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RELATORE Ch. Prof. Marcello Clarich

CANDIDATO Dott. Cesare Trecroci

**DO NOT COVET YOUR COMEPTITORS' WORKERS. JOB
POACHING BETWEEN PRIVATE ENFORCEMENT AND PUBLIC
ENFORCEMENT OF COMPETITION LAW**

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Introduction.

Do not covet your competitors' workers. Or not? There is an increasing concern, notably in the United States of America, about the antitrust implications of various practices in the field of Human Resources management. The new Antitrust Guidance for HR Professionals (2016) of the Department of Justice and the Federal Trade Commission looks at non-solicitation agreements with suspicion, even if these covenants are aimed at averting the complications of job poaching and underinvestment in training. Meanwhile, it is no mystery that talent raiding has always been challenged as a form of unfair competition. The extant dissertation will delve into these subjects, investigating on the legal treatment of job poaching and remedies correlated. More accurately, the question is understanding which interests are involved in these phenomena; which interests have been considered to be prevailing in legal scholarship and case law throughout the globe, and according to which methodology pre-eminence has been established; if the approach of legal scholarship and case law presents inconsistencies, and if a qualitative assessment could be of help in solving these problems, if any.

A vast literature as well as a vast case law have been dealing with job poaching. Yet, the present work might deliver an interesting contribution in a threefold sense.

Firstly, most of the scholars concerned have been focusing on job poaching only under the unfair competition doctrine, i.e. with the lenses of private law. At the same time, a few foreign scholars have

been examining competition law implications in recruiting processes. This dissertation will try to connect the researches made, evaluating the relationships between unfair competition rules and antitrust laws in the field of job poaching.

Secondly, most of the scholars concerned have been focusing on job poaching only through a dogmatic approach. This dissertation will try to fill in the gaps, assessing talent raiding also under the light of economic literature on human capital, antitrust enforcement, and economic development in the long run.

Thirdly, most of the scholars concerned have been focusing either on job poaching only, or on contractual remedies only. Again, this dissertation will try to fill in the gaps, analyzing job poaching and remedies against it contemporarily. In particular, attention will be devoted to both contractual and regulatory remedies. Contractual remedies cover non-competition clauses between employers and employees, non-disclosure agreements, non-solicitation agreements among the employers, etc. Regulatory remedies include instead training subsidies and payroll taxes (payroll fees) above all. A challenge here is to understand if contractual remedies against job poaching - and non-solicitation agreements play a key role in this direction - are to be discouraged, as the DOJ and FTC envisage. A challenge here is to understand under which conditions regulatory remedies like subsidies or payroll taxes (payroll fees) may prove themselves to be efficient against the underinvestment in training arising out of lateral hiring.

It is to be understood, however, that the present work only opens the gate for the researches to be made in the field of HR and competition law. This dissertation merely concerns job poaching and the remedies

against it. There is still room for further research, notably as regards the configuration of HR market as a distinct product market and geographical market, both under a static perspective and under a dynamic perspective.

In this context, three chapters are developed.

Chapter 1 has an eminently-legal subject. The focus is on how civil law jurisdictions and common law jurisdictions have been considering job poaching and contractual remedies against it from a comparative standpoint. The methodology employed is, thus, comparative.

Chapter 2 presents a different color. The goal of this chapter is deconstructing job poaching, verifying what are the interests involved, what are the effects according to economic literature; if the findings of legal scholarship and case law are justified compared with the considerations of economic literature. It is crystal clear that the approach used becomes qualitative.

Chapter 3 is eventually polarized on the balance of interests, but also on remedies. A primary objective is understanding if long term benefits like economic development could play a role in establishing a hierarchy among the interests involved, i.e. a precondition for any legal treatment. A secondary objective is grasping to what extent contract remedies and regulatory remedies against job poaching are effective in promoting long term goals. The methodology is qualitative and comparative at the same time.

In any case, the following pages will stress, two kinds of remedies are allowed against lateral hiring. There is the private enforcement of competition rules and, thus, employers can sue their competitors in courts under the doctrine of unfair competition or by alleging tortious

interference with contract. There is the public enforcement of competition rules and, thus, antitrust agencies or private plaintiffs can take the initiative, contesting predatory hiring and collusive hiring as a form of monopolization (abuse of dominant position) or cartel respectively. Public enforcement of competition law usually identifies procedures before NCAs in Europe. Nevertheless, if one considers other jurisdictions like the U.S., public enforcement tendentially happen through the intermediation of a court. The result is that conventional definitions of public enforcement could not be adaptable. In this dissertation, private enforcement of competition law amounts to actions based on unfair competition doctrine, tortious interference in contract, breach of contract, etc., i.e. private law. Public enforcement of competition law evokes instead actions based on antitrust rules. The discrimination between private enforcement and public enforcement of competition law is not linked, thus, to the subjects taking the initiative (private plaintiffs vs. agencies), nor to procedural steps (trial only vs. administrative procedure and subsequent judicial review). Conversely, the extant work employs another distinctive element, i.e. causes of action.

1.

Job poaching: a comparative law appraisal

1. Preliminary remarks.

The extant chapter shall reflect on job poaching from a comparative law standpoint. The ultimate goal is understanding how common law systems and civil law systems have been dealing with this economic phenomenon and the remedies correlated. As the introduction makes it clear, it is not an ambition of this work taking position on specific legal problems, e.g. the conditions for applying the unfair competition doctrine to talent raiding. This is a task for industrial law research to pursue. Conversely, the target for the moment being is emphasizing, contrasting, comparing both trends and general approaches, considering how scholarship and courts have been balancing the interests involved compared with the causes of action.

To this end, Paragraph 2 shall try to define what job poaching is and if relevant subcategories have been individuated over time. Paragraph 3 shall expose instead how the private enforcement of competition law works *vis-à-vis* job poaching, with a specific reference to two causes of actions, i.e. unfair competition doctrine and tortious interference with contract. Paragraph 4 shall be devoted to public enforcement of competition law *vis-à-vis* lateral hiring. Here the focus shall be both on the implementation of unfair competition rules before independent agencies, and on the application of antitrust law in the field of human

resources. Paragraph 5 shall draw some preliminary conclusions on the behavior of common law and civil law systems, as well as on the interferences between private law and antitrust law face to talent poaching.

2. A problem of definitions.

As an economic phenomenon, job poaching encompasses a variety of situations. There is the case where firms hire the employees of their competitors in order to acquire trained personnel and without incurring in training costs. There is the case where firms steal each other key workers so as to delete their competitors from the market. There is the case where firms solicit the talents of their competitors in order to win expertise, know-how, even a client base indirectly. There is the case where firms convince workers by proposing higher salary levels. There is the case where solicitation implies discrediting the competitors. All these hypotheses present a common denominator: lateral hiring is part of a wider strategy to outperform, outthink, outmaneuver competitors, both to ensure internal growth and to win market shares.¹

Within this plural context the risk from a legal standpoint is fragmentation. Fragmentation in dogmatic assessments. Fragmentation in legal treatment. The consequence is that a categorization of job poaching is required, if feasible.

Scholarship, case law, policy makers have been trying to define job poaching through conduct-based formulas. In the opinion of Gustavo

¹Perry, D.E.-Haluska, M.J., *Hiring Greatness: How to Recruit Your Dream Team and Crush the Competition*, Hoboken, New Jersey, 2016, p. 90. Paley, N., *How to Outthink, Outmaneuver, and Outperform Your Competitors: Lessons from the Masters of Strategy*, Boca Raton, Florida, 2016, p. 325. Morgan, J., *The Employee Experience Advantage: How to Win the War for Talent by Giving Employees the Work Spaces They Want, the Tools They Need, and the Culture They Can Celebrate*, Hoboken, New Jersey, 2017, p. 26.

Ghidini, thus, talent raiding happens when competing businesses subtract each other workers, a category including both employees and consultants.²In the opinion of Gardner, Stansbury, Hartin, job poaching is nothing else but ‘*hiring away the employees of another firm.*’³ In the opinion of Giampaolo Dalle Vedove, lateral raiding identifies an interference in the internal organization of personnel.⁴Under Article L1237-3 of the French Labor Code, employees are at the center of talent raiding, when they decide to break their contract and to work for another employer, a competing firm most of the times.⁵

These definitions do not describe the direct/indirect effects of job poaching, nor the specific reasons behind it. Indeed, the focus is on the structure of the conduct, i.e. the distraction of workers from competing businesses organizations. After all, rationales and consequences may vary. But the transfer of workers between competing firms, together with the convincing activity of a competitor, is something that is always present.

²Ghidini, G., *La concorrenza sleale*, Turin, 2001, p. 299. Petti, R., *L’animus nocendi nello storno di dipendenti alla luce del consolidato orientamento finalistico-oggettivo espresso dalla giurisprudenza di legittimità*, in Riv. Dir. Ind., No. 3, 2017, pp. 350 and ff.: ‘*per storno di dipendenti si intende la sottrazione di taluni collaboratori all’impresa del concorrente per assumerli nella propria.*’

³Gardner, T.M.-Stansbury, J.-Hart, D., *The Ethics of Lateral Hiring*, in Business Ethics Quarterly, Vol. 20, 2010, p. 341.

⁴Dalle Vedove, G., *Lo storno di dipendenti nella disciplina della concorrenza*, Padova, 1992, p. 2. p. 130.

⁵‘*Lorsqu’un salarié ayant rompu abusivement un contrat de travail conclut un nouveau contrat de travail, le nouvel employeur est solidairement responsable du dommage causé à l’employeur précédent dans les cas suivants: 1° S’il est démontré que le nouvel employeur est intervenu dans la rupture; 2° Si le nouvel employeur a engagé un salarié qu’il savait déjà lié par un contrat de travail; 3° Si le nouvel employeur a continué d’employer le salarié après avoir appris que ce dernier était encore lié à un autre employeur par un contrat de travail. Dans ce cas, sa responsabilité n’est pas engagée si, au moment où il a été averti, le contrat de travail abusivement rompu par le salarié était venu à expiration, soit s’il s’agit de contrats à durée déterminée par l’arrivée du terme, soit s’il s’agit de contrats à durée indéterminée par l’expiration du préavis ou si un délai de quinze jours s’était écoulé depuis la rupture du contrat.*’

A variable in each of the formulas proposed is, however, the main character. Ghidini devotes attention to the competing businesses who hire the personnel. Dalle Vedove sheds light on the firms who undergo a loss of workers. French Labor Code emphasizes the behaviour of employees, who take the decision to fly away.⁶

Meanwhile, in the opinion of scholarship, even the attempt to poach employees could be relevant under the unfair competition rules. In particular, Delle Vedove points out that, if interim relief may be authorized against acts of talent hiring, then the situation protected could not only coincide with an existing harm, but also with a qualified danger.⁷

In short, conduct structure and, therefore, distraction of workers shall be the cornerstone of any definition of lateral hiring. Furthermore, this definition shall account for all the subjects involved and for any relevant conduct, including mere attempts to poach workers, if pertinent.

According to case law and scholarship, two conditions are required for job poaching to be relevant, at least under unfair competition rules and antitrust laws.

From a subjective point of view, job poaching shall happen between entrepreneurs. Dominant scholarship in Italy tends to interpret this requirement strictly, i.e. as involving only the providers of goods and

⁶Bollettinari, A., *Concorrenza sleale, storno di dipendenti e liquidazione del danno*, in *Responsabilità Civile e Previdenza*, No. 4, 2016, pp. 1320 and ff. This scholar reflects on the position of SMEs and huge corporations *vis-à-vis* job poaching: “Distanza tra le valutazioni che informano la grande e la piccola impresa: mentre la prima si orienta verso una disciplina fortemente restrittiva, diretta a impedire il trasferimento delle risorse umane, la seconda si fa portavoce di un'esigenza contrapposta poiché il passaggio dei dipendenti consente il reclutamento di personale già addestrato.”

⁷Dalle Vedove, G., *Lo storno di dipendenti nella disciplina della concorrenza*, quoted, p. 123. Dalle Vedove, G., *Storno di dipendenti e possibili rimedi*, in *Riv. dir. ind.*, Voll. 4-5, 2005, pp. 249 and ff.

services through a professional organization⁸ (Article 2082 of the Civil Code). Gustavo Ghidini suggests instead that there is a parallelism between unfair competition rules and competition law. Hence, whoever carries out an economic activity, including professionals, non-profit organizations, universities, could be held responsible for illicit lateral hiring.⁹

From an objective point of view, the controversy is in contrast on the relevance of potential competition. In the opinion of numerous scholars, two businesses may be regarded as competitors stealing each other workers when they share the same client base and, thus, when products (or services) are complementary or substitutes.¹⁰ In the view of other experts, however, looking at current complementarity (or substitutability) of products (or services) is reductive. Talent raiders will not hire the employees of competitors only if they desire to expand their client base. Conversely, job poaching is linked, most of the times, to the creation of new business ventures (who require skilled personnel at a low training cost) and to the diversification of investments in new business areas (with skilled personnel at a low training cost).¹¹

⁸Petti, R., *L'animus nocendi nello storno di dipendenti alla luce del consolidato orientamento finalistico-oggettivo espresso dalla giurisprudenza di legittimità*, Ghidini, G., *La correttezza professionale tra due ordinamenti costituzionali*, in Riv. dir. ind., No. 6, 2011, pp. 350 and ff.

⁹Ghidini, G., *La concorrenza sleale*, quoted, p. 14. Spolidoro, M.S., *Concorrenza sleale, appropriazione del lavoro altrui e parassitismo*, in Riv. Dir. Ind., No. 1, 2018, pp. 5 and ff. Jaeger, P., *I soggetti della concorrenza sleale*, in Riv. Dir. Ind., Vol. 1, 1971, pp. 169 and ff. Jaeger, P., *Concorrenza sleale e impresa senza organizzazione*, in Riv. Dir. Ind., Vol. 2, 1977, pp. 337 and ff. For a general framework, see Sciré, F., *La concorrenza sleale nella giurisprudenza*, Vol. 1, Milan, 1989, pp.89 and ff.

¹⁰Petti, R., *L'animus nocendi nello storno di dipendenti alla luce del consolidato orientamento finalistico-oggettivo espresso dalla giurisprudenza di legittimità*, quoted.

¹¹Ghidini, G., *La concorrenza sleale*, quoted, p. 29. Spolidoro, M.S., *Concorrenza sleale, appropriazione del lavoro altrui e parassitismo*, quoted, pp. 5 and ff. T. Milan, 25.3.2011.

The result is that a comprehensive definition of lateral hiring shall also include economic operators (who are not entrepreneurs) and potential competition (that does not involve current substitutability or complementarity of products).

In this direction, job poaching may be defined as the situation where an economic operator interferes with the business organization of a potential competitor, soliciting, hiring, or trying to hire workers. Indeed, talent raiding does not only cover employees but also consultants, agents, other para-subordinate workers¹², even executives.¹³

That being said, one can individuate different subsets of lateral hiring.

A first distinction is between contract poaching and non-contract poaching. Contract poaching happens when employers induce the employees of their competitors not to comply with specific contract clauses or to get fired. The most common situation is an employer convincing the employee of his competitor to work for him, notwithstanding a clause-not-to-compete (CNC) set forth in the contract. Non-contract poaching occurs instead in the absence of any contract constraint on the employee or the consultant. The dichotomy between contract poaching and non-contract poaching is relevant from a legal standpoint. On the one side, tortious interference with contract could be invoked only with respect to contract poaching. On the other side, breach of contract rules is sufficient for talent raiding to represent an unlawful conduct.¹⁴

But there is a dividing line also between destructive poaching and parasitic poaching. In destructive poaching, employers solicit or hire

¹²T. Venice, 25.3.2011.

¹³Cass., First Ch., 4.12.2014, n. 25652. T. Milan, 14.2.2012.

¹⁴T. Milan, 28.2.2014.

the employees of their competitors in order to disrupt the business organization of these latter. In parasitic poaching, employers solicit or hire the employees of their competitors only to exploit skilled personnel without incurring in any training cost. The trend in Italian case law is to deliver legal protection also in cases of parasitic poaching, as the position of competitors is considered relevant from a legal standpoint only when entrepreneurs make investments and risk of their own, without relying on the costs of others.¹⁵ Nevertheless, Marco Saverio Spolidoro maintains that parasitic poaching should not give rise to legal protection. In the opinion of this scholar, returns on investments in human capital do not represent property and shall not be protected. Furthermore, the only *discrimen* between poaching allowed and poaching not-allowed lays in a damage to competitors beyond any reasonable limit. In this sense, a mere subtraction of workers, albeit being justified by savings reasons, does not harm competitors abnormally. In contrast, preventing simple parasitic poaching would not comply with the principle of free competition in the job market.¹⁶

¹⁵Bochicchio, F., *La concorrenza parassitaria e la tutela dell'iniziativa privata nei rapporti inter-imprenditoriali*, in Riv. Dir. Ind., Vol. 2, 2003, pp. 150 and ff. Berruti, G.M., *La concorrenza sleale nel mercato*, Milan, 2002, p. 135. T. Milan, 21.6.2012. T. Milan 21.2.2011.

¹⁶Spolidoro, M.S., *Storno illecito di dipendenti e sfruttamento parassitario degli investimenti altrui: contro una pretesa nuova razionalizzazione della fattispecie di storno come atto di concorrenza sleale*, in *Impresa e Mercato. Studi dedicati a Mario Libertini*, Vol. 2, Milan, 2009, p. 1255. Spolidoro, M.S., *Concorrenza sleale, appropriazione del lavoro altrui e parassitismo*, quoted: 'le leggi oggi vigenti non permettono di subordinare l'esercizio della libertà di iniziativa economica alla tutela di interessi altrui, ma solo al rispetto dell'altrui proprietà; né vale richiamare il limite all'iniziativa economica derivante dall'utilità sociale (art. 41 Cost.) perché, anche attribuendo alla norma immediata portata precettiva, non si vede come la tutela di un interesse individuale a non subire la concorrenza di terzi, adducendo che essi « approfittano » di investimenti non loro, coincida con l'interesse generale della società, la quale, anzi, può avvantaggiarsi da una rapida circolazione delle innovazioni e da un minor costo dei prodotti nuovi, salvo che ricorrano i presupposti di un diritto di proprietà industriale che il titolare si sia riservato o abbia fatto valere nelle forme previste dalla legge.' Bellia, M., *Concorrenza sleale*

Chapter 2 and 3 will explain through a qualitative-quantitative methodology when parasitic poaching may jeopardize interests, acquiring relevance from a legal standpoint. For the moment being, suffices to say that two kinds of remedies are allowed against lateral hiring. There is the private enforcement of competition rules and, thus, employers can sue their competitors in courts under the doctrine of unfair competition or by alleging tortious interference with contract. There is also the public enforcement of competition rules and, thus, antitrust agencies or private plaintiffs can take the initiative, contesting predatory hiring and collusive hiring as a form of monopolization (abuse of dominant position) or cartel, respectively.

Public enforcement of competition law usually identifies procedures before NCAs in Europe. Nevertheless, if one considers other jurisdictions like the U.S., public enforcement tendentially happen through the intermediation of a court. The result is that conventional definitions of public enforcement could not be adaptable.

In this chapter, however, private enforcement of competition law amounts to actions based on unfair competition doctrine, tortious interference in contract, breach of contract, etc., i.e. private law. Public enforcement of competition law evokes instead actions based on antitrust rules. The discrimination between private enforcement and public enforcement of competition law is not linked, thus, to the subjects taking the initiative (private plaintiffs vs. agencies), nor to procedural steps (trial only vs. administrative procedure and subsequent judicial review). Conversely, the extant dissertation employs another distinctive element, i.e. causes of action.

da storno di dipendenti e sua interpretazione nella giurisprudenza più recente, in Riv. Dir. Ind., No. 4-5, 2013, pp. 260 and ff.

3. Private enforcement of competition rules.

3.1. Unfair competition doctrine and job poaching in Italy: Article 2598 n. 3 of the Civil Code.

From a constitutional point of view, Italian courts are of the opinion that only fair competition deserves legal protection.¹⁷ However, some prominent scholars point out that free entrepreneurship is protected per se under Article 41 of the Italian Constitution. Indeed, unfair conducts constitute a limit on the freedom to compete.¹⁸

The consequence is that, according to case law, competitors' interests are to be protected only if they comply with professional diligence. In contrast, in the opinion of scholarship, legal protection comes up only with unfairness.

Article 2598 n. 3 of the Civil Code dictates: *'Subject to the provisions that concern the protection of distinctive signs and patent rights, anyone who engages in acts of unfair competition: [...] Directly or indirectly uses any other mean not comply with the principles of professional fairness and able to damage other people's company.'*

In the opinion of scholarship and case law, this statute incorporates a rule of fairness in business intercourse. More accurately, number 3) of article 2598 includes all the remaining atypical actions breaking the principles of professional integrity and that are able of damaging each other company. The breach of the principles of professional integrity does not necessarily require the violation of rules of law, but it can be simply a breach of professional standards, generally accepted in the field of reference.

¹⁷Cass., Sez. Un., 4.2.2005, n. 2207 ; Cass. n. 11859/97. Vanzetti, A.-Di Cataldo, V., *Manuale di diritto industriale*, Milan, 2012, p. 95.

¹⁸Ghidini, G., *La correttezza professionale tra due ordinamenti costituzionali*, in Riv. dir. ind., No. 6, 2011, pp. 239 and ff.

Hiring competitors' workers is not illegal per se. Workers have a right to change job and ameliorate their working conditions, including salary. Nevertheless, job poaching might become detrimental on some occasions, at least from a legal standpoint.¹⁹ Scholarship and courts debate on the dividing line between unlawful employee raiding and lawful employee raiding.

A first theory suggests that for job poaching to be unlawful the so-called *animus nocendi* shall be proved. Talent raiding is not forbidden per se or at least not always. Poachers will have to pay for compensation only if there is direct evidence of the fact that they want to disrupt the organization of competitors.²⁰ Critics to this doctrinal elaboration argue that plaintiffs may find it difficult to achieve evidence of business intention.²¹

A second theory purports instead that job poaching will be unlawful even if there is no proof of the *animus nocendi*, provided that the conduct disrupts the organization of competitors.²² Critics to this

¹⁹Cartella, B., *Osservazioni in tema di storno e violazione di know how*, in Riv. Dir. Ind., Vol. 3, 2011, pp. 145 and ff. Matter, G., *Brevi note in materia di storno dei dipendenti: criteri di individuazione dell'illecito concorrenziale*, in *Responsabilità Civile e Previdenza*, No. 6, 2012, pp. 1932 and ff. For the past, see Auletta, G.G., *Delle invenzioni industriali, dei modelli di utilità e dei disegni ornamentali, della concorrenza*, in Comm. cod. civ. Scialoja- Branca, Vol. V, Articles 2584-2601, II ed. 1973. Santini, G., *La vendita a prezzo imposto*, in Riv. trim. dir. proc. civ., 1952, pp. 1076 and ff.

²⁰Valle, V., *Brevi note a Trib. Monza, 13 febbraio 2001, in tema di storno di dipendenti*, in Riv. Dir. Ind., Vol. 2, 2002, pp. 183 and ff. Cass., First Ch., 20.1.2014, n. 1100. T. Catanzaro, 28.9.2016. T. Turin, 8.9.2015. T. Rome, 26.1.2015. T. Bologna, 5.11.2014. T. Bologna, 31.7.2014. T. Pisa, 24.3.2014. T. Mantova, 19.11.2014. T. Turin, 16.3.2012. T. Turin, 12.5.2011. T. Bologna, 8.3.2011.

²¹Montaruli, G., *Storno di dipendenti: tra elemento soggettivo e danno (ingiusto?)*, in Foro. it., 1997, p. 232. Vanzetti, A.,-Di Cataldo, V., *Manuale di diritto industriale*, quoted, p. 104.

²²Mosco, L., *La concorrenza sleale*, Naples, 1956, p. 221. Bonasi-Benucci, E., *Atto illecito e concorrenza sleale*, in Riv. trim. dir. proc. civ., 1957, p. 592. Ascarelli, T., *Teoria della concorrenza e dei beni immateriali*, Milan, 1962, p. 214. Fabiani, M., *Concorrenza sleale e annientamento del concorrente*, in Riv. Dir. Comm., 1967, pp. 369 and ff. Guglielmetti, G., *La concorrenza e i consorzi*, Turin, 1986, p. 165.

position object that, without *animus nocendi*, it could be difficult to assess when poaching is to be allowed and when this option is to be discarded.²³

A third theory eventually maintains that disruption of the organization could not be necessary, but *animus nocendi* is. Nevertheless, *animus nocendi* could be proved indirectly through presumptions. Plaintiffs claiming for compensation might succeed in court if they allege that specific conducts, like the use of subtle tactics, the subtraction of key workers, the subtraction of a huge amount of employees, etc., cannot be explained otherwise unless one infers the intention to erase the competitor from the market.²⁴ Critics object that this theoretical construction mixes subjective criteria (*animus nocendi*) and objective elements (specific conducts proving *animus nocendi*) unduly.²⁵

As the preliminary remarks anticipate, it is not the task of this chapter commenting the theories on job poaching from a legal standpoint.

Franceschelli, R., *Storno di se medesimo, lavoratori «migranti»: concorrenza sleale da storno di dipendenti e rilevanza del concetto di «gruppo»*, in Riv. dir. ind., Vol. 2, 1982, p. 158. Frau, G., *Lo storno di ausiliari autonomi come atto di concorrenza sleale*, in Riv. Dir. Ind., Vol. 1, 1973, p. 70. In case law, see: Cass., 10th May 1938, in Foro it., Vol. 1, 1938, p. 1558. Cass., 19th November 1968, No. 3763, in Foro It., Vol. 1, 1969, p. 316. T. Milan, 26.2.2015. T. Milan, 21.2.2011.

²³Auteri, P., *La concorrenza sleale*, in Trattato Dir. Priv. edited by Rescigno, P., Vol. 18, Turin, 1983, p. 406.

²⁴Pardolesi, R., *Comment to Cass., 6th May 1980, No. 2296*, in Foro. It., Vol. 1, 1980, p. 1886. Bellia, M., *Concorrenza sleale da storno di dipendenti e sua interpretazione nella giurisprudenza più recente*, quoted, pp. 260 and ff. Tiraboschi, A., *Brevi note in tema di storno di dipendenti quale atto di concorrenza sleale ex art. 2598, n. 3, c.c.*, in Riv. Dir. Ind., Vol. 2, 2007, pp. 129 and ff. Capra, D., *Due pronunce in tema di storno di dipendenti*, in Riv. Dir. Ind., Vol. 1, 2001, pp. 67 and ff. Cass., First Ch., 29.12.2017, n. 31203. Cass., ord., Sixth Ch., 15.11.2017, n. 27144. Cass., First Ch., 4.1.2017, n. 94. Cass., First Ch., 18.5.2012, n. 7927. For a comment, see Bruno, E., *Lecito contrattare con un agente in forza ad una azienda concorrente, nota a Cass. Civ., Sez. I, 4 gennaio 2017, n. 94*, in Diritto e Giustizia, No. 5, 2017, pp. 10 and ff. Court also discuss on how unfair competition doctrine works when tenderers, participating to a public procurement procedure, hire the employees of their competitors. This practice is allowed in T. Turin, 1.8.2015. Contrariwise see T. Turin, 10.7.2015.

²⁵Matter, G., *Brevi note in materia di storno dei dipendenti: criteri di individuazione dell'illecito concorrenziale*, quoted, pp. 1932 and ff.

Suffices to say instead that both disruption of the competing firms and *animus nocendi* represent limits, i.e. constraints through which policy makers and rules make it clear that job poaching is generally allowed, and that the interests of poachers, together with the rights of workers, prevail over the interests of training firms.²⁶ This is true also when firms steal the employees of their competitors in order to win know how indirectly.²⁷

3.2. Tortious interference with contract and job poaching in Italy: relations with Article 2598 of the Civil Code.

Article 2043 of the Civil Code sets out that any person who by willful or negligent conduct causes unfair detriment to another party must compensate that injured party for any resulting damage. For a very long time, compensation was limited on the infringement of absolute rights, e.g. property rights. Nowadays, however, the Court of Cassazione shares a different view, allowing compensation even for violation of relative rights.²⁸ More importantly, a new cause of action

²⁶Berruti, G.M., *La concorrenza sleale nel mercato*, quoted, p. 134.

²⁷Cartella, B., *Osservazioni in tema di storno e violazione di know how*, quoted, pp. 145 and ff. Paschi, C., *La tutela concorrenziale per le informazioni non qualificate*, in Riv. dir. ind., Vo. 2, 2012, pp. 95 and ff. Papagni, V., *La mancanza di prova della rivelazione di segreti industriali determina il lecito vantaggio del concorrente*, in Diritto & Giustizia, 2009, pp. 162 and ff. Meli, P., *Note in tema di sfruttamento di informazioni da parte di ex dipendenti e collaboratori*, in Riv. Dir. Ind., Vol. 3, 1999, pp. 303 and ff.

