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COMPETITIVE EDGE

NAVIGATING THE CMA'S RECENT ANTITRUST GUIDANCE TO EMPLOYERS

APRIL 2023 // NATHAN ELBROND-PALMER

Introduction

With the issuance of its latest guidance document, *Employers advice on how to avoid anti-competitive behaviour*[1], the UK's Competition and Markets Authority (CMA) has signalled its intention to ratchet up antitrust scrutiny of labour markets, reflecting a trend which continues to gather momentum amongst competition regulators across the globe. Traditionally, such regulators have focused on eliminating anti-competitive practices relating to the price, quality and availability of products and services. However, in recent years, anti-competitive practices concerning the supply of labour have increasingly come under the microscope, with regulators in North America leading the charge in scrutinising employers' practices in this area. Echoing this trend, the CMA's guidance acts as a warning to employers that it intends to crack down on three key anti-competitive employer practices, which include so-called 'no-poaching' agreements, wage-fixing agreements and information sharing. After exploring the exact guidance in more detail as well as its underlying rationale, this note examines the broader global context which surrounds the CMA's new paper. Finally, in the face of this increased scrutiny of labour markets, this note provides several practical steps that employers can take in order to minimise their antitrust risk going forward.

The CMA's guidance

The guidance document, issued on 9 February 2023, underlines the CMA's desire to remind employers of their important responsibilities under competition law – including the basic notion that collusion between employers is illegal - as well as the "significant financial and personal consequences"[2] associated with non-compliance. To that end, the CMA intends to target and crack down on three key anti-competitive employer practices, all of which are described as being examples of "business cartels"[3]. Whilst these practices can be agreed upon by employers in writing or agreed more informally through 'gentleman's agreements', the CMA notes that such agreements will be illegal irrespective of how they have been formed. These three practices may be defined in the following ways:

- **No-poaching agreements:** secret agreements struck between two or more businesses, under which it is agreed that they will not approach or hire each other's employees, except without the express consent of the other employer.
- **Wage-fixing agreements:** secret agreements struck between two or more businesses to fix the level of employees' pay or other employee benefits.
- **Information sharing:** instances where two or more businesses provide each other with sensitive information about the terms and conditions on which their staff are employed. Whilst the CMA does not elaborate on the types of information that should be considered sensitive, it is clear that not all information sharing will be unlawful. Indeed, a great deal of public information is available regarding employee salary levels, for example. Notwithstanding this, one would imagine that employee-related information (relating to permanent staff but also freelancers and contractors) such as hiring strategies, current and proposed pay, pay increases, commissions and allowances for expenses might all be considered competitively sensitive.

Why is the CMA interested in employment markets?

The negative impacts of anti-competitive practices in labour markets are, as the CMA notes, felt not just by employees but also by employers themselves. From one perspective, information sharing, wage-fixing and no-poaching agreements can enable employers to coordinate their employment

[1] Competition & Markets Authority (2023) *Employers advice on how to avoid anti-competitive behaviour, GOV.UK.* Available at: https://www.gov.uk/government/publications/avoid-breaking-competition-law-advice-for-employers/employers-advice-on-how-to-avoid-anti-competitive-behavior (Accessed: April 1, 2023).
[2] Ibid, 1.
[3] Ibid, 3.

terms, thereby leaving employees in a worse-off position. In an environment without collusion, employers would instead be forced to compete over the available labour in the market, producing upward pressure on employees' pay packets and increasing employee mobility and choice. In the midst of rampant inflation, a cost of living crisis and industrial action over pay in various sectors, the damage caused by wage-fixing agreements is not hard to imagine. Excessive information sharing may produce similar harms; for instance, where a firm has knowledge of the salary and benefits its rivals are intending to offer over the course of a financial year, the firm may become less likely to negotiate improved terms with current talent and new hires.[4] In tandem with this, anti-competitiveness is deeply harmful to businesses themselves; collusion, such as by agreeing not to poach employees, directly reduces the pool of available labour in the market, hampering a business's ability to recruit new talent and expand its operations.[5]

