Competition Enforcement and the Labor Market: Too Much Too Soon?

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Abstract

Authors from the United States and Portugal provide a comparative analysis of antitrust laws and their application to labour market laws in the United States and the European Union. Building on historical and legal overview of the development of antitrust law and policy in both jurisdictions, we highlight and provide possible explanations for the differences in approaches to labour-related conduct. We conclude that future judicial developments will be crucial for the crystallization of the definite boundaries of competitive legality of labour-market related conducts.

I. Introduction

The United States's (US's) antitrust laws were a pioneering endeavor, laying the foundation for modern competition regulation worldwide, including in the European Union (EU). Despite its historically pivotal role, antitrust enforcement in the US, and public enforcement in particular, has at times and on certain issues lagged behind its European counterparts. However, newly invigorated US public enforcers and private litigants, are blazing a trail on the intersection of antitrust and the labor markets, placing the US once again in the driver's seat, with overseas enforcers watching carefully to apply similar concepts in their home markets.

Indeed, US public enforcers and private litigants alike have targeted agreements between companies related to hiring practices. The Department of Justice (DoJ) has not seen much success in its criminal cases, while it is too soon to determine whether civil cases—both those brought by the government and those brought by private plaintiffs—will fare better.

Even though the EU has had a slower start in what concerns antitrust enforcement in labor market, it is starting to pick up speed, in particular at national level, and there are already interesting developments to take into account.

In this article, we begin by providing a comparative analysis of the United States' and the EU's antitrust laws and enforcement efforts, with a focus on their application to labor markets and to employers and workers. We provide a comparative assessment of current enforcement in labor markets, analyzing how the different historical backgrounds, legal doctrines, and overlying policy goals have influenced the recent focus on labor markets on both sides of the Atlantic.

II. Historical context and sectors typically affected

A. United States

Since their creation in the late 1800s, the US antitrust laws have aimed to protect markets from anticompetitive conduct. The statutory language of the Sherman Act, however, is infamously vague. Section 1 of the Sherman Act prohibits every "contract, combination, or conspiracy in restraint of trade or commerce," while s.2 makes it unlawful to "monopolize, attempt to monopolize, or combine or conspire to monopolize any part of the trade or commerce".[1] But what does this language mean? The legislative history does little to clarify. As one leading treatise notes,

> "[t]he legislative history of the Sherman Act does not point consistently in any single direction, particularly on the all-important questions of protection of consumers versus protection of competitors and the role that economic efficiency should play in antitrust analysis."[2]

Courts interpreting the law, however, have all agreed that it outlawed agreements between direct competitors to fix prices, allocate customers, or rig bids. Indeed, by 1927, the Supreme Court held that parties to a price-fixing conspiracy could not justify such agreements by arguing that the set price was reasonable; the agreement between the parties to set prices was itself illegal, regardless of the figure at which they set the price.[3] Courts also agreed that accruing monopoly power alone was not a violation of the Sherman Act; rather, a company must obtain or

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[1] 15 U.S.C. ss.1-2.

[2] Phillip E. Areeda and Herbert Hovenkamp, *Antitrust Law*, 4th and 5th edns (Wolters Kluwer, 2021), s.103c.

[3] See *United States v Trenton Potteries Co* 273 U.S. 392, 397–401 (1927). Today, this type of categorical prohibition on certain conduct is known as per se illegality.

maintain that power through anticompetitive means to be unlawful.[4] Beyond that, however, the state of the law largely remained unresolved.

By the mid-1940s and in the decades that immediately followed, enforcers, litigants, and courts focused on preventing market concentration. With that focus came a wave of antitrust cases. Mergers that would result in the combined firm obtaining a market share greater than thirty percent constituted a prima facie case for prohibiting the merger under s.7 of the Clayton Act.[5] The per se analysis applied to vertical territory restraints[6] and maximum resale price maintenance.[7] Then, a growing cohort of economists, sometimes referred to as the "Chicago School," began pushing back on some of these long-held tenets. By the 1970s, with economic analysis becoming more rigorous, enforcers and courts took more nuanced approaches to some conduct and applied a "rule of reason" standard in some cases to weigh anticompetitive effects of certain conduct against any procompetitive benefits.

In that light, the Supreme Court confirmed that the antitrust laws protect competition, not individual competitors.[8] In other words, simply because a company undertakes conduct to the detriment of a competitor does not mean the antitrust laws have been violated. There must be harm to the competitive process such that the fundamental nature of competition in a particular market has been damaged. Most often, that harm is reflected in higher prices, reduced output, and/or reduced innovation.[9]

Yet through all of this, antitrust law was typically applied to the sale of products and provision of services; it remained hands-off of labor markets (excepting certain union striking measures[10]). The Supreme Court held that the Sherman Act applies to labor markets in 1926,[11] but only a few federal monopsony[12] cases have ever been brought.[13]

State antitrust enforcers similarly had focused on downstream anticompetitive conduct rather than upstream labor markets. All 50 states have their own antitrust and/or consumer protection laws;[14] most of them overlap with the Sherman Act and a few purport to go further. State enforcers have traditionally followed the lead of federal enforcers though.

It is only recently that federal antitrust enforcers have turned their attention in a significant way to the labor market. In 2010, the DoJ filed a complaint against Adobe, Apple, Google, Intel, Intuit, and Pixar, alleging that the companies violated s.1 of the Sherman Act by entering into a series of agreements not to recruit each other' employees.[15] The companies quickly settled and agreed to cease the conduct at issue for a period of five years.[16]

The same year, the DoJ filed a similar lawsuit against Lucasfilm, alleging Lucasfilm reached an agreement with Pixar that restrained competition between them for skilled digital animators by agreeing not to cold call each other's employees, notifying each other when making an offer to an employee of the other, and not providing a counteroffer higher than the competing company's offer.[17] Lucasfilm quickly settled, agreeing to cease the conduct at issue for a period of five years.[18]

As is typically the case in the US, the DoJ matters spawned a class action lawsuit brought on behalf of more than 64,000 employees of the named companies.[19] The case eventually settled, with Adobe, Apple, Google, and Intel agreeing to pay $415 million into a settlement fund.[20]

In 2016, the US Department of Justice and the Federal Trade Commission published *Antitrust Guidance for Human Resources Professionals*.[21] While the agencies positioned their statement as simply a reaffirmation of the state of the law as it had already existed, practitioners recognized that the statement demonstrated, at least, a shift in focus and that the agencies would look for new types of cases to bring to reinforce the statement. This joint guidance—directed at HR executives but applicable to all—stated the agencies' position that certain agreements relating to labor markets are per se antitrust violations and placed executives on notice that entering into such agreements could subject them to criminal prosecution.[22] Specifically, the guidance addressed two types of potentially unlawful activity: (1) agreements

[4] See *United States v United States Steel Corp* 251 U.S. 417 (1920).
[5] See *United States v Philadelphia Nat'l Bank* 374 U.S. 321, 364–65 (1963).
[6] See *United States v Arnold Schwinn & Co* 388 U.S. 365 (1967), overruled by *Continental T.V., Inc. v GTE Sylvania Inc.* 433 U.S. 36 (1977).
[7] See *Albrecht v Herald Co* 390 U.S. 145 (1968), overruled by *State Oil Co. v Khan* 522 U.S. 3 (1997).
[8] See *Brunswick Corp v Pueblo Bowl-O-Mat, Inc* 429 U.S. 477, 488 (1977).
[9] See Competition and Monopoly: Single-Firm Conduct Under s.2 of the Sherman Act, Ch.1, available at *http://www.justice.gov/archives/atr/competition-and-monopoly-single-firm-conduct-under-section-2-sherman-act-chapter-1*.
[10] See, e.g., *United States v Workingmen's Amalgamated Council* 54 F. 994 (E.D. La. 1893).
[11] See *Anderson v Shipowners Association* 272 U.S. 359 (1926).
[12] A monopsony is "often thought of as the flip side of monopoly. A monopolist is a seller with no rivals; a monopsonist is a buyer with no rivals". Monopsony, *Black's Law Dictionary*, 11th edn (Thomson Reuters, 2019).
[13] See Eric A. Posner, "The Rise of the Labor-Antitrust Movement" *Competition Policy International* (29 November 2021).
[14] See, e.g. Cal. Bus. & Prof. Code s.16600 et seq (California's Cartwright Act); N.Y. Gen. Bus. Law ss.340–347 (New York's Donnelly Act).
[15] See *United States v Adobe Sys*, No.10-cv-1629, 2011 U.S. Dist. LEXIS 83756, at *1 (D.D.C. Mar. 18, 2011).
[16] Department of Justice, Press Release, *Justice Department Requires Six High Tech Companies to Stop Entering into Anticompetitive Employee Solicitation Agreements*, (24 September 2010), *www.justice.gov/opa/pr/justice-department-requires-six-high-tech-companies-stop-entering-anticompetitive-employee*.
[17] See Compl, *United States v Lucasfilm Ltd* No.1:10-cv-02220 (D.D.C. 21 December 2010).
[18] See Order, *United States v Lucasfilm Ltd* No.1:10-cv-02220 (D.D.C. 30 June 2011).
[19] See *In re High-Tech Employee Antitrust Litig.* 856 F. Supp. 2d 1103, 1107 (N.D. Cal. 2012).
[20] *www.hightechemployeelawsuit.com/frequently-asked-questions.aspx*.
[21] US Department of Justice and Federal Trade Commission, *Antitrust Guidance for Human Resources Professionals* (October 2016), available at *www.justice.gov/atr/file/903511/download*.
[22] US Department of Justice and Federal Trade Commission, Antitrust Guidance for Human Resources Professionals (October 2016), p.3, *http://www.justice.gov/atr/file/903511/download*, ("Agreements among employers not to recruit certain employees or not to compete on terms of compensation are illegal.").

between companies that constrain individual firm decision-making regarding hiring and compensation; and (2) the exchange of confidential, competitively sensitive employment information.[23] The former category includes agreements to fix compensation (typically referred to as "wage-fixing" as opposed to price-fixing) and agreements not to recruit others' employees (typically referred to as "no-poach" or "no-solicit" agreements), while the latter is typically referred to as information exchange.

Then, in July of 2022, the US Department of Justice and the National Labor Relations Board signed a Memorandum of Understanding in an effort to strengthen their partnership, better protect competitive labor markets, and ensure that workers are able to freely exercise their rights under the labor laws.[24] The Memorandum acknowledges that the agencies "share an interest in promoting the free flow of commerce and fair competition in labor markets" and

> "share an interest in protecting workers who have been harmed or may be at risk of being harmed as a result of interference with the rights of workers to obtain fair market compensation and to freely exercise their legal rights under the labor laws."[25]

That same month, the Federal Trade Commission signed a Memorandum of Understanding with the National Labor Relations Board, acknowledging their shared interest in policing competition in labor markets.[26] Specifically, the Memorandum acknowledges that both agencies share several "issues of common regulatory interest[,]" including

> "labor market developments relating to the 'gig economy' and other alternative work arrangements; claims and disclosures about earnings and costs associated with gig and other work; the imposition of one-sided and restrictive contract provisions, such as noncompete and nondisclosure provisions; the extent and impact of labor market concentration; the impact of algorithmic decision-making on workers; the ability of workers to act collectively; and the classification and treatment of workers."[27]

The Memorandum is intended to facilitate three objectives: (1) information sharing and cross-agency consultations on an ad hoc basis for official law enforcement purposes, in a manner consistent with and permitted by the laws and regulations that govern the Federal Trade Commission and National Labor Relations Board; (2) cross-agency training to educate each agency about the laws and regulations enforced by the other agency; and (3) coordinated outreach and education as appropriate. [28]

In April of 2024, the Federal Trade Commission voted, 3–2, in favor of a final rule preventing all for-profit employers nationwide from using non-compete agreements for any worker, regardless of whether the agreement is designed to protect legitimate business interests of employers.[29] The final rule declares that it is an unfair method of competition—and therefore a violation of s.5 of the FTC Act—for businesses to impose non-compete restrictions on workers on or after the final rule's effective date, which is 120 days after publication in the Federal Register.[30] The final rule faces several legal challenges, including from the U.S. Chamber of Commerce, Business Roundtable, Texas Association of Business, Longerview Chamber of Commerce, and Ryan LLC.[31]

With these regulatory statements and prioritizations came increased enforcement of the antitrust laws in labor markets. The DoJ has pursued at least eight cases (see s.IV.A), though it has seen little success. Private plaintiffs have likewise pursued a number of cases, although it is too early in many of those cases to determine their success. So, while the United States again appears to be leading in terms of guiding other nations as to areas on which to focus, it is not clear yet whether their newly found focus on labor markets will continue to gain hold or whether it will sputter following multiple losses in court.

