BUSINESS at OECD

Discussion Points

Presented by the Business at OECD Competition Committee to the OECD Competition Committee

Competition Issues in Labor Markets

June 5, 2019

Business at OECD appreciates the opportunity to contribute to the timely debate and submit these comments to the OECD Competition Committee for its session on competition issues in labor markets.

I. Introduction

1. Absent statutory exemptions, which exist in many instances, the competition laws are applicable to issues relating to labor markets on the same basis as other markets for goods or services. This includes the application of competition laws to agreements relating to wage fixing, "no poach" agreements, and other forms of joint activity relating to labor.

2. While there is an unquestionable "market" for labor, it should be recalled that, in general, labor is often an input, rather than an output, that facilitates the provision of goods or services downstream. From this perspective, the evaluation of labor markets can be conducted using many of the same analytical tools that are applicable to other inputs, including joint purchasing and monopsony analysis.

3. Because of the specialized nature of labor as an input, and its importance to a jurisdiction's economic, political and social cultures, countries often adopt specialized legislation relating to labor markets that preempt or exempt them from competition laws in certain respects. *Business at OECD* views these as legitimate policy choices for legislators to make. But *Business at OECD* also believes that in the absence of legislation of these policy choices, competition authorities should apply the competition rules as written, without attempting to implement non-antitrust policy goals or objectives.

II. Antitrust Standards for Labor Markets

4. Collective bargaining activities that may otherwise be applicable to wage-fixing agreements are generally exempt from competition law reviews. This is a widespread policy choice that *Business at OECD* continues to support.

5. In Canada, for example, certain types of collective bargaining agreements are exempted from the provisions of the Competition Act. In particular, the Canadian Competition Act provides that agreements between or among two or more employers in an industry that pertain to collective bargaining with employees in respect of salary or wages and terms or conditions of employment are exempt from the provisions of the Act. That exemption includes the criminal and civil provisions of the Competition Act. Other agreements that are not in a collective bargaining

context between or among competitors (i.e., wage-fixing agreements or no-poach agreements) are not subject to the same exemption under the Competition Act.

6. In Europe, collective bargaining may be carried out at a sectoral level and not necessarily—or even generally—at an enterprise level. The regulatory and practical background, impacting minimum wages, benefits, prohibiting discrimination, creating incentives to invest in training and the need to protect valuable commercial know-how, amongst a host of other factors, all add to an environment against which cases each require individual attention, especially at this time when there is a certain amount of theoretical study but little practical experience of enforcement and its impact.

7. In October 2016, the United States Department of Justice (DOJ) and the Federal Trade Commission (FTC) issued its joint *Antitrust Guidance for Human Resource Professionals* (*U.S. HR Guidelines*) addressing the potential application of antitrust regulations to the hiring and compensation of employees.[1] Under the DOJ and FTC guidance, "[n]aked wage-fixing or no poaching agreements among employers . . . are per se illegal under the antitrust laws" and "[g]oing forward, the DOJ intends to proceed criminally against [such] agreements."[2]

8. The DOJ has announced the position that it intends to prosecute all agreements continuing or entered into after October 2016 criminally.[3] "As a matter of prosecutorial discretion, the Division will pursue No-Poach Agreements entered into and terminated before [October 2016] through civil actions for equitable relief."[4] The DOJ brought its first enforcement action in April 2018 but did not seek criminal penalties.[5]

9. *Business at OECD* recognizes that under certain conditions wage-fixing and no-poach agreements have the potential to harm competition for labor, resulting in lower wages or benefits for employees. However, given the variety of circumstances in which such agreements can exist, including potential efficiency-enhancing agreements, *Business at OECD* believes that wage-fixing and no-poach agreements should be treated with the standards of review appropriate for non-hardcore violations of the antitrust laws, rather than categorized as per se illegal or criminal offenses under the antitrust laws.

10. The complexity of the analysis of wage-fixing and no-poach agreements make them ill-suited for treatment as per se illegal. The U.S. antitrust enforcement authorities—including the DOJ, state attorneys general, and the courts—continue to assess and clarify whether and, if so, when a per se rule should apply to wage-fixing and no-poach agreements.

