COLLUSION AND ABUSES ON THE LABOUR MARKET

Competition law
and labour cases

GUIDANCE

Office of Competition and Consumer Protection

Warszawa
2024

tl;dr

“Too long; didn’t read!”

1. For UOKiK, the Competition Protection Act is **the most important** law, but at UOKiK we know that for others it may be only one of many laws.
2. This page is a **summary** of information from the entire document.
3. This is a page for those who are sceptical of longer texts (**“too long; didn’t read”**, “tl;dr”).
4. Competition law is the branch of law that journalists write about when they use such phrases and words as: “price collusion”, “**market collusion**”, “monopoly”.
5. Competition law is also important to the **labour market**.
6. That is, **it is important** to: (a) employers; (b) employees.
7. This document **describes** labour market practices that may violate competition law, e.g. anti-competitive wage fixing and non-competition for employees.
8. Undertakings **face fines** amounting up to 10% of annual turnover and managers (e.g., members of company boards) face fines amounting up to PLN 2 million for violating competition law.
9. A fine amounting up to 10% of turnover (not profit, not income) for a company and up to PLN 2 million for an executive **is a lot**.
10. **That is why it is worth** to read this document – it is better to take some time today than to regret it later.

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1. "Protection of competition and employees? What is this? A crossover episode?"

Competition law is important to business activities on various markets.[1]

Undertakings (companies) are not always aware that competition law also applies to markets other than those in which they sell their products.[2] This includes the labour market.[3]

Before offering a product to consumers, most undertakings must acquire employees on the labour market on their own. Employees are needed to manufacture products and perform other tasks within the business itself. Competition law regulates the actions of undertakings not only when they sell their products, but also on the labour market.

This document describes what is the role of competition law on the labour market.

This is intended to make it easier for undertakings and employer organisations to conduct business in accordance with competition law. The document is addressed primarily to managers of companies, legal departments, and human resources and recruitment (HR) departments.

It should also make it easier for employees and trade unions to identify the actions of companies that violate competition law – this can make it easier for employees to decide whether to bring a possible violation of the law to the attention of that company's legal department or the Office of Competition and Consumer Protection (UOKiK).[4]

1 For the purposes of this document, competition law means the Act of 16 February 2007 on the Competition and Consumer Protection (Journal of Laws 2023, item 1689) (hereinafter referred to as "**ACCP**") and Articles 101 and 102 of the Treaty on the Functioning of the European Union (hereinafter referred to as "**TFEU**").

2 In Polish civil law, *"firma"* (business name or company) is understood to mean the designation of a business as disclosed in the relevant register. In the Polish version of the document, the word *"firma"* is used in a colloquial sense (company) to make the document more accessible. This footnote has been preserved in the English version of this document to ensure that the numbering of footnotes in the English and Polish version of the document remains the same.

3 Competition law uses the term "relevant market", as defined in Article 4 (9) of ACCP, as an analytical tool. In this document, the term "labour market" is used in a colloquial sense.

4 The administrative body that investigates competition-restricting practices in Poland is the President of the Office of Competition and Consumer Protection (UOKiK). This document contains references to UOKiK in order to simplify its contents.

2. "Competition law? Is that something related to sports?"

Competition law (antitrust law) prevents undertakings from engaging in competition-restricting practices on the market. Such practices include market collusion, other competition-restricting agreements, and abuse of a dominant market position (e.g. actions by a monopolist to block the entry of competitors on the market).[5]

Collusion and other agreements are so-called multilateral practices (they involve joint actions by multiple undertakings), whereas abuse of a dominant position is a so-called unilateral practice (it involves unilateral actions by undertakings).[6]

Competition law combats restrictive practices because they lead to higher prices, lower quality products (including services), and less innovation. Restrictions on competition can also affect the opportunities of undertakings to grow their operations and realise their business intentions. Ultimately, restrictions on competition translate into a decline in the competitiveness of the Polish economy and, consequently, the standard of living and wealth of Polish citizens as well as the quality of public services.

A significant percentage of competition law cases involve those markets on which undertakings sell their products. However, competition law applies to all areas of business activity – which includes the acquisition of employees, i.e. competing for employees on the labour market with other undertakings.

Violations of competition law on the labour market may consist, in particular, of anti-competitive agreements made by undertakings. For that reason, this document primarily describes what activities may constitute anti-competitive agreements involving employees.

5 The basic rules of competition are set forth in Article 6 (anti-competitive agreements) and Article 9 (prohibition on abuse of a dominant position) of the ACCP. The President of UOKiK, as the Polish competition authority, is also responsible for the implementation in Poland, in parallel with the European Commission, of Articles 101 and 102 of the TFEU, the scope of regulation of which is similar to Polish regulations.