B. European Union and Member States

Similarly, on the other side of the Atlantic, only recently has competition law begun to focus its enforcement law onto the labor markets, albeit with a different modus operandi and scope.

In general terms, the core of European competition law stems from arts 101 and 102 of the Treaty on the Functioning of the European Union (TFEU) which are also, but for different reasons if compared with the

[23] US Department of Justice and Federal Trade Commission, Antitrust Guidance for Human Resources Professionals (October 2016), pp.3–6, *http://www.justice.gov/atr/file/903511/download*.

[24] Department of Justice, Press Release, *Justice Department and National Labor Relations Board Announce Partnership to Protect Workers*, (26 July 2022), *www.justice.gov/opa/pr/justice-department-and-national-labor-relations-board-announce-partnership-protect-workers*.

[25] Memorandum of Understanding Between the US Department of Justice and the National Labor Relations Board (NLRB), (26 July 2022), available at *www.justice.gov/opa/press-release/file/1522096/download*.

[26] See Memorandum of Understanding Between the Federal Trade Commission (FTC) and the National Labor Relations Board (NLRB) Regarding Information Sharing, Cross-Agency Training, and Outreach in Areas of Common Regulatory Interest, (19 July2022), available at *http://www.ftc.gov/system/files/ftc_gov/pdf/ftcnlrb%20mou%2071922.pdf*.

[27] Memorandum Of Understanding Between the Federal Trade Commission (FTC) And The National Labor Relations Board (NLRB) Regarding Information Sharing, Cross-Agency Training, and Outreach in Areas of Common Regulatory Interest (19 July2022), p.1 at *http://www.ftc.gov/system/files/ftc_gov/pdf/ftcnlrb%20mou%2071922.pdf*.

[28] Memorandum Of Understanding Between the Federal Trade Commission (FTC) And The National Labor Relations Board (NLRB) Regarding Information Sharing, Cross-Agency Training, and Outreach in Areas of Common Regulatory Interest (19 July2022), *http://www.ftc.gov/system/files/ftc_gov/pdf/ftcnlrb%20mou%2071922.pdf*.

[29] See FTC, Press Release, *FTC Announces Rule Banning Noncompetes*, (Apr. 23, 2024), *https://www.ftc.gov/news-events/news/press-releases/2024/04/ftc-announces-rule-banning-noncompetes*.

[30] See FTC, Press Release, *FTC Announces Rule Banning Noncompetes*, (Apr. 23, 2024), *https://www.ftc.gov/news-events/news/press-releases/2024/04/ftc-announces-rule-banning-noncompetes*.

[31] See Compl. *Chamber of Commerce v. FTC*, No.6:24-cv-00148 (E.D. Tex. Apr. 24, 2024).

Sherman Act provisions, very vague, even though they include examples of restrictive conducts. In this sense, Art.101 prohibits,

> "all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market,"

and corresponds, *grosso modo*, to s.1 of the Sherman Act. All the while, art.102, which prohibits "Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part," is the European counterpart to s.2 of the Sherman Act. As is the case with their American correlates, arts 101 and 102 also constitute general rules, whose central role in the European Framework derives not so much from their exact wording, but from the teleological manner in which they have been interpreted allowing "the content of other Articles to influence [their] interpretation within the general scheme of the Treaty".[32] Consequently, these provisions allow for the convergence of the European competition law principles with other structural principles of the Union, since their main initial objective was the establishment of a single market within the EU, and as such, are applicable to all of competition law related matters.

As was the case in the US, the development of European competition law was underpinned by shifts in the underlying economic theories, as well as policy-related enforcement priorities and the overall interest—this particular aspect alien to US antitrust law—of European institutions to ensure that all national markets could operate as one, single market.[33] All of which occurred under the watch of the European Court of Justice (ECJ) whose rulings function under a de facto rule of precedent. An example of such evolution is the development of the regulation of vertical restrictions and the distinction, which is still ongoing, between "by object" and "by effects" restrictions.

In the beginning, the focus of the application of art.101 (at the time, art.85 of the EEC Treaty and, later on, art.81 of the EC Treaty) was on vertical agreements.[34] At first, a discussion arose on whether the Article should apply only to agreements between direct competitors or to all competition restrictive agreements—including between undertakings present a different levels of the production chain. However, this was settled by the ECJ in the *Consten Grunding* ruling,[35] in favor of the latter hypothesis while, in parallel, the ECJ also clarified, in *Societe Technique Miniere v Maschinenbau Ulm*[36] that some exclusive distribution agreements did not contain the necessary elements to be assessed under the scope of art.101 TFEU.

During a time when European public enforcement was to a large degree centralized in the European Commission (EC) following an ex ante, notification style, procedure (under Regulation 17/62,[37] which entered into force in 1962 and was only replaced by Regulation 1/2003[38] effectively decentralizing the enforcement of arts 101 and 102 TFEU, towards national competition authorities), the EC was flooded with analysis requests of bilateral vertical agreements by the contracting parties. The EC's decision practice and subsequent judicial developments from the ECJ were consequently transposed to the block exemption regulations and guidelines, covering issues such as exclusive distribution, selective distribution, franchising, R&D, standardization agreement, allowing the EC to alleviate its burden and constituting the core of EU competition law during the better part of the second half of the twentieth century.[39]

During this period, some significant progress was also made in cartel enforcement through the ECJ's decision practice, for example regarding the concept of "concerted practice" in the *ICI v Commission* and *Suiker Unie v Commission* rulings,[40] however it was only from 1990s onwards that the EC intensified its investigative focus onto cartels and horizontal practices overall, allowing for further developments of these matters by the ECJ.[41] Take, for example, the discussion of the distinction between by object/by effect restrictions which, despite having started in 1966, (with the *Consten Grunding* ruling[42] where the ECJ first recognized that certain agreements have such obvious anti-competitive effects that it is not necessary to examine their actual effects on the market) has had significant developments in the horizontal practices context in the last 20 years. For example, in 2020, in the *Budapest Bank* ruling, the Court clarified that when assessing whether an agreement falls within the scope of a restriction by object, it is necessary to consider the nature, content, and objectives of the agreement, as well as the economic and legal context in which it operates.[43] And, in 2023, the Court confirmed the EC's understanding

[32] See Joanna Gouyder and Albetina Albors-Llorens, *Goyder's EC Competition Law*, 5th edn (Oxford: Oxford University Press, 2009), p.73.
[33] See Kiran Klaus Patel and Heike Schweitzer, *The Historical Foundation of EU Competition Law* (Oxford: Oxford University Press, 2013), pp.21–22.
[34] Patel and Schweitzer, *The Historical Foundation of EU Competition Law* (2013), p.26.
[35] See *Consten and Grundig v Commission* EU:C:1966:41 (13 July 1966).
[36] See EU:C:1966:38 (30 June 1966) EU:C:1966:38 (30 June 1966).
[37] Council Regulation 17/62 First Regulation implementing arts 85 and 86 of the Treaty [1962] O.J. 13/204.
[38] Council Regulation 1/2003 on the implementation of the rules on competition laid down in arts 81 and 82 of the Treaty [2003] O.J. L1/1.
[39] Regulation 67/67 on the application of art.85(3) of the Treaty to certain categories of exclusive dealing agreements, Commission Regulation 1983/83 on the application of art.85(3) of the Treaty to categories of exclusive distribution agreements and Commission Regulation 1984/83 on the application of art.85(3) of the Treaty to categories of exclusive purchasing agreements [1967] O.J. 57/849.
[40] See *Imperial Chemical Industries Ltd v Commission of the European Communities* EU:C:1972:70 (14 July 1972) and *Cooperatieve Vereniging "Suiker Unie" UA v Commission of the European Communities* (40/73) EU:C:1975:174; *Coöperatieve Vereniging "Suiker Unie" UA v Commission of the European Communities* (40/73) EU:C:1975:174; [1976] 1 C.M.L.R. 295.
[41] Gouyder and Albors-Llorens, *Goyder's EC Competition Law*, 5th edn (2009), p.172.
[42] See *Consten and Grundig v Commission* EU:C:1966:41.
[43] See *Budapest Bank Nyrt. v European Commission* (C-228/18) EU:C:2020:525.

that an exchange of information could constitute a restriction by object insofar as it "is capable of removing uncertainty between participants as regards the timing, extent and details of the modifications to be adopted by the undertakings concerned in their conduct on the market must be regarded as pursuing an anticompetitive object regardless of the direct effects in the prices paid by end users."[44]

However, and despite the EC's and ECJ's central role in the development of the European competition law, on the subject matter of its application to the labor market, national competition authorities have taken the lead, initiating investigations and trying out novel theories of harm, focusing mainly in the sports sector, which have yet to be subjected to the judicial scrutiny imposed by courts throughout the Union, and, ultimately, by the ECJ.

At a European level, the first evidence of the EU enforcers' gaze turning towards labor markets arrived much later than it did in the US Indeed, on 24 October 2019, Margrethe Vestager, EU Commissioner for Competition, supported the need to grant "gig economy" workers the right to engage in collective bargaining to advocate for their rights,[45] which under art.101 TFEU would amount to a price fixing cartel, as self-employed workers constitute a undertaking for the purposes of EU Law.[46]

Fast forward to September 2022, and the EC published its Guidelines on the application of Union competition law to collective agreements regarding the working conditions of solo self-employed persons.[47] In these guidelines, the EC aimed at exempting collective negotiations held by solo self-employed workers—who are in a situation comparable to that of regular workers—from the scope of application of art.101, building upon the ECJ jurisprudence in the *Albany* case, where the Court stated that collective negotiations held by workers with their employer are exempted from the application of art.101 (previously art.85) since

> "the social policy objectives pursued by such agreements would be seriously undermined if management and labour were subject to Article 85(1) of the Treaty when seeking jointly to adopt measures to improve conditions of work and employment."[48]

Despite relating to the exemption of application of competition law to a certain category of workers, and not on the application of the competition law framework to employers, this development marks a shift in focus by the foremost European enforcer, signaling to its national competition authorities (NCAs) the EC's will and interest to use competition law tools to protect workers.

In this sense, and following this note, the Portuguese Competition Authority (PCA) published, in September 2021, its *Report and Best Practices Guide on anticompetitive agreements in the labor market*, following a market inquiry exercise held in Portugal between April and June 2021.[49] Along with it, the PCA also published its *Labor market agreements and competition policy Issues Paper* (Issues Paper),[50] in which it performed an exhaustive analysis of the relevant economic and legal considerations—such as the legal reasoning and theory of harm, drawing from U.S. decision practice on the subject and European decision practice on other issues[51]—of no-poach and wage-fixing infringements.

