



# “EQUAL RIGHTS FOR FREELANCERS”

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## Taking Stock of the shifting work and employment relationships

- ▶ Media, Arts and Entertainment sector is undergoing a series of major changes due to digital shift, other technological developments, emergence of new business models, all of which present challenges and opportunities
- ▶ New forms of work organisation, outsourcing and new technologies have contributed to the erosion of the so-called conventional employment and working arrangements



## Work and Employment Relationships in the Media, Arts and Entertainment Sector

- ▶ *Atypical* work is used to distinguish work which differs from the “standard model” of full-time, permanent and direct employment,
- ▶ *Atypical* work includes part-time, fixed term, interim/temporary agency work arrangements, but also self-employed/independent /free lance contracting
- ▶ Workers in the Live Performance and Audiovisual sectors particularly concerned by this type of work relations



## Work and Employment Relationships in the Media, Arts and Entertainment Sector

- ▶ Working conditions self employed workers in European labour markets likely to be characterized by precariousness and vulnerability (Eurofound,2017,European Commission 2017/18)
- ▶ This situation apply to certain categories of workers in the Media, Arts and Entertainment sector; women and young people are particularly affected



# Work and Employment Relationships in the Media, Arts and Entertainment Sector

## Legal rights for Freelancers – Key themes of the European debate

1. European labour market requires *European 'rules of the game'*, combining free movement with an adequate social model: Key conditions are:
  - ▶ Respect of freedom of association for all workers
  - ▶ Equal treatment of all workers
  - ▶ respect for national collective bargaining and industrial relations systems;
  - ▶ Equal access for all workers to social benefits;



## Freedom of Association- a grounded international framework

- ▶ ILO's Labour law standards on freedom of Association and collective bargaining (CN87,CN980)
- No. 87, Freedom of Association and Protection of the Right to Organize (1948)
- No. 98, Right to Organize and Collective Bargaining (1949).
- ▶ ILO Declaration on Fundamental principles and rights at work (1988)
- ▶ CoE /European Social Charter (Revised) (ESC), sets out the right to form, join and actively participate in associations designed to protect their members' professional interests (Article 5).
- ▶ EU's Community Charter of the Fundamental Social Rights of Workers
- ▶ EU Charter of Fundamental Rights



# Fundamental Social Rights for Atypical Workers

- ▶ Community Charter of the Fundamental Social Rights of Workers of 1989
- ▶ EU Charter of Fundamental Rights of 2000



# Community Charter of the Fundamental Social Rights of Workers of 1989

- ▶ 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





# Fundamental Social Rights for Atypical Workers

## Issue 1: Legislation to protect atypical workers

- ▶ Council Directive 91/383/EEC on Safety and Health for Temporary Workers
- ▶ Council Directive 97/81/EC on part-time work
- ▶ Council Directive 99/70/EC on fixed-term work.
- ▶ Council Directive 104/2008/EC on Temporary Agency Work Council



## Fundamental Social Rights for Atypical Workers

### Issue 1: Legislation to protect atypical workers

- ▶ the thread linking these directives 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 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 fixed-term contracts.



# Fundamental Social Rights for Atypical Workers

## Issue 1: Legislation to protect atypical workers

- ▶ 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 abusive use of successive fixed-term contracts of fixed-term employment.



## EU Charter of Fundamental Rights of 2000

- Freedom of association;
- Freedom to choose an occupation and right to engage in work; to seek employment in any Member State, with third countries nationals authorized to work having an entitlement to equivalent working conditions;
- Non-discrimination on any ground;
- Equality between men and women in all areas, including employment, work and pay;
- Rights to information and consultation for workers and their representatives
- Social security and social assistance
- Healthcare
- Right of collective bargaining and right to take collective action\*;
- Protection against unjustified dismissal;
- Right to fair and just working conditions, to maximum working hours, breaks and holiday.



## **Issue 2: Collective Bargaining practices in the media and live performance sector**

collective bargaining systems and processes in the EU have undergone a steady change that has accelerated since 2008.

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.



- ▶ **In the United Kingdom**, the 1992 Trade Relations and Labour Relations Act provides the regulatory framework for a union to engage in collective bargaining in the UK.
- ▶ 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



- Collective bargaining plays a critical role in the work of the **Musicians' Union (MU)** which represents over 30,000 musicians working in all sectors of the British music business.
- MU has been involved in the negotiation of collective agreements with a view to establishing minimum pay and working conditions for its members is part of its core business.
- 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 –





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)

**In Belgium the CSC** has managed to include freelancers journalists in the social plan they negotiated with the **SANOMA Group** and has secured some forms of severance pay indemnities for freelancers based on seniority .





- ▶ In **Germany and Austria**, collective agreements cover certain categories of self-employed workers or the social security insurance fund for artists and writers in Germany, covers self-employed and freelance artists and writers
- ▶ 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
- ▶ '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).



## Collective Bargaining practices in the media and live performance sector

- ▶ 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.



