VAN BAEL & BELLIS

No-poach Agreements: Heightened Antitrust Risks in Europe

No-poach agreements are not only risky under US law – they also create material risks in Europe, where regulators increasingly view them as an enforcement priority.

We summarise below six key factors highlighting why businesses with operations in Europe are well advised to incorporate no-poach agreements and similar labour market-related conduct into their antitrust compliance and risk assessment strategies.

01 **No-poach agreements are an enforcement priority in Europe.** It is only a matter of time until the European Commission ("Commission") brings its first no-poach case. Labour market issues are a serious concern, as repeatedly confirmed by senior Commission officials, and are high on the Commission's agenda. Senior Commission officials have repeatedly confirmed that they consider no-poach agreements a serious concern and view this area as an enforcement priority. Recent reports suggest that the Commission already currently runs a few no-poach investigations. National competition authorities are already ahead of the Commission, with a series of recent and high-profile no-poach investigations (for example, in Belgium, Hungary, Portugal, and Romania). The UK's CMA has also recently been showing greater interest in labour market-related agreements. In 2022, it launched an investigation into alleged wage-fixing for freelance staff by various sports broadcasters, and more recently published guidance on how employers can avoid anticompetitive behaviour.

02 **No-poach agreements presumptively infringe competition law.** No-poach agreements cannot be criminally prosecuted under EU competition law. This also means that the legal bar for establishing a (serious) competition law infringement is not particularly high: most no-poach agreements could often be considered to presumptively infringe competition law – there is no need to show effects on labour markets, let alone criminal intent. And in most situations, firms under investigation would find it exceedingly difficult to justify such agreements on efficiency grounds, a hurdle that is notoriously difficult to overcome under EU competition law.

03 **Sharing information on wage levels/bands/scales can create material competition law risks.** EU competition law treats information exchanges, and even the unilateral disclosure of information, more harshly than US antitrust law. The mere exchange/disclosure of competitively sensitive information (like wage levels) could be considered a presumptive competition law infringement, irrespective of whether the information exchange/disclosure was acted upon. This means that even collecting information on prevailing wage levels in an industry sector (e.g., as part of a legitimate benchmarking exercise) must be structured carefully in order to minimise risk.

04 **The consequences of labour-side antitrust violations can be severe.** No-poach agreements would likely be characterised as cartel-type violations and fines could thus be significant (up to 10% of worldwide group turnover). Firms found guilty of a competition law infringement could also suffer substantial reputational damage. In the UK, where the relevant antitrust laws are largely similar to those in the EU, potential individual criminal liability and individual director disqualifications create additional risks.

05 **No-poach agreements in an M&A context must be reasonable.** In an M&A context, no-poach agreements may be considered legitimate and therefore treated more leniently. Parties must ensure, however, that the length and scope of no-poach/no-hire obligations imposed on a seller can be objectively justified by the need to preserve the value of the acquired business.

06 **Compliance should be a priority.** Clearly, no-poach agreements and similar labour market-related conduct should be firmly incorporated into the compliance policy of every firm with business activities in Europe. If a no-poach agreement is detected, the situation should be treated just like the discovery of any other type of unlawful agreement among competitors – a careful case-by-case assessment will be required to decide the most effective strategy to mitigate antitrust risk.

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