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Boundaries of Competition in Labor Markets: An Analysis in Terms of No-Poaching Agreements and Ancillary Restraints Defense

The consecutive investigations initiated by the Competition Board ("Board") due to competition violations in labor markets, with the first one in 2021, have stirred significant attention. Following the investigations concerning 32 undertakings, primarily consisting of innovation-based technology companies, which resulted in substantial administrative fines imposed on some of the undertakings within the scope of the investigation, the investigations initiated against 19 undertakings operating mainly in the pharmaceutical sector and the recently concluded investigation targeting enterprises operating in the information technology sector indicate that the Board will continue to maintain the hot topic of competition issues in labor markets and support the anticipation that numerous inspections will be conducted to ensure competition in labor markets by scrutinizing different sectors.

What are No-Poaching Agreements?

No-poaching agreements are agreements, either directly or indirectly established, where an undertaking refrains from offering jobs to, or hiring, the employees of another undertaking. These agreements are commonly made between employers, although they can also occur between employers and labor providers. Such agreements, where businesses mutually refrain from competing for limited labor resources, can be deemed as a violation of competition law since they have the potential to restrict competition in the labor market.

These types of agreements can take different forms between employers or between employers and labor providers. Among two or more employers, an agreement can be reached regarding not poaching or hiring certain employees, or employers can reach an agreement with labor providers (such as recruitment firms) not to hire or poach specific employees. It is possible to say that such agreements can be strictly enforced or implemented in a more flexible manner with mutual consent. For example, the agreement may include provisions for the parties not to poach each other's employees and not to make any exceptions to this rule. In another scenario, undertakings can limit employee transfers flexibly based on a mutual approval mechanism. In this case, the parties do not completely prohibit employee transfers, but only allow transfers that they mutually approve.

No-poaching agreements can negatively impact competition in the labor market and restrict employees' freedom to find new jobs or switch jobs. Consequently, competition



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authorities in many countries deem these agreements as contrary to competition laws and prohibit them. The primary criterion in assessing these agreements is whether there is an agreement on anti-competitive behavior regarding labor resources.

No-poaching agreements are not always considered a competition violation. For example, an undertaking providing information technology services to its customers may wish to include provisions in the contracts with their customers to prevent the hiring of key personnel who play crucial roles in the services provided to the customers, either while the contractual relationship between the parties is ongoing or for a certain period after its termination, to be employed within the customers' organizations. In this case, the service provider may reasonably request the inclusion of such a provision in the contract to protect the time, effort, and expenses invested in training and supporting their personnel. Similarly, customers may also try to prevent service providers from hiring their own personnel. This is often because customers typically have smaller teams compared to the service provider's relevant business unit and have invested significant time and effort in training their personnel. Additionally, customers may be concerned about increasing their dependence on service providers if key employees are transferred by them. Therefore, customers may also request agreements regarding no-poaching to be made verbally or in writing in contracts they enter into with service providers.

No-Poaching Agreements in the Context of Ancillary Restraints Doctrine

Ancillary restraints are defined as restrictions that are imposed on the parties of an agreement which, although not constituting the essence of the agreement, are necessary for achieving the objectives intended by the agreement and are directly related to those objectives. In the Guidelines on Relevant Undertakings, Turnover, and Ancillary Restraints in Mergers and Acquisitions, the concept of ancillary restraint is described as restrictions directly related to and necessary for the implementation of the concentration process and for fully realizing the expected efficiencies from the concentration.

A no-poaching agreement, if not directly related to or necessary for a legitimate cooperation between employers (such as a merger or joint venture), is considered a naked restraint.

In practice, there are many examples where no-poaching agreements are considered ancillary restraints in the context of mergers and joint ventures. Indeed, mergers and joint ventures demonstrate legitimate cooperation between the parties, and provisions regarding no-poaching under the ancillary restraint doctrine are objectively analyzed in terms of the criteria of "direct relevance" and "necessity".



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In U.S. antitrust law, the Department of Justice and the Federal Trade Commission evaluate naked no-poaching agreements and wage-fixing agreements as anticompetitive and categorize them as per se violations of competition law.

In European Union competition law, no-poaching provisions in concentration transactions are considered "ancillary restraints" as long as they meet the criteria of direct relevance and necessity and are not directly prohibited. However, agreements between competing undertakings on issues such as determining employment conditions, setting terms related to fringe benefits, and fixing wages are also considered restrictive of competition by the European Commission and EU competition authorities.

