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No-Poach Agreements and Wage-Fixing Practices: When Labour Market Collusion Becomes an Antitrust Issue

Abstract: This article analyses the growing role of labour markets in competition policy, arguing that collusion between employers – particularly no-poach agreements and wage-fixing practices – should be assessed with the same severity as classic cartels. Using a doctrinal and comparative approach, it presents the legal frameworks and enforcement trends in the United States, the European Union, and Poland. The text conceptualizes hiring as a market transaction in which employers act as buyers of labour and employees as its suppliers, and shows how no-poach and wage-fixing agreements distort mobility, reduce wages, and weaken workers' bargaining power. It then discusses the convergences and divergences across jurisdictions: US authorities increasingly pursue criminal proceedings against 'naked' restraints; EU policy and case law tend to classify wage-fixing and many no-poach agreements as restrictions 'by object' (Article 101 TFEU); Polish practice adopts an effects-based approach. The article also addresses the issue of so-called ancillary restraints in the context of collaborations (e.g. franchising, joint ventures) and indicates when – if at all – recruitment bans may be considered objectively necessary and proportionate.

Keywords: antitrust law, labour rights, no-poach agreements, wage-fixing, economic law

Introduction

In recent years, the role and significance of the labour market in competition policy has become increasingly visible in both academic literature and case law. This is particularly noteworthy given that until now, issues concerning the employer–employee relationship had largely remained outside the mainstream focus of antitrust law, which concentrated primarily on consumer protection as well as business activity (Marinescu & Posner, 2020, p. 1347). However, the dynamic development of the digital economy, technological progress, and the globalization of labour markets have revealed that restrictions on competition can affect not only customers, but also the employees themselves. The digitalization of labour markets, including the expansion of remote and platform-based work (Nyka & Zapolska, 2024, p. 177–178), has on the one hand increased worker mobility, while on the other hand it has facilitated coordination between employers of practices that restrict competition for labour. As a result, digital tools that reduce geographic barriers and broaden employment opportunities may simultaneously foster the formation of no-poach or wage-fixing agreements, particularly in sectors related to new technologies and those requiring highly specialized labour. Consequently, the labour market is increasingly viewed as an object of interest and analysis within competition law.

As Luisetto rightly observes, '[i]n a dynamic labour market, workers change jobs for better working conditions and benefits, opportunities for training and advancement, and higher wages' (2025, p. 1). In this context, two categories of practice have gained particular significance: no-poach agreements and wage-fixing practices. The former consists of reciprocal commitments by employers not to engage in recruitment activities targeting a competitor's employees, while the latter involve agreements on wage levels (Aresu et al., 2024, p. 2). Both result in artificially limiting worker mobility and weakening their bargaining power. This directly translates into a reduction in the level of protection of workers' rights, including their ability to effectively shape the conditions of their employment and remuneration, thereby contributing to rising income inequality (Lee, 2020, p. 199). The origins of the issue show that for many years such practices were considered neutral tools of workforce management, until groundbreaking proceedings were initiated in the United States, including against companies in Silicon Valley (Marinescu & Posner, 2020, p. 1344).

Against this background, the main thesis of this paper is the assumption that the practices under discussion constitute not only classic violations of competition law, but also significantly interfere with workers' rights – including the right to freely choose employment, the right to choose an employer, and the right to influence one's position in the labour market. The primary objective of the article is therefore to present and compare the approach to such practices in the United States, the European Union, and Poland, as well as to reflect on future regulatory directions. The analysis will cover both legal regulations and case law, with particular emphasis on the impact of these practices on workers' rights. In this sense, the issue of no-poach agreements and wage-fixing practices serves as a starting point for a broader discussion of the relationship between labour law and competition law, especially in the digital economy. We seek to examine the role of antitrust law in the protection of workers and the preservation of employment stability. Accordingly, the primary objective of the article is to analyse no-poach agreements and wage-fixing practices occurring in labour markets, using doctrinal legal analysis and comparative methods.

1. The legal nature of labour market collusion

The starting point for the analysis of no-poach agreements and wage-fixing practices is the question: Is the labour market a 'market' within the meaning of competition law? In the traditional approach, a significant portion of competition law cases concerns markets in which undertakings compete with each other by offering their products or services to consumers (Déchamps et al., 2019, p. 190). It is undeniable, however, that antitrust law applies to all areas of economic activity, and thus it may also be extended to the labour market, where undertakings, acting as employers, compete for workers (Prager, 2025, p. 4). From this perspective, the labour market should be treated as a market within the meaning of antitrust law, and agreements restricting competition in this area should be viewed as analogous to classic cartels (Urząd Ochrony Konkurencji i Konsumentów, 2023, p. 4). Luisetto underscores that a 'well-functioning labor market is a critical component of a market economy […] In a dynamic labor market, workers change jobs for better working conditions and benefits, opportunities for training and advancement, and higher wages' (2025, p. 1).

