

Public consultation
Legal migration by non-EU citizens

Response of Pearle*-Live Performance Europe

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1. Introduction

In addition to the questions raised in the online public consultation, Pearle*-Live Performance Europe, presents herewith further views on the Commission's **Legal Migration Fitness Check – REFIT initiative**.

Over the past years, Pearle* responded to various consultations on EU Home affairs, including legal migration and visa policy. Pearle* also contributed to the new initiative of the Commission presented in April 2014 proposing a Touring Visa¹, which would provide an answer to the specific problem for qualified non-EU nationals, such a live performance artists and touring companies, wishing to travel and tour for a longer period than ninety days in a 180 day-period in the Schengen area.

Pearle* members welcome to be able to give input to the Commission's initiative to identify gaps and inconsistencies and consider possible ways to improve the current EU framework on Legal Migration.

This paper complements the replies of Pearle to the online survey. Pearle wishes to underline that the *answers to the online questions* focus primarily on giving response from the perspective of a *European sectoral employers association*.

2. Scope of legal migration acquis

The roadmap describes the background and context of the intervention to undertake a Fitness check, thereby referring to the Amsterdam treaty and the first proposal for a Directive on conditions of entry and residence of third-country nationals for the purpose of paid employment and self-employed activities in 2001, which was rejected by the Council

¹ Proposal for a regulation establishing a touring visa and amending the Convention implementing the Schengen Agreement and Regulations (EC) No 462/2006 and (EC) No 767/2008

and then withdrawn by the European Commission in 2006. It is interesting to remind that 2006 was designated as the European year for workers' mobility. A successful conclusion of the above mentioned Directive would have facilitated employers and third-country nationals alike. Since then the sectoral and targeted approach of the Commission to present different directives and the current developments following from the security measures, have led to a situation that **makes it more and more difficult for employers to engage or work with third-country nationals when not falling in the scope of one of the targeted or sectoral directives.**

Representing the music and performing sector, the sectorial directives unfortunately do not suit the specific needs or match the way in which artists, accompanying or supporting persons and cultural professionals work. Concretely the means: work that is often (and increasingly) project-based or for short durations in artistic productions, employment or projects in many parts of the world (thus meaning high mobility), career patterns which sometimes means a combination of different jobs at the same time.

Whilst some of the Directives have components which may also be applicable to the live performance sector, they each demonstrate shortcomings in relation to the scope.

⇒ This means that if a future initiative of the Commission does not include a proposal to broaden the scope or recast existing directives towards a more horizontal approach, then it is desirable for the Commission to consider the way in which gaps can be addressed, such as for artists and supporting people. This includes artistic touring, short-term mobility, the relations with national legislation for stays shorter than three months and the gaps in visa policy.

As the Commission describes in the Communication on a European agenda on migration of 13 May 2015: **"legal migration to attract the workers which sectors need requires a clear and common system"**. This is in particular necessary when it comes to regular migration and visa policy.

1. Preliminary observations: specifics about the arts sector

Labour or economic migration policy of third-country nationals is commonly based upon labour shortage in specific sectors or with regard to specific occupations or professions. As such it is an instrument that allows to accommodate the needs in specific countries or economic sectors. In the arts sectors, such as music and performing arts, there are also other components which have to be taken into account when discussing migration policies.

1. *About nationality & talent.*

In the arts sector, organisations and employers will attract people regardless of nationality or availability on the local job market: the motivation to employ or contract an artist is based upon the specific talent or artistic gift and skills a person has. It means that there is no other person with the same profile available on the market which is needed for the particular artistic production. This requires understanding and openness

by the national authority on the unique selling point (USP) of the artist concerned and the artistic reasons behind the recruitment.

Across the EU, there is national legislation dealing with talented people (usually artists and sportspeople), however there is no common approach at EU level, neither is it the case in all EU Member states (where it does not exist the sector would like to have specific rules or exemption of labour permit requirement for short term contract). In member states where exemption or special rules exist an important incentive for public authorities concerns the administrative workload for their administrations compared to the short employment and stay of the respective third country national artist. Because of subsidiarity the EU has not paid much attention to this short term employment, whilst it is particularly in such cases that employers in given sectors can react in a versatile way to demands and remain competitive in the world. In addition, referring to the freedom of movement of persons, in cases of exemption to the requirement of having a labour permit in one country, this should also apply in the other country. For instance ECJ judgment Vander Elst, case C-43/93 makes clear that the host Member State may not impose administrative formalities or additional conditions on posted workers who are third-country nationals when they are lawfully employed by a service provider established in another Member State, although there are still problems reported by touring companies that the receiving country does not apply this. In the case of absence of requirement of labour permit in one country, it makes it even more difficult for the touring company with the third country national to obtain the similar exemption. Here it seems that there is still ground for improvement.

