

ONE SIZE DOES NOT FIT ALL:

*A Comparative Approach to Antitrust Enforcement Against No-Poaching Agreements*

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**Abstract**

*The infamous “no-poaching” agreements, which prevent an employer from poaching his competitor’s employees, have recently been in the focus of the U.S. Department of Justice antitrust enforcement policy. Once considered a tool reserved for high-tech companies in Silicon Valley which were seeking to preserve their trade secrets and the know-how of their workforce by any means, recent cases show that these agreements could also apply to a low qualified workforce like those in the fast-food industry. American antitrust enforcers announced a shift of enforcement policy against what they consider as per se illegal restraints of trade in the labor market and pledged to bring criminal charges against the individuals who implement such agreements. On the other side of the Atlantic, their European counterparts do not seem to be as alert on this matter. Not that restraints of trade in the labor market cannot be found in Europe, but they are not only treated under competition law analysis. They are often treated under other theories in labor, commercial and contract law. The contrast between these two enforcement policies shed light on the interests that guide American enforcers: in the wake of populism, antitrust appears as a strong answer to the concerns of consumers and the employees, in the same way that antitrust was created and developed to address the adverse effects of economic concentration on wages and the purchasing power. This answer, however, could hit a wall if it expects to resolve all of the problems with one solution. The interactions between antitrust and labor are complex, and an antitrust enforcement policy cannot entirely rely on its enforcer’s zeal. Although strong enforcement against naked restraint on labor is necessary, an appropriate balance should be struck.*

**Résumé**

*Les tristement célèbres accords de « non-débauchage », qui empêchent un employeur de débaucher les employés de ses concurrents, ont récemment été au cœur de la mise en œuvre de la politique antitrust du Département de la Justice des États-Unis. Autrefois considéré comme un outil réservé aux entreprises de haute technologie de la Silicon Valley qui cherchaient à préserver par tous les moyens leurs secrets commerciaux et le savoir-faire de leur main-d’œuvre, des cas récents montrent que ces accords pourraient également s’appliquer à une main-d’œuvre peu qualifiée comme celle de la restauration rapide. Les autorités antitrust américaines ont annoncé un changement de leur politique de mise en œuvre du droit antitrust contre ce qu’elles considèrent comme des entraves illégales « per se » au commerce*

*sur le marché du travail et promettent d'engager des poursuites pénales contre les personnes qui appliquent ces accords. De l'autre côté de l'Atlantique, leurs homologues européens ne semblent pas aussi alertes en la matière. Ce n'est pas tant que l'on ne puisse trouver en Europe de restrictions au commerce sur le marché du travail, mais plutôt que celles-ci ne soient pas uniquement traitées dans le cadre du droit de la concurrence. Elles sont souvent traitées sous d'autres théories en droit du travail, en droit commercial et en droit des contrats. Le contraste entre ces deux politiques de mise en œuvre met en lumière les intérêts qui guident les autorités américaines : à l'heure d'une montée du populisme, l'antitrust apparaît comme une réponse forte aux préoccupations des consommateurs et des salariés, de la même façon que l'antitrust a été créé et développé pour répondre aux effets négatifs de la concentration économique sur les salaires et le pouvoir d'achat. Cette réponse, cependant, pourrait se heurter à un mur si elle s'attend à résoudre tous les problèmes avec une seule solution. Les interactions entre antitrust et travail sont complexes, et une politique de mise en œuvre du droit antitrust ne peut pas entièrement reposer sur le zèle de son responsable. Bien qu'il soit nécessaire d'appliquer vigoureusement le droit antitrust contre ces pratiques anticoncurrentielles sur le marché travail, un équilibre approprié devrait être trouvé.*

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### INTRODUCTION

In August 2018, eight fast-food chains entered into an agreement with the Washington State Attorney General's office to remove all no-poach clauses from their future franchise contracts, and not enforce the current ones<sup>1</sup>. The fast-food chain franchisors had agreed with their franchisees to preclude the employees of one franchisee from being hired at another within the same chain, covering more than 24,000 locations nationwide<sup>2</sup>. These practices are not solely a concern in Washington. Attorneys General in 10 other states<sup>3</sup> and in Washington D.C. started investigating fast-food businesses which impose these agreements in their franchise contracts<sup>4</sup>. The alarm bells were set off after a New York Times report inquired into pay stagnation in the American fast-food industry<sup>5</sup>. The report relied on a research paper by Professor Krueger and Orley C. Ashenfelter, two well-known labor-economist professors at Princeton University, who pointed out that the no-poaching agreements were included in 58 percent of major franchisors' contracts, affecting around 70,000 individuals<sup>6</sup>. Attorneys General scrutinize the ability of such practices to limit the wages and reduce the mobility of the employees under antitrust laws. Recently, four fast-food chains settled with 14 States and agreed to remove no-poaching provisions from their franchise contracts<sup>7</sup>.

Although the no-poaching agreements are not new to the antitrust landscape in the United States<sup>8</sup>, antitrust scrutiny into these practices has recently been reinvigorated with the Antitrust Guidance For Human Resource Professionals (the "Guidance") issued jointly by the Antitrust Division of the Department of Justice (the "DOJ") and the Federal Trade Commission

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<sup>1</sup> See News Release of the Office of the Attorney General, Washington State, "AG Ferguson secures end to no-poach provisions at eight more restaurant chains nationwide", September 13, 2018, available at <https://www.atg.wa.gov/news/news-releases/ag-ferguson-secures-end-no-poach-provisions-eight-more-restaurant-chains>; See also, R. Abrams, "8 Fast-Food Chains Will End 'No-Poach' Policies", *The New York Times*, August 20, 2018.

<sup>2</sup> See *supra* News Release of the Office of the Attorney General.

<sup>3</sup> California, Massachusetts, New York, Illinois, Maryland, Minnesota, New Jersey, Oregon, Pennsylvania and Rhode Island.

<sup>4</sup> See R. Abrams, "'No Poach' Deals for Fast-Food Workers Face Scrutiny by States", *The New York Times*, July 9, 2018.

<sup>5</sup> See R. Abrams, "Why Aren't Paychecks Growing? A Burger-Joint Clause Offers a Clue", *The New York Times*, September 27, 2017.

<sup>6</sup> See A. B. Krueger, O. Ashenfelter, "Theory and Evidence on Employer Collusion in the Franchise Sector", *IZA Institute of Labor Economics*, Discussion Paper Series, IZA DP No. 11672, July 2018.

<sup>7</sup> See "Four Fast Food Firms Settle No-Poach Claims With 14 States", *Bloomberg Law*, March 12, 2019, available at <https://news.bloomberglaw.com/mergers-and-antitrust/four-fast-food-firms-settle-no-poach-claims-with-14-states-doj>; the multi-state settlement included California, District of Columbia, Iowa, Illinois, Maryland, Massachusetts, Minnesota, North Carolina, New Jersey, New York, Oregon, Pennsylvania, Rhode Island, and Vermont.

<sup>8</sup> See *infra* Part I.B; They have been identified by courts regularly as anticompetitive practices in violation of the Section 1 of the Sherman Act.

(the “FTC”) in October 2016<sup>9</sup>. Through this communication, the American enforcers wanted to send a strong message to the employers who would risk participating in these no-poaching agreements: such conduct will be treated as *per se* violation of Section 1 of the Sherman Act, and criminal prosecution will be brought against these violations. Since, Assistant Attorney General Makan Delrahim became the zealous advocate of this new policy, warning several times that criminal cases were *en route*<sup>10</sup>. More recently, Makan Delrahim reaffirmed before the Senate Subcommittee on Antitrust, Competition Policy and Consumer Rights, as well as the U.S. House of Representatives Subcommittee on Regulatory Reform, Commercial and Antitrust Law that “[t]he Division will continue to be diligent in detecting and deterring collusion that harms American consumers, and we will remain focused on crucial industries that affect Americans deeply, such as real estate, food, financial services, and health care, just to name a few”<sup>11</sup>. Despite the strong commitment, the DOJ so far has not engaged in criminal enforcement actions against no-poaching agreements. The latest case brought by the DOJ in this regard received a civil treatment because the no-poaching agreements were uncovered by the DOJ and terminated by the parties before October 2016<sup>12</sup>.

There is no reason to doubt, even more than two years after the issuance of the Guidance, that the DOJ will eventually bring a criminal case. What triggers the attention here is the shift in the DOJ’s policy. The DOJ has already challenged no-poaching agreements under the *per se* rule in the past and succeeded in settling in all of the recent cases, though none of them included criminal charges. In their Guidance, the DOJ does not raise new issues of law as to the illegality

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<sup>9</sup> See Department of Justice, Antitrust Div. & Fed. Trade Commission, “Antitrust Guidance for Human Resource Professionals”, October 2016, available at <https://www.justice.gov/atr/le/903511/download>.

<sup>10</sup> See e.g., M. Perlman, “Delrahim Says Criminal No-Poach Cases Are In The Works”, *LAW360.COM*, January 19, 2018, available at <https://www.law360.com/articles/1003788/delrahim-says-criminal-no-poach-cases-are-in-the-works>; Speaking at a conference hosted by the Antitrust Research Foundation at the Antonin Scalia Law School at George Mason University on January 19, 2018, Makan Delrahim stated that the DOJ “has a handful of criminal cases in the works” and explained that in “the coming couple of months you will see some announcements, and to be honest with you, I’ve been shocked about how many of these there are, but they’re real”. See also Deputy Assistant Attorney General Barry Nigro, *Keynote Remarks at the American Bar Association’s Antitrust in Healthcare Conference* (Arlington, VA), May 17, 2018, available at

<https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-barry-nigro-delivers-keynote-remarks-american-bar>: “Combatting rising healthcare prices has been, and under the new Administration will continue to be, a priority for the Division. We are investigating other potential criminal antitrust violations in this industry, including market allocation agreements among healthcare providers and no-poach agreements restricting competition for employees. We believe it is important that we use our criminal enforcement authority to police these markets, and to promote competition for all Americans seeking the benefits of a competitive healthcare marketplace.”

