Still debatable, yet inevitable—increasing antitrust focus on labour markets and adapting to the new normal

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I. Introduction

For many years, competition authorities have not scrutinised anti-competitive practices in labour markets, not even remotely close to how they have approached the traditional sales/services markets. The competition authorities were mainly focused on the objective of antitrust rules for the purposes of ensuring competition in the markets for goods and services, and thereby consumer welfare. Based on this conceptual framework, the economic impacts of anti-competitive agreements (e.g., no-poach, wage-fixing, and non-hiring agreements) have remained out of the antitrust agencies' focus and, unavoidably, the grievances of employees have been overlooked by the competition authorities for a long time. So to say the so-called "inapplicability" of antitrust rules in labour markets has established an environment where the employers could enjoy the ability to decrease their costs for workforce easily by simply lessening the employees' wages and/or wiping out (or at least reducing) their mobility. However, the increasing number of antitrust cases concerning the labour market and the assessments made by the enforcers have proven that the restraints in the labour markets are of a less complicated structure compared to those in products markets and therefore, could be implemented by employers more easily. This is why it is easy to say without a doubt that restrictive behaviours of employers should have been considered at the dead centre of antitrust rules all along.

Thanks to the antitrust action in 2010 by the United States (US) Department of Justice (DoJ),[1] followed by a 2013 civil class action[2] against major Silicon Valley-based high-tech companies, antitrust enforcers have started to test their competence to scrutinise anti-competitive conduct in labour markets, despite the lack of fully-established legislation or precedent. The US labour market cases have served as a precipitating cause for scholars, antitrust enforcers and policymakers to recognise the applicability of antitrust rules for no-poaching agreements, wage-fixing agreements, and information exchanges on human resources (HR) data among competitors. In line with our projections back in 2013, enforcement of antitrust rules has become more common in labour market cases, and over the last decade, the applicability of antitrust and competition law has been widely recognised in major jurisdictions, including the European Union (EU).[3] Inevitably, new theories of harm are being scrutinised by the antitrust enforcers across the globe, mainly focusing on two kinds of anti-competitive agreements: no-poaching[4] and wage-fixing.[5] Accordingly, the regulators are progressively gathering around the idea that such conducts could pose violations, just as price fixing and other hard-core cartel conduct in product/services markets, signalling a dramatic exposure for companies' labour practices.

Investigations initiated by competition authorities regarding labour markets have confirmed that the arguments for keeping labour market-related restraints out of the scope of the antitrust rules have become rather archaic and weak. Considering that employers (i.e., companies) agree not to solicit or hire each other's employees, or co-ordinate with each other in determining compensation packages for their employees through no-poaching and/or wage-fixing agreements, antitrust enforcers have developed theories of harm for the restrictive conducts in labour markets and adopted the idea that anti-competitive agreements in labour markets should be examined comprehensively since such restraints

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[1] DoJ Office of Public Affairs, Justice Department Requires Six High Tech Companies to Stop Entering into Anticompetitive Employee Solicitation Agreements (DoJ, 2010), available at: *https://www.justice.gov/opa/pr/justice-department-requires-six-high-tech-companies-stop-entering-anticompetitive-employee#:~:text=WASHINGTON%20%E2%80%94%20The%20Department%20of%20Justice,no%20solicitation%20agreements%20for%20employees*.
[2] *Re High-Tech Employee Antitrust Litigation*, 11-CV-2509-LHK-PSG ND Cal 28 February 2013.
[3] G. Gürkaynak et al., "Competition Law Issues in the Human Resources Field" (2013) 4(3) *Journal of European Competition Law & Practice* 201.
[4] *People v eBay Inc* Case No 5:12-cv-05874-EJD ND Cal 3 September 2015; *Joseph Stigar v Dough Dough Inc et al* No 2:18-cv-00244-SAB ED Wash 8 March 2019.
[5] *US v Faysal Kalayaf Manahe* 2:22-cr-00013-JAW D Me 27 January 2022; *US v Neeraj Jindal* 4-20-CR-358 ED Tex 9 December 2020.

might result not only in lower wages, decreased mobility, or inequality for the employees, but also harm the competitive landscape of markets in general.

The conservative approach on this front still supports the idea that the primary purpose of antitrust rules is to protect consumer welfare and therefore, the regulation and supervision of labour markets would not align with this purpose in the first place, as it typically evaluates the impact of the alleged anti-competitive conduct merely on the prices of products/services purchased by the consumers. Hence this traditional approach considers labour market issues to be removed from the conventional antitrust cases concerning abuse of dominant position, horizontal arrangements or vertical restraints because all these typical cases have a direct impact on consumers. However, the restrictive conducts in labour markets also have direct and indirect consequences that impact the consumers. By way of no-poach, wage-fixing or non-hiring agreements, companies may decrease their workforce costs, but at the same time, such agreements harm the employees' motivation by consuming their time and energy in return for lower pay. In a scenario where companies do not compete for employees just as they compete for their customers, employees would not be properly rewarded for their work, which would result in less productivity and innovation. This is why a narrow interpretation of the scope of competition rules would inevitably have an adverse impact on the competition and total welfare including not only employees of which the minimum wages and motilities have been diminished but also the consumers.

Even though anti-competitive agreements in labour markets have been the elephant in the room for many years, this issue is now very much under the spotlight. Therefore, inconsistencies between the approaches adopted in various jurisdictions for labour market-related cases have also come to the fore as never before. This is why competition authorities should ideally collaborate towards a unified approach and a well-defined framework on antitrust issues in labour markets, by making use of their platforms to establish guidelines beforehand, rather than pushing their agenda with harsh enforcements/sanctions. Otherwise, undertakings would rather inevitably run into problems when shaping their HR and recruitment policies, especially on a global level. Companies whose operations span different jurisdictions may resort to adopting inconsistent HR policies for different countries/jurisdictions, particularly because of the lack of consensus among the antitrust agencies, resulting in the unpredictability of enforcement for the companies themselves, as well as their employees. To that end, issuing unified (or rather similar) guidelines based on certain core rules and principles would definitely help employers gain visibility and the insight to guard them against any possible enforcement/sanctions and adapt their HR policies to be generally compliant with antitrust rules.

II. Incompatible enforcement practices and academic opinions leading to uncertainties: should labour markets be a priority or be exempted entirely?

The conceptual debates tend to revolve around consumer welfare as the main objective of antitrust law, while legal practitioners and scholars repetitively turn a blind eye to one of the most vulnerable groups in the society: workers. As the welfare of employees has been proven to be a fragile aspect of anti-competitive agreements, labour market-related issues in antitrust enforcement have become rather inevitable. As the number of antitrust cases continue to pile up in various jurisdictions, it is now rather clear that restrictive conduct in labour markets does not just concern a small number of highly skilled employees as observed in *Silicon Valley*.[6] While some antitrust authorities, such as in the US, have been quite eager to adapt their enforcement to the arguably new normal by declaring war against anti-competitive agreements in the labour markets, jurisdictions such as Turkey, are still in transition to adapt their ways to increased scrutiny over labour market-related restrictions.

A. Theoretical and conceptual arguments

Since the Silicon Valley cases, although the number of antitrust cases in labour markets is observed to have been steadily increasing, the enforcement of antitrust law over labour-related issues still arguably has a long way to go. Due to the narrow interpretation of the objective of antitrust law (i.e., promotion of consumer welfare), there is still a lack of a widely accepted or common understanding in terms of the applicability of antitrust rules in labour markets.

As labour markets have caught the eye of antitrust enforcers, theories of harm orbit around analogies of the customary anti-competitive agreements. In line with this approach, the theory of harm concerning labour-related restraints assumes that companies (i.e. employers) are the rival buyers of labour, whereas the workers are positioned as sellers. Therefore, no-poaching/no-hire/non-solicit agreements could be indeed parallel to the harm by client sharing or allocation agreements; whereas wage-fixing agreements are parallel to price-fixing agreements, while anti-competitive exchange of information might be considered as a stand-alone theory of harm. Accordingly, in practice, the DoJ is observed to apply the conventional theories of harm to labour markets, namely price fixing and market allocation, which are per se illegal under US antitrust laws; therefore, resulting in harsher enforcement with lower burdens of proof for the DoJ.

