

# LEGAL REGIME APPLICABLE TO PROFESSIONAL CULTURAL WORKERS

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**Abstract:**

*This paper aims to highlight the hasty manner in which Romanian lawmakers have been regulating certain areas, driven by the idea of meeting certain milestones without identifying the best solutions that would allow for the harmonious development of the field in which they are intervening. The author does not propose an in-depth analysis of the status of a new profession, as it is not possible to speak of such a profession, but rather to highlight certain aspects of interest to the beneficiaries of the regulation.*

**Keywords:** *professional cultural workers, urgency; status, legal and fiscal regime*

## Introduction

In a market economy governed by the principle of free competition, the actors of economic life in general, but also those who act in the culture industry, fight in various ways to gain and maintain clientele. In order to survive, but also to identify solutions that lead to the maximization of profits, businesses (professionals) must quickly adapt to changes in the market, some of which are even generated by the rapid evolution of technologies. In this context, most of the time, "the law" is the one that has to keep up with the changes in society, although, ideally, it would be to anticipate them and regulate social relations before imbalances appear in society.

The field I am focusing on - that of the cultural industry - is one full of contrasts and in continuous change generated by an unprecedented technological development. Moreover, the restrictions imposed during the COVID-19 pandemic hit it hard, destabilizing it. This is also the reason why, at the level of the European Union, the emphasis is placed on culture, arts, cultural heritage and cultural diversity, being considered "particularly valuable for European society from a cultural, educational, democratic, ecological, social and economic point of view, as well as from the point of view of human rights". In this sense, they should be promoted and supported because they "contribute significantly to our collective European identity and our values, to our mental health and economic well-being and, in the long term, to the creation of an

European public space"[1]. Considering this desire, each of the member states of the European Union should identify and implement easy tools to benefit the actors of cultural life, including programs and projects subsidized from the state or European budget, through non-reimbursable funding. I do not deny the fact that some of them are successful cultural projects, which generate impressive incomes (such as Untold, Neversea, Electric Castle, etc.), but most cultural projects cannot be seen as businesses in themselves, but have need for financial support precisely for the arguments cited above.

With the expansion of the internet and especially with the use of artificial intelligence, the artists, in general, have more than ever the need for support, through legislative interventions, ensuring them a legal and fiscal framework adapted to the needs and conditions in which they carry out their activity and connected in reality, as well as a series of social protection measures, to allow them to "transition" to the new era that takes place more in the on-line environment.

### **Critical analysis of the adoption of the emergency ordinance**

As we have become accustomed to, regardless of the government, the easiest tool to use for legislating is the emergency ordinance, especially when it comes to transposing European legislation or, in this case, European commitments [2]. Invoking "the need to quickly establish a coherent legal framework that will allow the implementation of reforms and public investments" in this case established by the National Recovery and Resilience Plan (NRRP), Component 11 - Tourism and Culture, as well as "the pressure of the deadline assumed by the Romanian Government for the adoption of Reform of the cultural sector financing system, provided for, in the reform through which the Statutes of cultural workers will be updated / created" (first quarter of 2023) ", the Government proceeds to adopt the EO no. 21/2003 in less than 2 months (launches the draft ordinance for public consultation on February 15, 2023 and adopts it on April 5, 2023, although the NRRP was submitted to the European Commission as early as 2021). How can the "objective, quantifiable fact, independent of the Government's will, which endangers a public interest" to which the Constitutional Court refers in its decisions be justified [3]? How is it that in various fields, such emergencies appear after the time available for the transposition of a directive or the assumed commitments is on average 2 years?

### **Sphere of the concept of a professional cultural worker**

The concept of a "professional cultural worker" is defined by art. 21 par. 1 lit. k) of EO no. 21/2003, as such: "the author or performer, as they are defined in Law no. 8/1996 on copyright and neighbouring rights, republished, with subsequent amendments and additions, and /or the natural person carrying out a supporting or auxiliary cultural activity, among those listed in Annex 1 to this ordinance [4], which have been registered, as such, for tax purposes, for a period of three years " .;

We observe that the legislator places in the sphere of the concept of "professional cultural worker" two categories of professionals involved in the cultural and creative industries, with different skills and professional training: (1) the author or performer, on the one hand, and (2) the professional who carries out a supporting or auxiliary cultural activity.

