Cross-border employment in the live performance sector

EXPLORING THE SOCIAL SECURITY AND EMPLOYMENT STATUS OF HIGHLY MOBILE WORKERS

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Preface

The COVID-19 pandemic and subsequent containment measures in the EU had major consequences on (the transnational dimension of) the live performance sector: venue operators were forced to fully close down and tours were cancelled due to measures adopted by Member States which restricted the right to move freely across the EU.[1] Consequently, the pandemic had a huge (economic) impact on the sector as a whole, on the individual artist, musician, technician, etc., as many of them work as freelancers or self-employed persons, on the large number of small and medium sized companies that operate in the sector, and finally on the venue operators.[2] It may surprise many readers that our report, which mainly deals with the transnational dimension of the live performance sector, is published at a moment when cross-border labour mobility in this sector, due to the COVID-19 pandemic and the containment measures taken, is likely to have reached its lowest level in decades. Both as researchers interested in the cross-border aspects of labour and social security law, and as frequent users of the free movement principle in the EU, we have experienced all too often over the past year that these are strange times for studying this topic. However, when we submitted our research proposal and even at the start of this research project, we had no idea of the enormous challenges that the live performance sector would be facing. Despite the undeniable impact of COVID-19 on all segments of the live performance sector, this will not be our main focus when discussing the sector and its transnational dimension in particular.[3] Assuming, rather naively (?), that the COVID-19 pandemic only has a temporarily negative impact on intra-EU labour mobility. Of course, certain issues, problems, challenges, ... that have become more apparent during the COVID-19 pandemic will be reported.

The idea for this research project, called 'MOBILIVE', originates from a panel discussion on 'the forgotten sectors of the posted worker' at the VI European Labour Mobility Congress in Krakow.[4] In this panel, Anita Debaere (Director of Pearle*) highlighted the challenges that artists, musicians and touring companies face when providing services abroad. A feature of this group is the short period abroad, whereby the cost of complying with the legal framework and the administrative formalities is sometimes as high as the benefit of performing abroad. This reality also raises questions about the level of compliance. Furthermore, the sector might, due to its small size - especially compared to the road freight transport - be overlooked in policy discussions and decisions at European level. For instance, during the recent debates on the revision of the Posting of Workers Directive as well as on the revision of the Regulations on the coordination of social security systems, some concerns of the social partners in the live performance sector received little or no attention.[5] What finally emerged from the panel discussion, and what has become the starting point of this report, is that workers who are highly mobile in the EU (within or outside the live performance sector), known as 'highly mobile workers', as well as their employers, face several challenges both under European labour and social security law, especially since their profile differs significantly from the typical 'migrant worker' for whom, for example, the EU rules on the coordination of social

1 In that respect, see a proposal of the EC 'for a Council Recommendation on a coordinated approach to the restriction of free movement in response to the COVID-19 pandemic' (COM(2020) 499 final).

2 The OECD (2020) identified the sector of 'arts, entertainment and recreation', to which the live performance sector belongs, as one of the sectors most at risk due to the impact of the containment measures (OECD, 2020). On 13 October 2020, the live performance sector in Europe came together to discuss the future and the sustainability of the sector. The European social partners organised a webinar 'COVID-19: Outlook for the Live Performance Sector and Measures Needed' which addressed rescue packages at national and EU level, the challenges encountered when facing the social security system, and back-to-work agreements that ensure the safe re-opening of the sector (FIA, 2020).

3 In addition, to map the sector, we use, among others, administrative data of which the most recent year for which data is available (2019) applies to the pre-COVID period. Therefore, it was simply not possible to depict the period in which the COVID-19 measures were in force at the time of writing this report.

4 Panel members were Frederic De Wispelaere, Marco Rocca, Anita Debaere and Hilde Thys.

5 See, for instance, the statement of Pearle* of 22 March 2017 'on the social security coordination regulation and the posting of workers directive: a disproportionate proposal that doesn't recognise the daily reality of the live performance sector.'

security systems were designed more than 60 years ago. In that respect, listing the problems and challenges that highly mobile workers and their employers encounter (with a focus on the live performance sector) as well as suggesting possible recommendations and solutions, starting from a pragmatic bottom-up approach which fully endorses and implements the current European legislative framework and focus on the additional steps that can be taken in the area of information (i.e. 'raising awareness'), are two important research objectives of this report.

We would also like to thank the European Commission for funding this research project (Grant Agreement Number VS/2020/0116). This report is financed under the call for proposals on 'Improving expertise in the field of industrial relations' (VP/2019/004). Projects under this call should intend to improve expertise and knowledge on industrial relations through analysis and research, at EU level as well as in comparative terms. With this aim in mind, this report has attempted to take a step forward in mapping the live performance sector and its transnational dimension. Indeed, our observation is that there is still an incomplete picture of how many people are employed in the sector and how many companies are active in it. In that respect, the quantitative data and findings on the sector will hopefully be useful for the representativeness study on the sector that is currently being prepared. Several recommendations and tools/instruments also aim to directly support the European social partners in their day-to-day work. After all, social partners play a crucial role in informing their members about the legal framework and supporting them in applying it.

Finally, we would like to thank Pearle* (thanks Anita!) and several national employers' organisations (OKO (Belgium), APD CR (Czech Republic), FEPS (France), Performart (Portugal) and Svensk Scenkonst (Sweden)). Their support as well as that of the Administrative Commission for the coordination of social security systems and of several individuals and organisations that we have contacted and interviewed during this project were crucial for this research project.

Frederic De Wispelaere
May 2021

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'.[6]

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'.[7] 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 posted[8] 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, sale 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'.[9] 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;
- define the challenges and obstacles encountered in the live performance sector when providing cross-border services;

6 Including self-employed persons.

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

8 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).

9 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&intPageId=1842). In research on the sector, NACE codes are very often used to the 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 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'[10] and the 'prior notifications'[11]. 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.[12]

It is estimated that some 807,700 companies[13] and 1.3 million persons are active in the live performance sector within the EU-27/EFTA/UK.[14] Employment and companies are concentrated within a limited number of countries, mainly in Germany and France.[15] 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 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.

10 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).

11 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.

12 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.

13 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.

14 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.

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

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'[16] 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.[17]

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 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

16 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.

17 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.

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 France[18] and Germany are the main receiving Member States of mobile workers and (touring) companies active in the live performance sector.

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

18 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.

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 legalisation 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,[19] 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'[20] 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 (see *Appendix I* for a comparative analysis of the existing legal framework in Belgium, the Netherlands, France, and Germany). 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,[21] 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).[22] In addition, there is a lack of knowledge about the labour and social security legislation 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

19 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.

20 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).

21 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.

22 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).

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.[23]

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 need[24] to have a Portable Document A1 for every posting abroad is a burdensome and time-consuming procedure.[25] 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.

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

23 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 came into contact with the competent labour inspectorate.

24 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.

25 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.

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.[26] 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).[27] 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.[28]

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.[29] 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.

26 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, in 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'.

27 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.

28 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.

29 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 A1[30] 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.[31] 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).[32] 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.[33]

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.

30 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.

31 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.

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

33 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.

Résumé

Introduction

Afin de soutenir le travail des partenaires sociaux en général, et plus particulièrement dans les secteurs caractérisés par un haut degré de mobilité transfrontalière, ce rapport explore la question souvent négligée de la sécurité sociale et du statut professionnel des « travailleurs très mobiles ».[34]

Ces vingt dernières années, le nombre de citoyens européens travaillant (temporairement) dans un autre État membre de l'UE a considérablement augmenté, non seulement par la voie traditionnelle de la « migration de main-d'œuvre », mais aussi, et de plus en plus, par diverses formes de « mobilité temporaire de la main-d'œuvre ».[35] Cette dernière catégorie comprend également les travailleurs très mobiles, c'est-à-dire les travailleurs dont le lieu d'emploi n'est pas un État membre particulier mais « l'UE ». Soit parce qu'ils sont fréquemment détachés[36] à l'étranger, soit parce qu'ils exercent des activités dans plusieurs États membres simultanément. Les personnes employées dans le transport international semblent tout particulièrement appartenir à ce groupe (chauffeurs routiers, pilotes, membres d'équipage d'avion et marins). Néanmoins, il n'y a pas que dans le secteur des transports que les travailleurs sont très mobiles dans l'UE pour des raisons professionnelles. Par exemple, les dirigeants et le personnel des entreprises internationales, les représentants commerciaux ou les chercheurs peuvent également être très mobiles dans l'UE.

Dans ce rapport, nous attirons l'attention sur un groupe spécifique de travailleurs (très) mobiles dans l'UE, à savoir ceux actifs dans le « secteur du spectacle vivant ».[37] Cette catégorie est large et multiforme, incluant, par exemple, le danseur en tournée pendant plusieurs semaines dans différents États membres, l'acteur engagé par une compagnie de théâtre dans un État membre et invité comme dramaturge dans un autre État membre, le musicien jouant dans plusieurs orchestres et ensembles musicaux dans différents États membres, répétant dans un autre État membre encore. Ces situations montrent un secteur (très) mobile qui n'est pas défini sur la base de frontières étatiques. On ne peut nier que fournir des services dans un autre pays n'est pas toujours aussi simple qu'il n'y paraît, même dans un espace hautement intégré comme l'UE. Par exemple, il peut être très difficile d'identifier le régime de sécurité sociale et la législation du travail qui devraient être appliqués à ce groupe de travailleurs (très) mobiles. Cela soulève plusieurs questions pour les parties prenantes concernées (c'est-à-dire le travailleur mobile, la compagnie (en tournée), mais aussi l'exploitant de la salle de spectacle). Par conséquent, les personnes physiques et morales actives dans le secteur du spectacle vivant sont trop souvent dans l'incertitude et/ou manquent de connaissances sur le cadre juridique (droits et devoirs) et les formalités administratives qu'elles doivent remplir lorsqu'elles fournissent des services à l'étranger. Les défis à relever dans le domaine du droit du travail et de la sécurité sociale, ainsi que les réponses envisageables, sont discutés dans le rapport. À cet égard, les objectifs de recherche suivants ont été définis :

34 En ce compris des travailleurs indépendants.

35 Cette étude ne couvre pas les mouvements vers et depuis les pays hors de l'UE-27/AELE/Royaume-Uni.

36 Le détachement couvre la situation dans laquelle un employeur établi dans un État membre envoie un ou plusieurs de ses travailleurs dans un autre État membre pour y prester des services. Les travailleurs indépendants peuvent être « détachés » en vertu des règlements de coordination (c'est-à-dire les règlements 883/2004 et 987/2009), mais pas au sens de la directive concernant le détachement des travailleurs (c'est-à-dire la directive 96/71/CE).

37 Il n'existe pas de définition précise du « secteur du spectacle vivant », car la délimitation de ce secteur dépend fortement de la source à laquelle on se réfère. Ce secteur peut couvrir les activités suivantes : (1) les arts du spectacle tels que le théâtre, les concerts, l'opéra, la danse et autres spectacles scéniques, ainsi que les activités de soutien liées ; et (2) la gestion des lieux tels que les salles de concert, les théâtres et autres salles de spectacles (https://ec.europa.eu/social/main.jsp?catId=480&langId=en&intPageId=1842). Dans les recherches, les codes NACE sont très souvent utilisés pour définir le secteur du spectacle vivant. Le secteur peut être identifié au mieux en prenant comme point de départ les trois sous-catégories 90.01 (« Arts du spectacle vivant 175), 90.02 (« Activités de soutien au spectacle vivant ») et 90.04 (« Gestion de salles de spectacles ») de la NACE. Toutefois, dans la pratique, c'est le code NACE R90 « Activités créatives, artistiques et de spectacle », plus large, qui est utilisé.

- cartographier le secteur du spectacle vivant ;
- définir le concept de « travailleur très mobile » et cartographier la dimension transnationale du secteur du spectacle vivant ;
- décrire le cadre juridique dans le domaine du droit (européen) du travail et de la sécurité sociale applicable aux entreprises et aux travailleurs (très) mobiles, en mettant l'accent sur le secteur du spectacle vivant ;
- définir les défis et les obstacles rencontrés dans le secteur du spectacle vivant lors de la prestation de services transfrontaliers ;
- définir des solutions possibles aux défis et aux obstacles rencontrés par les entreprises et les travailleurs (très) mobiles, en mettant l'accent sur le secteur du spectacle vivant.

Une approche multidisciplinaire a été utilisée, dans laquelle une analyse socio-économique et juridique a contribué à l'élaboration des objectifs de recherche ci-dessus. La cartographie du secteur du spectacle vivant est principalement basée sur les données d'Eurostat et de la base de données Orbis. La dimension transnationale du secteur a été cartographiée en analysant les données sur l'exportation et l'importation de services ainsi que les données administratives provenant du « Document portable A1 »[38] et des « notifications préalables »[39]. En outre, pour nous aider à mieux comprendre la dimension transnationale, un questionnaire en ligne a été envoyé aux entreprises proposant des concerts ou des spectacles, aux agences de réservation et de gestion, et enfin aux exploitants de salles de spectacle. Afin d'identifier les principaux défis et les solutions possibles, la recherche documentaire a été combinée à une enquête en ligne, à l'organisation de discussions de groupe et à plusieurs entretiens avec des experts.

Cartographier le secteur du spectacle vivant

Contrairement à d'autres secteurs, peu d'informations quantitatives sont disponibles sur les personnes qui doivent être considérées comme faisant partie du secteur du spectacle vivant dans l'UE, ce qui rend extrêmement difficile la cartographie de l'emploi dans le secteur du spectacle vivant ainsi que des entreprises qui y opèrent. Cela est apparu encore plus clairement lors de la pandémie de COVID-19, à un moment où, plus que jamais, il aurait été utile de disposer de tels chiffres. Divers paramètres montrent que le secteur a été très durement touché, même si l'on ne sait pas dans quelle mesure les dispositifs de soutien (financier) adoptés aux niveaux régional, national et européen ont été adoptées par les personnes physiques et morales actives dans le secteur, et ont ainsi limité, au moins dans une certaine mesure, l'impact financier négatif de la pandémie de COVID-19. En outre, la situation décrite dans ce rapport avant la pandémie n'est pas nécessairement représentative du secteur après la pandémie. Enfin, il faut dire que les données disponibles au niveau de l'UE sont souvent incomplètes ou ne sont pas disponibles à un niveau suffisamment détaillé pour obtenir une image 100 % précise et donc fiable du secteur.[40]

38 Ce certificat concerne la législation de la sécurité sociale qui s'applique à une personne et confirme que cette personne n'a aucune obligation de payer des cotisations dans un autre État membre. Le document portable A1 est délivré à plusieurs catégories de travailleurs mobiles, principalement aux travailleurs détachés et aux indépendants (article 12 du règlement 883/2004) et aux personnes qui exercent une activité dans deux ou plusieurs États membres (article 13 du règlement 883/2004).

39 L'article 9, paragraphe 1, point a), de la directive 2014/67 introduit une obligation de notification dans l'État membre où l'on fournit des services : il permet aux États membres d'exiger d'un prestataire de services établi dans un autre État membre qu'il fasse une « déclaration simple » contenant les informations pertinentes nécessaires pour permettre des contrôles factuels sur le lieu de travail.

40 À cet égard, des mesures supplémentaires devraient être prises dans le domaine de la collecte de données. Par exemple, il semble qu'Eurostat sera en mesure de fournir une meilleure vue d'ensemble du secteur dans les années à venir en collectant des statistiques structurelles sur les entreprises (SSE) du secteur ainsi qu'en effectuant une analyse plus détaillée des données de l'enquête européenne sur les forces de travail (LFS), ce qui permettra une meilleure estimation du volume de l'emploi dans le secteur. On ne peut que s'en réjouir.

On estime qu'environ 807 700 entreprises[41] et 1,3 million de personnes sont actives dans le secteur du spectacle vivant au sein de l'UE-27/AELE/Royaume-Uni.[42] L'emploi et les entreprises sont concentrés dans un nombre limité de pays, principalement en Allemagne et en France.[43] L'emploi dans le secteur du spectacle vivant correspond à environ 0,5 % de la main-d'œuvre totale dans l'UE-27, avec de nettes différences dans l'importance relative entre les États membres. Il varie de 0,2 % dans la population active totale de la Croatie, de Chypre, du Luxembourg et de la Roumanie à 1 % dans la population active totale des Pays-Bas et de la Slovénie. Toutefois, les chiffres ci-dessus sont susceptibles d'être une sous-estimation (significative) de l'importance absolue et relative du secteur, car ils ne tiennent pas compte des personnes exerçant un deuxième emploi dans le secteur du spectacle vivant.

En outre, sur la base de la classification des entreprises en fonction du nombre d'employés, il apparaît clairement qu'à l'exception de la sous-catégorie 90.04 « Gestion de salles de spectacles », une très grande partie des « sociétés » (c'est-à-dire des entreprises) du secteur du spectacle vivant ne compte qu'une seule personne. Cela concerne environ sept sociétés sur dix actives dans le secteur. En outre, quelque 98 % des sociétés sont considérées comme des « petites » entreprises. Ce profil est en grande partie le résultat du nombre élevé d'indépendants dans le secteur, puisque nous pouvons affirmer que plus de quatre personnes actives sur dix dans le secteur sont des indépendants. Ce chiffre est beaucoup plus élevé que la moyenne de 14 % de l'emploi total dans l'UE.

Enfin, il faut dire que, par rapport à d'autres secteurs, l'emploi dans le secteur du spectacle vivant se caractérise par davantage d'aménagements atypiques[44] du temps de travail (plus de temps partiel et plus de combinaisons avec d'autres emplois), de contrats atypiques (travail à durée déterminée, sur projet ou sur tâche) et de relations de travail atypiques (plus de travail indépendant et de contrats d'appel). Lorsque les services sont fournis à l'étranger, ce caractère atypique peut créer des défis supplémentaires, notamment en ce qui concerne la détermination de la législation de sécurité sociale de l'État membre qui doit être considérée comme applicable. Cela nous amène à la dimension transnationale du secteur. Toutefois, avant de se prononcer sur l'ampleur et les caractéristiques de cette dimension, il convient de préciser le concept de travailleur « très mobile ».

Déchiffrer le concept de « travailleur très mobile »

Il faut reconnaître que dès que nous commençons à réfléchir au concept de « travailleur très mobile », il nous glisse entre les doigts comme du sable. À cet égard, il est difficile de le définir correctement. À notre avis, la meilleure façon de définir ce concept est d'examiner la *fréquence* et la *durée* de l'emploi à l'étranger d'un travailleur mobile. En effet, la fréquence des voyages professionnels dans un autre État membre pour ce groupe de travailleurs est généralement élevée à très élevée et la durée de leur présence dans ledit État membre est généralement très courte (souvent limitée à quelques semaines, jours ou même heures). En outre, dans de nombreux cas, cela ne concerne pas seulement l'État membre. À cet égard, les « travailleurs très mobiles » peuvent être définis comme des travailleurs (et

41 Si l'on applique la classification étroite du secteur (somme des codes NACE 90.01, 90.02 et 90.04, à l'exclusion du code NACE 90.03), le nombre d'entreprises tombe à quelque 461 000 entreprises, les activités de 327 900 entreprises pouvant être qualifiées d'« arts du spectacle vivant », celles de 107 200 entreprises d'« activités de soutien au spectacle vivant » et celles de 25 800 entreprises de « gestion de salles de spectacles ». Malheureusement, aucune ventilation de ce type n'est disponible pour les chiffres de l'emploi dans ce secteur.

42 Les travailleurs indépendants s'inscrivent dans les deux variables. Tant d'un point de vue statistique que juridique, la question se pose de savoir si ce groupe doit être rattaché au groupe des « travailleurs » plutôt qu'au groupe des « sociétés » (c'est-à-dire des entreprises). Le fait que les indépendants ne soient pas couverts par la directive sur les travailleurs détachés rend la réponse à cette question encore plus compliquée.

43 Par exemple, environ 40 % des entreprises sont situées en France et environ 18 % des emplois se trouvent en Allemagne.

44 Bien entendu, ce qui est considéré comme « non standard ou atypique » aujourd'hui peut devenir « standard ou typique » dans un avenir (proche), et *vice versa*. À cet égard, ces termes ne reflètent qu'une déviation de la norme d'emploi standard.

des travailleurs indépendants) qui, au cours de l'année, sont actifs dans plusieurs États membres et dont l'emploi dans chacun de ces États membres est généralement de (très) courte durée.[45]

En prenant également en compte le statut de l'artiste ou du musicien, le concept de « travailleur très mobile » applicable au secteur du spectacle vivant prend une dimension supplémentaire par rapport au concept de base défini ci-dessus, et va donc au-delà de l'aspect purement transfrontalier du concept. En effet, la « mobilité » dans le secteur du spectacle vivant ne peut pas simplement être considérée comme des déplacements occasionnels à travers les frontières nationales, car la « mobilité » fait partie intégrante de la vie professionnelle quotidienne des professionnels de la culture en raison des aménagements du temps de travail, des contrats et des relations de travail atypiques dans ce secteur. Nous pouvons donc proposer la définition suivante : les travailleurs hautement mobiles dans le secteur du spectacle vivant se caractérisent par un nombre élevé de mouvements transfrontaliers *(fréquence)*, par l'exécution de diverses missions de courte durée dans différents pays *(durée)* et par une situation professionnelle souvent atypique *(statut)*.

La question se pose de savoir si la délimitation ci-dessus du concept est suffisamment solide sur le plan *juridique*. La délimitation d'une catégorie spécifique de personnes implique la capacité d'identifier ce groupe de personnes sur la base d'un certain nombre de caractéristiques qu'elles ne partagent pas avec d'autres. Ce n'est pas du tout évident pour le groupe des « travailleurs très mobiles ». Il s'agit pourtant d'un prérequis essentiel si l'on veut définir des règles spécifiques pour ce groupe. Selon nous, il convient d'établir une distinction entre le concept de « travailleur très mobile » et celui de « secteur très mobile ». Après tout, même dans les cas où un secteur ne peut être qualifié de « secteur très mobile », il peut y avoir un groupe (important) de travailleurs très mobiles actifs dans ce secteur.

Cartographier la dimension transnationale du secteur du spectacle vivant

Il convient de noter que la dimension transnationale de ce secteur reste également un angle mort, tant en termes de taille que de caractéristiques. Par conséquent, nous avons tenté de quantifier la mesure dans laquelle le secteur du spectacle vivant a une dimension transnationale. Pourtant, il se pourrait bien que seule une partie du groupe de travailleurs et de sociétés de ce secteur se produise à l'étranger. La question se pose alors de savoir si ce groupe peut être considéré comme « très mobile ». Ici, nous examinons spécifiquement si les travailleurs mobiles et les compagnies (en tournée) se déplacent dans plusieurs pays, à quelle fréquence ils le font et combien de temps ils y restent. Malgré nos efforts, le lecteur constatera qu'il nous reste un chemin long et sinueux à parcourir pour obtenir une image précise de la dimension transnationale du secteur.

Comme nous l'avons déjà mentionné, l'emploi dans le secteur du spectacle vivant représente environ 0,5 % de la main-d'œuvre totale dans l'UE-27. Les données empiriques du document portable A1 montrent que, dans la plupart des États membres, la part du secteur du spectacle vivant dans le total des emplois transfrontaliers temporaires est supérieure à la part de l'emploi dans la main-d'œuvre totale de ces États membres. Cela montre que le secteur du spectacle vivant a une dimension transnationale plus importante que de nombreux autres secteurs d'activité.

En outre, sur la base des données relatives à l'exportation de services, nous pouvons tirer deux conclusions préliminaires : (1) un grand groupe d'entreprises d'arts de la scène ne semble pas exporter de services à l'étranger, et (2) un groupe important d'entreprises d'arts de la scène exporte presque exclusivement des services à l'étranger.

Pour les travailleurs mobiles et les entreprises actives dans le secteur du spectacle vivant, un document portable A1 est principalement accordé lors de la prestation temporaire de services dans

45 Il convient de noter que d'autres auteurs appliquent une définition légèrement différente du « travailleur très mobile ». Van Ooij (2020) affirme que le terme « travailleur très mobile » désigne deux aspects de la mobilité : l'exercice de l'activité professionnelle au-delà des frontières (mobilité géographique) et la mobilité dans la forme et le modèle d'engagement professionnel (mobilité professionnelle). Rasnača (2020) indique que soit ils traversent régulièrement les frontières en raison de la nature de leur travail, soit ils travaillent dans plusieurs États membres, soit ils traversent une frontière tous les jours afin de travailler dans un État membre autre que celui où ils résident en permanence. Notre définition présente des similitudes avec celle de Pieters et Schoukens (2020). Ils parlent de « forte mobilité » pour définir les activités professionnelles caractérisées par un degré de mobilité très intense et élevé.

un État membre particulier (conformément à l'article 12 du règlement 883/2004) plutôt que pour la prestation d'activités dans plusieurs États membres simultanément pendant une période plus longue (conformément à l'article 13 du règlement 883/2004), alors qu'ils se produisent souvent plusieurs fois par an à l'étranger, souvent dans différents États membres. Ces résultats montrent, bien qu'ils doivent être considérés comme préliminaires, que l'on ne peut pas simplement assimiler le profil de la dimension transnationale du secteur du spectacle vivant à celui d'autres secteurs « mobiles ». Par exemple, alors que pour le secteur du fret routier, les documents portables A1 sont principalement délivrés conformément à l'article 13, ce n'est pas le cas pour le secteur du spectacle vivant. Cette observation soulève la question de savoir pourquoi il en est ainsi. Il convient ici d'examiner les procédures d'application de l'article 13. Notamment, pour appliquer l'article 13, l'autorité nationale compétente doit prendre en compte la situation prévue pour les douze mois civils suivants. Cependant, les travailleurs et les entreprises (très) mobiles ne savent (souvent) pas à l'avance où ils vont travailler au cours des douze prochains mois.

En outre, les données empiriques montrent que la période de détachement dans le secteur du spectacle vivant est le plus souvent limitée à quelques jours. Par exemple, les données des États membres déclarants montrent que quelque six détachements sur dix dans le secteur durent entre un et huit jours. Ces résultats contrastent fortement avec la période moyenne de détachement d'environ trois mois pour l'ensemble de l'économie.

Enfin, les données montrent que la France[46] et l'Allemagne sont les principaux États membres d'accueil des travailleurs mobiles et des compagnies (en tournée) actives dans le secteur du spectacle vivant.

La sécurité sociale et le statut professionnel du travailleur (très) mobile

Les travailleurs mobiles et les entreprises se heurtent à un cadre juridique complexe lorsqu'ils fournissent des services à l'étranger. En effet, le degré d'harmonisation à l'échelle européenne est encore relativement modeste. Ainsi, les législations et réglementations nationales en place restent largement très différentes entre les États membres. L'unique objectif au niveau européen est d'établir un socle de droits fondamentaux et de coordonner les différents cadres législatifs dans un certain nombre de domaines. Il n'est pas prévu d'harmoniser et/ou de normaliser les systèmes/accords nationaux ou même sectoriels définissant les conditions de travail et les cotisations de sécurité sociale à respecter. La conséquence pratique pour les travailleurs et les entreprises (très) mobiles est que les droits et devoirs (sociaux) sont parfois difficiles à déterminer.

Dès que les artistes et les entreprises traversent les frontières, il est important de déterminer quelles dispositions en matière de sécurité sociale s'appliquent. Cette question est traitée sur la base des règlements 883/2004 et 987/2009 (dénommés « règlements de coordination »). Toutefois, la détermination de la législation de sécurité sociale applicable n'est pas une tâche facile, notamment pour les artistes et les compagnies actives dans le secteur du spectacle vivant. En effet, en raison du caractère atypique de ce secteur et de la diversité des « modèles d'emploi », la différence entre « détachement » (article 12 du règlement 883/2004) et « activités simultanées » (article 13 du règlement 883/2004) n'est pas toujours très claire. Cela nécessitera souvent une évaluation au cas par cas afin de déterminer la législation de sécurité sociale applicable.

Du point de vue du droit du travail,[47] le scénario qui caractérise principalement les travailleurs mobiles dans le secteur du spectacle vivant est celui du détachement des travailleurs. La directive 96/71/CE (dite directive sur le détachement des travailleurs) peut être comprise comme l'instrument

46 La France semble être très stricte sur la nécessité d'avoir un document portable A1 pour que le détachement soit « légal ». Elle a mis en place des sanctions en cas de non présentation du document portable A1 et/ou procède à de nombreux contrôles sur la détention du document portable A1. Ces mesures peuvent avoir un impact significatif sur les demandes de documents portables A1 lors de la prestation de services en France. Par conséquent, la part des États membres où de nombreux contrôles sont effectués, comme la France, dans le total pourrait être surestimée.

47 Le règlement (CE) n° 593/2008 (c'est-à-dire le règlement Rome I) détermine la loi applicable aux contrats en cas de conflit de lois possible, comme dans le cas d'une situation d'emploi transnationale.

permettant d'identifier les dispositions dont l'application aux travailleurs détachés doit être assurée par les États membres. La directive sur le détachement des travailleurs a récemment été modifiée par la directive (UE) 2018/957. En substance, les travailleurs détachés ont droit à la même « rémunération »[48] que les employés locaux. Toutefois, pour déterminer la rémunération applicable au travailleur détaché, une comparaison entre la rémunération versée en vertu du contrat de travail dans l'État membre d'origine et celle à verser dans l'État membre d'accueil doit être effectuée afin d'appliquer le niveau de rémunération le plus élevé.

Défis et obstacles rencontrés par les travailleurs et les entreprises du secteur du spectacle vivant dans des contextes transfrontaliers

Lorsqu'on évoque les défis et les obstacles rencontrés par les travailleurs mobiles et les entreprises, le dénominateur commun est souvent la complexité juridique et la charge administrative qui découlent de l'application du droit européen du travail et de la sécurité sociale (par exemple, l'identification de l'État membre compétent en matière de sécurité sociale, le paiement des cotisations de sécurité sociale dans ledit État membre,[49] l'application des conditions définies dans la directive sur le détachement des travailleurs), ainsi que les formalités administratives correspondantes (par exemple, la demande d'un document portable A1 et la notification préalable).[50] En outre, il existe un manque de connaissances sur la législation du travail et de la sécurité sociale à appliquer dans une situation transfrontalière, notamment en raison du manque d'informations claires. Par exemple, le manque de connaissance de la réglementation est clairement reflété par les résultats de l'enquête en ligne, puisque seul un répondant sur quatre était au courant de la récente modification de la directive sur le détachement des travailleurs. Cela indique un manque de connaissances/de sensibilisation, qui se traduit par un manque de conformité réglementaire.[51]

Ce rapport se concentre principalement sur la législation européenne, et en particulier sur les défis qui découlent de l'application des règlements de coordination et de la directive sur le détachement des travailleurs. Néanmoins, la législation nationale peut avoir un impact (significatif) sur la facilité ou la difficulté d'application de ces règles européennes (voir l'annexe I pour une analyse comparative du cadre juridique existant en Belgique, aux Pays-Bas, en France et en Allemagne). De plus, il faut être conscient que le caractère atypique du secteur peut avoir un impact sur les défis identifiés dans un contexte transnational. La question de savoir si ce caractère atypique peut être considéré comme un problème ou un défi pour le secteur dépasse le cadre de ce rapport.

Dans la définition des défis (et des solutions), nous sommes favorables à une distinction claire entre ceux qui découlent de l'application de la législation du travail et de la sécurité sociale et les formalités administratives correspondantes. En ce qui concerne ce dernier point, il est important de prendre des mesures pour que la charge administrative découlant d'une activité à l'étranger reste proportionnelle à ses avantages. Après tout, le fait qu'une entreprise, en cas de prestation de services à l'étranger, doive remplir plusieurs exigences de notification, tant dans l'État membre d'origine que dans l'État membre d'accueil, crée une charge administrative substantielle, voire une double charge. Actuellement, seuls l'Autriche, la Belgique, le Danemark, la France et les Pays-Bas accordent une exemption de notification préalable aux artistes et à leurs employeurs. En outre, la nécessité[52] de disposer d'un document portable A1 pour chaque détachement à l'étranger est une procédure lourde

48 Récemment modifiée par la directive (UE) 2018/957 (au lieu de « taux de salaire minimum » égaux comme le prévoyait la version précédente de la directive sur le détachement des travailleurs).

49 Par exemple, des problèmes peuvent découler de l'obligation de payer des cotisations de sécurité sociale dans un État membre autre que celui de l'employeur.

50 Cela peut conduire à des cas de non-respect ou de contournement (par exemple, par l'utilisation du statut d'indépendant afin d'éviter l'application de la directive sur le détachement des travailleurs).

51 Notamment parce que le secteur n'est pas considéré comme une priorité pour les inspections du travail. Par exemple, seul un répondant sur cinq à l'enquête en ligne a indiqué qu'il était déjà entré en contact avec l'inspection du travail compétente.

52 Dans certains cas, un détachement peut avoir lieu sans que les institutions en soient informées ou sur le document portable A1 soit octroyé avec effet rétroactif. À cet égard, la « nécessité » de disposer d'un document portable A1 peut varier fortement d'un État membre à l'autre et d'un secteur à l'autre, souvent en fonction du « risque » d'inspection.

et fastidieuse.[53] Par conséquent, l'absence de dispositions spéciales pour les détachements de (très) courte durée peut entraîner une charge administrative disproportionnée pour les PME. En outre, il n'est pas toujours possible pour ces PME d'engager des experts externes pour servir d'intermédiaires. À cet égard, une charge administrative élevée peut entraver les spectacles vivants à l'étranger, et donc la libre circulation des travailleurs et des services.

En raison du caractère atypique du secteur du spectacle vivant, il peut s'avérer difficile d'identifier la législation en matière de sécurité sociale qui doit s'appliquer à l'artiste, au musicien ou au technicien mobile. Par conséquent, les travailleurs (très) mobiles employés dans le secteur du spectacle vivant peuvent ne pas être sûrs de leurs droits, tandis que les employeurs peuvent avoir du mal à comprendre à quel système national de sécurité sociale ils doivent verser leurs cotisations de sécurité sociale. Par exemple, lorsque les artistes sont actifs dans plusieurs États membres, tombant ainsi sous le coup de l'article 13 du règlement 883/2004, les spécificités des modèles d'emploi dans le secteur pourraient finir par compliquer leur situation en matière d'affiliation à la sécurité sociale. Comme nous ne pouvons pas explorer ici la panoplie des scénarios possibles, nous nous limitons à un seul exemple. L'article 13, paragraphe 3, prévoit que lorsqu'une personne est active dans plusieurs États membres à la fois comme salarié et comme indépendant, elle est soumise à la législation de sécurité sociale de l'État membre où elle est salariée. L'article ne précise pas les seuils à partir desquels cette règle s'applique, et cela n'a pas été clarifié par une décision de la commission administrative pour la coordination des systèmes de sécurité sociale. Il pourrait en résulter une situation dans laquelle un artiste est actif dans plusieurs États membres, y compris son propre État membre de résidence, sous le statut d'indépendant, mais est ensuite engagé pour une durée limitée en tant que salarié dans un autre État membre, et finit donc par être affilié dans ce dernier État membre, malgré le lien limité. Ceci est particulièrement pertinent car certains marchés très importants pour le secteur du spectacle vivant, comme la France, prévoient une présomption de relation de travail pour les artistes. Cette présomption comporte une exception pour les artistes actifs en tant qu'indépendants dans un autre État membre, partant en détachement en France, mais cette exception ne s'applique pas aux artistes engagés en France par un employeur français et également actifs en tant qu'indépendants dans d'autres États membres. Enfin, des problèmes peuvent également se poser lors de l'application des conditions pour être détaché en vertu de l'article 12 du règlement 883/2004. Par exemple, un artiste peut se produire à l'étranger relativement peu de temps après avoir été engagé. Toutefois, dans ce cas, il doit être soumis à la législation du pays de l'employeur au moins un mois avant le détachement. Dans la discussion sur la révision du règlement de coordination, il est même proposé de porter ce délai à trois mois d'assurance préalable.

En droit du travail, l'une des principales difficultés vient du fait que la directive sur le détachement des travailleurs s'applique à partir du « jour zéro », c'est-à-dire à partir du premier moment où un travailleur détaché arrive dans l'État membre d'accueil pour y effectuer un service. Cela a un impact important sur la complexité à laquelle sont confrontées les entreprises visées par les détachements dans le secteur du spectacle vivant, notamment lorsque ces entreprises doivent organiser des tournées qui incluent une présence de courte durée dans plusieurs États membres. Bien que des décisions récentes de la Cour de justice semblent suggérer la création d'une catégorie de « détachements de courte durée », qui ne relèverait pas du cadre juridique du détachement de travailleurs en raison de leur lien limité avec l'État membre d'accueil, cette catégorie reste une catégorie jurisprudentielle, aux limites incertaines, qui n'apporte pas la certitude nécessaire aux décisions des entreprises. En fin de compte, le fait que les compagnies (en tournée) et leurs artistes excellent sur scène devrait constituer leur avantage concurrentiel et non le prix qu'elles pratiquent. Lorsqu'il s'agit de l'application des conditions d'emploi, la plupart des difficultés et des obstacles semblent provenir de la complexité des règles applicables. Certaines difficultés spécifiques se posent pour les employeurs du secteur public

53 En outre, les procédures administratives nationales de plusieurs États membres ne seraient pas toujours suffisamment adaptées aux détachements de très courte durée, car elles ne sont pas toujours en mesure de délivrer un document portable A1 à temps.

ou du secteur privé subventionné qui détachent leurs travailleurs, employés comme fonctionnaires, dans un autre État membre. Dans de nombreux cas, ces employeurs travaillent dans le cadre de règles budgétaires strictes, ce qui les empêche de prévoir l'augmentation de la rémunération qui est nécessaire lors du détachement d'artistes et de techniciens dans un État membre caractérisé par un niveau de rémunération applicable plus élevé.

Le « remède miracle » n'existe pas : recherche de solutions ascendantes

Lors de la formulation des solutions, une distinction est faite entre les solutions opérationnelles, d'une part, qui peuvent être facilitées par les partenaires sociaux, les administrations publiques et les inspections du travail au niveau national et européen, et les solutions législatives, d'autre part. Les solutions opérationnelles peuvent être mises en œuvre à court et moyen terme, tandis que les solutions législatives doivent plutôt être envisagées à long terme. Notre point de départ est une approche pragmatique ascendante, qui approuve et met en œuvre intégralement le cadre législatif européen actuel et se concentre sur les mesures supplémentaires qui peuvent être prises dans le domaine de l'information (c'est-à-dire la « sensibilisation »). Cela ne veut pas dire que nous ne reconnaissons pas la complexité juridique et la charge administrative. Toutefois, il ne faut pas s'attendre à ce que les règlements de coordination et la directive sur le détachement des travailleurs puissent résoudre tous les problèmes et défis identifiés. Après tout, certains des problèmes rencontrés par les entreprises et les artistes mobiles sont principalement dus à la législation nationale ou aux caractéristiques du secteur du spectacle vivant.

Accroître la sensibilisation en fournissant des informations précises et conviviales

Un objectif important de ce rapport est de fournir des indications sur la législation sociale et du travail à appliquer. À cette fin, plusieurs outils ont été développés dans le cadre de la présente recherche, notamment une approche par étapes de l'application des conditions de rémunération et de travail aux travailleurs détachés, ainsi qu'un organigramme permettant d'identifier la législation de sécurité sociale applicable aux situations d'emplois simultanés. En outre, nous avons utilisé un modèle développé par l'Autorité européenne du travail (AET) en collaboration avec son Groupe de travail sur l'information pour présenter les informations découlant des conventions collectives universellement applicables. Notamment, nous avons appliqué ce modèle à un cas type constitué des deux conventions collectives applicables au secteur du spectacle vivant en France. Nous espérons que cela encourage davantage d'acteurs, que ce soit parmi les partenaires sociaux ou les autorités publiques, à entreprendre ce travail pour les conventions collectives applicables aux travailleurs détachés. Enfin, le rapport fournit pour chaque État membre un lien vers le site web national officiel du détachement de l'État membre d'accueil, vers la page web contenant des informations sur la manière et l'endroit où demander un document portable A1 dans l'État membre d'origine, et enfin vers la page web contenant des informations sur la manière et l'endroit où effectuer une notification préalable dans l'État membre d'accueil.

Le degré de facilité d'utilisation des informations mises à disposition est un autre sujet de discussion. Par exemple, on peut facilement choisir de fournir un lien permettant d'accéder aux conventions collectives. C'est ce qui semble être la stratégie aujourd'hui sur les sites nationaux officiels du détachement.[54] Malheureusement, cela ne signifie pas que l'on puisse trouver facilement les

54 L'article 5 de la directive révisée sur le détachement des travailleurs donne à la Cour de justice le pouvoir d'apprécier le caractère complet des informations figurant sur les sites web nationaux officiels lorsqu'il s'agit d'évaluer la proportionnalité des sanctions éventuellement appliquées en cas de violation des règles de détachement. Une décision en ce sens constituerait certainement une puissante incitation à l'amélioration des informations contenues dans ces sites web. En même temps, une telle décision pourrait constituer un choc pour les États membres. Afin d'éviter cela, la Commission européenne pourrait commencer à demander de manière proactive aux États membres des informations sur l'état des informations présentées sur leurs sites web nationaux officiels et, dans ce contexte, développer une approche standardisée, éventuellement basée sur le modèle de l'AET, quant aux informations qui devraient y figurer. À cet égard, il convient de noter que le programme de travail 2021 de l'AET (p. 13) indique qu'« une attention particulière sera accordée aux informations fournies par le site web national sur le détachement des travailleurs, à la suite de l'entrée en vigueur de la directive (UE) 2018/957, l'AET poursuivant les activités d'examen par les pairs lancées par le comité d'experts sur le détachement des travailleurs ».

informations relatives à la rémunération à verser. À cet égard, une prochaine étape dans le processus d'information pourrait consister à faire en sorte que ces conventions collectives soient également facilement consultables dans toutes/plusieurs langues officielles de l'UE (par exemple, sur la base du modèle élaboré par l'AET).[55] Une dernière étape consiste à comparer les conventions collectives de tous les États membres entre elles afin de savoir combien il faudra éventuellement payer en plus. Bien entendu, le statut et l'ancienneté du travailleur ainsi que les nouvelles dispositions de la directive sur le détachement des travailleurs doivent être pris en compte lors d'un tel exercice. Par exemple, dans ce rapport, nous avons essayé de calculer de combien le salaire brut doit être augmenté lorsque les services sont fournis par des compagnies (en tournée) et des artistes mobiles d'un pays X à un pays Y. Cet exercice a été réalisé en tenant compte à la fois du salaire moyen dans le secteur des arts, du divertissement et des loisirs et des salaires minimums nationaux. Il indique clairement que le coût de la main-d'œuvre, et donc le coût à facturer à l'organisateur, lors d'un spectacle à l'étranger peut différer sensiblement du coût normalement facturé. De même, le budget requis par les compagnies en tournée pour respecter les conditions fixées par la directive sur le détachement des travailleurs sera souvent beaucoup plus élevé que celui des compagnies qui ne se produisent que dans leur pays de résidence. À cet égard, ce constat devrait également constituer un signal d'alarme pour la politique européenne et nationale de subventionnement du secteur du spectacle vivant.[56]

Les organisateurs et les salles de spectacle doivent être encouragés à jouer un rôle proactif en informant les compagnies (en tournée) des conventions collectives applicables aux artistes et aux techniciens qu'ils accueillent. Cela repose sur l'hypothèse que les organisateurs et les salles de spectacles sont susceptibles d'avoir une bien meilleure compréhension de leur propre système et donc d'être en mesure de guider les employeurs étrangers à travers cet ensemble de règles. Bien que ce rôle ne soit pas familier aux organisateurs et aux salles de spectacles, les associations d'employeurs, tant au niveau national qu'européen, pourraient jouer un rôle central dans cette entreprise, notamment en sensibilisant le public.[57] Enfin, les autorités nationales et les inspections du travail peuvent jouer un rôle plus actif dans l'information des travailleurs et des entreprises actives dans le secteur du spectacle vivant.

Diminution de la charge administrative (c'est-à-dire moins de formalités administratives)

L'entreprise visée par le détachement doit remplir plusieurs obligations de notification, à la fois dans l'État membre d'origine (c'est-à-dire la demande d'un document portable A1) et dans l'État membre d'accueil (c'est-à-dire faire une déclaration « simple »). Cela constitue une charge administrative importante, voire une double charge. L'introduction de procédures numériques conviviales de demande ou d'enregistrement pourrait réduire considérablement cette charge.

Par ailleurs, on peut également s'interroger sur la nécessité de disposer d'un document portable A1[58] et de procéder à une notification préalable pour chaque détachement court, comme c'est souvent le cas dans le secteur du spectacle vivant. Après tout, on peut se demander si l'exigence d'être en possession d'un document portable A1 même pour une très courte période à l'étranger - alors que ne pas être en possession d'un document portable A1 peut entraîner dans certains États membres

55 Il va sans dire que ce processus de réorganisation des informations contenues dans les conventions collectives et leur traduction dans une ou plusieurs langues est à la fois coûteux et long. On pourrait également considérer qu'il ne fait pas partie des activités principales des partenaires sociaux, car il profite essentiellement aux employeurs et aux travailleurs qui, par définition, ne sont pas leurs membres. À ce titre, un rôle proactif devrait être joué dans ce domaine par les fédérations et associations européennes, afin d'encourager leurs membres à relever ce défi qui, en fin de compte, profitera à l'ensemble du secteur en Europe en facilitant la mobilité et les échanges culturels.

56 Voir également les obstacles identifiés pour les employeurs du secteur public ou du secteur privé subventionné qui détachent leurs travailleurs, employés comme fonctionnaires, dans un autre État membre. Pour surmonter ces obstacles, il faut modifier les règles budgétaires applicables aux services publics et aux organismes de financement au niveau national, ce qui devrait inclure le degré de flexibilité nécessaire pour permettre aux employeurs qui détachent des travailleurs de respecter la législation européenne en la matière.

57 En outre, les résultats de l'enquête en ligne montrent que les exploitants de salles de spectacles dans le pays d'accueil sont le canal d'information le plus fréquemment utilisé par les entreprises artistiques.

58 Le cadre juridique actuel prévoit que l'employeur ou la personne concernée informe les autorités compétentes de ses activités transnationales prévues, *si possible* avant que celles-ci n'aient lieu.

des sanctions très élevées - est nécessaire et ne va pas au-delà de ce qui peut être exigé proportionnellement. Ici, il y a principalement un conflit entre la charge administrative pour l'employeur, la nécessité pour les institutions de sécurité sociale et les inspections de veiller à ce qu'il n'y ait pas d'abus ou de fraudes en matière de cotisations, et enfin le besoin de sécurité juridique pour le travailleur mobile afin d'éviter des lacunes dans la protection sociale transnationale. Parfois, l'équilibre est rompu, comme le montre la proposition de révision du règlement de coordination qui est actuellement sur la table et qui vise à exclure les voyages d'affaires de l'obligation de disposer d'un document portable A1. Plus important encore, il faut également s'interroger sur les sanctions élevées que certains États membres ont prévues en l'absence de document portable A1.[59] En outre, seuls l'Autriche, la Belgique, le Danemark, la France et les Pays-Bas dispensent les artistes d'une notification préalable. À cet égard, il serait utile de négocier une exemption de notification préalable avec chaque État membre séparément, et en particulier avec les principaux États membres accueillant les artistes (par exemple, l'Allemagne, l'Italie, etc.).

Il s'agit bien sûr de solutions qui demandent à être approfondies. Par exemple, pour faciliter l'identification des personnes au-delà des frontières aux fins de la coordination de la sécurité sociale, l'idée a été lancée par la Commission européenne d'introduire un numéro de sécurité sociale européen.[60] Cela peut être considéré comme une solution alternative possible au document portable A1. En outre, la mise en œuvre de l'EESSI (échange électronique d'informations sur la sécurité sociale) pourrait avoir un impact positif sur la charge administrative.[61]

Vers un cadre juridique adapté au secteur du spectacle vivant et/ou au « travailleur très mobile » ?

Certains artistes, notamment ceux qui exercent des activités de tournée, sont un exemple typique de travailleur très mobile. Comme les règlements de coordination semblent souvent s'adresser à un travailleur migrant typique qui se déplace dans un autre État membre pour une période plus longue et pour lequel l'intégration dans le nouvel État membre de destination est primordiale, il n'est pas surprenant que ces règles posent des défis pour ces personnes très mobiles. Les conséquences pour ces travailleurs très mobiles et leurs employeurs sont que les droits et obligations sociaux sont non seulement parfois difficiles à déterminer, mais aussi que des questions peuvent être soulevées quant à l'adéquation de la législation applicable, notamment en cas de multiples courtes périodes consécutives d'emploi à l'étranger. De ce point de vue, on peut se demander si et dans quelle mesure une approche sectorielle tiendrait mieux compte des particularités du secteur du spectacle vivant. En outre, il conviendrait d'envisager la rédaction de règles de conflit spécifiques qui soumettraient les travailleurs très mobiles à une législation plus stable. Toutefois, une délimitation solide du secteur du spectacle vivant ainsi que de la notion de « travailleur très mobile » constitue peut-être la plus grande pierre d'achoppement ici.

59 Comme l'a déclaré la Cour de justice, la sévérité de la sanction doit être proportionnelle à la gravité de l'infraction. En particulier, les mesures administratives ou punitives autorisées par la législation nationale ne doivent pas aller au-delà de ce qui est nécessaire pour atteindre les objectifs légitimement poursuivis par cette législation.

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

61 L'EESSI est un système informatique qui vise à aider les institutions de sécurité sociale dans l'échange de documents électroniques transfrontaliers. Le système EESSI a été mis à disposition par la Commission européenne en juillet 2017. Depuis lors, les États membres ont eu deux ans pour finaliser leur mise en œuvre nationale de l'EESSI et connecter leurs institutions de sécurité sociale aux échanges électroniques transfrontaliers. Actuellement, les 32 pays participants (UE-27/AELE/Royaume-Uni) sont connectés au système EESSI et sont en mesure d'échanger par voie électronique sur certains des processus commerciaux.

Zusammenfassung

Einführung

Um die Arbeit der Sozialpartner im Allgemeinen und insbesondere in Sektoren, die durch ein hohes Maß an grenzüberschreitender Mobilität gekennzeichnet sind, zu unterstützen, befasst sich dieser Bericht mit dem oft vernachlässigten Thema der sozialen Sicherheit und des Beschäftigungsstatus von „hochmobilen Arbeitnehmern".[62]

In den letzten zwei Jahrzehnten hat die Zahl der europäischen Bürger, die (vorübergehend) in einem anderen EU-Mitgliedstaat arbeiten, erheblich zugenommen, und zwar nicht nur über den traditionellen Kanal der „Arbeitsmigration", sondern auch und in zunehmendem Maße über verschiedene Formen der „vorübergehenden Arbeitsmobilität".[63] Letzteres schließt auch hochmobile Arbeitnehmer ein, d. h. Arbeitnehmer, deren Arbeitsort nicht in einem bestimmten Mitgliedstaat, sondern „in der EU" liegt. Entweder weil sie häufig ins Ausland entsandt[64] werden oder Tätigkeiten in mehreren Mitgliedstaaten gleichzeitig ausüben. Insbesondere Personen, die im internationalen Transportwesen beschäftigt sind, scheinen in diese Gruppe zu fallen (LKW-Fahrer, Piloten, Flugbegleiter und Seeleute). Doch nicht nur im Verkehrssektor sind die Arbeitnehmer aus beruflichen Gründen in der EU sehr mobil. So können z. B. auch Manager und Mitarbeiter internationaler Unternehmen, Handelsvertreter oder Forscher in der EU sehr mobil sein.

In diesem Bericht lenken wir die Aufmerksamkeit auf eine bestimmte Gruppe von (hoch-)mobilen Arbeitnehmern in der EU, insbesondere auf diejenigen, die im „Live-Performance-Sektor"[65] tätig sind. Diese Kategorie ist breit gefächert und vielfältig und umfasst beispielsweise den Tänzer, der für mehrere Wochen in verschiedenen Mitgliedstaaten auf Tournee ist, den Schauspieler, der von einer Theatergruppe in einem Mitgliedstaat engagiert und als Gastdramaturg in einen anderen Mitgliedstaat eingeladen wird, den Musiker, der in mehreren Orchestern und Musikensembles in verschiedenen Mitgliedstaaten spielt und in einem weiteren Mitgliedstaat probt. Diese Situationen zeigen einen (hoch-)mobilen Sektor, der nicht durch geografische Grenzen definiert ist. Es lässt sich nicht leugnen, dass die Erbringung von Dienstleistungen in einem anderen Land nicht immer so einfach ist, wie es scheinen mag, selbst in einem hoch integrierten Raum wie der EU. Zum Beispiel kann es eine große Herausforderung sein, die Sozialversicherungs- und Arbeitsgesetzgebung zu bestimmen, die auf diese Gruppe von (hoch-)mobilen Arbeitnehmern angewendet werden sollte. Dies wirft mehrere Fragen für die beteiligten Akteure auf (d. h. den mobilen Mitarbeiter, das (Tournee-)Unternehmen, aber auch den Betreiber des Veranstaltungsorts). Infolgedessen sind natürliche und juristische Personen, die im Bereich der Live-Darbietungen tätig sind, nur allzu oft unsicher und/oder kennen den rechtlichen Rahmen (Rechte und Pflichten) und die Verwaltungsformalitäten nicht, die sie bei der Erbringung grenzüberschreitender Dienstleistungen erfüllen müssen. Was genau diese Herausforderungen im Bereich des Arbeits- und Sozialversicherungsrechts sind und welche Antworten denkbar sind, ist

62 Einschließlich Selbstständige.

63 Der Umfang dieser Studie umfasst nicht die Bewegungen in und aus Ländern außerhalb der EU-27/EFTA/UK.

64 Unter Entsendung versteht man den Fall, dass ein in einem Mitgliedstaat niedergelassener Arbeitgeber einen oder mehrere seiner Arbeitnehmer zur Erbringung von Dienstleistungen in einen anderen Mitgliedstaat entsendet. Selbstständige können gemäß den Koordinierungsverordnungen (d. h. den Verordnungen 883/2004 und 987/2009) ‚entsandt' werden, aber nicht im Sinne der Entsenderichtlinie (d. h. der Richtlinie 96/71/EG).

65 Es gibt keine eindeutige Definition des „Live-Performance-Sektors" da die Abgrenzung des Sektors stark von der Quelle abhängt, auf die man sich bezieht. Der Sektor kann folgende Aktivitäten abdecken: (1) Darstellende Künste wie Live-Theater, Konzerte, Oper, Tanz und andere Bühnenproduktionen und damit verbundene unterstützende Tätigkeiten; und (2) Betrieb von Veranstaltungsorten wie Konzertsälen, Theatern und anderen Kunsteinrichtungen (https://ec.europa.eu/social/main.jsp?catId=480&langId=en&intPageId=1842). In der Forschung über den Sektor werden die NACE-Codes sehr häufig zur Definition des Live-Performance-Sektors verwendet. Der Sektor lässt sich am besten anhand der drei NACE-Unterkategorien 90.01 („Darstellende Kunst"), 90.02 („Erbringung von Dienstleistungen für die darstellende Kunst") und 90.04 („Betrieb von Kultur-und Unterhaltungseinrichtungen") ermitteln. In der Praxis wird jedoch meist der umfassendere NACE R90-Code „Kreative, künstlerische und unterhaltende Tätigkeiten" verwendet.

Gegenstand der Diskussion in diesem Bericht. In dieser Hinsicht wurden die folgenden Forschungsziele definiert:

- Inventarisierung des Live-Performance-Sektors;
- Definition des Konzepts des „hochmobilen Arbeitnehmers" und Inventarisierung der transnationalen Dimension des Live-Performance-Sektors;
- Beschreibung des rechtlichen Rahmens im Bereich des (europäischen) Arbeits- und Sozialversicherungsrechts, der auf (hoch-)mobile Arbeitnehmer und Unternehmen anwendbar ist, mit einem Fokus auf den Live-Performance-Sektor;
- Definition der Herausforderungen und Hindernisse, die im Bereich der Live-Darbietungen bei der Erbringung grenzüberschreitender Dienstleistungen auftreten;
- Definition möglicher Lösungen für die Herausforderungen und Hindernisse, auf die (hoch-)mobile Mitarbeiter und Unternehmen stoßen, mit einem Fokus auf den Live-Performance-Sektor.

Es wurde ein multidisziplinärer Ansatz gewählt, bei dem eine sozioökonomische und rechtliche Analyse zur Erarbeitung der oben genannten Forschungsziele beitrug. Die Abbildung des Live-Performance-Sektors basiert hauptsächlich auf Daten von Eurostat und der Orbis-Datenbank. Die transnationale Dimension des Sektors wurde durch die Analyse von Daten über den Export und Import von Dienstleistungen sowie von Verwaltungsdaten aus dem „Portablen Dokument A1"[66] und den „Vorabmeldungen"[67] abgebildet. Um die transnationale Dimension besser zu verstehen, wurde außerdem ein Online-Fragebogen an Unternehmen, die Live-Musik oder darstellende Künste anbieten, an Buchungs- und Managementagenturen und schließlich an Betreiber von Veranstaltungsorten verschickt. Um die wichtigsten Herausforderungen und mögliche Lösungen zu identifizieren, wurde Sekundärforschung mit einer Online-Umfrage, der Organisation von Podiumsdiskussionen und mehreren Experteninterviews kombiniert.

Inventarisierung des Live-Performance-Sektors

Im Gegensatz zu anderen Sektoren sind nur wenige quantitative Informationen darüber verfügbar, wer genau als Teil des Live-Performance-Sektors in der EU zu betrachten ist, was die Inventarisierung der Beschäftigung im Live-Performance-Sektor sowie der in ihm tätigen Unternehmen zu einer großen Herausforderung macht. Dies wurde während der COVID-19-Pandemie noch deutlicher, zu einem Zeitpunkt, als es mehr denn je nützlich gewesen wäre, über solche Zahlen zu verfügen. Verschiedene Parameter zeigen, dass der Sektor sehr stark betroffen ist, obwohl unklar ist, inwieweit die auf regionaler, nationaler und europäischer Ebene ergriffenen (finanziellen) Unterstützungsmaßnahmen von den im Sektor tätigen natürlichen und juristischen Personen in Anspruch genommen wurden und somit die negativen finanziellen Auswirkungen der COVID-19-Pandemie zumindest teilweise begrenzt haben. Außerdem ist die Situation, wie sie in diesem Bericht vor der Pandemie dargestellt wird, nicht unbedingt repräsentativ für den Sektor nach der Pandemie. Abschließend muss gesagt werden, dass die auf EU-Ebene verfügbaren Daten oft unvollständig oder nicht detailliert genug sind, um ein 100%-ig genaues und damit zuverlässiges Bild des Sektors zu erhalten.[68]

66 Diese Bescheinigung betrifft das für eine Person geltende Sozialversicherungsrecht und bestätigt, dass diese Person in einem anderen Mitgliedstaat nicht beitragspflichtig ist. Das Portable Dokument A1 wird mehreren Kategorien von mobilen Arbeitnehmern ausgestellt, hauptsächlich entsandten Arbeitnehmern und Selbstständigen (Artikel 12 der Verordnung 883/2004) sowie Personen, die eine Tätigkeit in zwei oder mehr Mitgliedstaaten ausüben (Artikel 13 der Verordnung 883/2004).

67 Artikel 9 Absatz 1 Buchstabe a der Richtlinie 2014/67 führt eine Meldepflicht in dem Mitgliedstaat ein, in dem eine Dienstleistung erbracht wird: Danach können die Mitgliedstaaten von einem in einem anderen Mitgliedstaat niedergelassenen Dienstleistungserbringer verlangen, eine „einfache Erklärung" abzugeben, die die relevanten Informationen enthält, die erforderlich sind, um faktische Kontrollen am Arbeitsplatz zu ermöglichen.

68 Diesbezüglich sollten weitere Schritte im Bereich der Datenerfassung unternommen werden. So scheint es, dass Eurostat in den kommenden Jahren in der Lage sein wird, einen besseren Überblick über den Sektor zu geben, indem es strukturelle Unternehmensstatistiken (SUS) über den Sektor erhebt und eine detailliertere Analyse der Daten aus der Europäischen Arbeitskräfteerhebung (EU-LFS) vornimmt, die eine bessere Schätzung des Beschäftigungsvolumens im Sektor ermöglicht. Dies kann nur begrüßt werden.

Schätzungen zufolge sind in der EU-27/EFTA/UK etwa 807.700 Unternehmen[69] und 1,3 Millionen Personen im Bereich der Live-Darbietungen tätig.[70] Beschäftigung und Unternehmen konzentrieren sich in einer begrenzten Anzahl von Ländern, hauptsächlich in Deutschland und Frankreich.[71] Die Beschäftigung im Bereich der Live-Darbietungen entspricht etwa 0,5% der Gesamtbeschäftigung in der EU-27, wobei es deutliche Unterschiede in der relativen Bedeutung zwischen den Mitgliedstaaten gibt. Sie reicht von 0,2% der Gesamtbeschäftigung von Kroatien, Zypern, Luxemburg und Rumänien bis zu 1% der Gesamtbeschäftigung der Niederlande und Slowenien. Die oben genannten Zahlen sind jedoch wahrscheinlich eine (erhebliche) Unterschätzung der absoluten und relativen Bedeutung des Sektors, da sie Personen nicht berücksichtigen, deren Zweitbeschäftigung im Bereich der Live-Darbietungen liegt.

Darüber hinaus wird anhand der Klassifizierung der Unternehmen nach der Anzahl der Beschäftigten deutlich, dass mit Ausnahme der Unterkategorie 90.04 „Betrieb von Kultur-und Unterhaltungseinrichtungen" ein sehr großer Anteil der „Unternehmen" (d. h. Betriebe/Geschäfte) im Bereich der Live-Darbietungen aus nur einer Person besteht. Dies betrifft etwa sieben von zehn Unternehmen, die in diesem Sektor tätig sind. Darüber hinaus werden etwa 98% der Unternehmen als „klein" eingestuft. Dieses Profil ist größtenteils das Ergebnis der hohen Anzahl von Selbstständigen in diesem Sektor, da wir behaupten können, dass mehr als vier von zehn in diesem Sektor tätigen Personen selbstständig sind. Dies ist eine viel höhere Zahl im Vergleich zum EU-Durchschnitt von 14% der Gesamtbeschäftigung.

Nicht zuletzt muss gesagt werden, dass die Beschäftigung im Live-Performance-Sektor im Vergleich zu anderen Sektoren durch mehr nicht-standardisierte oder atypische[72] Arbeitszeitregelungen (mehr Teilzeit und mehr Kombinationen mit anderen Jobs), nicht-standardisierte Verträge (befristete, projekt- oder aufgabenbezogene Arbeit) und nicht-standardisierte Arbeitsverhältnisse (mehr Selbstständigkeit und freiberufliche Arbeit auf Abruf) gekennzeichnet ist. Bei der Erbringung von Dienstleistungen im Ausland kann dieser atypische Charakter zusätzliche Herausforderungen mit sich bringen, nicht zuletzt im Hinblick auf die Bestimmung, welche Rechtsvorschriften der sozialen Sicherheit eines Mitgliedstaats als anwendbar zu betrachten sind. Damit sind wir bei der transnationalen Dimension des Sektors angelangt. Bevor jedoch eine Aussage über das Ausmaß und die Merkmale dieser Dimension getroffen wird, wird das Konzept des „hochmobilen" Arbeitnehmers näher erläutert.

Das Konzept des „hochmobilen Arbeitnehmers" entschlüsseln

Zugegeben, sobald wir anfangen, über das Konzept des „hochmobilen Arbeiters" nachzudenken, rieselt es uns wie Sand durch die Finger. In dieser Hinsicht ist es eine Herausforderung, das Konzept richtig zu definieren. Unserer Meinung nach lässt sich dieses Konzept am besten definieren, wenn man die *Häufigkeit* und *Dauer* der Auslandstätigkeit eines mobilen Arbeitnehmers betrachtet. In der Tat ist die Häufigkeit der beruflichen Reisen in einen anderen Mitgliedstaat für diese Gruppe von Arbeitnehmern meist hoch bis sehr hoch und die Dauer ihrer Anwesenheit im betreffenden Mitgliedstaat meist sehr kurz (oft auf einige Wochen, Tage oder sogar Stunden begrenzt). Außerdem betrifft dies in vielen Fällen nicht nur den Mitgliedstaat. In diesem Zusammenhang können „hochmobile

69 Bei Anwendung der engen Klassifikation des Sektors (Summe der NACE-Codes 90.01, 90.02 & 90.04, also ohne NACE-Code 90.03) sinkt die Zahl der Unternehmen auf etwa 461.000, wobei die Aktivitäten von etwa 327.900 Unternehmen als „darstellende Künste", etwa 107.200 Unternehmen als „unterstützende Tätigkeiten für darstellende Künste" und schließlich etwa 25.800 Unternehmen als „Betrieb von Kultur-und Unterhaltungseinrichtungen" bezeichnet werden können. Leider ist eine solche Aufschlüsselung für die Beschäftigungszahlen des Sektors nicht verfügbar.

70 Selbstständige sind in beiden Variablen enthalten. Sowohl aus statistischer als auch aus rechtlicher Sicht stellt sich die Frage, ob diese Gruppe mit der Gruppe der „Arbeitnehmer" und nicht mit der Gruppe der „Unternehmen" (d. h. Betriebe/Geschäfte) verbunden werden sollte. Die Tatsache, dass Selbstständige nicht unter die Entsenderichtlinie fallen, macht die Antwort auf diese Frage noch komplizierter.

71 So befinden sich etwa 40 % der Unternehmen in Frankreich und etwa 18 % der Arbeitsplätze in Deutschland.

72 Natürlich kann das, was heute als „nicht standardisiert oder atypisch" angesehen wird, in der (nahen) Zukunft „standardisiert oder typisch" werden und *umgekehrt*. Insofern stellen diese Bedingungen nur eine Abweichung von der üblichen Beschäftigungsnorm dar.

Arbeitnehmer" als Arbeitnehmer (und Selbständige) definiert werden, die im Laufe des Jahres in mehreren Mitgliedstaaten tätig sind und deren Beschäftigung in jedem dieser Mitgliedstaaten in der Regel von (sehr) kurzer Dauer ist.[73]

Indem auch der Status des Künstlers oder Musikers berücksichtigt wird, erhält das Konzept des „hochmobilen Arbeitnehmers", das im Bereich der Live-Darbietungen angewendet werden kann, eine zusätzliche Dimension zum oben definierten Grundkonzept und geht somit über den rein grenzüberschreitenden Aspekt des Konzepts hinaus. Tatsächlich kann „Mobilität" im Live-Performance-Sektor nicht einfach als gelegentliche Bewegung über nationale Grenzen hinweg betrachtet werden, da „Mobilität" aufgrund der atypischen Arbeitszeitregelungen, Verträge und Arbeitsverhältnisse in diesem Sektor ein integraler Bestandteil des täglichen Arbeitslebens von Kulturschaffenden ist. Daher können wir folgende Definition vorschlagen: Hochmobile Arbeitnehmer im Live-Performance-Sektor zeichnen sich durch eine hohe Anzahl von grenzüberschreitenden Bewegungen *(Häufigkeit)* aus, führen verschiedene kurzfristige Einsätze in verschiedenen Ländern aus *(Dauer)* und haben oft eine atypische Beschäftigungssituation *(Status)*.

Es stellt sich die Frage, ob obige Abgrenzung des Begriffs *rechtlich* solide genug ist. Die Abgrenzung einer bestimmten Personenkategorie setzt die Fähigkeit voraus, diese Personengruppe anhand einer Reihe von Merkmalen zu identifizieren, die sie nicht mit anderen teilt. Für die Gruppe der „hochmobilen Arbeitnehmer" ist das gar nicht so einfach. Dies ist jedoch eine wesentliche Voraussetzung, wenn man spezifische Regeln für diese Gruppe definieren möchte. Unserer Ansicht nach sollte zwischen dem Konzept des „hochmobilen Arbeitnehmers" und dem des „hochmobilen Sektors" unterschieden werden. Denn selbst in Fällen, in denen ein Sektor nicht als „hochmobiler Sektor" qualifiziert werden kann, kann es eine (signifikante) Gruppe hochmobiler Arbeitnehmer geben, die in diesem Sektor tätig sind.

Inventarisierung der transnationalen Dimension des Live-Performance-Sektors

Es muss angemerkt werden, dass auch die transnationale Dimension dieses Sektors immer noch ein blinder Fleck ist, sowohl in Bezug auf die Größe als auch auf die Merkmale. Deshalb haben wir versucht, das Ausmaß zu quantifizieren, in dem der Live-Performance-Sektor eine transnationale Dimension hat. Es kann aber durchaus sein, dass nur ein Teil der Arbeitnehmer und Unternehmen in diesem Sektor im Ausland tätig ist. Es stellt sich dann die Frage, ob diese Gruppe als „hochmobil" angesehen werden kann? Hier schauen wir uns speziell an, ob mobile Arbeitnehmer und (Tournee-)Unternehmen in mehrere Länder ziehen, wie oft sie dies tun und wie lange sie dort bleiben. Trotz unserer Bemühungen wird der Leser feststellen, dass noch ein langer und kurvenreicher Weg vor uns liegt, um ein genaues Bild von der transnationalen Dimension des Sektors zu erhalten.

Wie bereits erwähnt, entspricht die Beschäftigung im Live-Performance-Sektor etwa 0,5% der Gesamtbeschäftigung in der EU-27. Empirische Belege aus dem Portablen Dokument A1 zeigen, dass in den meisten Mitgliedstaaten der Anteil des Live-Performance-Sektors an der gesamten vorübergehenden grenzüberschreitenden Beschäftigung höher ist als der Anteil der Beschäftigung an der Gesamtbeschäftigung in diesen Mitgliedstaaten. Dies zeigt, dass der Live-Performance-Sektor im Vergleich zu vielen anderen Wirtschaftszweigen eine wichtigere transnationale Dimension hat.

Darüber hinaus können wir auf der Grundlage der Daten über den Export von Dienstleistungen zwei vorläufige Schlussfolgerungen ziehen: (1) eine große Gruppe von Unternehmen, die Kunst ausüben, scheint keine Dienstleistungen ins Ausland zu exportieren, und (2) eine bedeutende Gruppe von Unternehmen, die Kunst ausüben, exportiert fast ausschließlich Dienstleistungen ins Ausland.

73 Beachten Sie, dass andere Autoren eine leicht abweichende Definition von „hochmobilen Arbeitnehmern" verwenden. Van Ooij (2020) argumentiert, dass der Begriff des „hochmobilen Arbeitnehmers" auf zwei Aspekte der Mobilität hinweist: Ausübung der Arbeitstätigkeit über Grenzen hinweg (geografische Mobilität) und Mobilität in Form und Muster des Arbeitseinsatzes (berufliche Mobilität). Rasnača (2020) stellt fest, dass sie entweder aufgrund der Art ihrer Arbeit regelmäßig Grenzen überqueren, in mehreren Mitgliedstaaten arbeiten oder täglich eine Grenze überqueren, um in einem anderen Mitgliedstaat als dem, in dem sie dauerhaft wohnen, zu arbeiten. Unsere Definition zeigt durchaus Ähnlichkeiten mit der von Pieters und Schoukens (2020). Sie definieren „hohe Mobilität" als berufliche Tätigkeiten, die durch einen sehr intensiven und hohen Grad an Mobilität gekennzeichnet sind.

Mobilen Arbeitnehmern und Unternehmen, die im Bereich der Live-Darbietungen tätig sind, wird ein Portables Dokument A1 hauptsächlich bei der vorübergehenden Erbringung von Dienstleistungen in einem bestimmten Mitgliedstaat (gemäß Artikel 12 der Verordnung 883/2004) und nicht bei der gleichzeitigen Erbringung von Tätigkeiten in mehreren Mitgliedstaaten für einen längeren Zeitraum (gemäß Artikel 13 der Verordnung 883/2004) gewährt, während sie häufig mehrmals im Jahr im Ausland auftreten, oft in verschiedenen Mitgliedstaaten. Diese Ergebnisse zeigen, obwohl sie als vorläufig zu betrachten sind, dass man das Profil der transnationalen Dimension des Live-Performance-Sektors nicht einfach mit dem anderer „mobiler" Sektoren gleichsetzen kann. Während z. B. für den Straßengüterverkehrssektor die Portablen Dokumente A1 hauptsächlich gemäß Artikel 13 ausgestellt werden, ist dies für den Live-Performance-Sektor nicht der Fall. Diese Beobachtung wirft die Frage auf, warum dies der Fall ist. Hier sollten wir uns die Verfahren für die Anwendung von Artikel 13 ansehen. Insbesondere muss die zuständige nationale Behörde bei der Anwendung von Artikel 13 die für die folgenden 12 Kalendermonate prognostizierte Situation berücksichtigen. Allerdings wissen (hoch-)mobile Arbeitnehmer und Unternehmen (oft) nicht im Voraus, wo sie in den nächsten 12 Monaten Leistungen erbringen werden.

Darüber hinaus zeigen empirische Belege, dass der Buchungszeitraum im Bereich der Live-Darbietungen meist auf wenige Tage beschränkt ist. So zeigen die Daten aus den berichterstattenden Mitgliedstaaten, dass etwa sechs von zehn Entsendungen in diesem Sektor zwischen einem und acht Tagen dauern. Diese Ergebnisse stehen in starkem Kontrast zur durchschnittlichen Entsendungsdauer von etwa drei Monaten für die gesamte Wirtschaft.

Schließlich zeigen die Daten, dass sowohl Frankreich[74] als auch Deutschland die wichtigsten Aufnahmestaaten für mobile Arbeitnehmer und (Tournee-)Unternehmen sind, die im Bereich der Live-Darbietungen tätig sind.

Soziale Sicherheit und Beschäftigungsstatus von (hoch-)mobilen Arbeitnehmern

Mobile Arbeitnehmer und Unternehmen stoßen bei der Erbringung von Dienstleistungen im Ausland auf einen komplexen rechtlichen Rahmen. In der Tat ist der Grad der Harmonisierung auf europäischer Ebene noch relativ gering. So bleiben die sehr unterschiedlichen nationalen Gesetze und Vorschriften in den Mitgliedstaaten weitgehend bestehen. Das alleinige Ziel auf europäischer Ebene ist es, ein Fundament an Grundrechten zu schaffen und die verschiedenen gesetzlichen Rahmenbedingungen in einer Reihe von Bereichen zu koordinieren. Es ist nicht beabsichtigt, nationale oder sogar sektorale Systeme/Vereinbarungen zu harmonisieren und/oder zu standardisieren, die die einzuhaltenden Arbeitsbedingungen und Sozialversicherungsbeiträge definieren. Die praktische Folge für (hoch-)mobile Arbeitnehmer und Unternehmen ist, dass (soziale) Rechte und Pflichten manchmal schwer zu bestimmen sind.

Sobald Künstler und Unternehmen Grenzen überqueren, ist es wichtig zu klären, welche Sozialversicherungsbestimmungen gelten. Diese Frage wird auf der Grundlage der Verordnungen 883/2004 und 987/2009 (als Koordinierungsverordnungen bezeichnet) behandelt. Die Bestimmung der geltenden Sozialversicherungspflicht ist jedoch keine leichte Aufgabe, nicht zuletzt für Künstler und Unternehmen, die im Live-Performance-Sektor tätig sind. Denn aufgrund des atypischen Charakters dieses Sektors und der Vielfalt der „Beschäftigungsmodelle" ist der Unterschied zwischen „Entsendung" (Artikel 12 der Verordnung 883/2004) und „gleichzeitigen Tätigkeiten" (Artikel 13 der Verordnung 883/2004) nicht immer ganz klar. Hier ist oft eine Einzelfallprüfung erforderlich, um das anwendbare Sozialversicherungsrecht zu bestimmen.

74 Frankreich scheint sehr streng zu sein, was das Vorhandensein eines Portablen Dokuments A1 als Bedingung für eine „legale" Entsendung angeht. Das Land hat Sanktionen für den Fall eingeführt, dass das Portable Dokument A1 nicht vorgelegt wird und/oder führt eine Vielzahl von Kontrollen zum Besitz eines Portablen Dokuments A1 durch. Diese Maßnahmen können erhebliche Auswirkungen auf die Beantragung eines Portablen Dokument A1 bei der Erbringung von Dienstleistungen in Frankreich haben. Folglich könnte der Anteil der Mitgliedstaaten, in denen viele Kontrollen durchgeführt werden, wie z. B. Frankreich, insgesamt überschätzt werden.

Aus arbeitsrechtlicher Sicht[75] ist das Szenario, das die mobilen Arbeitnehmer im Live-Performance-Sektor hauptsächlich charakterisiert, das der Entsendung von Arbeitnehmern. Die Richtlinie 96/71/EG (die so genannte Entsenderichtlinie) kann als Instrument zur Festlegung der Bestimmungen verstanden werden, deren Anwendung auf entsandte Arbeitnehmer von den Mitgliedstaaten gewährleistet werden muss. Die Entsenderichtlinie wurde kürzlich durch die Richtlinie (EU) 2018/957 geändert. Im Wesentlichen haben entsandte Arbeitnehmer Anspruch auf die gleiche „Entlohnung"[76] wie lokale Arbeitnehmer. Bei der Festlegung des für den entsandten Arbeitnehmer geltenden Arbeitsentgelts sollte jedoch ein Vergleich zwischen dem im Rahmen des Arbeitsvertrags im Herkunftsmitgliedstaat gezahlten Arbeitsentgelt und dem im Aufnahmemitgliedstaat zu zahlenden Arbeitsentgelt angestellt werden, um das höchste Arbeitsentgelt zu ermitteln.