²⁸Cass., No. 18316/2007; 4791/2007; 13673/2006; 2530/2006; 1865/2006; 21641/2005; 15183/2004; 7859/2004; 15170/2003; 12215/2003; 1104/2003; 17110/2002; 15399/2002; 10403/2002; 10492/2001; 5247/2001; 3132/2001 (and 6719/2003); (*obiter*) 1143/2001; 14953/2000; 12425/2000; 6839/2000; 5421/2000; 1859/2000, 12941/1999; 9776/1999; 5562/1999; 1800/1999, 108/1999; 10067/1998; 7337/1998; 6691/1998; 5659/1998; 9405/1997; 9984/1996; 9776/1996; 1641/1996; 251/1996; 383/1995; 8496/1994; 3635/1994; 3123/1994; 655/1994; 8619/1993; 7063/1993; 4422/1993; 11207/1992; 1147/1992; 11099/1991; 8403/1990; 6778/1990; 18/1990; 5373/1989; 2526/1989; 6132/1988; 9407/1987; 9407/1987; 6132/1987; 531/1987; 7220/1986; 7117/1986; 6929/1986; 5699/1986; 4550/1985; 6006/1984; 5562/1984; 94/1984; 555/1984; 6160/1983; 29/1981; 6008/1980; 763/1982; 4550/1980; 2105/1980; 820/1979; 4538/1978; 3507/1978; 2938/1978; 909/1978; 2449/1977; 1459/1977; 22/1977; 2489/1976; 1008/1972; 174/1971; *Contra*, see Cass., No. 2085/1953.

emerged in 1971: tortious interference with contract. The problem is understanding if and to what extent tortious interference with contract can be invoked against talent raiding.

According to Di Martino and Gazzoni, tortious interference with contract can be justified against job poaching.²⁹ But Trimarchi objects that, even in the presence of a CNC, talent raiding can be challenged only through unfair competition rules. In the opinion of this scholar, contracts are relative and do not display any effect *vis-à-vis* competing firms or third parties. This is the reason why training businesses cannot plea for compensation under tortious interference with contract because competitors do not have an obligation not to engage in incompatible agreements with former employees.³⁰

Subsequent literature seems to admit tortious interference with contract as a plausible cause of action against job poaching, but only if competing employers solicit employees to infringe on a CNC. In the alternative, a CNC being absent or incitement being absent, actions based on tort law should be dismissed.³¹ Case law confirms this trend. In particular, the Court of Cassazione held on various occasions that tortious interference with a NDA could lead to liability even when there is no proof of *animus nocendi*.³²

²⁹Gazzoni, F., *Manuale di diritto privato*, Naples, 2017, p. 718. Di Martino, P., *La responsabilità del terzo complice nell'inadempimento contrattuale*, in Riv. Trim. Dir. Civ. Proc. Civ., 1975, pp. 1356 and ff.

³⁰Trimarchi, P., *Sulla responsabilità del terzo per pregiudizio al diritto di credito*, in *Sulla pretesa tutela aquiliana del credito del datore di lavoro*, Milan, 1985, p. 12.

³¹Dalle Vedove, G., *Lo storno dei dipendenti nella disciplina della concorrenza*, quoted, pp. 176 and ff. Bochicchio, F., *Lo storno di collaboratori tra patto di non concorrenza e concorrenza sleale: profili della concorrenza e teoria dell'impresa*, in Giur. Comm., No. 5, 1999, pp. 625 and ff.

³²T. Milan, 28.2.2014, quoted.

3.3. Contract remedies against job poaching in Italy.

Job poaching representing a risk for any business who intends to invest in human capital, it is possible to prevent harms through contract remedies. These contract remedies can be engaged in by employers and employees or employers only. Likewise, these contract remedies may concern the ongoing execution of the employment contract or they may cover the activities upon the termination of the work contract.

Contract remedies regarding the execution of the existing employment contract are generally allowed, provided that they are advantageous for both the worker and the employee. This is true with prior notice periods before resignation. This is true with minimum duration for employment contracts. Both these covenants strengthen loyalty between employers and employees. Both these covenants do not pose questions as to their admissibility per se.³³ Contract remedies concerning the activities upon termination of the work contract seem to be more problematic.

CNCs are clauses through which employees and consultants agree on not conducting similar economic activities upon termination of the work contract.³⁴ In contrast, through non-solicitation clauses, employers agree on not soliciting, nor hiring the employees or consultants of their competitors.³⁵ The difference between these two covenants is clear. CNCs concern employers and employees, in a context where workers take advantage of a higher salary in exchange

³³Zoli, C., *Clausole di fidelizzazione e rapporto di lavoro*, in Riv. it. dir. lav., No. 4, 2003, pp. 449 and ff.

³⁴Fabris, P., *Il patto di non concorrenza nel diritto del lavoro*, Milan, 1976, p. 57. Riva, Sanseverino, *Lavoro*, in *Comm. Scialoja, Branca*, sub art. 2125, Bologna-Roma, 1977, p. 745.

³⁵Faioli, M., *Clausola di tutela contro pratiche di storno di dipendenti*, in *Clausole Negoziali* edited by Confortini, M., Turin, 2017, p. 1583.

of their commitment not to start competing activities upon termination of the job. Non-solicitation clauses concern instead employers only, and these covenants do not necessarily embody an economic recognition for the employees. It is more convenient, thus, for businesses engage in non-solicitation clauses. Vice-versa, it is more convenient for workers that firms engage in CNCs.

Article 2125 of the Civil Code governs CNCs, stating out that non-competition covenants must comply with certain requirements regarding prescribed form, limited object and proper consideration, aimed at compensating the employee for the restriction of professional activity. This chapter will not focus on the legal structure of CNCs. Suffices to say that, in the opinion of scholarship, CNCs deserve implementation because they protect business start-up³⁶, and because these clauses tend to avoid acts of unfair competition under Article 2598 n. 3) of the Civil Code.³⁷

Conversely, non-solicitation clauses between employers do not have a legislative recognition. Scholarship underlines, however, that these agreements could be allowed under the existing laws, notably after the enactment of the so-called Jobs Act (Legislative Decree No. 83/2015). Non-solicitation clauses balance the interests of workers (to change job) and those of employers (to preserve investments in training). The only problem is that, according to traditional case law, workers' mobility shall not be frozen. The Jobs Act changed the landscape, for instance allowing demotion of employees through a specific procedure and under additional corporate collective agreements. The consequence is a major freedom for employers and a limit on the

³⁶Zamboni, L., *Sui limiti del patto di non concorrenza a carico del prestatore di lavoro (art. 2125 c.c.)*, in Riv. Dir. Ind., No. 6, 2003, pp. 339 and ff.

³⁷Bochicchio, F., *Patto di non concorrenza per il periodo successivo all'estinzione del rapporto di agenzia: l'art. 1751-bis c.c. non esaurisce la problematica*, in Giur. Comm., No. 2, 1999, pp. 205 and ff.

freedom of workers. In this framework, it is possible that additional corporate collective agreements will govern non-solicitation agreements in the future.³⁸ Yet unfortunately, there is no case law on the matter. Article 31 of Italian national collective agreement for the agency sector of 24 July 2008 considers that a transfer fee may be justifiable when the worker is 'poached' during the course of the assignment. But scholars object that, even if this case occurs, *'it is hard to see why the hirer should not be able to directly employ a worker after her fixed-term contract with the agency has expired, or if she was hired on an open-ended but 'zero-hour' basis.'*³⁹

Other remedies against the consequences of job poaching are non-disclosure agreements (NDAs), i.e. covenants through which employees agree not to reveal unqualified trade and industrial secrets upon termination of the work contract. However, non-solicitation agreements and CNCs are tools to avoid job poaching. Contrariwise, NDAs are meant to wane the adverse consequences of this phenomenon, discouraging talent raiding only to the extent that the reason behind it is acquiring know how indirectly.

3.4. Unfair competition doctrine, tortious interference with contract, contract remedies against job poaching in other jurisdictions.

France and Belgium have a strong tradition in dealing with job poaching (*'débauchage de personnel'*).

French case law confirms that employee raiding is to be allowed generally, as Article 1134 of the *Code Civil* and Article L. 1221-1 of the Labor Code declare the freedom of work.⁴⁰ In some cases,

³⁸Faioli, M., *Clausola di tutela contro pratiche di storno di dipendenti*, quoted, p. 1600.

³⁹Contouris, N.-Horton, R., *The Temporary Agency Work Directive: Another Broken Promise?*, in *Industrial Law Journal*, Vol. 38, No. 3, 2009, p. 336.

⁴⁰Cass. Com. Fr. 7.12.2010 No. 09-72999. Cass. Com. Fr. 29.3.2011 No. 10-17647.

however, poaching firms can be held responsible. They can be held responsible for '*tierce complicité pour la violation d'une obligation contractuelle*' when firms solicit their competitors' employees to break a CNC.⁴¹ They can be held responsible for '*concurrence déloyale*' when there are not CNCs, but there is evidence of an improper behavior like a '*détournement de clientèle*' or a '*dénigrement*', while the effect is the disruption of the business organization belonging to the competitor.⁴²

French courts make a distinction between CNCs, loyalty clauses, and non-solicitation clauses. CNCs forbid employees to conduct competing economic activities upon expiration of the work contract. Loyalty clauses engage workers on respecting the client base of former employers upon termination of the work contract.⁴³ Non-solicitation clauses engage employers on not hiring, nor soliciting employees while work contracts are in execution. CNCs and loyalty clauses concern, thus, employers and workers directly. Non-solicitation agreements regard employers directly and employees indirectly.

CNCs, loyalty clauses, and non-solicitation agreements shall be proportionate, as well as limited in scope, time, geographic application.⁴⁴ Moreover, CNCs shall incorporate an economic indemnity for employees.⁴⁵ If non-solicitation covenants impair any chance for employees to change job, there is the risk that these clauses may be re-qualified as CNCs, and an indemnity for workers will be required.

⁴¹Cass. Com. Fr. com. 15.3.2011 No. 10-14530.

⁴²CA Paris, 13.5.2015, No. 13/01095. Cass. Com. Fr. 20.9.2016 No. 15-13.263 F-D.

⁴³Cass., Chambre sociale, 2.12.2015, No. 13-20.706.

⁴⁴Cass. Fr., Chambre Social, 7.5.1991, No. 87-43.470

⁴⁵Cass. Fr., Chambre 1ère, 2.10.2013, No. 12-22.846 and 12-22.948.

Belgian law system has also been dealing with lateral hiring. As freedom in the work market is seen as a prevailing interest, Belgian courts punish job poaching on limited occasions.⁴⁶ This happens when talent raiding gives rise to slavish imitation of products and business plans⁴⁷, when talent raiding is meant to disrupt competing business organizations⁴⁸, when talent raiding is aimed at acquiring industrial or trade secrets indirectly⁴⁹, when talent raiding induce workers non to comply with a CNC.⁵⁰

Meanwhile, non-competition clauses are allowed provided that the conditions set forth in Article 65 (1) and 86 (1) of Law 3 July 1978 are met. More accurately, CNCs shall be drafted in writing⁵¹; CNCs shall be contained in individual contracts⁵²; employers signing CNCs shall not be in bankruptcy⁵³; CNCs shall be limited in scope⁵⁴, territorial application⁵⁵, time⁵⁶; employees shall earn more than 33.203,00 Euros par year; if employees earn between 33.203,00 Euros and 66.406,00 Euros, CNCs are allowed only in the cases set forth in collective

⁴⁶CA Bruxelles, 17.12.2008, R.G. 2008/AR/89.

⁴⁷*Ibid.*

⁴⁸Cour du travail de Liège, 22.9.2005, in Chron. dr. soc., 2006, p. 355. CA Liège, 4.6.2009, R.G. 2008/1452.

⁴⁹CA Liège, 2.9.2004, in J.L.M.B., 2006, p. 508. CA Bruxelles, 7.5.2002, in Ann. prat. com., 2002, p. 462. Ligot, J.-Vanbossele, F.-Battard, O., *Les pratiques loyales*, Bruxelles, 2012, p. 155.

⁵⁰CA Bruxelles, 11.10.2002, in Ann. prat. com., 2002, p. 504. Président du tribunal de commerce de Bruxelles, 2.2.2009, in J.T.T., 2009, p. 254.

⁵¹Taquet, M.-Wantiez, C., *Les clauses de non-concurrence souscrites par les représentants de commerce et par les employés*, in J.T.T., 1974, p. 194.

⁵²*Ibid.*

⁵³, p. 91.

⁵⁴Only similar activities can be covered. See Cass. Be., 25.6.1970, in J.T.T., 1970, p. 495.

⁵⁵CNCs shall cover geographic areas where potential competition is feasible. CNCs will be considered to be null and void if their area of application overcomes national borders. Verheyden, T., *Le droit social, Livre I, Contrats de travail*, Bruxelles, 1988, p. 288.

⁵⁶Twelve months is the maximum duration allowed for a CNC in Belgium. The difference with the Italian case is spark, as Article 2125 of the Civil Code allows CNCs to last even for five years.

agreements; if employees earn more than 66.406,00 Euros, CNCs shall comply with collective agreements, but they are generally allowed.⁵⁷

Now, CNCs concern the relationships between employers and employees (or consultants). Nevertheless, Belgian case law has been extending the limits on CNCs even with respect to non-solicitation clauses between employers.⁵⁸ In particular, scholars observe that '*la jurisprudence considère que la validité d'une clause de non-débauchage [de salariés] entre entreprises ne sera établie que si elle [...] prévoit une contrepartie financière au bénéfice du travailleur qui verrait sa liberté de travailler restreinte.*'⁵⁹

Common law jurisdictions also present a narrow approach to job poaching.

For instance, in *Tullet Prebon v. BGC*, the parties involved are two intermediaries for banks and other financial institutions. BGC recruits some brokers from Tullet, offering them, through forward contracts, higher commission fees and a full compensation in the event former employers serve a law suit on them. Tullet pleads for damages before the High Court of Justice of the United Kingdom, alleging that the conduct of BGC amounts to an act of unfair competition and tortious conspiracy to injure her by unlawful means ('*inducement to a repudiatory breach*'). BGC maintains instead that she never subtracted workers by unlawful means. Indeed, in the opinion of the defendant, former brokers of Tullet resigned because the employer was threatening them with possible law suits, and the hiring process

⁵⁷Cass. Be., 16.6.1998, in J.T.T., 1999, p. 80. Vannes, V., *Le contrat de travail: Aspects théoriques et pratiques*, Bruxelles, 2003, p. 279. Merla, C., *Les clauses et conventions de non-concurrence*, in Ors., 2002, p. 70.

⁵⁸Cour de Travail de Liège, 18.6.2007.

⁵⁹Clesse, C.E.-Gilson, S., *La clause de non-débauchage de personnel en droit du travail*, in *La concurrence loyale et déloyale du travailleur*, Limal, 2013, p. 230.

happened after the expiration of previous work contracts ('*constructive dismissal defense*'). The legal problem before the Court is, thus, if BGC interfered with the duties of trust and confidence during the execution of a work contract, and if the threat of law suits may undermine these duties of trust and confidence. The High Court of Justice⁶⁰ and the Court of Appeals upholds the claims of Tullett.

In particular, Maurice Kay LJ rules that '*Tullett's conduct was not intended to attack the relationship between Tullett and the brokers, but was intended to strengthen it. The context in which it happened was that the brokers were expecting a call from BGC to leave Tullett, and were prepared to do so in reliance on BGC's indemnity*' (para. 16). Subsequently, Lord Justice adds that '*BGC committed an anticipatory and repudiatory breach of the forward contracts of the Tullett Three in accordance with the principle expounded in the well-known case of Hochster v De La Tour (1853) 2 E&B 678. Perhaps the clearest modern formulation is that of Buckley LJ in Gunton v Richmond Borough Council [1980] 3 WLR 714, 729A-B: 'The basis of the doctrine is that where a party to a contract before the date for performance has arrived evinces an intention not to perform his part of the contract, he has committed no breach until the date for performance arrives. Nevertheless the innocent party will be relieved of his obligations under the contract, if he so chooses, so as to render him free to arrange his affairs unhampered by the continued existence of those obligations. It is for the innocent party to elect whether he wishes to be so relieved, which he does by accepting the repudiatory*

⁶⁰*Tullett Prebon Plc & Ors v BGC Brokers LP & Ors* [2010] EWHC 484 (QB) (18 March 2010).

act of the guilty party as a repudiation of his, the guilty party's obligations under the contract' (para. 46).⁶¹

The case above is interesting for four reasons. First, this case shows how English common law allows remedies against job poaching through the unfair competition doctrine or the law of torts. Secondly, this case emphasizes how law suits against job poaching will be successful only if '*inducement to a repudiatory breach*' is present, i.e. when poaching firms solicit the employees of their competitors not to comply with the duties of trust and confidence that are implied in the work contract, a CNC being not required. Thirdly, this case is interesting because, in the field of talent raiding, it deviates from *Malik v. Bank of Credit and Commerce International*, where the House of Lords links the infringement of the duty of trust to the determination of a severe harm on the plaintiff company.⁶² Fourthly, this case demonstrates that plaintiffs shall not provide evidence about malice, but they shall prove unlawful means of solicitation (i.e. that an indemnity will be paid in case of law suits) from an objective standpoint.⁶³

The existence of unlawful means of solicitation being required, it is clear that under English common law workers mobility is the rule, while the inhibition of talent raiding is subject to strict conditions. But this is less true with respect to CNCs and non-solicitation agreements.

⁶¹*Tullett Prebon Plc & Ors v BGC Brokers LP & Ors* [2011] EWCA Civ 131.

⁶²*Malik v Bank of Credit and Commerce International* [1997] IRLR 462. For a critic comment, see Goodfellow, N.-Mansfield, G., *The Implied Duty of Trust and Confidence: Are the Parties' Intentions Relevant when Determining if there is a Breach? Can the Duty Be Owed to Two Parties at the Same Time? Tullett Prebon plc and others v BGC Brokers LP and others*, in *Industrial Law Journal*, Vol. 41, No. 2, 2012, p. 234.

⁶³Spolidoro, M.S., *Storno illecito di dipendenti e sfruttamento parassitario degli investimenti altrui: contro una pretesa nuova razionalizzazione della fattispecie di storno come atto di concorrenza sleale*, quoted, p. 1257.

In *Alexandre Miguel Braz Duarte v. The Black and Decker Corporation ('B&DC') and Black and Decker Europe ('B&DE')*⁶⁴, the Queen's Bench Division of the High Court of Justice is called upon to assess the enforceability of a CNC governed by Maryland law. This CNC requires the employee not to work for a list of competing firms for two years upon expiration of the work contract, as well as not to solicit, nor hire fellow colleagues. The Court declares that the CNC is not enforceable, maintaining that *'for a 2 year non-compete covenant to be upheld, the breadth of the covenant would have to be narrowly drawn.'* This means that CNCs shall be limited in scope and time because the freedom of workers is a general principle. Moreover, a larger time scale for CNCs shall be compensated with a stricter area of application, and vice-versa. In any case, *'care should be taken when drawing-up non-poaching covenants. They should be realistic in light of the position held by the employee. Solicitors and in-house lawyers should resist calls from senior management and human resources departments for covenants to be long-lasting and relating to every company in a particular sector of business.'*⁶⁵

The approach is similar in *Kores Manufacturing Co Ltd v Kolok Manufacturing Co Ltd*. In this case, the Court of Appeals of England and Wales finds out that a non-solicitation agreement could not comply with fair competition law, as *'the mere fact that parties dealing on equal terms have entered into an agreement subjecting themselves to restraints of trade does not preclude the court from holding the agreement bad where the restraints are clearly*

⁶⁴*Alexandre Miguel Braz Duarte v. The Black and Decker Corporation ('B&DC') and Black and Decker Europe ('B&DE')* [2007] EWHC 2720 (QB). The approach is similar in *Spafax Ltd. v. Harrison*, (1980) IRLR 442. See Edwards, M., *Restrictive Covenants in Employment Contracts*, in *Business Law Review*, No. 2, 1988, p. 45.

⁶⁵Haslam, S., *You're not going to stop my work, mate*, in *Journal of Intellectual Property Law and Practice*, Vol. 3, No. 5, 2008, p. 290.

*unreasonable in the interests of the parties. In the present case, the restraint reciprocally imposed on the plaintiffs and the defendants by the agreement of 1934 was such as to preclude the plaintiffs from employing at any time any person who had, during the then past five years, been a servant of the defendants, and vice versa.*⁶⁶

However, after *Kores Manufacturing*, case law witnesses a significant transition.⁶⁷

In *Hanover Insurance Brokers Ltd. v. Shapiro*, the Court of Appeals voids a non-solicitation agreement according to which employers engage themselves not to solicit, nor entice each other's employees for 12 months upon termination of the employment contract. In the opinion of the Court, employees do not represent property of the employer, who wields no legitimate interest in this field.⁶⁸

Later on, in *Ingham v. ABC Contract Services Ltd.*, the Court of Appeals change her trends, clearing a non-solicitation agreement concerning directors, managers or servants, and maintaining that the stability of the workforce represents a legitimate interests for the employer.⁶⁹

In *Alliance Paper Group v. Prestwich*, the Privy Council clears a non-solicitation agreement during a M&A process, pointing out that the

⁶⁶*Kores Manufacturing Co Ltd v. Kolok Manufacturing Co Ltd.* [1959] Ch. 108; [1958] 2 W.L.R. 858; [1958] 2 All E.R. 65; [1958] R.P.C. 200; [1958] 102 S.J. 362.

⁶⁷Williams, A., *Fair Game? Assessing the Enforceability of Contractual Non Poaching Covenants*, in *Business Law Review*, No. 3, 2005, p. 58.

⁶⁸*Hanover Insurance Brokers Ltd. v. Shapiro*, (1994) IRLR 82, CA.

⁶⁹*Ingham v. ABC Contract Services Ltd.*, unreported, 12.11.93.

stability of the workforce could be a legitimate interest for the employer, but only in the context of acquisitions.⁷⁰

In *Dawnay Day & Co. Ltd. & Anor v. de Braconier d'Alphen & ors.*, the Court of Appeals eventually confirms an agreement not to solicit employees and directors for 12 months upon expiration of the work contract. The Court adheres to *Ingham*, emphasizing that the stability of the workforce could represent a legitimate interest under English common law.⁷¹

Meanwhile, if one considers Singapore, Australia, and India, the approach to non-solicitation agreements has been varying.

In *National Aerated Water Co. Ltd. v. Monarch Co. Inc.*, the High Court of Singapore considers a covenant according to which employers engage in not soliciting each other's employees for 7 months upon expiration of the employment contract. The Court refuses to enforce the clause, maintaining that the agreement was too broad in scope.⁷² The Court of Appeals confirms the ruling.⁷³

In *Hartley's Ltd. v. Martin*, which happens to be an Australian case, Gillard J clears a non-solicitation agreement set forth in the employment contract of two brokers. The conclusion is that employers have a legitimate interest in the stability of the workforce.⁷⁴ The approach is confirmed in *Pinnacle Hospitality People Pty v.*

⁷⁰*Alliance Paper Group v. Prestwich*, (1996) IRLR 25.

⁷¹*Dawnay Day & Co. Ltd. & Anor v. de Braconier d'Alphen & ors.*, (1996) IRLR 25.

⁷²*National Aerated Water Co. Ltd. v. Monarch Co. Inc.*, (2007) SGHC 5.

⁷³Chandran, R., *Restraint of Trade: A Singapore Perspective*, in *Business Law Review*, No. 12, 2008, p. 283.

⁷⁴*Hartley's Ltd. v. Martin*, (2002) VSC 301 per Gillard J. For an overview on Australian case law, see Cabrelli, D.-Floyd, L., *New Light through Old Windows: Restraint of Trade in English, Scottish, and Australian Employment Laws. Emerging and Enduring Issues*, in *The International Journal of Comparative Labour Law and Industrial Relations*, Vo. 26, No. 2, 2010, pp. 167-192.

*Ramasamy & Ors.*⁷⁵, *Brilliant Ligting (Aust) Pty Ltd. v. Baillieu*⁷⁶,
*Integrated Group Ltd. v. Dillon.*⁷⁷

In other words, Singapore's Courts uphold the civil law tradition according to which restraints on employment through non-solicitation agreements shall be recognized on limited occasions, i.e. when there are reasonable. Australian Courts agree with English common law, according to which non-solicitation agreements are to be allowed generally in so far as the stability of workforce is a legitimate interest. Indian courts share a different view.

Articles 23 and 24 of the Universal Declaration of Human Rights declare that everyone has the right to work and to choose his own employment freely. Section 41 of the Indian Constitution sets out instead that *'the State shall, within the limits of its economic capacity and development, make effective provision for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement, and in other cases of undeserved want.'*

Section 27 of Indian Contract Act (1872) states out that *'every agreement by which any one is restrained from exercising a lawful profession, trade or business of any kind, is to that extent void.'*

In this context, However, Indian case law has also been dealing with NCCs, NDAs, non-solicitation agreements, etc. The point here is understanding to what extent these covenants have been allowed under Section 27 of the Contract Act (1872) forbidding restraints on trade and employment.

⁷⁵*Pinnacle Hospitality People Pty v. Ramasamy & Ors.*, (2007) VSC 433.

⁷⁶*Brilliant Ligting (Aust) Pty Ltd. v. Baillieu*, (2004) VSC 248.

⁷⁷*Integrated Group Ltd. v. Dillon*, (2009) VSC 361.

In *Golikari*, the Supreme Court of India considers the so-called 'negative covenants.' The plaintiff receives special training from his employer on condition that he will serve the company for five years (i.e. a clause which amounts to a NCC). The Court primarily holds that this sort of negative contract does not amount to a restraint of trade and employment under Section 27 of the Contract Act. Moreover, in the opinion of the Court, even if a contract does not fall within the meaning of Section 27, the obligations set forth therein shall be reasonable, given that the freedom to work is protected under Section 41 of the Constitution. Nevertheless, the Court finds out that the clause is reasonable because it is limited in scope and time, because the employee is enabled to use the know how acquired after expiration of the five year period, because the clause is two-sided.⁷⁸

In *V.V. Sivaram*, an employee is restrained from using secrets and confidential information, which he gained during the execution of the work contract. After he left under a voluntary retirement scheme, he sues the employer in order to get rid of the NDA. But the Court finds out that this NDA is lawful under Section 27 of the Contract Act (1872). NDAs can be seen as restraints of trade when they impose limitations on knowhow. But if NDAs concern qualified trade and industrial secrets, constraints on employees will be justified.⁷⁹

In *Pepsi Foods Ltd.*, eventually, non-solicitation agreements have been deemed as null and void under Section 27 of the Contract Act.

⁷⁸A clause is two-sided if consideration is present or if there are not only unilateral obligations. *Ninanjan Shankar Golikari v. The Century Spinning and Manufacturing Company Ltd.*, 1967 AIR 1098, 1967 SCR (2) 378.

⁷⁹*V.V. Sivaram and others v. FOSECO India Ltd.*, 2006 (1) KarLJ 386.

Delhi Court holds that this sort of clause creates 'economic terrorism', freezing the position of each employee before former employers.⁸⁰

This approach is preserved in *Dessiccant Rotors International* and *American Express Bank Ltd.* In the first case, Delhi Court rules that non-solicitation agreements do not comply with Section 27 of the Contract Act, as these covenants are entered into by companies to shield themselves from competition and to curb the rights of the workers.⁸¹ In the second case, Delhi Court opines that an employee holding confidential information cannot be an excuse for the employers to impair his right to seek and search for better employment.⁸² It is to be understood, however, that in Indian case law restraints on trade and employment could be allowed in joint venture contracts, provided that these covenants are limited in scope and time, and provided that obligations are not one-sided.⁸³

In any case, in *Wipro Ltd.*, an arbitral tribunal in Delhi clears a non-solicitation clause for as long as this covenant does not prevent employees from seeking and searching a new employment, but only prevents employers from enticing each other's employees.⁸⁴

The result is that, under Indian contract law, non-solicitation agreements, NCCs, NDAs, other contractual remedies against the risk of employee raiding risk to be qualified as restraints of trade if they are not two-sided, nor limited in time and scope. Non-solicitation agreements are looked, in particular, in a negative way, as these covenants put restrictions in the mobility of workers without

⁸⁰*Pepsi Foods Ltd. and others v. Bharat Coca-Cola Holdings Pvt. Ltd. and Ors.* (1999) III LLJ 1140 Del.

⁸¹*Dessiccant Rotors International Pvt. Ltd. v. Bappaditya Sarkar & Anr.*, Delhi HC, CS (OS) No 337/2008 (14.7.2009).

⁸²*American Express Bank Ltd. v. Ms. Priya Puri* (2006) III LLJ 540 Del.

⁸³*GEA Energy System India Ltd. v. Germanisher Lloyd Aktiengesellshaf* (2009) 149 CompCas 689 (Madras).

⁸⁴*Wipro Ltd. v. Beckman Coulter International SA*, 2006 (3) ARBLR 118 (Delhi).

recognizing any indemnity for them. Nevertheless, non-solicitation agreements could be allowed when these contracts do not pose direct limitations on work mobility (i.e. by forbidding cross-business hiring processes), but only constrain solicitation activities of employers.

