



Atypical Workers and Collective Bargaining in the Live Performance and Audio-visual Sectors

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WORKSHOP DISCUSSION NOTE

The objective of this paper is to inform the exchanges that are to take place during the workshop on Atypical Workers and Collective Bargaining in the Live Performance and Audio-visual Sectors. It is structured in 5 sections.

Section 1 intends to briefly capture the international legal standards applicable to the protection of collective bargaining and its recognition as a fundamental social right under European Union law.

Sections 2 and 3 take stock of Trade Union approaches to addressing the needs of atypical workers through social dialogue and collective bargaining mechanisms. Examples are taken from the cross sectoral level and the live performance and audiovisual sectors.

Section 4 looks at barriers that might prevent collective bargaining from benefitting atypical workers particularly in light of competition law.

Section 5 examines challenges and ways forward and the extent to which the exercise of fundamental social rights can be reconciled with the requirements of the internal market.

You can find a detailed table of contents below.

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INTRODUCTION

In the Live Performance and Audio-visual Sectors, many different forms of atypical work arrangements have expanded during the past decades, notably: part-time, casual and fixed-term contracts; temporary agency work self-employment; homework; and telework. The effects of the 2008 financial and economic crisis with reduced public funding's has had a severe impact on employment and working conditions in the media, entertainment and live performance sector – and the crisis has reinforced the trend towards more free-lance activities and self-employment. In the EU, short-term contracts have become the norm and contract duration for occasional workers in the those industries has declined steadily since the 1990s¹.

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 standard employment along each of these primary axes described above (& sometimes along more than one). Thus, we may identify atypical working-time arrangements (part-time, on-call, zero-hours, and so on); short term /fixed term duration contracts (fixed-term, project or task-based work,); and atypical work relationships (contracted or subcontracted work, economically dependent 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 development of such contracts which are increasingly widespread.

Atypical workers in the media and culture industries often do not benefit from the same protection as employees, such as unemployment benefit, pensions, maternity leave and sick pay; they may be excluded because of their independent or self-employed status. If self-employed journalists and performing arts workers have a long tradition of unionization in many EU member states, they often lack coverage by collective agreements and are usually 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 arts, media and entertainment sectors, trade unions have started to address ways by which ways the needs of these categories of workers could be enhanced through the mechanisms of social dialogue and collective bargaining.

1. COLLECTIVE BARGAINING, INTERNATIONAL STANDARDS AND EUROPEAN UNION LAW

This section intends to provide a short summary of the international legal standards applicable to the protection of collective bargaining and its recognition as a fundamental social right under European Union law. Freedom of association and the right to collective bargaining are guaranteed in numerous international treaties and instruments² 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..

¹ Cf Working Paper No. 301, “Employment relationships in arts and culture Worsening incomes, shorter contracts and the aftermath of the 2008 crisis” p 34, Gijsbert van Liemt-ILO-2014, ch 5.

² The United Nations (UN) efforts for the protection of the right to association and collective 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. cf also “Enforcement of Fundamental Workers’ Rights”- cf pages -17-20 - EP-Directorate general for Internal Policies, Policy Department, economic and scientific policy - IP/A/EMPL/ST/2011-04 September 2012-PE 475.115

1.1 ILO

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’ organizations, on the one hand, and one or more workers’ organizations, 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 organizations and a workers’ organization or workers’ organizations (ILO Convention No. 154).³

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 recognized as fundamental rights and principles in the 1998 ILO Declaration on Fundamental Principles and Rights at Work. The 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 Convention No. 87 nor No. 98 provides a definition for the term and the question has in practice been left to the discretion of the national legislations.⁴ 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 organize, 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 organization’s”.⁵ (See also section 5).

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 basically implied that competition law should not prevent “self-employed” workers from concluding collective agreements⁶.