As evidence of the recent re-focus on these subjects in Europe, even if outside the EU, in February 2023, the Competition and Markets Authority, of the U.K. (CMA) published a guidance to employers, providing advice on how to avoid anti-competitive behavior, detailing no-poach, wage fixing and information sharing as the three main types of anti-competitive behaviors in the labor market, equating them as "examples of business cartels".[52] Similarly, on May 30, 2023, the competition authority of the Basque Region, in Spain, issued a guide regarding the labor market,[53] providing practical clarifications aimed at employers on the subjects of the applicability of competition law rules to collective labor conventions and of no poach agreements in general.

In this sense, and as will be better demonstrated below, it seems that European enforcement, in particular at EU level, is somewhat behind US enforcement, with European enforcers following the lead and drawing upon the conclusions of their American counterparts, even if adopting a different approach, through preventive issue of guidance and apparent focus on public enforcement. As Olivier Guersent, the director-general of the European Commission's Directorate-General for Competition (GDComp) stated, in June 2022, the DGComp takes inspiration in this subject from the US antitrust agencies.[54] Nevertheless, it should be noted that due to the essentially

[44] See *HSBC Holdings plc v European Commission* (C-883/19 P) EU:C:2023:11 at [203].
[45] See *Financial Times*, "Vestager says gig economy workers should 'team up' on wages", 24 October 2019.
[46] *FNV Kunsten Informatie en Media v Staat der Nederlanden* (C-413/13) EU:C:2014:2411; [2015] 4 C.M.L.R. 1 at [30], [31] and [42].
[47] Communication from the Commission, Guidelines on the application of Union competition law to collective agreements regarding the working conditions of solo self-employed persons (2022/C 374/02).
[48] *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* (C-67/96) EU:C:1999:430; [2000] 4 C.M.L.R. 446 at [60].
[49] See *The AdC publishes final Report and Best Practices Guide on anticompetitive agreements in the labor market*, (21 September 2021), available at *http://www.concorrencia.pt/en/articles/adc-publishes-final-report-and-best-practices-guide-anticompetitive-agreements-labor*.
[50] Labor market agreements and competition policy Issues Paper (September 2021), available at *http://www.concorrencia.pt/sites/default/files/Issues%20Paper%20Labor%20Market%20Agreements%20and%20Competition%20Policy%20-%20final.pdf*.
[51] Due to the overall lack of European decision practice on the subject.
[52] CMA, *Employers advice on how to avoid anti-competitive behavior*, available at *http://www.gov.uk/government/publications/avoid-breaking-competition-law-advice-for-employers/employers-advice-on-how-to-avoid-anti-competitive-behavior*.
[53] Autoridad Vasca de la Competencia, *Guía práctica sobre la incidencia de la competencia en el mercado laboral*, available at: *www.competencia.euskadi.eus/contenidos/documentacion/guia_competencia_mercado_labor/es_def/Guia-sobre-la-incidencia-en-el-mercado-laboral-Navegable.pdf*.
[54] *See Global Competition Review*, "EU finalises guidelines exempting gig workers from competition rules", 29 September 2022, available at: *https://globalcompetitionreview.com/article/eu-finalises-guidelines-exempting-gig-workers-competition-rules*.

regional/national nature of the conducts, infringement proceedings will likely be more frequent at a decentralized, national, level. Nevertheless, the EC will continue to have a role as agent of this change, particularly through policy-oriented actions at the EU-level. Indeed, most recently, in May 2024, the EC published a Competition Policy Brief on Antitrust in Labour Markets (Policy Brief), in which it detailed its understanding of the legal framework applicable to wage-fixing and no poach agreements. The EC's default position seems to be that (i) wage fixing and no-poach agreements have, by their very nature, the potential to restrict competition, and (ii) are unlikely to meet requirements to qualify as ancillary restraints or be exempted under art.101(3) TFEU, even though there seems to be more leeway with regards to justifying no-poach deals.[55]

III. Types of conduct

As mentioned above, both the Sherman Act and art.101 TFEU are facially vague, requiring materialization through a dense body of decision practice and precedent. In the context of labor markets, the application of these laws has been shaped by established decision-making practices and the issuance of non-binding regulatory guidance measures by enforcement authorities. These legal principles have been invoked specifically in relation to practices such as wage-fixing, no poach agreements, information sharing, and non-compete agreements. These specific forms of conduct, which we will delve into further below, represent the prevalent and potential violations that regulators are now closely scrutinizing.

A. Wage-fixing

A wage-fixing agreement is an agreement between two or more companies regarding employees' salaries or other terms of compensation.[56] Wage-fixing is a form of price-fixing, which has long been subject to per se treatment in the United States. Thus, to prove wage-fixing, the DoJ need only prove that two companies entered into an agreement to fix wages.[57] At that point, liability attaches. Private plaintiffs, however, must also prove standing, injury, and antitrust standing to recover damages.

Similarly, in the EU, wage-fixing is prohibited under art.101 TFEU, and, is considered similar to price fixing in that it negatively affects an input on the productive process and could be construed as a restriction by object.[58] However, what specific conduct amounts to wage-fixing is not clearly defined, due to the lack of supporting and definitive decision practice, which is unsurprising given that this is a relatively new focus for EU enforcers. It should be noted, nevertheless, that the EC in its new Horizontal Guidelines, in which it provides self-binding guidance on its interpretation of art.101 based on its and the ECJ's decision practice, included wage-fixing as form of *buyer cartels*, which "coordinate those purchasers' individual competitive behavior on the purchasing market or influencing the relevant parameters of competition between them through practices such as, but not limited to, the fixing or coordination of purchase prices or components thereof (including, for example, *agreements to fix wages* or not to pay a certain price for a product); the allocation of purchase quotas or the sharing of markets and suppliers" (emphasis added).

In its Policy Brief the EC, with respect to wage-fixing agreements, states that it seems difficult to argue that such arrangements may have pro-competitive effects.[59]

B. No poach

"A no-poaching agreement refers to an agreement between competing employers not to solicit, recruit, hire without prior approval, or otherwise compete for employees."[60] In recent matters (see Section III, below), the United States has taken the position that no poach agreements are a form of market allocation and, therefore, subject to the per se rule. Courts confronted with this question have largely agreed with the use of that standard, permitting cases to move forward on per se grounds (though, as described below, they have disagreed about how the standard applies and have found liability in few if any cases). However, at least one court has required the DoJ to meet a higher standard and to show that the no poach agreement at issue meaningfully limited competition in a market.[61] The DoJ was ultimately unable to meet that standard in that case because, according to the court, unlike the motion to dismiss stage, where "[t]here were no facts in the Indictment that would have suggested that the alleged agreement did not actually allocate the market to a meaningful extent," on "a full factual record," the government failed to meet its burden.[62]

State antitrust enforcers have also signaled a recent interest in no poach matters. For example, Washington launched an initiative to challenge no poach clauses in franchise agreements in January of 2018.[63] Washington

[55] See EC, *Competition Policy Brief*, "Antitrust in Labour Markets", Issue 2, May 2024.
[56] See *No More No Poach: The Antitrust Division Continues to Investigate and Prosecute "No Poach" and Wage-Fixing Agreements*, (Spring 2018), available at *https://www.justice.gov/atr/file/946981/dl?inline=*.
[57] See *Stop & Shop Supermarket Co v Blue Cross & Blue Shield* 373 F.3d 57, 61 (1st Cir. 2004) (explaining that when the per se rule applies, "liability attaches without need for proof of power, intent, or impact").
[58] See PCA, *Issues Paper* p.40, where the PCA tries to make up for the inexistence of any decision practice at the EC level on the subject of wage-fixing, by referencing the EC's two most recent decisions, at the time, of input price-fixing. Similarly, see EC, *Competition Policy Brief*, "Antitrust in Labour Markets", Issue 2, May 2024, pp.3–5.
[59] EC, Annex to the Communication From The Commission, Approval of the content of a draft for a Communication From The Commission - Guidelines on the applicability of art.101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, para.279.
[60] *Aya Healthcare Servs. v AMN Healthcare, Inc* 613 F. Supp. 3d 1308, 1330 (S.D. Cal. 2020). The court's reference to "competing employers" here refers to companies competing for employees; it does not refer to companies that are competitors based on the goods or services they offer.
[61] See Ruling and Order on Motions, *United States v Patel*, No.3:21-cr-220 (VAB)(RAR) (D. Conn. 28 April 2023). For additional detail, see Section III.A.4, below.
[62] 15 U.S.C. ss.12.
[63] See Labor and Antitrust, *Initiative to Eliminate No-Poach Clauses in Franchise Agreements*, available at *www.atg.wa.gov/labor-and-antitrust*.

entered into settlement agreements with McDonald's Corp, CKE Restaurants Holdings, Inc, Carl's Jr, and Jimmy John's that required the companies to end their alleged practice of prohibiting workers from moving from one fast-food franchise to another (within each company's umbrella).[64] Pennsylvania and Massachusetts followed suit, entering into agreements with Arby's, Dunkin', Five Guys Holdings Inc, and Little Caesar Enterprises Inc, requiring the companies to remove no poach language from franchise agreements.[65] Illinois filed suit against a group of temp agencies, alleging they agreed not to hire each other's employees when staffing a common client, in violation of the Illinois Antitrust Act.[66] The Illinois Supreme Court recently heard oral arguments regarding how it should answer a certified question from a county judge, asking whether the definition of "service" under the Illinois Antitrust Act excludes all labor services from the law's coverage.[67] The Court held that

> "the Illinois Antitrust Act does not exempt from antitrust scrutiny all agreements between competitors to hold down wages and to limit employment opportunities for their employees[,]"

and remanded for further proceedings.[68]

In the EU, no poach agreements can be regarded both as an indirect form of price-fixing as well as a supply market or supply-source sharing conduct, and from both perspectives could be regarded as by object restriction.[69]

However, it should be noted that no-poach clauses agreed between parties in a merger operation can be regarded an ancillary restraints if they fulfill certain conditions[70]—such as, only encompassing key employees and not prohibiting hiring an employee who actively engages with the contracting party to enter into its employment—and, in this sense, benefit from exemption of the application of art.101 TFEU, pursuant to art.21(1) of the Merger Regulation[71], as explained by the EC in its Commission Notice on restrictions directly related and necessary to concentrations.[72]

In its Policy Brief, even though it stresses the restrictive nature of these agreements, the EC seems to allow for more room for no-poach deals to be favourably assessed under certain conditions close to the ancillary restraints doctrine. The EC acknowledges that they can have pro-competitive effects including protecting firms' incentives to invest into employees' trainings protecting non-patent IP rights. However, according to the EC, net efficiencies with respect to the investment hold-up issue are uncertain, in particular, if the same results could be achieved through less restrictive mechanisms, such as non-disclosure agreements, gardening leaves or non-compete obligations in individual employees' contracts.

C. Information exchange

In the United States, exchanging competitively sensitive information between competitors can give rise to an antitrust violation in certain circumstances. For example, in *United States v Container Corp of America*, the Supreme Court reversed an order granting dismissal in a price information exchange case, finding that the exchange of pricing information violated the Sherman Act.[73] Not all information exchange, however, is an antitrust violation because courts and enforcers have recognized that such exchanges can be procompetitive depending on the circumstances.

