

# Kluwer Competition Law Blog

## Increasing Antitrust Spotlight on Labour Market Issues in the UK

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The UK's Competition and Markets Authority (the "CMA") has published a research report on competition and market power in labour markets. The report is likely to reinforce the CMA's determination to use its competition law powers to tackle anti-competitive behaviour in labour markets, as well as the case for broader legislative reform.

### **The report on "Competition and market power in UK labour markets"**

The Report[1] is the first "flagship" research study[2] published by the CMA's Microeconomics Unit, which was recently established to conduct economic research focusing on issues of competition, innovation and productivity to support growth in the UK economy. The Microeconomics Unit has been set up as an independent and open-access centre of microeconomic research expertise for the UK government as a whole, and so the Report is aimed not just to inform the CMA's work, but also to be of wider policy interest.

The Report examines employer market power and labour market concentration, the prevalence of restrictive covenants (including non-compete clauses), as well as changes in the labour market, including hybrid and flexible working and the gig economy, which features an increased amount of temporary positions and freelance work. The CMA is planning to use the findings to inform its current increasing scrutiny of potentially anti-competitive conduct in labour markets, as well as broader government and policy thinking.

We pick up on some of the main issues highlighted by the Report below.

### **Employer market power in UK labour markets**

Key findings regarding the level of employer market power in the UK include the following:

- Market power in the labour market can have a wide and negative impact not just on affected workers, but on markets more generally. Whilst market power in the labour market may reduce the wages of workers affected, the Report states that it "may also distort labour supply and

production decisions, reducing economic efficiency and possibly worsening consumer outcomes”.

- Employer market power and labour market concentration in the UK have not increased over the last 20 years. This contrasts with the US, where the CMA’s chief executive, Sarah Cardell, in her accompanying speech, comments that “there is a substantial body of research showing that labour market power in US labour markets have been increasing over time”.
- The share of income workers in the UK receive compared to their input has risen slightly since 2008 to around two-thirds of their contribution to revenues.
- Labour markets are more concentrated outside London and the South East of the UK.
- Concentration levels in job vacancies have remained steady for white-collar workers since 2012 (such as managerial and IT staff), whilst levels in blue-collar professions (such as plant operatives, skilled trade and care professionals) have dropped since 2014.
- The labour markets in the manufacturing, transport and storage and financial services sectors are particularly concentrated.

Key findings from the CMA report regarding employer market power and labour market outcomes include the following:

- Wages are on average ten per cent lower in the most concentrated ten per cent of labour markets compared to the least concentrated ten per cent, except for workers protected from this negative relationship by collective bargaining agreements.
- Consistent with a tightening labour market, the negative relationship between labour market concentration and workers’ wages has fallen steadily and substantially.

### **Non-compete clauses in UK employment contracts**

The Report finds evidence that post-termination non-compete clauses in employment contracts (preventing an employee from working at a competitor for a prescribed amount of time after they leave their current employer) are common in the UK.

According to the research:

- Non-compete clauses impact around:
  - Twenty-six per cent of workers in the UK
  - Forty per cent of UK workers in information and communication technologies and professional and scientific services
  - Twenty per cent of UK workers in retail, education and food services
  - The most common duration of UK non-competes is six months, applied by 43 per cent of employers who use non-competes. About 33 per cent of employers who use non-competes include year-long clauses.

Cardell questions, specifically, in her accompanying speech the high number of non-competes prevalent for the lowest-paid workers. She notes that whilst non-competes are typically justified on the basis of enabling investment to develop workers (through training/sharing confidential information), “we might expect to see non-competes only in particular industries or groups of workers where this sort of investment is happening”. The use of non-competes for rank-and-file workers at fast food chains throughout the US has been a focus of enforcement actions by state enforcers and the US Department of Justice, especially since 2016.

## Implications

The Report's findings (specifically the findings that well-functioning labour markets benefit workers and the economy more generally) will bolster the CMA's determination to ensure that businesses do not restrict competition between them in labour markets through, for example, no-poach and wage-fixing agreements.

The CMA currently has two ongoing investigations concerning alleged no-poaching arrangements in the production, creation and/or broadcasting of television content, and the consumer fragrances industry. In its most recent annual plan, the CMA has also declared competition law enforcement in labour markets to be a priority (which is in line with the priorities of several other competition authorities worldwide). In a drive to raise awareness, the CMA published in February 2023 "[Employers advice on how to avoid anti-competitive behaviour](#)".

