International Federation of Musicians | International Federation of Actors | Global Union for Media Entertainment and Arts | International Federation of Journalists | Federation of Script-writers in Europe | Federation of European Film Directors

JOINT STATEMENT OF THE EUROPEAN FEDERATIONS REPRESENTING CULTURAL AND CREATIVE WORKERS

Collective Representation of Freelance Workers in the Media/Entertainment/Creative Sector

Trying to Shed Some Light on a Grey Area

Introduction

Across the EU, the employment landscape has shifted significantly in recent years and the profile of the workforce has evolved in new directions. An increasing emphasis on flexibility and a move towards more intermittent, short-term, project-based ways of working across all sectors has resulted in a greater diversity of employment statuses. A growing percentage of the workforce can be described as independent /self-employed/ freelance/ casual workers – a whole range of terms that denote an increasingly common employment reality. This is certainly true of the cultural sector, where the nature of the work lends it particularly to this kind of employment regime. Thus, for actors, musicians, technicians, journalists, writers and others, this is the increasingly the reality they must work with. Short-term, contract-based work, on a freelance basis is the norm, however, the work itself (eg: acting or playing in live shows, films and TV programmes, or theatre/music companies; doing the technical work in such productions; or indeed producing news reports or articles) has hardly changed at all, though in the past it would have been done under an employee contract – in some cases, a permanent one.

Across the EU, Member States have varying definitions of what freelance actually means, based either on fiscal, social security or legal regimes. Naturally, this leads to confusion for people in the sector, with real employment status and entitlements not clearly understood. This is further complicated by the fact that there is growing group of workers, who might be considered as falsely self-employed or "forced-lance", who work with a freelance status which

has been imposed on them, despite a dependent, pay-earner relationship with the employer. Freelance workers in the media/entertainment/creative sectors often face a host of challenges in relation to social protection coverage, as well as healthcare and pensions. However, the purpose of this paper is to focus on one problem in particular.

Freelance employment status, the right of collective bargaining and the application of Competition Rules

The Problem:

Article 28 of the Charter of Fundamental Rights of the European Union sets out the "Right of collective bargaining and action" as follows: "Workers and employers, or their respective organisations, have, in accordance with Community law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action."

However, this is a right that is being clearly undermined in the cultural and creative sector, with self-employed workers finding themselves effectively excluded from the possibility of negotiating and concluding collective agreements.

This is a problem that has come to the attention of the European Federations in the media/entertainment/creative sector through the experience of their member unions at national level. Some recent and ongoing examples illustrate the legal problem that lies at the heart of this matter.

The first is from Ireland, where a decision in 2004 made by the Irish Competition Authority stated that the freelance voice-over actors who were members of the Irish Actors' Equity were in fact undertakings, by virtue of their self-employed status. Therefore the authority reached the conclusion that the minimum fees established in the Union's collective agreement were to be considered as equivalent to a price-fixing agreement and in breach of competition law. This was equally the case for freelance Journalists and Musicians. Irish Equity, The Musicians Union of Ireland, The Irish Playwrights and Screenwriters Guild and National Union of Journalists have, over a considerable period of time, been engaged in a long and determined campaign to reverse the ruling by the Competition Authority affecting these groups. This issue was seen to be a huge threat by, not only this Union, but all unions representing workers who operate in a 'freelance' environment. A strong campaign to reverse this ruling was launched by this group of Unions. It was successful and ultimately, the following provision was included in the Transitional 2008-2009 Social Partnership Agreement: "The Government is committed to

introducing amending legislation in 2009 to exclude voice-over actors, freelance journalists and session musicians, being categories of workers formerly or currently covered by collective agreements, when engaging in collective bargaining, from the provisions of Section 4 of the Competition Act, 2002, taking into account, inter alia, that there would be negligible negative impacts on the economy or on the level of competition, and having regard to the specific attributes and nature of the work involved subject to consistency with EU competition rules." The planned legislation has yet to be introduced.

This was an issue that also came to the fore in Hungary two years ago, when there was an attempt by dubbing actors to delay production, in order to improve their rates of pay (which have remained totally static for 50 years). This attempted collective action could not be taken up by the union due to the freelance status of those concerned and had to be kept short to avoid sanctions.

Recent contacts with writers and musicians in the Netherlands and journalists in Denmark have highlighted that they have fallen afoul of the competition authority in a similar fashion and are also struggling and lobbying with different degrees of success at national level to try and arrive at some kind of solution.

