

Behaviour on the labour market can infringe competition law

From the perspective of competition law, businesses can compete with each other also as employers, vying for the services of employees. This means that they can infringe competition law by taking actions in relation to employees or by making arrangements with other businesses involving their dealings with employees.



JOANNA SIEBIK

attorney-at-law

Competition & Consumer Protection practice



DR ANTONI BOLECKI

attorney-at-law, partner

Competition & Consumer Protection practice

More articles on this topic
on the In Principle portal:



competition

Competition on the labour market

Poland's Competition and Consumer Protection Act bans any agreements between undertakings with the object or effect of eliminating, limiting or otherwise infringing competition. The notion of “competition” is understood broadly—it is not limited to competing for customers, but also applies for example to dealings with suppliers. And, after all, employees are hired by an undertaking to supply services of a certain type. An employer thus competes with other undertakings for specific employees, primarily through the salary they offer but also through other conditions of work and pay.

Importantly, to be competitors on the labour market, undertakings do not also have to be competitors in the more basic sense, i.e. by competing with each other for customers. Manufacturers of entirely different products need some of the same employees, e.g. warehouse workers, drivers, and qualified specialists not directly tied to the specific industry, such as IT workers.

It should be borne in mind in this respect that competition law regards as “employees” not just people hired under an employment contract. Agreements on the labour market may thus also involve persons cooperating with an undertaking on the basis of civil-law contracts (such as, in the Polish context, a contract of mandate [*umowa zlecenia*], a contract to perform a specific work [*umowa o dzieło*], or a B2B contract).

Illegal agreements

The regulations also define very broadly the notion of “agreement” (*porozumienie*). The most obvious example of an agreement would be when two or more undertakings stipulate plans for how they will behave. Significantly, such an agreement does not necessarily

have to be complied with. Even if an undertaking merely declares that it will act in a certain way (for example, that it will not raise employees' salaries this year), but in reality behaves differently, the declaration itself may be determined by the Office of Competition and Consumer Protection (UOKiK) to be an infringement of competition law.

Another form of agreement could be decisions by associations of businesses (e.g. guidelines issued by industry groups), or even the mere exchange of information. For example, at a meeting with a competitor a businessperson might state on their own that their company does not plan any salary raises this year, without asking the competitor what its plans are in this area.

The regulations refer to agreements between “undertakings” (*przedsiębiorcy*), but illegal agreements do not have to be reached between persons formally empowered to act for an undertaking, such as the management board or directors of a company. In practice, an agreement might be reached by any employee of the undertaking (or a person working with the undertaking under a civil-law contract). In this context, staff of HR departments may be particularly exposed to the risk of entering into such agreements.

Moreover, an agreement does not have to be made in writing. An ordinary conversation could suffice, or an exchange of emails, SMSs, or instant messages via a messaging app.

Wage-fixing

The main metric when competing for employees is the compensation paid for their services. Consequently, a wage-fixing agreement—an agreement or exchange of information between undertakings on the salaries they plan to pay their staff—poses a huge risk of an infringement. Because salary is the price paid for employees' services, from the perspective of competition law such measures will constitute a price-fixing agreement.

Setting the salaries for particular positions may also constitute an anticompetitive agreement—for example, stipulating that the salary of persons hired to handle goods in the warehouse will not exceed a certain amount per hour or per month. Such an agreement might take a more general form, such as the plan not to offer any salary increases in the given year.

Agreements concerning not just the overall salary, but also specific components (e.g. bonuses, prizes or task-based supplements), can run afoul of competition law. Merely agreeing on the method for setting wages (e.g. that salespeople will receive, on top of their base salary, a commission of a certain percentage on the products they sell) could also be an infringement.

No poaching

Another example of a serious infringement involves a promise not to entice away each other's staff—a "no-poaching agreement." Such arrangements might involve specific employees or entire categories of workers. Currently UOKiK is conducting proceedings involving alleged agreements between transport companies that they will not hire each other's employees for a certain period after they stop working for their previous employer.

A restriction on competition could be an agreement concerning active recruitment of the competitor's employees—a promise by a business that when looking for employees, it will not contact current or former employees of the competitor (directly or through intermediaries). It could also be an infringement to agree not to hire the competitor's employees when the employees themselves apply for a job with the other company.

