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EXPLORING THE SOCIAL SECURITY AND EMPLOYMENT STATUS OF HIGHLY MOBILE WORKERS

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Summary

Introduction

In order to support the work of social partners in general, and more particularly in sectors characterised by a high degree of cross-border mobility, this report explores the often neglected issue of the social security and employment status of ‘highly mobile workers’.¹

Over the past two decades, the number of European citizens working (temporarily) in another EU Member State increased significantly, not only through the traditional channel of ‘labour migration’ but also, and increasingly, through various forms of ‘temporary labour mobility’.² The latter also includes highly mobile workers, which are workers whose place of employment is not a particular Member State but ‘the EU’. Either because they are frequently posted³ abroad or carry out activities in several Member States simultaneously. In particular, people who are employed in international transport seem to fall into this group (e.g. truck drivers, pilots, aircrew members, and seafarers). Nonetheless, it is not only in the transport sector that workers are highly mobile in the EU. For instance, managers and staff of international companies, sales representatives, or researchers can also be highly mobile in the EU.

In this report, we draw the attention to a specific group of (highly) mobile workers in the EU, notably those active in the ‘live performance sector’.⁴ This category is broad and multifaceted, including, for example, the dancer on tour for several weeks in different Member States, the actor engaged by a theatre company in one Member State and invited as a guest dramaturg in another Member State, the musician playing in several orchestras and music ensembles in different Member States, rehearsing in yet another Member State. These situations show a (highly) mobile sector that is not defined by geographical boundaries. It cannot be denied that providing services in another country is not always as simple as it may seem, even in a highly integrated space such as the EU. Thus, identifying the social security and labour legislation which should be applied to this group of (highly) mobile workers can be very challenging. This raises several questions for the stakeholders involved (i.e. the mobile worker, the (touring) company, but also the venue operator (i.e. the organiser)). Consequently, natural and legal persons active in the live performance sector are all too often uncertain about, and/or lack knowledge of the legal framework (rights and duties) and administrative formalities they must meet when providing cross-border services. What these challenges exactly are in the field of labour and social security law and what answers are conceivable, is subject of discussion in the report. In that respect, the following research objectives were put forward:

- map the live performance sector;
- define the concept of a ‘highly mobile worker’ and map the transnational dimension of the live performance sector;
- describe the legal framework in the field of (European) labour and social security law applicable to (highly) mobile workers and companies, with a focus on the live performance sector;

1 Including self-employed persons.

2 The scope of this study does not include movements to and from countries outside the EU-27/EFTA/UK.

3 Posting covers the situation where an employer established in a Member State sends one or more of its workers to a different Member State to perform services. Self-employed persons might be ‘posted’ under the Coordination Regulations (i.e. Regulations 883/2004 and 987/2009) but not in the meaning of the Posting of Workers Directive (i.e. Directive 96/71/EC).

4 There is no clear-cut definition of the ‘live performance sector’ available since the demarcation of the sector strongly depends on the source referred to. The sector may cover following activities: 1) Performing arts such as live theatre, concerts, opera, dance, and other stage productions and related support activities; and 2) Operation of venues such as concert halls, theatres, and other art facilities (<https://ec.europa.eu/social/main.jsp?catId=480&langId=en&intPageld=1842>). In research on the sector, NACE codes are very often used to define the live performance sector. The sector can best be identified by taking the three NACE subcategories 90.01 (‘Performing arts’), 90.02 (‘Support activities to performing arts’) and 90.04 (‘Operation of art facilities’) as a starting point. However, in practice, mostly the broader NACE R90 code ‘Creative, arts and entertainment activities’ is used.

- define the challenges and obstacles encountered in the live performance sector when providing cross-border services;
- define possible solutions for the challenges and obstacles encountered by (highly) mobile workers and companies, with a focus on the live performance sector.

