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QUICK LINKS

CMA issues guidance on collusion between employers

INTRODUCTION

The CMA recently issued a statement providing guidance to employers on how to avoid anti-competitive collusion in relation to employment matters. With 'no poach' agreements and other labour market practices coming under increasing scrutiny, the CMA's statement is the latest in a series of similar initiatives by other competition authorities around the world.

THE CMA'S STATEMENT

The CMA's statement sends a clear warning that anti-competitive collusion between employers is illegal, noting upfront that such collusion can lead to "*significant financial and personal consequences*" for employers. It also highlights the negative impact of anti-competitive practices on labour markets, including reducing employees' salaries, mobility and choices, as well as limiting a business's ability to expand.

MAIN TYPES OF ANTI-COMPETITIVE PRACTICES IN LABOUR MARKETS

The guidance focuses on three main types of anti-competitive behaviours, which the CMA classifies as examples of "*business cartels*":

- ***No-poaching agreements***: no-poaching agreements involve businesses agreeing not to approach or hire each other's employees (or not to do so without the other employer's consent). This prevents businesses from recruiting or competing for staff on the basis of remuneration, benefits or other employment terms.
- ***Wage-fixing agreements***: wage-fixing agreements occur when companies fix their employees' wages or other benefits. In its draft guidance on Horizontal Agreements, published on 25 January 2023, the CMA described wage-fixing collusion as a type of purchasing cartel and so a restriction of competition by object.
- ***Anti-competitive information sharing***: businesses must not generally share sensitive information about the terms and conditions on which their staff are employed. The CMA notes that such information-sharing reduces competition between businesses in both recruitment and retention. The CMA's guidance does not elaborate on the types of information it considers sensitive, but this category is likely to cover any information that could enable businesses to coordinate their employment terms to leave employees worse-off.

In its guidance, the CMA reminds employers that not all illegal agreements or practices are in writing and that they might take the form of informal practices, also known as 'gentleman's agreements'.

The CMA also warns that anti-competitive agreements or practices may cover staff other than permanent salaried employees, and can extend to freelancers and other contracted

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workers. In July 2022, the CMA launched an investigation in relation to the purchase of freelance services by certain companies active in the production and broadcasting of sports content in the UK.

THE CMA'S RECOMMENDATIONS

In its guidance, the CMA suggests that businesses and recruiters should consider taking steps to:

- understand how competition law applies to no-poaching and wage-fixing agreements;
- refrain from engaging in those practices or sharing sensitive information with a competitor;
- provide recruitment staff with training on competition law and how it applies in the recruitment context;
- ensure solid internal reporting processes are in place, and that staff are aware of these and how they can use them; and
- apply for leniency where appropriate (i.e., where a business's past or current practices would constitute a cartel).

GROWING SCRUTINY IN MANY JURISDICTIONS

The release of this statement by the CMA reflects the growing scrutiny of anti-competitive behaviour in labour markets, with many competition authorities releasing guidelines to employers and initiating enforcement action in this area. For example:

- ***North America***: in the United States, following an increase in enforcement activity by the Department of Justice (DOJ) under its criminal powers, 2022 saw the DOJ secure its first criminal conviction for 'no poach' and wage fixing conduct, when a healthcare company entered into a guilty plea for colluding with a competitor. Meanwhile, the Federal Trade Commission proposed a rule change in January this year that would ban non-compete agreements between employers and their staff (including employees and other staff and workers such as independent contractors). The Canadian Competition Bureau has recently taken a similar approach in new dedicated enforcement guidelines on no-poach and wage-fixing agreements. From 23 June 2023, such agreements will constitute criminal offences in Canada.
- ***Europe***: Olivier Guersent, Director-General of DG Competition, stated in June 2022 that the Commission is considering how to apply the Article 101 TFEU prohibition on cartels to no-poach agreements. At the national level, Portugal and Poland's competition authorities were among those taking enforcement action last year, fining sports organisations for anti-competitive conduct in the labour market for football and basketball respectively.
- ***Hong Kong***: in August 2022, the Hong Kong Competition Commission published an Advisory Bulletin laying out its expectations for proper competition between businesses over employee compensation and working conditions. Particular concern was drawn to the practice of joint negotiations by employers with a representative employee body. Please refer to our previous briefing for more information.

The focus of competition authorities on anti-competitive collusion between employers is expected to continue during the year ahead, with labour markets practices clearly an enforcement priority in many jurisdictions.

OTHER DEVELOPMENTS

ANTITRUST

COURT OF JUSTICE FINDS COST-SPLITTING IN PARTIALLY UPHELD DAMAGES CLAIMS TO BE COMPATIBLE WITH EU LAW

On 16 February 2023, in a reference from a Spanish court, the European Court of Justice (CJ) delivered its judgment in the *Tráficos Manuel Ferrer v Daimler* case.

