Joint Nordic report
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COMPETITION AND LABOUR MARKETS


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Competition and Labour markets

Joint Nordic report 2024

Executive Summary

Anticompetitive agreements that affect labour markets have gained global attention from competition authorities in recent years.

This report explains how anticompetitive agreements between firms that affect labour markets may present challenges in a Nordic context. Specifically, the report highlights the following aspects:

- Agreements between competitors to fix wages or not to hire each other's employees may constitute serious infringements of competition law.
- Such agreements could lead to less efficient allocation of resources, be detrimental to consumers and generally have negative effects on employees' working conditions.
- Evidence indicates it is not uncommon for companies in a range of industries to enter into agreements not to hire each other's employees, which suggests that there could be scope for more enforcement of competition law in labour markets in the Nordic region.
- A more active enforcement of competition law in labour markets is consistent with the approach taken by other European competition authorities. Recent decisions by such authorities show that anticompetitive agreements in labour markets may emerge across different sectors and industries, that wage-fixing and no-poach agreements are sanctioned with fines, and that such agreements may co-exist with other infringements of competition law, such as price fixing in selling markets.
- Although agreements between competitors to fix wages or not to hire each other's workers may constitute infringements of competition law, the competition acts in the Nordic countries also contain exemptions for agreements or arrangements related to collective bargaining agreements negotiated by organised social partners (trade unions and employers' organisations).
- Moreover, a relatively high proportion of employees and employers in the Nordic countries are members of trade unions and employers' organisations, and wages and working conditions are often regulated in collective bargaining agreements. These factors may mitigate the negative effects on employees from agreements between firms that affect labour markets.
- While there are alternative motivations behind such agreements, such as reducing labour costs, protecting investment in training or preserving trade secrets and proprietary information, the harmful consequences of no-poach and wage-fixing may remain the same.

1 Introduction

In recent years, competition authorities worldwide have looked at the question of anticompetitive agreements in labour markets.[1] The concerns raised relate primarily to agreements between undertakings that impact on employees through lower wages or by hindering their ability to switch workplace. Such agreements can also have other far-reaching implications, affecting not only employees, but also consumers and the efficient allocation of resources.[2]

However, labour markets in the Nordic countries diverge significantly from those in other European countries. A relatively high proportion of employees and employers in the Nordic countries are members of trade unions or employers' organisations respectively.[3] In addition, wage formation in Denmark, Finland, Norway and Sweden currently follows a negotiation model where trade unions in export-oriented sectors negotiate their wage growth first, and subsequently the overall wage growth in other sectors tends to be similar or lower than the growth obtained by the export-oriented industry.

Against this backdrop, this report explains how anticompetitive agreements between firms that affect labour markets may present challenges in the Nordic context.[4] The report specifically focuses on the following agreements between firms that may prima facie violate competition law:[5]

- No-poach agreements.
- Wage-fixing agreements.

The report is structured as follows: Chapter 2 outlines the most relevant forms of anticompetitive horizontal agreements that can affect labour markets. Drawing on economic theory, this chapter presents an overview of how these agreements can adversely impact employees, consumers, and the efficient allocation of resources. Furthermore, it sets out the legal framework and various decisions and judgments regarding horizontal agreements affecting labour markets.

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[1] See e.g. Competition and Markets Authority (CMA), 'Guidance Employers advice on how to avoid anti-competitive behaviour' (*gov.uk*, 9 February 2023) < Employers advice on how to avoid anti-competitive behaviour - GOV.UK (www.gov.uk) >; The Portuguese Competition Authority (Autoridade da Concorrência), 'Labour Market agreements and competition policy' (Issues Paper, 2021) < Issues Paper_Labour Market Agreements and Competition Policy.pdf (concorrencia.pt) >; OECD, 'Competition in Labour Markets' (2020) < 546723-competition-in-labour-markets-2020.pdf (oecd.org) >; From the US, se e.g. U.S. Department of the Treasury, 'The State of Labor Market Competition' (7 March 2022) < THE STATE OF LABOR MARKET COMPETITION (treasury.gov) >; and A proposed rule by the Federal Trade Commission on 'Non-Compete Clause Rule' (Federal Register, 88 FR 3482, 19 January 2023) < Federal Register :: Non-Compete Clause Rule >. Several jurisdictions have also taken enforcement actions against anticompetitive agreements in labour markets, see overview in Section 4.3.

[2] See e.g. The Portuguese Competition Authority, 'Labour Market agreements and competition policy' (n 1), page 14-15.

[3] See overview in Figure 2.

[4] The competition acts in the Nordic countries contain exemptions for agreements or arrangements related to collective bargaining agreements negotiated by organised social partners (trade unions and employers' associations). This report deals with agreements not covered by this exemption.

[5] The European Commission and national competition authorities in Europe have in recent years also dealt with agreements concerning solo self-employed persons, see for example the press release from the European Commission, 'Antitrust: Commission invites comments on draft Guidelines about collective agreements regarding the working conditions of solo self-employed people' (europa.eu, 9 December 2021) < Guidelines collective agreements solo self-employed people (europa.eu) >. This report does not consider the issue of solo-self employed persons.

Chapter 3 describes how the labour markets in the Nordic countries work, emphasizing factors that are relevant for the application of competition law in these markets. Chapter 4 gives an overview of relevant antitrust cases affecting the labour markets in the Nordic countries, while Chapter 5 discusses the scope for further application of competition law in these markets.

2 Anticompetitive agreements in labour markets

2.1 Introduction

This report examines horizontal agreements between firms that may affect labour markets. In particular, it considers the phenomenon of **no-poach agreements** and **wage-fixing agreements**. Wage-fixing agreements entail agreements between companies to establish and control employee wages. No-poach agreements on the other hand can take different forms, ranging from agreements where undertakings refrain from actively recruiting each other's employees to prohibitions on hiring employees from other firms altogether. From an antitrust perspective, no-poach agreements could be considered the mirror image of customer allocation or market sharing cartels between suppliers.[6]

By exploring these specific types of agreements, this section sheds light on their implications for competition and labour market dynamics. It explains why agreements between firms to fix wages or not to hire each other's employees may reinforce market power and restrict competition, and provides examples of how such agreements can increase buyer power and act as a countervailing factor.

2.2 Theories of harm – effects in labour markets and beyond

2.2.1 Wage fixing, no-poaching and monopsony power

The main goal of competition policy is to promote efficient resource allocation in society through effective competition for the benefit of undertakings and consumers. Competition between efficient firms prevents the escalation of market concentration and the exploitation of market power in **selling markets**, which could result in elevated prices, limited consumer choice and lower innovation.[7]

However, akin to the concerns arising from monopolisation of the sale of a particular good or service, it may also be problematic when a firm becomes the sole purchaser of an important input. This may give rise to **monopsony power**, which can manifest across all procurement markets, including the labour market.[8] The presence of monopsony power can have direct adverse effects on employees, for example by affecting:

- **Wages and working conditions**: A monopsonistic **employer** can exert significant influence over wages and working conditions, leading to lower wages for employees. Given limited alternative employment options, employees may have low bargaining power and risk being forced to accept lower wages than would be the case in a more competitive market.
- **Employment**: A monopsonistic buyer can also limit employment opportunities by lowering the quantity of labour they demand or by hiring fewer employees than would be the case in a competitive market. This may result in reduced job opportunities and higher unemployment rates in the affected industry or region.

In situations where a substantial portion of or even all potential employers within a specific industry have established a no-poach agreement, individual employees may find themselves constrained in terms of the number of potential employers they can offer their services to. As a result, their options

[6] OECD Competition Policy Roundtable Background Note, 'Purchasing Power and Buyers' Cartels' (2022) < www.oecd.org/daf/competition/purchasing-power-and-buyers-cartels-2022.pdf >.

[7] As explained in Chapter 3, labour unions enter into collective bargaining agreements on behalf of employees in many industries. Since such arrangements fix the wages of the employees, they may, at least in theory, have similar effects to a selling cartel. However, as explained in more depth in Section 2.4, collective bargaining agreements are normally exempted from competition law in the Nordic countries.

[8] See OECD 'Purchasing Power and Buyers' Cartels' (n 6).

may become limited, often restricted to only a few potential employers or, in extreme cases, solely to their current employer.