The theoretical justification for such an approach lies in the concept of the two-sided market: employers act as buyers of labour, while employees are its suppliers. When wage-fixing practices or no-poach agreements occur, this market becomes distorted in a manner similar to that observed in cases of price-fixing collusion (Aresu et al., 2024, p. 3). The effects of such practices are, of course, multidimensional. First and foremost, worker mobility in the market is restricted. In addition, wages are artificially depressed, and in a broader perspective, these practices may lead to reduced innovation and a slowdown in overall economic dynamics (Aresu et al., 2024, p. 2; Lee, 2020, p. 200). Economic arguments therefore clearly support treating the labour market as an area requiring competition protection. This is also confirmed by legal arguments, in particular the positions of US antitrust authorities, the European Commission, and national competition authorities (e.g. the president of Urząd Ochrony Konkurencji i Konsumentów (the Office of Competition and Consumer Protection) (UOKiK)), cited later. Importantly, recent enforcement practice increasingly reflects the view that labour market collusion constitutes a core concern of competition law rather than being a peripheral issue or one purely of labour law (European Commission, 2023a; FTC & DoJ, 2016). In their most recent guidelines, these bodies explicitly indicate that wage-fixing and no-poach agreements generally constitute restrictions of competition 'by object' under Article 101 TFEU.

Against this background, it is also worth pointing to two approaches to competition policy – neoliberalism and ordoliberalism. As Mączyńska and Pysz emphasize, '[t]he key to distinguishing between neoliberalism and ordoliberalism lies in their respective attitudes toward the freedom of the economic individual' (2014, p. 223). Neoliberalism assumes that the primary goal of competition policy is to maximize market efficiency and to ensure the lowest possible price for consumers (Carvalho, 2021, p. 151). Consequently, '[t]he constitutive slogans of the neoliberal doctrine are summed up most succinctly in the so-called sacred triad: privatization, deregulation, and stabilization' (Mączyńska & Pysz, 2014, p. 232). As pointed out by Boas and Gans-Morse,

> The most common use of neoliberalism refers to economic reform policies. Scholars typically characterize three sets of polices as being neoliberal: those that liberalize the economy, by eliminating price controls, deregulating capital markets, and lowering trade barriers; those that reduce the role of the state in the economy, most notably via privatization of state-owned enterprises; and those that contribute to fiscal austerity and macroeconomic stabilization, including tight control of the money supply, elimination of budget deficits, and curtailment of government subsidies. (Boas & Gans-Morse, 2009, p. 143)

In this respect, it seems that under neoliberalism, workers' rights and employment standards would be treated as separate issues belonging to labour law, rather than to competition law.

Ordoliberalism, by contrast, emphasizes not only competition itself, but also its quality and the framework conditions within which it operates. As Polański observes, "ordoliberalism assigns competition law the role of protecting freedom, thereby making it an 'economic constitution'" (2020, p. 60). Moreover, '[c]ompetition constituted the foundation of the principles of ordoliberalism. It was meant to drive economic efficiency' (Śliwa & Waląg, 2007, p. 79–80). Pawłowski observes that '[o]rdoliberals devoted a significant part of their considerations to moral, axiological, and social issues' (2018, p. 102). Ordoliberalism also stresses the necessity of 'a comprehensive approach to the study of the realities of economic life' (Mączyńska & Pysz, 2014, p. 231), emphasising that effective competition depends upon an appropriate legal, institutional and social framework (Bonefeld, 2012, p. 640). Against this background, it is possible to ask whether labour standards and working conditions should also be regarded as elements of that institutional framework. In this sense, the guiding notion is the word *ordo*, which in Latin means 'order, state of affairs' (Pawłowski, 2018, p. 102). As Mączyńska and Pysz point out, neoliberalism 'is characterized by market fundamentalism and the marginalization of the role of the state in shaping the socio-economic order, whereas in the latter [ordoliberalism] the issues of shaping order are of primary importance' (2014, p. 223). Neoliberalism therefore emphasizes freedom and efficiency (Mączyńska & Pysz, 2014, p. 223, 226, 241), while ordoliberalism emphasizes order, institutional structure, and quality standards, reflecting the conviction that a stable socio-economic order is essential to social and economic prosperity and stability (Pawłowski, 2018, p. 109).

