

# Kluwer Competition Law Blog

## How to Define Relevant Labour Markets?

Jan Broulík (University of Amsterdam) · Tuesday, December 17th, 2024

The application of competition rules to the conduct and concentrations of employers has been called ‘the new frontier for competition policy’ (see [here](#)). This so-called ‘labour antitrust’ has been growing rapidly especially on the other side of the Atlantic over the last fifteen years (see [here](#)). ‘All eyes are on labor’ in the United States even in 2024 (see [here](#)).

Competition between employers is receiving an increasing attention also on the old continent. We have seen enforcement cases in various European countries (see [here](#)). The European Commission [reported](#) this summer that it started its first ever formal investigation into no-poach agreements. Earlier this year, the Commission also published a [policy brief](#) called Antitrust in Labour Markets.

Yet, markets on which undertakings compete for labour are completely absent from the revised [Market Definition Notice](#) (Notice), which the Commission published this year. This is a pity because including labour markets would have given more credibility to the Commission’s mission to intervene in these markets and it would also have provided guidance to other enforcers of EU competition law. My newest [working paper](#) reflects on the omission and discusses how to define relevant labour markets.

### Why to define relevant labour markets?

As explained by the Notice, relevant markets are defined for the purposes of applying EU competition law. Labour markets then need to be defined for cases in which the conduct or concentration under investigation concern the purchasing of labour, i.e. employer conduct or employer concentrations.

There are good reasons to intervene against anti-competitive conduct and concentrations of employers. To start with, the exercise of employers’ market power may ultimately have negative consequences also for downstream consumers (see [here](#)). This will be the case when the exercise leads to a lower output of the undertakings in question, which is then not offset by their downstream competitors.

EU competition law should nevertheless defend workers against competitive harm even if consumers are not impacted negatively (see [here](#)). This can happen for instance when undertakings are able to suppress wages without decreasing the amount of procured labour and, thus, also of the produced output. The law ought to protect workers even in such situations not only because most

people receive income primarily from work (see [here](#)) but also because we tend to spend a good portion of our lives at work and hence care deeply about our working conditions (see [here](#)).

To be sure, the relevant market does not need to be defined in all enforcement cases against employers. The Notice provides that the Commission usually refrains from defining the relevant market when the case concerns agreements that restrict competition by object. And the Commission considers this category to include also agreements to fix wages or not to poach each other's workers (see [here](#) and [here](#)).

However, employers may also violate EU competition law by agreements that restrict competition by effect, by abusing their dominant position and by concentrations that significantly impede effective competition. The relevant labour market is then to be defined. It is true that the Commission's focus has so far been primarily on agreements restricting competition by object. This is illustrated for instance by the abovementioned [policy brief](#) being dedicated exclusively to such agreements. Other enforcers have nevertheless been gutsier. For instance, the Dutch competition authority [is looking](#) into how journalists will be impacted by a media concentration.

## **Market Definition Notice and Labour Markets**

The Notice does not say anything about labour markets. The only somewhat related provision is paragraph 7, which maintains that the guidance set out in the Notice also applies to the definition of 'purchasing markets', i.e. 'when defining relevant markets for the purchase of particular products in a particular area'. Since labour markets are markets on which employers purchase labour, the Notice arguably recognises the existence of relevant labour markets.

Paragraph 7 further advises to define purchasing markets 'taking into account their specificities'. Such advice, however, has little value when these specificities are not spelt out. The only specificity of purchasing markets mentioned by the Notice is the obvious point that actual competitors of a buyer are given by whom the sellers consider as alternative buyers.

Labour markets are missing from the Notice despite express requests to include them. As part of the 2020 stakeholder consultation on the previous Notice, the European Trade Union Confederation [criticised](#) their absence. When the draft new Notice published for comments in 2022 did not change anything in this respect, the criticism was [voiced](#) also by the Catalan Competition Authority.

This is different from the United States, where labour markets are addressed by antitrust soft law. In particular, they earned a few paragraphs in the [Merger Guidelines](#) published jointly by the US Department of Justice and the Federal Trade Commission at the end of 2023. Albeit rather briefly, the guidelines do discuss the special features of labour markets that have impact on their definition.

## **Relevant labour market**

The relevant labour market is 'a group of jobs, between which workers can switch with relative ease' (see [here](#)). The starting point of the definition are the jobs concerned by the investigated agreement between employers, potentially abusive conduct of a potentially dominant employer or

concentration of employers. The question is then which other undertakings these employers are competing with over the respective labour. That is to say that the process of defining the relevant labour market starts from the respective jobs provided by the undertakings involved, to which other jobs constituting the same market are then being added.

### *Occupation dimension*

The first dimension of labour markets to discuss is their occupation dimension, which corresponds to the product dimension of product markets. As observed by the Notice, ‘in purchasing markets the substitution assessment focuses on alternatives available to suppliers, rather than alternatives available to customers.’ The occupation dimension is thus given by the alternatives available to workers.

Which alternatives are available to suppliers is always constrained by the customers: suppliers can switch only to those customers who want to buy from them. The same holds also for labour markets: the alternatives available to workers depend on whom employers want to hire. Labour markets in this regard bear a resemblance to markets for differentiated products. In those markets, buyers do not see the offered goods as identical but distinguish between them. Consider for instance the market for cars: ‘the buyer cares about the identity, nature, and features of the product in question – the car’ (see [here](#)). The alternatives available to car suppliers are then very much contingent on the preferences of buyers.

