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Social security for authors and artists — current status and proposed changes — comments on the background of the Polish Draft Law of the Status of a Professional Artist

Ubezpieczenie społeczne twórców i artystów — stan obecny i propozycje zmian — uwagi na tle projektu ustawy o statusie artysty zawodowego

"Few people know that we creators do not exist legally.
We are neither entrepreneurs, nor employees, neither the unemployed, nor even freelancers (...)."
(Zygmunt Miłoszewski, 2019, p. 419)

Abstract

The author describes the applicable regulations regarding the social insurance of authors and artists. The article also assesses the direction of changes proposed in the draft law on the status of professional artist. As discussed the solutions in the field of social security for authors and artists require swift intervention by the legislator. At the same time, the proposals for solutions contained in the project are not consistent with the assumptions of the current social security system and may negatively affect the entire system in this form, leading to its greater disintegration. The proposed solutions can be improved with the involvement of experts into the field of social security system.

Keywords

artist, authors, social security, work contract, professional artist

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Introduction

The problem of social insurance for authors and artists has for years been of interest to lawyers and creators

Streszczenie

Autorka opisuje obowiązujące regulacje dotyczące ubezpieczenia społecznego twórców i artystów, ocenia również kierunek zmian proponowany w projekcie ustawy o statusie artysty zawodowego. Co do zasady obowiązujące w zakresie ubezpieczenia społecznego twórców i artystów rozwiązania wymagają szybkiej ingerencji ustawodawcy. Jednocześnie propozycje rozwiązań zawartych w projekcie nie są spójne z założeniami obowiązującego systemu ubezpieczeń społecznych i mogą wpływać w tej formie negatywnie na cały system doprowadzając do jego większej dezintegracji. Proponowane rozwiązania można jednak poprawić, z udziałem specjalistów zajmujących się ubezpieczeniem społecznym.

Słowa kluczowe

artysta, twórca, ubezpieczenie społeczne, umowa o dzieło, artysta zawodowy

and people involved in the development of the so-called creative sector in the economy. The ongoing research on the subject shows that the activity of a professional designer or artist is related to system based lack of social

security. This is due to the fact that in this industry incomes are non-standard — uncertain, irregular, often low — although high income is not out of ordinary. Above mentioned groups as a standard are not employed as full time employees. Contract work, which is not the basis of compulsory social insurance, is a prevailing form of employment in this professional group. The necessity to change the rules governing social insurance for artists and artists was pointed out in numerous speeches by the Ombudsman.¹ The weakness of the current regulations was drastically exposed by the epidemic of COVID-19. Many artists unable to perform their work turned to their audiences for financial support which was widely covered by the media. Notwithstanding the above, the current situation in the area of social security for authors and artists is also not adequate from the perspective of modern economy development because it is assumed that the creative services sector not only is less susceptible to the risks associated with the development of technology but also is a potential place for the development of creativity and innovation.²

This article describes the past and current regulations concerning the social protection of authors and artists and also evaluates the proposed changes and their direction.

Applicable regulation on social security insurance of creators and artists

The creative sector was covered by old-age pension insurance in 1973.³ It was a separate insurance for a small group of beneficiaries but for an important group of people as Waclaw Szubert (1987, p. 140) pointed out. The contribution was a percentage of the declared income from creative activity specified in the Act, with the upper and lower limits of income serving as the basis for the calculation determined. Payment of contributions was a condition for crediting periods of creative activity entitling to benefits. There was a Commission for Old-age Pension for Artists and Authors at the Ministry of Culture and Art and the decisions of this commission were binding on ZUS which was responsible for determining the right to benefits. This structure of the insurance was not financially self-sufficient i.e. the revenues from contributions covered only a small part of the expenses for benefits (Szubert, 1987, p. 141). This regulation referred to the so-called techniques of social supply (Bińczycka-Majewska, 2014, p. 73) despite its similarity to the employee system, it was much more favourable for the conditions it covered. The creator was not obliged to report to the commission to determine whether the activity performed was an artistic activity. They could therefore choose whether to join the system or stay outside of it (Bińczycka-Majewska, 2014, p. 74).

Regulations on social security insurance for authors and artists though subjected to some changes remained

in the basic form until the reform of the pension system in 1998 by which they were repealed.⁴ The reform implemented the postulate of universality of social insurance. It clearly departed from the paradigm that social insurance is employee insurance (Sanetra, 2011). At the same time, the catalog of insured persons was not and is not currently homogeneous. The Act on the Social Security System in art. 6 et seq. lists very many different insurance titles. In the system reformed in 1998, authors and artists were classified as persons conducting non-agricultural activities and were subjected to compulsory social insurance for old-age pension, disability and work accident. Sickness insurance is in this case voluntary. The terms author and artist were defined for the purposes of the Act. The author, referred to in paragraph 6 point 2 of the Act, is defined as a person who creates works that is the subject of copyright in the field of architecture, interior architecture, landscape architecture, urban planning, literature, fine arts, music, photography, audiovisual works, choreography and artistic violin making as well as folk art. The artist, referred to in par. 6 point 2, is defined as a person engaged in for profit artistic activity in the field of acting and stage art, theatre and stage directing, dance and circus art and in the field of orchestra and choir conducting, vocal arts, instrumental arts, costume and stage design, as well as in the field of audiovisual production of directors, screenwriters, image and sound operators, editors and stuntmen.

