EUROPEAN COMMITTEE OF SOCIAL RIGHTS
COMITÉ EUROPÉEN DES DROITS SOCIAUX

DECISION ON THE MERITS

Adoption: 12 September 2018

Notification: 4 October 2018

Publicity: 12 December 2018

Irish Congress of Trade Unions (ICTU) v. Ireland

Complaint No.123/2016

The European Committee of Social Rights, committee of independent experts established under Article 25 of the European Social Charter ("the Committee"), during its 301st session in the following composition:

Giuseppe PALMISANO, President
Monika SCHLACHTER, Vice-President
Karin LUKAS, Vice-President
Eliane CHEMLA, General Rapporteur
Birgitta NYSTRÖM
Petros STANGOS
Jozsef HAJDU
Marcin WUJCZYK
Krassimira SREDKOVA
Raul CANOSA USERA
François VANDAMME
Barbara KRESAL
Kristine DUPATE

Assisted by Henrik KRISTENSEN, Deputy Executive Secretary

Having deliberated on 5 July and 12 September 2018,

On the basis of the report presented by Monika SCHLACHTER,

Delivers the following decision adopted on this last date:

PROCEDURE

1. The complaint presented by the Irish Congress of Trade Unions (ICTU) was registered on 8 August 2016.

2. The complainant organisation alleges that the decision of the Irish Competition Authority prohibiting certain workers - deemed self-employed - such as voice over actors, free-lance journalists, and some musicians, from concluding collective agreements setting out minimum rates of pay and other working conditions, as this would amount to a breach of competition law, is in violation of Article 6 of the Charter.

3. On 23 March 2017, referring to Article 6 of the 1995 Protocol providing for a system of collective complaints ("the Protocol") the Committee declared the complaint admissible.

4. In its decision on admissibility, the Committee invited the Government to make written submissions on the merits of the Complaint by 7 June 2017.

5. Referring to Article 7§1 of the Protocol, the Committee invited the States Parties to the Protocol and the States having made a declaration in accordance with Article D§2 of the Charter, to notify any observations they wished to make on the merits of the complaint by 7 June 2017.

6. Referring to Article 7§2 of the Protocol, the Committee invited the international organisations of employers and workers mentioned in Article 27§2 of the 1961 Charter to make observations by 7 June 2017.

7. On 1 June 2017, the Government asked for an extension of the deadline for submitting its submissions on the merits. The President of the Committee extended this deadline until 8 September 2017.

8. The Governments submissions on the merits were submitted on 8 September 2017.

9. Observations by the International Organisation of Employers (IOE) were registered on 16 September 2016.

10. The deadline set for ICTU's response to the Government's submissions on the merits was 15 November 2017. The President then extended the deadline until 15 January 2018. ICTU's response was registered on 17 January 2018.

11. The Government was invited to submit a further response by 16 April 2018. The Government's further response was registered on 16 April 2018.

12. Additional information was submitted by ICTU on 10 May 2018.

13. The Government was invited to respond by 8 June 2018. The response to the additional information was registered on 8 June 2018.

14. Pursuant to Rule 31§4, the President of the Committee decided to close the written procedure upon the reception of the Government's response.

SUBMISSIONS OF THE PARTIES

A – The complainant organisation

15. ICTU asks the Committee to find that the situation in Ireland is in breach of Article 6 of the Charter on the grounds certain categories of workers deemed "self-employed" are denied the right to bargain collectively.

B – The respondent Government

16. The Government requests the Committee to find the complaint unfounded in all respects.

OBSERVATIONS BY EMPLOYERS' ORGANISATIONS

The International Organisation of Employers (IOE)

17. IOE recalls that Section 4 of the Competition Act 2002 mirrors Article 101(1) of the Treaty on the Functioning of the European Union (TFEU) in prohibiting anti-competitive agreements, decisions and concerted practices that can equate to directly or indirectly fixing purchase or selling prices or other trading conditions. In this respect IOE considers that 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, reinforced the view that collective labour agreements are only exempt from Article 101(1) 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".

18. According to IOE 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 by the 2017 amendment to Section 4 of the Competition Act 2002 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, according to IOE.

19. Moreover, IOE considers that the amending legislation was approved without any consultation with the social partners and that this in effect amounts to a clear lack of conformity with Article 6§1 of the Revised Charter.

RELEVANT DOMESTIC LAW AND PRACTICE

20. In their submissions the parties refer to the following provisions of domestic law:

> **"The Irish Competition Act 2002**
>
> **Section 4**
>
> 4.(1) Subject to the provisions of this Section, all agreements between undertakings, decisions by associations of undertakings and concerted practices which have as theft 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 1h15 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 arc 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.

The Competition (Amendment) Act 2017

PART 2B

Application of Section 4 to Collective Bargaining and Agreements in respect of Certain Categories of Workers

Definitions

15D. In this Part—

'collective bargaining' has the same meaning as it has in the Industrial Relations (Amendment) Act 2001 ;

'false self-employed worker' means 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;

'fully dependent self-employed worker' means 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 such services under contract is derived from not more than 2 persons;

'relevant category of self-employed worker' means—

(a) a class of worker specified in Schedule 4, or

(b) a class of false self-employed worker or fully dependent self-employed worker specified in an order made by the Minister under Section 15F;

'trade union' has the same meaning as it has in the Industrial Relations Act 1946.

Collective bargaining and agreements in respect of certain categories of workers

15E. Section 4 shall not apply to collective bargaining and agreements in respect of a relevant category of self-employed worker.

