Kluwer Competition Law Blog

The Assessment of Labor Market Collusion: EC Policy Brief on Antitrust Issues in Labour Markets

M. Mustafa Polat (ZESA Attorney Partnership) · Tuesday, May 7th, 2024

- On 3 May, the EC published a policy brief on labor markets.
- The existing legal framework allows the EC and EU national competition authorities to take decisive action against anticompetitive agreements in labor markets.
- Wage-fixing and no-poach agreements are detrimental to competition in labor markets and should generally be qualified as restrictions by object.
- Wage-fixing agreements are unlikely to be qualified as ancillary restraint or satisfy the conditions set forth in Article 101(3) TFEU.
- There might be a "room" for legitimate no-poach clauses as long as they are **(i)** qualified as an ancillary restraint or **(ii)** exempted under Article 101(3) TFEU. However, it is unlikely for such agreements to satisfy these criteria.
- The Policy Brief is a sign for an increased enforcement efforts in the EU for detecting anticompetitive agreements in labor markets.

Introduction

In recent years, the realization of restrictive labor market practices has gained practical significance among competition authorities. Accordingly, the European Commission (EC) has also taken a keen interest in such practices in two recently updated guidelines (the revised Horizontal Guidelines and the Collective Agreements of Solo Self-employed Guidelines). That said, case practice is largely missing: the EC has yet to conduct an investigation or reach a final decision specifically on labor market agreements.

Although recently the EC conducted unannounced inspections at the premises of undertakings active in the online ordering and delivery of food, groceries, and other consumer goods for alleged no-poach agreements; it is worth noting that the origin of the relevant investigation are not labor market concerns. Instead, the investigation was initially related to alleged market allocations and then 'bounced' to no-poach agreements during the proceedings. However, it is a good illustration that the EC would analyze no-poach agreements within the scope of different investigations if there is an evidence of labor market collusion.

As part of its interest in anticompetitive hiring practices through wage-fixing and no-poach agreements, the EC published a new competition policy brief explaining antitrust issues in labour markets (Policy Brief) on May 3, 2024.

This is a significant step towards establishing competitive labor markets in the EU considering the practical importance of identifying "what kind of labor market agreements would be considered competition law infringement". In this regard, Policy Brief provides guidance on the assessment of wage-fixing and no poach agreements.

Why can labor market agreements be harmful?

The Policy Brief starts its analysis from an economic perspective and identifies why such agreements are detrimental to competition. Accordingly, wage fixing agreements **(i)** sets wages at monopsony wage level via a reduction of labor demand, and **(ii)** increase downstream prices to the detriment of consumers.

Although the first element has a sound economic background, the Policy Brief does not explain why wage-fixing agreements increase downstream prices to the detriment of consumers. The extent of restrictions and consumer harm resulting from wage-fixing agreements depends on the downstream market power of the undertakings (see here). If there is a downstream market power, the reduction in labor output will be reflected as reduced downstream output which will result in higher consumer prices; if there is not, then the competitors can replace such reduced output and the consumers will not be negatively affected (in more detail see here). Therefore, the Policy Brief lacks an economic analysis regarding the competitive harm caused to consumers by wage-fixing agreements.

With regard to no-poach agreements, the detrimental effects are in fact the following:

- They are likely to reduce labour market dynamism with resulting negative effects on employee compensation, firm productivity, and innovation.
- They reduce wages as the companies will have less incentives to offer higher wages to employees.
- Such agreements prevent the efficient allocation of productive employees to productive firms. It is explained that declining job reallocation rates have been linked to declining productivity.

It was also indicated in the Policy Brief that no-poach agreements may have detrimental effects on innovation since employees do not switch to the employers where they are most valuable. Indeed, it is considered that if labor mobility is crucial element for innovation in the relevant sector, no-poach agreements would decrease the quality or variety of products in the downstream market. Although this is not the case in every sector, it might be relevant for the competition law assessment in some cases.

Classification: 'by object' or 'by effect'?

Considering that the EC and EU courts do not have a decisional practice regarding wage-fixing and no-poach agreements, the question on the classification of such agreements remains open. Although national competition authorities were inclined to classify labor market agreements as 'by object' infringement (in more detail see here), the EC's stance in this regard was not clear. The Policy Brief gives a clear answer to this discussion: **wage-fixing and no poach agreements generally qualify as restrictions 'by object'** under Article 101(1) Treaty on the Functioning of

the European Union (TFEU).