Notable Exceptions

Whilst the CMA does not elaborate on this point within its guidance, all three of the practices above may be subject to exceptions in some instances, meaning they may be permissible in a limited set of circumstances. For instance, it is likely that no-poaching agreements may sometimes be permissible, particularly where such agreements have been concluded in an M&A context or where parties are entering a joint venture agreement. This is a distinction found in US antitrust law, where a difference is drawn between 'naked' no-poach agreements (which employers enter with the sole motive of limiting competition in employment markets) as compared with no-poach agreements which are reasonably necessary to a larger legitimate collaboration.[6] Examples of a larger legitimate collaboration may include M&A transactions, where an acquirer negotiates a no-poach agreement with the seller to protect the acquirer's investment into the new business. The Department of Justice (DOJ) has distinguished between these two types of agreements, stating that they should be subject to differing standards of review under the Sherman Act – which is one of the US' foremost antitrust statutes. On the one hand, the DOJ has confirmed that 'naked' no poach agreements will be treated as *per se* illegal, meaning that they are presumed to be illegal, with the consequence being that neither courts or antitrust agencies will consider any proposed justifications for the agreement.[7] By contrast, agreements reasonably necessary for a larger legitimate collaboration have not been presumed to be illegal. Instead, these agreements have been subjected to the *rule of reason* standard, meaning a factfinder is tasked with weighing the pro-competitive benefits against the anti-competitive harms of any such agreement to determine the overall effect.[8] Thus, no-poaching agreements concluded within the context of a larger transaction have been treated more favourably under US antitrust rules, meaning they have been less likely to be considered anti-competitive, and it will be interesting to see whether the CMA adopts a similar approach in the UK moving forward. Either way, buyers in an M&A context would do well to ensure that any no-poach clauses that they agree with sellers are sufficiently limited in scope, protecting only their legitimate business interests and extending no further.

Narrowly defined exceptions are also likely to exist in relation to wage-fixing agreements. The fixing of wage rates through collective bargaining between businesses and trade unions is likely to remain one area which will be exempt from considerations of anti-competitiveness under antitrust law. As a

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[4] Ibid, 6.
[5] Nicola Whiteley (2023) *The Competition and Markets Authority issues new guidance on avoiding anti competitive behaviour for employers, Orrick Herrington & Sutcliffe LLP.* Available at: https://www.orrick.com/en/Insights/2023/02/The-Competition-and-Markets-Authority-Issues-New-Guidance-on-Avoiding-Anti-Competitive-Behaviour (Accessed: April 3, 2023).
[6] Keron J. Morris (2019) *Wage-fixing and no-poach agreements: Publications and presentations, Arnold & Porter Kaye Scholer LLP.* Available at: https://www.arnoldporter.com/en/perspectives/publications/2019/02/wage-fixing-and-no-poach-agreements (Accessed: April 4, 2023).
[7] Dee Bansal et al. (2022) *The 'no-poach' approach: Antitrust Enforcement of Employment Agreements, US Courts Annual Review - Global Competition Review.* Available at: https://globalcompetitionreview.com/review/us-courts-annual-review/2022/article/the-no-poach-approach-antitrust-enforcement-of-employment-agreements (Accessed: April 5, 2023).
[8] *NCAA v. Board of Regents of University of Oklahoma*, 468 U.S. 85, 100-03 (1984).

case in point, the European Court of Justice (ECJ) held in *Albany*[9] that a collective agreement fell outside of the scope of competition law. This ruling was underpinned by two key criteria having been satisfied; firstly, the agreement had been formed through negotiations between employers and workers, and, secondly, the agreement had been designed to improve working conditions. Whilst this ECJ ruling preceded Brexit, it is likely to still reflect the position under UK competition law, thus providing a narrow exception for wage-fixing agreements.

