

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS  
COMPETITION COMMITTEE****Competition Issues in Labour Markets – Note by Ireland****5 June 2019**

This document reproduces a written contribution from Ireland submitted for Item 4 of the 131<sup>st</sup> OECD Competition committee meeting on 5-7 June 2019.

More documents related to this discussion can be found at

<http://www.oecd.org/daf/competition/competition-concerns-in-labour-markets.htm>

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## Ireland

### 1. Introduction

1. This submission has been prepared by the Irish Competition and Consumer Protection Commission (“the CCPC”) to inform the discussion at the OECD Roundtable on 5 June 2019 which will address ‘Competition Issues in Labour Markets’.
2. The submission looks at the interface between competition law and employment law in Ireland. It focuses in particular on tensions surrounding the collective bargaining rights of certain categories of self-employed workers. These tensions, which have been manifest in Ireland for many years, culminated in the introduction of new legislation<sup>1</sup> in Ireland in 2017 which extended collective bargaining rights to a small number of specified groups of self-employed workers and made provision for two other categories of self-employed workers to apply for such rights in strictly defined circumstances.
3. This note provides detail on the Irish *Competition (Amendment) Act 2017* (“the 2017 Act”) and sets out the background to the Act in Ireland, including the CCPC’s previous activity in this area.

### 2. Collective Bargaining and Self-Employed Workers – The Experience of Ireland

#### 2.1. Competition (Amendment) Act 2017

4. In 2017, the Irish parliament amended the [Competition Act 2002](#) to provide that Section 4 of that Act (which prohibits anti-competitive agreements, decisions and concerted practices, and which mirrors Article 101 TFEU) shall not apply to collective bargaining and agreements in respect of a ‘*relevant category of self-employed worker*’. The Act provides a specific exemption for three named categories of self-employed workers: Voice-over Actors; Session musicians; and Freelance Journalists – since 2017 these workers have the right to bargain collectively with employers in relation to working conditions and terms of employment, including pay rates.<sup>2</sup> The 2017 Act also provides a mechanism which could, in strictly defined circumstances, allow other groups of self-employed workers to bargain collectively in the future.
5. Two ‘*relevant categories*’ of self-employed workers are defined in the 2017 Act: false self-employed workers and fully dependent self-employed workers. This is the first time that a statutory definition of what constitutes ‘false’ or ‘fully dependent’ self-employment has been laid down in Irish law. While these definitions do not extend beyond the 2017 Act, they will likely be relied on in future disputes over whether a worker is actually an employee rather than an independent contractor.
6. The definition of *false self-employed worker* under the 2017 Act follows closely ECJ case law in the Dutch Musicians case ([C-413/13 FNV Kunsten Informatie en Media v Staat der Nederlanden, 4 December 2014](#)).

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<sup>1</sup> Competition (Amendment) Act 2017

<sup>2</sup> Schedule 4, Competition (Amendment) Act 2017.

*A 'false self-employed worker' is defined as an individual who—*

- 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,*
- 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.*

7. The definition of a *fully dependent self-employed worker* under the 2017 Act follows International Labour Organisation (ILO) deliberations.

*A 'fully dependent self-employed worker' is defined as an individual—*

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

8. The 2017 Act provides that trade unions may apply<sup>3</sup> to the Minister for Business, Enterprise and Innovation to permit groups of self-employed workers who fall within the above definitions to act collectively. The onus is on the Trade Union making the application to show that the self-employed workers they represent fall within the above definitions and that the prescribing of such a class of workers for the purposes of the 2017 Act:

*'Will have no or minimal economic effect on the market in which the class of self-employed worker concerned operates,*

*Will not lead to or result in significant costs to the State, and*

*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.'*

9. The immediate pool of workers affected by the 2017 Act is small, being limited to voice over actors, session musicians and freelance journalists. As of April 2019, no applications for exemptions for other 'relevant categories of self-employed workers' have been made under the Act.