A multidisciplinary approach was used in which a socio-economic and legal analysis contributed to the elaboration of the above research objectives. The mapping of the live performance sector is mainly based on data from Eurostat and the Orbis database. The transnational dimension of the sector has been mapped by analysing data on the export and import of services as well as by administrative data from the 'Portable Document A1'⁵ and the 'prior notifications'⁶. In addition, to help us better understand the transnational dimension, an online questionnaire was sent to companies providing live music or performing activities, to booking and management agencies, and finally to venue operators. Finally, in order to identify the main challenges and possible solutions, desk research has been combined with an online survey, the organisation of panel discussions, and several expert interviews.

Mapping the live performance sector

Unlike other sectors, little quantitative information is available on who exactly is to be considered part of the live performance sector in the EU, making the mapping of the employment in the live performance sector as well as the companies operating in it, extremely challenging. This became even more apparent during the COVID-19 pandemic, at a moment when, more than ever, it would have been useful to have such figures. Various parameters show that the sector has been hit very hard, although it is unclear to what extent the (financial) support measures taken at regional, national, and European level have been taken up by natural and legal persons active in the sector, and thus have limited the negative financial impact of the COVID-19 pandemic at least to some extent. Moreover, the situation as depicted in this report before the pandemic may not necessarily be representative for the sector after the pandemic. Finally, it must be said that the data available at EU level are often incomplete or not available at a sufficiently detailed level to get a 100% accurate and thus reliable picture of the sector.⁷

It is estimated that some 807,700 companies⁸ and 1.3 million persons are active in the live performance sector within the EU-27/EFTA/UK.⁹ Employment and companies are concentrated within a limited number of countries, mainly in Germany and France.¹⁰ The employment in the live performance sector corresponds to some 0.5% of the total workforce in the EU-27, with some clear differences in the relative importance among Member States. It ranges from 0.2% of the total workforce in Croatia, Cyprus, Luxembourg, and Romania to 1% of the total workforce in the Netherlands and Slovenia. However, above figures are likely to be a (significant) underestimation of

5 This certificate concerns the social security legislation that applies to a person and confirms that this person has no obligations to pay contributions in another Member State. The Portable Document A1 is issued to several categories of mobile workers, mainly to posted workers and self-employed persons (Article 12 of Regulation 883/2004) and to persons who pursue an activity in two or more Member States (Article 13 of Regulation 883/2004).

6 Article 9(1) (a) of Directive 2014/67 introduces a notification duty in the Member State where one provides services. It allows Member States to require a service provider established in another Member State to make a 'simple declaration' containing the relevant information necessary in order to allow factual controls at the workplace.

7 In that regard, further steps should be taken in the area of data collection. For instance, it seems that Eurostat will be able to provide a better overview of the sector in the coming years by collecting Structural Business Statistics (SBS) on the sector as well as by making a more detailed analysis of the data from the European Labour Force Survey (EU-LFS), which will allow a better estimate of the volume of employment in the sector. This can only be welcomed.

8 When the narrow classification of the sector is applied (sum of NACE codes 90.01, 90.02 & 90.04, thus excluding NACE code 90.03), the number of companies decreases to some 461,000 companies, whereby the activities from some 327,900 companies can be labelled as 'performing arts', some 107,200 companies as 'support activities to performing arts', and finally some 25,800 companies as 'operation of art facilities'. Unfortunately, no such breakdown is available for the employment figures of the sector.

9 Self-employed persons are part of both variables. Both from a statistical as well as from a legal point of view, the question arises whether this group should be linked to the group of 'workers' rather than to the group of 'companies' (i.e. enterprises/businesses). The fact that self-employed persons are not covered by the Posting of Workers Directive makes the answer to this question even more complicated.

10 For instance, about 40% of the companies are located in France and about 18% of the employment is in Germany.

the absolute and relative importance of the sector, as they do not take into account persons whose second job is in the live performance sector.