In the literature, there is a view according to which ordoliberalism 'is not just about competition policy, it also views the competitive process as a pillar of a holistic political economy and societal order' (Anchustegui, 2015, p. 140). From this perspective, ordoliberalism may be understood not merely as a historical school of economic thought, but as a normative framework that has influenced the development of competition law. The ordoliberal approach to the economy and to competition, which emphasises that effective competition depends upon a robust legal, political and institutional framework (Bonefeld, 2012, p. 640), thus opens a space for discussion of whether labour standards – such as fair remuneration or decent working conditions – may be regarded as institutional preconditions for effective competition. Such an interpretation is consistent with ordoliberal premise that the market must be embedded in a constitutional framework designed to 'protect the process of competition from distortion by private power' (Vatiero, 2010, p. 374). Ordoliberalism conceives of a well-functioning market as depending on appropriate legal, social and institutional conditions (Bonefeld, 2012, p. 638). Accordingly, to what extent can labour standards themselves be regarded as institutional conditions that underpin the proper functioning of a market economy? Ordoliberalism may constitute a useful point of departure for interpreting selected workers' rights as institutional conditions underpinning a well-functioning competitive order. Consequently, anticompetitive agreements in the labour market may not only violate the norms derived from competition law, but also undermine the very foundations of a healthy market economy. This perspective helps explain why contemporary competition enforcement increasingly frames labour market collusion as a serious threat to market order rather than as a marginal concern.

2. Classification of anticompetitive practices in the labour market

2.1. No-poach agreements

No-poach agreements constitute a specific category of practices restricting competition in the labour market, the essence of which is the mutual commitment of employers not to compete for each other's employees. For the purposes of this analysis, the term 'no-poach agreements' is used in a broad sense to denote both no-hire and non-solicitation arrangements. No-poach agreements focus on the arrangement that often, competing employers will not recruit from one another's workforce (OECD, 2026, p. 248). In practice, this means that an employer refrains from 'poaching' or hiring such employees (Aresu et al., 2024, p. 2). Naturally, this usually concerns the best or most sought-after specialists on the market. At present, this can be observed particularly with respect to experts in new technologies, artificial intelligence, or cybersecurity (Davis, 2018, p. 279–280). Market observation shows that such agreements typically take the form of additional clauses included within another contract, most notably in franchise agreements or framework cooperation agreements between enterprises, rather than standalone arrangements. Moreover, the literature indicates that '[t]hese agreements may be express or implied, written or oral, and are most common among business competitors' (Davis, 2018, p. 281). Their essence lies in the fact that the parties to the agreement commit themselves to an arrangement whereby Undertaking A will not hire, engage, or offer cooperation to the employees of Undertaking B, and Undertaking B assumes an identical obligation toward Undertaking A.

Taladay and Mehta draw attention to the fact that such agreements 'can frequently be anticompetitive, resulting in lower wages or benefits for employees and harm to consumers in the form of reduced output or less innovation' (2017, p. 2; Lee, 2020, p. 200). It is worth noting that the understanding of the term 'employee' in this context is much broader than that traditionally derived from labour law. It usually covers not only individuals employed under an employment contract, but also those engaged on the basis of civil law contracts (e.g. a contract of mandate or a contract for specific work) and even sole proprietors operating under a B2B model (Aresu et al., 2024, p. 2). No-poach agreements themselves may take various forms and can also cover an entire sector or only selected entities.

When analysing no-poach agreements, two basic types can be distinguished: no-hire agreements and non-solicit agreements. The former involve employers agreeing among themselves not to hire each other's employees emphasize that a no-hire agreement may take an active form (a situation where an employer consciously refuses to enter into an employment contract with a candidate who has successfully completed the entire recruitment process, solely because that candidate is employed by a company with which the employer has entered into an agreement) or a passive form (a situation where an employer refuses to even consider a candidate's application solely because the person is employed by a company that is a party to the no-hire agreement) (Aresu et al., 2024, p. 2; OECD, 2026, p. 248).

Another type of no-poach agreement is the non-solicit agreement (also known as a no-cold-calling agreement), which focuses on prohibiting any active recruitment activities, such as sending job offers, encouraging participation in recruitment processes, or making individual offers of cooperation (Aresu et al., 2024, p. 2; OECD, 2026, p. 248; Lee, 2020, p. 200). Importantly, regardless of their scope or form, their very essence is the restriction of occupational mobility. They therefore directly affect the basic mechanism of competition in the labour market, and employees are deprived of the opportunity to improve their working conditions and remuneration through job changes (Lee, 2020, p. 199). Thus such agreements 'limit the outside employment opportunities of employees' (Luisetto, 2025, p. 1). Ultimately, this effectively reduces employees' bargaining power, not only in the labour market as a whole, but also vis-à-vis their current employer (Aresu et al., 2024, p. 2). It seems that no-poach agreements may be regarded as restrictions of competition 'by object' (Lehmann et al., 2025, p. 3). They would then be treated analogously to classic price-fixing cartels, though instead of goods or services, they concern labour resources.