6 A practice that qualifies as both a multilateral practice and an anti-competitive agreement is, for example, a decision issued by an association of undertakings (e.g. an employers' association), as ultimately it relates to the actions of undertakings comprising that association. On the other hand, the so-called abuse of a collective dominant position by a group of undertakings is recognised as a unilateral practice – in such case the practice is unilateral, since the dominant position is collective in nature and the action taken by undertakings themselves does not have to take the form of an agreement. Collective dominant position can especially exist in an oligopolistic market. An oligopolistic market is one on which only a few undertakings operate.

3. “We are an undertaking?!”

Competition law uses a broad definition of an undertaking.[7]

Undertakings include both self-employed individuals and commercial partnerships and companies – this also applies to state-owned and municipal companies.

Competition law also regulates the actions taken by associations of undertakings, such as trade associations and employer unions.

Not every employer is an undertaking. The issues discussed in this document do not apply to employment relationships in the civil service, employment relationships of government officials, employment in the law enforcement agencies, among others.

7 See Article 4 (1) of ACCP.

4. “We were just talking!”

Competition law uses a broad understanding of the word “agreement”.[8] An agreement is any arrangement between two or more undertakings, regardless of its form or degree of formality.[9]

Company board members and employees often do not realise that by making certain arrangements with competitors they are in fact entering into agreements under competition law. In competition law, a verbal arrangement, a “gentleman’s agreement” or a simple exchange of information can be considered an agreement.

For these reasons, it is important for the company’s board members and employees to know what kind of actions taken by an undertaking may constitute a violation of competition law.

8 See Article 4 (5) of ACCP.

9 PA decision made by an association of undertakings is treated the same way as an agreement, even if the association adopts a resolution on its own.

5. “Archie, market collusion is not only done by the board members – those can be people from the HR too”

Competition law applies its own rules for attributing liability to undertakings (companies). In competition law, an agreement can be made not only by a member of the company’s board of directors authorised to enter into (civil law) contracts on behalf of the company, but by any employee of the company.

This means that being a human resources (HR) employee, you can – also without realising that you are breaking the law – enter into an agreement with a competitor of your company and thereby expose it to liability under competition law.

An HR employee may, for example, enter into an agreement within the meaning of competition law by making unofficial arrangements with another HR employee working for a competitor.

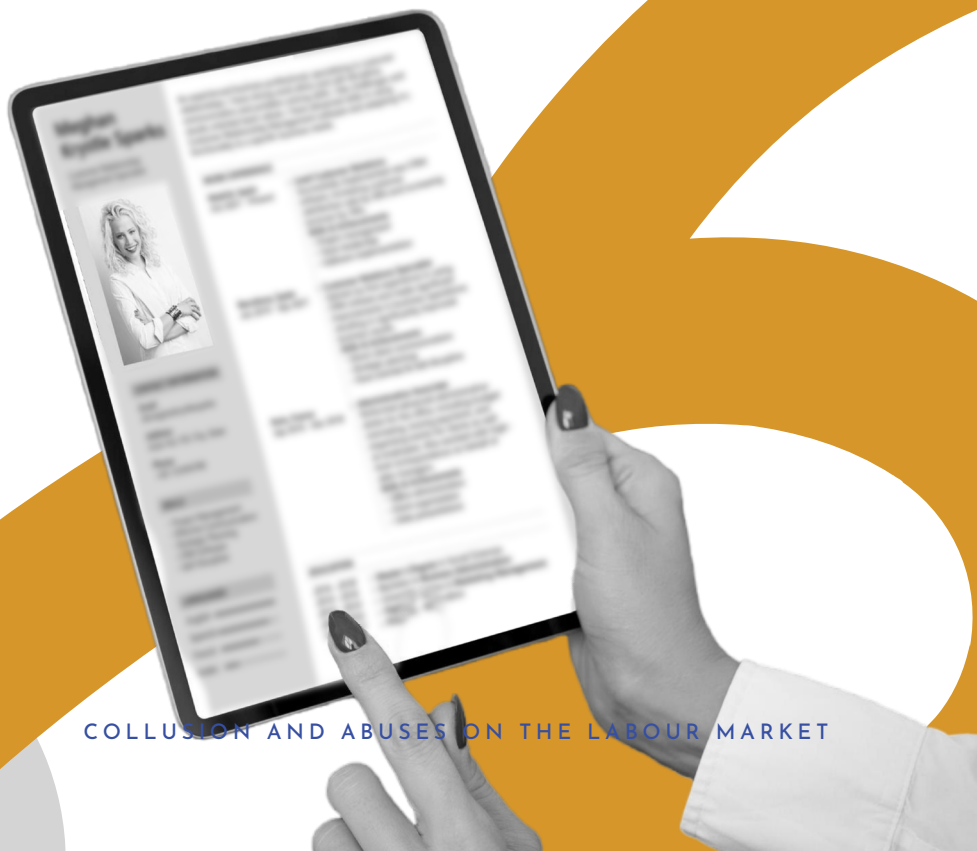
For these reasons, it is important for undertakings (companies) to provide adequate information to both their managerial staff and other employees. The information presented in this document is also relevant to HR personnel who are responsible for shaping the situation of other employees of the company.

