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How the Government can really help the self-employed: give their representative trade bodies a competition law exemption

By Stephen Hornsby

After fierce criticism of its initial passivity, the government has decided quite recently to give substantial financial assistance to self-employed workers in response to the problems that they face both in the current coronavirus pandemic and beyond. This funding will doubtless be most welcome; but much more can be done to help the self-employed without recourse to the public purse. As competition law is always relevant, it is disappointing that the departing Chairman of the Competition and Markets Authority (CMA), Andrew Tyrie did not identify a role for it in the paper he produced recently on how competition law and policy could be adapted to respond to the pandemic.

To show what can be done a step back is necessary. For a number of years now, it has been clear that organisations that represent workers who are genuinely self-employed are not exempt from the prohibitions in the competition rules that cover pricing agreements (see Case C-413/13; FNV - the 2014 Dutch Orchestras decision in the European Court of Justice). This analysis is based on the idea that each self employed person is an "undertaking" and therefore that a body who acts on his/her behalf is an "association of undertakings" that may restrict competition when it proposes common terms of employment, including remuneration to purchasers - despite the fact that very often such purchasers are much more powerful.

For a very long time, UK competition law took a very different position.Under the Restrictive Trade Practices Act (originally passed in 1956 but subsequently amended, most significantly in 1976), it was possible to justify a common price agreement between sellers faced with preponderant purchasers in a court proceeding. But much better than that, restrictive agreements which covered wages or emoluments fell outside the scope of the legislation altogether for such restrictions were disregarded by law.

Unfortunately for the self-employed and their representative organisations, EU competition law on the subject was by no means clear cut, and with the threshold test for its applicability ("effect on trade between members states") being set so low, the safe harbour under UK national law was precarious in the extreme for national agreements setting wages for the self-employed entered into by their representative organisations. So when, after many years of rather uneasy co-existence, the replacement of the UK legislation by provisions following the EU model was being mooted, the vulnerability of hitherto excluded employment related agreements to the EU style prohibition on cartel agreements was raised in the House of Commons. Understandably, some members sought a roll over in effect of the pre-existing exclusion just described.

Nigel Griffiths, who was the Minister in the debates in Standing Committee G, which was examining the bill, was rather relaxed about it all. He said that the self-employed were not necessarily "undertakings"; nor were their representative organisations "associations of undertakings" to whom the prohibitions applied. He added that should EU law develop in a negative direction, a specific exclusion could be made in the UK legislation after it was passed but that a specific exclusion was not necessary at the outset.

Subsequently, particularly in the Irish Equity case, where the Irish competition authorities applied what they took to be EU law, it became clearer that organisations representing the self-employed were acting in breach of EU competition law when they sought to fix the terms and conditions of self-employed members. The Dutch Orchestra case confirmed the position in 2014 subject to the proviso

that the self-employed had to be genuinely freelancers for competition law to apply. However, the exclusion envisaged by Nigel Griffiths did not see the light of day, nor was it even considered.

What is more, in 2017, the CMA imposed (in several cases) the maximum possible financial sanctions on leading model agencies who were trying to protect their young, self-employed models (and, to some extent, their own margins) from onerous terms that powerful purchasers like Boohoo and ASOS were seeking to extract from them.(fines for similar behaviour were very much lower in France, and though at similar levels in Italy were subsequently outweighed by a grant of state aid to the sector). Prior to the Competition Act 1998, much of the action so heavily penalised was, as we have seen, entirely exempt from UK competition law.

Prior to this important decision, which was announced with a fanfare as being of importance to the cultural sector, the CMA's predecessor organisation, the Office of Fair Trading, had already forced a number of rather impecunious trade associations in the cultural sector to remove price recommendations for commissions for photographic shoots and musical works from their websites. After the CMA decision, in light of the magnitude of the fines imposed, any such practices that remained in the cultural sector will probably been abandoned out of sheer terror.

The only real beneficiaries of these interventions are powerful purchasers who can look after themselves. Therefore, as part of the government's support to the UK's very important cultural sector, collective action by trade associations designed to protect the earnings of the self-employed faced with powerful purchasers (not the position of the professions of course!) should now be made exempt from competition law, as it has been before and as was envisaged by Nigel Griffiths.

Now that we are leaving the EU, there is no international legal impediment to the recovery of sovereignty in this way. Indeed, Ireland has actually gone ahead and reversed the Irish Equity decision mentioned above by means of a specific exclusion under its competition legislation; there is therefore no conceivable reason for a departing member state such as the UK not to propose and pass such an exclusion, and do so quickly.