<sup>11</sup> Statement of Assistant Attorney General Makan Delrahim Before the Senate Subcommittee on Antitrust, Competition Policy and Consumer Rights, Oversight of the Enforcement of the Antitrust Laws, October 3, 2018; Statement of Assistant Attorney General Makan Delrahim Before the U.S. House of Representatives Subcommittee on Regulatory Reform, Commercial and Antitrust Law, December 12, 2018.

<sup>12</sup> See Justice News, Office of the Public Affairs, DOJ, “Justice Department Requires Knorr and Wabtec to Terminate Unlawful Agreements Not to Compete for Employees”, April 3, 2018.

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of not new conduct. Thus, the DOJ's policy seems to answer an ambition that goes beyond a reminder of the scope of antitrust laws in the labor market; it wants to directly address the concerns that arise inside the labor market.

Indeed, despite the historic low unemployment rate<sup>13</sup>, wages have barely increased since the 1970s<sup>14</sup>. This stagnation directly impacts Americans' purchasing power; Drew Desilver, a Senior Writer at Pew Research Center in Washington, D.C., calculated that the purchasing power peaked forty-five years ago and that the average hourly wage recorded in January 1973 had the same purchasing power as it would today<sup>15</sup>. Moreover, data shows that the wage gains in recent years went mostly to highest earners<sup>16</sup>. According to the economist Heidi Shierholz<sup>17</sup>, “[t]he extra growth we are seeing in the economy is going somewhere: to capital owners and people at the top of the income distribution, [...] [a]nd what we've seen is in recent period a much higher share of total income earned going to owners of capital.”<sup>18</sup> This tends to create distrust towards the system. 71% of Americans feel the economy is rigged against them<sup>19</sup>.

In an attempt to identify the symptoms, antitrust experts point out the increasing concentration across many sectors of the economy. FTC Commissioner Rebecca Kelly Slaughter acknowledged that “Americans are feeling this concentration crunch from their perspectives as workers as well as consumers. Evidence is pointing to greater concentration in the labor market, which may deprive workers the competitive process for their employment,

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<sup>13</sup> The last U.S. Bureau of Labor Statistics report from April 2019 states an unemployment rate at 3.8%.

<sup>14</sup> J. Shambaugh, R. Nunn, “Why Wages Aren't Growing in America”, *Harvard Business Review*, October 24, 2017; According to the Harvard Business Review article, since the early 1970s, the hourly inflation-adjusted wages received by the typical worker have barely risen, growing only 0.2% per year.

<sup>15</sup> D. Desilver, “For most U.S. workers, real wages have barely budged in decades”, *Pew Research Center*, August 7, 2018; The research shows that “today's average hourly wage has just about the same purchasing power it did in 1978, following a long slide in the 1980s and early 1990s and bumpy, inconsistent growth since then. In fact, in real terms average hourly earnings peaked more than 45 years ago: The \$4.03-an-hour rate recorded in January 1973 had the same purchasing power that \$23.68 would today”.

<sup>16</sup> *Ibid.*: “Since 2000, usual weekly wages have risen 3% (in real terms) among workers in the lowest tenth of the earnings distribution and 4.3% among the lowest quarter. But among people in the top tenth of the distribution, real wages have risen a cumulative 15.7%, to \$2,112 a week – nearly five times the usual weekly earnings of the bottom tenth (\$426)”.

<sup>17</sup> Director of Policy at the Economic Policy Institute and a former Chief Economist at the Labor Department.

<sup>18</sup> J. Stein, A. Van Dam, “For the biggest group of American workers, wages aren't just flat. They're falling”, *The Washington Post*, June 15, 2018.

<sup>19</sup> Poll by Marketplace and Edison Research, Banner 1, May 2016, Question 31, p.31, available at <http://cms.marketplace.org/sites/default/files/EMR23033%20Marketplace%20Wave%20Three%20Web%20Only%20Banner.pdf>.

leading to wage stagnation”<sup>20</sup>. At a time where populism is described as our societies’ disease, some call antitrust enforcement to work as the matching remedy<sup>21</sup>.

On the other side of the ocean, in Europe, where populism is mounting as well, antitrust enforcers do not approach restrictions on labor with the same vehemence. Under European Union competition law, as well as under each Member State’s national competition laws, it is clear that a naked no-poach agreement between two employers is illegal. Although, European jurisprudence does not offer as many labor antitrust cases as in the United States in this area, such restraints are discerned under different legal grounds, such as labor law, contract law or commercial law. The European example does not provide guidance for the development of antitrust enforcement against the restraints in the labor market in the United States. However, the European example shows that the restraints in the labor market can be addressed in many ways beside antitrust enforcement. This leads us to the question: in the labor market, does one size, antitrust analysis, fit the bill?

This Paper intends to analyze antitrust enforcement as a tool for combatting restraints of competition in the labor market. In Section 1, we introduce our analysis with a simple overview of the economic and legal theories that characterize the worker in the labor market. In Section 2, we address the DOJ’s enforcement policy shift as announced by the Guidance, in the context of the ongoing enforcement in this area. Then, in Section 3, we attempt to provide a comparative approach to the restrained antitrust enforcement in Europe, and the different paths available to fight similar issues. Finally, in Section 4, we attempt to question the relevance of the antitrust enforcement strategy in the light of populism concerns. This Paper discusses principally enforcement policy and will only briefly discuss the substance of the antitrust laws within the labor market context<sup>22</sup>.

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<sup>20</sup> R. K. Slaughter, “Challenge ahead for US antitrust enforcement”, closing speech at the Concurrences conference « 6th Antitrust Salon: Where is antitrust policy going? » held on September 24th in Washington DC. Available at <https://vimeo.com/292198783?ref=em-v-share>.

<sup>21</sup> For a more detailed analysis on the Antitrust and the populism, See C. Shapiro, “Antitrust in a Time of Populism”, October 24, 2017, available at <https://ssrn.com/abstract=3058345> or <http://dx.doi.org/10.2139/ssrn.3058345>.

<sup>22</sup> For a deeper analysis of the antitrust analysis in the context, See e.g., D. E. Eash, D. Lewin, C. P. Wazzan, “Antipoaching Collusion in the Contemporary Labor Market: Evidence, Analysis, and Implications”, *Employee Relations Law Journal*, Vol. 43, No. 2, Autumn 2017; H. Hafiz, “Picketing In The New Economy”, *Cardozo Law Review* [Vol. 39:1845 2018], p. 1845; R. T. Davis, “Talent Can’t Be Allocated: A Labor Economics Justification For No- Poaching Agreement Criminality In Antitrust Regulation”, *Brooklyn Journal of Corporate, Financial & Commercial Law*, Volume 12, Issue 2, Article 2, 6-1-2018; C. J. Masterman, “The Customer Is Not Always Right: Balancing Worker and Customer Welfare in Antitrust Law”, 69 *VAND. L. REV.*, 1387 (2016), October 17, 2016.

**1. ANTITRUST LAW’S PARADIGM OF THE WORKER**

Before defining the specific restrictions that characterize the employment market, and the antitrust analysis that applies, it is useful to review the neoclassical economic theory that underlies labor analysis in antitrust.

**1.1. Restraints in the Labor Market under the Neoclassical Economic Theory**

According to neoclassical economic theory, the workforce supply, i.e., the quantity of workers available in the employment market for a specific demand, is determined primarily by the balance of the work-time each worker is willing to give to a firm, or, in other words, the free time each worker is willing to give up, and the compensation each worker can receive for this time, more generally a salary. The workforce demand, i.e., the quantity of workers demanded by firms to accomplish their business, is determined by the needs of each firm in their commercial development and the compensation they are willing to give to the workers in exchange for their work time. The relation of the workforce supply and the workforce demand is represented as follows (Figure 1):

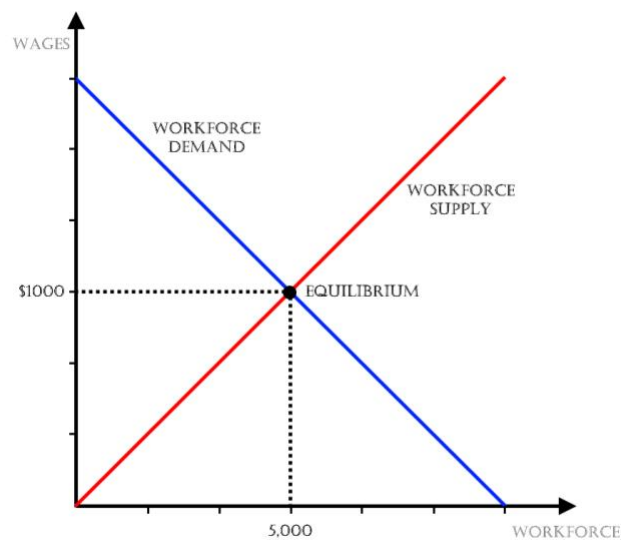


Figure 1

In Figure 1, the red curve represents the workforce supply, and the blue curve represents the workforce demand. On the supply curve, the more the wages increase, the more the workforce available increases. Conversely, on the demand curve, the more the wages increase, the more the demand for workforce decreases. The intersection of the demand curve and the



supply curve determines the equilibrium, i.e., the point where the workforce supplied matches the workforce demanded. In a market economy, the equilibrium represents what the economy can best accomplish. In other words, this is in theory the best allocation of resources we could have.

This graphic helps to determine what  $y$  salary is associated to  $x$  number of workers available to supply the demand. For instance, we can assume that at equilibrium, for an average salary of \$1,000, 5,000 workers will supply the demand. However, the equilibrium is not an immobile point; it shifts as the curves move. The supply curve moves depending on what the workers are looking for, to work more for greater compensation (mostly a salary) or to work less for greater free-time (assuming the salary does not satisfyingly compensate the loss of free time). The demand curve moves depending on what the firms want, more or fewer workers to maximize their profits.

