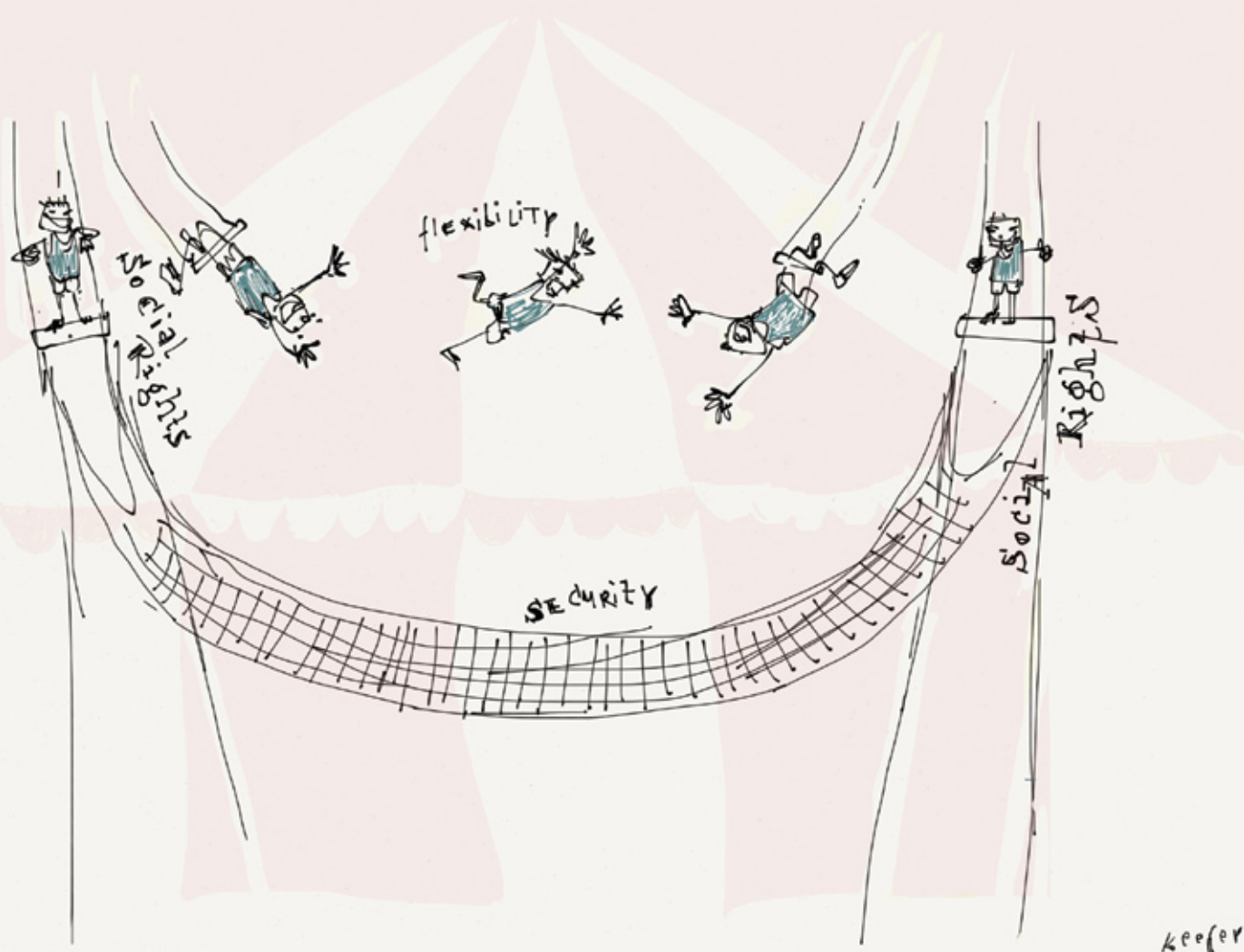


# The Future of Work in the Media, Arts & Entertainment Sector

## Meeting the Challenge of Atypical Working



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## Dear Reader,

It is our pleasure to introduce this project handbook, *The Future of Work in the Media, Arts & Entertainment Sector: Meeting the Challenge of Atypical Working*. It is the result of a two-year, EU-funded project: *Reaching out to Atypical Workers: Organising and representing workers with atypical contracts in the Live Performance and Audiovisual Sectors*, which drew to a close at the end of October 2016. This project was made possible through the joint engagement and efforts of the International Federation of Actors (FIA), the International Federation of Musicians (FIM), UNI MEI (Global Union for the Media and Entertainment Sector) and the European Federation of Journalists (EFJ).

The project aimed to create a space for the project partners and their members to engage with the challenges facing atypical workers in the Live Performance and Audiovisual sectors. Its objectives were to:

- gather and share experience on organising strategies of unions to reach out to atypical workers;
- develop advocacy work regarding more tailored social protection rights, improved working conditions, access to training and lifelong learning for atypical workers;
- reflect and develop fresh thinking regarding the urgent need to expand collective bargaining on behalf of atypical workers;
- share and exchange practice regarding service provision for atypical workers;
- explore the specific youth and gender dimensions of atypical work;
- address the issue of bogus self-employment.

The core activities of the project have included the organisation of four European workshops and a final conference designed to enable a cross-fertilisation of the experiences of trade unions active in the Audiovisual and Live Performance sectors across the EU Member States. These have enabled the identification of a wide array of initiatives and practices across EU Member States, designed to respond to the challenges facing workers in the Media, Arts and Entertainment sector. The situation facing atypical workers may vary across Member States as a result of trade union membership density. Certainly, new ways to reach out to, mobilise and organise atypical workers have come into being in a concerted attempt to support atypical workers in the face of competitive and highly flexible labour markets.

The present project handbook is structured in six main sections giving account of the exchanges and practices shared during the project.

- **Section 1** provides an account of some of the main trends affecting atypical employment and work relationships in the Media, Arts and Entertainment sector.
- **Section 2** introduces service-oriented approaches and actions put into place by trade unions to better address the needs of atypical workers.
- **Section 3** summarises the international and European standards related to the fundamental social rights applicable to atypical workers.
- **Section 4** takes stock of trade union approaches to addressing the needs of atypical workers through social dialogue and collective bargaining mechanisms. It also looks at barriers that might prevent collective bargaining from benefitting atypical workers particularly in light of competition law and how these might be addressed.
- **Section 5** provides a clarification of the concepts and status surrounding dependent self-employment and bogus self-employment and examines how the trade unions have started to engage with this category of worker.
- **Section 6** introduces issues that trade unions face in reaching out to atypical workers along with some examples of efforts to improve recruitment methods and organising models.

The project handbook also includes key recommendations as to the way forward and is published at a timely moment in relation to the current consultation initiated by the European Commission with a view to developing the proposed European Pillar of Social Rights.

It is our hope that this project can contribute to advancing the debates related to the state of play of fundamental social rights applied to all workers as well as the legislative gaps to be addressed in the protection of workers with atypical employment status across EU Member States, including their access to freedom of association and collective bargaining. Certainly this reflection is of great relevance to the growing number of atypical workers in the collaborative economy, facing many of the same challenges that have long existed in the Media, Arts and Entertainment sector.

We gratefully acknowledge the support of the European Commission for the project. Our renewed thanks also go to project consultant Pascale Charhon of Charhon Consultants for her dedicated work on this publication, to the members of the project steering group and to all our affiliates for their endless energy, passion and dedication and for their generosity in sharing their experiences and ideas in the context of this project.

*European Group of the International Federation of Actors, Euro FIA  
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# Table of Contents

<b>Key Conclusions and Recommendations</b>	<b>4</b>
<b>1. Taking Stock of the Shifting Work and Employment Landscape in the Live Performance and Audiovisual Sectors</b>	<b>12</b>
1.1. A First Snapshot	13
1.2. When 'Atypical' is Typical: Work and Employment Relationships in the Media, Arts and Entertainment Sector	14
1.3. The Gender and Youth Dimensions of Atypical Work	16
1.4. Reflection on the Implication of these Sectoral Trends	16
<b>2. The Challenge of Reimagining Services to Meet the Needs of Atypical Workers</b>	<b>19</b>
2.1. Adapting Union Support Services to Deliver for Atypical Workers	20
2.1.1. Developing individual benefits and an interest-based service offer for atypical workers	20
2.1.2. Offering access to training and skills development for atypical workers	21
2.1.3. Tailoring advisory services provision to support self-employed workers	22
2.2. Creating a Dedicated Structure for Atypical Workers within the Overall Framework of a Union	23
2.3. Challenges Moving Forward	23
<b>3. Fundamental Social Rights for Atypical Workers</b>	<b>27</b>
3.1. The Broad Legal Framework	28
3.2. Fundamental Social Rights and the Chimera of 'Flexicurity'	29
3.3. Trade Union Action to Promote and Protect Fundamental Social and Labour Rights	29
3.4. A Mixed Picture: How EU Law Approaches the Protection of the Fundamental Social Rights of Atypical Workers	30
<b>4. Collective Bargaining and Atypical Workers</b>	<b>32</b>
4.1. Setting the Scene: Collective Bargaining, International Standards and European Union Law	33
4.2. The Key and Future Challenge: Collective Bargaining for Atypical Workers	34
4.3. Approaches to Collective Bargaining for Atypical Workers	34
4.4. The Particular Case of the Live Performance and Audiovisual Sectors	35
4.4.1. General Overview of Collective Bargaining in the Audiovisual Sector	35
4.4.2. General Overview of Collective Bargaining in the Live Performance Sector	36
4.5. The ongoing challenge of establishing collective bargaining for self-employed workers or freelancers across the Live Performance and Audiovisual Sectors	37
4.6. The role of Trade Unions in protecting atypical workers in the Live Performance and Audiovisual Sectors: Selected Examples	37
4.7. A Spanner in the Works: Atypical Workers, Collective Bargaining and Competition Law	40
4.8. Where Economic Freedoms End and Fundamental Rights Begin: Reflection on Legal Ways Forward in Relation to the Competition Law / Collective Bargaining Clash	44
4.9. Using National Judicial Recourses and ILO Mechanisms to Better Enforce Freedom of Association and Collective Bargaining	45
4.10. Other Trade Union Responses to Strengthen Collective Bargaining for Atypical Workers	46
4.11. Concluding Thoughts on Complementary Actions at EU Level	47
<b>5. Tackling Dependent and Bogus Self-Employment: A Key Challenge in the Arts, Media and Entertainment Sectors</b>	<b>51</b>
5.1. Clarification of Concepts	52
5.2. The Grey Zone: the Legal Status of Dependent Self-Employed Workers	53
5.3. The Debate at European Level: Looking Towards the Future of Work in the EU	53
5.4. The Reality on the Ground: A Snapshot of Various Situations across the EU	54
5.5. Adapting to a Changing Paradigm: Trade Unions and Dependent Self-Employed Workers	58
5.6. Recommendations and Ways Forward	62
<b>6. Building for the Future: Organising Atypical Workers in the Live Performance and Audiovisual Sectors</b>	<b>65</b>
6.1. Building New Solidarities: Reaching out to, and Organising, Atypical Workers	66
6.2. What Works? Developing Trade Union Approaches to Reaching out to Atypical Workers	67
6.3. Keeping Pace with Digital Natives: Effective Use of Digital Tools and Social Media	70
6.4. Building for the Future: Reaching and Convincing Young People	71
6.5. A Certain Je ne sais quoi: Bringing Some Extra Creativity, Innovation and Opportunism to Engaging with Atypical Workers	74



## Key Conclusions and Recommendations

These recommendations seek to outline a framework for actions that could be undertaken at sectoral, national and European levels in order to address the situation of atypical workers in the Media, Arts and Entertainment sector. They draw in particular on the workshop exchanges which were held as part of the project and which have concentrated on key themes addressed in this publication forming an integral part of this project handbook. Thus observed situations and trade unions activities on the ground underpin the recommendations below.

The Media, Arts and Entertainment sector has undergone dramatic growth and change over the last two decades. This in turn has meant significant changes in the structure of the labour market and in the organisation of work both within and outside the framework of the traditional employment relationships. The sector is characterised by a wide spectrum of employment and working relationships falling outside the traditional employment model of open-ended full-time contracts and understood in this report as falling under the designation of 'atypical work'.

As highlighted in various ILO studies<sup>1</sup>, atypical forms of work relationships exhibit a higher incidence of decent work deficits. These are often not sufficiently addressed by regulatory frameworks, enforcement and labour inspections systems, active labour market policies or the judicial system, all of which should be effective and accessible to all workers, regardless of the nature of their employment relationship or work arrangement. Workers in atypical forms of employment still face barriers to collectively addressing decent work deficits. These workers are, more often than other workers, unable to exercise their fundamental rights, including the right to freedom of association and to bargain collectively with the relevant employer(s).

These conclusions and recommendations address atypical work in the Media, Arts and Entertainment sector, where project-based work and freelancing traditions have meant that there is already an established trend towards various forms of atypical work. Increasingly, this is true across other sectors and is a trend likely to expand in the future with new working relationships driven, among other things, by the rise of internet platforms and other forms of digital working. Thus we consider that these conclusions and recommendations have relevance far beyond the sector and that they can usefully feed into all policies seeking to develop a fairer and more balanced labour market in the future, by anticipating how current trends will impact on the future of work across all sectors.

## 1. Using The Roadmap of the 2014 Points Of Consensus from the ILO Global Forum on Employment Relationships in the Media and Culture Sector

The ILO Global Dialogue Forum on Employment Relationships in the Media and Culture Sector held in May 2014 adopted points of consensus intended to inform the development of policy measures at international, regional and national level<sup>2</sup>. These points of consensus included a series of key overarching recommendations intended to inform and underpin future policies in the field of labour law, fundamental social rights protection and social dialogue applied to atypical workers. Taken together, these offer an excellent overview of action needed to better address the sectoral issues driven by the changing nature of work in the sector. Thus we would like to recall certain key elements of these points of consensus, which we believe are of direct relevance to the themes addressed in this handbook. They are intended to serve as a general backdrop to the Conclusions and Recommendations detailed in this section.

They are as follows:

- Fundamental principles and rights at work apply to all workers in the media and culture sector, regardless of the nature of their employment relationship.
- Addressing challenges regarding the sector's employment relationships requires a holistic approach that takes into account other aspects of the sector, such as better coordination between supply and demand in its labour market, and a focus on training that is better adapted to industry needs and to the rapidly evolving technological environment.
- Global labour statistics on the media and culture sector are inadequate, and better labour market information using more up-to-date definitions and occupational categories is required. Gender equality should be promoted, including through addressing issues related to access to work, pay inequalities and barriers to promotion.
- Freedom of expression and independence must underpin the sector.
- A better understanding of the different types of employment relationships and other working arrangements in the media and culture sector is needed to assess which types constitute an employment relationship, and which ones constitute a civil or commercial relationship. It should be borne in mind that this exercise should not interfere with true civil and commercial relationships, while at the same time ensuring that individuals in an employment relationship have the protection they are due.



- Governments need to ensure that competition legislation does not obstruct the right of media and culture workers to freedom of association or to engaging in social dialogue with their social partners.
- Government and social partners need to develop strategies on training which will respond in a timely manner to current and future skills needs in the sector. Training should help address diversity in the sector and focus not only on people who want to find work in the sector, but also on existing media and culture workers.
- Social security schemes should take into account the particular needs of media and culture workers.

## 2. Upholding the Right of Freedom of Association and Access to Collective Bargaining for all Workers

Promoting more inclusive social dialogue and collective bargaining are key means of ensuring better conditions for all workers, regardless of their status. When examining the question of collective bargaining for atypical workers, there are two points to consider.

The first consideration relates to the overall labour market status of atypical workers, and how industrial relations institutions and practices can be more responsive to bridging the existing gaps between atypical and standard workers. The second consideration is to examine to what extent the exercise of fundamental social rights can be reconciled with the requirements of the internal market.

EU competition law, conceived as an EU internal market tool, may severely impact workers' collective bargaining rights and their freedom of association. This ultimately can impact on the quality of employment and working conditions, even to the extent of making it impossible for workers to earn a decent living.

The basic assumption is that workers, regardless of their status, should be protected by the ILO's International Conventions No. 87 and No. 98, which regulate freedom of association and the right to organise, and by the EU Charter of Fundamental Rights, as a legally binding tool of the EU treaty.

As emphasised by ETUC's Social Progress Protocol<sup>3</sup>: 'Economic freedoms, as established in the EU Treaties, should be interpreted in such a way as not infringing upon the exercise of fundamental social rights as recognised in the Member States and by Union law, including the right to negotiate, conclude and enforce collective agreements and to take collective action, and not infringing upon the autonomy of social partners when exercising these fundamental rights in pursuit of social interests and the protection of workers'.

### 2.1. Recommendations for Action

#### Sectoral level

- From an organisational point of view, trade unions need to remain committed to, and explore all avenues with a view to organising atypical workers, and negotiating or extending existing collective agreement to atypical workers.
- Enhance strategic litigation and the use of national, European (EU, Council of Europe) and international recourse mechanisms (ILO) to enforce the rights to collective bargaining and freedom of association for all workers.
- Analyse in further detail to what extent alternative dispute resolution (ADR) systems for collective conflicts and the provision of arbitration, mediation and conciliation services can be useful tools to protect freedom of association and the right to collective bargaining.

#### EU institutions and Member State level

- The EU institutions – and in particular the European Commission and the European Parliament – have to ensure the sound implementation of the right to collective bargaining for all workers as part of the principles of social progress contained in EU treaties, and the EU Charter of Fundamental Rights as a legally binding tool.
- Challenges of globalised labour markets need to be strictly monitored by European institutions and national institutions to ensure that they do not threaten the rights of all workers to freedom of association and collective bargaining.
- In the context of the European Semester, the European Parliament should pay special attention to this aspect in the discussions on the Annual Growth Survey and could call upon the European Commission and Council to monitor carefully such measures when assessing the National Reform Programmes.



- The EU institutions should ensure full implementation of the ILO's fundamental principles and rights at work, along with its core conventions C87 and 98 and C154: in line with the ILOs principles on rights at work, core conventions C87 and 98 and C154.
- The European Parliament should consider organising a specific hearing on the subject of atypical work and calling upon the European Commission to present a communication assessing the implementation of the relevant EU legislation, including Directive 97/81 on part-time work and Directive 2008/104 on temporary agency work. This communication should further identify possible options for better harmonisation or regulatory regimes applicable to atypical workers notably and specifically for self-employed workers.
- The European Parliament could call upon the European Commission to analyse further how far ADR (alternative dispute resolution) systems can be a useful tool to promote industrial relations and enforce collective workers' rights in line with the Mediation Directive (2008/52/EC) and as part of the European Commission's future initiatives on Justice for Growth.

### 3. The Need for Better Data and Labour Market Intelligence

The necessity to raise public awareness and increase visibility of atypical workers requires better comparative quantitative data regarding the working and living conditions, and specific needs of atypical and self-employed workers, with a view to improving knowledge and understanding of the labour market integration of these kinds of workers.

- Eurostat should continue to build up more detailed cultural statistics that acknowledge the specific features of the sectors. Pan-European comparative data should be collected, including on forms of employment and type of status.
- Eurofound should continue to provide analyses on the situation of atypical work along with a strong commitment to the development of pertinent qualitative analysis which includes the specific situation of vulnerable categories of workers.
- The integration of an 'equal opportunities' dimension in data collection requires particular attention notably when it comes to gender-specific data and the situation of young workers (see trainees).

### 4. Enhancing Legal Clarity on the Different Forms of Employment and Work Relationships

Current definitions differ across Member States and might create additional barriers to labour market integration and cross-country mobility within the EU in particular for mobile artists and workers in the Media, Arts and Entertainment sector. There is a strong need for a clear definition of the status of workers whether they are employed under a labour law contract, are genuine self-employed workers or whether they are contracted under other forms of dependent work relationships.

In particular, guidance is needed around the application of EU competition rules to workers in an employee-like situation. As noted in an EESC opinion in May of this year, 'in this context, the use of the ILO understanding of "worker" rather than the more narrowly defined "employee", could be helpful to better understand how fundamental principles and rights at work apply, the enjoyment of which EU competition rules should not impede".

### 5. Fighting Bogus Self-Employment More Effectively

Bogus self-employment has become a widespread phenomenon in EU countries. The legal and social security protection currently available to bogus self-employed workers is a source of widespread concern to unions and workers in the Live Performance and Audiovisual sectors. There is a danger that persons working on a bogus self-employed basis might either be deprived of their social rights or else that those rights might be violated.

Ongoing research on the evolution of the situation is needed to inform policy making and strategic decisions. Given the lack of empirical evidence across Member States and at sectoral level on the numbers and working conditions of dependent and bogus self-employed workers, there is a pressing need for better data collection.

Addressing bogus self-employment is one of the stated aims of the newly launched European Platform on Undeclared Work. The sectoral trade union confederations that are members of this platform must ensure that this issue receives the attention it needs and that there is an in-depth and ongoing exchange on strategies to address bogus self-employment.

## 5.1. Recommendations for Action

### Sectoral level

- European trade unions should call upon the European Commission, and the future European Platform on Undeclared Work to conduct sectoral surveys on the extent of the phenomenon of bogus self-employment across EU Member States. The development of sectoral surveys could be part of the future work programmes of the European Social Dialogue Committee for the Audiovisual sector and the European Social Dialogue Committee for the Live Performance sector.
- A cooperative dialogue framework for trade unions at inter-sectoral level could be set up to consider joint actions to address the specific dimensions of bogus self-employment, including in relation to the work of the European Platform on Undeclared Work.

### EU institution and Member State level

- The European Commission could, together with Eurostat and Eurofound, make sound use of future European Labour Force Surveys and include questions concerning dependent and bogus self-employment. This information should be monitored and integrated into the 2020 strategy's socio-economic monitoring mechanisms (European Semester<sup>5</sup>).
- European trade unions should also call upon the European Commission and the European Parliament to work towards an approximation of definitions or guidelines and/or legal criteria that could help to address the so-called 'grey area' regarding the legal status of dependent and bogus self-employment.
- Due regard should be paid to the recommendations of the European Parliament contained in its resolution of 12 December 2013, 'Effective Labour inspections as a strategy to improve working conditions'<sup>6</sup>, which acknowledges the role of labour inspections in addressing bogus employment.

## 6. Access to Fundamental Social and Labour Rights for all Workers, Regardless of Employment Status

It is fully consistent with the ambition of the European social model to provide more universal and appropriate social protection for all, notwithstanding different formal types of employment. This implies also extending social protection, and particularly social insurance creating specific social security regimes for specific categories of atypical workers. This is already the case in certain EU Member States. Existing national institutions and preferences have to be taken into account, as they have a strong influence on the functioning of labour markets. It is certainly not straightforward to promote a uniform European system, but some general principles and guidelines should be discussed at European level.

There is a need to advocate to ensure that Member States' legislation guarantees minimum entitlements to social protection for self-employed workers and atypical workers in the Live Performance and Audiovisual sectors as regards sickness, maternity, parental leave, incapacity and occupational accidents, as well as pension rights, in particular for workers with a low income.

- The European Commission should give due regard to the recommendations contained in the European Parliament resolution of 14 January 2014, Social protection for all, including Self-Employed Workers (P7\_TA(2014)0014)<sup>7</sup>, which stresses that 'self-employment needs to be recognised as a form of work which helps to create jobs and reduce unemployment, and that the expansion of self-employment should go hand-in-hand with appropriate social protection for the self-employed as defined in the Member States' national legislation'.
- The European Parliament resolution further calls on Member States and the European Commission to 'involve social partners, in accordance with national practices, in a process of developing and modernising social protection and to develop the social dialogue at EU and national levels'.

## 7. Developing Lifelong Learning and Professional Training for Atypical and Self-Employed Workers

The economic downturn has reinforced some of the employment features of the Audiovisual and Live Performance sectors, namely project-based work and self-employment. To manage their careers, which have become less and less linear, professionals have to diversify their skill sets even more than before. Many also have to acquire the necessary knowledge and skills to be able to cope with the legal, administrative and financial requirements of being self-employed or freelance. Trade unions' practices documented in the project handbook have highlighted a series of initiatives taken to fill the skills gaps.

Creative Skills Europe, the European Sector Skills Council for the Audiovisual and Live Performance Sectors<sup>8</sup> adopted its first report in 2016. The report identifies major trends in the sectors and skills requirements emerging from them. The report also puts forward a series of recommendations, which also address the specific situation and needs of workers active under atypical work arrangements.

## 8. Continue to Share and Exchange Trade Union Experience

Trade unions need to continue to reflect and take into account the specificity and diversity of atypical workers' profiles and needs, their specific circumstances and their preferences on how they wish to be organised through specifically dedicated organisations or through a more networking-oriented approach.

Exchange between unions is particularly beneficial regarding services provided by unions for workers on legal, administrative, fiscal, and other aspects of their professional life, including coaching and mentoring support for career management of workers.

## 9. Alliance Building for the Future

Trade unions need to broaden the 'work coalition' by building a relationship with other stakeholders (social movements, professional associations) on issues affecting atypical workers in the Live Performance and Audiovisual sectors.

Trade unions also need to develop outreach communication, recruitment and mobilisation strategies using social media to reach non-unionised atypical workers and create new forms of social capital and bonding relations as an opportunity to better organise atypical workers.

## 10. Towards a New Paradigm: Equal Pay for Equal Work

As part of the consultation on the proposed European Pillar of Social Rights, the European Commission has expressed its intention to identify a number of essential principles common to euro zone Member States, focusing on their needs and challenges in the field of employment and social policies. In his State of the Union address, in September 2015, President of the European Commission Jean-Claude Juncker stated, 'The Pillar should build on, and complement, our EU social "acquis" in order to guide policies in a number of fields essential for well-functioning and fair labour markets and welfare systems'.

The European Commission has recognised that new forms of work organisation and relationships have created a wide gap among workers 'perpetuating the segmentation of labour markets'. The European current labour law *acquis* has unevenly covered changing employment patterns, 'resulting in precarious working conditions, risks of circumvention or abuses'. The risk of precariousness faced by workers with atypical work relationships is further aggravated when it comes to accessing social security benefits, health insurance, pensions, and maternity leave etc.

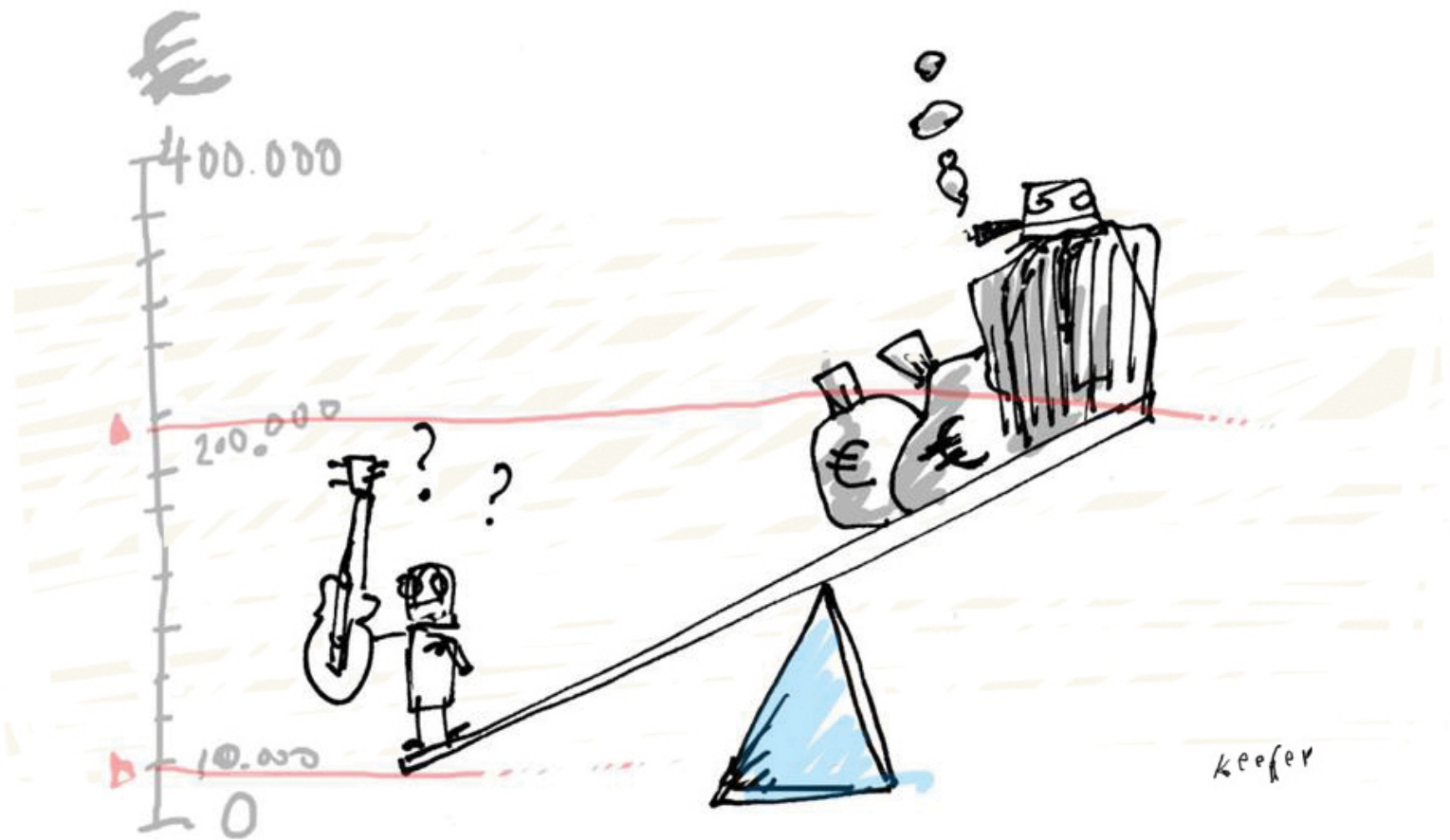
The EU Pillar of Social Rights is an opportunity which should not be missed to start a wider debate on the theoretical foundations of EU employment law and the state of play of fundamental social rights applied to all workers along the legislative gaps in the protection of workers with non-standard/atypical contracts across EU Member States. Also, the adoption of principles related to a basic standard of social rights applied to atypical workers should be part of the debate.

## Endnotes

- 1** For a detailed examination of decent work deficits, see the joint conclusions of the March 2015 Meeting of Experts on Non-Standard Forms of Employment, convened by the ILO:  
[http://www.ilo.org/gb/GBSessions/GB323/pol/WCMS\\_354090/lang-en/index.htm](http://www.ilo.org/gb/GBSessions/GB323/pol/WCMS_354090/lang-en/index.htm) p.50-53
- 2** ILO, Global Forum on Employment Relationships in the Media and Culture Sector (2014), Final report of the discussion, [online], Available at: [http://www.ilo.org/sector/activities/sectoral-meetings/WCMS\\_309859/lang-en/index.htm](http://www.ilo.org/sector/activities/sectoral-meetings/WCMS_309859/lang-en/index.htm)
- 3** See proposal for a 'Protocol on the Relation between Economic Freedoms and Fundamental Social Rights in the light of social progress' (the Social Progress Clause), [online], available at:  
[https://www.etuc.org/sites/www.etuc.org/files/social\\_progress\\_protocolEN\\_1.pdf](https://www.etuc.org/sites/www.etuc.org/files/social_progress_protocolEN_1.pdf)
- 4** Opinion of the European Economic and Social Committee, May 2016, The changing nature of employment relationships and its impact on maintaining a living wage and the impact of technological developments on the social security system and labour law, Conclusion 1.11, p. 4, [online], available at:  
<http://www.eesc.europa.eu/?i=portal.en.soc-opinions.37881>
- 5** See [http://ec.europa.eu/europe2020/making-it-happen/index\\_en.htm](http://ec.europa.eu/europe2020/making-it-happen/index_en.htm) for a detailed overview of the European Semester
- 6** See European Parliament resolution of 12 December 2013 on on effective labour inspections as a strategy to improve working conditions in Europe(2013/2112(INI))
- 7** See European Parliament resolution of 14 January 2014 on social protection for all, including self-employed workers P7\_TA(2014)0014.
- 8** European Skills Council for employment and training in the Audiovisual and Live Performance sectors (a joint project piloted by social partners of the EU Social Dialogue Committees in the Audiovisual and Live Performance sectors), *Trends and Skills in the European Audiovisual and Live Performance Sectors*, Report prepared by Daphne Tepper, June 2016, [online], available at: [https://ccskills.org.uk/downloads/Creative\\_Skills\\_Europe\\_final\\_report\\_.pdf](https://ccskills.org.uk/downloads/Creative_Skills_Europe_final_report_.pdf)



## SECTION 1



# Taking Stock of the Shifting Work and Employment Landscape in the Live Performance and Audiovisual Sectors

## 1. Taking Stock of the Shifting Work and Employment Landscape in the Live Performance and Audiovisual Sectors

The structure of the Media, Arts and Entertainment sector has undergone significant change. In many countries, gradual or rapid liberalisation and restructuring of these sectors has taken place, with less government funding, greater emphasis on enterprise development, more independent production and less emphasis on large studios. Technological developments, including the digital shift, have strongly affected work organisation in this sector, with labour-intensive work using many employees often giving way to technologically advanced work with fewer employees and more part-time and freelance work. Competition between media and culture enterprises, styles and formats have influenced business prospects and has had an impact on the numbers of jobs created or cut. In many countries, such restructuring of the media and cultural industries has been accompanied by the growth of a whole range of small and large enterprises with new employment opportunities and ways of working that affect the sector's composition and employment relationships<sup>1</sup>.

