FAIR INTERNET coalition joint guidelines for the implementation of the 2019 Copyright Directive

November 2019

The following is an overview on the key provisions of the Directive of relevance to performers. It aims to highlight issues for performer organisations to consider when advocating for the most meaningful implementation of the Directive in their respective national systems. It is fair to say that the Directive has failed to harmonise the neighbouring rights of performers in the EU to the desired extent and that the aggressive lobby of the industry and online platforms, combined with the pressure on decision-makers to deliver by the end of their mandate, has resulted in provisions that are often very unclear or incoherent.

Performer organisations shall try and make the best of what is possible. It is important to highlight that there may not be a one-size-fits-all model and that national/industrial circumstances may well warrant different choices, also with respect to the various rights involved.

Performer organisations in all Member States, including CMOs, unions and guilds, are therefore encouraged to get together and define the collective strategy that is most likely to deliver the greatest benefit to their members.

I. Principle of appropriate and proportionate remuneration (Article 18 and Recital 73)

Article 18
Principle of appropriate and proportionate remuneration

1.Member States shall ensure that where authors and performers license or transfer their exclusive rights for the exploitation of their works or other subject matter, they are entitled to receive appropriate and proportionate remuneration.
2. In the implementation in national law of the principle set out in paragraph 1, Member States shall be free to use different mechanisms and take into account the principle of contractual freedom and a fair balance of rights and interests.

Recital 73

(73) The remuneration of authors and performers should be appropriate and proportionate to the actual or potential economic value of the licensed or transferred rights, taking into account the author's or performer's contribution to the overall work or other subject matter and all other circumstances of the case, such as market practices or the actual exploitation of the work.

A lump sum payment can also constitute proportionate remuneration but it should not be the rule. Member States should have the freedom to define specific cases for the application of lump sums, taking into account the specificities of each sector.

Member States should be free to implement the principle of appropriate and proportionate remuneration through different existing or newly introduced mechanisms, which could include collective bargaining and other mechanisms, provided that such mechanisms are in conformity with applicable Union law.

Comments

1. General

This Article provides that in the event that a performer licenses or transfers his/her exclusive rights for the exploitation of their performances, (s)he is entitled to receive "*appropriate and proportionate remuneration*". This principle applies to the license or transfer of any exclusive right. Special reference to the right of making available will be made in this analysis as and where appropriate.

Whereas Member States must ensure that performers receive appropriate and proportionate remuneration when they license or transfer their exclusive rights, they are free to decide by

which mechanism this may be achieved. A complementary and unwaivable right to equitable remuneration may be interpreted as being one such "mechanism".

2. **"Appropriate and proportionate remuneration": what does this mean?**

Appropriate

The meaning of "appropriate" is mostly a matter of subjective interpretation.

Proportionate

The English-language version of the Directive uses the word "proportionate". Other language versions use a word closer to "proportional" instead. A sample of some language versions of Article 18, together with an extract from Recital 73, is listed in Annex I.

Some Latin languages refer to "proportional" and some to "proportionate". In the Portuguese version, both words are used.

In French law, the word "*proportionné*" has a vague meaning similar to "appropriate". However, the word "*proportionnel*" has a long-established legal meaning in the field of authors' rights. In this context it would suggest that the remuneration payable must be directly correlated to the revenues derived from the exploitation of the performance. The use of the word "proportionelle" also points in the direction of the involvement of collective management with a direct relation between the CMO and the user.

In practice, this should provide performer organisations in France with a sound legal basis upon which to claim on-going remuneration as the new standard practice.

In English and other languages, "proportionate" can be interpreted objectively (i.e. the diameter of a circle is proportionate to the radius of a circle) or subjectively, i.e. to mean the same thing as "appropriate".

It is however important in this context to note that the remuneration payable must meet **two separate criteria**. It must be (i) appropriate **and** (ii) proportionate. The use of the word "**and**" very strongly suggests that the "objective" interpretation is in fact the only plausible one.

It is essential, when implementing these provisions, to argue for this interpretation to prevail, regardless of the choice of word in the Directive's language versions. It would be completely meaningless in fact to have a provision saying that remuneration should be "appropriate" **and** "appropriate".

Proportionate… to what?

Having established that the remuneration must be "proportional" or at least "objectively proportionate", it follows that it must be proportionate to "something". This is dealt with at Recital 73, which states that the remuneration must be appropriate and proportionate:

> "*to* ***the actual or potential economic value of the licensed or transferred rights,*** *taking into account the author's or performer's contribution to the overall work or other subject matter and all other circumstances of the case, such as market practices or the actual exploitation of the work*."

The economic value may be either actual or potential. In our view, these references should not be mutually exclusive but intended to refer to when the assessment of the economic value of the work or performance is made in time. Whilst the economic value may well be based on projections **before** commercial exploitation begins, or a new phase thereof, the proportionality of the remuneration can only be measured against the **actual** economic value once the work or the performance are exploited.

Actual economic value

There is no definition of "actual economic value" in the Directive. Member States can interpret this at their own discretion.

One strong option is to link "actual economic value" to actual use. This connection is also made in the first paragraph of Recital 73, stating that "the actual exploitation of the work" is one determining factor when assessing what is appropriate and proportionate. It may equally be derived from Recital 74, stating that authors and performers need information regarding the (actual) exploitation of their works and performances to assess the economic value of their rights. Recital 75 further clarifies that it is the "continued" economic value of these rights that matters here.

Contractual arrangements based on actual use and the (direct/indirect) revenue generated by the exploitation of the performance as well as statutory payments like an unwaivable right to remuneration paid by online platforms and subject to compulsory collective management (the focus of our FAIR INTERNET campaign), are therefore appropriate. Depending on union clout in each country, the latter may be the only real option, albeit by no means less challenging.

Potential economic value

The "*potential economic value*" suggests that the proportionality of the remuneration may be based on an estimate of future revenues at point of contract. However, any such assessment will rarely be accurate. For example, "Gangnam Style" by an unknown (in the western world) K-pop artist turned out to be one of the most popular YouTube videos of all times, proving that *potentially* any song can be successful. The same is true for audiovisual works, as many successful low-budget movies have proven.

Provisions in collective bargaining agreements establishing minimum terms of use and setting additional payments for performers in the audiovisual sector also strive to bring the perception of the economic value of a performance as close as possible to its real value.