So-called conservative scholars and antitrust policymakers tend to stick with the rather outdated approach to exclude restrictive conduct in the labour markets out of the scope of competition law enforcement, with the notion that the sole focus of antitrust law should

[6] DoJ Office of Public Affairs, Justice Department Requires Six High Tech Companies to Stop Entering into Anticompetitive Employee Solicitation Agreements.

be consumer welfare.[7] This approach mainly relies on the argument that labour markets and antitrust are "conceptually distinct and pose a choice among competing values",[8] failing to consider the benefits of competitive labour markets for the consumers, as well as employees. Another similar perspective on this front is that antitrust laws do not apply to collaborative labour conduct to restrain labour markets but regulate any concerted agreements that result in unnatural anti-competitive effects on commercial markets (i.e., markets where goods and services are traded). In a similar vein, another view acknowledges the unlawful nature of restraining agreements concerning labour markets, not because of their effects on the labour markets themselves, but their consequences on actual product markets.[9] Accordingly, some cases in which the distinction between labour and product/services markets is blurry (e.g. professional athletes might be considered inseparable from the final product) may be considered to fall under the purview of antitrust law, however, this results in a very narrow framework that would fall short of providing a strong solution to the suppression of worker mobility and wages. Another aspect of this argument is fuelled by the claims that the restraint of labour is not commercial enough to fall within the scope of antitrust rules.[10] In other words, a labour force composed of natural persons is not considered a commercial commodity, therefore, the consequences of labour restraint are deemed unrelated to product market issues and do not constitute a concern for the antitrust circles.[11] Consequently, power imbalances in labour markets are ignored by antitrust rules, leaving the workers unguarded from the suppressive restraints of the profit-driven businesses.

Simply put, the reservations against labour market enforcement by the antitrust community may be summarised as follows: (i) antitrust law has traditionally focused on product markets due to an acute focus on consumer welfare, (ii) economists have long presumed the labour markets to be competitive, and (iii) antitrust litigation against employers has been neglected, while concentrations in product markets have attracted more attention.[12] Antitrust regulators and agencies have long resisted taking the necessary steps, since traditionally, labour law has been considered as the fundamental, and perhaps even the sole instrument, to achieve worker welfare. Therefore, the law has not been keeping up with modern struggles of the workforce.

The direct cause-and-effect reasoning that decreasing production costs by reducing the cost of labour may lead to lower prices might be seen as a positive outcome with respect to consumer welfare at first glance. Such rather one-sided reasoning on the effects of unnatural reduction of labour costs and the fixation on consumer welfare might be deemed as the justification of the antitrust enforcement turning a blind eye to concentrations on the buyers' side (in labour markets) while focusing on the sellers (in product/services markets), which in turn provokes an unrealistic and outdated approach towards antitrust law's ability to reshape itself according to the modern struggles of the workers. While drawing the line between naked restraints and others in labour-related markets, some enforcers still insist on adopting a rather non-progressive approach that buyer power indeed is a means to reduce the prices charged, which is considered to be a positive outcome concerning consumer welfare.[13] This arises from the debate on whether the reference point to maintain and protect competition is consumer welfare or economic welfare.[14] Taking it a step further, some scholars also argue that the interchangeability of output and consumer welfare is a fallacy, which feeds the idea that consumer welfare is the exclusive aim of antitrust law.[15] While a broader definition of consumer welfare principle could mean lower prices for the end consumer, the fact that the facilitation of higher input would result in the development of technology and innovation, and as a result, benefit consumer welfare, is often overlooked.[16] Therefore, it is time to let go of the prejudices and acknowledge that concentration in labour markets that enable employers to artificially suppress wages and restrict employment mobility by anti-competitive labour agreements also results in a significant decline in overall productivity, economic growth and innovation in the long term. In accordance, antitrust law and enforcement are expected to reconstruct to achieve an equilibrium between consumer welfare and employee welfare, as some scholars propose that "courts [should] consider the welfare of workers first, then customers' welfare only if workers experience a de minimis harm".[17] Protection of workers under the shield of antitrust does not arise from purely humanist intentions, but basically, it is a means to achieve overall economic welfare as evidenced by recent empirical work. A study regarding wage competition establishes that no-poaching agreements always reduce total welfare as they suppress the productivity-increasing effects of worker mobility.[18] The study also concludes that

[7] P. Déchamps et al., "Labour markets: a blind spot for competition authorities?" (Concurrences, 2020), *Competition Law Journal*, available at: *https://awards.concurrences.com/IMG/pdf/35._labour_markets-_a_blind_spot_for_competition_authorities_.pdf?55923/5fc0da7b9dba623c61505bcaddf54f90909cb57f9710739c804b617f0e2b2d0e*.
[8] R.M. Stutz, "The Evolving Antitrust Treatment of Labor-Market Restraints: From Theory to Practice" (American Antitrust Institute, 2018), *https://ssrn.com/abstract=3332642*.
[9] R.H. Jerry II and D.E. Knebel, "Antitrust and Employer Restraints in Labor Markets" (1984) 6 *Industrial Relations Law Journal* 173.
[10] Stutz, "The Evolving Antitrust Treatment of Labor-Market Restraints: From Theory to Practice", p.3.
[11] Stutz, "The Evolving Antitrust Treatment of Labor-Market Restraints: From Theory to Practice", p.3.
[12] E.A. Posner, *How Antitrust Failed Workers* (Oxford: Oxford University Press, 2022), pp.10–11.
[13] J.M. Jacobson, "Monopsony 2013: Still Not Truly Symmetric" (American Bar Association, 2013), 61st Annual ABA Section of Antitrust Law Spring Meeting, available at: *https://www.wsgr.com/a/web/191/jacobson-0413.pdf*.
[14] See, Rebecca Haw Allensworth, "The Commensurability Myth in Antitrust" (2016) 69 *Vanderbilt Law Review* 1.
[15] John M. Newman, "The Output-Welfare Fallacy: A Modern Antitrust Paradox" (2022) 107 *Iowa Law Review* 563.
[16] Ioana Marinescu and Herbert Hovenkamp, "Anticompetitive Mergers in Labor Markets" (2019) 94(3) *Indiana Law Journal* 1031.
[17] Clayton J. Masterman, "The Customer Is Not Always Right: Balancing Worker and Customer Welfare in Antitrust Law" (2016) 69 *Vanderbilt Law Review* 1387, 1422.
[18] Oz Shy and Rune Stenbacka, "Anti-Poaching Agreements in Labor Markets" (2019) 57 *Economic Inquiry* 243.

no-poaching agreements between rivals benefit these firms by increasing their profit, while worker surplus declines,[19] and promotes the argument in favour of a rule of reason approach regarding no-poaching agreements, while also highlighting that competition amongst rival firms in labour markets is an essential aspect of competition overall.[20]

The Silicon Valley cases in 2010 against certain tech giants that entered into non-solicit/no-poach agreements[21] were a wake-up call that shattered the assumption that labour markets are naturally competitive. Laying out the not-so-ideal competitive landscape of labour markets, the case was also a great example of how firms may be clueless when it comes to the risks they take with respect to anti-competitive behaviours in their HR practices and policies. The case set the record straight that even the tech giants with access to the highest level of legal/compliance guidance were blindsided when it comes to their HR practices. As this idealisation of labour markets turned out to be an illusion, new research also points to the substantial market power possessed by employers, who are found to suppress employee wages.[22] Similarly, a relatively recent empirical work that utilises the Herfindahl-Hirschman Index suggests that monopsonies exist in many labour markets in the US.[23]

To sum up, the dust has still not settled among the academic landscape, antitrust agencies and courts with regards to labour markets/HR issues from a competition law perspective. Despite the increasing trend of competition law enforcement in labour markets, antitrust agencies have yet to reach a common ground on their practices, as some still insist on approaching the issue rather conservatively. On the other hand, businesses navigate through their hiring policies blindly, with no clear guidelines by the antitrust agencies.

B. Divergent views between jurisdictions

Compared to other jurisdictions, the US has long been a pioneer in antitrust enforcement on anti-competitive conduct in connection with labour practices. The DoJ and the Federal Trade Commission (FTC) have prioritised labour markets within the scope of antitrust, "as employees like consumers are entitled to the benefits of the Sherman Act affords and protects".[24] The Antitrust Guidance for Human Resource Professionals, published jointly by the DoJ and the FTC in 2016, targets wage-fixing and non-solicit/no-poaching agreements, explicitly highlighting that the criminal charges against firms and individuals partaking in anti-competitive labour violations are also on the horizon.[25] The guidance was intended to alert hiring policymakers, including HR professionals, about the potential violations of their practices regarding antitrust rules. The risks of potential criminal and civil liabilities are clearly stated in the guidance, which also provides the first declaration of the DoJ's intention to pursue criminal charges against unlawful labour-suppressing agreements.