In the 1990s and early 2010s, the Department of Justice issued three policy statements to guide companies, in part, in determining what information exchange was permitted: *Department of Justice and FTC Antitrust Enforcement Policy Statements in the Health Care Area* (15 September 1993), *Statements of Antitrust Enforcement Policy in Health Care* (1 August 1996), and *Statement of Antitrust Enforcement Policy Regarding Accountable Care Organizations Participating in the Medicare Shared Savings Program* (20 October, 2011). These policy statements created safe harbors for the exchange of price and cost information—a policy not to challenge the exchanges "absent extraordinary circumstances".[74] For example, this protection permitted companies to participate in industry surveys without fear of prosecution, so long as the survey was managed by a third party, the information provided was historical, the information was aggregated to protect the identity of the underlying sources, and a sufficient number of sources were aggregated to prevent competitors from linking particular data to an individual source. Although originally aimed at the healthcare industry, enforcers and courts alike applied the guidance to information exchange more broadly to other industries as well.

[64] Stephen Joyce, *California Leads States in Probing Employers' "No-Poach" Pacts* (19 October 2022), *https://news.bloomberglaw.com/antitrust/california-leads-states-in-probing-employers-no-poach-pacts*.
[65] Stephen Joyce, *California Leads States in Probing Employers' "No-Poach" Pacts* (19 October 2022),*https://news.bloomberglaw.com/antitrust/california-leads-states-in-probing-employers-no-poach-pacts*.
[66] Stephen Joyce, *California Leads States in Probing Employers' "No-Poach" Pacts* (19 October 2022).
[67] See Celeste Bott, *Ill. Judge Questions Possibly 'Absurd' Antitrust Law Carveout*, (15 November 2023), *http://www.law360.com/competition/articles/1767044?nl_pk=b1604221-d99a-41dd-bd8f-a214b947d213&utm_source=newsletter&utm_medium=email&utm_campaign=competition&utm_content=2023-11-16&read_more=1&nlsidx=0&nlaidx=5*.
[68] *Illinois v Elite Staffing, Inc* No.128763, 2024 IL 128763 at *1 (Ill. 19 January 2024).
[69] See PCA, Issues Paper. pp.18–19 and 21.
[70] The US has similar legal precedent.
[71] Council Regulation 139/2004 on the control of concentrations between undertakings [2004] O.J. L24/1.
[72] Commission Notice on restrictions directly related and necessary to concentrations (2005/C 56/03, para.26, p. 3.
[73] *United States v Container Corp. of Am* 393 U.S. 333, (1969). See also *In re Flat Glass Antitrust Litig.* 385 F.3d 350 (3d Cir. 2004) (finding that a jury could infer that the exchange of pricing information was a concerted action designed to fix prices).
[74] *Statements of Antitrust Enforcement Policy in Health Care* (1 August 1996).

In February of 2023, however, the DoJ withdrew its support for all three policies.[75] This withdrawal removes the safe harbor for information exchange, creating new risks for companies that engage in the practice. The DoJ did not replace the guidance; rather it said that conduct would have to be evaluated on a case-by-case basis. It cited innovative technology (particularly artificial intelligence and algorithmic software) as the driving force behind the position shift. Moreover, the state of other guidance that relied on the now withdrawn policies is unclear. For example, according to the 2016 Antitrust Guidance for Human Resources Professionals, exchanging competitively sensitive employment information is similar to the exchange of pricing information—both have the potential to adversely impact competition in the market.[76] The guidance notes that companies can mitigate the risk of an antitrust violation by ensuring that they exchange only historical, aggregated information with safeguards to ensure the information will not be used to limit competition.[77] But, this guidance relied on the safe harbors in the now withdrawn policy statements. The 2016 guidance, however, has not been withdrawn, creating some uncertainty regarding the enforcers' approach to information exchange.

In any event, unlike wage-fixing, information exchange is typically not subject to per se treatment. Instead, it is commonly analyzed under the rule of reason.[78] Under the rule of reason,

> "the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition. Appropriate facts to take into account include specific information about the relevant business and the restraint's history, nature, and effect. Whether the businesses involved have market power is a further, significant consideration."[79]

Then, in September of 2023, the DoJ filed its first action based on the exchange of competitive information since withdrawing the guidance, suing Agri Stats—an analytics company that compiles, aggregates, and disseminates data among competing meat processors.[80] In the complaint, DoJ alleges that Agri Stats violated s.1 of the Sherman Act by facilitating anticompetitive information exchanges in the US broiler chicken, pork, and turkey markets that were used to stabilize and raise prices and restrict supply.[81] The case is ongoing.

Similarly, in the EU, information exchange should be analysed on a case-by-case basis and might not be prohibited under art.101 TFEU. In this sense, and as EC puts it in its Horizontal Guidelines, "Information exchange is a common feature of many competitive markets and may generate various types of efficiency gains."[82] However, it should be noted that the in the new Horizontal Guidelines, the EC appears to evidence a stricter approach to information exchanges, now detailing its understanding of what constitutes "commercially sensitive information."[83]

Indeed, the subject of treating standalone exchanges of sensitive information as a by object infringement is currently a hot topic, with a preliminary ruling procedure pending, at moment of preparation of this paper, which is liable to provide a definitive answer to this question.[84] Regardless of this margin of legal uncertainty, the PCA, in its *Issues Paper*, details its own understanding on the subject stating that "the exchange of commercially sensitive and strategic information between companies involving the hiring of workers, or wages and/or other forms of compensation, without involving those same workers, may constitute a practice restricting competition" and that "Several characteristics contribute to the exchange of commercially strategic and sensitive information being susceptible to violate competition law" such as "type, timeliness, level of aggregation, market characteristics and form in which the information is shared and disseminated."[85]

D. Non compete agreements

Although noncompete agreements were not addressed in the 2016 guidance, US antitrust enforcers have recently signaled an interest in curtailing such agreements.[86] A noncompete agreement is an agreement between an

[75] Department of Justice Press Release, *Justice Department Withdraws Outdated Enforcement Policy Statements* (3 February 2023), *www.justice.gov/opa/pr/justice-department-withdraws-outdated-enforcement-policy-statements*.
[76] Department of Justice Antitrust Division, "Antitrust Guidance for Human Resource Professionals" (October 2016), *http://www.justice.gov/atr/file/903511/download*.
[77] Department of Justice Antitrust Division, "Antitrust Guidance for Human Resource Professionals" (October 2016),*https://www.justice.gov/atr/file/903511/download*.
[78] See *United States v United States Gypsum Co.* 438 U.S. 422, 441 n.16 (1978) (stating that "we have held that such exchanges of information do not constitute a per se violation of the Sherman Act").
[79] *Leegin Creative Leather Prods. v PSKS, Inc.* 551 U.S. 877, 885–86 (2007) (internal quotation and citations omitted).
[80] See Complaint, *United States v Agri Stats, Inc.* No.23-cv-03009 (D. Minn. 28 September 2023).
[81] Complaint, *United States v Agri Stats, Inc.* No.23-cv-03009 (2023).
[82] Communication from the Commission, Guidelines on the applicability of art.101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements (2011/C 11/01), [2023] OJ C259/1, para. 57.
[83] EC, Annex to the Communication from The Commission, Approval of the content of a draft for a Communication From The Commission - Guidelines on the applicability of art.101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, paras 413 and ff.
[84] *Banko BPN v BIC Portugues* (C-298/22). For more information on the case, see *https://curia.europa.eu/juris/fiche.jsf?nat=or&mat=or&pcs=Oor&jur=C%2CT%2CF&num=C*
[85] PCA, *Issues Paper*, p.38.
[86] Although not an antitrust enforcer, the National Labor Relations Board has also signaled recent interest in noncompete agreements. See National Labor Relations Board, Press Release, *NLRB General Counsel Issues Memo on Non-competes Violating the National Labor Relations Act* (30 May 2023), *www.nlrb.gov/news-outreach/news-story/nlrb-general-counsel-issues-memo-on-non-competes-violating-the-national* (stating that the memorandum "explains that overbroad non-compete agreements are unlawful because they chill employees from exercising their rights under ss.7 of the National Labor Relations Act").

employer and an employee, whereby the employee agrees not to work for a competitor of the employer for a period of time following departure from the employer.[87] This type of agreement was designed to protect employers by, for example, preventing an employee from taking trade secrets or other competitively sensitive information directly to a competitor.

Historically, these agreements have been governed by state law. For example, California has long outlawed enforcing noncompete agreements that limit an employee's future job prospects.[88] Other states, including North Dakota and Oklahoma, historically permitted noncompete agreements, but passed laws in 2022 banning such agreements.[89] In June of 2023, New York sought to join them, passing a bill that would ban almost all new noncompete agreements (although Governor Hochul subsequently vetoed the bill).[90] Colorado, Illinois, Maine, Maryland, New Hampshire, Oregon, Rhode Island, Virginia, and Washington take yet another approach—banning noncompete agreements unless the worker earns above a certain threshold.[91]

In February of 2022, however, the Department of Justice signaled an interest in changing that status quo: the antitrust enforcer filed a Statement of Interest in a Nevada state court case, arguing "non-compete agreements limit competition in design and effect[,]" potentially violating the Sherman Act.[92] According to the Department of Justice, the noncompete agreement at issue was not merely a vertical restraint, but also a horizontal one because, at the time the agreement was made, the employees could sell their services to both the intermediate-contractor and the ultimate purchaser.[93] Stated another way, the antitrust enforcer argued that the noncompete at issue was akin to a no-hire agreement between competitors and, therefore, subject to per se treatment.

Then, in January of 2023, the Federal Trade Commission proposed a rule that would fully ban noncompete clauses nationwide.[94] As proposed, the rule would ban companies from enforcing nearly all noncompete clauses against their employees on the basis that the use of noncompete agreements "suppresses wages, hampers innovation, and blocks entrepreneurs from starting new businesses".[95] More specifically, the rule would make it illegal for employers to: (1) enter into or attempt to enter into a noncompete clause with employees and independent contractors; (2) maintain a noncompete clause with a worker that was executed prior to the rule's effective date; and (3) represent to a worker, under certain circumstances, that the worker is subject to a noncompete clause.[96] The proposed rule was subject to a public comment period, which ended on 19 April 2023.[97]

On April 23, 2024, the Federal Trade Commission voted 3–2 in favor of a final rule that had some differences from the articulated in the notice for proposed rulemaking.[98] Specifically, the final rule permits existing noncompete agreements for senior executives—defined as workers earning more than $151,164 annually and who are in policy-making positions—to remain in force (although new noncompete agreements for senior executives remain prohibited).[99] The final rule also eliminated the provision that would have required employers to legally modify existing noncompete agreements by formally rescinding them.[100] The rule is set to take effect 120 days after publication in the Federal Register, but faces legal challenges already.[101]

As opposed to the US approach, in Europe, with its stricter labor law tradition, non-compete clauses have been subject to legislative regulation in several jurisdictions and, as such, usually have well defined limits. Indeed, their goals and economic justifications are clear, and include preventing disloyal competition from previous employees, particularly highly specialized employees or involved in sales departments, which might free-ride on the training or commercial information obtained from their former employer.[102] In this sense, and for example, the Portuguese Labour Code,[103] establishes in art.136 that non-compete clauses are valid as long as they: (i) do not exceed a period of two years (may be considered until three years if the employee works in a

