Morgan Lewis

REPORT

FAIR WAGES, FAIR PLAY

EU ENFORCES ANTITRUST IN LABOUR MARKETS

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FAIR WAGES, FAIR PLAY: EU ENFORCES ANTITRUST IN LABOUR MARKETS

The European Commission (EC) has recently conducted unannounced antitrust inspections in the data centre construction sector, following concerns about potential collusion in the form of no-poach agreements. This investigation comes on the heels of the EC's Antitrust in Labour Markets policy brief (Policy Brief), which underscores the investigative remit of the EC under the existing legal framework to prosecute wage-fixing and no-poach agreements.[1]

Most cases of wage-fixing and no-poach agreements are usually dealt with by national competition authorities (NCAs) because labour markets are often national, regional, or local. Nonetheless, the EC has the power to initiate its own cases, especially where the alleged infringements involve multiple EU member states.

- **Key Takeaway:** The EC is prioritizing enforcement actions against anticompetitive practices in labour markets. We expect to see more coordination among member states and the EC in this developing area.

We outline the key aspects of the application of antitrust in labour markets, covering preliminary definitions of wage-fixing and no-poach agreements, their economic harm and legal qualification, the availability of exemption, relevant case-law at both the EU and member state levels, and final takeaways.

Definitions

Wage-fixing and no-poach agreements are agreements between employers that compete in the same labour market.

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

In **no-poach agreements**, employers agree *not* to hire employees from each other. These include the following:

- "No-hire" agreements, where employers agree not to hire employees of other parties to the agreement (i.e., neither actively pursue employees, nor passively accept applications from employees)
- "Nonsolicit" agreements, where employers only agree not to actively approach another employer's employees with a job opportunity

No-poach agreements may be sector-wide or only involve two or more parties. The restrictions can be reciprocal or apply unilaterally.

Wage-fixing and no-poach agreements must be distinguished from typical noncompete clauses in employment contracts that prohibit certain employees from working for a competitor for a given duration (approximately two to three years, depending on the circumstances) post-termination of their employment contract. Such arrangements usually fall outside the scope of Article 101 of the Treaty on the Functioning of the European Union (TFEU), as they are typically not agreements between

[1] Antitrust in Labour Markets policy brief (May 2024).

undertakings and are subject to either national labour laws and/or ancillary restraints provisions in the context of corporate transactions.

Economic Harm

Under certain conditions, the labour market can exhibit characteristics of a monopsony, where one or very few employers dominate. This gives the employer significant power to impose conditions on the employees because the employees have limited alternative employment options. The theory of harm is that in such markets:

- Wage-fixing agreements enable employers to maximize profit by setting the wages and other benefits of employees lower than they would be in a competitive market. According to the EC, the consequences are lower production levels and increased downstream prices, depending on the downstream market power of the employer.
- No-poach agreements have similar detrimental effects to wage-fixing agreements. Employers can reduce wages because there is no incentive to attract employees from competing firms and no opportunity for employees to seek alternative employment in the market. According to the EC, citing various economic studies, no-poach agreements lead to negative effects on employee compensation, firm productivity, gross domestic product growth, and innovation.[2]

'By Object' Restriction

Article 101 of the TFEU prohibits any arrangement between competitors that restricts or distorts competition in the EU's internal market.[3] "By object" restrictions are inherently anticompetitive, whereas "by effect" restrictions are only deemed anticompetitive if their actual impact on the market appreciably restricts competition between EU Member States. In other words, a "by object" restriction is the most restrictive type of anticompetitive practice, similar to "per se" violations under US antitrust laws. Examples of "by object" restrictions include agreements between competitors to fix purchase prices, divide territories, or limit sources of supply.

The EC has classified wage-fixing agreements as "by object" restrictions in two recently updated guidelines: the revised Horizontal Guidelines and the Collective Agreements of Solo Self-Employed

[2] See notably Ryan Decker, John Haltiwanger, Ron S. Jarmin, and Javier Miranda, *Changing Business Dynamism and Productivity: Shocks Versus Responsiveness*, American Economic Review, Vol 110(12), pp. 3952-3990. (Dec. 2020).

