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Detecting Bogus Self-Employment in Portugal's Cultural Sector: One Step Forward and Two Steps Back?

Joana Neto *

Abstract. In 2021, Portugal approved the new Status of Professionals in the Cultural Sector (the “Status”) aimed at combating precariousness within a sector characterised by various specificities. One of its innovative tools was the establishment of a specific system for the supervision and regularisation of situations involving false provision of services, alongside a new presumption of an employment contract. This article seeks to analyse the significance of these monitoring tools and the impact of the amendments introduced for detecting and preventing false self-employment in the Cultural Sector.

Keywords: *Culture professionals; bogus self-employment; fixed-term contracts; presumption of employment.*

1. Introduction

The artists and professionals within the cultural and creative sectors typically operate under freelance or other precarious statuses. The COVID-19 pandemic has underscored the fragile labour conditions in these sectors, particularly in Portugal. In an effort to combat this precariousness, which is characterised by volatility and intermittency in professional activities, the new Status of Professionals in the Cultural Sector (the “Status”) was approved by Decree-Law 105/2021 on 29th November 2021. One of the most significant tools introduced by the

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Status to address precariousness was the establishment of a specific system for supervising and regularising situations that constitute false provision of services, along with a presumption of an employment contract. These tools were designed to prevent the rise of fraudulent service contracts and false self-employment. However, this innovative system has undergone two amendments, leading to uncertainty regarding the results of its application. This article proposes to analyse the monitoring tool designed for detecting and preventing self-employment as outlined in the Status. The study will also examine the effects of the legislative amendments to the presumption of employment, which were justified by a need for simplification and flexibility, arguing that these changes have weakened its effectiveness. Additionally, this paper aims to provide a brief and simplified comparative analysis of specific labour protection mechanisms in Spain and Italy. The Spanish regime is more focused on combating fixed-term contracts, while Italy's ongoing review addresses compensation for intermittency. In contrast, the Portuguese legal framework primarily targets abusive service provisions.

2. A Brief Contextualisation of the International and European Legal Framework

The professionals in the cultural and creative sectors are often not recognised as workers, a situation that contravenes the 1980 UNESCO Recommendation concerning the Status of the Artist¹. Frequently, they carry out their work in contexts of insecurity, lacking permanent or full-time contracts. Many work as self-employed individuals or freelancers, hold secondary jobs, or combine multiple roles, often under contracts for the provision of services². This means they are frequently excluded or only partially covered by social security protection. Additionally, there is a significant lack of collective bargaining³ in the cultural sector, which

¹ UNESCO's 1980 *Recommendation concerning the Status of the Artist: promoting the professional, social and economic rights of artists*. Available at: [UNESCO's 1980 Recommendation concerning the Status of the Artist: promoting the professional, social and economic rights of artists - UNESCO Digital Library](#).

² MAFALDA DÁMASO (2021), *Research for CULT Committee – The situation of artists and cultural workers and the post-COVID 19 Cultural Recovery in the European Union: Background Analysis*, European Parliament.

³ MÄKI, TEEMU/ RYNGBECK, ANNICA / MICHALOWSKI, PIOTR (2021), «Fair pay, Collective Bargaining, Intellectual Property, Flattening Income Variations, Financial Support», in *Status and working conditions of artists and cultural and creative professionals*, Voices

contributes to further deregulation of working conditions. The pandemic crisis has highlighted the vulnerable position of professionals in the cultural and creative sectors.

According to the European Parliament Resolution 2020/2708(RSP) on the Cultural Recovery of Europe⁴, dated 2020, the Commission should introduce a European Framework for Working Conditions in the cultural and creative sectors and industries (CCSI) and provide guidelines and principles aimed at improving working conditions in these sectors. Later, the European Parliament Resolution of 20 October 2021 regarding the situation of artists and cultural recovery in the EU called, in paragraph 25, for the Commission to “propose a European Status of the Artist, setting out a common framework for working conditions and minimum standards applicable to all EU countries”.⁵ These resolutions advocate that EU Member States and European institutions recognise the fundamental role culture plays within society and provide support for culture, cultural diversity, and cultural rights, as well as freedom of artistic and cultural expression, acknowledging both its intrinsic value and its economic contribution. They also urge Member States to take measures to ensure fair working conditions for artists and cultural and creative professionals by implementing necessary actions to protect workers, especially in a context where prevalent employment relationships are changing. In 2020, experts from EU Member States within the OMC group on Innovation and Entrepreneurship in cultural and creative sectors recommended innovative policies: “Policy frameworks designed to foster innovation in the cultural and creative sectors should make special provisions to enable all professionals in these sectors to be creative and innovative. This can be achieved by ensuring that those who work on a project or other unconventional basis have access to appropriate employment rights and labour rights”.⁶ In Portugal, the adoption of the Status Law for Cultural Professionals aimed to align with these recommendations and was approved concurrently with the proposal for a European Status for Artists. The Draft Report dated 2023 includes a Motion for a European

of Culture Report, Brussels, Chapter 2, pp. 14-15. Available at: <https://voicesofculture.eu/wp-content/uploads/2021/07/VoC-Brainstorming-Report-Working-Conditions-2.pdf>

