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THE ROLE OF COMPETITION LAW IN REGULATING WAGE-FIXING AND NO-POACH AGREEMENTS

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Abstract

No-poach agreements and wage-fixing arrangements are increasingly assessed by national competition authorities and the European Commission as anticompetitive practices under Article 101 of the Treaty on the Functioning of the European Union (TFEU). This paper evaluates whether these agreements are sufficient to be considered anticompetitive abuses, with a focus on the European Commission's investigation into the food delivery sector, specifically the cases involving Delivery Hero and Glovo. It explores the complexities of intra-group exemptions, where companies are treated as competitors despite belonging to the same corporate group. The paper further discusses the intersection of labor and competition law, analyzing the combined impact of these practices on labor market dynamics and competition. The paper concludes by emphasizing the importance of comprehensible enforcement mechanisms to protect labor market competition within the EU.

Key words: *competition law; labor market; Art.101 TFEU; wage-fixing agreement; no-poach agreements; lock-in periods*

1. INTRODUCTION

The regulation of labor market practices through competition law has become increasingly important in recent years. Employers often use wage-fixing agreements and no-poach agreements in order to limit competition for labor. In no-poach agreements, companies agree not to hire or poach workers from each other, thus harming competition in many areas because they lead to significant restrictions on worker mobility, wage suppression, and distortion of labor market dynamics. Taking into account that the labor market should be a free and independent market that contributes to and promotes efficiency and innovation, using no-poach agreements would lead to a decelerated economic recovery.

The question, however, of whether no-poach agreements, without including other anticompetitive abuses under Article 101 TFEU, can constitute anticompetitive abuse has still been left unanswered by the European Commission.

2. NO-POACH AGREEMENTS AND ART. 101 TFEU

2.1. Definition and scope

Article 101(1) TFEU prohibits agreements between undertakings that affect trade between Member States and have the object or effect of preventing, restricting, or distorting competition within the internal market. The Court of Justice of the European Union (CJEU) has ruled that certain agreements can be so inherently harmful to competition that they are deemed restrictive by object without needing to consider their effects.[1]

Similar, in *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie*, the ECJ has ruled out that certain agreements can be inherently harmful to competition and are therefore considered restrictive by object under Article 101(1) TFEU.[2]

2.2. The legal framework under Article 101 TFEU

No-poach agreements, in which companies, not necessarily competitors, agree not to hire or solicit each other's employees, can fall into this category if they are intended to restrict competition. These agreements can be qualified as "by object" restrictions when they maintain artificial wage levels, reduce labor mobility, or divide the labor market.[3] The European Commission's approach, following the U.S. cases, suggests that such agreements could breach Article 101(1) TFEU if they are construed to limit labor market competition. These agreements restrict labor market mobility, limiting workers' ability to seek better opportunities, which in turn can suppress wages and hinder career advancement. This restriction not only affects individual workers but also impacts the economy by reducing overall productivity and innovation, as employees are unable to move to roles where their skills are most effectively utilized. Competition law, particularly Article 101 TFEU, is designed to protect the competitive process in both product and labor markets. No-poach agreements can violate this provision because they prevent companies

1 ECJ, *Groupement des Cartes Bancaires v Commission,* 2014, C-67/13 P, ECLI:EU:C:2014:2204.

2 ECJ, *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie,* 1999, C-67/96, ECR I-5751.

3 European Commission, "Commission opens investigation into possible anticompetitive agreements in the online food delivery sector", 2024, para. 15.

from competing fairly for talent, which is essential for a healthy economy. When firms agree not to hire each other's employees, they artificially suppress wages by removing the competitive pressure that would otherwise drive salaries to reflect the true value of workers' skills. This leads to a misallocation of resources, with employees stuck in positions that may not fully utilize their abilities or provide opportunities for growth. The harm caused by these agreements extends beyond the affected employees to the broader economy. The EU has recognized that labor is a critical input in the production process, and any restriction on the free movement of labor can have wider economic consequences. By limiting competition in the labor market, no-poach agreements can lead to inefficiencies, lower productivity, and reduced innovation, all of which are detrimental to economic growth.