The potential economic value, as the only reference, could be deemed proportional only where a lump sum (which must however remain the exception and only be used in specific predefined cases) was used to remunerate the author or the performer and the work or performance was not subsequently exploited.
Recital 73 provides that lump sums may be used but "should not be the rule". Lump sums are prepayments based on an estimate of the artist's contribution to the revenues that the exploitation **may** generate during a given period, before these revenues come into being. The proportionality of lump sum payments presupposes additional payments when exploitation takes place and certain thresholds are reached, either in terms of revenue or use. As the lump sum estimates may significantly diverge from actual value, they should be subject to regular reviews, based on objective information delivered under the transparency provision and therefore also in light of the actual economic value.

Other than in very limited cases, it is therefore essential to claim that the **actual** economic value of the licensed or transferred rights (i.e. linked to revenue from actual exploitation) must be the only general rule.

It is unlikely that national legislation implementing the Directive will go into such level of detail. In most cases, these types of issues will be left to the interpretation of national judges.

<u>The author's or performer's contribution to the overall work</u>
In addition to the remuneration being proportionate to the actual (or potential) economic value of the licensed or transferred rights, it must also take into account[1] (as stated in Recital 73):

> *"the author's or performer's contribution to the overall work or other subject matter and all other circumstances of the case, such as market practices or the actual exploitation of the work."*

It could be argued that the contribution of one performer may be greater than that of another performer in the same collective work and it might therefore be considered to be "*appropriate and proportionate*" that the first performer gets more than the second, e.g. in an orchestra, the contribution of the conductor may be deemed to be greater than that of a first violin. In a film, the contribution of a lead actor may be deemed greater than that of a supporting role.

1 Recital 73 is not completely clear as to whether the "wording "*taking into account*" applies to the adjectives "appropriate" and "proportionate" or only to the adjective "proportionate". The most likely interpretation is that it applies to both adjectives. In practice however, this may have minimal consequences.

In addition to the “qualitative” contribution of a performer, the “quantitative” contribution could also be considered. For example, one performer may play an entire symphony, whereas another may play only for a few minutes.

Provisions in collective bargaining agreements already make those distinctions to various degrees. Where remunerations are collectively managed, the internal distribution rules of CMOs can also determine how they may be distributed to performers on account of their individual contribution.

Market practices

The reference to “market practices” is problematic insofar as “market practices” will evolve throughout the life of the Directive. Indeed, the Directive itself aims at improving (i.e. changing) market practices and therefore it is unclear whether current market practices should be taken into account (which would seem illogical) or future market practices which, as yet, are unknown. It is noteworthy that Recital 73 provides that lump sum payments (currently a dominant market practice) should no longer be the rule. This would suggest that future (post-Directive) market practices should be taken into account.

Regardless of this issue, performer organisations can validly submit that on-going contractual and/or statutory payments do not interfere with market practices, as they are already industry practice to various degrees.

Lump sum payment

Recital 73 states:

> “*A lump sum payment can also constitute proportionate remuneration but it should not be the rule. Member States should have the freedom to define specific cases for the application of lump sums, taking into account the specificities of each sector.*”

It seems clear that "buy-out" payments are no longer acceptable under this Directive. Even though "lump sum payments" are not defined in the text, they cannot be deemed a synonym of buy-outs. Buy-outs are in fact wholesale acquisitions of rights for just about any possible use, known or yet to be discovered, against a one-off payment. It is arguably only when a lump sum payment is based on the potential economic value of the rights and the work or performance is not subsequently exploited, that it may appear to resemble in practice to a buy-out. Yet, even in these limited cases, a lump sum will not necessarily rival the extensive scope and length of a "buy-out" provision.

Lump sum payments, which should not be the rule, are therefore specific forms of remuneration packaging specific use fees into one comprehensive amount, for an agreed period of time and a defined geographical use. They are generally referred to as pre-payments and, whereas they do not "mechanically" follow revenue growth, they are proportional in the sense that any

additional use beyond the terms of the first payment (or agreed revenue threshold) must trigger another subsequent payment.

The proportionality of lump sum payments must also be assessed against actual economic value once exploitation has started and these payments are subject to the provisions in Chapter III of the Directive.

This wording proves that the legislator does not consider the status quo with regard to performers' remuneration, in particular the wholesale practice of buy-out payments, to be acceptable. This provides a strong argument in support of on-going contractual and statutory payments, proportionate to the actual economic value of the transferred/licensed rights.

Summary

In summary, it can be said that determining what is meant by "*appropriate and proportionate remuneration*" (Article 18) and the "*the actual or potential economic value of the licensed or transferred rights, taking into account the author's or performer's contribution to the overall work or other subject matter and all other circumstances of the case, such as market practices or the actual exploitation of the work*" (Recital 73) leaves much room for interpretation to the Member States . In some circumstances, Member States may be guided by national specificities (such as the use of the word "*proportional*" in France).

The implementation process is likely to be complex but at the same time provide opportunities to promote on-going payment mechanisms at national level, including a complementary right of equitable remuneration for making available for on-demand use, and fight against the abusive and widespread practice of buy-out payments.

Recital 73 clearly states that lump sums "should not be the rule". This indicates the need to depart from the *status quo*, and is helpful in supporting a claim for on-going remuneration mechanisms in synch with the revenue generated by the exploitation of audio and audiovisual performances.

In order to implement Article 18 specifically as regards appropriate and proportionate remuneration for on demand uses, performer organisations are encouraged to urge their national decision-makers to introduce into their national systems a right to remuneration for making available on demand for performers paid by online platforms and subject to mandatory collective management, complementary to any contractual arrangements that may otherwise apply.

For the purpose of introducing this complementary right, the following wording should serve as guidance:

"*Where a performer has transferred or assigned the exclusive right of making available on demand, and independent of any agreed terms for such transfer or assignment, the performer shall have the right to obtain an equitable remuneration to be paid by the user for the making available to the public of his fixed performance. The right of the performer to obtain an equitable remuneration for the making available to the public of his performance should be unwaivable and collected and administered by a performers' collective management organisation*".

