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No-poach agreements – Closing the enforcement gap

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+ On-Topic

No-poach agreements – Closing the enforcement gap

Antitrust enforcement in labour markets is increasingly gaining momentum, with several competition agencies around the globe, taking action. "Labour antitrust" has been targeted in the US for a while. At the EU member state level, there have also been several investigations and decisions regarding both no-poach and wage-fixing agreements, as well as relevant developments guidance-wise. Agreements between competitors not to hire or not to poach each other's workers can bring distortions of competition and efficiency losses downstream in labour markets, hurting consumers. This trend is expected to continue in the future and will likely contribute to closing the enforcement gap regarding such practices.

Le droit de la concurrence gagne de plus en plus de terrain sur le marché du travail avec des autorités de concurrence prenant des mesures spécifiques à travers le monde. Aux États-Unis, le "Labour antitrust" *est déjà étudié depuis un certain temps. Au niveau des États membres de l'Union européenne, plusieurs enquêtes et décisions ont eu lieu concernant à la fois des accords de non-débauchage et de fixation des salaires entre concurrents ; on a aussi vu plusieurs études pertinentes en matière de "guidance". Ces accords entre concurrents visant à ne pas débaucher les travailleurs peuvent entraîner des distorsions de concurrence importantes sur le marché du travail nuisant* in fine *aux consommateurs. L'intérêt pour ce sujet devrait se renforcer à l'avenir en favorisant une mise en œuvre du droit de la concurrence dans ces pratiques.*

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Foreword

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I. A global wave of interest in competition in labour markets

1. Recently, labour markets have taken centre stage in competition law and policy. This strong focus has been heightened by empirical findings showing a decreasing trend in the share of labour in GDP. At the heart of the debate, there has been a reflection as to the role of competition law in maintaining open and competitive labour markets.

2. This upsurge in the interest of the competition community in labour markets has also revived discussions on monopsony power, which made its way to policy documents and guidelines, particularly in the US, where monopsony-related concerns were further emphasised.

3. The intertwinement between the two debates as to the treatment of labour markets and monopsony power, more generally, is well reflected in the 11th "commandment," or guideline of the US Department of Justice and Federal Trade Commission's Draft Merger Guidelines, released for public consultation in July 2023: "When a Merger Involves Competing Buyers, the Agencies Examine Whether It May Substantially Lessen Competition for Workers or Other Sellers."

4. This special issue focuses on a class of agreements that artificially mimic monopsony power vis-à-vis workers: no-poach agreements, or agreements between firms not to "cold call" or not to hire each other's workers.

II. US – a more longstanding concern

5. Competition in labour markets has been voiced as a priority for the Biden administration, as part of a wider competition policy agenda set out in the 2021 Executive Order.

6. No-poach agreements, in particular, have been in the spotlight in the US for quite a while now. In 2010, the Department of Justice (DOJ) settled an action against several Silicon Valley technology firms, including Google, Apple, Adobe and Intel, for entering bilateral agreements not to poach each other's highly skilled workers, through internal "do not call" and "companies that are off-limits" lists. Empirical literature found that these agreements depressed wages and worsened stock bonuses and ratings of job satisfaction.

7. In 2016, the US agencies, in their Antitrust Guidance for Human Resource Professionals, announced that naked no-poach and wage-fixing agreements would be prosecuted criminally as per se offences to the Sherman Act. The DOJ has since then pursued criminally several such deals and has also been active in civil cases related to no-poach and wage-fixing.

8. In April 2022, the first two criminal trials regarding such agreements—*United States v. Jindal*, a wage-fixing agreement between clinics regarding physical therapists, and *United States v. DaVita Inc.*, a no-poach agreement in the dialysis sector—resulted in acquittals on the antitrust charges. Despite these developments, the DOJ has publicly reiterated its commitment to continuing to criminally prosecute such infringements. Subsequent court outcomes included other acquittals, but also the first criminal conviction for an antitrust infringement in labour markets in *United States v. Hee*. More recently, in September 2023, the first court of appeal decision recognising no-poach agreements can be a per se violation of the Sherman Act was issued. In *Deslandes v. McDonald's*, the Seventh Circuit revived the allegations against McDonald's no-poach provisions restricting franchisees from hiring or poaching each other's workers.

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9. Labour antitrust is not the only front in which the US agencies are seeking to address concerns with monopsony power. There have also been relevant developments regarding merger control. In 2022, the district court blocked the book publisher Penguin Random House's acquisition of Simon & Schuster due to concerns that the deal would reduce compensation for authors. This marked the first merger blocked solely due to a monopsony power theory of harm.

III. EU–relevant developments

10. Labour antitrust has also been garnering attention in Europe. While at the European Commission (EC) level, there are no precedents of decisions that assessed no-poach or wage-fixing agreements as infringements to Article 101 of the Treaty on the Functioning of the European Union (TFEU), in a speech in October 2021, EC Executive Vice-President and Competition Commissioner Margrethe Vestager stated that no-poach agreements are on the EC radar, highlighting that they restrict "*talent from moving where it serves the economy best.*"

11. There have also been relevant developments guidance-wise. In the newly revised guidelines on the applicability of Article 101 TFEU to horizontal co-operation agreements, the EC adds wage-fixing to the non-exhaustive list of agreements restricting competition "by object." Additionally, the Guidelines on collective agreements by solo self-employed people refer to wage-fixing and no-poach agreements as agreements that are outside the scope of the Guidelines, and which could amount to agreements restricting competition "by object."

12. At the Member State level, there are cases of no-poach and wage-fixing that date back a few years, such as the cartel regarding PVC and linoleum floor coverings, sanctioned by the French Competition Authority in 2017 or the cartel involving road transport forwarding agent companies, sanctioned by the Spanish Competition Authority in 2010. These were mostly in the context of wider horizontal conspiracies that involved coordination in other dimensions, such as prices to consumers.

13. More recently, there have been investigations and decisions regarding both no-poach and wage-fixing agreements, including stand-alone infringements, in various EU Member States.

14. In April 2022, the Portuguese Competition Authority (AdC) sanctioned the Portuguese Professional Football League and 31 sports clubs for entering a no-poach deal not to hire footballers who unilaterally terminated their employment contracts for reasons related to the COVID-19 pandemic. The AdC addresses the case as a "by object" infringement, while at the same time addressing the potential harm from the conduct and highlighting that there was no scope for efficiency claims on labour cost savings being passed through to consumers—namely, via cheaper tickets—as games were not allowed stadium audience at the time. The case is currently pending at the court of first instance. Later that year, the AdC issued a Statement of Objections against a business association and a set of private laboratories for agreeing not to hire away workers from each other, within a wider alleged conspiracy involving price fixing in clinical analyses and COVID-19 tests.

15. In December 2022, the Lithuanian Competition Authority fined the Lithuanian Association of Real Estate Agencies and its members for infringing competition "by object" when agreeing not to poach each other's clients and brokers working for them.

16. No-poach agreements have also been targeted by the Belgian Competition Authority (BCA). In July 2023, the BCA issued a Statement of Objections against a set of private security firms for price fixing, exchanging of information and bid rigging, as well as agreeing not to poach each other's employees.

17. There have also been decisions against wage-fixing agreements, as infringements restricting competition "by object" in the sports sector, during the COVID-19 pandemic, namely, the decisions from the Polish and the Lithuanian competition authorities involving the basketball leagues and clubs. In June 2022, the Lithuanian Competition Authority's decision was annulled by the court of first instance. In particular, the court disagreed that the discussions between the clubs involved could be unequivocally qualified as an anticompetitive agreement by object.

18. In terms of advocacy, in 2021, the AdC published an Issues Paper and Best Practices Guide on anticompetitive agreements in labour markets, primarily aimed at headhunters and other HR professionals. These initiatives aimed at raising awareness as to the potential harm brought about by such deals, promoting compliance, and strengthening detection. The strategy has prompted complaints and leniency applications, contributing to closing the perceived enforcement gap regarding such practices.

IV. Mind the gap: Why worry?

19. There are several channels by which no-poach agreements can distort competition in labour markets. Such distortions upstream can then map into distortions of competition and efficiency losses downstream, hurting consumers.

20. In labour markets, these agreements may reduce worker mobility. They may distort "price signals," causing wages to deviate from the competitive equilibria. As a result of price distortions, no-poach agreements

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may decrease the supply of labour if outside alternatives become relatively more attractive. These agreements may also thwart job match quality and lead to allocative inefficiency, for example, by overextending the time workers stay at their employer, preventing the best use of their skills.

21. As noted by the AdC in its Issues Paper from 2021, these distortions can harm competition, efficiency, and consumers in downstream markets, particularly by distorting the allocation of labour input. They may depress wages and, potentially, the quantity of labour employed, which in turn can lead to a decrease in output, an increase in prices or a quality deterioration in downstream markets, to the detriment of consumers. Moreover, if firms are limited in their ability to expand their workforce, they may be restricted in their capacity to expand output, for example, in response to a price increase or a quality reduction by their rivals downstream.

22. No-poach agreements can also hinder innovation, particularly if worker turnover and mobility are important elements of the innovative process. By limiting knowledge spillovers that would otherwise arise in an unrestricted labour market, these agreements might hinder firms' ability to innovate. These potential effects on innovation and competition downstream were at the core of Margrethe Vestager's October 2021 speech, when referring to industries where "*the key to success is finding staff who have the right skills. So in these cases, a promise not to hire certain people can effectively be a promise not to innovate, or not to enter a new market*."

23. No-poach agreements can also assist collusion in downstream markets. In certain market settings, agreements upstream may translate directly into market sharing downstream. It is quite straightforward to think of hypothetical examples as such. If, for example, law firms that are specialised in different law fields agree not to poach each other's workers, they would be fostering specialisation downstream, softening competition and promoting the market's status quo. In a market where customer portfolios and the relationship between customers and their manager are important, an agreement between rivals not to hire away workers from each other would translate into a customer allocation mechanism downstream.

24. Often, these potential harms are met with claims that these agreements may generate efficiencies through savings in labour costs. However, it is important to bear in mind that productivity and wages are jointly determined. Over time, the suppression in wages driven by no-poach or wage-fixing agreements can dampen labour productivity. The reduction in the amount of employment hired, together with a potential decrease in labour productivity, may worsen outcomes for consumers. Furthermore, if wages are fixed, rather than variable costs, then wage reductions will unlikely be passed on to consumers, and thus, unable to meet the criteria set out in Article 101(3) TFEU.

25. There are also arguments that place no-poach agreements as an instrument to protect investment in training. However, there are less restrictive ways to pursue the same objective, such as by envisaging the possibility of repayment of the training costs to the employer upon contract termination. Furthermore, on the other side of the market—workers—wage distortions may hinder employees' incentives to invest in their own qualifications.

V. The road ahead – closing the gap

26. Often, as the debate unfolds, sceptics about competition policy in labour markets ask "Why should we treat labour markets differently from other markets?" However, answering this question makes a strong case for intervening in labour markets, to the same extent as one can intervene in other input markets. Probably more so as, vis-à-vis many other input markets, in labour markets, there may even be less scope for efficiency arguments.

27. Regardless of the debate on the welfare standard, there is little doubt that there is an enforcement gap regarding no-poach and wage-fixing agreements, capable of generating relevant distortions in both labour and downstream product markets. Important steps are being taken by competition agencies globally to narrow this gap, and the trend is expected to continue in the future. ■

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The law and economics of no poach agreements

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I. Introduction

1. In 2005, Apple CEO Steve Jobs wrote an email to Google CEO Eric Schmidt, notifying him that a Google recruiter had contacted an Apple employee. Jobs said: "*I would be very pleased if your recruiting department would stop doing this*." In response, Schmidt acknowledged that the recruiter's contact violated Google's policies and promised that the recruiter would be immediately terminated. Jobs' reply was a simple smile emoticon (":)").

2. This email was just one piece of evidence pointing to bilateral agreements among six Silicon Valley firms prohibiting the recruitment of each other's employees. These types of agreements are often termed "no-poach" agreements, as they forbid companies from soliciting, recruiting, hiring without prior approval, or otherwise competing for employees. As alleged in the Department of Justice's (DOJ) complaint against the six companies, these no-poach agreements reduced the companies' ability to compete for employees and "*disrupted the normal price-setting mechanisms that apply in the labor setting*."[1] The companies eventually settled with the Department of Justice by agreeing to end their no-poach practices, and separately settled with employees who alleged that the practice resulted in diminished employee mobility and lower employee salaries in a follow-on civil class action.[2] DOJ's Antitrust Division (the "Division") later challenged similar agreements between other Silicon Valley technology firms in two separate cases, which resulted in similar settlements.[3]

3. Many no-poach agreements, which restrict workers' labor mobility and competing firms' ability to hire workers, run counter to U.S. antitrust laws. Courts have repeatedly recognized that no-poach agreements generally are subject to per se treatment, where they are illegal without any inquiry into their competitive effects. This treatment is appropriate, as no-poach agreements comprise a horizontal market allocation—or a market allocation between actual or potential competitors—that the Supreme Court has recognized as per se illegal.[4] Courts have recognized that these types of agreements are particularly harmful, as they eliminate or limit competition among rivals across numerous dimensions.[5]

4. Though courts do not examine the economic effects of no-poach agreements when applying per se analysis, there is economic theory showing that no-poach agreements limit hiring competition among employers, resulting in worse worker outcomes such as lower wages and fewer benefits.[6] An emerging body of empirical research confirms these theories, showing that no-poach agreements have detrimental effects on workers and on workers' wages. According to a working paper examining the effects of the no-poach agreements between Silicon Valley firms, these agreements result in a roughly 5% decrease in worker wages.[7] Another study shows that when no-poach practices are discontinued, both wages[8] and job postings increase.[9]

* The views expressed in this article do not necessarily represent the views of the authors' respective organizations.

1 *See* Complaint at 2, *United States v. Adobe Systems, Inc.*, No. 1:10-cv-01629 (D.D.C. Sept. 24, 2010).

2 *See* Final Judgment, *United States v. Adobe Systems, Inc.*, No. 1:10-cv-01629 (D.D.C. Mar. 18, 2011); *see also In re High-Tech Emp. Antitrust Litig.*, 856 F. Supp. 2d 1103 (N.D. Cal. 2012).

3 *See* Final Judgment, *United States v. Lucasfilm Ltd.*, No. 1:10-cv-02220 (D.D.C. May 9, 2011); Final Judgment, *United States v. Ebay Inc.*, No. 5:12-cv-05869 (N.D. Cal. Sept. 2, 2014).

4 *See Palmer v. BRG of Ga., Inc.*, 498 U.S. 46, 49–50 (1990); *United States v. Topco Assocs.*, 405 U.S. 596, 608–12 (1972).

5 Statement of Interest of the United States at 3, *Markson v. CRST Int'l*, No. 5:17-cv-01261-SB (C.D. Cal. July 15, 2022) (citing *Blue Cross & Blue Shield United of Wis. v. Marshfield Clinic*, 65 F.3d 1406, 1415 (7th Cir. 1995)).

6 F. Lafontaine, S. Saattvic and M. Slade, No-Poaching Clauses in Franchise Contracts: Anticompetitive or Efficiency Enhancing? (Apr. 13, 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4404155.

7 M. Gibson, Employer Market Power in Silicon Valley, *IZA Discussion Paper* No. 14843 (Nov. 2021).

8 Lafontaine et al., *supra* note 6.

9 B. Callaci, M. Gibson, S. Pinto, M. Steinbaum and M. Walsh, The Effect of Franchise No-Poaching Restrictions on Worker Earnings, *IZA Discussion Paper* No. 16330 (July 26, 2023).

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5. This article discusses the law and economics of no-poach agreements. Courts' recognition that these agreements are market allocations subject to per se treatment is also reflected in the economic understanding that these agreements in effect allocate labor markets, as one employer is forbidden from hiring away workers from the other employer, just as a producer is forbidden from serving the other producer's customers under a product market allocation agreement. And, as emerging empirical research has shown, these agreements result in lower wages, benefits, and employee satisfaction, confirming their deleterious effects and highlighting the benefits of courts' per se treatment of no-poach agreements and continued antitrust enforcement against these agreements.

II. No-poach agreements under U.S. antitrust law

6. U.S. antitrust law recognizes that certain horizontal restraints are per se unreasonable based on their inherently anticompetitive "*nature and character*."[10] Courts have long held that horizontal conspiracies to divide customers or territories are per se illegal unless defendants establish the ancillary restraints defense.[11] To meet this limited defense, defendants must show that the agreement is (i) subordinate and collateral to a separate, legitimate transaction or collaboration between parties to the agreement (such as a joint venture) and (ii) reasonably necessary to achieve a legitimate, procompetitive objective of the transaction or collaboration.[12] An agreement that meets these requirements is considered "ancillary" and will be assessed under the rule of reason. If not ancillary, the agreement is "naked" and illegal without any inquiry into its competitive effects.

7. Antitrust law applies the same principles to buyers that enter naked horizontal conspiracies to allocate sellers or workers.[13] Because no-poach agreements are a form of horizontal market allocation, courts have acknowledged that they are per se illegal—i.e., illegal without any inquiry into actual anticompetitive effects—unless they meet the requirements of the ancillary restraints defense.[14] Both private plaintiffs and the U.S. antitrust agencies have long advocated for per se treatment of naked no-poach agreements between actual or potential competitors in the labor market.

8. The Division has been at the forefront of analyzing and prosecuting no-poach agreements both civilly and criminally. While many articles trace the Division's initial challenges to no-poach agreements between Silicon Valley firms, the Division's first challenge to no-poach restrictions on employment can be attributed to a civil case occurring more than a decade earlier. The Association of Family Practice Residency Directors (AFPRD) is a not-for-profit corporation whose members comprised roughly 95% of all Family Practice Residency Directors in the U.S. in 1996. That year, the Division brought an enforcement action to stop the AFPRD from using and promulgating guidelines that restricted competition among its members.[15] Through the AFPRD's guidelines, members agreed not to offer contracts to applicants who were current residents in other family practice programs without the knowledge of the other program directors. The Division alleged that the guidelines were per se unlawful under Section 1 of the Sherman Act, as they embodied an agreement among the directors to limit competition. The Division alleged that the conspirators "*restrained price and other forms of competition*" in the recruitment and employment of current family practice residents. In addition, the Division alleged that these practices deprived the affected medical professionals of "*the benefits of free and open competition in recruiting and purchasing their services*."[16] The parties entered into a settlement agreement where AFPRD was enjoined from restraining competition among residency programs for residents, including enjoining prohibitions on direct and indirect solicitation of residents from other programs.[17]

9. The Division again alleged that no-poach agreements were per se violations of the Sherman Act when it brought three separate civil enforcement actions against Silicon Valley technology companies for entering into bilateral agreements not to recruit or solicit each other's employees.[18] The Division's Competitive Impact Statement in *Lucasfilm* discussed the effects of a no-poach agreement between Lucasfilm and animator Pixar, noting that the agreement "*disrupted the competitive market forces for employee talent*" by depriving employees of "*information and access to better job opportunities*."[19] As a result, the agreement "*interfere*[d] *with the proper functioning of the price-setting mechanism that would otherwise have prevailed*."[20] These cases ultimately resulted in settlements with the technology companies that prohibited the companies from continuing no-poach agreements and related activities.

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10 Standard Oil Co. v. United States, 221 U.S. 1, 64–65 (1911).

11 *See* Corrected Brief for the United States of America as Amicus Curiae at 10, *Giordano v. Saks & Co.*, No. 23-600 (2d. Cir. Aug. 7, 2023); *Palmer v. BRG of Ga., Inc.*, 498 U.S. 46, 49–50 (1990); *United States v. Topco Assocs.*, 405 U.S. 596, 608–12 (1972).

12 See Aya Healthcare Servs., Inc. v. AMN Healthcare, Inc., 9 F.4th 1102, 1109 (9th Cir. 2021).

13 See *Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co.*, 334 U.S. 219, 236 (1948); NBA v. Williams, 45 F.3d 684, 687 (2d. Cir. 1995).

14 *See U.S. v. Patel*, No. 3:21-CR-00220, 2022 WL 17404509, at 8–9 (D. Conn. Dec. 2, 2022) (acknowledging that a no-poach agreement was subject to per se treatment because it was properly pled as a market allocation).

15 *See* Complaint, *United States v. Association of Family Practice Residency Doctors*, No. 96-575-CV-W-2 (W.D. Mo. May 28, 1996); *see also* Competitive Impact Statement at 5, *United States v. Lucasfilm Ltd.*, No. 1:10-cv-02220 (D.D.C. Dec. 21, 2010).

16 Complaint at 7, United States v. Association of Family Practice Residency Doctors, No. 96-575-CV-W-2 (W.D. Mo. May 28, 1996).

17 Final Judgment, 1996-2 Trade Cases 71,533, 28894 (W.D. Mo. Aug. 15, 1996).

18 *See* Complaint, *United States v. Adobe Systems, Inc.*, No. 1:10-cv-01629 (D.D.C. Sept. 24, 2010); Complaint, *United States v. Lucasfilm Ltd.*, No. 1:10-cv-02220 (D.D.C. Dec. 21, 2010); Complaint, *United States v. eBay, Inc.*, No. 12-cv-05869 (N.D. Cal. Nov. 16, 2012).

19 Competitive Impact Statement at 8, *United States v. Lucasfilm Ltd.*, No. 1:10-cv-02220 (D.D.C. Dec. 21, 2010).

20 *Id.* at 1–2.

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10. In October 2016, the Division and the Federal Trade Commission issued joint guidance for human resources professionals on issues relating to competition in labor markets.[21] This guidance specifically noted that naked no-poach agreements among employers are per se illegal and that, going forward, the Division would proceed criminally against these agreements. The Division's first criminal charge alleging a no-poach agreement occurred when it charged Surgical Care Affiliates for allegedly agreeing with competitors to forgo soliciting each other's senior-level employees.[22] This case is still pending in federal court.

11. Additional criminal cases followed. In *United States v. DaVita*, the Division prosecuted a kidney dialysis company and its former CEO for entering into conspiracies to allocate employees through agreements with competitors not to recruit one another's employees.[23] Rejecting the defendants' motion to dismiss, the court held that, if proven, the conspiracy at issue would be a per se violation of the Sherman Act given the law's symmetrical treatment of allocating a product market and allocating an employment market.[24] The court acknowledged that "*anticompetitive practices in the labor market are equally pernicious—and are treated the same—as anticompetitive practices in markets for goods and services*."[25] Though a jury ultimately acquitted the defendants on the charged antitrust violations, the court's recognition of no-poach agreements as a horizontal market allocation is a proper reflection of U.S. antitrust law, which has treated equally harms in the product and labor markets. Similarly, in *United States v. Manahe*, where the Division alleged that the conspiracy at issue was a per se violation of Section 1, the court confirmed that this treatment was appropriate at the motion to dismiss stage, concluding "*that the indictment plausibly allege*[d] *a per se illegal conspiracy to fix wages and allocate employees*." The court accordingly denied the defendants' motion to dismiss, though a jury later acquitted the defendants of all antitrust charges.[26]

12. While no-poach agreements are standalone violations of the antitrust laws, these agreements may also be used in concert with other anticompetitive labor market practices. In *United States v. VDA OC LLC*,[27] nurse staffing company VDA OC pleaded guilty to conspiring with a competitor both to allocate nurses via a no-poach agreement and to fix their wages in violation of Section 1 of the Sherman Act. The company was sentenced to pay a criminal fine and restitution for the affected nurses.

