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Competing for Talent: Competition Law Reaches the Labour Market

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Overview

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One expensive e-mail

From: Steve Jobs
Sent: Thursday, May 26, 2005 9:36 AM
To: Bruce Chizen
Subject: Recruiting

Bruce,

Adobe is recruiting from Apple. They have hired one person already and are calling lots more. I have a standing policy with our recruiters that we don't recruit from Adobe. It seems you have a different policy. One of us must change our policy. Please let me know who.

Steve

USD 415 million

Why competition law cares about labour markets

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THE CONCERN

- Employers are buyers of labour: coordinating on pay or hiring is a purchasing cartel (wages are simply the price of talent)
- Restrictions may hurt employees (mobility, bargaining power, pay) and companies (weaker incentives to compete on attractive conditions)
- Effects spill over into product markets: less mobility means less innovation and productivity

KEY MESSAGE

“Companies that never compete for a single customer can still be head-to-head competitors for talent.”

Three ways HR conduct becomes a cartel issue

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Wage-fixing	No-poach	Information exchange
Agreeing salaries, bonuses or benefits with other employers (the whole pay package counts)	Agreeing not to solicit or hire another company's people, even informally.	Sharing salaries, bands, planned increases or hiring plans between employers.
→ treated like price-fixing	**→ treated like market sharing**	**→ the "gateway" conduct in most real cases**

No new laws were needed: existing cartel rules were simply applied to a market, which authorities had long ignored.

Delivery Hero / Glovo: an investment becomes a cartel

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€ 329 m

the European Commission’s first labour-market cartel fine (June 2025)

- July 2018: Delivery Hero takes a 15% minority stake in rival Glovo and the shareholders’ agreement contains **reciprocal no-hire clauses**
- The clauses are carried into four successive investment rounds and widened into a general understanding **not to poach each other’s employees**
- In parallel: allocation of geographic markets and exchange of sensitive commercial information, flowing in part through the board seat
- Detection: anonymous whistleblower tool; dawn raids in November 2023; settled in 2025
- Europe’s top court confirmed in 2026 (Portuguese football): no-poach is in principle a hardcore restriction, even in a crisis

No agreement needed: the UK sports broadcasters (2025)

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£ 4.24 m

fines for merely exchanging pay rates for freelance production crews — the UK's first labour-market decision

- 2014–2021: BBC, BT, IMG, ITV and Sky exchanged day-rates for freelance camera operators, sound engineers and other sports-production crew
- The form: short bilateral e-mails or calls such as "what do you pay a camera supervisor?"; typically just when rates were being set or a freelancer asked for more
- In most episodes the aim was to align rates or avoid bidding each other up; some contacts came with a "keep this between us"
- 15 bilateral episodes; pure information exchange; no wage agreement was needed for an infringement
- **Sky reported first and received full immunity**

What this means for Swiss multinationals

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1. Wage-fixing and no-poach are treated as hardcore infringements worldwide; information exchange is enforced on its own. Risk of **fines**, and even **criminal prosecutions** (e.g. USA, Canada)
2. You can be cartelists in the labour market **without competing** on any product.
3. Informal understandings, one-way arrangements and association recommendations are all caught.
4. Detection is **leniency-driven**: the first to report walks free and the others pay.
5. Group compliance should match the strictest applicable regime

How the Swiss case came about (2022–2024)

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- December 2022: the COMCO Secretariat opens a pre-investigation into the banking sector's labour market, triggered by one bank's leniency application on pay information exchanges re apprentices
- The press release sets off a wave: at least 5-6 further companies self-report, banks and non-financial companies
- The scope grows to more than 240 (!) undertakings across industries: regional banking circles, the cantonal banks' HR conference, cross-industry HR networks and ERFA rounds, international benefits councils
- *Some exchanges were documented back to 2015 in long-established, routine formats*

What was discussed

- Current and planned salaries, salary rounds and increases by function and seniority
- Apprentice, intern and graduate pay, compared in detailed tables
- Bonus pools and structures; fringe benefits (pensions, insurance, allowances, maternity/paternity leave)
- Planned changes to employment conditions
- Ad-hoc "quick surveys" by e-mail on individual pay questions

The findings

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- The Cartel Act applies to labour markets with no exemption; the information exchanges qualified as concerted practices comparable to price-fixing (except collective employment agreements): significant restriction, no efficiency justification
- The concern: any exchange that reduces uncertainty about competitors' pay behavior, current or forward-looking, whatever the format
- Broad in three respects:
  - all remuneration components count (e.g. also pensions, insurance, allowances, company cars);
  - "anonymised" is not safe where a small, known circle can (in this case 14!) re-identify the data;
  - even a compilation of public (!) information can be non-public as a whole
- Yet no investigation, no fines: proportionality. Most self-reporters had already stopped. Instead continued close scrutiny of the markets plus the promise of a guidance note
- **Since then, deliberate silence: despite indications of new cases. First the guidance note, then enforcement**

The draft guidance note

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- The first written Swiss guidance on labour-market antitrust, published by the COMCO Secretariat for consultation
- Practical orientation, not binding law. It signals the authority's enforcement intentions and priorities
- Addresses everyone in the labour market: companies, employer and industry associations, unions, authorities, advisers
- However: Applicability of the Cartel Act to companies (except intra-group), but not to employees
- The recent revision of the Cartel Act does not specifically address labour markets. The guidance reflects current practice and will evolve.