Finally, in the United States, both federal legislation and State statutes have been dealing with lateral hiring. Under federal legislation, i.e. the Sherman Act, job poaching can be contested as an antitrust misconduct. Under State legislation and common law talent raiding can be challenged through the unfair competition doctrine or unfair competition statutes, breach of contract (CNCs), breach of fiduciary duty (without CNCs), interference claims, misappropriation of trade secrets. Evidence varies from jurisdiction to jurisdiction, and therefore intent to destroy a competitor could be a relevant element in Missouri and California, but not even in Massachusetts. However, high evidentiary standards are required for a plaintiff to succeed in court, which suggests that mobility of workers is to be ensured unless there is proof of a misconduct. California does not allow CNCs and non-solicitation agreements at all, while Massachusetts courts ruled that these covenants protect legitimate interests of the employers in the stability of the workforce.⁸⁵ It is to be remembered that, in the U.S., NDAs are an effective instrument to protect trade and industrial secrets in the event of job poaching, as case law requires high evidentiary standards about the quality of confidence and the obligations of confidence in the absence of any pact.⁸⁶

⁸⁵For a review of case law and literature, see Bellia, M., *Concorrenza sleale da storno di dipendenti e sua interpretazione nella giurisprudenza più recente*, quoted, pp. 260 and ff.

⁸⁶For a review of American case law on trade secrets in the absence of NDAs, see Freedman, C.D., *The Protection of Computer Software in Copyright and the Law of Confidence: Improper Decompilation and Employee Poaching*, in *International Journal of Law and Information Technology*, Vol. 8, No. 1, 2012, pp. 29 and ff.

3.5. Preliminary conclusions.

As it is clear from the above, civil law jurisdictions and common law jurisdictions are convinced that talent raiding involves three centers of interest, i.e. training firms (who risk to lose workers and the returns on the investments made); competing businesses (who poach employees and consultants to win market shares without incurring in training costs); workers (who change job). The interests of competing businesses and workers are aligned. After all, both the subjects concerned benefit from a full-fledged mobility of workforce. Training firms wield instead an opposite interest in limiting the mobility of workers through contract remedies (e.g. CNCs, non-solicitation agreements, NDAs) or through the threat of law suits.

In this framework, considering actions against job poaching, civil law systems and common law systems favor the interests of workers and competing businesses, by providing specific causes of action (e.g. unfair competition doctrine or tortious interference with contract), and by imposing high evidentiary standards (e.g. proof of malice, conspiracy, severe harm to the competitor). This view is compatible to a Kaldor-Hicks Global Efficiency approach to legal problems.⁸⁷ After all, benefits for workers and competing businesses seem to overcompensate the losses for the training firms.

In the meantime, both common law jurisdictions and civil law jurisdictions (perhaps with the exception of California) seem to allow contract remedies against lateral hiring, through CNCs, non-solicitation agreements, NDAs, etc. The only difference lays in the approach to these covenants. For instance, civil law jurisdictions,

⁸⁷Compared with Pareto-Efficiency, Kaldor-Hicks Global Efficiency does not suggest that a market solution is efficient from an allocative standpoint only in so far as any operator concerned shall not lose welfare. Indeed, a solution will be efficient even when losses for an operator are overcompensated by gains of another operator.

Singapore courts, Indian courts enforce non-solicitation agreements only when clauses are limited in scope, time, geographic application, or when there is an indemnity for the workers concerned. British and Australian common law justifies instead these agreements per se, as the stability of the workforce is seen as a legitimate interest.

The point is, however, that law suits or the threat of law suits based on unfair competition rules (or the law of torts) may discourage job poaching indirectly, but case law and statutes could pose limits in this sense. In contrast, contract remedies tend to prevent talent raiding from happening by involving the counterparties concerned, i.e. workers (in CNCs and NDAs) and competitors (in non-solicitation agreements). It is to be remembered that:

- a) CNCs and NDAs are expensive for employers and convenient for employees, given that workers will receive an indemnity in exchange;
- b) non-solicitation agreements are less expensive for employers and not convenient for employees, as indemnities could not be contemplated;
- c) policy makers and courts may discourage CNCs/NDAs or non-solicitation agreements either by forbidding them (like in California), or by threatening a requalification in an expensive clause (like in Belgium);
- d) contract remedies ease the standards of proof for the training firms in the event they decide to file a law suit;
- e) the configuration of implied duties of trust and confidence (like in the U.K.) ease the standards of proof for the training firms;
- f) laxer standards of proof for the training firms (like in the U.K.) strengthen their position *vis-à-vis* competing businesses and

employees, reducing both the mobility of workers and their contract power,⁸⁸

- g) by establishing transfer fees, Article 31 of the collective agreement concerning Italian agents tries to discourage employee raiding always as contract instrument, i.e. by raising the costs of the poaching firms.

In any case, as Marco Bellia stresses, unfair competition plays a twofold role in so far as this doctrine allows both law suits and contract remedies against talent raiding. In the first case, unfair competition becomes a cause of action that operates ex post against job poaching. In the second case, unfair competition becomes the justification ('causa') of a contract tool that operates ex ante against job poaching.

4. Public enforcement of competition rules.

4.1. Human resources and antitrust law: general aspects.

Private enforcement of competition rules does not exhaust the remedies in the event of lateral hiring. Indeed, antitrust laws have been playing an increasing role in this field.

The intercourse between competition law and human resources management is a complex one. The ECJ undoubtedly rules in *Albany* that collective agreements and employer-employee relationships enjoy a relative immunity from antitrust rules. After all, in the opinion of the Court, *'certain restrictions of competition are inherent in collective agreements between organisations representing employers and workers. However, the social policy objectives pursued by such agreements would be seriously undermined if management and labour were subject to Article 85(1) of the Treaty when seeking jointly to*

⁸⁸Ichino, P., *Che cosa impedisce ai lavoratori di scegliersi l'imprenditore*, in *Giorn. dir. lav. e rel. ind.*, 2007, pp. 3 and ff.

*adopt measures to improve conditions of work and employment. It therefore follows from an interpretation of the provisions of the Treaty as a whole which is both effective and consistent that agreements concluded in the context of collective negotiations between management and labour in pursuit of such objectives must, by virtue of their nature and purpose, be regarded as falling outside the scope of Article 85(1) of the Treaty.*⁸⁹

Nevertheless, scholarship increasingly acknowledges that a certain parallelism exists between competition law and human resources, competition law and unfair competition doctrine.

For instance, Pietro Ichino criticizes *Albany*, suggesting that a limitation on the work market can also determine unduly limitations on product markets. The consequence is that making labor relations completely immune from antitrust law could undermine consumer welfare. As a result, this scholar advocates for a reduction of antitrust immunity, excluding the case where labor law restraints create advantages for the insiders *vis-à-vis* the outsiders.⁹⁰

⁸⁹ECJ, *Albany International BV v. Stichting Bedrijfspensioenfonds Textielindustrie*, 21.9.1999, case C-67/96, para. 59-60; *van der Woude*, 21.9.2000, case C-222/98, para. 23; III Chamber, *3F v. European Commission*, 9.7.2009, case C-319/07, para. 51. Immunity does not extend to unsubordinated work. See ECJ, *FNV Kunsten Informatie en Media v. Staat der Nederlanden*, 11.9.2014, case C-413/13, para. 33.

⁹⁰Ichino, P., *Contrattazione collettiva e antitrust: un problema ancora aperto*, in *Merc. Conc. Reg.*, vol. 2, 2000, pp. 643 and 649. Di Via, L., *Sindacati contratti collettivi e antitrust*, in *Merc. Conc. Reg.*, Vol. 2, 2000, pp. 279-310. Pallini, M., *Il rapporto problematico tra diritto della concorrenza e autonomia collettiva nell'ordinamento comunitario e nazionale, nota alla sentenza Albany (21 settembre 1999, causa n. c-67/97)*, in *Rivista italiana di diritto del lavoro*, Vol. 2, 2000, pp. 225-244. Tosi, P., *Concorrenza, lavoro, diritti (aspetti collettivo-sindacali)*, in *Arg. Dir. Lav.*, No. 6, spec., 2017, p. 1338. De Luca Tamajo, R., *Concorrenza e diritto del lavoro*, in *L'idea di diritto del lavoro, oggi. In ricordo di Giorgio Ghezzi*, edited by Perulli, A., Padova, 2016, pp. 13 and ff. Magnani, F., *Diritto sindacale europeo e comparato*, Torino, 2017, 2nd eds., pp. 75 and ff. Biasi, M., *Ripensando il rapporto tra il diritto della concorrenza e la contrattazione collettiva relativa al lavoro autonomo all'indomani della L. n. 81/2017*, WP CSDLE "Massimo D'Antona", n. 358/2018.

Meanwhile, Gustavo Ghidini imagines a full-fledged coincidence between competition law and unfair competition doctrine.⁹¹ But Dalle Vedove correctly points out that the scope of unfair competition rules overlaps with that of antitrust laws only partially. After all, competition law (i.e. norms against cartels and abuses of dominant position) tends to preserve a plural structure for the market. Unfair competition doctrine focuses instead on business relations of single enterprises.⁹²

This chapter does not focus on antitrust immunity for employers-employees relationships. This is a task for labor law doctrine to pursue. The point here is understanding instead (a) how competition law throughout Europe and beyond Europe has been dealing with job poaching; (b) if labor law intercourse outside of collective agreements may fall within the scope of antitrust rules; (c) in what sense unfair competition rules and antitrust laws do not only overlap partially, but they can operate in contrast on given occasions.

For the moment being suffices to say that antitrust laws interact with human resources management in three ways. Competition law may affect non-solicitation agreements among the employers by qualifying these covenants as cartels concerning inputs. Competition law may affect recruiting processes of a dominant firm by qualifying this conduct as predatory hiring. Competition law may affect recruiting processes of a group of firms by qualifying agreements either as collusive poaching or as wage-fixing cartels.

Non-solicitation agreements influence the cost of workforce as an input by freezing the demand of employees. Predatory hiring may

⁹¹Ghidini, G., *Monopolio e concorrenza*, in *Enciclopedia del Diritto*, Vol. XXVI, Milan, p. 791.

⁹²Dalle Vedove, G., *Lo storno di dipendenti nella disciplina della concorrenza*, quoted, pp. 73-74.

delete competition in so far as a business with significant market power raises the costs of workforce for a certain period of time, subtracting any skilled employee to potential competitors. Through collusive poaching a group of businesses raise the costs of workforce for a certain period of time, subtracting any skilled employee to firms who do not take part in the cartel. Through wage-fixing pacts businesses agree on keeping the costs of workforce low, influencing the demand and supply of inputs.

A similar result can be achieved through an exchange of HR data, given that employers become aware of input cost strategies of their competitors, a situation that eases coordination, notably in oligopolistic markets.⁹³ Indeed, for an exchange of data to be relevant under competition law, the Court of Justice of the European Union stresses in *T-Mobile Netherlands* as follows: '*An exchange of information between competitors is tainted with an anti-competitive object if the exchange is capable of removing uncertainties concerning the intended conduct of the participating undertakings.*'⁹⁴

4.2. Job poaching and antitrust law: EU competition law.

EU institutions faced the antitrust implications of job poaching on rare occasions. More accurately, two situations emerged. The existence of non-solicitation agreements, NCCs, NDAs, other contractual remedies during concentrations or corporate cooperation. Collusive poaching.

Case No IV/M.1482 concerns the acquisition of Wegert-Großlabor GmbH by KingFisher plc. In particular, the concentration covers retail and wholesale supply of non-food/non-drink goods and services. The

⁹³Gurkaynak, G., Guner, A., Ozkanli, C., *Competition Law Issues in the Human Resources Field*, in *Journal of Competition Law & Practice*, Vol. 4, No. 3, 2013, pp. 202, 205, 206, 207.

⁹⁴ECJ, III Chamber, *T-Mobile Netherlands*, 4.6.2009, case C-8/08, para. 43.

European Commission authorizes the concentration notwithstanding the presence of some ancillary restraints in the form of NCCs, non-solicitation agreements, NDAs. The Commission clears these covenants because their *'duration does not exceed two years'*; because they are *'limited to the geographic areas where the vendors had established the products and services before the transfer'*; because they are *'limited to the products and services which form the economic activity of the undertaking transferred.'*⁹⁵

Case No IV/M.1167 regards instead the acquisition of Williams, Inc. by Imperial Chemical Industries plc. The concentration covers the realization of special products, industrial chemicals, fire protection, security systems and home improvement products, including decorative coatings. The European Commission authorizes the operation, also specifying that *'the non-compete provisions included in provisions (a) and (c) are directly related and necessary to the implementation of the concentration. They aim to ensure that the full value of the Acquired Business is transferred to ICI, and are in line with the Commission's previous practice as regards their duration. They only cover the business of the Acquired Business as it is carried out today. Therefore, they do not prevent Williams from competing in other geographic markets where the Acquired Business is not presently active. Restriction (b) can be accepted as ancillary with respect to technical know-how, but not as regards the general commercial information (e.g. customer details, price and quantity information...).* Such a provision would have the result of effectively prolonging the protection of the acquirer from competitive acts of the vendor beyond the three year period of the non-competition clause.

⁹⁵European Commission, Case No IV/M.1482-Kingfisher/Grosslabor, 12.4.1999, para. 26 and 27.

*Accordingly, the ancillary character of this restriction should be limited to 3 years. The restriction on soliciting employees for 2 years (d) is also directly related and necessary to the implementation of the concentration.*⁹⁶

Case No COMP/M.6093 eventually concerns the creation of a corporate joint venture for combining the existing styrene monomer, polystyrene, and acrylonitrile–butadiene–styrene businesses of BASF and INEOS, together with certain minor related products. The concentration is cleared also in this case. More importantly, non-solicitation clauses are inserted in the commitments, which are approved. Commitment 11 states out *‘the Parties undertake, subject to customary limitations, not to solicit, and to procure that Affiliated Undertakings do not solicit, the Key Personnel transferred with the Divestment Business for a period of [...] after Closing.*⁹⁷

It emerges from the foregoing that, in the eyes of the European Commission, NCCs, NDAs, non-solicitation agreements, other contractual remedies against talent raiding could be allowed under competition law, provided that they are ancillary to business cooperation structures, and provided that they are limited in scope, time, geographic application. Indeed, non-solicitation clauses could even be inserted in commitments.

At the same time, in *Pre-Insulated Pipes Cartel*, the European Commission deals with collusive poaching. The problem here is that, as a part of an anti-competitive strategy, the cartelists in the field of heating systems also decide to poach key employees and managers of

⁹⁶European Commission, Case No IV/M.1167-ICI/Williams, 29.4.1998, para. 22.

⁹⁷European Commission, Case No COMP/M.6093-BASF/INEOS/Styrene/JV, 11.6.2011, commitment 11.

third firms. The Commission finds out that *'in 1993 ABB embarked on a systematic campaign of luring away key employees of Powerpipe, including its then managing director, by offering them salaries and conditions which were apparently exceptional in the business. According to Powerpipe the prime purpose of this tactic was to hamper Powerpipe in the market by, first, obtaining internal information regarding its manufacturing, strategies and markets and, secondly, adversely affecting its relations with customers until such time as a replacement could be found. ABB and Løgstør had already agreed in their meeting on 13 November 1992 to hire the then managing director of Powerpipe and share the cost of employing him as a 'consultant' operating out of ABB's lobbying office in Brussels. (ABB's original idea had been to make him vice-president of ABB Motors in Spain.) It is clear that this arrangement was directly aimed at Powerpipe: 'We agreed on a common action towards Powerpipe in Sweden by employment of [X]'. ABB admits that, in their November 1992 meeting, it and Løgstør had shelved plans jointly to acquire Powerpipe as a going concern. Hiring its managing director was seen an 'interim step' which would hasten what was perceived by them as the inevitable insolvency of Powerpipe. Its customers could then be divided between ABB and Løgstør in accordance with their agreed shares on the Swedish market.'*⁹⁸ These findings were confirmed before the Court of Justice.⁹⁹

⁹⁸European Commission, Case No IV/35.691-E.4-Pre-Insulated Pipes Cartel, para. 92.

⁹⁹ECJ, Grand Chamber, *Dansk Rørindustri A/S and others v. European Commission*, 28.6.2005, joint cases C-189/02 P, C-202/02 P, C-205/02 P a C-208/02 P e C-213/02 P.

The conclusion is that, under EU competition law, specific evidence of collusive poaching could reveal an infringement of Article 101 of the TFEU (concerning cartels and concerted practices).

National case law also deals with the antitrust implications of talent raiding.

For instance, the Court of Appeals in Hertogenbosch (Netherlands) holds that a non-solicitation agreement among fifteen hospitals does not comply with Dutch competition law. In the opinion of this court, this covenant has not only the object, but also the effect, of restraining competition among anaesthesiologists. In an attempt to deal with anaesthesiologist shortages, fifteen hospitals agree on providing a 'Working together educating together' programme for anaesthesiologists. The arrangement also contains an engagement not to poach each other's trained anaesthesiologists for at least 12 months. Hospitals purport that this arrangement is necessary so as to ensure the quality of the care. However, the Court of Appeals disagrees. In response to the hospitals' claims, the Dutch Association of Anaesthesia Employees maintains that lower justices correctly concluded that the agreement infringes on Dutch competition law, as the hospitals shall compete not only on the healthcare market, but also in the labour market. This reasoning succeeds on trial.¹⁰⁰

At the same time, in 1997, the French Competition Council fines various firms for having engaged in a wage-fixing scheme in the temporary employment sector. The Competition Council considers that, between 1989 and 1991, protocols were made to limit the increase in compensation for employees in the construction sector, in

¹⁰⁰Court of Hertogenbosch, 5 April 2010-4 April 2010, in Plomp, M.J., *Netherlands: anti-competitive agreements—hospitals*, in ECLR, 2010, pp. 174–175.

a context where the companies agreed that workers' wages should not be negotiated. The agreement was enforced by temporary employment agencies that participated in this concerted action. The decision above is appealed before the Court of Appeals of Paris, which later rules that a company active in the temporary employment sector agreed to abide by the rules established by the trade associations. The decision of the Court of Appeals is approved even by the Cour de Cassation, according to whom the agreements signed were aimed at limiting competition between temporary employment agencies. The Cour de Cassation concludes that, by virtue of a fixed basic salary, and even fixed fringe benefits, the agencies were only left with a minimum of freedom to negotiate. They were therefore either forced to bring their offers in line with the agreements or be excluded from the market. The Court further notes that users, notably owners, benefited from an equitable share of the resulting profits.¹⁰¹

In other words, if Dutch decisions and EU decisions are to be contrasted and compared, national case law confirms that non-solicitation agreements could be critical from an antitrust perspective if they are not limited in scope, time, geographic application. Meanwhile, French decisions show that wage-fixing covenants among employers might be equally incompatible under competition rules.

4.3. Job poaching and antitrust law: the situation in India and the United States of America.

Interesting case law and practice on the antitrust implications of job poaching comes from India and the United States. More accurately, this case law is of interest in so far as it concerns not only non-

¹⁰¹French Competition Council Decision, 25.6.1997, 1997-D-52. Cass. Fr., Chambre Com., fin., éco., 13.2.2001. [fonds_documentaire/dgccrf/boccrf/01_04/a0040003.htm](https://www.fonds_documentaire/dgccrf/boccrf/01_04/a0040003.htm). accessed 17 February 2013; Reille (n 64).

solicitation agreements, collusive poaching, wage-fixing pacts, i.e. cartels and concerted practices. Indeed, the relevance of American and Indian case law is also linked to the hypothesis of predatory hiring, i.e. a form of monopolization (in the U.S.) or abuse of dominant position (in India). Not to mention that recent Guidelines of the U.S. Department of Justice (DOJ) dealt with human resources management directly.

Sections 3 and 4 of Indian Competition Act (2002) forbid anti-competitive agreements and abuses of dominant position.

In this context, Air India Ltd. informs the Competition Commission of India of some plausible antitrust misconducts which are attributable to InterGlobe Aviation Ltd. The problem here is that, in the opinion of Air India, InterGlobe Aviation *'has systematically indulged in predatory recruitment of trained pilots, [...] inducing them to breach contractual and other obligations, which results in cancellation and delays of [...] flights.'* The Competition Commission dismisses the claim under Section 4 of the Competition Act (2002) concerning abuses of dominant position. According to this agency, *'the allegations leveled [...] do not seem to raise any competition concern. [...] there is no bar on [...] any [...] airline from recruiting pilots belonging to other airlines. [...] this seems more of an employment issue than a competition issue. Therefore the issues alleged therein do not raise any competition concern within the meaning of the Act.'*¹⁰²

This case can be read in two ways. On the one side, it seems that the Competition Commission of India makes job poaching immune from antitrust law because this phenomenon involves employment issues more than competition issues. On the other side, it is possible to argue

¹⁰²Competition Commission of India, Case No 108 of 2015, *In Re: Air India Ltd. v. InterGlobe Aviation Ltd.*, para. 5 and 12.

that for talent raiding to be established as an abuse of dominant position the Competition Commission demands higher evidentiary standards, which includes effective harm to competitors, an excluding strategy, the inexistence of legitimate business justifications. As the subsequent pages will show, this second opinion is consistent with U.S. case law on predatory hiring.

Considering the United States of America, Sections 1 and 2 of the Sherman Act (1890) forbid instead agreements in restraint of trade and monopolization, respectively. The Clayton Act (1914) deals with concentrations.

In this framework, non-solicitation agreements are defined in antitrust scholarship as the covenants which *'are entered into between employers, cutting the employee out of the equation altogether. The practice is rumored to have originated when Apple's then-CEO Steve Jobs directly contacted Google's then-CEO Eric Schmidt to discuss Google's pi- rating of Apple's employees. The practice of entering no-poaching agreements spread to other large technology companies, and the parties agreed (1) not to cold-call each other's employees; (2) to notify each other when making an offer to the other company's employee, even if employees applied for jobs on their own initiative; and (3) that any offer would be final and would not be improved in response to a counteroffer by the employee's current employer. This practice has garnered the attention of the Department of Justice (DOJ). In 2010, the DOJ investigated agreements between several high-profile technology companies on the basis that these restraints on employee recruitment and hiring violated antitrust laws While appellate courts have not yet ruled whether these agreements are per*

*se illegal, several lower court rulings clearly indicate that employers should seek appropriate counsel on the issue.*¹⁰³

In particular, in *Eichorn v. AT&T Corp.*, the Court of Appeals, Third Circuit, assesses the sale of Paradyne to Texas Pacific Group. The clause contested bars Paradyne employees (specifically, those that are paid more than \$ 50.000,00 per year) from being solicited or rehired by AT&T for eight months following the sale of Paradyne to Texas Pacific Group. Former employees of Paradyne maintain that AT&T, its affiliates, the acquirer have all conspired to prevent plaintiffs from obtaining their pension benefits, and that they engaged in price-fixing in violation of the Sherman Act. They primarily argue that the defendants illegally conspired to fix the cost of labor in the relevant market. The Third Circuit disagrees by affirming that pre-closing and post-closing NCCs can also include no-hire agreements, which are ancillary to legitimizing the transaction.¹⁰⁴

In *Williams v. I.B. Fischer Nevada*, the Court of Appeals, Ninth Circuit, deals instead with a 'no-switching agreement' that is functional to a corporate joint venture. The Court holds that this 'no-switching agreement', preventing manager switching among franchisees of Jack-In-The-Box, does not infringe on Section 1 of the Sherman Act. The franchisor of Jack-In-The-Box requires its franchisees to agree on a 'no-switching' agreement, preventing any offering of employment to rival franchisee managers (still within Jack-In-The-Box) within six months upon expiration of the manager's contract. The Court reasons that Jack-In-The-Box franchisees and

¹⁰³Davis, A. et. al., *Developing Trends in Non-Compete Agreements and Other Restrictive Covenants*, in ABA J. Lab. & Emp. L. , Vol. 33, 2015, pp. 255, 270.

¹⁰⁴*Eichorn v. AT&T Corp.*, 248 F.3d 131 (3d Cir. 2001).

franchisors are part of a 'common enterprise' and clears the no-switching agreement.¹⁰⁵

In sum, U.S. Courts tend to justify NCCs, NDAs, non-solicitation agreements, etc., when businesses set up a form of stable cooperation, provided that the clauses are limited in time and scope, and provided that the clauses serve the cooperation scheme. The approach to non-solicitation agreements outside of concentrations and business cooperation is, however, stricter.

If one considers *U.S. v. e-Bay, Inc.*, *U.S. v. Lucasfilm, Ltd.*, *U.S. v. Adobe Systems, Inc. et al.*, the Antitrust Division of the Department of Justice sues three prominent corporations for having engaged in a non-solicitation agreement. Notably, the agreement challenged is a provision set forth in the Music Teachers' National Association Code of Ethics, a clause which prevents soliciting competing music teachers.¹⁰⁶ Even if the case has been settled, the law suit has become the basis for the DOJ and FTC's Guidelines for Human Resources Professionals (2016), which expressly declare that '*naked wage-fixing or no-poaching agreements among employers, whether entered into directly or through a third-party intermediary, are per se illegal under the antitrust laws. That means that if the agreement is separate from or not reasonably necessary to a larger legitimate collaboration between the employers, the agreement is deemed illegal without any inquiry into its competitive effects. Legitimate joint ventures*

¹⁰⁵*Williams v. I.B. Fischer Nevada*, 999 F.2d 445. 1993-2 Trade Cases P 70,319.

¹⁰⁶*U.S. v. e-Bay, Inc.*, No CV12-58690-PSG (N.D. Cal. Filed Nov. 16, 2012). *U.S. v. Lucasfilm, Ltd.*, No 1:10-CV-02220 (DDC filed Dec. 21, 2010). *U.S. v. Adobe Systems, Inc. et al.*, No 1:10-CV-01629 (DDC filed Sept. 24, 2010).

(including, for example, appropriate shared use of facilities) are not considered *per se* illegal under the antitrust laws.¹⁰⁷

Wage-fixing covenants also could be regarded with suspect. The same things happen with respect to exchanges of HR data.

For instance, wage-fixing allegations are put forth in *Verdin v. R&B Falcon Drilling USA, Inc., et al.* The plaintiffs argue that the defendant, along with other competitors in the offshore drilling business, conspired to fix employee wages and benefits. To achieve this goal, companies' representatives '*met in secret over a ten-year period and policed the conspiracy through quarterly wage and benefit surveys shared among the companies.*' This case has been eventually settled.¹⁰⁸

Meanwhile, in *Reed v. Advocate Health Care*, registered nurses allege that defendant hospitals and healthcare facilities conspired to fix the wages of nurses (a *per se* violation) and agreed to regularly exchange detailed and non-public information about their compensation structures (rule-of-reason analysis) through trade association surveys or direct contacts. This case is ultimately decided in favor of the defendants, as the Court denies a motion to certify an antitrust class action. More importantly, the Court criticizes the economic models employed to prove damages.

In *Cason-Merenda v. Detroit Medical Center*, plaintiffs are eventually nurses in Detroit healthcare facilities, and they plea that wage-fixing happened through an exchange of information among the hospitals.

¹⁰⁷DOJ and FTC's Guidelines for Human Resources Professionals (Oct. 2016), p. 3. The Guidelines also rule against the exchange of information in the field of HR management. Basing the initiative on the Guidelines, the Antitrust Division of the DOJ sued Knorr-Brake Company and Faiveley Transport North America in early 2018 for having engaged in a clause according to which the other's permission is required before pursuing each other's employees.

¹⁰⁸*Verdin v. R&B Falcon Drilling USA, Inc., et al.*, 3:00-cv-00488.

According to the plaintiffs, eight hospitals agreed to fix nurses' wages primarily through direct contact between HR personnel, as well as through mutual organizations and meetings. District Court ultimately grants the defendants' motion for summary judgment with respect to the per se claim (fixing of nurse wages), which left the plaintiffs with only the rule-of-reason analysis as a legal avenue. It appears from the opinion that District Court is convinced by the evidence that the defendant hospitals did exchange HR data with each other and based their compensation decisions, at least partially, on the wage information that they gleaned from such data. Nevertheless, the District Court highlights the fact that the plaintiffs may face challenges in proving damages at trial.¹⁰⁹

Finally, considering predatory hiring, the leading case is *Universal Analytics, Inc. v. Macneal Schwendler Corp.* Macneal Schwendler Corp. hired five key technical employees of Universal Analytics. Universal Analytics claims that these hiring processes were predatory under Section 2 of the Sherman Act. The Court of Appeals, Ninth Circuit, dismisses the law suit, arguing that '*[i]n the absence [...] of the monopolist's proved subjective intent to hire talent preclusively or of clear non-use in fact, employment should not be held exclusionary.*' More accurately, Universal Analytics does not succeed in proving that the competitor pursued an exclusionary strategy. Employees were hired for their programming abilities. There was no evidence of exclusionary intent. Employees were not underused in the business organization of the competitor.¹¹⁰

This approach to predatory hiring has been confirmed in various subsequent rulings.

