

Competition Law and Labor Markets

New focus in the EU and some lessons from Turkey

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Grow | Protect | Operate | Finance

INTRODUCTION

What's the deal?

Labor markets in the focus

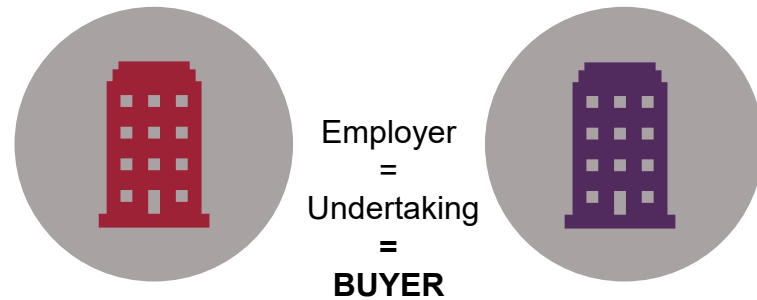
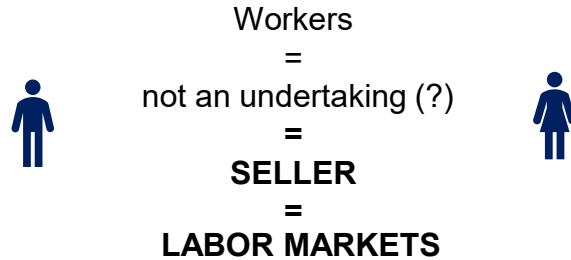
- Historically **low level of enforcement** in labor markets: *“competition law’s long neglected corner”* – M. Snoep, 2022
- **Recent enforcement activity** :
 - US lead the way: 2016 Guidelines published by the DOJ
 - Europe: multiple decisions in several jurisdictions across Europe
- **In 2022, the head of the European Commission’s cartel directorate** confirmed no-poaching agreements are in their radar.
- **New draft Horizontal Guidelines** notes that agreement fixing wages is a competition restriction by object.

“... some buyer cartels do have a very direct effect on individuals, as well as on competition, when companies collude to fix the wages they pay; or when they use so-called ‘no-poach agreements’ as an indirect way to keep wages down, restricting talent from moving where it serves the economy best.”

Margarete Vestager (10/2021)

Overview: labor markets

Labor markets



PRODUCT / SERVICE MARKET



- Firms can exercise market power (individually or as part of a cartel) in both the **buying and selling side of the market**. Firms buy labor as an input in the buying market.
- Labor markets characterized by certain frictions contributing to **mismatch between the worker and the employer**.
- Studies find:
 - **low level of labor supply elasticity** = the sensitivity with which workers react to changes in wages
 - **demand-side concentration** in certain labor markets (OECD, 2019)
- Challenging aspect - **market definition**:
 - Upstream labor input market
 - Downstream product/service market(s) that employers are active/competing

When is competition law relevant?

❖ Agreement between employers - collusion

- No-poaching agreement, wage-fixing, information exchange, collusive poaching

❖ Agreement between workers

- For example: wage cartel between workers or collective bargaining
- Only applicable if workers are „undertakings“ (genuinely self-employed)

❖ Mergers leading to employer monopsony

- Addressing monopsony power concerns on the demand side of labor markets in a merger

❖ Abuse of dominance by an employer

- For example: predatory hiring, adoption of non-compete clauses, unfair labor practices?



CASE PRACTICE IN THE EU

1. No-poaching agreements

In practice

Similar to a market allocation agreement = share of labor input + indirect way of fixing the purchase price of labor

Mostly sanctioned by NCAs as part of a wider cartel:

- **France, 2017:** The NCA sanctioned companies active in the PVC and linoleum floor coverings for engaging in a price-fixing agreement and a no-poaching agreement.

Few stand-alone cases (or cases with wage-fixing) are also available:

- **Portugal, 2022:** The NCA **sanctioned** sports companies for participating into a non-poach agreement preventing recruitment of players who unilaterally terminated their employment contract.
- **Romania, 2022:** The NCA launched an investigation against companies active in the motor vehicle production for no-poach agreement allegations + imposition of minimum level of wage rights.
- **Netherlands, 2010:** The national court **found infringement** in the agreement between hospitals to not hire each others' employees with a wage-fixing clause.

