SECOND PHASE CONSULTATION OF SOCIAL PARTNERS UNDER ARTICLE 154 TFEU ON A POSSIBLE REVISION OF THE WRITTEN STATEMENT DIRECTIVE (DIRECTIVE 91/533/EEC) IN THE FRAMEWORK OF THE EUROPEAN PILLAR OF SOCIAL RIGHTS

Introduction:

This submission on behalf of the European Arts and Entertainment Alliance (EAEA), composed of the International Federation of Actors (FIA); the International Federation of Musicians (FIM); and UNI Global Union – Media, Entertainment & Arts (UNI MEI); addresses the 2 questions posed by the Commission on page 14 of the Consultation Document. The EAEA is also supportive of the views and positions expressed in the submissions to this consultation by the ETUC and UNI Europa.

The European Arts and Entertainment Alliance is a European Sectoral Social Partner sitting in both the Live Performance and Audiovisual European Sectoral Social Dialogue Committees. It is also a European Trade Union Federation, affiliated to the ETUC. Its three member federations FIM, FIA and UNI MEI bring together hundreds of thousands of professional performers, creators, technicians and other workers in the media and live performance sectors across the EU and neighbouring counties.

The EAEA represents workers in a small but dynamic and influential sector, with the so-called cultural and creative industries seen by policy-makers as an important driver of growth, innovation and cultural capital. However, the Media, Arts and Entertainment sector has also been subject to drastic and ongoing cuts in public funding in many EU countries stretching back to the onset of the financial crisis and the quality and sustainability of work in the sector has seriously declined as a result.

The short-term and project-based nature of much of the work in the sector, combined with the climate of cuts and challenges to business models arising from digitalisation, means that the so-called 'atypical' and 'new' forms of work referred to in the present Consultation Document are already very established in the sector and continue to expand. These include widespread and growing (largely dependent) self-employment; part-time and very short-term contracts; and cumulating a range of employment statuses – all of which is highly prevalent for workers in this sector. There is also a high level of intra-EU mobility in much of the sector due to touring, co-productions and other instances of cross-border working.

The challenges faced by these freelance workers, including the denial of access to basic rights and protections, are among the most pressing social and labour priorities in the Media, Arts and Entertainment sector.

Answer to Question 1

1) **Regarding the Scope of Application:**

The EAEA believes that the scope of application must be as broad as possible to capture the complexities of how the labour market has evolved. In particular in the area of self-employment, our sector throws up a wide range of experience, with many workers wrongly categorised as self-employed, some others in a grey area and some genuinely self-employed, but still providing their labour as 'workers'.

In the Media, Arts and Entertainment sector many workers are hired in the original 'gig economy'. Production and project-based working, as well as the wide range and diversity of workers involved in a given project, mean that multiple, short-term contracts and a variety of employment statuses are a common aspect of working in the sector, with self-employment becoming increasingly prevalent. Indeed, many active in the sector would consider such contracts not as "atypical," but rather as the form to which they are most accustomed, with the culture of "freelancing" highly developed within the sector. However, this does not change the fact that the work itself is often identical to that carried out under employment contracts and the relationship of dependency and subordination often fully or partially remains, despite the varied nature of the working arrangements. For this reason, we support the inclusion in the directive of criteria to assist with identifying the existence of a working relationship, but these must also allow for the inclusion in the directive of self-employed workers and be calibrated to tackle current and emerging loopholes that are used to take dependent workers out of the scope of labour protections. The criteria mentioned above should allow for the presumption of an employment relationship.

The listing of certain categories of worker to clarify the scope of the directive is helpful, but we believe it must remain dynamic (to take in new forms as they emerge) and should be further broadened to capture those self-employed workers who may otherwise fall outside the scope of its protections: *"(…) while making it clear that it applies to every type of person that for a certain period of time performs services for and under the direction of another person in return for remuneration, including domestic workers, temporary agency workers, on-demand workers, intermittent workers, voucher-based workers, platform workers,* ***self-employed workers and autonomous workers*****".** We strongly believe that a careful mapping of such forms and the new labour market intermediaries that they have given rise to must inform this work and should draw on sectoral experience as well as cross-sectoral trends.

Careful reflection on the criteria and their application will be needed and the EAEA and sister federation EFJ intend to bring their sectoral experience together and offer a legal analysis of the employment relationship in the Media, Arts and Entertainment sector, through their recently funded project "Reaching the Potential of Social Dialogue for all Workers", bringing together a grouping of legal experts to carry out this work. We look forward to making a contribution to this important reflection.

