PEARLE
LIVE PERFORMANCE EUROPE

INPUT TO BACKGROUND NOTE

DEDICATED MEETING ON 12 APRIL 2021 WITH SOCIAL PARTNERS REGARDING THE APPLICATION OF EU COMPETITION LAW ON COLLECTIVE BARGAINING AGREEMENTS BY SELF EMPLOYED

Brussels, April 2021

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Introduction

Pearle*-Live Performance Europe is the European employers federation represented in the European sectoral social dialogue committee live performance. The workers represented in committee are the EAEA, regrouping FIA (international federation of actors), FIM (international federation of musicians) and UNI-MEI (media and entertainment).

Union representatives have brought the issue of collective bargaining for self-employed artists in Ireland to the attention at meetings of the European social dialogue committee in the past, a country where there is no sectoral (or multi-employer) collective bargaining. Pearle members from Netherlands have also brought to the attention the initiative taken by social partners in the live performance sector on a collective agreement for self-employed. It was given an ex-aequo award in November2018 at a high-level in Brussels in the frame of the European funded project 'Behind the Stage' in the category "social dialogue/collective bargaining".

Pearle* notes that the European Commission is taking an initiative that aims to define EU competition law's scope of application, to enable an improvement of working conditions through collective bargaining agreements – not only for employees, but also, under some circumstances, for the solo self-employed.

Pearle* welcomes the invitation of the Commission to consult social partners on a matter which is to be situated and at the heart of social dialogue and to provide feedback to the background note issued on the occasion of the social partner hearing. Pearle* also welcomes the clarification of the Commission at the hearing that the initiative intends to be a guidance document and not a regulation.

The Commission invites social partners to give views to three issues.

Q1 : Do you agree that EU competition law should not stand in the way of collective agreements of solo self-employed with their counterparts to improve their working conditions?

To answer this question one must consider when collective bargaining between self-employed and branch associations (often also employers associations) is meaningful.

The Impact inception assessment note says that the initiative seeks to achieve this objective by providing legal certainty about the applicability of EU competition law to collective bargaining by self-

employed. Individuals should be able to know, without complex legal or economic analyses, whether or not EU competition law prevents them from bargaining collectively.

From exchanges with Pearle representatives from across Europe, it is very clear that there is no one-size-fits all. Whether there is a desire or need for collective bargaining for self-employed depends on a wide range of factors: the characteristics of the labour market, the differences inside countries between regions, the history of labour markets, the sectors, the variations inside a sector, the nature of the work and work patterns (many clients/employers), the type of occupations, the mix of income, the definition of self-employed in national legislation, the (beneficial) tax position of self-employed, the fact whether self-employed are due social contributions, whether they can access certain social benefits, the applicable labour laws, etcetera. The variables are numerous and therefore can only be tackled through tailored approach.

We fear that a European approach would be too much guiding so that it would reduce solutions to develop tailored initiatives.

According to Eurostat there is a much higher percentage of people self-employed in the cultural sectors than average. As it concerns a broad definition of cultural sector, this doesn't come as a surprise as a range of occupations are creative professions which are individual and thus self-employed by nature, such as writers, composers, visual artists. The typical freelance activity of people working in the sector is based on a desire to be able to choose the work and assignments as expression of artistic freedom. The freelance career has become also popular in other sector, especially in the digital economy, such as with IT-ers or web-developers.

The Commission makes explicit reference to artists which are more likely to be self-employed and which may lead to poor working conditions. We do not agree with this approach as if it were a homogenous group. As already mentioned above it depends on the type of creative activity.

In the live performance, and in most countries, artists will normally be employed under labour contract (permanent or fixed-term). But a large majority also have a career simultaneously as self-employed and sometimes even as civil servant (e.g. when they are teaching at a music academy). This working pattern can also be observed with technicians working in or providing services to live performance organisations for concerts, performances, events and festivals.

The choice for self-employed status is often also based on the fact that it is beneficial for tax purposes. Hence one will note differences between countries, where there are relatively more self-employed than other countries. In this regard it is observed that solo self-employment is common practice in the sector in the Netherlands (and UK).

In the Netherlands, social partners in the sector believed that it would be useful to agree on a set of minimum tariffs for self-employed. They decided to do so because of the fact that the interplay of supply and demand doesn't function optimally in a sector like the live performance, that there is a growth of people taking a status of self-employed, and that there is improper competition between employees and self-employed. The tariffs are 40% (initially 30%) above the minimum wages in the applicable collective agreement for employees. This was eventually possible thanks to the fact the Dutch law allows under strict conditions to do so. In the case of the live performance sector it concerned in particular the condition put forward by the Dutch competition authority[1], being 'working side by side with employees'. We underline that this was a particular initiative that both social partners had considered to be beneficial and useful for the particular context in their sector.

[1] https://www.acm.nl/nl/publicaties/leidraad-tariefafspraken-zzpers

This approach has suited social partners in the live performance sector in UK[2] since many years where nearly every artist is a freelancer. The main group of Pearle members indicate that -when there is an aspect of subordination- a labour contract for the period concerned will be concluded.

Specific types of artistic or technical work, which require a high specialisation or reflect outstanding talent will be done by artists or certain technicians who are self-employed. It concerns e.g. soloists, conductors, choreographers, stage directors, designers (light, sound, costume, ..). Often musicians in the pop sector will also be self-employed. They are usually represented by an agent, a manager or impresario who negotiate a fee on their behalf. In a competitive market for talent, the group of artists that are not represented (or choose not to be represented) by an agent are required to negotiate on their own behalf. Some are better in doing so than others. Also, where in one context an artist or technician will be considered as highly specialised and accepted by labour courts to work as self-employed, in other settings the courts may interpretate it differently[3].