### 1.1. A First Snapshot

The Media, Arts and Entertainment sector encompasses many sub-sectors including: mass media, such as the internet, television, newspapers, magazines, books, film and radio; publishing, production and distribution of audiovisual content; performing arts, such as theatre, dance, ballet, music concerts and music festivals, opera, comedy and circus; and music recording. The broader media, culture and graphical sector also includes video games, print and electronic publishing and the printing industries. In the European Union (EU) alone, more than 2.3 million people are employed across publishing activities, video and television programme production activities and programming, broadcasting and information service activities, while approximately 1.2 million people work in printing and media reproduction<sup>2</sup>.

According to Eurostat data, 810,000 people were active in the Audiovisual sector in 2013, of whom 53% worked in production and 43% in broadcasting<sup>3</sup>. Live performance activities take place in both the public (still prevalent in most countries) and the private (subsidised or commercial) sectors. According to Eurostat's latest figures on employment, the European Live Performance sector employs around 1.9 million people<sup>4</sup>. However, the often informal and unstable nature of 'cultural' work in virtually all Member States makes it likely that not all European live performance employment is recorded in the Eurostat data. The lack of reliable data over a longer period of observation makes it almost impossible to properly assess the sector's development in terms of employment over the past couple of decades. Due to its heavy dependence on public funding and a stable and sustainable (legal, administrative, institutional) environment guaranteed by the public authorities, both turnover and employment in the Live Performance sector vary in accordance with different national traditions, standards and fluctuations in economic activity.

The Media, Arts and Entertainment sector is currently undergoing a series of major changes, principally due to the digital shift, other technological developments, changes in regulation, and the emergence of new business models, all of which present new opportunities and pose new challenges for the sector. The economic downturn and subsequent public sector austerity have had a major impact. There is a relative dearth of studies on the transformation of the sector, which makes it difficult to provide a clear picture of the changes occurring at national and European level. Nevertheless, it is possible to identify some important cross-country developments and trends. Key developments include significant market changes such as the digitisation of production, distribution and consumption, as well as cutbacks in public funding to cultural institutions and production.

Declining advertising revenues have been triggered by a shift in advertising budget streams from TV and printed press to online media. Additionally, public and private broadcasters have come under growing pressure to diversify their content production and content access, due in part to the increasing use of on-demand streaming services and new online platforms.

This development represents a business opportunity for the rapidly growing SMEs which continue to contribute significantly to job creation in the sector. Finally, the sector is experiencing a rise in production outsourcing and increased internationalisation.



## 1.2. When 'Atypical' is Typical: Work and Employment Relationships in the Media, Arts and Entertainment Sector

Over the last decade, industrial developments, new forms of work organisation, outsourcing and the use of new technologies in the Media, Arts and Entertainment sector have increasingly contributed to an erosion of the so-called conventional employment and working arrangements. The term 'employment relationship' has been traditionally associated with a concept of 'regular employment', which has three main characteristics: it is full-time, indefinite and part of a dependent, subordinate employment relationship. Other forms of work arrangements are becoming increasingly common and lack one or more of the characteristics of such employment. They may differ from one of the characteristics of standard employment described above (and sometimes more than one). Thus, we may identify atypical working-time arrangements (part-time, on-call, zero-hours, and so on); short-term/fixed-term contracts (fixed-term, project or task-based work); and atypical work relationships (contracted or subcontracted work, self-employment or agency work). It should also be noted that the term 'atypical' reflects only the deviation from the standard employment norm but it is not a reflection of the prevalence of such contracts which are increasingly widespread.

The status of being self-employment and/or freelance is highly prevalent in the Media, Arts and Entertainment sector and thus deserves particular mention. It shall first be recognised that within the EU, a significant proportion of the general workforce are self-employed and their numbers have been steadily increasing within European labour markets over the last decade. According to a study by the European Foundation for the Improvement of Living and Working Conditions (Eurofound), self-employed workers constituted 17% of the total working population in the EU27 in 2010<sup>5</sup>.

Within the EU, there is currently no commonly agreed definition between Member States of what constitutes a self-employed worker or self-employment. EU Directive 2010/41/EU of 7 July 2010 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity has defined a 'freelancer' or 'self-employed person' as: 'someone pursuing a gainful activity for their own account, under the conditions laid down by national law'<sup>6</sup>.

Eurofound has characterised 'self-employed workers' according to a series of criteria such as legal subordination; dependent/independent worker dichotomy and aligned classifications used by the International Labour Organization (ILO) and the Organization for Economic Cooperation and Development (OECD). Self-employment is defined in a residual way, comprising all contractual relationships not falling within the boundaries of 'paid employment'<sup>7</sup>. In its report, *Self-employed workers: industrial relations and working conditions*, Eurofound confirmed that freelance work was an established feature of the media sector, including the press and film industry and that the growth of information and communication technologies (ICT), had resulted in self-employment spreading to activities such as graphic design, web-based ventures and entertainment<sup>8</sup>. According to another study by Eurofound regarding the representativeness of social partners in the Audiovisual sector<sup>9</sup>, self-employment and non-employee relationships represented 21.4% of total employment in the Audiovisual sector in 2010 compared with 16.1% of total employment in the EU27. Furthermore, 6.2% of workers in the sector had more than one job in 2010.

As highlighted by the ILO<sup>10</sup>, the exact legal status of freelancers is a complex issue, and varies from country to country. 'The term "freelancer" should not be considered synonymous with "self-employed", although many freelancers in the media industry do indeed have self-employed status and thus effectively can be considered to be running their own micro-enterprise. In many States, there is no legal middle ground between employed and self-employed status, although there can be considerable areas of overlap in practice'<sup>11</sup>.

There has been a high level of concern among trade unions concerning the legal uncertainty linked to the status of freelancers. Séamus Dooley Irish Secretary, NUJ has noted: 'The term "freelance" has no legal status and does not adequately describe an individual class of workers. In effect the term is loosely used to describe those who do not have contracts of service and are engaged in a contract for service'<sup>12</sup>.

While it is difficult to aggregate comparable statistics concerning live performers across the EU, a 2011 survey by the International Federation of Actors (FIA)<sup>13</sup> found that in Member States, many dancers work predominantly under long-term or short-term employment contracts as employees, but there was a clear trend towards increasing use of short-term contracts in several countries and increasing numbers of self-employed. An ILO study by Gijsbert Van Liemt on employment patterns in the culture sector has confirmed that on the whole, people in Media and Culture are more likely to be self-employed, employed part-time, or in a combination of employment and self-employment. In fact, many in these industries have what has been called 'portfolio careers'<sup>14</sup>: 'these "portfolio workers" mix different types of employment status, usually because they have no choice [...]. In the span of a week, month or season, they can be part-time employed, self-employed, unemployed (with or without unemployment benefit) and engaged in

unpaid activities such as volunteer work, retraining, study and family life. In the Netherlands, the highest percentage self-employed is found among creative artists (70%) and among writers and translators (79%)<sup>15</sup>. In Ireland, self-employment is extensive among actors, entertainers and directors – about 60% of this group is self-employed in their main job – averaging 40% among all cultural occupations<sup>16</sup>.

There is a lack of comparative data documenting the situation of atypical work in the Audiovisual and Live Performance sectors across the 28 EU Member States. In 2015, however, the EU Audiovisual sectoral social dialogue committee<sup>17</sup> commissioned a study to provide an overview of employment and work arrangements in the Audiovisual sector<sup>18</sup>. This study offered some further insights into the composition of the workforce in the sector. Analysis of the EU Labour Force Survey data shows that the sector is characterised by higher levels of self-employment than average in the EU economy. In 2013, 78% of workers in the Audiovisual sector were employed and 22% were self-employed workers, compared with 15% being self-employed in the wider European economy. The Audiovisual sector has also experienced higher than average growth in the share of self-employed (without employees), from 16% to 19% compared to an increase of one percentage point across the whole European economy. This trend was mainly driven by the production sector, where self-employment (without employees) increased from 22% to 27% between 2008 and 2013.

The sector is also characterised by a highly educated workforce. In 2013, 57% of workers held a tertiary qualification, compared with 32% in the whole economy. Data also show that there has been a steady increase in the number of workers with a high-level qualification, while the number of less educated workers has decreased.

It is important to clarify that in EU-level data (EU LFS), the status of an employee or a self-employed person is self-assessed; therefore these categories are likely to include a wide range of work arrangements according to self-perception and national contexts. Temporary employment is also more widespread in the Audiovisual sector, compared to the average in the EU economy. In 2013, the share of temporary workers was 20%, well above the European average of 14%.

### Box 1

## An Illustrative Example: The Social and Employment Situation of Actors in Flanders

A piece of research entitled *Acteurs in de Spotlight*<sup>19</sup> commissioned by the Flemish Community Ministry of Culture and carried out by research teams at the University of Ghent (Belgium) has provided an objective snapshot of the socio-economic situation of actors in the region of Flanders. The research was based on a survey sent to 645 actors in the Flemish part of Belgium in 2014. The main findings are summarised as follows:

**Profile:** findings indicate that an actor in Belgium is likely to be highly educated (85% of respondents had an advanced degree) and live in an urban environment. Employment status: most of the persons interviewed as part of the survey work on fixed-term contracts (64%) or short-term contracts via interim agencies for artists (52.4%). Those actors with short-term contracts tend to belong to the younger and female. They are also the ones with the lowest job satisfaction. Among the self-employed, actors tend to be older and male. The latter enjoy good salaries and high job satisfaction. Income: most of the respondents confirmed that only a part of their income comes from their professional activities as actors, and only a tiny fraction of the survey sample (8%) is able to entirely earn their living from their performing activities.

**Actors by gender and age:** the gender distribution of the survey confirms that a significant number of the respondents aged 22-44 are women. Job search and networking: in terms of job search, most of the survey respondents find a job via their own

informal network or by being involved in the development of their own projects. 61% of the respondents are members of a professional organisation. Finally, as regards trusted sources of work-related information: 66% of people interviewed regularly seek such information from the following sources: from colleagues (52%); accountant (44%); employers (31%); their union (25%); interim agency (24%). 34% do not seek such advice.

**Actors' priorities and concerns:** the concerns which are most prevalent for actors, highlighted by the survey, confirm the rather unstable socio-economic status of many workers in the Live Performance sector. The need for stable and decent income along with job security, unemployment followed by pensions and social rights are among the top priorities of actors. Actors' motivations: despite a difficult socio-economic environment, the overall motivation and job satisfaction remains very high among the interviewees (90%). 86.9% recognise that their job provided them with a high level of personal development.

The study has at its core the central questions which affect atypical workers in the live performance sector and indeed the Media, Arts and Entertainment sector more broadly. These issues relate to the evolution of the labour market towards a more individualised, mobile and flexible work force. Addressing the specific situation of the Live Performance sector also helps to assess the macro trends that will shape tomorrow's workforce.

Additionally, increasing trends towards temporary employment have been observed from 2008 onwards, mostly in the production sector. Although data from national sources do not provide a clear picture of work arrangements, an increasing trend in temporary work and atypical work arrangements has been confirmed. The complexities of the different labour markets and the lack of available data make it difficult to provide a clear-cut picture of current employment and work arrangements in the Audiovisual sector. However, available data clearly points to employment being increasingly characterised by atypical contractual arrangements.

### 1.3. The Gender and Youth Dimensions of Atypical Work

Though women play an important role in the Media, Arts and Entertainment sector, a review of literature suggests that women performers and journalists are likely to face disadvantages in terms of pursuing gainful employment, managing career progression and work life balance<sup>20</sup>. Also, other identity markers such as age, ethnicity, sexual orientation or impairment can add additional layers of inequality. Some audiovisual occupations remain largely the preserve of men while others (such as those relating to make-up, costumes and hair) are dominated by women. Women in the media and culture industries are often in 'atypical' employment relationships, while men are disproportionately represented in standard employment.

In 2010, less than 40% of Audiovisual sector employees were women, a share that was lower than the average share of female employment in the whole EU27 (45.5%). For example, the increase in the freelance membership of the NUJ (UK and Ireland) between 2005 and 2012 was primarily attributable to an increase in the number of women members<sup>21</sup>.

The *Framework of Actions on Gender Equality* agreed on by the EU Audiovisual Sectoral Social Dialogue Committee in 2011 (which also addresses issues such as gender portrayal in the media, gender roles at work, equal pay and equality in decision-making) states: 'It is critical, when considering working arrangements which support the reconciliation of work and family life, that these can be taken up on a voluntary basis by both women and men, and are designed in a way that does not undermine their long-term participation and position on the labour market. Indeed, surveys show that flexible working practices are more used by women than men. In many cases, this has resulted in, inter alia, career stagnation, a pay-gap and lower pensions'<sup>22</sup>.

Young people and graduates are also facing structural inequalities in the media and cultures sectors. They often struggle to find a foothold, and may enrol in an unpaid work experience or internship schemes, which may involve months of work and might not lead to paid employment.

Reports from the European Federation of Journalists suggested that young people in France were accepting unpaid hours as a way of trying to gain a foothold in the industry. This same phenomenon exists in several other European countries. In the UK and Ireland, for example, the National Union of Journalists has stated that '*an increasing number of casual journalists are not paid at all*'<sup>23</sup>. An EC-led study on Precarious Work and Social Rights (PWSR)<sup>24</sup> has shown that across sectors, young men and young women are considered the most likely to be employed in atypical jobs with the least protection and/or access to welfare entitlements. Women workers were also classed as being more at risk of precarious work and the study suggests that their care responsibilities are a factor in exposing them to greater risk of precarious work, as it was also often the form of work that allowed women to combine their work and domestic responsibilities<sup>25</sup>.

### 1.4. Reflection on the Implication of these Sectoral Trends

The above snapshot of trends serves to demonstrate, there is a clear and ongoing transformation of employment and working relationships underway in the Media, Arts and Entertainment sector, though naturally, this is not happening in isolation. As mentioned earlier, across all sectors in the economy, the European labour market has, in recent years, been impacted by significant changes linked to the emergence of new forms of working relationships. The so-called 'typical' employment, characterised by the traditional open-ended full-time employment contracts is increasingly being replaced by 'atypical' (or non-standard forms of) employment and work arrangements.

These trends are long established and very marked in the Media, Arts and Entertainment sector, where they have already been the focus of union work stretching back many years. There are growing concerns amongst unions, and indeed policy-makers, that many forms of work arrangements do not provide workers with adequate protection and are increasingly resulting in precarious work.

A significant body of research has been produced on the working conditions of atypical workers in European labour markets. The situation varies depending on the national context but a range of factors have been identified which may contribute to determining levels of precariousness and vulnerability which apply also to certain categories of atypical workers in the Media, Arts and Entertainment sector:

- little or no job security or legal/conventional/contractual protection, i.e. where the worker is at the mercy of his/her employer (e.g. as to dismissal, employment continuation, etc.);
- insecure, low or inadequate income which does not reflect the work that is being performed, according to the living standards where the work is performed;
- absence of worker choice regarding basic working conditions (working place, job description, working time, etc.);
- absence of proper social protection in case of unemployment, incapacity (e.g. sickness, accidents) and old age;
- low health and safety standards;
- limited access to training opportunities;
- limited trade union representation or collective bargaining coverage (depending on the national context).

This has led ILO labour law experts to confirm at a recent expert meeting that non-standard forms of employment exhibit a higher incidence of 'decent work deficits'<sup>26</sup>.

During the ILO's Global Dialogue Forum on Media and Culture, the tripartite Points of Consensus reiterated that 'Fundamental principles and rights at work should apply to all workers in the media and culture sector, regardless of the nature of their employment relationship'<sup>27</sup>. It is this conviction that informs the union activities and positions that are described in the present report.

## Endnotes

1 ILO Global Employment Forum-GDFMCS/2014, *Employment relationships in the media and culture industries*, Issue Paper, 14-15 May 2014, p. 1-2.

2 ILO Global Employment Forum-GDFMCS/2014, *Employment relationships in the media and culture industries*, Issue Paper, 14-15 May 2014, p. 1-2.

3 Report prepared by ICF Consulting Services and commissioned by the members of the European social dialogue committee on Audiovisual services as part of the EU co-funded project *Analysis of the EU Audiovisual Sector Labour Market and of changing forms of employment and work arrangements* (VS 2015/0046).

4 Eurostat, *Culture statistics*, 2016 edition, [online], page 68. Statistics are based on the characteristics of two ISCO categories of occupations: 'creative and performing artists' (including visual artists, musicians, dancers, actors and film directors, etc) and 'authors, journalists and linguists'. Those categories are referred to as 'artists and writers'. Available at <http://ec.europa.eu/eurostat/documents/3217494/7551543/KS-04-15-737-EN-N.pdf/648072f3-63c4-47d8-905a-6fdc742b8605>

5 Eurofound, *Self-employed workers: industrial relations and working conditions*, 2010, p. 7.

6 Directive 2010/41/EU of the European Parliament and of the Council of 7 July 2010 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EE.

7 Eurofound, *Self-employed workers: industrial relations and working conditions*, 2010, p. 13.

8 Eurofound, *Self-employed workers: industrial relations and working conditions*, 2010, p. 5.

9 Eurofound, *Representativeness of the European social partner organisations: Audiovisual sector*, 2013, p. 4.

10 Global Dialogue Forum on employment relationships in the media and culture sector, *Employment relationships in the media and culture industries*, Issues paper GDFMCS/2014, 14-15 May 2014, p.17.

11 Global Dialogue Forum on employment relationships in the media and culture sector, *Employment relationships in the media and culture industries*, Issues paper GDFMCS/2014, 14-15 May 2014, p.17.

12 Extract from a speech intervention during FIA, UNIMEI, FIM, EUJ seminar on collective bargaining and atypical workers, 8 September 2015, Dublin, Ireland.

13 FIA, *Dancers' Career Transition: A EuroFIA handbook*, Brussels, 2011, p. 5.

14 ILO, Working Paper No. 301, *Employment relationships in arts and culture*, 2014, pp. 7-9.

- 15** Cf Schreven, L.; de Rijk, A. 2011 *Kunstenaars in breder perspectief: Kunstenaars, kunstopleiding en arbeidsmarkt* (CBS Centraal Bureau voor de Statistiek, Den Haag/Heerlen), quoted pp 7 in : "Working Paper No. 301, *Employment relationships in arts and culture*", 2014,.
- 16** ILO, Working Paper No. 301, *Employment relationships in arts and culture*, 2014, pp. 7-9.
- 17** A full list of members can be found here: <http://ec.europa.eu/social/main.jsp?catId=480&intPagelId=1825&langId=en>
- 18** Study commissioned by social partners in the European Union (EU) audiovisual sectoral social dialogue committee, represented by CEPI, EBU, EFJ, EURO MEI, FIA, FIAPF and FIM, and part of the EU co-funded project *Analysis of the EU Audiovisual Sector Labour Market and of changing forms of employment and work arrangements* (VS 2015/0046). The study covered 10 Member States, namely, the Czech Republic, Denmark, France, Germany, Italy, the Netherlands, Poland, Romania, Spain and the United Kingdom.
- 19** Siongers, J., Van Steen, A., & Lievens, J., *Acteurs in de spotlight: onderzoek naar de inkomens en de sociaaleconomische positie van professionele Vlaamse acteurs*, Ghent University, 2014.
- 20** ILO Global Employment Forum (GDFMCS/2014), *Employment relationships in the media and culture industries*, 14-15 May 2014.
- 21** ILO Working Paper No. 295, *Employment relationships in the media Industry*, 2014, pp. 27-28.
- 22** ILO Working Paper No. 295, *Employment relationships in the media Industry*, 2014, pp. 27-28.
- 23** ILO Working Paper No. 295, *Employment relationships in the media Industry*, 2014, quoted by Andrew Bibby, p. 29.
- 24** London Metropolitan University for the European Commission, *Study on Precarious work and social rights* (VT/2010/084), 2012, pp. 49-53.
- 25** London Metropolitan University for the European Commission, *Study on Precarious work and social rights* (VT/2010/084), 2012, pp. 49-53.
- 26** Conclusions of the Meeting of Experts on Non-Standard Forms of Employment, March 2015.
- 27** ILO Global Dialogue Forum on Employment Relationships in the Media and Culture Sector - Points of consensus adopted on 15 May 2014.

## SECTION 2



### **The Challenge of Reimagining Services to Meet the Needs of Atypical Workers**



## 2. The Challenge of Reimagining Services to Meet the Needs of Atypical Workers

Over the last decade, trade unions have reflected on how to manage changes in employment relationships. They have started to adapt their ways of working in order to be able to more effectively represent freelance and other atypical workers. This was the theme of a 2011 publication of the European Federation of Journalists which observed that 'unions are indicating that they want to change their structures, procedures and services in order to improve their work for freelance journalists'<sup>1</sup>. Research by Eurofound<sup>2</sup> has identified several examples of strategies and approaches developed by unions to better respond to the individual interests of certain categories of workers which involve two broad approaches:

- Organising initiatives at the individual level may seek to involve workers through the creation or activation of networks of workers and sometimes of associations, which mobilise around collective goals and thereby recognise the existence of collective interests and identities;
- Trade unions may emphasise the usefulness of union membership through the provision of services which are reserved for members. This differs from the collective benefit achieved through collective bargaining, which aims to benefit all workers pertaining to the bargaining unit concerned; Atypical workers may, in some cases, find themselves excluded from such bargaining units however.

The drivers of membership are therefore different in each case: individual participation and involvement in network-based approaches and/or individual benefits in interest-based strategies<sup>3</sup>. The models of individual benefits linked to membership are certainly not new. They have been central to the organisational strategy of major US trade unions in the media and culture sector, notably, the Directors Guild of America and the Writers Guild of America whose concept of membership combine collective representation with a strong emphasis on individual benefits involving actively participating in health care provision and retirement pension schemes for their members, provisions which have been negotiated through collective agreements in the sector.

New models of trade union organising have gained ground based on incentives and a range of benefits associated with membership and designed to respond to the specific needs of atypical workers and freelance or self-employed workers. This section will review a number of good practices, grouping them in two distinct clusters: firstly: adapting union support services to the needs of atypical workers and secondly, developing a dedicated structure for atypical workers within the overall framework of the union.

### 2.1. Adapting Union Support Services to Deliver for Atypical Workers

In the EU, there are several unions delivering or working to deliver both collective bargaining and one-to-one support to atypical workers on a range of employment issues in commercial and public service, broadcasting, programme production, film, theatre and the arts, digital media and live events.

#### 2.1.1. Developing individual benefits and an interest-based service offer for atypical workers

This kind of approach is developed for atypical workers who may have access to the union's legal service for problems arising at work and away from work. Legal services in that case may cover employment matters including breach of contract, discrimination, unfair dismissal, equal pay, working time, etc. Additional services provided to self-employed workers can also include contract negotiation. There are also examples of customised insurance services specifically geared to meeting members' needs. Insurance packages are particularly addressed to atypical workers and may cover such areas as public liability but also other types of risks such as sickness, business interruption, personal accidents, etc. As such, these are a very practical form of support to atypical workers that may be channelled through a union.

The box below shows how sectoral trade union BECTU in the UK has developed and adapted its offer to better respond to the needs of a growing self-employed membership base..



## Box 1

**A Bundle of Tailored Services for Freelancers: BECTU (UK)**

The British Broadcasting Entertainment, Cinematograph and Theatre Union<sup>4</sup> has some 25,000 members who work in broadcasting, film, theatre, entertainment, leisure and interactive media. In 2015, 57% of BECTU members were considered atypical workers.

Atypical workers are mostly present in the union's divisions for Freelance; Film and TV Production; and Theatre. As outlined in Section 1 of this handbook, the various forms of working relationship are complex and involve different statuses and fiscal regimes. Broadly speaking, in the UK, there are three forms of work relationships: Employee, Worker and Self-employed or Freelance.

Freelance or self-employed workers have no protection from unfair dismissal; no right to statutory maternity pay or sick pay; no right to statutory redundancy pay. The worker category is covered by some legal protection such as national minimum wage, working time legislation, statutory holiday pay, discrimination legislation and the right to be accompanied at a disciplinary or grievance hearing. BECTU delivers both collective bargaining and one-to-one support to its members on a range of employment issues in commercial and public service, broadcasting, programme production, film, theatre and the arts, digital media and live events.

All BECTU members have for instance access to the union's legal service for problems arising at work and away from work. Legal service covers employment matters including breach of contract, discrimination, unfair dismissal, equal pay, and working time. Additionally, there is a 24-hour legal helpline, providing legal advice on all non-employment related legal matters such as property, divorce and debt. Also a specific recovery scheme is in place including the right to consult the Ask First List (a service for union members only which gives information about employers who are in dispute with BECTU members on employer's practices), access to Small Claims Court and union-funded legal action in the High Court.

BECTU also offers access to a range of customised insurance services specifically geared towards meeting members' needs. Insurance packages are particularly geared to freelance media workers and cover public liability (insurance cost is about €30/year and covers risks up to €13,900,000). Other types of risks are also covered such as sickness, business interruption, personal accidents, etc. Training provision is another major area of attention for BECTU which provides training programmes targeting freelancers at various stages of their careers.

For more information, see <https://www.bectu.org.uk/>

**2.1.2. Offering access to training and skills development for atypical workers**

Given the changes which new technology is bringing to the media industry, training has never been more important. A 2010 OECD report on the effect of the internet on news publishing also addressed the issue of training: 'Fostering the skills of journalists, who increasingly have to be multimedia journalists, is central to maintaining a high-quality news environment. News organizations have to invest heavily in the creation of a versatile workforce'<sup>5</sup>. While the teaching of journalism, namely entrepreneurial journalism, in the new media ecosystem is also large and growing, training provision is another major area of attention for unions providing support to their atypical workers. Unions may offer for instance a range of advisory and training services covering the professional sphere. Such training programmes may be carefully designed to target atypical workers at various stages of their careers and the specific needs that they have.

The box next page highlights how the Netherlands Union of Journalists is working to foster innovation in services delivery within media structures addressing professional training, organisational change, employment sustainability and the future development of the profession.

## Box 2

### Reimagining a Dedicated Training Offer for Atypical Workers - Netherlands Union of Journalists (NVJ) – Netherlands

There are currently about 15,000 journalists in The Netherlands of which more than 5,600 have freelance status. The NVJ has 7,500 members, of which 2,500 are freelance journalists. The NVJ's general mandate is to represent the collective and individual interests of its members.

In the context of a fast-changing landscape, dominated by the development of new digital media and decreasing advertising revenues, journalists have been impacted by the crisis and recession. Between 2013 and 2014, more than 3,000 journalists lost their jobs and had to look for new employment. The freelance market has grown as a result of unemployment. In response to those developments, the NVJ decided to set up a training structure, the NVJ Academy, whose aim is to offer core training programmes designed to foster the professional growth of journalists at each stage of their career path. The training programmes of the NVJ Academy address critical subjects connected with the media profession such as entrepreneurship, personal branding, continued education and digital skills.

More than 75 courses were held in 2014 reaching out to some 1,000 participants. Specific training programmes are developed to target in particular freelance journalists and focusing on social media (such as the use of Facebook, Twitter and LinkedIn) for journalists; writing for the web; community management; data journalism or website development. Specialised courses are also delivered on specific thematic subjects (e.g. masterclass on nuclear security or a course for journalists working in conflict zones).

Member surveys have shown the need to better bridge gaps between educational programmes delivered and the situation on the ground. They also identified growing needs in career

management and digital skills training. This further led the NVJ to work to improve the catalogue of training on offer, as well as the quality of programme design. The approach adopted has been to partner with a wide range of industry stakeholders, along with trade unions, professional media organisations, but also management and accountancy firms (KPMG). For example, trade union FNV KIEM has financed training courses organised by the NVJ Academy, targeting 100 self-employed professionals from sales, marketing, HR and IT.

The NVJ Academy also tries to foster innovation in service delivery within media structures, addressing issues such as organisational change, employment sustainability and the future development of the profession. NVJ has been able to take advantage of government funding to further support the development of its services to members. €600 million have been made available for the promotion of sustainable deployment through education, career policy and work-to-work projects. Entrepreneurship programmes have been specifically developed for more than 200 self-employed journalists. Another area where the organisation is active is job creation: it negotiates traineeships for young journalists and has managed to help create up to 100 paid jobs in print media. One result of these efforts has been an increase in the membership. Facilitating training courses is of great importance to the development of journalism, for both journalists in employment and freelance journalists and the NVJ considers that this type of service should be incorporated into collective labour agreements. The NVJ Academy aims to become the leading centre for education of media.

For more information, see  
<https://www.nvj.nl/home>

### 2.1.3. Tailoring advisory services provision to support self-employed workers

Unions traditionally provide support to members as regards contractual conditions and rates of remuneration through the medium of collective bargaining. Increasingly, unions are also making such support and guidance available to members involved in one-to-one contract negotiation as well. Their indepth knowledge of the sectors concerned makes them particularly well-placed to offer this kind of service. As the box below will illustrate, the Finnish Musicians Union has developed its individual advisory services as a mechanism to empower performing musicians in better managing contract negotiation.

Additional advantages offered by unions, alongside the type of activities previously described, include such benefits as free public transportation, advance financing for legal disputes, special 'trainee press cards', membership fees that cover special insurance services, including travel insurance, discounts for relevant services (special discounts for car hire, mobile phone and internet rates, insurance, etc.), holiday homes and other leisure facilities.

## Box 3

### Supporting and Empowering Individual Contract Negotiation – Finnish Musicians Union

The Finnish Musicians Union is a small union with 3,300 members. There is a long tradition of unionism in Finland and 100% of classical full-time employed musicians are members of the union. Some 50% of the total number of self-employed musicians in Finland are also unionised. While collective bargaining continues to play an important role in the activities of the union, which is party to 30 collective agreements, it has become harder to achieve strong results from collective bargaining. Furthermore, public funding cuts remain a constant threat to stable employment in the sector, largely in the publicly funded cultural institutions. In this competitive climate, it is harder for freelancers to find work. The Finnish Musicians Union has therefore felt the need to start developing complementary services and facilities that could respond to the changing needs of its membership.

Examples of those services include developing collective schemes to facilitate and lower the cost of the rental of sound equipment, access to rehearsal spaces, and support for artists' residences. The union is also looking at developing a possible scheme to enable rental of vintage instruments. Union surveys have shown that members are now more interested in these kinds of benefits and services than traditional collective bargaining efforts provided by trade unions.

There is one service that has expanded greatly and gained in importance over the last 20 years, namely the 'individual contract consultation'. The contracts for which legal advice is sought are of various types. While recording contracts constitute the overall majority of contracts dealt with, other types of advice can relate to management contracts offered

to a musician or artists, or contracts with a music publisher. Other types of ventures could include agreements with artistic agencies for the representation of a musician in the Live Performance sector. The union generally provides legal advice on whether the proposed contract is acceptable and the terms of payment fair, compared with industry standards. Advice can also relate to breach of contract and legal action, if needed.