³ “Non-standard workers: Good practices of Social Dialogue and Collective Bargaining”-pages 3 Minawa Ebisui-Industrial and Employment Relations Department - International Labour Office, Geneva-April 2012-

⁴ 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, para. 98. Quoted page 7 in “Collective Bargaining and Competition law : A comparative Study on the Media , Arts and Entertainment sectors”,Camilo Rubiano with the collaboration of Shiomit Ravid-FIM-2013

⁵ Cf supra “Collective Bargaining and Competition law : A comparative Study on the Media , Arts and Entertainment sectors,Camilo Rubiano with the collaboration of Shiomit Ravid-FIM-2013, Quoted page 7

⁶ ILO, *Report of the Committee of Experts on the Application of Conventions and Recommendations*, Report III (Part 1A), International Labour Conference, 100th Session, Geneva, 2011, p. 124, quoted in “Collective Bargaining and Competition law : A comparative Study on the Media , Arts and Entertainment sectors”,Camilo Rubiano with the collaboration of Shiomit Ravid-FIM-2013- page 7

1.2 Council of Europe⁷

Within the Council of Europe legal order, the European Convention on Human Rights (ECHR) also guarantees the 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). 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.

1.3 European Union⁸

The freedom of association and the right to collective bargaining were initially recognized by 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. The freedoms 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 organizations, 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 TEU).

Collective bargaining and collective agreements are important within the EU legal framework in view of the various functions they perform. First, social partners assume a quasi-legislative function when engaging in collective bargaining at the EU level in the form of social dialogue. These collective agreements may be given legal effect in the form of directives (see section. (See section 2.1.1)).

Second, collective agreements may facilitate the implementation and application of Union 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 flexibilisation 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 as reflecting fundamental social objectives and values which should be protected against competing values (see also section 5).

⁷ "Enforcement of Fundamental Workers' Rights", pages 17-24-, EP-Directorate general for Internal Policies, Policy Department, economic and scientific policy - IP/A/EMPL/ST/2011-04 September 2012-PE 475.115

⁸ Cf Supra

2. COLLECTIVE BARGAINING FOR ATYPICAL WORKERS AT CROSS-SECTORAL LEVEL

This section looks at the approaches of collective bargaining and social dialogue which have been adopted to promote and strengthen the rights of atypical workers across sectors. It also reviews the systemic issues that might hinder successful strategies of collective bargaining reaching out to atypical workers.

2.1 Collective bargaining approaches

An ILO's recent study on "Practices of Social dialogues and Collective Bargaining for Non-Standard workers"⁹ 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 collective bargaining outside workplaces ii. Single and multi-employer bargaining or iii. extension of collective agreements to include atypical workers.¹⁰

A variety of strategies have also been adopted through collective bargaining (issues negotiated for improving the terms and conditions of atypical workers). The subsections below shall look at some of those collective bargaining approaches:

2.1.1 Extending negotiated outcomes to non-negotiating parties¹¹

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 organizations and the representative organizations 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 organized, in cases where bargaining itself does not take place in an inclusive manner.

How negotiated outcomes are extended varies in terms of, for example, whether there are legal mechanisms for extension or that can be implemented by voluntary agreement of the signing parties; or whether it requires the demand of one or both negotiating parties, depending on the country.

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.

⁹ "Non-standard workers: Good practices of social dialogue and collective bargaining"-pages 6-18- Minawa Ebisui-Industrial and Employment Relations Department - International Labour Office • Geneva-April 2012

¹⁰ Cf *Supra*

¹¹ Cf *Supra*

In Hungary¹², there are four sectoral collective agreements that have actually been negotiated and extended in the bakery, electricity, hospitality and building industries, among which only the one for the building industry is explicitly extended to all employees in the sector, including fixed-term, part-time and temporary agency employees. The agreement, which was originally agreed in November 2005, was extended to the entire sector in March 2006. It was renewed twice, in 2007 and 2009. In Luxembourg¹³, the extension of the terms of a collective agreement to "all employers and employees" in a sector is permitted through a Grand Ducal regulation. In the Netherlands¹⁴, sectoral collective agreements can be extended at the request of the social partners to "all employees" in the sector, by the ministry of Ministry of Social Affairs and Employment.

2.1.2. 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 partner's 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 important means of regulating atypical workers in many countries in the EU.