In such scenarios, the employer may possess monopsony power over its employees, thereby exerting significant control and influence over wage levels and employment conditions. This concentration of power can result in downward pressure on wages and an increased risk of unemployment for employees. An agreement between undertakings to fix wages will decrease the possibilities for employees to bargain for higher wages and better working conditions, which may in turn have the same effect as no-poach agreements on wages and employment.[9]

While conduct that gives rise to monopsony power is likely to harm the competitive process,[10] it may also harm consumers.[11]

2.2.2 Wage fixing and no-poaching – direct harm in downstream markets

In addition to giving rise to monopsony power, no-poach and wage-fixing agreements may also have more direct detrimental effects on consumers and efficient resource allocation. As regards no-poach agreements, they may:

- Limit knowledge spillovers and **harm innovation**[12]
- Reinforce the conditions to **sustain collusive behaviour**.

No-poach agreements normally hinder labour mobility, which in turn can have adverse effects on innovation, the quality of goods and services, and aggregate productivity growth.[13] Labour mobility tends to foster innovation and enhance the diversity of products and services in downstream markets, thus benefiting consumer welfare. By restricting the ability to hire employees from other firms, especially those possessing high qualifications and expertise, firms may face challenges in attracting the necessary talent pool required for innovation. As a result, firms may be compelled to rely on in-house training, which can be a time-consuming and expensive process. These implications highlight

[9] The creation of monopsony power may also be relevant in the context of merger control, though cases solely based on that theory of harm have rarely been dealt with by competition authorities. Such theories of harm have, however, received increased attention in recent years. An example is a case from the US, when Paramount decided to terminate the deal between Simon & Schuster and Penguin Random House after a federal judge ruled against Penguin Random House. The US Department of Justice sued to block the merger on grounds of 'harm to American workers, in this case authors, through consolidation among buyers'. Description of labour market concerns in merger control in Finland and Iceland can be found in Chapter 4.

[10] See Case C-6/72, *Europemballage Corporation and Continental Can Company v Commission* [1973], para 26: Provisions of EU competition law are 'not only aimed at practices which may cause damage to consumers directly, but also at those which are detrimental to them through their impact on an effective competition structure'; and Case C-209/10 *Post Danmark A/S v Konkurrencerådet* [2012], para 20; Case C-52/09 *TeliaSonera Sverige* [2011], para 24.

[11] OECD 'Purchasing Power and Buyers' Cartels' (n 6), and the economic literature cited there.

[12] See e.g. Massimo Motta and Thomas Rønde, 'Trade Secret Laws, Labour Mobility and Innovations' (2002) CEPR Discussion Papers No.3615.

[13] See e.g. US Department of the Treasury (n 1), where it is stated that "it is […] likely that restrictive employment agreements are contributing to lower levels of worker mobility" and that "[a] large economic literature provides both theoretical and empirical evidence for linking the pace of reallocation [of workers], to aggregate productivity growth"; and Guidance by the Lithuanian Competition Authority, 'Anti-competitive Agreements in Labour Markets' (2023) < https://kt.gov.lt/uploads/documents/files/Atmintin%C4%97%20ENG%20(1).pdf >.

how no-poach agreements may lead to reduced quality, limited variety of products and services, and increased costs, ultimately impacting both firms and consumers.[14]

Furthermore, no-poach agreements between competing firms have the potential to undermine competition in downstream markets by reducing the intensity of competition for labour inputs. This diminished competitive dynamic becomes more significant when the competing firms already possess market power in the downstream markets or when there are existing barriers to entry. In such circumstances, the impact of no-poach agreements on competition is particularly pronounced, especially if they contribute to creating a less competitive environment, limiting choices for both employees and consumers.

In particular, the implementation and monitoring of no-poach agreements often necessitates regular communication and interaction among competitors, creating a potential avenue for collusive behaviour in other downstream markets.[15] This close contact among firms can serve as a conduit for the transmission of broader cartel strategies, extending beyond the scope of labour markets and encompassing other aspects of competition. Consequently, no-poach agreements have the potential to contribute to a wider range of anticompetitive practices, amplifying their impact on market dynamics and consumer welfare.

Wage-fixing agreements between competitors can also yield adverse effects in downstream markets. Wage fixing entails the establishment of uniform wage levels, creating a convergence of cost structures among competitors. Such homogeneity in costs can diminish the strategic uncertainty typically associated with competitive markets, potentially fostering price coordination in the selling markets. This may be a particular concern in markets where labour costs account for a large proportion of total variable costs and the general market characteristics allow for coordination.

Moreover, wage-fixing agreements restrict labour mobility by standardising the wages that employees can be offered from different employers. This restriction stems from the elimination of the possibility for an employee to earn a higher wage by moving to a competing firm, which is one of the main reasons for employees to switch employers. Consequently, the lack of labour mobility resulting from no-poach agreements may also be observed in the context of wage-fixing agreements.

2.3 Legitimate motivations

While no-poach and wage-fixing agreements may harm competition, there may be other motivations for entering into them.

- **Protecting investment in training**: Firms invest resources in training their employees, and no-poach agreements may safeguard those investments. By restricting employee mobility, firms

[14] Recent empirical evidence, e.g. Evan Starr, J.J. Prescott & Norman Bishara, 'Noncompete Agreements in the US Labour Force', The Journal of Law and Economics 64, no. 1 (2021), 53-84, indicates that other types of agreements affecting the labour markets, such as non-compete clauses between employers and employees, may have similar detrimental effects on labour mobility. In a European context, it is important to note that Article 101 TFEU cannot be applied to non-compete clauses between employers and employees, as the article only applies to agreements between undertakings. While the use of non-compete clauses between employers and employees is regulated by employment law, it should be borne in mind that Article 102 TFEU could be applied to non-compete clauses in cases where a dominant undertaking seeks to exclude its competitors (or potential competitors) from the market by an extensive use of such clauses in its employment contracts. However, no case law exists to date where EU courts have considered non-compete clauses as an abuse of dominance.

[15] See e.g. the Issues Paper from the Portuguese Competition Authority (n 1).

retain their trained workforce and prevent competitors from free riding on their training efforts.[16]

- **Preserving trade secrets and proprietary information**: No-poach agreements help firms protect sensitive information and trade secrets. By limiting employee movement between firms, companies reduce the risk of knowledge spillovers and the possible loss of valuable intellectual property.[17]
- **Reducing labour costs**: No-poach agreements help firms maintain a stable labour force and avoid wage inflation. By limiting competition for employees, firms potentially suppress wage levels and avoid bidding wars for talent, thereby controlling labour costs.

As regards agreements to fix wages, they can be driven by the desire to reduce labour costs or reduce the risk of losing skilled employees to competitors.[18]

In relation to reductions in labour costs, the wages a company pays its employees are costs that to some degree will be reflected in prices. Wages may be negotiated between the employer and the employee, but, as we turn to in Chapter 3, they are often regulated in collective bargaining agreements. If there is a collective bargaining agreement between trade unions and employers or employers' organisations, the wages thus depend on the bargaining strength of the employers, the employees, and the trade unions.

If the employer holds a strong bargaining position (has buyer power), the cost of labour will be lower, while strong bargaining power on the side of the employees or the trade unions (seller power) will increase the cost of labour. Buyer power may thus act as a counterweight if sellers have bargaining power and consequently constrain price increases. To what extent lower wages are passed on to consumers as lower prices depend on a number of factors, such as the degree of product market competition and the curvature of the demand curve.[19]

Further, there may be an inverse relationship between product market competition and wage setting. If companies face poor competition in the product market and are able to earn higher profits, they may share some of this profit with the employees (rent sharing). A recent study using Danish data found sectors with high product market concentration to have higher wage premiums.[20]

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[16] Marx, M., & Shrestha, R., 'Non-compete agreements, worker effort, and firm competition', (2020) The Journal of Law and Economics 63(2), 339-375.

[17] Starr, E., 'Employer collusion in the labour market', (2019) Annual Review of Economics 11, 479-508.

[18] Card, D., & DiNardo, J., 'Skill-biased technological change and rising wage inequality: Some problems and puzzles', (2002) Journal of Labour Economics 20(4), 733-783.

[19] A comprehensive analysis of how lower wages may be passed on to consumers is outside the scope of this report. Guidelines on the assessment of passing-on can be found in the Official journal of the European Union, Communication from the Commission, 'Guidelines for national courts on how to estimate the share of overcharge which was passed on to the indirect purchaser' (2019/C 267/07) < Communication from the Commission — Guidelines for national courts on how to estimate the share of overcharge which was passed on to the indirect purchaser (europa.eu) >.