Herausforderungen und Hindernisse, auf die Arbeitnehmer und Unternehmen des Live-Performance-Sektors in grenzüberschreitenden Situationen stoßen

Bei der Diskussion der Herausforderungen und Hindernisse, auf die mobile Arbeitnehmer und Unternehmen stoßen, ist der gemeinsame Nenner oft die rechtliche Komplexität und der Verwaltungsaufwand, der bei der Anwendung des europäischen Arbeits- und Sozialversicherungsrechts entsteht (z. B. Ermittlung des für die Sozialversicherung zuständigen Mitgliedstaats,[77] Zahlung von Sozialversicherungsbeiträgen in diesem Mitgliedstaat, Anwendung der in der Entsenderichtlinie definierten Bedingungen), sowie die entsprechenden Verwaltungsformalitäten (z. B. Beantragung eines Portablen Dokuments A1 und vorherige Anmeldung).[78] Hinzu kommt ein Mangel an Wissen über die Arbeits- und Sozialversicherungsgesetze, die in einer grenzüberschreitenden Situation anzuwenden sind, was zum Teil auf den Mangel an klaren Informationen zurückzuführen ist. So spiegelte sich das mangelnde Wissen über die Vorschriften deutlich in den Ergebnissen der Online-Umfrage wider, da nur einer von vier Befragten von der jüngsten Änderung der Entsenderichtlinie wusste. Dies deutet auf eine Wissens-/Bewusstseinslücke hin und führt zu einer Lücke bei der Einhaltung von Vorschriften.[79]

Das Hauptaugenmerk in diesem Bericht liegt auf der europäischen Gesetzgebung und insbesondere auf den Herausforderungen, die sich aus der Anwendung der Koordinierungsverordnung und der Entsenderichtlinie für Arbeitnehmer ergeben. Nichtsdestotrotz kann die nationale Gesetzgebung einen (erheblichen) Einfluss darauf haben, wie einfach oder wie schwierig diese europäischen Regeln anzuwenden sind (siehe Anhang I für eine vergleichende Analyse des bestehenden Rechtsrahmens in Belgien, den Niederlanden, Frankreich und Deutschland). Darüber hinaus sollten wir uns bewusst sein, dass der atypische Charakter des Sektors Auswirkungen auf die identifizierten Herausforderungen in einem transnationalen Kontext haben kann. Die Beurteilung, ob dieser atypische Charakter als Problem oder Herausforderung für den Sektor angesehen werden kann, geht über den Rahmen dieses Berichts hinaus.

Bei der Definition der Herausforderungen (und der Lösungen) sind wir dafür, eine klare Unterscheidung zwischen denen zu treffen, die sich aus der Anwendung der Arbeits- und Sozialversicherungsgesetze ergeben, und den entsprechenden Verwaltungsformalitäten. Vor allem bei Letzterem ist es wichtig, Maßnahmen zu ergreifen, um den Verwaltungsaufwand, der durch die Leistung im Ausland entsteht, in einem angemessenen Verhältnis zu seinem Nutzen zu halten. Denn die Tatsache,

75 Die Verordnung (EG) Nr. 593/2008 (d. h. die Rom-I-Verordnung) legt fest, welches Recht auf Verträge im Falle einer möglichen Rechtskollision, wie z. B. bei grenzüberschreitenden Beschäftigungsverhältnissen, anzuwenden ist.

76 Kürzlich geändert durch die „Richtlinie (EU) 2018/957" (anstelle von gleichen „Mindestlohnsätzen" wie in der vorherigen Fassung der Entsenderichtlinie vorgesehen).

77 So können sich beispielsweise Probleme aus der Verpflichtung ergeben, Sozialversicherungsbeiträge in einem anderen Mitgliedstaat als dem des Arbeitgebers zu zahlen.

78 Dies kann zur Nichteinhaltung oder Vermeidung führen (z. B. durch die Nutzung des Status der Selbstständigkeit, um die Anwendung der Entsenderichtlinie zu vermeiden).

79 Nicht zuletzt, weil der Sektor von den Arbeitsaufsichtsbehörden nicht als Priorität betrachtet wird. So gab nur einer von fünf Befragten in der Online-Umfrage an, bereits mit der zuständigen Arbeitsaufsichtsbehörde in Kontakt gekommen zu sein.

dass ein Unternehmen im Falle der Erbringung von Dienstleistungen im Ausland mehrere Meldepflichten erfüllen muss, und zwar sowohl im Herkunfts- als auch im Aufnahmemitgliedstaat, führt zu einem erheblichen Verwaltungsaufwand, vielleicht sogar zu einer Doppelbelastung. Derzeit gewähren nur Österreich, Belgien, Dänemark, Frankreich und die Niederlande Künstlern und ihren Arbeitgebern eine Befreiung von der vorherigen Anmeldung. Darüber hinaus ist die Notwendigkeit,[80] für jede Entsendung ins Ausland ein Portables Dokument A1 zu haben, ein beschwerliches und zeitraubendes Verfahren.[81] Folglich kann das Fehlen von Sonderregelungen für (sehr) kurzfristige Entsendungen zu einem unverhältnismäßig hohen Verwaltungsaufwand für KMU führen. Außerdem ist es für diese KMU nicht immer möglich, externe Experten als Vermittler zu engagieren. In dieser Hinsicht kann ein hoher Verwaltungsaufwand die Live-Darbietung im Ausland und damit die Freizügigkeit von Arbeitnehmern und Dienstleistungen behindern.

Aufgrund des atypischen Charakters des Live-Performance-Sektors kann es eine Herausforderung sein, die Sozialversicherungsgesetze zu identifizieren, die auf den mobilen Künstler, Musiker oder Techniker anzuwenden sind. Daher können (hoch-)mobile Arbeitnehmer, die im Live-Performance-Sektor beschäftigt sind, über ihre Rechte verunsichert sein, während es für Arbeitgeber schwierig sein kann, zu verstehen, an welches nationale System der sozialen Sicherheit sie ihre Sozialversicherungsbeiträge abführen sollen. Wenn beispielsweise Künstler in mehreren Mitgliedstaaten tätig sind und somit unter Artikel 13 der Verordnung 883/2004 fallen, können die Besonderheiten der Beschäftigungsmuster in diesem Sektor ihre Situation in Bezug auf die Zugehörigkeit zur Sozialversicherung verkomplizieren. Da wir hier nicht die ganze Palette möglicher Szenarien durchspielen können, beschränken wir uns auf ein Beispiel. Artikel 13 Absatz 3 sieht vor, dass eine Person, die in mehreren Mitgliedstaaten sowohl als Arbeitnehmer als auch als Selbständiger tätig ist, den Rechtsvorschriften der sozialen Sicherheit des Mitgliedstaats unterliegt, in dem sie als Arbeitnehmer tätig ist. Der Artikel legt weder Schwellenwerte für die Anwendung dieser Regel fest, noch wurde dies durch einen Beschluss der Verwaltungskommission für die Koordinierung der Systeme der sozialen Sicherheit geklärt. Dies könnte zu einer Situation führen, in der ein Künstler in mehreren Mitgliedstaaten, einschließlich des eigenen Wohnsitzmitgliedstaats, als selbständiger Freiberufler tätig ist, dann aber für eine begrenzte Zeit als Arbeitnehmer in einem anderen Mitgliedstaat angestellt wird, sodass er trotz der begrenzten Verbindung schließlich in diesem letzten Mitgliedstaat registriert ist. Dies ist besonders relevant, da einige für den Live-Performance-Sektor sehr bedeutende Märkte, wie z. B. Frankreich, die Vermutung eines Arbeitsverhältnisses für Künstler vorsehen. Diese Vermutung beinhaltet eine Ausnahme für Künstler, die in einem anderen Mitgliedstaat als Selbständige tätig sind und sich nach Frankreich entsenden, aber diese Ausnahme gilt nicht für Künstler, die in Frankreich von einem französischen Arbeitgeber angestellt werden und auch in anderen Mitgliedstaaten als Selbständige tätig sind. Schließlich können auch Probleme bei der Anwendung der Bedingungen für die Entsendung nach Artikel 12 der Verordnung 883/2004 auftreten. Zum Beispiel kann ein Künstler relativ bald nach seiner Anstellung einen Auftritt im Ausland haben. In diesem Fall muss er jedoch mindestens einen Monat vor der Entsendung den Rechtsvorschriften des Landes des Arbeitgebers unterworfen sein. In der Diskussion um die Überarbeitung der Koordinationsverordnung wurde sogar der Vorschlag unterbreitet, diese Frist auf drei Monate Vorversicherungszeit zu erhöhen.

Im Arbeitsrecht ergibt sich eine der Hauptschwierigkeiten aus der Tatsache, dass die Entsenderichtlinie ab dem „Tag Null" gilt, also ab dem ersten Moment, in dem ein entsandter Arbeitnehmer im Aufnahmemitgliedstaat ankommt, um dort eine Dienstleistung zu erbringen. Dies hat erhebliche Auswirkungen auf die Komplexität, mit der Entsendeunternehmen im Live-Performance-Sektor konfrontiert sind, insbesondere wenn diese Unternehmen Tourneen organisieren müssen, die eine

80 In einigen Fällen kann eine Entsendung erfolgen, ohne dass die Institutionen darüber informiert werden, oder das Portable Dokument A1 wird rückwirkend vergeben. In dieser Hinsicht kann die „Notwendigkeit" eines Portablen Dokuments A1 in den einzelnen Mitgliedstaaten und Sektoren sehr unterschiedlich sein, oft in Abhängigkeit vom „Risiko" von Kontrollen.

81 Außerdem wird berichtet, dass die nationalen Verwaltungsverfahren in mehreren Mitgliedstaaten nicht immer ausreichend an sehr kurzfristige Entsendungen angepasst sind, da sie nicht immer in der Lage sind, rechtzeitig ein Portables Dokument A1 auszustellen.

kurzfristige Präsenz in mehreren Mitgliedstaaten beinhalten. Obwohl die jüngsten Entscheidungen des Gerichtshofs auf die Schaffung einer Kategorie „kurzfristige Entsendungen" hinzudeuten scheinen, die aufgrund ihrer begrenzten Verbindung mit dem Aufnahmemitgliedstaat aus dem rechtlichen Rahmen für die Entsendung von Arbeitnehmern herausfallen würde, bleibt dies eine von Richtern geschaffene Kategorie mit unsicheren Grenzen, die nicht die notwendige Sicherheit für Unternehmensentscheidungen bietet. Letztendlich sollte die Tatsache, dass (Tournee-)Unternehmen und ihre Künstler auf der Bühne brillieren, ihr Wettbewerbsvorteil sein und nicht der Preis, den sie verlangen. Wenn es um die Anwendung von Arbeits- und Beschäftigungsbedingungen geht, scheinen die meisten Schwierigkeiten und Hindernisse auf die Komplexität der geltenden Vorschriften zurückzuführen zu sein. Einige besondere Schwierigkeiten ergeben sich für Arbeitgeber im öffentlichen Sektor oder in der subventionierten Privatwirtschaft, die ihre als Beamte beschäftigten Arbeitnehmer in einen anderen Mitgliedstaat entsenden. In vielen Fällen arbeiten diese Arbeitgeber im Rahmen strenger Haushaltsvorschriften, die es unmöglich machen, für die Erhöhung der Vergütung zu sorgen, die bei der Entsendung von Künstlern und Technikern in einen Mitgliedstaat mit einem höheren geltenden Vergütungsniveau erforderlich ist.

Es gibt keinen „Königsweg": Suche nach Bottom-up-Lösungen

Bei der Formulierung von Lösungen wird unterschieden zwischen operativen Lösungen einerseits, die von den Sozialpartnern, öffentlichen Verwaltungen und Arbeitsaufsichtsbehörden sowohl auf nationaler als auch auf europäischer Ebene unterstützt werden können, und legislativen Lösungen andererseits. Die operativen Lösungen können kurz- und mittelfristig umgesetzt werden, während die legislativen Lösungen eher langfristig zu sehen sind. Unser Ausgangspunkt ist ein pragmatischer Bottom-up-Ansatz, der den aktuellen europäischen Rechtsrahmen vollständig befürwortet und umsetzt und sich auf die zusätzlichen Schritte konzentriert, die im Informationsbereich (d. h. „Sensibilisierung") unternommen werden können. Das soll nicht heißen, dass wir die rechtliche Komplexität und den Verwaltungsaufwand nicht zur Kenntnis nehmen. Man kann jedoch nicht erwarten, dass die Koordinierungsverordnung und die Entsenderichtlinie alle identifizierten Probleme und Herausforderungen lösen können. Schließlich sind einige der Probleme, auf die mobile Künstler und Unternehmen stoßen, vor allem auf die nationale Gesetzgebung oder auf die Besonderheiten des Live-Performance-Sektors zurückzuführen.

Sensibilisierung durch Bereitstellung genauer und benutzerfreundlicher Informationen

Ein wichtiges Ziel dieses Berichts ist es, einige Hinweise auf die anzuwendende Arbeits- und Sozialgesetzgebung zu geben. Zu diesem Zweck wurden im Rahmen der vorliegenden Untersuchung mehrere Instrumente entwickelt, darunter ein schrittweiser Ansatz für die Anwendung von Vergütungs- und Arbeitsbedingungen auf entsandte Arbeitnehmer sowie ein Flussdiagramm zur Ermittlung der anwendbaren Sozialversicherungsgesetze auf Situationen mit gleichzeitiger Beschäftigung. Darüber hinaus haben wir eine Vorlage verwendet, die von der Europäischen Arbeitsbehörde (ELA) zusammen mit ihrer „Working Group on Information" für die Darstellung von Informationen aus allgemeinverbindlichen Tarifverträgen entwickelt wurde. Insbesondere haben wir diese Vorlage auf einen Testfall angewandt, der aus den beiden Tarifverträgen besteht, die für den Live-Performance-Sektor in Frankreich gelten. Wir hoffen, dass dies mehr Interessenvertreter, sei es unter den Sozialpartnern oder den Behörden, ermutigt, diese Arbeit für Tarifverträge, die für entsandte Arbeitnehmer gelten, zu übernehmen. Schließlich enthält der Bericht für jeden Mitgliedstaat einen Link zu der einzigen offiziellen nationalen Website über die Entsendung des Aufnahmemitgliedstaats, einen weiteren zu der Website mit Informationen darüber, wie und wo ein Portables Dokument A1 im Herkunftsmitgliedstaat beantragt werden kann, und schließlich zu der Website mit Informationen darüber, wie und wo eine Voranmeldung im Aufnahmemitgliedstaat erfolgen kann.

Der Grad der Benutzerfreundlichkeit der zur Verfügung gestellten Informationen ist ein weiterer Diskussionspunkt. Zum Beispiel kann man einfach einen Link angeben, unter dem die Tarifverträge

zu finden sind. Dies scheint heute die Strategie auf den einzelnen offiziellen nationalen Websites zur Entsendung zu sein.[82] Leider bedeutet dies nicht, dass die Informationen über die zu zahlende Vergütung leicht zu finden sind. In dieser Hinsicht könnte ein nächster Schritt im Informationsprozess darin bestehen, dass diese Tarifverträge auch in allen/mehreren EU-Amtssprachen leicht einsehbar sind (z.B. auf der Grundlage der von der ELA entwickelten Vorlage).[83] Ein letzter Schritt ist, dass die Tarifverträge in allen Mitgliedsstaaten miteinander verglichen werden, damit wir wissen, wie viel mehr möglicherweise gezahlt werden muss. Natürlich sollten dabei der Status und das Dienstalter des Arbeitnehmers sowie die neuen Bestimmungen der Entsenderichtlinie berücksichtigt werden. In diesem Bericht haben wir zum Beispiel versucht zu berechnen, um wie viel der Bruttolohn erhöht werden muss, wenn Dienstleistungen von mobilen Künstlern und (Tournee-)Unternehmen von Land X nach Land Y erbracht werden. Diese Berechnung wurde unter Berücksichtigung der durchschnittlichen Löhne und Gehälter in Kunst, Unterhaltung und Freizeit und den nationalen Mindestlöhnen durchgeführt. Sie macht deutlich, dass die Arbeitskosten und damit die dem Veranstalter in Rechnung zu stellenden Kosten bei einer Leistung im Ausland erheblich von den normalerweise berechneten Kosten abweichen können. Auch das Budget, das von Tourneeunternehmen benötigt wird, um die Bedingungen der Entsenderichtlinie einzuhalten, wird oft viel höher sein als bei Gruppen, die nur im Land ihres Wohnsitzes auftreten. Insofern sollte diese Beobachtung auch ein Weckruf für die europäische und nationale Subventionspolitik für den Live-Performance-Sektor sein.[84]

Veranstalter und Veranstaltungsorte sollten ermutigt werden, eine proaktive Rolle bei der Information von (Tournee-)Unternehmen über die Tarifverträge zu spielen, die für Künstler und Techniker gelten, die sie aufnehmen. Dies basiert auf der Annahme, dass Veranstalter und Veranstaltungsorte wahrscheinlich ein viel besseres Verständnis ihres eigenen Systems haben und daher in der Lage sind, ausländische Arbeitgeber bei der Navigation durch dieses Regelwerk zu unterstützen. Während dies für die Veranstalter und Veranstaltungsorte eine ungewohnte Rolle sein mag, könnten die Arbeitgeberverbände, sowohl auf nationaler als auch auf europäischer Ebene, eine zentrale Rolle in diesem Vorhaben spielen, insbesondere durch Sensibilisierung.[85] Schließlich können die nationalen Behörden und Arbeitsaufsichtsbehörden eine aktivere Rolle bei der Information von Arbeitnehmern und Unternehmen spielen, die im Live-Performance-Sektor tätig sind.

Verringerung des Verwaltungsaufwands (d. h. weniger Verwaltungsformalitäten)

Das entsendende Unternehmen muss mehrere Meldepflichten erfüllen, sowohl im Herkunftsmitgliedstaat (d. h. Beantragung eines Portablen Dokuments A1) als auch im Aufnahmemitgliedstaat

82 Artikel 5 der überarbeiteten Entsenderichtlinie gibt dem Gerichtshof die Befugnis, die Vollständigkeit der auf den offiziellen nationalen Websites enthaltenen Informationen zu beurteilen, wenn es um die Bewertung der Verhältnismäßigkeit von Sanktionen geht, die schließlich bei Verstößen gegen die Entsendevorschriften verhängt werden. Eine Entscheidung in diesem Sinne wäre sicherlich ein starker Anreiz für die Verbesserung der in diesen Websites enthaltenen Informationen. Gleichzeitig könnte eine solche Entscheidung ein Schock für die Mitgliedsstaaten sein. Um dies zu vermeiden, könnte die Europäische Kommission proaktiv damit beginnen, von den Mitgliedstaaten Informationen über den Stand der Informationen auf ihren offiziellen nationalen Websites anzufordern und in diesem Zusammenhang einen standardisierten Ansatz, möglicherweise auf der Grundlage der ELA-Vorlage, hinsichtlich der Informationen, die darin enthalten sein sollten, zu entwickeln. In diesem Zusammenhang ist anzumerken, dass das ELA-Arbeitsprogramm 2021 (S. 13) feststellt, dass „nach dem Inkrafttreten der Richtlinie (EU) 2018/957 ein besonderes Augenmerk auf Informationen gelegt wird, die von einer einzigen nationalen Website über die Entsendung von Arbeitnehmern bereitgestellt werden, wobei die ELA die vom Expertenausschuss für die Entsendung von Arbeitnehmern initiierten Peer-Review-Aktivitäten fortsetzen wird".

83 Es versteht sich von selbst, dass dieser Prozess der Neuordnung der in Tarifverträgen enthaltenen Informationen und deren Übersetzung in eine oder mehrere Sprachen sowohl kostspielig als auch zeitaufwendig ist. Er könnte auch als außerhalb des Kerngeschäfts der Sozialpartner liegend betrachtet werden, da er im Wesentlichen Arbeitgebern und Arbeitnehmern zugute kommt, die per Definition nicht ihre Mitglieder sind. Daher sollten die europäischen Verbände und Vereinigungen in diesem Bereich eine proaktive Rolle spielen, um ihre Mitglieder zu ermutigen, diese Herausforderung anzunehmen, von der letztlich der gesamte Sektor in Europa durch die Erleichterung der Mobilität und des kulturellen Austauschs profitieren wird.

84 Siehe auch besondere Schwierigkeiten für Arbeitgeber im öffentlichen Sektor oder in der subventionierten Privatwirtschaft, die ihre als Beamte beschäftigten Arbeitnehmer in einen anderen Mitgliedstaat entsenden. Die Beseitigung dieser Hindernisse erfordert Änderungen der Haushaltsvorschriften für öffentliche Dienste und Finanzierungsstellen auf nationaler Ebene, die das notwendige Maß an Flexibilität beinhalten sollten, um Arbeitgebern, die Arbeitnehmer entsenden, die Einhaltung der EU-Rechtsvorschriften in diesem Bereich zu ermöglichen.

85 Darüber hinaus zeigen die Ergebnisse der Online-Umfrage, dass die Betreiber der Veranstaltungsorte im Aufnahmeland der am häufigsten genutzte Informationskanal für die Kunst ausübenden Unternehmen sind.

(d. h. Abgabe einer „einfachen" Erklärung). Dies stellt eine erhebliche administrative Belastung dar, vielleicht sogar eine Doppelbelastung. Die Einführung benutzerfreundlicher digitaler Anmelde- oder Registrierungsverfahren könnte diese Belastung deutlich reduzieren.

Darüber hinaus kann die Notwendigkeit, ein Portables Dokument A1[86] zu haben und für jede kurze Buchung eine Voranmeldung zu machen, wie es im Live-Performance-Sektor oft der Fall ist, ebenfalls in Frage gestellt werden. Schließlich kann die Frage gestellt werden, ob das Erfordernis, auch nur für einen sehr kurzen Zeitraum im Ausland im Besitz eines Portablen Dokuments A1 zu sein - wobei der Nichtbesitz eines Portablen Dokuments A1 in einigen Mitgliedstaaten zu sehr hohen Strafen führen kann - notwendig ist und nicht über das hinausgeht, was verhältnismäßig verlangt werden kann. Hier besteht vor allem ein Konflikt zwischen dem Verwaltungsaufwand für den Arbeitgeber, dem Bedürfnis der Sozialversicherungsträger und der Aufsichtsbehörden, dafür zu sorgen, dass es nicht zu Missbrauch oder Hinterziehung von Beiträgen kommt, und schließlich dem Bedürfnis nach Rechtssicherheit für den mobilen Arbeitnehmer, um Lücken im transnationalen Sozialschutz zu vermeiden. Manchmal geht das Gleichgewicht verloren, wie der Vorschlag zur Überarbeitung der Koordinierungsverordnung zeigt, der jetzt auf dem Tisch liegt, um Geschäftsreisen von der Verpflichtung, ein Portables Dokument A1 zu haben, auszunehmen. Noch wichtiger ist, dass man auch die hohen Strafen hinterfragen sollte, die einige Mitgliedstaaten für das Nichtvorhandensein eines Portablen Dokuments A1 festgelegt haben.[87] Derzeit gewähren nur Österreich, Belgien, Dänemark, Frankreich und die Niederlande Künstlern und ihren Arbeitgebern eine Befreiung von der Voranmeldung. In dieser Hinsicht wäre es sinnvoll, mit jedem Mitgliedstaat einzeln über eine Befreiung von der Voranmeldung zu verhandeln, insbesondere mit den wichtigsten Aufnahmemitgliedstaaten von Künstlern (z. B. Deutschland, Italien usw.).

Dies sind natürlich Lösungen, die weiter ausgearbeitet werden müssen. Um die grenzüberschreitende Identifizierung von Personen für die Zwecke der Koordinierung der sozialen Sicherheit zu erleichtern, wurde beispielsweise von der Europäischen Kommission der Vorschlag unterbreitet, eine Europäische Sozialversicherungsnummer (ESSN) einzuführen.[88] Dies kann als eine mögliche Alternative für das Portable Dokument A1 betrachtet werden. Darüber hinaus könnte sich die Einführung von EESSI (Electronic Exchange of Social Security Information, Elektronischer Austausch von Sozialversicherungsdaten) positiv auf den Verwaltungsaufwand auswirken.[89]

Auf dem Weg zu einem maßgeschneiderten Rechtsrahmen für den Live-Performance-Sektor und/oder den „hochmobilen Arbeitnehmer"?

Bestimmte Künstler, insbesondere solche, die auf Tournee sind, sind ein typisches Beispiel für einen hochmobilen Arbeitnehmer. Da die Koordinierungsverordnungen oft auf den typischen Arbeitsmigranten ausgerichtet zu sein scheinen, der für einen längeren Zeitraum in einen anderen Mitgliedstaat umzieht und für den die Integration in den neuen Bestimmungsmitgliedstaat im Vordergrund steht, ist es nicht verwunderlich, dass diese Vorschriften für solche hochmobilen Personen eine Herausforderung darstellen. Die Folgen für solche hochmobilen Arbeitnehmer und ihre Arbeitgeber sind, dass soziale Rechte und Pflichten manchmal nicht nur schwer zu bestimmen sind, sondern dass sich auch Fragen nach der Angemessenheit der geltenden Gesetzgebung stellen können, insbesondere bei mehreren aufeinanderfolgenden kurzen Auslandsaufenthalten. Unter diesem Gesichtspunkt

86 Der derzeitige Rechtsrahmen sieht vor, dass der Arbeitgeber oder die betreffende Person die zuständigen Behörden über ihre geplanten grenzüberschreitenden Tätigkeiten informieren muss, *und zwar nach Möglichkeit*, bevor diese Tätigkeiten durchgeführt werden.

87 Wie der Gerichtshof festgestellt hat, muss die Schwere der Strafe der Schwere des Vergehens angemessen sein. Insbesondere dürfen die nach den nationalen Rechtsvorschriften zulässigen Verwaltungs- oder Strafmaßnahmen nicht über das hinausgehen, was zur Erreichung der mit diesen Rechtsvorschriften rechtmäßig verfolgten Ziele erforderlich ist.

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

89 EESSI ist ein IT-System, das den Sozialversicherungsträgern beim Austausch elektronischer grenzüberschreitender Dokumente helfen soll. Das EESSI-System wurde von der Europäischen Kommission im Juli 2017 zur Verfügung gestellt. Seitdem hatten die Mitgliedstaaten zwei Jahre Zeit, um ihre nationale Umsetzung des EESSI abzuschließen und ihre Sozialversicherungsträger an den grenzüberschreitenden elektronischen Datenaustausch anzuschließen. Derzeit sind alle 32 teilnehmenden Länder (EU-27/EFTA/UK) an das EESSI-System angeschlossen und können einen Teil der Geschäftsprozesse elektronisch austauschen.

kann die Frage gestellt werden, ob und inwieweit ein sektoraler Ansatz die Besonderheiten des Live-Performance-Sektors besser berücksichtigen würde. Darüber hinaus wäre es angebracht, die Ausarbeitung spezifischer Kollisionsnormen zu erwägen, die hochmobile Arbeitnehmer stabileren Rechtsvorschriften unterwerfen würden. Eine solide Abgrenzung des Live-Performance-Sektors sowie des Begriffs des „hochmobilen Arbeitnehmers" ist hier jedoch vielleicht der größte Stolperstein.

Sommario

Introduzione

Al fine di sostenere il lavoro delle parti sociali in generale, e più in particolare nei settori caratterizzati da un alto grado di mobilità transfrontaliera, il presente rapporto esplora la questione spesso trascurata della sicurezza sociale e delle condizioni lavorative dei "lavoratori a elevata mobilità".[90]

Negli ultimi due decenni, il numero di cittadini europei che lavorano (temporaneamente) in un altro Stato membro dell'UE è aumentato significativamente, non solo per via del canale tradizionale della "migrazione di manodopera" ma anche, e sempre più spesso, attraverso varie forme di "mobilità temporanea dei lavoratori".[91] Fra questi ultimi rientrano anche i lavoratori a elevata mobilità: individui il cui luogo di lavoro non è un particolare Stato membro ma "l'UE": o perché sono spesso distaccati[92] all'estero o perché svolgono attività in diversi Stati membri contemporaneamente. In particolare, le persone che sono impiegate nel trasporto internazionale sembrano rientrare in questo gruppo (camionisti, piloti, personale di volo e marittimi). Tuttavia, non c'è solo il settore dei trasporti a dare impiego ai lavoratori a elevata mobilità nell'UE. Ad esempio, anche i manager e il personale di aziende internazionali, i rappresentanti di vendita o i ricercatori possono presentare un alto grado di mobilità nel territorio dell'Unione europea.

In questo rapporto, rivolgiamo attenzione a un gruppo specifico di lavoratori (altamente) mobili nell'UE, in particolare quelli attivi nel "settore degli spettacoli dal vivo".[93] Questa categoria è ampia e sfaccettata e comprende, ad esempio, ballerini in tournée per varie settimane in diversi Stati membri, attori ingaggiati da compagnie teatrali in uno Stato membro e invitati come drammaturghi ospiti in un altro Stato membro, musicisti che suonano in svariate orchestre ed ensemble musicali in più Stati membri e che eseguono le prove in un altro Stato membro ancora. Queste situazioni mostrano un settore (altamente) mobile che non è definito da confini nazionali. Non si può negare che fornire servizi in un altro paese non è sempre così semplice come può sembrare, anche in uno spazio altamente integrato come l'UE. Ad esempio, individuare la legislazione sulla sicurezza sociale e sul lavoro che dovrebbe essere applicata a questo gruppo di lavoratori (altamente) mobili può risultare molto impegnativo. Ciò solleva diverse questioni per i soggetti coinvolti (ossia il lavoratore mobile, la compagnia (itinerante), ma anche il gestore del locale). Di conseguenza, le persone fisiche e giuridiche attive nel settore degli spettacoli dal vivo nutrono troppo spesso incertezze e/o ignorano il quadro giuridico (diritti e doveri) e le formalità amministrative da rispettare per la fornitura di servizi transfrontalieri. Quali sono esattamente queste sfide nel campo del diritto del lavoro e della sicurezza sociale e quali risposte sono concepibili sono oggetto di discussione nel presente rapporto. A questo proposito, sono stati definiti i seguenti obiettivi di ricerca:

- mappare il settore degli spettacoli dal vivo;
- definire il concetto di "lavoratore a elevata mobilità" e mappare la dimensione transnazionale del settore degli spettacoli dal vivo;

90 Inclusi i lavoratori autonomi.

91 L'ambito di questo studio non include i movimenti verso e da paesi al di fuori dell'UE-27/EFTA/Regno Unito.

92 Il distacco afferisce alla situazione in cui un datore di lavoro stabilito in uno Stato membro invia uno o più dei propri lavoratori in un altro Stato membro per eseguire dei servizi. I lavoratori autonomi possono essere "distaccati" secondo i regolamenti di coordinamento (ossia i regolamenti 883/2004 e 987/2009) ma non nel senso della direttiva sul distacco dei lavoratori (ossia la direttiva 96/71/CE).

93 Non esiste una definizione chiara del "settore degli spettacoli dal vivo", poiché la delimitazione del settore dipende fortemente dalla fonte a cui ci si riferisce. Il settore può riguardare le seguenti attività: (1) Arti dello spettacolo come teatro dal vivo, concerti, opera, danza e altre produzioni teatrali e relative attività di supporto; e (2) Gestione di luoghi come sale da concerto, teatri e altre strutture artistiche (https://ec.europa.eu/social/main.jsp?catId=480&langId=en&intPageId=1842). Nella ricerca sul settore, per definire il settore degli spettacoli dal vivo, molto spesso sono utilizzati i codici NACE. Il settore può essere meglio identificato prendendo come punto di partenza le tre sottocategorie NACE 90.01 ("Arti dello spettacolo"), 90.02 ("Attività di supporto alle arti dello spettacolo") e 90.04 ("Gestione di strutture artistiche"). Tuttavia, in pratica, per lo più viene utilizzato il più ampio codice NACE R90 "Attività creative, artistiche e d'intrattenimento".

- descrivere il quadro giuridico nel campo del diritto del lavoro (europeo) e della sicurezza sociale applicabile ai lavoratori e alle imprese (altamente) mobili, rivolgendo particolare attenzione al settore degli spettacoli dal vivo;
- definire le sfide e gli ostacoli riscontrati nel settore degli spettacoli dal vivo quando si forniscono servizi transfrontalieri;
- definire possibili soluzioni per le sfide e gli ostacoli incontrati dai lavoratori e dalle imprese (altamente) mobili, rivolgendo attenzione al settore degli spettacoli dal vivo.

A tali fini è stato utilizzato un approccio multidisciplinare in cui un'analisi socioeconomica e giuridica ha contribuito all'elaborazione dei suddetti obiettivi di ricerca. La mappatura del settore degli spettacoli dal vivo si basa principalmente sui dati di Eurostat e sul database Orbis. La dimensione transnazionale del settore è stata mappata analizzando i dati sull'esportazione e l'importazione di servizi e i dati amministrativi del "Documento portatile A1"[94] e delle "notifiche preventive"[95]. Inoltre, per permetterci di comprendere meglio la dimensione transnazionale, è stato inviato un questionario online alle imprese che forniscono musica dal vivo o attività di spettacolo, alle agenzie di prenotazione e gestione e, infine, ai gestori di locali. Per individuare le principali sfide e le possibili soluzioni, la ricerca documentale è stata affiancata da un sondaggio online, dall'organizzazione di tavole rotonde e da diverse interviste a esperti.

Mappatura del settore degli spettacoli dal vivo

A differenza di altri settori, sono disponibili poche informazioni quantitative su chi esattamente debba essere considerato parte del settore degli spettacoli dal vivo nell'UE, cosa che rende la mappatura dell'occupazione nel settore degli spettacoli dal vivo, così come le imprese che vi operano, un esercizio estremamente impegnativo. Ciò è diventato ancora più evidente durante la pandemia del COVID-19, in un momento in cui, ora più che mai, sarebbe stato utile disporre di tali cifre. Diversi parametri mostrano che il settore è stato colpito molto duramente, anche se non è chiaro fino a che punto siano state adottate le misure di sostegno (finanziario) prese a livello regionale, nazionale ed europeo dalle persone fisiche e giuridiche attive nel settore, limitando così, almeno in parte, l'impatto finanziario negativo della pandemia del COVID-19. Inoltre, la situazione pre-pandemica descritta nel presente rapporto potrebbe non essere necessariamente rappresentativa del settore dopo la pandemia. Occorre infine precisare che i dati fruibili a livello unionale sono spesso incompleti o non disponibili a un grado sufficientemente dettagliato per ottenere un quadro preciso al 100% e quindi affidabile del settore.[96]

Si stima che circa 807.700 imprese[97] e 1,3 milioni di persone siano attive nel settore degli spettacoli dal vivo all'interno dell'UE-27/EFTA/Regno Unito.[98] L'occupazione e le imprese sono concentrate

94 Questo certificato riguarda la legislazione in materia di sicurezza sociale applicabile a una persona e conferma che questo individuo non ha obblighi di versare contributi in un altro Stato membro. Il documento portatile A1 è rilasciato a diverse categorie di lavoratori mobili, principalmente ai lavoratori distaccati e ai lavoratori autonomi (articolo 12 del regolamento 883/2004) e alle persone che svolgono un'attività in due o più Stati membri (articolo 13 del regolamento 883/2004).

95 L'articolo 9, paragrafo 1, lettera a), della direttiva 2014/67 introduce un obbligo di notifica nello Stato membro in cui si prestano servizi: esso consente agli Stati membri di esigere da un prestatore di servizi stabilito in un altro Stato membro una "semplice dichiarazione" contenente le informazioni pertinenti necessarie per consentire controlli fattuali sul luogo di lavoro.

96 A tale riguardo, dovrebbero essere compiuti ulteriori passi nel campo della raccolta dei dati. Ad esempio, sembra che Eurostat sarà in grado di fornire una migliore panoramica del settore nei prossimi anni, raccogliendo le statistiche strutturali sulle imprese (SSI) del comparto e procedendo a un'analisi più dettagliata dei dati dell'indagine europea sulla forza lavoro (EU-LFS), che permetterà una migliore stima del volume di occupazione nel settore. Si tratta di un fattore senz'altro benaccetto.

97 Applicando la classificazione ristretta del settore (somma dei codici NACE 90.01, 90.02 e 90.04, escludendo quindi il codice NACE 90.03), il numero di imprese scende a circa 461.000 unità, di cui le attività di circa 327.900 compagnie possono essere catalogate come "arti dello spettacolo", circa 107.200 aziende come "attività di supporto alle arti dello spettacolo", e infine circa 25.800 imprese come "gestione di strutture artistiche". Sfortunatamente, non è disponibile una simile ripartizione per le cifre dell'occupazione del settore.

98 I lavoratori autonomi fanno parte di entrambe le variabili. Sia da un punto di vista statistico che giuridico, si pone la questione se questo gruppo debba essere collegato al gruppo dei "lavoratori" piuttosto che a quello delle "aziende" (ossia imprese/società). Il fatto che i lavoratori autonomi non siano oggetto della direttiva sul distacco dei lavoratori rende la risposta a questa domanda ancora più complicata.

in un numero limitato di paesi, principalmente in Germania e Francia.[99] I lavoratori nel settore degli spettacoli dal vivo corrispondono a circa lo 0,5% della forza lavoro totale nell'UE-27, con alcune chiare differenze nell'importanza relativa tra gli Stati membri. Si va dallo 0,2% della forza lavoro totale di Croazia, Cipro, Lussemburgo e Romania all'1% della forza lavoro totale di Paesi Bassi e Slovenia. Tuttavia, le cifre di cui sopra sono probabilmente una (significativa) sottostima dell'importanza assoluta e relativa del comparto, in quanto non tengono conto delle persone con un secondo lavoro nel settore degli spettacoli dal vivo.

Peraltro, stando alla classificazione delle aziende in base al numero di dipendenti, è chiaro che, ad eccezione della sottocategoria 90.04 "gestione di strutture artistiche", la stragrande maggioranza delle "aziende" (ossia imprese/società) operanti nel settore degli spettacoli dal vivo è composta da una sola persona. Ciò riguarda circa sette aziende su dieci attive nel comparto. Inoltre, circa il 98% delle aziende sono considerate "di piccole dimensioni". Questo profilo è in gran parte il risultato dell'elevato numero di autonomi nel settore, dato che è possibile affermare che più di quattro persone su dieci attive nel comparto sono infatti lavoratori di questo tipo. Si tratta di una cifra molto più alta rispetto alla media del 14% dell'occupazione totale dell'UE.

Come ultima considerazione, ma non per questo meno importante, va detto che, rispetto ad altri settori, l'occupazione nell'ambito degli spettacoli dal vivo è caratterizzata da un'organizzazione dell'orario di lavoro meno standard o più atipica[100] (più part-time e più combinazioni con altri lavori), contratti non standard (contratti di lavoro a tempo determinato, a progetto o basati su una data mansione) e rapporti di lavoro non standard (più lavoro autonomo e lavoro freelance a chiamata). In caso di prestazione di tali servizi all'estero, questo carattere atipico può creare ulteriori sfide, non ultimo in termini di determinazione della legislazione di sicurezza sociale dello Stato membro da considerare applicabile. Questo ci porta alla questione della dimensione transnazionale del settore. Tuttavia, prima di fare un'affermazione sulla portata e le caratteristiche di tale dimensione, è opportuno approfondire il concetto di lavoratore "a elevata mobilità".

Enucleare il concetto di "lavoratore a elevata mobilità"

Occorre ammettere che quando ci mettiamo a riflettere sul concetto di "lavoratore a elevata mobilità", questo sembra sfuggirci tra le dita come sabbia. In tal senso, darne una definizione corretta può rivelarsi una vera e propria impresa. A nostro parere, il modo migliore per definire questo concetto è guardare alla *frequenza* e alla *durata* dell'impiego all'estero di un lavoratore mobile. In effetti, la frequenza dei viaggi professionali in un altro Stato membro per questo gruppo di lavoratori è per lo più alta o molto alta e la durata della loro presenza in tale Stato è di frequente molto breve (spesso limitata a poche settimane, pochi giorni o addirittura ore). Inoltre, in molti casi, questo non coinvolge un unico Stato membro. A questo proposito, i "lavoratori a elevata mobilità" possono essere definiti come lavoratori (anche autonomi) che, durante l'anno, sono attivi in diversi Stati membri e la cui occupazione in ciascuno di tali Stati membri è di solito di (molto) breve durata.[101]

Prendendo in considerazione anche lo status dell'artista o del musicista, il concetto di "lavoratore a elevata mobilità" applicabile nel settore degli spettacoli dal vivo assume una dimensione aggiuntiva rispetto al concetto di base definito sopra, che ne trascende quindi l'aspetto puramente transfrontaliero. In effetti, la "mobilità" nel settore degli spettacoli dal vivo non può essere considerata semplicemente alla stregua di uno spostamento occasionale al di là dei confini nazionali, poiché la

99 Ad esempio, circa il 40% delle aziende si trova in Francia e attorno al 18% dell'occupazione è in Germania.

100 Naturalmente, quanto viene ritenuto "non standard o atipico" oggi può diventare "standard o tipico" nel (prossimo) futuro, e viceversa. In tal senso, questi termini rispecchiano meramente una deviazione dalla norma dell'occupazione standard.

101 Si noti che altri autori applicano una definizione leggermente diversa di "lavoratore a elevata mobilità". Van Ooij (2020) sostiene che il termine "lavoratore a elevata mobilità" indica due aspetti della mobilità: lo svolgimento dell'attività lavorativa oltre i confini (mobilità geografica) e la mobilità nella forma e nel modello di impegno lavorativo (mobilità lavorativa). Rasnača (2020) afferma che tali lavoratori attraversano regolarmente le frontiere per via della natura del loro impiego, sono attivi in più Stati membri, o valicano il confine ogni giorno per lavorare in uno Stato membro diverso da quello in cui risiedono permanentemente. La nostra definizione mostra delle similitudini con quella elaborata da Pieters e Schoukens (2020), che per "mobilità elevata" intendono tutte quelle attività professionali caratterizzate da un grado di mobilità molto alto e intenso.

"mobilità" è parte integrante della vita lavorativa quotidiana dei professionisti della cultura per via dell'organizzazione dell'orario di lavoro, dei contratti e dei rapporti di lavoro atipici esistenti in questo comparto. Pertanto, possiamo proporre la seguente definizione: i lavoratori a elevata mobilità nel settore degli spettacoli dal vivo sono caratterizzati da un alto numero di spostamenti transfrontalieri *(frequenza)*, eseguono vari incarichi a breve termine in diversi paesi *(durata)* e hanno spesso una situazione lavorativa atipica *(status)*.

Si pone ora la questione se la suddetta demarcazione del concetto sia abbastanza solida dal *punto di vista giuridico*. Delimitare una specifica categoria di persone presuppone la capacità di individuare tale gruppo di individui sulla scorta di una serie di caratteristiche che non condividono con altre. Si tratta di un esercizio tutt'altro semplice per il gruppo dei "lavoratori a elevata mobilità", sebbene sia un prerequisito essenziale se si vogliono definire regole specifiche per tale categoria. A nostro parere, sarebbe opportuno operare una distinzione tra il concetto di "lavoratore a elevata mobilità" e quello di "settore a elevata mobilità". Dopo tutto, anche nei casi in cui un settore non può essere qualificato come "settore a elevata mobilità", potrebbe esserci un gruppo (significativo) di lavoratori a elevata mobilità attivi in quel comparto.

Mappatura della dimensione transnazionale del settore degli spettacoli dal vivo

Occorre notare che anche la dimensione transnazionale di questo settore è ancora un punto cieco sia in termini di dimensioni che di caratteristiche. Pertanto, abbiamo cercato di quantificare la misura in cui il settore degli spettacoli dal vivo ha una dimensione transnazionale. Inoltre, è possibile che solo una parte del gruppo di lavoratori e delle compagnie operanti in questo settore si esibisca all'estero. Ci si chiede allora se questo gruppo possa essere considerato "a elevata mobilità". In questa sede esamineremo in particolar modo se i lavoratori mobili e le compagnie (itineranti) si spostano in diversi paesi, con quale frequenza lo fanno e la durata della loro permanenza in tali Stati. Nonostante i nostri sforzi, il lettore noterà che la strada davanti a noi per giungere a una definizione di un quadro preciso della dimensione transnazionale del settore è ancora lunga e tortuosa.

Come già accennato, i lavoratori nel settore degli spettacoli dal vivo corrispondono a circa lo 0,5% della forza lavoro totale nell'UE-27. L'evidenza empirica del documento portatile A1 mostra che nella maggior parte degli Stati membri, la quota del settore degli spettacoli dal vivo sul totale dell'occupazione temporanea transfrontaliera è superiore alla quota di occupazione sul totale della forza lavoro in questi Stati membri. Questo dimostra che il settore degli spettacoli dal vivo ha una dimensione transnazionale più importante rispetto a molti altri comparti economici.

Inoltre, sulla base dei dati sull'esportazione di servizi, possiamo trarre due conclusioni provvisorie: (1) un cospicuo gruppo di imprese di arti figurative non sembra esportare servizi all'estero, e (2) un gruppo significativo di imprese di arti figurative esporta quasi esclusivamente servizi all'estero.

Per i lavoratori mobili e le società attive nel settore degli spettacoli dal vivo, il documento portatile A1 viene concesso principalmente per la prestazione temporanea di servizi in un particolare Stato membro (ai sensi dell'articolo 12 del regolamento 883/2004) piuttosto che per la fornitura contemporanea di attività in diversi Stati membri per un periodo più lungo (ai sensi dell'articolo 13 del regolamento 883/2004), sebbene essi spesso si esibiscano più volte all'anno all'estero, di frequente in diversi Stati membri. Malgrado debbano essere considerati ancora provvisori, questi risultati mostrano che non si può semplicemente equiparare il profilo della dimensione transnazionale del settore degli spettacoli dal vivo a quello di altri settori "mobili". Infatti, mentre per il settore del trasporto di merci su strada, ad esempio, i documenti portatili A1 vengono principalmente rilasciati in conformità all'articolo 13, ciò non avviene per il settore degli spettacoli dal vivo. Questa osservazione ci spinge a interrogarci sui motivi per cui questo non accada. Dovremmo qui esaminare le procedure previste per l'attuazione dell'articolo 13. Nella fattispecie, per applicare tale articolo, l'autorità nazionale competente deve tenere conto della situazione prevista per i 12 mesi di calendario successivi. Tuttavia, i lavoratori e le compagnie (altamente) mobili (spesso) non sanno in anticipo dove si esibiranno nei 12 mesi successivi.

Inoltre, l'evidenza empirica mostra che il periodo di distacco nel settore degli spettacoli dal vivo si limita per lo più a pochi giorni. Ad esempio, i dati degli Stati membri dichiaranti indicano che circa sei distacchi su dieci nel settore hanno una durata compresa tra uno e otto giorni. Tali risultati sono in netto contrasto con il periodo medio di distacco di circa tre mesi per l'intera economia.

Infine, i dati evidenziano che sia la Francia[102] che la Germania sono i principali Stati membri che ricevono lavoratori mobili e compagnie (itineranti) attive nel settore degli spettacoli dal vivo.

La sicurezza sociale e lo stato occupazionale del lavoratore (altamente) mobile

Quando forniscono servizi all'estero, lavoratori e imprese si imbattono in un quadro giuridico complesso. Il grado di armonizzazione a livello europeo è infatti ancora relativamente modesto. Così, leggi e normative nazionali molto diverse negli Stati membri rimangono in gran parte in vigore. L'unico obiettivo a livello europeo è quello di stabilire una base di diritti fondamentali e di coordinare i diversi quadri legislativi in determinati settori. Non c'è alcuna intenzione di armonizzare e/o standardizzare i sistemi/contratti nazionali o anche settoriali che definiscono le condizioni di lavoro e i contributi di sicurezza sociale da rispettare. La conseguenza pratica per i lavoratori e le imprese (altamente) mobili è che i diritti e i doveri (sociali) sono talvolta difficili da stabilire.

Non appena artisti e imprese valicano i confini nazionali, è importante determinare le disposizioni di sicurezza sociale applicabili. La questione viene affrontata sulla base dei regolamenti 883/2004 e 987/2009 (denominati "regolamenti di coordinamento"). Tuttavia, determinare la legislazione in materia di sicurezza sociale applicabile non è un compito facile, nemmeno per gli artisti e le compagnie attive nel comparto degli spettacoli dal vivo. Dopo tutto, dato il carattere atipico di questo settore e considerata la diversità dei "modelli di occupazione", la differenza tra "distacco" (articolo 12 del regolamento 883/2004) e "attività simultanee" (articolo 13 del regolamento 883/2004) non è sempre del tutto netta. Questo richiederà spesso una valutazione caso per caso per stabilire la legislazione di sicurezza sociale applicabile.

Dal punto di vista del diritto del lavoro,[103] lo scenario che caratterizza principalmente i lavoratori mobili nel settore degli spettacoli dal vivo è quello del distacco dei lavoratori. La direttiva 96/71/CE (denominata direttiva sul distacco dei lavoratori) può essere intesa come lo strumento atto a individuare le disposizioni obbligatoriamente applicabili ai lavoratori distaccati da parte degli Stati membri. La direttiva sul distacco dei lavoratori è stata recentemente modificata dalla direttiva (UE) 2018/957. In sostanza, i lavoratori distaccati hanno diritto alla stessa "retribuzione"[104] dei dipendenti locali. Tuttavia, ai fini della determinazione della retribuzione applicabile al lavoratore distaccato, si dovrebbe eseguire un confronto tra la retribuzione corrisposta in base al contratto di lavoro nello Stato membro d'origine e quella da pagare nello Stato membro ospitante, al fine di applicare il livello di retribuzione più alto.

Sfide e ostacoli riscontrati da lavoratori e imprese del settore degli spettacoli dal vivo in situazioni transfrontaliere

Quando si parla di sfide e ostacoli riscontrati dai lavoratori mobili e dalle imprese, il denominatore comune è spesso rappresentato dalla complessità giuridica e dagli oneri amministrativi derivanti dall'applicazione del diritto europeo del lavoro e della sicurezza sociale (ad es. l'individuazione dello Stato membro competente per la sicurezza sociale, il versamento dei contributi di sicurezza sociale in

102 La Francia sembra adottare una linea severa nei confronti dell'obbligo di esibire un documento portatile A1 quale condizione per essere "legalmente" distaccati. Il paese ha infatti comminato delle sanzioni in caso di mancata presentazione del documento portatile A1 e/o sta effettuando diversi accertamenti sul possesso di tale certificato. Queste misure possono avere un impatto significativo sull'osservanza della presentazione di una richiesta di un documento portatile A1 per la prestazione di servizi in Francia. Di conseguenza, la quota degli Stati membri in cui vengono effettuati molti controlli, come la Francia, sul totale potrebbe essere sovrastimata.

103 Il regolamento (CE) n. 593/2008 (ossia il regolamento Roma I) determina quale diritto è applicabile ai contratti in caso di possibile conflitto di leggi, come nel caso di situazioni di lavoro transnazionali.

104 Recentemente modificato dalla "direttiva (UE) 2018/957" (al posto di "tariffe minime salariali" uguali, come previsto dalla precedente versione della direttiva sul distacco dei lavoratori).

tale Stato membro,[105] l'applicazione dei termini e delle condizioni definiti nella direttiva sul distacco dei lavoratori), così come dalle formalità amministrative corrispondenti (ad es. la domanda di un documento portatile A1 e l'effettuazione di una notifica preventiva).[106] Inoltre, vi è una conoscenza insufficiente della legislazione sul lavoro e sulla sicurezza sociale da applicare in una situazione transfrontaliera, in parte dovuta all'assenza di informazioni chiare. Ad esempio, la mancanza di conoscenza della legislazione è stata chiaramente riflessa dai risultati del sondaggio online, dato che solo un interpellato su quattro era a conoscenza della recente modifica della direttiva sul distacco dei lavoratori. Questo è indice di una mancanza di conoscenza/consapevolezza, che si traduce in una lacuna di conformità normativa.[107]

Il presente rapporto verte principalmente sulla legislazione europea e, in particolare, sulle sfide derivanti dall'applicazione dei regolamenti di coordinamento e della direttiva sul distacco dei lavoratori. Ciononostante, la legislazione nazionale può avere un impatto (significativo) su quanto sia facile o difficile applicare queste norme europee (vedere l'Appendice I per un'analisi comparativa del quadro giuridico esistente in Belgio, Paesi Bassi, Francia e Germania). Inoltre, occorre essere consapevoli che il carattere atipico del settore può ripercuotersi sulle sfide individuate in un contesto transnazionale. La valutazione se tale carattere atipico possa essere considerato o meno un problema o una sfida per il comparto esula dallo scopo del presente rapporto.

Nella definizione delle sfide (e delle soluzioni), siamo favorevoli a operare una netta distinzione tra quelle che derivano dall'applicazione del diritto del lavoro e della sicurezza sociale rispetto alle corrispondenti formalità amministrative. Soprattutto per quanto riguarda queste ultime, è importante adottare misure per mantenere l'onore amministrativo derivante dalle esibizioni all'estero proporzionato rispetto ai benefici. Dopo tutto, il fatto che un'impresa, in caso di prestazione di servizi all'estero, debba soddisfare diversi requisiti di notifica, sia nello Stato membro di origine che in quello ospitante, crea un notevole onere amministrativo, se non addirittura un doppio onere. Attualmente solo Austria, Belgio, Danimarca, Francia e Paesi Bassi concedono un'esenzione dalla notifica preventiva agli artisti e ai loro datori di lavoro. Peraltro, la necessità[108] di avere un documento portatile A1 per ogni distacco all'estero è una procedura onerosa e che richiede tempo.[109] Di conseguenza, la mancanza di disposizioni speciali per i distacchi (molto) brevi può comportare un onere amministrativo sproporzionato per le PMI. Inoltre, queste PMI non sono sempre in grado di assumere esperti esterni come intermediari. In tal senso, un elevato onere amministrativo può ostacolare uno spettacolo dal vivo all'estero e, quindi, la libera circolazione dei lavoratori e dei servizi.

A causa del carattere atipico del settore degli spettacoli dal vivo, individuare la legislazione di sicurezza sociale che dovrebbe essere applicata all'artista, al musicista o al tecnico a elevata mobilità può rivelarsi difficile. Pertanto, i lavoratori (altamente) mobili impiegati nel settore degli spettacoli dal vivo possono essere incerti sui loro diritti, mentre i datori di lavoro potrebbero avere difficoltà a capire a quale sistema nazionale di sicurezza sociale dovrebbero versare i loro contributi. Ad esempio, quando gli artisti sono attivi in più Stati membri, rientrando così nell'articolo 13 del regolamento 883/2004, le specificità dei modelli occupazionali del settore potrebbero finire per complicare la loro situazione per quanto riguarda l'affiliazione alla sicurezza sociale. Non potendo esplorare qui l'ampia gamma di scenari possibili, ci limitiamo a un solo esempio. L'articolo 13, paragrafo 3, prevede che quando una

105 Possono verificarsi problemi dovuti, ad esempio, all'obbligo di versare i contributi di sicurezza sociale in uno Stato membro diverso da quello del datore di lavoro.

106 Ciò può portare alla non conformità o all'elusione (ad esempio attraverso l'uso dello status di lavoratore autonomo per evitare l'applicazione della direttiva sul distacco dei lavoratori).

107 Questa situazione è accentuata dal fatto che il settore non è considerato una priorità dagli ispettorati del lavoro. Ad esempio, solo un intervistato su cinque del sondaggio online ha indicato di essere già entrato in contatto con l'ispettorato del lavoro competente.

108 In alcuni casi, un distacco può avvenire senza che le istituzioni ne siano informate o il documento portatile A1 viene emesso con effetto retroattivo. A questo proposito, "la necessità" di avere un A1 portatile può differire fortemente tra Stati membri e settori, spesso a seconda del "rischio" di ispezioni.

109 Inoltre, si segnala come le procedure amministrative nazionali nei diversi Stati membri non siano sempre sufficientemente adattate a distacchi di breve durata, poiché non sempre in grado di rilasciare un documento portatile A1 in tempo.

persona è attiva in più Stati membri sia come dipendente che come lavoratore autonomo, sarà soggetta alla legislazione in materia di sicurezza sociale dello Stato membro in cui è attiva come lavoratore dipendente. L'articolo non specifica le soglie di applicazione di tale norma, né è stato chiarito da una decisione della Commissione amministrativa per il coordinamento dei sistemi di sicurezza sociale. Questo potrebbe causare una situazione in cui un artista è attivo in diversi Stati membri, compreso il proprio Stato membro di residenza, come libero professionista autonomo, ma viene poi assunto per un periodo limitato come dipendente in un altro Stato membro, finendo così per essere affiliato al sistema di sicurezza sociale di quest'ultimo Stato membro, nonostante il legame limitato. Tale punto è particolarmente rilevante poiché alcuni mercati molto significativi per il settore degli spettacoli dal vivo, come la Francia, prevedono una presunzione di rapporto di lavoro per gli artisti. Questa presunzione include un'eccezione per gli artisti attivi come lavoratori autonomi in un altro Stato membro, che si distaccano in Francia, ma questa eccezione non si applica agli artisti assunti in Francia da un datore di lavoro francese e attivi come lavoratori autonomi anche in altri Stati membri. Infine, possono sorgere problemi anche quando vengono applicate le condizioni di distacco di cui all'articolo 12 del regolamento 883/2004. Ad esempio, un artista può esibirsi in uno spettacolo all'estero relativamente poco dopo essere stato assunto. In questo caso, tuttavia, sarà soggetto alla legislazione del paese del datore di lavoro almeno un mese prima del distacco. Nella discussione sulla revisione dei regolamenti di coordinamento, si è avanzata persino la proposta di aumentare questo periodo a tre mesi di assicurazione preventiva.

Nel diritto del lavoro, una delle principali difficoltà deriva dal fatto che la direttiva sul distacco dei lavoratori si applica dal "giorno zero" e, pertanto, dal primo momento in cui un lavoratore distaccato arriva nello Stato membro ospitante per svolgervi un servizio. Ciò ha ripercussioni importanti sulla complessità in cui si imbattono le imprese che distaccano nel settore degli spettacoli dal vivo, in particolare quando queste devono organizzare tournée che includono la presenza a breve termine in più Stati membri. Sebbene le recenti decisioni della Corte di giustizia sembrino suggerire la creazione di una categoria di "distacco di breve durata", che non rientrerebbe nel quadro giuridico per il distacco dei lavoratori a causa del loro legame limitato con lo Stato membro ospitante, questa continua a essere una categoria di produzione giurisprudenziale dai confini incerti, che non fornisce la certezza necessaria in termini di decisioni aziendali. Alla fine, il fatto che le compagnie (itineranti) e i loro artisti eccellano sul palco dovrebbe essere il loro vantaggio competitivo e non il prezzo che fanno pagare. Quando si tratta dell'applicazione delle condizioni di lavoro, la maggior parte delle difficoltà e degli ostacoli sembrano derivare dalla complessità delle norme applicabili. Alcune difficoltà specifiche si manifestano per quei datori di lavoro del settore pubblico o del settore privato sovvenzionato che distaccano i loro lavoratori, impiegati come dipendenti pubblici, in un altro Stato membro. In molti casi, questi datori di lavoro operano sulla base di rigide norme di bilancio, non potendo così prevedere l'aumento di retribuzione necessario quando si distaccano artisti e tecnici in uno Stato membro caratterizzato da un livello di retribuzione applicabile più elevato.

Non c'è una "formula magica": alla ricerca di soluzioni dal basso

Nella formulazione delle soluzioni, viene operato un distinguo fra soluzioni operative, da un lato, che possono essere facilitate dalle parti sociali, dalle amministrazioni pubbliche e dagli ispettorati del lavoro sia a livello nazionale che europeo, e soluzioni legislative, dall'altro. Se le soluzioni operative possono essere attuate a breve e medio termine, quelle legislative andrebbero piuttosto considerate in un'ottica a lungo termine. Il nostro punto di partenza è un approccio pragmatico dal basso verso l'alto, che approva e attua pienamente l'attuale quadro legislativo europeo, concentrandosi sui passi aggiuntivi che possono essere compiuti nel campo dell'informazione (ossia la "sensibilizzazione"). Questo non significa che non riconosciamo la complessità giuridica e l'onere amministrativo; tuttavia, non ci si può aspettare che i regolamenti di coordinamento e la direttiva sul distacco dei lavoratori possano risolvere tutti i problemi e le sfide individuati. Dopo tutto, alcuni dei problemi riscontrati

dagli artisti e dalle compagnie mobili sono dovuti principalmente alla legislazione nazionale o alle caratteristiche del settore degli spettacoli dal vivo.

Aumentare la consapevolezza fornendo informazioni accurate e di facile utilizzo

Il presente rapporto si pone quale importante obiettivo quello di fornire alcune indicazioni sulla legislazione sociale e del lavoro da applicare. A tal fine, nel contesto della presente ricerca, sono stati sviluppati diversi strumenti, tra cui un approccio graduale all'applicazione delle condizioni di retribuzione e di lavoro ai lavoratori distaccati, nonché un diagramma di flusso per individuare la legislazione di sicurezza sociale applicabile alle situazioni di lavoro simultaneo. Inoltre, ci siamo avvalsi di un template messo a punto dall'Autorità europea del lavoro (ELA) insieme al suo "Gruppo di lavoro sull'informazione" per la presentazione delle informazioni derivanti dai contratti collettivi universalmente applicabili. In particolare, abbiamo applicato questo template a un test case costituito dai due contratti collettivi applicabili al settore degli spettacoli dal vivo in Francia. Speriamo che questo incoraggi più soggetti interessati, sia tra le parti sociali che tra le autorità pubbliche, a intraprendere questo lavoro per i contratti collettivi applicabili ai lavoratori distaccati. Infine, il rapporto fornisce per ogni Stato membro un link al sito web unico nazionale ufficiale sul distacco dello Stato membro ospitante, alla pagina web con informazioni su come e dove richiedere un documento portatile A1 nello Stato membro di origine e, infine, alla pagina web con informazioni su come e dove effettuare una notifica preventiva nello Stato membro ospitante.

Il grado di facilità d'uso delle informazioni messe a disposizione è un'altra questione. Ad esempio, si può facilmente scegliere di fornire un link in cui sono disponibili i contratti collettivi. Questa sembra essere la strategia oggi attraverso i siti web unici nazionali ufficiali sul distacco.[110] Sfortunatamente, ciò non significa che le informazioni sulla retribuzione da corrispondere siano facilmente reperibili. A tale riguardo, un prossimo passo nel processo di informazione potrebbe essere che questi contratti collettivi siano anche facilmente consultabili in tutte/diverse lingue ufficiali dell'UE (ad es. sulla base del template sviluppato dall'ELA).[111] Un ultimo passo sarebbe un raffronto fra i contratti collettivi di tutti gli Stati membri in modo da sapere quanto di più si dovrà eventualmente pagare. Naturalmente, ai fini di tale esercizio, sarebbe opportuno tenere conto anche dello status e dell'anzianità del lavoratore, nonché delle nuove disposizioni della direttiva sul distacco dei lavoratori. In questo rapporto, ad esempio, abbiamo cercato di calcolare l'entità dell'aumento del salario lordo quando i servizi vengono forniti da artisti mobili e compagnie (itineranti) dal paese X al paese Y. Questo esercizio è stato svolto prendendo in considerazione sia il salario medio nel settore delle arti, dell'intrattenimento e del tempo libero, che i salari minimi nazionali. Essa chiarisce che il costo del lavoro, e quindi il costo da addebitare all'organizzatore, in caso di esibizioni all'estero, può essere differire significativamente dal costo normalmente addebitato. Inoltre, il budget richiesto dalle compagnie itineranti per rispettare i termini e le condizioni stabilite dalla direttiva sul distacco dei lavoratori sarà spesso molto più elevato rispetto a quello di compagnie che operano solo nel loro paese di residenza. A tal riguardo, questa osservazione dovrebbe anche costituire un campanello

110 L'articolo 5 della direttiva riveduta sul distacco dei lavoratori dà alla Corte di giustizia la facoltà di valutare la completezza delle informazioni incluse nei siti web ufficiali nazionali ai fini della valutazione della proporzionalità delle sanzioni eventualmente applicate in caso di violazioni delle norme sul distacco. Una decisione in questo senso sarebbe certamente un valido incentivo per il miglioramento delle informazioni contenute in questi siti web. Allo stesso tempo, una tale decisione potrebbe essere uno shock per gli Stati membri. Per evitare che ciò accada, la Commissione europea potrebbe iniziare a richiedere proattivamente agli Stati membri informazioni sullo stato delle informazioni presentate nei loro siti web nazionali ufficiali e, in questo contesto, sviluppare un approccio standardizzato, possibilmente basato sul template dell'ELA, per quanto riguarda le informazioni che dovrebbero esservi incluse. A questo proposito, va notato che il programma di lavoro dell'ELA 2021 (p. 13) afferma che "particolare attenzione sarà dedicata alle informazioni fornite da un sito web nazionale unico sul distacco dei lavoratori, a seguito dell'entrata in vigore della direttiva (UE) 2018/957, per cui l'ELA proseguirà le attività di revisione inter pares avviate dal comitato di esperti sul distacco dei lavoratori".

111 Va da sé che questo processo di riorganizzazione delle informazioni contenute nei contratti collettivi e la loro traduzione in una o più lingue è sia costoso che dispendioso in termini di tempo. Potrebbe anche essere considerato al di fuori del core business delle parti sociali, dato che fondamentalmente beneficia i datori di lavoro e i lavoratori che non sono, per definizione, i loro membri. Pertanto, le federazioni e le associazioni europee dovrebbero svolgere un ruolo proattivo in questo settore, al fine di incoraggiare i loro membri a raccogliere questa sfida che, in ultima analisi, andrà a vantaggio dell'intero comparto in Europa attraverso la facilitazione della mobilità e degli scambi culturali.

d'allarme per la politica europea e nazionale in materia di sovvenzioni al settore degli spettacoli dal vivo.[112]

Gli organizzatori e le sedi presso cui si tengono gli spettacoli dovrebbero essere incoraggiati a svolgere un ruolo proattivo nell'informare le compagnie (itineranti) riguardo ai contratti collettivi applicabili agli artisti e ai tecnici che ospitano. Tale raccomandazione parte dal presupposto secondo cui è probabile che tali organizzatori e sedi abbiano una comprensione molto migliore del proprio sistema e sono dunque in grado di guidare i datori di lavoro stranieri a districarsi in questo insieme di norme. Se è vero che questo potrebbe essere un ruolo poco familiare per gli organizzatori e le sedi presso cui si tengono gli spettacoli, le associazioni dei datori di lavoro, sia a livello nazionale che europeo, potrebbero rivestire un ruolo cardine a tale scopo, in particolare mediante la sensibilizzazione.[113] Infine, le autorità nazionali e le ispezioni del lavoro possono svolgere un ruolo più attivo nell'informare i lavoratori e le imprese attive nel settore degli spettacoli dal vivo.

Diminuire l'onere amministrativo (ossia meno formalità amministrative)

L'impresa distaccante deve soddisfare diversi obblighi di notifica, sia nello Stato membro d'origine (ossia la richiesta di un documento portatile A1) che in quello ospitante (ossia effettuare una dichiarazione "semplice"). Questo costituisce un onere amministrativo sostanziale, se non addirittura un doppio onere. L'introduzione di procedure digitali di applicazione o di registrazione di facile utilizzo potrebbe ridurre significativamente questo onere.

È inoltre possibile mettere in discussione anche la necessità di avere un documento portatile A1[114] e di effettuare una notifica preventiva per ogni distacco di breve termine, come spesso avviene nel settore degli spettacoli dal vivo. Del resto è lecito chiedersi se il requisito del possesso di un documento portatile A1 anche per un brevissimo periodo di permanenza all'estero sia effettivamente necessario e non costituisca una richiesta sproporzionata (si pensi che la mancata esibizione di un documento portatile A1 in alcuni Stati membri può comportare sanzioni molto elevate). In questo caso vi è in primis un conflitto tra l'onere amministrativo richiesto al datore di lavoro, l'esigenza degli enti di sicurezza sociale e degli ispettorati di garantire che non si verifichino abusi o evasioni di contributi e, infine, la necessità di una certezza giuridica per il lavoratore mobile onde evitare lacune nella protezione sociale transnazionale. A volte questo equilibrio viene meno, come è evidente dalla proposta di revisione dei regolamenti di coordinamento che è ora al vaglio per escludere i viaggi di lavoro dall'obbligo di esibire un documento portatile A1. Soprattutto sarebbe opportuno interrogarsi in merito alle elevate sanzioni previste da alcuni Stati membri in caso di mancato possesso del documento portatile A1.[115] Inoltre, solo Austria, Belgio, Danimarca, Francia e Paesi Bassi esentano gli artisti dalla presentazione di una notifica preventiva. A tal riguardo, sarebbe utile negoziare un'esenzione dalla notifica preventiva con ogni Stato membro separatamente e, in particolare, con i principali Stati membri destinatari di artisti (ad es. Germania, Italia, ecc.).

Si tratta ovviamente di soluzioni che richiedono un'ulteriore elaborazione. Ad esempio, per facilitare l'identificazione delle persone attraverso le frontiere ai fini del coordinamento della sicurezza sociale, la Commissione europea ha lanciato l'idea di introdurre un numero di sicurezza sociale europeo (ESSN).[116] Questo può essere considerato una possibile alternativa al documento portatile A1.

112 Si vedano anche gli ostacoli individuati per i datori di lavoro del settore pubblico o del settore privato sovvenzionato che distaccano i loro lavoratori, impiegati come dipendenti pubblici, in un altro Stato membro. Affrontare questi ostacoli richiede modifiche alle norme di bilancio per i servizi pubblici e le agenzie di finanziamento a livello nazionale, che dovrebbero prevedere il necessario grado di flessibilità per consentire ai datori di lavoro che distaccano i lavoratori di rispettare la legislazione europea in materia.

113 Inoltre, i risultati del sondaggio online mostrano che i gestori dei luoghi sede di spettacoli nel paese ricevente sono il canale d'informazione più spesso usato dalle compagnie artistiche.

114 L'attuale quadro giuridico prevede che il datore di lavoro o la persona interessata debba informare le autorità competenti delle attività transnazionali previste, *se possibile* prima che queste attività abbiano luogo.

115 Come ha stabilito la Corte di giustizia, la severità della pena deve essere commisurata alla gravità del reato. In particolare, le misure amministrative o sanzionatorie consentite dalla legislazione nazionale non devono spingersi oltre il necessario per raggiungere gli obiettivi legittimamente perseguiti da tale legislazione.

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

Inoltre, l'attuazione dell'EESSI (Electronic Exchange of Social Security Information, scambio elettronico di informazioni sulla sicurezza sociale) potrebbe avere un impatto positivo sull'onere amministrativo.[117]

Verso un quadro giuridico su misura per il settore degli spettacoli dal vivo e/o il "lavoratore a elevata mobilità"?

Alcuni artisti, in particolare quelli impegnati in attività itineranti, sono un esempio lampante di lavoratori a elevata mobilità. Poiché i regolamenti di coordinamento sembrano spesso orientati al tipico lavoratore migrante che si trasferisce in un altro Stato membro per un periodo di tempo più lungo e per il quale è fondamentale l'integrazione nel nuovo Stato membro di destinazione, non sorprende che tali norme costituiscano delle sfide per queste persone a elevata mobilità. Ne consegue che, per questo tipo di lavoratori e i loro datori di lavoro, non solo a volte è difficile determinare diritti e obblighi sociali, ma possono essere sollevate anche questioni in merito all'adeguatezza della legislazione applicabile, soprattutto in caso di molteplici periodi consecutivi di lavoro all'estero. Da questo punto di vista, ci si può chiedere se e in che misura un approccio settoriale terrebbe meglio conto delle particolarità del comparto degli spettacoli dal vivo. Inoltre, sarebbe opportuno considerare l'elaborazione di norme di conflitto specifiche che sottopongano i lavoratori a elevata mobilità a una legislazione più stabile. Tuttavia, il più grande scoglio in tal senso è forse rappresentato da una netta demarcazione del settore degli spettacoli dal vivo e della nozione di "lavoratore a elevata mobilità".

117 EESSI è un sistema informatico che mira ad aiutare gli enti di sicurezza sociale nello scambio di documenti elettronici transfrontalieri. Il sistema EESSI è stato reso disponibile dalla Commissione europea nel luglio 2017. Da allora, gli Stati membri hanno avuto due anni per ultimare la loro attuazione nazionale dell'EESSI e collegare i propri enti di sicurezza sociale agli scambi elettronici transfrontalieri. Attualmente, tutti i 32 paesi partecipanti (UE-27/EFTA/Regno Unito) sono collegati al sistema EESSI e sono in grado di scambiarsi elettronicamente informazioni su alcune attività di impresa.

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1.1 Intra-EU labour mobility: an increasing number of 'highly mobile workers'?

Over the past two decades, labour mobility has increased significantly in the European Union (EU), the UK, and the European Free Trade Association (EFTA) (Fries-Tersch et al., 2021). In 2019, approximately 20 million EU/UK/EFTA movers were residing in the EU/UK/EFTA, including 15.3 million persons of working age (15-64 years) *(Table 1.1)*. They made up 3.8% of the total population and 4.5% of the population of working age in the EU/UK/EFTA. The number of third country nationals residing (and working) in the EU/UK/EFTA is even higher. In 2019, around 24 million extra-EU/UK/EFTA movers were residing in the EU/UK/EFTA, including 18.5 million persons of working age. This increases the share of movers residing in the EU/UK/EFTA to 8.4% of the total population and to 10% of the total population of working age. Most of them are residing in five major destination Members: Germany, the UK, Spain, France, and Italy. The Brexit has a significant impact on the volume of intra-EU labour mobility: in 2019, some 3.7 million EU/EFTA movers and some 2.4 million extra-EU/EFTA movers were residing in the UK (Eurostat data [migr_pop1ctz]). In 2020, and excluding the UK in the EU-figures, 'only' 15.4 million EU/EFTA movers were residing in the EU/EFTA (Eurostat data [migr_pop1ctz]).

Table 1.1 Composition of labour mobility in the EU/UK/EFTA, 2019

Type of labour mobility	Extent
Stock of EU/UK/EFTA movers in the EU/UK/EFTA of working age (15-64 years)	15.3 million
As share of the total working age population in the EU/UK/EFTA	*4.5%*
Cross-border workers in the EU/UK/EFTA	1.9 million
As share of the total employed in the EU/UK/EFTA	*0.6%*
Estimated number of posted workers in the EU/UK/EFTA*	1.9 million
As share of the total employed in the EU/UK/EFTA	*0.6%*
Estimated number of persons who normally worked in two or more Member States	1.2 million
As share of the total employed in the EU/UK/EFTA	*0.5%*

* Based on data from Portable Documents A1 issued according to Article 12 of Regulation 883/2004. Some 3.2 million PDs A1 were issued according to Article 12.

** Based on data from Portable Documents A1 issued according to Article 13 of Regulation 883/2004. Some 1.4 million PDs A1 were issued according to Article 13.

Source Eurostat data; Fries-Tersch et al. (2021); De Wispelaere et al. (2021a)

However, the scope of labour mobility in the EU cannot be narrowed to persons of working age residing in a Member State other than the Member State of birth/citizenship (i.e. 'labour migration') (by relying on the free movement of workers (Article 45 TFEU) or for self-employed, on the freedom of establishment (Article 49 TFEU). As stated by the United Nations Economic Commission for Europe (UNECE) (2018: 3) the concept of 'international labour mobility' includes 'all movements of natural persons from one country to another for the purpose of employment or the provision of services'. This comprehensive definition does not make a statement about the frequency and duration of the employment/service abroad when defining the concept. Consequently, very short, very frequent, or repetitive movements abroad are also included in this definition. Moreover, and most importantly, the definition includes movements for the purpose of providing services (by application of the freedom to provide services (Article 56 TFEU)). Therefore, this term does not only cover 'labour migration' but also other types of (temporary) labour mobility such as 'business trips', seasonal

work, commuting, posting of workers, circular labour migration, persons working in two or more Member States, etc.[118, 119]

'Stock' and 'flows' are the two basic measures characterising the size of labour mobility. The stock is the total number of 'mobile persons of working age' residing in a country at a particular point in time, while the flow is the number of 'mobile persons of working age' entering or leaving a country over the course of a specific period, e.g. one year. For temporary forms of labour mobility such as seasonal work, intra-EU posting, circular labour migration, working in several countries, etc. figures on the annual flow are therefore more indicative. For example, it is estimated that in 2019, some 1.6 million posted workers and self-employed persons were temporarily providing services in an EU/EFTA country other than that where they were employed, and some 1.2 million persons were active in several Member States for professional reasons.

In general, three parameters are crucial in defining and measuring the forms of international labour mobility. Firstly, there is the place of residence of the mobile person, the place of establishment of the employer, and finally the place of employment of the mobile person. These three parameters are relatively easy to determine for most forms of labour mobility, which is however not the case for 'highly mobile workers' regarding their place of employment. Despite the fact that the term 'highly mobile worker' is increasingly used in public and academic debate, very little research is available on the socio-economic and legal status of this group of workers. Highly mobile workers in the EU are persons whose place of employment is not a particular Member State but the EU in general. The question arises whether this is also a solid definition in legal terms. This is an essential prerequisite if one wants to define specific rules for this group. Moreover, the size of this group is still a 'dark number'. 'Highly mobile workers' represent a very diverse group of workers. In particular, people who are employed in the transport sector seem to fall into this group (truck drivers, pilots,[120] aircrew members and seafarers). Nonetheless, it is not only in the transport sector that workers are highly mobile in the EU for professional reasons. For instance, managers and staff of international companies, sale representatives, and researchers can also be highly mobile in the EU.

In this report, we draw specific attention to another group of (highly) mobile workers in the EU, notably those persons active in the 'live performance sector' (i.e. artists, musicians and where relevant also technicians and touring staff). They are part of the group of posted workers and self-employed persons who temporarily provide services in a specific EU/EFTA country or the group of persons who work for a longer period in several Member States. Think for example of a dancer touring for several weeks in different Member States, an actor engaged by a theatre company in one Member State and invited as a guest dramaturg in another Member State, a musician playing in several orchestras and music ensembles in different Member States, rehearsing in yet another Member State. All these situations show a vibrant and highly mobile sector that is not defined by borders.

An important objective of this report is to map the sector of the live performance sector in terms of volume and profile. Indeed, both for the sector as a whole and for its transnational dimension, there are still significant shortcomings in the area of statistics. Moreover, this mapping exercise should allow us to make a statement about the assumption we started from, namely that some specific groups of artists, musicians and technicians active in the live performance sector are (highly) mobile in the EU in the sense that they provide services in different Member States mostly of (very) short duration. Furthermore, we examine the challenges faced by this group of workers and their employers. As they have often little connection to a specific Member State, they may face several challenges in the fields

118 These forms of labour mobility may overlap with each other (for example, a posted seasonal worker). The delineation of these terms, not least within a legal context, is therefore a major challenge.

119 As argued in De Wispelaere et al., 2020 this reality should also be better reflected in national employment statistics. The place of residence of the employer is currently decisive in determining which forms of labour mobility are or are not included in calculating a country's domestic employment. In our opinion, this approach is too narrow.

120 See also Jorens, 2014 and Jorens et al., 2015.

of taxation (outside the scope of this report), social security and labour law. In that respect, the concept of 'transnational social rights' might be an interesting conceptual framework to define and address these challenges.

