EUROPEAN COMMITTEE OF SOCIAL RIGHTS
COMITÉ EUROPÉEN DES DROITS SOCIAUX

10 October 2016

Case No. 1

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

COMPLAINT

Registered at the Secretariat on 8 August 2016

Collective Complaint

to the

European Committee on Social Rights

On behalf of the

Irish Congress of Trade Unions

against

Ireland

18 July 2016

Patricia King,
General Secretary,
ICTU,
32 Parnell Square,
Dublin 2
Republic of Ireland

Contents

Introduction and background

1. The Irish Congress of Trade Unions (herein 'ICTU' or 'Congress') is the national representative voice of trade unions in Ireland. There are 47 unions affiliated to Congress, with a total membership (at the beginning of 2015) of 770,569, of whom 563,853 are in the Republic of Ireland and 206,716 in Northern Ireland. Amongst the unions affiliated to Congress are the NUJ and SIPTU of which latter union, Equity and MUI are part.

2. This is a Collective Complaint made under the *Additional Protocol to the European Social Charter Providing for a System of Collective Complaints* (Treaty No 158) signed and ratified by Ireland on 4 November 2000 and in force from 1 January 2001. The complaint is addressed to the Secretary General for transmission to the Irish government and to the European Committee on Social Rights. By this Complaint ICTU seeks a decision that the Republic of Ireland is in breach of its obligations under Article 6 of the European Social Charter 1996 in respect of a decision of the Irish Competition Authority (a State body which supervises and enforces Competition Law in the Republic) that a freely negotiated collective agreement setting minimum rates of pay and working conditions for the workers it covered was unlawful because it was in breach of Irish competition law. As will be seen, the issue is one of far wider significance than the particular collective agreement in question.

3. The Complaint sets out the factual background and then considers EU law (the basis of the Competition Authority ruling), then goes on to European Convention jurisprudence, the jurisprudence of the European Social Charter and finally ILO jurisprudence. Congress apologises for the fact that it does not address the Charter which governs the Committee to which it submits this Complaint until late in this document but it trusts it will be forgiven for adopting what it hopes is a logical sequence of exposition of the material considerations.

Voice-over actors

4. EQUITY/SIPTU is the Irish union for actors and is an affiliate of Congress on and one of the unions on whose behalf Congress makes this Collective Complaint. The collective agreement at issue was between EQUITY/SIPTU and the Institute of Advertising Practitioners in Ireland and was (until the intervention of the Competition Authority) effective from 1 October 2002. The Institute of Advertising Practitioners in Ireland was and is the employers' association representing advertising agencies. It is those agencies which hire actors for voice-overs for adverts subsequently broadcast on radio, television and film. The collective agreement set minimum rates of payment and other conditions of work (including rest breaks and overtime rates) for actors employed to perform voice-overs for radio, television and film adverts. A copy of the agreement is Appendix A to the Decision of the Competition Authority which is *Attachment 1* to this Collective Complaint. Because of the prohibition on the use of the collective agreement it has been pointless subsequently to update it.

The impugned decision

5. The decision of the Competition Authority (No.E/04/002 of 2004) of 31 August 2004, was that the collective agreement was in breach of s.4 Competition Act 2002 for the exclusive reason that each actor was considered to be a business "undertaking" and it is unlawful for undertakings to agree to fix prices for the sale of their services. The decision is at *Attachment* 1.

6. 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.

7. The Competition Authority threatened to fine EQUITY/SIPTU if it sought to use the collective agreement. The size of fine threatened was up to €4 million.

In the face of this existential threat EQUITY/SIPTU had no option but to sign, on 1 June 2004, an undertaking drawn up by the Competition Authority which precluded use of the collective agreement. The Institute of Advertising Practitioners of Ireland was also obliged to sign a similar undertaking (on 24 August 2004). These undertakings are at Appendix B to the Competition Authority decision at *Attachment 1* of this Collective Complaint.

Journalists and photographers

8. The decision of the Competition authority obviously had implications for other trade unions representing self-employed workers in Ireland. One such was the National Union of Journalists ('NUJ'), an international union affiliated to Congress and represented by it for the purposes of this Complaint. The NUJ represents (amongst others) freelance journalists and photographers. A 'freelance', for the avoidance of doubt, is a self-employed worker who sells each piece of writing or photograph to (usually) a media corporation where it may be published (alongside articles and photographs by employees of the media company).

9. There has been a long-standing collective agreement between the NUJ and the Provincial Newspapers Association of Ireland ('RNPAI', an employers' association consisting of Irish newspaper publishers). Collective bargaining took place from time to time to set rates for payment by Irish regional newspapers for articles and photographs bought by them. There was another long-standing collective agreement between the NUJ and the Dublin Newspapers Management Committee, the latter being effectively a sub-committee of the RNPAI. Collective bargaining within the arrangements established by the collective agreement between the NUJ and the Dublin Newspapers Management Committee set, from time to time, the minimum rates and conditions on which Irish national newspapers would pay for work by freelance journalists and photographers.

10. The NUJ published a Freelance Fees Guide reflecting the agreed rates and it was used by both the freelances and the employers to establish the appropriate rate for an article or photograph. The arrangement worked well and ensured that competition was on quality of work rather than lowest payment. In consequence the employers received high quality photographs and articles from the photographers and journalists in return for which those who were good were able to make a decent income.

11. However, after the decision of the Competition Authority in relation to the voice-over actors, The RNPAI and the Dublin Newspapers Management Committee refused to negotiate with the NUJ. So did the owners of individual national and regional newspaper titles. The reason given was that to do so would be in breach of competition law and would place the companies at risk of prosecution.

12. Messrs E Ronayne and S Dooley, officials of the NUJ, met with Mr P Massey, Director of Corporate Enforcement of the Competition Authority to clarify the situation but were told that any collective agreement reached with employers fixing freelance rates would indeed be in breach of competition law and, moreover, further publication of the Freelance Fees Guide would constitute a criminal conspiracy which would leave the NUJ open to prosecution.

Musicians

13. This Complaint is also lodged on behalf of the Musicians' Union of Ireland which is affiliated to SIPTU and hence to Congress. The Musicians' Union of Ireland represents many musicians who are self-employed (as well as many who are employees). It is concerned that the impact of the Competition Authority stance is that major employers of self-employed musicians which formerly negotiated rates with the union are no longer are willing to do so. As a consequence, rates for self-employed musicians have fallen and the bargaining power of the union even on behalf of employed musicians has naturally diminished.

ICTU takes up the issue

14. At the request of Congress, the Competition Authority agreed in 2004 to review its decision. In 2006 the latter announced that it upheld its original decision. Congress wrote to the Competition Authority again in December 2007 but in January 2008 again it refused to change its stance. Thereafter the 'National Social Partner Agreement' tripartite negotiations between government, employers and unions took place and agreement was reached in the form of *Towards 2016: Review and Transitional Agreement 2008-9*. This provided, amongst other things, for an amendment to the Competition Act:

> to exclude certain categories of self-employed workers (such as freelance journalists or voice-over actors) from the provisions of the Competition Act 2002.

This was noted by the European Committee of Social Rights (*Conclusions 2014 (Ireland)*, on Articles 2, 4, 5, 6, 22, 26, 28 and 29 of the Revised Charter, January 2015, p 27) which asked that the next report of the Irish government provided information on these (amongst other) developments.[1]

15. Consequently, it was believed that an amendment of the Competition Act would follow and allow collective agreements for such workers to become effective again.

16. Accordingly, on 18 December 2012 (*Attachment 2*) Congress wrote to the Minister for Jobs, Enterprise and Innovation seeking an exemption from the Competition Act in relation to the collective agreement in question. By a letter dated 24 January 2013 (*Attachment 3*) the private secretary to the Minister explained that the *Memorandum of Understanding* imposed by the TROIKA (the European Commission, the European Central Bank and the International Monetary Fund) on Ireland as a condition of financial support, precluded the Irish State from granting the proposed or any further exemption from the Competition Act unless the exemption was "entirely consistent with the goals

[1] It was noted too by the ILO Committee of Experts, see below.

of the EU/IMF Programme and the needs of the economy." The letter made clear that the TROIKA "would not support the envisaged exceptions." The letter continued:

> The intention of the EU/IMF commitment is to avoid a circumvention of competition law by undertakings and by associations of undertakings on their behalf and not to cut across ILO conventions and human rights.

17. Congress wrote on 13 March 2013 (*Attachment 4*) to the President of the European Commission. The response of the European Commission was dated 18 April 2013 (*Attachment 5*) and stood firm on the proposition that EU law would not permit self-employed workers to exercise the right to bargain collectively.

18. Submissions are made later about the legitimacy of a State annulling a collective agreement, but here it is appropriate to digress from the chronology to observe that the international bodies which composed the TROIKA appeared to have no compunction in annulling a collective agreement which had not merely been reached by negotiation between employers and unions but had the additional negotiating input and the imprimatur of the government of the nation State itself. This is remarkable, given that all the States which constitute the European Union from which the European Commission and the European Bank derive are bound by Article 28 of the Charter of Fundamental Rights of the European Union (on the right to collective bargaining) and by Article 11 of the European Convention on Human Rights (of which the Grand Chamber had held[2] only four years earlier that the right to bargain collectively was 'an essential element').[3] Not only that, but the TROIKA in requiring that collective agreement to be annulled, were obliging the Irish State to breach its international obligations - as this

[2] *Demir and Baykara v Turkey* (2009) 48 E.H.R.R. 54, see below.
[3] And 27 of the 28 EU States have ratified Article 6(2) of the European Social Charter (1961 or 1996).

Collective Complaint sets out to demonstrate. It seems impossible not to conclude that the TROIKA were not acting compatibly with the rule of law.[4]

Doctors

19. On 28 May 2014 the Competition Authority published a press release (*Attachment 6*) showing that it had commenced legal proceedings against the Irish Medical Organisation ('IMO') which represents Irish doctors and had reached a compromise agreement to resolve those proceedings. The basis of the legal action was that the IMO was acting in breach of the Competition Act by deciding to call on its members collectively to withdraw certain general practitioner ('GP') services as a means of pressing the government (which funds Irish GP services) to withdraw its proposal to cut certain payments for publicly funded GP services. The compromise involved the IMO undertaking to withdraw its threat and agreeing not to make any recommendation in relation to fees paid by the government to GPs and services provided by GPs. It undertook too to advise its members that they should decide individually and not collectively whether to participate in publicly funded GP health services on the terms offered by the government. The interference by the Competition Authority with the normal process of collective bargaining is manifest.

20. It was evident from the above that the Competition Authority maintained its stance on collective bargaining (and, indeed, extended it to the right to take collective industrial action). The irony in the IMO case was that, by barring the GPs from negotiating collectively with the government as the near-monopoly purchaser of GP services, the Competition Authority was intervening to support the anti-competitive power of the near-monopoly.

[4] Article 2, TEU proclaims the EU to be founded on "founded on the values of respect for human dignity, freedom, democracy, equality, **the rule of law** and respect for human rights'(emphasis supplied).' So does the preamble of the Charter of Fundamental Rights of the EU. The preamble of the European Convention on Human Rights also speaks of the rule of law and permitted restrictions on Convention rights must be 'prescribed by law.' Likewise permitted restrictions on rights specified in the European Social Charter 1996 must be 'prescribed by law' (Article G).

FNV Kunsten

21. On 4 December 2014, the Court of Justice of the European Union ('CJEU') gave judgment in *FNV Kunsten Informatie en Media v Staat der Nederlanden*, Case C-413/13 (discussed below). It mitigated the rule that every self-employed worker is an undertaking so that a collective agreement in respect of them was contrary to EU competition law. The court held that workers who:

> perform for an employer, under a works or service contract, the same activity as that employer's workers, are 'false self-employed'

and hence are not to be regarded as undertakings but as the equivalent of employees and so outside the scope of Article 101(1) TFEU. They are thus permitted to exercise the right to bargain collectively.

22. In consequence, the General Secretary of Congress wrote on 7 January 2015 (*Attachment 7*) to the Competition Authority asking it to reconsider and reverse its decision of 2004. It responded by letter dated 27 February 2015 (*Attachment 8*), upholding its original decision and rejecting the notion that the actors could be regarded as other than undertakings.

23. Notwithstanding the claims of adherence to ILO Standards, the European Convention on Human Rights and the EU Charter of Fundamental Rights, it is clear that the EU (and the Irish Competition Authority) is and remains intent on ensuring that, within the EU, collective agreements made on behalf of self-employed workers (other than 'false self-employed') will be outlawed on competition grounds. The terms of the TROIKA's rejection of the shared approach of Irish trade unions, employers and government, and the rationale of the Competition Authority makes clear that the denial of the right to collective bargaining to self-employed workers applies to every kind and category of self-employed worker in any and every sector and of every trade and skill. The only exception is in the rare situation where the self-employed worker can meet the criteria of 'false self-employment' because she or he, for

the moment, works alongside similar workers who are employed by the same employer. This is of the greatest concern to Congress and is a matter it has raised with sister federations within the European Trade Union Confederation.

European workers

24. 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.

Legislation?

25. On 15 January 2016 the Competition (Amendment) Bill 2016 (*Attachment 9*) was introduced into the Irish Parliament which is intended to remove some of the burdens of Competition Law on self-employed workers. Whether it succeeds and what amendments there may be to it are a matter of conjecture. But one thing is plain: Ireland, as a member of the EU, cannot escape the force of EU Competition Law so that the legislation, if passed, cannot exempt Irish trade unions from the effect of the latter.

Effects

26. 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. For voice-over actors, the rate for the job is theoretically left to negotiation by the actor with the particular agency for the particular job. Often however, it is set in advance by the agency and no negotiation is possible, the agency choosing from amongst those who may be prepared to work at that rate. EQUITY/SIPTU believes that, in general, those of its members who undertake primarily voice-over work have seen their earning diminish in real terms since 2004, and this is irrespective of the impact of the financial crisis in 2008.

27. For freelance writers and photographers, the collective agreements referred to earlier have collapsed, the Freelance Fees Guide has ceased publication and rates for articles and photographs are determined unilaterally by the editor on each occasion a piece of work is submitted. Those not prepared to accept the rate find their work wasted if they cannot place it elsewhere. The consequence has been a sharp decline in the earnings of freelance writers and photographers and some have ceased to be able to afford to work in those capacities. Again, the drop in earnings predates the recession from 2008 which has merely worsened a bad situation.

28. The regular earnings of session musicians have diminished in real terms too.

29. For the unions concerned, in relation to their self-employed members in the professions referred to, they have lost the capacity to represent those members in collective bargaining. Undoubtedly some members have left in consequence. Many members have remained though their collective voice has been silenced. The unions have also found that their capacity to collectively bargain on behalf of *employed* members in those professions has also been undermined because of the undercutting effect of self-employed outside the collective agreements.

What this Collective Complaint is and is not about

30. It is important to observe that use of the device of self-employment has expanded significantly in the EU and in Ireland as a means of avoiding or diminishing some or all of the employers' burdens in respect of tax liabilities, national insurance contributions, holiday entitlement, pension contributions, wages bills during non-productive periods, and health and safety obligations. The self-employment rate in Ireland is rising. By 2013 it had reached 17.1% of the workforce.[5] By 2014 (latest figures) it had risen to 17.4%.[6] Even discounting for those genuinely in business on their own account, this is a significant proportion of the workforce.

31. The reasons for classifying a worker as self-employed (reasons which may be shared in some respects and to some extent by some of the workers themselves) are diverse but of no relevance to the instant application. Neither is the controversial issue of non-standard employment, an issue which has concerned national and international courts, tribunals and supervisory committees. The categorisation of the workers in the instant Complaint as 'self-employed' is not an issue. Nor does the instant Complaint challenge the

[5] OECD: http://data.oecd.org/emp/self-employment-rate.htm.
[6] OECD: https://data.oecd.org/emp/self-employment-rate.htm#indicator-chart.

concept of self-employment for any of the reasons for which it may have a place in the legal order of States or of the EU.

32. 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. If the Complaint is upheld, it will not have any impact on the division of workers into employees and self-employed for any other purpose. Nor is this Complaint intended to weaken the competition rules against price-fixing by undertakings which are truly businesses (whether or not they consist of one or many people).

The benefits and basis of collective bargaining

33. It must be remembered that the employers and employers' associations often welcome collective agreements covering the self-employed since it saves them transaction costs (i.e. the resources required to negotiate for every hiring). Furthermore, giving workers a voice is said to lead to higher productivity and may lead to the development of more efficient work processes. Collective agreements prevent competition as to minimum conditions of work or rates of pay and so promote competition on the most important matter for the consumer: the quality of the service provided.[7] Neither do such collective agreements present any bar to paying higher rates or providing better conditions in order to compete to secure the best service. They do however, preclude a race to the bottom which might destroy the livelihoods of many and so reduce the field of competition available to the employers.

34. It is not disputed that competition law should preclude price fixing agreements amongst cartels of businesses. It is also accepted that there are circumstances where a business properly described as an 'undertaking' is conducted by a single person (whether or not incorporated as a legal entity).

[7] As to the stimulation of competition by the development of collective bargaining see S Deakin and F Wilkinson, 'Labour Law and Economic Theory: A Reappraisal' in H Collins, P Davies and R Rideout (eds), *The Legal Regulation of the Employment Relation*, Kluwer, 2000.

Many professionals fall into that category, the Irish barrister being archetypal. And so too may some artisans be properly regarded as a single person business. But in relation to them the nature of the trade or calling may not be definitive. The one-man plumbing firm found by the householder in Yellow Pages and hired to fix a leak may properly be regarded as an undertaking. But the plumbers hired by a construction company to fit the pipework in a new block of apartments may be self-employed or employed - as the hiring company prefers. Whatever their legal status, they are 'workers' and are (or ought to be) entitled to bargain collectively.

35. Congress's concern is thus that many self-employed persons are workers in the true and well understood meaning of that term; workers indeed who usually have little if any control over the legal niceties of, the legal nature of, or the legal label to be attached to the contractual relationship with those for whom they work. They are workers on the simple basis that they earn their living from providing their labour to those who engage them.

Irish labour law

36. The preamble to the definition of "worker" in s.4 Industrial Relations Act 1946 (effectively re-stated in s.23 Industrial Relations Act 1990) captures this concept of the worker. It materially provides (subject to the exclusion of some specific categories irrelevant for the purposes of this illustration) that:

> the word "worker" means any person ... who has entered into or works under a contract with an employer whether the contract be for manual labour, clerical work, or otherwise, be expressed or implied, oral or in writing, and whether it be a contract of service or of apprenticeship or a contract personally to execute any work or labour...