Article 19: Transparency

Article 19
Transparency obligation

1. Member States shall ensure that authors and performers receive on a regular basis, at least once a year, and taking into account the specificities of each sector, up to date, relevant and comprehensive information on the exploitation of their works and performances from the parties to whom they have licensed or transferred their rights, or their successors in title, in particular as regards modes of exploitation, all revenues generated and remuneration due.

2. Member States shall ensure that, where the rights referred to in paragraph 1 have subsequently been licensed, authors and performers or their representatives shall, at their request, receive from sub-licensees additional information, in the event that their first contractual counterpart does not hold all the information that would be necessary for the purposes of paragraph 1.

Where that additional information is requested, the first contractual counterpart of authors and performers shall provide information on the identity of those sublicensees.

Member States may provide that any request to sub-licensees pursuant to the first subparagraph is made directly or indirectly through the contractual counterpart of the author or the performer.

3. The obligation set out in paragraph 1 shall be proportionate and effective in ensuring a high level of transparency in every sector. Member States may provide that in duly justified cases where the administrative burden resulting from the obligation set out in paragraph 1 would become disproportionate in the light of the revenues generated by the exploitation of the work or performance, the obligation is limited to the types and level of information that can reasonably be expected in such cases.

4. Member States may decide that the obligation set out in paragraph 1 of this Article does not apply when the contribution of the author or performer is not significant having regard to the overall work or performance, unless the author or performer demonstrates that he or she requires the information for the exercise of his or her rights under Article 20(1) and requests the information for that purpose.

5. Member States may provide that, for agreements subject to or based on collective bargaining agreements, the transparency rules of the relevant collective bargaining agreement are applicable, on condition that those rules meet the criteria provided for in paragraphs 1 to 4.

6. Where Article 18 of Directive2014/26/EU is applicable, the obligation laid down in paragraph 1

of this Article shall not apply in respect of agreements concluded by entities defined in Article 3(a) and (b) of that Directive or by other entities subject to the national rules implementing that Directive.

(74) Authors and performers need information to assess he economic value of rights of theirs that are harmonised under Union law. This is especially the case where natural persons grant a licence or a transfer of rights for the purposes of exploitation in return for remuneration. That need does not arise where the exploitation has ceased, or where the author or performer has granted a licence to the general public without remuneration.

(75) As authors and performers tend to be in the weaker contractual position when they grant licences or transfer their rights, they need information to assess the continued economic value of their rights, compared to the remuneration received for their licence or transfer, but they often face a lack of transparency. Therefore, the sharing of adequate and accurate information by their contractual counterparts or their successors in title is important for the transparency and balance in the system governing the remuneration of authors and performers. That information should be up-to-date to allow access to recent data, relevant to the exploitation of the work or performance, and comprehensive in a way that it covers all sources of revenues relevant to the case, including, where applicable, merchandising revenues. As long as exploitation is ongoing, contractual counterparts of authors and performers should provide information available to them on all modes of exploitation and on all relevant revenues worldwide with a regularity that is appropriate in the relevant sector, but at least annually. The information should be provided in a manner that is comprehensible to the author or performer and it should allow the effective assessment of the economic value of the rights in question. The transparency obligation should nevertheless apply only where copyright relevant rights are concerned. The processing of personal data, such as contact details and information on remuneration, that are necessary to keep authors and performers informed in relation to the exploitation of their works and performances, should be carried out in accordance with Article 6(1)(c) of Regulation (EU) 2016/679.

(76) In order to ensure that exploitation-related information is duly provided to authors and performers also in cases where the rights have been sub-licensed to other parties who exploit the rights, this Directive entitles authors and performers to request additional relevant information on the exploitation of the rights, in cases where the first contractual counterpart has provided the information available to them, but that information is not sufficient to assess the economic value of their rights. That request should be made either directly to sub-licensees or through the contractual counterparts of authors and performers. Authors and performers and their contractual counterparts should be able to agree to keep the shared information confidential, but authors and performers should always be able to use the shared information for the purpose of exercising their rights under this Directive. Member States should have the option, in compliance with Union law, to provide for further measures to ensure transparency for authors and

performers.

(77) When implementing the transparency obligation provided for in this Directive, Member States should take into account the specificities of different content sectors, such as those of the music sector, the audiovisual sector and the publishing sector, and all relevant stakeholders should be involved when deciding on such sector-specific obligations. Where relevant, the significance of the contribution of authors and performers to the overall work or performance should also be considered. Collective bargaining should be considered as an option for the relevant stakeholders to reach an agreement regarding transparency. Such agreements should ensure that authors and performers have the same level of transparency as or a higher level of transparency than the minimum requirements provided for in this Directive. To enable the adaptation of existing reporting practices to the transparency obligation, a transitional period should be provided for. It should not be necessary to apply the transparency obligation in respect of agreements concluded between rightholders and collective management organisations, independent management entities or other entities subject to the national rules implementing Directive2014/26/EU, as those organisations or entities are already subject to transparency obligations under Article 18 of Directive2014/26/EU. Article 18 of Directive2014/26/EU applies to organisations that manage copyright or related rights on behalf of more than one rightholder for the collective benefit of those rightholders. However, individually negotiated agreements concluded between rightholders and those of their contractual counterparts who act in their own interest should be subject to the transparency obligation provided for in this Directive.

Comments

1. To whom must producers provide transparency information?

> *"Art 19.1 Member States shall ensure that **authors and performers** receive (…) information (…) from the parties to whom they have licensed or transferred their rights, or their successors in title."*
>
> *Art 19.2 Member States shall ensure that, where the rights referred to in paragraph 1 have subsequently been licensed, authors and performers **or their representatives** shall… receive from sub-licensees additional information…"*

Whilst the first paragraph seems to suggest that authors and performers may only be entitled to **receive** information directly from their first contracting parties, the second paragraph also warrants "their representatives" to **request** any missing information from third party licensees.

The Directive does not define here the concept of "representatives". We may deduce from Article 21 in the Directive that this term may be understood to include "representative

organisations", e.g. trade unions, guilds, CMOs, professional associations, etc. as long as they have a lawful entitlement/mandate. These organisations have a clear duty to act in the best interest of their members.