Might be addressed together with abuse of dominance:

- ✓ **Croatia, 2014:** The NCA accepted commitments from a company active in specialized IT support for having a no-hire clause in its contracts in the context of abuse of dominant position provisions.

Permissible: if it is directly related and necessary to the implementation of a concentration or maintenance of the viability and competitiveness of the divestment business.

2. Collusive poaching

An agreement among competitors to **lure away employees of a third competitor**.

Pre-Insulated Pipe Cartel, COMP IV/ 35.691:

- Producers of pre-insulated pipes entered into a cartel agreement aiming at market sharing and price fixing.
- The cartel also took measures to hinder the commercial activities of a non-cartel member competitor.
- One of these measures was to offer exceptional wages and conditions and hire the key employees of the non-cartel member.

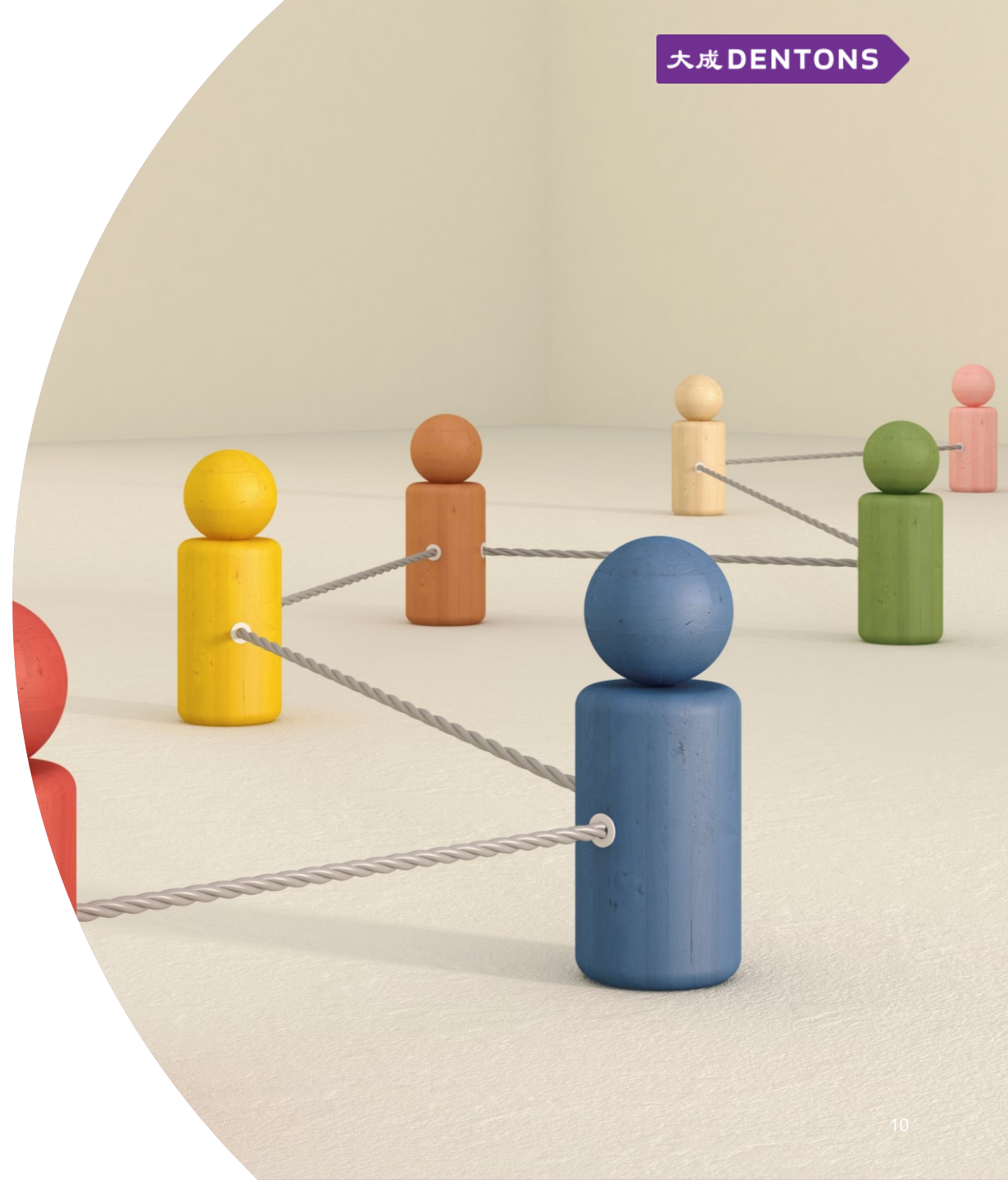


3. Wage-fixing agreements

- The agreement can relate to **any aspect of compensation**: wages, overtime, bonuses, benefits...
- Buyer cartel = **restriction by object** (Draft HBER Guidelines 2022)
- It leads to **harmonization** of the price paid for **labor input**. The symmetry of costs reduces **strategic uncertainty**, may promote **price coordination** in downstream markets.
- Treated similarly to price-fixing agreements.
- Examples:
 - **Greece, 2022**: The NCA imposed remedies to an association of undertakings for setting minimum remuneration rates in the market for the installation and maintenance of elevators.
 - **Romania, 2022**: The NCA launched an investigation against companies active in the motor vehicle production for no-poach agreement + imposition of minimum level of wage rights.
 - **Netherlands, 2021**: The NCA closed its investigation against the supermarkets for an agreement to limit the pay increase to their employees.
 - **Poland, 2021**: The NCA initiated an investigation against basketball clubs, on grounds that the clubs agreed on the terms of terminating the players' contracts to withhold the players' remunerations.

4. Information Exchange

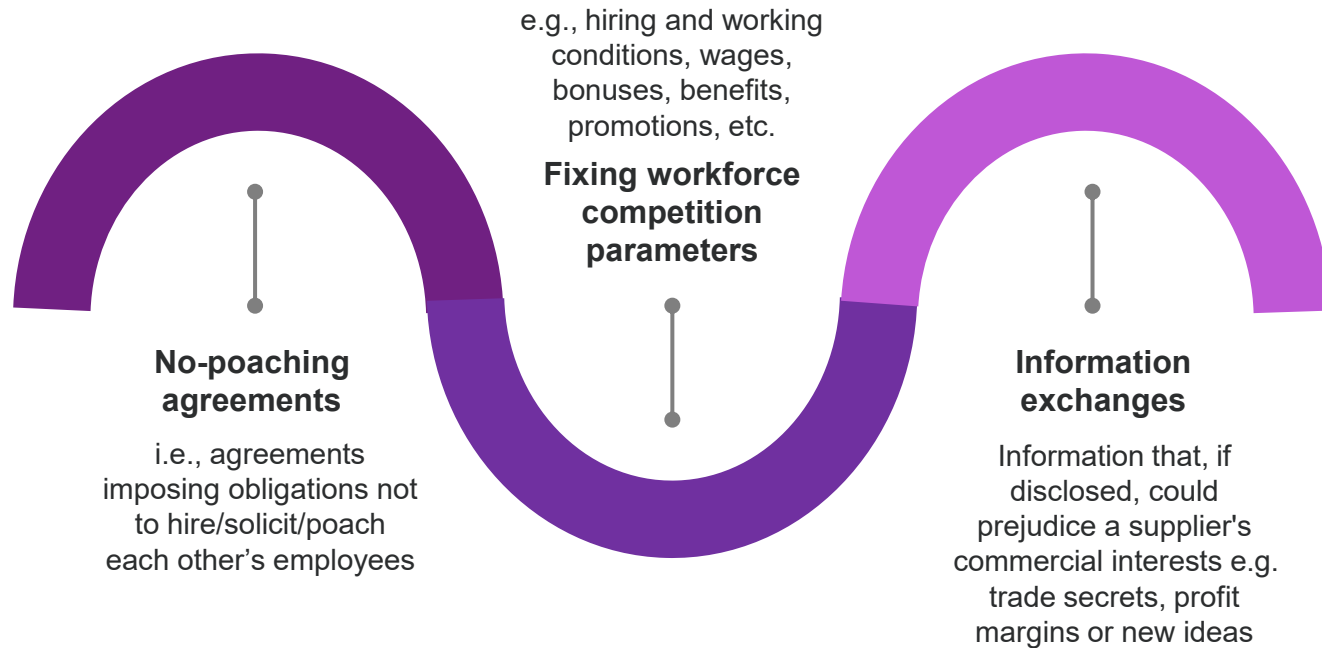
- Exchange of commercially sensitive information may lead to a buyer cartel:
 - Wages, remuneration, commission, salaries, other forms of compensation, terms of payment, insurance premiums, holiday surcharges...
- No need to find a direct link between the exchanged information and the consumer prices for there to be anti-competitive object (T-Mobile, ECJ, Case C-8/08)
- It depends on the age, frequency, level of aggregation, market characteristics and form in which the information is shared and disseminated
- Example:
 - **Germany, 2016:** The exchange of information about inter alia rates for freelance personnel, public holiday surcharges, insurance premiums is unlawful.



