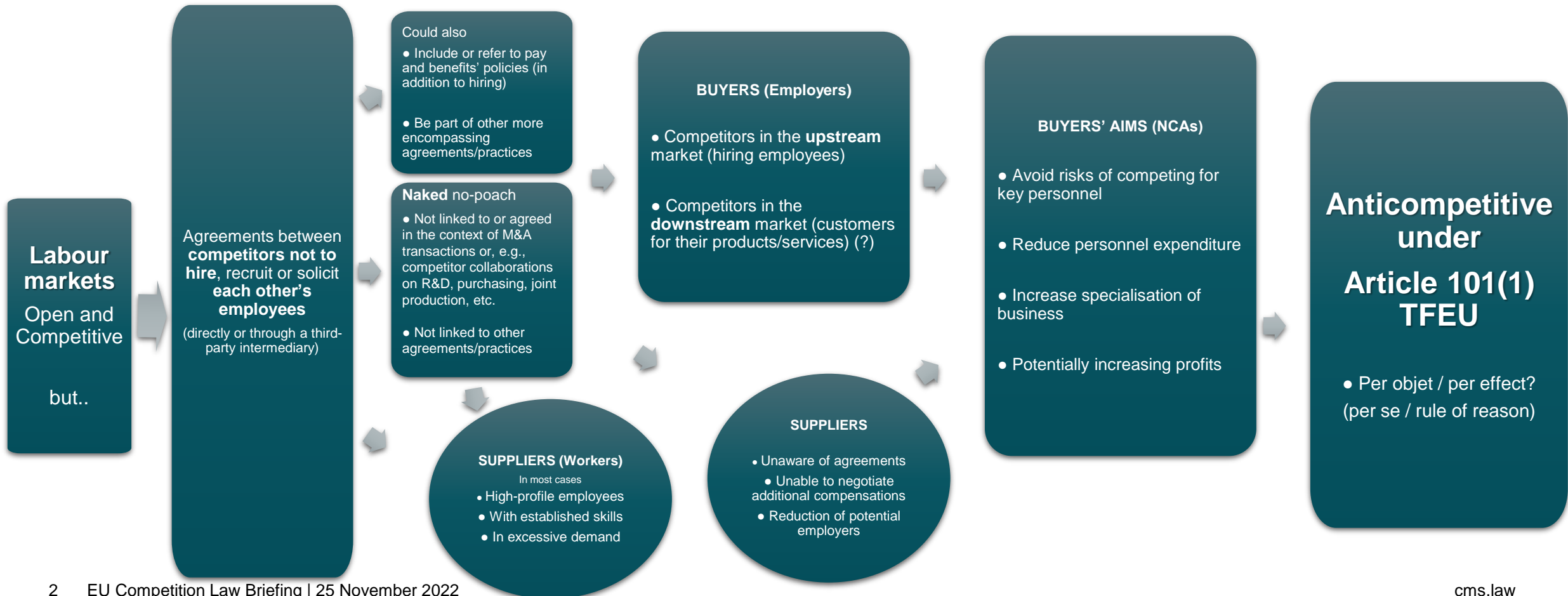


Labour market, no-poach agreements & competition law

Luis Miguel Romão

No-poach Agreements



Article 101 TFEU

« 1. The following shall be **prohibited** as incompatible with the internal market: all **agreements** between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which **have as their object or effect the prevention, restriction or distortion of competition** within the internal market, and in particular those which:

(a) directly or indirectly fix purchase or selling prices or any other trading conditions;

