EUROPEAN COMMITTEE OF SOCIAL RIGHTS
COMITE EUROPEEN DES DROITS SOCIAUX

4 June 2018

Case Document No. 7

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

ADDITIONAL OBSERVATIONS BY THE IRISH CONGRESS OF TRADE UNIONS

Registered at the Secretariat on 10 May 2018

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

Irish Congress of Trade Unions

v

Ireland

Reply by the Complainant to

the Supplemental Response of Ireland dated 16 April 2018

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1. The Complainant, the Irish Congress of Trade Unions ('ICTU'), notes the Supplemental Response of the government of Ireland ('the government') which appears to be no more than an elaboration of its Observations of 8 September 2017. The elaboration focuses on two points.

No jurisdiction

2. Firstly, the government seeks to argue (paragraphs 5-7) that ICTU's complaint is inadmissible and the European Committee of Social Rights has no jurisdiction to entertain it because the provenance of the law which violates the right to bargain collectively in Ireland is the Treaty on the Functioning of the European Union ('TFEU') rather than the 'domestic law' of Ireland.

3. It is to be noted that this argument on inadmissibility was not raised in the government's Observations on Admissibility dated 14 December 2016. That is no bar to raising the argument at this stage but it does suggest that it is an afterthought.

4. Much more significantly, the argument is wholly without merit. ICTU respectfully relies again on its submissions in its Response of 9 September 2017 at paragraphs 6-9. The government has simply not dealt with these submissions.

5. The European Committee of Social Rights has made clear in its jurisprudence that the fact that a right guaranteed by the European Social Charter has been restricted in a Member State by reason of the application of international obligations is irrelevant if the impugned restriction is part of the domestic law of the State; see, for example, *Federation of Employed Pensioners of Greece (IKA-ETAM) v Greece* (2013) 57 EHRR SE2 at [50]-[52] (cited in ICTU's Application at paragraph 176) which cites earlier precedent. As the committee there held:

> the fact that the contested provisions of domestic law seek to fulfil the requirements of other legal obligations does not remove them from the ambit of the Charter (at [50]);
>
> It is ultimately for the Committee to assess compliance of a national situation with the Charter, including when the implementation of the parallel international obligations into domestic law may interfere with the proper implementation of those emanating from the Charter (at [51]);
>
> … despite the … obligations of [the Member State], there is nothing to absolve the State party from fulfilling its obligations under the 1961 Charter (at [52]).

6. In *Confédération Générale du Travail (CGT) v France* (55/2009) 23 June 2010 (at [33]) the Committee held:

> It is ultimately for the Committee to assess compliance of a national situation with the Charter, including when the transposition of a European Union directive into domestic law may affect the proper implementation of the Charter.

7. In *Swedish LO and TCO v Sweden* (2015) 60 EHRR SE7 (cited in ICTU's Application at paragraphs 162-164, 177-178) the Committee held at [73]:

> … it is ultimately for the Committee to assess compliance of a national situation with the Charter, including when legislative changes, which have been introduced into domestic law to comply with preliminary rulings given by the CJEU, may affect the implementation of the Charter.

8. These principles must apply, *a fortiori*, where domestic law imports provisions of the EU Treaties into its domestic legal order rendering them directly

enforceable in its domestic courts by the State itself or by any other litigant claiming to be adversely affected. This must be so whether or not the State has sought to duplicate the Treaty obligation in its domestic legislation. The question then arising is, it is submitted (and assuming that the domestic duplicate legislation is not in violation of the Charter), whether the impugned Treaty obligation is directly effective in domestic law and enforceable in the domestic courts.

9. At [74] of *Swedish LO and TCO* the Committee held that:

> whenever it has to assess situations where states take into account or are bound by legal rules or acts of the EU, the Committee will examine on a case-by-case basis whether respect for the rights guaranteed by the Charter is ensured in domestic law… .

10. The issue therefore in this part of the case presented by ICTU to the Committee is whether, regardless of the compliance or non-compliance of the Competition Act 2002 with the Charter, Article 101 of the TFEU is part of Irish domestic law and enforceable directly in the Irish Courts. In relation to this the government appears to overlook the relevant and incontestable provisions of its own legal system.

11. In Ireland , the Third Amendment to the Constitution Act 1972 amended Article 29(4) of the Constitution of Ireland (following a referendum) so as to permit Ireland to become a member of the EU, to ratify the Lisbon Treaty and to provide that the Constitution did not preclude laws adopted by the EU from having the force of law in Ireland.