13. In *U.S. v. Patel*, the Division indicted six individuals who were employed by a major aerospace company, alleging that the defendants engaged in a years-long conspiracy to suppress competition by allocating employees through no-poach agreements. Ruling on the defendants' motion to dismiss, the court held that the alleged no-poach agreement was subject to per se treatment under Section 1 of the Sherman Act because, viewing the facts in the light most favorable to the government, a reasonable jury could find the defendants guilty of a conspiracy to allocate markets.[28] Despite this ruling, the judge acquitted the defendants at the close of the government's evidence, reasoning that the government had failed to adduce sufficient evidence that the charged no-poach agreement resulted in a "*cessation of 'meaningful competition' in the allocated market*."[29] In a separate case, the Division has asserted that this ruling was wrong "*as a matter of law*," explaining (inter alia) that a horizontal market allocation need not eliminate all meaningful competition to be per se unlawful. In private litigation related to *Patel*, the court held at the motion to dismiss stage that the plaintiff plausibly alleged a per se violation of the Sherman Act without requiring any allegation that the no-poach agreement eliminated all meaningful competition.[30]

14. Courts have considered certain no-poach agreements to be ancillary and therefore not subject to per se treatment. For example, a court found that a non-solicitation agreement between healthcare staffing agencies that were collaborating to supply hospitals and healthcare facilities with traveling nurses was necessary to ensure that each staffing agency would not lose its personnel during the collaboration.[31] Even if ancillary, no-poach agreements among employers are subject to a rule of reason analysis, where they can create civil antitrust liability if the restraints result in significant anticompetitive effects and the potential procompetitive benefits could be achieved by less restrictive means.

15. Ancillarity was a key issue in *Deslandes v. McDonald's*, which involved no-poach clauses contained within McDonald's franchise agreements. Pursuant to these clauses, each franchise operator could not hire any person employed by a different franchise, or by McDonald's itself, until six months after that person ceased working for McDonald's or another franchise. Workers at McDonald's franchises challenged these clauses, alleging that they were per se violations of the antitrust laws. The district court rejected plaintiffs' per se theory, determining that the no-poach clause was ancillary to each franchise

21 U.S. Dep't of Justice, Antitrust Div. and Fed. Trade Comm'n, Antitrust Guidance for Human Resource Professionals (Oct. 2016), https://www.justice.gov/atr/file/903511/download.

22 United States v. Surgical Care Affiliates, LLC et al., No. 3:21-cr-00011-L (N.D. Tex. Jan. 5, 2021).

23 *See* Superseding Indictment, *United States v. DaVita, Inc.*, No. 1:21-cr-00229-RBJ, 2022 WL 266759 (D. Colo. Nov. 3, 2021).

24 *United States v. DaVita Inc.*, No. 1:21-cr-00229-RBJ, 2022 WL 266759, at *9 (D. Colo. Jan. 28, 2022).

25 *Id.* at *3.

26 *United States v. Manahe*, No. 2:22-cr-00013-JAW, 2022 WL 3161781 (D. Me. Aug. 8, 2022).

27 Plea Agreement, *United States v. VDA OC, LLC*, No. 2:21-cr-00098 (D. Nev. Oct. 27, 2022).

28 *United States v. Patel*, No. 3:21-CR-00220, 2022 WL 17404509, at 8–9 (D. Conn. Dec. 2, 2022).

29 Rule 29 Motion, *United States v. Patel*, No. 3:21-CR-00220 (D. Conn. Apr. 28, 2023). When a judge grants a pre-verdict judgment of acquittal, the ruling is unappealable. Conducting a retrial in such situation would violate the Double Jeopardy clause. *United States v. Martin Linen Supply Co.*, 430 U.S. 564 (1977).

30 *Borozny v. Raytheon Techs. Corp.*, No. 3:21-CV-1657-SVN, 2023 WL 348323, at *8 (D. Conn. Jan. 20, 2023), reconsideration denied, No. 3:21-CV-1657-SVN, 2023 WL 3719649 (D. Conn. May 30, 2023).

31 Aya Healthcare Servs., Inc. v. AMN Healthcare, Inc., 9 F.4th 1102, 1109 (9th Cir. 2021).

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agreement, as it expanded output.[32] The Seventh Circuit recently reversed and remanded this ruling, holding that the district court should not have concluded that the per se rule did not apply as plaintiffs' complaint plausibly alleged a horizontal market allocation.[33] In addition, the court held that the district court erred in its treatment of the clause as ancillary, as it (i) allowed the claimed benefits to consumers in the form of increased output to justify detriments to workers and (ii) failed to analyze whether the no-poach clause actually promoted the claimed benefits.[34]

16. Courts' recognition that no-poach agreements that do not meet the limited ancillarity defense are subject to per se treatment reflects the acknowledgment that these agreements—like other types of market allocation agreements—are inherently anticompetitive in "*nature and character*."[35] Though not necessary to show in a courts' per se analysis, economic evidence examining these agreements also points to no-poach agreements' anticompetitive effects. This evidence is discussed in the following section.

III. The economics of no-poach agreements

17. When companies agree not to recruit or hire each other's workers, they reduce competition among employers for the hiring of workers. Economic theory shows that these types of agreements also result in lower wages for workers, a conclusion that was recently corroborated by empirical research.[36] While harm to labor markets is considered a "buy-side" or input harm, labor market harm is analogous to output harm. Like customers paying higher prices as a result of companies agreeing not to compete for each other's customers, workers can receive lower wages or worse benefits as a result of no-poach agreements.

18. In a perfectly competitive labor market, firms pay workers wages equal to the marginal revenue product of labor, i.e., the value that an additional worker adds to the firm's revenue. Both firms and workers are wage-takers, as the wages are set by the market. If a firm in the market were to offer a lower wage, workers would seek employment with other firms in the market paying the market wage. Workers in perfectly competitive markets are not incentivized to seek work elsewhere, as firms would all offer the market wage.

19. Many labor markets are not perfectly competitive. In fact, as recent research has shown, they are often far from it. Many labor markets are highly concentrated[37] and marked by employers with high degrees of labor market power, which allows these employers to pay workers less than their marginal revenue product of labor.[38] Besides concentration, job differentiation is another source of imperfect competition in labor markets. Jobs can vary across many dimensions, including geography, work flexibility, and skill set. Workers each value these dimensions differently and cannot costlessly substitute between jobs. In particular, workers who live closer to a job prefer this job to others, all other things equal. Such job differentiation allows employers to pay workers less than their marginal revenue product.[39] Finally, a third source of labor market power is search and matching frictions. Due to these frictions, workers cannot instantaneously meet all employers. When workers receive a job offer, they may rationally decide to accept the offer—even if the wage is below the workers' marginal revenue product—because otherwise they would have to go back on the market and search again with uncertain prospects for finding another job.[40]

20. No-poach agreements distort labor market competition through a variety of mechanisms. In particular, they limit the number of firms competing to hire certain types of employees, and they restrict labor market mobility. And, unlike agreements between employers and their workers—such as non-competes—no-poach agreements between competitors are often unannounced and done in a clandestine manner. Because workers are not aware of no-poach agreements, they are unable to negotiate compensation for the constraint (the "compensating differential").[41]

21. No-poach agreements inherently reduce the number of firms vying for a particular worker and reduce competition among employers for specific types of workers. By eliminating or restricting a source of alternative employment, these agreements increase the level of employer concentration a worker effectively faces when seeking a new job opportunity. As a result, firms amass market power and obtain the ability to reduce wages below the level that would have prevailed in the absence of the no-poach agreement.

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32 *Deslandes v. McDonald's USA, LLC*, No. 17 C 4857, 2018 WL 3105955, at *7 (N.D. Ill. June 25, 2018), vacated and remanded sub nom. *Deslandes v. McDonald's USA, LLC*, Nos. 22-2333 & 22-334, 2023 WL 5496957 (7th Cir. Aug. 25, 2023).

33 *Deslandes v. McDonald's USA, LLC*, Nos. 22-2333 & 22-334, 2023 WL 5496957 (7th Cir. Aug. 25, 2023).

34 Id.

35 Standard Oil Co. v. United States, 221 U.S. 1, 64–65 (1910).

36 Lafontaine et al., *supra* note 6.

37 *See*, e.g., J. Azar, I. Marinescu and M. Steinbaum, Labor Market Concentration, 57 *J. Hum. Res.* S167 (2022) (using job postings to calculate an average Herfindahl-Hirschman Index (HHI) of 3,157—far above the U.S. antitrust agencies' "highly concentrated" threshold).

38 *See*, e.g., C. Yeh, C. Macaluso and B. Hershbein, Monopsony in the US Labor Market, 112 *Am. Econ. Rev.* 2099 (2022) (estimating that workers at the average manufacturing plant earn 65% of their marginal revenue product of labor); J. A. Azar, S. T. Berry and I. Marinescu, Estimating Labor Market Power, *National Bureau of Economic Research Working Paper* No. 30365 (2022), https://doi.org/10.3386/w30365 (estimating that workers are paid 83% of their marginal revenue product); K. Kroft, Y. Luo, M. Mogstad and B. Setzler, Imperfect Competition and Rents in Labor and Product Markets: The Case of the Construction Industry, *National Bureau of Economic Research Working Paper* No. 27325 (2020), https://www.nber.org/papers/w27325 (estimating a markdown of 20% for the US construction industry).

39 Azar et al., Estimating Labor Market Power, *supra* note 38.

40 K. Burdett and D. T. Mortensen, Wage Differentials, Employer Size, and Unemployment, 39 *Int'l Econ. Rev.* 257 (1998).

41 O. Kini, R. William and S. Yin, CEO Noncompete Agreements, Job Risk, and Compensation, 34 *Rev. Fin. Stud.* 4701 (2021).

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22. In a labor market without restrictive covenants where firms compete against other employers for talent, firms seeking to hire away workers will typically offer higher wages, and current employers may increase wages to keep their employees. No-poach agreements eliminate these offers and counteroffers that push wage levels higher.[42] In the absence of competing offers, workers' wages will stagnate or remain artificially low. As a result, some workers will be forced out of the labor market or may move to markets where they are less productive. This may result in lower output and higher consumer prices.

23. Employers often enter into no-poach agreements with the goal of reducing employee turnover, particularly for jobs where specific training or skills are prevalent; however, no-poach agreements are not the only tactic available for reducing turnover. Alternatives include incentivizing current workers to remain at the firm with better terms.

24. No-poach agreements may also affect the elasticity of labor supply, which measures how strongly workers react when wages change. When the labor supply elasticity is relatively low, a small decrease in wages will not result in a large decrease in the number of workers who are willing to work for the firm. As a result, the firms can wield greater wage-setting power. If no-poach agreements play an important role in labor markets, the resulting reduced labor mobility may contribute to explaining the low labor supply elasticity estimated in the economics literature.[43]

25. It is difficult to discern the pervasiveness of no-poach agreements between firms, as they are often secret, "handshake" agreements between executives. However, in the case of franchises, no-poach agreements are often detailed in the franchise agreements themselves, making them ripe for empirical study. In addition, recent studies have also found ways to empirically examine non-franchise no-poach agreements.

26. Until recently, the prevalence of no-poach agreements was unknown. Recent empirical evidence examining franchise agreements shows that no-poach agreements were prevalent as of 2016. Krueger and Ashenfelter (2022) find that 58% of franchising agreements for 156 of the largest franchise chains in the U.S. in 2016 contained no-poach provisions.[44] Using data that spans a longer time period, Norlander (2023) reviews over 17,000 franchise disclosure filings from 2011 to 2022 and finds that 25% contain no-poach clauses.[45] These results track public news regarding no-poach agreements, which suggests that their incidence has declined over time. In 2018, many franchises reportedly discontinued their use of no-poach clauses in standard franchise contracts due to increased scrutiny, particularly by state attorneys general.[46]

27. No-poach agreements can have significant effects on worker wages and employment outcomes. A study examining the effects of no-poach agreements on Silicon Valley company employees treats the DOJ's prosecution of these firms as a "natural experiment" that nullified the agreements and compares workers' salaries between colluding and non-colluding firms. The results show that no-poach agreements reduced salaries at colluding firms by 4.8%.[47] The study also reports that employees reported lower stock bonuses and decreased job satisfaction when no-poach agreements were in effect.

28. There is some empirical evidence that suggests eliminating no-poach agreements leads to better worker outcomes. In 2018, Washington Attorney General Bob Ferguson implemented his No-Poach Initiative, a two-year project that ended the use of illegal no-poach clauses in franchise agreements at all chains that operated in Washington. Economists studying this enforcement campaign found that companies subject to the initiative offered a roughly 6% increase in job postings overall when compared to companies that were not part of the initiative.[48] Workers for companies subject to the initiative also saw a 4% increase in earnings. Other papers focusing on the removal of no-poach provisions similarly find positive effects on worker earnings.[49]

29. Taken as a whole, the theoretical and empirical research on no-poach agreements depicts their detrimental effects on labor market competition and confirms these agreements' symmetry with market allocation in output markets.

IV. Conclusion

30. Both economics and antitrust law recognize a symmetry between the harms that can result from allocating input and output markets alike. This symmetry is most visible in courts' recognition that no-poach agreements between actual or potential competitors are generally per se illegal. While per se treatment does not require inquiry into an agreement's potential competitive effects, emerging empirical evidence shows that no-poach agreements can result in significantly worse outcomes for workers, including lower wages and worse job satisfaction. This research demonstrates that per se enforcement of no-poach clauses under antitrust law may result in procompetitive benefits. ■

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42 F. Postel-Vinay and J.-M. Robin, The Distribution of Earnings in an Equilibrium Search Model with State-Dependent Offers and Counteroffers, 43 *Int'l Econ. Rev.* 989 (2003).

43 Azar et al., Estimating Labor Market Power, *supra* note 38.

44 A. B. Krueger and O. Ashenfelter, Theory and Evidence on Employer Collusion in the Franchise Sector, 57 *J. Hum. Res.* S324, S325 (2022).

45 P. Norlander, New Evidence on Employee Noncompete, No-Poach, and No-Hire Agreements in the Franchise Sector (Apr. 13, 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4342586.

46 *See*, e.g., R. Abrams, 8 Fast Food Chains Will End 'No-Poach' Policies, *N.Y. Times* (Aug. 20, 2018), https://www.nytimes.com/2018/08/20/business/fast-food-wages-no-poach-franchisees.html.

47 Gibson, *supra* note 7.

48 Callaci et al., *supra* note 9.

49 Lafontaine et al., *supra* note 6.

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No-poach antitrust litigation in the United States

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1. No-poach (or, sometimes, "anti-poach" or "no-hire") agreements are agreements between firms not to hire away each other's employees. They are typically agreements between labor-market competitors; they often appear as clauses in franchise agreements. In the last several years, no-poach agreements have been challenged in criminal and civil antitrust cases. These cases raise new questions about the operation of antitrust law in labor market disputes.

2. While the application of antitrust to labor markets has long been settled in U.S. law,[1] the recent wave of no-poach cases can be traced back to the 2010 Department of Justice (DOJ) lawsuit against Apple, Google, and other major Silicon Valley companies, which were accused of agreeing not to poach one another's software engineers.[2] The egregious behavior of leading executives of the tech companies, which would today likely have spurred criminal indictments, led the DOJ and the Federal Trade Commission (FTC) to issue a Human Resource Guidance in 2016 that warned employers that no-poach agreements would thenceforth be prosecuted criminally as well as civilly.[3]

3. "No-poach" is an umbrella term that refers to a variety of restraints on hiring. The Silicon Valley companies agreed not to cold call competitors' employees but apparently allowed cartel members to hire workers who took the initiative to apply for a job at a competing firm. Such agreements may also be called "non-solicitation" agreements. Firms can also agree not to compete at the entry level. A related but distinct employment restraint is the covenant not to compete, which is an agreement between the employer and the employee that forbids the employee from obtaining a job with a competitor for a period of time after leaving the employer. Noncompetes are vertical agreements, but they operate similarly to no-poach agreements if competing firms agree to require their employees to sign noncompetes.

4. The recent wave of no-poach cases can be divided into two broad categories: "naked" horizontal agreements between unrelated competing employers that agree not to poach each other's employees, and more complex relationships between employers that belong to a common franchise or other venture in which a no-poach agreement composes a part. We take each category in turn.

I. Naked no-poach agreements

5. In the Silicon Valley litigation, the DOJ alleged that agreements restricting firms from recruiting one another's employees were per se unreasonable, based on settled doctrine that the per se rule applies to naked horizontal restraints.[4] While the parties reached a consent decree on the same day the DOJ filed its complaint, a subsequent class action led to a judicial opinion.[5] A court in the Northern District of California rejected various defenses and recognized the basic antitrust logic of a no-poach claim. Sufficient overlap in the agreements and board membership of the defendants established a plausible allegation of conspiracy. By preventing salaries from increasing and restricting mobility in the labor market, the no-poach agreements inflicted the type of injury that the antitrust laws were aimed at remedying. The class action plaintiffs eventually settled. A similar set of issues was resolved in the same way in *United States v. eBay, Inc.*[6]

1 *Anderson v. Shipowners' Ass'n*, 272 U.S. 359 (1927). The Supreme Court recently reaffirmed the law in *National Collegiate Athletic Ass'n v. Alston*, 141 S. Ct. 2141 (2021).

2 Complaint, *U.S. v. Adobe Systems, Inc.*, No. 1:10-cv-01629 (D.D.C. Sept. 24, 2010).

3 U.S. Dep't of Justice, Antitrust Div. and Fed. Trade Comm'n, Antitrust Guidance for Human Resource Professionals (Oct. 2016), https://www.justice.gov/atr/file/903511/download.

4 Complaint, *supra* note 2, at 5.

5 *In re High-Tech Emp. Antitrust Litig.*, 856 F. Supp. 2d 1103 (N.D. Cal. 2012).

6 *U.S. v. eBay, Inc.*, 968 F. Supp. 2d 1030 (N.D. Cal. 2013).

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6. As the court recognized, the "naked" no-poach agreement fits easily in antitrust doctrine despite the rarity of prior cases involving labor market cartelization. Labor markets operate through competition among employers for workers. Through the competitive process, employers bid up wages to the marginal revenue product, drawing workers into the labor market. In the absence of competition, employers would pay workers below their marginal revenue product. Because the wage is below the rate at which some workers are willing to work, they drop out of the labor market. Normally, this would cause output to fall as well. A no-poach agreement blocks competition at the lateral level, preventing workers from moving to firms where they are more valued and reducing their bargaining power in the firms where they remain employed. While competition continues at the entry level, workers' productivity varies with time, resulting in separate employment markets at different levels of tenure.

7. The criminal investigations of no-poach agreements led to several indictments and trials. For example, *United States v. Manahe* involved no-poach agreements as well as wage-fixing in the home healthcare market,[7] and *United States v. Patel* involved no-poach agreements between an aerospace design company and its suppliers.[8] The courts recognized that parties that entered no-poach agreements could be held criminally liable and rejected defendants' motions to dismiss. But the government was ultimately unsuccessful on its antitrust claims in all three cases, and related cases as well, because of adverse jury verdicts or, in the case of *Manahe*, a judgment for the defendant on a motion for acquittal.

8. The *Manahe* court relied on an older case, *Bogan v. Hodgkins*, which conditioned antitrust liability on a horizontal market allocation having a "meaningful" impact on competition in the relevant market.[9] The court in *Manahe* held that since the no-poach agreements allowed workers to transfer under certain conditions, the court found that there was no meaningful cessation of competition (as opposed to, for example, an agreement that prevented transfers in any circumstances).[10]

9. *Bogan v. Hodgkins* involved an insurance company that hired independent contractors through a hierarchical structure.[11] Agents at the top of the structure entered into no-poach agreements—which eventually became company policy—with one another; subordinates could transfer between those controlling agents only with their consent. The district court granted summary judgment, finding that the agreements would enhance interfirm competition, but the plaintiff in *Bogan* appealed on the grounds that the restraint was per se illegal, or illegal under quick look review, which is applied when restraints are suspect. The Second Circuit held that only "established" per se categories of conduct, like price fixing, were subject to the per se rule. The agreements in *Bogan* permitted transfers with consent of the agent; while they imposed constraints on employee mobility, the court found partial constraints insufficient to trigger per se analysis. The court noted that even an interfirm agreement of this form would have been subject to rule of reason analysis because the "*anticompetitive effect on the market* [was] *not obvious*," in part due to the plaintiff's failure to plead a relevant market.[12] The holding of *Bogan*, which paradoxically appears to require plaintiffs to prove market power in order to obtain per se review, has been a stumbling block in other no-poach cases as well.[13] There is, however, no theoretical basis for denying per se treatment to no-poach agreements that are less than complete; that is not the rule in product market cases, where it has long been understood that any direct, naked restraint on competition, even if partial, is per se illegal. The *Bogan* court did not explain why labor markets should be treated differently from product markets.

10. Another criminal case was *United States v. DaVita Inc.*, where the defendant and his dialysis provision company were alleged to have entered into no-poach agreements with a competitor.[14] Echoing *Bogan*, the court refused to categorize no-poach agreements as a new category of per se violation. It argued that no-hire agreements had not been consistently found anticompetitive; without judicial experience and a showing of consistent anticompetitive effects, there was no justification to create a new per se category. The only grounds for per se treatment were through analogy, not through creating a new category of per se violation; and thus, the plaintiffs must prove a meaningful constraint, which may require showing an anticompetitive effect. While plaintiffs succeeded on the motion to dismiss, the defendants were acquitted by a jury.

11. Another court applied the per se rule to naked no-poach agreements in *Markson v. CRST International, Inc.*[15] Plaintiffs were truck drivers who worked for the defendants' trucking company, which was alleged to have entered into no-poach agreements with competing trucking companies. Any employee who had completed CRST's driver training program was subject to the no-poach agreement, which, according to the plaintiffs, reduced wages and employment mobility. The court held that plaintiffs had adequately alleged facts to support per se treatment of the agreements at issue—namely, showing horizontal market allocation agreements which were "*generally treated as per se antitrust violations*."[16]

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7 *U.S. v. Manahe*, No. 2:22-cr-00013, 2022 WL 3161781 (D. Me. Aug. 8, 2022).

8 *U.S. v. Patel*, No. 3:21-cr-220, 2022 WL 17404509 (D. Conn. Dec. 2, 2022).

9 Ibid. at *5 (citing *Bogan v. Hodgkins*, 166 F.3d 509, 515 (2d Cir. 1999)).

10 Ibid. at *10. A class action was also brought based on the facts in *Patel*, which survived the motion to dismiss stage. *Borozny v. Raytheon Techs. Corp.*, No. 3:21-CV-1657, 2023 WL 348323 (D. Conn. Jan. 20, 2023). There, cessation of competition was satisfied due to the lack of available jobs for plaintiffs. Ibid. at *8.

11 *Bogan v. Hodgkins*, 166 F.3d at 511.

12 Ibid. The court also denied a quick look analysis because the defendant sufficiently alleged that the agreement was not a naked restriction. Ibid. at 514 n. 6.

13 *See*, e.g., *U.S. v. DaVita Inc.*, No. 1:21-cr-00229-RBJ, 2022 WL 266759 (D. Colo. Jan. 28, 2022); *Patel*, 2022 WL 17404509; *Borozny*,2023 WL 348323; *Giordano v. Saks Inc.*, No. 20-CV-833 (MKB) 2023 WL 1451534 (E.D.N.Y. Feb. 1, 2023).

14 *DaVita*, 2022 WL 266759.

15 *Markson v. CRST Int'l*, Inc., No. 5:17-cv-01261-SB-SP, 2021 WL 1156863 (C.D. Cal. Feb. 10, 2021).