[3] An exemption from the prohibition may be applicable if the restrictive agreement has procompetitive effects as outlined in Article 101(3) TFEU. For this, four cumulative conditions must be met: (1) the agreement contributes to improving the production or distribution of goods or to promoting technical or economic progress, (2) the agreement allows consumers a fair share of the resulting benefit, (3) the agreement does not impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives and (4) the agreement does not afford those undertakings the possibility of eliminating competition in respect of a substantial part of the products in question. Companies must conduct a detailed self-assessment to determine if the conditions for exemption apply. The Guidelines on the application of Article 101(3) TFEU (Article 101(3) Guidelines) provides guidance on how to apply Article 101(3) TFEU in individual cases, and various block exemption regulations address how to apply Article 101(3) TFEU to certain categories of agreements (e.g., R&D, specialization).

Guidelines.[4] The Policy Brief also clearly states that both wage-fixing and no-poach agreements should generally be qualified as restrictions "by object" under Article 101(1) TFEU.

The analysis of a "by object" restriction must evaluate three criteria: (1) the content, (2) the objectives, and (3) the context of the agreement.

Content of the Agreement

The language of the agreement and/or the surrounding contemporaneous evidence are key to determining the agreement terms. According to the EC, wage-fixing agreements are considered to be akin to purchase price fixing, while no-poach agreements constitute supply source sharing. Both agreement types are prohibited as "by object" restrictions under Article 101 TFEU.

Objectives of the Agreement

Regardless of the parties' subjective intentions, it is the objective language and aim of the agreement that will prevail. Even if it can be argued that the agreement itself has a legitimate purpose, such as protecting the company's investment in know-how, this does not preclude the measure from qualifying as a "by object" restriction.

Economic and Legal Context

A fact-based analysis will be critical to determine whether specific agreement terms restrict competition (bearing in mind that labour is an essential element of production, and the ability to attract talent is an important parameter of competition). But given that wage-fixing and no-poach agreements are "by object" restrictions, according to the EC, the analysis can be limited to what is strictly required to demonstrate a sufficient degree of harm to competition. In essence, there is a presumption of illegality that is unlikely to be cured by any procompetitive effects.

Exemption

As mentioned above, an exemption to the prohibition of Article 101 of the TEU may be applicable if the restrictive agreement has procompetitive effects, pursuant to Article 101(3) TFEU.

According to the EC, it would be challenging to argue that wage-fixing agreements have any procompetitive effects, even in theory. Furthermore, wage-fixing agreements are unlikely to qualify as an ancillary restraint directly related and necessary to the implementation of a main transaction.

The position on no-poach agreements may be more nuanced: no-poach agreements may, in principle, have procompetitive effects, as they could be designed to protect a company's investment in training its employees. Since the employer knows that its employees are unlikely to join its competitors, the incentive to invest in training its employees with firm-specific know-how is higher. The EC acknowledges that this can have procompetitive effects in certain cases, but also notes that the other side of the coin is a reduced incentive for employees to invest in their own training. According to the EC, the net effect of no-poach agreements is therefore unclear.

In short, while there is more room for parties to argue procompetitive effects, the bar is (very) high to obtain an exemption for no-poach agreements under Article 101(3) TFEU.

[4] See Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, para. 279 (a); Guidelines on the application of Union competition law to collective agreements regarding the working conditions of solo self-employed persons, para. 17.

Case Law at the EU Level

Noncompete and nonsolicit clauses have traditionally been reviewed by the EC (and by NCAs as well) in the context of M&A transactions. Any issues are typically resolved in the context of the merger clearance process.