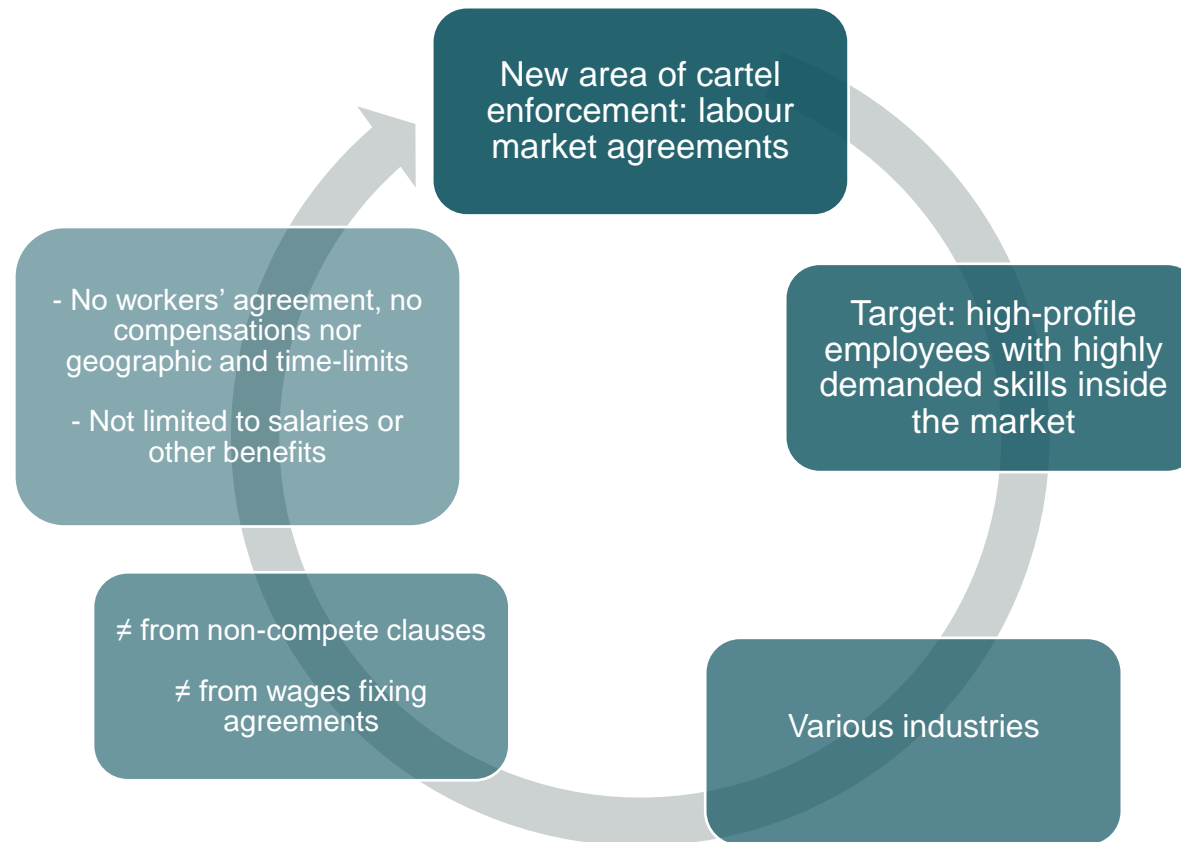
(b) limit or control production, markets, technical development, or investment;

(c) share markets or sources of supply;