Prescribed relevant category of self-employed worker

15F. (1) A trade union which represents a class of—

(a) false self-employed worker, or

(b) fully dependent 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 dependent self-employed worker for the purposes of this Part.

(2) An application by a trade union under subsection (1) shall be made in the manner specified by the Minister and shall be accompanied by evidence to show—

(a) that the class of false self-employed worker or fully dependent self-employed worker, as the case may be, the subject of the application, falls within the definition of false self-employed worker or fully dependent self-employed worker, as the case may be, and

(b) that the prescribing of such class of false self-employed worker or fully dependent 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 to 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.

(3) Subject to subsection (5), where, in relation to an application under subsection (1), the Minister is satisfied—

(a) of the matters referred to in paragraphs (a) and (b) of subsection (2), and

(b) that it is appropriate to do so,

he or she may prescribe by order the class of false self-employed worker or fully dependent self-employed worker, as the case may be, as a relevant category of self-employed worker.

(4) Where the Minister is not satisfied in accordance with subsection (3), he or she shall refuse an application under subsection (2).

(5) An order under subsection (3) shall only be made after consultation by the Minister with—

(a) such other Minister of the Government who, in the opinion of the Minister, having regard to the functions of that other Minister of the Government, ought to be consulted, and

(b) any other person or body who, in the opinion of the Minister, having regard to the functions of that other person or body, ought to be consulted.

(6) Where a class of false self-employed worker or fully dependent self- employed worker has been prescribed by the Minister under this Section and, since the making of the order—

(a) the market conditions or circumstances which pertained to the making of that order have changed substantially, or

(b) new information relevant to the application which was the subject of the order becomes available to the Minister,

the Minister may, if he or she is of the opinion that it is no longer appropriate for the class of false self-employed worker or fully dependent self-employed worker concerned to be so prescribed, revoke the prescription of the relevant category of self-employed worker by order.

(7) Whenever the Minister proposes to make an order under subsection (6), he or she—

(a) shall inform in writing the trade union who made the application concerned of the proposal and of the reasons for it and he or she may specify a period for the making of a submission under subsection (8),

(b) may invite such other persons as he or she considers appropriate to make submissions in respect of his or her proposal within such a period as he or she may specify,

(c) shall, in a case where the Minister consulted another Minister of the Government or other person or body under subsection (5) in respect of the making of an order under subsection (3), the subject of the proposal, consult with that Minister of the Government or person or body in respect of the proposal concerned, and

(d) shall cause notice of the proposal to be published on the Department's website and in one national newspaper circulating within the State.

(8) A trade union notified under subsection (7) (a) or other person or body referred to in subsection (7)(b) may make a submission to the Minister within the period (if any) specified by the Minister under subsection (7) (a) or (b), as may be appropriate, regarding the proposal setting out the reasons why the order should or should not be made.

(9) The Minister shall consider any submission made to him or her under subsection (8) before making an order under subsection (6).

(10) Where the Minister makes an order under subsection (3) or (6), he or she shall cause notice of the making of the order to be published on the Department's website and in one national newspaper circulating within the State.".

Amendment of Principal Act

3. The Principal Act is amended by the insertion of the text set out in the Schedule as Schedule 4 to that Act"

RELEVANT INTERNATIONAL MATERIALS

A – The Council of Europe

21. The European Convention on Human Rights 1950 ("the Convention") includes the following provision:

> **"Article 11 - Freedom of assembly and association**
>
> 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."

1. European Court of Human Rights

22. Demir *and Baykara* v. Turkey - Application No. 34503/97, judgment of 12 November 2008:

> "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 Article 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 Article 11 § 2 – a category to which the applicants in the present case do not, however, belong (see paragraphs 106-07 above)."

23. Hrvatski *Liječnički Sindikat* v. Croatia - Application No. 3670/09, judgment of 27 November 2014:

> "59. In the absence of any exceptional circumstances, the Court finds it difficult to accept that upholding the principle of parity in collective bargaining is a legitimate aim (see paragraph 57 above) capable to justify depriving a trade union for three years and eight months of the most powerful instrument to protect occupational interests of its members. That is especially so in the present case where the applicant union was in that period not allowed to strike to pressure the Government of Croatia to grant doctors and dentists the same level of employment-related rights the Government had already agreed upon in the Annex, which had been invalidated on formal grounds only. It follows that the interference in question cannot be regarded as proportionate to the legitimate aim it sought to achieve."

2. Parliamentary Assembly

24. Resolution 2033 (2015) of 28 January 2015, "Protection of the right to bargain collectively, including the right to strike" reads as follows:

> "1. Social dialogue, the regular and institutionalised dialogue between employers' and workers' representatives, has been an inherent part of European socio-economic processes for decades. The rights to organise, to bargain collectively and to strike – all essential components of this dialogue – are not only democratic principles underlying modern economic processes, but fundamental rights enshrined in the European Convention on Human Rights (ETS No. 5) and the European Social Charter (revised) (ETS No. 163).
>
> 2. However, these fundamental rights have come under threat in many Council of Europe member States in recent years, in the context of the economic crisis and austerity measures. In some countries, the right to organise has been restricted, collective agreements have been revoked, collective bargaining undermined and the right to strike limited. As a consequence, in the affected countries, inequalities have grown, there has been a persistent trend towards lower wages, and negative effects on working and employment conditions have been observed.
>
> 3. The Parliamentary Assembly is most concerned by these trends and their consequences for the values, institutions and outcomes of economic governance. Without equal opportunities for all in accessing decent employment and without appropriate means of defending social rights in a globalised economic context, the inclusion, development and life chances of whole generations will be put into question. In the medium term, the exclusion of certain groups from economic development, the distribution of wealth and decision making could seriously damage European economies and democracy itself.
>
> 4. Investing in social rights is an investment in the future. In order to build and maintain strong and sustainable socio-economic systems in Europe, social rights need to be protected and promoted.
>
> 5. In particular, the rights to bargain collectively and to strike are crucial to ensure that workers and their organisations can effectively take part in the socio-economic process to promote their interests when it comes to wages, working conditions and social rights. "Social partners" should be taken to mean just that: "partners" in achieving economic performance, but sometimes opponents striving to find a settlement concerning the distribution of power and scarce resources."