6. “Look, I am a businessman doing business. Why should I care?”

An undertaking may violate competition law, but may itself also be negatively affected by a competition-restricting practice used by other undertakings.

The violation of competition law by undertakings may lead to the launch of an antitrust procedure against them and to the imposition of fines, including fines being imposed on the managerial staff of these undertakings. Therefore, it is important for businesspeople to be aware of applicable competition regulations to limit legal risks. The next section of this document provides examples of areas to which people doing business should pay attention.

An undertaking may also be negatively affected by a competition-restricting practice. In the case of violations of competition law in connection with labour issues, they may be affected indirectly. A later section of this document discusses why competition restrictions in labour cases may lead to damages incurred by the undertaking, even though the violation is committed by other businesses.



7. What to avoid for sure?

7.1. ANTI-COMPETITIVE WAGE-FIXING

It may happen that, when conducting business activity, undertakings or associations of undertakings begin to jointly set wages for employees (so-called wage-fixing). Such actions can serve to collectively suppress wage growth or lower wages (e.g. during an economic crisis). Wages should be understood as all components of remuneration, including, for example, awards, performance allowances, duty allowances, bonuses.

Wage-fixing means that none of the undertakings making the arrangements will offer workers better wages – as a result, workers receive lower wages and the colluding undertakings eliminate the risk that a worker will leave having received a better offer from another undertaking (a competitor of these undertakings in the labour market). In the case of bonuses, wage-fixing may refer to the fact that in a given year none of the businesses will pay a bonus to employees, will pay them just a certain amount, or will pay them at a later point in time.

Since undertakings compete in the labour market for employees mainly through wages they offer (every employer wants to hire the best possible employee), anti-competitive wage-fixing concerns the basic parameter of competition, which is the wage ("price").

Such agreements are usually considered to have as their object the restriction of competition – neither UOKiK in administrative proceedings, nor the company's employees in civil proceedings (e.g. class action for damages) need to demonstrate the effects of the violation to prove its existence (although employees who seek damages need to prove loss).

These agreements may be considered as a violation referred to in Article 6.1 (1) of ACCP, i.e. price-fixing agreements.

EXAMPLE: WAGE-FIXING

Situation on the market. Archie is the head of HR in a major retail chain. For the past few months, the retail chain, for which Archie works, has been engaged in a price war with a rival retailer. A week ago, Archie's supervisor, who is a member of the company's board of directors, conveyed to Archie that the price war was over and that relations with the rival chain should now be more friendly. He also mentioned that Archie should think about how to prevent the wages of chain's employees from increasing, so that this can be reflected in operating expenses next year at the earliest.

Shortly after this conversation, Archie attends an industry conference. During a coffee break between conference panels, Archie has a conversation with Reggie, head of HR for a competing chain. At first the conversation is about general topics and the conference proceedings, but as time goes on Reggie begins to complain that the price war has negatively affected the market situation, in addition to which the employees of his network are demanding raises at an ever increasing rate.

Archie recalls the conversation with his boss about the fact that relations with the rival chain should now be more friendly and that raises for employees are currently not desirable. Archie tells Reggie that his network has a similar problem with wages, but that the company he works for is not going to raise them this year. Reggie is relieved by this information and says that in that case his network will also hold off on raises for as long as possible. Archie and Reggie agree that they will keep each other informed of further developments and that should the raises prove unavoidable, they will determine the amount of these raises and they will implement them at the same mutually agreed upon time.

EXAMPLE: WAGE-FIXING

What happened? In all likelihood, Archie and Reggie have entered into an anti-competitive wage-fixing agreement. Initially, Archie disclosed classified information as to the plans and future actions of the chain where he works in regard to wage policy to Reggie (who works at a competing chain). This information gives Reggie and the retail chain for which he is employed a better idea of what the competitor is doing and allows them to adapt. This action by Archie alone may raise concerns from the perspective of competition law.

In addition, having already received this information, Reggie confirmed that his chain would align its operations with those of its competitor, which from the perspective of competition law may further indicate that an anti-competitive agreement has been reached. Archie and Reggie then made straightforward arrangements to coordinate the two chains' policies. As a result of these actions, Archie and Reggie may have led the two chains to enter into an anti-competitive agreement and exposed them to antitrust liability for using competition-restricting practices.

7.2. NON-COMPETITION FOR EMPLOYEES

Undertakings or associations of undertakings may decide not to "poach" employees from each other (so-called no-poaching). Such actions can serve to eliminate competitive pressure between each other and remove the risk that a competitor will recruit the undertaking's employee – in return, the undertakings commits, for example, not to "poach" employees from their competitor.

Non-competition for employees may take different forms. Undertakings can agree among themselves, for example, not to actively solicit their employees (e.g. the recruiting department or hired employment agency will not contact a competitor's employees on social media to make them a job offer).