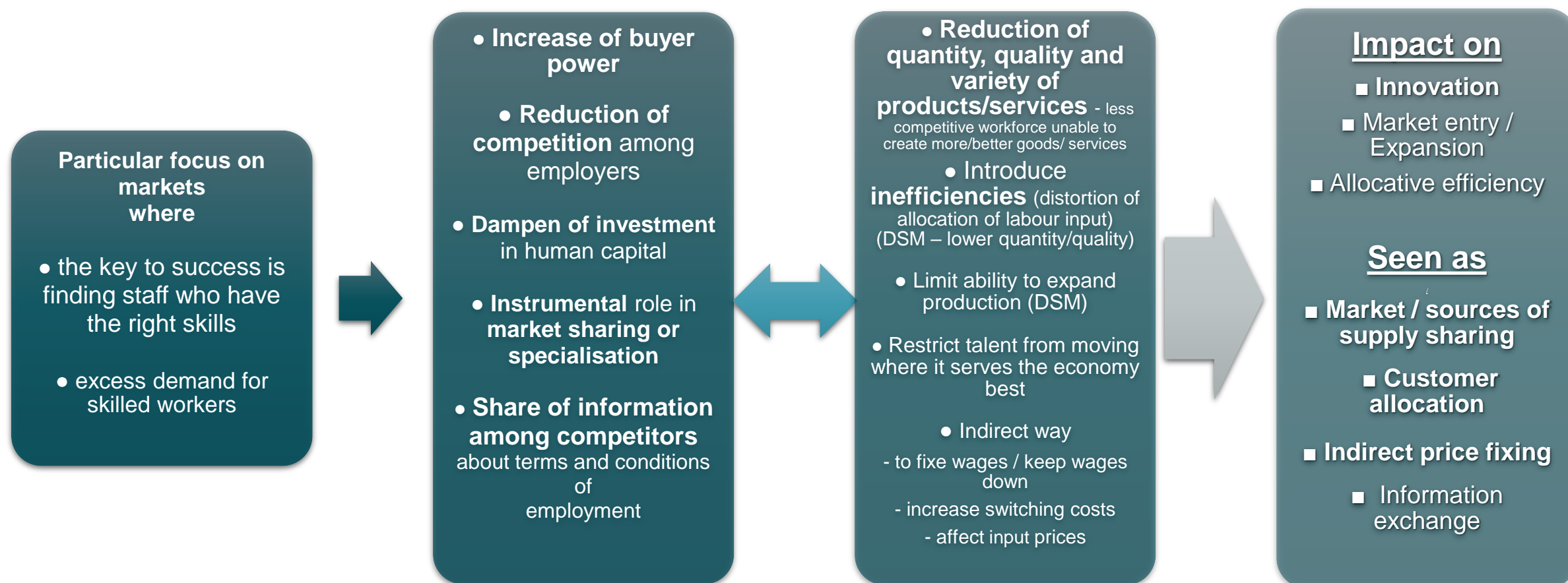
(...)

2. Any agreements or decisions prohibited pursuant to this Article shall be **automatically void**. »

No-poach Agreements



No-poach Agreements – Theories of Harm (NCAs)



European Union

Experience and Developments

European Commission



- EC has not dealt with no-poach agreements in the context of competition law
- Some Member States have already started dealing with such cases
- Commissioner's speech + current trends inside the EU
 - **very likely EC's enforcement actions in the near future**

«*A new era of cartel enforcement*»

Margrethe Vestager's speech on 22 October 2021

- Highlights the importance of cartel enforcement, «*the most fundamental threat to competition*»
- European Commission **planning a series of raids** for the following months
- Highlights no-poach agreements as having a very direct effect on individuals, as well as on competition, being «*an indirect way to keep wages down, restricting talent from moving where it serves the economy best*»
- Clear intent to develop new ways to detect cartels:
 - EC's electronic whistleblower channel
 - EC's intelligence unit, and
 - Discussions with businesses
- Particular **interest in new types of cartel**, such as no-poach agreements, besides the usual interest in traditional cartels

Member States

Main Cases

Portugal



Portuguese Football League – Autoridade da Concorrência (AdC)

(Decision – May 2022)

- Fined the Portuguese Professional Football League and its 31 member teams
 - in a total combined fine of €11.3 million
 - **for having concluded a no-poach agreement**
- Case opened in May 2020 *ex officio*, following two statements issued by the League on 7th and 8th April 2020
- Agreement allegedly established in the course of a deliberation
 - **prevented First and Second League teams of recruiting** players who had **unilaterally terminated their employment contract with other team** due to Covid-19 pandemic related issues
- Agreement intended *“to keep the players tied to the sports companies by limiting their incentive to terminate their contracts”* therefore being *“capable of reducing competitive pressure between the sports companies concerned”*
- **Disregarded the cooperation objectives raised by the League and teams** in the context of the pandemic

First sanctioning
decision by a
Competition Authority
dealing solely with a
no-poach agreement

Agreement to share
sources of supply (players)
under Article 101(1) TFUE

Restriction by object

Conduct aimed at
restricting demand on the
market for hiring
professional players

