



COLLECTIVE BARGAINING & SELF-EMPLOYED CREATIVES

Application of EU Law to collective bargaining agreements

Submission in response to call for evidence

About Us

The [Society of Authors](#) ('SoA') exists to protect the rights and further the interests of professional authors across the United Kingdom. Founded in 1884, the SoA has more than 11,500 members across all areas of the profession.

The SoA is also a member of the [European Writers' Council](#) ('EWC') and of the [British Copyright Council](#) ('BCC') as well as being a founding member of the [Creators' Rights Alliance](#) ('CRA'). We are therefore well placed to discuss the ongoing impact of the UK's departure from the EU on both the publishing and wider creative industries.

The [Association of Illustrators](#) ('AOI') is a membership organisation founded in 1973 to support and sustain illustrators and the illustration industry. The AOI is based in London, with members across the UK and a small percentage globally. Our membership of 3,000 strong is a significant number for our industry, and we are the representative body for the industry with illustrators, agents, and colleges as members.

The AOI is the President of the [European Illustrators Forum](#) ('EIF'), representing over 20,000 illustrators across Europe. Like the SoA, the AOI is a founding member of the Creators Rights Alliance (CRA) and is active in the British Copyright Council.

Our Members

The SoA and the AOI's memberships variously include journalists, broadcasters, illustrators, screenwriters and novelists, as well as translators based in the UK and across the EU27. They are mostly self-employed and broadly consist of six categories:

- i. British citizens resident in the UK providing services across the UK and/or EU member states;
- ii. Northern Irish residents holding British and/or EU citizenship providing services across the UK and/or EU member states;
- iii. EU citizens resident in the UK providing services across the UK and/or EU member states;
- iv. British citizens resident in EU member states providing services across the UK and/or EU member states;
- v. EU citizens resident in EU member states providing services across the UK and/or EU member states; and
- vi. UK and/or EU citizens resident overseas, trading into the UK and/or EU from outside jurisdictions affected by the [UK-EU Trade and Cooperation Agreement](#) ('TCA').



General Observations

The TCA runs to 1,263 pages. It therefore remains to be seen how the agreement will be implemented and, by extension, how it will affect our members in each of the categories outlined above. At its most basic, the TCA represents a significant improvement on No Deal and we hope that it will provide a baseline for future trade and cooperation, rather than a jumping off point for significant divergence in, and diminution of, competition rules and regulatory standards.

Translation, illustration and writing are significant contributors to the UK's creative industries, worth [£111.7 billion in Gross Value Added](#) – more than the automotive, life sciences, aerospace and oil and gas industries combined – and one of the biggest contributors to the UK economy. It is vital that the UK retains a genuinely world-leading regulatory system to safeguard UK creators' rights and that EU businesses have ready access to the UK's single market and the talent of creative professionals resident in the UK.

It is similarly vital that self-employed creative professionals providing services from and into the UK are not disadvantaged by application or interpretation of UK and/or EU competition rules that would prevent collective agreements in the publishing and creative industries, particularly given the significantly unequal bargaining power between commissioning companies and creative professionals.

Regulatory Alignment

The TCA is ambitious in its scope and unique in international legal terms in its attempt to facilitate both regulatory alignment and divergence across different sectors of the economy. UK and EU Competition Law is set to remain largely aligned under the TCA with the prohibitions in Arts. 101 and 102 [TFEU](#) continuing to have legal effect, to all intents and purposes, across the UK's internal market.

Our concern is that interpretation of these articles and/or legislation issuing from the Commission's consultation could adversely affect our ability to represent our members' interests, given the asymmetry of bargaining power that exists across the publishing and creative industries.

Collective Bargaining

The SoA does not ordinarily negotiate minimum rates for use of authors' published work or extracts. Alongside the Writers' Guild of Great Britain ('WGGB') and others, the SoA routinely negotiates with the BBC to set minimum terms for authors submitting pieces for broadcast drama and for licensing extracts from authors' work.

