

Implementation of the Directive 2011/77/EU: copyright term of protection

LEGAL AFFAIRS



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STUDY

Abstract

The objective of this study, commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the JURI Committee, is to examine the current status quo of implementation of the Directive, and to carry out an in-depth review of the practices in selected Member States. The study provides a brief overview of the international framework concerning the term of protection for performers and phonogram producers, and analyses the main objectives and provisions of the Term Extension Directive. It explores in-depth the implementation and practices in seven selected Member States, and identifies best practices that can serve as a model for other EU Member States. In addition, the long term effects of the Directive are considered, both within the EU (in relation to relevant EU policies) and outside the EU (in relation to its main trading partners).

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LIST OF ABBREVIATIONS

Berne Convention	Berne Convention for the Protection of Literary and Artistic Works, adopted in 1886
CDPA	Copyright, Designs and Patent Act 1988 (United Kingdom)
CJEU	Court of Justice of the European Union
CMO	Collective Management Organisation
CMO Directive	Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market (OJ L 84, 20.3.2014)
CPI	Code de la propriété intellectuelle (France)
Impact Assessment	Commission Staff Working Document accompanying the Proposal for a Council Directive amending Council Directive 2006/116 as regards the term of protection of copyright and related rights – Impact Assessment on the legal and economic situation of performers and record producers in the European Union, Doc. SEC(2008) 2287, 16.07.2008
Phonograms Convention	Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms, adopted in Geneva in 1971
PMA	<i>Post Mortem Auctoris</i> (after the death of the author)
Proposal for a DSM Directive	Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market - COM(2016)593
Rome Convention	International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, adopted in Rome, 1961
Term of Protection Directive	Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights (OJ L 372, 27.12.2006)
Term of Protection Directive 2011	Directive 2011/77/EU of the European Parliament and of the Council of 27 September 2011 amending Directive 2006/116/EC on the term of protection of copyright and certain related rights (OJ L 265, 11.10.2011)
TEU	Treaty on European Union (OJ C 326, 26.10.2012)
TFEU	Treaty on the Functioning of the European Union (OJ C 326, 26.10.2012)
TRIPS Agreement	Agreement on the Trade-Related Aspects of Intellectual Property Rights, 1994
US Copyright Law	Title 17 United States Code
WCT	WIPO Copyright Treaty adopted in Geneva, December 20, 1996
WPPT	WIPO Performances and Phonograms Treaty adopted in Geneva, December 20, 1996

EXECUTIVE SUMMARY

The objective of this Study is to evaluate the status quo of implementation of the Term of Protection Directive 2011, to identify best practices in the Member States, and to consider the potential long-term effects of the term extension of protection, both within and outside the EU.

For that purpose, the Study provides a brief overview of the **background** of the term extension. **At the international level**, several legal instruments regulate the duration of protection for performers and/or phonogram producers, including the Rome Convention, the Phonograms Convention, the WIPO Performances and Phonograms Treaty (WPPT) and the TRIPS Agreement. The protection term set forth in these treaties varies between 20 and 50 years (counting from the performance, fixation or publication, depending on the instrument). These treaties only apply to performances fixed in phonograms, and do not address audio-visual performances. **At the EU level**, the Impact Assessment accompanying the Proposal for a Term of Protection Directive clarifies that the specific policy objectives underpinning EU intervention must contribute to enhancing the welfare of performers and the competitiveness of the EU music industry, and to increase the available music repertoire. Regarding performers, the Commission considered that they needed extended protection to secure income at the end of their lifetimes, and that certain mechanisms were required to strengthen their position in contracts with phonogram producers. In what concerns producers, the Commission noted their decreasing revenues and their disadvantage vis-à-vis their US counterparts.

The different provisions in the Term of Protection Directive 2011 were adopted with the aim of addressing these concerns. The central measure of the Directive is the **extension of the protection term for performers and phonogram producers**. For the former, if the performance is fixed in a phonogram lawfully published or lawfully communicated to the public within 50 years, the rights shall expire 70 years from the date on which such event took place (whichever is the earliest). For the latter, if the phonogram is lawfully published within 50 years, their rights shall expire 70 years from the date of such event. If no lawful publication was made but the phonogram was lawfully communicated to the public within that period, the rights shall expire 70 years from the date of the first lawful communication to the public. When computing the term of protection for producers, preference is given to publication of the phonogram as the relevant event: if the phonogram is communicated to the public and later it is published, the 70-year term is counted from publication. This may lead to a discrepancy, in terms of duration of protection, between performers and producers: producers can delay the publication of records to a later date, which would mean their term of protection could potentially expand to almost 120 years. Moreover, the relevance given to publication might not be justified in view of the practices of the music industry, which increasingly exploit phonograms on the Internet.

The term extension does not apply when the performance is fixed in a medium other than a phonogram, such as an audio-visual file. None of the Member States surveyed has extended the term of protection for audio-visual performers and producers. Several stakeholders have underlined that, this creates inconsistencies where the same performance is recorded both on a phonogram and an audio-visual media. A deeper analysis of a possible legislative intervention on this matter is needed.

The Directive sets the term of protection of a musical composition with words to 70 years after the death of the last author to survive, whether it be the author of the lyrics or the composer of the music, provided that both the music and lyrics have been created specifically for the musical composition. For calculating this term of protection, it is irrelevant whether these persons are designated as co-authors under the applicable national law. The provision did not cause many problems at the implementation stage and all the Member States surveyed except for one implemented it.

The Directive also includes a few accompanying measures, with the objective of protecting performers in their contractual relations with producers: the “use it or lose it” clause, the supplementary annual remuneration, the “clean slate” clause, and the right to renegotiate the contract after the 50th year. These measures are only applicable during the extension period. This seems to be at odds with the objective they pursue (as performers are subjected to poor contractual conditions throughout the whole period of protection), although transparency obligations and adjustment mechanisms provided by Arts. 14-16 of the Proposal for a DSM Directive might, if adopted, provide some relief.

The main problems identified in relation to the accompanying measures are the lack of information of performers about their rights, and the identification of performers entitled to enjoy said measures. The Directive does not establish an obligation for CMOs to inform performers, but Art. 13(3) of the CMO Directive establishes a general obligation to adopt the necessary measures in order to identify and locate right holders who are entitled to remuneration. Member States should ensure that such obligation also includes the necessary information to facilitate the exercise of the rights provided for in this Directive. Producers typically hold such information, but their obligation to provide it is very limited: it is circumscribed to information necessary to secure the payment of the annual supplementary remuneration (but it does not cover any other aspects necessary for the exercise of other rights provided for in the Directive), and is dependent on request. None of the Member States surveyed has expanded the scope of this obligation. The obligation of producers to provide information should thus be reinforced. Chiefly, the information should be provided within a reasonable period of time, and it should be made clear that producers cannot charge for it. The type of information that producers are obliged to provide could also be identified in guidelines published by the competent authorities in the Member States.

The first of these measures, the “use it or lose it” clause, grants performers an unwaivable right to terminate the contract with a producer for the exploitation of a phonogram, after the 50th year from its lawful publication or, failing such publication, its lawful communication to the public. The performer will be entitled to terminate the contract if the phonogram producer does not offer copies of the phonogram for sale in sufficient quantity, or does not make it available to the public. The right to terminate the contract may be exercised if the producer, within one year of the notification by the performer of her intention to terminate the contract, does not carry out both acts of exploitation.

Where the phonogram contains the fixation of the performances of a plurality of performers, it is for national law to determine how they may enforce this right. Member States have regulated this matter differently. This Study concluded that the best solution is for the majority of performers to agree to terminate the contract, and to have a representative selected to exercise the right.

The “use it or lose it” clause raises several difficulties, one of which is the prevalence of the lawful publication over lawful communication, already identified above. Moreover, the definition of “sufficient quantity” is unclear. It should be considered that “offering for sale in sufficient quantity” exists where the performance is made available on the Internet in a manner that satisfies the reasonable needs of the public, taking into account the nature and aim of the phonogram. This would entail, contrary to what is explicitly or implicitly required in the laws of the Member States surveyed, that the producer would not have to carry out both the publication and communication to the public in order to avoid the performer triggering the clause: the latter would be enough.

The Directive does not contemplate those situations where the producer has transferred the rights to a third party. A couple of Member States have however envisaged that possibility, making it clear that the clause can be exercised against exclusive licensees as well. The Study found that this should be followed by other Member States as well.

The second measure put forth by the Directive is the **annual supplementary remuneration** (20% fund), which establishes an unswayable right to an annual supplementary remuneration for performers, consisting of 20% of the revenue which the phonogram producer has derived, during the preceding year, from the reproduction, distribution and making available of the phonogram. The beneficiaries of the remuneration are performers who have signed a contract in exchange for a non-recurring remuneration, where the lawful publication (or, failing that, lawful communication) of the phonogram occurred 50 years ago. This right is administered by CMOs.

Phonogram producers are obliged to provide, upon request, any information that may be necessary to secure payment of the supplementary remuneration. Member States' laws differ regarding the person entitled to request that information to the producer. It should be the case that such request can be made either by the CMO administering the right, or by the performer herself.

The right to the annual supplementary remuneration might prove ineffective in the case of remasters. These should be considered as original recordings, so as to incentivize phonogram producers to release their back catalogues. In principle, this should not prejudice performers, who will still be able to enjoy the supplementary remuneration in relation to the original performances. However, problems may arise if producers stop commercializing the original record – in this case, performers can no longer enjoy remuneration from the original recording (nor from the remaster, as it will not have reached the extension period yet).

In contrast to the annual supplementary remuneration, the **“clean slate” provision** is meant to benefit performers who contractually transfer or assign their rights in exchange for a royalty-based remuneration. Such contracts provide deductions of several producers' costs from the royalty payments performers are entitled to, which decreases the amount of royalties received by performers. Under the “clean slate” provision, however, neither advance payments nor any contractually defined deductions will be deducted from the payments made to them the 50th year after the phonogram was lawfully published or, failing such publication, lawfully communicated to the public. In line with the suggestions above, the prevalence of the lawful publication over the lawful communication to the public should be abolished.

Since nothing is explicitly said in the Directive regarding the mandatory character of this provision, Member States may decide not to implement it. This happened in one of the Member States surveyed. To avoid diminishing the effectiveness of the Directive, the “clean slate” clause should be understood as an overriding mandatory rule in the sense of Art. 9 of the Regulation 593/2008 on the law applicable to contractual obligations (Rome I).

The Directive has also introduced a transitional measure (Art. 10a), applicable to contracts concluded before 1 November 2013. The provision allows Member States to implement a **right of performers to renegotiate, in their favor, contracts that entitled them to recurring payments** following the 50th year after the phonogram was lawfully published or, failing such publication, the 50th year after it was lawfully communicated to the public. Only France out of the Member States surveyed has implemented this provision, and the implementing measure does not clarify how this right can be enforced, or which kind of modifications can be asked for. However, Art. 15 of the Proposal for a DSM Directive, if or when approved, might deem this right superfluous, seeing as the Proposal envisages a contract adjustment mechanism whereby performers may request an adjustment of their remuneration in cases where the remuneration originally agreed is disproportionately low compared to subsequent revenues.

More conclusions on the term extension and the accompanying measures could not be drawn because of **lack of data**. Many Member States have not put into practice the provisions of the

Directive. Very few performers are so far entitled to benefit from the rights established therein. Little amounts have been collected and distributed.

Likewise, regarding the **potential long-term effects of the Directive in the EU, it is too early to draw solid conclusions**. No data exists in relation to the impact on other EU policies and sectors. There is no information on whether users and their business models have been affected by the Directive, or on whether prices have increased to the detriment of consumers. It is also too early to say whether the term extension will have consequences from the point of view of competition law or cultural diversity. It is foreseeable that the term extension's impact on performers and producers, while marginal in the first years, might grow steadily, but again no evidence is available to support this forecast.

Regarding the **competitiveness of the European music industry vis-à-vis foreign trading partners**, the Study shows that, from a legal point of view, the term extension does not make the EU music industry more competitive. EU trading partners that had longer terms of protection are not allowed to discriminate against EU right holders. Importantly, that is the case of the US, whose longer term of protection applies equally to national and foreign sound recordings (provided of course that such sound recordings are protectable under US law). The exception is India, which is allowed to deny to foreign right holders its longer term of protection. However, any negative impact on the EU's exports to India likely derives from the latter's weak enforcement and rampant piracy, rather than any discrimination based on different terms of protection.

1. INTRODUCTION

In the Impact Assessment on the legal and economic situation of performers and producers in the EU, the Commission stated as a general policy objective the promotion of music production in Europe.¹ Specific objectives were listed too: to improve the social situation of performers; to enhance the competitiveness of the EU music industry; and to increase the available music repertoire.² The Commission estimated that the majority of performers faced an income gap at the end of their lifetime due to the limited duration of protection for their rights.³ Performers were also deemed to be in a weak contractual position vis-à-vis record producers, as they usually transfer their exclusive rights in exchange either for a one-off payment, or for recurring royalties that are paid only once the producer has deducted her costs.⁴ In turn, according to the Commission, producers were facing decreasing revenues due to piracy and were at a disadvantage when compared to their US counterparts.⁵ As a result, it was feared that creative efforts would be deviated away from the EU and towards the US, with resulting losses, inter alia, for EU cultural diversity.⁶

In order to achieve these objectives, the Term of Protection Directive 2011 was passed. The Directive puts forth several legal measures. First, it extended the term of protection of performers' and producers' rights to 70 years after publication or communication to the public of the fixation of the performance. The term extension was highly debated during the legislative procedure, with several scholars warning that it could have detrimental effects for users, cultural diversity and competition in the music sector (e.g. van Eechoud et al., 2009; Hilty et al., 2009). Next to the term extension, the Directive provides for accompanying measures: the "use it or lose it" clause, granting performers the right to terminate the contract with a producer after 50 years in case the latter does not exploit the phonogram; the annual supplementary remuneration (20% fund), granting performers who only received a lump sum payment the right to obtain an annual supplementary remuneration from the phonogram producer for each full year following the 50th year of publication or communication of the phonogram; and the "clean slate" provision, which establishes that neither advance payments nor any contractually defined deductions can be deducted from the payments made to performers as from the 50th year after the phonogram was published or communicated to the public. The adoption of these measures was not as controversial as the extension of the term of protection, even though they are conditional of that extension. The deadline for implementing the Directive was 1 November 2013. While not every Member State complied with that deadline, the Directive is currently implemented in all Member States of the EU.

1.1. Outline and methodology

The objective of this study is to evaluate the implementation of the Term of Protection Directive 2011, to identify best practices in the Member States, and to consider the potential long-term effects of the term of protection extension, including its impact outside the EU.

For these purposes, the study provides an overview of implementation in all EU Member States (Annex 1), and carries out an in-depth analysis of the implementation of the Directive in selected Member States (France, Germany, Portugal, Romania, Spain, Sweden, the UK). The sample of Member States was chosen according to a criterion of diversity regarding size of the country, its geographic

¹ Impact Assessment, p. 22.

² *Ibid.*

³ Commission Proposal, pp. 2-5.

⁴ *Ibid.*

⁵ Impact Assessment, pp. 19-20.