Recital 79, addressing the same topic as Article 21, surprisingly only mentions "representatives" of authors and performers. It is not clear whether these two concepts are intended as synonyms and therefore whether only "representative organisations" may act on behalf of authors and performers for the purposes of this Directive– excluding other intermediaries (e.g. agents, private firms, etc.) who may have a vested interest and not necessarily be acting in the best interest of their client performers. Trade unions, CMOs, guilds and professional associations, with a clear representativeness, are to be preferred – if possible – in the implementation process.

In the event that a CMO has been contractually, or by rule of national law, authorised to act on behalf of a performer with respect to these rights, no difficulty shall arise. The same is true were a collective bargaining agreement to identify the lawful receiver of such information. However, where no such authorisation exists and this process (or production) is not regulated by collective agreement, on what basis may a performer organisation (a CMO or a union) claim to receive transparency information from a producer (excluding information concerning sublicensing referred to in Article 19.2) on behalf of individual performers?

If a CMO does not manage a relevant performer's rights (i.e. the exclusive making available right), a producer may be entitled under this wording to reject any obligation to supply this information to a CMO. Equally, if transparency provisions in a collective agreement do not identify the lawful receiver of information related to exclusive rights in performances made under that agreement (or a production is not made under such agreement), a producer might insist on delivering such information only to performers individually or, at best, their agents.

The information may also end up being delivered to a variety of "representatives", where their entitlements are limited to certain rights or uses.

The Recitals do not contradict the wording of Article 19.1, e.g.:

> *Recital 75*
> *The information should be provided in a manner that is comprehensible to the author or performer and it should allow the effective assessment of the economic value of the rights in question.*

When implementing the Directive, it is important that Member States make it absolutely clear that Article 19.1 also refers to "performers or their representatives" and clarify how performer organisations may be lawfully entitled to receive such information on behalf of the performers they represent. This seems to be the understanding behind Recital 78 in the Directive addressing

the issue of contractual adjustments, where it refers to "*representatives of (…) performers duly mandated in accordance with national law [and] in compliance with Union law*."

Article 19.5 provides Member States with the flexibility to use collective bargaining agreements as a possible alternative to national provisions implementing the transparency obligation. Trade unions should therefore make the best of such provision to articulate a comprehensive transparency policy, ensuring the same (or higher) level of transparency than the minimum requirements provided in the Directive. These agreements should clearly define how the transparency information needs to be delivered and to whom.

Since not every production may be covered by a collective bargaining agreement, especially in countries with low levels of unionisation, uncertainties may persist as to whether trade unions may be the lawful recipients of information in those cases – which is why additional clarity in the implementing legislation is necessary.

2. Who has to provide the information?

Article 19.1 obliges Member States to ensure that authors and performers receive information from their "direct contractual counterparts, or their successors in title".

Article 19.2 extends the transparency obligation to "sub-licensees". In this case, however, the delivery of information is subject to the **explicit request** of performers or their representatives and only where the first contractual counterpart (the producer) does not hold all the information. The first contractual counterpart must in this case provide information on the identity of those sub-licensees. It is left to Member States to decide that such a request is made directly by the author or performer (or, by deduction, by their "representative") or indirectly through their contractual counterpart.

As for paragraph 19.1, national implementing rules should clarify how performer organisations may be entitled to claim such information from third party licensees. Collective bargaining, on the other hand, may provide further guidance with respect to productions made under union agreements.

Frequency and accuracy

The Article clearly notes that information must be provided on a regular basis (leaving some discretion again to Member States in deciding what is appropriate for each relevant sector) and, as an absolute minimum, "once a year". It must be up to date, relevant and comprehensive. Recital 75 clarifies that it must deliver "recent data [with respect to] the exploitation of the performance" and that it must cover "all modes of exploitation and (…) all relevant revenues worldwide, including, where applicable, merchandising revenues".

3. The obligation to provide information on the "Economic value of the rights"

Recital 75 provides:

> *(75) As authors and **performers** tend to be in the weaker contractual position when they grant licences or transfer their rights, they **need information to assess the continued economic value of their rights, compared to the remuneration received for their licence or transfer**…*
>
> *As long as exploitation is ongoing, contractual counterparts of authors and performers should provide information available to them on all modes of exploitation and on all relevant revenues worldwide with a regularity that is appropriate in the relevant sector, but at least annually. The information should… allow the effective assessment of the economic value of the rights in question…"*

What is relevant here is the "continued" economic value of the licensed or transferred rights, compared to the remuneration received for the licence. As some agreements may provide for on-going payments (e.g. royalties and/or residuals) it is legitimate to contend that the reference here must be the remuneration received **or otherwise agreed** for the licence/transfer.

There is no indication that this obligation may exclude contracts based on lump sum payments, as it was at one point suggested in the legislative process. Industry stakeholders will try to argue in national consultations that these payments (that may not be the general practice anymore) are justified when the performance is "not significant" and advocate for an exemption from reporting obligations (ex Article 19.4) in those cases.

Recital 74 clarifies that the "need for information" ceases to be relevant "where the exploitation has ceased or where the (…) performer has granted a licence **to the general public** (*i.e. a non-exclusive licence*) without remuneration".

Possible mitigations/exemptions

Assessing the on-going value of an individual performer's contribution to a particular work will be very challenging to monitor in practice, especially for certain types of online exploitation, e.g. on SVOD or YouTube-like platforms.

Article 19 opens up the possibility for Member States to consider less onerous transparency reporting obligations, or even exemptions, in certain cases.

3. "(…) *Member States may provide that in duly justified cases where the administrative burden resulting from the obligation set out in paragraph 1 would become disproportionate in the light of the revenues generated by the exploitation of the work or*

performance, the obligation is limited to the types and level of information that can reasonably be expected in such cases".

4. "*Member States may decide that the obligation set out in paragraph 1 of this Article does not apply when the contribution of the author or performer is not significant having regard to the overall work or performance (…)*"

Recital 77 encourages Member States to consult with stakeholders from all relevant sectors when deciding on sector-specific obligations and adds that:

> *"Where relevant, the significance of the contribution of authors and performers to the overall work or performance should also be considered."*

The exact scope of these two limitations is very uncertain.

The mitigation of reporting obligations (Article 19.3) cannot be generalised and must be limited to **duly justified cases**. Also, the use of the verb "become" instead of "be" indicates that each work/performance must be treated differently and must be subject to a regular assessment.

