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Law & Economics Webinar

Non-Poaching Agreements: A New Legal Battlefield for Antitrust in the EU & US Labor Markets

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Justin Murphy

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Justin Murphy underlined that no-poach agreements are a priority for competition enforcement agencies in both the EU and the US. Since 2016, the United States the Department of Justice has adopted an aggressive policy toward such agreements and prosecuted them -- for the first time ever -- criminally. Recently, a jury acquitted DaVita and its former CEO in the first-ever criminal no-poach trial, raising the question of whether such alleged agreements are appropriate for *per se* criminal treatment and whether they should be prosecuted criminally at all.

In the European Union, practices toward such agreements are more recent. Indeed, although the European Commission has recently started to take an interest in them, so far only the Portuguese Competition Authority has issued statements of objection to an anti-competitive labour market agreement.

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*Marie de Monjour drafted the following synthesis for Concurrences. The views expressed in this presentation are those of the speakers and do not necessarily represent those of the institutions to which they are affiliated.

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Jeffrey Stone

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Jeffrey Stone represented, with his firm, the former CEO of DaVita, Kent Thiry. Both Mr. Thiry and DaVita were charged for allegedly entering into non-soliciation agreements with three other companies. These charges reflected the change in approach by the DOJ since 2016, as it previously did not deal with these cases on a criminal basis but only on a civil basis. One of the defense themes was to emphasise that the government was approaching this case from a novel perspective and therefore was essentially in uncharted waters in terms of the application of the *per se* liability rule. In the context of conduct involving the alleged no-poach, no court had previously found such conduct to warrant criminal treatment or *per se* liability. Indeed, the government has been clear that if a case is not amenable to *per se* treatment, it is not subject to criminal prosecution in the United States. The defense argued in their motion to dismiss that it is inappropriate, unfair, unjustified, and unprecedented to apply the *per se* standard to the type of conduct at issue in this case.

However, in denying this motion, the court did not agree with DOJ that a typical *per se* approach was appropriate. Instead, the judge agreed with many of the defence arguments and required DOJ to prove that the defendants acted with the specific intent to constrain the labour markets. Specifically, he found that the government would have to prove beyond a reasonable doubt that the defendants had acted with the intent and purpose of allocating labour markets. This broadening of the government's burden provided a narrow pathway to victory at trial and gave the defence its consistent and common-sense theme: did any of the charged agreements have the purpose or intent of allocating the relevant employment market? . If the intent of the defendants was not to end meaningful competition, the defendants should not be guilty. Despite the jury’s decision to acquit the defendants in DaVita/Thiry on all counts, the DOJ still intends to aggressively pursue these cases going forward.

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Ana Sofia Rodrigues

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Ana Sofia Rodrigues pointed to several empirical studies that have shown a downward trend in the share of labour in GDP. Moreover, in times of economic distress, it is even more important to ensure that workers are not deprived of the opportunities that open and competitive markets can offer. In Ana's view, competition law enforcement is essential to help maintain open and competitive labour markets.

The Portuguese Competition Authority (AdC) published an issues paper and a best practice guide on anti-competitive agreements in labour markets in September 2021, following a public consultation launched in April 2021.

These papers focus on the effects of wage fixing and no-poach agreements and how these agreements can have an impact on labour markets, as well as downstream markets. Ana noted that these agreements can reduce labour mobility, through their potential to distort price signals in labour markets by reducing wage levels. These agreements can also create inefficiencies downstream by distorting the allocation of labour. By reducing wages and potentially the amount of labour employed, they can also lead to lower output, potentially higher prices, or lower quality of products or services offered in downstream markets. Conversely, they may play a key role in market sharing agreements and signal poor competition downstream. They may also be used to secure market sharing in terms of customers or geographic areas, or they may simply foster collusive conditions downstream more generally. Another important point that is made in the AdC’s Issues Paper concerns the potential claims that these agreements could be beneficial to consumers as firms' labour costs are reduced. On the effects of no-poach agreements on investment in human capital, Ana noted that no-poach agreements are not a proportional mechanism to ensure that firms can protect the investment they make in worker training.

As far as decision-making practice is concerned, the Portuguese Authority states that such agreements may constitute a violation of Article 9 of the Portuguese Competition Act and, where applicable, of Article 101 TFEU. Although there are no precedents at the EU level yet, Margrethe Vestager announced that these agreements are on the Commission's radar. However, at the Member State level, there are several decisions against no-poach and wage-fixing agreements.

The aim of the Portuguese Authority's Best Practices Guide is to strengthen detection by raising awareness to these infringements, to encourage reporting to the AdC and to promote compliance.

In April 2022, the Portuguese Competition Authority adopted a no-poach infringement decision against thirty-one clubs and the Portuguese Professional Football League..

Frédéric Pradelles

Frédéric Pradelles pointed out that no-poach agreements have been examined for several years as ancillary restraints in the context of mergers by antitrust authorities in Europe. The European Commission states that non-solicitation clauses imposed on the seller should be assessed in a similar way that non-competition clauses. The Commission has issued several clearance decisions covering such clauses, in which it has assessed whether the duration and scope of the clause were reasonable to ensure the full transfer and value of the acquired business (e.g. Autologic/TNT/Wallenius/CAT case).