⁴ EUROPEAN PARLIAMENT, Resolution of 17 September 2020 on the cultural recovery of Europe 2020/2708(RSP). Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020IP0239>

⁵ EUROPEAN PARLIAMENT, Resolution of 20 October 2021 on the situation of artists and the cultural recovery in the EU (2020/2261(INI)). Available at: [TAMEF \(europa.eu\)](https://tamef.europa.eu)

⁶ SNIJDERS, JACQUELINE et. al. (2020), *The status and working conditions of artists and cultural and creative professionals*, Panteia, pp. 121-122.

Parliament Resolution with recommendations to the Commission on an EU framework for the social and professional situation of artists and workers in the cultural and creative sectors (2023/2051(INL)). It calls on those Member States that have an ‘artist status’ to monitor its adequacy and review it where necessary.⁷ Pearle Performance Europe (the Performing Arts Employers Association League Europe/The European Federation of Music and Live Performance Organisations) emphasises the importance of “the application and respect for European rules in the broad field of employment and social affairs” among Member States. This organisation also highlights “the crucial role of social partners in creating a level playing field for those working in the sector” and stresses that “adequate social protection schemes provide artists with an important sense of security in cases of sickness, unemployment, pension income, care needs, and minimum income”.⁸ It is important to note that paragraph 12 of the Motion on the EU framework for the social and professional situation of artists and workers in the cultural and creative sectors (2023/2051(INL)) “calls on Member States and social partners to commit to preventing undeclared work and eradicating bogus self-employment practices in these sectors, including by strengthening the actions of labour enforcement authorities”.⁹ Some amendments proposed by political groups within the European Parliament aim to enhance this supervisory role. Paragraph 19 also stresses the need for more information to be provided to students and young graduates entering the labour market regarding working practices and conditions, including an understanding of worker versus self-employed status.

⁷ EUROPEAN PARLIAMENT, *Draft Report with recommendations to the Commission on an EU framework for the social and professional situation of artists and workers in the cultural and creative sectors* (2023/2051(INL)), 2023. Available at: https://www.europarl.europa.eu/meetdocs/2014_2019/plmrep/COMMITTEES/CJ28/PR/2023/06-29/1280867EN.pdf

⁸ PEARL LIVE PERFORMANCE EUROPE, *Pearl position on an EU framework for the social and professional situation of artists and workers in the cultural and creative sectors*, Bruxelles, 2023. Available at: <https://www.pearle.eu/positionpaper/pearle-position-on-an-eu-framework-for-the-social-and-professional-situation-of-artists-and-workers-in-the-cultural-and-creative-sectors>

⁹ EUROPEAN PARLIAMENT, *Motion EU framework for the social and professional situation of artists and workers in the cultural and creative sectors* ((2023/2051(INL)), 2023. Available at: [PR_INI \(europa.eu\)](https://www.europarl.europa.eu/press-room/en/infobox-item-attachment-item/infobox-item-attachment-item/PR_INI(europa.eu))

3. The New Status of Professionals in Portugal's Cultural Sector: An Outline

The impact of the COVID-19 pandemic on the cultural sector was particularly pronounced in Portugal, as it was in other European countries such as Italy¹⁰. The lack of labour and social protection, stemming from the widespread reliance on service provision rather than regular employment contracts in the cultural sector, remains unresolved. The response to this issue has primarily been social support, specifically compensation for loss of income. This support aligns with UNESCO's recommendations for building resilient creative industries beyond COVID-19¹¹. However, the implementation of this support has been weak in terms of coverage and effectiveness, with professional and trade union organisations in the cultural sector reporting practical difficulties. It is important to highlight that, according to UNESCO data from 2021, self-employed individuals experienced higher levels of income loss and unemployment compared to other categories of cultural and creative workers.¹² The urgency in accessing this support highlighted an ongoing issue that the new context brought to light: the widespread precariousness of labour in the cultural and creative sectors. A structural response is necessary. There are several potential solutions to this problem: i) Strengthening social protection for self-employed workers when their contracts are terminated, particularly through severance pay; ii) Promoting collective bargaining that is flexible enough to accommodate sector-specific needs, while also addressing unionisation restrictions for freelance professionals and the fragility and short duration of contracts that hinder these professionals' participation in collective representation structures; iii) Implementing labour regulations that can adapt to the nature of cultural activities, although this may face resistance from a sector that is not only informal but also tends to favour flexibility over rigidity. The European Parliament Resolution of 20 October 2021 on the situation of artists and cultural recovery in the EU (2020/2261(INI)) noted that “the COVID-19 pandemic had severely undermined the fragile cultural and creative ecosystem,” identifying this issue as a European-wide problem that