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<sup>3</sup> Application form and Guidance are available at <https://dbe.gov.ie/en/Publications/Application-exemption-from-section-4-Competition-Act-2002.html>

## 2.2. Background to the 2017 Act

### 2.2.1. Actors' Equity Decision (2004)

10. The 2017 Act effectively overturned a Decision taken by the CCPC's predecessor organisation, the Competition Authority,<sup>4</sup> in 2004. That Decision addressed the status of voice-over actors for competition law purposes.<sup>5</sup> The actors concerned were providing services to advertisers (for example, as voice-over actors in radio advertisements) and the decision related to a fee-setting arrangement between the trade union representing such actors (Actors' Equity) and an association of advertising practitioners (the Institute of Advertising Practitioners in Ireland, "the IAPI"). The issue was whether such an agreement constituted a restriction of competition that was prohibited by competition law. That would have been the case if the actors were self-employed, but not if they were employees of the advertisers.

11. Following a detailed examination of the facts, the Competition Authority took the view that the vast majority of actors providing advertising services under the agreement in question were self-employed independent contractors and that the agreement was therefore one that was likely to be subject to the Competition Act 2002. The Parties subsequently signed undertakings not to enter into or implement any agreement that directly or indirectly fixes the fees that the IAPI or its members paid to self-employed actors in return for services rendered.

12. *Subsequent Developments.* At the request of the Irish Congress of Trade Unions ('ICTU'), the Competition Authority reviewed and reconfirmed its decision in 2008 and again in 2015 (following the "Dutch Musicians" Case). In the years following the 2004 decision, there were calls on successive Irish Governments to exempt the categories of self-employed workers involved from the relevant provisions of the Competition Act 2002. The argument for exemption was not solely based on employment status, but also on the alleged vulnerability of the workers involved, due to the sporadic nature of their work, the relatively low incomes accruing and the imbalance of power between the workers and the organisations contracting their work. Two Private Members' Bills were put forward in the Irish Parliament (in 2007 and again in 2012) to give effect to this request for an exemption. Neither progressed beyond the initial stages of the legislative process.

13. In late 2010, the Irish Government entered a three year programme of financial assistance with the European Commission, the European Central Bank and the IMF (known as "the Troika"). This programme included a condition that the Irish authorities "*ensure that no further exemptions to the competition law framework will be granted unless they are entirely consistent with the goals of the EU/IMF Programme and the needs of the economy*" and to "*consult ex-ante with the European Commission, the ECB and the IMF on the adoption of policies that are not included in the Memorandum but that could have a material impact on the achievement of programme objectives*". In this context, the Irish authorities consulted with the European Commission (DG COMP) about the exemptions in the proposed legislation and were informed that support was not forthcoming for such

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<sup>4</sup> The Competition and Consumer Protection Commission ("The CCPC") was set up in 2014, following the amalgamation of the Competition Authority and the National Consumer Agency.

<sup>5</sup> [https://www.cpc.ie/business/wp-content/uploads/sites/3/2017/04/E\\_04\\_002-Actors-Fees-Enforcement-Decision.pdf](https://www.cpc.ie/business/wp-content/uploads/sites/3/2017/04/E_04_002-Actors-Fees-Enforcement-Decision.pdf)

exemptions. The Troika programme of financial assistance came to an end in December 2013.

14. In early 2016, a further Private Members' Bill was introduced and, following debate and amendment, was enacted – in mid 2017 - as the Competition (Amendment) Act 2017.

### *2.2.2. Irish Medical Organisation Case (2014)*

15. In tandem with the calls to exempt workers affected by the 2004 Decision, the Irish Government also faced repeated calls to extend collective bargaining rights to an additional group of self-employed workers in Ireland – namely family doctors (known as General Practitioners or “GPs”) contracted by the State to provide medical services without charge to eligible patients.