To date, the EC has not issued a decision relating to antitrust in labour markets in nontransactional matters. However, in November 2023, the EC raided the premises of food delivery companies Delivery Hero and Glovo in relation to suspected no-poach agreements.[5] The formal investigation was initiated on 23 July 2024 due to concerns, among others, that the two companies may have agreed not to poach each other's employees before Delivery Hero acquired Glovo.[6] According to the EC, these practices may have been facilitated by Delivery Hero's purchase of a minority share in Glovo in 2018. Given the Policy Brief, it is likely that the EC will take the opportunity of this ongoing proceeding to put some markers down in case law.

On October 4, 2024, the Court of Justice of the European Union (CJEU) analyzed recruiting practices in the football sector in the *FIFA v. BZ* case.[7] In that case, professional footballer Lassana Diarra signed a four-year contract with Russia's Futbolny Klub Lokomotiv (known as FC Lokomotiv Moscow). FC Lokomotiv Moscow subsequently terminated that contract due to the footballer's alleged conduct and requested compensation from Lassana Diarra of €20 million, claiming termination of contract without just cause pursuant to Articles 14 and 17 of the Regulations on the Status and Transfer of Players (RSTP). The RSTP was drawn up by FIFA and provides that if a contract is terminated without just cause, the party in breach shall pay compensation. Sporting du Pays de Charleroi SA and other football clubs were not willing to hire the professional footballer because of the risk of being held jointly and severally liable for payment of the claimed compensation.

Subsequently, and although having signed in the meantime a contract with Olympique de Marseille, Lassana Diarra brought an action before the Commercial Tribunal of Hainaut (Belgium) seeking an order against FIFA and the Union Royale Belge des Sociétés de Football Association ASBL (URBSFA) to pay compensation of €6 million for the loss suffered as a result of not being able to be recruited by the Belgian club Sporting du Pays de Charleroi SA. The Commercial Tribunal of Hainaut upheld the claim and ordered the two associations to pay a provisional sum in January 2017. FIFA subsequently appealed the judgement before the Mons Court of Appeal (Belgium), which referred the case to the CJEU for a preliminary ruling on the applicability of Article 45 TFEU (restriction on the freedom of movement of workers) and Article 101 TFEU to the case at hand.

Firstly, the CJEU reconfirmed that Article 101(1) TFEU applies to FIFA in its capacity as an association having as members national football associations, which can themselves be categorised as undertakings carrying out an economic activity. This is in line with its previous judgement in the football sector[8] and

[5] See EC press release, Commission carries out unannounced inspections in the online food delivery sector (Nov. 20, 2023).

[6] See EC press release, Commission opens investigation into possible anticompetitive agreements in the online food delivery sector (July 22, 2024).

[7] See Judgement of the CJEU, *FIFA / BZ*, Case C-650/22, EU:C:2024:824 (Oct. 4, 2024).

we refer to our prior analysis on this point. Furthermore, the RSTP constitutes a "decision of an association of undertakings" within the meaning of Article 101 TFEU because these rules have a direct impact on the conditions in which the economic activity is exercised by the members of the association.[9]

Secondly, the CJEU analyzed whether the practices constituted a "by object" restriction on the basis of the following criteria:[10]

- **The content:** The CJEU found, in substance, that the RSTP restricts competition generally and drastically.
- **The context of the agreement:** The CJEU recognized the legitimacy of FIFA establishing rules to maintain the integrity of inter-club football competitions. However, in a novel aspect of this judgment, the CJEU viewed these rules as no-poach agreements between clubs, which artificially segment national and local markets to the collective benefit of the clubs.
- **The objectives:** The CJEU held that the RSTP was intended to make it difficult for professional football clubs to compete for players.

Thirdly, the CJEU analyzed whether the practices could be exempted under Article 101(3) TFEU. Article 101(3) TFEU provides that a "by object" restriction can be exempted provided that the four cumulative conditions are met: (1) the agreement contributes to improving the production or distribution of goods or to promoting technical or economic progress; (2) the agreement allows consumers a fair share of the resulting benefit; (3) the agreement does not impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives; and (4) the agreement does not afford those undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

However, in the case at hand, the CJEU determined that the RSTP was discretionary, disproportionate, and created a generalised, drastic, and permanent restriction of competition, and could therefore not be deemed indispensable or necessary to enable efficiency gains to be made.