If, as far as the first category is concerned, Law no. 8/1996 on copyright and neighbouring rights [5], as well as legal doctrine [6], establish the sphere of the concepts of author and performer [7], outlining the portrait and the sphere of their concerns, in the case of the second category, the situation is much more complicated. Here I find a multitude of people "who carry out an auxiliary or supporting cultural activity" such as: technicians and production personnel, support and artistic management personnel, audiovisual specialists, event organizers, exhibition curators, specialists involved in editing books, magazines and periodicals, etc. These, although they do not have an artistic performance, still have a significant role in obtaining a "show" or other cultural product. In order to delimit the sphere of these, EO. no. 21/2003 establishes the limits of "cultural activity", referring to certain NACE codes (Nomenclature of Economic Activities) and the associated activities [8].

Thus, the concept of "professional cultural worker" includes an amalgam of professionals (authors of works, performers, technicians or specialists), who have one thing in common, namely: they carry out a cultural activity or contribute to the realization of a cultural activity. Starting from this hypothesis, we can affirm that the legislation did not aim to regulate a new professional status, as can be deduced from the title of the emergency ordinance. This error of the legislator has generated waves of criticism from the artistic environment, in the period preceding its adoption [9]. In fact, the initiator of the

ordinance started from the need to establish "the foundations and procedures for regulating the financial, fiscal and social status of professional cultural workers on the Romanian labour market" by proposing a normative framework "which will ensure their professional stability, in the sense of being able to carry out their activity and develop their professional career independently of contractual and income fluctuations inherent in the cultural sector, thus reducing the incidence of abandoning artistic or cultural practice" [10]. In this sense, EO no. 21/2003 regulates the procedure that must be followed and the conditions required to obtain a tax identity [11].

According to the provisions of art. 2 para. 2 of EO no. 21/2003, a "professional cultural worker" (...) cannot be a natural person who exercises a regulated or liberal profession, who is a civil servant or who carries out his cultural activity in the form of salaried work performed under an individual employment contract". Therefore, they cannot register as a professional cultural worker: (1) professionals whose legal status is regulated by other normative acts, (2) civil servants (considered *lato sensu*, i.e. including those with special status), as well as (3) employees, regardless of the position they hold, who have an individual employment contract for an indefinite or fixed period [12]. This legal rule underlines the legislator's intention to establish a tax and social protection regime, and not a professional status.

In the course of his activity, the professional cultural worker can conclude either contracts for the transfer of property rights resulting from copyright or neighbouring rights [13], or contracts for the performance of cultural activities. The latter are defined by EO no. 21/2003 as being those agreements concluded for a fixed period of time between a beneficiary of cultural activities [14] and the professional cultural worker, on condition that they have as their object the performance of a cultural activity [15]. As it results from reading the text of the law, these should complete the sphere of copyright assignment contracts or service contracts with which these professionals are already familiar. However, I do not see their usefulness as they are currently regulated. I believe that such a contract should be one in the sphere of labour law, not civil law. It should be closer to a fixed-term individual employment contract, and which, due to its specificities, should have a special regulation within the Labor Code. An argument in this sense would be the French model, which we have followed so many times, namely the "le contrat de travail à durée

déterminée d'usage" [16] regulated by the French Labor Code, a contract which also applies to categories of workers, professionals in the field of culture, to which our law refers. Moreover, according to art. 9 para. 2 of EO no. 21/2003, these contracts "are assimilated to individual employment contracts with respect to the award of public procurement contracts or service framework agreements". In addition, the legal regime applicable to professional cultural workers is similar to that of employees, as we shall see. Should we ask ourselves why our legislator did not proceed in the same manner? Could the urgency with which he legislated be excusable?

### **Procedural aspects**

To benefit from the rights recognized through EO no. 21/2003 and the more favourable fiscal and social status, people who work in the cultural sector have the option (not the obligation) to register as professional cultural workers. The procedure includes the registration phase in the Register of professional cultural workers (public database, administered by the Ministry of Culture) [17] and then the phase of obtaining the tax attestation certificate from the National Agency for Tax Administration at their fiscal domicile.