In the scenario where the demand curve moves downward because the firms need fewer workers (e.g., output prices fall, technological change, etc.), the equilibrium is accordingly adjusted to a lower average salary associated with a lower number of workers available. In neoclassical economic theory, the subtraction of the number of workers available in the first equilibrium and those in the second equilibrium corresponds to the number of workers who decided not to work as an answer to the lower salaries. If the wages decrease, the total quantity of work supplied decreases to the benefit of the quantity of free time (Figure 2).

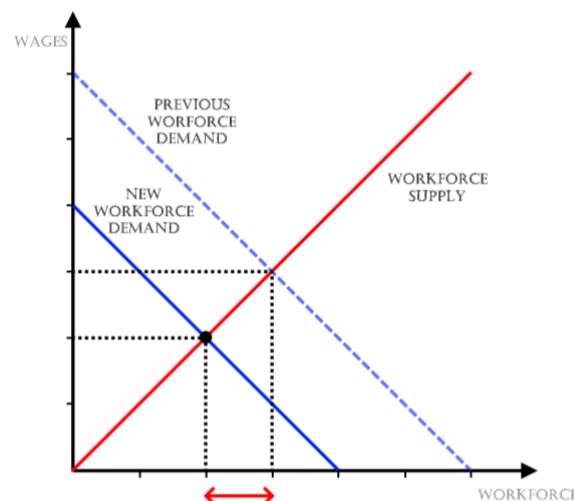


Figure 2

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However, in reality, workers cannot shift between work-time and free-time as they please. Even if the theory affirms that workers accepted not to work, and that they could have not accepted if they do (e.g., by quitting their job, renegotiating their work hours, etc.), economic reality forces the workers to give up their free time and continue to work, even if this involves a lower salary (or any conditions on the work). This is so because the economic theory only takes into account the free time as what every worker is seeking but does not take into account the cost of the activities that workers are seeking during this free time. Thus, workers would not make the choice to quit their job because it would not result in better compensation than the lower salary.

As a consequence, the supply curve will move accordingly to the demand curve movement. In other words, in order to keep every worker available at the first equilibrium in Figure 1, the wages will necessarily decrease, resulting in a new equilibrium (Figure 3).

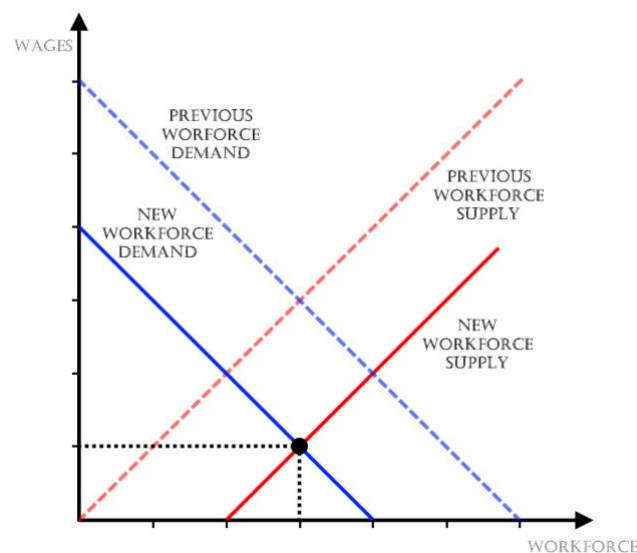


Figure 3

The law of supply and demand in the labor market is important to understand the effects of the restrictions within the market. For example, in a situation where a union succeeds in negotiating a minimum wage in a particular industry, the union restrains the ability of the employer to move the demand curve downward, i.e., on the wages axis, to a certain point (the minimum salary). This kind of restriction is exempted from the application of antitrust laws under the labor exemption provided in the Clayton Act<sup>23</sup>. However, in another scenario, the

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<sup>23</sup> Clayton Act §§ 6, 20; 15 U.S.C. § 17 (2012); 29 U.S.C. § 52 (2012).

employer could also restrain the labor market. For instance, if employers decide to fix the wages that they will offer workers, this time the supply curve cannot move upward. In theory, if the workers cannot receive a satisfying compensation for their work time, they either stop working, but we know this is never a real option, or they give their work time to another employer who will offer them a better compensation. The free competition between employers in the employment market is the main bargaining leverage workers have to move the curve upward. When employers agree to fix a ceiling to this curve, they force workers to give up their free time for lower working conditions.

Restraints of trade in the labor market can take many forms. They encompass all agreements or arrangements of any kind, between two or more competitors in the employment market, that have effects on their employees' salary or other terms of compensation, mobility within the output market or any other conditions of the employees' ability to work. In the antitrust experience, such restraints have been designated as "no-poaching" agreements, "wage-fixing" agreements, "no-hiring" agreements, "no-solicitation" agreements, "no cold call" agreement, "no-switching agreements", etc. The labels may indicate different levels of intensity of the restrictions. The *no-poaching*, *no-hiring*, or *no-switching* agreement usually refers to an agreement between two or more employers not to poach or not to hire each other's employees or former employees. The *wage-fixing* agreement is the agreement that fixes the price to which employers in the output market agree to purchase the workforce in the input market. The *no cold calling* or the *no solicitation* agreement usually refers to the agreement between employers not to cold-call each other's employees, but it does not involve a prohibition to hire each other's employees if the employee comes directly to the competitor.

In the following sections, we will refer mainly to the "no-poaching agreement" to address the antitrust enforcement against such restraints of labor, except when another label was used by a court in a specific case.

## **1.2. The Treatment of Restraints on Workers under Antitrust Laws: Per Se Rule V. Rule of Reason**

The 2016 Guidance asserts that no-poaching agreements are *per se* illegal under antitrust laws, and that for this reason the DOJ will proceed criminally against naked no-poaching agreements (the FTC does not have the authority to bring criminal proceedings or pursue criminal investigations). Although antitrust cases regarding no-poaching agreements are rare and "[t]he Supreme Court, in the long and active history of anti-trust litigation, has rarely

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considered the validity of agreements directed solely at the employment practices of an industry”<sup>24</sup>, this statement does not seem to be supported by the majority view.

Restraints on labor appeared in antitrust jurisprudence relatively late, probably more because antitrust analysis of the labor market, where the product is the workforce, was more difficult to undertake under the purview of antitrust laws, rather than these restraints were nonexistent before then. Without any U.S. Supreme Court case guidance for this matter<sup>25</sup>, federal courts commenced the antitrust analysis of restraints in the labor markets addressing no-poaching agreements.

In the *Union Circulation* case, the Court of Appeals for the Second Circuit affirmed an FTC order enjoining agreements between magazine subscription solicitation agencies not to employ persons, who had, during the past year, been engaged by another agency, whether or not such agency was party to agreements<sup>26</sup>. In its analysis, the court first observed that such no-switching agreement could be compared to a boycott or a refuse to deal, which for the most part have been held *per se* unlawful<sup>27</sup> since *Standard Oil*<sup>28</sup>. However, the court distinguished the no-switching agreements from the boycott because they are “directed at the regulation of hiring practices and the supervision of employee conduct, not at the control of manufacturing or merchandising practices”, and they “are not designed to coerce [...] independent members of an industry, into abandoning competitive practices of which the concerted parties do not approve”, but “they are ostensibly directed at ‘housecleaning’ within the ranks of the signatory organizations themselves”<sup>29</sup>. After denying the application of the *per se* rule to the no-switching agreements because they were distinguishable from boycotts, the court analyzed the agreement under the rule of reason within the specific context of the magazine-selling industry. The court considered the substantial segment that the parties to the agreement represent in the industry in concluding that their action will “freeze the labor supply”<sup>30</sup> and “discourage labor mobility” which are indispensable elements of the competition in this industry<sup>31</sup>. Thus, the court held the

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<sup>24</sup> *Union Circulation Co. v. Fed. Trade Comm'n*, 241 F.2d 652, 658 (2d Cir. 1957), FN2.

<sup>25</sup> Federal courts though referred to a U.S. Supreme Court case as a close parallel to no-poaching agreements. In *Anderson v. Shipowners' Ass'n of Pacific Coast*, 272 U.S. 359 (1926), the Supreme Court concluded that an association of ship-owners that fixed the wages to be paid the seamen, and in addition, agreed on the conditions to hire seamen, unlawfully restrained trade in violation of Section 1 of the Sherman Act (although the opinion did not indicate whether this restraint would be invalid *per se* or whether it would be found unreasonable). See *Union Circulation*, at 658.

<sup>26</sup> *Union Circulation*, at 654.

<sup>27</sup> *Ibid.* at 656.

<sup>28</sup> *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1 (1911).

<sup>29</sup> *Union Circulation*, at 657.

<sup>30</sup> Quotation omitted.

<sup>31</sup> *Ibid.* at 568.

restraint was unreasonable within the meaning of the Sherman Act. The employer's argument that the restraint was only meant to prevent fraudulent practices of some salesmen did not convince the judge; the agreements went beyond what was necessary.

Ten years later, the Court of Appeals for the Seventh Circuit rejected the *per se* treatment for a no-switching agreement that required testing by a standard of reasonableness as explored in *Union Circulation*<sup>32</sup>. This time, the lawsuit was initiated by a sales supervisor who worked successively for two encyclopedias sellers, but who was terminated by the latter after the former pressured its competitor to enforce the no-switching agreement to which both employers were parties. The district court granted summary judgment to the defendants with respect to the antitrust claim. The appellate court reversed because further inquiry into the facts was necessary. Since that time, the courts have not departed from the application of the rule of reason for such agreements<sup>33</sup>.

## 2. THE APPARENT SHIFT OF U.S. ANTITRUST ENFORCEMENT

The 2016 Guidance had the effect of alerting all employers that from now on, anticompetitive practices in the labor market will be treated with the utmost seriousness. However, the shift announced by the guidance actually was in the continuity of the enforcement policy adopted by the authorities against these practices. Thus, the question comes to the interests and the strategy hiding behind this move.