⁶ *Ibid.*

place in the EU, date of accession to the EU, and size of the music market. The data from these Member States was gathered through questionnaires completed by national experts, all of whom have experience in the field. The questionnaires were conceived by the authors of this study considering its main objectives and the diversity of the sample. Therefore, the questionnaires reflect the methodological choice for semi-structured or semi-standardized interviews – a methodology for qualitative research where pre-determined (yet often open) questions give the interviewer leeway to explore specific issues (which differed depending on the Member State concerned). The national experts contacted stakeholders representative of the different interests involved in the directive: performers, producers, and users of music repertoires.

In addition to the stakeholders contacted by national experts at national level, several stakeholders were contacted directly by the authors of the study at the pan-European level, with the objective of clarifying their views on how the Directive works in practice, and how its implementation has affected them. This list of stakeholders can be found in Annex 2.

The data thus gathered was combined with traditional literature review and legal analysis, in order to meet the objectives of the study.

The study is organized as follows: Chapter 2 will review the international background of the term of protection for performers and producers, as well as the objectives and content of the Directive. Chapter 3 will discuss national implementations of the Directive, relying on empirical research and data collected from the selected Member States (France, Germany, Portugal, Romania, Spain, Sweden, and the UK). Based on the data collected, Chapter 4 follows to identify the best practices in the Member States concerned. The best practices will be selected having the compliance with the objectives of the Directive as a benchmark. Particular attention will be paid to the mechanisms implemented by the Member States (and by collecting societies in those Member States) to facilitate the enforcement by performers of the “use it or lose it” clause, of the “clean slate” provision, and of the right to claim the annual supplementary remuneration. Chapter 5 evaluates the potential long term effects of the term extension, and will be based on both the data collected and desk research. This chapter analyses, first, the effects that the term extension might have within the EU in relation to the cultural and creative sector, as well as in relation to other policy areas (namely, consumer protection, competition and cultural diversity). Next, the chapter will analyze how the term extension might affect the competitiveness of the EU music sector in relation to third markets. Chapter 6 offers conclusions and recommendations.

2. BACKGROUND: INTERNATIONAL FRAMEWORK, OBJECTIVES AND CONTENT OF THE DIRECTIVE

2.1. International framework

At the international level, protection of performers and phonogram producers was first established in the Rome Convention of 1961 (92 contracting parties), which also included the protection of broadcasters. Despite the fact that the Rome Convention deals with these three right holders' categories (commonly called "related rights"), the justifications underlying their protection are different from one another. In particular, the protection of performers is closer to that of authors under copyright, and therefore natural- and social justice arguments for protection apply to them as well; conversely, the protection of producers is based on the protection of, and incentive to, investment (van Eechoud et al., 2009).

According to Art. 3 of the Rome Convention, performers are "actors, singers, musicians, dancers, and other persons who act, sing, deliver, declaim, play in, or otherwise perform literary or artistic works". The provision also includes a definition of producer of phonograms: "the person who, or the legal entity which, first fixes the sounds of a performance or other sounds".

The Convention provides for a limited set of exclusive rights (Arts. 7 to 12) and a minimum term of protection of 20 years from the end of the year in which the fixation, performance or broadcast was made (Art. 14). Subsequently, the scope of protection was increased in several treaties. The Phonograms Convention of 1971 (79 Contracting States) protects producers against the specific acts of importation of unauthorized copies of phonograms and their distribution (Art. 3 of the Phonograms Convention), and sets a minimum term of protection of 20 years from the end of the year in which fixation was carried out, or from its first publication (Art. 4). The WIPO Performances and Phonograms Treaty 1996 (WPPT, 95 ratifications) and the TRIPS Agreement in the framework of WTO extend the minimum term of protection to 50 years, even though the relevant event from which to start counting the term of protection differs in these two instruments. In the WPPT, performers are entitled to a 50-year term of protection counting from the fixation of the performance, while phonogram producers are protected for 50 years from publication or, failing such publication, for 50 years from the fixation of the phonogram (Art 17 of the WPPT). By contrast, the TRIPS Agreement calculates the term of protection for phonograms from fixation only (Art. 14(5) of TRIPS). As a result, phonogram producers might enjoy a longer term of protection under the WPPT if the publication occurred several years after the fixation (Reinbothe & von Lewinski, 2015; Sterling, 2015).

These treaties only apply to performances fixed on phonograms. Thus, the increase of protection applies to music performers, but not audio-visual performers. For this latter category, the applicable international instrument is the Beijing Treaty on Audio-visual Performances, signed in 2012. So far, the treaty has been ratified by 18 contracting states (including Slovakia, the only EU country to have ratified it at the time of writing), but it has not yet entered into force (30 ratifications are required).

2.2. Objectives of the Directive

Several EU Directives have put forth the goal of promoting creativity and innovation.⁷ In line with such goal, they have increased the level of protection for both copyright and related rights in relation to the level of protection found in international treaties.⁸ At first sight, the Term of Protection Directive 2011 responds to this idea of increasing the level of protection for a specific category of right holders - music performers and phonogram producers. However, the increased protection relates solely to the duration of the right (and, in the case of music performers, also contractual conditions), rather than affecting any other aspect of the right(s).

The ultimate objective of the Term of Protection Directive 2011 is to promote music production in the EU.⁹ However, neither the Commission Proposal nor the recitals of the Directive make any explicit reference to this general objective. Instead, they refer to more specific objectives, mentioned in the Impact Assessment: to contribute to enhancing the welfare of performers and the competitiveness of the EU music industry, and to increase the available music repertoire.¹⁰

In relation to the first objective – enhancing the welfare of performers –, the Commission Proposal states that “the current employment status and conditions for the average European performer are not very rewarding.”¹¹ According to the Commission, a number of reasons explain this situation: first, having in mind the term of protection applicable at the time the Directive was adopted (50 years), musicians or singers that started their career in their early 20’s face an income gap at the end of their lifetimes because their performances would enter the public domain in their 70’s. Second, discrepancies between the earnings of a minority of “superstar” performers and a majority of little-known performers are endemic to the music industry. Third, individual performers have little bargaining power when signing contracts with phonogram producers. As a consequence, unfair situations appear where session musicians are paid a flat-fee for their contribution to songs that may turn out to be a huge success and generate a lot of revenues, or featured artists do not receive royalty payments because of a variety of record producers’ costs that need to be deducted from those royalties. Fourth, performers are at a disadvantage as compared to authors (whose works are protected until 70 years after their death) even though there are cases where performers are more identifiable with the success of a sound recording than authors¹².

In relation to the second and third objectives – enhancing the competitiveness of the EU music industry and increasing the available music repertoire –, the Commission refers to the challenges phonogram producers are encountering as a consequence of digital piracy: “revenues in general and profits in particular have decreased, largely due to increased piracy”.¹³ In these circumstances, the European record industry arguably faces the challenge of keeping up the steady revenue stream necessary to invest in new talent¹⁴. Furthermore, the Commission is of the opinion that performers and phonogram producers in Europe are at a disadvantage when compared to those in the USA¹⁵.

⁷ Recital 2 Directive 2001/29: “Copyright and related rights play an important role in this context as they protect and stimulate the development and marketing of new products and services and the creation and exploitation of their creative content.” In the same vein, Recital 11 of the Term of Protection Directive (2006): “The level of protection of copyright and related rights should be high, since those rights are fundamental to intellectual creation. Their protection ensures the maintenance and development of creativity in the interest of authors, cultural industries, consumers and society as a whole”.

⁸ See e.g. the Term of Protection Directive (2006), which increased the term of protection of copyright to 70 years p.m.a., while the international treaties prescribed 50 years p.m.a.

⁹ Impact Assessment, p. 22

¹⁰ *Ibid.*

¹¹ Commission Proposal, p.2.

¹² Commission Proposal, pp. 3-4

¹³ Commission Proposal, p. 4.

¹⁴ Commission Proposal, p. 6.

¹⁵ Impact **Assessment**, pp. 8 and 13.

This may divert creative efforts away from Europe and toward the American market, and record producers may orient their productions to cater to the taste of that market where most revenues could be gained.¹⁶

The different measures in the Directive were adopted with the purpose of achieving these objectives. In turn, (part of) the objectives of the Directive are seemingly in alignment with the rationales for related rights: enhancing the welfare of performers conforms to the rationale of protecting performers due to natural rights arguments; enhancing the competitiveness of the EU music industry can act as an incentive and protection to the industry's investment.

2.3. Content of the Directive

The main measure in the Directive is the extension of the term of protection from 50 to 70 years. The Directive also includes complementary measures in relation to contractual practices in the music sector: the "use it or lose it" clause, the 20%-fund for an annual supplementary remuneration, and the "clear slate" clause.

2.3.1. The Term Extension

The term extension provided by the Term of Protection Directive 2011 applies to music performers and phonogram producers. According to the new Art. 3(1) of the Term of Protection Directive (introduced by Art. 1(2)(a) of the 2011 Directive), the rights of performers expire 50 years after the date of performance. However, if that performance is fixed in a phonogram lawfully published or lawfully communicated to the public within those 50 years, the rights shall expire 70 years from the date on which such event took place (whichever is the earlier). The 70-year term was introduced by the Term of Protection Directive 2011. Previously, the provision stated 50 years.

Example: A band played a concert in 1950. The performance is protected until 2000. However, if the concert was released as a record in 1953, the fixation of the performance is protected until 2023. If the phonogram where the performance is fixed was made available on the Internet in 2000, the term of protection still expires in 2023.

In the case of phonogram producers, their rights expire 50 years after the fixation is made (Art. 3(2) of the Directive). However, if the phonogram is lawfully published within that period, said rights shall expire 70 years from the date of such event. If no lawful publication was made but the phonogram was lawfully communicated to the public within that period, the rights shall expire 70 years from the date of the first lawful communication to the public. The 70-year period was also introduced by the Term of Protection Directive 2011. Before, the provision provided for 50 years.

Contrary to the provision concerning the rights of performers, Art. 3(2) **gives preference to the publication of the phonogram** as the relevant event: the provision makes clear that, if the phonogram is communicated to the public and later it is published, the 70-year term is counted from publication.

Example: A band recorded an album in 1990. The rights of the record producer are protected until 2040. If the record is released in 1999, the producer's rights are protected until 2069. If the phonogram where the performance is fixed was made available on the Internet in 1996, the term of protection expires in 2069 because the date of publication takes precedence over that of communication to the public.

¹⁶ Impact Assessment, p. 13.

The 70-year protection does not apply when the performance is fixed in a medium other than a phonogram (e.g. in an audio-visual file). In such a case, if the fixation of the performance is lawfully published or communicated to the public, the rights shall expire 50 years from the date of the relevant event, whichever is the earlier.

Example: A theatre company played a piece by Shakespeare in 1970. The performance of the piece is protected until 2020. The piece was recorded in video and broadcasted in 1973. The fixation of the piece is protected until 2023. If the video is commercialized on DVD in 2000, the term of protection still expires in 2023.

Finally, Art. 1(1) of the Term of Protection Directive 2011 introduces a new paragraph 7 in Art. 1 of the original Term of Protection Directive, in relation to co-ownership of musical compositions. Member States had different solutions to calculate the term of protection of these works. Some applied different terms of protection to the music and to the lyrics (Hungary, Germany, United Kingdom), while others applied a unitary term (France, Portugal, Spain).¹⁷ These divergences created legal uncertainty when these works were exploited in different Member States.¹⁸ According to new Art. 1(7), the term of protection of a musical composition with words expires 70 years after the death of the last one to survive, between the author of the lyrics and the composer of the music. For calculating this term of protection, it is irrelevant whether or not these persons are designated as co-authors under the applicable national law. As a condition to apply this rule, Art. 1(7) states that both contributions (music and lyrics) must have been created specifically for the musical composition.

While Art. 1(1) does not seem controversial, the amendments introduced by the Term of Protection Directive 2011 in relation to the extension of the term of protection raise at least *four concerns*.

The first one relates to the **interpretation of the terms “lawfully published” and “lawfully communicated”**. As previously explained, in relation to producers’ rights, the first event prevails over the second even if it takes place later in time. Moreover, this is not only important for the calculation of the term of protection of phonogram producers, but also to determine the time where performers may exercise the rights that the accompanying measures provide for them (see the following section). The interpretation of these two concepts may create problems in the long-term.

In relation to the definition of “lawfully published”, Art. 2(e) WPPT states that “publication of a fixed performance or a phonogram means the offering of copies of the fixed performance or the phonogram to the public, with the consent of the right holder, and provided that copies are offered to the public in reasonable quantity”. According to the Agreed Statement concerning this provision, it does not seem that the making available of copies of the phonogram on the Internet can be covered by this provision: “the expressions “copies” and “original and copies,” [...] refer exclusively to fixed copies *that can be put into circulation as tangible objects*”. Thus, it refers to the commercialization of the fixation of the performance in tangible supports such as CDs or DVDs.

Generally speaking, performances that will enter the extension period (from 50 to 70 years) in the short term were released as records (lawfully published) because that was the only means of commercialization available 50 years ago. However, since the beginning of the 2000’s the making available of performances on the Internet is increasingly gaining relevance.¹⁹ Having in mind the cost-reduction that it implies and the change of habits in music consumption, it is not difficult to imagine

¹⁷ Commission Proposal, p. 5.

¹⁸ Recital 19 of the Term of Protection Directive 2011.

¹⁹ According to the IFPI, 45% of consumers use audio streaming, and 75% video streaming, to consume music. Furthermore, a comparison of the share of time spent listening to licensed music shows that 18% refers to audio streaming, while 22% refers to purchased music. IFPI, *Connecting with music – Music consumer insight report* (September 2017), pp. 9 and 11. Available at <http://www.ifpi.org/downloads/Music-Consumer-Insight-Report-2017.pdf> (last accessed 3 December 2017).

that the “lawful communication” may become the rule and the “lawful publication” the exception in the near future. In such a scenario, it is hard to sustain that the second should prevail over the first to calculate the term of protection. In fact, record companies may make an abusive use of the provision, although the consequences would not be felt in the short-medium term: a record company that made a record available on the Internet in year 2008 may decide to wait until 2028 to publish the record as an album. In this case, the term of protection of the phonogram would extend until 2098. Certainly, performers will also benefit because their rights would be protected for a longer time; however, they would have to wait until 2078 to enjoy the rights provided by the accompanying measures (analyzed below in 2.3.2.).

A related problem is the treatment to be granted to remasters of original recordings. It can be questioned whether a remaster ought to be considered a new phonogram (and, if so, whether the term of protection ought to be calculated from the date of publication or communication to the public of the remastered recording). Should a remaster be considered an original recording, performers would not necessarily be prejudiced, as they will be able to enjoy their rights in the extension period in relation to the original performances. Furthermore, this solution would abide by one of the objectives of the extension of the term of protection, which is to incentivize record companies to release their back catalogues.

A second concern refers to the **lack of alignment** between the terms of protection of performers’ rights and producers’ rights (Sanchez Aristi, 2017). As explained, the former is calculated from the date of lawful publication or lawful communication to the public, whichever is the earlier. In the calculation of the latter, lawful publication takes preference. Therefore, the performer’s right in a performance might have entered the public domain, while the producer still enjoys his rights in the performance.

Example: A fixation of a performance in a phonogram is made available on the Internet in 2000, and in 2010 it is published as a record. Performer’s rights will last until 2071, while producers rights will expire in 2081.