In 1997, the Competition Authority instituted proceedings against the Danish Union of Journalists on its own initiative, as a result of a leaflet entitled "Recommended Terms for Freelance Journalism", which the authority found to be contravention of the Danish Competition Act of the day. The Danish Union of Journalists took the case to the Competition Appeals Tribunal, which found in their favour.

It seems clear that this is an issue that will continue to crop up in the cultural sector across Europe, which counts a high percentage of freelance and union-affiliated workers. Dissimilar definitions of freelance status and a lack of understanding of the variety of situations that this status may cover could continue to give rise to these kinds of ruling by competition authorities at national level.

Looking for Solutions:

Some key points about collective representation of freelance workers and collective agreements:

- Freelance workers have the basic right to be represented in social partner negotiations and benefit from collective bargaining. Clearly, where they are freelance workers,

without any staff, and carrying out contract-based work in a pay-earner relationship; they do not belong in the employer representation, but in the worker representation. For this reason, many trade unions in the media/entertainment/creative sector accept freelancers as members.

- Belonging to a collective organisation, such as a union, potentially allows freelance workers to benefit from group insurance (for pensions, health coverage etc.) and improve their social security coverage;

- Allowing freelancers benefit from collective agreements prevents those agreements from being undermined, protecting the workers in the sector. It prevents a situation where equal work, done on freelance basis, will not result in equal pay with someone who is has employee status.

- It is worth bearing in mind the profile of freelance workers in the sector, with a view to assessing their impact on competition in the market. In the cases cited above and as a general rule in the media/entertainment/creative sector, the workers in question would be considered as vulnerable workers, often in the low-income spectrum, with uncertain and short-term employment opportunities. Some could certainly be qualified as "false-independents", though some are very pleased to work with the status of freelance, considering that it gives them the flexibility necessary in their sphere of work. However, the administrative responsibilities that go with it are burdensome for all. Certainly such workers do not have the clout to dictate the going rates for work in the sector and their desire, in many cases, to benefit from the collectively agreed minimums, reflects that fact. Indeed, the position of the Irish government, where they state their intention to introduce legislation which would exclude certain categories of worker from competition rules, cite in their reasoning the "negligible negative impacts on the economy or on the level of competition".

Legal aspects of this issue:

- Competition authorities at national level in the EU member States are applying competition rules differently from country to country and some European guidance is needed in order for there to be clarity and consistency on this issue. Given the high levels of mobility and cross-border working in the sector, this is all the more crucial.

- The issue has been raised at European level through written parliamentary questions by MEPs[1] and the written responses of the European Commission highlight a number of key points that we believe are directly relevant for the media/entertainment/creative sector:
    - The important social objectives of collective bargaining should not be undermined by Article 81(1)
    - This might equally be true of collective bargaining of «certain categories of self-employed worker»
    - The issue then is whether such workers are genuinely self-employed or actually economically dependent, which would have to be established on the basis of case by case investigation.
- The issue of the employment relationship for certain categories of work in the sector is further complicated where there is "work for hire" legislation in place (this would affect writers and journalists in the UK and Ireland for instance). Such legislation means that it is crucial for such workers to retain their self-employed status, as work undertaken in an employer-employee relationship would mean they would automatically forfeit their intellectual property rights. However, this does not change the fact that they may well be in a dependent pay-earner relationship with an employer and wish to benefit from collectively agreed rates for the work done.

The European Trade Union Federations Representing Cultural and Creative Workers call on the European Commission to:

- Take account of the fact that competition rules are de facto being applied in a fashion that penalises certain categories of vulnerable freelance workers in the media/entertainment/creative sector (and possibly in other sectors) and that this should be addressed;

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[1] http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2008-6260&language=EN
This answer refers also to the previous Commission's reply of 7 June 2007 to the Written Question E-1849/07 (http://www.europarl.europa.eu/sides/getDoc.do?type=WQ&reference=E-2007-1849&language=EN) by Mr De Rossa.

- To recognise that preventing such workers from benefiting from collective agreements clearly undermines the social objectives of collective bargaining;
- To undertake a detailed study of the sector to establish whether there is any real risk of distortion of competition in allowing such workers to benefit, where they wish to, from collectively agreed minimums in the sector and from the right of collective action;
- To establish clear European guidance on this issue with a view to encouraging a coherent application of Competition rules at national level.