¹⁰⁹*Reed v. Advocate Health Care*, Case No 06-3337, in ABA Antitrust, Vol. 24, No. 3, 2010, pp. 63-70.

¹¹⁰*Cason-Merenda v. Detroit Medical Center*, 862 F.Supp.2d 603 (2012).

In *Midwest Radio Co., Inc. v. Forum Pub. Co.*, a radio company brings an antitrust action, alleging that the defendant intended to monopolize the mass media advertising market through anti-competitive acts, including the predatory hiring of seven of its key personnel. Evidence showed that the seven employees hired away were used to improve the radio station's operating performance. The station's acts of hiring new talented employees from the defendant were to attract new listeners and new advertisers. Here the Court concludes that the defendant's attempt to revive the failing station '*constituted a valid justification for improving its services to its customers*', which included both advertisers and listeners. Justices apply the *Universal Analytics, Inc.* standard by not only looking to whether the stolen employees were simply used, but whether the employees were used for their talents and whether there was a need for the employees' help.¹¹¹

In a later case, *Wichita Clinic, P.A. v. Columbia/HCA Healthcare Corp.*, the plaintiffs allege that the hiring of its physicians by the defendant constituted predatory conduct because the defendants intended to monopolize health care services and drive the plaintiffs out of business by offering excessive salaries to their employees. District Court also cites *Universal Analytics, Inc.* for the rule that '*predatory hiring should be restricted to cases in which the plaintiff can demonstrate either nonuse of the employee or a proven intent to hire for the sole purpose of denying the employee to the plaintiff.*' The Court finds out, however, no proof of either method for finding predatory hiring because evidence is lacking that physicians were only

¹¹¹*Midwest Radio Co. v. Forum Pub. Co.*, 942 F.2d 1294, 1296 (8th Cir. 1991).

recruited to keep them from being used by the plaintiff as well as proof that the physicians were not actively employed.¹¹²

In *American Professional Testing Service, Inc. v. Harcourt Brace Jovanovich Legal and Professional Publication, Inc.*, the Court of Appeals, Ninth Circuit, holds that the defendant's conduct of hiring one law professor away from the plaintiff is insufficient to constitute an antitrust violation, a continued pattern of such conduct being absent.¹¹³

In *Natsource LLC. v. GFI Group, Inc.*, the Court considers that Natsource's allegations that the defendants attempted to monopolize by the hiring of a competitor's employees were sufficient to raise a claim of antitrust liability given the pattern of wrongful acts by the defendant. These wrongful acts consisted of aiding and abetting the competitor's employees in breaches of their fiduciary duties and misappropriating trade secrets.¹¹⁴

In *McCabe Hamilton & Renny, Co. v. Matson Terminals, Inc.*, the plaintiff alleges that the defendant engaged in predatory conduct when he attempted to hire 108 of the plaintiff's employees. The Court rules that, although the defendant's use of all of the employees 60% of the time was certainly adequate use, 'clear non-use in fact' test is not the only way to find predatory hiring. However, the allegations presented by the plaintiff sufficiently stated a predatory hiring claim by arguing there was harm to the plaintiff due to the defendant hiring the

¹¹²*Wichita Clinic v. Columbia/HCA Healthcare Corp.*, 45 F. Supp. 2d 1164 (D. Kan. 1999).

¹¹³*Am. Prof'l Testing Serv., Inc. v. Harcourt Brace Jovanovich Legal & Prof'l Publ'ns, Inc.*, 108 F.3d 1147, 1153 (9th Cir. 1997).

¹¹⁴*Natsource LLC. v. GFI Grp., Inc.*, 332 F. Supp. 2d 626, 631-32 (S.D.N.Y. 2004).

plaintiff's employees to prevent the plaintiffs from being able to compete.¹¹⁵

In *Total Renal Care, Inc. v. W. Nephrology & Metabolic Bone Disease P.C.*, the Court finds out that a claim of predatory hiring brought by TRC alleging ARA's 'locking up' its own employees to keep them from moving to another firm by asserting illegal non-compete agreements is analogous to predatory hiring of a rival's employees because 'in both circumstances, the defendant seeks to prevent a rival from competing by denying that rival key employees.' Justices apply the *Universal Analytics, Inc.* analysis in finding that TRC took all possible measures to retain its staff, which was a sufficient business reason given that there was a shortage of qualified nurses and that the time to train and deploy nurses was substantial. Therefore, there was no way for TRC to harm the competition without helping its own business.¹¹⁶

In a more recent case alleging a claim of predatory hiring, *West Penn Allegheny Health System, Inc. v. UPMC*, Pittsburgh's second largest hospital system, sues the defendant UPMC, Pittsburgh's dominant hospital system and health insurer, for attempting to monopolize the Pittsburgh market for hospital services by raiding West Penn's key physicians. UPMC poached physicians, paying them salaries well above market rates even though they lacked the sufficient capacity to keep them employed, and admitted sacrificing financial loss in order to drive competing hospitals out of business. Referring to the *Universal Analytics, Inc.* two-part test, the Court holds that the

¹¹⁵*McCabe Hamilton & Renny, Co. v. Matson Terminals, Inc.*, No CIV.08-00080 JMS/BMK, 2008 WL 2437739, at *1 (D. Haw. June 17, 2008).

¹¹⁶*Total Renal Care, Inc. v. W. Nephrology & Metabolic Bone Disease, P.C.*, No. CIV.A08-CV-00513-CMA-KMT, 2009 WL 2596493, at *12 n.3 (D. Colo. Aug. 21, 2009).

allegations are sufficient to show that UPMC engaged in anticompetitive conduct through their hiring activities.¹¹⁷

Finally, in *Storage Technology Corp. v. Cisco Systems, Inc.*, the Circuit Court affirms that '*Minnesota had not recognized a cause of action for corporate raiding and that Minnesota has disfavored any cause of action that would inhibit employees' mobility in the workforce.*' Hence, the court declines to recognize a predatory hiring claim.¹¹⁸

Commenting this case law, American scholarship emphasizes how predatory hiring could amount to monopolization only on limited occasions, as the mobility of workforce shall be a prevailing goal¹¹⁹, and as '*unlawful predatory hiring occurs when talent is acquired not for purposes of using that talent but for purposes of denying it to a competitor.*'¹²⁰ Meanwhile, other commentators have been observing that, if narrow evidentiary standards are required for predatory hiring to be established as monopolization, businesses will find it difficult to use the threat of law suits to preserve their personnel. In short, the threat of law suits for predatory hiring is a substitute strategy for non-solicitation agreements. Through non-solicitation agreements firms remove the incentives for competitors to raid their talents contractually. Through the threat of law suits based on predatory hiring firms remove the same incentives non-contractually. Antitrust

¹¹⁷*W. Penn Allegheny Health Sys., Inc. v. UPMC*, 627 F.3d 85, 95-96 (3rd Cir. 2010).

¹¹⁸*Storage Tech. Corp. v. Cisco Sys., Inc.*, 395 F.3d 921, 924-25 (8th Cir. 2005).

¹¹⁹Areeda, P.E.-Hovenkamp, H., *Antitrust Law*, New York, 1996, para. 702b, at 141: '*Hiring talent cannot generally be held exclusionary even if it does weaken actual or potential rivals and strengthen a monopolist [...] because there is a high social and personal interest in maintaining a freely functioning market for talent.*'

¹²⁰*Universal Analytics*, quoted. Page, N., *The Predatory Hiring Standard for Section 2 Violations of the Sherman Antitrust Act*, in *Northern Illinois Law Review*, Vol. 8, No. 2, 2017, p. 92. This scholar suggests that non-use in fact of employees shall be established after examining business conducts for more than a month.

enforcement against non-solicitation agreements makes it less convenient for undertakings to resort to contract in order to protect their investments in training. But a strict approach to predatory hiring weakens the position of firms even more.¹²¹

4.4. Preliminary conclusions.

Previous paragraphs undoubtedly show that antitrust rules, i.e. rules against cartels and monopolization (abuse of dominant position), have been employed in talent raiding cases, next to unfair competition doctrine, tortious interference with contract, etc. More accurately, three paradigm situations have emerged:

- a) businesses, engaging in NCCs, NDAs, non-solicitation agreements, other contract remedies against job poaching, including exchange of HR data and wage-fixing covenants, risk an incrimination for having established a cartel;
- b) businesses, agreeing on poaching third parties' employees, risk an incrimination for having established a cartel (collusive poaching);
- c) businesses with significant market power, subtracting employees to their competitors, risk an incrimination for monopolization or abuse of dominant position (predatory hiring).

From a strategic standpoint, law suits for collusive poaching or predatory hiring represent substitutes for contract remedies against talent raiding. Firms may prevent their competitors from stealing their key employees, managers, and consultants either directly (i.e. by

¹²¹Braun, R.J.-Williams, M.A., *Predatory Hiring as Exclusionary Conduct: A New Perspective*, in J. Bus. Entr. and Law, Vol. 7, No. 2-3, 2013, pp. 1 and ff. Carey, K.L., *Beyond the Route 128 Paradigm: Emerging Legal Alternatives to the Non-Compete Agreement and Their Potential Effect on Developing High-Technology Markets*, in J. Small & Emerging Bus. L., 2007, pp. 135, 137. D'Arpino, *Universal Analytics, Inc. v. MacNeal-Schwendler Corp: Predators by Hire?*, in Fordham L. Rev., Vol. 7, 1991, pp. 343-44.

contract and by the threat of an action for breach of contract), or indirectly (i.e. by the threat of an action based on antitrust violations). Nevertheless, a negative approach to contract remedies, combined with a narrow interpretation of the evidentiary standards concerning collusive poaching and predatory hiring, disempowers the position of firms *vis-à-vis* competitors and workers. This situation happens in EU competition law, where collusive poaching requires evidence of an exclusionary strategy. This situation happens in American case law, where predatory hiring requires evidence of an exclusionary strategy or of non-use in fact.

Collusive poaching and predatory hiring are two sides of the same coin. After all, collusive poaching concerns predatory practices of a group of distinct businesses. Predatory hiring regards predatory practices of a single business. Both the antitrust misconduct concerned evoke predatory prices, but they are different in one fundamental character. Predatory prices presume a price below marginal cost. Predatory hiring and collusive poaching presume the supply of wages above average salaries.

IndiGo could be interpreted as if predatory hiring were immune from antitrust law. Nevertheless, if one compares this Indian case with American practice, it is possible to infer that the claim of the plaintiff was dismissed because he only proved harmful effects, but he did not succeed in showing exclusionary intent, nor non-use in fact. The same approach of *Universal Analytics, Inc.*

Both American case law and *T-Mobile Netherlands* decision of the ECJ agree that exchange of HR data represent antitrust misconducts by effect (subject to a rule of reason analysis). In contrast, wage-fixing pacts, non-solicitation agreements, NCCs, NDAs, etc., could constitute violations of competition law *per se* (or by object).

5. Conclusions.

Job poaching has been dealt with through private enforcement and public enforcement of competition rules. On the one side, training firms tend to preserve their workers and investments either by contract remedies, or by the threat of law suits for unfair competition or tortious interference with contract. On the other side, training firms tend to keep their employees and consultants either by contract remedies, or by the threat of claims, law suits, other initiatives under the antitrust laws forbidding restraints of trade, cartels and concerted practices, monopolization and abuses of dominant position.

In both cases, high evidentiary standards or other burdens on the plaintiffs limit the effects of potential law suits. This happens in private enforcement of competition law, where unfair competition doctrine requires proof of an anti-competitive strategy, at least most of the times. This happens with public enforcement of competition law, where antitrust case law requires proof of an exclusionary strategy or of non-use in fact of employees. Either way, requiring exclusionary intent to be proved means that mere parasitic poaching should not be considered relevant from a legal standpoint, as Marco Saverio Spolidoro pointed out.

Conversely, considering contract remedies, private law rules play a twofold role. They can create restrictions in this field (the case of Belgium may be paradigmatic in this sense). But they can also justify non-solicitation agreements, NCCs, etc. (the case of Article 2125 of the Italian Civil Code is paradigmatic in this sense). Antitrust laws always contrast instead contract remedies, when there is no business cooperation, and when these covenants are not limited in time, scope, geographic application. Dalle Vedove's view shall be corrected, thus. Competition law and unfair competition doctrine do not only overlap

partially, but they can operate in contrast the one against the other when unfair competition rules justify contract restrictions on employee mobility, whilst antitrust rules counteract against these restraints of trade.

In any case, the approach of case law and scholarship is always the same. Under unfair competition doctrine and tort law, Courts and scholars pose conditions for an action to be successful. These conditions reveal a global efficiency approach to legal problems, given that the interests of competitors, workers, even the labor market as a whole are seen as prevailing over the interests of the training firms. The same conditions are imposed in the event of collusive poaching allegations and predatory hiring allegations. The result is that, even in this hypothesis, Kaldor-Hicks efficiency is applied, with the benefits for workers, competitors, the labor market as a whole over compensating the disadvantages for training businesses.

Next chapter shall understand if the taxonomy of interests identified, the global efficiency approach, evidentiary standards with respect to exclusionary intent are justified in the light of economic literature.

2.

Job poaching: a qualitative review - part I.

1. Background.

1.1. In the previous chapter.

Chapter 1 focuses on job poaching and contractual remedies from a comparative law perspective, stressing three main points.

A. In the opinion of courts and legal scholarship, employee raiding and contractual remedies affect (a) the interests of the training firms; (b) the rights of the workers; (c) the interests of competing businesses.

Job poaching perturbs training firms first and foremost, as these businesses make investments in training and risk to lose their returns when skilled employees decide to work elsewhere. Contrariwise, in a context of unrestricted mobility, experienced employees exploit the harsh competition among the employers to win better wages and working conditions. Without bearing training costs, competitors will find it easier to hire skilled human resources, to strengthen their market positioning, and to acquire expertise, know-how, trade, industrial secrets indirectly.

Meanwhile, no-poaching arrangements or wage-fixing covenants create a competitive advantage for the training firms and disadvantages for any other economic operator. These contractual tools help training businesses both discourage a massive escape of workers and keep the costs of personnel low. But any agreement that constrains the mobility of workers and that interacts with wage

formation also affects the employees adversely, as they will find it harder to change job and to achieve any salary level coveted. Competitors are troubled too, notably when they are external to no-poaching agreements or wage-fixing pacts, and when this situation makes it more problematic for them to recruit skilled personnel at a reasonable cost.

A twofold trade-off arises out.

On the one side, investments in training stand as an interest against job poaching. On the other side, the right to find a job and the free entrepreneurship of competitors seem to justify employee raiding.

At the same time, investments in training are stimulated in the presence of no-poaching contracts and wage-fixing covenants. No-poaching agreements and wage-fixing pacts hinder instead the interests of competitors, the mobility of workers.

The chart below depicts the subjects involved and the interests affected (a) as they emerge from an analysis of case law and legal literature, and (b) in comparison with job poaching and no-poaching agreements (or wage-fixing pacts).



B. Both under antitrust rules and unfair competition doctrine, it seems that talent raiding shall be repressed only when there is proof of an exclusionary intent. Parasitic poaching would not pose problems instead.

C. With different grades, both civil law jurisdictions and common law jurisdictions do not perceive job poaching as a negative factor under unfair competition doctrine, the law of torts, contract law. Indeed, legal scholarship and case law in this field tend to allow employee raiding to the extent that the interests of the workers and those of the competing firms seem to prevail according to a global efficiency approach.

In contrast, under antitrust laws, the same civil law jurisdictions and common law jurisdictions might perceive job poaching negatively, i.e. either as a possible abuse of dominant position ('predatory hiring') or as a form of cartel ('collusive poaching'). The rights of the workers and the interests of the competitors could result, thus, irrelevant.

Meanwhile, unfair competition doctrine plays a double role. Undoubtedly, this doctrine discourages job poaching. But unfair competition rules also justify no-poaching and wage-fixing arrangements on given occasions.

1.2. First considerations.

It is easy to grasp that the conclusions above stem from the dogmatic approach employed in legal literature and case law. At the same time, it is easy to understand that the conclusions above could be inconsistent, at least in part.

As Chapter 1 underlines, job poaching is justified, at least under unfair competition rules and in the opinion of legal scholarship, as the interests of competitors and workers are deemed to be prevailing according to a global efficiency approach. Nevertheless, these considerations forget two key points. Firstly, strong regulations on employee raiding also help the training firms preserve their returns on investments while keeping labor costs low. Secondly, decreasing labor costs additionally entail lower prices for products and consumers. This means that case law and scholarship have been employing a global efficiency approach without considering all the subjects and interests involved. Indeed, the positive interests of consumers have been neglected, in a context where 'consumer welfare' is - or at least should be - the primary goal of competition law.¹

In the meantime, as far as job poaching and no-poaching arrangements are concerned, unfair competition rules and antitrust laws present themselves as misaligned in scope. On the one hand, unfair competition doctrine seems to bolster remedies against job poaching under certain circumstances. On the one hand, competition law tends to repress job poaching, wage-fixing pacts, and no-poaching covenants no matters what. After all, these situations could alter the well-functioning of the competitive game. The result is that, for instance, lateral hiring could receive a positive consideration or a negative consideration depending on the cause of action. For instance, if the cause of action is unfair competition doctrine, private plaintiffs or public enforcers will find it extremely difficult to succeed in courts. If the cause of action resides in tortious interference with contract or antitrust laws, then the same operators could stand a chance. It is not a

¹See Chapter 3, para. 2.

mystery that this form of inconsistency might not be in line with the principles of reasonableness and legal certainty.

Finally, it is not crystal-clear what is the dividing line between (a) an unfair competition doctrine that bolsters job poaching; and (b) an unfair competition doctrine that justifies contractual restrictions on employee raiding.

1.3. Structure of the chapter.

The next two chapters will consider job poaching and contractual remedies with the twofold purpose of starting harmonizing the inconsistencies found while understanding:

- when and on what grounds employee raiding is to be allowed;
- when and on what grounds no-poaching pacts and wage-fixing covenants are to be admitted.

To this end, any dogmatic approach will be relinquished and job poaching will be assessed through qualitative lenses. But why is a qualitative methodology required? And what does a qualitative methodology imply?

A qualitative methodology is necessary, as dogmatism is primary responsible for the inconsistencies examined. As stated above, linking the legal treatment of job poaching (and correlated remedies) to causes of action is unreasonable and contrary to any principle of legal certainty. This is the reason why, considering the relationships between competition law and human resources, the area of application of the antitrust rules is to be reconciled with the unfair competition doctrine otherwise. This is the reason why, if a sort of harmonization is needed, a different approach shall be the answer. The present chapter will dismantle the dogmatic elaboration on job poaching so as

to work out a simple qualitative model that could help interpreters coordinate antitrust enforcement and the unfair competition rules. The standpoint in this direction lies in the identification of the subjects involved and the interests affected in employee raiding situations, a precondition to understand all the effects of a narrow antitrust policy or a laxer antitrust policy.

In this scenario, paragraphs 2, 3, 4 will examine the existing literature on economic growth, human capital, job poaching. Analyzing the models on endogenous or exogenous growth is necessary, as the theory of human capital was developed in this domain. Likewise, understanding the theory of human capital is a required step, given that literature on job poaching is grounded on it. Finally, assessing the interactions between competition and economic development is crucial because job poaching and contractual remedies display their effects in the competitive game while influencing the determinants of economic growth in the long run. After this careful analysis, paragraph 5 will draw some conclusions on the taxonomy of the interests involved and on the real effects of talent raiding, contrasting and comparing the conclusions set forth in Chapter 1 with the findings of economic literature.

2. The basics of exogenous and endogenous growth.

Economists tend to reflect in the short run, the medium run, the long run. Fluctuations (i.e. expansions and recessions) define the short and medium run. Growth dominates in the long run.²

As far as the long run is concerned, the reasons behind economic growth, differences in growth rates, growth trends have been

²Blanchard, O., *Scoprire la macroeconomia*, vol. 1, translated version, Bologna, 2009, p. 237.

explained through endogenous growth models or exogenous growth models. Endogenous growth models assert that internal variables - i.e. saving rates, human capital growth rates, innovation - will sustain specific growth rates forever. Exogenous growth models specify instead that saving rates will not support specific growth rates for an indefinite period of time; indeed, only increases in technology and demography can do so. Harrod-Domar model is the most prominent endogenous growth explanation tool. Solow-Swan model is the most important exogenous growth simplification instrument.

However, the basic assumptions in any long-period model are five:

- Growth represents a differential in output per worker, considering period t and period $t+1$;
- the factors of production are capital and labor;
- the main determinant of output is the capital employed per worker;
- decreasing returns to scale affect capital, in the sense that, labor being a constant, increasing units of capital will deliver minor levels of output;
- differentials in capital per employee depend on the investments made, which are in turn equivalent to savings.³

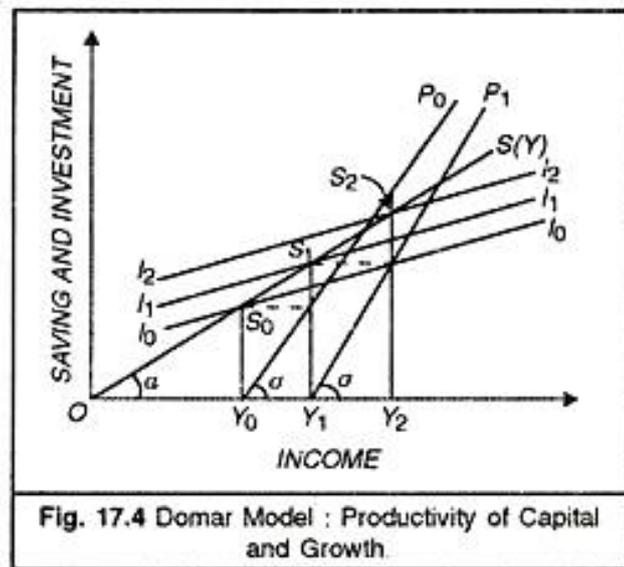
In this context, Harrod-Domar model concludes that *'the warranted growth rate is in part determined by what people want to save'*⁴, whereby the warranted growth rate indicates *'one level of output at which producers will feel in the upshot that they have done the right thing, and which will induce them to continue in the same line of advance.'*⁵In the opinion of Roy Harrod and Evsey Domar, there is a

³*Ibid.*, pp. 246-252.

⁴Harrod, R.F., *Economic Dynamics*, London, 1973, p. 20.

⁵Harrod, R.F., *An Essay in Dynamic Theory*, in *The Economic Journal*, Vol. 49, No. 193, 1939, p. 22. See also Harrod, R.F., *Towards a Dynamic Economics*, London

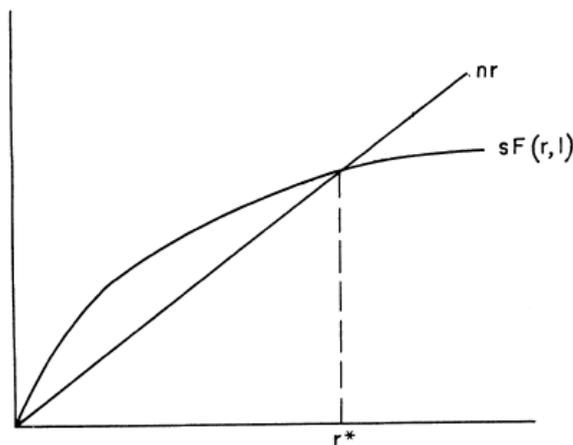
positive correlation between saving rates and warranted growth rates, if labor and capital are in fixed proportions. The result is that, given saving rates, it is always possible to predict warranted growth rates in a specific economic system. Nevertheless, actual growth rates might differ from warranted growth rates.



The graph above shows how, in the opinion of Harrod and Domar, productivity rates and growth rates are associated with specific saving rates.

1948. Harrod., R.F., *Second Essay in Dynamic Theory*, in *The Economic Journal*, Vol. 70, No. 278, 1960, pp. 277-293. Domar, E., *Capital Expansion, Rate of Growth, and Employment*, in *Econometrica*, Vol. 14, No. 2, 1946, pp. 137-147. Harrod-Domar model was further developed in Feldman–Mahalanobis Marxist model. According to this endogenous growth model, production requires capital and capital can be accumulated through investment; the faster one accumulates, the higher the growth rate will be. See Feldman, G. A., *On the Theory of Growth Rates of National Income*, 1928, in Spulber, N., *Foundations of Soviet Strategy for Economic Growth*, translated version, Bloomington, Indiana, 1964. Mahalanobis, P., *Some observations on the Process of Growth of National Income*, *Sankhya*, 1953, pp. 307–312.

Robert Solow and Trevor Swan share a different view. Criticizing the assumptions of capital and labor in fixed proportions, these scholars observe that, *'when production takes place under the usual neoclassical conditions of variable proportions and constant returns to scale, no simple opposition between natural and warranted rates of growth is possible. [...] The system can adjust to any given rate of growth of the labor force, and eventually approach a state of steady proportional expansion.'*⁶ According to Solow and Swan, savings will support growth rates until the economy achieves a situation of stalemate, i.e. the so-called steady state. When this case occurs, the accumulation of capital will not support growth rates any longer. After all, the law of diminishing returns of capital being operative, increasing levels of savings and investments (even beyond 100 %) will be needed to compensate the depreciation of the existing stock. The consequence is that only demography and technological change may lead to superior growth paths.



⁶Solow, R., *A Contribution to the Theory of Economic Growth*, in *The Quarterly Journal of Economics*, Vol. 70, No. 1, 1956, p. 73. See also Swan, T.W., *Economic Growth and Capital Accumulation*, in *The Economic Record*, Vol. 32, No. 2, 1956, pp. 334–361.

Curve nr representing the depreciation of the existing stock, the graph above shows that, after the steady state point r^* , increasing saving and investment rates will not be able to compensate any capital depreciation. As a result, the growth pattern will become constant after the steady state.

Ultimately, Harrod-Domar model and Solow-Swan model may disagree as to whether saving and investment rates will support growth rates beyond the so-called steady state. But both the models concerned also confirm that, apart from the steady state, investments in capital are indeed fundamental to ensure economic growth. This is true for physical capital. This is true for the so-called 'human capital.' Indeed, in *A Model of Economic Growth*, Nicholas Kaldor observes that *'the prime mover in the process of economic growth is the readiness to absorb technical change combined with the willingness to invest capital in business ventures.'*⁷ Even inventions are not sufficient to boost economic growth if the economic environment and the working population are not ready to exploit their potential. This is the reason why there is a close connection between investments in human capital and growth.

3. Human capital between exogenous and endogenous growth: a review of the existing literature.

3.1. The contribution of the Chicago School of Economics.

As a specific economic idea, 'human capital' has been popularized within the walls of the Chicago School of Economics. Nevertheless, there are anticipations of this concept in the works of Adam Smith, Karl Marx, Alfred Marshall, Irving Fisher, Arthur Cecil Pigou.

⁷Kaldor, N., *A Model of Economic Growth*, in *The Economic Journal*, Vol. 67, No. 268, 1957, p. 599.

As Barry Chiswick reports, *‘in his Wealth of Nations, Adam Smith lists five “principal circumstances, which [...] make up for a small pecuniary gain in some employments, and counter-balance a great one in others [...].” (Smith 1937, Book 1, Chapter X, pp.100-103). The second of these “circumstances” is the “easiness and cheapness, or the difficulty and expense of learning them.” In his discussion of this “circumstance” Smith first considers two categories of workers, “common labour” and “skilled labour”, where the latter includes “mechanics, artificers and manufacturers.” He then relates that the skilled workers are required to go through an apprenticeship program, in contrast to common labor, which is “free and open to everybody.” Moreover, “the whole labor of the apprentice belongs to his master [...]. Some money too is commonly given to the master for teaching him his trade [...]. They who cannot give money give time [...].” A third category of labor is those “in the ingenious arts and in the liberal professions,” and, as is the situation today, their education is “still more tedious and expensive.” In this discussion, Smith relates earnings to investment in education or training, at least some of which (apprenticeships) is undertaken in the workplace. Some of the time of the master and the apprentice, and perhaps other resources as well, are devoted to this training activity. Thus, Smith highlights what we would now call investment in on-the job training.*⁸

From a different perspective, Marx also individuates education and working capacity as a form of *‘knowledge capital’* endowed to or acquired by humans. Such a specific capital does not erase the exploitation of the working class, as the private property of the production means is held to be responsible for this situation. Nevertheless, knowledge capital affords the workers with a

⁸Chiswick, B., *Jacob Mincer, Experience and the Distribution of Earnings*, in IZA DP No. 847, 2003, pp. 3-4.

contractual power *vis-à-vis* their employers, a situation that helps them pretend better living conditions and higher wages.⁹

Likewise, Marshall observes that *'the most valuable of all capital is that invested in human beings.'*¹⁰ In the opinion of this scholar, a different propensity to invest in knowledge is responsible for the inequalities throughout the world. Wealthier classes take advantage of better introductions, better means of subsistence, a greater consciousness on the importance of culture. This is the reason why they tend to invest more in knowledge compared with the working classes. This is the reason why they will benefit of higher streams of income in the future. Conversely, scarceness of means and a limited cultural background constrain the poorest people, leading them to invest less in accruing their knowledge. Marshall assumes that this process and, thus, inequalities are cumulative over the decades.¹¹

On his own, Fisher confirms that, besides a dead capital, a living capital additionally exists.¹²

Finally, Pigou emphasizes that *'there is such a thing as investment in human capital as well as investment in material capital. So soon as this is recognized, the distinction between economy in consumption and economy in investment becomes blurred. For, up to a point, consumption is investment in personal productive capacity. This is especially important in connection with children: to reduce undue expenditure on their consumption may greatly lower their efficiency in after-life. Even for adults, after we have descended a certain distance*

⁹Marx, K., *Capital*, Vol. III, ch. 29, 1867, pp. 465–6. Marx., K., *The Emancipation Question*, in *New-York Daily Tribune*, January 17th and 22nd, 1859.

