



# HR issues in antitrust

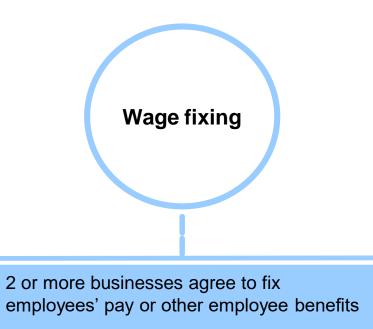
Wage fixing and no-poach: a new focus by enforcers

8 June 2023 Lucio D'Amario

## Areas of concern



Includes informal / unwritten agreements / understandings



This includes agreeing the same wage rates or setting maximum caps on pay

Regulators approach issues with broad mindset of "competition for talent" (so whether or not a counterparty is direct "competitor" in traditional sense is not relevant).

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## Increasing global focus on HR antitrust issues

EU's Vestager warns of more anti-cartel raids, criticises 'nopoach' deals

By Face Yale Cheel





Joe Biden 
@JoeBiden
Nutled States government official

It's simple: companies should have to compete for workers just like they compete for customers. We should get rid of non-compete clauses and nopoaching agreements that do nothing but suppress wages.



"...in areas with labour shortages, employers may be tempted to enter into nonhiring or non-poaching arrangements. Such labour-market-sharing arrangements distort competition, harm workers in improving their incomes, skills and job satisfaction, and disincentivize employers to improve labour conditions and efficiency. A good reason for competition authorities to enforce in this area too."



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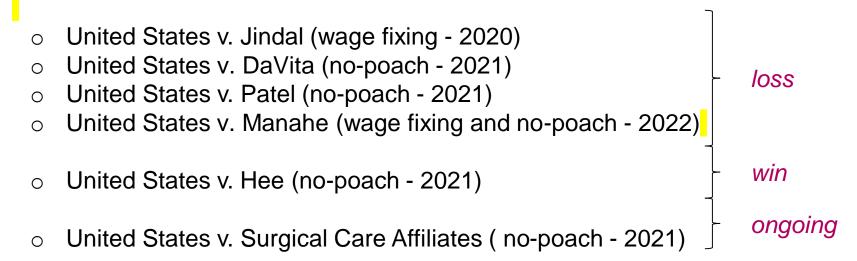
"...some buyer cartels do have a very direct effect on individuals, as well as on competition, when companies collude to fix the wages they pay; or when they use so-called "no-poach" agreements as an indirect way to keep wages down, restricting talent from moving where it serves the economy best."

whether no-poach agreements may violate antitrust law."

"Although the debate on labour markets and competition is less lively in Europe than in the US, there is a series of related issues that we are looking into, such as the competitive consequences of branch agreements, or

## **Recent development - US**

- Enforcement started in 2010 (no-poach practices between Silicon Valley tech companies)
- DOJ and FTC: Antitrust Guidance for Human Resource Professionals (2016)
- First wave of criminal cases focused on healthcare and aerospace sectors:



• DOJ continues its criminal enforcement focus, although has experienced mostly losses in the courts

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## **Recent development - EU**

- NCAs have indirectly sanctioned labour-related practices as part of "wider" cartel cases:
  - Spanish Competition Authority freight forwarders (2010), professional haircare (2011), and industrial assembly and maintenance (2019)
  - French Competition Authority / Italian Competition Authority modelling agencies (2016)
  - French Competition Authority floor coverings (2017)
  - Hungarian Competition Authority HR consulting agencies (2020)
- More recently, NCAs have started to investigate labour-related practices on a stand-alone basis:
  - Polish Competition Authority basketball league (2021)
  - Lithuanian Competition Authority basketball league (2021)
  - Dutch Competition Authority supermarkets (2021)
  - Romanian Competition Authority specialised motor vehicles (2021)
  - Greek Competition Authority elevators (2022)
  - Portuguese Competition Authority professional football league (2022)
  - Polish Competition Authority motorsports federation and speedway league (2022)
  - French Competition Authority IT sector (2022)
- Statements (e.g. EC, France, Netherlands) and guidelines (e.g. Portugal)

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- Enforcers' theories of harm seem to rely on traditional rules, where wage fixing and no-poach agreements have been compared to price fixing and market allocation arrangements, respectively
  - e.g., new horizontal guidelines, where at §279 the EC includes "agreements to fix wages" into the category of "buyer cartels"
- However, by object theories of harm should be handled with care, particularly in relation to nopoach
  - ECJ's case law: restrictive interpretation of by object
  - Counterbalance: flexibility needed in relation to non-compete in employment agreements
    - protecting employers' investments
    - > avoiding exchange of sensitive information



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