

Labor market agreements and competition policy

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EXECUTIVE SUMMARY

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

It is important to promote a labor market in which employers adopt an independent and competitive conduct, contributing to an efficient allocation of labor. This promotes efficiency and innovation, which are even more essential in a context of economic recovery.

No-poach agreements, by which companies agree not to poach or hire workers from each other restrict the mobility of workers and can harm competition in several dimensions. These agreements can, in particular:

- **Introduce inefficiency in the downstream markets,** by distorting the allocation of the labor input. This loss of efficiency may imply a lower quantity/quality pair downstream.
- **Limit production in the downstream markets.** They can artificially limit the amount of labor available to each competitor at any given time, restricting their ability to expand production as a strategic reaction in the downstream market.
- **Lead to a decline in the quality and/or variety of products and services provided to consumers,** as well as reduce innovation in sectors where labor mobility is a relevant element in the innovation process.
- **Have an instrumental role in the implementation of a market sharing strategy.** In particular, if the companies' business model is based on customer portfolios and competitors agree not to dispute each other's customers.
- **Have an instrumental role in the implementation of a strategy that aims to promote specialization,** among competing companies. E.g., if it consists of an agreement to allocate areas of expertise, avoiding the recruitment of a specialized workforce.
- **Signal that the interaction between competitors in the downstream market is not competitive.**
- **Amount to an indirect wage fixing strategy,** by indirectly affecting the prices of the inputs in question (wages and other forms of compensation).
- **Dampen investment in human capital,** leading to a reduction in the quantity and/or quality of the labor supply in the future.

Furthermore, agreements between employers to set wages and/or other forms of compensation harm workers and may have a negative impact on competition. On the one hand, these agreements lead to lower payoffs for workers vis-à-vis a scenario in which firms compete for labor. On the other hand, these agreements can affect the uncertainty associated with the competitive game, thus facilitating other collusive behavior.

Horizontal no-poach and wage-setting agreements can arise in any sector. These agreements are liable to violate the Portuguese Competition Act (Article 9 of Law No. 19/2012) and, if applicable, the Treaty on the Functioning of the European Union (see Article 101 of the TFEU). These agreements limit the individual freedom of companies to define their strategic business conditions (hiring and/or setting wage conditions).

On April 13, 2021, the AdC issued, for the first time, a Statement of Objections for a no-poach agreement as a restrictive practice of competition, involving the Portuguese Professional Football League (LPFP) and 31 sports companies (clubs) participating in the 2019/2020 edition

of the First and Second Professional Football Leagues.¹ The case was opened by the AdC in May 2020, and the AdC immediately imposed an interim measure on the LPFP.

In June 2020, the AdC issued a recommendation to the Portuguese Football Federation (FPF) not to impose a maximum limit on the total salary of each club that participates in the Women's League (Liga BPI), warning that this could constitute a restrictive practice of competition.

This document raises the awareness of companies, human resources professionals and other employees, recruitment agencies, among others, on the potential negative effects for workers and consumers resulting from anticompetitive agreements in the labor markets. The AdC lists a set of best practices related to labor markets directed at companies.

In April 2021, the AdC published, in public consultation, a preliminary version of this report. As part of the public consultation, the AdC received contributions from seven entities, including a workers' representative, a consumer protection association, business associations and companies, as discussed in the Public Consultation Report². This final version thus benefits from a participatory process with several relevant stakeholders.

¹ See the AdC [Press Release](#) "AdC issues Statements of Objections for anticompetitive agreement in the labour market for the first time", from April 19, 2021.

² See the contributions in the public consultation internet page of AdC, available [here](#).

Best Practices in preventing anticompetitive agreements in labor markets

Companies must internally pursue the following best practices:

- **Eliminate agreements and other practices with competitors, regarding recruitment that may hinder competition.** For example, and without prejudice of a case-by-case assessment:
 - Companies should not enter into agreements with other firms not to poach or hire each other's employees.
 - Companies should not exchange commercially strategic and sensitive information with each other about remuneration and recruitment of workers. Depending on the type, timeliness, level of aggregation, market characteristics and the way in which information is shared and disseminated, the exchange of information may be anticompetitive.
 - Outside legitimate contexts of social dialogues and/or collective bargaining agreements, as social partners:
 - Companies should not enter into agreements with other firms with regard to salaries or other forms of compensation of their employees.
 - Companies should not participate in meetings, such as business association meetings, where other companies are present, and in which they discuss wage-fixing and other forms of compensation related to each other's employees.
 - The scope of the expression *agreement* includes "non-aggression pact", "gentlemen agreements", "no-poach agreements", "wage-fixing agreements".
- **Raise workers' awareness, particularly amongst human resources personnel, to competition law, for example, through internal training:**
 - Raising awareness to a set of agreements and other practices, such as those described above, that may infringe the Portuguese Competition Act and, if applicable, the Treaty on the Functioning of the European Union (TFEU), and cause harm to employees and to competition.
 - Promote, internally, the adoption of the current best practices and disseminate them amongst all employees, spanning through all hierarchical levels.
- **Report to the AdC any indicia of a potential practice restrictive of competition, of which they become aware:**
 - The complaint can be made anonymously – v. [Complaints Portal](#).
 - There is the possibility of a leniency application (legal framework for the waiver or reduction of the fine in administrative offense cases for breach of competition rules) – v. [Leniency Program](#).

1. INTRODUCTION

The interactions between competition and the labor market have taken a prominent place in the recent discussion, worldwide, on competition policy. This discussion has focused primarily on the effects on competition and innovation that may result from the strengthening of purchasing power or bargaining power (i.e., buyer power) of acquirers (i.e., employers).

Alongside this debate, empirical studies have pointed to a trend of decreasing labor share in the Gross Domestic Product (GDP)³ and to an increase in the degree of concentration in some industries.⁴ Some empirical studies using data for Portugal have identified a negative relationship between wages and the degree of concentration of employers.⁵ The strengthening of employers' bargaining power vis-à-vis workers has been identified as one of the possible explanations for this trend.^{6,7}

On the other hand, sometimes firms enter into agreements with each other to coordinate their strategies in the labor market that may infringe the Portuguese Competition Act, such as:

- **No-poach agreements: horizontal agreements⁸ whereby companies mutually agree not to make spontaneous offers or to hire employees⁹ (i.e., not to poach), without the prior consent of the other companies with whom they have entered into the agreement.**
- **Wage-fixing agreements: horizontal agreements through which companies harmonize or standardize the salary and/or other forms of compensation of their employees.**

On April 13, 2021, the AdC issued a Statement of Objections for a no-poach agreement, involving the Portuguese Professional Football League (LPFP) and 31 sports companies (clubs) participating in the 2019/2020 edition of the First and Second Professional Football Leagues.¹⁰ The case was opened by the AdC in May 2020. The AdC immediately imposed an interim measure to LPFP mandating the immediate suspension of the decision that prevented clubs in the First and Second Leagues of professional male footballers from hiring players who unilaterally terminated the employment contract, invoking issues related to the COVID-19 pandemic. The interim measure was imposed in view of the potential serious and irreparable impact of a practice that could harm competition rules.¹¹

In June 2020, the AdC issued a recommendation to the Portuguese Football Federation (FPF) stating that the FPF should refrain from imposing a cap on the wage bill of each club that participates in the Women's League (i.e., Liga BPI).¹² The AdC warned that imposing a wage cap

³ E.g., Elsby, Hobijn, and Sahin (2013); Karabarbounis & Neiman (2014).

⁴ E.g., Autor et al. (2020); De Loecker, Eeckhout, & Unger (2020); Barkai (2020).

⁵ In particular, Martins (2018) demonstrates, using Portuguese data, that wages are negatively affected by the concentration of employers. The author states that these results indicate that workers who, eventually, would move from poorly concentrated labor markets to highly concentrated labor markets, would suffer a wage reduction of approximately 3.5%. Félix & Portugal (2017), also using Portuguese data, estimate that an increase in standard deviation in the elasticity of labor supply increases wages by approximately 1.5%.

⁶ See Stansbury & Summers (2020).

⁷ Some authors have identified technological change (e.g., Karabarbounis & Neiman 2014) and the increase of the market power of some companies (e.g., De Loecker, Eeckhout, & Unger, 2020; and Grullon, Larkin & Michaely, 2019) as possible explanations for the reduction of the share of labor in GPP.

⁸ It has been discussed that no-poach agreements in the context of franchising agreements, may also have a vertical nature (see section 2.3.2).

⁹ Hereafter, worker and employee are used interchangeably.

¹⁰ See the AdC [Press Release](#) "AdC issues Statements of Objections for anticompetitive agreement in the labour market for the first time", from April 19 2021.

¹¹ See the AdC [Press Release](#) "Covid – 19: AdC imposes interim measure to the Portuguese Professional Football League suspending the concerted decision to impede the hiring of football players", from May 26 2020.

¹² See Autoridade da Concorrência, [Recommendation regarding the proposal to limit the wage bill foreseen in the Draft Regulation of Liga BPI 2020/2021, subject to public consultation](#), from June 2020.

“may constitute a restrictive practice of competition, punishable with a fine under article 9 and article 68 (1) (a) of Law No. 19/2012, of May 8”.

At the international level, the agencies in charge of applying competition rules in the U.S. - the Department of Justice (DOJ) and the Federal Trade Commission (FTC)¹³ – issued a joint statement, in 2016, regarding labor market agreements, namely no-poach and wage fixing agreements. In a document published in October 2016, the two agencies warn that no-poach agreements and wage-fixing agreements (or other forms of compensation) are liable for civil and criminal sanctions under the U.S. antitrust law. Both agencies had already initiated civil lawsuits against companies that implemented this type of practice for constituting per se anticompetitive conduct under Section 1 of the Sherman Act.¹⁴ The paradigmatic example of no-poach agreements is from Silicon Valley, in 2010, where several companies in the technological sector agreed not to solicit certain types of workers.¹⁵

At the level of the European Commission (EC), and at the date of this document, there are no precedents of decisions that assessed no-poach or wage-fixing agreements as competition infringements, under Article 101 of the TFEU.¹⁶ The competition authorities of the EU Member States have already assessed wider and more complex agreements between companies regarding recruitment policy or wage conditions. These include “gentlemen's pacts (or agreements)”¹⁷, in terms of worker poaching and hiring policies, as well as their salary conditions. The restrictive practices in question consisted of no-poach and wage-fixing agreements, and also include coordination on other dimensions of competition. These decisional precedents have considered that decisions regarding the hiring and remuneration of the workforce, as input of production, can also constitute an illicit anticompetitive conduct, by object, under Article 101 of the TFEU.¹⁸

Competition law infringements by no-poach or wage-fixing agreements require that these are carried out by companies, within the meaning of “undertakings” under the competition law concept. Hence, the discussion of these agreements requires a distinction between the concepts of worker and undertaking (see Box 1).

¹³ See DOJ/FTC (2016) *Antitrust Guidance for Human Resource Professionals*.

¹⁴ These cases are addressed in sections 2.2.1 and 3.2.1.

¹⁵ U.S. v. Adobe Systems, Inc., Apple Inc., Google Inc., Intel Corporation, Intuit, Inc., and Pixar (2011). See Box 8.

¹⁶ Notwithstanding, it is worth highlighting a decision in which the EC sanctioned a cartel that involved, in addition to price fixing and market sharing, an agreement to hire key employees from a competitor that is not a member of the cartel. This case illustrates well the value, for competition dynamics, of the process of hiring the labor input.

¹⁷ I.e., “gentleman's agreements”.

¹⁸ See sections 2.2.1 and 3.2.1.

Box 1. Concepts of worker and undertaking

Only “true self-employed workers”, classified as undertakings, are subject to the application of competition law.¹⁹ Any natural person who carries out, on his own account, i.e., at his own risk, an economic activity, namely a self-employed person, is encompassed in the notion of undertaking.^{20,21} EU jurisprudence has contributed to the systematization of criteria that help to distinguish between the “real” and the “false” self-employed workers.²² These are, for example, the ability to determine independently their own conduct in the market and to bear financial risks or commercial consequences of the activity. On the other hand, the classification of a “self-employed person” under any national legislation, for tax, administrative or organizational reasons, does not exclude that he/she is classified as an employee, within the meaning of EU law, if his/her independence is merely theoretical, thus disguising an employment relationship.²³

In addition, when undertakings or associations of undertakings act under collective labor agreements, they are not exempted from the application of competition law and are thus being potentially liable under Article 9 of the Portuguese Competition Act and, if applicable, under Article 101 of the TFEU.²⁴

Their potential liability to competition law occurs when they do not act as social partners, but rather as undertakings or associations of undertakings. This understanding is confirmed by the EU's case law, namely, in various judgments by the CJEU²⁵ and by the AdC's decisional practice.²⁶

The present document addresses the legal framework and the precedent decisions regarding no-poach and wage-fixing agreements and their effects on the conditions of competition on

¹⁹ Article 9 of the Portuguese Competition Act and, if applicable, Article 101 of TFEU, only sanction agreements between undertakings, whether these have the object or the effect, of preventing, restricting or distorting competition.

²⁰ See, *inter alia*, the Judgment of the CJEU, in Case C-309/99, *Wouters*, of 19.02.2002, §§ 46 e 47.

²¹ The AdC's decisional practice, in line with European decisional practice and jurisprudence, confirms that self-employed professionals, members of professional bodies, exercise an economic activity. In particular, the decisions of the AdC of 19.05.2005 ([Case PRC/2004/28](#)), of 30.06.2005 ([Case PRC/2004/29](#)), of 26.05.2006 ([Case PRC/2005/07](#)) and of 07.05.2010 ([Case PRC/2009/03](#)).

²² As an illustration, see the judgment of the CJEU, Dutch Musicians - Judgment of the CJEU, in Case C-413/13, [FNV Kunsten Informatie en Media](#), from 04.12.2014, §§ 33 to 36.

²³ The classification of online platform workers (“gig workers”) as “real” or “fake” independent workers has been questioned in national disputes. E.g., in Spain, the Supreme Court of Spain has ruled that drivers who work for the Glovo platform are employed (see Judgment of 25.09.2020, [Glovoapp23 SL 805/2020](#), STS 2924/2020). In France, the Cour de Cassation decided that the same applied to Uber platform drivers (see Ruling of 03.04.2020, [Mr. X v Uber France and Uber BV, No. 374](#) FP-P+B+R+I; Appeal No. S 19-13.316). In Belgium, in 2019, a court in Brussels considered the drivers of the [UberX](#) platform as self-employed (see Judgment of 16.01.2019, A/18/02920, Tribunal de l'entreprise Francophone de Bruxelles). V.g., a decision at the UK Supreme Court on an action brought by drivers of the Uber platform, which aim at the recognition of labor rights (see Case Uber BV and o., [UKSC 2019/0029](#), and [Judgement](#), 19.02.2021 that recognizes labor rights).

²⁴ An initiative by the EC is underway to assess a set of four public policy options, in order to allow self-employed workers, without employees, whether “real” or “false”, to negotiate an improvement in their working conditions, through collective bargaining agreements, “without fear of violating EU competition law [101th TFEU]”. See European Commission (2021) and [Press release](#) (06.01.2021). The initiative was subject to a public consultation, between 05.03.2021 and 31.05.2021, with the adoption of an understanding by the EC in the last quarter of 2021.

²⁵ For illustrative purposes, see *Albany, Brentjens, Drijvende Bokken and Dutch Musicians*. See Judgment of the CJEU, in [Case C-67/96](#), *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie*, from 21/9/1999, §§ 59-60; [Joined Cases C-115/97 a C-117/97](#), *Brentjens' Handelsonderneming BV against Stichting Bedrijfspensioenfonds voor of Handel in Bouwmaterialen*, from 21/9/1999; [Case C-219/97](#), *Maatschappij Drijvende Bokken BV against Stichting Pensioenfonds voor de Vervoer- en Havenbedrijven*, 21/9/1999; and Judgment of the CJEU, in Case C-413/13, [FNV Kunsten Informatie en Media](#), from 04.12.2014.