Certain topics and issues raised by the Report will fall outside the areas considered by the CMA as part of its antitrust powers. One example is the issue of employee non-competes that are usually outside the scope of UK antitrust law, but are governed by employment law. The UK is currently planning to legislate to limit post-term non-competes to three months in the UK. In her accompanying speech, Cardell states that the evidence in the Report "supports this direction of travel", and comments that "the widespread prevalence of non-competes across the economy could act as a barrier to job switching". The Federal Trade Commission (the "FTC") in the US has taken even more extreme action than the UK, by publishing a broad proposal to ban non-compete clauses, with only limited exceptions related to the sale of a business. Whilst the timing and scope of the final rule are still unknown, the most current reporting indicates that the FTC may vote on the final version of the rule in April 2024.

Another area singled out for exclusion from antitrust scrutiny are collective bargaining arrangements with employers.<sup>[3]</sup> Cardell provides reassurance in her speech (consistent with the approach that the European Commission has taken) that "the CMA has no interest in interfering where self-employed workers and their employers come together to reach a genuine collective bargain and does not expect to stand in the way of such behaviour. Our focus will remain on deterring cartel conduct which by its nature is detrimental to well-functioning labour markets".

## Enhanced antitrust scrutiny of labour markets around the world

The CMA's current focus is part of a global trend of increasing antitrust scrutiny of labour markets. For the past few years, the US had led the way in aggressively investigating allegedly anti-competitive conduct in labour markets, but now global antitrust regulators, including those in Europe, have caught up.

On the same day as the Report's publication, the **Portuguese competition authority** fined<sup>[4]</sup> two multinationals in the technology consultancy sector for entering into no-poach arrangements. In November 2023, the European Commission dawn-raided companies for the first time on the basis of alleged labour market restrictions. On 16 January 2024, **Nordic competition authorities** (Danish, Norwegian, Swedish, Finnish and Icelandic) published a joint report<sup>[5]</sup> on competition and labour markets, concluding that "evidence indicates it is not uncommon for companies in a

range of industries to enter into agreements not to hire each other's employees, which suggest that there could be scope for more enforcement of competition law in labour markets in the Nordic region.

The message for companies doing business in the UK and internationally is clear: It is vital to ensure that HR departments are fully familiar<sup>[6]</sup> with competition law compliance in this sphere.

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[1] The Report on "Competition and market power in UK labour markets", published on 25 January 2024, can be found [here](#), with the accompanying speech by Sarah Cardell, CMA Chief Executive, [here](#).

[2] The Unit is due shortly to publish research on investment and innovation and in May 2024 the third edition of the CMA's "State of Competition" report. After this, the Unit is due to publish research on ownership networks in the UK, drivers of productivity and growth, and the results of the next Consumer Protection Survey.

[3] The CMA is currently considering whether to issue antitrust guidance on collective bargaining. Sarah Cardell comments in her accompanying speech that the CMA has been reflecting on "where there may be a lack of clarity about how the [UK antitrust] rules apply to a particular category of worker". On 29 September 2022, the European Commission published "Guidelines on the application of Union competition law to collective agreements regarding the working conditions of solo self-employed persons", with the aim of clarifying when certain self-employed people can get together to negotiate collectively better working conditions without breaching EU antitrust rules.

[4] See [here](#) for a copy of the Portuguese Competition Authority press release.

[5] See [here](#) for a copy of the Joint Nordic Report.

[6] Highlighting the possible need for further education, it is interesting that the Report notes that 40 per cent of respondents to the "Business Insights and Conditions Survey", with 250+ employees, stated that they were "not sure" what types of restrictive covenant they use in their employment contracts.

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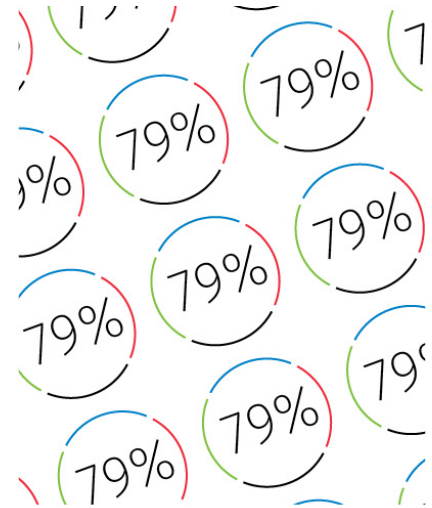
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