[20] Konkurrence- og Forbrugerstyrelsen, 'Konkurrence øger vækst og kan reducere formue- og indkomstforskelle' (2022) < 20220708-konkurrence-oeger-velstanden.pdf (kfst.dk) >.

2.4 Legal framework of wage-fixing and no-poach agreements

2.4.1 Threshold for intervention

Article 101 TFEU[21], Article 53 EEA[22] and corresponding national legislation apply to agreements and concerted practices of undertakings, and thus not to agreements on wages and working conditions between employers and employees. The competition acts in the Nordic countries contain exemptions for agreements or arrangements related to labour markets. While there is limited judicial guidance on the interpretation of the labour market exemption, the prevailing interpretation is that it relates to collective bargaining agreements negotiated by organised social partners (trade unions and employers' associations).

However, agreements between actual or potential competitors such wage-fixing and no-poach agreements, which are not covered by this exemption, may constitute infringements of competition law.

Wage-fixing and no-poach agreements are horizontal agreements between employers, i.e. between purchasers of labour. While wage-fixing agreements aim to coordinate wages or other forms of remuneration paid to employees, no-poach agreements refer to agreements whereby employers refrain from hiring employees from each other or making spontaneous offers to those employees.

The OECD, the European Commission ("the Commission") and national competition authorities in Europe have all focused their attention on the issue of whether anticompetitive agreements affecting labour markets may constitute infringements of Article 101 TFEU, Article 53 EEA or corresponding national legislation. The OECD published a working paper in 2020,[23] the Portuguese Competition Authority (Autoridade da Concorrência) presented an Issues Paper in September 2021,[24] while the Commission published guidelines dealing, among other things, with issues in the labour market in 2022[25] and 2023.[26]

Article 101(1) TFEU prohibits 'agreements between undertakings' and 'concerted practices' which 'have as their object or effect the prevention or distortion of competition within the internal market, and in particular those which: (a) directly or indirectly fix purchase or selling prices or any other trading conditions'. In accordance with Article 101(3) TFEU agreements may, however, not be prohibited if they 'improve the production or distribution of goods or promote technical or economic progress, while allowing consumers a fair share of the resulting benefit, as long as the restrictions imposed on the undertakings are indispensable for the objective and the undertakings involved cannot eliminate competition for a substantial part of the products.'

Article 101(1) TFEU requires that agreements either (i) have as their 'object' to prevent or distort competition, or (ii) have as their 'effect' to prevent or distort competition.

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[21] Treaty on the Functioning of the European Union.

[22] Agreement on the European Economic Area.

[23] OECD, 'Competition in Labour Markets' (n 1).

[24] The Portuguese Competition Authority, 'Labour Market agreements and competition policy' (n 1).

[25] European Commission, 'Guidelines on the application of Union competition law to collective agreements regarding the working conditions of solo self-employed persons' (2022/C 374/02), (hereafter 'guidelines on collective agreements').

[26] European Commission, 'Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements' (2023/C 259/01), (hereafter 'guidelines on horizontal co-operation agreements').

Object restrictions of competition and effect restrictions of competition require different assessments. The concept of restriction of competition 'by object' must be 'interpreted restrictively' and applied only to coordination that reveals 'a sufficient degree of harm to competition'.[27] To determine whether coordination reveals a sufficient degree of harm to competition, it is important to have regard to the 'content of their provisions, their objectives, and the economic and legal context of which they form part.' Considering these elements, the coordination must by its 'very nature' be 'harmful to the proper functioning of normal competition.'[28]

If a 'sufficient degree of harm to competition' cannot be proven, competition authorities must provide evidence of 'the effects on the market'.[29]

The following paragraphs point to relevant jurisprudence as regards whether wage-fixing and no-poach agreements have as their object to prevent or restrict competition, or whether these types of agreements are not by their very nature harmful to the proper functioning of normal competition and must accordingly be analysed in accordance with their effects on the market.

2.4.2 Wage-fixing agreements

Article 101(1)(a) TFEU highlights agreements which 'directly or indirectly fix purchase or selling prices or any other trading conditions' as agreements typically restricting competition by object or effect. A similar wording is evident from corresponding national legislation in Nordic countries.

Agreements which directly or indirectly fix purchase or selling prices must be distinguished from genuine joint purchasing agreements.[30] Whereas genuine joint purchasing of products by more than one undertaking generally does not amount to a restriction of competition by object, the fixing of purchase prices may constitute a buyer cartel which has as its object to restrict competition contrary to Article 101(1) TFEU.[31]

Buyer cartels are defined by the Commission as 'agreements or concerted practices between two or more purchasers which, without engaging in joint negotiations vis-à-vis the supplier:

> (a) coordinate those purchasers' individual competitive behaviour on the purchasing market or influencing the relevant parameters of competition between them through practices such as, but not limited to, the fixing or coordination of purchase prices or components thereof (including, for example, agreements to **fix wages** or not to pay a certain price for a product); the allocation or purchase quotas or the sharing of markets and suppliers […]'[32]

Accordingly, in the guidelines on horizontal co-operation agreements the Commission suggests that 'agreements to fix wages' can be considered as buyer cartels that restrict competition by object.

It is furthermore suggested in the Commission's guidelines on collective agreements that wage-fixing arrangements amount to object restrictions.[33] In these guidelines, the Commission provides an example whereby professional sports clubs agree among themselves not to hire athletes from each other's clubs and coordinate on the remuneration levels of athletes over 35 years old. The Commission

[27] Case C-228/18, *Budapest Bank and Others* [2020], para 54.
[28] Case C-307/18, *Generics (UK) and Others* [2020], para 67.
[29] Case C-228/18, *Budapest Bank and Others* [2020], para 54.
[30] Guidelines on horizontal co-operation agreements (n 26), paras 278-279.
[31] Ibid. paras 273 and 278-279.
[32] Ibid. para 279.
[33] Guidelines on collective agreements (n 25), 6.

describes the coordination of remuneration levels as a 'wage-fixing arrangement' which is 'likely to infringe Article 101 TFEU by object, since it is in essence an agreement between competitors (the clubs) to align their input costs.'

Wage-fixing arrangements have been the subject of cases at a national level in the EU, including both judgments by national courts and decisions by national competition authorities in which fines were imposed or commitments were accepted;[34] see for example Netherlands (hospital sector),[35] Greece (elevator installers),[36] and Poland (Speedway competition organisers).[37]

In light of the case law referred to above and the Commission's guidelines on horizontal co-operation agreements, it is clear that wage fixing is generally a serious infringement of competition law and is likely to be considered an object restriction. Yet, the analysis of whether a conduct is to be classified as a restriction by object will always be done on a case-by-case basis.[38]

2.4.3 No-poach agreements

No-poach agreements can manifest in diverse forms, from agreements to refrain from actively recruiting each other's employees to complete prohibitions on hiring each other's employees. Contrary to wage-fixing agreements, no-poach agreements are not specifically addressed by the Commission in its Guidelines on horizontal co-operation agreements.

However, with regard to buyer cartels, the Commission states:

> Where purchasers deal individually with suppliers (namely they do not engage in joint negotiations with the supplier), they must make their purchasing decisions independently and must not remove strategic uncertainty between themselves regarding their future behaviour on the market through agreements or concerted practices. Purchasers may not fix one or more of the conditions of purchase (price, quality**, source of supply**, quality or other parameters of competition) between themselves before each purchaser individually negotiates and purchases from the supplier.[39]

According to the Commission's guidelines on horizontal co-operation agreements, these breaches constitute object restrictions of competition. Although not specifically addressed in those guidelines, agreements to fix the source of supply likely include arrangements between employers wherein they agree not to hire each other's employees.

Indeed, in the guidelines on collective agreements the Commission argues that agreements between employers not to hire each other's employees will likely amount to an infringement of competition by object. In these guidelines the Commission explains that if professional sports clubs in a Member State agree not to hire athletes from each other's clubs for the duration of the athletes' contracts, the

[34] See Table 2 for further details.

[35] Dutch Court of Appeal (Court of Gerechtshof's – Hertogenbosch) HD 200,056,331, [2010], < ECLI:NL:GHSHE:2010:BM3366, voorheen LJN BM3366, Gerechtshof 's-Hertogenbosch, HD 200.056.331 (rechtspraak.nl) >.

[36] The Hellenic Competition Commission (HCC), Decision No 758/2021 [2021] < Decision 758/2021 (epant.gr) >.