²⁶ See AdC Sanctioning Decision in Process [PRC/2007/04 - SNATTI](#), of 02.12.2010. The AdC considered that: (i) the SNATTI acted as an economic operator, as an association of companies, approving and disseminating price lists for services provided by professionals in the tourist information industry; and that (ii) the tourism information professionals were independent professionals and, to that extent, companies. The AdC concluded that the approval

the labor market and downstream product markets as well as on consumer welfare (sections 2 and 3).

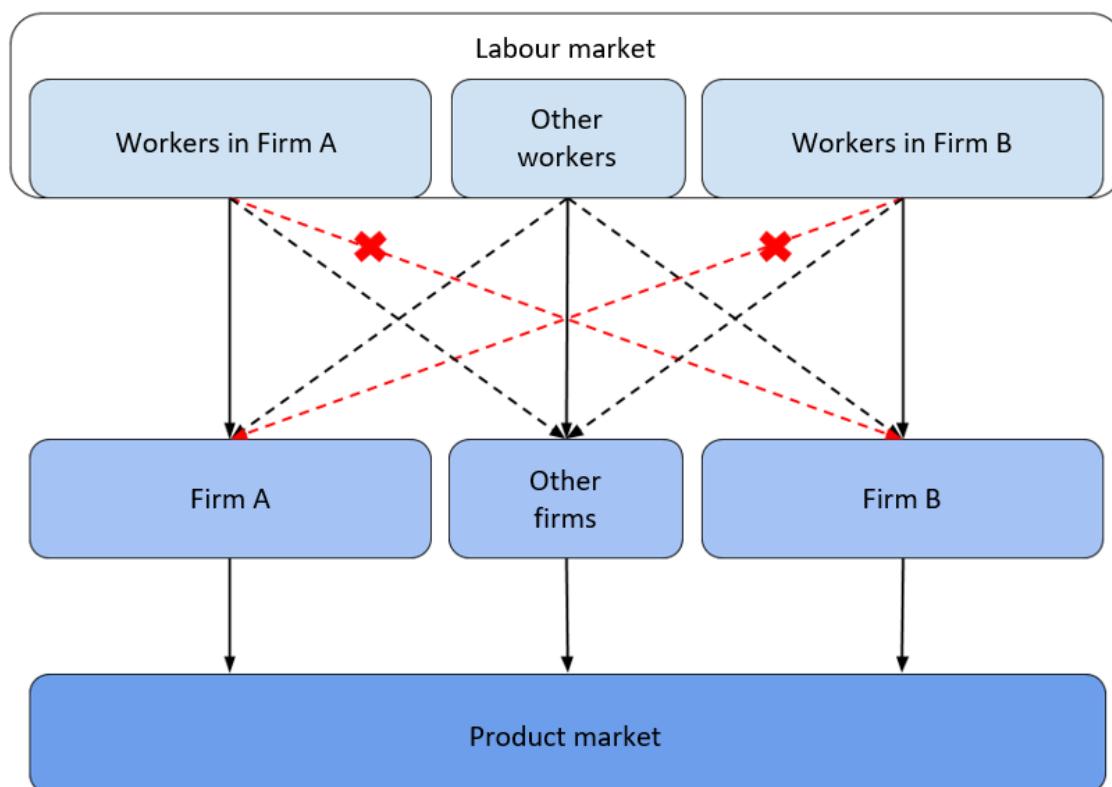
2. NO-POACH AGREEMENTS IN LABOR MARKETS

No-poach agreements aim at restricting companies from making spontaneous offers or hiring each other's workers.

This type of agreement can involve only an arrangement not to solicit, if the companies involved agree not to actively solicit each other's workers (i.e., not to "cold call" each other's workers), even though they may hire them.

On the other hand, agreements by which companies agree not to hire workers from each other are more restrictive. A no-poach agreement represents a commitment on the part of Firm A (B) not to hire the workers of Firm B (A) (Figure 1). Firms A and B may hire other workers (outside of firms A and B) and workers from firms A and B may be employed by other firms. In what follows, the term "no-poach" refers to any no-solicitation or no-poach agreement.

Figure 1. Example of a no-poach agreement between competitors in the labor and product markets



Notes: Solid lines represent relationships in the labor market or in the product market. Black dashed lines represent potential labor market relationships. Red dashed lines represent labor market relationships not allowed by the no-poach agreement between Firm A and Firm B.

Source: AdC.

One of the reasons often put forward for no-poach agreements relates to the high employee turnover in certain sectors or geographic clusters. The scarcity of highly qualified work and its

and disclosure of price lists, by a union, was equivalent to anticompetitive behaviour by an association of companies, subject to the scrutiny of the Portuguese Competition Act and, *in casu*, also, of article 101 of the TFEU.

high mobility could create incentives for employers to enter into no-poach agreements with one another or to agree on non-compete clauses with workers.^{27,28}

However, no-poach agreements are not exclusively used in sectors that employ highly qualified or specialized workers. There are no-poach agreements in many sectors, and involving workers with varied degrees of specialization.²⁹

2.1. Effects on competition and welfare

By restricting companies' purchasing decisions regarding an input, no-poach agreements may have an effect on the markets where these companies compete.

Regarding the labor market, these agreements may affect wages, labor mobility and investment in human capital. By restricting the mobility of workers, these agreements can decrease job match quality, translating into allocative inefficiency.

Agreements not to poach workers, as horizontal agreements between companies over an input's purchasing conditions, may have an impact on competition in downstream markets. In particular, this type of agreement may have an effect on the volume of sales and on prices, as well as on product quality and innovation, affecting consumer welfare.

The effects of no-poach agreements depend on a number of factors, such as their extent, qualitative or quantitative, e.g. the proportion of workers assigned to the companies subject to the agreement, and the market power of the companies downstream.

No-poach agreements between competitors in a downstream market are more likely to negatively affect competition in the downstream markets. On the other hand, horizontal agreements between companies hiring the same type of worker, but not competing in the same product market, will have a direct effect at the labor market level, with potential indirect effects downstream (e.g., through job match quality, affecting allocative efficiency³⁰).

The economic literature on the effects of no-poach agreements on social welfare is recent. According to the existing literature, the conditions under which no-poach agreements are likely to improve welfare are rather limited.³¹

2.1.1. Potential effects of no-poach agreements on the labor market

No-poach agreements are likely to affect the labor market equilibrium by decreasing the number of companies looking for the services provided by workers. This restricts worker mobility and their opportunities for career advancement with other employers, and strengthens the employers' bargaining power. This, in turn, may affect the wage level and other working conditions.³² These agreements can also affect investment in human capital.

2.1.1.1. Strengthening employers' bargaining power

No-poach agreements are likely to strengthen firms' buyer power vis-à-vis workers, by decreasing the number of potential alternative employers for each worker. The concept of

²⁷ Some studies suggest that workers such as software programmers receive daily proposals from their employers' competitors.

²⁸ Box 2 includes additional information on non-compete clauses.

²⁹ See section 2.2.

³⁰ In other words, no-poach agreements may preclude workers from being allocated to the projects they would best perform, with impact on the efficiency of firms' resources.

³¹ See Shy & Stenbacka (2019), who conclude that no-poach agreements will only increase social welfare, if the workers' switching costs are so high that they are not offset by productivity gains arising from switching employers. The authors define no-poach agreements to be those where firms agree not to poach each other's workers (i.e., "not to engage in "cold calling" each other's employees"), and where firms cannot set worker-specific wage discrimination.

³² *Vide* Davis (2018).

buyer power refers to the bargaining power that the purchasers of a given good or input have over their suppliers, which allows them to obtain more favorable purchasing conditions.³³ Referring to Figure 1, in the case of a no-poach agreement, workers matched to Firm A will not be able to provide their services to Firm B. If Firm B represents a substantial part of the labor market, workers matched to Firm A will have a smaller pool of jobs at their disposal, which results in an increase of the Firm A's buyer power *vis-à-vis* its workers.

In scenarios where a significant proportion or even all potential employers of a type of worker have entered into a no-poach agreement, each worker is limited to providing his/her services to a small number of potential employers or, ultimately, just to their current employer.

In these cases, the market structure approaches an oligopsony or even a monopsony³⁴ - *i.e.*, market structures in which, respectively, a small number of companies, or even just one company, acquire a certain input. In the labor market, for example, an oligopsony is associated with market structures in which a small number of employers hire the same pool of workers of a certain type, whose bargaining power is assumed to be limited.

The existence of a monopsony or oligopsony does not necessarily imply that buyers can exercise buyer power. The economic literature³⁵ identifies at least three conditions for buyer power, namely that (i) the employers/buyers that enter into the agreement represent a substantial proportion of the employers of that type of worker; (ii) there are barriers to entry in the market where employers operate³⁶; and (iii) the labor supply curve is positively sloped³⁷.

Thus, no-poach agreements may strengthen buyer power of employers in the labor market.³⁸ Indeed, the reduction in the number of buyers in the labor market due to no-poach agreements increases workers' switching costs.³⁹

Strengthening the buyer power of employers in the labor market may allow companies to affect workers' compensation, causing wages to deviate from marginal revenue of labor, *i.e.*, from the additional revenue generated by the worker. Greater buyer power in the labor market may provide incentives for firms to strategically limit the number of workers employed. This strategic reduction in demand will induce a reduction in the price of labor, *i.e.*, wages and/or other forms of compensation.

The reduction of the price paid for an input through a strategic reduction of demand happens when sellers in the upstream market are relatively fragmented.⁴⁰ That will be the case in labor markets where workers do not resort to collective bargaining that allow them to gather their individual bargaining power. In this case, the supply side of the labor market has an atomized

³³ Autoridade da Concorrência - *Linhas de Orientação Para a Análise Económica de Operações de Concentração Horizontais* (2013) (Horizontal merger guidelines), in Portuguese; and European Commission - *Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings* (OJ C 31, 5.2.2004).

³⁴ See, e.g., Dobson, Waterson & Chu (1998), Blair & Harrison (2010) and Bhaskar et al. (2002).

³⁵ See Dobson, Waterson & Chu (1998), §4.5.

³⁶ The existence of positive economic profits in the absence of barriers to entry will result in the entry of new firms. This in turn prevents the strengthening of buyer power in the upstream market and the respective effects downstream in a sustainable fashion.

³⁷ *I.e.*, hiring additional workers of a given type implies a higher wage to all these workers. In addition, as noted by Bhaskar et al. (2002), an upward-sloping supply curve for labor is associated with the fact that a higher wage retains workers more effectively.

³⁸ The economic literature (*e.g.*, Hemphill & Rose, 2018) has been discussing the difference between the exercise of buyer power in a context of monopsony and a mere increase in bargaining leverage. In the latter case, buyer power is exercised by threatening to reduce input demand, and not by an effective reduction of the volume of input demanded.

³⁹ *Vide* Ashenfelter et al. (2010).

⁴⁰ European Commission - *Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings* (OJ C 31, 5.2.2004, p. 5–18).

structure.^{41,42} If workers come together to negotiate with employers, there may be bargaining power on both sides of the market.

No-poach agreements may increase employers' buyer power vis-à-vis workers. Ultimately, workers face a monopsony if all employers in a given labor market sign a no-poach agreement.

2.1.1.2. Effects on compensation conditions and mobility

By strengthening the employers' bargaining power vis-à-vis workers, no-poach agreements can narrow the extent to which wages reflect productivity gains. In a labor market without barriers to mobility, productivity gains will tend to raise workers' wages through competition between employers, during the hiring process.

Empirical evidence on the effects of no-poach agreements shows that these agreements reduce workers' wages. For instance, an analysis on the impact of no-poach agreements concluded between tech firms in Silicon Valley estimated a reduction between 2 and 4 percentage points in wages, for each year on which the agreements were in effect.⁴³

In addition, employees are frequently unaware of the existence of no-poach agreements. This is one of the most negative aspects of no-poach agreements, as it hinders the employee's mobility while precluding him/her from identifying the underlying cause. Hence, employees might overextend their stay at firms, which may not match the best use of their skill set.⁴⁴ In this regard, no poach agreements are likely to reduce the quality of job match, to the detriment of efficiency in the allocation of human resources.

Moreover, no-poach agreements could be perceived as an indirect strategy that aims at fixing wages and/or other forms of compensation given its indirect effect on the prices of the inputs in question.⁴⁵

By strengthening the firm's buyer power vis-à-vis workers, no-poach agreements restrict labor mobility and may reduce wages. These agreements may also generate inefficiencies in the allocation of the labor input.

2.1.1.3. Effects on incentives to invest in human capital

Companies invest in their employees' human capital through on-the-job training. This training can be either general or specific, depending on the extent to which it increases the worker's productivity when working for other firms.⁴⁶ Most on-the-job training activities include both general and specific components.

Sometimes, firms argue that no-poach agreements are a way to protect investments in training.⁴⁷ A no-poach agreement limits the employee's number of prospective employers, thereby decreasing the likelihood of the employee terminating his/her employment contract with the company. In that sense, it reduces the employer's risk of losing the investment in

⁴¹ I.e., numerous suppliers/workers whose individual supply of labor account for a negligible share of total supply.

⁴² Hemphill & Rose (2017).

⁴³ See Gibson (2019).

⁴⁴ See Heyer & Shapiro (2010).

⁴⁵ Chapter 3 presents an analysis on wage-fixing agreements and/or other forms of compensation.

⁴⁶ A language course and a course on the firm's information systems are examples of general and specific training, respectively.

⁴⁷ The same argument is raised with regard to non-compete clauses, see Box 2.

training personnel. This restriction allows the employer to recoup a greater proportion of the investment in human capital.

However, given that no-poach agreements deteriorate the contractual conditions of the employees, labor supply may be lower than what it would be in the absence of such agreements. Moreover, the wage distortions may affect the incentives that employees have to invest in their own qualifications.⁴⁸

In addition, there are other mechanisms that preserve the incentives to invest in training, while imposing lower restrictions on labor mobility. Examples include mechanisms that allow training to be contingent on the employee staying at the firm for an adequate and previously determined period. This offers the employee the possibility to terminate the contract through the repayment of the training costs to the employer. Retention policies may also rely on the attribution of bonuses to specific employees, decreasing the probability of them switching to another employer.

In sum, no-poach agreements do not constitute a proportional mechanism to guarantee that firms protect the investment in workers' training. There are other less restrictive solutions in terms of labor mobility.

No-poach agreements may distort workers' incentives to invest in human capital and do not constitute a proportional mechanism to guarantee that firms protect the investment in personnel.

2.1.2. Potential effects of the no-poach agreements in the downstream market

No-poach agreements can have various impacts on the competitive conditions downstream, where companies compete. This type of agreement reinforces firms' buyer power, as buyers in the upstream market, and therefore, it may lead to a price increase or a quality deterioration in the product market.

By restricting labor mobility, no-poach agreements may limit knowledge spillovers. This, in turn, can affect the ability of firms to innovate.

Additionally, no-poach agreements can strengthen the market conditions required to sustain collusive behavior. This kind of agreement can be instrumental in the context of wider cartel agreements in the downstream markets, namely market sharing in terms of consumers or geographical areas.

2.1.2.1. Lower output and higher prices downstream as a result of the strengthening of buyer power

From a competition standpoint, the exercise of buyer power by employers may have an impact in the downstream market, in terms of consumer welfare. The strengthening of firms' buyer power can lead to a decrease in output and a potential increase in price and/or decrease in quality in the downstream markets, through a decrease in the quantity of labor employed and workers' wages.

