No-poach agreements: An overview of EU and national case law

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No-poach agreements have received increased attention by competition authorities, especially in the United States, as part of a broader movement to address anticompetitive behavior by employers in labor markets. A no-poach agreement is an agreement between employers not to hire away each other's employees. A no-poach agreement is actually just one of a family of related agreements among employers that have the purpose and effect of reducing competition in labor markets. Employers have also been accused of agreeing not to solicit or "cold call" one another's employees, and of fixing wages and exchanging information about compensation. There are also vertical no-poach agreements, for example, between staffing agencies and the firms to which they supply workers.

Horizontal no-poach agreements violate the principles of market competition, just as market division and price-fixing agreements on the output side of the market do. In a properly functioning labor market, employers compete for workers by offering higher wages, more favorable job conditions (such as safer worksites), and amenities (such as shift flexibility). Competition for workers is a species of "buy-side" competition, or competition in input or supply markets. According to economic theory, competition for workers causes employers to bid up compensation until it equals the marginal revenue product, which is the efficient or competitive level of compensation. To maintain competitive pressure, workers must retain the freedom to quit and move to competing employers if their current employer does not pay them the competitive wage. When employers agree not to poach each other's employees, they cut off an important source of competition. While competition may continue to occur at the entry level, and while employees who voluntarily quit and search for a new job will also maintain some competitive pressure on employers, the risk that a competitor will poach employees remains an important source of competitive pressure in well-functioning labor markets.

It is sometimes argued that a no-poach agreement benefits consumers because it reduces labor costs, and these labor cost savings are passed on to consumers in the form of lower prices. That view is fundamentally misleading. In the classic model of labor monopsony, which is analogous to the standard model of monopoly, downward pressure on wages pushes workers out of the labor market, or into markets in which they are less productive, resulting in lower output and hence higher prices for consumers. But even in settings where output remains constant (for example, where a unionized workforce prevents job loss), there is no guarantee that consumers benefit and no reason to believe that the transfer from workers to shareholders is legally appropriate or socially desirable. Input-side harms to competition (including harms to workers) and output-side harms to competition are symmetrical in economic theory, and should be treated the same under competition law.
Interest in the problem of employer no-poach agreements dates back to 2010, when the United States Department of Justice sued Apple, Google, and several other Silicon Valley tech firms for agreeing not to “cold call” one another’s software engineers. Evidence of the agreement included email exchanges between CEOs of the companies, who complained to each other whenever the agreement was broken. The defendants settled this case and a follow-on class action brought by the workers. In 2016, the Justice Department and the Federal Trade Commission issued a Human Resources Guidance document warning employers that no-poach agreements were per se illegal and criminal violations of the law. Subsequently, the Justice Department announced that it had launched criminal investigations. Meanwhile, academic research revealed that numerous major franchises, including McDonald’s and Burger King, included no-poach clauses in franchise contracts. State attorneys general sued these companies, most of which settled by agreeing to remove or not enforce the no-poach clauses. Class action litigation has been brought against many of these franchises as well.

Under U.S. law, no-poach agreements are treated the same as market division agreements on the product side of the market. Naked no-poach agreements between competitors are per se illegal and subject to criminal liability. No-poach agreements between competitors that are ancillary to legitimate business ventures are subject to the rule of reason, as are vertical no-poach agreements.

The Department of Justice has brought six criminal actions involving no-poach and related anticompetitive labor agreements. Several resulted in acquittals but even in these cases the courts recognized that naked horizontal no-poach agreements are criminally unlawful, and one case resulted in a plea bargain in which the defendant admitted criminal violation of the antitrust laws. The other cases are pending. Many of these cases have spawned civil litigation; other cases involving apparently naked no-poach agreements are also being litigated though very likely most such cases have settled.

A number of cases involve no-poach agreements used by franchises. A franchise is typically organized by a corporation (the franchisor), which licenses intellectual property and often rents property, and sells supplies and services, to independent business (the franchisees), which provide a common commercial service to customers. For example, McDonald’s is a well-known franchise. Many franchise contracts contain no-poach clauses that forbid franchisees to hire employees of the other franchisees within the common franchise. Workers have brought class actions against various franchisors and franchisees on the grounds that the no-poach clauses violate the antitrust laws.