### 2.1. Public Enforcement: The Formalization of Enforcement Policy

The DOJ had approached the *per se* treatment of no-poaching agreements before making it its standard of analysis in the Guidance. Still, among the first civil enforcement actions against these agreements that followed the *Union Circulation* case, the *per se* analysis was not

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<sup>32</sup> *Nichols v. Spencer Int'l Press, Inc.*, 371 F.2d 332, 337 (7th Cir. 1967).

<sup>33</sup> See, *Quinonez v. Nat'l Asso. of Sec. Dealers, Inc.*, 540 F.2d 824 (5th Cir. 1976); *UARCO Inc. v. Lam*, 18 F. Supp. 2d 1116 (D. Haw. 1998); *Bogan v. Hodgkins*, 166 F.3d 509 (2d Cir. 1999); *Ulrich v. Moody's Corp.*, 2014 U.S. Dist. LEXIS 145898 (S.D.N.Y. Mar. 31, 2014);

In certain circumstances, where the no-poaching agreements are ancillary restraints serving a legitimate business purpose, they will not be deemed illegal. This is the case for no-poaching agreements between Intra-Enterprises, the no-poaching agreements arising within a lawful joint venture, or no-poaching agreements made during an acquisition of a company. Because our analysis is focused on the enforcement of antitrust laws against naked no-poaching agreements made outside of the scope of mergers and acquisition, we will not treat further the question of the ancillary restraints within this context.

For a deeper analysis of the question, See e.g., R. T. Davis, "Talent Can't Be Allocated: A Labor Economics Justification For No-Poaching Agreement Criminality In Antitrust Regulation", supra note 22; S. Hemphill, N. L. Rose, "Mergers that Harm Sellers", *The Yale Law Journal*, 2018, vol. 127, issue 7, p. 2078; D. J. O'brien, "The Enforceability Of No-Hire Provisions In Mergers, Acquisitions And Other Entrepreneurial Ventures", *Entrepreneurial Business Law Journal*, 2008, vol. 3, p. 113.

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mentioned. Two earlier DOJ cases challenged restraints in labor markets, including price-fixing, without specifying the kind of analysis to be applied.

In *Utah Society For Healthcare Human Resources Administration*<sup>34</sup>, the DOJ challenged an agreement to exchange nonpublic prospective and current information about overall budgets, nursing budgets, and registered-nurse entry wages. This agreement had the purpose and effect of stabilizing registered-nurse entry wages and limiting the amount and frequency of registered-nurse entry wage increases in Salt Lake County, Utah, in violation of the Sherman Act, Section 1. However, the DOJ remained silent on the applicable analysis.

In the *Arizona Hospital*<sup>35</sup> case, the DOJ challenged an agreement fixing certain terms and conditions related to the purchase of temporary nursing personnel, including temporary nurse staffing agency bill rates. The complaint did not specify what analysis to apply to a wage-fixing agreement, and just mentioned that the agreement violated the Sherman Act. The defendant in this case settled for a payment of \$22.5 million<sup>36</sup>.

It was not until 2010 that the DOJ began to use the *per se* rule against no-poaching agreements, in the recent cases in the high-tech industry, where the no-poaching agreements were commonplace.

The first civil action was initiated by the DOJ against seven Silicon Valley companies that entered into different no cold call agreements with regards to the recruitment of high-tech employees. The DOJ first filed the complaint against six companies<sup>37</sup> on September 24, 2010<sup>38</sup> (the “*Adobe case*”) and later filed a complaint against *LucasFilm* on December 21, 2010<sup>39</sup>.

In the *Adobe case*, the DOJ asserted that the agreements constituted “unreasonable restraints of trade that are *per se* unlawful under Section 1 of the Sherman Act”<sup>40</sup>. The defendants finally settled<sup>41</sup>.

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<sup>34</sup> DOJ Final J. against Utah Society, September 9, 1994.

<sup>35</sup> DOJ Final J. against Arizona Hospital and Healthcare Association and AzHHA Service Corporation, September 12, 2007.

<sup>36</sup> The treatment of non-solicitation agreement in the same industry can be different depending on the relationship of the parties to the agreement. In *ProTherapy Associates, LLC v. AFS of Bastian, Inc.*, 2012 WL 2511175 4th Cir. Va. (2012), the Fourth Circuit held that the no-solicitation covenant contained in the therapy-services agreements made between the nursing homes and the provider of physical-therapy services was enforceable and the breach of it entitled the plaintiff to damages.

<sup>37</sup> Adobe; Apple; Google; Intel; Intuit; Pixar.

<sup>38</sup> DOJ Complaint against Adobe, et al., September 24, 2010 (“DOJ Adobe Compl.”).

<sup>39</sup> DOJ Complaint against Lucasfilm, December 21, 2010 (“DOJ Lucasfilm Compl.”).

<sup>40</sup> DOJ Adobe Compl., para. 35.

<sup>41</sup> DOJ Final J. against Adobe, et al., March 17, 2011 (“DOJ Adobe J.”).

Similarly, in the *LucasFilm* case<sup>42</sup>, the DOJ complained that the no cold call agreement between LucasFilm and Pixar, included the mutual obligation to notify the other when making an offer to one of its employees, without the possibility to counteroffer above the initial price, was *per se* unlawful<sup>43</sup>, because it eliminated significant forms of competition to attract digital animators to the detriment of the employees who likely were deprived of competitively important information and access to job opportunities<sup>44</sup>.

Almost two years later, the DOJ filed a complaint against eBay for a no-hire and a no-solicitation agreement with Intuit<sup>45</sup>.

In the *eBay* case<sup>46</sup>, the DOJ claimed the agreement between eBay and Intuit was limiting their employees' ability to secure better compensation, benefits, and working conditions. Here again, the DOJ characterized the agreements as a *per se* violation of the Sherman Act<sup>47</sup>. However, the DOJ also specified that the agreements were likewise an unreasonable restraint of trade under the quick look rule of reason analysis<sup>48</sup>. Unlike in the *Adobe* or *LucasFilm* cases, eBay moved unsuccessfully to dismiss the case before agreeing to settle<sup>49</sup>. eBay argued that the DOJ failed to state a claim under either of the theories that it has chosen to pursue<sup>50</sup>. The district court denied eBay the motion because the allegations were sufficient to state a horizontal market allocation agreement; as to the analysis to apply as a matter of law, the court said it could not determine at such an early stage whether the *per se* treatment or the quick look rule will be inappropriate<sup>51</sup>. Nothing in the opinion, however, indicates that the *per se* treatment is imminent; it is likely that once the discovery stage passed, the court would be able to apply the long-standing precedent where such agreement were analyzed under the rule of reason.

In 2016, the Guidance announced a new prioritization of antitrust enforcement in employment markets at the attention of the human resource professionals who are involved in employment policy in their company. In this respect, the Guidance appears more like a strong reminder to human resources professionals that antitrust laws apply with the same strength in the employment marketplace as any other markets, rather than guidelines on the analysis and

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<sup>42</sup> DOJ Final J. against Lucasfilm, June 3, 2011 (“DOJ Lucasfilm J.”).

<sup>43</sup> DOJ Lucasfilm Compl., para. 23.

<sup>44</sup> *Ibid.* para. 22.

<sup>45</sup> DOJ Complaint against eBay, November 16, 2012 (“DOJ eBay Compl.”).

<sup>46</sup> DOJ Final J. against eBay, September 2, 2014 (“DOJ eBay J.”).

<sup>47</sup> DOJ eBay Compl., para. 28.

<sup>48</sup> *Ibid.* para. 29.

<sup>49</sup> *United States v. eBay, Inc.*, 968 F. Supp. 2d 1030 (N.D. Cal. 2013).

<sup>50</sup> *Ibid.* at 1038.

<sup>51</sup> *Ibid.* at 1040.

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remedies the DOJ and the FTC intend to implement. Still, the Guidance formalizes the approach the DOJ had previously used against no-poaching agreements, i.e. the *per se* treatment.

Similarly, the announcement that the DOJ will proceed criminally against the naked no-poaching agreements may seem logical as the DOJ usually pursues criminally, at its own discretion, only naked restraints of trade or so-called “hard-core cartels”. Yet, for the same reason as a no-poaching agreement has never been held *per se* unlawful by a judge, the criminal prosecution has never followed a civil action challenging a no-poaching agreement so far.

In fact, the DOJ missed the opportunity to do so in the first post-Guidance case. In *Knorr-Bremse*, the DOJ challenged no-poaching agreements on skilled labor in the U.S. rail industry<sup>52</sup>. The DOJ treated the agreement as *per se* unlawful under Section 1 of the Sherman Act, but unlike its Guidance’s recommendation, did not pursue criminal sanctions. The DOJ explained that the agreements were discovered by the DOJ and terminated by the parties prior to the issuance of the October 2016 Guidance, and that, in “an exercise of prosecutorial discretion” it will bring criminal charges only against the agreements formed after or not terminated before the announcement of the Guidance<sup>53</sup>. However, the DOJ recently took part in the ongoing private class action that followed this case<sup>54</sup> by submitting a statement of interest in response to the defendants’ motion to dismiss<sup>55</sup>. In their motion, the defendants argued that as a matter of law, all no-poach agreements must be analyzed under the rule of reason. The DOJ strongly opposed this argument. The DOJ unfolded a detailed reasoning to justify that no-poaching agreements should be treated as *per se* unlawful, and that the plaintiffs’ allegations were sufficient to state a *per se* claim. Besides the interpretation of the case law on which the DOJ relies, this statement clearly shows the zeal the DOJ will employ to achieve the goal of its Guidance. The fact that the DOJ obtained the court’s permission to participate in the hearing<sup>56</sup> stresses how definitive the decision of the U.S. District Court for the Western District of Pennsylvania will be for the future of the DOJ’s enforcement policy.

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<sup>52</sup> *United States v. Knorr-Bremse AG*, No. 1:18-CV-00747-CKK, 2018 WL 4386565 (D.D.C. July 11, 2018).

<sup>53</sup> See “Justice Department Requires Knorr and Wabtec to Terminate Unlawful Agreements Not to Compete for Employees”, supra note 12.