37. It should be noted that by s.6 of the Trade Union Act 1941 "negotiations for the fixing of wages or other conditions of employment" can only be conducted by the holder of a negotiation licence and by s.9 only a trade union can obtain a negotiation licence. A 'trade union' was originally defined by s.23 of the Trade Union Act 1913:

> The term 'trade union' means such combination, whether temporary or permanent, for regulating the relations between workmen and masters, or

between workmen and workmen, or between masters and masters, or for imposing restrictive conditions on the conduct of any trade or business, as would, if this Act had not passed, have been deemed to have been an unlawful combination by reason of some one or more of its purposes being in restraint of trade... .

38. Other legislation from 1871 onwards protected trade unions from the otherwise inevitable consequence of being unlawful by reason that their fundamental purpose was to act 'in restraint of trade' (i.e. anti-competitively). This was and is inherent in their primary purpose of making and seeking to enforce collective agreements which set terms and conditions of work for their members and others.[8]

39. The term 'workman' denotes 'worker' in modern parlance. It is notable that in order to be a trade union the organisation had to be in breach of competition law ('in restraint of trade'), which its statutory purposes of regulating relations and imposing conditions on trade naturally achieved.[9] The definition of a trade union has been modified by successive statutes but it remains the case that *workers* - whether employed or self-employed - may be union members and hence, by Irish law, may be the subject of a collective agreement negotiated by their trade union, provided it has a negotiation licence.

40. It will be seen that international law (even including EU law) is consistent with the broad definition of "worker" at the heart of Irish labour law. Workers should therefore be able, through their trade unions, to enter into collective agreements with employers or employers' associations without such agreements being struck down by competition law.

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[8] S.3 Trade Union Act 1871 prevented the contract of membership of a trade union being rendered void because its purposes (making and enforcing collective agreements) are necessarily in 'restraint of trade' (see the line of cases: *Hornby v Close* (1867) 19 Cox CC 393; *Hilton v Eckersley* (1855) 6 E&B 47; *Osborne v ASRS* [1909] 1 Ch 163 at 189 etc and, in the UK, *Boddington v Lawson* [1994] ICR 478 Ch D). In the USA protection against competition law were found in the Clayton Act 1914, the Norris-LaGuardia Act 1932 and non-statutorily in *Apex Hosiery v Leader* 310 US 469, 60 S Ct 982,L Ed 1311 (1940).

[9] The means by which relations are regulated and conditions imposed is, of course, that of collective bargaining. The very statutory purpose of a trade union is thus to collectively bargain on behalf of its members. That is likewise the industrial reality.

EU law on competition

41. Irish competition law which has struck at the collective agreements at issue in this Collective Complaint is wholly derived from EU law. Yet, as will be seen, there is no proper correlation between the protection of collective bargaining, which both Irish and EU law proclaims, and EU law on competition which is imported into Irish law.

42. The Irish Competition Act was passed in order to implement the requirements of EU competition law. The preamble to the Act states that it is "to make new provision, by analogy with Articles 81 and 82 of the Treaty establishing the European Community" to prohibit activities which prevent, restrict or distort competition etc. In fact, in all material respects, the Act substantially mirrors those EU Treaty provisions.

43. Materially, Article 81 of the EC Treaty, now Article 101 of the Treaty on the Functioning of the European Union, provides:

> 1. The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:
>
> (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
>
> (b) limit or control production, markets, technical development, or investment;
>
> (c) share markets or sources of supply;
>
> (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
>
> (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.

3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:

- any agreement or category of agreements between undertakings,

- any decision or category of decisions by associations of undertakings,

- any concerted practice or category of concerted practices,

which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;

(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

44. S.4 of the Irish Competition Act 2002 substantially follows this. It materially provides:

4.—(1) Subject to the provisions of this section, all agreements between undertakings, decisions by associations of undertakings and concerted practices which have as their object or effect the prevention, restriction or distortion of competition in trade in any goods or services in the State or in any part of the State are prohibited and void, including in particular, without prejudice to the generality of this subsection, those which—

(a) directly or indirectly fix purchase or selling prices or any other trading conditions,

(b) limit or control production, markets, technical development or investment,

(c) share markets or sources of supply,

(d) apply dissimilar conditions to equivalent transactions with other trading parties thereby placing them at a competitive disadvantage,

(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which by their nature or according to commercial usage have no connection with the subject of such contracts.

(2) An agreement, decision or concerted practice shall not be prohibited under subsection (1) if it complies with the conditions referred to in subsection (5) or falls within a category of agreements, decisions, or concerted practices the subject of a declaration for the time being in force under subsection (3).

(3) The Authority may declare in writing that in its opinion a specified category of agreements, decisions or concerted practices complies with the conditions referred to in subsection (5); such a declaration may be revoked by the Authority if it becomes of the opinion that the category no longer complies with those conditions.

(4) The Authority shall publish, in such manner as it thinks fit, notice of the making of a declaration under subsection (3), and of any revocation by it of such a declaration.

(5) The conditions mentioned in subsections (2) and (3) are that the agreement, decision or concerted practice or category of agreement, decision or concerted practice, having regard to all relevant market conditions, contributes to improving the production or distribution of goods or provision of services or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit and does not—

(a) impose on the undertakings concerned terms which are not indispensable to the attainment of those objectives,

(b) afford undertakings the possibility of eliminating competition in respect of a substantial part of the products or services in question.

...

45. There is no equivalent in the 2002 Act of the express provision of s.60 in the UK Competition Act 1998 (which also substantially mirrors the Treaty) which provides that a court dealing with questions under the (UK) legislation must endeavour to deal with them "in a manner which is consistent with the treatment of corresponding questions arising in [EU] law in relation to competition within the Community" and "with a view to securing that there is no inconsistency between—(a) the principles applied, and decision reached, by the court ... ; and (b) the principles laid down by the Treaty and the European Court..." However, there can be little doubt that this is implicit in the Irish legislation given the reference to "analogy" in the preamble to the Act.

46. There appear to be no "relevant differences" between Irish law and EU law on competition in relation to the matters to which this Collective Complaint relates.

47. In particular, s.1(1) of the Irish Act defines an "undertaking" as "a person being an individual, a body corporate or an unincorporated body of persons engaged for gain in the production, supply or distribution of goods or the provision of a service." This is the same as in EU law.

48. For the purposes of this Collective Complaint, it is striking to note that there is neither use of the word 'worker' nor definition of it in the Competition Act. Nor is there in Article 101 TFEU.

49. Plainly a collective agreement fixing minimum terms on which workers will supply their labour would be, on its face, directly fixing (amongst other things) the 'selling price' of that labour. Hence, were the workers concerned to be classed as 'undertakings', such a collective agreement would appear contrary to Art.101(1)(a) TFEU and s.4 of the Competition Act 2002. The primary question is therefore whether and in what circumstances 'workers' can properly be regarded as 'undertakings'.

50. Before turning to that question, even were workers to be classed as undertakings, a collective agreement setting pay rates and other terms will not fall foul of competition law unless it has as its object or effect the prevention, restriction or distortion of competition within the internal market. Furthermore any such agreement may be declared exempt if it contributes to improving the provision of services, while allowing consumers a fair share of the resulting benefit, and is one which does not involve the conditions in paragraph 3(a) or (b) of Art.101 of the Treaty (s.4(5)(a) and (b) of the Act).

51. Congress certainly argues that the collective agreements in relation to voice-over actors and for journalists and photographers (and analogous collective agreements for other workers) did not "have as their object the prevention,

restriction or distortion of competition within the internal market"; nor did those agreements prevent nor significantly restrict or distort competition by creating a minimum base, a level playing field, on which competition could thrive. Indeed, as explained above, by ensuring minimum rates for actors, musicians and journalists, the collective agreement probably had the effect of increasing competition by preventing the poorest being driven out of the market (and into other jobs) or deciding not to enter it.

52. In any event the collective agreements in question could have been held to be exempt because they certainly contributed to improving the provision of voice-overs, articles, photographs and musical performances by ensuring that competition was primarily on grounds of suitability and excellence. Likewise the collective agreements contributed to improving economic progress by protecting or enhancing the earnings of those concerned thus maintaining or increasing their purchasing power, increasing demand in the Irish economy, increasing the government's tax take from them and diminishing the need for welfare benefits and social services to them and their families. The focus of competition away from labour costs and directing it to quality of service plainly resulted in giving consumers the consequential benefit which it may be assumed they enjoyed. The collective agreements could also be said to impose on the actors, journalists, photographers and musicians terms which were indispensable to the improvement of their terms and conditions of work. It did not allow them to eliminate competition in respect of any, let alone a substantial, part of their work. The Irish Competition Authority appears to have been oblivious to these features.

53. 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.

54. Plainly, what is required for the limited purpose of properly protecting the legitimacy of collective bargaining under competition law is a workable distinction between the sole-trader carrying on a business and a worker in the everyday sense of that word.

55. This distinction is found in other aspects of EU law (see below) and is compatible with both Irish labour law and international law. The key characteristic of 'subordination' identified in the EU legal definition of 'worker' is relevant to this distinction. Thus the actor, musician or commercial pilot all obviously work in accordance with the direction of the 'employer' (or its servants or agents) and, whilst they utilise their skills in their characteristic ways, each such worker is plainly legally subordinated to the control of the 'employer'. The freelance dramatist, author, journalist or photographer has more notional freedom but that degree of autonomy is also subordinate to the 'employer' (or its servants or agents) which may, in the usual situation, direct the content and timing of the work, accept or reject it or require it to be edited or changed.

56. The subordination in question is a reflection of the almost universal inequality of bargaining power between the employer and the worker on which many academics[10] and judges[11] have commented. That inequality of bargaining

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[10] From Adam Smith in *The Wealth of Nations*, 1776, book I, ch viii, onwards.

[11] For example, recently in the UK Supreme Court in considering the distinction between self-employment proclaimed in a written contract which masked the reality of employment, Lord Clarke in *Autoclenz plc v Belcher* [2011] I.C.R. 1157 held at paras 34-35:

> 34 The critical difference between this type of case and the ordinary commercial dispute is identified by Aikens LJ in para 92 as follows:
>
> 'I respectfully agree with the view, emphasised by both Smith and Sedley LJJ, that the circumstances in which contracts relating to work or services are concluded are often very different from those in which commercial contracts between parties of equal bargaining power are agreed. I accept that, frequently, organisations which are offering work or requiring services to be provided by individuals are in a position to dictate the written terms which

power in relation to the individual customer or client of the sole-trader is not usually so pronounced, and certainly the feature of subordination of the sole-trader to the customer/client (as opposed to the market as a whole) is hardly pervasive in the latter's case.

57. The very need for and the origin of collective bargaining derives from the subordination of workers (of all kinds) so that the marker of subordination may be a convenient proxy for distinguishing between those who ought to have the right to collective bargaining and those for whom it is not so necessary.

EU law on collective bargaining

58. Collective agreements and collective bargaining have a special place in EU law. Article 152 of the TFEU recognises and promotes the role of the social partners at EU level and is to facilitate dialogue between the social partners. Implementation of Directives by means of national level collective agreements is confirmed by Article 155(2) of the EU Treaty (TEU).

59. EU law regularly permits the use of collective agreements to bring member States into compliance with EU Directives. For example, Council Directive 2000/43/EC (the *Race Equality Directive*) and Council Directive 2000/78/EC (the *Employment Equality Directive*) provide that member states "may entrust the social partners, at their joint request, with the implementation of this Directive as regards provisions concerning collective agreements." The *Working Time Directive* 2003/88/EC states that derogations to the provisions on daily rest, rest breaks and weekly rest may be adopted by means of collective

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the other party has to accept. In practice, in this area of the law, it may be more common for a court or tribunal to have to investigate allegations that the written contract does not represent the actual terms agreed and the court or tribunal must be realistic and worldly wise when it does so.'

35 So the relative bargaining power of the parties must be taken into account in deciding whether the terms of any written agreement in truth represent what was agreed and the true agreement will often have to be gleaned from all the circumstances of the case, of which the written agreement is only a part. This may be described as a purposive approach to the problem. If so, I am content with that description.

agreements or agreements between the two sides of industry provided that the workers concerned are afforded equivalent protection. Thus the duration and conditions for granting rest breaks if the working day lasts longer than 6 hours "shall be laid down in collective agreements or agreements between the two sides of industry or, failing that, by national legislation".

60. There are other examples of the centrality of collective bargaining to the implementation of EU labour law standards in Member States. The *Works Council Directive* 94/45/EC specifically delegates the duty to define the operation of the Works Council to negotiations between management and representatives of the employees. This 'special negotiating body' also has the duty to negotiate an agreement on the arrangements for implementing a procedure for the information and consultation of employees.

61. EU law recognises collective agreements which bind non-parties and it regards them as legitimate. This is no surprise since such agreements are commonplace throughout most of Europe. They are known by European labour lawyers as *erga omnes* agreements. Thus, in the context of workers from one EU State working in another, the CJEU in *Rush Portuguesa* (Case C-113/89) [1990] ECR I-141, held at para 18 that:

> [EU] law does not preclude Member States from extending their legislation, or collective labour agreements entered into by both sides of industry, to any person who is employed, even temporarily, within their territory, no matter in which country the employer is established; nor does [EU] law prohibit Member States from enforcing those rules by appropriate means.

62. An *erga omnes* collective agreement would obviously be rendered pointless if an employer could evade it by the simple expedient of arranging relationships so that all its workers were self-employed. The CJEU does not appear to have turned its attention to this situation.

63. The *Posted Workers Directive* 96/71/EC, in requiring Member States to guarantee to workers posted from other Member States the same minimum

terms and conditions of employment that apply to workers ordinarily based in their territory, not only gives special recognition to collective agreements that apply to sectors or regions, but also provides an additional mechanism for Member States to extend representative collective agreements not already recognised under domestic law in that way. Thus Article 3(1) of the Directive requires Member States to:

> .... guarantee workers posted to their territory the terms and conditions of employment covering [various stipulated matters] which, in the Member State where the work is carried out, are laid down:
>
> - by law, regulation or administrative provision and/or
> - by collective agreements or arbitration awards which have been declared universally applicable within the meaning of paragraph 8, insofar as they concern the activities referred to in the Annex...
> -

64. Article 3(8) defines the collective agreements that may be relied on as:

> Collective agreements or arbitration awards which have been declared 'universally applicable' means collective agreements or arbitration awards which must be observed by all undertakings in the geographical area and in the profession or industry concerned.
>
> In the absence of a system for declaring collective agreements or arbitration awards to be of universal application within the meaning of the first subparagraph, Member States may, if they so decide, base themselves on:
>
> - collective agreements or arbitration awards which are generally applicable to all similar undertakings in the geographical area and in the profession or industry concerned, and/or
> - collective agreements which have been concluded by the most representative employers' and labour organizations at national level and which are applied throughout national territory,
>
> provided that their application to the undertakings referred to in Article 1 (1) ensures equality of treatment on matters listed in the first subparagraph of paragraph 1 of this Article between those undertakings and the other undertakings referred to in this subparagraph which are in a similar position.
>
> Equality of treatment, within the meaning of this Article, shall be deemed to exist where national undertakings in a similar position:
>
> - are subject, in the place in question or in the sector concerned, to the same obligations as posting undertakings as regards the matters listed in the first subparagraph of paragraph 1, and
> - are required to fulfil such obligations with the same effects.
> -

65. Therefore, the combined effect of paragraphs (3) and (8) of Article 3 is that, where the domestic law of a Member State already gives legal effect to a sector-wide or regional collective agreement, then the terms of that agreement

will also extend to posted workers. If self-employed workers could not be the subject of sector-wide *erga omnes* collective agreements, the impact of the Posted Workers' Directive could be negated by some employers' exclusive engagement of self-employed workers so giving rise to the conclusion that a collective agreement was not of universal application and hence could not be enforced against the employer of posted workers.[12] This surely cannot have been the intention of the EU in introducing the Directive.

66. The right to collective bargaining was held to be a fundamental right by the CJEU in the landmark judgment *Commission v Germany (occupational pensions)* (Case C-271/08) [2010] ECR I-7087 (at para 41, and see AG Trstenjak at para 4). However, as is well-known, as in the *Viking* and *Laval* cases[13] the CJEU also introduced a number of controversial restrictions on the exercise of the right to bargain collectively (and the right to strike). These restrictive conditions were derived by the CJEU from the four business freedoms protected by the TFEU (the approach of the CJEU was very different to that of AG Trstenjak in *Commission v Germany (occupational pensions)*, see paras 188-190 of her Opinion).[14] These restrictions are not material here and are heavily contested by academics because they do not appear consistent with the jurisprudence of the ECtHR; nor with ILO principles;[15] nor with the provisions of the European Social Charter.[16]

67. In *Union Européenne de l'Artisanat et des Petites et Moyennes Enterprises (UEAPME) and Others v E.U. Council and E.C. Commission* (Case T-135/96)

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[12] Cf *Rüffert v Land Niedersachsen* (Case C-341/05) [2007] ECR I-11767; [2008] 2 CMLR 9 where lack of universality (for a different reason) defeated the application of the collective agreement.
[13] *International Transport Workers' Federation and FSU v Viking Line ABP* (Case C-438/05) [2007] E.C.R. I-10779; [2008] 1 C.M.L.R. 51; [2008] C.E.C. 332; [2008] I.C.R. 741; [2008] IRLR 143 and *Laval Un Partneri Ltd v Svenska Byggnadsarbetareförbundet* (C -341/05) [2007] E.C.R. I-11767; [2008] 2 C.M.L.R. 9; [2008] C.E.C. 438; [2008] I.R.L.R. 160.
[14] See also *Rüffert Land Niedersachsen* (Case C-346/06) [2008] 2 C.M.L.R. 39; and *Commission v Luxembourg* [2008] ECR I-4323.
[15] See ILO, *Report of the Committee of Experts on the Collective Complaint of Conventions and Recommendations*, 2010 at 208-9; 2011 at 185; 2013 at 194; and see at 176 in relation to the *Laval* case.
[16] See *Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees (TCO) v Sweden* Complaint No 85/2012, decision of 3 July 2013 of the European Committee on Social Rights, cited earlier.

[1998] 3 C.M.L.R. 385, the *Parental Leave Directive* 96/35 was reached by collective negotiations between the major European employers' associations and a European trade union confederation (the ETUC). Its legality was challenged by an association representing small and medium sized undertakings which claimed it had been excluded from the negotiations which thus lacked representativity. The collective agreement on which the Directive was founded applied:

> to all workers, men and women, who have an employment contract or employment relationship as defined by the law, collective agreements or practices in force in each Member State.

