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Absence of protection for the right to Freedom of Association, the Right to Organise and Collective Bargaining for self-employed (including freelance/atypical) workers.

The Irish Congress of Trade Unions welcomes the recent commencement of the Industrial Relations (Amendment) Act 2015. Its passage was assisted by recommendation 107.46 made to Ireland in 2011 by UN member states as part of the United Nations Universal Periodic Review process.

That welcome is tempered by our disappointment at the failure of the Irish government to meet commitments made to the ICTU to bring forward legislation granting the right to collective bargaining and representation to certain classes of freelance/atypical workers.

The use of Competition Law to inhibit the right to collective representation for atypical workers serves to undermine the rights of a growing cohort of workers.

The position of the ICTU is set out in a letter to Ms Karan Curtin which is attached in annex #1.

We would like to bring to your attention a significant gap in the legislation, specifically the absence of protection for the right to Freedom of Association, the Right to Organise and Collective Bargaining for self-employed workers. Article 2 of ILO Convention No.87 on Freedom of Association and Protection of the Right to Organise (ratified by Ireland in 1955) provides that:

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

However the Competition Authority of Ireland (The Competition and Consumer Protection Commission) has Determined that a collective agreement concluded between a trade union (EQUITY/SIPTU) and an Employer Association (Institute of Advertising Practitioners in Ireland) was that the collective agreement was in breach of s.4 Competition Act 2002 for the exclusive reason that each actor was considered to be a business "undertaking" and it is unlawful for undertakings to agree to fix prices for the sale of their services (No.E/04/002 of 2004).

The Competition Authority threatened to fine EQUITY/SIPTU if it sought to use the collective agreement. The size of fine threatened was up to €4 million. In the face of this threat EQUITY/SIPTU had no option but to sign

an undertaking drawn up by the Competition Authority which precluded use of the collective agreement.

Earlier this year (2015) at the request of the ICTU, the Competition Authority has reviewed its decision. In March 2015, it announced that it upheld its original decision and no progress was made to address this deficit in the amending legislation.

The concern of Congress is that there are increasing categories of self-employed workers who, by virtue of the principle relied on by the Competition Authority, find themselves classed as "undertakings" and hence excluded from the right to collective bargaining. Apart from actors doing voice-overs for adverts, the majority of actors are affected by the ruling, including actors engaged to work in any dramatic production for radio, television, film or theatre. Moreover, many other classes of worker will be denied this fundamental right if the ruling by the Competition Authority stands. For example freelance journalists and photographers providing written copy, sound and visual contributions, photos and film clips to media outlets; writers for radio, television and film drama; musicians hired for gigs, recording sessions, orchestras and bands; dancers for shows, clubs and other performances; models on photo-shoots; bricklayers and other skilled tradesmen in the construction industry and many, many others will all be excluded from the right to collective bargaining.
The unions which organise these workers are likewise denied their function and purpose of negotiating collective agreements, even with willing employers.

It is important to observe that use of the device of self-employment has expanded dramatically in Ireland and in the EU as a means of avoiding or diminishing employers' burdens in respect of tax liabilities, national

insurance contributions, holiday entitlement, pension contributions, wages bills during non-productive periods, and health and safety obligations.
It is not disputed that competition law should preclude price fixing agreements amongst cartels of businesses. It is also accepted that there are some circumstances where a business can be conducted by a single person (whether or not incorporated as a legal entity). Congress's concern is that many self-employed persons are workers in the true and well understood meaning of that term; workers indeed who usually have little if any control over the legal niceties of the nature of the contractual relationship with those for whom they work. They are workers on the simple basis that they earn their living from providing their labour for remuneration to others. The preamble to the definition of "worker" in s.4 Industrial Relations Act 1946 (effectively re-stated in s.23 Industrial Relations Act 1990) captures this well. It materially provides (subject to the exclusion of some specific categories irrelevant for the purposes of this illustration) that:

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

What is required for the limited purpose of the properly protecting the legitimacy of collective bargaining under competition law is a workable distinction between the sole-trade carrying on a business and a worker in the everyday sense of that word. It is suggested that the key distinction of 'subordination' identified in the EU legal definition of 'worker' serves this function. Thus the actor, musician or commercial pilot all obviously work in accordance with the direction of the 'employer' (or its servants or agents) and, whilst they utilise their skills in their characteristic ways each

such worker is plainly subordinated to the control of the 'employer'. The freelance dramatist, author or journalist has more notional freedom but that degree of autonomy is also subordinate to the 'employer' (or its servants or agents) which may in the usual situation, accept or reject the proffered work or require it to be edited or changed.