The cases have raised various issues. In some cases, the no-poach clause has been deemed vertical and governed by the rule of reason because it is found only in a contract between the franchisor and the franchisee, who do not compete with each other. In other cases, the no-poach clause is treated as horizontal either because the franchisor owns corporate subsidiaries that compete with franchisees or the franchisee agreement can be enforced by franchisees and third-party beneficiaries. Even in these cases, defendants have argued that the rule of reason should apply on the ground that the no-poach clause is ancillary to the larger franchise arrangement, which they argue is an independent and legitimate business arrangement. The cases have spawned debates that have not yet been settled. For example, commentators have pointed out that a series of vertical no-poach agreements between a franchisor and multiple franchisees eliminates competition among the franchisees as effectively as horizontal agreements among franchisees orchestrated by the franchisor; there is no reason to subject the former to the rule of reason if the latter is per se illegal. The view that franchisees are a single entity and thus that franchisees cannot be sued for conspiring with one another has been rejected.
The argument that no-poach agreements are ancillary to business ventures has also been made successfully outside formal arrangements like franchises. In a case involving arrangements in which luxury brands made sales in venues inside department stores, a court held that the rule of reason applies. In another case, defendants tried to justify a no-poach agreement as a means of ensuring that employees paid off debts to their employers, but the case settled.

Another group of cases involve staffing agencies or outsourcing arrangements. Staffing agencies are companies that employ workers who they contract out to other companies. They may use no-poach clauses to prevent the companies they contract with from poaching their workers. In one case, one staffing agency that placed travel nurses with hospitals contracted with another staffing agency to help find additional nurses subject to a non-solicitation clause. A court held that the non-solicitation clause was subject to the rule of reason because it was ancillary to a procompetitive collaboration. By contrast, in a case where staffing agencies supplied construction workers to a worksite, and agreed not to hire away one another’s employees, a court held that the no-poach clause was per se illegal. Similar issues arise when companies working on common projects outsource employees to one another.

A related group of cases involve covenants not to compete, or noncompetes. A noncompete is a clause in an employment contract that forbids the employee to enter into or start a similar profession or trade that competes with the employer for a certain period of time and within a specific geographic area after the termination of employment. Similar to a no-poach agreement, a noncompete interferes with job mobility, and indeed to a greater extent since the employee is prohibited from working for any competitor rather than one or a few competitors. Unlike a no-poach agreement, the employee is party to the agreement.

Noncompetes have traditionally been subject to the common law and state statutes, and have very rarely been challenged under the antitrust laws. But in recent years, concerns have been expressed that firms may use noncompetes to tie up workers in a labor market so as to prevent entry by competitors, or to prevent the workers themselves from starting their own businesses to compete with former employers. Academic research has indicated that noncompetes have been used anticompetitively, spurring new state legislation to restrict them and, in 2023, a proposal by the Federal Trade Commission to ban them.

While not a no-poach case, the first-ever challenge to a merger based on its labor market effects raised issues similar to those in the no-poach cases. The first and third largest commercial publishers in the United States sought to merge. The DOJ challenged the merger on the ground that it would excessively reduce competition in the input market for the purchase of anticipated top selling books (those with advances of at least $250,000). A court ruled that the merger would substantially lessen competition among publishers for the work of authors, and enjoined the merger.

European Union

Similarly to the US, competition enforcement in labor markets in Europe has so far focused on anti-competitive agreements, particularly on wage-fixing and no-poach agreements. If limited in time and scope, no-poach or no-solicitation clauses can be unproblematic, for example when ancillary to acquisitions and joint ventures that would be impossible or significantly more difficult without the restriction. Naked no-poach agreements may also theoretically benefit from an exemption if they meet the conditions under Article 101(3) of the Treaty on the Functioning of the European Union but, if not, are automatically void and may subject to a fine.
Competition authorities in the European Union have characterized naked no-poach agreements as market-sharing cartels and considered them as “by object” restrictions of competition, i.e., restrictions whose nature reveals their potential for competition distortion and whose harmful effect on the market is considered to be so well-established that there is no requirement to prove it in the specific case. No-poach agreements limit mobility and wages for workers in the labor market and may result in higher prices and less innovation in the output market. As a result, in order to benefit from a lighter burden of proof, authorities have so far relied on this presumption, typically considering sufficient to provide evidence of the anti-competitive object of the agreement without need to prove the actual or potential effects on the market.

