

Summary.

Job poaching (talent raiding, employee raiding, lateral hiring) defines an economic phenomenon where competing businesses try to steal each other employees and contract agents. This phenomenon is relevant as talent raiding may disrupt the business organization of competitors while leading to underinvestment in training.

In this context, firms have been working out various contract remedies in order to avert lateral hiring. For instance, through non-competition clauses (CNCs), employees agree on not working for a competitor, nor starting a competing venture upon termination of the employment contract. Through non-disclosure agreements (NDAs), employees engage themselves on not revealing business secrets and know how to third concerns upon expiration of the employment contract. Through non-solicitation agreements, employers agree on not hiring, nor soliciting the employees and/or contract agents of their competitors. Besides contract remedies, regulatory tools like payroll taxes and subsidies try to correct some adverse consequences arising out of job poaching, i.e. underinvestment in training.

Both in common law jurisdictions and in civil law jurisdictions, legal scholarship and case have been dealing with talent raiding as well as contract remedies. They have been considering job poaching and contract remedies, thus, under the lenses of private law, i.e. a set of rules including unfair competition rules and tortious interference with contract. But they also have been considering job poaching and

contract remedies under the lenses of antitrust law, i.e. a set of rules including the prohibition of cartels, concerted practices, monopolization (abuse of dominant position). More accurately, predatory poaching identifies a practice where dominant firms exploit their market power to hire the workforce required by potential competitors. Collusive poaching identifies a practice where a group of firms agree on hiring and soliciting the workforce of their competitors. Through wage-setting pacts, businesses agree on fixing the wage of their employees so that competitors will find it more difficult to subtract workers by offering better working conditions.

After a careful analysis of case law and legal literature, the conclusion is threefold.

Firstly, according to legal scholarship and case law, job poaching involves the interests of workers, those of the training firms, the interests of competitors.

Secondly, unfair competition rules and antitrust law are misaligned in scope as unfair competition may also bolster contract remedies against talent raiding on given occasions.

Thirdly, English common law and Australian common law have a laxer approach to non-solicitation agreements as courts are persuaded that covenants against job poaching protect prevailing legitimate interests. Meanwhile, civil law jurisdictions tend to allow job poaching and act against contract remedies according to a Kaldor-Hicks efficiency parameter, i.e. supposing that the interests of the workers and those of the competitors offset the expectations of the training firms.

Nevertheless, some of these findings are inconsistent in the light of economic literature on human capital and talent raiding.

According to economic scholarship, job poaching produces both shortcomings and benefits. On the one side, lateral hiring is responsible for underinvestment in training as firms will not undertake investments in human capital if the risk of turnover is high. On the other side, lateral hiring allows knowledge spillovers, but also a loss of competitive advantage for regional clusters.

As a result, job poaching does not only involve the interests of the training firms, those of the competitors, those of the workers. The interests of consumers, regional clusters, the international market as a whole shall also be considered.

Furthermore, for interpreters to establish a hierarchy among all the interests the focal point shall be on investments in training and economic development rather than on a numerical comparison of the subjects involved in job poaching situations. After all, there is an increasing consensus in scholarship and case law on the fact that competition law needs to be polarized on long term goals, which means economic growth.

The FTC and other antitrust enforcers look at non-solicitation agreements with suspicion. However, if such remedies against job poaching are allowed, there will be an incentive for businesses to internalize poaching externalities, ensure investments in training, promote economic growth in the long run. Undoubtedly, non-solicitation covenants may create an occasion for unlawful coordination between firms. But these problems could be averted if the proportionality of these agreements, finding a support in the unfair competition doctrine and in Article 3 of the TEU, is reviewed

according to objective parameters. Meanwhile, contract remedies being absent, the mobility of workers shall be protected unless there is evidence of collusive poaching, destructive poaching, predatory poaching. In this context, payroll taxes more than entry fees and subsidies might internalize poaching externalities in the absence of long term contingent contracts between firms.