



EUROPEAN COMMISSION

DIRECTORATE-GENERAL FOR COMMUNICATIONS NETWORKS, CONTENT AND TECHNOLOGY

Media Policy
Copyright

Brussels
CNECT.I.2/R.W.

Mr. Barry Cowen TD
Select Committee on Budgetary
Oversight
Leinster House
Dublin 2
Ireland

Subject: Reply to your letter of 22 June concerning the report on Ireland's Film Tax Credit

Your Ref.: CBO-I-0415-2023

Dear Mr Cowen,

Thank you for your letter dated 22 June 2023 to Ms Themis Christophidou concerning the report on Ireland's Film Tax Credit published by the Committee on Budgetary Oversight of the Irish parliament. Your letter has been transferred to me and I am responding to you as acting head of the copyright unit.

In your letter, you raised concerns regarding the use of successive fixed term contracts and buyout contracts in the film production industry in Ireland and suggest assessing the interaction of such practices with EU law, notably employment, and copyright rules.

Fixed Term Work Directive

The Committee on Budgetary Oversight refers to the use of successive fixed-term contracts for film crew working across multiple productions and to the fact that such crew never acquire contracts of indefinite duration or any acknowledge of their service. The Committee has concerns whether this amounts to a breach of the Framework Agreement on fixed-term work annexed to Directive 1999/70/EC ⁽¹⁾ ("the Framework Agreement").

⁽¹⁾ Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP, OJ L 175, 10.7.1999

While the Framework Agreement recognises that contracts of an indefinite duration are the general form of employment relationship between employers and workers, it does not prevent employers from using fixed-term employment contracts.

Clause 3 of the Framework Agreement defines the term “fixed-term worker” as a person having an employment contract or relationship entered into directly between an employer and a worker where the end of the employment contract or relationship is determined by objective conditions such as reaching a specific date, completing a specific task, or the occurrence of a specific event. From the description included in the report of the Committee, it appears that the employment relationships within the film industry are defined in large part by fixed-term contracts due to the project-based nature of the industry.

To prevent abuse arising from the use of successive fixed-term employment contracts or relationships, Clause 5(1) of the Framework Agreement requires Member States to introduce, where no equivalent legal measures exist, one or more of the following measures: a) objective reasons justifying the renewal of such contracts or relationships; b) the maximum total duration of successive fixed-term employment contracts or relationships; c) the number of renewals of such contracts or relationships. Pursuant to Clause 5(2), Member States shall determine under what conditions fixed-term employment contracts or relationships shall be regarded as “successive”.

The Court of Justice of the European Union (“the Court”) has confirmed that Member States enjoy a certain discretion as regards the choice of relying on one or more of the measures listed in Clause 5, or on existing equivalent legal measures, while taking account of the needs of specific sectors and/or categories of workers ⁽²⁾. The Court has also clarified that the Framework Agreement does not lay down a general obligation on the Member States to provide for the conversion of fixed-term employment contracts into contracts of indefinite duration. The domestic law of the Member State concerned must nonetheless contain other measures that are effective to prevent and, where relevant, penalise the abuse of successive fixed-term employment contracts ⁽³⁾.

Clause 4 of the Framework Agreement prohibits treating fixed-term workers less favourably than comparable permanent workers in respect of employment conditions solely because they have a fixed-term contracts, unless different treatment is justified on objective grounds. This applies also to periods of service qualifications relating to particular conditions of employment (Clause 4(4) of the Framework Agreement).

From the information available to the Commission, the Irish Fixed Term Workers Act does lay down measures to prevent the abusive use of successive fixed-term contracts and the principle of equal treatment in working conditions, including as regards periods of service qualifications. It is the Commission’s understanding that this Act applies also to the film industry. The report of the Committee refers to the workers’ rights as set out in the Fixed Term Workers Act being systematically breached. If an employer does not act in conformity with the applicable national legislation which is, in principle, in compliance with EU law, it is a matter for the competent national authorities, including national courts, to intervene.

⁽²⁾ See, inter alia, judgment of 11.02.2021 in case C-760/18, M.V. and others, ECLI:EU:C:2021:113, paragraphs 55 and 56

⁽³⁾ Ibid, paragraph 58

Copyright rules

In your letter, you point at a growing trend of buy-out practices in the film production industry, which affect authors and performers.

We are aware that buy-outs practices are being used in the film production industry. The recently published European Media Industry Outlook ⁽⁴⁾ has revealed imbalances in the retention and ownership of intellectual property (IP) rights, in particular between European producers and broadcasters/ streamers. Some producers have reported a certain tendency to include in contracts the transfer of all IP rights in European works (e.g. film/TV series) in exchange of an upfront payment. In addition, the Media Outlook also refers to concerns raised over the use of such practices on individual creators, such as music composers.

Under EU copyright rules rightholders enjoy contractual freedom and are in principle free to determine whether, and under which conditions, their works and other subject matter are used, as well as their ability to obtain appropriate remuneration for such use. However, Directive (EU) 2019/790 on copyright in the Digital Single Market acknowledges that authors and performers tend to be in the weaker contractual position when they grant licences or transfer their rights (Recital 75). The directive introduces specific provisions to guarantee fair remuneration in the exploitation contracts of authors and performers (Articles 18-23). Such provisions include a principle of appropriate and proportionate remuneration for authors and performers, transparency obligations, contract adjustment mechanisms and alternative dispute resolution procedures.

Member States have some margin of manoeuvre to implement the principle of appropriate and proportionate remuneration. As mentioned in Recital 73, while a lump sum payment can also constitute proportionate remuneration, it should not be the rule. Under the directive, Member States are free to define specific cases for the application of lump sums considering the specificities of each sector. The Commission is actively monitoring the implementation of the directive in the Member States.

We are also in the process of further investigating the use of buy-out practices. Firstly, this should be one of the aspects to be covered by a stakeholder dialogue to be launched this autumn. Secondly, the Commission will launch a study before end of the year to further analyse recent developments in the contractual practices imposed on creators, such as buy-outs, in several sectors including the audiovisual sector, and assess their impact on remuneration and creation.

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We would like to thank you for consulting us on this matter. I hope you will find this information useful.

Yours sincerely,

⁽⁴⁾ <https://digital-strategy.ec.europa.eu/en/library/european-media-industry-outlook>.

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