The economic and legal significance of such agreements is well illustrated by the US example, which will be discussed in greater detail later. It is enough to mention here that between 2018 and 2020, the Attorney General of Washington State secured 237 so-called assurance of discontinuance agreements, under which the largest franchise chains committed to removing no-poach clauses from franchise agreements throughout the United States (Luisetto, 2025, p. 4). Moreover, existing analyses have shown that this initiative had effects beyond the directly targeted group: approximately 36% of franchisors who were not formally covered by the programme also decided to remove no-poach clauses from their contracts (Luisetto, 2025, p. 5). In addition, studies conducted by Lafontaine et al. (2024, p. 3) indicate that the elimination of these clauses translated into an estimated 4–5% increase in wages in the sectors affected by the practice. Similar concerns regarding no-poach agreements have also emerged in the EU. In this respect, the European Commission's Horizontal Guidelines emphasize that restrictions which are objectively necessary and proportionate to the implementation of an otherwise pro-competitive cooperation may constitute ancillary restraints. Although the Guidelines do not specifically refer to no-poach agreements, such clauses may fall within this category if these conditions are met (European Commission, 2023a).

2.2. Wage-fixing practices

The second category of practices restricting competition in the labour market are so-called wage-fixing practices, which consist in employers – usually competitors operating in the same market – jointly agreeing upon and controlling the level of their employees' remuneration (Aresu et al., 2024, p. 2; OECD, 2026, p. 248; Lee, 2020, p. 200). For the purposes of this analysis, wage-fixing practices are understood as agreements between employers that directly or indirectly eliminate wage competition on the labour market (Aresu et al., 2024, p. 2; US DoJ & FTC, 2025, p. 4–5). Such arrangements may concern both the direct setting of wages and the introduction of wage caps that employers undertake not to exceed. In practice, this leads to the elimination of wage competition between employers, which naturally results in limiting workers' freedom to negotiate better working conditions (Taladay & Mehta, 2017, p. 2). It may also involve artificially lowering the level of proposed remuneration. Importantly, the concept of remuneration covers not only the salary itself, but also all related components, such as bonuses, awards, and task-related or functional allowances, as well as social benefits (Aresu et al., 2024, p. 2). This means that agreements between employers relating to additional forms of benefits would also constitute a violation of competition law.

Among the negative effects of wage-fixing agreements, one may point to the direct lowering of employees' wages compared to the level that would prevail in a free and competitive labour market (Aresu et al., 2024, p. 2; Taladay, 2018, p. 2–3). Such practices may also eliminate competitive pressure between undertakings in the field of recruitment and retention of 'talents'. This undoubtedly affects the dynamics and attractiveness of the labour market for jobseekers (Aresu et al., 2024, p. 5). In the longer term, such practices may indirectly cause a decline in innovation and hamper economic growth, as well as resulting in 'harm to consumers in the form of reduced output' (Taladay, 2018, p. 2). In this sense, wage-fixing practices mirror the economic logic of classic price-fixing cartels, albeit with labour rather than goods or services as the relevant parameter of competition, given that '[l]abor market power is the mirror image of product market power' (Naidu et al., 2018, p. 538).

As the chair of the Federal Trade Commission (FTC), Lina M. Khan, has emphasized: 'Noncompete clauses keep wages low, suppress new ideas, and rob the […] economy of dynamism, including from the more than 8,500 new startups that would be created a year once noncompetes are banned' (FTC, 2024b). This was also highlighted in the justification to the Non-Compete Clause Rule, which pointed out that 'non-competes tend to negatively affect competition in product and service markets, suppressing new business formation and innovation' (FTC, 2024a, p. 7).

The US and EU approaches will be discussed more broadly later, but as an example of a wage-fixing practice, one may point to the well-known case of *United States v. DaVita Inc.*, in which employers were accused of fixing wages and restricting competition among employees in the medical sector (Lehmann et al., 2025, p. 2). This case is particularly noteworthy as it serves as a reference point for further actions of the US antitrust authorities, which in recent years have increasingly taken initiatives targeting such practices. It illustrates an evolving enforcement approach in which wage-fixing agreements are increasingly presumed to be anticompetitive, without a systematic requirement to demonstrate their actual effects. It should, however, be emphasized that increased antitrust enforcement in labour markets should consider the autonomy of labour law and the protective instruments and mechanisms provided within its framework. Treating these bodies of law in isolation from one another 'leads to the risk of fundamental conflicts between the two disciplines and some uncertainty as to their respective scope, with the result that the level of labour protection may suffer' (Lianos et al., 2019, p. 5). Accordingly, the actions of antitrust authorities must remain consistent with the protective functions of labour law.