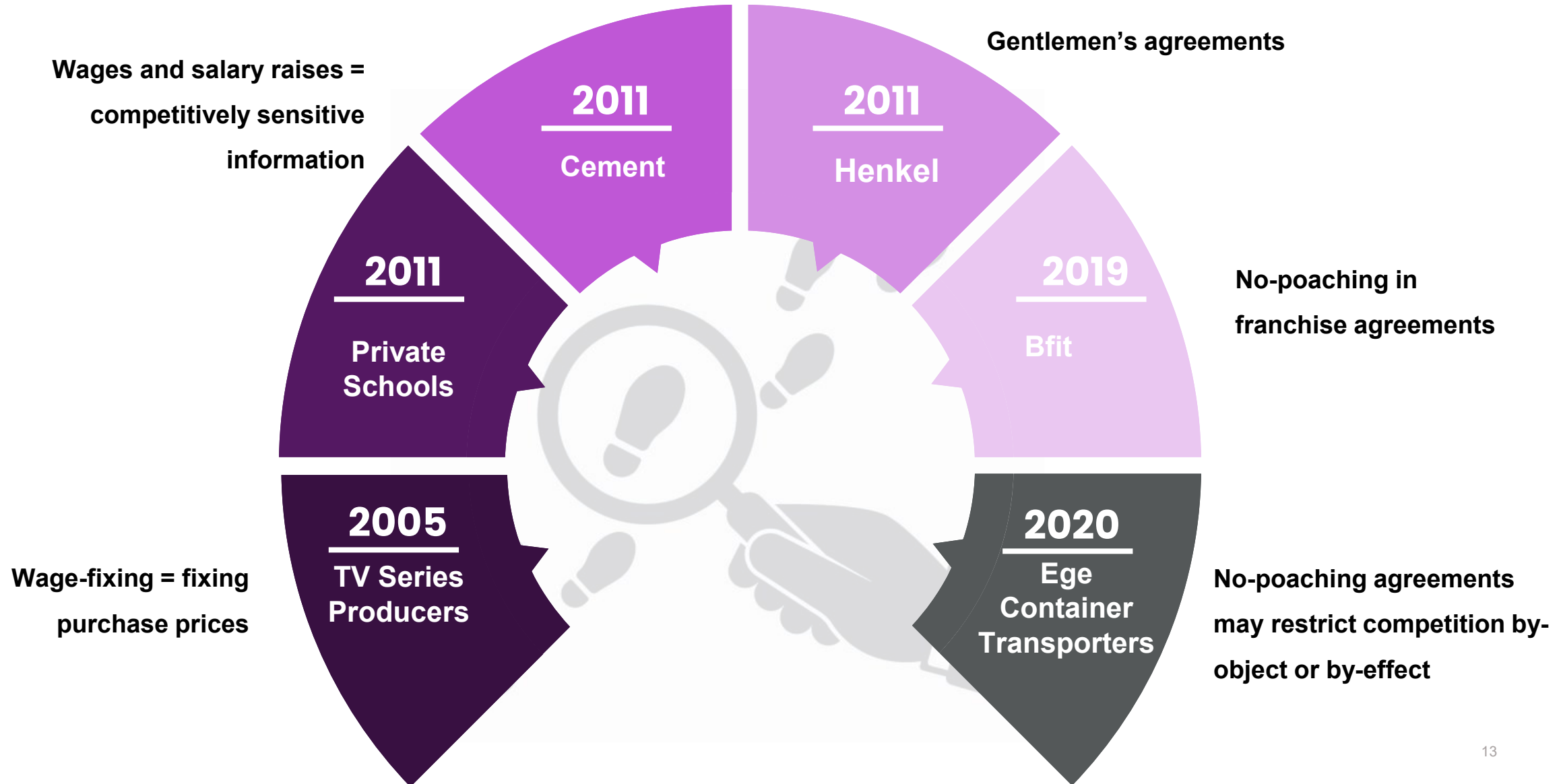
LESSONS FROM TURKEY

Overview – Agreements between employers

Turkish Competition Authority turned its attention to...



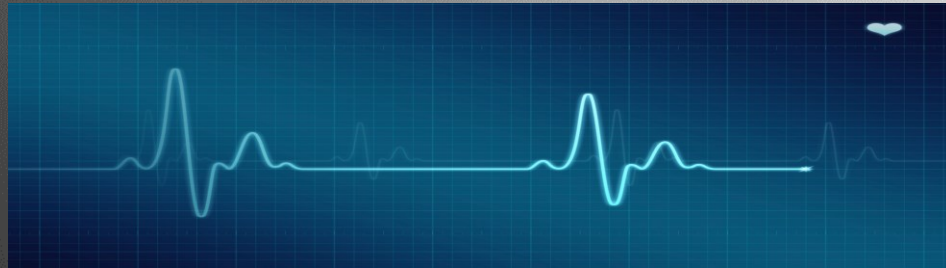
TCA precedents in labor market



Hot topic – no-poaching agreements



Hot topic – no-poaching agreements



Private Hospitals investigation (Nov '20)

- No-poaching agreement between hospitals for doctors
- Administrative fines on 18 undertakings and 1 association of undertakings
- Awaiting reasoned Board decision



Hot topic – no-poaching agreements



32 Undertaking investigation (April'21)

- Some of the major e-marketplaces in Turkey are among the investigated parties
- TCA argues that **undertakings wishing the recruit the same workforce are competitors in the labor market** irrespective of their position in the outcome market
- Ongoing yet settlements strengthen TCA's strict tendencies



Hot topic – no-poaching agreements



Telecoms investigation (May'22)

- Spin-off investigation focused on IT and telecommunications sector
- Examination of alleged non-poaching agreements between competitors and vertically related undertakings in the sector
- Currently awaiting the investigation report