B – The United Nations

25. The International Covenant on Economic, Social and Cultural Rights (New York, 16 December 1966) includes the following provision:

> **Article 8**
>
> "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;

(b) The right of trade unions to establish national federations or confederations and the right of the latter to form or join international trade-union organizations;

(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;

(d) The right to strike provided that it is exercised in conformity with the laws of the particular country.

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.

..."

C – International Labour Organisation

26. The Convention (No. 98) on the Right to Organise and to Bargain Collectively includes the following provision:

Article 4

"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."

27. General Survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization, 2008, International Labour Conference, 101st Session, 2012

"Workers covered by collective bargaining

209. 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,[499] fire service personnel,[500] seafarers,[501] self-employed and temporary workers,[502] outsourced or contract workers,[503] apprentices, non-resident workers and part-time workers,[504] dockworkers,[505] agricultural workers,[506] workers in religious or charity organizations,[507] domestic workers, workers in EPZs and migrant workers.[508] The Committee further emphasizes that the right to collective bargaining should be recognized for teaching personnel and managerial personnel in educational institutions, as well as staff engaged in technical and managerial functions in the education sector.[509]" [*footnotes omitted*]

D – European Union

28. 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 I 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.”

Court of Justice of the European Union: relevant case law

29. Albany International BV v. *Stichting Bedrijfspensioenfonds Textielindustrie,* Case C-67/96, judgment of 21 September 1999.

30. The Court of Justice found that by virtue of its nature and purpose, a collective agreement did not constitute a prohibited agreement between companies. Firstly, by nature it formed part of the fundamental right to bargain collectively; secondly, its purpose was to achieve the highest degree of social protection possible.

> "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."

31. FNV *Kunsten Informatie en Media* v. the Netherlands, Case C-413/13, judgment of 4 December 2014.

32. The Court decided that an agreement would fall outside the scope of Article 101 TFEU, if self-employed were in a comparable situation to a worker and if the agreement contributed to social policy.

> "22. it is to be recalled that, according to settled case-law, although certain restrictions of competition are inherent in collective agreements between organisations representing employers and employees, the social policy objectives pursued by such agreements would be seriously compromised if management and labour were subject to Article 101(1) TFEU when seeking jointly to adopt measures to improve conditions of work and employment (see judgments in *Albany*, EU:C:1999:430, paragraph 59; *International Transport Workers' Federation and Finnish Seamen's Union*, C-438/05, EU:C:2007:772, paragraph 49 and *3F* v *Commission*, C-319/07 P, EU:C:2009:435, paragraph 50)."
>
> "30. a provision of a collective labour agreement, such as that at issue in the main proceedings, in so far as it was concluded by an employees' organisation in the name, and on behalf, of the self-employed services providers who are its members, does not constitute the result of a collective negotiation between employers and employees, and cannot be excluded, by reason of its nature, from the scope of Article 101(1) TFEU."

33. The Court observed, however, that "it is not always easy to establish the status of some self-employed contractors as 'undertakings', such as the substitutes at issue in the main proceedings" (para. 32 of the judgment). It then subsequently set out how undertakings should be distinguished from employees. In short, employees are those that cannot independently determine their conduct on the market and do not bear the financial and economic risks of their activities, but are instead in a subordinate relationship towards an employer (paras. 33-36).

THE LAW

PRELIMINARY CONSIDERATIONS

As to the provisions of the Charter at stake

34. Both ICTU and the respondent Government variously refer to Article 6 of the Charter as a whole and to Article 6§2 of the Charter. The Committee recalls that Article 6 covers different aspects: joint consultation between workers and employers (Article 6§1), collective bargaining proper (Article 6§2, mediation and arbitration (Article 6§3) and collective action (Article 6§4). The Committee considers that the issue at stake in this complaint is the right of certain categories of self-employed workers to bargain collectively for the conclusion of collective agreements and it consequently decides to limit its assessment to Article 6§2.

As to Article 6§2 and self-employed workers

35. According to Part I of the Charter all workers and employers have the right to bargain collectively. Under Article 6§2 of Part II of the Charter, the Committee has primarily considered the right to bargain collectively of workers as dependent employees and has not hitherto addressed the situation of self-employed workers. In this respect, it is recalled that the Charter with one exception (Article 19§10) does not state whether its employment-related provisions apply to the self-employed. However, the Committee has constantly held that in principle the provisions of Part II of the Charter apply to the self-employed except where the context requires that they be limited to employed persons. No such context obtains in a generalised way for Article 6§2.