12. S.2 of the European Communities Act 1972 was subsequently amended to provide that:

> 2(1) The following shall be binding on the State and shall be part of the domestic law thereof under the conditions laid down in the treaties governing the European Union:
>
> (*a*) the treaties governing the European Union;

> (*b*) acts adopted by the institutions of the European Union (other than acts to which the first paragraph of Article 275 of the Treaty on the functioning of the European Union applies);
> (*c*) acts adopted by the institutions of the European Communities in force immediately before the entry into force of the Lisbon Treaty; and
> (*d*) acts adopted by bodies competent under those treaties (other than acts to which the first paragraph of the said Article 275 applies).
>
> 2(2) Without prejudice to subsection (1) of this section, from the coming into force of the EEA Agreement, the provisions of that Agreement and the acts to be adopted by institutions established by that Agreement which, pursuant to the treaties governing the European Communities, will be binding on the State and an integral part of the legal order of those Communities, shall have the force of law in the State on the conditions laid down in those treaties and in that Agreement.

Needless to say the 'treaties governing the European Union' include (by s.1 of the 1972 Act, as amended) the TFEU. Article 101 of the TFEU is therefore part of Irish domestic law, enforceable in the Irish courts.

13. In any event, as the CJEU has made clear for more than half a century since the seminal Case C-6/64 *Costa v ENEL* [1964] ECR 585:

> …the law stemming from the Treaty, an independent source of law could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, …[1]

14. EU law is directly effective in Member States including Ireland and may be relied up on by citizens and organisations in domestic courts overriding provisions to the contrary in domestic law (i.e. law of domestic origin without an EU foundation): Case C- 26/62 *Van Gen den Loos* [1963] ECR 1.

15. The Irish courts have, unsurprisingly, accepted that domestic law defers to EU law: *Pesca v Ministry for Fisheries (No.2)* [1990] 2 IR 305; *Tate v Minister for Social Welfare* [1995] 1 IRLM 507; *Eircom Ltd v Cmsn for Communications Regulations* [2006] IEHC 138; *Campus Oil v Minister for Industry and Energy* [1983] 1R 82.

[1] *Ibid* at 593; and see: Case C-106/77 *Ammininstazione delle Finanze dello Stato v Simmenthal SpA* [1978] ECR 629; Case C-106/89 *Marleasing SA v La Commercial Internacional de Alimentacion SA* [1990] ECR 1-4315 and Case C-6/90 *Francovich v Italy* [1991] ECR 1-5357.

16. In *Meagher v Minister for Agriculture* [1994] 1 IR 347 Blaney J held that '*It is well established that Community law takes precedence over our domestic law*.'

17. The Irish Competition Act 2002 duplicated Article 101 of the TFEU in Ireland as is set out in the preamble to the Competition Act of 2002. (The full detail is given in paragraphs 41-47 of ICTU's Complaint at pp17-20.) But whether the 2002 Act had been introduced or not, Article 101 was and remains directly enforceable in the domestic courts of Ireland as a matter of domestic law (as well as being enforceable through the mechanism and institutions of the EU).

18. It is not relevant to this point whether or not the Competition (Amendment) Act 2017, in granting an exemption to limited classes of worker from s.4 of the Competition Act 2002, did so effectively from the perspective of that Act. The essential fact is that Irish competition legislation has not, cannot and has not purported to, grant such exemption from Article 101 TFEU. Likewise Article 101 has not been amended by EU law so as to give effect to the exemption introduced in Ireland by the 2017 Act.

19. It follows therefore, that the amendment brought about by the 2017 Act, though ameliorating Irish competition law to a certain extent, will not and cannot afford protection in the Irish courts against Article 101 of the Treaty. The fact that Article 101 is part of Irish domestic law judiciable in the Irish courts is a matter wholly within the jurisdiction of the European Committee of Social Rights. The existence of law enforceable in the Irish courts which violates the right of collective bargaining of self-employed workers constitutes a violation of Article 6 of the Charter.

20. The fact that the Irish Competition and Consumer Protection Commission (as it now is) has not (yet) sought to rely on Article 101 of the EU Treaty against collective bargaining and collective agreements for the self-employed is irrelevant. It and any other person or body in Ireland or any business in an EU State providing services to, or seeking to exercise freedom of establishment in,

Ireland could, if affected, seek in the Irish courts, 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.

21. Likewise, as ICTU pointed out in its Response, 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. Likewise they could refuse to bargain collectively on the ground that the bargaining unit included self-employed workers. Any industrial action to apply pressure to such employers would be unlawful in Irish law for pursuing an unlawful objective under EU law.

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

22. The second argument raised by the Supplementary Observations of the government is the insubstantial claim that there is no evidence that any worker has yet been adversely affected by the four inadequacies identified by ICTU in the 2017 Act. This point is of course is, of course, secondary to the principal argument of ICTU that regardless of the effectiveness of the coverage of the 2017 exemptions, Article 101 violates the rights of all self-employed workers.

23. What is particularly striking in the government's Supplementary Observations is that it does not suggest that the legal analysis of ICTU in identifying the four deficiencies is wrong in any way. It is to be inferred that despite is generic denial, the government is unable to refute the identified deficiencies in coverage.