However, such arrangements can also take a more passive form, e.g. undertakings can agree that if they receive a resume from an employee of their competitor, they will not engage in a job interview with them or they will only have a sham interview, which will end with the candidate receiving information that the company is not interested in hiring them.

Similarly as in the case of wage-fixing, agreements on non-competition for employees may be considered as having as their object the restriction of competition – neither UOKiK in administrative proceedings nor the company's employees in civil proceedings (e.g. class action for damages) need to demonstrate the effects of the violation to prove its existence (although employees who seek damages need to prove loss).

These agreements may be considered as a violation referred to in Article 6.1 (3) of ACCP, i.e. market-sharing.

EXAMPLE: NON-COMPETITION FOR EMPLOYEES

Situation on the market. Veronica is the head of HR and a board member of a large IT company. At a recent industry event, Veronica met Betty, with whom she once attended the same university courses. Betty recently began working as head of HR at another IT company.

In the course of the conversation, Veronica jokingly throws in a comment that she hopes Betty now will not "poach" any of "her" employees. Betty jokingly replies that she will not, "unless they approach her themselves."
The conversation moves on to the topic of employee retention in companies. Veronica, as someone with greater experience in the industry, explains to Betty that although she was joking when she talked about poaching employees, the transition of employees between companies can be a problem and that in time Betty will probably have to face it as well. Betty, who has just started working in the industry, does not want to have a bad relationship with Veronica and, this time in a serious way, declares that she will not actively "poach" Veronica's employees. Veronica thanks Betty and declares that Betty can count on a similar favour in the future, once she has built her own team.

As they have renewed their acquaintance, Veronica and Betty meet privately on several occasions. Some time later, a resume from one of Veronica's employees arrives on Betty's desk. Betty does not want to tell Veronica directly who from Veronica's team wants to leave, because she feels that revealing personal information would be unethical and against her own company's data protection policy. However, she decides that it is appropriate to tell Veronica that she has received a resume from a person in Veronica's company. Betty sends a short message to Veronica, using Veronica's private phone number. Veronica thanks Betty and asks her to hold off on talking to this person, promising to return a similar favour in the future. Betty writes back that there is no problem and thanks Veronica for promising to return a similar favour in the future.

EXAMPLE: NON-COMPETITION FOR EMPLOYEES

What happened? In all likelihood, Veronica and Betty entered into an anti-competitive agreement not to compete for employees – this occurred when Betty declared in a serious way that she would not "poach" Veronica's employees, and Veronica tacitly accepted that declaration.

This agreement was initially limited to refraining from actively soliciting the competitor's employees. Later, the agreement was expanded to include non-competition also when it is the employees themselves who apply for the job.

The fact that Veronica and Betty were in contact during their private time is irrelevant here, as they were communicating on matters related to their work duties. As a result of these contacts, the companies where Veronica and Betty work may have become participants in an anti-competitive agreement and may be liable for using competition-restricting practices. In addition, Veronica, who is a member of the board of directors at the company where she works, could potentially be liable as a manager – she could face a fine of up to PLN 2 million.

The jokes that started the conversation between Veronica and Betty may not have been when the agreement was made. However, if UOKiK had found out about them without knowing Veronica and Betty's real intentions, it might have seen fit to initiate an investigation to determine whether the jokes remained merely a playful banter or whether an anti-competitive agreement has been made.

7.3. OTHER TERMS OF EMPLOYMENT

Undertakings or associations of undertakings may decide to agree on other terms of employment for employees.

This can apply to a wide range of benefits that can be included in a job offer or terms of employment, e.g. the number of training courses offered to employees, so-called employee benefits, the number of remote work days offered.

This type of agreements concerns the basic parameters of competition on the labour market. In consequence, they may be considered as having as their object the restriction of competition – neither UOKiK in administrative proceedings nor the company's employees in civil proceedings (e.g. class action for damages) need to demonstrate the effects of the violation to prove its existence (although employees who seek damages need to prove loss).

These agreements may be considered as a violation referred to in Article 6.1 (1) of ACCP, i.e. a violation concerning the price (to the extent that, for example, employee perks and benefits in the form of shopping vouchers can be considered as a component of the price) or other terms of purchase (in this case, the good that is subject to "purchase" is labour).

EXAMPLE: OTHER TERMS

Example. Mark, Aurelia and Anthony are journalists with many years of experience. Mark and Aurelia work at a daily and weekly newspaper, respectively, whereas Anthony is head of the editorial department at a radio station. All three began their careers in the 1990s, building their professional standing and climbing to higher positions.

All three meet at an industry event. In the course of the conversation, Mark begins to complain about the young workers' attitude to work. He recalls that when he started working, all the young people were present at work from morning until late in the evening, and no one complained about the hours. According to Mark, employees from the younger generation have become extremely demanding and do not appreciate the fact that they have the chance to work in reputable companies and learn from the most talented and accomplished people in the industry.

