



An Roinn Gnó, Fiontar agus Nuálaíochta  
Department of Business, Enterprise and Innovation

**Application for an exemption from section 4 of the  
Competition Act 2002 in accordance with section  
15F of the Competition Act 2002 (as inserted by  
section 2 of the Competition (Amendment) Act 2017)**

**Guidance note on completing the application form**

**7 September 2017**

## **PART A: COMPLETING THE APPLICATION FORM**

### **Introduction**

This information is provided to assist a Trade Union in completing and submitting an application form under the Competition Act 2002 seeking an exemption from section 4 of that Act in respect of certain classes of self-employed workers. Any application submitted is deemed to be an application to the Minister for Business, Enterprise and Innovation to prescribe a class of self-employed workers for the purposes of Part 2B of the Competition Act 2002. Section 15E of the 2002 Act provides that section 4 of that Act shall not apply to collective bargaining and agreements in respect of a relevant category of self-employed worker: this includes a class of false self-employed worker or fully dependent self-employed worker specified in an order made by the Minister under section 15F of that Act.

It is important to read this information carefully in advance of completing the application form. Please complete all sections of the form as failure to do so will result in the form being returned to the applicant. Information may be supplied on separate pages where required.

This guidance note should also be read in conjunction with the Competition Acts 2002 to 2017.

### **Trade Union details (section 1)**

The applicant Trade Union should include details of the Trade Union (including name, address and contact details).

It should be noted that section 15D of the of the Competition Act 2002 (as inserted by section 2 of the Competition (Amendment) Act 2017) defines a trade union as having the same meaning as it has in the Industrial Relations Act 1946 (viz. a trade union which is the holder of a negotiation licence granted under the Trade Union Act, 1941 (No. 22 of 1941). The application should provide evidence that such a licence is current at the time of the application (e.g. including a copy of such a current licence or providing the licence holder's details such as licence number and any other relevant details).

### **Details of self-employed workers (section 2)**

Section 15D of the Competition Act 2002 (as inserted by section 2 of the Competition (Amendment) Act 2017) defines false self-employed workers and fully dependent self-employed workers as follows:

*“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.*

Section 15F(2)(a) of the Competition Act 2002 (as inserted by section 2 of the Competition (Amendment) Act 2017) provides that an application under subsection (1) of section 15F of the Act

*“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 maybe”*

In the context of both of the above, the application must include details of which class/classes of self-employed workers is/are covered by the application as well as evidence to justify such classifications: it is advisable that such evidence would include detailed economic and legal analysis to support such a classification (the legal analysis may be provided by internal legal advice to the applicant Trade Union).

Evidence should also be provided to address the set of criteria set out in the definitions of “false self-employed worker” and “fully dependent self-employed worker” in section 15D of the Competition Act 2002 (as inserted by section 2 of the Competition (Amendment) Act 2017).

Additional details required include evidence that all of the workers covered by the application are fully paid-up members of the applicant Trade Union on the date of the application.

If the application covers both false self-employed and fully dependent self-employed workers, separate details must be provided for false self-employed and fully dependent self-employed workers.

It is advisable that details of how many workers are covered by this application are provided.

It is important to note that the application can only cover self-employed workers that are fully paid-up members of the applicant Trade Union and cannot cover, nor can it be interpreted to cover, any other self-employed workers.

### **Details of market in which the self-employed workers covered by the application operate (section 3)**

Section 15F(2)(b)(i) of the Competition Act 2002 (as inserted by section 2 of the Competition (Amendment) Act 2017) provides that an application under subsection (1) of section 15F of the Act

*“shall be accompanied by evidence to show –*

*(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,”*

To this end, the application should include the following minimum information:

- the relevant product (in terms of the goods or services offered) and geographic market or markets in which the class of false self-employed workers or fully dependent self-employed workers which are the subject of this application operate (including, for example, the industry sector or sectors involved, the nature of the products or services supplied and the geographic scope of the market, in particular whether the products or services in question are supplied in the State, the island of Ireland, the UK, elsewhere in the EU, globally, etc.);
- in giving details of the businesses or companies in this market, the applicant should identify:
  - (a) all of the businesses or companies active in the market(s) described in the applicant’s response to question 1 of section 3 of the application form that engage false self-employed workers or fully dependent self-employed workers

in the State and may be impacted by any exemption granted pursuant to the application;

(b) any businesses or companies active in such market(s) outside the State which may be impacted by any exemption granted pursuant to the application; and

(c) what proportion of the market(s) described in the applicant's response to question 1 of section 3 of the application form are not covered by the agreement for which the exemption is sought, i.e. whether there are businesses or companies active in such market(s) which are not covered by the agreement; and

- a detailed economic analysis to support the position (that the any exemption will have no or minimal economic impact on that market).

The application could also include legal analysis to support the above classification (which may be provided by internal legal advice to the applicant Trade Union).