Furthermore, based on the classification of companies according to the number of employees, it becomes clear that, with the exception of subcategory 90.04 ‘operation of art facilities’, a very large proportion of the ‘companies’ (i.e. enterprises/businesses) in the live performance sector consists of only one person. This concerns about seven out of ten companies active in the sector. Moreover, some 98% of the companies are considered ‘small sized’. This profile is largely the result of the high number of self-employed in the sector as we may argue that more than four out of ten persons active in the sector is self-employed. This is a much higher figure compared to the average of 14% in total EU employment.

Last but not least, it must be said that, compared to other sectors, employment in the live performance sector is characterised by more ‘non-standard’ or ‘atypical’¹¹ working-time arrangements (more part-time and more combinations with other jobs), non-standard contracts (fixed-term, project or task-based work), and non-standard work relationships (more self-employment and on-call freelance work). When services are provided abroad, this atypical character may create additional challenges, not least in terms of determining which Member State’s social security legislation is to be considered applicable. This brings us to the transnational dimension of the sector. Before making a statement on the extent and characteristics of this dimension, the concept of a ‘highly mobile’ worker is elaborated.

Unravelling the concept of the ‘highly mobile worker’

It should be acknowledged that once we start thinking about the concept of a ‘highly mobile worker’, it slips through our fingers like sand. In that regard, it is challenging to define it properly. In our opinion, the best way to define this concept is to look at the *frequency* and *duration* of the employment abroad of a mobile worker. Indeed, the frequency of professional trips to another Member State for this group of workers is mostly high to very high and the duration of their presence in said Member State is mostly very short (often limited to a number of weeks, days or even hours). Moreover, in many cases, this does not involve only one Member State. In that regard, ‘highly mobile workers’ can be defined as workers (and self-employed persons) who, during the year, are active in several Member States and whose employment in each of these Member States is usually of (very) short duration.¹²

By also taking into account the status of the artist or musician, the concept of the ‘highly mobile worker’ that can be applied in the live performance sector takes on an additional dimension to the basic concept as defined above, and thus goes beyond the purely cross-border aspect of the concept. Indeed, ‘mobility’ in the live performance sector cannot simply be considered as occasional movements across national borders as ‘mobility’ is an integral part of the daily work life of cultural professionals due to the atypical working-time arrangements, contracts, and work relationships in the sector. Hence, we can put forward the following definition: highly mobile workers in the live performance sector are characterised by a high number of cross-border movements (*frequency*), executing various short-term assignments in different countries (*duration*) while often having an atypical employment situation (*status*).

The question arises whether above demarcation of the concept is *legally* solid enough. Demarcating a specific category of persons implies the ability to identify said group of persons on the basis of a number of characteristics they do not share with others. This is not at all straightforward for the

11 Of course, what is considered as ‘non-standard’ or ‘atypical’ today may become ‘standard or typical’ in the (near) future, and vice versa. In that regard, these terms reflect only a deviation from the standard employment norm.

12 Note that other authors apply a slightly different definition of ‘highly mobile worker’ (e.g. AG Opinion in Case C-16/18 *Dobersberger* ECLI:EU:C:2019:638, para 58). Van Ooij (2020) argues that the term ‘highly mobile worker’ indicates two aspects of mobility: performing the work activity across borders (geographic mobility) and mobility in form and pattern of work engagement (job mobility). Rasnača (2020) states that they either regularly cross borders due to the nature of their work, work in multiple Member States, or cross a border every day in order to work in a Member State other than the one where they permanently reside. Our definition does show similarities with that of Pieters and Schoukens (2020). They define ‘high mobility’ as professional activities that are characterised by a very intense and high degree of mobility.

group of ‘highly mobile workers’. Though this is an essential prerequisite if one wants to define specific rules for this group. Finally, in our view, a distinction should be made between the concept of the ‘highly mobile worker’ and that of the ‘highly mobile sector’. After all, even in cases where a sector cannot be qualified as being a ‘highly mobile sector’ there might be a (significant) group of highly mobile workers active in that sector. The live performance sector might be a good example of this reality.

