

## Background

Historically, FAME has been approached to take part in various proposals to set wages, usually through the Industry Working Group (IWG), and FAME has always declined to participate. However, recently, we were alerted to the possibility that even being a member of the IWG is a breach of competition law. As a result, FAME have consulted with solicitors, at two different law firms, on the legality of coordinating pay. **What follows is a summary of those discussions, but the contents of this note do not constitute legal advice. This information is provided without any representations or warranties, express or implied. Appropriate legal advice should be taken from a qualified legal practitioner before taking or refraining from taking any action based on the contents of this note.** While the example is from a UK-context, the laws and their current interpretations are the same in the UK and the Republic of Ireland.

## Liability for controlling wages

We have been advised that FAME, and our members, would be liable for breaches of Competition Law. Conversely, individuals, or organisations representing individuals, like ClfA or Prospect, are unlikely<sup>i</sup> to be liable for anti-competitive actions.

Our solicitors explained that for there to be a violation of competition laws, two aspects are required - first, anti-competitive behaviour, intentional or not (further discussion below), by two or more 'undertakings' or by an association of 'undertakings'. Undertaking are *'any entity engaged in an economic activity, that is an activity consisting in offering goods or services on a given market, regardless of its legal status and the way in which it is financed.'* FAME members are undertakings and FAME is an association of undertakings. Associations of individuals are able to embark on activities that undertakings cannot<sup>ii</sup>.

## Is setting wages illegal?

Our solicitors explained that there are legal ways to set sectoral wages, such as through labour negotiations between employers and trade unions, or via a Government-set minimum wage. However, 'undertakings' setting sector wages is illegal. One of the solicitors elaborated that while there is an academic argument that, because wage minima would benefit workers by pushing up wages, it might be legal. But conversely, that could be price fixing,<sup>iii</sup> and thus illegal. Which argument would prevail in a court case is unknown; there is no case law for this scenario.

## Risks

Depending on the number and size of the of undertakings involved in wage setting, this could qualify as a cartel, which comes with unlimited fines and the banning of

Directors of those undertakings from being Directors of any company for up to 10 years. Furthermore, cartels do not need to be established through formal agreements either; a phone call, message on a media platform, discussion at a conference or any other informal agreement can form a cartel.

### 'intent and effect'

Finally, and of great importance, was the solicitors' explanation of 'intent and effect' in competition law. This means that if the intent of the behaviour is anti-competitive then whatever actions are taken, even if unsuccessful, they are illegal. Moreover, effect means that even if the intent is not to be anti-competitive but the result is, that is also illegal.

### FAME Actions

Based on these discussions with our solicitors, FAME found unacceptable risk in continuing our membership as part of the IWG. This is because a goal of the IWG is to increase wages i.e. the 'intent' of price fixing, regardless of FAME's effect on such matters. If FAME were to engage in illegal activity, that would invalidate our insurance and so we would not be able to contest any legal action. Accordingly, **FAME has withdrawn from the IWG** to avoid any suggestion that we are involved in any initiatives with an **intent**, or **effect**, of being anti-competitive.

Moreover, we would like to emphasise the point that the applicable competition laws protect free enterprise and fair competition. Supporting these principles is important to FAME, not just because it is the law, but because it is what we believe in. In order to achieve effective compliance with competition law by FAME and its members, it is important to set clear and unambiguous boundaries for all stakeholders. Therefore, FAME wishes to reiterate that, as a matter of principle, it has not been and will not be involved in any efforts to set salary levels of employees and/or contractors.



Tim Malim, Chair: Federation of Archaeological Managers and Employers

---

<sup>i</sup> We did not cover every possible situation, nor were we best placed to provide the full details of those individuals and organisations, with our solicitors. This likelihood is based on general overviews we provided and may not be accurate. Seek appropriate legal advice.

<sup>ii</sup> Only in relation to Competition Law; there may be aspects that are illegal under different laws. Seek appropriate legal advice.

<sup>iii</sup> Price fixing includes setting the rates of portions of the goods/services i.e. wages, not just the total price.