Employers have preferences over various worker characteristics. Most obviously, they have need for certain skills. In this respect, a position in another company will belong to the same market as the jobs in question of the undertaking involved if the workers holding these jobs have the necessary skills for the position. Many employers nevertheless have further requirements beyond skills that have to do for instance with time availability (see [here](#)) or the match of workers’ personality traits to their culture (see [here](#)). All such further requirements imposed by other employers do limit the set of alternatives available to workers and, thus, narrow the scope of labour markets.

What makes labour markets special – so-called matching markets – is that their scope depends *also* on the preferences of sellers, i.e. workers. Let’s think about the market for cars again. Car sellers usually do not care about who buys the car. Which alternatives are available to suppliers thus depends *just* on the preferences of buyers: whether a buyer is in competition with another one depends on whether the latter prefers the same car suppliers as the former (see [here](#)).

Workers, in contrast, do have preferences over various aspects of jobs (see [here](#)). An important consideration is of course financial compensation. Also, the actual content of work usually plays a significant role. Workers may further have preferences concerning practical issues such as shift flexibility, vacation and sick time (see [here](#)). They may nevertheless also favour a certain workplace culture (see [here](#)) or the identities of the other workers at a workplace (see [here](#)). Other relevant features of a job may include job security, job autonomy, job prestige, work intensity, participation in training, skill development, relationship with the employer, and potential adverse effects of work on private life (see [here](#)).

The preferences of workers further narrow down the scope of labour markets. A job at another company imposes a competitive constraint on an employer only to the extent to which its workers

are both *qualified for the job* and *willing to consider it*. As a result of this dual limitation, there may be not so many actual employment alternatives for a particular worker. This is why labour markets can be rather narrow in their substantive scope (see [here](#)).

### *Geographic dimension*

The question which alternative jobs are available to workers has also a geographic dimension. In particular, a job is an actual alternative only if workers are willing to commute or even relocate to it (see [here](#)). This will vary across different groups of workers. ‘For example, younger workers may be willing to commute farther or even move from one location to another, while older married workers or those with children may be less mobile’ (see [here](#)). Also, workers who are high-skilled tend to be more mobile than those who are low-skilled (see [here](#)). While some jobs do not require physical presence, which gives workers more alternatives, complete remoteness remains rather rare.

As people are generally not that mobile, labour markets will often be rather narrow in geographic terms. Some even [argue](#) that the geographic scope of labour markets is generally smaller than that of product markets.

### *Hypothetical monopsonist*

The definition of the relevant labour market may benefit from applying the perspective of a hypothetical monopsonist. To define a selling market, one can ask what the smallest set of products is over which a hypothetical monopolist would find it profitable to implement a small but significant non-transitory increase in price (SSNIP). Analogously, to define a labour market, it is possible to ask what the smallest set of jobs is over which a hypothetical single employer would find it profitable to implement a small but significant and non-transitory decrease in wages (SSNDW) (see [here](#)).

### *Labour markets and downstream product markets*

One should not infer too much about the relevant labour market from information about the downstream product markets on which the respective undertaking is active. For one, they can differ significantly as to their geographic scope. For instance, mines hire miners locally but distribute their products even globally (see [here](#))

In addition, two undertakings may compete as sellers but not as employers and vice versa. As for the former possibility, this may be obtained when the undertakings produce the same output but rely on different technology in doing so and, thus, need workers with different skills. Think for instance about different types of power plants. Or the undertakings may actually need the same skills but are located so far apart from each other that their employees are not willing to switch. The latter eventuality arises when undertakings employ the same type of workers but in order to produce non-substitutable products. This can be illustrated by the US case concerning the e-commerce platform eBay and the financial software company Intuit, who were in competition for

computer engineers (see [here](#)).

The relevant labour market may hence correlate poorly with the industry to which the given undertaking belongs. Some – especially low-skilled workers – may move between occupations: for instance, some retail workers may start working in food services (see [here](#)). But the same occupation may also be offered across various industries. For instance, ‘an accountant might leave his accounting job at a manufacturing company to join an accounting firm’ (see [here](#)). That is to say that labour markets should be defined in their own right.

## Conclusion

In principle, EU competition law is enforceable also against employers. The wording of the relevant legal provisions is sufficiently flexible and we are indeed already seeing some actions being taken by enforcers. To ensure that interventions against employer market power reach their full potential, however, the possibility of these interventions needs to be recognised across the entirety of EU competition law, including the definition of relevant markets. The Commission should hence quickly find a way to declare its readiness to define relevant markets for labour.

Eric Posner has [argued](#) that the modern enforcement against employers ‘marks a more fundamental and long-lasting development in [US] antitrust law’ than even the significant recent challenges to Big Tech. We are still far away from this being true also in Europe.

---

*To make sure you do not miss out on regular updates from the Kluwer Competition Law Blog, please subscribe [here](#).*



2024 Future Ready Lawyer Survey Report

**Legal innovation:  
Seizing the  
future or  
falling behind?**

Download your free copy →

 Wolters Kluwer



---

This entry was posted on Tuesday, December 17th, 2024 at 9:00 am and is filed under [Source: OECD](#)“>[Antitrust, Europe, Labour market, Source: OECD](#)“>[Market definition](#)

You can follow any responses to this entry through the [Comments \(RSS\)](#) feed. You can leave a response, or [trackback](#) from your own site.