Mapping the transnational dimension of the live performance sector

It must be noted that also the transnational dimension of this sector is still a blind spot both in terms of size and characteristics. Therefore, we have tried to quantify the extent to which the live performance sector has a transnational dimension. Yet it might well be that only a part of the group of workers and companies in this sector is performing abroad. The question then arises whether this group can be considered as ‘highly mobile’? Here, we specifically look at whether mobile workers and (touring) companies move to several countries, how often they do so, and how long they stay there. Despite our efforts, the reader will notice that there is still a long and winding road ahead of us to obtain an accurate picture of the transnational dimension of the sector.

As already mentioned, employment in the live performance sector corresponds to some 0.5% of the total workforce in the EU-27. Empirical evidence from the Portable Document A1 shows that in most Member States, the share of the live performance sector in total temporary cross-border employment is higher than the share of employment in the total workforce in these Member States. This shows that the live performance sector has a more important transnational dimension compared to many other business sectors.

Furthermore, based on data on the export of services, we can make two tentative conclusions: (1) a large group of companies performing arts do not appear to export services abroad, and (2) a significant group of companies performing arts almost exclusively exports services abroad.

For mobile workers and companies active in the live performance sector, a Portable Document A1 is mainly granted when temporarily providing services in one particular Member State (according to Article 12 of Regulation 883/2004) rather than for providing activities in several Member States simultaneously for a longer period (according to Article 13 of Regulation 883/2004), while they often perform several times a year abroad, often in different Member States. These results show, although to be considered tentative, that one cannot simply equate the profile of the transnational dimension of the live performance sector with that of other ‘mobile’ sectors. For instance, while for the road freight sector, Portable Documents A1 are mainly issued according to Article 13, this is not the case for the live performance sector. This observation raises the question why this is the case. Here we should look at the procedures for the application of Article 13. Notably, in order to apply Article 13, the competent national authority must take into account the situation projected for the following 12 calendar months. However, (highly) mobile workers and companies (often) do not know in advance where they will perform in the next 12 months.

Furthermore, empirical evidence shows that the posting period in the live performance sector is mostly limited to a few days. For instance, data from the reporting Member States show that some six out of ten postings in the sector last between one and eight days. These results are in stark contrast to the average posting period of approximately three months for the entire economy.

Finally, data shows that both France¹³ and Germany are the main receiving Member States of mobile workers and (touring) companies active in the live performance sector.

¹³ France seems to be very strict in its judgment of having a Portable Document A1 as a condition for being ‘legally’ posted. It implemented sanctions in case of failure to show a Portable Document A1 and/or is carrying out a lot of inspections on the possession of a Portable Document A1. These measures may have a significant impact on the compliance of requesting a Portable Document A1 when providing services in France. Consequently, the share of Member States where many controls are carried out, such as France, in total might be overestimated.

The social security and employment status of the (highly) mobile worker

Mobile workers and companies encounter a complex legal framework when providing services abroad. Indeed, the level of harmonisation at European level is still relatively modest. Thus, very different national laws and regulations in Member States remain to a great extent in place. The sole aim on the European level is to establish a floor of basic rights and to coordinate the different legislative frameworks in a number of areas. There is no intention to harmonise and/or standardise national or even sectoral systems/agreements defining the working conditions and social security contributions to be respected. The practical consequence for (highly) mobile workers and companies is that (social) rights and duties are sometimes difficult to determine.

As soon as artists and companies cross borders, it is important to determine which social security provisions should be applicable. This question is addressed on the basis of Regulations 883/2004 and 987/2009 (referred to as the Coordination Regulations). However, determining the applicable social security legislation is no easy task, not least for artists and companies active in the live performance sector. After all, due to the atypical character of this sector and the diversity of ‘employment models’, the difference between ‘posting’ (Article 12 of Regulation 883/2004) and ‘simultaneous activities’ (Article 13 of Regulation 883/2004) is not always very clear. This will often require a case-by-case assessment in order to determine the applicable social security legislation.