3. THE INTERSECTION OF LABOR LAW AND COMPETITION LAW

3.1. Implications for labor market dynamics

The convergence of labor law and competition law is gaining attention as authorities work to protect labor markets from anticompetitive practices. While labor law traditionally safeguards workers' rights, competition law ensures a competitive market environment. Recent developments in European competition law highlight the necessity of addressing practices that harm not only consumers but also workers.

A significant development is the European Commission's 2022 guidelines on applying EU competition law to collective agreements of solo self-employed persons, acknowledging that certain labor market practices, such as wage-fixing agreements, can fall under antitrust assessment even when involving individuals traditionally outside labor law's scope.[4] Additionally, the Directive on Transparent and Predictable Working Conditions (2019/1152) has enhanced worker protections in the EU, intertwining with competition law by addressing non-compete clauses and their potential to restrict worker mobility.[5] These legislative measures highlight the need for a coordinated approach to regulating labor market practices through both labor and competition law.

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4 European Commission, "Guidelines on the application of EU competition law to collective agreements of solo self-employed persons" (2022) https://ec.europa.eu/competition/cartels/overview/index_en.html accessed 22 August 2024.

5 European Parliament and Council, Directive (EU) 2019/1152 on Transparent and Predictable Working Conditions in the European Union, 2019, OJ L186/105.

4. SUFFICIENT FOR ANTICOMPETITIVE ABUSE?

4.1. "By object" restriction

Whether a no-poach agreement qualifies as anticompetitive abuse under Article 101 TFEU depends on its characterization as a "by object" restriction. The CJEU and the European Commission have indicated that agreements harming the competitive process are likely to be seen as anticompetitive by nature. In the context of no-poach agreements, if the object of the agreement is to eliminate competition for employees between firms, it can be viewed as anticompetitive, thereby restricting employees' freedom to move between employers and suppressing wages.[6] When assessing whether no-poach agreements fall under „by object" restrictions, the CJEU's ruling in *Becu and Others v Gedi* emphasizes that agreements designed to restrict competition may breach Article 101 TFEU, regardless of whether their impact is directly observable.[7]

4.2. Practical considerations

However, it does not necessarily limit this to agreements between firms that are direct competitors. Under EU competition law, specifically Article 101 TFEU, an agreement can be seen as anticompetitive if it aims to restrict, prevent, or distort competition, regardless of whether the parties are direct competitors in the same market. This means that no-poach agreements can be anticompetitive even if they are made between companies that do not compete in the same product or service market. The crucial point is whether the agreement restricts competition in the labor market. If the agreement limits employees' ability to move freely between jobs, thereby suppressing wages or reducing job opportunities, it can be deemed anticompetitive, whether or not the companies involved are competitors in their respective markets. The case *T-Mobile Netherlands BV and Others*[8] highlights that the anticompetitive nature of an agreement depends on its impact on competition, not just the competitive relationship between the firms. In practice, many no-poach cases also involve additional anticompetitive behaviors, such as market division or wage-fixing agreements, which bolster the case for a breach of Article 101. For instance, in the *eBook* investigation, the Commission identified both price-fixing and market-sharing agreements that cumulatively restricted competition.[9]

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6 ECJ, *T-Mobile Netherlands BV and Others v Raad van bestuur van de Nederlandse Mededingingsautoriteit*, 2009, C-8/08, ECLI:EU:C:2009:343.

7 ECJ, *Becu and Others v Gedi et al.*,1999, C-22/98, ECR I-5665, para 23.

8 *Op. cit.* para 31.

9 European Commission, "Commission fines e-book publishers and Apple for illegal agreements", 2011, https://ec.europa.eu/commission/presscorner/detail/en/IP_11_1509 accessed 22 August 2024.

In conclusion, no-poach agreements can constitute anticompetitive abuse under Article 101 TFEU, particularly when seen as having a restrictive object. However, they are frequently examined alongside other anticompetitive behaviors, creating a more comprehensive and compelling case for antitrust authorities. The sufficiency of the no-poach agreement as a standalone violation depends significantly on its context, intent, and impact on labor market competition.

