AN BILLE IOMAÍOCHTA (COMHALTAS CEARDCHUMANN) 2006
COMPETITION (TRADE UNION MEMBERSHIP) BILL 2006

EXPLANATORY MEMORANDUM

Purpose of Bill

If the Competition Act 2002 applied with full force and effect to trade unions and their members, then trade unions would revert to their old common law status as unlawful ''combinations'' and trade union leaders would be prosecuted as parties to a criminal conspiracy.

The purpose of the Competition Act is not only to encourage competition between entities but to make such competition mandatory. Any agreement or concerted practice that has the object or effect of distorting competition is null and void, a civil wrong and also a criminal act. This would include any agreement as to terms and conditions at which work or services are to be provided.

However, both statute law (since 1871), the Constitution and international human rights conventions recognise the right to form trade unions. And collective bargaining by trade unions on behalf of their members is actively encouraged as a bedrock of social partnership.

The issue for legislators is that trade union activity is at its heart an anti-competitive activity. Workers do not underbid each other to compete for jobs. Instead, they organise and bargain collectively so as to obtain the best outcome for all their members.

At present, the litmus test for exemption from the Competition Act is whether an individual is an employee or is self-employed. But atypical employment, involving those who are not obviously employed or self-employed, is a growing phenomenon. This is partly due to a desire on both sides to re-classify employees as self-employed. There are differences in taxation of expenses, in PRSI and in pension obligations. Most employment protection legislation applies only to employees. In addition, different health and safety rules may apply. The employer's vicarious liability (and, therefore, his or her insurance premiums) will also be different.

A variety of tests is applied in order to decide a person's employment status. But the basic question is whether the person engaged to perform services is performing them as a person ''in business on his own account''. For Competition Act purposes, the test is whether

an individual is what the Act refers to as an ''undertaking'', defined as a person ''engaged for gain'' in the production, supply or distribution of goods or the provision of a service. If he or she is engaged for gain, as opposed to being paid a wage, then the Competition Act applies and collective agreements are prohibited.

The danger is twofold. On the one hand, workers will find themselves exposed to the increasingly prevalent demands of employers that their work should be reclassified as self-employed or contracted, in order to escape the provisions of the State's employment protection laws.

On the other hand, once workers except the assurances of their employers, and any incentivisation package on offer, and agree to reclassify themselves as self-employed, then any action on their part to secure enforcement of the terms under which they changed their status will be challenged as an anti-competitive conspiracy.

This issue, and the associated changes in workplace practices that give rise to greater numbers engaged in atypical employment, will have a substantial impact on industrial relations and social partnership.

It seems clear that, as matters now stand, self-employed individuals are entitled to trade union membership. However, that does not mean that such individuals are entitled to negotiate collectively or that the union can engage in any representative activity on their behalf.

The issue was highlighted in a case last year where the Competition Authority decided that competition law applies to Equity, a section within SIPTU for actors and others in the entertainment industry. Traditionally, artists, actors and other self-employed individuals have acted collectively to reach agreements with powerful organised groups such as broadcasters and advertisers. However, from a competition law point of view, where entertainment trade unions enter into agreements recommending minimum prices for the hiring of services of their members, this is no more than a price fixing agreement to which the competition legislation applies.

This was the outcome of the Competition Authority's investigation. The Authority held that any immunity from the rules of competition that a trade union enjoyed could only apply where the union was acting on behalf of employees. In this case Equity was acting more as a trade association on behalf of independent contractors as opposed to employees. The individual actors were ''undertakings'' and Equity was ''an association of undertakings'' when it acted on their behalf. Therefore, its agreements with commercial buyers fell within the Competition Act.

The net result is that, although employees can act collectively to fix terms and conditions of employment, a collection of self-employed persons who sought to negotiate collectively would find themselves parties to an unlawful conspiracy between separate economic ''undertakings'' attempting to distort trade in the services they supply.

The implications of the case are important for all those in atypical employment, who find themselves under pressure to re-organise their work as self-employed contractors. Not only will they lose the benefit of much of employment protection legislation but they may well be prevented from organising collectively to better their terms and conditions of service.

This state of affairs is anomalous and unfair. The very same grounds that justified trade unions receiving recognition and immunity for employees over a century ago are still relevant and available to justify organising and collective bargaining by self-employed persons. Individually, they are weak, whereas united there is some rectification of the institutionalised inequality of bargaining power between the two parties.

It must also be queried whether the Competition Authority would be minded to pursue with the same vigour the Irish Medical Organisation when it re-negotiates the terms of the GMS payments scheme or the Law Society and the Bar Council when they re-negotiate the payments for their members under the criminal and civil legal aid schemes.

The reality is that collective negotiation on behalf of trade associations of self-employed individuals is very much a standard feature of industrial relations practice. It is also a standard feature of the procurement of professional services by the Government, for health and other public welfare programmes.

The purpose of this Bill is to enable trade unions to organise and to negotiate collectively on behalf of individuals who enter into or work under contracts ''personally to do or provide any work or services'' — the emphasis being on the word ''personally''.

It would follow that such individuals should not be classed as ''undertakings'' for the purposes of competition law. However, self-employed individuals would continue to be prohibited from price fixing against consumer interests.

Provisions of Bill

Section 1 sets out rules that delimit the application of section 4 of the Competition Act 2002, which is the section prohibiting anti-competitive agreements, decisions and concerted practices.

The section provides that, where an individual engages for gain under a contract with an undertaking ''personally to do any work or provide any services'', then—

- a trade union of which that individual and other individuals so engaged are members is not an association of undertakings, and
- section 4 does not apply to any agreement, decision or concerted practice affecting the terms or conditions under which such work or services is or are done or provided by two or more such individuals under similar contracts with the same undertaking or with members of an association that participates in social partnership agreements.

It is made clear that the exemption from the application of section 4 of the Competition Act only applies to contracts with undertakings, not with consumers. This point is reinforced by *subsection (2)*, which states that nothing in *subsection (1)* prevents the application of section 4 to agreements, decisions or concerted practices affecting the terms or conditions under which work is done for or services are provided to persons contracting outside the course of their business.

Section 3 makes standard provision for the short title and collective citation of the Bill.

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Bealtaine, 2006

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