The three talking friends are approached by Octavia – Aurelia's friend. Octavia works in the human resources department at a TV station. Aurelia explains to her briefly that they were "just complaining about the work ethic of the younger generation," and returns to the topic initiated by Mark. Aurelia says that when she started her career, it wouldn't have crossed her mind to demand special treatment from her boss – she was content to learn from the best and diligently completed every task. Now, however, some employees are spamming her company's HR department with questions about whether they could spend more hours working remotely; every now and then they also demand new perks and benefits that are gaining popularity on the market – recently someone even "requested" the possibility to come to work with a dog. Aurelia has more serious problems on her mind and does not have the energy to think about how to regulate such issues in the company's internal documents. Aurelia reproaches Anthony that, in essence, his company is one of the troublemakers "spoiling" the market and encouraging the younger generation of workers by introducing new perks and benefits all the time – one of Aurelia's former employees has just left for Anthony's company.

Anthony argues that his company is trying to adapt to employee expectations and labour market trends. However, Aurelia points out that if all leading players in the industry had more responsible employee policies, there would be no such problems – the market is based on reputation and young employees will not quit en masse as "not everyone can be an influencer."

Mark agrees with Aurelia and proposes that, "on a test basis," all companies should begin to work together to develop employment policies in a "more responsible way." This is to include, in particular, jointly discussing plans to introduce new benefits, non-monetary benefits, and additional home office days – "so as not to surprise each other." Anthony is sceptical of the proposal, as his company is more exposed to employees transferring to new media outlets that publish social media content. Nevertheless, he reluctantly agrees to see what will come out of such a joint, unofficial policy, on a test basis..

EXAMPLE: OTHER TERMS

What happened? In all likelihood, Mark, Aurelia and Anthony have entered into an anti-competitive agreement regarding terms of employment other than wages. The companies they work for may have become participants in an anti-competitive agreement and may be liable for using competition-restricting practices. Octavia's company may also be involved in this agreement, despite the fact that Octavia did not speak throughout the entire conversation.

The first person to speak in a way that raises concerns from the point of view of competition law was Aurelia. This is because, she suggested, in the presence of representatives of other competing companies, what she believed would be the desired course of action for all companies with regard to employees. Mark then defined these actions in more specific terms by pointing out that the solution he presented could be implemented "on a test basis". Although Anthony was sceptical of the idea, he still accepted it explicitly.

Octavia made no comment throughout the conversation and only listened to what the others were saying. However, under competition law, not lending her voice to the conversation in these circumstances still raises serious concerns. That is because Octavia learned what other companies would be doing, which in turn means she could align her own company's actions with those of her competitors.

In addition, Octavia did not distance herself from the subject of the conversation (e.g. she did not say that the proposals formulated in the conversation might be illegal, that she did not want to take part in them, and that she had to disengage from the conversation). Had UOKiK learned that Octavia was present at this conversation, and in the absence of any other information about her company's actions, UOKiK could have concluded that her company should also be subject to investigation for suspected violations of competition law. UOKiK might want to investigate whether Octavia's silence during the conversation constituted participation in an anti-competitive agreement.

7.4. „UPS...”

Arrangements between undertakings regarding wages, non-competition for employees, and other terms of employment are associated with a high probability of violating competition law.[10]

This means that:

01 UOKiK can take action in such cases and impose fines

02 the upper thresholds of these fines have been discussed in section 11 of this document;

03 UOKiK may conclude that a violation has been committed in the relevant case, even if it did not entail any market effects (the conclusion of this type of agreement is a violation in itself);

04 the conclusion of this type of agreement may mean that it will be easier for claimants, primarily employees, to establish liability and seek damages from companies (employers);[11]

05 even if UOKiK does not conduct its own investigation, but a private lawsuit (such as a lawsuit by employees against their employer) has been brought in a case concerning a violation of competition law, UOKiK can present an amicus curiae opinion on the case, assisting the court in the interpretation of the provisions of competition law.[12]

10 See, however, section 9 and the so-called cooperative agreements discussed there.
11 This is because the conclusion of this type of agreement may be a violation of the law in itself.
12 See Article 31d of ACCP.

8. What else should you be careful about?

Employers may take actions the legality of which from the perspective of competition law may strongly depend on the context of the case.

An example of such action may be introduction of non-compete clauses to contracts with employees.

Non-competes and market dominants. In principle, the use of non-compete clauses in an employment relationship does not violate competition law (see section 9 of the document).

Nevertheless, non-compete clauses used by companies who hold a dominant position on the relevant market may attract the interest of UOKiK. This applies if their use exceeds beyond what is objectively necessary and if they are used to pursue market exclusion strategies. Such exclusionary strategies are aimed to eliminate competitors or prevent them from entering a market – an undertaking in a dominant position, such as a monopolist, tries to block access to the market and keep it for itself.

The above may be particularly true when the activity on a given market is dependent on access to highly qualified personnel, the supply of which on the market is very low. A situation like that can create opportunities for a dominant undertaking to close access to the market by setting disproportionately long periods, inadequate to a given situation, during which a highly skilled employee or group of employees will not be allowed to work for a competitor attempting to enter the market.

