LAW360

Portfolio Media. Inc. | 111 West 19th Street, 5th Floor | New York, NY 10011 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Examining EU's Drift Toward US-Style Employer Pact Scrutiny

By **Peter Broadhurst, Karel Bourgeois and Stefan Meisner**
(November 15, 2021, 6:02 PM EST)

Peter Broadhurst

Karel Bourgeois

Stefan Meisner

Restrictions in employment arrangements appear to be coming into the focus of the competition authorities in Europe.

Recent statements by senior officials, as well as some initial enforcement actions, indicate that both European Union and national authorities are starting to give serious attention to this issue.

Companies with business activities in Europe may need to recalibrate their understanding of where competition enforcement risk lies, and adjust their training and other compliance programs accordingly.

Potentially anti-competitive arrangements include agreements by companies that compete for labor not to hire or not to solicit each other's employees — known as no-poach agreements.

They also include agreements between competing companies to set limits on wages for employees or to set other terms of compensation, so as to make it less attractive for those employees to move.

Such practices have been the subject of investigation and enforcement action in the U.S. for some time. The U.S. antitrust agencies' activity in scrutinizing employment and labor-related arrangements for antitrust issues was given greater impetus in October 2016, with the joint adoption by the U.S. Department of Justice and the Federal Trade Commission of "Antitrust Guidance for Human Resource Professionals."

This guidance sets out the agencies' joint views on the evaluation and legality of various practices in labor markets.

The most serious types of arrangements are no-poach and wage-fixing agreements, particularly where they stand by themselves and so cannot be argued to be ancillary to some wider, legitimate business relationship.

Under the DOJ and FTC guidance document, no-poach agreements can be agreements not to solicit or

not to hire another's employees. No-poach clauses often form part of a noncompete in the context of an acquisition or the creation of a joint venture or some other form of outsourcing, partnership or cooperation agreement.

Provided that these agreements are sufficiently tailored in terms of products or services covered, duration and geographical scope, they may be justifiable, both in the U.S. and Europe. However, so-called naked no-poach or wage-fixing agreements — or the mere perception of them — can substantially increase the risk of government investigation, enforcement action and potentially judicial determinations of antitrust violations.

Indeed, the publication of the joint DOJ and FTC guidance document coincided with the DOJ's aggressive pursuit of criminal enforcement actions against alleged no-poach and wage-fixing agreements, which had previously been enforced as civil matters.

After years of talk, in December 2020, the DOJ brought the first ever criminal indictment for alleged labor market collusion, in U.S. v. Jindal, and enforcement has continued under the Biden administration since then.

It is important to emphasize that in the U.S., companies and individuals can be separately subject to criminal enforcement and penalties, including jail time for individuals.

The focus of the DOJ and the FTC has further intensified over the last 24 months, with a number of new investigations being initiated. Statements by the new Biden administration, as well as the recent issuance of the executive order on promoting competition in the American economy directing the agencies to look at noncompetes in labor markets, suggest that this intensification of focus will continue.

In terms of understanding the enforcement landscape in the U.S., there is also an important dynamic in the interplay between federal and individual state law.

Certain U.S. states take a very aggressive, zero-tolerance approach to noncompetes, including those imposing no-poach obligations, even where there may be some link to an ostensibly justifiable business objective. This adds inevitable complexity when assessing compliance of such restrictions — which may be intended to have cross-border or even global reach — with applicable law in all jurisdictions where they have effect.

The focus of much of the recent enforcement activity by the DOJ has been in relation to health care providers. However, the issues are not limited to that sector and there are many open investigations spanning across different sectors. There is every reason to believe that no industry is entirely outside the purview of enforcement.

In Europe, however, there has not to date been the same level of competition law focus on these types of arrangements. In terms of enforcement by the European Commission, there have been no cases where stand-alone no-poach arrangements have been sanctioned; although such restrictions may be picked up as part of an investigation into wider cartel and anti-competitive activity.

In the 1999 Albany International BV v. Stichting Bedrijfspensionenfonds Textielindustrie judgment, the European Court of Justice found that collective bargaining agreements between employers and employees, which are intended to improve employment and working conditions, are excluded from the

EU competition law rules, although that would not offer any protection for ad hoc and covert wage-fixing agreements of the type the U.S. agencies have been investigating.

There has been more — although still limited — enforcement action at the EU member state level:

- In one of the few examples of a stand-alone arrangement being sanctioned, the Dutch Civil Court of Appeal — in 2010 — found that an agreement between 15 hospitals in the Netherlands, seemingly with the aim of protecting investments made to train certain staff, included both illegal no-poach restrictions and a cap on the level of overtime that each hospital would pay.

- There have also been a number of cases brought by the Spanish Competition Authority finding illegal no-poach restrictions, as part of wider cartel arrangements, for example, in the road transport freight forwarding and professional haircare products sectors — in 2010 and 2011 respectively.

- The French Competition Authority investigated and sanctioned three floor covering manufacturers and the professional floor coverings association for a range of collusive behavior, including a so-called gentleman's agreement not to poach each other's employees — in 2017.

- More recently, in 2020, the Portuguese Competition Authority ordered the Portuguese Professional Football League to suspend a decision that prevented First and Second League clubs from hiring players who had unilaterally rescinded their employment contracts for reasons related to the COVID-19 pandemic. There have been a number of other cases, in Portugal and elsewhere, relating to national sports leagues and restrictions being imposed on one team's ability to poach from another.

