EUROPEAN COMMITTEE OF SOCIAL RIGHTS
COMITÉ EUROPÉEN DES DROITS SOCIAUX

29 January 2018

Case Document No. 5

Irish Congress of Trade Unions v. Ireland
Complaint No 123/2016

RESPONSE OF THE IRISH CONGRESS OF TRADE UNIONS TO THE SUBMISSIONS OF THE GOVERNMENT ON THE MERITS

Registered at the Secretariat on 17 January 2018

In the European Committee of Social Rights Complaint No. 123/2016

Irish Congress of Trade Unions

v

Ireland

Response by the Complainant to
the Observations of Ireland dated 8 September 2017

The Competition (Amendment) Act 2017

1. The Irish Congress of Trade Unions ('ICTU') notes the Observations of the government of Ireland ('the government') to its Complaint to the European Committee of Social Rights. It is grateful for the additional time in which to respond to the government's Observations.

2. ICTU is appreciative of the Competition (Amendment) Act 2017 (No. 12 of 2017) ('the 2017 Act') and of the support of the Minister for Jobs, Enterprise and Innovation and the members of both Houses of the Oireachtas for enacting the Private Member's Bill initiated by Senator Ivana Bacik. The fact that the 2017 Act was passed without a vote is a source of considerable satisfaction to Congress.

3. The 2017 Act is accurately summarised in the government's Observations. The government founds its resistance to ICTU's Complaint exclusively on the 2017 Act. The 2017 Act disapplies, in respect of certain categories of workers only, s.4 of the Competition Act 2002 in relation to collective bargaining and agreements.

4. There are two fundamental flaws in the government's denial of a continuing violation of the European Social Charter Article 6(2).

The 2017 Act gives no protection against EU law in Ireland

5. Firstly, it is to be observed that the 2017 Act (necessarily) only amends the domestic law of the Republic of Ireland. The 2017 Act does not purport to and cannot amend the Treaties of the European Union as they apply in the Irish legal order. Since accession to the European Union by Ireland, those Treaties apply directly in Ireland and the Irish courts must enforce them as part of domestic law.

6. The Irish Competition Act 2002 constituted the enactment in Ireland of the relevant parts of Title VII, Chapter I and, in particular, Article 101, formerly Article 81, of the Treaty on the Functioning of the European Union. This fact is set out in the preamble to the Competition Act of 2002 and the full detail is given in paragraphs 41-47 of the Complaint (pp17-20). The Treaty remains directly enforceable in Ireland and Article 101 has not been amended as the 2017 Act purports to amend the Irish legislation. None of this is contested in the government's Observations.

7. As the government points out at paragraph 13: '*…it was always understood that any amending legislation [to the Irish Competition Act] was always going to be subject to consistency with the EU competition law.*'

8. Indeed, as discussed further below, new s.15F(2)(iii) of the Competition Act 2002 which was inserted by the 2017 Act provides that a class of workers designated by the Minister to be exempt from Irish competition law: '*will not otherwise contravene any other enactment or rule of law (including the law in relation to the European Union) relating to the prevention, restriction or distortion of competition in trade in any goods or services*.' This too recognises the need to conform to EU competition law.

9. It follows therefore, that the amendment brought about by the 2017 Act, though ameliorating Irish competition law, will not and cannot afford protection against Article 101 of the Treaty.

10. It is to be hoped that the Irish Competition and Consumer Protection Commission (as it now is) will no longer persist in its previous antipathy[1] to collective bargaining by the self-employed, though it remains open to it to rely on Article 101 of the EU Treaty rather than the Competition Act 2002. But there is no reason to suppose that the European Commission would feel similarly restrained from insisting on the full application in Ireland of Article 101 of the Treaty. It will be recalled that the European Commission, on the ground that it would not comply with EU competition law, previously rejected the ICTU's request for exemption in relation to collective bargaining by the self-employed.[2] More than that, any person in Ireland or any business in an EU State providing services to or seeking to establish in Ireland could, if affected, seek, on grounds of breach of EU competition law, the negation of any collective agreement in relation to workers in the categories purportedly protected by the 2017 Act.

11. Further, just as the Irish newspaper publishers did in the light of the Competition Authority's threat to the voice-over actors, an employers' association or an employer could simply refuse to honour a collective agreement relating to self-employed workers on the grounds that it would involve a breach of EU law.