2. About the need to be able to tour.

A specific characteristic of the music and performing arts sector encompasses the great need for being able to tour in different member states and in & out Schengen. It is rare and exceptional for an artistic organization not to present a production outside its residence country. On the contrary, for some it is even their livelihood and reason of existence.

This means that when an artistic group has a third-country national person who is part of the group, it is absolutely necessary that this person can easily travel with the group throughout the EU and in-and out the Schengen zone or other countries of the EU (non-Schengen).

Touring by European based organisations is in most cases of a very short duration, that can be from only one day to a few days, up to a tour of two or three weeks, after which the group goes back to the resident country (of the organization/employer). In the case of circus for example the touring schemes are usually longer, as a circus company may install a temporary structure for a number of weeks or even a few months in a particular location and country. Various touring acts of re-known companies or with re-known shows also come from outside the EU.

3. *About the career pattern of artist: temporary, freelancing, short duration.*

Whilst public arts institutions may still be able to offer a lifetime career under a permanent or open-ended contract, most of the artists pursue a career of succeeding employers or including periods of self-employment. Freelancing is the general term to which such career patterns are referred to. In addition, artists build up a career with periods of stay in different countries and parts of the world. Freelancing is also quite common for technical staff, in which case some have high specialization and travel the world to offer their services in productions where they need people with specific skills.

Some artists, technical people and other specialists in live performance and live entertainment activities are more abroad than that they are in their resident country as they work for different employers, in different projects, for different productions. It is a common feature of the global creative worker of today, for whom there is no legislation that accommodates the working patterns of such type of workers. At the same time employers report particular problems when having to deal with such highly mobile persons.

4. *A specific situation: the matter of urgency*

It happens that in the case of urgency, such as a cancellation by an artist or due to illness of an artist on the day or day before a performance an immediate and quick replacement has to be foreseen. As 'the show must go on', the organizer or employer will seek for someone who can immediately step in. In such case it may concern a third-country national who is familiar with the repertoire and who is immediately available. In some member states there are exemption foreseen to apply for a labour permit if it does not exceed a limited number of days. It has to be added that in some cases therefore fast track visa procedures may be required.

2. Shortcomings or gaps in EU legislation in relation to the needs of the artistic sector

In Annex II of the roadmap the tables give an insight of the coherence of the EU acquis of migration and other EU policy and legislation.

Pearle welcomes that the Commission has included in the online survey and in the table B the **category of artists**. Whilst it is included and mentioned there, the description on the personal scope in **the roadmap unfortunately does not mention artists as a category for further investigation**. This is surprising as the Commission had proposed in 2014 as part of the visa package a proposal for a touring visa, which mentions specifically artists.

Based upon the described characteristics of the artistic sector overlaps or similarities may be observed with other sectors or categories, such as :

- Transport sector (short term mobility)
- International service providers not linked to commercial presence, such independent professionals or contractual service suppliers
- Self-employed workers

However, as it is the case for other existing EU directives, such as the Blue card directive, the scope and admission conditions may not suit the needs of the artistic sector².

The problem of short-stay and touring in the Schengen zone (the visa rule of 90-day stay in a 180 day period). Except for the seasonal workers directive, the other EU acquis only covers stays exceeding 90 days. Yet, the Schengen acquis is important in the context of making touring possible, in particular for those third-country nationals that can enter the EU under visa-free condition. In this regard also, the Commission's revision of the EU blue card proposal is falling short in addressing the gap between a three-month (or 90 days) stay and a contract offer of minimum six months.

The recognition of the employer or host organization. Another issue concerns the way in which the EU acquis takes into consideration the role of the employer or host organization (see for example the seasonal workers directive or the proposal for the revision of the blue card or the researchers directive). This is dealt with in different ways in the current EU acquis and would merit to have a common approach as it would provide transparency for employers, host organisations and national administrations alike.

Posting and intra-EU mobility of third-country nationals. Finally, it is important that the third-country national can work under the same conditions as the national or EU-national worker in particular as regards posted work and intra-EU mobility. Whilst there could be several similarities found with the seasonal workers directive, the main shortcoming when addressing the need for the artistic sector, is that seasonal workers cannot work in another EU member state.