In practice, the BBC is content to engage in such voluntary agreements since it ultimately has the power to set its own rates and, in concluding such agreements with the SoA, avoids needing to engage in individual negotiations with our members at additional expense. It has, however, been unclear as to whether the SoA and/or others like the Publishers Association might be at risk of breaching EU Competition Law by seeking to agree *de minimis* terms with the BBC or other broadcasters in respect of members' work.

Fundamentally, the role of both the SoA and the AoI is to support our (self-employed) members to sustain their careers and thereby contribute to the industries in which they work. There is an important role around advising on fees and workloads to level the playing field between large and well-resourced corporations and individual artists and creatives. Without being able to advise in broad terms around fees, competition is materially compromised.

Without transparency surrounding fees charged and the terms on which they should be paid, self-employed creative professionals are routinely under-valued, accepting fees that are below their economic and societal value, and that compromise the sustainability of their careers and those of emerging professionals in their fields. We must stop an anti-competitive race to the bottom, and this is as much a problem in the UK as it is across the EU27.

Competition Law

Art. 101(1) TFEU provides that competition within the EU should not be restricted as a matter of law. In domestic legal terms, the principles set out in the [Competition Act 1998](#) substantially follow those of EU law¹ and a narrow view has historically been taken by the English Courts to ensure no material difference between UK and EU Competition Law².

Agreements serving to fix minimum terms for the supply of services are generally seen as being contrary to Art. 101(1) TFEU. However, it can be argued that the intention behind Art. 101(1) TFEU is merely to prevent harmful competition within the EU internal market and, by extension, the UK's following conclusion of the TCA.

Given that EU law also recognises collective bargaining agreements as a special category, EU law should not simultaneously seek to prevent trade unions acting in their members' best interests in setting minimum terms and/or in recommending *de minimis* rates where there are obvious disparities in bargaining power. We would ask that this fundamental principle be recognised in any amendments to, or clarification of, EU Competition Law.

Art. 156 TFEU provides that the Commission should promote co-operation between EU member states in the social field, including on collective bargaining matters. Furthermore, Art. 1 of the [Agreement on Social Policy \(\[1992\] O.J. C191/91\)](#) states that the Community (now the EU) should aim to improve living and working conditions, ensure proper social protection and dialogue between management and labour.

Restrictions of competition are necessarily inherent in collective bargaining agreements. The social objectives implicit in such agreements would, however, be severely undermined were companies and trade unions be subject to investigation or sanction under Art. 105(1) TFEU and/or other provisions of the TCA in concluding agreements that improve working conditions. From our perspective, it follows that Art. 105(1) and/or relevant provision(s) of the TCA cannot have collective bargaining in their scope³. However, we would ask for clarity on this point from the Commission as part of its review.

¹ s. 60 of the Act refers.

² See para. 234 of the judgment in [Bacardi/Pernod Ricard \[2004\] CAT 10](#).

³ Para 60. of the judgment in [Albany International v. Stichting Bedrijfspensioenfonds Textielindustrie \(Case C-67/96\), \[1999\] E.C.R. I-5751](#) confirms that collective bargaining fell outside the scope of Art. 85(1) [TEC](#), the predecessor to Art. 105(1) TFEU.

CJEU Jurisprudence

The CJEU has recognised that collective agreements require exemption from anti-competition rules. This exclusion is also well grounded in UK statute and common law⁴. Notably, the Albany principles were followed by the CJEU in [Van Der Woude v Stichting Beatrixoord \(Case C-222/98\)](#), [2001] 4 C.M.L.R. 2 in its determination that a collectively negotiated compulsory health care insurance was not caught by relevant EU treaty provisions. Meanwhile, the CJEU has also held that a collectively bargained compulsory pension scheme for medical specialists was not protected by Albany principles⁵.