The individual contract consultation service is financed collectively by membership fees, and there is no other direct or indirect cost attached to this type of service. This service is also available to non-members following payment of a retroactive six months membership. The union does not propose aligned rates or common terms for contracts, but rather advises its members on whether the proposal being made is reasonable with regard to the bargaining position of the individual member. The union can build on a track record of previously negotiated contracts with major labels such as Universal for instance, which can offer insight into the negotiating practices of a given record label regarding royalties for example or other contractual terms and conditions. Support in managing the negotiations of the contract with counterparts is also requested by members, but this goes beyond the boundaries of pure legal advice to become a business-management oriented service. The Finnish Musicians Union, which has advised on some 2,000 contracts, remains cautious about encroaching into the wider area of business decisions, which are left to the sole discretion of members.

For more information, see  
<http://www.muusikkojenliitto.fi/english.html>

## 2.2. Creating a Dedicated Structure for Atypical Workers within the Overall Framework of a Union

This subsection will illustrate how trade unions in Italy, Germany and Sweden have created dedicated organisational structures for atypical workers. These structures are created with the specific aim of catering for the needs of atypical workers and offering services designed for them.

## 2.3. Challenges Moving Forward

In the wake of the effects of the deregulation of labour markets and social protection systems on employment relationships in the media and entertainment sector, trade unions face a range of challenges. Internally, trade unions have first to adjust their operations to respond to the needs of a diverse membership base composed of workers with different types of status (employed with standard contract and atypical workers including self-employed). In this respect, organising atypical workers necessitates membership-oriented approaches which can reconcile the often varied interests and needs of diverse categories of workers, in order to build a strong social movement. From an organisational point of view, the question of financial resources needed by unions to manage the extension of their activities is also a point of concern. Finally, union staff needs to be fully suited to manage the diversity of profiles and specific needs of atypical workers.

Box 4

## New Work Identities: Representing Precarious and Atypical Workers - NidiL CGIL Italy

NidiL was created in 1998 as a response from the CGIL Union to the reform of the Italian labour market (the so-called TREU pack<sup>6</sup>). This reform introduced new forms of work into the Italian labour code: coordinated and continuous collaboration (*lavoro parasubordinato* [*para-subordinated work*]) and temporary work (*lavoro interinale*), currently called in *somministrazione interim* contracts.

While previously the predominant type of employment status was the open-end employment contract (*lavoro subordinato a tempo indeterminato*), the TREU pack essentially aimed to make the Italian market more flexible. This paved the way for a deregulation of the labour market itself and resulted in widespread misuse of the new contractual forms of employment.

In this context, the CGIL (*Confederazione Generale Italiana del Lavoro* [Italian General Confederation of the Labour]) decided to create NidiL, a department to monitor and study the new developments resulting from the labour market reform. In 2002, when the proposal and discussion of the second main reform of the labour market came about, CGIL decided to formalise the representation of all the para-subordinated workers and the temporary contract workers by transforming NidiL into an autonomous federation.

Italy currently has about 4 million precarious workers. About 260,000 of those atypical workers work with temporary contracts, mostly on a fixed-term basis (*contratti di somministrazione, prevalentemente a tempo determinate*). There are about 1.5 million Para subordinated<sup>7</sup> workers. In addition,

undeclared work is still widespread in Italy; some estimates suggest that there are about 4 million undeclared workers. NidiL CGIL today counts some 72.000 members, most of them unemployed or occasional workers. About 10% of members are interim workers and another 10% are Para subordinated.

From an organisational point of view, there is a NidiL CGIL - office in every Italian province and a national NidiL CGIL organisation supports all the local activities and projects. NidiL CGIL works to improve the working conditions of self-employed workers and others engaged in various forms of atypical work. NidiL CGIL has also worked to combat regulatory abuses resulting from labour market reforms. This action has taken the form of bargaining, at national or local level, through which NidiL has succeeded in transforming the 'para-subordinated' status of employment into open-ended contracts corresponding to the National Work Contract with corresponding rights. NidiL CGIL also promotes legal action against employers who make use of bogus self-employment, with the objective of transforming where possible bogus self-employment into regular subordinate employment.

With regard to temporary agency workers, since 1998, NidiL CGIL has been a signatory of a national collective contract, which has since been renewed three times (most recently in 2013). NidiL CGIL is also working on a new Workers' Status to ensure a series of universal rights to all workers regardless of contractual forms and keeping in mind the specificities of self-employed work.

For more information, see  
[www.nidil.cgil.it](http://www.nidil.cgil.it)

## Box 5

### Creating a Specialised Entity to Cater for Freelancers – mediafon Germany

mediafon started as a micro-enterprise initiative supported by the federal ministry for education and science back in 2002. The concept developed and built on ver.di's<sup>8</sup> previous experience of projects for freelance workers. The concept of mediafon is to be an information, networking and knowledge-based platform, covering the full range of employment status and job-related issues, for all freelancers and self-employed workers.

While it was originally geared towards the Live Performance, Culture and Media sectors, nowadays it caters for all service sectors organised by ver.di. It seeks to make use of the union's expertise and know-how to develop new forms of union services, targeting an enlarged client base and generating additional revenues from non-unionised clients. It also aims to create more transparency concerning the situation of freelance and self-employed workers. mediafon also seeks to foster cooperation with different types of stakeholders, such as researchers and policy-makers.

Services offered include job-related information, networking support and self-marketing techniques. mediafon focuses its expertise on a wide array of the concerns affecting freelance and self-employed workers, whether related to legal, marketing, financial or administrative matters. mediafon users can benefit from three types of customised services: an expert centre where they can benefit from peer counselling (from other members who have a wide range of professional experience as self-employed workers); a website with an interactive database where they

can find information or ask questions in line with their sectoral activity and where they can get specialised counselling; an 800-page *Online Handbook for Self-employed* which aggregates all important and specialised information necessary to work in a self-employed capacity. The information provided can include for example all the steps necessary to start and manage self-employed activity from the legal, administrative and fiscal point of view, along with a series of aspects related to day-to-day management of self-employment. This can include client management and client invoicing or payment defaults if they occur.

mediafon also provides an overview of the market value of self-employed professionals in the sector. mediafon's interactive database enables members to get information on standard fees and rates from a range of sectors. Online news and a newsletter offer insight into relevant developments affecting the media and culture sector. The mediafon web platform includes a public internet presence and intranet facilities for management consulting services. The services of mediafon have proven to be of substantial benefit to atypical workers, who particularly appreciate the fact that they are quickly accessible, reflect the needs and priorities of the target groups, provide knowledge management tools and have clear added value. These services give ver.di a competitive edge in the market.

For more information, see  
[projektleitung@mediafon.net](mailto:projektleitung@mediafon.net), [info@mediafon.net](mailto:info@mediafon.net).

## Box 6

### Billing and Other Business Services, Swedish Musicians' Union

The Swedish Musicians' Union has established a billing service (AMA) which enables the union to act as an 'employer umbrella company' for musicians who are self-employed. This service allows self-employed workers to access some of the advantages of employee status, particularly in terms of unemployment benefits<sup>9</sup> during times where musicians do not have work.

AMA has a collective agreement with the Swedish Musicians' Union to ensure that the salary terms are in line with agreed salary standards. AMA provides the administrative services necessary (contract management with the entity seeking to hire a musician and invoicing). AMA provides for the salary entitlements after deduction of taxes. Another type of service is also available to those musicians who want to manage their career through setting up their own company. They can benefit

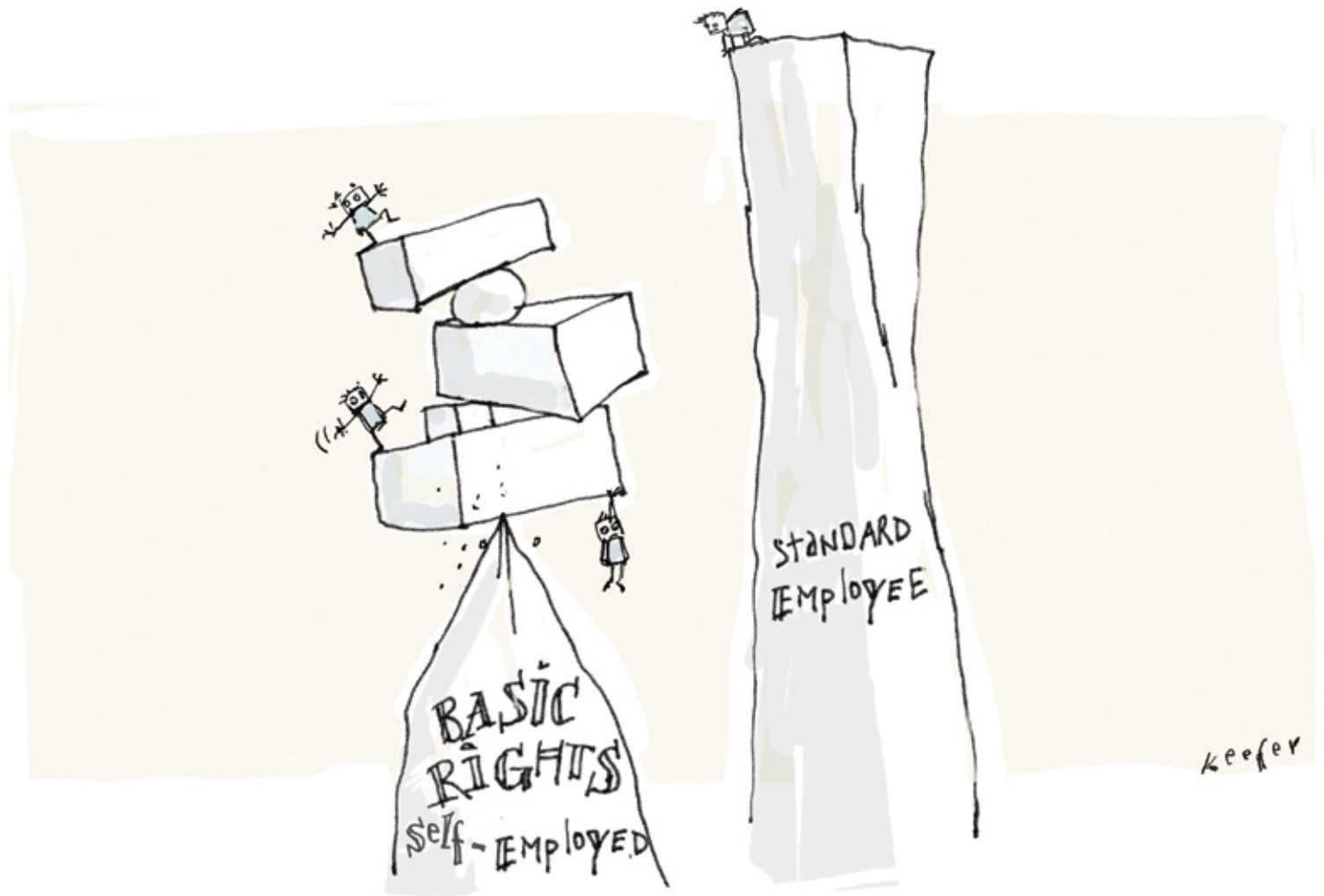
from 'enterprise services' (*Företagarservice*). The member pays half of the normal membership fee to the union and the same amount to the specific *Företagarservice*. The amount paid to the *Företagarservice* is deductible from the business income of those members that have registered to use the service. This type of service has proven to be very successful and the union may have to make some organisational changes to cope with the impact of these developments. The Swedish Musicians' Union also has a separate company ('Entertainment lawyers') which aims to complement the services offered by the 'enterprise services' and which provides support to members with regard to their business endeavours. The union also continues to represent members in other areas of its activity.

For more information, see  
<https://www.facebook.com/musikerforbundet>

## Endnotes

- 1 International Federation of Journalists, *Managing Change Innovation and Trade Unionism in the News Industry*, Belgium, 2011.
- 2 Eurofound, *Trade union strategies to recruit new groups of workers*, 2010, pp.20-21.
- 3 Eurofound, *Trade union strategies to recruit new groups of workers*, 2010, pp.20-21.
- 4 BECTU, Benefits and Services for members including BECTU Plus, see <https://www.bectu.org.uk>
- 5 ILO Global Employment Forum (GDFMCS/2014), *Employment relationships in the media and culture industries*, Issue Paper, 14-15 May 2014, pp. 3-4.
- 6 Former Italian Minister of Labour and Social Security, Tiziano Treu, initiated the 1997 labour market reforms.
- 7 Parasubordinated work is a legal term which indicates those workers who are neither self-employed nor employed. The existence of such a category of workers creates a grey area for employers, who can choose the most (economically) convenient contractual form rather than the one better corresponding to the actual occupational activity.
- 8 ver.di is an abbreviation of *Vereinte Dienstleistungsgewerkschaft* [United Services Union].
- 9 Recent information seems to suggest that the agency in charge of paying unemployment benefits is beginning to question the role of AMA and other similar agencies and thereby classify the musicians as self-employed.

## SECTION 3



### **Fundamental Social Rights for Atypical Workers**



### 3. The Challenge of Reimagining Services to Meet the Needs of Atypical Workers

As highlighted in Section 1, atypical workers face many challenges in accessing social protection and enjoying labour rights. The ILO has recognised that 'Non-standard forms of employment exhibit a higher incidence of decent work deficits'. These deficits are particularly associated with one or more of the following dimensions of work: (1) access to employment and labour market transitions; (2) wages differentials; (3) access to social security; (4) conditions of work; (5) training and career development; (6) occupational safety and health; and (7) freedom of association and collective bargaining'. If trade unions are to push for change in this area, it is worth bearing in mind the overarching legal and policy framework, what rights it recognises for atypical workers, and the legal weight of those rights.

#### 3.1. The Broad Legal Framework

EU Law relies on two major instruments in relation to atypical workers. The first is the Community Charter of the Fundamental Social Rights of Workers of 1989, hereafter the Community Charter), and the second is the EU Charter of Fundamental Rights of 2000. The Community Charter, adopted in 1989, has established the major principles on which the European labour law model is based. It applies to the following areas:

- free movement of workers;
- employment and remuneration;
- improvement of working conditions;
- social protection;
- freedom of association and collective bargaining;
- vocational training;
- equal treatment for men and women;
- information, consultation and participation of workers;
- health protection and safety at the workplace;
- protection of children, adolescents, elderly persons, and disabled persons.

These social rights represent a foundation of minimum provisions common to all the European Union (EU) Member States. The provisions of the Community Charter were kept by the Lisbon Treaty (Article 151 of the Treaty on the Functioning of the EU) and by the EU Charter of Fundamental Rights. While the 1989 Community Charter was more of a declaration and not legally binding, it was accompanied by an Action Programme which established a train of legislative initiatives on employment designed to address the needs of certain categories of atypical workers. At EU level, legislation governing part-time work, fixed-term workers and temporary work has provided a range of rights to workers under these types of contracts – that is, through the regulations passed under Council Directive 97/81/EC of 15 December 1997 on part-time work and under Council Directive 99/70/EC of 28 June 1999 on fixed-term work, and Council Directive 2008/104/EC on Temporary Agency Work. These directives have reproduced framework agreements concluded by the European social partners and have since been transposed into national legislation in all EU Member States.

The purpose of these regulations was to guarantee the rights of workers engaged in non-standard forms of work, laying down the principle of non-discrimination and of equal treatment between workers<sup>2</sup>. Furthermore, Directive 2010/41/EU on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity sets out new provisions on combating discrimination, and concerning business creation, social protection and maternity<sup>3</sup>.

The EU Charter of Fundamental Rights of 2000 covers a wide range of fundamental rights. Some of these are also referred to in the Community Charter. Relevant articles of the EU Charter of Fundamental Rights include notably:

- Art. 12: Freedom of association;
- Art. 15: Freedom to choose an occupation and right to engage in work, to seek employment in any Member State, with third countries nationals authorised to work having an entitlement to equivalent working conditions;
- Art. 21: Non-discrimination on any grounds;
- Art. 23: Equality between men and women in all areas, including employment, work and pay;
- Art. 27: Rights to information and consultation for workers and their representatives;
- Art. 28: Right of collective bargaining and right to take collective action;
- Art. 30: Protection against unjustified dismissal;
- Art. 31: Right to fair and just working conditions, to maximum working hours, breaks and holiday.

### 3.2. Fundamental Social Rights and the Chimera of ‘Flexicurity’

The idea that economic efficiency and rights are mutually reinforcing has been central to the ethos of the EU. The directives on part-time and fixed-term work are examples of this attempt to marry economic efficiency and rights. Those directives are designed to further the principles of flexicurity, a major element of EU employment policy which attempts to combine ‘flexibility’ for businesses with ‘security’ for workers. However the effectiveness of flexicurity as a means to enhance worker protection has been brought into question, as it has rather tended to be used as a tool to further economic efficiency at the expense of worker rights. The directives include specific rights (the right to equal treatment) which should enhance worker protection and neutralise some of the negative effects of the flexicurity agenda. The European Parliament resolution of 6 July 2010, Atypical contracts, secured professional paths, and new forms of social dialogue, has recognised the challenges facing European labour markets regarding atypical employment. It called for a rethink on flexicurity in light of the crisis, so as to help increase both productivity and the quality of jobs by guaranteeing security and the protection of employment and workers’ rights. It further stated that ‘labour market segmentation need to be overcome by giving all workers equal rights and investing in job creation, skills and lifelong learning; calls on the Member States, therefore, to phase out all forms of insecure employment’<sup>4</sup>.

### 3.3. Trade Union Action to Promote and Protect Fundamental Social and Labour Rights

Trade union actions in protecting fundamental social rights are manifold and complex. But the grounding approach that should underpin trade union strategies for atypical workers is about securing a harmonised floor of basic social rights for atypical and in particular self-employed workers across all EU Member States. This raises the question of not only ensuring that social dialogue mechanisms can address atypical workers’ issues, which means extending the reach of collective bargaining practices but also ensuring the sound implementation of core international labour standards and equality and non-discrimination principles as ‘core public goods’ for all workers. The sound implementation of European regulatory tools put into place to protect atypical workers through Directive 97/81/EC on part-time work and Directive 1999/70/EC on fixed-term work are part of those efforts. In line with ILO standards and European labour law, the main areas of action by trade unions to address atypical workers’ rights are linked to the regulatory context governing industrial relations and social dialogue in national contexts. Various types of union activities are to be considered and can be conducted in parallel, such as:

- addressing atypical workers’ rights in collective bargaining;
- developing strategic litigation and case law which can contribute to better implementation of ILO standards for the protection of all workers;
- influencing the legislative process at European and national levels through social dialogue or industrial action at sectoral or inter-sectoral levels;
- organising atypical workers through the provision of targeted services;
- conducting media campaigns to influence public opinion;
- developing coalition building activities cross-sectorally, with other social movements and stakeholders.

In the Fundamental Social Rights Manifesto of 2013<sup>5</sup>, transnational trade union rights experts along with 600 social and labour lawyers have reiterated their pledge to the European Union and its institutions to respect and promote the fundamental social rights guaranteed in the legally binding EU Charter of Fundamental Rights (Article 51 para. 1 CFREU), in particular the right of collective bargaining and action to be interpreted in line with the respective ILO Conventions ratified by all EU Member States (Article 53 CFREU), protection in the event of unjustified dismissal and social security and social assistance. The signatories also stated that the fundamental social rights of workers and their representatives should not be subordinated to internal market freedoms and competition law or to austerity measures. From that perspective, the ILO Global Forum adopted points of consensus in May 2014 which have reiterated the need to a) strengthen efforts to promote fundamental principles and rights at work (FPRW) in the media and culture sector and build capacity of constituents to do likewise; b) assist efforts to strengthen the social partners in the media and culture sector, and to promote the extension of social dialogue.

### 3.4. A Mixed Picture: How EU Law Approaches the Protection of the Fundamental Social Rights of Atypical Workers

EU law relating to employment has since its inception revolved around market integration rationales and the extent to which the smooth functioning of the common market required harmonisation of employment law. In this context, employment law was clearly dominated by economic imperatives. The construction of an elaborate body of legislation since the 1970s has triggered a shift from a debate around the needs of market integration to one that focuses on the most appropriate forms of market regulation; in other words, finding the best mix between worker protection and economic freedom with a view to enhancing the European Union's competitiveness. Within EU employment policy, it finds specific expression in the pursuit of 'flexicurity' which evokes an attempt to reconcile labour market flexibility and security in line with European Union's Europe 2020 Strategy. As the box below will explain, EU employment law has attempted to redress the risk of precariousness through the so-called 'atypical work directives', designed to improve the quality of non-standard jobs. Further on, ECJ case law also brought a renewed perspective building on the concept of non-discrimination and the European Charter of Fundamental Rights to reassert the importance of fundamental social rights for certain categories of atypical workers.

#### Box 1

#### A Better Understanding of the Ambition of the Atypical Work Directives and their Application and Potential in Practice<sup>6</sup>

Over several decades, the decline of standard forms of employment resulting from the introduction of more flexibility in the labour market has generated atypical forms of work relationships and increased precariousness in the overall supply of jobs. In order to address the negative trends resulting from these developments, a dominant regulatory tool has been the introduction of the principle of equal treatment between standard and non-standard forms of employment. As far back as 1991, the EU had legislated to ensure that fixed-term and agency workers are afforded the same level of protection as other workers as regards safety and health at work. Four directives – Directive 91/383 on Safety and Health for Temporary Workers, Directive 97/81 on Part-Time Work, Directive 1999/70 on Fixed-Term Work, and Directive 2008/104 on Temporary Agency Work – have since underpinned this approach.

While each of the atypical work directives contains some specific rights, the thread linking them together is the recourse to equal treatment as a means to improving the quality of these forms of employment. The concept of equal treatment has been expressed in the four atypical work directives (under reference) as: 'the right not to be treated less favourably than comparable full-time workers in 'employment conditions'. The same concept was applied to the Fixed-Term Work Directive along with measures to prevent the abusive use of successive fixed-term contracts. In the ECJ Case C-238/14, (Commission vs. Luxembourg), the court ruled that Luxembourg had failed, in the case of occasional workers in the Media, Arts and Entertainment sector, to fulfil its obligation to prevent the abuse of fixed-term employment contracts. The court declared that, by maintaining derogations in force, with respect to occasional workers in the entertainment arts, to the measures designed to prevent the abusive use of successive fixed-term contracts, the Grand Duchy of Luxembourg had failed to fulfil its obligations under clause 5 of the Framework Agreement on Fixed-term Work of 18 March 1999 concluded by ETUC, UNICE and CEEP (238/14), which is set out in the Annex to Council Directive 1999/70/EC of 28 June 1999<sup>7</sup>. The Directive on Temporary Agency Work integrates a reference to those 'basic working and employment conditions' that would apply if the worker had been recruited directly by the user undertaking.

The EU's atypical work directives thus offer a framework for European social partners where collective bargaining can be used to reinforce protections for atypical workers whether it relates to negotiating derogations, removing obstacles to part-time work or reviewing restrictions on temporary agency work. However, protection gaps remain. Part-time workers employed on a casual basis may be excluded from the directives' protections and zero-hours workers may have problems being treated in a way that is comparable to that of a full-time worker. The first ECJ decision to consider in depth this aspect in the case of the Part-time Work Directive was the Wippel<sup>8</sup> case. The case concerned a casual worker employed under an 'on demand' contract where there were no set working hours and the volume of work fluctuated. The ECJ claimed, inter alia, that this constituted less-favourable treatment in comparison with full-time workers who, according to national law, had to have an agreed set of working hours. The court decided that there was no comparable full-time worker in the enterprise. In particular, it emphasised that full-time workers were obliged to perform the work required under their contract, whereas casual workers had the possibility to decline work. The absence of a comparable full-time worker meant that there was no need to proceed further with the examination of the treatment of this worker and whether or not it was justified. This decision effectively deprives casual workers of any opportunity to benefit from the principle of equal treatment.

The engagement of the general principle of equal treatment does not, in itself, explain the way in which the court has interpreted the atypical work directives. As underlined by Professor Bell, the essence of the general principle of equal treatment is its flexibility, 'When applied in the context of distinctions between products, for example, the court readily accepts that market-based considerations are entirely admissible as potential justifications for differences of treatment. In other contexts, where there are notable inequalities based on personal characteristics, the court applies the principle of equal treatment with more rigidity<sup>9</sup>. The strict interpretation of equal treatment in respect of personal characteristics such as sex, ethnic origin, religion, etc. is justified by the wide range (...)

(...) of international human rights instruments that expressly recognise the right to freedom from discrimination on these grounds, as well as Art. 21 of the EU Charter of Fundamental Rights. The Charter of Fundamental Rights, Art. 21(1) on the right to non-discrimination enumerates a non-exhaustive list of protected characteristics and potentially, according to Professor Bell, this could be interpreted as extending to discrimination against atypical workers. The increased presence of women in part-time work means, for example, that less favourable treatment of part-time workers will often constitute indirect sex discrimination, and the court of Justice has confirmed that its general principle of equal treatment can extend to indirect sex discrimination in respect of part-time workers<sup>10</sup>.

Based on the same logic, the prohibition of age discrimination might also lead indirectly to a requirement to provide equal treatment to atypical workers: for example, young workers who are over-represented in temporary employment. Equal treatment and non-discrimination could therefore be argued for the benefit of atypical workers including self-employed workers whose personal characteristics would be covered by Directives 2000/43<sup>11</sup> and 2000/78. Lastly in ECJ Case C-173/99, BECTU [2001] ECR I-4881, judges have recognised that the fundamental social rights should be enjoyed by all workers and that exclusion of workers on short contracts from paid

annual leave were in breach of the Working Time Directive: 'such workers often find themselves in a more precarious situation than those employed under longer term contracts, so that it is all the more important to ensure that their health and safety are protected' (para. 63).

In conclusion, as argued by Professor Bell, the dominant influence that shaped the adoption of the atypical work directives was primarily an approach based upon labour market regulation based on flexicurity, rather than fundamental social rights. But the case law emerging from the Court of Justice has opened the door to a different reading of the directives. The ECJ has identified equal treatment as embodying higher legal norms that demand a stricter level of judicial scrutiny. Furthermore, the ECJ's familiarity with equal treatment in the context of anti-discrimination legislation creates legal overlaps with the atypical work directives. Inequalities linked to gender and age (in particular) are reflected in the demographic profile of atypical workers; this may encourage the court to echo the approach it has adopted in anti-discrimination legislation when interpreting the right to equal treatment for atypical workers. Lastly, this opens the door to a wider debate on the theoretical foundation of EU employment law and has the potential to enhance the protections provided by the atypical work directives with a perspective based on fundamental social rights protections.

## Endnotes

<sup>1</sup> ILO, Conclusions of the meeting of experts on Non-Standard forms of Employment-Governing body, 323rd Session, 12-27 March 2015.

<sup>2</sup> London Metropolitan University for the European Commission, *Study on Precarious work and social rights* (VT/2010/084), 2012, p. 145.

<sup>3</sup> Directive 2010/41/EU of the European Parliament and of the Council of 7 July 2010 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EE.

<sup>4</sup> European Parliament resolution of 6 July 2010 on atypical contracts, secured professional paths, and new forms of social dialogue, P7-TA(2010)0263.

<sup>5</sup> <http://www.etui.org/Networks/The-Transnational-Trade-Union-Rights-Experts-Network-TTUR>

<sup>6</sup> Presentation of Professor Mark Bell, Regius Professor at Trinity College Dublin, *Collective Bargaining and Fundamental rights for atypical workers, the contribution of EU law*, Dublin, 8 September 2015. Also, Bell, Mark, *Between Flexicurity and Fundamental Social Rights: The EU Directives on Atypical Work*, European Law Review, University of Leicester, 2012, 37 (1), pp. 31-48 (17).

<sup>7</sup> Supra

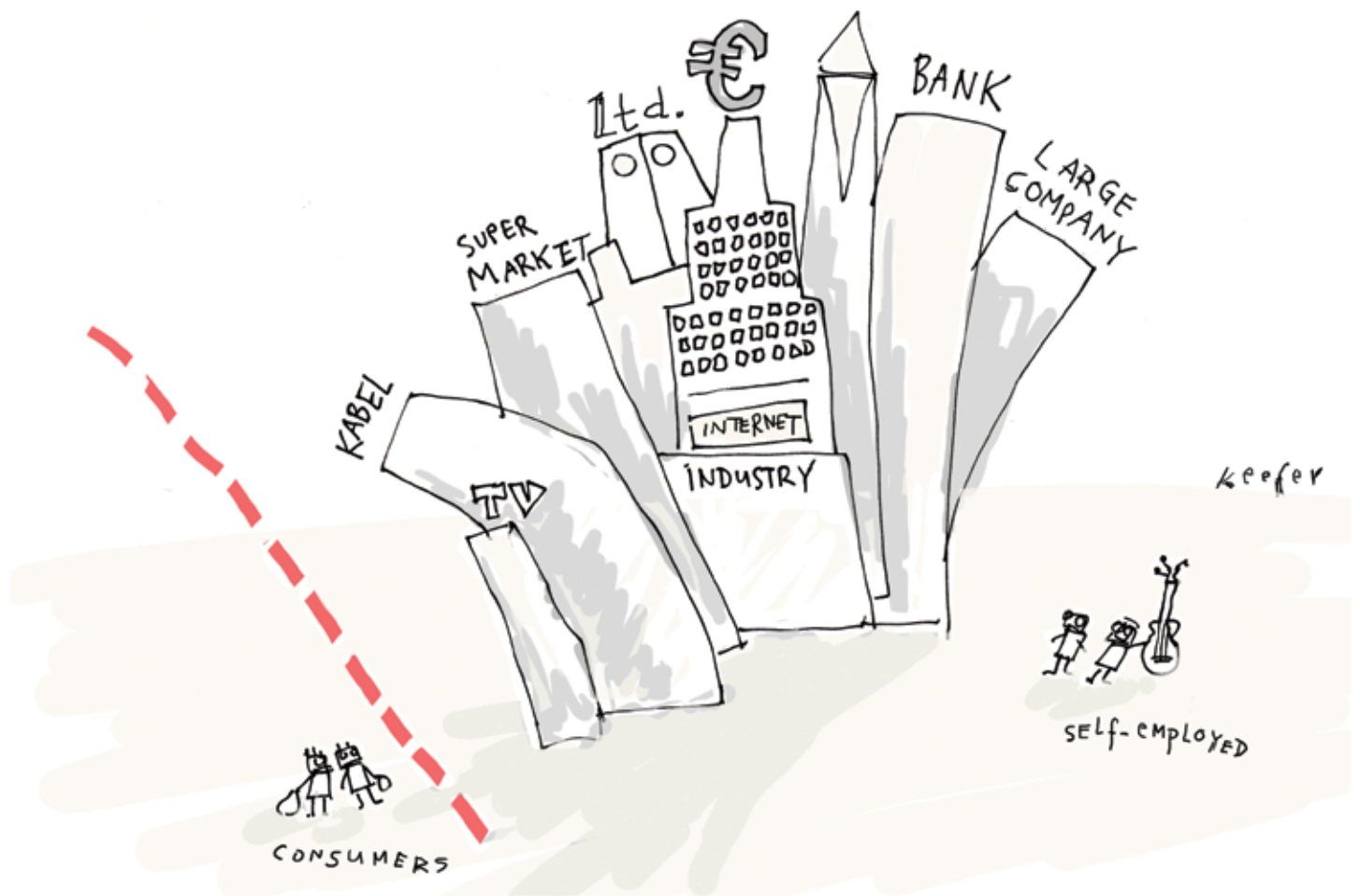
<sup>8</sup> Supra, ECJ Case C-313/02, Wippel [2004] ECR I-9483.

<sup>9</sup> Bell, Mark, *Between Flexicurity and Fundamental Social Rights: The EU Directives on Atypical Work*, European Law Review, University of Leicester, 2012, 37 (1), pp. 31-48 (17).

<sup>10</sup> Council Directive 2010/41/EU of the European Parliament and of the Council of 7 July 2010 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EEC. Also, see Bell, Mark, *Between Flexicurity and Fundamental Social Rights: The EU Directives on Atypical Work*, European Law Review, University of Leicester, 2012, 37 (1), pp. 31-48 (17).