1.2 Transnational social rights in the EU: still room for improvement

In case of transnational mobility, people move from one 'social space' to another (see e.g. Ferrera, 2005).[121] It could be argued that in the course of this action, people enter a (European) transnational social space which includes several actors from the country of origin as well as the host country (Heidenreich, 2019). These actors are those that provide 'transnational social protection'. During the last few years, the latter concept has received much scholar attention of sociologists and political scientists (e.g. Levitt et al., 2017; Faist, 2017; Serra Mingot & Mazzucato, 2017; Dobbs et al., 2019; Lafleur, 2019; Talleraas, 2019a; 2019b; Lafleur & Vintila, 2020). This may sound strange to legal experts in European social and labour law as it gives the impression that the protection of social rights in a cross-border context has only recently become a policy objective, which is, of course, not the case.

The definition that is used by scholars to indicate what the umbrella concept 'transnational social protection' comprises reads as follows: 'transnational social protection[122] comprises the policies, programmes, people, organisations, and institutions which provide for and protect individuals across national borders in the categories of old age, survivors, incapacity, healthcare, family benefits, active labour market programs, unemployment, and housing assistance' (Levitt et al., 2017: 6).[123, 124] From a European point of view, the above definition seems too broad in terms of the actors involved, given that national and European policy guarantees to a large extent transnational social protection without the intervention of other formal and informal actors. Moreover, according to Sabates-Wheeler (2009), social protection for international migrants consists of four components: *i)* access to formal social protection in host and origin countries; *ii)* portability of vested social security rights between host and origin countries; *iii)* labour market conditions for migrants in host countries and the recruitment process for migrants in the origin country; and *iv)* access to informal networks to support migrants and their family members. Above definition of 'transnational social protection' seems to exclude component *iii*. In this respect, especially within the context of this report, it is better to use the notion of 'transnational social rights'. After all, the focus will not only be on the social protection of mobile persons, but also on their terms and conditions of employment.

Levitt et al. (2017: 3) point out that 'studying transnational social protection will help scholars identify which policies or strategies can most efficiently provide for and protect the wellbeing of individuals in our increasingly transnational world.' This statement gives the impression that there are still many gaps in guaranteeing the transnational social rights of mobile persons. Both in terms of protecting the terms and conditions of employment as well as the social security rights of intra-EU

121 Ferrera (2005; 2009) defines three types of (social) sharing spaces: transnational sharing spaces, cross-regional sharing spaces and finally, supranational sharing spaces.

122 Social security and social assistance are both part of the broader concept of social protection, which, in its turn, is an important aspect of 'the welfare state'. The International Labour Organization (ILO) defines social protection as 'a set of policies and programmes designed to reduce and prevent poverty and vulnerability throughout the life cycle. It includes child and family benefits, maternity protection, unemployment support, employment injury benefits, sickness benefits, health protection, old-age benefits, disability benefits and survivors' benefits.'

123 This definition suggests that persons may access transnational social protection through formal social protection provided by the state of origin or the host State as well as through informal provisions based on social networks located in multiple geographical locations. In literature four actors of social protection are defined: States, markets, civil society and family and social networks (Faist, 2017; Talleraas, 2019a). In that respect, it might have been better if these four actors were included in the definition. Now one gets the impression that there is an overlap between 'policies, programmes, people, organisations, and institutions'.

124 Faist (2017) argues that these sources can be ordered according to the scale of transnational social protection provided (relational vs systematic) as well as the degree of formalisation. Protection provided by friends is at one end of the spectrum while protection provided by supranational regulations applied systematically when persons move to another country is at the other end of the spectrum. A similar exercise is provided by Serra Mingot and Mazzucato (2017) as they present an exhaustive overview of actors that provide social protection transnationally, from highly formalised public and private ones to informal ones.

mobile persons, the EU has put in place a sound legal framework (Fuchs & Cornelissen, 2015).[125] Indeed, despite the many criticisms on the social dimension of the EU, it can be argued that the EU has always had an important social dimension for people who are mobile (Cornelissen & De Wispelaere, 2019). Moreover, contrary to the (soft) legal instruments the EC has at its disposal for enhancing social security and social protection at national level, the protection of mobile persons is mainly based on hard law.[126] In that respect, the EU has always been an important facilitator in protecting the social (security) rights of mobile persons of working age.[127] Indeed, already in the earliest days of the European Economic Community (EEC), it was realised that genuinely free movement could not be achieved without a solution for the social security rights of mobile persons. Consequently, from 1958 onwards, the Treaty included a strong legal basis for legislation in the field of coordinating social security. Now enshrined in Article 48 TFEU, this legal basis obliges the legislature to take measures to provide, in the field of social security, protection to people who make use of their right to free movement. In the form of Regulations 3 and 4, this was one of the first domains in which the Community was active. Both Regulations were replaced in October 1972 by Regulations 1408/71 and 574/72. Since May 2010, 'Basic' Regulation 883/2004[128] and 'Implementing' Regulation 987/2009[129] are in force (hereinafter jointly referred to as the 'Coordination Regulations'). The outcome of the Coordination Regulations is an extensive system of coordination techniques guaranteeing the social security rights of European citizens who move between Member States. Certain key principles protect the social security rights of persons moving within Europe: *a)* the prohibition of discrimination, reinforced by the equal treatment of cross-border facts and events (i.e. principle of assimilation); *b)* the aggregation of insurance periods; *c)* the exportability of benefits; and *d)* the determination of a single applicable legislation (Jorens, 1992; Pennings, 2010). Sincere transnational cooperation between the national competent administrations is generally considered as the fifth principle. In order to prevent that different national criteria lead to conflicts of law in cross-border situations, Basic Regulation 883/2004 contains uniform criteria (i.e. conflict rules) for determining the applicable social security legislation. This is an important issue both for the mobile person, since it has an impact on what social protection can be enjoyed, as well as for the employers and Member States concerned, since it determines where social security contributions have to be paid. Consequently, how these conflict rules are defined is not at all trivial. For economically active people the main rule is that persons are subject to the legislation of the Member State in which they work, even if their place of residence is in another Member State (the so-called *'lex loci laboris'* principle). This rule is based on the idea to link social security rights to the legal system to which the labour migrant is most attached in his or her daily life (Jorens, 2009). However, for specific categories of workers, *inter alia*, posted workers and workers normally employed in two or more Member States, specific rules have been created. Several groups of artists, musicians, technicians, and other supporting staff will fall under these specific two categories of workers which deviate from the typical 'migrant worker'. The report discusses how the principles defined in the Coordination Regulations are applied to mobile artists, what challenges this brings for them, touring companies, and venue operators, and finally, what possible solutions can be defined.

125 However, this does not preclude that persons using atypical forms of labour mobility experience difficulties in safeguarding their social rights. Moreover, it cannot be denied that major challenges still arise in the area of transnational social protection of economically inactive persons.

126 See also Börner (2020: 12) 'mobile citizens are at the heart of "Social Europe".'

127 We mainly focus on the importance of 'Basic' Regulation 883/2004 and 'Implementing' Regulation 987/2009 (i.e. Coordination Regulations), Regulation (EC) No 593/2008 (i.e. Rome I) and Directive 96/71/EC and (i.e. Posting of Workers Directive). Of course, there are several other relevant legislative initiatives (such as Regulation (EU) No 492/2011; the Citizens' Rights Directive 2004/38/EC; the Directive 2019/1152 on Transparent and Predictable Working Conditions etc.).

128 Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems.

129 Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems.

However, the focus of the report is not only on the social law aspects but also on the labour law aspects. Regulation (EC) No 593/2008 on the law applicable to contractual obligations *(Rome I)* contains special provisions relevant for determining the governing law of employment contracts with an international element.[130] In Article 8, the Rome I Regulation establishes rules for determining the applicable law to international employment contracts. The basic rule is that parties can choose the applicable law, subject to two sets of limitations: *(1)* non-derogable provisions of law of the Member State that would be applicable in the absence of choice, and *(2)* overriding mandatory rules of public interest (further elaborated below). In the absence of choice, subsidiary criteria are to be applied in the following hierarchical order: *(1)* habitual place of work, *(2)* place of hiring, and exceptionally *(3)* another law with a closer connection. The habitual place of work is defined as 'the law of the country in which or, failing that, from which the employee habitually carries out his work in performance of the contract' (Article 8(2)). Furthermore, it is to be pointed out that the rule on habitual place of work also covers cases of temporary posting of workers, to the effect that the law applicable to such contracts remains in principle the law of the country where the work is habitually carried out regardless of the temporary posting. Nevertheless, Directive 96/71/EC on the posting of workers (hereinafter referred to as the Posting of Workers Directive)[131] establishes certain overriding mandatory rules in the area of employment contracts that have to be respected, such as e.g. rules on remuneration, maximum working periods, and minimum number of paid annual holidays.

The report mainly pays attention to the challenges faced by mobile workers and companies when providing services in another Member State. Therefore, the focus is mainly on labour mobility under Article 56 TFEU. This type of labour mobility is 'employer-driven', unlike the 'worker-driven' types of labour mobility under the free movement of workers. The social security and employment status of posted workers differ (significantly) from that of 'migrant' workers or cross-border workers *(Figure 1.1)*. The report describes more in detail the legislative framework as briefly explained above and rendered in below figure.

Figure 1.1 Legislation that applies to the 'main' forms of intra-EU labour mobility

	'Migrant' workers (Articles 45 and 49 TFEU)	**Cross-border workers (Article 45 TFEU)**	**Posted workers (Article 56 TFEU)**
	Residing and working in a Member State other than the Member State of origin	*Working in a Member State other than the Member State of residence*	*Temporarily working in a Member State other than the Member State in which the employer is established*
Wage and labour conditions	Host Member State (full equal treatment)	Host Member State (full equal treatment)	Minimum 'hard core' set of terms and conditions of the host Member State + same remuneration as 'local' workers + allowances. After 12 (+6) months of posting almost full equal treatment
Social security contributions	Host Member State (full equal treatment)	Host Member State (full equal treatment)	*Less than 24 months:* Member State of origin *More than 24 months:* host Member State
Personal income taxes	Host Member State (full equal treatment)	*Less than 183 days:* Member State of residence *More than 183 days:* host Member State	*Less than 183 days:* Member State of residence *More than 183 days:* host Member State

Source De Wispelaere and Pacolet (2017) and updated/revised in Bottero (2021).

130 Regulation (EC) No 593/2008 on the law applicable to contractual obligations (Rome I).

131 Recently amended by 'Directive (EU) 2018/957 of the European Parliament and of the Council of 28 June 2018 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services'.

1.3 An interdisciplinary approach: overview of the scope and content of the report

One of the main objectives of this report is to provide an overview of the challenges faced by mobile workers and companies active in the live performance sector when providing their services in another Member State. We hereby limit ourselves to those challenges that may arise in the areas of social security law and labour law, where the personal scope is limited to intra-EU labour mobility and thus does not include persons coming from a third country to provide services in the EU or *vice versa*. In addition, a number of solutions to these challenges are proposed, which may be useful for highly mobile workers active in the live performance sector, but preferably for all highly mobile workers and thus also those active in the transport sector. These solutions should not necessarily be of a legislative nature. Before going into these obstacles and solutions, we would like to have a closer look at the sector. We know that the live performance sector consists of a web of actors in which it is not always so clear who is the employee and who is the employer, not least due the atypical character of the sector, covering a lot of persons with multiple jobs and many self-employed persons and free-lancers. In that respect, it is important that the profile of the live performance sector is mapped out carefully. Afterwards, this will also be done for the socio-economic and legal dimension of the sector within a cross-border context.

In the following chapter *(Chapter 2)*, the specific research questions as well as the interdisciplinary research methodology are described in more detail. Before going into this, the sector of 'live performance' is defined, knowing that this is not so straightforward and that different approaches exist in this regard.

The mapping of the sector, both in terms of companies and employment, is discussed in *Chapter 3*.

Chapter 4 has the ambition to disentangle the concept of the 'highly mobile worker' as well as to present figures on the number of individuals and employers in the live performance sector who offer their services abroad.

Before analysing the challenges experienced by mobile workers and companies, with a main focus on the live performance sector *(Chapter 7)*, and formulating solutions to these obstacles *(Chapter 8)*, it is of course useful to describe the legal framework in both social security *(Chapter 5)* and labour law *(Chapter 6)*.

2 | Research questions and methodology

2.1 'The live performance sector': the lack of a clear-cut definition

In order to provide an accurate picture of the live performance sector, it is important to know who is part of it. A literature review on what has already been written on the live performance sector shows that a clear-cut definition of the sector is not available for a number of reasons. Various institutions and organisations describe the sector and the activities covered in different ways, putting each their own emphasis (European Parliament, 2021; ESSnet-Culture, 2012; United Nations, 2008; UNESCO, 2009).[132]

In the context of sectoral social dialogue, DG EMPL of the European Commission considers 'live performance' as a particular sector. The sector is defined as:

- performing arts such as live theatre, concerts, opera, dance and other stage productions and related support activities;
- operation of venues such as concert halls, theatres and other art facilities.[133]

Furthermore, a representativeness study for the live performance sector carried out by Eurofound identifies the relevant national and European social partners (Eurofound, 2013). A new representativeness study for the sector will be published in the second half of 2021 (Eurofound, 2021).

In research on the sector within the European Union, NACE codes[134] are very often used to define the live performance sector. In its representativeness study of the European social partner organisations, Eurofound defines the live performance industry as coinciding with the entire NACE R90 code - 'Creative, arts and entertainment activities' (Eurofound, 2013).[135] This division includes the operation of facilities and provision of services to meet the cultural and entertainment interests of their customers. This contains the production and promotion of, and participation in, live performances, events or exhibits intended for public viewing; the provision of artistic, creative, or technical skills for the production of artistic products and live performances.

At first sight, this seems to correspond rather well with what is meant by the live performance sector as defined above. In what follows, we take a closer look at which activities are covered by the NACE R90 code by zooming in on the four subsectors (90.01 to 90.04) *(Table 2.1)*. For each subcategory, we assess whether the activities can be considered part of the live performance sector as defined in the previous section.

Table 2.1 Code and description for the NACE R090 category and subcategories 90.01 to 90.04

NACE code	Description
90.0	Creative, arts, and entertainment activities
90.01	Performing arts
90.02	Support activities to performing arts
90.03	Artistic creation
90.04	Operation of arts facilities

132 Although the demarcation of the sector may differ depending on the source used, they often include common central components that can be considered to be essential. Hence, activities in the sector seem to include two main aspects. Firstly, the sector is often demarcated by summing up the different types of live performances it covers. Secondly, having a live audience constitutes an essential feature.

133 https://ec.europa.eu/social/main.jsp?catId=480&langId=en&intPageId=1842

134 NACE is the uninform 'statistical classification of economic activities in the European Community'. The classification should be used uniformly within all Member States.

135 The European Commission mandates Eurofound to carry out studies on the representativeness of European sectoral social partner organisations. These 'representativeness studies' are designed to provide basic information needed for the setting up and functioning of sectoral social dialogue committees at European level. The sectoral social dialogue committees are the mechanisms used by the Commission to consult management and labour under Article 154 TFEU.

Subsector 90.01 - 'Performing arts' includes the production of live theatrical presentations, concerts and opera or dance productions and other stage productions such as activities of groups, circuses or companies, orchestras, bands and individual artists (actor, dancers, musicians, lecturers or speakers).

Subsector 90.02 - 'Support activities to performing arts' contains support activities to performing arts for production of live theatrical presentations, concerts and opera or dance productions and other stage productions. Examples are activities of directors, producers, stage-set designers and builders, scene shifters, lighting engineers. This category also includes activities of producers or entrepreneurs of live arts events, with or without facilities but excludes activities of personal theatrical or artistic agents or agencies.

Subsector 90.03 - 'Artistic creation' encompasses activities of individual artists (sculptors, painters, cartoonists, engravers, etchers, etc.), individual writers, independent journalists and the restoration of works of arts such as paintings. However, it excludes the creation of statues, other than artistic originals, and the restoration of organs and other historical musical instruments.

Subsector 90.04 - 'Operation of arts facilities' includes the operation of concert and theatre halls and other arts facilities. The operation of cinemas, museums and the activities of ticket agencies are not included in this subcategory (Eurostat, 2008).

As regards the above economic classifications for measuring performing arts based on the NACE *(Rev 2 codes)*, 3 of the 4 digit subsectors fully cover the activities of performing arts. They are the NACE activities related to organisation of performing arts and arts facilities: 90.01, 90.02, 90.04. The NACE activities under subsector 90.03 do not include 'real' live performances taking place at a particular moment in front of a live audience and rather belong to the more static visual activities as described in the previous section.

An overview of the NACE codes furthermore shows that a distinction is made between the creative, arts and entertainment sector (R90) on the one hand and the audiovisual sector on the other hand. Despite the fact that sectors such as motion pictures and video production, motion picture projection and radio and television broadcasting also provide cultural entertainment as described under the NACE R90 code, they are not part of it and are classified in other divisions of the NACE codes (59.11-59.14; 60.1-60.2). Therefore, these audiovisual activities are automatically excluded from the live performance sector under the NACE codes.

NACE codes that are partly related to the live performing arts sector are dance/music schools and dance/music instructor services. They belong to the 'Cultural education' category (NACE 8552). Some other NACE codes have a very small proportion of cultural content, identifiable only at a detailed level. Examples are 'Other professional, technical and business services (including engagement in motion pictures, theatre or other entertainment)', 'Reservation services for event tickets' and 'Firework and light and sound shows services' (Eurostat, 2008). However, the link these categories have with the live performance sector is not strong enough to include them in the light of this research project.

It can be concluded that the live performance 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. This also seems to be in line with the definition of (live) performing arts used by the European Statistical System network on culture (ESSnet Culture).[136]

The description of the live performance sector in the following sections will, where possible, be based on the three subcategories of the NACE code (90.01, 90.02 & 90.04). However, the broader

136 The ESSnet Culture consisted of several European Statistical System organisations, working together on methodological developments with the aim to produce results useful for all ESS members and leading to the generation of comparable statistics on culture within a reasonable time frame. In its final report, it proposed a new European framework for cultural statistics as the basis for the production of comparable data across the EU (ESSnet Culture, 2012).

group based on the full NACE 90 code will also be used, mainly for two reasons. First of all, other research often refers to the sector by starting from this broader category. It is therefore very interesting to be able to compare the data in this report with what has been written before. Secondly, a large part of the available data is only available for the NACE code up to two digits (i.e. NACE 90). Therefore, it is often only possible to obtain data for the broader NACE 90 category (and not for the subcategories up to 4 digits such as NACE 90.01, 90.02 & 90.04). Moreover, throughout the report, it will become clear that various data sources cannot even be traced back to the detail of the broader NACE 90 category. In that case, even broader sectors of which the live performance sector is only a part, were consulted. In data sources based on NACE codes, this is usually the category R – 'Arts, Entertainment and Recreation'.

2.2 Research objectives

Over the past two decades, the number of European citizens working (temporarily) in another Member State for professional reasons increased significantly, moving closer to a truly 'European labour market'. The focus of this research project is on the highly mobile worker. Defining and quantifying this group of workers is a very challenging task. Indeed, despite the fact that the term 'highly mobile worker' is increasingly used in public and political debate, very little research is available on the socio-economic and legal status of this group of workers. In order to support the work of social partners in general, and more particularly in sectors which are characterised by a highly mobile workforce in a cross-border context, this report explores the social security and employment status of highly mobile workers. To do so, the report zooms in on the live performance sector. Indeed, some specific groups of artists and companies active in this sector are characterised by a high degree of cross-border mobility. As they often have little connection to a specific Member State, this group of workers, and their employers may face several obstacles and challenges. This raises questions and concerns about where social security contributions are to be paid, where social rights are to be acquired, and what terms and conditions are to be respected. The report aims to identify the hurdles and obstacles that these (highly) mobile artists and companies encounter, and possible solutions. In order to do so, the (atypical) socio-economic profile of the sector as well as the applicable legal framework needs to be clarified. Both aspects may have an important impact on the challenges faced by (highly) mobile artists and companies.

Following research objectives are put forward:

- map the live performance sector *(Chapter 3)*;
- define the concept of a 'highly mobile worker' and map the transnational dimension of the live performance sector *(Chapter 4)*;
- 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 *(Chapters 5 and 6)*;
- define the challenges and obstacles encountered in the live performance sector when providing cross-border services *(Chapter 7)*;
- define possible solutions for the challenges and obstacles encountered by (highly) mobile workers and companies, with a focus on the live performance sector. *(Chapter 8)*.

2.3 Research methodology

2.3.1 Mapping the live performance sector

One of the aims is to better understand the business structures and employment practices in the live performance sector in the EU, UK, and EFTA.[137] For this research we mainly use data from Eurostat and Orbis (i.e. a database from Bureau van Dijk) in order to map the sector. These data are complemented by relevant sectoral studies. 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 picture of the sector.[138] Moreover, a (significant) part of the employment in the sector is not known due to undeclared work.

2.3.1.1 Eurostat business and employment statistics

Eurostat is the statistical office of the EU, established in 1953. Data are collected on a range of topics, going from economy and finance, population and social conditions, and international trade to environment and energy, agriculture, forestry and fishery, and transport. Eurostat publishes 'Structural Business Statistics' (SBS).[139] These data describe the structure, activity, competitiveness and performance of economic activities within the business economy down to the detailed level of several sectors. The regulation which governs the annual data collection for structural business statistics is set out by Regulation (EC) No 295/2008. According to this regulation, business statistics are essential for economic analysis and policy formulation, as they make it possible to analyse the potential growth of a sector and the employment creation. They are provided by all EU Member States, Norway, Switzerland, and some candidate and potential candidate countries.[140] There are three main categories of data collected by the Structural Business Statistics: Business Demographics variables (e.g. number of enterprises, etc.), 'Output related' variables (e.g. turnover, value added, etc.), and 'Input related' variables, consisting of labour input (e.g. employment, hours worked, etc.), goods and services input (e.g. total of purchases, etc.), and capital input (e.g. material investments, etc.). An advantage of the Structural Business Statistics is that data are standardised and comparable among Member States.

Unlike for many other sectors, such statistics are not (yet) available for the live performance sector. This constitutes an important limitation and may contribute to our observation that little is known about the profile of the sector.[141] However, such data may become available in the near future.[142]

Furthermore, Eurostat collects data on the employment in the live performance sector, derived from the EU Labour Force Survey (EU-LFS).[143] The sector of interest, the live performance sector, can be classified under NACE code R90 'Creative, arts and entertainment activities'. Employment statistics for this NACE code are published by Eurostat as part of the 'cultural employment statistics'. These statistics include all persons having either a cultural profession or working in the cultural sector.

137 As of 1 February 2020, the United Kingdom is no longer part of the European Union. This has a significant impact on the dissemination of statistics. Due to the large number of companies active and persons employed in the live performance sector in the UK as well as the high number of venues located there, it is important that the UK figures are included in this report. In addition, the countries that are part of the EFTA (Iceland, Liechtenstein, Norway and Switzerland) are also included in the geographical scope and analysis. Consequently, in most tables/figures both an EU-27 aggregate and an EU-27/UK/EFTA aggregate is included.

138 However, it seems that Eurostat will be able to provide a better overview of the sector in the coming years by collecting Structural Business Statistics on the sector as well as by making a more detailed analysis of the data from the EU-LFS, which will allow a better estimation of the scope of employment in the sector.

139 https://ec.europa.eu/eurostat/web/structural-business-statistics/overview

140 Data for Structural Business Statistics are generally collected by the national statistical institutes among enterprises, through statistical surveys, business registers or administrative sources (Eurostat, n.d.-e).

141 In that regard, ESSnet-Culture (i.e. working *Group European Statistical System Network on Culture*) already identified the need for better coverage of culture in the SBS survey, on 4 digit level in particular to cover divisions 90 and 91 of the NACE Rev.2 ('Creative, arts and entertainment activities' and 'Libraries, archives, museums') in a report of 2012.

142 During a panel discussion on the OECD Webinar on culture & jobs (27 January 2021), Marta Beck Domzalska of Eurostat mentioned that SBS data for the NACE 90 sector will be available in 2023 (based on data starting from 2021). This can be considered as an important step forward in the mapping of the sector.

143 The EU-LFS is conducted in all Member States of the European Union, 4 candidate countries and 3 countries of the European Free Trade Association (EFTA) in accordance with Council Regulation (EEC) No. 577/98 of 9 March 1998. The LFS is conducted by the national statistical institutes across Europe and is centrally processed by Eurostat.

The data provide an overview of cultural employment broken down by NACE code, age, sex, education level.

However, the data published by Eurostat are not sufficiently detailed to have a good understanding of the live performance sector in terms of both size and profile of the employment. First, a more detailed sectoral breakdown would be better. Second, given that several socio-economic variables on cultural employment are only published for the entire sector, it is not possible to deduct data for the relevant subcategory of creative, arts and entertainment activities. Finally, a number of socio-economic variables collected by the EU-LFS such as professional status and full-time/part-time distinction are not publicly available in the cultural employment statistics. Consequently, a data request was sent to Eurostat in order to obtain a more detailed picture of the employment situation in NACE code R90 'Creative, arts and entertainment activities', and thus of the live performance sector. However, due to restrictions on microdata, it was only possible to receive data on a more aggregated level. Hence, the dataset only contained data for the broader category R meaning that it was not possible to analyse data for the creative, arts and the entertainment sector (R90) based upon this request.

Our main observation and concern are that the volume of employment in the live performance sector, which is estimated based on data from the EU-LFS, is underestimated due to an approach that is too narrow. According to figures published by Eurostat, approximately 1.2 million persons were employed in the EU-28 under category 'Creative, arts and entertainment activities' (i.e. performing arts) in 2019. However, this figure only includes persons whose main job is providing 'creative, arts and entertainment activities'. Consequently, this figure does not take into account persons who have a main job in another sector (e.g. education) and have as second job providing 'creative, arts and entertainment activities'. This reality not only underestimates the number of persons active in the sector, but it also makes the (atypical) profile of the sector less accurate.[144]

2.3.1.2 Orbis

Orbis is a database from Bureau van Dijk which contains financial and non-financial information from private companies across the world, currently more than 365 million companies and entities (Bureau van Dijk, n.d.-a). Data are collected from over 160 providers and own sources which are then processed, appended and standardised to ensure comparability (Bureau van Dijk, n.d.-b). This database is increasingly being used by scholars studying multinational enterprises, as it is a very extensive database, considered to be the 'most comprehensive commercially available company-level global database at present' (Nakamoto et al., 2019). As we want to better understand the business structure of the live performance sector, this type of information is very valuable, not least because currently no business statistics for this sector are collected by Eurostat.

In the Orbis database a broad scope of information can be consulted, including the address of the company, the sector of activity, financial information, balance sheet information, information on headquarters, foreign subsidiaries and shareholders. The Orbis database has several important advantages. First, its main asset is the detailed information on corporate ownership structures, which is unique among firm-level datasets (Luptak et al., 2015; Ahmad et al., 2018). Second, its coverage is very broad and balanced, not only in terms of the type of information, but also in the countries and industries covered (Cortinovis, & van Oort, 2015; Johansson et al. 2017). Third, given that the data are standardised, there is a certain degree of consistency between data from different countries, which would be impossible to achieve when using different national datasets (Luptak et al., 2015). The fourth main advantage is the detail of the information that can be retrieved. As a result, the profile of a company can be thoroughly analysed, for instance by looking at its ownership structure, its address, legal form, year of incorporation, network analysis, and much more.

However, there are also certain important shortcomings of the Orbis database, which cannot be overlooked. The most pressing issues are the incomplete coverage of established companies as well

144 In next years, Eurostat intends to analyse 'cultural employment' more in depth by using additional variables. The issue of the second job is hereby a priority (information received from Marta Beck Domzalska –Eurostat).

as the existence of missing data for companies. This incomplete coverage is understandable, as Orbis is not an administrative dataset (Johansson et al., 2017). The principal reason for the missing data seems to relate to the different accounting rules and obligations with regard to the provision of information in different countries. Additionally, data are collected from different sources across countries, such as chambers of commerce, local public administrations, and credit institutions (Johansson et al., 2017). As a result, the availability of information might differ between countries and sectors (Ahmad et al., 2018; Tørsløv et al., 2018). It was also found that since larger firms often have stricter data reporting requirements, they are better covered in the database, whereas smaller firms might be underrepresented (Johansson et al., 2017; Cortinovis & van Oort, 2015). Nonetheless, as stated above when summarising Orbis' benefits, its overall coverage is certainly adequate, and can therefore serve as an alternative to the lack of business data of the live performance sector from Eurostat.

2.3.2 The transnational dimension of the live performance sector

Occasional cross-border movements in the live performance sector can take place under different circumstances: a short-term assignment abroad lasting several days or even hours; a long-term assignment abroad of several weeks or months; consecutive performances in several countries; etc. These movements can take place under the free movement of workers (Article 45 TFEU), the freedom of establishment (Article 49 TFEU) and the freedom to provide services (Article 56 TFEU). When compiling statistics, we especially try to quantify the number of persons active in the live performance sector who are posted to another Member State as well as the number of persons who are active in several Member States. However, it must be said that the transnational dimension of the live performance sector is still a blind spot in terms of its size as well as its characteristics.[145] To take a step forward, administrative information on the impact and export of services as well as on the number of incoming and outgoing persons temporarily providing services in the live performance sector are used. The results from the data are complemented by a survey that was sent out to employers active in the live performance sector.

2.3.2.1 Defining the concept of 'highly mobile worker'

Before making a statement on the transnational dimension of the sector, the concept of a 'highly mobile' worker is further elaborated. No clear-cut definition of the concept 'highly mobile worker' can be found in European and national labour and social legislation. Also in social sciences, the analysis of this concept seems to have been neglected. On the basis of desk research, the constituting elements of this concept will be defined. Demarcating a category of persons implies the ability to identify a group of persons sharing the same characteristics which nobody else shares. This will be an enormous challenge when defining the concept of 'highly mobile worker'. Not least because it must also be possible to clearly define this concept in legal terms, whereby the question arises as to what extent this concept can be linked to Article 13 of the Basic Regulation applicable to mobile persons pursuing activities in two or more Member States. In any case a distinction should be made between the concept of a 'highly mobile worker' and that of a 'highly mobile sector'. Indeed, it is not because a sector cannot be defined as 'highly mobile' - which might be the case for the live performance sector - that there is no (significant) group of highly mobile workers in it.

145 In addition to our study, there is other ongoing research that may be relevant. The aim of 'Perform Europe' is to pilot a new EU support scheme for the cross-border distribution of performing arts works (both physical touring and digital distribution). In order to design such a scheme, a research consortium started mapping and assessing the current state of affairs with regards to the cross-border presentation of performing arts and support schemes for the distribution of performing arts works currently existing in the 41 countries covered by the Creative Europe programme.

2.3.2.2 Data on the export of services

Although several data sources exist on the export of services,[146] we use data from Eurostat. The balance of payments (BoP) is a statistical statement that summarises, over a given period of time, all the transactions of an economy with the rest of the world. The balance of payments records all economic transactions undertaken between the residents and non-residents of an economy during a given period. It thus provides information on the total value of credits (or exports) and debits (or imports) for each BoP item and on the net result or 'balance' (credits minus debits) of the transactions with each partner (Eurostat, n.d.-g). The data on International Trade in Services Statistics (ITSS) are an important component of the BoP current account.[147] In the production of data on International Trade in Services the references are the IMF's BPM6 and the United Nations' Manual on Statistics of International Trade in Services. Data on the export of services allow us to put the transnational dimension of the live performance sector in perspective. In this report data on the export and import of services will be analysed for the BoP item 'Services: Artistic related services'.[148]

In addition to these macro data, micro-data available in Orbis are used to estimate the volume of exports of services and goods by companies 'performing arts' (NACE 90.01). This is done by using the variables 'Export revenue' (i.e. turnover abroad) and 'Export revenue/Operating revenue' (turnover abroad compared to the total turnover). However, these data are only available for a limited number of companies active in live performance. Furthermore, a distinction between goods vs services and between EU vs extra EU cannot be made.

2.3.2.3 Movement of natural persons to provide services abroad

Unfortunately, the data on the export of services do not give any indication of the number of persons involved.[149] In that respect, measuring transnational labour mobility and, *inter alia*, forms of temporary labour mobility by providing services abroad remains a major challenge. National, European and international institutions are therefore aware that the extent of labour mobility between countries is sometimes strongly underestimated due to the fact that certain forms of (temporary) labour mobility are not or only partly included in the available survey and administrative data (OECD, 2019; UNECE, 2018).

A number of data sources can be consulted in order to map labour mobility through the free movement of services. Notably, where companies provide services in another Member State, they must fulfil a number of administrative obligations both in the country of establishment and in the country where they provide those services. First, Regulation 987/2009 introduces a notification 'duty' in the Member State of establishment of the company: the employer or the self-employed person 'shall inform' the competent social security institution, 'whenever possible in advance', whereupon it will consider issuing a so-called Portable Document A1 (PD A1).[150] 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 PD 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

146 For instance the World Input Output Database (WIOD) (see http://www.wiod.org/release16), the UN Comtrade Database (see https://comtrade.un.org/data/), or the central balance sheet from Banco de Portugal Microdata Research Laboratory (BPLIM) (see https://msites-dee-bplim-prd.azurewebsites.net/datasets).

147 See also data from Eurostat on International trade in cultural services (cult_trd_ser).

148 The data collection is regulated by Regulation No 184/2005 and has been taking place from reference year 2006 onwards. Data are collected through questionnaires filled out by the national banks or the national statistical offices of the Member States and a number of administrative sources. Data for international trade in services are derived from a variety of surveys where the data can be reported either by the banks or directly by the enterprises or the households.

149 Under the General Agreement on Trade in Services (GATS), services can be traded internationally in four different ways - known as the four modes. Mode 4 refers to the presence of persons in the territory of another country for the purpose of providing a service. It does not concern persons seeking access to the employment market in the host Member State, nor does it affect measures regarding citizenship, residence or employment on a permanent basis. For the EU, however, there are no data quantifying GATTS mode 4, let alone the flows between Member States. Only an experimental dataset on trade in services by mode of supply, the TISMOS dataset, is published by WTO (see https://www.wto.org/english/res_e/statis_e/trade_datasets_e.htm).

150 Article 15(1) and Article 19(2) of Regulation 987/2009.

persons who pursue an activity in two or more Member States (Article 13 of Regulation 883/2004).[151] Second, Article 9(1) (a) of Directive 2014/67 introduces a notification duty in the Member State where the services are provided: 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. The content of the notification duties in both the country of origin and the destination country are described and discussed in *Chapter 4*. Such data, both from the PD A1 as well from the prior notifications, are currently collected by the Network Statistics FMSSFE (free movement of workers, social security coordination, fraud and error). This Network is set up by the European Commission - DG Employment, Social Affairs and Inclusion and collects and analyses administrative data on intra-EU labour mobility, the European coordination of social security systems and fraud and error.[152] However, detailed data for the live performance sector are not requested by the administrative questionnaires launched within the framework of the Administrative Commission for the coordination of social security systems (AC)[153] and the Committee of Experts on Posting of Workers (ECPW).[154] Therefore, an ad-hoc request was sent to the AC for statistical data on the number of PDs A1 issued for reference year 2019 to persons employed in the live performance sector. Because this was a voluntary exercise, only six Member States (Belgium, Estonia, Luxembourg, Poland, Portugal and Slovakia) have provided such data. Nevertheless, these data provide useful insights into the transnational dimension of the live performance sector and are complemented by information available at national level, particularly from the prior notification tools.

2.3.2.4 A survey on the transnational employment in the live performance sector

A questionnaire was sent to the members of Pearle*'s national partners at the beginning of February 2021. The aim of this questionnaire was to gather information from employers working across the EU/EFTA borders and organisations hosting artists and supporting staff from other EU/EFTA countries In this respect, information was gathered from three types of organisations: (1) music & performing arts (i.e. theatre, concerts, opera, dance, circus and other stage productions and related support activities); (2) booking and management activities in the live performance sector; (3) operation of venues (e.g. concert halls, theatres and other arts facilities also including festivals). The results from the questionnaire should help us to better understand the characteristics of the transnational dimension of the sector. Moreover, the questionnaire intended to identify the practical problems related to transnational mobility encountered by employers and organisations in the live performance sector, as well as to obtain actual examples of these problems. Finally, the questionnaire also enquired about possible solutions. In that respect, these answers should help reviewing the most pressing obstacles and problems deriving from the application of national and European legislation.

A total of 382 completed questionnaires were received of which 301 responses from music & performing arts companies (i.e. theatre, concerts, opera, dance, circus and other stage productions and related support activities), 41 responses from booking and management agencies in the live-performance sector, and finally 88 responses from companies facilitating arts and cultural programmes and activities.

To make a reliable statement about the entire population of organisations based on the results of the questionnaire completed by a relatively limited group of organisations, a weighting must be applied. By doing so, the fact that certain groups/countries are over- or underrepresented in the response group can be corrected. This assumes, however, that reliable and detailed sectoral

151 The distinction between both groups is elaborated in the legal discussion and analysis of Regulation 883/2004.

152 The network consists of experts from HIVA (KU Leuven), Milieu Ltd, IRIS (Ghent University), Szeged University and Eftheia. The statistical reports cover intra-EU labour mobility and social security coordination, which consists of applicable social security legislation, cross-border healthcare, unemployment benefits, family benefits, old-age, survivors and invalidity pensions, and measures to tackle fraud and error. See https://hiva.kuleuven.be/en/news/newsitems/Reports-on-social-security-coordination-and-intra-EU-labour-mobility-20171212 for an overview of the published reports.

153 Through the AC, data from the PD A1 were requested (De Wispelaere et al., 2021a).

154 Through the ECPW, data from the prior notification tools were requested (De Wispelaere et al., 2021b).

information is available, which is not the case for the live performance sector. Consequently, it is impossible to apply a correct weighting factor. Therefore, the results and the consequent conclusions of the web survey can only be applied to the organisations that participated.

Because the questions in the questionnaire deal with different topics, we will incorporate interesting analyses and insights based on this survey into the relevant sections/chapters throughout this report. In this way, they complement the (often incomplete) administrative data at our disposal. However, it should always be kept in mind that the analyses and conclusions based on the questionnaire only relate to the relatively limited number of organisations that completed the survey. The contributions based on the questionnaire are therefore mainly intended to provide additional insights, but not to make statements about the entire population of organisations.

2.3.3 Describing the legal framework applicable to (highly) mobile workers and companies

Highly mobile workers and companies encounter a complex legal framework. 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 effect for (highly) mobile workers and companies is that social rights and obligations are sometimes difficult to determine.

As soon as artists and companies cross borders, it is important to determine which social security provisions should apply. 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 legalisation is no easy task, not least for artists and companies active in the live performance sector. Due to its atypical character, there are many employment models in the live performance. Consequently, in a cross-border situation, it is not always clear whether one should speak of posting or simultaneous employment. This will often require a case-by-case assessment by the national competent administrations.

Attention will also be paid to national social security legislation. We know that the live performance sector consists of a web of actors in which it is not always so clear who is the employee and who is the employer. Moreover, it is important to get an idea of the social security status of those who are active in the sector. In this respect, the status of the live performance artist in national social security law is examined by drawing a comparative analysis of the existing legal framework in Belgium, the Netherlands, France and Germany. These Member States are important 'import' countries of artists, so the description of problems they encounter can be seen as a typical example. In addition, problems encountered in other countries were taken on board on the basis of interviews held with people in these countries.

From the perspective of labour law, the main scenario which characterises mobile workers in the live performance sector is the one of posting of workers. Directive 96/71/EC on the posting of workers (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 personal scope of the Posting of Workers Directive excludes self-employed persons. As such, when discussing issues related to the application of labour laws to posted workers, we focus exclusively on workers having an employment relationship. The Posting of Worker Directive was recently amended by 'Directive (EU) 2018/957'. The most important changes are briefly discussed. We also need to take stock of a recent evolution concerning very short-term postings as well as the challenges of posting civil servants.

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) for the presentation of information stemming from universally applicable collective agreements. Notably, we have applied this to a test case consisting of the two collective agreements applicable to the live performance sector in France. We hope that this encourages more actors, whether among the social partners or national competent administrations, to undertake this work for collective agreements applicable to posted workers.

2.3.4 Defining the challenges and obstacles encountered by (highly) mobile workers and companies when providing cross-border services in the live performance sector

Different methods have been used to identify the challenges and problems workers encountered by highly mobile workers and (touring) companies when providing services abroad. First, desk research was carried out in order to obtain an overview of these main challenges. Indeed, several studies have been published in recent years that address this research question (e.g. Bàlta et al., 2019; Daubeuf et al., 2018; Demartin et al., 2014). Second, beginning of February 2021, a questionnaire was sent to the members of Pearle*'s national partners. Third, a focus group was organised at the beginning and end of the project with, among others, several national employers' organisations that were closely involved in this research (OKO (Belgium), APD CR (Czech Republic), FEPS (France), Performart (Portugal), and Svensk Scenkonst (Sweden)). Finally, several expert interviews were organised with touring companies and organisations receiving touring companies as well as with national competent administrations.

2.3.5 Defining possible solutions for the challenges and obstacles encountered by (highly) mobile workers and companies when providing cross-border services

The research methodology used to identify problems is largely copied to determine possible solutions, combining desk research, an online survey, panel discussions as well as several expert interviews.

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 hand. The operational solutions can be implemented in the short and medium term, whereas the legislative solutions should rather be seen at the long term. Moreover, this report does not have the ambition to test the suggested legislative solutions on their legal and socio-economic impact and feasibility.

3 | Mapping the live performance sector

Unlike other sectors, there is relatively little quantitative information available about who is part of the live performance sector in the EU. As already mentioned in *Section 2.3.1.2*, structural business statistics (SBS) describe the structure, activity, competitiveness, and performance of economic activities within the business economy down to the detailed level of several sectors. However, such statistics are not yet available for the live performance sector. Despite this limitation, we try to give an elaborate overview of the live performance sector based on other available quantitative data.[155] The companies active in the live performance sector are described in more detail by focusing on their number, company size and legal status. For this, we mainly use data from the Orbis database (cf. *Section 2.3.1.3*). In a next section of this chapter, we zoom in on the persons employed in the live performance sector with a main focus on the employment number, but also on the share of self-employed workers, the types of contract and the potential combination with other jobs. Our main data source for this part is data from the EU-LFS (cf. *Section 2.3.1.2*). As already mentioned, these data provide only a partial view of total employment in the sector and its (atypical) profile. The fact that the quantitative data used for mapping the live performance sector have a number of shortcoming means that the picture presented below of the live performance sector should be considered indicative.

3.1 Profile of companies active in the live performance sector

For a description of the companies active in the live performance sector, we mainly rely on the Orbis database. This database makes it possible to analyse the companies belonging to a certain NACE category up to 4 digits. In this section, we discuss the active companies for the broad NACE 90 sector and all of its subcategories (90.01 to 90.04) based on the number of companies, the company size, the number of employees and the legal form. Besides an overview per subsector, we compare the broad and narrow classification of the live performance sector (NACE 90 vs NACE 90.01, 90.02 & 90.04) for these variables (cf. *Section 2.1*).

3.1.1 Number of active companies

Table 3.1 gives an overview per country (EU-27, UK, and EFTA) of the companies that are active in each subsector of the NACE 90 category (90.01 to 90.04) and for the complete NACE 90 category. Based on the broad NACE 90 category, some 807,700 companies provide creative arts and entertainment activities in the EU-27, UK, and EFTA.[156] However, when applying the narrow classification of the live performance sector (NACE codes 90.01, 90.02 & 90.04 and thus excluding NACE code 90.03) 'only' 460,938 companies are part of this sector. Therefore, it has a major impact whether or not the subgroup of NACE 90.03 'Artistic creation' is retained for the delimitation of the live performance sector.

A general look at the distribution of the companies under the four subcategories (9001-9004) without making a breakdown at country level shows that the vast majority of active companies fall under 90.03 – 'Artistic creation' and 90.01 – 'Performing arts categories' (respectively 43% and 41%). Together they represent 83% of the companies in the four subsectors. Subcategory 90.02 – 'Support activities to performing arts' (13%) and in particular subcategory 90.04 – 'Operation of art facilities'

155 In this chapter we do not address the issue of which actors are involved in the live performance sector *(see Chapter 5)*.

156 It should be noted that the total number of companies under the broad NACE 90 category (807,760 companies) is not simply the sum of the subcategories 90.01 to 90.04 (804,265 companies). This is because some companies were assigned to the general NACE 90 category, but not to a specific subcategory. As a result, there are more companies in the NACE 90 category than in the four subcategories combined.

(3%) contain comparatively a much smaller proportion of companies. However, this distribution tells us nothing about the size of these companies,[157] neither in terms of turnover nor employment.

The vast majority of companies are located in a limited group of countries. This is also shown in *Figure 3.1* where the enterprises per country in the full NACE 90 sector and the combined subsectors 90.01, 90.02 & 90.04 are displayed in decreasing proportions. Although small differences between the proportions based on category 90 and the combined categories 90.01, 90.02 & 90.04 can be observed, a similar trend clearly emerges:

- based on the NACE 90 code, 78% of the active companies in the sector are located in France (40%), the Netherlands (15%), Sweden (8%), the United Kingdom (8%), and Norway (7%). This implies that five out of the 32 countries represent almost four out of five companies in the sector based on the NACE 90 code;
- the same phenomenon can be observed for the combination of subsectors 90.01, 90.02 & 90.04, where the same five countries still represent 73% of the active companies.

It can therefore be concluded that the companies which, on the basis of the NACE codes (both applying a broad and narrow approach to the sector), carry out activities belonging to the live performance sector are largely concentrated in a limited number of countries. Especially the very high share of France in the total number of companies active in the sector is striking (NACE 90: 40,4%; NACE 9001-9002 & 9004: 33.8%). One of the possible explanations for this significantly high number of companies in France is that one must have a *'licence d'entrepreneur du spectacle'* in order to be allowed to perform an activity related to live performances in France. This implies that every organisation, no matter how small or sporadic the activity, must have such a license. The mandatory registration of their activity with the Ministry of Culture is linked to the NACE code: 'All performing arts enterprises whose main activity is the production, dissemination or exploitation of performing arts venues, regardless of the type of management, public or private, profit-making or not, are subject to the obligation to hold a licence (amongst others, companies with the following NACE codes 90.01-90.02 & 90.04)' (Plateforme des entrepreneurs de spectacles vivants, 2020/Rabot, 2012). Because of this compulsory registration, we can assume that the coverage of companies in the live performance sector under NACE code 90 in France is very high compared to other countries.

157 For example, it can be seen that the companies under NACE code 90.04 employ on average more workers compared to the companies under NACE codes 90.01, 90.02 and 90.03 (see *Table* 3.2). Moreover, in subcategory 90.04 the proportion of small companies in total is lower compared the other subcategories (see *Table 3.3*).

Table 3.1 **Number of active companies under NACE 90 and subcodes 90.01- 90.04 (EU-27, UK, and EFTA countries)**

	90.01 – Performing arts		90.02 – Support activities to performing arts		90.03 – Artistic creation		90.04 – Operation of art facilities		90.01, 90.02 & 90.04 combined		90 – Creative, arts and entertainment	
	N	%	N	%	N	%	N	%	N	%	N	%
Belgium	11,298	3.4	8,911	8.3	7,456	2.2	2,011	7.8	22,220	4.8	30,356	3.8
Bulgaria	13,622	4.2	835	0.8	1,232	0.4	49	0.2	14,506	3.1	15,734	1.9
Czech Republic	497	0.2	3,886	3.6	2,202	0.6	718	2.8	5,101	1.1	7,966	1.0
Denmark	4,757	1.5	666	0.6	6,883	2.0	524	2.0	5,947	1.3	12,830	1.6
Germany	1,358	0.4	472	0.4	884	0.3	1,743	6.8	3,573	0.8	4,559	0.6
Estonia	3,354	1.0	470	0.4	3,180	0.9	217	0.8	4,041	0.9	7,221	0.9
Ireland	4	0.0	1	0.0	316	0.1	214	0.8	219	0.0	535	0.1
Greece	12	0.0	22	0.0	8	0.0	9	0.0	43	0.0	51	0.0
Spain	4,551	1.4	1,291	1.2	1,213	0.4	5,378	20.9	11,220	2.4	12,433	1.5
France	127,211	38.8	24,292	22.7	170,613	49.7	4,250	16.5	155,753	33.8	326,366	40.4
Croatia	538	0.2	419	0.4	437	0.1	41	0.2	998	0.2	1,435	0.2
Italy	1,468	0.4	5,172	4.8	3,706	1.1	392	1.5	7,032	1.5	12,285	1.5
Cyprus	66	0.0	13	0.0	58	0.0	13	0.1	92	0.0	161	0.0
Latvia	785	0.2	397	0.4	526	0.2	194	0.8	1,376	0.3	1,902	0.2
Lithuania	458	0.1	539	0.5	252	0.1	130	0.5	1,127	0.2	1,379	0.2
Luxembourg	32	0.0	5	0.0	4	0.0	25	0.1	62	0.0	85	0.0
Hungary	8,589	2.6	2,603	2.4	5,757	1.7	163	0.6	11,355	2.5	17,112	2.1
Malta	2	0.0	2	0.0	2	0.0	0	0.0	4	0.0	19	0.0
Netherlands	51,594	15.7	24,366	22.7	40,289	11.7	538	2.1	76,498	16.6	116,787	14.5
Austria	169	0.1	325	0.3	309	0.1	229	0.9	723	0.2	1,174	0.1
Poland	3,342	1.0	1,145	1.1	2,720	0.8	452	1.8	4,939	1.1	7,659	0.9
Portugal	4,006	1.2	686	0.6	478	0.1	86	0.3	4,778	1.0	5,256	0.7
Romania	6,833	2.1	3,394	3.2	3,320	1.0	80	0.3	10,307	2.2	13,627	1.7
Slovenia	1,880	0.6	651	0.6	3,877	1.1	118	0.5	2,649	0.6	6,849	0.8
Slovakia	121	0.0	1,141	1.1	201	0.1	832	3.2	2,094	0.5	2,295	0.3
Finland	6,790	2.1	2,417	2.3	6,626	1.9	40	0.2	9,247	2.0	15,873	2.0
Sweden	27,702	8.4	6,259	5.8	30,415	8.9	67	0.3	34,028	7.4	64,443	8.0
EU-27 subtotal	**281,039**	**85.7**	**90,380**	**84.3**	**292,964**	**85.3**	**18,513**	**71.8**	**398,932**	**84.6**	**686,392**	**85,0**
United Kingdom	15,155	4.6	10,282	9.6	28,404	8.3	6,826	26.5	32,263	7.0	60,667	7.5
Iceland	206	0.1	36	0.0	143	0.0	52	0.2	294	0.1	437	0.1
Liechtenstein	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0
Norway	30,824	9.4	6,069	5.7	20,400	5.9	156	0.6	37,049	8.0	57,449	7.1
Switzerland	699	0.2	463	0.4	1,415	0.4	238	0.9	1,400	0.3	2,815	0.3
Total	**327,923**	**100**	**107,230**	**100**	**343,326**	**100**	**25,785**	**100**	**460,938**	**100**	**807,760**	**100**

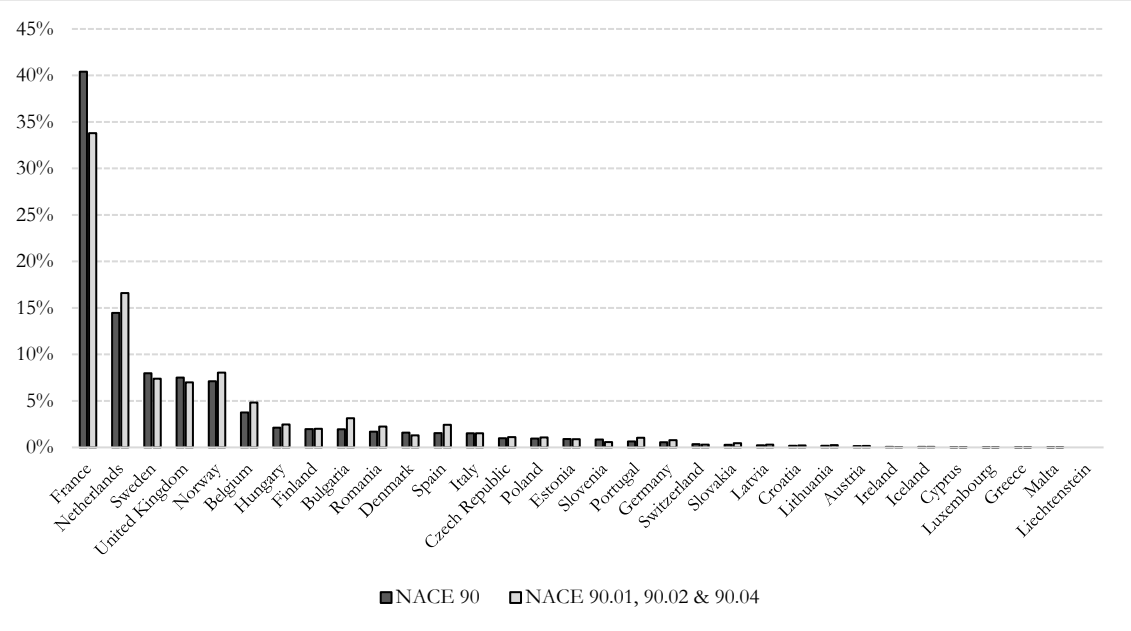
Source Orbis database [Data extracted on 26 May 2020]

In addition to the great variation between countries in terms of the representation of companies based on the NACE 90 (sub)codes, a breakdown by subsector shows that there are also clear differences within countries in terms of the proportion of companies per subsector. Some interesting findings:

- although the active companies in France are strongly represented in each subsector, the share varies from 50% in subsector 90.03 to 'only' 17% in subsector 90.04;
- whereas companies from the UK represent less than 10% of the companies in each of the first three subcategories (90.01-90.03), most of the active companies (27%) in subsector 90.04 are located in the UK;
- while Spain represents the second greatest number of companies (21%) in subsector 90.04, only 0.4% of the companies in sector 90.03 is situated there.

It can therefore be concluded that in some countries companies operating in the live performance sector are strongly concentrated in a particular subcategory of the sector.

Figure 3.1 Active companies under NACE 90 and NACE 90.01, 90.02 & 90.04, in % of total (EU-27, UK, and EFTA countries)



Source Orbis database [Data extracted on 26 May 2020]

Another remarkable finding is the extremely low number of companies based in Germany (only 0.6% based on the NACE 90 category). This is all the more striking when one knows that Germany does employ the largest number of people in that sector. Further on in *Section 3.1.2.1*, we will see that Germany employs 18% of all persons employed under the NACE 90 category within the EU-27, UK and EFTA, making it the country with the highest employment number in the live performance sector. There might be several explanations for the high discrepancy between the extremely low number of German companies and the very high number of persons employed in the sector. Although we specifically focus on the German case, the explanations also apply to other possible underestimations of the number of companies in other countries:

- even though the Orbis database is a very rich source of information, it has some important shortcomings. The most pressing issues are the incomplete coverage of established companies as well as the missing data for companies (cf. *Section 2.3.1.3*). Consequently, if the missing data are unevenly distributed among countries, it can result in a skewed picture with an under- or overrepresentation of some countries;
- another reason for the possibly partly distorted results (and in particular the low number of German companies) is that not every company belonging to the live performance sector is automatically categorised as part of the NACE 90 category. Specifically for Germany, there might be many companies that are not included under the NACE 90 category while carrying out activities that fall under it. A good example of this discrepancy are the members of the *'Deutscher Bühnenverein'*, an (employers) organisation that represents 430 theatres, opera houses, theatre, ballet and opera companies and orchestras in Germany. The main reason why the members of the *'Deutscher Bühnenverein'* do not belong to the NACE 90 category has to do with the fact that they are mostly public organisations owned by a city or region often labelled under another NACE category. As a result, such lacunae may lead to a large underestimation of the number of companies in Germany (Deutscher Bühnenverein, 2020).

3.1.2 Company size

In this section, we zoom in on some relevant characteristics of the companies involved in the live performance sector. Again, both the broad and narrow classification of the sector are taken into account.

Table 3.2 gives an overview of the number of employees in the active companies under the NACE 90 category and subcategories for the EU/EFTA countries. Important to keep in mind is that the problem of data availability is very pressing for this variable. Hence, for only slightly more than one out of five companies (21%), the number of employees is known for the companies that are classified under the broad NACE 90 category. The availability rates of data on the number of employees for the companies in the subcategories (90.01 to 90.04) vary significantly but are all low (between 18 and 35%). This has to be taken into account when interpreting the results.

Based on the classification of companies according to the number of employees, it becomes clear that, with the exception of subcategory 90.04, a very large proportion of 'enterprises' consists of only one employee. For the broad NACE 90 category, the number of companies with one employee amounts to 70% and similarly high rates can be observed for the companies in the 90.01 (71%), 90.02 (65%), and 90.03 subcategories (76%). Moreover, the number of employees in the other companies is also rather low with 14% of the companies of the broad NACE 90 category having two employees. Only 4% of this group has more than ten employees. For the subcategory 90.04 – 'Operation of art facilities', we can see a different picture with only 29% of companies with one employee and 23% with more than ten employees. The large proportion of companies with only one employee can be explained by the fact that the Orbis database categorises self-employed as 'companies with one employee'. In the next section, it becomes clear that the live performance sector consists for a large part of self-employed persons.

Table 3.2 Number of employees in the active companies under NACE 90 and subcodes 90.01, 90.02, 90.03 & 90.04 (EU-27, UK, and EFTA countries)

Number of employees	90.01 – Performing arts		90.02 – Support activities to performing arts		90.03 – Artistic creation		90.04 – Operation of art facilities		90.01, 90.02 & 90.04 combined		90 – Creative, arts and entertainment	
	N	%	N	%	N	%	N	%	N	%	N	%
1	42,403	71.1	19,973	65.4	51,344	75.9	2,623	29.3	64,999	65,6	116,994	69,8
2	8,023	13.4	4,545	14.9	9,129	1.5	1,317	14.7	13,885	14,0	23,095	13,8
3	1,555	2.6	1,366	4.5	1,286	1.9	842	9.4	3,763	3,8	5,117	3,1
4	1,121	1.9	824	2.7	917	1.4	566	6.3	2,511	2,5	3,448	2,1
5	3,608	6.0	1,490	4.9	3,022	4.5	568	6.4	5,666	5,7	8,708	5,2
6-10	1,258	2.1	1,057	3.5	879	1.3	927	10.4	3,242	3,3	4,174	2,5
More than 10	2,945	2.8	2,328	4.2	1,947	2.9	2,095	23.4	5,053	5.1	6,192	3,7
Total	**59,655**	**100**	**30,526**	**100**	**67,645**	**100**	**8,938**	**100**	**99,119**	**100**	**167,728**	**100**
Average number of employees	3.5		9.3		2.3		17.3		6.5		4.8	
Median number of employees	1		1		1		3		1		1	

* N (% available data): N NACE 90 = 167,728 (20.8%)/N NACE 90.01 = 59,655 (18.2%)/N NACE 90.02 = 30,526 (28.5%)/ N NACE 90.03 = 67,645 (19.7%)/N NACE 90.04 = 8,938 (34.7%).

Source Orbis database [Data extracted on 26 May 2020]

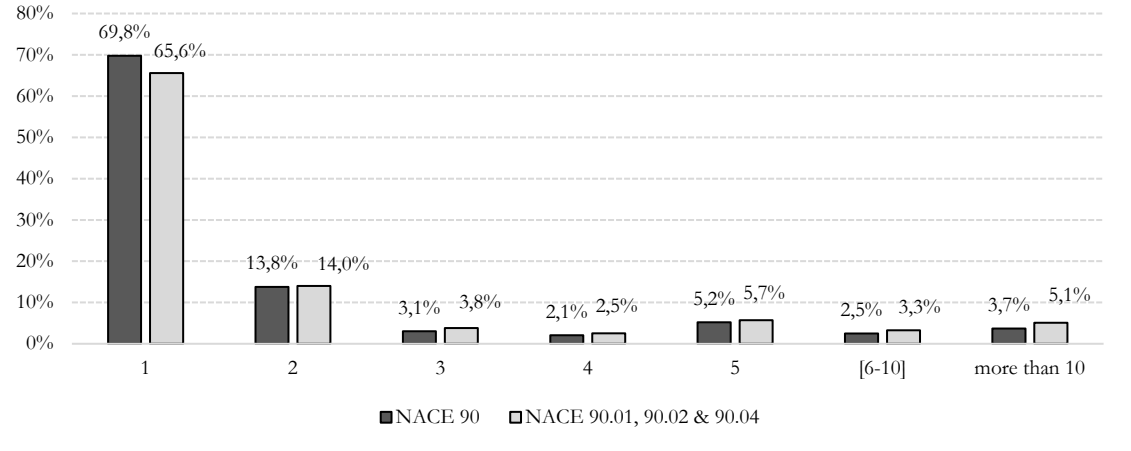
A closer look at the average and median number of employees[158] of the companies classified under the NACE 90 (sub)categories shows a similar picture. The companies in sector 90 and subsectors

158 See remark above – the Orbis database also categorises self-employed as 'companies with one employee'.

90.01, 90.02 and 90.03 have a rather low average number of employees (between two and five) and a median of one employee. The companies within subcategory 90.04 have a significantly higher average of 17 employees and a median of three employees. This is logical given the fact that category 90.04 includes all activities related to the operation of concert and theatre halls. These are often very labour-intensive activities whereas the other NACE 90 categories, and in particular 90.01 and 90.03, refer to activities that might be conducted in small groups or even alone.

Figure 3.2 visualises this distribution of number of employees for the active companies in both the broadly (NACE 90) and narrowly defined live performance sector (NACE 90.01, 90.02 & 90.04). It can be observed that both interpretations of the live performance sector have a similar distribution of the number of employees. Whereas 70% of the companies only have one employee[159] in the broadly defined sector, this amounts to 66% in the live performance as defined by the 90.01, 90.02 & 90.04 NACE subcategories. The relative amount of companies having two employees is 14% in both interpretations of the live performance sector. The other categories of companies having more than two employees are rather poorly represented with ratios between 2 and 6%.

Figure 3.2 Number of employees in active companies under NACE 90 and NACE 90.01, 90.02 & 90.04, in % of total (EU-27, UK, and EFTA countries)



Source Orbis database [Data extracted on 26 May 2020]

In addition to the variable on the number of employees, the Orbis database also contains a variable in which a breakdown is made according to the company size. Hence, each company for which data is available is divided into a category ranging from small to very large companies. As can be seen in *Table 3.3*, this variable is known for a relatively high proportion of the active companies under the NACE 90 (sub)code(s). Such data are available for 60% of the companies under the NACE 90 category and vary between 51% and 85% for the subcategories 90.01 to 90.04.

The classification by company size in Orbis categorises companies into small, medium sized, large and very large companies. The criteria for a company to be included in one of the categories are the operating revenue,[160] total assets and the number of employees:

- *small companies:* companies are considered to be small when they are not included in another category. This means that the operating revenue is lower than € 1 million, the total assets are not higher than € 2 million, and the number of employees is lower than 15;
- *medium sized companies:* companies are considered to be medium sized if they have an operating revenue greater than or equal to € 1 million; and/or have total assets greater than or equal to € 2 million; and/or have 15 or more employees;

159 Again, this probably mainly concerns self-employed persons as the Orbis database also categorises self-employed as 'companies with one employee'.

160 In terms of turnover, the performing arts industry experienced sustained growth (+2.9%) between 2013 and 2020 with particularly high growth rates in Slovakia (+53%) and the Czech Republic (+33%) (Ernst & Young, 2021).

- *large companies:* companies are considered the be large if they have an operating revenue higher than or equal to € 10 million; and/or have total assets higher than or equal to € 20 million; and/or have 50 or more employees;
- *very large companies:* companies are considered to be very large if they have an operating revenue greater than or equal to € 100 million; and/or if total assets are greater than or equal to € 200 million; and/or if the number of employees is greater than or equal to 1,000 (Bureau Van Dijk).

Table 3.3 clearly shows that almost all companies in the NACE 90 category and subcategories are categorised as small. This is the case for as many as 98% of companies in the general NACE 90 category. The same trend can also be seen in the subcategories: in subcategories NACE 90.01-90.03, some 97 to 99% of the companies are considered small. In subcategory 90.04 the proportion of small companies is lower, but it still concerns almost nine out of ten companies (89%). The few companies in the NACE 90 category and subcategories that are not considered small are almost always medium sized. This means that there are almost no large or very large companies in the NACE 90 category and subcategories based on the Orbis criteria. Given the high amount of companies with only one employee (cf. *Table 3.3*), this comes as no surprise.

Table 3.3 Size of active companies under NACE 90 and subcodes 9001, 9002, 9003 & 9004 (EU-27, UK, and EFTA countries)

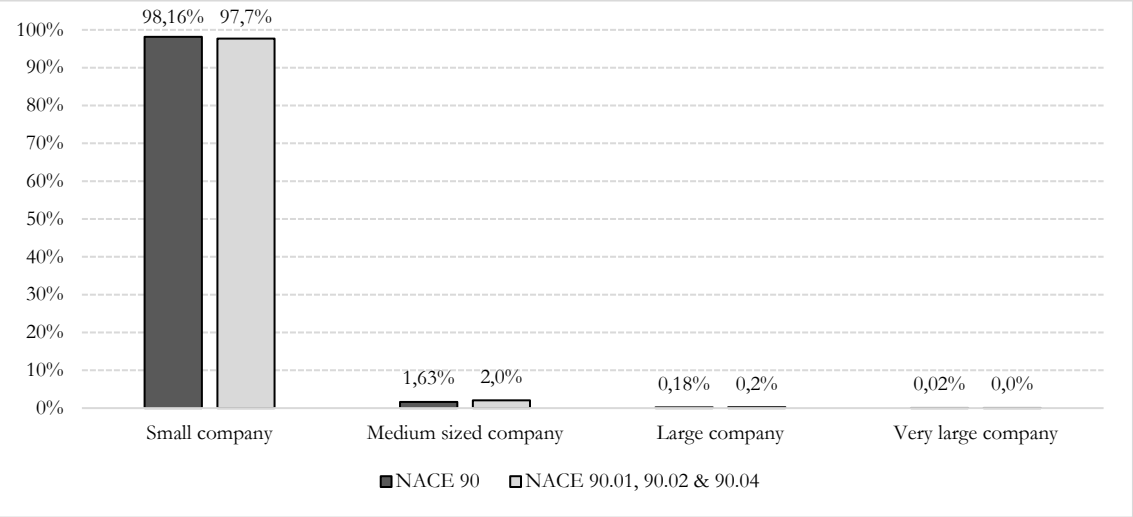
Company size	90.01 – Performing arts		90.02 – Support activities to performing arts		90.03 – Artistic creation		90.04 – Operation of art facilities		90.01, 90.02 & 90.04 combined		90 – Creative, arts and entertainment	
	N	%	N	%	N	%	N	%	N	%	N	%
Small	200,203	98.8	82,446	97.4	171,472	99.0	19,333	88.7	301,982	97.7	476,795	98.2
Medium	2,165	1.1	2,044	2.4	1,493	0.9	2,114	9.7	6,323	2.0	7,935	1.6
Large	259	0.1	171	0.2	139	0.1	318	1.5	748	0.2	895	0.2
Very large	17	0.0	15	0.0	30	0.0	41	0.2	73	0	103	0.0
Total	**202,644**	**100**	**84,676**	**100**	**173,134**	**100**	**21,806**	**100**	**309,126**	**100**	**485,728**	**100**

* N (% available data) : N NACE 90= 485,728 (60.1%)/N NACE 90.01 = 202,644 (61.82%)/N NACE 90.02 = 84,676 (79.0%)/ N NACE 90.03 = 173,134 (51.4%)/N NACE 90.04 = 21,806 (84.6%).

Source Orbis database [Data extracted on 26 May 2020]

Figure 3.3 shows the distribution of the active companies based on the size classification variable for the live performance sector as defined by both the broad NACE 90 category and the NACE 90.01, 90.02 & 90.04 subcategories. The company size differences between both classifications are rather marginal. In both classifications some 98% of the active companies are considered to be small and almost all of the 2% other companies are labelled as medium sized.

Figure 3.3 **Size of active companies under NACE 90 and NACE 90.01, 90.02 & 90.04, in % of total (EU-27, UK, and EFTA countries)**



Source Orbis database [Data extracted on 26 May 2020]

In its 2019 report, Pearle* confirms that more than 90% of the companies active in the live performance sector in the EU are micro-companies and small and medium sized companies (SMEs). They range from micro companies (often self-employed persons) to small and medium sized enterprises, together with a few large organisations employing over 1,000 people (Pearle*, 2019a).

3.1.3 Legal form

The Orbis database also contains information on the legal form of most companies. The availability ratio of the companies of the NACE 90 category and NACE 90.01 to 90.04 subcategories equals the ratio for the size classification variable and amounts to 60% of the companies in the NACE 90 category and varies between 51% and 85% for the subcategories 90.01 to 90.04. This means that the proportion of companies for which the standardised legal form is known can be considered to be relatively high. *Table 3.4* gives an overview of the different standardised legal forms as classified in the Orbis database. However, the exact meaning of the terms is not explained in the database and may vary slightly within countries. Consequently, the descriptions of the different legal forms are kept general in this section. Important categories are 'sole trader/proprietorships'; 'non-profit organisations'; 'private limited companies'; 'partnerships'; and 'branches'. The category 'other legal forms' is a residual category which contains the following less frequently occurring legal forms: 'companies with unknown/unrecorded legal form', 'foreign companies', 'public authorities' and 'public limited companies'.

As can be deducted from *Table 3.4*, 'sole trader/proprietorship' is by far the most common legal form for enterprises in the NACE 90 category. The proportion of this legal form amounts to 55% for the companies in the broad NACE 90 category and varies between 42 and 67% among the NACE 90.01 to 90.3 subcategories. However, in NACE subsector 90.04, the sole traders/ proprietorships only represent 6% of the active companies. Sole trader/proprietorships are companies owned by one person. From a legal perspective, the company and owner are considered one and the same. Most sole proprietorships are small, have no employees and can be considered as self-employed. They often run their businesses from their homes to avoid expenses with operating an office (Dornseifer, 2005). This corresponds with earlier findings with a very high proportion of small companies with only one 'employee' (cf. *Table 3.2* & *Table 3.3*).

The second most popular legal form among the active companies in the NACE 90 category and subcategories are 'private limited companies': 16% of the NACE 90 companies and between 16 and

37% of the companies in the NACE subcategories have this legal classification. Private limited companies are companies that offer limited liability, or legal protection for its shareholders. Most private limited companies are small as there is no minimum capital requirement to incorporate a limited company aside from the issuing of at least one share. The biggest difference with sole traders/proprietorships is that a limited company has a special status in the eyes of the law. Part of the limited company's definition is that it is incorporated (formally set up) and it issues shares to its shareholders (Dornseifer, 2005).

The third type of legal form that is relatively common among the NACE 90 category (16%) and subcategories (between 6 and 25%) are the 'non-profit organisations'. These organisations are privately held entities that do not provide financial benefits for their members or stakeholders. They are created for many different purposes such as cultural activities (Dornseifer, 2005).

Together, the three legal forms mentioned above represent 92% of all active companies under the NACE 90 code and 90.01-90.03 subcodes. Again, subcategory 90.04 forms an exception with 'only' 68% of the active companies being labelled as a sole trader/proprietorship, non-profit organisation or private limited company. More than 20% of the companies active in the 'Operation of art facilities' subcategory belong to the residual 'other legal forms' category.

Table 3.4 Standardised legal form of active companies under NACE 90 and subcodes 90.01, 90.02, 90.03 & 90.04 (EU-27, UK, and EFTA countries)

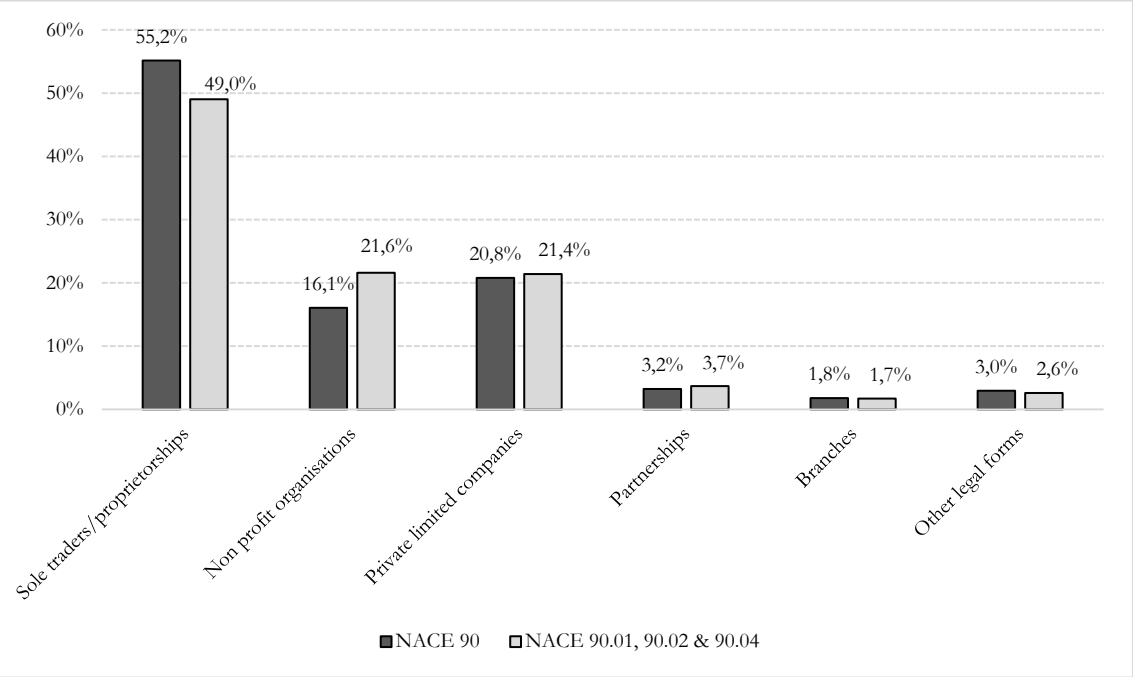
Standardised legal form	90.01 – Performing arts		90.02 – Support activities to performing arts		90.03 – Artistic creation		90.04 – Operation of art facilities		90.01, 90.02 & 90.04 combined		90 – Creative, arts and entertainment	
	N	%	N	%	N	%	N	%	N	%	N	%
Sole trader/ proprietorships	114,274	56.4	35,876	42.4	115,401	66.7	1,377	6.3	151,527	49.0	267,931	55.2
Non-profit organisations	45,005	22.2	16,354	19.3	10,157	5.9	5,406	24.8	66,765	21.6	77,971	16.1
Private limited companies	31,887	15.7	26,320	31.1	34,344	19.8	7,949	36.5	66,156	21.4	100,978	20.8
Partnerships	6,817	3.4	3,566	4.2	3,845	2.2	987	4.5	11,370	3.7	15,752	3.2
Branches	2,232	1.1	1,426	1.7	3,376	1.9	1,606	7.4	5,264	1.7	8,724	1.8
Other legal forms	2,429	1.2	1,134	1.3	6,010	3.5	4,481	20.5	8,044	2.6	14,371	3.0
Total	**202,644**	**100**	**84,676**	**100**	**173,134**	**100**	**21,806**	**100**	**309,126**	**100**	**485,728**	**100**

* N (% available data) : N NACE 90 = 485,728 (60.1%)/N NACE 90.01 = 202,644 (61.8%)/N NACE 90.02 = 84,676 (79,0%)/ N NACE 90.03 = 173,134 (51.4%)/N NACE 90.04 = 21,806 (84.6%).

Source Orbis database [Data extracted on 26 May 2020]

Figure 3.4 visualises the distribution of the active companies for both the broad NACE 90 category and the combined 90.01, 90.02 & 90.04 subcategories according to their legal form. Despite the slight differences, we can see a rather similar picture based on legal forms of the companies in both interpretations of the live performance sector: around half of the companies are sole traders/ proprietorships and approximately two out of five companies are non-profit organisations or private limited companies. Companies with other legal forms are relatively rare on the basis of both definitions of the sector.

Figure 3.4 **Standardised legal form of active companies under NACE 90 and NACE 90.01, 90.02 & 90.04, in % of total (EU-27, UK, and EFTA countries)**



Source Orbis database [Data extracted on 26 May 2020]

3.2 Employment characteristics

For the characteristics of the people employed in the live performance sector, we mainly rely on the data from the EU-LFS on the one hand and secondary sources on the other hand. As already indicated in Section *2.3.1.2*, these sources do not allow us to zoom in on the subsectors of the NACE 90 sector.[161] Therefore, it is only possible to describe the employment characteristics based on the broader NACE 90 sector 'Creative, arts, and entertainment activities' as a whole. For some other characteristics, we even have to look at more aggregated data due to the lack of available data for the NACE 90-category.

One of the main caveats is that below figures only include persons whose *main job* is providing 'creative, arts and entertainment activities'. Consequently, they do not take into account persons who have a main job in another sector (e.g. education) and have as second job providing 'creative, arts and entertainment activities'. This results in an underestimation of total employment in the sector and it makes the (atypical) profile of the sector less accurate.

3.2.1 Employment number and evolution

Before looking closer at the profile of the workforce employed in the live performance sector, we first look at the total number of persons employed within the sector. *Table 3.5* and *Figure 3.5* give an overview of the number of persons employed in the live performance sector (under NACE 90) per country (EU-27, UK and EFTA) and the relative importance in total employment of the sector and of the country concerned. Furthermore, the table includes the absolute and relative change of the employment number between 2011 and 2019.

Total workforce in the live performance sector amounts to approximately 1.3 million in the EU-27, UK, and EFTA. The subtotal for the 27 EU-countries amounts to some 1 million employed persons. A closer look at country level reveals that Germany (231,400), the UK (213,300) and France (185,200) have the largest number of persons employed in the live performance sector. Together, they represent

161 A more detailed breakdown of NACE code R90 was not possible because data would no longer be reliable.

almost half (48%) of the workforce in the sector. The other countries have considerably lower numbers of employed persons in the sector (next is Italy with 92,800). *Figure 3.5* ranks the countries from the highest to the lowest employment level.

The employment in the live performance sector corresponds to some 0.5% of the total workforce in the EU-27. The relative importance of the live performance sector in the total workforce does not differ greatly between countries. 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 percentages are likely to be a (significant) underestimation of the relative importance of the sector as they do not take into account persons with a second job in the live performance sector.