36. The Committee observes that nothing in the wording of Article 6 of the Charter entitles States Parties to impose restrictions on the right to bargain collectively of particular categories of workers. Therefore, any restrictions are exclusively limited to those provide for by Article G. It follows from this that the right to bargain collectively is not an absolute right and that it may be restricted by law where this pursues a legitimate aim and is necessary in a democratic society (see *mutatis mutandis* European Confederation of Police (EUROCOP) v. Ireland, Complaint No. 83/2012, decision on the merits of 2 December 2013, §159, and also European Council of Police Trade Unions (CESP) v. France, Complaint No. 101/2013, decision on the merits of 27 January 2016, §118). In this respect it cannot be automatically presumed that restrictions following from competition law or commercial law do not pursue a legitimate aim and/or are notnecessary in a democratic society, for example to protect the rights and freedoms of others.

37. The Committee further observes that the world of work is changing rapidly and fundamentally with a proliferation of contractual arrangements, often with the express aim of avoiding contracts of employment under labour law, of shifting risk from the labour engager to the labour provider. This has resulted in an increasing number of workers falling outside the definition of a dependent employee, including low-paid workers or service providers who are de facto “dependent” on one or more labour

engagers. These developments must be taken into account when determining the scope of Article 6§2 in respect of self-employed workers.

38. Moreover, the Committee emphasises that collective mechanisms in the field of work are justified by the comparably weak position of an individual supplier of labour in establishing the terms and conditions of their contract. This contrasts with competition law where the grouping of interests of suppliers endanger fair prices for consumers. To overcome the lack of individual bargaining power the anti-cartel regulations are considered inapplicable to labour contracts and this has also been generally accepted by the CJEU (see *Albany International BV v. Stichting Bedrijfspensioenfonds Textielindustrie,* Case C-67/96, judgment of 21 September 1999). In establishing the type of collective bargaining that is protected by the Charter, it is not sufficient to rely on distinctions between worker and self-employed, the decisive criterion is rather whether there is an imbalance of power between the providers and engagers of labour. Where providers of labour have no substantial influence on the content of contractual conditions, they must be given the possibility of improving the power imbalance through collective bargaining.

39. The Committee finally observes that ILO Conventions 98, 151 and 154 extend collective bargaining rights to all employers and workers and all subjects and according to the 2012 General Survey the right to collective bargaining should also cover organisations representing self-employed workers (ILO General Survey, para. 209).

40. .The Committee does not consider it appropriate to elaborate a general definition of how self-employed workers are covered by Article 6§2. However, even without developing the precise circumstances under which categories of self-employed workers fall under the personal scope of Article 6§2, an outright ban on collective bargaining of all self-employed workers would be excessive as it would run counter to the object and purpose of this provision (see *mutatis mutandis*, European Organisation of Military Associations (EUROMIL) v. Ireland, Complaint No. 112/2014, decision on the merits of 12 September 2017, §94).

ALLEGED VIOLATION OF ARTICLE 6§2 OF THE CHARTER

41. Article 6§2 of the Charter reads as follows:

Article 6 – The right to bargain collectively

Part I: “All workers and employers have the right to bargain collectively.”

Part II: “With a view to ensuring the effective exercise of the right to bargain collectively, the Parties undertake:

…

> 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;
>
> …"

A – Arguments of the parties

1. The complainant organisation

42. ICTU complains on behalf of certain self-employed workers who, by virtue of the principles relied on by the Competition Authority, find themselves classed as "undertakings" and hence are denied the right to collective bargaining.

43. 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, principally voice-over actors, journalists 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, Ireland is in breach of its obligations under Article 6 of the Charter.

Background

<u>Voice-over actors</u>

44. EQUITY/SIPTU is the Irish union for actors and is an affiliate of Congress 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.

45. A decision of the Competition Authority (No. E/04/002 of 2004) of 31 August 2004, found that the collective agreement was in breach of Section 4 of the Competition Act 2002 for the sole 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.

46. 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 light of this 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).

Journalists

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

48. There has been a long-standing collective agreement between the NUJ and the Provincial Newspapers Association of Ireland ('RNPA1', 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 bought by those papers. 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.

49. The NUJ published a Freelance Fees Guide reflecting the agreed rates and it was used by both the freelancers and the employers to establish the appropriate rate for an article.

50. 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.

Musicians

51. The complaint is also lodged on behalf of the Musicians' Union of Ireland which is affiliated to SIPTU and hence to ICTU. 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.

Subsequent developments

52. At the request of ICTU, the Competition Authority agreed in 2004 to review its decision. In 2006 the latter announced that it upheld its original decision. ICTU wrote to the Competition Authority again in December 2007 but in January 2008 again the Competition Authority 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. Consequently, it was believed that an amendment of the Competition Act would follow and allow collective agreements for such workers to become effective again.

53. However in January 2013, ICTU were informed by the relevant Minister 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. An exemption would only be possible where it was “entirely consistent with the goals of the EU/IMF Programme and the needs of the economy.” The letter made clear that the TROIKA “would not support the envisaged exceptions.”

54. ICTU wrote on 13 March 2013 to the President of the European Commission. The response of the European Commission was dated 18 April 2013 and stood firm on the proposition that EU law would not permit self-employed workers to exercise the right to bargain collectively.

55. ICTU refers to a decision of the Court of Justice of the European Union (‘CJEU’) judgment in *FNV Kunsten Informatie en Media v. the Netherlands*, Case C413/13, decision of 4 December 2014. 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.”

56. ICTU provides an overview of EU law on collective bargaining.

57. ICTU states that the principles raised in the complaint apply to many categories of worker, however it maintains that it is sufficient to highlight the effect of the decision on actors, journalists and musicians.