5. WAGE-FIXING AGREEMENTS AND ITS EFFECT ON COMPETITION

5.1. Definition of "wage-fixing agreements"

A wage-fixing agreement is an arrangement between two or more employers where they agree to set or limit the wages or salaries that they will pay to their employees. This type of agreement is considered a violation of competition law because it restricts the normal competitive process in the labor market. By fixing wages, employers can prevent salaries from rising in response to supply and demand, effectively suppressing the natural wage levels that would have been established through open competition for labor. Wage-fixing agreements can take various forms, such as direct agreements to cap wages at a certain level, or colluding to avoid raising salaries above an agreed-upon threshold. These agreements are generally prohibited under competition law, such as Article 101 of the Treaty on the Functioning of the European Union (TFEU), because they distort the labor market, reduce employee mobility, and harm the broader economy by inhibiting fair competition.

5.2. Comparison with "no-poach agreements"

Wage-fixing and no-poach agreements share similarities in their anticompetitive effects, particularly in terms of suppressing wages and limiting worker mobility. Both practices remove the competitive pressures that would naturally drive wages and employment opportunities higher. Wage-fixing directly sets wage levels, while no-poach agreements limit the availability of alternative employment opportunities, both leading to a stagnation of wages and reducing the bargaining power of employees.

In the EU, wage-fixing agreements are unequivocally considered violations of Article 101 TFEU due to their direct impact on the competitive process. In contrast, no-poach agreements, while increasingly assessed, have not yet reached the same level of legal condemnation, though this is likely to change as enforcement intensifies.

6. HOW WORKERS CAN DISCOVER NO-POACH AND WAGE-FIXING AGREEMENTS?

No-poach and wage-fixing agreements are typically confidential arrangements made between employers, often kept hidden from employees. This secrecy presents a significant barrier to employees who may be affected by these agreements but are unaware of their existence. However, workers can uncover these agreements through several ways:

a) Whistleblower programs - Many competition authorities within the EU offer whistleblower programs that allow individuals to anonymously report anti-competitive practices, including no-poach and wage-fixing agreements.[10]

b) Collective bargaining and union representation - Labor unions often have the resources and legal authority to investigate and challenge potential no-poach or wage-fixing agreements. Through collective bargaining and negotiations, unions can pressure employers to disclose such arrangements or bring them to the attention of competition authorities.[11]

c) Market indicators and anomalies - Workers may notice unusual patterns in wage stagnation or limited job mobility within their industry, which could indicate the presence of wage-fixing or no-poach agreements. These signs, though indirect, can be a trigger for further investigation by unions, legal advisors, or competition authorities.[12]

7. ECONOMIC HARM OF NO-POACH AGREEMENTS AND THE EU COMPETITION AUTHORITIE'S PERSPECTIVE

No-poach agreements can lead to significant economic harm by disrupting the normal functioning of labor markets. These agreements artificially suppress wages, restrict employee mobility, and reduce the incentives for firms to compete for talent. From an economic perspective, such restrictions lead to a misallocation of resources, where workers are unable to move freely to positions where their skills might be most effectively utilized. This distortion results in reduced innovation, lower productivity, and ultimately, a less competitive economy.

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10 European Commission, "Guidelines on the application of EU competition law to collective agreements of solo self-employed persons" (2022) https://ec.europa.eu/competition/cartels/overview/index_en.html accessed 22 August 2024).

11 Kovacic, W. E. and Shapiro, C. "Antitrust Policy: A Century of Economic and Legal Thinking", 2000, 14 Journal of Economic Perspectives 43, pp. 43-60.

12 Kovacic, W. E. and Shapiro, C. "Antitrust Policy: A Century of Economic and Legal Thinking", 2000, *14 Journal of Economic Perspectives* 43, pp. 44.

