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Insights

CMA HITS ACCELERATOR ON ENFORCEMENT OF UK LABOUR MARKETS

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SUMMARY

Whilst not traditionally a focus of the Competition and Markets Authority ("CMA"), the UK's labour markets now form one of the CMA's strategic priorities, as outlined in its 2023 to 2024 Annual Plan. The Annual Plan highlights that with the cost-of-living crisis and at a time where finances are under particular pressure, the CMA wants to clamp down on cartel behaviour and unilateral effects impacting household income and labour markets, and therefore is actively pursuing collusive behaviour that affects finances/household incomes. The CMA's focus on labour markets comes at a time that the UK Government has also signalled its intention to limit post-termination non-compete clauses to a period of three months.[1]

Since coming squarely into the CMA's focus, the CMA has: (i) published specific guidance for employers on the types of anti-competitive agreements and behaviours they should avoid in labour markets; (ii) published a report on competition and market power in UK labour markets; and (iii) has opened a number of investigations into potential anti-competitive behaviour in labour markets (and is reported to be investigating further potential instances).

The CMA is not alone in this approach, and follows the activities of regulators in other jurisdictions such as the US and the EU.

This article focuses on the key issues that employers should be aware of following the CMA's recent activity, in particular no-poaching and wage-fixing agreements.

THE CMA'S CONCERNS

The CMA has articulated two main concerns in respect of the labour market: (i) the impact of market power exerted by firms (broadly, the relative negotiating strength of employers versus employees for wages); and (ii) the impact of anticompetitive agreements. The negative impacts of

these could potentially include a reduction of the wages of workers affected and a distortion of labour mobility, supply and production (ultimately leading to detrimental consumer outcomes).

The CMA has been clear that it will not "*step in to use its competition enforcement powers in every case involving labour relations*", noting that "*Employment law and policy is obviously a complex and multi-faceted area that goes well beyond the remit of competition authorities*". The CMA has specifically highlighted that non-compete provisions between employers and employees will typically not infringe competition law, and thus will not normally be considered by the CMA, such provisions instead generally falling to be considered in the context of employment law. Likewise, nor will the CMA typically seek to intervene in genuine collective bargaining arrangements between employers and employees.

However, whilst it currently appears unlikely that the CMA will look to use its competition law powers in relation to non-competes and genuine collective bargaining arrangements, the CMA has not ruled out its ability to intervene should it consider that these provisions result in an anti-competitive effect (the CMA appears to suggest that this could be the case where a non-compete does not protect substantial training or client relationship investments).

The CMA has indicated that it is not looking at non-competes as an object infringement but that wage fixing, no-poach clauses and information sharing are buyer side cartels (although the CMA has recognised that brief no-poach agreements in a failed M&A context may amount to an ancillary restraint). The CMA is pursuing such agreements more frequently. For other issues, such as non-compete clauses in employment contracts, enforcement will require an effects-based assessment of competition.

THE CMA'S REPORT ON COMPETITION AND MARKET POWER IN UK LABOUR MARKETS

The CMA's report is wider in scope than simply looking at competition law concerns, as it also addresses trends within labour markets amongst other things. However, from a competition focus, the CMA found that while overall buyer power (which enables a single buyer, or a group of buyers, to influence or dictate the terms of trade with upstream suppliers) has not increased in the UK over the last 20 years, "*there are large and persistent differences* […] *across regions, occupations, and firms*." As such, it is to be expected that the CMA will look to focus on those areas which it has identified as having higher employer market power, or which raise particular concerns - such as the gig economy, or in what the CMA terms "low-paying sectors". The CMA is still exploring whether there is a link between a company having a dominant position in certain upstream product markets, and that company having market power in the labour market.

The report also found that roughly 26% of UK workers are subject to non-compete clauses, rising to over 40% in certain sectors. With this in mind, the CMA's Chief Executive Sarah Cardell has stated

publicly that the evidence in the report supports the Government's proposal to legislate to limit post-termination non-compete clauses to three months.

COMPETITION GUIDANCE ISSUED BY THE CMA TO EMPLOYERS

As mentioned above, the CMA has concerns about anti-competitive agreements in the labour market (whether formal or informal). The CMA recently issued guidance with an upstream (business to business) focus for employers regarding the three main types of anti-competitive cartel behaviour[2] that it has identified as potentially existing in labour markets, along with tips on how to avoid falling foul of competition law. This guidance applies to all employees (whether permanent salaried staff, or freelancers and contracted workers). These behaviours are:

a. no-poaching agreements (agreements not to hire each other's employees);

b. wage-fixing agreements (agreements to fix pay or other employee benefits); and

c. information sharing of terms and conditions offered to employees.