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1 U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, ANTITRUST GUIDANCE FOR HUMAN RESOURCE PROFESSIONALS (Oct. 2016), *available at* www.justice.gov/atr/file/903511/download,[hereinafter U.S. HR GUIDELINES].

2 *Id.* at 3-4.

3 *See* Andrew C. Finch, Trump Antitrust Policy After One Year, Address Before the Heritage Foundation 5 (Jan. 23, 2018), *available at* www.justice.gov/opa/speech/file/1028906/download ("In October 2016, the Division issued guidance reminding the business community that no-poach agreements can be prosecuted as criminal violations. For agreements that began *after* the date of that announcement, or that began before but *continued after* that announcement, the Division expects to pursue criminal charges.").

4 Competitive Impact Statement at 11, United States v. Knorr-Bremse AG and Westinghouse Air Brake Technologies Corporation, No. 1:18-cv-00747 (D.D.C. Apr. 3, 2018), *available at* www.justice.gov/atr/case-document/file/1048891/download.

5 Complaint, United States v. Knorr-Bremse AG and Westinghouse Air Brake Technologies Corporation, No. 1:18-cv-00747 (D.D.C. Apr. 3, 2018), *available at* www.justice.gov/atr/case-document/file/1048866/download.

11. Earlier this year in Washington state, the DOJ filed Statements of Interest in three private no-poach cases involving employees of Auntie Anne's, Arby's, and Carl's Jr./Hardee's franchises.[6] In these cases, the DOJ took the position that franchise no-poach agreements should be evaluated under the rule of reason analysis. In other cases, the DOJ has reasserted its position that no-poach agreements should be evaluated under the per se standard.[7] U.S. courts have yet to apply a per se standard to evaluate a wage-fixing or no-poach agreement.

III. Wage-Fixing and No-Poach Agreements Jurisprudence is Unsettled

12. Historically, courts in the U.S. have determined whether conduct should be evaluated as criminal, per se unlawful, or rule of reason conduct. The U.S. agencies declared that wage-fixing and no-poach agreements "eliminate competition in the same irredeemable way as agreements to fix product prices or allocate customers" and thus should be treated as per se illegal criminal offenses.[8] However, this conclusion removes the Courts from their role in determining standards that should apply to anticompetitive conduct.

13. Per se treatment is justified in the context of offenses that have a well-developed jurisprudential basis, as with the traditional hardcore antitrust violations of price fixing, bid rigging, and market allocation. The DOJ has previously analyzed wage-fixing under the rule of reason. For example, in 2013, the DOJ sued eBay based on its no-solicitation and no-hiring agreements with Intuit and applied a rule of reason analysis.[9] The DOJ has previously argued for per se treatment of no-poach agreements, as in its complaint against Adobe, Apple, Google, Intel, Intuit, and Pixar in 2010.[10]

14. The inconsistency with which wage-fixing and no-poaching agreements have previously been evaluated indicates that there is insufficient jurisprudential basis to place these potential harms within the per se criminal category of antitrust violations.

IV. Potential for Procompetitive Benefits Makes A Per Se Rule Inappropriate

15. The *U.S. HR Guidelines* indicate that, while "naked" wage or hiring-related agreements among employers are per se illegal, "legitimate collaborations" will not be considered per se illegal, citing as an example "appropriate shared use of facilities" in the context of a joint venture agreement.[11]

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6 *See* Corrected Statement of Interest of the United States, Ashlie Harris v. CJ Star, LLC, No. 2:18-cv-00247 (E.D. Wash. Mar. 8, 2019), ECR No. 38, *available at* www.justice.gov/atr/case-document/file/1141726/download; Corrected Statement of Interest of the United States, Myrriah Richmond & Raymond Rogers v. Bergey Pullman Inc., No. 2:18-cv-00246 (E.D. Wash. Mar. 8, 2019), ECF No. 45, *available at* www.justice.gov/atr/case-document/file/1141721/download; Corrected Statement of Interest of the United States, Joseph Stigar v. Dough, Inc., No. 2:18-cv-00244 (E.D. Wash. Mar. 8, 2019), ECF No. 34, *available at* www.justice.gov/atr/case-document/file/1141731/download.

