SLAUGHTER AND MAY/

CLIENT BRIEFING

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THE NEXT FRONTIER: EU / UK COMPETITION LAW AND LABOUR MARKETS

Introduction

At its core, competition law is about protecting the competitive process to ultimately ensure desirable outcomes for society – economic growth, fair competition, no exploitation, consumer welfare. Within this framework, competition authorities have mainly focussed on impacts on the consumer-facing side of markets when assessing mergers, or exploitative and collusive behaviour. However, competition authorities are increasingly re-focussing on different parts of the puzzle - labour market issues being one such angle.

At the EU level, Commissioner Margrethe Vestager has given clear indications that the European Commission is not just looking to investigate traditional cartels but also anti-competitive conduct in labour markets such as wage-fixing or no-poach agreements.[1] Member State competition authorities have already taken enforcement action in relation to labour market infringements.

The UK's Competition and Markets Authority (CMA) has highlighted in its Annual Plan for 2023 - 2024 that enforcement action in labour market issues is an area of focus. The CMA has also issued guidance to employers on anti-competitive collusion in employment matters (as covered in our previous Competition & Regulatory newsletter.

This briefing reflects on these trends, discusses where EU and UK competition authorities are going next when it comes to labour market issues and sets out some practical tips to mitigate risk.

How do competition laws come into play here?

Article 101 TFEU (and Chapter 1 of the UK Competition Act) prohibits agreements between undertakings that have the object or effect of (amongst other things) directly or indirectly fixing purchase or selling prices or limiting or controlling production, sharing markets or sources of supply. To date, enforcement priorities have largely focused on sellers' cartels but there have been a handful of buyer cartel cases on the EU's enforcement record (e.g. car battery recycling, ethylene).[2] In July 2022 the CMA opened an investigation into suspected anti-competitive behaviour relating to the purchase of freelance services. In a similar vein, wage or salary (purchase price) fixing agreements, no-poach agreements and agreements to limit production (including by reducing the labour force in collusion with competitors) would be caught by the Article 101/Chapter 1 prohibition.

Wage-fixing agreements

Wage-fixing has been identified as a 'by-object restriction' in the CMA's draft revised Horizontal Guidelines published for consultation in January 2023, which means it would not be necessary to prove that the agreement will produce anti-competitive effects as the 'object' itself demonstrates a sufficient harm to competition. The CMA Guidance defines these as agreements between employers to fix employees' pay or other employee benefits. This includes agreeing the same wage rates or setting maximum caps on pay level.

It is worth noting that the concern here goes beyond just agreements to co-ordinate on monetary pay levels. First, guidance by the US authorities on the topic clarifies that job benefits such as gym membership, parking, transit subsidies, meals, or meal subsidies and similar benefits of employment are all considered to be elements of employee compensation and an agreement to align on these elements is illegal wage-fixing. Authorities in the EU and UK are likely to take a similar position. Second, the authorities will consider that in substance the agreement has the effect of preventing easy movement of labour and reduced competitive tension amongst employers. For instance, in Poland, the authority found unlawful an agreement between basketball clubs and the Polish Basketball League not to pay players all the salaries due for the season which was terminated on

[1] Speech by Margrethe Vestager at the Italian Antitrust Association Annual Conference, "A new era of cartel enforcement", on 22 October 2021.

[2] Case C-563/19 *Recylex SA and Others v European Commission*, judgment of 3 June 2021 and Westlake/Orbia/Clariant/Celanese Commission decision of 14 July 2020 (AT.40410).

account of the coronavirus. Given this coordinated action, clubs could reduce their players' monetary benefits without the fear of losing them to rival clubs in the next season.

Sidebar: Collective agreements between workers and employers have been historically exempt from the scope of the Article 101 prohibition. This was to allow negotiations between workers and employers to improve working conditions and wage levels. Solo self-employed workers however fell out of the scope of this exemption. To remedy this anomaly, the European Commission is working on guidelines for platform workers and the self-employed to clarify that self-employed individuals will be categorised as 'workers' meaning that they can collaborate amongst themselves to establish a fair bargaining position vis-à-vis potential employers. Previously, such collaboration between self-employed persons (those organised as individual companies) would have been viewed as 'collusion' in breach of Article 101. While the Commission's guidelines seem to focus only on workers in the digital labour markets, one might expect that they will have a wider application in practice. It is important to note though that this exemption is limited. As acknowledged by the Dutch Competition Authority, 'context matters' and any relaxation of the Article 101 rules in this regard is only meant to allow a fair negotiation on basic labour conditions; it is not meant to allow self-employed workers to unfairly 'collude' to increase fees in a specialised field for example.

In the UK, self-employed contractors do not currently benefit from collective bargaining rights as they fall outside the definition of 'workers' that can form part of a trade union. However, this is currently the subject of a challenge before the Supreme Court by the Independent Workers Union of Great Britain (IWGB), who are seeking to represent Deliveroo riders in its Camden zone. If the Supreme Court finds in favour of the IWGB, it could have significant implications for the wider gig economy.

No-poach and non-compete agreements

No-poach (defined by the CMA as agreements between employers not to hire one another's employees, or at least not to do so without the other employer's consent) and non-competes (agreements that forbid employees from moving from one employer to another) are also attracting significant antitrust scrutiny.

No-poach agreements reduce competitive tension amongst employers in the same way as wage-fixing agreements.

