SUBMISSION TO THE CONSULTATION ON THE DRAFT GUIDELINES ON THE APPLICATION OF EU COMPETITION LAW TO COLLECTIVE AGREEMENTS REGARDING THE WORKING CONDITIONS OF SOLO SELF-EMPLOYED PERSONS

Introduction

The undersigned organisations represent hundreds of thousands of authors, including screenwriters, film/TV directors, composers and songwriters in Europe. Our members are self-employed authors who are encouraged by the 2019 Copyright Directive to collectively bargain but are too often prevented by the application of Competition Law from doing so.

We would like, once again, to welcome this initiative by the Commission. The European Union, in the 2019 Copyright Directive[1], already formally accepts that authors and performers are in a "weak bargaining position"[2] and has encouraged collective agreements as a prospective route to improve their situation in collaboration with their contractual counterparts. A serious block to progress to achieve these EU policy goals, as outlined in Title IV, Chapter III of the Copyright Directive entitled "Fair remuneration in exploitation contracts of authors and performers", is the well-established understanding that authors and performers who were freelance would be defined as undertakings for the purpose of Article 101 of the TFEU and were therefore unable to enter into collective agreements.

National Competition Authorities in three member states have taken action against organisations of authors and performers and the relevant governments have struggled to amend their legislation to affect the desirable social goal of improving remuneration for authors while maintaining respect for competition law. All over Europe, the legal uncertainty raised by the articulation between competition law and collective agreements has often prevented authors and their contractual counterparts to even contemplate the prospect of a collective agreement and start negotiations.

[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 (Text with EEA relevance.)

[2] Recitals 72 and 75 of 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

The Commission initiative to publish these Guidelines, which have as their stated objective "clarifying the circumstances in which competition law does not stand in the way of collective agreements to improve the working conditions of certain self-employed people" is therefore welcome.

2019 Copyright Directive

The inclusion in the draft Guidelines at Articles (37) and (38) of a commitment not to act against collective agreements negotiated in the context of the implementation of the Copyright Directive is the logical continuation of a policy of trying to address the issue of authors' remuneration by facilitating collective action, removing an apparent contradiction between the policy goals of the Copyright Directive and the practise of occasionally challenging collective agreements by authors and performers on the basis of Article 101. It is our sincere hope that such a commitment will effectively encourage the negotiations and the adoption of collective agreements between our member organisations and their contractual counterparts.

Should there be elements of a collective agreement, negotiated by authors, and not covered by reference to Title IV, Chapter III of the Copyright Directive then they can be picked up, subject to limitations on counterparties of a certain economic strength, in Articles (34) and (35).

Particular status of authors in the Guidelines

However, in the logical taxonomy of levels of solo self-employed persons that the Guidelines propose – ranging from workers, through false self-employed, economically dependent, "side-by-side" and solo self-employed at digital labour platforms - authors fall in the last category – those with weak bargaining position or who wish to establish collective agreements pursuant to national or EU law or dealing with parties of a certain economic strength.

The Guidelines make clear that the Commission does not consider solo self-employed people in these categories to be outside Article 101 of the TFEU, but proposes only to exercise a margin of discretion and treat collective agreements reached by this group as a negative enforcement priority.

In that context the fact that the Guidelines are not a legislative act leaves open a degree of legal uncertainty which, to the extent that it exists, is particularly worrisome for those

categories of solo self-employed, such as authors, still not considered to be workers or their equivalent. A complicating factor here may occur where groups of authors seeking to collectively bargain with, for example, a broadcaster may well be composed of a mixture of persons, some of whom will be economically dependent (as defined at Articles (24) and (25) of the Guidelines - and therefore considered to be outside Article 101 of the TFEU - and some who are not economically dependent.

Article 16 - collective refusal to provide labour

While welcoming, as essential, that the principle of a collective refusal to provide labour (at Article (16)) would not, per se, be in conflict with competition law, we see some difficulties arising from the inclusion of the concept that a refusal to provide labour would be "necessary and appropriate".

The implication is that a group of solo self-employed might engage in a refusal to provide labour which they themselves considered unnecessary and inappropriate.

The weak bargaining position of authors is in large measure the result of their commitment to their profession. It is difficult to imagine a situation where a representative organisation of authors would propose a collective refusal to provide labour except in extreme circumstances.

It might be more appropriate therefore if the Guidelines were limited in this respect to a requirement that the exercise of a refusal to provide labour should not be done in a way that impinges on competition law.

This limitation would also fit with the primary aim of the Guidelines to remove competition law as an issue from the consideration of collective bargaining by solo self-employed people including authors.

Aside from this concern we see the provisions of Article (16) as sufficiently clear and do not see benefit in the Commission trying to introduce additional clarifying language.