It is important to note that this is not a closed list, and the CMA is not limited to investigating only these three types of behaviour. Given that the CMA's activity in labour markets is at an early stage, it is likely that the CMA will continue to identify new behaviours of concern, and to develop its guidance further.

The CMA's guidance for employers is currently very short, but its more detailed guidance on horizontal agreements can equally apply in labour markets. For instance, information exchanges are being increasingly targeted where they amount to an anti-competitive practice. Likewise, benchmarking (e.g. for salaries) can also raise competition concerns, in particular if this facilitates anti-competitive communications or collusion.

ONGOING INVESTIGATIONS

There are a number of CMA investigations ongoing with a labour market focus. For instance, in October 2023, the CMA announced that it is investigating suspected breaches of competition law in relation to the purchase of freelance services and the employment of staff supporting the production, creation and/or broadcasting of television content in the UK, excluding sport content. More recently, in January 2024 the CMA announced that it was widening its investigation into anti-competitive behaviour in relation to the supply of fragrances and fragrance ingredients to cover agreements regarding reciprocal hiring or recruitment of staff. Both investigations are at an early stage.

These investigations demonstrate that the CMA's activity in labour markets is increasing, and further investigations are expected to follow – indeed the CMA is reported to be looking to investigate at least two further potential cases.

COMPETITION LAW AND LABOUR MARKETS – A GLOBAL CONCERN

The CMA is not alone in its focus on labour markets. In the US, in January 2023 the Federal Trade Commission ("**FTC**") announced a proposed rule that would ban nearly all post-employment non-compete agreements, with limited exceptions. This followed enforcement proceedings by the FTC against a number of companies for non-compete violations. This appears to demonstrate a change in approach by the FTC, following a lack of success in obtaining criminal convictions in relation to no-poach agreements. The Department of Justice has also brought criminal charges against companies for no-poach and wage-fixing agreements - with mixed success. Similarly, Canada has implemented a no-poach ban.

At the EU level, Competition Commissioner Margrethe Vestager has indicated that the European Commission (the "**Commission**") is not just looking to investigate 'traditional cartels' but also anti-competitive conduct in labour markets - such as wage-fixing and no-poach agreements.

Member States' national competition authorities have also been taking enforcement action. For instance, in France in 2017 the French Competition Authority sanctioned the competitors in the floor-covering sector for having adopted a "*tacit non-aggression agreement*" or a "*gentleman's agreement*". This agreement prohibited the companies from actively soliciting each other's employees for a number of years. The companies had also exchanged information on salaries (including planned increases) and bonuses awarded to employees. In January 2023, the French Directorate-General for Competition, Consumer Affairs and Fraud Control (the "**DGCCRF**", responsible for local anti-competitive practices) fined metal recycling companies for having concluded a no-poach agreement covering the whole French territory as part of a divestment deal. The DGCCRF considered that this agreement went beyond what was necessary for the completion of the merger due to the national scope of the undertaking (which covered a larger territory than the one in which the seller offered its services prior to the divestment) and its reciprocity. Likewise, in January 2024 the Portuguese Competition Authority, in its second labour market enforcement action, issued fines against two companies for no-poach agreements.

PREDICTIONS FOR 2024

It is anticipated that during the course of 2024, there will be an increase in competition enforcement in labour markets, particularly in respect of no-poach and wage-fixing agreements both in the UK and globally. Similarly, as a result of the increased scrutiny of labour markets, there could be a rise in private claims, especially concerning equal pay.

If you would like to discuss any of the issues raised in this article (or how competition law applies to your business more broadly), please contact a member of BCLP's Antitrust and Competition team.

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FOOTNOTES

[1] The Government has stated that this will not restrict the ability of employers to use other forms of post-termination restrictions, paid notice periods or gardening leave.

[2] Cartel offences, typically seen by competition authorities as the most serious of competition law offences, can result in fines for business of up to 10% of their worldwide turnover. Individuals involved in a cartel can also face significant personal fines, face director disqualification of up to 15 years and, in rare instances, imprisonment.

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