¹⁰ A. ALAIMO, *Povert , lavoro autonomo e tutela del corrispettivo*, Centre for the Study of European Labour Law “Massimo D’Antona”, 2023, p.7.

¹¹ UNESCO, *Culture in crisis: Policy guide for a resilient creative sector*, 2020. Available at: [Culture in crisis – New UNESCO publication offers tips for resilient creative industries beyond COVID-19 | Diversity of Cultural Expressions](#)

¹² UNESCO, *Culture and Creative Industries in the Face of Covid-19. An Economic Impact Outlook*, 2021. Available at: [377863eng.pdf \(unesco.org\)](#)

threatens cultural and artistic creation while weakening the contribution of arts and culture to well-being, cultural diversity, democracy, and more. In Portugal, following the European Parliament Resolutions, a solution was found with the approval of the Status aimed at combating precariousness in a sector characterised by volatility and intermittency in professional activities. This has sometimes led to worker rotation and the flexibilisation of fixed-term contracts¹³. On 29th November 2021, Decree-Law 105/2021 was approved, establishing the Status of Professionals in the Area of Culture (the “Status”), which came into force on 1st January 2022. There are several inspiring examples of Status of Artist laws worldwide that can serve as comparative references:

a) Morocco’s Status of the Artist legislation (2003) includes important measures such as “the requirement for a written contract between the artist and employer, with terms that respect minimum wage requirements and include provisions for remuneration and termination,” ensuring that performing artists with term contracts are considered employees under labour law. This Status Law was amended in 2016 to extend social benefits protection for performing artists to other cultural professionals, thereby reducing their generally precarious work situations.

b) The Korean Artists Welfare Act (2011), also amended in 2016, mandates that “those who use artistic services must enter into a written contract with artists.” This is complemented by institutional information provided by the Korean Ministry of Culture, which has issued “56 model contracts across nine different artistic fields,” outlining each party’s obligations and responsibilities, scope of work, and compensation agreements. According to Korean surveys, there was a “significant improvement in the number of artists who obtained written contracts for their services,” rising from 26% in 2015 to 37% in 2018¹⁴.

c) In Spain, Royal Decrees 26/2018 and 302/2019 established urgent measures for artistic creation and cinematography following a vigorous advocacy campaign led by prominent artists’ associations in September 2018. These measures relate specifically to recognising intermittency and implementing social security provisions¹⁵.

¹³ MARIA DO ROSÁRIO PALMA RAMALHO, «O contrato de trabalho dos profissionais de espectáculos: algumas notas», *Estudos de Direito do Trabalho em homenagem ao Professor António Monteiro Fernandes, Vol. II, Capítulo IX*, Nova Causa, 2018, pp. 224-246, [233-234].

¹⁴ UNESCO, *Culture & Working Conditions for artists*, Paris, 2019, pp. 16-19 [18]. Available at: [371790eng.pdf \(unesco.org\)](https://unesco.org/371790eng.pdf)

¹⁵ UNESCO, *Culture & Working Conditions*...p. 18.

d) In Italy, Law 106/2022 (15 July) delegates power to the Government to draft a Codice dello Spettacolo (Entertainment Code), acknowledging the discontinuous and flexible nature of cultural activities. This law aims "to provide the sector with a more effective, organic structure aligned with principles of simplification of administrative procedures and optimisation of expenditure," while promoting gender balance and enhancing artistic-cultural quality within activities.

e) The Portuguese Status encompasses all professionals working within performing arts, audiovisuals, visual arts, and literary creation sectors, provided they engage in authorial, artistic, or technical-artistic activities.

