
Introduction

EURO-MEI is the European region of UNI-MEI global union representing creative, technical and administrative workers’ organisations in the media, entertainment and arts in the EU and other European countries. The employment status of workers in this sector has been a major concern among media and entertainment unions in Europe for a long time given the high percentage of so-called atypical workers among the workforce in this sector. EURO-MEI together with its sister organisations, the International Federation of Actors, FIA and the International Federation of Musicians, FIM has undertaken studies and seminars during the period 2002-2004 with its member organisations and other stakeholders assessing the status of employment of workers in the media, entertainment and arts sector and its impact on the rights of those workers.¹

Before answering the questions in detail we would like to draw your attention to some key factors in relation to the status of employment of media and entertainment workers:

1. The studies and seminars mentioned above have confirmed that a wide range of different forms of work contracts exists within each EU Member State. The inflation of different types of contract mirrors the situation that often the same job can and is being carried out under different work contracts. This lack of legal certainty in national labour laws and the impact of definitions in tax and competition laws have created a grey zone between the status of ‘workers’ and ‘companies’ or ‘entrepreneurs’. It is in these grey areas where the workers face discrimination, limited access to core labour standards and exploitation.

2. The media, entertainment and arts sector is characterised across the EU by a high flexibility in general and workers working under a freelance or service contract are at the extreme end of this spectrum of flexibility. Many of the workers represented by our affiliates are or are in danger of dropping out of the scope of parts or the entire labour law protection because of the freelance or service contracts under which they are employed. It is important to underline that the so-called freelance workers can mean both, non-permanent employment or self-employment.

¹ EURO-MEI, FIA and FIM together form the European Arts & Entertainment Alliance (EAEA)

The EAEA is a Federation of the European Trade Union Federation (ETUC)
3. Workers in the sector are confronted with insecurity in terms of employment. To a large extent this is due to the specificity of the sector, in which many economic activities are project based and employment ends with the end of the project (e.g. film and TV production). Outsourcing has contributed to an increase of atypical forms of contracts even in more classic working environments (e.g. broadcasting).

4. The concept of ‘economically dependent worker’ as defined by the Commission does not match the reality of labour relations in the media, entertainment and arts sector. Freelancers are in the overwhelming majority economically dependent since they remain completely dependent on the prevailing terms and conditions in this freelance labour market while working for many different employers or clients in any given year. Our experience is that all freelancers including self-employed in our sector are economically dependent even if they are working for different employers.

Response to the Questionnaire

In the following EURO-MEI responds to the questions 1, 6, 7, 8, 11, 12 and 13.

Question Nr. 1: “What would you consider to be the priorities for a meaningful labour law reform agenda?”

We believe that for workers in the media, entertainment and arts sector the two most important priorities for a labour law reform agenda are:

1. Setting a clear and consistent legal definition of ‘worker’ in national labour laws in all EU Member States. These definitions should be based on an inclusive approach of labour law and the concept of ‘worker’ eliminating grey zones and enlarging it to all atypical forms of employment including self-employment.

2. Reinforcing the right of freedom of association and applying it to all workers regardless of their status of employment.

These two issues are not isolated but necessary to achieve an inclusive labour market. In our opinion without any significant progress towards a more inclusive labour law in EU Member States and the effective enforcement of ILO conventions 87 and 98 a meaningful modernisation of the European Social Model will not be possible.

Question Nr.2: “Can the adoption of labour law and collective agreements contribute to improved flexibility and employment security and a reduction in labour market segmentation? If yes, how?”

It is our experience that there is too much flexibility and not enough security for workers in the media, entertainment and arts sector across the EU. A meaningful reduction of labour market segmentation can only be achieved if the security of freelance employment is significantly increased through the recognition of their workers’ rights and investment in training and the skillsbase is promoted. It is our view that such measures would also contribute to the development of a higher skilled and motivated workforce resulting in productivity gains referred to in question 3.
Question Nr. 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?”

We would like to draw the attention to the sector-wide training systems in France and the UK. Both systems have their specificity. What they have in common is that they respond to the specificity of the labour market. Training levies on employers are transferred to a fund for training to which all workers including freelancers have access. Social partners play a crucial role in running the training schemes funded through the levy system.

Training levies combined with cooperation of social partners in the management of the training schemes are in our view a useful model and best practice in sectors with a fragmented company structure and a high freelance labour force. Levies could be collected on a voluntary basis. However, in order to avoid the risk of setting-up ineffective voluntary levies we advocate the implementation of a mandatory levy, which also guarantees that investment in the skillsbase is shared among the stakeholders of the entire sector concerned.

The adaptation of national labour laws recognising the need to include freelance workforce in sector training schemes could help to facilitate the setting-up of such training schemes across the EU.

Question Nr. 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?”

We believe that a greater clarity is needed in the definition of employment and self-employment in the EU Member States. However we would like to underline that some of the elements put forward in the Green Paper to discern employment and self-employment are not applicable to the labour relations in the media, entertainment and arts sector.

This sector is characterised by a fragmented company structure and multiple short-term contracts. Freelance work is not a matter of “a decision, freely taken, to work self-employed despite a lesser level of protection, in exchange for a more direct control over conditions…” but the result of the insecure labour market. Freelancers whether employed or self-employed cannot set their own terms and have to operate within the rates already set. Only a small elite among media, entertainment and arts workers is in a position to negotiate independent terms. The fact that freelancers can work for more than one employer is no indication of economic independence but rather the opposite: there is only freelance work available and many workers - a growing number of workers - dependent entirely on these short term contracts.