<sup>11</sup> Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, Article 3. Also, see Bell, Mark, *Between Flexicurity and Fundamental Social Rights: The EU Directives on Atypical Work*, European Law Review, University of Leicester, 2012, 37 (1), pp. 31-48 (17).

## SECTION 4



## Collective Bargaining and Atypical Workers



## 4. Collective Bargaining and Atypical Workers

### 4.1. Setting the Scene: Collective Bargaining, International Standards and European Union Law

Freedom of association and the right to collective bargaining are guaranteed in numerous international treaties and instruments<sup>1</sup> in view of the particular links between these rights and the ability of workers to secure fair economic return from their work and access to social protection.

International Labour Organisation (ILO) standards: The term 'collective bargaining' used in this paper follows the ILO definition, which extends to all negotiations which take place between an employer, a group of employers or one or more employers' organisations, on the one hand, and one or more workers' organisations, on the other, for: (a) determining working conditions and terms of employment; (b) regulating relations between employers and workers; (c) regulating relations between employers or their organisations and a workers' organisation or workers' organisations (ILO Convention No. 154)<sup>2</sup>. Freedom of association and collective bargaining have been acknowledged as a means for improving and regulating terms and conditions of work and advancing social justice since the ILO's foundation in 1919. The Freedom of Association and Protection of the Right to Organize Convention, 1948 (No. 87), and the Right to Organize and Collective Bargaining Convention, 1949 (No. 98), are recognised as fundamental rights and principles in the 1998 ILO Declaration on Fundamental Principles and Rights at Work. Freedom of association and the effective recognition of the right to collective bargaining are included in the Declaration, making it clear that these rights are considered universal and that they apply to all workers.

One key issue concerns the term 'workers' and whether the provisions of these instruments apply equally to 'self-employed' workers or to 'employees' alone. Neither ILO Convention No. 87 nor No. 98 provides a definition for the term and the question has in practice been left to the discretion of national legislators<sup>3</sup>. The supervisory mechanisms of the ILO, have dealt with this question on several occasions adopting a broader view. As a result, jurisprudence has been developed. For instance, in relation to self-employed workers, as early as 1983 the Committee of Experts questioned some countries where they were denied the right to organise, and stated that in view of the fact that 'they are not specifically excluded from Convention No. 87, all these categories of workers should naturally be covered by the guarantees afforded by the Convention and should, in particular, have the right to establish and join organisations'<sup>4</sup>.

The ILO's Committee of Experts dealt with the situation of self-employed workers and collective bargaining in an observation concerning the application of Convention No. 98 in the Netherlands and recalled that Article 4 of Convention No. 98 establishes the principle of 'free and voluntary collective bargaining and the autonomy of the bargaining parties'. In other words, the Committee implied that competition law should not prevent self-employed workers from concluding collective agreements<sup>5</sup>.

Council of Europe<sup>6</sup>: Within the Council of Europe legal order, the European Convention on Human Rights (ECHR) also guarantees freedom of association (Article 11) while Article 5 of the European Social Charter (Revised; ESC; adopted in 1996) sets out the right to form, join and actively participate in associations designed to protect their members' professional interests (Article 5)<sup>7</sup>.

Article 6 of the ESC describes the content of the right 'to bargain collectively' by listing the actions parties can undertake in order to ensure 'its effective exercise', including active promotion. According to the European Court of Human Rights, the right to collective bargaining and to negotiate and enter into collective agreements is an inherent element of the right to association, i.e. the right to form and join trade unions for the protection of one's interests, as protected under Article 11 of the ECHR.

The European Union<sup>8</sup>: Freedom of association and the right to collective bargaining were initially recognised in the Community Charter of the Fundamental Social Rights of Workers of 1989 (1989 Community Charter), adopted as a non-legally binding declaration by all Member States. As of today, freedom of assembly and of association are guaranteed under Article 12 of the Charter of Fundamental Rights of the EU. The right to collective bargaining and collective action is found in Article 28 of the Charter of Fundamental Rights according to which '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'.

Article 28 deals with the process of collective bargaining, the actors involved in this process, its potential outcomes and the appropriate levels of bargaining. Since the adoption of the Lisbon Treaty, the Charter of Fundamental Rights has the same legal status as the Treaties (Article 6 TFEU). Collective bargaining and collective agreements are important within the EU legal framework in view of the various functions they perform. Firstly, social partners assume a quasi-legislative function when engaging in collective bargaining at EU level in the form of social dialogue. These collective agreements may be given legal effect in the form of directives. Secondly, collective agreements may facilitate the implementation and application of EU law in two ways: collective agreements may be allocated a role in the transposition of EU law into the national law of the Member States or they may be allocated a role in the flexible implementation of EU law, allowing for its adaptation to the specific national context of industrial relations and employment practices in each Member State.

Finally, collective bargaining and collective agreements are considered to reflect fundamental social objectives and values which should be protected against competing values.

## 4.2. The Key and Future Challenge: Collective Bargaining for Atypical Workers

In 2015, Eurofound conducted a Europe-wide mapping exercise to identify emerging trends in forms of workplace organisation<sup>9</sup>. This resulted in the categorisation of nine broad types of new employment forms. Most of these employment forms contribute to labour market innovation but have resulted in increased labour market segmentation and a widespread acceptance of fragmented jobs that are inherently linked to poor job quality, low income and limited social protection.

Responding to complex developments related to the deregulation of labour markets and the rise of new forms of work relationships, collective bargaining systems and processes in the EU have undergone a steady change that has accelerated since 2008. Another recent study from Eurofound, *Collective Bargaining trends in the 21st Century*<sup>10</sup>, has highlighted the main indicators of those changes which are: the rapid decline of coverage rates, as well as regulatory changes in relation to a number of collective bargaining practices and processes, particularly with regard to the extension of collective agreements, and the growing importance of company-based bargaining processes. A significant shift towards more de-centralised and sometimes fragmented and individual bargaining systems has also gained ground. However, whereas the decentralisation and growing flexibility of multi-level bargaining systems and practices in the Nordic countries and western-continental Europe was implemented in a gradual and coordinated way, based – to a greater or lesser extent – on tripartite consultation and concertation, the shift in countries such as Greece, Portugal, Romania and Spain has been much more abrupt and disorganised, often imposed unilaterally by government. In addition, the social, equity-related and redistributive aspects of collective bargaining, as well as its subsidiary role in regard to social and employment security, are increasingly being challenged.

## 4.3. Approaches to Collective Bargaining for Atypical Workers

An ILO study, *Practices of Social dialogues and Collective Bargaining for Non-Standard workers*<sup>11</sup>, has documented various initiatives or frameworks used globally to strengthen the functioning of collective bargaining mechanisms for atypical workers. Approaches used at inter-sectoral level can include i. collective bargaining outside workplaces ii. single and multi-employer bargaining or iii. extension of collective agreements to include atypical workers<sup>12</sup>. A variety of strategies have also been adopted through collective bargaining (issues negotiated for improving the terms and conditions of atypical workers).

Extending negotiated outcomes to non-negotiating parties<sup>13</sup>: One of the traditional approaches to reaching out to non-trade union members is the extension of all or part of collective agreements concluded between single employers or their representative organisations and the representative organisations of workers, such as trade unions, to workers and employers who are not represented by the social partners signing the agreement. Through the adoption of such an approach, the negotiated outcomes become applicable to non-standard workers who are not organised, in cases where bargaining itself does not take place in an inclusive manner. Depending on the country, the way in which negotiated outcomes are extended varies in terms of, for example, whether there are legal mechanisms for extension or whether it may be implemented by voluntary agreement of the signatory parties; or whether it requires the agreement of one or both negotiating parties. However, collective agreement extension seems to benefit certain categories of non-standard workers, particularly non-standard employees (e.g. fixed-term or part-time employees) associated with employment relationships who are excluded from collective bargaining coverage.



Regulatory strategies based on collective bargaining: the principle of non-discrimination is one common way of dealing with atypical work arrangements. This approach has been especially relevant to promoting collective bargaining for part-time and fixed-term workers who are directly employed by the same employer, while general demands for wage increases are more common for other categories of atypical workers. The EU directives on part-time and fixed-term work (which ensure the appropriate protection of these categories of workers through application of the principle of equal treatment relating to basic working and employment conditions) came into being as a result of European Social Partners' Framework Agreements.

This is also the case with the Directive on temporary agency work, adopted in 2008, which ensures that temporary agency workers should be entitled to equal treatment with regard to basic working and employment conditions, although it also allows for the possibility of derogation by collective agreements concluded by the social partners, while respecting the overall protection of temporary agency workers. The Directives together with collective agreements thus form an important means of regulating atypical workers in many countries in the EU.

## 4.4. The Particular Case of the Live Performance and Audiovisual Sectors

In many EU Member States social dialogue and collective bargaining covering the media and culture sector are highly fragmented because subsectors of the Media, Arts and Entertainment sector are often considered as being separate, involving both public and private employers, and a wide range of activities and occupational profiles. Nevertheless, social dialogue and collective bargaining can play an important role in addressing the situation of atypical workers. A variety of joint approaches have been used to address issues related to extending social protection to workers in this sector, mostly as an outcome of social dialogue and collective bargaining.

A 2015 Study entitled *Remuneration of Authors and Performers*<sup>14</sup>, commissioned by the European Commission's DG Communications Networks, Content & Technology, picked up on the particular role of trade union membership and collective bargaining in reducing asymmetries and improving the position of authors and performers.

It noted that: 'A measure at national or EU level that could contribute to the reinforcement of the authors' and performers' contractual position vis-à-vis the exploiters, and to reduce information asymmetries in particular, could be to create a more conducive environment to support the role of trade unions. Trade unions can indeed support authors and performers in at least three different ways that are most useful for securing remuneration: supply of information, collective negotiation and enforcement'<sup>15</sup>. Thus it was clear that the study authors considered that where it exists, collective bargaining and trade union membership delivers benefit for these workers in the Live Performance and Audiovisual sectors and that furthermore, it is useful to look at ways to enhance this potential benefit by 'creat[ing] a more conducive environment to support the role of trade unions.'<sup>16</sup>

At European level, two sectoral social dialogue committees are relevant: the one for the Audiovisual sector (established in 2004) and the one for the Live Performance sector (established in 1999). In both committees, the EAEA (European Arts and Entertainment Alliance, composed of the European members of FIM, FIA and UNI MEI) is the recognised social partner for the workers and for the Audiovisual sector; it is joined in the trade union delegation by the International Federation of Journalists (IFJ). The Live Performance employers are represented by their European umbrella, the Performing Arts Employers' Associations League Europe (PEARLE\*). In the Audiovisual sector, the employers' social partner organisations are the European Broadcasting Union (EBU), the Association of Commercial Television in Europe (ACT), the European Coordination of Independent Producers (CEPI), the Association of European Radios (AER), and the International Federation of Film Producers Associations (FIAPF). These committees discuss European social and labour issues related to the sector and are consulted on the drafting of EU legislation, in accordance with the provisions of the Treaty on the Functioning of the European Union<sup>17</sup>.

### 4.4.1. General Overview of Collective Bargaining in the Audiovisual Sector

Collective bargaining is long established in the media and entertainment industries in many countries. According to a Eurofound study<sup>18</sup>, collective bargaining coverage in the Audiovisual sector has been low in newer EU Member States, such as Hungary (38%), Lithuania (27%) and Latvia (17%), and higher in older Member States, with the exception of Spain (24%) and the United Kingdom (30%).

However, coverage is very high in Slovenia (100%), where public broadcasting companies have a major role, and thanks to a multi-employer agreement that ended in 2013. Several factors contribute to higher levels of collective bargaining coverage, such as: the predominance of multi-employer bargaining; relatively higher density rates of

employee and employer organisations (Belgium, Denmark, Finland, and Sweden). Germany is a Member State where a wide range of collective agreements exist due to the critical mass of Audiovisual industries and workers and the prominent role of global trade unions such as ver.di.

Traditional social dialogue and collective bargaining have also been under pressure in some countries, particularly in relation to print media, where most major industrial disputes were related to restructuring and the development of ICTs, driven by changes in ownership, falling sales and the increasing importance of the internet and free newspapers. In Italy, an agreement was reached in 2007 between the main journalist employer confederations (FIEG) and the two main trade unions (FNSI and INPGI) under the supervision of the Italian Ministry of Labour in order to guarantee fair treatment to freelance journalists with the so-called 'co.co.co' arrangement (*contratto di collaborazione coordinata e continuativa*)<sup>19</sup>. The agreement contained provisions responding to external labour market needs, including: (a) those on employers' pension contributions, which should have gradually increased within four years to reduce the gap in social protection between co.co.co and standard workers; and (b) those for limiting the use of co.co.co contracts, by financial incentives committed by the government for the transformation of co.co.co contracts into fixed-term dependent contracts with a minimum duration of 24 months.

In the United Kingdom, the bargaining policy of the media and entertainment unions on behalf of freelancers has been to secure relatively high rates of pay to compensate for periods without work<sup>20</sup>. The International Federation of Journalists – as far back as 2006 – claimed to have identified a trend 'away from collective bargaining towards deregulated, individual negotiations'.

It returned to this issue in its 2011 report, *Managing Change*, 'In many countries, the context of and approach to collective negotiations is changing. [...] The negotiations are conducted more rigorously and often take up a lot of time; in some cases they even last years.[...] It is increasingly the case that no negotiations are held at all [...] There is a distinct trend towards an attempt to abandon industry-wide agreements, in favour of company-based pay systems<sup>21</sup>'.

Examples of countries where collective agreements have proved difficult to renegotiate include Italy and Germany. In the Media sector, there are currently no Global Framework Agreements in place with major multinational media companies, although some regional agreements have been negotiated.

In Germany, a breakdown in negotiations between publishers and the unions in 2011 also led to several strike actions, as well as a campaign by the unions to persuade the public of the value of journalism. The collective agreement was eventually renegotiated. However, according to the IFJ, around 50 companies have dropped collective agreements in recent years, using more casual and lower paid workers instead. Another development in Germany has been the decision by Axel Springer to establish a separate entity for its publication Computer Bild, so that staff falls outside the collective agreement which would otherwise apply<sup>22</sup>.

#### 4.4.2. General Overview of Collective Bargaining in the Live Performance Sector

Overall, collective bargaining coverage in the Live Performance sector is relatively low, but tends to be higher in the public and state-funded segment of the sector than in the commercial one. A study undertaken by Eurofound<sup>23</sup>, in 20 EU Member States, found that there was a high coverage rate of around 80% or more in 2010–2011 in Belgium, Denmark, France, Greece, Italy, Romania and Sweden. In Austria, Bulgaria, Germany, Estonia, Finland, Hungary and Luxembourg, the coverage rate was around 30%–70% in 2010–2011. However, a third group of four countries (Lithuania, Latvia, Malta and Spain) had coverage rates of 20% or below in 2010–2011<sup>24</sup>. Although sector-related social partner organisations on both sides of industry have been established in the vast majority of countries, they usually cover only particular niches of the sector; this is especially true in the private/commercial segment. The high fragmentation of the associational 'landscape' and thus the collective bargaining structures in the sector, are among the main factors making it difficult or even impossible to even roughly estimate the collective bargaining coverage rate for the entire Live Performance sector in several EU Member States.

## 4.5. The ongoing challenge of establishing collective bargaining for self-employed workers or freelancers across the Live Performance and Audiovisual Sectors

While self-employed journalists and performing arts workers have a long tradition of unionisation in many EU Member States, they often lack coverage by collective agreements as they are increasingly not considered to be employees. As a result of the evolution of the labour market workforce profile and because of the long tradition of atypical work arrangements that prevail in the Media, Arts and Entertainment sector, trade unions have started to grapple with the problem of how to better protect such workers through the mechanisms of social dialogue and collective bargaining.

Given the number of freelancers and self-employed workers in the Audiovisual and Live Performance sectors, one issue to consider is the extent to which collective agreements also cover this category of workers. For the Media sector, the picture is mixed. In the United Kingdom, the collective agreement between BECTU and the Producers Alliance for Cinema and Television covers freelancers.

BECTU and the Directors' Guild of Great Britain have multi-employer bargaining for freelance directors. Freelancers are also covered in various collective agreements with the BBC and with some commercial television operators. The NUJ (UK and Ireland) has some collective agreements covering the use of freelancers' work as casuals in employers' premises, as well as one agreement (with The Guardian Media Group) covering minimum rates for editorial supplied by freelance contributors<sup>25</sup>. In Germany and Austria, collective agreements cover certain categories of self-employed workers or freelancers. However, the majority of freelancers in print media are not included in collective agreements. In Greece, although the statutes of the journalists' unions restrict membership to journalists working as employees, and therefore freelancers are not eligible to join, in practice, some flexibility is being shown. The Journalists' Union of the Athens Daily Newspapers (ESIEA) reports that more and more freelance journalists are now among its members<sup>26</sup>.

A variety of joint approaches have been used to address issues related to extending social protection to Media, Arts and Entertainment sector workers, mostly as an outcome of social dialogue. Some trade unions offer access to social protection for freelance members. In some countries, specific schemes have been developed to provide coverage to Media, Arts and Entertainment workers – for example, the social security insurance fund for artists and writers in Germany, which covers self-employed and freelance artists and writers, and the unemployment benefit for intermittent entertainment workers in France<sup>27</sup>.

Clearly great progress is needed in bipartite or tripartite social dialogue at national, sectoral or enterprise levels on social protection for Media, Arts and Entertainment sector workers who currently lack coverage, in a context of constant change and adaptation in these industries. However, the examples in the following sections serve to demonstrate the value of progress in this direction, highlighting how unions can better serve and protect the all-too-often precarious workers in an atypical work relationship.

## 4.6. The role of Trade Unions in protecting atypical workers in the Live Performance and Audiovisual Sectors: Selected Examples

The protection of workers' rights through labour law, regulations and collective agreements are generally linked to the existence of an employment relationship between an employer and an employee. The issue of who is or is not in an employment relationship has become problematic in recent decades as a result of major changes in work organisation, as well as in the inadequacy of legal regulation in adapting to these changes.

While trade unions are not always organised or authorised to represent certain categories of workers (who are not employees) in most European countries specific categories of workers (such as freelancers), some categories of self-employed persons and economically dependent workers can be represented to an extent, and certainly this is the case in the Media and Live Performance sector. This is particularly true in those Member States where regulatory employment regimes or statutory exemptions create a more enabling environment for social partners to include atypical workers in collective bargaining. This includes exemptions intended to capture the specific nature of work in the sectors, usually of a short-term and intermittent nature.

As the box below illustrates, performing artists in France engaged on short term contracts are recognised as 'employees' and benefit from union representation and collective agreements.

Box 1

## Legal Presumption of Employment for Performing Artists in Media and Entertainment in France<sup>28</sup>

Live Performance, Audiovisual, Entertainment and Music Recording are the sectors where the French labour code makes it possible to use short-term contracts (so-called 'd'usage') to carry out regular activities. Since 1969, performing artists benefit from a rebuttable presumption of employment enshrined in the French Labour Code whether working on short-term or long-term contracts. It is the backbone of all the social rights of performing artists, their working conditions and compensation. Although this provision applies to performing artists only, the same mechanism also applies to technicians. Artists and technicians are commonly called *intermittents du spectacle* when employed on short-term contracts.

Article L7121-3 of the French labour code provides that 'any contract whereby a person secures, for consideration, the assistance of an entertainer for its production, is presumed to be an employment contract when this artist does not exercise the activity for which the subject of the contract under conditions of registration in the commercial register'. This article is completed by Article L7121-4 of the Labour Code, which provides that, 'the presumption of the existence of an employment contract exists regardless of the method and amount of remuneration, as well as the qualification given by the parties to the contract. This presumption remains even upon evidence that the artist retains his freedom of expression in his art, that he is the owner of all or part of the material used or employs himself one or more persons to assist him, as long as he is personally involved in the show'<sup>29</sup>.

The legal presumption of employment thus enables performing artists to be recognised as employees. It entitles them to benefit from Union representation and collective agreements through either collective labour agreements or specific agreements which take into account the specific characteristics of their profession. This mechanism also enables unions to negotiate the adjustment of labour regulations to the specific situation of performing artists. Inter-sectorial collective agreements have also been negotiated with respect to the specific situation of performing artists and provide for a set of rights that would

have never been achieved if general rules were to apply.

Among key collective agreements which have been concluded, the one on unemployment insurance benefits for intermittent workers in entertainment is of paramount importance. Another agreement of this type also enables workers to have access to lifelong learning. Other agreements relate to insurance coverage in case of death or in the case of total and permanent disability. Extensions of this agreement are currently being negotiated in case of work interruption; including specific coverage for pregnant women whom, due to the nature of their work, may not be able to resume their work before the beginning or the end of the legal period of maternity leave.

Agreements have also been reached for intermittent entertainment workers to have access to supplementary health insurance coverage at reduced price, thanks to the establishment of a mutual fund supported by employers on the basis of a percentage of payroll. These developments have paved the way for the opening of collective bargaining agreements in relation to freelance journalists in the media sector.

The process of extension of collective labour agreements: in France the provisions of a collective agreement apply to all employees (unionised or not) working for companies that are members of signatory employers' organisations. These provisions can be further extended to all enterprises whether they are members of signatory organisations or not. The extension of a collective agreement is decided by the Ministry of Labour which has the power to extend a collective labour agreement to all companies. This extension is often requested by signatory employers' organisations themselves, in order to ensure a level playing field. Other national inter-professional agreements which address issues such as retirement, social security, unemployment insurance, lifelong learning are also subject to this mechanism. All national collective agreements relating to live performance including recording apply in the sector as a whole.

Germany is among the few Member States to address, in its national law, the problem of collective bargaining by self-employed workers. As the box below illustrates, specific categories of authors and performers (mainly self-employed workers in the press and television sectors) can, under certain conditions, benefit from the provisions of collective labour agreements.

## Box 2

**Collective Bargaining in the Media Sector in Germany<sup>30</sup>**

The German media labour market has witnessed continued expansion of atypical forms of work relationships including freelancing, self-employment, 'work for hire' or casual employment. According to Ver.di, representing over 50,000 authors, creators, performers and journalists, freelancing has become a trend in many media companies and this form of work relationship is increasingly being used to replace, rather than complement, regular employees.

The level of remuneration of freelancers has constantly fallen and is now below the level of remuneration of employees. Unlike in other countries, national law in Germany (Article 12A of the *Tarifvertragsgesetz* [German Collective Agreement Act]) allows for the conclusion of collective agreements for self-employed workers, considered 'employee-like persons', provided they fulfil certain conditions: (1) they have to perform their contractual duties personally and essentially without the help of employees; (2) either the major part of their work is performed for one client or more than 50% of their income is paid by one client (or 33% in the case of artists, writers and journalists).

'Employee-like' persons are not covered by labour law as a whole, only by some specific provisions of it (e.g. labour disputes, leave, working conditions). ver.di has managed,

on the basis of article 12 A of the *Tarifvertragsgesetz* to negotiate collective agreements for 'employee-like' persons in public service broadcasting and in newspapers. One example is an agreement which was signed with the Bavarian public broadcaster (BR). The collective agreement applies to journalism as the main occupation on the basis of 33% of the entire professional income. Rights included in this agreement include sick pay, maternity leave, paid leave, family allowance, and minimum fees. Also and in line with the Author's Rights Act, joint remuneration agreements are possible since 2002.

One of the shortcomings of the German law is that the article 12A status needs to be 'requested' by the 'employee-like' persons themselves, before it can lead to the negotiation of labour agreements. Requesting to benefit from article 12A status proves difficult for a wide number of freelance journalists, feeling insecure about the reaction of their employer and the consequences this could have on the sustainability of their job. Finally, ver.di is also concerned about the rise of 'work for hire' contracts whereby workers are paid on the basis of an agreed outcome rather than hours spent. ver.di and other German unions are pushing for a law which would regulate the abuse of 'work for hire' in all sectors of the economy, notably in temporary employment.

In the UK, the Live Performance sector represents around 0.5% or 147,975 workers of the UK labour force. The sector is characterised by a high incidence of freelance and self-employed workers. There is a tendency to recruit freelancers at the point of entry to the occupation. Multi-employer collective bargaining is common and is an important mechanism for setting pay and conditions for work across the many trades in the sector. Despite the absence of any legal provision for the extension of collective bargaining agreements in the UK, the negotiated rates of pay between unions and employers' organisations serve generally as a benchmark for the sector<sup>31</sup>. The box below relates to the collective bargaining processes negotiated by the Musicians' Union (MU).

### Box 3

## Collective Bargaining for Freelance Musicians in the UK<sup>32</sup>

The 1992 Trade Relations and Labour Relations Act provides the regulatory framework for a union to engage in collective bargaining in the UK. The Musicians' Union (MU) represents over 30,000 musicians working in all sectors of the British music business. Collective bargaining plays a critical role in the work of the MU and the negotiation of collective agreements with a view to establishing minimum pay and working conditions for its members is part of its core business.

As previously mentioned, collective bargaining occurs at both single and multi-employer levels depending upon the nature of the activity within the Live Performance sector. For example, freelancers who make up the cast and crew assembled and disbanded for a given production or tour are covered by multi-employer agreements. Also musicians who are employed to record music for media projects such as films, TV, adverts, computer games and albums, and who are paid per session, can be engaged directly by a production company or record label, but are often engaged via a fixer (also known as a contractor) who has signed an agreement with the Musicians' Union.

The minimum rates established for freelancers under the negotiated agreements usually apply to sessions with a minimum call of 3 hours. Venues, such as theatres, who are members of employer organisations are obliged to honour the collective agreements negotiated between unions and employer organisations – i.e.: the multi-employer agreement

with the MU on minimum rates of pay applies. In practice, the terms and conditions negotiated in these agreements are often also extended to non-member contexts even it is important to stress that there are no legal mechanisms for extending multi-employer agreements in the UK<sup>33</sup>. Where an employer can more readily be identified there are also single-employer agreements in place.

The MU has multi-employer agreements with representative organisations of theatres or orchestras such as the Society of London Theatre (SOLT), the Association of British Orchestras (ABO), or UK Theatre. In the case of recordings, MU has agreements with BBC, ITV, the Institute of Practitioners in Advertising (IPA), and independent film and TV producers who form the Producers' Alliance for Cinema and Television (PACT) or with the British Phonographic Industry (BPI) on behalf of record companies. To give an example regarding the content of such agreements, the MU agreement with the BBC applies to in-house BBC productions, and sets out the minimum terms and conditions for engaging session musicians for BBC TV and Radio. The agreement covers: live sessions and the broadcasting of BBC and non-BBC events, musicians engaged to record specially composed music (e.g. titles, jingles or incidental music), the reuse of existing performance footage, secondary exploitation of musicians' performances e.g. TV sales, DVD and DTO (Download To Own), rates for signed bands and artists.

## 4.7. A Spanner in the Works: Atypical Workers, Collective Bargaining and Competition Law

In several countries, efforts by freelancers to organise and bargain collectively have been judged illegal under competition law. Media and culture unions have called for the conflict between labour rights and competition law to be resolved to enable freelance workers to enjoy the right to freedom of association and collective representation. In some countries, unions are legally unable to recruit and organise freelance workers and unions of freelance workers are not recognised.

The collision of competition law and collective bargaining is one of the numerous examples of the complex relationship that prevails between the protection of fundamental social rights on the one hand and the respect of economic freedoms on the other, within the EU single market. The EU rules on competition in Article 101(1) TFEU prohibit restrictions on competition as incompatible with the principles of the common market. Based on the theory of efficiency of free competition and open markets, the objective of competition law is to protect competition in free-market economies. The rights to freedom of association and collective bargaining are rooted in the recognition of the unequal bargaining power between workers and employers. However, according to competition law theory, freedom of association may also be seen as creating a concentration of power within one party (the workers in this case) against the other, which might have an impact on free competition and open market balance. Thus, it may also be equated with negative economic structures such as cartels and / or price fixing<sup>34</sup>.

Situations in selected EU Member states: As most national legislations do not exclude collective bargaining from the scope of competition law and given the particularities of work arrangements of Media, Arts and Entertainment sector workers (high incidence of freelancers, temporary contracts, outsourcing, etc.), competition authorities in some Member States have used their powers to target certain categories of workers who have concluded collective bargaining agreements on pay rates, on the grounds that such standardised rates could restrict competition from other providers. Freelance media and culture workers have been particularly affected by this type of development. Rulings by competition authorities have posed problems for freelance Media, Arts and Entertainment sector workers in countries including Denmark, Ireland and the Netherlands. Where trade unions representing these workers are



## Box 4

## Competition Law and Collective Bargaining in Ireland

Irish competition regulations are embodied in the Competition Act 1990, and the Competition (Amendment) Act 2006. The Competition Act generally prohibits all agreements, decisions and concerted practices whose object or effect is to prevent, restrict or distort competition in trade in any goods or services in the State or in any part of the State.

By a decision of 31 August 2004<sup>35</sup>, the Competition Authority advised that the collective agreement concluded between Irish Equity (part of SIPTU, the Services, Industrial, Professional and Technical Union) and the Institute of Advertising Practitioners in Ireland (IAPI), concerning the terms and conditions under which advertising agencies would hire actors, infringed competition laws.

In its decision, the Competition Authority made a distinction between ‘self-employed independent contractors’, who are subject to competition laws, and ‘employees’, who are generally not subject to competition laws, and examined whether the actors represented by Irish Equity were self-employed or employees. The Competition Authority considered this issue of paramount importance, since it was of the opinion that ‘[w]hile perfectly legal [for Irish Equity] to represent employees in collective bargaining with their employers, its trade union status cannot exempt its conduct when it acts as a trade association for “self-employed independent contractors”’. The Competition Authority concluded that the actors represented by Irish Equity were ‘self-employed actors’, based

on the following grounds: (i) actors providing advertising services generally are not obliged to work for a single advertising agency; (ii) they may work for several at the same time; (iii) such actors generally do not receive benefits such as holiday pay, health insurance, maternity leave and the like; (iv) such actors generally do not have employment security; (v) such actors are free to accept or decline a specific piece of work as they see fit; and (vi) actors generally are not thought of as employees of a particular agency. Accordingly, they were ‘undertakings’ subject to competition law and – as a result – Irish Equity was an association of undertakings (when it acts on behalf of self-employed actors). However, the Competition Authority refrained from commencing enforcement actions (civil and criminal) since prior to the proceedings, Irish Equity agreed with the Authority concerned not to enter into or implement any agreement that directly or indirectly fixes the fees to be paid to self-employed actors in return for the services rendered<sup>36</sup>. In early 2015, the ICTU (Irish Congress of Trade Unions) requested a review of the decision.

The Competition Authority announced in March 2015 that it upheld its original decision. No progress was made towards addressing this issue in the course of the revision of the Industrial Relations Act undertaken in 2015<sup>37</sup>. The ICTU has expressed its concerns, at the level of the ILO’s Freedom of Association Branch, about the increasing number of self-employed workers who find themselves classified as undertakings and therefore excluded from the right to collective bargaining<sup>38</sup>.

targeted by competition law, it significantly weakens their collective bargaining power.

The cases above illustrate how the potential clash between competition law and certain forms of collective bargaining has been addressed in the Member States of Ireland, the Netherlands and Denmark.

In light of decreasing budgets related to a marked reduction of public funding, orchestras in the Netherlands have sought ways to adapt their labour costs by engaging fewer musicians with employee status. The box below lists the strategic litigation actions undertaken by FNV KIEM to protect the right of freelance orchestra musicians to be included in collective agreements.



## Box 5

### FNV KIEM Case in the Netherlands<sup>39</sup>

In the Netherlands, orchestra musicians have traditionally been engaged on an employee contract, the terms and conditions of which are guided by collective labour agreements. Budgetary cuts have driven a trend whereby orchestras increasingly contract some musicians, in particular orchestra substitutes, on a self-employed basis, resulting in lower labour costs due to savings on social security and pension contributions. FNV KIEM has worked to ensure that substitute orchestra musicians be entitled to equality through benefitting from the terms of the collective agreement, regardless of the contractual form of their engagement.

