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No-poach agreements on the European Commission dawn raid radar

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In a speech on 22 October 2021, EU Competition Commissioner Margrethe Vestager revealed that the European Commission was planning a series of dawn raids for the months to come. She highlighted that the European Commission is not just looking to investigate traditional cartels, like price-fixing agreements, but also other types of anti-competitive conduct – such as wage-fixing or no-poach agreements. Notably, Commissioner Vestager linked the upcoming focus on such agreements in labor markets to another hot topic in EU competition law: innovation competition.

Commissioner Vestager's remarks indicate that the European Commission is likely to launch investigations into suspected anti-competitive behavior in the human resources area very soon. Companies should be aware of this new risk area and review compliance.

The Vestager speech

Speaking at the Italian Antitrust Association's Annual Conference, Commissioner Vestager noted that it had been practically impossible to conduct coordinated dawn raids in many countries at once as a result of the pandemic, but that the picture has now changed (see our recent alert: an autumn dawn raid revival has started in the EU). Just in the last two weeks, the European Commission has dawn raided several companies in the wood pulp industry and a company in the animal health sector.

Vestager's speech clarified that the European Commission will also look at atypical cartels, and in particular at no-poach agreements. Key statements in the speech include:

- "*…the more we focus on … familiar cartels, the more companies will look for other ways to collude. And for deterrence to work, we need to show that when they do, we'll be waiting for them*".
- "*… 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**."*

- *"And that's not the only way that an agreement not to poach each other's staff can create a cartel. There are markets where you can only compete if you have expensive machinery or costly IP. And then there are those where the key to success is finding staff who have the right skills. So in these cases, **a promise not to hire certain people can effectively be a promise not to innovate, or not to enter a new market**."*

Recent enforcement activity

The United States has led the way in aggressively investigating anti-competitive activity in the human resources area, but regulators in other jurisdictions around the world are rapidly catching up.

Prominent examples of recent enforcement activity by antitrust authorities in the US, Europe and around the world include:

United States: So-called "no-poach" agreements have been a hot topic in the US. State Attorneys General have been especially active in the US in attacking no-poach agreements against franchise systems in the foodservice industry.[1] For many years, labor markets were either a backwater for US enforcement officials or considered at odds with the traditional focus of antitrust enforcement being concerned with consumer welfare.[2]

Beginning a little more than a decade ago, the US Department of Justice Antitrust Division started vigorously pursuing antitrust enforcement against no-poach agreements among competing employers. The DOJ Antitrust Division investigated a number of high-tech companies for anti-competitive and allegedly "naked" no-poach agreements among the companies to prevent poaching of high-tech animators and other sophisticated engineers.[3] (In the DOJ Antitrust Division cases, where civil consent decrees and settlements were obtained, no firm litigated the case to final judgment). The cases spawned a series of steps taken by three successive US Administrations. In October 2016, the DOJ and Federal Trade Commission released a joint Antitrust Guidance for Human Resource Professionals, which confirms the enforcers' agenda "to proceed criminally against naked wage-fixing or no-poaching agreements."

There have been a number of further investigations in the US since the 2016 Guidance, and earlier this year, the DOJ Antitrust Division filed its first criminal antitrust prosecution, which led to two more indictments in July 2021, against a healthcare company and its former CEO. In July 2021, President Biden signed an Executive Order which considers whether to revise the 2016 Antitrust Guidance for Human Resource Professionals to strengthen employee protection (see our alert on Executive Order 14036's directive on non-competes and no-poach agreements). Importantly, the enforcers' agenda has not yet faced a substantial court challenge, with most accused firms simply settling with the US government or State Attorneys

General.

Europe: National competition authorities have recently begun a number of competition investigations concerning no-poach agreements and salary agreements, for example in Hungary (recruitment association), Lithuania (basketball), Poland (basketball), and Portugal (football). The Portuguese competition authority recently published an issues paper on labor market agreements and competition law. In her farewell speech in October 2021, Isabelle de Silva, former head of the French Competition Authority, also praised enforcement activities in the US on non-poach agreements and opened the door for her authority to focus on this area going forward.

Other jurisdictions: Brazil – In March this year, CADE's General Superintendence initiated a proceeding in the labor market of the Brazilian healthcare industry (alleged wage agreements and exchange of competitively sensitive information among competitors' HR departments). The investigation involves 37 companies and 108 current or former employees. **Mexico** – In September 2021, the Mexican antitrust agency fined a football federation, 17 football clubs, and eight individuals a total of US$ 8.9 million for salary caps and labor movement restrictions in women's football.

