



## **EQUITY RESPONSE TO EUROPEAN COMMISSION GREEN PAPER: MODERNISING LABOUR LAW TO MEET THE CHALLENGES OF THE 21ST CENTURY**

### **INTRODUCTION**

1. Equity is a trade union representing 37,000 performers and creative personnel who work across the whole spectrum of entertainment in the UK, including visual broadcasts, sound recordings, film and live performance. These Equity members work principally in drama, comedy or entertainment roles.
2. Equity is also a member of the European group of the International Federation of Actors (FIA) and supports the concerns raised by FIA, as well as other trade union colleagues as part of the European Arts and Entertainment Alliance (EAEA).
3. Equity members work in an unusual employment environment, due to the fact that they will often work for more than one employer during a relatively short period of time (or at the same time). Due to their range of performance and creative skills they may also work in a number of different roles across different areas of the industry.
4. In fact recent research found that over the course of a year one-half of Equity members (50%) worked in two or more different types of production in the entertainment industry. In addition, over a third (38%) worked in more than one type of role – including acting, singing, dancing, directing or presenting.
5. These unusual working patterns mean that many Equity members do not have conventional employment relationships. Therefore many of the issues raised in the Green Paper will have a particular resonance. However, this submission does not seek to provide a response to all of the questions in this inquiry, but simply addresses the most relevant matters to Equity's membership.

### **THE KEY POLICY CHALLENGE – A FLEXIBLE AND INCLUSIVE LABOUR MARKET**

1. **What would you consider to be the priorities for a meaningful labour law reform agenda?**

- 2. Can the adaptation of labour law and collective agreements contribute to improved flexibility and employment security and a reduction in labour market segmentation? If yes, then how?**
- 3. Do existing regulations, whether in the form of law and/or collective agreements, hinder or stimulate enterprises and employees seeking to avail of opportunities to increase productivity and adjust to the introduction of new technologies and changes linked to international competition? How can improvements be made in the quality of regulations affecting SMEs, while preserving their objectives?**
- 4. How might recruitment under permanent and temporary contracts be facilitated, whether by law or collective agreement, so as to allow for more flexibility within the framework of these contracts while ensuring adequate standards of employment security and social protection at the same time?**
  
6. In our view the priority for the EC in addressing labour law reform should be the development of a much broader definition of the concept of “worker”. This definition should be wide enough to encapsulate all workers who are not genuinely self-employed and address the current inequality in the application of employment rights and the legal uncertainty around employment status.
  
7. It should not be possible for a Member State to avoid its obligations under European Treaties or secondary legislation simply by applying a narrow definition of those eligible for employment rights. It would be preferable for Member States to apply the practice of the European Court of Justice (ECJ) by interpreting the definition of worker uniformly and extensively.
  
8. In the UK, many Equity members are engaged to work in a subordinate employment relationship (i.e. not genuinely self-employed), but do not benefit from the security of employment protection rights, family friendly employment rights, redundancy or unfair dismissal rights. Such inequality of provision is unhelpful, as it fails to provide the necessary support for a vulnerable workforce in an industry already characterised by insecurity.
  
9. It is clearly important for Europe’s economies to establish the right balance between flexibility and security in the labour market, if they are to achieve the stated goals of sustainable economic growth with more and better jobs. However, it must be understood that key growth areas of the economy such as the creative industries are driven by individual creators, artists and performers, who currently operate in an employment environment of ultimate flexibility, but no real security through the provision of basic employment rights.
  
10. Therefore a meaningful labour reform agenda should seek to acknowledge and improve the position of these creators, who will be a prime economic driver for Europe’s economies in the 21<sup>st</sup> century. This should include a full adoption of existing instruments such as the UNESCO Recommendation on the Status of the Artist, which is designed to

recognise the unique social, economic and industrial circumstances of artists.

11. The recommendations contained in the UNESCO Recommendation were first produced in 1980 and taken forward in a 1997 final declaration. Central to this was a call to define artists as an employment category with a full range of employment rights, respect and enforcement of intellectual property rights and active recognition of the contribution of artists to society and modern economies.
12. In contrast to this, it would appear that much of the EC's generic approach to labour law reform has been influenced by the "flexicurity" model. While we understand the attraction of this approach to policy makers, we would stress that the experience of Equity members working across the entertainment industry is one that is characterised by increasing flexibility and no corresponding improvements in security. The establishment of a broader definition of worker with corresponding employment rights for artists and other workers would be a measure that would assist in redressing this balance.
13. That is not to say that flexibility in the entertainment industry should not be retained. Clearly it is important for the entertainment industry to preserve a degree of flexibility with respect to the mobility of its workforce and the short-term nature of engagements (e.g. films, theatre productions, commercials). That is something that is expected and understood by performers and creators, many of whom value their own flexibility to work for different employers on projects that are temporary by their very nature.
14. Nevertheless, the flexibility to engage workers on short-term projects should not undermine the rights of all economically dependent workers to a full range of employment rights. Further detail is given on this issue in response to question 7/8.

