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Should No-Poaching Agreements Be Prohibited in Corporate Transactions? From the View of Taiwanese Competition Law

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Abstract

No-poaching agreements (NPAs) prohibit parties from recruiting each other's employees. While the agreements can prevent unethical recruitment in corporate transactions, they reduce external job options for laborers, thereby significantly harming their bargaining power. Yet, employment law and labor law appear to face difficulties of addressing the problem. This article seeks to tackle the problem by examining the legality of NPAs under Taiwanese competition law. With reference to the major jurisdictions and Taiwan's competition law and previous cases, this article clarifies the relevant market of NPAs and their anticompetitive harms and

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procompetitive benefits. It argues that NPAs should be prohibited under competition law, even to protect parties' interests in corporate transactions, because organizing an independent team to manage employee information is a less restrictive way to achieve the same goal.

Keywords: No-poaching Agreements, Restriction of Competition, Corporate Transaction, Unethical Recruitment, Labor Protection

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交大法學評論，第 13 期，頁 45（2023）

因併購交易簽訂的禁止聘僱條款是否合法？從臺灣競爭法角度觀之

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摘　要

在併購交易的協商過程中，雙方或簽訂禁止聘僱條款，限制一方於交易過程進行中（或結束後）聘僱他方之員工。該條款固能防止因併購交易發生的惡意招募行爲，但也嚴重限制員工到他方公司任職的轉職自由，使員工與現在雇主在薪資福利的協商上陷於談判劣勢。有鑑於現有勞動法規似未能有效規範此問題，本文嘗試從競爭法角度探討該條款的合法性。透過比較分析外國及臺灣的競爭法及相關案例，本文釐清禁止聘僱條款的相關市場範圍、限制競爭與促進競爭效果。本文主張爲保障弱勢的勞工族群，該條款須爲保障併購交易雙方利益且損害最小的方法時，方能認爲該條款的促進競爭效果優於限制競爭效果。在盡職調查過程中委由獨立團隊閱覽員工資訊，不須限制勞工的轉職自由即能避免經營團隊利用該等資訊惡意聘僱他方員工，與禁

* 日本京都大學法學院及白眉中心助理教授；美國聖路易華盛頓大學法學博士。本文感謝和久井理子教授分享其透過競爭法處理勞工保障議題的經驗及日本學術振興會與京都大學白眉中心的研究支持。本文亦感謝匿名審查委員對於本文的諸多寶貴建議及所有編輯與廖晨竹同學的協助。

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止聘僱條款相較應屬損害更小的方法。因此除非個案中組成獨立團隊有其困難，應認禁止聘僱條款違反競爭法。

關鍵詞：禁止聘僱條款、限制競爭、併購交易、惡意聘僱、勞工保護

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1. INTRODUCTION

Laborers are a critical driver of the economy; however, they have not equally shared the fruits of economic growth as reflected in salaries. Poor salaries discourage talented laborers from staying in a country, thus harming the country's workforce, and this is particularly true in Taiwan.[1] While substantial efforts have been made to address this problem,[2] it remains a significant issue.

Prior literature highlights that poor salaries are commonplace with anticompetitive behaviors.[3] This can include no-poaching agreements (NPAs), which are commonly employed by firms to suppress the ability of laborers to request a raise.[4] NPAs are "agreements among employers not to recruit certain employees or not to compete on terms of compensation."[5] For example, Adobe was found to have

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1 *See* Michael C.Y. Lin, *Attracting and Retaining Talent: Taiwan's Challenges and Opportunities Amid COVID-19*, TAIWAN INSIGHT (Mar. 15, 2021), https://taiwaninsight.org/2021/03/15/attracting-and-retaining-talent-taiwans-challenges-and-opportunities-amid-covid-19/.

2 *See e.g.*, DEP'T OF JUST. (DOJ) ANTITRUST DIV. & FED. TRADE COMM'N (FTC), ANTITRUST GUIDANCE FOR HUMAN RESOURCE PROFESSIONALS (2016), https://www.justice.gov/atr/file/903511/download; WHITE HOUSE, NON-COMPETE AGREEMENTS: ANALYSIS OF THE USAGE, POTENTIAL ISSUE, AND STATE RESPONSES (2016), https://obamawhitehouse.archives.gov/sites/default/files/non-competes_report_final2.pdf; JAPAN FAIR TRADE COMM'N COMPETITION POLICY RESEARCH CENTER (JFTC RESEARCH CENTER), REPORT OF THE STUDY GROUP ON HUMAN RESOURCE AND COMPETITION POLICY (2018), https://www.jftc.go.jp/en/pressreleases/yearly-2018/February/180215_files/180215_3.pdf.

3 *See* Eric A. Posner & Cristina A. Volpin, *Labor Monopsony and European Competition Law*, 4-2020 CONCURRENCES, Nov. 2020, at 1, 3-4, 6, 7-8. The authors pointed out that laborers are deprived due to anticompetitive agreements, unilateral conducts, and mergers that distort competition in the employment markets.

4 *See* Organisation for Economic Co-Operation and Development (OECD), *Competition in Labour Markets*, at 28 (2020), https://www.oecd.org/daf/competition/competition-in-labour-markets-2020.pdf.

5 *See* Posner & Volpin, *supra* note 3, at 4; *see also* DOJ & FTC, *supra* note 2, at 3. A seemingly-similar, but essentially distinctive agreement is a no-compete agreement achieved

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reached agreements with technology companies in Silicon Valley not to poach, solicit, interview, and hire each other's employees.[6] Arizona Hospital and Healthcare Association were found to set a uniform bill rate schedule for temporary and per diem nurses.[7] Essentially, NPAs protect firms from competing with each other for employees by offering greater employee benefits.[8]

NPAs are problematic as they hamper laborer mobility among firms, thus putting them in an inferior bargaining position with their current or prospective employers. Bargaining power (an individual's subjective ability to negotiate an agreement) and bargaining leverage (an individual's objective outside options) are closely linked to employment negotiation.[9] Due to binding by NPAs, firms are not

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by employers and employees to prohibit employees from working for the employers' competitors after leaving. *See* Organization for Economic Co-Operation and Development (OECD), *Competition Concerns in Labour Markets – Background Note*, at 31, DAF/COMP(2019)2 (May 13, 2019), https://one.oecd.org/document/DAF/COMP(2019)2/en/pdf. Both NPAs and no-compete agreements weaken laborers' ability to switch jobs; however, only NPAs are entered into by competing firms and thus should receive stricter scrutiny.

6 United States v. Adobe Sys., Inc., No. 10-CV-1629, 2011 WL 10883994, at *5 (D.D.C. Mar. 18, 2011). NPA content may vary depending on parties' needs in specific cases. For example, NPAs can be written as follows: (1) the parties "not cold call each other's employees;" (2) the parties "notify each other when making an offer to an employee of the other" parties; and (3) the parties "making the offer to the other [partie's] employee not counteroffer above its original offer." United States v. Lucasfilm, Inc., No. CIV.A. 10-02220 RBW, 2011 WL 2636850, at *1 (D.D.C. June 3, 2011).

7 U.S. and State of Arizona v. Arizona Hospital and Healthcare Association and AzHHA Service Corp., No. CV07-1030-PHX, slip op. at 4-7 (D. Ariz. Sept. 12, 2007).

8 *See* OECD, *supra* note 4, at 28.

9 *See* John F. Nash, *The Bargaining Problem*, 18 ECONOMETRICA 155, 155 (1950). For reasons of why laborers' bargaining power is suppressed by market structure, *see* C. Scott Hemphill & Nancy L. Rose, *Mergers that Harm Sellers*, 127 YALE L.J. 2078, 2078-93 (2018).

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able to hire other firms' employees even if the applicants are qualified and passionate about the position. Accordingly, these agreements eliminate alternative job options for laborers and strengthen a current employer's bargaining power.[10]

NPAs are also problematic due to the significant potential harm to consumers. Lower salaries for laborers cut production costs but also decrease the number of laborers who are willing to work,[11] and can contribute to a reduction in market supply. Lower market supply strengthens upward pressure on product prices and is reflected in the prices consumers pay for products.[12]

Unfortunately, neither employment law, labor protection law, nor consumer protection law can adequately address this problem. Employment law aims to protect laborers' rights from potential infringement by employers.[13] Yet, NPAs rarely exist in employment contracts or affect the rights written in employment contracts. This fact renders employment laws less effective. Labor law is enacted to advocate for laborers' collective rights to bargain with employers.[14] But rare empirical evi-

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10 *See* ALAN B. KRUEGER & ERIC A. POSNER, A PROPOSAL FOR PROTECTING LOW-INCOME WORKERS FROM MONOPSONY AND COLLUSION 6 (2018), https://www.hamiltonproject.org/assets/files/protecting_low_income_workers_from_monopsony_collusion_krueger_posner_pp.pdf.