[87] See Lina M. Khan, *Opinion, Lina Khan: Noncompetes Depress Wages and Kill Innovation*, N.Y. Times (9 January 2023), available at *www.nytimes.com/2023/01/09/opinion/linakhan-ftc-noncompete.html* (stating that "[w]hen you're subject to a noncompete clause, you lose your right to go work for a competing company or start your own, typically within a certain geographic area and for a certain period of time.").
[88] See Cal. Bus. & Prof. Code s.16600.
[89] Leah Shepherd, *More States Block Noncompete Agreements*, (15 September 2022), *http://www.shrm.org/resourcesandtools/legal-and-compliance/state-and-local-updates/pages/states-restrict-noncompete-agreements-colorado.aspx*.
[90] Section 191-d(2).
[91] Section 191-d(2).
[92] Statement of Interest of the United States at 2, *Beck v. Pickert Medical Group*, No.CV21-02092 (2d Dist. Washoe Cty. 25 February 2022) (hereinafter Statement of Interest).
[93] Statement of Interest, *Beck v. Pickert Medical Group*, No.CV21-02092 (2d Dist. Washoe Cty. 25 February 2022).
[94] Non-Compete Clause Rulemaking (5 January 2023), *http://www.ftc.gov/legal-library/browse/federal-register-notices/non-compete-clause-rulemaking*.
[95] FTC Press Release, *FTC Proposes Rule to Ban Noncompete Clauses, Which Hurt Workers and Harm Competition*, (5 January 2023), *http://www.ftc.gov/news-events/news/press-releases/2023/01/ftc-proposes-rule-ban-noncompete-clauses-which-hurt-workers-harm-competition*.
[96] FTC Press Relaese, *FTC Proposes Rule to Ban Noncompete Clauses, Which Hurt Workers and Harm Competition*, (5 January 2023), *http://www.ftc.gov/news-events/news/press-releases/2023/01/ftc-proposes-rule-ban-noncompete-clauses-which-hurt-workers-harm-competition*.
[97] FTC Press Release, *FTC Extends Public Comment Period on Its Proposed Rule to Ban Noncompete Clauses Until April 19*, (6 March 2023), *http://www.ftc.gov/news-events/news/press-releases/2023/03/ftc-extends-public-comment-period-its-proposed-rule-ban-noncompete-clauses-until-april-19*.
[98] *https://news.bloomberglaw.com/antitrust/ftc-expected-to-vote-in-2024-on-rule-to-ban-noncompete-clauses*.
[99] See FTC, Press Release, FTC Announces Rule Banning Noncompetes, (Apr. 23, 2024), *https://www.ftc.gov/news-events/news/press-releases/2024/04/ftc-announces-rule-banning-noncompetes*
[100] See FTC, Press Release, FTC Announces Rule Banning Noncompetes, (Apr. 23, 2024), *https://www.ftc.gov/news-events/news/press-releases/2024/04/ftc-announces-rule-banning-noncompetes*
[101] See Compl., *Chamber of Commerce v. FTC*, No. 6:24-cv-00148 (E.D. Tex. Apr. 24, 2024).
[102] PCA, *Issues Paper*, p.17.
[103] Law no.7/2009 of 12 February, as amended.

particular activity that implies a special relationship of trust or who has access to commercially strategic and sensitive information on competition); (ii) are established in writing; and (iii) provide a compensation to be awarded to the former employer or criteria for its determination. Similarly, in Italy, under s.2125 of the Italian Civil Code these clauses are valid if they: (i) are in writing; (ii) grant consideration to the employee; (iii) narrowly define the prohibited activities and limit the geographical scope of the restrictions; and (iv) do not exceed a period of three years (five years for executives).[104] Similarly, in Germany, under ss.74 and 75 of the German Commercial Code, these clauses are binding and valid if they: (i) are in writing; (ii) the employer has a justified commercial interest; (iii) the justified interests of the employee are not unlawfully restricted; (iv) do not exceed a maximum two years; and (v) the employer pays a compensation for the duration of the post-contractual restrictive covenant in the amount of at least 50% of the prior overall earnings of the employee.[105]

The EC Policy Brief also safeguards these obligations, since agreements in individual employee contracts are not agreements between undertakings. In this sense, as long as the non-competes are compliant with national labour laws, they constitute less restrictive ways of protecting the employers' investments in training or non-patent IP, since, as referred, non-competes are transparent vis-a-vis employees, who can then ask for an equitable compensation.

IV. Investigations and litigation

Since issuing the 2016 guidelines, the US Department of Justice has criminally charged companies and individuals alike for entering into wage-fixing and no poach agreements. The Federal Trade Commission has opened investigations into both companies' and individuals' use of noncompete agreements. And State Attorneys General also have brought civil actions concerning alleged antitrust violations in labor markets. Accordingly, private enforcement has also increased, as plaintiffs file follow-on actions to the government investigations.

In Europe, following Margrethe Vestager's declarations in late 2019, the first relevant evidence of enforcement of the types of practices described above arose out of Portugal where, in May 2020, the PCA imposed an interim measure on the Portuguese Football League, regarding a no poach agreement. As can be seen below, the driving force of this enforcement is public enforcement, with no evidence of private enforcement claims so far.

A. US Department of Justice Enforcement

In the past few years, the DoJ has sought and obtained a number of indictments charging both companies and individuals with wage-fixing and market allocation via non-solicitation and no poach agreements. Very few have been successfully prosecuted.

1. United States v Neeraj Jindal; John Rodgers

On 9 December 2020, the DoJ indicted physical therapist staffing company owner Neeraj Jindal with violating the Sherman Act by "enter[ing] into and engag[ing] in a conspiracy to suppress competition by agreeing to fix prices by lowering the pay rates to [physical therapists] and [physical therapist assistants]."[106] Thereafter, the DoJ obtained a superseding indictment, charging one of Jindal's alleged co-conspirators, John Rodgers, with the same Sherman Act violation.[107] Jindal and Rodgers filed motions to dismiss the indictment, arguing that the indictment failed to identify a per se violation and, therefore, did not charge a criminal violation.[108] The court denied the motion, holding that "[f]or over 100 years, the Supreme Court has consistently held that price-fixing agreements are unlawful *per se* under the Sherman Act[,]" and that the indictment alleged a form of price-fixing via fixing pay rates.[109]

A jury trial began on 4 April 2022.[110] The DoJ argued to the jury that Jindal and Rodgers learned that their biggest client would be cutting the amount it paid the company to supply physical therapists and physical therapist assistants by 23% at the same time they were trying to sell their company.[111] According to DoJ, Jindal and Rodgers panicked because the reduction would cause the value of the company to drop, potentially spoiling the deal.[112] The DoJ contended that, rather than competing for employees and in light of the reduced revenue they forecasted, Jindal and Rodgers reached out to five competitors and secured an agreement with one to collectively lower the rates they would pay physical therapists and assistants.[113] The jury, however, disagreed with DoJ. On 14 April 2022, after nine days of trial and

[104] See Angelo Zambelli, *Employment Law Overview*, Italy available at *https://leglobal.law/countries/italy/employment-law/employment-law-overview-italy/08-restrictive-covenants/*.
[105] See Tobias Pusch, *Employment Law Overview*, Germany, available at *https://leglobal.law/countries/germany/employment-law/employment-law-overview-germany/08-restrictive-covenants/*.
[106] Indictment, *United States v Jindal*, No.4:20-CR-358 (E.D. Tex. 9 December 2020).
[107] See First Superseding Indictment, *United States v. Neeraj Jindal*, No.4:20-CR-358 (E.D. Tex. 15 April 2021).
[108] See Mot. to Dismiss Count One of the First Superseding Indictment, *United States v Jindal*, No.4:20-CR-358 (E.D. Tex. 25 May 2021).
[109] Mem. Opinion & Order, *United States v Jindal*, No.4:20-CR-358 (E.D. Tex. 29 November 2021).
[110] See Minute Entry for proceedings held before District Judge Amos L. Mazzant, III, *United States v Jindal*, No.4:20-CR-358 (E.D. Tex. 4 April 2022).
[111] Katie Buehler, *DOJ Tells Texas Jury Staffing Firm's Wage Fixing Was A Crime*, 5 April 2022, available at *http://www.law360.com/articles/1480041*.
[112] Katie Buehler, "DOJ Tells Texas Jury Staffing Firm's Wage Fixing Was A Crime" (5 April 2022), *https://www.law360.com/articles/1480041*.
[113] Katie Buehler, "DOJ Tells Texas Jury Staffing Firm's Wage Fixing Was A Crime" (5 April 2022), *https://www.law360.com/articles/1480041*.

only five and a half hours of deliberations, the jury returned a verdict of not guilty on all Sherman Act violation charges.[114]

In a post-trial interview, one juror revealed that although she "th[ought] what they [the defendants] did was wrong[,]" the government evidence "was just too vague" to convict.[115] Additionally, the juror noted that the government's cooperating witness—an alleged co-conspirator who received an immunity deal—offered testimony that contradicted her prior testimony before the Federal Trade Commission, without offering a credible reason for the contradictions.[116] This caused "her credibility … [to go] down the drain" and the jurors to view the witness as "very sketchy".[117]

2. United States v Surgical Care Affiliates, LLC and United States v DaVita, Inc.

On 5 January 2021, the DoJ indicted outpatient medical care facilities owners and operators SCA and SCAI Holdings, LLC, charging both with violating the Sherman Act by

> "enter[ing] into and engag[ing] in a conspiracy to suppress competition [with certain competitors] for the services of senior-level employees by agreeing not to solicit each other's senior-level employees[.]"[118]

Thereafter, SCA filed a motion to dismiss the indictment, arguing that it failed to state a per se offense and that the novelty of the government's theory demonstrates that SCA was not on fair notice that its conduct was criminal, thereby violating fundamental rules of due process.[119]DoJ opposed the motion, arguing that the agreement not to solicit constituted an agreement to allocate the market, which is per se unlawful.[120] Thereafter, and following DoJ's loss in its related case against DaVita (described below), the DoJ moved to dismiss the case with prejudice, and the court granted the motion.[121]

Six months after issuing the SCA indictment, on 14 July 2021, the DoJ unveiled an indictment charging some of SCA's alleged co-conspirators, DaVita, Inc. (formerly DaVita Healthcare Partners, Inc) and its CEO, Kent Thiry, with violating the Sherman Act by

> "enter[ing] into and engag[ing] in a conspiracy with SCA to suppress competition between them for the services of senior-level employees by agreeing not to solicit each other's senior-level employees."[122]

On 14 September 2021, defendants filed a joint motion to dismiss, making the same arguments SCA had made in its still-pending motion.[123] The DoJ successfully opposed DaVita's motion, and the court denied the motion to dismiss, holding that "[s]ome non-solicitation agreements [including the one at issue here] can be properly categorized as horizontal market allocation agreements[,]" and, therefore, are subject to the per se rule.[124] The court cautioned the government, however, that not all non-solicitation agreements are subject to the per se rule.[125] Rather, to fall subject to per se treatment, there must be some showing of market allocation—that is, there must be a sufficient factual showing that the non-solicitation agreement at issue allocated the market.[126]

A jury trial began on 4 April 2022.[127] The trial lasted eight days, during which time the DoJ argued DaVita and its former CEO, Thiry, "cheated" by forming agreements with competitors not to solicit employees from each other, rather than competing openly and freely for employees.[128] The defense disagreed, arguing that Thiry's intent was never to prevent competition or allocate a market; instead, they argued, Thiry wanted to know about possible departures so that he could compete for those workers.[129] The jury agreed with the defense; after two days of deliberations, they returned a verdict of not guilty on all counts as to all defendants.[130]

3. United States v Hee

On March 30, 2021, the DoJ unveiled an indictment charging nursing staffing company VDA OC, LLC (formerly Advantage On Call, LLC) and its regional manager, Ryan Hee, with violating the Sherman Act by

