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EU COMPETITION COMMISSIONER SIGNALS TOUGHER ENFORCEMENT OF NO-POACH AND OTHER LABOR MARKET AGREEMENTS

To Our Clients and Friends:

Summary

- On 22 October, 2021, Executive Vice President Margrethe Vestager delivered a speech in which she stated for the first time that the European Commission (Commission) is going to expand its cartel enforcement to labor markets, including no-poach and wage-setting agreements.
- The U.S. authorities have already been active in pursuing naked no-poach and other labor market agreements, but to date the Commission has not taken any enforcement action in this area.
- The Commissioner's statement signals a new enforcement priority and companies should prepare. We recommend that companies review their recruitment policies and HR practices in the EU to identify and remediate potential competition law risks.
- Companies should also expand compliance programs to include anticompetitive conduct in labor markets and ensure human resources personnel are receiving competition law training on a regular basis.

Background

The EU turns its attention to labor market agreements

On 22 October, Margrethe Vestager, the Commission's Competition Commissioner and Executive Vice President, delivered a speech in which she signaled a new area of cartel enforcement for the Commission: anticompetitive labor market agreements.^[1] Vestager highlighted wage-fixing and no-poach agreements as two examples of labor market agreements that could create a cartel. Under a no-poach agreement, companies mutually commit not to recruit and/or hire one another's workers, or at least certain types of workers. Vestager argued that such arrangements can depress salaries, but she cautioned that labor market agreements could be seen as a broader threat to innovation and market entry. She explicitly shared her belief that labor market agreements can “*restrict talent from moving where it serves the economy best*” and can “*effectively be a promise not to innovate.*”

While the Commission has historically not focused its enforcement efforts on labor market arrangements such as naked no-poach agreements, Vestager's speech is an indication that change is coming in the near future. This is part of a broader action plan with respect to EU cartel enforcement, which has historically given rise to high fines. Companies should be taking steps now to ensure they are prepared.

EU labor market interest follows growing international momentum

Vestager’s interest in labor market cartel enforcement is consistent with the growing enforcement efforts in several other jurisdictions. In 2016, the U.S. became the first jurisdiction to announce that it would treat labor market agreements as a criminal cartel matter.^[2] In the subsequent five years, the U.S. Department of Justice (“DOJ”) has pursued numerous criminal investigations into potential wage-fixing, no-poach, and non-solicitation agreements. However, these investigations have only recently led to the first criminal charges, and the DOJ is now preparing for a series of criminal trials in 2022 that will test whether courts agree that such labor market agreements can amount to a cartel.

- **Healthcare Providers:** In 2021, the DOJ indicted two healthcare providers and a former CEO for their alleged participation in non-solicitation agreements. The DOJ charged both companies and the executive with agreeing not to solicit certain “senior-level employees” from one another. Additionally, the DOJ charged one of the companies and its former CEO with entering a separate agreement in which an unidentified healthcare company agreed not to solicit its employees—without any reciprocal commitment from the other company. Both companies and the executive have filed motions to dismiss the charges, arguing that such labor market agreements should not be treated as a criminal matter under U.S. law and that imposing criminal liability in the absence of judicial precedent would violate due process. The trial courts will first rule on these threshold legal issues and, if the DOJ prevails, the cases are scheduled for trial in March and May 2022, respectively.
- **Physical Therapists:** Neeraj Jindal and John Rodgers were charged in December 2020 and April 2021, respectively, as part of the DOJ’s first criminal wage-fixing case. Both individuals are alleged to have participated in a conspiracy among companies in northern Texas to lower rates paid to in-home physical therapists. Jindal and Rodgers are also charged with obstruction of justice for their actions during an earlier investigation into the same conduct by the U.S. Federal Trade Commission. The case is currently scheduled for trial in April 2022.
- **School Nurses:** The DOJ secured criminal charges against VDA OC and its regional manager, Ryan Hee, for participating in a conspiracy to fix wages and restrain their recruitment efforts for school nurses in Las Vegas, Nevada. During a ten-month period that began in October 2016, VDA OC and Hee allegedly agreed with a competitor not to solicit or hire each other’s nurses and to resist nurses’ efforts to increase wages. The case is currently scheduled for trial in late February 2022.

In Europe, the Portuguese Competition Authority moved to the forefront on labor market enforcement earlier this year. On April 13, the Portuguese Competition Authority announced a statement of objections against the Portuguese Professional Football League and 31 of its teams for an alleged agreement not to hire any player who terminated his agreement with another team for reasons related to the pandemic.^[3] More importantly, the Portuguese authority used the case as an opportunity to outline its enforcement policies for labor market conduct. The authority released a policy paper on labor market enforcement^[4] and published a Good Practice Guide entitled “Prevention of Anticompetitive Agreements in the Labor

Market,” which sets out the various ways labor market agreements might be viewed as anticompetitive.[5]

Companies should prepare for a new era of labor market enforcement

Vestager’s comments suggest that the Commission is turning its enforcement efforts to labor markets. Companies should therefore be taking steps now to ensure they are identifying potential risks and working to remediate them before an investigation occurs.

As a starting point, companies should review their recruitment practices in the EU to determine whether their HR teams avoid recruiting or hiring from specific companies. In many instances, these restraints can be identified quickly in communications with external recruiters in which they receive instructions about the company’s specific hiring needs. Any such hiring restraint should be assessed to ensure it is permissible in its specific context. Any hiring restrictions agreed upon between companies or among members of a trade association that are unrelated to a legitimate commercial relationship are particularly high risk.