58. ICTU alleges that the denial of the right to bargain collectively to those workers who happen to be self-employed is in breach of the Charter. Many self-employed persons are workers in the true and well understood meaning of that term; they are workers on the simple basis that they earn their living from providing their labour to those who engage them. The Industrial Relations Act 1990 provides for a broad definition of a “worker”.

59. ICTU alleges that the denial of collective bargaining rights to certain categories of self-employed workers on the grounds that they are undertakings amounts to a violation of Article 6 of the Charter.

Present situation

60. In its response to the Government’s submissions ICTU acknowledges that the Irish Competition Amendment Act 2017 entered into force providing for certain classes of self-employed persons to be exempt from Section 4 of the Competition Act 2002. However it maintains that the situation remains in breach of Article 6§2 of the Charter; firstly on the ground that the 2017 Act gives no protection against EU law in Ireland and secondly the limited coverage of the Act.

No protection against EU law in Ireland

61. The 2017 Act only amends the domestic law. The 2017 Act does not purport to amend, and cannot amend, the Treaties of the European Union as they apply in the Irish legal order. Since accession to the European Union by Ireland, those Treaties apply directly in Ireland and the Irish courts must enforce them as part of domestic law.

62. The Competition Act 2002 constituted the enactment in Ireland of the relevant parts of Title VII, Chapter I and, in particular, Article 101, formerly Article 81, of the TFEU. The Treaty remains directly enforceable in Ireland and Article 101 has not been amended as the 2017 Act purports to amend the Irish legislation. None of this is contested in the Government’s observations.

63. The new Section 15F(2)(iii) of the Competition Act 2002 which was inserted by the 2017 Act provides that a class of workers designated by the Minister to be exempt from Irish competition law: “will not otherwise contravene any other

enactment or rule of law (including the law in relation to the European Union) relating to the prevention, restriction or distortion of competition in trade in any goods or services." This recognises the need to conform to EU competition law.

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

65. ICTU argues that it is possible that an employer could refuse to bargain collectively or honour a collective agreement on the grounds that it would involve a breach of EU law.

Limited Coverage of the Act

66. The 2017 Act in Schedule 4 specifies three categories of self-employed worker. These are actors engaged as voice-over actors, musicians engaged as session musicians, and journalists engaged as freelance journalists. These three categories cover only a limited proportion of the professions identified. Most actors, of course, are self-employed and they spend most if not all of their working time engaged in stage, film, television, radio and other work rather than performing voice-overs for adverts. There are very many professional self-employed musicians who perform other than as session musicians (for example musicians who play booked gigs, solo or in bands).

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

68. ICTU argues that its complaint is not restricted to the three categories of worker referred to in Schedule 4.

69. ICTU accepts that whilst voice-over actors, session musicians and freelance journalists are specifically protected, the 2017 Act provides that two other categories of self-employed workers can apply for protection. Actors other than voice-over actors, musicians other than session musicians and journalists other than freelancers and all other self-employed workers can only achieve the protection of the 2017 Act, if the Minister entertains an application for exemption from (Irish) competition law in respect of them under Section 15F(1). Such an application for a prescribed class of worker can only succeed, if the worker falls into one of two categories. The first category requires a worker in respect of whom an application can be made to be deemed as a 'false self-employed worker' – which ICTU maintains is overtly restrictive. The second category of worker in respect of whom an application for exemption can be made to the Minister is that of "fully dependent self-employed worker". ICTU also maintains this is too restrictive and will have the effect of depriving many self-employed workers from the right to collective bargaining.

70. Lastly ICTU maintains that there are procedural limitations on applications under Section 15F(1).

2. The respondent Government

71. The Government does not accept that there is any breach of the Charter. It maintains that since the complaint was lodged there has been a significant change in the legislative framework governing the rights of self-employed persons to engage in collective bargaining. The Competition (Amendment) Act 2017 now provides a legislative framework under which classes of self-employed persons may be exempt from Section 4 of the Competition Act 2002, 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.

72. 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.

73. The Competition Authority decided 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.

74. Successive 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 voiceover actors, freelance journalists and session musicians from the provisions of Section 4 of the Competition Act 2002. However, it was understood and accepted that any amending legislation was always going to be subject to consistency with the EU competition law.

75. In 2008, the Irish Government entered into an EU/IMF Programme of Financial Support arising from the very serious financial and economic situation 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.

76. 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.

77. 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.

78. 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.

79. 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.

80. 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 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.

81. 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

82. In addition 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.

83. 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". 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"*.

84. The Government 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.

85. The Government states that the assessment of conformity with the Charter of domestic law and practice should occur 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 (CESP) v. Portugal, Complaint No. 11/2001, decision on the merits of 21 May 2001, §§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 No. 32/2006, decision on the merits of 16 October 2006, §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 i.e. 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.

86. In conclusion, the Government 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.

87. As regards ICTU's argument that that the 2017 Act does not preclude the application of European Competition Law and therefore "will not and cannot afford protection against Article 101 of the Treaty" the Government states that the argument made in this regard is inappropriate and ought to be disregarded by the Committee. The compatibility of Irish domestic law is the only matter that is properly before the Committee and, in these circumstances, it is submitted that it would be inappropriate for the Committee to engage in any consideration of the compatibility aspects of European Law, including Articles of the Treaty, with the Charter.

