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Competition and Markets Authority wage-fixing cartel probe

On 12 July 2022, the Competition and Markets Authority ("**CMA**") opened its first investigation into labour markets when it announced its potential wage-fixing cartel probe into BT Group PLC ("**BT**"), IMG Media Limited (including Premier League Productions) ("**IMG**"), ITV PLC ("**ITV**"), and Sky UK Limited ("**Sky**") (together, the "**Broadcasters**").

Traditionally, competition authorities worldwide have largely focussed on price-fixing arrangements within the sale of goods and services markets. However, this investigation reflects a growing recognition that antitrust rules have a role to play in labour markets and that authorities are increasingly investigating anti-competitive practices between competitors in labour markets. Companies should have to compete for workers just like they compete for customers, products or services. The same antitrust rules apply.

CMA probe

In this recent CMA investigation, the Broadcasters have allegedly colluded to fix the rates offered to freelance workers. The CMA's investigation focusses, in particular, on camera operators, sound engineers, slow-motion specialists, floor managers and technical staff, which each support the production and broadcasting of sports content in the UK. It arises over concerns of the Broadcasters' flat rate for freelancers of £400 for matches, regardless of the duration of the shoot, distance travelled or popularity of the game. The £400 blanket fee includes travel costs and other expenses, and, although the rate has risen marginally over the last eight years, it has not kept up with the rate of inflation.

The CMA announced that it has "reasonable grounds" to suspect that this is a breach of competition law. However, it has yet to reach a view as to whether there is sufficient evidence of an infringement of competition law for it to issue a statement of objections to any of the parties.[1] A number of the Broadcasters have publicly indicated that they are cooperating with the CMA on this matter.

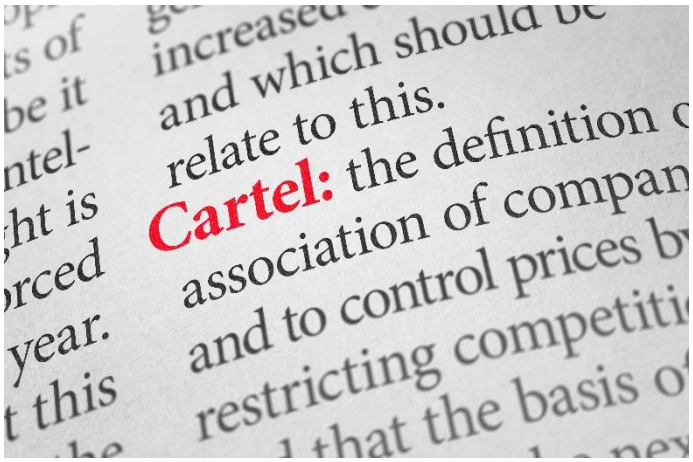
This investigation shines a light on the challenging working conditions faced by freelancers. Until the announcement of this investigation, many within the industry believed that the freelancers' wages were set by an official body and did not expect any underlying collusion. Post Covid-19, especially, there has been a focus on supporting economic recovery and boosting innovation and competition in labour markets by increasing mobility and preventing stagnation of earnings (i.e., by improving level of wages, benefits and working conditions for employees).

Legal issues

The focus of this investigation is on "wage fixing" which can be treated akin to a price-fixing cartel between competing organisations. Cartels are agreements or arrangements (generally covert) between two or more competitors that agree to restrict competition on the marketplace by entering into so-called "hard-core" restrictions of competition law, such as price-fixing, market/customer sharing, limiting output and/or bid-rigging, which limit competition.

[1] A statement of objections is a formal step in an investigation, where the CMA informs the companies concerned in writing of the objections raised against them.

In the context of labour markets, where competitors agree how much to pay employees, such as capping or maintaining wages, or withholding pay rises and/or bonuses; this can be considered as price-fixing. Ultimately, employers competing to hire or retain the same employees or types of employees are competitors from an antitrust perspective. Each competitor should be able to set their pay strategy independently and thus wage fixing agreements are generally considered per se illegal. If there is greater competition among employers, it is considered that this helps employees achieve higher wages and greater benefits, leading to greater innovation through increased quality and quantity of goods and services for consumers.



Anti-competitive practices in labour markets

Price-fixing is not the only practice of concern to authorities in labour markets. The following anti-competitive practices may also be generally considered to be illegal:

(i) **No-poach agreements** entered into between competing organisations where they agree not to hire each other's employees. This can extend to agreeing not to cold call employees at competing firms, not to hire employees from a specific organisation for certain years and not to counteroffer above the initial offer for certain employees. Although a company will attempt to retain their own talent, especially if it is an industry where employees have specialist training/qualifications or where the employee acquires specific know-how from the employer, this raises antitrust concerns. Such restrictions in effect inhibit the movement of employees between rival employers which can prevent mobility and career development, and ultimately lead to suppressed wages.