3. Link with national legislation

In the artistic sector, employers and host organisations, have more or less found their way when dealing with the applicable national system, rules and administrative processes in their respective country.

Moreover some EU member states have specific legislation or rules in place for top-talents or artists and sportspersons, including also exemption of labour permit in case of a very short duration of stay by the third-country national, notwithstanding the visa conditions (when required).

The inconsistency of different national rules, becomes clear and problematic **when touring with a third-country national inside the EU** where it happens that the authorities in the other member state request that a work permit is obtained (even in the case of only one performance). This problem is to be linked to the EU visa policy, where the shortcoming or absence of an EU approach to touring third-country artists becomes clear.

² However, it is noted that in the current legislative process for revision of the EU blue card, the EP report submitted for vote in plenary is proposing to take artistic or sporting talent into consideration.

- ⇒ It should not be a hindrance or an obstacle for a group to accept an offer and invitation to perform in another country at a festival, theatre or concert venue, when this group has one or more third-country nationals who form part of the team. This goes against the fundamental principles of the internal market : the freedom to provide services and freedom of movement of workers. It also acts against the EU's objective to promote cultural diversity.
- ⇒ In this regard, Pearle is convinced that there are grounds and reasons for the EU to take an initiative for a coordinated EU approach.

4. Link with EU visa policy

In April 2014, the Commission proposed as part of a Visa package a new instrument called **Touring visa**. Interestingly the type of persons mentioned, alongside artists, include researchers and students, as well as sportspersons and tourists. Those share the common characteristic to be highly mobile.

The Commission addressed in the touring visa proposal the **legal gap that exists for legitimate non-EU nationals entering the Schengen area to circulate for up to 1 year** in this zone (without staying in one Member State for more than 90 days in any 180-day period), with the possibility of an extension for up to two years (provided that the applicant does not stay for more than 90 days in any 180-day period in the same Member State).

The Commission also proposed for a phasing out of national bilateral visa waiver agreements with third countries, which was a main area of concern in the Council.

The European Parliament adopted its report in 2016, including stricter conditions, in particular as regards conditions of proof of employment or contract of the third-country national artist. In this way, the EP moved the touring visa proposal into the direction of an economic or work migration instrument with a focus on artists and accompanying persons, elite sportspersons and business-related travellers.

As other priorities prevailed, due to the security issues and illegal migration, Pearle regrets that there is no further progress made as regards negotiations between the institutions on the recast visa code and the proposal for touring visa.

5. Other comments : Brexit

In the context of the current of negotiations on the Brexit, Pearle wishes to underline the importance and need for cultural organisations of the UK to be able to continue undertaking cross-cultural cooperation with EU based organisations and festivals, by means of touring UK groups to the EU member states and employing or working with UK artists. The members of Pearle in the UK, including Society of London Theatre and UK theatre and the Association of British Orchestras are addressing their concerns with the UK government.

6. Conclusion

Pearle* would like to see further consideration of the Commission to **include artists and cultural or creative professionals in the refit exercise on legal migration.**

In general the current **EU acquis still has legal gaps and inconsistencies** which deserve to be clarified and where possible harmonized.

Pearle* regrets that the EU is missing opportunities to improve **legal and economic migration as this provides oxygen to Europe** and addresses concrete needs of many sectors, including the live performance sector.

An EU legal migration policy, should include a pillar focusing on **short term economic labour migration needs** would help employers to respond to demands of the market, especially when they need to act quickly.

The EU also needs to look urgently to **gaps in EU legislation when touring (or posting) third-country nationals to other EU member states**, in particular for very short term periods (a day or a few days).

As a final remark, migration policy should also look into **self-employed** workers from third-countries as they are involved because of their specific expertise or skills in productions, projects or assignments for particular periods. In the case of the live performance sector, it often concerns soloists (singers, musicians, dancers, and other performers), conductors, stage directors, sound/light/stage engineers, and others.

PEARLE* - Live Performance Europe, is the European employers' federation of music and performing arts organisations. Pearle* represents through its members associations the interests of more than 10,000 live performance organisations across Europe (such as theatres, theatre production companies, bands and music ensembles, orchestras, opera houses, ballet, dance companies, festivals, concert venues, producers, promoters, agents, comedy, variété, circus, event suppliers and others). The Live Performance sector is the biggest employer of the cultural industries with over 1,2 million employees.