Thus FNV KIEM negotiated with orchestra employers for the insertion of a paragraph in the collective agreement which guaranteed self-employed musicians a minimum rate of pay and pension contribution, comparable to those of colleagues with employee status. These developments were brought to the attention of the Netherlands Competition Authority (NMa) which opposed the principle of minimum fees for the self-employed in collective labour agreements claiming it breached the rules of both national and European competition law<sup>40</sup>.

The NMa ruling stated that *'self-employed are undertakings. A union bargaining on behalf of self-employed members is an association of undertakings and is not allowed any social exemption'*<sup>41</sup>. As a result FNV KIEM engaged court proceedings with the objective of defending free bargaining by unions on behalf of self-employed musicians, including regulation of minimum fees and pension contributions. The Hague court of appeal subsequently initiated a request for a preliminary ruling and referred two prejudicial questions to the Court of Justice of the European Union (CJEU). In its ruling of 4 December 2014, the CJEU stated that musicians working as service providers and carrying out the same tasks as their (permanent) salaried

colleagues could be considered 'false self-employed'<sup>42</sup>, where there was a subordination link in their working relationship. Consequently, since Article 101 (1) of the TFEU prohibited any agreement on prices between service providers, this article did not apply to them and entering into a collective agreement between social partners covering such workers was legal.

The Hague Court of Appeal gave its ruling on 1 September 2015, following analysis of the CJEU response to its two prejudicial questions concerning the enforceability of Article 101 of the TFEU in relation to a collective agreement regulating the conditions of employment for substitute orchestra musicians engaged under a service provision contract. The court judged that freelance musicians were bogus self-employed insofar as their work relationship reflected a link of subordination. In its analysis, the Court of Appeal noted that the orchestra substitutes in question: (i) were performing the same tasks as their incumbent colleagues; (ii) were playing their score alongside such colleagues; (iii) had to comply with a strict rehearsal and concert planning; and (iv) could not be replaced by freely designating other musicians to this end.

It therefore judged that such musicians were in fact bogus self-employed within the meaning of the CJEU ruling. The court was nevertheless careful to point out that its analysis was limited to the case in question and did not cover the situation of self-employed workers in other sectors of activity. FNV KIEM was partially satisfied with the national court ruling. It holds the view that there is a need for a more level playing field between workers covered by labour contracts and 'self-employed workers' and upholds the principle of equal pay for equal work. FNV KIEM is therefore advocating the principle of a general exception for self-employed in the cultural and media sector / creative industries.

In Denmark, despite a long and robust collective bargaining tradition, it has become increasingly difficult for trade unions to negotiate collective agreements on behalf of the many freelance and short-contract workers including journalists, illustrators, graphic artists and photographers working for media companies. The Danish Union of Journalists recognises the necessity of rules that protect against any distortion of markets by cartels and price-fixing, but strongly disagrees that its efforts to ensure fair rates of pay in this increasingly freelance market should be construed as such. At issue is the fact that Danish freelance press photographers and freelance journalists have been forbidden to compile and publish a list of recommended rates and terms for freelancers. As the case below will illustrate, the limitations placed on the publication of such recommended rates by competition rules has detrimentally affected the quality of employment in the media labour market in Denmark.

Box 6

## Competition Law and Collective Bargaining in Denmark<sup>43</sup>

The Danish Union of Journalists (Dansk Journalistforbund or DJ) is a trade union founded in 1961 for journalists, graphic designers, communication officers, photographers, and media technicians. Members are both permanent employees and freelancers. There have been freelancers in the Danish media industry ever since the first Danish newspaper was published in Copenhagen in 1749 and there have been freelancers in the DJ membership since its founding. Today, about 20-30% of the material in Danish newspapers is produced by freelancers, while around 80% of the material in Danish magazines and weeklies comes from freelancers. The TV and film industry also have a very high proportion of affiliated freelancers. Freelancers and other non-permanent workers are thus an important part of Danish media companies' workforce. DJ has since its foundation striven to protect freelancers' rights and has concluded general collective agreements on their behalf since the late 1990s.

Some of these agreements deal with both pay and terms of delivery, while others deal exclusively with copyright payments and usage rights. DJ provides lists of recommended prices for various kinds of freelance work, the aforementioned 'recommended terms for freelancers'. DJ has been compiling these lists since the 1980s and the use of the recommended terms for freelance journalists and press photographers have been particularly widespread.

The lists have been accepted by a large number of media companies. However, certain media employers adopted the stance that the existence of such lists was wrong in principle and they complained in 1997 to the Danish competition authority, the Competition Council. Initially, the Competition Council ruled that all freelancers were to be considered self-employed, and consequently, that the recommended price lists for freelancers were illegal and should be withdrawn. DJ appealed this decision, and the Competition Council then ruled in 2002 that freelancers who work in a similar manner to employees are exempted from competition rules. Working in a similar manner to employed workers means that the freelancer performs work of a similar nature to that of permanent employees, and under similar working conditions. These workers are called 'freelance wage-earners', and can be included in collective agreements and compile recommended price lists. Conversely, freelancers who work on a more independent basis cannot be included in collective agreements or issue recommended price lists.

These workers are categorised as 'self-employed freelancers'. There are therefore significant variations of status between freelancers. This difference was emphasised in 2007, when the big Danish media company Aller Media demanded that their approximately 600 freelance journalists and photographers supply their material at a considerably lower price than what

was practiced previously.

Following those developments DJ issued strike notice on behalf of all the 'freelance wage-earners'. In DJ's view, the vast majority of Aller Media's freelancers were freelance wage-earners. It had also successfully obtained a ruling from the Danish Labour Court confirming that it was legal to issue a strike notice for freelance wage-earners. This was a landmark case in DJ's struggle to uphold labour rights for freelancers. Subsequently, a collective agreement was achieved for the freelance wage-earners. However, Aller Media launched a counterattack through the courts and in 2010 a Danish labour court judge ruled that only about 100 of the 600 freelancers were in fact freelance wage-earners and actually covered by the terms of the agreement. All the others were to be regarded as self-employed and hence outside its scope. The judge's key argument was that the agreement would otherwise be contrary to the Competition Act.

Since then, the pay and conditions of all the self-employed freelancers at Aller Media have deteriorated significantly. By way of example, in the recommended price list for freelance photographers, which dates back to 2002, the price of a press photograph is set at 650 kroner, almost 90 euros. Today, Aller Media and many other media companies pay just 200 kroner, or about 25 euros, for a press photo – less than a third of the original price. The main driver of the falling rates is the highly limited possibility for DJ to undertake collective bargaining on behalf of freelancers. And that is to a large extent due to the Competition Act. Consequently, the situation prevailing today is that DJ is not able to negotiate deals for a very large part of its freelance members. In addition to greatly lowered rates of pay, freelance members no longer benefit from certain workers' rights such as a period of notice in case of dismissal and sick pay in case of illness. Nor are they entitled to parental leave with pay.

While DJ has continued to be able to conclude collective bargaining agreements for permanently employed editorial staff, journalists, photographers, graphic artists, etc., these in turn have been increasingly affected by the deterioration of conditions of freelancers, with constant pressure placed on conditions. Furthermore, in the negotiations between DJ and certain media groups on behalf of 'freelance wage earners' employers have pushed for a trade-off, with reductions in the terms and conditions applicable to permanent employees, in return for better conditions for those freelance wage-earners, on whose behalf the union can still negotiate. DJ has maintained an attitude of solidarity in the face of this pressure, noting that 'we go down so that we can go up together'. In the Danish parliament, DJ has called for an amendment in order to mitigate the impact of competition rules on social rights in the labour market.

## 4.8. Where Economic Freedoms End and Fundamental Rights Begin: Reflection on Legal Ways Forward in Relation to the Competition Law / Collective Bargaining Clash

Taking stock of ‘Albany’ – ECJ Cases C-67/96, C-115-117/97 and C-219/97<sup>44</sup>: On 21 September 1999, the European Court of Justice gave its ruling on a case brought by a Dutch textile company. The textile company Albany was trying to escape applying collectively bargained terms established between the textile unions and employers in the Netherlands. These included a pension fund for workers in the industry, compulsory for all companies in that industry. The grounds for the complaint are noteworthy: Albany used the competition rules in Article 81(1) of the EC Treaty (now Article 101(1) TFEU) as a basis for claiming that mandatory affiliation to the pension scheme compromised their competitiveness. The court in its ruling emphasised the social policy objectives of the Treaty – which are given equal weight to those on competition (paragraph 54); it focused on the provisions of the EC Treaty (Articles 118 and 118B, now Articles 156 and 154-155 TFEU) and, in particular, the provisions in the (then) Agreement on Social Policy (Articles 1 and 4, now Articles 151 and 154 TFEU). These provisions explicitly stipulate the objective of social dialogue and collective bargaining between employers and workers, including this objective at EU level (paragraphs 55-58). The court’s conclusion was (paragraphs 59-60): ‘It is beyond question that certain restrictions of competition are inherent in collective agreements between organisation’s representing employers and workers. However, the social policy objectives pursued by such agreements would be seriously undermined if management and labour were subject to Article 85(1) of the Treaty when seeking jointly to adopt measures to improve conditions of work and employment. It therefore follows from an interpretation of the provisions of the Treaty as a whole which is both effective and consistent that agreements concluded in the context of collective negotiations between management and labour in pursuit of such objectives must, by virtue of their nature and purpose, be regarded as falling outside the scope of Article 85(1) of the Treaty.’

Learning from the ECJ Case<sup>45</sup>: the decision in Albany recognised that EC social policy acknowledges trade union rights, according them equal or greater status than competition law and that trade union rights derive support from the EC Treaty. Particularly important, therefore, was the court’s reliance in the Albany judgement on the provisions of the Social Chapter and now the provisions of the EU Charter of Fundamental Rights in regard to social rights<sup>46</sup>.

The Albany landmark case law provided that future collective agreements within Member States could potentially similarly fall outside of the scope of competition law. But further cases of alleged breach of competition rules brought forward by national competition authorities have confirmed that some degree of legal uncertainty still prevails when it comes to asserting the right to collective bargaining for all workers in the light of EU competition law.

In a study led for FIM<sup>47</sup>, *Collective Bargaining and Competition law: A comparative study on the Media, Arts and Entertainment Sector*, researcher Camilo Rubiano has explored several legal options, suggesting that competition law provisions could provide limitations that would potentially prevent its application in cases of collective agreements concluded by or on behalf of ‘self-employed’ workers.

In the first place, even with the assumption that a group of organised workers could be considered as an ‘undertaking’, not all agreements (or price-fixing) between undertakings are against competition law, but only those that are aimed at the ‘prevention, restriction or distortion of competition’. As Rubiano commented, ‘Thus, when deciding whether an agreement violates competition rules, one should assess to which extent, collective bargaining could have an effect on competition notably from the perspective of the business value, the number of undertakings involved, the geographic area or “relevant market” of application’<sup>48</sup>.

In the second place, competition law provides for a set of exemptions and/or exceptions that limit the application of competition rules to a number of economic or business activities. For instance, the Treaty for the Functioning of the European Union (TFEU) provides that competition law does not apply to agreements, decisions and concerted practices which contribute to the ‘improvement of production or distribution’, or to the ‘promotion of technical or economic progress’.

The fact that trade unions and other organisations representing the interests of workers in the Media, Arts, and Entertainment sector in several EU Member States are exposed to the effect of competition law means that the workers have become much more vulnerable. In particular, because this situation undermines collective bargaining power as a fundamental social right, and any industrial action mechanism to promote workers’ rights. This finally impacts on the quality of working conditions, even to the extent of driving down employment by making it impossible to earn a decent living from working in the field.

When examining the relationship between two competing rights in EU law – collective bargaining and competition law – there is a need first to reaffirm that freedom of association and collective bargaining are basic human rights, while competition laws are meant to avoid distortions in a free market economy. Thus, those rights stand at different levels. The basic assumption in this context is that the Media, Arts, and Entertainment sector workers should, regardless of their status, be protected by the ILO's international Conventions No. 87 and No. 98, which regulate freedom of association and the right to organise, and by the EU Charter of fundamental rights, as a legally binding tool within the EU treaty.

As emphasised by ETUC's<sup>49</sup> proposal for a Protocol on the Relation between Economic Freedoms and Fundamental Social Rights in the light of social progress ('the Social Progress Clause'): 'Economic freedoms, as established in the EU Treaties, should be interpreted in such a way as not infringing upon the exercise of fundamental social rights as recognized in the Member States and by European Union law, including the right to negotiate, conclude and enforce collective agreements and to take collective action, and not infringing upon the autonomy of social partners when exercising these fundamental rights in pursuit of social interests and the protection of workers'<sup>50</sup>.

From an organisational point of view, trade unions need to examine the course of action needed to extend existing collective agreements to include atypical workers. From a more legal point of view, there is a need to better enhance strategic litigation and the use of national and international recourse mechanisms to enforce the rights to collective bargaining and freedom of association for all workers.

## 4.9. Using National Judicial Recourses and ILO Mechanisms to Better Enforce Freedom of Association and Collective Bargaining

The contribution below documents the efforts undertaken by Polish trade unions to ensure that freedom of association and collective bargaining extends to atypical workers.

### Box 7

#### Polish Trade Unions Joining Forces to Defend Freedom of Association for Atypical Workers

The Polish Act on Trade Unions explicitly states that the right to create and join trade unions is limited to workers who have employee status according to the Polish Labour Code. The need to ensure that all types of workers could form or join workers' organisations and be covered by collective bargaining has thus become an important issue for Polish trade unions. The first legal step aimed at adjusting existing Polish law to the ILO's conventions ratified by Poland was a complaint submitted on 28 July 2011 by Solidarność to the Committee on Freedom of Association of the ILO. Solidarność stated that Polish legislation restricts the right of certain categories of workers to establish and join trade unions and does not effectively protect against acts of anti-union discrimination.

The ILO committee ruled in favour of the complaint and pointed to unjustified limitation of the freedom of association (motion 2888/2012). Unfortunately, Poland did not undertake any legislative action to comply with this decision and with Convention no. 87. Therefore, OPZZ, the All-Poland Alliance of Trade Unions, submitted a motion to the Polish Constitutional Court on 27 June 2012 to check the legal compliance of the

Polish Act on Trade Unions with the Constitution and with the ILO conventions ratified by Poland, and in particular ILO Convention no. 87.

In December 2014, the Constitutional Court ruled that Article 2 of the Act on Trade Unions deprived a category of workers of their constitutional freedoms and concluded that it was noncompliant with Article 59 and Article 12 of the Polish Constitution. The Council for Social Dialogue, re-established in September 2015, was entrusted with the task of proposing specific legislative solutions to ensure an effective right of association and collective bargaining for all.

In April 2016, the Polish government proposed amendments to the Act on Trade Unions, which aimed at expanding freedom of association. The government proposal was that the right of association would apply to all workers who performed paid work and were under a contract for at least six months. Polish trade unions still consider this proposal as a limitation of the full right of association for workers who are not employees. Talks are currently ongoing.

## 4.10. Other Trade Union Responses to Strengthen Collective Bargaining for Atypical Workers

This subsection will illustrate two trade unions' practices aiming to ensure equitable remuneration of freelance and self-employed workers in the Audiovisual and Live Performance sectors.

### Box 8

#### The Freelance Calculator: A Tool for Freelance Journalists in Norway<sup>51</sup>

The media sector in Norway is characterised by a high level of concentration, with a few corporations controlling the printed press and two broadcasting companies dominating broadcast television. The Norwegian Union of Journalists (Norsk Journalistlag or NJ) is the only journalists' trade union in Norway. Its membership takes in personnel in newspapers, magazines, television and radio, as well as freelance journalists.

It has 9,000 members of whom 9% are freelance. Women make up 45% of the membership. The union has a freelance section and has long been concerned about the situation of freelance journalists who lack the protection of strong collective agreements. The decline of advertising revenues has resulted in significant job losses in the sector and the rise of freelancing with lower rates. Until 2002, freelance journalists were considered 'independent non-employed workers'. Up to 2008, freelance journalists were compensated on the basis of fixed rates by words, lines or pages. The rates were low and did not take into account freelancers' operating costs. While price fixing was deemed illegal, rates needed to be reviewed and adjusted by the media sector. The strategy developed by the NJ was to link freelance rates to staff wages.

Freelance journalists would therefore also be paid by the hour and not on the basis of words. In order to be able to promote this approach, NJ used its weight to support the

goal of equal earning for freelance journalists. It used detailed wage statistics to develop a system of 'wage calculation' for freelancers. The method of calculation was developed using the standard annual wage applicable to employed journalists as a basis, adjusted to billable hours. The 'freelance calculator' is based on an Excel spread-sheet used to calculate real billable hours (billable hours integrate all the operating costs such as administration, holidays, etc.). Also and in parallel, a significant amount of support was provided to freelance journalists in order to help strengthen their capacity to develop their professional businesses. The 'freelance calculator' was launched in November 2010. An increased number of freelancers have since started using this system and billing by the hour.

This has resulted in freelance wages becoming more visible. A new online tool is under preparation and should be available in 2016, along with a mobile web calculator. As lower freelance rates are a threat to the sustainability of the profession, another important activity of NJ is to use the strength of the union to negotiate freelance collective agreements. A collective framework agreement is currently with the main media companies and negotiations should be completed by mid-February 2017. Based on the successful model developed by the Norwegian Journalists' Union, the Professional Journalists' Association in Belgium (AJP) has also developed a freelance calculator for their freelance journalists<sup>52</sup>.

As described elsewhere in this report, BECTU is a major union in the Media, Arts and Entertainment sector in the UK. Below is a snapshot of some of its key activities to mobilise freelancers and engage them in campaigning, with a view to being able to negotiate better rates and conditions.

## Box 9

**BECTU Campaigning for Fair Pay for Freelance Workers in the UK**

BECTU has been negotiating for a number of years with PACT (Producers Alliance for Cinema and Television), where they have had previous agreements. The negotiations have been long and drawn out and are still problematic. The negotiations with PACT though have led to a significant amount of mobilisation of BECTU freelance members across the film industry, as members are consulted about their specific issues.

The Hair and Makeup branch, concerned with the abusive number of hours during the filming of *Les Misérables*, called a meeting in 2012 and within a month had added 120 members just from the crew working *Les Misérables*. In the following year, another Hair and Makeup mass meeting was called and over 330 showed up on the night. The branch gained 51 members on the night and a campaign to combat excessive hours gained strength. Three tools were used to organise and support freelance members' campaigns for better hours and wages.

Firstly, a number of branches issued their own Rate Cards, representing the rates that members are currently getting on jobs. Secondly, BECTU supported branches distributing mobile phones that could be used for union work and sharing of information, including warning about production companies which offer lower wages. Finally the union maintained for years an 'Ask First List' which could be accessed by members, warning them about difficulties encountered by fellow members with regard to being paid by certain listed companies.

An important aspect of BECTU's campaigns was the fact that results were achieved directly by BECTU members in their workplace, such as the BBC Factual Natural History Unit's breakthrough for freelance recognition at the BBC. BECTU members managed to conclude the ever first freelancers' agreement with the BBC.

This agreement gave BECTU legal standing for the collective representation of freelance individuals within the BBC. This further led to an agreement with the BBC's Drama Unit, probably the most significant for BECTU members. However, at the BBC, pay rate negotiations remain restricted to those bargaining units where the union can demonstrate a freelance coverage rate of 35% falling within its membership.

As is the case with all the divisions of BECTU, organising freelance atypical worker members and increasing representation is critical. Providing support to help members improve their capacity to act is among BECTU's main tasks. BECTU's training department has organised a number of courses supporting union organising but has also run courses that support the identification and training of activists. Recently, BECTU began to support its young members through a Young Members Forum with members drawn from all divisions. This has generated interesting campaigning actions on the internet and helped support the overall union campaigns. The campaign for a 'London Living Wage' at the Ritzy Cinema was a highly successful endeavour in this respect<sup>53</sup>.

**4.11. Concluding Thoughts on Complementary Actions at EU Level**

The challenges arising from globalised labour markets need to be strictly monitored by European and national institutions to ensure that they do not represent a step backward in the enforcement of freedom of association and the right to collective bargaining. Other types of advocacy actions could be undertaken by trade unions in calling on the EU institutions to monitor labour market developments and the right to collective bargaining for atypical workers. In the context of the European Semester, the European Parliament should for example be called upon to pay special attention to the question of atypical work in the Media, Arts and Entertainment sector.

In the context of the discussions on the Annual Growth Survey, the Commission and Council should be called to monitor carefully such measures when assessing the National Reform Programmes. The European Parliament could also call upon the Commission and the Member States to provide for sections in the National Reform Programmes on how social dialogue has been respected in the adoption of measures that affect the fundamental rights of workers and more specifically those of atypical workers.

The EU institutions should also be called upon to uphold full implementation of the ILO fundamental principles and rights at work, along with its core conventions C.87 and 98 and C154, along with the Charter of Fundamental Rights. The European Parliament could also call upon the Commission to present a Communication identifying the obstacles and exploring the relevance of possible solutions applicable to atypical workers.

This could include guidelines on the implementation of the relevant EU acquis, e.g. Directive 97/81 on part-time work or Directive 2008/104 on temporary agency work, and exchange of best practices at national level which would also include self-employed workers. Promoting Alternative Dispute Resolution practices in industrial relations and a better implementation of the Mediation Directive (2008/52/EC) is another option to consider. The European Parliament could call upon the Commission to further promote the use of ADR systems in the course of industrial relations and enforcement of collective workers' rights in line with the Mediation Directive (2008/52/EC) and as part of the European Commission's future initiatives on Justice for Growth<sup>55</sup>.



## Endnotes

- 1 The United Nations (UN) efforts for the protection of the right to association and collective bargaining include the Universal Declaration of Human Rights (UDHR) in 1948. Two of its provisions are of particular interest: Article 20(1) on the freedom of assembly and association and Article 23(4) on the right to form and join trade unions. See also European Parliament's DG for Internal Policies, *Enforcement of Fundamental Workers' Rights* (IP/A/EMPL/ST/2011-04), pp. 17-20.
- 2 ILO, *Non-standard workers: Good practices of Social Dialogue and Collective Bargaining*, Geneva, April 2012, p. 3.
- 3 Rubiano, Camilo, Collective Bargaining and Competition law : A comparative Study on the Media, Arts and Entertainment sectors in ILO, *Freedom of Association and Collective Bargaining: General Survey*, Report of the Committee of Experts on the Application of Conventions and Recommendations, Report III (Part 4 B), International Labour Conference, 69th Session, Geneva, 1983.
- 4 *Supra*
- 5 *Supra*
- 6 European Parliament's DG for Internal Policies, *Enforcement of Fundamental Workers' Rights* (IP/A/EMPL/ST/2011-04), pp.17-24.
- 7 Council of Europe, European Social Charter (Revised), 3 May 1996, ETS 163. Please note that as of 22 March 2012 the following EU Member States have not ratified the European Social Charter (Revised): Czech Republic, Denmark, Germany, Greece, Latvia, Luxembourg, Poland, Spain and the UK, Cf European Parliament's DG for Internal Policies, *Enforcement of Fundamental Workers' Rights* (IP/A/EMPL/ST/2011-04), pp.19
- 8 *Supra*
- 9 Eurofound, *New Forms of Employment*, Publications Office of the European Union, Luxembourg, 2015.
- 10 Eurofound, *Collective Bargaining in Europe in the 21st Century*, Publications Office of the European Union, Luxembourg, 2015.
- 11 ILO, *Non-standard workers: Good practices of Social Dialogue and Collective Bargaining*, Geneva, April 2012 pp. 6-18.
- 12 *Supra*
- 13 *Supra*
- 14 DG Communications Networks, Content & Technology, *Remuneration of authors and performance for the use of their works and the fixations of their performances*, Brussels, 2015, [online], <http://www.ivir.nl/publicaties/download/1593>
- 15 *Supra*, p. 149.
- 16 *Supra*
- 17 ILO Sectoral Activities Department, *Employment relationships in the media and culture industries*, Issues paper for the Global Dialogue Forum on employment relationships in the media and culture sector, 14-15 May 2014, p. 23.
- 18 Eurofound, *Representativeness of the European social partner organisations: Audiovisual sector*, 2013, pp. 20-22.
- 19 *Collaborazioni coordinate e continuative (co.co.co)* and *Contratti di collaborazione per programma (co.co.pro)* are work contracts covering so-called employer-coordinated freelance workers. See ILO, *Non-standard workers: Good practices of Social Dialogue and Collective Bargaining*, Geneva, April 2012, p. 18.
- 20 ILO, *Non-standard workers: Good practices of Social Dialogue and Collective Bargaining*, Geneva, April 2012, p. 3.
- 21 ILO Working Paper No. 295, *Employment relationships in the media Industry*, 2014, p. 17.
- 22 *Supra*
- 23 Eurofound, *Representativeness of the European social partner organisations: Live Performance industry*, 2013, pp. 44-46.
- 24 Eurofound estimates need to be examined with caution since quantitative data is lacking in certain Member States. See Table 4: Domain coverage, membership and density of trade unions, 2010–2011, [online], <http://www.eurofound.europa.eu/observatories/eurwork/comparative-information/representativeness-of-the-european-social-partner-organisations-live-performance-industry>
- 25 ILO Sectoral Activities Department, *Employment relationships in the media and culture industries*, Issues paper for the Global Dialogue Forum on employment relationships in the media and culture sector, 14-15 May 2014, pp. 20-22.
- 26 *Supra*



- 27** ILO Sectoral Activities Department, *Employment relationships in the media and culture industries*, Issues paper for the Global Dialogue Forum on employment relationships in the media and culture sector, 14-15 May 2014, pp. 20-
- 28** Fouqueray, Denys (of SFA), presentation made during FIA, FIM, EJU, UNIMEI workshop on collective bargaining, Dublin, 8 September 2015.
- 29** Fouqueray, Denys (of SFA), presentation made during FIA, FIM, EJU, UNIMEI workshop on collective bargaining, Dublin, 8 September 2015.
- 30** Döring, Valentin (of ver.di), presentation made during FIA, FIM, EJU, UNIMEI workshop on collective bargaining, Dublin, 8 September 2015.
- 31** Eurofound, *Representativeness of the European social partner organisations: Live Performance industry* (UK), [online], <http://www.eurofound.europa.eu/observatories/eurwork/comparative-information/national-contributions/united-kingdom/uk-the-representativeness-of-trade-unions-and-employer-associations-in-the-live-performance-sector>
- 32** Jones, Ben (of the British Musicians' Union), presentation made during FIA, FIM, EJU, UNIMEI workshop on collective bargaining, Dublin, 8 September 2015.
- 33** See Eurofound, *Representativeness of the European social partner organisations: Live performance industry, UK country profile, the system of collective bargaining*, 2013, available at: <http://www.eurofound.europa.eu/observatories/eurwork/comparative-information/national-contributions/united-kingdom/uk-the-representativeness-of-trade-unions-and-employer-associations-in-the-live-performance-sector>
- 34** Rubiano, Camilo, *Collective Bargaining and Competition law: A comparative Study on the Media, Arts and Entertainment sectors*, pp. 9-10, [online], [https://www.fim-musicians.org/wp-content/uploads/fim\\_study\\_competition.pdf](https://www.fim-musicians.org/wp-content/uploads/fim_study_competition.pdf)
- 35** Rubiano, C., *Collective Bargaining and Competition law: A comparative Study on the Media, Arts and Entertainment sectors*, p. 12, [online], [https://www.fim-musicians.org/wp-content/uploads/fim\\_study\\_competition.pdf](https://www.fim-musicians.org/wp-content/uploads/fim_study_competition.pdf)
- 36** The Irish Competition authority had warned against any attempt of EQUITY/SIPTU to negotiate a collective agreement. The trade union would have been liable for a fine amounting to €4 million. EQUITY/SIPTU had to preclude the use of the collective agreement. See comments by Patricia King, General Secretary of the Irish Congress of Trade Unions (ICTU), during FIA, UNI MEI, FIM, EUJ seminar on collective bargaining and atypical workers, 8 September 2015, Dublin.
- 37** The Irish Industrial Relations Act revision in 2015 provided for amendments to the Industrial Relations Act 2001/2004 notably to address some issues signalled to the ILO's committee on Freedom of Association by the Irish Congress of Trade Unions.
- 38** See comments by Patricia King, General Secretary of the Irish Congress of Trade Unions (ICTU), during FIA-FIM, EFJ, UNI MEI seminar on collective bargaining and atypical workers, Dublin, 8 September 2015.
- 39** Section drafted on the basis of contributions from Caspar de Kieffe of FNV KIEM during the FIA Workshop on Collective Bargaining, Dublin, 8 September 2015, and Martin Kothman of FNV KIEM at the FIM European group Berlin meeting, 1-2 October 2015.
- 40** See <https://www.acm.nl/nl/publicaties/publicatie/7129/Cao-tariefbepalingen-voor-zelfstandigen-en-de-Mededelingswet/>
- 41** See *supra*, quoted in Martin Kothman FNV KIEM presentation at the FIM European group Berlin meeting, *Creating a level playing field for orchestra musicians on labour conditions*, 1-2 October 2015.
- 42** 'False self-employed', that is to say, service providers in a situation comparable to that of employees. FNV and FNV KIEM did make the case that economically dependent self-employed were also false self-employed in accordance with the ruling of this decision.
- 43** See presentation of Hans Jørgen Dybro (Programme manager and political consultant at Danish Journalists' Union), during FIA-FIM, EFJ, UNIMEI workshop on collective bargaining, Dublin, 8 September 2015.
- 44** Case C-67/96 Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie (Reference for a preliminary ruling from the Kantongerecht te Arnhem) (Compulsory affiliation to a sectoral pension scheme – Compatibility with competition rules - Classification of a sectoral pension fund as an undertaking), [online], <http://curia.europa.eu/juris/liste.jsf?language=en&num=C-67/96>
- 45** Bercusson, Brian, *Protecting Collective Agreements*, [online], <http://www.thompsons.law.co.uk/itext/I0560004.htm>
- 46** *Supra*
- 47** Rubiano, Camilo, *Collective Bargaining and Competition law: A comparative Study on the Media, Arts and Entertainment sectors*, pp. 43-45, [online], [https://www.fim-musicians.org/wp-content/uploads/fim\\_study\\_competition.pdf](https://www.fim-musicians.org/wp-content/uploads/fim_study_competition.pdf)
- 48** *Supra*
- 49** Since 2008, ETUC has been calling for a Social Progress Protocol as a way of strengthening the protection of fundamental social rights in the EU treaties. The jurisprudence of the Court of Justice of the European Union (CJEU) in the Viking and Laval Cases provided impetus for this suggestion.

<https://www.etuc.org/etuc-demand-social-progress-protocol>

**50** ETUC, *Economic freedoms versus workers' rights: The Viking, Laval, Rüffert and Luxembourg judgments*, Brussels, 2008-2009.

**51** Sandåker, Toralf (freelance journalist at Norwegian Journalists' Union), during FIA-FIM, EFJ, UNIMEI workshop on collective bargaining, Dublin, 8 September 2015.