The impact of the strengthening of buyer power in the downstream market depends on the ability and/or incentive for the employer to pass on, to consumers, the cost savings obtained

⁴⁸ As noted by Bhaskar et al. (2002), in an oligopsony, if workers are not paid their marginal product, they may not have sufficient incentives to invest in training.

in the hiring of labor (i.e., pass-through rate), via lower prices. In this regard, we consider two different scenarios, depending on whether companies hold or not market power downstream.

If the subset of companies that enter into a no-poach agreement do not hold market power downstream, the impact of such agreement on competition in the product market is limited, as those companies will sell their output at the market-determined price. In this scenario, the companies that enter into a no-poach agreement will be limited in their ability to influence the price paid by the consumers.⁴⁹ The reduction in labor employed will only result in a lower market share downstream for the companies that enter into the agreement and the potential cost savings that result from the decrease in the input's price are retained as profit. In turn, the decrease in market share will not affect the total quantity sold in the market, if the competing companies (that did not enter into the agreement) are able to expand their supply.

If the companies that enter into a no-poach agreement hold market power downstream, the lower quantity of labor employed, alongside a wage reduction, will tend to decrease the quantity downstream, which may lead to an increase in the product's price.^{50 51}

Additionally, the decrease in the price paid for the labor input that arises from the strengthening of the buyer power will often translates into savings in fixed costs and hence, will not be passed on to final consumers.⁵² In a large number of economic activities, wages paid to workers for their regular hours, usually on a fixed contract, are not variable, but rather fixed costs and, therefore, a decrease in wages would not be passed on to final consumers.

Furthermore, over time, a wage reduction resulting from the buyer power that firms achieve through no-poach agreements can lead to a decrease in labor productivity. That potential loss of productivity can lead to price increases or quality reduction in the product market, harming consumers.⁵³

If the decrease in the cost of the labor input is not passed to consumers, and assuming that a no-poach agreement does not lead to quality improvements in the product market, the cost savings will not likely be considered as sufficient to generate efficiencies, and in turn to fulfil the exemption criteria included in Article 101(3) of the TFEU.⁵⁴

A decrease in the quantity of labor employed and/or a lower labor productivity, resulting from no-poach agreements, may lead to a decrease in quantity and an increase in price, downstream, harming consumers.

⁴⁹ See, e.g., Dobson, Waterson & Chu (1998); OECD (2020); Salop (2004).

⁵⁰ See Blair & Harrison (1990); Dobson, Waterson & Chu (1998); OECD (2020); Hemphill & Rose (2017); Angerhofer & Blair (2020).

⁵¹ Angerhofer & Blair (2020) also argue that the decrease in the labor input can reduce the use of complementary inputs, affecting the respective markets.

⁵² See Blair & Harrison (1990); Dobson, Waterson & Chu (1998); OECD (2020); and Hemphill & Rose (2017).

⁵³ See Dobson, Waterson & Chu (1998).

⁵⁴ As mentioned in paragraph 34 of the Guidelines on the application of Article 101(3) of the TFEU [former Article 81(3) of the TFEU] “[a] *The application of the exception rule of Article 81(3) is subject to four cumulative conditions, two positive and two negative: a) The agreement must contribute to improving the production or distribution of goods or contribute to promoting technical or economic progress; b) Consumers must receive a fair share of the resulting benefits; c) The restrictions must be indispensable to the attainment of these objectives, and finally; d) The agreement must not afford the parties the possibility of eliminating competition in respect of a substantial part of the products in question*”.

2.1.2.2. Effects on the ability and incentives to innovate

The restriction imposed on labor mobility by no-poach agreements may limit knowledge spillovers and harm innovation. If labor mobility has a positive impact on innovation and on the quality of the goods and services provided, no-poach agreements can lead to lower quality and less variety in the downstream markets, with an impact on consumer welfare.⁵⁵

Hiring other firms' employees, in particular the most qualified ones, is a way in which firms can attract the required expertise and know-how to innovate. Under the impossibility of hiring such workers, firms would have to train their human resources in-house, which can be a lengthy and/or costly process.

Empirical evidence suggests a positive correlation between labor mobility and productivity, in sectors characterized by high values of investment in Research and Development (R&D).⁵⁶ This relationship can be explained by various factors, namely the fact that labor mobility is a source of knowledge spillovers and the incentives that workers with greater mobility have to generate innovation and knowledge.⁵⁷ In addition, the incentives to innovate are greater for those employees who can recoup economic benefits from the knowledge they generate when working for a firm.⁵⁸

The empirical analysis assessing the impact of no-poach agreements on innovation in specific sectors or sets of firms is rather limited, given that these agreements are mostly secret. However, the empirical analyses on non-compete clauses that are known to the employees show that, under certain circumstances, restrictions to labor mobility can inhibit entrepreneurship and the innovation rate in the market (see Box 2).

Box 2. Non-compete clauses

Non-compete clauses are contractual clauses in which employees agree not to work for the firm's competitors or to establish their own competing firm, for a certain period, after the term of the employment contract.

Many jurisdictions have been allowing employers the possibility for them to sign these agreements with their employees, when there is some form of compensation and the contracts are temporally and geographically bounded⁵⁹.

According to article 136 of the Portuguese Labor Code, under the heading "*Non-competition agreement*", non-compete clauses must comply with a series of requirements, under penalty of being declared null and void. The legal framework introduces limits on the validity of these clauses. These are only valid if (i) do not exceed a period of two years (may be considered until three years if the employee works in a particular activity that implies a special relationship of trust or who has access to commercially strategic and sensitive information on competition), (ii) are established in writing, and (iii) provide a compensation to be awarded to the former employer or criteria for its determination.⁶⁰

The invoked rationale for non-complete clauses lies on the protection of trade secret and the safeguarding of incentives to invest in human capital. These clauses allow the firm to prevent the

⁵⁵ Regarding the relationship between labor mobility and incentives to innovate see, e.g., Motta & Rønde (2002), Franco & Mitchell (2008), and Andersson et al. (2008).

⁵⁶ See Andersson et al. (2008).

⁵⁷ See Hyde (2012).

⁵⁸ See Kräkel & Sliwka (2009).

⁵⁹ Note that, however, on January 9, 2020, the FTC organized a public workshop to evaluate the existence of legal and economic support to enact a restriction on the use of non-compete clauses in employment contracts. According to information available on the FTC's website, available [here](#), visited in 07.01.2021.

⁶⁰ See the Ruling by Lisbon's Court of Appeal, on the process nr. [5738/16.8T8SNT.L1-4](#), dated 28.06.2017; and the Ruling by Oporto's Court of Appeal on process nr. [3526/15.8T8OAZ.P2](#), dated 08.06.2017.

employees from using trade secrets in the benefit of competitors or a new competing firm established by the employee (i.e., spinouts).

Recent empirical evidence shows that:

- Non-compete clauses are highly prevalent⁶¹, identified in different compensation levels, and restrict labor mobility⁶².
- Non-compete clauses result in longer employment periods at the same employer, as well as in the exit from workers to different activity sectors, which implies the loss of specific human capital.⁶³
- The increase in the enforcement of such clauses is associated with an increase of 14% in training, but with a decrease of 4% in wages.⁶⁴
- These clauses may have a negative impact on innovation through the decrease in start-up creation, namely spinouts⁶⁵, on venture capital financing and on the number of patents.⁶⁶

Non-compete clauses impose an additional burden on the hiring of workers, even if new entrants are willing to offer higher wages and better working conditions to employees.⁶⁷ If workers are restricted, in an inadequate and unnecessary way, from working for any firm, new entrants may face obstacles when recruiting the workers they need to enter the market.

The restriction in labor mobility associated with no-poach agreements is prone to weaken innovation⁶⁸, at the expense of consumer welfare and economic efficiency.⁶⁹ In the sectors in which labor mobility represents a key element in the innovation process, downstream, such as when the employee's contribution to innovation is particularly relevant (e.g., some tech industries), no-poach agreements can result in a decline in the quality and/or in the variety of the goods and services provided to the consumers.

By restricting labor mobility, no-poach agreements may reduce entrepreneurship and innovation rates, at the expense of consumer welfare and economic efficiency.

2.1.2.3. Reinforcement of the conditions to sustain collusive behavior

No-poach agreements between competitors may undermine competition in the downstream markets, by softening competition for the labor input. The potential decrease of the competitive dynamic will be more pronounced in case the competing firms hold market power downstream or if there exist barriers to entry.

The implementation and monitoring of no-poach agreements, as well as the exchange of commercially sensitive and strategic information on the recruitment policy, may require

⁶¹ Some studies point that 18% of the employed population in the US, and half of the technical workers from various industries, are subject to non-compete clauses (Office of Economic Policy - U. S. Treasury, 2016; and Marx, 2011).

⁶² See Starr, Prescott & Bishara (2021 e 2020); Marx, Strumsky & Fleming (2009) and Samila & Sorenson (2011).

⁶³ See Starr, Prescott & Bishara (2021).

⁶⁴ See Starr (2020) and Starr (2019). The study by the Office of Economic Policy - U. S. Treasury (2016) corroborates the lower wages and their slower increase among workers that are subject to non-compete clauses.

⁶⁵ Spin-outs tend to live longer and perform better than other entrants (Franco & Filson, 2006 and Franco & Mitchell, 2008). Moreover, one of the conjectures behind the success of Silicon Valley is related to the impossibility of employers in the state of California being able to prevent their employees from creating spinouts, which promotes the entry of new firms in the market and the resulting competitive dynamic (Gilson, 1999).

⁶⁶ See Hyde (2012) and Samila & Sorenson (2011).

⁶⁷ See Office of Economic Policy - U. S. Treasury (2016) and Naidu, Posner & Weyl (2018).

⁶⁸ Note, however, that there may be different effects on the incentives to innovate, depending on the associated risk of innovation. Conti (2014) uses data from property rights in the US, in states where the legal application of non-compete clauses is void and in states where the same application is not void, demonstrating that the more restrictive application increases the likelihood of firms deciding to execute high risk projects.

⁶⁹ See Lindsay & Santon (2011).

frequent contact among competitors – a factor which may facilitate collusive behavior. As discussed below (section 2.2.1), in many of the cases appreciated by European national competition authorities that resulted in sanctions, no-poach agreements were part of wider cartel strategies, involving other competition dimensions. No-poach agreements can signal that the nature of the interaction between competing firms, in the downstream market, is not so competitive.

No-poach agreements may also facilitate the implementation of a market allocation strategy, particularly if the business model of the firms is based on customer portfolios. If the relationship between clients and the customer portfolio's manager is important,⁷⁰ a no-poach agreement concerning these managers may be instrumental for a market allocation agreement, in which competitors agree to refrain from disputing each other's clients.

No-poach agreements may affect competition when the hiring of a competitor's employee increases the probability of securing, fully or partially, the corresponding customer portfolio.⁷¹ The high value of these customer portfolios in particular sectors stands out, for example, from the employers' attempts to induce workers to sign contracts that do not allow them from maintaining the customer portfolio following the termination of employment.⁷² On the other hand, customers may themselves choose to follow the employee when the latter decides to switch firm.

A no-poach agreement can also be used to allocate markets territorially, if the customer portfolios include, for instance, a geographic dimension (i.e., the clients that integrate a portfolio are located in the same geographical market).

In addition, in certain contexts, no-poach agreements can crystalize the market and ensure a non-expansion agreement, in a particular area of expertise, thus avoiding the hiring of specialized labor force. An agreement of this nature may fulfil the purpose of keeping or strengthening the product specialization and differentiation among competing firms, softening competition (e.g., hospitals specialized in different therapeutic areas may agree not to approach each other's specialists).

No-poach agreements may reinforce the conditions to sustain collusive behaviour and be instrumental in the context of a wider downstream cartel, including market allocation based on clients or geographical areas and the reinforcement of product differentiation (specialization).

2.2. No-poach agreements under competition law

As described above, in no-poach agreements, competing employers in the labor market limit or fix the terms of employment for potential hires of each other's employees. These companies deprive workers of labor mobility. It is, therefore, likely that these employees will be deprived of higher wages or other terms of compensation.

These agreements are liable to violate the Portuguese Competition Act and, if applicable, the TFEU, for constituting a share of labor input and an indirect form of purchase price of labor input. According to Article 9 (1) (a) or (c) of the Portuguese Competition Act, which corresponds to Article 101 (1) (a) or (c) of the TFEU: "*Agreements between undertakings, concerted practices and decisions by associations of undertakings which have as their object or effect the prevention, distortion or restriction of competition in the domestic market, in whole or in part, and to a*

⁷⁰ For example, some areas related to banking and financial consulting.

⁷¹ Empirical evidence on non-compete clauses – even if different from the agreements discussed so far – demonstrates that its prevalence is higher in situations where employees have a higher level of contact with clients or have access to customer portfolios (see Box 2).

⁷² See Rauch & Watson (2014).

considerable extent, are prohibited, in particular those which: a) Directly or indirectly fix purchase or selling prices or any other trading conditions (...) c) Share markets or sources of supply" (our highlight).

The Box below includes a summary of the relevant legal framework for determining the amount of the fine, the waiver or reduction of the fine and the settlement procedures. It also includes information on the possibility of seeking damages for those harmed by anticompetitive behavior.

Box 3. Potential misdemeanor and civil consequences of anticompetitive agreements

Potential misdemeanor consequences^{73,74}

The violation of Article 9 of the Portuguese Competition Act and, if applicable, of Article 101 of the TFEU constitutes an administrative offence punishable by a fine under the Portuguese Competition Act (see Article 68 (1) (a) (b) of the Portuguese Competition Act)⁷⁵.

- **The fine may amount to up to 10 % of the turnover** in the financial year immediately preceding the final conviction decision issued by the AdC, for each of the infringing undertakings or, in the case of an association of undertakings, the aggregate turnover of the associated undertakings (see Article 69 (2) of the Portuguese Competition Act).
- **The fine applicable to natural persons may be up to 10 % of their annual remuneration** for the exercise of their functions in the infringing undertakings, in the last full year in which the prohibited practice occurred (see Article 69 (4) (5) of the Portuguese Competition Act).
- **Negligence is punishable**, however, the amount of the applicable fine is reduced by half (see Article 68 (3) of the Portuguese Competition Act).
- **Under the Leniency Program⁷⁶, the AdC may grant a waiver or reduction of the fine that would otherwise have been imposed.** An undertaking which self-reports to the AdC an agreement in which it has participated may obtain a **total fine waiver** (immunity). Other undertakings may obtain a **reduction of the fine** applicable to the infringement in question (the AdC applies three levels depending on the order in which information and evidence of significant additional value is submitted, namely, reductions from 30% to 50%, from 20% to 30%, and up to 20% to the following undertakings; these percentages are reduced by half if the request by the party concerned in the case is submitted after the notification of the statement of objections) (see Articles 75 to 82 of the Portuguese Competition Act) (see Articles 75 to 82 of the Portuguese Competition Act).
- **In settlement procedures, the AdC defines the percentage of the fine reduction applicable.** When the misdemeanor procedures, object of a settlement, also involve an application for a reduction of the fine, the reduction of the amount of the fine that is granted during the settlement will be added to the reduction resulting from that application (see Articles 22 and 27 of the Portuguese Competition Act).

Potential civil consequences

The violation of Article 9 of the Portuguese Competition Act and, if applicable, of Article 101 of the TFEU, is liable to trigger civil liability, pursuant to Law No. 23/2018⁷⁷.

⁷³ AdC (2012) "Guidelines on the Methodology to be used in the Application of Fines", available [here](#) (PT language).

⁷⁴ AdC (2013) "Guidelines on the Instruction of Cases", available [here](#) (PT language).