16 Ibid.

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12. In *Giordano v. Saks Incorporated*, retail conglomerate Saks and a number of luxury brands ("brand defendants") entered into no-poach agreements, where brand defendants were forbidden to poach Saks employees unless their current managers consented or the employee had left Saks at least six months prior.[17] The court held that a no-poach agreement could give rise to an allegation of conspiracy. However, the court refused to view the agreement as a naked market allocation subject to per se analysis, finding instead that it was ancillary to a procompetitive venture. The court apparently believed that Saks would not train employees to sell the brands if the brand defendants could hire away those employees. However, it should have put the burden on the defendants to prove this argument. The court also rejected quick look analysis, holding that there was insufficient judicial experience with no-hire agreements to justify a quick look standard.[18] The court lastly turned to the question of rule of reason analysis, and dismissed the claim because the plaintiff did not allege an adequate market.

13. In *Hunter v. Booz Allen Hamilton, Inc.*, contracted workers brought a complaint against their employers, contracting companies that worked for the Defense Intelligence Agency.[19] The Agency hires contractors to provide intelligence reports to the Department of Defense. Defendants, jointly located on a British air force base, had a history of competing for skilled contractors in the area. However, they entered into no-poach agreements with each other that prevented hiring contractors who worked for a competitor located on the air force base. Plaintiffs alleged that these agreements reduced job mobility for workers, and suppressed wages. While the court denied defendants' motion to dismiss on the grounds that plaintiffs had adequately alleged an agreement that substantially reduced competition for labor, it also declined to take a stance on what the appropriate standard to evaluate the alleged violation would be. This case ended in settlement.[20]

14. The cases involving naked no-poach agreements show the courts struggling over the question whether no-poach agreements should be subject to the usual per se rule or a qualified version that requires plaintiffs to show not only that the employers had agreed not to poach workers but had successfully reduced transfers and wages. The latter approach has no basis in traditional antitrust doctrine, which requires proof of agreement only in the case of naked horizontal agreements. Nor have the courts that have adopted this approach explained why a weaker standard is appropriate for labor markets. As the tradition in antitrust law is to treat all markets the same, and there is no theoretical or economic basis for treating labor and product markets differently,[21] the latter approach is wrong.

17 *Saks*, 2023 WL 1451534.

18 Ibid. The court also referred to the procompetitive justification in finding quick look inappropriate.

19 *Hunter v. Booz Allen Hamilton, Inc.*, 418 F. Supp. 3d 214, 218 (S.D. Ohio 2019).

20 *Hunter v. Booz Allen Hamilton Inc.*, No. 2:19-CV-00411, 2023 WL 3204684 (S.D. Ohio May 2, 2023).

21 *See* E. A. Posner, The New Labor Antitrust (Sept. 2023), https://ssrn.com/abstract=4575258, for a discussion.

II. Franchise no-poach agreements

15. A group of cases against franchise no-poach agreements was inspired by an academic study by Alan Krueger and Orley Ashenfelter, which was first circulated in 2017.[22] Krueger and Ashenfelter discovered that 90 out of a sample of 156 franchise contracts used by large companies contained a no-poach clause. Their study led to lawsuits by the state governments, which most franchises settled by dropping the clauses, and private litigation, which is ongoing. Follow-on academic research indicates that the elimination of clauses resulted in higher wages, implying that the clauses were indeed anticompetitive in effect.[23]

16. Franchise cases and related cases in which a no-poach agreement advances a larger cooperative venture are more complex than cases involving naked restraints. Defendants typically argue that the restraint is necessary to protect investments in training or benefits for consumers—echoing arguments made in traditional joint venture cases.[24] For example, in *Deslandes v. McDonald's USA, LLC*, a class action lawsuit involving no-poach clauses in McDonald's franchise agreements, the defendant argued that the restraints encouraged franchisees to invest in training restaurant workers and to improve service for customers. [25] Antitrust theory and law have traditionally permitted such arguments only when the benefit is enjoyed by those in the market in which the restraint operates—workers, not consumers. That rules out the argument that restraints might result in better service. In principle, the restraints could be defended on the ground that they protect investments in training, in which case they should result in higher, rather than lower, wages for employees.

17. The lead plaintiff in this class action was an employee of a McDonald's franchise who sought employment at a higher-paying McDonald's restaurant. Her application was initially accepted on the merits, but then rejected on account of the no-poach agreement. The district court dismissed the complaint, holding that the rule of reason applied because the restraint was ancillary to the franchise and the plaintiffs failed to allege a plausible labor market. The problem facing the plaintiff was that substitute occupations involving the same skills and similar tasks were difficult to identify, and a market consisting of only McDonald's employees was regarded as implausibly

22 A. B. Krueger and O. Ashenfelter, Theory and Evidence on Employer Collusion in the Franchise Sector, 57 *J. Hum. Res.* S324 (2022).

23 F. Lafontaine, S. Saattvic and M. Slade, No-Poaching Clauses in Franchise Contracts: Anticompetitive or Efficiency Enhancing? (Mar. 2023), https://papers.ssrn.com/abstract=4404155; B. Callaci, M. Gibson, S. Pinto, M. Steinbaum and M. Walsh, The Effect of Franchise No-Poaching Restrictions on Worker Earnings (July 2023), https://ssrn.com/abstract=4155577.

24 See, e.g., Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1 (1979).

25 *Deslandes v. McDonald's USA, LLC*, No. 17 C 4857, 2018 WL 3105955 (N.D. Ill. June 25, 2018).

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narrow by the court. The Seventh Circuit Court of Appeals reversed in an opinion that is likely to be influential in further franchise litigation.[26]

18. First, the court held that the district court properly rejected the complaint's allegation that McDonald's workers could compose a relevant market given that McDonald's workers could switch among other fast-food restaurants within a few miles of the plaintiffs' homes. The court apparently believed that it was not plausible under prevailing standards for a motion to dismiss to argue that workers acquired franchise-specific skills or relationships that raised switching costs. In future litigation, plaintiffs' lawyers would do well to educate courts on the difficulty that many workers face in switching jobs or commuting even short distances.[27]

19. Second, the court held that the restraint was horizontal because it applied to relationships between franchisees and restaurants directly owned by McDonald's. The court did not reach the question of whether restraints that run only from a franchisor that does not operate restaurants to franchisees are subject to the per se rule on a "hub-and-spoke" theory. That question has been the subject of litigation elsewhere and likely will continue to be a matter of dispute.[28]

20. Third, the court held that the district court erred by finding that the restraint was ancillary because it appeared in a franchise contract that may have expanded the output of restaurant meals. This was an important error: labor markets and product markets are different markets, and, as noted above, antitrust law prohibits cross-market balancing. This approach "*treats benefits to consumers (increased output) as justifying detriments to workers (monopsony pricing). That's not right; it is equivalent to saying that antitrust law is unconcerned with competition in the markets for inputs, and* Alston *establishes otherwise*."[29] The court further noted that the restraint would not necessarily increase output.

21. Fourth, the court acknowledged that a no-poach clause could be lawful as an ancillary restraint if it was necessary to protect investments in training. Presumably, this is true only in the context of a franchise, where the restaurants share "*layout, tasks, and so on*."[30] But then the district should not have required the plaintiffs to plead market power and should not have dismissed the complaint because plaintiffs did not. The allegations made out a plausible theory of naked collusion; a defense that showed that the no-poach clauses were subordinate and reasonably necessary to protect procompetitive training investment would have to await trial, and the defendants would bear the burden of proof.[31]

22. Despite its first holding, the Seventh Circuit's opinion squarely endorses labor market antitrust, in tension with the qualified endorsement in *Bogan*.

23. Another court of appeals slapped down a district court's labor market skepticism. In *Arrington v. Burger King Worldwide, Inc.*,[32] defendants participated in a franchise structure similar to McDonald's: franchisees were asked to sign agreements restricting the hiring of any Burger King employee for at least six months after leaving another Burger King restaurant, franchise or standalone. The district court granted defendants' motion to dismiss on the grounds that a franchise structure was a single entity, and thus could not engage in the concerted action Section 1 requires. The Eleventh Circuit rejected this argument. Burger King and its franchisees had different economic interests: in hiring employees, the companies would compete by offering different compensation and benefits packages. Because the no-poach agreement involved concerted activity, they could give rise to liability.

24. An important ancillary restraints case that occurred outside the franchise context is *Aya Healthcare Services, Inc. v. AMN Healthcare, Inc.*[33] The parties were healthcare staffing agencies that placed travel nurses in hospitals. When AMN was unable to satisfy its clients' demand, it subcontracted requests for nurses to Aya. As part of the subcontracting agreement, Aya entered into a non-solicitation provision under which it could not poach travel nurses from AMN. Aya later violated the provision, AMN terminated the contract, and Aya brought suit alleging a Section 1 violation. While the court agreed that the restraints were horizontal, it found them to be ancillary rather than naked and thus subject to the rule of reason. A horizontal restraint must meet two requirements to be ancillary: first, it must be subordinate to a separate and legitimate transaction; second, it must be at least reasonably necessary to achieve the transaction's procompetitive purpose. Aya argued that the no-poach provision was unnecessary to the subcontracting agreements and that its duration extended beyond the joint collaboration. The court disagreed, holding that the provision protected AMN's workforce and would encourage AMN to continue subcontracting, which would stimulate competition in the healthcare staffing industry. The court's rejection of the duration argument was unpersuasive and in tension with holdings in other ancillary restraint cases. Applying the rule of reason, the court held that plaintiffs failed to show harm to competition in the relevant market—that of hospitals competing for labor.

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26 *Deslandes v. McDonald's USA, LLC*, 81 F.4th 699 (7th Cir. 2023).

27 *See*, e.g., T. Ransom, Labor Market Frictions and Moving Costs of the Employed and Unemployed, 57 *J. Hum. Res*. S137 (2022).

28 *Compare Butler v. Jimmy John's Franchise, LLC*, 331 F. Supp. 3d 786, 789 (S.D. Ill. 2018) (recognizing hub-and-spoke theory), *with Ogden v. Little Caesar Enters., Inc*., 393 F. Supp. 3d 622 (E.D. Mich. 2019) (rejecting hub-and-spoke theory).

29 *Deslandes*, *supra* note 26, at 703. The reference is to *National Collegiate Athletic Ass'n v. Alston*, 141 S. Ct. 2141 (2021), which reaffirmed that antitrust law applies to labor markets.

30 Ibid. at 704.

31 As the concurrence emphasizes, and which seems to be the view of the majority opinion, which questions the national scope and lengthy duration of the no-poach clauses.

32 *Arrington v. Burger King Worldwide, Inc.,* 47 F.4th 1247 (11th Cir. 2022).

33 *Aya Healthcare Servs., Inc. v. AMN Healthcare, Inc.,* 9 F.4th 1102, 1105 (9th Cir. 2021).

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25. Horizontal no-poach provisions among parties were also challenged in *State by Raoul v. Elite Staffing, Inc.*[34] Three staffing agencies that provided workers to a construction contractor agreed not to poach one another's employees. The contractor coordinated enforcement of the agreements by informing staffing agencies if their employees switched jobs. The court held that the per se rule applied: coordination of a horizontal restraint by a vertical party does not transform the restraint into a vertical one. Unlike the facts in *Aya*, the restraint did not advance a procompetitive venture.

III. Conclusion

26. No-poach litigation is just one type of case in the recent wave of labor-related antitrust litigation in the United States. The broader litigation trend reflects academic research and methodological advances that have established that labor market imperfections are widespread rather than (as previously believed) rare. It also reflects worries about growing income inequality and exploitation of workers.[35] Alongside the no-poach cases, plaintiffs have sued employers for fixing wages under Section 1,[36] and for maintaining labor market power by using exclusionary labor contracts (for example, noncompetes) under Section 2.[37] The DOJ also brought a criminal action against a defendant for wage-fixing, alleging that he had conspired with the owners of therapist staffing companies to lower the wages paid to their contractors, though its antitrust claim was rejected by a jury.[38] The Justice Department recently blocked a merger between commercial publishers based on its labor market effects,[39] and the FTC filed an objection to a merger between hospitals because of its impact on labor markets.[40] The two agencies have recently issued draft merger guidelines that include a new section that addresses the labor market impacts of mergers.[41] Labor antitrust is on its way to becoming an established practice within antitrust enforcement. ■

34 *State by Raoul v. Elite Staffing, Inc.*, 210 N.E.3d 188, 191 (Ill. App. 1 Dist. 2022). The state also brought a claim alleging wage-fixing agreements.

35 *See* E. A. Posner, *How Antitrust Failed Workers*, Oxford University Press, 2021.

36 *Jien v. Perdue Farms, Inc.*, No. 1:19-CV-2521-SAG, 2020 WL 5544183 (D. Md. Sep. 16, 2020).

37 *Le v. Zuffa, LLC*, No. 2:15-cv-01045-RFB-BNW, 2023 WL 5085064 (D. Nev. Aug. 9, 2023).

38 *U.S. v. Jindal*, No. 4:20-cr-00358, 2021 WL 5578687, at *1–2 (E.D. Tex. 2021).

39 *U.S. v. Bertelsmann SE & Co. KGaA*, No. 21-2886-FYP, 2022 WL 16949715 (D.D.C. Nov. 15, 2022).

40 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 37 (Sept. 11, 2020), https://www.ftc.gov/news-events/news/press-releases/2020/09/ftc-staff-submits-public-comment-texas-opposing-certificate-public-advantage-applications.

41 U.S. Dep't of Justice & Fed. Trade Comm'n, Draft Merger Guidelines for Public Comment (July 18, 2023), https://www.regulations.gov/document/FTC-2023-0043-0001.

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Emerging insights on antitrust issues in labor markets: Growing international enforcer concern for worker welfare

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I. Introduction

1. Around the world, antitrust issues in labor markets are high on antitrust agencies' enforcement agenda, with a growing number of competition authorities beginning to initiate investigations into various forms of employment-related arrangements.

2. The US authorities have an undisputedly pioneering role in this field, recently culminating in the US Federal Trade Commission (FTC) taking the unprecedented step of proposing a rule to completely ban virtually all employer-employee non-compete agreements.[1] Although antitrust enforcement by the European Union (EU) remains timid[2] since Commissioner Vestager stressed in 2021[3] that the European Commission (the "Commission") would be vigilant against this type of anticompetitive behavior, European national competition authorities (NCAs) are beginning to make progress in this area where competition law and labor law meet.[4]

3. While in the US, concern for labor market effects has broadened beyond impacts on horizontal competition to concern for the welfare of laborers themselves, in Europe, at least currently, the increasing attention of competition authorities around labor markets is predominantly linked to the anticompetitive effects that employment-related arrangements might have on competition, rather than a need to protect workers. For example, in her speech dated October 2021, Commissioner Vestager underlined that no-poach agreements may constitute a threat to

* Any views expressed in this publication are strictly those of the authors and should not be attributed in any way to White & Case LLP.

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1 Already in 2016, the FTC and Antitrust Division of the Department of Justice (DOJ) published Antitrust Guidance for Human Resource Professionals, which indicated that anticompetitive labor-related arrangements such as wage-fixing might be subject to criminal prosecution. In 2023, the FTC proposed a rule to ban non-compete clauses in employment contracts. Please *see* FTC's press release, FTC Proposes Rule to Ban Noncompete Clauses, Which Hurt Workers and Harm Competition (Jan. 5, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/01/ftc-proposes-rule-ban-noncompete-clauses-which-hurt-workers-harm-competition.

2 On June 21, 2023, the Commission reportedly submitted questions concerning the existence of no-poach agreements to TDK Electronics AG and Qualcomm's subsidiary, RF360 Holdings Singapore, in the framework of an ongoing antitrust investigation into radio frequency front-end products. It remains unknown whether these two companies are under investigation.

3 Speaking at the Italian Antitrust Association's Annual Conference in October 2021, Commissioner Vestager revealed that new types of anticompetitive conduct, such as "*'no-poach agreements' as an indirect way to keep wages down, restricting talent from moving where it serves the economy best*" will be in the spotlight of the EC's investigative work. Please *see* Italian Antitrust Association's Annual Conference in October 2021, https://www.concurrences.com/IMG/pdf/speech_by_evp_m._vestager_at_the_italian_antitrust_association_annual_conference_-__a_new_era_of_cartel_enforcement____european_commission.pdf?72385/ab53a9bf5e758be93de52f726420eb2f99a04962d4b57a9da18cd4a21483c51f. In April 2022, it was further confirmed by Maria Jaspers, the head of the European Commission's cartel directorate, that the Commission is currently looking at this type of conduct: "*Although we have not pursued a* [no-poach] *case so far, these cases are certainly on our radar. We have a few cases that we are actively looking into and let's see what comes out of that.*" American Bar Association Antitrust Spring Meeting 2022, Washington, DC, Apr. 5–8, 2022, https://content.mlex.com/#/content/1370279/no-poach-agreements-undermine-the-american-dream-doj-s-price-says.

4 Antitrust enforcement in the labor law field in regions such as Latin America and China is experiencing a significant development. However, this article will focus mainly on the US, the UK, and the EU and its Member States.

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innovation competition.[5] Recent investigations conducted by the Polish NCA also suggest that the focus is on diminished competition in the downstream market where employers compete.[6] That said, in its recently published Guidance on Anti-Competitive Agreements in Labor Markets, the Lithuanian Competition Council indicated that no-poach and similar agreements may have harmful effects not only on consumers and the competition landscape itself, but also on workers' "*position and working conditions* (. . .) *such as their ability to find and hold a job that suits their interests and abilities, and to obtain a wage that satisfies them.*"[7] It remains to be seen whether the protection of workers will be included in any future enforcement cases in Europe, as that would move away from the consumer welfare standard and would constitute a novel policy consideration under antitrust laws.

4. We submit that the specific type of labor-related arrangement concerned is key to assessing whether such an agreement raises antitrust issues (including whether it qualifies as a "by object" infringement or whether effects on the market must be proven). Arrangements that will be discussed in this article are:

- No-hire agreements are concluded between competitors (i.e., employers) who agree not to hire (some of) each other's employees, even if they applied of their own volition.
- Non-solicitation or no-poach agreements (we will be using the terms simultaneously) are known as agreements that prohibit competitors from "cold calling" (i.e., soliciting) each other's employees. Typically, these can be distinguished from no-hire agreements as they allow employers to accept unsolicited applications from such employees. However, in the US, the phrase "no-poach" generally encompasses both no-hire and non-solicitation agreements.
- Wage fixing occurs when companies collude to fix the maximum wages they pay to their employees. As is the case with the exchange of information, this extends to other salary or compensation components.
- Employer-employee non-compete clauses typically occur either in mergers and acquisitions (M&A) or broader employment law context and prohibit the employee from working for competitors of the current employer, usually in a specified geographic region and for a specified period, after the labor contract has expired.

5. We examine below four key issues focusing on the interplay of competition and labor law: (i) the assessment of non-compete, no-hire, and non-solicitation (no-poach) clauses agreements in the context of M&A deals; (ii) the assessment of non-compete clauses in employment contracts; (iii) whether companies engaging in such agreements need to be competitors in the downstream market for the agreement to raise antitrust concerns; and (iv) the existence of efficiency justifications for such agreements.

II. Are non-compete, no-hire, and no poach in M&A deals under fire?

6. Merging parties often include employee non-compete clauses in M&A agreements, which are typically accepted under the ancillary restraints doctrine.

7. Such a doctrine was first applied in Europe in the 1980s in *Remia and Nutricia v. Commission*,[8] where Nutricia agreed not to compete with Remia, its subsidiary business, upon selling it to a new owner. The Commission recognized that certain contractual restrictions may be imposed on a seller if they are necessary to protect the legitimate interests of the merging parties.[9] On appeal, the Court of Justice of the European Union (CJEU) clarified that, in addition to being necessary for the completion of the transaction, a non-compete clause must be of a duration and scope that is strictly limited to that purpose.[10]

8. In 2005, these principles were embedded in the Commission's Ancillary Restraints Notice (the "Notice"),[11] which is one of the European instruments that first brought to light the overlap between competition law and labor law. The Notice states that non-compete and no-poach[12] clauses relating to employees may escape antitrust scrutiny under Article 101 of the Treaty on Functioning of the European Union (TFEU), prohibiting anticompetitive agreements as long as they are "*directly related and necessary to the implementation of the concentration*."[13]

5 *Supra* note 3.

6 *See* Polish Office of Competition and Consumer Protection, press releases, Basketball clubs violated competition – decision of President of UOKiK (Oct. 25, 2022), https://uokik.gov.pl/news.php?news_id=19005&news_page=11 and Competition-limiting agreement in speedway – decision of President of UOKiK (June 7, 2023), https://uokik.gov.pl/news.php?news_id=19643&news_page=2.

7 *See* Competition Council Guidance on Anti-Competitive Agreements in Labor Markets, https://kt.gov.lt/uploads/documents/files/Atmintin%C4%97 ENG (1).pdf.

8 *See* Judgment of the Court of Justice of 11 July 1985, *Remia and Others v. Commission*, case 42/84, EU:C:1985:327.

9 *See* Commission decision 83/670/EEC of 12 December 1983, *Nutricia/de Rooij*, case IV/30.389 and *Nutricia/Zuid-Hollandse Conservenfabriek*, case IV/30.408, OJ 1983, L 376, 31.12.1983, p. 22. In particular, the Commission indicated that non-compete clauses can constitute "*a legitimate means of ensuring the performance of the seller's obligation to transfer the full commercial value of the business*" (para. 26).

10 See Remia and Others v. Commission, para. 20.

11 *See* Commission Notice on restrictions directly related and necessary to concentrations, OJ C 56, 5.3.2005, p. 24-31.

12 The exact wording of the Notice is "*non-solicitation*," in its para. 26.

13 The Notice explains that "directly related" means "economically related to the main transaction and intended to allow a smooth transition to the changed company structure," while "necessary" means that "in the absence of those agreements, the [main operation] could not be implemented or could only be implemented under considerably more

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9. As a rule, post-deal non-compete and non-solicitation (or no-poach) clauses relating to employees in cases concerning the acquisition of sole control of a business may be justified for up to a three-year period provided that "*the transfer of the undertaking includes the transfer of customer loyalty in the form of both goodwill and know-how*." If only goodwill is acquired, that period is limited to two years.[14]

10. However, non-compete and no-poach clauses of longer duration (e.g., five years) can also be justified on a case-by-case basis. For example, non-compete and no-poach clauses relating to employees could potentially last for more than three years if the parties justified "*the length of the period with the necessity of the buyer to assimilate*" a new business or technology.[15]

11. It is worth noting that the Notice only applies to transactions that fall within the Commission's jurisdiction under the EU Merger Regulation, so non-compete or no-poach clauses concluded in the context of the transactions that do not involve an EU-level review (e.g., non-full function joint venture or acquisitions of minority non-controlling shareholdings) do not formally benefit from the Notice. In such instances, a case-by-case assessment under Article 101(1) and (3) TFEU is required, but the Notice is typically of indicative value.

12. Similarly, in the US, employee non-compete and no-poach agreements ancillary to an M&A transaction have traditionally been permissible provided that there is a legitimate business justification and that they are reasonable in scope and duration. Such agreements are evaluated under the rule of reason, which weighs any anti-competitive effects against the procompetitive business justifications. (Indeed, in 2016, the US Department of Justice Antitrust Division (DOJ) and FTC jointly issued Antitrust Guidance for Human Resource Professionals, the agencies recognize that restrictive employment agreements that are part of legitimate joint activity are not considered per se illegal under antitrust laws.[16])

13. One key business justification in these circumstances is that such restrictions are necessary for the buyer to obtain the value of its bargain—for example, it would undermine the entire purpose of the deal if the seller CEO were permitted to immediately post-transaction "poach" back all senior executives intended to transfer to the buyer, and with them, their knowledge and skills.