#### **Cost to the State (section 4)**

Section 15F(2)(b)(ii) of the Competition Act 2002 (as inserted by section 2 of the Competition (Amendment) Act 2017) provides that an application under subsection (1) of section 15F of the Act

*“shall be accompanied by evidence to show –*

*(b) that the prescribing of such class of false self-employed worker or fully dependent self-employed worker, as the case may be—*

*(ii) will not lead to or result in significant costs to the State,”*

The applicant Trade Union should declare whether it believes that the application will lead to or result in any significant cost to the State and provide detailed economic analysis as evidence to support this. In this context, the applicant Trade Union should provide an estimate of the potential cost to the State and how it was calculated: such evidence should be provided even if the applicant Trade Union does not consider such cost to the State to be “*significant*”.

## **Relationship with competition law (section 5)**

Section 15F(2)(b)(iii) of the Competition Act 2002 (as inserted by section 2 of the Competition (Amendment) Act 2017) provides that an application under subsection (1) of section 15F of the Act

*“shall be accompanied by evidence to show –*

*(b) that the prescribing of such class of false self-employed worker or fully dependent self-employed worker, as the case may be—*

*(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.”*

The application should include evidence to prove that any exemption (which is the subject of the application) will not otherwise contravene the requirements of the Competition Act 2002 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.

Such evidence should include detailed legal analysis to support such information (which may be provided by internal legal advice to the applicant Trade Union).

It is important to recall that Article 101 of the Treaty on the Functioning of the European Union (TFEU) applies to all agreements between undertakings, decisions by associations of undertakings and concerted practices *“which may affect trade between Member States”*. The Minister cannot lawfully grant any exemption sought pursuant to an application which may affect trade between Member States, and thereby breach EU competition law.

Article 101 of TFEU states:

*“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 1 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.”*

## **Declaration page (section 6)**

The applicant Trade Union is required to complete and sign this page to confirm that the information in the application is correct and up-to-date, and should be at a senior level in the Trade Union (at least Deputy Secretary-General level or equivalent).

## **PART B: PROCESS FOR SUBMITTING THE APPLICATION FORM**

For security and data protection reasons, the application form, together with any attachments, should be password protected and submitted electronically via e-mail to [conspol@dbei.gov.ie](mailto:conspol@dbei.gov.ie). Submissions should be titled “Application under the Competition Act 2002 (as amended)”. The password to access the application form should be sent separately to the Competition and Consumer Policy Section, Department of Business, Enterprise and Innovation via e-mail ([conspol@dbei.gov.ie](mailto:conspol@dbei.gov.ie)).

It is important to read this information carefully in advance of completing the form. Please complete all sections of the form as failure to do so will result in the form being returned to the applicant.

Applications will be acknowledged on receipt. Once an application form is submitted, the Competition and Consumer Policy Section of the Department of Business, Enterprise and Innovation will carry out an assessment of the information contained in the application. The Competition and Consumer Policy Section of the Department of Business, Enterprise and Innovation may seek further information from the applicant Trade Union or seek clarification from the applicant Trade Union on the information contained in the application, if required. Such further information or clarifications may occur on more than one occasion if deemed necessary.

### **Commercially sensitive information**

It is recognised that the application forms may include commercially sensitive information. The applicant Trade Union should indicate, at the time of application, the exact part of the application form that it considers to be commercially sensitive (either in the form itself or in any covering letter to the application).

### **Data protection requirements**

The applicant Trade Union is reminded that, as a data controller, it may have to obtain the consent of its members to the disclosure of certain data to the Department as part of this application in order to comply with its obligations under the data protection legislation.

The Department of Business, Enterprise and Innovation will ensure that all personal data provided by the applicant Trade Union in the course of the application process will be held by the Department in compliance with its obligations as a data controller under the data protection legislation.

### **Retention of supporting documents and records**

An applicant Trade Union is advised to retain all documentation relevant to the application in order to substantiate the information provided in the application and to make such documentation available for inspection by the Competition and Consumer Policy Section of the Department of Business, Enterprise and Innovation, if required.



## **PART C: CONSULTATION ON AN APPLICATION**

### **Consultation with third parties**

Section 15F(5) of the Competition Act 2002 (as inserted by section 2 of the Competition (Amendment) Act 2017) provides that the Minister for Business, Enterprise and Innovation shall undertake consultation with relevant other Ministers of the Government or other persons or bodies who, in the opinion of the Minister, ought to be consulted.

To this end, it is expected that such consultation will take place, where appropriate, with employer's groups (including bodies such as IBEC, ISME and SFA), the Competition and Consumer Protection Commission (CCPC), the EU Commission (DG COMP), as well as other Ministers of the Government and/or sectoral regulators. In addition, consultation with relevant specific employers or sectoral groups may also be undertaken. To this end, the information set out in the application form may be shared with those being consulted.

In addition, the Competition and Consumer Policy Section of the Department of Business, Enterprise and Innovation may also seek inputs by way of a public consultation process.

### **Freedom of Information Act**

Applicants should also be aware that submissions may be disclosed by the Department in response to requests under the Freedom of Information Act 2014. Any information that is regarded as commercially sensitive should be clearly identified and the reason for its sensitivity stated. In the event of a request under the Freedom of Information Act 2014, the Department will consult with applicants about information identified as commercially sensitive before making a decision on such a request.