[37] Press Release from the UOKiK, 'Competition-limiting agreement in motorcycle speedway - decision of President of UOKiK', 7 June 2023, < https://uokik.gov.pl/news.php?news_id=19643 >.

[38] Case C-211/22, *Super Bock Bebidas* [2023].

[39] Guidelines on horizontal co-operation agreements (n 26), para 280.

agreement 'is likely to infringe Article 101 TFEU by object, as it restricts competition between the sports clubs to hire the best athletes in the market.'[40]

Whether agreements not to engage in poaching or cold calling each other's employees are considered to amount to fixing the source of supply is not clearly described in either the Commission's guidelines on horizontal co-operation agreements or the guidelines on collective agreements.

Case law from the European Court of Justice on no-poach agreements is limited. However, in some decisions the national competition authorities in the EU have fined undertakings for engaging in no-poach agreements.

Box 1: Examples of cases

Portugal: Horizontal no-poach agreement in the Portuguese Football League (2022)[41]

In 2022, the Portuguese Competition Authority sanctioned the sports companies participating in the 2019/2020 edition of the First and Second Leagues and the Portuguese Professional Football League (LPFP) for having entered into an agreement not to hire players who unilaterally terminated their employment contract while invoking issues caused by the Covid-19 pandemic. The authority concluded that the agreement could reduce competitive pressure between the sports companies concerned, and be capable of replacing the outcome that would be obtained through competition with an outcome that is influenced, or even determined, by coordinated conduct aimed at restricting demand on the market for hiring professional players. The agreement was also capable of reducing the quality of football matches, thereby harming consumers by reducing the competitive environment between clubs, preventing the recruitment of players who could fill gaps in football teams and forcing talented players to leave the country to pursue their professional activity. The Portuguese Competition Authority concluded that the agreement restricted competition by object and did not find efficiency gains that compensated the loss of consumer welfare.[42]

Poland: Horizontal no-poach agreement in the Polish Basketball League (2022)[43]

In 2022, the Polish competition Authority (UOKiK) sanctioned 16 clubs in the Polish Basketball League after the clubs agreed during the Covid-19 pandemic to terminate the players' contracts and not pay all the salaries for the season. The UOKiK stated that 'sports clubs are entrepreneurs within the meaning of the Polish and European competition law. This means that they should make their own business decisions independently. Acting in agreement, they were able to illegally exchange sensitive information and eliminate an important factor affecting competition between them, i.e. rivalry for the best players.'

[40] Guidelines on collective agreements (n 25), 6.

[41] Authoridade da Concorrência (AdC), Case No. PRC/2020/1 [2022] < AdC - PesquisAdC (concorrencia.pt) >.

[42] OECD, 'Competition and Professional Sports – Note by Portugal', DAF/COMP/WP2/WD(2023)43, 4 December 2023, < pdf (oecd.org) >, paras 47 and 49.

[43] Press Release from the UOKiK, 'Basketball clubs violated competition - decision of President of UOKiK', 25 October 2022, < UOKiK - About us - About us - News - Basketball clubs violated competition - decision of President of UOKiK >.

Lithuania: Real estate agencies agreed not to compete for clients and employees (2022)[44]

In 2022, the Lithuanian Competition Council sanctioned the Lithuanian Association of Real Estate Agencies and 39 of its members after they agreed not to compete for each other's real estate brokers. The Lithuanian Competition Council, explained that 'when companies agree not to compete for each other's employees, the latter lose their bargaining power with employers, which worsens the employees' ability to negotiate higher salaries and other more favourable working conditions.' Accordingly, the Council found that the conduct, which also included an agreement where 'real estate specialists had to avoid direct contact with the brokers' clients of other agencies', restricted competition by object under national competition law and article 101 TFEU.

France: Cartel and horizontal no-poach agreement in the PVC and linoleum floor covering industry (2017)[45]

In 2017, the French competition authority (Autorité de la Concurrence) fined a cartel in the PVC and linoleum floor covering industry. While the cartel involved a series of concerted practices between the undertakings, they also engaged in a no-poaching 'gentlemen's agreement' not to hire each other's employees.[46] The authority argued that the agreement not to hire each other's employees contributed to eliminating strategic uncertainty among the involved undertakings, which, in conjunction with the multiple other concerted practices were considered an infringement by object.

Spain: Cartel and horizontal no-poach agreement between eight freight forwarding companies (2010)[47]

In 2010, the Spanish competition authority (CNMC) fined a cartel between eight freight forwarding companies. The concerted practice included coordination of costs and prices of products sold in the downstream market, but also coordination of hiring practices including agreements not to hire each other's employees. The CNMC argued:

´The hiring of employees is a parameter of competition between companies, including in the freight forwarding industry, since the labour factor is still an input for business activity. The agreement has the object and the effect of reducing competition between companies in the cartel, in the acquisition of the labour factor´(our translation).[48]

The CNMC argued that the agreement not to hire each other's employees contributed, in conjunction with other breaches, to the elimination of strategic uncertainty leading to an object infringement of Article 101 TFEU.

[44] Press Release from the Competition Council of the Republic of Lithuania (Konkurencijos taryba), 'Real estate agencies agreed not to compete for clients and employees', 29 December 2022, < REAL ESTATE AGENCIES AGREED NOT TO COMPETE FOR CLIENTS AND EMPLOYEES | (kt.gov.lt) >.

[45] Autorité de la Concurrence: Decision 17-D-20 of 18 October 2017, 'regarding practices implemented in the hard-wearing floor covering sector' [2017] < Decision 17-D-20 of October 19, 2017 | Autorité de la concurrence (autoritedelaconcurrence.fr) >.

[46] Ibid. para 317.

[47] Comisión Nacional de los Mercados y la Competencia (CNMC), Resolución del Consejo, S/0120/08: *Transitarios* [2010] < S/0120/08 - TRANSITARIOS | CNMC >.

[48] Ibid. page 93.

Although the Lithuanian, French and Spanish decisions mentioned in Box 1 did not concern no-poaching as stand-alone agreements restricting competition by object, they illustrate how national competition authorities outside the Nordic countries have regarded no-poaching – within the context at hand in each case – as amounting to an object infringement of competition.[49]

Moreover, in 2020, the OECD argued that:

> There is no disagreement on the importance for competition authorities to pursue adequately infringements in labour markets that are treated as hard-core cartels, such as wage-fixing and no-poaching agreements, and to prevent the concentration of power in the hands of employers that may negatively affect consumers downstream. However, time will reveal if authorities and courts will become more active in their enforcement in labour markets.[50]

The case law and the examples set out in this section make a case for considering no-poaching as a serious infringement of competition law. No-poaching is also likely to be considered a restriction of competition by object – especially when it borders on horizontal fixing of the source of supply. At the same time, the analysis of whether conduct is to be classified as a restriction by object will always be done on a case-by-case basis.[51].

Some Nordic countries have additional legislation regulating no-poach agreements. In Denmark, the use of no-poach agreements is regulated in the Danish Act on restrictive employment clauses. The act stipulates that 'an employer cannot lawfully enter into any agreement on no-hire clauses.' Similar legislation has also been introduced in Norway.[52]

Regarding transfers between businesses, enterprises may under certain conditions enter into agreements with other enterprises to prevent or restrain an employee's opportunities to obtain employment with another employer.[53]

[49] An extensive list of decisions is referred to in Table 2.

[50] OECD, 'Competition in Labour Markets' (n 1), page 19-20.

[51] Case C-211/22, *Super Bock Bebidas* [2023].

[52] In Norway, for example, the Working Environmental Act section 14 A-1 allows non-compete clauses between the employer and the employee as far as they are necessary to safeguard the employer's particular need for protection against competition (business secrets and know-how), under the condition that they are invoked no longer than one year from termination of the employment. In addition, non-compete clauses must be entered into in writing, and the employee must be compensated if the non-compete is invoked.

[53] In Norway, the Working Environmental Act section 14 A-6 prohibits non-solicitation of employees clause', which is 'an agreement between the employer and other undertakings preventing or limiting the employee's possibility of taking up appointment in another undertaking'. However, section 14 A-6 paragraph two, includes an exemption, allowing non-solicitation clauses in connection with negotiations on the transfer of undertakings (acquisitions) under the condition that certain additional requirements are met.