11 *See* Organization for Economic Co-Operation and Development (OECD), *Competition Policy for Labour Market – Note by Herbert Hovenmakp*, at 2-3, DAF/COMP/WD (2019)67 (Sept. 17, 2020), https://one.oecd.org/document/DAF/COMP/WD(2019)67/en/pdf.

12 *Id*.

13 This regulatory intent can be found in Article 1 of the Labor Standards Act in Taiwan, which stipulates that "[t]he Act is enacted to provide minimum standards for working conditions, protect workers' rights and interests, strengthen employee-employer relationships and promote social and economic development."

14 Article 1 of the Collective Agreement Act make it clear that the Act aims to "regulate the bargaining procedures and effect of collective agreement, stabilize labor relations, promote labor-management harmony, and protect rights and interests for the labor and the management."

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dence suggests that laborers exercise their collective bargaining power to prevent NPAs in Taiwan. Consumer protection law aims to eliminate asymmetrical risk[15] and information asymmetry[16] between consumers and sellers. But it is ill-suited to address problems caused by NPAs as there are no deceptive activities involved, and because proving the causation of harm between NPAs and the final price is practically impossible for consumers. Therefore, an alternative approach from another field of law is needed.

To address this regulatory gap, this article employs a competition law approach to explores a normative question: Should NPAs be prohibited under Taiwanese competition law—the Fair Trade Act (FTA)? The competition law analysis begins by defining the relevant market. Article 15 of the FTA forbids competing firms from engaging in any concerted action. The Article's text clearly indicates that it only applies to concerted actions between competing firms, so determining whether the parties in NPAs are competitors in the same market is the initial step in applying the Article. Subsequently, because competition law only prohibits behaviors that harm market competition,[17] it is important to examine NPAs' potential

15 For example, Article 7 of the Consumer Protection Act requires traders to "ensure that goods or services provided meet and comply with the contemporary technical and professional standards with reasonably expected safety requirements when placing the goods into the stream of commerce, or at the time rendering services." This is because consumers are generally incapable of ensuring the sources and quality of the products. Thus, Article 7 imposes risks on traders that are equipped with more fabulous experience and opportunities to ensure products' origin and quality.

16 For instance, Article 13 of the Consumer Protection Act demands traders to "express the standard terms and conditions in full." Article 14 further rules that "[f]or terms and conditions not specified in standard contracts and not foreseeable by the consumers under normal circumstances shall not constitute as part of the contract." The Articles intend to ensure that consumers receive sufficient information to make informed decisions.

17 *See* HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY THE LAW OF COMPETITION AND ITS PRACTICE 254-55 (5th ed. 2016).

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harm to the market. Finally, this article explores potential justifications for NPAs that produce greater procompetitive benefits than anticompetitive harms. This research specifically focuses on NPAs in corporate transactions[18] as this has been the subject of questions in congressional hearings,[19] and is involved in critical processes of reallocating resources and fostering research and development (R&D).[20]

With the analysis process in mind, three specific sub-questions are posed to answer the main question: (1) How is the relevant market of NPAs defined? (2) What economic harms to the market are generated by NPAs? (3) Where NPAs are found to harm the market, do procompetitive benefits produced by NPAs in corporate transactions adequately justify the harms?

To answer the abovementioned questions, this research refers to the United States (US), European Union (EU), and Japan's regulations and cases for discussion. It suggests a clearer view on regulating NPAs under the FTA for the courts and the main Taiwanese competition law enforcer, the Taiwan Fair Trade Commission (TFTC). It also provides a basis for further academic discussion on the interaction of competition law and labor protection.

The remainder of this article is divided into three parts. Section Two defines the relevant market of NPAs (question one). Section Three explores the anticompe-

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18 The term corporate transactions used in this article refers to mergers, acquisitions, divestment, and transactions engaging in corporate reorganization.

19 It was reported that Citi Bank Group was planning to sell its business of individual financial services in Taiwan and required potential buyers to sign NPAs. Congressmen questioned whether the agreement violated Article 15 of the FTA and requested the TFTC launch an investigation and report the results within two months. *See* Yu-Xuan Lin (林育瑄), *Suspicion of Conspiracy of Citi's Sale of Individual Finance Service (花旗售消金涉聯合行為　立委要公平會 1 個月給報告)*, THE CENTRAL NEWS AGENCY (中央通訊社) (Nov. 10, 2021), https://www.cna.com.tw/news/afe/202111100237.aspx.

20 *See* YIH-NAN LIAW (廖義男), FAIR TRADE LAW (公平交易法) 247-49 (2021).

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titive harms and procompetitive benefits of NPAs in corporate transactions (questions two and three), and Section Four offers concluding remarks.

2. THE RELEVANT MARKET OF NPAS

Let's start with defining the relevant market of NPAs. Article 5 of the FTA defines a relevant market as "a geographic area or a coverage wherein enterprises compete in respect of particular goods or services." That being said, two firms producing competing products form a single relevant market; by contrast, two firms supplying non-competing products constitute two separate relevant markets. Article 15 of the FTA only applies to agreements reached by competing firms within a single relevant market.

Beyond that, an accurately defined market enables competition law enforcers to analyze the alleged firm's market power, "the power to raise prices above competitive levels without losing so many sales that the price increase is unprofitable."[21] The extent of market power is crucial to deciding the alleged activity's market impact.[22] Pursuant to Article 3 of the Principles of the Fair Trade Commission Regarding the Definition of Relevant Markets (Market Definition Guideline),

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21 *See* HOVENKAMP, *supra* note 17, at 106-07; *see also* Fortner Enterprises, Inc. v. US Steel Corp., 394 U.S. 495, 503 (1969); Ball Memorial Hospital, Inc. v. Mutual Hospital Insurance, Inc., 784 F.2d 1325, 1335 (1986). The EU holds a similar view as the US courts, defining market power as "capable of profitably increasing prices above the competitive level for a significant period of time does not face sufficiently effective competitive constraints and can thus generally be regarded as dominant." *See* Guidance on the Commission's Enforcement Priorities in Applying Article 82 of The EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings, para. 11. For approaches of assessing a firm's market power, *see* Shin-Ru Cheng, *Approaches to Assess Market Power in the Online Networking Market*, 22 COLUM. SCI. & TECH. L. REV. 231, 235-39, 252-59 (2021).

22 *See* RICHARD WHISH & DAVID BAILEY, COMPETITION LAW 187-88 (9th ed. 2018); LIAW (廖義男), *supra* note 20, at 111.

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the product market and the geographic market are two factors commonly used to define a relevant market.[23]

2.1 Product Market

The product market is the first factor of defining a relevant market. Pursuant to Article 2(4) of the Market Definition Guideline, the product market is defined as a market consisting of highly substitutable products or services by functions, features, purposes, or prices. Put simply, a product market looks for the substitutability of two products in the eyes of consumers.[24] Article 4 of the Market Definition Guideline suggests indicators for assessing product substitutability, including price fluctuation and elasticity between products, product traits and purposes, and switching costs between products.

Beginning with price fluctuation and elasticity between products, the Small but Significant and Non-transitory Increase in Price (SSNIP) test is commonly used to assess product substitutability. This test examines whether consumers would switch to other products if a product's price is raised by, for example, five percent.[25] If so, the two products are considered substitutable and therefore should be included in a relevant market.[26]

Some scholars have suggested the SSNIP test to define the relevant market of NPAs.[27] That is, assuming a firm reduces employees' salaries by five to ten per-

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23 Article 3 of the Market Definition Guideline suggests that "[t]he Commission defines the scope of Relevant Markets from the perspective of Product Market and Geographic Market; additionally, depending on concrete cases, the Commission also measures the impact of time factors on the delineation of Relevant Markets."

24 *See* HOVENKAMP, *supra* note 17, at 122.

25 *Id*. at 111-14.

26 *Id*.