⁷⁵ Pursuant to Articles 67 and 68 of the Portuguese Competition Act, in conjunction with Article 7 (1) (2) (a) of the AdC's Statutes, it's within the AdC's attributions, in the pursuit of its mission, to impose fines for administrative offences for infringements of the competition rules, set out in the Portuguese Competition Act and in Articles 101 and 102 of the TFEU.

⁷⁶ See the AdC page "Leniency Program", available [here](#) (EN language).

⁷⁷ Law No. 23/2018, of 5 June, transposed Directive No. 2014/104/EU, commonly referred to as the "Private Enforcement Directive". It applies regardless of whether the infringement of competition law on which the claim for damages is based has already been declared by any competition authority or court, national or of any Member State, by the Commission or by the CJEU.

- **Injured parties, who have suffered harm caused by an infringement of competition law, can bring a civil claim** against the undertakings involved in the antitrust settlement in order to be compensated. For example, following a decision by the AdC or another competition authority finding such an infringement.
- **Calculation of the compensation:** the reparation of damages covers the damage caused, the benefits that the injured party no longer obtains and moratory interest from the time of the decision until effective and full payment.

Several jurisdictions, both in the U.S. and in some EU Member States, have considered no-poach agreements between competing undertakings contrary to and in violation of antitrust laws. Below we identify decisional practice and, when relevant, judicial decisions handed down by the courts, in order to assess their legal validity.

2.2.1. Competition law enforcement: decisional practice

As detailed below, and given the decisional practice, we have identified a number of no-poach agreements across several sectors, namely in the following ones:

- **Health sector**, with no-poach and wage-fixing agreements or other terms of compensation for nurses and medical doctors.⁷⁸
- **Technology sector**, with no-poach agreements relating to highly qualified employees, such as engineers.⁷⁹
- **Railway sector**, with no-poach agreements involving employees of companies that supply and sell railroad equipment.⁸⁰
- **Industrial sector of PVC and linoleum floor coverings**, with no-poach agreements involving employees of companies active in the sector.⁸¹
- **Transport sector**, with no-poach agreements involving employees of freight forwarding companies.⁸²

⁷⁸ See [Indictment, United States v. Surgical Care Affiliates, LLC, et al.](#), U.S. District Court for the Northern District of Texas Dallas Division, No. 3-21-cr-00011 (05.01.2021); [Press Release](#) (07.01.2021). See Dutch of Court of Appeal: LNJ: BM3366 (Dutch Court of Appeal, Court of Gerechtshof's - Hertogenbosch) HD 200,056,331, 05.04.2010, available [here](#); LNJ: BM3366 (Court of Gerechtshof's - Hertogenbosch) HD 200,056,331, 05.04.2010 (NL), available [here](#); Press communication "Ziekenhuizen dienen covenant gedeeltelijk op te schorten - Banning N.V.", *Hof Den Bosch 4 mei 2010*, *LJN BM3366*, available [here](#); Act of 22 May 1997, "Providing New Rules for Economic Competition" (Dutch Competition Act), available [here](#).

⁷⁹ See Case No. 1:10-cv-01629, U.S. District Court for the District of Columbia, "U.S. v. Adobe Systems, Inc. et Al." (17.03.2011), "Competitive Impact Assessment", available [here](#) and "Final Judgement", available [here](#); see Daniel von BREVERN, in Business Law Magazine, "HR does not always fly below the radar. Recent developments show human resources professionals should be aware of the key principles of antitrust law", 27.02.2019, available [here](#). See Case 1:10-cv-02220-RBW, U.S. District Court for the District of Columbia, "U.S. V. Lucasfilm Ltd." (03.06.2011), "Competitive Impact Assessment", available [here](#), and "Final Judgement", available [here](#). See Case No. 12-CV-05869-EJD-PSG, U.S. District Court for the Northern District of California San Jose Division, "U.S. v. eBay, Inc." (02.09.2014), "Competitive Impact Assessment", available [here](#) and "Final Judgement", available [here](#).

⁸⁰ See Case 1:18-cv-00747-CKK, U.S. District Court for the District of Columbia, "U.S. v. Knorr-Bremse AG and Westinghouse Air Brake Technologies Corporation" (11.07.2018), "Competitive Impact Assessment", available [here](#), and "Final Judgement", available [here](#).

⁸¹ See Autorité de la Concurrence : «Décision n° 17-D-20 du 18 octobre 2017, relative à des pratiques mises en œuvre dans le secteur des revêtements de sols résilients» (19.10.2017), available [here](#); [Press Release](#). See "Competition Issues in Labour Markets - Note by Croatia" (2019), OECD roundtable, v. CCA vs. Gemicro d.o.o., Zagreb, available [here](#); see, also, CAA website, available [here](#).

⁸² See EU Press Release, "Spain: Competition Authority (CNC) imposes Fines on Freight Forwarding Cartel", available [here](#); "Resolución (EXPTE. S/0120/08, Transitarios) - Clemencia, Existencia de práctica prohibida" (31.07.2010), [here](#).

- **Education sector**, with no-poach agreements involving university professors.⁸³
- **Hairdressing sector**, with no-poach agreements involving employees of companies active in the sale of products for professional hairdressers.⁸⁴

In addition, in the **sports sector**, the AdC issued, in April 2021, a Statement of Objections for a no-poach agreement as a restrictive practice of competition.⁸⁵ The AdC had already imposed interim measures relating to this case involving professional football players, last May, 2020.⁸⁶

These potential antitrust practices also cuts across all types of employees. These agreements can comprise top-level managers, as well as highly skilled workers and unskilled workers.

2.2.1.1. Decisional practice from Portugal

On April 13, 2021, the AdC issued a Statement of Objections for a no-poach agreement, involving the Portuguese Professional Football League (LPFP - Liga Portuguesa de Futebol Profissional) and 31 sports companies (clubs) participating in the 2019/2020 edition of the First and Second Professional Football Leagues.⁸⁷ The case was opened by the AdC in May 2020. The AdC immediately imposed interim measures on the LPFP in order to suspend, with immediate effect, the decision that prevents First and Second League football clubs from hiring players who unilaterally terminate their employment contract due to issues caused by the COVID-19 pandemic. The interim measure was decided in view of the potential serious and irreparable impact of a practice that could harm the competition rules.⁸⁸

2.2.1.2. Decisional practice from competition authorities in EU Member States

In some EU Member States, the competition authorities have assessed the (in)compatibility of no-poach agreements in the context of cartels, as one of the agreements that contributed to a collusive strategy.^{89,90}

These cases were considered violations by object, and as such, prohibited by national competition laws and by Article 101 of the TFEU. See, for example, the cases from the French and the Spanish national competition authorities (Box 4). In the Netherlands, a national court evaluated a no-poach agreement as an horizontal agreement restricting competition.

Box 4 also contains a reference to a case from the Croatian competition authority, whereby was identified a no-poach clause in a number of contracts. This case is, however, an alleged abuse of a dominant position.

⁸³ See Case Civil No. 1:15-cv-462, U.S. District Court for the District of Middle District of North Carolina, “*U.S. v. Duke University, et al.*”, “Final Judgement” (25.11.2019), available [here](#), and “Statement of Interest of the U.S.” (07.03.2019), available [here](#).

⁸⁴ See Comisión Nacional de la Competencia, “Resolución (EXPTE. S/0086/08, Peluquería Profesional) - Clemencia, Existencia de práctica prohibida” (02.03.2011), available [here](#).

⁸⁵ See the AdC [Press Release](#) “AdC issues Statements of Objections for anticompetitive agreement in the labour market for the first time”, from April 19, 2021.

⁸⁶ See the AdC [Press Release](#) “Covid – 19: AdC imposes interim measure to the Portuguese Professional Football League suspending the concerted decision to impede the hiring of football players”, from May 26 2020.

⁸⁷ See the AdC [Press Release](#) “AdC issues Statements of Objections for anticompetitive agreement in the labour market for the first time”, from April 19 2021.

⁸⁸ See AdC’s [Press Release](#), May 26, 2020.

⁸⁹ See OECD (2020).

⁹⁰ Among others, accordingly Gürkaynak et al. (2013).

Box 4. Some decisional practice cases on no-poach by national competition authorities in the EU

France: Cartel in the PVC and linoleum floor coverings industry (2017)⁹¹

On October 18, 2017, the French competition authority (*Autorité de la Concurrence*), sanctioned a number of companies (groups *Forbo*, *Gerflor*, *Tarkett*, *Midfloor*, *Topfloor*) active in the PVC and linoleum floor coverings industry, and the industry's trade association (*SFEC*), for implementing a cartel, infringing antitrust law.

The cartel involved multiple agreements and concerted practices, such as a price-fixing agreement. The companies also agreed on a series of specific issues related to their internal management, namely with regard to the strategies to be adopted in relation to certain customers or competitors, in the recruitment policy, in the sales organization or samples of new products. These practices constituted a complex and continuous infringement, with a single anticompetitive objective, that of reducing or eliminating strategic uncertainty of the firms in the French market.

The no-poach agreement was established through a gentlemen's agreement, which involved the non-mutual hiring of workers. The gentlemen's agreement also involved an explicit prohibition, with specialist recruitment companies and headhunters, not to consider the employees of other members of the cartel. Among others, it was considered that the no-poach agreement contributed to the elimination of the strategic uncertainty about the recruitment policy of the firms. The *Autorité de la Concurrence* also noted the impact on workers in terms of loss of professional opportunities.

The cartel was considered an infringement by object, prohibited by national competition law (see art. L. 420-1, of the *Code de Commerce*) and by Article 101 of the TFEU.

Spain: Cartel between 8 freight forwarding companies (2010)⁹²

On July 31, 2010, the Spanish competition authority, at the time, *CNC* (now the “*Comisión Nacional de Mercados y Competencia*”, *CNMC*), adopted a conviction decision against eight road transport forwarding agent companies.⁹³

A concerted practice was at stake, whereby these companies maintained contacts to coordinate various aspects of their strategy in the market, namely, with regard to the pass-through of costs and the updating of prices of products/services sold downstream, as well as the hire of new employees. The restrictive practice included a no-poach agreement between the members of the cartel, in which companies agreed not to hire or recruit one another's employee. Under this pact, companies who wanted to hire workers from other members of the cartel were obliged to contact the management bodies of the respective employer in advance to obtain their prior consent. Hence, the no-poach agreement was assessed as one of the dimensions of a cartel.

According to the *CNC* Decision, this no-poach agreement resulted in damages to workers and competition:

“The hiring of workers is a parameter of competition between companies, also in the freight forwarding industry, since the labour factor is still an input. The agreement reached has the object and the effect of reducing competition between companies in the cartel, in the acquisition of the labour factor. On the other hand, and as has already been mentioned above, it must be borne in mind that this pact is also apt to affect the conditions of the referred input to the detriment of the workers.”
⁹⁴ (AdC's translation).

“The risk that a competitor may solicit the workers of another firm gives workers greater bargaining power and ability to demand a more attractive remuneration, appropriate to the demand for that

⁹¹ See, *Autorité de la Concurrence* : «*Décision n° 17-D-20 du 18 octobre 2017, relative à des pratiques mises en œuvre dans le secteur des revêtements de sols résilients*» (19.10.2017), available [here](#); and the Press Release, available [here](#).

⁹² See EU Press Release, “*Spain: Competition Authority (CNC) imposes Fines on Freight Forwarding Cartel*”, available [here](#) ; “*Resolución (EXPTE. S/0120/08, Transitarios) - Clemencia, Existencia de práctica prohibida*” (31.07.2010), available [here](#).

⁹³ Companies from the groups ABX Logistics España, DHL Express Barcelona, Deutsche Post AG, Rhenus Logistics, Salvat Logística, SPAIN-TIR Transportes Internacionales, Transnatur and Transportes Internacionales INTER-TIR.

⁹⁴ See CNC Decision, p. 93.

worker in the market. If non-hiring is agreed or that it does not occur without consent, the workers lose bargaining power, which affects their remuneration.”⁹⁵ (AdC’s translation).

The CNC Decision considers that: (i) the workers were harmed to the extent that the decrease in their bargaining power led to a reduction in their remuneration; and (ii) the damage to competition results from the fact that the hiring of workers constitutes a parameter of competition between companies in the labour market. Among many other aspects, it was considered that the no-poach agreement contributed to the elimination of strategic uncertainty about the recruitment policy of the rival firms.

The cartel was considered an infringement by object, prohibited by national competition law (see art. 1 of *Ley 15/2007, Defensa de la Competencia*) and by Article 101 of the TFEU.

Spain: Cartel in the sale of products for professional hairdressers (2011)⁹⁶

On March 2, 2011, the Spanish competition authority, CNC at the time, adopted a conviction decision against eight companies that manufacture cosmetic products for professional hairdressers⁹⁷, for implementing a cartel.

The cartel involved (i) the exchange of current and future sensitive and strategic commercial information, namely on the salaries of its sales teams (fixed and variable), fees and daily expenses subsidies for each employee and number of employees (sales teams); and (ii) a no-poach agreement, where companies agreed not to cold call nor hire each other’s employees (sales teams), without prior consent. Hence, the no-poach agreement was assessed in the context of a wider cartel and not as stand-alone agreement.

The cartel was considered an infringement by object, prohibited by national competition law (see art. 1 of *Ley 15/2007, Defensa de la Competencia*).

Croatia: CCA vs. Gemicro d.o.o., Zagreb (2015)⁹⁸

In 2014, the Croatian competition authority (“Agencija za zaštitu tržišnog natjecanja” or “CCA”) filed a lawsuit against Gemicro, a company active in providing specialized IT support to leasing companies and other forms of financing, for abuse of a dominant position.

The process started on the basis of a complaint, according to which Gemicro had conditioned the conclusion of contracts to the acceptance of supplementary obligations by the users of its services. The CCA reviewed the contracts between Gemicro and the leasing companies and concluded that these contracts contained a clause that prevented the hiring of former Gemicro employees, who worked in competing companies, for the entire life of the agreement.

In 2015, Gemicro committed to eliminate this clause from the contracts in force and not to include it in future contracts. The CCA considered the commitments sufficient to remove the anticompetitive effects and to re-establish competition. Thereafter, the CCA closed the procedure.

The contractual clause was considered a potential restriction of the national competition law, in the context of an abuse of a dominant position (see article 13 of the Croatian national competition law).

The Netherlands: Agreement between 15 Dutch hospitals (2010)⁹⁹

On April 5, 2010, a Dutch Civil Court of Appeal (“Gerechtshof’s-Hertogenbosch”) examined an agreement between 15 hospitals in the provinces of Zeeland, Noord-Brabant and Limburg, entitled

⁹⁵ See CNC Decision, p. 92.

⁹⁶ See, *Comisión Nacional de la Competencia*, “Resolución (EXPTE. S/0086/08, Peluquería Profesional) - Clemencia, Existencia de práctica prohibida” (02.03.2011), available [here](#).

⁹⁷ L’Oréal, Wella, Colomer Group, Eugène Perma, Montibello, Lendan, Henkel, DSP.

⁹⁸ See “Competition Issues in Labour Markets - Note by Croatia” (2019), OECD roundtable, v. CCA vs. Gemicro d.o.o., Zagreb, available [here](#). See, also, CCA website, available [here](#).

⁹⁹ See Dutch of Court of Appeal: LJN: BM3366 (Dutch Court of Appeal, Court of Gerechtshof’s - Hertogenbosch) HD 200,056,331, 05.04.2010, available [here](#), LJN: BM3366 (Court of Gerechtshof’s - Hertogenbosch) HD 200,056,331, 05.04.2010 (NL), available [here](#); Comunicado de imprensa “Ziekenhuizen dienen covenant gedeeltelijk op te schorten - Banning N.V”, Hof Den Bosch 4 mei 2010, LJN BM3366, available [here](#); Act of 22 May 1997, “Providing New Rules for Economic Competition” (Dutch Competition Act), available [here](#).

