

In Exile or Shelter?
Mobility, Social Protection and Cultural Labor in the European Union

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In recent years, European Union institutions have devoted increasing attention to cultural labor and culture producers. Cultural labor has been invoked as a key factor contributing to meeting the goals of the Lisbon Agenda, including enhancing competitiveness and innovation in the Single Market; encouraging the emergence of a ‘creative class’ is now argued to underpin strategies for successful regional development and economic growth; and the rights of culture producers continue to prove contentious in European and global debates about intellectual property, technology and the appropriation of cultural production.

Yet many forms of cultural labor fit awkwardly into the assumptions that frame policy debates about workers and their rights in the EU. Cultural labor – and particularly the labor of performing artists – present challenges to the traditional understandings of work, productivity and solidarity that have shaped discussions in many EU member states about access to social benefits and ultimately to social citizenship. Furthermore, while consideration of ‘atypical work’ has had an increasing presence in EU policy-making since the 1990s, academic literature has devoted little time to exploring whether the particular circumstances faced by many workers in the cultural sector are adequately addressed by current policy.

This paper seeks to highlight the challenges of analyzing cultural labor in the EU by examining circumstances in which the slippage between cultural labor and ‘traditional’ labor appears most acute: under conditions of mobility within the Single Market. To what extent does the Single Market fully enable freedom of movement, with its purported concomitant rights, for workers in the cultural sector? How do the unique working conditions of cultural producers, with a focus on the conditions faced by

performing artists, resonate with EU and academic debates about social protection and labor mobility? While I concur with arguments that states are increasingly limited in their capacity to manage social welfare systems for the benefit of their own citizens, and that European Union institutions play an increasingly salient role in coordinating access to social benefits, evidence suggests that a level playing field for mobile cultural workers seeking to access social benefits and protections is far from a reality. I argue that in practice, the continuing dominance of states in defining ‘workers’ as statutory categories, in serving as gate-keepers to social benefits, and in defining the parameters of taxes and social charges has largely negated many of the efforts by the EU, whether through positive or negative integration, to facilitate free movement for workers in cultural fields. Even in policy areas in which the coordinating function of the EU is well-established, such as social security, administrative and fiscal burdens on mobile performers combine with the unique characteristics of cultural labor to produce a fragmented, incoherent sphere within the Single Market, in which many performers are economically or socially disadvantaged. Thus some performers may find that they must choose between the “shelter” of their own national social welfare systems, or the permanent “exile” of travel and work with a diminished social and economic safety net.

First, I review current debates that situate social policy in the context of struggles between the EU and the member states to shape the content and quality of market integration, and that suggest that EU efforts to protect the freedom of movement of workers within the Common Market have undermined the grip of states on limiting access to social benefits. The logic of much of this literature suggests that despite the ongoing salience of states in social welfare policy-making and implementation, a European

‘social space’ has taken form, shaped by European-level coordination of social security, limited positive integration and negative integration that has upheld the social rights of mobile workers across EU territory. In this context, mobile cultural workers might be expected to benefit similarly to other categories of workers in enjoying guarantees of social protection. Indeed, the actions of EU institutions clearly indicate a special recognition of the importance of promoting mobility in the cultural sector for achieving Community goals and an optimism that Community-based tools can overcome existing barriers to mobility for cultural workers. Next, however, I situate the problem of cultural labor in broader debates about definitions of employment and work, arguing that member states’ pre-eminence in establishing statutory categories in these areas poses specific challenges to performing artists and that any reading of academic literature that supports a view of the growing ‘Europeanization’ of social policy must consider the impact of basic administrative obstacles on the free movement of workers. I then focus on two specific policy areas in which differences among member states have generated significant burdens for performing artists who are mobile within the Single Market: social security and taxation. Combined with obstacles deriving from the definition of employment status, the administration of social security benefits and the application of national tax regimes to performing artists constitute challenges to mobility within the Single Market that may prove to be insurmountable obstacles for some artists.

I conclude by noting that calls for greater harmonization of minimum standards for artists’ social rights are unlikely to gain traction if they require encroachment on sensitive issues of taxation or social security. Rather, the entrenched obstacles to mobility for performing artists in the EU, and the daunting challenges to negotiating national

systems of social benefits for those who are mobile, indicate a considerable “blind spot” in the ability of the European Union fully to extend the four freedoms of the Single Market to all EU citizens.