16. In Ireland, an increasingly large proportion of healthcare services are delivered without charge to eligible patients by self-employed professionals who are contracted by the State to provide the services in question. The State is the sole purchaser of such services. GPs provide services to eligible patients under what is known as the General Medical Services (“GMS”) contract. In 2010, the Irish Competition Authority carried out a study of competition among GPs.<sup>6</sup> The study made a number of recommendations designed to address anti-competitive practices in the sector. Among the recommendations made was that decisions about the fees and allowances to be paid to GPs under the GMS contract should be made unilaterally by the Minister for Health<sup>7</sup>, and not, as was then the practice, by collective agreement with the representative body for GPs (the Irish Medical Organisation, “the IMO”).

17. In 2013, the Competition Authority initiated proceedings against the IMO. This arose following the IMO’s refusal to cancel a decision of its own General Practitioner Committee to withdraw certain patient services in protest at proposed Government cuts to fees paid to family doctors.

18. In 2014, the IMO provided undertakings<sup>8</sup> to the Irish High Court<sup>9</sup>:

- Not to organise or recommend the collective withdrawal of services or boycotts by its members.

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<sup>6</sup> <https://www.ccpc.ie/business/wp-content/uploads/sites/3/2017/03/General-Medical-Practitioners-Report.pdf>

<sup>7</sup> The Minister could, if desired, make their decision following consultation with GPs and/or their representative bodies.

<sup>8</sup> Under Section 14(b) of the Competition Act 2002 (as amended), the CCPC can enter into an Agreement with an undertaking, following an investigation, whereby the CCPC will not pursue proceedings against the undertaking provided it does - or refrains from doing – specified actions. The CCPC can apply to the Irish High Court to have the Agreement made an order of the Court; failure to comply with any order so made constitutes contempt of court. Such orders can remain in effect for up to ten years.

<sup>9</sup> <https://www.ccpc.ie/business/wp-content/uploads/sites/3/2017/02/2014-05-28-CA-v-IMO-Signed-Settlement-Agreement.pdf>

- To advise its members that they should decide individually and not collectively whether to participate in publicly funded GP health services on such terms as are offered by the Minister for Health.

19. In the build-up to the 2017 Act, there were renewed calls on the Irish Government to include a provision which would have allowed GPs and other self-employed professionals providing services to the State under similar contracts to collectively negotiate. The group of self-employed professionals potentially affected included barristers and solicitors providing services under the Free Legal Aid Scheme; dentists, pharmacists, opticians, veterinary surgeons etc. The CCPC was opposed to such proposals.

20. Since 2014, discussions between the IMO and the State on contractual arrangements for GPs are held under the auspices of a framework agreement between the Minister for Health and the IMO which takes account of competition law concerns and incorporates the High Court undertakings given by the IMO in 2014.<sup>10</sup>

### 2.3. Activity by the Irish Trade Union Movement

#### *2.3.1. Irish Congress of Trade Unions (ICTU) Complaint to the European Committee on Social Rights (2016)*

21. In 2016, ICTU lodged a collective complaint (Complaint No. 123/2016) against Ireland with the European Committee on Social Rights (Council of Europe) regarding an alleged breach of Article 6.2 of the European Social Charter, due to the decision of the Competition Authority in the Actors' Equity Decision of 2004. Although the subsequent 2017 Act addressed some of ICTU's concerns, the trade union body pressed ahead with its complaint to the Committee on the grounds that i) the 2017 Act only amended domestic Irish legislation and did not offer protection from EU law; and ii) the scope of the Act was too limited. Following engagement with relevant parties, the complaint process concluded with a majority decision of the Committee being adopted in December 2018.

22. The Committee<sup>11</sup> found "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".

23. The Committee considered that the 2017 Act removes the restriction to Article 6§2 of the Charter previously affecting certain self-employed workers 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.