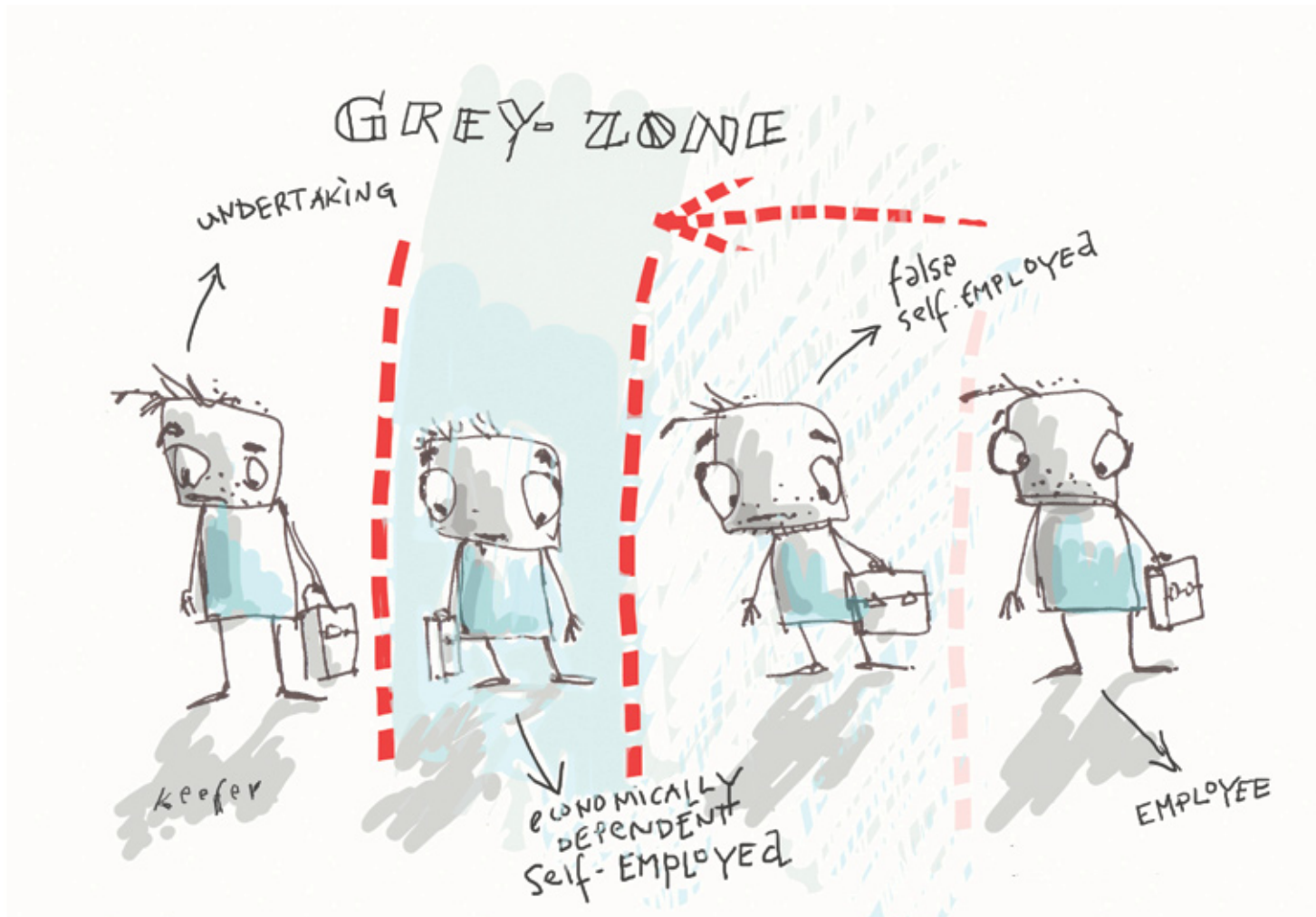
**52** <http://www.journalistefreelance.be/Les-Tarifs-de-la-pige?lang=fr>

**53** <https://www.bectu.org.uk/news/2249>

**54** *Supra*

**55** European Parliament's DG for Internal Policies, *Enforcement of Fundamental Workers' Rights* (IP/A/EMPL/ST/2011-04), pp.11-17 and 68.

## SECTION 5



**Tackling Dependent  
and Bogus Self-Employment:  
A Key Challenge in the Arts, Media  
and Entertainment Sectors**

## 5. Tackling Dependent and Bogus Self-Employment: A Key Challenge in the Arts, Media and Entertainment Sectors

The phenomenon of dependent and bogus self-employment can be regarded as part of the trend towards increasing labour market flexibility. There are signs that the number of such workers will continue to rise significantly in the coming years. The legal and social security protection currently available to these workers is, in this context, a source of widespread concern in the Live Performance and Audiovisual sectors where such working relationships are constantly expanding. This section aims to clarify the concepts and terms of the debate at hand, as well as to outline certain regulatory measures and trade union practices to address the situation of dependent and bogus self-employed workers<sup>1</sup>.

### 5.1. Clarification of Concepts

Changing labour markets, restructuring, outsourcing and an increase in temporary work arrangements have led to a blurring of the boundaries between subordinate employment<sup>2</sup> and self-employment in many economic sectors including the Live Performance and Audiovisual environments. However, some categories of workers have increasingly found themselves effectively without labour protection owing to their employment relationship being disguised, ambiguous or not clearly defined. The debate at hand focuses on emerging work arrangements which are 'in a grey area', an often-used term to describe those types of work that do not easily fit into the traditional binary distinction between 'employees' and the independent 'self-employed'. There are various concepts which have been developed in order to describe and categorise this group of workers.

**Bogus self-employment:** there are employment relationships which can be regarded as 'bogus self-employment', i.e.: subordinate employment relations which are disguised as autonomous work, usually for fiscal reasons, or in order to avoid the payment of social security contributions and thereby reduce labour costs, or in order to circumvent labour legislation and protection, such as the provisions on dismissals. This specific and unfair form of contracting is often raised as an issue in the context of the wider debate on self-employment, but in relation to bogus self-employment, the focus is generally on the need for better capacity to enforce existing regulations on dependent employment and to detect and punish violations<sup>3</sup>.

**Dependent self-employment:** this term is used to describe work relationships where the worker is formally self-employed yet the conditions of work are similar to those of employees. Despite working exclusively (or mainly) for a single employer, workers are neither clearly separated from, nor integrated with, the employer they contract with. In some cases, economically dependent self-employed workers may also be similar to employees in other ways. There may be no clear organisational separation, i.e. they work on the employer's premises and/or use the employer's equipment; there may be no clear distinction of task, i.e. they perform the same tasks as some of the existing employees, or tasks which were formerly carried out by employees and later contracted out to 'service providers'. Finally, it may be that the 'service' they sell individually to employers falls outside the traditional scope of 'professional services', i.e. the tasks are simple, do not require specific skills and no professional knowledge or competence is needed<sup>4</sup>.

Dependent self-employment work relationships are not based on employment contracts, but rather on commercial contracts between a self-employed worker and a specific employer. Empirical literature shows that these work relationships create both economic and personal dependence. Economic dependence fundamentally means that the worker takes (part of) the entrepreneurial risk, without the trade-off in terms of employment security. Furthermore, the entrepreneurial possibilities associated with self-employment are also limited in their case, due to the demands of their 'main' employer. Given that these workers have only one (main) employer, they generate the whole, or at least a substantial part, of their income from this work relationship. Personal dependence – or subordination – means that the outsourcing firm strongly determines working methods as well as the time, place and content of work<sup>5</sup>. Dependent self-employment also means that both organisational boundaries and the boundaries between employment and self-employment become blurred, resulting in the need to rethink labour and social security law.

**Other intermediate forms:** But there are also new forms of employment that are midway between dependent self-employment and bogus self-employment and cannot be easily grouped with either of the two, since they have some features of both. These are employment relationships which have gained importance in recent years, following the deregulation of labour markets and the spread of reorganisation policies, which have often included outsourcing of non-core activities and 'downsizing' of the organisational structure.

## 5.2. The Grey Zone: the Legal Status of Dependent Self-Employed Workers

Dependent self-employed workers in most EU Member States legally fall within a so-called 'grey zone' and in recent years, nearly all countries have reported an increasing need to find criteria that will help to more effectively define the uncertain status of economically dependent workers<sup>6</sup>. The difficulty in assessing dependent forms of self-employment are being tackled in different ways throughout the European Union. While dependent self-employment does not always have a specific place in labour law, some EU Member States have introduced a hybrid legal category to address the grey area between dependent employment and self-employment. The aim of this hybrid legal category involves facilitating outsourcing activities whilst simultaneously covering dependent self-employed workers with some legal rights that would not exist under the legal status of self-employment. This approach has been adopted in countries like Germany, Austria (see section below), Italy, the Netherlands and Portugal. Italy has also adopted the approach of extending basic protections to all workers, but with specific protections for specific categories.

Other countries have maintained the strict dichotomy between employed and self-employed and have tried other approaches to capture the growing reality of the dependent self-employed. These have included: (i) presumptions that these are employees and fall within the scope of employment protection legislation (France, Greece, Luxembourg); (ii) reversal of the burden of proving employee status (Belgium); (iii) listing criteria that enable identification of workers as either employees or self-employed (Austria, Belgium, Germany, Ireland<sup>7</sup>); (iv) extending protection to specified categories, even though they are not presumed to be employees (Denmark, France, Germany, Greece, Italy). Case law has also played an important role where there is no statutory definition of dependent employment (Ireland, Norway, Sweden and the UK) or where the legal definition is quite general<sup>8</sup>. Depending on the features of some EU Member States' national welfare state systems, dependent workers tend to be outside the scope of labour law protections (dismissal, holiday pay, sick leave) and collective bargaining coverage, while being subject to different fiscal and tax regulations<sup>9</sup>. This has played a role in the introduction of legal forms of employment, as mentioned earlier, mainly to broaden the coverage of social security schemes – and in particular pension schemes – to include these workers.

## 5.3. The Debate at European Level: Looking Towards the Future of Work in the EU

Dependent self-employment gained attention at European level in the context of the broader debate started by the European Commission and the European Parliament at the end of the 1990s on the future of work and labour law in EU Member States. An expert report, commissioned at that time, (*The Supiot Report*, 1998<sup>10</sup>) identified the phenomenon of dependent self-employed workers who are 'economically dependent on a principal' and in 'permanent legal subordination' to their principal, arguing for the application of certain aspects of labour law to workers who are neither employees nor employers.

In the year 2000, the European Commission raised the issue of economically dependent work in the consultation of the social partners on the modernisation and improvement of employment relations. The social partners and the European Commission agreed that more information and research was necessary. The European Parliament called on the European Commission to carry out an in-depth study and to hold a joint public hearing with the European Parliament on economically dependent workers. A study by Adalberto Perulli<sup>11</sup> was commissioned and published in 2002, to provide a detailed and comprehensive overview of the legal, social and economic situation in relation to economically dependent work in the Member States. The report proposed, among other things, the creation of a new kind of employment relationship (*tertium genus*) lying somewhere between employment and self-employment. There would then be three different employment models, all equal in functional terms: self-employment, where an individual makes his/her own provisions for protecting his/her professional and personal life; subordinate employment, where the employer undertakes to provide such protection; and, finally, quasi-subordinate or 'coordinated' employment, where the burden is equally divided between the person performing the work and the principal. The suggestion was that once this new model was created, some social protection should be extended to it.

In 2006, *The European Commission Green Paper on the Modernisation of Labour Law in the 21st Century*<sup>12</sup> identified the main challenges resulting from the gap between the existing legal frameworks and the realities of the labour market. The aim was to involve the Member States, the social partners and other interested parties in an open debate, in order to look at how labour law could help to promote flexibility in conjunction with security, regardless of the type of employment contract. It recognised that diverse forms of non-standard work had made the boundaries between labour law and commercial law less clear and that the traditional binary distinction between 'employees' and the independent 'self-employed' was no longer an adequate depiction of the economic and social reality of work. It further identified the question of disguised employment as part of the issues to be tackled.

In 2014, an additional impetus was given to addressing the question of bogus self-employment with the European Commission (EC) decision proposal on establishing a *European Platform to enhance cooperation in the prevention and deterrence of undeclared work*<sup>13</sup>. In its exploratory memorandum, the EC stated, 'A closely related phenomenon is falsely declared work, or bogus self-employment, which occurs when the worker is formally declared as self-employed on the basis of a service contract but the work he/she performs fulfils all the criteria that are used by national law and practice to characterise an employment relationship. Bogus self-employment has negative consequences in terms of health and safety and social security of the workers concerned'. *The European Platform to enhance cooperation in the prevention and deterrence of undeclared work* should seek to provide a forum where experts could share information and best practices to face common problems caused by undeclared work and by the related phenomenon of bogus self-employment<sup>14</sup>.

## 5.4. The Reality on the Ground: A Snapshot of Various Situations across the EU

As mentioned earlier, bogus self-employment has become a widespread phenomenon in EU countries. The legal and social security protection currently available to bogus self-employed workers is a source of widespread concern in the Live Performance and Audiovisual sectors, where such working relationships are on the rise. There is a danger that persons working on a false self-employed basis might either be deprived of their social rights or else that those rights might be violated. This subsection examines the state of play in selected Member States and further elaborates on some of the regulatory steps and enforcement mechanisms put into place to curb bogus self-employment.

In the UK, deregulation of the media industry and labour market changes have impacted on the situation of atypical workers. Work has become more precarious, less secure and more intense. The box below builds on the testimony of Tim Lezard, former president of the National Union of Journalists in the UK, a freelance worker and trade union activist, giving an overview of the situation of freelance workers in journalism in the UK<sup>15</sup>.

Working conditions and the social security situation of performers and cultural workers are among the major challenges facing the Audiovisual and Live Performance sectors in Turkey. In practice, cultural production outside the publicly funded sector is quite unregulated, with short-term contracts and bad working conditions, without basic social protection and unemployment benefits, often the norm. Turkey is characterised by low union density, decentralised collective bargaining and complex labour-employer and labour-state relations. There is no collective bargaining mechanism in place in the Live Performance sector or Audiovisual sectors. In the box below, the Actors Union of Turkey (AUT)<sup>16</sup> gives an account of the difficulties faced by atypical workers in these sectors.



## Box 1

## Trade Union Efforts to Tackle the Increase of Precarious Work in the Media

Over the past two years, 6,000 employed journalist and media workers lost their jobs at the BBC and in regional newspapers. This has not only generated an increase in the number of freelancers and self-employed workers, but has also brought about increased vulnerability in relation to social rights. This is due to the fact that many former television or newspaper staff, made redundant from their job, have in fact gone on to be subcontracted by their former employers on a freelance basis, but for lower wages and without any kind of social benefits. By way of illustration, Tim Lezard cited the experience of photographers working for news agency, Local World. 'Local World, a news agency in the West of England decided to dismiss a large number of its employed photographers. More than ten photographers were being asked to accept zero-hours style contracts instead, if they wanted any work from the company in future. They were also told that if they wanted to become a "freelance consultant" with Local World, they would not get any redundancy pay'. The announcement was part of Local World's plan for a 'freelance model' for photographic staff in Gloucestershire, Somerset, Bath, and the Western Daily Press in Bristol (the WDP covers the whole region). Other staff photographers working for newspapers including the Western Daily Press, Bath Chronicle, Gloucester Citizen and Echo and in Yeovil at the Western Gazette had also been put at risk of redundancy.

Another major issue is unpaid work and the failure to pay workers, particularly in the context of internships. An NUJ survey showed that 82% of young entrants into journalism had completed an internship, but most of them had received no remuneration. Again, Tim Lezard noted that: 'working for no remuneration undermines the work of everyone in the industry.

And underpaid interns will affect the quality of journalism in the end.'

The NUJ is therefore working to support young journalists as they embark on their careers. To this end, in 2011, the NUJ undertook litigation against TPG Web Publishing Ltd. over the unpaid internship of Keri Hudson. The Keri Hudson litigation was successful, as the Central London Employment Tribunal recognised she had a right to be paid for work carried out over several weeks for TPG Web Publishing Ltd. late in 2010. The tribunal heard that, despite the fact that she worked each day from 10am to 6pm and had been personally responsible for a team of writers, providing training and delegating tasks, collecting briefs, scheduling articles and even for hiring new interns, the company had decided that she was not eligible for any pay because they considered her an intern. The tribunal found she was a worker in law even though she did not have a written contract and was therefore entitled to be paid at least the National Minimum Wage and holiday pay.

More broadly, Tim Lezard noted that: 'in the UK, freelancers are a key part of the media industry where they play an essential role in bringing ideas to the fore and in fostering creativity. They have to be respected and employers need to pay decent wages'. Tim Lezard also warned against unhealthy competition between freelancers, which keeps fees artificially low. Trade unions such as the NUJ are therefore heavily invested in organising freelancers through training and advice. Tim Lezard further concluded that 'trade unions have a key role to play ensuring that all workers stick together, in order to ensure a level playing field based on a fair day's pay for a fair day's work, applicable to all workers'.

## Box 2

## Atypical Workers are Typical in the Cultural Sector in Turkey

'In Turkey, atypical forms of work are widespread in the cultural sector and they are often the norm,' says Sercan Gidisoglu (AUT). Most actors, including dubbing actors, even working full time, cannot afford to pay the applicable contributions for social protection, the cost of which may be as high as their monthly income. Low health and safety standards in the workplace are highlighted as another particular issue, although in the Audiovisual sector the situation has improved somewhat, thanks to the efforts of trade unions.

Turkish labour law sets out three categories of worker: employee, self-employed/freelance and civil servants. Most actors do not have employee status with the exception of contracted actors working in state or municipality funded theatres. In municipality theatres, workers have generally been paid on the basis of the actual number of days or performances, but under the pressure exerted by trade unions, the situation has changed and actors now receive full monthly allowances independent of the number of performances. Trade unions are currently involved

in negotiations with the Ministry of Labour and with producers to improve the status of live performance actors, but with no tangible results to date.

Among the problems identified, is the lack of state regulation and enforcement of labour rights, particularly as regards atypical workers subcontracted by commercial TV production companies. Turkish TV series represent an important export market. TV production companies threaten Turkish labour authorities with the supposed negative repercussions of increased labour costs for the sustainability of the sector. There are also challenges in relation to possible litigation strategies due to the fact that actors are generally afraid to take court cases, due to the possible impact on work and career opportunities. Employment tribunals consider that self-employed actors, engaged under civil law contracts, have to be referred to commercial courts. Trade unions have been developing awareness campaigns and organising strategies to better empower freelancers to access their social rights.



Austria is one of the several countries where dependent self-employment is defined by the criteria of legal subordination. An extensive social security reform took place in 1997, defining several hybrid categories of employment and extending certain rights to groups of self-employed (Muehlberger, 2007)<sup>17</sup>. Austria has also been confronted with an increase in bogus self-employment. The box below gives an account of developments and approaches in this area, based on comments from Dr Eva Fehringer<sup>18</sup>, Deputy Head International and European Social Policy, Labour Law, Austrian Ministry for Labour, Social Affairs and Consumer protections (BMASK).

### Box 3

## Tackling Bogus and Dependent Self-Employment in Austria: A Policy Making Perspective

As mentioned above, there is no uniform and clear-cut legal definition of 'self-employed workers' in Austria – rather there is a range of contractual statuses, with varying bundles of rights. Firstly, there is the so-called 'free service contract': this is a somewhat hybrid legal construction midway between a standard employment relationship on the one hand, and actual self-employment on the other. A second category is the so-called 'new self-employed' worker: covering holders of a 'contract for work' (without a trade licence). It is a common feature of both of these categories of atypical workers that they do not employ other people and mostly work for only one (main) client. In reality, their working situation largely resembles that of dependent employees, although they are, at least in certain respects, legally treated as self-employed workers. Apart from these atypical workers, there are also some more classical self-employed persons (i.e. one-person companies) holding a trade licence, who can be assigned to the category of 'economically dependent self-employed workers'.

Free service contract workers are insured under the terms of the General Social Insurance Act and covered by health, pension and unemployment insurance. They have no trade licence. However, for these workers, labour law as such does not apply: they do not fall within the scope of collective agreements on wages, have no paid holiday or protection from dismissal.

The second category of the 'new self-employed' have much the same status as self-employed and they can contract unemployment insurance on a voluntary basis. Self-employed persons who are one-person companies, holding a trade licence, are not included in any collective agreements. They do not enjoy any social protection (no minimum wage, sick pay or paid holidays, no unemployment insurance) and fall under a rather expensive social insurance regime. Trade unions and researchers consider that these 'entrepreneurs' are

also 'economically dependent self-employed workers' - often contracted for the sole purpose of saving on social insurance contributions and bypassing labour law obligations. While Austria has seen a decrease in the number of 'free service contract workers', due to the fact that this status offered better labour protection, there has been an increase of workers with the status of one-person companies. Researchers and trade unions argue that this points to a likely rise in bogus self-employment with an increase of outsourcing and the flexibilisation of the labour market.

In Austria, actors, theatre staff and journalists are also widely affected by bogus self-employment (and other precarious working arrangements) even though collective agreements do protect dependent self-employed journalists. Austria enacted anti-wage and social dumping legislation in 2011, the most important provisions of which imposes administrative sanctions on employers found guilty of the underpayment of their workers. The Austrian Ministry of Employment and Social Affairs (BMASK) and trade unions launched a website in 2015 (<http://www.watchlist-prekaer.at/>) aimed at supporting workers in better asserting their rights and identifying legal recourse. Dr Fehringer notes that: 'The widespread use of dependent self-employment is an area of increasing concern within the EU as it both undermines collective bargaining and collective interest representation. In many cases, this is a clear circumvention of labour law and this constitutes a form of social dumping which results in the lowering of standards and wages. It further threatens the fundamental principles of the European Social Model and the European Union should be more determined in addressing this situation'. She further concludes that 'better enforcement of labour legislation is needed to address the situation and trade unions have a key role to play through exploring litigation options and notably the use of collective claims (class actions) on behalf of freelancers'.

The European Parliament adopted a resolution on 14 January 2014<sup>19</sup> on effective labour inspections as a strategy to improve working conditions in Europe. The resolution recognised that there is a growing trend towards bogus self-employment, outsourcing and subcontracting, which may lead to an increase in precarious jobs and low levels of protection for workers. It further recognised that labour inspection played an important role in protecting employees' rights and preventing breaches of employment protection rules. Nataša Trček, Chief Labour Inspector, is the head of the Slovenian Labour Inspectorate. In the box below, she describes the role of the Labour Inspectorate in combating undeclared work and bogus self-employment in Slovenia.

## Box 4

## Effective Labour Inspection: A Useful Tool in Combating Bogus Self-Employment in Slovenia<sup>20</sup>

The Labour Inspectorate of Slovenia is an administrative body within the Slovenian Ministry of Labour, Family, Social Affairs and Equal Opportunities. The Labour Inspectorate supervises the implementation of legislation, other regulations, collective agreements and general acts that govern employment relations.

Labour inspection plays an important role in protecting employees' rights, preventing breaches of employment protection rules and promoting fair and socially responsible economic growth. In 2015, special attention was given to breaches of labour law considered likely to constitute major violations of workers' rights. Such infringements included: underpayment of work or failure to remunerate work contracted

under labour law; failure to respect minimum wages; breach of working time regulations; and failure to provide holiday pay. Bogus self-employment was also one of the infringements considered; it constitutes a breach of the prohibition of the conclusion of civil law contracts when elements of an employment relationship are present.

In this context, the Labour Inspectorate of Slovenia audited a considerable number of media companies. In this context, in the last quarter of 2015, the Labour Inspectorate issued a warning to the management of national media company RTV regarding violations of labour legislation. The company has been given a deadline until 2018 to set its practices in order, as detailed below<sup>21</sup>.

RTV Slovenia, the national public service broadcaster, formerly employed a significant number of dependent self-employed workers. With the entry into force of the Employment Act in 2003 (ZDR), and following a series of audit reports, RTV was found to be in breach of Slovenian labour law. RTV's in-house work arrangements with contracted freelance workers were found to be in breach of Slovenian labour law which outlaws use of civil contracts when elements of an employment relationship are present. The box below further details the processes put into place by RTV Slovenia with a view to regularising the situation of such workers, through re-classifying the contractual relationship with its dependent self-employed workers.

## Box 5

## From Self-Employed to Employee: The Example of RTV Slovenia

RTV Slovenia is a public, non-profit radio and television broadcasting company. It operates in accordance with the 2005 Law on RTV Slovenia, and in compliance with Slovenia's 2001 Law on Media. RTV Slovenia employed 1,948 full-time employees at the end of 2015. According to Slovenian labour law, the presumption of employment was to be applied to dependent self-employed workers of RTV. RTV Slovenia is a public institution, thus it is deemed important that the company be considered an example of good practice in managing its workforce.

In 2015 a major human resources (HR) strategy was put into place assessing the current HR approach, in light of the projected needs of RTV. The plan, which aimed to control labour costs, included a review of the criteria for employment within RTV, setting out a matrix of competences and skills of RTV staff along with staffing grades. The plan was to ensure that all RTV contracts (both employment and subcontracting) would strictly comply with Slovenian labour law. HR policy principles were set based around four key principles:

- equal treatment between employees and contract workers;
- the definition of formal qualifications for employment (e.g. RTV journalists and workers should have reached certain

levels of educational qualification degree or vocational diploma level);

- recruitment policies should be aligned with RTV staffing needs;
- the social situation of the workers should be taken into account.

The HR plan included a downsizing of the number of employees, through the establishment of early retirement schemes. A thorough review of the situation of dependent self-employed workers took place. In the wake of this, the contractual arrangements of RTV with 434 workers have been revisited, in accordance with the new RTV HR strategy and with the social dialogue held with sectoral trade unions. Out of the 434 self-employed contracts, plans have included the requalification of 157 self-employed workers as employees, 53 self-employed workers were declared eligible for employee status but with a slightly lower professional grade and 58 self-employed workers were conditionally eligible for employee status, pending a skills upgrade through vocational training schemes. The regulation of other self-employed contracts, part-time contracts, interim work arrangements and student internships have been thoroughly reviewed in order to avoid any form of disguised employment relationship.

## 5.5. Adapting to a Changing Paradigm: Trade Unions and Dependent Self-Employed Workers

In many countries, trade unions have been calling for a redefinition of the boundaries between dependent employment and self-employment stretching back to the early 2000s, in order to provide more protection to workers whom they regard as 'economically dependent'<sup>22</sup>. The *Green Paper on the Reform of Labour Law for the 21st Century* was heavily criticised by European trade unions<sup>23</sup> and by labour law experts for failing to take into account a 'social and fundamental rights-driven' perspective needed in the reform of the labour market.

Within the Media, Arts and Entertainment sector, two types of representation of dependent self-employed workers can be identified<sup>24</sup>. The first type of representation is simply through the inclusion of economically dependent workers in existing trade unions. The second is through the creation of new union organisations which only organise and represent economically dependent workers, though such unions tend to be cross-sectoral, rather than sector-specific.

An example of the first may be found in Germany, where a legal exception means that self-employed freelance journalists are considered dependent workers if at least 50% of their salary comes from a single employer/client, and they are exempt from any competition regulations preventing the conclusion of agreements on common fees and prices. Thus they can be covered by collective agreements negotiated by established sectoral unions.

An example of the second comes from Italy, where labour reforms introduced new forms of employment midway between dependent and autonomous. The legislative challenge was to ensure adequate union representation and social protection to autonomous, economically dependent workers. The Italian legislator decided to explicitly define the category of economically dependent workers (so-called *parasubordinati*) as those who perform a 'continuous, coordinated and mainly personal' form of collaboration with the same employer (Art. 409 N.3, Codice di Procedura Civile). For the *parasubordinati*, the legislation provides levels of social protection similar to those guaranteed to dependent workers and they are also entitled to be represented by trade unions in collective bargaining. This last measure has favoured the successful development of trade union representation among economically dependent self-employed workers. In 1998, the main trade union organisations (CGIL, CISL and UIL) all created their own structures (respectively *NidiL CGIL*, *ALAI-CISL* and *CPO-UIL*) for representing non-standard workers (including the *parasubordinati*) and a number of agreements have been signed since then<sup>25</sup>.

## Box 6

## Reaching, Organising and Mobilising Freelance Workers: the Experience of BECTU, UK

BECTU organises its members through five key divisions: the BBC division, the Independent Broadcasting division, the London Production division, the Regional Production division, and the Arts & Entertainment division.

The London division is organised by branch according to members' professional sector (hair and make-up, cameraman, writers and producers); the Regional Production division brings together all professional sectors of activity and has branches in various geographical locations throughout the country. The Arts & Entertainment division gathers workers from London Theatres, regional theatres, arts centres and cinema workers.

The three divisions of Broadcasting, Regional Production and Arts & Entertainment represent more than 50% of the membership. Most members working in these divisions have atypical working patterns and this phenomenon is growing. Both of the freelance divisions have seen steady and sustained growth over the last few years with a significant increase in membership.

The Arts & Entertainment division has been steadily adding members for the last decade. In contrast the Broadcasting division's membership has been declining due to outsourcing and BBC and Independent Broadcasting redundancies which impacted BECTU membership.

Some of BECTU's practices for reaching out to members and recruiting new affiliates involve the following activities: analysing and responding to membership needs, developing training programmes for both union organising and career building skills, supporting and attending 'bottom-up' members' initiatives, developing online communication and looking for ways to improve contact with members. Joining online is a successful portal for new member recruitment. Active outreach strategies are also put in place with targeted campaigns using Facebook pages, online membership subscriptions, and enrolment leaflets distributed during members' events.

Some of BECTU's successful initiatives have included: training days on tax or health and safety, as well as recruiting new affiliates through freelance fairs or BBC events. Health and Safety initiatives have been especially successful. The union, together with the industry and government, developed a health

and safety passport. The passport is given once members complete training to prove that they are skilled in industry health and safety issues. BECTU is one of the key providers of such training and highly rated by both members and employers. 'Move On Up days' are events specifically targeted at ethnic minorities and have been running for over ten years. BECTU members of the Arts and Entertainment division also attend trade fairs aimed at those working in the Live Performance sector. All of these approaches aimed at enlarging the constituency base have proved to be successful both in terms of boosting recruitment and organising atypical members.

A new area of organising has been the visual effects (VFX) and gaming industry. BECTU's mobilisation campaigns have been slowly developed targeting workers in the VFX sector. Over the years and as the conditions became tougher, a core groups of members joined BECTU.

The campaign, 'BBC Love it or Lose it: Let's stop the Jobs cuts' petitioned against the BBC austerity package and employment reductions plans. The 'Love it or Lose it' campaign is being coordinated with other key unions within the BBC, the NUJ, Equity and other members of the Federation of Entertainment Unions (FEU). It hosts Facebook pages and online petition appeals and twitter feeds. BECTU also joined forces with the staff of the Ritzy Cinema in London in the context of the 2014 long-running campaign under the title: Living Staff, Living Wage. The members held 13 strikes from April to July 2014 that were supported by BECTU and union members such as British film director, Ken Loach. The campaign called for decent wages that Ritzy Cinema's workers could live on in London. The cinema's holding company, Picture House, finally granted workers a pay rise and redundancy plans were also fended off.

On the specific question of bogus self-employment, BECTU also provides its members with various types of advisory services which include tax advice and notably online material which include detailed definitions on employment and tax regimes. Also, the Know your Rights campaign helps members to better understand the phenomenon of bogus self-employment. BECTU officials may also approach member's employers and point out their legal obligations.

The system of industrial relations in Ireland is essentially voluntary in nature. There has been agreement on all sides that the terms and conditions of employment of workers is best determined by the process of voluntary collective bargaining between an employer or employers' association and one or more trade unions, without the intervention of the State. Under this process standard matters like wages or hours of work are determined and, in addition, some collective agreements lay down procedural rules which govern the conduct of industrial relations between the parties<sup>26</sup>. Over the years, however, legislation has been enacted in certain areas (such as minimum rates of pay, holidays, working hours, minimum notice, redundancy, dismissals and employment equality) laying down certain minimum standards which may be improved upon by collective bargaining but cannot be taken away or diminished.

The State's role in industrial relations in Ireland has been largely confined to facilitating the collective bargaining process through the establishment in law of certain institutions (Labour Relations Commission, Rights Commissioner Service and Labour Court) to assist in the resolution of disputes between employers and workers and creating a supportive framework through the Workplace Relations Commission and the Labour Court.

Other labour rights are covered by individualised statutory rights applied to employees only (e.g. The Unfair Dismissal Act, 1977). Recently, new industrial relations legislation was passed regarding Collective Bargaining Rights, but again, applied to employees only. The right of freelance/self-employed workers to be represented in collective bargaining is currently being hampered by the decision of the Irish Competition Authority which in 2004 ruled that voice-over actors, musicians, journalists, photographers and writers, are considered undertakings. This means that collective bargaining on behalf of those workers cannot be considered to fall under the general exception for collective bargaining and can therefore not be exempted from application of competition rules (See Section 4). Negotiations had been held between trade unions and the government to examine a possible sectoral exemption from competition law and discussions are ongoing regarding legal solutions to this problematic application of competition law. Case law can however play a meaningful role in advancing the debate and in extending protections to self-employed workers. The box below highlights some relevant cases taken by trade unions in this area, with a view to establishing stronger rights and better protections for self-employed workers.