<sup>54</sup> *In re Railway Industry Employee No-Poach Antitrust Litigation*, 326 F. Supp. 3d 1381 (U.S. Jud. Pan. Mult. Lit. 2018).

<sup>55</sup> Statement of Interest, February 8, 2019, available at <https://www.justice.gov/atr/case-document/file/1131056/download>.

<sup>56</sup> L. R. Vaala, “DOJ Fans the Flames in Support of Plaintiffs Suing Former Employers in Private Antitrust Fray”, *Lexology*, March 12, 2019, available at <https://www.lexology.com/library/detail.aspx?g=c6a6fba9-833f-46d4-a6d9-37750e6567c8>.



## 2.2. The Call to Strong Enforcement: Private Enforcement

Private enforcement against no-poaching agreements reinforces the overall antitrust enforcement against no-poaching agreements and demonstrates that the DOJ prosecution of no-poaching agreements is a real advantage for the private enforcers.

The class action cases that followed the DOJ investigations against the high-tech companies are referred as *High Tech Employee Antitrust Litigation* (“HTEAL”). In HTEAL, the district court denied the defendants a motion to dismiss because the “plaintiffs successfully pled a *per se* violation of the Sherman Act for purposes of surviving a 12(b)(6) motion”, and therefore the court needed not “decide now whether *per se* or rule of reason analysis applies”<sup>57</sup>. It is interesting to underline that the plaintiff’s allegation of a *per se* violation relied on the “DOJ investigation in which the DOJ found the agreements to be “*per se* unlawful” and in which Defendants agreed that the DOJ stated a federal antitrust claim”<sup>58</sup>. Thus, it appears that the DOJ investigation and the *per se* prosecution of these agreements are significant for a class action to survive a motion to dismiss, and then negotiated a settlement. All the defendants eventually settled.

Several class actions against animation companies<sup>59</sup> arose closely to the HTEAL case, that have been consolidated in *In re Animation Workers Antitrust Litigation*<sup>60</sup>. Plaintiffs accused multiple animation companies of entering into secret “gentlemen’s agreements” not to actively solicit one another’s employees. After dismissing the case a first time without prejudice<sup>61</sup>, the court denied defendants’ second motion to dismiss because the plaintiffs sufficiently alleged that defendants had fraudulently concealed the alleged conspiracy<sup>62</sup>, based on the HTEAL findings. When the court certified the class, it relied on the same arguments. After the class certification, all the remaining defendants settled the case<sup>63</sup>.

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<sup>57</sup> *In re High-Tech Employee Antitrust Litig.*, 856 F. Supp. 2d 1103, 1122 (N.D. Cal. 2012).

<sup>58</sup> *Ibid.* at 1117.

<sup>59</sup> Blue Sky; DreamWorks; LucasFilm; Pixar; Sony; Disney.

<sup>60</sup> *In re Animation Workers Antitrust Litigation*. See Case No. 14-4062, ECF No. 38., November 5, 2014.

<sup>61</sup> *In re Animation Workers Antitrust Litig.*, 87 F.Supp.3d 1195 (N.D.Cal.2015).

<sup>62</sup> *In re Animation Workers Antitrust Litig.*, 123 F.Supp.3d 1175, 1207 (N.D.Cal.2015).

<sup>63</sup> Lucasfilm and Pixar had reached a settlement with the HTEAL plaintiffs; Blue Sky settled for a payment of \$5,950,000 to the class before the opposition to the class certification; Sony settled for a payment of \$13,000,000 to the class, agreed not to cooperate with the remaining Defendants in opposing Plaintiffs’ motion for class certification; After the class certification, DreamWorks signed a settlement agreement on October 4, 2016 in which DreamWorks agreed to pay \$50,000,000, and Disney signed a settlement agreement on January 30, 2017 in which Disney agreed to pay \$100,000,000 (final approval hearing for the Dreamworks and Disney Settlements on May 18, 2017).

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Conversely, in another class action, against *Microsoft*, the absence of a DOJ complaint after the closing of an investigation over agreements regarding employees recruiting led to denial of a class action on statute of limitation grounds<sup>64</sup>. Under the statute of limitation, plaintiffs' claims under the Sherman Act are all subject to a four-year statute of limitations<sup>65</sup>. Because plaintiff's claims were not brought within the four-year period, they argued that the DOJ investigation into Microsoft is entitled to statutory tolling under 15 U.S.C. § 16(i)<sup>66</sup>. The court dismissed the argument, and then the complaint, because “the DOJ never filed a complaint against Microsoft, Plaintiffs are not entitled to any tolling based on the DOJ's investigation of Microsoft”<sup>67</sup>.

Another class action failed at the motion to dismiss stage in *Frost v. LG Elecs. Inc.*<sup>68</sup>. Plaintiffs alleged that LG and Samsung engaged in a conspiracy agreeing not to recruit or directly hire the other company's U.S. employees. In concluding that the plaintiffs did not satisfy the pleading standard, the court “acknowledges that Plaintiffs in the present case have not had the benefit of investigations conducted by the Department of Justice as in *Animation Workers* and *High Tech*, or of merits discovery”, and thus, “the Court [found] dismissal to be appropriate here under the standards set forth in *Twombly* [...]”<sup>69</sup>.

Finally, the most recent private action against a no-poaching agreement<sup>70</sup> echoes the current investigations against such agreements in the franchise sector. In *Deslandes v. McDonald's USA*<sup>71</sup>, a former employee of McDonald's alleged she was precluded access to a job in another franchise of the restaurant that offered higher compensation and better working conditions because of a no-poaching provision in the franchise contract. The plaintiff alleged a violation of section 1 of the Sherman Act under both the *per se* rule and the quick look analysis. Although the district court denied the defendant's motion to dismiss at this stage of the proceeding, the court dismissed the plaintiff's claim in part for the allegation based on the *per se* rule. Indeed, because “the restraint alleged in plaintiff's complaint is ancillary to an agreement with a pro-competitive effect, the restraint alleged in plaintiff's complaint cannot be deemed unlawful *per*

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<sup>64</sup> *Ryan v. Microsoft Corp.*, 147 F. Supp. 3d 868 (N.D. Cal. 2015).

<sup>65</sup> 15 U.S.C. § 15b (Sherman Act).

<sup>66</sup> The doctrine of equitable tolling, in general, halts the running of the limitations period so long as the plaintiff uses reasonable care and diligence in attempting to learn the facts that would disclose the defendant's fraud or other misconduct. See § 1056 Statutes of Limitations—In General, 4 Fed. Prac. & Proc. Civ. § 1056 (4th ed.).

<sup>67</sup> *Ryan v. Microsoft*, at 881-82.

<sup>68</sup> *A. Frost & Jose RA, individually & on behalf of all others similarly situated, Plaintiffs, v. LG Electronics Inc.; LG Electronics U.S.A., Inc.; Samsung Electronics Co., Ltd.; & Samsung Electronics America, Inc., Defendants.*, No. 16-CV-05206-BLF, 2018 WL 6256790 (N.D. Cal. July 9, 2018).

<sup>69</sup> *Ibid.* at \*5.

<sup>70</sup> In addition to *In re Railway Industry Employee No-Poach Antitrust Litigation*, supra note 54.

<sup>71</sup> *Deslandes v. McDonald's USA*, 2018 WL 3105955 (N. D. Ill, 2018).

*se*<sup>72</sup>. In other words, the no-poaching provision is ancillary to a franchise agreement with pro-competitive effects, so the *per se* analysis is excluded. This decision creates very narrow room for the application of the *per se* rule regarding no-poaching agreements, especially by accepting a broad definition of the pro-competitive effects, which in this case were characterized as the output enhancing effect of each franchise agreement entered by McDonald's enter, *i.e.*, the creation of a new franchise increases the "output of burgers and fries"<sup>73</sup>. The turn of the tide in the franchise sector is welcomed<sup>74</sup>.

### 2.3. The Strategy Of Tandem Enforcement

Historically, there is no doubt that the no-poaching agreements have been treated under the rule of reason rather than the *per se* rule by the courts. The DOJ's early attempts to create a *per se* violation of Section 1 of the Sherman Act were largely unsuccessful. These attempts preexisted the 2016 Guidance, and the Guidance only provides in this respect a strong warning, or even more, a threat to the businesses which adopted these practices. The DOJ's enforcement strategy in this area has been giving good results so far. Every civil action brought by the DOJ ended in consent decrees; a missed opportunity for the courts to assess the application of the *per se* analysis to such agreements. Furthermore, the DOJ's enforcement is significant for follow-on private enforcement. Private plaintiffs can rely on the DOJ investigation and complaint to state an antitrust claim; conversely, where the DOJ's enforcement is absent, plaintiffs will have more trouble surviving a motion to dismiss.

However, the strong posture strategy should not shadow the lack of receptivity of the courts to the *per se* treatment. In the *eBay* case, the opinion rejecting the plaintiffs' motion to dismiss does not seem opposed to the *per se* treatment, but nothing indicates that it may eventually be the applicable analysis. More obviously, in the recent *Deslandes* case, the court points out an interesting element: the "plaintiff has not attempted to plead a claim under the rule of reason". The court thinks it is "unsurprising", since in order to "state a claim under the rule of reason, a plaintiff must allege market power in a relevant market". The problem is that the proof of

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<sup>72</sup> *Ibid.* at \*7.

<sup>73</sup> *Ibid.*

<sup>74</sup> In *Williams v. I.B. Fischer Nevada* 794 F. Supp. 1026 D. Nev. (1992), *aff'd*, 999 F.2d 445 9th Cir. (1993), the court ruled that a franchisor and franchisee were a single enterprise, and, thus, a no-switching agreement between them was incapable of restraining trade in violation of Sherman Act.