Agreement reduced the
quality of football matches

Harmed consumers by
reducing competitive
environment between
teams

Deprived workers of labour
mobility

Labor market agreements and competition policy

Issues Paper - Final Version



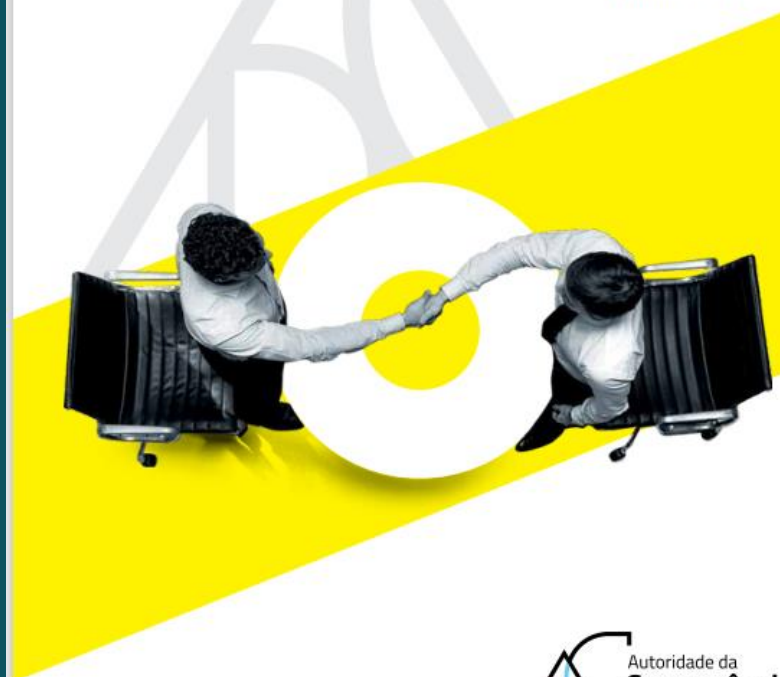
September 2021



1

Best Practices

In preventing
Anticompetitive Agreements
in Labor Markets



Poland



Basketball League- Office of Competition and Consumer Protection (OCCP)

(Decision - October 2022)

- Fined the Energa Basketball Liga (EBL) and its 16 member teams
 - a total combined fine of €197,616 **for having concluded a no-poach agreement**
- Alleged agreement established after the 2019/20 season ended earlier, due to Covid-19
 - the teams issued a **joint statement** announcing that for financial difficulties derived from the pandemic they could not comply fully with the salaries payment
- The Clubs and EBL **agreed on the termination of contracts and on reduction of payments of salaries**
 - preventing players from moving to other teams
 - potentially engaged in **sensitive information exchange**
- **Affects competition**
 - teams with better players would finish the season in a higher position
 - enabling them to increase ticket and merchandising sales
 - sponsorship deals

Most recent
sanctioning decision by
a Competition Authority
dealing solely with a
no-poach agreement

Poland



[Motorsports Federation](#) - OCCP

(Investigation - May 2022)

- Investigation opened
 - Polish Automobile and Motorcycle Federation and Speedway Ekstraliga (Polish top speedway league)
 - to examine potential agreements on **limits to the values that teams can pay their riders**
- Limits on salaries may have been in place since 2014, having likely **distorted competition** between teams for the best riders
- Although this does not seem to configure a no-poach agreement *per se*, it shows the growing importance given to labour matters under competition law



Motor vehicle production companies - Romania Competition Council (RCC)

(Investigation - February 2022)

- Investigations
 - **several motor and vehicle production companies**
 - based on information received from a **whistleblower**
 - already carried out dawn raids in at least one of those companies
 - aims at determining whether the companies
 - concluded **no-poach** and **minimum wage-fixing agreements** that prevented companies from hiring employees that had worked for their competitors
- RCC mainly concerned with
 - **barriers created to the mobility** of employees and
 - **artificial salary levels** established



Basketball League - Lithuania Competition Council (LCC)