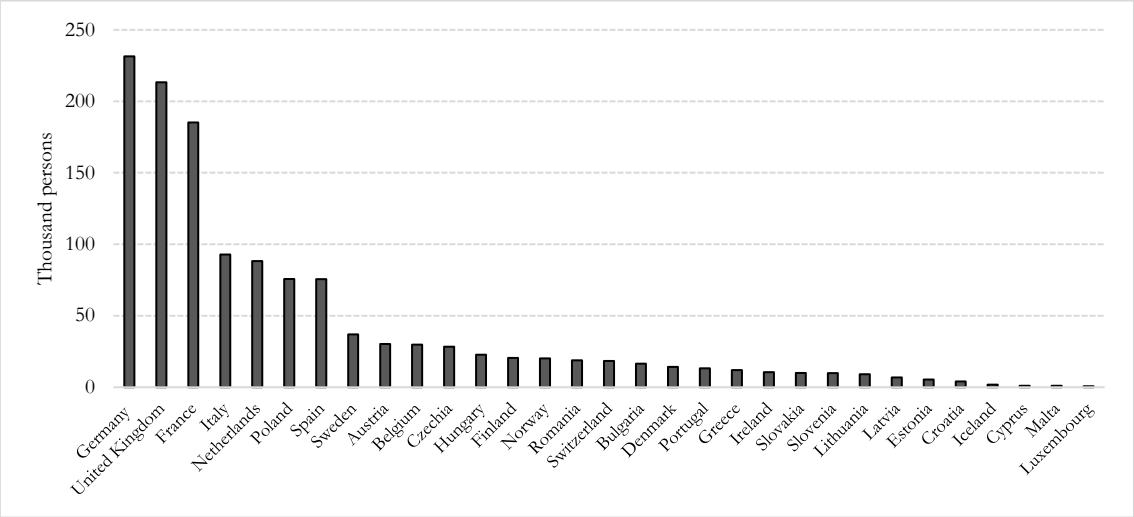
The evolution of the employment between 2011 and 2019 shows that the employment in the live performance sector in the EU-27, UK, and EFTA rose significantly with 242,000 people or about 23%. The overview per country shows that the employment level only decreased in 5 countries over the period 2011-2019, whereas the levels increased in the other 26 countries. As can also be seen from *Figure 3.5*, the employment considerably rose between 2011 and 2018 in most countries with the highest employment numbers in the live performance sector, such as the United Kingdom (+56%), Spain (+43%), France (+24%), and Italy (+11%). In some other (mostly smaller) countries, the employment rate in the live performance sector even (more than) doubled between 2011 and 2019 (Slovenia: +115%; Estonia: +100%; Malta: +100%).

Table 3.5 **Employment (i.e. main job) in the live performance sector (NACE 90 sector), 2019 (EU-27, UK, and EFTA)**

	Employment (i.e. main job) in 2019			Change compared to 2011	
	N (in 1,000 persons)	Share of the total workforce in the live performance sector	Share of total employment in the country	N (in 1,000 persons)	%
Belgium	29.8	2.3	0.6	+4.8	+19.2
Bulgaria	16.5	1.3	0.5	+5.8	+54.2
Czech Republic	28.4	2.2	0.5	+2.8	+10.9
Denmark	14.2	1.1	0.5	+1.0	+7.6
Germany	231.4	17.7	0.5	+12.2	+5.6
Estonia	5.4	0.4	0.8	+2.7	+100.0
Ireland	10.6	0.8	0.5	-3.4	-24.3
Greece	12.0	0.9	0.3	+2.3	+23.7
Spain	75.6	5.8	0.4	+22.5	+42.4
France	185.2	14.2	0.7	+35.8	+24.0
Croatia	4.1	0.3	0.2	-0.2	-4.7
Italy	92.8	7.1	0.4	+11.1	+13.6
Cyprus	1.0	0.1	0.2	-0.3	-23.1
Latvia	6.9	0.5	0.8	+2.6	+60.5
Lithuania	9.1	0.7	0.7	+2.4	+35.8
Luxembourg	0.7	0.1	0.2	-0.1	-12.5
Hungary	22.8	1.7	0.5	-0.6	-2.6
Malta	1.0	0.1	0.4	+0.5	+100.0
Netherlands	88.2	6.8	1.0	+20.4	+30.1
Austria	30.2	2.3	0.7	+6.7	+28.5
Poland	75.7	5.8	0.5	+8.5	+12.6
Portugal	13.2	1.0	0.3	+0.8	+6.5
Romania	18.8	1.4	0.2	+5.5	+41.4
Slovenia	9.9	0.8	1.0	+5.3	+115.2
Slovakia	10.0	0.8	0.4	+2.5	+33.3
Finland	20.5	1.6	0.8	+0.9	+4.6
Sweden	37.0	2.8	0.7	+6.5	+21.3
EU-27 subtotal	**1,051.1**	**80.6**	**0.5**	**+159.0**	**+17.8**
United Kingdom	213.3	16.3	0.7	+76.5	+55.9
Iceland	1.8	0.1	0.9	+0.4	+28.6
Norway	20.2	1.5	0.7	+1.0	+5.2
Switzerland	18.4	1.4	0.4	+5.1	+38.3
Total	**1,304.7**	**100**	**0.5**	**+242.0**	**+22.8**

Source Eurostat (extracted on 01.12.2020)

Figure 3.5 Total employment number (i.e. main job) in the live performance sector (NACE 90 sector), 2019 (EU-27, UK, and EFTA)



Source Eurostat (extracted on 01.12.2020)

In its 'Rebuilding Europe' report, Ernst & Young compared cultural and creative industries (CCI) in the European Union. Performing arts and music were two of the ten subsectors besides Books, Newspapers and magazines, Radio, Audiovisual, Video games industry, Visual arts, Architecture and Advertising. In its report, Ernst & Young confirms the labour intensity of the live performance sector: 'Providing more than 1 million jobs in the EU-27 in 2019, the performing arts sector was the fourth largest employer among the continent's cultural and creative industries, providing more than one job in six.[162] Together with the Visual arts (1.9 million), Music (1.2 million), and Audio-visual industry (1.1 million), they accounted for more than two thirds (68%) of the 7.6 million CCI jobs in the EU-27 in 2019' (Ernst & Young, 2021).

3.2.2 Share of self-employed persons

Before looking at the data on the number of self-employed persons, it is important to clarify that in EU level data (EU-LFS), the status of an employee or a self-employed person is self-assessed. Therefore, these categories are likely to include a wide range of work arrangements according to self-perception and national contexts. Moreover, this does not necessarily correspond to the legal qualification in labour and social security law.

Within the EU, there is currently no commonly agreed definition between Member States of what constitutes a self-employed person or self-employment. Eurofound has characterised 'self-employed persons' according to a series of criteria such as legal subordination; dependent/independent worker dichotomy and aligned classifications used by the International Labour Organization (ILO) and the Organization for Economic Cooperation and Development (OECD). Self-employment is defined in a residual way, comprising all contractual relationships not falling within the boundaries of 'paid employment' (FIA, 2016b). Moreover, as highlighted by the ILO, the exact legal status of freelancers is a complex issue, and varies from country to country: 'The term "freelancer" should not be considered synonymous with 'self-employed', although many freelancers in the media industry do indeed have self-employed status and thus effectively can be considered to be running their own micro-enterprise. In many States, there is no legal middle ground between employed and self-employed status, although there can be considerable areas of overlap in practice' (ILO, 2014).

162 Together with the music sector which accounts in total for 1.2 million and of which a portion of employment is to be situated in the live sector (EY study 2014 'Creating growth http://creatingeurope.eu/ 650,000 musicians, songwriters – 375,000 entertainment workers in profit and 81,000 in non-profit).

In addition to the difficulties in defining the different types of employment, EU LFS-data do not allow to give an overview of the employment type for 'creative, arts and entertainment activities' based on the NACE 90 category. Instead, we have to rely on more aggregated data such as the cultural employment data. Cultural employment is defined by crossing two classifications: NACE (economic activities) and ISCO (occupations). It includes all persons working in economic activities that are deemed cultural, irrespective of whether the person is employed in a cultural occupation. It also covers persons with a cultural occupation, irrespective of whether they are employed in a non-cultural economic activity. Consequently, with 7.4 million people in the EU-27 in 2019, the cultural employment category is much broader compared to the NACE 90 category, which accounts for only one million employed persons (cf. *Table 3.5*).

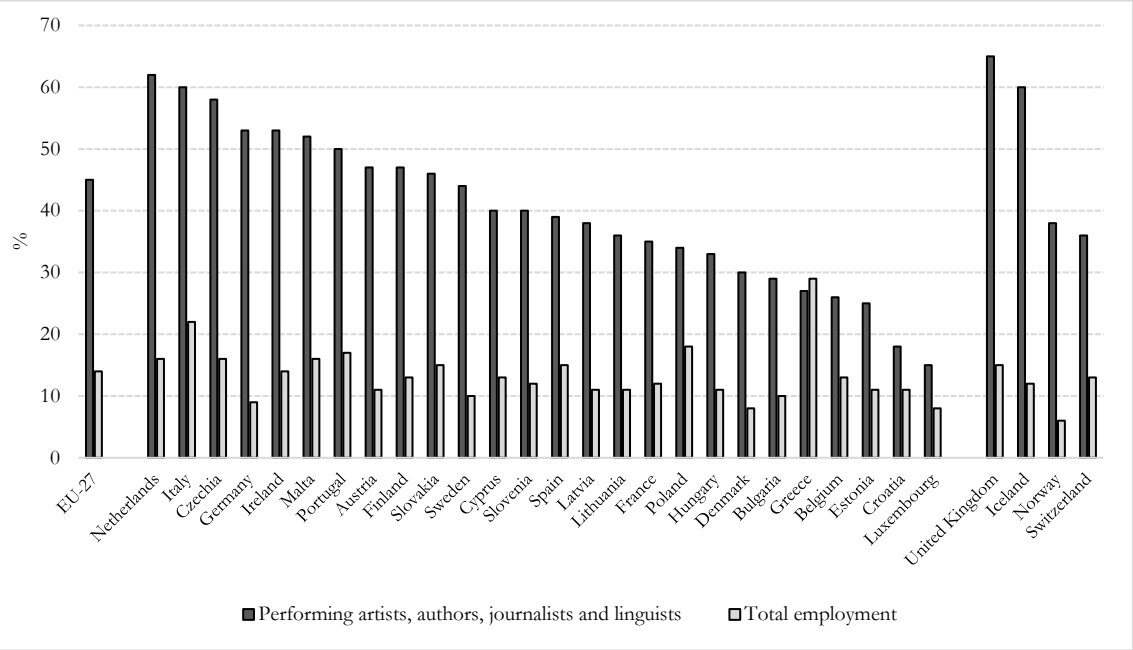
In addition to the predominantly general economic analyses for the broader cultural sector, the cultural employment statistics also contain some more detailed analyses of certain subgroups. Interesting in this respect is the special focus on the group 'artists, authors, journalists and linguists' in the 2019 cultural employment statistics. The group represents creative and performing arts (including visual artists, musicians, dancers, actors, film directors, etc.) and authors, journalists and linguists. Although this group is broader than the live performance sector, it largely coincides with the broader NACE 90 category which also includes authors and journalists (NACE 90.03, *cf. Section 2.1)*. Although the subgroup of 'artists, authors, journalists and linguists' is only a small fraction of the total cultural employment (1.7 million out of 7.4 million in 2019), it is still broader than the NACE 90 category (some 1 million in the EU-27, cf. *Table 3.5*) which we used in this report to define the live performance sector (cf. *Section 2.1*). However, taking into account the large overlap, it can be assumed that an analysis based on the broader group of 'artists, authors, journalists and linguists' is also largely applicable to the live performance sector.

Figure 3.6 depicts the share of self-employed among 'performing artists, authors, journalists and linguists' compared to the share of self-employed in total employment within the EU-27, UK and EFTA in decreasing order. In the EU-27, on average 45% of the 'performing artists, authors, journalists and linguists' are self-employed.[163] This is much more than the average of 14% for all sectors of activity. In some countries, even more than half of the employed 'performing artists, authors, journalists and linguists' are self- employed: 62 % of all artists and writers in the Netherlands were self-employed in 2019, 60% in Italy, 58% in the Czech Republic, 53% in Germany and Ireland, 52% in Malta and 50% in Portugal.

With the exception of Greece, the average number of self-employed within this subgroup is far above the average for the total of employed in the EU-27, UK and EFTA. In Germany, the share of artists and writers that were self-employed was almost six times as high as the national average for the entire economy. This ratio was also high in Sweden (4.4 times as high) and Austria (4.3 times as high).

163 Authors, and to a large extent linguists, are typical occupations which are not taking place in a context of subordination or employment. A more detailed breakdown would give a more accurate picture.

Figure 3.6 **Share of the self-employed among 'performing artists, authors, journalists, linguists' and in total employment in the EU-27, UK, and EFTA countries (2019, %)**



* No data available for Romania.
Source Eurostat (extracted on 04.12.2020)

In the Creative Skill Europe 2016 report, this high and increasing proportion of professionals operating outside the standard 'employee status' (as freelancers, intermittent workers, self-employed, etc. or any other status as provided by the provisions of national labour law) in the live performance sector was also confirmed (Creative Skills Europe, 2016).

3.2.3 Type of contracts

For the group of 'performing artists, authors, journalists and linguists', the 2019 cultural employment statistics also include relevant information on the type of contracts. In what follows, we will have a closer look at the proportion of artists, authors, journalists and linguists working full-time and having a permanent contract within the EU-27, UK, and EFTA. Again, a comparison with the employed in the entire economy will be made. *Table 3.6* gives an overview of the share of full-time workers, and employees with a permanent contract among the subgroup of performing artists, authors, journalists and linguists compared with the total employment for the EU-27, UK, and EFTA in 2019.

Table 3.6 shows that the share of artists, authors, journalists and linguists working on a full-time basis was generally lower than the national average for total employment across the EU-27 (70% vs. 81% for the entire economy). The only exceptions to this rule were Luxembourg and Romania. However, in these two Member States the gap was not as significant as in some other cases where a considerable difference in full-time employment rates was observed. In Cyprus, Malta, Latvia, Portugal, and Finland, the share of artists and writers working on a full-time basis was at least 20 percentage points lower than the national average. Among the EU-27 Member States, the lowest share of artists and writers working on a full-time basis was recorded in the Netherlands, where fewer than half (44%) of all artists and writers worked on a full-time basis.

Regarding the share of employees with a permanent contract, some 75% of the artists, authors, journalists and linguists had a permanent employment contract within the EU-27, while the corresponding figure for all employees was higher (with an average of 85% in the EU-27). This pattern was repeated in the majority of the countries concerned, apart from Luxembourg, Slovakia, Estonia, Hungary, Romania, Bulgaria, Czech Republic, Malta, Iceland, and Switzerland (Eurostat).

The fact that the live performance sector is characterised by atypical and short contract types, cannot be properly deduced from *Table 3.6*. This might be due to the fact that figures are only given for respondents who have their main job in the live performance sector. Consequently, the atypical character of the sector would be better reflected if persons who have a second job in this sector were also taken into account. However, such data from the EU-LFS are currently not publicly available.

Table 3.6 **Share of full-time workers, single job holders, employees with a permanent contract among performing artists, authors, journalists and linguists compared with total employment in EU-27, UK, and EFTA, 2019 (in %)**

	Working full-time		Employees with a permanent contract	
	Performing artists, authors, journalists and linguists	Total employment	Performing artists, authors, journalists and linguists	Total employment
Belgium	70	75	74	89
Bulgaria	91	98	96	96
Czech Republic	83	92	92	92
Denmark	71	75	83	89
Germany	66	71	82	88
Estonia	77	87	99	97
Ireland	79	80	83	90
Greece	78	91	79	88
Spain	78	85	64	74
France	70	82	59	84
Croatia	79	94	77	82
Italy	73	81	76	83
Cyprus	48	89	76	86
Latvia	66	91	87	97
Lithuania	77	93	98	99
Luxembourg	89	83	94	91
Hungary	93	95	95	93
Malta	59	86	914	91
Netherlands	44	49	74	80
Austria	62	72	80	91
Poland	80	93	70	78
Portugal	68	90	61	79
Romania	96	93	100	99
Slovenia	87	91	85	87
Slovakia	92	95	95	92
Finland	63	83	78	84
Sweden	65	76	69	83
EU-27 subtotal	**70**	**81**	**75**	**85**
United Kingdom	70	74	90	95
Iceland	65	78	95	92
Norway	69	73	88	92
Switzerland	38	60	87	87

Source Eurostat (11.06.2020) - extracted on 05.12.2020

3.2.4 Combination with other jobs

In *Table 3.6*, we observe that the group of 'performing artists, authors, journalists and linguists' has a lower chance to work full-time compared to the employed in the entire economy within the EU-27, UK, and EFTA. The main reason for this discrepancy might be that this group more often combines their jobs as 'artist' or 'writer' with other jobs. The 2019 cultural statistics allow to give an overview of the share of single job holders of this subgroup and compare them with the share for the entire

economy. In the EU-27, almost nine out of ten of the performing artists, authors, journalists and linguists had a single job in 2019 *(Table 3.7)*. This is lower compared to the very high majority (96%) of single job holders among the whole workforce within the EU-27. Artists and writers are thus less likely to have a single job compared to the 'average worker' in the EU. The share of artists and writers who were single jobholders was more than 10 percentage points below the national average in Estonia, Latvia, Cyprus, France, and the Netherlands. A same trend could be observed within the EFTA with higher single job holder shares in the entire economy compared to the subgroup of artists and writers.

However, these figures only tell part of the story. After all, they start from the point of view that the main job of the respondents is performing arts. Respondents whose second job is being an artist or musician are therefore not included. The percentage of persons with one or more jobs, one of which is in the live performance sector, may therefore be much higher than *Table 3.7* suggests.

Table 3.7 Share of single job holders among performing artists, authors, journalists and linguists compared with total employment in EU-27, UK, and EFTA, 2019 (in %)

	Performing artists, authors, journalists and linguists	Total employment
Belgium	95	96
Bulgaria	98	100
Czech Republic	90	97
Denmark	85	92
Germany	91	95
Estonia	67	94
Ireland	95	97
Greece	95	98
Spain	95	98
France	82	95
Croatia	100	99
Italy	93	99
Cyprus	81	97
Latvia	74	95
Lithuania	92	95
Luxembourg	95	97
Hungary	96	99
Malta	100	97
Netherlands	80	92
Austria	90	96
Poland	91	95
Portugal	85	95
Romania	100	98
Slovenia	98	98
Slovakia	92	99
Finland	84	93
Sweden	81	91
EU-27	**89**	**96**
United Kingdom	94	97
Iceland	73	90
Norway	86	91
Switzerland	82	92

Source Eurostat (11.06.2020) - extracted on 05.12.2020

Assuming that the category of 'performing artists, authors, journalists and linguists' is a (good) proxy for the live performance sector, the lower proportion of single job holders confirms again the atypical

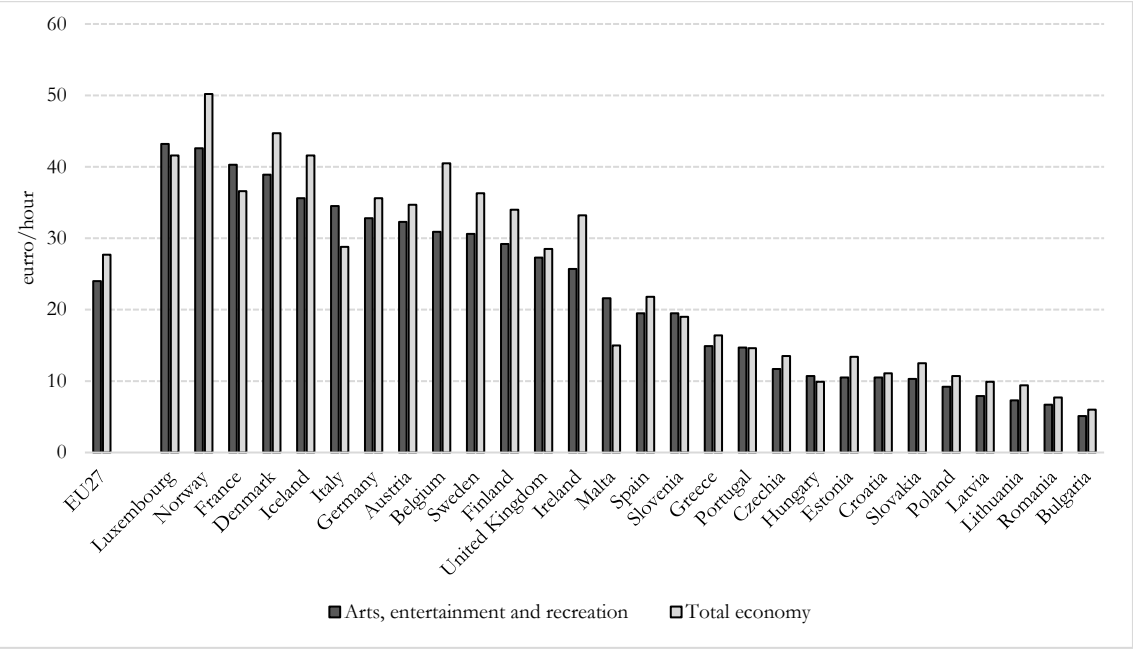
character of the sector. It should be noted that the term 'atypical' reflects only the deviation from the standard employment norm. More generally, the above statistics on the share of self-employed workers, the type of contracts and the proportion of single job holders clearly reveal that the employment in the live performance sector is highly characterised by atypical working-time arrangements (part-time, on-call, multiple jobs), short-term/fixed-term contracts (fixed-term, project or task-based work) and atypical work relationships (contracted or subcontracted work, self-employment or agency work). When services are provided abroad, this atypical character may create additional challenges, not least in terms of determining the competent Member State for social security.

3.2.5 Labour costs

Also with regard to labour costs,[164] the Eurostat data do not allow an analysis at the level of the NACE 90 category and thus certainly not at the level of the subsectors within NACE 90. Consequently, for the analysis of labour costs for the live performance sector, we have to fall back on the broader NACE category R including 'arts, entertainment and recreational activities'. This category includes a wide range of activities to meet varied cultural, entertainment and recreational interests of the general public, including live performances, operation of museum sites, gambling, sports and recreation activities. Therefore, when reading below analysis on labour costs, it should be taken into consideration that we use this broader category to which the live performance sector belongs.

Figure 3.7 gives an overview of the average labour costs per hour for 'the arts, entertainment and recreational' sector and the entire economy (all sectors) for the EU-27, UK and EFTA in 2019. Whereas the average labour cost is € 24 per hour in the 'arts, entertainment and recreations' sector in the EU-27, it amounts to almost € 28 per hour in the entire economy. However, the average of € 24 in the sector masks significant differences in the EU-27, UK and EFTA, with hourly labour costs ranging between € 6 and € 41.6 per hour. Only in seven countries for which data are available, average labour costs in the 'entertainment, arts and recreation' sector were higher than in the total economy in 2019 (compared to 21 countries with lower labour costs in that subsector).

Figure 3.7 Average labour costs (in € per hour) among the arts, entertainment and recreation sector compared with total employment in EU-27, UK, and EFTA, 2019



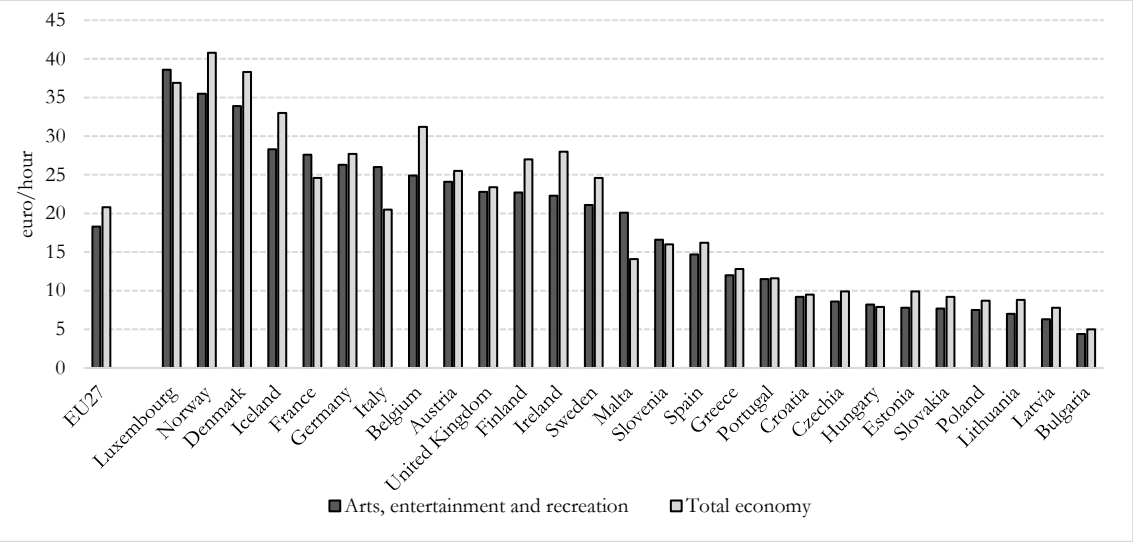
* No data were available for the Netherlands and Cyprus.

Source Eurostat (27.03.2020)

164 Labour costs are made up of costs for wages and salaries, plus non-wage costs such as employer's social contributions. These do not include vocational training costs or other expenditures such as recruitment costs, spending on working clothes, etc.

In what follows, we take a closer look at the wages and salaries as the most important component of labour costs. *Figure 3.8* shows hourly wages and salaries paid in the arts, entertainment and recreation sector in the EU-27, UK and EFTA. The average hourly wages and salaries amount to some € 18.4 in the EU-27. Again, the comparison is made with the gross wages and salaries for the entire economy. We can observe a similar trend as for labour costs: within the EU-27, the average gross wages and salaries are generally lower compared to those for the entire economy. Only in four countries within the EU, UK and EFTA for which data are available, average gross wages are higher in the 'arts, entertainment and recreation' sector than in the entire economy. In the 'arts, entertainment and recreation' sector, we can see significant differences between the countries with average wages varying between only € 4.4 per hour (Bulgaria) and € 38.6 per hour (Luxembourg).

Figure 3.8 Average gross hourly wages and salaries (in € per hour) among the arts, entertainment and recreation sector compared with total employment in EU-27, UK, and EFTA, 2019



* No data were available for the Netherlands, Cyprus, Romania & Switzerland.
Source Eurostat (27.03.2020)

In essence, posted workers are entitled to the same 'remuneration' as local employees (instead of equal 'minimum rates of pay' as provided for under the previous version of the Posting of Workers Directive). Of course, this principle does not apply when the remuneration in the 'sending' Member State is higher compared to that of the 'receiving' Member State. We have applied these rules in the two tables below with a view to determining by how much the gross wage has to be increased when services are provided 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 *(Table 3.9)* and the national minimum wages *(Table 3.10)*. For example, the average gross wage paid in the arts, entertainment and recreation sector in Bulgaria will have to be increased by 5.8 if the average gross wage applicable to this sector in Belgium has to be paid. This exercise, which is only an estimate, can be a tool in the negotiation of the cost of the services when performing abroad. As it should be clear that this cost can differ significantly from the cost charged when performing within the country concerned.

Ideally, this exercise should be made by taking into account the collective agreements of the sector. Gathering such information is a time-consuming exercise that goes beyond the scope of this report. Nevertheless, such an exercise can be seen as the final step in the process of how best to inform employers. After all, one can easily provide a link to the websites where the collective agreements can be found, which also seems to be the strategy today. This does not mean, however, that the information about the remuneration to be paid can easily be found. In that respect, a next step in the information process is that these collective agreements are also easily consultable in all or several

official EU languages (e.g. based on the template designed by ELA together with its 'Working Group on Information'). 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.

Figure 3.9 **The provision of services from MS X to MS Y in the arts, entertainment and recreation sector. By how much should the gross wage be increased? *(estimate)*, 2020**

		From …																							
		BE	**BG**	**CZ**	**DK**	**DE**	**EE**	**IE**	**EL**	**ES**	**FR**	**HR**	**IT**	**LV**	**LT**	**LU**	**HU**	**MT**	**NL**	**AT**	**PL**	**PT**	**SI**	**SK**	**FI**	**SE**
To …	**BE**		5.8	2.7	1.0	1.0	3.2	1.1	2.0	1.5	1.0	2.7	1.0	3.6	3.2	1.0	3.0	1.3	1.0	1.0	3.3	1.7	1.4	2.9	1.1	1.2
	BG	1.0		1.0	1.0	1.0	1.0	1.0	1.0	1.0	1.0	1.0	1.0	1.0	1.0	1.0	1.0	1.0	1.0	1.0	1.0	1.0	1.0	1.0	1.0	1.0
	CZ	1.0	2.1		1.0	1.0	1.2	1.0	1.0	1.0	1.0	1.0	1.0	1.3	1.2	1.0	1.1	1.0	1.0	1.0	1.2	1.0	1.0	1.1	1.0	1.0
	DK	1.4	8.2	3.9		1.2	4.6	1.5	2.8	2.2	1.2	3.9	1.4	5.2	4.6	1.0	4.3	1.9	1.4	1.3	4.7	2.5	2.1	4.1	1.5	1.6
	DE	1.2	6.6	3.1	1.0		3.7	1.2	2.3	1.7	1.0	3.1	1.1	4.2	3.7	1.0	3.5	1.5	1.2	1.1	3.8	2.0	1.7	3.3	1.2	1.3
	EE	1.0	1.8	1.0	1.0	1.0		1.0	1.0	1.0	1.0	1.0	1.0	1.1	1.0	1.0	1.0	1.0	1.0	1.0	1.0	1.0	1.0	1.0	1.0	1.0
	IE	1.0	5.4	2.5	1.0	1.0	3.0		1.9	1.4	1.0	2.6	1.0	3.4	3.0	1.0	2.8	1.2	1.0	1.0	3.1	1.6	1.4	2.7	1.0	1.1
	EL	1.0	2.9	1.4	1.0	1.0	1.6	1.0		1.0	1.0	1.4	1.0	1.8	1.6	1.0	1.5	1.0	1.0	1.0	1.7	1.0	1.0	1.5	1.0	1.0
	ES	1.0	3.8	1.8	1.0	1.0	2.1	1.0	1.3		1.0	1.8	1.0	2.4	2.1	1.0	2.0	1.0	1.0	1.0	2.2	1.1	1.0	1.9	1.0	1.0
	FR	1.2	6.7	3.1	1.0	1.0	3.7	1.2	2.3	1.8		3.2	1.1	4.2	3.7	1.0	3.5	1.5	1.2	1.1	3.8	2.0	1.7	3.3	1.3	1.3
	HR	1.0	2.1	1.0	1.0	1.0	1.2	1.0	1.0	1.0	1.0		1.0	1.3	1.2	1.0	1.1	1.0	1.0	1.0	1.2	1.0	1.0	1.1	1.0	1.0
	IT	1.0	6.0	2.8	1.0	1.0	3.3	1.1	2.0	1.6	1.0	2.8		3.7	3.3	1.0	3.1	1.4	1.0	1.0	3.4	1.8	1.5	3.0	1.1	1.2
	LV	1.0	1.6	1.0	1.0	1.0	1.0	1.0	1.0	1.0	1.0	1.0	1.0		1.0	1.0	1.0	1.0	1.0	1.0	1.0	1.0	1.0	1.0	1.0	1.0
	LT	1.0	1.8	1.0	1.0	1.0	1.0	1.0	1.0	1.0	1.0	1.0	1.0	1.1		1.0	1.0	1.0	1.0	1.0	1.0	1.0	1.0	1.0	1.0	1.0
	LU	1.6	9.3	4.3	1.1	1.4	5.2	1.7	3.2	2.4	1.4	4.4	1.6	5.8	5.2		4.8	2.1	1.6	1.5	5.3	2.8	2.3	4.6	1.7	1.9
	HU	1.0	1.9	1.0	1.0	1.0	1.1	1.0	1.0	1.0	1.0	1.0	1.0	1.2	1.1	1.0		1.0	1.0	1.0	1.1	1.0	1.0	1.0	1.0	1.0
	MT	1.0	4.4	2.0	1.0	1.0	2.4	1.0	1.5	1.1	1.0	2.1	1.0	2.7	2.4	1.0	2.3		1.0	1.0	2.5	1.3	1.1	2.2	1.0	1.0
	NL	1.0	5.7	2.7	1.0	1.0	3.2	1.1	2.0	1.5	1.0	2.7	1.0	3.6	3.2	1.0	3.0	1.3		1.0	3.3	1.7	1.4	2.9	1.1	1.1
	AT	1.1	6.3	2.9	1.0	1.0	3.5	1.2	2.1	1.7	1.0	3.0	1.1	3.9	3.5	1.0	3.3	1.4	1.1		3.6	1.9	1.6	3.1	1.2	1.3
	PL	1.0	1.8	1.0	1.0	1.0	1.0	1.0	1.0	1.0	1.0	1.0	1.0	1.1	1.0	1.0	1.0	1.0	1.0	1.0		1.0	1.0	1.0	1.0	1.0
	PT	1.0	3.3	1.6	1.0	1.0	1.9	1.0	1.1	1.0	1.0	1.6	1.0	2.1	1.9	1.0	1.8	1.0	1.0	1.0	1.9		1.0	1.7	1.0	1.0
	SI	1.0	4.0	1.9	1.0	1.0	2.2	1.0	1.4	1.1	1.0	1.9	1.0	2.5	2.2	1.0	2.1	1.0	1.0	1.0	2.3	1.2		2.0	1.0	1.0
	SK	1.0	2.0	1.0	1.0	1.0	1.1	1.0	1.0	1.0	1.0	1.0	1.0	1.3	1.1	1.0	1.0	1.0	1.0	1.0	1.1	1.0	1.0		1.0	1.0
	FI	1.0	5.3	2.5	1.0	1.0	3.0	1.0	1.8	1.4	1.0	2.5	1.0	3.3	3.0	1.0	2.8	1.2	1.0	1.0	3.0	1.6	1.3	2.7		1.1
	SE	1.0	5.0	2.3	1.0	1.0	2.8	1.0	1.7	1.3	1.0	2.4	1.0	3.1	2.8	1.0	2.6	1.1	1.0	1.0	2.9	1.5	1.3	2.5	1.0	

* Based on average hourly wages/salaries. Missing Member States: Cyprus and Romania.

Source Authors' own elaboration based on Eurostat data

Figure 3.10 **The provision of services from MS X to MS Y. By how much should the gross wage be increased?** ***Estimate based on the national minimum wages in the EU***

		From …																			
		BE	**BG**	**CZ**	**DE**	**EE**	**IE**	**EL**	**ES**	**FR**	**HR**	**LV**	**LT**	**LU**	**HU**	**MT**	**NL**	**PL**	**PT**	**RO**	**SI**	**SK**
To …	**BE**		4.89	2.81	1.01	2.78	1.00	2.14	1.47	1.05	2.89	3.25	2.53	1.00	3.67	2.07	1.00	2.65	2.10	3.55	1.59	2.61
	BG	1.00		1.00	1.00	1.00	1.00	1.00	1.00	1.00	1.00	1.00	1.00	1.00	1.00	1.00	1.00	1.00	1.00	1.00	1.00	1.00
	CZ	1.00	1.74		1.00	1.00	1.00	1.00	1.00	1.00	1.03	1.16	1.00	1.00	1.31	1.00	1.00	1.00	1.00	1.26	1.00	1.00
	DE	1.00	4.86	2.79		2.76	1.00	2.13	1.46	1.04	2.87	3.23	2.51	1.00	3.65	2.06	1.00	2.63	2.08	3.52	1.58	2.59
	EE	1.00	1.76	1.01	1.00		1.00	1.00	1.00	1.00	1.04	1.17	1.00	1.00	1.32	1.00	1.00	1.00	1.00	1.27	1.00	1.00
	IE	1.06	5.19	2.98	1.07	2.95		2.27	1.56	1.11	3.06	3.45	2.69	1.00	3.90	2.20	1.02	2.81	2.22	3.76	1.68	2.77
	EL	1.00	2.28	1.31	1.00	1.30	1.00		1.00	1.00	1.35	1.52	1.18	1.00	1.71	1.00	1.00	1.23	1.00	1.66	1.00	1.22
	ES	1.00	3.33	1.91	1.00	1.90	1.00	1.46		1.00	1.97	2.22	1.73	1.00	2.51	1.41	1.00	1.80	1.43	2.42	1.08	1.78
	FR	1.00	4.68	2.68	1.00	2.66	1.00	2.05	1.40		2.76	3.11	2.42	1.00	3.51	1.98	1.00	2.53	2.00	3.39	1.52	2.50
	HR	1.00	1.69	1.00	1.00	1.00	1.00	1.00	1.00	1.00		1.13	1.00	1.00	1.27	1.00	1.00	1.00	1.00	1.23	1.00	1.00
	LV	1.00	1.50	1.00	1.00	1.00	1.00	1.00	1.00	1.00	1.00		1.00	1.00	1.13	1.00	1.00	1.00	1.00	1.09	1.00	1.00
	LT	1.00	1.93	1.11	1.00	1.10	1.00	1.00	1.00	1.00	1.14	1.28		1.00	1.45	1.00	1.00	1.05	1.00	1.40	1.00	1.03
	LU	1.35	6.63	3.80	1.36	3.77	1.28	2.90	1.99	1.42	3.91	4.40	3.43		4.98	2.81	1.31	3.59	2.84	4.81	2.15	3.53
	HU	1.00	1.33	1.00	1.00	1.00	1.00	1.00	1.00	1.00	1.00	1.00	1.00	1.00		1.00	1.00	1.00	1.00	1.00	1.00	1.00
	MT	1.00	2.36	1.35	1.00	1.34	1.00	1.03	1.00	1.00	1.39	1.57	1.22	1.00	1.77		1.00	1.28	1.01	1.71	1.00	1.26
	NL	1.04	5.07	2.91	1.04	2.88	1.00	2.22	1.52	1.08	2.99	3.37	2.62	1.00	3.81	2.15		2.74	2.17	3.68	1.64	2.70
	PL	1.00	1.85	1.06	1.00	1.05	1.00	1.00	1.00	1.00	1.09	1.23	1.00	1.00	1.39	1.00	1.00		1.00	1.34	1.00	1.00
	PT	1.00	2.33	1.34	1.00	1.33	1.00	1.02	1.00	1.00	1.38	1.55	1.21	1.00	1.75	1.00	1.00	1.26		1.69	1.00	1.25
	RO	1.00	1.38	1.00	1.00	1.00	1.00	1.00	1.00	1.00	1.00	1.00	1.00	1.00	1.04	1.00	1.00	1.00	1.00		1.00	1.00
	SI	1.00	3.08	1.77	1.00	1.75	1.00	1.35	1.00	1.00	1.82	2.05	1.60	1.00	2.31	1.31	1.00	1.67	1.32	2.24		1.64
	SK	1.00	1.87	1.08	1.00	1.07	1.00	1.00	1.00	1.00	1.11	1.25	1.00	1.00	1.41	1.00	1.00	1.01	1.00	1.36	1.00	

* Missing Member States (with no national minimum wage): Denmark, Finland, Sweden, Italy, Cyprus and Austria.

Source Authors' own elaboration based on Eurostat data

4 | Mapping the transnational dimension of the live performance sector

It must be said that the transnational dimension of the live performance sector is still a blind spot in terms of its size and characteristics.[165] Consequently, the assumption that this sector has a strong transnational dimension through the provision of cross-border services, and/or that a (significant) group of workers and companies in this sector is often active in several Member States for a short period, cannot currently be confirmed or refuted. By collecting empirical evidence, the analyses in this chapter aim to solve this data gap and thus aim to formulate an answer to above assumption. Before making a statement on the transnational dimension of the sector, the concept of a 'highly mobile' worker is elaborated.

4.1 Unravelling the concept of the 'highly mobile worker'

By analogy with the concept of the 'live performance sector', the 'highly mobile worker' is a concept that regularly appears in (policy) documents but for which no clear-cut (legal) definition is available.[166] In this section we provide an overview of the main characteristics of this group of workers. Here it is useful to note that when we speak of 'labour mobility' we are referring to cross-border labour mobility in the EU and not to labour mobility within a country. Especially for a sector such as the live performance sector, this may be a relevant remark, given the atypical nature of the sector where workers often take on one temporary assignment after another. Furthermore, it is useful to distinguish between the concept of a 'highly mobile worker' and that of a 'highly mobile sector'. For instance, in transport both the sector and the workers and companies concerned have a highly mobile transnational character. However, it is not because a sector cannot be classified as 'highly mobile' that there is no (significant) group of highly mobile workers in it.

4.1.1 The different faces of intra-EU labour mobility

Both conceptually and empirically, there has been a shift in the debate from the narrow concept of 'labour migration' to the broader concept of 'labour mobility' (see e.g. Andrijasevic & Sacchetto, 2016; OECD, 2019; Recchi, 2015; van Ostaijen M. & Scholten, 2018). Firstly, there is a distinction in terminology used by the Commission to describe and discuss cross-border movements in the EU of citizens residing in the EU versus those residing outside the EU. As put by Ruhs (2019: 166) 'European policy-makers typically insist that EU citizens moving from one Member State to another are not 'migrants' but 'mobile EU citizens.' Secondly, and more importantly, there has been a change in practice. Intra-EU labour mobility has experienced an upward evolution during the last fifteen years (Batsaikhan et al., 2018; Fries-Tersch et al., 2021). Especially the EU enlargements of 2004 and 2007 have influenced labour mobility and also the type of it. This is largely due to the transitional arrangements[167] that the 'old' Member States implemented for the 'new' Member States regarding the free movement of workers. These restrictions on the free movement of workers (Article 45 TFEU) on the accession of the new Member States in 2004 led to massive recourse to the freedom of establishment (Article 49 TFEU) and the freedom to provide services (Article 56 TFEU), and thus to a substantial rise of the number of posted workers and (bogus) self-employed persons (EC, 2006).

Also in academia there is a growing awareness that all kinds of (temporary) labour mobility have gained importance in the EU. Consequently, the demarcation of the concept of 'labour mobility' has become a popular subject of discussion among scholars (see e.g. Engbersen & Snel, 2013). Types of

165 This is hardly surprising if we consider how incomplete the picture still is for the whole sector *(see Chapter 3)*.

166 This discussion appears for the first time in an article by B. Schulte from 1982.

167 The measures aim to introduce free movement gradually over a seven-year period. The arrangements cover three phases (2+3+2 years).

labour mobility are often difficult to demarcate and can sometimes overlap each other. One option is to make a distinction between types of (temporary) labour mobility relying on the principle of the free movement of workers[168] versus those relying on the freedom to provide services. After all, there are important differences between how both are considered in social and labour law as well as in tax law (see also *Introduction - Figure 1.1*) (see also Spiegel et al., 2015), which has an impact on all partners involved (the 'mobile' worker/self-employed person, the employer of the 'mobile' worker, the Member State of origin, and the host Member State). For instance, public revenues of the Member State of origin and the host Member State will vary depending on whether labour mobility occurs under the free movement of workers or the freedom to provide services. In case of export of services, in most cases, social contributions for posted workers as well as personal income taxes will continue to be paid in the Member State of origin. This is in contrast to temporary labour mobility through the free movement of workers where social contributions (and personal income taxes) are paid in the host Member State. Moreover, also when calculating the domestic concept of employment as defined by the 'European system of national and regional accounts - ESA 2010' a distinction is actually made between both principles. Notably, based on the domestic concept, the place of establishment of the employer is decisive in determining which forms of labour mobility are or are not included in the employment of a country.[169] Consequently, labour mobility by the freedom to provide services is not taken into account when calculating the domestic employment of the host Member State. This methodological approach might be too narrow if we want to get a better idea of the total number of people who are working in a country at any given moment. This should be unrelated to whether or not the employer is established there. Therefore, we argued in previous research that the provision of cross-border services also needs to be taken into account when calculating total domestic employment of a country (see also De Wispelaere et al., 2020).[170] Three parameters are crucial in defining and measuring the forms of international labour mobility: *1)* the place of residence of the mobile person, *2)* the place of establishment of the employer, and *3)* the place of employment of the mobile person. In that respect, the combination of the place of residence of the mobile person with the place of establishment of the employer yields four groups (see UNECE, 2018):[171]

1. foreign workers resident in the host country who have an employment relationship with an employer established in the host country (i.e. the 'labour migrant');[172]
2. foreign workers resident in the host country who have an employment relationship with an employer not established in the host country (e.g. long-term posting);
3. non-resident foreign workers who have an employment relationship with an employer established in the host country (e.g. cross-border/frontier workers);
4. non-resident foreign workers who have an employment relationship with an employer not established in the host country (e.g. short-term posting).

There are, of course, other useful typologies available, distinguishing between the different forms of labour mobility. In *Figure 4.1*, the different types of labour mobility are subdivided according to whether there is a weak or strong connection with the country of origin and the (temporary) host country. By doing so, a number of forms of temporary labour mobility with a strong link with the country of origin but a weak link with the host country are bundled (posting, seasonal work, circular or temporary labour migration). These forms of labour mobility distinguish themselves from permanent labour migration (strong link with the host country and weak link with the country of origin),

168 And the freedom of establishment for self-employed persons.

169 In calculating 'domestic employment', the territory of a country/region and the established production unit (i.e. the 'resident employer') are taken as criteria for counting employment. Where a worker lives does not count. This concept differs from 'national employment' in that only the residents of a country are included in these labour statistics.

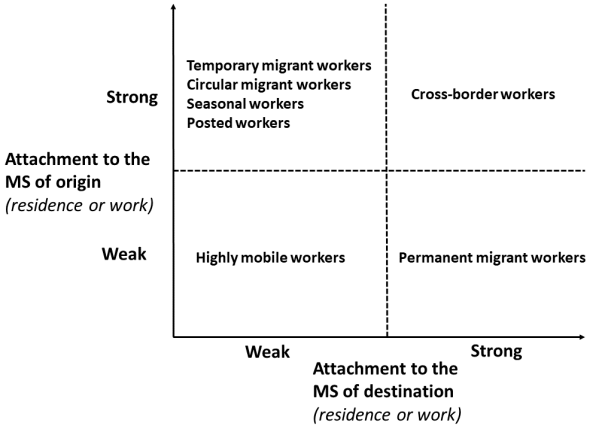
170 However, this presupposes that the 'net number of posted workers' (i.e. incoming posted persons - outgoing posted persons) is calculated as outgoing posted persons cannot be counted as domestic employment.

171 Only groups 1 and 3 are currently taken into account when calculating the domestic employment of the host country.

172 We can call them 'EU-movers' who move from one Member State to another.

from commuting (strong link with both the country of origin and the host country), and highly mobile labour mobility (weak link with both the country of origin and the host country).

Figure 4.1 Different patterns of labour mobility



Source De Wispelaere (2019)

Highly mobile workers in the EU are persons whose place of employment is not a particular Member State but the EU in general (De Wispelaere & Rocca, 2020). After all, the connection with the country of origin and the host country might be very weak. This is, of course, a theoretical approach as the group of workers who have weak ties with both the country origin and the host country may be very small. In that regard, it might be useful to look in particular to the connection with the country of (temporary) employment. For instance, to distinguish the different types of labour mobility from each other, Green et al. (2009) make a distinction according to how *frequently* that a person is mobile and the *length of stay* there. Both variables can be used when defining the concept 'highly 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 this 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 the same Member State but several Member States. In that respect, highly mobile workers (and self-employed persons) can be defined as 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. Note that other authors apply a slightly different definition of 'highly mobile worker'.[173] 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).[174] Rasnača (2020) states that these workers 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.[175] 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.

173 See also AG Opinion in Case C-16/18 Dobersberger ECLI:EU:C:2019:638, para 58: 'What differentiates such highly mobile workers from other mobile workers is that their place of work is, in reality, immaterial. It does not matter whether the means of transport on which they carry out their duties happens, at a specific point in time, to be in Hungary, Austria or Germany. Put differently, the entire logic of the country of origin (or posting) and the country of destination does not apply in such a situation, as there is no country of destination: the train departs in Budapest. It comes back to Budapest. If anything, the country of destination is Hungary itself. Country of origin and destination coincide.'

174 It can be argued that mere 'geographic mobility' is too generic a concept that should be deepened by including aspects such as duration and frequency of geographic mobility. Job mobility is indeed an interesting aspect that can be taken into account when discussing the concept for the live performance sector.

175 This is again a (too) broad demarcation of the concept 'labour mobility' (for instance, it also includes frontier workers).

Furthermore, the question arises whether this is also a solid definition in legal terms. Indeed, demarcating a category of persons implies the ability to identify a group of persons sharing the same characteristics which nobody else shares. This is not at all straightforward for the concept 'highly mobile worker'.

In particular, people who are employed in the international transport sector seem to fall into the group of 'highly mobile workers' (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 professional reasons. For instance, managers and staff of international companies, sale representatives, and researchers can also be highly mobile in the EU. This chapter only analyses the extent to which the live performance sector has a transnational dimension through the export of services. Moreover, it might be the case that the live performances sector does not show a transnational dimension to the same extent as the transport sector. Yet it might well be that a (significant) group of artists and companies is frequently active abroad. The question then arises whether this group can also be considered highly mobile workers? Here, we will especially look at whether they move to several countries, how often they do so and how long they stay there.

4.1.2 Application of the concept of 'highly mobile worker' to the live performance sector

Over the past two decades, international mobility of artists and culture professionals has gained a significant, but variable, position on the EU's agenda on cultural affairs, as a result of, on the one hand, the demands of professionals and representative organisations and, on the other, the relevance of the issue to EU policy priorities in culture and other areas. This has been reflected in several policy documents (e.g. the 2007 and 2018 European Agendas for Culture, and the successive Council Work Plans, among others) and recommendations and reports produced by professional networks and other stakeholders. Over the years, there has been a progressive understanding that mobility is not exceptional, but something ordinary in the professional trajectory of artists and culture professionals (Baltà et al., 2019). The increased importance of the international mobility of artists and culture professionals within the EU led to the notion of 'cultural mobility' (ERICarts Institute, 2008).

'Cultural mobility' can be defined as the temporary cross-border movement of artists and other culture professionals. This concept is therefore closely related to that of the 'highly mobile worker'. Highly mobile workers in the live performance sector are characterised by a high number of cross-border movements *(frequency)*, the execution of various short-term assignments in different countries *(duration)*, often in an atypical employment situation *(status)*. 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 adds an additional dimension to the basic concept as defined above, and thus goes beyond the purely cross-border aspect of the concept.[176] 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.

4.2 The transnational dimension of the live performance sector

The transnational dimension of the live performance sector can be reflected by two aspects: first, by the temporary cross-border movements of artists and companies, and second, when companies active in this sector set up a subsidiary abroad. Sectors such as road freight transport show a strong transnational dimension for both aspects. It remains to be seen whether this is also the case for the live performance.

The main focus will be on the extent to which artists and companies in the live performance sector are (temporarily) active abroad. It is estimated that in 2019, some 1.6 million posted workers and self-

176 As also seen in van Ooij's definition of a 'highly mobile worker' (2020).

employed persons were temporarily providing services in an EU/EFTA country other than that where they are normally employed, and that some 1.2 million persons were professionally active in several Member States (see *Introduction - Table 1.1*). The question arises as to what extent mobile workers in the live performance sector are part of both groups. This can be done by analysing data on the export and import of services *(Section 4.2.2)* as well as by the data that become available by applying for a Portable Document A1 in the 'sending country' and by making a prior notification in the 'receiving country' *(Section 4.2.3)*.

4.2.1 Foreign shareholders

To get an idea of the cross-border business structure of companies active in the live performance sector, an analysis of foreign majority shareholders is carried out using the Orbis database. In Orbis, having a foreign majority shareholder is defined by the concept of the 'Ultimate Owner', meaning a shareholder who holds a minimum of 51% in the company.

Table 4.1 looks at the number of active live performance companies with a foreign majority shareholder based on the NACE 90 category - 'Creative, arts and entertainment activities' within the EU-27 Member States and the UK. As seen in *Section 2.1*, this NACE 90 category contains all companies related to the production and promotion of, and participation in, live performances, events or exhibits intended for public viewing; the provision of artistic, creative, or technical skills for the production of artistic products and live performances and can be seen as the live performance sector in the broad sense. In the EU-27 and the United Kingdom, there are some 753,000 companies active under NACE 90 category - 'Creative, arts and entertainment activities'. Around 697,000 of them are established in the EU-27, whereas 56,000 are established in the United Kingdom.

When looking at companies with a foreign majority shareholder, Orbis gives the possibility to include or exclude companies of which the location of the shareholder is not available. This means that column B of *Table 4.1* provides the upper bound of companies with a foreign shareholder, as all companies of which the location of the shareholder was unknown, are included. On the other hand, column C (excl. n.a.) of *Table 4.1* gives the lower bound of companies with a foreign shareholder, as all companies of which the location of the shareholder is unknown, are considered to be domestic shareholders. Thus, the 'real' number of companies with a foreign majority shareholder in the live performance sector lies between 4,412 and 21,459 companies, or 0.6% and 2.9% of all companies respectively.

This shows that there is a considerable group of companies with a 'foreign' shareholder for which the location is not available. This proportion is analysed in the fifth column ((B-C)/B) to get an idea of the magnitude of this problem in each Member State. In many Member States, the location of the foreign shareholder is not available for more than half of the companies. This is the case for Belgium, Bulgaria, Estonia, Ireland, Spain, France, Croatia, Latvia, Malta, Poland, Portugal, Romania, Slovenia, Slovakia, Finland and the United Kingdom. As a result, only looking at companies with a foreign majority shareholder excluding the ones for which the location is unknown, would lead to a serious underestimation of the true extent of companies with a foreign majority shareholder. Therefore, to get an estimation of the 'real' share of companies with a foreign majority shareholder, the number of companies of which the location of the foreign shareholder is not available should also be included.

In a first step, the total number of companies with a foreign shareholder excluding the unknown ones was divided by the total number of companies minus the number of companies with a foreign shareholder of which the location of the shareholder is not available. This represents the share of companies with foreign shareholders of which it is certain that the shareholder is actually foreign. Second, the number of companies for which the location of the shareholder is unknown was multiplied by this share. Third, the number of companies with a foreign shareholder excluding the ones of which the location of the shareholder was not available was increased with the outcome of the previous steps. A concrete example might make this calculation easier to understand (*Figure 4.2*,

example for Belgium). These calculations were made for each country and can be found in the sixth column (estimation of foreign majority shareholders) of *Table 4.1*.

Figure 4.2 **Calculation of the estimation of the number of companies with a foreign majority shareholder, Belgium**

Estimation number of companies with a foreign shareholder
= step 3 + [step 2 * step 1]
= total number of companies with a foreign shareholders excl. country n.a. +
[number of companies with a foreign shareholders of which the location is unknown *
(total number of companies excl. country n.a. / (total number of companies – number of companies with country n.a.))]
= 66 + [(138 – 66) * (66 / (30,830 – (138 – 66))]
= 66 + [72 * (66 / (30,830 – (72)))]
= 66.15

Source Own calculations based on Orbis [Data extracted on 8 December 2020]

As a result, it is estimated that there are 4,514 companies in the live performance sector in the EU-27 and the United Kingdom with a foreign majority shareholder located anywhere in the world. Particularly striking is the significant overrepresentation of companies out of the United Kingdom among the companies with foreign majority shareholders: 3,704 of the 4,514 companies in the EU-27 and the UK are located in the United Kingdom, corresponding with more than 82%.

For each Member State, the estimated number of companies with a foreign majority shareholder is compared to the total number of companies in the seventh column (D/A) (see also *Figure 4.3*). In the entire EU-27 and UK countries, it can be seen that only 0.6% of the companies in the live performance sector have a foreign majority shareholder. Certain Member States even have almost no companies with a foreign majority shareholder, for instance in France (0.0%), Sweden (0.0%), Bulgaria (0.1%), Hungary (0.1%), the Netherlands (0.1%), Poland (0.1%), and Lithuania (0.1%). In this sense, in only 11 of the 28 countries do companies with foreign majority shareholders represent more than 1% of the total companies. On the other hand, certain Member States have a relatively high share of companies with a foreign majority shareholder. This is particularly the case in Malta (33.3 % of all companies in the live performance sector) and Luxembourg (11.8%).

It is also possible to look at the distribution of the total number of EU-27 + UK companies with a foreign majority shareholder, as is done in the eighth column which calculates the column percentage. Again, it is clear that the large majority of EU-27 + UK companies with a foreign majority shareholder is located in the United Kingdom (82.1%). Consequently, when taking the United Kingdom out of the equation, the EU-27 countries with most companies with foreign majority shareholders are Romania (20.1%), Slovakia (17.5%), and Germany (13.7%).

In the analysis that follows, the exact location of the foreign majority shareholder is looked at in more detail. However, this can of course only be done for companies for which the location of the foreign shareholder is known (column C). Therefore, the sum of the breakdown by location (located in EU-27 + UK and extra-EU + UK; columns 9 & 10) equals the number of companies with a foreign majority shareholder excluding the ones for which the location was not available (column C).

A distinction is made between foreign majority shareholders located in the EU-27 + UK (column 9) and extra-EU-27 + UK (column 10). The final column shows the share of companies with a foreign majority shareholder located outside the EU-27 + UK (column E/C). In the EU-27 + UK, 44.1% of all live performance companies with a foreign majority shareholder have a shareholder located outside the EU-27 + UK. This makes it clear that in general, a significant part of the companies with a foreign majority shareholder has a shareholder located outside the EU-27 + UK. If the UK is excluded, 39.3% of the companies with foreign majority shareholders within the EU-27 Member States still have majority shareholders outside the EU-27 + UK. In five countries, even more than half (50%) of the companies with a foreign majority shareholder have a shareholder located outside the EU-27 + UK (Lithuania: 100%, Latvia: 68.2%, Germany: 61.3%, the Netherlands: 54.9%, and Finland: 54.8%).

Table 4.1 Companies active under NACE 90 'Creative, arts and entertainment activities' with a foreign majority shareholder, EU-27 + UK

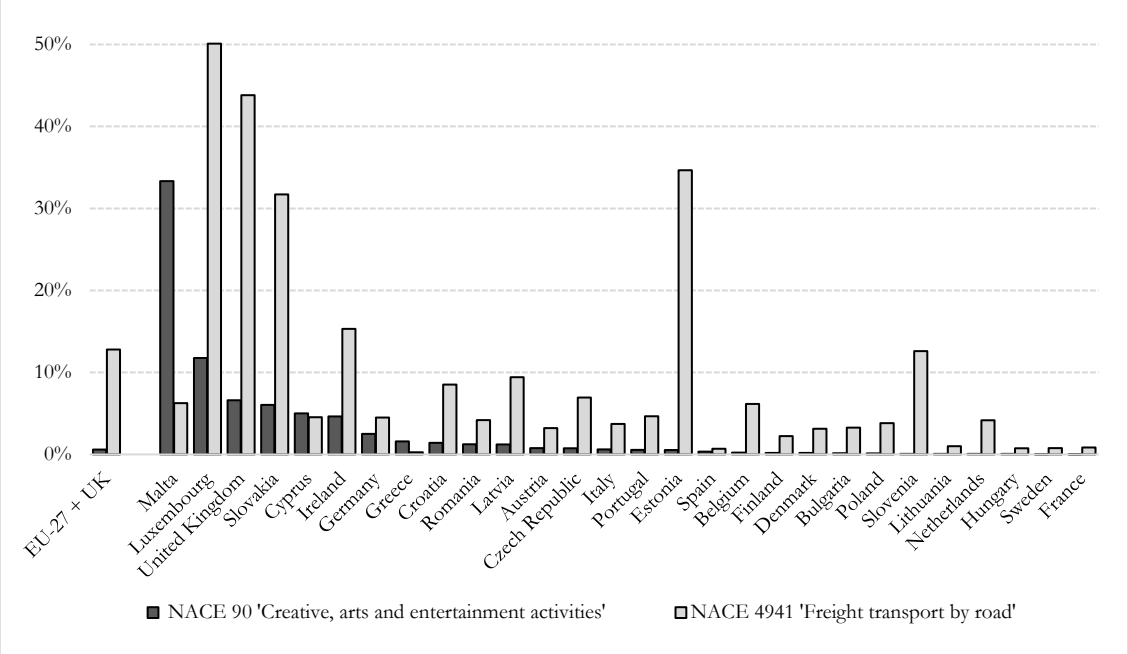
	Number of companies (A)	Foreign majority shareholder (incl. n.a.) (B)	Foreign majority shareholder (excl. n.a.) (C)	Share of location n.a. ((B-C)/B) in %	Estimation foreign majority shareholder (C + ((B-C)* C/(A-(B-C)) (D)	Share foreign majority shareholder (D/A) in %	Column % foreign majority shareholder in %	Foreign majority shareholder EU-27 + UK	Foreign majority shareholder extra EU-27 + UK (E)	Share of majority shareholder extra-EU (E/C) in %
Belgium	30,830	138	66	52.2	66	0.2	1.5	45	21	31.8
Bulgaria	15,853	125	23	81.6	23	0.1	0.5	14	9	39.1
Czech Republic	7,527	62	57	8.1	57	0.8	1.3	32	25	43.9
Denmark	13,239	30	25	16.7	25	0.2	0.6	18	7	28.0
Germany	4,429	117	111	5.1	111	2.5	2.5	43	68	61.3
Estonia	7,437	4,054	18	99.6	39	0.5	0.9	15	3	16.7
Ireland	551	263	14	94.7	26	4.6	0.6	12	2	14.3
Greece	64	2	1	50.0	1	1.6	0.0	1	0	0.0
Spain	12,699	1,578	37	97.7	42	0.3	0.9	24	13	35.1
France	331,707	806	54	93.3	54	0.0	1.2	33	21	38.9
Croatia	1,509	119	20	83.2	21	1.4	0.5	13	7	35.0
Italy	12,410	86	75	12.8	75	0.6	1.7	39	36	48.0
Cyprus	162	10	8	20.0	8	5.0	0.2	4	4	50.0
Latvia	1,914	137	22	83.9	23	1.2	0.5	7	15	68.2
Lithuania	1,369	1	1	0.0	1	0.1	0.0	0	1	100.0
Luxembourg	85	10	10	0.0	10	11.8	0.2	9	1	10.0
Hungary	17,060	17	10	41.2	10	0.1	0.2	6	4	40.0
Malta	19	11	4	63.6	6	33.3	0.1	3	1	25.0
Netherlands	118,263	126	71	43.7	71	0.1	1.6	32	39	54.9
Austria	1,180	9	9	0.0	9	0.8	0.2	6	3	33.3
Poland	8,535	99	10	89.9	10	0.1	0.2	8	2	20.0
Portugal	4,919	1,845	17	99.1	27	0.5	0.6	12	5	29.4
Romania	13,230	331	161	51.4	163	1.2	3.6	101	60	37.3
Slovenia	6,835	2,762	3	99.9	5	0.1	0.1	3	0	0.0
Slovakia	2,358	831	98	88.2	142	6.0	3.2	85	13	13.3
Finland	16,500	388	31	92.0	32	0.2	0.7	14	17	54.8
Sweden	65,847	21	19	9.5	19	0.0	0.4	12	7	36.8
United Kingdom	56,092	7,481	3,437	54.1	3,704	6.6	82.1	1,874	1,563	45.5
Total (EU-27 + UK)	**752,623**	**21,459**	**4,412**	**79.4**	**4,514**	**0.6**	**100.0**	**2,465**	**1,947**	**44.1**

Source Own elaborations based on Orbis [Data extracted on 8 December 2020]

On the basis of column 7 in the above table, we already observed that only 0.6% of the companies in the EU-27 + UK have a foreign majority shareholder. In order to have a better idea of the proportions of foreign majority shareholders among the companies in live performance sector (based on the NACE 90 code) in the EU-27 and the UK, we compare these ratios with the estimated share of foreign majority shareholders among companies in another sector, i.e. freight transport by road (NACE 4941). The road transport sector can be considered as one of the key sectors of activity in the EU. *Figure 4.3* compares the estimated share of companies with a foreign majority shareholder for both sectors (NACE 90 'Creative, arts and entertainment activities' & NACE 4941 'Freight transport by road') per country for the EU-27 + UK countries.

In general, it can be observed that the proportion of companies with a foreign majority shareholding is considerably higher in the transport sector (12.8%) than in the live performance sector (0.6%). The substantial difference between the two sectors is also reflected in the country-by-country analysis. With the exception of only three countries (Malta, Cyprus and Greece), the proportion of companies with a foreign majority shareholder is (significantly) higher in the road transport sector (based on NACE 4941) compared to the live performance sector (based on NACE 90). While in as many as 17 of the 28 countries, the companies in the live performance sector (NACE 90) with a foreign majority shareholder represent less than 1% of all companies, this is only the case in five countries for the companies in the road transport sector.

Figure 4.3 **Estimation of the share of companies with a foreign majority shareholder in total number of companies active in NACE 90 'Creative, arts and entertainment activities' and NACE 4941 'Freight transport by road', EU-27+ UK**



Source Own elaborations based on Orbis [Data extracted on 8 December 2020]

The above figure reaffirms what we had previously found on the basis of *Table 4.1*, namely that the share of companies with a foreign majority shareholder is very limited in the live performance sector.

4.2.2 Export and import of artistic related services

The Balance of Payments data (BoP) allow us to look at the international trade in services. It is a statistical statement that summarises, over a given period of time, all the transactions of an economy with the rest of the world *(cf. Section 2.3.2.3)*. The balance of payments records all economic transactions undertaken between the residents and non-residents of an economy during a given period. It thus provides information on the total value of credits (or exports) and debits (or imports) for each

BoP item and on the net result or 'balance' (credits minus debits) of the transactions with each partner (IMF, 2009). More specifically, we are able to analyse the export, the import, and the balance of services related to the live performance sector.

However, we are again confronted with the lack of a feasible category covering the live performance sector in the BoP database. The BoP category that approaches the sector best is 'Artistic related services' (SK12). However, hardly any data are available for this category (only for 5 of the 28 countries of the EU-27 + UK).[177]

What do we learn from the data available for Bulgaria, the Czech Republic, Croatia, Lithuania and Finland (reference year 2018) *(Table 4.2)*? In all these Member States, the export of 'artistic related services' is at a higher level than the import of it. The 'artistic related services' of these Member States are mainly offered in the United Kingdom. Only Finland's artistic related services are mainly provided in Sweden. Furthermore, for Croatia and Lithuania the amount of imported artistic related services from outside the EU-28 is higher than that from within the EU-28. Finally, we note that the export and import of 'artistic related services' constitutes only a very small part of the total volume of services from and to these Member States. How much the export of services accounts for the total turnover created in the live performance sector is not known.[178] In that respect, data from 'Culture Satellite Accounts'[179] may complement above results (ESSnet-Culture, 2012), although such a satellite account exists only in a few Member States. A good example is the Netherlands (Statistics Netherlands, 2015).[180]

177 An alternative option is to rely on a broader category for the BoP data. The category 'Audiovisual and related services' (SK1) covers services associated with the production of motion pictures on films or video tape, radio and television programs, and musical recordings and artistic related services. Especially this latter subcategory of artistic related services is relevant in the line of this research. This option was discarded after consultation of the data.

178 For Belgium, the export of services AND goods accounts for some 5% of the total value of goods and services purchased (Pacolet & Van Normelingen, 2016).

179 This is a statistical system which aims at describing the economic contribution of culture.

180 In the Netherlands, the share of export of 'performing arts' accounts for some 8% of the total value of goods and services (2015 figures).

Table 4.2 Import and export of 'Artistic related services' in Bulgaria, Czech Republic, Croatia, Lithuania and Finland, € million, 2018

	Credit					Debit					Balance				
	Bulgaria	Czech Republic	Croatia	Lithuania	Finland	Bulgaria	Czech Republic	Croatia	Lithuania	Finland	Bulgaria	Czech Republic	Croatia	Lithuania	Finland
Belgium	0.0	0.0	0.0	0.0		0.1	0.0	0.0	0.0	0.0	-0.1	0.0	0.0	0.0	0.0
Bulgaria	0.0	0.0	0.0	0.0		0.0	0.0	1.3	0.0		0.0	0.0	-1.3	0.0	
Czech Republic	0.0	0.0	0.0	0.0		0.0	0.0	0.1	0.0		0.0	0.0	-0.1	0.0	
Denmark	0.0	0.0	0.0			0.0	0.0	0.0		0.0	0.0	0.0	0.0		0.0
Germany	0.0	0.0	1.6		0.0	0.1	0.9	0.9	0.1	0.0	-0.1	-0.8	0.8		0.0
Estonia	0.0	0.0	0.0	0.0		0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Ireland	0.0	0.0	0.0			0.0	0.0	0.0			0.0	0.0	0.0		
Greece	0.0	0.0	0.0	0.0		0.0	0.0	0.0	0.0		0.0	0.0	0.0	0.0	
Spain	0.0	0.0	0.1	0.0		0.0	0.2	0.0	0.0	0.0	0.0	-0.1	0.0	0.0	0.0
France	0.0	0.0	0.1			0.1	0.3	0.3		0.0	0.0	-0.3	-0.1		0.0
Croatia	0.0	0.0	0.0	0.0		0.0	0.0	0.0	0.0		0.0	0.0	0.0	0.0	
Italy	0.0	0.0	0.1	0.0		0.0	0.1	0.1		0.0	0.0	-0.1	0.0		0.0
Cyprus	0.0	0.0	0.0			0.0	0.0	0.0	0.0		0.0	0.0	0.0		
Latvia	0.0	0.0	0.0	0.3		0.0	0.1	0.0		0.0	0.0	-0.1	0.0		0.0
Lithuania	0.0	0.0	0.0	0.0		0.0	0.0	0.0	0.0		0.0	0.0	0.0	0.0	
Luxembourg	0.0	0.0	0.0	0.0		0.0	0.0	0.1	0.0	0.0	0.0	0.0	-0.1	0.0	0.0
Hungary	0.0	0.0	0.1			0.0	0.0	1.1		0.0	0.0	0.0	-0.9		0.0
Malta	0.0	0.0	0.1	0.0		0.0	0.0	0.1			0.0	0.0	0.0		
Netherlands	0.0	0.0	0.0	0.0		0.0	0.3	1.2	0.0	0.0	0.0	-0.3	-1.2	0.0	0.0
Austria	0.0	0.0	0.0	0.0		0.0	0.2	0.1	0.0	0.0	0.0	-0.2	-0.1	0.0	0.0
Poland	0.0	0.0	0.0			0.0	0.1	0.0			0.0	-0.1	0.0		
Portugal	0.0	0.0	0.0	0.0		0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Romania	0.0	0.0	0.0	0.0		0.0	0.0	1.9	0.0		0.0	0.0	-1.9	0.0	
Slovenia	0.0	0.0	1.5	0.0		0.0	0.0	1.2	0.0		0.0	0.0	0.3	0.0	
Slovakia	0.0	0.2	0.0	0.0		0.0	0.4	0.0	0.0		0.0	-0.2	0.0	0.0	
Finland	0.0	0.0	0.0	0.0		0.0	0.0	0.0	0.0		0.0	0.0	0.0	0.0	
Sweden	0.0	0.1	0.1		0.0	0.0	0.0	0.0		5.0	0.0	0.0	0.1		-5.0
United Kingdom	0.0	0.0	0.4	0.0	0.0	0.4	0.9	4.6	0.4	1.0	-0.4	-0.9	-4.2	-0.4	-1.0
EU-28	0.1	0.4	4.6	0.5	1.0	0.8	3.5	13.6	1.4	8.0	-0.8	-3.2	-9.0	-1.0	-7.0
% total exported/imported services	0.00%	0.00%	0.05%	0.01%	0.01%	0.02%	0.02%	0.59%	0.04%	0.04%					
Extra-EU28	0.1	0.2	8.0	1.8		0.2	1.9	10.1	0.7	0.0	-0.1	-1.7	-2.3	1.0	0.0

Source Eurostat [bop_its6_det]

In addition to these macro data, micro-data available in Orbis are used to estimate the volume of exports of services and goods by companies 'performing arts' (NACE 90.01). This is done by using the variables 'export revenue' (i.e. turnover abroad) and 'Export revenue/Operating revenue' (turnover abroad is compared to the total turnover). However, such data are only available for a limited number of Member States (Estonia, France, Croatia, Hungary and Slovenia) and companies (n: 1,610).

The average figures for these countries indicate a number of interesting observations *(Table 4.3)*.[181] A large group of companies do not appear to export services abroad (the average median is equal to zero). This is in contrast to another interesting finding: a group of companies almost exclusively exports services and goods abroad (some 20% of the companies performing arts in these five Member States). On average (weighted figure), about 5% of the services and goods of the companies performing arts are exported abroad.

Table 4.3 Distribution of exporting organisations by share of performances abroad in relation to total performances (absolute number & %)

	Number of companies	Median (in %)	Weighted average (in %)	Unweighted average (in %)	% >75
Estonia	54	17	24	33	19
France	1180	0	4	3	1
Croatia	84	0	16	6	5
Hungary	12	0	1	1	0
Slovenia	277	100	99	99	99
Total	1,610	0	5	21	19

Source Orbis database

4.2.3 Temporary cross-border employment in the live performance sector: data from the Portable Documents A1 issued and the prior notifications received

The data on the export and import of 'artistic related services' can be supplemented with the data that become available when artists temporarily provide services abroad, both in the sending Member State (by applying for a Portable Document A1) and in the receiving country (by making a prior notification).

The first source we consider is data from the PDs A1. In order to prove that a person is subject to a social security system a PD A1 is issued by the Member State whose legislation remains applicable. The PD A1 data thus concern data from a sending perspective, because it is the sending Member State that issues these forms when workers go abroad.

Secondly, data from the prior notification tools will be analysed. These tools are set up in the host Member States and include data on posting undertakings and their incoming workers. Data collected from the prior notifications concern data from a receiving perspective because it is the host Member State that asks information about incoming posted workers and undertakings *(cf. Section 2.3.2.3)*.

It should be noted that these data sources only provide an indicative picture of the phenomenon of intra-EU posting, because of several limitations of the data. 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 take place. Subsequently, after verification of several conditions, a PD A1 will be provided by the competent authorities. In practice, authorities are not always informed about these transnational activities. Consequently, there will be a discrepancy between the number of PDs A1 issued and the actual number of persons providing services abroad. In that respect, the number of PDs A1 issued and its evolution may depend on the number of inspections performed by the enforcement bodies in the host Member State, to what

181 Note that there are some important differences in the results for these five Member States.

extent host Member States impose administrative fines in case of failure to show a PD A1, but also to what extent posting undertakings are aware of the application procedures in the Member State of origin. Data from the prior notifications also have restraints, as the content of the notification tools may vary considerably between Member States. In most Member States, the obligation to register only applies to posted workers and not to self-employed.

Moreover, for various reasons, the two databases are not fully comparable. The notion of a 'posted' worker/person is used both in the Coordination Regulations (determining the applicable social security regime of the posted worker) and the Posting of Workers Directive (determining the terms and conditions of employment of the posted worker). However, their personal scope is not the same. Indeed, persons might be 'posted' under the Basic Regulation but not in the meaning of the Posting of Workers Directive. For instance, self-employed persons falling under Article 12 (2) of the Basic Regulation are not covered by the Posting of Workers Directive. In addition, workers who are sent temporarily to work in another Member State, but do not provide services there, are not covered by the Posting of Workers Directive. This is the case, for example, for workers on business trips (when no service is provided), attending conferences, meetings, fairs, following training, etc. In contrast, persons might also be posted under the Posting of Workers Directive and not under the Basic Regulation. For instance, workers who pursue an activity in two or more Member States (Article 13 of the Basic Regulation) may fall under the terms and conditions of the Posting of Workers Directive. Furthermore, according to the EU rules on social security coordination, workers who at the outset will be posted for a period of longer than two years fall outside the posting provisions of the Coordination Regulations, and in such case they need to be socially insured in the host Member State, unless a specific agreement under Article 16 of the Basic Regulation is concluded.

4.2.3.1 Portable Documents A1

The PD 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). Hence, the analysis of these PDs A1 can be useful to estimate the size of labour mobility through employers established in a Member State other than the (temporary) Member State of employment. Unlike for many other sectors, data related to the issuance of these PDs A1 are not publicly available for activities related to the live performance sector. In order to obtain as much data as possible, we sent an online questionnaire (cf. *Section 2.3.2.2*) to all Member States to collect data on the number of persons employed in the live performance sector (NACE code 90) with a PD A1 issued by the competent Member State for reference year 2019. Although we only received partial data for six Member States (Belgium, Estonia, Luxembourg, Poland, Portugal and Slovakia),[182] they can give us important insights regarding the number of PDs A1 issued, a breakdown by receiving Member State, by professional status and by duration. In addition, these data can be compared with the total number of PDs A1 issued under Articles 12 and 13 BR in the EU-27, UK and EFTA. Nonetheless, it should be emphasised that these are only tentative results given the limited number of reporting Member States.

In 2019, some seven out of ten PDs A1 granted by the competent authorities in the EU-27, UK, and EFTA were issued according to Article 12 (some 3.2 million PDs A1). In addition, approximately 1.4 million PDs A1 were issued according to Article 13 and finally only 80,000 PDs A1 to other categories (of which some 19,000 PDs A1 issued under Article 16). The main issuing Member States were Germany and Poland. Germany provided nearly 1.8 million PDs A1 in 2019, mostly according to Article 12 and Poland issued some 650,000 PDs A1, mostly according to Article 13. As is illustrated below, the profile for the live performance differs from that known for the total number of PDs A1 issued. It is striking, for instance, how few PDs A1 have been issued by Poland to persons employed in the live performance sector (668 PDs A1). This gives the impression that there might

182 Slovakia: only totals are reported.

be a (huge) discrepancy between the number of PDs A1 issued and the actual number of persons providing services abroad.

On average for the five reporting Member States, some nine out of ten PDs A1 granted to employers/workers active in the live performance sector are issued according to Article 12. For four of the five reporting Member States for which we have data, the number of PDs A1 issued under Article 12 is higher than the number of PDs A1 issued under Article 13. Only for Portugal we see a higher number of PDs A1 issued under Article 13. Consequently, below figures give the impression that if a PD A1 is granted to an employer or self-employed person active in the live performance sector, this is mainly for the purpose of temporarily providing services in one particular Member State (according to Article 12) rather than for the purpose of providing activities in several Member States for a longer period (according to Article 13). These results show, although to be considered tentative, that we cannot simply equate the profile of the transnational dimension of the live performance sector with that of the road freight sector. While for the road freight sector, PDs A1 are mainly issued according to Article 13,[183] this is not the case for the live performance sector (based on the collected empirical evidence). This observation raises the question as to why this is the case. Here we should look at the procedures for applying Article 13 *(see Chapter 5)*. In order to apply Article 13, it must be possible to ascertain in advance - by virtue of foreseeability or predictability in the next 12 months - not only when and for how long a work activity takes place, but also where. However, mobile artists and companies certainly do not always know in advance (and in detail) where they will perform in the next 12 months. Consequently, the link between the concept of 'highly mobile worker' and Article 13 is probably not as strong as originally assumed.