The third concern relates to the **rationale of the term extension**. This issue was highly debated during the preparatory works. In fact, the Commission received 36 responses to the public consultation in favor of the term extension and 29 against it. The Commission submitted a proposal that established a term of protection of 95 years (which was subsequently reduced to 70), because it was understood that it would bring benefits to performers and would thus allow more performers to dedicate more time to their artistic activities.²⁰ It would also increase the pool of Artist & Repertoire (A&R) resources available to record producers, and could thus have an additional positive impact on cultural diversity.²¹ The impact on users was considered minimal because there was no clear evidence that prices of sound recordings would increase due to the term extension. On the contrary, the measure should have an impact on consumer choice and cultural diversity since more producers would have more resources to fund and develop new talent, and would have an incentive to digitize and market their back catalogue of old recordings.²² Finally, the impact on so-called public domain producers was considered minimal because, independently of the expiration of performer’s rights, the work performed on a phonogram remains protected for the life of the author who wrote the song.²³

²⁰ Commission Proposal, pp. 8-9.

²¹ *Ibid.*

²² *Ibid.*

²³ *Ibid.*

The proposal was criticized in a few studies that have refuted some of these arguments used by the European Commission (Helberger et al, 2008; Hilty et al, 2009; VVAA, 2008). The present study will not carry out an in-depth review of such studies, since the Term of Protection Directive 2011 has entered into force and these discussions are thus of limited relevance. A reduction of the term of protection would create legal uncertainty. However, some of the arguments used to support the term extension should be carefully revised in future proposals. This is particularly the case of the need to address the loss of revenue due to digital piracy. The extension of the term of protection of phonogram producers may benefit record labels, but it does not reduce digital piracy (Hilty et al, 2009). Even if record producers enjoy a longer term of protection of their rights, the losses from digital piracy do not decrease. Furthermore, in relation to the improvement of the current employment status and conditions of performers in Europe, it can be questioned whether a term extension was necessary. Performers are subjected to poor contractual conditions during their whole life, not only during the extension period (Hilty et al, 2009). Hence, it would likely be more effective to adopt measures to protect performers throughout their professional life. This shortcoming seems to have been addressed by the Proposal for a DSM Directive, which introduces provisions to protect performers during their entire career (Arts. 14 to 16 of the Proposal).

The fourth concern amounts to the **exclusion of audio-visual performers and producers** from the scope of application of the Directive. According to the Impact Assessment, these categories of right holders were excluded because their economic and legal situation is significantly different: for instance, film producers are in some Member States considered as co-authors of films, and contractual practices in the film industry are different from those in the music industry (when it comes, for example, to presumption of transfer of rights).²⁴ However, with the adoption of the Term of Protection Directive 2011, audio-visual artists seem to be lagging behind music performers, as was pointed out by several stakeholders contacted by the authors of the present report (e.g. AISGE in Spain, GVL in German or the pan-European association AEPO-ARTIS). The argument used by the Commission in relation to music performers appears to be applicable also to audio-visual artists: several times, the commercial success of certain films is more identifiable with actors than with their authors (directors, producers or script-writers). Thus, even if international treaties do not oblige the European Union to do so, the different treatment awarded to music and audio-visual artists might merit some legislative intervention.

2.3.2. Accompanying Measures

Art. 1(2) of the Term of Protection Directive 2011 includes a few accompanying measures, the purpose of which is to protect performers in their contractual relations with producers: the “use it or lose it” clause, the supplementary annual remuneration, the “clean slate” clause, and the right to modify the contract after the 50th year. These measures are a novelty in EU Copyright Law; the regulation of copyright contracts was in the past not considered a priority.²⁵

These measures are dependent on the term extension since they provide for rights, obligations or prohibitions that are only applicable in the extension period. As previously mentioned, this does not seem coherent. Performers can suffer from abusive contractual practices throughout the whole term of protection of their rights. Legal doctrine has criticized the fact that the accompanying measures are only effective after the 50th year of protection (Hilty et al., 2009). Since a performer in his/her 20’s

²⁴ Impact Assessment, p. 11.

²⁵ Following the study carried out by IVIR (Hugenholtz et al, 2002), the European Commission stated in 2004 that differences between contractual rules were not significant enough to require harmonisation (Commission Communication “The Management of Copyright and Related Rights in the Internal Market”, Doc COM(2004) 261 final).

will not enjoy these measures until he/she is in his/her 70's, the link between said measures and the promotion of creativity becomes frail.

Nevertheless, copyright laws in some Member States already contain provisions that protect performers during the whole contractual relationship.²⁶ In addition, the Proposal for a DSM Directive includes certain provisions on contractual practices that apply not only to authors but also to performers (Arts. 14-16).²⁷ If adopted, these provisions will harmonize the protection of performers in the EU: they aim at imposing transparency obligations to those contracting with performers, and at providing for adjustment mechanisms for cases where the remuneration originally agreed is disproportionately low compared to the subsequent revenues derived from the exploitation of the performances. Art. 16 of the Proposal for a DSM Directive further promotes the use of alternative dispute mechanisms in these contracts.²⁸

2.3.3. The "Use it or Lose it" Clause

The new Art. 3(2a) of the Term of Protection Directive, introduced by Art.1(2)(c) of the Term of Protection Directive 2011, grants performers an unwaivable right to terminate the contract with a producer for the exploitation of a phonogram under certain cumulative conditions:

- a) This right can only be enforced 50 years after the phonogram was lawfully published or, failing such publication, 50 years after its lawful communication to the public.
- b) The phonogram producer does not offer copies of the phonogram for sale in sufficient quantity or does not make it available to the public.
- c) The producer has been notified by the performer of his/her intention to terminate the contract and after one year from that notification he/she has not carried out both acts of exploitation referred to in b).

Where the phonogram contains the fixation of the performances of a plurality of performers, it is for national law to determine how they may enforce this right.

If the performer enforces the "use it or lose it" clause, the rights of the phonogram producer in the phonogram expire in the EU territory (not abroad) (Gonzalez Gozalo, 2017). Although the Directive does not specify this, it is assumed that in those cases where the subject matter of the contract are performers' rights in EU territory and in third countries, the termination of the contract in accordance with this provision would exclusively affect the rights in EU territory (Gonzalez Gozalo, 2017).

The wording of the provision raises some questions.

The first one is related to **the interpretation of "lawfully published" and "lawfully communicated to the public"**, since the first event prevails over the second. As explained in the previous section, while this might not be problematic in the short term, problems may appear in the long term. Once a record is "lawfully communicated to the public" on the Internet, the more the record company delays the "lawful publication" of the album the later performers would be able to make use of the use it or lose it clause. To avoid this problem, the prevalence of the "lawful publication" over the "lawful communication to the public" should be eliminated.

The interpretation of the second requirement, according to which the performer can exercise this right when "the producer does not offer copies of the phonogram for sale in sufficient quantity or does not make it available to the public", also raises some issues. The **definition of "sufficient**

²⁶ See Bentley et al. 2017.

²⁷ In 2015, following another study (Europe Economics et al., 2015) the European Commission formed the view that contract regulation was then appropriate at the European level.

quantity” is unclear. According to Recital 8, reference should be made to the meaning of these words in the Rome Convention. However, there is no definition of the concept in the Convention. Probably the reference is to the meaning of “publication”, but it does not provide much help: “publication means the offering of copies of a phonogram to the public in reasonable quantity” (Art. 3). As analyzed in the following Chapter, national implementation regulations show certain discrepancies in relation to this requirement.

A different question concerning the provision is the **relation between “lawfully published” and “communicated to the public”**. If the Directive requires the producer to carry out either one of these acts, the performer will be able to exercise the “use it or lose it” clause only where the producer does not publish *and* does not communicate the performance to the public. If however the Directive requires the producer to carry out both acts, the performer would be able to exercise the clause where the producer does not publish *or* communicate the performance to the public. The second interpretation is supported not only by a literal interpretation of the Directive, but also by the Impact Assessment.²⁹ So for example if a producer only offers the phonogram online, the performer could activate the clause to make the producer distribute physical copies. This interpretation is certainly more beneficial for performers since it increases the number of situations where they would be able to make use of the clause. However, the interpretation does not seem consistent with current (and most probably future) practices of the music business. It is likely to become increasingly common that sound recordings are exclusively made available on the Internet, and not released in CDs, vinyl or DVDs. If the sound recording is exclusively made available on the Internet, the performer should not be entitled to terminate the contract.

Finally, by referring exclusively to the “producer”, the Directive does not contemplate those situations where the producer has assigned the rights over the performance to a **third party**. In such cases, it is not clear whether the performer(s) should notify the original producer or the third party of his/her intention to terminate the contract. The answer is not necessarily straightforward, since the producer might have assigned the right without giving any notice to performers.

2.3.4. Annual Supplementary Remuneration

The new Art. 3(2b) to (2d) of the Term of Protection Directive aim to protect performers who are paid a flat fee (non-recurring remuneration) for the transfer or assignment of their exclusive rights. This is the case of session musicians (musicians who are hired on an *ad hoc* basis to play for a recording session). Generally, these musicians cannot negotiate their contracts and have to transfer their rights in perpetuity against a one-off payment. In cases where a song or a record is a success, these musicians do not have the right to ask for a percentage of the revenues generated by their performance.³⁰

To offset this situation, the provisions establish an unwaivable right to an annual supplementary remuneration for performers, consisting of 20% of the revenue which the phonogram producer has derived, during the preceding year, from the reproduction, distribution and making available of each fixation in phonogram of their performances in the Member State concerned.

The supplementary remuneration is supposed to benefit performers who have signed a contract that only gives them a right to claim a non-recurring remuneration. Performers who have a right to claim royalty payments over the revenues generated by their performances fixed in phonograms cannot claim this right.

²⁸ An analysis of these provisions can be found in the Study by Bently et al., 2017.

²⁹ Impact Assessment, p. 26.

³⁰ Commission Proposal, p. 3.

The eligible category of performers enjoys this supplementary remuneration each year from the 50th until the 70th year after the phonogram was lawfully published or, failing such publication, lawfully communicated.

Phonogram producers are obliged to provide, upon request, any information that may be necessary to secure payment of that remuneration.

The right is administered by Collective Management Organisations (CMOs)³¹. It is understood that the reference in the provision is to CMOs administering performers' rights. These need to work closely with CMOs representing phonogram producers to ensure the effectiveness of the remuneration. In certain Member States, performers and phonogram producers are represented by the same collecting society; hence at first sight the collection and distribution of the 20% fund should be easier. As will be analyzed in Chapter 3, much of the effectiveness of this provision depends on the measures adopted by the legislators and the CMOs in the Member States to identify performers entitled to this right and to inform them about it. In that regard, it should be recalled that Art. 13.3 of the CMO Directive requires CMOs to take all necessary measures to identify and locate the right holders. Furthermore, Art. 14 of the Proposal for a DSM Directive establishes an obligation for those contracting with performers to provide "adequate and sufficient information on the exploitation of their [...] performances [...], notably as regards modes of exploitation, revenues generated and remuneration due".

The provision might also prove ineffective where **remasters** are at stake. As explained in Section 2.3.1, remasters should be considered a new phonogram, so a new term of protection should apply to them. Therefore, performers will only start enjoying the annual supplementary remuneration 50 years after the release of the remaster. At first sight, this does not prejudice performers because they will be able to enjoy the supplementary remuneration in relation to the original performances. However, as explained in the UK Report, problems may arise if record companies make the original recording no longer available to users and to the public. In this case, performers will not enjoy the supplementary remuneration from the remaster (because it has not reached the extension period), but also not from the original recording (because it is not generating any revenue since it was removed from commerce).

2.3.5. The "Clean Slate" Provision

While the annual supplementary remuneration aims to improve the position of performers who receive a flat-fee payment, the "clean slate" provision is devised for performers who contractually transfer or assign their rights in exchange for a royalty-based remuneration. This is usually the case of featured artists (performers who appear in the credits).

These contracts provide deductions of a variety of record producers' costs (e.g. music videos, promotion, master costs) from the royalty payments performers are entitled to. As a consequence, the average percentage of royalties actually received by them is very low. According to the Commission, having in mind that only 1 in 8 CD is profitable, royalty payments are often not paid out at all.³²

To protect this category of performers, the new Art. 3(2e) of the Term of Protection Directive establishes that neither advance payments nor any contractually defined deductions will be

³¹ CMOs are defined in the CMO Directive as "any organisation which is authorised by law or by way of assignment, licence or any other contractual arrangement to manage copyright or rights related to copyright on behalf of more than one rightholder, for the collective benefit of those rightholders, as its sole or main purpose, and which fulfils one or both of the following criteria: (i) it is owned or controlled by its members; (ii) it is organised on a not-for-profit basis."

³² Commission proposal, pp. 3-4.

deducted from the payments made to them the 50th year after the phonogram was lawfully published or, failing such publication, lawfully communicated to the public.

Again, the **interpretation of “lawfully published”** should not be an issue in the short-term. However, it may cause problems in the future due to the changes brought by digital technologies to the music market.

Furthermore, as Chapter 3 will explain, the effectiveness of this provision resides on the measures taken by the Member States and the CMOs to **identify which performances and which performers benefit from this provision, and under which terms**. The effectiveness of the provision will also depend on informing performers about this right. In addition, as explained in the UK Report, it is not easy to identify which terms of a contract might be considered **“deductions from royalty payments”**.

2.3.6. Right to renegotiate the contract following the 50th year

The Term of Protection Directive 2011 has introduced a transitional measure (Art. 10a), which relates to contracts concluded before 1 November 2013 (the date when the Directive entered into force). According to this provision, Member States may introduce a right of performers to renegotiate in their favor those contracts which entitled them to recurring payments following the 50th year after the phonogram was lawfully published or, failing such publication, the 50th year after it was lawfully communicated to the public.

The provision does not provide much information about **how this right can be enforced by performers or which kind of modifications can be asked for**. Neither does it clarify whether producers are obliged to accept the modifications proposed by performers, although Recital 16 of the Directive is an indication that the producers have some negotiation leeway.³³ It is optional for the Member States to introduce this right into national legislation. As explained in Chapter 3, only France has implemented this provision in national law, and the implementing measure does not address these questions. However, if the Proposal for a DSM Directive is adopted, performers would benefit from a clearer right to modify their contracts (Arts. 14 to 16).

³³ Recital 16 of the Term of Protection Directive 2011: “(...) Member States should have procedures in place to cover the eventuality that the renegotiation fails.”

3. STATUS QUO OF NATIONAL IMPLEMENTATIONS

The analysis of the implementation of the Directive in selected Member States (France, Germany, Portugal, Romania, Spain, Sweden, and the UK) has three different purposes: first, to obtain detailed information on the adequacy of implementation; second, to find out if the objectives of the Directive are already being accomplished; third, to determine whether Member States have solved the problems identified in Chapter 2. Since it is too early to have relevant case law on the implemented measures, we will analyze their drafting in national laws, as well as the actions taken by CMOs and other stakeholders. This analysis will allow us to identify best practices of implementation that may help in interpreting the Directive's provisions, or that may facilitate the accomplishment of its objectives. The best practices will be identified in Chapter 4.