To register in the Register of professional cultural workers, certain conditions must be met in relation to the fiscal year prior to the registration request: the natural person must have obtained at least 50% of the income subject to income tax, cumulatively, from: the assignment of copyright or neighbouring rights; independent activities (from those listed in the annex to the ordinance); fixed-term individual employment contracts, for cultural activities and in the cultural field, which have expired by the date of submission of the registration application. Those incomes obtained by the person in question from the exploitation of copyright or neighbouring rights acquired by assignment or inheritance, as well as those from the assignment of copyright for scientific works or for computer programs, are not taken into account [18].

The registration as a professional cultural worker is valid for three consecutive fiscal years. The term starts from the date of registration in the register. It can be extended, provided that at least 50% of the income subject to income tax, realized in the previous interval, as an annual average, comes from activities carried out as a

professional cultural worker [19]. At the same time, the legislator also establishes the conditions under which the registration is suspended or ceases, either by law or at the request of the person.

It is also worth noting that the legislator attaches notable importance to the registration of the person as a professional cultural worker, conditioning the validity of the contracts for the performance of cultural activities on the mention of the date and the unique registration number of the professional cultural worker from the register of professional cultural workers. The same sanction (nullity of the contract) intervenes in the case of the absence from the contract of the conditions for ensuring health and safety at work during or in the course of the activity.

### **Fiscal and social protection legal regime**

The Ordinance includes a series of norms that regulate the social protection system during and in the course of its activity [20]. This aims at: ensuring safety and health at work, access to social health insurance, i.e.: sick leave, benefits for temporary incapacity for work, maternity leave and benefits, maternal risk and for the care of a sick child. Also, professional cultural workers can benefit, under certain conditions established in art. 14 of EO no. 21/2003, from unemployment benefits, as well as the right to participate and be represented collectively or the right to form or join a professional association. Moreover, the period in which the natural person was registered as a professional cultural worker represents seniority in work and in specialty.

Under EO no. 21/2003 (art. 9 par. 3), a professional cultural worker who does not have his domicile in the locality where the performance institution or concerts with which he contracts carries out his activity, can receive, for the entire duration of the contract, from the budget of the respective institution a monthly non-taxable lump sum amounting up to 50% of the average net salary in the economy, to ensure his accommodation.

As far as the fiscal regime is concerned, we can also speak of a more favourable treatment than that applied to other income from independent activities. Thus, cultural activity contracts will be subject to a lump-sum deduction of 40%. The tax will be withheld at source by the payer of income at the time of payment of the income and represents the final tax. Professional cultural workers owe tax and compulsory social contributions, like

all those who earn income from independent activities or from intellectual property rights, as the case may be.

Given that the cultural field is one that is dependent on funding, with the idea of also referring to the "professional career" of this category of workers (since we cannot speak of a "profession"), the legislator allocates a large space to the way of financing these activities through the National Mobility Program and local mobility programs. If the first one is viable being financed from the state budget, through the National Cultural Fund Administration [21], the local mobility programs remain at the disposal and resources of the local authorities, often unable to ensure the financing of current operating needs, which will generate either underfunding of these activities or territorial discrepancies in terms of financing.

We consider it a positive provision that allows (art. 26 of EOU no. 21/2023) local public administration to grant "the right to use performance and concert halls or other spaces, owned by the public or private property of the administrative-territorial unit and administered by public institutions, for the purpose of carrying out professional training activities, such as, but not limited to, rehearsals, exercises, workshops, courses". This right can be granted for a period of no more than 60 days within a 12-month period, for each beneficiary. It represents real help for professionals in the cultural field, especially those at the beginning of their professional career, but not exclusively.