[114] See Verdict of the Jury, *United States v Jindal*, No. 4:20-CR-358 (E.D. Tex. 14 April 2022), available at *www.law360.com/articles/1484191/attachments/0*. The jury found Jindal guilty of obstruction of justice in connection with the proceedings before the FTC. *See id*.
[115] Bryan Koenig, *DOJ "Dropped the Ball" in 1st Wage-Fixing Case, Juror Says*, (20 May 2022), *www.law360.com/articles/1494304/doj-dropped-the-ball-in-1st-wage-fixing-case-juror-says*.
[116] Bryan Koenig, "'Dropped the Ball' in 1st Wage-Fixing Case, Juror Says" (Law360, 20 May 2022), *https://www.law360.com/articles/1494304/doj-dropped-the-ball-in-1st-wage-fixing-case-juror-says*.
[117] Bryan Koenig, "'Dropped the Ball' in 1st Wage-Fixing Case, Juror Says" (Law360, 20 May 2022), *https://www.law360.com/articles/1494304/doj-dropped-the-ball-in-1st-wage-fixing-case-juror-says*.
[118] Indictment, *United States v Surgical Care Affiliates, LLC*, No. 3-21-cr-00011 (N.D. Tex. 5 January 2021), *www.justice.gov/opa/press-release/file/1351266/download*.
[119] See Mot. to Dismiss, *United States v Surgical Care Affiliates, LLC*, No. 3-21-cr-00011 (N.D. Tex. 26 March, 2021).
[120] See United States' Opp. to Def.'s Mot. to Dismiss, *United States v Surgical Care Affiliates, LLC*, No. 3-21-cr-00011 (N.D. Tex. 30 April 2021).
[121] See United States' Mot. to Dismiss, *United States v Surgical Care Affiliates, LLC*, No. 3-21-cr-00011 (N.D. Tex. 13 November 2023).
[122] Indictment, *United States v. DaVita, Inc.*, No.21-cr-00229-RBJ (D. Colo. 14 July 2021), *http://www.justice.gov/opa/press-release/file/1412606/download*.
[123] See Def.'s J. Mot. to Dismiss, *United States v. DaVita, Inc.*, No.21-cr-00229-RBJ (D. Colo. 14 September 2021).
[124] Order Denying Def.'s Mot. to Dismiss, *United States v DaVita, Inc.*, No.21-cr-00229-RBJ (D. Colo. 28 January 2022).
[125] Order Denying Def.'s Mot. to Dismiss, *United States v DaVita, Inc.*, No.21-cr-00229-RBJ (D. Colo. 28 January 2022).
[126] Order Denying Def.'s Mot. to Dismiss, *United States v DaVita, Inc.*, No.21-cr-00229-RBJ (D. Colo. 28 January 2022).
[127] See Minute Entry for proceedings held before Judge R. Brooke Jackson, *United States v DaVita, Inc.*, No. 21-cr-00229-RBJ (D. Colo. 4 April 2022).
[128] Matthew Perlman, *Outraged' DaVita CEO Plotted to Keep Employees, Court Told*, 4 April 2022, available at *http://www.law360.com/articles/1480374*.
[129] Cara Salvatore, *DaVita, Ex-CEO Acquitted In Antitrust No-Poach Trial*, 15 April 2022, available at *http://www.law360.com/articles/1484766/davita-ex-ceo-acquitted-in-antitrust-no-poach-trial*.
[130] See Verdict, *United States v DaVita, Inc.*, No.21-cr-00229-RBJ (D. Colo. 15 April 2022).

"enter[ing] into and engag[ing] in a conspiracy to suppress and eliminate competition for the services of nurses by agreeing to allocate nurses and to fix the wages of those nurses".[131] On 27 October 2022, VDA OC, LLC entered a guilty plea.[132] Pursuant to the terms of the plea deal, VDA OC, LLC was sentenced to pay a $400 special assessment, a $62,000 fine, and $72,000 in restitution.[133] Then, on 23 January 2023, the United States and Hee entered a Pretrial Diversion Agreement, deferring prosecution of the charged offense for a period of six months, with an effective date of 12 September 2022.[134] Hee agreed to perform 180 hours of community service in the healthcare or education field within the six month term of supervision and the United States agreed to dismiss the indictment against him upon his successful completion of the community service.[135] The court ordered dismissal of the indictment on 14 March 2023.[136]

4. United States v Patel

On 15 December 2021, the DoJ charged six aerospace-industry executives and managers with violating the Sherman Act by engaging in a conspiracy to "suppress competition … by agreeing to restrict the hiring and recruiting of engineers and other skilled-labor employees".[137] Notably, one of the individuals indicted, Mahest Patel, was an intermediary between the supply companies and an aerospace company and was allegedly responsible for enforcing the agreement.[138]

A jury trial began on 27 March 2023.[139] Following the conclusion of the United States' case-in-chief, the defendants filed a joint r.29 motion for judgment of acquittal.[140] They argued that the government's evidence failed to establish a single, overarching conspiracy to allocate employees, that there was no evidence of intent to allocate a market, and that the business arrangement was ancillary to a legitimate business collaboration.[141] The court agreed with defendants, granting their r.29 motion and dismissing the case before the jury could deliberate.[142] In granting the motion, the judge held that a market allocation agreement requires evidence that meaningful competition was limited in the relevant market and, based on the facts the government presented, no reasonable juror could find that an illegal conspiracy to allocate the market existed.[143]

5. United States v Manahe

On 27 January 2022, the DoJ charged four employees of home healthcare agencies in Maine with engaging in a conspiracy to

> "suppress and eliminate competition for the services of PSS [personal support specialist] workers by agreeing to fix the rates paid to PSS workers and by agreeing not to hire each other's PSS workers"

between April of 2020 and May of 2020.[144]

Four months later, on 31 May 2022, defendant Faysal Kalayaf Manahe filed a motion to dismiss, which the other defendants later joined.[145] The defendants argued that the indictment must be dismissed because applying the per se rule to the alleged non-solicitation agreement violates the Fifth and Sixth Amendments and, even if it did not, the indictment failed to state a *per se* claim.[146] Defendants also contended that dismissal was required because the indictment alleged an ancillary restraint subject to a rule of reason analysis, which was not properly alleged in the indictment.[147] The DoJ opposed the motion, arguing that the indictment should not be dismissed because it alleged a per se violation of s.1 of the Sherman Act and the Sherman Act as construed by the courts provided the notice required by the due process clause.[148] The court agreed with the government and denied the motion to dismiss.[149] Notably, however, the court stated it would permit the defendants "to contest whether there was an agreement and argue that their conduct was merely ancillary to a procompetitive purpose" at trial.[150]

A jury trial occurred in March of 2023 and lasted approximately two weeks.[151] The jury voted not guilty as to all four defendants.[152]

[131] Indictment, *United States v Hee*, No.2:21-cr-00098 (D. Nev. 26 March 2021), *www.justice.gov/opa/press-release/file/1381556/download*.
[132] See Plea Agreement, *United States v Hee*, No.2:21-cr-00098 (D. Nev. 27 October 2022).
[133] See Minutes of Proceedings, *United States v. Hee*, No.2:21-cr-00098 (D. Nev. 27 Octobeer 2022).
[134] See United States' Rule 48 Motion to Dismiss the Indictment as to Ryan Hee, *United States v Hee*, No.2:21-cr-00098 (D. Nev. 13 March 2023).
[135] United States' Rule 48 Motion to Dismiss the Indictment as to Ryan Hee, *United States v Hee*, No. 2:21-cr-00098 (D. Nev. 13 March 2023).
[136] See Order Granting United States' Rule 48 Mot. to Dismiss the Indictment as to Ryan Hee, *United States v Hee*, No.2:21-cr-00098 (D. Nev. 14 March 2023).
[137] Indictment, *United States v Patel*, No.3:21-cr-220 (D. Conn. 15 December 2021), *http://www.justice.gov/opa/press-release/file/1457091/download*.
[138] Indictment, *United States v Patel*, No.3:21-cr-220 (D. Conn. 15 December 2021), *http://www.justice.gov/opa/press-release/file/1457091/download*.
[139] See Minute Entry for proceedings held before Judge Victor A. Bolden, *United States v Patel*, No.3:21-cr-220 (VAB)(RAR) (D. Conn. 29 March 2023).
[140] See Mem. of Law in Support of Defs.' J. Mot. for Judgment of Acquittal, *United States v Patel*, No.3:21-cr-220 (VAB)(RAR) (D. Conn. 24 April 2023).
[141] Mem. of Law in Support of Defs.' J. Mot. for Judgment of Acquittal, *United States v Patel*, No.3:21-cr-220 (VAB)(RAR) (D. Conn. 24 April 2023) at 2–5.
[142] See Ruling and Order on Motions, *United States v Patel*, No.3:21-cr-220 (VAB)(RAR) (D. Conn. 28 April 2023).
[143] Ruling and Order on Motions, *United States v Patel*, No.3:21-cr-220 (VAB)(RAR) (D. Conn. 28 April 2023).
[144] Indictment, *United States v Manahe*, No.2:22-CR-13-JAW (D. Maine 27 January 2022), *www.justice.gov/opa/press-release/file/1466611/download*.
[145] See Def. Faysal Kalayaf Manahe's Mot. to Dismiss with Incorporated Mem. of Law, *United States v Manahe*, No.2:22-CR-13-JAW (D. Maine 31 May 2022).
[146] Def. Faysal Kalayaf Manahe's Mot. to Dismiss with Incorporated Mem. of Law, *United States v Manahe*, No.2:22-CR-13-JAW (D. Maine 31 May 2022) at 8–24, 26–28.
[147] Def. Faysal Kalayaf Manahe's Mot. to Dismiss with Incorporated Mem. of Law, *United States v Manahe*, No.2:22-CR-13-JAW (D. Maine 31 May 2022) at 24–26.
[148] See United States' Opp. to Defs.' Mot. to Dismiss the Indictment, *United States v Manahe*, No.2:22-CR-13-JAW (D. Maine 21 June 2022).
[149] See Order on Mots. to Dismiss the Indictment & for a Preliminary Hearing Concerning Conspiracy Evidence, *United States v Manahe*, No. 2:22-CR-13-JAW (D. Maine 8 August 2022).
[150] See Order on Mots. to Dismiss the Indictment & for a Preliminary Hearing Concerning Conspiracy Evidence, *United States v Manahe*, No.2:22-CR-13-JAW (D. Maine 8 August 2022) at 1.
[151] Cara Salvatore, *Home Health Execs Acquitted in Latest DOJ Antitrust Loss*, 22 March, 2023, available at *http://www.law360.com/articles/1586974*.
[152] See Jury Verdict Form, *United States v Manahe*, No.2:22-CR-13-JAW (D. Maine 22 March 2023).

