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Working hard and rarely competing - labour markets continue to be a target...!

Introduction

On 12 October 2023, the UK's Competition and Markets Authority ("**CMA**") revealed that several major UK broadcast and production companies are the subjects of an antitrust investigation into the purchase of freelance services and the employment of staff.[1] The companies under investigation include the BBC, ITV, Hat Trick Productions, and Tiger Aspect Productions. Whilst the specific nature of the infringement(s) is unclear, it is suspected that the anti-competitive breaches involve broadcasters agreeing to fix wages for freelance employees - but we will have to wait and see…

The BBC and ITV are simultaneously subject to a parallel investigation that has been running since July 2022 over suspected wage-fixing for freelance workers supporting the production and broadcasting of sports content in the UK (see our briefing here). Other broadcasters involved in this probe include BT Group, IMG Media, Sunset and Vine Productions and Sky UK.

This most recent CMA investigation is the latest in a string of probes into employment-related conduct worldwide as competition regulators continue to ramp up their scrutiny of labour markets. Historically, antitrust authorities have tended to focus their attentions on defending consumer outcomes in the goods and services market. However, increasingly there has been a growing recognition that greater enforcement is needed to protect employees from anti-competitive practices in the labour market – in particular, against activities such as wage-fixing and no-poach agreements.

CMA's investigation

As mentioned, at present, very little is known about the CMA's investigation into the broadcasters and whether there is sufficient evidence of any infringement. The next steps for the CMA will be to conduct an initial 'information gathering' investigation which will run from October 2023 until March 2024. During this process the CMA is able to utilise its formal powers of investigation, which may include sending requests for information to the defendants and/or third parties, as well as conducting interviews with key individuals.

If, following analysis of the collected evidence, the CMA considers that the UK competition rules have been breached, it will issue a 'Statement of Objections' ("**SO**") to each business it considers responsible.[2] Each addressee of the SO will be invited to respond in writing, following which an oral hearing may take place for the parties to present their case in person. Finally, if there is sufficient evidence of an infringement, the CMA will issue a decision and may impose penalties on the relevant parties.

Before the conclusion of an investigation, it may be possible for businesses to settle with the CMA by admitting to wrongdoing and agreeing to the CMA's findings, in exchange for a reduction in the level of penalty imposed.

Significantly, businesses which are involved in cartel activity (as opposed to other anti-competitive behaviour) may receive total or partial immunity from fines through the CMA's leniency programme.[3] Applying for leniency is distinct and separate from

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[1] See press release here: https://www.gov.uk/cma-cases/suspected-anti-competitive-behaviour-relating-to-freelance-and-employed-labour-in-the-production-creation-and-slash-or-broadcasting-of-television-content-excluding-sport

[2] An SO is a formal step in an investigation, where the CMA informs the companies concerned in writing of the objections raised against them and the evidence relied upon to prove their case.

[3] Further guidance on the CMA's leniency programme can be found here: https://www.gov.uk/guidance/cartels-confess-and-apply-for-leniency

settlement. Subject to meeting certain conditions, the first business to inform the CMA about a cartel that is not already being investigated may receive immunity from fines, protection from criminal prosecution for cooperating employees, and protection from director disqualification for cooperating directors. Only the first company to come forward can receive total immunity, but any subsequent businesses which contact the CMA may also benefit from reduced fines depending on how much additional value they can provide to the investigation.

Which labour market practices are the CMA concerned about?

In February 2023, the CMA published short guidance for employers on how they can avoid anti-competitive behaviours, and within a month in its 2023-2024 annual plan made clear that it intended to identify and clamp down on illegal conduct in labour markets. Importantly, there are three particular practices which are ordinarily considered anti-competitive (and which can all be considered examples of business cartels):

- *No-poaching agreements:* these occur when 2 or more competing businesses agree not to approach or hire each other's employees (or not to do so without the other employer's consent).
- *Wage-fixing agreements:* namely, when 2 or more competing businesses agree to fix employees' pay or other employee benefits. This includes agreeing the same wage rates or setting maximum caps on pay.
- *Sharing commercially sensitive employment information:* for instance, the sharing of current/future salaries, benefits, contractual terms and other employment perks that a business offers to specific employees.