27 *See e.g*., Suresh Naidu, Eric A. Posner & E. Glen Weyl, *Antitrust Remedies for Labor Market Power*, 132 HARV. L. REV. 537, 574-76 (2018). The authors call the modified SSNIP

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cent, a significant amount of switch indicates the two firms are competitors and thus should be included in a relevant market.[28] However, this approach is weakened by its nature. Besides amount of salary, laborers are subject to more complicated factors in deciding whether to work for or leave a firm.[29] A survey of recent college graduates indicated that in addition to salary, they consider factors such as work-life balance, friendliness of the working environment, and the social responsibility and morality of a firm.[30] Consequently, the SSNIP test defining the relevant market for standard products is somehow limited in the case of NPAs.

Next, like traits and purposes of products, the value of laborers' performance to firms are helpful indicators of determining whether two firms should be included in a relevant market.[31] By this factor, two firms could be considered competitors when a laborer's performance produces equivalent value for both firms. For illustr-

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test as "Small but Significant and Non-transitory Decrease in Wages (SSNDW) Test." *See also* Ioana Marinescu & Herbert Hovenkamp, *Anticompetitive Mergers in Labor Markets*, 94 INDI. L.J. 1031, 1048-50 (2019).

28 Naidu et al., *supra* note 27. The authors call the modified SSNIP test as "Small but Significant and Non-transitory Decrease in Wages (SSNDW) Test." *See also* Marinescu & Hovenkamp, *supra* note 27.

29 A survey conducted by 104 Job Bank, one of the largest job-matching platforms in Taiwan, found that apart from salary and employee welfare, productive communication among colleagues, clear management policies, and balance between personal interests and work are factors that job seekers look closely when selecting prospective employers. *See What Factors Matter to Job Seekers? Salary, Interpersonal Relationships, and Job Stability Ranked Top Factors (員工工作價值重要度認知：薪酬最重要、組織安定與人際關係次之 | 2021 員工 C.E.O.工作價值認知調查報告)*, 104 JOB BANK (Jan. 1, 2022), https://pro.104.com.tw/vip/preLogin/recruiterForum/post/53851.

30 *See The Most Desired Companies for Young Job Seekers: Release of Ideal Employers Ranking in 2021 (年輕人最想去哪些公司上班？2021 理想雇主排名揭曉)*, MANAGER (經理人) (Aug. 3, 2021), https://www.managertoday.com.tw/articles/view/63487.

31 *See e.g.*, Marinescu & Hovenkamp, *supra* note 27, at 1048. The authors suggested that "[t]he boundaries of labor markets are driven mainly by employee skills or training."

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ative purposes, this article roughly identifies three groups of employees in a firm: managers, professionals, and support staff. Generally, specialized laborers fall into a narrower product market; conversely, general-skilled laborers constitute a broader product market.[32]

Managers generally refer to those who deal with long-term plan development, corporation management, and representation of a firm, such as a board of directors who possess specific industry knowledge and management skills. Consequently, a manager who successfully runs a firm in Silicon Valley may not be able to do the same job in the traditional banking industry. In this respect, technology firms and banks cannot form a product market since they are not competing for managers.

Professionals commonly refer to those who possess specific professional knowledge, for example, designing, manufacturing, and marketing products, such as engineers and data scientists. This type of labor involves skills that are widely-applicable to various industries, and can therefore provide similar-value-performance in several industries. For example, in the eBay case, the court found online auction site eBay and business software developer Intuit were within a relevant market of NPAs because computer engineers at eBay could apply their programming skills and bring the same value to Intuit, although the two firms have no competitive relationship of selling products.[33]

The term of support staff generally means those who provide technical support to maintain a firm's daily operations. Unlike professionals, support staff are not usually required to possess industry-specific knowledge, but instead provide general support services to a firm. Thus, a wider range of firms that need general operational services would be included in a single relevant market for support staff.

The last factor in defining the product market of NPAs is switching costs.

32 *See* Naidu et al., *supra* note 27, at 575.

33 State of California v. eBay, Inc., No. 5:12-CV-05874-EJD, 2014 WL 4273888, at *2 (N.D. Cal. Aug. 29, 2014).

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Switching costs refer to "costs that are incurred when switching from one supplier of a particular good or service to another supplier, including financial costs and the value of users' time."[34] In cases where switching costs among firms are unreasonably high, the firms can be deemed to be in separate relevant markets. This is because, from a laborer's perspective, high switching costs lead the two firms to become less substitutable. To measure switching costs, the three categories used to assess the value of a laborer's performance are suggestive. For instance, a manager who possesses years of experience in a law practice could service a legal professional's position. Yet, this switch would cause significant depreciation of the manager's legal proficiency, which reflects a significant depreciation of salary. Hence, considering this substantial switching cost, two firms that offer inequivalent job opportunities are not substitutable, accordingly should be defined as two relevant markets.

Briefly, firms that evaluate the performance of a certain group of laborers as similar, and where switching between the firms would not generate substantial switching costs, can be defined as a relevant market regardless of the firms' industries.[35] For practical purposes, the Standard Occupational Classification System is useful for determining substitutability among positions.[36]

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34 See Aaron S. Edlin & Robert G. Harris, *The Role of Switching Costs in Antitrust Analysis: A Comparison of Microsoft and Google*, 15 YALE J.L. & TECH. 169, 169-76 (2013).

35 *See* DOJ & FTC, *supra* note 2, at 2 ("[F]irms that compete to hire or retain employees are competitors in the employment marketplace, regardless of whether the firms make the same products or compete to provide the same services.").

36 *See* Ioana Marinescu & Eric A. Posner, *Why Has Antitrust Law Failed Workers*, 105 CORNELL. L. REV. 1343, 1349-53 (2020). For instance, the Category initially defined managers and professionals (e.g., lawyers) are different occupational categories. This determination is helpful for the TFTC to conclude two relevant markets when NPAs target managers and professionals. Yet, the Category should not be treated conclusively for market definition purposes because, on some occasions, two categories may overlap. In these cases, the

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2.2 Geographic Market

The geographic market is another crucial factor to define a relevant market. Article 2(5) of the Market Definition Guideline defines a geographic market as an area where buyers can easily switch to other suppliers who offer alternative products or services. Article 5 of the Market Definition Guideline continues suggesting factors that define a geographic marker, including the cost of transportation, product traits and purposes, the convenience of accessing products, consumers' shopping area selection in response to price changes, and so on. As some of these factors are product-focused, this section will only discuss those that are closely relevant to laborers.

Transportation costs refer to the efforts and expenses generated by commuting from a place to another place. In NPA cases, transportation costs consider the commuting costs of laborers between areas, including the price of a ticket, time, and convenience.[37] Transportation costs, however, are not a persuasive reason to conclude that the two cities in Taiwan are two geographic markets because the public transportation system, including buses, railways, and high-speed rail, offers frequent transportation services at an affordable cost for commuters between major cities. Similarly, commuting time plays a minor role in defining a geographic market in Taiwan, as traveling between cities can be within a few hours by public transport in the country.

The second essential consideration is the features of a city or an area. Unlike

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TFTC needs to apply the rule of thumb for appropriate market definition. For example, in determining whether banks and law firms are competitors for legal professionals, the answer is likely to be positive as many chief legal officers of banks are also lawyers. But an adverse conclusion could be drawn under the Category where lawyers and managers are put in different categories.

37 *See* Marinescu & Hovenkamp, *supra* note 27, at 1048.

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products that perform the same functions wherever they are used, location is closely linked with laborers' career development, such as diversity of available careers, the prospects of industries, and chances for promotion or switching jobs. For instance, lawyers in international commercial cities, possess greater opportunities for handling international transaction cases and thus earning higher incomes; however, they potentially suffer from higher living costs. Hence, location can strongly affect lawyers' willingness to move to non-capital cities. Considering the differences in industrial features among cities, it is proper to define Taipei and other cities as separate geographic markets.

Further, working locations also affect laborers' daily life in various ways. This includes basic life maintenance (e.g., living costs, medical service availability, and child education facilities), fulfillment-pursuing activities (e.g., community involvement, personal habits, and career development), family-maintenance activities (e.g., children's education and original family's support), and social networking activities. Each city or area has its regional features. For example, international commercial cities are suitable for those pursuing career development; conversely, other cities could be more suited for people seeking greater work-life balance. Considering these regional divergences, capital cities and non-capital cities should be defined as separate geographic markets.