In the EU, the European Commission has indicated in its guidelines that 'both wage-fixing and no-poach agreements will in most cases qualify as restrictions by object under Article 101 TFEU and are unlikely to meet the requirements to qualify as ancillary restraints; moreover, they are unlikely to meet the requirements for an exemption under Article 101(3) TFEU' (Aresu et al., 2024, p. 1). It is important to note that '[t]he policy brief categorized wage-fixing agreements as "detrimental" to employees and outlined the EC's views on the potential effects of no-poach agreements, which included reduced compensation, inefficient allocation of workers, and stifled productivity' (Lehmann et al., 2025, p. 3). This approach reflects the increasing recognition of labour markets as fully fledged markets within EU competition law. A similar position can also be found in the statements of the Polish antitrust authority, i.e. by the president of UOKiK, who emphasizes that employers' agreements on employee remuneration are treated analogously to classic price-fixing cartels. As the president of UOKiK points out, 'employers compete in the labour market for employees mainly through the wages they offer (each employer wants to hire the best possible worker); anticompetitive wage-fixing refers to the fundamental parameter of competition, which is remuneration ("price")' (Urząd Ochrony Konkurencji i Konsumentów, 2023, p. 10).

3. The regulatory response and case law

3.1. The USA

A proper understanding of the US approach to no-poach and wage-fixing agreements first requires the presentation of the basic assumptions of American antitrust law and its evolution. One of the first federal antitrust statutes is the Sherman Antitrust Act of 1890. Pursuant to Section 1 of this Act,

> every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

Section 2, on the other hand, provides that

> every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

The Act thus addresses two key issues from the perspective of competition law: namely, it establishes a prohibition on entering into contracts and agreements that negatively affect trade, and it prohibits conduct resulting in the creation of a monopoly (Frankiewicz & Grzebieniak, 2024, p. 26).

Since the provisions of the Sherman Act were rather general, in order to specify its general principles the Clayton Antitrust Act and the Federal Trade Commission Act were adopted in 1914. The Clayton Act supplemented the provisions of the Sherman Act by prohibiting practices such as price discrimination, group boycotts, and anticompetitive mergers. The Federal Trade Commission Act, on the other hand, established the Federal Trade Commission, whose tasks include, above all, initiating proceedings against conduct that infringes antitrust laws. Both of these statutes, which clarify the Sherman Act, prohibit restraints on trade, monopolization, unfair agreements, mergers, and price discrimination (Cenzartowicz, 2002, p. 258–260).

In US case law, two approaches to analysing antitrust cases have been developed: illegality per se or according to the rule of reason. Cases involving unequivocal violations of antitrust law are illegal per se, whereas other restrictive practices are assessed on the basis of the rule of reason. Practices deemed illegal per se include agreements that have a negative impact on competition and for which no circumstances exist that could justify their application. Agreements not found to fall under the per se rule will instead be assessed under the rule of reason (Nealis, 2006, p. 348).

In *Addystone Pipe & Steel Co. v. United States* (Judgment of the US Supreme Court, 1899), an alternative method of assessing the compliance of business conduct with Section 1 of the Sherman Act was formulated: a distinction was made between direct restraints on trade and ancillary restraints, which later became the foundation of the per se prohibition. Direct restraints occurred when the purpose or subject matter of the agreement was focused solely on restricting competition, and therefore they were prohibited without the need to analyse their effects and without the possibility of justification. Ancillary restraints, on the other hand, accompanied another lawful agreement; their purpose was to increase efficiency, ensure the effectiveness of the transaction, facilitate the conclusion of a contract, or protect the lawful interests of the parties to the agreement against harm that would result if competition were not restricted (Jebelli, 2010, p. 2–4). At that time, the rule of reason was admitted only in relation to those restraints of competition that were ancillary in nature (Miąsik, 2004, p. 76–77).

The Antitrust Division of the Department of Justice (DoJ) and the Federal Trade Commission (both Antitrust Agencies) have significantly intensified their enforcement actions against no-poach agreements, under which undertakings (employers) commit not to recruit or hire each other's employees. The DoJ now regularly initiates criminal proceedings concerning such agreements. In January 2025, the antitrust agencies issued the Antitrust Guidelines for Business Activities Affecting Workers (US DoJ & FTC, 2025). According to Section 1 of these Guidelines, some types of agreement, including wage-fixing and no-poach agreements, may violate antitrust laws and can lead to criminal charges. Competing employers in the labour market may commit an antitrust offence if they enter into an agreement not to recruit, solicit, or hire one another's employees or to fix wages or terms of employment (US DoJ & FTC, 2025, p. 4).

Such agreements may also give rise to civil liability, even if criminal proceedings are not initiated, as emphasized in *United States v. Lucasfilm Ltd* (Final judgment of the US DoJ, 2011). The antitrust agencies focus on the essence of a wage-fixing or no-poach agreement; if the object of the employers' agreement is the alignment, stabilization, or other form of coordination of wage-setting, including through arrangements on ranges, caps, or benchmarks for calculating pay, it does not matter that a specific rate is not agreed upon (Plea agreement of the US DoJ, 2015). Moreover, if an undertaking agrees to limit their hiring of another undertaking's employees, it is irrelevant that the agreement does not completely prohibit such hiring. For example, based on the judgment in *United States v. Association of Family Practice Residency Directors* (Final judgment of the US DoJ, 1996), an agreement prohibiting 'cold-calling' employees must be considered a 'no-solicit' agreement, regardless of whether employers are still allowed to hire employees who apply on their own initiative without prior solicitation.