Article 15 – kinds of agreements covered

We would also like to commend the inclusion in the Guidelines in Article (15) of a wide interpretation of the concept of collective agreement, in line with the 2019 Copyright Directive. Authors are often organised into representative organisations which are not trade

unions and not part of national or local social dialogue, which usually focuses on employees and their relations with employers. As a result, limiting the scope of collective agreements to trade unions only would simply prevent our organisations to engage into collective agreements and preclude the Directive to reach its full potential.

Some Member States acknowledge this issue and have addressed it. Section 36 of the German Copyright Law, for example, makes specific provision for so-called Joint Remuneration Agreements to be made by authors with their contractual counterparts and French law provides for inter-professional agreements which also address remuneration issues.

A limitation on the form of collective agreement could, as well as being an interference in industrial relations practises by Guidelines which are intended to be limited to considerations of the impact of competition law, reduce the successful collective agreements already being reached by solo self-employed.

Article 17 - Information to solo self-employed members of an organisation

It would seem self-evident, but is perhaps worth mentioning, that the "multiple parties on each negotiating side" referred to at Article (17) would necessarily include the solo self-employed members of the representative organisation or trade union. How they would be engaged in consultation and decision making about negotiations with contractual counterparties is an issue for each organisation of self-employed persons but clearly cannot be limited by the Guidelines.

Publication of recommended rates

An aspect of the Guidelines where the signatory organisations to this letter would request a re-consideration is that of the publication of recommended rates of remuneration.

We would propose that a margin of interpretation be introduced, probably in Article (17), that would allow the publication of recommended rates in a situation where negotiation with the contractual counterparties to establish agreed rates of remuneration had proved impossible either because of a refusal to negotiate or because of a failure of negotiations.

We believe that this would contribute to clarity and transparency in the market place for the work of solo self-employed authors. The publication of recommended rates by solo self-employed covered by these Guidelines within the limits described could hardly be compared

to price fixing because in practise each author is still entitled to agree whatever price they wish regardless of the existence of a transparently available bench-mark in the share of recommended rates. Such recommended rates would have neither the object or effect of the prevention, restriction or distortion of competition within the internal market. Nor could the publication of recommended rates have any impact on prices to consumers as a) recommended rates would not constitute fixed prices, b) authors do not provide their labour directly to consumers and c) prices charged by the counterparty to the consumer are not related to the level of remuneration of authors but rather as a fixed price paid for access to a service which includes the product of the authors work, such as a cinema theatre, a broadcast service, a streaming platform accessible through a monthly or annual subscription fee and so on.

"Subordinate" contractual counterparts

A problem which we would also hope could be addressed, which is perhaps particular to authors and performers is the "subordinate" role often played by the immediate contractual counterpart of authors and performers. The authors immediate contractual counterpart can often be an independent producer, but that producer is dependent on the contract and associated funding/investment coming from a broadcaster or streaming company or state agency which has commissioned the work. The commissioning producer will have considerable authority over the working conditions of the author or performer.

In the limited collective bargaining which does happen in the audio-visual industries, it is relatively common for independent producers organisations to insist that they have no capacity to bargain on matters ultimately decided by the commissioning producer and for the commissioner to insist that they are not the direct contractual counterpart of the author.

A provision that would allow for collective bargaining with a secondary contractual counterpart or for the possibility of a tripartite agreement would be very helpful in addressing a relatively minor point but one which could be used to avoid engagement with collective bargaining by some groups of contractual counterparties.

Review and assessment

Given that the intention of the Guidelines is to remove the role of competition law in respect of collective agreements by certain categories of solo self-employed, a continuing

engagement and monitoring of the Commission to ensure the consistent application of the Guidelines by Nation Competition Authorities is necessary.

However, the success of the Guidelines would surely not be measured solely by the extent to which issues with Competition law are successfully dealt with, but rather would also require that a pattern of successful collective bargaining by solo self-employed has resulted.

We would suggest that the inclusion of a commitment to review the Guidelines and the consideration of possible further action in case of diverging application by NCAs would be a useful addition to the Guidelines perhaps as an Article (40).

Conclusion

While certain improvements are still necessary, these Guidelines are an important step towards removing the competition law obstacles to more collective bargaining agreements for authors and performers. In that regard, the discussions on the "Protecting the Right to Organize Act" in the United States demonstrate that this is a global issue for all creatives in the world. Once the Guidelines are adopted, the European Union and its Member States will not only have a duty to ensure that both the 2019 Copyright Directive and those Guidelines effectively lead to more collective agreements and that those agreements cannot be circumvented, notably through the artificial application of foreign law. They should also play a proactive role with third countries and in trade agreements to ensure that the European overarching policy objective of a fair remuneration of authors and performers can be extended beyond the EU and improve the working conditions of all creative talents on a global scale.

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THE SIGNATORIES

ECSA (European Composer and Songwriter Alliance) 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), founded in 1980, represents film and TV directors at European level, with 49 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) is a network of national and regional associations, guilds and unions of writers for the screen in Europe, created in June 2001. It comprises 27 organisations from 22 countries, representing more than 7,500 screenwriters in Europe.

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