Companies would also benefit from reviewing their processes for setting employees’ compensation and benefits. Each company should be competing independently in setting its package of cash compensation (e.g., salaries, hourly wages, bonuses) and non-cash benefits (e.g., insurance, vacation and family policies). Any agreements or informal understandings with another company about the amount of compensation or the types of benefits that will be offered should be immediately discussed with legal counsel. Additionally, companies should be cautious about directly exchanging HR-related information with other companies in an effort to benchmark their compensation practices.

Companies should also expand the scope of their antitrust compliance programs, which have historically been focused on sales and marketing personnel and senior executives. As antitrust enforcers move into labor markets, compliance programs should be extended to human resources personnel and any other employees involved in recruiting. The programs themselves must also be updated to ensure the company’s competition law policy addresses labor market risks, competition training materials reflect labor market conduct, and employees have pathways to internally report suspected competition violations.

In the event that companies do encounter a potential antitrust breach, they should immediately seek legal counsel. The European Commission operates a leniency program that encourages companies to self-report a suspected cartel in exchange for full immunity (for the first company to report the breach). If other companies involved in the cartel can provide evidence of “*significant added value*,” they will be eligible for a fine reduction (between 30% to 50% for the first company, 20% to 30% for the second, and up to 20% thereafter).

Conclusion

Executive Vice-President Vestager’s statement is a clear signal that the Commission is shifting its attention to anticompetitive labor market conduct, such as wage-fixing and no-poach agreements. To prepare, companies must promptly review their HR-related practices to ensure they address any existing

conduct that creates competition law risks and educate their HR employees to minimize the risk of a future infringement.

Gibson Dunn will be hosting a Webcast in November to discuss labor market enforcement in the U.S. and other jurisdictions, including the EU, as well as practical steps that companies should be taking to minimize HR-related competition law risks. Invitations to join the Webcast will follow shortly.

[1] Margrethe Vestager, *A new era of cartel enforcement*, Speech at the Italian Antitrust Association Annual Conference (Oct. 22, 2021), available at https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/speech-evp-m-vestager-italian-antitrust-association-annual-conference-new-era-cartel-enforcement_en.

[2] U.S. Dep't of Justice & Fed. Trade Comm'n, *Antitrust Guidance for Human Resources Professionals* (October 2016), <https://www.justice.gov/atr/file/903511/download>.

[3] Autoridade da Concorrência, *AdC issues Statements of Objections for anticompetitive agreement in the labour market for the first time* (Apr. 18, 2021), <https://www.concorrenca.pt/en/articles/adc-issues-statements-objections-anticompetitive-agreement-labour-market-first-time>.

[4] Autoridade da Concorrência, *Acordos no Mercado de trabalho e política de concorrência* (Apr. 2021), [here](#).

[5] Autoridade da Concorrência, *Guia De Boas Práticas: Prevenção De Acordos Anticoncorrenciais Nos Mercados De Trabalho* (Apr. 2021), [here](#).



The following Gibson Dunn lawyers prepared this client alert: Scott Hammond, Jeremy Robison, Christian Riis-Madsen, Stéphane Frank, Katie Nobbs, and Sarah Akhtar.

Gibson Dunn lawyers are available to assist in addressing any questions you may have regarding these developments. Please contact the Gibson Dunn lawyer with whom you usually work, the authors, or any leader or member of the firm's Antitrust and Competition or Labor and Employment practice groups:

Antitrust and Competition Group:

Brussels

*Attila Borsos (+32 2 554 72 11, aborsos@gibsondunn.com)
Christian Riis-Madsen (+32 2 554 72 05, criis@gibsondunn.com)
Lena Sandberg (+32 2 554 72 60, lsandberg@gibsondunn.com)
David Wood (+32 2 554 72 10, dwood@gibsondunn.com)*

GIBSON DUNN

Stéphane Frank (+32 2 554 72 07, sfrank@gibsondunn.com)
Alejandro Guerrero (+32 2 554 72 18, aguerrero@gibsondunn.com)

Frankfurt

Georg Weidenbach (+49 69 247 411 550, gweidenbach@gibsondunn.com)

Munich

Michael Walther (+49 89 189 33 180, mwalther@gibsondunn.com)
Kai Gesing (+49 89 189 33 180, kgesing@gibsondunn.com)

London

Ali Nikpay (+44 20 7071 4273, anikpay@gibsondunn.com)
Deirdre Taylor (+44 20 7071 4274, dtaylor2@gibsondunn.com)
Philip Rocher (+44 20 7071 4202, procher@gibsondunn.com)
Patrick Doris (+44 20 7071 4276, pdoris@gibsondunn.com)
Charles Falconer (+44 20 7071 4270, cfalconer@gibsondunn.com)

United States

Scott D. Hammond - Washington, D.C. (+1 202-887-3684, shammond@gibsondunn.com)
Kristen C. Limarzi - Washington, D.C. (+1 202-887-3518, klimarzi@gibsondunn.com)
Jeremy Robison - Washington, D.C. (+1 202-955-8518, wrobison@gibsondunn.com)
Stephen Weissman - Washington, D.C. (+1 202-955-8678, sweissman@gibsondunn.com)
Rachel S. Brass - San Francisco (+1 415-393-8293, rbrass@gibsondunn.com)
Caeli A. Higney - San Francisco (+1 415-393-8248, chigney@gibsondunn.com)
Veronica S. Lewis - Dallas (+1 214-698-3320, vlewis@gibsondunn.com)

Labor and Employment Group:

Jason C. Schwartz – Washington, D.C. (+1 202-955-8242, jschwartz@gibsondunn.com)
Katherine V.A. Smith – Los Angeles (+1 213-229-7107, ksmith@gibsondunn.com)

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