The agencies may also investigate and take action against other restrictive agreements that limit worker mobility or otherwise negatively affect competition. Agreements about non-solicitation of clients, which prohibit an employee from contacting former clients or business partners of the employer, may, depending on the circumstances, be anticompetitive, for instance if they are drafted so broadly that they effectively prevent the employee from taking up new employment or starting their own business (US DoJ & FTC, 2025, p. 9–10).

In recent years, the enforcement focus against no-poach agreements in the United States has shifted significantly toward state-level jurisdictions. State Attorneys General, particularly in states such as Washington, Illinois, and New York, have begun to identify no-poach clauses as a systemic barrier to labour mobility and a factor suppressing wage growth, an effect that is especially pronounced among lower-wage workers (Callaci et al., 2024, p. 4–5; Steinbaum, 2019, p. 51–52). This approach is grounded in the recognition that no–poach restrictions adversely affect workers' bargaining power by eliminating competition for labour.

In recent years, public debate has intensified regarding the need to reform US antitrust law (Jones & Kovacic, 2020, p. 228). Within this discussion, increasing emphasis has been placed on the role of actions undertaken at the state level, including heightened enforcement activity by state Attorneys General as well as legislative initiatives aimed at establishing distinct, state–specific standards of competition protection that differ from federal regulations. It should be noted, however, that states seeking to influence the national economy in matters of clearly nationwide significance should rely on the instruments of federal antitrust law to do so. Such actions may be carried out through the state Attorneys General, who are vested with broad authority to initiate proceedings under federal law (Stock, 2025, p. 14). This approach promotes more effective enforcement, supports more democratically grounded outcomes, and strengthens the legitimacy of state antitrust enforcement on the national stage, while at the same time preserving states' ability to pursue their policy objectives in local markets (Stock, 2025, p. 18).

The key legal instrument employed by the state of Washington was the so–called assurances of discontinuance (Gordon, 2021, p. 338), voluntary settlements under which corporations committed to cease the use of the disputed clauses. The initiative achieved remarkable success: from 2018, more than 200 nationwide franchise chains (including such major brands as McDonald's, Arby's, and Subway) entered into agreements to remove no–poach provisions from all of their contracts across the United States (Callaci et al., 2024, p. 1).

The most compelling example of the effectiveness of state enforcement authorities in the area of wage–related agreements is the campaign initiated in 2018 by the Attorney General of the state of Washington, Bob Ferguson. These actions focused on eliminating no–poach clauses from franchise agreements, which systematically prevented employees from moving between different outlets within the same network (e.g. fast–food restaurants), thereby de facto entrenching their bargaining position (Callaci et al., 2024, p. 2). This strategy was based on the premise that although the franchisor and the franchisee remain in a vertical relationship, individual franchisees compete directly with one another in the labour market (Posner, 2021, p. 57).

3.2. The European Union

When analysing the European approach to wage–fixing and no–poach agreements, it is worth noting that initially, the European Commission considered any agreement restricting competition to be contrary to competition law, even if economic analysis did not demonstrate a serious restriction of competition. Ultimately, however, the EU decided to adopt a more flexible approach, involving the assessment of business conduct in light of the economic conditions, considering the effects of the agreement under Article 101(1) TFEU, rather than verification under Article 101(3) TFEU. According to Article 101(1) TFEU, 'all agreements between undertakings, decisions by associations of undertakings, and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market shall be prohibited'. It must therefore be recognized that no–poach and wage–fixing agreements fall within this definition, since they restrict competition in the labour market.

In 2011, the European Commission issued guidelines on the applicability of Article 101 TFEU to horizontal cooperation agreements (European Commission, 2023). The purpose of Article 101 TFEU is to ensure that undertakings do not use horizontal cooperation agreements to eliminate, restrict, or distort competition in the internal market, ultimately to the detriment of consumers. In light of this, wage–fixing and no–poach agreements must be regarded per se as restrictions of competition, similar to price cartels. This means that such agreements are treated as 'hardcore restrictions' that fundamentally violate EU competition law, regardless of their potential economic benefits. This assessment was further substantiated in the European Commission's decision in *Food Delivery Services*, where it emphasized that

> no–poach agreements typically cause economic harm. In particular, they can have negative effects on wages because the parties can no longer proactively offer higher wages to induce employees to switch, and/or provide counteroffers to induce their own employees to stay. By doing so, no–poach agreements are capable of preventing the efficient allocation of productive employees to productive firms. Declining job reallocation rates have been linked to declining productivity and hence slower GDP growth (European Commission, 2025, sec. 5.2.2.2.1).