Lastly, the nature of the occupation is another critical element in defining the geographic market. Generally, the demand of high-skilled occupations (e.g., professors, doctors, and lawyers) is more likely to be nationwide, while the demand of low-skilled jobs tend to be area-specific. For example, an engineering professor can teach dynamics at universities in two distant cities because the universities are willing to offer similar recruitment terms to the professor who is one of a few qualified experts in the field. By contrast, a low-skilled job featuring poor payment and high substitutability is generally bound to local job networks. Further, moving to a new city is particularly costly for low-skilled laborers because they potentially

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have limited access to family-support services (e.g., housing, child-care and elder-support services) which further binds them to the local job market.[38] Thus, the geographic market of high-skilled jobs is generally broader than that for low-skilled jobs.

In summary, the relevant market of NPAs consists of substitutable firms where laborers can freely switch jobs and still contribute similar-value performance, and with similar geographic markets with respect to regional features and the nature of the jobs. Applying the rule to the Citi Bank Group case in Taiwan, given the NPAs at issue restrict financial institution buyers from recruiting Citi's managers or data scientists with expertise in developing fintech services, they are within a relevant employment market.

3. NPAS' ECONOMIC EFFECTS ON THE RELEVANT MARKET

3.1 Anticompetitive Harms of NPAs

Based on the defined relevant market, the next step of competition law analysis is to examine the economic effects of the alleged behaviors. This section discusses NPAs' anticompetitive harms by examining both input and output markets. The input market is where laborers are hired for production, and the output market is where products are sold to consumers.

NPAs can harm laborers in the input market in two ways. Firstly, in an output market, deadweight loss is generated when suppliers set prices above the marginal costs of production, resulting in reduced access to products for those unwilling or unable to pay the price above marginal costs.[39] The same theory applies to an input market. Firms offering salaries below marginal profits of production can lead to

38 *See e.g.*, Naidu et al., *supra* note 27, at 555.

39 *See* Hemphill & Rose, *supra* note 9, at 2083.

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production losses because laborers who expect a salary above the fixed salary but below marginal profits of production become unemployed.[40] Fewer laborers engaging in productive activities reduce the amount of production. Production loss occurs due to the difference between the actual amount of production and that in the absence of NPAs.[41] Secondly, poor salaries disincentivize laborers from investing in skill-development and training, which eventually lowers overall productivity.[42]

NPAs may also damage consumer welfare in the output market. Generally, less investment in laborers leads to lower quantity and quality of production. With respect to quantity, a decrease in the number of laborers results in a reduction of product supplied into markets,[43] and reduced supply can then raise product prices for end consumers.[44] Pertaining to quality, insufficient investment in recruitment or employee training can have disastrous results. For instance, to save labor costs, airlines could recruit less qualified or an inadequate number of technicians, which then adversely impacts the quality of airplane maintenance and endangers flight safety.

After identifying the harms of NPAs, a subsequent issue is whether a firm can argue that the NPAs are not harmful since they reduce the price of the product sold to consumers.[45] In the US, a series of judicial decisions have clearly rejected this argument, holding that the efficiency gain proposed to justify the alleged activity

40 *Id*. at 2083-84; *see also* Naidu et al., *supra* note 27, at 558.

41 *See* Marinescu & Hovenkamp, *supra* note 27, at 1041-42 ("[I]f the labor market is perfectly competitive, wages are equal to marginal productivity and there is no incentive for companies to hire fewer workers to make higher profits by depressing wages"; "monopsony power exists, and that workers are paid below their marginal productivity").

42 *See* Hemphill & Rose, *supra* note 9, at 2083; *see also* Naidu et al., *supra* note 27, at 538.

43 *See* Marinescu & Hovenkamp, *supra* note 27, at 1038.

44 *Id*. at 1062.

45 *See* Hemphill & Rose, *supra* note 9, at 2105.

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cannot be produced by an anticompetitive behavior[46] or be based on the argument that competition is unreasonable.[47] Conversely, the efficiency defense can be successful only if parties prove that NPAs can increase output even when hiring fewer laborers.[48] To the author's best knowledge, there is little literature discussing this issue under the FTA. Indeed, this defense shall not be allowed under the FTA because the Act prohibits both behaviors that cause actual harm and those that have the potential of harming market competition. For instance, Article 20 of the Act lists several types of prohibited acts due to their risk of restraining competition. Thus, these behaviors should be considered illegal once all elements are satisfied, regardless of whether actual harm has occurred. This legislative decision leaves no room for a defendant to justify NPAs satisfying all elements of Article 15 by showing a lower price.

Overall, having seen NPAs harm to both input and output markets, US Agencies principally regard NPAs between competitors (horizontal NPAs) as illegal per se because these agreements rarely demonstrate procompetitive benefits and cause anticompetitive harms to markets.[49] More specifically, NPAs that fix salaries are equivalent to price-fixing, and NPAs that restrict poaching is equivalent to market

46 US v. Anthem, Inc., 855 F.3d 345, 369 (D.C. Cir. 2017) ("[T]here is no dispute that, to have any legal relevance, a proffered efficiency cannot arise from anticompetitive effects."). Point 10 of the US Horizontal Merger Guidelines (08/19/2010) holds the same view ("Cognizable efficiencies are merger-specific efficiencies that have been verified and do not arise from anticompetitive reductions in output or service.").

47 National Society of Professional Engineers v. US, 435 U.S. 679, 679 (1978) ("[T]he canon in question restrains trade within the meaning of § 1 of the Sherman Act, and the Rule of Reason, under which the proper inquiry is whether the challenged agreement is one that promotes, or one that suppresses, competition, does not support a defense based on the assumption that competition itself is unreasonable."), *aff'g*, US v. National Society of Professional Engineers, 555 F.2d 978 (D.C. Cir. 1977).

48 *See* Marinescu & Hovenkamp, *supra* note 27, at 1060.

49 *See* DOJ & FTC, *supra* note 2, at 3.

allocation agreements that are traditionally deemed illegal per se.[50] Recently, the US DOJ actively filed criminal prosecutions under the per se illegal rule[51] that enables courts to directly find the alleged NPAs' in antitrust violation without considering procompetitive benefits.[52] For vertical NPAs and some extremely exceptional horizontal NPAs, the rule of reason will be applied to review the cases. Under the rule of reason, NPAs are justified where the procompetitive benefits outweigh anticompetitive harms.[53] To measure the effects, the Agencies need to conduct a comprehensive analysis by defining the relevant market, assessing the alleged firm's market power, conducting a market study, and so on.[54]

Unlike the US, Japan's Antimonopoly Law does not formally recognize per se illegal rule, but scholars and courts recognize the concept of hardcore cartels—meaning some types of behaviors demonstrate obvious anticompetitive effects and lack efficiency-enhancing effects, such as price-fixing.[55] Like the per se illegal rule, a relaxed standard of burden of proof applies to hardcore cartel cases.[56] Ap-

50 *Id*. at 4. Scholars echoed this view, *see e.g*., OECD, *supra* note 11, at 8; KRUEGER & POSNER, *supra* note 10, at 13.

51 *See* DOJ & FTC, *supra* note 2, at 4. For general information on the DOJ's first NPA indictments, *see Former Aerospace Outsourcing Executive Charged for Key Role in a Long-Running Antitrust Conspiracy*, U.S. DEP'T OF JUST. (Dec. 9, 2021), https://www.justice.gov/opa/pr/former-aerospace-outsourcing-executive-charged-key-role-long-running-antitrust-conspiracy.

52 FTC v. Superior Court Trial Lawyers Association, 493 U.S. 411, 432-36 (1990).

53 FED. TRADE COMM'N & U.S. DEP'T OF JUSTICE, ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS 11-12 (2000), https://www.ftc.gov/sites/default/files/documents/public_events/joint-venture-hearings-antitrust-guidelines-collaboration-among-competitors/ftcdojguidelines-2.pdf.

54 *Id*.

55 *See* MASAKO WAKUI, ANTIMONOPOLY LAW: COMPETITION LAW AND POLICY IN JAPAN 88 (2d ed. 2018).

56 *Id*. at 89-92.

