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Towards an employment cartel law?

Recent developments in enforcement against anti-competitive recruitment practices

by **Oliver Geiss, Marga Caproni** and **Ruggero Chicco**

Competition law has traditionally focused on investigating companies in relation to their conduct towards the market – agreements between competitors to fix prices, share markets or limit production. However, competition authorities have recently turned to more sophisticated forms of collaboration, most notably between buyers. In recent years, the European Commission, for instance, has repeatedly fined companies for colluding to lower the prices they pay their suppliers. These are agreements with a view to increasing profitability not by maximising revenue, but by minimising cost.

Wages are obviously a cost factor. It follows that competition authorities have increasingly started looking at anti-competitive agreements between employers in relation to recruitment and terms of employment. In this article, we describe this evolving trend among competition authorities, its expected adoption by regulators and the resulting challenges for human resources professionals and employers.

Evolution of competition law

In this section, we briefly consider the historical evolution of modern competition law, which began by prohibiting classic price-fixing arrangements and has now evolved to apply to more elaborate buyer cartels. Against this backdrop we describe the gradual emergence of employer cartels and introduce the examples of "no-poaching" and "wage-fixing" agreements.

Since its inception in the early and mid-20th century in the US and the European Union respectively, modern competition law has evolved from prohibiting direct collaboration between competitors to addressing more nuanced anti-competitive arrangements, such as the exchange of information between buyers.

The initial seller-focused approach to the prohibition on collusion between competitors can be observed from earlier enforcement action brought by the European Commission in relation to price-fixing arrangements breaching Article 101 of the Treaty on the Functioning of the European Union (TFEU). There are dozens of cases involving enforcement action against price-fixing arrangements between sellers.

Recently, however, the European Commission has moved towards also tackling collaboration between competing buyers. In 2020, the Commission fined Orbia, Clariant and Celanese for colluding to buy ethylene from suppliers at the lowest possible price. Notably, this involved a more complicated type of price-fixing arrangement than the traditional agreement to increase prices, by instead artificially modifying an industry price reference resulting from individual negotiations between ethylene buyers and sellers.[1] Another early example is the €68 million fine imposed by the Commission in 2017 on companies recycling car batteries for colluding to reduce the purchase price they paid to scrap dealers.[2] The Commission has confirmed that it considers purchasing cartels to be as harmful as price-fixing cartels since, although they "may not raise prices for consumers [...] that doesn't make them some sort of victimless crime. They still make our economy work less efficiently. And they still have direct victims – even if it's suppliers, not consumers, who suffer".[3]

Even more recently, competition authorities have applied those principles to the labour market. Agreements between employers not to compete can take place in a number of ways, but usually the agreement in question takes one of two forms:

1. No-poaching agreements, whereby employers agree not to recruit each other's employees; and
2. Wage-fixing agreements, whereby employers agree not to offer each other's employees high salaries in order to reduce the likelihood of them moving to the competition.

The justification for prohibiting such agreements through competition law is twofold. By agreeing not to compete in the recruitment of employees and on terms of employment, employers negatively affect:

1. Employees, who are unable to leverage their skills to obtain better terms of employment, such as higher salaries; and
2. Competition, as employees are unable to move where their skills best serve the market, and new companies are prevented from entering markets where success is dependent on being able to hire employees with the right skills.

Enforcement practices of the competition authorities

In this section, we address the enforcement practice of competition authorities and, in particular, its evolution from focusing on only the clearest infringements of competition law to challenging more nuanced agreements between competitors. We provide examples of enforcement against employer cartels in a selection of jurisdictions, and predict that the same evolution in enforcement – starting with the obvious cases and moving on to more sophisticated arrangements – is likely to be followed in this area as well.

Recent enforcement practice in a number of jurisdictions shows that competition authorities are increasing their focus on employer cartels and anti-competitive practices in relation to recruitment and terms of employment. In particular, regulators in some jurisdictions, such as the US and UK, are already applying competition law to investigate and in some cases punish no-poaching and wage-fixing agreements. Other authorities, including the Commission, have indicated that they will follow suit in the near future.

The enforcement trend started – as many do – in the US.

The first indication of interest by US regulators in anti-competitive practices in relation to recruitment and terms of employment came in October 2016, when the Antitrust Division of the US Department of Justice (DOJ) and the Federal Trade Commission (FTC) published joint guidance for human resources professionals highlighting aspects of competition law relevant to the recruitment process.[4] In particular, the DOJ and FTC guidelines indicated that:

1. Competing employers agreeing not to recruit each other's employees or not to compete on salaries is illegal;
2. Competing employers sharing information about terms and conditions of employment can result in a competition law breach; and
3. Competing employers can design such exchanges of information in order to make them compliant with competition law – for example, by using a neutral third-party to manage the information exchange or having multiple data sources to prevent the linking of particular data to an individual competitor.