In *Allianz Hungária Biztosító v. Magyar Biztosítók* (Judgment of the CJEU, 2013), the CJEU emphasized that agreements restricting competition are prohibited per se, without the need to demonstrate a direct effect on the consumer. In *Groupement des Cartes Bancaires v. Commission* (Judgment of the CJEU, 2014), the Court held that certain agreements may be so inherently harmful to competition that they are considered restrictive by object, without any need to analyse their effects. Similarly, in *Albany International BV v. Stichting Bedrijfspensioenfonds Textielindustrie* (Judgment of the CJEU, 1999), the CJEU held that certain agreements may be inherently harmful to competition and are therefore deemed restrictive by object under Article 101(1) TFEU.

The mutual interaction of labour law and competition law is gaining importance as regulators seek to protect labour markets from anticompetitive practices. The primary function of labour law is to protect workers' rights, while competition law ensures the functioning of a competitive market environment (Lianos et al., 2019, p. 6–10). Worth noting in this respect are the European Commission's 2022 guidelines on the application of EU competition law to collective agreements of the self–employed, which recognize that certain labour market practices, such as wage–fixing agreements, may be subject to antitrust assessment even with respect to persons traditionally outside the scope of labour law. In addition, the Directive on Transparent and Predictable Working Conditions (2019/1152) has strengthened worker protection in the EU, interacting with competition law through rules concerning non–compete clauses and their potential impact on limiting worker mobility. These legal acts highlight the need for a coordinated approach to regulating labour market practices through the combined application of labour law and competition law.

In the context of no–poach agreements, if the object of the agreement is to eliminate competition for employees between undertakings, it may be considered anticompetitive, thereby restricting employees' freedom to change employers and preventing wage adjustments (Aresu et al., 2024, p. 5). In assessing whether no–poach agreements qualify as restrictions 'by object', the CJEU's judgment in *Becu and Others v. Gedi* (1998) emphasized that agreements intended to restrict competition may infringe Article 101 TFEU regardless of whether their direct effect is noticeable (Vejseli, 2024, p. 366).

According to EU competition law, and in particular Article 101 TFEU, an agreement may be considered anticompetitive if its object is to restrict, prevent, or distort competition, regardless of whether the parties are direct competitors in the same product market. This means that no–poach agreements may be anticompetitive even if they are concluded between undertakings that do not compete in the same product or service markets. The key question will therefore be whether the agreement restricts competition in the labour market. If the agreement limits employees' ability to freely change jobs or reduces employment opportunities, it may be deemed anticompetitive, regardless of whether the undertakings participating in the agreement are competitors in their respective markets (Vejseli, 2024, p. 367). The case of *T–Mobile Netherlands BV and Others* (Judgment of the CJEU, 2009) demonstrates that the anticompetitive nature of an agreement depends on its impact on competition, rather than solely on the competitive relationship between undertakings. In practice, many cases involving no–poach agreements also include additional anticompetitive conduct, such as market sharing or wage–fixing, which reinforces the grounds for finding a violation of Article 101 TFEU.

An interesting position was expressed by the Advocate General in the case of *Tondela and Others*, in which he emphasized that 'Article 101(1) TFEU must be interpreted as meaning that a no–poach agreement […] shall not be classified as restrictive by object, if its genuine rationale was to preserve the fairness and integrity of the sports competition affected by the pandemic' (Emiliou, 2025). As of now, it remains uncertain to what extent the Advocate General's opinion will shape the approach of European antitrust authorities to such agreements.

3.3. Poland

Article 6(1) of the Act on Competition and Consumer Protection (Sejm Rzeczypospolitej Polskiej, 2007) prohibits agreements whose object or effect is the elimination, restriction, or other distortion of competition in the relevant market, while it also lists exemplary agreements – although wage–fixing and no–poach agreements are not explicitly mentioned. Polish competition law has adopted an effects–based approach to anticompetitive agreements, which consists in examining the economic consequences of business conduct. This means that the assessment of conduct is based not only on the content of the agreement, but also – if not primarily – on the market conditions in which such conduct takes place (Jurkowska–Gomułka, 2012, p. 34–35).

In its 2024 guide 'Cartels and Abuses in the Labour Market: Competition Law and Labour Law', the Office of Competition and Consumer Protection (UOKiK) emphasizes that competition law applies not only to markets where products are sold, but also to the labour market, where employers compete for workers. UOKiK identifies wage–fixing and no–poach agreements as being 'highly likely to infringe competition law'. Consequently, the president of UOKiK may find that a violation of competition law has occurred in a given case and, in turn, may take enforcement action and impose fines. In recent years, UOKiK has increasingly signalled that 'anticompetitive HR agreements' will be treated in the same way as price cartels. The president of UOKiK has repeatedly spoken about plans to scrutinize such practices, and proceedings have been initiated in relation to no–poach and wage–fixing agreements, although no final decisions have yet been issued.