2.1.3 Addressing specific interests and needs through tailored bargaining

The social partners also attempt to represent the specific and differentiated needs of atypical workers, requiring differentiated treatment and tailored agreements responding to the needs of specific categories of non-standard workers. Some country cases demonstrate how the social partners capture the different interests and needs of atypical workers and initiate tailored social dialogue and negotiation with employers. (See section 3.1).

¹² Cf Non-standard workers: Good practices of social dialogue and collective bargaining"-page 11 - Minawa Ebisu-Industrial and Employment Relations Department - International Labour Office , Geneva-April 2012

¹³ Cf *Supra*

¹⁴ Cf *Supra*

3. COLLECTIVE BARGAINING FOR ATYPICAL WORKERS IN THE LIVE PERFORMANCE AND AUDIOVISUAL SECTORS

One should first acknowledge that in many EU member states social dialogue and collective bargaining covering the media and culture sector are highly fragmented because subsectors of the media and culture industries 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 media and culture workers, mostly as an outcome of social dialogue.

At the 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) and the International Federation of Journalists (IFJ) are the recognized social partner for the workers, while the employers' social partner organizations are the European Broadcasting Union; the Association of Commercial Television in Europe; the European Coordination of Independent Producers; the Performing Arts Employers' Associations League Europe (PEARLE*); the Association of European Radios; and the International Federation of Film Producers Associations.

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 Union¹⁵.

3.1 The Audiovisual Sector

Collective bargaining is long-established in the media and entertainment industries in many countries. According to a study of Eurofound¹⁶, collective bargaining coverage in the audiovisual sector has been low in newer EU Member States, such as Hungary (38 per cent), Lithuania (27 per cent) and Latvia (17 per cent), and higher in older Member States, with the exception of Spain (24 per cent) and the United Kingdom (30 per cent).

However, coverage is very high in Slovenia (100 per cent), 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 organizations (Belgium, Denmark, Finland, and Sweden).

¹⁵ GDFMCS/2014 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 and 15 May 2014), cf pages 23-Geneva, 2014

¹⁶ European Foundation for the Improvement of Living conditions- Representativeness of the European social partner organisations: Audiovisual sector, pages 20-22-2013

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 Labor in order to guarantee fair treatment to freelance journalists with the so-called “co.co.co” arrangement (contratto di collaborazione coordinata e continuativa).¹⁷ 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.¹⁸ 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.*”¹⁹

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. Some collective agreements cover freelance workers.

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.²⁰

3.2 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.

¹⁷Collaborazioni coordinate e continue (co.co.co) and Contratti di collaborazione per programma (co.co.pro) are work contracts covering so-called employer-coordinated freelance workers. They are legislatively considered autonomous employees but generally work within the production cycle of a firm and are subordinated to the needs of the employer.¹⁷ Cf Non-standard workers: Good practices of social dialogue and collective bargaining"-page 18- Minawa Ebisui-Industrial and Employment Relations Department - International Labour Office • Geneva-April 2012

¹⁸ Non-standard workers: Good practices of Social Dialogue and Collective Bargaining"-pages 3 Minawa Ebisui-Industrial and Employment Relations Department - International Labour Office • Geneva-April 2012-

¹⁹ Bibby, Andrew “Employment relationships in the media industry” page 17 / Andrew Bibby ; International Labour Office, Sectoral Activities Department. - Geneva: ILO, 2014 Sectoral Activities working paper

²⁰ Cf Supra

A study undertaken by Eurofound²¹, in 20 EU member states countries, found that there was a high coverage rate of around 80% or more in 2010–2011 in Belgium, France, Greece, Italy, Romania, Slovenia, Sweden. In Austria, Bulgaria, Germany, Estonia, Finland, Hungary, Luxembourg, the coverage rate was around 30%–70% in 2010–2011. However, a third group of five countries (Denmark, Lithuania, Latvia, Malta, Spain) had coverage rates of 20% or below in 2010–2011.

Although sector-related social partner organizations 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 structure in the sector, are among the main reasons making it difficult or even impossible to even roughly estimate the collective bargaining coverage rate of the entire live performance sector in several EU member states.