In the UK, engaging in the above activities will generally constitute a breach of Chapter 1 of the UK Competition Act 1998, and if investigated, the CMA could impose fines of up to 10% of a company's annual worldwide turnover. Liable businesses are also likely to face significant reputational damage; and implicated individuals could potentially face criminal sanctions (e.g. fines and/or imprisonment) and/or company director disqualification orders ("**CDDOs**"). Similar sanctions also apply in other jurisdictions.

Notably, there is no need for businesses to have any kind of formal agreement in place in relation to any of these practices; it will be sufficient that competitors have, for example, engaged in informal discussions, or entered into a 'gentleman's agreement'. Additionally, in the CMA's Guidance on Horizontal Agreements, published in August 2023, wage-fixing is established as a 'by object' restriction. This means there is no need to demonstrate that an agreement to fix wages has actual anti-competitive effects – the very existence of the agreement itself will be considered sufficiently harmful. This position is also mirrored in the European Commission's Horizontal Guidelines.

Businesses should be mindful that it may not always be obvious who their competitors are in the labour market and, indeed, their competitors from a recruitment perspective may be different from their commercial ones. For example, competitors which work across different sectors may be competing for the same in-house lawyers, engineers, or designers.[4]

An increasingly global focus

It is not only the CMA that is signalling a more rigorous approach to anti-competitive activities in the employment space. In fact, antitrust enforcement in labour markets has gained significant momentum across the U.S., Asia and Europe, indicating that many regulators view this as an important area.

The EU has been comparatively slow to engage, but nonetheless there is a clear appetite for enforcement. Whilst there has been no direct prosecution at the European Commission ("**Commission**") level, in a speech given in October

[4] As an example of this, in 2014, online marketplace, eBay, entered into a no-poach agreement with tax software company, Intuit. A federal district court found this agreement to be anti-competitive, despite the fact that the two businesses were not competitors in any product or service markets.

2021, the Executive Vice President for the Commission indicated that employment-related issues are firmly on the Commission's radar, and that collusion to fix wages or so-called no-poach agreements could be treated as an atypical form of buyer cartel. At the national level, several EU Member States have led successful investigations in competition infringements in the labour market:

- In March 2022, Greece's antitrust authority imposed behavioural remedies on an elevator maintenance and installation trade association for setting minimum wages, six weeks after fining another association in the sector for the same conduct.
- In May 2022, the Portuguese Competition Authority fined the national football league and 31 football clubs €11.3 million for implementing an anticompetitive no-poach agreement. Since then, the regulator has indicated that this case has led to various employee tip-offs and company leniency requests resulting in further investigations in labour markets.
- In October 2022, the Polish Competition Authority fined 16 basketball clubs and the national league for exchanging commercially sensitive information and colluding to terminate player contracts during the covid-19 pandemic in its first no-poach infringement decision.
- In December 2022, the Lithuanian competition authority fined the Lithuanian Association of Real Estate Agencies and 39 of its members €969,060 for a no-poaching agreement.
- Many other EU Member States have also recently come out publicly to confirm that they are closely looking at labour-related issues such as wage fixing and no-poach agreements, even though no concrete cases may have to date materialised (e.g. French and Dutch competition authorities).

Outside of the EU, there has also been significant antitrust enforcement in labour markets. In December 2022, Switzerland's Competition Commission opened an investigation into the alleged exchange of employee salary information between 34 banks in six regions of German-speaking Switzerland. In August 2023, Turkey's Competition Authority stepped up its crackdown on no-poach agreements by fining Vodafone, Turk Telekom and 14 other companies for agreeing not to hire each other's employees.[5]

In the U.S., competition in the labour market has been in the spotlight for some time. In 2016, the US Federal Trade Commission ("**FTC**") and the Antitrust Division of the Department of Justice ("**DOJ**") issued joint Antitrust Guidance to Human Resource Professionals, warning that certain hiring and compensation agreements between competitors could violate antitrust laws and incur criminal sanctions. Since then, the DOJ has pursued several wage-fixing and no-poach cases without success - but recently secured its first criminal conviction in this area in October 2022 when a healthcare company pleaded guilty to colluding with another company to allocate nurses and fix their salaries. This came months after the Antitrust Division lost its first two criminal labour cases. Previously, the DOJ has successfully brought civil claims against businesses for labour market infringements – including against three of America's largest poultry processors for participating in an alleged wage-fixing scheme.[6]

Across the Atlantic, Canada's Competition Bureau in May 2023 published enforcement guidelines which criminalise wage-fixing and no-poach agreements. Persons who contravene the prohibition may be imprisoned for up to 14 years or subjected to a fine at the discretion of the court, or both.