In the last few years, several bodies, including the DoJ,[26] FTC, and the White House Council of Economic Advisors[27] have published reports and announcements on the potential consequences of collusive labour conduct, no-poaching agreements, wage-fixing agreements and cartel behaviour in labour markets. Furthermore, the DoJ has also initiated criminal investigations against no-poach agreements, mainly in the aerospace and healthcare sectors. The anti-competitive labour practices under the radar of DoJ and the courts comprise mainly of (i) no-poach/non-solicit/no-hire agreements (including cold-calling),[28] (ii) wage-fixing agreements,[29] and (iii) information exchange. In the last decade, the US has adopted the approach of categorising wage-fixing agreements and no-poaching agreements as per se violations rather than running a rule of reason analysis. For example, the high-level Silicon Valley cases which ended with a settlement, concerned the per se violation by the tech companies who had agreed to refrain from hiring another one's highly skilled tech employees or poaching these employees by cold-calling.[30] In *US v Lucasfilm*, the DoJ highlighted that naked agreements

[19] Shy and Stenbacka, "Anti-Poaching Agreements in Labor Markets" (2019) 57 *Economic Inquiry* 243, 259.
[20] Shy and Stenbacka, "Anti-Poaching Agreements in Labor Markets" (2019) 57 *Economic Inquiry* 243.
[21] DoJ Office of Public Affairs, Justice Department Requires Six High Tech Companies to Stop Entering into Anticompetitive Employee Solicitation Agreements.
[22] Suresh Naidu et al., "Antitrust Remedies for Labor Market Power" (2018) 132 *Harvard Law Review* 537.
[23] Ioana Marinescu and Eric A. Posner "A Proposal to Enhance Antitrust Protection Against Labor Market Monopsony" (2018) Roosevelt Institute.
[24] J. Kanter, "Making Competition Work: Promoting Competition in Labor Markets" (FTC DoJ, 2021), available at: *https://www.ftc.gov/system/files/documents/public_events/1597830/ftc-doj_day_1_december_6_2021.pdf*.
[25] DoJ and FTC, "Antitrust Guidance for Human Resource Professionals" (DoJ and FTC, 2016), available at: *https://www.justice.gov/atr/file/903511/download*.
[26] DoJ and FTC, "Joint Antitrust Statement Regarding Covid-19 And Competition In Labor Markets" (DoJ and FTC, 2020), available at: *https://www.justice.gov/opa/press-release/file/1268506/download*.
[27] The White House, "Non-Compete Agreements: Analysis of the Usage, Potential Issues, and State Responses" (The White House, 2016), available at: *https://obamawhitehouse.archives.gov/sites/default/files/non-competes_report_final2.pdf*.
[28] *US v Mahesh Patel* 3:21-cr-00220-VAB; *US v Surgical Care Affiliates LLC* 3:2021-cr-00011 (N.D. Tex. 5 January 2021); *US v Surgical Care Affiliates, LLC* 3:21-CR-00011 (ND Tex 5 January 2021); *US v Faysal Kalayaf Manahe* 2:22-cr-00013-JAW (D Me 27 January 2022); *US v DaVita Inc* 1:21-cr-00229-RBJ (D Colo 14 July 2021); *Danielle Seaman v Duke University and Duke University Health System* 15-cv-00462 (MDNC 7 March 2019); *Doe v Raytheon Technologies Corporation* US District Court, D Conn, 3:22CV00035; *Quinonez v National Association of Securities Dealers Inc* 540 F2d 824 (5th Cir 1976); *Uarco Inc v Lam* 18 F Supp 2d 1116 (D Haw 1998); *Robert Bogan and Scott Bogan v Austin E Hodgkins Jr, Northwestern Mutual Life Insurance Company* 166 F.3d 509 (2d Cir 1999); *Ulrich v Moody's Corp* 13-CV-00008 (VSB) (SDNY 30 September 2014); *California v eBay Inc* 2015 WL 5168666 (NDCal. 3 September 2015); *Joseph Stigar v Dough Dough Inc et al* 2:18-cv-00244; *Myrriah Richmond and Raymond Rogers v Bergey Pullman Inc* 2:18-cv-00246; *Ashlie Harris v CJ Star LLC* 2:18-cv-00244; *US v Knorr-Bremse AG and Westinghouse Air Brake Technologies Co* 1:18-cv-00747 (2018); *US and State of Arizona v Arizona Hospital and Healthcare Association and AzHHA Service Co* CV07-1030-PHX (22 May 2007); *Eichorn v AT&T Co* 248 F 3d 131, 136 3rd Cir (2001), 143-45 (3d Cir 2001); *Pittsburg Logistics Systems Inc v Beemac trucking LLC and Beemac Logistics LLC* 2021 WL 1676399 (Pa. 29 April 2021).
[29] *US v Faysal Kalayaf Manahe* 2:22-cr-00013-JAW (D Me 27 January 2022); *US v Neeraj Jindal* 4-20-CR-358 (ED Tex 9 December 2020); *US v VDA OC LLC* US District Court, D Nev, 2:21-CR-00098.
[30] *US v Adobe Systems Inc, Apple Inc, Google Inc, Intel Corporation, Intuit Inc*, Pixar 1:10-cv-01629, USA Columbia District Court (2011); *Re Animation Workers Antitrust Litigation* Master Docket No 14-CV-4062-LHK (ND Cal 11 November 2016).

restricting the hiring of employees are unlawful, underlining the distinction between naked agreements and ancillary agreements.[31]

Despite the efforts, even the US competition law landscape has not settled on common ground, as antitrust bodies and academia still debate whether per se violation approach is comprehensive of all kinds of anti-competitive labour agreements, or only limited to wage-fixing agreements.[32] Furthermore, the discussions over whether antitrust enforcement is the best tool to police the labour markets in order to achieve and maintain worker welfare have still not reached a conclusion.[33] Having said that, it has been established that income maximisation of the firms by way of wage-fixing agreements is an illusion of consumer welfare, considering the drastic downsides of wage-fixing agreements such as lower and unequal wages for workers, and a decrease in innovation due to the restricted mobility of employees, as stated in *US v eBay*.[34]

While anti-competitive agreements that limit the mobility of workers, agreements regarding wage-fixing and ancillary employment conditions are widely accepted as per se violations by the US antitrust agencies, they generally adopt the rule of reason approach for vertical restraints of labour. Within the scope of the rule of reason approach, the DoJ has focused on no-poaching agreements between franchises in several cases.[35] In *Leinani v McDonald's*,[36] which concerns the allegations against the no-hire provision in McDonald's franchise agreements that prohibits employees from seeking employment from another franchisee, the US District Judge examined the case under the rule of reason, imposing the burden to demonstrate the anti-competitive effect of the provision on the plaintiff. Furthermore, in *Butler v Jimmy John's*,[37] the provision that seeks written consent of a franchisee, when another franchisee wishes to employ its ex-employee within a year after termination, was under scrutiny by the rule of reason approach. The DoJ concluded that the provision did not constitute an antitrust violation, as it did not prohibit another franchisee from employing the said worker altogether, despite requiring consent. Also, in *Stigar v Dough Dough*,[38] *Richmond and Rogers v Pullman*,[39] and *Harris v CJ Star*[40] decisions, where no-poach agreements between franchisees were under scrutiny, the DoJ adopted the rule of reason approach to determine whether the no-poach provisions as ancillary conditions to franchise agreements violated antitrust law.

The US also established the criteria regarding the geographical scope of labour markets through its decisions. The *Deslandes* decision, concerning no-hire agreements between the restaurants for active employees and those who left employment in the last six months, provides an extensive analysis of the geographical scope of the market.[41] The decision states that the restaurants in the same region can compete in the labour market while two McDonald's branches in different cities cannot compete with each other. Moreover, the decision argues that the worker's skill level is a parameter for the geographical scope of the labour market, stating that low-skilled employees prefer jobs that do not require commuting long distances and are closer to their places of residence. Just as in franchise agreements, the US antitrust enforcement also analyses licensing agreements that include no-poach provisions with the rule of reason approach, such as in *ProTherapy Associates*[42] and *Helmerich & Payne v Schlumberger*[43] cases. In *ProTherapy Associates*, the court found that the contractual provision which prohibited the nursing homes from directly or indirectly poaching ProTherapy Associates' employees (i.e. nurses) was enforceable. In *Helmerich & Payne v Schlumberger*, the provision regarding non-solicitation in the licensing agreement concerning specific software for the oil industry was found to violate Oklahoma's restraint of trade statute.