6. United States v Lopez

On 15 March 2023, the DoJ indicted a healthcare staffing executive for

> "knowingly enter[ing] into and engag[ing] in a conspiracy to suppress and eliminate competition for the services of nurses employed by the [uncharged] co-conspirator companies by agreeing to fix the wages of those nurses"

between March of 2016 and May of 2019.[153] On September 6, 2023, the DoJ obtained a superseding indictment, adding charges for wire fraud, stemming from alleged failure to disclose the pending criminal charges when completing certain paperwork accompanying the sale of his business.[154]

A jury trial is set to begin on 7 October 2024.[155] Undeterred by the string of losses at trial, the DoJ continues to investigate and pursue indictments for wage-fixing and non-solicit and no poach agreements. Speaking before the antitrust law bar in March of 2023, Assistant Attorney General Jonathan Kanter emphasized that wage-fixing and no poach cases "are righteous cases and [the Department of Justice, Antitrust Division] will continue when the facts and the law support it to bring those cases".[156]

B. Private plaintiffs

In the wake of the criminal cases, a number of private plaintiffs have filed suit alleging civil violations based on the same conduct. For example, a proposed class of employees filed suit following the *Surgical Care Affiliates* and *DaVita* cases, alleging the purported agreements to refrain from soliciting each other's senior-level employees harmed competition via market allocation.[157] That civil case survived a motion to dismiss and is in the midst of discovery.[158] Similarly, a proposed class of employees filed suit following the *Patel* case, alleging the purported agreements to restrict recruitment and hiring of aerospace engineers and other skilled workers harmed competition via market allocation.[159] Defendants filed a motion to dismiss,[160] which the Court denied.[161] Fact discovery has concluded. Plaintiffs have since reached settlements with certain defendants, but class certification motions remain pending as to others.[162]

Private plaintiffs have also filed suit in cases unconnected to the criminal allegations described above. For example, a group of former Saks employees filed suit against Saks Fifth Avenue, Gucci, Louis Vuitton, and other luxury fashion houses, arguing that the companies reached an agreement not to hire Saks workers for six months after the workers left Saks.[163] The defendants filed a motion to dismiss, which the court granted, finding that any agreement was ancillary to the broader business relationships because Saks sells the luxury fashion houses' products in their stores and the brands operate rented space in Saks' stores.[164] The plaintiffs appealed and the case is currently pending before the Second Circuit.[165]

C. The Federal Trade Commission

Unlike the Department of Justice, the Federal Trade Commission lacks criminal prosecution powers. However, that has not stopped the Commission from investigating and challenging noncompete agreements. On 4 January 2023, the Commission announced that it had entered consent orders against three companies and two individuals to resolve allegations that the companies' use of noncompete agreements constituted an unfair method of competition in violation of s.5 of the FTC Act.[166] The orders enjoined the companies and individuals from enforcing or threatening to enforce their noncompete agreements and required them, for the next 10 years, to provide a clear and conspicuous notice to any new relevant employee that they may freely seek or accept a job with any company or person, run their own business, or compete with them at any time following their employment.[167] These cases represent the first time the Commission sued to halt noncompete restrictions.[168]

D. European enforcement

Similarly, in past few years, there has been an increase in competition law investigations regarding alleged infringements connected with labor markets. This enforcement has been led primarily at the member state

[153] Indictment, *United States v Lopez*, No.2:23-cr-0055-CDS-DJA (D. Nevada 15 March 2023), *http://www.law360.com/articles/1586646/attachments/0*.
[154] See Superseding Indictment, *United States v Lopez*, No.2:23-cr-0055-CDS-DJA (D. Nevada 6 September 2023).
[155] See Findings and Order on Stipulation to Continue Pretrial Motions, Calendar Call, and Trial Deadlines, *United States v. Lopez*, No.2:23-cr-0055-CDS-DJA (D. Nevada November 17, 2023).
[156] Lauren Briggerman, Kirby Behre, & Helen Marsh, *Is "No Poach" No More?*, 31 May, 2023, available at *http://www.law.com/litigationdaily/2023/05/31/is-no-poach-no-more/*.
[157] Am. Compl., *In re Outpatient Medical Center Employee Antitrust Litig.*, No. 1:21-cv-00305 (N.D. Ill. 9 August 2021).
[158] See generally *In re Outpatient Medical Center Employee Antitrust Litig.* Docket.
[159] See Ruling & Order on Pls.' Mot. for Reconsideration, *Borozny v Raytheon Technologies Corp Pratt & Whitney Division et al.*, No. 3:21-cv-01657-SVN (D. Conn. 30 May 2023).
[160] See Mot. to Dismiss, *Borozny v Raytheon Technologies Corp., Pratt & Whitney Division et al.*, No. 3:21-cv-01657-SVN (D. Conn. 8 July 2022).
[161] See Order, *Borozny v Raytheon Technologies Corp., Pratt & Whitney Division et al.*, No. 3:21-cv-01657-SVN (D. Conn. 20 January 2023).
[162] See Order, *Borozny v Raytheon Technologies Corp., Pratt & Whitney Division et al.*, No. 3:21-cv-01657-SVN (D. Conn. 14 August 2023).
[163] See Compl., *Giordano v. Saks Inc. et al.*, No. 1:20-cv-00833 (E.D.N.Y. 14 February 2020).
[164] See Order, *Giordano v. Saks Inc. et al.*, No. 1:20-cv-00833 (E.D.N.Y. 21 March 2023).
[165] See generally Docket, *Giordano v. Saks Inc. et al.*, No. 23-600-cv (2d Cir.).
[166] FTC, Press Release, *FTC Cracks Down on Companies That Impose Harmful Noncompete Restrictions on Thousands of Workers* (4 January 2023), *www.ftc.gov/news-events/news/press-releases/2023/01/ftc-cracks-down-companies-impose-harmful-noncompete-restrictions-thousands-workers*.
[167] FTC, Press Release, *FTC Cracks Down on Companies That Impose Harmful Noncompete Restrictions on Thousands of Workers* (4 January 2023), *http://www.ftc.gov/news-events/news/press-releases/2023/01/ftc-cracks-down-companies-impose-harmful-noncompete-restrictions-thousands-workers*.
[168] FTC, Press Release, *FTC Cracks Down on Companies That Impose Harmful Noncompete Restrictions on Thousands of Workers* (4 January 2023), *http://www.ftc.gov/news-events/news/press-releases/2023/01/ftc-cracks-down-companies-impose-harmful-noncompete-restrictions-thousands-workers*.

level, but the publication of the Policy Brief strengthens the idea, shared by the Commissioner and by the EC officials in their public interventions, that labour market related offences are a key focus of the EC and the EC is said to be currently pursuing a few of such cases, besides its coordinating role within the ECN due to the generally limited geographic scope of these conducts.[169]

1. Netherlands—Investigation—Wage-fixing cartel between Supermarkets

After announcing a probe into the supermarket sector in September 2021, for an alleged wage fixing cartel, on 26 November 2021, the Dutch NCA announced that it was dropping this investigation due to its enforcement priorities.[170] In this case, the Dutch NCA found in its preliminary investigation that there were

> "indications that several supermarkets, in February, made arrangements regarding a limited wage increase of 2.5 percent for their employees (…) The supermarkets seemed to have coordinated these arrangements through the trade association."

However, it ultimately decided to close this investigation due to the fact employers and employees ended up on agreeing to new collective agreement, which took effect retroactively and, as such, eventually erased any possible harm caused to the employees in the sector.

Nevertheless, the Dutch NCA took the opportunity to affirm its position regarding the unlawfulness of these conducts, stating that these arrangements between employers served the purpose of limiting competition in the hiring and retention of staff among competitors. Because of such arrangements, employees might find themselves receiving lower wages or less favorable employment conditions than they would have without these agreements.

2. Lithuania—Decision—Wage-fixing in national Basketball League

In November 2021, Lithuanian NCA levied fines against the top professional basketball league in the country and all its clubs for engaging in collusion to limit the players' salaries following the cancellation of the 2019-2020 season due to the Covid-19 pandemic. According to this NCA, the Lithuanian Basketball League and its ten teams had agreed to withhold player salaries and any other financial compensation when the season was canceled due to the pandemic, during a board meeting on March 13, 2020.

The investigation was initiated by the Competition Council a month after this and was prompted by public discussions held by the league and its clubs. Even though three clubs did not explicitly express their position on the agreement during the board meeting, the NCA determined that each team participated in the collusion, regardless of whether their support for the agreement was clearly stated or implied. The investigation revealed that the salary agreement was terminated once the authority initiated its probe. As a result, the NCA imposed a fine of €3,440 on the league and a combined penalty of €36,640 on its ten teams.[171]

However, in June 2022, the Vilnius Regional Administrative Court annulled the decision, rejecting the NCA's conclusion that the association and teams breached competition law, citing the lack of evidence for the allegations based on league meeting transcripts and electronic correspondence among the teams. The court reasoned that the NCA overlooked the significant impact of the pandemic and failed to evaluate the alleged agreement's effects on competition.[172]

3. Portugal—Decision—PRC/2020/1 First and Second Leagues and the Portuguese Professional Football League ("LPFP") / Decision—PRC/2022/3— IT Consulting

In Portugal, the first ever decision by the PCA regarding anti-competitive practice in the labor market was issued on 29 April 2022, following an investigation which was initiated ex officio, in May 2020.[173]

This case concerned two press releases issued by LPFP on 7 and 8 April of 2022, in the midst of the initial reaction to the lockdowns motivated by the Covid-19 pandemic, regarding a deliberation/decision, adopted by agreement between the First League clubs, with the participation of the President of the LPFP, and to which the Second League clubs later adhered to, where the parties stated that no club would hire any football player who would terminate its employment contract with grounds related to the COVID-19 pandemic or any exceptional measure enacted as a response to it, such as the extension of the sporting season.

According to the PCA, as a consequence of these deliberations, which amounted to an agreement between competitors, a player who ceased his contract mentioning pandemic-related reasons could not be hired by another club in the First or Second Professional Football Leagues in Portugal, and could only be hired by a club if it was located outside of Portugal or if it participated in a competition below the two main professional leagues in

[169] See *Global Competition Review*, "Jaspers: limited geographic scope of labour market conspiracies slowing enforcement", 15 May 2024, available at: *https://globalcompetitionreview.com/article/jaspers-limited-geographic-scope-of-labour-market-conspiracies-slowing-enforcement*.
[170] See Authority for Consumers and Markets, Press Release (26 November 2021), available at *http://www.acm.nl/en/publications/acm-suspends-investigation-possible-wage-fixing-cartel-between-supermarkets-after-conclusion-collective-agreement* .
[171] See Competition Council of the Republic of Lithuania, Press release (19 November 2021), available at *https://kt.gov.lt/en/news/by-agreeing-not-to-pay-players-salaries-lithuanian-basketball-league-and-its-clubs-infringed-competition-law*.
[172] See *Global Competition Review*, "Lithuanian court overturns basketball league sanctions for wage-fixing", 8 June 2022, available at: *https://globalcompetitionreview.com/article/lithuanian-court-overturns-basketball-league-sanctions-wage-fixing*.
[173] See PCA decision of 28 April 2022, in Case PRC/2020/1, available at *http://www.concorrencia.pt/sites/default/files/processos/prc/AdC-PRC_2020_01-Decisao-VNC-final-net.pdf*.

Portugal. Consequently, this conduct would amount to a no-poach agreement. In this context, on 26 May 2020, the PCA decided to apply interim measures, ordering the LPFP to immediately suspend the deliberations, which the LPFP promptly did.[174]

In relation to qualification of the infringement, the PCA imported onto its reasoning decision practice of the EC as well as that of the Italian NCA, which concerned buyers cartels and the sharing of markets in relation to suppliers, and not no-poach related conducts.[175] It also made reference to previous decision practice from the Finnish NCA, from 31 October 2019, where it concluded that an agreement between hockey clubs, and the Finnish Hockey league, pursuant to which they would not hire any players from the team Jokerit—which had just left the Finnish league to join the KHL League, which is mainly composed of Russian hockey teams—or play any friendly games against this team. However, one fact should be noted: the illicit conduct in this case was not the prohibition of hiring players from a particular club, in itself, but that, together with other restraints, it amounted to an exclusionary conduct through a collective boycott:

> "The purpose of the practice between the parties has been to exclude their competitor by sharing the market. The market sharing has been carried out by limiting production and using the method of collective boycott."[176]

Finally, the PCA also mentions in its decision the existence of two decisions of the Spanish NCA, from 2010 and 2011, regarding cartels in the transporters and hairdresser sectors, which among, other things, such as price fixing, also exchanged information/coordinated behaviors in the labor market.