¹⁰Marshall, A., *Principles of Economics*, 1890, p. 324.

¹¹*Ibid.*, p. 323.

¹²Goldin, C., *Human Capital*, in *Handbook of Cliometrics*, Heidelberg, 2016, p. 57. Fisher, I.R., *The Nature of Capital and Income*, New York, 1906.

*along the scale of wealth, so that we are beyond the region of luxuries and “unnecessary” comforts, a check to personal consumption is also a check to investment.*¹³

In short, with different accents, Pigou, Fisher, Marshall, Marx, Smith regard knowledge and expertise as another form of incremental capital, something that is different from physical capital, but also something where it is possible to invest in, notably for the purpose of winning better living conditions (for the employees) or returns on the investment made (for the training firms).

Worked out in Chicago, the theory of ‘human capital’ further explores the factors influencing investments in knowledge and expertise. But what is ‘human capital’ precisely? And what does the existence of ‘human capital’ imply?

In 1953, Milton Friedman writes *Choice, Chance, and the Personal Distribution of Income*. This article inquires on the rationale behind social inequalities. The conclusion is that *‘differences among individuals or families in the amount of income received are generally regarded as reflecting [...] circumstances largely outside the control of the individuals concerned, such as unavoidable chance occurrences and differences in natural endowment and inherited wealth [...]. The way that individual choice can affect the distribution of income has been less frequently noticed. The alternatives open to an individual differ, among other respects, in the probability distribution of income they promise. Hence his choice among them depends in part on his taste for risk [...]. The foregoing analysis is exceedingly tentative [...]. One cannot rule out the possibility that a large part of the*

¹³Pigou, A.C., *A Study in Public Finance*, London, 1928, p. 29.

*existing inequality of wealth can be regarded as produced by men to satisfy their tastes and preferences.*¹⁴

To put it otherwise, Friedman does not rule out starting financial conditions as a determinant of social inequalities. Nevertheless, this scholar also argues that individual choices orient the distribution of wealth, as people undertake economic activities depending on risk aversion and the streams of income expected. The theory of human capital delves into these findings, considering the choice between education and work at an earlier age, i.e. between a postponement of incomes and a current salary.

Subsequently, Arthur Lewis of the University of Manchester edits an article whose title is *Economic Development with Unlimited Supplies of Labor*. The scope of this research is linking inequality with a theory of economic development. Lewis proposes a model where there is a post-industrial sector (that demands employees) next to a pre-industrial sector (with an unlimited supply of labor). Businesses in the post-industrial sector start draining workforce from the pre-industrial sector. As an unlimited supply of jobs always exceeds the demand, salaries in the post-industrial sector will be lower, while firms will make profits and investments, leading to capital accumulation and a self-sustaining growth.

It is to be noticed that Lewis treats distinctively *'the growth of the supply of skilled labor and the growth of capital as a single phenomenon in long run analysis.*¹⁵ This means that, in the opinion of

¹⁴Friedman, M., *Choice, Chance, and the Personal Distribution of Income*, in *Journal of Political Economy*, Vol. 61, No. 4, 1953, pp. 277-78, 289-90. This theoretic model was anticipated in Friedman, M., Kuznets, S., *The Data on Income from Independent Professional Practice*, NBER, 1945.

¹⁵Lewis, A., *Economic Development with Unlimited Supplies of Labor*, in *The Manchester School*, Vol. 22, No. 2, 1954, p. 153.

the scholar concerned, employees with a specific education and training differ from unskilled workers, in the sense that they represent another form of capital where businesses might invest in.

In 1958, Jakob Mincer writes *Investment in Human Capital and Personal Income Distribution*. Again, this article intends to understand the rationale behind social inequalities. But this time the assumption is that individuals enjoy equal abilities and opportunities, and that individuals have to choose between work or training/education. Opting for training and education is not costless. After all, any individual who desires an education incurs in direct costs (e.g. tuition, books, etc.) and opportunity costs (i.e. no salary for a certain period of time). Nevertheless, a choice is required and it will be based on the returns expected from an investment in training or education. The conclusion is that, considering inter-occupational situations among plural businesses, people with a higher degree of education or training will likely perceive better wages as '*the assumption of rational choice means an equalization of present values of life-earnings at the time the choice is made.*'¹⁶ Meanwhile, considering intra-occupational situations within a single firm, on-the-job training will influence experience, marginal productivity, and wages positively.¹⁷

Two articles of Theodore Schultz, i.e. *Investments in Human Capital* and *The Economic Value of Education*, follow up in 1961 and 1963, respectively. Schultz remarks that '*much of what we call consumption*

¹⁶Mincer, J., *Investment in Human Capital and Personal Income Distribution*, in *Journal of Political Economy*, Vol. 66, No. 4, 1958, p. 301.

¹⁷*Ibid.*, pp. 288, 289, 301: '[...] experience influences productivity more strongly in jobs that normally require more training. [...] Differences in training result in differences in levels of earnings among "occupations" as well as in differences in slopes of life-paths of earnings among occupations. [...] Interoccupational differentials are therefore a function of differences in training.'

*constitutes investment in human capital. Direct expenditures on education, health, and internal migration to take advantage of better job opportunities are clear examples.*¹⁸ In the opinion of this scholar, any expenditure that increases working capability shall not be regarded as consumption, but as an investment in human capital to increase job opportunities and perspective streams of income. Human capital includes, thus, education, on-the-job-training, migration, healthcare, study programs for adults that are not organized by firms. The results of investments in human capital are positive both for individuals and the society as a whole. Individuals investing in education and training will draw benefits in terms of higher wages. The society as a whole will enjoy instead higher levels growth, given that not only the quantity, but also the quality of capital (and labor) influences productivity.¹⁹

However, the landmark contribution in the theory of human capital comes from Gary Becker, who writes *Human Capital. A Theoretical and Empirical Analysis with Special Reference to Education* (1964).

First, Becker defines what human capital means, maintaining that *'expenditures on education, training, medical care, etc., are investments in capital. However, these produce human, not physical or financial, capital because you cannot separate a person from his or her knowledge, skills, health, or values the way it is possible to move financial and physical assets while the owner stays put.'*²⁰

¹⁸Schultz, T.W., *Investments in Human Capital*, in *The American Economic Review*, Vol. 51, No. 1, 1961, p. 1.

¹⁹*Ibid.*, pp. 1-16. See also Schultz, T.W., *The Economic Value of Education*, New York, 1963. Schultz, T.W. and others, *Investment in Human Beings*, in *The Journal of Political Economy*, Vol. 52, No. 5, Part 2, 1962.

²⁰Becker, G., *Human Capital. A Theoretical and Empirical Analysis, with Special Reference to Education*, Chicago, 1964, p. 16.

Secondly, Becker reiterates that *'an investment approach to human resources is a powerful and simple tool capable of explaining a wide range of phenomena.'*²¹ In the opinion of this scholar, expenditures in education and training do not amount to consumption, but they represent investments to increase future streams of income. Hence, Becker draws a distinction between investments in training and investments in education. In the first case, businesses will invest in training, considering the returns expected on the investment made. In the second case, individuals will invest in education until *'the present value of the marginal cost of investing in human capital equals the present value of future returns.'*²² Investments in human capital will produce positive external effects on the economic system as a whole, as *'social returns are said to be larger than private returns because of the external economies produced by college graduates.'*²³

Finally, Gary Becker and Barry Chiswick publish *Education and the Distribution of Earnings* in 1966. More accurately, this article stresses that *'each person is assumed in effect to maximize his economic welfare by investing an appropriate amount in human capital, and the distribution of earnings is determined by the distribution of investments and their rates of return. These determinants are in turn related to various "institutional" factors which also play an important part in our theory: inheritance of property income, equality of opportunity, distribution of abilities, subsidies to education, and other human capital, etc.'*²⁴

²¹*Ibid.*, p. 85.

²²*Ibid.*, pp. 78-79.

²³*Ibid.*, p. 209.

²⁴Becker, G.-Chiswick, B.R., *Education and the Distribution of Earnings*, in *The American Economic Review*, Vol. 56, No. ½, 1966, p. 368.

In the end, the theory of human capital delivers three significant additions:

- education and on-the-job training represent a form of capital where both businesses and individuals could invest in (Friedman, 1953; Lewis, 1954; Becker and Chiswick, 1966);
- education and on-the-job training will deliver private benefits, as investments in human capital may improve wages and living conditions (Mincer, 1958; Schultz, 1963);
- education and on-the-job training will also deliver social benefits, as investments in human capital spur productivity and economic growth (Schultz, 1961; Becker, 1964).

Now, Michael Spence's theory on signaling (1973) objects that there is not a direct connection between productivity and education (or training). In the opinion of this scholar, hiring processes are a lottery. Employers are uncertain about the marginal productivity of each employee and they will bet on them by paying a wage. Meanwhile, there are bad prospective employees and good prospective employees. But good prospective employees have a superior incentive to buy education credentials in order to be recruited as well as to fill the information gap between them and the employers. The conclusion is that investments in human capital do not boost productivity per se. Conversely, these expenses help good employees in hiring processes.²⁵

It is to be understood, however, that investments in education and training might not be responsible for productivity and growth directly.

²⁵Spence, M., *Job Market Signalling*, in *Quarterly Journal of Economics*, Vol. 87, No. 3, 1973, pp. 356 ff.

Nevertheless, these investments will provide an indirect contribution to innovation and economic development, as signaling enables the selection of good workers, while the selection of good workers increases productivity.

Finally, human capital theory is not in opposition with Solow-Swan model on exogenous growth. After all, Mankiw, Weil and D. Romer (1992) prove that *'the Solow model is consistent with international evidence if one acknowledges the importance of human as well as physical capital.'*²⁶ However, human capital has also been called upon to justify endogenous growth models. This is true with Lucas-Uzawa model on endogenous economic growth.

3.2. After Chicago: Lucas-Uzawa model on endogenous growth.

In 1965, Hirofumi Uzawa of Stanford University writes *Optimum Technical Change in An Aggregative Model of Economic Growth*. Conversely, Robert Lucas of the University of Chicago edits *On the Mechanics of Economic Development* in 1988. These two articles are at the basis of the so-called Lucas-Uzawa model on endogenous growth²⁷, a landmark in the economic theory, but also an elaboration that finds its origins in the work of Kenneth Arrow and Paul Romer.

Arrow publishes *The Economic Implications of Learning by Doing* in 1962. The scope of this short essay is designing a long-run growth model that covers knowledge. The conclusion is that, representing a main driver for economic growth, *'technological change in general can be ascribed to experience, that is the very activity of production*

²⁶Mankiw, N.G.-Romer, D.-Weil, D.N., *A Contribution to the Empirics of Economic Growth*, in Quarterly Journal of Economics, Vol. 107, 1992, p. 433.

²⁷Uzawa, H., *Optimum Technical Change in An Aggregative Model of Economic Growth*, in International Economic Review, Vol. 6, No. 1., 1965, pp. 18-31. Lucas, R.E., *On the Mechanics of Economic Development*, in Journal of Monetary Economics, Vol. 22, 1988, pp. 3-42.

*which gives rise to problems for which responses are selected over time.*²⁸To put it in other words, in the opinion of Arrow and considering a single firm, productivity is an increasing function of cumulative aggregate investments for the industry. Avoiding the issues of specialization and the division of labor, the scholar concerned argues that increasing returns arise because new knowledge is discovered and production takes place. The increasing returns are external to individual firms because such knowledge becomes publicly known. Arrow also supposes that improvements in human capital do not attain to the quality of capital as a basic productive factor, but to the quality of labor. Moreover, he assumes that technological change is incorporated in new goods, that new goods are the product of experience, and that learning processes arise out of experience.

Romer's *Increasing Returns and Long-Run Growth* follows up about two decades later. The aim of this article is working out an endogenous growth model, assuming that *'knowledge is a capital good.'*²⁹ The conclusion is that *'knowledge may have an increasing marginal product'*, that the accumulation of knowledge may fuel the economic growth forever³⁰, and that knowledge produces some positive externalities. After all, inventions cannot be kept secret integrally and for an indefinite time. In turn, these externalities may lead to underinvestment in human capital, a situation which does not reflect a social optimum, but also a situation which can be remedied through taxes or subsidies.³¹

²⁸Arrow, K.J., *The Economic Implications of Learning by Doing*, in *The Review of Economic Studies*, Vol. 29, No. 3, 1962, p. 156.

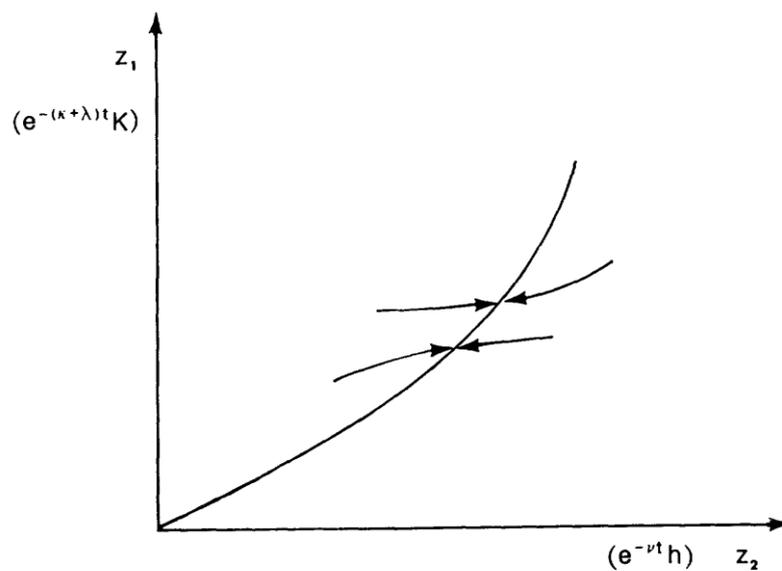
²⁹Romer, P.M., *Increasing Returns and Long-Run Growth*, in *The Journal of Political Economy*, Vol. 94, No. 5., Oct., 1986, p. 1006.

³⁰*Ibid.*, p. 1003.

³¹*Ibid.*, pp. 1015 and ff.

Lucas-Uzawa model is built up on the findings of Arrow and Romer, but also on the seminal contribution of Gary Becker.

More accurately, this model draws a distinction between physical capital and human capital. Physical capital is always seen in a neo-classical perspective, i.e. as factor of production consisting of machinery, buildings, computers, and the like. Human capital defines instead the general skills of workers, i.e. a working ability that enables them to increase productivity. The accumulation of human capital depends on time allocation between leisure time and education (or training).



The graph above shows in what sense, in the opinion of Lucas and Uzawa, human capital *'is accumulated according to a law having the*

*crucial property that a constant level of effort produces a constant growth rate of the stock, independent of the level already attained.*³²

Lucas also considers the international trade implications of human capital accumulation, confirming that *'production patterns are dictated by comparative advantage: each country produces goods for which its human capital endowment suits it. Given a learning technology [...], countries accumulate skills by doing what they are already good at doing, intensifying whatever comparative advantage they begin with.'*³³ The consequence is that, if no international trade occurs, then countries will continue to grow on the basis of their human capital accumulation trend: rich countries will remain rich; poor countries will rest poor. If international trade occurs, then one needs to understand if *'the effects of human capital are internal - affecting the productivity of its 'owner' only – or whether they have external benefits that spill over from one person to another.'* Only when these knowledge spillovers take place, *'the wage rate of labor at any given skill level will increase with the wealth of the country in which he is employed. Then if labor can move, it will move, flowing in general from poor countries to wealthy ones.'*³⁴

In this framework, the extant dissertation has not the ambition to take a stance in favor of exogenous growth or endogenous growth. Suffices to say that, even if Lucas-Uzawa model uses human capital as a way out from the elaboration of Robert Solow, this theory confirms that investments in education and training do not only provide private benefits, but also societal advantages in terms of a higher productivity and a higher economic growth. Furthermore, it is true that some

³²Lucas, R.E., *On the Mechanics of Economic Development*, quoted, p. 39.

³³*Ibid.*, p. 33.

³⁴*Ibid.*, p. 40.

economists link human capital with capital, while other economists connect human capital with the quality of labor. Nevertheless, these inconsistencies do not remove the fact that investments in human capital are crucial for the economic growth.³⁵

Meanwhile, Lucas reflects on the external effects of human capital. Considering single national systems, these externalities are positive, in the sense that they produce underinvestment in training and education. Considering a wider scenario, investments in human capital strengthen instead the comparative advantage of States and regions in the international trade. Knowledge spillovers influence the mobility of workers from poorest countries to richest countries positively.

3.3. After Chicago: economic theories on 'knowledge spillovers.'

Knowledge spillovers identify any exchange of ideas among businesses, industries, countries. More importantly, spillover effects occur when (a) businesses or countries undertake non-rival knowledge market costs without agreeing on assuming these costs; (b) non-rival knowledge market costs also stimulate technological improvements in a neighbor through one's own innovation process.

As the previous paragraph shows, Lucas (1988) stresses that a parallelism exists between the investments in human capital, knowledge spillovers, and the mobility of workers. It is also true that other models have been considering knowledge spillovers in a more general fashion.

³⁵These findings are confirmed in literature. Prescott and Boyd develop another endogenous growth model where knowledge accumulation does not only depend on the investments in single workers, but also on the investments in co-workers. If this case occurs, knowledge will not show diminishing returns and its accumulation could sustain economic growth forever. See Prescott, E.C.-Boyd, J., *Dynamic Coalitions, Growth, and the Firm*, in Prescott, E.C., and Wallace, N., eds., *Contractual Arrangements for Intertemporal Trade*, Vol. 1, Minneapolis, 1987, p. 146.

MAR spillover model finds its origins in the contributions of Alfred Marshall (1890), Kenneth Arrow (1962), Paul Romer (1987). Years later, Edward Glaeser, Hedi Kallal, José Scheinkman, Andrei Shleifer pull together the Marshall-Arrow-Romer views on knowledge spillovers and accordingly name the view MAR spillover.

In *Principles of Economics*, Marshall declares that '*so great are the advantages which people following the same skilled trade get from near neighbourhood to one another.*'³⁶ The question is what are the determinants, what are the effects of industry localization. In the opinion of Marshall, physical conditions (e.g. '*the character of the climate and the soil, the existence of mines and quarries in the neighbourhood, or within easy access by land or water*') and regulation (e.g. '*the patronage of a court*') prompt specific industries to settle down in specific regions. Meanwhile, networking between employers and employees spurs the exchange of input, expertise, information. This factor contributes to the growth of businesses, industries, economic systems. It is to be understood that, according to Marshall, inventions and the accumulation of knowledge produce externalities, as technology cannot be kept secret, at least for an indefinite period of time.³⁷

In *The Economic Implications of Learning by Doing*, Arrow adds two points. First, experience is the engine behind both technological progress and economic growth. Second, '*institutions, education, and research*' pave the way for an exchange of ideas while enabling '*learning to take place more rapidly.*'³⁸

³⁶Marshall, A., *Principles of Economics*, quoted, p. 156.

³⁷*Ibid.*, p. 237.

³⁸Arrow, K.J., *The Economic Implications of Learning by Doing*, quoted, p. 172.

In *Growth Based on Increasing Returns Due to Specialization*, Romer eventually investigates on the findings of Marshall and Arrow in deep. He concludes that industry specialization in a given region conducts to a *'higher rate of investment and a higher rate of growth.'* In the opinion of this scholar, *'it is not an accident that the analysis of this equilibrium so strongly resembles one with a positive externality. This apparent "external economy" associated with the specialization is closely related to the intuition behind Marshall's use of the term. This model is not one with a true positive externality, but it nonetheless behaves exactly as if one were present.'*³⁹

Glaeser and co-authors provide a synthesis in *Growth in Cities*. Above all, these scholars confirm that *'concentration of an industry helps knowledge spillovers between firms and, therefore, the growth of an industry and of that city.'* This process is due to *'spying, imitation, and rapid interfirm movement of highly skilled labor'*, i.e. three factors that allows a dissemination of ideas among neighboring businesses.⁴⁰In any case, in the opinion of Glaeser and colleagues, MAR spillover model present two main features:

- in the model, knowledge spillover are externalities within a specific industry and a specific region;
- in the model, local monopolies are likely to ensure a rapid adoption of innovation as the positive externalities are internalized by the innovator.

³⁹Romer, P.M., *Growth Based on Increasing Returns Due to Specialization*, in *The American Economic Review*, Vol. 77, No. 2, Papers and Proceedings of the Ninety-Ninth Annual Meeting of the American Economic Association, 1987, p. 61.

⁴⁰Glaeser, E., Kallar, H., Scheinkman, J., Shleifer, A., *Growth in Cities*, in *Journal of Political Economy*, Vol. 100, No. 6, 1992, p. 1127.

Michael Porter shares a different view in *The Competitive Advantage of Nations*. He always considers knowledge spillovers that happen within a single industry in a single region. He also confirms that '*proximity increases the speed of the information flow*', and that this situation allows economic growth and innovation. Nevertheless, in the opinion of Porter, the positive externalities arising out of proximity and knowledge accumulation are not internalized through local monopolies. Indeed, geographic concentration represents a competitive advantage notably when '*rivals located the one close together tend to be jealous and emotional competitors*'.⁴¹In short, Porter's idea of clusters identifies a situation where businesses in a single region compete and cooperate among themselves at the same time, leading to the success of the industry in global competition.⁴²

Jane Jacobs reflects instead on knowledge spillovers across multiple industries. In *The Economy of Cities*, the transformation of Detroit from a district mainly producing gasoline engines to an automotive industry-concentrated district is considered. The question is why this passage has been possible. Urbanist Jacobs points out that, in contrast with MAR spillovers, the proximity of firms from different industries helps knowledge travel while fueling innovation and boosting economic growth. The scholar concerned stresses that the key factors behind economic growth are cities. For a productive standpoint, the rise of local industry is path-dependent as it exploits the resources and achievements of elder traditions. However, any production process gives rise to exports and imports, imports that are likely to replace local productions. Exports and imports create in turn an incentive for

⁴¹Porter, M.E., *The Competitive Advantage of Nations*, New York, 1990, mobi format.

⁴²Porter, M.E., *Location, Competition, and Economic Development: Local Clusters in a Global Economy*, in *Economic Development Quarterly*, vol. 14, No. 1, 2000, p. 15.

an exchange of ideas among plural industries and regions. Finally, knowledge spillovers set the conditions for new productions, new exports, new imports, i.e. economic development.⁴³

In the end, starting with Marshall, economic scholarship agree on the fact that knowledge spillovers constitute positive externalities, i.e. beneficial outcomes arising out of investments in education and on-the-job training. These benefits are for businesses who do not invest in human capital, but also for the economic system as a whole. After all, knowledge spillovers contribute to innovation and growth.

In the meantime, there is controversy:

- as to whether inter-firm knowledge spillovers (Jakobs spillovers) or intra-firm knowledge spillovers (MAR spillovers) are responsible for innovation and, thus economic growth;
- as to whether local competition (MAR model) or local monopoly (Porter model) is the best market structure to internalize knowledge spillovers and, thus, to ensure allocative efficiency.

In short, it is established that knowledge spillovers contribute to innovation and economic growth in the long run. Nevertheless, it is also established that knowledge spillovers could lead to allocative imbalances in the short and medium run.

Likewise, it is commonly understood that knowledge spillovers are an engine behind economic development. Nevertheless, it is not crystal-clear if economic development is the fruit of knowledge spillovers among a single industry (MAR model) or knowledge spillovers among plural industries (Jakobs model).

⁴³Jakobs, J., *The Economy of Cities*, New York, 1969, pp. 122 and ff.

Finally, it is well-known that knowledge spillovers are positive externalities. Nevertheless, scholarship does not agree on whether these imbalances could be corrected through a competitive market structure (Porter model) or a monopolistic market structure (MAR model). Subsequent literature highlights, however, that *'research programs located within larger firms are significantly more productive'*, and that *'larger firms are in a better position to realize economies of scope by sustaining diverse portfolios of research projects that capture internal and external knowledge spillovers.'*⁴⁴

In any case, local knowledge spillovers (LKS) and international knowledge spillovers (IKS) represent other sub-sets of externality in an international trade perspective. Local knowledge spillovers are inter-firm dynamic externalities within a single region. International knowledge spillovers represent inter-firm dynamic externalities in the international trade and by virtue of the international trade.

Considering LKS, economic literature confirms that businesses tend to concentrate and flourish in regional clusters, as knowledge spillovers represent economies of scale⁴⁵; as there is a positive correlation between industry agglomeration and knowledge spillovers⁴⁶; as economies of scale are responsible for industrial concentration.⁴⁷

⁴⁴Henderson, R.-Cockburn, I., *Scale, scope, and spillovers: the determinants of research productivity in drug discovery*, in RAND Journal of Economics, Vol. 27, No. 1, 1996, pp. 32, 55.

⁴⁵Brandt, N., *Mark-ups, Economies of Scale, and the Role of Knowledge Spillovers in OECD Industries*, in European Economic Review, Vol. 51, No. 7, 2017, pp. 1727-1728.

⁴⁶Audretsch, D.B.-Feldman, M.P., *R&D Spillovers and the Geography of Innovation and Production*, in The American Economic Review, Vol. 86, No. 3, 1996, p. 636.

⁴⁷Krugman, P., *Cities in Space: Three Simple Models*, in NBER Working Paper No. w3607, p. 2. Blanchard, O.-Katz, L.F., *Regional Evolutions*, in Brookings Papers on Economic Activity, Vol. 1, 1992, p. 55.

However, scholarship does not agree on the role of local knowledge spillovers as a driver for regional development and competitiveness. Some authors point out that the fortune of regional clusters depends on the rapidity and convenience of networking⁴⁸, and that propensity in innovation is superior in clusters.⁴⁹ Other authors are convinced that the role local knowledge spillovers is overrated, as cost advantages are mainly responsible for regional success.⁵⁰ Caniels and Romijn recently stress that *'if spillovers would be the chief mechanism operating in clusters, we are facing a situation in which market forces lead to sub-optimal social outcomes due to private under-investment in innovation and learning.'*⁵¹

Considering IKS, Grossman and Helpman (1991) are of the opinion instead that regional knowledge spillovers in a small country will boost innovation and productivity less than international knowledge spillovers.⁵² Baldwin, Braconier, and Forslid (2005) underline that multinational corporations (MNCs) and foreign direct investments (FDIs) *'play a critical role in determining the endogenous long-run*

⁴⁸Malmberg, A.-Maskell, P., *The elusive concept of localization economies: Towards a knowledge-based theory of spatial clustering*, in *Environment and Planning*, Vol. 34, No. A, 2002, pp. 429–49.

⁴⁹Audretsch, D.B.-Feldman, M.P., *R&D Spillovers and the Geography of Innovation and Production*, quoted, p. 635: *'innovative activity will tend to cluster in industries where new economic knowledge plays an especially important role.'* Jaffe, A.-Trajtenberg, M.-Henderson, R., *Geographic localization of knowledge spillovers as evidenced by patent citations*, in *The Quarterly Journal of Economics*, Vol. 108, No. 3, 2000, pp. 577–98.

⁵⁰Breschi, S.-Lissoni, F., *Localised knowledge spillovers versus innovative milieux: Knowledge "tacitness" reconsidered*, *Papers in Regional Science*, Vol. 80, 2001, pp. 255–73. Breschi, S.-Lissoni, F., *Knowledge spillovers and local innovation systems: a critical survey*, in *Industrial and Corporate Change*, Vol. 10, No. 4, 2001, pp. 975–1005. Breschi, S.-Malerba, F., *The geography of innovation and economic clustering: some introductory notes*, in *Industrial and Corporate Change*, Vol. 10, No. 4, 2001, pp. 817–33.

⁵¹Caniels, M.C.J, Romijn, H.A, *Localised knowledge spillovers. The key to innovativeness in industrial clusters?*, in *Regional Development in the Knowledge Economy* edited by Cooke, P., Piccaluga, A., New York, 2006, p. 36.