Mobility within the Single Market and Challenges to National Welfare States

While the minimalist role of the European Community in social policy in the early years after the Treaty of Rome has been described elsewhere (Hine and Kassim, 1998; Falkner, 1998), by the late 1990s, the argument that European welfare states remained largely “national states” (Rhodes and Mény, 1998) was being challenged by the pressures of positive and negative integration. From its narrowly defined origins in provisions for gender equality in pay, the free movement of labor and social security coordination, the social policy competences of the European Union, in which the Union “shall support and complement the activities of the Member States,” expanded by the beginning of the twenty-first century to include the possibility of action in occupational health and safety, working conditions, social security and the social protection of workers, combating economic and social exclusion, and measures to promote the representation and collective defense of workers’ and employers’ interests (Article 153 [ex Art. 137 TEC]).

Concerns about ‘social dumping’ in the wake of the Single Market project of the 1980s created pressure for common policies to mitigate a potential race to the bottom in social protection for workers. Furthermore, broader structural challenges to member state social welfare systems were emerging: the shift to post-industrial service economies created new challenges for European workforces that increasingly did not resemble the

“standard male worker of the *trente glorieuses*, characterized by full-time continuous employment from an early age and with a steadily rising salary” (Bonoli, 2006: 7) and who thus faced disadvantages in accessing the benefits of many of the traditional post-war welfare systems. So-called new social risks deriving from labor market instability and atypical career patterns (including part-time work, and breaks in career paths for childbearing and child raising) increased the precariousness of living standards for many workers, in particular women, the young, and those with few skills, and threatened both the present and future welfare of those who were unable to participate in the labor market on ‘traditional’ terms. In response, by the late 1990s, the EU was assigned policy competences in the areas of working conditions, worker information and consultation, and the integration of those excluded from labor markets, and was empowered to act to combat discrimination against atypical workers (in particular, part-time and fixed-term workers).¹

However, positive integration *per se* has had a limited impact on challenging the sovereignty of national welfare states. An active European agenda in social policy has been constrained by member state governments’ protection of their prerogatives in social policy, as well as by institutional barriers to enacting change. Instead, state autonomy has been encroached upon by the mode in which the Commission implements policy, by requirements for market building and by the role of the European Court, with a growing body of European law limiting the sovereignty of member states to construct and maintain ‘national’ welfare states (Leibfried and Pierson, 2000; Hine and Kassim, 1998).

¹ Culminating in directives in 1997 and 1999, the Commission sought to address new issues in worker protection in the context of market liberalization, with proposals that would require that part-time and fixed-term workers be granted social protection equal to that of permanently employed workers. See Treib and Falkner, 2006.

Even in areas where EU has had no, or limited, competences to draw upon, the dominance of member states in shaping the environment in which social policy is produced has been challenged. Hine (1998) concludes that the engagement of the Commission in building policy networks, bringing together domestic actors from the interest groups and public agencies involved in delivering social policy in areas such as unemployment and occupational health and safety, has served to influence public debate about the role of the EU in social policy, shaping the “intellectual framework in which even national governments think about social policy, gradually pushing out the boundaries of what is seen as a legitimate area of concern and involvement for the Community.”²

The capacity of the EU to coordinate the implementation of some areas of social policy among member states has also raised questions about state autonomy in this field. For example, the Treaty of Rome limited the Community to “coordinating” social security systems (an area brought into the Amsterdam Treaty with unanimity requirements), but this coordination is now well-established as a key protection for workers who travel within the EU, ensuring that member states must recognize working time and contributions made to social security schemes abroad.³ Thus coordination has largely recognized the priority of *national* social security schemes. However, member

² Hine argues that the Commission’s success in building policy networks has been critical for exchanges of information and social dialogue, if not “outright ‘social partnership’” (Hine, 1998: 8-9). In this respect, he echoes the findings of Falkner (1998) and others who argue that in the post-Maastricht period, the Commission’s promotion of dialogue among the social partners has proven important in enabling it to achieve aspects of its own social policy agenda.

³ The principle of ‘aggregation’, in order to determine eligibility for social security and the amount of benefits, requires full consideration of all periods of time that a worker has been employed in all member states. Coordination also ensures the payment of benefits to workers who reside in a member state other than their own. See Mosley (1990) for a discussion of coordination during the post-Treaty of Rome period.

states have in some cases resisted coordination as a challenge to their sovereignty over social security; in the early 1990s, the member states unanimously agreed to provisions that would place some restrictions on portability, implicitly recognizing that coordination “has become the entering wedge for an incremental, rights-based ‘homogenization’ of social policy” (Leibfried and Pierson, 2000: 279).