The CJEU held that though the applicant organisation was representative, the employers' associations which participated in the negotiations were sufficiently representative in themselves. It held (at para 94):

> The first point to note is that the purpose of the framework agreement was to set out the minimum appropriate requirements for all employment relationships, whatever their form. If the various signatories to the framework agreement are to satisfy the requirement of sufficient collective representativity, they must therefore be qualified to represent all categories of undertakings and workers at Community level.

Though not at issue in the case, it may be deduced that (i) for the purpose of the Directive no derogation was intended in respect of workers in a particular form of employment relationship such as self-employment; and that (ii) organisations representing self-employed workers could not legitimately be excluded from the collective bargaining which led to the framework agreement.

68. In 2009 a Directive (2009/13) was adopted giving effect to a framework agreement between the European Community Ship Owners' Associations and the European Transport Workers' Federation governing terms and conditions of employment of seafarers affected by flags of convenience. Again it would be strange if it were to be held that it was intended that ship owners could gain exemption from it by the device of self-employment of seafarers.

69. The EU has recognised the proposition that collective agreements made on behalf of workers with employers should not be judged by the standards of competition law which is intended to prohibit cartels of businesses. This is the judgment of the CJEU in the *Albany* cases.[17]

Albany

70. The *Albany* cases concerned compulsory affiliation of employers and 'workers' (the terms used in the judgment) to a sectoral pension scheme as a result of collectively bargained agreements. Certain employers claimed the scheme to be anti-competitive because, first, it deprived undertakings in the sector concerned of the right to affiliate to another scheme and, secondly, it excluded insurers other than the fund set up under the collective agreements in question, "from a substantial part of the pension insurance market" (para.48). The Court held (references to Article 85 is to the predecessor of Article 101 TFEU which is, materially, in identical terms):

> 54. ... [I]t is important to bear in mind that, under Article 3(g) and (i) of the E.C. Treaty (now, after amendment, Article 3(1)(g) and (j) E.C.), the activities of the Community are to include not only a 'system ensuring that competition in the internal market is not distorted' but also 'a policy in the social sphere'. Article 2 of the E.C. Treaty (now, after amendment, Article 2 E.C.) provides that a particular task of the Community is 'to promote throughout the Community a harmonious and balanced development of economic activities' and 'a high level of employment and of social protection'.
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> 55. In that connection, Article 118 of the E.C. Treaty (Articles 117 to 120 of the E.C. Treaty have been replaced by Articles 136 E.C. to 143 E.C.) provides that the Commission is to promote close co-operation between Member States in the social field, particularly in matters relating to the right of association and collective bargaining between employers and workers.
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> 56. Article 118b of the E.C. Treaty (Articles 117 to 120 of the E.C. Treaty having been replaced by Articles 136 E.C. to 143 E.C.) adds that the Commission is to endeavour to develop the dialogue between management

[17] *Albany International v. Stichting Bedrijfspensioenfonds Textielindustrie* (Case C-67/96), [1999] E.C.R. I-5751; [2000] 4 C.M.L.R. 446; Joined Cases *Brentjens' Handelsonderneming v. Stichting Bedrijfspensioenfonds Voor de Handel in Bouwmaterialen*: (C 115–117/97), [1999] E.C.R. I-6025; [2000] 4 C.M.L.R. 566 ; and *Maatschappij Drijvende Bokken v. Stichting Pensioenfonds Voor de Vervoer- En Havenbedrijven* (Case C-219/97), [1999] E.C.R. I-6121; [2000] 4 C.M.L.R. 599.

and labour at European level which could, if the two sides consider it desirable, lead to relations based on agreement.

57. Moreover, Article 1 of the Agreement on social policy ([1992] O.J. C191/91) states that the objectives to be pursued by the Community and the Member States include improved living and working conditions, proper social protection, dialogue between management and labour, the development of human resources with a view to lasting high employment and the combating of exclusion.

58. Under Article 4(1) and (2) of the Agreement, the dialogue between management and labour at Community level may lead, if they so desire, to contractual relations, including agreements, which will be implemented either in accordance with the procedures and practices specific to management and labour and the Member States, or, at the joint request of the signatory parties, by a Council decision on a proposal from the Commission.

59. It is beyond question that certain restrictions of competition are inherent in collective agreements between organisations representing employers and workers. However, the social policy objectives pursued by such agreements would be seriously undermined if management and labour were subject to Article 85(1) of the Treaty when seeking jointly to adopt measures to improve conditions of work and employment.

60. It therefore follows from an interpretation of the provisions of the Treaty as a whole which is both effective and consistent that agreements concluded in the context of collective negotiations between management and labour in pursuit of such objectives must, by virtue of their nature and purpose, be regarded as falling outside the scope of Article 85(1) of the Treaty.

71. It is important to note that the exemption applies to collective agreements intended to improve conditions of work and employment.[18] Presumably, collective agreements for other purposes might not attract the exemption from competition law. Such a limitation has no relevance to the instant Complaint.

72. The Court in *Albany* went on to consider "whether the nature and purpose of the agreement at issue in the main proceedings justif[ied] its exclusion from the scope of Article 85(1) of the Treaty" (para 61) and held that the collective agreement for the provision of a pension scheme was like those that derived from social dialogue, and, since it was "concluded in the form of a collective agreement and is the outcome of collective negotiations between

[18] See also *Landsorganisasjonen I Norge, Norsk Kommuneforbund, Kommunalansattes Fellesorganisasjon v Kommunenes Sentralforbund and ors.* Case E-8/00, 22 March 2002, para 49.

organisations representing employers and workers" (para 62) it satisfied the first condition.

73. Since the agreement established, in a given sector, a supplementary pension scheme with the object of seeking generally to guarantee a certain level of pension for all workers in that sector and therefore contributing directly to improving one of their working conditions, namely their remuneration (para 63), it therefore satisfied the second condition. Consequently, the Court was satisfied that "[it did] not, by reason of its nature and purpose, fall within the scope of Article 85(1) of the Treaty" (para 64).

74. It should be observed that the CJEU's recognition that collective agreements needed exemption from anti-competition law is no more than a modern reiteration on a European scale of the protection which had to be given to trade unions in the 19th century, exemplified in Ireland and the UK by the Trade Union Act 1871, referred to above.

75. The *Albany* principles were followed and applied by the CJEU in *Van Der Woude v Stichting Beatrixoord* (Case C-222/98), [2001] 4 C.M.L.R. 2 which held that a collective agreement for a compulsory health care insurance to be provided by a specified provider was likewise not caught by the relevant EU Treaty provisions (and see *AG2R Prévoyance v Beaudout Père et Fils Sarl* (Case C-437/09) [2011] 4 C.M.L.R. 19).[19]

Pavlov

76. However, in *Pavlov and Others v Stichting Pensioenfonds Medische Specialisten* (Joined Cases C180–184/98) [2001] 4 C.M.L.R. 1 the CJEU held that a compulsory pension scheme for self-employed medical specialists which had

[19] See also *Poucet v Assurances Generales de France (AGF) et Caisse Mutuelle Regionale du Languedoc-Roussillon* (C159/91) [1993] E.C.R. I-637; *Pistre v Caisse Autonome National de Compensation de l'Assurance Veiellesse des Artisans* (C160/91) [1993] E.C.R. I-637; *Sodemare v Regione Lombardia* (Case C-70/95) [199] ECR I-3395. The EFTA court has applied *Albany* too: *Landsorganisasjonen I Norge, Norsk Kommuneforbund, Kommunalansatles Fellesorganisasjon v Kommunenes Sentralforbund and ors.* Case E-8/00, 22 March 2002, paras 36 and 44.

been collectively bargained by their professional association was *not* protected by the *Albany* principles which :

> 68. ...cannot be applied to an agreement which, whilst being intended, like the agreement at issue in the main proceedings, to guarantee a certain level of pension to all the members of a profession and thus to improve one aspect of their working conditions, namely their remuneration, is not concluded in the context of collective bargaining between employers and employees.
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> 69 On this point, it should be emphasised that the Treaty contains no provisions, like Articles 118 and 118b of the E.C. Treaty (Articles 117 to 120 of the E.C. Treaty have been replaced by Articles 136 E.C. to 143 E.C.) or Articles 1 and 4 of the Agreement on Social Policy, encouraging the members of the liberal professions to conclude collective agreements with a view to improving their terms of employment and working conditions and providing that, at the request of members of the professions, such agreements be made compulsory by the public authorities, for all the members of the profession in question.
>
> 70 That being so, Article 85(1) of the Treaty must be interpreted as meaning that a decision taken by the members of a liberal profession to set up a pension fund responsible for managing a supplementary pension scheme and to request the public authorities to make membership of that fund compulsory for all the members of that profession does not, by reason of its nature or purpose, fall outside the scope of that provision.

77. The CJEU considered that self-employed medical specialists (who supplied their services for payment) were each an economic undertaking. The Court reiterated (at para 74): that it had:

> consistently held that, in the context of competition law, the concept of an undertaking covers any entity engaged in an economic activity, regardless of the legal status of the entity or the way in which it is financed.

And (at para 75) that it had also: "consistently held that any activity consisting in offering goods and services on a given market is an economic activity." The medical specialists provided (para 76),

> in their capacity as self-employed economic operators, services on a market, namely the market in specialist medical services. They are paid by their patients for the services they provide and assume the financial risks attached to the pursuit of their activity.

They therefore carried on (para 77 and see 82):

> an economic activity and are thus undertakings within the meaning of Articles 85, 96 and 90 of the Treaty. The complexity and technical nature of the services they provide and the fact that the practice of their profession is regulated cannot alter that conclusion.

78. The professional association which negotiated the collective agreement was therefore an association of undertakings (para 85):

> 85 Suffice it to say in this regard that the fact that a professional organisation is governed by a public law statute does not preclude the application of Article 85 of the Treaty. According to its wording, that provision applies to agreements between undertakings and decisions by associations of undertakings. So, the legal framework within which an association decision is taken and the legal definition given to that framework by the national legal system are irrelevant as far as the applicability of the Community rules on competition and, in particular, Article 85 of the Treaty are concerned ....
>
> 86 Nor, contrary to what the Fund maintains, can the [association] be taken outside the scope of Article 85 of the Treaty by the fact that its main task is to protect the interests of medical specialists, and in particular their income, which is made up in part by supplementary pensions, in negotiations with the Dutch authorities concerning the cost of medical services.

79. But the setting up of the fund did not have as its object or effect the prevention, restriction or distortion of competition within the Common Market because (para 91):

> account should be taken of the economic context in which undertakings operate, the products or services covered by the decisions of those undertakings, the structure of the market concerned and the actual conditions in which it functions.

80. Nevertheless, there was a restriction of competition in relation to (para 93):

> one cost factor of specialist medical services, inasmuch as one of its effects is that those medical practitioners do not compete with one another to obtain less costly insurance for that part of their pension.

81. However (paras 94-96), the restrictive effects of the single cost factor of the services offered by self-employed medical specialists, namely the supplementary pension scheme, was held to be insignificant in comparison with other factors, such as medical fees or the cost of medical equipment. It therefore had only a marginal and indirect influence on the final cost of the services offered by self-employed medical specialists whilst achieving economies of scale in the management of contributions and payment of pensions and in the investment of assets. There was therefore no appreciable

restriction of competition within the Common Market and hence the agreement could be enforced.

82. There is no recognition in *Pavlov* that the precedence given to competition law may involve the subversion of a fundamental human right for some of those who might be affected by the ruling. That conundrum is not explored.

83. It is, perhaps, significant that the doctors in the *Pavlov* case were self-employed members of "a liberal profession" which took them (paragraph 68) out of the context of collective bargaining between employers and workers which founded the *Albany* exception. *Pavlov* did not hold that self-employment *per se* rendered the doctor an undertaking. It is to be noted that the *Albany* judgment avoided any use of the term "employees" and referred instead, in paragraphs 56, 57, 58, 59 and 60 to collective bargaining (or dialogue or negotiations) between management (or employers) and "labour"; and in paragraphs 55 and 59 to employers and "workers". There is no suggestion in *Albany* that its central *ratio* is confined to the narrower concept of "employee". The concept of "worker" (or "labour") for the purposes of the *Albany* judgment is therefore at large.

FNV Kunsten

84. The rigour of the approach set out in *Pavlov* was mitigated to a degree in *FNV Kunsten Informatie en Media v Staat der Nederlanden*, Case C-413/13 (referred to earlier). The judgment moderated the proposition that every self-employed worker is an undertaking so that a collective agreement in respect of them was contrary to EU competition law. In that case there was a collective agreement which provided for minimum rates of pay both for musicians employed by Dutch orchestras and for self-employed musicians who either stood-in or worked under a service agreement for those orchestras. The Dutch competition authority had held that the collective agreement contravened

competition law in respect of the self-employed musicians. However, the court held that self-employed workers who:

> perform for an employer, under a works or service contract, the same activity as that employer's workers, are 'false self-employed'.

For that reason they are not to be regarded as undertakings but as the equivalent of employees and so outside the scope of Article 101(1) TFEU. They are thus permitted to exercise the right to bargain collectively. The court thus recognised that within the ranks of the self-employed there are those who are to be regarded as undertakings and those who are not. The distinction depends not on whether they are members of liberal professions, nor their subservience to the hirer, nor any other characteristic pertaining to them as workers but solely on whether the hirer has also engaged other workers on the same activity but on contracts of employment.

85. Insofar as the judgment diminishes the proposition that *all* those who are self-employed are automatically denied the right to bargain collectively, it is to be welcomed. But the basis of the distinction between those with that right and those without, is insupportable. Take for example the jobbing musician (a member of the relevant union) who has a regular afternoon gig in a band where other members are employed by the bandleader. There is a relevant collective agreement honoured by the bandleader. So for those sessions the musician enjoys the right to collective bargaining. She also has a regular evening session in a band where the bandleader does not employ the other members but would wish (but for the fear of competition law) to abide by the collective agreement. For those sessions the musician is denied the collective bargaining right.

86. The curious line of demarcation of *FNV Kunsten* also creates uncertainty for those who work through an agency whereby the agency is the employer but the end user is not. Are the agency workers in this scenario employed under a 'works or service contract' which entitles them to compare themselves with

the end user's workers so that they can share with the latter the benefits of collective bargaining with the end user? Or are they only able to share the (purely theoretical) benefit of being part of any collective bargaining with the agency?

87. So, in accordance with the judgment in *FNV Kunsten*, the path of the self-employed musician from gig to gig meanders from the pool of light cast by a protected right to collective bargaining and into the darkness of a denial of that right - and back again - dependant solely on the fortuity of whether the person engaging her for the particular session does or does not also employ other musicians on contracts of employment. Entitlement to fundamental rights should not depend on such extraneous and irrelevant considerations.

EU law and 'workers'

88. The dissonance in EU law between competition law and the recognition of the right to collective bargaining is stark. Yet much of this tension could be dissipated if the CJEU chose to apply the *Albany* exemption to competition law to the wide and insightful definition of 'worker' it has adopted in other contexts. The rationale for not doing so is unclear. It is true that the Court's broad definition of 'worker' is not as broad as the concept of 'everyone' or even that of 'worker' in other human rights Treaties (see below) but use of the CJEU definition of 'worker' in relation to the right to collective bargaining would include a large swathe of the self-employed who are not in business on their own accounts. It was plainly open to the CJEU simply to expand the benefit of the right to collective bargaining exempt from Article 101 to all those who are workers (according to the CJEU definition) and are not businesses.[20] The CJEU chose not to do so.

[20] A leaked document from the European Commission from Commissioner Thyssen to President Juncker , dated in September 2015 suggests that the Commission (DG Emp) might 'prepare a legislative proposal to introduce an autonomous EU definition of 'worker' and lay down a number of rights that all workers should be entitled to.' If so it is to be hoped that the right to bargain collectively is included.

89. This Complaint does not argue for the CJEU definition but instead submits that the concept of worker in this context should be yet more broadly construed in order to give effect to the European Social Charter. The significance of the CJEU definition is to point out that there is no rational basis (in the Competition provisions or anywhere else) for confining the right to collective bargaining to a sub-set of the classification 'worker', namely employees.

90. In that connection it was noted earlier that neither Article 101 TFEU nor its Irish derivative are said to apply to 'workers' of any kind and that word is neither found nor defined in either instrument, [21] both of which are directed solely at 'undertakings'. Nor is there any reference to 'employees'.

91. There is no universal definition of 'worker' in the EU Treaties, Regulations, or Directives. Some Directives (such as that on transfer of undertakings, 2001/23) confer discretion on national law as to the beneficiaries.[22]

92. As to the CJEU's definition of 'worker' in other contexts, in relation to what is now Article 45 of the TFEU which guarantees the free movement of workers, a broad approach was adopted in an early case (though not one concerning any distinction between workers and the self-employed). *Sotgiu v Deutsche Bundespost* [1974] ECR 153, (C-152/73), held in 1974 at para 5:

> It is necessary to establish further whether the extent of the exception provided for by Article [now 45(4) TFEU] can be determined in terms of the designation of the legal relationship between the employee and the employing administration. In the absence of any distinction in the provision referred to, it is of no interest whether a worker is engaged as a workman [ouvrier], a clerk [employé] or an official [fonctionnaire] or even whether the terms on which he is employed come under public or private law. These legal designations can be varied at the whim of national legislatures and cannot therefore provide a criterion for interpretation appropriate to the requirements of Community law.

[21] And certainly no distinction is drawn between the employed and the self-employed.
[22] So that they may be confined to 'employees.' But the CJEU has intervened to impose limits on the exercise of such discretion, see e.g. in relation to the Working Time directive: *O'Brien* Case C-393/10 at paras 34, 43, 51.