14. But the rule of reason approach to ancillary restraint also extends to the use of such employee restrictions in the pre-signing process. For example, no-poach agreements may be useful to facilitate the exchange of confidential information (clean team, when commercially sensitive) in the due diligence process to protect both sides. Courts in the US would consider such an agreement to be ancillary to the merger or acquisition (even if not ultimately consummated), in which case it would be evaluated under the rule of reason.[17] The same considerations apply in Europe for the due diligence process.

15. Critically importantly, however, the FTC's newly proposed rule, discussed *infra*, would change this traditional approach. The FTC's proposed rule would ban all employer-employee non-competes, even in M&A (including during diligence or to apply post-transaction). The only exception the FTC would allow is in the sale of a business where the restricted person owns 25% or more of the business being sold.[18]

16. While this rule has not yet been promulgated, and is likely to face challenges if passed, parties in M&A should expect increased scrutiny of employee restrictions in the merger clearance process in the US.

III. Are non-competes in a company's employment contracts with its employees an antitrust issue?

17. Non-competes are often inserted into an individual employee's employment contract, in part because alternatives like nondisclosure agreements may not provide the most robust protection for businesses to secure trade secrets and other intellectual property (IP) and know-how. Non-competes efficiently address the so-called hold-up problem (i.e., where an employee could walk away with trade secrets, know-how, client lists, and other valuable information). More specifically, non-compete

uncertain conditions, at substantially higher cost, over an appreciably longer period or with considerably greater difficulty." See Notice, paras. 11–13. In Remia, the CJEU further clarified that to qualify as "necessary," a restriction must meet two cumulative conditions. First, it must be objectively required for the implementation of the main operation. If, without the restriction, the main operation is difficult, or even impossible, to implement, the restriction may be regarded as objectively required for its implementation. In this respect, the Notice specifically mentions that "[a]greements necessary to the implementation of a concentration are typically aimed at protecting the value transferred, maintaining the continuity of supply after the break-up of a former economic entity, or enabling the start-up of a new entity." Second, the condition needs to be proportionate, meaning that its duration and its material and geographic scope do not exceed what is necessary to implement the main operation. See Notice, paras. 19, 20, 22 and 36.

14 *See* Notice, para. 20.

15 In this case, the Commission accepted a five-year non-compete clause. Commission decision of 5 January 2000, *Delphi Automotive Systems/Lucas Diesel*, case IV/M.1784, para. 9. *See also* Commission decision of 27 July 1995, *RWE-DEA/Augusta*, case IV/M.612, para. 37; Commission decision of 23 October 1998, *Kodak/Imation*, case IV/M.1298, paras. 72–73; and Commission decision of 1 September 2000, *Volvo/Renault V.I.*, case M.1980, para. 56.

16 U.S. Dep't of Justice, Antitrust Div. and Fed. Trade Comm'n, Antitrust Guidance for Human Resource Professionals (Oct. 2016), https://www.justice.gov/atr/file/903511/download.

17 *See*, e.g., *Christian Disposal LLC v. WCA Waste Corp.*, No. 4:13-cv-2255 RWS, 2014 WL 65141, at *5 (E.D. Mo. Feb. 19, 2014).

18 A full summary of the FTC's proposed rule is available at https://www.whitecase.com/insight-tool/white-case-global-non-compete-resource-center-ncrc#non-competes-entered-ma.

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clauses may incentivize employers to make human capital investments such as the provision of costly training and essential know-how, which overall increases the company's productivity and thus becomes beneficial for the economy.[19]

1. European Union

18. The approach regarding this type of clause may differ depending on the jurisdiction. The main issue under the EU competition rules is that individual employees are not classified as "undertakings" and thus employment contracts cannot be scrutinized as agreements under Article 101 TFEU. Rather, national labor laws and the fundamental freedom of free movement of workers[20] primarily apply to such clauses.

19. The lack of a uniform approach within Europe is illustrated by the divergent duration of non-compete clauses that is allowed under national laws. For example, in Italy, non-competes are limited to five years for executive employees and managers, while the duration of non-competes for other types of employees is limited to three years.[21] In Spain, the duration of non-competes is limited to two years for skilled employees and six months for other types of employees.[22] In May 2023, the UK government announced[23] its intention to limit the length of non-compete clauses in employment contracts to three months.

2. The US

20. Historically, non-compete clauses in the US have been governed by state-specific statutes or common law. Although state non-compete laws vary, the general rule among the states is that a non-compete is not enforceable where it restricts an employee beyond what is reasonably necessary to protect a legitimate business interest, or where the need for the clause fails to outweigh the hardship created and the injury to the public. State courts will consider a non-compete's business justification, time period, and geographic scope to determine whether it is "*reasonably necessary*." However, beginning in late 2022, the FTC has taken a position on non-competes at the federal level. In November 2022, the FTC issued a policy statement that its power under Section 5 of the FTC Act goes beyond antitrust claims to "*encompass various types of unfair conduct that tend to negatively affect competitive conditions*."[24] In January 2023, the FTC announced a Notice of Proposed Rule-Making (NPRM) that would essentially ban non-compete clauses in employer-employee contracts, subject to the sale-of-business exception discussed above.[25] The current proposed ban does not contain any exceptions for IP or trade secrets. Employers that violate the rule would be subject to fines, penalties, and other injunctive relief for violating Section 5 of the FTC Act.

21. On June 20, 2023, also relying on competition principles, the New York State Legislature passed a bill that would prohibit employers from seeking, requiring, demanding, or accepting non-compete agreements from virtually any New Yorker.[26] The bill goes a step beyond even the FTC's proposed law and creates a private right of action for workers to sue their employers to void their non-compete and receive payment for liquidated damages, lost compensation, damages, and reasonable attorneys' fees and costs.[27] This bill, if enacted, would be the most restrictive non-compete legislation in the US.[28]

IV. Are labor-related agreements between companies an antitrust issue only if the companies compete in the downstream market?

22. Outside the M&A and employment agreement context described in Sections II and III above, the legal standard for labor-related agreements is not clear, and key questions on the theory of harm are open.

23. The limited enforcement against these types of agreements in the EU has, so far, focused on cases in which the parties to the arrangement were not only upstream competitors for the hiring of workers (i.e., competitors

19 *See* F. Arduini, C. Baye, L. Damstra, P. Déchamps and A. Descamps Labour Markets: A Blind Spot for Competition Authorities?, *Competition Law Journal* (forthcoming, 2020), https://awards.concurrences.com/en/awards/2020/academic-articles/labour-markets-a-blind-spot-for-competition-authorities.

20 Consolidated versions of the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU), OJ C 202, 7.6.2016, p. 1-388, Art. 3(2) TFEU; Art. 45 TEU.

21 Italian Civil Code, Art. 2125.

22 Spanish Statute of Workers, Art. 21(2).

23 UK's Department for Business and Trade, Smarter regulation to grow the economy, Policy Paper (May 10, 2023), https://www.gov.uk/government/publications/smarter-regulation-to-grow-the-economy/smarter-regulation-to-grow-the-economy#reforming-regulations-to-reduce-burdens.

24 Fed. Trade Comm'n, Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act (Nov. 10, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/P221202Section5PolicyStatement.pdf.

25 *See* FTC's press release, *supra* note 1.

26 A1278b, 2023-2024 Leg., Reg. Sess., § 191-d(2) (N.Y. 2023).

27 Ibid. at § 191-d(4)(A)–(B).

28 Ibid. at § 191-d(5). The law would exclude (i) agreements establishing a "fixed term of service"; (ii) non-disclosures governing trade secrets or confidential and proprietary client information; and (iii) non-solicitation provisions related to clients a worker learned about during employment.

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in the labor market) but also downstream competitors.[29] Structurally, the question is whether such labor-related cases may be viewed as similar to purchasing cartels or cooperation arrangements, where enforcement focused on companies that were competitors both in the upstream and downstream (product) market but also on cases where the parties were only upstream competitors.[30]

24. In contrast, in the US, labor-related agreements are analyzed in the context of their impact on the relevant labor market, regardless of how the companies are positioned in the downstream market.

25. This raises the fundamental question of what the potential competitive harm in such cases is. In this regard, several theories of harm could be considered. For instance, limiting the mobility of employees or keeping salaries artificially low could result in diminished innovation downstream, discouraging talented workers from striving to excel, as their labor market is restricted. It can also lead to stifled competition where small firms or new entrants are unable to attract or retain key workers, creating considerable barriers to entry. These downstream effects would speak in favor of limiting enforcement to cases involving downstream competitors.

26. However, restrictive labor clauses could lead to reduced labor market efficiency by keeping skilled workers in roles that do not fit their professional skills and, consequently, leading to slowed market growth and reduced productivity. This would speak in favor of enforcement focused on the effects of the upstream labor markets, i.e., not necessarily requiring that the companies involved are downstream competitors.

27. Of course, labor-related agreements may generate certain efficiencies, such as, for example, reducing an end product's price or protecting the employer's investment. Section V below provides a more detailed analysis of what kind of efficiencies labor-related agreements may generate.

29 For example, on January 6, 2023, the Directorate General for Consumer Affairs, Competition and Fraud Prevention in France imposed a EUR 0.14 million fine on three companies for reaching non-compete and no-poach agreements in the context of a merger in the market of non-ferrous metals recycling (*see* Communication relative aux pratiques anticoncurrentielles relevées dans le secteur du recyclage de métaux non-ferreux (in French), https://www.economie.gouv.fr/files/files/directions_services/dgccrf/concurrence/pac/Transaction_injonction/2023/Communication-TI-recyclage-metaux-non-ferreux.pdf?v=1673018415). On July 26, 2016, the German competition authority fined three television studios for exchanging competitively sensitive information, including staff costs and other information related to employee benefits. The fines amounted to around EUR 3.1 million (*see* press release Bundeskartellamt imposes fines on TV studio operators (in German), https://www.bundeskartellamt.de/SharedDocs/Entscheidung/DE/Fallberichte/Kartellverbot/2016/B12-23-15.pdf?__blob=publicationFile&v=3).

30 In the *Ethylene* cartel, the Commission fined four companies for exchanging sensitive commercial and pricing-related information and fixing a price element related to the purchase of the input material ethylene—but not all of these companies were actual competitors in the downstream market. *See* Commission decision of 14 July 2020, *Ethylene*, case AT.40410.

1. European Union

28. We submit that the question of whether parties compete in upstream or also downstream markets should play a critical role in assessing the potential anticompetitive effects of such agreements. We acknowledge that the impact of labor-related agreements on upstream markets seems more obvious than in downstream markets. For example, high-tech engineers, managers, consultants, etc., could easily become targets of no-poach/no-hire agreements between companies active in different sectors. This may seem similar to companies competing for a common input in the purchasing/upstream market or "shelf space" in the downstream market, even where they do not compete at the product/service level in the downstream market.

29. That said, market power must have an impact on the effect of any arrangement,[31] so if one focuses on the "upstream" effects on labor markets, this assumes that there is a distinct overall "market for hiring labor force." Perhaps most fundamentally, in such a market, companies competing upstream are likely to have minuscule shares given the broad scope of the market itself. Getting to market power would require defining narrow distinct markets for workforce for specific downstream industries or even product markets, which would suggest that the upstream overlap must mirror a downstream overlap—i.e., the parties must also be downstream competitors.

30. But any impact of labor-related agreements on downstream markets in which the parties compete is likely to be indirect at best. This is because a causal link and appreciable effect of a pure upstream arrangement on competition in a downstream market would typically seem difficult to prove. This is because labor-related arrangements differ from joint purchasing arrangements, where parties jointly purchase input material that accounts for a large portion of common costs—the impact of a labor-related agreement on downstream prices is much more indirect, if discernable at all.

31. In the same vein, innovation takes much more than just individuals, and is such a broad concept that it would typically seem difficult to prove the direct causal effect of a no-poach agreement and reduced innovation efforts or output (which could likely only be observed over time). Moreover, if diminishing downstream innovation is a major concern, this would suggest that, if at all, the issue could only arise with respect to agreements relating to highly skilled employees who could promote innovation downstream. That said, and at the same time, it is precisely those employees for which a no-poach or no-hire agreement would seem justified—in order to protect and secure downstream innovation, companies agreeing not

31 Cf. the Revised Horizontal Guidelines, which note that, unless it constitutes a "by object" restriction, a joint purchasing arrangement enjoys a safe harbor if its members' combined market shares do not exceed 15% on both the upstream and downstream markets (Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, OJ C 259, 21.7.2023, p. 1-125, para. 291) (Revised EU Horizontal Guidelines).

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to hire or poach each other's employees may claim that certain restrictions are necessary to protect their investment, know-how or trade secrets. Competition authorities may, therefore, find it difficult to establish the causal link between the arrangement and a negative effect on competition.

32. Moreover, somewhat similar to joint purchasing agreements, even practices like wage-fixing keep salaries artificially low and, hence, reduce costs, which may translate into eventual procompetitive effects.

33. In sum, in our view, from an EU perspective, labor-related agreements can only be an issue if entered into between downstream competitors, negative effects on downstream markets will likely be indirect at best, and in any event may be justified (see Section V below).

2. The US

34. By contrast, the US approach of analyzing labor-related agreements in the context of their impact on the relevant labor market is well established in US precedent and agency guidance. For example, in the 2016 DOJ Antitrust Division and FTC jointly issued Antitrust Guidance for Human Resource Professionals, the agencies explained that "[f]*rom an antitrust perspective, firms that compete to hire or retain employees are competitors in the employment marketplace, regardless of whether the firms make the same products or compete to provide the same services.*"[32] Therefore, the agencies view such agreements regarding employment terms as unlawful when made *"with firms that compete to hire employees*," or "*seeking to hire the same employees*."[33]

35. Courts in the US are similarly consistent with their approach of viewing the relevant market as where the companies compete for employees regardless of whether the companies compete in their downstream products and services. For example, in *United States v. eBay, Inc.*, the court denied a motion to dismiss (thereby allowing the claims to proceed) where the DOJ alleged that eBay and Intuit entered into allegedly unlawful agreements not to solicit or hire each other's employees.[34] The Antitrust Division did not allege that eBay and Intuit were downstream competitors in any way, but instead that "*eBay and Intuit are direct competitors for employees, especially skilled engineers and scientists*."[35] The court found the alleged horizontal agreement not to poach/hire each other's employees sufficient.

36. Indeed, in a more recent case, *Deslandes v. McDonald's USA, LLC*, the Seventh Circuit Court of Appeals affirmed the district court's dismissal of a "rule of reason" challenge to McDonald's franchise no-poach agreements on the ground that the plaintiff failed to allege a relevant antitrust market for employees in which the defendant had market power.[36] In *Deslandes*, the plaintiff's claims against McDonald's premised on McDonald's no-poach agreements between franchises. The court found that "rule of reason" allegations (which would apply if the defense to the allegedly anticompetitive "no-poach" were ancillary to a legitimate business purpose) required that the plaintiff plead a relevant market, which the plaintiff did not do.[37] Similar to how US courts evaluate downstream competition by asking about interchangeability and cross-elasticity of demand from a consumer perspective, the court explained that in that particular case, "workers at McDonald's" was not an independent economic market because "[p]*eople who work at McDonald's one week can work at Wendy's the next*," and "[p]*eople entering the labor market can choose where to go—and fast-food restaurants are only one of many options*."[38]

V. Are there any efficiencies/ justifications for labor-related agreements between companies?

37. As already touched upon above, companies may legitimately advance a number of justifications depending on the scope and content of the labor-related agreement.

1. European Union

38. A threshold question is whether the practices are subject to a potential justification at all. Per se, violations in the US are not, and "by object" violations under EU law are theoretically justifiable under Article 101(3) TFEU, but such justifications almost never succeed.[39]

39. From an EU perspective, the qualification "by object" or "by effect" may differ depending on the specific type of arrangement at issue.

40. Restrictions of competition by object are those that, by their very nature, have the potential to restrict competition. These are restrictions which, in light of the

32 Antitrust Guidance for Human Resource Professionals, *supra* note 16, at 2.

33 Ibid. at 3 and 1.

34 *United States v. eBay, Inc.*, 968 F. Supp. 2d 1030 (N.D. Cal. 2013).

35 Ibid. at 1038.

36 *Deslandes v. McDonald's USA, LLC*, Nos. 22-2333 & 22-2334, 2023 U.S. App. LEXIS 22509 (7th Cir. Aug. 25, 2023).

37 Ibid. at *11.

38 Ibid.

39 This is primarily because the parties bear the burden of proof, and it is a high standard to demonstrate that the restriction is indispensable and proportionate to attain the efficiencies. *See* Commission decision of 19 December 2007, *MasterCard*, case AT.34579, para. 690.

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objectives pursued by the EU competition rules, have such a high potential of negative effects on competition that it is unnecessary for the purposes of applying Article 101(1) TFEU to demonstrate any actual effects on the market.[40]

41. The CJEU clarified in *Cartes bancaires*[41] that the concept of restriction "by object" must be interpreted restrictively and that this type of restriction reveals a sufficient degree of harm, by its nature. In contrast, in "by effect" restrictions, a somewhat higher burden of proof to demonstrate anticompetitive effects specifically and persuasively rests with the competition authorities.

42. Given the lack of case law precedents, it is far from obvious that labor-related agreements could qualify as a "by object" restriction (at least for now), unless one would find them to be "naked restrictions" without any link to a legitimate business purpose or a procompetitive justification.[42] In this context, the type of practice concerned will play a role. For example, wage-fixing agreements are considered "by object" restrictions under the revised EU Horizontal Guidelines if wages were qualified as "future prices," i.e., as future purchasing prices in the purchasing market for labor force.[43] Similarly, in the UK, the Competition & Markets Authority (CMA) has recently identified wage fixing as a hardcore restriction (restricting competition by object) in its revised Horizontal Guidelines published in August 2023.[44]

43. By contrast, it is not difficult to conceive that no-poach agreements could have procompetitive effects at least in specific factual circumstances, so a "by object" treatment seems unwarranted. As a general principle, in Europe, we submit that labor-related agreements (even those between competing companies) can be justified in certain circumstances, and especially when they are required for the protection of a company's trade secrets and IP. This is especially the case when potential alternatives, like NDAs, afford lesser practical protection and are difficult to enforce. However, given the lack of precedents and changing landscape, the boundaries of such justifications are not ironclad, and a balancing test would need to apply to conclude whether procompetitive justifications outweigh anticompetitive justifications.

40 Communication from the Commission, Notice — Guidelines on the application of Article [101](3) of the Treaty, OJ C 101, 27.4.2004, p. 97-118, para. 21.

41 Judgment of the Court of Justice of 11 September 2014, *Groupement des cartes bancaires v. Commission*, case C-67/13 P, EU:C:2014:2204.

42 According to the CJEU, in the context of "by object" restrictions, past experience shows that certain conducts lead to anticompetitive outcomes (*Cartes bancaires,* para. 51). However, there is no such "experience" in the context of antitrust and labor-related agreements.

43 Revised EU Horizontal Guidelines, para. 279(a).

44 Para. 6.9(a) of the Guidance on the application of the Chapter I prohibition in the Competition Act 1998 to horizontal agreements (CMA174, Aug. 2023) provides "agreements fixing wages" as an example of a hardcore restriction in the context of joint purchasing. Guidance available here: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1178791/Horizontal_Guidance_FINAL.pdf

2. The US

44. In the US, the DOJ Antitrust Division has taken an aggressive stance in recent years, treating no-poach agreements as per se illegal under antitrust law, and accordingly, by definition, lacking in justification. In 2016, the DOJ and FTC issued joint guidance stating that entering into a "no-poach" agreement was a likely violation of antitrust law and that "naked" no-poach agreements were per se illegal under antitrust law—defining naked no-poach agreements as those that are "*separate from or not reasonably necessary to a larger legitimate collaboration between the employers*."[45] In justifying their policy to treat these agreements as per se illegal, the agencies stated that "[t]*hese types of agreements eliminate competition in the same irredeemable way as agreements to fix product prices or allocate customers*."[46] In January 2021, the DOJ indicted two companies for engaging in no-poach agreements.[47] But the DOJ has yet to secure a criminal conviction in court for no-poach or wage-fixing conduct—losing four cases in 2022 and 2023.[48]

45. Prior to taking a more aggressive stance on no-poach agreements, in 2011, the DOJ settled a civil case involving no-poach and wage-fixing agreements, allowing a series of carve-outs for no-poach agreements that were "*reasonably necessary for contracts with consultants or recipients of consulting services, auditors, outsourcing vendors, recruiting agencies or providers of temporary employees or contract workers*."[49]

46. US federal courts to consider no-poach agreements in civil antitrust cases have often rejected the per se rule in favor of review under the rule of reason, observing that these restraints can be ancillary to a broader, procompetitive agreement.[50] In February 2023, a federal district court held that alleged no-poach agreements between defendants Saks Fifth Avenue and companies selling branded apparel in Saks stores were not subject to the per se rule because the alleged agreements were not

45 Antitrust Guidance for Human Resource Professionals, *supra* note 16, at 3.

46 Ibid. at 4.

47 *United States v. Surgical Care Affiliates., LLC et al.*, No. 3:21-cr-00011-L (N.D. Tex. Jan. 5, 2021), ECF No. 1, superseded by ECF No. 48 (July 8, 2021).

48 *See United States v. Neeraj Jindal and John Rodgers*, No. 4:20-cr-00358 (E.D. Tex. Apr. 14, 2022); *United States v. DaVita Inc. et al.*, No. 21-cr-00229 RBJ (D. Colo. Apr. 20, 2022); *United States v. Manahe et al.*, No. 2:22-cr-00013 (D. Me. Mar. 22, 2023); *United States v. Patel et al.*, No. 3:21-cr-00220 (D. Conn. Apr. 28, 2023).

49 Proposed Final Judgment at 4, *United States v. Lucasfilm Ltd.*, 1:10-cv-02220- RBW (D.D.C. May 9, 2011), ECF No. 6-1.

50 *See*, e.g., *Aya Healthcare Servs., Inc. v. AMN Healthcare, Inc.*, 9 F.4th 1102, 1109 (9th Cir. 2021) (non-solicitation agreement between healthcare staffing agencies was ancillary restraint subject to rule of reason); *Eichorn v. AT&T Corp.*, 248 F.3d 131, 143–44 (3d Cir. 2001) (finding "*no support within the relevant case law*" for labeling a no-hire agreement during the acquisition of a business as per se unlawful, and holding that "*the no-hire agreement here is more appropriately analyzed under the rule of reason*"); *Bogan v. Hodgkins*, 166 F.3d 509, 515 (2d Cir. 1999) (agreement among higher-level insurance agents not to hire or recruit each other's district or sales agents was "*akin to an intrafirm agreement*" and not subject to per se illegal treatment); *Ogden v. Little Caesar Enters.*, 393 F. Supp. 3d 622, 635 (E.D. Mich. 2019) (stating that "*the franchise agreements here allegedly were part of an overall scheme of 'legitimate collaboration' between franchisees operating under the umbrella of the same brand*"; plaintiff failed to plead facts showing "*that the franchise agreements' no-poaching provisions are unreasonable* per se.").

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naked agreements among competitor firms.[51] The court differentiated cases that "*involve*[d] *horizontal competitors whose conduct did not involve any sort of collaborative relationship*."[52] In contrast, the complaint alleged that the brand defendants in *Saks* sold their products in Saks stores and that "*absent the no-hire agreement, there would be a continual risk that the Brand Defendants would use their concessions in Saks stores to recruit employees*."[53]

47. In *Deslandes*, discussed above, which involved McDonald's' no-poach agreements, the Seventh Circuit Court of Appeals recognized that, for instance, "[c] *ommon training and job classifications could in principle justify restraints on poaching*."[54] However, in determining whether those justifications are furthered by the terms of the no-poach, the court observed that this is a complex question that must take into account geographic scope, duration, and include economic analysis.[55] Without clarity in the complaint that such justifications clearly existed, like in *Saks*, further analysis was required.