Through the National Mobility Program and the local mobility programs of the local authorities, professional cultural workers can individually apply for non-reimbursable funding for one of the following activities: (a) their international and national mobility for participation in conferences, workshops, exhibitions, exchanges of experience, camps and creative residencies, as well as others, for professional training and qualification; (b) the acquisition of new skills, for the diversification of forms of artistic expression and public communication of works, artistic performances and other protected objects; (c) the costs of transport and insurance of works and other protected objects, as well as the necessary equipment. Non-reimbursable funding is not full, but refers to a fairly significant part (80-90%) of the eligible expenses listed.

## Conclusions

The creation of a regulatory framework to ensure professional stability and independence and to allow for career development for actors in the cultural industries is commendable. It will allow them to recover financially and access the main financing instruments used in the cultural field, thus reducing the incidence of abandonment of cultural activity.

Although it had the opportunity to follow the model of legislation with tradition in the field, the legislator chose to regulate this field through a separate legal act, using a sometimes-uninspired legislative technique. The disparate treatment, in various normative acts, of aspects related to labour relations, even intermittent ones, can only lead to a disruption of the "workers" in the field, an aspect that ultimately has repercussions on cultural activity. We note in the ordinance a mix of civil law, tax law, administrative law and labour and social protection law, but we cannot speak of a real status, because we cannot speak of a new professional category, but rather, as we have shown, rather of a regulation of the fiscal and social protection regime of specialists in the cultural field who carry out such an activity regularly. Although they work in the same field, they belong to different socio-professional categories or perform different professions that support cultural activity.

Despite its limitations, the EO no. 21/2003 represents a first step towards improving the working and social conditions of cultural workers in Romania. However, in order to achieve a truly effective and sustainable regulation, it would be necessary to adopt a comprehensive approach that addresses the specific needs and challenges of this sector, taking into account the diversity of professions and activities that it encompasses.

### References:

[1] See the Explanatory Memorandum of the Government Emergency Ordinance no. 21/2023 on the status of professional cultural workers, published in the Official Journal of Romania, Part I, no. 297 of April 7, 2023, approved by Law no. 346 of November 10, 2023, published in the Official Journal of Romania, Part I, no. 1030 of November 13, 2023, hereinafter referred to as EO no. 21/2023.

[2] Assuming the reform of the cultural sector through the National Recovery and Resilience Plan (NRRP).

[3] As regards the extraordinary and urgent situation, the following emerge from the case-law of the Constitutional Court: the emergency ordinance must justify the urgency and the extraordinary situation in the very body of the ordinance; this justification presupposes the existence of an objective, quantifiable factual situation, independent of the will of the Government, which menace a public interest. See also <https://www.juridice.ro/465263/memoriu-fjr-unjr-si-amr-ref-neconstitutionalitatea-oug-pentru-modificarea-oug-privind-salarizarea-personalului-platit-din-fonduri-publice-in-anul-2016.html>. See also Constitutional

Court Decision no. 225 of May 11, 2005, published in the Official Journal of Romania, Part I, no. 511 of June 16, 2005.

[4] The Annex includes, on the one hand, the fields of cultural activity, ancillary activities and support for cultural activity, proceeding to the enumeration of the NACE codes, as well as cultural management and cultural project management activities, education through culture, film education, cultural dissemination, film/visual arts/performing arts curation, stunt work, cultural festival production activities, specific technical activities for offline and online cultural production.

[5] Republished in the Official Journal of Romania, Part I, no. 489 of June 14, 2018, pursuant to art. III of Law no. 74/2018. Subsequently to the republication, the law has undergone a number of amendments and additions.

[6] See Roş V., Bogdan D., Spineanu-Matei O., Copyright and Neighbouring Rights, All Beck, Bucharest, 200, pp.33 and following; Ungureanu G., Intellectual Property Law, Mustang, Bucharest, 2021, pp. and following.

[7] The legislator proceeds to enumerate the categories of persons who fall within the scope of this notion of "performers": actors, singers, musicians, dancers and other persons who fall within one of the following criteria: present, sing, dance, recite, declaim, play, perform, direct, conduct or perform in any other way a literary or artistic work, a performance of any kind, including folk, variety, circus or puppetry. Therefore, from the literal interpretation of the legal text, we can conclude that the scope of these is limited, even if the expression "and other persons" would have led to the idea that the scope of these is wider, because the enumeration of the criteria is a limiting one ("present, sing, dance, recite, declaim, play, interpret, direct, conduct or perform in any other way"). For details, see Roş V., Bogdan D., Spineanu-Matei O., op. cit., pp. 465-466; Ungureanu G., op. cit., pp. 75-76.