Review of no-poach agreements and wage-fixing under antitrust law

Competition authorities around the globe are therefore currently focusing on what they deem to be "naked" no-poach and wage-fixing agreements between employers. The authorities' definition of "naked" is a question of debate in many jurisdictions, including the US, where there are arguments that such agreements should be evaluated under the balancing "rule of reason" test and cannot be *per se* violations. But per the enforcers' definition, "naked" agreements are standalone, i.e., they are not linked to or agreed in the context of M&A transactions or, for example, competitor collaborations on R&D, purchasing, joint production, etc. Agreements related to M&A transactions are typically subject to the ancillary restraints doctrine, i.e., with the appropriate limits, they (e.g., non-solicitation restrictions imposed on the seller) can be justified in the context of a merger control assessment as "directly related" and "necessary" for the transaction. In the same vein, agreements in the context of neutral or even competition-enhancing competitor collaborations are also not the focus of the current antitrust discussion. Neither are agreements between employers and their employees, for example not to poach colleagues when they leave the company.

Rather, competition authorities are focusing on agreements between employers not to poach/cold call each other's employees and/or to set fixed wages for employees or a certain group of them. The scope of such agreements (and context) varies from agreeing not to actively poach employees to actually committing not to hire employees from the other company. Wage-fixing agreements can relate to wages, bonuses, and/or other salary/compensation components. Employees subject to the agreements above will most likely not be aware of them.

The "target group" for such agreements is in most cases high-profile employees with

established skills for which there is excessive demand. There are, on the other hand, no limitations regarding the industry or business area such employees are active in. As the recent enforcement activities show, these employees can work in any sector including high-tech, software engineering, animation, sports, pharma, healthcare, etc. For example, in the US, there have been cases related to hourly employees in fast-food franchising companies where the skills justifications may be called into question.

One major issue is whether employers have to be competitors in order to fall foul of antitrust rules and if yes, on which "market" do they have to compete. Will it be sufficient to have companies competing on the upstream market for hiring employees, or some generalized labor market, or do the companies have to be competitors on the downstream market, i.e., competing for customers for their products/services?

In her latest speech, Commissioner Vestager indicated that the Commission is likely to adopt a rather flexible approach: when speaking about "buyer cartels" she explained that for these to be anticompetitive, the cartelists do not need to be competitors on the downstream market (see for example the Commission's antitrust decision in *Ethylene*, where not all parties subject to the decision were present on the same downstream chemical market(s)). Equally, the Portuguese authority in its paper explains that while agreements between companies competing on the downstream market "*are more likely to negatively affect competition in the downstream markets*", agreements among companies that do not compete on the same downstream market can have negative competitive effects on the upstream labor market.

What would be the antitrust infringement?

For the US, the enforcement priorities and legal standard seem clear: the FTC/DOJ guidance paper establishes the enforcement agencies' view that "[n]*aked wage-fixing or no-poaching agreements among employers, whether entered into directly or through a third-party intermediary, are* ***per se illegal*** *under the antitrust laws.*" This means that there is very little room in the eyes of government officials for pro-competitive justifications to be advanced by the parties to justify such agreements. (US courts have not yet fully weighed in on the government's approach). And the fact that the guidelines and cases have been brought and maintained across Administrations shows the bipartisan support that the enforcement initiative has had in the United States.

For the EU, the nature of the potential infringement is less clear. Wage-fixing agreements could be perceived as price-fixing cartels – and thus "by-object" restrictions – on the basis that there is very little room for any pro-competitive justifications. Exchanging information on wages or wage levels could be seen as an exchange of competitively sensitive information on the upstream market for hiring employees, or as a cost factor relating to the downstream market. Such an exchange could also be considered a by-object or by-effect infringement, depending on the specific circumstances.

For no-poach agreements, Commissioner Vestager's recent speech indicates that the

Commission may qualify these as restrictions of innovation competition – which is in line with its increased focus on this competitive factor. Indeed, only recently, the Commission issued its first-ever decision that collusion on technical developments/innovation can amount to a cartel: the *AdBlue* case. In this case, the Commission found that the carmakers "stepped over the line" and, through legal cooperation on technical aspects of their emissions cleaning strategy, colluded by "*avoid*[ing] *to compete on using* [their] *technology's full potential to clean better than what is required by law".* The Commission imposed fines of more than €800 million against German car manufacturers, sending a strong deterrence signal.

Looking at no-poach agreements, in light of the *AdBlue* case, it is an open question whether an infringement of innovation could also be established between companies that do not compete on the downstream market, and where to draw the line? What are those "markets where the key to success is finding staff who have the right skills"? And will there be different views on no-poach vs. no-hire agreements? In any event, since the Commission seems to have put this new theory of harm on its current enforcement agenda, there will likely be more cases to come in the near future that could provide some more clarity.

Policy tension?

Going forward, the European Commission's crackdown on illegal no-poach agreements may create some conflict with its other recent policies, such as the control of so-called "killer acquisitions" and foreign direct investment (FDI). Poaching star employees from a target business may be a strategy for some companies to absorb know-how and kill start-ups without having to undergo merger control review (and the risk of Commission review under Article 22 of the EU Merger Regulation even where the transaction is not notifiable at Member State level) or an FDI filing. Preventing no-poach agreements against this background may make such strategies easier to implement.

