Competition in Labour Markets - New Focus Area for Competition Enforcement in Sweden and the EU

Recently, we have seen a shift in the approach to labour markets in competition law. The labour market has long been shielded from competition law. However, the Swedish Competition Authority has signalled that it will prioritise suspected antitrust infringements in the labour market, while the European Commission has begun investigating agreements that may restrict mobility in the labour market. In this article, we clarify the framework under Swedish labour law and what developments are taking place in competition law.

Under Swedish labour law, there is a general duty of loyalty in employment relationships, which for employees means, among other things, that they are not allowed to engage in any activity that competes with the employer in a way that may cause damage to the employer or that may otherwise impede the employer's operations. In order to limit competition from an employee after employment, a non-competition clause may be agreed for a period after the termination of employment. However, for such a prohibition to be applicable, it must be reasonable, otherwise it may be declared invalid by a court under section 38 of the Contracts Act. The reasonableness of a non-competition clause is assessed with consideration of the extent of the restriction of competition and on the basis of the 1969 and 2015 agreements on non-competition clauses between the Confederation of Swedish Enterprise and PTK (the council for negotiation and cooperation).

Employers who wish to prevent their former employees from actively recruiting old colleagues can also agree on a ban on recruiting employees, also known as a recruitment ban. The reasonableness of such bans can be tested against both sections 36 and 38 of the Contracts Act. Recruitment bans have, in comparison with customary non-competition clauses, been considered a minor restriction on employees' ability to conduct business. However, in its case law, the Labour Court has emphasised that recruitment bans are likely to create significant lock-in effects and discourage mobility in the labour market. In the application of section 38 of the Contracts Act, it has therefore been possible to consider the general interest of competition and mobility in markets and the Labour Court has consequently taken a restrictive view of the permissibility of such clauses. In this assessment the court has considered, inter alia, whether it is limited to employees with whom the person has worked, whether it covers only active recruitment and how it is limited in time after employment. This assessment refers to restrictive clauses in the employment relationship - but what about recruitment bans between undertakings?

The labour market has long been shielded from competition law. However, anticompetitive agreements in labour markets have recently become a key focus area for several competition authorities in Europe. In November 2023, the European Commission (the "**Commission**") conducted dawn raids on food delivery companies Delivery Hero and Glovo over suspected no-poaching agreements, i.e. agreements between undertakings not to recruit each other's employees. At the same time, there are at least nine ongoing investigations into suspected labour market infringements in the EU, the UK and Switzerland, most of which concern suspected no-poaching agreements.

In addition, the Nordic competition authorities published a joint report in January 2024 highlighting how agreements between employers can restrict competition in the labour market. According to the report, coordination between employers on the setting of wages can restrict competition in the labour market by lowering workers' wages and degrading their employment conditions. In addition, no-poaching agreements may also restrict competition by reducing labour mobility. According to the report, a reduction in labour mobility can in turn hamper innovation, reduce the quality of goods and services and reduce productivity in the market.

At the same time, the report found that potentially anticompetitive effects of agreements between employers could be counteracted by the high level of unionisation in the Nordic region. For instance, in Sweden 88% of employees were covered by collective bargaining agreements in 2019. The fact that wages and other working conditions are typically set within the framework of collective bargaining agreements may reduce the scope for employers to agree, for example, not to raise their employees' wages. In this context, it is worth noting that the Swedish Competition Act does not apply to collective bargaining agreements, while anticompetitive agreements between employers may constitute infringements.

Furthermore, in May 2024 the Commission published a competition policy brief on antitrust in labour markets. In the Commission's view, wage-fixing and no-poaching agreements can be classified as restrictions by object, regardless of whether they are sector-wide, only involve a few parties, or if they bind only one party or are reciprocal. According to the Commission, such agreements may qualify as ancillary restraints, e.g. in the case of a research joint venture where the parties may argue that they would only assign key personnel to the joint venture if they were sure that the other party would not poach the best employees. However, the Commission emphasises that the Courts have consistently interpreted the conditions for ancillary restraints strictly, and that most wage-fixing and no-poaching agreements are therefore unlikely to fulfil the conditions. The Commission also argued that such agreements are unlikely to be exempt under Article 101 (3) TFEU, as it would be difficult to find pro-competitive effects of such agreements.

As far as we know, the Swedish Competition Authority (the "**SCA**") has no ongoing investigations of suspected competition infringements in the labour market. However, the SCA has signalled that the labour market will be a key focus area in the future, not least following the joint Nordic report. It may therefore be appropriate for companies to review their employment and consultancy agreements, or other agreements that may contain provisions that restrict employees' ability to freely seek employment or that coordinate wage-levels, to ensure that these agreements do not infringe competition law.