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Different types of labour
market restrictions:
competition law leaves
very little room for lawful
labour market restrictions
between employers

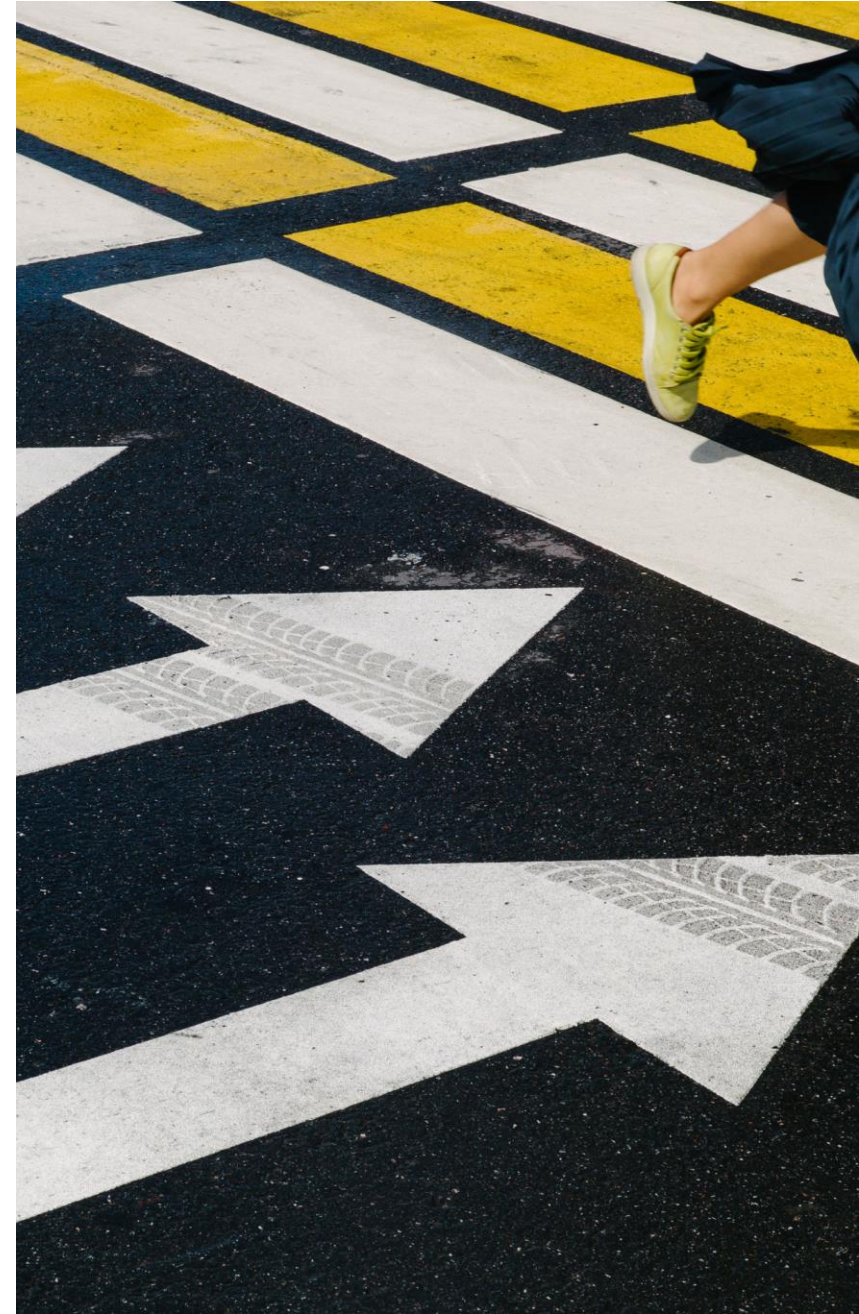
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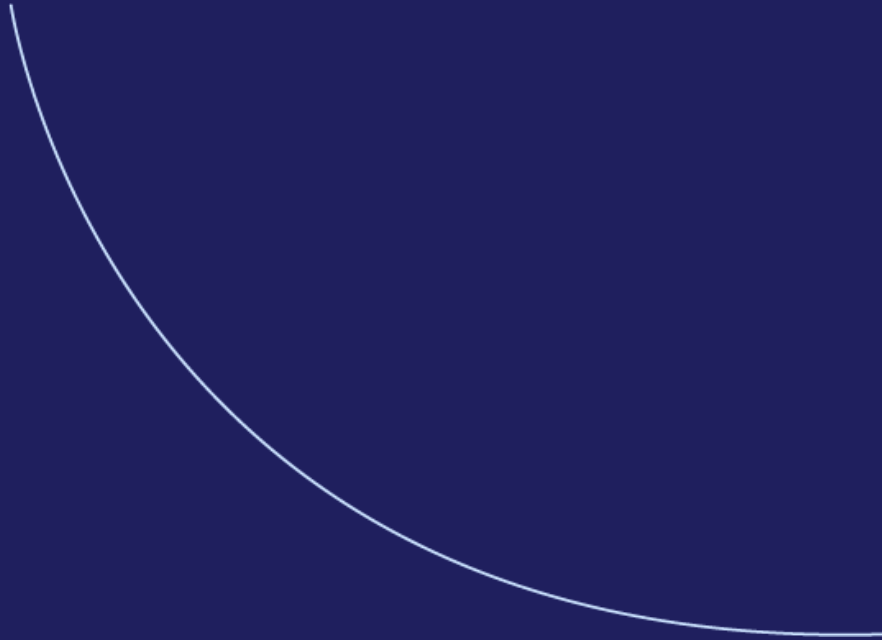
Types of labour market restrictions

