can generally be achieved by means which are not or less problematic under Article 101 TFEU, such as, as mentioned, possible obligations on the employees to reimburse proportionate training costs, national labour-law-compliant non-compete clauses, non-disclosure agreements, gardening leaves, etc.

It follows that wage-fixing constitutes a by object restriction like the fixing of other purchase prices under Article 101(1)(a) TFEU. Also based on the above, we take the view that all forms of no-poach agreements, including no-hire and non-solicit agreements, and even agreements creating a one-way (non-reciprocal) obligation, are likely to be restrictions of competition by object, as they all are explicitly prohibited under Article 101(1)(c) TFEU, have the anticompetitive objective of preventing employees from freely moving between competing employers and/or increase employees' search costs and thereby almost invariably cause economic harm to employees and to the market structure. The fact that a no-poach agreement may have a legitimate objective does not preclude its qualification as a restriction by object.[46] Finally, while pro-competitive effects may, if sufficiently related and significant, be relevant as part of the economic and legal context to conclude that a no-poach agreement is a restriction by

[38] See footnote 20 above and related text.

[39] See footnotes 23-26 above and related text.

[40] Judgment of the Tribunal of 27 September 2023 in Case T-127/21 - *Valve v Commission*, EU:T:2023:587, paragraph 212 ("Case T-127/21 – Valve"), and Case C-883/19 – *HSBC Holdings* , paragraphs 120-121 and case-law cited, and see also Judgment of the Court in Case C-377/20 - *Servizio Elettrico Nazionale and Others*, EU:C:2022:379, paragraphs 47-48.

[41] Case C-680/21 - *Royal Antwerp Football Club*, paragraph 107.

[42] See footnotes 27, 28 above and related text.

[43] Daniel Ferrés, Gaurav Kankanhalli, Pradeep Muthukrishnan,"Anti-poaching Agreements, Corporate Hiring, and Innovation: Evidence from the Technology Industry" August 2023, Working Paper.

[44] Ulrich Kaiser, Hans Christian Kongsted, and Thomas Rønde. "Does the mobility of R&D labor increase innovation?." Journal of Economic Behavior & Organization 110 (2015): 91-105; Pontus Braunerhjelm, Ding Ding, and Per Thulin. "Labour market mobility, knowledge diffusion and innovation." European Economic Review 123 (2020): 103386; Liyan Shi, Optimal regulation of noncompete contracts, Econometrica 91.2 (2023): 425-463.

[45] See Suman Ghosh and Kameshwari Shankar, "Optimal Enforcement of Noncompete Covenants", 2017, Economic Inquiry, Vol 55(1), pp. 305-318. Empirically, most training offered by firms seems to be general in nature rather than firm-specific, indicating that there is little scope for underinvesting in firm-specific training, see Konings, Jozef, and Stijn Vanormelingen. "The impact of training on productivity and wages: firm-level evidence." Review of Economics and Statistics 97.2 (2015): 485-497. To the contrary, firms may have an incentive to invest in general training due to imperfections in the labour market, see Daron Acemoglu, and Jörn-Steffen Pischke. "The structure of wages and investment in general training." Journal of political economy 107.3 (1999): 539-572.

[46] See footnote 19 above and related text.

object,[47] the Commission does "*not require an in-depth analysis of the economic and legal context*" to reach that conclusion, and that analysis may be "*limited to what is strictly necessary*" since no-poach agreements falls within a category of agreements explicitly prohibited under Article 101(1)(c) TFEU.[48]

No-poach and wage-fixing agreements may qualify as ancillary restraints under strict conditions

Claims that wage-fixing or no-poach agreements are ancillary could arise both when the parties are in either horizontal or vertical relationships. An example of a horizontal relationship could be a research joint venture where the parties may argue that they would only assign key personnel to the joint venture if they were sure that the other party would not poach the best employees. Similarly, parties to a potential vertical supply relationship may argue that, without a no-poach agreement, they would not enter it. In both examples the parties may argue that without the wage-fixing or no-poach agreement, they would risk (i) losing the investment they made in training their employees, and (ii) losing possible non-patent IP rights, such as trade secrets, developed by or learned by the relevant employees, (iii) being unable to fulfil their obligations under the main transaction due to the lack of staff.

