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**EUROPEAN COMMITTEE OF SOCIAL RIGHTS  
COMITÉ EUROPÉEN DES DROITS SOCIAUX**

12 October 2017

**Case Document No. 3**

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

**SUBMISSIONS OF THE GOVERNMENT ON THE MERITS**

**Registered at the Secretariat on 8 September 2017**



# EUROPEAN COMMITTEE OF SOCIAL RIGHTS

COMPLAINT NUMBER: 123/2016

IRISH CONGRESS OF TRADE UNIONS

-and-

IRELAND

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## OBSERVATIONS OF IRELAND ON THE MERITS OF THE COMPLAINT

8 SEPTEMBER 2017

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### Introduction

1. On 18 July 2016 Patricia King, General Secretary, Irish Congress of Trade Unions lodged a collective complaint (*the Complaint*) on behalf of the Irish Congress of Trade Unions (*ICTU*) against Ireland (the Respondent) with the European Committee of Social Rights (*the Committee*). The Complaint centres on the consequences of a decision of the Competition Authority dated 31 August 2004 (Reference Number E/04/002) relating to the application of section 4 of the Competition Act, 2002 to certain categories of self-employed persons in Ireland, namely voice-over actors, journalists, photographers and musicians. ICTU argues that by reason of that decision certain categories of self-employed persons are not entitled to enter into collective agreements negotiated through collective bargaining and consequently, the Respondent is in breach of its obligations under Article 6 of the European Social Charter 1996 (*the Charter*). While brief reference is made in

the Complaint to rights arising under Article 2 and 4 of the Charter, the focus of the Complaint is on an alleged breach of Article 6.

2. As can be seen from the Complaint, ICTU argues that the consequence of the decision is 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”*. The Complaint is made specifically relating to voice-over actors, journalists, photographers and musicians and relates solely to their entitlement to enter into collective agreements negotiated by collective bargaining. The submission of ICTU confirms that no issue is taken regarding the status of certain persons as self-employed or the classification of persons as self-employed nor is any issue taken relating to the conceptual framework of self employment. The only issue raised in this complaint is the alleged *“denial to those workers who happen to be self-employed of the right to collective bargaining”*. By decision of the 23 March 2017 the Committee declared the complaint to be admissible.
3. As will be explained in more detail in the submission, Ireland does not accept that there is any breach of the Charter by reason of the facts disclosed in the Complaint. This particularly arises by reason of a significant change in the legislative framework governing the rights of self-employed persons to engage in collective bargaining. The Competition (Amendment) Act 2017 (**Appendix 1**) now provides a legislative framework under which classes of self-employed persons may be exempt from section 4 of the Competition Act, 2002 (**Appendix 2**) and therefore engage in collective bargaining. In these circumstances, Ireland submits that no violation of Article 6 arises and that the complaint ought to be dismissed.

### **The Decision of the Competition and Consumer Protection Commission**

4. As is outlined in the submission made on behalf of ICTU, the Complaint relates to the consequences of a decision of the Competition Authority relating to an agreement between the Irish Actors Equity SIPTU (*‘SIPTU’*) and the Institute of Advertising Practitioners in Ireland (*‘the Institute’*) concerning the terms and conditions under which advertising agencies would hire actors.

5. The Competition Authority was an independent statutory authority established under the Competition Act, 2002, which by virtue of functions assigned to it by Section 30 of the Competition Act, 2002, had powers to investigate, either on its own initiative or arising from a complaint made by any person, alleged breaches of the Competition Act, 2002. On 31 October 2014, by virtue of the Competition and Consumer Protection Act, 2014<sup>1</sup>, the Competition Authority and the National Consumer Agency were merged to form the Competition and Consumer Protection Commission (*‘the CCPC’*), which said body now has a dual mandate to enforce competition and consumer law in Ireland.
6. As can be seen from its decision, in March 2003 the Competition Authority commenced an investigation into possible price fixing among self-employed actors and advertising agencies contrary to section 4(1) of the Competition Act, 2002. Section 4(1) of the Competition Act, 2002 states:

*“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 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 subjects of such contracts.*

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<sup>1</sup> A full copy of the Act is available at: <http://www.irishstatutebook.ie/eli/2014/act/29/enacted/en/html>