Once again proving to be the pioneer of the subject, the US antitrust enforcement is the first to launch criminal prosecutions against violations in labour markets. Back in 2016, within the scope of *The Antitrust Guidance for Human Resource Professionals*,[44] the DoJ and FTC declared that no-poach agreements and wage-fixing agreements would be criminally prosecuted, and since then, the DoJ has initiated a few cases targeting these agreements.[45] The first examples of criminal cases were targeted at the healthcare industry.[46] In *US v Jindal*,[47]

[31] *US v Lucasfilm Ltd* No.1:10-cv-02220, 2010 WL 5344347 (DDC 21 December 2010).
[32] H. Hafiz, "Labor Antitrust's Paradox" (2019) 87(2) *University of Chicago Law Review* 381, 381–411.
[33] Hafiz, "Labor Antitrust's Paradox" (2019) 87(2) *University of Chicago Law Review* 381.
[34] *US v eBay Inc* 968 F Supp 2d 1030 (ND Cal 2013).
[35] *Conrad v Jimmy John's Franchise LLC* No.18-CV-00133-NJR (SD Ill 23 July 2021); *Arrington v Burger King Worldwide Inc* No 20-13561 (11th Cir 31 August 2022).
[36] *Deslandes v McDonald's US LLC* 17 C 4857 (ND Ill 28 July 2021).
[37] *Butler v Jimmy John's Franchise LLC* 331 F Supp. 3d 786 (SD Ill 2018).
[38] *Joseph Stigar v Dough Dough Inc* 2:18-cv-00244 (ED Wash 8 March 2019).
[39] *Myrriah Richmond and Raymond Rogers v Bergey Pullman Inc* 2:18-cv-00246.
[40] *Ashlie Harris v CJ Star LLC* 2:18-cv-00244 (ED Wa 2018).
[41] *Deslandes v McDonald's US LLC* 17 C 4857 (ND Ill 28 July 2021).
[42] *ProTherapy Associates, LLC v AFS of Bastian Inc* 2012 WL 2511175 4th Cir Va (2012).
[43] *Helmerich & Payne Int'l Drilling Co v Schlumberger Tech Co* 17-CV-358-GKF-FHM (ND Okla 26 December 2017).
[44] DoJ and FTC "Antitrust Guidance for Human Resource Professionals".
[45] *US v Jindal* No 4:20-cr-00358 (ED Tex 29 November 2021).
[46] DoJ, "Health Care Company Indicted for Labor Market Collusion" (Office of Public Affairs, 2021), available at: *https://www.justice.gov/opa/pr/health-care-company-indicted-labor-market-collusion*; DoJ, "Health Care Staffing Company and Executive Indicted for Colluding to Suppress Wages of School Nurses" (Office of Public Affairs, 2021), available at: *https://www.justice.gov/opa/pr/health-care-staffing-company-and-executive-indicted-colluding-suppress-wages-school-nurses*; DoJ, "DaVita Inc. and Former CEO Indicted in Ongoing Investigation of Labor Market Collusion in Health Care Industry" (Office of Public Affairs, 2021), available at: *https://www.justice.gov/opa/pr/davita-inc-and-former-ceo-indicted-ongoing-investigation-labor-market-collusion-health-care.*
[47] DoJ, "Health Care Company Indicted for Labor Market Collusion"; DoJ, "Health Care Staffing Company and Executive Indicted for Colluding to Suppress Wages of School Nurses"; DoJ, "DaVita Inc. and Former CEO Indicted in Ongoing Investigation of Labor Market Collusion in Health Care Industry".

which was the first criminal wage-fixing agreement case in the US, the act of sharing wage-related information and conspiring to lower wages with another company was under scrutiny; and, in *US v DaVita and Kent Thiry*,[48] criminal charges were brought by the DoJ against the entities for agreeing not to solicit each other's workers. The court, in line with the conventional interpretation of the Sherman Act concerning market allocation, decided that no-poach agreements can fall under per se scrutiny. However, unlike the DoJ, the court ruled that not all no-poach agreements can be scrutinised for being per se unlawful, and the no-hire agreements that do not constitute market allocation are to be analysed under the rule of reason approach. Although these first two criminal charges against anti-competitive agreements in labour markets show great initiative by the DoJ to fulfil its intention to criminally prosecute such collusive conduct (i.e. wage-fixing and no-poaching agreements), the DoJ's efforts could not proceed further, as the jury, in both cases, found the two defendants not guilty of the charges, since the agreements did not end meaningful competition in the labour market in question.[49] Although the acquittals in these two cases were a considerable setback to the DoJ's goal to prioritise the criminal prosecution of wage-fixing and no-poach agreements, the ongoing cases[50] brought by the DoJ will demonstrate whether its efforts shall bear fruit at last.

Although the DoJ and the FTC have shown significant initiative to challenge no-poach/no-hire agreements, wage-fixing agreements and exchange of HR information, they have not shown the same interest in the anti-competitive labour impact of mergers, despite frequently challenging the effects of mergers on product markets. In September 2020, for the first time, the FTC analysed a hospital merger on its potential consequence of suppressing wages of the registered nurses, which is signalling an increase in the scrutiny over the labour market effects of mergers in the coming years.[51]

Compared to the US, Europe has more to explore about labour markets' interaction with competition law through very limited soft law, case law, and regulations establishing the subject's framework. Contrary to the US jurisprudence that is mainly shaped by the case law on this front, European legal enforcement is shaped according to legislation; therefore, the rarity of labour market antitrust cases by the European competition authorities and courts may stem from the fact that legislation has not yet caught up on the developments in labour markets and competition law. Unlike the US, only a few EU Member States have pursued the application of competition rules to anti-competitive behaviours in labour markets. Yet, with a limited number of cases on the subject, they still have not established a settled framework on the illegality of no-poaching agreements, neither in the EU nor at the national level.[52] Accordingly, national courts appear to apply the rules of labour law, commercial law, law of obligations, civil law, or even constitutional law to the issues regarding labour markets, keeping their conservative approach intact.

Additionally, provisions in art.101 of the Treaty on the Functioning of the European Union (TFEU) that bans cartels and restricts anti-competitive agreements could be applied to labour markets, since labour markets are not principally exempted from EU antitrust laws. On the other hand, collective agreements and agreements conducted between unions are exempt from antitrust law. Furthermore, in late 2021, the European Commission (EC) suggested exempting the agreements between digital labour platforms and self-employed workers from antitrust laws.[53] In *Walrave*,[54] which concerned a no-hire agreement conducted between firms, and *Angonese*,[55] where a firm's specific requirement for employment eligibility was causing disproportionate restraint on labour, the European Court of Justice applied s.1 of art.45 of the TFEU: "Freedom of movement for workers shall be secured within the Union".[56] On the other hand, the EC has not yet initiated any cases against no-poach or wage-fixing agreements as standalone violations. Showing signs of progress on the subject, Executive Vice-President Margrethe Vestager has expressed the EC's intention to include anti-competitive labour agreements under its radar.[57] In line with Vestager's statement, as well as the draft horizontal guidelines published in March 2022 by the Commission, where "agreements fixing wages" are categorised as part of "buyer cartels", the Commission is likely to adopt a "by object" standard against labour market agreements.

In *UK/Kores Manufacturing v Kolok Manufacturing*[58] dating back to 1959, two competing companies agreed to refrain from employing each other's employees without the other's consent. The defendants argued that their agreement was conducted among equals, did not pose a

[48] *US v DaVita Inc and Kent Thiry* No.1:21-cr-00229 (D Colo 3 November 2021).
[49] *US v Jindal* No.4:20-cr-00358 (ED Tex 29 November 2021); *US v DaVita Inc and Kent Thiry* No.1:21-cr-00229 (D Colo 3 November 2021).
[50] *US v Manahe* 2:22-cr-00013-JAW; *US v Patel* 3:21-cr-00220-VAB; *US v Hee* 2:21-cr-00098-RFB-BNW; *US v Surgical Care Affiliates LLC* 3:21-cr-00011-L.
[51] FTC, "Staff Submission to Texas Health and Human Services Commission Regarding the Certificate of Public Advantage Applications of Hendrick Health System and Shannon Health System" (FTC, 2020), available at: *https://www.ftc.gov/system/files/documents/advocacy_documents/ftc-staff-comment-texas-health-human-services-commission-regarding-certificate-public-advantage/20100902010119texashhsccopacomment.pdf*; Marinescu and Hovenkamp, "Anticompetitive Mergers in Labor Markets" (2019) 94(3) *Indiana Law Journal* 1031.
[52] Valentin Depenne, "One Size Does Not Fit All: A Comparative Approach to Antitrust Enforcement Against No-Poaching Agreements" (2019) 2(1) *Sorbonne Student Law Review* 238, 258.
[53] C. Connor, "EU Suggests Exempting Some Gig Workers from Competition Rules" (2021) *Global Competition Review*, available at: *https://globalcompetitionreview.com/article/eu-suggests-exempting-some-gig-workers-competition-rules*.
[54] *Walrave v Association Union Cycliste Internationale* (36/74) EU:C:1974:140; [1975] 1 C.M.L.R. 320.
[55] *Angonese v Cassa di Risparmio di Bolzano SpA* (C-281/98) EU:C:2000:296; [2000] 2 C.M.L.R. 1120.
[56] Depenne, "One Size Does Not Fit All: A Comparative Approach to Antitrust Enforcement Against No-Poaching Agreements" (2019) 2(1) *Sorbonne Student Law Review* 238–270.
[57] M. Vestager, "A New Era of Cartel Enforcement" (Italian Antitrust Association Annual Conference, 2021), European Commission, available at: *https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/speech-evp-m-vestager-italian-antitrust-association-annual-conference-new-era-cartel-enforcement_en*.
[58] *Kores Manufacturing Co Ltd v Kolok Manufacturing Co Ltd* [1959] Ch. 108; [1958] 2 W.L.R. 858.