From a labour law perspective,¹⁴ the scenario which mainly characterises mobile workers in the live performance sector is the one of posting of workers. Directive 96/71/EC (referred to as the Posting of Workers Directive) can be understood as the instrument to identify the provisions whose application to posted workers must be ensured by the Member States. The Posting of Worker Directive was recently amended by Directive (EU) 2018/957. In essence, posted workers are entitled to the same ‘remuneration’¹⁵ as local employees. However, when determining the remuneration applicable to the posted worker, a comparison between the remuneration paid under the employment contract in the Member State of origin and the one to be paid in the host Member State should be made in order to apply the highest level of remuneration.

Challenges and obstacles encountered by workers and companies of the live performance sector in cross-border situations

The main focus in this report is on European legislation, and in particular on the challenges that arise from the application of the Coordination Regulations and the Posting of Workers Directive. Nonetheless, national legislation may have a (significant) impact on how easy or how difficult these European rules are to apply. Moreover, we should be aware that the atypical character of the sector can have an impact on the challenges identified in a transnational context. The assessment whether or not this atypical character can be considered as a problem or challenge for the sector goes beyond the scope of this report.

When discussing the challenges and obstacles encountered by mobile workers and companies, the common denominator is often the legal complexity and administrative burden that arises when applying European labour and social security law (e.g. identifying the competent Member State for social security, paying social security contributions in said Member State,¹⁶ applying the terms and conditions as defined in the Posting of Workers Directive), as well as the corresponding administrative formalities (e.g. applying for a Portable Document A1 and making a prior notification).¹⁷ In addition, there is a lack of knowledge about the labour and social security legislation

14 Regulation (EC) No 593/2008 (i.e. the Rome I Regulation) determines which law is applicable to contracts in case of possible conflict of law, such as in the case of transnational employment situation.

15 Recently amended by ‘Directive (EU) 2018/957’ (instead of equal ‘minimum rates of pay’ as provided for under the previous version of the Posting of Workers Directive).

16 For instance, problems may arise from the requirement to pay social security contributions in a Member State other than the Member State of the employer.

17 This may lead to non-compliance or avoidance (e.g. through the use of the self-employment status in order to avoid the application of the Posting of Workers Directive).

to be applied in a cross-border situation, partly due to the lack of clear information. For instance, the lack of knowledge about the regulations was clearly reflected by the results of the online survey as only one out of four of the respondents was aware of the recent amendment of the Posting of Workers Directive. This knowledge/awareness gap may result into a regulatory compliance gap.¹⁸

In defining the challenges (and the solutions), we are in favour of making a clear distinction between those that arise from the application of labour and social security legislation versus the corresponding administrative formalities. Especially with regard to the latter, it is important to take steps in order to keep the administrative burden that arises from performing abroad proportionate to its benefits. After all, the fact that a company, in case of providing services abroad, has to fulfil several notification requirements, both in the Member State of origin and in the host Member State creates a substantial administrative burden, perhaps even a double burden. Currently only Austria, Belgium, Denmark, France and the Netherlands grant an exemption from prior notification to artists and their employers. Moreover, the need¹⁹ to have a Portable Document A1 for every posting abroad is a burdensome and time-consuming procedure.²⁰ Consequently, the lack of special arrangements for (very) short-term postings can lead to a disproportionate administrative burden for SMEs. Moreover, it is not always possible for these SMEs to hire external experts as a go-between. In that regard, a high administrative burden may impede live performance abroad, and thus the free movement of workers and services.