3.3 Self-employed workers or freelancers

Given the number of freelancers and self-employed workers in the Audiovisual and Live performance sectors sector, 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 of BECTU and the Producers Alliance for Cinema and Television covers freelancers and 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.²²

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 cannot 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 members²³.

In several countries, efforts by freelancers to organize and bargain collectively have been judged illegal under competition law (see section 4). 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 association and representation. In some countries, unions are legally unable to recruit and organize freelance workers and unions of freelance workers are not recognized.

It shall also be mentioned that a variety of joint approaches have been used to address issues related to extending social protection to media and culture workers, mostly as an outcome of social dialogue. Some trade unions offer access to social protection for freelance members. .

²¹ “Representativeness of the European social partner organization's: Live performance industry”-European Foundation for the improvement of living conditions -2013- pages 44-46

²² GDFMCS/2014 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 and 15 May 2014)- cf pages 20-22 -Geneva, 2014

²³ Cf Supra

In some countries, specific schemes have been developed to provide coverage to media and culture 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.²⁴

The question remains of whether there may be potential for bipartite or tripartite social dialogue at the national, sectoral or enterprise levels on social protection for media and culture workers who currently lack coverage, in a context of constant change and adaptation in these industries.

4. ATYPICAL WORKERS, COLLECTIVE BARGAINING, COMPETITION LAW

Atypical forms of work, pose a number of challenges to the effective functioning of traditional industrial relations systems and collective bargaining processes²⁵.

One key challenge in promoting collective bargaining atypical workers is their limited attachment to single workplaces/employers as compared with workers having a regular contract with one employer.

Atypical workers are either (a) directly employed by employers, but with non-stable and temporary employment, and thereby association with the single employer is limited (e.g. part-time, fixed-term) or (b) not directly employed by the “principal” or “real” employer for which or where they actually work (e.g. temp agency workers, contract workers).

A second area of concern is that a growing numbers of workers nowadays engage in work not as employees but through individual commercial service contracts, including independent contractors, and freelance workers.

Such erosion of the traditional direct employment relationship has resulted in fragmentation of collective bargaining. A fragmented workforce also implies that there are different segments of workers in the same workplaces with diverse interests and different contractual status, which can hinder solidarity among workers.²⁶

A third issue at stake is that in a growing number of cases, the contractual employers are not necessarily the only appropriate negotiating parties. This is the case for triangular employment, including employment agencies, agency work, and other forms of outsourcing and subcontracting which pose a challenge to freedom of association and collective bargaining. Meaningful collective bargaining, which brings about tangible outcomes, may not take place unless negotiation involves employers in power.²⁷

Finally, atypical work arrangements often challenge the traditional parameters for the organization of work, giving rise to uncertainty about workers’ employment status²⁸.

²⁴ GDFMCS/2014 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 and 15 May 2014)- cf pages 20-22 -Geneva, 2014

²⁵ Non-standard workers: Good practices of Social Dialogue and Collective Bargaining"-pages 4-5 - Minawa Ebisui-Industrial and Employment Relations Department - International Labour Office • Geneva-April 2012-

²⁶ Non-standard workers: Good practices of Social Dialogue and Collective Bargaining"-pages 3 Minawa Ebisui-Industrial and Employment Relations Department - International Labour Office • Geneva-April 2012

²⁷ Cf Supra

²⁸The ILO 's Employment Relationship Recommendation, 2006 (No. 198) provides that national policy on the employment relationship should at least include measures to provide guidance to the parties on the establishment and

This happens when atypical work arrangements expose ambiguities and uncertainties in legal frameworks that are intended to offer certain protections to those who are in a legally constituted employment relationship. Thus, legal frameworks are often unable to provide an effective enabling environment for atypical workers to exercise collective rights.

There is one further significant challenge however, one of which is not strictly related to industrial relations. As the section below will explain, the established practice of collective bargaining, a pillar of the European social model and a key fundamental social right embedded in the EU charter of fundamental rights, has in the last decade of European integration started to collide with a fundamental economic freedom and guiding principle of the EU single market : competition law.