"Working together, training together". This agreement contained provisions on training and employment conditions for anaesthetists and assistants.

The agreement was designed in the context of joint training and included a no-poach and a wage-fixing clauses:

- A no-poach clause: hospitals agreed not to hire an employee who left his/her current position to work through an employment agency, for a period of at least 12 months after she/he left her/his current job.

The court found it plausible that the object of the agreement was not to restrict competition, but that it had this effect, since anaesthetists saw their opportunities to work for other hospitals substantially limited (see Art. 6 of the Dutch competition law).

- A wage-fixing clause: hospitals agreed to set a maximum percentage in the case of overtime pay to employees, up to 75% of the hourly wage.

The court found that this agreement constituted an infringement by object, prohibited by national competition law, since anaesthetists saw their salaries substantially limited (see Art. 6 of the Dutch competition law).

2.2.1.3. Decisional practice from the EU regarding horizontal agreements of sharing of markets or sources of supply

No-poach agreements limit individual firm decision-making when acquiring input labor, and are liable to violate the national competition laws of the EU Member States, as well as, in Portugal, of article 9 of the Portuguese Competition Act and, if applicable, Article 101 TFEU.

Even though not specific to the hiring of workers and its remuneration conditions, the EC's decision-making practice in relation to anticompetitive practices, due to purchase price fixing of inputs and sharing of sources of supply, is vast. We highlight two landmark precedents of the EC for illustrative purposes.¹⁰⁰ The two cases concern cartels in the market for the purchase and processing of a raw material (i.e., an input, raw tobacco), through which companies agreed to (i) fix the purchase prices of the raw material, (ii) share the input quantities to be purchased, and (iii) share suppliers, restricting competition. The cases were considered violations, by object, of the rules corresponding to the current Article 101 of the TFEU and were upheld in court (see Box 5).

Box 5. EC: Buying cartels in the raw tobacco sector: fixing purchase prices of inputs and allocating purchased quantities

COMP/C.38.238/B.2 – Raw tobacco, Spain (2004)¹⁰¹

On 20.10.2004, the EC adopted a decision regarding two horizontal prohibited practices, by price fixing and market sharing, in violation, by object, of Article 101 TFEU.

Processors cartel - from 1996 to 2001, raw tobacco processors, either directly or through an association, agreed on: (i) **the maximum average price they would pay at delivery for each variety of raw tobacco, regardless of quality**; and (ii) **the purchased quantities of tobacco that each of them could buy** from producers. The processors aimed at preventing an increase in purchase prices, beyond what they would consider acceptable, following negotiations with producers at delivery.

Producers cartel - from 1999 to 2001, organizations of farmers' representatives and a confederation of agrarian cooperatives (collectively referred to as producer representatives) agreed on: (i) **the price brackets, by quality of each tobacco raw**; and (ii) additional price conditions, in the form of **minimum**

¹⁰⁰ See Whish & Bailey (2015).

¹⁰¹ See EC Decision COMP/C.38.238/B.2, Spanish Raw Tobacco, 20.10.2004, substantially confirmed in appeal in the joined cases C-628/10 P e C-14/11 P, Alliance One International e Standard Commercial Tobacco v. Commission and Commission v. Alliance One International e o. [2012], C-240/11 P, World Wide Tobacco España v Commission [2012], and the action having been withdrawn in the process C-537/10 P, Deltafina SpA v Commission [2011].

average prices per producer and per producer group for each variety of tobacco, regardless of the various quality grades, which would subsequently be proposed to processors during the negotiation of the contract-type of annual crop. The average minimum prices per producers group would still be open to increase following negotiations at delivery.

COMP/C.38.281/B.2 - Raw tobacco, Italy (2005)¹⁰²

On 10/20/2005, the EC adopted a decision regarding three horizontal prohibited practices, by price fixing and market sharing, in violation, by object, of the current Article 101 of the TFEU.

Processors cartel - from 1995 to 2002, raw tobacco processors colluded on their overall purchasing strategy, agreeing between themselves the commercial conditions for the purchase of raw tobacco in Italy (both for direct purchases from producers as for third-party packers), including: a) purchase prices that they would pay at delivery; b) the allocation of suppliers and quantities; c) exchange of commercially sensitive and strategic information to coordinate their purchasing behavior; d) the determination of quantities and prices in relation to surplus production; and e) the coordination of bids for public auctions in 1995 and 1998. The coordination by the processors affected fundamental aspects of their competitive behavior, being susceptible to affect their behavior in any other market in which they compete, including downstream.

Two other separate infringements - from 1999 to 2001 - which consisted of the decisions by which: (i) the professional association of Italian tobacco processors set the contract prices which it would negotiate, on behalf of its members, in the conclusion of Interprofessional Agreements with the Italian confederation of associations of raw tobacco producers; and (ii) the Italian confederation of associations of raw tobacco producers set the selling prices for its members which it would negotiate with the Italian association of raw tobacco processors, on behalf of its members, for the conclusion of the Interprofessional Agreements.

It follows from the previous EU decisional practice that undertakings involved in horizontal market-sharing agreements, via the allocation of sources of supply, have the objective of harming competition and, as such, are sanctioned by Article 101 (1) (c) of the TFEU.

The undertakings involved in no-poach agreements are also involved in horizontal agreements of fixing, direct or indirectly, purchase prices and market-sharing, via the allocation of sources of supply and, therefore, have the objective of harming competition. The labor factor can be an essential input to a particular activity, susceptible of being the object of collusion between companies, to the detriment of workers and consumers.

In addition, the EC alerts for the fact that the joint purchasing arrangements can be used to disguise a purchasing cartel, constituting a restriction of competition, by object, to Article 101 of the TFEU, e.g., involving a price fixing, output limitation or market allocation^{103,104} (see Box 6).

Box 6. EC: Joint purchasing arrangements¹⁰⁵

According to the European Commission Guidelines on joint purchase agreements, these relate to the joint purchase of products. These type of purchases “can be carried out by a jointly controlled company, by a company in which many other companies hold non-controlling stakes, by a contractual arrangement or by even looser forms of co-operation” (joint purchasing arrangements) (§ 194).

These arrangements usually aim at the creation of buyer power, with potential benefits to the consumer via lower prices or better quality products or services.

¹⁰² See EC Decision COMP/C.38.281/B.2, *Italian Raw Tobacco*, 20.10.2005, confirmed in appeal C-578/11 P *Deltafina SpA v Commission* [2014].

¹⁰³ European Commission (2011) *Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements* (JO C 11/1, 14.1.2011), §§ 205-206.

¹⁰⁴ See Box 6 for further information on joint purchasing agreements.

¹⁰⁵ European Commission (2011) *Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements* (JO C 11/1, 14.1.2011), §§ 194-224.

However, buyer power may, under certain circumstances, also give rise to competition concerns in the upstream and downstream markets (e.g., through higher prices, output and quality or variety limitation, market allocation and foreclosure of potential buyers).

The EC states “[t]here is no absolute threshold above which it can be presumed that the parties to a joint purchasing arrangement have market power so that the joint purchasing arrangement is likely to give rise to restrictive effects on competition within the meaning of Article 101 (1). However, in most cases it is unlikely that market power exists if the parties to the joint purchasing arrangement have a combined market share not exceeding 15 % on the purchasing market or markets as well as a combined market share not exceeding 15 % on the selling market or markets. In any event, if the parties' combined market shares do not exceed 15 % on both the purchasing and the selling market or markets, it is likely that the conditions of Article 101 (3) are fulfilled.” (§ 208).

2.2.1.4. Decisional practice from the EC regarding horizontal agreements of poaching workers from third-party undertakings

An agreement related to no-poach is an agreement between competitors regarding the hire of key employees working in a third-party undertaking. These collusive poaching agreements are likely to have an impact on competition. The hiring of a competitor's key workers, if carried out in a concerted manner, with the aim of restricting or eliminating the competition exerted by that rival firm, is likely to be contrary to the antitrust rules.¹⁰⁶

For example, the EC has already convicted a cartel that involved, in addition to price fixing and market sharing, an agreement to hire key employees from a competitor that is not a member of the cartel (see Box 7). The EC did not consider, in isolation, the agreement to hire key employees. The EC, rather, assessed it in the context of a wider cartel that was considered a violation by object, of Article 101 of the TFEU. The practice aimed at restricting or eliminating the rival competitor from the product and geographic market.

Box 7. EC: Agreement of collusive poaching of third operator's employees

COMP IV/35.691/E.4 - Pre-Insulated Pipe Cartel (1998)¹⁰⁷

The Court of Justice of the European Union (CJEU) upheld the EC decision of 21.10.1998 against several undertakings, belonging to four business groups, Danish producers of pre-insulated pipes for district heating, for price fixing and market sharing, in violation, by object, of the current Article 101 TFEU.

According to the EC decision, a number of agreements and concerted practices have been concluded, since the late 1990s, between Danish producers of pre-insulated pipes for district heating, in the Danish national market. These agreements were subsequently extended to other national markets, covering the Common Market, aiming at market sharing and price fixing.

In particular, they (i) allocated producers to national markets and the European market amongst themselves on the basis of quotas; (ii) allocated national markets to particular producers and arranged the withdrawal of others; (iii) agreed prices for the product and for individual projects and manipulated the bidding procedure for those projects; and (iv) took concerted measures to hinder the commercial activity of the only substantial non-member of the cartel, Powerpipe AB. Quotas would have been allocated to each of the companies by the “directors’ club” (composed of the presidents or directors-general of the companies participating in the cartel), both at European and national level.

The EC took into account the circumstances of the hiring of the director-general and other key employees of the competing company, Powerpipe AB. These hiring were made through the offer of wages and conditions that, apparently, were exceptional in the business and taking into account the fact that the cost of such wages was shared amongst the undertakings. The EC took into account the

¹⁰⁶ Some authors advocate that this typology can be regarded as “*agreements of collusive poaching*” distinct from “*agreements among competitors not to solicit each other's employees*” (vide Gürkaynak et al., 2013).

¹⁰⁷ See EC Decision, 21.10.1998, relating to a procedure for the application of Article [current 101] of the Treaty [current TFEU], Case No. IV/35.691/E.4, “*Pre-Insulated Pipe Cartel*”, JO L 24, 30.01.1999, pp. 1-70; Judgement of the Court of Justice, 28.06.2005, in the joined cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P, e C-213/02 P.

objectives pursued: obtaining internal information about the rival and harming the competitor's business through an adverse effect on its customers.

The ECJ judgment highlights that the EC decision refers, as one of the elements of the cartel, "*the adoption and implementation of concerted measures designed to eliminate the only large undertaking not forming part of the cartel, Powerpipe. The Commission explains that certain participants in the cartel recruited 'key employees' from that company and gave it to understand that it must withdraw from the German market*" (see § 22 of the judgment).

The EC decision was upheld, by the ECJ, in a set of joined cases.

2.2.1.5. The decision-making practice of the competition authorities in the U.S.

There are several decisional precedents from the other side of the Atlantic, which sanctioned the behavior of undertakings, as employers, for having entered into no-poach agreements and wage-fixing agreements or other forms of compensation (cf. chapter 2.2.1.5).

The set of decisional precedents in the U.S. jurisdiction contributed to the joint adoption, by DOJ and FTC, in October 2016, of a document called "Antitrust Guidance for Human Resource Professionals".¹⁰⁸ This document consists of an advocacy mechanism, containing Guidelines with regard to the evaluation of certain practices carried out in the hiring of human resources that potentially violate U.S. competition law, and, as such, subject to be sanctioned. This document states that:

- **No-poach and wage-fixing agreements between employers are anticompetitive practices**, having the object of violating per se competition rules, without the need to demonstrate any anticompetitive effects, in violation of Section 1 of the Sherman Act.
- **Employers are considered as competing buyers in the labor market and workers as sellers of the input labor.** It is not relevant whether the employers are competitors in the downstream market. It is, however, decisive that the undertakings compete for the same employees.
- **No-poach agreements are likely to eliminate competition in the same way as market segmentation or customer allocation agreements.** Thus, when employers agree not to solicit or recruit one another's employees, the workers harm is analogous to the harm caused by market segmentation or customer allocation agreements.
- **Wage-fixing agreements are likely to eliminate competition in the same way as price-fixing agreements.**

The DOJ and the FTC further state that, as of October 2016, the no-poach and wage-fixing agreements have also become subject to criminal sanctions, and not just civil sanctions, as until then, as a measure of "public enforcement", for violation of Section 1 of the Sherman Act.¹⁰⁹ These agreements may also be the subject of civil damages actions brought by injured parties through "private enforcement" (e.g., by the worker or another injured party), through Section 4 of the Clayton Act.

Box 8 identifies six decisional-making precedents from the U.S. jurisdiction.

The first four decisional precedents in Box 8 refer to civil lawsuits filed by the DOJ. This authority considered that the no-poach agreements in question were allegedly unlawful and per se violated Section 1 of the Sherman Act, as they were not necessary, as ancillary agreements,

¹⁰⁸ Vide DOJ/FTC (2016).

¹⁰⁹ DOJ/FTC (2016).

to any corporate transaction or concentration (hence called “naked no-poach”).^{110,111} In the decisions in question, it was clearly identified that no-poach agreements in the labor market should not be treated differently from other input markets under competition policy. Additionally, it follows from the decisions that no-poach agreements must be considered as agreements similar to per se illegal market-sharing agreements.

The fifth decisional precedent in Box 8 concerns a civil class action,¹¹² to which the DOJ joined a Statement of Interest¹¹³ to the private litigation process. The sixth decisional precedent concerns the DOJ's first criminal prosecution, putting into practice the Guidelines contained in the “Antitrust Guidance for Human Resource Professionals”, adopted in 2016, with regard to no-poach agreements.

Box 8. U.S.: Some decision-making precedents regarding no-poach agreements in the U.S.

In all the cases below, where the DOJ has initiated a civil lawsuit, it concluded that the effect of these no-poach agreements was to reduce competition between undertakings for qualified employees, depriving the affected employees from better opportunities and interfering into the proper functioning of wage-setting that would otherwise have prevailed.

***U.S. v. Adobe Systems, Inc., Apple Inc., Google Inc., Intel Corporation, Intuit, Inc., and Pixar (2011)*¹¹⁴**

On September 24, 2010, the DOJ filed a civil lawsuit against Adobe, Apple, Google, Intel, Intuit and Pixar for alleged per se violation of Section 1 of the Sherman Act.

The companies entered into five bilateral no-poach agreements by which they agreed not to solicit one another's employees. The agreements were between (i) Apple and Google, (ii) Apple and Adobe, (iii) Apple and Pixar, (iv) Google and Intel, and (v) Google and Intuit. These agreements, substantially similar, restricted competition for workers, prohibiting unsolicited communications addressed to one another's employees (“no cold calls of employees”). With the exception of the agreement between Google and Intuit, which only prohibited Google from contacting Intuit employees, the remaining covered all employees of both parties to the agreement. On March 17, 2011, the court decision resulted in a “consent judgment”.

***U.S. v. Lucasfilm Ltd. (2011)*¹¹⁵**

On December 21, 2010, the DOJ filed a civil lawsuit against Lucasfilm, for entering into a no-poach agreement with Pixar, in alleged violation per se of Section 1 of the Sherman Act. The agreement in question was complex, involving a “naked restraint”, not considered ancillary nor necessary to any transaction.

The digital animation studios agreed not to recruit workers from one another's, in particular: refraining from communications with one another's employees unless these have applied for a recruitment process (i.e., “do not cold call agreements”); notification between undertakings, whenever they make a job offer to one another's worker; refraining from offer counterproposals, in the event that one of the undertakings offered a position to one another's worker; and, involving all employees of the undertakings concerned, regardless of the geographic area where they worked or the position of the employee in question.