Thus, the approval of Portugal's new legal regime for the cultural sector is based on an understanding—previously established—that employment contracts for cultural professionals possess certain specificities (such as intermittency and seasonality) that necessitate their classification as special employment contracts requiring distinct legal frameworks.¹⁶ In Portugal, key differences between the previous system (established by Law 4/2008 on 7th February¹⁷) and the current legal framework include regulation for autonomous labour relations without legal subordination and a more comprehensive framework for social protection for unemployed workers. The new Status grants access to a special contributory regime and benefits for suspending cultural activity, thereby preventing systematic entry into and exit from support systems by these professionals. The new legal framework also establishes specific mechanisms for supervising and regularising situations constituting false provisions of services combined with a presumption of an employment contract. This presumption

¹⁶ GOMES, JÚLIO (2010), «Da fábrica à fábrica dos sonhos – primeiras reflexões sobre o regime dos contratos de trabalho dos profissionais», *Novos estudos de direito do trabalho*, Coimbra Editora, pp. 197- 231, [204-212]; VICENTE, JOANA NUNES (2018), «A disciplina do contrato a termo dos profissionais de espectáculo: relações de tensão entre a Lei 4/2008, de 7 de Fevereiro e a CRP e o Direito da União Europeia», *Prontuário de Direito do Trabalho II*, 2017, n.º II, Almedina, pp.259-279 [263-264] e NETO, JOANA (2019), «Na boca de cena da desregulação. O regime jurídico do contrato de trabalho dos profissionais de espetáculo». Vila Nova de Famalicão, Novembro Editora, pp. 19-32. Ainda no sentido da qualificação destas relações como relações especiais de trabalho cfr. MAZZONI, GIULIANO (1977), *Manuale di Diritto del Lavoro*, vol. I, 5.ª edição, Giuffrè, Milano, pp. 775-776 e ALZAGA RUIZ (2015), “La relación laboral especial de los artistas en espectáculos públicos: balance a los treinta años de su aprobación”, *Revista del Ministerio de Empleo y Seguridad Social*, n.º 118, 2015, pp. 127-265, [128- 129].

¹⁷ For further developments about Law 4/2008, 7th February, cfr. NETO, JOANA (2019), *Na boca de cena da desregulação. O regime jurídico do contrato de trabalho dos profissionais de espetáculo*, Vila Nova de Famalicão, Novembro Editora.

considers specific rules regarding workplace conditions, working time, and working hours tailored to each area within culture, allowing for greater flexibility and better adjustment. In summary, the Status applies to professionals engaged in performing arts, audiovisuals, visual arts, or literary creation who are involved in authorial, artistic, technical-artistic or cultural mediation activities. Its aim is to combat precariousness within cultural contexts while preventing an increase in false provisions of service contracts.

4. The Innovations introduced by the Status

The Status contains two significant innovative provisions related to its regulatory scope: it includes copyright activities and establishes a legal regime not only for labour contracts but also for contracts for the provision of services, aspects that were excluded under the previous regime, Law no. 4/2008 of 7th February.¹⁸ The new legal framework emphasises the monitoring of the improper use of service provision contracts, defining how various supervisory bodies in the cultural and labour sectors should interact, according to Articles 78 and 79. Article 4 outlines positive action measures, stipulating that state services, the state business sector, and associations and foundations primarily funded by the state must hire professionals in the cultural sector under an employment contract regime. Additionally, if they engage legal entities to carry out cultural activities, these entities must ensure that their cultural professionals are also hired under an employment contract regime. The legal regime of the Status also establishes new special rules regarding the registration of cultural professionals and defines the social protection regime available to those covered by the Status, including provisions for very short-term contracts—a controversial contractual modality introduced in an amendment made in 2009 to the now-repealed Law 4/2008. The regulation concerning social protection for these contracts was implemented by Ordinance 209/2023 of 14th July (Articles 2 and 3).¹⁹ The Status regulates employment contracts, internship contracts (as provided for in Article 10(2) of Decree-Law 66/2011 of 1st June), and service provision contracts—a legal solution that is quite unusual. This

¹⁸ NETO, JOANA (2023) «A alteração ao Estatuto dos Profissionais da Cultura. Amputaram a nova presunção de laboralidade?», *Revista Internacional de Direito do Trabalho* n.º 4, Ano III, maio de 2023, Instituto de Direito do Trabalho, Faculdade de Direito da Universidade de Lisboa, pp. 181-218, [181-187].

¹⁹ Available at: <https://diariodarepublica.pt/dr/en/detail/government-order/209-2023-215647927>

framework applies to all professionals in performing arts, audiovisuals, visual arts, and literary creation who engage in authorial, artistic, technical-artistic, or cultural mediation activities. The Status has also clarified debated aspects of the previous regime concerning fixed-term employment contracts. It establishes the necessity to specify justifying reasons for imposing a term and sets a limit on renewals (fixed-term contracts may be renewed up to three times if agreed upon in writing). However, it maintains the provision exempting these contracts from the regime of successive contracts. It also clarifies employee duties during periods of intermittency by extending the duty of effective occupation (Article 16(6) of the Status) and enshrining the requirement for absolute incapacity for applying the professional reconversion regime. In the following section, one of the most important innovations of the Status will be explored: the aforementioned special presumption of an employment contract and its monitoring system.