In conclusion, the CJEU held that the RSTP are prohibited under Article 101 (1) TFEU and could not be exempted under Article 101(3) TFEU in this instance. It remains to be seen what decision the Mons Court of Appeal will take. The timeframe for a decision from the Mons Court of Appeal is unclear at this stage.

On November 18, 2024, the EC carried out unannounced antitrust inspections in an entirely different sector of activity—that of data centre construction. The inspections were launched following concerns that companies in the data centre construction sector may have violated Article 101 TFEU. In particular,

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[8] See Judgement of the CJEU, December 21, 2023, *European Superleague Company*, C-333/21, EU:C:2023:1011, paragraph 115. The conclusions of the CJEU in the European Superleague judgement were ultimately confirmed by the Madrid Commercial Court (Juzgado de lo Mercantil nº 17 de Madrid, Appeal n. 150/2021) (May 24, 2024); See also Judgement of the CJEU, *Royal Antwerp Football Club*, C-680/21, EU:C:2023:1010, paragraph 79 (Dec. 21, 2023).

[9] See, e.g., Judgment of the CJEU, *European Superleague Company*, C-333/21, EU:C:2023:1011, paragraph 118 (Dec. 21, 2023).

[10] See Judgement of the CJEU, October 4, 2024, *FIFA / BZ*, Case C-650/22, EU:C:2024:824, paragraph 130 ; Judgement of the CJEU, *European Superleague Company*, Case C-333/21, EU:C:2023:1011, paragraph 158 (Dec. 21, 2023).

the EC is investigating a possible collusion in the form of no-poach agreements.[11] The EC also sent targeted requests for information to "several companies in the same sector." The EC did not identify any of the companies concerned by the investigation.

Case Law at Member State Level

To date, NCAs in the EU have been more active in conducting antitrust investigations concerning no-poach and wage-fixing agreements than the EC. However, the NCAs and the EC cooperate closely. Selected cases pursued by member states are set out in the table below. The NCA cases have tended to investigate the labour law violations, as is one element among other antitrust violations. Thus far, the fines have been relatively low, with the exceptions of the decisions of the French and Belgian NCAs in 2017 and 2024, respectively.

Belgium

- The Belgian Competition Authority (BCA) recently fined private security firms more than €47 million for price-fixing and no-poach arrangements, as well as collusion during public procurement and other tender procedures.[12]

France

- The French competition authority (FCA) imposed sanctions totalling €302 million on the three leading manufacturers of PVC and linoleum floor coverings for price fixing and other practices, including wage fixing and no-poach agreements[13].
- The FCA has also notified several companies active in the engineering, technology consulting, and IT services sectors that it will investigate potential violations on labour markets.[14]

Germany

- The German competition authority (BKA) fined three television studios €3.1 million for exchanging competitively sensitive information, including staff costs and other information related to the benefits of the employees.[15]

Italy

- The Italian Competition Authority (AGCM) fined eight fashion-modeling agencies and the industry association approx. €4.5 million for participating in a cartel concerning price fixing. The agencies coordinated prices relating to salaries, image rights, agency commission, and model transfer costs between 2007 and 2015.[16]

[11] See EC press release, Commission carries out unannounced inspections in the online food delivery sector (Nov. 20, 2023).

[12] See BCA press release No. 27/2024 (July 2024).

[13] See FCA decision 17-D-20 (Oct. 19, 2017).

[14] See FCA press release (Nov. 23, 2023).

[15] See BKA decision B12 - 23/15 (July 26, 2016).

[16] See AGCM decision 1789 (Oct. 16, 2016).

