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NEW EUROPEAN COMMISSION POLICY BRIEF ON ANTITRUST IN LABOUR MARKETS: A NOVEL, HARD STANCE ON NO-POACH AGREEMENTS YET TO SURVIVE SCRUTINY BY THE EUROPEAN COURTS

The European Commission (the **'EC'**) has recently intensified its focus on anticompetitive practices within labour markets, particularly targeting no-poach agreements. In May 2024, the EC published a policy brief (the **'Brief'**) on labour markets, defending a bold and novel view that these practices inherently have the potential to restrict competition. The Brief is a non-binding statement setting out the EC's future approach and priorities but does not reflect the EC's previous decisional practice or the case law of the European Courts.

While it suggests that most enforcement will likely remain at the national level, the Brief indicates that the EC is itself prepared to address anticompetitive practices in labour markets. The EC issued its Brief at a time when no-poach agreements have attracted significant scrutiny from competition authorities in EU Member States, several of those having already conducted investigations into labour markets – amongst others – Belgium (private security sector), Denmark (banking), France (engineering, technology consulting, and IT service sectors), Finland (healthcare), Hungary (HR consultants), Lithuania (real estate agencies, basketball clubs), Portugal (technology consulting, sports clubs), Romania (automotive sector), and Spain (private schools). The UK's CMA is also conducting investigations into no-poach agreements and has issued guidance for employers on the types of anticompetitive agreements and behaviours they should avoid in labour markets.

Key issues

- Labour-related agreements classified as 'by object' restrictions
- No justifications?
- Heightened vigilance for employers going forward

THE NOTION OF NO-POACH AGREEMENTS AND THEIR ALLEGED ECONOMIC HARM

According to the EC, no-poach agreements involve companies agreeing not to solicit or hire each other’s employees, including both no-hire agreements, in

which employers agree not to hire employees from each other at all, both actively and passively, and non-solicit agreements in which employers agree not to actively solicit another employer's employees with job offers.

From an economic perspective, the EC claims that no-poach agreements, like wage-fixing, reduce labour market dynamism, thus harming employee compensation, firm productivity, and innovation.

THE EC'S NOVEL POLICY POSITION: NO NEED TO SHOW EFFECTS TO ESTABLISH A NO-POACH INFRINGEMENT

Under EU competition laws, infringements fall into two broad categories: infringements 'by object' (for example, price fixing or market sharing) and infringements 'by effect'. In practice, the former being the most serious form of competition infringement, the EC does not need to demonstrate actual effects to establish such infringements. The Brief sets out the novel position that no-poach agreements generally should qualify as 'by object' restrictions under Article 101(1) of the Treaty on the Functioning of the European Union (**'TFEU'**). This classification would mean that such agreements would be regarded as being by their very nature harmful to competition despite the pro-competitive effects or competitively benign effects they may have. Moreover, because no-poach agreements are entered into between businesses that are actual or potential competitors for the hiring of employees (i.e., horizontal agreements), the EC's interpretation will be that they are 'by object' infringements even if the businesses in question do not compete in respect of the goods or services that they supply. Consequently, even non-solicitation clauses in vertical distribution arrangements risk being assessed as 'by object' infringements by the EC going forward.

In an attempt to reconcile its novel approach with established case-law, the Brief seeks to provide criteria in support of its proposition that no-poach agreements constitute restrictions 'by object':

- **Content of the agreement**: the EC finds that no-poach agreements fall *"within one of the situations referred to in Article 101 TFEU, i.e., as a form of supply market sharing under Article 101(1)(c) TFEU,"* which the EC treats as a restriction 'by object'. Moreover, in the EC's bold view, there is no substantive difference between (i) no-hire agreements that prevent all active or passive hiring of a party's employees and non-solicitation agreements that allow a party passively to hire employees that respond to a job advert; or (ii) bilateral no-poach or non-solicitation agreements and those that impose obligations on one party only. However, as discussed below, these factors remain relevant to ensuring that permissible non-solicitation agreements are suitably limited in scope.
- **Objective of the agreement**: while the EC recognises that no-poach agreements serve legitimate goals, such as preventing investment loss in employee training or protecting non-patent IP rights (e.g., trade secrets), it adopts the position that these legitimate objectives do not negate the EC's proposed 'by object' classification. Moreover, the EC states that less restrictive alternatives exist, such as non-disclosure agreements or non-compete clauses in employment contracts, which are usually not covered by Article 101 TFEU and are assessed under national employment laws.