5. The Presumption of Employment and its Monitoring System: Strengths and Weaknesses

The intermittent nature of work in the cultural and creative sector impacts not only the income of cultural workers but also their access to social benefits and collective bargaining. Since 1930, the French legal system has sought to regulate and improve the legal response to this situation through the designation of “intermittent du spectacle,” which includes the presumption of employment²⁰. In West African countries, such as Senegal, the presumption of employee status is also a crucial provision of the Status of Artist Law²¹. In fact, many countries, including Spain²², utilise the presumption of employment. In Portugal, Article 7 of the Status establishes a new presumption of an employment contract based on Article 12 of the Portuguese Labour Code, with specificities concerning the place of work and the start and end times of service now articulated in

²⁰ CUNY, LAURENCE; GU, XIN; INTHAMOUSSÚ, MARTIN; KESSAB, AMMAR, (2022), *A crisis of sustainable careers? Examining working conditions for independent arts and cultural workers*, IFFACA, International Federation of Arts Council and Cultural Agencies, 2022, p. 37. Available at: <https://ifacca.org/news/2022/09/15/crisis-sustainable-careers-examining-working-condi/>

²¹ UNESCO, *Culture & Working Conditions for artists...* p 19.

²² OIT, *Las relaciones de trabajo en las industrias...* p. 2.

broader terms²³. However, the presumption of an employment contract outlined in Article 12 of the Labour Code (CT) lacks a rule clarifying "proof of the facts determining the nature of the contractual relationship in situations where work is provided by one person for the benefit of another."²⁴ According to Article 7, workplaces are defined as all locations owned by entities receiving services, whether or not specified by them. This includes ateliers and all locations where activities related to development, pre-production, testing, execution, finalisation, and post-production of cultural and artistic events are carried out. Under this rule, an employment contract is presumed to exist when certain characteristics outlined in Article 12 of the CT are present in the relationship between the individual providing an authorial, artistic, technical-artistic, or cultural mediation activity under this Status and those benefiting from it. Consequently, the definitions of working time and place have been expanded. To combat the improper use of service provision contracts, as originally defined by the Status, employers with organised accounting were required to rebut the presumption of an employment contract when entering into contracts for service provision, as per Article 30(2) of the Status. This rule stipulated that entities receiving service provisions must inform about the conclusion of service provision contracts before they take effect to justifiably rebut the presumption of an employment contract outlined in Article 7. This communication was to be made using a single electronic form defined by Ordinance 13-A/2022 of 4th January, which regulated this duty as a measure against precariousness and directed it to both the General Inspection of Cultural Activities (IGAC) and the Tax and Customs Authority (AT). In summary, Article 30(2) stipulated that employers had to provide a reasoned rebuttal against the presumption of employment using a form. Violating this requirement constituted a serious administrative offence under paragraph 3 of the same article. This solution has faced criticism due to practical difficulties in justifiably rebutting the presumption using a form.²⁵ The specific system for supervising and regularising situations constituting false services—

²³ DRAY, GUILHERME/BARRIAS, JOSÉ (2023), *Estatuto dos Profissionais da Cultura Anotado. Decreto-lei n.º 105/2021, de 29 de Novembro. com a Redação Conferida Pelo Decreto-lei n.º 64/2022, de 27 de Setembro*, Editora d' Ideias, Coimbra, pp. 29-31.

²⁴ FERNANDES, ANTÓNIO MONTEIRO (2021), «Nótula sobre o ónus da prova nos litígios laborais», *Prontuário de Direito do Trabalho, 2021-II*, Centro de Estudos Judiciários, pp. 95-111, [108-109].

²⁵ VENTURA, VICTOR HUGO (2022), *O estatuto dos profissionais da área da cultura: regime novo ou Mise-en scène (Decreto-lei n.º 105/2021, de 29 de novembro)*, Edições Almedina, Maio de 2022, p.201.

