



## DRAFT RESOLUTION

### ON THE RECOGNITION OF THE BASIC RIGHTS OF PERFORMING ARTISTS

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#### **I. CURRENT STATUS**

##### **A. The majority of jobs offer no long-term security**

1. Performing artists are greatly affected by unemployment and underemployment, with unemployment rates ranging from 20% in Sweden to as high as 50% in Portugal. Fixed-term contracts represent a major proportion of contracts, reaching 50-75% of those on offer to musicians. Comedians, dancers and pop singers are mostly engaged for a period not exceeding the duration of the projects they work in. The average duration of engagements is particularly short, often less than a month. In France, performing artists work on average just 42 days per year<sup>1</sup>.

2. No country has yet implemented an effective response to this employment instability. In Central and Eastern European (CEE) countries, the lack of security is being aggravated by the financial crisis which, apart from its direct effects, is sometimes being used as an argument to cut jobs in the arts (Poland, Latvia), with long-term jobs being replaced by jobs with fixed-term contracts (Serbia) or with collective bargaining on working conditions being suspended or even abandoned. This is even the case in certain internationally renowned institutions with long-term missions.

##### **B. Imbalances in contractual relationships lead to low levels of pay**

3. With the exception of a few stars and those working for permanent institutions, performing artists generally speaking find it difficult to actually live off their work. The fees they earn are subject to great fluctuations and can be very low, especially in CEE countries. This means that a large number of artists are forced to take on a second job to ensure a decent income, preventing them from devoting enough time to keeping up their artistic skills and studying new works.

4. Revenue from intellectual property rights in association with the exploitation of sound or audiovisual recordings is also kept at levels too low to constitute a satisfactory source of remuneration, with the exception of the few top artists whose fame gives them real bargaining power vis-à-vis their producers: in France, the lead singer of a popular CD will receive royalties ranging from 2 to 4% of the CD's sale price, i.e. between 30 and 60 cents per CD. If a group is involved, then this revenue will have to be shared between the members as appropriate. All that "accompanying" musicians receive is a lump sum upon signing the contract. As regards Internet sales, the lead singer will receive between 3 and 4 cents for a title with a 99 cent price tag, with any accompanying artists receiving nothing at all.

5. In the audiovisual field, the contractual inequality of the respective parties, coupled with the perverse effects of the presumed contractual transfer of exploitation rights from performers to producers that legislation in many countries has introduced, mean that many artists have nothing to negotiate other than a ridiculously low lump-sum remuneration covering both their work and all downstream sales. Though the distribution of audiovisual content on the new media is expanding fast (in particular on-demand services), artists' remuneration hardly extends to these new distribution channels.

##### **C. The lack of any legal status means limited or no access to social protection**

6. In the majority of countries, there is national legislation protecting salaried employees and according them rights deriving from the transposition of international standards<sup>2</sup>, such as the European Social Charter or various ILO conventions. Such protection does not stretch to so-called "self-employed" performing artists.

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<sup>1</sup> cf.: M. Gouyon / F. Patureau, *Tendances de l'emploi dans le spectacle* (Employment trends in entertainment), DEPS, French Ministry of Culture and Communication, 2009.

<sup>2</sup> cf.: European Social Charter – ILO conventions and recommendations – the EU's Charter of the Fundamental Social Rights of Workers - the Universal Declaration of Human Rights (Article 23).

7. Of the 41 countries studied by the *Compendium des politiques et tendances culturelles en Europe*<sup>3</sup> (Cultural policies and trends in Europe), 30 do not have any mechanism for compensating self-employed performing artists during periods of unemployment. Portugal, already cited for its unemployment rate of over 50%, is one of these 30 countries, together with the United Kingdom where 80% of performing artists are self-employed. This category also contains countries deemed to have high levels of security, such as Germany, which has introduced a common law system applying the prerogatives of wage-earners to self-employed performing artists, considering them to be "quasi-employees", though without access to unemployment insurance.

8. The situation is no better regarding access to state pension funds or social security: 18 out of 41 countries do not require self-employed performing artists to belong to a pension scheme and 23 have no law governing their attachment to a social security scheme.

#### **D. Self-employed artists find themselves having to fight for access to collective representation**

9. In certain countries - including Ireland - the strict application of competition law to self-employed performing artists prohibits them being represented by unions, which are treated in this case as illegal cartels between competing companies. This fact makes it impossible for them to work on improving their legal status and leaves them completely isolated, with their ability to negotiate satisfactory contract terms reduced to nil.