(Decision - November 2021)

- Fined
 - Lithuanian Basketball League
 - 10 basketball teams (combined fine of €40.080)
 - for having allegedly concluded an **anticompetitive agreement**,
 - deciding **not to pay players their salaries and other remuneration** for the rest of the 2019/20 season,
 - which ended prematurely due to Covid-19
- Agreement established in the course of a meeting between the League and the 10 teams, affecting **players' decision on the teams' choice** for next season
- The Vilnius Regional Administrative Court **annulled the fines in June 2022**, due incorrect assessment of facts, insufficient consideration of conduct's context and lack of evidence
- Even not being a pure no-poach agreement, this is another case that shows growing importance given to labour matters

Hungary



[Association of Hungarian HR Consulting](#) - Hungarian Competition Authority (GVH)

(Decision – December 2020)

- Fined the Association of Hungarian HR Consulting Agencies in HUF 1 billion for having included **anticompetitive provisions in its ethical code**
- The code contained
 - provisions fixing **minimum fees**
 - **conditions** regarding hire and recruitment services provided by the Association's members
 - limitations in **public procurement** procedures
 - a **no-poach clause** that prohibited members from recruiting or enticing employees from other members
- No-poach clause caused **market sharing** between members and prevented the **free movement** of employees, affecting their ability to find better employment and higher salaries

Finland



Ice Hockey SM-Liiga - Finnish Competition and Consumer Authority (FCCA)

(Decision – October 2019)

- The Finnish Ice Hockey League (Jääkiekon SM-liiga Oy) and its 15 teams **agreed**
 - **not to hire** any players from Jokerit team (from another League) during the season
 - not to make
 - any player **loan agreements** with it for the following season, or
 - play any friendly games against it
- FCCA
 - ordered for the agreement to be **terminated**
 - enforced by a **period penalty payment** of €75.000 for each involved party that would continue the infringement after the decision
- The agreement, while being a collective boycott agreement (restrictive by object) rather than a no-poach agreement, shows the importance given to labour market agreements

France



PVC floor coverings manufacturers - Autorité de la Concurrence (AdlC)

(Decision – October 2017)

- Fined
 - three PVC floor coverings manufacturers and
 - French association of manufacturers of floor and wall coverings
 - combined fine of €302 million
 - agreement on several aspects such as
 - price fixing
 - information exchange
 - commercial strategy
 - **no-poach** obligations
- Gentleman's agreement established that the companies **could not hire or approach each other's employees**
- Although the Decision mentions the no-poach component of the agreement, the aspect is not valued autonomously by the AdlC - agreement considered as a whole under competition law as a **restriction by object**



BILOG and KOIOS - Croatian Competition Agency (CCA)

(Case Dismissed – November 2018)

- CCA analysed **no-poach clauses included in contracts** between BILOG (complainant) and KOIOS
 - companies active in the provision of IT services
 - skilled employees are highly demanded
- No-poach agreement established
 - each party **could not**
 - **poach,**
 - **solicit or**
 - **invite to hire** employees from the other party during the implementation of the agreement, without its prior written approval
- CCA considered the agreement represented an “*ancillary restriction of competition*”,
 - clause considered as “**objectively necessary** for the main operation and **proportionate** to the underlying objectives of that operation”,
 - considered not to be anticompetitive



Gemicro - CCA

(Commitments Decision – June 2015)

- Following procedures for abuse of a dominant position,
- CCA analysed **no-poach clauses included in contracts** between
 - Gemicro, a company providing specialised IT support to leasing companies, and
 - its clients
- Clauses - parties were **prohibited**
 - **to hire** or engage with any former employees
 - that had been working for either of them
 - at any time
 - during the lifetime of the agreement
- Gemicro proposed **commitments** to delete the clauses from all concluded contracts and refrain from including it in subsequent contracts - accepted by the CCA
- CCA considered there were no legal grounds to carry out proceedings against Gemicro



Peluquería Profesional - Comisión Nacional de los Mercados y la Competencia (CNMC)