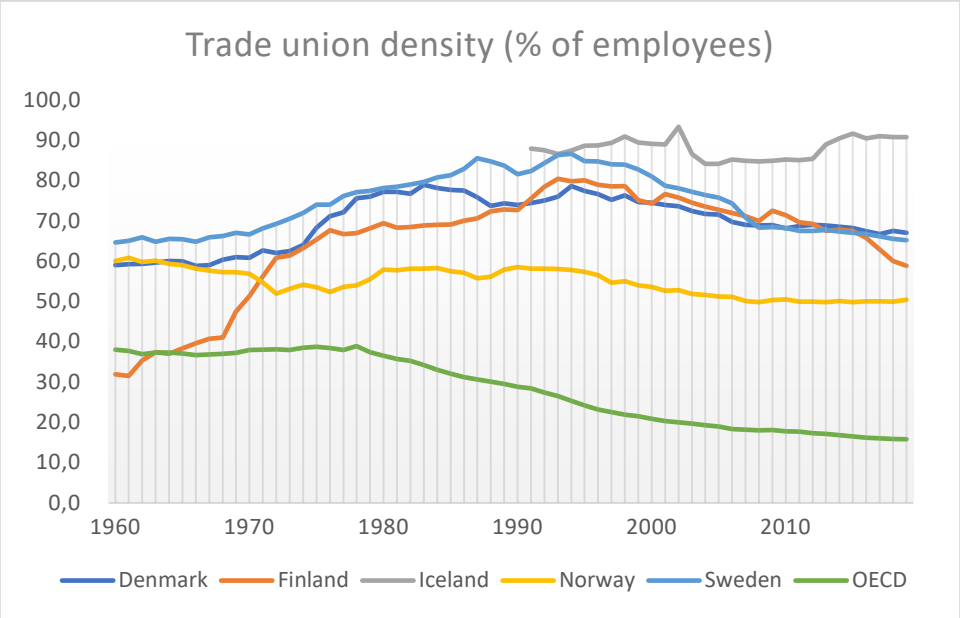
3 Labour markets in the Nordic countries

The labour markets in the Nordic countries differ from most European countries in terms of regulation and function. At the same time, the labour markets in these countries share common characteristics that matter for the enforcement of competition law. This chapter describes the labour markets in the Nordic countries by highlighting key factors that are common across them.

3.1 High degree of unionisation

The degree of unionisation is high in the Nordic countries compared to other nations. Even though the degree of unionisation has declined over time, the five Nordic countries covered in this report rank among the top six countries in terms of unionisation rates, significantly above the OECD average, as depicted in Figure 1. The reasons behind the relatively high proportion of employees being members of trade unions vary among the different countries. For instance, in Iceland, every employer is obliged to pay a fee to the union that negotiated the collective pay agreement for that particular job. This incentivises employees in Iceland to be members of unions since payments to them are mandatory even though membership is not.

Figure 1: Degree of unionisation in the Nordic countries[54]



In some countries, the percentage of organised employees differs between the private and public sector. The difference is most pronounced in Norway, where approximately 37% of employees in the private sector are union members (compared to approximately 50% in general).[55]

3.2 Many companies are members of employers' organisations

As shown in Table 1, a relatively high proportion of companies are members of employers' organisations in the Nordic countries. However, there are variations among the countries. Sweden has

[54] Calculation based data from the OECD, available at < Trade Union Dataset (oecd.org) > accessed 10. November 2023.

[55] Kristine Nergaard, 'Organisasjonsgrader, tariffavtaledekning og arbeidskonflikter 2018/2019', Fafo-notat 2020:12, (2020) < 10332.pdf (fafo.no) >.

the highest percentage of companies being members of such organisations (87% of companies), while Denmark and Finland have the lowest (68% and 69%).

Table 1: Degree of organisation of employers[56]

	Denmark	Finland	Iceland	Norway	Sweden
Degree of organisation of employers*	68% (2018)	69% (2018)	78% (2018)	80% (2019)	87% (2021)
- Private Sector	N.A.	N.A.	N.A.	73% (2021)	81% (2021)

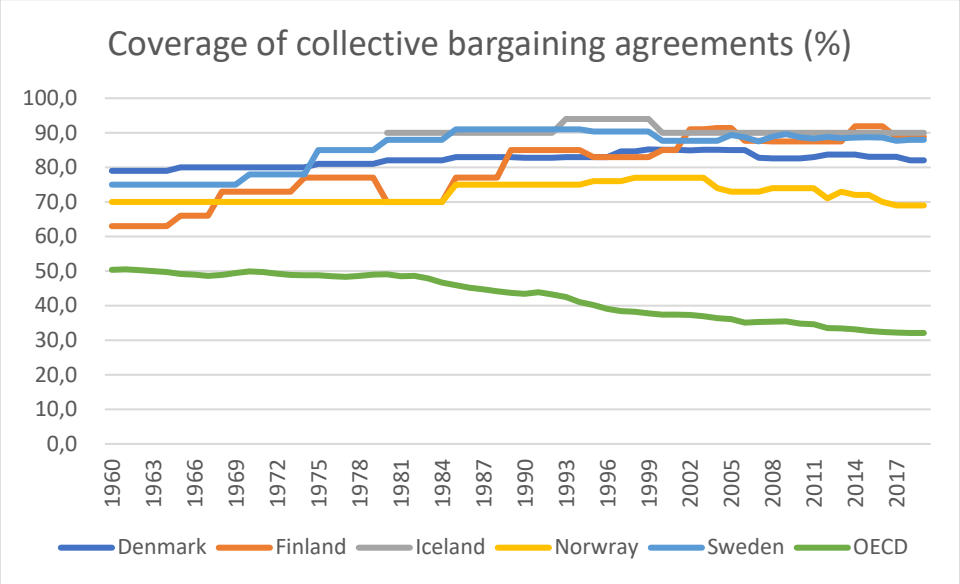
*These numbers are set in relation to the whole labour market in each country. As most of this data stems from different years, any comparisons between the years should be made with caution.

3.3 Many employees are covered by collective bargaining agreements

The unions and employers' organisations negotiate collective bargaining agreements, which set terms and conditions of employment for the employees of the companies that are covered by the agreements. Beyond the determination of wages, collective bargaining agreements often cover other general employment terms, such as sick leave allowances, working hours and leave.

In the Nordic countries, these collective bargaining agreements may also apply to employees who are not union members. Consequently, the percentage of employees covered by collective bargaining agreements is higher than the percentage of union members (Table 1). As shown in Figure 2, more than 90% of employees were covered by collective bargaining agreements in Iceland in 2019, while in Norway, the proportion was 69%. The share of employees covered by collective bargaining agreements in the Nordic countries is far above the OECD average.

Figure 2 Share of employees covered by collective bargaining agreements[57]



[56] Medlingsinstitutet, 'De nordiska modellerna – en jämförelse', (19 April 2023) < De nordiska modellerna – en jämförelse - Medlingsinstitutet (mi.se) > accessed 1 June 2023; OECD, 'Iceland – Main indicators and characteristics of collective bargaining', (Version: 17 February 2021) < collective-bargaining-database-iceland.pdf (oecd.org) > accessed 15 June 2023.

[57] Calculation based data from the OECD, available at < Trade Union Dataset (oecd.org) > accessed 10. November 2023.

The bargaining system associated with collective bargaining agreements in all Nordic countries contains elements of centralisation. The wage formation systems in Finland, Norway, Denmark and Sweden aim to maintain wage levels that preserve the competitiveness of the export industry. The export sector in each of those countries plays a leading role in negotiating the salary increase rate and other central terms, with other sectors following their levels in their own negotiations.

Although individual unions have the right to bargain, they can give their mandate to their respective federations. In recent years in Iceland, the main federations have negotiated simultaneously on similar terms. Even though the wage levels are to some extent determined centrally, the system also allows for deviations at the local level. In Sweden, the collective bargaining agreements do not always regulate the wage for each employee. 26% of the central collective bargaining agreements in Sweden are 'figureless', which means that the individual wages are set in local negotiations during which there is an obligation to maintain industrial peace.[58] Other collective bargaining agreements may stipulate certain increases at central or company levels, with or without guarantees on an individual level. Collective bargaining agreements may also enforce minimum wages in certain professions when recruiting new employees.

In Finland, collective bargaining agreements permit employers and employees to negotiate certain working conditions locally. In Denmark, the collective agreements offer a flexible framework for employers and employees to negotiate key conditions, including pay and working hours. Companies and employee representatives can enter into specific local agreements that supplement the framework conditions in the overall agreement for each sector.

