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I PRINCIPALI SVILUPPI
NEL DIRITTO DELLA
CONCORRENZA DELL'UNIONE
EUROPEA E NAZIONALE

MAIN DEVELOPMENTS
IN EUROPEAN
AND ITALIAN
COMPETITION LAW





HR issues in antitrust

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



8 June 2023

Lucio D'Amario

Areas of concern

“No-poach” agreements

2 or more businesses agree not to solicit or hire each other’s employees (or not to do so without the other employer’s consent)

Includes informal / unwritten agreements / understandings

Wage fixing

2 or more businesses agree to fix employees’ pay or other employee benefits

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).

Increasing global focus on HR antitrust issues

EU's Vestager warns of more anti-cartel raids, criticises 'no-poach' deals

By Foo Yee Chee



"...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."



Joe Biden ✓
@JoeBiden

United 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 no-poaching agreements that do nothing but suppress wages.



"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 whether no-poach agreements may violate antitrust law."



"...in areas with labour shortages, employers may be tempted to enter into non-hiring 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."



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:
 - United States v. Jindal (wage fixing - 2020)
 - United States v. DaVita (no-poach - 2021)
 - United States v. Patel (no-poach - 2021)
 - United States v. Manahe (wage fixing and no-poach - 2022)
 - United States v. Hee (no-poach - 2021)
 - United States v. Surgical Care Affiliates (no-poach - 2021)
- DOJ continues its criminal enforcement focus, although has experienced mostly losses in the courts

loss

win

ongoing

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)

Developing theories of harm

- 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 no-poach
 - 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



Lucio D'Amario

Partner, Antitrust & Foreign Investment

Milano

Tel: +39 02 88 393 5352

lucio.damario@linklaters.com

Studio Legale Associato in associazione con Linklaters LLP

Via Fatebenefratelli 14

Milano 20121

Telefono: +39 02 8839 351

Facsimile: +39 02 8839 35201

www.linklaters.com

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