93. Again in relation to the Treaty provision on free movement of workers, a broad approach was adopted in *Levin v. Staatssecretaris Van Justitie* Case 53/81, [1982] 2 C.M.L.R. 454 in relation to a part-time and lowly paid worker working apparently so as to be able to make an application for residency. The CJEU held that (emphasis supplied):

> 9 Although the rights flowing from the free movement of workers, and, in particular, the right to enter the territory of a member-State and to remain there, are thus connected with status as a worker or else as a person who works or wishes to take up work in paid employment, the terms 'worker' and 'work in paid employment' are not expressly defined in any provision connected with this matter. In determining their meaning, one must therefore have recourse to the generally accepted principles of interpretation, beginning with the usual meaning which the words have in their context and in the light of the objectives of the Treaty.
>
> 10 ...
>
> 11 ... As the Court has already declared in its judgment of 19 March 1964, the terms 'worker' and 'work in paid employment' cannot be determined by reference to the legislation of the member-States, but have a meaning in Community law. Otherwise, the Community rules relating to the free movement of workers would be deprived of their effect, because the meaning of these terms could be fixed and varied unilaterally, outside the control of the Community institutions, by the national legislators, who could thus at will exclude particular categories of person from the application of the Treaty.
>
> 12 This would particularly be the case if enjoyment of the rights accorded on the basis of the free movement of workers could be made dependent on a wage which the law of the host State regards as the minimum; because of this, the personal area of application of the Community rules on this subject could vary from member-State to member-State. **The meaning and scope of the terms 'worker' and 'work in paid employment' must therefore be clarified in the light of the principles of the Community legal order.**
>
> 13 It must be emphasised in this connection that **these terms determine the area of application of one of the fundamental freedoms guaranteed by the Treaty and must on this basis not be interpreted restrictively.**
>
> 14 In accordance with this view, the recitals to Regulation 1612/68 confirm in general terms the right of all workers of the member-States to do the work of their choice within the Community, **regardless of whether they are** permanent workers, seasonal workers or frontier workers, or **workers who are employed in the framework of a supply of services.** Moreover, while, by its Article 4, Directive 68/360 grants workers—on production of the document on which they have entered the territory, and of a **confirmation of engagement or employment made by the employer**—the right of residence,

it does not make this right dependent on any condition as to the sort of work or the income earned thereby.

15 An interpretation which accords to these terms their full scope is equally in keeping with the objectives of the Treaty, which, under Articles 2 and 3, includes the removal between the member-States of obstacles to the free movement of persons, inter alia, in order to promote the harmonious development of economic activity within the whole Community and to improve the standard of living. Since part-time work, although possibly producing less income than that which is regarded as the minimum for subsistence, is for many an effective means of improving their living conditions, the beneficial effect of Community law would be undermined and the achievement of the objectives of the Treaty jeopardised if enjoyment of the rights accorded on the basis of the free movement of workers were reserved to persons who earn by full-time work wages which are at least equal to the minimum wage guaranteed in the sector concerned.

94. This broad approach crystallised in *Lawrie-Blum v Land Baden-Württemberg* (Case 66/85), [1987] 3 C.M.L.R. 389, in respect of trainee teacher:

15 The Commission takes the view that **the criterion for the application of Article [now 45 TFEU] is the existence of an employment relationship, regardless of the legal nature of that relationship and its purpose.** The fact that the period of preparatory service is a compulsory stage in the preparation for the practice of a profession and that it is spent in the public service is irrelevant if **the objective criteria for defining the term 'worker' , namely the existence of a relationship of subordination vis-à-vis the employer, irrespective of the nature of that relationship,** the actual provision of services and the payment of remuneration, are satisfied.

16 Since freedom of movement for workers constitutes one of the fundamental principles of the Community, the term 'worker' in Article [now 45 TFEU] may not be interpreted differently according to the law of each member-State but has a Community meaning. Since it defines the scope of that fundamental freedom, the **Community concept of a 'worker' must be interpreted broadly** (*Levin v. Staatssecretaris Van Justitie* Case 53/81, [1982] 2 C.M.L.R. 454).

17 That concept must be defined in accordance with objective criteria which distinguish the employment relationship by reference to the rights and duties of the persons concerned. **The essential feature of an employment relationship, however, is that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration.**

95. This latter proposition is clearly broad enough to include the self-employed worker who fulfilled the conditions specified. The construction was repeated in *Saint Prix v Secretary of State for Work and Pensions (Aire Centre, intervening)*

(Case C-507/12), 19 June 2014, [2015] 1 C.M.L.R. 5 in which the question was (as stated at para 22) 'whether a pregnant woman who temporarily gives up work because of her pregnancy is to be considered a "worker" for the purposes of the freedom of movement for workers as laid down in art.45 TFEU' (and of a right of residence conferred by Directive 2004/38).[23] Neither article 45 not the Directive provided any definition of the word 'worker'. The CJEU held:

> 33 In that regard, it must be noted that, according to the settled case law of the Court, the concept of "worker", within the meaning of art.45 TFEU, insofar as it defines the scope of a fundamental freedom provided for by the TFEU Treaty , must be interpreted broadly (see, to that effect, *N v Styrelsen for Videregående Uddannelser og Uddannelsesstøtte* (C-46/12) EU:C:2013:97; [2013] 2 C.M.L.R. 37 at [39] and the case law cited).
>
> 34 Accordingly, the Court has held that any national of a Member State, irrespective of his place of residence and of his nationality, who has exercised the right to freedom of movement for workers and who has been employed in a Member State other than that of his residence falls within the scope of art.45 TFEU (see, inter alia, *Ritter-Coulais v Finanzamt Germersheim* (C-152/03) [2006] E.C.R. I-1711; [2006] 2 C.M.L.R. 31 at [31], and *Hartmann v Freistaat Bayern* (C-212/05) [2007] E.C.R. I-6303; [2008] 3 C.M.L.R. 38 at [17]).
>
> 35 The Court has thus also held that, in the context of art.45 TFEU , **a person who, for a certain period of time, performs services for and under the direction of another person in return for which he receives remuneration must be considered to be a worker.** Once the employment relationship has ended, the person concerned, as a rule, loses the status of worker, although that status may produce certain effects after the relationship has ended, and a person who is genuinely seeking work must also be classified as a worker (*Caves Krier Frères Sàrl v Directeur de l'Administration de l'emploi* (C-379/11) EU:C:2012:798; [2013] 2 C.M.L.R. 14 at [26] and the case law cited).
>
> 36 Consequently, and for the purposes of the present case, it must be pointed out that freedom of movement for workers entails the right for nationals of Member States to move freely within the territory of other Member States and to stay there for the purposes of seeking employment (see, inter alia, *R. v Immigration Appeal Tribunal Ex p. Antonissen* (C-292/89) [1991] E.C.R. I-745; [1991] 2 C.M.L.R. 373 at [13]).
>
> 37 It follows that classification as a worker under art.45 TFEU , and the rights deriving from such status, do not necessarily depend on the actual or continuing existence of an employment relationship (see, to that effect, *Lair v*

[23] The Directive conferred the right on workers and the self-employed so distinguishing them but the judgment (and the submission advanced herein based upon it) is confined to the construction of the concept of 'worker'.

Universität Hannover (39/86) [1988] E.C.R. 3161; [1989] 3 C.M.L.R. 545 at [31] and [36]).

So even a person who has ceased to work may be a 'worker'.[24] The CJEU has thus adopted a very broad view of the notion of 'worker' for the purposes of the assessing the coverage of the fundamental freedom of freedom of movement of workers.

96. The same approach can be seen in *Bettray V Staatssecretaris Van Justitie* (C-344/87) in respect of an EU Regulation concerning the right to take up work in another Member State. There the employment of a drug addict in a local authority establishment would give him the right to residence to the extent that the establishment was not simply directed to rehabilitation and reintegration. The Court held:

> 14 It appears from the order for reference that persons employed under the scheme set up by the Social Employment Law **perform services under the direction of another person in return for which they receive remuneration. The essential feature of an employment relationship is therefore present.**
>
> 15 That conclusion is not altered by the fact that the productivity of persons employed in the scheme is low and that, consequently, their remuneration is largely provided by subsidies from public funds. Neither the level of productivity nor the origin of the funds from which the remuneration is paid can have any consequence in regard to whether or not the person is to be regarded as a worker.
>
> 16 Nor can the person cease to be regarded as a worker merely by virtue of the fact that the employment relationship under the Social Employment Law is of a *sui generis* nature in national law. As the Court has held (see, primarily, the judgment of 12 February 1974 in Case 152/73 *Sotgiu* v *Deutsches Bundespost* [1974] ECR 153), **the nature of the legal relationship between the employee and the employer is of no consequence in regard to the application of Article [now 45 TFEU].**

97. In yet another freedom of movement of workers case, *Asscher v Staatssecretaris*

[24] The CJEU has also held that migrant workers are guaranteed certain rights consequent on their categorisation as a worker even when they are no longer in an employment relationship: *Commission v France* (C-35/97) [1998] E.C.R. I-5325, para 41; *Ninni-Orasche* (C-413/01) [2004] 1 C.M.L.R. 19, para 34; *Collins v Secretary of State for work and Pensions* [2004] 2 C.M.L.R. 8 at paras 27 and 30. Those who are looking for work but not actually in work may nonetheless be regarded as 'workers' and have rights accordingly *Martínez Sala v Freistaat Bayern* (Case C-85/96) [1998] ECR I-2691, para 32.

van Financien (C-107/94) [1996] 3 CMLR 61, the broad definition was again applied, this time with the consequence that a company director was not a 'worker'. The CJEU held (at paras 25 and 26):

> 25 It is settled law that any person who pursues an activity which is effective and genuine, to the exclusion of activities on such a small scale as to be regarded as purely marginal and ancillary, is to be treated as a "worker" within the meaning of Article [no 45 TFEU] of the Treaty. According to the case law, **the essential characteristic of the employment relationship is that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration** (Case 66/85, *Lawrie-Blum v. Land Baden-Württemberg*).
>
> 26 In the Netherlands, Mr Asscher is the director of a company of which he is the sole shareholder; his activity is thus not carried out in the context of a relationship of subordination, and so he is to be treated not as a "worker" within the meaning of Article 48 of the Treaty but as pursuing an activity as a self-employed person within the meaning of Article 52 .

98. As the much reiterated citation from *Sotgiu* v *Deutsches Bundespost* makes clear, the CJEU will look to the reality behind the parties' categorisation of the work relationship and so, in *Danosa v LKB Līzings SIA* (Case C-232/09) [2011] 2 C.M.L.R. 2, the Court concluded that the fact that a person is a company director:

> 47 ... is not enough in itself to rule out the possibility that she was in a relationship of subordination to that company: it is necessary to consider the circumstances in which the Board Member was recruited; the nature of the duties entrusted to that person; the context in which those duties were performed; the scope of the person's powers and the extent to which he or she was supervised within the company; and the circumstances under which the person could be removed.
>
> 48 First of all, ... Ms Danosa was appointed sole member of LKB's Board of Directors for a fixed period of three years; that she was made responsible for managing the company's assets, directing the company and representing it; and that she was an integral part of the company. It has not been possible to tell, from the reply given to a question raised by the Court during the hearing, by whom or by what body Ms Danosa had been appointed.
>
> 49 Next, even though Ms Danosa enjoyed a margin of discretion in the performance of her duties, she had to report on her management to the supervisory board and to co-operate with that board.
>
> 50 Lastly, ... The dismissal decision in Ms Danosa's case was therefore adopted by a body which, by definition, she did not control and which was able at any time to take decisions contrary to her wishes.

> 51 While it cannot be ruled out that the members of a directorial body of a company, such as a Board of Directors, are not covered by the concept of "worker" as defined in [39] above, in view of the specific duties entrusted to them, as well as the context in which those duties are performed and the manner in which they are performed, the fact remains that Board Members who, in return for remuneration, provide services to the company which has appointed them and of which they are an integral part, who carry out their activities under the direction or control of another body of that company and who can, at any time, be removed from their duties without such removal being subject to any restriction, satisfy *prima facie* the criteria for being treated as workers within the meaning of the case law of the Court, as referred to above.

99. It will be seen from *Asscher* that the CJEU does recognise the category of self-employment of individuals but it is a very narrow category indeed. Article 49 TFEU gives undertakings established in one Member State the freedom to establish business in another Member State. In *Jany and Others v Staatssecretaris Van Justitie* (Case C-268/99) [2003] 2 C.M.L.R. 1, the Court, considered the position of several Polish and Czech nationals who had applied for a residence permits to operate in the Netherlands in a self-employed capacity as prostitutes. Under bilateral treaties each Member State was to grant Polish and Czech companies and nationals treatment no less favourable than that accorded to its own companies and nationals in relation to their establishment and operations. Establishment was defined as meaning, in relation to nationals, the right to take up and pursue economic activities as self-employed persons. However, self-employment was not to extend to seeking or taking employment in the labour market and did not confer a right of access to the labour market of the host State. This accorded with Article 49 TFEU. The CJEU held:

> 33 According to settled case law, the pursuit of an activity as an employed person or the provision of services for remuneration must be regarded as an economic activity within the meaning of Art.2 of the EC Treaty ..., provided that the work performed is genuine and effective and not such as to be regarded as purely marginal and ancillary.
>
> 34 Since the essential characteristic of an employment relationship within the meaning of Art. [now 45 TFEU] is the fact that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration, any activity which a person performs outside a relationship of subordination must be classified as an

activity pursued in a self-employed capacity for the purposes of Art. [now 49 TFEU].

100. Once one removes from the European workforce all those who are persons who, for a certain period of time, perform services for and under the direction of another person in return for which they receive remuneration,[25] and who do so in a relationship of subordination, [26] one is left with only a very few who can properly be categorised as genuinely self-employed undertakings.

101. In *Confederación Española de Empresarios de Estaciones de Servicio* (EU:C:2006:784) it was held that a self-employed person can lose that status (as an undertaking) if he does not independently determine his own conduct on the market but is entirely dependent on his principal because he does not bear any of the financial or commercial risks arising out of the latter's activity and operates as an auxiliary in the principal's undertaking. [27]

102. It seems that there has been no significant other CJEU case law on the meaning of the phrase 'self-employed': C. Barnard, *EU Employment Law*, 4th ed, 2012, OUP at 151.[28] Those who are classically to be regarded as undertakings carrying on business in their own right include self-employed barristers: *Wouters v Algemene Raad van de Nederlandse Orde van Advocaten* (C309/99) [2002] E.C.R. I-1577; [2002] 4 C.M.L.R. 27.

103. In the context of the Working Time Directive 2003/88 in *Union Syndicale Solidaires Isère* (Case C-428/09) [2011] 1 C.M.L.R. 38 the CJEU followed the familiar jurisprudence set out above in relation to the concept of the 'worker' to whom the Directive was intended to apply so that there was no exclusion

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[25] Remuneration is broadly defined in this context: *Steymann v Staatssecretaris van Justitie*, Case C-196/87 [1988] ECR 6159.

[26] It is for the national court to decide whether a relationship of subordination exists: *Meeusen v Hoofddirectie van de Informatie Beheer Groep* (Case C-337/97) [1999] ECR I-3289 , 3311, para 15 (a wife employed for two days a week in a company owned by her husband of which he was sole director was not, on the grounds of her relationship, to be excluded from being a worker).

[27] As to not sharing the employer's commercial risks, see *Agegate* C-3/87, EU:C:1989:650.

[28] Of course, EU law recognises an 'employee' as a distinct sub-category of 'worker' for certain purposes (such as the Transfer of Undertakings Directive: *Danmols Inventar* Case C-105/84).

from its application for the workers concerned who were casual and seasonal staff at holiday and leisure centres (see paras 25-26, 32). The CJEU held:

> 27 It must also be borne in mind that, while the concept of a "worker" is defined in art.3(a) of Directive 89/391 to mean any person employed by an employer, including trainees and apprentices but excluding domestic servants, Directive 2003/88 made no reference to either that provision of Directive 89/391 or the definition of a "worker" to be derived from national legislation and/or practices.
>
> 28 The consequence of that fact is that, for the purposes of applying Directive 2003/88, that concept may not be interpreted differently according to the law of Member States but has an autonomous meaning specific to EU law. The concept must be defined in accordance with objective criteria which distinguish the employment relationship by reference to the rights and duties of the persons concerned. **The essential feature of an employment relationship, however, is that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration** (see, by analogy, for the purposes of art.39 EC , *Lawrie-Blum v Land Baden-Württemberg* (66/85) [1986] E.C.R. 2121; [1987] 3 C.M.L.R. 389 at [16] and [17], and also *Collins v Secretary of State for Work and Pensions* (C-138/02) [2004] E.C.R. I-2703; [2004] 2 C.M.L.R. 8 at [26]).
>
> 29 It is for the national court to apply that concept of a "worker" in any classification, and the national court must base that classification on objective criteria and make an overall assessment of all the circumstances of the case brought before it, having regard both to the nature of the activities concerned and the relationship of the parties involved.
>
> 30 Even though, according to the order for reference, the persons employed under educational commitment contracts are not subject to certain provisions of the Labour Code, it must be recalled that the Court has held that **the sui generis legal nature of the employment relationship under national law cannot have any consequence in regard to whether or not the person is a worker for the purposes of EU law** (see *Kiiski v Tampereen Kaupunki* (C-116/06) [2007] E.C.R. I-7643; [2008] 1 C.M.L.R. 5 at [26] and case law cited).
>
> 31 As regards workers employed on a fixed-term contract, such as those employed under the contract at issue in the main proceedings, the Court has previously ruled, in connection with Directive 93/104 , that that directive draws no distinction between workers employed under such a contract and those employed under a contract of indefinite duration, in particular with regard to the provisions concerning minimum rest periods, which refer in most cases to "every worker" (see, to that effect, *BECTU* [2001] 3 C.M.L.R. 7 at [46]). That ruling holds equally true for Directive 2003/88 , and in particular art.3 thereof concerning the daily rest period.

104. In the context of the Collective Redundancies Directive 98/59, the CJEU has adopted the familiar jurisprudence: *Commission v Italy* Case C-596/12, para 17. In *Balkaya*, Case C-229/14, the Court applied that jurisprudence (in the context of the same Directive) to find that a paid director of a company who owned no shares in it was a 'worker' though he was not deemed to be so in national law. In the same case, the Court held that an unpaid trainee who performed real work in the course of skills and vocational training was likewise a 'worker'.[29]

105. Similarly, in the context of EU Treaty provisions guaranteeing equality, in *Allonby v Accrington and Rossendale College* (Case C-256/01) [2004] ICR 1328 the CJEU held that (emphasis supplied):

> 64. The term 'worker' within the meaning of article 141(1) EC is not expressly defined in the EC Treaty. It is therefore necessary, in order to determine its meaning, to apply the generally recognised principles of interpretation, having regard to its context and to the objectives of the Treaty.
>
> 65. According to article 2 EC, the Community is to have as its task to promote, among other things, equality between men and women. ... the principle of equal pay forms part of the foundations of the Community.
>
> 66. Accordingly, **the term 'worker' used in article 141(1) EC cannot be defined by reference to the legislation of the member states but has a Community meaning. Moreover, it cannot be interpreted restrictively.**
>
> 67. For the purposes of that provision, **there must be considered as a worker a person who, for a certain period of time, performs services for and under the direction of another person in return for which he receives remuneration;** see, in relation to free movement of workers, in particular *Lawrie-Blum v Land Baden-Württemberg* (Case 66/85) [1987] ICR 483, para 17, and *Martínez Sala* (Case C-85/96) [1998] ECR I-2691, para 32.
>
> 68. Pursuant to the first paragraph of Art.141(2) EC, for the purpose of that article, "pay" means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his employment, from his employer. It is clear from that definition that **the authors of the Treaty did not intend that the term 'worker', within the meaning of article 141(1)EC, should include independent providers of services who are not in a relationship of subordination with the person who receives the services** (see also, in the

[29] In the context of the same Directive the fact that workers were hired for a fixed term or for a specific task did not exclude them from being workers: *Pujante Rivera*, Case C-422/14.

context of free movement of workers, *Meeusen v Hoofddirectie van de Informatie Beheer Groep* (Case C-337/97) [1999] ECR I-3289 , 3311, para 15).