Information sharing is also likely to be permissible in certain circumstances, although, as noted above, the CMA has not expressly defined how it intends to draw the line on this issue. Pending any clarification from the UK regulator, greater clarity has been provided in the US by the DOJ and the Federal Trade Commission (FTC), who note that information exchanges may be compliant with antitrust laws if:

i) a neutral third party manages the exchange,

ii) the exchange involves information that is relatively old,

iii) the information is aggregated to protect the identity of the underlying sources, and

iv) enough sources are aggregated to prevent competitors from linking particular data to an individual source.[10]

Consequences of Non-Compliance

Given the multitude of negative impacts associated with employer collusion in the labour markets, the CMA has left no doubt as to the consequences for businesses and individuals who fall foul of the new guidance.[11] These consequences broadly fall into two separate categories and can be summarised as shown below:

Businesses	Individuals
• Anti-competitive agreements are unenforceable • The CMA has the power to investigate if there are reasonable grounds to suspect the law is being broken, "such that fair competition when recruiting and retaining talent is being undermined." In July 2022, the CMA opened its first investigation into wage-fixing arrangements, examining suspected fixing by sports broadcasters of the wage rates offered to freelance workers. • Following a CMA investigation, businesses found to have breached competition law may face fines of up to 10% of their global, annual group worldwide turnover • Injured parties can seek damages before the Courts. • Negative publicity arising from any CMA investigation	• Individuals participating in the collusion may face significant personal fines and imprisonment. Entering into anti-competitive agreements may constitute a criminal offence under s 188 of the Enterprise Act 2002 (the so-called "cartel offence".) • Individual participants may be disqualified from acting as a company director for up to 15 years.

[9] C-67/96, Albany BV v Stichting Bedrijfspensioenfonds Textielindustrie, [1999] ECR I-5751.
[10] US Department of Justice Antitrust Division & Federal Trade Commission (2016) *Antitrust Guidance for Human Resource Professionals.* Available at: https://www.justice.gov/atr/file/903511/download (Accessed: April 3, 2023).
[11] Competition and Markets Authority (2023) *CMA reminds employers to avoid anti-competitive practices, GOV.UK.* GOV.UK. Available at: https://www.gov.uk/government/news/cma-reminds-employers-to-avoid-anti-competitive-practices (Accessed: April 2, 2023).

The Global Landscape

i) North America

With its new guidance, the CMA has positioned itself amongst a rapidly-growing list of regulators around the globe who have recently enhanced their focus on antitrust issues in labour markets. Indeed, this global shift arguably originated on the other side of the Atlantic, with activity starting to ratchet up in the North America region as early as 2016. It was during this year in particular that the DOJ, combined with the FTC, issued a report entitled *Antitrust Guidance for Human Resource Professionals*[12], which pre-empted the CMA's recent activity by specifically focusing on anti-competitive information sharing, no-poach and wage-fixing agreements. At the time the report was issued, employers were warned that such agreements would be treated as unlawful, and that the DOJ would bring criminal prosecutions where appropriate. Several years on from this warning, 2022 saw the DOJ secure its first criminal conviction relating to a labour market antitrust violation. In the case in question, a healthcare staffing agency pleaded guilty to entering an agreement not to recruit nurses from a competitor school district or to raise school nurses' wages.[13] As such, the agency's conduct combined elements of wage-fixing with no-poaching, and it was found to have violated Section 1 of the Sherman Act, which prohibits agreements that unreasonably restrain trade.[14] The Canadian Competition Bureau has very much followed a similar path, confirming that as of June 2023, no-poach and wage-fixing agreements will constitute criminal offences in Canada.[15]

Increased antitrust scrutiny of US employment markets has also been underlined with regards to the third practice, namely information sharing. As per the FTC and DOJ's guidance document from 2016, companies sharing employment information which has anti-competitive consequences may be found to be committing antitrust violations.[16] As recently as last month, the DOJ sought to toughen its stance further in this area. In their 2016 document, the regulators had referred to their joint 1996 Statement of Antitrust Enforcement Policy in Health Care to clarify some of the instances in which information sharing may be lawful.[17] In particular, this Statement had outlined a number of 'safety zones' for the sharing of competitively sensitive information between participants in the health care industry.[18] In a significant reversal, however, the DOJ's Antitrust Division recently opted to withdraw the 1996 Statement, condemning it for being "overly permissive" on the issue.[19] With these particular safety zones withdrawn, it appears that US regulators are gearing up to adopt a stricter stance on permissible types of information sharing, mirroring the growing body of investigations and enforcement actions which it has pursued regarding no-poach and wage-fixing agreements. Thus, in relation to all three of the major anti-competitive practices outlined above, the North America region has acted as a forerunner in terms of ratcheting up its antitrust scrutiny of labour markets.