But note that the concern here is not with common contractual provisions, such as non-compete (and non-solicitation) clauses imposed often on a seller in the M&A context, if they are directly related and necessary to the implementation of the deal and to protect the purchaser's investment. For instance, such non-compete provisions are generally allowed if they are reasonable in product/geographic scope and duration (i.e. two years if goodwill is transferred, and three years if goodwill and know-how is transferred).

(ii) **Exchange of competitively sensitive information** between competitors (direct or indirect) can also raise competition issues, namely an increase in transparency in the marketplace giving an insight into competitors' commercial strategies leading to potential collusion and less competitive markets. The more current/future, granular and frequent the exchange of data the more problematic. The types of information in a labour context that could be considered sensitive if shared between competitors, include current or future salary levels, remuneration policies, incentives, flexible working and sabbatical offers or hiring levels as well as compensation levels offered to employees put on furlough or redundancy.

Recent enforcement action

There has indeed over the years been an increased awareness of these issues and significant enforcement of wage fixing and non-poaching practices around the world, including in Europe (albeit not at the European Commission level at the moment), in a variety of sectors. In the last few years alone there have been a number of high profile cases in this area:

(i) On 7 January 2021, the Hungarian competition authority fined the Association of Hungarian Human Resource Consulting Agencies €2.8 million for imposing rules on its members that set minimum prices for their services and prevented them from recruiting each other's employees.

(ii) On 16 March 2021, the Brazilian competition authority, CADE, opened an investigation into three dozen companies, including the Brazilian subsidiaries of Abbott, Acelity LP, Baxter, Bayer and Siemens Healthcare — as well as 108 individuals linked to them – for allegedly engaging in wage-fixing labour agreements in the healthcare market.

(iii) On 23 September 2021, Mexico's antitrust authority fined more than a dozen football clubs and the Mexican Football Federation

approximately €7.5 million over salary caps for female players and labour movement restrictions.

(iv) On 29 November 2021, the US District Court for the Eastern District of Texas held for the first time that a conspiracy to fix wages can constitute a criminal violation of antitrust laws under the Sherman Act. The defendant, the owner of a physical therapist staffing company, was found guilty of making agreements with competitor companies, including over text message, to lower pay rates for therapists.

(v) On 7 December 2021 and 16 December 2021, the Antitrust Division in the US announced a criminal indictment for a no-poach agreement between competitors. A former director of global engineering at a major aerospace engineering company was indicted for allegedly conspiring with outsource engineering suppliers to restrict recruiting and hiring of engineers and other skilled workers.

(vi) On 1 February 2022, Romania's antitrust watchdog announced it was investigating seven automotive engineering and technology providers for alleged no-poach and wage-fixing agreements, in the agency's first probe into labour markets.

(vii) On 14 February 2022, Peru's competition authority launched an investigation into six construction companies after they allegedly agreed not to hire each other's employees, marking what appears to be the agency's first-ever probe into alleged no-poach agreements.

(viii) On 7 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.

(ix) On 3 May 2022, the Portuguese competition authority fined 31 football clubs and Portugal's Football League €11.3 million for implementing an anticompetitive no-poach agreement, which agreed not to hire players who unilaterally terminated their employment contracts between 2019 and 2020 due to the covid-19 pandemic.

(x) On 21 July 2022, a US federal court denied five motions to dismiss a lawsuit accusing some of the largest chicken and turkey producers of conspiring to fix the wages of their workers.

Practical advice

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. This is particularly important, given the potential civil and criminal consequences.[2] Our practical tips are as follows:

(i) Train HR managers and staff on antitrust rules relevant to HR practices.

(ii) Update competition law compliance policies to ensure that they address any labour market risks and are extended to include HR personnel and any other personnel involved in recruitment.

(iii) Review any agreements that may have the effect of restricting the hiring of employees from competitors or preventing competitors from being able to hire your employees, including deferred compensation arrangements and wage fixing agreements.

(iv) Ensure any existing or future non-compete and non-solicitation clauses contained in commercial agreements are within permitted boundaries.

[2] A person who is guilty of the cartel offence under Chapter 1 of the Competition Act 1998 is liable to: (i) on conviction on indictment, to imprisonment for a maximum term of five years, and/or a fine, and (ii) on summary conviction, to imprisonment for a maximum term of six months and/or to a fine not exceeding the statutory maximum. There are also a range of penalties for failure to comply with investigations.

(v) Check how you are setting employee compensation and benefits. Each company should be competing independently in setting its package of cash compensation and non-cash benefits. Any agreements or informal understandings with another competing company about the amount of compensation or types of benefits that will be offered to employees should be discussed immediately with your legal team.

(vi) Be aware of which industry group meetings and conferences are being attended by HR teams, which email and WhatsApp groups they are on, and whether they communicate with counterparts at rival employers to ensure your HR teams understand the competition law limits.

(vii) 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.

(viii) Take action if you identify an issue to bring any illegal conduct to an end and take remediation steps to prevent its reoccurrence. In the event of illegal conduct, you should also consider whether you need to report the breach to a regulator or seek leniency or immunity. It is vital to consider current and historical practices in this area with your legal team to ensure compliance with best practice and to minimise any risk or exposure.

Contact us

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