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market power in labor markets can be a hard task depending on the structure of the labor market analyzed; in this case, the court asserts that:

“The relevant market for employees to do the type of work alleged in this case is likely to cover a relatively small geographic area. Most employees who hold low-skill retail or restaurant jobs are looking for a position in the geographic area in which they already live and work, not a position requiring a long commute or a move. That is not to say that people do not move for other reasons and then attempt to find a low-skill job; the point is merely that most people do not search long distances for a low-skill job with the idea of then moving closer to the job. Plaintiff, though, seeks to represent a nationwide class, and allegations of a large number of geographically small relevant markets might cut against class certification”<sup>75</sup>.

Thus, the DOJ’s strategy to implement a *per se* treatment of the no-poaching agreements makes more sense when it takes into account all the resources a rule of reason analysis would require. In addition, the *per se* treatment of these agreements will reinforce private enforcement efforts; as we just observed, a rule of reason analysis might cut against class certifications. Even if the *per se* rule or the quick look analysis does not fit such agreements, all defendants in class action cases would rather settle because of the uncertainty of the outcome, especially when the private action follows a DOJ civil action.

In addition, the announcement of criminal prosecution against no-poaching agreements will certainly deter employers from entering into such agreements of fighting back the allegations.

### 3. THE MULTI-FACETED EUROPEAN ENFORCEMENT

Although European competition enforcement has been recognized as more modern and bolder than in the United State in many regards, European competition enforcement against no-poaching agreements lags significantly. Unlike their American counterpart, the European public enforcer, the European Commission, does not focus its enforcement policy on anticompetitive practices in the labor market. The enforcement of competition laws in this area has been pursued by the national competition authorities of only a few Member States, but without building a substantial body of case law of the illegality of the no-poaching agreements under European and national competition rules. On the other hand, the no-poaching agreements seem to receive a more diversified treatment, of which competition law is an important component, but where other legal grounds are also solicited<sup>76</sup>.

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<sup>75</sup> *Deslandes*, at \*8.

<sup>76</sup> Some of the cases in the following sections were sourced from G. Gürkaynak, A. Güner, C. Özkanlı, “Competition Law Issues In The Human Resources Field”, *Journal of European Competition Law & Practice*, 2013, volume 4, issue 3, p. 201–214.

### 3.1. Competition Enforcement in the European Union

The European Commission has not brought any cases that have dealt with no-poaching agreements exclusively. Still, we can find an example of an illegal poaching agreement in the *pre-insulated Pipes* case<sup>77</sup>. In this case, the European Commission fined 10 pre-insulated pipe producers more than 90 million ECU<sup>78</sup> for their participation in a cartel in the district heating sector in Europe. All these companies entered into an agreement to fix quotas for the whole of the European market. As an element of the cartel, the Commission found the concerted actions to eliminate Powerpipe, the competitor who refused to take part in the cartel and lodged a complaint to the Commission in the first place. The decision, in particular, refers to the campaign carried by two of Powerpipe's main competitors, consisting of luring Powerpipe's employees, especially the managing directors, by offering them salaries and conditions which were apparently exceptional in the business<sup>79</sup>. The cartellists admitted they were planning to jointly acquire their non-cartelist competitor, then to share its customers, and that the poaching of its key employees would hasten its insolvency<sup>80</sup>.

At the Member States level, national enforcers also deal with no-poaching agreements in few decisions.

One of the first cases was brought by the French Competition Council and dealt with a wage-fixing agreement in the temporary work sector<sup>81</sup>. In that case, a federation of companies in the building industry in the French departments of Isère and Savoie decided to establish rules consisting of fixing the salary for temporary workers to the minimum wage level as fixed by the collective bargaining agreement – applicable to permanent workers – relevant for this industry in the departments. This action came in anticipation of the Winter Olympic Games organized in Albertville in 1992, where the construction sites required many temporary workers in the area and stimulated the labor market. The federations wanted to prevent the temporary work companies from poaching permanent workers, and thus leading to a foreseeable salary increases in the sector. The rules established by the federations were successful in restraining the competition between them and the temporary work companies in the supply of labor,

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<sup>77</sup> COMP IV/35.691/E.4 (21 October 1998) — *Pre-insulated Pipes Cartel* OJ L 24 (30.1. 1999), approved by Judgments of the Court of Justice in Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P.

<sup>78</sup> European Currency Unit.

<sup>79</sup> *Pre-insulated Pipes Cartel*, para. 92.

<sup>80</sup> *Ibid.*

<sup>81</sup> Decision n° 97-D-52, June 25, 1997, concerning practices in sector of temporary work in the departments of Isère and Savoie.

especially because the federation companies promoted and hired the temporary work companies which agreed to enforce such rules.

The French Competition Council held the practices illegal by object and by effect, and sanctioned participants in this cartel. The Council observed that the competition between the temporary work companies on the supply market was mostly determined by the salary they were ready to offer to the workers; the minimum wage fixed by the collective bargaining agreements was only fixing a minimum price to access the supply market, but not a maximum price. Thus, workers' salary in this sector still had to be determined by the free competition between the companies who hire them. Most of the competitors acknowledged that their rules intended to restrain the competition to access the supply, in a very intense period, which would have increased significantly the workers' wages.

In 2010 in Netherlands, the Dutch Court of Appeal, the *Gerechtshof 's-Hertogenbosch* had to examine an agreement between fifteen hospitals prohibiting them from hiring employees, especially anesthesia employees, who had been employed by one of the hospitals within the past twelve months<sup>82</sup>. The Court held that the agreement did not have the purpose of preventing or restricting competition by object, but still had anticompetitive effects on anesthesia assistants and surgical assistants that were substantially limited in their opportunities to work for hospitals<sup>83</sup>. Thus, the agreement was illegal under Dutch competition law.

The same year, in Spain, the Spanish Competition Authority ("CNC")<sup>84</sup>, in a freight forwarding cartel case, identified as part of the coordination of the competitive strategies between the cartelists, the fixation of conditions for the recruitment of workers<sup>85</sup>. The coordination included the obligation for the employers parties to the agreement to notify the recruitment of an employee covered by the agreement to his current or former employer<sup>86</sup>, and to obtain the prior consent of this employer to proceed the recruitment<sup>87</sup>. In rejecting the defendant's argument that the no-hire agreement was not, in its object, anticompetitive, because it did not imply an homogenization of commercial conditions, the CNC affirmed the agreement

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<sup>82</sup> LJN: BM3366 (Court of Hertogenbosch) HD 200,056,331 Date of judgment: 05.04.2010, Date of publication: 04.05.2010; Mariette J. Plomp, 'Netherlands: anti-competitive agreements – hospitals' (2010) E.C.L.R. N174-175, available at

<https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:GHSHE:2010:BM3366>.

<sup>83</sup> *Ibid.*, para. 4.9.5.

<sup>84</sup> Comisión Nacional de los Mercados y la Competencia.

<sup>85</sup> RESOLUCIÓN (EXPTE. S/0120/08, Transitarios), July 31, 2010, available (in spanish) at <http://www.cncompetencia.es/Inicio/Noticias/tabid/105/Default.aspx?Contentid=274528&Pag=1>.

<sup>86</sup> *Ibid.*, para. 199.

<sup>87</sup> *Ibid.*, paras. 210, 228, 361-369.

was a restriction by object and by effect of the competition between freight forwarding business in the acquisition of input, with a detrimental effect for the workers<sup>88</sup>, in violation of Article 101 TFEU.

More recently, the competition authorities in the United Kingdom, in Italy and in France assessed anticompetitive practices in the labor market in cases of a cartel between top modelling agencies.

In December 2016, the Competition and Market Authority (“CMA”) imposed a £1.5 million fine on five model agencies and their trade association which colluded on prices for modelling services from 2013 to 2015<sup>89</sup>. The CMA found out that as part of the collusion, the cartelists agreed to fix minimum prices or agreed a common approach to pricing for their modelling services. The practice constituted a restriction by object of the competition in violation of Article 101(1) TFEU as well as British competition law<sup>90</sup>. Although the qualified restriction was directed to the model agencies’ customers, the agreement affected the models’ conditions of work.

The link between the price-fixing of modelling services and the adverse effects it has on the models’ conditions of work was more detailed in the French case. In the Modelling Sector case, the *Autorité de la concurrence* (“French Competition Authority”) fined the main professional union of modelling agencies 2,381,000 euros in total for having, between 2000 and 2010, drawn up and distributed pricing schedules as a guide to modelling agencies’ commercial policy, as well as 37 modelling agencies, representing almost the entire market turnover, for having participated in statutory meetings on union pricing schedules between 2009 and 2010.

The French labor code established very specific rules that address the model’s salaries. In simple words, the Article L. 2241-1 imposes the annual negotiations on models' minimum salaries which take the form of a collective bargaining agreement between the agencies. In this context, the union was issuing pricing schedules after each annual negotiation, intending to set

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<sup>88</sup> “[L]a contratación de trabajadores es un parámetro de competencia entre empresas, también en el negocio transitario, puesto que el factor trabajo no deja de ser input para la actividad empresarial, y el pacto alcanzado tiene por objeto y efecto reducir la competencia entre las empresas cartelizadas en la adquisición de este input. Por otro lado, y como ya se ha señalado más arriba, hay que tener presente que este pacto es también apto para afectar a las condiciones de dicho input en sentido perjudicial para los trabajadores ”, p. 93.

<sup>89</sup> Decision of the Competition and Markets Authority, Conduct in the modelling sector, Case CE/9859-14 (December 16, 2016), available at <https://assets.publishing.service.gov.uk/media/58d8eb1840f0b606e7000030/modelling-sector-infringement-decision.pdf>.

<sup>90</sup> *Ibid.*, para. 5.1.

a standard in the total price each agency could invoice their services. The pricing was calculated on the basis of the minimum salary agreed in the annual negotiation and included the margin of profit the agencies were allowed to make.

One of the interesting elements of this case was the labor regulation context which led to the pricing schedules. The French Authority acknowledged that the pricing schedules took into account the model's wage rules established by the collective bargaining agreement and the Labor code. However, the pricing schedule also contained elements determining the agencies' services' price that were entirely part of each agency's commercial strategy. Thus, the pricing schedule reflected the commercial strategy of the agencies rather than the minimum wages, and the coordination of their commercial strategy was a restriction by object<sup>91</sup>. The labor exemption provided in the Article L.420-4 I 1° of the French Commercial Code was not applicable.

