Note of Law Society Roundtable on the CMA's approach to labour markets, competition rules and employer responsibility

Thursday 2nd November 9:30-10:30

Speakers

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The CMA's interest in labour markets

The CMA's annual plan makes a commitment to clamp down on cartel activity and collusive behaviour that affects the finances and incomes of households – including potential interference in labour markets. Anti-competitive behaviour in the labour market can reduce workers ability to earn money and companies' ability to expand.

The CMA's microeconomics research strategy sets one of the areas of focus as being labour markets and monopsony power. This includes:

- measuring labour market concentration and estimating labour market power, and
- looking at specific issues such as the nature and prevalence of non-compete clauses in employee and employer relationships.

It is possible that there is a significant amount of buyer cartel activity around wage fixing, no poaching agreements, and the illegal sharing of competitively sensitive information. This may be underreported because there is less awareness of what behaviours are anti-competitive in the work environment.

Workers/ex-workers are a potential good information source for the CMA of suspected anti-competitive behaviour. The CMA want more workers to be aware that they can report anti-competitive behaviour to the CMA.

There are currently two-live competition act investigations into aspects of the labour market, and there may be more in the future. They both concern labour markets related to the production of television content, and included practices related to freelancers and employees.

How the CMA operates

The CMA is the primary competition authority in the UK, though they do work alongside sector regulators who have concurrent competition law responsibilities. The penalties for organisations who break competition law can be big. They include fines of up to 10% of global turnover and disqualification of directors. Their prioritisation of investigations is laid out in their prioritisation principles, which includes consideration of the impact of the CMA's interventions.

Individuals can either report anonymously or as named individuals.

CMA officials have the power to visit commercial or domestic premises without notice, and can act under court issued warrants. CMA officials will be interested in getting information and documents. This often involves getting the assistance of those employed in IT at the company.

The case initiation letter from the CMA will set out all the information to do with a case, including legal obligations. The letter will also explain how to enquire as to the availability of leniency.

Rewards/Leniency

The CMA can grant discretionary awards of up to £250,000 to those who provide valuable information. The CMA does not publicise the number and value of such awards, but they do grant them. They also can give leniency to corporations who confess to anti-competitive behaviour. The earlier and fuller the confession, the greater scope for protection for the company. Those who report first, and before the CMA has commenced an investigation, and cooperate throughout an enquiry can receive full immunity from any potential related penalties/prosecutions.

Guidance in the area of labour markets

The CMA's Cheating or Competing website includes a set of resources on how to spot and report cartels in employment. It sets out advice for employers and explanations on what wage-fixing and non-poaching are. They are aimed at those with limited knowledge of competition law, so are high-level. It reminds business of key concepts.

The CMA welcomes feedback if people feel that more detailed guidance were needed to understand particular matters. Earlier this year the CMA published more detailed guidance on horizontal agreements – which provides more information on buyer cartels and how these are distinct form joint purchasing arrangements, and how information sharing is considered by the CMA. Both these factors apply to how the CMA approaches the labour market.

Restrictive covenants

On restrictive covenants and non-compete clauses, the CMA is interested in the work that is happening in the academic and policy sphere on these. Competition law provisions on anti-competitive agreements are not often focused on issues between two parties within the same undertaking, such as an employee and employer. Though an issue between self-employed provider of services and a company could come under the CMA's remit.

Buyer-side cartels are very well understood. Other issues, for example the individual employer to employee restrictive covenant disputes, might not be squarely a competition law issue, but the effects of such practices, if they are practiced widely enough, could have anti-competitive repercussions for the wider labour market.

It is important that companies consider whether there is a legally valid reason for imposing restrictions on competition. Companies need to show that such conditions are objectively necessary to achieve legitimate aims. Section 9 of the Competition Act 1998 is the relevant legislation for this. Private individuals and firms can also take competition cases, and so companies do not only need to be concerned about the CMA's public enforcement of competition law.

The CMA is not just an enforcer. They have tools to intervene in markets, and they also support policy makers and legislators on broad issues, especially if they are concerned about broader impact on competition.

Transparency and competition law

Transparency is a tricky issue in competition law. Competition law can sometimes be only one driver. Policy makers may legislate to priorities other aspects in certain situations, such as equal pay. Companies need to comply with employment laws, like other laws, so you cannot breach competition law if you are following the law. This may not be still the case if you do things that are not required by legislation.

Agreeing to share, exchanging competitively sensitive information, about intentions regards workers' pay and conditions, could be an infringement of competition law. It may be a buyer-side cartel. In such cases the CMA would look to separate true transparency, especially if it directed by legislation, from exchanging competitive information that will cause competitive harm. If information is being shared between competitors for transparency reasons, then companies should consider how it can be done in a way that does not have a negative impact on competition – for example, aggregating date across a wide pool of sources.

In the labour market we are talking about competitors in a purchasing market, not a selling (downstream) market.

Collective agreements and competition

Collective bargaining, and industrial relations in general, between employers and employees is not generally covered by competition rules, due to the *Albany* case law of the Court of Justice of the EU. Collective agreements between self-employed workers can be covered by competition law, even if from the outside such agreements look similar to those between employers and employees. This is because self-employed persons providing services would typically be treated as an independent economic undertakings in their own right.

The European Commission in September 2022 came up with its own guidance on applying EU competition law to collective agreements regarding working conditions of the solo self-employed. It says what they would prioritise when looking at such agreements. The guidance tries to provide legal certainty so such negotiations can happen within a legally acceptable framework. The Federal Trade Commission in the USA has made similar pronouncements related to independent contractors in the gig economy.