Another relevant distinction that should be made is between the number of PDs A1 issued to employees versus those issued to the self-employed. In general, on average 5 to 7% of the persons covered by Article 12 are posted self-employed persons. Given the high number of self-employed persons in the live performance sector, it is expected that this will also be reflected in the number of PDs A1 issued under Article 12. However, the number of PDs A1 issued to self-employed persons under Article 12 is very low in the Member States for which these data are available (Poland and Estonia), and thus also the proportion of the total number of PDs A1 issued under Article 12. However, it is striking that the majority of PDs A1 issued by Portugal are granted to self-employed persons working in several Member States.

183 For instance, some four out of ten PDs A1 issued according to Article 13 were provided to persons employed in the road freight sector.

Table 4.4 Number of PDs A1 issued to persons employed in the live performance sector, 2019

By category	Belgium		Estonia		Luxembourg		Poland		Portugal		Total
	Number	Column %	Number	Column %	Number	Column %	Number	Column %	Number	Column %	Column
Posted employed person	11,367	95	145	63	352	78	371	56	38	13	90
Posted self-employed person	n.a.	n.a.	11	5	n.a.	n.a.	10	1	0	0	0
Employed, working in two or more States	555	5	65	28	99	22	256	38	25	8	7
Self-employed, working in two or more States	n.a.	n.a.	9	4	n.a.	n.a.	30	4	240	79	2
Working as an employed person and as a self-employed person in different States	n.a.	n.a.	2	1	n.a.	n.a.	1	0	0	0	0
Working as a civil servant in one State and as an employed/self-employed person in one or more other States	n.a.	n.a.	0	0	n.a.	n.a.	0	0	0	0	0
Civil servant	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.
Contract staff	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.
Other categories	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.
Total	**11,922**	**100**	**232**	**100**	**451**	**100**	**668**	**100**	**303**	**100**	**100**

* n.a.: not available.

Source PD A1 Questionnaire on the live performance sector

Table 4.5 shows the total number of PDs A1 issued under Articles 12 and 13 BR as well as the number and share issued specifically for activities under NACE 90 'Creative, arts and entertainment activities' in 2019.

Some 15% of the total number of PDs A1 issued according to Article 12 by the competent authority in Belgium is issued for activities related to the live performance sector (based on NACE 90). This is in contrast with the relatively low number of PDs A1 issued by the other reporting Member States (with shares between 0.1% and 2.1%). Regarding the issuance of PDs A1 under Article 13, we can observe relatively low numbers for all Member States. Accordingly, most reporting Member States show low shares of PDs A1s issued for the live performance sector. These figures can be compared with the share of employment in the live performance sector in the total workforce (*see Chapter 3 – Table 3.5)*. The employment in the live performance sector corresponds to some 0.5% of the total workforce in the EU-27. The results show that in most Member States the share of the live performance sector in total temporary cross-border employment (measured by the number of PDs A1 issued) is higher than the importance of the sector in the total economy in terms of employment (BE: 0.8% vs 8.9%; EE: 0.8% vs 1.0%; LU: 0.2% vs 0.5%; PT: 0.3% vs 0.4%; SK: 0.4% vs 0.5%). Only for Poland this percentage is lower (0.5% vs 0.1%). This confirms our assumption that the live performance sector has a more important transnational dimension compared to many other business sectors (at least in the reporting Member States).

Table 4.5 Number of PDs A1 issued according to Articles 12 and art 13 of Regulation 883/2004 for activities in the NACE 90 sector and total activities in all sectors, 2019

	Article 12			Article 13			Total (Article 12 & 13)		
	PDs A1 for NACE 90	Total PDs A1 issued	Share of NACE 90 (in %)	PDs A1 for NACE 90	Total PDs A1 issued	Share of NACE 90 (in %)	PDs A1 for NACE 90	Total PDs A1 issued	Share of NACE 90 (in %)
Belgium	11,367	77,865	14.6	555	55,737	1.0	11,922	133,602	8.9
Estonia	156	7,469	2.1	76	15,591	0.5	232	23,060	1.0
Luxembourg	352	76,778	0.5	99	15,572	0.6	451	92,350	0.5
Poland	381	261,246	0.1	287	386,786	0.1	668	648,032	0.1
Portugal	38	59,253	0.1	265	18,136	1.5	303	77,389	0.4
Slovakia							696	127,706	0.5
Total (weighted)	**12,294**	**482,611**	**2.5**	**1,282**	**491,822**	**0.3**	**14,272**	**1,102,139**	**1.4**

Source PD A1 Questionnaire on the live performance sector; De Wispelaere et al. (2021)

The bottom row in the table below shows the number of PDs A1 issued relative to the total employment number in the live performance sector within the reporting Member States. The results strongly differ among the reporting Member States. Belgium (40%) has a high share of PDs A1 issued compared to the employment in the live performance sector, whereas Poland (0.9%), Portugal (2.3%), and Estonia (4.3%) have rather low proportions. On average, it can be estimated that one out of ten of the persons employed in the reporting Member States was posted or active in two or more Member States. This average is much higher compared to the share of PDs A1 in total employment in these Member States (see last column).

Although these figures give a first idea of the relative volume, it is certainly not the best indicator to measure the relative importance of cross-border services in total employment, as in that case the number of 'forms' issued are compared to the number of employed persons. In that regard, it is better to compare the total number of employed/self-employed persons with the number of individual persons involved, as several PDs A1 can (and will) be issued to the same person during the reference year. However, figures on the number of individuals active in the live performance sector and posted to another Member State are only available for Belgium. Some 13% of total number of employees providing creative, arts and entertainment activities in Belgium were posted to another Member State in 2018. This percentage is probably a better estimate of the actual volume of postings from artists

in the Belgian live performance sector. Moreover, by comparing the number of PDs A1 issued with the number of individuals, it is possible to get an idea of how often a person active in the Belgian live performance sector is posted abroad. On average in the EU/EFTA, a person falling under Article 12 was sent abroad 1.7 times in 2019. For the Belgian live performance, however, this figure is significantly higher, notably a person was posted abroad about 3.5 times.

Table 4.6 Share of the number of PDs A1 issued in total employment of the live performance sector, 2019

	Number of PDs A1 issued for the live performance sector (A)	Total employment in the live performance sector (B)	% share PDs A1 in total employment in the live performance sector (A/B) (in %)	% share PDs A1 in total work force (in %)
Belgium	119,22	29,800	40.0	3.1
Estonia	232	5,400	4.3	3.5
Poland	668	75,700	0.9	4.0
Portugal	303	13,200	2.3	1.6
Slovakia	696	10,000	7.0	5.2
Total	**13,821**	**134,100**	**10.3**	**3.5**

Source PD A1 Questionnaire on the live performance sector; Eurostat; De Wispelaere et al. (2021)

Table 4.7 gives an overview of the duration of activities pursued under Articles 12 and 13 in the live performance sector for the Member States for which data were available in 2019. The period persons can pursue an activity under Article 12 is set at a maximum of 24 months according to Article 12. However, this does not necessarily imply that this is also the real duration. In practice, the average duration amounts to some three months per posting or some 6 months per year. Under Article 13, no maximum period for the provision of services in two or more Member States is set. The average duration persons pursue an activity in two or more Member States was almost 312 days per PD A1 in 2019 and even a complete year per individual person.

Figures from the reporting Member States show that for the live performance sector the majority (58%) of the transnational activities on the basis of Article 12 has a duration of between 1 and 8 days. The country-level analysis shows that this is also the case in Belgium (59%) and Estonia (71%), where the vast majority of activities under Article 12 have this duration. In Luxembourg, on the other hand, almost all activities pursued under Article 12 in 2019 lasted only 1 day. Activities in the live performance sector carried out under Article 13 have, on average, a longer duration. For the total of the reporting Member States, two thirds (66%) of the activities pursued in the live performance sector lasted longer than two weeks. The analysis per country shows that in Luxembourg, almost all activities (99%) pursued in accordance with Article 13 have a duration of 15 to 31 days. In Estonia, in contrast, almost three quarters of the activities (74%) pursued under Article 13 last less than 8 days.

Above tentative results show that the posting period in the live performance sector is often limited to a few days. These results are in contrast to the average posting period of approximately three months.

Table 4.7 Number of PDs A1 issued according to Articles 12 and art 13 of Regulation 883/2004 for activities in the NACE 90 sector by duration, 2019

	Belgium				Estonia				Luxembourg				Total			
	Under Article 12 BR		Under Article 13 BR		Under Article 12 BR		Under Article 13 BR		Under Article 12 BR		Under Article 13 BR		Under Article 12 BR		Under Article 13 BR	
	Number	%	Number	%	Number	%	Number	%	Number	%	Number	%	Number	%	Number	%
1 day	3,158	28	41	7	40	26	3	4	345	98		0	3,543	29.8	44	6.0
More than 1 day and less than 8 days	6,713	59	124	22	110	71	53	70	2	1		0	6,825	57.5	177	24.2
Between 8 and 14 days	922	8	27	5	2	1		0	3	1		0	927	7.8	27	3.7
Between 15 and 31 days	390	3	29	5	1	1		0	2	1	98	99	393	3.3	127	17.4
Between 1 and 6 months	179	2	99	18	2	1	11	14		0		0	181	1.5	110	15.1
Between 6 and 12 months	5	0	172	31	1	1	1	1		0	1	1	6	0.1	174	23.8
Longer than 12 months	0	0	63	11		0	8	11		0		0	0	0.0	71	9.7
Total	**11,367**	**100**	**555**	**100**	**156**	**100**	**76**	**100**	**352**	**100**	**99**	**100**	**11,875**	**100**	**730**	**100**

Source PD A1 Questionnaire on the live performance sector

So far, when discussing the PDs A1, we have solely focused on the sending countries, i.e. the countries that compile the PDs A1 for exporting services related to the live performance sector to other countries. However, it is also possible to look at the receiving countries to which the services are exported and whom thus receive the PDs A1 coming from the sending countries. *Table 4.8* pictures the number of PD A1s issued under Article 12 by receiving Member State within the EU-27 and EFTA in 2019 for four reporting Member States (Belgium, Estonia, Luxembourg and Poland). Although the data are very limited, it can be observed that France is an important receiving Member State for Belgium, Estonia, Luxembourg and Poland. Of all Member States issuing PDs A1 for exporting services related to the live performance sector that responded to the questionnaire, France received the majority of these exported services related to those PDs A1. Particularly surprising is that 99% of the PDs A1 issued by Luxembourg were received by France. A country-level analysis shows that, besides France, the most import receiving Member States are Germany and the Netherlands (both 7%) for Belgium; Italy (24%) and Finland (16%) for Estonia; and Germany (14%) and Switzerland (10%) for Poland.

Although it is not possible to draw in-depth conclusions based on above data, it appears that the findings on PDs A1 by receiving country differ somewhat from earlier findings regarding the import of services *(cf. Section 4.2.2)*. France seems to be very strict in its judgment of having a PD A1 as a condition for being 'legally' posted. They implemented sanctions in case of failure to show a PD A1 and/or are carrying out a lot of inspections on having a PD A1. These measures may have a significant impact on the compliance of requesting a PD A1 when providing services in France. Consequently, the share of Member States where many controls are carried out, such as France, might be overestimated in total.

Table 4.8 Number of PDs A1 issued according to Articles 12 Regulation 883/2004 for activities in the NACE 90 sector by receiving Member State, EU-27 and EFTA, 2019

Receiving Member State	Belgium		Estonia		Luxembourg		Poland	
	Number	Column %	Number	Column %	Number	Column %	Number	Column %
Belgium	-	-	10	6	0	0	26	7
Bulgaria	10	0	0	0	0	0	1	0
Czech Republic	56	0	0	0	0	0	34	9
Denmark	52	0	0	0	0	0	3	1
Germany	797	7	0	0	0	0	53	14
Estonia	18	0	-	-	0	0	0	0
Ireland	20	0	0	0	0	0	0	0
Greece	30	0	0	0	0	0	0	0
Spain	458	4	0	0	0	0	1	0
France	6,964	61	83	53	348	99	196	51
Croatia	15	0	0	0	0	0	0	0
Italy	598	5	37	24	1	0	6	2
Cyprus	8	0	0	0	0	0	0	0
Latvia	3	0	1	1	0	0	0	0
Lithuania	7	0	0	0	0	0	0	0
Luxembourg	184	2	0	0	-	-	0	0
Hungary	58	1	0	0	0	0	2	1
Malta	3	0	0	0	0	0	0	0
Netherlands	831	7	0	0	0	0	3	1
Austria	224	2	0	0	0	0	2	1
Poland	64	1	0	0	0	0	-	-
Portugal	70	1	0	0	0	0	0	0
Romania	123	1	0	0	0	0	3	1
Slovenia	20	0	0	0	0	0	0	0
Slovak Republic	18	0	0	0	0	0	0	0
Finland	22	0	25	16	0	0	1	0
Sweden	70	1	0	0	0	0	0	0
United Kingdom	265	2	0	0	0	0	1	0
Iceland	12	0	0	0	0	0	0	0
Liechtenstein	3	0	0	0	0	0	0	0
Norway	73	1	0	0	0	0	12	3
Switzerland	291	3	0	0	3	1	37	10
Total	**11,367**	**100**	**156**	**100**	**352**	**100**	**381**	**100**

Source PD A1 Questionnaire on the live performance sector

4.2.3.2 Prior notification tools

Article 9 (1) (a) of the Enforcement Directive[184] states that Member States may impose an obligation on a service provider established in another Member State to make a simple declaration to the

184 Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System ('the IMI Regulation').

responsible national competent authorities containing the relevant information necessary to allow factual checks at the workplace, including:

- the identity of the service provider;
- the anticipated number of clearly identifiable posted workers;
- the identity of the person to liaise with the competent authorities in the host Member State in which the services are provided and to send and receive documents and/or notices to and from, if need be;
- the identity of the contact person acting as a representative through whom the relevant social partners may seek to engage the service provider to enter into collective bargaining in the host Member State, in accordance with national law and/or practice, during the period in which the services are provided;
- the anticipated duration, and the envisaged beginning and end date of the posting;
- the address(es) of the workplace;
- and the nature of the services justifying the posting.

All Member States[185] have used this opportunity to implement a prior notification tool for incoming posting undertakings and the workers concerned.

In the context of this research, we are particularly interested in the postings undertaken in the live performance sector. However, the breakdown by activity sector (based on the NACE codes) does not allow us to look exclusively at the activities under the NACE 90 code which best correspond to the live performance sector *(cf. Section 2.1)*. Consequently, we must take the broader 'R – arts, entertainment and recreation' category as our starting point. This category includes a wide range of activities to meet varied cultural, entertainment and recreational interests of the general public, including live performances, the operation of museum sites, gambling, sports and recreation activities. Therefore, when analysing the incoming posting undertakings based on the prior notification tools, it should be taken into account that we start from this broader category to which the live performance sector belongs.

An important note to the reported figures is that these data only reflect the intention to provide services in the host Member State. Indeed, it is not known whether these services have actually been provided. Moreover, in most Member States, the obligation to register applies to posted workers, but not to self-employed persons. Finally, Member States' policies on exempting posting undertakings from notification, have a significant impact on the mapping of the phenomenon of 'posting'. Several Member States (Austria, Belgium, the Czech Republic, Denmark, Germany, France, Italy, Luxembourg, the Netherlands, Poland, Slovakia, and Finland) exempt certain activities or sectors from notification (e.g. persons attending business meetings, academic conferences, international truck drivers, professional artists, athletes, etc.). Austria, Belgium, Denmark, France, and the Netherlands also grant an exemption from notification to artists and their employers.

185 The UK is an exception, as it has not implemented a prior notification tool.

Table 4.9 Member States exempting artists or the live performance sector from notification, 2020

	Activities/sectors exempted from notification
AT	Participation in cultural events in the areas of music, dance, theatre or small-scale performances and other comparable areas, which take place during an international tour, where only a small part of the work is performed in Austria when compared with the tour as a whole.
BE	Artists with an international reputation are exempted on the condition that their stay in Belgium for such purposes does not exceed 21 days per quarter. This exemption also applies to the support staff needed for the performance and who come to Belgium as workers. The same applies for independent artists and their self-employed support staff who do not have their main place of residence in Belgium.
DK	Participation in individual artistic events by professional artists. Supply of a technical facility or a technical installation if the work does not take more than eight days and if the employee or self-employed person posted to work in Denmark is a specialist or qualified to fit, install, inspect, repair or inform about the technical facility or installation in Denmark.
FR	Artists (in the context of live performance) posted for a period less than 90 days in a twelve-month period are waived from the administrative obligations. However, technicians and administrative workers continue to be subject to the administrative obligations.
NL	Artists and musicians and their permanent personal assistants performing a show, visual artists, conservators or restorers, provided their stay does not exceed 6 consecutive weeks within a 13-week period.

Source De Wispelaere et al. (2020b)

Table 4.10 depicts the number of posted workers in the arts, entertainment and recreation sector (NACE code R) and the entire economy registered in the prior notifications tools for reference year 2019. As data are only available for ten Member States, they only give a partial picture of the number of incoming posted workers employed in this sector.

It can be seen that for the ten reporting Member States, France in particular frequently reports posted workers within NACE category R. Consequently, incoming posted workers account for some 2% of the total workforce in this sector for France. In most other incoming countries, this percentage is mostly below 0.5%. However, it should be noted that France does not require a prior notification for artists (still obliged for technicians). This means that data for France (and Denmark) relate to the other activities in the R-NACE code.

Furthermore, the results show that the importance of the 'arts, entertainment and recreation' sector in the number of total posted workers received remains rather limited in most of the host Member States. For the total of countries for which data are available, the notifications related to the sector to which the live performance sector belong represent some 2% of the notifications for the entire economy in 2019. Of course, this is hardly surprising given the small share of this sector in the total workforce.

Table 4.10 Number of posted workers in NACE sector R (arts, entertainment and recreation) and the entire economy registered in the prior notification tools, 2019

Member State	R - arts, entertainment and recreation	Total	Share of R in total number of incoming posted workers (in %)	Share in total employment (in %)
Bulgaria	4	1,578	0.3	0.0
Denmark	345	26,822	1.3	0.5
Greece	22	2,627	0.8	0.0
France	9,289	262,723	3.5	1.9
Italy	531	32,377	1.6	0.2
Luxembourg	182	27,883	0.7	5.2
Malta	24	356	6.7	0.2
Slovenia	49	4,049	1.2	0.2
Slovakia	11	9,017	0.1	0.0
Sweden	87	41,504	0.2	0.1
Total	**10,544**	**408,936**	**2.6**	

Source De Wispelaere et al. (2020b)

4.2.4 Transnational employment characteristics based on the online questionnaire

The online questionnaire *(cf. Section 2.3.2.4)* allowed us to gather information from employers working across EU/EFTA borders and organisations hosting artists and supporting staff from other EU/EFTA countries. This helped us to better understand the characteristics of the transnational dimension of the sector. These survey data complement above administrative data.

Before focusing on the different patterns of labour mobility among the organisations, we will first give a brief overview of the profile characteristics of the participating organisations (i.e. our response group) that had live performances abroad or programmed (groups of) foreign artists in recent years (2018 and 2019).

4.2.4.1 Profile of the response group (i.e. organisations with a transnational dimension)

a) Main activity of the response group

Organisations were asked about their main activities with the following possible categories:

1. **Music & performing arts** (i.e. theatre, concerts, opera, dance, circus and other stage productions) **and related support activities** (e.g. stage-set designers and builders, scene shifters, lighting engineers, etc.);
2. **Booking and management activities in the live performance sector**;[186]
3. **Operation of venues** (e.g. concert halls, theatres and other arts facilities including festivals).

The organisations selecting one or both of the first two categories were asked whether they or their artists had live performances abroad in recent years (2018 and 2019). The organisations that stated operation of venues (3) as their main activity were asked whether they programmed (groups of) foreign artists in recent years (2018 and 2019). In what follows, we zoom in on the organisations that answered affirmative on these questions. This implies that the concerned organisations were all involved in transnational mobility patterns in recent years, i.e. sending artists abroad and/or programming foreign artists. Therefore, these data do not allow us to estimate the percentage of companies active in the live performance sector that provide services abroad.

Whereas the transnational dimension of the organisations with music, performing arts and related activities (1) and the booking and management agencies (2) is considered from a sending perspective, the transnational dynamic for the venue operators (3) is seen from a receiving perspective. Put

186 Booking and management activities are not included in Nace R90.

differently, the organisations focusing on (1) music, performing arts and related support activities and (2) booking and management activities export services to other countries, whilst the (3) venue operators mostly import live performance services from other countries.

Table 4.11 gives an overview of the response group based on their main activities. It can be seen that the organisations with music, performing arts and related activities represent more than two thirds of our response group (67%). Almost one fifth (23%) of the organisations that completed the questionnaire are venue operators, and booking and management agencies form 10% of the total of participating organisations with a transnational dimension.

Table 4.11 Distribution of the response group based on their main activity

	N	%
Music, performing arts and related activities	209	66.8%
Booking and management activities	32	10.2%
Operation of venues	72	23.0%
Total	**313**	**100.0%**

Source Own calculations based on online questionnaire (2020)

However, it is important to take into account that a single organisation can combine different main activities. This implies that a single organisation could have marked more than one option of the aforementioned categories. It can be observed that the participating organisations combining two or more activities are very limited: only 6% of all companies combines two or more activities. This implies that the lion's share (94%) of companies only has one activity.

b) Country of establishment of the response group

Table 4.12 gives an overview of the different types of organisations with a transnational dimension by country/countries of establishment. Important to take into account is that the companies could select multiple residence countries. Consequently, the total number of selected countries (N=337) is higher than the number of organisations with a transnational dimension (N=313).

For all types of organisations (music, performing arts and related activities, venue operators and booking and management agencies), it can be observed that most organisations in our response group are located in a relatively limited number of countries. The most frequently mentioned countries for the total of all types of organisations are Belgium (12%), the Netherlands (11%), Italy (11%), Germany (10%), Spain (9%), and France (9%). If we compare this with the profile of all companies active in the live performance sector based on the NACE 90 code and subcodes 90.01 to 90.04 *(cf. Section 3.1.1)*, it emerges that countries such as the Netherlands and France were also among the main countries of residence. However, the number of active companies in the live performing sector located in Belgium, Italy, Germany and Spain were more limited compared to what has been found based on the replies to the questionnaire in this section. Given that we only look at companies with a transnational dimension in this section whereas the discussed companies based on the NACE-codes represent *all* companies (thus also without a transnational dimension), the difference of top resident countries between the two datasets should be no surprise.

If we look at the different types of organisations more into detail, the following most frequently mentioned countries of establishment emerge:

- most of the organisations with mainly music, performing arts and related activities are located in Belgium (12%), Germany (12%), Italy (12%), and France (9%);
- booking and management agencies are mostly located in France (16%), Belgium (13%), and the United Kingdom (13%);
- organisations involved in the operation of venues are most frequently located in the Netherlands (26%), Italy (10%), Belgium (10%), and Spain (10%).

Table 4.12 Distribution of the response group (i.e. organisations with a transnational dimension) by EU-27, UK and EFTA country/countries of establishment (%)

Country of establishment	Music, performing arts and related activities	Booking and management activities	Operation of venues	Total
Austria	1.3	6.5	0.0	1.5
Belgium	12.1	12.9	9.5	11.6
Bulgaria	1.7	3.2	0.0	1.5
Croatia	0.0	0.0	0.0	0.0
Cyprus	0.4	0.0	0.0	0.3
Czech Republic	6.5	0.0	2.7	5.0
Denmark	1.7	3.2	1.4	1.8
Estonia	0.4	0.0	0.0	0.3
Finland	0.9	0.0	0.0	0.6
France	8.6	16.1	8.1	9.2
Germany	11.6	3.2	6.8	9.8
Greece	0.9	0.0	1.4	0.9
Hungary	5.2	6.5	5.4	5.3
Iceland	0.4	0.0	0.0	0.3
Ireland	0.4	0.0	0.0	0.3
Italy	11.6	9.7	9.5	11.0
Latvia	0.4	0.0	0.0	0.3
Liechtenstein	0.0	0.0	0.0	0.0
Lithuania	0.4	0.0	0.0	0.3
Luxembourg	0.0	0.0	0.0	0.0
Malta	0.0	0.0	0.0	0.0
Netherlands	7.3	6.5	25.7	11.3
Norway	1.7	3.2	0.0	1.5
Poland	1.3	3.2	1.4	1.5
Portugal	3.0	0.0	6.8	3.6
Romania	0.0	0.0	0.0	0.0
Slovakia	0.4	0.0	0.0	0.3
Slovenia	0.4	0.0	0.0	0.3
Spain	9.1	6.5	9.5	8.9
Sweden	3.4	3.2	5.4	3.9
Switzerland	2.6	3.2	4.1	3.0
United Kingdom	6.0	12.9	2.7	5.9
Total	100	100	100	100
N	232	31	74	337

* N organisations = 313.

Source Own calculations based on online questionnaire (2020)

4.2.4.2 The export of live performance services

This section will particularly focus on the organisations that themselves executed live performances activities abroad in recent years (organisations with music, performing arts and related activities) or whose artists had live performances abroad in recent years under their management (i.e. organisations with booking and management activities). In that way, these organisations can be seen as *exporters* of live performance services to other countries.

For the organisations that exported live performance services in recent years, the other EU/EFTA countries to which the services are sent (receiving countries) and the frequency and duration of the stays will be examined.

a) Share of performances abroad provided by the response group

Before giving an overview of the countries to which the services provided by the music and performing arts organisations and booking and management agencies were sent, the share of performances that have been exported to other countries by these organisations is being looked at. *Table 4.13* portrays the average distribution of domestic performances compared to performances abroad in recent years (2018-2019) for the organisations with music, performing arts and related activities and the booking and management agencies.

For the performing organisations, it can be seen that on average almost eight out of ten performances (78%) are executed in the own county of establishment. The performances abroad (22%) are mostly conducted in other EU/EFTA countries (18%). Consequently, only 3% of the total performances are executed in other parts of the world. The average share of performances abroad organised by booking and management agencies is considerably higher compared to the performing organisations. Accordingly, more than four out of ten (41%) performances conducted by artists under their management are performed abroad. Again, the lion's share of these performances is executed in other EU/EFTA countries. However, the average share of activities conducted in other parts of the world is significantly higher (7%) compared to the performing organisations. For the total of exporting organisations, it could be observed that on average, more than three quarters (77%) of the activities take place in the country of establishment of the respective organisations. Of the performances conducted abroad, the vast majority are performed inside the EU/EFTA-zone (19.6% of the 23.2% performances or 85%).

Table 4.13 Average share of performances in country of establishment and abroad (total = 100%) by type of exporting organisation over the period 2018-2019 (%)

	Music, performing arts and related activities	Booking and management activities	Total
Performances in country of establishment	**78.4**	**58.9**	**76.8**
Performances abroad	**21.6**	**41.1**	**23.2**
In the EU/EFTA	18.3	33.7	19.6
In other parts of the world	3.3	7.4	3.6
Total performances	100.0	100.0	100.0

* N music, performing arts and related activities = 208; N booking and management activities = 32.
Source Own calculations based on online questionnaire (2020)

On the basis of the above data, it can therefore be concluded that the share of performances in one's own country constitutes the most important for the response group. In a next step we can classify the organisations that send artists abroad according to the importance of these performances abroad compared to the total performances. *Table 4.14* categorises the organisations that recently sent artists abroad by (1) organisations with less than 25% of the performances abroad; (2) organisations with

between 26% and 50% abroad; (3) organisations with more than 50% but less than 75% of the performances abroad; and (4) organisations with more than 75% of the performances abroad.

Table 4.14 Distribution of exporting organisations by share of performances abroad in relation to total performances (absolute number and %)

Share of performances abroad	Music, performing arts and related activities		Booking and management activities		Total organisations	
	N	%	N	%	N	%
Less than 25%	144	69.9	13	40.6	157	66.0
Between 25% and 50%	38	18.4	8	25.0	46	19.3
Between 51% and 75%	11	5.3	5	15.6	16	6.7
More than 75%	13	6.3	6	18.8	19	8.0
Total	**206**	**100.0**	**32**	**100.0**	**238**	**100.0**

* N music, performing arts and related activities = 206; N booking and management activities = 32; N total = 238.
Source Own calculations based on online questionnaire (2020)

For the total of exporting organisations, it could be observed that for two out of three organisations whose artists had performances abroad in recent years, the share of performances abroad was less than 25%. This implies that the artists and support staff of an overwhelming majority of organisations mainly performed in their own country. For the subgroup of organisations with mainly music, performing arts and related activities, the share of organisations with mainly domestic activities is even higher (70%).

Another 19% of the total organisations had between 25% and 50% of the performances abroad. Combined with the group with less than 25% of the performances abroad, this means that the artists and support staff of 85% of the organisations mainly performed in their own country. Among the organisations with mainly music, performing arts and related activities, this share was even higher (88%). Among the organisations with mainly booking and management activities, on the contrary, 'only' 66% had more than half of the performances in the own country.

At the other end of the spectrum, there is the group of organisations whose artists mainly performed abroad in recent years. This group of organisations, for which more than 75% of the total performances by their artists and support staff took place abroad, is particularly interesting in the context of this chapter (the transnational dimension). As can be seen in *Table 4.14*, they make up 8% of the total group of organisations (N=19). In the subgroup of organisations with mainly booking and management activities, they even represent 19% of the total of *exporting* organisations. However, it should be taken into account that it concerns a very limited response group in absolute figures (N=6), prompting caution when interpreting the results.

Given the important transnational character of the subgroup of organisations with more than 75% of the performances abroad, we will complement the following general analyses on the entire group of participating organisations with a specific focus on this transnational subgroup. Already interesting to keep in mind is that this particular group of highly transnational organisations that participated are mainly based in Belgium (42%), France (11%), and the United Kingdom (11%).

b) Receiving countries of the response group

In what follows, we solely focus on those performances conducted in other EU/EFTA countries. A distinction was made between organisations that mostly sent artists and supporting staff to one and the same country on the one hand and organisations that mostly sent artists and supporting staff to different countries on the other hand. In *Table 4.15*, it can be seen that more than two thirds of the total of exporting organisations (77%) mostly perform activities in multiple other EU/EFTA countries. For the booking and management agencies, this share is even higher: More than eight out of

ten (81%) organisations state that the booked artists under their management mostly perform in multiple countries.

Specifically, among the most transnationally active subgroup of organisations whose artists performed more than 75% of their activities abroad, 90% of their artists and support staff performed mostly in different countries, which is considerably higher compared to the total organisations.

Table 4.15 Distribution of exporting organisations by performances in other EU/EFTA countries mostly in one singular country or in multiple countries (2018-2019)

	Music, performing arts and related activities		Booking and management activities		Total	
	N	%	N	%	N	%
Mostly to one and the same country	71	34.5	6	18.8	77	32.4
Mostly to different countries	135	65.5	26	81.3	161	67.6
Total	**206**	**100**	**32**	**100**	**238**	**100**

Source Own calculations based on online questionnaire (2020)

Among the relatively few organisations with music and performing activities and booking and management agencies for which artists mostly go to one and the same country, the most popular destination countries or receiving countries were Germany (19%), France (13%), Belgium (12%), and Italy (8%).

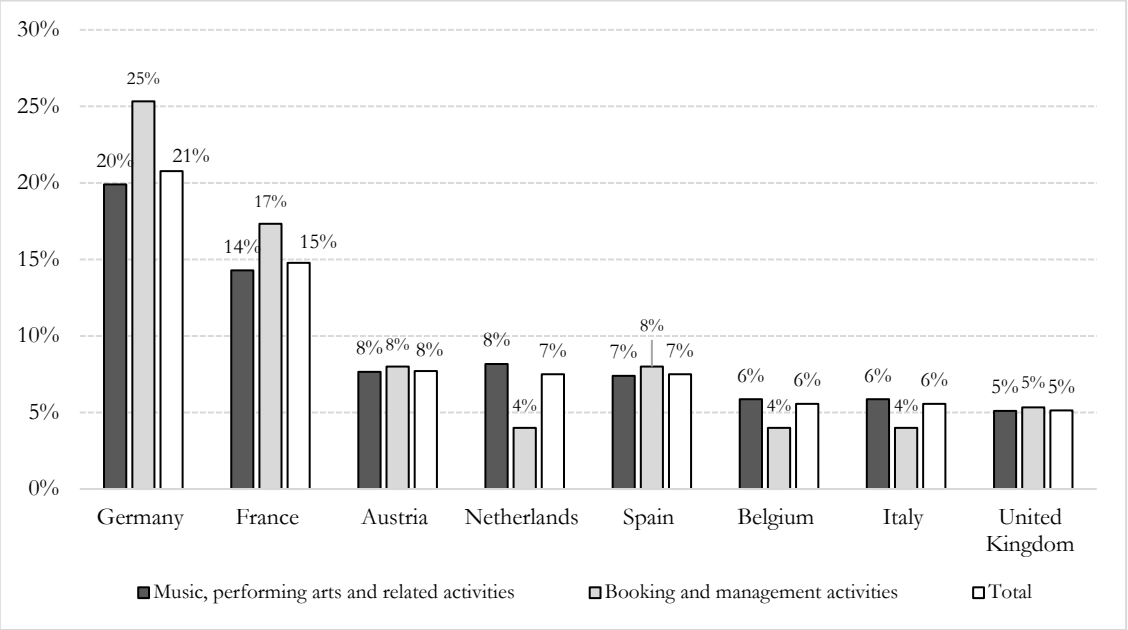
The organisations with performances in multiple EU/EFTA countries in recent years were asked to indicate the three most visited countries in the period 2018-2019. *Figure 4.4* gives an overview of the top receiving countries[187] for the organisations with music and performing activities and booking and management activities. If we compare the two types of organisations, it can be seen that the distribution based on receiving countries is very similar. Consequently, the organisations involved in music and performing arts and booking and management activities share the same top receiving countries. For both types of organisations, it can be observed that Germany (21%) and France (15%) are the countries to which they exported the most performing activities in recent years (2018-2019). Other important receiving countries for the total of performing organisations and booking agencies are Austria (8%), Spain (8%), and the Netherlands (7%).

The organisations whose artists and support staff performed more than 75% of their activities abroad seem to share the same top receiving countries as the total group of exporting organisations given that Germany (28%) and France (22%) were mentioned by far as the most important receiving countries. However, it should again be emphasised that these are only tentative results given the limited number of participating organisations within this subgroup.

The above results largely correspond with what has been found based on the Portable Documents A1 where France and Germany also were the top receiving countries *(cf. Section 4.2.3.1)*.

187 All countries which were mentioned by at least 5% of the total group of organisations are displayed in the graph.

Figure 4.4 **Share of top receiving EU/EFTA countries by type of exporting organisation over the period 2018-2019 (%)**



* N organisations = 161.

Source Own calculations based on online questionnaire (2020)

c) Frequency and duration of activities abroad of the response group

The organisations with music, performing arts and related activities and the booking and management agencies were asked how often their artists and supporting staff go abroad in normal circumstances. *Table 4.16* depicts the frequency of activities conducted by the artists for the respective organisation types. It can be seen that the frequency of activities conducted in other countries is relatively limited. For about six out of ten of all organisations, the artists only go abroad about once a year.[188] This is particularly the case for the artists and supporting staff in organisations involved in music, performing arts and related activities (62%). Among the artists under the management of the booking and management agencies, the vast majority goes abroad about once a year (38%) or about once a month (38%). However, a relatively substantial group of organisations with booking and management activities (16%) stated that the artists under their management are being send abroad almost all the time throughout the year:

- 40% of these booking and management agencies with artists being abroad almost all time throughout the year are based in the UK;
- all these booking and management agencies sent artists mostly to different countries;
- the top receiving countries to which the artists were being sent almost all the time throughout the year were Germany (27%), France (13%), and Spain (13%).

For the organisations whose artists and support staff performed more than 75% of their activities abroad, a different picture emerges compared to the total group of exporting organisations. In concrete terms, more than one out of four organisations (26%) state that their artists are abroad almost all the time throughout the year. Moreover, another 32% of the organisations indicate that their artists are usually sent abroad about once a week. In itself it is of course logical that this highly transnational subgroup has a larger proportion of artists who go abroad more often compared to the total group of organisations.

188 At first glance, this does not seem to be consistent with the earlier finding that the majority of organisations send artists to multiple countries. However, this can be explained, for example, by artists touring only once a year (and thus going abroad once a year), but then visiting several countries. Another explanation is that a certain artist within an organisation always goes to a specific country, but another artist within the same organisation goes to another country.

Table 4.16 Average frequency of activities abroad by type of exporting organisation over the period 2018-2019 (%)

	Music, performing arts and related activities	Booking and management activities	Total
About once a year	62.4	37.5	59.1
About once a month	27.8	37.5	29.1
About once a week	5.4	9.4	5.9
Several times a week	1.0	0.0	0.8
Almost all the time throughout the year	3.4	15.6	5.1
Total	**100.0**	**100.0**	**100.0**

* N music, performing arts and related activities = 205; N booking and management activities = 32; N total = 237.
Source Own calculations based on online questionnaire (2020)

The average duration of the activities conducted by the artists and supporting staff can be found in *Table 4.17*. More than three out of four (75%) of the artists and supporting staff sent abroad by the total group of organisations stay abroad a couple of days (43%) or about one week (33%). Artists staying abroad for a longer time throughout the year (more than three months) are very rare (less than 1%). The differences between the two types of organisations are rather small.

Again, we can see a completely different picture among the organisations whose artists and support staff performed more than 75% of their activities abroad. Whereas the average time frame duration which artists and support staff were sent abroad was limited to a couple of days for almost half of the total group of organisations (49%), this was only the case for 31% of the highly transnational subgroup. In addition, 11% of the highly transnational subgroup stated that the artists and support staff stayed abroad for more than three months, while this was only the case for less than 1% of the total group of *exporting* organisations.

Table 4.17 Average duration of activities abroad by type of exporting organisation over the period 2018-2019 (%)

	Music, performing arts and related activities	Booking and management activities	Total
A day	6.3	3.1	5.9
A couple of days	43.4	37.5	42.6
About one week	34.1	21.9	32.5
About two weeks	7.3	9.4	7.6
About three weeks	1.5	0.0	1.3
About one month	0.5	6.3	1.3
More than 1 month, but less than 3 months	1.0	3.1	1.3
More than 3 months, but less than 6 months	0.0	3.1	0.4
More than 6 months, but less than one year	0.5	0.0	0.4
About one year	0.0	0.0	0.0
More than one year	0.0	0.0	0.0
This strongly depends	5.4	15.6	6.8
Total	**100.0**	**100.0**	**100.0**

* N music, performing arts and related activities = 205; N booking and management activities = 32; N total = 237.
Source Own calculations based on online questionnaire (2020)

Based on the overview the frequency and duration of activities conducted by artists sent by organisations involved in music and performing arts activities and booking and management activities, it can be concluded that the majority of artists are only sent abroad once a year and this for a short stay (a couple of days to one week). Earlier, it was already noted that the share of performances conducted abroad within an organisation was relatively limited, meaning that the vast majority of the activities take place in the home country.

d) Employment profile of transnational artists and supporting staff of the response group

For the organisations with artists working abroad, the questionnaire also contained questions about the employment status of those involved. *Table 4.18* summarises the employment status of the artists and supporting staff with activities abroad sent by the organisations with music and performing arts activities and the booking and management agencies. Whereas the vast majority of the artists and supporting staff among the organisations with music and performing activities are employed (60%), this is only the case for 34% of the artists sent by booking and management agencies. Most artists and supporting staff sent by booking and management agencies are self-employed (52%). This confirms the earlier findings for the whole sector where the share of self-employed is many times higher than in the entire economy.

Table 4.18 Employment status of artists and support staff sent abroad (2018-2019, %).

	Music, performing arts and related activities	Booking and management activities	Total
Employed	60.1	34.3	57.0
Self-employed	31.2	52.1	33.7
Other status	8.7	13.6	9.3
Total	**100.0**	**100.0**	**100.0**

* N music, performing arts and related activities = 192; N booking and management activities = 23; N total = 215.
Source Own calculations based on online questionnaire (2020)

Finally, *Table 4.19* gives an overview of the contract type of the artists and supporting staff sent abroad per type of organisation. For both categories, we can observe that the employees are relatively evenly distributed over the different types of contracts. For the total of music and performing arts organisations and booking and management agencies, about one third of the artists and supporting staff have a fixed-term employment contract, 30% have an open-ended contract whereas one out of five work on the basis of service agreements. It is remarkable that a relatively high proportion of employees have another type of contract (17%). Presumably, this mainly concerns freelancers who are employed to conduct a well-defined activity.

Table 4.19 Employment contract type of artists and support staff sent abroad (2018-2019, %)

	Music, performing arts and related activities	Booking and management activities	Total
Open-ended employment contract	32.0	21.7	30.4
Fixed-term employment contract	32.7	35.0	33.1
Service agreement	19.2	24.2	20.0
Another type of contract	16.1	19.1	16.6
Total	100.0	100.0	100.0

Source Own calculations based on online questionnaire (2020)

5 | The live performance from a social security law perspective

5.1 Who's who? The artist in the web of the partners involved

We know that the live performance sector consists of a web of actors in which it is not always so clear who is the employee and who is the employer. Moreover, very often several intermediaries play their own role behind the scenes and, as a result, it is not always clear who should take on which (administrative, social and fiscal) obligations. The following actors will be legally involved in an average performance or concert: the organiser, the promoter, the personal manager(s) of the artists, the agents or so-called 'bookers' who often set the agenda of the artist, the company or companies of the artists, and finally the artists themselves. In addition, there is the support staff, who are paid either by the organiser or by an external company called in by the organiser or are even brought and paid for by the artist himself/herself. One cannot lump artists together in this regard. The 'big stars' or groups are not at all comparable with the smaller, local artists. The better-known groups - the international top artists performing at some festival, for example - sometimes bring more than hundred people in their wake, just like a multinational, each with their own role and with different administrative obligations. In an average performance, a lot of parties are involved so that it is not always clear who does what and who is responsible for meeting these obligations. It is different for the small beginning artists, who sometimes perform abroad, and often have to take care of all obligations themselves or rely on a temporary employment agency (e.g. 'social bureau') that acts as an employer for the person concerned and takes care of all administrative law obligations. The live performance sector is highly diverse. A significant group of artists are also self-employed, which means that they have to ensure their own social security. Exceptions to this are, for example, dance, music, theatre or other groups or ensembles or large orchestras, where artists often work with an employee status. Artists themselves are hardly or not at all aware of the administrative obligations.

Disentangling these structures is important because they determine who is an employer and therefore who must fulfil social security obligations, apply for PDs A1, and so on. It is striking that in France, Belgium, and the Netherlands, regulations have been drawn up to make it easier to identify the 'legal employer'. In Belgium and France, there are rebuttable presumptions to designate the employer and, in the Netherlands, there are regulations designating the 'withholding agent'. In France, there has also been much discussion recently about the issue of legal *portage salarial*, whereby intermediaries (usually a non-profit organisation or a cooperative) act as the legal employer of a performer, although in reality they do not exercise any authority over the performer and do not organise any performances themselves. In other words, it is a construction in which an intermediary acts as legal employer in order to reduce the administrative burden for the 'real' employer and the artist himself/herself. Recently, however, such constructions have been deemed unlawful by the French *Pôle emploi*. From now on, only the real employer will be able to account for the employer's obligations. In Germany, the so-called *Künstlersozialkasse* provides for insurance for self-employed artists and writers, on the following basis: half is paid by the respective self-employed artist, 30% from companies and 20% is topped up by a federal grant.[189] This facilitates the collection of all social contributions.

189 A special regime that regulates the social security status of self-employed artists and writers, providing similar protection in statutory social insurance as employees (https://www.kuenstlersozialkasse.de/die-ksk/die-kuenstlersozialkasse.html).

In general, we see a large straddle between, on the one side, the 'big artists' who are often a business in themselves, who also arrange everything themselves, from catering to transport, technology and so on, who are fairly to very well informed about the administration that comes with international mobility and usually arrange everything down to the last detail - this sector not being a priority for social inspectorates also points in that direction -[190] and, on the other side, the 'small fish' who have less income and also have to sort everything out themselves. The perception that emerged from interviews is that big artists, organisations, and bookers make sure that everything is as well organised as possible. Furthermore, the interviews showed that organisers state that the artist himself/herself should make sure that (s)he has all the paperwork in order, while the artist assumes that the organiser is responsible for this. However, this does not seem to cause major problems in practice. Inspection services do not consider the sector itself to be extremely vulnerable to 'social dumping'. Issues do occasionally arise in relation to work permits and visas for non-EU nationals (an increase in problems is expected for British nationals). However, more frequent checks are carried out on peripheral activities and the use of subcontractors in catering (festivals, performances), transport (tours), and the use of volunteers. An exception to this is France, which does regard the live performance sector as a priority. The main reasons for this are abuses within the French national *intermittent* statute. The number of working hours declared is subject to a great deal of monitoring (intermittents have an interest in filling in the highest possible number of hours), but also, for example, the use of minors in performances and shows, and non-compliance with working hours are closely monitored.

The example below illustrates the legal background of an average performance by a band coming to play a show at the *Ancienne Belgique*, a large concert hall in Brussels (Belgium). It concerns a hypothetical example that should allow us to understand the legal background of an average performance by a band on tour. The different actors present in this example are: **AB** (organiser), **Die Antwoord** (the band of the evening), **Manager** (the manager of Die Antwoord), **Live Nation** (the booker and promoter), **Stage Hands** (provides technical staff), **DJ Different** (support act).

Ancienne Belgique (AB): the organisation that provides a venue as well as a stage and seeks bands to perform in its venue through its own programmers (or is approached by booking agencies).

- AB has signed an agreement with Live Nation for Die Antwoord's performance in the AB. Live Nation also promotes the performance. AB has **no direct contact or contract with the band Die Antwoord.** In the agreement with Live Nation, AB includes a clause stating that it is not responsible for the correct processing of visas for the artists, nor for any tax law obligations nor documents that artists have to submit such as PDs A1. AB assumes that the booker and band are already doing the necessary. In fact, AB is nothing more than a venue rental company for a music performance.
- However, AB does **employ some local technicians and catering staff** that evening. They work with short-term employment contracts for AB. AB takes care of all employer obligations and is responsible for paying social security contributions. These persons are of course not artists.

Die Antwoord: the band that will perform in the AB. This band, in turn, is organised into a company of which the various band members are all managers. The band also brings along a tour manager, a cook, and some light and stage technicians. These people are on the payroll of the company of the band or have concluded a contract with it.

In addition, the band Die Antwoord has:

- a contract of mandate with the manager,
- an agreement with Live Nation to act as booker and promoter (negotiated by the manager),
- employment contracts with their cook, tour manager, and stage crew for the performance in the AB (concluded through the manager). The ltd. Die Antwoord is legally responsible for paying the

190 As opposed to fiscal control (taxes, copyrights...) where there is greater monitoring.

social contributions of the cook, tour manager, and stage crew. In practice, the manager assumes these tasks.

Manager: manager of Die Antwoord. Looks after the financial and business interests for Die Antwoord in the name and on behalf of the band, through a mandate agreement. Is also a self-employed person with his own company. Furthermore, the manager is also mandated by the band Die Antwoord to hire, pay, and fire staff (cook, tour manager, stage crew). He or she acts in the name and on behalf of Die Antwoord. He or she also pays the staff's social security contributions on behalf of Die Antwoord and arranges PDs A1, visas, ...
- Has a mandate agreement with Die Antwoord.
- Has negotiated contracts with Live Nation (this may be directly with Live Nation Belgium or through a Live Nation representative abroad) as mandatary for Die Antwoord.

Live Nation: acts as a booking agency and promoter of Die Antwoord's performance that evening in the AB. Has concluded an agreement with (the company of) the band Die Antwoord to act as booker and promoter of its performances in Belgium. This agreement was negotiated by the manager of Die Antwoord, who was mandated to do so. As agent, he or she is mandated to do so either in writing, orally, or even tacitly, by the band members of Die Antwoord. Sometimes, there are intermediaries between the manager and Live Nation. In many cases, Live Nation will state in its agreement with the manager that Die Antwoord is responsible for compliance with all social law and tax law obligations. The manager may be able to conclude an agreement with Live Nation to take care of certain administrative obligations (visas, taxation, etc.), given the know-how of the latter in this respect, for example.
- Live Nation has a contract with Die Antwoord for promotion and booking.
- Has a contract with the AB for Die Antwoord's performance that evening in its hall.
- If necessary, arranges visas and administration for Die Antwoord.

Stage Hands: This is the company that the AB calls on to provide sound and special effects during its performances. For this purpose, they conclude an agreement with the private company Stage Hands, which supplies the technicians. These technicians are either freelancers or permanently employed by Stage Hands. In the latter case, Stage Hands is responsible for fulfilling the employer obligations of their own staff.
- Has a contract for services with the AB to provide sound and music that evening.
- Has employment contracts with their staff and is responsible for the employer obligations or has entered into a contract for services with another subcontractor.

In some cases, the band Die Antwoord may also work with its own light and sound technicians. Often, these are technicians who work under contracts for services - arranged through the manager - for this group and go on tour with them. This will be included in the contract that the manager has concluded with the booking agency.

DJ Different: warms up the audience and provides the support act that evening. DJ Different's real name is Koen De Jonge and he has an artist's status. He is paid a small sum by the AB that evening. AB must therefore ensure the payment of social contributions for Koen's work. After all, the one who pays the artist is legally the employer of the artist. Another option is that Koen works through an SBK (social bureau/temporary employment agency for artists), which takes care of the employer obligations. In that case, the AB does not have to take care of this itself. A 'small fee regulation' is also possible, but then the DJ does not build up any social rights.

5.2 The protection of the artist: a separate regime in social security law

Because of the often unclear situation of the status of an artist and the resulting lack of social protection, Belgium, France, the Netherlands, and Germany (among others) have introduced in their national systems in one form or another specific regulation to improve the social protection of artists

and other persons in the live performance sector. An analysis of the origin of these special regulations in the respective national legal systems shows that the rationale behind the specific legislation in each country is the same: due to the 'specific nature' of the artistic-cultural sector (*sensu lato*), national governments deem it necessary to provide special regimes or at least special legislation for people employed in this sector. A detailed description of these systems can be found in Appendix I.
An observation made by each of the Member States analysed is the fact that artists' income - especially in the live performance sector - is often very uncertain and unstable. Belgium and France, among others, have therefore provided tailor-made unemployment regulations to find a way round the irregular work and income patterns of artists and technicians. A second aspect that always comes up is the often unclear status of an artist: is (s)he an employee or a self-employed person? A purely legal analysis of the legal position of the artist or technician will in many countries often lead to the conclusion that an artist or technician is self-employed. A conclusion that is often at odds with socio-economic reality, which mostly shows a position of dependence on one single 'commissioning' party.

Although the degree of protection, the scope, and the comprehensiveness of specific measures vary greatly, the above considerations have led each of the aforementioned Member States to enact certain legislation specifically for artists and sometimes technicians, aimed at improving their legal status. France has the regime of *intermittents*, Belgium has its artist's status, the Netherlands has a - albeit limited - artist arrangement, and Germany finally has a separate social security arrangement for self-employed artists and writers.

Here, presumptions of an employment contract were introduced into the social security system precisely in order to be able to extend the protection of those concerned. In Belgium, there is a *rebuttable* presumption of subjection to social security for employees applicable to persons who, *without* being bound by an employment contract, provide artistic services and/or produce artistic works. In this way, social security for employees still applies to artists who are, in fact, *legally* self-employed. Artists are therefore presumed *by default* to be employees as far as social security is concerned. Note: these artists remain self-employed under labour law. France knows a similar situation. Article L. 7121-3 of the *Code du Travail* presupposes that performing artists that are paid for their services are employed under an employment contract: « *tout contrat par lequel une personne physique ou morale s'assure, moyennant rémunération, le concours d'un artiste du spectacle en vue de sa production,* ***est présumé être un contrat de travail*** *dès lors que cet artiste n'exerce pas l'activité, objet de ce contrat, dans des conditions impliquant son inscription au registre du commerce.* »

In Germany and the Netherlands, artists are not by default regarded as employees when it comes to affiliation to the social security system. In Germany, self-employed artists and publicists do have their own special 'artist's insurance', which gives them almost the same protection as employees. The Netherlands has the artist arrangement whereby self-employed artists are also treated as employees for certain social insurances. However, this does not involve **full** subjection to the social security system for employees, as is the case in France and Belgium.

However, being considered a worker for the purposes of social security does not make one an employee under labour law. In Belgium, for example, self-employed artists who are not employed via an employment contract and who provide services or produce works of an artistic nature in return for payment of a fee, on the instructions of a natural or legal person, can be included in the social security system for employees remain self-employed under employment law. These artists remain self-employed under labour law and therefore not bound by collective labour agreements, rules regarding a minimum wage, and other labour legislation. In France, the presumption of the existence of an employment contract for performing artists extends to both the social security aspect and labour law. Collective labour agreements and other labour law protections therefore also apply to artists. The Netherlands and Germany do not have a rebuttable presumption for the existence of an employment contract in the case of artists or performers. Although in these countries, self-employed artists are given the possibility of largely enjoying the same social protection as employees, they do

remain self-employed under employment law (at least when they are not employed under an employment contract).

Table 5.1 Summarising table

	Belgium	France	The Netherlands	Germany
Is there a special arrangement for performing artists in social security?	Yes	Yes	Yes	Yes
Presumption of employment contract for social security?	Yes	Yes	No	No
Presumption of employment contract in labour law?	No	Yes	No	No
Is there a special arrangement for artists in unemployment insurance?	Yes	Yes	No	No
Is there a special regulation for technicians with regard to social security?	No	Yes	No	Yes
Is there a special arrangement for technicians in unemployment insurance?	Yes	Yes	No	No
Does the live performance sector constitute a priority for the social inspectorates?	No	Yes	No	Yes

Source Authors' own elaboration

5.3 Live performance artists crossing the border: their social security status

5.3.1 Coordination of social security: the general framework

As soon as artists cross borders, it is important to determine which social security provisions apply to them. Precisely because artists are, by definition, highly mobile, the question arises as to which social security legislation applies to them. To which legislation is an artist subject who normally works in Belgium, performs once a year in the Netherlands, and then goes on tour for a month in Germany and France?

This question should be addressed on the basis of coordinating Regulations 883/2004 and 987/2009. Coordination, not harmonisation, is paramount. The coordination between the national social security systems of the Member States aims to guarantee that the right of free movements of persons can actually be implemented and can thus contribute to a higher standard of living and better working conditions of the persons migrating within the European Union.[191] As a result, the national legislator remains competent to determine, on the basis of its own territorial criteria (such as place of employment, domicile, or nationality[192]) the personal scope of its social security system (Cornelissen, 1984; Jorens, 1992). As each national legislator therefore remains competent to determine its own criteria under which a person is insured, the European regulations on coordination of social security systems include a set of rules on conflict of laws that designate the legislation - the internal or a foreign one - applicable to the situation concerned. Based on a connecting factor, these rules particularly specify which State is competent to levy contributions and who will grant the benefits. The appointed legislation determines as such to which social security obligations an employee as well an employer are subject to. All contributions must be paid in that State.

Title II of Regulation 883/2004 regulating the social security law applicable in the framework of mobility in the European Union is structured around basically three levels: the general rules of Article 11 (i.e. the *lex loci laboris*, adapted to civil servants), all with their unique connecting factor; followed

191 See paras 1 and 45 of Regulation 883/2004.

192 Although nationality may constitute a criterion to demarcate social security law, it goes without saying that such a criterion will soon be considered contrary to the principle of non-discrimination.

by the special rules of Article 12 (in particular the situations of posting for employed as well as self-employed persons) and the particular rules of Article 13, which focus on the simultaneous performance of activities in two or more Member States. These three main divisions are followed by some complementary rules and the general possibility of Article 16 to deviate from all previous rules. It is thus assumed that one can only be employed under one single legislation.[193] Consequently, for persons exercising activities in several Member States, such as our artist mentioned above as an example, we should look for one well-defined legislation that will be applicable for all activities carried out in the different Member States. Simultaneous subjection to two or more legislations, as is not excluded in e.g. labour law, is therefore completely impossible.

In order to determine the legislation applicable, a distinction is made between, on the one hand, persons carrying out activities, as an employed or self-employed person (and equivalent persons as well as civil servants, unemployed persons, or those in military/civil service) and, on the other hand, all other - read inactive - persons. Within the European Union, the option was made to choose for the place of work, the *lex loci laboris*, as the main criterion for defining the applicable legislation for active persons. For instance, a person pursuing an activity as an employed or self-employed person in a Member State will be subject to the legislation of that Member State.[194] An artist working in Belgium but living in the Netherlands is therefore in principle subject to Belgian legislation as the country of employment. Contrary to the rules on labour law and international private law, social security regulations do not foresee the possibility of a free choice of social security legislation.

Thus, the key concept is employment, defined as any activity or equivalent situation treated as such for the purposes of the social security legislation of the Member State in which such activity or equivalent situation exists.[195] The content of the concepts is therefore determined by the legislations of the Member States in whose territory the activity is pursued, whether as an employed or self-employed person.[196] Moreover, these definitions make it clear that the content of this concept is a national concept, and one should therefore look at the social security legislation of the Member State where the activity (or equivalent situation) is carried out in order to determine whether it is an activity and whether this is an employed activity or not.[197]

We only focus on how social security law considers an activity such as that of an artist. Member States remain largely sovereign in defining the organisation of their social security systems (with or without their own social security system for artists), just as they can define the employment relationship of these artists (employee, self-employed, civil servant, *sui generis* category, ...). If that Member State considers this work to be an employed activity under social security law - e.g. by establishing a presumption - both the classification under employment law in that State and the classification under social security law in another Member State of this work (which, for example, considers it to be a self-employed activity) are irrelevant. In the same way and *vice versa*, one can say that a person's status under social security law does not determine his or her classification under labour law. For instance, in Belgium, artists who fall under the artist's status are presumed to be employees under social security law but are not employees under labour law. This sometimes causes problems of interpretation between Member States. In practice, one sometimes sees issues with artists who come *from France* to perform in another EU Member State and have problems obtaining the correct PD A1, because in France artists are presumed to be employees. If the person concerned is regarded as an employee in France, (s)he shall be classified as a person engaged in 'activities as an employed person' for the purposes of this Regulation. A manager reported that it occurs that French social security considers

193 We do not want to go into the possibility provided for by the Court that the Regulation cannot preclude a migrant worker who is subject to the social security legislation of the State of employment from obtaining benefits under a national scheme of the State of residence (Case C-352/06, Bosmann, ECLI:EU:C:2008:290; Case C-611/10, ECLI:EU:C:2012:339 (Hudzinski)).

194 Article 11(3) of Regulation 883/2004.

195 Article 11(1) and Article 1(a-b).

196 See De Jaeck, case 340/94, para 34 and also Hervein I, case 212/95, para 21.

197 Including those activities which give rise to insurance in a social security system for employees and vice versa.

the Belgian organiser as an employer, while the organiser had already paid the artist as a self-employed person.

Then, on the basis of these qualifications, the competent Member State can be designated according to the designation rules of the regulation and is therefore competent. Nevertheless, the time spent on an activity is irrelevant, even if it concerns an occasional activity. The existence of an employment relationship and the type of employment relationship, such as part-time work or work on call, or also the number of hours worked by the employee, are irrelevant.[198] Therefore, it is not excluded that a person can quickly change the applicable social security legislation. A very occasional activity, i.e. three dance evenings, was thus considered by the Court of Justice as sufficient to be regarded as giving rise to a change in the applicable legislation.[199]

The content of the concepts is therefore determined by the legislations of the Member States in whose territory the activity is pursued, whether as an employed or self-employed person. The application of the provisions of the Regulations depends on the objective conditions and circumstances in which the migrant worker concerned is situated and the latter has no option.[200] The objective situation of the employee prevails over the formal considerations, such as the conclusion of an employment contract. In particular, the nature of the activities as described in the contractual documents must be taken into account, provided that the wording of those documents corresponds to the activities carried out.

The pan-European labour market in the European Union led to new forms of mobility where highly mobile workers, such as artists, constantly move between several States. European mobility is therefore characterised by (large) groups of people who often move temporarily to another Member State with or without the intention of returning. Such high mobility does test the actual conflict rules in the coordination of social security. As mentioned above, we must not forget in this respect that every new working situation leads, according to the Coordination Regulations, to a new possible applicable legislation. A highly mobile worker, moving for relatively short periods, on short-term contracts, could as such be faced with a number of different social security schemes. In our previous example of the international artist on tour, the person concerned would therefore be subject to Belgian law, then to Dutch law, and lastly to German and French law. It goes without saying that this is not exactly enticing. The different legal statuses in Member States, with various definitions of employed/self-employed, and multiple criteria for minimum coverage, with short periods of insurance in many countries not providing any benefits, may as such have an enormous impact on the social security situation of mobile persons and often deprive the latter of any protection whatsoever. Artists in the performance sector constitute a prime example of this danger.

For these reasons, a number of special rules were adopted in the Coordination Regulations, as exceptions to the general principle of the *lex loci laboris*, especially as a consequence of a special situation (e.g. temporarily working abroad or working on the territory of various countries) which should bring more stability to the social security situation of the persons concerned. Contrary to labour law, under social security there also exists a separate conflict rule for people working in different Member States. The adequacy of these arrangements can sometimes be questioned, as it cannot be excluded that highly mobile persons, such as international artists, may fall under different conflict rules. If our international artist performs a few shows a year in the Netherlands, are they consecutive postings or should we rather speak of simultaneous employment in several countries because these performances take place in the context of an annually renewable contract?

Determining the applicable social security legislation is therefore no easy task, precisely because there are many ambiguities regarding the conditions of application of the various conflict rules.

Let us now take a closer look at the range of options.

198 Case Franzen 382/13, para 50. ECLI:EU:C:2015:261.

199 See the Foot-Ball Club d'Andlau Case 8/75. (ECLI:EU:C:1975:87), para 10.

200 See e.g. also Case C-12/67 Guissart [1967], ECR 536; Aldewereld, C 60/93, ECR p I 2991, para 20.

5.3.2 Posting of artists

Posting constitutes the most important exception to the general principle of the *lex loci laboris*. 'A person who pursues an activity as an employed person in a Member State on behalf of an employer which normally carries out its activities there and who is posted by that employer to another Member State to perform work on that employer's behalf shall continue to be subject to the legislation of the first Member State, provided that the anticipated duration of such work does not exceed twenty-four months and that he/she is not sent to replace another posted person.'[201] There exists a more or less similar provision for self-employed persons.[202] An artist habitually employed in Belgium who performs in the Netherlands remains subject to Belgian legislation even for a Dutch performance. Self-employed workers can also post themselves to the territory of another Member State. There exist great similarities between the system for the posting of workers and that of self-employed workers - the period is similar. However, some conditions for workers do not apply for self-employed workers, simply because they result from the very nature of self-employment. For instance, the condition of a direct relationship with the posting undertaking does not exist for self-employed workers. This does not imply that no further connection must exist with the posting State. The person concerned is required to have habitually carried out self-employed activities on the territory of the posting State.

The extensive use, or according to some abuse, of the posting provisions has made this provision to one of the most popular but also one of the most controversial provisions of the Coordination Regulations. This is also one of the reasons why the application of the posting provisions is subject to several conditions which are often interpreted in a strict manner. If one of the conditions is not fulfilled, the logical consequence is that the artist is subject to the normal rule, which is the place of employment. Suppose our artist, who habitually works in Belgium, now performs in the Netherlands, but one of the posting conditions is not fulfilled. (S)He will then be subject to the Dutch social security scheme for that performance and the basic scheme is just consecutively applied. Now **these conditions, especially for highly mobile artists, sometimes cause problems**.

a) In order for a person to be posted to another Member State, (s)he must, at the time of his or her posting to the territory of another EU Member State, be normally attached with that employer and, in other words, be insured as an employee under the social security legislation of the Member State in which the employer posting him is established.
b) The second decisive condition for the application of the posting provision is, as explicitly provided for in Article 12(1) of Regulation 883/2004, that the worker concerned is posted by the posting employer to another Member State in order to carry out work 'on his behalf' there. This is the case if it is established that a direct relationship continues to exist between the worker and the employer who posted him/her.[203] A direct relationship implies a legal relationship between the employer and the worker and thus the conclusion of an employment contract.
c) The third condition for the posting provisions to apply is the existence of a connection between the employer and the State in which he is established. The posting provisions may only be applied to employers who *normally* carry out their activities on the territory of the Member State of establishment. Furthermore, in the period during which the self-employed worker carries out these activities, (s)he must continue to comply with the conditions in the State of establishment which enable him to pursue his activities upon return. The self-employed worker concerned must therefore maintain the necessary resources and certain infrastructure in his/her State of origin which are - however small - needed for the pursuit of his/her activities, thus enabling him/her to pursue his/her activities in a normal way upon return. The idea is that the self-employed person must have already pursued his/her activity for some time before the date when (s)he wishes to invoke the posting provision and, during any period of temporary activity in another Member State, must continue to fulfil, in the Member State where (s)he is established, the requirements for the pursuit

201 Article 12(1) of Regulation 883/2004.
202 Article 12(2) of Regulation 883/2004.
203 See also Decision A2, preamble, para 3.

of his activity in order to be able to pursue it on his return. This means that the self-employed worker carries out concrete and determined activities of which the content has been established beforehand and of which the realisation can be proven by means of the relevant contracts. Elements that can be taken into account are the availability of office space, the payment of taxes, the possession of a professional card and a VAT number, and/or registration with a Chamber of Commerce or a professional organisation.[204]

d) Posting is a temporary event, and in social security law this period is expressly stated. It concerns a period of 24 months.
e) The fifth condition for posting is that the posted worker may not be posted to replace another posted worker. This problem hardly raises any issues in the music sector.

The most difficult problem arises precisely with regard to the requirement under a) that at the time of posting, one should have been subject to the country of posting for a certain period of time. Subsequently, the question arises as to how long one should have been subject to a State before posting is possible. Imagine a student who has just left the conservatory and can immediately start performing with an orchestra. Can this person now be posted/post himself/herself? Decision No A2 of the Administrative Commission lays down a minimum period and states that a subjection of at least one month for employees can be considered as an indication that the requirement of being subject to the legislation of the posting State immediately before commencing work has been met. The aim of this is to ensure that there is and remains a sufficient link between the employee concerned and the posting State. Shorter periods would also be possible - perhaps to avoid problems with the Court of Justice - but would require a case-by-case assessment of many factors.[205] For self-employed persons, the conditions are even stricter: a period of two months is given as an indicative period. Also here shorter periods would require a case-by-case assessment taking into account all factors involved.[206] These minimum conditions were installed as a measure to avoid abuse of the posting provisions and circumvention of the general applicable rule of the State of employment. In the current discussions on the amendment of the provisions concerning the applicable legislation, it is being considered to extend this period even further - to three months - just in order to ensure that the person concerned is actually subject to a social security system.[207] The aim of this is to ensure that there is and remains a sufficient link between the employee concerned and the posting State. This condition must be understood correctly. The only requirement is that one is subject to the legislation of the posting State. This does not presuppose, therefore, that one was insured on the basis of employment or that one has worked for the employer who is posting the person concerned. A person who, for other reasons, such as training or study, was subject to the social security legislation of that State - e.g. on the basis of residence - also meets this condition.[208] However, it is clear that such a requirement - especially if extended - leads to problems for mobile persons such as artists. Not least when, for example, a dancer or musician drops out at the last minute, it is often very difficult to replace him or her by someone who is not resident in the same country of the employer. After all, the strict requirement of three months does not seem desirable for all professions and in all circumstances, the music and performing arts sector being a paramount example. An artist whose first assignment would be to perform for music group abroad, should also be able to invoke the posting provisions. It should therefore be possible to apply the posting provisions even if less than three months' work has been completed. It is indeed questionable if a minimum requirement can be set. It is therefore perfectly possible for someone to be hired to be sent abroad immediately.

204 CJEU C-178/97, Banks, ECR. 2000, I, 2005, para 26 and B. A2, para 2.
205 Point 1, Decision No A2.
206 Decision A2, para 2.
207 In the provisional agreement between the Council and the European Parliament on the amendments to the regulations, a period of at least three months is required (7698/19 ADD 1 rev 1, 43). (new article 14(1)).
208 This is the case, for example, for a student who has finished his/her studies (music school) and starts working abroad immediately after his/her graduation, which presupposes posting.

5.3.3 Simultaneous employment

5.3.3.1 The conditions

Another important conflict rule, which appears to be on the rise and probably represents more and more the textbook example for international artists, is simultaneous employment in two or more Member States. Think of an artist touring through different countries. It is striking that these provisions have gained enormous importance in recent years (De Wispelaere et al., 2021a).

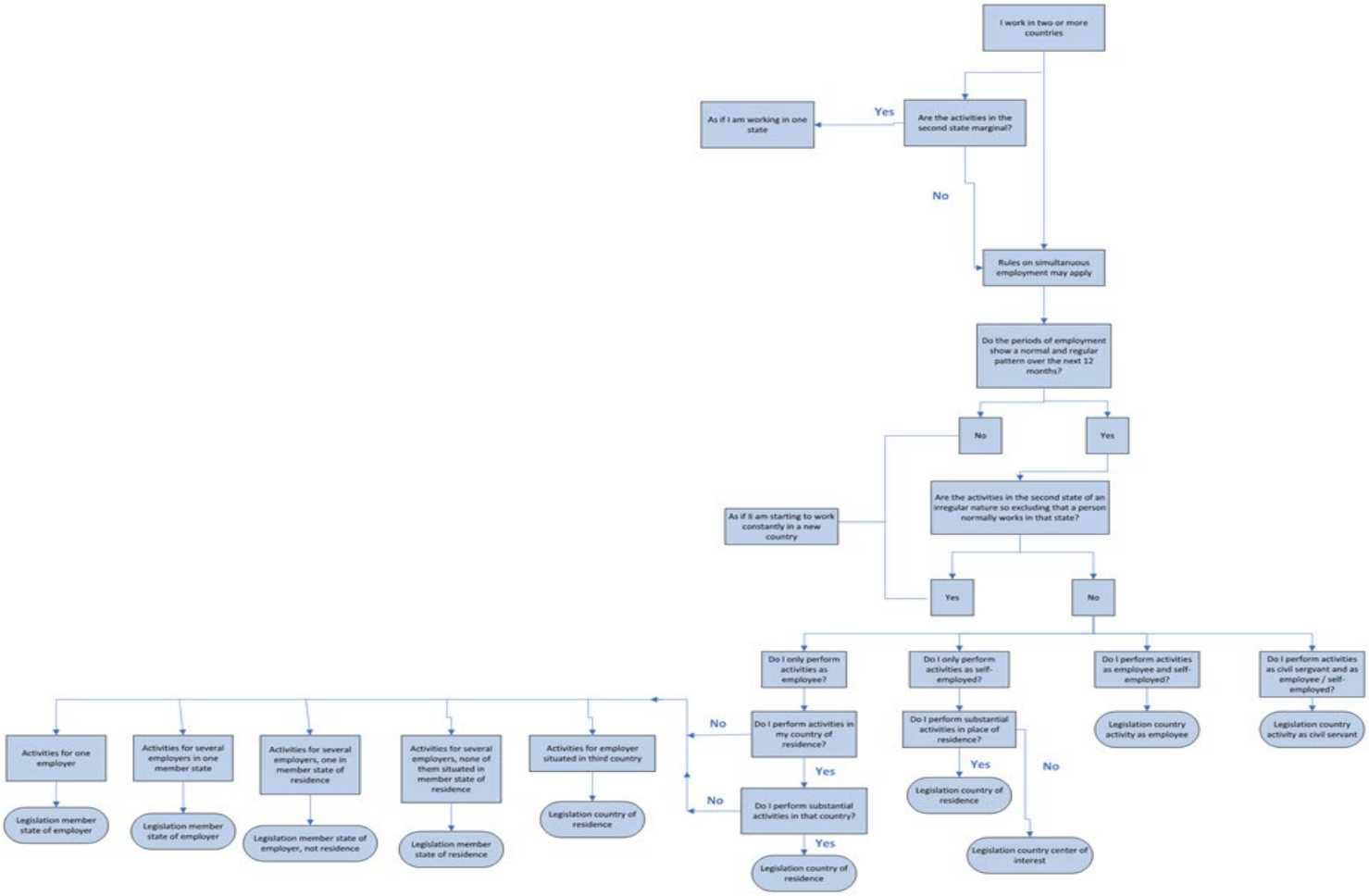
Surely, the general conflict rule of place of work cannot help to solve the conflict of laws in case somebody is performing activities of employment in two or more States. Logically, the person concerned would be subject, following the general rule, to both or more States leading to problems if the legislation of either of the two Member States would e.g. contain limits for paying contributions. Thus, even when a person pursues his/her activities in two or more Member States, only one legislation will apply to the person concerned, and the legislation of the different Member States will not apply in proportion to the activity pursued. The person concerned is therefore subject to this single legislation as regards both the payment of contributions and the payment of benefits (with the exception of sickness benefits in kind).

For that reason, another complementary conflict rule needed to be found. In such cases, the basis conflict rule will be the place of residence (in the case of substantial activity in this country of residence), the place of establishment of the employer, or the place of the centre of interests of the person involved. In order for this legislation to apply, the mobile person is deemed to carry out all his/her occupational activities on the territory of the Member State concerned and also to have obtained all his/her income there.[209] An international artist performing in Belgium and touring in Germany and France is therefore subject to one specific legislation for all of his performances.

Although at first glance, this rule is appropriate for international artists, the conditions of its application are far from clear, just as the distinction from the other conflict rules.

209 Article 13(5) of Regulation 883/2004. Consequently, it does not make any difference whether this is a situation in which different activities are carried out in different Member States or whether employment is carried out in different Member States.

Figure 5.1 Working in two or more Member States: the legal decision tree



Source Authors' own elaboration

In the first place, it is required that substantial activities be carried out in the country of residence in order for the latter legislation to become applicable. In addition, Regulation 883/2004 provides that the conflict rule does not apply to a person who permanently pursues alternating activities in two or more Member States when that person would pursue marginal activities in the second country. Imagine, for instance, the situation of an artist who performs for a philharmonic orchestra and, in addition, performs every month in another Member State for another orchestra. Can we consider this to be a marginal activity and does it therefore have no impact on the applicable social security legislation? The aim was also to create greater legal certainty for those concerned but also to avoid a situation where, for example, by performing a few shows abroad, a person would be subject to (or submit to) different legislation. It is thus assumed that one can only be employed under one single legislation. Nevertheless, this does not imply that these marginal activities do not play any role. The activities as such remain relevant for the application of national social security legislation; if the marginal activity generates social security affiliation, the contributions shall be paid in the competent Member State for the overall income from all activities. The Practical Guide developed by the Member States and the Commission (EC, 2013) considers marginal activities as permanent activities which are negligible in terms of time and economic gain. In the first instance, these activities should be activities which, by virtue of the legislation in which they are carried out, give rise to an insurance obligation. It also concerns marginal activities, i.e. on the border of insignificant activities. As an indicator, activities that represent less than 5% of the worker's normal working time and/or less than 5% of his/her total wage are put forward. We must therefore consider the marginal activities in proportion to the whole of the person's activities. Quantifying does however seem to add few added value, as the size and significance of activities are not simply quantifiable. For instance, the Court of Justice has already made clear that spending 6.5% of the total number of hours could also be considered insignificant.[210] It is not clear which element(s) should be considered. According to the Practical Guide, marginal activities must be assessed separately per Member State and may not be added together.[211] But does that make sense? Imagine a musician who in the first half of the year works for a large orchestra, but in the second half of the year regularly has short performances for other orchestras in different countries (no longer than one week) with a fixed contract per performance. Seen from the point of view of each Member State, this is probably a marginal activity, but if we add them all together, the picture is completely different. As a matter of fact, the question whether it concerns a marginal activity is a decision on which both Member States must agree pursuant to Article 16 of Regulation 987/2009.

To apply the rules on simultaneous employment, it does not play any role whether the person concerned is employed by one or more employers.[212] It concerns two situations: it concerns both a person who continuously pursues alternating activities in two or more Member States and a person who simultaneously pursues those activities. The latter situation applies to a person working part-time in two Member States but also and especially to a person employed by one employer but carrying out activities in his/her free time (e.g. in the weekend, in the evening, etc. provided that the social security legislation of the State at issue continues to consider the person concerned as a worker: think for instance of a musician teaching music in the evenings or weekends, or appears as a jury member in a music competition). The first example refers to someone who carries out work in different countries consecutively, so without overlap. Regularity, rather than how often there is an alternation between Member States, is important. Someone working in the arts sector who successively performs abroad for various organisers, is a typical example.

In case of simultaneous employment, the country of residence applies if one performs substantial activities there. A quantitative criterion has been chosen, without this necessarily being a major part

210 See para 24 in the case X C-570/15. ECLI:EU:C:2017:674.

211 See Practical Guide on the applicable legislation in the European Union (EU), the European Economic Area (EEA) and in Switzerland, https://ec.europa.eu/social/BlobServlet?docId=11366&langId=en, p 37.

212 See CJEU case 73/72, Bentzinger, para 4. ECLI:EU:C:1973:26.

of the activities. In particular, 'substantial' means that the person concerned carries out more than 25% of his/her working time in the Member State of residence and/or more than 25% of the person's remuneration is earned in the Member State of residence. If this is the case, it is considered that a person is performing a substantial part of his/her activities in the Member State of residence.