7. An “*undertaking*” is defined in Section 3(1) of the Competition Act, 2002 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.*”<sup>2</sup>
8. The investigation focused on an agreement between SIPTU, acting on behalf of actors, and the Institute, acting on behalf of advertising agencies entitled “*2002 Agreement on minimum fees effective from 1 October 2002*”. The Competition Authority concluded that self-employed actors were undertakings within the meaning of the Competition Act, 2002 and that SIPTU was an association of undertakings when it acted on behalf of self-employed actors. The Competition Authority concluded that the agreement with the Institute amounted to a breach of Section 4 (1) of the Competition Act 2002 as it established the level of fees for services rendered and constituted a price fixing.
9. Following that investigation SIPTU and the Institute undertook not to enter into or implement any agreement that directly or indirectly fixed the fees that the Institute or its members pay self-employed actors. The decision of the Competition Authority was not challenged by either party at that time or subsequently.
10. For completeness, it should be noted that Section 4(2) of the Competition Act, 2002 provides that an agreement or concerted practice shall not be prohibited under section 4(1) if the conditions established by section 4(5) of the Competition Act, 2002 are met. Section 4(3) of the Competition Act, 2002 permits the Competition Authority and/or the CCPC to declare that a specified category of agreements, decisions or concerted practices complies with the conditions set out in Section 4(5). Section 4(5) of the Competition Act, 2002 states:

*“The conditions mentioned in subsections (2) and (3) are that the agreement, decision or concerted practice or category of agreement, decision or concerted*

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<sup>2</sup> Please note that the definition of “undertaking” in the 2002 Act was amended by Section 47 of the Competition and Consumer Protection Act 2014.

*practice, having regard to all relevant market conditions, contributes to improving the protection 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 possibilities of eliminating competition in respect of a substantial part of the products or services in question.*

11. Neither SIPTU nor the Institute argued that the Agreement met the conditions established by section 4(5) and was therefore not prohibited by reason of the application of section 4(2).

12. As is outlined in the submission of ICTU, the decision of the Competition Authority has been reviewed on a number of occasions and on each occasion the Authority has declined to alter its view. Following the decision of the Court of Justice of the European Union in the case of *FNV Kunsten Informatie en Media v. Staat der Nederlanden* ICTU wrote to the CCPC and asked it to review its 2004 decision. In that review, which was communicated to ICTU by letter of 27 February 2015, the CCPC concluded that “*on the basis of the facts specified in the Equity decision, that the Authority’s analysis and conclusions in that decision were a correct application of Irish competition law and that the Authority’s application of Irish competition law was and remains consistent with EU competition law, including the principles of EU competition law elaborated by the CJEU in its Dutch Musicians judgement*”. The CCPC was of the view that its prior decision was consistent with the approach adopted by the CJEU in the *FNV Kunsten* decision. It was emphasised that the decision in question was “*clearly and expressly confined to the facts of the case, and in particular the fact that the vast majority of actors in question were self-employed independent contractors rather than employees*”. It was also of the view that if the actors who fell within the framework of the decision were “*false self-employed*” then the conclusions reached by the CCPC would have been different.

**Government actions taken with respect to self-employed persons and the right to collective bargaining**

13. Successive Irish Governments have been committed to exploring mechanisms whereby certain categories of self-employed persons would be enabled to engage in collective bargaining. This is reflected in the *Review and Transitional phase in 2008/2009 of the Towards 2016 Social Partnership Agreement*, in which the Government entered into a commitment to introduce legislation to exclude voice-over actors, freelance journalists and session musicians from the provisions of Section 4 of the Competition Act 2002. However, it was always understood and accepted that any amending legislation was always going to be subject to consistency with the EU competition law.
14. In 2008, the Irish Government entered into an EU/IMF Programme of Financial Support arising from the very serious financial and economic situation in which the State was in. As part of the Memorandum of Understanding forming the basis of that Agreement the Irish Authorities committed to “*ensure that no further exemptions to the competition law framework would be granted unless they are entirely consistent with the goals of the EU/IMF Programme and the needs of the economy*”. It also provided that the agreement of the Troika had to be sought in advance of any initiatives that could impact on the objectives of the programme being fulfilled.
15. The Troika was made aware of the commitment to exempt voice-over actors, session musicians and freelance journalists from the provisions of the Competition Act 2002. On two separate occasions the EU Commission was consulted on proposed draft legislation which sought to place limitations on the application of the Competition Act 2002 in certain circumstances with the view to establish rights for self-employed persons to be represented by trade unions for the purposes of collective bargaining. On both occasions it indicated that it did not see a need for the exemptions from competition law and declined to provide the necessary agreement required by the Memorandum of Understanding. Ireland exited the EU/IMF Programme of Financial Support on 15 December 2013.
16. The Government has been committed to introducing legislation to alter the application of section 4 of the Competition Act, 2002 to certain categories of self-employed persons. The implementation of that commitment was restricted for a period of time by outside factors, including the requirements of the Memorandum of



