How European Authorities Are Foiling Anti-Competitive Hiring

By **Oliver Geiss, Marga Caproni and Lucija Vranesevic** (November 27, 2023)

Oliver Geiss

Marga Caproni

Lucija Vranesevic

Against the background of employment practices that have come under the radar of cartel enforcement in Europe, the European Commission announced on Nov. 21 that it carried out dawn raids for a suspected cartel infringement relating inter alia to no poach agreements.

Other national authorities are also paying closer attention to the topic, with the U.K. Competition and Markets Authority, or CMA, being no exception — Brexit notwithstanding. The latest big swing came in October, as the CMA opened its second investigation into suspected fixing of staff rates by broadcasters.

By focusing on such agreements, the European Union and the U.K. are following in the footsteps of the U.S., which has been looking at anti-competitive practices among companies in the hiring of employees for some years.

In this article, we discuss the key antitrust concerns surrounding labor practices and explore notable trends in regulation and enforcement in Europe.

With antitrust law setting the basis, European national authorities have built upon the basic antitrust principles by developing further rules through enforcement action and guidelines. We discuss below the developments in select jurisdictions with recent or notable activity, although there is enforcement happening in other jurisdictions as well, e.g., Hungary and Portugal.

As enforcement priorities of the major antitrust enforcement authorities tend to harmonize, it is probably only a matter of time before other authorities also focus on employment practices.

What are the areas of concern?

Competition law infringements arising in the employment field could include agreements between groups of companies (1) not to hire each other's staff members at all — called no-poaching agreements — or (2) not to offer them a higher salary to move — called wage-fixing agreements. Such agreements reduce employees' mobility and can negatively affect competition by preventing new companies from breaking into markets where their success is dependent upon being able to hire employees with the right skill sets.

In EU Competition Commissioner Margrethe Vestager's words, no-poaching agreements between employers are "an indicated way to keep wages down, restricting talent from moving where it serves the economy best."

Interestingly, in its Horizontal Guidelines that were updated on July 21, the European Commission expressly listed wage-fixing agreements among "by object" restrictions, meaning that they are automatically illegal without the need to show negative effects. This

is similar to a purchasing cartel, except that the object is not a raw material or a manufactured product but the employees.

An important aspect of cartel enforcement is information exchange, which reduces uncertainty among competitors in sensitive areas, such as their purchasing price. Applied to the world of employment, this means that exchanges on individual nontariff salaries, including indirectly through publications, are problematic.

Essentially, the terms and conditions of employment should be treated as similar to pricing information, and their exchanges as similar to a price-fixing cartel. Of course, there is difficulty with this approach because terms and conditions of employment are not information that purely "belongs" to the company, but also to the employee.

The EU

Already in 2021, Vestager delivered a speech on the EU's cartels policy during which she announced an increased EU interest in anti-competitive hiring practices.

On Nov. 21, the commission announced, for the first time, that it had carried out dawn raids for a suspected cartel infringement relating, inter alia, to no poach agreements. This investigation may have the same effect as previously the first commission investigation into purchasing cartels and put employment cartel law on top of the agenda.

Already in the recent past, we have seen companies extending their compliance programs to include human resources personnel and review internal policies with regard to providing information on compensation levels.

The U.K.

The U.K. CMA is at the forefront of developments. On Feb. 9, the CMA published guidance for employers on how to avoid anti-competitive behavior. This outlines the three main ways in which anti-competitive behaviors can arise in labor markets.

No-poaching agreements are the first example of anti-competitive behavior that the CMA warns against. The guidance also discusses the anti-competitive nature of wage-fixing agreements, which are agreements between two or more employers to fix employee pay or any other employee benefits.

The final key anti-competitive behavior warned against by the CMA is information sharing, i.e., two or more entities sharing sensitive commercial information with anti-competitive ramifications, because of its impact on recruitment and retention in the labor market.

In its guidance, the CMA outlines a number of steps that businesses can take to ensure that they do not inadvertently engage in anti-competitive behavior, including

- Understanding how competition law applies to no-poaching and wage-fixing agreements;

- Ensuring that no sensitive wage or similar business information is shared with a competitor;
- Ensuring that recruitment staff are provided with training on competition law and how it applies in the recruitment context; and
- Ensuring that they have robust internal reporting processes in place.