The role of the European Court as an enforcer of Single Market freedoms has been fundamental to challenging the sovereignty of the national welfare state, with social policy providing the grounds on which arguments about the functioning of the market and the application of freedoms within the market have been fought. The struggle to maintain national social policy sovereignty against market liberalization has been a theme in Community politics since the formation of the EC, with Court rulings situating national social policy in contexts of market freedoms for consumers, providers of services, and mobile workers.⁴ Freedom of movement for workers has played a central role in the Court’s interpretations of social policy as a potential “obstacle” to market freedoms, even during the years of relatively little positive integration in this area (Bernard, 1996). The implications of the activities of the Court are significant: a member state cannot limit most social benefits to its own citizens; social benefits have been de-linked from state territorial governance, with states no longer able to claim that benefits only apply within their territory; and a member state no longer has the sole power to determine social protections for those living within its borders, even for migrants. Thus if

⁴ See Barnard and Deakin (2000) for a comprehensive discussion of the Court’s interpretation of the relationship between social policy and market liberalization. They describe the Court’s interpretation of this relationship as “expansive,” supporting neo-liberal norms at the expense of member state social policies that are construed as incompatible with the principles of free movement and undistorted competition.

“national *de jure* authority in these respects is what sovereignty in social policy is all about, it has already ceased to exist in the EU” (Leibfried and Pierson, 2000: 279).

Despite constraints on positive integration, EU institutions continue to develop policy instruments that are intended to identify and overcome remaining obstacles to workers’ mobility. In the domain of culture, EU institutions have sought to use coordination, program development and institutional agenda-setting power to promote mobility among cultural workers. In June 2008, the eighteen-month program of the future Troika (the French, Czech and Swedish Council Presidencies) explicitly situated the implementation of the European Agenda for Culture and the Work Plan for Culture 2008-2010 in the framework of the open method of coordination (OMC), in order to promote cultural diversity and intercultural dialogue. The Presidencies signaled their desire to address the question of “improving the internal market for cultural goods and services, as well as creating better conditions for professionals within the cultural and creative sectors, and improving the mobility of artists and of art collections” (Council of the European Union, 2008: 49). The French Presidency specifically outline its plans for promoting culture and cultural mobility, for example with the organization of colloquia and forums to bring a variety of cultural projects to the EU-27, with the development of an internet-based European cultural library to enable virtual access to aspects of European cultural heritage (i.e., virtual mobility), and by supporting cultural exchanges and ‘tandem’ projects that would promote interaction among European artists and promote a European cultural identity.

The Commission also drew on its institutional role as the implementer of EU program funds to enhance prospects for mobility in the cultural sector. The EU’s Culture

Program (2007-2013) established a €400 million budget for initiative to celebrate cultural diversity and promote cross-border cooperation between cultural actors and institutions, in recognition that mobility had special implications for workers in the cultural sector:

Artists and cultural professionals need to travel beyond borders to extend their scope of activities and meet new audiences, to find new and inspiring sources of inspiration [sic.] to make their creations evolve, and to exchange experiences and learn from each other with a view to developing their careers (European Commission, 2009).

“Removing obstacles to the mobility of artists and cultural professionals” became one of five priority areas for action in 2008-2010, with an expert group on improving conditions for the mobility of artists established under the framework of OMC. The Culture Program also funded a study to examine issues in artist mobility in Europe and to recommend possible responses to problems in this area. Additional funding has supported networking among structures that promote mobility in the cultural sector, including efforts to promote virtual mobility.

Mobility for Performing Artists and the Reassertion of the State: The Problem of “Work”

Thus the assertion of Community authority in areas of social policy has extended certain social rights to workers who take advantage of free movement within the EU, with workers in the cultural sector recognized as possessing an intrinsic need to be mobile. Yet despite the on-going construction of a European ‘social area’ and EU efforts to promote mobility in the cultural sector, cultural workers continue to face obstacles to mobility particular to their professions, and a de facto exclusion from numerous

categories of social benefits. Even where artists manage to claim the full social rights to which they are legally entitled, the excessive costs and burdens of doing so may ultimately serve to discourage the mobility that is essential for their creative and professional lives. The experiences of performing artists attempting to benefit from mobility and its concomitant social rights in the EU reveal an often hidden structure of member state predominance in social policy, in which administrative and fiscal practices continue to fragment the Single Market along national boundaries.