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3.1. Term Extension

The provisions concerning the **term extension** were mostly complied with and implemented without much problem by the Member States. This was the case in Sweden, France, Spain, Romania and the UK. This however was not the case in Portugal. Portuguese Copyright Law does not have a distinction between the term extension for performers and for producers. The provision referring expressly to the term of protection for producer's rights (Art. 183(4) of the Portuguese Copyright Law) was revoked and never substituted. This leaves one provision on term extension – Art. 183(3) – to be applied to both. The provision reads: "If the fixation of the performance of a performer in a phonogram is lawfully published or lawfully communicated to the public, within the period mentioned in paragraph 1, the term of protection of the right is 70 years following the date of the first publication or the first communication to the public, whichever is the earlier" (the relevant period mentioned in the current version of Art. 183(1) is the 50-year period following the date of the performance; the 50-year period following the fixation was revoked). The term "right" could then be interpreted to refer to either performer or phonogram producer, but this is shrouded in uncertainty and does not seem consistent with the fact that Art. 183(1)(a) only refers to the performance as the relevant act (and not to fixation as well).

As explained in Chapter 2, the Directive does not indicate **what is meant by "lawful publication" and "lawful communication"**, and the majority of countries surveyed have not provided a definition either (although the UK implemented these terms as meaning "authorized", as is apparent from Section 13A(2) CDPA).³⁴ In Portugal, in the first implementation attempt, the national lawmaker did not even state that the phonogram had to be lawfully published or lawfully communicated to the public within the 50-year period following the date of the performance. This error was later corrected.

³⁴ The final part of Section 13A(2) CDPA reads: "(...) in determining whether a sound recording has been published, played in public or communicated to the public, no account shall be taken of any unauthorised act."

The lack of a definition may create legal uncertainty, in particular in those cases where unauthorised fixations of a sound recording (so-called bootlegs) are released. Still in relation to these terms, none of the Member States surveyed have introduced specific measures to deal with the question of **remasters**, and whether they are considered as new phonograms for purposes of computation of term.

In what concerns **co-written musical works**, the provision hasn't caused much difficulties in the implementation stage, again the exception being Portugal, which did not implement it. Under Portuguese law, works of joint authorship are given a single term of protection calculated from the death of the last surviving author, but a musical composition will not necessarily be a work of joint authorship under Portuguese law.

When the performance is **fixed in a medium different than a phonogram**, some national laws were silent (Portugal, UK), which indicates that the term extension does not apply when the performance is fixed in other media (as the respective provisions on term extension only mention phonograms). Other countries (France, Romania, Germany, Spain, Sweden) make a clear differentiation between phonograms and video/other media, prescribing a different term of protection for the latter (50 years). As a result, practical difficulties may arise when a performance has been recorded both on a phonogram and other (audio-visual) media, since such situation is not accounted for in any of the Member States covered by this study. None of the Member States surveyed opted for extending the **term of protection of rights of audio-visual performers and producers**.

3.2. Use it or lose it clause

The implementation of the use it or lose it clause has revealed several problems. Parts of the clause leave **considerable leeway to national legislators**, such as the termination of contracts on transfer and assignment in accordance with applicable national laws when the phonogram contains the **fixation of the performances of a plurality of performers**. The subject of joint ownership is not harmonised in the EU, and therefore the choice to leave this issue to national law is on the one hand understandable. On the other hand, EU law has in the past avoided harmonisation of authorship/ownership while still regulating particular situations – see the case, e.g., of the harmonisation of the term of protection of cinematographic or audio-visual works, which is attached to the death of the last person to survive out of a list of contributors, regardless of whether they are designated as authors;³⁵ or the term of protection of co-written musical works, again set independently of regulation of joint ownership and introduced in the Term of Protection Directive 2011 itself. The regulation of termination of contracts in cases where a plurality of performers is involved might thus represent a missed opportunity to approximate national laws. The choice of the EU legislator to leave this issue to national law has dictated very different solutions across the EU. Having in mind that music performances with a plurality of performers is the general rule in many music styles, the effectiveness of the Directive is affected. The exercise of the use it or lose it clause by performers depends on how complex the answer to this question is in each Member State. Sweden requires that the performers exercise jointly the right to terminate the contracts on transfer or assignment. If only part of the performers does so, the producers will retain the rights in the other contributions. French law requires a common agreement of the performers, who will then have to jointly follow the specific procedure laid down in the law, which is also applicable to individual

³⁵ Art. 2(2) of the Term of Protection Directive: "The term of protection of cinematographic or audiovisual works shall expire 70 years after the death of the last of the following persons to survive, whether or not these persons are designated as co-authors: the principal director, the author of the screenplay, the author of the dialogue and the composer of music specifically created for use in the cinematographic or audiovisual work."

performers (R212-8, III of CPI); any disagreement is to be settled by civil courts. By contrast, in the UK, it seems that any one performer can trigger the use it or lose it clause, which would then cause the other performers to be entitled to terminate their contracts as well; however, they would have to agree on the exercise of their rights after that (e.g., joint exercise, or assignment of the rights to the performer who triggered the clause). Thus, in practice, this might mean that all the performers will need to act jointly (although each one of them would have to issue notices to terminate their individual contracts). Romania has not established any specific procedure, but the existing procedure for collective works states that the group's rights (including, presumably, the right to termination) are exercised by a representative nominated by majority. Similarly, in Germany, the right to termination is to be exercised by an elected representative of the group or by the group leader. In Spain, the exercise of the right must be decided by a representative designated by a majority of the performers for that purpose, but some exceptions exist: orchestra directors and soloists can decide autonomously. So, in the end, the agreement of a majority of performers and of the soloist or the orchestra director is needed; in cases where the soloist and/or the orchestra director decide to terminate the contract, but the rest of the performers do not, this may create a stalemate. Portugal has unclear rules, as it prescribes that performers may terminate their contracts provided that the rules regarding works of joint authorship are respected. This might be interpreted to mean that said rules are applicable to performances, in which case performers would have to be in agreement to terminate their contracts.

Another instance where countries had implementation leeway concerns the procedure to trigger the "use it or lose it" clause. So, for example, French law introduced a two-step procedure to operationalise the clause: the performer must first notify the producer of her *intention* to terminate the contract and – if after one year the producer does not engage in distribution or making available of the phonogram – then she exercises the termination right by notifying the producer of her *decision* to terminate said contract. Since in the other Member States no such procedure is mentioned, this may give the impression that the rights automatically expire after one year post the first notification (because there is no second step). This however does not seem to be the case in Spain, where Art. 110bis(1) of the Spanish Copyright Act refers to the *exercise* of the right after one year, counted from notification. It appears thus that the performer must communicate the termination of the contract to the producers at that point in time (Gonzalez Gozalo, 2017). National reports from Germany, Romania, Sweden and Portugal are not conclusive about this issue.

A second set of problems with the implementation of the "use it or lose it" clause are the **obscure and/or undefined terms** comprised in the provision. This is particularly the case of the term "sufficient quantity". As explained in Chapter 2, the reference to "the meaning of the International Convention on the Protection of Performers, Producers of Phonograms and Broadcasting Organisations", in Recital 8 of the Term of Protection Directive 2011, does not seem to be enough to avoid divergent interpretations. The majority of Member States surveyed have implemented the term without defining it. In the opinion of the CMO representing performers in Portugal, the expression should be interpreted as meaning "in sufficient quantity to be acquired in normal market conditions, that is with a balanced distribution in the territory at stake". According to the same stakeholder, the "sufficient quantity" requirement should also be applied to the making available act, in order to mean that the producer should make the phonogram available not only in one online platform, but in a "significant part" of them that are active on the market. Unsurprisingly, the CMO representing producers in the same country disagreed with these interpretations – it held that "sufficient quantity" is tied to market demand, and that it is only applicable regarding physical copies. The difference in interpretation thus illustrated is likely to take place in other Member States as well.

Other Member States however have defined the term in legislation. It is the case of Spain, where Art. 110bis(1) refers to “a sufficient quantity of copies so as to satisfy the reasonable needs of the public taking into account the nature and aim of the phonogram.” The definition derives from Art. 3(3) of the Berne Convention. As explained by legal doctrine (Gonzalez Gozalo, 2017), the definition requires an analysis of the particular circumstances of the phonogram in question (its content, the featured artist, the producer, its aim, the market and the targeted audience) to determine whether the offer of copies is sufficient. Similarly, in the UK, the law states that “sufficient quantity” means “such quantity as to satisfy the reasonable requirements of the public for copies of the sound recording” (Section 191HA7 CDPA).

Another problem in the implementation of this clause is its operationalisation in practice, and **whether performers are sufficiently informed about their rights** in the context of the “use it or lose it” mechanism. There does not seem to be concerted efforts in terms of informing performers about this clause. Information available on model contracts used by producers indicates that they have not amended such contracts to reflect the use it or lose it clause (Romania, UK, Germany, Portugal). Therefore, performers might be informed of it through the general, official information channels (such as websites of legislative institutions or official journals). Some CMOs representing performers have undertaken to inform their members through their usual channels of communications, chiefly their websites (such is the case of the Romanian CREDIDAM, the British PPL, or the Portuguese GDA). Some respondents point out that more could be done on the side of phonogram producers (or the bodies representing them), with performers in one country (Romania) indicating that producers were reluctant “to enter into a conversation on this topic”.

There also seems to be a mismatch between the practices of the music industry and the “use it or lose it” clause. As explained in Chapter 2, a literal interpretation of the Directive implies that **the right to terminate arises where the producer “fails to carry out both of the acts of exploitation”** (i.e., offering copies in sufficient quantity and making the phonogram available). Such interpretation is supported by the Impact Assessment.³⁶ So for example if a producer offers the phonogram online only, the performer could activate the clause to make the producer distribute physical copies. This can be at odds with existing practices in the music industry, where it is increasingly common to rely only on digital distribution methods (i.e., making the phonogram available on the Internet, as opposed to distributing physical copies such as CDs). Portugal appears to be the only one out of the countries surveyed that went against the text of the Directive and opted for a different solution: according to Art. 183-A(2) of the Portuguese Copyright Law, it is enough that the producer carries out one of the two acts to avoid the performer triggering the clause. The rest of the Member States surveyed have used the same wording as the Directive when implementing the measure in their national laws.

Moreover, and following the Directive’s wording, most national laws do not envisage the possibility of the offering or making available of copies to be made by **third parties**. However, some countries have chosen to deviate from this, probably to comply with industry practices or at least to make the clause more efficient in practice. It is the case of the UK and Portugal, where the offering of copies and making available can be carried out respectively by an exclusive licensee or assignees. In the case of Spain, legal doctrine has interpreted the relevant provision (Art. 110bis (1)) to refer also to third parties (Gonzalez Gozalo, 2017). However, the wording of the second paragraph of the provision refers exclusively to producers.

³⁶ Impact Assessment, p. 26

According to data retrieved, the use it or lose it clause has not been invoked by performers in any of the selected countries. This might be due to the fact that the number of performers that fits this particular “window of time” (given that the right can only be exercised 50 years after the lawful publication or communication to the public of the performance) is still limited (this was pointed out by stakeholders in the UK and Portugal). In addition, in countries such as the UK it is likely that the use it or lose it clause will never be enforced. This is because the equitable remuneration of performers for certain uses of the recording (namely communication to the public) is payable by the owner of the copyright in the phonogram (i.e., the producer).³⁷ But copyright in the phonogram expires if the performer triggers the use it or lose it clause (Section 191HA4 CDPA), causing the performer to lose the right to claim equitable remuneration from the producer during the extension period. Instead, the performer will have to claim it from the “person who plays the sound recording in public or communicates the sound recording to the public” (Section 182D CDPA).³⁸ The uncertainty as to how this remuneration will be paid might thus act as a disincentive to trigger the use it or lose it clause.

3.3. Annual Supplementary Remuneration

The first and most important conclusion that can be extracted from the national reports in relation to the annual supplementary remuneration is that **it is not fully working in practice in all of the surveyed Member States**. Only the CMOs in Spain and the UK are presently distributing the 20% fund among their members. In Spain, more than 1.000 performers have benefited so far; and in the United Kingdom 2.000 performers received until 2016 (collectively) GBP 241.857 relating to 11.600 recordings. GDA in Portugal has initiated the process of collection of the remuneration, but due to the low amount to be collected so far (about EUR 3.000) it has not distributed it among performers yet. GDA expects to start distributing the 20% fund still in 2017. In the case of Germany, according to the information provided by GVL, a pilot phase has started in 2014 and a reasonable amount has already been collected (about EUR 11.400 for 2014 and EUR 32.800 for 2015). However, the remuneration has not yet been distributed among their members because the number of entitled performers is still to be determined, and the way to distribute the remuneration has not been decided. In Romania, the administration of the 20% fund has not been formally discussed, and none of the three CMOs representing performers has been designated to administer it. Finally, information available from CMOs in Sweden and France does not reveal whether they are already collecting and distributing the remuneration³⁹.

The second conclusion relates to the **measures adopted in law and in practice in each of the Member States to identify performers who are entitled to the annual supplementary remuneration**. Having in mind the time that has passed since performances have been published or communicated to the public (50 years), certain scholars have pointed out that this is not an easy task (Gonzalez Gozalo, 2017). However, the effectiveness of the annual supplementary remuneration relies on these measures. Generally speaking, all CMOs have informed their members about it through their websites or newsletters. However, according to the information received, just a few of these CMOs have actively taken concrete steps towards identifying performers who are entitled to the remuneration. That is the case of AIE in Spain, which addressed the record companies either directly (in the case of the “majors”) or through AGEDI (the phonogram producers’ CMO); of GVL in Germany

³⁷ Section 182D. (1.b) of the Copyright and Related Rights Regulations 1996: “Where a commercially published sound recording of the whole or a substantial part of a qualifying performance is included in a broadcast or cable programme service, the performer is entitled to equitable remuneration from the owner of the copyright in the sound recording.”

³⁸ As also stated in the UK Government Explanatory Notes, available at <https://www.gov.uk/government/publications/copyright-in-sound-recordings/copyright-in-sound-recordings> (last accessed 2 November 2017)

³⁹ Apart from the surveyed Member States, the questionnaire received from Yunion/Musik sector states that Austria is already applying the annual supplementary fund and that 17.000 performers are already benefiting from it.

(which addressed the producers represented by the society); and of PPL in the UK, which was able to extract the necessary information for the collection and distribution of the remuneration due to its advanced IT systems and accurate database. GDA in Portugal has started to collect the necessary information but no payment has been distributed yet. According to the national reports, in France, Sweden and Romania no actions have been adopted by CMOs in this regard. AEPO-ARTIS has however pointed out that this is not always the fault of CMOs. Access to the information held by producers is not always easy, and apparently certain CMOs have been asked to pay producers to access their databases.

A third conclusion refers to the implementation in national laws of the **producers' obligation to provide, upon request, any information which may be necessary in order to secure the payment of the remuneration**. This is vital to the effectiveness of the annual supplementary fund, since the necessary information to identify the performances and performers entitled to it is held by producers. While the Directive states that the 20% fund is to be administered by a CMO, most of the Member States have established that the person who has to request the information from the producer is the performer herself (Germany: Section 79a (4), UK: Section 191HB (5), Portugal: Art. 183A (6), and Romania: Art. 102 (1) (5)). French legislation refers to both the performer and the CMO (Art. L-212-3-3-III) Spain (Art. 110bis (2)) and Sweden (Section 45b) have established that the request has to be done by a CMO (and not by performers). So far, these contradictions have not created any problem to the functioning of the fund - probably because it can be presumed that CMOs requesting information to producers are acting on behalf of performers. In fact, in the surveyed Member States where the supplementary remuneration is already operating in practice (Spain, UK, Germany and Portugal), it is the CMO who is contacting producers to obtain this information, and there is no evidence that producers have not provided it. However, it should be recalled that so far the supplementary remuneration system is only working in a few Member States. It is thus not known if any questions will arise in other Member States because of this contradiction. In any case, it should be noted that the regulation of these issues is complemented by Art. 13(3) of the CMO Directive, which establishes a general obligation for CMOs to adopt the necessary measures to identify and locate right holders who are entitled to remuneration.