(Decision – March 2011)

- Eight cosmetic product manufacturers and the sector's association (Asociación Nacional de Perfumería y Cosmética)
 - concluded a **no-poach agreement**
 - in the context of a wider cartel,
 - overall fines of €51,5 million
- The companies
 - exchanged **sensitive information** regarding employees' salaries
 - **could not recruit each other's salespeople** without prior consent from the respective company
- CNMC considered the no-poach agreement to be
 - a “**price fixing practice**” and therefore a “**cartel**” **itself**
 - aim was to “*restrict price competition, quantities and other competitive variables equivalent to price-fixing*”
 - a restriction **by object**

Spain



Transitarios - CNMC

(Decision – July 2010)

- Eight transport freight forwarding agents
 - concluded a **no-poach agreement**
 - in the context of a wider cartel that lasted for a period of eight years
 - overall fines of €9,5 million
- The agreement established
 - rates and price increases
 - strategies to pass on direct costs to consumers
 - companies **could not hire each other's employees** without prior consent from the respective company
- CNMC considered the agreement
 - impacted on costs and margins
 - same **harmful effect as an agreement on price fixing**,
 - it replaced free business autonomy
 - (CNMC also highlighted the harm caused to employees)
 - a restriction **by object and effect**

The Netherlands



[Dutch hospitals](#) - Dutch Authority for Consumers and Markets (DACM)

(Court of Appeal Decision – April 2010)

- Dutch Court of Appeal confirmed that several hospitals located in The Netherlands had concluded a **no-poach agreement**
- The agreement contained a **no-poach clause**
 - hospitals agreed **not to hire employees**
 - who had left their current position to go and work through sub-contracting agencies
 - for a period of at least 12 months after the employees left the position
- The agreement might have been put in place to serve plausible interests
 - the quality of care for patients
 - maintenance of employee costs
- Had the **effect of restricting competition**
 - employees had their possibilities limited in a substantial part of the labour market

Other Countries

Recent Developments

United Kingdom



Sport broadcasters – Competition and Markets Authority (CMA)

(Investigation – July 2022)

- Opened a wage-fixing cartel probe into four sports broadcasters
 - for potentially fixing the **rates offered to freelance workers**
- Focus on rates offered to high-profile employees with highly demanded skills inside the market
 - camera operators
 - sound engineers
 - slow-motion specialists
 - floor managers
 - technical staff
- Although the conduct does not seem to configure a no-poach agreement, this is CMA's first cartel investigation in/into **labour markets**

United States of America



90's - 2014

Several **civil** enforcement actions filed by DOJ in labour markets

- Arizona hospitals
- Tech companies
- Nursing services
- Fashion industry



October 2016

DOJ & FTC
Antitrust
Guidance for
HR
Professionals



ANTITRUST GUIDANCE
FOR HUMAN RESOURCE
PROFESSIONALS
DEPARTMENT OF JUSTICE
ANTITRUST DIVISION
FEDERAL TRADE COMMISSION
OCTOBER 2016



DOJ's clear intention to proceed **criminally** against naked wage-fixing or no-poach agreements, punishable by fines up to \$100 million and/or imprisonment up to 10 years



January 2021

1st **criminal** prosecution against healthcare company in a **no-poach agreement** that prohibited companies from soliciting each other's senior employees (acquittal)



July 2021

President Biden signs Executive Order encouraging FTC to ban/limit employee non-compete agreements