4. Challenges and perspectives concerning the legality of no–poach and wage–fixing agreements

One of the most serious challenges in relation to wage–fixing and no–poach agreements is establishing the boundary between permissible business cooperation and prohibited restrictions of competition. In practice, a recruitment ban is often an element of a cooperation agreement, such as a joint venture or outsourcing arrangement. In each case, it will therefore be necessary to determine whether such a clause is genuinely indispensable to achieving the business objective or whether it constitutes a restriction of competition per se (Nealis, 2006, p. 348). Both EU and US law have developed the doctrine of ancillary restraints, under which certain restrictions of competition may be legally permissible if they are ancillary to another lawful business arrangement (Miąsik, 2004, p. 76–77). One of the major challenges will be answering the question of whether, for example, a no–recruitment clause in a franchise agreement should be considered a justified restriction or a prohibited anticompetitive agreement.

Another challenge is the proper definition of the relevant market in the context of competition law. Traditionally, antitrust regulation focused on product and service markets, while the labour market was for a long time not regarded as an area requiring intervention by competition authorities (Déchamps et al., 2019, p. 190). Defining the relevant market for workers is crucial to assessing the impact of a given agreement on competition. There are also significant differences in regard to sanctions. While in the United States individuals may be held criminally liable, including with the possibility of imprisonment (Kobayashi, 2001, p. 715–717), in the European Union and Poland the sanctioning system is limited to administrative liability (with fines imposed on undertakings) (Błachucki, 2013, p. 58). This raises the question of the effectiveness of the European system and whether it provides a sufficient deterrent effect.

Taking into account both the regulations and the enforcement activity of antitrust authorities in the United States, as well as the principles adopted at the level of the European Union, in the coming years one can expect further strengthening of competition authorities' involvement in the labour market. In the context of dynamic economic changes, advancing digitalization, and growing awareness of workers' rights, any restrictions on occupational mobility or artificial wage suppression should be regarded as contrary to the principles of the labour market – including freedom of employment – as well as to the fundamental freedoms of the EU internal market (Majewska & Samol, 2016, p. 15–19). Furthermore, given the global nature of many companies' activities, one may expect further intensification of cross–border cooperation between competition authorities, both within the EU and in relations with US authorities.

Conclusions

Analysis of no–poach and wage–fixing agreements leads to the conclusion that the labour market should be treated as a fully fledged market within the meaning of competition law, in which employers compete with one another for employees and where the parameters of competition include, inter alia, labour mobility and wage levels (Aresu et al., 2024, p. 1–2). The considerations presented also indicate that the ordoliberal concept of competition policy opens the space to view labour standards, such as fair remuneration or minimum employment conditions, as an element of market quality, the maintenance of which is essential for the proper functioning of the economy. From this perspective, anticompetitive agreements in the labour market infringe not only the norms of competition law, but also the foundations of a fair economic order.

No–poach and wage–fixing agreements generally constitute 'by object' restrictions, analogous to price cartels, since they artificially depress wages and limit worker mobility (Aresu et al., 2024, p. 1). Exceptions may be permissible only under the doctrine of ancillary restraints, where the restriction is genuinely necessary for lawful cooperation. Against the backdrop of international practice, clear differences emerge between the United States and the European Union and Poland. In the US, a repressive approach prevails, including the possibility of criminal liability for individuals and the classification of such agreements as per se violations. In the EU and Poland, administrative liability dominates, but the European Commission and national competition authorities clearly indicate that no–poach and wage–fixing agreements are, as a rule, restrictions of competition 'by object'. In this context, particular attention should be paid to the opinion of the Advocate General in *Tondela* (Emiliou, 2025), suggesting that in exceptional circumstances a no–poach agreement need not automatically be classified as a restriction 'by object'; in this case its true aim was to preserve the integrity of sporting competitions during the pandemic. At this stage, however, it is difficult to assess whether this reasoning will influence the CJEU's case law and the Commission's practice.

Looking ahead, one of the key challenges will be drawing the boundary between permissible business cooperation and prohibited restrictions of competition, as well as properly defining the relevant market in labour market cases. The effectiveness of the European system of sanctions also gains particular importance, raising the question of whether the absence of criminal liability may weaken its deterrent effect. Given the growing enforcement activity of competition authorities in the US, the EU, and Poland, as well as the global nature of labour markets and business operations, further intensification of competition law enforcement in this area can be expected. In the context of dynamic economic change, digitalization, and increasing awareness of workers' rights, any practices that restrict labour mobility or artificially suppress wages should be regarded as contrary not only to the principles of the labour market, but also to the fundamental freedoms of the EU internal market.

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