10. In Ireland in the early 2000s, the Office of Fair Trading (OFT) first questioned collective agreements guaranteeing minimum wages to press photographers and actors<sup>4</sup>, stating that they constituted unfair price-fixing. A question-mark was subsequently placed over voice actors doing voice-over in radio and television and over musicians. The Irish OFT's E/04/002 decision treats actors as entrepreneurs. Arguments<sup>5</sup> put forward to substantiate this position are based on the absence of any employment contracts and the security (health insurance, paid leave) deriving from such, which are not sufficient to establish a legitimate employee status. The OFT sought to substantiate its position by citing the lack of subordination vis-à-vis "the employer", but stopped short of assessing whether an artist had any real possibility of exerting such independence.

11. With its ruling of 15 January 2010, the Dublin Labour Court overturned this legal interpretation, affirming its jurisdiction to rule over a case involving a self-employed musician<sup>6</sup>. It based its decision on the Industrial Relations Act<sup>7</sup>, recognising the artist as a *worker* with an obligation, as a musician, to perform the work personally, without being able to delegate or subcontract it. The Code of Good Practice<sup>8</sup> adopted in Ireland to facilitate the distinction between workers and service providers provides further arguments to this effect: the fact that certain working conditions are imposed on an artist (or in a wider sense, the person under contract), or that the artist has no interest in the management - for good or for worse - of the resources of the agency hiring him, constitute characteristic attributes of an employment relationship.

12. Whether employed or self-employed, the vast majority of performing artists work in a relationship of subordination vis-à-vis the person or organisation hiring them. This corresponds to an employment relationship, as suggested by the above example and many other cases referred to the traditional judiciary dealing with the subject. As workers, these artists should benefit from social security, fair wages and other rights recognised by international law. Carrying out their profession as self-employed workers should in no way interfere with their right to organise and to collective bargaining.

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<sup>3</sup> [http://fgimello.free.fr/enseignements/metz/institutions\\_culturelles/intermittence.htm](http://fgimello.free.fr/enseignements/metz/institutions_culturelles/intermittence.htm)

<sup>4</sup> Cf : Eurofound, *Self-employed workers: industrial relations and working conditions*, 03/2009.

<sup>5</sup> The Court uses the following criteria (2 .15 - 2.16) to establish service provider status: Most actors are not subject to the "pay as you earn" taxation imposed on employees / they do not work for just one employer / they do not enjoy the prerogatives attached to an employment contract such as social security, paid holidays, maternity leave etc.. / they do not enjoy job security / they may freely accept or refuse a contract / they are generally not considered employees of a particular agency.

<sup>6</sup> The Labour Court, Dublin, CD/09/453, 01/2010.

<sup>7</sup> Article 23 of the *Irish Industrial Relations Act*, 23, 1990, defines a worker as "any person aged 15 years or more who has entered into or works under a contract with an employer, whether the contract be for manual labour, clerical work or otherwise, whether it be expressed or implied, oral or in writing, and whether it be a contract of service or of apprenticeship or a contract personally to execute any work..." Service contracts are explicitly referred to within the scope of this definition.

<sup>8</sup> As a result of the negotiations conducted in connection with the "Programme for Prosperity and Fairness" agreement, an "Employment Status Group" was set up to come to a decision on the question of employment statuses.

### **E. Major increase in the number of “bogus self-employed” and in undeclared work**

13. In many countries, contracting parties are free to define the contractual relationship between the performing artist and his "employer" as they see fit. Given the imbalance of power, the choice is usually made by the employer who often requires the artist to accept self-employed status as a way of avoiding the social security contributions he would have to pay when hiring a salaried worker. Such bogus self-employed workers are well aware of the vulnerability of this status, without having the least control over their working conditions. They are subordinated to the person or organisation engaging them, which gives their work the character of an employment relationship<sup>9</sup>. In Poland, this is the case for 70-80% of artists. In other countries like Hungary or Belgium, the bogus self-employed are encouraged to set up micro-enterprises

14. In other countries such as Germany, the employment relationship is recognised regardless of the legal status of the artist. In France, any engagement of a performer is based on a presumed employment contract, unless proven otherwise. The use of bogus self-employed workers is considered as undeclared work, making employers liable to punishment. The 2008-2009 Hartung case, in which the German orchestra conductor V. Hartung was charged with illegally employing musicians, is a recent example of this problem: their employment conditions and their lack of any documents backing up their status as self-employed musicians cast serious doubts on the whether the status was being legitimately used. Initially sentenced, V. Hartung won his appeal on the grounds of lack of evidence contradicting the musicians' assertion that they were self-employed. To the detriment of the protection of performing artists and the fight against social dumping, the Court declined to look into the relationships between the contracting parties to assess the existence of an employment relationship.