alongside the assumption of an employment contract—aimed at preventing an increase in false service contracts (as defined by Ordinance 13-A/2022) was altered by Decree-Law no. 64/2022 on 27th September. This Decree revoked the aforementioned ordinance and eliminated obligations for employers with organised accounting when entering into contracts for service provision. Thus, following this amendment, there was a clear regression in what was previously considered a primary instrument for combating improper use of false service contracts. Subsequently, Government Order 142/2023 was published in *Diário da República* (the Portuguese Official Journal) on 30th May 2023. This order appeared to rectify that situation by altering regulations regarding communication about signing contracts for service provision with professionals in culture. According to Article 4 of this new Ordinance, entities benefiting from services that have or should have organised accounting under Portuguese tax law must communicate any signed contracts for service provision within ten working days following each quarter through the ePortugal portal. In this way, 2023 saw a simplification of previous communication requirements that had removed the presumption of an employment contract. Additionally, according to Article 5(1) (in line with Articles 30(3), 79, and 81(3) of the Status), electronic checks can be conducted based on these communications alongside associated tax and social security obligations. Without prejudice to other supervisory activities, verification by authorities responsible for inspecting working conditions in Portugal regarding improper use of service provision contracts within subordinate employment relationships is carried out through periodic sample checks. In 2024, Decree-Law no. 25/2024 introduced amendments to the Status, specifically regarding Article 30 related to communication about service provision while reinforcing it by including another entity—the Authority for Working Conditions (ACT), which promotes improvements in working conditions through prevention, control, auditing, and inspection. Despite this amendment and the positive step involving ACT's participation, the current version of the monitoring mechanism suffers from vague wording that does not specify inspection frequency. This ambiguity may render its application ineffective or impractical. It is also important to note that operational difficulties regarding inspection activities within this sector may become even more pronounced in this context since contracting entities are relieved from having to demonstrate—even indicatively—the presumption of employment.

6. The Problem of Contract Qualification: A Paradigmatic Case Law Example

The distinction between an employment contract and a contract for the provision of services in the cultural sector presents additional challenges regarding the longstanding question of the limits of legal subordination in activities traditionally performed in a liberal or creative manner. This issue is linked to the emergence of hybrid or intermediate categories of self-employed workers, which are recognised by the Portuguese, Spanish, and German legal systems²⁶: economically dependent self-employed workers. This category is acknowledged within the Portuguese legal system and comes with specific forms of protection. Although this article does not focus on it, reinforcing labour protections for this category of professionals is a viable response to the precariousness prevalent in the sector. However, the more pressing question is whether legal subordination remains the determining criterion for contract qualification or if new forms of legal subordination must be considered alongside criteria such as economic dependence. One notable decision regarding this issue in Portugal is the emblematic ruling from the Supreme Court of Justice, which qualified the contractual relationship established between the conductor of the Teatro Nacional de S. Carlos (TNSC) orchestra as a provision of services because the employee failed to prove the existence of a contractual relationship with TNSC. This ruling has faced criticism from Portuguese legal scholars.²⁷ The 2013 decision, made prior to the introduction of the new Status, interpreted the presumption of employment outlined in Article 12(1) of the Labour Code (CT). According to Article 12, an employment contract is presumed to exist when certain characteristics are verified, namely: i) the activity is performed at a location belonging to or determined by the employer; ii) work equipment and instruments used belong to the employer; iii) start and end times are observed as determined by the employer; iv) a certain amount of money is paid to the provider at specified intervals in exchange for their activity; and v) the provider performs management or leadership functions within the organisational structure of the company. The definition of an employment contract is further clarified by Article 11 of

²⁶ For further information, see ALAIMO, A. (2023), *Povert , lavoro autonomo e tutela del corrispettivo*, Centre for the Study of European Labour Law “Massimo D’Antona”, p.39.

²⁷ SUPIOT, ALAIN (2000), “Les nouveaux visages de la subordination” in *Droit Social*; FERNANDES, ANT NIO MONTEIRO (2018), «Dever  a subordina o jur dica manter-se como elemento qualificador? II Congresso Europeu de Direito do Trabalho. Os desafios atuais do Direito do Trabalho, Almedina, pp.97-107.

the CT, which states that it is "the contract whereby a natural person undertakes, for remuneration, to provide their activity to another person or persons within the scope of organisation and under their authority." Additionally, Article 1152 of the Civil Code (CC) stipulates that "the employment contract is one whereby a person undertakes, for consideration, to provide their intellectual or manual activity to another person under that person's authority and direction." In contrast, a service contract is governed by Article 1154 of the CC, which states that "a service contract is one whereby one party undertakes to provide another with a certain result of their intellectual or manual work, with or without payment." The boundary between these two contractual modalities can sometimes be difficult to define, although legal scholars have clarified this distinction. Currently, the presumption of employment is defined by the Status and results from a combined interpretation of Article 7—embodying an adaptation of indicators of legal subordination as contemplated in Article 12 of the Labour Code—alongside Article 30(2) of the Status.