#### Box 7

### The Role of Case-law in Establishing the Rights of Self-employed Cultural Workers in Ireland<sup>27</sup>

Case law in Ireland has set precedents with regard to the protections of self-employed cultural workers. One such claim was introduced under Article 20 of the Industrial Relations Act related to a production company, Tommy Fleming TF Productions, which cancelled the contract of a supporting musician on very short notice.

In the case (Recommendation Number LCR19705), the Labour Court considered the definition of a worker with regard to Article 23(3) of the 1990 Industrial Relations Act: 'any person aged 15 years or more who has entered into or works under a contract with an employer, whether the contract be for manual labour, clerical work or otherwise, whether it be expressed or implied, oral or in writing, and whether it be a contract of service or of apprenticeship or a contract personally to execute any work or labour'<sup>28</sup>. The musician was recognised as a worker and awarded €4,600 in compensation. Due to the voluntary nature of Irish industrial relations, the court decision was not implemented.

In the case 'Ferguson versus John Dawson and Partners [Contractors]', 1976, it was found that a certain element of control existed between the organisation and the independent contractor. In other words, certain factors confirmed that the relationship was one of employer – employee. It is however not always clear whether this level of control applies, as was demonstrated in a later Irish case: Sunday Tribune, 1984 HC. In this case, two journalists were doing similar work. The distinction was in how the work was done by each journalist. The court looked at arrangement by journalists where, for tax purposes, they were considered to be independent contractors. The 'realities of the relationship' was the decisive factor taken into account and as a result it was held that one was an integral part of the Sunday Tribune while the other was a freelance contributor.

Another situation involved the case of an actor working for the Dublin bus company, Ghost Bus Tours, for six years and whose contract had been terminated. SIPTU took the case to the Workplace Relations Commission under the Unfair Dismissals Act 1977-2007. The preliminary issue to be decided was whether the worker fit the definition of employee as Dublin Bus had claimed they were self-employed and not an employee.

When the Commission applied the tests, control, integration, mutuality of obligation and examined precedent and key issues etc., the Commissioner concluded that the worker was in reality employed under a contract of service (employee contract) and he was unfairly dismissed. The Dublin bus company has since introduced an appeal against the decision.

Relevant cases have also been taken outside of the media and cultural sector and may well help to build future actions within the sector. For example, in the case of Henry Denny & Sons (Ireland) Ltd. v Minister for Social Welfare [HC 1995] [SC1998] 1 IR 34, the court considered various tests and criteria in determining both the status of the contract and the worker.

It introduced the economic test. The case related to the status of a supermarket demonstrator whose job was to offer free samples to shoppers. The demonstrator was paid by the supplier of the free samples. Tests applied were:

- Control test – the demonstrator (she) was found to be under the control and direction of and could be dismissed by the employer.
- Integration Test – the worker was considered to be an integral part of the supplier's business.
- Own Business Test – the worker was found not to be in business.

As a conclusion, the merchandiser was considered not to be in business for herself and was ruled to be an employee.

Since 1969 in France, performing artists working on a short-term basis (*intermittent du spectacle*) benefit from a rebuttable presumption of employment enshrined in the French Labour Code. This provision applies to performing artists and to technicians who regularly work on a short-term basis. The box below details the mechanism of the Guichet Unique du Spectacle Occasionnel (GUSO)<sup>29</sup> designed to facilitate the protection of short-term workers in France and their enjoyment of this status. This mechanism and the vocational training fund that it facilitates are an outcome of the strong social dialogue between employers and workers on behalf of the intermittent du spectacle.

## Box 8

## Making it Simple to Offer a Short, Fully Legal Employment Contract in France

The Guichet Unique du Spectacle Occasionnel (GUSO) was created and put into operation in 1999 as a mandatory 'one-stop shop' for organisers who do not work in live performance as their primary activity (for example, cafes, bars or restaurants, but also individuals) but who organise occasional live shows. GUSO aims to reduce the administrative burden attached to labour contracts and takes care of the administration of employers' payroll including social security contributions and other rights and contributions associated with the employment status of short-term workers. It is designed to simplify the contractual and administrative declarations for employers and short-term workers and thereby reduce illegal work in this sector.

Thus, in practice, GUSO is a mechanism which centralises administration procedures which need to be fulfilled by any organisation employing artists for short duration contracts that caters for statements and payment of social security contributions when an employer hires an artist or a technician for the production of a live performance. This process is run and implemented by the national employment agency, Pôle Emploi. It allows all legal obligations to be observed and ensures the appropriate social security contributions are made to social protection agencies concerned with social security. These are: URSSAF (the unemployment insurance); UNEDIC (supplementary pension); AUDIENS (concerned with welfare); les congés spectacles (which administers holiday pay); AFDAS (vocational training); and the CMB (occupational health services).

Through the GUSO declaration, employers are able to complete their legal obligations towards short-term workers involved in live performance activities. Employers' social security obligations are handled by a single contact point system through GUSO, which performs the following services: issuing the contract of employment; producing the annual declaration

of social security information; handling the declaration form proving employment for Pôle Emploi, along with the certificate of employment related to annual leave and the certificate of monthly employment (which is the equivalent of the salary slip for an employee).

A system of portability of rights has been set up which gives the worker a right to accrue the right to a leave of absence for vocational training purposes. Such vocational training rights are funded by employers within a mutual fund (the AFDAS mentioned above). Incentive measures have also been set up with subsidies given to employers to foster recruitment. The rights accrued through these short-term contracts are also extended to those international and European artists touring in France.

An administrative reform of GUSO took place in 2004<sup>30</sup> and focused on a number of key points. Firstly, the scope of GUSO, (which was limited until 31 December 2003 to occasional organisers of live performances, i.e. those not holding more than six performances per year) was further expanded to the organisers of live performance shows which perform more than six annual performances, but who are not engaged in live performance as their primary activity. Secondly, GUSO was made compulsory for the organisers of live performance shows effective on 1 January 1 2004. This measure was intended to simplify the tax declaration obligations of small structures, to reduce illegal employment in the sector, to improve the welfare of the artists and technicians and reduce unfair competition. Finally, the social security inspectors (URSAFFG) are, since 1 January 2004, authorised to check employers' administrative interactions with all the social security entities which partner with GUSO. In addition, GUSO handles litigation recovery for all the social security partners entrusted to work with GUSO.

For more information, see <https://www.guso.fr/>

In Romania, legislation has had the opposite effect to that in France by placing certain categories of short-term and freelance worker squarely outside of social dialogue and the protections that it might afford, rather than facilitating their inclusion. Thus the challenge trade unions face is to establish representativeness and to challenge the race to the bottom that freelance workers now face, without the benefit of union protection.



Box 9

## The Social Dialogue Law in Romania: An Attack on Trade Unions and the Rights of Atypical Workers - FAIR-MEDIASIND

Law 62 on Social Dialogue, adopted by the government in 2011, has radically altered the system of industrial relations in Romania. Labour law changes have affected some important parts of the employment relationship, such as work contracts, collective bargaining and working time, as well as representativeness and the right to strike. In particular, the law abolished collective bargaining at national level and made sector-level bargaining virtually impossible. The situation has got much worse for workers since the introduction of these changes. Many local unions have lost representative status. Leonard Paduret of FAIR-MEDIASIND (the trade union for culture and mass media), has described how the new law on social relations has succeeded in not only depriving freelancers in the cultural sector of the right to be represented by a union,

but also workers in small and medium businesses, in full disregard of ILO Conventions 87 and 98, despite the fact that these were ratified by Romania.

Moreover, the restriction on the right to strike has significantly impacted the union's capacity to mobilise. The legislation has also made it easier for employers to use non-standard employment contracts, by extending the period for which fixed-term employment contracts may be concluded from 24 to 36 months. As reported by affiliates, the vast majority of new jobs created are temporary. In addition, employers take advantage of the legislation to reduce the number of workers on open-ended contracts and replace them with the more flexible fixed-term contracts.

## 5.6. Recommendations and Ways Forward

Several strands may be developed to drive forward the work on issues around bogus and dependent self-employment.

Ongoing research on the evolution of the situation is needed to inform policy making and strategic decisions. Given the lack of empirical evidence across Member States and at sectoral level on the numbers and working conditions of dependent and bogus self-employed workers, there is a pressing need for better data collection. European trade unions should call upon the European Commission, and the future European Platform on Undeclared Work to conduct a wide cross-sectoral survey on the extent of the phenomenon of bogus self-employment.

The European Commission could also, together with Eurostat and Eurofound, make sound use of future European labour surveys and include questions concerning dependent and bogus self-employment.

This information should be monitored and integrated into the 2020 strategy 'socio-economic monitoring mechanisms' (European semester<sup>31</sup>). Sectoral surveys could be put on the future work programme of European social partners.

Better legal clarity and definitions: current definitions differ across Member States and might create additional barriers to labour market integration and cross-country mobility within the EU in particular for mobile artists in the Live Performance sector and this may be detrimental to the working and living conditions of potential workers.

European trade unions should call upon the European Commission and the European Parliament to work towards an approximation of definitions or guidelines and or legal criteria that could help to address the so-called 'grey area' prevailing regarding the legal status of dependent and bogus self-employment. As an example, FIM's response<sup>32</sup> to the Commission Green Paper, *Modernising Labour law to meet the Challenge of the 21st Century*, proposed establishing a clear distinction between the category of 'workers' and that of 'service providers' in all Member States, and ensuring that such a distinction is recognised by all. The category of workers would be subdivided into 'employees' and 'self-employed' who are economically dependent. The benefits of labour rights (in particular collective bargaining) would, therefore, no longer depend on the existence of a work contract but on the fact of being a worker.

A cooperative dialogue framework for trade unions at inter-sectoral level: given that this issue is increasingly prevalent across a range of diverse sectors, it might be helpful to consider collaborative actions to address the specific dimensions of bogus self-employment, including in relation to the future European Platform of Undeclared Work. Joint reflection on strategic litigation and case law across sectors could be one form of cooperation.

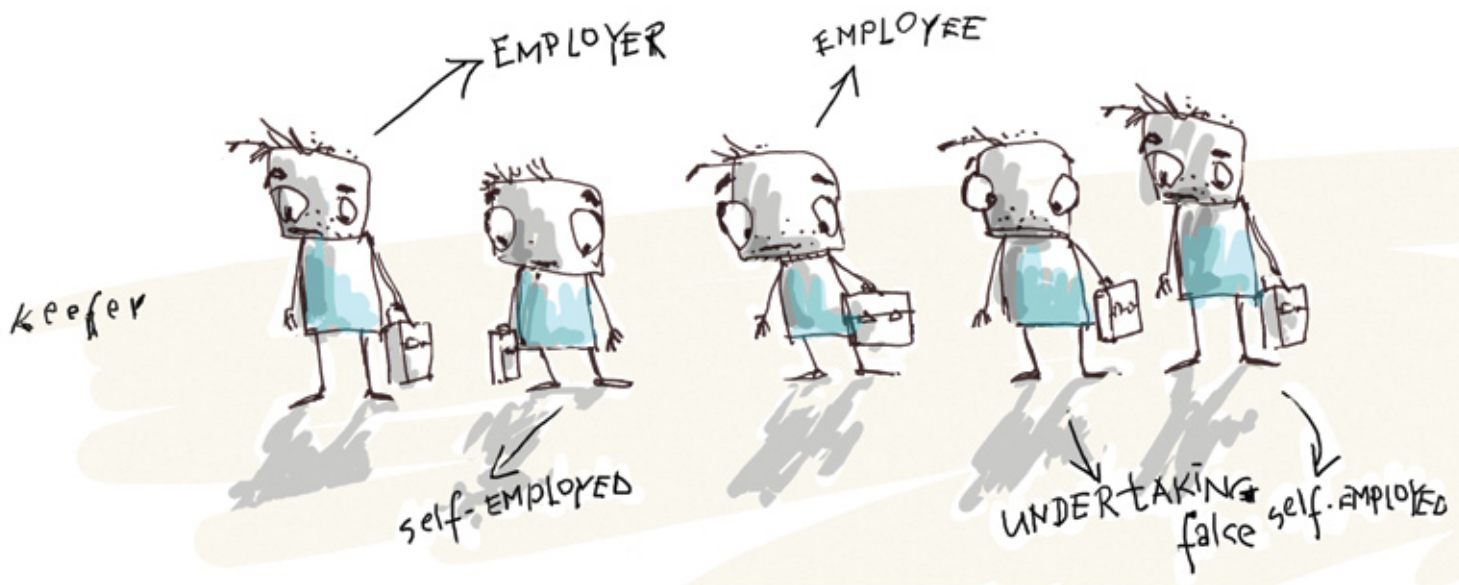
Re-invigorating the policy debate on bogus self-employment: the European Commission, the European Parliament and the European social partners should continue to reflect and exchange on general guidelines related to dependent self-employment and social protection for (dependent) self-employed in all EU Member States to provide a sustainable solution in the future.

## Endnotes

- 1 This section integrates speakers' contributions made during the seminar 'Improving Social Rights and Working conditions for Atypical Workers in the Live Performance and Audiovisual Sectors', Ljubljana, Slovenia, 26-27 January 2016.
- 2 There is no single definition of subordinate employment accepted across EU Member States. According to Belgium labour law, it can be defined by the employer's right to direct work and to control the worker's performance. The main feature of subordinate employment under labour law is the considerable level of protection that the legislation provides employees. See EURwork, '*Economically dependent workers*', *employment law and industrial relations*, Table 1. Definitions of 'dependent employment' in the EU and Norway, [online], <http://www.eurofound.europa.eu/observatories/eurwork/comparative-information/economically-dependent-workers-employment-law-and-industrial-relations>
- 3 EURwork, '*Economically dependent workers*', *employment law and industrial relations*, [online], <http://www.eurofound.europa.eu/observatories/eurwork/comparative-information/economically-dependent-workers-employment-law-and-industrial-relations>
- 4 European Parliament Committee on Employment and Social Affairs, *Social protection rights of economically dependent self-employed workers*, 2 April 2013, pp. 25-26.
- 5 European Parliament Committee on Employment and Social Affairs, *Social protection rights of economically dependent self-employed workers*, 2 April 2013, p. 25.
- 6 EURwork, '*Economically dependent workers*', *employment law and industrial relations*, [online], <http://www.eurofound.europa.eu/observatories/eurwork/comparative-information/economically-dependent-workers-employment-law-and-industrial-relations>
- 7 Interestingly, Ireland was the only country to introduce 'soft regulation' by social dialogue, extending the legal protection of workers in the grey zone. See EURwork, '*Economically dependent workers*', *employment law and industrial relations*, [online], <http://www.eurofound.europa.eu/observatories/eurwork/comparative-information/economically-dependent-workers-employment-law-and-industrial-relations>
- 8 EURwork, *Self-employed Workers: Industrial Relations and Working Conditions*, [online], [http://www.eurofound.europa.eu/sites/default/files/ef\\_files/docs/comparative/tn0801018s/tn0801018s.pdf](http://www.eurofound.europa.eu/sites/default/files/ef_files/docs/comparative/tn0801018s/tn0801018s.pdf)
- 9 EIRO, 2002.
- 10 European Commission, *Transformation of labour and future of labour law in Europe*, Final Report, (General Rapporteur Dr Alain Supiot), Belgium, 1998.
- 11 Perulli, Adalberto, *Study on economically dependent work/parasubordinate (quasi-subordinate) work*, presented at a hearing co-organised by the Committee on Employment and Social Affairs and the European Commission, DG Employment and Social Affairs European Parliament, Brussels, 19 June 2003.
- 12 European Commission Green Paper, *Modernising Labour law to meet the Challenge of the 21st Century*, [online], [http://www.europarl.europa.eu/meetdocs/2004\\_2009/documents/com/com\\_com\(2006\)0708\\_/com\\_com\(2006\)0708\\_en.pdf](http://www.europarl.europa.eu/meetdocs/2004_2009/documents/com/com_com(2006)0708_/com_com(2006)0708_en.pdf)  
Also, ETUC, *Modernising and Strengthening Labour Law to meet the Challenge of the 21st Century*, [online], <https://www.etuc.org/IMG/pdf/Annex04-04-07.pdf>
- 13 European Commission, *Proposal for a decision on establishing a European Platform to enhance cooperation in the prevention and deterrence of undeclared work* (COM/2014/0221 final - 2014/0124 (COD)).
- 14 The EC decision proposal was published in April 2014 and forwarded to the European Parliament and the Council in order to start the co-legislative procedure. On 7 May 2015, the EMPL Committee adopted the final report of the Bulgarian Rapporteur Georgi Pirinski (S&D) on the Commission proposal. On 20 November 2015, the Council approved the compromise text negotiated with European Parliament. See <http://www.eu2015lu.eu/en/actualites/communique/2015/11/20-travail-non-declare/index.html>
- 15 Lazard, Tim, (of NUJ, UK) keynote address made at seminar on 'Improving Social Rights and Working conditions for Atypical Workers in the Live Performance and Audiovisual Sectors', Ljubljana, Slovenia, 26-27 January 2016.
- 16 Gidisoglu, Serkan, (of Actors Union of Turkey), keynote address made at seminar on 'Improving Social Rights and Working conditions for Atypical Workers in the Live Performance and Audiovisual Sectors', Ljubljana, Slovenia, 26-27 January 2016.
- 17 Muehlberger, U., 'Dependent Self-employment: Workers on the Border between Employment and Self-employment'. Houndmills: Palgrave Macmillan. 2007a, quoted in '*Social protection rights of economically dependent self-employed workers*' (study), [online], [http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/507449/IPOL-EMPL\\_ET\(2013\)507449\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/507449/IPOL-EMPL_ET(2013)507449_EN.pdf)

- 18 Fehringer, Eva, (Deputy Head International and European Social Policy and Labour Law, Austrian Ministry for Labour, Social Affairs and Consumer protection), keynote address made at seminar on 'Improving Social Rights and Working conditions for Atypical Workers In the Live Performance and Audiovisual Sectors', Ljubljana, Slovenia, 26-27 January 2016.
- 19 European Parliament, Resolution of 14 January 2014 on effective labour inspections as a strategy to improve working conditions in Europe (2013/2112(INI)) 7\_TA(2014)0012.
- 20 Trček, Nataša (Chief Labour Inspector, Slovenia), comments made at seminar on 'Improving Social Rights and Working conditions for Atypical Workers in the Live Performance and Audiovisual Sectors', Ljubljana, Slovenia, 26-27 January 2016.
- 21 <http://www.eurofound.europa.eu/observatories/eurwork/articles/labour-market-industrial-relations/slovenia-growth-of-precarious-work-in-the-media-sector>
- 22 Article 12a of the German Collective Agreement Act (*Tarifvertragsgesetz*).
- 23 ETUC, *Modernising and Strengthening Labour Law to meet the Challenge of the 21st Century*, [online], <https://www.etuc.org/IMG/pdf/Annex04-04-07.pdf>
- 24 See FIA, UNI MEI, EFJ, FIM seminars of 20 May and 8 September 2015 as part of the EU project 'Reaching out to Atypical Workers: Organising and Representing Workers with Atypical Contracts in the Live Performance and Audiovisual Sectors'. See <http://www.iaea-globalunion.org/atypical-workers>
- 25 Ebisui, Minawa (for the ILO), *Non-standard workers: Good practices of social dialogue and collective bargaining*, box 6 p. 19, [online], [http://www.ilo.org/wcmsp5/groups/public/---ed\\_dialogue/---dialogue/documents/publication/wcms\\_179448.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---dialogue/documents/publication/wcms_179448.pdf)
- 26 See [https://www.workplacerelations.ie/en/What\\_You\\_Should\\_Know/Industrial\\_Relations/](https://www.workplacerelations.ie/en/What_You_Should_Know/Industrial_Relations/)
- 27 Cf "Self-employment in Ireland", by Karan O Loughlin, Irish Equity SIPTU, contribution delivered during seminar on 'Improving Social Rights and Working Conditions for Atypical Workers in the Live Performance and Audiovisual Sectors', Ljubljana, Slovenia, 26-27 January 2016.
- 28 Cf Self-employment in Ireland", by Karan O Loughlin, Irish Equity SIPTU, contribution delivered during seminar on 'Improving Social Rights and Working Conditions for Atypical Workers in the Live Performance and Audiovisual Sectors', Ljubljana, Slovenia, 26-27 January 2016.
- 29 Slyper, Marc, presentation made at seminar on 'Improving Social Rights and Working Conditions for Atypical Workers in the Live Performance and Audiovisual Sectors', Ljubljana, Slovenia, 26-27 January 2016.
- 30 See France's interministerial circular no. DSS/5C/DMDTS/2009/252 of 5 August 2009 *relative au guichet unique pour le spectacle vivant* (Guso), [online], [http://circulaires.legifrance.gouv.fr/pdf/2009/08/cir\\_29236.pdf](http://circulaires.legifrance.gouv.fr/pdf/2009/08/cir_29236.pdf)
- 31 The European Semester is the EU's annual cycle of economic policy guidance and surveillance.
- 32 See [http://ec.europa.eu/employment\\_social/labour\\_law/green\\_paper\\_responses\\_en.htm#2](http://ec.europa.eu/employment_social/labour_law/green_paper_responses_en.htm#2)

## SECTION 6



**Building for the Future:  
Organising Atypical Workers  
in the Live Performance  
and Audiovisual Sectors**

## 6. Building for the Future: Organising Atypical Workers in the Live Performance and Audiovisual Sectors<sup>1</sup>

Across the EU, trade unions face hard times. Their status as pillars of a European social model is being challenged. The decline in trade union density and the decrease in membership have been identified as clear signs of those difficulties in today's economy<sup>2</sup>. Moreover, there has been an increased growth in diverse forms of atypical employment, resulting in insecurity in relation to labour rights and increased precariousness. Also, the Audiovisual and Live Performance sectors rely on a high proportion of atypical workers but the trade union membership of this category of workers varies greatly across Member States. Density is, for instance, far below average for younger age groups and this is a challenge for the future of trade union membership<sup>3</sup>. In the context of this adverse environment, dilemmas facing trade unions increasingly require outreach strategies and new approaches to recruiting and organising atypical workers. This section seeks to introduce the challenges trade unions face in reaching out to atypical workers, along with some examples of innovative recruitment methods and organising models.

### 6.1. Building New Solidarities: Reaching out to, and Organising, Atypical Workers

Across EU Member States, unions are increasingly faced with the need to halt the decline in membership of traditional standard employees by reaching out to a more diverse membership, as a key priority. The situation in the Audiovisual and Live Performance sectors is slightly different however. Atypical workers have long formed an important part of trade union constituencies in the sector and particularly in certain Member States. But this category of workers also tends to require different organising approaches, as traditional approaches may not be adapted to reach them or engage them. In the wider context, debates on trade union renewal strategies must also address difficult questions about whether unions should open up more to atypical workers. There are understandable concerns that unions would be tacitly encouraging an increase in working relationships which take place outside established employment law. Other considerations relate to whether labour movement traditions of solidarity and collective action can extend to self-employed workers, who may often be working in a very individualistic way. This raises important questions about how unions may successfully engage with these groups of workers. Many unions active in the Live Performance and Audiovisual sectors have experience organising freelance or self-employed workers. They have thus started to respond to the needs of their atypical membership – both within and outside the remit of collective bargaining – through the creation of specific organisational structures and the development of service-oriented approaches<sup>4</sup>. Also the desire to adjust and respond to the developments affecting atypical workers in highly precarious labour markets has increasingly led trade unions to set up strategies of recruitment, outreach and membership engagement, which take greater account of diverse worker profiles and distinctive interests. Mobilisation and the building of strategic partnerships with atypical workers remain therefore a key challenge.

Central to the process of mobilisation is the ability of atypical workers to build solidarities both within their own group, and with other groups. In the box below, Associate Professor Deborah Dean from Warwick University shares central elements of her research on mobilisation approaches targeting atypical workers in the Live Performance sector.

## Box 1

## Performers' Occupational Ideology: A New Lever for Solidarity and Collective Action

Performers are insecure contingent workers in that they supply their personal services to an employer while being largely economically dependent on the employer's business. How does a union operate when its members' work is casualised, infrequent and unpredictable but the members have a drive to work at almost any cost?

In responding to this question, Dr Deborah Dean of Warwick University in the UK conducted research on industrial relations in the Live Performance sector, focusing on the mobilisation strategies of Equity UK, the largest performers' union in the UK and indeed in Europe. The research highlighted that the use of the sector's occupational ideology and the workers' drive to work could be used as a strategy of mobilisation.

Dr Dean's research also analysed how these workers approached the notion of 'collective ethos'. She studied the phenomenon of strikes at the National Opera and West End theatres and found that where performers perceive a particular social injustice, which is attributed to management, a feeling of solidarity among workers is generated and can lead to mobilisation with effective results. Further, the combined alliance between union infrastructure and workers' personal bonding networks can generate powerful forces for change. Members – in the Audiovisual sector for instance – have networks, forums and social capital which bond them together. If this strong bonding capital can be built upon, it can generate effective collective mobilisation approaches.

Another consideration arising from this research is that the sectoral workers' occupational ideology can be a barrier to, as well as an opportunity for, union engagement. A barrier that may arise in the Live Performance sector may be related to the strongly held principles that 'Art is free' or 'Art for Art's sake' which often permeate artistic ideology. This occupational ideology plays a key role in keeping workers committed to the artistic and media profession. This comes with a perceived feeling of penalty in the case of exit from the profession. However, research has also shown that where unions can identify with the workers' ideology and give the concept of art and artistic considerations a key place in their efforts to recruit and mobilise, then members are likely to listen and act collectively.

As a part of the research led by Dr Dean, the case of a successful mobilisation campaign undertaken by Equity UK<sup>5</sup> was examined. The campaign concerned the English National Opera (ENO) Chorus members, whose contracts were under threat of non-renewal. Equity took action on several fronts including mobilising chorus members to take strike action. Protest actions included demonstrations through singing sessions in front of the ENO offices, lobbying MPs and a print and broadcast media campaign. This industrial action, where atypical workers and Equity joined forces, was heavily covered by newspapers at the time and made the BBC 6 O'clock News. This placed pressure on the ENO management, which then moved to resolve the dispute, with a mutually satisfactory agreement being reached.

## 6.2. What Works? Developing Trade Union Approaches to Reaching out to Atypical Workers

How do unions reach out and engage and respond to the needs of a wide range of membership? The need to tailor strategies and services to respond to the changing labour market landscape is a starting point. Developing membership surveys can bring useful information, helping unions to increase their knowledge of the atypical workforce. Reaching out to atypical workers means also tailoring recruitment approaches and this requires resources. Approaches can be organisational, with the appointment of recruitment officers, and even business directors, in charge of new members. It can also include the development of recruitment packs, specifically tailored to certain target groups, explaining to those potential members what the union can offer them and why they should join it. Avoiding lengthy administration processes and making it simple for potential members to join a union is also recognised as key.

Over the past decades, unions have also been developing ways of giving atypical workers a voice within their organisational structures. New approaches have included the establishment of special organisations, committees or bodies which have a representative role with respect to particular groups of workers, for example women, young people or other profiles of atypical workers.

For example, the NidiL CGIL trade union<sup>6</sup> in Italy was created to represent the specific interests of dependent, atypical workers. Some unions also give the democratic right (equal voting right for union elections) to young workers so that they can influence union policy and so prepare the ground for the next generation of trade union activists.

The Danish Union of Journalist (DJ) has a membership of 17,500. Over the last decade, the union has experienced a dynamic 3% growth per year in terms of new members and a 5% growth among students despite an adverse and competitive environment. The union has also managed to increase significantly the percentage of members aged 35 years or under. Those inspiring achievements are the result of a focused recruitment strategy taking into account the developing trends occurring in the media sector and the evolving needs of the new generation of journalists



and other media workers. The box below illustrates the strategy put into place at the Danish Union of Journalists to recruit new members among young media workers and maintain loyalty among the existing membership base, in the context of demanding business developments affecting the media sector in Denmark.

## Box 2

### Back to the Drawing Board: Daring to Overhaul Services and Recruitment Strategies in Light of Industry Change

A first important strategic decision taken by the DJ was to market and embrace the wider industry, not only targeting journalists but other media workers such as photographers, cartoonists, and authors. A second aspect of the strategy was to organise the communication social media industry. This resulted from observations made of the evolving media market where a growing part of developing business focused on social media communications. By embracing both industries – the journalistic and the communication sectors – the union was in a better position to help its membership to make better use of their journalist skills. This also helped them to upgrade and develop social media skills that are being looked for by employers. Embracing the overall industry also meant that the union would be able to make an impact helping members grow their business and influencing the terms of the industry.

An important aspect of the union's work was recruiting new members among young people and building retention programmes. One approach has been to create specific strategies in the sectors where the union wanted to recruit. The main method made use of peer recruitment techniques. Six student organisations were created throughout the country in charge of welcoming new students and located in the schools of journalism. Those student unions played an important role in helping to position the DJ as an integrated part of the communication and media industry. These student unions reached out to students by offering rebates on membership fees and giving them 100% democratic participation and voting rights but only access to selected union membership's services. Services that are the most wanted by young students include career counselling over the phone, free courses and seminars and advice on wages and employment conditions in

the industry. The union also made it easy to become a member enabling full access to the way the union worked.

The growing number of atypical workers brought new demands and needs. The union decided to reorganise the services proposed to freelancers and self-employed workers. It provided business training for people who were considering becoming self-employed. A six-week 'Starter Kit' programme was proposed for people starting a new business, as well as a growth package targeting people already in business, who wanted to grow their operation. Business coaching was also provided to members and those services helped to better integrate freelancers in the union. A last part of the efforts of the DJ were targeted at workers in the TV business environment which in Denmark is characterised by very hard working conditions compared to other branches. The level of precarious work has increased with the proliferation of short-term contracts. Workers are subject to huge work pressure with more production in less time and for less money. The DJ created an 'Ambassador Network' composed of members respected in the industry. Those members acted as union relays in the TV business environment. Ambassadors helped the union reach out to members and potential new recruits in the sector and kept them informed in a timely fashion of developments at hand.

Key questions linked to the recruitment of new members necessitate a sound reflection on why the union wants new members and what are potential members' needs in line with the market trends. If responses to those questions are not aligned and consistent, the union will not be able to build conviction in its recruitment approach and potential recruits will not follow as a result.

Specific sectors of the entertainment industry are still facing challenges in terms of unionisation of workers; this is the case of the video game industry. In the box below, FNV-KIEM gives an account of its efforts in trying to organise the sub-sector of video-games and animation.

## Box 3

## Understanding and Listening to your Target Audience: the Experience of Organising Workers in the Gaming and Animation Industry in the Netherlands

With a view to extending its membership, FNV KIEM took the decision to investigate the main issues facing workers in the video game, VFX and animation industry, and to explore ways to unionise this category of workers. This project built on a comprehensive piece of research, produced by Tilburg University. The research aimed to identify the developments in the broader creative industry, the working conditions, the needs of the workers and the potential role of the unions. The research focused on three groups of professionals: application developers; 2D/3D animation and game professionals; and pop musicians.

In terms of working conditions, the sector is characterised by low pay and long working hours especially in animation/VFX. Animation artists work long hours, particularly near deadlines, with little time left over to spend with their families or at leisure, and indeed often leading to lack of sleep. Working 60 hours a week is common and there are even those who work 100 hours per week. Many in the industry are forced to work overtime in order to meet tight production deadlines, but they are contracted or paid in such a way that they essentially work those extra hours at their regular rate of pay, rather than at the standard time-and-a-half rate of overtime pay. Student internships are barely paid. This is one of the more pervasive and unfortunate problems of the animation industry.

There is consequently an identified need for collective action to address certain of these issues. Questioned on their perception of what would an ideal union look like, workers surveyed said that the ideal union would be clearly aware of and grounded in the specific working reality of the sector.

The union or professional association would be membership based. The union would provide advice on relevant issues and would be digitally advanced. The union would need to build its legitimacy on trust and value. The organisation should be a strong and a visible advocate of game and video developers. Besides, the organisation should seek to stay away from any type of conflictual debates such as working hours, and adopt a positive approach to helping the industry grow. The union should use the guild model of organisation. It should provide its members with a tool box of services such as guidelines, fee advice, support in relation to tax and bookkeeping and model work contracts.