October 2022

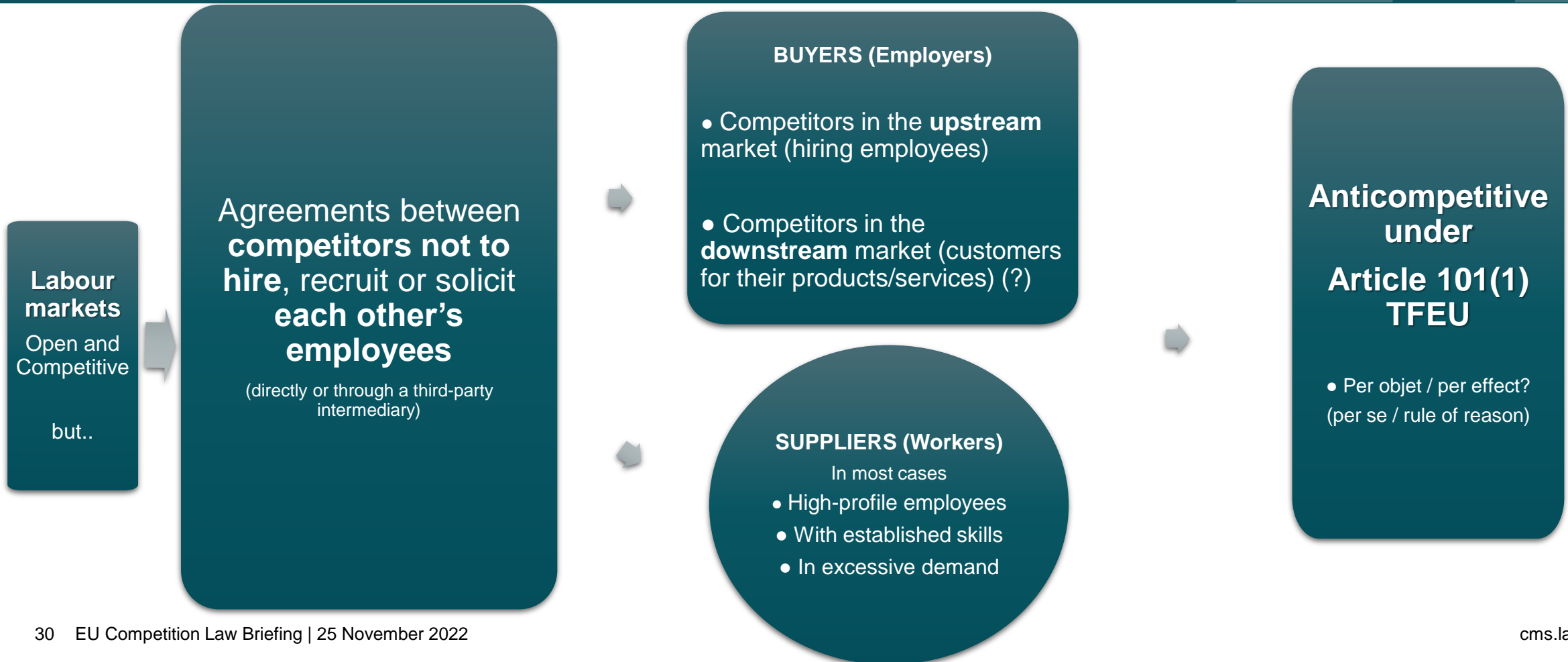
1st DOJ criminal conviction - healthcare company pleaded guilty of conspiring with competitor to allocate staff and suppress wages