¹¹⁰ Accordingly, see Gürkaynak et al. (2013) and OECD (2020, 2019).

¹¹¹ See section 2.4 for further details on no-poach clauses for workers in the context of mergers.

¹¹² In the English-speaking, legal term called “class action”.

¹¹³ In the English-speaking legal term called “statement of interest”.

¹¹⁴ Vide Case No. 1:10-cv-01629, U.S. District Court for the District of Columbia, “U.S. v. Adobe Systems, Inc. et Al.” (17.03.2011), “Competitive Impact Assessment”, available [here](#) and “Final Judgement”, available [here](#). See also Daniel von BREVERN, in Business Law Magazine, “HR does not always fly below the radar. Recent developments show human resources professionals should be aware of the key principles of antitrust law”, 27.02.2019, available [here](#); DOJ/FTC (2016), “[Antitrust Guidance for Human Resource Professionals](#)”.

¹¹⁵ Vide Case 1:10-cv-02220-RBW, U.S. District Court for the District of Columbia, “U.S. V. Lucasfilm Ltd.” (03.06.2011), “Competitive Impact Assessment”, available [here](#), and “Final Judgement”, available [here](#).

The DOJ claimed that the effect of the no-poach agreement was to disrupt competitive market forces as to attract highly qualified digital animation employees and other employees covered by the agreement. On June 3, 2011, the court decision resulted in a “consent judgment”.¹¹⁶

U.S. v. eBay, Inc. (2014)¹¹⁷

On November 16, 2012, the DOJ filed a civil lawsuit against eBay for entering into a no-poach agreement with Intuit, in alleged violation per se of Section 1 of the Sherman Act. The two companies agreed not to recruit employees from one another’s and eBay has agreed not to hire Intuit employees. The DOJ claimed that the agreement dates back to 2006, and that it reduced competition for highly qualified technical staff. On September 2, 2014, the court decision resulted in a “consent judgment”.

U.S. v. Knorr-Bremse AG and Westinghouse Air Brake Technologies Corporation (2018)¹¹⁸

On April 3, 2018, the DOJ filed a civil lawsuit, claiming that Knorr and Wabtec entered into a set of no-poach agreements: not soliciting and not hiring employees from one another’s, without prior authorization, in violation per se of Section 1 of the Sherman Act.

According to the DOJ’s, the undertakings were global suppliers of railway equipment and the main rivals in the development, manufacture and sale of equipment used in railway cargo and passenger applications. However, these undertakings decided not to compete with each other in hiring qualified employees.

The DOJ claimed that Knorr and Wabtec’s no-poach agreements were not reasonably necessary for any legitimate business transaction or collaboration between the companies. On July 11, 2018, the court decision resulted in a “consent judgment”.

Danielle Seaman v. Duke University et al. (2019) – DOJ Statement of Interest¹¹⁹

In June 2015, Danielle Seaman, an assistant professor at the Faculty of Medicine, at Duke University, brought a class action into court, claiming the existence of a no-poach agreement between two U.S. medical schools, the Duke University and the University of North Carolina, through which they had allegedly agreed not to hire one another’s teachers. This agreement would be likely to violate per se of Section 1 of the Sherman Act.

The professor claimed to have expressed an interest in working for the University of North Carolina when she learned of the existence of a non-hiring agreement between the two universities. The professor claimed that the agreement had the effect of reducing competition for hiring university professors of medicine, and thus, suppressing teachers’ mobility and wages.

On March 7, 2019, the DOJ, joined a Statement of Interest to the private litigation lawsuit, arguing that the agreement should be assessed under the DOJ/FTC Guidelines, as it involved a no-poach agreement, which could per se violate Section 1 of the Sherman Act. The DOJ reaffirmed its understanding that no-poach agreements in the labor market should not be treated any differently from other input markets, under competition policy. The DOJ also argued that no-poach agreements should be considered per se illegal analogously to market or customer sharing agreements.

¹¹⁶ I.e., without the recognition of the facts or the imputed rights, but rather by establishing commitments to be fulfilled by the target undertakings, namely, to eliminate the illicit conduct.

¹¹⁷ Vide Case No. 12-CV-05869-EJD-PSG, U.S. District Court for the Northern District of California San Jose Division, “*U.S. v. eBay, Inc.*” (02.09.2014), “Competitive Impact Assessment”, available [here](#) and “Final Judgement”, available [here](#).

¹¹⁸ Vide Case 1:18-cv-00747-CKK, U.S. District Court for the District of Columbia, “*U.S. v. Knorr-Bremse AG and Westinghouse Air Brake Technologies Corporation*” (11.07.2018), “Competitive Impact Assessment”, available [here](#), and “Final Judgement”, available [here](#).

¹¹⁹ Vide, Case Civil No. 1:15-cv-462, U.S. District Court for the District of Middle District of North Carolina, “*U.S. v. Duke University, et al.*”, “Final Judgement” (25.11.2019), available [here](#), and “Statement of Interest of the U.S.” (07.03.2019), available [here](#).

On November 25, 2019, the court's final decision resulted in a settlement agreement. It was agreed the payment of an indemnity amount to the claimant and a ban on Duke's University from entering, maintaining or enforcing illegal no-poach agreements.

U.S. v. Surgical Care Affiliates, LLC and SCAI Holdings, LLC (2021) – DOJ Criminal Prosecution¹²⁰

On January 5, 2021, the DOJ criminally accused Surgical Care Affiliates, LLC (SCA), of separately agreeing, with two other undertakings, to suppress competition between themselves for the services of senior officials, agreeing not to solicit such employees from one another's, thus acting in per se criminal violation of Section 1 of the Sherman Act.

The three undertakings were active in the healthcare sector, in which they owned and operated outpatient medical care facilities in the U.S..

Both agreements were reflected in documents that contained statements such as:

"We reached agreement that we would not approach each other's [senior executives] proactively.";
"[in light of] the verbal agreement with SCA [Surgical Care Affiliates, LLC] to not poach their folks";
"Someone called me to suggest they reach out to your senior biz dev guy for our corresponding spot. I explained I do not do proactive recruiting into your ranks."; "[SCA cannot recruit from the other company] unless candidates have been given explicit permission by their employers that they can be considered for employment with us."

This is the first case of criminal prosecution, by the DOJ, based on no-poach agreements, after the adoption of the DOJ/FTC Guidelines "Antitrust Guidance for Human Resource Professionals", of 2016. It is still expected the jurisprudential conclusion of the criminal lawsuit.

2.3. No-poach agreements in franchising chains

No-poach and wage-fixing agreements as described in the previous chapters have a horizontal nature, and are carried out between independent competitors. However, no-poach clauses have also been found in franchising chains, when vertically imposed by the franchisor on the franchisee(s), within the same brand.¹²¹ These agreements are vertical in nature since they are imposed by the franchisor on the franchisee. A recent appreciation of this type of clauses leads to the interpretation that they may also have a horizontal nature as the franchisees compete with each other, for the input labor and for customers, even if they are vertically controlled by the same entity.¹²²

In the U.S., several civil class actions were brought before the courts by franchisee workers, from various franchising chains, both in the fast-food industry as in other industries. A more detailed analysis of these cases will be carried out below, but there is a common allegation to all of them: no-poach clauses within the same franchising brand (*i.e.*, intra-brand) restrict the mobility of workers, and their ability to benefit from better working conditions and compensations.

In fact, there is a significant prevalence of clauses that restrict the hiring policy in the context of franchising contracts¹²³ **and it is more common in sectors with a high turnover of workers.** A study¹²⁴ that analyzed franchising contracts from 156 franchising chains in the U.S. identified restrictive hiring clauses in about 58% of these contracts. These clauses are more frequent in

¹²⁰ *Vide Indictment, United States v. Surgical Care Affiliates, LLC, et al.*, U.S. District Court for the Northern District of Texas Dallas Division, No. 3-21-cr-00011 (05.01.2021); [Press Release](#) (07.01.2021).

¹²¹ It should be noted that some franchising chains own more than one brand (*e.g.* Yum! Brands, Inc., according to [the information available on its website](#), accessed on 01.15.2021, controls and uses the brands KFC, Taco Bell, Pizza Hut and Habit Burger Grill. A no-poach clause in such a franchising chain may cover the different brands of the same franchising chain.

¹²² See OECD (2020) and Durrance (2020).

¹²³ The available evidence is from the US. No information was found regarding the EU or Portugal, in particular.

¹²⁴ *Vide Krueger & Ashenfelter (2018).*

sectors with a high turnover of workers, such as in the fast-food industry. The same study found that the prevalence of such clauses in the U.S. increased from 35.6% in 1996 to 53.3% in 2016.

More recently, in the U.S., negotiations have taken place between undertakings and Attorneys General of several U.S. states, in order to ensure that firms eliminate and stop using this type of clauses. Several settlement agreements were signed, as described in Box 9.

Box 9. U.S.: Settlement agreements reached by Attorneys General with undertakings to remove no-poach clauses in franchising

Attorneys General in many U.S. states have been arguing that no-poach clauses in franchising are a *per se* infringement of Section 1 of the Sherman Act. They highlight that no-poach agreements have negative effects on workers, namely, by restricting their mobility, and adverse effects on labor income. The following events stand out:

Multi-state agreements involving the fast-food industry¹²⁵: in March 2019, the California Attorney General announced that multi-state agreements were reached with four fast-food undertakings (*Arby's*, *Dunkin'*, *Five Guys* e *Little Caesars*). These compromised: (i) to remove no-poach clauses in their existing franchising agreements; (ii) not to include no-poach clauses in new franchising agreements; and (iii) not to enforce the no-poach clauses in existing contracts.

Campaign with results in several industries¹²⁶: the Attorney General of Washington has led a campaign to remove no-poach clauses from franchising contracts. This campaign started in January 2018. By September 2019, the Attorney General has reported that he had signed agreements with 85 firms, in 140 000 locations, at the national level. These firms have compromised with the requirements set above, within the scope of the multi-state agreements involving the fast-food industry. On that date, the set of agreements was extended to 10 additional franchising chains¹²⁷.

2.3.1. Effects of no-poach agreements in franchising

No-poach agreements in franchising chains may increase the buyer power of the franchising chain vis-à-vis workers by preventing them from working for other franchisees in the same chain. In a given local market, each franchisee contests workers with other franchisees, both from their own and from other franchising chains. Each market player faces a high elasticity of labor supply, and will face difficulties in hiring workers if they pay workers below their marginal productivity. No-poach agreements between franchisees belonging to the same franchising chain strengthens the buyer power of the franchising chain in the labor market.

The main argument in favor of no-poach clauses in the context of franchising relates to the incentives for firms to invest in worker-specific training. Training of a worker with management responsibilities may involve, for example, specific training related to the franchising. Firms have argued that a certain franchisee could take advantage of the investment in the specific training provided to a worker by other franchisees of the same brand, thus affecting franchisees' incentives to invest in the specific training of their workers.¹²⁸ It should be noted, however, that it is unlikely that there will be an effective loss of the value of the investment in specific training since the worker would move to another franchisee of the same brand, with similar responsibilities.¹²⁹

Although no-poach agreements may be an instrument to mitigate investment losses in specific training, there may be less restrictive ways of achieving the same goal. Firms can opt for a different wage policy (e.g., firms may provide training to their employees only if they commit to

¹²⁵ Vide [Press Release](#) (12.03.2019).

¹²⁶ Vide [Press Release](#) (20.09.2019).

¹²⁷ I.e., *Abbey Carpet, Charley's Philly Cheesesteak, Floors to Go, Frugals, Gold's Gym, Kung Fu Tea, Mattress Depot, Mrs. Fields, Tan Republic e TCBY*.

¹²⁸ See, e.g., *Deslandes v. McDonald's USA, LLC et al.*, No. 17-4857 (25.06.2018), "Complaint" available [here](#).

¹²⁹ See Schaefer (2019); and Krueger & Posner (2018).

remain working for them or worker retention policies based on giving bonus to specific workers; so as to decrease the probability of workers moving to franchisees under the same brand).

2.3.2. Legal framework of no-poach agreements in franchising

No-poach agreements between competitors in the labor market have been considered horizontal in nature, and are liable to infringe competition law.

No-poach agreements can also be included in franchising contracts, albeit in a different context. In particular, these may be included in the master franchising contract itself, of a certain franchising brand, whereby the franchisor imposes a no-poach clause on each of the franchisee(s). This no-poach clause, in principle, will be an obligation according to which each of the franchisees, individually, will be obliged, before the franchisor, not to solicit or hire workers from other franchisees or from the franchisor itself (i.e., in the scope of franchising intra-brand).

At the EU level, considering either the EC or the Member States, no precedent decisions regarding no-poach agreements in franchising are known, as of date.

In the U.S., the DOJ has considered, as a rule, that this type of no-poach agreements is of a vertical nature. This type of agreements may infringe Section 1 of the Sherman Act and should be assessed under the rule of reason standard. This understanding is in a Statement of Interest by the DOJ, joined in the context of a set of civil class actions, brought by franchisees employees, against different franchising brands.

The DOJ has also ruled that no-poach agreements in the context of intra-brand franchising can be horizontal, depending on a case-by-case analysis. It also did so in a Statement of Interest, joined to a set of class actions, brought by employees of franchisees. The DOJ provided guidance to the court, stating that, if no-poach agreements are not ancillary to any legitimate and pro-competitive collaboration, they would be *per se* illegal under Section 1 of the Sherman Act.

These no-poach agreements, in the context of franchising, are likely to have characteristics of both vertical and horizontal restrictions. In this regard, it should be noted that, in the U.S., civil class actions were brought, in which the plaintiffs alleged the existence of a “hub-and-spoke” agreement between the franchisor and the franchisees, which could be a *per se* infringement of Section 1 of the Sherman Act. The DOJ has also intervened in several of these processes, joining Statements of Interest, providing guidance to the court, stating that, in the context of franchising, the “hub-and-spoke” claim would likely to be subject to the DOJ’s analysis as an ancillary restriction (inherent to the legitimate intra-brand collaboration), assessed under the rule of reason standard.

The DOJ has been actively participating in the civil class actions identified below, brought by employees of franchisees, through, *inter alia*, joining Statements of Interest to the cases, advocating and providing guidance to the courts (see Box 10).

In recent years, several civil class actions were brought by franchisees' employees from the fast-food industry and other industries. These actions were related to the existence of no-poach clauses in franchising contracts, claiming for the loss suffered, namely in terms of mobility and wage return. The content of these no-poach clauses is illustrated below (see Box below).

Box 10. U.S.: Examples of no-poach clauses in franchising contracts in the fast-food industry and other industries

Examples of cases in the fast-food industry¹³⁰: (i) *Butler v. Jimmy John's Francise, LLC*; (ii) *Ion v. Pizza Hut, LLC*; (iii) *Deslandes v. McDonald's USA, LLC et all*; (iv) *Bautista v. Carl Karcher Enter*.

¹³⁰ Vide *Butler v. Jimmy John's Francise, LLC*, No. 18-133 (31.07.2018), “Complaint” available [here](#); *Ion v. Pizza Hut, LLC*, No. 17-788 (3.11.2017), “Complaint” available [here](#); *Deslandes v. McDonald's USA, LLC et all*, No. 17-4857

Example of a no-poach clause in the Jimmy John's catering chain franchise agreement:

*"Jimmy John's franchisees agreed to neither: recruit as a partner or investor/owner, or hire as an employee, any person then employed, or who was employed within the immediately preceding twelve (12) months, by [Jimmy John's], any of [of Jimmy John's] affiliates, or a franchisee – or who is still bound (even if it has been more than 12 months) by a restrictive covenant in an agreement with [Jimmy John's], any of [Jimmy John's] affiliates, or a franchisee – without obtaining the existing or former employer's prior written permission and giving [Jimmy John's] a copy."*¹³¹

Another example can be found in the franchising agreement for the McDonald's catering chain:

*"Interference With Employment Relations of Others. During the term of this Franchise, Franchisee shall not employ or seek to employ any person who is at the time employed by McDonald's, any of its subsidiaries, or by any person who is at the time operating a McDonald's restaurant or otherwise induce, directly or indirectly, such person to leave such employment. This paragraph [...] shall not be violated if such person has left the employ of any of the foregoing parties for a period in excess of six (6) months"*¹³²

Examples of cases in other industries¹³³: e.g., (i) *Victor Fuentes v. Royal Dutch Shell PLC, et al. (Jiffy Lube)* – Car maintenance/oil change; (ii) *Benson v. H&R Block Inc., et al.* – Taxation.