69. The question whether such a relationship exists must be answered in each particular case having regard to all the factors and circumstances by which the relationship between the parties is characterised.

70. Provided that a person is a worker within the meaning of article 141(1)EC, **the nature of his legal relationship with the other party to the employment relationship is of no consequence** in regard to the application of that article
...

71. The formal classification of a self-employed person under national law does not exclude the possibility that a **person must be classified as a worker within the meaning of article 141(1)EC if his independence is merely notional, thereby disguising an employment relationship within the meaning of that article.**

72 In the case of teachers who are, *vis-à-vis* an intermediary undertaking, under an obligation to undertake an assignment at a college, it is necessary in particular to consider the extent of any limitation on their freedom to choose their timetable, and the place and content of their work. The fact that no obligation is imposed on them to accept an assignment is of no consequence in that context.

– *The category of persons who may be included in the comparison*
...

75 In order to show that the requirement of being employed under a contract of employment as a precondition for membership of the [Teachers superannuation Scheme] – a condition deriving from State rules – constitutes a breach of the principle of equal pay for men and women in the form of indirect discrimination against women, a female worker may rely on statistics showing that, among the teachers who are workers within the meaning of Art.141(1) EC and fulfil all the conditions for membership of the pension scheme except that of being employed under a contract of employment as defined by national law, there is a much higher percentage of women than of men.

76 If that is the case, the difference of treatment concerning membership of the pension scheme at issue must be objectively justified. In that regard, no justification can be inferred from the formal classification of a self-employed person under national law.

...
79 ... **The formal classification of a self-employed person under national law does not change the fact that a person must be classified as a worker within the meaning of that article if his independence is merely notional.**

106. The definition of 'worker' in *Allonby*, para 67 was reiterated, in different contexts, in *Danosa* C-232/09 [2010] ECR I-11405, para 39 and in *Holterman Ferho Exploitatie BV v Spies Von Büllesheim* C-47/14 [2016] IRLR 140, para 41.[30]

107. So a 'worker' in these spheres of EU law (and there do not appear to be any areas of EU law where the term 'worker' is differently defined) is:

a. "a person who, for a certain period of time, performs services for and under the direction of another person in return for which he receives remuneration";
b. who must be "in a relationship of subordination with the person who receives the services";
c. in applying these criteria, the "nature of his legal relationship with the other party to the employment relationship is of no consequence"; and
d. the fact that a person may be classified as self-employed under national law does "not exclude the possibility that a person must be classified as a worker" in EU law "if his independence is merely notional, thereby disguising an employment relationship";
e. in that regard, "the fact that no obligation is imposed on [him or her] to accept an assignment is of no consequence"; and
f. any "limitation[s] on [the person's] freedom to choose their timetable, and the place and content of their work" must be considered.

108. It would appear self-evident that (for example) an actor hired to perform a voice-over by an advertising agency making a radio, television or film advert will, for the period of his or her engagement, work "under the direction of another person in return for which he receives remuneration" and will be "in a relationship of subordination" to the agency manager or director hired by the agency to control and organise the work. The fact that the actor is self-

[30] The case involved determining the forum for suing on a contract under Reg 44/2001/EC, which in turn depended on whether the director of a company had a contract of employment or a (commercial) contract with it. 'Contract of employment' has an independent definition in EU law: *Shenavai* [1987] ECR 23, para 10, applied in *Spies Von Büllesheim* at paras 39 and 45. A 'worker.' of course, may or may not have a contract *of employment*.

employed would not appear to take him or her out of the definition of 'worker' since his/her independence whilst under contract "is merely notional", the fact that s/he can refuse an assignment "is of no consequence", and, no doubt, the scheduling, the place and the content of the work required will all be specified in the contract.

109. The same conclusions are to be reached in relation to the freelance journalist or photographer. An assignment is given and the time for completion specified. The journalist is instructed as to the subject matter and how many words are required; the photographer told the subject, location and format. The relationship between each and the editor in terms of the power of direction and subordination is no different to those of employed journalists and photographers except that the freelancers may work for the editors of other journals as well.

110. The journalist or photographer who supplies work 'on spec' is similarly in a position of subservience since the editor has the power to require changes of length, wording, focus, cropping or other changes.

111. Submissions have already been made above as to session musicians. Evidently, whatever artistic licence they may have in performance, they nonetheless for the period of the engagement, work "under the direction of another person in return for which he receives remuneration" and will be "in a relationship of subordination" to the bandleader, conductor, studio manager or impresario. Since the CJEU has already conceded in *FNV* that the self-employed musicians in an orchestra may be the subject of a collective agreement if one or more of their colleagues are employed, there can be no logical reason for them to be excluded from the right to collective bargaining where all of them are self-employed.

Charter of Fundamental Rights of the European Union

112. The CJEU in *Pavlov* gave judgment in September 2000 and did not refer to the *Charter of Fundamental Rights of the European Union* ('EU Charter') which was not adopted until December 2000 (in Nice). It could not be known to the CJEU at the time of *Pavlov*, that the Lisbon Treaty, signed on 13 December 2007 and coming into force on 1 December 2009, would give the EU Charter "equal legal value" to the Treaties of the EU. Curiously, the EU Charter was not cited in *FNV Kunsten Informatie.*

113. Article 12(1) of the EU Charter materially provides that:

> Everyone has the right ... to freedom of association at all levels, in particular in ... trade union ... matters, which implies the right of everyone to form and to join trade unions for the protection of his or her interests.

114. Article 28 provides that:

> Workers and employers, or their respective organisations, have, in accordance with Community law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and; in cases of conflicts of interest, to take collective action to defend their interests, including strike action.

115. Article 52(3) provides that

> Insofar as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.

116. Article 53 provides:

> Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union, the Community or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions.

117. It is of significance that, as noted above, by Article 6(2) Treaty of the European Union, ('TEU') the provisions of the EU Charter now have "equal legal value"

to the Treaties of the EU. This means, in particular, that the provisions of the EU Charter cited above now have equal legal value to Article 101 TFEU which is the basis for the Competition Authority's ruling. The failure to consider this in *FNV Kunsten Informatie* seems inexplicable. It is submitted that *Pavlov* and *FNV Kunsten Informatie* insofar as either can be said to hold that a worker who is self-employed is, by reason of Article 101, denied the right to collective bargaining, cannot now stand; nor can the impugned decision of the Competition Authority for the same reason.

118. The EU Charter is accompanied by a set of *Explanations* (prepared originally by the Praesidium of the Committee which drafted the Charter) which describes itself as "a valuable tool of interpretation intended to clarify the provisions of the [EU] Charter". The *Explanations* state that "Paragraph 1 of [Article 12] corresponds to Article 11 of the ECHR" which it then sets out and continues:

> The meaning of the provisions of paragraph 1 is the same as that of the ECHR, but their scope is wider since they apply at all levels including European level. In accordance with Article 52(3) of the Charter, limitations on that right may not exceed those considered legitimate by virtue of Article 11(2) of the ECHR.

119. It follows that Article 12(1) and Article 52(3) incorporate into EU law the right to collective bargaining declared in the ECtHR judgment in *Demir and Baykara v Turkey* – see below.

120. In relation to Article 28 of the EU Charter the relevant passage of the *Explanations* materially states:

> This Article is based on Article 6 of the European Social Charter and on the Community Charter of the Fundamental Social Rights of Workers[31] (points 12 to 14). The right of collective action was recognised by the European Court of Human Rights as one of the elements of trade union rights laid down by Article 11 of the ECHR.

[31] Of 1989.

121. Thus the primary source of the right to collective bargaining in EU law is twofold, both Article 12 (which extends to everyone) and Article 28 (which applies to 'workers') of the EU Charter, since both invoke Article 11 of the ECHR and must, by Article 52(3) of the EU Charter, be construed consistently with it. In addition Article 6 of the European Social Charter which is a 'valuable tool of interpretation' of the meaning of the rights in Article 28 of the EU Charter.

122. In the light of the foregoing, the restriction of the right in Article 28 of the EU Charter to that which is in accordance with 'Community law and national laws and practices' appears to be circular and ineffective since Articles 52(3) and 53 preclude any restriction which is greater than that permitted by the European Convention (i.e., in this context, Article 11(2) thereof) and international law, in particular ILO Conventions 87 and 98 to which all Member States of the EU are party.

123. As we have seen, whilst Article 28 of the EU Charter speaks of the right of 'workers' to negotiate and conclude collective agreements, the equivalent right protected by Article 12 of the EU Charter (and by Article 11 of the ECHR) is the right of 'everyone'. Given the *Explanations* and Article 52(3) of the EU Charter, the beneficiaries of the right under Article 28 of the EU Charter cannot be more narrowly defined than the beneficiaries of Article 11 of the ECHR, Article 6 of the European Social Charter or Article 12 of the EU Charter. In any event, the EU Charter contains no definition of 'worker'. So there can be no basis for confining its scope to workers who are not self-employed (or any other sub-category of worker). Still less is there any jurisprudential rationale, applicable to competition law alone, for limiting to workers who are not self-employed the application of a right otherwise granted to 'everyone.'

124. In *Küküdeveci v Swedex GmbH & Co. KG* (Case C-555/07) Article 21(1) of the EU Charter (against age discrimination) was found to have direct horizontal application between private citizens by reason of Article 6(1) TFEU giving Charter rights the same legal value as the Treaties. In *Association De Médiation Sociale V. Union Locale Des Syndicats CGT* (Case C-176/12) [2014] IRLR 310, at para 42 the CJEU held that:

> it should be recalled that it is settled case law that the fundamental rights guaranteed in the legal order of the European Union are applicable in all situations governed by European Union law (see case C-617/10 *Aklagaren v Hans Akerberg Fransson* [2013] 2 CMLR 1273, paragraph 19).

At issue there was Article 27 of the Charter guaranteeing workers information and consultation "in good time and under the conditions provided for by [EU] law and national laws and practices". Accordingly, the CJEU distinguished *Küküdeveci*:

> 45 It is therefore clear from the wording of Article 27 of the Charter that, for this Article to be fully effective, it must be given more specific expression in European Union or national law.
>
> 46 It is not possible to infer from the wording of Article 27 of the Charter or from the explanatory notes to that Article that Article 3(1) of Directive 2002/14, as a directly applicable rule of law, lays down and addresses to the Member States a prohibition on excluding from the calculation of the staff numbers in an undertaking a specific category of employees initially included in the group of persons to be taken into account in that calculation.
>
> 47 In this connection, the facts of the case may be distinguished from those which gave rise to *Kücükdeveci* in so far as the principle of non-discrimination on grounds of age at issue in that case, laid down in Article 21(1) of the Charter, is sufficient in itself to confer on individuals an individual right which they may invoke as such.

125. By contrast the right to collective bargaining (and certainly its application to all workers) in the EU Charter bestowed by Article 28 directly and by Article 12 indirectly is not expressed to need and does not require further expression in EU or national law; the right to collective bargaining "is sufficient in itself to confer on individuals an individual right which they may invoke as such", as is demonstrated in *Demir and Baykara*. Certainly it is a right which may be

invoked by an individual against a State body such as the Irish Competition Authority.

126. It is significant that in the case of *Fenoll* Case C-316/13, the work performed by a disabled person in a non-profit rehabilitation centre for disabled people (and was classified in national law as a 'user' of the centre) rendered him a 'worker' for the purpose both of the Working Time Directive (2003/88/EC)[32] and Article 31(2) of the EU Charter (the right to fair and just working conditions). The Court held that the concept of a worker must be interpreted both for the purposes of the Directive and of the EU Charter provision in the same way, i.e. in accordance with the jurisprudence set out above.

127. In the absence either of an EU Charter definition or any judicial pronouncement as to the meaning of the term 'worker' in the context of the EU Charter, the usual EU law definition of 'worker' (as above) is a functional definition which differentiates, on the one hand, single-owner businesses who may not be permitted to establish anti-competitive cartels, from, on the other hand, workers who should be free to have their work regulated by collective agreements.

128. This distinction is, it is submitted, both applicable and necessary to give effect to Article 28 of the Charter so that it has 'equal value' to Article 101 of the TFEU. This would also ensure a measure of consistency with the ILO and European Social Charter principles discussed below, and would give effect to *Demir and Baykara* in the ECHR. In relation to the latter it is of significance that the EU is in the process of acceding to the Convention in accordance with Art.6(2) TEU:

> (2) The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties.

[32] See *Union Syndicale* cited above.

The EU is already required to give due deference to the ECHR, since Art.6(3) provides:

> Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.

129. It must now be dubious, as a matter of EU law whether workers can, by the application of EU competition law, be denied the right to collective bargaining on the basis that they are self-employed.

130. It is to be noted that the EU European Economic and Social committee published, on 25 May 2016, an Opinion on *The changing nature of employment relationships and its impact on maintaining a living wage and the impact of technological developments on the social security system and labour law* (SOC/533) (*Attachment 10*). It investigated the changing nature of work and contained the following (at para 1.11):

> The impact on collective bargaining coverage in affected sectors should also be analysed, given that many workers could be placed outside collective bargaining structures and trade union representation. The EESC is concerned that where workers are regarded as self-employed, their right to associate freely may be in question if their association could be regarded as forming a cartel, running a risk of being put in conflict with EU rules on anti-competitive practices. These concerns, which could undermine this fundamental right, need to be addressed and remedied. Guidance is needed around the application of competition rules to self-employed workers in an employee-like situation. In this context, the use of the ILO understanding of "worker" rather than the more narrowly defined "employee", could be helpful to better understand how fundamental principles and rights at work apply[33], the enjoyment of which EU competition rules should not impede.

And (at para 9.3):

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[33] [Footnote in the original] As shown by the ECJ ruling in the FNV-KIEM (http://curia.europa.eu/juris/liste.jsf?num=C-413/13) case in 2015, there is clear room for interpretation around the application of competition rules to self-employed workers in an employee-like situation. A 2014 Study on Contractual Arrangements for Authors and Performers by IVIR also highlighted sectoral exemptions as a possible way forward highlighting a relevant example from Germany, where article 12a of the Collective Bargaining Act allows certain self-employed authors and performers to benefit from collective bargaining. The study specifies that such exemptions "are believed to serve the public interest by awarding protection to a group that economically and socially deserves it in the same way as employees".

> Where workers are regarded as self-employed, their right to associate freely may be in question if their association could be regarded as forming a cartel, putting them in conflict with EU rules on anti-competitive practices. This needs to be addressed, especially in situations where ostensibly self-employed workers lack autonomy in defining their tasks and rates of pay.

And (at para 11.4):

> Some new forms of employment have been driven by a desire to avoid the costs and obligations of more standard forms of employment. There is a risk that without effective rights and protections, monitoring and enforcement, many new forms of employment relationship will result in a race to the bottom of pay and conditions, and fuel widening income inequalities, reduce disposable income and suppress demand and potential for economic growth across the EU and lead to further long term macro-economic challenges. The ability of such workers to determine their levels of pay and conditions through collective agreements is vital to maintaining a living wage.

Whether this *Opinion*, which mirrors the concerns of ICTU, will lead to a resolution of the EU Competition Law issue is a matter of speculation.

Conclusion on EU law

131. Collective agreements relating to workers should not be subject to competition law and it is submitted that the approach in *Albany* was correct but too limited. On the other hand, *Pavlov* went further than was necessary to ensure that self-employed sole-traders carrying on a business were subject to competition law. *FNV Kunsten Informatie* was right to exclude some categories of the self-employed from the consequence of *Pavlov* but its line of distinction is untenable.

132. Neither *Pavlov* nor *FNV Kunsten Informatie* gave any consideration to the EU Charter of Fundamental Rights, to the European Convention on Human Rights (and *Demir and Baykara* in particular), to the European Social Charter or to the ILO principles considered below.

133. In order to give effect to the right to collective bargaining recognised by EU law, self-employed workers who are not sole-traders in business on their own account should not be regarded as business undertakings but as workers engaged under a different form of contract. Such an analysis would not

preclude the application of Article 101 to sole-traders who are genuinely carrying on a business of their own without subordination to the individual customer or client.[34]

[34] Though it is hard to see the circumstances in which such genuine businesses would seek a collective agreement with their clients (rather than an agreement amongst themselves setting a tariff – which would be, on the face of it, anticompetitive).

The European Convention on Human Rights and Fundamental Freedoms

134. Ireland is a member of the Council of Europe and bound by the European Convention on Human Rights and Fundamental Freedoms ("ECHR"). Article 11 provides that:

> 1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.
>
> 2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

135. Since it is the right of *everyone* to be a member of a trade union there appears to be no justification for a State to bar the self-employed from membership of a trade union[35] or the rights which flow therefrom. Whilst the right to form and to join a union may be restricted by Member States in the case of the armed services, the police and civil servants engaged in the administration of the State, it is notable that no restriction is expressed in relation to workers whose terms of engagement are non-standard.

136. The European Court of Human Rights ("ECtHR") is guided in its application of Art.11(2) by other relevant international treaties and their jurisprudence (see below). In such other international treaties, the right to form and join trade unions is universal and there is no jurisprudence to suggest exclusion from that right on the basis of the nature of the terms of engagement of the workers concerned (though there is much which turns on the scope of exclusions for the armed services, police, State administrators and the like).

[35] In *Le Compte, Van Leuven and de Meyere v Belgium* 23 June 1981(1982) 4 E.H.R.R.1 compulsory membership of State-approved bodies for doctors (paid by fees from patients) was contrasted with their right to form "professional associations and traditional trade unions" (para.65) for the protection of their interests.

137. Thus Article 22 of the International Covenant on Civil and Political Rights provides as follows:

> 1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.
> 2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.