Specific meetings were held with selected groups of workers to get a deeper insight into the priorities on which the union should focus, such as market trends and how to address them, as well as the engagement strategy and ways to attract members. A name, logo and identity for the future professional organisation were developed in cooperation with a group of workers. A kick-off meeting took place in Amsterdam during KLIK! (the Amsterdam Animation Festival) in November 2015. The meeting brought together 100 interested participants. Subsequently the young organisation's digital communication infrastructure was formalised (website, Facebook, Twitter) and a ten-point action plan developed, along with a presentation of the organisation in the main Arts and Cinema schools. The organisation is in the early days of its development and has set up working groups focusing on developments in the labour market and the industry, communication, education and business development.

There have been many attempts to create unions devoted to supporting atypical workers, but those efforts remain challenging. In the box below, Antonio Salerno, a long time trade union representative and activist, gives an illustration of a failed attempt to unionise musicians through the creation of a professional union of musicians in Italy.

#### Box 4

### What Doesn't Work: Learning from SIAM, A Project to Unionise Musicians in Italy

From 2002 to 2013, attempts were made to organise musicians in Italy in a professional union. Ultimately, it was a failed attempt, but one which offered valuable experience and insight into the complex environment in which musicians today operate both in Italy and across Europe.

At the outset, the three types of categories of musicians likely to join were identified. The first two were a small minority of star musicians; and the employees of a few lyric Symphonic Orchestras Foundations (these private-law entities are funded by public resources). They constitute a privileged minority of musicians, historically protected by the union, but heavily under attack in the context of public spending cuts. Freelance musicians were the remaining and most precarious category. A framework programme was drafted, recruitment started and an independent trade union affiliated to NIdiL CGIL got off the ground. The union was called the Italian Union of Music Artists (SIAM). The statutes of the union stipulated that SIAM was 'a National Union of Artists of Music, men and women, who work under short-term contracts, through all kinds and forms of musical expression.' The association managed to gain a foothold in a dozen regions from the north to the south of Italy, but never exceeded 600 members nationwide.

From the outset, some musicians were sceptical about the proposals emanating from the union, others viewed considering the union as some kind of employment agency. The meetings of the union brought together jazz musicians, classical musicians and artists from other sectors such as pop music, dance music and entertainment. Income and working conditions were naturally significantly different across all of these sectors and the dialogue was consequently difficult.

There were common concerns and complaints across the sector however: the lack of jobs, low wages, failure to comply with the agreements, lack of transparency in the provision of public funding, lack of clear regulation, state bureaucracy, undeclared work and unfair competition. There was a deeply felt need for recognition of the social identity of artists. There was also a strong need for individual services, including legal protection on matters such as copyright and contracts, as well as tax advice. However, the reality was that trade union structures were not properly equipped or adapted to respond to such needs and the Italian trade union context did not lend itself to developing them in that way.

Considering the different types of musicians in the sector, but also the lack of collective agreements, the bulk of the union's efforts went into promoting initiatives to build awareness among the general public and policy-makers. A network of professional resources was also set up. Advocacy activities were developed, targeting regions and aimed mainly at the renewal, and greater transparency of, public funding. Advocacy for a national bill extending unemployment insurance and accident insurance to these workers was also developed but unsuccessful. The main merit of SIAM was to raise awareness about the challenges in the cultural sector in terms of employment and funding, while emphasising its great importance. Atypical work and precariousness have become recurring features of the musical sector in Italy. This situation creates a growing rift between standard employment and precarious non-standard working relationships. It is therefore necessary to adapt the social security system, the tax system and social protection to this new reality of the work environment. The fledgling union was ultimately too weak to address these systemic challenges.

## 6.3. Keeping Pace with Digital Natives: Effective Use of Digital Tools and Social Media

Using internet and web communication has become a growing trend to better reach atypical workers. For trade unions; the challenge is to effectively use new means of communication to inform and provide services for members and explain union aims and policies to the wider public at the same time. Many union websites now have Facebook and Twitter links. Creation of a strong intranet has become a key resource for union communication among officials and with workplace representatives, at least in northern Europe. As Greene and Kirton have suggested (2003), electronic technologies have the potential to allow members to adapt union activity to their own time constraints, and also provide 'safe spaces' for those who may find traditional union meetings an uncomfortable environment<sup>7</sup>.

Most unions have therefore been making the most of the opportunities presented by new technology. Many unions offer member-only sections of their websites providing access to information and advice and to informal discussion forums. In a recent focus on reaching out more effectively to young people in particular, the European Federation of Journalists organised a seminar for its members where recruitment practices using peer-to-peer communication (young journalist members recruiting other young journalists) were discussed<sup>8</sup>. In a number of cases, specialist websites have been set up specifically for self-employed members. ver.di (Germany) has set up **mediafon**<sup>9</sup>, a dedicated website and information platform for freelance workers. Because mediafon can be used by non-ver.di members, it has become a useful recruitment tool (about 15% of non-members using it subsequently join ver.di).

In the box below, Equity UK, one of the major performers' unions in the UK, illustrates the power of social media in campaigning and reaching out to atypical workers.

## Box 5

### Using Social Media to Magnify the Impact of Campaigns: the Experience of the Equity UK Campaign to save ENO

A recent effective social media campaign was the one which Equity undertook in February 2016 on behalf of the ENO chorus, a group of 44 opera singers, then permanently employed and faced with a 25% pay cut and a move to part-time, atypical working (see also Box 1 for Deborah Dean's analysis of this campaign).

This campaign regularly posted on social media and the success of these postings added major impetus to the campaign giving it wide visibility. A video posting which showed the group singing in Westminster was viewed 14,000 times and was shared by 300 Facebook users. The campaign which included a press conference and some guerrilla performance type actions generated high interest which was then picked up by TV and printed press. The campaign was a key support to the industrial negotiations which were undertaken by Equity to try to mitigate the proposed job cuts.

Equity identified some key factors that helped to deliver the success of the social media campaign. It was vital that the value of art was at the heart of the campaign. Thus the message delivered by Equity was that the move by opera singers to part-time work would signal a decline of the ENO standards and output. This message was effective not only in reaching members but also in mobilising the general public. The campaign sought to achieve an informal, approachable tone in communication on social media and build-in an emphasis on two-way communication by involving members in shaping debates, policy and campaigns. As Equity union officer Louise McMullan comments, 'We need to move away from wordiness

and the use of official documents which may turn people off. On social media, Twitter is limited to 140 characters which teaches the union to be succinct in our messages [...] There is a need also to relinquish control of debate and allow our members, activists and networks to express themselves freely and develop their own campaigns, sometimes outside of the union's formal structures.' Other campaigns not initiated by the union, but involving union members and non-members also frequently pop up on a range of single issues and again, they can be an opportunity for positive engagement and new interactions.

Campaigns using social media have challenged established activism and the union's traditional methods. But that is not to say that these are to be sidelined: unions still have a key role to play in actually harnessing and channelling the energy of the members of the various social media groupings and campaigns and finding ways to organise and recruit them. Equity's strategy is therefore to engage with these groups, offering assistance, support and expertise, but also listening to, and learning from, their possible resistance to being more actively involved in the union or joining the union. It is also an opportunity to educate and raise awareness about the union and how it is modernising. Equity has delegated involvement in various campaigning groups to established Equity activists, who are best placed to recruit and organise non-members.

The Equity video of English National Opera Chorus singing at the House of Commons (posted 8 March) is available on <https://www.facebook.com/EquityUK/>

## 6.4. Building for the Future: Reaching and Convincing Young People

Many studies show that young people are more exposed to atypical and precarious jobs than older workers. The question of the decline of union membership also clearly relates to the difficulties facing trade unions in reaching and empowering young workers. In the box below, Carl Roper, a TUC National Organiser, highlights some broad facts and figures across sectors affecting the unionisation of young workers in the UK, along with key challenges for organising young and atypical workers.

Box 6

## Unions and Young People: Issues and Challenges in the UK

Between 1970 and 2014 union density has declined from 12 to 6 million unionised workers in the UK. The highest density is in the public sector, but most people work in the private sector, where union density is very low. Just one in five union members are under 35 today, and almost 60% of workers have never been in a union. In the age cohort of 16 to 24 year old workers, only 8% have joined a union. The average age of a union representative is 45 while only one in ten representatives is under 30 years old. Only one in five members is under 30. 75% of young workers (aged between 16 and 29 years) work in places where there are no unions. Most young workers are concentrated in the private sector, where only 5% of young people are organised.

Roper also noted that if people do not join a union at a young age, it is unlikely that they ever will. There is no evidence to suggest that people are more likely to join when they are older. Union members aged between 50 and 60 today joined at a young age and stayed in membership. This should not be categorised as an attitude problem on the part of young workers but rather as a structural problem as many young people simply do not know anything about unions and the benefits of joining one. Thus the major challenges facing trade unions in reaching out to young workers include the high concentrations of young workers in sectors with poor union organisation and very low density and the fact that the legal framework offers limited

scope in organising atypical workers in these sectors. This is further compounded by the lack of knowledge about unions among the target group of young people.

From a structural point of view, additional challenges relate to unions' capacity to organise sectors where young people work in the absence of any tradition of union representation. Furthermore, traditional models of organisation and activity do not always appeal to young workers. In response to this situation, the TUC has been undertaking a series of actions designed to reshape the positioning and activities of the TUC youth representation body, placing more emphasis on campaigns as a vehicle for reaching out to young workers. Processes have been developed to enable better mainstreaming of youth issues in TUC policies. Partnerships have been developed with organisations that have a better reach in relation to young workers.

In conclusion, major initiatives on reaching out to young workers are needed and their key objectives must be to raise the profile of trade unions, make sure trade unionism works for, and is seen as relevant by, young people. Activities also need to focus on developing and testing new models of membership and collective organisation, building the capacity of unions and young workers to act collectively on issues they are concerned about.

Indeed, one of the big issues which trade unions have to deal with is the lack of knowledge which prevails among the younger generation about the role of trade unions and the value of collective agreements. In response to this situation, targeted communications and social media can yield successful results.

The Swedish media campaign 'Like a Swede' is an interesting example of trade union efforts to create better awareness among young workers about the role of trade unions in enabling Swedish workers to benefit from its unique social model, the so-called Swedish part model<sup>10</sup>.

## Box 7

**Going viral: Like a Swede**

TCO (The Swedish Confederation of Professional Employees) comprises 14 affiliated trade unions and their combined membership of some 1.35 million workers, across all sectors of the labour market. The TCO set out to develop a media campaign that would address the lack of knowledge about the role of trade unions among the younger generation. TCO studies had shown that 25% of workers aged 20-25 did not know whether their workplace had a collective agreement or not. 50% of young workers surveyed did not know about the content of collective agreements, including in relation to an annual salary raise. Most did not know that certain social benefits, such as support for parental leave were included in the collective agreement (and not simply created and administered by the government). Similarly the target audience was not aware of the fact the popular, special employer subsidy for certain kinds of sport/physical activity (*friskvårdsbidrag*) also arose from collective agreements.

The aim of the TCO campaign was therefore to increase awareness among young workers about the so-called 'Swedish Part Model' of autonomous employer-worker collective bargaining and the workplace benefits that it delivers for Swedish workers. The humorous video campaign 'Like a Swede' was the result. It took as its starting point the notion that a rich Beverly Hills character decides to opt for the lifestyle choice of living 'like a Swede'. The video interviews and follows 'Joe Williams', a Beverly Hills resident, who explains how it works. His dad (also his boss), provides him with six weeks of annual paid vacation and six months of paternity leave when he becomes a father. His *friskvårdsbidrag* pays for a top LA personal trainer (but only stretches to a couple of minutes given her rates so she has him run up and down a set of stairs daily). Williams enjoys an all-around life of comfort thanks to his decision to live 'like a Swede'. Living like a Swede seeks to convey, in a light-hearted way, the benefits of the Swedish social model.

TCO representative Petra Jankov Picha shed some light on the campaign aims, 'It's about making the Swedish Model more visible in a different way. People often know very little about it, which makes it harder for the unions to justify their own existence.' The campaign was a huge success with 600,000

views on YouTube and a lot of press and media coverage which increased the overall knowledge about the Swedish Part Model. Again, TCO sought to monitor impact through surveys and encouragingly, 42% of that target audience knew about the model as a result of the campaign and 51% were positive about it. A problem remained though: while the target audience had taken in a positive message about the benefits of living 'Like a Swede' many were still hazy about how these results were delivered. They remained unclear about the fact that the Swedish Part Model involved both unions and employers' organisations and that there were negotiations and agreements involved in the process.

Taking account of this failing, the communications campaign moved into its second phase, with the development of a second humorous video, this time entitled 'Business like a Swede'. The video is a lightly satirical take on a rap video, following the boss and the workers around a fictitious workplace, where they 'do business like a Swede'. The Swedish Part Model is the focus, with the benefits highlighted with a touch of humour and a clear message about the 'two parts in decision-making: it's a win-win situation'. The core message of the campaign was that the Swedish Part Model ultimately leads to a happy and healthy workplace, with successful business outcomes. It is a real win-win situation where the collective agreement plays a key role and is the result of important negotiations that take place between unions and employers' organisations.

Building on the success of its predecessor and the already established hashtag #likeaswede, this follow-up campaign was even more successful in digital and social media with over 800,000 views on YouTube. It was re-tweeted and shared by policy-makers and other influential relays. It also brought 150,000 new viewers to the original 'Like a Swede' campaign. The two campaigns have substantially increased the level of knowledge and understanding about the Swedish Part Model among young workers and created a more solid appreciation of its benefits. 'Business like a Swede' can still be viewed on YouTube, but the original 'Like a Swede' video is no longer available. TCO did not foresee the longevity of its success and initially paid for the right to exploit it only for a limited period.

BECTU, one of the unions in the UK with the highest percentage of atypical workers, has initiated a series of focused mobilisation campaigns targeting young atypical workers on one hand and women on the other. These campaigns are described in the box below.



## Box 8

### Developing Meaningful Messages and Making the Most of Wider Opportunities: BECTU's Coordinated Approach

BECTU has developed the approach of reaching young people by joining and creating synergies with wider campaigning actions related to their working situations. A recent relevant example was the Intern Aware Campaign which originated outside of BECTU and was created as a campaign to run primarily through social media and to raise awareness on the key issue of unpaid internships and particularly instances where the definition of 'worker' is simply ignored leading to clear exploitation of the young interns concerned.

The campaign focused on the need for a minimum wage for interns. BECTU joined forces with the campaign, bringing in its own experience fighting against the prevalent use of unpaid 'interns' on films and TV productions for a number of years and especially coming up to the 2012 London Olympics. The broader campaign worked on three levels, supporting legal challenges and law changes, informing interns of their rights and encouraging them to join unions to fight for their rights.

The Runners Charter Campaign was again a broader campaign, shared by a number of unions, drawing attention to vulnerable situation of runners in the industry, particularly the exploitation of young workers having recently graduated in the media area and trying to enter the industry. In the wake of the campaign,

BECTU started a successful national Runners Branch whose first aim is to develop a best practice charter and a rate card for members. This work is ongoing. BECTU has also developed a Creative Took Kit for new entrants. It provides information and guidance to help young people at the start of their career. A Young Members Forum has been set up and enables BECTU to be more connected with these young members.

Organising women workers in the Film and TV industry is also a complex endeavour, with a target group that is not always easy to reach. Certain BECTU branches have a high number of women, as is the case with the Media Hair & Makeup or Costume and Wardrobe branches. Here BECTU has primarily aimed to capitalise on known instances of discontent arising in a given production due to difficult working conditions, for example during the shooting of a film. As BECTU past President Christine Bond noted, 'the best recruiters can sometimes be employers! During the shooting of "Les Misérables", for example, a mass meeting was held on the initiative of BECTU members, which attracted over 300 participants. And over 100 workers joined BECTU overnight.' Women are increasingly in leadership positions within BECTU and this sends positive gender equality messages which are vital to ensure the next generation of female activists.

## 6.5. A Certain Je ne sais quoi: Bringing Some Extra Creativity, Innovation and Opportunism to Engaging with Atypical Workers

Social researchers Heely and Abbott<sup>11</sup> have identified approaches that trade unions can use when seeking to organise and represent non-standard workers, including servicing, partnership, dialogue and mobilisation. While preceding sections have reviewed servicing, campaigning, outreach and dialogue approaches, it is worth further exploring approaches that can support members in an innovative manner. Unions have to develop a strategic awareness of opportunities to engage atypical workers and make use of them however, and whenever, they arise.

This may also involve taking a fresh look at traditional union tools and strategies and seeing how they can be adapted to be deployed on behalf of a profoundly different workforce. It may mean being alive to the possibility of using new legal strategies to assert the rights of atypical workers.

In the box below the experience of the UK Musicians' Union and the creation of its Fair Play Guide is set out. This has created a new engagement with 'gigging musicians', a traditionally elusive and hard-to-reach group, often on their path into the industry. It has proven to be a successful means of support to some touring musicians, helping them to secure better and fairer deals with the venues that host them.

## Box 9

## The Fair Play Guide Opens New Doors for the Musicians' Union, UK

In 2013, the UK Musicians' Union (MU) created a Live Performance department to complement other industrial departments within the union, all of which cater for the needs of atypical workers. The Live Performance department strives to ensure that members have a decent place to play for fair compensation. One of the key tasks that the Live Performance department set itself was to get a clearer picture of how the union could reach out to the many 'gigging' musicians across the UK and the, often small, venues in which they worked. One of the key objectives was to identify those venues, whose terms of engagement were considered to be fair to musicians.

In 2010 during a panel hosted by the MU in Manchester, union members and concert venue owners openly discussed the dangers associated with 'paying to play' and the risks borne by promoters when offering good deals to artists, along with possible solutions. This led the MU to more deeply investigate the matter and its research revealed that not all the promoters offering 'pay to play' deals were bad employers as such. Those promoters might well be prepared to negotiate in order that fairer terms could be secured. This situation led the MU to develop guidelines for both promoters and artists, in order to explain what might be expected from both parties when working together. The guidelines were also meant to remove the 'pay to play' element of such shows. The Fair Play Guide was launched to deliver those objectives. It helped MU to inform members who could in turn negotiate with venue promoters. It also

helped to position the MU in the industry in terms of credibility and capacity to put forward realistic demands to engagers.

Currently the MU has over 80 Fair Play venues across the UK that support the MU Fair Play Guide ensuring that their business models do not conflict with the minimum terms of the guide. The Fair Play venue scheme provides the opportunity for the MU regional offices to build relationships with good venues and promoters in each region, and can also support venues which might face difficulties. The Fair Play Guide provides MU members with advice and guidance in terms of what constitutes a fair deal. A dialogue was thus established between musicians and venues, facilitated by the union.

The nature of the expansion of the Fair Play venues is that it relies upon artists helping to spread the word about the initiative. Other related initiatives have also been developed. An agreement was secured with the Association of Independent Festivals on fair terms and conditions and a code of conduct was set up for emerging and unsigned artists.

In conclusion, the Fair Play initiative supports musicians against all forms of bad practices coming from employers but it can at the same time help strengthen relations between musicians and the industry. As Dave Webster from the British Musicians' Union comments, 'Strengthening relations with industry strengthens musicians and strengthens the MU'.

When circumstances permit it, deploying industrial muscle on behalf of atypical workers can both raise awareness and drive recruitment, as well as deliver better conditions in practice. The box below describes the efforts of the Italian trade union NidiL CGIL to organise temporary workers during the Milan Expo 2015<sup>12</sup>.

Box 10

## High Profile Industrial Dispute Delivers Better Conditions for Temporary Agency Workers at Milan Expo 2015, Italy

Expo 2015 was a landmark event for Italy, with 21 million visitors and 13,000 workers involved, including 4,000 temporary workers and 7,000 volunteers. The majority of temporary workers were contracted by Manpower Agency, chosen by Expo organisers to manage the recruitment of temporary workers on the Expo site. The issues faced by those temporary workers related to respect of the principle of equal treatment and the mandatory application of the national collective work agreement (CCNL-Contratto collettivo nazionale di lavoro) in force for temporary workers on the Expo site. While the terms of the collective work agreement were applied correctly in the case of 2,000 temporary workers (through a legal triangular relationship between the agency, user company and worker), some 1,000 temporary workers were subject to different contractual terms, which had not been endorsed by all representative trade union organisations.

The unions therefore officially accused Manpower and its subsidiary, Manpower Group Solutions (the user company), of engaging temporary workers on so-called 'pirate contracts', not endorsed by the union federations and characterised by much lower salaries. Following an agreement in April 2015, Manpower decided to change course and adopt contracts in line with the collective agreements endorsed by all representative trade unions (CGIL, CISL and UIL). But new disputes then arose in relation to the specific terms dictating the employment relationship. As Andrea Borghesi, NidiL CGIL National Secretary explained, 'instead of the CCNL Terziario (in use for workers directly employed by Manpower Group Solutions), another type of contract (CCNL Multi-services) was applied to certain agency workers, and whose terms resulted in a diminution of wages by 15 to 30 percent'. This in turn led to a litigation process started by 100 temporary workers, with the support of trade unions.

A second matter of concern for trade unions related to the question of the remote monitoring of the workers by Manpower. The temporary agency had put in operation a system called

Peoplelink, a mobile application intended as an alternative to the classical access badge worn by workers, and which would also report entry and exit from work via the worker's smartphone.

This drew a strong condemnatory reaction from trade unions, arguing that Manpower was making a disproportionate use of geolocalisation mechanisms in order to monitor workers' activity on the Expo site. Another outstanding question was whether or not the use of the application had been imposed on the workers. Trade unions were concerned that Manpower was practicing a form of psychological pressure on the workers to impose its uptake. On 28 July 2015, an agreement was signed with Manpower in line with the Workers' Statute (Law no. 300/1970) restricting the mobile application use to simply checking the entry and exit of temporary workers.

A final issue faced by trade unions related to the onward-placement of temporary workers after the completion of their work on Expo 2015. Agreements had been negotiated between trade unions and Manpower for onward placement workers at the end of Expo 2015, along with access to vocational training opportunities where relevant. The onward placement programmes proved unsatisfactory for most of the workers (only 200 workers found a new job placement through the temporary agency). There was also strong dissatisfaction among workers with regard to access to training opportunities, as the offers were absolutely not in line with workers' skills.

The role played by trade unions supporting and protecting atypical workers present on the Expo site was critical and it directly led more than 150 workers to becoming members of the NidiL CGIL. It also provided workers with the opportunities to pursue individual and collective litigation. The fact that Expo 2015 was a unique job site, with a large number of workers, created a unique opportunity to drive these developments. The union used the occasion to develop and expand its work for equal treatment of temporary workers.

As exemplified by the actions undertaken by NidiL CGIL described above, the role of industrial relations and collective agreements continue to play a pivotal role in addressing issues affecting atypical workers in the Live Performance and Audiovisual sectors. This is also the case in Sweden. In the box below, Thomas Bjelkerud from the Swedish Musicians' Union explains how the Swedish Labour legislation protects atypical workers in the course of implementation of collective agreements negotiated by trade unions and employers.

## Box 11

## Making the Most of Existing Industrial Relations Mechanisms to Protect Atypical Workers in Sweden

The Swedish Labour Law MBL (Act 1976:580) rules that an employer has to negotiate with workers' organisations before taking the decision to let someone other than an employee carry out work covered by a collective agreement.

MBL 38 § (Act 1976:580) article of the of the Swedish labour law states that, 'Before an employer decides to let a worker perform work on his behalf or in his business without having the status of employee, the employer must, on his own initiative, negotiate with the workers' organisations to whom he is bound by a collective agreement for such work. During the negotiations, the employer is obliged to provide any information about the intended work and needed by the workers' organisation to take decisions on the issues for negotiation.'

If a union concludes that the proposed measures could be expected to violate the collective agreement, it may declare

that the employer is not allowed to proceed as intended (MBL 39 §). If the employer 'breaks the veto', he/she has to take the case to the Labour Court so that it can be decided whether the veto issued by the union is to be upheld or not. The Swedish Musicians' Union (SMF) is also offering their counterparts in negotiations a simplified management system, meaning that the employer agrees on paying every self-employed worker fees which are 50% higher than the salaries to which an employee would be entitled in a similar situation, according to the collective agreement in force.

The employer would, in this case, not have to call negotiations with trade unions every time. The 50% supplementary fees would be based on some of the labour social costs which any employer in Sweden has to face and which includes holiday pay, employers taxes, labour market insurance, and retirement fees.

Among the tools available to trade unions to organise and mobilise workers, strategic litigation is a method that can bring about significant changes in the law, practice or public awareness through taking carefully selected cases to court. Organisations involved in strategic litigation focus on an individual case in order to bring about social change. A typical feature of strategic litigation is that cases are brought to test a legal point that also applies to cases other than just their own. Strategic litigation is sometimes referred to as 'impact' or 'test case' litigation. The aims of strategic litigation are to enforce the law or clarify the meaning of the law. Test case strategies seek to create awareness and publicise the cause, encourage public debate, set important precedents, achieve change for people in similar situations and spark policy changes. In the box below, Ahti Vääntinen from the Finnish Musicians Union (Muusikkojen liitto) comments on its efforts to use strategic litigation in order to advance the debate related to the recognition of online music transfer of rights to artists, to the benefit of all of the musicians it represents. In this way, strategic litigation can be an organising tool, by rallying members around the defence of principle to which they are committed and demonstrating the union's own commitment to that principle.

Box 12

## Braving the Courts to Establish Vital Legal Precedent, the Hurrigane Case in Finland

During the last decade, the music sector has witnessed major developments which revolutionised music consumption. The worldwide recorded repertoire is now available for anyone to listen to, anytime, anywhere, with little or no cost, and, at the same time, the physical market is being marginalised entirely. The music sector in Finland has been heavily affected by these developments. A couple of years ago, the Finnish Musicians Union started to reflect on the possibility of litigation where it could test/challenge the transfer of online music rights in recording contracts of artists. The underlying presumption (or conviction) was that the rights for uses such as streaming (which corresponds to the 'making available' right in copyright language) could not have been transferred in contracts signed before the right even existed in national law, before the millennium.

As far back as 2000, the producers (IFPI) were forced to admit that studio musicians had not given over those rights in collective agreements. The Finnish Musicians Union conducted a review of all collective agreements in force for recording studio work since the 1950s.

Its analysis was indisputable: digital rights had not been transferred, and therefore the IFPI<sup>13</sup> eventually agreed to pay a lump sum for the rights for studio/session musicians through the collecting society, in order to acquire those rights and start selling music online. The union wanted to take this analysis further, to prove that these rights were not transferred in featured artists' recording contracts either. In a world where three major record companies control 90% of the market, and where all music is already available online, it is a kind of radical idea or a bold statement to say that half of the music is there illegally, without a proper licence.

This would seem a lost cause, as it would not be possible to challenge the whole recording industry and force them to the bargaining table. They analysed the situation regardless of whether they would win or lose in court. The union felt that whatever the result might be, the battle was legitimate and that it would obviously be doing what it should be doing as a union.

The first challenge was to identify a case/artist and this was a difficult thing. Artists are always hesitant to sue the employer or the label. An artist with an active career very rarely sues a record label, because his/her whole career is on the line. We therefore needed to find an artist with nothing to lose. A guitar player of a popular rock band called Hurriganes who passed away 20 years ago was identified as a suitable case. His son – a member of the union – needed help managing his father's royalties from Universal. The case was not about money as such, but about the principle and our member was fully aligned with the union's position on this. Due to the nature of the music business and the way the record industry works, we needed also to be sure that our member would not give up the case

once in court. It is quite common, that the big major companies try to make a substantial offer of money directly to the artists in court in order to make them give up the case. Thus it was a precondition that the union would assume all the legal costs related to the case.

The case went eventually to Helsinki Market Court (where copyright cases are addressed). The specific case brought to court related to the online rights for two albums from the 1970s. Universal had made the albums available online without agreeing this with the artist. In court, Universal had to present evidence that it had received the right to make the music available for the public on the internet. Eventually, the Market Court held that Universal could not prove it had a right, either contractually or by tacit approval, to make the music available to the public via the online services. The court ordered Universal to remove the music from the services pending a fine of €50,000. Universal had paid a royalty of 30% (which is pretty high) for the digital uses – with no prior negotiation with the artist – and the artist had received some money, but even that was not considered tacit acceptance of the use or the terms of use. The court noted that a transfer of rights is considered to cover only the right as they existed at the time of the transfer, and that any new rights will be for the benefit of the original right holder. New technologies would be covered only when they were known to the right holder at the time of the transfer. The court said also, that when a contract refers to physical records only, there cannot be an extension to internet without the right holder's specific consent. Universal did not appeal in the end and judgment became final and binding.

The results of the litigation illustrate the legal situation of recorded repertoire from before 2000, meaning that a large part, probably most of, the online music repertoire is made available illegally, without a licence. And this triggers a real question about what should happen next: what can be the significance of one court decision? Three court cases of the same type have since taken place in Sweden. Others might follow in other countries. And there is undoubtedly a need for more case law across EU Member States in order to make a strategic impact in the sector.

The Fair Internet Campaign in Europe and strategic litigation can also be tools to convince the legislator that something needs to be done. The strategic implications of this type of case go beyond the music sector. What is needed is legislation that would guarantee fair remuneration through the copyright societies every time music is used online. Ahti Vääntinen from the Finnish Musicians Union concludes, 'the dilemma we are facing now, where half of the online repertoire is not properly licensed, cannot be solved by an army of lawyers. This strategic litigation in Finland was aimed at drawing the attention of the legislator to this dilemma, and to the fact that this should be solved through sound legislation.'

Finally and to conclude this section, other alliances and coalition building, for example with civil society organisations (CSOs), can also add legitimacy to union campaigns. Working with civil society organisations and/or social movements may help to strengthen union claims to represent a broad public interest. Such alliances can strengthen unions' mobilisation capacity, particularly when working with CSOs that possess a vibrant activist base.

## Endnotes

**1** This section encompasses a working paper and contributions which took place during the workshop 'Organising Atypical Workers In the Live Performance and Audiovisual Sectors', Rome, 7-8 April 2016.

**2** See EURwork, *Trade union strategies to recruit new groups of workers*, [online], <http://www.eurofound.europa.eu/observatories/eurwork/comparative-information/trade-union-strategies-to-recruit-new-groups-of-workers>. See also Bernaciak, Magdalena, Gumbrell-McCormick, Rebecca and Hyman, Richard, *Trade Unions in Europe, Innovative Responses to Hard Times*, 2014, [online], Friedrich Ebert Stiftung, <http://library.fes.de/pdf-files/id-moe/10688.pdf>

**3** *Supra*

**4** Workshop 'Developing Services for Atypical Workers & Ensuring Access to Social Rights in the Live Performance and Audiovisual Sectors', Amsterdam, May 2015.

**5** Simms, Melanie, and Dean, Deborah, 2015, Representing and mobilising contingent workers: an analysis of two successful cases, *Economic and Industrial Democracy*, 36 (1), pp. 173-190.

**6** [www.nidil.cgil.it](http://www.nidil.cgil.it)

**7** Quote extracted from : Bernaciak, Magdalena, Gumbrell-McCormick, Rebecca and Hyman, Richard, *Trade Unions in Europe, Innovative Responses to Hard Times*, p 7, 2014, [online], Friedrich Ebert Stiftung, <http://library.fes.de/pdf-files/id-moe/10688.pdf>

**8** European Federation of Journalists workshop, 'Let's organise, invest in youth and skills', Copenhagen, May 2015.

**9** <http://www.mediafon.net/>

**10** The Swedish Part model is a collaboration between trade unions and employers' organisations which has been instrumental in creating one of the highest standards of living in Europe over the last decades thanks to a healthy and effective work environment.

**11** See Heery, Edmund, and Abbott, Brian, Trade unions and the insecure workforce, in Heery, Edmund and Salmon, John (Eds.), *The Insecure Workforce*, London, Routledge, 2000, pp.155-180.

**12** The Universal Exposition hosted by Italy between May and October, 2015.

**13** IFPI is the voice of the recording industry.



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September 2016