When activities as a self-employed are exercised in two or more States, the State of residence will be the competent State, in case a substantial part of the activities is fulfilled in this State.[213] In this case, the rule is very similar to the one we know for activities as an employee in two or more States: the turnover, the working time, the number of services rendered, and/or the income constitute indicative criteria.[214] In the framework of an overall assessment, a share of less than 25% in respect of these criteria shall be an indicator that no substantial part of the activities is pursued in the relevant Member State. In the past, the European Court of Justice ruled that a German artist's contribution for self-employed artists and journalists should be paid by firms which market their work, thus prohibiting those firms from passing on the contribution in question to the artists and journalists. This does not have the effect of applying more than one social security scheme to self-employed artists and journalists who have their work marketed in Germany but live in another Member State and carry out part of their activities there as self-employed persons (and are therefore also insured there), and this is not contrary to the Coordination Regulation.[215]

Artists often have a separate status - whether or not through the application of certain legal presumptions - in the various countries where they work, sometimes as employees, sometimes as self-employed, and sometimes as civil servants. In case a person normally pursues an activity as an employed person and as a self-employed person in different Member States, (s)he will be subject to the legislation of the Member State in which (s)he pursues an activity as an employed person.[216] The State where the activities as employee are fulfilled has therefore priority over the place where someone is working as a self-employed person. So, it is not required that the person concerned carries out a substantial part of his/her activities there and it does not matter that the employed activities are only subsidiary to the main self-employed activities. Nevertheless, marginal activities do preclude the applicability of this legislation.[217] In this case, therefore, one is subject to the legislation of the country in which one is working as an employee and this for all activities carried out in all Member States. An artist who lives in Belgium but is employed in France by an organisation for one day a week and who spends most of his/her time touring and performing in Belgium and abroad as a self-employed person will therefore be subject to French law. Thus, a self-employed person carrying out a minor employment activity as an employee can lead to major consequences.

However, it is unclear to what extent the competent State must then also adopt the classification given to that activity by each Member State and is thus bound by it, or whether that State may then proceed to reclassify the activity carried out abroad as if that activity were carried out in the territory of that State. Suppose, for example, that someone is presumed to be self-employed as an artist abroad. In the latter case, the designated applicable legislation would not change, but only the internal division between employee and self-employed. The latter view can be defended. Suppose that an artist is an employee in Member State A and self-employed in Member State B. On the basis of the designation rules, State A is designated as competent. The view may be defended that A, as the competent State, decides on the qualification of any activity carried out in any territory.[218] In that case, the activity that is considered self-employed in Member State B would suddenly become an employee activity because Member State A qualifies it as such.

213 Article 13(2)(a) of Regulation 883/2004.

214 Article 14(8) of implementing Regulation 987/2009.

215 First sentence of Article 14a(2) of Regulation No 1408/71 (now Article 13(2) of Regulation No 883/2004): Commission v Germany, case C-68/99.

216 Article 13(3) of Regulation 883/2004.

217 See Article 14(5) of Regulation 987/2009.

218 MoveS report on non-standard forms of employment 2020: 30.

No special provision is made if a person is also employed as a civil servant in two or more Member States. It is therefore unclear to which legislation the person concerned is subject. It may be defended that the person concerned is subject to the legislation of the country of residence as a catch-all clause.[219]

5.3.4 Simultaneous employment, posting, or the *lex loci laboris*? How to differentiate?

The major problem with this form of employment is that it is not easy to distinguish between simultaneous work in two Member States, temporary posting abroad, or successive application of the ordinary principle of the country of employment.

The decision on which conflict rule will be applicable is not completely without relevance as both rules know different conditions (being stricter in the domain of posting than in the case of simultaneous employment) and can lead to different outcomes. However, the main problem is that there are many employment models - certainly in the live performance sector - in which, in principle, one could speak of both posting and simultaneous employment. Or is it simply a consecutive application of the normal principle of the country of employment? Consider the example of a violin player who works freelance for an orchestra that normally only plays in France (Lille, close to the Belgian border). Sometimes the orchestra goes on tour abroad. The location and timing of its tour depends on the programming. During his/her free time - depending on the programme - the violin player also performs for other orchestras as a freelancer, also abroad, or sometimes gives private lessons as a freelancer to a number of students in Belgium just across the border. In the weeks with performances, the lessons are very limited (a few hours), but if there are no performances, it concerns about one day a week.

Which conflict rule is applicable in this regard? As the rules on the legislation applicable constitute a complete and uniform set of conflict rules with the purpose of uniting under the social security scheme of one Member State, the situation concerned must therefore be brought under one particular rule involving mutually exclusive conflict rules, depending on the objective situation of the worker. The rules on conflict of laws must be applied and making one's own choice is thus impossible.[220] There is also no reason to believe that one conflict rule might take precedence over another.

An additional important point to note is that in social security law, the designation of the applicable social security legislation is a question that arises at the beginning of the employment, whereas in labour law, the problem rather arises in case of a conflict between an employee and an employer. After all, contributions have to be paid. It is therefore not surprising that many issues arise before it is clear which legislation applies to an international artist (see also, van Ooij, 2020):

- the predictability of the employment situation needed to determine in advance the legislation applicable;
- the impact of minor 'marginal' activities on the applicable legislation (Are the private lessons given by the person concerned sufficiently broad not to be considered marginal?) Can it be said that the person is simultaneously working in several countries? Or does it rather concern activities carried out as a posted person?;
- the classification of certain activities - presumptions - under certain legislations;
- the demarcation between temporary and regular activities abroad or, in other words, the difference between posting and simultaneous employment in two or more countries.

Different questions of interpretation may thus arise.

Certainly in the music performing arts sector, the biggest problem is that a conflict can arise to the application of which conflict rules apply: e.g. when does the posting rule or the conflict rule of simultaneous employment apply? In the case of self-employed persons who post themselves repeatedly to the same Member State, it will of course be quite clear that the distinction between posting

219 Article 11(3e).

220 CJEU case 610/18, AFMB, para 66. ECLI:EU:C:2020:565

and the simultaneous execution of self-employed activities in different countries is paper-thin. What to be said of our violin player who has concluded a service agreement with a big orchestra? When this orchestra is not on tour or during the holiday period, (s)he goes to play for other orchestras around Europe. One could argue here that the conflict rule on simultaneous employment is applicable, as the person concerned still has an agreement with the orchestra and will continue to play for that orchestra. Indeed, in case the activity in the posting State would come to an end, and one goes to work abroad for a short period of time, one might defend that the posting provisions are applicable as no two activities are performed at the same moment. This situation might however not always be very crystal clear. When can it be said that the activity came to an end? A self-employed person will hardly ever completely finish his/her activities in his/her 'posting home State' when he is shortly working abroad. It might be expected that (s)he will continue to look for new clients from his/her home place, which would imply that (s)he is still active in two States.

According to Article 14(7) of implementing Regulation 987/2009, the duration of the work in one or more Member States (whether it is permanent, ad hoc, or temporary in nature) will be the deciding factor in determining the distinction between simultaneous employment and cases of posting. To this end, a general assessment will be made of all relevant facts, including in particular – with regard to a person in salaried employment – the place of work specified in the contract of employment. Posting relates to a temporary, finite period. There is however ambiguity over which criteria have to be used. When are we still dealing with occasional work abroad or when, on the other hand, is it structured? And does this matter? What when simultaneous employment and self-posting are combined? For instance, a person normally works as a self-employed music teacher in Belgium where (s)he lives. In parallel, (s)he also works one week per month as musician in Germany. (S)he is now asked to go to play in France for a short period, so (s)he posts himself/herself. Which legislation is now applicable to him/her? The starting point is that (s)he works in parallel in two countries and so the conflict rules on simultaneous employment apply according to which (s)he will be subject to Belgian legislation (the law of residence, where (s)he has his substantial activity).[221] Afterwards, (s)he posts himself/herself to France as a musician. As (s)he is now insured in Belgium, the Belgian legislation remains applicable. The question could be asked if the posting provisions can apply to him/her. Indeed, for the posting conditions to apply, one has to perform similar activities in the home State and the host State. Is it a problem that his/her main activity in Belgium - the competent State - is being a music teacher and (s)he goes to work as a self-posted musician in France? Both are not similar, as it is not in Belgium that (s)he normally works as musician but in Germany. One can argue that the posting provisions further apply. But what happens if (s)he pursued a temporary self-employed activity in France which is not similar neither to the activity in Belgium nor to the activity in Germany. For instance, when (s)he goes to work as a cook in France. In such circumstances, one should apply the rules of simultaneous employment. These examples show how difficult it is to make a distinction between these two conflict rules.

Let us also not forget that the conflict rule on simultaneous employment will apply to situations where a person carries out an economic activity in a Member State under whose social security legislation that activity is regarded as that of a self-employed person for the purposes of affiliation to the appropriate social security scheme, and who at the same time carries out an economic activity in another Member State under whose social security legislation that activity is regarded as that of an employed person for the purposes of affiliation to the appropriate social security scheme. Both Member States therefore remain competent to qualify the activities performed on their territory. Under the posting provisions however, it is up to the legislation of the country of origin to check which category – employee or self-employed – the cross-border person belongs to for his/her posting and the host State is not in a position to qualify the activities performed on its territory.

221 Article 13(2)(a) of Regulation 883/2004.

In general, to assess a situation of simultaneous employment and to find out if substantial activities were performed, the work patterns over a time frame of at least 12 months will be considered. After all, nowhere is it required that it should be clear in advance, at the start of the activities, what the employment pattern of the person concerned looks like and how long, for example, the duration of employment in the various Member States will be.[222] It follows from the above that the competent social security institution must check whether, at the time when the applicable legislation is determined, the periods of employment in different Member States are expected to follow each other with a certain regularity over the next twelve calendar months. Attention to the situation of the next 12 months[223] therefore implies that the situation may be subject to change and that, in fact, any determination of applicable legislation is provisional. One problem with this is that the employee is often unaware that (s)he must report employment in several Member States to the competent institution in the country of residence.[224] The implementing Regulation[225] provides for a procedure whereby the place of residence of the person concerned determines the applicable legislation and informs the designated institutions of each Member State in which an activity is pursued of its provisional determination. The provisional determination of the applicable legislation shall become definitive within two months of the institutions designated by the competent authorities of the Member States concerned being informed, except where prior contacts were necessary to determine the applicable legislation and these were determined by mutual agreement, in which case a period of four months shall apply, after which it shall become definitive. Thus, in the case of an activity in two or more Member States, the assessment of the facts for the purposes of determining the applicable legislation shall be carried out by at least two different institutions, which should, a priori, ensure a correct assessment of the facts and, consequently, of the applicable legislation. According to the Court of Justice, in that regard, account must be taken, in particular, of the nature of the activity as an employed person, as defined in the contract documents, in order to determine whether the foreseeable activity is an employed activity which is carried out - not merely occasionally - in the territory of several Member States, provided, however, that the wording of those documents corresponds to the activities in question.[226] However, in addition to the future 12 months, the Practical Guide points out that past work is also a reliable indicator of future behaviour, and if a decision cannot be taken on the basis of planned work patterns or duty rosters, it would therefore be reasonable to look at the situation in the previous 12 months and use this information when assessing substantial activities.[227] Thus, depending on the way in which the various administrations of the Member States view it, the provisional determination may differ, especially when different provisions are applicable. However, one can only judge that this 12-month period is inappropriate in some circumstances for artists. Artists certainly do not always know in advance where they will be performing (= where they will be working) on a regular basis over the next 12 months. However, sometimes this period is too short. Think of the following example: a music teacher carries out a normal teaching activity during the year and also plays abroad for about ten days a year. This has been the case for years and moreover, it is also foreseen to be this way in the years to come (yearly decision). When only considering the situation within one year, it is easy to judge that this is a one-off activity, and it will perhaps more easily be considered as a case of posting. When also considering the years to come, it is easier to view this situation as a case of simultaneous employment.

If a person has to carry out work in several Member States on an irregular basis, this situation shall be covered by the rules on simultaneous employment in so far as the activities in several Member States form an integral part of the pattern of work and the interval between periods of work is not

222 See conclusion of Advocate General in Bogdan Chain, para 73 et seq.

223 Article 10(14) of Regulation 987/2009.

224 Therefore, in the event that the applicable legislation is subsequently found to be incorrect, a retroactive payment/recovery of contributions and benefits should be made.

225 Article 16 of Regulation 987/2009.

226 Case C-115/11 Format ECLI:EU:C:2012:60644.

227 See Practical Guide p 31.

such that it changes to such an extent or nature that a person no longer 'normally pursues' an activity in two or more Member States.[228] What happens, for example, if someone works for an employer in State A in the first half of the year and for another employer in Member State B in the second half of the year. In principle, the lex loci laboris applies to every employment. But what in case of a regular pattern?

After all, it is very important that there is a certain pattern of simultaneous employment. Article 13 refers to a person who 'normally' pursues an activity in two Member States. It is of great importance that there is a certain pattern behind it and that there is a simultaneous, consecutive, alternating exercise of work in several Member States that is characterised by a certain consistency and permanence.[229] The duration of the employment does not play any role in this.

If the person concerned would not perform substantial activities in the State of residence, then different criteria could play a role: for employees this may be the residence as well as, in the most cases, the place where the company's registered office or residence is located. This is e.g. the case when activities are performed for one employer, for several employers established in one Member State, or for several employers of which one in the Member State of residence (Member State of employer not residence). An artist working as an employee for an orchestra in Belgium as well as for an orchestra in France and who lives in Belgium, will be subject to French legislation. Therefore, his/her Belgian employer must join the French social security system and will have to pay contributions in France for his/her employee, according to the French legislation. In case a person is working as self-employed in several States, without exercising substantial activities in his/her State of residence, the legislation of the State where (s)he has his/her centre of interests will become applicable.[230]

The centre of interests shall be determined by taking account of all the aspects of that person's occupational activities, notably where the person's fixed and permanent place of business is located - which will often be the easiest to assess -, the habitual nature or the duration of the activities pursued, the number of services rendered, and the intention of the person concerned as revealed by all the circumstances. An example: a freelance artist performs self-employed activities in Germany and Luxembourg. (S)He has no permanent and fixed premises in these States. (S)He lives in France. Most of the services are rendered in Germany, where (s)he is for the moment investing and his/her plans are also to make Germany his centre of interests. In such case, the competent State will be Germany.

The connection to the employer often reinforces the idea that inventive employers set up artificial legal constructions in order to secure competitive advantages. Furthermore, in this era of subcontracting, outsourcing, and establishing (legally) independent entities which divide the authority of the employer over different undertakings, it is unclear whether there is one single employer or several employers (the latter case could even entail the application of other rules with regard to the legislation applicable) and who the right employer is. It is also the employer who has to pay the contributions and has the legal responsibility obligation to fulfil the administrative formalities. Imagine, for example, a manager of an opera house in Brussels who, under a cooperation agreement with the Paris Opera, becomes the temporary advisor of the latter in reforming its operations. The person in question regularly receives instructions from the Paris Opera. But who is his/her employer? Does this imply a formalist legal approach in which the employer is the person with whom the employee has concluded an employment contract, or do we rather take into account the economic approach in which the employer is the person who, in the end, economically 'benefits' from the employee and thus has the economic decision power within the organisation. No definition of the concept of employer[231] is found in the coordinating regulations, nor any reference to the legislation of the Member States to determine this definition. Building on national interpretations of the concept of 'employer' could quickly create a situation where Member States have a different interpretation as to

228 See Practical Guide (2013).

229 See also conclusion of Advocate General in Format, para 58.

230 Article 13(2b) of Regulation 883/2004.

231 This is also not the case for the concept of 'place where the activities are carried out'

who is an employer - irrespective of whether this concept is defined nationally in social security law, which is also distinguishable from the concept of employer under labour law - and this could lead to different legal regimes. The Court therefore makes it clear that an autonomous interpretation is necessary, taking account not only of the wording of that provision, but also of its context and the objective of the scheme in question.[232] An employer refers to a person in an employment relationship with an employee who is subordinated to and therefore under the authority of that employer.[233] This subordination is characterised by elements such as who de facto exercises the authority (instructions for the assignments) over the employee, pays the employee's wages - re-invoicing is not considered to be one of the elements in this respect - and who can impose sanctions on the person concerned and dismiss him/her.[234] Although the conclusion of a contract of employment between an employee and an undertaking may be an indication of a relationship of subordination between that employee and that undertaking, it is not conclusive.[235] It is way more important to observe the factual circumstances and if other relevant factors show that a worker's employment situation actually differs from the description given in the documents, the institution concerned must, notwithstanding the wording of the contractual documents, base its findings on the worker's actual and factual situation.[236] The person who has entered into an employment contract is therefore just an indication and nothing more. On the basis of the factual circumstances, we will have to check whether it is still the Belgian opera or the Parisian opera that exercises the authority - as interpreted above.

The application of the rule of simultaneous employment in two or more countries implies that an employer may have to pay contributions in the last Member State for his/her employee residing in another Member State. Imagine that an artist-employee lives in Liège (Belgium) where (s)he works several days a week for a dance company. The person concerned also works for an employer in Germany as a teacher in a dance school in Cologne. As the person concerned carries out substantial activities in Belgium, his/her German employer must pay contributions for his/her activities in Germany in accordance with Belgian legislation. For a foreign employer, this requires a whole administrative arrangement for the application of a regulation with which (s)he is not familiar.[237, 238]

In order to assist the employer concerned in this regard, it is possible, in the first instance, for the employer to draw up an administrative arrangement (e.g. opening an account with a trustee established in Belgium). However, in some Member States, such as France, this is viewed critically as a local representative is considered a prohibited posting (*portage salarial*). The foreign employer thus has to register as employer in France and make declarations to URSSAFF on a monthly basis, even if there is for months no employment of a French artist. Another solution is to use the option provided for in the regulation whereby the employee may take over the obligations of an employer established outside the competent Member State - if the employee does not wish to do so or does not pay, the employer remains obliged to pay the contributions - and the employer must then inform the competent Member State thereof.[239] The main purpose of this would be to strengthen the possibility of collecting contributions, as late contributions are much more complicated to collect from employers based abroad. However, the latter option is not without danger, especially for the employee. After all, (s)he then has to pay both employee and employer contributions. Differences in legislation can

232 See CJEU AFMB 610/18, para 50.

233 See CJEU AFMB 610/18, para 53.

234 See AFMB 610/18, para 91; see also Manpower, case 35/70, paras 17-20.

235 See for instance AFMB, para 61.

236 Format 44 et seq.; see also para 21 case X; CJEU case 610/18, AFMB, para 67.

237 This implies not only the payment of contributions but also, for example, the payment of sickness benefits if this is an obligation under the legislation applicable.

238 An example of the Swedish Royal Opera House illustrates the situation. The Royal Swedish Opera has, according to their ability been trying to register as an employer, report and to make payments of employer's contributions in several EU/EFTA countries. But this has been a complicated and costly struggle and often without success. For example the Opera House contacted the Danish social security office to pay social security contributions for a Danish artist. The response to their request was as follows: Danish Tax Authority says: 'I must firmly maintain that you do not have to pay anything in social contributions - in Denmark you pay taxes and social security contributions are included in the tax - that's why the tax is apparently higher in Denmark than in other countries.'

239 Article 21(2) of Regulation 987/2009.

lead to a significant reduction in net income, making the determination of income possibly very important.

It should also be borne in mind that the Coordination Regulations apply irrespective of the nationality of the person concerned, and that non-EU nationals moving for purposes of intra-EU activity are also covered.[240] Nevertheless, it is important to note that the Coordination Regulations only apply to intra-European mobility. Therefore, the social security situation of a person who also performs outside the EU or is from outside the EU depends either on a bilateral agreement, if any, between the non-EU country in which (s)he performs and the third non-EU country, or, failing that, on the national law of this country. If the person concerned performs in several EU countries, the possible application of several bilateral treaties will have to be examined, without any coordination between the individual bilateral treaties.

5.3.5 Administrative proof of applicable social security legislation

In order to prove that someone remains submitted to the social security rules of a State, one has to be in the possession of a PD Al. This document indicates where a person is covered by social security, but at the same time, this form also implies that other Member States cannot submit the person concerned to their social security in order not to impede free movement.[241] This form is well known in the case of posting but also applies in all cases of international employment. The legal value of the PD A1 is highly controversial. In case the host State is of the opinion that the posting conditions are not deemed to be fulfilled, the general rule of *lex loci laboris* should be invoked and consequently, the legislation of the country of temporary employment would become applicable. However, according to the Court, this PD A1 establishes an almost irrebuttable legal presumption and constitutes strong evidence of compliance with the posting conditions. Consultation between the competent services of the Member States concerned is necessary if there are doubts about the legal validity of this certificate or about the compliance with the posting conditions. Hence, the absence of such a certificate does not preclude the possibility that a host State may have to accept other elements of proof - e.g. national declarations on applicable legislation - on the basis of which a legally valid posting can be proven. But even not having such a PD A1 does not imply that one would automatically be subject to the country of employment. Indeed, the Court of Justice clearly stated that such a certificate is not a constitutive condition and therefore does not create any rights and can also be delivered retroactively.[242] The PD A1 therefore plays a major role in determining where one has to pay contributions. Therefore, inspection services often ask for the presentation of such a PD A1. This form is requested in all circumstances. Until now, the coordinating Regulations on social security do not exclude certain activities, such as short trips abroad, from the obligation to be in a possession of a PD A1. So even an artist that goes abroad for one performance of a few hours, should have such PD A1. Some Member States recently seem to be much stricter in their judgment of having a PD A1 as a condition for being subject to the legislation of another State. They implemented sanctions in case of failure to show a PD A1 (or proof of the application of such form) and/or are currently carrying out far more inspections on having a PD A1.[243] Since there are often high administrative sanctions in the event that no proof can be delivered,[244] this might be an incentive for people to ask for a PD A1. Such Member States also refer to the Enforcement Directive which states that the lack of the

240 The question of whether non-EU nationals can also perform with their companies, e.g. abroad, is a question of whether or not a work permit is required and thus depends on each individual national Member State. However, (1) according to European law and the Court of Justice, a service provider established in the EU has the possibility, within the framework of the free movement of services, to bring along its staff (therefore also non-EU nationals/employees) without requiring a work permit from them (Curia CJEU Van der Elst), (2) in many cases national law provides an exception for obtaining a work permit for international artists or artists of international renown.

241 A PD A1 includes the personal information of employer and worker, the validity period, and the employment position or Member States of employment.

242 CJEU 30 March 2000, Banks, C-178/97, ECLI:EU:C:2000:169, paras 52-53.

243 See Austria: Section 21 LSD-BG France: Article L 114-15-1.

244 Current monthly social security ceilings or pecuniary sanctions up to € 10,000.

certificate concerning the applicable social security legislation referred to in Regulation (EC) No 883/2004 may be an indication that the situation should not be characterised as one of temporary posting to a Member State other than the one in which the worker concerned habitually works in the framework of the provision of services.[245] While, on the one hand, this obligation could be seen as an instrument to protect the person concerned, on the other hand, it is also an administrative measure leading to additional costs and burden that might be seen as an impediment to the free movement of services. In this respect, one could wonder if this requirement to ask for a certificate, even for very short trips, is in line with the necessity and proportionality of the application of the rules. In line with the recent case law of the Court of Justice in the domain of the Posting of Workers Directive (Dobersberger, Van den Bosch)[246] where the Court decided that the Posting of Workers Directive does not apply to activities in case they do not have a sufficiently close connection with that territory,[247] we can also defend that the obligation of a PD A1 could be excluded in case of very short postings. The current discussions on the amendment of the social security regulations also propose to exempt business trips from this requirement in the context of the administrative posting obligations[248] and seem to open the possibilities not to require the possession of a PD A1 in all circumstances. However, this proposal for exclusion seems to be difficult to apply in the music and performing arts sector as activities related to the provision of services or the delivery of goods are excluded from business trips, which is basically always the case for live performances. But more importantly, one might also question the high sanctions people are subject to in case they do not have a PD A1. While Member States are free to choose the penalties to be imposed,[249] they must verify that the material and formal conditions to punish infringements of Union law correspond to those to punish comparable and equally serious infringements of national law. In any event, they must ensure that the penalty is effective, proportionate, and dissuasive.[250] The actual sanctions are certainly not proportional. As the Court 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.[251] It seems to be that less drastic measures should be opted for.

245 See Preamble, 12.

246 CJEU Case C-16/18, (Dobersberger), ECLI:EU:C:2019:1110.

247 CJEU: Case C-16/18. Dobersberger, ECLI:EU:C:2019:1110 and CJEU C-815/18 ECLI:EU:C:2020:976, Van den Bosch.

248 Although the reason is different from the Posting of Workers Directive.

249 CJEU 2 February 1977, Amsterdam Bulb BV v Produktschap voor Siergewassen, C-50/76, ECLI:EU:C:1977:13, para 32.; CJEU Maksimovic (C 64/18), ECLI:EU:C:2019:723.

250 CJEU of 27 March 2014, Le Crédit Lyonnais SA v Fesih Kalhan, ECLI:EU:C:2014:190, para 44.

251 CJEU, Case Maksimovic, C-64/18, ECLI:EU:C:2019:723, 39.

6 | The live performance from a labour law perspective

6.1 Introduction

From the perspective of labour law, the main scenario which characterises mobile workers in the live performance sector is the one of posting of workers. Posting covers the situation where an employer established in a Member State (the home State) sends one or more of its workers to a different Member State (the host State) to provide services. As such, when discussing issues related to the application of labour laws to posted workers, hence including both posted artists and posted technicians and support staff, we focus exclusively on workers having an employment relationship. This excludes from the onset the potentially vast area of self-employment.

The main piece of EU legislation concerning this form of intra-EU mobility, namely the Posting of Workers Directive,[252] identifies three situations which should be considered as covered under the concept of 'posting':

- *transnational (sub)contracting:* covering the situation of workers employed in Member State A (Home State) by the posting undertaking who are then 'sent' to Member State B (Host State) in order to work directly under the direction of their employer in the context of a provision of services;
- *intra-group posting:* covering the situation where one or more workers working in the Home State for the posting undertaking are then 'sent' to the Host State in order to work in a different undertaking or establishment owned by the same group of the posting undertaking;
- *posting by temporary work agencies:* covering the situation where a temporary employment undertaking, or a placement agency hires out a worker to a user undertaking operating in the Host State.

All these situations cover a mobility which is **employer-driven**. The presence of the posted artist, technician, and/or member of the support staff in the host State is based of the business decision of their employer of carrying out a performance under a contract for services in a Member State other than the one where the undertaking is established. Of these three scenarios, the first one is the one which is most commonly applicable to the live performance sector. This would cover situations where artists have a contract of employment with an employer (a dance company, an orchestra, a theatre, ...) who, in its turn, concludes a contract of services for a performance (or series of performances) in a Member State different than the one where the employer is established. The employees, be them artists, technicians or support staff, are then temporarily sent to such Member State for the performance, while still being employed by the said employer.

This legal construction places posted workers, when it comes to their employment conditions, in a very different situation than workers circulating under the free movement of workers (Article 45 TFEU). An Italian cellist moving to France to join an orchestra as a temporary replacement will enjoy equal treatment *vis-à-vis* local workers, even if (s)he moves for just a couple of days for a series of rehearsal and a one-off performance. On the other hand, the same cellist moving between the same two Member States in order to carry out a performance under a contract for services, but doing so at the request of his/her employer, for instance, an Italian ensemble, will fall under the definition of posting of workers.

252 Directive 96/71/EC of 16 December 1996 concerning the posting of workers in the framework of the provision of services.

The Rome I Regulation[253] determines which law is applicable to contracts in case of possible conflict of law, for instance in transnational employment, situations such as those we have just presented. The main rule which is relevant for the situations of posted workers can be summarised as follows[254]:

- if the parties have not opted for a specific legislation to be applied to the employment contract, the contract shall be governed by the law of the country in which the employee habitually carries out his/her work;
- the country identified following the previous rule 'shall not be deemed to have hanged if he is temporarily employed in another country'.

The application of these rules would entail, for a situation where a worker is normally employed in the Home State and only temporarily posted to a different Member State,[255] the application of the employment conditions of the Home State. However, Article 9 of the Rome I Regulation includes a deviation from this scheme, by providing that **overriding mandatory provisions** in the Host State should be applied to the abovementioned situation, irrespective of the law applicable to the employment contract. It goes without saying that the identification of these mandatory provisions leaves a large amount of leeway to the Host State, which was confirmed by the Court of Justice in one of its earliest decision on posting of workers:

> *'[...] Community law does not preclude Member States from extending their legislation, or collective labour agreements entered into by both sides of industry, to any person who is employed, even temporarily, within their territory, no matter in which country the employer is established.'*[256]

Therefore, the Posting of Workers Directive can be understood as the instrument to identify **the provisions whose application to posted workers must be ensured by Member States**. Concretely, this instrument also provides guidance for posting employers to know which working conditions and levels of remuneration must be applied to their employees when these are posted abroad.

In addition to ensuring the application of these provisions, posting employers have to notify the posting of the artists through the **prior notification systems** that Member States have implemented for posted workers.[257] Several Member States have recognised the special situation of the live performance sector, thus introducing an exemption to this obligation when it comes to artists. For instance, France provides an exception for artists,[258] notably for postings up to 90 days over a year, while Belgium excludes 'artists of international renown' (up to 21 days over a trimester).[259] However, the introduction of these exemptions rests solely in the hands of a Member State, so that posting undertaking must adopt a case-by-case approach to check whether a prior notification is required or not in the specific national context and/or specific situation of posting.

6.2 Scope of application

When looking at the Posting of Workers Directive from the point of view of a 'forgotten sector', like the live performance sector, it is important to remark how this instrument **does not include any sectoral exceptions**. Indeed, the recent revision of this Directive went strongly in this direction, by mandating the application of the working conditions listed under Article 3(1), which we will describe

253 Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I).

254 Article 8 of the Rome I Regulation.

255 For example, a dancer employed by a dance company in Warsaw being sent to Berlin for a performance.

256 CJEU, Case C-113/89, *Rush Portuguesa Ldª v Office national d'immigration*, 27 March 1990, §18. It should be noted that just a few years later the Court had already developed a more restrictive approach, only allowing the application of 'legislation, or collective labour agreements entered into by both sides of industry *relating to minimum wages*' (our emphasis). See CJEU, Case C-43/93, *Raymond Vander Elst v Office des Migrations Internationales*, 9 August 1994, §23.

257 In application of Article 9 of the so-called 'Enforcement Directive', Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System ('the IMI Regulation').

258 Article L1262-6 of the Labour Code and decree of 4 June 2019, Article 1.

259 Royal Decree of 20 March 2007.

in the next subsection, to all sectors of the economy, whereas the previous text only mandated the inclusion of the construction sector, leaving Member States free to extend to other sectors. This change was partly due to specific problems arising from the sectoral approach. A good example of this was the situation of the meat processing industry (slaughterhouses) in Germany. This sector had not been included in the German transposition of the Posting of Workers Directive, giving rise to a situation where, up to 2014, posting undertaking in this sector could apply wage levels of their Home State (Wagner, 2015). This even gave rise to complaints from other EU Member States, lamenting the unfair competition vis-à-vis their own companies active in the meat industry.[260] Therefore, an adapted approach in this context, for instance to include exemptions to the application of working conditions for specific sectors, like the live-performance one, seems unlikely in the short and medium term. In this perspective, social partners and associations in this sector might find it more productive to focus on the possibilities offered to national legislators to better adapt regulations and enforcement regimes to the specificities of individual sectors.

Secondly, the Posting of Workers Directive is **applicable from 'day zero'**, that is, from the first moment a worker is sent to another Member State in the context of a provision of services. From this moment, the posting employer will have to apply the working conditions of the host Member State when it comes to the list of measures included in Article 3(1) of the Posting of Workers Directive (see next subsection). This is also confirmed by the Practical Guide on Posting released by the European Commission in 2019 (EC, 2019c).[261] While this rule can appear as rather rigid, it has at least the advantage of providing a clear indication concerning the applicable rules. The only mandatory exception to this regime is established by Article 3(2), and covers the 'initial assembly and/or installation of goods' up to a maximum of 8 days of posting. This exception *might* cover the initial work done by technicians to set up a concert stage or other venue, as it has been suggested by Pearle*, the European employers association for the live-performance sector in Europe (Pearle*, 2019a, pp. 3-4). In this regard, it is important to stress that the wording of the article only cover activities carried out in the context of a provision of goods, so that it is impossible to provide a clear answer as to whether this exception might apply to such situations. In the past the Court of Justice has relied on a very broad interpretation of this exception to underpin its reasoning on short-term postings, as we will see in the next paragraph, so it is possible that such an expansive approach might also be applied in a hypothetical case concerning the initial work done by technicians. Other exceptions are possible under the Posting of Workers Directive, but these only provide options which Member States are free to integrate in their national transposition. In particular, Article 3(3) provides for the possibility to exempt postings not exceeding one month in duration from the obligation to apply the same remuneration as local workers. Again, this is only possible if the Host State has decided to include explicitly such an exception in their legal framework for posting, so that a case-by-case approach is once again necessary.

In closing the Section devoted to the scope of application of the Posting of Workers Directive, we also need to take stock of a recent legal evolution concerning **very short-term postings**. This stems from two decisions of the EU Court of Justice.[262] As such, it is important to keep in mind that clear-cut conclusions on this issue are impossible and basing any business practice on this legal construction would expose companies to an important degree of risk. In these decisions the Court of Justice concluded that 'a worker cannot, in the light of Directive 96/71/EC, be considered to be posted to the territory of a Member State unless the performance of his or her work has a **sufficient connection with that territory**'[263] (the emphasis is ours). In the absence of this connection, workers are not

260 BBC News, Belgium protests over German low pay in EU complaint, 9.4.2013.

261 EC, 2019c: 'As far as the terms and conditions of employment of posted workers are concerned, Directive 96/71/EC applies to all postings, irrespective of their duration'.

262 CJEU, Case C-815/18, Federatie Nederlandse Vakbeweging v Van den Bosch Transporten BV and Others, 1 December 2020, and CJEU, Case C-16/18, Michael Dobersberger v Magistrat der Stadt Wien, 19 December 2019.

263 *FNV Transporten*, §45.

considered as posted by the Court of Justice and, as such, they escape the whole legal framework being presented here, remaining instead covered by their home State rules on remuneration and working conditions (Ioassa, 2021). The existence of this 'sufficient connection' has to be assessed on a case-by-case basis, and in light of three criteria established by the Court of Justice in the same decision:

a) the nature of the activities;
b) the degree of connection between the worker's activities and the territory in which the worker operates;
c) the proportion represented by those activities;

The first of these precedents (the *Dobersberger* case) was decided in the context of an international railroad operation. The Court of Justice put a special emphasis on the fact that the workers in question would begin and end their shifts in their Home State. The second of these precedents (the *FNV Transporten* case) deals with international road transport. Therefore, it is unclear if and to what extent this exception would apply to artists and technicians posted in the context of the live-performance sector. On the basis of the said precedents, it is *more likely* that operations which entail a very limited presence (under 24 hours) in the host State would fall under this exception. Barring a further legislative intervention, this aspect of posting will remain a grey area (Rocca, 2020) and will only be clarified by future decisions of courts and tribunals.

6.3 Working conditions

Coming to the remuneration and working conditions of posted workers, the Posting of Workers Directive obliges Member State to extend **a list of specific protections** to these workers, covering important employment conditions such as remuneration, maximum work periods, minimum paid annual leave, and health and safety measures.[264] The Directive identifies which legal instruments should be taken into account when determining these protections. These are:

1. laws, regulations and administrative provisions;
2. universally applicable collective agreements, meaning collective agreements which are legally binding on all undertakings in the geographical area and in the specific industrial sector or profession;
3. generally applicable collective agreements, meaning collective agreements which are either a) generally applied[265] in the geographical area and in the specific industrial sector or profession or b) concluded by the most representative employers' and labour organisations at national level.

The application of collective agreements identified at point (3) can be done 'in the absence of, or in addition to' collective agreements identified at point (2). This means, for instance, that a Member State characterised by both a national level of mandatory collective agreements and a regional level of collective agreements which are generally applicable in the given region and improve on the level of the national agreement, could opt for applying the latter ones to posted workers. It is important to note that Member States must operate an explicit choice as to which kind of agreements they wish to apply to posted workers,[266] as long as these fall into one of the abovementioned categories.

264 The full list included in Article 3(1) of the Posting of Workers Directive is: (a) maximum work periods and minimum rest periods; (b) minimum paid annual leave; (c) remuneration, including overtime rates; this point does not apply to supplementary occupational retirement pension schemes; (d) the conditions of hiring-out of workers, in particular the supply of workers by temporary employment undertakings; (e) health, safety and hygiene at work; (f) protective measures with regard to the terms and conditions of employment of pregnant women or women who have recently given birth, of children and of young people; (g)equality of treatment between men and women and other provisions on non-discrimination; (h) the conditions of workers' accommodation where provided by the employer to workers away from their regular place of work; (i) allowances or reimbursement of expenditure to cover travel, board and lodging expenses for workers away from home for professional reasons.

265 Generally applicable collective agreements should be intended as covering the great majority of undertakings in the occupation or industry concerned.

266 See CJEU, Case C-341/05, *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet*, 18 December 2007 (hereinafter, '*Laval*'), §67.

The Posting of Workers Directive also states that the application of the list of specific protections should not prevent the application of **more favourable conditions** to workers.[267] The Court of Justice has interpreted this to only cover more favourable conditions which are applicable under Home State rules.[268] As such, when determining the remuneration and working conditions applicable to posted workers, the posting employer has to operate a comparison between the conditions applicable under the employment contract in the home State and the ones applicable under the instruments, listed in the Posting of Workers Directive, and apply those which are more favourable. This will lead, for instance, to the application of the highest level of remuneration and the lowest level of maximum working time.

The 2018 reform of the Posting of Workers Directive has replaced the concept of 'minimum rates of pay' that have to be applied to posted workers by '**remuneration**'. This broader concept includes both the minimum wage applicable to the given posted worker, but also all the constituent elements of remuneration rendered mandatory by the applicable legislation and/or collective agreements.[269] For the identification of the remuneration applicable to the given posted worker, the posting undertaking must take into account the specific functions (1st solo singer, chorister, dancer, etc.) as well as the seniority of the worker if these elements are part of the legislation and/or collective agreements applicable to posted workers in the Member State of posting. Other elements of remuneration can include end of the year bonuses and other kind of bonuses, indemnities for travelling to the workplace or for hard and hazardous work and so on. Single national websites set-up by Member States should include all the constituent elements of remuneration which are applicable to posted workers,[270] although, in the absence of case law from the Court of Justice, it is unclear whether such an 'inclusion' can be fulfilled by a simple reference to the collective agreements providing the applicable remuneration. The remuneration applicable to posted workers in the home State and the applicable one in the Host State should be compared on the basis of the gross amount of remuneration,[271] taking into account the global 'package' of remuneration (that is, not on an item-by-item basis). Importantly, sums 'paid in reimbursement of expenditure actually incurred on account of the posting' cannot be included by the posting undertaking in the calculation of the global amount of remuneration of posted workers.[272]

In the context of our research, we encountered the experience of a **public sector employer** posting artists, employed under the status of civil servants, to a different Member State. The working conditions and, specifically, remuneration of these artists was thus set by administrative act which the director of the theatre in question could not amend under the home State constitutional rules. This made it impossible to ensure that the posted artists would receive a level of remuneration in line with the one applicable under the legislation and collective agreements of the host State. It is important to note that the Posting of Workers Directive itself does not exclude the public sector from its scope of application and the term 'undertaking' used by the Directive, has been interpreted by the Court of Justice as covering public bodies.[273] While many Member State have rules for civil servants which entail the payment of allowances for missions abroad, these are generally defined as reimbursement for the expenses incurred during the trip, sometime providing a lump-sum payment meant to cover costs of meals and lodging. However, the Posting of Workers Directive explicitly excludes this kind of payments from the calculation of the remuneration applicable to posted workers.[274] This has been confirmed by the Court of Justice,[275] thus giving rise to a particularly complex situation. While it is

267 Article 3(7) of the Posting of Workers Directive.

268 See CJEU, *Laval*, §80.

269 Posting of Workers Directive, Article 3(1).

270 *Ibidem*.

271 Recital 18, Directive (EU) 2018/957 of the European Parliament and of the Council of 28 June 2018 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services.

272 Posting of Workers Directive, Article 3(7).

273 See CJEU, Case C-108/10, *Ivana Scattolon v Ministero dell'Istruzione, dell'Università e della Ricerca*, 6 September 2011, §§42-44.

274 Posting of Workers Directive, Article 3(7).

275 CJEU, Case C-396/13, *Sähköalojen ammattiliitto ry v Elektrobudowa Spolka Akcyjna*, 12 February 2015, §60.

clear that EU law prevails over national constitutional arrangements,[276] the national institution would still find itself in the difficult position of not having a legal means to ensure the application of the correct remuneration to its employees (civil servants) and, as such, having to renounce to perform abroad. This clearly represents an obstacle to the full enjoyment of the freedom to provide services guaranteed by the EU Treaties. In the absence of clearer guidance from the Court of Justice, similar situations can only be solved by the national legislator, through the introduction of a legal means to allow for the payment of a posting allowance to civil servants to match the remuneration applicable to these workers in the host State.

The application of remuneration levels and working conditions from a different Member State entails an added layer of complexity for posting employers, which is a natural consequence of the transnational nature of the employment situation of posted workers combined with the different systems of labour laws in force across the Member States of the EU/EEA. To obviate to this problem, Article 5 of Directive 2014/67/EU states that each Member State should set up a **single official national website** to improve accessibility to information. However, websites implemented on the basis of Article 5 of the Enforcement Directive, so far and for the most part, cover only a part of the information that workers and employers actually need, as no information is available on social security law and tax law, or even on the applicable collective agreements (Jorens & De Wispelaere, 2019). It is important to highlight that Member States now have a direct interest in ensuring the quality and completeness of the information provided through national websites. Indeed, the revision of the Posting of Workers Directive has added, in Article 3(1), an obligation for national authorities to 'take into account' the absence or incompleteness of information provided by said websites when determining the proportionality of penalties in case of infringement of the posting rules. Furthermore, the Court has already shown a clear willingness to assess the proportionality of sanctions introduced by Member States against posting undertakings.[277] Though non-binding, the approach to the presentation of information stemming from universally applicable collective agreements designed by ELA together with its 'Working Group on Information' might provide a blueprint for public authorities, as well as social partners, to provide the relevant information in an easily accessible format in the context of official national websites. To give an idea of what this might look like, we have applied this template to the two collective agreements applicable to the live performance sector in France. The result is included in Appendix 2.

6.4 Posting and labour law: a sequence

In the previous pages we have provided an overview of the EU framework for the application of labour laws to posted workers, and of the issues and tensions arising in the context of mobility in the live performance sector. Here we propose a step-by-step approach meant to summarise the main areas that a posting undertaking must consider when defining the remuneration and working conditions applicable to its workers during their period of posting. This represents a useful tool not only to guide the action of posting undertakings, but also to identify difficulties, grey areas and potential for improvement.

IDENTIFICATION OF SOURCES

1. Laws, regulations and/or administrative provisions in the host State constitute the 'legislation of the host State'. They are applicable to posted workers inasmuch as they contain provisions concerning terms and conditions of employment included in Article 3(1) of the Posting of Workers Directive.
2. 'Applicable collective agreements' are collective agreements which are either universally or generally applicable in the host State, or have been concluded by the most representative trade

276 See for example CJEU Case C-490/04, *Commission v Germany*, 18 July 2007, §43.

277 See Case C-33/17, 13 November 2018, *Čepelnik d.o.o. v Michael Vavti*, and Joined Cases C 64/18, C 140/18, C 146/18, and C 148/18, 12 September 2019, *Zoran Maksimovic and Others v Bezirkshauptmannschaft Murtal and Finanzpolizei*.

unions and employers' organisations at national level in the host State.[278] They are applicable to posting undertakings and posted workers who fall into their scope of application.[279]

3. If the posting is done by a temporary employment undertaking or agency, then the user undertaking must inform that undertaking or agency of the terms and conditions of employment that it applies regarding the working conditions and remuneration. Go to point **5**.
4. If the posting is not performed by a temporary employment undertaking or agency, go to point **6**.

TEMPORARY WORK AGENCIES

5. The posting employer must apply to workers posted by a temporary employment undertaking or agency working conditions and remuneration which are at least the same that would apply if they had been recruited directly by the user undertaking to perform the same job, unless national law provides for an exception.[280]

REMUNERATION

6. Check the remuneration applicable to posted workers under the legislation of the host State (legal minimum wage). If this is higher than the remuneration applicable to the employee on the basis of his/her employment contract, then the remuneration must be increased to match the legal minimum wage for the whole duration of the posting.
7. Check the remuneration applicable to posted workers under the applicable collective agreements. This includes the general minimum level of remuneration and/or the minimum remuneration for the specific functions and seniority of the posted worker. If it is higher than the remuneration applicable to the employee on the basis of his/her employment contract, or higher than the remuneration applicable under point **6**, then the remuneration must be increased to match the level set by the applicable collective agreement for the whole duration of the posting.[281]

OTHER ELEMENTS OF REMUNERATION[282]

8. Check other elements of remuneration applicable to posted workers under the legislation of the host State.
9. Check other elements of remuneration applicable to posted workers under the applicable collective agreements. These can be elements which are specific to certain functions and/or categories of workers identified by the collective agreements.
10. The total amount of remuneration (gross) to be paid to the posted worker is equal to the sum of a) the highest amount resulting from points **6** and **7** + b) the highest amount resulting from points **8** and **9**. If this (gross) amount is higher than the total amount of remuneration (gross)

278 Multiple collective agreements can be applicable to the same situation, particularly in the case of Member States characterised by multiple levels of collective bargaining (national, sectoral, regional). Collective agreements applicable to posted workers should be referred to in the single official national website. Links to national websites are listed on https://europa.eu/youreurope/citizens/work/work-abroad/posted-workers/index_en.htm. The user undertaking, venue, or organiser in the host State might also be able to provide assistance concerning the identification of these collective agreements.

279 The scope of application of a collective agreement can be defined using different criteria. The most common ones refer to (a) the territorial scope (a collective agreement is applicable in the national, regional or other territory), (b) the industrial scope (a collective agreement is applicable to a specific economic sector), and the personal scope (a collective agreement is applicable to specific professions). NB: other criteria are possible. France, for instance, has a collective agreement for the live performance sector applicable to work done for an organiser which is subsidised by public funds and a different one for work carried out for a purely private organiser.

280 See Article 5 of Directive 2008/104/EC.

281 The application of the rules on remuneration established by collective agreements includes the way in which remuneration should be calculated. For instance, this includes the distinction between minimum fees for rehearsals, travel days, performances, etc.

282 Elements of remuneration include all the elements of remuneration which are mandatory under the applicable legislation and collective agreements, and for example: payment for overtime, payment for evening and night work, payment for work on Saturdays/Sundays/public holidays, payment for shift work, payment for hazardous work, payment for particular working conditions, end of the year bonuses, meal vouchers, compensation for daily travel time, profit sharing plans, ... Other elements of remuneration applicable to posted workers should be identified by the Host State in the single official national website.

paid to the employee on the basis of their employment contract, then the total amount of remuneration (gross) must be increased to at least match the amount resulting from the present point for the whole duration of the posting.

MAXIMUM WORK PERIODS AND MINIMUM REST PERIODS[283]

11. Check the maximum work periods under the legislation of the host State.
12. Check the maximum work periods under the applicable collective agreements.
13. The maximum work periods of posted workers during their posting must be limited to the lowest ceiling resulting from points **11** and **12**.
14. Check the minimum rest periods under the legislation of the host State.
15. Check the minimum rest periods under the applicable collective agreements.
16. The minimum rest periods to be recognised to posted workers during their posting must be at least equal to the highest level resulting from points **14** and **15**.

MINIMUM PAID ANNUAL LEAVE

17. Check the minimum amount of paid annual leave under the legislation of the host State.
18. Check the minimum amount of paid annual leave under the applicable collective agreements.
19. The minimum amount of paid annual leave to be recognised to posted workers during their posting must be at least equal to the highest amount resulting from points **17** and **18**. If the period of posting is shorter than one year, the amount of paid annual leave should be reduced accordingly.

ALLOWANCES OR REIMBOURSEMENT OF EXPENDITURE[284]

20. Check the allowances or reimbursement of expenditure under the legislation of the host State. These are applicable to posted workers in the same way as they apply to local ones.
21. Check the allowances or reimbursement of expenditure under the applicable collective agreements. These are applicable to posted workers in the same way as they apply to local workers.
22. The minimum amount of each specific allowance or reimbursement of expenditure to be recognised to posted workers must be set at least at the same level as the highest ones resulting from points **21** and **22** if the posted workers satisfy the same criteria for their application as the ones applicable to local workers.

CONDITIONS FOR ACCOMMODATION

23. Check the existence of an obligation for the employer to provide accommodation for its workers under the legislation of the host State. These obligations are applicable to the posting employer in the same way as they apply to local employers.
24. Check the existence of an obligation of the employer to provide accommodation for its workers under the applicable collective agreements. These obligations are applicable to the posting employer in the same way as they apply to local employers.
25. The posting employer must provide accommodation for posted workers if such an obligation results from either point **23** or **24**. Conditions for accommodation must be at least the same as those applicable to local employers and workers.

283 Maximum work periods include maximum daily and weekly working time, as well as the methods for its calculation. They include the thresholds after which posted workers are considered to be working overtime, as well as the maximum amount of overtime which can be requested to a worker over a certain period. Also included in this category are special conditions for the calculation of working time, such as reference periods, night work, work patterns, ... Minimum rest periods include daily and weekly rest, the minimum amount of breaks during the working day, and the organisation of shift work.

284 Allowances or reimbursement of expenditure can include elements such as travel allowances for trips undertaken in the host State (hence, not related to the posting itself), meal and/or subsistence allowances, compensation for lodging, ...

HEALTH, SAFETY AND HYGIENE AT WORK

26. Check the obligations of the employer to ensure the health and safety of its workers under the legislation of the host State. These include specific protective measures concerning the employment of pregnant women or women who have recently given birth, as well as the employment of children and of young people.
27. Check the obligations of the employer to ensure the health and safety of its workers under the applicable collective agreements. These include specific protective measures concerning the employment of pregnant women or women who have recently given birth, as well as the employment of children and of young people.
28. The obligations of the posting employer concerning the protection of the health and safety of its workers, including the entitlement of posted workers to training in matters related to these subjects, are equal to the most specific ones resulting from points **26** and **27**.

EQUALITY OF TREATMENT

29. Check the conditions related to equal treatment between men and women and other provisions on non-discrimination under the legislation of the host State.
30. Check the conditions related to equal treatment between men and women and other provisions on non-discrimination under the applicable collective agreements.
31. The posting employer must ensure the application of conditions resulting from both points **29** and **30**.

7 | Problems and challenges encountered

In this chapter, we give an overview of the main challenges and problems (highly) mobile workers and (touring) companies encounter when providing services abroad. Different methods have been used to identify these obstacles. First, desk research was carried out in order to obtain an overview of the main challenges defined in other studies (e.g. Bàlta et al., 2019; Daubeuf et al., 2018; Demartin et al., 2014). We have focused on a few key points and do not have the ambition to provide an exhaustive overview of all possible problems and obstacles. Second, beginning of February 2021, a questionnaire was questionnaire was sent to the members of Pearle*'s national partners. Third, a focus group was organised at the beginning and end of the project with, among others, several national employers' organisations that were closely involved in this research (OKO (Belgium), APD CR (Czech Republic), FEPS (France), Performart (Portugal), and Svensk Scenkonst (Sweden)). Finally, several expert interviews were organised with touring companies and organisations receiving touring companies as well as with national public authorities.

7.1 Difficulties and obstacles based on a literature review

When analysing the main challenges mobile artists and (touring) companies encounter, the common denominator is often the legal complexity and administrative burden that arises when applying the rules in the field of European labour and social security law, as well as the corresponding administrative formalities (i.e. applying for a PD A1 and making a prior notification). In addition, there is a lack of knowledge about the social security and labour legislation to be applied in a cross-border context, partly due to the lack of clear information.

When discussing the challenges related to the application of the labour and social security legislation, a distinction can be made between national and European legislation. In this report, the focus is on European legislation, in particular on the challenges encountered regarding the application of the Coordination Regulations and the Posting of Workers Directive. However, national legislation may have an impact on how easy or how difficult these European rules can be applied. In addition, we should also be aware of the fact that the 'atypical'[285] character of the sector can have an impact on the challenges identified in a transnational context.[286] However, the assessment whether or not this 'atypical' character should be considered as a problem or challenge for the sector (and possible solutions to address this) goes beyond the scope of this report.

7.1.1 Problems related to the application of the legal framework in the field of social security law

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 very 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. How challenging this can be, also for the competent national administrations, has already been extensively discussed in *Chapter 5*.

285 According to Eurofound, 'atypical work' includes part-time work, temporary work, fixed-term work, casual and seasonal work, self-employed people, independent workers and homeworkers. Although the number of workers in non-standard employment has grown significantly over the past two decades, these workers continue to be regarded as being in 'atypical' employment. See https://www.eurofound.europa.eu/observatories/eurwork/industrial-relations-dictionary/atypical-work

286 For instance, some of the difficulties result from the absence of legislation recognising the specific labour situation of artists and culture professionals. Despite the high rate of self-employed artists, specific legislation on self-employed artists is absent in at least nine Member States (Baltà et al., 2019). Furthermore, there is no general definition in EU law of what an artist is, or clarity on how (s)he works. Given the artists' generally dynamic career pattern, it is common that they are subjected to a simultaneous or combined status of employed or self-employed. This ambiguity in their employment status may weaken the artists' level of social protection especially in cross-border situations.

For instance, when artists are active in multiple Member States, thus falling under Article 13, 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 social security coordination. This might cause a situation where a musician is active in a number of Member States, including his/her 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 (such as, in our example, a French orchestra) and also active as self-employed in other Member States.

Problems may also arise when applying the conditions in order to be posted under Article 12 of the Basic Regulation. 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 to three months of prior insurance.

Another obstacle and administrative burden derives from the requirement to make payments in another country than the country of the employer when it concerns an artist who remains subject to the social security of his/her country of residence. Problems occur with the condition to register in each of the countries of the person concerned, the actual payment of the social security contribution due which in practice seems often not possible, the administrative conditions with the payroll services which do not have systems in place to deal with social security contributions due in another country.

Finally, due to this complexity, gaps may appear in the social protection of mobile workers in the live performance sector. For instance, the stay in another Member State might be too short for an artist to build up social rights and to be entitled to access the local social security system. Despite the principle of aggregation of insurance periods, artists may experience difficulties in accessing unemployment schemes.[287] Furthermore, at the end of their career, this may have negative consequences on the calculation of the old-age pension.[288, 289]

7.1.2 Problems related to the application of the legal framework in the field of labour law

As highlighted in Chapter 6, a first order of 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 State to perform a service there. This has an important impact on the complexity faced

287 The draft to revise the Coordination Regulations proposes a minimum period of three months of insurance in the Member State where the last activity took place in order to acquire the right to total previous periods of insurance. For highly mobile workers, this provision may hamper the entitlement to unemployment benefits.

288 The claimant of an old-age, survivors' or invalidity pension should submit a claim to the Member State of residence or the Member State in which s/he was last insured. This is the 'contact Member State'. However, the Member State of residence cannot be the contact Member State if the claimant has never been insured in this Member State. The contact Member State will send the claim and the accompanying documents to the other Member States in question (i.e. Member States in which the claimant was previously insured). Each Member State in question will notify the claimant and the contact Member State of the decision. Once the contact Member State has received all decisions, it will send the claimant and the other Member States concerned a summary of those decisions via the Portable Document P124 or the equivalent E211 form. The PD P1 'Summary note' provides an overview of the decisions taken by the various Member States from which one has claimed an old-age, survivors' or invalidity pension.

289 Article 57 of the Regulation 883/2004 exempts the Member State to pay an old-age benefit if the duration of insurance, employment, self-employment or residence is less than one year provided that no right to benefit is acquired under that legislation for periods of less than one year.

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 the limited connection with the host State, this remains a judge-made category with uncertain boundaries which does not provide the necessary certainty for business decisions.

The fact that the remuneration applicable to posted workers is not limited to minimum wages in force in the host State, but also includes all other mandatory elements such as indemnities and bonuses, also means that a case by case analysis is often necessary to make sure that the correct amount is paid to posted workers. In the context of the interviews carried out for the present report, we sometimes encountered the practice of checking the level of minimum wage applicable in a given Member State to determine whether any additional remuneration is to be paid to posted workers. While this can provide some guidance, particularly in case of important differentials, this practice is open to potential errors and, hence, sanctions. This is notably the case where in the live performance sector of a given Member State collective agreements provide for important bonuses and similar elements to be added on top of a relatively low minimum wage. Clarity concerning the applicable elements of remuneration would thus be of paramount importance in the context of single national websites.

7.1.3 High administrative burden

A distinction should be made between the administrative burden that arises from the application of the legal framework (e.g. identifying the competent Member State for social security, paying social security contributions in this Member State, applying the terms and conditions as defined in the Posting of Workers Directive) versus the corresponding administrative formalities (e.g. request for a PD A1 in the Member State of origin, a prior notification in the host Member State). In this section, the focus is on the latter.

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 and France grant an exemption from prior notification to artists and their employers. Moreover, the need to have a Portable Document A1 for every posting abroad is a burdensome and time-consuming procedure.[290] 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.

7.1.4 Lack of information and awareness

A general problem for mobile artists and companies is to get the necessary and specific information on their rights and obligations when providing services abroad.[291] Even national administration(s) sometimes seem unable to provide precise information (Demartin et al., 2014). In that respect, the availability and accessibility of information on the applicable rules and the administrative formalities have regularly been cited as a central challenge for cultural mobility and for the live performance sector in particular.

Information platforms are not always properly funded and rely on extra-contractual investments to operate on a quasi-voluntary basis. At the same time, policy has failed to support businesses by developing 'one-stop-shops' (Pearle*, 2019a).

290 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 PD A1 in time.

291 Moreover, legislation and documents are not always available in a language other than the national language.

Finally, EU funding opportunities for mobility are not always connected by a clear strategy and vision on the mobility of artists and creative entrepreneurs across Europe. As such, the mobility opportunities appear isolated in various EU support programmes, an aspect which hampers their visibility and accessibility.

7.2 Difficulties and obstacles based on the online questionnaire

The online questionnaire, administered to organisations with transnational activities in the live performance sector, also aimed to expose potential difficulties and obstacles they face when sending/hosting artists and support staff from another EU/EFTA country. As already mentioned in Section *2.3.2.4*, the questionnaire was largely structured on the basis of three different types of main activities:

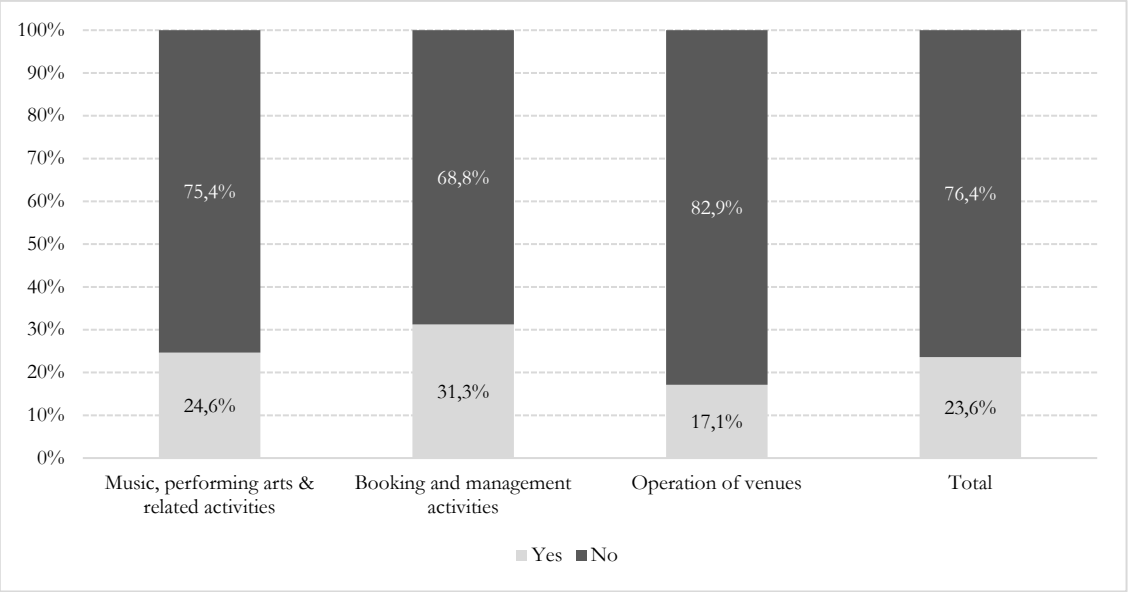
1. **music & performing arts** (i.e. theatre, concerts, opera, dance, circus and other stage productions) **and related support activities** (e.g. stage-set designers and builders, scene shifters, lighting engineers, etc.);
2. **booking and management activities in the live performance sector**;
3. **operation of venues** (e.g. concert halls, theatres and other arts facilities including festivals).

Whereas the transnational dimension of the organisations with (1) music, performing arts and related activities and (2) the booking and management agencies is considered from a sending perspective, the transnational dynamic for (3) the venue operators is seen from a receiving perspective. Put differently, the organisations focusing on (1) music, performing arts and related support activities and (2) booking and management activities *export* services to other countries, whilst the (3) venue operators mostly *import* live performance services from other countries.

Figure 7.1 visualises the share of organisations that encountered difficulties or obstacles when sending/hosting artists and supporting staff to/from other EU/EFTA countries for all participating organisations that exported/imported live performance services in recent years. The organisations are classified on the basis of their main activity which makes it possible to make a distinction between the *exporting* organisations (music and performing activities & booking and management activities) and the *importing* organisations (operation of venues).

One out four (24%) respondents experiences difficulties or obstacles when sending artists to another Member State or when hosting foreign artists. A distinction based on the main activity shows that the organisations *exporting* services from artists or supporting staff are more likely to encounter difficulties and problems (25% among music and performing arts and 31% among booking and management activities) than the organisations *importing* services from artists or supporting staff (17% among venue operators). These figures show that we should not overestimate the problems and obstacles faced when providing services abroad.

Figure 7.1 **Share of organisations facing difficulties or obstacles when sending/hosting artists from another EU/EFTA country mainly linked to their employment or social security status (organisations that sent or hosted artists and supporting staff to/from other EU/EFTA countries, 2018-2019, in %)**



* N Music & Performing arts = 203/N Booking and management agencies = 32/N Venue operators = 70/ N Total = 305.

Source Own calculations based on online questionnaire (2020)

In what follows, we zoom in on the characteristics of the difficulties encountered by the exporting and importing organisations that faced difficulties or obstacles in recent years.

7.2.1 Most frequently mentioned difficulties and obstacles

The organisations that experienced challenges when sending/hosting artists and support staff to/ from other EU/EFTA countries in recent years were asked to specify the nature of these difficulties and obstacles in an open answer. A relatively high proportion of organisations used this opportunity:

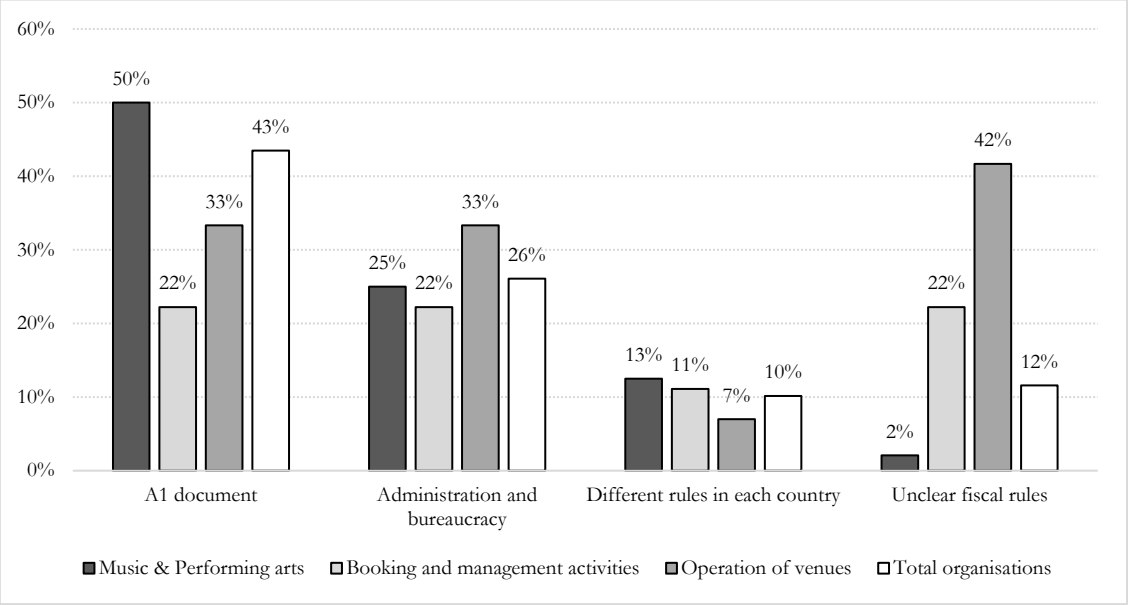
- 42 out of the 50 exporting organisations with mainly music, performing arts and related activities that encountered difficulties/obstacles (84%) gave extra information on the nature of these challenges;
- nine out of ten organisations with mainly booking and management activities that encountered difficulties while sending artists abroad (90%) also explained the nature of these problems;
- all of the venue operators which recently *imported* services from artists and supporting staff from other EU/EFTA countries and experienced difficulties/obstacles (N=12) gave more insight into how these problems actually manifest themselves by completing the open question.

In what follows, we discuss the obstacles and difficulties reported by these respondents in more detail. Particularly for the organisations with booking and management activities, it should be taken into account that the following analyses are based on a relatively small number of organisations (N=9). This should always be kept in mind when interpreting the following quantitative analyses. Therefore, the statements based on the following analyses only relate to the organisations that participated and should not be generalised to the population of organisations with a transnational character.

Because the organisations could answer openly when discussing the difficulties and obstacles experienced, the answers given are very diverse. In contrast to closed questions in which the organisations have to choose from different answers, they were not pushed in a certain direction and would indicate the problems they had in mind. Despite the large variety of given answers, we have tried to find out which problems were mentioned the most by searching for a number of key words in the

open answers. *Figure 7.2* gives an overview of the most frequently mentioned challenges per type of organisation.

Figure 7.2 Share of organisations mentioning following difficulties/obstacles by type of organisation facing difficulties/obstacles when sending/hosting artists to/from other EU/EFTA countries (in %)



* N Music & Performing arts = 48/N Booking and management agencies = 9/N Operation of venues = 12/ N Total = 69.

Source Own calculations based on online questionnaire (2020)

Although most of the organisations that replied described a very specific problem, it is striking that certain difficulties and obstacles are shared by a relatively large number of organisations. This is particularly the case for problems related to the PD A1. As much as 43% of the total group of organisations reports this as being a difficulty. For the subgroup of organisations mainly involved in music, performing arts and related activities, even half (50%) of them specifically refer to the A1 documents. While some organisations simply state 'A1' as their answer, others go into more detail about the exact problems with the document. A brief overview:

- a number of organisations complain about the constant need to provide a PD A1 for very short stays abroad. They consider this 'obligation' as disproportionate;
- other organisations state that it is sometimes difficult to get a PD A1 (on time);
- many do not consider it necessary to fill in a PD A1 for self-employed artists or support staff.

Another important obstacle based on the replies of the exporting organisations are the abundance of administrative procedures and bureaucracy related to sending/hosting artists abroad. Accordingly, more than one out of four organisations (26%) complained about the enormous amount of administration and slow procedures. Since the stay of most artists and support staff is usually very short *(cf. Section 4.2.4.2c)*, this is experienced as extremely frustrating. Consequently, terms as '*frustrating*', '*irritating*' and '*cut the red tape*' emerged in the answers.

Other less frequently mentioned difficulties relate to the complexity due to differences in rules between countries (*'please unify the EU')* (10%) and the lack of clarity with respect to the fiscal rules (*'what should be done?'*) (12%). This lack of clarity regarding the fiscal rules was particularly frequently mentioned by the *importing* venue operators that faced difficulties when hosting artists and support staff from abroad (42%). Some quotes:

'Questions about double taxation where the artists' home country can't take into account the documents the other EU/EFTA government provides';

'If foreign artists work as independent there is always an issue/question if they have to add VAT or not to their invoice, which taxes or not have to pay on their fee, this is very unclear'.

7.2.2 Lack of awareness regarding regulations on working conditions of posted workers

In addition to above-mentioned problems, it appears that a large proportion of the surveyed organisations that sent/hosted artists and support staff to/from other EU/EFTA countries are not (sufficiently) aware of the applicable rules regarding the working conditions to be respected. Concretely, the questionnaire contained a question asking the organisations whether they were aware of the amendment of the Posting of Workers Directive. *Table 7.1* gives an overview of the replies by typology of organisation. The figures clearly show that the vast majority of organisations were not aware of the changes in legislation. While more than seven out of ten (72%) organisations with mainly music, performing arts and related activities stated not to be aware of the changes, the shares among organisations operating venues (78%) and booking and management agencies are even higher (84%). This is all the more surprising, as we assumed that a number of organisations would respond in a socially desirable way to the question.

Table 7.1 Share of organisations aware of the amendment of the Posting of Workers Directive by type of organisation (in %)

	Music, performing arts and related activities	Booking and management activities	Operation of venues	Total organisations
Yes	28.0	15.6	22.5	25.5
No	72.0	84.4	77.5	74.5
Total	**100.0**	**100.0**	**100.0**	**100.0**

* N Music & Performing arts = 207/N Booking and management agencies = 32/N Operation of venues = 71/N Total = 310.

Source Own calculations based on online questionnaire (2020)

Surprisingly, the relatively small group of *exporting* organisations (music, performing arts and related activities & booking and management activities) that is aware of the amendments (26%) is not very transnationally active: Among 83% of these organisations, more than half of the performances by their artists and support staff took place in the own country. Moreover, within these organisations, an overwhelming majority (95%) of the artists and support staff going abroad only go abroad about once a year or about once a month for only a relatively short duration.

Although the changes in the legislation are relatively recent, it can be concluded that it is striking that only 26% of the organisations that recently sent/hosted artists are aware of this. This indicates a huge communication gap with potentially major consequences in terms of compliance. After all, if the rules are not known, a correct application of it cannot be assumed.

7.3 Incoming mobility, views from France[292]

As we highlighted in *Chapter 4*, France is one of the main destinations for live-performance companies and artists in Europe, often constituting the main receiving Member State when looking at the P1 A1 data. As such, in our initial mapping of the problem, the obstacles and hurdles encountered in mobility were often put forward by stakeholders. To better grasp these problems, we proceeded with a series of interviews addressed at actors in France to measure the extent of the understanding of these problems from the inside.

292 We are grateful to all the stakeholders who accepted to answer our questions. We also wish to stress that numerous issues have been raised by employers' associations and trade unions in the field of performing arts, particularly in relation to tax law and right of residence. We will not deal with those as they do not fall within the scope of the MOBILIVE project.

An important difference between the French regulation of artistic work and the one encountered in other Member States is the pivotal role that the employment relationship plays in structuring the work of artists. Indeed, under the French Labour Code, the existence of an employment relationship is presumed in the case of artists (Article L. 7121-3 of the Labour Code), although this presumption can be rebutted. This presumption does not apply to technicians who are not listed in Article L. 7121-2 of the French Labour Code. According to a national French artists' union (SNAM-CGT), 'from a social point of view, this status provides important social protection with unemployment, social security, retirement, vocational training, provident schemes, etc.' and is therefore of paramount importance and strongly rooted in French culture. The French Labour Code, Article L 7121-5, provides a specific exception to this presumption for self-employed artists established in a Member State. However, the fact that organisers, labour inspections, and other actors in the French live-performance environment are used to working with artists under an employment relation is a known (potential) source of misunderstandings (MOBICULTURE). In particular, situations where both employees and self-employed artists work side by side in the same production/performance, are known to be more open to challenges.

Some of the participants to our interviews highlighted the importance of the exemption[293] for employers who post artists, for a period not exceeding 90 days over 12 consecutive months from the obligation of introducing the prior notification for posting of artists, as well as from appointing a representative. Our interlocutors highlighted their relief in this regard, as the prior notification represented an administrative burden especially for small performances/productions (PRODISS).

On the other hand, our participants were unanimous that there were no legal or conventional exceptions to the application of the remuneration and working conditions established by laws and collective agreements. Collective agreements are as much applicable to employees as to self-employed workers under the principle of equal treatment. A trade union representative highlighted that these collective agreements ensure a dignified level of remuneration for artists in France (SNAM-CGT). The main problem highlighted by our interviews in this regard lies in the identification and understanding of the applicable collective agreement. Indeed, 'for instance, if one looks at the collective agreement that came into force in 2013, one realises the difficulties ... the pay and employment scales are not always obvious. As for the artist, there is the individual artist, the group of artists, it's complicated to understand. If the organisers themselves do not understand the collective agreement they cannot explain it to foreign employers' (PRODISS, our translation). The national collective agreement for artistic and cultural companies dated 30 November 2013 was the most cited during our interviews. However, the national collective agreement for private performing arts companies dated 3 February 2012 was never cited. These are the two collective agreements applicable in the performing arts. There are many more in the audiovisual field. In our interviews we were often told that it is easier for large organisations to comply with the applicable rules, whereas small venues, which do not always have access to the necessary information (MOBICULTURE).

As we already mentioned in the context of collective agreements, the question of access to information emerged in multiple occasion during our interviews. The impression emerging from these discussions is that the access to updated, clear and operational information represents the main problem encountered by foreign employers and artists in their mobility to France. In order to obtain information concerning, among other things, the applicable working conditions, foreign employers often refer to French organisers. These organisers, we were told, make use of the CLEISS website to answer their questions (PRODISS). However, CLEISS does not include any information specific for the live performance sector. Importantly, it also emerged from our interviews that French organisers often focus on the idea of buying 'a package' or 'a product' when they sign a contract for a provision of services (covering, for instance, a concert or pièce), with the implication that wages and working conditions paid to the intervening artists should be of no concern for them (SYNDEAC). As such,

293 Introduced by decree n° 2019-555 of 4 June 2019.

several participants highlighted how 'a clear, centralised, multilingual website which explains the applicable collective agreements, the applicable employment status and the applicable social security regime' would go a long way to remove obstacles to mobility (SFAI).

Difficulties in obtaining PDs A1 were sometimes highlighted as important barriers to inbound mobility of artists. Organisers often require these certificates, and some foreign employers might find it difficult to obtain them in a timely fashion. Our participants mentioned experiences in this sense with employers and artists from Poland and the United Kingdom (MOBICULTURE, SFAI). While in all our interviews we were unable to identify a specific attention of labour inspections to potential violations in the live-performance sector, we were told that, on the contrary, checking PDs A1 is a more common occurrence (MOBICULTURE). Our participants also expressed the feeling that there were stricter controls for artists sent to France from extra-EU countries in Africa or Asia (SYNDEAC).

When it comes to social security, no specific instances of foreign companies being subjected to 'double payments' of social security contributions could be identified by our participants. Our interviews mostly highlighted issues related to outbound mobility of French artists. These are also useful to highlight how the reliance on the qualification of artists as employees creates some difficulties in the context of mobility. From the point of view of the French artists going abroad for a performance (or a series of performances), the question of unemployment insurance might be an issue upon their return, if they have been recruited as self-employed abroad (SNAM-CGT). This creates an incentive for artists to sell their performance through intermediary structures which handle administrative work, in order to preserve their employee status when working abroad. As such, social security law is a more complicated issue than labour law for French employers sending workers abroad (PRODISS).

8 | Looking for solutions

The research methodology used to identify problems is largely copied to determine possible solutions. Indeed, the research methodology is a combination of desk research, an online survey, the organisation of panel discussions as well as several expert interviews. 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 hand. The operational solutions can be implemented in the short and medium term, whereas the legislative solutions should rather be seen in the long term. Moreover, this report does not have the ambition to test the suggested legislative solutions on their legal and socio-economic impact and feasibility.

Based on the results of the previous chapter, four main categories of challenges/obstacles are identified for which solutions can be defined:

- legal complexity:
  - related to the application of the Coordination Regulations;
  - related to the application of the Posting of Workers Directive;
- administrative burden (and related costs);
- lack of information and awareness.

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. After all, providing better information cannot solve all the issues highlighted in our report. However, modifying the legal framework often requires a revision of the existing legislation, which will take time.[294] Moreover, 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.[295]

Before going into these possible solutions, we first refer to the solutions formulated by the response group of the online questionnaire.

8.1 Most frequently mentioned recommendations in the online questionnaire

The questionnaire addressed to organisations that carry out transnational activities in the live performance sector also asked for recommendations in order to improve the situation of companies performing abroad or those facilitating support (cf. *Section 2.3.2.4*). Again, the distinction will be made between organisations that send artists and support staff to other EU/EFTA countries (and thus *export* live performance services) and organisations that book artists from other EU/EFTA countries (and thus *import* live performance services).

Concretely, all of the organisations that sent/hosted artists and support staff to/from other EU/EFTA countries in recent years were asked whether they had recommendations in order to improve the situation of companies performing or facilitating support abroad in an open answer. A relatively high proportion of organisations used this opportunity:

294 The discussion on the revision of the Coordination Regulations demonstrates this all too well.

295 As identified in a recent document of the European Parlement – CULT Committee: See Point 1: Member States offer unequal protections and opportunities to artists and cultural workers. This results in structural inequities throughout the European cultural ecosystem that imperilcultural diversity; Point 3: The need for minimum standards and minimum requirements regarding fair working conditions, among others, can be tackled at the EU level; Point 4: Is necessary to ensure that social protection systems allow artists and cultural workers to access benefit schemes such as unemployment allowance and pensions.