In recent years, developments in the evaluation of no-poaching agreements have sparked discussions on whether such agreements could be considered as ancillary restraints in agreements between competitors or in other vertical relationships such as supplier-buyer relationships, outside of concentration operations. Particularly in their defense, undertakings have argued that the provisions related to no-poaching under review should be considered as ancillary restraints, and therefore cannot be deemed as an absolute violation in terms of restricting competition. The discussions surrounding investigations and inquiries into sectors scrutinized for labor market issues have become quite significant in our country lately. The approach of the Board, which emphasizes the necessity for a restriction to be explicitly agreed upon in writing and for its boundaries to be clearly defined for it to be considered as an ancillary restraint, has added a new dimension to this debate. However, due to the absence of a legal rule mandating that ancillary restraints must be in writing, the Board's requirement of this condition has been subject to intense criticism.

The Board justifies its approach by stating that in cases of oral agreement claims, the defenses and statements reflected in the evidence presented by the parties can be considered. However, critics argue that granting the Board such broad discretion contradicts the principle of legality prevalent in administrative law, as it would be difficult to clearly determine the legal boundaries of an agreement with vague scope.

While evaluating ancillary restraints, the Board determines whether they are directly relevant and then assesses whether they are reasonably necessary, taking into account the nature, duration, and scope of the restraint. For instance, in the sale of a shopping mall in Istanbul, if a non-compete clause prevents the seller from operating a shopping mall in the Marmara region for seven years, it is evident that such a non-compete clause would raise concerns about competition due to its excessively broad geographic scope and duration. On the other hand, if a non-compete clause is valid for a radius of a few



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kilometers around the shopping mall for a period of three years, this seems more appropriate and reasonable to address potential concerns about the depreciation of the buyer's investment. A similar approach would apply to no-poaching agreements. In the case of no-poaching agreements, these restrictions should be narrowly tailored to protect the value that employees bring to the enterprise.

In its decisions evaluating no-poaching agreements, the Board emphasizes that agreements related to no-poaching should be considered as clear and serious violations in terms of their nature and effects. The Board assesses that such agreements constitute violations in terms of their purpose and may lead to consumer harm.[1]

However, the Board has granted exemptions to agreements prohibiting the transfer of employees in narrowly defined, innovation-driven sectors where technical knowledge and skill are crucial. In another decision[2], the Board stipulated that for non-compete restrictions to be considered an ancillary restraint, they must meet the criteria of being "directly related and necessary to the concentration," "restrictive only for the parties," and "proportional." The Board accepted a two-year non-employment obligation proposed by the parties as an ancillary restraint because it was relevant only to the parties and the subject of the transfer, its duration was reasonable, and it was necessary for the return on the buyer's investment. These assessments could serve as references for determining whether no-poaching agreements outside of concentration operations can be considered as ancillary restraints.

In its decisions, the Board examines whether no-poaching agreements are limited in duration, whether the restriction is based on a reasonable commercial interest, whether it is reasonably justified, and whether this justification is clearly stated in the contract.

Prohibiting agreements among employers to fix wages and restrict employee mobility undoubtedly protects competition in labor markets, prevents the distortion of resource allocation, and is crucial in establishing a fair competitive environment in this area. Preserving and promoting competition in labor markets will provide better wages, benefits, and employment opportunities for workers. However, it is also clear that not every no-poaching agreement should be evaluated within this framework. Agreements that are transaction-related and reasonably necessary should also be considered under the ancillary restraint doctrine.

In the context of compliance with competition law, employers must refrain from sharing sensitive information with each other for the purpose of comparing employment conditions. While salary information is often the primary concern in this regard, when



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assessing sensitive information, consideration should be given to the "entirety of employment terms and conditions" that could influence an individual's decision to enter into or remain in an employment contract.

When a restriction request is made in a transaction in which one is involved, it is crucial to analyze which elements are being sought for protection with this restriction, whether there is a genuine need for this protection, and to analyze its scope correctly. A proper analysis of all these aspects will enable the parties to reach an agreement within a reasonable scope that does not violate competition laws.

Special thanks to Asya Naz Kızılırmak for his contributions.

[1] The Decision of the Competition Board dated 11.11.2021 and numbered 21-55/765-381

[2] The Decision of the Competition Board dated 18.06.2009 and numbered 09-29/602-143