4.1 Collective bargaining and competition law: scoping the issues at stake:

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 and the respect of economic freedoms 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.

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 one that can create 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 the source of negative economic structures such as monopoly and / or price fixing.²⁹. 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.

As most national legislations do not exclude collective bargaining from the scope of competition laws, and given the particularities of work arrangements of media and culture workers (freelance, temporary contracts, outsourcing, and so on), 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, because such standardized rates could restrict competition from other providers. Freelance media and culture workers have been particularly affected by this type of development. Anti-competition law initiatives by competition regulators have posed problems for freelance media and culture workers in countries including Denmark, France, Ireland, or the Netherlands. When trade unions representing media and culture workers are exposed to competition law, it might weaken their collective bargaining power and they cannot negotiate with those who have commissioned the work of their members.

identification of employment relationships, measures to combat disguised employment, and the general application of protective standards that make clear which party is responsible for labour protection obligations. Cf also Non-standard workers: Good practices of social dialogue and collective bargaining"-page 18, Minawa Ebisui-Industrial and Employment Relations Department - International Labour Office, Geneva-April 2012

²⁹ - Collective Bargaining and Competition law :A comparative study on the Media , Arts and Entertainment Sector- By Camilo Rubiano With the collaboration of Shomit Ravid-2013, cf pages 9-10

4.2 ECJ Case laws on Competition law and collective bargaining : Albany” and “FNV Kunsten Informatie and Media”

4.2.1 Albany case – ECJ Cases C-67/96, C-115-117/97 and C-219/97³⁰

On 21 September 1999, the European Court of Justice gave its ruling on a case brought by a Dutch textile company. The decision has affected the core of the relationship between trade unions and their collective bargaining activities, on the one hand, and the legal framework covering the state and European Community institutions on the other. The textile company Albany was trying to exempt itself from a deal between the textile unions and employers in the Netherlands. The latter had established a pension fund system for workers in the industry and this was made compulsory for all companies in that industry. What made their complaint interesting were the grounds: 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 emphasized 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 addition 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 organization’s representing employers and workers. However, the social policy objectives pursued by such agreements would be seriously undermined if management and labor 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 labor 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 Case³¹: The decision in Albany has conveyed a number of potentially fundamental implications for the future of labour law: It recognized, that EC social policy acknowledges trade union rights, with 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 related to social rights³².

³⁰ 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)-
<http://curia.europa.eu/juris/liste.jsf?language=en&num=C-67/96>

³¹ Cf « Protecting collective agreements”, Comments of Professor Brian Bercusson -Manchester University -. Issue 41 (December 1999)- <http://www.thompsons.law.co.uk/ltext/l0560004.htm>

³² Cf *supra*

The Albany landmark case law was holding the promise 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 confirmed the legal uncertainty that still prevails when it comes to ascertaining the right to collective bargaining for all workers in the light of EU competition law rules. In 2004 the Irish Competition Authority investigated an agreement between the Irish Actors' Equity SIPTU (representing actors) and the Institute of Advertising Practitioners in Ireland (Decision No. E/04/002). It concluded that Equity was an "association of undertakings" when negotiating and concluding contracts on behalf of self-employed actors and was subject to competition law. Equity and the Institute were therefore not entitled to set minimum fees for the self-employed actors' services as they are considered "undertakings" for the purposes of EU law.

4.2.2 FNV Kunsten Informatie en Media - C-413/13³³

In 2006 and 2007, Dutch associations representing contractual and self-employed workers in the performing arts sector and an association representing orchestras in the Netherlands concluded an agreement that included a minimum fee for self-employed musicians who temporarily replaced other musicians in orchestras. The Dutch NCA objected to this arrangement, considering that it was essentially a price-fixing scheme.

As a result, the agreement was terminated by one of the parties, which led to the current preliminary reference procedure. The question put before the Court was whether competition law applies to such arrangements, which quite clearly have a social aim and seek to address the increasingly common issue of the 'false self-employed' in today's society.