Due to the atypical character of the live performance sector, identifying the social security legislation which should be applied to the mobile artist, musician, or technician can be challenging. Therefore, (highly) mobile workers employed in the live performance sector may be uncertain about their rights, while employers might struggle to understand to which national system of social security they should pay their social security contributions. For instance, when artists are active in multiple Member States, thus falling under Article 13 of Regulation 883/2004, the specificities of employment patterns in the sector might end up complicating their situation when it comes to social security affiliation. As we cannot explore the panoply of possible scenarios here, we limit ourselves to just one example. Article 13(3) provides that when a person is active in multiple Member States both as an employed and as a self-employed person, (s)he will be subject to the social security legislation of the Member State where (s)he is active as an employee. The article does not specify thresholds for this rule to apply, nor has this been clarified by a decision of the Administrative Commission for the coordination of social security systems. This might cause a situation where an artist is active in a number of Member States, including the own Member State of residence, as a self-employed freelancer, but is then hired for a limited time as an employee in a different Member State, thus ending up being affiliated in this last Member State, the limited connection notwithstanding. This is particularly relevant as some very significant markets for the live performance sector, such as France, provide for a presumption of employment relationship for artists. This presumption includes an exception for artists active as self-employed in another Member State, posting themselves to France, but this exception does not apply to artists hired in France by a French employer and also active as self-employed in other Member States. Finally, problems may also arise when applying the conditions in order to be posted under Article 12 of Regulation 883/2004. For example, an artist may have a performance abroad relatively soon after being hired. However, in that case (s)he must be subject to the legislation of the employer's country at least one month prior to the posting. In the discussion on the revision of the Coordination Regulations, there is even the proposal to increase this period to three months of prior insurance.

18 Not least because the sector is not being considered a priority for labour inspectorates. For instance, only one out of five respondents to the online survey indicated that they had already come into contact with the competent labour inspectorate.

19 In some cases, a posting may take place without the institutions being informed of it or the Portable Document A1 is awarded with retroactive effect. In this respect, 'the need' for having a Portable A1 may differ strongly between Member States and sectors, often depending on the 'risk' for inspections.

20 Moreover, national administrative procedures in several Member States are reported as not always being sufficiently adapted to very short-term postings as they are not always able to issue a Portable Document A1 in time.

In labour law, one of the main difficulties stems from the fact that the Posting of Workers Directive applies from ‘day zero’, and hence from the first moment a posted worker arrives in the host Member State to perform a service there. This has an important impact on the complexity faced by posting undertakings in the live performance sector, specifically when these undertakings have to organise tours which include short-term presence in multiple Member States. Although recent decisions of the Court of Justice seem to suggest the creation of a ‘short-term postings’ category, which would fall outside of the legal framework for the posting of workers due to their limited connection with the host Member State, this remains a judge-made category with uncertain boundaries which does not provide the necessary certainty for business decisions. In the end, the fact that (touring) companies and their artists excel on stage should be their competitive advantage and not the price they charge. When it comes to the application of terms and conditions of employment, most difficulties and obstacles seem to stem from the complexity of the applicable rules. Some specific difficulties arise for employers in the public sector or subsidised private sector who post their workers, employed as civil servants, to another Member State. In many cases these employers work within strict budgetary rules, making it impossible to provide for the increase in remuneration which is necessary when posting artists and technicians to a Member State characterised by a higher level of applicable remuneration.

There is no ‘silver bullet’: looking for bottom-up solutions

When formulating solutions, a distinction is made between operational solutions on the one hand, which can be facilitated by the social partners, public administrations, and labour inspectorates on both a national and European level, and legislative solutions on the other. The operational solutions can be implemented in the short and medium term, whereas the legislative solutions should rather be seen in the long term. Our starting point is a pragmatic bottom-up approach, which fully endorses and implements the current European legislative framework and focuses on the additional steps that can be taken in the area of information (i.e. ‘raising awareness’). This is not to say that we do not recognise the legal complexity and the administrative burden. However, one cannot expect that the Coordination Regulations and the Posting of Workers Directive can solve all problems and challenges identified. After all, some of the problems encountered by mobile artists and companies are mainly due to national legislation or due to the characteristics of the live performance sector.