violation, did not restrict the employees from seeking employment elsewhere, and was aimed to protect the parties' commercial interests. As a response to the parties' claims, the court ruled that the parties being on equal terms did not mean the restraint would not be deemed to be against the public interest. In conclusion, the court did not accept the parties' claims and ruled that the agreement was too broad as it included all employees, independent of their qualifications and seniority, and violated public policy, therefore, signalling that it could find the provisions reasonable if they applied to the employees with sophisticated know-how and high-level seniority (i.e. for the protection of business secrets). More recently, the Competition and Markets Authority of the United Kingdom (UK) initiated an investigation against four sports broadcasters concerning wage-fixing agreements targeted at freelance employees, allegedly in violation of antitrust laws.[59]

Although the EU lags behind the recent developments on the issue, the individual countries in Europe themselves are no different at the national level. As early as 2011, *French IT*,[60] targeted a non-solicitation agreement between two rival firms where, the Supreme Court of France decided that the non-solicitation agreement violated the freedom of employment and the public interest which were secured under the French Labour Law and Civil Law,[61] and avoided even considering applying antitrust rules to the case. Five years later, in *Modelling Agencies*,[62] the French Competition Authority sanctioned a wage fixing agreement between modelling agencies (i.e. set a minimum wage), and a year later, in *Floor Coverings*,[63] exchange of commercially-sensitive information regarding wages. Both cases have not arisen from labour-related concerns on a stand-alone basis, rather, were ancillary to the main allegations such as price fixing or exchange of information. In *Dutch Hospital*,[64] the Appeals Court of the Netherlands ruled that the non-solicit agreement conducted between the 15 Dutch hospitals was not aiming to limit or avert competition by object but concluded that it still violated Dutch competition rules since it resulted in an anti-competitive outcome by restricting the mobility of the workers. Furthermore, in November 2021, the Netherlands Authority for Consumers and Markets concluded its investigation regarding an alleged wage-fixing cartel among Dutch supermarkets, possibly due to unsuccessful attempts of the supermarkets to settle with labour unions regarding employee wages.[65] As the supermarkets and trade unions reached an agreement through a collective labour agreement, the investigation was dropped by the Dutch Competition Authority in November 2021.[66]

Furthermore, in January 2022, Romanian Competition Council announced that it is investigating seven automotive technologies companies concerning allegations of wage-fixing and no-poaching agreements, which constitutes as the authority's first initiative against anti-competitive labour practices.[67] In *Freight Cartels*[68] dated 2010 against eight freight forwarding companies, the Spanish Competition Authority analysed the concerted behaviour of the companies, which included price-fixing of the products as well as a no-poach agreement as an ancillary restraint.[69] Although the case was not targeted at the no-poach agreement on a stand-alone basis, it sets an example of a no-poach agreement being treated as an aspect of cartel behaviour. A year later, in *Professional Haircare*,[70] the Spanish Competition Authority sanctioned the anti-competitive conduct of eight undertakings active in the hair products sector, as well as the professional association, more specifically, a no-poach agreement regarding labour-related aspect. In May 2022, Polish Competition Authority initiated an investigation against the Polish top speedway league and motorsports federation regarding the imposition of wage caps on motorcyclists, adopting a theory of harm explicitly excluding the workers and mainly basing its arguments on the harm on the competition between rival clubs; and in December 2020, the Hungarian Competition Authority imposed fines on a recruitment association in relation with no-poach agreements while also imposing sanctions regarding price fixing.[71] The investigation initiated in April 2021 by the Polish Competition Authority against the Basketball League along with 16 basketball clubs, where the main allegations revolved around the co-operative practices of the basketball clubs affecting the salaries of the players, has notably made it clear that the Polish Competition Authority does not consider the theory of harm as harm to the workers, but instead, the harm over competition between rival basketball clubs.[72]

[59] Janith J. Aranze, "CMA Probes Broadcasters Over Wage-Fixing Concerns" (13 July 2022) *Global Competition Review*, available at: *https://globalcompetitionreview.com/article/cma-probes-broadcasters-over-wage-fixing-concerns*.
[60] Cass. soc., 2 March 2011, No.09-40.547 (Cour de Cassation Social Chamber, France, 2 March 2011).
[61] See, the French Civil Code art.1134 and art.1164; Autorite de la concurrence 17-D-20, 19 October 2017.
[62] l'Autorité de la concurrence, *Modelling Agencies*, 16-D-20, 29 September 2016.
[63] l'Autorité de la concurrence, *Floor Coverings*, 17-D-20, 19 October 2017.
[64] Court of Hertogenbosch, LJN: BM3366 HD 200,056,331.
[65] J. Masson, "Dutch enforcer drops wage-fixing cartel probe" (2021) *Global Competition Review*, available at: *https://globalcompetitionreview.com/article/dutch-enforcer-drops-wage-fixing-cartel-probe*.
[66] Masson, "Dutch enforcer drops wage-fixing cartel probe" (2021) *Global Competition Review*.
[67] J. Masson, "Romania Launches First Labour Market Probe" (2022) *Global Competition Review*, available at: *https://globalcompetitionreview.com/article/romania-launches-first-labour-market-probe*.
[68] Comisión Nacional de los Mercados y la Competencia Resolución (EXPTE S/0120/08, Transitarios).
[69] OECD, "Competition Issues in Labour Markets—Note by Spain" (2019), available at: *https://one.oecd.org/document/DAF/COMP/WD(2019)48/en/pdf*.
[70] Spanish CNC Council, *Professional haircare* (2 March 2011), case No. S/0086/08.
[71] J. Masson, "Poland Probes Speedway League Over Anticompetitive Salary Cap" (2022) *Global Competition Review*, available at: *https://globalcompetitionreview.com/article/poland-probes-speedway-league-over-anticompetitive-salary-cap*; Hungarian Competition Authority Hungarian HR consulting agencies Case No.VJ/61/2017 dated 18 December 2020.
[72] Polish Competition Authority, "The President of UOKiK brings charges of limiting competition against basketball clubs" (12 April 2021), available at: *https://uokik.gov.pl/news.php?news_id=17405*.

Similarly, in November 2021, the Lithuanian Competition Council has shifted its focus on the same sector, initiating an investigation targeted at the Lithuanian Basketball League, powered by allegations of anti-competitive conduct regarding salaries against the League as well as 10 basketball clubs.[73] Considering the cases handled on a national level in Europe, there lacks a common understanding with only small steps taken to develop the case law on the issue, where labour-related anti-competitive conduct is often not targeted by the authorities as stand-alone violations but rather an aspect of cartel-like behaviour.