Implications for Companies

It cannot be excluded that the Commission will begin an investigation into suspected anti-competitive behavior in the human resources area (such as no-poach agreements) shortly. Companies should review their HR practices and procedures carefully to ensure compliance in this fast-moving and rapidly evolving area of antitrust enforcement. Companies may also find that there is a spectrum of restraints and restrictions from non-disclosure agreements (which government enforcers have not challenged under antitrust rationales) to non-solicit and non-poach agreements. Companies with legacy employment practices may find vestiges of older policies, even if policies have been modified.

Moreover, in the context of transactions, acquirers should also ensure that they have conducted sufficient antitrust due diligence of the target business in this area in order to avoid potential antitrust liability.

For the avoidance of doubt, post-completion non-solicitation covenants in the context of a transaction which are imposed by the buyer on the seller to ensure that employees of the acquired business are not poached may be acceptable, if they are reasonable in terms of scope, duration, and geographic reach.

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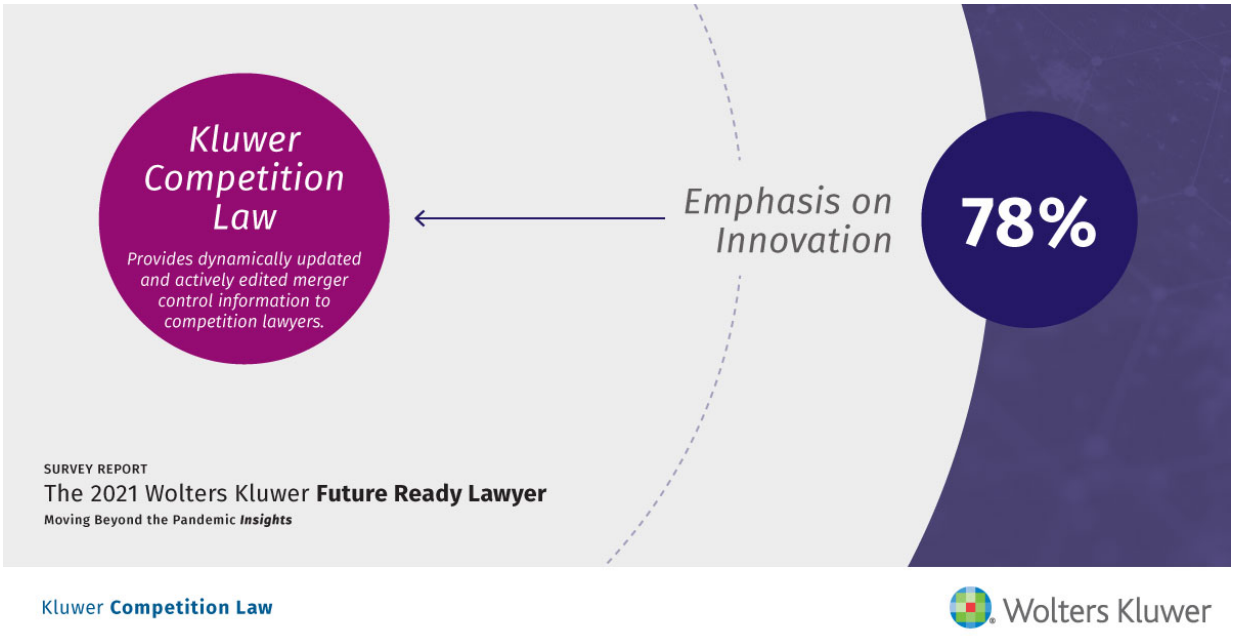
[1] A crucial distinction in US law is whether a restraint is "vertical" (as in a buy-sell agreement) or "horizontal" (as in two competitors in the same line of business). Under US law, vertical restraints are treated under the deferential rule of reason, which weighs pro- and anti-competitive effects, and vertical restraints cannot be the subject of a criminal conviction. The distinction is often not given the weight it critically deserves by antitrust enforcers, as the Government's loss in the Foreign Exchange trial demonstrate. (See our article on the Foreign Exchange trial.)

[2] See, e.g., Stephen F. Ross, *Antitrust Options to Redress Anticompetitive Restraints and Monopolistic Practices by Professional Sports Leagues*, 52 Case Western Reserve L. Rev. 133, 152 (2001) ("For most industries, a consumer-oriented antitrust policy is either unconcerned or turns a blind eye toward labor restraints.").

[3] "Justice Department Requires Six High Tech Companies to Stop Entering into Anticompetitive Employee Solicitation Agreements," Sept. 24, 2010. https://richmond.com/news/local/updated-mayor-stoney-releases-statement-on-failure-of-the-casino-gaming-referendum/article_1a9294a1-2744-5242-aea4-438dabfd09e4.html#tracking-source=home-top-story-1.



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