12. By the same token, any employer approached by a union representing a category of worker purportedly protected by the 2017 Act could on grounds that it would be breaking EU law, refuse to enter into any collective

[1] Shown in its decision of 31 August 2004 at attachment 1 to the Complaint and its letter of 27 February 2015 at attachment 8, cited in the government's Observations at paragraph 12, including: '*…the Authority's application of Irish competition law was and remains consistent with EU competition law, including the principles of EU competition law elaborated by the CJEU…*'.

[2] See paragraph 16 of the Complaint and attachment 3 thereto, and, in particular, paragraph 17 of the Complaint and attachment 5 thereto.

agreement proposed. In such circumstances, should the union call for industrial action to compel collective agreement, the employer would have grounds to complain that the industrial action was unlawful since it sought to breach EU Treaty law.

13. Any challenge to collective bargaining or a collective agreement on behalf of self-employed workers could, ultimately, come before the Court of Justice of the European Union. But the more immediate risk is of proceedings brought in the Irish courts which, ICTU believes and is advised, would have no alternative but to uphold EU Treaty law over contrary Irish legislation such as in the 2017 Act.

14. However, the issue raised by the Complaint is not to be resolved by an estimate of how likely it might be that an employer of another might or might not seek to rely on the continuing application of Article 101 to restrict collective bargaining on behalf of self-employed workers. It is the very existence of EU law in Ireland rendering such collective bargaining unlawful which constitutes the violation here.

15. Not surprisingly, in spite of its gratitude for the passing of the 2017 Act, ICTU does not consider that its self-employed members yet enjoy the unequivocal rights protected by Article 6 of the Charter whilst those rights remain at risk of violation by operation of EU law in Ireland.

Even in domestic law the protection of the 2017 Act is deficient

16. The second flaw in the Observations of the government is that even if the 2017 Act did provide protection against EU competition law, the exceptions it provides even from the Irish Competition Act are, in any event, partial and inadequate to safeguard the rights, under the European Social Charter, of self-employed workers to bargain collectively. This is evident for several reasons.

Limited coverage in Schedule 4

17. The 2017 Act in Schedule 4 specifies three categories of self-employed worker. These are actors engaged as voice-over actors, musicians engaged as session musicians, and journalists engaged as freelance journalists. These three categories cover only a limited proportion of the professions identified. Most actors, of course, are self-employed and they spend most if not all of their working time engaged in stage, film, television, radio and other work rather than performing voice-overs for adverts. There are very many professional self-employed musicians who perform other than as session musicians (for example musicians who play booked gigs, solo or in bands). There are some (perhaps not many) self-employed journalists and photographers who are not freelance journalists (e.g. journalists compelled by their employer to categorise themselves as self-employed). For the reasons set out below, most of these (save the example given of the journalists) could not come within the two other protected categories identified in the 2017 Act and discussed below.

18. In consequence self-employed actors other than voice-over actors, self-employed musicians other than session musicians and self-employed journalists other than freelancers receive no protection under Schedule 4.

19. It seems to be implied in the government's Observations that ICTU's complaint is restricted to the three categories of worker referred to in Schedule 4. That is a misapprehension. Of course, the existence of the violation of rights was brought home to ICTU by the threat of a €4 million fine by the Competition Authority if the collective agreement in relation to the voice-over actors was utilised – see paragraphs 5 and 7 of the Complaint. ICTU's concern was exacerbated by the refusal of newspaper employers to collectively bargain with the NUJ because of the Competition Authority's threat – see paragraphs 11 and 12 of the Complaint. ICTU was also alerted by the Musicians' Union to the repercussions for musicians – paragraph 13 of the Complaint. ICTU also raised in its complaint the problem posed for doctors (paragraph 19). But ICTU's concerns in raising the Complaint were much

wider. The Complaint reflects this and some passages are, for convenience, reiterated below.

20. At paragraph 6 the Complaint stated:

> The concern of Congress (and other European trade unions) is in respect of self-employed workers who, by virtue of the principle relied on by the Competition Authority, find themselves classed as "undertakings" and hence are or will be denied the right to collective bargaining.

21. At paragraph 26 it stated:

> Though the principles raised in this Collective Complaint apply to many categories of worker, it is sufficient to highlight the effect of the decision on actors, journalists, photographers and musicians.

22. At paragraph 32 the Complaint stated:

> The only challenge raised by this Complaint is to the denial to those workers who happen to be self-employed of the right to collective bargaining.