In this type of case, UOKiK may analyse whether the presence of such non-compete clause(s) is not an element of the anti-competitive strategy of an undertaking with a dominant position on the relevant market.

9. What else should be given due consideration?

There are certain actions taken on the labour market that literally relate to competition, but which are not necessarily the focus of competition law or do not necessarily constitute a violation of competition law.

Such activities include, for instance, lobbying efforts by employer unions, the introduction of non-compete clauses in contracts with employees, agreements between self-employed workers, and so-called cooperation agreements.

Lobbying by employers. Employers and employer unions can participate in the legislative process. Such activity may consist, in particular, in expressing views on the desirable amount of minimum wage or labour law regulations. Through this type of activity, employers can jointly present positions and agree on their actions vis-à-vis state bodies. Such activities, except in special circumstances, are not the focus of competition law and UOKiK.[13]

Non-compete clauses. It is common practice on the labour market to include non-compete clauses in contracts with employees. They are introduced primarily to protect the company's know-how. A non-compete clause inserted into an employee's contract may mean that, for a specified period of time after leaving the company, the employee may not take a job with a competitor of that company. An employee may also be required not to perform tasks for a competitor during the period of employment.

13 The special circumstances referred to above may concern specific cases of undertakings pursuing anti-competitive market strategies that also have the purpose of influencing the way public authorities act, see the judgment of the Court of Justice of 23 January 2018 in Case C-179/16, Hoffmann-La Roche, EU:C:2018:25, paragraph 95, in which the Court of Justice stated that in specific cases actions agreed by undertakings to deliberately mislead public authorities in the context of a broader anti-competitive strategy may be considered a violation of Article 101 of TFEU "by object.".

Insofar as such clauses are introduced into employment contracts as a result of unilateral actions by the undertaking (i.e. not agreed upon with other undertakings), they are outside the scope of competition law. This is because in such case they do not constitute an agreement between undertakings, but only between an undertaking and an employee. Under competition law, anti-competitive agreements require the participation of at least two undertakings.[14]

Insofar as clauses of this kind are inserted into contracts with individuals who are employees within the meaning of competition law, but who in practice are sole proprietors (see section 10), this type of clauses on non-competition do not necessarily have to constitute a violation of competition law. This is due to the fact that the said non-compete clause may constitute an ancillary provision in relation to the main subject of the contract. The main subject of the contract is to perform work similar to that which could be performed under an employment contract, and the non-compete plays a similar role to that of a classic employment relationship. In other words, if a non-compete is inserted, for example, by a software developer into a contract with an IT expert who operates a sole proprietorship, but in practice (for the purposes of competition law) acts as an employee – such a non-compete is not necessarily incompatible with competition law.

Consequently, this type of provision is generally not of interest to UOKiK.

Agreements between self-employed workers. Sole proprietors are undertakings within the meaning of competition law. When operating on the same market, such sole proprietors may additionally be competitors. This means that agreements between them can be considered as agreements between competitors.

14 It is worth to remember that a decision made by an association of undertakings is a special type of arrangement – the said decision may be an act of the association, but it remains related to the activity of undertakings in that association and is therefore considered an arrangement similar to an agreement.

At the same time, such individuals can enter into contracts with trading partners in conditions of highly disproportionate market power. These individuals may be in a situation where they find it necessary to agree on their actions vis-à-vis a trading partner in order to protect their rights on a similar basis to what workers do when they join trade unions.

Such coordination of activities does not necessarily constitute a violation of competition law or may not be a priority for UOKiK. Coordination of this kind is discussed in the European Commission's "Guidelines on the application of Union competition law to collective agreements regarding the working conditions of solo self-employed persons".[15]

These guidelines are not binding for UOKiK and (Polish and EU) courts. Nevertheless, UOKiK intends to apply similar principles for evaluating such agreements in its activities, particularly if UOKiK were to evaluate the case in parallel under Polish and EU law.

Cooperative agreements and labour cases. In special circumstances, it is possible that agreements between undertakings concerning employee wages or non-competition for employees can be recognised as permitted under competition law.

This may apply to situations where an agreement of this kind is ancillary to another legitimate venture of undertakings. For example, if competitors choose to cooperate as permitted under competition law, they may find it necessary to establish that employees participating in a joint project cannot be recruited by the competitor after the project is completed. This type of arrangement requires individual legal analysis as regards its necessity and close connection to a legitimate objective pursued by undertakings.

15 Communication from the Commission of 30 September 2022. "Guidelines on the application of Union competition law to collective agreements regarding the working conditions of solo self-employed persons" (2022/C 374/02).

10. “But they didn’t have an employment contract!”

Under competition law, the term “employee” applies to more than those employed under an employment contract.