The Court started its analysis by essentially finding that *Albany* (in which the Court determined that collective bargaining agreements fell outside the scope of competition law) does not *prima facie* apply to the case at hand. It noted that a provision of a collective labour agreement, concluded by an employees' organisation in the name, and on behalf, of the self-employed services providers who are its members, does not constitute the result of a collective negotiation between employers and employees, and cannot be excluded, by reason of its nature, from the scope of Article 10.

The Court decided that competition law does not apply to arrangements among freelance substitute orchestra musicians that aim to improving their working conditions if they can be qualified as 'workers'. In so doing, the Court significantly expanded the scope for taking social interests into account within competition law analysis and rejected the more narrow approach taken by the Dutch National Competition Authority (NCA).

The Court first observed that '*it is not always easy to establish the status of some self-employed contractors as 'undertakings', such as the substitutes at issue in the main proceedings.'* (para 32). It then subsequently set out how *undertakings* should be distinguished from employees. In short, employees are those that cannot independently determine their conduct on the market and do not bear the financial and economic risks of their activities, but are instead in a subordinate relationship towards an employer (paras 33-36).

³³<http://curia.europa.eu/juris/document/document.jsf?text=&docid=143248&pageIndex=0&doctlang=EN&mode=lst&dir=&occ=first&part=1&cid=311109>

Applying these criteria to the case at hand, the Court held that the national court must ascertain whether these substitute musicians are ‘false self-employed’ or ‘undertakings’, in particular by investigating whether “*their relationship with the orchestra concerned is not one of subordination during the contractual relationship, so that they enjoy more independence and flexibility than employees who perform the same activity, as regards the determination of the working hours, the place and manner of performing the tasks assigned, in other words, the rehearsals and concerts.*” (para 37). If the substitute musicians could not be classified as ‘undertakings’ but rather as ‘false self-employed’, the Court considered that the agreement itself could be excluded from the application of the EU competition rules, as ‘the collective labour agreement directly contribute[s] to the improvement of the employment and working conditions of those substitutes’ (para 39).

According to the Court : “Such a scheme not only guarantees those service providers basic pay higher than they would have received were it not for that provision but also, as found by the referring court, enables contributions to be made to pension insurance corresponding to participation in the pension scheme for workers, thereby guaranteeing them the means necessary to be eligible in future for a certain level of pension.” (para 40).

Learning from the ECJ case: The approach taken by the Court acknowledged the changing nature of labour relationships in today’s economy, and is also in line with one of the fundamental purposes of the EU treaties: to create a social market economy which is sufficiently reflective of other societal interests than just protecting effective competition. The court also dealt for the first time with the increasingly more common phenomenon of the ‘false self-employed’ when interpreting competition law. The court also demonstrated its willingness to take public interests other than economic efficiency into account when applying competition law (a holistic approach that is fundamentally more in line with the EU treaties).³⁴

4.2.3 Comments

Camilo Rubiano in a study led for FIM³⁵ under the title: “Collective Bargaining and Competition law :A comparative study on the Media, Arts and Entertainment Sector” has explored several legal options, suggesting that competition law provisions could provide limitations that could potentially exclude 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 organized 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”.³⁶

³⁴ Cf also “Competition law and the cultural industries: is there now a “social” exemption”?-dknowledge.co.uk/competition-law-and-the-cultural-industries-is-there-now-a-social-exemption/

³⁵FIM, “Collective Bargaining and Competition law :A comparative study on the Media , Arts and Entertainment Sector” By Camilo Rubiano With the collaboration of Shiomit Ravid-2013- cf pages 43-45

³⁶ Cf Supra

In the second place, competition law in general – provide 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”.

5. CHALLENGES AND WAYS FORWARD

Promoting more inclusive social dialogue and collective bargaining are key means of ensuring an equal voice for all workers, regardless of their status. When examining the question of collective bargaining for atypical workers, two considerations are at stake.

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. The fact that trade unions and other organizations representing the interests of workers in the arts, media, and entertainment sectors, 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 art, entertainment and media 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 organize, and by the EU Charter of fundamental rights, as a legally binding tool within the EU treaty.