Indeed, Portugal currently seems to be the member state taking the greatest interest in this area. In 2021, the Portuguese Competition Authority followed up its decision in relation to the Portuguese Professional Football League with an issues paper on "Labour market agreements and competition policy." The issues paper made it clear that:

> As the economic recovery and employment take on a priority role, competition law enforcement contributes to keeping labor markets open and competitive. Workers should not be deprived of the opportunities that an open and competitive labor market can offer. Thus, labor markets are amongst the priorities set for the Portuguese Competition Authority in 2021.

Despite the limited examples of enforcement activity so far, there is little doubt that the European Commission and national member-state competition authorities would have serious concerns about an agreement between two competitor companies not to poach each other's employees or to set the level of wages, even if this arrangement were not part of a wider cartel or other anti-competitive behavior.

Significantly, in Europe there have been no cases where a competition authority has identified and criticized no-poach arrangements between companies that are not downstream competitors. A review of the comprehensive issues paper produced by the Portuguese Competition Authority confirms that all of the many cases cited relate to companies that are competitors in relation to the products or services they supply in downstream markets.

However, the Portuguese issues paper does allude to a situation where an anti-competitive agreement

may exist, in breach of EU and Portuguese competition law, even where the parties are not downstream competitors:

> No-poach agreements between competitors in a downstream market are more likely to negatively affect competition in the downstream markets. On the other hand, horizontal agreements between companies hiring the same type of worker, but not competing in the same product market, will have a direct effect at the labor market level, with potential indirect effects downstream (e.g., through job match quality, affecting allocative efficiency).

The enforcement position on this is much more clear-cut in the U.S. The 2016 joint DOJ and FTC guidance confirms that it is irrelevant whether employers are competitors in a downstream market; what is decisive is that the companies compete to hire the same employees — in other words, that they are competitors in a labor market.

This clear guidance is reflected in the enforcement history of the agencies. Although most no-poach investigations have related to companies that compete in a downstream market, there have been examples of enforcement action being brought where that is not the case.

There is an intuitive logic to this. If two companies — even if not competitors downstream — want to hire the same candidate, they may bid against each other to try to convince that candidate to join them. In such a situation, there is clearly competition. Nevertheless, how restricting that competition then inevitably translates into a lessening of competition for the supply of products or services to consumers in a market is much less clear. It may do so, but not necessarily.

This raises an interesting question about whether the welfare of employees — and their ability to move jobs freely and secure a fair salary — is protected by the consumer welfare standard applied under EU competition law, even when there is no impact on a product market in terms of higher prices or reduced quality or innovation.

Analogies can usefully be drawn between no-poach and wage-fixing agreements and buyer cartels — where, unlike a classic supplier cartel, buyers collude to agree on the prices at or terms on which they will purchase from upstream suppliers.

Labor — and its cost — is an input like any other. As such, given that a buyer cartel would be viewed as an infringement by object under EU law, there would be no need to demonstrate any impact on a downstream market.

It may not be necessary to wait too long to find out how the European Commission and member-state national competition authorities will approach these types of situations. A number of recent comments indicate that the level of interest in this area by European competition authorities may be about to increase.

Isabelle de Silva, the outgoing head of the French Competition Authority, said in her farewell speech on Oct. 13 that she thinks there is more antitrust enforcement that should be done in labor markets in France and Europe. This echoed comments that she had made earlier in her term.

Even more recently, Oct. 22, Margrethe Vestager, the competition commissioner at the European Commission, made a speech to the annual conference of the Italian Antitrust Association in which she confirmed that the European Commission is interested in these types of no-poach arrangements, and

that they may be looking out for these in a series of upcoming dawn raids.

It may be expected that the European Commission and the member state national competition authorities will be more likely to bring cases against such arrangements involving companies that are in fact downstream competitors, at least initially. It is also true that companies that are downstream competitors will be more likely to want to put in place these types of arrangements.

But, there may be situations where no-poach arrangements might appear attractive to companies that, although not competing with each other in providing the same services or products, may value the same types of employees, for example, senior members of the technology or research and development teams.

The U.S. antitrust agencies have now regularly begun to make requests for no-poach and noncompete restrictions part of their standard questions in the context of other investigations, including merger reviews. Indeed, some of the DOJ's enforcement actions for no-poach conduct have followed from the discovery of potentially problematic conduct in the course of parallel investigations by other government agencies or different divisions of the DOJ for other substantive issues.

Given the public acknowledgement of interest in these areas, it should not be too surprising if the competition authorities in Europe begin to follow suit.

The reality is that all companies in Europe need to take note of this developing area of competition law enforcement, just as companies in the U.S. have been doing over the last years.

It may also be important for those companies to reevaluate their thinking about what nonpublic employment related information should be treated as being competitively sensitive and, therefore, not shared with competitors, and how that situation would need to be managed, for example, in a due diligence exercise in the context of a potential acquisition.

Further, like many U.S. companies have done recently, European corporates may find it prudent to update their competition compliance policies and training programs to address this emerging area of risk.

It is certainly now no longer the case that competition law scrutiny of no-poach and wage-fixing arrangements can be dismissed as something in which only the U.S. antitrust agencies are interested.

Peter Broadhurst, Karel Bourgeois and Stefan M. Meisner are partners at Crowell & Moring LLP.

Crowell & Moring partners Megan Wolf, Juan Arteaga and Thomas De Meese contributed to this article.