⁵²Grossman, G.M.-Helpman, E., *Trade, knowledge spillovers, and growth*, in *European Economic Review*, Vol. 35, No. 5, 1991, pp. 17-526.

growth rate via technological spillovers.'⁵³ Coe, Hoffmaister, and Helpman (2009) draw a parallelism between firms investing in R&D and the appropriation of international knowledge spillovers.⁵⁴ Bianco and Niang (2012) report that there is evidence of substantial cross-country spillovers mainly related to R&D and human capital variables, which contribute significantly to productivity.⁵⁵ Conversely, Fink and Jansen (2008) emphasize that local spillovers might enhance innovation more than the international trade in general situations, as *'additional gains from trade, associated with greater economies of scale and knowledge spillovers, are also likely to be greater if liberalization proceeds on an MFN basis'*⁵⁶, i.e. with bilateral investment treaties (BITs) and free trade agreements (FTAs) rather than with an open door policy.

The conclusion is that a further distinction between local knowledge spillovers and international knowledge spillovers exists. Both these externalities spur innovation and productivity, even if there is controversy on the impact of LKS or on the prevalence of IKS.

Anyway, on the one side, knowledge spillovers act as positive externalities by discouraging investments in training and education (Romer, 1986-1987). On the other side, knowledge spillovers might additionally ensure a competitive advantage to regional economies (Porter, 1990; Audretsch and Feldman, 1996; Malmberg and Maksell,

⁵³Baldwin, R.-Braconier, H.-Forslid, R., *Multinationals, Endogenous Growth, and Technological Spillovers: Theory and Evidence*, in *Review of International Economics*, Vol. 13, No. 5, 2005, p. 959.

⁵⁴Coe, D.T.-Helpman, E.-Hoffmaister, A.W., *International R&D spillovers and institutions*, in *European Economic Review*, Vol. 53, 2009, pp. 723–741.

⁵⁵Bianco, D.-Niang, A., *On international spillovers*, in *Economics Letters*, Vol. 117, 2012, pp. 280–282.

⁵⁶Fink, C.-Jansen, M., *Services provisions in regional trade agreements: stumbling blocks or building blocks for multilateral liberalization*, in *Multilateralizing Regionalism. Challenges for the Global Trading System*, edited by Baldwin, R., Low, P., Cambridge, 2008, p. 229.

2002, Jaffe, 1993). At the same time, confining knowledge spillovers to a regional stage may ensure a competitive advantage (Porter, 1990), but may also jeopardize an international circulation of ideas, i.e. a factor behind global growth (Grossman and Helpman, 1991; Baldwin, Braconier, Forslid, 2006; Bianco and Niang, 2012). The question is understanding when - rather than if - IKS or LKS are to be regarded mainly as a positive factor that fosters competitiveness or principally as a negative factor that conducts to underinvestment in human capital. The question is understanding if a limitation of IKS will endanger growth or will propel the competitive advantage arising out of LKS.

What is crystal-clear is that there may be a trade-off between the aversion of knowledge spillovers (to protect investments in human capital) and the promotion of knowledge spillovers (to guarantee competitiveness). Nevertheless, a full-fledged dissemination of expertise shall prevail over the promotion of investments in education and expertise, at least in principle. After all, a red thin line links knowledge spillovers, including IKS, with a primary goal in the long run, i.e. economic growth.

It is to be noticed, however, that knowledge spillovers require investments in human capital in the first place, and that any underinvestment in this field will lead to second best solutions (Caniels and Romijn, 2006). Logically, there will not be any expertise for dissemination if expertise is not built up through expenses in education and training. As a result, even if the promotion of knowledge spillovers is a prevailing objective, any policy and any regulation shall ensure proper investments in human capital first and foremost. Conversely, any business conduct that goes beyond the protection of investments in education and training shall be fined, as

knowledge spillovers are crucial for economic development. Chapter 3 will clarify on what legal grounds, when, and to what extent business behavior could be held proportionate and limited to the protection of investments in education and training.

4. On-the-job training and job poaching: a review of the existing literature.

As the extant paragraph will show, job poaching has been examined from an economic standpoint as a factor that might perturb the investments in human capital, with a specific reference to on-the-job training. On-the-job training in turn has been specifically studied as an economic phenomenon starting with the seminal contributions of Jakob Mincer and Gary Becker.

4.1. Contributions by Jakob Mincer and Gary Becker.

Jakob Mincer edits *On-the-Job Training: Costs, Returns, and Some Implications* in 1962. The scope of this article is understanding the cost structure and benefits of on-the-job training, i.e. '*a more specialized and often prolonged process of acquisition of occupational skill, after entry into the labor force.*' In his model, Mincer takes two different kinds of training into account, i.e. formally organized activities such as apprenticeship programs and the purchase of knowledge through experience. He asserts, thus, that these operations present both disadvantages and advantages. Disadvantages include direct outlays (e.g. the cost of training personnel, etc.) and foregone earnings (i.e. the returns that firms would have earned if they had renounced to training programs); portions of direct outlays '*are currently charged to the worker in the form of a reduction in wages*', in which case '*the worker buys training services from the firm*' itself. Advantages cover instead the returns on the investments made; these

returns are similar to those of a higher education and tend to increase with the stability of employment intercourses. Mincer also adds that education and on-the-job training are substitute services, and that there is a positive correlation between the diffusion of higher levels of education and the rate of investments in work-specific training.⁵⁷

Gary Becker develops these findings in *Human Capital. A Theoretical and Empirical Analysis with Special Reference to Education* (1964).

In the opinion of the scholar concerned, investments in human capital cover expenditures in education and training. More accurately, there exist two types of on-the-job training, i.e. general training and specific training. '*General training is useful in many firms besides those providing it.*'⁵⁸ Specific training '*has no effect [instead] on the productivity of trainees that would be useful in other firms.*'⁵⁹

Becker imagines a situation of perfect competition, where workers enjoy an unlimited mobility, but also where firms will bear costs and will expect returns if they invest in training. In this scenario, on the one side, '*firms would provide general training only if they did not have to pay any of the costs.*' On the other side, '*persons receiving general training would be willing to pay these costs since training raises their future wages. Hence it is the trainees, not the firms, who would bear the cost of general training and profit from the return. [...] Employees would pay for general training by receiving wages below their current (opportunity) productivity, [and thus] [...]*

⁵⁷Mincer, J., *On-the-Job Training: Costs, Returns, and Some Implications*, in *Journal of Political Economy*, Vol. 70, No. 5, Part 2: Investment in Human Beings, 1962, pp. 50-79.

⁵⁸Becker, G., *Human Capital. A Theoretical and Empirical Analysis, with Special Reference to Education*, quoted, p. 33.

⁵⁹*Ibid.*, p. 40. Becker adds that '*much on-the-job training is neither completely specific nor completely general but increases productivity more in the firms providing it and falls within the definition of specific training.*'

*earnings of persons receiving on-the-job training would be net of investment costs.*⁶⁰

Conversely, with respect to specific training, there are less incentives on the firms to translate the costs of training on their employees. After all, workers cannot use the expertise acquired elsewhere and the investments made can be recouped with a minor risk of losing employees during the execution of the employment contract.

The conclusion is that it is not true that *'firms in competitive labor markets have no incentive to provide on-the-job training because trained workers would be bid away by other firms.'* Indeed, *'firms that train workers are supposed to impart external economies to other firms because the latter can use these workers free of any training charge. An analogy with research and development is often drawn since a firm developing a process that cannot be patented or kept secret would impart external economies to competitors. This argument and analogy would apply if firms were to pay training costs, for they would suffer a "capital loss" whenever trained workers were bid away by other firms. Firms can, however, shift training costs to trainees and have an incentive to do so when faced with competition for their services.'*⁶¹

In short, according to Becker, job poaching will not lead to underinvestment in training if perfect competition is established. Considering general training, the employees will bear all the costs while the employers will benefit of all the returns. Considering specific training, employers and employees will share both costs and returns thanks to bargaining. Considering hybrid training, employers

⁶⁰*Ibid.*, pp. 34-36.

⁶¹*Ibid.*, p. 39.

and employees tend to behave as if firms had invested in specific training. The consequence is that training is not likely to lead to positive 'poaching' externalities, nor to situations of underinvestment, as employers and employees manage costs and returns from a contractual standpoint.

Yet, this result is conditioned three times. On the one side, both product markets and job markets should be perfectly competitive. On the other side, employees shall accept wages that are inferior compared with marginal productivity, notably during traineeship programs. Finally, employees shall enjoy a complete mobility.

It is easy to grasp that these conditions could not be met, at least always.

Above all, workforce mobility could be lacking. If workers face high moving-costs to other areas, or are prevented from moving by family commitments, their set of potential employers may be further reduced.⁶²

Moreover, even in competitive markets and especially for highly-skilled workers, wages are not necessarily below marginal productivity and sometimes salaries do not even equal this standard, notwithstanding the costs of training.⁶³

Meanwhile, in *Labor Contracts as a Partial Gift Exchange* (1982), George Akerlof of Berkeley University stresses that employees might

⁶²Huttunen, K.-Møen, J.-Salvanes, K.G., *Job Loss and Regional Mobility*, IZA DP No. 8780, 2015.

⁶³Economic scholarship in the late 1990s provides evidence of firm-sponsored general training, in a context where lower wages for workers in training programs could not exist. Indeed, there is proof that even when wages are lower, the amounts typically appear too small to compensate firms for the costs. See Acemoglu, D.-Pishke, J.S., *The Structure of Wages and Investment in General Training*, in *The Journal of Political Economy*, Vol. 107, No. 3, 1999, pp. 539-572

deliver extra-work to their employers free of charge, and that employers might ensure wages in excess in return.⁶⁴

Finally, markets could not be perfectly competitive. Subsequent literature focuses on the effects of employee raiding with imperfect competition.

4.2. Job poaching and investments in training after Becker: the contributions of Margaret Stevens, Darren Acemoglu, Espen R. Moen and Asa Rosén.

In 1994, Margaret Stevens of Oxford University publishes *A Theoretical Model of On-the-Job Training with Imperfect Competition*. The goal of this research is verifying if a poaching externality exists, notably in the event of imperfect competition. Stevens stresses, thus, that *'it is natural to consider imperfect competition in the context of training, since the acquisition of specialised skills by workers, and the requirement for particular skills by firms, can be regarded as reducing competition in the labour market. In the classical perfectly competitive labour market there are many identical workers and many identical firms, but as workers acquire different bundles of skills, they differentiate themselves from each other. Similarly, firms who use different combinations of specialised technology, or different patterns of work organisation, require workers with particular sets of skills and job experience. If, when an investment in transferable skills is made, the training firm and worker are uncertain about whether the worker will remain with the firm after training or move to an alternative firm which values the skills, and if the labour market is such that alternative firms are able*

⁶⁴Akerlof, G.A., *Labor Contracts as Partial Gift Exchange*, in *The Quarterly Journal of Economics*, Vol. 97, No. 4, 1982, p. 552.

*to pay a wage less than marginal product, then part of the total expected return to the investment is captured by alternative firms. That is, the total private return (the joint return to the worker and training firm) is smaller than the social return which includes that obtained by alternative firms: there is an externality associated with transferable training, which may lead to underinvestment.*⁶⁵

Becker excludes the existence of a poaching externality as employees and employers will internalize it through bargaining in a perfectly competitive environment. Stevens purports, however, that labor markets could not be perfectly competitive, which may lead in turn to a poaching externality and underinvestment in training.

In *Training and Innovation in an Imperfect Labour Market* (1997), Darren Acemoglu of MIT extends the findings of Margaret Stevens to the existence of frictions in the labor market, a situation that may occur frequently. Acemoglu sustains, thus, that *'in a frictional labour market part of the productivity gains from general training will be captured by future employers. As a result, investments in general skills will be suboptimally low, and contrary to the standard theory, part of the costs may be borne by the employer.'*⁶⁶

In *Does Poaching Distort Training?* (2004), Espen R. Moen and Asa Rosén delve into the findings of Acemoglu. In particular, they highlight that *'on-the-job training is one essential determinant of worker productivity. Accordingly, the extent to which market induces firms to invest in general and specific training is crucial for economic*

⁶⁵Stevens, M., *A Theoretical Model of On-the-Job Training with Imperfect Competition*, in *Oxford Economic Papers New Series*, Vol. 46, No. 4, 1994, pp. 540-541.

⁶⁶Acemoglu, D., *Training and Innovation in an Imperfect Labour Market*, in *The Review of Economic Studies*, Vol. 64, No. 3, 1997, p. 445. This approach is confirmed in Vona, F.-Consoli, D., *Innovation and skill dynamics: a life-cycle approach*, in *Industrial and Corporate Change*, Vol. 24, No. 6, 2014, p. 1401.

welfare.⁶⁷ Later on, however, the scholars concerned try to verify if the conclusions of Acemoglu will be confirmed even if one draws a distinction between newly-graduated workforce and experienced workforce. The conclusion is that, if employers and employees engage in 'a long term contract in which the wage of an experienced worker equals his productivity', the worker becomes 'a residual claimant on the return from human capital', and investment in training will be undertaken 'if the worker bears the entire investment cost.'⁶⁸

In sum, economic scholarship currently agrees on the positive correlation between investments in training and economic growth, as well as between job poaching and underinvestment in training in the long run. After all, there is evidence on the fact that labor markets are imperfect, while employee-employer relations are frictional. Nevertheless, Moen and Rosén anticipate that contract remedies between employers and employees (or among employers with effects on the wages of employees) could internalize any poaching externality.

4.3. Job poaching and investments in training after Becker: recent developments in economic literature.

Recent literature has been reflecting on job poaching in four ways.

Firstly, in *Competition and Strategic Information Acquisition in Credit Markets* (2006), Hauswald and Marquez confirm that job

⁶⁷Moen, E.R.-Rosén, A., *Does Poaching Distort Training?*, in *Review of Economic Studies*, Vol. 71, 2004, p. 1143.

⁶⁸*Ibid.*, p. 1151.

poaching could serve as an indirect tool to acquire trade and industrial secrets, but even a client base, indirectly.⁶⁹

Secondly, in *Seeking Alpha: Excess Risk Taking and Competition for Managerial Talent* (2016), Acharya, Pagano, and Volpin assess the relationships between job poaching and the quality of corporate management. The conclusion is that poaching decreases corporate loyalty of star employees⁷⁰, and that '*competition for managerial talent induces a negative externality: Every firm effectively offers an "escape route" to the others' employees, thus slowing down discovery of true alpha and the assignment of skill-sensitive projects to the few managers who can competently manage their risks, as well as preventing efficient insurance of low-alpha managers against their human capital risk.*'⁷¹ In other words, there is a positive correlation with a full-fledged mobility of workforce, a full-fledged freedom to poach competitors' employees, the persistence of low quality managers, the persistence of low quality monitoring systems.

Again, economic scholarship is increasingly emphasizing how CNCs between employers and employees, but even coordination among the employers through rescissory clauses, non-solicitation agreements, wage-fixing pacts, etc., might internalize poaching externalities, leading to more investments in training, at the expenses of antitrust concerns. Ola Sjoberg (2008) recognizes, thus, that the '*most obvious*

⁶⁹Hauswald, R.-Marquez, R., *Competition and Strategic Information Acquisition in Credit Markets*, in *The Review of Financial Studies*, Vol. 19, No. 3, 2006, pp. 967-1000

⁷⁰Acharya, V.-Pagano, M.-Volpin, P., *Seeking Alpha: Excess Risk Taking and Competition for Managerial Talent*, in *Review of Financial Studies*, Society for Financial Studies, Vol. 29, No. 10, 2016, pp. 2566.

⁷¹*Ibid.*, p. 2567.

*way of stemming the poaching tide is to pay key employees to stay*⁷² (i.e. through a CNC). Meanwhile, Soskice (1999) and Dieckhoff (2007) are of the opinion that *'coordinated wage-setting and cooperative industrial relations minimize the risk of poaching, creating a context in which employers are more likely to provide their workers with portable vocational skills.'*⁷³ Mukherjee and Vasconcelos (2011) eventually point out that both poaching and the aversion of poaching through coordination tools lead to suboptimal solutions from a social standpoint.⁷⁴

Finally, literature has been analyzing the relationships between job poaching, LKS, IKS, and the success of regional clusters. More accurately, considering skilled and experienced employees, Partridge and Olfert (2011) argue that *'attracting and retaining this coveted segment of the labor force is essential to a region [...] for long-term and sustainable success.'*⁷⁵ At the same time, Combes and Duranton (2006), as well as Barde (2010), underline that if *'the source of knowledge spillovers is the firm-specific knowledge that workers passes, a firm may decide not to locate in the same local labour*

⁷²Sjoberg, O., *Corporate Governance and Earnings Inequality in the OECD Countries 1979–2000*, in *European Sociological Review*, Vol. 25, No. 5, 2009, p. 524.

⁷³Dieckhoff, M., *Does it Work? The Effect of Continuing Training on Labour Market Outcomes: A Comparative Study of Germany, Denmark, and the United Kingdom*, in *European Sociological Review*, Vol. 23, No. 3, 2007, p. 297. Soskice, D., *Divergent Production Regimes: Coordinated and Uncoordinated Market Economies in the 1980's and 1990's*, in Kitschelt, H. et al. (Eds) *Continuity and Change in Contemporary Capitalism*, Cambridge, 1999, pp. 101–134. Pruijt, H.-Dérégée, P., *Employability and job security, friends or foes? The paradoxical reception of employability in the Netherlands*, in *Socio-Economic Review*, Vol. 8, 2010, p. 454: *'the co-ordinated nature of the collective bargaining process, in which the bipartite Dutch Labor Foundation sets the agenda, creates institutional pressure, and co-ordinated wage setting puts a damper on poaching employees.'*

⁷⁴Mukherjee, A.-Vasconcelos, L., *StarWars: Exclusive Talent and Collusive Outcomes in Labor Markets*, in *The Journal of Law, Economics, & Organization*, Vol. 28, No. 4, 2011, p. 757.

⁷⁵Partridge, M.D.-Olfert, M.R., *The Winners' Choice: Sustainable Economic Strategies for Successful 21-st Century Regions*, in *Applied Economic Perspectives and Policy*, Vol. 33, No. 2, 2011, p. 168.

*market as its competitors, simply to avoid poaching behaviour.*⁷⁶ Indeed, *'scholars have also pointed out that labour mobility may obstruct human capital formation at the regional level, because of labour poaching.'*⁷⁷

To put it differently, according to economic scholarship, job poaching and a full-fledged mobility for incoming workers bring IKS and LKS with them, ensuring the success of a regional cluster from an international trade perspective. Nevertheless, job poaching and a full-fledged mobility for outgoing workers is a risk for businesses who are set up in rich regional clusters, a situation which may lead to underinvestment in training. Not to mention that, if knowledge spills over throughout the globe, inter-regional competition could be affected, as the quality of human capital is a key factor for the success of regional areas.

The consequence is that talent raiding produces ambivalent effects on the success of regional clusters. But even the outcomes on the quality of management could not be satisfying. In the meantime, coordination tools among employers are likely to conduct to suboptimal solutions in terms of social welfare as much as an unrestricted job poaching will lead to suboptimal solutions in terms of investments in training and growth.

4.4. The position of international organizations.

International organizations also recognize that talent raiding could deprive regional clusters of human capital, and that poaching

⁷⁶Barde, S., *Knowledge spillovers, black holes and the equilibrium location of vertically linked industries*, in *Journal of Economic Geography*, Vol. 10, 2010, p. 46.
Combes, P.P.-Duranton, G., *Labour pooling, labour poaching, and spatial clustering*, in *Regional Science and Urban Economics*, Vol. 36, 2006, pp. 1–28.

⁷⁷Timmermans, B.-Boshma, R., *The effect of intra- and inter-regional labour mobility on plant performance in Denmark: the significance of related labour inflows*, in *Journal of Economic Geography*, Vol. 14, 2014, p. 288

externality could lead to underinvestment in training and, thus, to a minor growth.

After all, UNCTAD's Report on *Transnational Corporations* points out that FDI through multinational groups produce *'effects in terms of wages and training [that] are positive for the host country, although demand for high skilled labour may poach some employees away from local firms.'*⁷⁸

Meanwhile, OECD's Employment Outlook 2006 states out that *'Market failures related to so-called "poaching" may also cause firms to invest less in the human capital of their workers than would be socially optimal. This can occur when the training is general, since workers may be tempted to quit after being trained in order to accept better job offers. In such cases, future employers appropriate a part of the benefits of the training without having contributed to its costs, reducing the current employers' incentives to train. However, employers may exercise some degree of market power over their trained personnel, allowing them to implement pay scales that do not fully reflect the increase in productivity brought about by training. Any such "wage compression" would reinforce employers' incentives to train their workers, so long as labour turnover rates are not too high.'*⁷⁹

OECD's Employment Outlook 2007 eventually stigmatizes that centralized wage-setting could help operators *'compress wage relativities and reduce poaching, giving employers incentives to invest in training.'*⁸⁰

⁷⁸UNCTAD, *Transnational Corporations*, Vol. 21, No. 3, New York-Geneva, 2015, p. 12.

⁷⁹P. 110.

⁸⁰P. 66.

5. Conclusions.

Considering job poaching and contractual remedies, Chapter 1 stresses that legal scholarship identifies three conflicting interests. The interests of training firms. The interests of workers. The interests of competitors. By examining economic scholarship, Chapter 2 amplifies the taxonomy of the interests involved.

The table below depicts the interests standing in favor of lateral hiring (+) and the interests standing against lateral hiring (-).

+	Job Poaching	-
Workers (mobility)		Training firms (investments)
Competitors (freedom)		
International market (IKS)		International market (inter-regional competition)
Regional clusters (LKS-IKS with respect to incoming workers)		Regional clusters (LKS-IKS with respect to outgoing workers)

As the table shows, job poaching could be positive even for the international market as a whole. After all, due to the IKS that come up with a full-fledged mobility of employees throughout the globe, expertise tends to spread, an event that contributes in turn to economic development in the long run. But, with the presence of IKS, international market also experiences a lessened degree of competition among regional clusters, a situation that could jeopardize the path to economic growth.

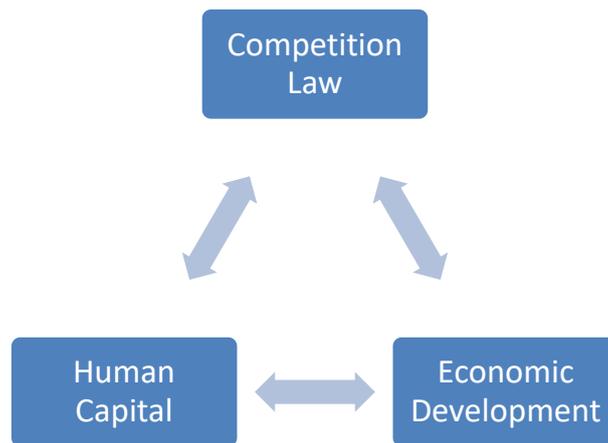
Meanwhile, job poaching creates advantages and disadvantages for regional clusters. Advantages in so far as clusters could exploit knowledge spillovers of incoming workforce. Disadvantages in so far as clusters could witness knowledge spillovers of outgoing workforce, an event that reduces any competitive advantage *vis-à-vis* the other regions.

It is easy to understand that, with these beneficial or detrimental effects for the international market (or regional markets), a global efficiency approach, being based on part of the subjects and the interests involved (i.e. the one employed by case law and legal scholarship), could not represent a proper answer to talent raiding. It is true that workers and competitors outnumber training firms. Nevertheless, the focus shall not be on the number of the persons, nor on any dogmatic hierarchy between interests. Conversely, attention shall be devoted to the real consequences of lateral hiring from an economic perspective.

In this direction, Chapter 2 emphasizes that the main advantage of job poaching is linked to the mobility of workforce and, thus, to knowledge spillovers. But a full-fledged mobility of workers and knowledge spillovers may also give rise to ambivalent effects. As stated above, IKS and LKS could hamper the competitiveness of regional clusters. A complete mobility of workforce could help low quality managers survive. Job poaching and an unrestricted mobility of workforce are responsible for a positive externality which leads to underinvestment in training. It is also true that contract limitations on the mobility of workers might conduce to suboptimal solutions in terms of social welfare. And it is true that poaching externality will be internalized if employers engage in contracts to this end.

The point is, however, that, specific indications from policy makers being absent, case law and legal scholarship should polarize their interpretative efforts not by employing traditional methodologies, but by looking at the reality of the consequences arising out of job poaching. And in this framework, underinvestment in training does not only stem from destructive raiding, but even from mere parasitic hiring.

As the table below shows, the extant Chapter stressed the intimate connection between job poaching and underinvestment in human capital, between investment in human capital (underinvestment in human capital) and economic growth (stagnation or recession).



Chapter 3 will try to fill in the last part of the scheme, assessing if there is a link also between competition law, economic growth in the long run, investments in human capital.

3.

Job poaching: a qualitative review - part II.

1. Background.

After a careful analysis of both case law and legal literature, Chapter 1 stresses three main points. Firstly, according to legal scholarship and case law, talent raiding would involve three different subjects wielding diversified interests, i.e. training firms, workers, and competitors. Secondly, according to legal scholarship, destructive poaching only would be relevant from a legal standpoint, while parasitic poaching should be allowed. Thirdly, in civil law jurisdictions and in the majority of common law systems, both contract remedies against lateral hiring and law suits in the event of job poaching suffer from limitations, i.e. constraints under private law and constraints under antitrust law. For instance, with the exception of the U.K. and Australia, non-solicitation agreements among businesses shall be limited in scope, territorial application, time. Sometimes, even an indemnity for the workers concerned shall be provided for. In the meantime, law suits against talent raiding are subject to high evidentiary standards, which makes the success in court less likely. It is no mystery that the situation described encourages talent raiding while discouraging any reaction against it, including contract remedies and the threat of law suits.

Because of some inconsistencies found, Chapter 2 starts investigating and deconstructing the conclusions set forth in Chapter 1. Thanks to a

careful analysis of economic literature on human capital and talent raiding, the conclusions are three:

- job poaching also involves the interests of the international market and regional clusters as a whole;
- a global efficiency approach to talent raiding leads to inconsistent interpretations;
- both talent raiding and contract remedies may conduct to suboptimal solutions in terms of social welfare.

In particular, there is evidence that job poaching is responsible for weakening the competitiveness of regional clusters; that job poaching is responsible for fueling bad management in corporations; that job poaching is responsible for underinvestment in training and, thus, for a minor growth in the long run.

As stated before, the extant chapter shall fill in the gaps. Chapter 2 anticipates that there is a positive correlation between job poaching, less investments in training, minor growth rates. The scope in Chapter 3 is instead understanding if there is a link between competition law and growth. After all, if growth in the long run could be regarded even as a key goal of competition law, then (a) a stricter approach to job poaching could be required as talent raiding is responsible indeed for underinvestment in training and for a minor growth in the long run; (b) parasitic poaching also should be restricted as this phenomenon is responsible for underinvestment in training and, thus, for a minor growth.

In this framework, paragraph 2 shall investigate on the objectives of competition law in American and European antitrust analysis. Paragraph 3 shall draw some preliminary conclusions on the legal

treatment of talent raiding and contractual remedies under competition law. Paragraph 4 shall delve into the relationships between regulation and poaching externality. In particular, the focus shall be on payroll taxes (fees) and subsidies (State aids), i.e. two opposite tools that aim at internalizing poaching externality while boosting investments in training.

2. The goals of competition law.

2.1. Preliminary remarks.

Case law in Italy tends to consider competition as a primary goal for policy makers. In ruling No. 401/2007, the Constitutional Court holds that Italian legal order shall ensure *'la piú ampia apertura al mercato a tutti gli operatori economici del settore in ossequio ai principi comunitari della libera circolazione delle merci, della libertà di stabilimento e della libera prestazione dei servizi.'*¹ But what does competition mean? And what does the protection of competition entail?

With the emergence of liberalism as a driver even in legal thought, Italian scholarship starts investigating which interests competition law serves (economic development, economic pluralism, etc.); if competition and the freedom to compete represent different ideas; if competition law shall ensure consumer welfare, global welfare, or the business interests of rivals.² Yet unfortunately, case law is not crystal-clear on this subject.

¹Const. C., 23.11.2007, n. 401. For an overview on case law of the Constitutional Court, see Argentati, A., *Autorità antitrust e Corte Costituzionale: il dialogo al tempo della crisi*, in Merc. Conc. Reg., Vol. 1, 2015, pp. 41 and ff.

²Libertini, M., *La tutela della concorrenza nell'ordinamento italiano: dal codice civile del 1942 alla riforma costituzionale del 2001*, in Moneta e Credito, Vol. 68, 2015, p. 381. For an overview on the principle of competition in Italy also see Libertini, M., *Concorrenza*, in Enc. Dir., Vol. III, Milan, 2011, pp. 191 and ff. Olivieri, G., *Iniziativa economica e mercato nel pensiero di Giorgio Oppo*, in Riv.

For instance, with ruling No. 94/2013, the Constitutional Court describes competition as the existence of *'una pluralità di imprenditori [...] [che] giova a migliorare la qualità dei prodotti e a contenerne i prezzi.*³ It is true that, through this landmark decision, the Court seems to look at competition as economic pluralism in a static space. Nevertheless, as the quality of products and a control on prices for consumers is required, the functional nature of competition is also emphasized. The problem is a persistent confusion between a hypothetical market structure (economic pluralism) and the objective of competition (consumer welfare), between antitrust analysis in the short run (static competition) and antitrust analysis in the long run (dynamic competition).