In this analysis, the decisional practice of the European Court of Justice (ECJ) regarding the concept of restriction by object is explained in detail and the Policy Brief accordingly conducts the assessment under three criteria:

The content of the provisions

According to the Policy Brief, labor market agreements are akin to a buyers' cartel as wage-fixing has similar characteristics with purchase price fixing and no-poach is a form of supply-source sharing. Making reference to the EC's decisional practice on these cases in the product markets, it is indicated that such restrictions have been treated as restrictions of competition by object.

Objectives of the agreement

The Policy Brief indicates that undertakings involved in wage-fixing or no-poach agreements might justify their actions by claiming that they serve a legitimate purpose, such as to tackle the issue of 'investment hold-up' by safeguarding a company's investment in training its employees, or to protect the company's non-patent intellectual property (IP) rights and trade secrets. However, it is further explained in the Policy Brief that even if the restriction of competition also has legitimate objectives, this does not as such exclude it qualifies as a restriction by object. It is also noteworthy that the Policy Brief asserts that the same objectives may be achieved by means which are not or less problematic (such as non-disclosure agreements, obligations to stay with an employer for a minimum amount of time, the repayment of proportionate training costs, gardening leaves, etc.).

While the Policy Brief suggests that there is no requirement to establish that the parties had the intention to restrict competition, the EC can consider the evidence showing that the intention of the parties was, for instance, **(i)** limiting or distorting competition for talent between the parties; **(ii)** keeping salaries low; or **(iii)** preventing a competitor from entering the market by increasing its costs in recruiting the necessary talent. The availability of such evidence would indicate that a wage-fixing or no-poach agreement was indeed a restriction by object.

Economic and legal context

By making reference to the decisional practice of the EU courts, Policy Brief suggests that the EC does "not require an in-depth analysis of the economic and legal context" to classify a practice as a by object restriction, and that analysis may be "limited to what is strictly necessary" since wage-fixing (*as price fixing*) and no-poach agreements (*as supply-source sharing*) falls within a category of agreements explicitly prohibited under Article 101(1) TFEU. In the assessment of such agreements, the following factors are taken into account:

- Labor is a fundamental factor of production and the ability to attract talent is a key competitive parameter.
- Once the parties compete for labor it is not necessary that they also compete in any product

market.
- Following the EU courts' assessment of buyers' cartels, it is unnecessary to conduct a competition law analysis in downstream product markets.

It is considered that each of these conclusions in the Policy Brief have a practical significance in competition law assessment. **Firstly**, the key competitive parameter in labor markets is indeed the ability to attract talent (such as prices in product markets) and any agreement restricting this parameter would be considered as a hardcore restriction at the very first look. **Secondly**, undertakings might be competing for the same labor irrespective of their downstream activities which means that even parties to a vertical agreement can be regarded as competitors in labor markets. **Thirdly**, it is not required to show anticompetitive effects in downstream markets to establish that labor market collusion infringes competition law.

After establishing these factors, it was concluded in the Policy Brief that it seems difficult to argue that wage-fixing agreements may, even only in principle, have pro-competitive effects. Therefore, there is not much discussion around the classification of such agreements: **wage-fixing practices are likely to be regarded as restrictions of competition by object**.

With regard to no-poach agreements, it is indicated that they might at least in principle solve an 'investment hold-up' problem. It is understood from the Policy Brief that the below factors are considered for the classification of no-poach agreements:

- Based on the current literature, net efficiencies of no-poach agreements to tackle investment hold-up problem are at best uncertain,
- the alleged efficiencies can generally be achieved by means which are not or less problematic,
- and the fact that a no-poach agreement may have a legitimate objective does not preclude its qualification as a restriction by object.

In light of the above, it was concluded that **no-poach agreements also likely to restrict competition by object** (even if it is non-reciprocal) as the relevant analysis may be limited to what is strictly necessary.

The classification of wage-fixing and no-poach agreements as a 'by object' restriction is in line with the decisional practice of the national competition authorities (see for example, Spanish 'freight forwarding' and 'hairdressers' decisions or French PVC cartel decision here).

Is there a room for legitimate no-poach agreements?

Perhaps, the status of legitimate no-poach agreements is the most important part of the competition law assessment in labor markets. Such agreements should not always be considered as a cartel, most of the times contracts between undertakings include no-poach, non-solicitation or off-limits clauses. In product markets, these contracts can be vertical agreements (such as a relationship between service provider and its customer) or horizontal agreements (such as a joint venture agreement).