23. At paragraph 53 the Complaint stated:

> Be that as it may, this Collective Complaint proceeds not on the basis of exemptions from the general principle of competition law but on the basis that the general principle itself is indefensible when applied to workers. Collective agreements made on behalf of workers with employers must be protected as a matter of international human rights law and should not be struck down by laws intended to prevent cartels of businesses. Compliance with a provision of competition law aimed at such cartels should not be a permissible basis for denying workers the rights inherent in their right to be a trade union member, in particular, their right to collective bargaining.

24. Finally, at paragraph 25 the following appears:

> A conference was held in Dublin on 9-10 September 2015 on the subject of 'Collective Bargaining for Atypical Workers in the Performance and Audio Visual Sectors' which attracted delegates from all over Europe from trade unions representing actors, musicians, journalists, film and TV producers, directors and technicians, writers, dancers, models and information technology workers and others. They were all very concerned at the objection made by national Competition Authorities which had taken a similar position in relation to varied categories of

self-employed workers as the Irish Authority, and by the unequivocal position of the European Commission and the CJEU. Though there was no comprehensive pattern, it was clear that many workers in various sectors across the European Union had been denied collective bargaining rights on the sole ground that they were self-employed. Workers identified include actors doing voice-overs for adverts and actors engaged to work in any dramatic production for radio, television, film or theatre; freelance journalists and photographers providing written copy, sound and visual contributions, photos and film clips to media outlets; writers for radio, television and film drama; musicians hired for gigs, recording sessions, orchestras and bands; dancers for shows, clubs and other performances; models on photo-shoots; bricklayers, electricians, pipe-fitters, roofers and other skilled tradesmen in the construction industry, couriers and delivery drivers providing their own transport and many, many others. The unions which organise these workers are likewise denied their function and purpose of negotiating collective agreements, even with willing employers.

25. It would be most unfortunate should the Complaint be treated as restricted to the primary examples raised by ICTU of the impact of competition law on self-employed workers. It is beyond argument that the principle raised in the Complaint concerns the violation of the right to bargain collectively of every self-employed worker (and their trade unions) in every member State of the European Union, i.e. more than half the countries in the Council of Europe. This was and remains the concern of the ICTU and, it is believed the European Trade Union Confederation. It would be a waste of time and resources if the same fundamental issue were to be raised by other European Trade Unions by way of further complaints to this Committee, or even by the ICTU given that such complaints would essentially duplicate the Complaint currently before the Committee.

Other categories

26. Whilst voice-over actors, session musicians and freelance journalists are specifically protected, the 2017 Act provides that two other categories of self-employed workers can apply for protection. Actors other than voice-over actors, musicians other than session musicians and journalists other than

freelancers and *all other self-employed workers* can only achieve the protection of the 2017 Act if the Minister entertains an application for exemption from (Irish) competition law in respect of them under s.15F(1).[3] Such an application for a prescribed class of worker can only succeed if the worker falls into one of two categories.

Limited definition of 'false self-employed'

27. The first category requires each worker in respect of whom an application can be made to rank as a '*false self-employed worker*' under a definition which appears to be largely based on (though not identical to) the criteria of the CJEU established in (C413/13) *FNV Kunsten Informatie en Media V The State of the Netherlands*, discussed at paragraph 84 of the Complaint. Amongst other criteria this definition requires that the self-employed worker performs for another person, under a contract… the same activity or service as an employee of the other person. The drawbacks of this curious line of demarcation are discussed in paragraphs 85-87 of the Complaint. Suffice it to say here: where the self-employed worker is engaged by an 'employer' who has no employees performing the same activity or service, then the Minister can provide no exemption under the 2017 Act from the rigours of Irish competition law.

28. Thus there can be no lawful collective agreement with the film company which engages only self-employed actors, or the café which engages only self-employed musicians, or the photographic agency which engages only self-employed photographers. Of yet wider significance this categorisation excludes from lawfulness collective bargaining, by way of example: in the construction industry, sub-contractors which engage only self-employed building workers; food delivery companies which engage only self-employed

[3] This is a reference to the new s.15D of the Competition Act 2002 which is inserted in it by s.2 of the Competition (Amendment) Act 2017.

cycle delivery riders; taxi firms which engage only self-employed taxi drivers; and employment agencies which engage only self-employed workers.

Limited definition of 'fully dependent self-employed worker'

29. The second category of worker in respect of whom an application for exemption can be made to the Minister is that of 'fully dependent self-employed worker.' This too requires fulfilment of a number of conditions amongst which is that the person engaging the worker must have other employees (though not necessarily employees performing the same activity or service as the self-employed worker) and, in addition, that the self-employed worker's main income is derived from not more than two persons.