In this context, the extant chapter shall assess which are the ultimate goals of competition law, notably in the long run, by contrasting and comparing American antitrust analysis and European antitrust analysis. For the moment being, suffices to say that the key aspects needing an explanation are two:

- if the ultimate goal of competition law is the interest of competitors, consumer surplus, or global welfare (i.e. consumer welfare and producer welfare altogether);
- if consumer surplus or global welfare can be achieved even through non-pluralistic market structures, notably when the point of observation is not static but dynamic.

Dir. Civ. Vol. 1, 2001, pp. 421 and ff. Irti, N., *L'ordine giuridico del mercato*, Bari-Rome, 1998. Oppo, G., *Impresa e mercato*, in Riv. dir. civ., Vol. 1, 2001, pp. 423 and ff.

³Const. C., 22.5.2013, n. 94.

2.2. A general framework on competition and economic development in the long run. Schumpeter v. Arrow.

With opposite accents, both Joseph Schumpeter and Kenneth Arrow address the relationships occurring between competition and economic development in the long run.

Undoubtedly, the origins of dynamic antitrust analysis lay in the work of Schumpeter, a German scholar whose most representative contributions in this field are the *Theory of Economic Development* (1911), *Business Cycles: A Theoretical, Hystorical, and Statistic Analysis of the Capitalist Process* (1939), *Capitalism, Socialism, and Democracy* (1943).

Schumpeter's goal is to assess the determinants of economic expansions and depressions trough dynamic lenses. After all, it is true that previous scholarship (e.g. Smith, Ricardo, Mill, Cairnes) tried to explain the causes of economic equilibrium and disequilibrium but her findings were based only on '*static values and prices*'.⁴ In this scenario, the theoretical elaboration of the scholar concerned is founded on three pillars, i.e. a '*circular flux of income*', '*creative destruction*', '*business cycles*.'

In the opinion of Schumpeter, economic operators ground their behaviours on past experiences. This is the reason why they always understand how much to give and how much they will receive for the satisfaction of their needs. The result is a '*circular flux of income*', i.e. a trend situation, notably in the long run, where, considering the interactions between producers and consumers, employers and employees, fund-givers and fund-takers, overall output is always

⁴Schumpeter, J.A., *La Teoria dello Sviluppo Economico*, 1911, Italian translation by Talamona, M., Milan, 1977, p. 55.

equivalent to overall input. If this is true, however, usual intercourses among the economic forces will not be responsible for economic development.⁵

Indeed, the very driver of economic development is innovative entrepreneurship.⁶ 'Creative destruction' identifies a process in which a new commodity, a new technology, a new source of supply, even a new organization 'command a decisive cost or quality advantage' while striking 'not at the margins of the profits and the outputs of the existing firms but at their very foundations and their very lives.'⁷

'Business Cycles' finally account for an endogenous model where expansions and depressions follow each other, and where the disruptive effect of innovative industries is the main driver of growth.⁸ The standpoint for this consideration is a methodological one. Traditional economic literature (Smith, Ricardo, Mill, Cairnes) anchors economic equilibrium and perturbations to the conditions that lay behind price formation in a situation of perfect competition. But Schumpeter argues that these findings are incomplete as they are based only on 'static values and prices.'⁹ This is the reason why a dynamic approach to economic development is suggested. And according to this model market concentration, even monopoly, ensures costly investments in technology, while creative destruction ensures competition and replacement of out-dated industries (or firms) from an intertemporal standpoint.

⁵*Ibid.*, pp. 7 and 49.

⁶*Ibid.*

⁷Schumpeter, J.A., *Capitalism, Socialism, and Democracy*, Routledge, London and New York, 1943, p. 84.

⁸Schumpeter, J.A., *La teoria dello sviluppo economico*, quoted, p. 242. Schumpeter, J.A., *Business Cycles: A Theoretical, Historical, and Statistical Analysis of the Capitalist Process*, Vol. I, New York, Toronto, London, 1939, pp. 132 and ff.

⁹Schumpeter, J.A., *La teoria dello sviluppo economico*, quoted, p. 55.

Kenneth Arrow shares a different view. In *Economic Welfare and the Allocation of Resources for Invention* (1962), he declares that the production of knowledge could be costly, and *'the only way, within the private enterprise system, to minimize this problem is the conduct of research by large corporations, with many projects going on, each small in scale compared with the net revenue of the corporation. Then the corporation acts as its own insurance company. But clearly, this is only an imperfect solution. [...] an incentive to invent can exist even under perfect competition in the product markets. [...] the incentive to invent is less under monopolistic than under competitive conditions but even in the latter case it will be less than is socially desirable. [...] Since the inventor's incentive under competition is the cost reduction on the competitive output, it will again always exceed the monopolist's incentive. [After all] the monopolist's incentive is always less than the cost reduction on the post-invention monopoly output.'*¹⁰

The result is that, according to Schumpeter, even non-plural market structures can ensure economic development (a primary goal), provided that intertemporal competition is established through the so-called cyclical creative destruction process. Conversely, in the opinion of Arrow, the incentives for innovation and economic development are usually more present in competitive (plural) market structures. In any case, antitrust enforcement shall not only look at allocative efficiency in the short run but above all at innovation in the long run. This perspective is further specified in subsequent works.

It is a fact that economic scholarship after Arrow and Schumpeter has been elaborating four situations in which competition and innovation

¹⁰Arrow, K., *Economic Welfare and the Allocation of Resources for Invention*, in *The Rate and Direction of Inventive Activity: Economic and Social Factors*, Princeton, 1962, pp. 616, 619, 621, 622.

encounter each other. Firstly, businesses may compete for innovation, a situation which encourages expenditure in R&D. Secondly, businesses may advert that innovating will provide them with a competitive advantage *vis-à-vis* their rivals, a situation which also encourages expenditure in R&D.¹¹ Thirdly, businesses may acknowledge that innovating will expose them to a major competition in the long run, a situation which discourages expenditure in R&D.¹² Fourthly, businesses will have an extra incentive to innovate if in doing so they can discourage potential rivals from investing in R&D.¹³ It is not a mystery that a competitive game tends to encourage innovation, exception made for the case where post-innovation competition and appropriability of R&D expose innovating firms to losses. But even in this hypothesis a prominent scholar like Jonathan Baker stresses that an *'antitrust intervention can systematically promote innovation competition and pre-innovation product market competition, which will encourage innovation, without markedly increasing post-innovation product market competition, and, thus, without detracting from the pro-innovation benefits.'*¹⁴

Hence, after Arrow and Schumpeter, economic analysis abandons the idea that competition only or market concentration only can guarantee

¹¹Aghion, P.-Harris, C.-Howitt, P.-Vickers, J., *Competition, Imitation and Growth with Step-by-Step Innovation*, in *Rev. Econ. Stud.*, Vol. 68, 2001, pp. 467, 468 n.4.

¹²Gans, J.S.-Stern, S., *The Product Market and the Market for "Ideas": Commercialization Strategies for Technology Entrepreneurs*, in *Res. Pol'Y*, Vol. 32, 2003, p. 333. Gans, J.S.-Hsu, D.H.-Stern, S., *When Does Start-Up Innovation Spur the Gale of Creative Destruction?*, in *Rand J. Econ.*, Vol. 33, 2002, p. 571. Gans, J.S.-Stern, S., *Incumbency and R&D Incentives: Licensing the Gale of Creative Destruction*, in *J. Econ. & Manag. Strategy*, Vol. 9, 2000, p. 453.

¹³Leemore, S.D., *Games Hospitals Play: Entry Deterrence in Hospital Procedure Markets*, in *J. Econ. & Manag. Strategy*, Vol. 14, 2007, pp. 513 and ff. Blundell, R.-Griffith, R.-Van Reenen, J., *Market Share, Market Value and Innovation in a Panel of British Manufacturing*, in *Rev. Econ. Stud.*, Vol. 66, 1999, pp. 529 and ff. Smiley, R., *Empirical Evidence on Strategic Entry Deterrence*, in *Int'l J. Indus. Org.*, Vol. 6, 1988, pp. 167 and ff.

¹⁴Baker, J.B., *Beyond Schumpeter vs. Arrow: How Antitrust Fosters Innovation*, in *Antitrust Law Journal*, Vol. 74, 2007, p. 589.

innovation and, thus, economic growth. Indeed, the position of scholarship shifts from static relationships between market structure and innovation towards a discretionary assessment of antitrust cases in order to promote innovation while eradicating the distortions of post-innovation competition. It is in this general framework that American antitrust analysis and European antitrust analysis have been developing.

2.3. The role of competition law in American antitrust analysis.

Considering American antitrust analysis, the scope of competition has been varying over the decades. In short, it is possible to identify three main periods. A period during which American antitrust scholarship mainly suggests that competition law protects the interests of competitors. A period during which American antitrust scholarship starts suggesting that competition law shall ensure consumer welfare and not even the interests of rivals. A period during which American antitrust analysis starts emphasizing that consumer welfare standard should be addressed in terms of both global efficiency and dynamic assessments.

Carl Kaysen and Donald Turner publish *Antitrust Policy: An Economic and Legal Analysis* in 1959.¹⁵ This essay may be described as the summary of Keynesian approach to competition law in Rooseveltian and post-Rooseveltian America.¹⁶ In particular, Kaysen and Turner explain the role of competition law through the so-called Structure-Conduct-Performance (SCP) formula. In the opinion of the scholars concerned, the primary responsible for anti-competitive

¹⁵Kaysen, C.-Turner, D.F., *Antitrust Policy: An Economic and Legal Analysis*, Harvard, Cambridge, Mass., 1959.

¹⁶Sosnik, S.H., *Reviewed Work: Antitrust Policy, an Economic and Legal Analysis by Carl Kaysen, Donald F. Turner*, in *Journal of Farm Economics*, Vol. 42, No. 4, 1960, pp. 933-938.

behaviors is the structure of the market. Highly-concentrated markets will not behave correctly and will lead to the inconsistent situations as follows: (1) persistent failure of prices to reflect substantial declines of demand or costs, or to reflect substantial excess capacity; (2) persistence of profits that are abnormally high, taking into account such factors as risks and excess capacity; (3) failure of new rivals to enter the market during prolonged periods of abnormally high profits or of persistent or recurrent rationing.¹⁷ It is to be understood that, according to Kaysen and Turner, the key interest of antitrust policy is ensuring the presence of multiple firms in the market. This is the reason why they advocate for the institution of an Industrial Reorganization Commission to split huge businesses in a plurality of firms.

Hence, according Kaysen and Turner, the goal of competition law is ensuring the most plural economic environment while protecting the interests of actual and potential rivals. Nevertheless, American scholarship are of the opinion today that economic pluralism is a mirage, as *'when one inquires of economists as to what the real-world competitive process is like and how many firms actually go about competing with one another, the ability to respond in precise terms blurs and the guidance that can be offered becomes uneven.'*¹⁸

Kaysen and Turner's approach is reversed, however, in Robert Bork's *The Antitrust Paradox: A Policy at War with Itself* in 1968. In this seminal contribution, Bork excludes that antitrust law is originally meant to protect competitors and to contrast the internal growth of

¹⁷Fuchs, R.F., *Book Review. Kaysen, C. and Turner, D.F., Antitrust Policy: An Economic and Legal Analysis*, in *Articles by Maurer Faculty*, 1960, p. 149.

¹⁸Thompson, A.A., Jr., *Competition as a Strategic Process*, in *Antitrust Bull.*, Vol. 25, 1980, p. 780.

businesses. Indeed, in his opinion, *'the conventional indicia of legislative intent overwhelmingly support the conclusion that the antitrust laws should be interpreted as designed for the sole purpose of forwarding consumer welfare. [...] Those who continue to buy after a monopoly is formed pay more for the same output, and that shifts income from them to the monopoly and its owners, who are also consumers. This is not dead-weight loss due to restriction of output but merely a shift in income between two classes of consumers. The consumer welfare model, which views consumers collectively, does not take this income effect into account.'*¹⁹

Bork's findings are upheld in subsequent case law and literature. In *Reiter v. Sonotone Corp.* (1979), thus, the Supreme Court of the United States rules that treble damages under antitrust law are *'designed to protect consumers.'*²⁰ In *The Antitrust Enterprise: Principle and Execution* (2005), Herbert Hovenkaamp declares that, *'after thirty years, the debate over antitrust's ideology has quieted. Most now agree that the protection of consumer welfare should be the only goal of antitrust laws. [...] [the] only articulated goal of the antitrust laws is to benefit consumers.'*²¹

It emerges from the foregoing that, after Bork, allocative efficiency and consumer welfare have become the goals of antitrust policy, at least for dominant scholarship and case law in the U.S. Yet unfortunately, *'efficiency and consumer welfare have become the dominant terms of antitrust discourse without any clear consensus as*

¹⁹Bork, R., *The Antitrust Paradox. A Policy at War with Itself*, New York, 1968, p. 51.

²⁰*Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979). *Arizona v. Maricopa County Med. Soc'y*, 457 U.S. 332, 367 (1982). *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 107 (1984).

²¹Hovenkaamp, H., *The Antitrust Enterprise: Principle and Execution*, Harvard, Cambridge, Mass., 2005, p. 2.

to what they exactly mean.²² More accurately, it is not crystal-clear if consumer welfare shall reflect a Pareto-efficiency condition or a global efficiency condition. Nor is it crystal clear if efficiency is to be assessed from a static standpoint or from a dynamic standpoint.

In this framework, in *Competition Policy as a Political Bargain* (2006), Jonathan B. Baker proposes a singular solution: *'The interpretation of antitrust law as a bargain between consumer and producer interests provides a new window into the debate over what welfare standard should be applied in antitrust enforcement. That debate is commonly framed today as a choice between an aggregate surplus standard or a consumer surplus standard. Viewing antitrust as a political bargain suggests an intermediate position: antitrust enforcers and courts should seek to maximize aggregate surplus, subject to the constraint that consumers and producers sufficiently share the efficiency gains, at least on average, so that neither group thinks it can do better by reneging on the political bargain.'*²³

In contrast, in *Antitrust Law* (2001), Richard Posner takes a stance in favor of a global efficiency approach to consumer welfare. He states out that *'Kaldor-Hicks efficiency, potential Pareto-efficiency, or wealth maximization [...] is an important component of social welfare and [...] probably the only one that the antitrust laws can do much to promote.'*²⁴

²²Brodley, J.F., *The Economic Goals Of Antitrust: Efficiency, Consumer Welfare, And Technological Progress*, in N.Y.U. L. Rev., Vol. 62, 1987, p. 1020. Stigler, G.J., *Perfect Competition, Historically Contemplated*, in Journal of Political Economy, Vol. 67, No. 1, 1957, p. 1.

²³Baker, J.B., *Competition Policy as a Political Bargain*, in Antitrust L.J., Vol. 73, 2006, p. 484.

²⁴Posner, R., *Antitrust Law*, Chicago, 2001, p. 28. Orbak, B.Y., *The Antitrust Consumer Welfare Paradox*, in Journal of Competition Law & Economics, Vol. 7, No. 1, 2010, p. 164: *'Considering the nature of antitrust methodology, the total surplus standard is probably the only standard that courts and agencies can*

Meanwhile, in *Economies as an Antitrust Defense: The Welfare Tradeoffs* (1968), as well as in later works, Oliver Williamson points out that Borkian elaboration is static and incomplete as it ignores dynamic efficiencies or inefficiencies. More accurately, Williamson attacks *Brown Shoe*²⁵, a ruling where the Supreme Court of the U.S. declares that the existence of cost efficiencies arising out of a merger are irrelevant in antitrust cases as they further demonstrate that rivals are disadvantaged. In the opinion of this scholar, indeed, *'most mergers produce neither significant price nor efficiency consequences, and where this is true the analysis of this paper has limited relevance. Where both occur, however, and if without merger the transition to an efficient industrial configuration is apt to be both painful and delayed, an efficiency defense deserves consideration. This does not of course mean that the mere existence of economies is sufficient to justify a merger. But since a relatively large percentage increase in price is usually required to offset the benefits that result from a 5 to 10 per cent reduction in average costs, the existence of economies of this magnitude is sufficiently important to give the antitrust authorities pause before disallowing such a merger.'*²⁶

The conclusion is that, on the one side, Posner confirms that the goal of competition law is consumer welfare, defining this welfare in terms of total efficiency (i.e. a sum between producer surplus and consumer

consistently apply. But "consumer welfare" clearly does not mean total surplus.' Hovenkamp, H., *Consumer Welfare in Competition and Intellectual Property Law*, in *Competition Policy International*, Vol. 8, No. 2, 2014, p. 53: *'A perfectly competitive economy is said to be efficient because it maximizes the sum of producers' and consumers' surplus.'*

²⁵*Brown Shoe Co., Inc. v. United States*, 370 U.S. 294 (1962)

²⁶Williamson, O.E., *Economies as an Antitrust Defense: The Welfare Tradeoffs*, in *Am. Econ. Rev.*, Vol. 58, No. 1, 1968, p. 33. Williamson, O.E., *Allocative Efficiency and the Limits of Antitrust*, in *Am. Econ. Rev.*, Vol. 59, 1969, pp. 105 and ff. Williamson, O.E., *Economies as an Antitrust Defense Revisited*, in *U. Penn. L. Rev.*, Vol. 125, 1977, pp. 699 and ff.

surplus). On the other side, Williamson advocates for a discretionary assessment of antitrust cases in order to balance the social costs of market concentration with the cost advantages coming up with economies of scale.

These findings are further developed in subsequent works.

For instance, in *Competition, Entry, and Antitrust Policy* (1987), Michael Spence agrees on the fact that dynamic competition shall involve a complex economic analysis on a case-by-case basis. Harvard Professor Spence draws a distinction between market power arising out of exclusionary practices (predatory practices) and market power arising out of market structure considerations (e.g. because of economies of scale). In the second case, *'to the extent that one's objective is the improvement of market performance as conventionally measured by the present value of the net surplus, then it is not at all clear that preventing market power from developing (even if one could) would be desirable. In industries where the structural basis for market power is a scale economy or a learning effect, relatively efficient market structures may entail having powerful firms or groups of firms.'*²⁷

Likewise, in *Optimal Antitrust Enforcement, Dynamic Competition, and Changing Economic Conditions* (2010), Keith Hilton and Heizhen Lin confirm the need to conduct antitrust enforcement through discretion and on a case-by-case basis. After all, in their opinion, *'the optimal antitrust penalty has to be designed to reconcile conflicting welfare concerns. There is the static welfare concern addressed earlier: the monopolizing firm should be forced to regurgitate the*

²⁷Spence, M., *Competition, Entry, and Antitrust Policy*, in J. Reprints Antitrust L. & Economics, Vol. 17, 1987, p. 79.

*transfer and to pay for the destroyed surplus D in order to optimally regulate (in the first-best sense) its incentive to monopolize. However, the penalty will also affect ex ante investment incentives. In order to optimally regulate investment incentives, the ideal penalty would be negative; it is a subsidy equal to the residual surplus. This is because the private benefit of the firm's investment is simply the transfer (T). The social benefit of its investment is the sum of the transfer and residual surplus ($T+W$). In order to align private incentives to invest with social incentives, the punishment authority should award the monopolizing firm with a bounty equal to the residual surplus. These conflicting welfare concerns are not easy to reconcile.*²⁸

Finally, in *Competition and Antitrust: A Productivity-Based Approach* (2001), Michael Porter of Harvard Business School is convinced that competition is a driver for competitiveness of regional clusters in the long run, and that antitrust analysis shall be conducted according to a 'productivity growth standard.'²⁹ In the opinion of the scholar concerned, 'the most important goal for society is a healthy process of dynamic improvement, which requires innovations in products, processes, or ways of managing. [...] technical (static) efficiency should be the second most important goal, but that it must be assessed with more subtlety. While antitrust analysis tends to focus on cost justifications, equal attention should be paid to product or service value. Roughly speaking, productivity is price times quantity divided by the quantity of labor or capital involved. It can be divided into two distinct components: the prices that products command in the marketplace (which reflect value) and the efficiency with which a unit

²⁸Hylton, K.N.-Lin, H., *Optimal Antitrust Enforcement, Dynamic Competition, and Changing Economic Conditions*, in *Antitrust Law Journal*, Vol. 77, 2010, p. 255.

²⁹Porter, M.E., *Competition and Antitrust: A Productivity-Based Approach*, in *Antitrust Bulletin*, Vol. 46, no. 4, 2001, pp. 919–958.

of product can be produced. Thus, productivity is enhanced not just by efficiency improvements, but also by improvements in product quality, features, and services. Product variety is also an essential component of value, giving customers more choices to better meet their particular needs. High-value products provide the consumer with superior performance and features, and therefore justify higher prices. With a focus on price/cost margins, however, high prices are often seen as inherently undesirable for consumers. Higher prices should be a danger sign in antitrust analysis only if they are not justified by rising customer value. Limiting short-term price/cost margins or profitability is a dubious goal for antitrust. Firm profitability is a good thing if it reflects truly superior products or significant advantages in process technology or operating efficiency. It is a bad thing if it occurs in the absence of a healthy rate of dynamic improvement. In a typical industry, average price-cost margins and profitability will vary significantly among competitors, reflecting varying levels of fundamental competitiveness. Short-term consumer welfare measured by price, then, is a dubious goal on two levels. First, it fails to measure true consumer welfare by ignoring product value. Second, we care much more about the long-term trajectory of value, prices, and costs than we do about consumer welfare in the short run or immediately after a merger. Moreover, a productivity growth standard is entirely consistent with the language of the main antitrust laws.'

Porter asks himself why productivity growth standard is important for antitrust analysis, and how this productivity standard should be applied in practice. In the first case, he maintains that productivity standard *'relates directly to competitiveness, a nation's standard of living, and long-term consumer value, while price/cost margins and technical efficiency are theoretically suspect.'* Furthermore, *'a*

productivity growth standard would shift antitrust away from a narrow focus on static, short-term consumer welfare to a dynamic and more all-encompassing view of competition and its benefits to consumers, firms, and society as whole.' In the second case, Porter advocates instead for abandoning static analyses, e.g. the so-called Herfindhal-Hirschman Index (HHI) standard³⁰, for the so-called five forces diagram. The five forces diagram requires a deep assessment on a case-by case basis encompassing '*all the important dimensions of competition*', i.e. bargaining power of suppliers, rivalry among existing competitors, bargaining power of buyers, threat of substitute products or services, threat of new entrants.³¹

In sum, after Bork, antitrust analysis in the U.S. identifies consumer welfare as the primary goal of competition law. Indeed, scholarship has even started looking at consumer welfare in terms of a reduction of existing inequalities.³² However, it is not crystal-clear in Bork's findings as well as in case law if consumer welfare shall be appreciated in terms of consumer surplus or global welfare, as well as in terms of static (short term) efficiency or in terms of dynamic (long term) efficiency.

³⁰Hirschman, A.O., *The Paternity of an Index*, in *The American Economic Review*. American Economic Association, Vol. 54, No. 5, 1964, pp. 761 and ff. HHI standard indicates the sum of the squares of the market shares of the firms within the industry (sometimes limited to the 50 largest firms), where the market shares are expressed as fractions. The result is proportional to the average market share, weighted by market share. As such, it can range from 0 to 1.0, moving from a huge number of very small firms to a single monopolistic producer. Increases in the Herfindahl index generally indicate a decrease in competition and an increase of market power, whereas decreases indicate the opposite. Alternatively, if whole percentages are used, the index ranges from 0 to 10,000 points. For example, an index of 25 is the same as 2,500 points.

³¹Porter, M.E., *On Competition, Chapter 1: The Five Competitive Forces That Shape Strategy*, Harvard, Cambridge, Mass., 1998, pp. 3 and ff.

³²Baker, J.B.-Salop, S.C., *Antitrust, Competition Policy, and Inequality*, in *Geo. L.J. Online*, Vol. 104, 2015-2016, p. 14. Stiglitz, J.E., *The Price of Inequality*, New York, 2012, p. 338.

Prominent American scholars recommend to look at aggregate efficiency (Baker, 2006) or total efficiency (Posner, 2001), but also to employ discretionary methodologies to assess the advantages and disadvantages of a concentrated industry (Williamson, 1968; Spence, 1987; Porter, 2001). It is not a mystery - and Porter confirms it - that this new approach to antitrust puts competitiveness and economic development as primary objectives of antitrust policy, while the preservation of a plural market structure and the interests of competitors are considered to be recessive.

Indeed, after the antitrust investigation on *Microsoft*, the focus of enforcement agencies in the U.S. has been on the dividing line between anti-competitive conducts and internal growth on the merits. *vis-à-vis 'tipping'*, i.e. *'a point at which the joint existence of two incompatible products may be unstable, with the possible consequence that a single product and standard will dominate.'*³³ Concentrated market structures are not ruled out automatically because they are inefficient. Nor shall agencies *'impose or dictate the ultimate structure of markets'*³⁴ for the sake of current or potential rivals. In contrast, the DOJ, the FTC, and Courts are called upon to balance properly the pros and cons of market power by establishing, for example, if patent laws and technology standards are employed to strengthen innovation or to exclude competitors.³⁵ Furthermore, At the same time, the New Horizontal Merger Guidelines (2010) witness the attention of American departments and agencies for dynamic antitrust

³³Rubinfeld, D.L., *Antitrust Enforcement in Dynamic Network Industries*, in Ant. Bull., Vol. 43, 1998, p. 865.

³⁴Levitt, A., *Dynamic Markets, Timeless Principles*, Colum. Bus. L. Rev., 2000, p. 3.

³⁵Phillips, A., *Patents Potential Competition and Technical Progress*, in J. Reprints Antitrust L. & Econ., Vol. 2, 1971, pp. 745-766.

analysis and potential competition on a case-by-case basis, at least for the assessment of market shares.³⁶

2.4. The role of competition law in European antitrust analysis.

A common misconception in legal literature is that European competition law derives its identity from American antitrust tradition. Indeed, '*German and European competition laws [are] in large part indigenous products.*'³⁷ Ordoliberal thought is at the basis of EU competition law, with a specific reference to abuses of dominant position.

Ordoliberal school or Freiburg school believes in a free market in a strong State. Ordoliberals adverse Marxism and State control on means of production. But they also contrast laissez faire. Ordoliberal scholars believe in the virtues of free markets. Nevertheless, in their opinion, for a market to operate correctly regulation is required. Two devils threat freedom in ordoliberal tradition: State power and private power. 'As if' policy aims at challenging State power through the artificial creation of a competitive game (i.e. competition for the market). Competition law (i.e. competition in the market) aims instead at challenging private power, given that '*when individuals or groups have the power to influence the conduct of other market participants,*

³⁶Federal Trade Commission, Horizontal Merger Guidelines, 2010, p. 16. Conversely, potential competition still does not form object of analysis before the European Commission. See Notice on the Definition of Relevant Market, Communication C/97 372/03, para. 24: '*The third source of competitive constraint, potential competition, is not taken into account when defining markets, since the conditions under which potential competition will actually represent an effective competitive constraint depend on the analysis of specific factors and circumstances related to the conditions of entry. If required, this analysis is only carried out at a subsequent Stage, in general once the position of the companies involved in the relevant market has already been ascertained, and when such position gives rise to concerns from a competition point of view.*'

³⁷Felice, F.-Vatiero, M., *Ordo and European Competition Law*, Research in the History of Economic Thought and Methodology, in: A Research Annual, Vol. 32, 2014, p. 147.

*the model does not work properly. Protecting the economic freedoms of individuals from the power of the government is not enough, because powerful economic agents could also destroy or limit such freedoms.*³⁸ It is not a mystery that ordoliberalists prefer fragmented market structures over concentrated market power. Nor is it a mystery that ordoliberalists ignore consumer welfare or economic welfare as goals of competition law. After all, in their eyes, the ultimate scope of antitrust rules is protecting competitors from the market power of the incumbents. Attempts of emancipation from ordoliberal teachings is the history of European antitrust analysis.

After Bork's findings on consumer welfare as the ultimate goal of antitrust law, a debate has started in Europe. More accurately, scholarship needs to understand if a consumer welfare standard can also be adopted in European competition law. Case law of the ECJ still is not crystal-clear on the matter. Indeed, in *T-Mobile Netherlands*, Advocate General Kokott only considers consumer welfare as one of the objectives of competition rules.³⁹ Scholars agree over a single point, nonetheless. Even if a consumer welfare standard cannot be upheld, EU competition rules shall stop to protect competitors while starting to focus on competition and the underlying interests.⁴⁰

In *Abuse of Market Power* (2005), John Vickers of Oxford University takes a stance for a consumer welfare standard, advocating for the adoption of a consumer harm test in the assessment of abuses of

³⁸*Ibid.*, p. 153.

³⁹*T-Mobile Netherlands BV and others*, opinion of Adv. Gen. Kokott, 19.2.2009, case C-8/08, para. 59.