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plying the established rules to NPAs that fix wages, the Japan Fair Trade Commission (JFTC) Research Center suggested that there is "no room for consideration of whether such an action has pro-competitive effects, whether it has a public-benefit purpose, or whether its means are appropriate."[57] Similarly, NPAs that restrict switching jobs could be problematic under the Act because the practice raises difficulties for the new entry, blocking more efficient firms from entering the markets due to difficulties in recruiting employees.[58]

Like Japan's Antimonopoly Act, Taiwan has not developed the per se illegal rule or anything similar for the FTA. Therefore, the TFTC and courts need to complete a full process of analysis that begins with defining the relevant market and ends with weighting the anti and pro-competitive effects of the alleged behavior. Following this rule, after establishing NPA harm to the market, this article will now examine issue three: Can the procompetitive benefits produced by NPAs in corporate transactions adequately justify the harms?

3.2 Procompetitive Benefits of NPAs in Corporate Transactions

Corporation transactions involve transactions associated with the reorganization of a firm or firms. Methods for reorganizing a firm include selling corporation assets, mergers, acquisitions, and divestments. These transactions involve exchange of detailed information relating to individual employees and thus generate antitrust risk. Consequently, for the purpose of this article, the term corporation transaction particularly refers to the transactions involving employment information exchange.

To explore NPAs' procompetitive benefits in corporate transactions, this article begins by explaining why NPAs are adopted to relieve parties' concerns about unethical recruitment that substantially harms their investment. Subsequently, this

57 *See* JFTC RESEARCH CENTER, *supra* note 2, at 3.

58 *Id*. at 4.

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article sheds light on why NPAs should be tolerated only when they are the least restrictive measures to protect parties' interests in corporate transactions. Importantly, this article provides convincing reasons to explain why NPAs do not satisfy these requirements.

3.2.1 Due Diligence in Corporate Transactions and NPAs

There are several steps for completing a corporate transaction, and each requires different information. For example, merger transactions begin with strategic planning. In the initial stage, a potential buyer develops transaction strategies by screening available information regarding the target firm(s).[59] A potential buyer then performs due diligence to estimate a target firm's market value. To do so, a potential buyer must request the target firm provide information on its operation, assets, human resources, and so forth.[60]

After due diligence, a potential buyer should have acquired critical employment information, particularly in relation to retention bonuses for core employees, employment profit-sharing plans, deferred compensation plans, and pension policies.[61] Critically, the potential buyer should have access to the target firm's employee census, thereby obtaining individual employees' identification, position, employment history, salaries, and benefits.[62] Disclosure of information regarding

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59 *See* DELOITTE, M&A DUE DILIGENCE WORKSHOP 5, 8 (2017), https://www2.deloitte.com/content/dam/Deloitte/us/Documents/Real%20Estate/us-engineering-construction-ma-due-diligence.pdf; *see also* Richard D. Harroch, David A. Lipkin, Richard V. Smith & John Cook, *A Comprehensive Guide to Due Diligence Issues in Mergers and Acquisitions*, FORBES (Mar. 27, 2019), https://www.forbes.com/sites/allbusiness/2019/03/27/comprehensive-guide-due-diligence-issues-mergers-and-acquisitions/?sh=302fdb912574.

60 *See* DELOITTE, *supra* note 59, at 5, 7.

61 *See Employment Law Due Diligence in M&A: What Buyers & Sellers Need to Know*, DUFFY & SWEENEY, LTD. (Aug. 17, 2021), https://www.duffysweeney.com/employment-law-due-diligence-in-ma-what-buyers-sellers-need-to-know/.

62 *Id*.

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employees' salaries, bonuses, and pension plans is crucial for the buyer to execute due diligence and estimate the target firm's current and future value.[63]

Information disclosure for corporate transactions, however, is risky for a target firm. This is because disclosing employment information offers a potential buyer an effective and low-cost venue to solicit the target firm's employees. Losing core employees is disastrous for a firm when, for example, the know-how of the R&D process is held by a few employees. They may even reveal trade secrets to their new employer. NPAs directly prohibit potential buyers from recruiting a target firm's employees and, therefore, can eliminate the said risks.

The buyer also faces the risk of losing core employees from the purchased business. After a corporate transaction is completed, the target firm (now seller) has both incentive and ability to reemploy previous employees of its sold business. Losing core employees significantly depreciates the value of the purchased business. Considering the risk, in the absence of a protective measure, a rational buyer will not be willing to continue the merger transaction. As such, NPAs are valuable because they prevent the seller from poaching its prior employees, thereby relieving the buyer's concerns of losing value of the purchased business.[64]

Briefly, if a merger transaction is unsuccessful, NPAs oblige a potential buyer not to poach the target firm's employees, thus alleviating worries about risks of disclosure.[65] This view is supported by US cases where courts recognize NPAs are justifiable in merger cases.[66] When a transaction is completed, NPAs ban the seller

63 *See Treatment of M&A Non-solicits and Employee Comp Diligence Under New Antitrust Guidelines*, COOLEY M&A (Nov. 21, 2016), https://cooleyma.com/2016/11/21/treatment-of-ma-non-solicits-and-employee-comp-diligence-under-new-antitrust-guidelines/.

64 *See* OECD, *supra* note 5, at 21.

65 *Id*.

66 United States v. Adobe Sys., Inc., No. 10-CV-1629, 2011 WL 10883994, at *5 (D.D.C. Mar. 18, 2011); United States v. Lucasfilm, Inc., No. CIV.A. 10-02220 RBW, 2011 WL 2636850, at *4 (D.D.C. June 3, 2011); United States v. Ebay Inc., No. 12-CV-05869-EJD-PSG, 2014

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from rehiring its prior employees, ensuring the buyer enjoys the entire value of the purchased business.

3.2.2 Requirement of Least Restrictiveness

Besides pursuing a legitimate purpose, to be justified under the FTA NPAs' procompetitive benefits must outweigh the harms to laborers.[67] FTA and existing cases do not indicate a clear standard for weighting benefits and harms in NPA-related cases.[68] Thus, an NPA-specific standard needs to be developed. Because NPAs' potential significant harm to laborers, NPAs must induce critical benefits to pass the balance test. This means that NPAs must be the last resort to promote corporate transactions by eliminating concerns about unethical recruitment. When a less restrictive alternative is found, NPAs fail to generate sufficient benefits to outweigh potential harms.

This view reflects on Organization for Economic Cooperation and Development (OECD) report, which suggested that NPAs could be justified only when they are "directly related and necessary to the implementation of a cleared merger transaction."[69] More specifically, the agreement must be entered into exclusively for merger purposes where the merger would not be completed without the agreement.[70] Taking this view, NPAs tend to be permitted in corporate transaction cases

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WL 5364751, at *4 (N.D. Cal. Sept. 2, 2014).

67 Article 15 of the FTA says that "[n]o enterprise shall engage in any concerted action; unless the concerted action that meets one of the following requirements is beneficial to the economy as a whole and in the public interest." Following the second part of the Article, NPA parties may argue that the agreements are for the purposes of improving industrial development and (or) technological innovation, thus benefiting Taiwan's economy.

68 *See e.g.*, 1 THE FAIR TRADE COMMISSION (公平交易委員會), INTERPRETATION BOOK OF THE FAIR TRADE ACT (公平交易法之註釋研究系列(一)) 515-30 (2003).

69 *See* OECD, *supra* note 4, at 29.

70 *Id*.

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where the agreements only restrict the employees who hold know-how associated with the transactions, making NPAs necessary to guarantee the full value of the transfer to the buyers.[71] Similarly, NPAs could be applied to business divestment cases in which some key personnel (e.g., R&D researchers and managers) need to be restricted from being poached by their prior firm to maintain the divested business' viability and competitiveness.[72]

Moreover, the EU holds a similar view to the OECD. The European Commission provides a more concrete instruction on NPAs in merger transactions, that in the absence of the agreements "the concentration could not be implemented or could only be implemented under considerably more uncertain conditions, at a substantially higher cost, over an appreciably longer period or with considerably greater difficulty."[73] The standard required by this instruction is exemplified in three cases that found laborer-related restrictive NPAs are justifiable: protection of the transferred assets or business' value,[74] maintenance of a continuous supply of the divested business,[75] and enablement of start-up new entity.[76]

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71 *Id*.

72 *Id*.

73 *See* Commission Notice on Restrictions Directly Related and Necessary to Concentrations, 2005 O.J. (C 56) 13, https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2005:056:0024:0031:EN:PDF.