It is questionable whether, and how often, a producer may in good faith appeal for a mitigation of the reporting obligations. As the argument must be based on "*the revenues generated by the exploitation of the work*", this means that the collection of all relevant information (arguably the most burdensome part of the obligation) will have to be carried out anyway. It might actually be more onerous for the producer, at this stage, having to justify (on a case-by-case basis) only the delivery of information that may "*reasonably be expected*".

Article 19.4 stipulates that the reporting exemption is optional for the Member States. The Recital however seems to suggest that this may well be a deciding factor in some sectors.

Further, the interpretation of the word "*significance*" may easily become extremely subjective. For instance, in popular music, rightly or wrongly, the public perception of the contribution (to the song's popularity) of the singer is that it is usually greater than that of e.g. the bass player. We should not let such subjective views determine who should or should not benefit from an access to minimum transparency. A musician plays on a recording because it is required by the composer or/and because their contribution makes the overall performance different from what it would be without them. Either way, each musician plays an objective role in the performance's identity. There may be variations in significance, but no contribution has zero-significance. From that point of view, access to transparency should be granted to all performers in a recording, but it might be acceptable that reporting be delivered on a more frequent basis to those performers who play a greater role.

To some extent, the same applies also to audiovisual works, where lead actors often help building an audience and thus their contribution may be deemed to be "more significant" than that of other less-known performers.

Consultations by the Member States with all concerned stakeholders will be of key importance to clarify these provisions. Where possible, collective bargaining may also help delineate these boundaries more clearly. In the absence of clear guidelines, abundant litigation is otherwise to be expected.

The exemption in Article 19.4 is however not an absolute one, and it may be overrun if “the author or performer demonstrates that he or she requires the information for the exercise of his or her rights under Article 20.1 and requests the information for that purpose”. This language was the only possible alternative to an outright reporting exemption for "less significant" performances that the industry tried to push through up until the end. Its relevance in practice is debatable and performer organisations should therefore seek to narrowly (and objectively) frame the concept of "significance".

Member State and stakeholders' flexibility

Recital 76 notes that Member States are allowed to provide further measures through national provisions to ensure transparency for authors and performers. The same goes for collective agreements, whereby unions and producer bodies may agree on a "*higher level of transparency that the minimum requirements provided for in [the] Directive*".

Consideration should be given at the implementation stage to maximising the potential of these provisions, with a view to optimising reporting obligations, narrowly framing all possible forms of mitigation and/or exception.

Coming into force

Agreements for the licence or transfer of rights of authors and performers benefit from a transitional period. They shall be subject to the transparency obligation in Article 19 as from one year after the transposition date, i.e. 3 years after the Directive’s entry into force (see Article 27).

To conclude, Article 19 is of key importance to all performer organisations, regardless of the remuneration mechanism.

Performer organisations must remain very vigilant, and narrowly define cases where exceptions to reporting obligations or the delivery of less comprehensive information may be allowed. The wider the scope of application of Article 19, in fact, the more the performers will be able to exercise their right under Article 20.1 and seek to adjust initially agreed terms of payment in light of subsequent revenue.

Article 20: Contract adjustment mechanism

Article 20
Contract adjustment mechanism

1. Member States shall ensure that, in the absence of an applicable collective bargaining agreement providing for a mechanism comparable to that set out in this Article, authors and performers or their representatives are entitled to claim additional, appropriate and fair remuneration from the party with whom they entered into a contract for the exploitation of their rights, or from the successors in title of such party, when the remuneration originally agreed turns out to be disproportionately low compared to all the subsequent relevant revenues derived from the exploitation of the works or performances.

2. Paragraph 1 of this Article shall not apply to agreements concluded by entities defined in Article 3(a) and (b) of Directive2014/26/EU or by other entities that are already subject to the national rules implementing that Directive.

(78) Certain contracts for the exploitation of rights harmonised at Union level are of long duration, offering few opportunities for authors and performers to renegotiate them with their contractual counterparts or their successors in title in the event that the economic value of the rights turns out to be significantly higher than initially estimated. Accordingly, without prejudice to the law applicable to contracts in Member States , a remuneration adjustment mechanism should be provided for as regards cases where the remuneration originally agreed under a licence or a transfer of rights clearly becomes disproportionately low compared to the relevant revenues derived from the subsequent exploitation of the work or fixation of the performance by the contractual counterpart of the author or performer. All revenues relevant to the case in question, including, where applicable, merchandising revenues, should be taken into account for the assessment of whether the remuneration is disproportionately low. The assessment of the situation should take account of the specific circumstances of each case, including the contribution of the author or performer, as well as of the specificities and remuneration practices in the different content sectors, and whether the contract is based on a collective bargaining agreement. Representatives of authors and performers duly mandated in accordance with national law in compliance with Union law, should be able to provide assistance to one or more authors or performers in relation to requests for the adjustment of the contracts, also taking into account the interests of other authors or performers where relevant. Those representatives should protect the identity of the represented authors and performers for as long as that is possible. Where the parties do not agree on the adjustment of the remuneration, the author or performer should be entitled to bring a claim before a court or other competent authority. Such mechanism should not apply to contracts concluded by entities defined in Article 3(a) and (b) of Directive2014/26/EU or by other entities subject to national rules implementing Directive2014/26/UE.

Comments

This provision is subject to the terms of Recital 78 stating that these provisions are *"(…) without prejudice to the law applicable to contracts in Member States"*. Accordingly, the obligations in Article 20 may be harder to enforce in countries with a "strong" contract law, such as the UK. However, despite the fact that this Recital seems to only "suggest" the establishment of contract adjustment mechanisms in national legal systems, the language in Article 20 is more assertive, as it says that "*Member States shall ensure (…)*", and could provide more leeway that expected even in those countries.

Article 20.1 obliges Member States to ensure that, in the absence of an applicable collective bargaining agreement providing for a similar adjustment mechanism, authors and performers or their representatives are entitled "*to claim additional, appropriate and fair remuneration*" from their direct counterpart or their successors in title "*when the remuneration originally agreed turns out to be disproportionately low compared to all the subsequent relevant revenues derived from the exploitation of the works or performances*".