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[12] DOJ Antitrust Division & FTC (2016) Antitrust Guidance for Human Resource Professionals.
[13] Office of Public Affairs (2022) Health Care Company pleads guilty and is sentenced for conspiring to suppress wages of school nurses, The United States Department of Justice. Available at: https://www.justice.gov/opa/pr/health-care-company-pleads-guilty-and-sentenced-conspiring-suppress-wages-school-nurses (Accessed: April 6, 2023).
[14] 15 U.S.C. § 1
[15] Michael Osborne & Samuel Bogetti (2023) Getting Ready for Canada's Upcoming Ban on Wage-Fixing & No-Poach Agreements, Cozen O'Connor LLP. Available at: https://www.cozen.com/news-resources/publications/2023/getting-ready-for-canada-s-upcoming-ban-on-wage-fixing-no-poach-agreements (Accessed: April 1, 2023).
[16] DOJ Antitrust Division & FTC (2016) Antitrust Guidance for Human Resource Professionals.
[17] US Department of Justice & Federal Trade Commission (1996). Statements of Antitrust Enforcement Policy in Health Care. Available at: https://www.justice.gov/atr/page/file/1197731/download (Accessed: April 6, 2023).
[18] Ibid, 5-7.
[19] Office of Public Affairs (2023) Justice Department Withdraws Outdated Enforcement Policy Statements, The United States Department of Justice. Available at: https://www.justice.gov/opa/pr/justice-department-withdraws-outdated-enforcement-policy-statements (Accessed: April 6, 2023).

ii) **Europe**

Increased scrutiny on anti-competitive conduct in the labour markets has also become apparent in continental Europe, both from the perspective of various national competition regulators as well as the European Union. In June 2022, for instance, the Director-General of the Directorate General for Competition, Olivier Guersent, clarified that the European Commission was actively considering how to apply Article 101 TFEU - which prohibits cartels - to no-poach agreements.[20] Beyond this, several national competition authorities have chosen to pursue employment-related enforcement actions over the past year. Illustrating this, the Portuguese Competition Authority last year handed out fines to 31 football clubs for implementing a no-poach agreement.[21] In a similar vein, in October 2022, the Polish Basketball League and its 16-member clubs received significant fines from the Polish Competition Authority for colluding to terminate players' contracts and withhold their wages in response to the COVID-19 pandemic.[22] Even in countries where enforcement actions have been rarer, labour markets have still been investigated and heavily scrutinised to ascertain whether anti-competitive practices are occurring.[23]

Practical steps employers can take to minimise antitrust risk

As explored, regulators' increasing focus on this area of competition law, combined with the significant penalties associated with non-compliance, both serve to underline the need for employers to actively manage and mitigate their antitrust risk. Examples of proactive steps that employers should take include the following:

1. **Refrain from sharing sensitive employee information with competitors and refrain from entering no-poach and wage-fixing agreements**

The corollary of this point is that, in the various fora where business competitors congregate and interact, employers should proceed with some caution. For instance, businesses who attend trade association meetings and conferences should ensure that these events are not treated as an opportunity to share commercially sensitive information or strike other illegal agreements with competitors. If any such information is involuntarily received, individuals should refuse to accept the information and leave the meeting or delete the email in question, recording that this action was taken. This is a particularly pertinent consideration for HR teams who are invited to engage in such industry fora, perhaps to discuss market trends relating to terms of employment, salary levels and bonuses. In line with the FTC and the DOJ's guidance explored above, HR teams should ensure that, as far as possible, any information shared is aggregated, anonymised, relatively old and not forward-looking, so as to limit their chances of unwittingly facilitating anti-competitive behaviour. Another major instance where employers can heed this advice relates to the information they share in salary surveys; indeed, employers can ensure that such sharing is compliant by only participating in surveys run by independent third parties that provide aggregated information. Until the CMA chooses to clarify its definition of competitively sensitive information, following the guidance provided by US regulators represents the best path for employers to minimise the risk of non-compliant sharing.