In Asia, competition regulators are likewise turning their attentions to labour markets. In Japan, the Japan Fair Trade Commission ("**JFTC**") published a report in 2018 indicating that certain employment-related practices between competitors (e.g., no-poach agreements) could infringe national antitrust laws. The JFTC particularly targeted entities in the

[5] https://turkishminute.com/2023/08/04/turkeys-competition-board-fines-16-companies-for-anti-competitive-practices/

[6] See details of the complaint here: Microsoft Word - 2022-07-24 Settlement Complaint - Final (justice.gov)

country's sports sector against imposing restrictions on player transfers.

Similarly, in 2018, Hong Kong's Competition Commission ("**HKCC**") published an advisory notice setting out certain employment-related practices which could be considered anti-competitive. This was followed by further guidance from the HKCC in 2022 advising that joint negotiations between employee bodies (including trade unions) and groups of employers may give rise to competition concerns.

Mainland China also recently issued its first judgment regarding antitrust issues in labour markets, ruling that no-poach and wage-fixing agreements involving a driving school infringed the applicable competition laws.[7] More recently, in July 2023 the Chinese antitrust authority, the State Administration for Market Regulation, intervened against a no-poach agreement between four of the country's largest pig breeders, over concerns that it infringed Article 17 of the Anti-Monopoly Law. The pig breeders subsequently withdrew their proposal to put a stop to talent poaching in the industry because it violated the country's anti-monopoly law.[8]

Latin America is also focused on the issue. In May 2023, Peru's antitrust authority issued its first ever no-poach infringement decision fining six construction companies and four executives for agreeing not to hire rival workers. In September 2021, Mexico's Federal Economic Competition Commission issued a landmark no-poach decision against top-tier football clubs, the Mexican Football Federation and eight individuals. Suspected wage fixing, no-poach arrangement and information-exchange agreements are also understood to be being investigated in Colombia and Brazil.

Other areas

Whilst current enforcement areas have tended to focus on wage-fixing, no-poach agreements and information sharing (as outlined above), the list of practices which authorities have found to be problematic in labour markets is not exhaustive, and there are several other activities which regulators have indicated may be concerning:

Non-competes

Contractual non-compete clauses (i.e., agreements which prohibit employees from working for a competitor for a defined period following termination) have traditionally been permitted to the extent that they are reasonable and necessary to protect commercial interests. However, in January 2023 the FTC in the US proposed a rule that would ban employers from imposing non-competes on their workers. The proposal is currently going through consultation, but if implemented it would mark a radical departure from existing practice, which would have a profound impact on employer-employee contracts.

The EU and European regulators have not made such explicit moves against non-competes, however the UK government has announced plans to limit the length of such agreements to a maximum of three-months.

Merger control

Standard merger control frameworks have tended to focus on product markets; however, recently there has been an increased interest in how labour markets are affected by mergers – particularly in the US. In November 2021, the DOJ prohibited Penguin Random House's acquisition of Simon and Schuster over concerns that it would limit the ability of authors to negotiate fair advances and royalties. Following this, in July 2023 the FTC and DOJ published updated draft Merger Guidelines which encourage enforcement agencies to consider how mergers between competing buyers may lessen competition for workers.

Again, the impact of mergers on labour markets has not yet been considered in Europe or at the EU level, but regimes remain flexible enough that it is likely only a matter of time before the issue is considered.

Even before a merger takes place, businesses should also be alert to antitrust concerns during the due diligence process and should take care not to share commercially sensitive employment information with competitors without putting in place appropriate safeguards.