A wage-fixing or no-poach agreement may only qualify as an ancillary restraint if it meets four cumulative conditions:[49] (i) there is a main non-restrictive transaction; (ii) the restraint is directly related to that transaction, i.e., subordinate to its implementation and inseparably linked to it;(iii) the restraint is objectively necessary for the main transaction's implementation. "Objectively" means that it is not sufficient that the parties regard it as necessary but one must show that, given the nature of the agreement and the characteristics of the market, undertakings in a similar situation would not have participated in the main transaction without the relevant restraint.[50] "Necessary" requires, in addition, proof that the main "*operation would be impossible to carry out in the absence of the restriction in question*".[51] In particular, "*the fact that that operation is simply more difficult to implement or even less profitable without the restriction concerned cannot be deemed to give that restriction the 'objective necessity' required in order for it to be classified as ancillary*".[52] Finally, (iv) the restraint should be proportionate to the main transaction, meaning that there should be no less restrictive means to allow that transaction to take place.[53] The parties to the main transaction bear the evidential burden to prove that the above criteria are met.

In this context, as mentioned, the Courts have consistently interpreted the above-mentioned ancillary restraints conditions strictly. For instance, if the parties in the examples above argued that a no-poach agreement is necessary for them to be willing to enter into a joint venture or to supply certain goods to each other, they would need to demonstrate (i) that there are no less restrictive means of ensuring the existence of the same relationship, including, for instance, other equally effective means of protecting non-patent IP rights or the investment in employee training, such as non-disclosure or other confidentiality agreements, possible obligations on the employees to reimburse proportionate training costs, national labour-law-compliant non-compete clauses, gardening leaves, etc. Moreover, (ii) they would also have to demonstrate that the scope of the clause does not cover, for instance, all employees but is strictly limited to the employees necessary to feed the relevant supply relationship, in case of a vertical agreement, or directly involved in the performance of the relevant horizontal agreement, and only for a justifiable duration and an adequately limited territorial scope. In any event the willingness to keep salaries low would not be considered an acceptable justification for a wage fixing or no-poach agreement.

Wage-fixing and no-poach agreements are unlikely to be exempted under Article 101(3) TFEU

Under Article 101(3) TFEU, agreements which restrict competition (including by object) may be exempted if it is proven that they have pro-competitive effects, in particular if they meet four cumulative criteria:

i. The agreement must contribute to improving the production or distribution of goods or contribute to promoting technical or economic progress.
ii. Consumers must receive a fair share of the resulting benefits.
iii. The restrictions must be indispensable to the attainment of these objectives, and

[47] See footnotes 27 and 28 above and related text.
[48] See footnotes 22-24 above and related text.
[49] Guidelines on the application of Article 81 (3) of the Treaty, 2004/C 101/08 ("Article 101(3) Guidelines"), para 29. See also Horizontal Guidelines, paragraph 34.
[50] Article 101(3) Guidelines, paragraphs 29 and 18(2).
[51] Judgment of 11 September 2014, in Case C-382/12 P *MasterCard Inc. and Others v Commission*, EU:C:2014:2201, paragraph 91, ("Case C-382/12 P – *MasterCard*"). See also Horizontal Guidelines, paragraph 34.
[52] Case C-382/12 P – *MasterCard*, paragraph 91, also adding that "[s]*uch an interpretation would effectively extend that concept to restrictions which are not strictly indispensable to the implementation of the main operation. Such an outcome would undermine the effectiveness of the prohibition laid down in Article 81(1) EC.*".
[53] Guidelines on the application of article 81 (3) of the Treaty, 2004/C 101/08, paragraph 29, and Case C-382/12 P – *MasterCard,* paragraphs 91 and 107-108 and 111, clarifying, *inter alia*, that "*in order to contest the ancillary nature of a restriction, as referred to in paragraphs 89 and 90 of the present judgment, the Commission may rely on the existence of realistic alternatives that are less restrictive of competition than the restriction at issue*" and see also, by analogy, Commission Notice on restrictions directly related and necessary to concentrations, OJ C 56, 5.3.2005, p. 24–31, paragraph 13: "[i]*f equally effective alternatives are available for attaining the legitimate aim pursued, the undertakings must choose the one which is objectively the least restrictive of competition.*"

iv. The agreement must not afford the parties the possibility of eliminating competition in respect of a substantial part of the products in question.