88. According to the Government any complaint of alleged incompatibility of the TFEU or European legislation introduced on foot of the TFEU with the Charter could only properly be brought against the European Union itself, were the Union to be a party to the Charter. As the Union is not a Party to the Charter, the Committee lacks jurisdiction to consider any question of compatibility of European Law with the Charter. Further, it would not be appropriate for Ireland, as an individual Member State, to purport to defend the compatibility of aspects of European Union Law with the Charter. The defence of European Law as regards any alleged incompatibility with the Charter would, more properly, be a matter for the European Commission who is not a party to this complaint. It would not be appropriate for a single Member State to purport to express the views of all Member States and or the institutions of the Union. Ireland is only in a position to answer the complaint that has been made to the Committee.

89. As regards the allegation that there are deficiencies in the Competition (Amendment) Act 2017, the Government states that the position of ICTU is contradictory and inconsistent. The alleged deficiencies identified by ICTU are speculative and not supported by any evidence. It maintains that ICTU have not provided any evidence to support the contention that there are deficiencies in the 2017 Act, whether under the specific headings or otherwise. In so far as criticism is made of the definitions contained in the 2017 Act of 'false self-employed worker' or 'fully dependent self-employed worker', they are made on a theoretical basis and without reference to any evidence of actual self-employed workers who have been excluded from the benefits of the 2017 Act by reason of the criticisms contained in the Response.

90. The Government states that to date there have been no applications under Section 15F of Part 2B of the 2002 Act. The Government notes that ICTU do not put forward any evidence of there existing a class of workers who seek to be prescribed

as a class of self-employed workers under Section 15F but who have been unable to do so by reason of the definition of 'false-self-employed worker' or 'fully dependant self-employed worker.

91. Further, ICTU have not identified any situation whereby a class of self-employed workers have sought to engage in collective bargaining following the passage of the 2017 Act but have been unable to do so by reason of the alleged deficiencies identified in the Response.

92. As regards the alleged procedural limitations on applications that may be made under Section 15F of Part 2B of the 2002 Act and claims that this procedure amounts to a restriction on the right protected by Article 6 of the Charter, the Government states that this argument is made in the abstract without reference to any factual situation whereby a class of self-employed persons have been unable to exercise a right to engage in collective bargaining.

B – Assessment of the Committee

93. Under Article 6§2 the Committee has constantly held that domestic law must recognise that employers' and workers' organisations may regulate their relations by collective agreement. If necessary and useful, and in particular if the spontaneous development of collective bargaining is not sufficient, positive measures should be taken to facilitate and encourage the conclusion of collective agreements. Whatever the procedures put in place, collective bargaining should remain free and voluntary (Conclusions I (1969), Statement of Interpretation on Article 6§2).

94. Moreover, States Parties should not interfere in the freedom of trade unions to decide themselves which industrial relationships they wish to regulate in collective agreements and which legitimate methods should be used in their effort to promote and defend the interest of the workers concerned, including the use of collective action. Trade unions must be allowed to strive for the improvement of existing living and working conditions of workers and in this area the rights of trade unions should not be limited by legislation to the attainment of minimum conditions (Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees (TCO) v. Sweden, Complaint No. 85/2012, decision on admissibility and the merits of 3 July 2013, §§111 and 120).

95. As noted above (§§ 35-40, preliminary considerations), the Committee further considers that self-employed workers should enjoy the right to bargain collectively through organisations that represent them, including in respect of remuneration for services provided, subject only to restrictions provided by law, pursuing a legitimate aim and being necessary in a democratic society (Article G of the Charter).

Situation prior to the entry into force of the Competition (Amendment) Act 2017

96. The Committee notes that Section 4 of the Competition Act 2002 prohibits and makes void all agreements between undertakings, decisions by bodies representing 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. This reflects the provisions of Article 101 TFEU, which contains a similar prohibition in relation to agreements, decisions and concerted practices, which may affect trade between Member States.

97. The Committee further notes that the decision of the Competition Authority (No. E/04/002 of 2004) of 31 August 2004, found that a collective agreement between the trade union EQUITY/SIPTU (representing inter alia voice-over actors) and the Institute of Advertising Practitioners was in breach of Section 4 of the Competition Act 2002 for the exclusive reason that each actor was considered to be a business "undertaking" and it being unlawful for undertakings to agree to fix prices for the sale of their services. According to ICTU this decision, which was upheld by the Competition Authority after a review in 2006, had similar implications for collective agreements concluded by the National Union of Journalists in respect of freelance journalists and for the bargaining options of certain musicians represented by the Musicians Union of Ireland.

98. The Committee considers that the situation amounted to a ban on collective bargaining with respect to remuneration for the categories of self-employed workers specifically referred to in the complaint (voice-over actors, freelance journalists and certain musicians) and thus to a restriction of the right guaranteed by Article 6§2 of the Charter. Although the restriction was provided for by law and could be said to pursue a legitimate aim of ensuring effective and undistorted competition in trade with a view to protecting the rights and freedoms of others, the Committee considers that the ban was excessive and therefore not necessary in a democratic society in that the categories of persons included in the notion of "undertaking" were over-inclusive.

99. Without finding it necessary to determine whether the particular categories self-employed workers in question were "false self-employed" or "fully dependent self-employed workers", the Committee considers it evident that they cannot predominantly be characterized as genuine independent self-employed meeting all or most of criteria such as having several clients, having the authority to hire staff, and having the authority to make important strategic decisions about how to run the business. The self-employed workers concerned here are obviously not in a position to influence their conditions of pay once they have been denied the right to bargain collectively.

100. Moreover, the Committee does not consider that permitting the self-employed workers in question to bargain collectively and conclude collective agreements, including in respect of remuneration, would have an impact on competition in trade that would be significantly different from the impact on such competition of collective agreements concluded solely in respect of dependent workers (employees).