138. Article 8 of the International Covenant on Economic, Social and Cultural Rights provides as follows:

> 1. The States Parties to the present Covenant undertake to ensure:
> (a) The right of everyone to form trade unions and join the trade union of his choice, subject only to the rules of the organization concerned, for the promotion and protection of his economic and social interests. No restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;
> ...
> (c) The right of trade unions to function freely subject to no limitations other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;
> ...
> 2. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces or of the police or of the administration of the State."

139. Given that the right in these Treaties is that of *everyone*, it would appear that the mere fact that workers are self-employed could not be a legitimate basis for excluding them from the rights guaranteed by Article 11.

140. Many States guarantee essential trade union rights to everyone without any distinction related to their employment status. Thus the Irish Constitution Article 40.6.1. provides:

> The State guarantees liberty for the exercise of the following rights, subject to public order and morality: ...
> iii The right of the citizens to form associations and unions.

(The Competition Authority did not appear to have regard to whether the requirements of the Competition Act on which it purported to rely could be construed compatibly with this provision of the Irish Constitution.)

141. Similarly, Article 9(3) *Grundgesetz* in Germany provides that "the right to form associations to safeguard and improve working and economic conditions shall be guaranteed to every individual in every occupation or profession."

142. In *Demir and Baykara v Turkey* (2009) 48 E.H.R.R. 54, the Grand Chamber of the ECtHR gave a landmark judgment concerning the right to bargain collectively. The case involved, like the instant Collective Complaint, a collective agreement which was annulled by the State. The ECtHR held:

> 147 The Court observes that in international law, the right to bargain collectively is protected by ILO Convention No.98 concerning the Right to Organise and to Bargain Collectively. Adopted in 1949, this text, which is one of the fundamental instruments concerning international labour standards, was ratified by Turkey in 1952. It states in art.6 that it does not deal with the position of, "public servants engaged in the administration of the State". However, the ILO's Committee of Experts interpreted this provision as excluding only those officials whose activities were specific to the administration of the state. With that exception, all other persons employed by government, by public enterprises or by autonomous public institutions should benefit, according to the Committee, from the guarantees provided for in Convention No.98 in the same manner as other employees, and consequently should be able to engage in collective bargaining in respect of their conditions of employment, including wages.
>
> 148 The Court further notes that ILO Convention No.151 (which was adopted in 1978, entered into force in 1981 and has been ratified by Turkey) on labour relations in the public service leaves states free to choose whether or not members of the armed forces or of the police should be accorded the right to take part in the determination of working conditions, but provides that this right applies everywhere else in the public service, if need be under specific conditions. In addition, the provisions of Convention No.151, under its art.1(1), cannot be used to reduce the extent of the guarantees provided for in Convention No.98.
>
> 149 As to European instruments, the Court finds that the European Social Charter, in its art.6(2) (which Turkey has not ratified), affords to all workers, and to all unions, the right to bargain collectively, thus imposing on the public authorities the corresponding obligation to promote actively a culture of dialogue and negotiation in the economy, so as to ensure broad coverage for collective agreements. The Court observes, however, that this obligation does not oblige authorities to enter into collective agreements. According to

the meaning attributed by the European Committee of Social Rights (ECSR) to art.6(2) of the Charter, which in fact fully applies to public officials, states which impose restrictions on collective bargaining in the public sector have an obligation, in order to comply with this provision, to arrange for the involvement of staff representatives in the drafting of the applicable employment regulations.

150 As to the European Union's Charter of Fundamental Rights , which is one of the most recent European instruments, it provides in art.28 that workers and employers, or their respective organisations, have, in accordance with Community law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels.

151 As to the practice of European states, the Court reiterates that, in the vast majority of them, the right of civil servants to bargain collectively with the authorities has been recognised, subject to various exceptions so as to exclude certain areas regarded as sensitive or certain categories of civil servants who hold exclusive powers of the state. In particular, the right of public servants employed by local authorities and not holding state powers to engage in collective bargaining in order to determine their wages and working conditions has been recognised in the majority of contracting states. The remaining exceptions can be justified only by particular circumstances.

152 It is also appropriate to take into account the evolution in the Turkish situation since the application was lodged. Following its ratification of Convention No.87 on freedom of association and the protection of the right to organise, Turkey amended, in 1995, art.53 of its Constitution by inserting a paragraph providing for the right of unions formed by public officials to take or defend court proceedings and to engage in collective bargaining with authorities. Later on, Law No.4688 of June 25, 2001 laid down the terms governing the exercise by civil servants of their right to bargain collectively.

153 In the light of these developments, the Court considers that its case law to the effect that the right to bargain collectively and to enter into collective agreements does not constitute an inherent element of art.11 should be reconsidered, so as to take account of the perceptible evolution in such matters, in both international law and domestic legal systems. While it is in the interests of legal certainty, foreseeability and equality before the law that the Court should not depart, without good reason, from precedents established in previous cases, a failure by the Court to maintain a dynamic and evolutive approach would risk rendering it a bar to reform or improvement.

154 Consequently, the Court considers that, having regard to the developments in labour law, both international and national, and to the practice of contracting states in such matters, the right to bargain collectively with the employer has, in principle, become one of the essential elements of the "right to form and to join trade unions for the protection of [one's] interests" set forth in art.11 of the Convention, it being understood that states remain free to organise their system so as, if appropriate, to grant special status to representative trade unions. Like other workers, civil servants,

> except in very specific cases, should enjoy such rights, but without prejudice to the effects of any "lawful restrictions" that may have to be imposed on "members of the administration of the State" within the meaning of art.11(2) —a category to which the applicants in the present case do not, however, belong.
>
> *Collective Complaint in the present case of the foregoing principles*
> 155 In the light of the foregoing principles, the Court considers that the trade union Tüm Bel Sen, already at the material time, enjoyed the right to engage in collective bargaining with the employing authority, which had moreover not disputed that fact. This right constituted one of the inherent elements in the right to engage in trade-union activities, as secured to that union by art.11 of the Convention.

143. The Court was not, in that case, concerned with the contractual status of the workers constituting the union or the collective bargaining unit and so its use of the term 'workers' cannot be regarded as definitive. However, the fact that the right to collective bargaining is inherent in the rights in Art.11 and those rights are the rights of "everyone" supports the thesis that the right to collective bargaining derived from the right to trade union membership is not to be denied to those engaged on terms other than a contract of employment or similar.

144. It is impossible to see on what basis the Irish state, on behalf of the Irish Competition Authority, could distinguish the instant case from the annulment of the collective agreement in *Demir and Baykara* so as to conclude that the prohibition on the collective agreements in the instant Collective Complaint was, nevertheless, compatible with Article 11(1) or justifiable under Article 11(2).

145. In the case of *Sigurður Sigurjónsson v Iceland* Appn 16130/90, (1993) 16 EHRR 462 the Commission regarded an association of taxi drivers as a trade union (Cmsn, paras 43, 53-55) but the ECtHR dealt with the case as one of freedom of association. No point was taken that self-employed taxi drivers were not entitled to a right protected by Article 11 such as the right to form a trade union (judgment, paras 30-32). In *Sindicatul Pastorul Bun v Romania* Appn

2330/09, [2014] I.R.L.R. 49 the relationship between priests and their bishop was based upon a religious vow and their pay came from the State not the bishopric. Those features did not preclude the priests being workers for the purpose of exercising their right to form a trade union pursuant to Article 11.[36]

146. In the case of *Vörður Ólafsson v Iceland* (Appn 20161/06) a self-employed artisan was held to be entitled to rely on freedom of association under Article 11 of the Convention.

147. Like its sister provision, the European Social Charter, no restriction on the right to collective bargaining may be imposed save to the extent that it is necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and interests of others. The ECtHR has held in *Chassagnou v France* (2000) 29 E.H.R.R. 615 at paragraph 112:

> that in assessing the necessity of a given measure a number of principles must be observed. The term "necessary" does not have the flexibility of such expressions as "useful" or "desirable". In addition, pluralism, tolerance and broadmindedness are hallmarks of a "democratic society". Although individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position. Lastly, any restriction imposed on a Convention right must be proportionate to the legitimate aim pursued.

148. And at paragraph 113:

> In the present case the only aim invoked by the Government to justify the interference complained of was "protection of the rights and freedoms of others". Where these "rights and freedoms" are themselves among those guaranteed by the Convention or its Protocols, it must be accepted that the need to protect them may lead States to restrict other rights or freedoms likewise set forth in the Convention. It is precisely this constant search for a balance between the fundamental rights of each individual which constitutes

[36] The Grand Chamber held therefore that the refusal to register a union of priests was in contravention of Article 11(1). However, the ECtHR held that the decision of the national court that the registration of the union created a real risk to the autonomy of the Romanian Orthodox Church was reasonable and so restriction of the Article 11 right was justifiable by reference to Article 11(2).

> the foundation of a "democratic society". The balancing of individual interests that may well be contradictory is a difficult matter, and Contracting States must have a broad margin of appreciation in this respect, since the national authorities are in principle better placed than the European Court to assess whether or not there is a "pressing social need" capable of justifying interference with one of the rights guaranteed by the Convention.
>
> It is a different matter where restrictions are imposed on a right or freedom guaranteed by the Convention in order to protect "rights and freedoms" not, as such, enunciated therein. In such a case only indisputable imperatives can justify interference with enjoyment of a Convention right.

149. In that case (which concerned a mandatory obligation to join a hunters' association) the French Government sought to protect a right or freedom to hunt. However, since such a right or freedom was not one of those set out in the ECHR, it could not justify restriction of the right of freedom of association guaranteed by Article 11.

150. In the instant case, the Competition Authority may perhaps assert a right or freedom vested in the Irish public not to be subjected to anti-competitive collective agreements. It would be difficult for the Competition Authority to pray in aid the right of employers not to be subject to the collective agreements in question since, by definition, they had voluntarily agreed to them. But the hypothetical right to be free of anti-competitive collective agreements is not a right or freedom guaranteed by the ECHR. Therefore, in order to justify prohibition of the Article 11 right of self-employed workers' to collective bargaining, mere necessity in a democratic society would not be enough; the Irish State would have to demonstrate an 'indisputable imperative' in democratic societies to prohibit such workers exercising the right to collective bargaining or relying on collective agreements freely entered into by employers. Given the fact that the Irish government, in the tripartite negotiations referred to in the introduction agreed (prior to the intervention of the TROIKA) that self-employed workers such as those in question should be exempted from the Competition Act, this is an impossible argument for it.

151. In any event, there is plainly no such necessity in democratic societies and certainly no such imperative in the light of the international recognition of the right to collective bargaining.

152. Since the collective agreements at issue here suited the workers in question, their trade union, the employers' associations of those that hired them and the Irish government of the time, it seems inconceivable that the restriction on the right to collective bargaining could be justified under Art.11(2). For all the reasons set out earlier, such agreements benefit both sides and provide a fair and stable platform for competition on quality.

153. Furthermore, since the ECtHR is guided by other relevant treaties and their jurisprudence (considered below) it seems unlikely that the Court would reject the broad approach of the supervisory bodies of those treaties in favour of an anomaly created by EU competition law.

154. The ECtHR is also guided by the law and practice of the other Member States. It is understood that, until domestic recognition and implementation of the CJEU judgment in *Pavlov*, most (if not all) countries in Europe permitted the self-employed both to be members of trade unions and to enjoy the benefit of collective agreements negotiated on their behalf.

155. It is therefore submitted that Art.11 of the ECHR guarantees the right of workers (including self-employed workers) to collective bargaining and to the benefits of their collective agreements and that competition law provides no justification for denial of that right.

The European Social Charter

156. In November 2000 Ireland ratified the other human rights instrument of the Council of Europe, the European Social Charter of 1996 ("ESC") as well as the Collective Complaints Protocol of 1995. By Article A of the Charter, Ireland undertook to regard ('consider') Part 1 of the ESC (which includes the rights referred to below) "as a declaration of the aims which it will pursue by all appropriate means."

157. It has already been noted (paragraph 11 above) that the Committee in its Conclusions 2014, in its periodic review of Ireland, has noted the issue concerning the Competition Authority and self-employed workers. In that review the Committee records that agreement had been reached between government, employers and unions that there would be an amendment to the Competition Act to exclude such workers. The Committee asked that the next report of the Irish government provided information on this. The Committee may be disappointed to learn that the agreement was overridden and the Act has not been so amended (as described in paragraph 11 above).

158. Ireland has ratified Article 2, providing for the right to just conditions of work, and Article 4, the right to fair remuneration. It has never been suggested that the terms of the collective agreements in question were other than the principal means by which these rights were guaranteed to the workers involved.

159. Ireland has also ratified Article 6 of the ESC which provides:

> Article 6 – The right to bargain collectively
>
> With a view to ensuring the effective exercise of the right to bargain collectively, the Parties undertake:
>
> 1 to promote joint consultation between workers and employers;
>
> 2 to promote, where necessary and appropriate, machinery for voluntary negotiations between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements;

> 3 to promote the establishment and use of appropriate machinery for conciliation and voluntary arbitration for the settlement of labour disputes;
>
> and recognise:
>
> 4 the right of workers and employers to collective action in cases of conflicts of interest, including the right to strike, subject to obligations that might arise out of collective agreements previously entered into.

160. Ireland has also ratified Article G of the ESC which provides that the relevant rights shall not be subject to any restrictions or limitations:

> except such as are prescribed by law and are necessary in a democratic society for the protection of the rights and freedoms of others or for the protection of public interest, national security, public health, or morals

161. Whilst the Competition Authority might wish to argue that the negation of the collective agreements in question was for the protection of a hypothetical (and dubious) public interest in the relevant workers undercutting each other, for the reasons set out in relation to the ECHR above, it is inconceivable that the Authority could demonstrate that it was 'necessary in a democratic society' to prohibit them from agreeing not to do so.

162. The supervisory body of the ESC, the European Committee on Social Rights (the 'Committee'), in a recent decision in *Swedish LO and TCO v Sweden*, Complaint No 85/2012, Decision 3 July 2013, (2015) 60 E.H.R.R. SE7, held (at para 109):

> From a general point of view, the Committee considers that the exercise of the right to bargain collectively and the right to collective action, guaranteed by Article 6§§2 and 4 of the Charter, represents an essential basis for the fulfilment of other fundamental rights guaranteed by the Charter…

163. In that case it relied (at para 110) upon the jurisprudence of European States and other international treaties in reaching its conclusions:

> In addition, the Committee notes that the right to collective bargaining and action receives constitutional recognition at national level in the vast majority of the Council of Europe's member States, as well as in a significant number of binding legal instruments at the United Nations and EU level. In this respect, reference is made *inter alia* to Article 8 of the International Covenant on Economic, Social and Cultural Rights (see paragraph 37 above), the

> relevant provisions of the ILO conventions Nos. 87, 98 and 154 (see paragraph 38 above) as well as the EU Charter of Fundamental Rights, Directive 2006/123/EC on services in the internal market (cf. Article 1§7) and the Directive 2008/104/EC on temporary agency work -recital 19 (see paragraphs 36 above).

164. In that case too, the Committee emphasised (at para 120) the fundamental nature of the right to collective bargaining:

> ...within the system of values, principles and fundamental rights embodied in the Charter, the right to collective bargaining and collective action is essential in ensuring the autonomy of trade unions and protecting the employment conditions of workers: if the substance of this right is to be respected, trade unions must be allowed to strive for the improvement of existing living and working conditions of workers, and its scope should not be limited by legislation to the attainment of minimum conditions.

165. It is worth digressing to observe that this key and succinct passage strongly resonates with a fuller passage from a judgment in another jurisdiction, underlining the importance and universality of the propositions contained in both. The Canadian Supreme Court in *Mounted Police Association of Ontario v. Canada (Attorney General)* [2015] 1 SCR 3, 2015 SCC 1, held that an unequivocal right to collective bargaining derives from s.2(d) of the Canadian Charter of Rights which provides:

> 2. Everyone has the following fundamental freedoms:
> ...
> (d) freedom of association.

The Court referred to the international materials cited by the European Committee on Social Rights (as well as Canadian history) and held that:

> [69] ..., this Court recently affirmed the importance of freedom of expression in redressing the imbalance inherent in the employer-employee relationship in *Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, Local 401*, 2013 SCC 62, [2013] 3 S.C.R. 733, at paras. 31-32:
>
> > A person's employment and the conditions of their workplace can inform their identity, emotional health, and sense of self-worth. . .
> > Free expression in the labour context can also play a significant role in redressing or alleviating the presumptive imbalance between the employer's economic power and the relative vulnerability of the individual worker. . . It is through their expressive activities that unions are able to articulate and promote their common interests, and, in the event of a labour dispute, to attempt to persuade the employer. [Citations omitted.]

> [70] The same reasoning applies to freedom of association. As we have seen, s.2(*d*) functions to prevent individuals, who alone may be powerless, from being overwhelmed by more powerful entities, while also enhancing their strength through the exercise of collective power. Nowhere are these dual functions of s.2(*d*) more pertinent than in labour relations. Individual employees typically lack the power to bargain and pursue workplace goals with their more powerful employers. Only by banding together in collective bargaining associations, thus strengthening their bargaining power with their employer, can they meaningfully pursue their workplace goals.
>
> [71] The right to a meaningful process of collective bargaining is therefore a necessary element of the right to collectively pursue workplace goals in a meaningful way (*Health Services*; *Fraser*). Yet a process of collective bargaining will not be meaningful if it denies employees the power to pursue their goals. As this Court stated in *Health Services*: "One of the fundamental achievements of collective bargaining is to palliate the historical inequality between employers and employees..." (para. 84). A process that substantially interferes with a meaningful process of collective bargaining by reducing employees' negotiating power is therefore inconsistent with the guarantee of freedom of association enshrined in s.2(*d*).
>
> [72] The balance necessary to ensure the meaningful pursuit of workplace goals can be disrupted in many ways. Laws and regulations may restrict the subjects that can be discussed, or impose arbitrary outcomes. They may ban recourse to collective action by employees without adequate countervailing protections, thus undermining their bargaining power. They may make the employees' workplace goals impossible to achieve. Or they may set up a process that the employees cannot effectively control or influence. Whatever the nature of the restriction, the ultimate question to be determined is whether the measures disrupt the balance between employees and employer that s.2(*d*) seeks to achieve, so as to substantially interfere with meaningful collective bargaining: *Health Services*, at para. 90.

Parts of this passage were cited with approval by the same Court in *Saskatchewan Federation of Labour v Sakatchewan* 2015 SCC 4 [53] – [55] in support of its judgment that the right to strike was equally derived from freedom of association.