74 *E.g*., Commission Decision of 20/03/2001 Declaring a Concentration to be Compatible with the Common Market (Case No IV/M.2227 - Goldman Sachs/Messer Griesheim) according to Council Regulation (EEC) No 4064/89, 2001 O.J. (C127) 11 ("The non compete clause is directly related and necessary to the implementation of the concentration, since it ensures that the full value of the interest in MGG can be taken over by Goldman Sachs. It is therefore also covered by the present decision.").

75 *E.g*., Commission Decision of 25/02/2000 Declaring a Concentration to be Compatible with the Common Market (Case No IV/M.1841 - Celestica/IBM (EMS)) according to Council Regulation (EEC) No 4064/89, 2000 O.J. (C 341) 21 ("IBM's favourite customer clause for the same period of time ... contained in the Supply Agreement are not exclusive. IBM's sta-

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By the same token, the US courts adopt an approach akin to reviewing NPAs in a corporate transaction. To pass the rule of reason analysis, the US courts have suggested that NPAs at issue must have direct economic linkage with a merger, and that the agreements are strictly necessary for the implementation of the merger to comply with merger-related rules.[77] Particularly, the agreements must: (1) "identify, with specificity, the agreement to which it is ancillary"; (2) "be narrowly tailored to affect only employees who are anticipated to be directly involved in the agreement"; (3) "identify with reasonable specificity the employees who are subject to the agreement"; (4) "contain a specific termination date or event"; and (5) "be signed by all parties to the agreement, including any modifications to the agreement."[78]

Turning to Taiwan, neither the FTA nor prior TFTC and judicial decisions has clearly indicated what requirements NPAs must satisfy to be justified in corporate

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tus as a favourite customer will allow IBM to ensure the continuity in supply at the same standards of qualities, previously guaranteed by its internal manufacturing sources. On the other hand Celesticas' status as preferred supplier will allow Celestica a minimum economic protection during the start-up period providing that is able to make competitive offers as any other third party.").

76 *E.g.*, Commission Decision of 22/12/2000 Declaring a Concentration to be Compatible with the Common Market (Case No IV/M.2243 - 1* Stora Enso/Assidomän/JV) according to Council Regulation (EEC) No 4064/89, 2001 O.J. (C49) 49 ("The Commission considers that the non-competition clause is directly related and necessary for the market entry of the joint venture. Beyond this period, however, the parties have failed to justify the need for this clause. Therefore, the non-competition clause is only covered by the present decision for a period of 5 years. Moreover, it can only be considered as ancillary as far as it is confined to the area where the parent companies have established their products before the transaction.").

77 *See* OECD, *supra* note 5, at 21.

78 United States v. Adobe Sys., Inc., No. 10-CV-1629, 2011 WL 10883994, at *6 (D.D.C. Mar. 18, 2011).

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transactions. The views of the foreign jurisdictions and institutions mentioned above could be applied to the TFTC without difficulty. In addition to listing certain types of prohibited behaviors, the Act authorizes the FTC broad discretion to justify these prohibited behaviors through elements such as "beneficial to the economy," "public interest," "justifiable reasons," and "justification."[79] The Act further empowers the TFTC to develop new types of prohibited behaviors under Article 25[80] to catch all potential anticompetitive behaviors as a result of rapid industrial development.[81] Thus, to enrich the FTA, the TFTC can use its discretion to freely introduce the views established by the OECD, the US, and the EU with modifications. That is, to be justified, NPAs must clearly identify their scope, and be adopted for facilitating corporate transactions, and there must be no other less restrictive means to reach the same goal.

The TFTC has applied a similar view in merger reviews. For instance, the Commission dismissed Uni-President Enterprises corporation merger application, finding that the merger was not necessary to enhance international competitiveness as the parties could achieve the goal without mergers.[82] Applying this rule to NPA

79 Articles 15, 19, and 20 of the FTA, respectively.

80 Article 25 of the FTA stipulates that "[i]n addition to what is provided for in this Act, no enterprise shall otherwise have any deceptive or obviously unfair conduct that is able to affect trading order."

81 *See* LIAW (廖義男), *supra* note 20, at 636.

82 Taiwan GongPing Jiaoyi Weiyuanhui (公平交易委員會) [Taiwan Fair Trade Commission], Gong Gye Zi Di 097005 (公結字第 097005 號) [Gong Gye Zi No. 097005] 9 (2008); *aff'd*, Uni-President Enterprises Corp. v. Gongping Jiaoyi Weiyuanhui, 2013 SIFAYUAN FAXUE ZILIAO JIANSUO XITONG (司法院法學資料檢索系統) [LAWS AND REGULATIONS RETRIEVING SYSTEM, JUDICIAL YUAN, REPUBLIC OF CHINA] (Taipei Admin. High Ct. Apr. 11, 2013), https://judgment.judicial.gov.tw/FJUD/data.aspx?ty=JD&id=TPBA,100%2c%e8%a8%b4%2c1226%2c20130411%2c1; Uni-President Enterprises Corp. v. Gongping Jiaoyi Weiyuanhui, 2013 SIFAYUAN FAXUE ZILIAO JIANSUO XITONG (司法院法學資料檢索系統) [LAWS AND REGULATIONS RETRIEVING SYSTEM, JUDICIAL YUAN, REPUBLIC OF CHINA] (Admin.

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cases, parties would need to prove that the alleged NPAs have clearly identified the scope of affected employees and secure the parties' interest in corporate transactions. Given they are proven, the next issue to consider is whether NPAs are the least restrictive measure.

3.2.3 Satisfaction of the Least Restrictiveness Requirement

This part examines whether an NPA is the least restrictive measure to protect the parties' interest in corporate transactions. The major risks that NPAs aim to prevent a firm from recruiting other parties' employees to distort its R&D progress or steal the benefits of R&D investment. In this respect, a qualified alternative should address the said risks and generate less harm to laborers' mobility. This section analyzes three vital approaches that could prevent unethical recruitment.

3.2.3.1 Trade Secrets Law

The first possible alternative relates to trade secrets law. Article 2 of the Taiwanese Trade Secrets Act (TSA) defines trade secrets as unknown information that has economic value and is protected by reasonable measures, such as information regarding "any method, technique, process, formula, program, design, or other information that may be used in the course of production, sales, or operations." Under this definition, information concerning a firm's R&D is the subject that the Act aims to protect.

The Act protects trade secret owners by preventing misappropriation—"acquir[ing] a trade secret by improper means" and "disclos[ing] an acquired trade secret knowing ... that it is a trade secret."[83] Furthermore, the Act grants those who

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Sup. Ct. Aug. 15, 2013), https://judgment.judicial.gov.tw/FJUD/data.aspx?ty=JD&id=TPAA,102%2c%e5%88%a4%2c500%2c20130815%2c1.

83 Article 10 of the TSA defines misappropriation as "acquir[ing] a trade secret by improper means," "acquir[ing], us[ing], or disclos[ing] a trade secret as defined in the preceding item knowingly or unknowingly due to gross negligence," "us[ing] or disclos[ing] an acquired

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are injured by misappropriation the right to request prevention and removal of misappropriation[84] and the right to civil remedies.[85]

To avoid leaking trade secrets to competitors, a firm generally inserts a confidentiality clause in employment contracts. This practice prevents employees with know-how from revealing trade secrets if they are subsequently employed by the firm's competitors.[86] Further, the TSA prohibits trade secret holders from revealing this information without the secret owners' informed consent, and bans anyone from collecting trade secrets by improper means.[87] Pursuant to Article 13 and Article 13-1 of the TSA, violators are subject to civil and even criminal liability. This framework intends to prevent a firm from accessing another firm's trade secrets by recruiting its employees. From this perspective, TSA could serve as an alternative

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trade secret knowing, or not knowing due to gross negligence, that it is a trade secret," "us[ing] or disclos[ing] by improper means a legally acquired trade secret" and "us[ing] or to disclos[ing] without due cause a trade secret to which the law imposes a duty to maintain secrecy."

84 Article 11(1) of the TSA stipulates that "[i]f a trade secret is misappropriated, the injured party may request for the removal of such misappropriation. If there is a likelihood of misappropriation, a prevention may be requested."

85 Article 12(1) of the TSA says that "[o]ne who intentionally or negligently misappropriates another's trade secret shall be liable for damages. If two or more parties jointly misappropriate, such parties shall be jointly and severally liable."