The challenges faced by cultural workers begin with the very categories of ‘workers’ and ‘work’ that enable movement, residence and social rights throughout the EU. Defining the employment status of a worker has consequences for numerous aspects of social policy: employment status may affect how much a worker is taxed and how social security is paid (e.g., by employer or worker), whether and to what extent a worker is entitled to benefits, including social security and unemployment benefits, and what form or degree of labor legislation protects the worker (Staines, 2004).

The distinction between employee and self-employed status is a crucial one for any worker’s location in the arena of social rights, but it is especially problematic for mobile cultural workers. Typically, EU member states distinguish (at a minimum) between workers who are employees and workers who are self-employed, with each state establishing its own criteria for these categories.⁵ In most EU states, a self-employed person is “someone who has no employment contract, but who carries out an economic

⁵ Other categories include free-lance workers, who may be defined in contrast to the self-employed. Some member states make additional distinctions between individual self-employed (“own account”) workers, who may legally be equivalent to “sole traders,” and self-employed workers with employees. States may also create specialist categories of work, such the *intermittents du spectacle* in the domain of cultural labor in France. These distinctions have implications for VAT and social insurance responsibilities. Staines (2004) offers additional detail on the variations in criteria for self-employment in that are found in different member states.

activity on a regular basis which guarantees an income,” while an employee undertakes salaried work (Staines, 2004: 10). The procedures for establishing oneself as self-employed vary in complexity, and in some cases require registration with relevant public authorities for tax and social security purposes, forming a company, registering for VAT, or other formalities. Indeed, some member states effectively exclude workers in the cultural sector from establishing themselves as self-employed; self-employment can carry tax advantages, such as deductions of professional expenses, that countries wish to control.⁶

For performing artists who travel in the EU, defining employment status can be a challenge and may ultimately be an obstacle to non-discriminatory treatment regarding taxes and social security. The EU neither harmonizes nor coordinates employment status; thus an artist’s employment status may change depending on the country in which she is working. For performers who travel extensively across member states (e.g. popular musicians on tour who negotiate fees for each venue in which they perform), employment status may change frequently during a short period of time; other performers may be established in companies in which their status as employees is more stable. Self-employment status requires that performers take on the responsibility for vigilance over payment of necessary taxes and social charges. However, artists who claim self-employed status are usually required to prove that they pay tax in their own countries, in order to avoid income tax abroad (a point that I develop below); the irregularity of work and earnings for some performers may make this an onerous task.

⁶ Performing artists in France were almost always categorized as employees until recent legislative changes; the Netherlands requires self-employed workers to meet criteria that include a minimum number of working hours and a prescribed number of clients, which may be difficult criteria for artists with intermittent work to meet.

More critically, the employment status of performing artists may prove to be *ambiguous* (fitting no clear category, or fitting more than one category simultaneously), or irregular. Poláček (2007) offers the example of a self-employed live performer who may decide to become an ‘employee’ for a brief period in another country, or who might be subject to several employment contracts in multiple EU countries at the same time while remaining self-employed at home. Rapidly shifting employment patterns are common for many cultural workers, for whom the amount, duration, intensity and remunerative possibilities of work may be unpredictable.

The problem of remuneration is not merely a legal one with regard to defining employment status; it is also a moral one: what constitutes ‘work’? While this subject cannot be given adequate treatment here, it is noteworthy that much of the labor of performing artists falls outside any employment relationship. Dancers, musicians, actors and other performers train, practice and rehearse for many hours before any actual paid performance takes place. Yet training and practice may not count toward establishing employment status or toward the right to claim unemployment protection or social security benefits. Mobility only exacerbates the inability of the performer to establish a clear status with predictable understandings of social rights.⁷

The same structural shifts in European economies that generated the new social risks outlined above have compounded the definitional problems related to artistic employment. The EU and professional arts associations have noted the blurring of

⁷ Dancers face unusual difficulties in this regard, as do other performers who engage in physically rigorous or dangerous training. While most EU citizens will be covered for emergency care while abroad, work-related health issues such as the need for on-going physical therapy or care for chronic pain may not be fully covered by insurance, depending on the member state. The International Federation of Musicians notes that performing artists who tour and perform abroad, particularly those who are self-employed, face occupational health risks for which they are often inadequately insured (International Federation of Musicians, undated pamphlet).