## Collective Bargaining practices in the media and live performance sector

- ▶ German trade union 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.



## Collective Bargaining practices in the media and live performance sector

- ▶ In France, 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. Artists and technicians are commonly called *intermittents du spectacle* when employed on short-term contracts.
- ▶ Entertainment workers benefit from unemployment as part of the statute of “*intermittents du spectacle*” in France.



## Collective Bargaining and competition law

- ▶ Establishing collective bargaining for self-employed workers and freelancers in the Live Performance have led trade unions to adopt multifold strategy building on advocacy and strategic litigation at national and European levels making sound use of complaints mechanisms and judicial recourses to international instances such as ILO, CoE, EU





## ▶ **Collective Bargaining and competition law**

- ▶ According to competition law theory, freedom of association and collective bargaining is seen as concentration of power within one party (workers) with an effect on the principles of free competition and open market balance (price fixing)
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- ▶ Collective bargaining in most member states has not been exempted from the scope of competition law
- ▶ Competition authorities in certain member states have used their powers to target certain categories of workers who had concluded collective agreements on pay rates (such rates could restrict competition from other providers)
- ▶ Freelance media, musicians and culture workers have been particularly affected by this type of development



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- **Collective Bargaining and competition law**
- *Using judicial recourses (UE, ECSR (CoE) , ILO) and advocacy to better enforce freedom of association and Collective Bargaining*
- ▶ Competition Law and Collective Bargaining - Ireland
- ▶ FNV-KIEM Case – Netherlands





## ○ Competition Law and Collective Bargaining - Ireland

- ▶ 2004, the Irish Competition Authority published a decision which defined freelance actors who provided voice-over services for advertising production as “undertakings” and the Trade Unions/Organisations who negotiate for them as “associations of undertakings”
- ▶ **Double effect** :
- ▶ Nullifying the collective agreement on rates which had been agreed between Irish Actors Equity and the Institute of Advertising Practitioners in Ireland.
- ▶ Preventing any such collective bargaining from reoccurring for this category of worker, for freelance musicians who were members of the Musicians Union of Ireland (SIPTU) and freelance photographers/Journalists who were members of the National Union of Journalists (NUJ).
- ▶ The unions involved conducted a political campaign against this decision



## ○ Competition Law and Collective Bargaining - Ireland

- ▶ In January 2015 ICTU requested that the Competition Authority decision be revisited. Negative response by CA.
- ▶ In January 2016 under the initiative of Irish Senator Ivana Bacik , a **Competition (Amendment) Bill was proposed** which sought to act to delimit the application of the Competition Act 2002 to Trade Unions and Trade Union Members.
- ▶ This Bill was passed through the Senat on January 20th 2016 with all party support.
- ▶ lobbying campaign by ICTU at national level but also at ILO and CoE (Committee of the ECSR) played an important role



## FNV-KIEM Case – Netherlands

- ▶ orchestra musicians have traditionally been engaged as employees and covered by collective labour agreement
- ▶ trend whereby orchestras increasingly contract some musicians, on a self-employed basis,
- ▶ FNV KIEM negotiated the insertion of provisions in a collective agreement which guaranteed self-employed musicians a minimum rate of pay and pension contribution



## FNV-KIEM Case – Netherlands

- ▶ Netherlands Competition Authority (NMa) 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.
- ▶ FNV KIEM engaged national court proceedings with the objective of defending free bargaining by unions on behalf of self-employed musicians,
- ▶ Two prejudicial questions to the Court of Justice of the European Union (CJEU).



## FNV-KIEM Case – Netherlands

- ▶ 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’, where there was a subordination link in their working relationship.
- ▶ Consequently, Article 101 (1) of the TFEU did not apply to them and entering into a collective agreement between social partners covering such workers was legal.



## ▶ FNV-KIEM Case – Netherlands

- ▶ Hague Court of Appeal gave its ruling on 1 September 2015 and confirmed the ECJ Analysis
- ▶ Judged that such musicians were in fact bogus self-employed within the meaning of the CJEU ruling.
- ▶ FNV KIEM partially satisfied. There is a need for a more level playing field between workers covered by labour contracts and 'self-employed
- ▶ FNV KIEM has been therefore advocating the principle of a general exception for self-employed in the cultural and media sector /creative industries.



## **Issue 3 : access to social protection for workers and the self-employed.**

Under the European Social Pillar, proposal for a **Council Recommendation on access to social protection for workers and the self-employed.**

encourage EU MS to:

- ▶ allow non-standard workers and the self-employed to adhere to social security schemes (closing formal coverage gaps).
- ▶ take measures allowing them to build up and take up adequate social benefits as members of a scheme (adequate effective coverage) and facilitating the transfer of social security benefits between schemes.
- ▶ increase transparency regarding social security systems and rights.
- ▶ covers social security schemes for unemployment, sickness and healthcare, maternity or paternity, accidents at work and occupational diseases, disability and old age.