As regards non-competes, traditionally the courts and EU/UK rules have recognised that such restrictions should be acceptable (subject to well defined boundaries) as they are an effective means to safeguard the former employer's legitimate interests, such as protecting confidential information, customer connections and/or workforce stability. However, in February 2022, the US Department of Justice (DOJ) used a lawsuit to advance the case that non-compete agreements should be considered *per se* violations of the Sherman Antitrust Act. While the court did not agree, the mere fact that the DOJ was prepared to advance the case would seem to indicate a departure from the traditional position that non-competes serve a legitimate purpose in certain circumstances.[3] On 5 January 2023, the US Federal Trade Commission also announced a proposal to ban all existing and future non-competes in employment contracts. This proposal is going through consultation and its jurisdictional reach is unclear.

In the EU, enforcement action on such clauses is already underway at member state level. In Hungary, the authority cracked down on internal rules of the Association of Hungarian HR Consulting Agencies, which prohibited members from soliciting employees of fellow members (and fixed minimum fees in respect of labour-hire and recruitment services provided by its members). In Portugal, the authority found unlawful an agreement between the Portuguese Professional Football League and 31 member clubs which prevented the hiring by First and Second League of professional football clubs of players who unilaterally terminated their employment contract invoking issues caused by the Covid-19 pandemic. Through such a no-poach understanding, mobility of such players was restricted and competition for players automatically reduced.

The European Commission it appears is waiting for its test case. Interestingly, Commissioner Vestager has linked no-poach agreements to the stifling of innovation competition; she says, "*a promise not to hire certain people can effectively be a promise not to innovate, or not to enter a new market*".[4]

On 10 May 2023 the UK government confirmed that it intends to legislate to limit the length of non-compete clauses in employment contracts to three months. This will not interfere with the ability of employers to use longer periods of (paid) notice or garden leave, or to use other post-termination restrictions such as non-solicitation clauses. The change will require primary legislation and will be implemented "when Parliamentary time allows".

Practice point: Non-competes and no-poach arrangements are common features in an M&A context. However, under competition law rules there is tolerance

[3] Stmt. of Interest, Beck v. Pickert Medical Grp., No. CV21-02092 (D. Nev. Feb. 25, 2022). A US federal jury acquitted four individuals charged by the DOJ in a wage-fixing and no-poach conspiracy - United States of America V. Faysal Kalayaf Manahe et al, No. 2:22-cr-00013-JAW (D. Me. Jan. 27, 2022).

[4] Speech by Margrethe Vestager at the Italian Antitrust Association Annual Conference, "A new era of cartel enforcement", on 22 October 2021.

for these clauses only when they qualify as necessary ancillary restraints, i.e. agreements necessary to give effect to another related main transaction that in itself is not anti-competitive. Furthermore, the restrictions must be objectively necessary and indispensable for the main transaction. Limiting the duration and scope of the restrictions is therefore key.

In an employment law context as well, the English courts[5] will only uphold these clauses where they are necessary to protect the employer's legitimate business interests, namely confidentiality, stability of the workforce and/or customer connections.

Exchange of competitively sensitive information

This is also a breach of Article 101. There is increasing recognition amongst competition agencies that the terms and conditions that a business offers to employees could in itself comprise competitively sensitive information as disclosure would reduce competition between businesses vis-a-vis recruitment and retention. One could also categorise this as an exchange of sensitive information on input costs. There has already been enforcement action in this regard at national level in the EU e.g. in Lithuania where the competition authority investigated and fined an agreement among the Lithuanian Basketball League clubs that exchanged information on player payment terms and salaries.

There is an interesting contrast here with growing trends towards pay transparency, particularly employers disclosing salary ranges in job adverts. Some employers are choosing to do this voluntarily, but regulators are increasingly introducing legal requirements to promote pay transparency. For example, the New York State legislature has recently passed a law requiring employers to list salary ranges in job advertisements from September 2023. The requirements will apply to all jobs that can or will be performed, at least in part, in New York State (including remote positions). The compensation range which must be published is the lowest and highest annual salary or hourly range of compensation that the employer believes in "good faith" to be accurate at the time of the advertisement. This is part of a patchwork of both state laws (of which California and Colorado are included) and city laws (of which there is a separate New York City law) on pay transparency in the US. The Californian law does not simply require employers to include pay ranges in job adverts; it also allows employees to ask their employer to provide the pay range for their own role.

Similar legislation is in progress for the EU. In April 2023 the European Council adopted a new EU Pay Transparency Directive. This will also require employers to publicly state the starting salary or pay range when advertising new roles (either in the advert or in advance of an interview). It will also entitle existing employees to ask to see their employer's data on average pay levels, as well as their criteria used to establish both pay and career progression.

The UK has so far resisted implementing similar legislative measures on pay transparency, although the government did launch a pilot in March 2022 asking participating employers to voluntarily publish salary ranges in job adverts (amongst other measures).

The intention of pay transparency is to improve employees' bargaining position in salary negotiations and help reduce the gender pay gap, but it could potentially enable businesses to collate competitively sensitive wage information. There is a balancing act required here (see section below).

Practical steps to mitigate risk

Labour markets are clearly on competition regulators' radars. There are therefore some to-dos to consider:

- Roll out antitrust training to HR and business services departments.
- Steer clear of soft or explicit no-poach or wage fixing understandings and agreements.
- Document internally the independent decision making and criteria impacting salary and benefit changes.
- Do not share sensitive information about your business or employees with a competitor (beyond what is required by any applicable legislation on pay transparency). This would include granular information on wage levels, benefits and employment terms. There are scenarios in which aggregated, historic and anonymised information may be fine to share, for instance in the context of a third-party independent survey being conducted for legitimate purposes. However, re-assess participation in any such information collection exercises that may be undertaken by industry associations and agree safeguards in advance that will prevent the matching up of data to a particular source.

[5] See TFS Derivatives Ltd v Morgan [2004] EWHC 3181 (QB), Dyson Technology Ltd v Strutt [2005] EWHC 2814 (Ch) and Apex Resources Ltd v Macdougall [2021] CSOH.

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