distinctions between employee and self-employed status, as workers in the cultural sector increasingly fall into employment patterns that can be characterized as ‘atypical’ (although, perhaps not surprisingly, the definition of atypical labor also varies across member states). Cultural workers in the EU are more likely to have temporary jobs and second jobs than workers in the general population (Staines, 2004: 21). In general the nature of cultural work is increasingly precarious, even for workers who are not mobile. The Commission identified the decline in public subsidies in EU countries as contributing to budgetary pressures on many performing arts organizations, which has led to a reduction in permanent jobs in the arts. The International Federation of Musicians pointed to the changing relationship between the state and the cultural arena as a contributor to the destabilization of employment patterns in the cultural sector: privatization and growing preferences for “project-based” contracts by employers, instead of permanent or public sector employment, force working performers to rely on lower-income, less predictable employment opportunities (International Federation of Musicians, undated pamphlet). Others have argued that in some EU countries, the increase in cultural workers with self-employed or free-lance status has been driven by employers’ desires to avoid paying high social contributions, effectively forcing many who work in the arts to accept self-employment status.⁸

The inherently problematic location of many cultural workers in employment relations is thus further complicated at the domestic level by broader shifts in employment patterns in much of the EU. The added dimension of mobility across the EU amplifies these ambiguities. While coordination and social dialogue at the EU level have

⁸ See Staines, 2004, and the International Federation of Musicians, undated pamphlet. The question of employers’ seeking to avoid paying social contributions is, however, largely anecdotal in these documents.

begun to grapple with the challenges of atypical work and workers, the control exerted by member states in defining employment status remains significant and has particular economic and social ramifications for performing artists.

States as Gate-keepers to Social Benefits for Mobile Cultural Labor

By retaining discretion over definitions of employment status, EU member states also exercise control over how, and whether, mobile workers gain access to social benefits. The relationship between employment status, taxation and social insurance has served to reproduce the ‘national’ parameters of social welfare regimes that, while legally mandated to extend equal treatment to non-nationals, in practice generate barriers to mobility and discriminatory outcomes.

Coordination at the EU level has served to create the legal infrastructure for aggregation of pension benefits and some unemployment benefits, as noted above. Sickness benefits are also subject to a degree of coordination, for those entitled to benefits and treatment in their own countries. The system of ‘E Forms’, standardized forms employed throughout the EU, EEA and Switzerland, are intended to document working time and contributions paid into social security schemes, by certifying that income earned abroad will be subject to social security contributions in the worker’s home country, the aggregation of periods of insurance, employment or residence, or periods of work to be considered for granting unemployment benefits. The E101 form is fundamental to the working lives of self-employed cultural laborers, who must frequently prove to employers while traveling that the worker is responsible for paying his or her

own taxes at home and can therefore be paid a gross fee (i.e., without social security contributions).

However, difficulties in accessing benefits in *practical* terms is a major difficulty for cultural workers who travel in the EU. Employers cannot treat fixed-term (contract) workers less favorably than employees; however, self-employed workers can be, and are, treated differently. With the exception of Denmark (according to 2004 data), where employees and the self-employed are covered by the general social protection scheme, other EU countries provide reduced social benefits for self-employed workers compared to employees. A survey of the membership of the IETM (Informal European Theater Meeting), of whom the majority of members is self-employed, identified “no social security safety net (unemployment, sickness, pension)” as the main disadvantage of a performing arts career in the EU. While the survey does not indicate whether this disadvantage is linked in the minds of respondents to mobility across EU member states, other evidence suggests that the “precariousness” of self-employment in the cultural sector is, again, magnified when mobility is taken into consideration (Staines, 2004). Other arts organizations specifically point to the difficulties created by mobility with regard to social security, noting that social security, pensions and tax schemes are often inadequate because they are not designed to meet the specific requirements related to artists’ working conditions.⁹

⁹ See the International Federation of Musicians, undated pamphlet. Even the career trajectories of some performing artists are difficult to reconcile with traditional understandings of social security and pensions. Dancers, for example, for physical reasons have only a short career span in which to pursue their primary occupation, regardless of whether they remain employed in other areas after that point; yet successful dancers are unlikely to earn income at the same levels in their post-‘active’ career employment and may then be intermittently employed or self-employed, making pension and benefits calculations difficult.