The activity is considered creative or artistic and the date of its commencement is determined in the form of the decision of the Commission for Old-age Pension for Artists and Authors acting with the *minister competent for culture*. *The minister competent for culture*, in consultation with the minister competent for social security, by regulation appoints a commission and defines its tasks in detail, as well as its composition and mode of operation. The activity is recognised as creative or artistic at the request of the person concerned, however the regulations do not clearly state when a person concerned is to submit such an application. According to M. Zieleniecki (2013, p. 53) it suggests that we are dealing with voluntary insurance coverage. The point is that the author or artist, in order to be considered insured for conducting non-agricultural activities must obtain a decision of the Commission for Old-age Pension for Artists and Authors indicating their business activity as creative or artistic and only then has the obligation to register for social insurance. Since the mere submission of an application for a determination that an activity is creative or artistic takes place at the request, it consequently also "at the request" and, therefore, as if "voluntarily" is covered by insurance for creative or artistic activities. This is not entirely correct since all insured persons paying contributions are obliged to register for social insurance during the course of their business to which the insurance obligation is connected.⁵ The Commission issues a decision on recognising the activity of a specific

person as creative, i.e. consisting in the creation of works within the scope indicated by statute and for profit artistic activity in the areas specified in the statute. The Commission's decision is declaratory. The implementing regulation shows that the Commission issues decisions on the basis of documents confirming the duration and nature of creative or artistic activities carried out on the basis of an employment contract, work contract, mandate contract, as well as catalogs from exhibitions, reviews, awards and distinctions awarded, and 1) a diploma of graduating from the appropriate type of art school or college in the field appropriate for the creative or artistic activity or 2) a certificate issued by the relevant association of authors or artists about the acquisition of professional skills through practice.⁶

As previously indicated, there are no specific provisions that state when the interested party is to submit an application in the above referred matter to the commission. At the same time, the commission's decision is not a permit to engage in creative (artistic) activities and this body is also not obliged to inform the disability pension authority pursuant to art. 37 section 2 of the system act, i.e. an ex officio registration of this activity for social security insurance.⁷ Article 13 point 4 of the System Act indicates, however, that authors and artists are subjected to compulsory retirement and disability insurance as well as accident insurance from the date of commencement of activities to the date of cessation of activities. The problem in this case is that it is not enough to register a business but that in order to do this the final decision of the Commission for Old-age Pension for Artists and Authors indicating said activity artistic or creative is necessary (Kostrzewa, 2019, p. 79).

Persons conducting creative or artistic activity are obliged to register themselves to social security insurance within 7 days from the date of receiving of the decision of the Commission for Old-age Pension for Artists and Authors setting the date of commencement of creative or artistic activity (the interested parties are not always fully aware of the consequences of abandonment of implementation of this obligation). They pay contributions on the principles provided for in art. 47 section 1a of the system act. This provision stipulates that authors and artists send monthly ZUS statements, personal monthly reports and pay contributions for the period of performing creative or artistic activity before the date of the decision of the Commission for Retirement Provision of Artists and Authors on the date of payment of contributions for the month in which they received decisions.⁸ However, in accordance with the adopted position of the courts, established in art. 47 section 1a u.s.u.s. the exception to the principle of the monthly transfer of social security contributions to the Social Insurance Institution (Article 47 (1) of the Act) applies to those creators and artists who obtained the decision of the Commission for Retirement Supply of Artists at the Ministry of Culture and Arts after commencing creative activity and who

may pay contributions once for the entire period before the decision issuance (Wajda, 2011, p. 619). The exercise of this statutory privilege for this group of insured persons is, however, possible only on condition that these contributions are due and therefore not barred. The author or artist, as every payer of own insurance contributions, should therefore register for insurance in the course of conducting business and pay due contributions throughout conducting business activity when due.⁹

It is worth noting that authors and artists thanks to being subjected to retirement and disability insurance are able to voluntarily join sickness insurance. The lack of being subjected to the former insurance makes it impossible to join the latter.