[8] By cultural activity we understand "the creation of a literary or artistic work or a protected object and/or the performance or execution, non-fixed or fixed, as defined in Law no. 8/1996 on copyright and neighbouring rights, protected or capable of being protected by copyright or neighbouring rights, as well as the activities provided for in the annex which is an integral part of this emergency ordinance". (art. 2 para. 1 lit. a) of EOU no. 21/2023).

[9] See the letters of the UNITER Association of March 9, 2023, addressed to the Ministry of Culture in the article by Demeter C., PNRR also strikes at artists. The Ministry of Culture hides in the fog a strange body of inventory of the cultural act, published in Jurnalul, <https://jurnalul.ro/editorial/ministerul-culturii-pnrr-artisti-organism-inventariere-927747.html>; Open letter from director Theo Herghelegiu in Revolt of a director against the new status of the "professional cultural worker": "We do not want ANAF to decide whether or not we are professionals". The response of one of the authors of the legislative act, article by Şerban A. and Ungureanu L., published in Libertatea <https://www.libertatea.ro/stiri/revolta-unei-regizoare-fata-de-noul-statut-al-lucratorului-cultural-profesionist-nu-dorim-ca-anaf-sa-decida-daca-suntem-sau-nu-profesionisti-raspunsul-uneia-dintr-4458083>

[10] EOU no. 21/2023 uses an unprecedented technique to regulate the status of the professional cultural worker and allocates only one article to this effect, which is added to the definition of art. 2 para. Lit. k) mentioned above, specifying who cannot be a professional cultural worker.

[8] In the sense of the ordinance, the beneficiary of cultural activity is "the legal person, the authorized natural person, the individual enterprise, the family enterprise, for which the professional cultural worker carries out remunerated activities on a contractual basis, other than the individual employment contract".

[9] In the case of performing artists who perform a non-fixed performance or execution, the assigned patrimonial rights are provided for, as a distinct object, in the contract for the performance of cultural activity.

[10] See the statement of reasons.

[11] See the following sections.

[12] O.U.G. no. 21/2023 uses a novel technique to regulate the status of the professional cultural worker and allocates a single article in this sense, which is added to the definition in art. 2 para. LIT k) above-mentioned, specifying who cannot be a professional cultural worker.

[13] For more details, see Roş V., Bogdan D., Spineanu-Matei O., op. cit., pp. 371 et seq.

[14] In the sense of the ordinance, the beneficiary of the cultural activity is "the legal person, authorized natural person, individual enterprise, family enterprise, for which the professional cultural worker carries out remunerated activities on a contractual basis, other than the individual employment contract".

[15] In the case of performers and performers who carry out an unfixed interpretation or performance, the assigned patrimonial rights are provided, as a separate object, in the contract for the performance of the cultural activity.

[16] <https://www.legalplace.fr/guides/cdd-usage-cddu/>

[17] The register includes the identification information of natural persons registered as professional cultural workers: the unique registration number, the date of registration as a professional cultural worker and the date of termination of this registration, the mentions regarding the suspension of the quality of professional cultural worker, including the termination of the suspension and, as the case may be, the date of legal termination.

[18] In the calculation of the income threshold taken into account for the registration of the professional cultural worker for the years 2023 and 2024, the legislator provides an exception (art. 71). Dividend income, distributed by companies with a single shareholder, which carry out their activity, based on the main NACE code, in one of the cultural fields referred to in the annex to the O.U.G. no. 21/202, as well as those incomes from other sources about which the applicant submits a declaration on his own responsibility regarding the fact that these incomes come from cultural activities.

[19] The extension of the registration is requested with a minimum of 60 days and a maximum of 120 days before the expiration of the term.

[20] We do not propose a detailed treatment of them, but only an enumeration.

[21] The amount allocated will be established annually, by May 15 of each year, by order of the Minister of Culture.