The French Competition Authority, on the other hand, has issued about ten merger decisions since 2009 and has not hesitated to reduce the duration of the non-solicitation clause to three years when it exceeded the agreed duration to protect the acquirer's investment in an energy merger case in the French office's territory. In addition, no-poach agreements have also been encountered in Europe as a possible remedy to merger control. The European Commission Notice provides that, where necessary to ensure the viability and competitiveness of the divested business, a non-solicitation undertaking may be offered as a remedy.

Concerning so-called naked or stand-alone no-poach agreements that are not linked to merger and acquisition transactions, more than 15 investigations have been opened in the last two years, compared to a total of 24 cases between 2010 and 2019. At the moment there is one ongoing investigation at the European level, but no decision has been taken by the Commission, unlike the national authorities which are very active in this area. This can be explained by the fact that non-prosecution agreements can be part of wider cartel practices, as is the case in France. This is for example the case in Romania. This issue is also a priority in other Member States such as the Netherlands, Lithuania, Poland, and Spain.

Three lessons can be drawn from these national decisions. The first is that this is not a specific market where we will not set any limits on how they should be studied. The second is that there seems to be a common and even very cooperative effort on the part of the authorities to try to detect an antitrust violation on this legal basis. The third is that this is perhaps more of a restriction by an object than by effect.

It is important to stress that these agreements will continue to be examined at the national level. In France, according to the Cour de cassation, no-poach agreements are lawful in labour law provided that they are proportionate to the legitimate interest to be protected. It will therefore be interesting to see the future interaction between antitrust enforcement by national and European antitrust authorities and the future interaction between antitrust and labour law.

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Raphaël De Coninck

Raphaël De Coninck highlighted that when looking at intervention in labour markets, the main question is about the purpose of enforcement: who is to be protected in the situation at hand, consumers or workers? What happens when their respective interest are not aligned? Under certain market characteristics, the exercise of market power on the labour market may also be associated with reduced output on the downstream product market. In such cases, both worker and consumer effects are aligned. However, this is not necessarily the case: e.g., a reduction in wages may be passed on in the form of lower prices in the product market, which would benefit consumers. In such cases, the question is how to balance benefit to consumers with harm to workers. If

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Raphaël De Coninck

one focuses on just one market in isolation without considering the other market, there is a risk of sub-optimal enforcement.

No-poach agreements can have anti-competitive effects. There are two main economic frameworks to assess these effects. The first one is monopsony or monopsonistic competition (monopsony is the extreme case of only one buyer, which is somewhat relaxed under monopsonistic competition). This model assumes that unlike corporations, workers have no market power of their own – they will take the wage offered as given. In this framework, market power materializes through a reduction in the use of labour input, which depresses wages (and reduces output). In this context, no-poach agreements can increase the employer's market power by making the employee less likely to switch (i.e., decreasing the elasticity of the residual labour supply curve faced by the employer).

The second framework is based on bargaining, which may be more appropriate for highly skilled workers. The key question in that model is how the agreement reduces outside options for workers. Friction in search and matching matters, and the concern is that a no-poach agreement may create lock-in effects for workers. A company's action that would effectively reduce the outside employment options available to its workers would reduce their bargaining position and thereby increase the firm's share of profits.

Regarding potential anti-competitive effects in product markets, an important question is whether the parties to the no-poach agreement are direct competitors, i.e., whether they compete with each other horizontally. If one of the inputs (in this case, a specific type of worker) is particularly critical for competition between them, not having access to it may limit that competition. Another potential point of concern, as already mentioned, is a situation where a reduction in output is the result of a decrease in the input level by a monopsonistic company in the labour market. Theories of harm in the absence of horizontal competition can be developed but these tend to be more difficult to establish as they would typically relate to potential competition (e.g., does a no-poach agreement between a supplier and a customer prevent potential entry/backward integration by the customer at the upstream level).

No-poach agreements can also have pro-competitive effects. First, they can protect the firm's incentive to invest in its employees' human capital (including training and know-how) and facilitate the sharing confidential information. Indeed, such agreements can mitigate the well-known hold-up problem (risk that employees appropriate the value of the investment before the firm can recoup it) and allow firms to invest in employee human capital beyond firm-specific skills. In addition, longer tenure is not necessarily negative for employees and workers can also benefit from the increased human capital investment they receive from companies. Second, containing labour costs is an efficiency with potential pass-on effect on downstream prices. Third, such agreements may allow firms to establish efficient vertical relationships: e.g., a customer who is in close contact with a supplier's employee may agree to a no-poach agreement with its supplier in the absence of which the vertical relationship between the two companies may not take place.

No-poach agreements can thus have both anti- and pro-competitive effects. Both need to be considered and balanced against each other to determine the net effect and establish a counterfactual scenario. Economic and empirical analysis can provide a framework and direct evidence to assess such effects, e.g. whether in the specific circumstances of the case, such agreements are likely to depress wages and how they would likely affect downstream product markets. ■