101. For these reasons, the Committee holds that the ban on collective bargaining was not necessary in a democratic society and the situation that obtained before the entry into force of the 2017 Act was therefore in breach of Article 6§2 of the Charter.

Situation after the entry into force of the Competition (Amendment) Act 2017

102. The Committee recalls that within the scope of the collective complaints procedure it bases its assessment of conformity with the Charter on the domestic law and practice applicable on the date of the decision on the merits of the complaint (European Council of Police Trade Unions v. Portugal (CESP), Complaint No. 11/2001, decision on the merits of 21 May 2001).

103. The Committee notes that the Competition (Amendment) Act 2017 was signed into law on 7 June 2017. Furthermore, 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.

104. The Competition (Amendment) Act 2017 provides that Section 4 of the Competition Act 2002 is not applied to collective bargaining and agreements in respect of certain categories of workers. More specifically 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 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 dependent self-employed worker specified in an Order made by the Minister under Section 15F.

105. 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

106. Having examined the Competition (Amendment) Act 2017, the Committee considers that it removes the restriction to Article 6§2 of the Charter previously affecting the self-employed workers listed in Schedule 4 of the Act, i.e. voice-over actors, session musicians and freelance journalists, and the situation is therefore in conformity with the Charter as far as those self-employed workers are concerned.

107. With respect to other self-employed workers, the Committee notes that 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.

108. Thus, 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". Section 15F applies in respect of workers who may be considered to be either a false self-employed worker or a fully dependent self-employed worker.

109. The Committee notes that according to ICTU this scope of application is too restrictive and will deprive many self-employed workers of the right to bargain collectively. In this respect, ICTU maintains that the concepts of false self-employed worker or fully dependant self-employed worker are excessively narrow and that there are procedural limitations amounting to a restriction on Article 6§2 of the Charter, in particular that the prescribing of the class of self-employed workers will have no or minimal economic effect on the market, will not lead to significant cost to the State and will not contravene any other law, including EU law, relating to the prevention, restriction or distortion of competition in trade.

110. However, the Committee, while acknowledging that the exact scope to be given by the national authorities to the concepts of false self-employed worker or fully dependant self-employed worker remains as yet undefined, considers that the claim about Section 15F being overly restrictive is essentially speculative in the absence of evidence that self-employed workers have been denied recognition as belonging to a class of false self-employed worker or fully dependant self-employed worker. It observes in this respect that Section 4 of the Competition Act 2002 does not contain any explicit prohibition of collective bargaining for self-employed workers and that the restrictions had followed from an interpretation by the Competition Authority. The Committee is of the view that the question of whether the preconditions establishing self-employed workers as belonging to the two specified categories are overly

restrictive depends on the interpretation of these preconditions in practice. Furthermore,, while the procedural requirements for the prescription of a class of self-employed workers appear strict, whether this runs contrary to the Charter similarly depends on the interpretation given to those requirements in practice. Therefore, the Committee does not consider it demonstrated, on the basis of the evidence before it, that they go beyond the boundaries of Article G of the Charter.

111. The Committee emphasises nevertheless that the Minister's decisions pursuant to Section 15F must take into account the interpretation of Article 6§2 outlined above bearing in mind in particular that any restrictions on the right to bargain collectively in respect of self-employed workers must respect the conditions provided by Article G of the Charter. The Committee considers that self-employed workers having no substantial influence on the content of their contractual conditions, if they were to bargain individually, must therefore be given the right to bargain collectively. It highlights in this respect that an overly restrictive interpretation of Section 15F would run the risk of being in violation of Article 6§2 of the Charter.

112. Finally, the Committee notes the claim of ICTU that the Competition (Amendment) Act 2017 gives no protection against EU law in Ireland, specifically against Article 101 TFEU. ICTU points out that the 2017 Act does not purport to amend, and cannot amend, the Treaties of the European Union as they apply in the Irish legal order. Since accession to the European Union by Ireland, those Treaties apply directly in Ireland and the Irish courts must enforce them as part of domestic law.

113. As regards this argument, the Committee recalls its general approach to the relationship between the Charter and EU law. With respect to the relevance for the Charter of any EU Treaty rules or legally binding measures adopted by the institutions of the EU within the framework of EU law, the fact that national provisions are based on such rules or binding measures does not remove them from the ambit of the Charter.

114. In this regard, the Committee has already stated that it is neither competent to assess the conformity of national situations with a directive of the European Union nor to assess the compliance of a directive with the European Social Charter. However, when Member States of the European Union agree on binding measures in the form of directives which relate to matters within the remit of the European Social Charter, they should – both when preparing the text in question and when transposing 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 transposition of a European Union directive into domestic law may affect the proper implementation of the Charter" (see Confédération Générale du Travail (CGT) v. France, Complaint No. 55/2009, decision on the merits of 23 June 2010, §§32 and 33; see also LO and TCO v. Sweden, Complaint No. 85/2012, decision on admissibility and the merits of 3 July 2013, §§72 and 73, with regard to to national

provisions based on preliminary rulings given by the CJEU on the basis of Article 267 TFEU).