The DOJ has intervened in civil class actions, joining Statements of Interest, to the cases, in court. Such interventions have allowed the DOJ to provide the courts with guidance on the standard of proof for assessing the alleged breach of Section 1 of the Sherman Act, through no-poach agreements in the context of franchising (i.e., following the per se standard or the evaluation according to the rule of reason).

As an illustration, we refer to DOJ's recent Statement of Interest regarding three cases of no-poach agreements in the context of franchising in the fast-food industry (see Box 11).

Box 11. U.S.: DOJ's understanding of no-poach clauses in the context of franchising in the fast-food industry

Cases: *Stigar v. Dough, Inc.* (*Auntie Anne's*), *Richmond and Rogers v. Bergey Pullman* (*Arby's*) and *Harris v. CJ Star* (*Carl's Jr./Hardee's*) – Statement of Interest of the DOJ¹³⁴

In 2019, three civil class actions were assessed by the US courts, involving fast food franchising chains, whereby the franchisees' employees contested the no-poach clauses contained in the franchise agreements between the franchisor and each franchisee. The class actions alleged a violation per se of Section 1 of the Sherman Act, due to an alleged "hub-and-spoke" agreement between the franchisor and the franchisees.

The no-poach clauses contained in the franchise agreements with the franchisees said the following: "*franchisees will not employ [...] or seek to employ an employee [of the franchisor] or another franchisee*"¹³⁵.

The petitioners alleged that the defendants, franchisor and franchisees, entered into no-poach agreements "*with the common interest and intention to keep their employees' wage costs down, so that profits continued to rise or at least not be undercut by rising salaries across the industry*"¹³⁶. Most

(25.06.2018), "Complaint" available [here](#); *Bautista v. Carl Karcher Enters.*, No. BC 649777 (08.02.2017), "Complaint" available [here](#).

¹³¹ *Vide Butler v. Jimmy John's Francise, LLC*, No. 18-133 (31.07.2018)).

¹³² *Vide Deslandes v. McDonald's USA, LLC et all.*, No. 17-4857 (25.06.2018)).

¹³³ *Vide Victor Fuentes v. Royal Dutch Shell PLC, et al. (Jiffy Lube)*, Case No. 2:18-cv-05174 (29.11.2018), "Complaint" available [here](#); *Benson v. H&R Block Inc., et al.*, Case No. 4:19-cv-00477-ODS (25.02.2019), "Complaint" [here](#).

¹³⁴ *Vide Corrected Statement of Interest of the USA* (08.03.2019), U.S. District Court for the Eastern District of Washington, *Stigar v. Dough, Inc.*, No. 2:18-CV-00244- SAB (*Auntie Anne's*), *Richmond and Rogers v. Bergey Pullman*, No. 2:18-cv-00246-SAB (*Arby's*) e *Harris v. CJ Star*, No. 2:18-cv-00247-SAB (*Carl's Jr./Hardee's*).

¹³⁵ *Vide Corrected Statement of Interest of the USA* (08.03.2019), p. 9.

¹³⁶ *Vide Corrected Statement of Interest of the USA* (08.03.2019), p. 9.

stated that "[t]he desired effect was obtained"; each "conspiracy suppressed [their] compensation and restricted competition in the labor markets in which [they] sold their services"¹³⁷.

The DOJ intervened in these three private disputes, joining a Statement of Interest, specifying that:

- Most no-poach agreements between franchisor and franchisee are generally vertical restrictions and should be analyzed, from the point of view of the alleged violation of Section 1 of the Sherman Act, under the standard of the rule of reason, and not under the per se rule. Such an analysis will make it possible to make a judgment about the possible pro-competitive effects, as well as the harmful effects of such restrictions. The DOJ further points out that the increase in inter-brand competition may offset the reductions in intra-brand competition generated by these restrictions.
- However, these agreements can also constitute horizontal agreements, whereas in that case should be analyzed under the standard of the violation per se of Section 1 of the Sherman Act. This may happen when no-poach agreements are concluded:¹³⁸
 - Between independent franchisees in the same franchising chain
 - Between franchisees belonging to different franchising chains that compete, currently or potentially, for the same workers (e.g., no-poach agreement between McDonald's and Burger King franchisees);
 - Between a franchisor and a franchisee in the same franchising chain, whenever they are competitors, currently or potentially, for employees in the same relevant geographic labor market where these are hired. This may happen whenever the franchisor and the franchisee are competitors in the labor market, without prejudice to not being competitors downstream, in the market where their goods or services are sold.
- Regarding the alleged "hub-and-spoke" conspiracies, the DOJ considered that not all constitutive elements would be demonstrated for a per se violation of Section 1 of the Sherman Act.

2.4. No-poach clauses for workers in the context of mergers

In the context of a merger, the undertakings¹³⁹, sometimes agree on no-poach or non-solicitation clauses for certain workers. The AdC can analyze these clauses, within the framework of Article 41 (5) of the Portuguese Competition Act, as restrictive and accessory clauses to the main transaction. The restrictions agreed between the undertakings may revert to the benefit of the purchaser(s) or the vendor(s), or both the parent companies of a full function joint venture. The AdC does not address the legality of such clauses in relation to the applicable labor law, as it is a matter that goes beyond of its powers.

In general, in the case of the acquisition of control over an undertaking, the need for protection is more compelling for the purchaser than for the vendor¹⁴⁰. It is the purchaser who needs to be assured that he/she will be able to acquire the full value of the acquired business. Thus, as a general rule, the restrictions which benefit the vendor are either not directly related and necessary to the implementation of the concentration or their scope (nature, duration, material and/or geographical scope) need to be more limited than that of clauses which benefit the purchaser.

In the case of the creation of a full function joint venture, these clauses can be considered directly related and necessary to carry out a concentration during the lifetime of the joint venture¹⁴¹. These clauses may aim to protect the interests of the parent companies in the joint

¹³⁷ Vide [Corrected Statement of Interest of the USA](#) (08.03.2019), p. 9.

¹³⁸ Vide [Corrected Statement of Interest of the USA](#) (08.03.2019), *cit. supra*, pp. 16-18.

¹³⁹ I.e., seller(s) and buyer(s); or parent companies of a full function joint venture.

¹⁴⁰ See Commission Notice on restrictions directly related and necessary to concentrations (2005/C 56/03), JO C 56, 05.03.2005, §§ 17 and 26.

¹⁴¹ *Idem*, §§ 36 and 41.

venture against competitive acts facilitated, in particular, by the parents' privileged access to the know-how and goodwill transferred to or developed by the joint venture.

Under Article 41 (5) of the Portuguese Competition Act, it is presumed that the decision authorizing a concentration between undertakings covers restrictions directly related and necessary to its implementation, namely those on key workers. The AdC "Notification Filing Forms for Concentrations Between Undertakings"¹⁴² include a mandatory answer for the undertakings concerned to substantiate the direct and necessary relationship of the restrictive clauses within the pursuit of the concentration.

The AdC may always limit the effects of its decision, as these restrictive clauses must be directly related and necessary for the implementation of the concentration in question and must not go beyond what is reasonably required for its realization. In its decision-making practice, the AdC expressly mentions the use of the European Commission's principles and guidelines, contained in the "Commission Notice on restrictions directly related and necessary to concentrations", as well as its decision-making practice. To that extent and, as shown in Box 12, to determine whether a restriction is directly related and necessary to the completion of the concentration, the AdC takes into account its nature, its duration, its material and geographical scope, to ensure that it does not exceed what is reasonably required to carry out the concentration.

The AdC has already assessed no-poach or non-solicitation clauses for certain workers in the context of merger and has also limited the effects of its decision. Of the 95 non-opposition decisions adopted in the period 2019-2020, 34% included the aforementioned clauses (32 decisions). Of the 32 decisions, the AdC limited the material scope of the clauses in 13 cases (about 40% of the cases), restricting that scope to key workers. For example, the AdC expressly stated that the extension of this type of clause to any type of employee of the target company was not covered by the authorization decision, limiting its decision to key workers¹⁴³ and for a duration, as a rule, of less than two or three years¹⁴⁴.

The European Commission, in the same line, has limited the effects of its decision in several relevant decision-making precedents. For example, limiting the authorization decision to non-solicitation and/or recruitment clauses to key workers and to a duration, in general, of less than two or three years. These precedents concern either to the acquisition of control of companies and/or assets¹⁴⁵, or to the creation of full function joint ventures¹⁴⁶.

¹⁴² See Notification Filing Forms approved by the AdC, attached to Regulation No. 60/2013, of 14.02.2013 – *Notification Filing Forms for Concentrations Between Undertakings*, Official Journal DR, 2nd Series, No. 32, 14.02.2013, available [here](#). See Regular Form, Section V, 5.2.; and Simplified Procedure Form, Section V, 5.1.

¹⁴³ See, for illustrative purposes, the AdC's non-opposition decisions at [Ccent. 35/2018 – Amplifon/Grupo Gaes](#), of 10.4.2018, §§ 88; and at [Ccent. 31/2020 - Securitas/Stanley Black & Decker](#), 20.10.2020, § 8.

¹⁴⁴ See, for illustrative purposes, the AdC's non-opposition decision in [Ccent. 39/2009 - Unicer/NewCoffee II](#), of 10.30.2009, §§ 85 and 86. The AdC expressly mentions that a duration of more than three years is authorized, taking into account the exceptional characteristics of the case (acquisition of exclusive negative control), however, it did not consider the entire period as requested by the notifying party to be covered by this decision.

¹⁴⁵ See, for illustrative purposes, the EC's non-opposition decisions, in [Case IV/M.1482 - Kingfisher/Großlabor](#), of 12.04.1999, §§ 24-32; and in [Case IV/M. 1167 - ICI/Williams](#), 29.04.1998, §§ 21 and 22. In the latter case, the EC considered non-solicitation obligations on some key employees of Williams (assignor of assets), up to a period of two years; ICI (acquirer) could, however, recruit these workers, in case they no longer work for the acquired business, or have responded to a public job offer.

¹⁴⁶ See, for illustrative purposes, the non-opposition decision of the EC, in [Case COMP/M.6093 – ASF/INEOS/STYRENE/JV](#), of 01.06.2011, § 11 of the Commitments. The EC authorized a non-solicitation clause for key personnel transferred with the business, subject to a divestment commitment, by the companies concerned, for a certain period of time.

Article 9 of the Portuguese Competition Act and, if applicable, Article 101 TFEU, remain potentially applicable to restrictions not directly related to and necessary for the realization of the concentration, as restrictive competition practices.

Box 12. Legal framework in the EU: Restrictions directly related and necessary to concentrations involving non-solicitation and recruitment clauses¹⁴⁷

Regulation (EC) No 139/2004 on the control of concentrations between undertakings

- The Regulation enshrines the principle of self-assessment by the undertakings notifying these ancillary restrictions. The EC has an assessment function with regard to "*novel or unresolved questions giving rise to genuine uncertainty*" (21st recital).
- The decision declaring the concentration compatible with the common market covers restrictions directly related to and necessary to the implementation of the concentration (Article 6 (1) (b)) and Article 8 (1) and (2)).

Commission Notice on restrictions directly related and necessary to concentrations (2005)

- The Communication sets out the principles applicable to the usual ancillary restrictions involving clauses of non-recruitment of workers in a scenario of acquisition of control and / or in a scenario of creation of a full function joint venture, insofar as "*they produce a comparable effect and therefore are evaluated in a similar way to non-compete clauses*" (§§ 26; 41).
- Thus, the principles are:
 - **Duration:** as a rule, limited to acquisitions of control, "*are justified for periods of up to three years, when the transfer of the undertaking includes the transfer of customer loyalty in the form of goodwill and know-how. When only goodwill is included, they are justified for periods up to two years*" (§ 20); and, for the creation of joint ventures, "*for the lifetime of the joint venture*" (§ 36).
 - **Material scope:**
 - Scope limited to key workers, i.e. workers with specific goodwill or know-how (§§ 18; 36);
 - Scope limited to key workers related to the products/services forming the economic activity of the undertaking transferred, or the joint venture; may include key workers involved with products and services in an advanced stage of development, or fully developed but not yet marketed, at the time of the operation (§§ 23; 38).
 - **Geographic scope:** should be limited to the area in which the vendor, or the parent companies, have offered the relevant products or services before the transfer, or creation of the full function joint venture; this geographical scope could be extended to the territories where the vendor, or the parent companies, were planning to enter at the time of the operation, provided that they had already invested in the preparation of that entry (§§ 22; 37).

Articles 101 and 102 TFEU

- Paragraph 7 of the Commission Notice (2005) states that "*the mere fact that an agreement or arrangement is not deemed to be ancillary to a concentration is not, as such, prejudicial to the legal status thereof. Such agreements or arrangements are to be assessed in accordance with Article [101] and [102] [TFEU] (...). They may also be subject to any applicable national competition rules*".

¹⁴⁷ See Commission Notice on restrictions directly related and necessary to concentrations (2005/C 56/03), JO C 56, 05.03.2005; Council Regulation (EC) No. 139/2004 of 20 January 2004, on the control of concentrations between undertakings, OJ L 24, 29.01.2004; Articles 101.^o and 102.^o TFUE.

2.5. No-poach agreements under the Portuguese labor law

Non-hiring and/or solicitation agreements between employers are null and void under the Portuguese Labor Law. Article 138 of the Portuguese Labor Code¹⁴⁸, under the heading “Limitation of freedom of work”, determines the nullity of agreements between employers. In particular, in a contract clause for the use of temporary employment that prohibits the hiring of a worker who works or has worked for them, and obliges, in case of hiring, to pay compensation.

In law, the nullity of a legal norm, a legal act or a legal transaction implies that these are considered to be invalid. It prevents them from producing any effect, from the moment of their formation (ex tunc). In the event of failure to comply, the counterparty will be unable to legally execute a null legal transaction. To that extent, the nullity can be contested by any interested party, at all times, and is not subject to prescription. A judicial decision that decrees nullity goes back to the date of the birth of the addicted act. The idea is that its effects will disappear as if they had never occurred¹⁴⁹. The Portuguese Labor Code does not provide an misdemeanor offense, or payment of fines, by undertakings in violation of Article 138º. The nullity in the labor norm does not consider any potential damages to the affected workers, whose harm could be, for example, the result from restriction to labor mobility.

This type of agreements between employers tend not to be known by workers (i.e., these agreements are secret). Hence, workers are not able to invoke them and benefit from the effects of the sanction of nullity provided for in the labor law.

In sum, we highlight the consequences of this type of agreements between employers in the context of The Portuguese Labor Law, the Portuguese Competition Act and Law no. 23/2018, June 5 (“Private Enforcement”): (i) nullity of the agreements; (ii) administrative offense leading to the imposition of pecuniary fines following an assessment of the breach of the agreement with the Competition Act; and (iii) civil liability if the affected workers bring an action for damages against the companies involved, for example following a decision by the AdC or another competition authority that finds an infringement of this nature.