The fundamental principles that (1) not all anti-competitive agreements are in writing, and some may take the form of informal practices, and that (2) anti-competitive agreements may also cover freelancers and contracted workers, as well as salaried staff, is reiterated in the guidance.

Finally, the CMA makes it clear that any anti-competitive behavior within the labor market should be reported as soon as possible.

The CMA took a step further by opening two investigations into broadcasters of television content, including BBC, ITV and BT Group PLC. One investigation covered sports and the other focused on nonsports content.

Both investigations are looking into possible agreements among broadcasters concerning the employment of staff and the purchase of freelance services and are in the information gathering phase.

Poland

In contrast to the U.K., there are no general or specific guidelines available from Poland's Office of Competition and Consumer Protection, known by its Polish acronym UOKiK, when it comes to nonsolicitation or no-poaching agreements. However, this does not mean that such acts do not happen in practice, or that the Polish regulator is unaware or not concerned.

UOKiK notes interest in such practices from the U.S., the U.K. and EU regulators, and looks at them from the perspective of agreements between entrepreneurs that prevent, restrict or distort competition, but also possibly will allow some exceptions under doctrine of ancillary restraints.

This refers to any restriction that is directly related and necessary to the implementation of a main agreement. Their specific focus would be on wage-fixing or no-poach agreements.

There are no provisions in the Polish Labor Code dealing with poaching of employees. However, under Article 12 of the Fair Trading Act, it is considered an unfair trading practice to induce a person employed by an entrepreneur on the basis of an employment relationship.

This also includes legal bases for neglecting or improperly performing their duties or other contractual obligations for personal gain or for the benefit of a third person, or to cause a

disadvantage to the entrepreneur. This restriction assumes that inducing nonperformance or improper performance of the contract is an unfair trading practice.

As for wage fixing, notable cases in Poland concern remuneration rates for athletes. In one of the cases, UOKiK found an agreement between the Polish Basketball League and basketball clubs on reducing the players' monetary benefits unlawful due to the COVID-19 pandemic.

Another investigation targeted regulations adopted by the Polish Automobile and Motorcycle Federation providing for maximum rates of remuneration that sports clubs may pay to participants. The most recent case in November involved nurses who notified wage-fixing by hospital directors in Wrocław, alleging that they kept the rates intentionally low to achieve overtime work.

France

In her farewell speech from Oct. 11, 2021, Isabelle de Silva, former president of the French Competition Authority, stated that the FCA should take stronger action on anti-competitive behaviors in the labor markets in the future. Marriage between competition law and employment is, therefore, not new in France and will likely raise more and more questions.

The FCA has also already taken an interest in potential antitrust harm in the labor markets. Since 2016, the French regulator has issued several decisions and an opinion related to the interplay between competition and employment.

On the one hand, the FCA has qualified certain labor-related practices as anti-competitive, as part of the wider cartel cases. In 2016, for example, it sanctioned various modeling agencies for collaborating, together with their professional association, pricelists fixing and, in particular, the salary to be paid to the models.

The following year, companies active in the floor-covering market were sanctioned by the FCA for price fixing, no-poach agreements and exchanges on wages.

On the other hand, the French competition regulator has issued an opinion on the extension of branch agreements and the effects they have on competition. Branch agreements are collective labor agreements concluded between trade unions and at least one employers' association at the branch level.

In France, such agreements can be expanded to make the provisions compulsory for all employees and employers included in its territorial and professional scope.

However, since 2017, the French minister of labor has been able to refuse their extension under the French employment code for "reasons of general interest, in particular for excessive harm to competition." When asked for an opinion, the FCA noted the social benefits of branch agreements, but also stated that these agreements could be anti-competitive.

In regard to nonsolicitation or no-poach agreements, the French Court of Cassation recognizes the validity of such clauses provided that they are proportionate to the interests that are to be protected. In contrast to its English counterpart, from a competition law perspective, the FCA has not published guidelines on nonsolicitation agreements or no-poach agreements.