Fast forward to current developments, it is observed that more European authorities have started to catch up on the scrutiny over anti-competitive behaviour in labour markets. Among the recent international cases, for instance, the investigation against seven automotive firms alleging no-poach agreements initiated by the Romanian Competition Council,[74] the investigation against the association of private schools alleging no-poach agreements initiated by the Catalan competition authority (similar to *Turkish Private Schools Association*),[75] and, as the first sanction of anti-competitive conduct involving labour markets in Portugal,[76] the fine imposed on the Portuguese Professional Football League and a number of its members alleging no-hire agreements after the termination of the football players' contracts, by the Portuguese Competition Authority[77] are only a few examples of the diverse nature of the labour market claims where antitrust laws are applied to no-poach agreements. Furthermore, the EC's Directorate-General for Competition has indicated that the EU might look into labour markets and that they could learn from the US's experience regarding antitrust remedies in labour markets.[78]

The Turkish Competition Authority (TCA) has recognised antitrust issues in labour markets in its 2019 Note for Organisation for Economic Co-operation and Development (OECD) Competition Committee, stating that; "the reason behind the global inattention to the topic of this roundtable lies in the fact that modern competition law literature and enforcement have focused on production markets and the effects of monopolies on production".[79] Under the Turkish competition law regime, there are no specific guidelines that address competition in labour markets. However, case law confirms that factors regarding workforce or labour such as wages and salaries are subject to antitrust scrutiny. Compared to the EU Member States, Turkey has been more inclined to keep up with the developments on the issue.[80] The TCA ruled on its first-ever case concerning no-poaching and wage-fixing agreements in 2005.[81] In this initial case, the Turkish Competition Board (TCB) decided on the agreements between private schools and school associations[82] regarding the exchange of information (on wages), wage-fixing, and no-poaching; and afterwards in the *Bfit* case[83] addressed the issue of no-poach agreements between franchisees. The TCA is showing signals of increasing its supervision over labour markets. In November 2022, the TCA published its reasoned decision of *Hospitals*,[84] namely, the case, which was brought up by the TCA in July 2020 against 29 private hospitals concerning allegations of determination for operating room service fees charged by independent physicians and a gentlemen's agreement to agreeing to not poach each other's workers, as well as no-poaching agreements to avert employee transfers between the hospitals. The investigation was initially brought by the TCA against eight private hospitals, and later[85] expanded to a total of 29 private hospitals. The main allegations were (i) price fixing, (ii) restriction of competition in the labour market, and (iii) exchange of information, as highlighted in the reasoned decision. The Board found a bunch of hospitals to be in violation concerning the aforementioned violations. Although the *Hospitals* case did not solely target anti-competitive conduct in labour markets, the TCA once again proved that its intentions to oversee labour markets are solid, as it has imposed fines on 18 private healthcare organisations and one association of undertakings, making the *Hospitals* case the first investigation that resulted in penalty, addressing that price-fixing and no-poaching agreements also constitute cartel behaviour. Notably, as the first sanction regarding labour markets by the Portuguese Competition Authority, *Portuguese Professional Football League*[86] sets an example by way of acknowledging the anti-competitive effects of such labour-restrictive agreements such as on the competitive landscape of

[73] Lithuanian Competition Council, *Basketball League*, 18 November 2021.
[74] Consiliul Concurenței România, "Consiliul Concurenței România A Declanșat O Nouă Investigație Pe Piața Serviciilor De Reparare A Autovehiculelor" (2021), available at: *http://www.competition.ro/wp-content/uploads/2021/11/Inspectii-Auto-Italia-nov-2021.pdf*.
[75] *Private Schools Association* Case No.11-12/226-76, 03 March 2011.
[76] C. Connor, "A Q&A with Margarida Matos Rosa" (2021) *Global Competition Review*, available at: *https://globalcompetitionreview.com/article/qa-margarida-matos-rosa-0*.
[77] *Autoridade de Concurrencia*, "AdC Issues Sanctioning Decision for Anticompetitive Agreement in the Labor Market for the First Time", Autoridade de Concurrencia (2020), available at: *https://www.concorrencia.pt/en/articles/adc-issues-sanctioning-decision-anticompetitive-agreement-labor-market-first-time*.
[78] C. Connor, "Guersent hints that EU may look into labour markets" (2022) *Global Competition Review*, available at: *https://globalcompetitionreview.com/article/guersent-hints-eu-may-look-labour-markets*.
[79] OECD, "Competition Issues in Labour Markets—Note by Turkey" (2019), available at: *https://www.rekabet.gov.tr/Dosya/geneldosya/daf-comp-wd(2019)49-en-pdf*.
[80] *Private Schools Association* Case No.11-12/226-76, 03 March 2011; *Bfit* Case No.11-12/226-76, 03 March 2011; *Izmir Container Transporters* Case No.20-01/3-2, 2 January 2020; *Television Series Producers* Case No.05-49/710-195, 28 July 2005; *Henkel* Case No.11-32/650-20, 26 May 2011.
[81] *Private Schools Association* Case No.11-12/226-76, 3 March 2011.
[82] *Private Schools Association* Case No.11-12/226-76, 3 March 2011.
[83] *Bfit* Case No.11-12/226-76, 3 March 2011.
[84] *Hospitals* Case No.22-10/152-62, 24 February 2022.
[85] TCA, "Sekiz özel hastane hakkında yürütülen soruşturmaya 21 teşebbüs eklendi" (2021), available at: *https://www.rekabet.gov.tr/tr/Guncel/sekiz-ozel-hastane-hakkinda-yurutulen-so-791e76b17c6beb11812a00505694b4c6*.
[86] C. Connor, "A Q&A with Margarida Matos Rosa" (2021) *Global Competition Review*.

human resources, harm caused over labour mobility and reduction of wage and bargaining power, as well as harm to consumers. Also, the TCA has been investigating 32 undertakings (operating in various sectors) for alleged gentlemen's agreements related to labour markets since April 2021, and has already highlighted its increased focus on gentlemen's agreements for wage-fixing and suppression of worker mobility in its announcement.[87] Furthermore, in May 2022, the TCA announced a new investigation against seven tech companies active in the IT and communication sectors concerning the allegations regarding gentlemen's agreements in related labour markets.[88]

Although Europe seems to be sharpening its focus on competition issues in labour markets following the US's footsteps, this is not the case in every jurisdiction. For instance, the German Federal Cartel Office (*Bundeskartellamt*), which is considered to be one of the leading European antitrust agencies, has not decided on any case related to no-poaching agreements, which might be a conscious choice by German authorities and labour policies to keep labour markets and antitrust law apart.[89] Within the scope of the legislation, agreements that restrict hiring are covered by the German Commercial Code[90] (*Handelsgesetzbuch*). Furthermore, the highest German Civil Court (*Bundesgerichtshof*) drew the line regarding no-poach and no-hire agreements in its 2014 decision,[91] making its position clear that no-poach and no-hire agreements fall under the German Commercial Code provisions regarding anti-hire agreements and therefore no-hiring practices are not to be scrutinised under antitrust rules in Germany.[92]

Globally speaking, Europe and the US are not the only jurisdictions that have shown interest in this subject, with diverse approaches. For instance, the Australian Competition and Consumer Commission does not have the jurisdiction to examine or monitor agreements related to employee wages and conditions, therefore, the Australian competition regulation is not capable of scrutinising anti-competitive labour agreements among rivals. Also, the Competition and Consumer Act 2010 of Australia does not apply to services rendered by workers under an employment contract.

Skipping to Singapore, the authority has not yet initiated a case directly concerning labour markets on the demand side, but it has issued fines to 16 employment agencies for fixing monthly salaries, in 2011.[93] On the other hand, in Brazil, although the framework on the subject has not yet been declared and there is no specific regulation in the Brazilian Antitrust Law to be applied to labour markets, the Brazilian Competition Authority initiated its first-ever case exclusively against (i) wage-fixing and co-ordination of HR policies, (ii) exchange of sensitive information regarding wage-related employment information (including benefits and hiring terms) in March 2021.[94] Singapore[95] and Brazil[96] have further made clear in their OECD Notes that they recognise the antitrust issues in labour markets.

More of the South American antitrust agencies have recognised labour markets as an antitrust issue, following the lead of the US and the European jurisdictions.[97] For instance, in late 2021, the Colombian Superintendence of Industry and Commerce initiated an investigation concerning no-poach agreements in the football industry,[98] while the National Institute for the Defence of Free Competition and the Protection of Intellectual Property of Peru initiated a case against six construction companies regarding alleged no-hire agreements.[99] Also, the Federal Economic Competition Commission of Mexico issued fines against 17 football clubs within the scope of its first-ever no-poach case in September 2021.[100]

In addition to the developments in case law by the antitrust authorities/bodies, some jurisdictions have taken the initiative to publish guidelines on the subject: "The Antitrust Guidance for Human Resource Professionals" published jointly by the DoJ and FTC in 2016,[101] "Report of the Study Group on Human Resource and Competition Policy" published by Japan in 2018,[102] the Advisory