VI. Conclusion

48. As per the above, legal standards and enforcement regarding labor-related agreements are still a developing area. Companies are facing a global patchwork of approaches, case law and policy statements, and hence much remains unclear. But this area is clearly becoming an enforcement priority everywhere, so companies need to get ready and assess their risk profile carefully. ■

51 *Giordano v. Saks Inc.*, 2023 U.S. Dist. LEXIS 17154, at *40–41 (E.D.N.Y. Jan. 31, 2023).

52 Ibid. at *41.

53 Ibid. at *42.

54 *Deslandes v. McDonald's USA, LLC*, Nos. 22-2333 & 22-2334, 2023 U.S. App. LEXIS 22509 at *10

55 Ibid. at *11–12.

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Losing *per se*: Potential fallout from the U.S. Department of Justice's no-poach enforcement

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I. Introduction

1. In the United States, the Department of Justice Antitrust Division (DOJ) has made its mission over the past several years to criminally prosecute labor market conduct, including "no-poach" agreements—a term used to refer to a range of restrictions on employee mobility, including agreements not to hire or not to solicit certain employees. In doing so, it has characterized this conduct as analogous to traditional criminal conduct. This is at least in part an effort to bring labor market agreements under the per se rule—one of the DOJ's most powerful tools for winning antitrust suits—and thereby leverage the significant attendant advantages that render irrelevant evidence that defendants could otherwise use to justify their actions. In short, the DOJ has set its sights on ensuring that agreeing not to recruit a competitor's employees is treated as dividing the labor market between competing employers, and should be approached by courts with the same degree of skepticism.

2. Even though the DOJ touts its strong record of overcoming substantive motions to dismiss,[1] it has failed to convince a single jury to convict on a labor charge.[2] Perhaps more important, some courts that have declared the challenged conduct as per se illegal have added hurdles that effectively apply a standard other than the traditional per se rule. In particular, the courts in both *United States v. DaVita Inc.*, No. 1:21-cr-00229-RBJ (D. Colo. 2022) and *United States v. Patel*, No. 3:21-cr-00220-VAB (D. Conn. 2023) have held the DOJ to an unusually high bar to support convictions. These cases and others beg the question: have the DOJ's "wins" been worth the effort, or might the DOJ inadvertently be dulling its own most potent weapon? Put another way, is the DOJ winning the battle but losing the war?

1 *See* J. Kanter, Assist. Att'y General, Dep't of Justice, Antitrust Div., Testimony Before the Senate Judiciary Committee Hearing on Competition Policy, Antitrust, and Consumer Rights (Sept. 20, 2022), https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-antitrust-division-testifies-senate-judiciary (announcing that "[i]*n the last two years, the* [DOJ] *has brought six criminal cases alleging collusion in labor markets*," that "[t]*he juries in our first labor market prosecutions acquitted the defendants of the antitrust charges*," but that "[i]*n both cases, the courts denied the defendants' motions to dismiss, reaffirming the core principle of our labor market prosecutions: that labor market collusion is a felony under the Sherman Act*.").

2 *See* B. Koenig, DOJ Antitrust Head Calls No-Poach Prosecutions 'Righteous', *Law360* (Mar. 31, 2023, 7:06 PM), https://www.law360.com/articles/1592488 (detailing how "*the DOJ failed for the third time to win a jury conviction in the still-nascent pursuit of criminal wage-fixing and no-poach charges*" and how "[i]*ts only successful prosecution on labor-side criminal allegations, which the DOJ had only pursued civilly until 2020, has come from a pair of plea deals*"); *see United States v. DaVita Inc*., No. 21-cr-00229-RBJ (D. Colo.); *see United States v. Patel*, No. 3:21-cr-220-VAB (D. Conn.); *see United States v. Jindal*, No. 4:20-cr-00358-ALM-KPJ (E.D. Tex.); *see United States v. Manahe*, No. 2:22-cr-00013-JAW (D. Me.).

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II. Per se standard

3. U.S. courts use two main analytical frameworks to determine whether a restraint is unreasonable under the Sherman Act. The default is the rule of reason, where the factfinder undertakes a broad and fact-specific evaluation of the market to weigh the anticompetitive effects and the procompetitive justifications of the conduct before determining whether it unreasonably restrains competition in the relevant market. But certain restraints have been found by courts to be so inherently anticompetitive and damaging to the market that they deserve condemnation without a detailed inquiry into their merits. This conduct is analyzed under the per se rule, which is limited to certain types of horizontal agreements between competitors that have no purpose but to frustrate competition, called "naked" (i.e., purely anticompetitive) agreements to fix prices, rig bids, and allocate markets.

4. Per se illegality brings potent and often decisive advantages to a plaintiff. This is especially true in the criminal context where, by longstanding policy, the DOJ only prosecutes antitrust cases it deems to involve agreements between horizontal competitors.[3] The per se rule drastically limits the government's burden, requiring it to prove primarily that the specific alleged agreement was knowingly reached. Historically, the government has been relieved of the need to demonstrate negative competitive effects, define a relevant product or geographic market, or show that the conduct was unreasonable. And the per se rule also limits defendants' ability to introduce procompetitive justifications for their behavior.[4]

5. However, even where conduct is normally subject to the per se rule, the ancillary restraints doctrine, if satisfied, would cause the agreement to be evaluated under the rule of reason. A restraint is ancillary when it is imposed by a "*legitimate business collaboration*" that is "*reasonably necessary*" to a procompetitive objective of the collaboration. Such a restraint, because it is related to a facially plausible procompetitive value, is not considered "naked" and therefore deserves to be judged under the more fulsome rule of reason. The determination of whether the per se rule or the rule of reason applies to alleged conduct is a critical legal decision, and it often dictates how the remainder of the case will be litigated and what evidence will be presented.

6. The massive advantages of the per se standard have historically been instrumental in the DOJ's ability to obtain antitrust convictions. But because the interpretation of the Sherman Act relies heavily on cases to form an antitrust common law, these standards can evolve as courts examine and classify new or different business practices. In this way, the DOJ's recent efforts to criminally prosecute labor-related offenses have opened new opportunities for courts to examine and classify labor-related agreements. And while multiple courts have ostensibly accepted the DOJ's characterization of no-poach agreements as per se unlawful market allocations, several early cases, such as *DaVita* and *Patel*, signal that change is still afoot.

III. United States v. DaVita: "No poach" acquittal and heightened intent standard

7. In July 2021 in the U.S. District Court for the District of Colorado, the DOJ charged DaVita Inc., owner and operator of outpatient medical care facilities, and Kent Thiry, its CEO, for conspiring with another outpatient medical care facility company to "*suppress competition between them*" for the services of employees, in part by "*agreeing not to solicit each other's senior-level employees*."[5] What followed was the first-ever U.S. criminal trial challenging an alleged "no-poach" agreement.[6]

8. The DOJ achieved some early success in its prosecution of DaVita, securing court buy-in for its novel position[7] that no-poach agreements are essentially horizontal agreements to allocate a market for employees, meaning they should be judged under the per se standard.[8]

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3 See U.S. Dep't of Justice Manual, 7-2.200 (updated Apr. 2022), https://www.justice.gov/jm/jm-7-2000-prior-approvals ("While a violation of this Act may be prosecuted as a felony, in general, the Department reserves criminal prosecution under Section 1 for 'per se' unlawful restraints of trade among competitors, e.g., price fixing, bid rigging, and market allocation agreements. It may also bring, and has brought, criminal charges under Section 2.").

4 See Northern Pac. Ry. Co. v. U.S., 356 U.S. 1, 5 (1958) ("This principle of per se unreasonableness (. . .) avoids the necessity for an incredibly complicated and prolonged economic investigation into (. . .) whether a particular restraint has been unreasonable"); see In re Flat Glass Antitrust Litig., 385 F.3d 350, 356 (3rd Cir. 2004) (per se "restraints of trade are conclusively presumed to unreasonably restrain competition without elaborate inquiry as to [any] business excuse for [its] use" (internal citations and quotations omitted) (second alteration in original)).

5 Indictment at 1–3, 6, *United States v. DaVita Inc.*, No. 1:21-cr-00229-RBJ (D. Colo. July 14, 2021), ECF No. 1.

6 The DOJ's decision to seek criminal penalties for alleged agreements between labor market competitors to restrict employees' freedom of movement or to fix employee wages is of relatively recent vintage. *See* U.S. Dep't of Justice, Antitrust Div. and Fed. Trade Comm'n, Antitrust Guidance for Human Resource Professionals 4 (Oct. 2016), https://www.justice.gov/atr/file/903511/download ("*Going forward, the DOJ intends to proceed criminally against naked wage-fixing or no-poaching agreements*.").

7 In an order resolving disputes regarding jury instructions (to be discussed in greater detail below), the district court highlighted the "novelty" of the DOJ's position, finding that the fact the case was "*among the first ever criminal prosecutions for allocating a labor market*" warranted certain departures from the settled principles applicable to more traditional horizontal market allocations. Order Resolving Disputes on Proposed Jury Instr. at 3, 8–9 *United States v. DaVita Inc.*, No. 1:21-cr-00229-RBJ (D. Colo. Mar. 25, 2022), ECF No. 214.

8 Order Denying Defs.' Mot. to Dismiss at 4–6, 17, *United States v. DaVita Inc.*, No. 1:21-cr-00229-RBJ (D. Colo. Jan. 28, 2022), ECF No. 132 (acknowledging that "[v]*iolations of Section 1 are analyzed under the rule of reason as a default*" and that the rule of reason requires courts to consider "*a variety of factors, including specific information about the relevant business, its condition before and after the restraint was imposed, and the restraint's history, nature, and effect*" (internal quotations and citations omitted)).

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The applicable legal standard was hotly contested. DaVita argued in its motion to dismiss that the per se standard was inapplicable because no-poach agreements are "*not actually market-allocation agreements*," "*there is no valid basis to declare the types of agreements alleged here per se illegal*" otherwise, and even if the court were to apply a per se standard, it would violate DaVita's constitutional right to due process by outlawing its conduct "*for the first time in a criminal case*."[9] In support of its position, DaVita highlighted that, far from being the rare restraint that "*considerable judicial experience has shown to be inherently anticompetitive and without any plausible procompetitive justification*," not a single no-poach agreement had ever been adjudged by a U.S. court to be per se illegal.[10]

9. The DOJ took the position that the per se category is defined by the "*practice involved, rather than the industry in which the allegedly unlawful practice was used*," and that the practice of allocating markets was not new, despite the lack of precedent specific to the alleged allocation of a labor market.[11] In any case, argued the DOJ, "[t]*he judicial decisions construing Section 1* (. . .) *provided fair notice under the Due Process Clause*."[12]

10. The court was not convinced that the lack of precedent for no-poach prosecution necessitated a fulsome rule of reason review. The judge concluded that the per se rule applied because the challenged agreement was just a "*horizontal market allocation agreement*" of a different stripe; the fact that the challenged agreement was to allocate a labor market as opposed to a product market "*makes no difference*."[13] To many observers, it appeared that if the DOJ could convince a court that the per se rule applied such that the court need not consider defendants' justifications for restricting employees' freedom of movement, then the DOJ's path to securing convictions should be straightforward. In short, it seemed the DOJ had overcome the most significant hurdle to realizing its first criminal conviction for a no-poach agreement.

11. When it came to jury instructions, however, the *DaVita* court began to depart from directions normally used under the per se rule. In a typical per se case, the jury is instructed that it must convict if the DOJ proves the following basic facts: (i) the challenged agreement existed; (ii) the defendant voluntarily entered the agreement with knowledge of its purpose; and (iii) the agreement affected interstate commerce.[14] A jury is accordingly not permitted to acquit on the basis that the charged company or individual did not specifically intend for the agreement it entered to harm competition or to break the law. Instead, a "not guilty" verdict would typically be supported by a finding that (i) no agreement existed; (ii) a defendant did not intend to enter the agreement (e.g., an executive's casual body adjustment is misinterpreted by a competitor as a nod of assent); or (iii) a defendant did not know what it was agreeing to (e.g., an executive agrees to vaguely "be reasonable," without understanding such agreement to amount to a commitment not to price below a certain level).

12. Unexpectedly, the *DaVita* court departed from this well-worn path, essentially allowing the jury to acquit based on a finding that would have previously been legally irrelevant. The jury instructions introduced a new requirement that the DOJ establish that the defendants had a particular "purpose" for entering the challenged agreement. The ordered jury instructions read in full:

> "*In order to establish the offense of conspiracy to allocate the market for employees charged in the Indictment, the government must prove each of these elements beyond a reasonable doubt:*
>
> *1. A conspiracy existed on or about the time periods alleged (a) to allocate the market for senior executives of DaVita and SCA (Count 1); (b) to allocate the market for employees of DaVita (Counts 2 and 3).*
>
> *2. The defendant knowingly entered into the conspiracy with the purpose of allocating the market with respect to that conspiracy.*
>
> *3. The Conspiracy occurred in the flow of or substantially affected interstate trade or commerce*."[15]

13. The addition of this "purpose" element essentially gave the jury permission to acquit based on a finding that, although the defendants may have voluntarily entered the no-poach agreement with the knowledge that they were agreeing not to hire or solicit certain competitor

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9 Defs.' Joint Renewed Mot. to Dismiss at 2, *United States v. DaVita Inc*., No. 1:21-cr-00229-RBJ (D. Colo. Nov. 10, 2021), ECF No. 83.

10 Defs.'Joint Mot. to Dismiss at 1–2, *United States v. DaVita Inc.*, No. 1:21-cr-00229-RBJ (D. Colo. Sep. 14, 2021), ECF No. 49. Notably, the court appeared to disagree with DaVita's position that it was in uncharted territory, analogizing to a case examining a customer non-solicitation agreement, *United States v. Cooperative Theatres of Ohio, Inc.* 845 F.2d 1367 (6th Cir. 1988), as precedent. Regardless, according to the court, "[e]*ven if there were no prior cases finding that a non-solicitation agreement had violated Section 1, that would not prevent* [the court] *from finding that this non-solicitation agreement was sufficiently alleged to have allocated the market, and thus that per se treatment was appropriate*."Order Denying Defs.'Mot. to Dismiss at 14, *United States v. DaVita Inc*., No. 1:21-cr-00229-RBJ (D. Colo. Jan. 28, 2022), ECF No. 132.

11 United States' Opp. to Defs.' Joint Mot. to Dismiss at 5, *United States v. DaVita Inc*., No. 21-cr-00229-RBJ (D. Colo. Oct. 19, 2021), ECF No. 67.

12 Ibid. at 2.

13 United States'Order Denying Defs.'Mot. to Dismiss at 5, *United States. v. DaVita Inc*., No. 21-cr-00229-RBJ (D. Colo. Jan. 28. 2022), ECF No. 132.

14 E.g., Jury Instr. at 19, *United States v. Penn*, No. 1:20-cr-00152-PAB (D. Colo. July 7, 2022), ECF No. 1421 (explaining that the government must prove"[1] *that the charged price-fixing and bid-rigging conspiracy existed* (. . .); [2] *that the defendant knowingly—that is, voluntarily and intentionally—became a member of the conspiracy charged in the indictment, knowing of its goal and intending to help accomplish it; and,* [3] *that the conspiracy affected interstate commerce*"); Jury Instr. at 20–21, 23, *United States v. Tokai Kogyo Co*., No. 1:16-cr-00063-TSB (S.D. Ohio Dec. 5, 2017), ECF No. 235 (requiring that government must prove"[1] *that there was a mutual understanding, either spoken or unspoken, between two or more people, to cooperate with each other to allocate sales, rig bids, and fix prices* (. . .), [2] *that each defendant knowingly and voluntarily joined that conspiracy* (. . .) *intending to help advance or achieve its goals*," and "[3] *that the conspiracy charged in the indictment either occurred in the flow of interstate commerce or affected interstate commerce in goods and/or services*"); Jury Instr. at 16, *United States v. Lischewski*, No. 3:18-cr-00203-EMC (N.D. Cal. Dec. 2, 2019), ECF No. 626 (informing that government must prove"[1] *that the charged price-fixing conspiracy existed at or about the time alleged;* [2] *that the defendant knowingly—that is, voluntarily and intentionally—became a member of the conspiracy charged in the indictment, knowing of its goal and intending to help accomplish it; and,* [3] *that the conspiracy occurred within the flow of, or substantially affected, interstate commerce*").

15 Jury Instr. at 15, *United States v. DaVita Inc*., No. 1:21-cr-00229-RBJ (D. Colo. Apr. 13, 2022), ECF No. 254.

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employees, the defendants did not subjectively intend to "*allocate the market*." The court inserted this element over the objection of the DOJ. The DOJ argued a purpose requirement would allow defendants to circumvent the per se rules by introducing "*irrelevant*" evidence that the agreement may have been motivated by a desire to, for example, increase compensation.[16] But the court found that while the DOJ was correct that it was "*immaterial*" whether a per se unlawful agreement "*was actually good for the company or even good for the market as a whole*," evidence of beneficial effects of the agreement could still be relevant to "*disprove that the purpose of the agreement was to allocate a market*."[17] The court's stated goal was to help the jury understand that "*an agreement may have multiple purposes, but a guilty verdict could be appropriate if one of the purposes was to allocate a market*."[18] In other words, the court intended to require the DOJ to prove only that market allocation was a partial and not necessarily the sole motivator for the agreement.

14. For the defendants, this was a big win—they went on to argue, for example, that the intent of the DaVita CEO in agreeing with competing employers was merely to learn which of his employees were considering leaving for employment with a competitor so that he could compete to retain them.[19] By giving the jury leeway to acquit defendants based on a lack of intent to harm competition, the *DaVita* court essentially sealed the DOJ's fate. On April 15, 2022, a federal jury acquitted the defendants on all counts.[20]

15. The imposition of an intent requirement was a departure from per se precedent. It allowed for the introduction by defendants of certain evidence that beneficial effects of the agreement were relevant to disprove that the purpose of the agreement was to allocate a market.

16. The DOJ has decried this departure in subsequent cases in which defendants have urged courts to follow *DaVita*'s lead in requiring a demonstration of intent. For example, in opposing a similar jury instruction in the later *Patel* case (discussed below), the DOJ claimed the *DaVita* court's emphasis on the individual defendant's purpose for entering the conspiracy is "*plainly incorrect*,"[21] and entirely at odds with "*the whole point*" of the per se standard, which is that "*certain types of conspiracies* [are] *unreasonable, and thus unlawful, as a matter of law, without regard to the motives or justifications offered by conspirators*."[22] And more recently, in opposing a similar instruction in *United States v. Surgical Care Affiliates*, No. 3-21-cr-00011-L (N.D. Tex.), the DOJ again argued the imposition of an intent requirement was "*erroneous*" and contrary to precedent, highlighting that "*simply because Defendants did not think of their agreements in the antitrust terminology of an 'allocation' is irrelevant*."[23] Regardless, *DaVita* foretold that courts may be willing to take a more flexible and nuanced approach in the no-poach context, suggesting a court's initial acceptance of the per se standard might be just the beginning and not the end of the story.

IV. *United States v. Patel*: Court reversal on per se

17. This pattern was further demonstrated in *United States v. Patel*. In December 2021 in the U.S. District Court for the District of Connecticut, the DOJ charged six individuals, one employed by an aerospace company and the remaining by several of its engineer staffing suppliers, with one count of conspiracy in violation of Section 1 of the Sherman Act. The DOJ alleged that the defendants engaged in a no-poach agreement to "*suppress competition by allocating employees in the aerospace industry working on projects*" for the aerospace company by agreeing to "*restrict the hiring and recruiting of engineers and other skilled-labor employees*" between and among the companies.[24]

18. The defendants moved to dismiss the indictment on two principal grounds, both of which related to the application of the per se rule.

19. First, like in *DaVita*, defendants argued that courts lacked sufficient judicial experience with no-poach agreements to justify per se treatment.[25] The *Patel* court agreed that the allegations did not qualify as an independent category of per se unlawful restraint. But the court sided with the DOJ that the alleged no-poach agreement was properly fashioned as a horizontal allocation of a labor market.[26] Importantly, however, the court warned that "*not all no*[-]*poach agreements are market allocations subject to* per se *treatment*."[27] Thus, while the court ruled in the government's favor on the pleadings, it effectively left open the legal question of whether the particular restraint deserved per se treatment until justified at

16 Order Resolving Disputes on Proposed Jury Instr. at 9, *United States v. DaVita Inc.*, No. 1:21-cr-00229-RBJ (D. Colo. Mar. 25, 2022), ECF No. 214.

17 Ibid. at 9–10.

18 Ibid. at 11.

19 C. Salvatore, DaVita, Ex-CEO Acquitted In Antitrust No-Poach Trial, *Law360* (Sept. 25, 2023, 5:08 PM), https://www.law360.com/articles/1484766/davita-ex-ceo-acquitted-in-antitrust-no-poach-trial?

20 *See* Verdict at 1–2, *United States v. DaVita Inc.*, No. 1:21-cr-00229-RBJ (D. Colo. Apr. 15, 2022), ECF No. 264.

21 United States' Objections to Defs.' Proposed Jury Instr. at 5, *United States v. Patel*, No. 3:21-cr-220-VAB (D. Conn. Apr. 28, 2023), ECF No. 421.

22 Ibid. at 8.

23 United States' Objections To Defs.' Proposed Jury Instr. at 4–6, *United States v. Surgical Care Affiliates, LLC*, No. 3:21-cr-00011-L (N.D. Tex. Oct. 28, 2022), ECF No. 166.

24 Indictment at 4, *United States v. Patel*, No. 3:21-cr-00220-VAB (D. Conn. Dec. 15, 2021), ECF No. 20.

25 Defs.' Joint Mot. to Dismiss at 2, *United States v. Patel*, No. 3:21-cr-220-VAB (D. Conn. June 29, 2022), ECF No. 174.

26 See Order Denying Mot. to Dismiss at 21, No. 3:21-cr-00220-VAB (D. Conn. 2023), ECF No. 257 ("[T]his agreement, as described in the Indictment, is sufficient because it describes a horizontal agreement to allocate employees in a specific labor market.").

27 Ibid.

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trial.[28] Though few observers may have fully appreciated the significance of that language at the time, it foreshadowed the possibility that a failure of proof of actual market allocation could rule out the application of the per se rule and doom the government's case.

20. Second, defendants argued that the agreement should not be criminally prosecutable because it was ancillary. Because all the outsource employees were working for the benefit of the engineering firm, the alleged agreement increased efficiency by helping to "*promote consistent staffing, avoid*[] *disruptions, and incentivize*[] *outsource firms to invest in recruitment and training of outsource engineers by preventing free riding*."[29] The DOJ, on the other hand, argued that ancillarity was a fact-intensive question beyond the pleadings, and more importantly, defendants held the initial burden of proving ancillarity, not the government.[30] While the court punted on the burden, it agreed with the DOJ that the indictment as drafted did not evince ancillarity because the suppliers competed, rather than cooperated, for the engineering firm's business.[31] But, like with the legal standard, the court allowed defendants to contest the characterization with facts later in the proceedings.[32]

21. These holdings may have been predictable based on *DaVita*, but things changed in the lead-up to trial as the court decided several pre-trial motions in ways that contrast with those typically permitted in a per se case. First, the court ruled that evidence regarding an ancillary restraints defense would be admissible, allowing for the defense's challenge to the application of the per se rule.[33] Second, although defendants were barred from presenting evidence to support the inference that the alleged agreement had procompetitive benefits—a standard exclusion in per se cases—the court permitted evidence of procompetitive benefits as relevant to arguments such as "*whether Defendants joined the charged conspiracy, whether the conspiracy existed as alleged, and whether Defendants had the requisite intent to join such a conspiracy*."[34] Third, over the DOJ's objection, the court permitted defendants to call an economic expert witness to offer opinions "*relevant to rebut the charges*." These opinions included procompetitive justification evidence normally excluded from a per se case. For example, in one opinion, the expert planned to opine that no "*statistical support*" existed that the alleged conspiracy had any adverse impact on engineers' wages.[35] Another permitted opinion related to the alleged relevant market definition, which the DOJ argued was irrelevant, risked confusing the issues, and would mislead the jury because of the per se illegality of the alleged agreement.[36] The court also allowed testimony that the conduct was inconsistent with suppressing wages. This type of economic expert testimony, once rare in criminal antitrust cases, further signaled a highly permissive approach to allowable testimony in the trial of a per se case.