Proposed changes to the Draft Law of The status of a Professional Artist

The existing model of insurance for authors and artists has been criticised for many years primarily by the interested parties themselves. The last proposal to solve this problem was a draft law on the status of a professional artist developed, as reported on numerous websites,¹⁰ by the creative community under the auspices of the Ministry of Culture and National Heritage. This project proposes defining the term professional artist as a person professionally performing: a) creative activity or b) artistic activity as defined in the Act. The status of a professional artist would be granted to: 1) graduates of graduate studies at artistic universities or secondary education level of ballet schools; 2) natural persons who have documented artistic achievements confirmed by a representative organisation. The Council of the Polish Chamber of Artists would confirm the status of a professional artist by means of a decision indicating the period in which the status of the artist is confirmed. Confirmation of the status of a professional artist would occur on an application, which shall be attached by: 1) a diploma or certificate of completion of graduate studies at artistic universities or 2) a certificate confirming the artistic achievements issued by a representative organisation. When submitting an application for confirmation of the status of a professional artist, the artist would indicate a representative organisation acting on their behalf. A professional artist could change his representative organisation at any time by informing the Chamber Director. During the periods specified in the Act, as a rule every 3 years, the status of the artist would be verified. Obtaining the status of a professional artist would entitle the said artist to special social security rights. And so professional artists would pay contributions for old-age pension, sickness, disability and health insurance on the principles set out in separate provisions. Professional artists with average monthly income lower than the average salary in the national economy in the previous calendar year would be granted a supplement upon application. The

Minister competent for Culture and Protection of National Heritage would by regulation specify the amount of the subsidy, depending on the average monthly income, taking into account the need to maintain the budget balance and the financial position of professional artists. In order to co-finance the contributions of professional artists the Support Fund for Professional Artists acting as a state earmarked fund would be established.

Evaluation of the proposed solutions

An analysis of the pre- and post-reform social security regulations for authors and artists leads to the conclusion that these solutions in principle do not differ from each other. As a consequence the current solution also duplicates the disadvantages associated with the application of the previous regulation. Thus, when introducing the system law the legislator had no new idea on how social insurance of authors and artists should be organised. The idea was probably first and foremost to include this professional group in the created social insurance system. Probably due to the similarity in terms of potential income irregularity, its variable value and potential wide income spread between individuals in this group, the inclusion of creators and artists as a professional group in the universal system through the title referred to as conducting non-agricultural activities seemed justified. However, this means that conducting non-agricultural activities is essentially a collective and heterogeneous title covering very different forms of professional activity. The currently proposed solution, meeting the expectations of this professional group, aimed at ensuring that professional artists (as defined in the Act) are to pay contributions for old-age pension, sickness, disability and health insurance on the principles set out in separate regulations. This, however, can lead to the disintegration of the universal social insurance system. Instead of evolving the basic system and adapting it to social needs, it creates another separate system for authors and artists alongside currently applicable separate systems, e.g. for farmers or officers. The creators of the project on the status of professional artist propose to introduce another exclusion for this professional group. Meanwhile, the current state is criticised and needs to be changed. The legislator's goal should rather be to include in the system groups currently outside it. The social insurance system, as has long been indicated in the literature, should be universal and uniform (Wagner, 2009, p. 51). From the point of view of the social security system, the solution proposed by the authors of the draft law is inappropriate and irrational (Świątek-Rudoman, 2019, p. 114 et seq.). The acceptance of the proposed solution is also not justified by the fact that such separate systems exist in other countries, because the solution adopted under Polish law must be primarily consistent with the Polish legal system, and thus the adopted social insurance system.

In addition to the above, creating a separate system for authors and artists can also be viewed negatively in the context of art. 32 of the Constitution and art. 2a of the Act on the Social Security System and in the context of principles of equality. As indicated in the literature and case-law, persons belonging to the same category, i.e. possessing the same or similar significant characteristics, should be treated equally. Deviations from the principle of equality are potentially possible, but to comply with the principle of equality they must: 1) be of a relevant nature, and thus be directly related to the purpose and essential content of the regulations in which a given standard is contained, and serve the purpose and content; 2) be of a proportional nature, which means that the importance of the interest, which is to serve to differentiate the situation of the addressees of the standard, must be balanced with the interests that will be violated as a result of unequal treatment of similar entities, and 3) be associated with other values, constitutional principles or norms justifying different treatment of similar entities see Antonów, 2015, p. 9–28; Liszcz, 2014, p. 39 et seq.). This understanding of equality and situations in which a deviation is possible is accepted in social insurance. Given the above, it is assumed that while the title of insurance may justify different regulation of the issue of being subject to social insurance, the differentiation of the insured persons situation which is a departure from the principle of equal treatment requires, as every exception, special justification (Wagner, 2014, p. 222–223). Compared to the persons conducting non-agricultural activities, the situation of authors is not unique, as all persons conducting activity may have irregular income subjected to significant fluctuations. Finally, it is not convincing to say that this is a small group, and therefore creating separate rules for it is of no account for the functioning of the system. However, one can agree that this is a culture-forming group, and therefore particularly important for social development, and for this reason creating conditions for its development, also in the area of social insurance, is as important as taking care of e.g. the country's economic development. At the same time, however, taking into account the huge variety of titles indicated in art. 6 et seq. you can find a separate place in the system for this case, and so next to the title of conducting non-agricultural activities. Especially since among the titles mentioned in art. 6 there are titles related to permanent income generation and those in which the basis for social insurance coverage are social security benefits, and even those where there is no actual professional activity at all. It can therefore be imagined that the author or artist is covered by social insurance and pays a contribution, e.g. on the income received, and if this income is not present or does not exceed the specified amount, then the person pays the appropriate flat-rate contribution or this contribution is partly financed from a special fund or even subsidised by the state budget. It should be remembered, however, that the source of this subsidy is significant for the