[58] Medlingsinstitutet, 'Kollektivavtal - vilka tecknar avtalen och hur är löneavtalen konstruerade?' (2023) < Kollektivavtal - vilka tecknar avtalen och hur är löneavtalen konstruerade? (mi.se) >, 25.

4 Enforcement of competition law related to labour markets – examples

In comparison to certain European countries, competition authorities in the Nordic countries have addressed issues related to labour markets in a relatively limited number of cases. Moreover, compared to the US, researchers have noted that 'there appears to be no clear economic or legal justification for lower level of enforcement activity by European competition authorities in labour markets.'[59]

This chapter presents an overview of cases in the Nordic countries that deal with issues related to the labour markets. It also provides a schematic presentation of cases in other European countries, as well as an overview of a survey showing the prevalence of no-poach agreements in Norway.

4.1 Labour market concerns in antitrust cases

4.1.1 Short-term contracts in the Swedish Ice Hockey League

In September 2012, the Swedish Competition Authority (the SCA) started an investigation regarding a ban on short-term contracts for ice hockey players in Sweden. Svenska Hockeyligan AB (SHL AB) is a limited company owned by the ice hockey clubs that are qualified to play in Sweden's highest division, and is set up to protect the clubs' interests, including media rights.[60] During the ice hockey season 2012/2013, SHL AB decided that its owner clubs should not be allowed to sign short-term contracts with players from the National Hockey League (NHL) in North America during their lockout from the NHL. The collective bargaining negotiations between the players and the clubs in the NHL had not resulted in an agreement, and during this standstill the NHL players turned to the Swedish and other hockey leagues for the possibility to play ice hockey while the lockout was still ongoing.

Based on its initial investigation, the SCA considered that SHL AB's decision restricted competition between the clubs as it restricted their possibilities to offer the best product – to the detriment of consumers, buyers of media rights and sponsors. The SCA also considered that the conditions for imposing interim measures were fulfilled and decided that SHL AB should not apply its ban or sanction clubs that signed contracts with players from the NHL until the date of a final decision. SHL AB appealed the interim decision to the Market Court. The Market Court first concluded that the competition rules applied to SHL AB's decision as such, and that it did not fall under the exemption for agreements related to labour markets. The Market Court then took the view that SHL AB's decision was a general ban on short-term contracts and not aimed specifically against locked-out NHL players. Based on the preliminary findings in the case, the Market Court found that the ban appeared to be necessary and proportionate to achieve the legitimate purpose of safeguarding a fair and properly functioning league, and was thus compatible with Swedish competition law. The SCA's interim decision was annulled.[61] The NHL lockout ended one and a half months later and the SCA closed its investigation.[62]

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[59] Satoshi Araki, Andrea Bassanini, Andrew Green, Luca Marcolin, and Cristina Volpin, 'Labor Market Concentration and Competition Policy Across the Atlantic', (2023), University of Chicago Law Review: Vol. 90: Iss. 2, Article 3 < Labor Market Concentration and Competition Policy Across the Atlantic (uchicago.edu) >.

[60] The league itself is organised by the Swedish Ice Hockey Association, but the decision under investigation was taken by SHL AB.

[61] Marknadsdomstolen, Protocol 2012-12-03 Case A 2/12 [2012] <http://avgoranden.domstol.se/Files/MD_Public/SlutligaBeslut/A2-12%20Protokoll%20med%20beslut.pdf >.

[62] The Swedish Competition Authority, Decision 2013-01-21 Dnr 501/2012, *Ifrågasatt konkurrensbegränsning – förbud mot tackande av korttidskontrakt med lockoutade NHL-spelare* [2013] <

4.1.2 Ice hockey league case in Finland

The Finnish Competition and Consumer Authority (FCCA) decided in 2019 that an agreement among hockey league clubs of the top-tier league SM-Liiga breached competition law. The league and its clubs had agreed not to hire players that played for the Helsinki-based club Jokerit midseason and not hire such players for the following season until the current season had ended. In addition, it had been agreed that the clubs would not play any friendlies against Jokerit. The clubs decided on these measures in 2014 after Jokerit had moved to play in the Russian league KHL.

The FCCA deemed that the parties had engaged in market partitioning aimed at eliminating a competitor by means of a collective boycott and production limitation. Such conduct has consistently been recognised as one of the most serious restrictions of competition in competition law matters. League clubs are in competition with each other and must decide independently on matters such as player acquisitions.

During the FCCA's investigation, the parties claimed that the labour market exemption was applicable. The FCCA rejected the claim on the basis that the agreement did not apply to the terms of employment of an individual player or a group of players, but rather stipulated the conduct of competing undertakings towards a competitor outside their association. Further, the agreement was not made for the purpose of protecting social goals that have been referred to in EU case law with regard to collective agreements.

The FCCA ordered the implementation of the agreement to be terminated and imposed a conditional fine of EUR 75,000 per party.

4.1.3 Trade associations of local banks (Denmark)

In 2008 the Danish Competition Council (the DCC) issued a decision regarding the Trade Association of Local Banks, Savings Banks, and Cooperative Banks in Denmark (LOPI). LOPI had among others recommended to its members that they should refrain from headhunting new labour through direct contact with the employees of other banks, and had also accused its members of a lack of collegiality by marketing new employees from other member banks.[63] The DCC concluded that LOPI's behaviour and its conduct towards its members constituted an infringement of section 6 of the Danish Competition Act.

4.1.4 Locum doctors and nurses (Sweden)

For a number of years there has been a lack of educated doctors and nurses in Sweden, especially in rural areas. Many Swedish regions and other healthcare providers have therefore used locum doctors and nurses to staff healthcare centres and other healthcare services. As locum doctors and nurses are often better paid than the regions' employed staff, many doctors and nurses have started to work for staffing agencies. This has further exacerbated the challenges that the regions have faced in recruiting

https://www.konkurrensverket.se/globalassets/dokument/konkurrens/beslut/interimistiskt-beslut/12-0501-svenska-hockeyligan-ab.pdf >.

[63] Press Release from the Danish Competition and Consumer Authority, 'The Association of Local Banks in Denmark, Savings Banks and Cooperative Banks in Denmark and its illegal dictation of its members' behavior', 30 January 2008, < The Association of Local Banks in Denmark, Savings Banks and Cooperative Banks in Denmark and its illegal dictation of its members' behavior (kfst.dk) >.

staff. In addition, it has led to higher costs for the Swedish regions. The costs for locum staff increased from 1.6 billion SEK in 2015 to 5.6 billion SEK in 2019.[64]

In order to reduce the cost of locum staff and to make it less attractive for healthcare professionals to work as locums, the Swedish regions often use deferral periods in their contracts with the staffing agencies. These clauses often forbid the staffing agencies from using personnel who are employed, or have been employed, by the same region during the past 12 months.

The SCA, which is also the supervisory authority for public procurement in Sweden, has received some complaints regarding these practices, primarily concerning the public procurement contracts with the staffing agencies. One alleged problem was that the hired doctors and nurses were often not directly employed by the staffing agencies. Instead, they were self-employed and could offer their services via different staffing agencies at the same time, and choose which staffing agency to offer their services to. This meant that even though the regions had entered into procured framework agreements with staffing agencies, the agencies sometimes had no doctors or nurses to offer. This meant that the regions ended up without doctors and nurses when they were needed, and therefore had to sign contracts with staffing agencies outside the procured framework agreements.[65] The complaints did not result in any legal action by the SCA, and the SCA did not take a position on whether the regional authorities are undertakings. However, the SCA looked into this topic in two separate reports which primarily focused on the procurement problems that had been identified.[66]

In 2020, all regions in Sweden started the procurement of a common framework agreement for locum doctors and nurses that aims to reduce the rise in costs. Both staffing agencies and labour unions have criticised the proposed framework agreement, and the procurement was appealed in court. In November 2023, the Administrative Court of Appeal in Gothenburg rejected the appeals, and the framework agreement took effect on 1 January 2024.

The deferral periods referred to above make it hard for doctors and nurses to start to work for staffing agencies and may, therefore, hinder mobility on the labour market. It should, however, be noted that the deferral periods only forbid locum personnel from working for their previous employer and do not restrict them from working for any other employer.