Both wage-fixing agreements and no-poaching agreements are treated by the Polish competition authority as restrictions of competition due to the very object of such agreements. This means that the regulator does not have to prove that such agreement actually had a negative impact on competition, or had any effects at all on the given labour market. Simply making such agreements is prohibited.

Exchange of information

The exchange of confidential information between undertakings can constitute an anticompetitive agreement. This is because obtaining information on a competitor's plans can influence the company's business decisions. For example, if a company learns that a competitor plans to lay off a large portion of its staff, it may hold off

on awarding planned pay raises to its own staff, because it knows that the staff will have less opportunity to change employers. If it didn't have access to that information, it might take a different decision. This is why the very exchange of information—or even unilateral sharing of certain information by one undertaking with its competitors—may constitute a restriction on competition.

Non-compete clauses

A ban on competition during employment or after the employment ends is a separate topic. Non-compete clauses are sometimes included in the employment contract or cooperation agreement, or set forth in a separate non-competition agreement. As a rule, such a ban will not constitute an infringement of competition law, so long as it results from the employer's own decision, i.e. was not consulted with other undertakings. This is because only anticompetitive agreements between undertakings are banned—not arrangements between an undertaking and its own employee. And because for the purposes of competition law “self-employed” persons are treated like employees, such a prohibition in civil-law contracts (contract of mandate, contract to perform a specific work, or B2B contract) will also generally be permitted.

However, an agreement in this area between competitors, e.g. concerning the duration of non-compete clauses or the compensation payable to the employee for accepting a non-compete clause, will not be permitted.

UOKiK proceedings to date

The Polish competition authority may conduct proceedings against entities suspected of infringing the Competition and Consumer Protection Act, which may lead to imposition of a fine as high as 10% of the undertaking's turnover in the preceding year. Individual management personnel of the undertaking (management board, directors of specific divisions, and other managers) can also be fined up to PLN 2 million.

To date the president of UOKiK has issued two decisions concerning agreements on the labour market. One of them involved an agreement among **professional basketball teams** playing in the top division that they would stop paying salaries to players from the moment that games were suspended due to the Covid-19 pandemic. The regulator found that setting salaries at zero from a certain moment can also be considered wage-fixing, and thus a form of price-fixing, and is an anticompetitive agreement by its very object. The decision also fined the Polish Basketball League, organiser of the games, which supported the teams in reaching their wage-fixing arrangement.

The other decision also involved sports, this time professional **motorcycle speedway racing**. The rules for speedway events included a provision setting a maximum fee which teams could offer riders within the specific division. The president of UOKiK found that this agreement restricted competition for riders between the teams. In this case, the fine was imposed on the Polish Automobile and Motorcycle Federation (PZMot) and the Speedway Ekstraliga division—the organisers whose rules included the restrictions on riders' pay.

Proceedings are also currently underway before UOKiK concerning alleged no-poaching agreements among **transport companies**. In one of the cases, allegations were filed against 33 companies and 8 individuals. The regulator found that the companies may have limited the opportunity for drivers to change employers between transport companies serving the distribution centres of the grocery chain Biedronka, by agreeing not to hire their competitors' former employees. Allegations were also filed against the owner of Biedronka, Jeronimo Martins Polska, which may have helped its shippers enforce their arrangement.

Examples from other countries

The European Commission imposed a fine of over EUR 320 million on **food delivery** companies. Delivery Hero and Glovo agreed, among other things, that they would not hire each other's employees. Initially this agreement applied only to certain categories of workers, but then was extended to all employees.

The competition authority in the UK found an infringement and fined companies involved in **transmission of sporting events**. The violations concerned the exchange of information by senior management on the rates the companies would pay to certain types of freelancers (such as camera operators, makeup artists, and sound technicians).

In France and Portugal the regulators fined **consulting firms** specialising in engineering and technology for agreeing not to poach each other's staff.

Risk for employers

As these examples show, there is a risk of infringement of competition regulations in various sectors, and the banned practices may involve both skilled and unskilled workers. Therefore, companies need to be particularly careful when raising the topic of employment with other undertakings. Proper training is essential, as well as raising the awareness of employees, particularly in HR departments, of the existing dangers of running afoul of competition law.