### **3.2. Challenges on Non-Competition Grounds in the European Union**

The EU competition law enforcers have had relatively little experience with the so-called no-poaching agreements<sup>92</sup>. This fact shall not overshadow the different manners these agreements can be struck down under EU law. This kind of agreement has been many times held illegal by the EU courts on different legal grounds.

One of the oldest opinions on a restraint to hire was delivered in the United Kingdom by the Court of Appeal, in the *Kores Manufacturing Co Ltd v Kolok Manufacturing Co Ltd case*<sup>93</sup>. The case was about an agreement between two competitors that neither would hire someone who was employed or had been employed within the past five years by the other, without their prior consent. When one of the parties to agreement hired an employee covered by the agreement, the other party moved to enforce the contractual obligation not to hire. The court held that the contract between the competitors not enforceable because the restraint, which was covering the unskilled worker and the skilled worker, was too wide. We notice that the court rejected the defendant's argument that the contract was intended to protect trade secrets since both companies were dealing with chemical processes.

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<sup>91</sup> Decision n° 16-D-20, September 29, 2016, concerning practices in sector of services provided by model agencies, p.52-53.

<sup>92</sup> For a more detail analysis of the EU competition law enforcement in the HR field, See G. Gürkaynak, A. Güner, C. Özkanlı, "Competition Law Issues In The Human Resources Field", supra note 76.

<sup>93</sup> *Kores Manufacturing Co Ltd v Kolok Manufacturing Co Ltd* [1959] Ch. 108; [1958] 2 W.L.R. 858; [1958] 2 All E.R. 65; [1958] R.P.C. 200; [1958] 102 S.J. 362.



In France, the courts approach a solution based on the labor laws. The French *Cour de cassation* (the “French Supreme Court”) delivered an interesting opinion in a case involving a no-poaching agreement, in the context of a labor law case<sup>94</sup>. In this case, an engineer asked the French *Conseil de prud’hommes* (the “Labor court”) to pronounce the termination of its contract with his employer at the employer’s expenses<sup>95</sup>. The engineer claimed, among others, that his employer agreed with one of its competitors to not solicit or hire each other’s employees, as it was supported by an e-mail where the engineer’s manager was informing him that he was not allowed to work for the competing company within the year and a half. The French *Cour d’appel de Versailles* (the “Court of Appeals”) held that this clause harmed the engineer’s interests and that the engineer was entitled to damages. Before the French Supreme Court, the employer argued that the non-soliciting clause could not be analyzed as a non-compete clause, and thus, the employee was not entitled to any indemnification. However, the Supreme Court upheld the decision by affirming that such a clause harmed the engineer’s freedom to work, and thereby he was entitled to damages.

This decision is interesting because it shows how a non-solicit agreement can be analyzed under labor laws. Here, it was litigation between an employee and his employer about the termination of a work contract. The employee was complaining that he could not get hired by his employer’s competitor. Under the French Labor Code, employers can impose on their employees a non-compete clause in their work contract, in exchange for an indemnification. In this case, however, the clause was agreed between the employer and its competitor, not between the employer and its employee. Thus, the employee’s claim was about the indemnification that he should have received in exchange for the restraint on his labor. Regarding this claim, the employer argued that this was a non-solicit clause that could not be properly characterized as a non-compete clause, and, as a result, the employee was entitled to no indemnification under the French Labor Code. However, the Court was not misled by the employer’s mechanisms to avoid the regulation on non-compete; instead of reasoning on the non-compete clause qualification ground, the Court acknowledged the freedom to work of the employee, that the agreement between the two companies was unreasonably restraining this freedom, and thus, the employee was entitled to damages for the injury he suffered from this restriction.

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<sup>94</sup> Cass. soc., 2 mars 2011, n° 09-40.547.

<sup>95</sup> Under the French Labor Code, the illegal termination of the employee’s contract by the employer entitles the employee to damages. The employee is not entitled to such damages when he quits voluntarily his job, unless his departure is justified by the illegal behavior of the employer; then the employee can claim damages before the labor courts.

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In Germany, the commercial laws specifically treat the no-hiring agreements. Under the Section 75f of the German Commercial Code (Handelsgesetzbuch, “HGB”), the no-hire agreements covering sales agents are not binding<sup>96</sup>. In 2014, the highest German Civil Court, *Bundesgerichtshof* (BGH), held that this provision was applicable to any no-hire and no-poach agreements between two employers<sup>97</sup>. This case followed the High-Tech cases in the United States which received considerable attention in Germany. The Court furthermore acknowledged situations where the no-poaching agreements were lawful such as agreements in the context of the acquisition of a company, or within the framework of a distribution agreement between independent companies.

At the EU level, the no-poaching agreements will also be treated under the TFEU provisions dealing with the free movement of persons in the EU.

Under Section 1 of Article 45 of the TFEU, the “[f]reedom of movement for workers shall be secured within the Union”. This right given to workers in the EU “entail[s] the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment”. Because the working conditions in the different Member States are not only governed by Member States’ laws or regulations, but sometimes by agreements and other acts concluded or adopted by private persons, the rights contained in the freedom of movement of the workers are enforceable both against the Member States and the individuals. The enforcement of this provision has led the courts to strike down any measures which restrain workers in their ability to enjoy their right of free movement in the internal market; this includes any discrimination on grounds of nationality, or any measure likely liable to hamper or to render less attractive the exercise of this freedom.

The European Court of Justice (“ECJ”) had the opportunity several times to apply Article 45 in cases where companies agreed not to hire each other’s employees, or where a private regulation created a restraint in the labor market. In the *Walrave* case, the ECJ held that the rule on non-discrimination applied to the rules of the *Union Cycliste Internationale* (the world governing body for sports cycling), relating to medium-distance world cycling championships

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<sup>96</sup> Section 75f HGB provides that “ [i]n the case of an agreement by which a principal committed a trade assistant who is or has been in the service at this one other principal to not or only under certain conditions, the resignation shall be free both parts. Under the agreement, neither complaint nor Defense takes place.” (translation provided by Global-Regulation on <https://www.global-regulation.com/>).

<sup>97</sup> Judgment of the I. Civil Senate of 30.4.2014 - I ZR 245/12, available at <http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&Datum=Aktuell&Sort=12288&nr=68900&pos=0&anz=531>.

behind motorcycles, according to which the pacemaker must be of the same nationality as the stayer<sup>98</sup>.

In the *Angonese*<sup>99</sup> case, the plaintiff Italian citizen was denied participation in recruitment organized by a private banking company because he did not fulfil the requirement to obtain a certificate of bilingualism (in Italian and German) issued only in one particular province of a Member State, although he proved he was perfectly bilingual. The ECJ ruled that Article 45 TFEU precluded such requirement, because it was a disproportionate restraint of the plaintiff's freedom of movement in relation to the aim to assess one applicant's knowledge.

All these cases do not involve collusion between employers. Still, it enforces EU law against restraints on the labor market for the purpose of the protection of the fundamental freedoms in the internal market whereas in the U.S. these cases would probably have been treated under antitrust laws.

#### **4. RELEVANCE AND EFFICIENCY OF THE ANTITRUST ENFORCEMENT STRATEGY**

The DOJ antitrust enforcement against no-poaching agreements draws a strategy of deterring the employers from engaging in these practices. This strategy proved effective and the tide of no-poaching agreements is indeed on the way to turning. However, this strategy might not necessarily address entirely the concerns that triggered the attention on no-poaching agreements in the first place. Moreover, the zealous antitrust enforcement against no-poaching agreements should not overshadow related issues that could undermine, in the long-term, the enforcers' efforts.

##### **4.1. Is Antitrust Well Equipped to Answer the Issue of Populism?**

The shift of antitrust enforcement against no-poaching agreements in the United States, from civil action towards criminal action, as far as it has been virtual so far, express nonetheless a deeper concern among the U.S. authorities in the flows of populism<sup>100</sup>.

Concerns regarding the restraints on labor need to be understood within the context of rising populism, which can be observed in most of our societies. Antitrust is not unfamiliar with populism concerns; antitrust was born and developed to address these concerns more than a

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<sup>98</sup> CJEC, December 12, 1974, 36-74, *Walrave*, para. 34.

<sup>99</sup> CJEC, June 6, 2000, C-281/98, *Angonese*.

<sup>100</sup> For a thorough definition of the concept of 'Populism' nowadays, *See* C. Mudde, "How populism became the concept that defines our age", *The Guardian*, 22 November, 2018.

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century ago. This is totally legitimate today for antitrust to be an essential tool against populism. In this regard, the strong antitrust enforcement policy promoted by American enforcers is more than welcome. Notwithstanding our skepticism about the implementation of this strategy<sup>101</sup>, the adverse effect that no-poaching agreements have on competition, and, in addition, the particular prejudice it represents to the workers, are undeniable. The antitrust enforcement is right not to ignore these problems. Some even regret that antitrust enforcement is not stronger. A weak antitrust enforcement against no-poaching agreements is dangerous, not only to the workers, but also to antitrust itself: populism tends to jeopardize antitrust policies; the more populism has room to grow, the less antitrust will be supported, to the detriment of the welfare of the consumers and the workers.

Strong antitrust enforcement, however, cannot be the solution to the whole problem. Professor Shapiro<sup>102</sup> thus acknowledged that in order to “protect and preserve this mission [a strong antitrust enforcement policy in answer to populism], it is important to recognize that antitrust cannot be expected to solve the larger political and social problems facing the United States today. In particular, while antitrust enforcement does tend to reduce income inequality, antitrust cannot and should not be the primary means of addressing income inequality; tax policies and employment policies need to play that role”<sup>103</sup>.