15. There is a clearly an urgent need to address the problem of self-employed performers' lack of protection, as the current situation encourages undeclared work and downgrades employment conditions within the entire profession.

### **F. Mobility can complicate or prevent access to rights for which contributions have been paid**

16. Performing artists often work outside their country of residence. Performing in front of international audiences, in itself an enriching experience, allows artists to increase their number of engagements, to become better known and to develop their professional contacts. From Avignon to Edinburgh, from Aix-en-Provence to Bayreuth, such major festivals symbolise the internationalisation of performing arts. Alongside such flagship events, there are a whole host of lesser-known organisations hiring artists of various nationalities under a very wide range of conditions.

17. Mobility often leads to limitations being put on performing artists' social security rights or making access to them more difficult due to the disparity of employment and social security schemes. Dependent on whether he is in England, Belgium or elsewhere, the same artist will have a different status. Treated in the one country as self-employed, he might well be treated as a salaried employee in the next one, with different rights in each country. This back-and-forth between different systems puts a question-mark over access to social security benefits, mainly due of the short-term nature of assessment periods. This problem is particularly tricky with respect to pensions, the calculation of which constitutes a formidable challenge.

18. The lack of effective coordination between national social security schemes can also lead to a performing artist having to pay social security contributions simultaneously to two social security systems for the same protection, despite the coordination mechanisms foreseen by the EU. In 2000 the ECJ ruled on a dispute arising from such circumstances: the Theatre de la Monnaie in Brussels had deducted contributions claimed by the Belgian social security from the salary of English singers, even though these artists were subject to the same contributions in their home country. This led them to claim reimbursement of this amount<sup>10</sup>. Interpreting the terms of Regulation 1408/71, the ECJ held that when a worker, regardless of whether he is salaried or self-employed, works in another Member State for a period less than six months, he remains subject to the laws of the Member State in which he usually works.

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<sup>9</sup> Naving regard to the ILO's Report V on *The employment relationship*, for the 95th session of the International Labour Conference in 2006

<sup>10</sup> ECJ, 30/03/2000, case C-178/97, Barry Banks et al./Théâtre royal de la Monnaie.

## **G. Occupational diseases specific to performing artists are not recognised**

19. The degree to which national legislation on occupational diseases takes into account diseases related to artistic practices remains inadequate or is often non-existent. Yet there are a number of very debilitating diseases specifically affecting performing artists which can even put a question-mark over their being able to continue working. One example is focal dystonia, which affects 1 to 2% of musicians and causes involuntary contractions of regularly used muscles, such as those in instrumentalists' fingers and hands in (the prevalence of the disease is 50 times higher among instrumentalists than in all other professions subject to repetitive movements, where it is only 1 in 3400). This disease often marks the end of the affected musician's career, yet it is not recognised as an occupational disease, meaning that affected artists are not entitled to any form of support.

20. Very few rules exist to protect the health and safety of artists in their working environment. The fear of losing their jobs leads them to conceal - or to accept that others conceal on their behalf - accidents occurring at work or other health-related factors (such as pregnancy). This is often the case with dancers, for whom this situation increases the risk of developing permanent disabilities due to lack of appropriate treatment for repeated injuries to muscles and joints.