86 *See e.g.*, MINISTRY OF ECONOMY, TRADE AND INDUSTRY, MANAGEMENT GUIDELINES FOR TRADE SECRETS 9 (2003), https://www.meti.go.jp/english/policy/economy/chizai/chiteki/pdf/0813mgtc.pdf.

87 Article 10 of the TSA stipulates that "[a]ny of the following acts shall be deemed as a misappropriation of a trade secret: ... 3. To use or disclose an acquired trade secret knowing, or not knowing due to gross negligence, that it is a trade secret as defined in item one. 4. To use or disclose by improper means a legally acquired trade secret." NPAs can constitute "improper means" as the agreements are akin to bribery, or offering unreasonably high economic benefits to employees in exchange for disclosure of certain unrevealed information to the employer.

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means for NPAs in corporate transactions.

Nonetheless, TSA plays a limited role in cases where the goal of a firm recruiting other firms' key employees is to destroy their business. On some occasions, the recruiting firm does not ask the core employees to share information but merely hires the employees to interrupt its competitors' R&D progress. This case shows that TSA can only eliminate parts of the said employment risks generated by corporate transactions. For this reason, TSA is not a perfect alternative to NPAs.

3.2.3.2 Business Tort and Unfair Practice

This section continues to examine whether the rule of business tort and unfair practice can play an ideal role for NPAs in corporate transactions. Business tort, rooted in Article 184 of the Taiwanese Civil Code, prohibits any intentional or negligent behaviors that damage others' rights and intentional behaviors that violate the rule of morals.[88] Since the Article applies to both commercial and non-commercial activities, it covers a broad range of behaviors that violate commercial morality.[89] Despite the broad coverage of Article 184, to the author's best knowledge, there are few discussions concerning the Article's effectiveness in addressing problems of unethical recruitment. There is uncertainty about the extent courts will

88 Article 184 of the Civil Code stipulates that "[a] person who, intentionally or negligently, has wrongfully damaged the rights of another is bound to compensate him for any injury arising therefrom. The same rule shall be applied when the injury is done intentionally in a manner against the rules of morals."

89 Diamond Polymer Science Co., Ltd. v. Yan Hong Jia, 2017 SIFAYUAN FAXUE ZILIAO JIANSUO XITONG (司法院法學資料檢索系統) [LAWS AND REGULATIONS RETRIEVING SYSTEM, JUDICIAL YUAN, REPUBLIC OF CHINA] (Sup. Ct. Dec. 6, 2017), https://judgment.judicial.gov.tw/FJUD/data.aspx?ty=JD&id=TPSV,106%2c%e5%8f%b0%e4%b8%8a%2c1693%2c20171206. The court held that the term "rules of morals" in Article 184 of the Civil Code includes rules and customs regarding competitive order and commercial ethics. Accordingly, the fact that employees misappropriate their employer's business resources by taking advantage of their position in the firm, which results in the employer's loss of clients and damage, constitutes a violation of the rules of morals.

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be willing to apply the Article against unethical recruitment as it involves a balance of two conflicting fundamental values, a firm's right to property protection and a laborer's right to work. Consequently, it appears to be too early to draw a conclusion on the effectiveness of Article 184 on the issue of NPAs.

In contrast to the Civil Code, the FTA provides a clear basis to regulate unethical recruitment with the explicit aim of maintaining market competition. The specific rule, Article 20(3) of the FTA, prohibits a firm from "preventing competitors from participating or engaging in competition by inducement with low price, or other improper means." Scholars have suggested that the term "improper means" includes behaviors that could distort competition even if it does not break commercial morality.[90] Therefore, soliciting competitors' employees to steal R&D results or disrupt R&D processes would violate this Article as these practices can potentially distort R&D competition between firms.

The catch-all clause, Article 25, prohibits all types of deceptive and obviously unfair behaviors that negatively affect trading order.[91] The Fair Trade Commission Disposal Directions (Guidelines) on the Application of Article 25 of the Fair Trade Act (Article 25 Guideline) offers more detail about what practices are considered obviously unjust behaviors. This includes those that "[i]mpede[s] market competition for the purpose of injuring a particular enterprise"[92] and "[e]xploit the fruits of others' work."[93] Pursuant to the Guideline, a firm's antitrust violations may be found in cases where it solicits other firms' employees to distort R&D competition for distorting its business or to steal the benefit of the firm's R&D investment.[94]

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90 *See* LIAW (廖義男), *supra* note 20, at 460.

91 *See* Gongping Jiaoyi Fa (公平交易法) [Fair Trade Act], art. 25.

92 *See* Point 7(1) of the Article 25 Guideline.

93 *See* Point 7(2) of the Article 25 Guideline.

94 *See e.g.*, Kung-Chung Liu (劉孔中), *Poaching and Unethical Employee Poaching (挖角與惡意挖角)*, 97 TAIWAN L. REV. (月旦法學雜誌) 173, 173-87 (2003).

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In a baseball player case, the Taiwanese High Court found the appellee, a baseball team owner, violated both Article 20(3) and Article 25 of the FTA by inducing a leading baseball player to leave his current team (owned by the appellant) by paying nearly five times the signing bonus and salary.[95] Since the bonus and salary apparently exceeded the players' market value, the court found the intention of the practice was to distort the appellant's operation rather than compete for players by offering a lucrative salary.[96] It is noteworthy that this case was decided by a general court rather than administrative courts or the FTC that have acquired abundant experience in enforcing competition law. Moreover, the judgment is seemingly silent on the key issues of whether and how the competition was harmed by the practice. Therefore, it would be premature for the court to find an antitrust violation, and it is questionable whether the judgment will be followed by FTC and administrative courts in subsequent similar cases.

In summary, Article 184 of the Taiwanese Civil Code coupled with Article 20(3) and Article 25 of the FTA are expected to establish a regulatory framework preventing unethical employee poaching. Article 20(3) is specifically written to prevent business distortion and cheating by unethical employment solicitation. However, to date, there is an insufficient basis for concluding that business tort and unfair practice are ideal alternatives for NPAs because courts are highly likely to limit the application of the Articles for the sake of freedom of work.

3.2.3.3 Independent Team

This section discusses the last measure, an independent team, to examine

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95 Brother Recreational Co., Ltd. v. Naluwan Co., 2000 SIFAYUAN FAXUE ZILIAO JIANSUO XITONG (司法院法學資料檢索系統) [LAWS AND REGULATIONS RETRIEVING SYSTEM, JUDICIAL YUAN, REPUBLIC OF CHINA] (Taiwan High Ct. Jan. 25, 2000), https://judgment.judicial.gov.tw/FJUD/data.aspx?ty=JD&id=TPHV,88%2c%e9%87%8d%e5%8b%9e%e4%b8%8a%e6%9b%b4%ef%99%be%2c4%2c20000125%2c2.

96 *Id*.

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whether it is the least restrictive measure to protect employers' interests in corporate transactions. An independent team is constituted by professionals and staff who are authorized to make decisions independently and prohibited from revealing received information to unauthorized parties. Organizing an independent case-specific team to avoid conflict of interest has been widely adopted in corporation and securities law.

Organizing an independent team to manage employee information in corporate transactions can effectively prevent potential buyers from unethical recruitment. To organize an independent team, the target firm and potential buyers can appoint independent experts (e.g., lawyers, accountants, and finance consultants) to provide or review employment information for due diligence purposes.[97] The designated experts should be independent of the management team that has the power to form employment policies and to reach hiring decisions. Furthermore, they should be required not to reveal information to any unauthorized parties, including their employers, during and after the due diligence process. These requirements are designed to block management teams' access to employment information for use in anticompetitive recruitment purposes.[98] In the field of competition law, this approach has been suggested to prevent the risk of illegal information exchange.[99]

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97 *See e.g.*, U.S. DEP'T OF JUST. & FED. TRADE COMM'N, STATEMENTS OF ANTITRUST ENFORCEMENT POLICY IN HEALTH CARE 50 (1996), https://www.justice.gov/atr/page/file/1197731/download.

98 *See Treatment of M&A Non-solicits and Employee Comp Diligence Under New Antitrust Guidelines*, *supra* note 63.

