Atypical Workers and Collective Bargaining in the Live Performance and Audio-visual Sectors
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Jurys Inn Custom House Dublin - Kindly hosted by National Union of Journalists (Ireland)

EXECUTIVE SUMMARY – WORKSHOP DISCUSSION NOTE

The objective of this paper is to give a short summary of main discussions points for debate and which are to be addressed during the workshop "Collective Bargaining for Atypical Workers in the Live Performance and Audiovisual Sectors" This paper is a summary of a longer concept paper developed to inform debate at this workshop The longer paper version, ideally to be read in conjunction with this executive summary, includes a review of international legal standards applicable to the protection of collective bargaining. It also documents Trade Union approaches to addressing the needs of atypical workers in social dialogue and collective bargaining mechanisms. The paper further addresses challenges and barriers that might prevent collective bargaining from benefitting atypical workers particularly in the light of competition law. The final section of the paper 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

INTRODUCTION

In the media and culture industries, many different forms of atypical work arrangements have expanded during the past decades, including part-time, casual and fixed-term contracts; temporary agency work self-employment; homeworking; and telework. The effects since 2008 of the financial and economic crisis with reduced public funding's have had a further severe impact on employment and working conditions in the media, entertainment and live performance sector – and the crisis has reinforced the trend towards more freelance activities and self-employment. In the EU, short-term contracts have become the norm and contract duration for occasional workers in those industries has declined steadily since the 1990s[1].

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 use in practice of such contracts which are increasingly widespread.

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

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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.
While self-employed journalists and arts and entertainment 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 sector, trade unions are seeking to better ensure that these categories of workers can access better protection and conditions of work through the mechanisms of social dialogue and collective bargaining.

1. CHALLENGES FACING ATYPICAL WORKERS IN INDUSTRIAL RELATIONS

Atypical forms of work pose a number of challenges to the effective functioning of traditional industrial relations systems and collective bargaining processes[2]. 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, meaning that association with the single employer is limited (e.g. part-time, fixed-term); or (b) not directly employed by the "real" employer for whom 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. [3]

A third issue at stake is that in a growing number of cases, actual 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 the employers in power. [4]

Finally, atypical work arrangements often challenge the traditional parameters for the organization of work, giving rise to uncertainty about workers' employment status[5]. 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.

[2] 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-
[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] Cf *Supra*
[5]The 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 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

2. COLLECTIVE BARGAINING AND COMPETITION LAW

A further significant challenge which is not strictly related to industrial relations is that the established practice of collective bargaining, a pillar of the European social model 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. Competition law and collective bargaining are among 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.[6] 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.

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. 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 and performances of their members.

However, there has been development of the ECJ case law in the last decades, including Albany-67/96, C-115-117/97 and C-219/97 [7] which acknowledged the changing nature of labour relationships in today's economy, in line with one of the fundamental purposes of the EU treaties to create a social market economy reflective of other societal interests than just protecting effective competition. In the case of FNV Kunsten Informatie en Media C-413/13[8]" , the ECJ also dealt for the first time with the increasingly common phenomenon of the 'false self-employed' when interpreting competition law.[9]

[6] - 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 9-10

[7] Albany case – ECJ Cases C-67/96, C-115-117/97 and C-219/97 –cf extended version of the concept paper "Atypical Workers in the Live Performance and Audio-visual Sectors Collective Bargaining"

[8]"http://curia.europa.eu/juris/document/document.jsf?text=&docid=143248&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=311109- cf extended version of the concept paper "Atypical Workers in the Live Performance and Audio-visual Sectors Collective Bargaining"

[9] Cf longer concept paper « Atypical Workers and Collective Bargaining in the Live Performance and Audio-visual Sectors Collective Bargaining"

3. 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.

First consideration in line revolves around the overall labour market status of atypical workers, and ways by which industrial relations institutions and practices can be more responsive to bridging the existing gaps between atypical and standard workers.

A 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. Notably 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 concurring 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 basis assumption in the context is that the art, entertainment and media sector workers should independently from their status be protected by 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's [10]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".*[11]

Recognizing the right to collective bargaining for atypical workers necessitate actions at various 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 ILO's complaint mechanisms have proven to be a successful means of moving the agenda of atypical workers forward.

[11]cf "Economic freedoms versus workers rights- The Viking, Laval, Rüffert and Luxembourg judgments"-ETUC—2008-2009

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 bargaining[12].
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.

A set of several advocacy led actions could be brought forward at the European Level:

- Calling the EU institutions to monitor labour market developments and the right to collective bargaining for atypical workers[13]
- 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. In the context of the European Semester, the European Parliament could 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 ILOs 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".[14].

[12] "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
[13] Cf *Supra*
[14] Cf *Supra*

A concluding question that might trigger further debate needs to be brought forward:

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 [15]

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.

Since 2008, the ETUC has been calling for a "Social Progress Clause" [16]in 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 conditions[17].

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

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

[17] Cf *Supra*