The European Commission has increasingly recognized the economic harm posed by no-poach agreements, particularly in its investigations into labor market restrictions. The Commission argues that these agreements are detrimental to both workers and the broader economy, as they prevent employees from obtaining better wages and career opportunities, thereby stifling economic growth. The suppression of wage competition among employers also leads to broader market inefficiencies, as it reduces the pressure on firms to innovate and improve working conditions to attract and retain talent.[13]

Furthermore, the economic harm caused by no-poach agreements is aggravated by the fact that these agreements are often hidden from employees, leaving them unaware of the restrictions being placed on their career choices. This lack of transparency aggravates the negative effects on the labor market, as employees are unable to negotiate better terms or seek alternative employment. The Commission has argued that these factors collectively contribute to a labor market that is less dynamic and less competitive, with long-term negative consequences for the European economy as a whole.[14]

8. LOCK-IN PERIODS IN AGREEMENTS VS. NO-POACH AGREEMENTS

8.1. DEFINITION OF LOCK-IN PERIODS

A "lock-in period" in legal agreements is a specified duration during which a party, often an employee, is contractually obligated to remain in a particular position or arrangement. This period restricts the party from terminating the contract prematurely without facing penalties or legal consequences. Lock-in periods are commonly included in employment contracts to ensure employee retention, protect investments made in employee training, or safeguard business interests during crucial periods. The concept of a lock-in period is grounded in contract law, where its enforceability is typically judged based on its reasonableness in terms of scope and duration. Courts often evaluate these clauses to ensure they do not unfairly restrict the employee's freedom to seek new employment, while still allowing employers to protect legitimate business interests.[15] In practice, lock-in periods are often found in contracts involving significant training or specialized skills. For

[13] European Commission, "Commission opens investigation into possible anticompetitive agreements in the online food delivery sector", 2024, https://ec.europa.eu/competition/cartels/overview/index_en.html accessed 22 August 2024.

[14] *Ibid.*

[15] Painter, R. and Holmes, A. Cases and Materials on Employment Law. 10th edn. Oxford: Oxford University Press, 2021, pp. 354-356.

example, an employer may require an employee to stay with the company for a set period after completing expensive training, or else repay the training costs if they leave early.[16] The fairness and legality of such periods are assessed by considering whether the duration and scope are proportionate to the investment made by the employer and whether the employee's rights are adequately protected.[17] These clauses serve as a tool for balancing the interests of both parties in a contractual relationship, ensuring that employers can secure returns on their investments while also providing clear boundaries on how long an employee can be reasonably bound by such an agreement.

8.2. Comparison with non-poaching agreements

While lock-in agreements and no-poach agreements both restrict worker mobility, their antitrust implications differ.

No-poach agreements are explicit, contractual arrangements between employers that prevent workers from moving freely between companies, thereby directly affecting competition in the labor market. In contrast, the arrangement on lock-in periods is a more indirect phenomenon, arising from structural issues within the employment system, such as the provision of benefits tied to specific employment. While lock-in periods do restrict mobility, it is not typically the result of a deliberate agreement between employers to stifle competition.

From an antitrust perspective, no-poach agreements are seen as a more direct violation of competition law because they involve explicit collusion between employers to limit labor market competition. Clauses on lock-in periods, on the other hand, while problematic for labor mobility, does not involve such collusion and is not typically subject to antitrust enforcement. However, both phenomena result in similar economic harms, such as reduced employee mobility, suppressed wages, and a less dynamic labor market.[18]

In cases where two or more firms use similar lock-in periods clauses, the competition law assessment might lead to a different conclusion: using lock-in period clauses by multiple companies might create a *de facto* no-poach effect, which might lead to similar anticompetitive outcomes. In this scenario, antitrust authorities might argue that these clauses collectively distort the labor market, especially if they are widespread and particularly restrictive. However, addressing this issue would be

16 Deakin, S. and Morris, G. S. Labour Law. 7th edn. Oxford: Hart Publishing, 2020, pp. 240-242.

17 Collins, H. Employment Law. 2nd edn. Oxford: Oxford University Press, 2022, pp. 203-205.

18 Van den Bergh, R. and Camesasca, P. D. European Competition Law and Economics: A Comparative Perspective. 2nd edn. Intersentia, 2006, pp. 123-125.

more complex than with no-poach agreements because job lock generally stems from internal company policies rather than explicit agreements between firms.

Therefore, while the economic impact might be similar, the legal and regulatory approach to addressing widespread lock-in period clauses might differ, potentially requiring broader labor market reforms or changes in the regulation of employment contracts.