It is a question whether (all) self-employed would like to be represented by an organisation (union or other) to undertake collective bargaining. Much of it will depend of a person's individual situation, his/her situation at home, whether a person would feel more or less comfortable with a minimum collective tariff-setting.

This leads to a number of other questions: who would represent the self-employed? Is the organisation subject to a representativeness check? Is the organisation recognised by the employers/businesses? Does the collective agreement apply to all self-employed of a certain occupation of for a certain work? only the businesses with whom negotiated or the entire sector? does the self-employed work for only one company or more? A court in Sweden concluded that a cellist who was first employed but then resigned to settle himself as self-employed for tax purposes and who offered services to two different companies, could not claim rights to be employed again by a previous employer, as during his period of self-employment he was working for more than one employer.

It has been reported, that unions[4] set tariffs in the form of guidance or recommendations to their members without a collective bargaining with employers (or without recognising them as the counterpart). In the public sector, it's also been observed that tariffs have been proposed to funding bodies (arts councils, ministries of culture) who provide grants and include the application of those tariffs as a condition for funding. The employer/business/client is here in the weak position because of low bargaining power on that side of the spectrum.

Drawing from the points raised above it should be concluded that a collective bargaining for self-employed should be regarded in the context of national labour markets where it could be beneficial. The example of the Netherlands shows that it can be done within the context of the national competition law. In other words there is no real need for a European approach, it should be up to Member States to consider a change to competition law where and when there is need for it based on the situation of the labour markets and could also provide clarification on the definition of self-employed where there is ambiguity.

[2] In UK it concerns the category 'worker' which is to be situated between employed and self-employed
[3] Göttingen - 2019
[4] Denmark and Finland

Q2: What is your view about the overarching principles to ensure the proportionality of the options (see para 4.7-4.8)?

The background in para 4.1 to 4.5 underlines several times the desire for an initiative to allow self-employed in a weak position or 'vulnerable' self-employed to undertake collective bargaining. The Commission also recognises that the key issue is to be able to determine who are the self-employed in such a situation.

As described above, when we consider the live performance sector the situation of people is very different depending on the question whether one has other sources of income such income from employed work, copyright income or royalties, other assets, whether they are alone or have a partner who earns income, etcetera. All such elements determine the situation of an individual and the consideration of vulnerability.

As pointed out in para 4.6 the Commission does not want an initiative that goes beyond what is necessary to reach its objective. Therefore the Commission considers a number of overarching principles:

- It should concern only and exclusively solo self-employed
- They should provide their own labour, in their physical or intellectual capacity
- It should be provided through a digital platform or to a professional customer
- It would also only cover collective negotiations/agreements aiming at improving working conditions
- The counterparts should also be entitle to bargain collectively vis-à-vis the solo self-employed
- It would not cover unilateral price fixing by self-employed nor trading conditions applied to private customers

As regards the principle described in para 4.7 "solo self-employed providing own labour through digital platform or to a professional customer" – it is said that it concerns here a group of self-employed who have a weak bargaining position. Yet, there is no clear-cut description of who this group is, neither are there criteria to determine this group. Nor can it be said that all such solo self-employed are in a weak bargaining position.

The Commission wants to correct situations where there is considered to be an imbalance of bargaining power, but the example in our sector of the Netherlands is not an issue of lack of bargaining power of self-employed, as they are represented by the unions. The issue that social partners decided to act upon concerned a matter of providing a response to self-employed doing the same work as employed.

Para 4.8 points out as a principle that it should not cover unilateral price fixing by self-employed. There is however a very thin line between what is price fixing and guidance or recommendation by unions or other associations. As it happens that recommendations are made by unions to their members it easily can be considered as a unilateral price fixing, without negotiating with employers/businesses.

Collective bargaining is a tool of industrial relations and it helps to create a level playing field for those working in the sector. Where the (sectoral) national partners consider it necessary and relevant to extend their bargaining to specific working conditions of self-employed that should be an autonomous decision by those social partners.

In our view the principles that should be overarching to allow for collective bargaining for self-employed will not automatically solve the Commission's aim to support a specific category of self-employed which have low income.

It may well be that they are even neglected as self-employed with less such need would be the first to take advantage of a possibility to undertake collective bargaining.

Q3: What are your views in relation to each of the four mentioned options especially in relation to their possible social and economic impacts?

There will be four options impact assessed, ranging from solo self-employed providing their own labour through digital labour platforms to those providing their own labour to a professional customer of any size.

The options only look at the right of self-employed to undertake collective bargaining to various sizes of professional customers or with digital platforms. It makes no mention of the role of social partners which is surprising as working conditions is the area of expertise of social partners. The proposed options ignore this. It should therefore be subject of the impact assessment what could be the consequences and how it could intervene with existing industrial relations.

In our view, the proposed options do not serve the purpose and may endanger an equal level playing field in many sectors. Without guidance and involvement of social partners there is a serious danger that it may mean the opening of pandora's box.

Finally, as a general remark self-employed who only work for one customer will generally be regarded as falsely self-employed according to labour law in most countries and therefore there is no need for an initiative to cover such type of 'platform' workers.

To conclude, it is clear that the impact assessment should carefully take into account the scope of the group of self-employed, as it can now be anyone, whilst the Commission's intention is to focus on a specific group of self-employed in society. It should also consider carefully the role of social partners, their autonomy to collectively bargain and their know how in industrial relations. Finally the assessment of collective bargaining under competition rules should be conducted on a case-by-case basis as there is no overarching solution for what concerns particular situations.