The problem of ‘inadequate’ support or coverage may stem in part from the fact that different member states simply provide different levels of protection, with cultural workers who find themselves adequately covered at home lacking access to similar levels of protection abroad. But in the areas of unemployment benefits, sickness benefits, health insurance and pensions, significant differences in the treatment of self-employed workers and the presence of special regimes in some countries for artists constitute a bewildering constellation (and degree) of social protections, presenting enormous logistical difficulties for artists who travel among the EU member states. Some states (Austria, Hungary, Germany, Ireland, the Netherlands, Portugal and the UK) offer no unemployment benefits to self-employed or independent workers, unless such workers qualify under special schemes for artists (e.g. the Netherlands; France, Denmark and Belgium also have schemes to provide unemployment benefits to artists).¹⁰ General sickness benefit schemes (income support) do not support self-employed workers in Austria, Hungary, Ireland and the Netherlands; other states permit access to reduced benefits, delay the start of benefits or require means-testing. Full health insurance benefits may be available to some cultural workers on the basis of partial payment of contributions (Austria, Germany and Slovenia). The area of pension schemes has seen the greatest activity in producing special arrangements for some artists and cultural workers: Austria, for example, established a social security insurance fund for self-employed artists with grants to top up pension contributions; Belgium reduces the social security

¹⁰ The data in this section are from 2004 and some changes may have occurred since. Member states with special unemployment schemes for artists may require that artists work as employees (Belgium), that they must have worked for a specific minimum duration of time in previous months or years, or that benefits are means-tested. The ability of self-employed cultural workers to maintain accurate records of working time (and to file the appropriate E-forms) will be crucial to securing benefits.

charges that employers pay for artists as employees, allowing access to the full range of social benefits on the condition of sufficient contributions; France maintains social security schemes for some creative artists, to enable them to access social security benefits on the same terms as employees after a year of insured professional activity (Staines, 2004).

Yet the fact that some member states have produced special schemes or categories of benefits for creative workers (and frequently, only for certain types of creative workers), magnifies the difficulties that traveling artists face in determining which benefits they are entitled to and how to access them. Qualifying periods to access benefits are sensitive to disruption for cultural workers, particularly for those who work for short periods of time in multiple EU states. Poláček notes that this is a significant issue in the live performance sector, where performers who cannot demonstrate that they have spent sufficient time to meet the criteria to access benefits feel “punished” for mobility. Organizations that employ live performance workers also report that these workers have difficulties getting periods of time that they have worked in other EU countries recognized at home, or that the home state refuses to recognize this time, with a few interview subjects reporting to Poláček that local authorities did not understand how to deal with E-forms (Poláček, 2007: 32).

The issue of employment status can also result in double payment of social security contributions. Self-employed cultural workers may not be recognized as such when they travel (as has been the case in France until recently), meaning that the ‘host’ country does not recognize that workers are responsible for contributing to social security schemes on their own at home. The host country therefore deducts social security

contributions from fees, although the worker may never receive any benefit. A case referred to the European Court in 2000 involved twelve British opera singers and a conductor employed by the Brussels opera house Théâtre Royal de la Monnaie: the singers and conductor were self-employed in the UK, where they paid social insurance; however, Belgium treated them as employees and deducted 13% of their fees as social security contributions.¹¹ While the Court ruled in favor of the performers, the case suggests that despite possessing the relevant documentation (E-forms), self-employed performers must frequently exert additional effort and scrutiny to ensure that they are not contributing to social security systems from which they will never benefit. Furthermore, while benefits are in theory ‘exportable’, some mobile workers pay into benefit schemes that cannot be transferred to other countries or that short-term workers may never be able to use, such as social security payments in France that contribute to paid holidays and professional training.

While it may be the case that access to social benefits is largely a bureaucratic exercise that happens to place an excessive burden on self-employed cultural workers, there are obvious bureaucratic obstacles to securing access, as well as informational barriers and issues of ‘culture’ within the community of cultural workers. In some cases, acquiring the correct forms in order to prove employment status (and self-contribution to social security schemes) is not possible on short notice (e.g., for replacement performers joining a production or tour in progress, or for rock and popular musicians who may organize foreign performances on an ad-hoc or very short term basis), or member states will not issue the E101 form to a worker who is employed only for a short period of time

¹¹ For a similar case that resulted in the rejection of France’s ‘presumption of employment [*salariat*’ legislation, see ECJ decision 15 June 2006, case C-255/04, *Commission v. France*.

(Poláček, 2007). Some countries require a separate form for each performer for each separate visit to the country, a requirement that poses considerable burdens for groups such as orchestras that may need to collect forms from performers from a variety of member states, in order to travel to multiple member states.