22. Finally, and perhaps most consequentially for future labor cases, the *Patel* court's jury instructions further challenged the DOJ's paradigm of what must be proven in a per se case. Prosecution-friendly instructions were accepted on several of the basic elements of the offense, including the court's refusal to incorporate the *DaVita* instruction regarding intent to allocate a market. But over the government's objection that defendants must first shoulder an initial demonstration of ancillarity,[37] the court required the DOJ to bear the burden of proving, beyond a reasonable doubt, that the ancillary restraints doctrine does not apply to the alleged agreement.[38] The court further approved a relaxed standard for defendants to show ancillarity by finding that the charged agreement need not be "*absolutely essential*" to achieve the claimed procompetitive benefits, nor did it need to be the "*only possible way to achieve those benefits*" in order to bring the case out of the ambit of the per se rule.[39] These rulings, if followed in later cases, would significantly complicate the DOJ's burden in winning labor cases, and hand defendants ample opportunity to show that a no-poach restraint was justified.

23. As the case proceeded to trial, these departures from per se norms appear to have played a role in altering the trajectory of the case. Trial documents indicate that defendants elicited from DOJ witnesses a substantial amount of testimony indicating that any agreement that was reached between the engineering firm and its suppliers

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28 Mem. In Opp. to Mot. to Dismiss at 21, *United States v. Patel*, No. 3:21-cr-220-VAB (D. Conn. Aug. 10, 2022), ECF No. 216.

29 Ruling and Order on Mots. at 26, *United States v. Patel*, No. 3:21-cr-00220-VAB (D. Conn. Dec. 2, 2022), ECF No. 257.

30 Ibid. at 24–26.

31 Ibid. at 29.

32 The *DaVita* court came to a similar conclusion that an ultimate factual finding that the agreement was not ancillary would be necessary to support the applicability of the per se standard: "*What I conclude is that if naked non-solicitation agreements or no-hire agreements allocate the market, they are per se unreasonable*." Order Denying Defs.' Mot. to Dismiss at 17, *United States v. DaVita Inc.*, No. 1:21-cr-00229-RBJ (D. Conn. Jan. 28, 2022), ECF No. 132.

33 Ruling and Order on Mots. in Limine at 16, *United States v. Patel*, No. 3:21-cr-220-VAB (D. Conn. Aug. 10, 2022), ECF No. 457.

34 Ibid. at 13.

35 Ibid. at 68–71.

36 Ibid. at 68.

37 *See* United States' Objections to Defs.' Proposed Jury Instr. at 24, n. 7, *United States v. Patel*, No. 3:21-cr-00220-VAB (D. Conn. Mar. 20, 2023), ECF No. 421. The Court also rejected the DOJ's request that defendants make a preliminary proffer of ancillary restraint evidence prior to trial in order to avoid the presentation of "*prejudicial and irrelevant procompetitive benefits evidence* (. . .) *that will ultimately fail to warrant a jury instruction*." Ibid. at 24 n. 7.

38 Proposed Post-Trial Annotated Jury Instr. at 54, United States v. Patel, No. 3:21-cr-00220-VAB (D. Conn. Mar. 27, 2023), ECF No. 456 ("Even if the Government proves the three elements beyond a reasonable doubt, if the charged agreement is ancillary to a legitimate business collaboration you must find the Defendants not guilty. The Government bears the burden of proving the charged agreement is not ancillary. To be ancillary, the charged agreement must be two things. First, the agreement must be subordinate and collateral to a separate, legitimate business collaboration; and Second, the agreement must be reasonably necessary to achieving the legitimate and pro-competitive purposes of the business collaboration."). In an alternative jury instruction, the DOJ acknowledged that, should the defendants first establish an ancillarity defense, it would be required to "prove beyond a reasonable doubt that the charged employee allocation agreement was not an ancillary restraint." United States' Objections to Defs.' Proposed Jury Instr., Exhibit C at 1, United States v. Patel, No. 3:21-cr-00220-VAB (D. Conn. Mar. 20, 2023), ECF No. 421-3.

39 Proposed Post-Trial Annotated Jury Instr. at 51, *United States v. Patel*, No. 3:21-cr-00220-VAB (D. Conn. Mar. 27, 2023), ECF No. 456.

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was indefinite, inconsistently adopted or followed, and riddled with exceptions. The engineering firm regularly hired directly from suppliers at will,[40] and suppliers also hired from each other as needed.[41] In fact, many of the government's own witnesses were individuals who, even if initially unsuccessful in jumping from employment with the outsourcing company to the engineering firm, were ultimately able to do so.[42] Any restrictions in place by the alleged agreement continuously changed throughout the course of the alleged conspiracy. In an ordinary per se case, it is no defense that the parties to an agreement failed to abide by it.[43] But in *Patel*, the defendants were given wide latitude to offer that argument directly, even if the evidence was not being used solely to disprove the existence of a conspiracy.

24. After the DOJ rested its four-week case-in-chief, defendants sought a judgment of acquittal under Federal Rule of Criminal Procedure 29, whereby courts may acquit only if the evidence of the crime is nonexistent or "*so meager that no reasonable jury could find guilt beyond a reasonable doubt*."[44] Under this high standard—which had not yielded an acquittal in an antitrust case for decades—the court granted the motion and acquitted all defendants on April 28, 2023.[45] Despite its motion to dismiss holding and a reaffirmation that horizontal market allocation agreements are usually subject to per se treatment,[46] the court concluded the alleged agreement was not a market allocation at all and declined to apply the per se rule, resulting in acquittal.

25. In doing so, the court principally relied on *Bogan v. Hodgkins*,[47] a case the court originally distinguished in favor of the DOJ in denying the motion to dismiss. In *Bogan*, the Second Circuit considered an agreement among general insurance agents not to allow transfers of active subordinate agents without mutual permission.[48] The Second Circuit found that although the agreement constrained competition to some degree, it did not allocate the market "*to any meaningful extent*."[49] Under this reasoning, the *Patel* court could not find "*any meaningful difference*" between *Patel* and *Bogan*. Also citing *DaVita*,[50] the *Patel* court held that a market allocation agreement must result in a "*cessation of 'meaningful competition' in the allocated market*,"[51] which the court found was not established by the DOJ's evidence in the case. The court assumed the DOJ had proven an agreement among the defendants to restrict hiring, but because the alleged agreement had so many exceptions, it could not meaningfully allocate the relevant labor market. Therefore, the court removed the case from per se treatment as a matter of law.[52]

26. The *Patel* court's stunning Rule 29 order seemed to reverse its motion to dismiss order on the applicability of the per se rule. But did it? Likely not. At motion to dismiss, the court found only that the agreement was properly alleged as a per se market allocation, but it clearly did not make a final determination on this question. Despite the "favorable" denial of the dismissal bid, the DOJ remained in limbo; its obligation to establish the application of the per se rule to the evidence at trial, including the *Bogan* requirement that the restraint on the labor market be "meaningful," would simply be left for another day. Worse still for the government, the court's order also implied that the DOJ must "*submit sufficient evidence of the relevant market*" alleged in the complaint.[53] Of course, defining a relevant market—which is a tool for assessing anticompetitive effects—is not generally an element of a pure per se offense.[54]

27. These holdings also stood in contrast with the jury instructions issued prior to trial that contained no such impact or effect requirements of proof by the DOJ.

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40 In one example, the government introduced an exhibit showing that the engineering firm hired more than 40 people from its alleged co-conspirator in a span of 14 months of the alleged 8-year conspiracy. *See* Ruling and Order on Defs.' Mots. for Judgment of Acquittal at 17, *United States v. Patel*, No. 3:21-cr-00220-VAB (D. Conn. Apr. 28, 2023), ECF No. 599; *see* Indictment at 4, *United States v. Patel*, No. 3:21-cr-00220-VAB (D. Conn. Dec. 15, 2021), ECF No. 20 ("*Beginning at least as early as 2011 and continuing until as late as September 2019* (. . .) [the defendants] *knowingly entered into and engaged in a combination and conspiracy* (. . .) to suppress competition (. . .)"); *see also* Memo. of Law in Supp. of Defs.' Joint Mot. for Judgment of Acquittal at 20, No. 3:21-CR-220 (VAB) (D. Conn. Apr. 24, 2023), ECF No. 578-1.

41 *See*, e.g., Ruling and Order on Defs.' Mots. for Judgment of Acquittal at 14, *United States v. Patel*, No. 3:21-cr-00220-VAB (D. Conn. Apr. 28, 2023), ECF No. 599 (explaining "*that Cyient hired 'whoever [it] needed when [it] really needed them' and that the only directive he received from Defendant Edwards was to 'hire whoever we need*'" (alterations in original)).

42 See ibid. at 17–18 ("[A]l but one of the engineers who testified during the Government's case-in-chief now work at one of the companies that they had applied to during the time period of the alleged conspiracy.").

43 See, e.g., United States v. Socony-Vacuum Oil Co., 310 U.S. 150, (1940) ("Conspiracies under the Sherman Act are on 'the common law footing': they are not dependent on the 'doing of any act other than the act of conspiring' as a condition of liability.").

44 Ruling and Order on Defs.' Mots. for Judgment of Acquittal at 5, *United States v. Patel*, No. 3:21-cr-220-VAB (D. Conn. April 28, 2023), ECF No. 599 (quoting from *United States v. Facen*, 812 F.3d 280, 286 (2d Cir. 2016)).

45 *See* ibid.

46 Ibid. at 94 ("Horizontal market allocation agreements are traditionally subject to per se treatment (. . .)").

47 *Bogan v. Hodgkins*, 166 F.3d 509 (2d Cir. 1999).

48 *See* ibid. at 511–12.

49 Ibid. at 515. Perhaps foreshadowing this holding, the court's Jury Instructions cited *Bogan* for this proposition. Annotated Post-Trial Jury Instr. at 33, n. 9, No. 3:21-cr-00220-VAB (D. Conn. Mar. 27, 2023), ECF No. 456.

50 United States v. DaVita Inc., No. 1:21-cr-00229-RBJ, 2022 WL 1288585, at *3 ("Second, I find that a horizontal market allocation requires cessation of 'meaningful competition' in the allocated market. This standard requires the government prove actual employee allocation (or, in this case, a conspiracy to actually allocate), but it does not allow defendants to disprove the government's case by showing that switching employers is theoretically possible or occurred in a few exceptional cases.").

51 Ruling and Order on Defs.' Mots. for Judgment of Acquittal at 18, No. 3:21-cr-220 (VAB) (D. Conn. Apr. 28, 2023), ECF No. 599 (quoting *United States v. DaVita Inc.*, No. 1:21-cr-00229-RBJ, 2022 WL 1288585, at *3. (D. Colo. Mar. 25, 2022)).

52 See ibid. at 11–12, 17–18 ("[T]he agreement here cannot be said to 'allocate the market . . . to any meaningful extent,' and therefore, it is not a market allocation agreement as a matter of law" (quoting Bogan v. Hodgkins, 166 F.3d 509, 515 (2d Cir. 1999) (alteration in original))).

53 Ibid. at 13.

54 See ibid. at 12–13 ("[E]ven assuming the Government has proved that there was an agreement between Defendants to restrict hiring and assuming that the Government has submitted sufficient evidence of the relevant market—engineers or other skilled labor employees at QuEST, Belcan, Cyient, PSI, and Agilis working on projects for Pratt & Whitney (. . .) this alleged agreement 'does not allocate the [relevant labor] market . . . to any meaningful extent'" (quoting Bogan v. Hodgkins, 166 F.3d at 515)) (second and third alteration in original). Note that the DaVita court rejected the invitation to require the DOJ to define a relevant market. United States v. DaVita Inc., No. 1:21-CR-00229-RBJ, 2022 WL 1288585, at *2–3 (D. Colo. Mar. 25, 2022).

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In fact, the jury instructions regarding the element of the offense were broadly in line with commonly accepted antitrust jury instructions regarding per se offenses—focused on the existence of an agreement, not its effect on the market.[55] So, for example, under the *Patel* jury instructions, if an alleged agreement to allocate the labor market existed, it would not matter whether the alleged coconspirators chose not to participate, cheated, failed to abide by, or were otherwise unsuccessful in carrying out the plan.[56] "*The agreement is the crime, even if it was never carried out*."[57] These jury instructions, which presumed per se treatment, are harder to square with the court's requirement that the restraint "meaningfully" affect an allocation of the labor market at issue.

28. The *Patel* court preemptively addressed the charge that its holding would alter or add elements to the per se standard. The court claimed only to be putting the DOJ through its paces to prove that per se treatment was justified. In a parting shot, the court stated that it was, in fact, the DOJ that "*has tried to expand the common and accepted definition of market allocation in a way not clearly used before*."[58] These holdings, made possible by an effective deferral of the decision on application of the per se treatment, may have allowed broader latitude for defendants to elicit and introduce favorable evidence than would be allowed in a pure per se case.

29. Because the double jeopardy clause of the Fifth Amendment bars appeals from Rule 29 acquittals,[59] the DOJ was unable to challenge, or even object to, the *Patel* court's holding directly. But in May 2023, the DOJ responded to the *Patel* ruling through a filing in a separate labor market prosecution, *United States v. Surgical Care Affiliates* (SCA), in the Northern District of Texas. There, the DOJ argued the *Patel* ruling is contrary to relevant Supreme Court and Fifth Circuit precedent[60] that categorizes horizontal no-poach agreements as per se unlawful market allocations, "*even though such agreements merely limit, rather than eliminate, competition*."[61] The DOJ clearly took issue with the *Patel* court's decision to require proof that the alleged conspiracy amounted to a "*cessation of 'meaningful competition' in the allocated market*" to be per se illegal.[62] The *Patel* ruling was also erroneous, argued the DOJ, because once a horizontal employee-allocation conspiracy is categorized as per se unlawful at the motion to dismiss stage, no further inquiry into the efficacy, unreasonableness, or quantum of harm of the conspiracy is necessary or allowed based on proof offered at trial.

V. Takeaways, looking forward

30. It is too soon to tell how the DOJ's labor market prosecution campaign will develop in the future or how the *DaVita* and *Patel* cases will impact those enforcement efforts. It seems clear that courts have accepted the notional analogy of no-poach agreements to more traditional market allocation agreements subject to the per se rule. There is also reason to believe the DOJ will continue to successfully survive dismissal bids if it chooses to continue to pursue labor cases. In fact, recent holdings in the civil context reinforce the inability of defendants to raise, as a defense, the nature of an alleged restraint and its ancillarity to legitimate conduct at the pleading stage.[63] However, other than a sole negotiated corporate conviction,[64] the DOJ has not managed to translate its ability to survive dismissal motions into labor market convictions.

31. If future courts adopt the approaches of the *DaVita* and *Patel* courts, the denial of a motion to dismiss will fail to carry the significance it traditionally has in per se prosecutions. Over the DOJ objections that the analytical

55 The proposed charges were primarily derived from relevant portions of the *Modern Federal Jury Instructions—Criminal*, the ABA Section of Antitrust Law *Model Jury Instructions in Criminal Antitrust Cases*, and recent jury instructions in per se criminal cases. *See Modern Federal Jury Instructions—Criminal* (Matthew Bedner and Co.); *see Model Jury Instructions in Criminal Antitrust Cases* (ABA, 12th ed., 2010); *see United States v. Lischewski*, No. 3:18-cr-203 (N.D. Cal.); *see United States v. Penn*, No. 20-cr-152 (D. Colo.); *see United States v. Aiyer*, No. 18-cr-333 (JGK) (S.D.N.Y.).

56 Annotated Post-Trial Jury Instr. at 36, No. 3:21-cr-00220-VAB (D. Conn. Mar. 27, 2023), ECF No. 456 ("If you should find that the Defendants and alleged coconspirators entered into the charged agreement to allocate or divide the labor market, the fact that the Defendants or their alleged coconspirators did not abide by it, or that one or more of them may not have lived up to some aspect of the agreement, or that they may not have been successful in achieving their objectives, is no defense. The agreement is the crime, even if it was never carried out.").

57 Ibid. at 36; see also ibid. at 33 ("The agreement itself is a crime. Whether the agreement is ever carried out, or whether it succeeds or fails, does not matter. Indeed, the agreement need not be consistently followed. Conspirators may cheat on each other and still be conspirators. It is the agreement to do something that violates the law that is the essence of a conspiracy.").

58 Ruling and Order on Defs.' Mots. for Judgment of Acquittal at 18 n. 7, No. 3:21-cr-220 (VAB) (D. Conn. Apr. 28, 2023), ECF No. 599.

59 See United States v. Martin Linen Supply Co., 430 U.S. 564, 571–72 (1977) ("Perhaps the most fundamental rule in the history of double jeopardy jurisprudence has been that '[a] verdict of acquittal . . . could not be reviewed, on error or otherwise, without putting [a defendant] twice in jeopardy, and thereby violating the Constitution'" (quoting United States v. Ball, 163 U.S. 662, 671 (1896) (alterations in original)).

60 See United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 220–21 (1940) ("[T]he fact that sales on the spot markets were still governed by some competition is of no consequence," and the conspiracy was per se unlawful even though participants "were in no position to control the market"); ibid. at 224 n. 59 ("Price-fixing agreements may or may not be aimed at complete elimination of price competition"); Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643 (1980) (per curiam) (agreement that related only to credit terms still deemed per se unlawful); United States v. Realty Multi-List, Inc., 629 F.2d 1351, 1362, 1365 (5th Cir. 1980) (explaining that, for per se unlawful agreements, "it is irrelevant that a particular agreement may be between two small firms occupying an insignificant market position").

61 United States' Response to Defs.' Notice of Additional Authority at 1–2, *United States v. Surgical Care Affiliates*, No. 3-21-cr-00011-L (N.D. Tex.), ECF No. 201.

62 *See* Ruling and Order on Defs.' Mots. for Judgment of Acquittal at 18, No. 3:21-cr-220 (VAB) (D. Conn. Apr. 28, 2023), ECF No. 599 (*quoting United States v. DaVita Inc.*, No. 1:21-cr-00229-RBJ, 2022 WL 1288585, at *3. (D. Colo. Mar. 25, 2022)). Notably, the *DaVita* court similarly found that "*a horizontal market allocation requires cessation of 'meaningful competition' in the allocated market*." Order Resolving Disputes on Proposed Jury Instr. at 6, No. 1:21-cr-00229-RBJ (D. Colo. Mar. 25, 2022), ECF No. 214.

63 *See Deslandes v. McDonald's USA*, LLC, No. 22-2333, 2023 WL 5496957, at *1–4 (7th Cir. Aug. 25, 2023), ECF No. 109 (reversing a district court's decision to dismiss the case because "[t]*he complaint alleges a horizontal restraint, and market power is not* [always necessary] *to antitrust claims involving naked agreements among competitors*.").

64 *See* Office of Pub. Affairs, Dep't of Justice, Health Care Company Pleads Guilty and is Sentenced for Conspiring to Suppress Wages of School Nurses (Sept. 27, 2023, 12:43 PM), https://www.justice.gov/opa/pr/health-care-company-pleads-guilty-and-sentenced-conspiring-suppress-wages-school-nurses.

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standard is locked in at motion to dismiss, an early win for the government will not provide finality that a "pure" per se legal standard will apply in the jury room.[65] Moreover, the crucial intent and market impact holdings in *DaVita* and *Patel* will significantly increase the government's trial burden. It also remains to be seen how the *Patel* holding that the government bears the burden to prove lack of ancillarity—which never fully played out in *Patel* because the trial was terminated before the defense put on its case—will affect the DOJ's ability to obtain convictions. In cases like *Patel*, where the defendants have both horizontal and vertical business relationships with each other, the challenge of proving a lack of ancillarity beyond a reasonable doubt may become an insurmountable challenge. The DOJ's case selection going forward will be of significant importance to its likelihood of success.

32. A number of other important questions remain about the impact of the DOJ's early prosecution efforts. First, while the *Patel* court explicitly denied that its holding changed the legal standard, it is fair to question whether some form of modified per se rule is emerging as applicable to no-poach agreements. Courts are willing to accept the DOJ's view that no-poach agreements are subject to the per se standard, but when it comes time to apply that standard, at least in the criminal context, for whatever reason, they are veering off-course. And there are signs this trend may reach civil enforcement as well. For example, in *Borozny v. Raytheon Technologies Corp.*, the civil follow-on damages suit regarding the aerospace industry labor market conspiracy alleged in *Patel*, the District of Connecticut held that plaintiffs must "*describe the relevant market*" even in claims alleging a per se violation, even though market definition is not required in per se cases.[66] It is possible that the DOJ will prevail in convincing subsequent courts that these early decisions reflect unwarranted departures from well-established law and should not be followed. But it seems equally, or even more, likely that future courts will follow this lead, creating what is essentially a different, more difficult legal standard applicable to no-poach and no-solicitation agreements.

33. Second, to the extent courts continue to add to the elements the DOJ must prove at trial and allow defendants to adduce evidence on the procompetitive justifications for no-poach agreements, it will be crucial to see whether such a trend has spillover effects outside of the labor context. While at first blush, such a result would seem unlikely given the well-established case law supporting the traditional per se standard's application to ordinary horizontal agreements to fix prices, rig bids, or allocate product markets, it is not out of the realm of possibility. As long as courts departing from the usual bounds of per se litigation do not expressly cabin those departures to agreements to allocate labor markets, there is nothing to stop defendants in other contexts from pushing for a similarly flexible approach to judging alleged conspiracies. Thus, there is at least some cause to suspect the DOJ's losses could be creating precedent that will make it easier for defendants to ward off antitrust claims even outside the labor context.

34. In light of these developments, one might wonder whether the DOJ ought to cut its losses and quit its pursuit of criminal convictions for no-poach agreements. But if the Division's head, Assistant Attorney General Jonathan Kanter's public statements are any indication, there is little risk of that.[67] There appear to be more than pragmatics at play. As Kanter put it, the DOJ's no-poach pursuits are "*righteous cases*," in which "*the ability of hardworking people to find jobs*" is on the line.[68] But no matter how "righteous" its cause, without the threat of a pure per se standard, the DOJ may lose some of the leverage it has historically enjoyed in plea negotiations. The labor cases tried to date suggest no-poach defendants can reasonably expect a more nuanced examination of their conduct at trial, which may give them the confidence to continue to take their chances with juries. ■

65 Indeed, a recent civil case challenging a no-poach agreement reiterated this takeaway from *DaVita* and *Patel*, holding that per se was the appropriate legal standard to apply at the motion dismiss stage to an alleged no-poach agreement, but that a factual finding at trial that the agreement was ancillary would suffice to pull the case out of the per se domain. *See Deslandes v. McDonald's USA, LLC*, No. 22-2333, slip op., at *4, *7–8 (7th Cir. Aug. 25, 2023), ECF No. 109. ("[T]*he district judge jettisoned the* per se *rule too early*," because "*the classification of a restraint as ancillary is a defense, and complaints need not anticipate and plead around defenses*.").