An additional question related to the obligation to provide information refers to the **measures that can be adopted against those producers who do not provide information, or who provide incomplete information**. Certain CMOs have raised concerns about this issue. Only UK legislation has envisaged a solution to this hypothetical problem: the performer may apply to the county court if the producer does not comply with the obligation within 90 days after the request. Furthermore, performers have a statutory right to apply to the Copyright Tribunal to determine the correct amount which should be remitted by the record company to the CMO (Section 191HB of CDPA). Presumably, even though the CDPA refers exclusively to the performer as the person entitled to go to court, the CMOs will also be able to file these complaints on behalf of the performers they represent, since the Term of Protection Directive 2011 (Art. 2d) requires Member States to ensure that this remuneration is administered by CMOs.

Another issue concerning the obligation to provide information refers to **its scope**. UK legislation obliges producers to provide the necessary information to ascertain the amount due, or to secure its distribution by the CMO. In Germany, the obligation exclusively relates to information about "generated revenues", so it is more limited in scope. According to the national report, it does not entitle performers to check the books of the producer to determine who participated in which fixation and under which terms, for example. By contrast, in Sweden, the Government has interpreted the provision very broadly as entailing an obligation for producers to report such material as is

necessary to make it possible to check the amount of the annual supplementary remuneration. Thus, if an organization so requests, the producer may be required to issue documents that allow for such control. GDA ([Portugal](#)) has also raised concerns about the difficulties in operationalising the payment of the remuneration if accurate information is not provided by producers. In fact, GDA considers it advisable to monitor the records that are marketed in order to double-check the amounts payable. Other Member States ([Spain](#)) have used the same wording as the Directive to implement this obligation, but it is still to be seen how it is interpreted by the competent authorities.

Regarding the **identification of the person responsible for paying the 20% fund**, the [British](#) (Section 191HB (1) (b)) and [Spanish](#) (Art. 110bis.2) legislations refer to the producer or “the exclusive licensee.” However, following the wording of the Directive, most national laws refer exclusively to the “producer”. Problems may arise since, as some CMOs have explained, it is often someone else other than the original producer who exploits and derives income from the exploitation of the sound recording. In those cases, questions can be raised as to who is supposed to pay the remuneration. At least in [Germany](#) and according to the national report, scholars have criticized the legal provision and have sustained that, in case of “band-transfer agreement”, the original producer should be exempted from paying the annual supplementary remuneration.

In relation to the **calculation of the 20% fund**, Art. 3 (2c) of the Directive refers to “20 % of the revenue which the phonogram producer has derived, during the year preceding that for which the said remuneration is paid, from the reproduction, distribution and making available of the phonogram in question”. Furthermore, Recitals 11-13 make clear that “revenue” refers to gross revenue (before deducting costs) and that “no account should be taken of revenue which the phonogram producer has derived from the rental of phonograms, of the single equitable remuneration received for broadcasting and communication to the public or of the fair compensation received for private copying.” Just a few Member States ([Spain](#) and [UK](#)) have introduced these clarifications in their national laws. In the case of the [UK](#), it is further said that the remuneration “is payable within 6 months of the end of each relevant period and is recoverable by the collecting society as a debt.” In other Member States, either the law does not refer to gross revenues ([Sweden](#), [France](#), [Portugal](#)), or the excluded acts are not mentioned ([Germany](#), [Portugal](#)). These omissions might generate legal uncertainty both for performers and producers.

The Swedish Artists' and Musicians' Interest Organisation (SAMI) has criticised that the [Swedish](#) implementing measures do not make entirely clear which uses of the performances are covered, and whether the remuneration applies to foreign fixations exploited in the country. The legislative works support the interpretation that only producers whose contracts are governed by Swedish law (so, phonograms produced in Sweden) are covered by the provision. However, this interpretation is not compatible with the Directive. None of its provisions can be interpreted as limiting the scope of application of the annual supplementary fund.

In the case of [Spain](#), legal doctrine has pointed out that the implementing measures are not in conformity with EU Law, the reason being that Art. 108(3) of the Spanish Copyright Act already grants performers a right to a single equitable remuneration for the making available of their performances (Gonzalez Gozalo, 2017). The introduction of the annual supplementary remuneration in Spanish legislation should then have been accompanied by the revocation of Art. 108 (3), so that performers are not paid twice for the same acts of exploitation of their performances (Gonzales Gozalo, 2017).

Finally, in relation to the possibility of exempting **micro-entreprises** from the obligation to pay the annual supplementary remuneration (Recital 12 of the Term of Protection Directive 2011), only [France](#) has made use of this possibility (Art. 212-3-3 CPI).

3.4. “Clean Slate” Provision

Out of the seven Member States surveyed, two of them **do not seem to have properly implemented the “clean slate” provision**: Sweden and Portugal. In the case of Sweden, art. 45C of the Copyright Act is very similar to the wording in the Directive. However, according to SAMI, the last sentence of the provision states that “Offsetting may be made if the artist explicitly approved it.” This means that the “clean slate” clause is not mandatory and can be derogated by explicit agreement of the parties. According to the national expert report, the Swedish government understood that the existing legislation offers enough means of protection to performers. In particular, contract law (section 36) sets out that contractual terms may be adjusted if a clause is unfair in view of the content of the agreement, the circumstances surrounding it and the circumstances in general. A contract where a “clean slate” clause has been contracted out may still then be considered null and void if, in the view of the circumstances, it is considered unfair. It is doubtful whether this is enough to implement the provision.

In the case of Portugal, the lawmaker seems to have misinterpreted Art. 3(2)(e) of the Directive. It was considered that this obligation is related to the annual supplementary remuneration. This is the reason why Art. 183.a(5) of the Portuguese Copyright Law states that the overall amount that the producer should set aside for performers who receive non-recurring payments shall be unencumbered by advance payments or contractually defined deductions. An amendment to the Copyright Law should be introduced to solve this problem.

The implementations in Spain, UK, France, Germany and Romania are in conformity with the Directive. In fact, most of them are a verbatim copy of the text in Art. 3 (2)(e).

Nevertheless, the implementation of this provision raises some concerns. Firstly, it can be concluded from the national reports that **very few measures have been adopted to inform performers** and/or to help them in enquiring producers about this right. Producers have not amended their model contracts to introduce a “clean slate” clause either. Certainly, they are not obliged to do so, but it shows that so far the clause has not been adopted as a contractual practice in the music sector.

Secondly, none of the reports provides information about **cases where performers have asked for the application of this right**. This might be due to the fact that, as mentioned by SAMI (Sweden), advance payments and deductions were not common contractual practices in the music sector 50 years ago. Another report (UK) provides a different explanation: it is not unusual that a featured artist will be un-recouped for GBP 100.000 or more. In any case, very few performers (those whose performances have already entered the extension period) might have benefitted from this right so far.

Thirdly, as mentioned in the Report from the UK, **the exercise of this right by performers can be made quite difficult** since not all of their performances will come into the extension period at the same time. Most probably, they will come two at a time (if they were originally released as singles) or ten (album). In addition, it is very difficult for producers to find 50-year old accounting and write off the appropriate amount for that individual recording or album.

Finally, some national reports (Spain, Germany, UK) point out that there are some **problems in interpreting the terms “advance payments” and “contractually defined deductions”**. As mentioned in the UK report, further guidance on this issue would facilitate the fulfilment of the obligation by producers. For instance, it is not clear whether the producer can use the royalties generated by the performances already in the extension period to compensate advance payments of performances of the same performers that have not reached that period.

3.5. Right to renegotiate the contract following the 50th year

France is the only Member State that has made use of this optional measure included in Art. 10a(2) of the Directive. According to art. 8.III Loi 2015-195, a recurring remuneration agreed prior to 1 November 2013 can be renegotiated for the benefit of performers. However, the way the provision has been implemented does not necessarily improve the position of performers in contractual relations. In particular, the provision does not clarify important questions surrounding this right to modify the contract, such as: a) how shall this renegotiation take place?; b) are producers obliged to renegotiate?; c) can performers sue producers if they do not agree to renegotiate the terms of the contract?. Without those questions being answered by the legislator, this right does not appear to be fully effective.

In any event, certain Member States already provide performers with “**contractual adjustment mechanisms**” (Bently et al, 2017). That is the case in France, where there are rules aimed at guaranteeing music performers a minimum share in remuneration (Art. 212.13 CPI); and Germany, where the courts have held that the contract adjustment mechanism provided for authors in Art. 32a of German Copyright Law could be exercised by a dubbing actor.⁴⁰ In Spain, performers are not covered by the equitable remuneration action provided for in Art. 47 of the Spanish Copyright Act. In the UK, minimal regulation of copyright contracts exists. Judicial intervention to reformulate contractual terms only occurs under the general doctrines applicable to cases of unreasonable restraint of trade and undue diligence (Bently et al, 2017). Moreover, Arts. 14-16 of the Proposal for a DSM Directive (if and when approved) will ensure the availability of contractual adjustment mechanisms throughout the EU territory.

⁴⁰ BGH I ZR 145/11, 10 May 2012, “*Fluch der Karibik*”

COUNTRY	Term extension	Use it or lose it clause	Annual Supplementary Remuneration	"Clean Slate" Provision	Right to renegotiate the contract following the 50th year
FRANCE	Implemented verbatim.	In case of multiple performers, a common agreement is needed A two-step procedure to operationalise the clause is introduced: first a notification to the producer, if after one year the producer does not engage in distribution or making available of the phonogram; second, a new notification to terminate the contract.	Still not working in practice. The person who has to request the information from the producer can be either the performer of the CMO. Micro-enterprises are exempted from the 20% fund.	Implemented verbatim.	Implemented quasi verbatim.
GERMANY	Implemented verbatim.	In case of multiple performers, the right of termination is to be exercised by an elected representative of the group or by the group leader.	The remuneration is already being collected, but not distributed. The person who has to request the information from the producer is the performer herself.	Implemented verbatim.	This optional measure has not been implemented.
PORTUGAL	The provision was not adequately implemented. A distinction is not made between performers and phonogram producers.	In case of multiple performers, rules on joint ownership must be followed. The offering of copies and making available can be carried out respectively by an exclusive licensee or assignees instead of the producer.	The remuneration is already being collected, distribution is expected to start still in 2017. The person who has to request the information from the producer is the performer herself.	The provision has not been adequately implemented.	This optional measure has not been implemented.
ROMANIA	Implemented verbatim.	In case of multiple performers, the general procedure for collective works applies.	Still not working in practice. The person who has to request the information from the producer is the performer herself.	Implemented verbatim.	This optional measure has not been implemented.
SPAIN	Implemented verbatim.	In case of multiple performers, an agreement by a majority is needed. A representative will be appointed to exercise the right. Soloist and	The remuneration is being collected and distributed in an adequate manner.	Implemented verbatim.	This optional measure has not been implemented.

COUNTRY	Term extension	Use it or lose it clause	Annual Supplementary Remuneration	"Clean Slate" Provision	Right to renegotiate the contract following the 50th year
		<p>orchestra directors can act autonomously.</p> <p>A definition of "sufficient quantity" is included: "a sufficient quantity of copies so as to satisfy the reasonable needs of the public taking into account the nature and aim of the phonogram."</p>	<p>The person who has to request the information from the producer is the CMO.</p> <p>The person responsible for paying the 20% fund is the producer or "the exclusive licensee".</p>		
SWEDEN	Implemented verbatim.	In case of multiple performers, they must jointly exercise the right.	<p>Still not working in practice.</p> <p>The person who has to request the information from the producer is the CMO.</p>	The implementing provision states that "Offsetting may be made if the artist explicitly approved it."	This optional measure has not been implemented.
UK	Implemented verbatim.	<p>In case of multiple performers, any of them can trigger the clause, which would then cause the other performers to be entitled to terminate their contracts as well.</p> <p>A definition of "sufficient quantity" is included: "such quantity as to satisfy the reasonable requirements of the public for copies of the sound recording."</p> <p>The offering of copies and making available can be carried out by an exclusive licensee or assignee instead of the producer.</p>	<p>The remuneration is being collected and distributed in an adequate manner.</p> <p>The person who has to request the information from the producer is the performer herself.</p> <p>Performers can bring producers to court if the latter do not provide the information needed for payment of the remuneration within 90 days.</p> <p>The person responsible for paying the 20% fund is the producer or the exclusive licensee.</p>	Implemented verbatim	This optional measure has not been implemented.

4. BEST PRACTICES

The analysis of national implementations of the Term of Protection Directive 2011 in selected Member States allows for the extraction of best practices. The best practices were selected taking into account its contribution to achieve the main objectives of the Directive, identified in 2.2.: contributing to enhancing the welfare of performers and the competitiveness of the music industry, and increasing the available music repertoire. The best practices identified may thus be used as a model in other Member States to provide a solution to the problems identified in Chapter 2, and to facilitate the accomplishment of the Directive's objectives.

4.1. Term extension

The implementation of the provisions concerning the term extension is very similar in the Member States surveyed, making it challenging to select best practices. Only one is worth mentioning: the clarification in UK law that "lawfully published" or "lawfully communicated" means **authorised by the right holder concerned**. This would make clear that the unlawful publication or communication to the public of the phonogram (such as the so-called "bootleg") should not be taken into account in the calculation of the term of protection.

All the Member States surveyed have kept the distinction between "lawful publication" and "lawful communication to the public", as well as the more relevant role of the former in the calculation of the term of protection of producers' rights. As explained in Chapter 2, this preference does not seem to be in conformity with the actual practices in the music sector, where making available on the Internet is becoming the rule, and the lawful publication of an album in tangible format will soon be the exception. Still, none of the Member States have understood that this problem deserved a detailed solution in national law. The same is true in the case of remasters: no particular provision is found in the implementation measures analysed.

Considering the actual practices in the music market, it would be better to count **the terms of protection from the date of the lawful publication or the lawful communication to the public, whichever takes place first**. It is possible that the CJEU adopts a broad interpretation of the concept of "lawful publication" that includes the making available of the performance on the Internet, in which case an amendment of the Directive would not be necessary in the future. Such broad interpretation would not be incompatible with the WPPT and the Rome Convention, since both treaties provide for a "de minimis" protection: while the EU must consider as a publication the commercialization of the performance in tangible copies, it ought to be free to consider the making available on the Internet as a publication as well. If adopted, such interpretation would favour the protection of performers, since the extension period would start earlier (and thus performers would be able to enjoy the rights provided for in the accompanying measures earlier).

None of the Member States have opted for an extension of the term of protection for audio-visual performers and producers either.