The Spanish court asked the CJ to rule on three questions in relation to allocation of costs and the quantification of follow-on damages claims arising from a cartel. The first question related to the legality of a national provision by which the costs of proceedings in a partially upheld damages claim are split between a claimant and defendant. The second and third questions related to the power of the national court in estimating harm under the Damages Directive (Directive 2014/104).

In relation to the first question, the CJ noted at the outset that the right to full compensation for harm suffered as a result of anti-competitive effects does not concern the rules on the allocation of costs in judicial proceedings. The CJ considered that it is reasonable for a partially unsuccessful claimant to bear a part of the common costs, following an assessment by the national court of the conduct of each party in the proceedings, provided those costs are attributable to the claimant. Therefore, the CJ concluded that provisions of EU law "*do not preclude a national rule of civil procedure under which, in the event that the claim is upheld in part, costs are to be borne by each party and each party bears half of the common costs, except in cases of wrongful conduct*". In particular, the CJ found that cost-splitting in a partially upheld damages claim was compatible with the principle of effectiveness under EU law.

On the second and third questions, the CJ affirmed that the national court may undertake an estimation of harm but that the premise for doing so is twofold: the existence of harm has been established, and that it is *"practically impossible or excessively difficult to quantify it with precision"*. The CJ further found that for these purposes, it is not relevant that the defendant has made available data on which it relied to refute the claimant's expert report. The fact that the action has been brought against only one of the addressees of a cartel decision is also not relevant.

PHARMA COMPANY FINED FOR EXCESSIVE PRICING OF KIDNEY DISEASE DRUG IN CHINA

On 20 February 2023, the State Administration for Market Regulation (SAMR), China's competition authority, published a decision to fine Northeast Pharmaceutical Group (NEPG) CN¥133 million (approximately £16 million) for excessive pricing in relation to levocarnitine active pharmaceutical ingredient (API), which is used for producing medicine widely used by patients with chronic kidney disease.

SAMR found levocarnitine API to constitute its own product market and the geographic market to be China. NEPG was found to be dominant for a number of reasons, including that it held market shares of 100% in 2017, 99.97% in 2018 and 81.06% in 2019, calculated by the sales volume. SAMR found that NEPG had abused that dominant position through excessive pricing, raising prices up to 3.96 times from around CN¥2,500/kg on average to CN¥8,000-10,000/kg at the high end.

The investigation found that NEPG's costs were essentially stable in 2018, but the price increase by NEPG was above a normal range and was many times higher than any cost increase for the later period. It also found that NEPG's price was much higher than its largest competitor and pointed out the harm caused to consumers and the "public good".

The pharmaceutical sector is among SAMR's key focus areas, in line with its stated aim to focus enforcement activity on areas that affect consumers' everyday lives. We have also seen SAMR impose excessive pricing decisions recently in other sectors. For example, in December 2022, SAMR published a penalty decision against China National Knowledge Infrastructure (CNKI), fining the company CN¥87.6 million (approximately £10.5 million). SAMR found that CNKI's market share had been consistently above 50% since 2014 in the relevant market of Chinese academic literature online database services, with its database containing more than 95% of published

Chinese academic literature. Among other abuses, CNKI was found to have charged excessive prices for access to its database and was ordered to offer access at a fair, reasonable and non-discriminatory rate.

In light of this year's priorities for enforcement announced by SAMR (reported below), we expect to see a number of similar cases such as these, particularly in consumer-facing industries.

GENERAL COMPETITION

SAMR OUTLINES ITS KEY TASKS FOR 2023

SAMR held a conference on 9 February at which it discussed its key tasks for 2023. In its press release, SAMR made clear that, from an Anti-Monopoly Law perspective, these included continuing to increase enforcement in areas related to people's everyday life, reinforce supervision over the platform economy, ensure merger control compliance in key sectors, and enhance competition law compliance in intellectual property rights, as well as strengthening its assessment of competition in key industries and areas. SAMR also indicated that it will seek to deepen international cooperation and discussions with other competition agencies.

SAMR noted that it conducted 794 merger reviews in 2022, along with issuing publicly 32 penalties for failure to file, investigating 187 monopoly cases and imposing fines of CN¥784 million (approximately £94 million). On merger review and the investigations into monopoly cases, this is more or less in line with 2021, but it shows a significant decrease in the publicly issued penalties for failure to file (around a 70% decrease) and the level of fines (around a 97% decrease) compared with 2021. This was influenced by the increased enforcement against technology companies and the exceptionally high fine of CN¥18 billion that was imposed on Alibaba in 2021.

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