Under competition law and for the purposes of this document, “employee” is understood to mean a person employed under a contract of employment, but may also include persons performing tasks for undertakings on other legal basis. From the perspective of competition law, an employee can be a person who performs tasks under a contract of mandate or a person who runs a sole proprietorship, but in practice acts like an employee within the meaning of labour law.

“Labour cases” under competition law are cases in which undertakings take actions prohibited under competition law with respect to or in connection with the employment of employees.

This means that the issues described in this document apply to a broader range of individuals than just employees and employee affairs as defined by labour law.

Under competition law, an employee and an employee case may be, for instance:

a case concerning persons performing manual labour and employed under an **employment contract** at an industrial plant

a case concerning persons performing tasks as a service under **contracts of mandate** in restaurants in a given city

a case concerning persons performing programming tasks for an IT company (video game, software developer) or professional sports in a sports club as part of a **sole proprietorship**

Restrictions on competition in labour cases first and foremost have a direct and adverse effect on the situation of employees. For this reason, it is beneficial for an employee to have information about what actions of undertakings may result in restrictions on competition.

11. "Say what? A fine up to 10% of the company's turnover and 2 mln for the CEO? You've got to be kidding me."

Undertakings face a fine that may amount up to 10% of turnover generated in the financial year preceding its imposition. The method for determining the amount of fine has been presented in a separate document published on the website of UOKiK.[16]

In the case of associations of undertakings, if the violation is related to the activities of its members, the fine may not exceed 10% of the total turnover of the members of that association operating on the market affected by the violation, generated in the financial year preceding the year in which the fine is imposed. This means that in the cases specified in ACCP, it is not the turnover of the association itself (e.g. from membership fees) that is taken into account, but also the turnover of its members.

Managers face a fine of up to PLN 2 mln for the types of anti-competitive agreements indicated in ACCP. The method for determining the amount of fine for managers has been presented in a separate document published on the website of UOKiK.[17]

16 Guidelines concerning the amounts of fines in cases related to infringement of the prohibition on the use of anti-competitive practices (2024).
17 Guidelines concerning the method for imposing fines on managers pursuant to Articles 106a and 111 of ACCP (2020).

12. “Who would need that? And why?”

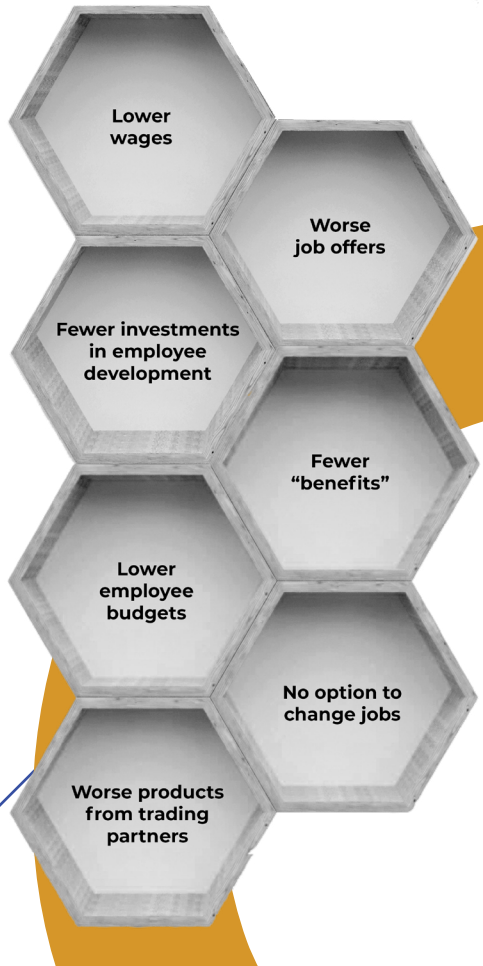
The essence of competition law is to ensure that activities on the market take place within the framework of so-called “effective competition” between undertakings. The existence of effective competition promotes better offers and products for consumers as well as the development of entrepreneurship, followed by an increase in the quality of life and economic growth.

Restrictions on competition in labour cases have a negative impact on both the situation of workers and the economic growth rate.

From the perspective of employees, restrictions on competition on the labour market can mean that they receive lower wages than they could have received if the restriction of competition did not exist. It also means lower budgets of employees, who in other market contexts (“after work”) are already acting as consumers. Restrictions on competition on the labour market can also mean that employees receive less attractive job offers or are denied jobs altogether.

From the perspective of undertakings, restrictions on competition on the labour market may indirectly affect the possibility of business growth. If a group of trading partners of a given undertaking restricts competition among themselves on the labour market, it may mean that the overall level of competition between them is also reduced. This, in turn, affects the quality of their products and services and, consequently, the situation of the undertaking which contracts with this group of trading partners. Just as consumers care about undertakings competing with each other (as the consumer will then receive a better product), it should be important for an undertaking to have their trading partners compete with each other, as they will then receive better intermediate products for use in their own business operations.

Competition restrictions in labour cases result in many negative consequences.



13. “Well, okay, what next?”