Further, the freedom from subordination of self-employed workers is in this sector often fiction. Assessing the working patterns of the entire production process of an audiovisual or entertainment product would confirm that the overwhelming majority of formally self-employed workers are in effect regularly subject to different forms of control and subordination. This ambiguity is creating a grey zone between employment and self-employment, which is used by employers to avoid social contributions and other obligations under the labour law while retaining direct control over the work and the worker.

We believe that the following measures should be taken in order to eliminate these grey zones and improve the security for freelance workers in an extreme flexible working environment:
Inclusive definitions of ‘worker’ should be developed encompassing all freelance workers including those economically dependent workers, who work for several employers. This definition should give access to the full range of employment rights.

There should be a statutory presumption of coverage of labour law. In the event of a legal dispute, there should be the burden of proof on the employer to show that an individual is not a ‘worker’.

Question Nr. 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?”

As outlined under question Nr. 7 we advocate an inclusive approach and argue that all workers regardless of their legal status should have access to the full range of employment rights. We do reject the term ‘floor of right’s’ although we recognise the intention to better protect those who have now no protection whatsoever. However, we fear that the introduction of yet another category of employment form with a minimum floor of rights would have as direct result a race to the bottom because of the competition between different contractual arrangements in the labour market.

Question Nr. 11 How could minimum requirements concerning the organisation 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 organisation of working time should be tackled as a matter of priority by the Community?

EURO-MEI supports the position of its UK affiliate BECTU and the ETUC position and calls for an immediate end to the individual opt-out to the 48-hour maximum working week.

The media and entertainment sector is characterised by long working hours in particular in film production and live performance. As BECTU in its submission to the Green Paper points out the individual opt out has become, in practice, a means of undermining the original aim of the Working Time Directive to regulate working time in the interests of health and safety. The very unequal relationship between an individual freelance and an employer means that the opt-out can, in effect, become a requirement rather than a voluntary option. Employers routinely issue contracts already containing an opt-out clause to freelances seeking work. The overwhelming majority of freelances feel they have to accept the opt-out rather than object and risk losing the work. The opt-out has become compulsory and constitutes, in our view, an abuse of the system of working time regulation.

Question Nr. 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 ‘workers’ in EU Directives in the interest 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?”

Employment rights of the country where work is carried out should be applied to all workers within its territory whether it concerns permanent or freelance employment. We believe that is necessary to reach a more coherent approach when defining ‘worker’ in EU Directives. We advocate a broad minimum definition, which should not limit Member States to adopt or keep more extensive national definitions. The European Commission should be promoting more convergent and inclusive national definitions where national definitions are narrow or exclude broad categories of workers such as freelance workers.
Question Nr. 13: "Do you think it is necessary to reinforce administrative co-operation between the relevant authorities to boost their effectiveness in enforcing Community labour law? Do you see a role for social partners in such cooperation?"

Moonlighting (i.e. undeclared work) or concealed work is objectively harmful to the European economy and needs to be combated, particularly against the backdrop of an enlarged Europe and increased mobility within the Union's borders.

The audiovisual sector and some of its subsectors are also, to a certain extent, exposed to this practice on account of the high degree of fragmentation within the industry and the extremely mobile character of productions and workers, including transnational mobility. Consequently, enhanced cooperation is required between the various European administrations, but there is also a need for teams of labour inspectors to be set up or strengthened. For the sake of efficiency, Member States should be in a position to ensure that undertakings operating transnational activities are duly registered, which requires close cooperation between national administrations.

The Social Dialogue Committee stresses Member States' responsibility for combating clandestine work. Notably through labour inspectorates, Member States are fully competent to deal with what is essentially a policing issue. Consequently, social partners should in no way be given legal responsibility for reporting on moonlighting or given the power to interfere with the activities of undertakings.

The Committee recalls the role played by the social partners in the fight against moonlighting, aimed at combating illegal practices, which result in distortion of the labour market and a weakening of collective agreements.

The Committee considers that this issue could be subject to bilateral discussions between the social partners, and not least in the framework of collective bargaining.

To the extent that appropriate tools have not already been established in the Member States and without prejudice to bilateral cooperation between the social partners, the setting-up in Member States of Moonlighting Commissions with the following tasks could be considered:

- assessing the impact of clandestine work on the industry with particular attention to transnational mobility;
- exchanging information;
- identifying sectoral hot spots which are particularly vulnerable, as well as the different forms of illegal work, and considering possible tools (including guides) to tackle this issue;
- creating appropriate statistics tools;
- raising awareness amongst stakeholders as well as the public authorities.

The Committee suggests that the creation of a European Observatory on Moonlighting might also be considered.
1 EAEA Study Relating to the Various Regimes of Employment and Social Protection in the EU, 2001; EAEA Study on the Status of Workers in European Media, Arts and Entertainment Sector in Five Applicant Countries, 2002.

2 Detailed information on the French training system is available on the Internet at http://www.afdas.com/. Information on the UK training system can be found also on the Internet at http://www.skillset.org/.