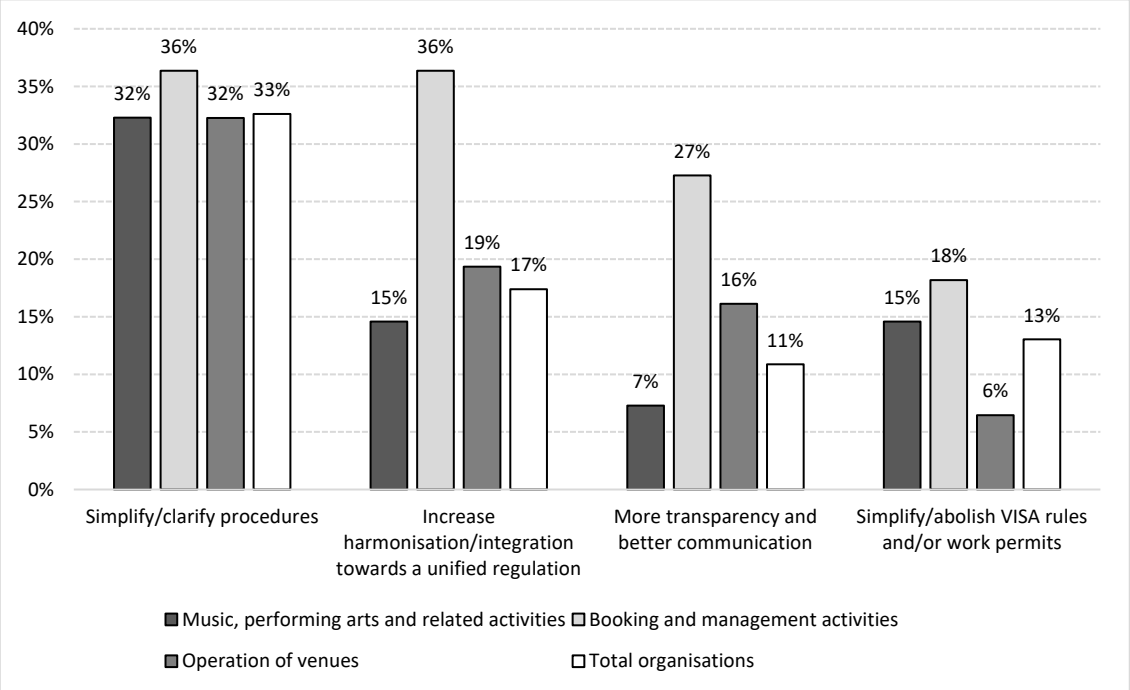
- 96 out of the 209 exporting organisations with mainly music, performing arts and related activities that encountered difficulties/obstacles (46%) gave recommendations;
- Among the organisations with mainly booking and management activities that recently sent artists and support staff abroad, 11 out of 32 (or corresponding with 34%) also proposed solutions to the national and European policy makers;
- 31 out of the 72 organisations that operate venues as main activity (43%) gave their opinion on how to improve the situation of transnationally active companies with activities related to the live performance sector.

In what follows, we discuss the recommendations reported by these respondents in more detail. Particularly for the organisations with booking and management activities it should be taken into account that the following analyses are based on a relatively small amount of organisations.

Because the organisations could give an open answer when discussing the solutions, the answers given are very diverse. While some answers applied to a very specific situation, others were very general. Nevertheless, we have tried to find out which problems were mentioned the most by searching for a number of key words in the open answers.

Figure 8.1 visualises the most frequently mentioned solutions per type of organisation. Each solution displayed in the graph is based on a collection of different key words that could be bundled together. In this way, it is possible to display some of the key proposals made by the organisations with (1) mainly music, performing arts and related activities; (2) booking and management activities, and (3) the operation of venues.

Figure 8.1 Share of organisations with following recommendations by type of organisation sending/ hosting artists to/from other EU/EFTA countries (in %)



* N Music & Performing arts = 96/N Booking and management agencies = 11/N Operation of venues = 31/N Total = 138.

Source Own calculations based on online questionnaire (2020)

The answers most frequently given by the *exporting* and *importing* organisations related to simplifying or clarifying the current procedures. This was the case for 32% of the organisations with (1) mainly music, performing arts and related activities; (2) and the venue operators; and for more than one third (36%) of (3) the booking and management agencies. Key words that were central in the responses of

the organisations involved were '*simplify*', '*facilitate*', '*ease*', '*make less complex*' and '*clarify*'. Many of these organisations made rather general statements on this matter. Some quotes:

'Make the rules as simple as possible, to be sure that everybody knows what to do.'
'Clear and easy-to-implement measures for the cultural sector.'
'Better collaboration/clear rules.'

Other exporting organisations talked about recommendations to tackle a specific problem:

'Simplify and standardise the issuing of PDs A1.'
'Clear and quickly processed procedures for dealing with social security payments and withholding tax issues.'

In relation to the above-mentioned recommendation to facilitate the current complex process, a number of organisations are proposing to bring more unity to the different rules. In this way, they want to move towards a more integrated system. These recommendations were brought together in the second category 'increase harmonisation/integration towards a unified regulation'. Concretely, 14% of the organisations mainly with (1) music, performing arts and related activities; (2) 19% of the venue operators and even 36% of (3) the booking and management agencies made recommendations to harmonise or even integrate the current different country-specific rules into a single system:

'To unify the rules as much as possible in the whole EU. It is very hard to apply different rules in each Member State while touring (for example collective agreements). Or to have general exemptions for short term posting.'
'I think the most important thing is to have EU artists/culture workers to get that special status we have in France called 'intermittence du spectacle'. We should really have this status broaden to all EU countries.'
'Implement only one clear policy with clear and easy rules applicable in all countries.'

Although the integration into a unified system seems to be the ultimate solution for most exporting organisations, many of them realise that this is not immediately achievable. Therefore, more pragmatic solutions are being put forward as well. Many of these solutions are about making the multitude and complexity of different regulations more transparent and user-friendly. Concretely, about 11% of the total of participating organisations that made recommendations formulated proposals in this direction:

- *'More visibility, a specialised assistance point where one can obtain a precise procedure according to one's situation, as there is only a case-by-case approach possible in our sector';*
- *'Digitalising the A1 forms via platforms';*
- *'Establish a single travel protocol system, such as a one-stop shop in each home country, where you can carry out all the formalities and be aware of all the requirements that the company and each of the workers need (European health card, European health and safety protocol, travel insurance, usual companies for travel, how to ask for the legal invoice in each country and what you need for the supplier to issue it, ...)';*

Furthermore, 15% of the organisations with (1) music, performing arts and related activities; 18% of (2) the booking and management agencies and 6% of (3) the venue operators also had concrete recommendations related to the visa and work permits. The combination of the heavy (administrative) work and the often short stays of the artists and support staff requires adjustments according to these organisations. Some of them see this rather radically by abolishing all the rules related to visa and/or work permits for artists and support staff in the live performance sector:

'For visa and work permit free travel for musicians/performing artists and their support staff.'
'Negotiation of visa and permit free short-term working rights.'
'A simple work permit/visa process (if required at all) which recognises that musicians go temporarily to another country to work and, by the nature of their job, will then leave to go to another country. Better still would be no work permit/visa process ... or a blank permit for the EU/Schengen zone.'

8.2 A non-exhaustive overview of possible solutions

8.2.1 Increasing awareness by providing detailed information

For the correct implementation of rules of conflict of law in the field of social security law and thus to know where contributions should be paid and benefits granted, mobile workers and companies must have access to relevant and up-to-date information clarifying the conditions of application, the assessment criteria, and the procedural requirements. It is no understatement that a large proportion of the problems with 'highly mobile workers' are often procedural and administrative. The lack of information for administrations is often exacerbated by a lack of knowledge of rules on the part of employers and workers. A lack of accessibility of information will impede the free movement of workers and services. It may also cause an incorrect application of coordination rules. For example, one sometimes hears that an organiser employing an artist *wants* to pay the social security institution of the posting country but has no information about how and to whom (s)he should make this payment. On top of this, there are also language problems. In such cases, people sometimes call in a law firm to find out who to pay to, or they simply pay contributions in another country. Information contributes to prevention. After all, prevention is better than a cure. It may as such not come to a surprise that an information obligation is the subject of many EU initiatives. Improving information to the workers and employers at EU and national level is therefore paramount. The social security regulation stipulates that the competent institution of the Member State whose legislation becomes applicable pursuant to Title II of the basic Regulation shall inform the person concerned and, where appropriate, his/her employer(s) of the obligations laid down in that legislation. It shall provide the person concerned with the necessary assistance to complete the formalities required by that legislation.[296]

In labour law, this obligation is even more clearly formulated. For instance, one of the objectives of Enforcement Directive 2014/67/EU is to improve the lack of information about working conditions for workers by means of awareness-raising measures in the form of websites and leaflets, translation in other languages (for foreign workers), and simple, up to date, accessible information. The new Posting of Workers Directive 2018/957 further emphasises this by pointing out that, in accordance with national law and/or practice, Member States shall, without undue delay and in a transparent manner, publish on the single official national website referred to in that Article information on the terms and conditions of employment, including the components of remuneration referred to in the third subparagraph of this paragraph, as well as all terms and conditions of employment in accordance with paragraph 1a of this Article. Member States shall ensure that the information provided on the sole official national website is accurate and up to date. The Commission publishes the addresses of these official national websites on its website. This is a difficult task for the government, and if the government fails to perform this task properly, it should be taken into account in the penalties incurred by the ... posting employer. Consequently, Member States have a direct interest in ensuring the quality of the information provided through the single national official websites on posting.[297]

ELA - the newly established European Labour Authority - also mentions that one of the four objectives of the institution is to promote the access to relevant services and to information about rights and duties relating to labour mobility in the entire European Union.[298] It is not the objective that the ELA will provide information itself, but rather that it constitutes an intermediary which assists the Member States in carrying out this obligation by, inter alia, setting up a single Union-wide website, acting as a single portal providing access to information sources and services at Union and national level in all the official languages of the Union; supporting the Member States in the quality,

296 Article 19(1) of Regulation 987/2009.

297 The Court has already shown a clear willingness to assess the proportionality of sanctions introduced by Member States against posting undertakings (48See Case C-33/17, 13 November 2018, C˘epelnik d.o.o. v Michael Vavti, and Joined Cases C 64/18, C 140/18, C 146/18, and C 148/18, 12 September 2019, Zoran Maksimovic and Others v Bezirkshauptmannschaft Murtal and Finanzpolizei).

298 Article 2 of Regulation 2019/1149.

user-friendliness, and availability of the information, etc.[299] In the context of these objectives, ELA together with its 'Working Group on Information' has developed a common (though non-binding) approach to the presentation of information stemming from universally applicable collective agreements. This has the potential of streamlining the presentation of the content of collective agreements which are applicable to posted workers, thus greatly facilitating the access to information for both posting employers and posted workers.

Over the years, measures have been adopted to develop a more structured information framework across the EU, including the Mobility Information Points[300] (MIPs) as well as other online and offline resources such as a range of booklets produced by Pearle* and EFA to explain in an easy way the rules in relation to social security, taxation, VAT, copyright clearance and Schengen visa. As a result, it has been argued that artists and culture professionals now have better access to general information about the questions and issues they face, but the complexity of their questions has increased, which requires more tailor-made, personalised information provision (Baltà et al., 2019).

Nevertheless, information on which terms and conditions of employment should be followed, on where to apply for a PD A1 and finally, on where to make a prior declaration is still difficult to find. Let alone that it can be found in one place. This is a painful observation, certainly given the complexity of the legal framework.

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. 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/several official EU languages (e.g. based on the template designed by ELA together with its 'Working Group on Information'). To show the potential of this template, we have applied it to two collective agreements applicable in the live performance sector in France *(see Appendix 2)*. 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.

8.2.1.1 Information at national and European level

It cannot be denied that providing services in another Member State is not as simple as it may seem. For this reason, it is both necessary and important to inform mobile workers and companies on their rights as well as their duties. Insufficient information is an impediment to exercising one's rights and duties, which endangers transnational social rights and leads to incorrect application of the rules in place. In that respect, a bottom-line requirement is that Member States should ensure that information is made generally available, in a clear and understandable manner, and that easy access to it is provided.[301] However, reality has demonstrated that mobile workers and companies are far from acquainted with their rights and duties.

299 Article 5 of Regulation 2019/1149.

300 Mobility Information Points (MIP) are information centres and/or websites in several European countries, and one in the USA, which aim to tackle administrative challenges that artists and cultural professionals may face when working across borders.

301 See also point 9 of a recent *Policy Recommendation Briefing* of the European Parliament – CULT Committee: 'Providing increased and consistent information on mobility through policies such as: Supporting the publication of updated toolkits and handbooks and the revision of existing ones; Increasing the capacity and the number of Mobility Information Points (information centres and websites addressing administrative challenges that artists and cultural professionals often face when working across borders) to offer free and tailored support. And Point 5: 'To ensure that artists and cultural workers have equal access to the EU Single Market, it would be important to address ... as information asymmetries. Doing so would require, for example: … The removal of information asymmetries such as those faced by artists planning to develop cross-border work (e.g. via a comprehensible practical handbook for European artists and cultural workers and the authorities dealing with them). This could take place via new or updated handbooks and toolkits (see point 9)'.

In order to achieve this, information should be made available, ideally in all official EU languages, regarding the labour, social security and tax law to be respected, as well as the administrative formalities that follow from this legal framework in both the 'sending' and the 'receiving' Member State.

A helpful tool could be the single official national website on posting.[302] The information provided by these websites became even more important since the revision of the Posting of Workers Directive.[303] *Table 8.1* provides an overview of these websites by Member State.

A number of critical remarks can be made when consulting these websites. After all, the ways in which Member States have developed their website varies greatly.[304] For instance, for some national websites the information is available only in the mother tongue. Furthermore, several websites only contain part of the information that the posting undertaking actually needs, as no information is available on social security law and tax law, or even on the applicable collective agreements.[305] Furthermore, websites do not always refer to the application process of posted workers.

Given the above limitations of many websites, we certainly agree with the remark/proposal of the employers' organisations included in the review of the Enforcement Directive: 'a template for a uniform website would be a significant improvement when it comes to the clarity and accessibility of information' (EC, 2019a). A number of steps have been taken by ELA, and more specifically within the 'Working Group on Information', to further review and improve these websites. For instance, as announced in the ELA Work Programme 2021 (p. 13) '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.'

302 An obligation introduced by Article 5 of the Enforcement Directive. This Article states that 'Member States shall take the appropriate measures to ensure that the information on the terms and conditions of employment referred to in Article 3 of the Posting of Workers Directive which are to be applied and complied with by service providers is made generally available free of charge in a clear, transparent, comprehensive and easily accessible way at a distance and by electronic means, in formats and in accordance with web accessibility standards that ensure access to persons with disabilities and to ensure that the liaison offices or other competent national bodies referred to in Article 4 of the Posting of Workers Directive are in a position to carry out their tasks effectively.'

303 Recital 21 of Directive (EU) 2018/957 points out that 'each Member State should ensure that the information provided on the single official national website is accurate and is updated on a regular basis. Any penalty imposed on an undertaking for non-compliance with the terms and conditions of employment to be ensured to posted workers should be proportionate, and the determination of the penalty should take into account, in particular, whether the information on the single official national website on the terms and conditions of employment was provided in accordance with Article 5 of the Enforcement Directive.'

304 Good practices are identified in, among others, Austria, Slovenia, Italy and Sweden.

305 This is for instance not the case for the live performance sector. This means that in most cases the sending employer does not know whether there is a collective agreement in the sector and/or region and the applicable scope. For instance there exists multi-employer collective agreements in the sector in the following countries: AT, BE, BG, DE, DK, EE, ES, FI, FR, IT, NL, and SE. In most of those Member States it concerns the public sector, whilst only in a few there also collective agreements for the private sector.

Table 8.1 Single official national websites on posting

	Link to the official national websites on posting
Belgium	https://employment.belgium.be/en/themes/international/posting
Bulgaria	https://postedworkers.gli.government.bg/
Czech Republic	http://www.suip.cz/english-documents/
Denmark	https://workplacedenmark.dk/en/
Germany	https://www.zoll.de/EN/Private-individuals/Work/Minimum-conditions-of-employment/minimum-conditions-of-employment_node.html
Estonia	https://www.ti.ee/en/foreign-worker/posted-workers-and-rental-workers
Ireland	https://www.workplacerelations.ie/en/what_you_should_know/employment_types/posted%20workers/
Greece	http://www.ypakp.gr/index.php
Spain	https://www.mites.gob.es/es/sec_trabajo/debes_saber/desplazamiento-trabajadores-eng/index.htm
France	https://travail-emploi.gouv.fr/droit-du-travail/detachement-des-salaries/posting-of-employees/
Croatia	https://migracije.hr/referral-2/?lang=en
Italy	https://distaccoue.lavoro.gov.it/en-gb/
Cyprus	http://www.mlsi.gov.cy/mlsi/dl/dl.nsf/page1k_en/page1k_en?OpenDocument
Latvia	http://www.lm.gov.lv/eng/index.php?option=com_content&view=article&id=83473
Lithuania	https://www.vdi.lt/Forms/Tema.aspx?Tema_ID=50
Luxembourg	https://guichet.public.lu/en/entreprises/ressources-humaines/mobilite/detachement.html
Hungary	http://ommf.gov.hu/index.php?akt_menu=547
Malta	https://dier.gov.mt/en/Employment-Conditions/Posting%20of%20Workers%20in%20Malta/Pages/Information.aspx
Netherlands	https://english.postedworkers.nl/
Austria	https://www.postingofworkers.at/cms/Z04/Z04_10/home
Poland	https://www.biznes.gov.pl/en/firma/doing-business-in-poland/cross-border-services-in-poland/provision-of-cross-border-services-in-poland-by-citizens-of-eu-countries
Portugal	https://www.act.gov.pt/(pt-PT)/CentroInformacao/DestacamentoTrabalhadores/Postingofworkers/Paginas/default.aspx
Romania	https://www.inspectiamuncii.ro/Posting-of-workers
Slovenia	http://www.napotenidelavci.si/en/
Slovak Republic	https://www.ip.gov.sk/posting-of-workers/
Finland	https://www.tyosuojelu.fi/web/en/employment-relationship/posted-worker
Sweden	https://www.av.se/en/work-environment-work-and-inspections/foreign-labour-in-sweden/Posting-foreign-labour-in-sweden/

Source Authors' own elaboration based on https://europa.eu/youreurope/citizens/work/work-abroad/posted-workers/index_en.htm#national-websites

Furthermore, it is also important to know how to request a PD A1 and where to find the prior notification tools.

Table 8.2 gives an overview per country where a PD A1 can be requested. Member States have an important margin of discretion regarding the application and granting procedure of the PD A1.[306] Consequently there is a great variety of practices among Member States. A centralised approach seems to prevail. Moreover, in most Member States, an electronic procedure to apply for a PD A1 is implemented. In the near future, hopefully every Member State will offer this possible. This should avoid making the application procedure unnecessarily time-consuming.

306 Whereas the Administrative Commission lays down the structure, content, format, and detailed arrangements for the exchange of documents, and whereas the Implementing Regulation sets out the information policy affecting the granting of PD A1, the Coordination Regulations provide no detailed rule about the process that leads to the issuing of a certificate (Jorens & Lhernould, 2014).

Table 8.2 Application for a Portable Document A1

	Application for a Portable Document A1 – Link to relevant websites
Belgium	**Employees and civil servants**: https://www.socialsecurity.be/site_fr/employer/applics/gotot/index.htm#severalMember States https://www.socialsecurity.be/site_fr/employer/applics/gotot/gotot-gt.htm **Self-employed**: http://www.inasti.be/fr/demande-declaration-concernant-la-legislation-de-securite-sociale-formulaire-a1?_ga=2.39132195.1274301230.1529302589-979124352.1522913304
Bulgaria	http://www.nap.bg/page?id=510
Czech Republic	http://www.cssz.cz/cz/tiskopisy/evropska-unie.htm
Denmark	https://www.borger.dk/danskere-i-udlandet/Arbejde-i-udlandet/International-social-sikring; https://indberet.virk.dk/myndigheder/stat/Udbetaling_Danmark/Social_sikring_ved_beskaeftigelse_i_udlandet#tab2; https://indberet.virk.dk/myndigheder/stat/Udbetaling_Danmark/Social_sikring_ved_beskaeftigelse_i_udlandet#tab3
Germany	https://www.deutsche-rentenversicherung.de/DRV/DE/Ueber-uns-und-Presse/Presse/Meldungen/2019/190312_a1_bescheinigung.html
Estonia	http://www.sotsiaalkindlustusamet.ee/et/sotsiaalkindlustus-elis/sotsiaalkindlustus-euroopa-liidus#Kuidas%20taotled%20A1%20t%C3%B5endit
Ireland	https://www.welfare.ie/en/Pages/International-Postings.aspx
Greece	www.efka.gov.gr
Spain	http://www.seg-social.es/wps/portal/wss/internet/InformacionUtil/32078/38626/39544?changeLanguage=en
France	https://www.cleiss.fr/reglements/a1.html#:~:text=Le%20formulaire%20A1%20remplace%20les%20formulaires%20E%20101%20et%20E%20103.&text=Le%20formulaire%20E%20102%20qui,plus%20de%20prolongation%20de%20d%C3%A9tachement
Croatia	https://www.mirovinsko.hr/en/issuing-of-a1-certificates-applicable-legislation-eu/384
Italy	https://www.inps.it/bussola/VisualizZADOC.aspx?sVirtualURL=/messaggi/Messaggio%20numero%20218%20del%2020-01-2016.htm&iIDDalPortale=48802
Cyprus	http://www.mlsi.gov.cy/mlsi/sid/sidv2.nsf/page52_gr/page52_gr?OpenDocument
Latvia	https://www.vsaa.gov.lv/en/services/work-another-eu-country-a1-certificate
Lithuania	http://www.sodra.lt/lt/situacijos/informacija-draudejams/a1-pazymejimo-isdavimas/dokumentai-kuriuos-reikia-pateikti-sodrai-formos
Luxembourg	https://ccss.public.lu/fr/employeurs/secteur-prive/detacher-etranger.html
Hungary	**Posted workers**: http://www.neak.gov.hu/data/cms1013079/NEU.72.G.doc (online); Self-employed: http://www.neak.gov.hu/data/cms1013079/NEU.72.G.doc **Active in two or more Member States**: http://www.neak.gov.hu/data/cms1013081/NEU.73.G.doc
Malta	https://www.gov.mt/en/Services-And-Information/eforms/Pages/Landing%20Pages/Request%20for%20Entitlement%20to%20remain%20insured%20in%20Malta.aspx
Netherlands	https://www.svb.nl/nl/id/u-bent-werkgever/a1-certificatie-of-coverage-aanvragen
Austria	https://www.gesundheitskasse.at/cdscontent/?contentid=10007.819854
Poland	**Employee, posting to another Member State** (US-3): http://www.zus.pl/documents/10182/788036/1453_18+US-3_do+zapisu.pdf/a3f95da4-723f-498a-816f-9ae70e8fb875 ; **Employee, posting to more than one Member State** (US-4): http://www.zus.pl/documents/10182/788036/1454_18+US-4_do+zapisu.pdf/5b496a61-3145-46f3-aa9e-cb57adb19874; **Self-employed, posting to another Member State** (US-1): http://www.zus.pl/documents/10182/788036/1451_18+US-1_do+zapisu_lipiec.pdf/7ea53e29-10bf-40a2-9896-9d15b933b513.
Portugal	Posting: http://www.seg-social.pt/documents/10152/39117/RV_1020_DGSS/a78292b8-86fc-4486-b4a1-cf346125149c; active in two or more member states: http://www.seg-social.pt/documents/10152/39103/RV_1018_DGSS/d478f02b-8f85-4812-a5f5-67d8e7e9974f
Romania	https://www.cnpp.ro/documentul-portabil-a1
Slovenia	http://www.napotenidelavci.si/en/; https://zavarovanec.zzzs.si/wps/portal/portali/azos/podstrani_kategorije_z_o/opravljanje_dela_dejavnosti_eu; https://zavarovanec.zzzs.si/wps/wcm/connect/ae0e2b6b-b61e-4e46-ac97-ac14188078f0/Vloga+13.%C4%8Dl.pdf?MOD=AJPERES
Slovakia	https://www.socpoist.sk/2149-menu/55449s
Finland	Online application system: https://www.etk.fi/en/pension-services/insurance-while-working-abroad/applying-a1-certificate/
Sweden	https://www.forsakringskassan.se/wps/wcm/connect/fa2f1866-2531-4ecb-a4cb-735f77416fda/FK6220_004_F_001Beg%C3%A4ran+Intyg+A1E10+eller+konventionsintyg.pdf?MOD=AJPERES&CVID=

Source Authors' own elaboration based on previous research

All Member States implemented a prior notification tool for incoming posting undertakings and the workers concerned *(Table 8.3)*. In most Member States the obligation to register applies to posted workers, but not to self-employed persons. Most Member States have implemented an online/ electronic registration tool (Belgium, Bulgaria, Denmark, Germany, France, Italy, Luxembourg, Hungary, Malta, the Netherlands, Austria, Poland, Portugal, Slovenia, Slovakia, Finland and Sweden). Nonetheless, in Romania, the notification of posting is done by post only, and in Estonia, Croatia, Lithuania and Latvia the notification is done by e-mail. In the Czech Republic, Ireland, Greece, and Cyprus, the notification can be done by post or e-mail. Again, it would make sense that this declaration can be made electronically everywhere.[307] Note that Austria, Belgium, Denmark, France and the Netherlands exempt artists from making a notification.

307 Article 9 (4) of the Enforcement Directive states that 'Member States should ensure that the procedures and formalities relating to the posting of workers can be completed in a user-friendly way by undertakings, at a distance **and by electronic means as far as possible**.'

Table 8.3 Overview of the prior notification tools in the 'receiving' Member States

		Link to the webpage of the prior notification tools
Belgium	Electronically	www.limosa.be
Bulgaria	Electronically	https://postedworkers.gli.government.bg/
Czech Republic	Mail/post	https://www.mpsv.cz/web/cz/-/informace-o-vyslani-pracovnika-oznameni-zamestnavatele-vysilajici-spolecnosti-o-vyslani-pracovnika-ku-na-uzemi-ceske-republiky-dle-smernice-96-71-es-1
Denmark	Electronically	https://indberet.virk.dk/myndigheder/stat/ERST/Register_of_Foreign_Service_Providers_RUT
Germany	Electronically	www.meldeportal-mindestlohn.de
Estonia	Mail	https://www.ti.ee/en/foreign-worker/posted-workers-and-rental-workers/registration-and-provision-data
Ireland	Mail/post	www.workplacerelations.ie
Greece	Mail/post/fax	http://www.ypakp.gr/uploads/docs/10805.pdf
Spain		https://www.mites.gob.es/es/sec_trabajo/debes_saber/desplazamiento-trabajadores-eng/desplazamiento/index.htm#section6
France	Electronically	https://www.sipsi.travail.gouv.fr
Croatia	Mail	http://www.mrms.hr/posting/instructions-for-foreign-companies/
Italy	Electronically	https://servizi.lavoro.gov.it/Distacco/
Cyprus	Mail/post	http://www.mlsi.gov.cy/mlsi/dl/dl.nsf/71A55A7C2227BD60C22581CB0041B58C/$file/N.63(I)2017.pdf
Latvia	Mail	There is no specific declaration tool. An employer should inform the State Labour Inspectorate (http://vdi.gov.lv/en/contacts/) in writing.
Lithuania	Mail	https://www.vdi.lt/Forms/Tema.aspx?Tema_ID=50
Luxembourg	Electronically	https://itm.public.lu/fr/conditions-travail/detachement/etranger-vers-luxembourg.html
Hungary	Electronically	http://www.ommf.gov.hu/index.php?akt_menu=552
Malta	Electronically	https://dier.gov.mt/en/Employment-Conditions/Posting%20of%20Workers%20in%20Malta/Pages/Information.aspx
Netherlands	Electronically	https://meldloket.postedworkers.nl/
Austria	Electronically	https://service.bmf.gv.at/service/anwend/formulare/show_mast.asp?Typ=SM&__ClFRM_STICHW_ALL=zko&searchsubmit=Suche
Poland	Post/ Electronically	https://www.biznes.gov.pl/en/firma/cudzoziemcy/chce-delegowac-pracownikow-do-polski/proc_1328-oswiadczenie-o-delegowaniu-pracownika; https://www.pip.gov.pl/pl/f/v/155136/Oswiadczenie%20pracodawcy%20delegujacego%20pracownika%20na%20terytorium%20RP.pdf
Poland	Electronically	http://www.act.gov.pt/(pt-PT)/CentroInformacao/DestacamentoTrabalhadores/Postingofworkers/Paginas/default.aspx
Romania	Post	https://www.inspectiamuncii.ro/documents/66402/1518590/ModelDeclaratie-en.pdf/976f2580-2efd-4553-8382-df76328dca5b
Slovenia	Electronically	https://www.ess.gov.si/delodajalci/zaposlovanje_in_delo_tujcev/spletna-prijava-dela-tujcev/-spletna-prijava-dela-tujcev-prijava-izvajanje-storitev-delodajalca-s-sedezem-v-drzavi-clanici-eu-egp-ali-svicarski-konfederaciji
Slovakia	Electronically/ mail	https://www.ip.gov.sk/general-information/#
Finland	Electronically	https://www.tyosuojelu.fi/web/en/employment-relationship/posted-worker/reporting-duty
Sweden	Electronically	https://posting.av.se/Default.aspx?ReturnUrl=%2f

Source De Wispelaere et al. (2021b)

8.2.1.2 The importance of information channels

Taking into account the perceived complexity and the lack of awareness of the regulations regarding the working conditions of posted workers *(cf. Section 7.2.2)*, the need for reliable and easily accessible information channels clearly emerged from the replies of the participating organisations.

In the online questionnaire, the organisations whose employees executed live performances activities abroad in recent years (organisations with music, performing arts and related activities) or whose artists under their management had live performances abroad in recent years (organisations with booking and management activities) were asked which channels they used to get information concerning the applicable wages and working conditions in force in the country where the performance will take place. *Table 8.4* gives an overview of the most frequently used information channels by type of exporting organisation. It is important to take into account that each participating organisation

could select multiple information channels. Consequently, the percentages in the table add up to more than 100%. In addition, one should be aware of the relatively low number of participants, particularly among the booking and management agencies. The analyses below should therefore be interpreted purely as indicative and should not be generalised to all organisations.

The table shows that most participating organisations among both types of exporting organisation used the organiser/venue in the country where the performance will take place as most important information channel. This was the case for almost two thirds of the organisations with mainly music, performing arts and related activities (64%) and more than one thirds of the booking and management agencies (35%). The second most used information channel among the total of exporting organisations were other companies/colleagues that already have experience in sending artists abroad. Concretely, 37% of the organisations with mainly music, performing arts and related activities and 21% of the organisations with mainly booking and management activities selected this option. Other important information channels to get information concerning the applicable wages and working conditions in force in the country of the performance were the national official website of the country of the performance will take place (28%) and public authorities/institutions of the receiving country (27%). Based on the above findings, it can be concluded that the organiser/venue in the receiving country was the most frequently used information channel by the exporting organisation.

Table 8.4 **Share of information channels used to get information concerning applicable wages and working conditions when sending artists to another EU/EFTA country by type of exporting organisation (%)**

	Music, performing arts and related activities	Booking and management activities	Total
National official website of the country where the performance will take place	29.7	14.7	27.7
Public authorities and/or institutions of the country where the performance will take place	28.7	16.2	27.0
Other companies/colleagues in the own country who have already sent artists and supporting staff to the country where the performance will take place	37.3	20.6	35.1
The organiser and/or venue in the country where the performance will take place	64.1	35.3	60.3
Employers' organisations	12.4	2.9	11.2
Workers' organisations	4.3	0.0	3.7
Websites	7.7	7.4	7.6
Other channels	8.1	2.9	7.4
N Organisations	**209**	**32**	**241**

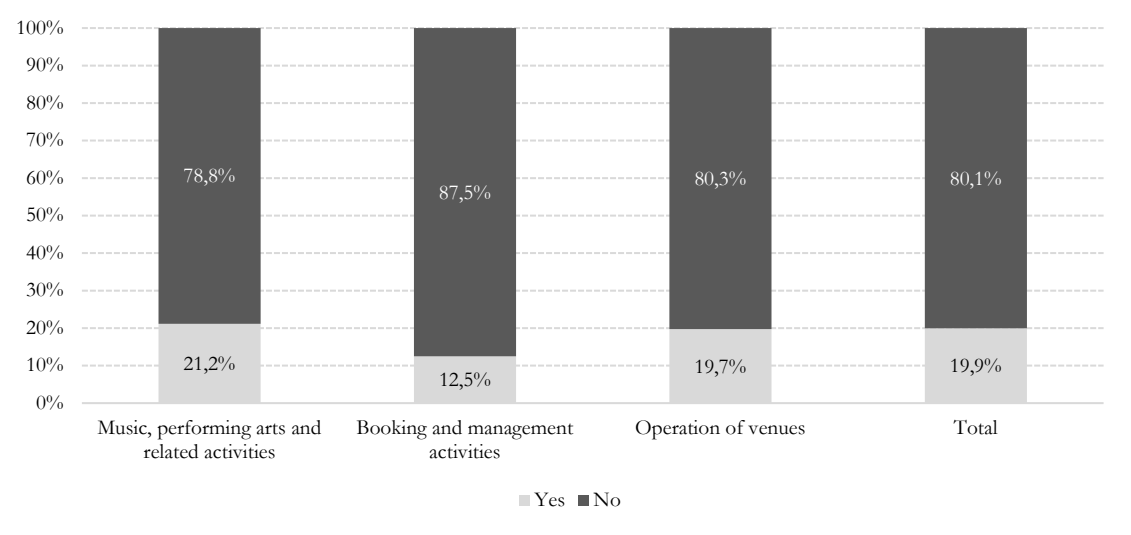
Source Own calculations based on online questionnaire (2020)

Interestingly, the venue operators that hosted artists from other EU/EFTA countries that participated in the questionnaire (the *importing* organisations) were asked whether they have ever been contacted by the artists or their employer to provide information concerning the wages and working conditions which they would have to apply when performing in their country. Surprisingly, only one quarter of the participating venue operators stated that this was the case (25%). Again, however, it should be noted that here too relatively few organisations answered this question (N=69). Therefore, no general conclusions can be drawn here. Among the venue operators that received questions by the artist or employer from another EU/EFTA country, most questions were about the PD A1, taxation issues, and visa regulations.

In addition to the direct communicative role of the information channels in the previous section, labour inspections can also have an important sensitising function. Given that a large proportion of the participating organisations are not (sufficiently) aware of the new regulations concerning the working conditions of posted workers (*cf. Section 7.2.2)*, inspections by labour inspectorates could play an important role. Concretely, an inspection can give organisations the opportunity to find out in a very concrete way whether they are aware of (all) the rules and whether they comply with (all of) them. If not, they also have an idea of what they need to adjust.

In the questionnaire, the organisations that exported live performance services (organisations with mainly music, performing arts and related activities and/or booking and management activities) abroad in recent years were asked whether their artists (under their management) were ever inspected by a labour inspectorate, either on tour or at home. Similarly, the participating organisations with the operation of venues as main activity that hosted foreign artists and support staff in recent years, and thus *imported* live performance services, were asked whether one of the artists they hosted was ever inspected by a labour inspectorate. *Figure 8.2* summarises these findings for both types of organisations.

Figure 8.2 Share of organisations who were ever inspected by a labour inspectorate, by type of organisation (%)



* N music, performing arts and related activities = 208 ; N booking and management activities = 32; N operation of venues = 71; N total = 311.

Source Own calculations based on online questionnaire (2020)

For the total of the organisations that filled in the question about the labour inspectorate, approximately one in five organisations (20%) indicated that the sent/hosted artist and support staff had already came into contact with the labour inspectorate. This ratio can also be more or less found among the organisations that mainly *export* music, performing arts and related activities (21%) and the venue operators *importing* live performance activities (20%). Among the *exporting* booking and management agencies, the proportion of sent artists and support staff with the experience of a social inspection is significantly lower at 13%.

8.2.2 Reducing the administrative burden

In principle, a PD A1 is needed for every employment, even for very short periods of time, which can lead to a great deal of administrative complexity. The question can be asked whether the requirement of being in possession of a PD A1 even for a very short period of employment abroad - whereby not being in possession of a PD A1 may lead to very high penalties in some Member States - is necessary and does not go beyond what can be required proportionally. We have seen that the

majority of artists go abroad for very short periods of time (from a few hours to a few days). 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 (Galián et al., 2021). Sometimes the balance is lost, as is evident from the proposal that is now on the table to exclude business trips from the 'obligation'[308] to have a PD A1. As we have already pointed out, however, this proposal does not entail any major changes, as activities in the artists' sector often take place within the framework of service contracts, which are not covered by the concept of business trips. An extension of this proposal is therefore needed. Consideration could be given, for example, to not requiring a posting certificate for very short trips abroad (e.g. postings lasting less than eight days) and allowing administrations to exchange information among each other in case of doubt.

Currently, only Austria, Belgium, Denmark, France and the Netherlands exempt artists from a prior notification. In that regard, it would be useful to negotiate an exemption from declaration in the prior notification tools with every Member State separately, and in particular the main receiving Member States of artists (Germany, Italy, etc.).

In addition, there 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 European Commission has launched the idea to introduce a European Social Security Number (ESSN).[309, 310, 311] 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. EESSI is an IT system which aims to help social security institutions with the exchange of electronic cross-border documents.[312] 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, UK, and EFTA) are connected to the EESSI system and are able to exchange electronically on some of the business processes. Finally, a next step in the exchange of data would be to improve access to national and foreign data and information 'in real time'. When taking these steps, the relevant EU legislation on data protection when collecting and exchanging personal data should always be kept in mind.

8.2.3 Social security: towards a tailored framework?

The difficulties surrounding the application and interpretation of the coordination rules described in *Chapter 5* show that the framework for the social security position of artists is not always appropriate. This is not entirely surprising when we consider the nature of mobility. After all, certain artists, and particularly those engaged in touring activities, are a typical example of highly mobile persons. As the coordination provisions often seem to be geared towards a typical 'migrant worker' moving to another State for a longer period of time and for whom the integration with the new country of destination is paramount, it is not surprising that these rules pose challenges for such highly mobile

308 One should also question the high sanctions some Member States have laid down for not having a Portable Document A1.

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

310 'Companies consistently tell us that it is an administrative headache to send staff, such as engineers, to another country, say to work on a building site. We will work with Member States to devise a common form, in electronic format, to make the posting of workers easier, without compromising on protection for workers. To start, this could be introduced on a voluntary basis.' (Remarks by Executive Vice-President Dombrovskis at the press conference on the Launch of Updated EU Industrial Strategy, 5 May 2021).

311 See the recent *Policy Recommendation Briefing* published by the European Parliament – CULT Committtee: 'Launching a pilot project introducing a European electronic social security card intended for highly mobile European artists and cultural workers. This is subject to the establishment of a minimum level of convergence between national systems.'

312 It could be considered to definie a specific code/number that indicates to the competent social security administration of the country of the employer that the contribution concerns a foreign employment, which can be passed on via EESSI to the country of the artist concerned. As such the employer can easily comply with the request to pay social security contribution and the artist concerned is guaranteed that the contributions and rights continue to be exercised.

persons. However, for persons moving for very short periods of time who retain rather closer links with their Member State of origin (or where the close link with the country of destination and/or the country of origin is unclear), integration into their country of short employment seems less appropriate. The consequences for such highly mobile persons 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 is sometimes asked whether and to what extent a sectoral application that would take better account of the particularities of the specific sector would be appropriate.

8.2.3.1 Towards specific conflict rules for the live performance sector?

The development of a separate instrument poses a number of challenges:

- First of all, specific regulation for a certain sector is certainly not the path that is followed at European level. With the amendments to the Coordination Regulations in 2004, for example, exemptions for certain groups (international transport) had already been dispensed with. In labour law, too, the Posting of Workers Directive is in principle applicable to all sectors, although this has not precluded the very recent adoption of a separate instrument (Directive 2020/1057) that merely clarifies the application of the directive in the transport sector without departing from the principles laid down in the Posting of Workers Directive. Politically, therefore, it will certainly not be an easy task to bring about a change in the regulatory framework in this regard at European level. Nonetheless, there are/were interesting specific provisions for some groups of (highly) mobile workers (e.g. for 'flight and cabin crew members', [313] for 'Rhine boatmen').[314]
- Another problem is that it is unclear who shall be described as an 'artist'. If a separate regulation is to be worked out, a clear-cut definition per category is necessary. That is exactly where the problem lies. There is no clear definition of who is an artist at European level either. Should we limit the definition to the live performance sector? Should we consider the employer? Or should we consider the NACE codes that were also used as a basis for this study? This definition is broad, thus implying that professions that are not necessarily immediately considered to be of an artistic nature but are of a supportive nature (building stages, organising live events, etc.) would also fall under this regulation. Or should we take account of the national definition of an artist? Apart from the fact that, depending on the country, someone will be an artist or not, resulting in different treatment, here too we face the problem of defining this concept. Whereas in some countries, artists have their own separate regulations, we also notice this statute being extended in some countries to include supporting staff for building stages and so on. Consequently, there is a great risk that we will end up with an endless discussion about who exactly is an artist. A broad interpretation of the concept of an artist, comprising all kinds of supporting services, therefore entails the risk of including a whole group of persons who perform activities that are not so much specific to the arts sector but would now fall under this scheme because they perform activities for an artist, whether or not by accident. But is a stage builder for a festival different from someone who, for example, builds a stage for the purpose of vaccinating a population? Should we consider the employer in this regard? The only solution would then possibly be to consider the industry, the sector of activity, irrespective of one's profession. The need for a clear-cut definition is therefore paramount.

313 For flight and cabin crew members, Article 11(5) of the Basic Regulation refers to 'home base as the only decisive criterion for determining the social security legislation. By introducing the concept of 'home base', the legislator aimed to simplify the determination of the applicable legislation for flying personnel. The 'home base' should be the location where the person is physically located and with which (s)he has a close connection in terms of his/her employment.

314 The Agreement concerning the social security of Rhine boatmen, which was adopted by an ILO Conference in 1949, was the first multilateral European instrument for social security which instituted a system for coordinating social security legislation among the countries concerned in the interests of Rhine boatmen (Agreement concerning social security for Rhine boatmen, dated 27 July 1950, revised on 13 February 1961, and subsequently revised on 30 November 1979). The Administrative Commission agreed that Article 87(8) of Regulation 883/2004 is also applicable also for Rhine boatmen.

- However, demarcating a category of persons implies the ability to identify a group of persons sharing the same characteristics which nobody else shares. In this meaning, posting or temporarily working in two or more countries does not belong to a category as such since everybody can be posted or work in two Member States: posting and simultaneous employment are only a particular form of mobility for which specific rules of conflict - at least in the social security domain - have been designed. An artist may therefore find himself/herself in different situations according to the activities (s)he performs - although it is not always easy to distinguish between these different rules. As a result, different possible rules might apply. Artists cannot, therefore, be lumped together. While many artists, at certain periods of their career, have successive contracts (performances) in different countries and build up an international career, most artists will mostly work in and from one country and occasionally perform in a certain other Member State. The claim for particular statuses poses challenges.

8.2.3.2 Towards specific conflict rules for 'highly mobile workers'?

The current system of conflict rules whereby highly mobile persons change applicable legislation each time they change jobs is certainly not conducive to the free movement of workers, as it prevents continuity in legislation. Especially for highly mobile persons, who exercise successive contracts in several Member States, such as artists, this can lead to the application of the legislation of a Member State with which the person concerned has little connection and which will often not grant any or very limited rights, thus resulting in the loss of rights for a highly mobile person.

The application of the Coordination Regulation has many ambiguities - both with regard to posting (Article 12) and pursuing activities in two or more Member States (Article 13) - whereby the application of the provisions is also not optimal in all circumstances. The most pronounced example of this is a self-employed person who starts a limited employment as an employee. After all, all these different conflict rules can apply to highly mobile workers, with the distinction between them difficult to make and no priority of one regulation over another.

In that regard, national competent authorities could be more supportive by informing highly mobile workers and companies about the content and consequences of these rules. In addition, it might be useful for national competent authorities to have a broader margin of appreciation in the application of Articles 12 and 13,[315] based on a 'case-by-case' evaluation. For instance, a certain margin of appreciation could be given to the national competent authorities as regards the application of the conditions under Article 12, in particular regarding the condition that one should have been subject to the country of posting for a certain period of time (Decision No A2 of the Administrative Commission lays down a minimum period of at least one month). Also in the provisional agreement between the Council and the European Parliament on the amendment of the Coordination Regulation, a period of at least three months is proposed.[316, 317] It would be good to agree that a derogation may be granted in specific circumstances (for instance, for highly mobile workers (in the live performance sector)).

Furthermore, it would be appropriate to consider drafting specific conflict rules that would subject highly mobile persons to more stable legislation and that would also take into account the interests

315 Regarding the procedure for the application of Article 13, it might sometimes be useful to deviate from Article 14(10) of Regulation 987/2009 that states that 'for the determination of the applicable legislation, the institutions concerned must take into account the situation projected for the following 12 calendar months.' Highly mobile workers (also in the live performance sector) do not know (in detail) in which Member States they will be active and for how long. However, it would be useful for both highly mobile workers and companies to know the competent Member State for a longer period of time. Otherwise, Article 12 will usually be applied, which means that a new PD A1 will have to be applied for and issued for every new short period abroad. In that respect, it would be appropriate to agree that a derogation from Article 14(10) can be granted in specific circumstances. Of course, an alternative is to apply Article 16.

316 https://data.consilium.europa.eu/doc/document/ST-7698-2019-ADD-1-REV-1/en/pdf

317 See note from Pearle* (2019b): 'This is a particular problem when artists are contracted to take part in a tour where one has one or two days of rehearsals in the country of the employer before going on tour. This means that in such case the employee is only subject to the social security regime of the country of the employer for one or two days, before being posted. This creates difficulties to obtain an PD A1 in such cases and leads to legal uncertainty.'

of all stakeholders.[318, 319] Although these interests are certainly not always identical, one can think in particular of the interest of the highly mobile person to remain as much as possible during his or her career subject to the same legislation and thus, for example, to avoid gaps and interruptions in the development of (long-term) benefits. Which Member State is optimal in this respect, is a matter for further discussion and research - after all, there is not only the interest of the higher mobile workers, but also that of an employer (who will often prefer to apply only his/her own social security system) and the administration (which wants to avoid cross-border collection of contributions (Jorens et al., 2008)).[320] However, it is also a fact that the current system does not really strive for this balance. Moreover, the demarcation of the notion 'highly mobile worker' is perhaps the biggest stumbling block here.

Meanwhile, the conclusion of agreements on the basis of Article 16 of the Basic Regulation may be considered.[321] According to this article, exceptions to the rules on conflict of laws may be accorded by mutual agreement between the Member States (two or more Member States) in the interest of certain persons or categories of persons. This could possibly provide a solution in case we are confronted with situations in which the application of the new legislation has major negative consequences for the mobile person (e.g. loss of or no acquisition of rights, interruptions in social security protection). The application of this rule may well provide ad hoc solutions, but a generalised use is certainly not desirable, not only because of the legal uncertainty but also because it cannot be intended that the rule call into question basic principles of the regulation to such an extent.

8.2.4 And finally in the field of labour law

When it comes to the application of working conditions and remuneration to posted artists and technicians, most difficulties and obstacles seem to stem from the complexity of the applicable rules, notably when it comes to identifying and accessing the correct information. Several important steps can be taken to address these obstacles which, importantly, do not require legislative changes and, in many cases, can be put in place by the social partners themselves:

- Organisers and venues should be encouraged to play a proactive role in informing posting employers (companies, orchestras, etc.) about the collective agreements which are applicable to the artists and technicians they host. This is based on the assumption that organisers and venues should 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 of this.
- The access to the relevant information contained in legislation and, more importantly, collective agreements which are applicable to posted workers should be made easier. While limited in its scope, the experiment we carried out in the context of the present research with the application of the ELA template to the French collective agreements, shows that using such a template could go a long way to reduce the obstacles to the access to applicable rules. Therefore, public authorities

318 Some kind of 'harmonised social security status' could also be aspired to for the group of highly mobile persons. This brings us to the 'thirteenth state', an idea that was launched by Pieters and Vansteenkiste (1993) in the early 1990s that seems to be reviving today. Yet the idea seems even more utopian than at the time it was launched. After all, differences in the social field have become greater between Member States. In a recent publication of Pieters and Schoukens (2020), a 'thirteenth state 2.0' has been developed, which could be applicable to, *inter alia*, highly mobile workers.

319 See also van Ooij (2020: 596): 'One could imagine introducing a new conflict rule for highly mobile workers to mitigate legal uncertainty and adverse effects on their social security rights and obligations. This would require, however, careful consideration and a great deal of political commitment, which currently seems to be lacking.'

320 For instance, (touring) companies could fulfil the social security contributions in the country of establishment, whilst the artist could continue to benefit and claim its social security rights in the country of residence. The national authority where the employer is based would then transfer the amount due for the coverage of the benefits to the country where the artist is resident accordingly (as proposed in De Wispelaere & Rocca, 2020).

321 No figures are available on the extent to which Article 16 is used for the live performance sector. In that respect, it would be useful to analyse the cases behind Article 16 more in detail (in 2019, some 19,000 PDs A1were issued according to Article 16).

and social partners should be encouraged to use this template, whether in its present form or in a future improved one, to provide this information.

- 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 social partners, as it basically benefits employers and workers who are, by definition, not their members. Therefore, a proactive role should be played in this area by European federations and associations, 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.
- In the same vein, European institutions can play a role in encouraging this work. On the one hand, 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 and constitute yet another painful chapter of the debate on the posting of workers. 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,[322] and, in this context, develop a standardised approach, possibly based on the ELA template, as to the information which should be included therein.

Finally, going beyond the difficulties of accessing relevant information, we encountered a specific difficulty in the application of the remuneration and working conditions of the host State to posted artists and technicians. This is related to employers in the public sector or subsidised private sector who post their workers, employed as civil servants, to a different Member State. In many cases these employers work within strict budgetary rules which they cannot themselves control, 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. Addressing this obstacle requires 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.

322 See also the ELA Work Programme 2021 (p. 13) '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.'

- APPENDICES

appendix 1 The live performance artist and social security under national law: Belgium, France, Germany and the Netherlands

a1.1 The social security status of the artist in Belgium

Belgium has a number of legal provisions that specifically address the social protection of artists. Before diving deeper into the question of who is officially considered an 'artist' in Belgium, a very brief summary of the origins and the changes in the so-called 'artist's status' over the past decades will be given. After that, the concept of 'artist' will be discussed, followed by the advantages of the regime that a certified artist in Belgium can make use of. It is important to emphasise that the 'artist's status' is not a real, separate statute. It does not exist in isolation, but instead consists of a set of support measures which an artist falls under if certain conditions are met.

a1.1.1 A brief history

In 1969 already, a specific protection measure for artists was introduced in Belgium. The then Article 3, 2° of the Royal Decree of 28 November 1969 provided for the irrebuttable presumption for performing artists that they were employees, and not independent contractors, so they had to be subjected to the social security for salaried persons. The client of a performing artist was to be legally considered *an employer* and was therefore bound to pay the social security obligations for employees. It seemed like a big step forward for artists at the time, but in reality this legal provision aimed to protect artists was rarely applied.

The administrative burden for the 'employer' (alias the *client*) of the artist often was so great that the legislation was simply not complied to and artists were *de facto* left without social protection. Because of the irrebuttable presumption, they could not become self-employed, and the NISSE (*National Institute for the social security of the Self-Employed*), in accordance to the law, refused to register them as self-employed. As a result, artists often found themselves in no man's land: they were refused to be enrolled in social security schemes for independent workers and at the same time, their clients often refused to pay the necessary social contributions for artists to be enrolled in social security schemes for salaried workers. Regularly, there was legal uncertainty as well, as to who exactly was the client: in the cultural and arts sectors, the existence of intermediaries between artists and their clients are a common phenomenon, which made it unclear as to who precisely was the 'client' and who therefore had to pay the social contributions for the artists, even if they were willing to do so (Van De Velde, 2013).

By the end of 2002, an official 'statute' for artists was drawn up, and this time the aim was to have it precisely tailored to the needs and situation of artists. On the one hand, the legal presumption was made rebuttable and, on the other hand, the term 'artist' was expanded, from merely performing artists to both *'interpreting and creating'* artists. With the programme law of 24 December 2002, *Article 1bis* was inserted into the law concerning the social security of salaried persons.[323] This *Article 1bis* introduced a **rebuttable presumption** of **submission to social security for salaried persons**, for persons who, **without being bound by an employment contract**, provide **artistic services and/or produce artistic works** commissioned **by a natural or legal person**. From now on, the presumption could be reversed if the artist could prove that (s)he was not working under similar socio-economic conditions as those under which an employee is bound to his employer.[324]

323 Known as the 'RSZ-wet' in Dutch.

324 Dutch: Artikel 1bis, §1, Wet van 27 juni 1969 tot herziening van de besluitwet van 28 december 1944 betreffende de maatschappelijke zekerheid der arbeiders.

At the same time in 2002, a 'Commissie Kunstenaars' (an official national *Artists Commission*) was set up to check whether the conditions enumerated in *Article 1bis* were met. If so, one would officially be considered an artist (and thus to benefit from the *artist's status*). If an artist was working while:
- *not* being bound by an employment contract;
- receiving a wage;
- working by order of a natural or legal person; and
- providing 'artistic services' and/or producing 'artistic works'.

If these conditions were met, an artist without a contract of employment could still benefit from the social protection of the employee status.

Although the explanatory memorandum to this law stated that it thus put an end to *'three decades of legal uncertainty'*, the *artist's status* (in Dutch: het Kunstenaarsstatuut) - insofar as we can speak of a separate status - had to be thoroughly reviewed and amended in 2014 (Van der Aa, 2014). Over time, the legislator came to the constatation that *Article 1bis* provided a very attractive status that was all too often being interpreted too broadly, which led to improper use of the artist's status.

There was hardly any control on the artistic merits of the performances delivered and anyone could in fact call themselves an artist. Over time, cleaning staff who worked in an artistic environment, carpenters and other craftsmen were brought under *Article 1bis* in order make to use of the beneficial status for artists. This way, the number of 'artists' in Belgium more than doubled in 10 years' time.

It resulted in changes to the artist's status in 2014. In addition to tightening the rules for receiving unemployment benefits - which are in themselves separate from *Article 1bis* - the competences of the Belgian Artists Commission were expanded. From 2014 onwards, this Commission was made responsible for assessing the 'artistic character' of a service or a performance. If the *artistic character* of a performance or service was approved by the Commission, the artist would receive an official document that confirmed this assessment. If the Commission ruled that a service or performance could not be considered 'artistic', the applicant had no right to make use of the artist's status.

This way, an 'official artist's visa' (Dutch: Kunstenaarsvisum) was introduced. This *artist's visa* issued by the Artists Commission, thus became the gateway to *Article 1bis* and the social protection that it offered. Previously, the Artists Commission only had an advisory role. Now it became the official gatekeeper of the artist's status, making legally binding decisions as to someone could be considered an artist or not. It was entrusted with the task of preventing abuses of the beneficial legal provisions for the category of artistic workers.

a1.1.2 What is 'art'?

a1.1.2.1 A. The Belgian Artists Commission

Now, what is art and what is not? It is the difficult question that the Artists Commission had to answer time and again when it assessed applications of (aspiring) artists who wanted to make us of the official artist's status. This national Commission determines whether the person concerned *'provided services or produces works of an artistic nature*' falling within the scope of *Article 1bis*. Only if it concerned such an *'artistic activity'*, the Belgian Artists Commission issued an artist's visa, which thus became the access ticket to social security benefits for employees. Fleshing out the definition of an 'artistic activity' is therefore the main occupation for the Artists Commission (Commissie Kunstenaars, 2019).

However, it is not the only task of the Belgian Artists Commission (BAC). The BAC was established in 2003, together with the creation of the artist's status. For a long time, its role was purely advisory: the Commission had to inform the artist about the possible statuses and the social and legal rights of artists, advise on their preferable status (employee or independent worker?) and so on. Only in 2014, its competences were expanded and it was given the task of assessing the artistic character of a performance on a case-by-case basis. Yet is still plays its advisory role as well.

In the event of a positive assessment, the BAC issues an artist's visa. When *Article 1bis* was reformed in 2014, the legislator decided **not to include a definition** of what is meant by works of 'artistic nature'. The *National Labour Council* (i.e. an important national institution in Belgium that concludes collective labour agreements and advises the federal ministers and the House of Representatives on social issues) had pointed out in its advice that a legal definition of 'artistic activities' was not desirable, because art should be considered a constantly evolving, searching and changing matter.[325]

In its 2019 annual report, the Belgian Artists Commission argued along the same lines: according to the BAC, a legal definition may indeed have some pernicious effects. It substantiated this argument with the example of graffiti art. Whereas graffiti in the past used to be dismissed as no more than an illegal wantonness, today graffiti art is often indeed regarded as a full-fledged form of artistic activity. It is just one example of how the perception of art will always evolve (Commissie Kunstenaars, 2019: 7). Graffiti artist like Banksy for example, has become world-famous in recent years for his graffiti artworks applied to random walls in the streets of London and elsewhere. There is hardly any doubt about Banksy's artistic merits. [326]

The Belgian Council of State (the highest administrative court in Belgium) however, found that the absence of any definition regarding the term 'artistic activity' gave too much discretionary power to the Artists Commission to decide what was or was not an artistic service. Following this decision by the Council of State, the following definition, that had disappeared from Article 1bis in 2014, was reinserted in 2015: '*The provision of artistic services and/or the production of 'artistic works' should be understood to mean the creation and/or performance or interpretation of artistic work in the audiovisual and* visual *arts, in music, literature, spectacle, theatre and choreography'*.[327] In addition, the methodology by which the Artists Commission had to assess an artistic creation was laid down in its rules of procedure, which were established by Royal Decree.[328] A more concrete list of artistic services or jobs was not established. According to legal doctrine, this would create too many opportunities to abuse the system (Van De Velde, 2013). Only the *methodology* for assessing an artistic service is laid down.

According to the methodology laid down in the rules of procedure, in assessing what is art or not art, the Artists Commission takes into account '*the latest forms and techniques, technologies, materials used by the applicant to realise an artistic performance /creation'* and examines '*to what extent an activity (creation, production, performance) is influenced by contributions of an artistic, technical, technological and/or organisational nature'*. [329]

This means that even if well-known artists submit an application to the Commission, the artist's visa will not be granted if the Commission judges that the performance/creation/production submitted is not artistic in itself: '*The creativity, originality and artistic character (of the performance) shall prevail'* (Commissie Kunstenaars, 2019: 9).

a1.1.2.2 The composition of the Artists Commission

The Belgian Artists Commission (BAC) has two chambers, a French-speaking one and a Dutch-speaking one, thus respecting the federal structure of the country. Besides the chairman, each chamber consists of thirteen members: one representative of the NSSO (*National Social Security Office)*, one of the NISSE (*National Institute for the Social Security of the Self-Employed*), one of the ONEM (*National Employment Office*), three representatives of the trade unions and three of the employers' organisations, one representative of the regional government and finally three representatives appointed by the artistic sector itself. The fact that the artistic sector itself is represented in the Artists Commission was not self-evident for a long time. It is only since 2014 that the sector has been represented in the Commission (Vanheusden, 2016: 209).

325 NAR (National Labour Council), 24 maart 2015, Advies 1.931, Parl. St., Kamer 2014-2015, 1135, 175.

326 'Banksy: Who is the famous graffiti artist?', BBC News, 2020. (https://www.bbc.co.uk/newsround/46632542).

327 Dutch: Art. 1bis §1, Wet van 27 juni 1969 tot herziening van de besluitwet van 28 december 1944 betreffende de maatschappelijke zekerheid der arbeiders.

328 Dutch: KB van 29 februari 2016 tot goedkeuring van het huishoudelijk reglement van de Commissie Kunstenaars.

329 Dutch: Art. 17 KB van 29 februari 2016 .

Initially, after the introduction of *Article 1bis* and the national Artists Commission in 2003, the Commission's tasks were handled by NSSO and NISSE officials, which meant that representation by the arts sector itself was completely absent. Very soon, the risk was pointed out that the absence of the arts sector itself could lead to 'straying from artistic reality', which in turn would undermine the credibility of the Artists Commission (Van Regenmortel, 2007). In 2014, not only the arts sector was finally institutionally involved in the Artists Commission, also a representative of the ONEM - the institution responsible for unemployment benefits - was included in the new composition of the Commission.

The ONEM's presence should ensure that the definition of who is or is not an 'artist' is interpreted in the same way by the Artists Commission and the ONEM itself. However, both services sometimes had different interpretations of the artistic value of certain performances or works, which in the past regularly led to contradictory decisions (Vanheusden, 2016). After all, the ONEM (responsible for the allowance of unemployment benefits) and the Artists Commission (responsible for other branches of the *artist's status*) each judged in mutual autonomy.

a1.1.2.3 Who is considered an artist?

As has been said above, the official artist's status and subjection to *Article 1bis* is determined by the artistic merits of performance or creation and not by the capacity of a person. It is therefore important to know which activities the Commission considers to be artistic in order to be able to qualify for the artist's status. The Artists Commission examines *'to what extent an activity (creation, production, performance) is influenced by contributions of an artistic, technical, technological and/or organisational nature'*.

In its own interpretation of the concept of 'artistic activity', the Commission states that, in its investigation regarding the artistic nature, it will limit itself '*to* ***verifying whether the service (and/or oeuvre) belongs to the audiovisual and plastic arts, music, literature, spectacle and choreography*** **(Article 1bis of the Act of 27 June 1969)** ***and whether there is an original and creative step*** *which, in addition to the techniques and materials used by the artist, is* ***part of the essence of every artistic production'***(Commissie Kunstenaars, 2010). The Commission also states that only '***a purely artistic activity*** *leads to an approval for the official artist's status. Performances in an artistic environment do not make the performer an artist per se'* (Ibid.).

The mere fact of participating in the creation of an artistic performance is neither sufficient nor decisive in obtaining an artist's visa. In this context, for example, the question has already arisen as to the 'artistic added value' of professions such as decorator, painter, fashion designer, hair stylist, make-up artist and dressmaker. People who do these 'behind-the-scenes' jobs do take part in the creation, performance and the interpretation of artistic works, but whether they themselves 'create, perform or interpret artistic works' is the key question that needs to be addressed. The Belgian Artists Commission has stated that **creativity, originality and uniqueness are the essential criteria for identifying and authenticating the artistic nature of a performance**. In principle, the activities listed above will not be considered an artistic activity, although the BAC will always make an individual and case-by-case assessment. It is therefore important that the person submitting an application to obtain the artist's status, ***'provides in support of his application the necessary elements for the identification of that creative, original and unique nature'*** (Commissie Kunstenaars, 2010).

Both *creative artists* (such as painters, sculptors, etc.) and *performing artists* (musicians, singers, dancers, etc.) can obtain an artist's visa on the basis of *Article 1bis*. Although the Artists Commission assesses each activity on a case-by-case basis, it has, based on its own 'case law', drawn up a list of activities and jobs that do fall within the scope of an 'artistic activity' in the sense of *Article 1bis*. For example, a painter who produces a painting will provide an artistic service, but a painter-restorer or a muralist will not, because the latter two lack a 'purely artistic aspect' and the activities in question require

technical skills rather than artistic originality. Activities with a predominantly technical or organisational nature are not covered by the definition of artistic activity. Activities can only be considered artistic if **elements of creativity or originality prevail**.

The same reasoning is also used by the Commission in the case of a dancer in a ballet performance (= an artistic service) versus a dance teacher (not an artistic service, because the **educational aspect is predominant**) and in the case of a writer of novels (artistic) versus a journalist (not artistic but educational, the emphasis is on the provision of information). Technical and supportive functions such as the lighting and sound technician will *generally* not qualify for the official artist's status. Such activities can only be considered artistic if elements of creativity or originality prevail. However, the Artists Commission will always judge on a case-by-case basis. If a light technician delivers an 'artistic added value', (s)he will also be granted the artist's status.

That is why it is crucial to emphasise that the interpretation of the term 'artistic activity' remains a very factual question and it must always be answered in the most concrete circumstances. There is the dubious case of the profession of DJ. Generally, the Belgian Artists Commission does not consider DJ'ing to be an artistic activity, but legal doctrine points out that there is a big difference between a DJ who mixes records at a wedding party and a DJ who plays an original and unique set at a festival or in a large discotheque (Van De Velde, 2013: 22). An applicant has the right to appeal against the initial judgement of the Artists Commission. The competence to receive these appeals lays with the Belgian labour courts, which thus have the possibility to overturn a refusal decision by the Commission, and can grant the applicant the artist's status, after initial rejection by the Artist's Commission.

a1.1.2.4 Admission Requirements

In the previous sections we learned that the Belgian Artists Commission issues an artist's visa to all those who can prove that they are engaged in an artistic activity. However, *Article 1bis* states a number of other conditions for admission to the official artist's status: only artistic activities by persons who are **not employed via an employment contract** and who provide services or produce works of an artistic nature **in return for payment of a fee**, on the **instructions of a natural or legal person**, are permitted.[330]

1. **Not be employed through an employment contract**
   Someone does only fall within the scope of *Article 1bis* if that person is **not** working as an employee under an employment contract. This is logical, because an artist who is engaged through an employment contract, is always covered by a social security scheme for salaried workers: (s)he does not need an artist's visa to be granted access. The problem however, is this: artists often do not work in a 'subordinate relationship', which means that from a legal point of view, there will be no employment contract. *Article 1bis* is used to bring artists under the social security of salaried workers. After all, the self-employed status requires sufficient regular income, which is often a tricky point for artists, given the highly irregular nature of their performances and income. According to the legislator, the employee status - and attachment to social security for salaried workers - is therefore a more desirable situation for this sort of artistic professions (Vanheusden, 2016: 201).

2. **Working for a remuneration**
   An artist will only fall within the scope of Article 1bis if the service is provided **against payment of a fee.** This concerns not only the remuneration paid in return for the artistic activity provided, but also all the benefits which the artist may enjoy as a result of his/her work. **Voluntary artistic services are not eligible for an artist's visa**. Article 1bis refers explicitly to '*artists who perform or supply their artistic work or services for remuneration*'. One of the Commission's tasks is to check whether a fee is paid. Without payment of a fee, the Commission rejects the application of *Article 1bis*

330 Dutch: Art. 1bis RSZ-wet.

(Commissie Kunstenaars, 2019: 6). An artist who performs in a family setting also falls outside the scope of the artist's status (Van De Velde, 2013: 17).

3. **Commissioned by a natural or legal person**

The demand for the artistic performance or creation must **be commissioned by** a natural person or a legal entity (a client). According to the Artists Commission, this condition prevents *Article 1bis* from being used to sell one's own works at fairs, exhibitions or via the internet. In such cases there is no identifiable client and the activity in question does not fall under Article 1bis. Therefore, the artist's status cannot be used by an artist who voluntarily creates a work in order to offer it for sale afterwards (Commissie Kunstenaars, 2019: 9).

In this case, there is only a purchase/sale agreement, with the buyer or client only coming into play after the artistic work has been carried out. *Article 1bis* can only be applied when there is an identifiable client beforehand who wishes to use the artist's services. In order to avoid ambiguities, the **person who pays the artist was considered the employer** in previous national social security legislation. [331]

The current provision *Article 1bis* puts the 'employer's obligations' (i.e. the payment of -social contributions) on 'the client', the person who commissions the artistic service. In a 2015 ruling, the Constitutional Court clarified how the term 'client' should be understood: the principal is '***the person who ordered the performance or work against payment of a wage*** *and* ***defines its expected characteristics***'.[332]

Please note that, as mentioned above, artistic activities within the family circle fall outside the scope of *Article 1bis*. Therefore, someone who calls on a musician in the context of a family party will not be considered an employer by the NSSO. In that scenario, however, it is likely that a DJ or musician will be paid via the tax-free small fees scheme (Dutch: *KVR – kleine vergoedingsregeling*) for small-scale artistic services (see below).

a1.1.3 Artists: salaried workers or self-employed?

a1.1.3.1 The artist as a salaried worker

The social status of the artist can only be disputed when (s)he works on the instructions of another person or legal entity. When, for example, a sculptor makes a sculpture on his own initiative in order to sell it afterwards, (s)he is working completely autonomously, and there is no possible employer or client to be considered. If an artist works on the instructions of a natural or legal person, then the question arises whether the artist is self-employed or an employee working for his/her client.

In principle, an artist can work as a self-employed person or as an employee: contracts are free and both parties choose whatever relationship they prefer. The question that arises however, the same as always in employment law, is the following: does the artist in question work *under the authority* of another person- in the sense of Articles 2 and 3 of the Belgian Employment Contracts Act - or not? In order to determine if there is 'authority' by an employer, it is sufficient that the employer/client **has the possibility to give instructions about the organisation and execution of the agreed wor**k, without this authority actually having to be exercised.[333]

The answer to this question is a question of fact that will have to be assessed case by case, by a judge, or in advance by the Belgian Commission for the Regulation of the Employment Relationship. It is therefore perfectly possible for an artist to be engaged via a contract of employment. In that case, an artist is an employee like any other and falls under social security for salaried workers, with the same social protection which every other employee enjoys as well. An employee is also subject to labour law and collective labour agreements (Vanheusden, 2016). The latter is the big difference with artists who work under *Article 1bis* and its special artist's status: these artists are also covered by social

331 Old Art 1bis RSZ-wet.

332 Dutch: GwH 17 sept. 2015, nr. 115/2015, punt 20.2.

333 Dutch: Cass. 13 juni 1968, Arr. Cass. 1968, 1239.

security for employees, but remain **'self-employed' under employment law**, **because they do not work with an employment contract**. Therefore they are not bound by collective labour agreements, minimum wage regulations and so on.

a1.1.3.2 The intermediate status: the artist falling under Article 1bis

The 'artistic freedom' of an artist will often make it difficult to demonstrate a legal relationship of subordination. In practice, artists do not often work in a relationship of authority. They often arrange their working hours themselves, without any form of hierarchical control. Moreover, making one's own, original creation is the essence of being an artist, which is difficult to combine with a commissioner who can give far-reaching instructions. A bond of subordination is therefore often regarded by artists as a restriction of their artistic freedom (Commissie Kunstenaars, 2019: 6).

However, this remains a question of fact that must be assessed on a case-by-case basis. For instance, it is certainly not inconceivable that certain groups of artists find themselves under the authority of a principal. Let us take the example of a dancer in a dance ensemble: (s)he has to follow very strict choreographic instructions and has little freedom to make artistic decisions of his/her own. This dancer therefore works under authority, with an employment contract, and will not fall under *Article 1bis*. The same may also apply to singers, musicians and actors. However, there are no general rules and it is dangerous to make statements on this per profession or per sector: everything must be considered on a case-by-case basis. Nevertheless, there will often be no employment contract in the legal sense of that term, and an artist is therefore a self-employed person.

However, the self-employed status presupposes a sufficient and regular income, whereas artists often live on (limited) income generated at irregular times. Therefore, the employee regime is actually considered more suitable for artists. For this reasons, the legislator opted to subject artists to the status of employees, albeit with the possibility of rebutting this presumption. *Article 1bis* of the Act of 27 June 1969, amending the Decree-Law of 28 December 1944 on the social security of salaried workers subjects, artists to the social security of employees, even when they do not work in a subordinate relationship to their client. **That is a shift from the general principle of legal subordination in favour of the criterion of *economic* dependence** (Vanheusden, 2016: 201).

An artist who has been accredited by the Artists Commission with an artist's visa is thus presumed to be working **under the social security system for salaried workers**. In this way, artists who do not work with a contract of employment are still covered by an extended social security system. As mentioned above, it does have to concern an ***artistic service*** that is performed ***for payment*** on the ***instructions of a natural or legal person***. The application is made by the artist himself/herself, after which the Artists Commission assesses the application and, if the assessment is positive, issues the artist's visa for the activity applied for.

a1.1.3.3 The artist as a self-employed person

Artists who work *without* an employment contract and who provide artistic services on commission and in return for payment are equated with the status of employees. However, this is a rebuttable presumption: the legislator also wanted to offer artists the freedom to choose which social status they would like to adopt. This free choice is a basic principle in the Belgian legal system. An artist who does *not* work in similar socio-economic circumstances as an employee has the option to request the Artists' Commission to issue a so-called 'declaration of self-employment'.[334]

This means that only the artist (and not the client) can opt for a self-employed collaboration. Moreover the artist must prove that (s)he is socio-economically independent. The declaration of self-employment was created to offer clients legal certainty: in this way, a client can be sure that a self-

334 Dutch: Art. 1bis, Wet van 27 juni 1969 tot herziening van de besluitwet van 28 december 1944 betreffende de maatschappelijke zekerheid der arbeiders.

employed collaboration will not be reclassified as an employment relationship, thus excluding unexpected social obligations. It is up to the Commission to judge the 'socio-economic' independence of the artist in question on the basis of ten indicators that point to socio-economic independence, such as having a financial plan, invoices from various clients, having staff, doing promotion under one's own name, being registered with an insurance institution for the self-employed, etc. [335]

If the Commission establishes that sufficient criteria have been met, it issues a declaration of self-employment, which creates an irrefutable presumption of self-employment. The NSSO and other institutions are bound by this declaration of self-employment. However, the declaration of self-employment is not a legal obligation for the artist who wants to work on a self-employed basis: the artist who prefers to work on a self-employed basis, even if (s)he is not socio-economically independent, should simply abstain from applying for an artist's visa (Vanheusden, 2016: 208).

Based on the figures released by the Artists Commission in its annual reports, we can conclude that artists who work independently usually do **not** apply for a visa. In 2017 and 2018, the Commission issued barely fifteen declarations of self-employment per year, compared to many hundreds (around 400 to 500 per year) of artists' visas that give access to *Article 1bis* and the social security for salaried workers (Commissie Kunstenaars, 2019). This indicates that artists who work on a self-employed basis save themselves the troubles of having to pass through the Commission's administration in order to obtain an official 'declaration of self-employment'. In 2019, the number of declarations of self-employment issued did increase to around sixty (Commissie Kunstenaars, 2019).

After all, an artist who does not receive a 'declaration of self-employment' from the Commission can still establish himself/herself as a self-employed person. The declaration of self-employment is not an obligatory document for registering as a self-employed person within the Belgian Legal Entities Register. The essential condition is of course that the artist does **not** work in a legally subordinate relationship. If there is a relationship of authority, there is an employment contract, and false self-employment can possibly be reclassified.

The artist's status therefore does not apply to persons providing artistic services in the context of the legal entity of which they themselves are the owner or mandate holder. The manager of a company that provides artistic activities is never covered by the artist's status. After all, legally speaking in this case it is the *company* that provides the artistic services and not the person himself/herself (Van De Velde, 2013: 23).

Successful artists who enjoy (inter-)national prestige are therefore not in need of a protectionist artist's status. They will usually have their own legal entity and act as manager (or agent, director, etc.) of their own company. Such artists, who no longer really have to worry about their social security status, fall outside the philosophy of the artist's status, which aims to protect the group of artists who find themselves in precarious socio-economic circumstances (Van De Velde, 2013: 9). It is this target group for which the artist's status was originally created.

a1.1.4 Accompanying measures

The Belgian legislator soon found out that the commissioning party often failed to pay social security contributions when they employed artists and thus chose to take a series of accompanying measures to encourage the use of the *artist's status* by lowering the administrative and financial burdens attached to the new status.

a1.1.4.1 Reduced employer contributions

The legislator wanted to urge commissioners to register artists for the artist's status. This of course also implied the affiliation of these artists to social security schemes for salaried workers. The fear at the time was that artists would be pushed into working on a self-employed basis, because that would

335 Dutch: Art. 3 KB van 26 juni 2003 betreffende zelfstandigheidsverklaring aangevraagd door bepaalde kunstenaars.

still be a lot cheaper and easier for the commissioners, because then they would not be held accountable to pay employer contributions (Vanheusden, 2016: 202). Therefore, the legislator provided a reduction in the employer's social security contributions for artists.[336] The commissioner did not have to pay social security contributions on the weekly or hourly wages of the artist up to a certain fixed amount.

This so-called 'tax reduction for target groups' amounts to a maximum of € 517 per quarter, during the entire period of the artist's employment. As a result of a recent state reform in Belgium, this target group reduction became a competence of the regional governments, but the entire regulation was maintained. This reduction in social security contributions applies both to artists working with an 'ordinary' employment contract and to artists who do not have an employment contract but are affiliated to the social security system via *Article 1bis* (the artist's status).[337] However, the share of social security contributions due from the artist's themselves (13.07% of total fee) still has to be paid (Joachimowicz, 2015).

a1.1.4.2 Centralisation of administration concerning workplace accidents, holiday pay and child support

By centralising the administrative obligations for the commissioners, it was made easier for them to correctly declare all charges and contributions. The calculation and payment of the holiday allowance is based on the rules that apply to blue-collar workers, and the payment is made by the National Office for Annual Vacation, and is financed by a contribution that the client pays directly to the National Social Security Office. Artists often enter into short-term contracts with various employers and centralising holiday allowances then makes the administrative process less complicated. The mandatory work accident insurance and payments for child allowances were also centralised.

a1.1.4.3 The creation of Social Bureaus for Artists[338] (SBK's)

Because the legislator came to notice that artists often worked for a lot of various clients, with contracts that were often (very) short-term, it was decided to set up a number of so-called *Social Bureaus for Artists* (known as SBK's in Dutch), which functioned as employment agencies that occasional commissioners could call upon when they wanted to engage an artist. These 'occasional patrons' (who do not employ staff and are not professionally active in the cultural sector) regularly neglected their social obligations, since they had very few experience with engaging artists. They could then call on these SBK's for the registration of artists and stage technicians to legally become the employer of the artist. The administrative burden for the artist is also taken care of by the SBK's. It is an excellent way of working for artists or technical freelancers who do not want to work on a self-employed basis, but do have a lot of various short-term contracts and occupations (Van De Velde, 2013: 44).

a1.1.4.4 The Small Fee Regulation (KVR)[339]

To provide more legal certainty for the remuneration of **artistic activities of a very small scale**, a so-called Small Fee Regulation (known as KVR in Dutch) was introduced (Joachimowicz, 2015: 88). This also prevented clients from having to register an artist with the social security services for very small tasks. Think, for example of a brief photo shoot, or making a drawing for a magazine. A small fee for these services was officially considered an 'expense allowance' on which no social contributions or taxes are due.

To be able to make use of the KVR, an artist must be in possession of an *artist's card* (not to be confused with the *artist's visa* required for Article 1bis) which is issued in advance by the Artists

336 Dutch: Art. 2 KB 23 juni 2003 houdende maatregelen inzake de vermindering van de socialezekerheidsbijdragen verschuldigd voor de kunstenaar.

337 VLAIO 'Doelgroepvermindering Kunstenaars-Vlaanderen'

338 Dutch: Sociaal Bureau voor Kunstenaars (SBK).

339 Dutch: Kleine Vergoedingsregeling (KVR).

Commission, at the request of the person who wishes to have a small-scale artistic activity remunerated via the KVR. This *artist's card* is in fact a control instrument for the maximum number of days that a person can make use of this small-scale compensation system (Vanheusden, 2016: 202). A person may only use the KVR 30 times per year. Moreover, an artist may not work for the same client for more than 7 days in a row. The maximum amount that a person can receive per day through the KVR in 2020 is about € 130.[340] These limits obviously serve to prevent abuse of this tax-free allowance.

