**Employment and Competition Law – A new frontier?**

With the labour market showing no signs of weakening since the end of the crisis caused by the Covid 19 pandemic, which has also led to significant changes in the way work is organised, talent retention continues to be on top of human resources agenda.

It goes without saying that talent retention strategies encompass issues that go well beyond the strictly legal, but in this area, topics that both employment lawyers as well as human resources managers have historically remained aloof from are beginning to have a potential impact. We are referring specifically to competition law.

At its core, competition law aims to protect competition as a public good, guaranteeing the balanced and efficient functioning of the market economy and protecting consumers.

As of late competition authorities have increasingly focused their attention on labour markets, seeking to ensure that they remain open and competitive. In Portugal, at least since 2021, the Competition Authority ("AdC") has also had this issue under its radar and has included, in its competition policy priorities document for 2023, intensifying "*the contribution to the promotion of an open and competitive labor market, in which employers adopt an independent and competitive conduct, contributing to more opportunities for workers and innovation*."

**How do competition laws impact labour markets?**

Article 101 of the Treaty on the Functioning of the European Union ("TFEU") prohibits agreements between undertakings which have as their object or effect, inter alia, the fixing, directly or indirectly, of purchase or selling prices or any other trading conditions or the allocation of markets or sources of supply.

In this context, agreements between companies not to pool and/or hire workers (no-poach agreements), agreements to fix wages or other forms of remuneration (wage-fixing agreements) and other types of agreements that have an impact on the workforce as a production input can constitute anti-competitive offences.

**What kind of practices are on the competition authorities' radar?**

In Portugal, AdC has made available a good practice guide for the prevention of anti-competitive agreements in labour markets. This document identifies the following types of agreements as potentially anti-competitive:

1. **No-poach agreements**

These are horizontal agreements whereby companies mutually undertake not to make spontaneous offers or hire workers without the prior consent of the other(s). In the AdC's view, this type of agreement, insofar as it restricts the mobility of workers, can harm competition in several dimensions[1], limiting the autonomy of companies to define strategic commercial conditions (hiring of human resources policy) and affecting employees by reducing bargaining power and wage levels and limiting labour mobility.

[1] It should be noted that in 2020 the AdC initiated proceedings against the Portuguese Professional Football League and 31 sports companies over an agreement not to hire workers, which culminated in the imposition of fines totaling around 11.3 million euros.

This type of agreement prevail in sectors of activity where there is a shortage of highly qualified workers[2], but they are not exclusive to them.

It should be noted that the Labour Code ("CT") itself bans the existence of agreements between employers that prevent the mutual hiring of employees or that oblige them to pay compensation in the event of such hiring. However, the Labour Code does not lay down any additional consequences for entering into such agreements.

In the case of no-poach agreements deemed to violate competition law, the AdC may impose fines of up to 10 per cent of the company's total turnover.

**2. Agreements to fix salaries or other forms of employee remuneration**

These are horizontal agreements between companies aimed at harmonising or coordinating the wages or other forms of remuneration paid to employees.

According to the AdC this type of agreement can lead, among other effects, to "a harmonisation of the price paid for an input, thus resulting in a greater similarity of competitors' cost structures." Such harmonisation of costs "reduces the uncertainty associated with the competitive game and can facilitate price coordination in downstream markets."

In this context, the exchange of commercially sensitive and strategic information involving the recruitment of workers, salaries or other forms of remuneration can also constitute a practice that restricts competition.

It should be emphasised here that although companies or associations of employers activities as social partners traditionally falls outside the scope of competition law, this is no longer the case when they act as undertaking or associations of undertakings[3].

[2] A case brought in the United States in 2010 by the U.S. Department of Justice (DOJ) against a group of technology companies (including Adobe, Apple and Google) is a landmark concerning this issue. In the case, the companies had entered into no-poach agreements with each other in which they undertook not to solicit each other's workers. The agreements included a ban on unsolicited communications with employees (so-called cold calls to employees). The case ended in a consent judgement, i.e. a solution agreed between the DOJ and the companies, with commitments to be fulfilled by the companies to eliminate the conduct deemed unlawful.

[3] For example, AdC has already considered that the SNATTI (National Union of Tourist Activity, Translators and Interpreters) acted as an economic operator - as an association of companies - by approving and publicising price lists for services provided by tourist information professionals and that the approval and publicising of price lists by a union amounted to anti-competitive behaviour by an association of companies (tourist information professionals were independent professionals and, to that extent, companies), subject to the competition law.