EUROPEAN COMMITTEE OF SOCIAL RIGHTS
COMITE EUROPEEN DES DROITS SOCIAUX

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

OBSERVATIONS BY THE INTERNATIONAL ORGANISATION OF EMPLOYERS (IOE)

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International Organisation of Employers
Organisation Internationale des Employeurs
Organización Internacional de Empleadores
The Global Voice of Business

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European Committee of Social Rights
Council of Europe
1, quai Jacoutot
F – 67075 Strasbourg Cedex

LETTER OF THE INTERNATIONAL ORGANISATION OF EMPLOYERS ON THE APPLICATION OF ARTICLE 6 OF THE REVISED EUROPEAN SOCIAL CHARTER IN IRELAND AND IN RESPONSE TO THE COLLECTIVE COMPLAINT N. 123/2016

Dear Members of the European Committee of Social Rights,

The International Organisation of Employers (IOE) would like to draw the European Committee of Social Rights (ECSR) attention to the specific situation in Ireland regarding to the application of Article 6.1 of the Revised European Social Charter (Revised Charter).

This letter also constitutes a response to the collective complaint N. 123/2016 filed by the Irish Congress of Trade Unions (ICTU) against Ireland for violation of Article 6 of the Revised Social; it includes comments from the perspective of the IOE-affiliated Employers' federation, the Irish Business and Employers Confederation (IBEC).

INTRODUCTION

Recent developments in Ireland's industrial relations framework have further strengthened an already robust structure for the protection and promotion of the rights of freedom of expression and the right to form and join trade unions. Workers in Ireland enjoy extensive protection under the Industrial Relations Acts 1946 to 2015 in addition to a range of other employment rights protections.

Freedom of expression and freedom of association enjoy the highest possible protections under Irish law, being enshrined in the Constitution of Ireland 1937 (Article 40).

The business community at national level has consistently supported these freedoms and accepts and promotes, where necessary, legislation to ensure their protection.

However, the IOE would like to transmit to the ECSR its (and IBEC) notable concerns at recent developments to extend exemptions within the Irish Competition Acts 2002 and 2017, to provide for collective bargaining rights for certain self-employed individuals.

IRISH COMPETITION (AMENDMENT) ACT 2017

Section 4 of the Competition Act 2002, that mirrors Article 101(1) of the Treaty on the Functioning of the European Union (TFEU) , prohibits anti-competitive agreements, decisions and concerted practices that can equate to directly or indirectly fixing purchase or selling prices or other trading conditions. "Self-employed" individuals (as defined by the national legislations

of the EU countries) are considered as “undertakings” under the competition rules of EU law and therefore subject to Article 101(1) of the TFEU (without legitimate possibility to negotiate and sign a “collective agreement”).Over time, the ICTU has made representations to international bodies such as the ILO Committee on the Application of Conventions and Recommendations (CEACR) with regards to certain categories of self-employed workers.

In 2016, further to the Court of Justice of the European Union decision in the case of ‘FNV Kunsten Informatie en Media v Staat der Nederlanden’ C-413/13, ICTU requested CEACR to support an amendment to Section 4 of the Competition Act 2002 to allow for collective bargaining for self-employed workers. IBEC disputed that request stating that the Kunsten case reinforced the view that collective labour agreements are only exempt from Article 101(1) of the TFEU when they relate to terms and conditions of employees or those who are considered by a court of national competence to be “false self-employed”.

In June 2017, section 4 of the Irish Competition Act 2002 was amended to lift the exclusions in section 2, stating that:

“*Section 4 shall not apply to collective bargaining and agreements in respect of a relevant category of self-employed worker”. This category is composed of:*

(1) Actors engaged as voice-over actors

(2) Musicians engaged as session musicians

(3) Journalists engaged as freelance journalists”.

The list of relevant self-employed workers is now encompassed by these three categories, however the same amendments have also opened the possibility to conduct negotiation and conclude collective agreements for ‘“fully dependent” self-employed workers’, without any clear parameters or clear definition in the legislation as to what the term ‘“fully dependent” self-employed workers’ might mean.

LACK OF CONSULTATION WITH THE SOCIAL PARTNERS

This amendment to the legislation has been approved without any consultation with the social partners. While it is suggested in the complaint that it arose from a shared approach agreed with employers, in fact the text in the legislation goes far beyond a reference to the small cohort of actors and musicians that the Towards 2016 Transitional Agreement in 2008-2009 was envisaged to address.

In addition, under the amendment, the new categories of self-employed workers or of ‘“fully dependent” self-employed workers’ are determined by the Minister for Business, Enterprise and Innovation in consultation with a trade union only. In this categorization process, employers’ representatives or employers’ organisations do not play any role.