The triggering factor is therefore the fact that the remuneration agreed in the original contract must be "disproportionately low" compared to (Recital 78) "*the subsequent exploitation of the work or fixation of the performance by the contractual counterpart of the author or the performer*". The Recital goes on to say that:

> *"All revenues relevant to the case in question, including, where applicable, merchandising revenues, should be taken into account for the assessment of whether the remuneration is disproportionately low"*

Note, however, that this assessment should also take account of:

> *"the specific circumstances of each case, including the contribution of the author or performer, as well as of the specificities and remuneration practices in the different content sectors, and whether the contract is based on a collective bargaining agreement".*

It is not hard to anticipate that, in practice, any such claim is likely to lead to litigation and that the courts will have an important role to play in clarifying these concepts.

The fact that a contract is based on a collective bargaining agreement and that, therefore, the remuneration is compliant with union minimum terms is indicative but cannot be decisive *per se* to exclude all disproportion between such remuneration and the subsequent revenues. Union agreements, in fact, establish minimum fees that effectively become industry standards, but do not always manage to tie those fees to actual revenue. Even when they do, the direct and indirect revenue generated by exploitation of the work of performers may still overshadow the remuneration paid out to them. This is particularly true for the mass use of performances. For

this reason, and also in order to prevent excessive litigation, a complementary and unwaivable remuneration right for making available on demand is urgently needed, paid by online platforms and subject to mandatory collective management.

It is worth noting that, once again, the Directive empowers "representatives" of performers to make such claim on their behalf. As we mentioned earlier in this analysis, it will be important to clarify in the implementation phase the conditions upon which performer organisations may be entitled to do so.

It is also worth mentioning that the following Article 21 (about the alternative dispute settlement mechanism) refers to "representative organisations" instead. The lack of coherence in the text of the Directive is of course regrettable. As previously mentioned, this is the result of a hasty and hectic conclusion of the negotiation. Whilst it may be impossible to argue convincingly from this Article for a harmonised interpretation limiting the representation of authors and performers to "organisations" (rather than, for instance, agents or other vested businesses), this does bring further credit to the fact that unions, guilds or CMOs may well be entrusted with that role.

In an attempt to protect authors and performers from blacklisting, Recital 78 provides that "*representatives of authors or performers should protect the identity of the represented authors/performers for a long as it is possible*". It further states that "*where the parties do not agree on the adjustment of the remuneration, the author and performer should be entitled to bring a claim before a court or other competent authority*". Once again, it would be consistent with the spirit of the Directive to assume that "representative organisations" may also do this on their behalf (also considering that the latter are expressly entitled by Article 21 to submit a dispute to a voluntary, alternative dispute settlement mechanism).

There are no options in principle here to limit the entitlement to claim a contractual adjustment to "significant" contributors. However, the limitations in Article 19 will certainly impact on who may invoke such prerogative – making a narrow implementation of the exception in Article 19.4 in national law all the more important.

Performers may be deprived from fair revenues as a mere consequence of their contribution being arbitrarily found not significant enough in the first place. Contractual adjustment should therefore also allow a re-assessment of the "significance" of the performer's contribution, in case this factor is behind the "disproportionately low" remuneration.

As noted above, Recital 78 does state that "*the assessment of the situation should take account of the specific circumstances of each case, including the contribution of the author or performer* (…)". However, this is to define "*whether the remuneration is disproportionately low*" and not who may or may not submit a claim.

Article 21 expressly mentions collective bargaining agreements as a way to also regulate over contractual adjustments. Trade unions are thus encouraged to negotiate new provisions in their agreements determining how minimum terms and conditions may be revised on individual cases on account of subsequent, disproportionate profits.

Article 21: Alternative dispute resolution procedure

Article 21
Alternative dispute resolution procedure

Member States shall provide that disputes concerning the transparency obligation under Article 19 and the contract adjustment mechanism under Article 20 may be submitted to a voluntary, alternative dispute resolution procedure. Member States shall ensure that representative organisations of authors and performers may initiate such procedures at the specific request of one or more authors or performers.

(79) Authors and performers are often reluctant to enforce their rights against their contractual partners before a court or tribunal. Member States should therefore provide for an alternative dispute resolution procedure that addresses claims by authors and performers, or by their representatives on their behalf, related to obligations of transparency and the contract adjustment mechanism. For that purpose, Member States should be able to either establish a new body or mechanism, or rely on an existing one that fulfils the conditions established by this Directive, irrespective of whether those bodies or mechanisms are industry-led or public, including when part of the national judiciary system. Member States should have flexibility in deciding how the costs of the dispute resolution procedure are to be allocated. Such alternative dispute resolution procedure should be without prejudice to the right of parties to assert and defend their rights by bringing an action before a court.

Comment

Article 21 provides that disputes concerning Articles 19 and 20 **may** be submitted to a voluntary, alternative dispute resolution procedure and also that authors' and performers' representative organisations may initiate such procedures at the specific request of one or more authors and performers.

The Directive refers to "representative organisations" in the Article and to "representatives" in the corresponding Recital. Whilst it is clear here that only representative organisations (e.g. trade unions, guilds, professional associations or CMOs) may be entitled to act on behalf of individual authors or performers, the same may be argued, as mentioned previously, with respect to all other provisions in Chapter III.

Transposing legislation however will need to clarify the requirements that these organisations will need to fulfil for this purpose.

This Article is self-explanatory and its success (if it is to become a useful tool for performers) will largely depend upon the type of "*alternative dispute resolution procedure*" that Member States

will incorporate in their legislation. This is something that should be given close attention during the implementation period.

Article 22: Right of revocation

Article 22
Right of revocation

1. Member States shall ensure that where an author or a performer has licensed or transferred his or her rights in a work or other protected subject matter on an exclusive basis, the author or performer may revoke in whole or in part the licence or the transfer of rights where there is a lack of exploitation of that work or other protected subject matter.

2. Specific provisions for the revocation mechanism provided for in paragraph 1 may be provided for in national law, taking into account the following:
(a) the specificities of the different sectors and the different types of works and performances; and
(b) where a work or other subject matter contains the contribution of more than one author or performer, the relative importance of the individual contributions, and the legitimate interests of all authors and performers affected by the application of the revocation mechanism by an individual author or performer.

Member States may exclude works or other subject matter from the application of the revocation mechanism if such works or other subject matter usually contain contributions of a plurality of authors or performers.

Member States may provide that the revocation mechanism can only apply within a specific time frame, where such restriction is duly justified by the specificities of the sector or of the type of work or other subject matter concerned.