In general, it is worth noting that EU treaty obligations supervene on domestic legislation within EU member states such that even professional organisations that are established or governed by domestic statutes are not necessarily precluded from the application of TFEU and/or TCA principles. Quite apart from authors, illustrators and translators, there therefore remains an obvious question about lawyers and other liberal professionals, which are more commonly regulated in this way.

Fundamental Rights

The CJEU cases discussed above do not refer to the [European Union's Charter of Fundamental Rights](#), which now enjoy equal legal value under Art.6 TFEU with other treaty provisions. Specifically, Art. 28 of the Charter provides that:

"Workers and employers, or their respective organisations, have, in accordance with Union law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action."

The CJEU cases make no reference to the [European Convention on Human Rights](#). However, we understand that the EU is increasingly close to acceding to the Convention and indeed is obliged to do so under the TFEU. We would therefore hope and expect the CJEU to consider jurisprudence of the ECtHR and vice versa.

Since the above CJEU cases, the Grand Chamber of the ECtHR has decided the Art. 11 case of [Demir and Baykara v Turkey \(2009\) 48 E.H.R.R. 54](#) in which the right to bargain collectively was held as being protected by [ILO Convention No.98](#). We therefore submit that it is a matter of fundamental importance and human rights that trades unions representing self-employed workers in the UK be unrestricted, from an EU Competition Law perspective, in representing the best interests of their members.

General Conclusions

By way of general conclusion, restrictions on anti-competitive agreements are necessary in democratic societies. Given the example of our using best endeavours to agree *de minimis*

⁴ See s. 3 of the [Trade Union Act 1871](#), now s. 11 [Trade Union and Labour Relations \(Consolidation\) Act 1992](#) and the following line of cases: *Hornby v Close* (1867) 19 Cox CC 393; *Hilton v Eckersley* (1855) 6 E&B 47; *Osborne v ASRS* [1909] 1.

⁵ See [Pavlov and Others v Stichting Pensioenfonds Medische Specialisten \(Joined Cases C180-184/98\)](#) [2001] 4 C.M.L.R. 1.



terms with the BBC, and broad advice to members, we would argue that such endeavours do not amount to the prevention, restriction or distortion of competition within the UK's internal market and should not therefore engage Art. 101(1) TFEU or such other relevant provisions of the TCA.

From authors' perspectives, no competitive professional is excluded, nor is any fellow author forced to lower working rates to an uneconomic level to 'compete' with another. All authors therefore compete on the quality of their work.

EU Policymaking

With a document of the length and complexity of the TCA, we would expect there to be a sustained period of reflection by the Commission and HM Government to work out how each of its composite parts will work in practice. However, we would urge the Commission to take on board the concerns set out in this submission and to act positively to ensure that self-employed creators' rights trading from and in the UK and the EU are safeguarded and improved moving forward.

To this end, we have previously called for the [creation of a UK Creators Council](#) to ensure that collecting societies, trades unions and other organisations can directly inform policymaking affecting the creative industries.

Given that there appears to be no formal consultation mechanism in policymaking terms for such engagement at the EU level, the establishment of an EU Creators Council would be welcome to ensure better and more consistent policymaking in this area in future. This is, in fact, one way in which the EU could lead on the UK.

Further Evidence

The SoA and the AOI are grateful for the opportunity of submitting this evidence following the Commission's deadline of 28 May and both organisations stand ready to assist in offering further evidence to aid subsequent deliberations. For further information about this submission or to arrange for oral evidence and/or supplementary submissions to be taken, please contact the SoA's Chief Executive [Nicola Solomon](#), copying in Public Policy Advisor [Eddie Reeves](#), and the AOI's CEO [Ren Renwick](#).

Embedded Links

Links to external research and reports have been embedded and will take the reader through to external websites. Names highlighted in this report contain embedded 'mailto:' links.

Submitted to the European Commission by [email](#) only.
© The Society of Authors, June 2021.

The Society of Authors is a company registered in England No. 00019993 and is an independent trade union.

The Association of Illustrators is a company registered in England No. 01237440 and the professional body for illustration in the UK.