[87] TCA, "İşgücü piyasasına yönelik centilmenlik anlaşmaları nedeniyle Türkiye genelinde 32 teşebbüs hakkında soruşturma açıldı" (2021), available at: *https://www.rekabet.gov.tr/tr/Guncel/isgucu-piyasasina-yonelik-centilmenlik-a-d8bc3379bea1eb11812e00505694b4c6*.
[88] TCA, "Etiya Bilgi Teknolojileri Yazılım Sanayi ve Ticaret A.Ş., Pia Bilişim Hizmetleri A.Ş., İnnova Bilişim Çözümleri A.Ş., NETAŞ Telekomünikasyon A.Ş., MAGİS Teknoloji A.Ş., Kafein Yazılım Hizmetleri Tic. A.Ş. ve RDC Partner Bilişim Danışmanlık ve Teknoloji Hizmetleri A.Ş. hakkında soruşturma açıldı" (2022), available at: *https://www.rekabet.gov.tr/tr/Guncel/etiya-bilgi-teknolojileri-yazilim-sanayi-80c5fac49ccfec11a22000505685ee05*.
[89] Ardıyok and H. Başar, "İşgücü Pazarlarında Rekabet Hukuku Uygulamaları: ABD Yaklaşımının Türk Hukuku Yönünden Uygulanabilirliği" in *Nurkut İnan'a Armağan* (Istanbul: On İki Lehva, 2022), pp.305–344.
[90] For the relevant provision, see, German Commercial Code (Handelsgesetzbuch) s.75f.
[91] German I Civil Senate I ZR 245/12 [2014].
[92] Depenne, "One Size Does Not Fit All: A Comparative Approach to Antitrust Enforcement Against No-Poaching Agreements" (2019) 2(1) *Sorbonne Student Law Review* 238.
[93] Singapore Competition & Consumer Commission, "CCS Fines 16 Employment Agencies For Price Fixing" (2011), available at: *https://www.cccs.gov.sg/media-and-consultation/newsroom/media-releases/ccs-fines-16-employment-agencies-for-price-fixing*.
[94] CADE Case No.08700.004548/2019-61.
[95] OECD, "Competition Issues in Labour Markets-Note by Singapore" (2019), available at: *https://one.oecd.org/document/DAF/COMP/WD(2019)70/en/pdf*.
[96] OECD, "Competition Issues in Labour Markets-Note by Brazil" (2019), available at: *https://one.oecd.org/document/DAF/COMP/WD(2019)51/en/pdf*.
[97] O. Rafferty, "Latin America Should Expect Influx of No-Poach Cases, Says Former Enforcer" (2022) *Global Competition Review*, available at: *https://globalcompetitionreview.com/article/latin-america-should-expect-influx-of-no-poach-cases-says-former-enforcer*.
[98] J. Masson, "Colombia Probes Top Football Clubs for No-Poach Agreements" (2021) *Global Competition Review*, available at: *https://globalcompetitionreview.com/article/colombia-probes-top-football-clubs-no-poach-agreements*.
[99] O. Rafferty, "Peru Probes Construction Companies over No-Poach Agreements" (2022) *Global Competition Review*.
[100] J. Masson, "COFECE Sanctions Football Clubs in First No-Poach Probe" (2021) *Global Competition Review*, available at: *https://globalcompetitionreview.com/article/cofece-sanctions-football-clubs-in-first-no-poach-probe*.
[101] DoJ and FTC, "Antitrust Guidance for Human Resource Professionals".
[102] Japan Fair Trade Commission, "Report of the Study Group on Human Resource and Competition Policy" (2018), available at: *https://www.jftc.go.jp/en/pressreleases/yearly-2018/February/180215_files/180215_3.pdf*.

Bulletin regarding certain practices in the employment marketplace concerning hiring, and the terms and conditions of employment in Hong Kong,[103] and *Best Practices in Preventing Anticompetitive Agreements in Labor Markets*[104] by Portugal. Furthermore, although they have not been published yet, the president of the TCA announced in 2021 that the authority is planning to prepare guidelines for firms and employers to eliminate legal uncertainties in this new aspect of antitrust law, adding that labour markets will be a major focus of inspection in the future.[105] Additionally, Canada has taken it a step further by introducing new amendments to its Competition Act in 2022 (subs.45(1.1)), and criminally prohibited wage-fixing and no-poaching agreements between employers.[106]

With the diverse and inconsistent approaches of different jurisdictions, it is apparent that the labour markets have long been neglected by the competition authorities and scholars in many jurisdictions, which has caused an unpredictable environment regarding labour practices of the businesses. In line with the ongoing global trend, labour markets are expected to be an important aspect of antitrust law soon, with a higher number of cases. Antitrust circles must recognise antitrust enforcement as an effective way to maintain worker welfare, and that well-functioning labour markets are a vital aspect of healthy competition and economic stability, as well as growth, therefore, should be given the well-deserved attention.[107]

III. The lack of common understanding of the application of antitrust law to labour markets: what should be the next steps?

While the lack of common ground among the antitrust authorities in various jurisdictions and academics remains a lingering problem, the antitrust attention over labour markets keeps gaining momentum. Even though the triggering event in terms of scrutiny over labour markets by antitrust law was related to the conduct of high-tech companies in the early 2000s, recent developments have proven that labour market-related anti-competitive agreements span over various sectors. The ongoing investigations and regulation efforts concerning labour markets in different jurisdictions prove that antitrust agencies are trying to minimise potential violations and also sustain legal predictability in this fast-paced environment. On the flip side, businesses and HR professionals must also take the necessary precautions to avoid violations with their labour policies and hiring practices.

A. What could be done? Further steps to establish a framework and other possible solutions

With the increased scrutiny of antitrust law, it is clear that in many jurisdictions, enforcement in labour markets will take place more frequently. As the number of antitrust cases continues to grow, law enforcers and lawmakers must take the matter into their own hands imminently and work with full capacity to establish the framework on the subject. The most prudent and convenient way to achieve this framework could be by publishing new regulations or guidelines to provide guidance to the firms and HR professionals and help them avoid unlawful actions regarding labour markets, rather than pressing on with harsh enforcement/sanctions. Antitrust agencies should make use of their platforms to outline the framework and ground rules, so that the firms, (in-house) HR professionals, in-house counsel and law practitioners may be able to smoothly conduct their labour/HR practices and have legal predictability to calibrate their actions.

As a vital aspect of the labour markets, the framework of geographic scope must also be clarified by the antitrust circles. Parameters such as the qualifications, specific know-how or training of the target employees should be taken into account to determine how broad or limited the geographic scope of a labour market is. Industry locations, scarcity, and availability of the employees (due to their seniority, rank or specialisation), and other legal particularities that affect the mobility of the workers such as visas, residency permits, or other prerequisite factors, are among the parameters to measure the geographic scope of labour markets.

The principles governing competition law enforcement in labour markets could be issued in the form of official guidelines of competition authorities or white/working papers published by international organisations. Such announcements would not only explicitly display the authorities' intentions to enforce competition law in labour markets and allow undertakings to adopt necessary measures to comply with competition law but would also set out the guiding principles to be applied by competition authorities in antitrust cases involving labour markets.

B. Adoption of a common ground among different jurisdictions

While the reach of antitrust arguably remains relatively national, businesses are globalising with their activities, increasing the demand for antitrust bodies to coordinate or at least harmonise their practices/enforcement. Accordingly, a common ground must be established and

[103] Hong Kong Competition Commission, "Advisory Bulletin regarding certain practices in the employment marketplace in relation to hiring and terms and conditions of employment" (2018), available at: *https://www.compcomm.hk/en/media/press/files/20180409_Competition_Commission_Advisory_Bulletin_Eng.pdf*.
[104] Autoridade da Concurrencia, "Best Practices in Preventing Anticompetitive Agreements in Labor Markets" (2021), available at: *https://www.concorrencia.pt/sites/default/files/Best%20Practices_Preventing%20Anti-Competitive%20Agreements%20in%20Labour%20Market_0.pdf*.
[105] TCA, "Rekabet Kurumu Başkanı Birol Küle, İşgücü Pazarlarındaki Rekabetçi Sorunlara Yönelik Olarak Anadolu Ajansı'na Açıklamalarda Bulundu" (2021), available at: *https://www.rekabet.gov.tr/tr/Guncel/rekabet-kurumu-baskani-birol-kule-isgucu-704d8ab983adeb11812e00505694b4c6*.
[106] Competition Bureau Canada, "Guide to the 2022 amendments to the Competition Act" (2022), available at: *https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04671.html#sec03*.
[107] Gönenç Gürkaynak et al., "Competition Law Issues in the Human Resources Field", p.33.

adopted not only by the national-level authorities but also globally, between different jurisdictions. First, a consensus must be reached that antitrust rules and enforcement are indeed potent policy tools to establish and maintain competitive labour markets and address inequality problems.[108] Anti-competitive behaviour and cartels in labour markets should be treated just as any other product market violation since antitrust is "the body of law that addresses problems of market competition and market structure".[109]

Co-operation among antitrust agencies worldwide has tremendous benefits, including efficiency and practicality, which, in turn, contribute to consumer welfare.[110] Accordingly, international antitrust circles must keep in mind the potential struggles that multinational firms may face when employing workers in many jurisdictions, due to the lack of a common ground. Otherwise, these undertakings may inevitably fail in establishing the ground rules for hiring and compensation that would comply with the legal requirements of every jurisdiction they are active in, considering the inconsistencies of different antitrust agencies in terms of labour markets.