Many arts organizations also report that cultural workers simply do not have sufficient information to know what forms must be filed, and when, in order best to ensure their fair treatment with respect to social security schemes. In this case, burdens are likely to fall more heavily on the less-economically established artists who will have fewer resources to secure access to accountants and tax lawyers, and to younger performers with little experience in navigating bureaucratic hurdles (or who may not know that they need to). Poláček also noted a cultural factor pertinent to the arts sector, namely that for many artists and performers, “pension rights [are] simply not an issue. . . as they cannot and often are not willing to imagine that one day they will no longer be working” (Poláček, 2007: 33). Thus some performers may have little motivation to resolve complications related to pensions or other benefits, because they may assume that they will never cease, in some respect, to be economically active.

The ‘map’ of social security regimes confronted by performing artists is thus a complicated one, with unexpected barriers that clearly reflect the imposition of national preferences and concerns about ensuring contributions from mobile workers. Yet the experience of cultural workers encountering this mosaic of regimes while engaging in their work is universally expressed in negative terms: the vocabulary of interview subjects, arts organizations and analysts of cultural labor in the EU is dominated by terms such as “burdensome,” “time-consuming,” “incoherent,” “expensive,” “complex,” and

“aggravating,” with calls for progress in ensuring the uniform application of common rules and forms, equal treatment for mobile cultural workers, transparency and improved access to information regarding necessary procedures.¹² Coordination at the EU level and guarantees of equality of treatment for nationals and non-nationals have done little to minimize the practical difficulties encountered by cultural workers who seek to take advantage of their Single Market freedoms.

Taxes, Double Taxes and Invisible Taxes as Disincentives to Mobility

While the right to fair treatment in accessing social security benefits is firmly grounded in EU law and practice in principle, regardless of the difficulties encountered by cultural workers, and is minimally governed by EU-level coordination and challenges to discrimination, tax policy largely escapes discipline by European institutions. It is thus perhaps no surprise that taxes emerge across all studies of the cultural sector as the most problematic obstacle to mobility within the Single Market for cultural workers.

Performing arts organizations describe tax issues – in particular concerns about double taxation and VAT – as “the most serious difficulties they encounter in their everyday activity when mobile inside the EU,” and report that the administrative work required to avoid excessive or double taxation “clearly discourage[s] them from being mobile or from hosting mobile organizations” (Poláček, 2007: 37). Yet there seems little possibility that these challenges can be resolved without fundamentally altering the balance of

¹² Poláček, 2007; European Institute for Comparative Cultural Research (2008). The latter contains a map of social security regimes for self-employed artists in Europe, describing how the main social risks of self-employed or freelance artists are covered; the permutations of choices are so complicated that the authors resort to a series of visual ‘overlays’ to describe the nine (major) possible forms of coverage in the EU. The authors do not attempt to map the additional complications for artists who are considered employees in one member state and self-employed in others.

institutional power in the EU away from member state control of this area; states will otherwise shape the highly fragmented system of tax responsibilities that all workers encounter while traveling in the EU.

Double taxation ranks high in the concerns of cultural workers for the simple reason that performing artists are singled out in many member states for special tax regimes that increase the likelihood of double or excessive taxation. All EU countries have signed bilateral tax treaties to avoid or eliminate double taxation, based on the OECD Model Tax Treaty. However, under the Model Tax Treaty, withholding taxes can be deducted from the fees of non-resident performing artists (self-employed and employee) and performance companies in the country where the performance occurs.¹³ Performers or their employing arts organizations must then approach national tax authorities upon their return home in order to seek a credit or exemption for withholding paid abroad.¹⁴ Withholding tax rates can be high, and vary considerably across the EU, from 10% to 30% of taxable income; some countries exempt non-profit or state-subsidized performers from this withholding tax.¹⁵

¹³ This has contributed to – again – differences among member states about what constitutes a ‘performance’: e.g., master classes and workshops conducted by well-known musicians or artists may be exempted from the ‘performance’ category by some member states but not others; poetry readings could be interpreted as performance, depending on the context (Staines, 2007). The peculiarity of categorizing those who may be subject to withholding as ‘performers’ is that it excludes cultural workers who do not appear on stage, live or via recorded media. Thus the members of a touring rock band would be subject to withholding, but the sound and lighting crew, manager and other support staff would not.

¹⁴ This rule was originally conceived as a special “superstar” rule, in order to prevent highly mobile, very successful performers with legal residences in tax havens from taking gross self-employed income without paying any tax at all.