Other Jurisdictions

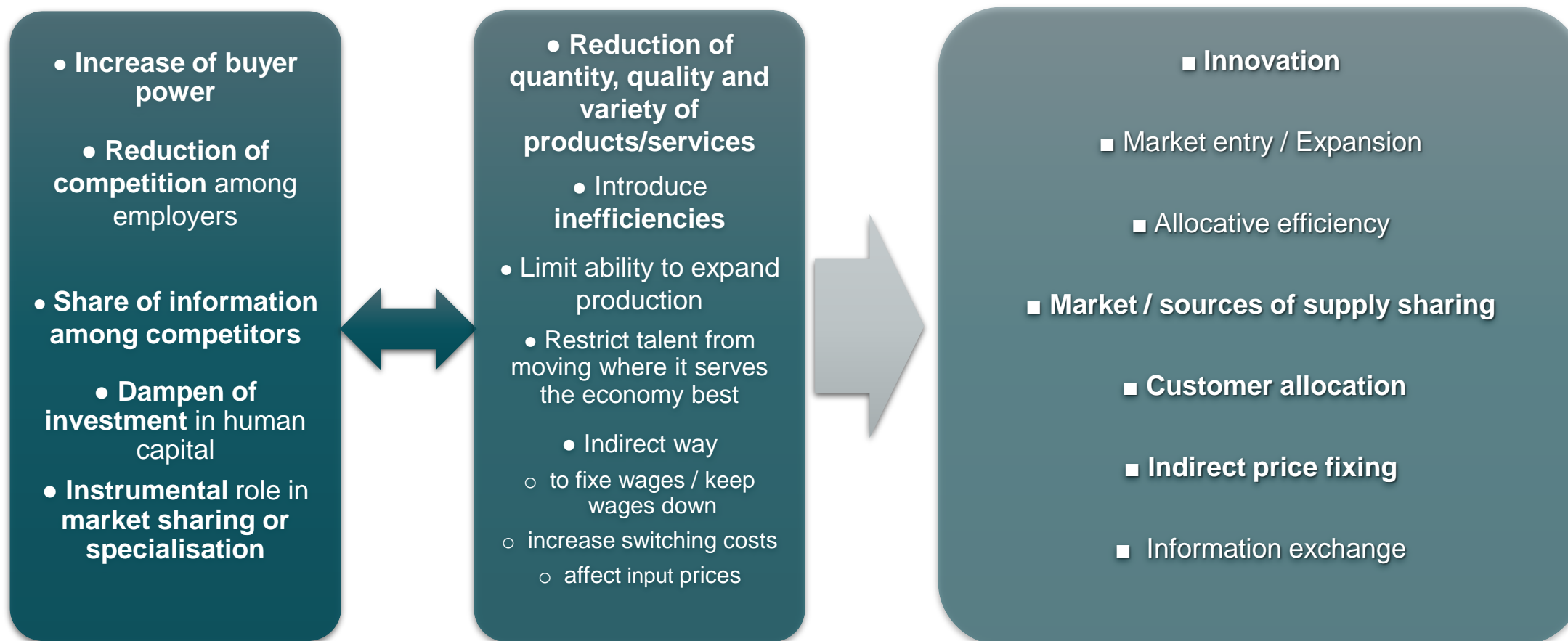
Turkey 	Japan 	Canada 
<p>Turkish Competition Authority (TCA) has shown interest in several situations inside the labour market</p> <p>In April 2022, TCA opened an investigation against 7 undertakings in the field of software/information technologies</p>	<p>Japan Fair Trade Commission published a report in February 2018, assessing hiring practices for service providers and highlighting undesirable activities from a competition point of view</p>	<p>Amendments made to the Canadian Competition Act in June 2022 <u>criminalise</u> both wage-fixing and no-poach agreements with a fine and/or imprisonment up to 14 years</p> <p>The Act opens space for situations where no-poach agreements and wage-fixing agreements may be defensible</p>

Takeaways, red flags and recommendations

No-poach Agreements



No-poach Agreements – Theories of Harm (NCAs)



Antitrust Red Flags for Labour Market Practices



DO NOT

- Agree with another undertaking
 - about employee salaries or other terms of compensation (specific level, within a range, etc.)
 - to refuse to solicit or hire that other undertaking's employees
 - about employee benefits
 - on other terms of employment
- Express to competitors that you should not compete too aggressively for employees
- Exchange company-specific information about employee recruitment, remuneration, compensation or terms of employment
- Participate in a meeting (e.g., in a trade association), where the above topics are discussed
- Discuss the above topics with colleagues at other companies (including during social events or in other non-professional settings)
- Exchange documents that contain company's internal data about employee compensation

RECOMMENDATIONS

TOESMSDC IALINGB KCA
INWPHZ HUKW FE BH UZY T
P GZLFO IE L TRAGO GEH
SS LT BY MY BAS L W F
V D N C N R T B E P P E N N E D T V
A Z M E R T H E Y E H V I G N E
S G M P W K E M V T A S P M G E I
V S X E L Y D A P A G U P E B

- # BEST PRACTICES

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