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[20] Olivier Guersent (2022) *Labour and Competition: Non-poaching agreements, status of platform workers: What are the risks?* New Frontiers of Antitrust, 13th Annual International Conference of Concurrences Review, Paris. Keynote Speech.
[21] Olivia Rafferty (2022) *Portugal punishes football clubs in first no-poach case, Global Competition Review.* Available at: https://globalcompetitionreview.com/article/portugal-punishes-football-clubs-in-first-no-poach-case (Accessed: April 2, 2023).
[22] Alex Bagley (2022) *Poland issues first no-poach infringement decision, Global Competition Review.* Available at: https://globalcompetitionreview.com/article/poland-issues-first-no-poach-infringement-decision (Accessed: April 4, 2023).
[23] *Marc Israel et al. (2023) CMA joins the global pack and signals increased antitrust scrutiny of labour markets, White & Case LLP.* Available at: https://www.whitecase.com/insight-alert/cma-joins-global-pack-and-signals-increased-antitrust-scrutiny-labour-markets (Accessed: April 1, 2023).

2. **Conduct a thorough review of existing agreements and establish robust internal reporting processes**

Where no-poach and wage-fixing agreements have been entered into with competitors, employers should strongly consider applying to the CMA for leniency. Under the leniency rules, businesses participating in a cartel may receive total or partial immunity from fines, criminal prosecution and director disqualification proceedings where they choose to proactively supply information about the cartel, provided that a number of other conditions for leniency have also been met.[24] Indeed, minimising this exposure through early admission of wrongdoing is preferable compared to waiting for a scenario in which a disgruntled employee informs the competition authorities under a whistleblower programme. To that end, employers must also establish robust internal reporting processes and ensure that staff are aware of these processes, allowing illegal agreements to be reported and dealt with internally, thus minimising whistleblower risk.

3. **Create appropriate safeguards for protecting sensitive information during the due diligence process within M&A transactions**

Simply put, the due diligence process within M&A transactions represents the buyer's opportunity to thoroughly investigate the target company in order to make an informed decision about whether to proceed with the transaction. When completing this diligence phase, the buyer often requires access to a significant amount of commercially sensitive information, which must be protected and safeguarded in a way which is a compliant with competition law - particularly where the parties to the transaction are business competitors. Given the increased focus of antitrust regulators on employment markets, commercially sensitive information may start to increasingly include information regarding the target's employees. Parties can protect this information during due diligence by entering into clean team agreements - which limit the sharing of commercially sensitive information to an identified and limited group of individuals on the buy-side – thus ensuring antitrust compliance whilst also allowing diligence to be undertaken.

4. **Provide HR and Recruitment staff with training on how competition law applies to their work**

Given that they are both heavily involved in hiring and compensation decisions, HR and recruitment staff must play an active role in mitigating the antitrust risks raised by the CMA. Through updating their compliance policies, internal guidance and training programmes, businesses can empower their staff to actively spot illegal practices and recognise the penalties associated with breaching competition law.

Final Word

The expanding role of antitrust regulators, captured in their shifting focus from the product markets towards also considering the labour markets, has created a myriad of new competition law risks for businesses to contemplate. This trend, which has its origins in North America, has spread to much of continental Europe and now the UK, as seen in the CMA's recent guidance. Seeking to remind employers of their obligation to avoid forming cartels, the Authority's guidance focuses in on anti-competitive information sharing, no-poach and wage-fixing agreements as three key areas in which it intends to investigate and bring enforcement actions. Despite this heightened scrutiny and these nascent risks, employers who heed the four key pieces of advice explored above will be in a strong position to manage and mitigate their employment-related antitrust risk.

[24] Competition & Markets Authority (2014) *Cartels: come forward and apply for leniency, GOV.UK.* Available at: https://www.gov.uk/guidance/cartels-confess-and-apply-for-leniency (Accessed: April 3, 2023).