24. With respect to other self-employed workers, the Committee noted that the 2017 Act provided a framework for other classes of self-employed workers to be recognised for the purposes of engaging in collective bargaining (by way of an application by a trade union to the Minister for Business, Enterprise and Innovation).

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<sup>10</sup> [https://health.gov.ie/blog/publications/framework-agreement-between-the-minister-for-health-and-the-irish-medical-organisation-in-respect-of-a-process-for-engagement-concerning the GMS/GP contract](https://health.gov.ie/blog/publications/framework-agreement-between-the-minister-for-health-and-the-irish-medical-organisation-in-respect-of-a-process-for-engagement-concerning-the-GMS/GP-contract)

<sup>11</sup> Resolution CM/ResChS (2018)11

### 3. The CCPC's Position on Collective Bargaining by Self-Employed Workers

25. The CCPC was not in favour of the introduction of the 2017 Act and worked closely with the Department of Business, Enterprise and Innovation to significantly restrict its scope. The impact of the legislation is restricted to a small number of areas - voice-over actors, session musicians and freelance journalists. Any trade union seeking a further exemption under the 2017 Act must first show that the category of self-employed worker they represent falls within the definition of 'false self-employed' or 'fully dependent self-employed' and must also meet the stringent conditions noted in paragraph 2.5 above (which reflect the requirements of Article 101 TFEU).

26. The application of EU competition law to self-employed workers provides important protections for consumers and the State. It ensures that members of professions, trades and other self-employed individuals (doctors, lawyers, plumbers, electricians etc.) compete with each other in the markets in which they are active. Such competition promotes efficiency, puts downward pressure on prices, helps to maintain or develop a high standard of service and works for the benefit of clients and consumers generally.

27. The right of employees to engage in collective bargaining has, of course, long been recognised under European law. In *Albany* (C-67/96 *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie*, 21 September 1999), the CJEU held that collective agreements between trade unions and employers relating to conditions of employment and working conditions fell outside Article 101(1) TFEU. It ruled that these agreements met important social objectives which should not be caught by the competition rules.

28. The CCPC recognises that changes in the workforce globally can cause the line between employees and self-employed to become blurred. Some individuals who appear to be self-employed service providers may, in fact, be "false self-employed" and are, in reality, employees. If they are employees, then – as has always been the case – competition law does not apply. The definitions of 'false self-employed' and 'fully dependent self-employed' contained in the 2017 Act provide a basis on which to make such distinctions.

29. The CCPC's position is consistent with the position taken by the ECJ in the "Dutch Musicians" Case (C-413/13 *FNV Kunsten Informatie en Media v Staat der Nederlanden*, 4 December 2014). In that case, the ECJ struck a careful balance between the need to have effective enforcement of the EU competition rules, while at the same time protecting social interests. It emphasised that self-employed service providers are, in principle, "undertakings" and are therefore subject to EU competition law. However, the Court also acknowledged the importance of examining the particular circumstances, in each case, to determine whether individuals who appear to be self-employed are actually employees. The Court made it clear that it is for national courts to examine the facts of particular cases in order to determine the appropriate classification of individual workers. In this particular instance, which involved musicians who were filling in as substitutes in an orchestra, the Dutch Civil Court subsequently found, on a detailed examination of the facts, that substitute musicians who were soloists were genuinely self-employed and were therefore prohibited by EU and Dutch competition law from engaging in collective bargaining. Others, who were ordinary members of the orchestra, should be classified as "false self-employed" – and therefore be deemed to be employees and entitled to engage in collective bargaining in the same way as any other employee.

30. The 2017 Act provides a mechanism to enable certain categories of self-employed workers to bargain collectively, provided they meet the criteria set down. Calls to extend collective bargaining rights more widely - to groups of self-employed workers, who do *not*

fall within the remit of the Act (e.g. family doctors) - are likely to continue. The CCPC will continue to assess any applications for exemptions from competition law on the basis of a detailed examination of the specific circumstances of the workers involved.