Increasing awareness by providing accurate and user-friendly information

An important objective of this report is to provide some guidance on the labour and social legislation to be applied. To this end, several tools were developed in the context of the present research, including a step-by-step approach to the application of remuneration and working conditions to posted workers, as well as a flow-chart to identify the applicable social security legislation to situations of simultaneous employment. Moreover, we have used a template developed by the European Labour Authority (ELA) together with its ‘Working Group on Information’ for the presentation of information stemming from universally applicable collective agreements. Notably, we have applied this template to a test case consisting of the two collective agreements applicable to the live performance sector in France. We hope that this encourages more stakeholders, whether among the social partners or public authorities, to undertake this work for collective agreements applicable to posted workers. Finally, the report provides for each Member State a link to the single official national website on posting of the host Member State, to the webpage with information on how and where to apply for a Portable Document A1 in the Member State of origin, and finally to the webpage with information on how and where to make a prior notification in the host Member State.

The degree of user-friendliness of the information made available is another discussion. For instance, one can easily opt to provide a link where the collective agreements can be found. This

seems to be the strategy today through the single official national websites on posting.²¹ Unfortunately, this does not mean that the information about the remuneration to be paid can easily be found. In that respect, a next step in the information process could be that these collective agreements are also easily consultable in all or at least several official EU languages (e.g. based on the template developed by ELA).²² A final step is that the collective agreements in all Member States are compared with each other so that we know how much more will possibly have to be paid. Of course, the status and seniority of the worker as well as the new provisions of the Posting of Workers Directive should be taken into account when making such an exercise. For instance, in this report, we have tried to calculate by how much the gross wage has to be increased when services are provided by mobile artists and (touring) companies from country X to country Y. This exercise was carried out by taking into account both the average wage and salary in the arts, entertainment, and recreation sector and the national minimum wages. It makes clear that the labour cost, and thus the cost to be charged to the organiser, when performing abroad may differ significantly from the cost normally charged. Also, the budget required by touring companies in order to respect the terms and conditions set by the Posting of Workers Directive will often be much higher compared to companies that only perform in their country of residence. In that respect, this observation should also be a wake-up call for the European and national subsidy policy for the live performance sector.²³

Organisers and venues should be encouraged to play a proactive role in informing (touring) companies about the collective agreements which are applicable to artists and technicians which they host. This is based on the assumption that organisers and venues are likely to have a much better understanding of their own system and hence be able to guide foreign employers in navigating this set of rules. While this might be an unfamiliar role for organisers and venues, employers' associations, both at national and European level, could play a pivotal role in this endeavour, notably by raising awareness.²⁴ Finally, national authorities and labour inspections may play a more active role in informing workers and companies active in the live performance sector.

Decreasing the administrative burden (i.e. less administrative formalities)

The posting undertaking has to fulfil several notification requirements, both in the Member State of origin (i.e. application for a Portable Document A1) and in the host Member State (i.e. making a 'simple' declaration). This constitutes a substantial administrative burden, perhaps even a double burden. Introducing user-friendly digital application or registration procedures could significantly reduce this burden.

21 Article 5 of the revised Posting of Workers Directive gives the Court of Justice the power to assess the completeness of the information included in official national websites when it comes to the evaluation of the proportionality of sanctions eventually applied for violations of posting rules. A decision in this sense would certainly act as a powerful incentive for the improvement of the information contained in these websites. At the same time, such a decision might come as a shock for Member States. In order to avoid this, the European Commission could proactively start requesting information from Member States as to the state of the information presented in their official national websites, and, in this context, develop a standardised approach, possibly based on the ELA template, as to the information which should be included therein. In that regard, it should be noted that the ELA Work Programme 2021 (p. 13) states that 'particular attention will be dedicated to information provided by a single national websites on the posting of workers, following the entry into force of Directive (EU) 2018/957, whereby ELA will carry on with peer review activities initiated by the Committee of Experts on Posting of Workers'.

22 It goes without saying that this process of reorganisation of the information contained in collective agreements and their translation in one or more languages is both costly and time consuming. It might also be considered as outside the core business of the social partners, as it basically benefits employers and workers who are, by definition, not their members. As such, a proactive role should be played in this area by European federations and associations, in order to encourage their members to take up this challenge which will ultimately benefit the whole sector in Europe through the facilitation of mobility and cultural exchanges.

