



ECSA, FERA and FSE comments on the European Commission's inception impact assessment regarding collective bargaining agreements for self-employed and the scope of application of EU competition rules

3rd February 2021

The European Composer and Songwriter Alliance (ECSA), the Federation of European Screen Directors (FERA) and the Federation of Screenwriters in Europe (FSE) collectively represent tens of thousands of authors, including, composers, songwriters, film/TV directors and screenwriters in Europe. Our organisations very much welcome this inception impact assessment and the general objective of defining EU competition's scope of application to enable an improvement of the working conditions of freelancers through collective bargaining agreements.

Authors are in their vast majority freelancers who face precarious working conditions as well as low and unstable income. They also have a systemic weak negotiating position vis-à-vis their contractual counterpart. An EU wide study of the income of European Screenwriters and Directors established that their median after-tax annual income from their work as authors was €19,000 (including income generated in that year from the exploitation of past work) in 2016. In addition, an internal survey with ECSA Members in 2020 has shown that 74% of music authors cannot live from the income from their artistic profession. Various national studies on the situation of freelance writers (of literature, poetry, etc.) show falling annual income which was in 2017 around or less than €10,000.

In some EU Member States (Ireland, Netherlands, Spain), the members of our respective organisations have been actively prevented from collective bargaining on the grounds that such bargaining contravenes competition law as applied in those Member States. In a few other EU Member States (such as Germany), collective bargaining is explicitly allowed. This patchy framework creates confusion and a distortion of the internal market but also discourages collective bargaining on the grounds of lack of legal certainty, since those who might subscribe to a collective bargaining agreement are unsure about the legality of its provisions.

The potential usefulness of collective bargaining for authors and performers to address their "weak negotiating position" has been acknowledged by the EU in the 2019 Copyright Directive¹ (Title IV, Chapter 3 - Fair remuneration in exploitation contracts of authors and performers / Articles 18 to 23), due to be implemented by all EU Member States before 7 June 2021. Those provisions refer seven times to collective bargaining agreements as a mean to reach the level of protection set out in the Directive. However, the application of competition law still constitutes a strong potential impediment to the implementation and the practical application of the Directive at national level. Removing this impediment will be key to fully implement the provisions of the copyright directive.

With regards to the EU legal instrument foreseen, the Inception Impact Assessment suggests that the Commission may proceed by way of a Council regulation or a Commission Communication. Our organisations consider that a Commission Communication will be insufficient to tackle the problems identified and that a Regulation, with consequent legal force, would be essential to provide enough legal certainty to solve this issue. Given that the matter

¹ Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC

has already been the subject of action by competition authorities in a number of Member States, that all Member States include specific provision on these matters in their national legislation, and that there are a number of relevant decisions at the Court of Justice of the EU, only a regulation – binding in its entirety and directly applicable in all EU countries – can ensure that EU competition law does not stand in the way of collective agreements for freelancers and self-employed.

The Commission offers four alternative approaches to address the problem:

Option One, which would exclude professions which are traditionally freelance, would clearly be unacceptably discriminatory in that the Copyright Directive encourages use of collective bargaining by authors and performers, while, under Option One, a Regulation would prevent access to this option for authors and performers while granting it to other freelance workers.

The contractual counterparts of freelance authors and performers range from global companies to SMEs, including micro-companies. These smaller companies constitute the vast majority of employers in certain cultural and creative sectors (e.g. audiovisual production) and are often grouped together in representative organisations which represent the interests of their profession in discussions with Government and state agencies, as well as in collective bargaining with those that they contract who are directly employed. As a result, Option 2 would still prevent a vast number of our members' organisations and their contractual counterparts to engage into collective bargaining agreements.

To ensure that these organisations can be the counterparties of representative organisations of authors or performers in an equitable manner, Option Four of those presented by the Commission in the Inception Impact Assessment would be the only one which could achieve its purpose.

In sum we strongly welcome this initiative by the Commission which, from the perspective of authors, clarifies an existing contradiction in the application of Competition law in a positive way and facilitates the effective use and implementation of Title IV, Chapter III of the Copyright Directive. However, we believe that the proposed action is unlikely to be of significant benefit to authors unless it is enacted as a Regulation and at the level of the Fourth Option suggested by the Commission in the Inception Impact Assessment.

ECSA (European Composer and Songwriter Alliance) - The European Composer and Songwriter Alliance (ECSA) represents over 30,000 professional composers and songwriters in 27 European countries. With 57 member organizations across Europe, the Alliance speaks for the interests of music creators of art & classical music (contemporary), film & audiovisual music, as well as popular music.

Web: www.composeralliance.org / EU Transparency Register ID: 71423433087-91

FERA (Federation of European Screen Directors) - The Federation of European Screen Directors (FERA), founded in 1980, represents film and TV directors at European level, with 48 directors' associations as members from 35 countries. We speak for more than 20,000 European screen directors, representing their cultural, creative and economic interests.

Web: screendirectors.eu / EU Transparency Register ID: 29280842236-21

FSE (Federation of Screenwriters in Europe) - The Federation of Screenwriters Europe is a network of national and regional associations, guilds and unions of writers for the screen in Europe, created in June 2001. It comprises 25 organisations from 19 countries, representing more than 7,000 screenwriters in Europe.

Web: www.federationscreenwriters.eu/ EU Transparency Register ID: 642670217507-74