66 Ruling and Order on Plaintiffs' Mot. for Reconsideration at 1–2, 6–7, *Borozny v. Raytheon Techs. Corp.*, No. 3:21-cv-1657-SVN (D. Conn. May 30, 2023), ECF No. 647 (in denying Defendants' motion to dismiss, the court held—again in reliance on *Bogan*—that "*it is an element of a per se case to describe the relevant market in which we may presume the anticompetitive effect would occur*").

67 *See* J. Kanter, Assist. Att'y General, Dep't of Justice, Antitrust Div., Remarks at the Fordham Competition Law Institute's International Antitrust Law and Policy Conference (Sept. 22, 2023), https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-remarks-fordham-competition-law (Kanter affirming the DOJ remains "*just as committed as ever to, when appropriate, using our congressionally given authority to prosecute criminal violations of the Sherman Act in labor markets*").

68 *See* Koenig, *supra* note 2.

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What about class actions?: Why the *per se* no-poach debate matters in class actions

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I. Introduction

1. In 2016, the Antitrust Division of the Department of Justice (DOJ) and the Federal Trade Commission (FTC) issued their guidelines for human resource professionals.[1] The guidelines made clear that agreements among employers to set wages and naked, no-poaching agreements would be subject to a per se rule and that DOJ would pursue these agreements criminally. While the DOJ had previously taken the position that these agreements are per se violations, pursuing these agreements criminally was a fresh enforcement approach.[2] DOJ has followed through on its position, bringing and continuing to bring cases concerning criminal no-poaching agreements, notwithstanding its uphill battles to secure convictions.[3] Of course, in those cases, the appropriate antitrust standard of review to be applied to the agreements at issue was crucial to DOJ's ability to win jury convictions or obtain guilty pleas. As a result, much has been written on the treatment of no-poaching agreements as per se illegal and the pursuit of these agreements criminally. However, little has been written on how the applicable standards of review for no-poaching agreements affect class certifications in class actions. This article seeks to fill this gap, considering the risk of both first-mover private class action litigations and follow-on class action litigations stemming from DOJ's investigations.

II. Overview of history of private class actions concerning no-poaching agreements

2. Over ten years ago, groups of plaintiffs initiated private antitrust class actions against multiple technology companies alleging wage suppression achieved through no-poaching agreements.[4] Those cases settled for about USD 9–USD 415 million.[5] These cases preceded the DOJ and FTC's 2016 guidance concerning no-poaching agreements.

3. Following DOJ's guidance, multiple private class actions have been filed and class plaintiffs have had success in pursing no-poaching cases, especially in times when DOJ's position remained that a per se standard should be applied to no-poaching agreements (whether by official statement through the submission of a statement of interest or maintaining the policy articulated in the 2016 guidelines). For example, between 2021 and 2022, plaintiffs in *Hunter v. Booz Allen Hamilton* reached settlements with the government contractors they had alleged entered into no-poaching agreements totaling approximately USD 5.3 million.[6] Additionally, in *Seaman v. Duke University and Duke University Health System*, a

1 U.S. Dep't of Justice, Antitrust Div. and Fed. Trade Comm'n, Antitrust Guidance for Human Resource Professionals (Oct. 2016), https://www.justice.gov/atr/file/903511/download.

2 *See* Complaint, *High-Tech Employees*, No. 10-01629 (D.C. 2010), https://www.justice.gov/d9/atr/case-documents/attachments/2010/09/24/262654.pdf.

3 E.g., Judgment of Acquittal, *United States v. DaVita Inc.*, No. 21-CR-229 (D. Colo. Apr. 20, 2022); *United States v. Jindal et al.*, No. 4:20-cr-00358 (E.D. Tex.).

4 *In re: High-Tech Employee Antitrust Litigation*, No. 5:11-cv-02509-LHK (N.D. Cal. May 4, 2011); 4 *In re: Animation Workers Antitrust Litigation*, No. District of California, No. 14-cv-04062-LHK (123 F.Supp.3d 1175 (2015)).

5 A. Amidi, Animation Workers Set To Receive $170 Million Payout From Wage-Theft Lawsuit (June 27, 2018), *Cartoon Brew*, https://www.cartoonbrew.com/artist-rights/animation-workers-set-to-receive-170-million-payout-from-wage-theft-lawsuit-161482.html.

6 418 F. Supp. 3d 214 (S.D. Ohio 2019) (denying motion to dismiss); *Hunter v. Booz Allen Hamilton Inc.*, No. 2:19-CV-00411, 2023 WL 3204684, at *1 (S.D. Ohio May 2, 2023) (approving settlement).

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class alleging that Duke University and the University of North Carolina (UNC) agreed not to allow lateral hiring among faculty members between the two universities settled for approximately USD 19 million. Although the case was filed before DOJ's 2016 guidance, the court certified the class two years after the guidance, in 2018.[7] Further, in March 2019, the parties reached a settlement agreement just one month later month after DOJ filed a statement of interest.[8] There, the court allowed DOJ to enforce an injunction for Duke and UNC to cease engaging in the conduct.[9]

4. Moreover, in 2019, in a no-poaching case concerning a franchise, DOJ submitted a statement of interest taking the position that "*most franchisor-franchisee restraints are subject to the rule of reason*."[10] But DOJ clarified its position in *Deslandes v. McDonald's USA, LLC*, stating that "*agreements among competing employers not to hire or solicit each other's employees are per se unlawful unless defendants establish ancillarity*" following McDonald's reference to DOJ's previous statement of interest to support its (McDonald's) argument for the application of the rule of reason.

5. Since then, DOJ's position has remained unchanged; it maintains that a per se standard should be applied to no-poaching agreements in any context unless ancillarity is shown. DOJ has continued to make its position known at both the district court and circuit court level. In some cases where the putative class plaintiffs' arguments for a per se standard were defeated at the motion to dismiss or class certification stage, DOJ has submitted amicus briefs that rally for per applicability. For example, when the plaintiffs in *Giordano v. Saks Inc.* appealed the district court's decision to dismiss the case, DOJ, submitted an amicus brief in support of the plaintiff-appellants argument for the per se standard to apply.[11]

III. Class certification

6. Antitrust class actions are among the riskiest antitrust cases after criminal antitrust matters. Class certification is a critical step in the class action process that comes with significant outcomes for both plaintiffs and defendants. Class certification allows plaintiffs to recover more damages than these plaintiffs would be able to recover for individual claims and often provides plaintiffs with more leverage in settlement negotiations. This is especially true in antitrust class actions because plaintiffs can recover treble damages amounting to three times the amount of damages they have proven under Section 4 of the Clayton Act. Consequently, the risk of financial exposure, e.g., a large jury verdict or a large settlement, is high in antitrust class actions. In addition, litigating antitrust class actions requires significant discovery efforts that are costly for both plaintiffs and defendants. Besides financial risks, there also exists the risk of being subject to injunctive relief.

7. In antitrust cases, it is easier for plaintiffs to obtain class certification when the per se rule applies to the alleged conduct.[12] This is because the rule of reason requires plaintiffs to prove the anticompetitive effect in a relevant market and permits defendants to offer procompetitive justifications. As a result, courts may need to examine multiple applicable markets and individual relationships between plaintiffs and defendants, for example, which in turn results in individualized issues predominating the putative class.[13] This difficulty remains true in cases involving no-poaching agreements. For example, in *Conrad v. Jimmy John's Franchise*, the court denied certifying a putative class that alleged the no-poaching agreements in Jimmy John's franchise agreements were anticompetitive and noted that "*the rule of reason raises more individualized issues precluding class certification*."[14] Additionally, the difficulty in achieving class certification in cases applying the rule of reason is likely why the plaintiffs in *Deslandes* made the strategic decision to only include per se claims in their complaint.[15]

1. Certifying a class

8. For a putative class to obtain class certification, the class must meet the requirements established in Fed. R. Civ. P. 23(a):

> "*(1) the class is so numerous that joinder of all members is impracticable* [('numerosity')]*;*
>
> *(2) there are questions of law or fact common to the class* [('commonality')]*;*
>
> *(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class* [('typicality')]*; and*
>
> *(4) the representative parties will fairly and adequately protect the interests of the class* [('adequacy')]."

7 *Seaman v. Duke Univ.*, No. 1:15-CV-462, 2018 WL 671239, at *1 (M.D.N.C. Feb. 1, 2018) (class certification opinion).

8 Office of Pub. Affairs, Dep't of Justice, Press release, Justice Department Comments on Settlement in Private "No-Poach" Class Action That Allows Government to Enforce Injunction Against Duke University (Nov. 8, 2019), https://www.justice.gov/opa/pr/justice-department-comments-settlement-private-no-poach-class-action-allows-government.

9 Final Judgment, *Seaman v. Duke Univ.*, No. 1:15-CV-462 (Sept. 25, 2019).

10 Statement of Interest of the DOJ, *Stigar v. Dough Dough*, No. 2:18-cv-00244, at 11 (E.D. Wash. Mar. 8, 2019).

11 No. 20-CV-833 (MKB), 2023 WL 1451534, at *12 (E.D.N.Y. Feb. 1, 2023) (dismissing claims); Brief for the United States of America and the Federal Trade Commission as Amici Curiae in Support of Plaintiff-Appellants , *Giordano v. Saks Inc.*, No. 23-600, Doc. 89 (2d Cir. Aug. 7, 2023), Dkt. 89; *see also*, *e.g.* Brief for the United States of America and the Federal Trade Commission as Amici Curiae in Support of Neither Party, *Deslandes,* Nos. 22-2333, 22-2334, Dkt. 51.

12 E.g., *In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litig.*, 691 F.2d 1335, 1343 (9th Cir. 1982) (denying certification due to lack of common evidence).

13 *In re Beer Distribution Antitrust Litig.*, 188 F.R.D. 549, 555 (N.D. Cal. 1998) (holding "*individual questions would predominate in such an analysis*" where individual sales relationships were at issue that would require "the Court to individually analyze each relationship between a distributor and [supplier]").

14 No. 18-CV-00133-NJR, 2021 WL 3268339, at *1 (S.D. Ill. July 30, 2021).

15 No. 17 C 4857, 2018 WL 3105955, at *8 (N.D. Ill. June 25, 2018), vacated and remanded, No. 22-2333, 2023 WL 5496957 (7th Cir. Aug. 25, 2023).

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9. The putative class must also meet at least one of the requirements outlined in Fed. R. Civ. P. 23(b). In antitrust class actions, Rule 23(b)(3) is typically the relevant subsection applicable and requires that "*the court finds that questions of law or fact common to the members of the class predominate over any other questions affecting only individual members, and that a class is superior to other available methods for the fair and efficient adjudication of the controversy*," i.e., predominance.

10. This section examines how each required element may impact class certification in no-poaching cases.

1.1 Numerosity

11. "[T]*he number of class members is the starting point of* [a] *numerosity analysis. Although district courts are always under an obligation to ensure that joinder is impracticable, their inquiry into impracticability should be particularly rigorous when the putative class consists of fewer than forty members*."[16] "'*Impracticable does not mean impossible,' and refers rather to the difficulties of achieving joinder. This calls for an inherently fact-based analysis that requires a district court judge to 'take into account the context of the particular case,' thereby providing district courts considerable discretion in making numerosity determinations*."[17] "*Generally if the named plaintiff demonstrates that the potential number of plaintiffs exceeds 40, the first prong of Rule 23(a) has been met*."[18]

12. Outside of a few common situations, like direct purchaser pay-for-delay actions where the number of direct purchasers is not typically high, defendants do not usually challenge numerosity because the presumptive number of class members is met.[19] However, numerosity may be at issue in no-poaching cases where parties agree, or a court finds, that the labor markets at issue are local. Depending on how small those local markets are, each local market could include very few putative class members. In *Deslandes*, while the court did not directly discuss numerosity while considering the defendant's motion to dismiss, the court noted the difficulty of successful class certification where the relevant market is confined to a "*relatively-small geographic area*," i.e., extremely small local areas. The Court said: "*The relevant market for employees to do the type of work alleged in this case is likely to cover a relatively-small geographic area. Most employees who hold low-skill retail or restaurant jobs are looking for a position in the geographic area in which they already live and work, not a position requiring a long commute or a move. That is not to say that people do not move for other reasons and then attempt to find a low-skill job; the point is merely that most people do not search long distances for a low-skill job with the idea of then moving closer to the job. Plaintiff, though, seeks to represent a nationwide class, and allegations of a large number of geographically-small relevant markets might cut against class certification.*"[20]

13. Although the Seventh Circuit Court of Appeals has since ruled that the district court's decision on whether the per se or rule of reason standard of review was applicable to the no-poaching agreements in *Deslandes* was premature, the district court's point on local markets and class certification difficulty remains true.[21]

1.2 Commonality

14. "*An individual question is one where 'members of a proposed class will need to present evidence that varies from member to member,' while a common question is one where 'the same evidence will suffice for each member to make a prima facie showing* [or] *the issue is susceptible to generalized, class-wide proof*.'"[22] "*If, to make a prima facie showing on a given question, the members of a proposed class will need to present evidence that varies from member to member, then it is an individual question. If the same evidence will suffice for each member to make a prima facie showing, then it becomes a common question.*"[23] The threshold requires only that common questions exist. It does not require that those questions predominate the individual ones (unlike predominance, discussed *supra*). Thus, even one common question is sufficient.[24] However, the analysis should focus not only on "*the raising of common 'questions'* (. . .) *but rather the capacity of a class-wide proceeding to generate common answers*."[25]

15. In *Conrad*, the court did not examine commonality and instead focused its analysis on predominance because there is a "*low threshold for commonality*."[26] For example, even whether there was a violation of the antitrust laws would be a common question. Due to the low threshold, defendants in antitrust cases seldom challenge commonality.

1.3 Typicality

16. The *Conrad* court succinctly laid out how to evaluate typicality: The typicality requirement "*primarily directs the district court to focus on whether the named representatives' claims have the same essential characteristics*

16 *In re Modafinil Antitrust Litig.*, 837 F.3d 238, 250 (3d Cir. 2016), as amended (Sept. 29, 2016).

17 Ibid. at 249 (citations omitted).

18 *Stewart v. Abraham*, 275 F.3d 220, 226–27 (3d Cir. 2001).

19 See, e.g., In re Zetia (Ezetimibe) Antitrust Litig., 7 F.4th 227 (4th Cir. 2021).

Ill. June 25, 2018), vacated and remanded, No. 22-2333, 2023 WL 5496957 (7th Cir. Aug. 25, 2023).

21 *Deslandes*, 2023 WL 5496957 (7th Cir. Aug. 25, 2023) (considering consolidated cases *Deslandes v. McDonald's USA LLC*, No. 22-02333 and *Turner v. McDonald's USA, LLC*, No. 22-2334.).

22 *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 453, 136 S. Ct. 1036, 1045, 194 L. Ed. 2d 124 (2016).

23 *Blades v. Monsanto Co.*, 400 F.3d 562, 566 (8th Cir. 2005).

24 Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 359 (2011) ("Even a single [common] question will do.").

25 Ibid. at 350.

26 Conrad, No. 18-CV-00133-NJR, 2021 WL 3268339, at *5 ("Given the low threshold for commonality, the Court will not belabor this discussion and will instead focus on the more stringent standard for predominance below.").

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as the claims of the class at large" (*De La Fuente v. Stokely-Van Camp, Inc.*, 713 F.2d 225, 232 (7th Cir. 1983)). "*'A plaintiff's claim is typical if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members and his or her claims are based on the same legal theory'*" (ibid. (quoting H. Newberg, *Class Actions* § 1115(b) at 185 (1977))). "*The typicality requirement may be satisfied even if there are factual distinctions between the claims and the named plaintiffs and those of other class members. Thus, similarity of legal theory may control even in the face of differences of fact*" (ibid.). But "[e]*ven though some factual variations may not defeat typicality*" (*Oshana v. Coca-Cola Co.*, 472 F.3d 506, 514 (7th Cir. 2006)), there must still "*be enough congruence between the named representative's claim and that of the unnamed members of the class to justify allowing the named party to litigate on behalf of the group*" (*Spano v. Boeing Co.*, 633 F.3d 574, 586 (7th Cir. 2011).[27]

17. The typicality threshold is often met, but Conrad demonstrates an instance in which atypicality might exist in no-poaching agreement challenges. In *Conrad*, the court found the claims were atypical because the plaintiff was fired for workplace misconduct, and "*while some factual distinctions will not preclude class certification, Conrad's claim is atypical of those putative class members who were actually denied the opportunity to change locations for better wages because of the No-Poach Provision*."[28] The plaintiff had argued that he met the typicality requirement because he was a Jimmy John's employee. However, the harm he alleged, i.e., that the no-poaching agreements prevented his ability to seek employment at another Jimmy John's location, was inapplicable to him.

1.4 Adequacy

18. "*The adequacy inquiry turns on whether (1) the 'named plaintiffs and their counsel have any conflicts of interest with other class members' and (2) 'the named plaintiffs and their counsel [will] prosecute the action vigorously on behalf of the class.*"[29] It is not uncommon for parties to a putative class action to litigate whether conflicts exist between absent class members and the named plaintiff(s), including antitrust class actions.

19. In *Conrad*, the court found that the adequacy requirement was not met because the proposed class included employees at different levels and in different positions, which could create conflicts of interest in no-poaching cases. Specifically, in *Conrad*, the proposed class included managers and non-managerial employees, and those interests were in conflict since: (i) managers would be required to enforce the no-poaching provisions at issue; (ii) some of those managers would be testifying on behalf of Jimmy John's if the case were to proceed to trial; and (iii) the managers benefited from Jimmy John's profit-sharing program, while non-managerial employees did not.[30]

1.5 Predominance

20. As mentioned, in antitrust class actions, the requirement in Fed. R. Civ. P. 23(b) that is usually applicable is 23(b)(3). There are two requirements of the rule: predominance of common questions and superiority. To establish predominance, questions of law or fact common to the class must predominate over individual questions, i.e., questions that concern individual members.[31] On the other hand, superiority requires that a class action be superior to other means of litigating or adjudicating the claims at issue.[32] Most inquiries hinge on predominance, and not superiority.

21. To analyze predominance, courts must look to the specific issues that may proceed to trial and the evidence required to prove a case. The Supreme Court has said the most critical question in the inquiry is "*whether the common, aggregation-enabling, issues in the case are more prevalent or important than the non-common, aggregation-defeating, individual issues*."[33] A court must "*walk a balance between evaluating evidence to determine whether a common question exists and predominates, without weighing that evidence to determine whether the plaintiff class will ultimately prevail on the merits*."[34] "*'Analysis of predominance under Rule 23(b)(3) "begins, of course, with the elements of the underlying cause of action."'* [In antitrust cases,] *the* [c]*ourt must examine whether* [the plaintiff(s)] *can 'establish each of the three required elements of an antitrust claim—(1) a violation of antitrust law; (2) injury and causation; and (3) damages—using common evidence.'*"[35]

22. In cases applying a rule of reason standard, predominance is not usually difficult for defendants to overcome, especially if there are multiple relevant markets at issue, for example.

23. Case in point, in *Seaman*, the court found that if it were to include non-faculty members in the class of faculty members, inclusion "*would defeat predominance and superiority*" because proving the claims of each type of employee would require different evidence.[36] As a result, the court certified the class as to the faculty members only.[37]

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27 Ibid.

28 Ibid.

29 *In re Packaged Seafood Prod. Antitrust Litig.*, 332 F.R.D. 308, 319 (S.D. Cal. 2019)) (modification in original).

30 *Conrad*, No. 18-CV-00133-NJR, 2021 WL 3268339, at *6–7.

31 *Tyson Foods*, 577 U.S. at 453.

32 Ibid.

33 Ibid.

34 *Bell v. PNC Bank, Nat'l Ass'n*, 800 F.3d 360, 376 (7th Cir. 2015).

35 *Conrad*, No. 18-CV-00133-NJR, 2021 WL 3268339, at *6–7 (citations omitted).

36 *Seaman*, 2018 WL 671239, at *9.

37 Ibid.

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24. In *Conrad*, the court found that predominance was not satisfied because the common evidence requirement would be unmet. For instance, some franchisees in the proposed class enforced the no-poaching provision at issue, while others did not, and the specific contracts at issue varied.[38] Therefore, the court declined to certify the class. Notwithstanding the denial of class certification, the parties reached a settlement agreement, but Conrad's loss at class certification resulted in Jimmy John's reducing its financial exposure (since Conrad's claim was now individualized after losing class certification) and risk of being subject to injunctive relief, which is the goal in defeating class certification.[39]

2. Class certification in no-poaching cases: Why the applicable standard of review matters

25. Just as the application of a per se standard is critical criminal no-poaching cases, whether the per standard applies is also critical in class actions concerning no-poaching agreements. This is because the applicable standard of review affects the likelihood of whether plaintiffs can successfully certify a class, which in turn determines defendants' risk of financial exposure, risk of to being subject to injunctive relief and even reputational harm. The successful certification of a class increases defendants' risks because the size of potential settlement or the amount of damages recoverable from a jury trial increases in certified class actions and there exists broader injunctive relief in antitrust class actions.

26. Where a per se standard applies, or where it is debatable whether it applies, plaintiffs have more leverage in negotiations, especially when DOJ agrees with the applicable standard, because the class certification hurdle is less difficult to overcome when a per se standard is applied than when the rule of reason standard applies. If defendant-employers can convince a court that the rule of reason is applicable, then companies would be positioned to argue against class certification and reduce their risks. They may be positioned to make arguments that the applicable labor market is local and that relationships between employers and the employees in a defined class are different from each other in order to overcome predominance, for example.[40]

27. Recently, on August 25, 2023, the Seventh Circuit Court of Appeals overturned and remanded the district court's decision to dismiss a putative antitrust class action challenging no-poaching agreements in McDonald's franchise agreements in *Deslandes*.[41] The court ruled that it was premature to determine whether the per se standard applied to the case and whether the agreements at issue were ancillary at the motion to dismiss stage. Because "*the complaint alleges a horizontal restraint, and market power is not essential to antitrust claims involving naked agreements among competitors*," according to the court, "*district judge jettisoned the per se rule too early*."[42] Hence, going forward, where plausible allegations of a horizontal restraint exist, district courts, at least in the Seventh Circuit, may be more careful in their examination of which standard of review is applicable to the no-poaching agreement(s) at issue at the motion to dismiss stage and may conduct robust analyses on whether ancilliarity exists.

28. Once at the class certification stage, plaintiffs would be in an advantageous position if the per standard is applicable. As explained in *United States v. DaVita*, whether a no-poaching agreement is a "*naked restraint*," and therefore subject to the per se rule, hinges on whether the only purpose of the restraint is to "*stifle competition*" (which is a long-held standard for examining naked restraints in general even outside of the no-poaching context).[43] Ironically, in helping the court determine the applicable standard of review, factors the court may need to consider include similar inquiries that would be required at the class certification stage in a rule of reason analysis, such as the relationship between the employees and the defendants.[44] Issues like these are often "*complex questions*" requiring "*careful economic analysis*," as the Seventh Circuit puts it in *Deslandes*.[45]

IV. Conclusion

29. While it is important for companies and their human resources professionals to monitor criminal treatment of no-poaching agreements, and thus whether the per se standard applies to the agreements at issue, it is also important to pay close attention to whether the per se standard might apply in antitrust class actions concerning no-poaching agreements. Although there is no risk of criminal liability in antitrust class actions, companies' risks, including financial exposure and the risk of being subject to injunctive relief, significantly increase in class actions. This is particularly true where the per se standard applies and plaintiffs overcome the class certification hurdle. Accordingly, it is prudent for companies and their counsel to monitor what standard courts

38 Conrad, 2021 WL 3268339, at *9.

39 Mike Leonard, Jimmy John's No-Poach Antitrust Case Ends With Confidential Deal (Nov. 16, 2021).

40 E.g., *Seaman v. Duke Univ.,* No. 1:15-CV-462, 2018 WL 671239, at *1 (M.D.N.C. Feb. 1, 2018) ("Inclusion of non-faculty in the class, however, would inject issues that cannot be resolved based on the proof offered for the faculty case, would cause significant confusion at trial, and would raise difficult manageability problems.").