Prior to issuing this guidance, US regulators had treated anti-competitive practices in the hiring of employees as civil offences, which often resulted in settlement. One well-known example is the antitrust litigation initiated by the DOJ in 2010 against eight Silicon Valley companies – Adobe, Apple, Google, Intel, Intuit, Pixar, Lucasfilm and eBay – for agreeing not to make unsolicited offers of employment (ie not to "cold call") each other's employees.[5] The DOJ and the defendants settled on 17 March 2011, with the defendants undertaking not to enter into "any agreement [...] to refrain from soliciting, cold calling, recruiting, or otherwise competing for employees of the other person", but without any fines being imposed on them.[6]

However, there is now strong evidence of a change in attitude by US regulators. In December 2020, the DOJ brought, for the first time, criminal charges against an individual – the "owner of a therapist staffing company" – for concluding wage-fixing agreements, described as "a conspiracy to suppress competition by agreeing to fix prices by lowering pay rates to PTs [physical therapists] and PTAs [physical therapist assistants]".[7] Soon after, in January 2021, the DOJ brought, for the first time, criminal charges against two companies – operators of "outpatient medical care facilities across the US" – for concluding no-poaching agreements, described as a "conspiracy [...] [to] allocate senior-level employees by not soliciting each other's senior-level employees across the US".[8] Further criminal charges were brought by the DOJ in March 2021 for the conclusion of no-poaching and wage-fixing agreements,[9] and in July 2021 for the conclusion of no-poaching agreements.[10]

It is clear that US regulators' interest in anti-competitive practices in relation to recruitment and terms of employment will continue in the near future. In fact, the DOJ and FTC announced, on 27 October 2021, that they would host a joint virtual workshop on 6 and 7 December 2021 to "explore recent developments at the intersection of antitrust and labour, as well as implications for efforts to protect and empower workers through competition enforcement and rulemaking".[11]

There is also evidence that competition authorities in other jurisdictions are following in the footsteps of US regulators.

In the UK, the Competition and Markets Authority (CMA) has conducted early enforcement efforts against wage-fixing agreements. In December 2016, it imposed a £1,533,500 fine on five modelling agencies and their trade association, finding that they had colluded on prices for modelling services between 2013 and 2015.[12] The CMA found that, as part of the collusion, the agencies agreed to fix minimum wages or agreed a common approach to pricing for their modelling services. It decided that the practice constituted a restriction of competition by object in violation of Article 101(1) of the TFEU as well as UK competition law. Although the qualified restriction was directed to the modelling agencies' customers, the agreement affected the models' conditions of work.

At the EU level, a recent official statement by Margrethe Vestager, Executive Vice-President and Commissioner for Competition at the European Commission, indicates that

the Commission is also considering enforcement action against anti-competitive practices in relation to recruitment and terms of employment. On 22 October 2021, during a speech she delivered in Rome on the EU's current policy when addressing cartels, Ms Vestager raised the need to challenge agreements between companies not to recruit each other's staff and to fix wages. She emphasised that such agreements have a negative effect not only on employees, but also on competition by "restricting talent from moving where it serves the economy best".[13]

One could describe the US examples as "obvious" infringements.

While these examples indicate that regulators in many jurisdictions, following in the footsteps of the US, will begin enforcement action against anti-competitive practices in relation to recruitment and terms of employment, it is also true that such enforcement efforts are likely to move further than the obvious infringements arising from the no-poaching and wage-fixing agreements described above.

In fact, historically, competition authorities (and often the US authorities first) have typically begun enforcement actions against anti-competitive practices by, first, focusing on straightforward situations presenting a clear breach of competition law and, only then, moving to sophisticated types of collusion, which constitute less overt infringements.

Competition authorities around the world have now unanimously moved beyond simply addressing the archetypal situation of the "smoke-filled room", where cartelists agree on prices and joke about regulators having planted microphones. It has long been accepted that information exchanges alone, without an agreement per se to fix prices, are sufficient to establish illegal collusion. This development can be seen in the current approach to price signalling, that is a situation where companies make public statements on prices without actively coordinating their behaviour. Competition authorities such as the European Commission have on occasion found that such announcements were made in a way that was capable of facilitating collusion and distorting competition. As every practitioner will confirm, the level of proof required to show a potential distortion of competition, even in the absence of an agreement as such, is very low.

Moreover, at EU level, agreements to exchange information carry essentially the same penalty as hardcore price-fixing agreements. In general, individual "guilt" has little impact on the amount of the fines as the basic amount is largely based on objective economic criteria such as sales, and the EU concept of a single and continuous infringement tends to blur individual responsibility.

It is to be expected that competition authorities' enforcement practice will converge towards more complicated scenarios when it comes to the labour market as well. As competition authorities globally begin to focus on anti-competitive practices in the labour market, the related legal uncertainty will have to be resolved against the backdrop of potentially immense fines (up to 10 per cent of a company's worldwide turnover) and far-reaching investigative powers by regulators. Fines of hundreds of millions of euros are not uncommon.[14]

Compliance challenges for employers

In this section, we describe the practical consequences of these enforcement efforts by competition authorities. In particular, we analyse the compliance challenges which the emergence of employer cartels and its corresponding enforcement practice will bring for human resources professionals in the recruitment process. We also address the practical hurdles which are likely to be faced by employers to avoid entering into anti-competitive agreements.

