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Submission by Irish Congress of Trade Unions to the Department of Justice to help shape Ireland's second National Report for the 25th Session of the UPR Working Group April/May 2016

23 October 2015

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 to address two important areas in the legislation:

a. 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.

b. Failure by the Irish Government to protect the rights enshrined under article 11 of the European Convention for the Protection of Human Rights

A. 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.

We would like to bring to your attention (we have also done this in a submission to the UPR) 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 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.

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)".

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 has therefore requested 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.

B. Failure to protect the rights to freedom of expression and right to form and join trade unions under article 11 of the ECHR

There are also outstanding issues in relation to the right of trade unions to represent their members as set out in the Wilson Judgement of the European Court of Human Rights.

The European Court made it clear in Wilson v the UK that a trade union must be free to strive for the protection of its members interests and that individual members have a right that the trade unions should be heard. They have set out the essential elements of the right to freedom of association as including the right of a trade union to seek to persuade the employer to hear what they have to say on behalf of its members. The court examined the ILO Conventions 87 and 98 and the 1998 report of the ILO Committee on the Freedom of Association, which confirmed the voluntary character of collective bargaining. However, the Court went on to say that the words "for the protection of his interests" are not redundant and the Convention safeguards the freedom to protect the interests of trade union members by trade union action, the conduct and development of which the contracting states must both permit and make possible. A trade union must therefore be free to strive for the protection

of its members interests and the individuals must have a right that the trade union should be heard. They leave each state a free choice as to the means to be used to secure this right.

The Court has not yet been prepared to hold that the freedom of a trade union to make its voice heard extends to imposing on an employer an obligation to recognise a trade union. The union and its members must however be free to seek to persuade the employer to listen to what it has to say on behalf of its members.

The Irish Government has failed to introduce a mechanism to ensure the right to be heard is vindicated for Irish workers.