Understanding between the Irish Government and the Troika institutions. Following the exit of the State from the programme of financial support provided by the EU/IMF, the Government was released from the requirement of having to seek the agreement of the Troika institutions before amending national competition law and was entitled to consider proposals to amend the relevant law. The Respondent presents these facts before the Committee by way of background information and to ensure that the Committee understands the history to the current legislative position in Ireland.

### **The Competition (Amendment) Act, 2017**

17. The Competition (Amendment) Bill 2016 was commenced as private members legislation (introduced by a member of the Opposition) in Seanad Éireann (the Irish Parliament's Upper Chamber) on 15 January 2016. The principle underlying the Bill was agreed to by the Government, which supported its passage subject to certain amendments being introduced. The Bill was passed by Seanad Éireann on 10 November 2016 and by Dáil Éireann on 31 May 2017. The Competition (Amendment) Act 2017 was signed into law by the President of Ireland on 7 June 2017. Further Section 4(4) of the Competition (Amendment) Act 2017 provides that the Act shall come into operation no later than three months after the date of its passing. As a consequence thereof the Act came into operation on 7 September 2017.
18. The purpose of the Competition (Amendment) Act 2017 is to amend the Competition Act 2002 so as to provide that Section 4 of that Act is not applied to collective bargaining and agreements in respect of certain categories of workers. This is achieved by Section 2 of the 2017 Act, which amends Section 4 of the Competition Act 2002 by the insertion of Part 2B after Part 2A of Section 4 of the 2002 Act. The core provisions of Part 2B are set out hereunder.
19. Section 15E of the Competition Act 2002 (as inserted by section 2 of the Competition (Amendment) Act, 2017) provides that "*Section 4 shall not apply to collective bargaining and agreements in respect of a relevant category of self-employed worker.*" As a consequence thereof, any worker who falls within a relevant category

of self-employed worker is no longer subject to the restrictions contained in section 4 of the Competition Act, 2002 and may engage in collective bargaining. A relevant category of self-employed worker is defined by Section 15D as

- a. a class of worker specified in Schedule 4, or
- b. a class of false self-employed worker or fully dependant self-employed worker specified in an Order made by the Minister under Section 15F.

20. Schedule 4 lists certain classes of self-employed workers who are automatically considered to be relevant categories of self-employed workers and therefore governed by the legislation once it comes into operation. Those classes of workers are:

1. Actors engaged as voice-over actors
2. Musicians engaged as session musicians
3. Journalists engaged as freelance journalists

21. In addition to providing a legislative basis to permit specific classes of self-employed persons engage in collective bargaining and be exempt from the application of section 4 of the Competition Act 2002, the Competition (Amendment) Act 2017 provides a framework for other classes of self-employed workers to be recognised for the purposes of engaging in collective bargaining. This is done by way of an application to the Minister for Jobs, Enterprise and Innovation by a trade union for specific categories of self-employed workers to be prescribed for the purposes of the Act. Section 15F provides that a trade union which represents a class of false self-employed worker or fully dependant self-employed worker “*may, for the purposes of collective bargaining and agreements on behalf of the class of worker so represented, apply to the Minister in accordance with this Section, to prescribe such class of false self-employed worker, or fully dependant self-employed worker for the purposes of this Part*”.

22. Section 15F applies in respect of workers who may be considered to be either a “*false self-employed worker*” or a “*fully dependant self-employed worker*”. Section 15D defines false self-employed worker as an individual who

- a. *performs for a person ('other person'), under a contract (whether express or implied and if express, whether orally or in writing), the same activity or service as an employee of the other person*
- b. *has a relationship of subordination in relation to the other person for the duration of the contractual relationship*
- c. *is required to follow the instructions of the other person regarding the time, place and content of his or her work,*
- d. *does not share in the other person's commercial risk*
- e. *has no independence as regards the determination of the time schedule, place and manner of performing the tasks assigned to him or her, and*
- f. *for the duration of the contractual relationship, forms an integral part of the other person's undertaking.*