Different people reading this document may be interested in taking different actions in the context of the issues discussed above. Below we present possible actions that may be taken by different groups of people.

In-house lawyers. If you are an in-house lawyer for a business and have read this document, it is worthwhile to analyse whether the company you work for may be exposed to competition law violations in connection with labour cases. The document compiled by UOKiK contains only basic information, since the specifics of each company’s operations and the profile of its employees vary greatly – as an in-house lawyer, you may be in a better position to assess which areas of your company’s operations require the most attention. You might also consider alerting the company’s board of directors to the existence of such legal risks or organise internal training in that regard. Depending on whether you work in a large or small or medium-sized enterprise, you may additionally want to consider taking the steps mentioned below.

Large enterprises. If you are a member of the board of directors of a large company, you may want to consider whether the legal situation in your company warrants adequate training for your employees. Large enterprises usually implement so-called compliance programmes. You may therefore want to consider whether to also introduce a segment related to competition law as part of your compliance programme. If you already have a compliance programme in place with regard to competition law, you may want to consider supplementing it to cover staff-related matters. You might, for example, consider whether your HR and recruiting staff should also complete training in the area of competition law.

Small and medium-sized enterprises. If you are a small or medium-sized enterprise and have read this document, it is worth to consider whether the scale and type of your business make it likely that you may encounter competition law violations in the course of your business. If the scale of your business warrants it, you may want to consider implementing a compliance programme – as is often the case with the largest enterprises. However, if you assess that your type of business does not warrant the implementation of such programmes, it is worthwhile to at least distribute the document developed by UOKiK to other employees of your company, especially HR and recruitment staff. You can post a link to the UOKiK document on your intranet or inform people of the existence of the document developed by UOKiK after conducting mandatory health and safety training when you hire new employees. The more your employees (especially in senior positions) are aware of competition law, the less likely they are to violate it – this in turn reduces the risk of legal liability for your company.

Employers' unions. If you represent an employer union, it is worth remembering that the union itself is an association of undertakings and that its actions may violate competition law. The comments made above with regard to large, small and medium-sized enterprises therefore also apply to associations of undertakings. However, employer unions can support employers in the preparation of documents that expand and detail the information contained in the document prepared by UOKiK – this can include, for example, the specifics of a particular industry. The development of such documents with legal advice provided by the association of undertakings can, in particular, reduce compliance costs borne by small and medium-sized enterprises.

Employees and trade unions. If you are an employee or a union member and you read this document, you may want to consider disseminating it further to other employees as well as alerting your employer to its existence. Knowledge of this document may allow you to more easily identify violations of the law. At the same time, your employer's familiarity with the document can make it easier to prevent a violation. It is worth to remember that a violation of competition law by an employer may result in a fine being imposed on them by UOKiK – the fine will put a strain on the employer's budget, which in turn may be reflected in the employee's situation. It is best for everyone, including UOKiK, when undertakings act in accordance with the law and when there are no violations at all. It is therefore important that your employer is aware of this document and the applicable law.

14. "What to do in the event of a violation?"

Depending on who identifies a possible violation of competition law in connection with labour cases, different paths of action are possible.

Tip-offs. UOKiK accepts all kinds of reports (including anonymous reports), both electronically (via UOKiK's whistleblowing platform) and in the form of official written reports. This path of action is recommended in particular for employees who believe that a violation may have occurred and who may be affected by that violation.

Non-leniency whistleblowers. UOKiK also accepts anonymous reports from non-leniency whistleblowers. The said whistleblower may be, for example, an employee of the company who is not necessarily affected by the relevant violation, did not commit the violation themselves, but knows that it is taking place. This could be, for example, an employee of the HR department or a former employee of the company who knows that the violation occurred because they witnessed it. This type of whistleblower can report a violation anonymously – in such case UOKiK does not learn the identity of the whistleblower, but can start investigating the case.

Leniency. For undertakings (e.g. companies) who are involved in and may be responsible for an anti-competitive agreement as well as for managers who may be responsible for such an agreement, the appropriate way of establishing contact with UOKiK is to file an application for fine immunity or an application for fine reduction (leniency programme).[18]

Filing an application for leniency means that a company or its manager can avoid a fine, if they cooperate with UOKiK. This path applies only to anti-competitive agreements, as only these types of violations are covered by the leniency programme. In particular, a manager who may be liable for entering into an anti-competitive agreement should familiarise themselves with the terms of the leniency programme, rather than simply report the violation anonymously. In the case of an application for leniency, a manager is statutorily guaranteed the opportunity to obtain either a fine immunity or fine reduction (provided that the conditions indicated in ACCP are met) – in the case of an anonymous report, these guarantees do not apply.

The contact information of UOKiK and more detailed information about communication methods can be found at: uokik.gov.pl.

18 See Articles 113a to 113l of ACCP.

Zgłoś naruszenie prawa konkurencji na rynku pracy

Platforma dla anonimowych sygnalistów

uokik.whiblo.pl

Office of Competition and Consumer Protection

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