7. The Spanish and the Italian Case

One of the essential distinctive aspects of the Portuguese Status for Cultural Professionals is that it regulates the provision of services in the cultural sector, giving it a much broader scope than the Spanish legal regime, which applies only to employment relationships within the sector. However, Spain's 2007 Law on the Statute of Self-Employed Workers recognises the concept of "economically dependent self-employed worker," which encompasses a wide range of rights²⁸. In Portugal, the same concept is used, but only to compensate for lost income due to the involuntary termination of the service agreement with the employer²⁹. The greater protection afforded to self-employed workers in Spain may explain the differing focus of the new Artist Status Law in Portugal and Spain. In Spain, in 2021, Royal Decree 639/2021 of 27 July established a Commission for the Development of the Artist Status Law (*la Comisión Interministerial para el desarrollo del Estatuto del Artista*). According to news reports from the same year, prior to the announced new Statute of

²⁸ OIT (2014), *Las relaciones de trabajo en las industrias de los medios de comunicación y la cultura*, p. 20.

Available at: [Las relaciones de trabajo en las industrias de los medios de comunicación y la cultura \(ilo.org\)](https://ilo.org/public/spanish/region/eur/leap/2014/06/20140601.es.pdf)

²⁹ Information available at: [Request the severance grant - ePortugal.gov.pt](https://ePortugal.gov.pt/)

Artists, the Labour and Social Security Inspectorate was actively monitoring entertainment companies and sanctioning instances of 'false self-employment' in the cultural sector³⁰. Years prior, in 2018, Royal Decree-Law 26/2018 was approved, providing emergency measures for artistic and cinematographic creation within the tax and social security framework, but it depended on changes to the labour legal regime.

Subsequently, Royal Decree-Law (hereinafter RD) 5/2022, of 23 March 2022, amended, for the first time, RD 1435/1985, of 1 August 1985, which regulates the employment relationship of artists³¹. The amendments introduced by RD 5/2022 expanded its scope to include technical and auxiliary staff and added an exemplary list of artistic activities (Article 1, paragraph 1), similar to the Portuguese Status. However, unlike the current version of the Portuguese legal regime, the Spanish version does not extend the entire regime to technical and support activities. This includes the new provisions concerning contract qualification, measures to combat the misuse of fixed-term contracts, and increased compensation for contract expiration to enhance employment stability.

It is also important to stress that some of the amendments in Spain are similar to those introduced by the Status in Portugal. These include the updating of means of reproduction and venues for artistic activities, akin to the expansion or clarification of the concept of the workplace provided in Article 7 of the Status by reference to Article 12 of the Labour Code, which may encompass creators, artists, and cinematographers. The presumption of an indefinite duration contract was also established, mirroring Article 15/1 of the Estatuto de los Trabajadores (ET), approved by Royal Decree-Law 2/2015, of 23 October. However, it is significant to note that these presumptions are now less about fraud and more reliant on verifying illegality³².

³⁰ FIAVE, Federación de la Industria Audiovisual y Eventos (2021), *The new Statute of Artists wants to stop the hiring of false self-employed in the world of culture*. Available at: [Statute of Artists, against hiring of false self-employed - FIAVE](#)

³¹ Real Decreto-ley 5/2022, de 22 de marzo, por el que se adapta el régimen de la relación laboral de carácter especial de las personas dedicadas a las actividades artísticas, así como a las actividades técnicas y auxiliares necesarias para su desarrollo, y se mejoran las condiciones laborales del sector. Available at: <https://www.boe.es/eli/es/rdl/2022/03/22/5/con>

³² ALTÉS TÁRREGA, JUAN ANTONIO / ARADILLA MARQUÉS, MARÍA JOSÉ ... pp. 1-29, [8-10] e ALZAGA RUIZ, ICÍAR «La reforma de la relación laboral especial de artistas en espectáculos públicos» in *Interpretación, aplicación y desarrollo de la última reforma laboral*, coord. por Angel Jurado Segovia, Javier Thibault Aranda, 2023, pp. 140-143.

Nonetheless, this new presumption does not clarify whether Article 15.5 TE applies to professionals in the arts sector. According to this article, workers who, during a 24-month period, are employed for more than 18 months, whether continuously or intermittently, in the same role in the same company or group of companies, under two or more contracts due to production circumstances, either directly or via temporary employment agencies, acquire the status of permanent workers. Article 5.2 of RD 5/2022 stipulates that fixed-term work contracts must precisely specify the reason for the temporary contract, the specific circumstances justifying it, and its relationship to the contract's duration.

Like Portugal, the Spanish amendments invoke a "presumption mechanism," namely an *iuris et de iure* presumption, asserting that fixed-term contracts violating this rule transform into permanent contracts.