As mentioned, it seems difficult to argue that wage-fixing agreement may have pro-competitive effects. While no-poach agreements may in principle have pro-competitive effects as they may solve an "investment hold-up" problem, the current literature shows that net efficiencies are at best uncertain, as while they may preserve the employers' incentives to offer training, they have the effect of decreasing the employees' incentives to invest in their own general-skills training.[54] Wage-fixing and no-poach agreements tend to artificially lower wages. One might question whether lower wages could lead to lower prices. However, the Commission's Article 101(3) Guidelines clarify that cost savings that arise from the mere exercise of market power cannot be taken into account as source of possible pro-competitive effects.[55] The same Guidelines also clarify that possible pro-competitive effects are generally taken into account only if they take place in the same market of the anti-competitive effects.[56]

Finally, as also mentioned, there are usually less restrictive ways of achieving the same result, for instance, non-disclosure agreements, obligations to stay with an employer for a minimum amount of time, the repayment of proportionate training costs, gardening leaves, non-compete clauses compliant with national labour laws.

Conclusion

A recent OECD-led economic study shows that labour markets in numerous EU Member States are moderately to highly concentrated[57] and therefore many employers likely enjoy market power. In this context, wage-fixing and no-poach agreements risk reinforcing that market power and cause harm to employees, while softening downstream competition and ultimately leading to higher prices and lower quality.

The economic literature on the topic is developing rapidly and supports the view that the harm stemming from this kind of labour market agreements should not be taken lightly. Wage-fixing and no-poach agreements generally harm employees and the competitive process, while their ability to produce net efficiencies seems uncertain and less restrictive means of achieving them are generally available.

Although the Commission has not yet adopted a decision concerning wage-fixing and no-poach agreements, it is actively investigating leads and recently carried out unannounced inspections in this area.

The existing legal framework allows the Commission and EU national competition authorities to take decisive action against such agreements. Both wage-fixing and no-poach agreements are likely to qualify as restrictions by object under Article 101 TFEU and not to meet the requirements to qualify as ancillary restraints; moreover, they are unlikely to meet the requirements for an exemption under Article 101(3) TFEU.

Most cases of wage-fixing and no poach agreements are likely to be dealt with by EU National Competition Authorities due to the geographic scope, but the Commission can bring its own cases and has a coordinating role within the European Competition Network.

[54] See footnotes 44 and 45 above and related text.

[55] See Article 101(3) Guidelines, paragraph 49. Lower wages are a "direct consequence of a reduction in output and value": In the case of wage-fixing, firms reduce labour demand to lower wages. This reduces output and therefore increases prices to the detriment of consumers. In the case of no-poach, the efficient allocation of inputs is hampered, which again harms consumers by reducing output and increasing downstream prices. Even if wage-fixing and no-poaching agreements would generate an incentive to pass-on lower wages (quod-non), pass-on is generally only conceivable if labour costs are variable costs not if they are fixed costs and it would have to be established that labour costs concern an appreciable part of an undertaking's cost structure. Finally, the cost savings would have to be balanced with the anti-competitive harm of the agreement (Article 101(3) Guidelines, paragraphs 96-101). See also Horizontal Guidelines, paragraph 34.

[56] Article 101(3) Guidelines, paragraph 43.

[57] Satoshi Araki, Andrea Bassanini, Andrew Green, Luca Marcolin and Cristina Volpin, "Labor Market Concentration and Competition Policy Across the Atlantic", 2023, 90 U. Chi. L. Rev. 339 pp. 341, 347-348.