7 *See, e.g.*, Statement of Interest of the United States, *In re* Railway Industry Employee No-Poach Antitrust Litigation, No. 2:18-MC-00798-JFC (W.D. Pa. Feb. 8, 2019), ECF No. 158, *available at* www.justice.gov/atr/case-document/file/1131056/download.

8 U.S. HR GUIDELINES, *supra* note 1, at 4.

9 *See In re* High-Tech Employee Antitrust Litigation, 856 F. Supp. 2d 1103 (N.D. Cal. 2012); *see also* Complaint, United States v. Arizona Hosp & Healthcare Ass'n & AzHHA Service Corp., No. CV07-1030-PHX (D. Az. May 22, 2007), ECF No. 1, *available at* www.justice.gov/atr/case-document/file/487196/download (analyzing the challenged conduct under the rule of reason).

10 Complaint, U.S. v. Adobe Systems, et. al., No. 1:10-cv-01629 (D.D.C. 2010), *available at* www.justice.gov/atr/case-document/file/483451/download.

11 U.S. HR GUIDELINES, supra note 1, at 3 ("Naked wage-fixing or no-poaching agreements among employers, whether entered into directly or through a third-party intermediary, are per se illegal under the antitrust laws. That means that if the agreement is separate from or not reasonably necessary to a larger legitimate collaboration between the employers,

16. The *U.S. HR Guidelines* provide little insight to businesses as to what constitutes legitimate collaboration between employers. For example, it may be desirable for a manufacturer to have a supplier to co-locate employees at the manufacturer's facility. The supplier would likely desire an agreement that its employees (trained at its expense) will not be hired by the manufacturer. Conduct with nuanced and potentially procompetitive justifications does not warrant the application of a per se rule. U.S. jurisprudence has recently moved away from application of a per se rule in other contexts, as a per se rule forecloses inquiry into potential procompetitive justifications.[12]

17. Courts have recognized that other types of conduct analogous to wage-fixing and no-poach agreements could yield efficiencies and procompetitive benefits. For example, joint purchasing agreements between competitors of necessary inputs may enable efficiencies that result in reduced costs that ultimately benefit downstream consumers. These types of potential efficiencies and procompetitive effects are why courts have reserved per se categorization only for actions which lack any redeeming virtue and solely serve to harm competition.[13]

18. The risk of potential criminal penalties imposed on members of a joint venture paired with the inconsistent treatment of wage-fixing and no-poach agreements across jurisdictions will likely lead to a chilling of potentially procompetitive arrangements with respect to the labor market.

19. *Business at OECD* cautions that enforcement agencies should recognize that agreements between employers may provide ancillary procompetitive benefits that may outweigh potential harm to competition in the labor market. The uncertainty of where this balance lies cautions against the use of the categorization of wage-fixing and no-poaching agreements as per se illegal under the antitrust laws.

V. Conclusion

20. Wage-fixing and no-poach agreements can potentially harm competition among employers for labor, resulting in lower wages or benefits for employees and potential harm to consumers by reducing output. However, wage-fixing and no-poach agreements do not resemble the types of competitive harms that have traditionally been categorized as per se illegal criminal offenses. Categorization of wage-fixing and no-poach agreements as per se illegal ignores the potential that agreements may have to create efficiencies that lower costs, thus benefiting downstream consumers.

21. While *Business at OECD* continues to support enforcement agencies' efforts to target and eliminate wage-fixing and no-poaching agreements that have the effect of harming competition, *Business at OECD* hopes that they will do so in a manner that consistently and reasonably administers antitrust laws. A shift in competition policy regarding wage-fixing and no-poach agreements—in the absence of clear statutory policy choices—risks creating greater uncertainty and inconsistency in the application of antitrust law.

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the agreement is deemed illegal without any inquiry into its competitive effects. Legitimate joint ventures (including, for example, appropriate shared use of facilities) are not considered per se illegal under the antitrust laws.").

[12] *See, e.g.*, Leegin Creative Leather Prods. v. PSKS, Inc., 551 U.S. 877 (2007) (holding that resale price maintenance claims should be evaluated under the rule of reason, moving away from a per se rule).

[13] Likewise, procurement can also be distorted through monopsony conduct, but in such cases, harm is typically found only when the effect of driving down procurement prices is to decrease output. Otherwise, the net effect is the reduction of input costs which is deemed to enhance, rather than diminish, competition.