115. The Committee considers that the same principle is applicable – *mutatis mutandis* – to the transposition into national provisions of TFEU Articles, as well as to TFEU provisions where they are directly applicable in the EU member State internal law. However, in the instant case Article 101 TFEU is not likely, per se, to affect the implementation of the Charter, as it does not as such restrict collective bargaining rights for workers and allows for the exemption of certain categories of self-employed workers. In addition, the domestic law in Ireland *a priori* does not disclose any violation of Article 6§2 of the Charter in this respect. The Committee is therefore not in a position to entertain the claim by ICTU that it is the very existence of EU law in Ireland, being a member state of the EU, that constitutes a violation of Article 6§2 of the Charter by rendering collective bargaining on behalf of self-employed workers unlawful. In other words, the Committee cannot assess the potential risk of EU law being applied, but only its actual execution through domestic law.

116. For these reasons, the Committee holds that there is no violation of Article 6§2 of the Charter.

CONCLUSION

For these reasons, the Committee concludes by 11 votes to 2 that there is no violation of Article 6§2 of the Charter.

Monika SCHLACHTER Rapporteur	Giuseppe PALMISANO President	Henrik KRISTENSEN Deputy Executive Secretary

In accordance with Rule 35§1 of the Rules, a joint disenting opinion of Petros STANGOS et Barbara KRESAL is appended to this decision.

Joint dissenting opinion of
Petros STANGOS and Barbara KRESAL

We do not agree with the conclusion that most Committee members came to, namely that there was no violation in this case of Article 6§2 of the Charter.

We consider that the right to collective bargaining is an especially important collective labour right and that this right should be effectively guaranteed in practice to all workers, including self-employed workers who are not independent contractors. Such self-employed workers often find themselves in precarious and insecure situations, often even in worse than regular workers, also due to the fact that individually, they can have weak bargaining position and are, besides that, usually not unionised and not engaged in collective bargaining. Instead of restricting the right to collective bargaining and impeding its effective implementation in practice, the State should promote it for all categories of workers, including self-employed workers who are in need of such protection. The majority decision rightly says in the preliminary considerations that "where providers of labour have no substantial influence on the content of contractual conditions, they must be given the possibility of improving the power imbalance through collective bargaining" (see paragraph 38 of the decision).

What the majority decision failed to take into account was the fact that the complainant trade union submitted this complaint on behalf of all categories of self-employed workers who fall within the scope of Section 4 of the 2002 Competition Act as interpreted by the Competition Authority. Through its decisions in 2004 and 2006, the Competition Authority had brought three specific categories of self-employed workers (voice-over actors, freelance journalists and session musicians) within the scope of this legislation. However, the complainant trade union alleges the violation of Article 6§2 of the Charter by a law of general scope, which establishes standards expected to be applied to any legal person lying within its scope by authorities other than the author of the measure (the legislator), namely by the executive, acting under the supervision of the judiciary. The decision adopted by the majority of the Committee refers to the fact that the complainant organisation considers the disputed legislation to apply generally, resulting therefore in a violation of the Charter (see paragraphs 57 and 68 of the decision), but it does so only formally, without drawing the appropriate legal inference.

In point of fact, the Irish Competition Act 2002, as amended by the Competition (Amendment) Act 2017 establishes an exception for certain categories of self-employed workers (which are those covered by the Competition Authority's decisions of 2004 and 2006) regarding the application of Section 4 of the 2002 Act, which is interpreted by the Competition Authority to mean that access to collective bargaining for the three above-mentioned categories of worker is prohibited on the ground that through collective bargaining, each of the workers concerned set up agreements between companies which distort competition. Yet for any other category of self-employed workers with the same or similar characteristics as the three categories of workers explicitly exempted from the prohibition, Section 4 of the 2002 Act remains general in scope and hence a general legal rule resulting in a violation of Article 6§2 of the Charter. Articles 15E and 15F of the 2002 Act, as incorporated by the 2017

Act, grant all other categories of self-employed workers a “quasi-exemption”, or an exemption that is not equal to that enjoyed by the three aforementioned categories.

The latter provision grants any other legal person who claims that he/she is a “false self-employed worker” or a “fully dependent self-employed worker”, the chance to ask the Minister to order their association an exemption, i.e. the right to engage in collective bargaining. Yet the power delegated to the Minister in this connection is not made explicitly subject to an obligation to achieve results. The executive enjoys a wide margin of discretion in the case of all other self-employed workers, which is unbalanced in relation to the power firmly enshrined in the law under which the three specific categories of self-employed workers are permanently exempted from the prohibition set out in Section 4 of the 2002 Act. Such legal regulation which puts the right to collective bargaining of other categories of self-employed workers in the hands of the executive and makes the realisation of this right entirely dependent and conditional on prior decision of the executive power (Minister’s Order) is a serious barrier and can result in refraining potential self-employed workers from their collective engagement and collective bargaining. Such restriction of their right to collective bargaining cannot be justified. It is excessive, since less restrictive measures are possible. It is true that the decision adopted by a majority of Committee members acknowledges the “risk” of “an overly restrictive interpretation”, probably by the Minister, of the required conditions (incorporated into the 2002 Act by the 2017 Act) for a category of self-employed workers to be permitted to take part in collective bargaining, and hence of a violation of Article 6§2 of the Charter (see paragraph 111 of the decision). There is more than a risk. The Act of 2002, although duly amended, in keeping with its general scope, by the new provisions (Sections 15D-F) on the substantive conditions and procedural requirements which any category of self-employed workers must satisfy to take part in collective bargaining, exacerbates this “risk” in that it introduces a regulation on the freedom to take part in collective bargaining which leaves room for all sorts of subjective interpretation by the executive. This type of regulation is at variance with the measures to “promote” collective bargaining required by Article 6§2 of the Charter and hence in breach of that provision.