99 *See* U.S. DEP'T OF JUST. & FED. TRADE COMM'N, *supra* note 97. According to the Statement, to avoid antitrust liability, an industrial health survey involving the price of service or salary of health care personnel should meet the following conditions: (1) hiring an independent third party to manage the survey; (2) information provided for survey analysis must be older than three months; and (3) more than five participants and each participant's data are equally evaluated (no one's information is weighted more than twenty-five percent). Nota-

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This approach could bring three major benefits to transaction parties and laborers. Firstly, it would protect parties' interests without compromising laborers' freedom to switch jobs. This is especially relevant to Taiwan's labor market which has low rates of mobility.[100] Switching jobs serves as an important way for laborers to increase their salary.[101] Secondly, it can prevent the risk of tacit employment-restrictive agreements. Because the independent team isolates its team members who hold employment information from those who enforce employee policy, this approach can prevent the management teams of the two firms from exchanging employee information and even reaching tacit agreements regarding labor matters. Lastly, the independent team approach has been broadly employed in financial sectors in Taiwan. Hence, introducing the approach to corporate transactions will not be too costly.

Notably, the independent team in corporate transactions is distinguishable from the audit committee established under the Taiwanese Securities and Exchange Act (Securities Act). According to Article 14.4 of the Securities Act, a listed company can select to establish an audit committee comprised of all independent direc-

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bly, the information used for the survey must be unidentifiable so no one could know other survey participants' price policies.

100 A 2021 survey indicated that about 46 percent of young laborers never switch jobs. *See 15-29 Sui Qingnian Laogong Jiuye Zhuangkuang Diaocha Tongji Jieguo* (*15-29 歲青年勞工就業狀況調查統計結果*) [*Statistic Result of Employment Status of Young Laborers Age 15-29*], MINISTRY OF LAB. (勞動部) (Mar. 29, 2022), https://www.mol.gov.tw/1607/1632/1640/32950/.

101 For relevant surveys, *see e.g.*, Sarah Brady, *49% of Americans Who Switched Jobs Received a Pay Increase*, VALUEPENGUIN (Mar. 3, 2022), https://www.valuepenguin.com/news/switch-jobs-income-increase; Chris Kolmar, *26 Average Salary Increase When Changing Jobs Statistics [2023]*, ZIPPIA (Feb. 7, 2023), https://www.zippia.com/advice/average-salary-increase-when-changing-jobs/.

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tors.[102] The audit committee should exercise its power independently to perform directorial duties.[103]

The major differences between them are the goal of the committee and qualifications of members. For relieving the NPA concerns, the independent team aims to isolate those who manage employment from accessing its competitors' detailed employment information. As a result, there is no specific regulatory qualification requirement for the members to be in the team. By contrast, the purpose of an audit committee is to oversee a listed company's reporting process and internal control. To achieve the goals, the Securities Act sets forth the qualification requirement of being independent directors.[104]

3.3 The Way Forward

Competition law is highly policy-oriented, and lawmakers empower the TFTC to enforce the law with an aim to seek the best balance of harms and benefits on a case-by-case basis.[105] Following this intent, competition law enforcers possess wide discretion to employ strict or relaxed standards in applying the law. This article argues that the TFTC should adopt stricter standards to review NPAs to pro-

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102 Article 14-4 of the Securities Act sets forth that "[a] company that has issued stock in accordance with this Act shall establish either an audit committee or a supervisor" and "[t]he audit committee shall be composed of the entire number of independent directors."

103 The Securities Act does not directly say the audit committee should be independent of other parts of the corporation. Yet, Article 14-2 of the Act does require independent directors to "maintain independence within the scope of their directorial duties, and may not have any direct or indirect interest in the company." Read together, the audit committee should be independent since the committee is composed of independent directors.

104 Article 2 of the Regulations Governing Appointment of Independent Directors and Compliance Matters for Public Companies (authorized under Article 14-2 of the Securities Act).

105 As noted in footnote 79, the FTA uses broad terms like "beneficial to the economy," "public interest," and "justifiable reasons" in several articles for the enforcers to determine whether to justify the alleged activities on a case-by-case basis.

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tect employees with weak bargaining power over their employers. This means that it is the parties' burden of proof to show that NPAs are the least restrictive means. Unless organizing an independent team to manage employee information obtained from due diligence has been proved impossible, NPAs are not tolerated.

This suggestion can render special protection to vulnerable employees with limited ways of escaping from a restricted labor market.[106] Enforcing this approach would not be too burdensome for parties in corporate transactions as professional investors are more likely to have abundant experience in organizing an independent team at affordable costs. In this regard, ensuring a free labor market that fosters labor mobility should be the prioritized goal of competition law and policy.

It is worth noting some potential challenges concerning the enforcement of the independent team approach. The first challenge relates to the team's ability to evaluate high-level employees' value to the company. A similar concern occurs in the audit committee's capability of fostering a company's performance.[107] Indeed, adopting the independent team approach would not harm a company's ability to

106 *See* OECD, *supra* note 4, at 8. The research found that "workers cannot easily change jobs as a reaction to wage decreases" and "the level of responsiveness of workers to wages decreases is overall low in Europe, the [US], Canada and Australia."

107 Relevant discussions, *e.g.*, TUAN-MEI WANG (王端鎂), EMPIRICAL RESEARCH OF TAIWAN AUDIT COMMITTEE UNDER SECURITIES AND EXCHANGE ACT (台灣依證券交易法設置審計委員會制度實證研究) 59-60 (2011) (Master Thesis, Institute of Technology Law College of Management National Chiao Tung University, renamed as National Yang Ming Chiao Tung University School of Law in 2021) (on file with the National Yang Ming Chiao Tung University Library) (empirically examining the correlation between audit committee and company performance in Taiwan); Yu-Shan Chang (張瑀珊) & Huai-Yuan Chang (張懷源), *A Study on the Necessity of Audit Committees in the Financial Industry and the Influence of Audit Committee Characteristics (金融業設置審計委員會之必要性？兼論審計委員會之特性影響)*, 19 J. CONTEMP. ACCOUNT (當代會計) 139, 139-40 (2018) (empirically investigating audit committees' characteristics on a voluntary or mandatory base and their influences on the financial industry).

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measure the value of a corporate transaction. The companies are advised to appoint professionals (e.g., lawyers, accountants, and experienced human recourses experts) to the independent team. The primary restriction is the appointed professionals can no longer engage in the transaction parties' hiring and employment-related decisions.

The following concern is the appointed professionals' independence—how to prevent them from releasing employment-related information to the parties of the corporate transaction for employment purposes. Lawyers and accountants are prohibited from breaching duties (e.g., duty of loyalty, duty of confidentiality, and other contractual duties) to their clients.[108] Thus, after being appointed to the independent team, they won't be able to engage in employment matters as the engagement would put their clients at antitrust risk. In this regard, it is more desirable to hire professionals for the independent team.

4. CONCLUSION

To summarize, this article has explored the legality of NPAs under the FTA and concludes that NPAs employed in corporate transactions are generally illegal unless organizing an independent team to review employment information is impossible. To reach this conclusion, this article answered three specific questions regarding these agreements: market definition, anticompetitive harms, and procompetitive benefits.

Firstly, the relevant market of NPAs can be defined as the market composed of firms competing for laborers who provide similar-value performance and with similar area or geographic features. Article 15 of the FTA only applies to NPAs entered by competing firms in the same relevant market, and these agreements are

108 *E.g.*, Article 7 of the Legal Ethics Rules, published by the Taipei Bar Association, requires lawyers to pursue both public and their client's best interests during performing duties.

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traditionally considered highly risky of competition law violation.

Secondly, the harm that NPAs cause to the market can be observed from multiple facets. In the input market, NPAs exploit laborers' freedom to switch jobs and ask for a raise. In the output market, suppressed salaries reduce employees' output, which increases a product's market price and harms consumers. Benefits produced by anticompetitive behaviors should not be recognized as a defense of NPAs.

Lastly, it is undeniable that NPAs could protect parties' interests in corporate transactions to a certain extent. However, considering labor protection, this article suggests the TFTC employ a stricter standard to review NPAs. Following this view, unless parties can prove that organizing an independent team to manage employee information in due diligence is impossible, NPAs are not justified. The TFTC is advised to refer to the established rules regarding independent audit committees in the field of corporate governance[109] in developing a practical and detailed guideline for competition law compliance.

109 *E.g.*, the structure and operation of the independent committee. More details can be found in the Regulations Governing the Exercise of Powers by Audit Committees of Public Companies established by Financial Supervisory Commission, Taiwan.

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