## **MODERNISING LABOUR LAW – ISSUES FOR DEBATE**

### **Employment transitions**

**5. Would it be useful to consider a combination of more flexible employment protection legislation and well-designed assistance to the unemployed, both in the form of income compensation (i.e. passive labour market policies) and active labour market policies?**

15. It is possible to develop flexible assistance to groups of workers that may not currently be considered to be employees, but this approach is more difficult to monitor and enforce than providing rights to all workers under a broader definition. For example, while most actors would be seen as atypical workers, arrangements have been developed in the UK to provide this flexible workforce with some improved security in an otherwise uncertain and insecure profession. In particular, arrangements are in place in the UK that mean many actors are eligible to claim unemployment

assistance (in the form of *Jobseekers' Allowance*) when they are between jobs.

16. However, due to the ambiguity of employment status in the UK, eligibility for this assistance is dependent on a number of factors, including previous tax, National Insurance and employment arrangements. These criteria can be confusing for unemployed workers and often for the staff responsible for administering these payments. A broader definition of worker for all those who are not genuinely self-employed would assist by providing greater clarity and certainty regarding employment status and corresponding rights, including this form of income compensation.

17. Moreover, Equity would argue strongly that tax and National Insurance status must be separate from labour law and must not be determining factors in defining employment status. The key consideration to the overall application of employment rights must be the nature of the employment relationship itself.

**6. What role might law and/or collective agreements negotiated between the social partners play in promoting access to training and transitions between different contractual forms for upward mobility over the course of a fully active working life?**

18. The training of atypical workers, such as performers and other creators, is notoriously difficult given the fact that these individuals are likely to work on different projects for a number of different employers, often in very different roles. This lack of a single employer responsible for training of performers has meant that, until recently, the UK broadcasting industry was almost entirely dependent on the BBC for training requirements, as an extension of its role as the main public broadcaster.

19. However, the UK Government has supported the establishment of Sector Skills Councils (SSCs). These SSCs are independent, UK-wide organisations developed by groups of influential employers in industry or business sectors of economic or strategic significance. They are employer-led and actively involve trade unions, professional bodies and other stakeholders in the sector.

20. Equity has been closely involved with the SSCs covering areas where our members work – specifically Skillset for the audiovisual sector and Creative and Cultural Skills for live performance. These bodies are supported with a combination of public funding and training levies on employers. This funding mechanism enables the provision of training that would not otherwise be available to workers as part of their relationship with their employer(s). For example, Skillset have been working closely with Equity to provide performers with access to face-to-face advice with professional careers and learning advisors.

21. Equity would support the extension of levies to support the provision of training for other workers whose working arrangements mean that they are unlikely to benefit from training directly from a single employer.

### **Uncertainty with regard to the law**

**7. Is greater clarity needed in Member States' legal definitions of employment and self employment to facilitate *bona fide* transitions from employment to self-employment and *vice versa*?**

**8. Is there a need for a “floor of rights” dealing with the working conditions of all workers regardless of the form of their work contract? What, in your view, would be the impact of such minimum requirements on job creation as well as on the protection of workers?**

22. At the UK level, Equity has argued strongly for greater certainty in employment status and associated employment rights. In response to the UK Government's review of employment status, Equity argued that the best way to achieve this clarity and certainty would be for all workers to be entitled to a full range of employment rights.

23. Currently, the vast majority of Equity members are economically dependent workers and do not benefit from a consistent approach to employment rights, which is not only problematic for the workers themselves, but can also lead to legal disputes over employment rights in the courts. Other Equity members, such as singers, are treated as freelancers and excluded completely from basic employment rights. This is due to the employment relationship whereby singers will work on different projects and will be paid per session.

24. As noted above, Equity does not believe that this is the appropriate way for artists to be treated under labour law. The recommendations of the UNESCO Treaty on Status of the Artist should be implemented fully, so as to reduce uncertainty of employment status of these workers.

25. That said, the problem of uncertain employment status in the UK is one that is shared in other industries and in a number of other Member States and identified by the Green Paper when it states that “the traditional binary distinction between “employees” and the independent “self-employed” is no longer an adequate depiction of the economic and social reality of work” (para 4b).

26. However, it is for this reason that Equity rejects the proposal to create a lower level of rights and employment protection for “economically dependent” workers. Equity believes that the concept of a “floor of rights” – for workers who fall between the established concepts of subordinate employment and independent self-employment – is only liable to cause greater uncertainty and confusion.

27. To establish an additional category of worker, with a lower level of employment rights, is not a framework that is capable of providing

appropriate protection for vulnerable workers. On the contrary, this structure could be exploited by unscrupulous employers in order to provide inferior levels of protection for workers currently provided with full employment rights.