4.2 Labour market concerns in merger cases

4.2.1 Finland

In Finland, labour market concerns were raised by the Finnish Medical Association (FMA) in the context of the acquisition of Pihlajalinna by Mehiläinen in 2020. According to the FMA, the concentration would have diminished the self-employed physicians' ability to choose between different clinics and curtailed their ability to decide on their own fees. The FCCA did not specifically investigate the effects on the physicians' labour conditions, but found that the transaction would have significantly impeded effective

[64] Konkurrensverket, 'Regioners upphandlingar av vårdpersonal – En uppföljning av utvecklingen sedan 2015', Rapport 2020:4, (2020) < Konkurrensverkets rapportserie 2020:4. Regioners upphandling av vårdpersonal. >.

[65] Konkurrensverket , 'Hyrläkare i primärvården – en kartläggning av landstingens upphandlingar och kostnader', Rapport 2015:10 (2015) < Rapport 2015:10 - Hyrläkare i primärvården – en kartläggning av landstingens upphandlingar och kostnader (konkurrensverket.se) >.

[66] Konkurrensverket , 'Hyrläkare i primärvården – en kartläggning av landstingens upphandlingar och kostnader' (n 65); and Konkurrensverket, 'Regioners upphandlingar av vårdpersonal – En uppföljning av utvecklingen sedan 2015' (n 64).

competition in several market segments. Following the FCCA's prohibition proposal, Mehiläinen withdrew its offer for Pihlajalinna's shares before the Market Court's judgment could be delivered.

4.2.2 Iceland

In two recent merger cases the Icelandic Competition Authority (ICA) investigated the mergers' effects on labour.

The first case concerned the proposed Storytel acquisition of Forlagið in 2020. A part of the investigation focused on what effect the merger would have had on Icelandic writers. During the investigation, ICA received comments from various market participants, competitors and writers, many of whom expressed concerns about the merger and its impact on competition. Post-merger, the merging parties would have had a strong position in the market for publishing audiobooks as well as physical books in Icelandic, which would have affected Icelandic writers. After the ICA's statement of objections, the parties withdrew the merger notification.

The second case, also finalised in 2020, resulted in the ICA blocking a merger between two companies that provided a variety of radiodiagnosis services. The merger was blocked on the grounds that it would have led to a significant lessening of competition in the market for non-hospital radiodiagnosis services in Greater Reykjavík. A market for labour was not defined in this case, but the effect of the merger on the labour market for radiologists was considered, since radiodiagnosis services are a specialised form of healthcare and require radiologists who possess highly specialised knowledge and have limited employment options in Iceland. In internal documents the merging parties had assessed how the merger would affect radiologists. They stated that 'since the companies have needed to compete for employees, the salaries of their employees are in the higher order, but due to the merger there should be leeway to decrease wage increases in the long term.' This indicates that post-merger, the merging parties would have gained a strong bargaining position vis-à-vis radiologists. The case was appealed to the Competition Appeals Committee which confirmed the decision of ICA. The merging parties have appealed the Appeals Committee decision to the District Court.

4.3 Enforcement in other European countries

In recent years, several national competition authorities in Europe have initiated investigations into potential anticompetitive behaviour in relation to the labour market. Table 2 below provides an overview of the decisions that national competition authorities have issued and investigations they have initiated. It illustrates the fact that anticompetitive agreements in labour markets may **emerge across different sectors and industries**, that **wage-fixing and no-poach agreements may be serious infringements** of competition law **sanctioned with fines,** and that such agreements **may co-exist with other infringements of competition law**, such as price fixing in selling markets.

Table 2: Overview of cases in other European countries

Member State	Year	Market	Type of infringement	Fine	Decision
LT	2022	Real Estate Agencies[67]	No-poaching	Yes	Yes
LT	2021	Basketball[68]	Wage-fixing	Yes	Yes
PT	2022	Clinical Laboratories/healthcare[69]	No-poaching		Opened
PT	2022	Football[70]	No-poaching	Yes	Yes
PL	2022	Basketball[71]	No-poaching	Yes	Yes
GR	2022	Elevator Installers[72]	Wage-fixing	Commitment	Yes
PL	2022	Speedway competition organisers[73]	Wage-fixing	Yes	Yes
RO	2022	Engineering and technology providers (MV)[74]	Wage-fixing and No-poaching		Opened
ES	2022	Independent Private Schools[75]	No-poaching		Opened
FR	2017	Linoleum floor covering[76]	Price fixing & No-poaching	Yes	Yes
ES	2010	Road transport[77]	Price fixing & No-poaching	Yes	Yes

[67] Press Release from the Competition Council of the Republic of Lithuania (Konkurencijos taryba), 'Real estate agencies agreed not to compete for clients and employees', 29 December 2022, < REAL ESTATE AGENCIES AGREED NOT TO COMPETE FOR CLIENTS AND EMPLOYEES | (kt.gov.lt) >.

[68] Press Release from the Competition Council of the Republic of Lithuania (Konkurencijos taryba), 'By agreeing not to pay players' salaries lithuanian basketball league and its clubs infringed competition law', 18 November 2021, < BY AGREEING NOT TO PAY PLAYERS' SALARIES LITHUANIAN BASKETBALL LEAGUE AND ITS CLUBS INFRINGED COMPETITION LAW | (kt.gov.lt) >; the decision was later overturned by a Lithuanian administrative court.

[69] Press Release from the Authoridade da Concorrência (AdC), 'AdC issues Statement of Objections to laboratories and business association for involvement in cartel to test COVID and other clinical analysis', press release No. 30/2022, 15 December 2022, < AdC issues Statement of Objections to labouratories and business association for involvement in cartel to test COVID and other clinical analysis | Autoridade da Concorrência (concorrencia.pt) >.

[70] Authoridade da Concorrência (AdC), Case No. PRC/2020/1 [2022] < AdC - PesquisAdC (concorrencia.pt) >.

[71] Press Release from the UOKiK, 'Basketball clubs violated competition - decision of President of UOKiK', 25 October 2022, < UOKiK - About us - About us - News - Basketball clubs violated competition - decision of President of UOKiK >.

[72] The Hellenic Competition Commission (HCC), Decision No 758/2021 [2021] < Decision 758/2021 (epant.gr) >.

[73] Press Release from the UOKiK, 'Competition-limiting agreement in motorcycle speedway - decision of President of UOKiK', 7 June 2023, < https://uokik.gov.pl/news.php?news_id=19643 >.

[74] Press Release from the Romanian Competition Council (Consiliul Concurentei România), 'The Competition Council has Opened an Investigation on Labor Force Market', January 2022, < investigatie-piata-muncii-ian-2022-English.pdf (consiliulconcurentei.ro) >.

[75] Catalan Competition Authority, 'Initiation of sanctioning file no. 109/2021 - ASSOCIATION OF INDEPENDENT PRIVATE SCHOOLS OF CATALONIA', 3 February 2022, < Initiation of sanctioning file no. 109/2021 - ASSOCIATION OF INDEPENDENT PRIVATE SCHOOLS OF CATALONIA. Catalan Competition Authority (gencat.cat) >.

[76] Autorité de la Concurrence: Decision 17-D-20 of 18 October 2017, 'Regarding practices implemented in the hard-wearing floor covering sector' [2017] < Decision 17-D-20 of October 19, 2017 | Autorité de la concurrence (autoritedelaconcurrence.fr) >.

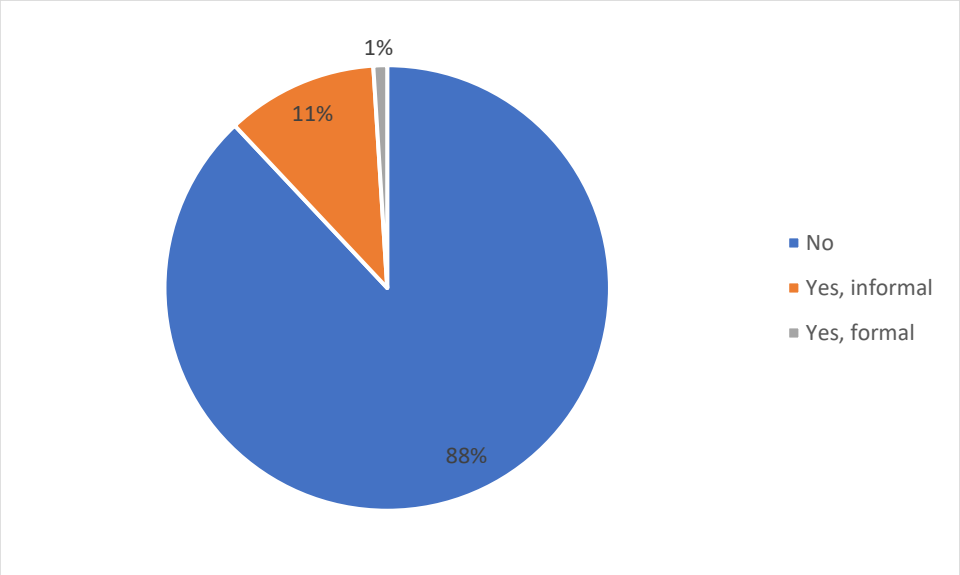
[77] Comisión Nacional de los Mercados y la Competencia (CNMC), Resolución del Consejo, S/0120/08: *Transitarios* [2010] < S/0120/08 - TRANSITARIOS | CNMC >.