Lithuania

- In December 2022, the Competition Council of the Republic of Lithuanian (KT) imposed fines of €969,060 on the Lithuanian Association of Real Estate Agencies and 39 of its members for no-poaching agreements.[17]

Poland

- In October 2022, the Polish competition authority (UOKiK) imposed fines of €200,000 on the Polish Basketball League and 16 of its basketball clubs for engaging in a no-poaching agreement.[18]

Portugal

- In April 2022, the Portuguese competition authority (AdC) fined the Portuguese Football League and 31 football clubs a total of €11.3 million for entering into a no-poaching agreement.[19] According to the AdC, the sports clubs agreed not to hire one another's football players who had terminated their employment contracts because of the pandemic.

Spain

- The Spanish competition authority (CNMC) has previously qualified no-poach agreements as cartels violating competition law.[20]
- More recently, on July 11, 2023, the Catalonian Competition Authority (ACCO) imposed a fine of €75,500 on a teachers' association for agreeing not to recruit teachers employed by other educational centers and/or hire them without prior consent.[21]

Key Takeaways

- The EC's Policy Brief has identified action against anticompetitive practices in labour markets as a priority. While we expect that most cases will be investigated at the national level, the EC has announced its intention to bring its own cases. The above-mentioned Delivery Hero/Glovo investigation and the data centre construction sector investigation are proof of this interest, and we expect further cases to follow. We would also expect that EC fines for violations would be higher than the average fines at NCA level.
- To date, antitrust precedents in wage-fixing and no-poach agreements vary widely across member states. The levels of fines also differ significantly across member states, and have been rather modest—with the exception of the French and Belgian decisions

[17] See KT press release, Real Estate Agencies Agreed Not to Compete for Clients and Employees (Dec. 29, 2022).

[18] See Basketball clubs violated competition - decision of President of UOKiK (Oct. 25, 2022).

[19] See AdC issues sanctioning decision for anticompetitive agreement in the labor market for the first time (April 29, 2022).

[20] See, e.g., CNMC File No. S/0086/08 (Feb. 22, 2012).

[21] See Resolución del procedimiento sancionador con número de expediente 109/2021, Asociación (July 11, 2023).

already noted. Some of the discrepancies may be explained by the specific circumstances of each case. The Policy Brief may be a sign that more cooperation amongst member states is on the horizon, under the coordinating role of the EC. This is likely to lead to increased enforcement and potentially materially higher fines, even at Member State level. It may also result in additional clarity as to what is, or is not, acceptable.

- NCA precedents to date have tended to focus on anticompetitive practices in the labour market only in the context of other more traditional anticompetitive practices. It remains to be seen how aggressively the European antitrust authorities will pursue cases solely based on wage-fixing or no-poach agreements.
- While the Policy Brief sheds light on certain aspects of antitrust in the labour market, such as the classification of wage-fixing and no-poach agreements as "by object" restrictions, other areas remain unclear. For example, the Policy Brief states that wage-fixing and no-poach agreements are unlikely to be qualified as ancillary restraints and unlikely to be exempted under Article 101(3) TFEU. It is therefore not clear how exemptions may apply. A lack of predictability could result in more cautious action by business, until case law provides additional guidance.
- The Policy Brief demonstrates that the application of antitrust to labour markets is sector-agnostic. Furthermore, all levels of employees are covered. The French competition authority recently underlined in a report on the generative AI sector that any restriction on the movement of skilled personnel, such as wage-fixing agreements and no-poach agreements, can constitute an anticompetitive practice.[22] In this context, skilled personnel are considered key in the upstream generative AI value chain (we refer to our prior analysis in this regard).
- Legal, human resources, and compliance departments across all industries will have to exercise caution in drafting employment contracts going forward and consider the least restrictive ways possible to protect investments in technology/know-how and human capital and retain talent. For example, alternatives to no-poach agreements include nondisclosure agreements, obligations to stay with an employer for a minimum amount of time, or appropriately structured noncompete clauses. Businesses should review their various practices, guided by the Policy Brief. Each case will turn on its specific facts and circumstances, and tailored advice for outside counsel will be crucial.

[22] See relatif au fonctionnement concurrentiel (June 28, 2024).

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