8.3. Investment in workers' training as justification for the use of non-poaching agreements?

An argument often made in defense of no-poach agreements is that they enable firms to invest in the training and development of their workers without the risk of losing them to competitors. Employers argue that without such agreements, they might be reluctant to invest in employee training, as the benefits of that investment could be reaped by rival firms if the trained employees are poached. This justification hinges on the notion that no-poach agreements create a more stable workforce, allowing employers to recoup their investment in employee development over time.

However, this argument should be assessed carefully under competition law. The European Commission has indicated that while investments in training are crucial, they do not justify restrictions on labor mobility. Additionally, it may happen that not all employees receive training but are still covered by their employer's no-poach agreement. This is something that cannot be tolerated under competition law.

Moreover, in cases where employers voluntarily opt to provide training, employees are usually subject to non-compete clauses or have individual agreements with their employer (such as repaying a certain percentage for the training) to ensure the employee is not hindered in freely moving to another company (regardless of whether the new employer is a contractual partner in the no-poach agreement of the previous employer).

In any case, the Commission's view is that the benefits of investment in training shouldnot come at the expense of a competitive labor market, which ultimately serves the broader economy by fostering innovation and productivity.[19]

[19] European Commission, "Commission opens investigation into possible anticompetitive agreements in the online food delivery sector", 2024, https://ec.europa.eu/competition/cartels/overview/index_en.html accessed 22 August 2024.

9. RECENT DEVELOPMENTS: EUROPEAN COMMISSION INVESTIGATION IN THE FOOD SECTOR

In June 2022 and November 2023, the Commission conducted unexpected inspections at the offices of *Delivery Hero*, a German online food takeaway company, and its Spanish subsidiary Glovo as part of its investigation into potential collusion within the food delivery industry. This investigation focused on allegations that these companies, despite being part of the same corporate group, engaged in a cartel by allocating geographic markets, sharing commercially sensitive information, and agreeing not to poach each other's employees.[20] The Commission announced on July 23, 2024, that it initiated a formal antitrust investigation to assess whether *Delivery Hero and Glovo* breached EU competition laws by allegedly forming a cartel in the delivery sector for food, groceries, and consumer goods.

9.1. Intra-Group Exemption: Does It Apply?

Typically, agreements between entities within the same corporate group are exempt from the application of Article 101 TFEU, as they are considered internal arrangements rather than agreements between independent undertakings. This exemption is based on the premise that entities within the same group share a common economic interest, and thus cannot be considered competitors under competition law.[21]

However, the European Commission's investigation into *Delivery Hero and Glovo* complicates this exemption. The investigation undertaken by the Commission in June 2022 and November 2023 revealed that from July 2018 to July 2022, *Delivery Hero* held only a minority share in *Glovo*, raising questions about whether the companies' relationship was sufficiently integrated to qualify for the intra-group exemption. During this period, the companies may have had distinct economic interests that could have affected market dynamics in a manner that restricted competition.[22]

9.2. Why Are Delivery Hero and Glovo Treated as Competitors?

The European Commission's decision to treat *Delivery Hero* and *Glovo* as competitors, despite their corporate relationship, underscores the complexity of competi-

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20 *Ibid.*

21 European Commission, "Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements", 2011, OJ C11/1.

22 European Commission, "Commission opens investigation into possible anticompetitive agreements in the online food delivery sector", 2024, https://ec.europa.eu/competition/cartels/overview/index_en.html accessed 22 August 2024.

tion law in the context of corporate groups. The Commission was concerned that the companies' agreements influenced their competitive behavior in ways that harmed the market. By treating the two entities as competitors, the Commission highlights the importance of assessing the economic reality of their relationship rather than relying solely on formal corporate structures.