2) **Regarding the Provision of Information on the Applicable Working Conditions:**

We join many of our fellow trade union organisations in urging the Commission to ensure that the information be given **at the start of the employment relationship.** We further support the inclusion of additional information elements to be integrated into the list and welcome the detailed list set out by the ETUC in their response to the consultation. Drawing on the experience of the complex, highly mobile,

labour force in the Media, Arts and Entertainment Sector, we emphasise in particular the following proposed additions to the list of information to be given to workers:

- Information on equal pay for equal work
- Information on worker representatives in the workplace
- Information on sexual harassment protocols and support and reporting mechanisms available to workers
- Information to posted workers about their rights
- Information for workers working abroad specifying which law applies, the rights afforded to the worker in the host member state; how the right to equal pay for equal work has been secured as well as where the social contributions are paid. (This would make a significant difference to performers, creators, technical staff and other workers engaged in the context of touring for example, where lack of transparency about terms and conditions has in some cases resulted in exploitative contracting and very poor working conditions).
- Information on conditions of accommodation
  We also warmly support the ETUC proposal for a "catch-all provision" aimed at requiring the provision of essential information relevant to the nature of the work, which we believe will better address specific sectoral challenges and will also serve to future-proof the Directive in a labour market that continues to evolve.

3) Regarding the new minimum rights aimed at reducing precariousness at work:

We must begin by noting that while we welcome the aim of developing new rights aimed at addressing gaps in protection, we strongly emphasize that such rights will be a minimum floor and must, **under no circumstances, undermine existing provisions in any member state,** including collectively bargained provisions. Downward convergence would be a disastrous result of this initiative and as such, we believe it is of key importance that the legal instrument include a non-regression clause. The transposition of these rights into national law cannot be a pretext to lower any existing standards.

We further wish to highlight that while we welcome the Commission proposal regarding three new rights (we offer a more detailed overview of our specific view of these rights below), we regret that the scope and ambition of the proposal seems significantly reduced since the first consultation. These new rights in themselves will not be sufficient to significantly advance decent work and fair working conditions. A wider scope is needed and we suggest two further additions below, which we believe are fundamental to make the minimum floor of rights a meaningful one.

3.1 Right to predictability of work:

We strongly uphold the detailed suggestions made by the ETUC in its consultation response.

In particular, the EAEA believes that the Commission proposal that a written statement might set out: *"the normal working schedule or the principle that there is no predetermined and recurrent working schedule" (…) "the amount of guaranteed hours or the principle that there is no guaranteed paid hours"* runs the severe risk of fundamentally undermining the stated aim of addressing precariousness, by essentially recognising and legitimising some of the most precarious forms, including zero hour contracts, in this formulation.

To meet the aim of addressing precariousness, the EAEA urges the Commission to prohibit zero hours contracts and shift the focus instead to creating an obligation on the employer to provide a minimum number of guaranteed hours, completed by strict anti-avoidance measures.

3.2 Right to request another form of employment and receive a reply in writing

The EAEA believes that without a clear vision with respect to what this right is aiming to achieve, it may very well prove worthless. This provision should aim to provide a pathway to more secure employment and income. The right to make the request is therefore insufficient: such a request must create a corresponding obligation on the part of the employer to genuinely consider it, discuss it with the worker concerned and justify any refusal on objective grounds and in pre-defined circumstances. The Commission could offer guidance on specific instances where refusal is justified or require employers to offer means and information to their workers on the procedures for such requests.

We further believe that the current formulation proposed by the Commission - limiting such requests to workers who are not employed on a permanent basis and who have accrued a certain level of seniority – is too narrow and misses meeting the needs of the most precarious. We believe this possibility must be available to all workers in all situations. It is also vital to ensure through accompanying enforcement measures that such requests cannot result in the worker suffering any detriment.

3.3 Right to a maximum duration of probation period

Here the EAEA wishes to join trade union colleagues in suggesting the Commission ensure the focus is clearly defined as being on probation periods for new workers only. It is also vital to ensure that the Directive would not be used to introduce probation periods where they are not used or do not exist.

The EAEA further wishes to warmly commend to the Commission the inclusion of

3.4 The right to fair remuneration and to fair terms and conditions of employment

The Directive will be a vital opportunity to make good on the undertaking of President Juncker to drive forward the principle of equal pay for equal work for all workers, as set out in the scope of application, **and with the vital inclusion of self-employed and autonomous workers, of whom the EAEA counts many in the sectoral work force**. Such fair remuneration would be set in accordance with national law, collective agreements or practice at the appropriate level and in conformity with national industrial relations traditions.