23 See also the obstacles identified for employers in the public sector or subsidised private sector who post their workers, employed as civil servants, to another Member State. Addressing these obstacles require changes in budgetary rules for public services and funding agencies at national level, which should include the necessary degree of flexibility to allow employers who post workers to respect the EU legislation in the field.

24 Moreover, the results from the online survey shows that venue operators in the receiving country are the most frequently used information channel by the companies performing art.

Furthermore, the necessity of having a Portable Document A1²⁵ and making a prior notification for every short posting, as is often the case in the live performance sector, can also be questioned. After all, the question can be asked whether the requirement of being in possession of a Portable Document A1 even for a very short period abroad - whereby not being in possession of a Portable Document A1 may lead in some Member States to very high penalties - is necessary and does not go beyond what can be required proportionally. Here, there is mainly a conflict between the administrative burden on the employer, the need for social security institutions and inspectorates to ensure that there are no abuses or evasions of contributions, and finally the need for legal certainty for the mobile worker in order to avoid gaps in transnational social protection. Sometimes the balance is lost, as is evident from the proposal to revise the Coordination Regulations that is now on the table to exclude 'business trips' from the obligation of having a Portable Document A1. More importantly, one should also question the high sanctions some Member States have laid down for not having a Portable Document A1.²⁶ Furthermore, only Austria, Belgium, Denmark, France and the Netherlands exempt artists from a prior notification. In that respect, it would be useful to negotiate an exemption from prior notification with every Member State separately, and in particular the main receiving Member States of artists (e.g. Germany, Italy, etc.).

These are of course solutions that require further elaboration. For instance, to facilitate the identification of persons across borders for the purposes of social security coordination, the idea has been launched by the European Commission to introduce a European Social Security Number (ESSN).²⁷ It can be considered as a possible alternative for the Portable Document A1. Furthermore, the implementation of EESSI (Electronic Exchange of Social Security Information) might have a positive impact on the administrative burden.²⁸

Towards a tailored legal framework for the live performance sector and/or the 'highly mobile worker'?

Certain artists, particularly those engaged in touring activities, are a typical example of a highly mobile worker. As the Coordination Regulations often seem to be geared towards a typical migrant worker moving to another Member State for a longer period of time and for whom the integration with the new Member State of destination is paramount, it is not surprising that these rules pose challenges for such highly mobile persons. The consequences for such highly mobile workers and their employers are that social rights and obligations are not only sometimes difficult to determine but also that questions can be raised if the applicable legislation is appropriate, especially in case of multiple consecutive short periods of employment abroad. From this point of view, the question can be asked whether and to what extent a sectoral approach would take better account of the particularities of the live performance sector. Furthermore, it would be appropriate to consider drafting specific conflict rules that would subject highly mobile workers to more stable legislation. However, a solid demarcation of the live performance sector as well as of the notion 'highly mobile worker' is perhaps the biggest stumbling block here.

25 The current legal framework provides that the employer or the person concerned must inform the competent authorities about their planned transnational activities, whenever possible before these activities takes place.

26 As the Court of Justice has stated, the severity of the penalty must be commensurate with the seriousness of the offence. In particular, the administrative or punitive measures permitted under national legislation must not go beyond what is necessary in order to attain the objectives legitimately pursued by that legislation.

27 https://ec.europa.eu/info/law/better-regulation/initiatives/ares-2017-5862503_en

28 EESSI is an IT system which aims to help social security institutions with the exchange of electronic cross-border documents. The EESSI system was made available by the European Commission in July 2017. Since then, Member States had two years to finalise their national implementation of EESSI and connect their social security institutions to the cross-border electronic exchanges. Currently, all 32 participating countries (EU-27/EFTA/UK) are connected to the EESSI system and are able to exchange electronically on some of the business processes.