qualifications of a given solution in the context of the method used for social security of a given group of people. Paying pension contributions from the budget with the State guaranteeing a minimum benefit from the Social Insurance Fund — is essentially the adoption of a supply rather than an insurance mechanism of social security system.

Summary

There is no doubt that regulations in the field of social security for creators and artists require swift intervention by the legislator. It cannot be overlooked that the problem of the widespread use of non-employment forms of agreements are also superimposed on the problems of social security in this professional group. This issue is extremely important from the point of view of social and economic development. On the one hand, they are deprived of

proper social protection. On the other hand, the search for such protection encourages authors and artists to give up or limit their artistic efforts which in turn is a waste of social capital. In general the solution proposed in the project in the area of social insurance requires refinement and to some extent modification including the participation of social insurance experts. The point is for the final solution to not only be appropriate from the point of view of the expectations of the creative environment, but also to be pro-development and consistent with other solutions adopted in the social insurance system and not to affect the whole system negatively (Sanetra, 2011, p. 19). The fact that the project is based on serious cross-sectional empirical research should be assessed positively. It still requires work as it should be subjected to substantive discussion among specialists and its fate should not be decided, as often happens, based on political reasons. This will certainly not be easy.

Przypisy/Notes

¹ <https://www.rpo.gov.pl/pl/content/do-mrpiws-zasad-ubezpieczenia-spoecznego-tworcow-i-artystow>; <https://www.rpo.gov.pl/pl/content/minister-rodziny-o-zasadach-ubezpieczenia-spoecznego-tworcow-i-artystow>; <https://www.rpo.gov.pl/pl/content/wystapienie-do-ministra-kultury-i-dziedzictwa-narodowego-ws-zasad-ubezpieczenia-spoecznego-artystow>; <https://www.rpo.gov.pl/pl/content/interwencja-rpo-do-premiera-ws-utworzenia-odrebnego-systemu-emerytalnego-dla-tworcow-i-artystow>; <https://www.rpo.gov.pl/pl/content/ubezpieczenia-spoeczne-tworcow-wicepremier-wyjasnia-co-znajdzie-sie-w-rzadowym-projeckcie>

² See the research: Ilczuk (ed.), Dudzik and Gruszka. (2014). *Rynek pracy artystów i twórców w Polsce. Research summary report*. Retrieved 15.10.2018 from: <https://docplayer.pl/2139948-Rynek-pracy-artystow-i-tworcow-w-polsce-pod-redakcja-doroty-ilczuk-raport-z-badan.html>, and Ilczuk, Karpińska cooperation and Stano-Strzałkowska, http://konferencjakultury.pl/_admin/stuff/okk_wsparcie_dla_tworcow_PREV2.pdf

³ Act of 27 September 1973 on the retirement provision of creators and their families, i.e. from 1983, no. 31, item 145.

⁴ The Act of 13 October 1998. Social Insurance System, OJ from 2020, item 266.

⁵ See. judgment of the Court of Appeal in Szczecin of December 3, 2015, II AUa 544/15, LEX 2086549.

⁶ Regulation of the Minister of Culture and Art of March 9, 1999 regarding the establishment of the Commission for Retirement Supply of Artists and a detailed description of its tasks, composition and mode of operation. *Journal of Laws* 1999.27.250.

⁷ Judgment of the Court of Appeal in Łódź of January 26, 2018, III AUa 418/17 Decision of the Commission for Retirement Supply of Artists.

⁸ Judgment as above.

⁹ Judgment of the Court of Appeal in Szczecin of December 3, 2015, II AUa 544/15, LEX 2086549.

¹⁰ http://konferencjakultury.pl/_admin/stuff/Projekt_ustawy_o_statusie_artysty_zawodowego_11.09._2019_.pdf

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Z recenzji dr hab. Krystyny Żołądkiewicz, prof. Uniwersytetu Gdańskiego

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