

## **Independents/Free-lancers/Casual/Self-employed Workers:**

*A theme for discussion and action in the Social Dialogue Committee on Live Performance.*

### **Introduction**

The issue of independent/self-employed/freelance/casual status (hereafter “self-employed”) in the live performance sector is an issue that has come up previously within the framework of the social dialogue committee. It was one of the elements that was highlighted in the joint response to the Green Paper on Labour law in 2007. It is worth recalling briefly the points made in that joint response. They were set out as follows:

- “Social partners discussed the different employment statuses in the sector; in particular with regard to self-employed persons, often referred to in the sector as *freelancer*, *casual* or *independent worker*. Member States have dissimilar definitions, based either on fiscal, social security or legal regimes: this causes increased confusion for people in the sector. Listing and explaining these various definitions (on which basis it could be learned that amongst clusters of Member States there exists common terminology) would support the better understanding of the status of a person concerned.
- Moreover, in a highly mobile sector, such as the performing arts, more transparency would be helpful for persons working in another country than their resident country.
- The European sectoral social partners underline that people (whatever employment status they have) should have the right to create and join in representative organisations, which are entitled to bargain collectively on matters related to the relevant sector.
- We believe the European Commission should encourage Member States to look at the definitions in their law considering the development of the labour markets.”

### **Recognition of the Points Raised:**

The points made were taken up at different levels and in different ways. The Commission and the Parliament are continuing to examine the issue of mobility and to look for ways to build transparency and make administrative procedures more straight forward. There does seem to be a good willingness to address the problematic effects that mobility may have on social security and pension calculation. However the issues arising from varying definitions of self-employed, and indeed the very varied realities that this term may cover, still continue to pose a number of intractable problems. Several of the points made by the Committee in our joint response have also been echoed in other recent documents emanating from the European Parliament in particular. It is worth noting the following, among others:

Much like the response of the social partners, the **European Parliament’s Resolution on Modernising Labour Law to Meet the Challenges of the 21<sup>st</sup> Century** also highlighted as a priority “clarifying the situation of dependent employment and the grey areas between self-employment and

employees with a dependent employment relationship.”<sup>1</sup> **The EP resolution on Flexicurity in November 2007** called for a more balanced set of flexicurity principles, including that “all workers shall have a core of rights regardless of their employment status;”<sup>2</sup>. This was clearly taken up in 2008 in the **EP Report on the Employment Guidelines from May 2008**, which recommends “guaranteeing core employment rights regardless of employment status” (Amendment 28 p19)<sup>3</sup>.

However, it is clear that despite this recognition of the problems from the European Parliament, it has not translated into workable solutions on the ground for workers in the cultural sector and there perhaps two pressing issues in particular, on which the Social Dialogue Committee might usefully undertake joint action.

### **Self-employed Status and undermining of the right to create and join in representative organisations:**

This is a problem that has come to the attention of EAEA through the experience of its unions in Ireland and Hungary in particular. In the case of Ireland, a decision in 2004 made by the Irish Competition Authority stated that the voice-over actors who were members of the Irish Actors' Equity were undertakings. 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 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 seems likely to have a successful outcome, though it is part of a package deal in the sector that has yet to go through.

This was an issue that also came to the fore in Hungary over a year 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 self-employed status of those concerned and had to be kept short to avoid sanctions.

Recent contacts with writers and translators 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 at national level to try and arrive at some kind of solution.

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 self-employed and union affiliated workers. Dissimilar definitions

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<sup>1</sup> European Parliament resolution of 11th July 2007 on modernising labour law to meet the challenges of the 21st century (2007/2023(INI))

<sup>2</sup> European Parliament resolution of 29 November 2007 on Common Principles of Flexicurity (2007/2209(INI))

<sup>3</sup> <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A6-2008-0172+0+DOC+PDF+V0//EN&language=EN>

of self-employed 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.

### **Self-employed status and Mobility of Artists:**

Mobility is of course a feature of the working lives of artists and brings a range of challenges with it. Many artists who are self-employed have occasion to work abroad and will maintain that status there. However, this does have certain implications and may have a penalising effect on artists. It may become problematic, notably in the context of mobility, if it is employed to circumvent social obligations or collectively negotiated conditions; or when it serves to leave the artist without guarantees or protection concerning their contractual situation in a host country. In practice, recourse to a service contract sometimes results from the desire of the employer to bypass labour law. The practical consequences for workers are generally to significantly limit possibilities for access to social welfare benefits (retirement pension, unemployment, health, paid leave). It may also have detrimental consequences for established cultural institutions by creating a situation of unfair competition with unscrupulous cultural operators.

While it is not desirable that social security and employment systems in Europe should be harmonized, and some variation between the exact understandings of what constitutes self-employed status results from this, what is essential, is that a core of employment rights for artists should be safeguarded when they are working abroad.

However, it is clear that posting of workers directive and the services directive do not provide this kind of guarantee for artists in the live performance sector and that they may still be vulnerable to exploitation. Debates organised around the proposed directive on services highlighted the problem of the self-employed who came under a "grey area": those who are without a contract of employment but who do not work in conditions of self-employment either, or have sufficient economic control to be considered as service providers. Certainly there is scope for operators to assemble, for example, groups or companies of self-employed artists (dancers, singers, musicians, actors etc.) and to tour with them, while offering them conditions that are absolutely not in line with the norms in the sector in the host country. It may also have the effect of undermining locally negotiated agreements for artists in the host country, who cannot compete. Consequently, this creates a situation of artificial and unhealthy competition between workers covered by a protective legal framework (in particular for nationals of countries who apply labour law to these work relations) and those who are not covered by any specific legal framework, where the qualification of the contract is left to the sole appreciation of the parties.

Thus it would seem that there might be some scope in the European context for advocating for minimum standards when convening the contractual conditions of artists in a cross border context. This should take account of the specific characteristics of the sector and the need to uphold the status of the artist. At European level, there could at least be models or uniform terms that could apply. The aim should be to guarantee collective and human rights for all workers, whether employees or "self-employed", (in particular the right to negotiate and benefit from collective agreements) may be recommended. Such an approach would go towards replacing the social dimension at the heart of the internal market and would limit discriminations between workers "protected" by an employment contract and those without any protection whatsoever.

**Conclusion:**

Essentially, we believe it would be useful for the Social Dialogue Committee to follow-up the point it made in 2007 regarding the wide variety of self-employed status and the problems that it creates in the Live Performance Sector. In particular, we could highlight the fact that self-employed status has seriously undermined rights in the area of collective representation and bargaining of workers in the cultural sector in several countries and that the rulings of the competition authority in these cases has been based on an inaccurate understanding of what the self-employed status of these workers actually implies in reality. We could also highlight that self-employed status is sometimes a problem in the context of mobility and one that penalises both cultural sector workers who are mobile and those at local level, whose collectively negotiated minimum standards are undercut by unfair competition.

- Possible actions might include, at this stage, joint letters to the relevant Commissioners (Employment and Competition – possibly education and Culture also);
- Contact with the present and the future MEPs on this issue;
- Joint follow-up action as appropriate.