41 *Deslandes*, 2023 WL 5496957.

42 Ibid. at *2.

43 *DaVita Inc.*, No. 21-CR-229 (D. Colo. 2022).

44 *Giordano*, 2023 WL 1451534, at *14 (considering the relationship at the motion to dismiss stage and stating: "Saks and the Brand Defendants are competitors, but they also acknowledge that Defendants collaborate, that the Brand Defendants 'sell their goods and apparel through department stores (including Saks)' and through 'concessions (including concessions at Saks stores),' (. . .) Such a relationship is not the same as one between 'naked' competitors.").

45 *Deslandes*, 2023 WL 5496957, at *4.

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are applying in class action cases involving no-poaching agreements, as well as DOJ's statements in those cases. While DOJ has lost multiple criminal cases concerning no-poaching agreements, the risk of high-risk class action litigation continues to exist, especially in light of the Seventh Circuit's ruling in *Deslandes* concerning the applicable standard of review. ■

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Canada's new wage-fixing and no-poach offence

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I. Wage-fixing and no-poach agreements now prohibited

1. Wage-fixing and no-poach agreements are now prohibited in Canada. As of June 23, 2023, it became a criminal offence for non-affiliated employers to agree to fix wages or not to poach each other's employees. In addition to criminal prosecution, employers that enter into these agreements also face class action liability.

2. This article outlines the parameters of this new offence and discusses some of the interpretive issues that are likely to arise when the first cases are brought.

II. The new offence

3. The new wage-fixing and no-poach offence has been grafted onto the existing conspiracy offence in section 45 of the Competition Act.[1] The new provision reads as follows:

> "*Conspiracies, agreements or arrangements regarding employment*
>
> *(1.1) Every person who is an employer commits an offence who, with another employer who is not affiliated with that person, conspires, agrees or arranges*
>
> *(a) to fix, maintain, decrease or control salaries, wages or terms and conditions of employment; or*
>
> *(b) to not solicit or hire each other's employees.*"

4. Like the price-fixing offence, this offence is a per se indictable offence punishable by up to 14 years in jail, or a fine in the discretion of the court, or both.

5. Two defences are available. The ancillary restraints defence applies to wage-fixing and no-poach agreements that are contained within otherwise legitimate arrangements. The regulated conduct defence may apply where wage-fixing or no-poach agreements have been mandated by other provincial or federal legislation.

III. Elements of the wage-fixing and no-poach offence

6. To obtain a conviction, the Crown must prove all elements of the offence beyond a reasonable doubt. There are two components to this: the *actus reus*, or the prohibited conduct, and the *mens rea*, or the intention.

7. The *actus reus* of the wage-fixing and no-poach offence has two main elements:

- An agreement between unaffiliated employers
- To fix employees' wages or to not hire or solicit each other's employees

8. The offence is a full *mens rea* offence. That means that the Crown must prove that the accused intended to enter into the prohibited agreement and had knowledge of its terms.[2]

1. Agreements between unaffiliated employers

9. The wage-fixing and no-poach offence only applies to conspiracies, agreements, or arrangements between unaffiliated employers.

1 Competition Act, RSC 1985, c. C-34, s. 45.

2 Canada v. Pharmaceutical Society of Nova Scotia, [1992] 2 SCR 606.

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1.1 "Employer"

10. Both parties to the agreement must be employers. "Employer" is not defined in the Competition Act. While it is often obvious whether someone is an employer or not, that is not always the case. There are two interpretive issues.

11. The first issue revolves around proving whether the employer has in fact entered into a prohibited agreement with another employer.

12. In its guidance on the new provision, the Competition Bureau says that "employer" "*includes directors, officers, as well as agents or employees, such as human resource professionals.*" For there to be an offence, however, there must be an agreement between employers, that is, the entities that are considered at law to be employers. One would think that this would be entities that are parties to a contract of employment, as employer, with an employee. Directors, officers, agents, employees, and human resource professionals are not themselves employers. They are not, for example, personally liable to pay the employees' wages (except in certain limited circumstances).

13. Of course, corporations can only act through individuals. Section 22.2 of the Criminal Code provides that where a "senior officer" of the corporation, acting within the scope of their authority, is a party to the offence, the corporation is a party to the offence.[3] "Senior officer" is meant quite broadly as "*a representative who plays an important role in the establishment of an organization's policies or is responsible for managing an important aspect of the organization's activities.*"[4] This provision begs the question, however, since there can only be an offence if the employer has entered into the agreement; if it has not, there is no offence for the senior officer to be a party to.

14. Because of this difficulty, the better question likely is whether the person who acted on behalf of the employer in entering into a wage-fixing or no-poach agreement had the authority to bind the corporation to that agreement. This may involve the application of the common law "directing mind" approach.

15. It should be noted, however, that section 22.2 has been applied in a price-fixing case.[5] That case was decided under the pre-2010 version of the price-fixing offence in section 45, however. Currently, the price-fixing offence only applies to agreements between competitors, which potentially raises the same issue for section 22.2 as "employers" in the wage-fixing provision. Before 2010, however, section 45 applied to all agreements that lessened competition unduly. It was not necessary for the parties to the agreement to be competitors.

16. The second issue is whether the provision will apply to agreements to fix terms applicable to contracts with independent contractors. In principle, it does not. Apart from the wage-fixing and no-poach offence, section 45 exempts buyer-side agreements entirely. Thus, unaffiliated firms are in theory free to fix the terms of their contracts with independent contractors.

17. However, even courts have struggled to work out when someone is an independent contractor or an employee for purposes such as vicarious liability, taxation, labour and employment legislation, common law severance pay, and workplace health and safety legislation. The answer can be different depending on the context. The common law applies a list of factors, principally relating to the degree of control exercised by the putative employer (the "control test"), and the degree of integration of the employee/independent contractor in the business of the employer (the "integration test").[6] Quebec's Civil Code relies on a control test.[7] The common law tests may not be determinative in cases involving labour and employment legislation, which contain very broad statutory definitions of "employee"[8] that may be broader than the common law or Civil Code concepts.[9]

18. As a result, it will be difficult for two firms that propose to fix terms for independent contractors to know whether they are "employers" for purposes of subsection 45(1.1).

1.2 "Unaffiliated"

19. Unlike the price-fixing offence, which requires that the parties be competitors or potential competitors with respect to a product, the wage-fixing and no-poach offence merely requires that they be "unaffiliated." There is no requirement that they be competitors.

20. This difference arises because of the differences between supplier-side and buyer-side conspiracies. Underlying the price-fixing offence is the notion that price fixing will only cause harm if the products involved compete with each other. An agreement between two automobile repair shops on their hourly rates would harm consumers, but an agreement between an automobile repair shop and a law firm on hourly rates would not, because those rates would ultimately be disciplined by each firm's competitors. (Of course, there would be no reason for an automobile repair shop and a law firm to fix rates together, precisely because they are not competitors.)

21. Underlying the "unaffiliated" requirement is the notion that firms that do not compete with each other when selling products may nevertheless compete with each other when buying labour. Thus, the automobile repair

3 Criminal Code, RSC 1985, c. C-46, s. 22.2.

4 Criminal Code, s. 2.

5 R. c. Pétroles Global inc., 2013 QCCS 4262.

6 671122 Ontario Ltd. v. Sagaz Industries Canada Inc., 2001 SCC 59.

7 Civil Code of Quebec, art. 2085.

8 Golden Feet Reflexology Ltd. (Re), 2018 BCEST 1.

9 Modern Cleaning Concept Inc. v. Comité paritaire de l'entretien d'édifices publics de la région de Québec, 2019 SCC 28.

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shop and the law firm might compete with each other when hiring a receptionist. (They do not compete when hiring automotive technicians or lawyers, yet it would still be an offence for them to fix wages for those roles.)

22. The Competition Act provides a definition of affiliation. In essence, firms are affiliated with each other if one is controlled by the other, or they are each controlled by the same firm or individual. As well, if two firms are affiliated with a third firm, then they are affiliated with each other. The Act also defines control as requiring ownership of securities to which are attached more than 50% of the votes that may be cast to elect directors of the corporation, and that those votes are sufficient to elect a majority of the directors.[10]

1.3 "Conspires, agrees or arranges"

23. The terms "conspires, agrees or arranges" are considered synonymous; they all connote a "*meeting of the minds or a mutual understanding*"; that is, an agreement.[11] In its guidance, the Competition Bureau suggests that a "tacit" agreement could constitute an agreement for purposes of section 45.[12] But so-called conscious parallelism is not enough. Nor is it enough that the parties "*have communicated and thereby aroused in each other an expectation that they will act in a certain way*."[13] Rather, there must be a communication of an offer and acceptance of it, although the acceptance may be tacit in the sense that it is inferred from a course of conduct.[14]

24. The offence is complete upon the making of an agreement with a prohibited object (wage-fixing or no-poach); no implementation or negative effects on labour markets are needed.

2. Wage-fixing

25. The first type of prohibited agreement is an agreement to "*to fix, maintain, decrease or control salaries, wages or terms and conditions of employment*."

26. The verbs used are similar to those used in the price-fixing offence ("*fix, maintain, increase or control the price*"). Interestingly, "increase" is absent from the wage-fixing provision. Nevertheless, an agreement to increase wages would likely constitute an agreement to "fix" or "control" wages. Moreover, even an agreement to increase wages could be characterized as an agreement to decrease wages, if it is in reality an agreement to limit a salary increase, as the Competition Bureau notes in its guidance.[15]

2.1 Salaries and wages

27. The wage-fixing provision also uses two sets of synonyms to describe what cannot be fixed: "*salaries, wages*" and "*terms and conditions of employment*."

28. Although the Bureau appears to draw a distinction between salaries and wages in its guidance,[16] there is no meaningful distinction between the two words. "Wages" is the term generally used in employment standards legislation to refer to monetary remuneration paid to an employee, including hourly wages, salaries, commissions, and amounts payable pursuant to statute.[17] However, "wages" is generally defined as excluding gratuities, discretionary bonuses, and expenses.[18]

29. It is likely that the terms "salaries" and "wages" as used in the wage-fixing provision are broader still; the provision would likely apply to a conspiracy to limit discretionary bonuses, for example. A conspiracy to withhold gratuities would likely also contravene the wage-fixing provision, but withholding gratuities is typically illegal under provincial employment standards legislation in any event.[19]

2.2 Terms and conditions of employment

30. "Terms and conditions" are also likely synonymous. Indeed, the French version uses one word, "conditions."

31. What is captured by "terms and conditions" likely is extremely broad. The expression likely includes everything that can be included in the employment contract. This could include:

- Job descriptions and responsibilities
- Working hours and location (including, currently, how often an employee must be in the office)
- Allowances and reimbursements
- Vacation, sick leave, and other kinds of leave
- Parental leave and top-up during parental leave
- Benefits (drug, dental, etc.)
- Pensions or pension plan contributions
- Policies on promotion and advancement
- Ethics policies
- Post-employment restrictive covenants such as non-solicitation and confidentiality clauses

10 Competition Act, s. 2(2)–(4).

11 *R. v. Gage (No. 2)* (1908), 13 CCC 428 at 449 (MBCA); *R v. Armco Canada Ltd.* (1976), 13 OR (2d) 32, 70 DLR (3d) 287 (CA); *Watson v. Bank of America Corporation*, 2015 BCCA 362.

12 Canada, Competition Bureau, Competitor Collaboration Guidelines (2021), § 2.2.

13 R v. Armco Canada Ltd.

14 Atlantic Sugar Refineries Co. v. Canada (Attorney General), [1980] 2 SCR 644.

15 Canada, Competition Bureau, Enforcement Guidelines on wage-fixing and no poaching agreements (2023), § 2.1

16 Ibid.

17 The term typically used in French for wages is "salaire"; *see* Canada Labour Code, RSC 1985, c. L-2; Ontario Employment Standards Act, 2000, SO 2000, c. 41, s. 1; Quebec's Act Respecting Labour Standards, c. N-1.1, s. 1. For some reason, the French version of subsection 45(1.1) of the Competition Act uses "*les salaires, les traitements*" for "salaries, wages."

18 *See* for example Ontario's Employment Standards Act, 2000, SO 2000, c. 41, s. 1 and British Columbia's Employment Standards Act, RSBC 1996, c. 113, s. 1.

19 *See* for example Ontario's Employment Standards Act, c. 41, s. 14.2 and British Columbia's Employment Standards Act, c. 113, s. 30.3.

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32. In its guidance, the Bureau notes that in enforcing the provision, it is concerned with terms and conditions that "*could affect a person's decision to enter into or remain in an employment contract*."[20] While that may be so, the provision is actually broader than that.

3. No-poach

33. The second type of prohibited agreement is an agreement "*to not solicit or hire each other's employees*."

34. For the provision to apply, the no-poach agreement must be mutual—an agreement not to solicit or hire each other's employees. A one-way or unilateral no-poach agreement does not contravene the provision. Thus, for example, a clause in a consulting agreement that prohibits the client from poaching the consultant's employees, but contains no reciprocal obligation on the part of the consultant, is lawful. Nor would the provision apply to a post-employment non-solicitation of employees clause in an employment contract.

35. The Bureau suggests that limitations in an agreement that are designed to prevent employees from being solicited or hired by another party to the agreement, such as restrictions on communication of information related to job openings or the adoption of biased hiring mechanisms, might constitute no-poach agreements. This is a somewhat strained interpretation. The provision requires an agreement not to solicit or hire each other's employees. An agreement that falls short of that is unlikely to breach the provision. Indeed, the Bureau adds in a footnote that it "*will examine the matter to determine whether there is evidence of an agreement between employers to not solicit or hire each other's employees*."

IV. Criminal and civil penalties

1. Criminal penalties

36. The wage-fixing and no-poach provision creates a per se indictable criminal offence (felony) that is punishable by up to 14 years' imprisonment, a fine in the discretion of the court, or both.

37. This is the same penalty as that provided for price-fixing offences. As a result, case law under that provision can be of assistance in identifying likely penalties.

38. First, despite the potential for a 14-year jail term, it is extremely rare for individuals to serve any time behind bars for price-fixing offences. When individuals are convicted of price-fixing offences, the typical sentence is a conditional sentence of 12 to 18 months "*to be served in the community*." While this means that the individual does not physically serve time in jail, they are potentially subject to restrictions during this time, and do have a criminal record that can have a serious effect on their ability to obtain employment or to travel outside Canada.

39. Second, from March 2010 until June 2022, the maximum fine for a breach of section 45 was CAD 25 million. Before then, it was CAD 10 million. The bid-rigging provision (section 47) has long provided for fines in the discretion of the court, however. There have been no fines imposed for price fixing that took place since the cap was removed. However, fines for price fixing have rarely reached the CAD 25 million maximum (or even the earlier CAD 10 million maximum), and only one fine for bid rigging has ever exceeded that amount (a CAD 40 million fine paid by an auto parts manufacturer). More recently, in June 2023, Canada Bread Company was sentenced to pay a CAD 50 million fine for fixing the price of bread. A fine of this magnitude was only possible because Canada Bread pleaded guilty to four counts of price fixing, under two different versions of section 45.

2. Civil damages actions

40. Firms that enter into wage-fixing or no-poach agreements also face civil liability through class actions.

41. The Competition Act creates a statutory cause of action to recover damages caused by breaches of the Act's criminal provisions, including section 45. That provision, section 36, provides that "*any person who has suffered loss or damage as a result of (a) conduct that is contrary to any provision of Part VI*" can sue for and recover damages, plus costs of the investigation and proceedings.

42. Section 36 does not require prior criminal proceedings. In fact, most class actions brought under section 36 have not followed on a conviction. If a defendant has been convicted, however, the record of any criminal proceedings that resulted in a conviction can be used in a section 36 action as proof that the defendant committed the offence.[21]

43. As well, section 36 actions can be configured as class actions under provincial class proceedings legislation (and in the Federal Court under its class proceedings rules).

44. So far, no class actions claiming damages for wage-fixing or no-poach agreements have been filed. It may not be long before such claims are filed, however. Canada has a very active class action plaintiff bar that has filed numerous price-fixing class actions and collected multi-million-dollar settlements.

20 Enforcement Guidelines on wage-fixing and no poaching agreements, § 2.1

21 Competition Act, s. 36(2).

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3. Immunity and leniency programs

45. The Competition Bureau and the Public Prosecution Service of Canada offer immunity or leniency to parties that self-report an offence and cooperate with the investigation. These programs are available for breaches of the wage-fixing and no-poach offence.

46. The immunity program offers full immunity from criminal prosecution to the first individual or company to admit involvement in criminal activity and agree to cooperate with the Bureau's investigation and subsequent prosecutions.

47. Once a participant in a particular conspiracy has been granted a marker under the immunity program, other participants are only eligible for leniency, which offers a reduced sentence in exchange for cooperation and an agreement to plead guilty.

V. Defences

1. Ancillary restraints defence

48. The ancillary restraints defence is designed to exempt legitimate competitor collaborations (such as joint ventures) and legitimate restrictions (such as non-competition clauses in merger transactions) from the reach of section 45. This defence is potentially available in wage-fixing and no-poach cases.

49. The provision reads as follows:

> "*Defence*
>
> *(4) No person shall be convicted of an offence under subsection (1) or (1.1) in respect of a conspiracy, agreement or arrangement that would otherwise contravene that subsection if*
>
> *(a) that person establishes, on a balance of probabilities, that*
>
> *(i) it is ancillary to a broader or separate agreement or arrangement that includes the same parties, and*
>
> *(ii) it is directly related to, and reasonably necessary for giving effect to, the objective of that broader or separate agreement or arrangement; and*
>
> *(b) the broader or separate agreement or arrangement, considered alone, does not contravene that subsection.*"

50. The ancillary restraints defence has four components:

- There must be a broader or separate agreement that includes the same parties
- The restraint must be ancillary to that broader or separate agreement
- The restraint must be directly related to and reasonably necessary for giving effect to the objective of the broader or separate agreement
- The broader or separate agreement must not itself contravene subsection 45(1) or (1.1)

The defendant has the burden of proving the first three of the above components, but not the fourth.

51. In its guidance, the Bureau notes that while all of the parties to the restraint must be parties to the broader agreement, it is not necessary that all of the parties to that broader agreement be parties to the restraint.

52. The question of whether a restraint is ancillary is to some extent bound up with whether it has the requisite relationship with the objective of the broader agreement. According to the Bureau, a restraint is "*ancillary*" if it is a part of an agreement, or, if separate, is "*functionally incidental or subordinate to the objective of some broader agreement*."[22] Similarly, to show that the restraint is directly related to and reasonably necessary to the objective, the parties must show that it is "*directed at the promotion or facilitation of an objective of the broader agreement*."[23]

53. The "reasonably necessary" requirement does not create a requirement that the restraint be the least restrictive alternative open to the parties. But it does mean that if the parties could have achieved their objective without the restraint, or with a significantly less restrictive restraint, the restraint may not have been reasonably necessary.

54. An important consideration in determining the reasonable necessity of any restraint is whether it goes outside the bounds of the broader agreement, either with respect to its subject matter, geographic scope, or duration.[24]

55. The Bureau's guidance on the application of the ancillary restraints defence to wage-fixing and no-poach agreements mirrors its guidance on its application to other restraints. Just as non-competition agreements are important in merger transactions, wage-fixing and no-poach agreements can "*play an important role in stabilizing and protecting parties' business interests in the course of advancing legitimate pro-competitive objectives*."[25] Thus, the Bureau will generally not assess these restraints under the criminal provisions when they are ancillary to mergers, joint ventures, or strategic alliances, as well as when they are in franchise agreements and certain service provider-client relationships. But, the Bureau cautions, when wage-fixing or no-poach clauses are clearly longer in duration and affect more employees than necessary, it may investigate them under the criminal provision.[26]

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22 Competitor Collaboration Guidelines, § 2.5.2

23 Ibid., §2.5.3

24 Ibid.

25 Enforcement Guidelines on wage-fixing and no poaching agreements, § 3.1

26 Ibid.

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56. While the Bureau's guidance provides less certainty than businesses might like, a few practical conclusions can be drawn.

57. First, restraints, whether they involve wage-fixing or no-poach restraints, or restraints that fall under subsection 45(1), such as a non-competition clause, should never be included in a contract without considering whether they are necessary and not over-broad.

58. Second, it is routine for merger transactions to include restraints. Unless these restraints are clearly over-broad, they will not raise an issue.

59. Third, while the Bureau softened its position on no-poach clauses in franchise agreements, it is not a fan of the practice. Franchisors should consider whether they really need a no-poach provision, and if they do, they should draft it as narrowly as possible.

60. Fourth, while the Bureau recognizes the usefulness of no-poach clauses in staffing and IT service contracts, consideration should be given as to whether a mutual no-poach clause is needed. Typically, it is the service provider that wants to protect its employees from being hired by the client. Where that is the concern, a one-way clause will protect the service provider's interests.

61. Fifth, no-poach clauses should not be included in agreements entered into in anticipation of a business transaction (such as a non-disclosure agreement) without careful consideration as to whether they are truly necessary. If they are included, they should be strictly limited to the personnel who will be working on the transaction.

2. Regulated conduct defence

62. Section 45 also contains a defence commonly known as the regulated conduct defence. This defence was developed under section 45 as it stood before March 2010. That provision made it an offence to lessen competition "unduly." Courts held that the undueness element created leeway for provincial laws to authorize or mandate conduct that would otherwise breach section 45.[27] When the new section 45 was enacted in 2010, this defence was continued. The ambit of this defence remains somewhat uncertain and the subject of some debate.

63. This defence likely would apply where a provincial statute authorizes conduct that might otherwise breach the new wage-fixing and no-poach provision.

64. One area might be the collective bargaining context. For example, Ontario's Labour Relations Act provides for collective bargaining between unions and organizations representing a group of employers in the construction industry[28] and more generally, for any industry, on a province-wide basis.[29] Once an employers' organization is accredited, the organization becomes the bargaining agent for all of its members; it must enter into only one agreement, and the individual employers are prohibited from bargaining directly with the union. These activities are already exempt from the Competition Act pursuant to the collective bargaining exemption in section 4, however. As a result, the regulated conduct defence would only be needed if a provincial statute authorized conduct that did not fit within this exemption.

VI. Constitutional validity

65. There is a serious issue as to whether the wage-fixing and no-poach provision is within the legislative competence of Canada's federal Parliament. Canada's constitution assigns criminal law to the federal Parliament, but labour and employment law is generally a matter of exclusive provincial jurisdiction (except for employers in federally regulated sectors such as banks and airlines).[30]

66. The justification for the new provision centres on protecting workers, as opposed to competition more generally. The fact that Parliament chose to criminalize only buyer-side conspiracies affecting workers, and not other buyer-side conspiracies, supports an argument that the pith and substance of this provision is employment law, not criminal law, which would render the provision ultra vires the federal Parliament (except with respect to federally regulated employers).

67. The constitutional validity of the provision will thus almost certainly be challenged. ■

27 Canada (Attorney General) v. Law Society of British Columbia, [1982] 2 SCR 307.

28 Labour Relations Act, 1995, SO 1995, c. 1, Sched. A, s. 134–140.

29 Ibid., c. 1, Sched. A, s. 151–168.

30 Constitution Act, 1867, 30 & 31 Victoria, c. 3 (UK), s. 91–92.

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