23. Section 15D defines fully dependant self-employed worker as an individual

- a. *who performs services for another person (whether or not the person for whom the service is being performed is also an employer of employees) under a contract (whether express or implied, and if express, whether orally or in writing), and*
- b. *whose main income in respect of the performance of which services under contract is derived from not more than 2 persons.*

24. The mechanism of application for a class of self-employed workers to be prescribed is established by section 15F of the Competition Act, 2002 (as inserted by Section 2 of the Competition (Amendment) Act, 2017). Any application made under this section must be accompanied by evidence to show that the class of self-employed worker which is the subject of the application "*falls within the definition of false self-employed worker or fully dependant self-employed worker*" and that the prescribing of such class of false self-employed worker or fully dependant self-employed worker, as the case may be

- (i) will have no or minimal economic effect on the market in which the class of self-employed worker concerned operates.
- (ii) will not lead or result in significant costs to the State, and

(iii) will not otherwise contravene the requirements of this Act or any other enactment or rule of law (including the law in relation to the European Union) relating to the prohibition on the prevention, restriction or distortion of competition in trade in any goods or services.

25. In accordance with section 15F(3) of the Competition Act, 2002 an application for such class of self-employed worker to be prescribed may be granted by the Minister when the Minister is satisfied of the matters referred to in Section 15F(2)(a) and (b) and that it is appropriate to do so.

### **Alleged violation of Article 6 of the European Social Charter**

26. The gravamen of the Complaint is that the Respondent is in breach of the obligations arising under Article 6 of the Charter by reason of the operation of the Decision of the Competition Authority as it applies to specific categories of self-employed persons, namely voice-over actors, journalists, photographers and musicians. Article 6 of the Charter states:

*With a view to ensuring the effective exercise of the right to bargain collectively, the Contracting 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.*

27. The application of Article 6 of the Charter is subject to Article G, which states:

*1. The rights and principles set forth in Part I when effectively realised, and their effective exercise as provided for in Part II, shall not be subject to any restrictions or limitations not specified in those parts, 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.*

*2. The restrictions permitted under this Charter to the rights and obligations set forth herein shall not be applied for any purpose other than that for which they have been prescribed.*

28. For the reasons more fully set out below, the Respondent submits that there is no violation of Article 6 of the Charter relating to the right of categories of self-employed persons, namely voice-over actors, musicians and journalists to engage in collective bargaining. Following the enactment of the Competition (Amendment) Act, 2017, section 4 of the Competition Act, 2002 does not apply to those categories of self-employed workers and they are consequently permitted to engage in collective bargaining into the future.

29. Ireland recalls that the assessment of conformity with the Charter of domestic law and practice occurs by reference to the domestic law and practice in force on the date of the decision on the merits of the complaint (see *European Council of Police Trade Unions v. Portugal (Collective complaint number 11/2001), decision on the merits of 21 May 2001 at paragraphs 47-48 and 67-68*) and *Confederation of Independent Trade Unions in Bulgaria, Confederation of Labour "Podkrepa" and European Trade Union Confederation v. Bulgaria (Complaint Number 32/2006), decision on the merits of 16 October 2006 at paragraph 19*). Therefore any assessment of conformity of Irish domestic law and practice must be carried out by reference to the legislative framework that exists on the date that the Complaint is considered by the Committee ie after 7 September 2017, the date upon which the Competition (Amendment) Act, 2017 came into operation. Therefore the assessment of the

Complaint must be carried out in the context of the legislative framework that now exists rather than that which existed at the time the Complaint was submitted.

30. As has been outlined above, there has been significant change in the legislative framework that governs the entitlement of the categories of self-employed workers identified in the Complaint to engage in collective bargaining. Arising from the enactment of the Competition (Amendment) Act, 2017 the categories of workers that are specifically referenced in the complaint brought by ICTU are now permitted to be represented by a trade union for the purposes of collective bargaining. Further the Act has broader import in that it enables trade unions to apply to the Minister to have categories of self-employed workers prescribed for the purposes Part 2B of the Competition Act, 2002 and such application may be granted if the criteria established by section 15F of the Competition Act, 2002 (as inserted by section 2 of the Competition (Amendment) Act 2017) are fulfilled. Having regard to this legislative framework, in which the right to engage in collective bargaining is provided, there can be no violation of Article 6 of the Charter.