Self-employed workers

In the EU, collective agreements between 'workers' and 'employers' fall outside of competition law to allow for negotiations between parties which improve working terms and conditions for employees. Historically, this exemption has not applied to self-employed workers - so that any collaboration between them (e.g., relating to how much to charge for a service) could be considered a breach of

[7] See Taizhou Luqiao Jili Motor Vehicle Driving Training Co., Ltd. et. al. v. Taizhou Luqiao District Donggang Vehicle Driving Training School et. al., Zui Gao Fa Zhi Min Zhong, (2021) No. 1722, Dec. 22, 2021.

[8] https://www.yicaiglobal.com/news/chinas-four-biggest-hog-breeders-withdraw-initiative-restricting-talent-flow

competition law. However, with the growth of the 'gig-economy' and a general increase in the number of self-employed workers, the situation is changing.

In the Netherlands, the Authority for Consumers and Markets has issued guidelines outlining four situations in which self-employed workers are allowed to make arrangements with each other about rates and other conditions. Additionally, the Commission is working on a set of draft guidelines for collective agreements of self-employed persons which will offer self-employed workers more leeway to enter into collective agreements.

In the UK, the Independent Workers Union of Great Britain ("**IWGB**") has brought a challenge before the Supreme Court to argue that Deliveroo riders should be considered workers and therefore entitled to collective bargaining rights. If the Supreme Court finds in favour of IWGB, this could have significant consequences for self-employed workers.

Whilst there appears to be a shift towards awarding more powers to self-employed workers to collectively agree working conditions, it should be remembered that any such collaboration must only go as far as permitted and must stay within the boundaries of competition law.

Pay transparency

It is worth noting that warnings from regulators not to share sensitive employee information with competitors will increasingly need to be balanced against growing demands for greater pay transparency. In the US, New York and California have already enacted state laws which require employers to specify minimum and maximum salary ranges when advertising jobs; and the European Commission has similarly adopted an EU Directive on Pay Transparency. In the UK, the government also launched a pay transparency pilot scheme in March 2022 to encourage businesses to disclose their salary ranges. More generally, there is a small but growing number of companies which are choosing to voluntarily publish their salary ranges on job postings, even where not required to do so by law. As transparency around pay (and potentially other benefits) increases, businesses need to be mindful that this does not inadvertently allow the collation of commercially sensitive wage or other employment information on competitors. Where required to share such information by law, businesses should not go beyond what is necessary to satisfy any applicable legislation (including competition rules).

Practical tips

In the wake of the renewed interest in labour markets, companies should assess whether their human resources ("**HR**") practices are competition compliant to ensure they are not exposing themselves to possible complaints or claims. Our practical tips are as follows:

1. Incorporate antitrust issues into HR training, including discussion of strategies to mitigate risk.
2. Update internal competition law compliance policies to address any labour market risks and ensure that adequate reporting procedures are in place.
3. Avoid entering into no-poach agreements and review any existing agreements with competitors that may have the effect of restricting the movement of employees.
4. Conduct a careful analysis of who your competitors are, remembering that competitors from a recruitment perspective may differ to commercial competitors.
5. Ensure any existing or future non-compete and non-solicitation clauses contained in commercial agreements are within permitted legal boundaries.
6. Confirm that employee benefits and compensations are being set independently and keep a record of any decision-making affecting salary and benefit changes.
7. Avoid any activity which could be interpreted as an agreement to fix wages or other employee terms with another employer.
8. Ensure that employees understand the nature and limits of sensitive employment information and the risks of sharing such information with their peers in other businesses.
9. Monitor competitive trends and activity in the job market. If there are skills in high demand but short supply, or if a particular competitor is on a hiring spree, those situations could create high risk conditions leading to illegal discussions or agreements.
10. Take care when participating in due diligence exercises for a merger or acquisition, and carefully consider whether a potential merger may lead to a restriction of competition for employees.

11. Take immediate action if you identify improper conduct and consider whether the breach should be reported to a regulator and/or whether legal counsel should be sought.

Many businesses do not consider their human resources or employment practices to give rise to risk under the antitrust rules, and often there is no cause for concern. However, there is no doubt that competition regulators globally are turning a watchful eye towards the employment market, and the latest investigation from the CMA into UK broadcasters is a clear indication that the authorities intend to take such infringements seriously. Therefore, it is vital that companies are mindful of their practices, and in particular, pay keen attention to any activity which could be considered as wage-fixing, an agreement not to poach employees, or an exchange of sensitive employment information.

Contact us

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