As emphasized by ETUC's³⁷ 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 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*”³⁸

³⁸cf “Economic freedoms versus workers rights- The Viking, Laval, Rüffert and Luxembourg judgments”-ETUC—2008-2009

5.1 Recognizing the right to collective bargaining for atypical workers: possible actions at different levels:

From an organizational point of view, trade unions need to examine the course of action needed to extend existing collective agreement to include atypical workers. Several industrial relations practices have seen light across EU member states.

From a more legal point of view, there is a need to better enhance strategic litigation and the use of national, European and international recourse's mechanisms to enforce the rights to collective bargaining and freedom of association for all workers. From this perspective the ILO's complaint mechanisms have proven to be a successful means of moving the agenda of atypical workers forward.

In this context it is worthwhile referring to the successful outcome of a complaint brought to the ILO's Committee on Freedom of association by one of the largest Polish trade unions OPZZ "Solidarnosc"³⁹.

ILO Case No 2888 (Poland) - 2011⁴⁰ In 2011, a complaint was brought to the ILO committee on freedom of association by the National Commission of the NSZZ "Solidarnosc". The complainant organization alleged that Polish legislation restricted the right of certain categories of workers and notably persons employed on the basis of civil law contracts (contract for service), self-employed and other persons performing work. In its recommendations of 03/2012, the ILO's Committee on Freedom of Association requested the Polish Government to ensure that all workers, without distinction whatsoever, including self-employed workers and those employed under civil law contracts, enjoy the right to establish and join organizations of their own choosing within the meaning of Convention No. 87. The Polish Constitutional Court ruling of 02 June 2015 stated that the provisions of the Law on Trade Unions (LTU) currently in force were unconstitutional as they exclude those who work under civil law contracts and those who work freelance. Such a restriction was contrary to the polish constitutional guarantees of freedom of association and the ILO Convention (No. 87), declaring freedom of association in trade unions of all workers regardless of the legal basis on which the work is performed"⁴¹

Access to alternative dispute resolution (ADR) systems for collective conflicts should be facilitated and the provision of arbitration, mediation and conciliation services encouraged by both the European institutions and the national governments as such systems have proven effective for the protection of freedom of association and the right of collective bargaining⁴².

From an advocacy perspective, there is a role that the EU has to play in promoting 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.

5.2 A set of several advocacy actions to be brought forward at European level:

Calling the EU institutions to monitor labour market developments and the right to collective bargaining for atypical workers⁴³:

³⁹ ILOs Committee on Freedom of Association (CFA) set up in 1951 for the purpose of examining complaints about violations of freedom of association

⁴⁰ Governing Body 313th Session, Geneva, 15–30 March 2012 GB.313/INS/9 -Reports of the Committee on Freedom of Association 363rd Report of the Committee on Freedom of Association

⁴¹ Cf 'Poland: "Polish Constitutional Tribunal decides rules on freedom of trade union association are too narrow and unconstitutional" By Joanna Untershetz - www.planetlabor.com/

⁴² "Enforcement of Fundamental Workers' Rights"- cf pages 11-17 and 68 - EP-Directorate general for Internal Policies, Policy Department, economic and scientific policy - IP/A/EMPL/ST/2011-04 September 2012-PE 475.115

⁴³ Cf Supra

Challenges of globalized 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 of 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 Commission and Council 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 most specifically atypical workers.

Enhancing full implementation of ILO's fundamental principles and rights at work, along with its core conventions C.87 and 98 and C154: in line with the ILO's principle's on Rights at work , core conventions C.87 and 98 and C154, and the Charter of Fundamental Rights, the European Parliament could consider calling 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): the European Parliament could call upon the Commission to ensure further promote the use of ADR systems in the course of industrial relations practices and enforcement of collective workers' rights in line with the Mediation directive (2008/52/EC) and as part of EC's future initiatives on "Justice for Growth".⁴⁴

5.3 A concluding question for further debate

To what extent can the exercise of fundamental social rights be reconciled with the requirements of the internal market? This was in essence the question put to the European Court of Justice (ECJ) in three landmark cases Viking, Laval, Rüffert ⁴⁵ These three cases related to clashes between the right to collective bargaining and provisions of Directive 96/71/EC, which regulates the rights of posted workers and have had chilling effects on trade unions' capacity to defend workers' rights.