- Wage-fixing agreements
- No poach agreements:
 - no hire agreements (no active or passive hiring)
 - non-solicitation agreements (no active hiring)
 - binding on only one party or both of them
 - can be stand-alone ('naked') or part of a main agreement (eg a services agreement)
- Our focus is on no poach agreements

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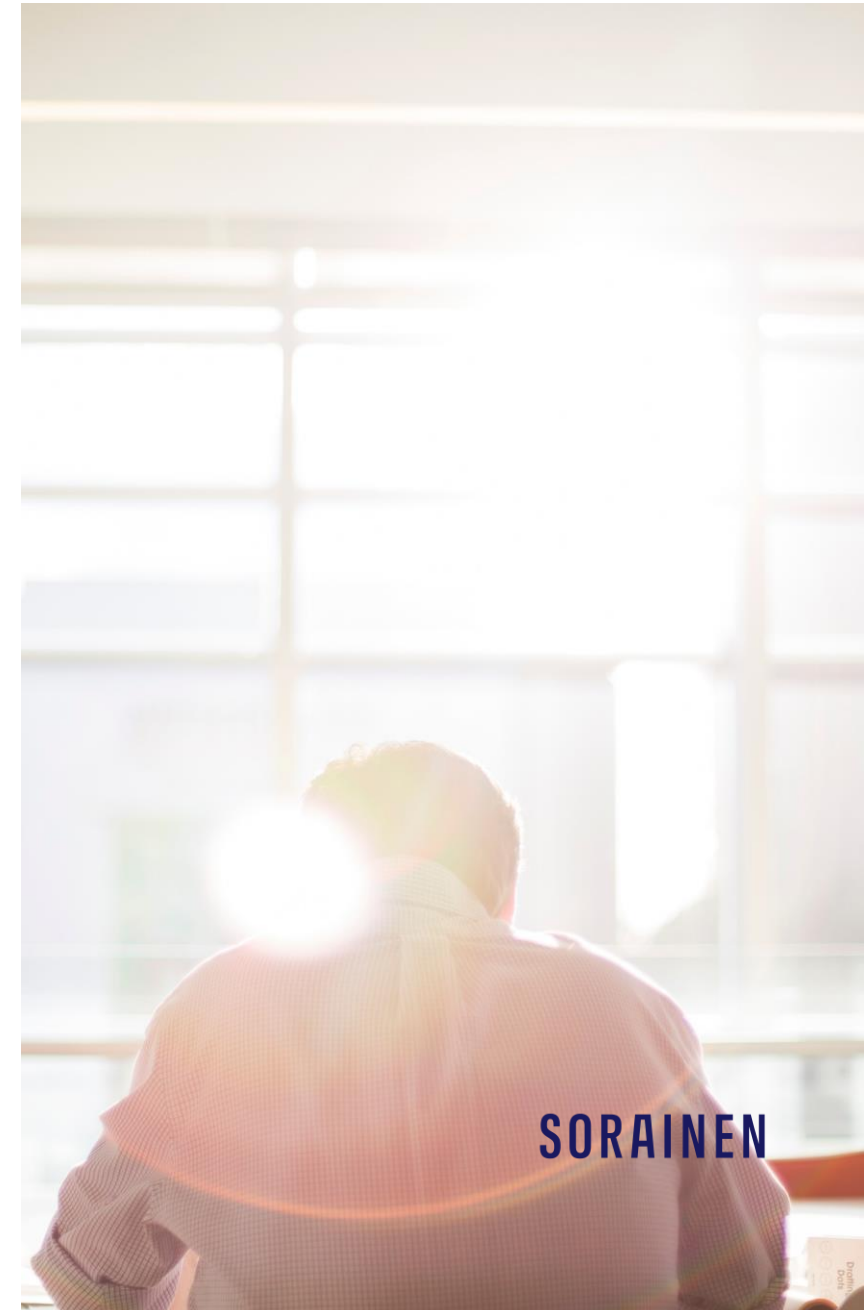
A recent priority