Further to the Policy Brief, there is indeed room for legitimate no-poach clauses considering that they might **(i)** be qualified as an ancillary restraint or **(ii)** satisfy the conditions set forth in Article 101(3).

In light of the strict interpretation of ancillary restraints conditions by the courts, for example, the Lithuanian Notaries case (see here), the Policy Brief indicates that the parties to such agreements need to demonstrate two elements:

- There are no less restrictive means of ensuring the existence of the same relationship,
- The scope of the clause does not cover all employees but is strictly limited.

In this regard, the parties must limit the scope of the clause

- with the **employees directly involved in the performance of the agreement**,
- only for a **justifiable duration** and
- an **adequately limited territorial scope**.

It is noted that the willingness to keep salaries low would not be considered an acceptable justification for a wage fixing or no-poach agreement.

In light of the explanations provided in the Policy Brief, it is understood that the wage-fixing and no-poach agreements are likely to restrict competition by their object, however, there might be scenarios in which some types of no-poach agreements can be qualified as an ancillary restraint. This conclusion seems to be contradicting the ECJ's decisional practice in Lithuanian Notaries (see here) and ISU decisions (see here) in which it was clarified that the ancillary restraints doctrine applies only to agreement that do not have, as their object, the restriction of competition. Although the Policy Brief explains that it is unlikely for such agreements to be regarded as ancillary restraints, certainly there will be scenarios in which the above-mentioned criteria are met. Otherwise, there would be no point for the Policy Brief to establish certain criteria for no-poach agreements to be qualified as ancillary restraint. It is also confirmed by the decisional practice of the Croation competition authority that no-poach clauses can represent an ancillary restraint of competition (see here).

Although not mentioned in the Policy Brief, it is considered that having a non-reciprocal no-poach clause in place is also less restrictive than mutual no-poach agreements; while 'non-solicit' (also called 'no-cold-calling' where employers only agree not to actively approach another employer's employees with a job opportunity) agreements are also easier to satisfy ancillary restraints conditions than no-hire clauses (where employers agree not to hire actively or passively employees of other parties to the agreement).

With regard to exemption under Article 101(3), the Policy Brief clearly indicates that it is difficult to argue that wage-fixing agreement may have pro-competitive effects. No-poach agreements, however, may in principle have pro-competitive effects as they may solve an 'investment hold-up' problem. But it was further indicated that **(i)** the current literature shows that net efficiencies are at best uncertain, **(ii)** wage-fixing and no-poach agreements tend to artificially lower wages, and **(iii)** there are usually less restrictive ways of achieving the same result. It is not surprising that the Policy Brief did not make any specific conclusion as to whether some types of no-poach agreements would likely to be exempted under Article 101(3), as it would require case-by-case analysis. It is considered that the availability of the factors discussed under ancillary restraints doctrine would be a useful guide in such assessment.

Outlook

The assessment indicated in the Policy Brief confirms that the current legal framework gives investigative powers to the EC as well as the national competition authorities to take action wage-fixing and no-poach agreements. Further, such agreements are likely to be classified as restrictions by object under Article 101 TFEU and they are unlikely to meet the criteria to be considered as ancillary restraints. It is also concluded that these agreements are unlikely to qualify for an exemption under Article 101(3) TFEU.

The lack of enforcement on EU level with regard to competition law issues in labor markets is also addresses in the Policy Brief and the reasoning of the same was indicated as these markets are often national, regional or local. However, the EC can also bring cases to review no-poach and wage-fixing agreements, which also confirmed in the Policy Brief. It is also possible for the EC to analyze such practices within the scope of different investigations if there is an evidence of labor market collusion. This was the case in the mentioned EC's investigation of online ordering and delivery of food, groceries and other consumer goods investigation which 'bounced' to no-poach agreements during the proceedings.

The Policy Brief is a sign for an increased enforcement efforts in the EU for detecting anticompetitive agreements in labor markets. The companies have already included human resources (HR) personnel into their compliance trainings to avoid possible labor market investigations and started to approach more conservatively to no-poach clauses in their business contracts. However, the Policy Brief did not provide any guidance on information exchange in labor markets and how should the agreements concluded between HR firms and their customers be assessed under competition rules. It is considered that these gaps will be filled once the EC or national competition authorities have the opportunity to evaluate such practices.

This entry was posted on Tuesday, May 7th, 2024 at 2:30 pm and is filed under European Commission, European Union, Labour market, No-poach-agreement, Restriction by object
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.