4.2. "Use it or lose it" clause

The first problem concerning this provision is the termination of contracts in accordance with national law when the phonogram contains the **fixation of the performances of a plurality of performers**, something that is very common in practice. The analysis of the national laws has shown different approaches from one Member State to another. This creates legal uncertainty and diminishes the protection of performers in those Member States where the solution provided in

national law is very complex. Following the solution in most of them, the decision to exercise the right of termination should be adopted by a majority of performers, so that no “blocking minority” stands in the way of the wishes of the majority. As established e. g. in Germany, performers should nominate a representative to exercise the right and to negotiate with the producers following the instructions previously agreed with the rest of performers. This solution lends fairness and clarity to the system, therefore enhancing the welfare of performers.

Another cause for concern is the interpretation of the first condition that triggers the application of the clause: the fact that the “phonogram producer does not offer copies of the phonogram for sale in sufficient quantity or does not make it available to the public”. All the Member States surveyed (except for Portugal) have implemented this provision verbatim, and thus the performers’ right to terminate the contract arises where the producer fails to carry out both of the acts of exploitation. The obligation for the producer to carry out both acts of exploitation seems to be out of synch with the reality of the music industry. The solution provided in Portugal is better suited for that reality: **one act of exploitation (making available on the Internet) is enough to avoid the application of the clause.**

Moreover, further clarification of the term “**sufficient quantity**” is needed. In this respect, the implementing measures in Spain and the UK provide a good example. In particular, Art. 110bis of the Spanish Copyright Act appears to be a sensible option: it takes Art. 3(3) of the Berne Convention as a reference, instead of the Rome Convention (which was mentioned in Recital 8 of the Term of Protection Directive 2011). The provision in the Spanish Copyright Act mentions “a sufficient quantity of copies so as to satisfy the reasonable needs of the public, taking into account the nature and aim of the phonogram”. As explained by legal doctrine (Gonzalez Gozalo, 2017), the definition requires an analysis of the circumstances of the phonogram in question (its content, the featured artist, the producer, its aim, the market and the targeted audience) to determine whether the offer of copies is sufficient. A similar interpretation could be adopted in other Member States, as the Spanish solution – by considering the context of the specific case – seems to strike a balance between the interests of the producers and the performers.

Yet another problem identified refers to the procedure to terminate the contract. For the benefit of performers’ interests, and also in line with the aim of increasing the available music repertoire, **this procedure should be as simple as possible**, where permitted by national contract law. So a two-step procedure such as the one in France should be avoided. Hence, once the producer has been notified, if a year passes without offering copies in sufficient quantity or making the performance available to the public, the contract should be automatically terminated.

In addition, following the example of UK and Portugal, Member States should clarify that the right to terminate the contract can be enforced against producers or against third parties (**exclusive licensees**) to whom the rights have been assigned/transferred to. In such situations of assignment/transfer, the addressee of the notification that needs to be made by performers should be the exclusive licensee and not the original producer. It should be noted, however, that national laws do not necessarily provide a definition of “exclusive licensee”, and where they do such definition might differ from one Member State to another.

Finally, a reference should be made to the relevance of adequately informing performers of their rights in the context of the “use it or lose it” clause. In all the Member States surveyed, CMOs have adopted measures to inform their members of this new right. However, only a few have reported that they have taken the initiative of contacting phonogram producers to obtain the necessary information that performers need to exercise the right. From the information in the national reports

and the questionnaires, the measures taken by AIE ([Spain](#)) and PPL ([UK](#)) are examples to follow. They show the relevance of an updated electronic database, and of a good communication scheme between performers' CMOs and producers' CMOs. Questionnaires have shown that more can be done. The fact that no performer has made use of the clause so far in the Member States surveyed might be explained by the limited number of performers who currently fulfil the conditions to trigger the clause. Still, an additional reason might be the lack of information these performers have about the new right. Similarly to what will be explained in relation to other provisions of the Directive, **more can be done by CMOs, producers and national authorities to inform performers of their rights and to assist them in their exercise**. This cannot be accomplished by CMOs alone, since the relevant information is held by producers, and it refers to performances that were recorded 50 years ago. Communication schemes between CMOs and producers are required. National authorities should provide for a mandatory obligation of producers to provide information about performances entering into the extension period at the beginning of each year. As explained by AEPO-Artis, this obligation exists in the CMO Directive in relation to users (art. 17) but not to producers.

4.3. Annual Supplementary Remuneration

Just as the “use it or lose it” clause, the effectiveness of the annual supplementary remuneration depends both on the legal measures adopted by the Member States to implement the obligation in national law, and on the **measures taken by CMOs to inform performers and to obtain the necessary information** about which of them participated in a particular performance and under which terms. In this sense, as the examples of AIE ([Spain](#)) and PPL ([UK](#)) confirm, good internal organisation and handling of advanced computer systems by CMOs is of great help. In cases where performers' and producers' rights are administered by different CMOs (e.g. Spain), efficient communication schemes are essential for the annual supplementary remuneration to effectively work in practice.

In relation to the obligation of producers to provide the information needed to secure the payment, this obligation should be accompanied by three measures, which would contribute to enhance the welfare of performers.

First, further **clarification in relation to the person who can request the provision of that information**. The wording of the national implementation measures shows discrepancies on this issue: some only mention the performer (Germany, UK, Portugal, Romania), others only mentioned CMOs (Spain, Sweden). The implementing measure in [France](#) is the only one that mentions both CMOs and performers. Since in practice CMOs are requesting this information in all the Member States, a reference to them should be included in the provision. However, performers should also be mentioned since in certain situations it might be easier for them than for the CMO to contact the producer to obtain that information. Therefore, a provision such as the one in French legislation is to be followed to avoid any uncertainty about the legal standing of performers or CMOs to request that information.

Second, the obligation of producers to provide such information **should be strengthened**. As mentioned by AEPO-Artis, this obligation should be mandatory, and producers should provide the information free of charge. The rule imposed on users in Art. 17 of the CMO Directive, or in Art. 14 of the Proposal for a DSM Directive, could be taken as a model to follow. Legislation similar to the one adopted in the [UK](#) also seems appropriate. According to Section 191HB CDPA, if a producer does not provide the required information within 90 days, or if he/she provides incomplete information, the performer or the CMO should be entitled to bring the producer to court. If this procedure is used as a

model, it should be considered having exceptions to this rule; namely, the producer should be allowed to deny the provision of the information in justified cases (e.g., if the collection of the information is excessively burdensome). This would guarantee a balance between the interests of performers and producers.

Third, national legislations should **clarify what information a producer can be asked to provide**. The broader the interpretation of the terms of the Directive – “any information which may be necessary in order to secure payment” – the better for the accomplishment of the Directive’s objective of increasing the protection of performers. While a broad interpretation is defended by the Swedish government regarding the Swedish implementing measures, the only law that presently allows for a broad interpretation is the UK’s, which refers to information that can enable the performer “to ascertain the amount of the annual payment to which the performer is entitled to”, or “to secure its distribution by the collecting society” – Section 191HB (5) CDPA. However, some limits should be established so that producers are not unfairly affected: the amount of information requested should not make its provision excessively burdensome for producers; and the obligation should not extend to information that can be considered trade secrets, or personal data of third parties.

Another question where further clarification is needed refers to the **identification of the person responsible for paying** the annual supplementary remuneration. As established in UK and Spanish legislations, in those cases where the producer has assigned the rights to an exclusive licensee, the person who must pay the annual supplementary remuneration ought to be the latter. This should be replicated in the laws of other Member States, either by means of amending the law or by means of interpretation by the courts. However, the producer should only be exempted from payment where exclusive licenses are implied. By contrast, in the case of a non-exclusive license, the producer should still be responsible for paying the remuneration.

Finally, only Spain and the UK have elaborated on the **calculation of the 20% fund**. Still, according to the national experts, this does not seem to be enough. Providing more details on this issue is beneficial for performers (since it enables them to know how the annual supplementary remuneration is calculated), and it can give guidance to producers on how to adequately comply with their obligation. This is a practice that should be followed either by the administrative unit with competences in copyright, or by CMOs in other Member States.

4.4. “Clean Slate” provision

In relation to the “clean slate” provision, most Member States have followed closely the wording of the Directive, which means that there are not many best practices that can be derived from national experiences.

Nevertheless, further action seems necessary in all the Member States to **inform performers of this new right**. CMOs are likely in the best position to provide this information, but other measures can be considered: e.g., producers could be obliged to send notices to performers to inform them of the possibility to exercise the “clean slate” right every time one or several of their performances enter the extended period of protection (from the 50th to 70th year).

Furthermore, some guidance is needed on the **interpretation of certain terms** of the provision such as “advance payments” and “contractually defined deductions”.

Finally, it needs to be mentioned that the option taken by Sweden of adopting a provision on the “clean slate” right that can be derogated by the parties appears to be in contradiction with the Directive. To ensure a high level of protection of performers, this provision should be **mandatory**.

4.5. Right to renegotiate the contract following the 50th year

As mentioned by the UK expert, the optional measure established in Art. 10a(2) of the Directive - the right of performers to ask for the renegotiation of their contract - would improve their position in contractual relations. **Only one of the Member States (France) has opted for introducing this right in national law** and, as previously explained, the regulation is not satisfactory since many questions in relation to its exercise remain unanswered. Further development of the regulation is needed.

Should Art. 15 of the Proposal for a DSM Directive be adopted, the lack of implementation of the right to ask for the modification of the contract is less problematic. Art. 15 would oblige Member States to introduce a much clearer and stronger right to request an adjustment of their remuneration in cases where the remuneration originally agreed is disproportionately low compared to the subsequent relevant revenues derived from the exploitation of the performance. Performers would be entitled to request the amendment of their contract at any moment (not as Art. 10a (2) states following the 50th year of protection).

5. POTENTIAL LONG TERM EFFECTS OF TERM EXTENSION

5.1. Effects in the EU

In its Digital Single Market Strategy from 2015, the Commission indicated the need to modernise EU copyright rules as a way forward to have “better access to digital content.”⁴¹ Still, while the need to increase (cross-border) access to copyright-protected content seems to underline the Strategy, the Commission also points out the key role, inter alia, of an “effective and balanced civil enforcement system against commercial scale infringements of copyright”, as well as of measures safeguarding remuneration of creators. The Commission thus seeks to strike a balance between the protection of creators, on the one hand, and the dissemination and consumption of their creations, on the other hand.⁴² Having this balance in mind, the analysis of the effects of the term extension within the EU has to be carried out against the backdrop of its impact on the cultural and creative sectors (5.2.1.), but also on other EU policies that might be affected, such as consumer protection, competition and the protection of cultural diversity (5.2.2.)

5.1.1. The Cultural and Creative Sectors

Most collecting societies representing performers and/or producers (such as the Portuguese GDA, the UK Musician’s Union, or the Swedish SAMI) have indicated that the term extension was extremely important for the protection of performers and/or producers, because among other reasons it approximated EU laws to those of relevant markets (such as the US and Brazil), and also due to the incentive to investment that the potential increase in revenues represents. Nevertheless, it has also been pointed out that in Germany small or independent producers, as well as performers, have not yet benefitted from the term extension. Some performers in Portugal were not aware of the benefits brought by the Directive. In Romania, a collecting society representing performers stated that, even though performers are aware of the Directive, they need further assistance from collecting societies to actually accrue the benefits they might derive from it. The UK expert indicated that the Directive is beneficial to performers depending on their situation. Non-featured performers are benefitting from the supplementary remuneration and from extra 20 years of additional equitable remuneration (provided that no other performer triggers the “use it or lose it” clause). By contrast, featured performers, who are receiving recurring payments, benefit less from term extension due to the way the “use it or lose it” clause was drafted, the issues associated with the “clean slate” provision, and the fact that in the UK there is no contract renegotiation provision. Their main benefit is the equitable remuneration in the extension period (again, provided that none of the other performers triggers the “use it or lose it” clause). These performers receive royalties during the extension period, but the amount of such royalties may be low due to the age of the contract.

The benefits of term extension are contested by some users rights’ associations (e.g., the Portuguese D3 Direitos Digitais, which is included in the Portuguese national report), which argue that it makes access to culture more expensive by prolonging the period of exclusivity.

In the countries surveyed, no data was available regarding the global yearly benefits resulting from term extension (even though some data was available in relation to the 20% fund, as mentioned in Chapter 3). This might have to do with the fact that it is too early on to collect data (e.g. the Portuguese collecting society GDA admitted that they had not yet completely organised the

⁴¹ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, “A Digital Single Market Strategy for Europe, COM (2015) 192 final, 6.5.2015.

administration and distribution of benefits to its members), or with the method through which the data is gathered by the collecting society, which might not allow for the differentiation of records protected under the extension period (i.e., records which are older than 50 years and younger than 70 years) vis-à-vis the other protected records (i.e., records younger than 50 years) - this is the case, for instance, of the Portuguese collecting society AUDIOGEST. The global music industry seems to be experiencing a “modest growth”,⁴³ and particular EU countries (e.g. Sweden) confirm this,⁴⁴ but no correlation can be established with the implementation of the Term of Protection Directive 2011. It is foreseeable that the term extension’s impact on performers and producers will be marginal in the first years, but it might grow steadily on a yearly basis – discounting of course the risk of unstable business models that characterise the music industry (as mentioned by the Impact Assessment carried out for the implementation in France).⁴⁵

Moreover, some stakeholders that operate at the European level (such as Spotify or Deezer) and national level (e.g., Radio France) were consulted, but did not provide a reply within the time frame of the preparation of this study. It is therefore not known whether their business models were affected by the Term of Protection Directive 2011. It is believed however (as pointed out by the UK expert) that users such as film and television companies will have to pay synchronisation licenses that they would not have to pay had the recordings in question been in the public domain (even though synchronisation accounted for only 2% of the global music revenues in 2016,⁴⁶ which shows its relative unimportance).

There is no concrete data on the development of new distribution channels, or on new means of revenue streams. One collecting society (the Swedish SAMI) has mentioned that “new areas of exploitation are popping up”, but did not provide any further details.

5.1.2. Other EU Policy Areas

- Consumer Protection

The EU’s Consumer Policy is based on a high level of consumer protection (Art. 169 TFEU and Art. 38 of the EU Charter of Fundamental Rights). Consumer protection requirements should be taken into account in the context of other EU policies (Arts. 12 and 114(3) TFEU). Some end users of copyright protected works can be seen as consumers under consumer law (chiefly, those who are the passive recipients of copyright goods and services - Ramalho, 2016). It follows that consumer protection imperatives ought to be taken into account in copyright lawmaking (Ramalho, 2016).

Regarding potential **positive effects** of the Term of Protection Directive 2011 on consumer protection policies, the Commission has indicated in the Impact Assessment that public domain companies tend to re-release records without due regard for quality, and that few incentives were in place to market records in the public domain (i.e., where both copyright and related rights had expired). According to the Commission, this would affect both the quality of music products and

⁴² In the words of the Commission, “Europe needs a more harmonised copyright regime which provides incentives to create and invest while allowing transmission and consumption of content across borders, building on our rich cultural diversity (Digital Single Market Strategy, 2015).

⁴³ According to the IFPI’s “Global Music Report 2017”, available at <http://www.ifpi.org/downloads/GMR2017.pdf> (last accessed 26 November 2017). In 2016, revenues from recorded music in Europe amounted to ca. 4.3 billion Euro, which is an increase for the second year in a row after a decreasing tendency since 2001 (data available at <https://www.statista.com/topics/3903/music-industry-in-europe/>, last accessed 28 November 2016).