In the Viking case (2007)⁴⁶, the ECJ recognized that the right to collective action was a fundamental right, but placed a narrow definition on the circumstances in which the exercise of this right could be recognized as a permitted restriction on the rights of businesses.

In the Laval case(2007)⁴⁷, the EJC ruled on the compatibility of the collective action with companies' freedom to provide cross-border services in the Union and provisions of Directive 96/71/EC, which regulates the rights of posted workers.

⁴⁴ Enforcement of Fundamental Workers' Rights"- cf pages 11-17 and 68 - EP-Directorate general for Internal Policies, Policy Department, economic and scientific policy - IP/A/EMPL/ST/2011-04 September 2012-PE 475.115

⁴⁵ Cf Viking – Laval – Rüffert: Consequences and policy perspectives —Edited by Andreas Bücker and Wiebke Warnecke, ETUI, 2010 and "Economic Freedom versus workers rights : the Viking, Laval, Ruffert, Luxembourg Judgments"-2008-ETUC

⁴⁶ Cf Supra

⁴⁷ Cf Supra

The Court held that a collective action seeking to entice a foreign employer to sign a collective agreement on more favourable terms and conditions than those referred to in the Posting of Workers Directive was unlawful under EU law, irrespective of the fact that the purpose of the action was to protect standards in collective agreements from being undercut and to protect posted workers from being exploited in the domestic labour market.

In the Rüffert judgment (2008)⁴⁸, the ECJ narrowly interpreted the Posting of Workers Directive 96/71 and considered that the mechanisms used by the public authority to extend the protection of the locally applicable collective agreement to posted workers were not an acceptable method of implementation of the Directive.

In its report the President of the European Commission José Manuel Barroso on "A new strategy for the Single market at the service of Europe's economy and society" (2010)⁴⁹, Professor Monti commented on Economic freedoms and workers' rights after Viking, Laval and Rüffert". "(..)On a normative ground, the question concerns the place of workers' right to take industrial action within the single market and its status vis-à-vis economic freedoms. There is a broad awareness among policy makers that a clarification on these issues should not be left to future occasional litigation before the ECJ or national courts. Political forces have to engage in a search for a solution, in line with the Treaty objective of a "social market economy"(...)". Professor Monti further added :""The issue is to guarantee adequate space of action for trade unions and workers to defend their interests and protect their rights in industrial actions without feeling unduly constrained by single market rules"⁵⁰.

Since 2008, the ETUC has been calling for a "Social Progress Clause" ⁵¹in order to address the general implications of the ECJ cases and of any future case law. The Social Progress Clause was to take the form of a Protocol, to be attached to the European Treaties and with the same legal value.

The role of this Protocol was to seek to redress the balance between economic freedoms and fundamental social rights calling for an interpretation of Treaties and secondary legislation in the light of the following elements:

- the single market is not an end itself, but is established to achieve social progress for the peoples of the Union,
- economic freedoms and competition rules cannot have priority over fundamental social rights and social progress, and that in the event of conflict social rights shall take precedence,
- economic freedoms cannot be interpreted as granting undertakings the right to exercise them to evade or circumvent national social and employment laws and practices, or for the purposes of unfair competition on wages and working conditions⁵².

⁴⁸ Cf Viking – Laval – Rüffert: Consequences and policy perspectives —Edited by Andreas Bücker and Wiebke Warnecke, ETUI, 2010 and "Economic Freedom versus workers rights : the Viking, Laval, Ruffert, Luxembourg Judgments"-2008-ETUC

⁴⁹ Cf "A new strategy for the single market at the service of Europe's economy and society-Report to the President of the European Commission José Manuel Barroso by Mario Monti, 9 May - 2010

⁵⁰ Cf *Supra*

⁵¹ "Economic Freedom versus workers rights : the Viking, Laval, Ruffert, Luxembourg Judgments"-2008-ETUC

⁵² Cf *Supra*