⁴⁰Spector, D., *From Harm to Competitors to Harm to Competition: One More Effort, Please!*, in *European Competition Journal*, Vol. 2, Special Issue, 2006, pp. 145-162.

dominant position.⁴¹ This test has been employed in recent case law of OFCOM concerning margin squeeze in the telecommunication sector.⁴² However, in *Market Power in Antitrust Cases* (2006), Vickers also stresses his opinion that *'dynamic considerations are important also insofar as the prospect of some future market power may spur competition to innovate.'*⁴³

Likewise, in *Competition Law* (2012), Richard Whish and David Bailey of King's College are of the opinion that *'as a general proposition competition law consists of rules that are intended to protect the process of competition in order to maximize consumer welfare.'*⁴⁴ For sure, the two scholars concerned acknowledge that other interests have been taken into account by antitrust enforcers in Europe, notably the construction of the single market or even the interests of competitors. However, in their opinion, *'it can be questioned whether it is appropriate in the new millennium to maintain this approach: there is much to be said for applying competition rules to achieve economic efficiency rather than economic equity. The two ideas sit awkwardly together: indeed they may flatly contradict one another, since an efficient undertaking will inevitably be able to defeat less efficient competitors, whose position in the market ought not to be underwritten by a competition authority on the basis of political preference or, as Bork might say, sentimentality. [...]*

⁴¹Vickers, J., *Abuse of market power*, in *The Economic Journal*, Vol. 115, 2005, pp. F244-F261.

⁴²*Thus, Plc. and Gamma Telecom Ltd. v. British Telecom*, 20.6.2013, CW/988/06/08.

⁴³Vickers, J., *Market Power in Antitrust Cases*, in *European Competition Journal*, Vol. 2, 2006, p. 6.

⁴⁴Whish, R.-Bailey, D., *Competition Law*, Oxford, 2012, p. 1.

*the European Commission is clear that Article 102 is an instrument for the protection of competition and not of competitors as such.*⁴⁵

Renato Nazzini of King's College shares a different view. In *The Foundations of European Union Competition Law* (2011), he discusses consumer welfare standard and social welfare standard as two goals in contradiction with each other. Thence, the scholar concerned proposes a social welfare standard in the long run as the true normative scope of competition rules. After all, according to Nazzini, short term allocative efficiency may coincide with consumer welfare, but this standard can also hide welfare losses in the long run. Mere consumer welfare in the long run does not take into account instead dynamic considerations.⁴⁶

The result is that, if one considers EU competition law, ordoliberal tradition pushes towards the protection of competitors as the primary scope of antitrust rules. Nevertheless, even in the silence of the ECJ, scholarship has been constantly emancipating itself from the findings of ordoliberalism, by suggesting that antitrust law shall serve consumer welfare (Vickers, 2005; Whish & Bailey, 2012) or social welfare in the long run (Nazzini, 2011). In any case, dynamic considerations should be part of the assessments in antitrust proceedings (Vickers, 2006; Nazzini, 2011).

In this framework, it is true that, compared with FTC's Horizontal Mergers Guidelines, European Commission Notice on Market Definition does not account for potential competition yet.⁴⁷ Nevertheless, the practice of the Commission witnesses an

⁴⁵*Ibid.*, p. 22.

⁴⁶Nazzini, R., *The Foundations of European Union Competition Law*, Oxford, 2012, pp. 39 and ff.

⁴⁷See Footnote 36.

interest of antitrust enforcers for the efficiencies arising out of a merger, in line with the teachings of Oliver Williamson.⁴⁸ However, the interest of European scholarship for the long term effects of antitrust enforcement is undoubted. Even in Europe there is a consciousness on the fact that *'antitrust scholars must confront an inconvenient truth: innovation drives competition as much as competition drives innovation. Thus, antitrust analysis must recognize that advancing dynamic competition will benefit consumers most, certainly in the long run if not also in the short run. The law has already begun to move in this direction, as have the enforcement agencies.'*⁴⁹

2.5. Competition law: short run and long run.

It emerges from the foregoing that American antitrust analysis and European antitrust analysis may present divergent views on the role of consumer welfare as a scope of competition rules. American scholarship and case law have adopted a consumer welfare standard since 1968. European scholarship does not agree on the fact that consumer welfare is the ultimate objective of competition rules. Nevertheless, there is a common denominator. Both American and European scholarship are of the opinion that antitrust assessment shall be dynamic and that the effects of antitrust enforcement in the long

⁴⁸Reference is to Case COMP/M.2314, *BASF/Pantochim/Eurodiol* [2002] OJ L132/45. Monti, G., *EC Competition Law*, Cambridge, 2007, p. 298, comments: *'The significance of this analysis lies in the Commission's consideration of the efficiencies that result from the merger, and it might be the first case where the efficiency defence as set out in the Horizontal Merger Guidelines was applied. However, the tradeoff that the Commission carried out is not between the merger's anticompetitive effects and its redeeming virtues. Rather, the efficiencies outweighed the harm that would result absent the merger, where the exit of the assets would reduce economic welfare more severely than the merger. Conversely, if the post-exit market is likely to be more competitive than the post-merger scenario, the merger will be prohibited.'*

⁴⁹Sydak, G.F.-Teece, D.F., *Dynamic Competition in Antitrust Law*, in J. Comp. L. & Econ., Vol. 5, 2009, p. 631.

run are primary as much as economic development is primary. There is a close connection, thus, between competition law and the promotion of long term growth. After all, Article 3 (3) of the TEU sets forth that *'the Union shall [...] work for the sustainable development of Europe based on balanced economic growth and price stability.'*

3. Poaching externality, antitrust enforcement, regulation.

3.1. Preliminary remarks.

As stated before, there is a trilateral relation between competition law and economic growth in the long run, between investments in training and economic growth, between competition law and investments in training. Competition enforcement shall happen dynamically, and a dynamic approach means ensuring economic development. Meanwhile, investments in training are a driver for economic growth. The conclusion is that antitrust enforcement shall promote investments in training or shall disincentivize underinvestment in training because of the existing poaching externalities.

In this context, Espen R. Moen and Asa Rosén suggest that poaching externality can be internalized through three different tools:

- through contracts, notably contracts among employers which are costless compared to CNCs between employers and employees;⁵⁰
- through subsidies, as investments in training and the possibility of job poaching create a positive externality for rival firms;⁵¹
- through payroll taxes (entry fees or entry taxes), as the loss of a worker arising out of talent raiding also creates a negative externality on training firms.⁵²

⁵⁰Moen, E.R.-Rosén, A., *Does Poaching Distort Training?*, quoted, p. 1144.

⁵¹*Ibid.*, p. 1151.

Competition law deals with all these instruments. Article 101 of the TFEU and Section 1 of the Sherman Act deal with contracts among employers, even if these covenants are meant to counteract against job poaching. Articles 107 and 108 of the TFEU, as well as WTO Agreement on Subsidies and Countervailing Measures, govern subventions to training firms as these measures amount to State aids. Payroll taxes, entry taxes, entry fees could fall within the scope of Article 110 of the TFEU concerning discriminatory taxes.

3.2. Poaching externality and antitrust enforcement.

Chapter 2 anticipates two key considerations.

Firstly, lateral hiring gives rise to a poaching externality and, thus, underinvestment in training, even when poachers do not adopt exclusionary or destructive conducts. This means that, if antitrust enforcement shall ensure economic development, and if underinvestment in training shall be remedied through competition law, it will be irrelevant if poaching is destructive or parasitic, as Marco Saverio Spolidoro purports instead. Both destructive poaching and parasitic poaching deserve attention from an antitrust standpoint as both destructive poaching and parasitic poaching are responsible for underinvestment in training, indeed.

Secondly, there is evidence that both job poaching and the contract remedies against it conduct to suboptimal solutions in terms of social welfare. Likewise, there is proof that contracts against poachers internalize poaching externalities while ensuring investments in training. This means that, considering two situations leading to suboptimal solutions, contract remedies against lateral hiring protect investments in training while guaranteeing economic growth in the

⁵²*Ibid.*, p. 1151.

long run, at least. As a result, if long term goals shall prevail, and if an unrestricted talent riding and restrictions on talent raiding are to be balanced, contract remedies against job poaching shall be allowed provided that they ensure investments in training and economic development.

To this end, non-solicitation agreements represent the best way for employers to internalize poaching externalities through a long-term contingent contract, which is Moen and Rosén (2011) advocate for.⁵³ After all, if these covenants are allowed, there will be an incentive for businesses to discharge the burdens of their investments in training on the workers without any risk of retaliation by poaching competitors. Furthermore, non-solicitation agreements present less transaction costs for the employers concerned compared with CNCs. In fact, as Chapter 1 explains, non-solicitation agreements do not provide for an indemnity for workers.

Chapter 1 also highlights, however, that non-solicitation agreements are generally allowed in Australia and the U.K., but civil law jurisdictions and other common law systems tend to pose severe limitations. But the true point is that, if economic development and investments in training are goals under Article 3 (3) of the TEU, then non-solicitation agreements shall be allowed per se. If unfair competition is a doctrine in both common law orders and civil law orders, then non-solicitation agreements will find a justification unfair competition rules. The only problem is linked to proportion. It is crucial understanding on what grounds a control on the proportionality of non-solicitation agreements is allowed; to what extent non-solicitation agreements tend to preserve investments in training; to

⁵³Moen, E.R.-Rosén, A., *Does Poaching Distort Training?*, quoted, p. 1151.

what extent these instruments may represent instead disguised attempts of coordination with respect to the price of labor as an input.

Chapter 1 underlines that unfair competition doctrine and antitrust laws are misaligned in scope *vis-à-vis* job poaching. Unfair competition doctrine may support contract restrictions on lateral hiring on given occasions. Competition law always counteracts against these covenants. The conclusion is that, if a check on the proportionality of non-solicitation agreements is to be conducted, then the antitrust laws, i.e. Article 101 of the TFEU or Section 1 of the Sherman Act, shall be the references. After all, these norms represent external limits on the possibility to engage in restrictive covenants under the unfair competition doctrine.

That being said, Chapter 1 stresses that non-solicitation agreements are generally allowed in concentrations and other forms of business cooperation schemes as a confidence building measure. Chapter 2 clarifies that employers will undertake investments in training only if they are sure that they will recoup the initial cost of these investments plus some reasonable returns over a certain period of time. This implies that restrictions on workers mobility could be justified:

- (a) if a non-solicitation clause is embodied in a cooperation agreement or a concentration scheme for the entire duration of the cooperation or concentration;
- (b) for the minimum time required for a reasonably efficient business to recoup the cost of the investments made (together with returns);
- (c) for those businesses who undertake investments in training effectively;

(d) for those employees who take advantage of investments in training effectively;

(e) for those geographic areas which host investments in training.

It is suggested hereby that agencies and Courts check all these aspects when assessing if a non-solicitation agreement is to be forbidden under Article 101 of the TFEU. Chapter 1 shows that agencies and Courts tend to assess the proportionality with respect to the duration of non-solicitation agreements, subjective and objective areas of application, geographical area of application. The extant chapter proposes some tested parameters to evaluate if the duration of non-solicitation agreements, subjective and objective areas of application, geographical area of application are proportionate.

In short, it may be true that talent raiding ensures the mobility of workers and knowledge spillovers. But it is also true that this economic phenomenon puts investments in training and growth in the long run at risk. If long term objectives shall prevail even in antitrust enforcement, then agencies and Courts will be called upon to employ competition law in order to incentivize investments in training.

Meanwhile, contract remedies against job poaching constitute a self-regulation tool through which businesses will find a way to internalize poaching externalities, a condition that averts underinvestment in training. This is the reason why antitrust enforcement shall be permissive on non-solicitation agreements provided that these covenants are effectively ensure investments in human capital. A set of objective criteria for assessment is provided for above.

As Chapter 1 reports, DOJ and FTC's Antitrust Guidance for Human Resources Professionals (2016) adopt a strict approach on non-

solicitation schemes. The recommendation in this dissertation is that a laxer antitrust treatment on non-solicitation agreements would be preferable as these covenants help economic operators cooperate to internalize poaching externalities, promote investments in training, ensure economic growth in the long run, which is a prevailing goal even in competition law. Undoubtedly, the free mobility of workers shall be protected in some way. But this scope will be achieved anyway if lateral hiring is generally allowed unless there is evidence of destructive poaching, collusive poaching, predatory poaching. A more benevolent view on non-solicitation agreements serve instead as an incentive for internalization of poaching externalities through self-regulation and, thus, through contract. In any case, even when self-regulation is insufficient, the toolkit of regulators encompass other remedies.

3.3. Poaching externality and subsidies.

As state above, contract remedies against job poaching represent a form of self-regulation. But poaching externality could be internalized also through traditional regulatory schemes like subsidies or State aids.

Considering the European Union, subventions favoring general training and specific training are set forth in the General Block Exemption Regulation (GBER). Paragraphs 52 and 53 of the GBER recognize, thus, that *'the promotion of training and the recruitment/employment of disadvantaged workers and of workers with disabilities constitutes a central objective of the economic and social policies of the Union and its Member States. Training usually generates positive externalities for society as a whole, since it increases the pool of skilled workers from which other firms may*

*draw, improves the competitiveness of the Union industry and plays an important role in the Union employment strategy. Aid to promote training should therefore be exempted from the notification requirement under certain conditions. In the light of the particular handicaps which SMEs face and the higher relative costs that they must bear when they invest in training, the intensities of aid exempted by this Regulation should be increased for SMEs. Furthermore, the intensities of aid exempted by this Regulation should be increased if the training is given to disadvantaged workers or to workers with disabilities. The characteristics of training in the maritime transport sector justify a specific approach for that sector.*⁵⁴

In this framework, Article 31 of the GBER declares that State aids in the field of training comply with Articles 107 and 108 of the TFEU provided that the subventions concerned do not cover training which is compulsory under the law (e.g. HACCP training for the manipulation and supply of food or training for the safety of personnel).

Hence, Member States are allowed to cover eligible costs as follows:

'(a) trainers' personnel costs, for the hours during which the trainers participate in the training;

(b) trainers' and trainees' operating costs directly relating to the training project such as travel expenses, materials and supplies directly related to the project, depreciation of tools and equipment, to the extent that they are used exclusively for the training project.

⁵⁴European Commission, Reg. No. 651/2014/EU of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty.

Accommodation costs are excluded except for the minimum necessary accommodation costs for trainees' who are workers with disabilities;

(c) costs of advisory services linked to the training project;

(d) trainees' personnel costs and general indirect costs (administrative costs, rent, overheads) for the hours during which the trainees participate in the training.

70 % of the eligible costs, as follows:

The aid intensity shall not exceed 50 % of the eligible costs. It may be increased, up to a maximum aid intensity of

(a) by 10 percentage points if the training is given to workers with disabilities or disadvantaged workers;

(b) by 10 percentage points if the aid is granted to medium-sized enterprises and by 20 percentage points if the aid is granted to small enterprises.

Where the aid is granted in the maritime transport sector, the aid intensity may be increased to 100 % of the eligible costs provided that the following conditions are met:

(a) the trainees are not active members of the crew but are supernumerary on board; and (b) the training is carried out on board of ships entered in Union registers.'

Nevertheless, State aids in the field of HR are not limited to the GBER. There are also specific State aid regimes that indirectly foster innovation and the accumulation of knowledge in the human capital. This is true with the State aid regime in the domain of R&D&I

(Research, Development, Innovation). This is true with the State aid regimes concerning energy and industrial policy.

Indeed, Annex I of European Commission's Framework Communication *for State aid for research and development and innovation* sets out that eligible costs cover '*organisation of training programmes, workshops and conferences to support knowledge sharing and networking and transnational cooperation.*'⁵⁵

Meanwhile, Paragraph 39 (b) and Footnote 39 of European Commission's *Guidelines on State aid for environmental protection and energy 2014-2020* link the need of subventions to '*the fact that part of the benefit from an investment will accrue to market participants other than the investor*', a situation which '*will lead undertakings to underinvest. Positive externalities may occur for instance in case of investments in eco-innovation.*' '*Typical examples of positive externalities are [...] externalities as a result of general training.*'⁵⁶

Finally, in the Communication concerning a *Multisectoral framework on regional aid for large investment projects*, the European Commission puts ceilings on regional investments in order to avoid distortions of competition on a larger scale. These investments also may cover '*large investments can effectively contribute to regional development, amongst other things by attracting other companies to*

⁵⁵European Commission, Communication, Framework for State aid for research and development and innovation, 2014/C 198/01, 27.6.2014.

⁵⁶European Commission, Communication, Guidelines on State aid for environmental protection and energy 2014-2020, 2014/C 200/01, 28.6.2014.

*the region and introducing advanced technologies as well as by contributing to the training of workers.*⁵⁷

It emerges from the foregoing that the European Union builds up a complex set of subsidies to internalize the positive externalities arising out of training. This set of subsidies encompasses a specific tool like the GBER. This set of subsidies encompasses sector-specific exemptions in the field of R&D&I, energy, regional aids for large investment projects. But what are the problems arising out of these subventions?

State aids in general and State aids in the field of training present limits.

Firstly, Moen and Rosén show that subsidies in the field of training reduce welfare. In their opinion, *'a training subsidy will increase the training level in each firm.'* However, subventions do not influence the equation according to which, *'although excessive turnover reduces the private returns from training, it also reduces the social returns by the same amount.'*⁵⁸

Secondly, subsidies create distortions in public expenditure, as only specific categories take advantages, while all the taxpayers will bear the costs of aid measures.

Thirdly, subsidies may internalize the externality but they may distort competition at the same time.

Latter adverse consequences could be averted, however, through procurement procedures or auctions for the allocation of State aids.

⁵⁷European Commission, Communication, Multisectoral framework on regional aid for large investment projects (notified under document No C (2002) 315), 2002/C 70/04, 19.3.2002, para. 13.

⁵⁸Moen, E.R.-Rosén, A, *Does Poaching Distort Training?*, quoted, p. 1154.

After all, if the spirit and principles set forth in Directives No. 2014/23/EU and 2014/24/EU are applied to State aid procedures, the selectivity of measures will be compressed, while the amount of aids and the costs for taxpayers will be reduced.⁵⁹

⁵⁹For case law, see ECJ, *Altmark Trans GmbH e Regierungspräsidium Magdeburg v. Nahverkehrsgesellschaft Altmark GmbH*, 24.7.2003, case C-280/00, para. 93. See also European Commission, Communication, Notion of State Aid, 2016/C 262/01, 19.7.2016, para. 92-93, European Commission, Communication, 2013/C 25/01, 26.1.2013, *Broadband Guidelines*, para. 78 (c).

The relationship between State aid procedures and procurement law is biunivocal. Bartosh, A., *Relationship between Public Procurement and State Aid Surveillance - The Toughest Standard Applies*, in *Common Market Law Review*, Vol. 39, No. 3, 2002, pp. 551-576.

On the one side, each procurement procedure may represent a State aid. Bovis, C., *State Aid and Public Private Partnerships - Containing the Threat to Free Markets and Competition*, in *Eur. Pub. Private Partnership L. Rev.*, Vol. 5, 2010, p. 169: '*Discriminatory public procurement practices could also be used to confer competition advantages on certain enterprises which distort market and competition thereby amounting to State aid.*'

On the other side, procurement procedures reduce the selectivity and the costs of aid measures, while confirming that a beneficiary does not possess an industrial character. Bovis, C., *State Aid and Public Private Partnerships - Containing the Threat to Free Markets and Competition*, quoted, p. 169: '*Discriminatory public procurement practices could also be used to confer competition advantages on certain enterprises which distort market and competition thereby amounting to State aid.*' Bovis, C., *Public Procurement, State Aid and Public Services: Between Symbiotic Correlation and Asymmetric Geometry*, in *Eur. St. Aid L.Q.*, 2003, p. 569: '[...] *the application of the public procurement regime reinforces the character of services of general interest as non-commercial or industrial and the existence of marchés publics.*' Olykke, G.S., *The Notice of the Notion of State Aid and Public Procurement Law*, in *Eur. St. Aid L.Q.*, 2016, p. 9: '[...] *in State aid law the use of competitive, transparent, non-discriminatory and unconditional procedures have been used for several decades as a tool to minimize the risk of granting State aid.*' Janssen, S., *Services of General Economic Interest, State Aid, and Public Procurement, J. Network Ind.*, in *Eur. Procurement & Pub. Private Partnership L. Rev.*, Vol. 5, 2004, p. 158: '*the ECJ thus pushes Member States towards a policy of systematically entrusting undertakings with SGEI through public procurement procedures. Legally this can be justified by arguing that State financing that would reward undertakings entrusted with the provision of SGEI for their inefficiency would constitute an advantage, and hence State aid to these undertakings. A public procurement procedure is a good way to make sure that the services in question will be discharged in the most efficient manner.*' Flynn, L., *State Aid and Procurement-Current Framework*, in *Public Procurement and State Aid - A Constructive Competition?*, Workshop Material, 28.10.2016, p. 4: '*If competitive, unconditional, open and non-discriminatory, in principle a tender awarded based on price establishes the market price and excludes the grant of an advantage to the successful bidder.*' Nicolaidis, P.-Rusu, I.E., *Competitive Selection of Undertakings and State Aid: Why and When Does It Not Eliminate Advantage*, in *Eur.*

In any case, it is true that the organization of procurement procedures is costly compared with the allocation of funds on a *first come, first served basis*. This means that, if procurement procedures are associated with transaction costs, these transaction costs shall be deducted from the advantages arising out of the implementation of an auction. The consequence is that procurement procedures may be implemented only for large aids, given that the costs of an auction will not exceed the economic benefits on this occasion. As an alternative, State aids shall be allocated on a *first come, first served basis*.

3.4. Poaching externalities and payroll taxes (entry fees or entry taxes).

Payroll taxes are taxes on the incomes of physical persons and legal persons. Entry fees and entry taxes represent instead a sum that hiring firms will pay when they recruit personnel or when they contract out specific activities to agents. Entry fees are set forth in employment collective agreements. Entry taxes are set forth in legislation. Payroll taxes, entry fees, entry taxes can be employed to internalize poaching

Procurement & Pub. Private Partnership L. Rev., Vol. 7, 2012, p. 5: *'the use of public procurement procedures is in most instances sufficient to eliminate advantage in the meaning of Article 107(1) of the Treaty on the Functioning of the European Union (TFEU).'*

If State aid procedures present discriminatory standards, both State aid rules and procurement rules will be violated. See Nicolaidis, P.-Schoenmaekers, S., *Public Procurement, Public Private Partnerships and State Aid Rules: A Symbiotic Relationship*, in Eur. Procurement & Pub. Private Partnership L. Rev., Vol. 9, 2014, p. 69: *'any public procurement procedure or PPP term that favours a particular firm without securing lower price, higher quality or higher return would not only infringe public procurement Directives but would also constitute State aid in the meaning of Article 107(1).'* A different opinion in O'Keffe, D., *Public Private Partnerships, Local Authorities and State Aid*, in Eur. Pub. Private Partnership L. Rev., Vol. 2, 2007, p. 21: *'Even if the public procurement Directives are breached in the tendering process for a PPP, this does not necessarily imply that the State aid rules have been breached.'* Mehta, J., *State Aid and Procurement in PPPs – Two Faces of a Single Coin*, in Eur. Pub. Private Partnership L. Rev. 141, Vol. 2, 2007, pp. 141-142: *'a genuine competition can substantially reduce or eliminate the possibility of overcompensation or the provision of a selective advantage.'*

externalities. After all, competitors will be discouraged to poach personnel if they will need to pay an extra in taxes or fees. To this end, there is a sample of entry fee in Italy. There are samples of payroll tax in Australia

As Chapter 1 reports, Article 31 of Article 31 of Italian national collective agreement for the agency sector of 24 July 2008 considers that a transfer fee may be justifiable when the worker is 'poached' during the course of the assignment.

Meanwhile, Australian regional policy makers try to internalize poaching externalities by granting tax breaks concerning traineeship. The existence of tax exemptions for training creates at the same time an incentive for investment in this field and a disincentive for non-training/poaching firms, for whom tax pressure will be higher because it does not incorporate tax breaks compared to number of the workers employed.

If one considers Western Australian Traineeship Payroll Tax Exemptions, thus, for each eligible employee businesses have on a Traineeship in Western Australia, firms could potentially exclude that employee's wage from Payroll Tax (5.5%) for the full duration of the training, up to 2 years.

In order to qualify for exemptions, 3 criteria must now be met:

- (a) the employee must be an apprentice/trainee, and
- (b) there must be a training contract in place, and
- (c) the contract must be registered.

If one considers New South Wales Traineeship Payroll Tax Exemptions, for each eligible employee a business has on a 'New

Entrant' Traineeship (employed for less than 3 months), that business can potentially exclude the employee's wage from Payroll Tax (5.45%) for the full duration of training, up to 2 years.

In order to qualify for exemptions, 4 criteria must now be met:

- (a) the employee must be employed with the business concerned for less than 3 months, and
- (b) the employee must be an apprentice/trainee, and
- (c) there must be a training contract in place, and
- (d) the contract must be registered.

If one considers, Queensland Traineeship Payroll Tax Exemptions, for each eligible employee firms have on a 'New Entrant' Traineeship (employed for less than 3 months), they could potentially exclude that employee's wage from Payroll Tax (4.75%) for the full duration of training, up to 2 years.

In order to qualify for exemptions, 4 criteria must now be met:

- (a) the employee must be employed with the business concerned for less than 3 months, and
- (b) the employee must be an apprentice/trainee, and
- (c) there must be a training contract in place, and
- (d) the contract must be registered.

There are currently no Payroll Tax Exemptions or Rebates for Victorian or ACT-based Trainees.⁶⁰

But what are the advantages, what the disadvantages of a payroll tax, an entry fee, an entry tax?

Moen and Rosén suggest that payroll taxes are better instruments compared with subsidies for the purpose of counteracting against poaching externalities. And this would be true even with payroll taxes or instruments with similar effects are combined.⁶¹ But payroll taxes, entry fees, entry taxes share a limit. They will not disincentivize lateral hiring and they will not reduce poaching externalities if the economic advantages for a raiding business offset the economic burden that comes up with the tax. At the same time, payroll taxes and entry taxes are more effective compared to entry fees in so far as (a) the implementation of a tax system is up to public agencies whose interest is aligned with those of the training firms⁶²; (b) monitoring powers on the compliance with entry fees is up to the counterparty, i.e. trade unions whose interests are not aligned with those of the training firms.⁶³

4. Conclusions.

The Introduction of this dissertation underlines how, above all after the DOF and the FTC issued the Antitrust Guidance for HR Professionals, competition law analysis needs to deal with a new

⁶⁰<https://www.upskilled.edu.au/how-to-apply/financial-assistance/payroll-tax-exemptions.aspx>

⁶¹Moen, E.R.-Rosén, A., *Does Poaching Distort Training?*, quoted, pp. 1155-1156.

⁶²Training firms desire a full implementation of payroll taxes and entry taxes in order to discourage poaching. Public agencies desire a full implementation of payroll taxes and entry taxes in order to collect revenues.

⁶³Training firms desire a full implementation of entry fees in order to discourage poaching. Trade unions protect the interests of workers, including workers who take advantage of poaching and of a violation of entry fees.

topic. Antitrust rules do not govern only the market for goods and services. Nor does competition law manage only capital as an input. Indeed, provisions regarding abuse of dominant position, monopolization, cartels, concerted practices also cover the labor market.

The extant work does not have the ambition to assess the intercourse between competition law and HR completely. Conversely, the intention is opening a window on this subject. In particular, generally speaking, this window concerns the relationships between the antitrust laws and private law tools like the unfair competition doctrine. Methodologically speaking, this window concerns the role of economic analysis to individuate and balance the interests involved. Considering the contents, this window concerns job poaching and contract remedies against it, with a specific reference to non-solicitation agreements.

The FTC and other antitrust enforcers look at non-solicitation agreements with suspicion. This dissertation suggests instead that, 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.

As stated above, employee raiding, including parasitic poaching, creates a positive externality which leads to underinvestment in training and less growth in the long run. Meanwhile, non-solicitation agreements find a support in the unfair competition doctrine and in Article 3 of the TEU. This is another contribution of the extant dissertation. After all, Marco Saverio Spolidoro envisages that parasitic poaching does not pose problems, while Giampaolo Dalle Vedove imagines that unfair competition rules and antitrust law overlap only partially. This work explains that parasitic poaching also is responsible for underinvestment in training and shall be dealt with, notably through contract remedies against lateral hiring as well as through a laxer antitrust approach. In addition, emphasis is put on the fact that unfair competition doctrine and antitrust law are misaligned in scope sometimes, as unfair competition rules will provide a support for restrictions on the mobility of workers on given occasions.

Finally, Chapter 2 is interesting for the identification of the interests involved and for the critics to dogmatic methodology. This chapter shows that lateral hiring also affects the interests of regional clusters and the international market as a whole. At the same time, this chapter proves that case law and legal scholarship tend to balance the interests involved in lateral hiring through a global efficiency approach. This global efficiency approach is challenged and replaced through an analytical methodology aimed at promoting long term investments in training and long term growth above all.

In any case, there is still room for further research. More accurately, a specific point to assess is the configuration of HR market as a distinct

product market and geographical market from an antitrust standpoint,
both under a static perspective and under a dynamic perspective.

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