This new expected focus by competition authorities on anti-competitive practices in the labour market will present certain challenges for employers in training human resources professionals involved in the recruitment of employees and the setting of terms of employment.

This is particularly the case in an area of increased enforcement. When competition authorities investigate anti-competitive behaviour, they look backwards on conduct by companies to assess whether it constitutes a breach of competition law, as it is understood at the time of the investigation. There might be many years between the conduct in question and an investigation, in particular if an authority is investigating a long-standing arrangement. As it is expected that competition authorities will develop, over the next few years, greater sensitivity to infringements in relation to employment, this will lead them to investigate present behaviour by human resources professionals, but with a greater degree of scrutiny than would be expected in an investigation today.

That time gap between infringement by companies and enforcement by competition authorities essentially means that effective compliance efforts today must anticipate stricter enforcement in the future. In this way, effective compliance requires employers to think two steps (or a few years) ahead.

Notwithstanding the difficulty of predicting the types of behaviour competition authorities will consider to constitute a breach of competition law in a few years' time, it is clear that compliance efforts should also be directed at human resource professionals, just as enforcement actions on buyer cartels have led companies to include their purchasing department in compliance training sessions. However, there are significant challenges to provide effective training to human resources professionals on anti-competitive practices in the labour market.

The main practical hurdle for employers when considering this question is the fact that terms and conditions of employment are not equivalent to standard pricing information, as they are information that belongs not only to the employer, but also to the employee. For example, it would be extremely difficult for an employee to negotiate with a

future employer if they were not able to refer to their current salary and benefits. The future employer could take a note to prove, in the event of an investigation by a competition authority, that the salary information came from a competitor's employee looking for alternative employment, rather than a competing employer looking to fix the purchasing price of labour. An even better approach would be for the future employer to produce a contemporaneous record of why it decided not to offer a higher salary, in order to prove that this was a genuine market decision and not the result of an express or tacit agreement by the employers not to recruit each other's employees.

The situation becomes even more complicated when information about salaries originates directly from a competing employer, rather than from a competing employer's employee. For example, it is not uncommon for companies to make statements announcing that they are raising their entry-level salaries to match the new scale set by a competing employer. In a standard pricing context, this would be equivalent to a company announcing that it was lowering its prices to match the new scale set by a competing seller. The first question a regulator would ask in both situations is where the scales came from and why the first company was only matching the second company's salaries/prices, rather than offering higher salaries/lower prices. Coupled with a few unwise remarks about entry-level salaries at a conference, this situation could be considered to be over the line by a regulator.

Exchanging of information becomes even more concrete in industry-level negotiations. Employers' organisations negotiate on a regular basis with trade unions on the employment conditions of the sector. These negotiations are prepared by the employers' organisations in concertation with their members, often the companies with the most employees in the sector, which also sit on the board of the employers' organisation. These companies meet regularly to discuss the employment conditions in their sector, their experiences with trade unions and issues such as shortages of staff in certain regions. In such an amicable context, one may more easily be inclined to give certain instructions to a recruiter.

A similar discussion on raw material pricing would obviously be highly problematic. However, in relation to wages, it cannot be ignored that such discussions, and collective bargaining in general, have clear social benefits. It is entirely unclear, however, how such social benefits are taken into consideration when assessing information exchanges in the employment sector.

This is where an emerging "employment cartel law" encounters another hotly discussed topic, which is to what extent non-economic criteria should be taken into account when assessing agreements under competition rules. The current discussion is about environmental benefits, but the basic contradiction – a strict application of competition law leading potentially to negative social consequences – is the same. All of this adds to the uncertainty that companies face, which is not alleviated by the current case law and public statements addressing obvious infringements.

A natural continuation

The nascent enforcement efforts by competition authorities against anti-competitive practices in the labour market are the natural continuation of the evolution of competition law.

Such enforcement efforts are already well-established in the US, and there is evidence that the UK and the European Union are ready to increase their scrutiny of these practices. As more regulators begin to take an interest in anti-competitive practices in relation to recruitment and terms of employment, it is to be expected that others will follow, and that enforcement will begin going beyond obvious breaches of competition law. The corresponding legal uncertainty created will fall to be determined through litigation, with the risk of heavy sanctions.

This will raise a number of challenges for employers and human resources professionals. Employers will need to predict the enforcement trends and priorities of competition authorities in a few years' time in order to provide effective compliance training to human resources professionals. They will also have to adapt their recruitment practices to protect themselves against the risk of investigation by competition authorities.

Oliver Geiss *and* ***Marga Caproni*** *are partners – and* ***Ruggero Chicco*** *is a trainee solicitor – at Squire Patton Boggs in Brussels (https://www.squirepattonboggs.com/en). The authors' views are their own and do not represent the views of Squire Patton Boggs.*

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Editorial queries: Please contact Kate Clifton on tel: +44 (0)78 2579 9139, or email kate.clifton@informa.com

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