- **Economic and legal context of the agreement**: the EC at least indirectly acknowledges that the legal and economic context still matters to the assessment. Its Brief considers labour a key competitive parameter and posits that no-poach agreements suggest a scarcity of talent. The EC will assess such arrangements in the context of their impact on the labour market in question, irrespective of the companies' respective positions in the downstream market.

WHEN CAN NO-POACH AGREEMENTS BE PERMISSIBLE ACCORDING TO THE EC'S NOVEL POSITION?

According to the Brief, no-poach deals can qualify as lawful ancillary restraints under strict conditions or satisfy the criteria for exemption under Article 101(3) TFEU.

Parties may claim no-poach agreements are ancillary in both horizontal (e.g., research joint ventures) and vertical relationships (e.g., supply agreements) to protect investments in employee training and trade secrets and to ensure staffing for the main transaction. However, to be considered ancillary restraints, four strict conditions must be met: (i) there is a main transaction that is not itself anticompetitive; (ii) the restraint is directly related to the transaction; (iii) the restraint is objectively necessary for the main's transaction implementation (it is not sufficient that the transaction would be more difficult or less profitable without the restraint); and (iv) the restraint is proportionate to the main transaction, with no less restrictive alternatives available.

Parties bear the burden of proof to demonstrate these criteria, e.g., they must show that other protections such as non-disclosure agreements or reimbursement of training costs are not viable alternatives, that the no-poach agreement has a reasonable duration and geographic limit, and covers only essential employees. In this respect, the EC's position would make it harder to justify a restriction on all hiring of employees than a restriction limited to active solicitation of employees. The decisional practice of the Croatian competition authority recently showed that no-poach clauses can constitute an ancillary restraint of competition.

The Brief does not cover non-solicitation clauses in the context of an M&A transaction that are imposed on a seller to protect the value of the target business in the hands of the buyer. Those continue to be assessed under the EC's separate guidelines on ancillary restraints in M&A transactions, which allow obligations to be imposed on a seller not to solicit employees of the target for up to two years (or three years if the transaction involves a transfer of know-how). However, non-solicitation clauses imposed in other M&A contexts – such as those imposed on potential bidders who receive access to information about an acquisition target– are not covered by the EC's M&A guidance, meaning that it is now prudent for them to be assessed based on the stricter, novel standards set out in the Brief.

Regarding Article 101(3) TFEU and the ability to justify restrictions that would otherwise be prohibited, the EC indicates, without any apparent evidentiary basis for its view, that the ability of no-poach agreements to produce net efficiencies seems uncertain at best. In any event, the EC considers that less restrictive alternatives exist to achieve the same goals, such as non-disclosure agreements, obligations to stay with an employer for a minimum amount of

time, the repayment of proportionate training costs, gardening leaves, non-compete clauses compliant with national labour laws.

TAKEAWAYS AND OUTLOOK

The brief signals the EC's enhanced focus on enforcing competition law in employment markets and serves as a warning for stricter scrutiny, which is yet to be tested by the European Courts. While it is by no means clear that the EC's novel approach would withstand scrutiny from the European Courts, it is prudent for Legal, HR, and compliance teams to note:

- Labour market coordination is now a key aspect of competition law compliance.
- The notion of "competitor" is too broadly defined: the central issue is whether two companies compete to recruit the same talent, irrespective of whether their products or services are in direct competition.
- While the ancillary restraints doctrine may be available, its application requires a strict case-by-case assessment.
- Employers should consider less restrictive alternatives, such as non-compete clauses in employment contracts, which must adhere to national employment laws. Appropriately limited non-compete clauses are generally lawful under national employment laws in Europe, which differs sharply from the US, where the Federal Trade Commission has recently moved – albeit subject to ongoing court challenges - to ban most non-compete clauses in employment contracts (with exceptions for owners connected to the sale of a business and senior executives with decision-making authority).
- Finally, given the lack of case law supporting the EC's novel approach, it will be interesting to see whether, if tested, the positions articulated in its Brief will withstand the European Courts' scrutiny. The EU Court of Justice might give a first indication of its views in the context of answering preliminary questions that a Portuguese court put to it regarding no-poach agreements between football clubs (C-133/24).

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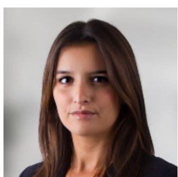

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