This issue has been addressed by the Court of Justice of the European Union (CJEU), particularly in Case C-238/14, 26 February 2015, *European Commission v Grand Duchy of Luxembourg*³³, and Case C-331/17, 25 October 2018³⁴, *Ms Sciotto v the Fondazione Teatro dell'Opera di Roma*. In the first case, the CJEU concluded that "by maintaining derogations from measures designed to prevent the abusive use of successive fixed-term contracts with respect to occasional workers in the entertainment arts, the Grand Duchy of Luxembourg has failed to fulfil its obligations under Clause 5 of the Framework Agreement on fixed-term work of 18 March 1999, which is set out in the Annex to Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE, and CEEP".

The CJEU held that "Clause 5 of the framework agreement on fixed-term work concluded on 18 March 1999, which is set out in the Annex to Council Directive 1999/70/EC of 28 June 1999... must be interpreted as precluding national legislation, such as that at issue in the main proceedings, wherein the common law rules governing employment relationships, intended to penalise the misuse of successive fixed-term contracts by automatically transforming the fixed-term contract into a

³³ Case C-238/14, 26 february 2015, *European Commission v Grand Duchy of Luxembourg, Judgment of the Court (Third Chamber)*. Available at: <https://curia.europa.eu/juris/document/document.jsf?text=&docid=162535&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1410275>

³⁴ Case C-331/117, 25 October 2018, *Ms Sciotto v the Fondazione Teatro dell'Opera di Roma, Judgment of the Court (Tenth Chamber)*) Available at: <https://curia.europa.eu/juris/document/document.jsf?text=&docid=207010&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1399774>

contract of indefinite duration if the employment relationship exceeds a specific date, are not applicable to the operatic and orchestral foundations sector, where there are no other effective measures in the domestic legal system to penalise abuses identified in that sector.”

In Portugal, doctrinal interpretation has often concluded that the revoked legal regime established by Law 4/2008 was not compliant with Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE, and CEEP.

In Spain, until the amendments to RD 1435/1985, the debate centred around the conformity of allowing successive fixed-term contracts with Community legislation, particularly Directive 1999/70/EC, along with Spanish case law’s resort to the anti-fraud rule in Article 15.5 of the ET, which limits successive contracts.

In Italy, several changes are projected for the legal regime governing entertainment professionals. Legislative intervention for self-employed workers in the entertainment sector began with the “Sostegni-bis” Decree of 2021, which introduced innovations in social security and assistance within the sector. Later, this 2021 Decree was accompanied by Law 106/2022 of 15 July, which delegates the Government the authority to draft a Codice dello Spettacolo (Entertainment Code).

According to the governmental timetable presented during a meeting with theatre operators on 26 March 2024, the finalisation of the text is set to be presented to the Council of Ministers at the beginning of May, followed by consultations with regions and municipalities, with the measure anticipated to be approved by 18 August 2024, possibly by the end of July. Law 106/2022 authorises the Government to adopt a legislative decree containing provisions for fair compensation for self-employed workers in the performing arts, including agents and representatives. This may involve the recognition of a daily allowance as a distinct and additional element of remuneration for workers who are obligated to be available on call or guarantee exclusive performance. Consequently, from 1 January 2024, entertainment workers will be entitled to the new discontinuity allowance, which is an economic aid of approximately €1,500 on average, recognised for periods of interrupted work activity. This new provision is outlined in Decree 175 of 30 November 2023, which reforms the sector's support mechanisms and allowances.

Similar to the Portuguese statute, the new Italian Code is expected to integrate increased labour protection for cultural professionals in dependent employment relationships with a set of rights granted to self-employed workers. To achieve this, Law 106/2022 specifies the need for distinct regulatory and economic protections for intermittent and casual

labour contracts, as well as special protections for preparatory and instrumental activities. The same Law also aims to ensure that self-employed workers receive fair wages that reflect the quantity, quality, complexity of the work performed, and obliges public authorities to remunerate all self-employed work in the performing arts resulting from public tenders or selective processes. The Law further acknowledges the roles of agents or representatives in live performances and establishes an Observatory of the Show, intended to inform the Ministry of Culture, particularly regarding working conditions.

It is important to analyse the specific role assigned to the Observatory in terms of monitoring situations where the employment relationship is incorrectly qualified. However, Law 106/2024 does not seem to emphasise this dimension significantly, in contrast to Portuguese law.

In fact, the Italian approach does not strongly highlight the presumption of labour association and the contractual modalities that accommodate intermittency—important tools of the French regime designed to address the discontinuous nature of cultural work and combat precarity.

It remains questionable whether the ongoing changes in the Italian legal regime align completely with the views expressed by some scholars advocating for a “unitary level of protection for professionals in the cultural sector.”³⁵ Nonetheless, the new Italian Code could represent a step forward in providing a response tailored to the specific needs of the sector and ensuring greater protection for its professionals.

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