Recently, the sports sector has been the target of several standalone investigations of no-poach agreements to limit mobility of athletes between teams. For example, the Portuguese Professional Football League and 31 clubs were hit with a fine of 11.3 million euros for promising not to hire football players who had terminated their contracts due to Covid-19. Similarly, in Poland and in Lithuania, when the 2019/2020 season came to an early end due to Covid-19, the national basketball league and its teams agreed to suspend the payment of players’ compensation for the rest of the season and end their contracts. The competition authorities fined the leagues and the clubs for wage-fixing and for preventing the players, via such agreements, from switching to other clubs potentially offering better terms. The Lithuanian decision has been annulled in court in the first instance, the court taking issue, among other things, with the qualification of the agreement as a “by object” restriction.

Outside of the sports sector, no poach agreements have occasionally been discovered in the context of investigation into collusive practices taking place in the downstream product markets (for example in Spain and France) or as a standalone restriction in relation to skilled labor. The Portuguese competition authority recently discovered a cartel between laboratories providing clinical analyses and Covid-19 tests, which included an agreement not to hire workers. A no-poach investigation involving Renault Technologie and other companies was launched in Romania in the automotive engineering sector. In Lithuania, the competition authority recently also fined the Lithuanian Association of Real Estate Agencies and its members for including into its code of ethics, among others, a provision not to poach other agencies’ brokers. In Spain, the Catalan competition authority is investigating no-poach agreements between members of the Association of Independent Private Schools.

No-poach agreements, and labor markets in general, also due to their local nature, have been areas where European national competition authorities have until now readily taken the lead. The European Commission has not yet opened a no-poach or other labor market case, but Executive Vice-President Margrethe Vestager and DG COMP Director General Olivier Guersent suggested that labor markets may be increasingly scrutinized in the future by the supranational enforcer.

Note from the Editors: although the e-Competitions editors are doing their best to build a comprehensive set of the leading EU and national antitrust cases, the completeness of the database cannot be guaranteed. The present foreword seeks to provide readers with a view of the existing trends based primarily on cases reported in e-Competitions. Readers are welcome to bring any other relevant cases to the attention of the editors.


[9] United States v. Patel, et al., No. 3:21-CR-00220-VAB (D. Conn. 2023). As this article went to press, the district court granted the defendants’ motion for judgment of acquittal on the ground that the alleged no-hiring agreement was riddled with exceptions and did not meaningfully restrict job mobility.


[23] European Commission, Notice on restrictions directly related and necessary to concentrations (2005/C 56/03).

[24] This notion is very similar to that of per se restriction in the US, even if a by object conduct can theoretically benefit from an exemption if it is shown to yield pro-competitive effects under Article 101(3) TFEU.

[25] See Judgment of the Court of Justice of 19 March 2015, Dole Food and Dole Fresh Fruit Europe v Commission, C-286/13 P, EU:C:2015:184, paras. 113-114 and cited case law. See, Peter D. Camesasca, Johan Ysewyn, Laurie-Anne Grelier, Phillip H. Warren, Michael J. Fanelli, Derek Ludwin, The EU Court of Justice confirms that the exchange of sensitive information could constitute a cartel (Dole Food), 19 March 2015, e-Competitions May 2015, Art. N° 95755, Kyriakos Fountoukakos, Kristien Geuverickx, The EU Court of Justice considers that the bilateral exchange of pre-pricing informations to a concerted practice with the object of restricting competition is an anticompetitive practice (Dole), 19 March 2015, e-Competitions March 2015, Art. N° 79540, and Tony Woodgate, Ajit Kainth, The EU Court of Justice decides that the General Court was correct in finding that the exchange of pre-pricing information was a restriction of competition by object under Art. 101 TFEU (Dole), 19 March 2015, e-Competitions March 2015, Art. N° 77186.

Competition Authority overturns basketball league sanctions


[34] See, for Spain, Resolución S/DC/0612/17, Montaje y Mantenimiento Industrial, Comisión Nacional de la Competencia (CNMC), Oct. 1, 2019. See, Clara García Fernández, Miguel Troncoso Ferrer, Sara Moya Izquierdo, The Spanish Competition Authority fines companies for participating in a cartel in the industrial assembly and maintenance sector (Montaje y Mantenimiento Industrial), 1 October 2019, e-Competitions October 2019, Art. N° 92288 and Pablo Velasco, Javier Torrecilla Pérez, Rafael Baena Pérez, The Spanish Competition Authority fines 19 assembly and maintenance companies operating in the energy and petrochemical sectors €54.2 million and also fines 8 directors €0.28 million for big-rigging (Montaje y Mantenimiento Industrial), 1 October 2019, e-Competitions October 2019, Art. N° 94049.