3.5 The right to collective bargaining for self-employed workers

In its first consultation, the Commission made detailed reference to the Refit evaluation in terms of compliance on page 6, which highlighted the implementation issues associated with the "'*grey area' between self-employment and subordinate employer-employee arrangements, especially in the case of bogus self-employment*". This corresponds closely to the situation in the Media, Arts and Entertainment sector, where work arrangements often fall into this so-called 'grey' area, with combinations of subordinate and autonomous arrangements, very short-term contracts and frequent dependent or even bogus self-employment. Certainly, this group also includes genuinely self-employed people, who by the nature of their working relationships are also captured in the understanding of 'worker'. As we detailed in the first section of this response, expansion of the scope to include such workers is vital in the Media, Arts and Entertainment sector and in the many other sectors facing similar challenges. There is a clear

challenge to arrive at a workable EU distinction between the sole-trader carrying on a business and a worker in the everyday sense of that word (regardless of his/her classification in national systems). The marker of "subordination" is certainly part of making this distinction. This subordination also directly relates to the inequality of bargaining power that is the legal basis for the protection of collective bargaining.

Despite the fact that they are workers, self-employed workers are often deprived of the key protection and instrument for improvement of conditions offered by collective bargaining. Certainly this has proved to be the case in certain parts of the Media, Arts and Entertainment sector and obstacles to establishing collectively bargained minimums have in some cases significantly undermined conditions in the sector creating an unbearable drag on minimum rates, leading to a plummeting of standards in terms of pay and working conditions. This damages sectoral sustainability and quality of work but also flies in the face of the principle of equal pay for equal work, by creating scenarios in which employed workers and self-employed workers, carrying out the same task, for the same employer, in the same workplace will have conditions, rates of pay and access to work-related benefits that are absolutely at variance.

The work of the ILO on its Decent Work Agenda and on new forms of employment and how fundamental principles and rights at work apply to them is of direct relevance to this reflection. In this regard, we commend the points of consensus reached at the 2014 ILO tripartite Global Dialogue Forum on Employment Relationships in the Media and Culture sector and the recommendations they extend: in particular the recognition that fundamental principles and rights at work apply to all workers irrespective of employment status.[1]

For self-employed workers, the right to collective bargaining on rates of remuneration and fair working conditions, along with a specific written statement on terms and conditions of work, needs to be ensured. Such collective bargaining must clearly fall outside the scope of art. 101 TFEU.

We believe that failure to include this would be to miss an opportunity to make progress on strengthening social dialogue on national level and ensuring minimum protection to those most in need. We further believe that social dialogue will be an important tool to allow SMEs in particular to develop models and approaches that will facilitate them to meet their obligations under the scope of an expanded and reinforced future directive. Social dialogue will be the right instrument to drive a multiplier effect from such a directive and leverage further upwards convergence, addressing the growing inequalities in the labour market.

[1] Points of Consensus, ILO Global Dialogue Forum in the Media and Culture Sector, Ma 2014: http://www.ilo.org/sector/activities/sectoral-meetings/WCMS_243842/lang--en/index.htm

4) Regarding Enforcement:

The EAEA supports the enforcement tools set out in the ETUC response to the consultation and highlights the particular importance of:

- The presumption of an employment relationship as the vital basis for adequate protection of workers;
- The need for all workers to be able to be represented by their trade unions when seeking to address a breach of their EU Employment rights under this directive;
- The potential that so-called 'class action' procedures would offer to greatly enhance the power of unions to take meaningful actions for collective redress against infringers and benefit a larger number of workers.

Answer to Question 2:

5) Regarding willingness to enter into negotiation:

We refer the Commission to the Consultation response submitted by the ETUC, which we support and endorse:

> *"The ETUC is convinced that there are no longer the conditions, in terms of timing to start proper negotiations with the employers' organisations at EU level about the above-mentioned issues. In its letter sent to the employers' organisations and for information to the Commission at the end of July, the ETUC underlined that a formal 9-months negotiation wouldn't match with the time frame for Commission and Parliament to finalise the revision of the Directive before the end of the current legislative term. The ETUC had therefore proposed to the employers to engage in dialogue, with the purpose of providing the Commission with shared inputs. Such proposal was refused by the employers. Consequently, the ETUC urges the Commission to come up with a legislative proposal that will improve the situation for workers, and remains ready to engage in dialogue after the proposal will be made known.*
>
> *This does not prevent the social partners having dialogue on the proposals and communicating the outcome of that dialogue to the Commission."*

We join the ETUC in urging the Commission to come up with a legislative proposal. The EAEA has ongoing exchanges with its employer counterparts on labour market developments in the sector in the framework of the sectoral social dialogue committees on Live Performance and on Audiovisual. We firmly believe the European Social partners can add value and input to the policy development process and should take up an active role in dialogue with the EU institutions, when such a proposal is made known. We will invite our employer counterparts to exchange with us regarding sectoral specificities and challenges in light of such a proposal.

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Brussels, November 3, 2017