Currently in Ireland, the Minister can effectively determine whether a self-employed individual, in business on their own account, falls within the definition of a “false self-employed worker” or ‘“fully dependent” self-employed worker’ despite the fact that the second term while defined in the Act, lacks any real clarity.. Additionally, it is unclear as to with whom such a worker should engage in collective bargaining. The question of whether a worker is ‘“fully dependent” self-employed worker’ can be determined by the Minister based on the evidence of the trade union alone, without any consultation with the individual or body which engaged the independent contractor to carry out the services, or with any employers’ organisation.

There is a reason that workers operating under a contract of employment enjoy significant additional levels of protection under law, given the level of control usually associated with an employment relationship. An independent contractor (“undertaking” according to the EU

competition rules) does not face these constraints or controls and is not entitled to the same level of protection.

Of further concern is the introduction of a category of self-employed persons, in business on their own account, who will be excluded from the remit of the Competition Act. While the list of categories included in Schedule 4 is currently quite short, there is nothing to impede expansion of said list in the future. In fact, the amendment facilitates and envisages this extension, always based on a proposal from the trade union and in complete exclusion of the national employers' organisations perspective.

As a result of the decision of the Irish legislature to proceed in this way, there are significant adverse implications for Ireland's competitiveness. The individual consumer is likely to also be adversely impacted with higher costs for goods and services which fall within the unclear categorizations of '"fully dependent" self-employed worker" and those provided by the categories of the self-employed granted exemptions under Schedule 4 of the Competition (Amendment) of June 2017.

NON-COMPLIANCE WITH ARTICLE 6 OF THE REVISED EUROPEAN SOCIAL CHARTER

The situation explained above constitutes a clear lack of conformity with article 6.1 of the Revised Charter and needs to be taken into account by the ECSR when examining the collective complaint N. 123/2016.

Article 6.1 of the Revised Charter aims at promoting joint consultation between workers and employers or their organisations on all matters of mutual interest, including occupation issues, economic problems and social matters. The Government of Ireland is therefore expected to assist in bringing together employers and workers or their organisations on terms of equality with a view to consultation on all questions of mutual interest at every level.

The Amendment in question and the definitions contained therein are a social matter of mutual interest.

Likewise, the question as to whether a certain category of workers has to be considered as a "false self-employed" or '"fully dependent" self-employed worker' is a matter of mutual interest.

Therefore, the process leading to the Amendment Act and the concrete details of the amendment have failed to comply with Article 6.1 of the Revised Charter, accepted by the Government of Ireland.

Further, the same Government of Ireland had been invited by the ILO CEACR to hold consultations with all the parties concerned with the aim of limiting the restrictions to collective bargaining before the recent amendment. "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" (CEACR Observations, 2015).

Also of importance, the International Labour Conference Committee on the Application of Standard (ILC CAS), the "apex" of the ILO supervisory machinery, despite the lack of agreement between the tripartite constituents as of the scope for collective bargaining for self-employed, in its discussion on the case concluded "the Committee noted that this case related to issues of EU and Irish competition law. To this end, the Committee suggested that the Government and the social partners identify the types of contractual arrangements that would have a bearing on collective bargaining mechanisms" (CAS, Individual case – Ireland, 2016).

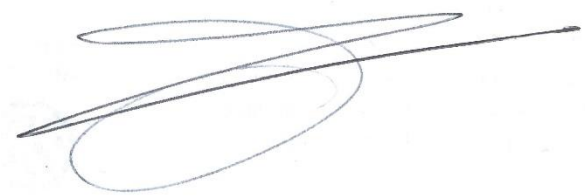
In this respect, the IOE and IBEC have sent their concern to the ILO CEACR on 1 September 2017, with regards to the application in law and practice of Right to Organise and Collective

Bargaining Convention, 1949 (No. 98) by the government of Ireland. They have underlined the following: “The situation in Ireland as a result of the Competition (Amendment) Act of 2017 is expressly against the long-standing principle at the basis and core of the International Labour Organisation, that requires all social policies to be discussed in consultation with the national social partners. In this regard, it is useful to recall the ILO Consultation (Industrial and National Levels) Recommendation, 1960 (No.113), para. 1 which provides that measures should be taken to promote effective consultations and cooperation between public authorities and employers and workers organisations without discrimination of any kind against these organisations. In accordance with para 5. of the Recommendation, such consultation should aim at ensuring that the public authorities seek the views, advice and assistance of these organisations, particularly in the preparation and implementation of laws and regulations affecting their interests”.

CONCLUDING REMARKS

The IOE, based on the indications provided by IBEC, trusts the ECSR that all the information detailed above will be duly taken into account when examining the application of Article 6.1 (right to bargain collectively – joint consultations between workers and employers) of the Revised Charter in Ireland and the substance of complaint N. 123/2016 of ICTU against Ireland.

Yours Faithfully,



Linda Kromjong
Secretary-General