¹⁵ Poláček (2007) points out that there are no standard rules across the EU on exemptions from withholding, and that performers who attempt to seek an exemption based on non-profit status often have difficulty securing the required documentation to prove it. The ability to secure exemptions from withholding may determine whether a non-profit organization is able to tour certain EU countries or not.

When withholding taxes are dealt with by promoters or performance venue operators, performers themselves may be put at additional risk of excessive taxation or “invisible” taxation. Inexperienced or younger performers may not realize that taxes have been withheld and will thus not attempt to secure a tax credit when returning home (or may fail to secure a tax certificate or other documentation to demonstrate that they have paid withholding taxes). Even when performance fees are negotiated ‘net’ of withholding, some arts organizations report that domestically, they cannot be bothered to deal with the additional administrative procedures to declare that taxes have already been withheld and reporting the income as ordinary taxable income; these organizations recognize that the result is likely excessive taxation (Poláček, 2007: 38).

Despite the apparent discriminatory outcomes produced by special withholding tax regimes, the European Court has issued several rulings upholding aspects of these regimes. In the case of the German concert promoter Scorpio, the Court ruled that a withholding tax from non-resident artists is not in general a breach of the EC Treaty and the freedoms established by the Treaty. However, the Court has also found in favor of mobile performing artists who claimed that they had paid excessive taxation, establishing that the taxation of non-resident performing artists and organizations in the EU had to be framed by EC rules on non-discrimination. Dutch musician Arnoud Gerritse had worked in Germany where his earnings were taxed at a withholding rate of 25%, but he was unable to deduct expenses, even though German artists were allowed to deduct expenses before tax. The Court ruled that Germany’s treatment of Gerritse breached the freedoms

established by the TEC, a decision that created the basis to challenge discriminatory tax rates against foreign artists in other member states.¹⁶

Some member states have opted to eliminate withholding taxes on non-resident performing artists (e.g. the Netherlands in 2007), to reframe laws so that non-residents who only perform occasionally are not taxed, given their minimal usage of public services in the country where the performances take place (Denmark), or to eliminate income tax for non-resident artists, but to impose VAT on the gross performance fee minus expenses (Ireland levies a VAT of 21% for this purpose) (Staines, 2007). While this flexibility contributes to lessening the actual fiscal burden on artists who travel within the EU, it nonetheless increased the complexity of the tax regimes that they encounter, particularly for artists who travel to multiple member states.

Conclusions

The recognized impact of mobility on artists' social rights has not gone without response. Arts organizations, policy analysts and EU-sponsored reports offer a variety of possibilities for closing the gap that artists experience in seeking to balance the creative requirements of their professional lives and the economic and social realities that cultural labor implies. Some call for expansive policy choices on the part of member states, seeking minimum employment rights for all artists, ensured access to the full range of social benefits with flexible tax and pension schemes to meet the unique needs of artists' working lives, and full, compulsory health coverage without additional cost. The EU is

¹⁶ See Staines (2007) for further discussion. The cases in question are *Arnoud Gerritse v.[.]*, 12 June 2003, C-234/-01; and *FKP Scorpio Konzertproduktionen GmbH v. Finanzamt Hamburg-Eimsbüttel*, 3 October 2006, C-290/04.

similarly called upon to undertake an activist approach to positive integration, to build a core of minimum contractual conditions for performing artists operating across borders. Others look to the EU to ‘deepen’ coordination, for example by replacing the current E-forms with a European health insurance card, creating life-long EU social security ID numbers for mobile or workers, or by creating EU “one stop shops” for social security contributions of mobile performers, in which social security charges abroad would not go to a national scheme but to a European office that would immediately transfer them to the worker’s regular country of residence (Poláček, 2007; International Federation of Musicians, undated pamphlet). On the more modest side are calls for improved access to and coordination of tax and social security information (Staines, 2004; Staines, 2007).

Yet the experiences of positive integration suggest that states are unlikely to engage in any real or perceived transfer of authority – or finances – to the European level in areas where domestic social protection might be threatened. Furthermore, during a time of economic and financial crisis, with ever-louder calls for protecting “our” workers emerging in many member states, perceived transfers of social benefits to “others” seems, at least for the moment, politically unfeasible. The European Union has dedicated the year 2009 to being the Year of Creativity and Innovation in Europe. Yet artists trying to take advantage of mobility within the EU seem likely to remain caught between the opposing poles of exile or shelter with regard to social rights and social protection for the foreseeable future.

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