Member States may provide that authors or performers can choose to terminate the exclusivity of the contract instead of revoking the licence or transfer of the rights.

3. Member States shall provide that the revocation provided for in paragraph 1 may only be exercised after a reasonable time following the conclusion of the licence or the transfer of the rights. The author or performer shall notify the person to whom the rights have been licensed or transferred and set an appropriate deadline by which the exploitation of the licensed or transferred rights is to take place. After the expiry of that deadline, the author or performer may choose to terminate the exclusivity of the contract instead of revoking the licence or the transfer of the rights.

4. Paragraph 1 shall not apply if the lack of exploitation is predominantly due to circumstances that the author or the performer can reasonably be expected to remedy.

5. Member States may provide that any contractual provision derogating from the revocation mechanism provided for in paragraph 1 is enforceable only if it is based on a collective bargaining agreement.

(80) When authors and performers license or transfer their rights, they expect their work or performance to be exploited. However, it could be the case that works or performances that have been licensed or transferred are not exploited at all. Where those rights have been transferred on an exclusive basis, authors and performers cannot turn to another partner to exploit their works or performances. In such a case, and after a reasonable period of time has elapsed, authors and performers should be able to benefit from a mechanism for the revocation of rights allowing them to transfer or license their rights to another person. As exploitation of works or performances can vary depending on the sectors, specific provisions could be laid down at national level in order to take into account the specificities of the sectors, such as the audiovisual sector, or of the works or performances, in particular providing for time frames for the right of revocation. In order to protect the legitimate interests of licensees and transferees of rights and to prevent abuses, and taking into account that a certain amount of time is needed before a work or performance is actually exploited, authors and performers should be able to exercise the right of revocation in accordance with certain procedural requirements and only after a certain period of time following the conclusion of the licence or of the transfer agreement. Member States should be allowed to regulate the exercise of the right of revocation in the case of works or performances involving more than one author or performer, taking into account the relative importance of the individual contributions.

Comments

Article 22.1 obliges Member States to ensure that "*when authors and performers license or transfer their rights concerning a work or other subject-matter on an exclusive basis, the author and performer may revoke in whole or in part the licence or transfer of rights, where there is a lack of exploitation of the work or other subject matter*". This right would allow authors and performers to then license/transfer their exclusive rights to another person.

However, the Directive does not define what "lack of exploitation" means exactly. For instance, is the mere fact that the fixation of a performance is made available online enough to consider that the exploitation of such performance is still occurring?

Article 22.2 states that specific provisions for the revocation mechanism may be provided for in national law, taking into account the "*specificities of the different sectors and types of works and performances*" and, in the presence of several authors or performers, the "*relative importance of the individual contributions*" as well as the "*legitimate interests"* of all other involved authors or performers.

Moreover, Member States may choose to **exclude** works and other subject-matter if they contain contributions of a plurality of authors and performers, to subject the exercise of the revocation right to a specific time frame "*where it is duly justified by the specificities of the sector, type of work or protected subject-matter concerned*" and to provide that authors and performers may choose to terminate the exclusivity of the contract instead of revoking the rights.

This wording in Article 22.2 (a) and (b) lacks clarity and raises a number of questions.

In Article 22.2 (a) what is meant by the "*specificities of the different sectors*"? There are no objective definitions. Article 22.2 (b) raises the issue of how to evaluate the "*relative importance of the individual contributions*". Should it be based on the qualitative contribution of a performer, the quantitative contribution or other criteria? The confusion is further increased by the wording "*legitimate interests*". It is impossible to understand what this means exactly and no further explanation is provided by Recital 80.

These issues are particularly relevant in the case of performers (as opposed to authors) since more than one of them will contribute to the vast majority of performances. The question of whether the contribution of one performer is sufficient to allow him/her to invoke the right of revocation will be very hard to define and ultimately will be a matter for the national courts to determine. The large degree of discretion given to Member States is illustrated by the wording in Recital 80 which states that "*Member States should be allowed to regulate the exercise of the right of revocation in the case of works or performances involving more than one author or performer, taking into account the relative importance of the individual contributions*".

The implementation of these provisions should therefore be closely monitored at national level, particularly on account of the high degree of discretion given to the Member States.

Article 22.3 states that the revocation can only be exercised "*after a reasonable time after the conclusion of the licence or transfer agreement*". The author and performer must notify the licensee or transferee and set an "*appropriate deadline*" by which the exploitation of the rights is to take place. After the expiration of that deadline, the author and performer may choose to terminate the exclusivity of the contract instead of revoking the licence or transfer.

Article 22.4 provides a derogation from the revocation mechanism for situations where the non-exercise of the rights is "*predominantly due to circumstances which the author and performer can be reasonably expected to remedy*".

Article 22.5 notes that contractual provisions that derogate from the revocation mechanism are enforceable only if they are based on a collective bargaining agreement.

Comment

Clearly, the effectiveness of this Article will greatly depend on the level of detail in implementing legislation. For example, strictly speaking a performance may be exploited for as long as it is accessible via an online content sharing service provider. However, it would seem unreasonable to make this Article meaningless purely by virtue of a performance being indefinitely accessible. Rather than speaking about a "lack of exploitation" per se there has to be a clear link to the "promotion" of a performance for this Article to be a useful tool for performers.

Article 23: Common provisions

Article 23
Common provisions

1. Member States shall ensure that any contractual provision that prevents compliance with Articles 19, 20 and 21 shall be unenforceable in relation to authors and performers.
2. Members States shall provide that Articles 18 to 22 of this Directive do not apply to authors of a computer program within the meaning of Article 2 of Directive2009/24/EC.

(81) The provisions regarding transparency, contract adjustment mechanisms and alternative dispute resolution procedures laid down in this Directive should be of a mandatory nature, and parties should not be able to derogate from those provisions, whether in contracts between authors, performers and their contractual counterparts, or in agreements between those counterparts and third parties, such as non-disclosure agreements. As a consequence, Article 3(4) of Regulation (EC) No 593/2008 of the European Parliament and of the Council1 should apply to the effect that, where all other elements relevant to the situation at the time of the choice of applicable law are located in one or more Member States , the parties' choice of applicable law other than that of a Member State does not prejudice the application of the provisions regarding transparency, contract adjustment mechanisms and alternative dispute resolution procedures laid down in this Directive, as implemented in the Member State of the forum.