24. Instead, the government argues that until some workers can be identified who have been adversely affected by them, the deficiencies are merely 'speculative', 'theoretical' or 'abstract'. But the fact that a Member State has a law which violates a right guaranteed by the European Social Charter is sufficient. It is not necessary to wait until there are victims.

25. In fact, of course, it is known that there are victims as ICTU's Response points out (paragraphs 4-18). The Competition Commission threatened first the voice-over actors. One consequence was that newspaper employers then refused to collectively bargain over freelance journalists. Subsequently musicians' collective agreements were threatened. The Competition Commission next threatened doctors. Where the exemptions available under the 2017 amendment are not available the Competition Commission remains a potent threat to the exercise of the right to bargain collectively of self-employed workers and their unions. Plainly other employers are likely to exploit this situation even if they have not done so already. As ICTU's Complaint made clear, and as was reiterated in the its Response to the government's Observations (at paragraphs 20-25), ICTU's concern is that competition law *is available* to be used to violate the collective bargaining rights of all classes of un-exempt self-employed workers. These include (paragraph 20) but are no means confined to: actors, journalists, photographers, writers, musicians, dancers, models, bricklayers, electricians, pipe-fitters, roofers and others in the construction industry, couriers and delivery drivers, and many others. ICTU is aware of the growth of the use of self-employed workers in almost every industrial sector; in catering, amongst pilots and cabin crew on aircraft, amongst agricultural workers and elsewhere.

Limited coverage in Schedule 4

26. Even amongst the three categories of self-employed workers on which ICTU's Complaint focussed, the government does not dispute that there are categories of actors, musicians and freelances who are outside the three classes the Act purports to protect, see paragraph 17 of ICTU's Response. The most striking of these are actors who are not engaged in voice-overs. There appears to be no rational basis for seeking to exempt actors engaged on voice-overs but not actors engaged in drama productions. The same is true of musicians who play gigs in pubs, cafés and dance halls but are not hired for sessions in studios.

Other categories

27. The government does not dispute that other categories of worker beyond voice-over actors, session musicians and freelance journalists can only achieve exemption under the Act by Ministerial Order if they qualify either as 'false self-employed' or 'fully dependent self-employed' and that these are limited categories. The fatuous argument is raised that no group of workers who do not meet these criteria have yet applied to the Minister for exemption claiming that they do meet the criteria!

Limited definition of 'false self-employed'

28. ICTU has set out in its Response to the government's Observations at paragraph 27 that a self-employed worker engaged by an 'employer' who has no employees performing the same activity or service, is outside the criterion for Ministerial exemption of false self-employment. Many workers will be in this situation and multiple examples are set out in paragraph 28 of ICTU's Response to the government's Observations.

29. This is not apparently disputed by the government; its only point is that no such workers have sought Ministerial exemption for which, of course, they would inevitably be rejected.

30. ICTU makes no secret of the fact that it and its affiliated unions desire to organise all Irish workers and achieve collective agreements in respect of them all; the exclusion of these categories of worker from Ministerial exemption from Irish Competition law so as to permit the fulfilment of this objective is a plain violation of the Charter.

Limited definition of 'fully dependent self-employed worker'

31. 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.' The government does not dispute the fact that unless a worker in this category fulfils a number of conditions, Ministerial exemption cannot be given. Again, the government does not dispute ICTU's identification of self-employed workers who cannot fulfil these criteria (paragraphs 29-31 of its Response to the government's Observations) but resorts to the argument, again, that none have yet sought that unachievable exemption or sought collective bargaining which would expose them to legal action by the Competition Commission.

32. The government does not seek to challenge ICTU's point (at paragraph 32 of the Response) that new s.15F(2)(iii) of the Competition Act 2002 requiring that the Minister does not exempt a class of worker in contravention of EU competition law will be impossible to achieve unless the workers are already protected as false self-employed workers which, by definition they will not be if they are seeking to rely instead on exemption as fully dependent self-employed workers.

Procedural limitations on applications

33. The government does not dispute that the procedural requirements in making an application to the Minister impose restrictions on the Charter right. The restrictions were identified in ICTU's Response at paragraphs 34-35. Instead, the government seeks to argue that in the absence of the identification of a class of self-employed workers who have been '*unable to exercise a right to engage in collective bargaining*' (emphasis supplied) by reason the procedural restrictions, there can be no violation and so no need for it to show that the procedural impediments are proportional.

34. ICTU has never claimed that the procedural hurdles render it *impossible* to gain the exemption necessary to conduct lawful collective bargaining. Its argument is that access to the right is restricted by those procedural hurdles and that is a violation unless the government can show, not merely that the restrictions are proportionate but that they are '*necessary in a democratic society*'. The

government does not engage with ICTU's argument which, it is respectfully submitted, is incontrovertible.

Conclusion

35. The government has failed in its Supplemental Response to demonstrate that ICTU's complaint should not succeed.

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