31. Ireland notes that a similar situation arose for consideration by the Committee in *European Council of Police Trade Unions v. Portugal (Collective complaint number 11/2001), decision on the merits of 21 May 2001*), which also considered a potential violation of Article 6 of the Charter arising from Legislative Decree number 161/90 of 22 May 1990 governing the right of association of members of the Public Security Police. In particular, it was alleged that a violation of Article 6 arose as members of the Public Security Police were not permitted to engage in collective bargaining. However, prior to the merits of the complaint being considered by the Committee Legislative Decree No. 161/90 was amended by Act n°14/2002 of 19 February 2002, which provided for a right of collective bargaining for members of the Public Security Police. In circumstances where the legislative framework had been amended to provide the rights protected by Article 6(2) of the Charter, the Committee found that there was no violation of the Charter. It is respectfully submitted that the same approach ought to be taken with this Complaint and that, by reason of the enactment of the Competition (Amendment) Act, 2017 no violation of Article 6 may be found.

32. It is noted that the enactment of the Competition (Amendment) Act, 2017 has been welcomed by a number of Unions operating in Ireland. Significantly, press releases<sup>3</sup> issued by SIPTU (who were a party to the Agreement the subject of the original investigation by the Competition Authority) and by the National Union of Journalists on 31 May 2017 welcomed the passing of the legislation. In circumstances where Unions, who are members of ICTU, have taken the stance domestically that the Competition (Amendment) Act, 2017 entitles them to immediately engage in collective bargaining in respect of certain categories of workers and to apply to have other categories of workers prescribed under the legislative framework it is respectfully submitted that the matters that form the substance of the Complaint which must be adjudicated by this Committee have resolved.
33. It is noted that paragraph 158 of the Complaint makes reference to Article 2 and 4 of the Charter and appears to suggest that collective agreements are the mechanism whereby the rights identified in those articles are guaranteed to the workers involved. This is not expanded upon nor is any stand-alone complaint relating to the application of Article 2 and 4 made out. At most, any complaint made relating to Articles 2 and 4 is made subordinate to the primary complaint made in respect of an alleged breach of Article 6. In those circumstances, the Respondent does not propose to address the substance of the rights protected by Articles 2 and 4 save as to submit that in circumstances where there is no breach of Article 6, by extension no breach of Articles 2 and 4 arises.
34. The Complaint lodged by ICTU places significant emphasis on the interpretation and application of the law of the European Union and the interpretation of decisions the Court of Justice of the European Union. Unusually, the substance of the Complaint as it relates to the Charter is relegated to a minor part of the submission made on behalf of ICTU. It would appear from the manner in which the Complaint is presented and the nature of the arguments made that the real target of the Complaint is the law of the European Union rather than domestic law that applies in Ireland. The Complaint focuses on the right of collective bargaining as it arises in the context of

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<sup>3</sup> Press releases issued by SIPTU and the National Union of Journalists on 31 May 2017 are contained at **Appendix 3**

the law of the European Union and is critical of the manner in which competition law, as promulgated under the Treaty on the Functioning of the European Union, has interacted with the right of collective bargaining. It is further critical of the failure of the CJEU to include self-employed persons in the definition of ‘worker’. It is submitted that the interpretation of the law of the European Union and decisions of the Court of Justice of the European Union does not fall within the jurisdiction of the Committee and instead the task of the Committee is to consider as to whether the legal framework that currently exists in Ireland constitutes a violation of the Charter. The Respondent does not propose to engage with the legal arguments made by ICTU with respect to the interpretation of EU competition law as it goes beyond the scope of the Complaint being considered by the Committee. It is respectfully submitted that it is not necessary to consider the legal arguments raised by ICTU relating to the application and interpretation of the law of the European Union in circumstances where the substance of the Complaint has been dealt with by the enactment of the Competition (Amendment) Act 2017 in domestic Irish law.

## **Conclusion**

35. The Respondent submits that no violation of Article 6 has arisen in circumstances that, at the time of the consideration of the merits of this complaint there is legislation in force which exempts voice-over actors, session musicians and freelance journalists from the application of section 4 of the Competition Act, 2002 and permits those categories of self-employed persons to engage in collective bargaining. The passing of the Competition (Amendment) Act, 2017 deals with the entirety of the Complaint as lodged by ICTU.
  
36. In the circumstances the Respondent respectfully submits that the proper course of action is for the Committee to find that there has been no violation of Article 6 of the Charter by reason of the matters identified in the Complaint submitted by ICTU.