23 July 2026

Draft published for consultation

30 Sept 2026

Consultation closes

End 2026 / early 2027

Final version, depending on the comments received

What the draft says (1/2): pay & hiring coordination

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Pay coordination

- Agreements and concerted practices on pay between employers are "comparable" to hardcore price-fixing on the buying side (sanction risk)
- The entire package counts: base salary, variable pay, bonuses, and fringe benefits, treated as essential price components
- The form is irrelevant: a survey, a table, an e-mail/chat or an informal understanding can suffice
- Unclear: indirect information exchanges, e.g. through employees and their associations?

No-poach

- Agreeing not to solicit, not to hire, or to hire only on conditions are "comparable" to market sharing (sanction risk)
- Also caught: recommendations and understandings within industry or employer associations
- Exception: non-solicitation clauses ancillary to M&A and joint ventures, where necessary and proportionate; other cooperations are measured in a similar manner
- Unclear: Services agreement (e.g. IT service providers, headhunters, etc.)

What the draft says (2/2): information & benchmarking

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Information exchange	Benchmarking
▪ Sensitive: individual salaries, internal salary bands, current or planned increases, bonus schemes, recruiting and hiring plans, workforce-reduction strategies, future working conditions ▪ Particularly risky: Information allowing conclusions to be drawn about a company's future market behaviour ▪ Rule of thumb: the more current, detailed and individualised, the higher the risk ▪ Aggregated, anonymised and sufficiently historical data are generally less problematic	▪ Risk-reducing elements: 1) at least **five** participants 2) aggregation 3) anonymisation 4) historical data 5) independent third party 6) no current or future individual data ▪ But no element (nor all six together?) guarantees conformity; the assessment stays case-by-case (market structure, concentration, re-identification risk) ▪ Practical consequence: professional third-party setups only. No self-run tables or e-mail surveys

The Swiss particularities

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Social partnership / collective agreements	Apprentices
▪ Collective bargaining with unions is outside the Cartel Act. Collective agreements are not cartels ▪ But the exception is purpose-bound: employer-side exchanges before negotiations must stay within what the agreement will regulate ▪ Arrangements without the social partner enjoy no protection ▪ Unclear: What about work councils?	▪ The dual training system is recognised as a joint task of business, state and society ▪ Cantonal apprentice-wage recommendations are accepted as justified, as long as they serve the functioning of the system ▪ Companies nevertheless remain competitors for apprentices

The biggest gap to be addressed: no real safe harbours

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The draft identifies what is prohibited but provides companies with little concrete guidance.

1

Benchmarking Six criteria, yet “no element guarantees conformity”.

Request: cumulative compliance = presumption of lawfulness; define “sufficiently historical” (e.g. older than 3/6 months); indicate that associations can run surveys; and confirm that professional third-party surveys meeting the criteria are safe.

2

No-poach in service relationships Only M&A and JV ancillary agreements are explicitly addressed. Everyday non-solicitation clauses (outsourcing, secondment, consulting, staffing) are unclear.

Request: recognition as legitimate ancillary restraints where limited to the personnel actually involved, a defined scope and a reasonable duration (e.g. two to three years).

3

Indirect information flows The draft ignores how pay information actually travels: candidates and new joiners, recruiters and references, public job ads, shared consultants or cost review exercises.

Request: information from employees themselves or from public sources is no exchange between competitors, possibly: guidance on unsolicited receipt (distancing) and on third-party and algorithmic channels.

Four further points the final version could clarify

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1 **No-poach taxonomy:** The draft treats outright no-hire bans, mere non-solicitation and conditional arrangements alike. Severity should be gradual and purely unilateral internal policies involve no agreement at all: confirm they are out of scope.

2 **Scope of "remuneration":** All fringe benefits are declared "essential price components". Training budgets, workplace policies and other non-monetary conditions do not behave like prices. Distinguish pay (strict) from other working conditions (assessed by their effects).

3 **Sanctionability:** The draft only ever says wage-fixing and no-poach "can be compared to" hardcore restraints. Whether direct fines attach and how the revised Cartel Act's new overall assessment applies, is left open and should be stated clearly.

4 **Association work:** Confirm the model associations already use: data collected by the association secretariat or an independent third party, used only in aggregated form, for statistics, consultation responses and advocacy.

Do’s & don’ts for HR and association delegates

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DON’TS — NEVER SHARE OR ACCEPT

- Individual salaries, internal bands, current or planned increases and salary rounds
- Bonus schemes, remuneration structures, benefits
- Recruiting strategies, hiring plans, workforce-reduction plans
- Any understanding not to poach or hire, however informal, including association recommendations
- *In any format: meeting, e-mail, survey, coffee chat. Receiving passively counts too*

DO’S — GENERALLY FINE

- Publicly available information; professional exchange without firm-specific parameters (legal developments, authority practice, etc.)
- Benchmarking via independent professional providers meeting "the six criteria"
- Collective-agreement work with the social partner, limited to its content and scope
- Association and consultation advocacy on aggregated or qualitative bases
- *When in doubt: involve Legal before joining any new format*

Five immediate measures

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1. **Inventory:** Map all memberships, ERFA rounds, HR networks, salary surveys and benefits councils, group-wide.
2. **Remediate:** Align exchange formats with the benchmarking criteria or exit them.
3. **Review contracts:** Non-solicitation and pay clauses in service, outsourcing, secondment and transaction agreements: limit them to the personnel involved, a defined scope and duration.
4. **Train:** HR, line managers and association delegates, incl. the distancing protocol: object – leave – have it minuted – report to Legal.
5. **Document:** Agendas and minutes of association meetings

> *Act before enforcement begins — and use the consultation to turn a list of prohibitions into a document you can work with.*

Thank you!

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