⁴⁴ In Sweden, recorded music revenues have increased 6,2% in 2016, with streaming revenues accounting for 82,3%.

⁴⁵ French Impact Assessment available at http://www.legifrance.gouv.fr/content/download/7258/102236/version/1/file/ei_dda_ue_propriete_artistique_patrimoine_culturel_cm_22_10.2014.pdf (last accessed 21 November 2017).

⁴⁶ See IFPI’s “Global Music Report 2017”.

services offered to consumers, as well as the breadth of consumer choices, which might consequently increase as a result of the Directive.⁴⁷

The only instance where this has been confirmed by empirical data is Portugal, but even so said data relies on the views of one collecting society (which indicated that low-quality musical products had been forced out of the market as a result of the implementation of the Directive). Another Portuguese collecting society mentions that data show an increase in record releases in Portugal, but highlights that it cannot establish a correlation between such increase and the Directive.

In terms of the potential **negative effects** of the Term of Protection Directive 2011 on consumer protection policies, the enlarged protection granted to performers and phonogram producers might erode the protection of some users of copyright protected works who are also consumers under consumer law. Namely, such enlarged protection might lead to a price increase of phonograms. The increase in price could be a consequence not only of the term extension, but also of the establishment of a 20% fund (which might lead producers to charge more for their services).

The EU Commission has stated in the Impact Assessment that “there is no empirical evidence that price difference between sound recordings that are in- or out-of copyright would be significant.”⁴⁸ Some studies back up this conclusion, by finding no evidence that out-of-copyright sound recordings are systematically sold at cheaper prices (it is the case of a PriceWaterhouseCoopers study, cited by the Commission in its Impact Assessment, which analysed the impact of term extension in the UK)⁴⁹. According to the Commission, this is all the more so since, after the expiry of neighbouring rights, the musical composition is still under copyright. This would in theory lead to less price fluctuation between works that are still protected and those that are not.⁵⁰ Other studies however hold that producers’ gains from term extension are derived from higher prices, and therefore from consumer losses (Kretschmer et al., 2008; see also Hilty et al., 2009 and van Eechoud et al., 2009).

The different methodologies and outcomes of the various studies allow for one conclusion: it is indeed difficult to demonstrate a price increase, or a lack thereof, connected to an enlarged protection. Music is sold in different ways, many times as part of online subscription packages, and in some instances no pecuniary price is paid by the end user (who “pays” for music indirectly, through advertisements) (UNESCO, 2016). Moreover, the price of recordings is determined by several factors, which include its copyright status, but also production costs and demand due to e.g. genre popularity. In that sense, no two recordings are exactly the same, making it hard to find works that are completely identical save for its copyright status (CIPIL, 2006; Kretschmer et al., 2008) – and consequently making it difficult to demonstrate fluctuations of price (or the absence thereof) between protected and unprotected recordings. This difficulty has expressly been underlined by one of the Swedish experts.

The extension of the term of protection has not been uncontroversial, with some organisations and/or governments (e.g. in Portugal and Sweden) raising concerns connected to the cost increase for users (including end-users or consumers). Such concerns were however not accompanied by specific data showing said cost increase. By contrast, the Swedish collecting society SAMI has stated that it has not carried out any changes in pricing, but this constitutes only one stakeholder and broad conclusions cannot be drawn. The impossibility to draw clear conclusions from the data available regarding the effect of the Directive’s provisions on the price of phonograms was in fact pointed out

⁴⁷ Impact Assessment, p. 37-38.

⁴⁸ Impact Assessment, p. 29.

⁴⁹ Impact Assessment, p. 36, citing PriceWaterhouseCoopers, “The impact of copyright extension for sound recordings in the UK” (2006), a report prepared for the British Phonographic Industry.

⁵⁰ Impact Assessment, p. 36-37.

by some national experts.⁵¹ As mentioned above, stakeholders such as Spotify or Deezer did not provide an answer to the questionnaire, and it is therefore not known whether they bore costs deriving from the implementation of the Directive, that they then passed on to consumers. Likewise, even though it is believed that other users such as film and television companies will have to pay synchronisation licenses that they would not have to pay absent the Directive's implementation, it is not clear if and how that extra cost would pass on to consumers. Other organisations that operate at the national level - e.g., the Portuguese Consumer Rights Association or the British consumer organisation Which? - reported not having enough data to assess whether the Directive had a negative impact on consumers.

- **Competition**

Arts 101 and 102 TFEU are aimed at preventing anti-competitive behaviour in the internal market and constitute the core of EU competition policy. Ownership of an intellectual property right coupled with an agreement, decision, or concerted practice which affects competition (Art. 101), or with an abuse of dominant position (Art. 102) will be at odds with EU competition law. For instance, a licensing agreement the effect of which is to avoid entirely the effects of competition would infringe Art. 101 TFEU (Seville, 2016).⁵² In what concerns Art. 102 TFEU, term extension could in theory consolidate the dominant position of the major market players, with effects on secondary markets (such as films or broadcasts) because, for example, of higher prices, or due to the fact that the producer refuses to license a particular work (van Eechoud et al., 2009). Either circumstance might constitute an abuse barred by Art. 102 TFEU in case the prices charged are unreasonable or if the refusal to license prevents the emergence of a new product for which there is potential consumer demand; is unjustified; and excludes competition in the secondary market (Seville, 2016).

No evidence could be collected from the surveyed Member States that either of these situations took place since the implementation of the Directive, in relation to phonograms that fall under the extended period of protection. The Spanish Competition Authority was very critical of the term extension in general, and of its application to existing phonograms in particular, stating that the latter could not be based on the incentive function of copyright and created therefore an unjustified monopoly. However, this position did not have any consequences to the implementation of the term extension in Spain. According to the British report, some companies in the secondary market will find that they are paying more in licensing due to the term extension, but that observation was not accompanied by quantifiable data, and in any case that fact alone does not yield a distortion of competition.

- **Cultural Diversity**

One of the objectives of the EU is to "ensure that Europe's cultural heritage is safeguarded and enhanced" (Art. 3(3) TEU). Following Art. 167(4) TFEU, which sets forth an obligation for the EU to take cultural aspects into account in its actions, copyright legislation has to be compatible with the EU's cultural objectives (including cultural diversity) (Ramalho, 2016; Psychogiopoulou, 2008). This implies inter alia a facilitation of access to culture and cultural works, as advocated by the Commission in its Communication on a European Agenda for Culture in A Globalizing World.⁵³ In that sense, cultural diversity policies are inextricably linked to consumer protection policies, as more access to cultural

⁵¹ See e.g. report from Sweden.

⁵² In 2007, the European Commission sent a Statement of Objectives to record companies and Apple against alleged territorial restrictions in online music sales, but there was no follow-up action because Apple announced that it would not engage in territorial price discrimination (Seville, 2016).

⁵³ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a European agenda for culture in a globalizing world, COM (2007) 242 final, 10.05.2007.

works will in theory benefit consumers. The arguments outlined below should also, therefore, be considered in the framework of consumer protection policies.

In what concerns the **positive effects** of the Directive, the Commission has argued in the Impact Assessment that benefits deriving from the term extension would fund new talent.⁵⁴ This point is controversial, with some studies holding that increased profit deriving from term extension will not necessarily be channelled towards investing in new artists (van Eechoud et al., 2009; Hilty et al., 2009), while others state that future artists are typically financed from current revenues (LECG, 2007). One collecting society has indicated an increase in record releases in Portugal, and these releases concern mainly new artists. However, the collecting society itself underlined that it could not establish a correlation between that fact and the implementation of the Directive.

It can also be argued that producers will be more willing to market back catalogue items, thereby making access to otherwise unmarketed items possible.⁵⁵ Some studies contradict this premise, stating that what would be needed to enable access to back catalogue music are limitations subject to remuneration, not an extension of protection (Hilty et al., 2009). One national expert (UK) has stated that increased marketing spend on back catalogue items is likely to have happened, although he was not able to obtain quantifiable information on this.

In terms of **negative effects** on cultural diversity, it is not clear whether the extra licenses to be paid by users such as film and television companies will have a chilling effect on the availability of works that would be in the public domain were it not for the Directive. If that is the case, such effect might be at odds with the facilitation of access to culture and cultural works that should underpin cultural diversity policies. The same can be said of a potential price increase – as mentioned by D3, an association advocating for users' rights, access to culture will be more expensive due to price increase. However (as discussed in the previous section) it is not possible to draw definitive conclusions as to whether the Directive has indeed caused such price increase and consequently a decrease in access to culture and cultural works.

5.2. Effects on competitiveness vis-à-vis third countries

The potential long term effects on competitiveness in relation to third countries relate to the alignment of the EU term of protection with the terms of its trading partners, thus potentially improving the situation of the EU performers and record producers in the music market. The Impact Assessment identifies as an operational objective of the proposal for a Directive on Term Extension to decrease discrepancies in protection between the EU and US markets, and one of the specific objectives of the proposal relates also to enhancing the competitiveness of the European music industry.⁵⁶

Copyright and related rights treaties prescribe the principle of national treatment, which requires countries to grant foreigners the same treatment that they give to their own nationals.⁵⁷ This would decrease the risk of discrepancies in protection between the EU and third countries. However, the principle of national treatment comprises limitations. One example of such limitations is the rule on comparison of terms of the Berne Convention, which allows member countries to shorten the

⁵⁴ Impact Assessment, p. 39.

⁵⁵ Impact Assessment, p. 38.

⁵⁶ Impact Assessment at 22-23.

⁵⁷ Berne Convention, Arts. 5.1 and 5.3.; Rome Convention, Art. 2; TRIPS Agreement, Art. 3; WCT, Art. 3; and WPPT, Art. 4.

duration of copyright protection given to foreigners to the term enjoyed by them in their country of origin.⁵⁸

Arguably, the rule on comparison of terms can be used as an argument for national governments to increase their own term of copyright protection and align it with foreign trading partners – that is what happened, for example, in the United States, which chose to increase copyright duration from 50 to 70 years pma following the original EU Term of Protection Directive (Brauneis, 2013). The rule on comparison of terms was also one of the arguments used to defend the extension of the term of protection of performers' and producers' rights to 70 years after publication or communication to the public of the fixation of the performance (van Eechoud et al, 2009). Such argument was based on the premise that non-EU countries were allowed to not grant longer protection to EU right holders as they granted their nationals, thus putting EU performers and producers at a disadvantage.

However, when it comes to related rights such as those of performers and phonogram producers, not all international treaties put forth the limitation of comparison of terms. The majority of commentators is of the opinion that the Rome Convention does not give room to comparison of terms (van Eechoud et al, 2009, and references cited therein). In accordance with this interpretation, the Rome Convention applies a broad principle of national treatment: it requires a member country to grant to foreign right holders terms of protection longer than they would enjoy in their country of origin.⁵⁹ By contrast, the TRIPS Agreement (Art. 3.1) and the WPPT (Art. 4) only require countries to apply the principle of national treatment in relation to the rights provided in their texts. Parties to these treaties may thus apply a comparison of terms by restricting the term of protection of foreign right holders to the minimum terms provided for in the treaties (i.e., 50 years) (van Eechoud et al, 2009; WIPO, 2004).

In order for EU performers and producers to be put at a disadvantage vis-à-vis third countries due to the rule on comparison of terms, three conditions must be met: (1) the non-EU country is a trading partner of the EU; (2) the non-EU country has a term of protection longer than 50 years (which was the term of protection before the Term of Protection Directive 2011); (3) the non-EU country applies a comparison of terms. These conditions shall be analysed in turn. The effects of competitiveness vis-à-vis the countries that meet the three conditions will then be further examined.

(1) Trading partners of the EU

Statistics relating to trade in music are disperse and not always available. For example, while CDs come under trade of cultural goods, streaming and music downloads are factored in as trade in services. A recent study has found that physical formats still account for about half of the music industry's total revenue (Europe Economics et al., 2015), and therefore it is necessary to establish who the main trading partners of the EU are in both music goods and music services.

In statistics relating to EU exports of tangible cultural goods from 2014, CDs, DVDs and records (excluding licenses) represented 6% of the total trade (behind works of art, books, and antiques, which together amount to about 70%).⁶⁰ That percentage dropped to 5.3% in 2015,⁶¹ and music

⁵⁸ Berne Convention, Art. 7.8: "In any case, the term shall be governed by the legislation of the country where protection is claimed; however, unless the legislation of that country otherwise provides, the term shall not exceed the term fixed in the country of origin of the work."

⁵⁹ With one exception: where the producer of a phonogram is a national of another Contracting State, Article 16.1.a.iv Rome Convention provides for a possibility of a country limiting the right to remuneration for the secondary use of phonograms for commercial purposes to the duration that that State grants protection to phonograms first fixed by a national of the country making use of that possibility. Some Member States of the EU have resorted to this clause - see van Eechoud et al., 2009.

⁶⁰ Data available in the Eurostat cultural statistics report 2016, available at <http://ec.europa.eu/eurostat/documents/3217494/7551543/KS-04-15-737-EN-N.pdf/648072f3-63c4-47d8-905a-6fdc742b8605> (last accessed 25 October 2017)

⁶¹ Data available at

consumption patterns evolving from physical to digital mean that this figure is bound to continue to decrease.

In terms of trading partners for tangible cultural goods, in 2015 the United States were the leading export market (40.8%), followed by Switzerland (19%), Hong Kong (6.9%), Norway (2.7%), Australia (2.4%), China (2.2%) and Japan (2%). The central role of the US as an export market is more visible in comparison with previous years (e.g., 27.2% in 2014), but it is relatively safe to assume that the US has been a constant target for cultural exports (including music) throughout the years. The same can be said of Switzerland (21.7% in 2014), Hong Kong (2.3% in 2014), Norway (5% in 2014), Australia (2.5% in 2014) and Japan (2.6% in 2014).⁶² Available statistics from 2009 per product show a similar tendency: the main export markets for CDs that year were Switzerland (23%), Norway (20%), the United States (17%), Japan (12%), Australia (4%) and Hong Kong (2%).⁶³

With regard to music services, these would come under the general category of trade in services and include personal, cultural and recreational services (which comprises audio-visual and related services such as music, television and radio), as well as charges for the use of intellectual property, which encompasses licenses. In 2015, these categories amounted to almost 10% of the total trade in services.⁶⁴ Information relating to the trading partners in these specific categories could not be retrieved, but statistics of trade in services reveal that the main EU trading partners regarding services in general from 2011 to 2016 were the United States, Switzerland, China, Japan, Norway, Russia, Canada, Turkey, India, Hong Kong and Brazil.⁶⁵

In addition, studies on the origin and number of downloads per country complete this picture and show that Switzerland, Norway, United States and Canada can be considered the main trading partners in that particular area: 45% of all the music downloaded in Switzerland, from 2006 to 2011, comes from 13 EU Member States. In Norway, music from the same 13 EU Members amounted to 45% of downloads in the same period. In Canada, the share was of 18,5% and in the United States, which has the major home consumption, it was of 14,3% (Gomez-Herrera et al., 2014).⁶⁶

This means that, according to the data available, the main trading partners of the EU in goods and services relating to phonograms are the United States (major partner), Switzerland, Norway, Canada, Japan, Australia, China + Hong Kong, India, Brazil, Turkey, and Russia.