Hot topic – no-poaching agreements



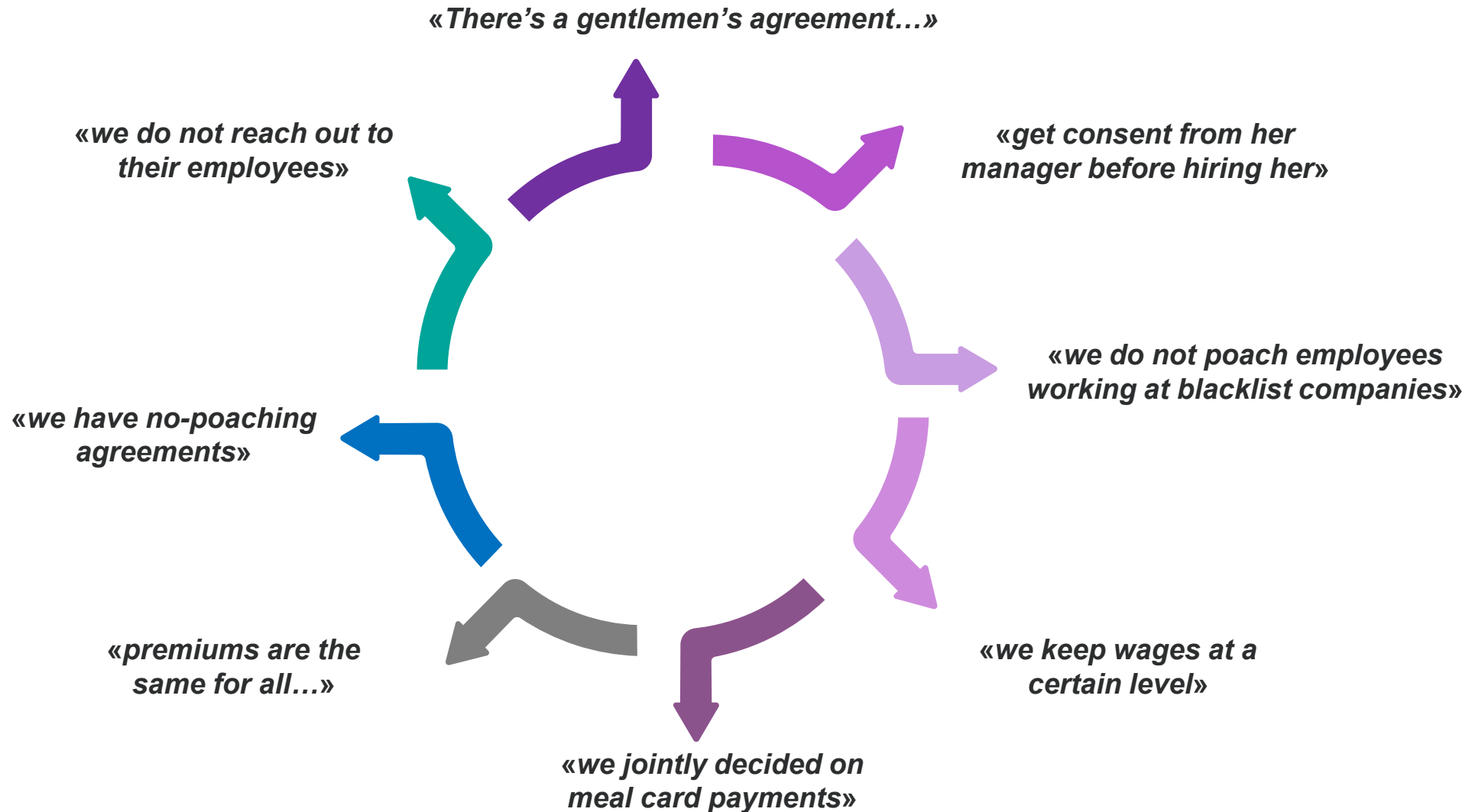
HR Guidelines (Ongoing)

- TCA seeks to publish a guideline for employers to clear uncertainties concerning labour markets
- Digitalization and changes in business models weaken the bargaining power of the workforce
- Prohibiting the mobility of the workforce between undertakings decreases innovation
- Trend for underpayment and flight of human capital increases



What got under TCA's radar

Keywords from seized documents and correspondences



Takeaways from TCA's case law



DOs

- Provide additional explanations when reporting on recruitment procedures (e.g. reasons for not accepting a particular candidate), if needed.
- Read twice before sending any communication to third parties to detect any misunderstandable phrases.
- Attend internal antitrust compliance programs.
- Develop company HR policy on the use of language in recruitment procedures.
- Consult independent third party market intelligence agencies for benchmark studies.
- Avoid and decline participating in Google Groups, WhatsApp Groups where company representatives discuss commercially sensitive HR-related issues.
- Inform the legal team if you feel like a communication carries risk in terms of compliance.

DON'Ts

- Discuss recruitment terms/conditions, especially future projections, with other companies.
- Share information on current and prospective salaries, wages, and fringe benefits.
- Attend sector gatherings where commercially sensitive issues can be discussed.
- Keep a blacklist of candidate employees based on their past employment.
- Hinder employee transfers in any way.
- Make courtesy calls to past employers of candidates or ask for their approval for the transfer.
- Use ambiguous expressions in your correspondences such as:
 - "Gentlemen's agreement..."
 - "We do not interfere with their employees..."
 - "We have non-solicitation..."
 - "The bonuses are the same for all of us..."
 - "We decided on meal vouchers together..."
 - "We keep salaries at a certain level..."
 - "We don't recruit from blacklisted companies..."
 - "Get permission from their manager before hiring..."

Any questions?



Thank you



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