166. The *Mounted Police* case also offers another parallel with the jurisprudence of the Committee. In *Eurocop v Ireland* (82/2012, 2 December 2013, 268th session of the Committee) the Committee held that basic guarantees must be given to the police ([73]), that especially given the denial of the right to trade union status and the right to strike, it was 'imperative to maintain the remaining trade union prerogatives... as fully as possible' ([111]). A police association

should not therefore be excluded from affiliation to the workers' side in the collective bargaining regime, being instead compelled to participate in a flawed process ([109], [112], [120]-[121], [159]-[162], [170]-[173], [177], [186]). In the *Mounted Police* case, similarly a police association (equally denied the right to strike and other associational rights) was excluded from participation in a meaningful process of collective bargaining which provided employees with a degree of choice and independence sufficient to enable them to determine and pursue their collective interests. In both cases, whilst it was accepted that the trade union rights of the police may be limited, the right to participate in meaningful collective bargaining must be observed and any limitations must be justified.[37]

167. Those propositions are of relevance to the instant case for if there is no justification for excluding the police (who are specifically identified in Article 5(2) of the ESC - but not in Article 6 - and Article 11(2) of the European Convention) from the right to collective bargaining, there can be no justification for denying that right to actors, journalists, photographers or musicians (or other self-employed workers) to whom the normal right to collective bargaining applies without any express limitation. Any restriction on that right must be founded on Article G exclusively.

168. Certainly, the stress by the Committee on the fundamental nature of the right to collective bargaining surely presupposes that it is not to be lost by the fortuity of the legal categorisation of the workers concerned (especially where that categorisation depends on the nature of legal obligations in the contract of engagement determined almost invariably by the hirer to advance his own interests). This is particularly so in light of the fact that the differentiation between employed and self-employed is invariably drawn by national legal

[37] And in *Matelly v France* Appn No 10609/10, 2 January 2015, the ECtHR held that though restrictions, even significant ones, could be imposed on the military, a blanket ban on forming or joining a trade union impermissibly encroached on the very essence of freedom of association. On the other hand a ban on the right to strike of armed police was justifiable: *Junta Rectora Del Ertzainen Nazional Elkartasuna (ER N.E.) v. Spain* Appn No 45892/09, 14 September 2015.

systems for purposes wholly other than seeking to exclude one category of workers from their fundamental rights - here, the right to collective bargaining. Indeed, it is also very unlikely that whether or not the worker will have a right to collective bargaining plays any part in the choice by the hirer of a contract for services or a contract of services.

169. The Committee has held (in *Conclusions IV*, Germany, at 50; cited in its *Digest of the Case-Law of the European Committee of Social Rights*, Council of Europe 2008 at paragraph 199) that :

> Any bargaining between one or more employers and a body of employees (whether 'de jure' or 'de facto') aimed at solving a problem of common interest, whatever its nature may be, should be regarded as 'collective bargaining' within the meaning of Article 6.

170. The reference to *de jure* or *de facto* employees suggests, respectfully, that the Committee accepts that there is no distinction for the purposes of Article 6 rights which can permissibly be based on the legal form of the contract of hire.

171. This view gains some support from the Committee's consideration of Article 5 of the ESC which protects the right to trade union membership (with the permissible exclusion of the police and armed services). The Committee held in Conclusions XVII-1, Poland, at 375, cited in the *Digest of the Case-Law of the European Committee of Social Rights*, op. cit. at paragraph 146:

> that the notion of "worker" in the sense of the Charter covers not only workers in activity but also persons who exercise rights resulting from work. By way of consequence, the Committee considers that the granting of a separate legal regime for the right to organise to retired persons, homeworkers and to the unemployed is not in conformity with the Charter.

172. Though this statement does not cover the self-employed explicitly, the proposition in the first sentence would appear to render impermissible their exclusion from any provision (such as Article 6(2)) conferring the protection of the Charter on 'workers'. It is consistent with this that the conclusion of the

Committee (Conclusions I, Statement of Interpretation on Article 5, at 31, cited in the *Digest of the Case-Law*, op. cit. at paragraph 163) records that:

> All classes of employers and workers, including public servants, subject to the exceptions mentioned below, are fully entitled to the right to organise in accordance with the Charter. Certain restrictions to this right are, however, permissible under the terms of the two last sentences of Article 5 in respect of members of the police and armed forces.

173. The Committee has held that all workers including those who are not employees must be covered by health and safety at work regulations since both employed and workers who are not employees are exposed to the same risks at work: Conclusions XVI-2 (2005) at 11, in relation to Austria.

174. Furthermore, it is submitted that, given the jurisprudence of the ILO (below) in relation to the inclusion of self-employed workers in the trade union rights to be accorded to workers, the jurisprudence of the ESC is likely to be, and should be, convergent on the point.

175. It is not surprising that the Committee has *not* recognised that competition law is a legitimate reason for (i) excusing a State from the obligation to promote collective bargaining or (ii) rendering collective agreements void and of no effect. Nor has the Committee accepted that self-employment is a legitimate reason for doing so.

176. It should be noted that it is not open to the government to argue that the requirements of EU law (or the requirements of the TROIKA) justifies what would otherwise be a breach of its obligations under the Charter. In *Federation of Employed Pensioners of Greece (IKA-ETAM) v Greece* (2013) 57 EHRR SE2 the Committee held:

> 50 With regard to the observation made by the Government to the effect that the rights safeguarded under the 1961 Charter have been restricted pursuant to the Government's other international obligations, namely those it has under the loan arrangement with the EU institutions and the International Monetary Fund, the Committee considers that 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. It has

previously concluded to this effect in relation to national provisions enacted by states parties to the Charter which were intended to implement EU directives or other legal norms emanating from the European Union (see *Confédération Générale du Travail (CGT) v France* (55/2009) 23 June 2010 at [32]; *Confédération Française de l'Encadrement (CFE-CGC) v France* (2005) 41 E.H.R.R. SE17 at [30]).

51 In the same context, the Committee has held also that when states parties agree on binding measures, which relate to matters within the remit of the Charter, they should—both when preparing the text in question and when implementing it into national law—take full account of the commitments they have taken upon ratifying the European Social Charter. 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 (*CGT v France* at [33]).

52 Basing its opinion on the above considerations, the Committee holds that despite the later international obligations of Greece, there is nothing to absolve the state party from fulfilling its obligations under the 1961 Charter and that the Committee is competent to examine, whether the claims made in the complaint establish that the measures taken by Greece with regard to old-age benefits are not in conformity with art.12 of the 1961 Charter.

177. Likewise, in *Swedish LO and TCO v Sweden* (above) the Committee held (at [121]) that:

> legal rules relating to the exercise of economic freedoms established by State Parties either directly through national law or indirectly through EU law should be interpreted in such a way as to not impose disproportionate restrictions upon the exercise of labour rights as set forth by, further to the Charter, national laws, EU law, and other international binding standards. In particular, national and EU rules regulating the enjoyment of such freedoms should be interpreted and applied in a manner that recognises the fundamental importance of the right of trade unions and their members to strive both for the protection and the improvement of the living and working conditions of workers, and also to seek equal treatment of workers regardless of nationality or any other ground.[38]

[38] And note [74]: 'neither the current status of social rights in the EU legal order nor the substance of EU legislation and the process by which it is generated would justify a general presumption of conformity of legal acts and rules of the EU with the European Social charter.' And to similar effect *CGT v France* at [34]-[38]. This position is in marked distinction to that adopted by the ECtHR in *Bosphorus Airlines v Ireland* (2006) 42 EHRR 1 where it was held that civil and political rights protected by the ECHR enjoyed an 'equivalent' level of protection under EU law as they did under the ECHR and therefore founded a presumption that national measures implementing EU law were in conformity with the Convention, though this position was qualified in *Michaud v France* (2014) 59 EHRR 9.

178. So, in that case, the Committee held (at para 122) that the economic freedoms of business protected by the Treaty on the Functioning of the European Union:

> cannot be treated, from the point of view of the system of values, principles and fundamental rights embodied in the Charter, as having a greater *a priori* value than core labour rights, including the right to make use of collective action to demand further and better protection of the economic and social rights and interests of workers.

179. It is submitted that the jurisprudence of the ESC recognises that the State must promote and not prohibit collective agreements made on behalf of, amongst others, self-employed workers, an obligation that cannot be overridden by any requirements imposed by EU law or the TROIKA (especially where, EU law, as noted above, could easily be construed in such a way as not to give rise to any inconsistent obligation).

180. The Committee, as long ago as 1969-70, in Conclusions I at p35, held, in relation to Article 6(2):[39]

> According to the Committee's interpretation, in accepting the terms of this provision, the Contracting Parties undertake not only to recognise, in their legislation, that employers and workers may settle their mutual relations by means of collective agreements, but also actively to promote the conclusion of such agreements if their spontaneous development is not satisfactory and, in particular, to ensure that each side is prepared to bargain collectively with the other.

181. The Committee found, in 2014, in the case of Spain[40], that austerity inspired legislation which permitted employers to suspend or dis-apply collective agreements was illegitimate:

> The legitimation of unilateral derogation from freely negotiated collective agreements is in violation of the obligation to promote negotiation

[39] This citation was paraphrased in the *Digest* of 208 at p54.

[40] Conclusions XX-3 (2014), p 25. Furthermore, though the Committee accepted that member states have a wide margin of appreciation in terms of bargaining structures, thereby allowing the radical decentralisation of bargaining activity that took place in response to the economic crisis, it nonetheless held that the crisis itself was not sufficient justification for introducing changes to the collective bargaining regime without first consulting the trade unions. It rejected the government's claim that its conduct was justified by the urgency of the situation: 'Article 6(2) entails the obligation to arrange for the participation of those concerned, through the intermediary of their representatives, in the drafting of the regulations which are to apply to them (Conclusions III (1973). Germany)' (ibid. p 24).

procedures. Accordingly the Committee finds that the situation is in violation of Article 6(2) of the 1961 Charter on this point.

182. For Ireland (or, indeed, other bodies under the control of Contracting Parties within the Council of Europe such as the European Commission and the European Central Bank) to effectively annul (on pain of massive fines or criminal proceedings) collective agreements such as those in the instant Complaint, is the very antithesis of the obligations on Contracting Parties set out in the above citation.

The International Labour Organisation

183. The issue raised in the instant Complaint has been raised by Congress with the ILO Committee of Experts on the Application of Conventions and Recommendations. In 2006 the Committee made a Direct Request to the Irish government (published at the 96th International Labour Conference in 2007) as follows (emphasis in the original):

> The Committee takes note of the Government's report. The Committee also takes note of the comments made by the Irish Congress of Trade Unions (ICTU) dated 28 October 2005, underlining developments which, according to the ICTU, restrict the right to organize and to bargain collectively. These restrictions have been introduced by the Competition Authority of Ireland which has decided that the provisions of the Competition Act, 2002, overrule the provisions of the Industrial Relations Act. The Competition Authority has made unlawful a collective agreement made by Equity/SIPTU on behalf of workers with the Institute of Advertising Practitioners on behalf of employers, despite the fact that Equity/SIPTU holds a licence to carry on negotiations for the fixing of wages or other conditions. This agreement fixes the rates of pay and the conditions of employment to be provided to workers within radio, television, cinema, and visual arts. Other relevant statutory provisions have also been similarly overruled according to the ICTU. **The Committee requests the Government to provide comments to these observations.**

184. Ireland failed to submit its mandatory and cyclical report in 2007 resulting in a further Direct Request in identical terms that year, published at the 97th International Labour Conference in 2008.

185. Ireland likewise failed to make a report in 2008 resulting in a yet further Direct Request in identical terms, published at the 98th International Labour Conference in 2009.

186. By 2009 the negotiations referred to in paragraph 10 had taken place and so the Committee issued the following Direct Request, published at the 99th International Labour Conference in 2010, (emphasis in the original):

> The Committee notes the comments made by the Irish Congress of Trade Unions (ICTU) in a communication dated 31 August 2009.
>
> In its previous comments, the Committee requested the Government to provide its comments on the observations made by the ICTU in relation to

> restrictions on the right to organize and collectively bargain introduced by the Competition Authority of Ireland. The Committee recalls that the ICTU had stated that the Competition Authority had decided that the provisions of the Competition Act 2002 overruled the provisions of the Industrial Relations Act and had declared unlawful a collective agreement between Equity/SITP and the Institute of Advertising Practitioners that fixes rates of pay and conditions of employment for workers within radio, television, cinema and visual arts. The ICTU added that other relevant statutory provisions had also been overruled.
>
> The Committee notes that the Government indicates that, during the course of the social partnership talks in 2008, it committed itself to introducing legislation amending section 4 of the Competition Act to the effect that certain categories of vulnerable workers, formerly or currently covered by collective agreements, when engaging in collective bargaining, would be excluded from the section 4 prohibition. According to the Government, this commitment took into account that there would be negligible negative impacts on the economy or on the level of competition and will have regard to the specific attributes and nature of the work involved, subject to consistency with European Union (EU) competition rules. Three categories of workers are proposed to be covered by the exclusion: freelance journalists, session musicians and voice-over actors. Recalling that the Convention requires the Government to take measures to encourage and promote the full development and utilization of machinery for voluntary negotiation between employers or employers' organizations and workers' organizations, with a view to the regulation of terms and conditions of employment by means of collective agreements, the Committee points out that intervention by the authorities which has the result of unilaterally altering the terms and conditions agreed upon is, in general, contrary to the Convention. **The Committee requests the Government to provide further information in its next report on the impact of the section 4 prohibition, in particular on the types of abuses targeted by this provision and the progress made in amending the Act in accordance with its commitment and in full consultation with the social partners concerned.**

187. In 2011 the government of Ireland again failed to provide its report with the consequence that the Committee again made a Direct Report (published at the 101st International Labour Conference, 2012) in identical terms to that in the preceding paragraph.

188. In 2012 the Committee reported (to the 102nd International Labour Conference, 2013) as follows (emphasis in the original):

> The Committee notes the Government's report in which it states that there has been no significant change in the implementation of the Convention since its last reports in 2002 and 2003. The Committee also notes the recommendations of the Committee on Freedom of Association of March

2012 regarding Case No. 2780 and the indication of the Government that it will consider these and provide a response.

In previous comments, the Committee requested the Government to provide its observations on the comments made by the Irish Congress of Trade Unions (ICTU) in relation to restrictions on the right to organize and bargain collectively introduced by the Competition Authority of Ireland. The Committee recalled that the ICTU had stated that the Competition Authority had decided that the provisions of the Competition Act 2002 overruled the provisions of the Industrial Relations Act and had declared unlawful a collective agreement between Equity/SITP and the Institute of Advertising Practitioners that fixes rates of pay and conditions of employment for workers within radio, television, cinema and the visual arts. The ICTU added that other relevant statutory provisions had also been overruled.

The Committee had noted the Government's indication that, during the course of the social partnership talks in 2008, it committed itself to introducing legislation amending section 4 of the Competition Act to the effect that certain categories of vulnerable workers, formerly or currently covered by collective agreements, when engaging in collective bargaining, would be excluded from the section 4 prohibition. According to the Government, this commitment took into account that there would be negligible negative impacts on the economy or on the level of competition and gave consideration to the specific attributes and nature of the work involved, subject to consistency with European Union (EU) competition rules. Three categories of workers were proposed to be covered by the exclusion: freelance journalists, session musicians and voice-over actors. The Government indicates that since the social partnership talks took place, the EU/International Monetary Fund (IMF) Programme of Financial Support for Ireland has been agreed and the authorities have committed themselves to ensuring that no further exemptions to the competition law framework will be granted unless they are entirely consistent with the goals of the EU/IMF Programme and the needs of the economy. The Government indicates that this commitment requires further consideration in the context of the EU/IMF Programme. **The Committee trusts that the Government will pursue its review of the Act with the social partners in accordance with its previous commitment and requests it to provide information on progress made in this regard.**

189. The reference to 'the recommendations of the Committee on Freedom of Association of March 2012 regarding Case No. 2780' was a reference to a case put by Congress before that Committee concerning the behaviour of Ryanair. The recommendations referred to included:

> (c) In light of the above, and noting with interest the Government's statement, contained in its communication from 11 July 2011, that the administration is committed in its Programme for Government to reform the current law on employees' right to engage in collective bargaining (the Industrial Relations (Amendment) Act 2011) so as to ensure compliance by the State with recent

judgments of the European Court of Human Rights, as well as the Government's subsequent indication that its reply should not be taken as an indication that the Government will not be proposing any changes in the framework of the ongoing review of the procedures under the Industrial Relations (Amendment) Act 2001, particularly in the light of the Ryanair case, the Committee invites the Government, in full consultation with the social partners concerned, to review the existing framework and consider any appropriate measures, including legislative measures, so as to ensure respect for the freedom of association and collective bargaining principles set out in its conclusions, including through the review of the mechanisms available with a view to promoting machinery for voluntary negotiation between employers' and workers' organizations for the determination of terms and conditions of employment.

190. The government of Ireland yet again failed to make its report to the Committee of Experts in 2014. In consequence a further Direct Request was addressed to it by the Committee that year (published at the 104th session of the International Labour Conference in 2015). Congress understands that the Irish government has not responded. The Direct Request was in the following terms (emphasis in the original):

> The Committee notes that the Government's report has not been received. It hopes that a report will be supplied for examination by the Committee at its next session and that it will contain full information on the matters raised in its previous comments.
>
> **Repetition**
> In previous comments, the Committee requested the Government to provide its observations on the comments made by the Irish Congress of Trade Unions (ICTU) in relation to restrictions on the right to organize and bargain collectively introduced by the Competition Authority of Ireland. The Committee recalled that the ICTU had stated that the Competition Authority had decided that the provisions of the Competition Act 2002 overruled the provisions of the Industrial Relations Act and had declared unlawful a collective agreement between Equity/SITP and the Institute of Advertising Practitioners that fixes rates of pay and conditions of employment for workers within radio, television, cinema and the visual arts. The ICTU added that other relevant statutory provisions had also been overruled.
>
> The Committee had noted the Government's indication that, during the course of the social partnership talks in 2008, it committed itself to introducing legislation amending section 4 of the Competition Act to the effect that certain categories of vulnerable workers, formerly or currently covered by collective agreements, when engaging in collective bargaining, would be excluded from the section 4 prohibition. According to the Government, this commitment took into account that there would be negligible negative impacts on the economy or on the level of competition

and gave consideration to the specific attributes and nature of the work involved, subject to consistency with European Union (EU) competition rules. Three categories of workers were proposed to be covered by the exclusion: freelance journalists, session musicians and voice-over actors. The Government indicates that since the social partnership talks took place, the EU/International Monetary Fund (IMF) Programme of Financial Support for Ireland has been agreed and the authorities have committed themselves to ensuring that no further exemptions to the competition law framework will be granted unless they are entirely consistent with the goals of the EU/IMF Programme and the needs of the economy. The Government indicates that this commitment requires further consideration in the context of the EU/IMF Programme. **The Committee trusts that the Government will pursue its review of the Act with the social partners in accordance with its previous commitment and requests it to provide information on progress made in this regard.**

191. Congress wrote to the ILO a letter dated 21 September 2015 (*Attachment 11*). The ILO replied on 25 September 2015 (*Attachment 12*) saying that the matter would be brought to the attention of the Committee of Experts.