This approach is consistent with the Commission's broader efforts to protect labor markets from anticompetitive practices that can limit labor mobility, suppress wages, and reduce consumer choice. The alleged no-poach agreement, coupled with the sharing of commercially sensitive information and geographic market allocation, suggests that *Delivery Hero* and *Glovo* may have engaged in practices with significant anticompetitive effects.[23]

9.3. Analysis: Sufficient for Anticompetitive Abuse?

The investigation into *Delivery Hero* and *Glovo* shows how no-poach agreements, particularly when combined with other restrictive practices, can be sufficient to initiate an investigation by the Commission under Article 101 TFEU. Even if the companies belonged to the same corporate group, their conduct during the relevant period may have had substantial anticompetitive effects. The Commission's focus on the broader context of these agreements reflects a nuanced understanding of how labor market practices intertwine with competition law.

In this case, the no-poach agreement alone may not have been enough to trigger the investigation. However, when viewed alongside the geographic market allocation and sharing of sensitive information, it forms part of a broader anticompetitive strategy that could significantly distort competition. The Commission's approach aligns with its overarching goal of ensuring that labor markets remain open and competitive, even in complex corporate scenarios.[24]

10. RECOMMENDATIONS AND CONCLUSION

10.1 Recommendations

a) The competition authorities should provide guidance on the application of Article 101 TFEU to no-poach and wage-fixing agreements. The ambiguity surrounding these practices leads to confusion and inconsistency in enforcement. Clear delineation of what constitutes a "by object" restriction in the context of labor markets would serve as a preventive measure and a deterrent against un-

[23] *Ibid.*

[24] *Ibid.*

lawful agreements. Furthermore, issuing sector-specific guidelines, taking into account particularities in industries such as tech, healthcare, and food delivery, would ensure a more tailored approach in enforcement.

b) The intersection of competition law and labor law requires a coordinated enforcement strategy. Establishing an inter-agency body composed of representatives from both labor and competition authorities at the national and EU levels would allow for a comprehensive review of labor-related agreements, enabling the body to effectively identify and address any anticompetitive practices while respecting the confidentiality of sensitive business information. Such a body could be empowered to issue joint statements, carry out combined investigations, and propose legislative amendments, thereby bridging the gap between these two traditionally distinct areas of law.

c) Given the covert nature of no-poach and wage-fixing agreements, the role of insiders in exposing such practices cannot be understated. Strengthening whistleblower protection mechanisms under the Whistleblower Directive[25], coupled with financial incentives similar to those in antitrust leniency programs, would encourage reporting of unlawful agreements. Additionally, empowering labor unions to initiate complaints before competition authorities would leverage their capacity to monitor labor market practices, thus acting as a complementary enforcement channel.

d) The widespread use of lock-in periods in employment contracts requires more scrutiny, especially when they collectively create barriers to employee mobility. The European Commission, in collaboration with national labor law regulators, could consider developing non-binding guidance or a set of best practices that outline acceptable limits on the scope and duration of lock-in periods. Such guidance would need to respect the prerogatives of Member States in managing their own employment contract regulations, while still offering a structured approach for identifying potential anticompetitive effects, particularly in cases where lock-in clauses are implemented in a coordinated or systematic manner across multiple companies.

10.2. Conclusion

The analysis presented highlights how no-poach agreements, wage-fixing practices, and similar labor-related anticompetitive behaviors threaten not only the freedom of employees but also undermine the overall efficiency and dynamism of the European economy. Although Article 101 TFEU provides a solid foundation

[25] European Parliament and Council, Directive (EU) 2019/1937 on the protection of persons who report breaches of Union law, OJ L 305.

for tackling product market restrictions, it needs to be adapted and fine-tuned to address the particular challenges posed by labor market agreements. Recent cases, such as the European Commission's probe into Delivery Hero and Glovo, underscore the complexities of applying traditional competition law principles to labor market arrangements, especially when these agreements occur within corporate groups. The intra-group exemption, while serving its purpose in shielding internal transactions, should not become a blanket shield for practices that have significant negative impacts on competition in the labor market. Shifting towards a more labor-market-oriented enforcement strategy, would ensure that competition law evolves in step with the changing dynamics of employment relationships across the EU. While the Commission's recent actions indicate an openness to addressing these issues, further clarity and institutional coordination are still necessary in order to foster a healthier and more competitive labor market that supports fair opportunities, stimulates growth, and promotes sustainable economic development.

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