As part of the discussions with the Government, in 2012 Congress wrote to the Minister for Jobs, Enterprise and Innovation seeking an exemption from the Competition Act in relation to the collective agreement in question. By a letter dated 24 January 2013 the private secretary to the Minister explained that the Memorandum of Understanding imposed by the TROIKA as a condition of financial support precluded the Irish State from granting any further exemption from the Competition Act unless the exemption 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." The letter continued:

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

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

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

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

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

The ILO Committee of Experts on the Application of Conventions and Recommendations similarly rejects "employment relationships disguised as civil contracts for the provision of services" so as to preclude the formation of trade unions (ILO, *General Survey on the fundamental Conventions concerning rights at work in the light of the ILO Declaration on Social Justice for a Fair Globalization 2008*, ILO, 2012, para.77). Thus the ILO holds that the self-employed are workers who may join trade unions; it follows that they must be entitled to the benefit of collective agreements negotiated by those trade unions - since that is the very purpose of joining a trade union. For a State body such as the Competition Authority effectively to preclude a trade union from making (or enforcing) collective agreements on behalf of its self-employed members (or to penalise or threaten to penalise a union for doing so) must be a breach of Article 3 of Convention 87 which provides:

1. Workers' and employers' organisations shall have the right to draw up their constitutions and rules, to elect their representatives in full freedom, to organise their administration and activities and to formulate their programmes.
2. The public authorities shall refrain from any interference which would restrict this right or impede the lawful exercise thereof.

Likewise, the taking of industrial action to achieve or enforce a collective agreement governing conditions of self-employed workers would no doubt be regarded by the Competition Authority as a restriction or distortion of competition in itself or, at the least, action to taken to achieve such a distortion of competition by making or enforcing the collective agreement. However, denial of the right to strike on that ground would clearly be in breach of Article 3 of Convention 87 since the ILO recognises the right to strike as one of the essential means by which workers defend their economic and social interests (*Digest*, op. cit., paragraphs 520-523). The ILO jurisprudence has never held that self-employed workers may not have the right to strike. Nor does that jurisprudence recognise amongst the legitimate grounds for restricting the right to strike that the strike might distort free competition (whether amongst the self-employed or otherwise) (*Digest*, op. cit., paragraphs 570ff).

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

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

> "Measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and

> utilisation of machinery for voluntary negotiation between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements".

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

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

Paragraph 898 deals with the specific proposition that "no provision in Convention 98 authorizes the exclusion of staff having the status of contract employee from its scope." This paragraph derives from the 324th Report, Case No. 2083, para. 254; the 327th Report, Case No. 2138, para. 544; and the 335th Report, Case No. 2303, para. 1372, in each of which the proposition was stated and applied. These cases involved, respectively, casual workers, workers on probation and workers employed by a sub-contractor. There is no reason to suppose that the proposition should not apply equally to workers providing services under a contract, i.e. the self-employed. Consistently with this, the *Digest* in dealing with the categories of workers covered by collective bargaining (paragraphs 885ff), gives no hint that it is permissible to exclude the self-employed

from the right to collective bargaining. Nor does it suggest that collective bargaining may not apply if a State authority holds that it is anti-competitive.

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

> "The suspension or derogation by decree – without the agreement of the parties – of collective agreements freely entered into by the parties violates the principle of free and voluntary collective bargaining established in Article 4 of Convention No. 98".

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

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

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

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

Neither does the *General Survey* recognise the preservation of competition as a legitimate ground for restricting the right to collective bargaining.

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

> "Under the terms of Article 4 of the Convention, collective bargaining must be free and voluntary and respect the principle of the autonomy of the parties. However, the public authorities are under the

> obligation to ensure its promotion. Interventions by the authorities which have the effect of cancelling or modifying the content of collective agreements freely concluded by the social partners would therefore be contrary to the principle of free and voluntary negotiation. The detailed regulation of negotiations by law would also infringe the autonomy of the parties".

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

Congress conclusion is that the consistent jurisprudence of the ILO requires that self-employed are workers and may not therefore be excluded from the right to collective bargaining.

Congress is therefore requesting that UN member states as part of the United Nations Universal Periodic Review process issue a recommendation to the Government of Ireland that they take action to implement reforms to properly protect the right of self-employed (including freelance/atypical) workers to collectively bargain.