30. The former condition is commonly fulfilled, though many self-employed workers will be under engagements to self-employed sub-contractors (as in the construction industry), or self-employed theatrical agents (in the theatre industry), or small companies with no employee (run by directors drawing only dividends) as with many small employment agencies.

31. The second condition is yet more exclusive, denying many self-employed workers protection. There will be few actors whose main income over any sensible period of time is derived from a maximum of two theatre, film or television companies. There will be many gigging musicians whose income is mainly derived from a succession of engagements by different venues on different nights of the week. More widely, self-employed workers, particularly the more skilled, often move from job to job, especially in the construction industry. Such workers, over any sensible period of time, will derive their income from multiple employers.

32. In addition, as has been mentioned, new s.15F(2)(iii) of the Competition Act 2002 provides that the designation of any class of workers by the Minister to be exempt from Irish competition law: '*will not otherwise contravene any other enactment or rule of law (including the law in relation to the European Union)*

relating to the prevention, restriction or distortion of competition in trade in any goods or services.' This requirement appears impossible to achieve since the exemption of a class of *fully dependent self-employed workers* must fall foul of EU competition law unless protected by the ruling in *FNV Kunsten Informatie en Media* as *false self-employed workers*. But that class is, as noted, already protected and workers will only be seeking exemption as *fully dependent self-employed workers* if they are, by definition not *fully dependent self-employed workers*; there would otherwise be no purpose in specifying the other class of exempt workers.

33. In consequence, the category of fully dependent self-employed worker goes nowhere near protecting from (Irish) competition law, the right of the bulk of self-employed workers to bargain collectively.

Procedural limitations on applications

34. There is a further limitation on applications to the Minister in respect of the two categories discussed above. The 2017 Act provides that a trade union can apply on behalf of one or other of the two specified classes of self-employed workers (assuming the conditions above are fulfilled) to the Minister for Jobs, Enterprise and Innovation for an exemption in respect of collective bargaining and agreements from the application of section 4 of the Competition Act 2002. Yet the procedure for doing so is an impediment which discriminates against these workers in contrast to all other workers who have no such restraints on their right to collective bargaining. This procedure is plainly a restriction on the right protected by Article 6 of the Eruopean Social Charter which cannot be justified under Article 31 as 'necessary in a democratic society' since it is not considered necessary in any other Council of Europe State and is not necessary in relation to all other workers in Ireland.

35. To summarise, the procedure requires:

    a. The trade union must provide evidence that the workers fall within one or other of the two specified categories (false self-employed or

fully dependent self-employed workers), that the prescribing of the class will have (i) no or minimal economic effect on the market in which the class operates, (ii) will not lead to or result in significant costs to the State, and (iii) *will not otherwise contravene any other enactment or rule of law (including the law in relation to the European Union) relating to the prevention, restriction or distortion of competition in trade in any goods or services*.

b. The Minister may then prescribe by Ministerial Order, following consultation with any other Minister of the Government or any other person or body who ought to be consulted, such classes of self-employed workers to be exempt from section 4 of the Competition Act 2002;

c. Any such Order must then be laid before both Houses of the Oireachtas which may pass a resolution to annul an Order within 21 sitting days;

d. If made, the Minister may subsequently revoke any such Order if he thinks it no longer appropriate where market conditions or circumstances have changed substantially or new information becomes available to the Minister.

Conclusion

36. The Act of 2017 therefore wholly fails to protect against violation by Article 101 of the EU Treaty of the right to bargain collectively, and Article 101 is directly enforceable in Ireland. Further, the 2017 Act only provides partial and incomplete protection of the right to bargain collectively in relation to s.4 of the Competition Act 2002.

37. These severe limitations on the right to collective bargaining render invalid the argument put forward by the government of Ireland to the President of the European Committee of Social Rights that the issues raised by ICTU in its Complaint have been addressed.

38. The Competition (Amendment) Act 2017 is no more than an attempt at a partial Irish solution to a violation of the rights of workers to bargain collectively which fails to protect that right from EU competition law which is applicable in the domestic law of Ireland and every other EU member State.

39. It is respectfully submitted that there is a need for the Committee of Social Rights to examine the Complaint in its totality and to fully protect the right of all workers in member states of the Council of Europe to bargain collectively.

John Hendy QC
On behalf of Patricia King,
General Secretary
Irish Congress of Trade Unions
18 January 2018