ES	2011	Professional hairdressers[78]	Info-exchange & No-poaching	Yes	Yes
HR	2015	Specialised IT support[79]	Abuse of dominance	Commitment	Yes
NL	2010	Hospital sector[80]	No-poaching & price fixing		Yes

4.4 Survey of no-poach agreements (Norway)

Two surveys commissioned by the Ministry of Labour and Social Inclusion in Norway provide insights into the prevalence of no-poach agreements in Norway. These empirical inquiries indicate that no-poach agreements exist, even within highly regulated labour markets, as detailed in Chapter 3. When explicitly questioned about no-poach agreements between employers, 12% of respondents reported that their companies had established agreements with other firms not to pursue recruitment of each other's employees in 2023.[81] Within this subset, 1% stated that such agreements were formal, while 11% indicated that the arrangements were informal.

Figure 3: Share of undertakings in Norway with no-poach agreements, 2022



[78] Comisión Nacional de los Mercados y la Competencia (CNMC), Resolución del Consejo, S/0086/08: *Peluquería Profesional* [2011] < S/0086/08 - PELUQUERIA PROFESIONAL | CNMC >.

[79] Press Release from the Croatian Competition Agency (AZTN), 'Gemicro committments accepted', < Gemicro committments accepted - AZTN >.

[80] Dutch Court of Appeal (Court of Gerechtshof's – Hertogenbosch) HD 200,056,331, [2010], < ECLI:NL:GHSHE:2010:BM3366, voorheen LJN BM3366, Gerechtshof 's-Hertogenbosch, HD 200.056.331 (rechtspraak.nl) >.

[81] Menon Economics and Hjort, written by Erland Skogli, Erika Karttinen, Ida Ljøgodt von Hanno, Alex Borch and Sunniva Jacobsen Øyen, 'Konkurransebegrensende avtaler i arbeidsforhold. Kartlegging av utvikling i omfang og praksis knyttet til bruk av konkurranseklausuler, kundeklausuler og rekrutteringsklausuler – utvikling fra nullpunktsmåling i 2016', MENON-PUBLIKASJON nr. 54/2023, (2023) < 2023-54-Konkurransebegrensende-avtaler-i-arbeidsforhold.pdf (menon.no) >.

Furthermore, it is noteworthy that such agreements seem to have become more prevalent since 2016, when only 4% of companies reported having entered into no-poach agreements with other firms.[82]

No-poach agreements appear to be most prevalent in the construction and transport industries, and least prevalent in the education sector and retail trade. However, as evident from Table 3, the variations between the different sectors are not significant. In other jurisdictions, no-poach agreements have also been detected in a wide range of industries, including digital markets, movie production, medical and healthcare markets, information technology services, flooring production, railways and fast-food franchises.[83]

Table 3: Share of undertakings in Norway (in %) with no-poach agreements, reported by sector/industry. N=2000

	Primary	Industry	Construction	Retail	Transport	Accommodation and catering	Service sector	Education	Health
Yes, formal agreement	0	1	0	1	2	0	1	2	1
Yes, informal agreement/ understanding	11	10	19	8	14	6	9	6	9
No	87	88	80	89	84	94	90	92	90
Do not know	3	0	0	1	0	0	0	0	0

Moreover, as shown in Table 4, no-poach agreements are, according to these results, equally prevalent in small and large companies.

Table 4: Share of undertakings (in %) in Norway with no-poach agreements, reported by size of company (number of employees). N=2000

	Below 20	20-49	50 +
Yes, formal agreement	1	1	2
Yes, informal agreement/ understanding	10	10	11
No	89	88	86
Don't know	0	0	0

[82] Menon Economics and Hjort, written by Erland Skogli, Alex Borch and Ida Amble Ruge, 'Konkurransebegrensende avtaler i arbeidsforhold. Nullpunktsanalyse av omfang og praksis knyttet til bruk av konkurranseklausuler, kundeklausuler og rekrutteringsklausuler', MENON-PUBLIKASJON nr. 58/2016, (2016) < 2016-58-Konkurransebegrensende-avtaler-i-arbeidsforhold.pdf (menon.no) >.

[83] See OECD 'Purchasing Power and Buyers' Cartels' (n 6), and Table 2 above.

5 Further scope for application of competition law related to labour markets in the Nordics

As described in Section 2.2, no-poach and wage-fixing agreements may increase the monopsony power of employers and make it more difficult for employees to improve their wages and working conditions by shifting to other employers. Such agreements may therefore exert adverse effects on labour markets, such as lower wages and elevated levels of unemployment among employees.

However, as highlighted in Chapter 3, the Nordic labour markets exhibit distinctive features that may mitigate the likelihood of detrimental effects in those markets. Wages and working conditions are often regulated by collective bargaining agreements between unions and employers' organisations. The fact that most employees are covered by collective bargaining agreements may discourage employers from entering into wage-fixing agreements, since deviations from the terms of the collective bargaining agreement could constitute a breach of contract. Employees also know what they are entitled to and will therefore not accept lower wages or poorer working conditions than those deriving from the collective bargaining agreements.

Moreover, as illustrated in Figure 1 and Figure 2, the proportion of employees covered by collective bargaining agreements varies between the Nordic countries and between sectors within each country. A topic for further research could be whether agreements between employers to fix wages may be more prevalent in industries or sectors that are not covered by collective bargaining agreements than those where the wages are not determined by collective agreements.

Furthermore, the prevalence of trade unions among employees in the Nordic countries surpasses that of many other European counterparts. Recent research, presenting data from Norway, revealed that robust unionisation may counteract the negative impact of labour market concentration. This empirical observation suggests that the existence of unions or collective bargaining agreements might serve to counteract monopsony power to some extent.[84] This is explained by the fact that unions can extract higher wages especially when labour market concentration is high, resulting in higher wages in concentrated labour markets as compared to more competitive ones. Consequently, unions can play a pivotal role in levelling the competitive landscape in concentrated markets. Specifically, a 10 percentage point rise in unionisation leads to a 3% increase in wages in non-concentrated markets, while the increase rises to 8% in concentrated markets.[85]

Overall, this suggests that the theories of harm related to increased monopsony power in labour markets may be less relevant in Nordic countries compared to other European countries. However, the degree of unionisation varies both between the Nordic countries and within different industries in each country, as discussed in Chapter 3. Thus, the potential negative effects may differ in the Nordic countries.

Moreover, as shown in Section 2.2, it is important to acknowledge that no-poach agreements in particular may still have detrimental effects in downstream markets, such as limiting the efficient allocation of labour. Such adverse effects are not directly related to the existence or exploitation of

[84] See Samuel Dodini, Kjell Salvanes, and Alexander L.P. Willén, 'The Dynamics of Power in Labour Markets: Monopolistic Unions versus Monopsonistic Employers', CESifo Working Papers No.9495/2021 (December 2021) <The Dynamics of Power in Labor Markets: Monopolistic Unions versus Monopsonistic Employers | Publications | CESifo >.

[85] Ibid.

monopsony power, and the relatively high degree of unionisation may not mitigate anticompetitive effects of no-poach agreements in downstream markets.

In an investigation of agreements between undertakings related to labour markets, competition authorities may face investigatory challenges, since wages and working conditions often are coordinated through branch-level collective bargaining agreements. As explained in Chapter 2, collective bargaining agreements negotiated between organised social partners (trade unions and employers' associations) can be exempted from competition law in the Nordic countries. During negotiations, however, representatives of undertakings and their unions should keep in mind that while some coordination will fall under the exemption for agreements concerning the labour market, that exemption has its limits.

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