## **II. INTERNATIONAL STANDARDS AND RECOMMENDATIONS**

- having regard to the European Social Charter of the Council of Europe, in particular Articles 2, 4, 5, 6, 10, 12, 18 and 22
- having regard to the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions
- having regard to the Universal Declaration of Human Rights, in particular Articles 22, 23, 24, 25, 27 and 28
- having regard to the International Covenant on Economic, Social and Cultural Rights of the United Nations, in particular Articles 6 and 15
- having regard to the UNESCO Recommendation of 1980 concerning the Status of the Artist
- having regard to the European Parliament resolution of 9 March 1999 on the situation and the role of artists in the European Union
- having regard to the European Parliament resolution of 7 June 2007 on the social status of artists
- having regard to the ILO's Report V on *The employment relationship*, for the 95th session of the International Labour Conference in 2006
- having regard to ILO Convention 154 on Collective Bargaining
- having regard to ILO Convention 102 on Social Security and Convention 157 on the Maintenance of Social Security Rights
- having regard to ILO Convention 118 on Equality of Treatment (Social Security), and the Conventions 97 and 143 on migrant workers
- having regard to ILO Convention 87 on Freedom of Association and Protection of the Right to Organise and Convention 98 on the Right to Organise and Collective Bargaining.

## **III. RECOMMENDATION**

### **A. A high level of protection of performing artists' intellectual property rights.**

21. Member States should fully recognise performing artists' intellectual property rights in both the sound and audiovisual fields, guaranteeing artists a high level of protection with regard to such rights in association with the exploitation of recorded performances (whatever the type of media involved). Performing artists must be in a position to collectively exercise such rights, whether as employees or as self-employed workers, whether working as a lead or as an accompanying performer, to reduce the imbalance in the contractual relationship they have as individuals with their contractors or those commercially exploiting their work. Finally, such rights must not be subject to a presumed contractual transfer to the benefit of producers, as such a scheme generally prevents the artist from receiving any genuine benefit. Instead, they must be freely transferrable on the basis of collective agreements setting limits to the contractual freedom of parties

## **B. Legal and institutional frameworks adapted to the professional situation of performing artists.**

22. Innovative legal and institutional frameworks are necessary to take into account the specific working conditions of performing artists, especially the short-term and varied nature of their engagements, the diversity of their employers (in many cases in different countries), and income disparities from one year to another.

23. Access to social security, health insurance and tax systems and fair and flexible pension rights need to be guaranteed, whatever the nature of their contracts. Similarly, all contractual commitments of performing artists should include a full and compulsory accident insurance at no additional cost to the artist, whatever his legal status. Such schemes must be promoted and strengthened through international dialogue and the exchange of good practices.

## **C. A core set of employment-related rights for performing artists.**

24. The minimum rights guaranteed to workers should also benefit performing artists, regardless of their employment status and taking the specific features of the sector into account. A core set of professional rights should be provided to all performing artists, whether employees or self-employed, in particular the right to collective bargaining and to collective agreements negotiated on their behalf by the unions. Member States should agree on a minimum set of contractual provisions for performing artists working in different national legal environments.

## **D. Better coordination to facilitate mobility.**

25. Social security systems need to be coordinated on an international level so that artists can fully benefit from all rights accruing from their work, whether conducted in their home countries or abroad. A system for collecting information on periods of employment needs to be set up, together with easy access to such information to allow careers to be effectively monitored. Statistical surveys are needed on an international level to periodically assess the situation, with all Member States using the same criteria.

## **E. Involvement of performing artists in decision-making processes.**

26. Performing artists have a role to play in the decision-making processes involved in implementing this recommendation. Together with their representative organisations, they must be involved in the development and implementation of national policies. In countries where social dialogue is either nonexistent or inadequate, it is the duty of the state to promote its development, as well as providing both performing artists and their employers with training in collective bargaining. The establishment of representative organisations (unions, employers' associations) should also be encouraged and facilitated.

## **F. Recognition of occupational diseases connected with the performing arts.**

27. States must recognise as occupational diseases those induced by artistic practice, thereby enabling affected performing artists to benefit from healthcare and, whenever necessary, support in retraining. Such recognition goes hand in hand with studies and surveys directed at better understanding the causes and the impact of such diseases as well as with effective prevention campaigns. Adequate and effective regulation regarding work-related accident prevention and risk assessment in the context of live and recorded entertainment could both contribute to the improvement of working conditions and help artists to pursue their careers for a longer time.

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*The International Federation of Musicians (FIM) is an international non-governmental organisation representing musicians' trade unions, guilds and associations in about 70 countries covering all regions of the world, which enables it to speak for hundreds of thousands of musicians. The European group of FIM counts 28 musician trade unions of performers from 22 EU Member States.*

*The International Federation of Actors (FIA) is an international non-governmental organisation representing more than 100 performers' trade unions, guilds and associations around the world. The European group of FIA represents professional trade unions of performers in 23 EU Member States, in the European Economic Area and Switzerland.*