The KVR is essentially an exception to the officially regulated artist's status. The Artists Commission itself does question this 'small fees scheme'. It states that artists themselves often see the KVR as positive, because of the fact that no contributions or taxes are due. However, according to the Commission, artists are not always aware of the fact that there is no social protection provided by the KVR. Artists are not insured and no rights are created with regard to unemployment benefits. The Commission therefore questions the usefulness of the KVR (Commissie Kunstenaars, 2019: 17).

Artists who are unemployed can also make use of the KVR, but they will not receive unemployment benefits for the day that they make use of it. The small fees arrangement is therefore not always interesting for professional artists. For amateur artists who have a day job in addition to their artistic activity, the KVR is very advantageous and this group often makes use of the KVR. For them it often means an extra tax free income. Furthermore, it is very difficult for the tax authorities to verify whether the KVR is used correctly at all times (Van De Velde, 2013: 31). The actual introduction of the *artist's card* also took a long time to be established, so that in practice a *'declaration of honour'* was used, in which the client and the artist agree on a certain fee for a specific service on a specific day. This way, the client had official proof of payment and the artist did not have to declare his/her income.

a1.1.5 The status of the unemployed artist

With regard to Belgian unemployment schemes, people who provide artistic services can count on a few advantageous exceptions as well. The ONEM (National Employment Office) is the institution that manages unemployment benefits. The rules for calculating unemployment benefits are not necessarily linked to the artist's visa or the *artist's status*. Technicians active in the cultural sector can also make use of (certain) benefit measures in the context of unemployment allowances.

Moreover, unemployment allowances are based on regulations and interpretations of the ONEM, whereby the concept of **'artistic activity'** is sometimes interpreted differently by the ONEM and the Belgian Artists Commission. In order to bring the two together, the definition of 'artistic activity' as stated in Article 1bis has also been introduced in the unemployment regulations, and since 2014 there has also been a representative of the ONEM sitting in the Artists Commission. [341]

However, this did not prevent both institutions from still being able to interpret the same definition differently, which also happened regularly: *'The Artists Commission gives its opinion on the basis of individual dossiers. It is possible that due to special circumstances in the dossier, certain activities that are in principle not artistic in the sense of the interpretation (of the ONEM, ed.), nevertheless give rise to the granting of an artist's visa. You can therefore be faced with an activity that is envisaged by a visa even though it is not considered to be artistic in the sense of the aforementioned interpretation of the ONEM'.*[342]

Thus, an artist with an artists' visa could still be rejected as an artist as far as unemployment benefits are concerned. Only since the adaptation of its memorandum on 27 May 2020, in the midst of the COVID-19 pandemic - which hit the cultural sector particularly hard - , the formal link between the artist's visa and the unemployment benefits for artists has been established: '*when the unemployed person has an artist's visa, the ONEM will no longer ask questions about the artistic nature of the activities that are mentioned*

340 'Werken met de KVR', 2020. (https://vi.be/advies/werken-met-de-kvr).

341 Dutch: Art. 27, 10° Werkloosheidsbesluit van 25 november 1991 (gewijzigd via KB van 7 februari 2014).

342 'Statuut: artistiek of niet? nota RVA.', 2020. (http://www.artistsunited.be/nl/content/statuut-artistiek-niet-nota-rva-p#tabel_werkloosheid-artistieke_activiteiten).

as such in the letter accompanying the visa'.[343] According to *Artists United* - an interest group for people active in the Belgian cultural sector - this will finally put an end to repeated 'Kafkaesque situations' (Ibid.).

In order to be admitted to unemployment benefits, an artist must, just like any other employee, have worked a minimum number of days in a reference period and have received an income during that time. Because it was found that artists often did not meet the standard conditions with regard to income and days worked (because of their specific way of working with very short-term contracts, different commissioners, unregistered rehearsal periods, etc.), the conditions for access to unemployment benefits for artists were eased. The most important benefits are the so-called **'cachet rule'** (for artists only) and the **'neutralisation advantage'** (for artists as well as technicians active in the cultural sector).

a1.1.5.1 The cachet rule

The so-called **'cachet rule**' is a rule to calculate the number of working days in the case of payment by task. It applies to artists who carry out 'artistic activities' in return for payment of a task wage, i.e. a wage where there is no direct link between the income and the hours worked. The definition of 'artistic activity' is the same as the definition included in Article 1bis (Joachimowicz, 2015). When applying the cachet rule, the ONEM bases itself on the task wage to calculate the number of working days. The task wage received is divided by the reference day wage for artists, and on this basis the number of days worked is counted.

For example: a musician receives a task wage of € 600 for a performance. The reference day wage for an artist is (approximately) € 60. This means that the ONEM will take into account 10 days worked for this performance, even though the musician was de facto only employed for one day to perform his/her act.

It goes without saying that this method of calculation is very advantageous because it allows artists to reach the required number of working days for admission to the unemployment system much easier. Other admission conditions, such as 'being without work and without pay',[344] are general rules within the unemployment system and must be met, just like for all other workers. Therefore, we will not elaborate on other general admission and allowance conditions of the unemployment system.

a1.1.6 The neutralisation advantage

There is a special 'neutralisation rule' for people who carry out artistic or technical activities in the artistic sector.[345] Article 116 of the Unemployment Decree has created special rules for employees working on short-term contracts and also specifically for artists. In concrete terms, this neutralisation rule means that artists (and, since April 2014, also technicians working in the artistic sector) have the advantage of still being able to enjoy a benefit rate of (maximum) 60% of a previous (capped) salary even after 12 months of unemployment. Thus, the amount of the benefit will not decrease at the end of 12 months of unemployment, which is an advantage compared to other workers (Vanheusden, 2015).

a1.1.7 Conclusion

There is no real 'separate' status for artists in Belgium yet. What is commonly called the *artist's status* is in fact a hotchpotch of various exceptional measures in the social security of employees and the unemployment regulations, which were introduced to try and overcome the often precarious situations in which artists found themselves. In addition, there are accompanying measures, which do not directly relate to the status of artists itself, but which were taken to encourage access to and the effective application of this status.

343 X, 'Statuut: artistiek of niet? nota RVA.', 2020. (http://www.artistsunited.be/nl/content/statuut-artistiek-niet-nota-rva-p#tabel_werkloosheid-artistieke_activiteiten).

344 Dutch: Art. 44 Werkloosheidsbesluit.

345 Dutch: Art. 116 §5 Werkloosheidsbesluit.

The introduction of *Article 1bis* in the Social Security Act was a praiseworthy initiative, because it guaranteed access to social security for a socio-economically vulnerable professional group. The legal authority criterion was pushed aside in favour of socio-economic reality. It is true that the artist himself/herself must first take action to gain access to the status of artist, which is actually at odds with the original principle of this status, namely that socio-economic dependence - despite the absence of authority - automatically leads to better social protection of (artistic) labour (Vanheusden, 2016: 202).

Today, this protection first requires the granting of an *artist's visa*. Figures show that in fact only a limited group finds access to this status. That is why it is important that artists are informed as well as possible and that the threshold to this status is as low as possible. Finding a balance in this respect has not been easy up to now. After all, access to *Article 1bis* was tightened in 2014, precisely because there were flagrant abuses due to too easy access. Easy access to Article 1bis for those who are entitled to it and the exclusion of abuses must ever be able to go hand in hand.

a1.2 The social security status of the artist in France

a1.2.1 Introduction

The social protection of artists in France has a long and capricious history, as in many other countries. During the Middle Ages, artists who coloured outside the lines were often excommunicated by the Christian powers of the time. Under the *Ancien Régime*, artists in France often acted as '*serviteurs*' (servants) to entertain and/or glorify the absolutist monarchs. From the beginning of the 20th century, the legal position of artists steadily improved, up to and including the current system, which offers specific social protection to artists in France (Barbato, 2006: 657).

This long history and the rationale behind it will not be elaborated upon. The essence of the special rules that apply to (performing) artists in France today is that **they recognise the specific nature of the sector and offer a legal framework that responds to the fact that the employment and therefore the income of artists is often very irregular**. The result is that artists in France have a socio-legal framework that sets them apart from any other professional group (Ibid.).

The special regime for the live performance sector enjoyed by these *'intermittents du spectacle'* in France can generally be described as advantageous and has been the subject of much debate over the years. In 2003, a proposed reform (*ergo*: tightening) of this regime led to a wave of strikes in the cultural sector, forcing the cancellation of even some of the most prestigious theatre and music festivals in France.

Also, after the wave of strikes in 2003, the special regime for artistic intermittent workers came under fire, the system of unemployment benefits in particular being the subject of debate. The question arose as to whether the specific treatment of people with the regime of i*ntermittent* can still be justified in an economic and social context in which flexibility exists in many other sectors as well.[346]

Critics of the intermittent regime in France sometimes speak disparagingly of the regime of the 'permittents', arguing that this regime costs too much - the system of intermittents is indeed in deficit - and due to the general financial problems in unemployment, they state that the average French taxpayer is no longer prepared to shoulder the cost of 'the French cultural excellence'. However, in spite of regular changes (mostly tightening the access to the intermittent regime) over the years, this special regime for intermittents still exists today.

a1.2.2 Who is an artist?

French law distinguishes different types of artists or performers according to the different branches of the law, with different rules applying to artists. It makes the qualification of who is legally considered an artist quite diffuse. First, there is the distinction made by the French Intellectual Property Code. That distinction is twofold: there are the **authors**, i.e. **those who create an original work and, on that basis, claim copyright and other rights on their works**. Then there are the ***artistes-***

346 'European arts cuts: France threatens to pull plug on creatives' special benefits', The Guardian, 30 July 2012.

interprètes, the performing artists. **They interpret and perform what the author has conceived**. They own the **neighbouring rights** of intellectual property. They have a right to remuneration when a film or play is recorded and commercially exploited. In the case of a play, for example, the person who conceived and wrote the play is the author and the actors on stage are *artistes-interprètes*.

In the context of the social security schemes for artists, this distinction is less important, because the French Labour Code *(Code du Travail)* uses the concept of artists in a different way. Therefore, this text will focus on that use. Moreover, many **artist-authors** such as writers, composers, and photographic artists are not the kind of artists who are active in the live performance sector, which constitutes the core of this study. However, it is important to keep in mind that all these categories can be mixed. An artist-author can in certain cases also be an *intermittent du spectacle*, but this is by no means always the case. An *artiste-interprète* will usually also be an *intermittent du spectacle*, which means that (s)he also falls within the regime of the *intermittent du spectacle*. But again: this is not always the case.

So, it is the Labour Code that provides a special socio-legal protection for (certain) artists in France. **This Code uses the term *'artiste du spectacle'*, for artists who can benefit from the special regime for '*intermittents du spectacle*', commonly abbreviated as *intermittents***. We find the term *'artiste du spectacle'* in Article L. 7121-2 of the *Code du Travail* (CT):

> *'Are to be considered artistes du spectacle, mainly:*
> *1° The opera singer*
> *2° The dramatic artist*
> *3° The dancer*
> *4° The entertainer*
> *5° The musician*
> *6° The singer*
> *7° The complementary artist*
> *8° The conductor*
> *9° The arranger-orchestrator*
> *10° The director*
> *11° The circus performer*
> *12° The puppeteer*
> *13° Persons whose activity is recognised as a performer's occupation by the extended performing arts collective agreements.'*

All these artists are considered under French law as *artistes du spectacle* for whom the special regime of *intermittent du spectacle* may be applicable. This list, however, is not exhaustive. Other performing artists may also be entitled to the regime of 'intermittent du spectacle'. Moreover, the French Court of Cassation ruled that the concept of '*spectacle*' must be interpreted broadly.[347]

French case law has also extended the regime of *intermittents* to people who perform functions in the artistic-cultural sector that are not generally considered to be artistic, such as set designers, lighting and sound technicians, etc. According to the Court of Cassation, rehearsals (without an audience) should also be seen as '*spectacle*', even if they do not lead to a final performance. **The category *artiste du spectacle* should therefore be interpreted in the broadest sense.**[348]

According to figures from 2017, there were **143,321 people registered as intermittent du spectacle in the performing arts sector in France that year**. This figure includes both the performing artists themselves and their support staff such as stage builders, sound and lighting technicians, make-up artists, and so on. In total, some 217,000 people worked in the performance sector (dance, theatre, music, film, and audiovisual arts) in 2017. This means that **around 66% of all employees active in these sectors make use of the special *intermittent* regime** (Casse, 2020: 40).

347 Cass. 28 March 2013, n° 12-13527.
348 Cass. 2 April 2013, n° 11-19091.

The *intermittent régime* is reserved for artists and technicians working with **fixed-term contracts** (*contrats à durée déterminée* - abbr CDD). Those who are employed with a permanent contract in the above-mentioned sectors do not fall under the intermittent regime. In French labour law, the contract of indefinite duration is the general rule, but some sectors where employment is by nature temporary, have the right to work with fixed-term contracts. The performing arts and the audiovisual sector are some of the sectors that have obtained an exception for working with this type of *contrats à durée determine d'usage*.

The advantageous unemployment regulation for *intermittents* is the core of the regime. These regulations therefore contain very extensive and detailed lists of jobs per (sub)sector that qualify for the *intermittent* regime. These lists are included in two different annexes to the general *règlement d'assurance chômage*. Annex 8, which defines the technicians eligible for the *intermittent* regime, is very extensive and contains for each of the nine subcategories (television sector, radio, events, ...) a list that enumerates all possible technical functions that are admitted to the regime. Functions that do not appear on these lists cannot be registered as *intermittent*. Annex 10 defines which performing artists are eligible for the *intermittent* regime, but mainly refers to the non-exhaustive enumeration included in Art. L. 7121-2 of the French Labour Code (see above). It is therefore important to take into account any extensions made by case law.

This special regime that applies to the *artistes de spectacle* (plus technicians) by no means covers all people who are active as artists in France. Artists who work as **employees with permanent contracts** are not included in the statistics of the *intermittents*. There also exist other very specific statuses and regimes that apply to dancers, opera singers, etc. who are employed by public institutions such as opera and theatre houses, who often enjoy a sort of status that is closely related to that of French civil servants.

The dancers of the *Opera de Paris*, for example, have a specific legal status and accompanying social security schemes of their own. This special status is a relic from the era of the opera-loving *Louis XIV* and has been in existence since 1698, making it one of the oldest legal public statutes in the world.[349]

These special regulations will not be discussed further here, as they constitute only a small minority of the total number of active (performing) artists. Apart from these aforementioned special statutes, a performing artist can be employed either as an **employee** (either as an ***intermittent*** or **permanent** employee) or, more rarely, as a **self-employed person**, if (s)he meets the requirements. This text will mainly elaborate on the specific regime of the *intermittent du spectacle*.

a1.2.3 The legal status of the artist in France

As in most countries, an artist can work as an employee or as a self-employed person. For performing artists (the so-called *intermittents du spectacle*), there is a **legal presumption that they work in an employment relationship**. The French legislator therefore clearly prefers the status of employee, certainly as far as performing artists are concerned.

With regard to social security and labour law, the concept of artist is usually linked to that of *artiste du spectacle*, who, as *intermittent*, can receive special social protection. Often people speak of the status of *intermittent du spectacle*, but this denomination is in fact incorrect. Artists who are registered as *intermittents* carry out their job as ordinary employees, and not within a separate status like for example, civil servants. The intermittent is usually an artist or a technician who works for many different employers with short-term contracts and for whom a different regime is thus provided in unemployment. However, it is not a fully separate status in itself.

349 Annex 8 and 10 to the general rules of the unemployment assurance of 18 January 2006 (https://www.unedic.org/sites/default/files/regulations/TXT-ANX-RG-Ann10ACh17.pdf) and (https://www.pole-emploi.fr/files/live/sites/PE/files/masters/spectacle/les-notices-reglementaires/annexe-8-techniciens-du-spectacl).

a1.2.3.1 The artist-employee

As in other countries, there are many artists who work with a regular employment contract. Legally speaking, this simply means that an artist works under the authority of an employer, who can give him/her orders and directives, control the execution (of his/her work) and possibly punish the shortcomings of his subordinate worker.[350] The commissioner has employer authority. The fact that the employee performs works of an artistic nature is of little relevance.

The artist-employee is, just like other employees, affiliated with the social security system for salaried workers. The same consequence applies when an artist formally works as a self-employed person, but is in reality under the authority of an employer. It is then possible that a judge requalifies it into an employment contract. The artist who works as an employee will be registered by his/her employer with the relevant social security institutions (via a *déclaration unique d'embauche - DUE*) and the employer will also pay the social security contributions. It is only when the employed artist applies for social security benefits that (s)he will have to complete the necessary formalities with the competent authorities (Justine, 2015).

Employers whose main activity is the exploitation or production of spectacles are obliged to complete these formalities themselves. Natural or legal persons who only occasionally, and not as their main activity, make use of *intermittents du spectacle* - think of private performances or company parties - can appeal to the *guichet unique du spectacle occasionnel* (*GUSO*) that takes care of all social security administration on behalf of the *intermittents*.[351]

a1.2.3.2 The independent artist

An artist can also work as a self-employed person. Either without an identifiable client or commissioned by a natural or legal person who has asked the artist to do so. In this case, however, the artist is not under the authority of his/her client. (S)He retains the freedom to perform: the client has no powers to sanction the artist. As a rule, therefore, the artist will have much greater artistic freedom in the execution of his work, but (s)he will also bear the economic risks of his/her artistic activities.

In this way, the self-employed artist is an entrepreneur like any other, just as the artist-employee is an employee like any other. As far as affiliation to social security is concerned, it is the artist himself/herself who has to complete the necessary formalities, such as affiliation to a *Centre de formalité des entreprises (CFE)*. The *CFE* with which an artist must affiliate is determined by the nature of his/her work. For example, a producer in the performing arts will have to join the *Chambre de commerce et d'industrie*, but this does not apply to artists who exercise a rather artisanal activity or a liberal profession (Justine, 2015: 197). The details of these will be left aside here.

a1.2.3.3 The artist-author

In France, authors and artist-authors such as novelists, composers, film and screenwriters, choreographers, photographers, visual artists, etc. also have a specific social security regime applicable to them.[352] It puts them in a regime largely similar to that of ordinary employees.

As already briefly mentioned above, an artist who wants to fall under this system must create an **original work** and receive copyright for it. The Court of Cassation considers a work to be original when it **bears the personal stamp of the artist**. Artists who follow the instructions of others or merely reproduce works do not fall under the artist-authors system (Justine, 2015: 198). This system of artist-authors often concerns artists who do not actively participate as performers in performances or shows. The regime of the *intermittents du spectacle* will therefore usually not apply to these people.

It is the *artistes-interprètes* who perform the original works. Although these performing artists do not receive any copyright, they do receive neighbouring rights. When their interpretation is recorded and commercially exploited, they also receive remuneration. This remuneration may be a fixed amount

350 Cour de Cassation, chambre sociale, 12 June 2014, n° 13-16753.

351 https://www.guso.fr/information/accueil.

352 Art. R. 382-2 Code de la sécurité social.

or depend on the success of the exploitation. The performing artist - who will often be an intermediary - must pay social security contributions on this income as well (Justine, 2015).

In certain cases, one person can be an artist-author as well as an *intermittent du spectacle* at the same time. For example, a writer-director is presumed to be an employee in his capacity as director and also receives royalties for his/her work. Social security contributions as an employee or *intermittent du spectacle* are then due on his/her remuneration as a director, but social security contributions are also due on his/her royalties received as an author, according to the rules of the artist-author system.

a1.2.3.4 The special regime of the '*intermittent du spectacle*'

In the context of this study, the artist working as *intermittent* is the most interesting one, because a special regime applies to these artists, which takes into account the irregular nature of their assignments. This is precisely why the unemployment regime for these i*ntermittents* differs from that of any other professional group. It has already been mentioned above which artists and technicians are entitled to registration as *intermittents*. Just like the performing artists themselves, the support staff is also subject to an irregular income pattern, which makes the extension of the regime of *intermittents* to technicians not illogical. Artists in France have many different possible regimes and statutes, but specifically for the live performance sector, this regime is the most common one.

a) Presumption of the existence of an employment contract

In France, technicians were historically seen as employees in most cases. For the artists themselves, this was by no means always the case. The nature of the work and the accompanying artistic freedom make it more difficult to speak of a relationship of authority between employer and employee. Since 1969 in French Labour Code, there is a presumption in favour of the status of employee for performing artists. This article presumes that performing artists who are paid for their services are employed under an employment contract:

> *« Tout contrat par lequel une personne physique ou morale s'assure, moyennant rémunération, le concours d'un artiste du spectacle en vue de sa production, est présumé être un contrat de travail dès lors que cet artiste n'exerce pas l'activité, objet de ce contrat, dans des conditions impliquant son inscription au registre du commerce. »*[353]

This presumption exists regardless of the amount of the remuneration and the qualification given to the contract by the parties themselves. The fact that an artist retains his/her artistic freedom does not affect the presumption of the existence of an employment contract either. Other elements that could legally point to self-employment, such as the use of one's own material by the artist or the fact that the artist also employs someone to assist him/her, are not elements that reverse this presumption, as long as the artist himself/herself takes part in the spectacle.[354]

This presumption does not apply as an exception when the artist performs his/her work 'in conditions implying his/her inscription to the trade register'. This is the case when an artist acts as an entrepreneur and therefore bears (part of) the economic risk that underlies the production and performance of this spectacle. In this case, the presumption of an employment contract does not apply.

In addition, any person who thinks to have an interest in doing so can provide counterevidence which removes the presumption of an employment contract. This person (artist or client) will then have to prove that the artist works under circumstances which completely rule out any subordinate relationship (Barbato, 2006: 660).

Article L. 7121-3, which establishes the presumption of the existence of an employment contract for the *artistes du spectacles*, is of public policy nature - which means that the level of remuneration and the qualification made by the parties themselves do not play a role - and is therefore difficult to refute.

353 Art. L-7121-3 Code du Travail.

354 X, « Le Guide des Intermittents du Spectacle : pour comprendre les nouvelles règles » (Ed. N. MARC), La Scène, Nantes, p. 4-5. https://www.lascene.com/newsletter/files/LS95-PDF-Guide-intermittents.pdf.

The subordinate relationship between an artist and his or her client is often somewhat ambiguous (Menger, 2004: 278). It is therefore possible for an artist who prefers to work on a self-employed basis to provide the necessary evidence to rebut the presumption.

b) Unemployment regime

The core of the more favourable system for performing artists registered as *intermittent du spectacle* is unemployment insurance. As these performing artists are often employed on fixed-term contracts - which is the exception in France - a different scheme applies to them, tailored to their working conditions. *Intermittents* are entitled to unemployment benefits if they can prove 507 hours worked in the 12 months preceding the end of their last employment contract.[355] Both the number of hours worked (507) and the reference period (12 months) that must elapse before entitlement to benefit is opened are much more advantageous than for other workers (610 hours worked in 28 months). Moreover, the benefit period can be shifted when the performing artist finds work again and as soon as that employment contract ends, the benefit period automatically starts counting again (instead of looking at the situation one year after the person lost his job previously) (Justine, 2015).

Often, performing artists who are hired with a *CDD d'usage* (a specific form of short-term contracts) are paid with task wage or '*cachet*' without counting a specific number of working hours. When the artist is paid according to *cachet*, (a maximum of) twelve working hours are taken into account when calculating the number of hours worked.[356]

Because performing artists such as dancers and musicians also regularly teach alongside their job as an artist, hours spent teaching can, under certain conditions, also be counted in the unemployment benefit scheme for *intermittents* in the performing arts. The condition is, however, that this educational work must have been done in a recognised educational institution. Moreover, the number of hours that can be counted in the capacity of teacher for the calculation of working hours in the *intermittent* system is capped at 70 working hours. Thus, the majority of the hours worked must have been obtained directly as a performing artist or technician in the cultural sector.[357]

For the *intermittents du spectacle*, the French legislation that regulates the right to unemployment benefits has two important annexes in which it is precisely defined which technicians (annex 8)[358] and which artists (Annex 10) [359] are entitled to benefits under the *intermittent* regime and which are not. For technicians, for example, the annex describes very precisely per sector which jobs are eligible (postproduction assistant, production assistant, head of make-up, etc.). [360] Given the very extensive lists of functions that qualify for the regime of *intermittents*, it can be assumed that most technical functions in the artistic-cultural sector are covered. For artists, the legislation refers to the definition of *artiste du spectacle* as mentioned in Art. L. 7121-1 of the Labour Code (supra).[361]

The calculation of the gross daily allowance to which an *intermittent* is entitled is a complex matter and is based on three different parameters: the number of hours worked in the reference period, the intermittent's salary, and a minimum amount, the absolute minimum being an allowance of € 44/day (Centre National de la Danse, 2017: 8).

The COVID-19 pandemic hit the cultural sector and its employees very hard. For example, since March 2020, practically the entire live performance sector in France and the rest of Europe has been in a state of complete lockdown, which implies that many *intermittents* have been unable to work the required number of hours that entitle them to an allowance. However, the French government recently announced support measures to overcome this.

355 Pôle emploi France. « Intermittents du spectacle », p. 4. (https://www.pole-emploi.fr/files/live/sites/PE/files/fichiers-en-telechargement/fichiers-en-telechargement---dem/Notice%20-%20GUIDE%20INTERMITTENT%20-%20Nov%2019.pdf).

356 Pôle emploi France. « Intermittents du spectacle, p. 4.

357 Pôle emploi France. « Intermittents du spectacle, p. 7.

358 Réglementation assurance-chômage : « ANNEXE 8 : Techniciens du spectacle Liste des emplois et des secteurs d'activités ».

359 Réglementation assurance-chômage : « Annexe 10 du 14 avril 2017 : Artistes du spectacle ».

360 Annex 8 (https://www.pole-emploi.fr/files/live/sites/PE/files/masters/spectacle/les-notices-reglementaires/annexe-8-techniciens-du-spectacl).

361 Annex 10 (https://www.unedic.org/sites/default/files/regulations/TXT-ANX-RG-Ann10ACh17.pdf).

In France, periods of lockdown are not included in the calculation of the reference period for unemployment insurance. In the same way, the period during which *intermittents* are entitled to benefits is extended. Until the end of the lockdown, these *intermittents* retain their right to benefits (ETUC, 2020: 4). The French Minister of Labour has already announced that *intermittents* will be guaranteed their rights at least until August 2021.[362]

c) The so-called CDD d'usage

French labour law is very rigorous when it comes to the duration of the employment contract. In France, the general rule is that an employment contract is concluded for an indefinite period (*contrat à durée indéterminée - CDI*).[363] The live performance sector is no exception. However, French labour law offers certain sectors the possibility of using fixed-term contracts (*contrat à durée determinée - CDD*), due to the nature of the work and the inherently temporary nature of certain activities.[364] One of the sectors covered is that of '*the spectacles, cultural action, audiovisual, cinematographic production, phonographic publishing*'.[365]

In France, the live performance sector often uses these fixed-term contracts, and more specifically the *contrats de durée déterminée d'usage (CDDU*), which allow the employer to use a worker for a well-defined and temporary task, ranging from a few hours to a few days. The permission to work with such contracts is in itself also an exception for (among others) the live performance sector.

a1.2.4 Social security contributions

An artist who is covered by French social security, whether (s)he is French or not, must pay social security contributions according to the system to which (s)he is subject. In the case of **artist-employees**, the social security contributions are paid by the employer, who must make the necessary payments and undertake the administrative steps. These contributions are paid to the various social security institutions such as the *Unions de Recouvrement des Cotisations de Sécurité Sociale et d'Allocations Familiales* (Urssaf), the *Pôle emploi* (unemployment insurance), the sector supplementary pension fund, the fund for vocational training, etc.

The amounts and basis of calculation vary over time and according to the sector. The social contributions for the employee (employee's share) amount to approximately 20% of the gross salary. The employer pays social contributions that amount to approximately 50% of the gross salary (employer's share) (Justine, 2015: 202-203). Artists who work as *intermittents* are entitled to special unemployment insurance, as explained above.

Self-employed artists arrange their social security themselves. The *régime social des indépendants* collects all contributions, which are then distributed among all the different social insurances (sickness, pension, maternity, invalidity, etc.). The social contributions amount to approximately 45% of the gross remuneration. In principle, self-employed artists are not covered against unemployment, although voluntary insurance is always possible.

Artist-authors pay social contributions on their copyright income, which are usually withheld by the organisation paying the copyright. They are also not entitled to unemployment benefits. For the rest, they enjoy the same statutory social protection as employees.[366]

362 T. CORLIN, « Intermittence : prolongation de la durée des droits jusqu'au 31 août 2021 », 17 July 2020. (https://www.culturematin.com/juridique-rh/rh-formation-intermittence/pratiques/intermittence-prolongation-de-la-duree-des-droits-jusqu-au-31-aout-2021.html).

363 Art. L. 1221-2 Code du Travail.

364 Art. L. 1242-2 Code du Travail.

365 Art. D. 1242-1 Code du Travail.

366 Art. R. 382-1. Code de la Sécurité Social.

a1.3 The social security status of the artist in Germany

a1.3.1 A brief history

The German social security system came into being at the end of the 19th century and also served as an example for many other social security systems that gradually emerged in Europe in the course of the 20th century. It was under the iron rule of Otto von Bismarck that the first legislation for a compulsory, national social insurance was voted (De Swaan, 2004).

The foundations laid by Otto von Bismarck are still in place, but in the meantime, the world and the labour market in Germany have drastically changed. Fewer and fewer people are working in traditional full-time jobs, especially in Germany, where labour market reforms have led to a growing number of part-time and flexible workers and a large number of mini-jobs. There is also a growing number of active persons working on a freelance or self-employed basis - such as artists - which has in turn led to the emergence of (public) social security systems for those who do not work in traditional employment (Tobsch & Eichhorst, 2018).

The social insurance for artists and writers (*Künstlersozialversicherung*) is just one example.[367] Today, all self-employed people in Germany must join a social insurance scheme (either public or private) (Ibid.). For self-employed artists and writers (including journalists, editors, publicists, etc.), there has been a specific, public social insurance since 1 January 1983. On that date, the *Künstlersozialversicherungsgesetz* of 27 July 1981 (the Artists Social Security Act)[368] came into force. This law was created because in the 70s and 80s, it was found that artists and writers, as self-employed workers, often had worryingly low incomes, which led to very weak social protection for this professional group.

In Germany, as in many other European countries, it was found that the rather low and very irregular income from artistic activities led to a socio-economic status that was closer to that of employees than to that of the self-employed, even though artists were de jure not under authority. The *Künstlersozialversicherung* was intended to ensure that self-employed artists could enjoy the same social protection as employees, at least with regard to health insurance and pension accrual (Tobsch & Eichhorst, 2018).

After the fall of the Berlin Wall and the end of the GDR, this legislation also came into force in the former East German states in 1992. In 1995, the Künstlersozialversicherungsgesetz was extended with an additional health insurance. [369] In the meantime, this different regime for independent artists and writers has existed for almost forty years. [370]

a1.3.2 The legal status of the artist in Germany

In Germany, we cannot speak of a separate status for artists. However, here too, there are certain specific measures to protect the social rights of artists (and writers). In the *Bundesrepublik* too, it has been established that freelance artists and writers are mostly formally self-employed, but in reality, often find themselves in 'financial and social circumstances'[371] similar to those of ordinary employees.

According to the German Federal Ministry of Labour and Social Affairs, they are often dependent on cooperation with other companies, individuals, or marketeers to make their work and services accessible to the general public. Although these persons are often self-employed, they are socio-

367 Some comments: Although the target group definition may well be considered comprehensive - very, very few technicians would be able to qualify. A 'DJ' still has some artistic aspects. The 'Künstlersozialversicherug' is - also because of the COVID-19 crisis, very restrictive in accepting new members. Some of the artists who are insured dislike the fact that they must pay into the 'normal' social security fund - which is not necessarily as strong as a privately run pension system might be. See also: Deutscher Bundestag (2020).

368 Federal Ministry of Labour and Social Affairs, '*Künstlersozialversicherung (Artists' Social Security Fund)* ' (https://www.bmas.de/EN/Our-Topics/Social-Security/artists-social-security-fund.html).

369 Gesetz über die Sozialversicherung der selbständigen Künstler und Publizisten (Künstlersozialversicherungsgesetz - KSVG) of 27 July 1981 (BGBl. I p. 705), (https://www.kuenstlersozialkasse.de/fileadmin/Dokumente/Gesetze/KSVG.pdf).

370 *Künstlersozialkasse, Social Security Insurance for Artists and Writers*, 2018. (https://www.kuenstlersozialkasse.de/).

371 Federal Ministry of Labour and Social Affairs, 'Künstlersozialversicherung (Artists' Social Security Fund)'.

economically not 'entrepreneurs'.[372] From this point of view, a special social protection for these 'dependent' self-employed persons was considered necessary.

That is why since 1983 there has been a '*Künstlersozialversicherung'* in Germany, a special regime that regulates the social security status of self-employed artists and writers. Therefore, **only the *self-employed* artists and writers who exercise *artistic activities*** can make use of this regime. Artists and writers who are employed via an ordinary employment contract are subject to the general social security regime for employees.

The *Künstlersozialkasse* is responsible for the implementation of this social insurance in Germany. This administrative service is the contact point for all social insurance issues for artists. It gives advice to artists, writers, and their clients. This *Künstlersozialkasse* also decides who is entitled to this insurance and who is not, who is exempted from paying contributions and who is not, etc. Moreover, this fund collects the social contributions paid by artists as well as principals and transfers them to the competent insurance institutions. In short, this service is the beating heart of the whole special social security regime for artists and writers.

a1.3.2.1 Who is an artist?

The target group of this insurance falls into two categories: the artists and the publicists. The *Künstlersozialversicherungsgesetz* rather concisely states who shall be or shall not be considered as an artist:

> *'**Künstler im Sinne des Künstlersozialversicherungsgesetzes** (KSVG) ist, **wer Musik, darstellende oder bildende Kunst schafft, ausübt oder lehrt.** Hierzu gehören auch Designer sowie die Ausbilder im Bereich Design'.'*[373]

Within the meaning of this law, an artist is a person practicing or teaching performing and visual arts or music. Designers and design teachers also fall under the KSVG. The scope of this insurance is not discussed further, but the *Künstlersozialkasse* has a '*Künstlerkatalog'* which alphabetically lists a whole set of functions which define the scope and coverage of this social insurance more concretely

In addition to the rather obvious 'artistic professions' such as actors or musicians, the list explicitly categorises clowns, choreographers, illustrators, dramaturges, directors, choirmasters, poets, conductors, cosmeticians, web designers, puppet players, comedians, stylists, etc. as *artists*. DJs are also eligible for the artist's status within the meaning of the KSVG. Moreover, this enumeration is not exhaustive, as the *Künstlersozialkasse* explicitly states in its *Künstlerkatalog*. Detailed descriptions may therefore be requested for certain activities in order to assess each individual case.[374]

Compared to other countries, this definition may well be considered comprehensive. This enumeration also shows that certain common jobs in the live performance sector, such as make-up artists, stylists as well as sound and light technicians, are brought under the artists' regime. Belgian law, for example, makes a sharp distinction between artistic and technical functions within the framework of the artist's statute, whereas Germany also places the rather technical profiles under the artist's regime within the framework of the ***Künstlersozialversicherungsgesetz***.

a1.3.2.2 Who is a publicist?

The second category consists of the so-called 'publicists'. The Künstlersozialversicherungsgesetz describes them as follows: **'Publizist im Sinne des KSVG** ist, wer als **Schriftsteller, Journalist oder in ähnlicher Weise publizistisch tätig** ist oder Publizistik lehrt.' Again, there is no further definition, except for the non-exhaustive examples included in the artist's catalogue.

372 Federal Ministry of Labour and Social Affairs, 'Künstlersozialversicherung (Artists' Social Security Fund)' (https://www.bmas.de/EN/Our-Topics/Social-Security/artists-social-security-fund.html).

373 Künstlersozialkasse, *Künstlerische/publizistische Tätigkeiten und Abgabesätze - Informationsschrift Nr. 6 zur Künstlersozialabgabe (https://www.kuenstlersozialkasse.de/fileadmin/Dokumente/Mediencenter_K%c3%bcnstler_Publizisten/Allg._Infos_u._Anmeldeunterlagen/Info_06_-_Kuenstlerkatalog_und_Abgabesaetze.pdf.*

374 Touring Artists, *The Artists Social Security Fund* (https://www.touring-artists.info/en/social-security/the-artists-social-security-fund/#c1348).

That is also a deliberate choice: The law 'refrains from a detailed definition of artistic or journalistic activities by listing professional titles. The **diversity, complexity, and dynamism** of the manifestations of artistic and journalistic professional activities **preclude such a list** (...). The present catalogue provides for an overview of some artistic/journalistic activities of the KSVG. Therefore, it builds on the experience gained by the **Künstlersozialkasse** in the practical implementation of the law and can **by no means be considered conclusive or static**.'[375]

a1.3.2.3 Admission Requirements

In principle, three important conditions exist for artists and publicists to be admitted to the *Künstlersozialversicherung* (KSV) (Tobsch & Eichhorst, 2018):

- their artistic or journalistic activities shall be their main 'commercial' occupation, and not a temporary or part-time supplementary income. They also shall not employ more than one worker;
- their main activity shall fall within the definition of artist or publicist as intended by law (see above). In case of ambiguity or dispute, the German Labour Court (*Arbeitsgericht*) shall have jurisdiction;
- they shall earn at least € 3,900 per year from these artistic or publishing activities, with the exception of 'new' artists or writers, who must, under certain conditions, pay reduced contributions during the first three years of their affiliation. According to the *Künstlersozialkasse*, this should give artists a chance to get through the difficult start-up period, as this system allows them to remain affiliated even in the absence of any income.

The aim of the KSV is therefore to protect solely those artists for whom the artistic work is their main livelihood. Only 'serious participation' in the German economy is covered; 'hobbyists', by contrast, are not welcome, according to the *Künstlersozialkasse*.[376] Artists or publicists who too often take on the role of 'employer' are not the target audience of the KSVG either. No more than one person with an employment contract may be employed by an artist/writer in the context of the artistic or writing process. Nevertheless, an artist or writer may employ trainees or part-timers (with a maximum salary of € 450) without jeopardising his or her affiliation to the KSVG as an artist.

a1.3.3 The artist in Germany: salaried worker or self-employed?

Germany, like most other countries, has two systems that can apply to an artist: the self-employed system or the employed system. As a result, artists or technicians have no special status. In terms of social security, an artist employed through the system of employees is an employee like any other. We will not elaborate on the concept of 'employee' in Germany here, but an artist is an employee if (s)he **works for a boss and receives instructions**. The electronic payroll tax card ('*ELstAM*') constitutes the main indicator for the employee status. The employer has the responsibility to insure his/her employees with the social security system whereupon the artist enjoys full social protection under this system.

It goes without saying that an artist may also work as a self-employed person. Sometimes it is difficult to determine whether an artist's activity should be considered as self-employment or as wage labour. In view of this difficult question, the German Federal Ministry of Finance has introduced a '*Künstlererlass*' (German regulation on exemption for artists). This *Künstlererlass* defines the distinction between self-employment and paid employment and answers related questions concerning the deduction of income tax. The *Künstlererlass* is therefore particularly relevant with regard to the tax aspects of the German artist statute. This regulation providing certain tax exemptions for artists is similar - but not to be confused with - the list of criteria used by social security institutions and with the procedure for determining affiliation to the *Künstlersozialversicherung*. We will not go into the specific elements that may distinguish a German self-employed artist from an employed artist. Here too,

375 Künstlersozialkasse, Künstlerische/publizistische Tätigkeiten und Abgabesätze - Informationsschrift Nr. 6 zur Künstlersozialabgabe.

376 Künstlersozialkasse, 'Social Security Insurance for Artists and Writers', 2018. (https://www.ericon-broker.com/fileadmin/downloads/ksk/ksk-general-information-about-social-security-insurance.pdf).

a case-by case assessment is required. However, the special social protection a **self-employed** artist receives in Germany through the *Künstlersozialversicherung* will be discussed below.

a1.3.4 The *Künstlersozialversicherung*: contributions and costs

The *Künstlersozialversicherungsgesetz* provides self-employed artists and publicists with public **pension insurance** (also covering disability and survivors' pensions), **public health insurance** (also covering *Mutterschaftsgeld,* German maternity allowance) and **long-term medical insurance**. Unemployment is not covered, as is the case for other self-employed people. However, it is possible to take out unemployment insurance. If an artist or writer has started to pay contributions to the unemployment system within three months after starting his/her self-employed activities and has contributed to this system for at least 12 months in the last two years, an entitlement to *Arbeitslosengeld* (unemployment benefit) arises (Tobsch & Eichhorst, 2018).

For **pension insurance**, a contribution of 18.6% is levied on the income of the self-employed artist and publicist in 2020. The artist pays half of that 18.6% and the client the other half. A contribution of around 14% is required for **health insurance**, again half paid by the employer and half by the artist or publicist. Finally, **long-term medical insurance** costs about 3% of the insured's income, again divided between the user and the artist according to the same principle.

As is the case with employees, the costs of this regime are thus shared between the self-employed artist or writer and his/her client. For artists and writers, there also exists a federal subsidy system that makes up the difference of this regime: about 20% of the total budget of the *Künstersozialkasse* is supplemented by the government. In 2020, this amounted to just over € 200 million. The administrative costs of running the *Künstlersozialkasse* itself are also financed by the German government. In addition, there is a general state contribution to the German pension funds, from which artists and writers also benefit.

According to information from a 2013 OECD report, there were 177,000 affiliated artists and writers that year, with around 16,000 applications (Tobsch & Eichhorst, 2018). About 75% of those applications were actually approved by the *Künstlersozialkasse*. The *Künstlersozialkasse* registers the artists admitted to these insurances with the competent insurance institutions. This institution also collects the contributions from the artists and the clients and then passes them on to the pension and healthcare institutions. Furthermore, companies that regularly make use of self-employed artists and writers are obliged to register with the *Künstlersozialkasse*.[377]

For many years, the number of affiliated artists and writers has been on the rise. As of 2019, 190,508 self-employed artists and writers were already insured through the *Künstlersozialkasse*, the breakdown by category being as follows[378]:

Publicists	Visual artists	Musicians	Performing artists
41,220	65,964	54,032	29,292

As self-employed persons, artists and writers in Germany enjoy a favourable position with regard to social security. They pay only about half of the social contributions to the system themselves, whereas other self-employed workers are fully responsible for paying their social security contributions. As a result, the social contributions of a publicist/artist are similar to those of an employee. The other half is paid by the clients (called 'users' in Germany) and through grants from the German Federal Republic (which accounts for around 20% of the total budget of the artists' insurance scheme).[379]

It comes as no surprise, then, that joining this regime is a popular option. If, for example, a self-employed writer has to choose between the regime for 'ordinary' self-employed persons and the

377 Touring-artists, '*Social security contributions for artists (Künstlersozialabgabe or KSA) checklist*' (https://www.touring-artists.info/fileadmin/user_upload/Sozialrecht_EN/Checklist_Social_security_contributions_for_artists.pdf).

378 Numbers: (https://www.kuenstlersozialkasse.de/).

379 Numbers: (https://www.kuenstlersozialkasse.de/service/ksk-in-zahlen.html).

regime for publicists and artists, the choice is easily made. This observation also translates into a strong increase in the number of affiliated artists: in 20 years, the number of affiliated artists exploded from around 80,000 in the late 1990s to almost 200,000 in 2020.

This is partly due to the expansion of the number of 'artistic' positions that qualify for the status of **artist** or **publicist** for the *Künstlersozialkasse*. Disputes about the artistic nature of certain professions in Germany also generated a lot of work for labour courts, which had to decide each time whether someone could qualify for the KSK or not. The *Frankfurter Allgemeine* newspaper has reported on judgements about the artistic nature of professions such as Japanese tea master or juror in casting shows.[380] Even 'new' professions such as website designers and app designers now fall within the scope of the artists' insurance.[381]

Employers are not always happy about the popularity of the *Künstlersozialversicherung*, complaining mainly about the ever-increasing costs of this system and the legal uncertainty (who is an artist and who is not?) that comes with the ever-growing group of artists and publicists.[382] Companies that make use of artists and publicists pay, on top of the 'usual' social contributions for pension, health, and medical insurance, a '*Künstlersozialabgabe'* (a kind of general solidarity contribution) that is needed to finance the regime.

In order to maintain a level playing field, **employers employing artists that are not affiliated to the *Künstlersozialversicherung*** must also pay this general solidarity contribution. In this case, it mainly concerns artists who only carry out artistic activities as a secondary activity and (foreign) artists who are not subject to the German social security system but who perform there.

It is therefore very important for foreign companies to be aware of this obligation as well. In 2020, this contribution will be around **4.2% of the salary of artists and publicists**. For some years now, the German government has also been strictly monitoring the payment of this contribution. This resulted in a higher degree of compliance, which also made it possible to reduce the contribution rate of this *Sozialabgabe* recently. In 2016, the contribution was just over 5%, whereas now it has dropped to 4.2%. The German Ministry of Social Affairs revises this contribution rate annually, based on the payments of social allowances to artists and publicists (Tobsch & Eichhorst, 2018).

a1.4 The social security status of the artist in the Netherlands

a1.4.1 A brief history

The Netherlands has had a specific tax and social security scheme for artists for some time now. The first measures for **professional boxers, magicians, and other musicians** were introduced in 1941 by the German occupying forces, when the Nazi regime was looking for a way to tax income generated during performances and shows as quickly and efficiently as possible. They therefore introduced a special scheme whereby they subjected income generated from such shows to immediate collection. The German occupiers disappeared from the scene in 1945, but the special regulation that they had introduced stayed in place. In the 1950s, it was even extended to fair and variety artists without fixed residence for the very same reason: the government could immediately collect the taxes from these performances as payroll tax and did not have to wait until the annual income tax was levied. In 1964, the artist arrangement came under pressure, but because trade unions were strongly in favour of extending social protection for employees to the artistic sector, the specific artist arrangement was even strengthened. In 2001, the contemporary ***'artist and professional sportsman arrangement'*** (Dutch: artiesten- en beroepssportersregeling - ABSR) came into being, which has since been amended several times (Molenaar, 2004: 1).

380 Frankfurter Allgemeine, 29 Augustus 2016, ,*Wirtschaft läuft gegen die Künstlersozialkasse Sturm '* *(https://www.faz.net/aktuell/wirtschaft/kuenstlersozialversicherung-verursacht-hohe-kosten-14410014.html).*

381 Duitslandinstituut, 'Duitsland biedt creatieve zzp'ers zekerheid', 16 februari 2017. (https://duitslandinstituut.nl/artikel/20249/duitsland-biedt-creatieve-zzpers-zekerheid).

382 Frankfurter Allgemeine Zeitung, 29 August 2016, '*Wirtschaft läuft gegen die Künstlersozialkasse Sturm'*.

The abolition of this artist arrangement has often been considered, but so far, it still holds. The arrangement for professional sportsmen will not be discussed below, but the arrangement for artists will. The so-called artist arrangement (Dutch: *Artiestenregeling*) consists of a series of special provisions in the wage taxes and employee insurances. Normally, payroll taxes and contributions (together: the wage taxes) are levied on employees in periodic payments, but **because of the special Dutch *artist arrangement* (AR) also self-employed artists fall under the wage taxes that exist for employees.**

That is why it is very essential for artists and organisers in the Netherlands to know how this AR works. It is important to mention that when an artist works as a **regular employee**, the artist arrangement is not applicable. Article 2 of the Dutch Law on Wage Taxes (regarding employees) precedes and prevails over Article 5a of this law (regarding artists).[383]

Artists who work under an employment contract in the Netherlands, for example with an orchestra or a theatre company, also fall under the relevant collective labour agreements (All Arts Belastingadviseurs & Vereniging Nederlandse podia en festivals, 2018: 3). As fully-fledged employees, they are also subject to labour law and collective labour agreements, in contrast to independent artists who work under an artist arrangement. Artists that work with an AR, do pay social security contributions like employees, but remain independent with regard to labour law. This makes the official Dutch artist arrangement fairly comparable to the Belgian artist status. Both are mechanisms that bring an artist, who is not bound by an employment contract, under the social security for employees. Labour law does not apply.

a1.4.2 Who is an artist?

The Netherlands has an artist arrangement (AR) giving artists special protection, not only with regard to tax law, but also with regard to social security. According to Dutch law, artists are persons who **perform in front of an audience** and **deliver an artistic performance**. '*For the application of this law and the provisions based on it, artist is defined as: the person* ***who performs as a musician or otherwise as an artist under a short-term contract***'.[384]

It is irrelevant whether a performance is given directly before an audience or, for example, via radio or television, whether the artist performs professionally or as an amateur, and whether (s)he performs alone or in a company. Examples: members of bands and orchestras, entertainers, comedians, singers, solo musicians, acrobats, magicians, ventriloquists, mimes, puppeteers and actors and actresses. An actor or actress who is hired to play a role in a practical simulation for a training course is also an artist. A disc jockey, video jockey, and an MC who performs as a singer are artists when they perform at a dance party, festival, or pop stage, for example (Belastingdienst, 2015).

For the Dutch tax authorities, directors are therefore not considered to be artists, because they do not perform in front of an audience. In Belgium, the official Artists Commission would normally consider a director to be an artist, because directing a film or theatre play is an artistic activity according to Belgian law. The fact that the director in question does not perform before an audience is not a condition for being considered an artist in Belgium.

Recording and lighting technicians, roadies, and managers, but also for example dressers and make-up artists are not artists according to Dutch law. Under Belgian law, this type of technician will not usually be considered an artist either, due to the rather technical nature of their services, but it is not inconceivable that, for example, a stage builder or make-up artist will be considered an artist. The only condition is that the performance must offer an artistic added value. In the Netherlands, ***persons who do not actively perform for an audience are excluded in advance.*** The beneficial artist arrangement does not apply to them.

A clear-cut definition of who is considered an artist and who is not, does not exist in the Netherlands either. As indicated above, the legislation defines the artist as the person who, **'pursuant to a**

383 Dutch: Art. 5a, lid 3 Wet Loonbelasting.

384 Dutch: Art.I 5a, Wet op de loonbelasting 1964.

short-term contract, performs as a musician or otherwise as an artist'.[385] Molenaar (2016: 82) states that this definition causes few problems, because in the Netherlands there seems to be little ambiguity about who is an artist.

There has been a long discussion in the Netherlands though, about whether a DJ could fall under the artist arrangement or not. The question arose whether or not DJing was an artistic performance. In the end, this question was even put on the Minister of Finance's plate at the end of 2006. Initially, the then Minister Gerrit Zalm stated that a DJ could only qualify for the fiscally beneficial artist arrangement when DJs 'added some extra spice to the song and not just put on records'.[386]

According to Zalm, a DJ was only an artist if (s)he added something to the music, 'even if it was just a bad joke, or greetings to his/her uncle in between two records'.[387] If a DJ does not do that, then the DJ was merely a record player (not an artist) and could not take advantage of the special tax scheme for artists.

These statements caused quite some controversy in the Dutch dance world and eventually the minister changed his opinion when he was questioned about it in the Dutch parliament. His answer to the parliamentary questions on this subject was: 'a DJ performs, according to his or her own artistic views, selected music from (parts of) sound carriers in a sequence of his or her choice, in front of an audience, with or without the addition of live elements, such as musical instruments, vocals, and samples. In case law, when assessing the artistic performance, much value is **attached to society's views and speech**. **Taking this into account, DJs who perform at dance parties, festivals, pop stages, and the like are now to be regarded as artists without question**.' [388]

It is striking that the answer clearly refers to society's views when assessing an artistic achievement. When something is seen as artistic by society, it will also qualify as an artistic performance. Nowadays there is no more discussion in the Netherlands: a DJ can make use of the AR, regardless of his way of performing (Molenaar, 2016).

The AR applies only to performances and not to rehearsals and the like. There must be an audience, whereby performances that are not live have also been brought under the AR by jurisprudence. The term 'performance' must therefore be interpreted broadly. Musicians who assist in the production of an album are also covered by the artist arrangement. Until 2001, there was an official Decree where all artistic professions were listed. However, this list has been dropped because the definition of the term 'artistic performance' was considered to be clear enough without an exhaustive list (All Arts Belastingadviseurs & Vereniging Nederlandse podia en festivals, 2018: 4).

The Dutch legislation also mentions '**a contract of short duration** as a musician or otherwise as an artist'.[389] This **short duration mentioned in the law should be understood as a contract of maximum three months.** Therefore, the AR does not apply when the contract between the contracting party and the artist is longer than three months. However, when a contract is concluded for more than three months, it will often be the case that there is an employment relationship and that the artist is an employee (Belastingdienst, 2015). When there is a contract for longer than three months, but it is no employment contract, then the artist arrangement does not apply, and the commissioner of the artist does not have to make any social security payments. In that case, the artist is responsible for paying the necessary taxes and contributions himself/herself.

385 Dutch: Art. 5a, 1e lid, Wet op de Loonbelasting 1964.

386 'Zalm buigt: dj is toch een artiest', *NRC Handelsblad*, 30 November 2006, (https://www.nrc.nl/nieuws/2006/11/30/zalm-buigt-dj-is-toch-een-artiest-11236627-a1225322).

387 'Dj nu écht echt artiest', *3voor12VPRO*, 30 November 2006, (https://3voor12.vpro.nl/artikelen/overzicht/2006/november/dj-nu-cht-echt-artiest.html).

388 Dutch: Antwoorden Tweede Kamer, 27 November 2006, V-N 2006/63.19.

389 Dutch: Art. 5, Wet Loonbelasting.

a1.4.3 The content of the Artist Arrangement (AR)

a1.4.3.1 Protection through employee insurances

Artists who work with the AR are officially considered to be fictive employees. They are paid in the same way as employees: they do not send an invoice but are paid net by the commissioning party, pay the same contributions and are insured against **sickness** and **unemployment** (both for the General Unemployment Fund and the sector fund) and **disability** (Disability Insurance Act as well as Work and Income according to Labour Capacity), just like any other employee (Beran, 2015: 238). These are the 'employee insurances'.

For artists who work across borders, the European social security regulations come into play. These referral rules will determine if an artist is to be registered as a socially insured person in the Netherlands and if (s)he can fall under the AR. The artist arrangement also implies that the commissioning party will have to pay payroll taxes as an employer. These taxes are about 36% of the fee that the artist receives. It remains an exceptional arrangement for payroll taxes and social insurances because it concerns de facto **independent artists** of whom payroll tax has to be deducted and on top of that employer contributions have to be paid.

a1.4.3.2 Small Fee Regulation (KVR)

The Netherlands also knows a sort of small compensation scheme for artists, commonly called 'Small Fee Regulation' (Kleine Vergoedingsregeling KVR in Dutch). From the gross fee that the artist receives, € 163 can be deducted. This amount can be paid to the artist **tax free** and **without social security contributions**. Anything over and above the € 163, if any, must be declared. Also, contributions must be paid thereon. However, the organiser or the so-called withholding agent (infra) needs the **explicit permission** of the artist to apply the KVR to the fee the artist receives.[390] The KVR is not a tax-free allowance for the artist, because the KVR has to be declared in the official artist's tax return. In practice, the KVR is a tool for the commissioning party to pay out a part of the artist's fee without administrative hassle and tax free (All Arts Belastingadviseurs & Vereniging Nederlandse podia en festivals, 2018: 11).

a1.4.3.3 Cost reimbursement (KVB)

Besides the KVR, there is also a **'cost reimbursement arrangement'** (Dutch: *kostenvergoedingsbeschikking - KVB*) with which the artist (and therefore not the commissioning party) can make certain costs deductible for tax purposes. This KVB is little used by Dutch artists. When they do not want to make use of the AR, it is easier for them to work with their own declaration or model agreement. For foreign companies, this declaration is the best way to mitigate or even avoid the Dutch payroll taxes. The organiser with the duty to withhold taxes can deduct these costs from the fee and only has to pay payroll taxes over the remaining amount.

a1.4.4 The artist in The Netherlands: salaried worker or self-employed?

An artist can work as an employee or as a self-employed person. For people who fall under the definition of artist of Article 5a of the Dutch Wages Taxes Act, the AR is the default-setting. This means that an artist - who **does not have an employment contract** with the commissioning party - by default falls under the artist arrangement. **It also does not matter whether the artist in question is an amateur or professional artist**. Those who, as an artist, do not want to work with the AR, will have to take the necessary steps to have it declared not applicable.

Until the 1 May 2016, this was usually done with a declaration of labour relation (Dutch: *verklaring arbeidsrelatie – VAR*) with which artists (just like other self-employed people) could declare that they

390 Dutch: Art. 12a Uitvoeringsbesluit LB – Kostenvergoedingsbeschikking.

were working **completely independently** and **did not want to fall back on the AR**. This declaration could be requested from the Dutch Tax Authority by artists who wanted to work without an AR that would bring them under social security schemes for employees.

The main *raison d'être* for this VAR was to take away the uncertainty about the nature of the contract. When an artist could present a VAR, clients were sure of the fact that there would be no additional taxes because of a possible reclassification from a contract between independent contractors into an employment contract. This arrangement, however, was subject to criticism because it stimulated bogus self-employment.

Even when there was a de facto employment relationship, the commissioning party was safeguarded from any problems thanks to the VAR. Besides that, **clients often demanded a VAR before hiring artists** (Beran, 2015: 234). Also administratively and in terms of flexibility, a VAR and the accompanying independency of the artist were more beneficial for the commissioning party than the artist arrangement, where taxes and social contributions had to be paid.

This way, artists (but also other self-employed workers) increasingly found themselves in precarious situations where they had little legal protection as a self-employed person, no social insurance, and no pension accrual (Molenaar, 2016). In 2016, this VAR scheme was therefore abolished. Since then, it has been the intention that the Tax and Customs Administration will assess agreements between the client and the artistic contractor in advance. With the abolition of the VAR, **it must first be assessed whether or not there is a regular employment contract.**

The new *Deregulation of Labour Relationships Assessment Act (Wet Deregulering Beoordeling Arbeidsrelatie - DBA)*, introduced in 2016, has come under fire in 2020 due to various ambiguities in its application. As a result, the Dutch tax authorities have stopped applying this legislation for the time being: no retrospective assessments will be made in the event of a reclassification of a labour relationship until the ambiguities have been resolved (Molenaar, 2020). The COVID-19 crisis and the almost complete paralysis of the artistic sector throw a spanner in the works on the concrete implementation of the legislation. The Rutten Cabinet recently announced that an actual application of this new law will have to wait until at least January 2021.[391]

When an artist works under the authority and in subordination of another person, (s)he legally is a salaried worker like any other. As said before, in this case the AR does not apply. Instead of the VAR, there is now the DBA, a law deregulating assessment of labour relations. With this new law, the absolute indemnification of the commissioning party was lifted. The commissioner will no longer be able to hide behind a VAR declaration to safeguard himself/herself from employer obligations such as social security contributions or other taxes (Molenaar, 2016).

Very often though, an artist will *not* work in a subordinate labour relation, and will also prefer to avoid the AR. There are two possibilities for artists to opt out of the AR. The first is through **an approved model agreement**. There exist approved model contracts specifically for individual artists, for companies, and for DJs.[392] An artist who does not want to fall under the AR can, since the abolishment of the VAR, also **agree with the organiser not to apply the AR**. The agreement is free of form, so when the artist announces in an e-mail or invoice that (s)he declares the artist arrangement not applicable, it is fine.

a1.4.4.1 The artist as a salaried worker

In the Netherlands, an artist can work under an employment contract, as a freelancer, or as a self-employed person. An artist who works in an employer-employee relationship with his or her client, performs his or her work in the context of an employment contract. In that case, the artist works for

391 'Kabinet stelt handhaving Wet DBA opnieuw uit', *CMWeb.nl*, 12 November 2020. (https://cmweb.nl/2020/11/kabinet-stelt-handhaving-wet-dba-opnieuw-uit/).

392 Model agreement for DJ's: (http://download.belastingdienst.nl/belastingdienst/docs/voorbeeldovereenkomst_dj_dv10061z1ed.pdf.)

an **agreed salary**, with a set **number of working hours**. An artist who works under a contract of employment is equated with any other employee. (S)He does the work personally (Beran, 2015: 234). An actor, musician, or dancer who concludes an employment contract with an ensemble, orchestra, or theatre company is therefore, in principle, an employee like any other. In order to be an employee, there must be a contract of employment, and there are three criteria for this: (1) the employee receives a **wage**, (2) is obliged to **perform work** in return and (3) does so **under the authority** of the employer (3).[393]

However, there is some case law and legal doctrine about when an artist works 'under authority'. An employment relationship[394] exists when the commissioning party has a relationship of authority over the artist. This should be interpreted in the sense that an employer **has a say in the content of a programme or performance, can make adjustments, and can possibly also order other activities**. That authority must be **continuous** and leave the artist **no choice as to whether or not to follow instructions**.

This will especially be the case with long-term contracts of actors, musicians, and dancers, when the programmes are conceived by the artistic management, the pieces are designed by a director, conductor, or choreographer, and the performances are planned without the participation of the artist. An artist is **not an employee** if (s)he receives a commission to perform a piece but is **free to determine how this is done** (Molenaar, 2016). An artist who works with a contract of employment does not use the artist arrangement, because (s)he is already a member of the social security scheme for salaried workers, albeit as a regular employee. The AR is superfluous in this case.

a1.4.4.2 The self-employed artist

An artist can also work independently or as a freelancer, in which case (s)he works with a commission contract. There are some differences in Dutch law between a fully-fledged self-employed person and a freelancer (who is also self-employed). Often **a freelancer** is a starting artist who does not (yet) meet the requirements of the tax authorities to call themselves an independent entrepreneur. The activities of freelancers are usually less frequent. In order to become fully self-employed, an artist needs to have **at least three clients** and to be able to **prove that (s)he sells his/her services through promotional material and publicity**. The artist must also perform at **least 50% of his/her working hours for his/her own enterprise** and (s)he must be the one who runs the **entrepreneurial risk**, with the risk of not receiving any money.

In other words, the artist must be able to demonstrate that (s)he can stand completely on his/her own as an independent entrepreneur and have a running business under his/her own name. For these fully-fledged independent entrepreneurs, there are a few extra advantages in the Netherlands. They enjoy certain fiscal deductions like the self-employed tax deduction and certain profit exemptions (Beran, 2015: 237).

Artist-freelancers are also self-employed but do not have their own company and therefore form the target group of the artist arrangement. **Freelancers who work with an AR are considered to be fictive employees**. They receive a net wage and are protected in the same way as normal employees against unemployment, sickness, and occupational disability. However, an artist who is self-employed but not an entrepreneur is not obliged to work with the AR. In the past, there was the VAR and now the DBA Act which offers the artist the possibility to opt out of the AR if (s)he wishes to do so.

The self-employed entrepreneur-artist does not have the advantage of being insured through the social security for salaried workers. The entrepreneur-artist is considered to be fully responsible for his or her own social protection. **Commissioners of artist-freelancers who work with the AR pay contributions for employee insurance, national insurance, and the health insurance law. The contributions that the clients have to pay to the tax office are calculated on the basis of the**

393 Wet Deregulering beoordeling arbeidsrelaties.
394 In the sense of in art. 7:610 Dutch Civil Code.

***gage* that an artist receives for his or her performances.** The gross fee is calculated on both the payments in money and the payments in kind or in the form of claims that the artists have.[395] So when the artist receives a new guitar as remuneration, for example, the employer/principal also owes contributions on this.

The figure of fictitious employment has been created for self-employed persons who are in a socio-economic position similar to that of employees. The condition for such a fictitious employment is, as mentioned above, that the artist in question does not run a business for his or her own account and earns his or her profits from it (Belastingdienst, 2015).

a1.4.5 Who is the commissioner?

An important question arises here: **who is the commissioning party that is liable to pay social security contributions** for the artist that is employed through the artist arrangement? **The person with the duty to withhold taxes is the one with whom the performance is agreed upon or the one from whom the fee is received.** A commissioning party of an artist is someone who has an artist perform for an audience and gives a reward (the fee) for that. The Dutch tax office mentions as examples of possible commissioning parties: organisers of musical and sporting events, theatre directors, casting managers, hall managers, impresario's, artist agencies, and entrepreneurs in the catering industry. Also, a company that has an artist perform at a staff party, is considered by the tax authorities as the commissioning party (Belastingdienst, 2015: 5).

The one who pays the fee to the artist is obliged to make the necessary social contributions. Payroll taxes and employee insurance have to be paid for the artist. The Dutch tax office emphasises **that also when the gig is agreed upon via an intermediary** (booking office, agent, manager, impresario, ...), **the one who pays the *gage* for the artist is the one who has to pay the social contributions** and taxes for the artist. In case the artist is paid by someone else, it is also that other person who has to pay the payroll taxes and employee insurance contributions. If the artist receives an allowance from more than one person, each person has to pay the withholding for his share of the allowance. These rules also apply to payment in kind. In principle, the entire fee is taxed.

There are some exceptions to the above rules, in order not to increase the administrative burden for **small or occasional organisers**:

- **a private person who directly arranges a performance with an artist** for a **personal occasion** (such as a wedding) is not liable to withhold taxes;
- the fee is paid to a person with a **withholding obligation declaration**: such a person takes over the withholding obligation, **if the entire fee is paid in this way**. Such a withholding obligation statement can be requested for example by the leader of an (amateur) company who has arranged the performance, by the company itself (when it is organised by a company or association), by artist agencies, etc. It takes a lot of administration out of the hands of the person who wants to perform, because the person with the withholding statement takes care of all administrative burdens;
- the artist is self-employed and declares not to want to work with the AR. In the past, the VAR declaration was the way to escape this, but this has changed now. The VAR declaration previously applied to all freelancers. Today, the artist can let it be known in any way possible that (s)he does not want to work with the AR, or (s)he can work with an approved model agreement.

a1.4.6 Foreign artists: *quid*?

Usually, foreign artists or bands will not be socially insured in the Netherlands. It is therefore logical that no payments have to be made for the Dutch social security. The artist arrangement can apply to foreign artists, but in that case only the normal payroll taxes are due, without the social security costs. The Netherlands also has tax treaties with several countries (including Belgium) that prevent double taxation on this income (Molenaar, 2020).

395 Dutch: Art. 35 e.v. Wet Loonbelasting 1964.

So, when the foreign artist is taxed on this income in another country, the Dutch contracting party does not have to pay payroll taxes. The artist arrangement is then not applicable. Whether a Dutch contracting party needs to apply payroll taxes to the fees of foreign artists depends on whether the artists are taxed in a country with which the Netherlands has a tax treaty. Apart from that, a foreign artist can of course be registered as a socially insured person in the Netherlands. It are the European rules of reference that determine in which country someone is socially insured. In that case, the usual Dutch taxes and contributions are applicable.

appendix 2 Collective agreements in the live performance sector in France

National collective agreement for artistic and cultural enterprises of 30 November 2013 – Information on terms and conditions of employment		
Item (related provision in the collective agreement)	**Information provided**	**Example**
Personal and material scope (Articles 1 to I.1).	Applicable to: - Artistic, technical and administrative staff, with the exception of State personnel and public law staff of local authorities; - Live performance companies in the public sector.	*This Convention and its Annexes regulate in the national territory the relationship between**
Period of validity of the collective agreement (Article I.2)	This agreement is concluded for an indefinite period.	*This agreement is concluded for an indefinite period.*
Details of the parties to the collective agreement	- Employers' organisations: SYNDEAC, SNSP, CPDO, SYNOLYR, SMA, SCC, PROFEDIM. - Trade unions : CFTC, SNAPAC, SFA-CGT SNAM-CGT, SYNPTAC, SNM-FO, FNSAC, FC-CFTC, F3C-CFDT, SNLA-FO, SNAPS-CFE-CGC, SNSV-FO.	- *Employers' organisations: (see details).* - *Employees' trade union organisations: (see details).* - *Latest: Syndicat National CFTC SCSL, by letter of 14 March 2012.*
Remuneration (Articles X.3.1, X.3.2 et X.3.4)	- Minimum wage (10,25€/hour gross). - Minimum wage by function.	***
Other elements of remuneration (Articles VI.5 et VI.9)	- Overtime. - Sunday work.	- *Hours worked in excess of 35 hours give entitlement to overtime pay or compensatory rest in lieu thereof.* - *Due to the activity of companies, an employee may be required to work on Sundays in accordance with Articles L. 3132-12 and R. 3132-5 of the Labour Code. However, each employee may not work more than XX Sundays per reference period.* - *The parties agree that the annual overtime quota provided for in Article L. 3121-11 of the Labour Code is 130 hours.*

Maximum work periods and minimum rest periods (Article VI.6)	- Maximum working time.
	- Minimum rest times.
	- Overtime.
	- Night work.
	- Break time.
	- Interruption of activities.
		- *The actual daily working time of each employee may not exceed 10 hours. The actual daily working time may be increased to 12 hours in the following cases:*
		  - *for employees who are on tour or on festival activity;*
		  - *for employees participating in the production (creation or reprise) of a show: in this case, this derogation can only be effective for the 15 days preceding the first performance;*
		  - *for employees who take part in setting up and dismantling the show.*
		- *No employee, regardless of how his or her working time is organised, may be called in for less than 3.5 consecutive hours of work during the day.*
		- *Within the framework of a daily maximum limited to 13 hours, the working day of a part-time employee is in principle made up of a maximum of two work sequences, separated by a maximum break of 2 hours.*

Minimum paid annual leave (Article VI.3)	Amount of minimum paid annual leave.	- *Staff with one year of service are entitled to a minimum of 5 weeks' annual leave. The duration of paid leave is expressed in working days, i.e. 25 working days per year (or 30 working days).* - *The calculation of the paid leave allowance is equal to 1/10th of the total remuneration received by the employee during the reference period, without however being less than the remuneration the employee would have received if (s)he had worked during the period of leave.*
Allowances or reimbursement of expenditure to cover travel, board and lodging expenses	***	***

***Article I.1**: This agreement and its annexes regulate the relationship between, on the one hand, artistic, technical and administrative personnel, with the exception of State personnel and public law personnel of local authorities, and, on the other hand, companies in the public live performance sector.

Live performance companies in the public sector are structures under private law (regardless of their status) and public law that meet one or more of the following criteria:

- companies whose management is appointed by public authorities (State and/or local authorities);
- companies where at least one of the decision-making bodies includes a representative of the public authorities;
- companies benefiting from a label awarded by the State (approved drama companies, approved choreographic companies, approved music venues and, in general, all approved or commissioned structures);
- companies subsidised directly by the State and/or local authorities within the framework of multi-annual funding agreements, or project support agreements for dramatic, choreographic, lyrical, performing arts or street arts companies, and musical ensembles.

The following are excluded from this scope of application:

- live performance companies in the private sector within the meaning of the inter-branch agreement on the performing arts of 22 March 2005 concerning the common definition of the fields of application of collective agreements in the private and public sectors;
- national theatres (Comédie-Française, Théâtre de l'Opéra de Paris, Odéon, Chaillot, Théâtre national de Strasbourg, Théâtre national de la Colline and Opéra-Comique) ;
- directly managed establishments, except for their relations with staff employed under private law contracts;
- non-profit organisations governed by private law, whose main activity is to develop activities of social interest in the cultural, educational, leisure and outdoor fields.

Artist-musicians hired by other companies	
Monthly remuneration	
Open-ended contract, monthly gross amount	€ 2,577.59
Fixed-term contract > 1 month, monthly gross amount	€ 2,680.45
Fixed term contract (special contract) > 1 month, monthly gross amount	€ 2,835.44
Fee based remuneration	
Rehearsal, 3 hours	€ 102.87
Performances	€ 102.87

Unspecified artist-musicians in ensembles	
Monthly remuneration	
Open-ended contract, monthly gross amount	€ 2,577.48
Fixed-term contract > 1 month, monthly gross amount	€ 2,680.45
Fixed term contract (special contract) > 1 month, monthly gross amount	€ 2,835.44
Fee based remuneration	
Rehearsals	
Day with 2 services (6 hours and pro rata after that)	€ 145.27
Daily guaranteed pay if isolated rehearsal	€ 102.87
Performances	
General case	€ 145.27
7 performances or more over 15 days	€ 127.84
Performances and rehearsals	
Rehearsal and performance in a single day	€ 222.50

Specified artist-musicians in ensembles	
Monthly remuneration > 1 month	
Tutti player	€ 3,005.85
Solo player	€ 3,117.18
Section leader (Must also take into account the categories defined in the orchestra by company agreement)	€ 3,328,72
Fee based remuneration	€ 102.87
Minimum fee for 3 hours of service (or less)	
After 3 hours: pro rata temporis remuneration	
See also special case of ensembles employing specified musicians under open ended contract, Article X.3.3.A	

National collective agreement for private companies in the live performance sector of 3 February 2012 – Information on terms and conditions of employment		
Item (related provision in the collective agreement)	**Information provided**	**Example**
Personal and material scope (Article 1er)	Applicable to: - artistic, technical, administrative, commercial and reception staff; - legal entities in the private sector with an artistic and cultural purpose whose main activity is live performance; - operators of live performance venues or touring companies; - producers of live performances or touring companies; - presenters of live performances.	*This agreement and its annexes regulate, on the national territory (metropolitan France and overseas departments), the relations, working conditions and wages as well as the questions arising from it between ...****
Period of validity of the collective agreement (Articles 16.1 à 16.11)	1 year from its signature, then tacitly renewed once for an indefinite period, then biennially, then 1 year before the expiration of each biennial period.	*This agreement is concluded for an initial period of one year from the date of signature, during which time it may not be terminated. It will then be tacitly renewed once for an indefinite period and then every two years, unless it is terminated by registered letter with acknowledgement of receipt 6 months before the end of the first annual period, and then 1 year before the end of each two-year period.*
Details of the parties to the collective agreement	- Employers' organisations: CSCAD, PRODISS, SCC, SNDTP, SMA, SNC, SNES. - Trade unions : F3C-CFDT, SNAPAC-CFDT, FCCS-CFE-CGC, SNACOPVA-CFE-CGC, SNAPS-CFE-CGC, CFTC de la communication, Syndicat national CFTC spectacles, communication, sports, loisirs, FNSAC-CGT, SFA-CGT, SNAM-CGT, SYNPTAC-CGT, FASAP-FO, SN2A-FO, SNLA-FO, SNM-FO, SNSV-FO.	- *Done in: Paris on 3 February 2012.* - *Employers' organisations: (see details).* - *Employees' trade union organisations: (see details).* - *Latest: FSICPA, by letter of 4 August 2017.*
Remuneration (Articles 6.3 et 6.4)	- Minimum wage (€ 10,25/hour gross). - Minimum wage by function.	*Monthly salary for 30 performances and/or Monthly salary for 151.67 hours.*
Other elements of remuneration (Articles 8.6, 8.11, 8.20, 10.2)	- Overtime. - Sunday work. - Days' package. - Night work. - Working on public holidays.	- *Overtime: the annual quota of overtime per employee and per year is set at 220 hours for the same employer, unless otherwise provided for in the annexes, with a maximum of 270 hours.* - *Work exceeding the maximum amount of days under a days' package: the remuneration may not be less than 130% of the agreed minimum wage corresponding to the professional category to which the person concerned belongs, nor, in the case of an employee who was not previously on a day's package scheme, 110% of his or her previous gross basic salary.* - *For this category of staff, if they work on a public holiday, they will be paid an additional 15%.*
Maximum work periods and minimum rest periods	- Maximum working time. - Minimum rest time. - Overtime. - Night work. - Break time.	*The legal provisions are those to be taken into account in the absence of elements in the collective agreement.*
Minimum paid annual leave (Article 10.1)	Amount of minimum paid annual leave.	*2.5 working days of holiday per month.*
Allowances or reimbursement of expenditure to cover travel, board and lodging expenses	***	***

Article 1 : This agreement and its annexes regulate, on the national territory (metropolitan France and overseas departments), the relations, working conditions and wages as well as the issues arising from it between

- on the one hand, the artistic, technical, administrative, commercial and reception staff;

- and, on the other hand, natural and legal persons in the private sector with an artistic and cultural purpose whose main activity is live performance, who create, host, produce, tour or broadcast live performances.

A live performance is understood to be the public representation of intellectual work presented by at least one artist in the presence of an audience. This includes, in particular, live performance entrepreneurs in the private sector who hold one or more of the licences referred to in Article 2 of Law No 99-198 of 18 March 1999 amending the Decree of 13 October 1945 relating to live performances, whose main activity is that of :

- operators of live entertainment venues equipped for public performances;
- and/or producers of live performances or tour operators;
- and/ or broadcasters of live performances as defined by the aforementioned law.

N° of performances		1 to 7 performances	8 or more performances	Monthly remuneration
Remuneration per performance in venues with a maximum capacity of 300 seats (or opening acts and openers)	Solo artist	€ 87.28	€ 79.78	€ 1,521.22
	Group of solo artists	€ 87.28	€ 79.78	€ 1,521.22
	Chorister	€ 87.28	€ 79.78	€ 1,521.22
	Dancer	€ 87.28	€ 79.78	€ 1,521.22

N° of performances		1 to 7	8 to 15	16 and more	Monthly remuneration
Remuneration per performance	Solo artist	€ 128.31	€ 113.99	€ 102.23	€ 2,046.47
	Group of solo artists	€ 113.99	€ 102.32	€ 91.19	€ 1,536.43
	Chorister whose part is integrated into the director's partition	€ 112.39	€ 100.73	€ 89.60	€ 1,791.98
	Chorister	€ 90.48	€ 80.32	€ 71.74	€ 1,521.22
	Dancer	€ 90.48	€ 80.32	€ 71.74	€ 1,521.22

N° of performances		1 to 7	8 to 15	16 and more	Monthly remuneration
Remuneration per performance	1st solo singer/1st role	€ 157.74	€ 142.07	€ 127.97	€ 2,559.33
	Solo singer/2nd role	€ 126.4	€ 112.82	€ 100.81	€ 2,017.17
	Chorister	€ 90.48	€ 80.32	€ 71.74	€ 1,521.22
	1st solo dancer/1st role	€ 157.74	€ 142.07	€ 127.97	€ 2,559.33
	Solo dancer/2nd role	€ 147.29	€ 129.53	€ 114.39	€ 2,283.55
	Ensemble choreographer	€ 126.40	€ 112.82	€ 100.81	€ 2,017.17
	Music hall artist, illusionist, visual act (juggling, acrobatics, etc)	€ 157.74	€ 145.72	€ 1319	€ 2,622.00
	Actor, comedian	€ 157.74	€ 145.72	€ 1319	€ 2,622.00
	Understudy	€ 88.27	€ 78.35	€ 69.99	€ 1,521.22
	1st assistant of attractions	€ 85.66	€ 77.30	€ 69.99	€ 1,521.22
	Other assistants	€ 77.08	€ 69.69	€ 68.11	€ 1,521.22

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