- Agreements in labour markets are a recent priority of competition authorities
- No EU-level decisions or cases yet (one ongoing investigation)
- Some local decisions or cases (most still on appeal in courts)
- The lack of previous practice leaves some unanswered questions – can labour market restrictions be justified and when?

Protecting investment

- In many cases, stand-alone ('naked') no poach agreements have no clear benefit or rationale (besides restricting competition)
- However, no poach agreements that are part of other agreements (eg a services agreement) could have a different rationale: protecting the training costs, non-patented IP rights, confidential business information which would all be lost if employees are poached
- Companies may have less incentive to invest



The European Commission's policy brief (2024)

- Not legally binding but provides the stance of the European Commission (EC)
- Takes a very strict view: labour market restrictions are restrictions 'by object' (can be punished even if not enforced or implemented)
- EC's conclusion: labour market restrictions are 'unlikely' to be justified. The EC states that there are alternative ways to protect business investment



The ancillary restraint doctrine

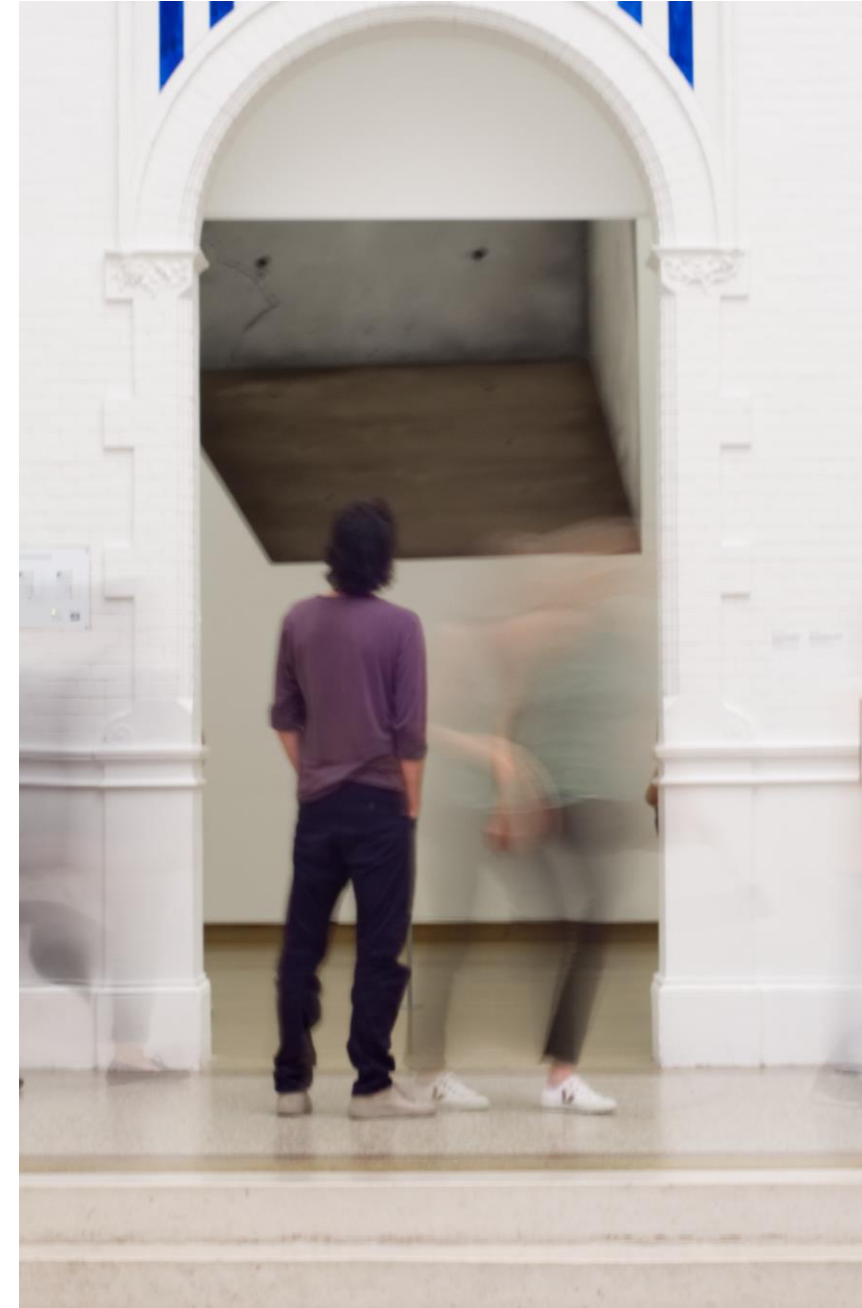
- The ancillary restraint doctrine
- Even if a clause restricts competition, it can be lawful if it is a *necessary* part of another, lawful agreement
- Strict legal test:
 - is the clause really necessary (the main agreement would not exist without it)?
 - is the clause proportionate?
- Key question – possible alternatives

The EC's view: labour market restrictions are unlikely to be ancillary. There are alternatives:

- non-compete agreements with the employee
- non-disclosure agreements
- obligations to stay with an employer for a minimum amount of time
- the repayment of proportionate training costs
- gardening leaves

Art 101(3) TFEU exemption

- Agreements that restrict competition can also be justified if they benefit consumers
- The exception has very strict conditions. One of them requires necessity, so alternatives must be evaluated (just like with ancillary restraints)
- The EC's brief: Art 101(3) unlikely to justify no poach agreements as well



Issues

- The EC's brief is a policy document. Courts could have a different view
- Are the alternatives less restrictive? Non-compete agreement with an employee could limit their options even more
 - The EC: a non-compete agreement with an employee is preferable due to its 'transparency' (the employee will know about it)
- Are the alternatives suitable?
 - Alternatives may be much more difficult to enforce
 - Their suitability also depends on local labour law
- No specific examples of when a no poach agreement could be justified given by the EC
 - What if the employee refuses to sign a non-compete agreement?
 - What if the undertaking's business model requires no poaching (eg staffing companies)?

Conclusion



- Investigating labour market restrictions is a new trend and priority for competition authorities
- Lack of practice so far leaves uncertainty. The EC's brief takes a very strict view
- No specific examples of when restrictions are justified by the EC
- The key question is whether there are alternative ways to protect investment



Thank you!

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