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New trend in competition policy: investigation and prohibition of restrictive agreements in labour markets

1. Introduction

Competition authorities have recently stepped up their efforts to combat restrictive agreements in labour markets.

In May this year, the European Commission (the "**Commission**") published a Policy Brief setting out its position on the analysis of agreements between companies that restrict competition in labour markets, in the light of European competition law.

As early as 2021, the Portuguese Competition Authority (the "**PCA**") published the Good practice guide on anti-competitive agreements in the labour market, compiling a set of recommendations for companies to promote desirable practices for the emergence and maintenance of an open and competitive labour market, and a Report on agreements in the labour market and competition policy. The authority has recently carried out several investigations in this field.

According to the competition authorities, restrictive labour market agreements, by reducing competition between employers, tend to limit mobility between workers, result in lower wages and worse working conditions.

This legal briefing aims to clarify some essential aspects of this trend, explaining the practices targeted and their framework, providing examples of cases investigated by the PCA and emphasising the importance of implementing compliance measures.

2. What is at stake?

No-hire agreements or **"no-poach" agreements** are agreements between companies whereby they agree to not hire each other's employees.

These agreements include agreements in which companies undertake not to actively approach the employees of others with job opportunities ("**non-solicit agreements**"), or agreements in which it is also forbidden to hire on the basis of an approach by employees, or passive hiring ("**no-hire agreements**").

Both the Commission and the PCA have also targeted "**wage-fixing" agreements**, in which companies agree among themselves to standardise the wages or other benefits to be paid to their workers.

Taking into account the **broad concept of "agreement"** that has been advocated by the competition authorities, these categories could include not only explicit agreements, such as reciprocal or non-reciprocal non-contractual agreements, but also implicit agreements or understandings, through informal understandings between company managers (for example, the sharing of information on salary conditions between human resources managers).

However, **agreements between a company and its employees are excluded**, since the concept of "agreement" presupposes the participation of two or more "companies".

3. What are the penalties?

Being found to have entered into a non-hiring or wage-fixing agreement can lead to the following fines:

- Up to 10 per cent of the group's total worldwide turnover for companies;
- Up to 10 per cent of gross annual income for natural persons who are members of the management body of legal persons and similar entities or responsible for the management or internal supervision of areas of activity in which the infringement is committed.

4. The Commission's framework

The Commission has made the fight against no-poach agreements a priority. At the end of last year, it launched a series of spontaneous investigations into companies in the online food delivery sector for competition-restricting practices in the form of no-poach agreements and the exchange of commercially sensitive information. As early as 23 July 2024, the Commission opened an investigation into whether Delivery Hero and Glovo violated EU competition rules because, among other things, they may have agreed not to hire each other's workers.

In turn, in May, it published an important Policy Brief that provides a framework on how to evaluate agreements between companies in the labour market.

These are the main conclusions of the document:

- The Commission argues that no-poach agreements are akin to supply-source sharing agreements and wage-fixing agreements are akin to price-fixing agreements. As such, they should be considered broadly covered by the prohibition of agreements between undertakings as **restrictions by object**, being assimilated to "buyers' cartels" (covered by Article 101(1) of the Treaty on the Functioning of the European Union, (the "**TFEU**")).

  One of the main consequences of categorisation as a "restriction by object" is that the authority is exempt from examining the actual effects of the agreements on competition in order to conclude that they are anti-competitive.

  Another concerns the fact that justifications based on possible efficiency gains (provided for in Article 101(3) of the TFEU) are not easily admissible for this type of restriction. These effects will tend either not to be taken into account (such as the fact that lower wages bring lower prices) or to be passed on to markets other than the relevant market.

- Although the Commission recognises that some agreements can pursue **legitimate objectives**–such as protecting and encouraging investment in employee training or protecting the company's intellectual property rights–the exceptions provided for will be difficult to apply:

  Firstly, because these objectives will often be mere subjective intentions or complementary objectives, which are not sufficient to justify the underlying intention to restrict competition by prohibiting hiring or wage fixing;

  Secondly, because these objectives can be pursued by **less restrictive means** (such as agreements with workers on confidentiality, non-competition, staying for a minimum period in the company or proportional reimbursement of training costs).

- The exceptions allowed by the Commission are limited to situations in which the agreements are **ancillary restrictions** to a legitimate agreement, such as the conclusion of a research and development joint venture or within the scope of a transaction. To this end, it will be up to the parties to demonstrate: (i) the existence of a transaction or main agreement that does not restrict competition; (ii) the direct relationship between the restriction and the transaction; (iii) the restriction being "objectively necessary" and indispensable (and not

merely perceived by the parties as necessary) for the conclusion of the transaction; and (iv) the proportionality of the restriction in relation to the object of the transaction.

Thus, for a no-poach or wage-fixing agreement not to be subject to penalties, not only must it be ancillary to a legitimate transaction, but the parties will have the complex burden of demonstrating that all these conditions have been met. However, in this regard, it is worth bearing in mind that the Labour Code considers an agreement between employers that prohibits the hiring of a worker who is or has been working for them to be null and void, as well as obliging the payment of compensation in the event of hiring.

5. The role of the PCA

Investigating and combating agreements that restrict competition in the labour market is a trend that cuts across several competition authorities, not only in Europe[1] , but also in the United States[2] .

The PCA has been particularly active in this fight. The Good practice guide on anti-competitive agreements in the labour market, published by the PCA in 2021, demonstrates the PCA's early attention to this type of agreement and reminds us that they can result in high fines for the companies involved.

One of the most emblematic cases of restrictive practices in the labour market, which was also the PCA's first sanctioning decision of this kind, involved 31 clubs from the first and second football leagues and the Portuguese Professional Football League itself. According to the PCA, the agreement between these organisations, which prevented them from signing players who unilaterally terminated their contracts for reasons related to the COVID-19 pandemic, was aimed at restricting competition and violated the prohibition in Article 9 of the Competition Act. The procedure, opened unofficially by the PCA in May 2020, was concluded in 2022 with the adoption of a sanctioning decision and the imposition of fines totalling €11.3 million euros.

Finally, in 2024, the PCA announced the issuing of three final decisions and another notice of illegality for the conclusion of no-poach and wage-fixing agreements, this time in the technology consultancy sector. Three of the defendants admitted to the practice and resorted to the settlement procedure to reduce the fine, while the investigation is continuing regarding one of the business groups.

6. The importance of compliance strategies

Given the severity and breadth of the applicable penalties, it is crucial that companies adopt a robust compliance strategy in order to avoid becoming involved in no-poach or wage-fixing agreements. As mentioned, both the PCA and the Commission have been active in combating these practices, adopting restrictive positions on these types of agreements. In addition to high fines and reputational damage, infringements can lead to claims for damages.

To mitigate risks, companies should, by way of example:

- Eliminate recruitment policies and/or the definition of salary conditions that involve agreements with other companies;
- Avoid exchanging commercially sensitive information on the remuneration and employment of workers or collaborators;
- Not take part in meetings with other companies where salaries or other terms of remuneration are discussed.

1 See, for example, the reports published by the authorities in the United Kingdom and the Nordic countries (Denmark, Finland, Norway, Sweden and Iceland).
2 On 23 April 2024, the US Federal Trade Commission published a "final rule" banning non-competition clauses between companies and workers at a national level.

In addition, companies must implement a robust compliance programme that includes risk mitigation measures such as raising awareness of competition issues among human resources departments, appropriate training programmes and ongoing legal advice on competition compliance.

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