The view that antitrust enforcement is not the only answer to compensate the victims of the “rigged economy” echoed the analysis of Frédéric Jenny, Chairman of OECD Competition Committee, providing that “competition authorities have held the view that there are other policy instruments than competition law to ensure that the losers in the competitive game are compensated”<sup>104</sup>. He further said that “[r]edistribution, even when it works, is like putting a Band-Aid on a wound, but it’s not preventing the wound in the first place”.

The European example shows that remedies can be found in many aspects of our legal system, including labor regulations, commercial and contractual laws, etc. For instance, labor regulations in the United States could be a path. The unions of workers could outweigh the effects workers can feel from the restraints in the labor market.

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<sup>101</sup> See, *infra* Part II.C.

<sup>102</sup> Transamerica Professor of Business Strategy at the Haas School of Business at the University of California at Berkeley.

<sup>103</sup> See C. Shapiro, “Antitrust in a Time of Populism”, *supra* note 21, p. 29.

<sup>104</sup> F. Jenny, Chairman of OECD Competition Committee, Interview by K. Katona, *The Antitrust Source*, [www.antitrustsource.com](http://www.antitrustsource.com), June 2018.

In the research for more remedies outside those provided by the antitrust laws, the antitrust enforcement should also be framed. The criminal enforcement promised and promoted by the DOJ is, even if not implemented yet, debatable. In a study on rational incentives and criminal justice reform<sup>105</sup>, Professor Keith Hylton<sup>106</sup> underlined that in the area of price-fixing, the enforcer discretion and the high offender stakes<sup>107</sup> tend to create instances of unequal treatment by enforcers of similar cases. As an example, Professor Hylton pointed out the different treatment between foreign firms, mostly from Asia, that have been pursued criminally for their cartel activities, and domestic Silicon Valley firms that received civil treatment for their participation in no-poaching agreements, even though the DOJ considered these practices as *per se* illegal. If a difference of treatment is perceived, this would lead “to suggestions that antitrust enforcement is either discriminatory or deliberately structured in a manner that has had a discriminatory impact”<sup>108</sup>. In sum, the criminal enforcement could create more new problems than viable solutions to the matter of populism.

That is why Professor Hylton advocates “that in the area of price fixing, the role of criminal law enforcers should be more limited than it is today”<sup>109</sup>. Although this recommendation applies to all price-fixing activities beyond horizontal restraints in the labor market, it is specifically significant within the context of the DOJ’s enforcement strategy choosing criminal law as the main tool against no-poaching agreements. Instead, Professor Hylton suggests that the “[a]ntitrust enforcement should fall under the tort regime, not the criminal justice system”<sup>110</sup>. This echoes the different theories that are implemented in Europe to fight these agreements.

Notwithstanding the lack of a “special functional role” for criminal law, agencies remain at the forefront of the fight in detecting, investigating, and sentencing these cartels under civil law. But “the remaining work should be left to private class action attorneys”<sup>111</sup>.

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<sup>105</sup> K. N. Hylton, “Whom Should We Punish, And How? Rational Incentives And Criminal Justice Reform”, *William & Mary Law Review*, 2018, vol. 59, p. 2513.

<sup>106</sup> William Fairfield Warren Distinguished Professor of Boston University and Professor of Law at Boston University School of Law.

<sup>107</sup> It is suggested that high offender companies, especially in the technology sector, are able to implement an influential funding and lobbying force directed to deter the enforcer from bringing criminal charges.

<sup>108</sup> *Ibid.* at p. 2570.

<sup>109</sup> *Ibid.* at p. 2553.

<sup>110</sup> *Ibid.* at p. 2549.

<sup>111</sup> *Ibid.* at p. 2553.

#### **4.2. Rising Issues in the Enforcement Against No-Poaching Agreements**

The harm done to the labor market over the past years not only alerted antitrust enforcers; legislators recently joined the fight and called for a statutory solution. In reaction to the news about the fast-food franchisors-franchisees deal locking their employees to one store, the Democratic Senators Cory Booker (N.J.) and Elizabeth Warren (Mass.) introduced in March 2018 The End Employer Collusion Act, a bill targeting the no-poaching agreements to clarify their illegality and giving workers the ability to sue and the right to claim damages. The initiative was quickly followed in the House of Representatives in April 2018 by representative Keith Ellison (D.-MN,) who introduced a similar bill to the End Employer Collusion Act. In addition, representative Joseph Crowley (D.-NY) introduced the Workforce Mobility Act, a bill that would establish a presumption that non-compete agreements contained in employment contracts are illegal.

Basically, the bills intend to support the current actions taken by the antitrust enforcers against no-poaching agreements; the bills seek to extend the scope of antitrust laws.

With the End Employer Collusion Act, legislators want to prohibit restrictive employment agreements, defined as any agreement between two or more employers, including through a franchise agreement or a contractor-subcontractor agreement which prohibits or restricts one employer from soliciting or hiring another employer's employees or former employees. In other words, the bill exactly targets the agreements that the DOJ and the FTC already covered in their guidance. Then, what is the interest to pass a bill to prohibit agreements which are already deemed unlawful? One of the possible answers, and also the most logical, is that the bill would clarify that the rule of reason is no longer the standard to be applied to no-poaching agreements, which could be seen as criticism of the current antitrust development. The bill, if passed, will have a real impact on the enforcement policy. This legislation would likely preempt the application of the Sherman Act, and, as a result, the rule of reason by which courts have analyzed such restraints. Thus, the legislation might provide the antitrust enforcers with a clear legal basis to treat the no-poaching agreements under the *per se* rule.

As to the Workforce Mobility Act, Section 2 provides that a "covenant not to compete contained in an employment contract made between an employer and an employee is anticompetitive and violates the antitrust laws unless the employer establishes by a preponderance of the evidence that the covenant does not have an anticompetitive effect or that the pro-competitive effects outweigh the anticompetitive harm." In other words, the bill wants

to establish a statutory presumption of illegality for the non-compete agreements, not only between two employers, but between an employer and an employee. The shift here will be even more significant, since such non-compete clauses have been accepted in years of precedents and are accepted in most of the legal system. This Act would lead to prohibit some vertical restraints *per se*, while the precedents all indicate that the *per se* rule is inapplicable for vertical restraints.

In addition to the statutory answer issue, the enforcement against no-poaching agreements is likely to impact Trade Secret laws. Many justifications provided for the no-poaching and no-hiring agreements, especially from the High-Tech companies, were the protection of trade secrets.

As part of the rule of reason analysis, the court will ordinarily take into account this justification to assess the reasonableness of a restriction. The protection of trade secrets has obvious pro-competitive effects. Unlike the intellectual property rights, trade secrets do not receive legal protection and are only protected by the secret that must remain confined within the walls of the company. The trade secret is necessarily exposed to the employees, especially the skilled ones, who are dealing with the process, product or technic that is secret. Because the employee is free to quit his job, companies tend to protect their secrets from their competitors by any means. No-poaching agreements appear as one solution for this matter. Companies have mutual interests in protecting their own secrets and find this method more protective than a contractual obligation between the employee and the employer, that usually will not be enforceable against the competitor who wants to employ an employee. The protection of trade secrets is a protection of their innovation.

On the other hand, some assert that in some industries, “allowing employees to move freely among companies can dramatically increase the pace of innovation”. Indeed, “[k]nowledge spillover” prevents innovative companies from repeating mistakes previously made by their competitors and leads all the players of one industry to contribute to the innovation, instead of insulating innovation between the hands of one. In other words, “[k]nowing that your rival will soon hire your best employees, and learn all your secrets, encourages firms to avoid resting on their laurels”<sup>112</sup>.

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<sup>112</sup> C. Duhigg, “STOP, THIEF”, *New Yorker*, 0028792X, 10/22/2018, vol. 94, Issue 33.

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In order to offer companies a legal means to protect their trade secrets efficiently, the Congress passed in 2016 the Defend Trade Secrets Act (“DTSA”)<sup>113</sup>. The DTSA provides companies holding a trade secret with a federal cause of action over trade-secret misappropriation and can lead to block employees from working for competitors if they take trade secrets.

This legislation gives the High-Tech companies recently involved in the HTEAL an incredible opportunity to legally block their employees from working for their competitors. The DTSA is a powerful deterrent for the employees who would try to challenge their ex-employer authority. This concern is supported by the upsurge in the number of federal trade-secret suits since the DTSA was enacted<sup>114</sup>.

Finally, another issue arose recently related to the enforcement of arbitration clauses in employment contracts. Indeed, in *Epic Systems Corp. v. Lewis, Mitsubishi*<sup>115</sup>, the U.S. Supreme Court ruled that employees and employers are allowed to agree that any disputes between them will be resolved through one-on-one arbitration, even when it prevents employees from bringing their claims in class or collective actions. This ruling “could be a fatal blow to the no-poach class actions”<sup>116</sup>.

## CONCLUSION

Antitrust enforcement against no-poaching agreements is necessary. Naked no-poaching agreements are harmful to workers, and antitrust laws are well suited to fight them. The recent agitation around this matter denotes a deeper concern. In the renewed interest of populism today, more vigorous antitrust enforcement has been proposed as one of the best answers. However, it seems that *one size does not fit all*. Antitrust enforcers must learn the limits of what antitrust can provide. Moreover, the recent shift in antitrust policy does not necessarily provide good answers. Zealous antitrust enforcement should not shadow other issues that could jeopardize the efforts of enforcers. That is, I think, the real challenge for American antitrust enforcement on no-poaching agreements.

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<sup>113</sup> S.1890 - Defend Trade Secrets Act of 2016.

<sup>114</sup> See C. Duhigg, “STOP, THIEF”, supra note 112: “[M]ore than eleven hundred [federal trade secret suits] were filed last year, most of them by large companies against employees who went to work for other American firms. There have been more cases in California than in any other state”.

<sup>115</sup> *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 200 L. Ed. 2d 889 (2018).

<sup>116</sup> D. Hoffer, E. Prewitt, “To hire or not to hire: U.S. cartel enforcement targeting employment practices”, *Conurrences*, 2018, issue 3, p. 78-85.