3. AGREEMENTS TO FIX WAGES OR OTHER FORMS OF COMPENSATION

Wage fixing agreements are agreements between purchasers of labor that aim to harmonize or coordinate wages or other forms of remuneration paid to workers.

The effects of these agreements are wide-ranging and are not limited to competition. In particular, if the agreement is between employers, then workers will be harmed to the extent that they earn less than what they would receive if the employers were lawfully competing.

These effects are described in more detail below. The legal framework of these agreements is also analyzed, as well as the decision-making practice of the application of competition law.

3.1. Effects of wage-fixing agreements

Wage-fixing agreements lead to a harmonization of the price paid for an input, resulting in similar cost structures among competitors. This symmetry of costs reduces the strategic uncertainty that characterizes competition, which may promote price coordination, in the downstream markets.

Wage-fixing limits the ability firms have to expand their labor force, if the hiring of new employees requires the payment of a wage that is different from the one that was agreed.

¹⁴⁸ See [Law No. 7/2009](#), of 12 February, which approves the revision of the Portuguese Labor Code, which has been successively amended.

¹⁴⁹ Among others, see Mota Pinto (1976); Castro Mendes (1995); Ascenção (2003).

This restricts competition. The rigidity in the possibility of adjusting production in terms of quantity, price and quality may translate into welfare losses for the consumer.

By standardizing wages that workers may earn from various employers, wage-fixing agreements limit labor mobility. This outcome derives from the absence of the possibility that an employee may have to earn a higher wage in a competing firm, which constitutes one of the main incentives for workers to switch firms. In that sense, the analysis on the strengthening of the buyer power resulting from no-poach agreements also applies in the case of wage-fixing agreements.

In line with no-poach agreements, wage-fixing agreements may soften downstream competition. Labor is an input for the product activity and the hiring of employees is a parameter of competition among firms. Hence, competition may be harmed. Such deals may restrict downstream competition, by coordinating strategies.

Lastly, competition will be most severely affected when competitors hold downstream market power and when there are barriers to entry.

3.2. Wage-fixing agreements under competition law

Fixing purchase prices (e.g., wage fixing) by two or more companies can lead to a reduction in purchase prices beyond which would be expected in a competitive situation. Article 9 of the Portuguese Competition Act, and, if applicable, also Article 101 of the TFEU, are liable to sanction these practices.

In addition, the exchange of commercially sensitive and strategic information between companies involving the hiring of workers, or wages and/or other forms of compensation, without involving those same workers, may constitute a practice restricting competition.

Several characteristics contribute to the exchange of commercially strategic and sensitive information being susceptible to violate competition law. As illustrated by the AdC in "Guide for Business Associations"¹⁵⁰, "*depending on the type, timeliness, level of aggregation, market characteristics and form in which the information is shared and disseminated*", the exchange of information may be anticompetitive (see Box below).

¹⁵⁰ AdC (2016) "Guide for Business Associations", available [here](#) (PT language).

Box 13. Exchange of information between undertakings which may violate competition law

Notwithstanding a case-by-case assessment, here are some of the characteristics identified in "Guide for Business Associations"¹⁵¹:

- **Type:** "*The exchange of so-called strategic and commercially sensitive information, such as individualized information on pricing policy, its sales or production volume, cost structure or marketing plans, is usually considered restrictive of competition*" (p. 19).
- **Timeless:** "*There is a presumption of anticompetitive effects when the information exchanged concerns the future price or future quantity of a certain product or service. The exchange of information regarding current, or relatively recent, prices or production data is also likely to infringe the competition rules*" (p. 19).
- **Level of aggregation:** "*The more recent and the higher the level of disaggregation of the information exchanged, the greater the potential restrictive effect of competition on the market*" (p. 19).
- **Market characteristics:** "*Information exchange in concentrated markets, involving products that are not particularly complex and where firms' market shares are relatively stable and symmetric, will be more likely to constitute an anticompetitive practice*" (p. 20).
- **Form:** "*As to the form of the information exchange, even if the information disclosure is informal and non-reciprocal or if it is made through public announcements, it may be prohibited by competition law*" (p. 20). Data may be shared directly between competitors; or shared indirectly through a common agency (e.g. industry association) or a third party (such as a market research organization, or through the company's suppliers or retailers).

Both the AdC and the European Commission¹⁵² consider that the exchange of commercially strategic and sensitive information between competitors, regarding data that reduce strategic uncertainty in the market, will be more likely to qualify as a practice restricting competition.

Decisional practice in misdemeanor procedures by the AdC for information exchange infringements

- **The AdC has already condemned associations of undertakings:** e.g. [PRC/2005/26](#), *Associação dos Industriais de Panificação de Lisboa* (AIPL), condemned for exchanging information on bread selling prices to the public, between 2002 and 2005. Case that became *res judicata*.
- **The AdC has already condemned undertakings:** e.g., [PRC/2012/9](#), convicting 14 banks for concerted practice of exchanging commercially strategic and sensitive information, between 2002 and 2013. Case under appeal.
- **The AdC has already accepted commitments with a view to the closing of the proceedings by association of undertakings:** e.g., [PRC/2015/08](#), *Associação Portuguesa de Leasing, Factoring e Renting* (ALF); [PRC/2015/9](#) - *Associação de Instituições de Crédito Especializado* (ASFAC).

Hereafter, we address some decisional practice that involve wage (or other terms of compensation) fixing agreements.

3.2.1. Competition law enforcement: decisional practice

3.2.1.1. Decisional practice from Portugal regarding wage-fixing agreements

In line with the decisional practice from competition authorities in EU Member States involving wage fixing agreements and input price fixing cartels, wage fixing agreements between companies can be considered null and prohibited under Article 9 (1) (a) of the Portuguese Competition Act and, if applicable, Article 101 (1) (a) of the TFEU. These norms

¹⁵¹ AdC (2016) "Guide for Business Associations", available [here](#) (PT language).

¹⁵² European Commission (2011) "[Guidelines on the applicability of Article 101 of the TFEU to horizontal co-operation agreements](#)", OJ C 11/1 of 14/01/2011.

prohibit agreements between companies, concerted practices and decisions by associations of companies that directly or indirectly set purchase or sale prices or any other negotiating conditions.

These agreements are subject to fines. In this context, reference is made to Box 3 above, which includes a summary of the relevant legal framework for determining the amount of the fine, the waiver or reduction of the fine and transaction procedures. It also includes information on the possibility of taking compensation for victims of anticompetitive behavior.

In June 2020, the AdC, within the scope of its supervisory powers, recommended that the Portuguese Football Federation (FPF) abstained from imposing a limit on the total wage bill of each club participating in the women's league (i.e., Liga BPI)¹⁵³. The AdC warned that the imposition of a maximum cap on salaries “*may constitute a restrictive practice of competition, punishable by a fine under the terms of article 9 and article 68 (1) (a) of Law no. 19/2012, of May 8*”¹⁵⁴. In terms of effects, the AdC identified that “*damage could be caused to the fans/consumers of the Liga BPI football games*”, namely, with the “*reduction in the degree of differentiation and competitiveness between rival clubs, thus reducing the quality of football matches and competition*”¹⁵⁵ in case that limit was to be adopted. The AdC also identified that the restriction “*could harm the football players in the Liga BPI, to the extent that it reduced the ability of each athlete to find better compensation conditions in a rival club if they were dissatisfied with the conditions offered by their own club*”¹⁵⁶.

3.2.1.2. Decisional practice at the EU level

There are several cases in which the EC analyzed and condemned companies for purchase price fixing, in violation of Article 101 TFEU, even though these have not regarded specifically workers' wages. For example, the EC recently adopted two decisions¹⁵⁷, on purchase price fixing agreements, in violation of Article 101 of the TFEU. The EC concluded that the companies unlawfully agreed to reduce the purchase price paid to input suppliers, with a negative impact on the normal functioning of the market, reducing price competition. The EC highlighted the importance of ensuring that companies compete on merit and that input prices are competitively set.

With regard to workers' wages, we highlight the abovementioned case (Box 4) in the Netherlands, where a national court assessed an agreement between 15 hospitals that included a wage-fixing clause and a no-poach clause. In relation to the wage-fixing clause, the hospitals agreed to set a maximum percentage in the case of overtime pay to employees, anesthesiologists and assistants, up to 75% of the hourly wage.

The competition authorities in the UK, France and Italy have already assessed cases that involved the work of professional models represented by intermediary agencies (see Box 14). These, however, do not constitute practices imposed by employers on workers. These cases relate to a concerted practice, namely between model agencies, who represent models, in order to ensure higher prices (including model fees and/or wages and agency fees), to the detriment of customers (e.g., a company that needs model services in an advertising campaign), with a negative impact on the normal functioning of the market.

¹⁵³ AdC, [Recomendação relativa a proposta de limitação de massa salarial contida em projeto de Regulamento da Liga BPI 2020/2021, em consulta pública](#), June 2020 (in Portuguese).

¹⁵⁴ See paragraph 15 of the abovementioned Recommendation.

¹⁵⁵ See paragraph 12 of the abovementioned Recommendation.

¹⁵⁶ See paragraph 13 of the abovementioned Recommendation.

¹⁵⁷ See Case AT.40018 – Car battery recycling (Campine, Eco-Bat Technologies and Recylex), C(2017) 900 final, 08.02.2017; Press Release, “[Antitrust: Commission fines three companies €68 million for car battery recycling cartel](#)”, 08.02.2017; and Case AT.40410 – ETHYLENE, C(2020) 4817 final, 14.07.2020; [Press Release](#), 14.07.2020.

**Box 14. EU: Decisional practice from NCAs: price fixing agreements in the modelling sector
(including model fees and/or wages and agency fees)**

Between 2016 and 2017, three competition authorities, from the United Kingdom (*CMA*¹⁵⁸), France (*Autorité de la Concurrence*¹⁵⁹) and Italy (*Autorità Garante della Concorrenza e del Mercato*¹⁶⁰), investigated price-fixing agreements in the modelling sector, agreed between modelling agencies, professional associations and industry unions.

This involved agreements/concerted practices and/or exchange of commercially strategic and sensitive information between companies, with the objective of fixing prices, in the modelling sector. In general, the practices involved the fixing of minimum prices or a common approach to the price scheme, of the services provided to its customers, in the downstream markets. The agreements involved, more or less directly, the fixing of model fees or wages and agency fees.

The national competition authorities considered that such agreements eliminated the risk of competition between companies, allowing them to coordinate their commercial strategies and to agree on various components of the price charged to customers.

Model agencies and condemned associations attempted to justify their actions by generally claiming to be acting in defense of models, in order to ensure that they were adequately remunerated. Such justification was not accepted.

The agreements were classified as anticompetitive agreements, in breach, by object, of national competition laws, and, with regard to the UK and Italian cases, as well as Article 101 of the TFEU.

3.2.1.3. The decision-making experience of the U.S. competition authorities

According to the DOJ and the FTC, wage-fixing agreements are considered to be anticompetitive agreements, having the object of violating per se competition rules, without the need to demonstrate any anticompetitive effects, in violation of Section 1 of the Sherman Act. The understanding is that these agreements are likely to eliminate competition in the same way as price-fixing¹⁶¹ agreements (as referred to in section 2.1.1 above).

In terms of decision-making practice, we highlight the DOJ's first criminal prosecution, putting into practice the Guidelines "Antitrust Guidance for Human Resource Professionals", adopted in 2016, with regard to wage-fixing agreements.

Box 15. Some decision-making precedents in the U.S. regarding wage-fixing agreements

***U.S. And State Of Arizona V. Arizona Hospital And Healthcare Association And Azhha Service Corp. (2007)*¹⁶²**

On May 22, 2007, the DOJ, accompanied by the State of Arizona, put for a civil lawsuit, against the Arizona Hospital, the Healthcare Association and the AzHHA Service Corporation, for having acted in violation of Section 1 of the Sherman Act.

The undertakings concerned have agreed to set a uniform price list that all hospitals involved in the agreement would pay for hiring services provided by nurses, hired on a temporary or daily basis, from recruitment agencies.

¹⁵⁸ Competition and Market Authority (CMA), Case CE/9859-14, "[Conduct in the modelling sector](#)" (16.12.2016).

¹⁵⁹ Autorité de la Concurrence, « [Décision n° 16-D-20 du 29 septembre 2016 relative à des pratiques mises en oeuvre dans le secteur des prestations réalisées par les agences de mannequins](#) » (29.09.2016).

¹⁶⁰ Autorità Garante della Concorrenza e del Mercato, I789 – « [Agenzie di modelle](#) », (11.11.2016).

¹⁶¹ Vide DOJ/FTC (2016).

¹⁶² Vide Case No. CV07-1030-PHX, "United States and the State of Arizona v. Arizona Hospital and Healthcare Association and AzHHA Service Corporation" (22.05.2007), "Final Judgement", available [here](#).

On September 12, 2007, the judicial decision resulted in a "consent judgment", whereby commitments were established to be fulfilled by the undertakings referred to in the agreement, namely, in order to eliminate the illicit conduct.

U.S. v. Neeraj Jindal (2020) - DOJ Criminal Prosecution¹⁶³

On December 9, 2020, the DOJ, on behalf of the US, criminally accused the former owner of a Texas-based physiotherapist and physiotherapist assistants recruiting firm, Neeraj Jindal, in conjunction with another recruiting firm (together referred as "therapist staffing companies"), of a wage-fixing agreement, in alleged criminal violation per se of Section 1 of the Sherman Act.

According to the prosecution, Neeraj Jindal shared commercially strategic, sensitive and non-public information, with another competing company, about prices to be paid for services provided by physiotherapists and physiotherapist assistants, and both agreed to lower these prices (from March to August 2017).

Recruitment companies compete with each other in the labor market, for the hiring of physiotherapists and assistants of physiotherapists, with a view to intermediating their services to home health agencies. These professionals can be hired by several recruiting companies, for their services, choosing between them based, *inter alia*, on factors such as the price of payment, the number of treatments per clients and the location of patients. The difference between the prices that the recruiting company pays to the workers concerned and the price it charges to home health care agencies constitutes its margin.

This is the first case of criminal prosecution, by the DOJ, based on a wage-fixing agreement, after the adoption of the DOJ/FTC Guidelines "Antitrust Guidance for Human Resource Professionals", 2016. It is still expected the jurisprudential conclusion of the criminal lawsuit.

4. CONCLUSIONS

No-poach agreements, by which companies agree not to make spontaneous offers or hire workers from each other, restrict the set of available workers which companies can recruit and can harm competition in several dimensions. On the one hand, these agreements may have effects on salaries and mobility. On the other hand, these agreements may have a negative impact on competition conditions in the downstream markets where firms compete, namely on quantities and price, as well as on the product quality and innovation, with an impact on consumer welfare.

Agreements between employers to set wages and/or other forms of compensation may harm workers and may have a negative impact on competition. On the one hand, these agreements lead to lower pay-offs for workers vis-à-vis a scenario in which firms compete for labor. On the other hand, they can affect the uncertainty associated with the competitive game, thus facilitating coordinated behavior.

Horizontal no-poach and wage-setting agreements (or other forms of compensation) are liable to constitute agreements between undertakings, concerted practices and/or decisions by associations of undertakings, under article 9 of the Portuguese Competition Act, and if applicable, under article 101 of the TFEU.

The AdC raises awareness of the possible anticompetitive risks of these agreements and lists a set of best practices related to the labor market (see p. 6). These best practices aim at proving guidance to companies, human resources professionals and other employees, recruitment agencies, among others involved in the recruitment process.

¹⁶³ *Vide Indictment, United States v. Neeraj Jindal*, U.S. District Court for the Eastern District of Texas Sherman Division, No. 4:20-cr-00358 (09.12.2020); [Press Release](#), DOJ, "Former Owner of Health Care Staffing Company Indicted for Wage Fixing" (10.12.2020).

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