Comment

This provision ensures that the mandatory obligations in Articles 19, 20 and 21 of this Directive may not be dodged by contractual arrangements. Recital 81 explains that this is so, "*whether included in the contracts between authors, performers and their contractual counterparts or in agreements between those counterparts and third parties such as non-disclosure agreements*".

Recital 82: Free licenses

(82) Nothing in this Directive should be interpreted as preventing holders of exclusive rights under Union copyright law from authorising the use of their works or other subject matter for free, including through non-exclusive free licences for the benefit of any users.

Comment

Recital 82 provides that exclusive rightholders may license their works or other subject-matter for free, including through non-exclusive free licences for the benefit of any users.

ANNEX I

Language	Article 18	Recital 73
English	Principle of appropriate and **proportionate** remuneration 1.Member States shall ensure that where authors and performers license or transfer their exclusive rights for the exploitation of their works or other subject matter, they are entitled to receive appropriate and **proportionate** remuneration.	(73) The remuneration of authors and performers should be appropriate and **proportionate** to the actual or potential economic value of the licensed or transferred rights, taking into account the author's or performer's contribution to the overall work or other subject matter and all other circumstances of the case, such as market practices or the actual exploitation of the work...
Spanish	Principio de remuneración adecuada y **proporcionada** 1. Los Estados miembros garantizarán que, cuando los autores y los artistas intérpretes o ejecutantes concedan licencias o cedan sus derechos exclusivos para la explotación de sus obras u otras prestaciones, tengan derecho a recibir una remuneración adecuada y **proporcionada.**	(73) La remuneración de autores y de artistas intérpretes o ejecutantes debe ser adecuada y **proporcionada** respecto del valor económico real o potencial de los derechos objeto de licencia o cedidos, teniendo en cuenta la contribución del autor o el artista intérprete o ejecutante al conjunto de la obra u otra prestación y todas las circunstancias del caso, como las prácticas de mercado o la explotación real de la obra. …
French	Principe de rémunération appropriée et **proportionnelle** 1. Les États membres veillent à ce que, lorsque les auteurs et les artistes interprètes ou exécutants octroient sous licence ou transfèrent leurs droits exclusifs pour l'exploitation de leurs œuvres ou autres objets protégés, ils aient le droit de percevoir une rémunération appropriée et **proportionnelle.**	(73) La rémunération des auteurs et artistes interprètes ou exécutants devrait être appropriée et **proportionnelle** à la valeur économique réelle ou potentielle des droits octroyés sous licence ou transférés, compte tenu de la contribution de l'auteur ou de l'artiste interprète ou exécutant à l'ensemble de l'œuvre ou autre objet protégé et de toutes les autres circonstances de l'espèce, telles que les pratiques de marché ou l'exploitation réelle de l'œuvre. …
Italian	Principio di una remunerazione adeguata e **proportionate** 1. Gli Stati membri provvedono a	(73) La remunerazione degli autori e degli artisti (interpreti o esecutori) dovrebbe essere adeguata e **proporzionata** al valore

	che gli autori e gli artisti (interpreti o esecutori), se concedono in licenza o trasferiscono i loro diritti esclusivi per lo sfruttamento delle loro opere o altri materiali, abbiano il diritto di ricevere una remunerazione adeguata e **proporzionata.**	economico effettivo o potenziale dei diritti concessi in licenza o trasferiti, tenendo conto del contributo dell'autore o dell'artista (interprete o esecutore) all'opera o altri materiali nel suo complesso come pure di tutte le altre circostanze del caso, tra cui le pratiche di mercato o lo sfruttamento effettivo dell'opera.
Portuguese	Princípio da remuneração adequada e **proporcionada** 1. Os Estados-Membros asseguram que, caso os autores e artistas intérpretes ou executantes concedam uma licença ou transfiram os seus direitos sobre uma obra ou outro material protegido para efeitos de exploração, têm direito a receber uma remuneração adequada e **proporcional.**	(73) A remuneração dos autores e dos artistas intérpretes ou executantes deverá ser adequada e **proporcional** ao valor económico real ou potencial dos direitos objeto de licença ou transferência, tendo em conta a contribuição do autor ou do artista intérprete ou executante para o conjunto da obra ou de outro material protegido e todas as demais circunstâncias do caso, tais como as práticas de mercado ou a exploração efetiva do trabalho.
Dutch	Beginsel van passende en **evenredige** vergoeding 1. De lidstaten zorgen ervoor dat, wanneer auteurs en uitvoerende kunstenaars hun uitsluitende rechten voor de exploitatie van hun werken of andere materialen in licentie geven of overdragen, zij gerechtigd zijn een passende en **evenredige** vergoeding te ontvangen.	(73) De vergoeding van auteurs en uitvoerende kunstenaars dient **passend te zijn en in verhouding te staan** tot de werkelijke of potentiële economische waarde van de in licentie gegeven of overgedragen rechten, rekening houdend met de bijdrage van de auteur of uitvoerende kunstenaar aan het geheel van het werk of het andere materiaal en met alle andere omstandigheden van het geval, zoals marktpraktijken of de werkelijke exploitatie van het werk.
German	Grundsatz der angemessenen und **verhältnismäßigen** Vergütung (1) Die Mitgliedstaaten stellen sicher, dass Urheber und ausübende Künstler, die eine Lizenz- oder Übertragungsvereinbarung für ihre ausschließlichen Rechte an der	(73) Die Vergütung der Urheber und ausübenden Künstler sollte angemessen sein und in einem **ausgewogenen Verhältnis** zum tatsächlichen oder potenziellen wirtschaftlichen Wert der Rechte, die erteilt oder übertragen wurden, stehen, wobei der Beitrag des Urhebers

	Verwertung ihrer Werke oder sonstigen Schutzgegenstände abschließen, das Recht auf eine angemessene und **verhältnismäßige** Vergütung haben.	oder des ausübenden Künstlers zum Gesamtwerk oder sonstigen Schutzgegenstand in seiner Gesamtheit und alle sonstigen Umstände des jeweiligen Falls zu berücksichtigen sind, etwa die Marktpraktiken oder die tatsächliche Verwertung des Werks