28. Moreover, our experience of the entertainment industry would suggest that the understanding of economically-dependent worker as provided by the EC Green Paper is fundamentally flawed. It states that individuals who fall into this third category “remain economically dependent on a single principal or client/ employer for their source of income” (para 4b, p.11). As noted earlier in this submission, we know that one-half of Equity members will work on more than one type of production during the course of a year.
29. However, generally speaking it would be wrong to assume that this experience in working on different productions with a large number of employers is a sign of financial independence and negotiating strength on behalf of the worker. Apart from a small number of “star” performers, who are in a position to dictate their own terms, most Equity members will work on standard collective agreements, with many working on minimum rates of pay. Therefore the need to work for numerous employers in various roles is one of economic necessity dictated by job insecurity.
30. Therefore Equity would stress that the key change to the legal definitions under EC labour law should be a much broader definition of “worker”. This must be broad enough to encompass all economically dependent individuals, freelance workers and artists as envisaged by UNESCO. While some employment rights would still need to be subject to a qualifying period, this presumption of coverage must be the starting point for a clear and unambiguous employment rights framework.
31. Finally, Equity would repeat the view that the attempts to modernise labour law in the EU should be restricted to a review of these matters in respect of employment status. There should be no corresponding review of tax and National Insurance. Moreover, the application of collective agreements between social partners and the rights to agree minimum terms and conditions for workers of all kind must not be affected by erroneous attempts to apply competition law.

### **Three Way Relationships**

**9. Do you think the responsibilities of the various parties within multiple employment relationships should be clarified to determine who is accountable for compliance with employment rights? Would subsidiary liability be an effective and feasible way to establish that responsibility in the case of sub-contractors? If not, do you see other ways to ensure adequate protection of workers in "three-way relationships"?**

**10. Is there a need to clarify the employment status of temporary agency workers?**

32. Most Equity members who are active in the entertainment industry will engage the services of an agent or personal manager, who will find them employment and act on their behalf in negotiating the detailed arrangements for that work. However, it is clear from this business relationship that employment agents do not act in the role of employer for the performers and other individuals that they represent. The employer will be the production company, broadcaster or theatre company who has engaged the individual to carry out a certain role. This relationship is clear and unambiguous and should remain so.
33. Separately from matters of employment status, Equity has expressed concerns about the way in which some entertainment agents and publishing services operate. In particular, we have opposed the charging of up-front fees by agents (rather than commission from work found); supported licensing of agents; and called for commission rates to be limited so that their clients receive at least the national minimum wage after deductions.
34. While these remain important issues to our members, and may impact upon the operation of the three-way employment relationships in the entertainment industry, they are not appropriate matters for reform of labour law at a European level. Equity will continue to discuss improvements to the existing framework with the UK Government.

### **Organisation of working time**

**11. How could minimum requirements concerning the organization of working time be modified in order to provide greater flexibility for both employers and employees, while ensuring a high standard of protection of workers' health and safety? What aspects of the organization of working time should be tackled as a matter of priority by the Community?**

35. Due to the ways in which our members work – and the complexities of production schedules in film, television and theatre – they are often required to work well in excess of the maximum 48-hour working week established in the Working Time Directive.
36. To some extent these intense periods of work are inevitable and are accepted as part of the process of production. Moreover, these long hours are mitigated by the long periods between jobs, which are accounted for in the reference period and bring the weekly average down to less than the legal maximum.
37. However, Equity opposes the continued use of the individual opt-out from working time limits that is used in the UK. Given the flexibility of reference periods and the ability to average out the periods of intense work (even in a long hours industry such as entertainment) the opt-out is an unnecessary measure, which is too often included as a standard term within contracts for all types of worker.

## **Mobility of workers**

**12. How can the employment rights of workers operating in a transnational context, including in particular frontier workers, be assured throughout the Community? Do you see a need for more convergent definitions of 'worker' in EU Directives in the interests of ensuring that these workers can exercise their employment rights, regardless of the Member State where they work? Or do you believe that Member States should retain their discretion in this matter?**

37. Equity believes that it is currently correct for individual Member States to retain the ability to apply domestic employment law and not that of the "country of origin". To do otherwise would enable employers to engage performers and other workers on inferior terms if they arrived from countries with weaker social protection, leading to a levelling down of social conditions. For that reason we were pleased to see that the EU Directive on Services in the Internal Market excluded labour law from its scope.

38. However, we would be concerned if atypical workers were incorrectly categorised as self-employed service providers and treated as independent businesses, unprotected by domestic employment law or collective agreements. This would be an unacceptable outcome for vulnerable workers and underlines the need for a broader definition of worker, which is not so open to interpretation and misrepresentation.

39. As noted earlier, it is also important for EU legislation to be applied in the same way in all Member States. That is why Equity believes that it should not be possible to apply a restricted definition of worker to avoid obligations under Community law. The term worker should be interpreted uniformly and extensively in accordance with the practice of the ECJ.

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