192. Accordingly, in 2016 the Committee of Experts considered the matter again. Again the government of Ireland had failed to file its annual report.[41] The Committee held:

> *Self-employed workers.* In its previous comments, the Committee had requested the Government to provide comments on the observations made by the ICTU in relation to restrictions on the right to organize and bargain collectively introduced by the Competition Authority of Ireland. The Committee recalled that the ICTU had stated that the Competition Authority had decided that the provisions of the Competition Act 2002 overruled the provisions of the Industrial Relations Act and had declared unlawful a collective agreement between Equity/SITP and the Institute of Advertising Practitioners that fixes rates of pay and conditions of employment for workers within radio, television, cinema and the visual arts. The Committee had noted the Government's indication that, during the course of the social partnership talks in 2008, it committed itself to introducing legislation amending section 4 of the Competition Act to the effect that certain categories of vulnerable workers, formerly or currently covered by collective agreements, when engaging in collective bargaining, would be excluded from the prohibition in section 4 of the Competition Act. The Government subsequently added however that this commitment was overtaken by the EU/International Monetary Fund (IMF) Programme of Financial Support for Ireland in which it

[41] Accordingly, 'The Committee notes with ***concern*** that, for the second year in succession, the reports due on the ratified Conventions have not been received and that 31 reports are now due on fundamental, governance and technical Conventions (most of which should include information in reply to the Committee's comments). It hopes that the Government will soon submit its reports, in accordance with its constitutional obligation.'

had been agreed that no further exemptions to the competition law framework would be granted unless they were entirely consistent with the goals of the EU/IMF Programme and the needs of the economy. The Committee had trusted that the Government would pursue its review of the Act with the social partners in accordance with its previous commitment and requested it to provide information on progress made in this regard.

The Committee notes that the ICTU continues to raise its concerns that this matter has not been resolved. In 2015, and in light of a recent decision emanating from the European Court of Justice (*FNV Kunsten Informatie en Media v. Staat der Nederlanden*, of 4 December 2014), the ICTU had requested the Competition Authority to reconsider its decision. The Authority nevertheless upheld its decision despite the concerns of the ICTU that there were increasing categories of self-employed workers who, due to the Authority's decision, find themselves classed as "undertakings" and hence excluded from the right to collective bargaining. This included actors, freelance journalists, writers, photographers, musicians, dancers, performers, models, bricklayers and other skilled trades in the construction industry. The ICTU explains that it does not dispute that competition law should preclude price fixing agreements among cartels of businesses. The ICTU maintains, however, that, in order to protect legitimate collective bargaining, there needs to be a workable distinction between the sole-trade carrying on a business and a worker in the everyday sense of the word who is in a position of subordination.

The Committee recalls that Article 4 of the Convention establishes the principle of free and voluntary collective bargaining and the autonomy of the bargaining parties with respect to all workers and employers covered by the Convention. As regards the self-employed, the Committee recalls, in its 2012 General Survey on the fundamental Conventions, paragraph 209, that the right to collective bargaining should also cover organizations representing the self-employed.

The Committee is nevertheless aware that the mechanisms for collective bargaining in traditional workplace relationships may not be adapted to the specific circumstances and conditions in which the self-employed work. **The Committee therefore invites the Government to hold consultations with all the parties concerned with the aim of limiting the restrictions to collective bargaining that have been created by the Competition Authority's decision, so as to ensure that self-employed workers may bargain collectively. To this end, the Committee suggests that the Government and the social partners concerned may wish to identify the particularities of self-employed workers that have a bearing on collective bargaining, so as to develop specific collective bargaining mechanisms relevant to them.** (Emphasis in original)

193. Congress thus considers that the ruling of the Irish Competition Authority is incompatible both with ILO Convention No.87 on the right to organise and ILO Convention No.98 on the right to collective bargaining.

Convention 87

194. Article 2 of ILO Convention No.87 on Freedom of Association and Protection of the Right to Organise (ratified by Ireland in 1955) provides that:

> Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation.

It is implicit that the words "without distinction whatsoever" must mean that no distinction can be drawn to exclude from this right workers who happen to be engaged under a contract to provide services, i.e. are self-employed.[42] Indeed, the Committee on Freedom of Association has, in terms, held (ILO, *Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO*, ILO, 2006, para.254) that:

> By virtue of the principles of freedom of association, all workers - with the sole exception of members of the armed forces and the police - should have the right to establish and join organisations of their own choosing. The criterion for determining the persons covered by that right, therefore, is not based on the existence of an employment relationship, which is often non-existent, for example in the case of agricultural workers, **self-employed workers in general** or those who practise liberal professions, who should nevertheless enjoy the right to organise. (emphasis supplied)

195. Thus the Committee on Freedom of Association held as follows in 2012 on a complaint by NSZZ Solidarnosc: [43]

> **1084.** The Committee recalls that the term "organization" used in Convention No. 87 means any organization of workers or of employers for furthering and defending the interests of workers or of employers (Article 10), such organizations **should therefore have the possibility of engaging in collective negotiations in the interest of its members.** The Committee notes, however, the Government's indication that the model of labour relations in the country does not permit self-employed or independent professionals to enter into negotiations. The Committee recalls in this regard that, **by virtue of the principles of freedom of association, all workers - with the sole exception of members of the armed forces and the police - should have the right to establish and join organizations of their own choosing.** The criterion for determining the persons covered by that right, therefore, is not based on the existence of an employment relationship, which is often non-

[42] Note that Recommendation R198 *Employment Relationship Recommendation* 2006 requires ratifying States to include measures of national policy to 'combat disguised employment relationships...' (I (4)(b)) and proposes indicators for an 'employment relationship' with full protection: II (13).
[43] 363rd report of the Committee on Freedom of Association, March 2012, Case No 2888 (Poland).

> existent, for example in the case of agricultural workers, **self-employed workers in general** or those who practise liberal professions, who **should nevertheless enjoy the right to organize** [see Digest of decisions and principles of the Freedom of Association Committee, fifth (revised) edition, 2006, para. 254]. The Committee therefore, like the Committee of Experts, requests the Government to take the necessary measures, including where necessary, the amendment of the legislation in order to ensure that all workers, without distinction whatsoever, **including self-employed workers** and those employed on the basis of civil law contracts, enjoy the right to establish and join organizations of their own choosing within the meaning of Convention No. 87. Further, recalling that Convention No. 98 protects all workers and their representatives against acts of anti-union discrimination and that the only possible exceptions from its scope of application are the police, armed forces and public servants engaged in the administration of the State, the Committee requests the Government to ensure that all workers and their representatives enjoy adequate protection against acts of anti-union discrimination regardless of whether they fall into the definition of employees under the Labour Code or not.

196. Apparently in consequence of this ruling, the Constitutional Court of Poland held (judgment of 2 June 2015) that the Law on Trade Unions then in force was unconstitutional in that it excluded from scope self-employed workers and those who worked under civil law contracts. The Court accepted that freedom of association in trade unions applied to all workers regardless of the legal basis on which their work is performed.

197. Also in 2012, in a complaint in relation to Korea, the Committee on Freedom of Association held (ILO Report of the CFA No 33, case 2062, p 140, para 461[44]) (emphasis supplied):

> ... the Committee recalls that by virtue of the principles of freedom of association, all workers - with the sole exception of members of the armed forces and the police - should have the right to establish and join organizations of their own choosing. The criterion for determining the persons covered by that right, therefore, is not based on the existence of an employment relationship, which is often non-existent, for example in the case of agricultural workers, **self-employed workers in general** or those who practise liberal professions, who should nevertheless enjoy the right to organize [see **Digest** op. cit., para. 254]. The Committee considers that this principle equally applies to heavy goods vehicle drivers. Consequently, and considering that truck drivers should be able to join the organizations of their own choosing to further and defend their interests, including organizations

[44] Reiterated at para 467(e).

> formed under the TULRAA, the Committee once again requests the **Government to take the necessary measures to: (i) ensure that "self-employed" workers, such as heavy goods vehicle drivers, fully enjoy freedom of association rights**, in particular the right to join the organizations of their own choosing; (ii) to hold consultations to this end with all the parties involved with the aim of finding a mutually acceptable solution so as to **ensure that workers who are self-employed could fully enjoy trade union rights under Conventions Nos 87 and 98 for the purpose of furthering and defending their interest, including by the means of collective bargaining;** and (iii) in consultation with the social partners concerned, to identify the particularities of self-employed workers that have a bearing on collective bargaining so as to develop specific collective bargaining mechanisms relevant to self-employed workers, if appropriate. ...

198. The ILO Committee of Experts on the Application of Conventions and Recommendations similarly states of "workers engaged under a disguised labour relationship (in the form of service contracts, for example)"[45] as well as other workers, that "all these categories of workers should benefit from the rights and guarantees set forth in the Convention [No 87]." It rejects "employment relationships disguised as civil contracts for the provision of services" so as to preclude the formation of trade unions.[46]

199. Since the ILO holds that the self-employed are workers who may join trade unions, it follows that they and their unions must be entitled to the benefit of collective bargaining conducted, and collective agreements negotiated, by those trade unions. That proposition holds good, too, for employers' associations. Collective bargaining is after all is the central reason for and purpose of trade unions. For a State body such as the Competition Authority effectively to preclude a trade union (and an employers' association) from making (or enforcing) collective agreements on behalf of self-employed workers (or to penalise or threaten to penalise a union for doing so) must be a breach of Article 3 of Convention 87 which provides:

> 1. Workers' and employers' organisations shall have the right to draw up their constitutions and rules, to elect their representatives in full freedom, to

[45] ILO, *General Survey on the fundamental Conventions concerning rights at work in the light of the ILO Declaration on Social Justice for a Fair Globalization 2008*, ILO, 2012, para 58.
[46] Ibid, para.77.

> organise their administration and activities and to formulate their programmes.
> 2. The public authorities shall refrain from any interference which would restrict this right or impede the lawful exercise thereof.

200. The taking of industrial action to achieve or enforce a collective agreement governing conditions of self-employed workers is, it is now known from the Irish Medical Organisation case above, regarded by the Competition Authority as a restriction or distortion of competition in itself or, at the least, action to taken to achieve such a distortion of competition. However, denial of the right to strike on that ground would clearly be in breach of Article 3 of Convention 87 since the ILO recognises the right to strike as one of the essential means by which workers defend their economic and social interests (*Digest*, op. cit., paragraphs 520-523). The ILO jurisprudence has never held that self-employed workers do not have the right to strike. Nor does that jurisprudence recognise amongst the legitimate grounds for restricting the right to strike that the strike might distort free competition (whether amongst the self-employed or otherwise) (*Digest*, op. cit., paragraphs 570ff).

201. Article 8(2) of Convention 87 provides that the "law of the land shall not be such as to impair, nor shall it be so applied as to impair, the guarantees provided for in this Convention." Yet that is what the Competition Act 2002 appears to do.

Convention 98

202. Article 4 of Convention 98 on the Right to Organise and Collective Bargaining (ratified by Ireland in 1955) provides that:

> Measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements.

203. This cannot be read as excluding the self-employed from the scope of collective agreements. Paragraph 881 of the *Digest*, op. cit., puts the general proposition thus:

> The right to bargain freely with employers with respect to conditions of work constitutes an essential element in freedom of association, and trade unions should have the right, through collective bargaining or other lawful means, to seek to improve the living and working conditions of those whom the trade unions represent. The public authorities should refrain from any interference which would restrict this right or impede the lawful exercise thereof. Any such interference would appear to infringe the principle that workers' and employers' organizations should have the right to organize their activities and to formulate their programmes.

204. Paragraph 898 deals with the specific proposition that "no provision in Convention 98 authorizes the exclusion of staff having the status of contract employee from its scope." This paragraph derives from the 324th Report, Case No. 2083, para. 254; the 327th Report, Case No. 2138, para. 544; and the 335th Report, Case No. 2303, para. 1372, in each of which the proposition was stated and applied. These cases involved, respectively, casual workers, workers on probation and workers employed by a sub-contractor. There is no reason to suppose that the proposition should not apply equally to workers providing services under a contract, i.e. the self-employed. Consistently with this, the *Digest* in dealing with the categories of workers covered by collective bargaining (paragraphs 885ff), gives no hint that it is permissible to exclude the self-employed from the right to collective bargaining. Nor does it suggest that collective bargaining may not apply if a State authority holds that it is anti-competitive.

205. The Committee of Experts in its *General Survey*, op. cit. has stated:

> Convention No. 98 covers all workers and employers, and their respective organizations, in both the private and the public sectors, regardless of whether the service is essential. The only exceptions authorized concern the armed forces and the police, as well as public servants engaged in the administration of the State (see below). Accordingly, for example, the Committee has recalled that the right to organize and to collective bargaining applies to the following categories of workers: .... Moreover, the rights and safeguards set out in the Convention apply to **all workers irrespective of the type of employment contract**, regardless of whether or not their employment relationship is based on a written contract, or on a contract for an indefinite term. (emphasis supplied)

206. It could not be clearer therefore that the right to collective bargaining applies "irrespective of the type of employment contract." That this includes the self-employed is put beyond doubt by paragraph 209 of the *General Survey*:

> With the exception of organizations representing categories of workers which may be excluded from the scope of the Convention, namely the armed forces, the police and public servants engaged in the administration of the State, recognition of the right to collective bargaining is general in scope and all other organizations of workers in the public and private sectors must benefit from it. However, the recognition of this right in law and practice continues to be restricted or non-existent in certain countries. This situation has given the Committee cause to recall that the right to collective bargaining should also cover organizations representing the following categories of workers: prison staff, fire service personnel, seafarers, **self-employed** and temporary workers, outsourced or contract workers, apprentices, non-resident workers and part-time workers, dockworkers, agricultural workers, workers in religious or charity organizations, domestic workers, workers in EPZs and migrant workers. (emphasis supplied, footnotes omitted)

207. It is no surprise to find that there is nothing in the jurisprudence of the ILO to suggest that the cause of competition between workers as to the terms on which they are prepared to work could conceivably constitute a justification for restricting their right to collective bargaining.

State intervention

208. In relation to intervention by public authorities in collective agreements already made, the General Survey states, at paragraph 200:

> Under the terms of Article 4 of the Convention, collective bargaining must be free and voluntary and respect the principle of the autonomy of the parties. However, the public authorities are under the obligation to ensure its promotion. Interventions by the authorities which have the effect of cancelling or modifying the content of collective agreements freely concluded by the social partners would therefore be contrary to the principle of free and voluntary negotiation. The detailed regulation of negotiations by law would also infringe the autonomy of the parties.

209. The *General Survey* is equally forceful about a requirement that there be prior approval by the public authorities for a collective agreement: see paragraph 201.

210. Accordingly, paragraph 1001 of the *Digest* states that "State bodies should refrain from intervening to alter the content of freely concluded collective agreements" and paragraph 1005 holds that it is not compatible with the Convention for public authorities to intervene in collective bargaining to ensure "that the negotiating parties subordinate their interests to the national economic policy pursued by the government". Paragraph 1008 of the *Digest* states that:

> 1008. The suspension or derogation by decree – without the agreement of the parties – of collective agreements freely entered into by the parties violates the principle of free and voluntary collective bargaining established in Article 4 of Convention No. 98. If a government wishes the clauses of a collective agreement to be brought into line with the economic policy of the country, it should attempt to persuade the parties to take account voluntarily of such considerations, without imposing on them the renegotiation of the collective agreements in force.[47]

211. This passage was reiterated recently by the Committee on Freedom of Association in the case of *Spanish Trade Unions v Spain* (Case No 2947, 27 March 2014). Likewise the Committee of Experts on the Collective Complaint of Conventions and Recommendations in its Observations on Croatia under Convention 98 stated that it:

> underlines the importance of ensuring that any future Act on the realisation of the State budget does not enable the government to modify the substance of collective agreements in force in the public service for financial reasons.

212. Likewise in its review of Convention 98 in relation to Croatia in 2015, the Committee of Experts recalled that: [48]

> In general, a legal provision which allows one party to modify unilaterally the content of signed collective agreements is contrary to the principles of collective bargaining'.

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[47] Citing the 1996 *Digest*, para. 876; 307th Report, Case No. 1899, para. 84; and 323rd Report, Case No. 2089, para. 491.
[48] ILO Committee of Experts, *Report III(Part 1A) to the 104th International Labour Conference*, 2015.

213. It is submitted that the jurisprudence of the ILO is unequivocally to the effect that the self-employed are workers and may not therefore be excluded from the right to collective bargaining.

214. Compliance with decisions of the CJEU is not a legitimate excuse for breach of ILO Convention, as the Committee of Experts in effect held in the case of the British Airline Pilots Association in 2010.[49]

215. Before leaving the ILO, an important footnote may be added. Article 101 TFEU would, on the face of it, outlaw a collective agreement fixing minimum terms on which workers will supply their labour because such

> agreements between undertakings... have as their object or effect the prevention [or] restriction of competition...in particular those which... fix purchase or selling prices or any other trading conditions...'

The categorisation of workers with the right to bargain collectively as 'undertakings' is wholly inapt, as discussed elsewhere in this Collective Complaint. But just as inappropriate is the regard the setting of wages and terms and conditions of work as 'purchase or selling prices or ... other trading conditions.' It is a fundamental principle of the ILO, indeed the very first principle of the Declaration of Philadelphia 1944, that *'labour is not a commodity.'* For this reason too, competition law prohibiting the anti-competitive agreements for the sale or purchase of commodities or services should not apply those who labour to earn a living.

Conclusion

216. The Committee is asked to find in the light of its own jurisprudence, and that of the other international Treaties considered above, that the decision of the Irish Competition Authority to prohibit the collective agreements at issue in this Collective Complaint and to bar any further collective bargaining

[49] ILO Committee of Experts, *Report III(Part 1A) to the 99th International Labour Conference*, 2010.

between the relevant trade unions and employers associations on the ground that the workers concerned are self-employed is incompatible with Ireland's obligations under Article 6 of the ESC.

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15 July 2016