Nevertheless, in 2017, it sanctioned the competitors in the floor-covering sector for having adopted a tacit nonaggression agreement or a gentleman's agreement. This agreement prohibited the companies from actively soliciting each other's employees for several years. The FCA stated that this agreement — effectively, a no-poach agreement — was a part of a complex and continuous infringement with an anti-competitive object.

Germany

The German competition authority has not published specific legal guidance. However, it is clear that no-poach and wage-fixing agreements could form a competition law infringement and be subject to investigations and fines.

Spain

The position in Spain is in line with that in Germany, as there have been no policy statements from the competition authority on the topic.

Notable cases include two cartel decisions from 2010 and 2011, which, on top different price-fixing elements, addressed no-poaching and information exchange on wages.

Czech Republic

To date, the Czech competition authority, or UOHS, has not issued any specific guidelines concerning inter-employer agreements and there is not yet any specific case law from the Czech courts regarding this issue.

However, the focus on labor markets is increasing, as UOHS closed its first labor market investigation in October.

In response to UOHS's objections, two Czech associations — the Association of Czech Travel Agencies and the Association of Used Cars Vendors — have agreed to stop promoting noncompete clauses among their members.

In this respect, UOHS has also declared that it will be its priority to focus on wage-fixing and no-poaching agreements between employers, as these can interfere with fair competition. When assessing this type of agreements in the future, it is likely that the UOHS will also consider case law from other jurisdictions, especially other EU countries.

In the case of acquisitions and joint ventures, inter-employer arrangements are normally accepted by the competition authorities if they are part of the transaction, are necessary for its implementation and are limited in time and geography. This follows the practice of the European Commission, which has found a nonsolicitation commitment for specific senior employees of the target company to be permissible in the context of a merger clearance.

Outside the mergers and acquisitions area, a nonsolicitation commitment may also be justified if it is part of a broader cooperation between the parties and is proportionate to that cooperation.

In any event, the commitment should always be limited in time and should only apply to selected employees, e.g., those in whom the employer has invested a large number of resources for training and know-how transfer, and so whose loss to a competitor would pose a particular threat to the business.

Belgium

In Belgium, there is no case law on this matter nor any guidelines. However, several investigations into the labor market appear to have been carried out by the Belgian Competition Authority.

Furthermore, in 2022, the Belgian regulator's budget was increased, allowing it to have more resources "to deal with new challenges such as competition in the labour market." Further developments in this area seem only a matter of time.

No-poach agreements are legal in Belgium, if they are limited in time and space, restricted to a specific activity and grant the employee a level of financial compensation.

It appears that the Belgian regulator has not yet assessed the prospective antitrust harm of such clauses. However, the Belgian Competition Authority has indicated that it will take more stringent action on concentrated practices in the world of sport, with particular focus on no-poach agreements.

Switzerland

In December 2022, the Swiss competition authority, or COMCO, investigated 34 banks for colluding on salaries, marking its first-ever probe into labor markets. The alleged practices consisted in banks sharing information about what they pay certain categories of their employees.

COMCO stated that, if necessary, the procedure can be extended to other geographical regions and companies.

What is next?

The heightened attention of the European Commission and national authorities to this matter collides squarely with the war for talent that most employers are currently facing and that may encourage them to precisely consider those arrangements that have now come under scrutiny.

They will need to tread a careful line between measures to retain their own staff and the information and connections they possess on the one hand and not unnecessarily restricting their own ability to hire exactly such people out of their competitors.

Companies will need to be extra careful when they discuss their approach to how to face the challenges in the employment market. Company policies and training may have to be revised to address situations where these discussions are taken outside the company to informal platforms organized at an industry level.

Where the HR team may have traditionally not been included in competition training sessions, it is recommended to extend the invitation to them going forward.

Lastly, this may be a suitable time to review the template employment and service agreements to ensure that they will be compliant.

Oliver Geiss and Marga Caproni are partners, and Lucija Vranesevic is an associate,

at Squire Patton Boggs LLP.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of their employer, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.