In this context, according to the PCA the aim of this agreement was to allow for the football clubs to reduce the football player' salaries or other conditions without risking the players terminating their respective work agreement—despite recognising that there was no evidence of the clubs' intention to do so—which, in itself, reduced competitive pressure between clubs and, as such, amounted to a by object restriction. The PCA rejected the targeted entities claims that this decision had a particular context of sporting activities in a pandemic situation, and merely aimed at ensuring the future stability of competitions, with clear benefits consumers and players, preventing the bigger clubs from hiring the smaller clubs' best players who leveraged the pandemic to force a team move. As such, it applied a total combined fine of around €11.3 million, for a breach of art.9 of the Portuguese Competition Act, and of art.101 TFEU. At the time of preparation of this article, this decision is under a judicial appeal, with the Competition Court having referred the matter to the ECJ, for a preliminary ruling decision in February 2024.[177]

In January 2024, the PCA issued its second decision, within a settlement procedure, regarding labour market infringements, sanctioning two multinational companies active in the technology consultancy sector, in Portugal, for entering into a no-poach practice between, 2014 and 2022, which also involved, allegedly, other entities.

In this decision, the PCA levied a total of €3.8 million in fines, with the concerned undertakings entering into a settlement agreement, and one of them also benefiting from an additional fine reduction under the leniency procedure. In April 2024, the PCA issued a second decision in this case, levying a €278.000 fine to a third settling company. The investigation carries on in what concerns the entity allegedly involved in this infringement, who did not settle the procedure.[178]

4. Poland—Investigation—Wage-fixing in motorsports federation/Decision—No-poach in national Basketball League

In May 2022, the Polish NCA announced that it was conducting an investigation into the Polish Automobile and Motorcycle Federation and into a Speedway league, due an alleged agreement to fix the competitor's maximum salaries.[179]

In October 2022, following the lead of its Lithuanian counterpart, the Polish NCA also fined its country national basketball league, including its 16 clubs for illegally colluding to terminate players' contracts and withhold their wages in response to the coronavirus pandemic.[180]

According to this NCA the clubs had reached an agreement, regarding the 2019/2020 season, which had been terminated due the Covid-19 pandemic, pursuant to which all player agreements were to be terminated in order to exempt the clubs from the payment of the respective wages, which, by being done in a collective manner, aimed at preventing players from moving to other teams with better conditions. In this context, the Polish NCA applied a combined fine of €197,616.[181]

[174] See PCA Press release 08/2020 (25 May 2020), available at *http://www.concorrencia.pt/en/articles/covid-19-adc-imposes-interim-measure-portuguese-football-league-suspends-no-poach*.

[175] See PCA decision of 28 April 2022, in Case PRC/2020/1, available at *http://www.concorrencia.pt/sites/default/files/processos/prc/AdC-PRC_2020_01-Decisao-VNC-final-net.pdf*, paras 841 and ff.

[176] Finnish Competition and Consumer Authority, press release (31 October 2019), available at *http://www.kkv.fi/en/current/press-releases/jokerit-agreement-between-finnish-ice-hockey-league-and-league-teams-in-violation-of-competition-law/*.

[177] Under case C-133/24 CD Tondela and Others c. Autoridade da Concorrência.

[178] See PCA Press release 04/2024 (25 January 2024), available at *http://www.concorrencia.pt/en/articles/adc-fined-multinationals-anticompetitive-practices-labor-market* and PCA Press release 08/2024 (4 April 2024), available at *https://www.concorrencia.pt/en/articles/adc-sanctions-national-company-anti-competitive-practices-labor-market*.

[179] See *Global Competition Review*, "Poland probes speedway league over anticompetitive salary cap", 24 May 2022, available at *https://globalcompetitionreview.com/article/poland-probes-speedway-league-over-anticompetitive-salary-cap*.

[180] See Office of Competition and Consumer Protection, Press release (25 October 2022), available at *https://uokik.gov.pl/news.php?news_id=19005*.

[181] See *Global Competition Review*, "Poland issues first no-poach infringement decision", 24 October 2022, available at *https://globalcompetitionreview.com/article/poland-issues-first-no-poach-infringement-decision*.

5. Romania—Investigation—No-poach and wage-fixing in the auto engineering market

In February 2022, the Romanian NCA announced that it was opening an investigation into the conducts of several undertakings in the "skilled / specialized labour force in the field of motor vehicle production and / or other related activities (*e.g.*, components and systems for motor vehicles, testing, design) in Romania" following information received through its whistleblowing platform.[182] According to this NCA's preliminary assessment there was evidence supporting the existence of a coordination between competitors to share this market through a no-poach agreements.

6. United Kingdom—Investigation—Wage-fixing between sports broadcasters

In July 2022 the UK's NCA also announced that it would be opening an investigation onto four sports broadcasters for potentially fixing the remuneration of highly skilled freelance workers, who support the production and broadcasting of sports content in the United Kingdom, such as camera operators and sound engineers. Following the initial phase of the investigation, in April 2023, the UK's NCA decided to extend its scope further adding two other undertaking to it.[183]

7. Switzerland—Investigation—Information sharing in the banking sector

Moving to the outside of the European Union, on December 2022, the Swiss NCA also announced that it would conduct a probe into the labor market in the banking sector, particularly against 34 banks in six German-speaking regions of the country,[184] with the aim of analyzing if the exchanges of information amounted to a competition law infringement.

V. Conclusion

Over the last few years, antitrust enforcers on both sides of the Atlantic have directed their attention to labor markets, recognising the importance of qualified labor as a determining input in certain markets.

While the beginning of the US's enforcement efforts seem not to be attributed to any particular event, in the EU it seems clear that the shift was at least partly motivated by the Covid-19 pandemic and the subsequent policy efforts to maintain and protect worker's rights in an economically frozen and socially quarantined society. This conclusion, of course, is not detached from the fact that European enforcers are apparently willing to accommodate into their enforcement agendas policy goals other than competition, and the latest developments, including the Digital Markets Act and the Foreign Subsidies Regulation, show willingness to pursue alternative goals. In this sense, it will be particularly interesting to view how both jurisdictions will react to the current inflation related economic crisis, which has brought on significant reduction in the working class's purchasing power. We anticipate that this particular context will most likely contribute to the strengthening of the current trend in the EU, with its higher level of inflation and more policy-oriented enforcers.

In the EU, most cases of wage-fixing and no-poach agreements are likely to be dealt with by EU National Competition Authorities due to their geographic scope, which has often local effects, but the EC can, and most likely will, bring its own cases and has a coordinating role within the European Competition Network.

In terms of affected sectors, the healthcare industry and fast food industries have been, amongst others, the focus of investigations in the US. In the EU, at least in an initial phase, investigations seem to be particularly focused on the sports sector, which can perhaps be explained by the fact that it is a sector where the labor input is particularly relevant, with competition for workers/players being a central aspect of regular working of sports competitions. The IT sector, with its very specialized and skilled work force, in particular in what concerns I&D projects, is also gaining relative weight. This circumstance, combined with it the fact that this sector was particularly affected in the early stages of the pandemic can explain this phenomenon.

In terms of the type of conduct under scrutiny, perhaps the biggest difference between both jurisdictions is the outlook on noncompete clauses in labor agreements, with the US agencies, in the last couple of years, attempting to crack down from both the legislative and enforcement perspectives against this type of contractual arrangements, proposing their banishment altogether. In Europe, where the limits of such agreements are long-established and well-defined, noncompete clauses do not appear to be a similar focus for enforcement and the EC Policy Brief seems to confirm it.

While in both regions, enforcers are investigating and pursuing charges of wage-fixing and no-poach investigations alike, information sharing appears to be different. It is clear that the agencies are focused on identifying violations based on information exchange, though the DoJ's 2023 withdrawal of its support for the information exchange policies creates uncertainty as to

[182] See Competition Council, "The Competition Council Has Opened An Investigation On Labor Force Market", available at *http://www.competition.ro/wp-content/uploads/2022/01/investigatie-piata-muncii-ian-2022-English.pdf*.

[183] See Competition and Markets Authority, information on the ongoing investigation available at *http://www.gov.uk/cma-cases/suspected-anti-competitive-behaviour-relating-to-the-purchase-of-freelance-services-in-the-production-and-broadcasting-of-sports-content#full-publication-update-history*. Also, *Global Competition Review*, "CMA probes broadcasters over wage-fixing concerns", 13 July 2022, available at *https://globalcompetitionreview.com/article/cma-probes-broadcasters-over-wage-fixing-concerns*.

[184] See Competition Commission, Press Release (5 December 2022), available at *http://www.weko.admin.ch/weko/en/home/medien/press-releases/nsb-news.msg-id-92044.html*.

what precise conduct is unlawful. In the EU there is much debate on whether standalone information sharing should be construed as a by object or by effects restriction.

Unsurprisingly, there is more evidence of private enforcement follow-on actions in the US than in the EU, which can be explained both by a matter of legal tradition and by the fact that American investigations are more advanced than the European ones, allowing for more opportunity to present these actions.

In addition, as suggested by the Policy Brief, the EC's attention on antitrust issues related to labour markets is, at this stage, predominantly linked to the anti-competitive effects said arrangements might have on competition rather than the welfare of workers themselves. Nonetheless, a broader focus, such as is currently the case in the US, cannot be excluded since both the Policy Brief and the enforcement actions by national competition authorities acknowledge that the labour market restrictions have negative impact on employees themselves.

There is a trend of increased focus in both continents in what concerns these types of conducts, however, it appears to be still at the early stages of development—more so in the European Union—as such, it will be interesting to view, in the near future, how these investigations and claims fare against the scrutiny of higher courts, since, according to the available information, the US cases are not doing well in court, even though there are differences in terms of burden of proof.

Finally, labour related issues are increasingly relevant within the context of merger control, stressing the attempt by regulators to limit disincentives to innovation within merger control analysis. Indeed, the EC is currently assessing whether Microsoft's hiring practices of AI specialized workers, namely, the co-founders of Inflection, an AI focused startup founded in 2022, and a significant part of its workers for Microsoft's AI division could amount to companies' integration and is a way to side-step merger control rules.[185] In that regard, the US Federal Trade Commission's lawsuit against Tapestry/Capri merger is notable as the agency claims that the merger would create an employer with anticompetitive buyer power and harm workers in the luxury style industry.[186] As is the Dutch Competition Authority's recent decision to move DPG Media's proposed takeover of RTL Netherlands to an depth assessment of harm to competition within the journalism labour market (among other concerns).[187]

[185] See *Reuters*, "EU's Vestager may act if Microsoft's poaching of Inflection staff signals wider trend", 3 April 2024, available at *https://www.reuters.com/technology/eus-vestager-may-act-if-microsofts-poaching-inflection-staff-signals-wider-trend-2024-04-03/*.

[186] FTC, Press Release, FTC Moves to Block Tapestry's Acquisition of Capri (22 April 2024), *https://www.ftc.gov/news-events/news/press-releases/2024/04/ftc-moves-block-tapestrys-acquisition-capri*.

[187] ACM, ACM: further investigation needed into acquisition of media company RTL by rival DPG, 17 May 2024, available at *https://www.acm.nl/en/publications/acm-further-investigation-needed-acquisition-media-company-rtl-rival-dpg*.