Establishing guidelines or publishing white papers would provide much-needed foreseeability for larger multinational companies operating in multi jurisdictions, to help understand whether their practices involving labour markets would violate competition rules of such jurisdictions. In the absence of such guidelines, these undertakings would be left in the dark due to unpredictability and lack of uniformity in rules/regulations and face unexpected antitrust investigation risks for their practices in labour markets, which might lead to grave consequences of antitrust enforcement. Therefore, clear guidelines and a common legal understanding of potential antitrust issues/theories of harm in labour markets would help all relevant stakeholders (e.g., HR professionals, in-house counsel etc.) to comply with such principles in their activities. In other words, building the path solely via decisions of antitrust authorities (which remain discordant) is not sufficient and there is a clear need for announcements on this topic via international/global communication channels (e.g. the EC, International Competition Network, International Chamber of Commerce and OECD, etc.).

On the other hand, considering that competition law enforcement in labour markets in many jurisdictions is still under debate and far from established/settled, the authorities/agencies might be reluctant to commit themselves to certain principles/guidelines before developing their case law in these matters or prefer to at least wait for other agencies/organisations to develop such principles/guidelines. Indeed, since this still arguably remains to be a relatively new area in competition law, hastiness in announcing/publishing the authorities' intentions and guiding principles might also impede the natural development of such authorities' approach towards these matters.

All in all, although there are certain risks of announcing/publishing guidelines and/or white/working papers at a relatively early stage and setting out basic principles to be applied in competition law matters involving labour markets, these efforts would still serve to establish a uniform framework, ensure foreseeability for the undertakings, clarify the authorities' intentions in these markets and pave the way for the agencies to conduct their investigative procedures in a more predictable and fair manner.

Courts and antitrust agencies should focus on employers and their conduct with respect to the labour market, and not just cling to traditional antitrust enforcement where product markets are the main concern. Also, taking it a step further from the current developments on the matter, the attention should not be focused just on the no-poach/no-hire/no-solicit agreements and wage-fixing agreements, but on any kind of sophisticated or complex anti-competitive agreements or conduct, as well as mergers regarding the restriction of labour should be recognised as anti-competitive labour market corruption. The agencies must make it clear that companies that suppress labour markets by collusive behaviour will face the consequences before they are crushed with severe criminal charges and penalties.

Agencies as well as courts must face the reality that the traditional approach to labour markets is inadequate to sustain a healthy, functioning, and effective competition, and they should be open to the developments on the issue by catching up with the latest developments. Additionally, legal academicians/scholars have a lot of catching up to do, considering the imbalance between the amount of legal research devoted to labour market antitrust, and the legal literature available with respect to product market antitrust.[111] As the scholars lay the foundation to the theoretical aspects of the issue and provide guidance to the antitrust circles, enforcement policies are to be developed accordingly.

C. Businesses Adapting to the New Normal

Even though there appears to be a long way to go for antitrust agencies to produce clear guidelines and regulations ensuring that employees are not under the risk of anti-competitive agreements made among competing employers, the businesses should also set their own principles proactively by considering and analysing the competition authorities' precedent concerning labour markets and the trends in competition law on a national level and worldwide.

[108] D.L. Moss, "Antitrust and Inequality: What Antitrust Can and Should Do to Protect Workers", American Antitrust Institute (2017), available at: *https://www.antitrustinstitute.org/work-product/antitrust-and-inequality-what-antitrust-can-and-should-do-to-protect-workers/*.
[109] Posner, *How Antitrust Failed Workers* (2022), p.29.
[110] S.A. Posen, "Remarks as Prepared for Delivery by Acting Assistant Attorney General Sharis A. Pozen at the E-Books Press Conference", US Department of Justice Office of Public Affairs (2012), available at: *http://www.justice.gov/atr/public/speeches/282147.htm*.
[111] Posner, *How Antitrust Failed Workers* (2022), p.124.

First and foremost, the companies could proactively take into account that the employers operating in different sectors and providing different products and/or services could be still considered competitors when it comes to hiring employees for their companies. That means, for the purposes of hiring new employees, companies operating in different markets could not engage in any kind of interactions to reduce competition in terms of employment. Therefore, in the context of labour markets, businesses must be aware that "competitors" are not those entities that compete in the same product or service sectors as them, but businesses that hire the same employees (for instance, two companies that are active in completely different sectors may both be employing IT technicians, therefore, in terms of labour markets, they are competitors).

Considering the typical anti-competitive agreements in labour markets, companies could adapt their compensation and hiring policies and practices to avoid any liability which could be related to no-poaching agreements, exchange of information about wages or any working conditions pertaining to their workers' employment. Compliance trainings are typically customised for the sales and management teams of the companies since typical anti-competitive behaviours such as exchange of commercially sensitive information between competing companies, exclusive supply dealing arrangements, interfering in the resale prices of the dealers, etc. are generally concerns for sales and/or management teams. However, considering the increasing number of investigations by competition authorities in labour markets, HR compliance training could be also added to the companies' agenda immediately. Just like the HR policies preventing any discrimination based on ethnicity, gender, age, and marital status, the companies could also train their HR departments to ensure that no information regarding the applicants' current or historic information on salaries or any working conditions are requested for the purposes of recruitment, since such information might facilitate exercising wage fixing by the companies. In a similar vein, the companies could adopt policies requiring full anonymous job applications in terms of the applicants' current employer (to the extent possible) to avoid any potential allegations regarding no-poaching agreements among employers and any data which might be interpreted as evidence of implied anti-competitive agreements.

IV. Conclusion

The labour markets have faced many anti-competitive agreements and practices resulting in significant direct impacts on employees' working conditions which inevitably affected consumer welfare in a negative way since the start of the millennium. Especially the lack of clear rules and principles in terms of antitrust enforcement over the labour markets has increased the attention to the no-poaching and wage-fixing agreements made among companies.

While the investigations and their consequences in labour markets are erupting in almost every point of the world, antitrust agencies should ideally reach a consensus and common ground regarding the essential principles of antitrust law enforcement in labour markets. In order to clarify their positions regarding antitrust enforcement in labour markets and the main/essential principles to be applied in such matters, competition authorities/agencies should ideally issue/announce guiding principles regarding the application of competition law to labour markets via their own means and/or through international organisations such as the European Commission, International Competition Network, International Chamber of Commerce or Organisation for Economic Co-operation and Development. For the companies, assessing and adjusting their recruitment-related applications merely relying on the case law would not be sufficient and might lead to unpredictable results due to the inconsistencies among the antitrust enforcers around the world. Therefore, to provide employers with legal certainty and, thereby, protect and maintain the proper functioning of labour markets, the competition authorities should issue guiding principles regarding the enforcement of antitrust law. Guidelines, white/working papers and sectoral reports should be used to demonstrate the authorities' approaches and intentions regarding competition law enforcement in labour markets and allow companies to align their compliance policies accordingly.

Even though jurisdictions around the globe are still lacking clear principles and rules to deal with anti-competitive gentlemen's agreements related to labour markets, companies should closely watch for any global developments on this front to be on the safe side, since the antitrust enforcement over labour markets is progressing in full force.[112] Although some still could prefer to argue that in the absence of common understanding and regulations, it would be rather too early for companies to take measures against antitrust- and competition-related concerns in the labour markets, the prudent way would be still to act proactively considering each element of gentlemen's agreements and adjust their HR policies in advance of antitrust agencies and competition authorities setting clean-cut rules on the antitrust enforcement in labour markets. Following all of the rules and principles to be delivered by the enforcers, the companies and their HR practitioners would then be in a position to align their employment principles accordingly and on a global basis, not just striving for compliance in each country separately.

It is rather irrefutable that the adverse outcomes due to the absence of clear rules and principles for antitrust enforcement in labour markets are spreading around the globe in a ripple effect. Therefore, antitrust agencies and competition authorities should ideally consider the issues

[112] OECD, "Competition in Labour Markets" (2020), available at: *http://www.oecd.org/daf/competition/competition-concerns-in-labour-markets.htm*.

regarding anti-competitive practices in the labour markets as the highest priority to protect social and economic aspects as well as the proper functioning of the labour markets.