(2) Term of protection in the main trading partners

Out of the main trading partners identified in the previous section, only a few had terms of protection longer than 50 years when the Term of Protection Directive 2011 was passed.⁶⁷

The US protects sound recordings under copyright (Section 102 (a)(7) US Copyright Law). The protectable elements of a sound recording include the contributions of both the performers and the record producers (Goldstein & Hugenholtz, 2010; Moser, 2006). The duration of protection of sound recordings in the US depends on the particular circumstances of a given sound recording: if it is a

http://ec.europa.eu/eurostat/statistics-explained/index.php/File:Exports_of_cultural_goods_by_group_of_products_2015.png (last accessed 26 October 2017)

⁶² Data available in the Eurostat cultural statistics report 2016, available at <http://ec.europa.eu/eurostat/documents/3217494/7551543/KS-04-15-737-EN-N.pdf/648072f3-63c4-47d8-905a-6fdc742b8605> (last accessed 25 October 2017).

⁶³ Data available in the Eurostat cultural statistics report 2011, available at <http://ec.europa.eu/eurostat/documents/3930297/5967138/KS-32-10-374-EN.PDF/07591da7-d016-4065-9676-27386f900857?version=1.0> (last accessed 25 October 2017).

⁶⁴ Data available at <http://ec.europa.eu/eurostat/news/themes-in-the-spotlight/trade-in-services> (last accessed 21 November 2017)

⁶⁵ Data available at http://ec.europa.eu/eurostat/statistics-explained/index.php/File:Trade_in_services_with_non-member_countries_extra-EU_main_partners_EU-28_2011_and_2016_billion_EUR.png (last accessed 21 November 2017)

⁶⁶ Note however that the study uses data, gathered by Nielsen Music, that is limited to downloads in only some countries in the world.

⁶⁷ Canada, which had a 50-year term of protection for performances and sound recordings when the Term of Protection Directive 2011 was enacted, has changed its legislation in 2015 to extend the term to 70 years after first publication or 100 years after first fixation, whichever occurs earlier (Section 23 of the Canadian Copyright Act).

work made for hire (which is often the case in the US, according to Goldstein & Hugenholtz, 2010 and van Eechoud et al, 2009)⁶⁸, it will be protected for 95 years from the year of its first publication, or for a term of 120 years from the year of its creation, whichever expires first (Section 302 (c) US Copyright Law). If the sound recording does not amount to a work made for hire, protection lasts for 70 years pma. These are the rules for works created on or after 1 January 1978; for sound recordings dating from before that, a complex map of rules applies, even though it can be stated that in general such sound recordings enjoy a term of protection of 95 years, counting from when copyright was secured (van Eechoud et al, 2009).⁶⁹

Other trading partners that have terms of protection longer than 50 years are Australia (70 years from first publication),⁷⁰ Brazil (70 years from fixation or performance),⁷¹ Turkey (70 years from fixation),⁷² and India (60 years from publication).⁷³

(3) Trading partners that apply a comparison of terms

If a country is part of the Rome Convention, a broad principle of national treatment applies and the country is not allowed to discriminate against EU right holders. It is thus necessary to assess which relevant trading partners – i.e., trading partners that have terms of protection longer than 50 years, which is the term of protection pre-Term of Protection Directive 2011 – are part of the TRIPS Agreement and/or the WPPT while not being part of the Rome Convention. It is furthermore necessary that such countries apply a comparison of terms. Out of the countries analysed in (2), only the United States and India fulfil those conditions.

Indeed, the **United States** have a term of protection longer than 50 years, and it is not a party to the Rome Convention. However, the US does not apply a comparison of terms. The US term of protection rules apply equally to national and foreign sound recordings, provided of course that such sound recordings are protectable under US law (van Eechoud et al, 2009). Foreign sound recordings can qualify for protection under US Copyright Law if first fixed in a country party to an international treaty to which the US is also a party, such as the Berne Convention or the WCT. That is the case of all EU countries (van Eechoud et al, 2009), with the result that EU sound recordings are theoretically not at a disadvantage in relation to US ones due to divergent terms of protection.

Some studies from 2006 and 2009 report that European music was not significant in the US music market as a whole, revealing the little receptivity of said market to foreign music in general (including European local music) (van Eechoud et al., 2009; CIPIL, 2006). Recent statistics focusing only on the United States in the category of charges for the uses of intellectual property (which includes licences, as explained above) reveal that the exports of the EU to the United States have not increased much in recent years.⁷⁴ It seems therefore that the term extension has not significantly enhanced the competitiveness of the EU music industry vis-à-vis the United States'.

In what concerns **India**, the country did not ratify the Rome Convention. India applies a comparison of terms following Section S.O.228(E), paragraph 7 of the International Copyright Order 1999, which

⁶⁸ As stated in Section 101 US Copyright Law, a "work made for hire" is a work prepared by an employee in the course of her employment, or a specially ordered or commissioned work that comes under one of the categories listed in the provision (among which, "contribution to a collective work").

⁶⁹ A more detailed overview of the rules applying to sound recordings created before 1 January 1978 can be found at: <https://www.copyright.gov/circs/circ15a.pdf> (last accessed 11 October 2017)

⁷⁰ Section 93 of the Australian Copyright Act 1968.

⁷¹ Art. 96 of Brazilian Copyright Law.

⁷² Art. 82 of the Turkish Law on Intellectual and Artistic Works.

⁷³ Section 27 of the Indian Copyright Act.

⁷⁴ The figures for this category were at 17,793,000 USD in 2012; 15,835,000 USD in 2013; 17,099,000 USD in 2014; and 17.754 USD in 2015 - data available at http://www.trademap.org/Country_SelServiceCountry_TS.aspx?nvpm=1|842|||||S08|1|3|1|1|2|1|2|1|1 (last accessed 24 November 2017).

prescribes that “the term of copyright in a work shall not exceed that which is enjoyed by it in its country of origin.” The country is one of the main partners of the EU for services in general, which means that the part of EU-India trade that could be affected would be music services such as those coming under the category “Charges for the use of intellectual property”. No statistics on this particular issue could be retrieved. General imports by India on this category (i.e. without discriminating the country of origin of the intellectual property in question) show a steady increase between 2012 and 2014 and a drop in 2015,⁷⁵ but these numbers can be explained by a variety of factors, such as e.g. an increase in piracy. And indeed, any negative impact on a country’s exports to India likely derive from the latter’s weak enforcement and pervasive piracy: India ranked 43 out of 45 countries surveyed for the international IP index, and one of the key weaknesses underlined was the enforcement environment.⁷⁶ It is therefore not expected that European producers and performers are better positioned to market their assets in India due to term extension.

The UK expert has mentioned that he expects opportunities in other countries will have increased (in the form of e.g. exclusive licenses), but no data supports this conclusion and no particular country is indicated. On the other hand, as pointed out by one Portuguese collecting society, it can be argued that the term extension is not hindering the music market either, insofar as users such as Spotify have never publicly stated their intention to leave markets where terms of protection for sound recordings are longer (like the United States or Brazil).⁷⁷ In relation to the United States specifically, authors have noted that, in terms of competitiveness, the linguistic and cultural diversity of the EU stands in the way of a truly pan-European music industry comparable to the American model (Bernstein et al., 2007); and that other differences in legal regimes - e.g. regarding remuneration rights that EU right holders are not able to claim in the United States - are what really dictates the better position of the latter’s music industry (van Eechoud et al., 2009).

Therefore, from the analysis and data available, the term extension does not seem to have reduced any disadvantages of EU producers and performers vis-à-vis third countries, nor does it seem to have increased their competitiveness. It can also be argued that the EU term extension will benefit foreign right holders (thus comparably not putting EU right holders at an advantage). Even though Art. 7(2) of the Term of Protection Directive imposes a comparison of terms, the provision also states that it is only to be applied if it does not contradict Member States’ international obligations (which is also underlined by Recital 23 of the Directive). All Member States except for Malta are party to the Rome Convention. Considering that the Rome Convention does not allow for a comparison of terms, if the third country is also party to the Rome Convention a broad principle of national treatment applies and that country will be able to benefit from the extended EU term of protection. If the third country is not party to the Rome Convention, the right holder in question can, in certain cases, still benefit from the extended term if the phonogram was published in a Rome Contracting State within thirty days of its publication in a non-Contracting State (Art. 5(1)(c) and 5(2) of the Rome Convention).⁷⁸

⁷⁵ 321,445,173.963 in 2012; 658,772,433.044 in 2014; 466,556,8838.054 in 2015. Data available at <https://data.worldbank.org/indicator/BX.GSR.ROYL.CD?end=2015&locations=IN&start=2011> (last accessed 28 November 2017).

⁷⁶ Data and report available at <http://www.theglobalipcenter.com/wp-content/uploads/2017/02/India.pdf> and http://www.theglobalipcenter.com/wp-content/uploads/2017/02/GIPC_IP_Index_2017_ExecutiveSummary.pdf (last accessed 28 November 2011).

⁷⁷ This is not confirmed by Spotify, Deezer or other users, since, as mentioned before, no reply has been received from these companies.

⁷⁸ Note however that a Contracting State may deviate from this possibility if it declares, under Art. 5(3) of the Rome Convention, that it will not apply the criterion of publication, or if it declares, under Art. 17 of the Rome Convention, that it applies the criterion of fixation alone. According to van Eechoud et al, 2009, the following EU Member States come under one of the two situations: Belgium, Denmark, Estonia, Finland, France, Italy, Luxembourg, Poland, Slovenia and Spain.

6. CONCLUSIONS AND RECOMMENDATIONS

The expert reports from selected Member States and the questionnaires completed by stakeholders generally state that it is too early to draw definitive conclusions on the effectiveness of the Directive. No case law interpreting the Directive's provisions exists, and its application in practice is still in its infancy. It should be recalled that only four years have passed since the Directive entered into force. At the time of writing this report, none of the pan-European users of music repertoires contacted by the authors of this study (Spotify and Deezer) had sent back the questionnaire,⁷⁹ and therefore no data is available on the impact of the Directive on their business models.

Nevertheless the analysis of the Directive's provisions and of the expert reports and questionnaires highlights some points of attention. The fact that performers **only enjoy the accompanying measures during the extension period is a modest achievement** of the objective of enhancing the welfare of performers. Performers have a weak contractual position vis-à-vis producers throughout the entire period of protection. In this context, Arts. 14 to 16 of the Proposal for a DSM Directive provide additional safeguards. The provisions would oblige Member States to introduce a much clearer and stronger right to request an adjustment of their remuneration in cases where the remuneration originally agreed is disproportionately low compared to the subsequent relevant revenues derived from the exploitation of the performance. As a consequence, the (optional) right of performers to ask for the modification of their contract (Art. 10a (2) of the Directive) might become superfluous. Only one of the Member States (France) has introduced this right in national law and, in any case, its regulation is not satisfactory since many questions in relation to its exercise remain unanswered.

The **identification of the performers entitled to the rights** provided for in the Directive –the “use it or lose” it clause, the annual supplementary remuneration and the “clean slate” right – stands out as the main problem regarding the effectiveness of the Directive. The fact that these rights are enjoyed over performances that were recorded 50 years ago makes this not an easy task. The role played by CMOs to inform performers about their new rights varies from one Member State to another. The Directive does not establish an obligation for CMOs to inform performers, but Art. 13(3) of the CMO Directive does provide a general obligation to adopt the necessary measures to identify and locate right holders who are entitled to remuneration. Member States should ensure that such obligation also refers to the necessary information to facilitate the exercise of the rights provided for in this Directive.

Producers also play an essential role in identifying entitled performers, since they hold the necessary information about the performances that are entering the extension period, the performers who participated in their fixation, and the terms of their participation. Good internal organisation of CMOs, the use of advanced and up-to-date electronic databases of their members, good communication schemes with CMOs representing producers or directly with producers seem essential to guarantee the effectiveness of the Directive.

The Directive establishes an obligation for producers to provide information on very limited terms: a) information necessary to secure the payment of the annual supplementary remuneration (but not covering any other aspect necessary for the exercise of other rights provided for in the Directive); b) information only provided upon request. None of the Member States surveyed have expanded the

⁷⁹ See Annex 2.

scope of this obligation in national law. The expert reports or questionnaires do not mention examples of producers who have incorporated clauses in their model contracts reflecting the rights provided to performers in the Directive. While producers are not obliged to do so, the incorporation of these clauses in their model contracts would have shown that the provisions in the Directive are established practices in the music sector. So far, this doesn't seem to be the case, and more should be done by Member States to achieve it. For this reason, **the obligation of producers to provide information should be reinforced**. The general obligation established in the CMO Directive for users (Art. 17) does not apply to producers. However, if adopted, Art. 14 of the Proposal for a DSM Directive will help to reinforce the obligation of producers to provide information to performers. According to this provision, Member States shall ensure that performers receive on a regular basis timely, adequate and sufficient information on the exploitation of their performances from those to whom they have licensed or transferred their rights. It is assumed that such an obligation would have a retroactive character so that producers are obliged to inform performers bound by contracts concluded previously to the entering into force of the Directive. Information on contracts concluded 50 years might not be readily available, and paragraph 2 of Art. 14 states that Member States may adjust this obligation in accordance to the administrative burden it implies and the revenues generated by the exploitation of the performance. However, the provision also makes clear that the obligation must remain effective and ensure an appropriate level of transparency.

The **lawful publication or lawful communication to the public** of the performance are taken into account for two different purposes in the Directive. First, to calculate the term of protection. Second, to calculate the beginning of the extension period where performers start to enjoy the rights provided for them in the Directive. Except for the calculation of the term of protection of performers' rights, the lawful publication prevails over the lawful communication. Only Portugal out of the Member States surveyed has deviated from the wording of the Directive on this issue. The Directive's rule is cause for a number of concerns. It opens the door to abusive practices by producers, as they can make new releases available on the Internet and delay the publication of records to a date where the 50-year period from the performance is about to expire (which would mean that the term of protection could expand to almost 120 years). Moreover, there is no justification to apply a different term of protection to performers' rights (lawful publication or lawful communication of the performance, whichever is first) and to producers' rights (lawful publication or, if this does not happen, lawful communication). If producers put in practice the abusive practice mentioned above, during the "new" term of protection they would also benefit from the fact that performers' rights would have expired. In addition, an interpretation of "lawful publication" as the offering of "fixed copies that can be put into circulation as tangible objects" in the sense of Art. 2(e) and the Agreed Statement in WPPT is not adapted to actual practices in the music sector, where the making available of performances on the Internet is increasingly gaining more relevance.

These concerns could be adequately addressed by **interpreting the term "lawful publication" as including the making available of a performance on the Internet**. This position is supported by legal doctrine that understands that the interpretation of "publication" in the WPPT should be assimilated to that in Art. 3(3) of the Berne Convention (Ricketson & Ginsburg, 2006; Evangelio Llorca, 2013). The interpretation is compatible with the WPPT due to its "de minimis" character (Ficsor, 2002): nothing prevents the CJEU from interpreting that "lawful publication" for the purpose of the Term of Protection Directive 2011 covers the offering of tangible copies of the performance but also its making available on the Internet. Following the example of CDPA in the UK, such interpretation from the CJEU should also make clear that "lawful publication" and "lawful communication to the public" imply the consent of the right holder.

Another relevant issue concerning the term extension refers to the **exclusion of audio-visual performers and producers** from the scope of application of the Directive. None of the Member States surveyed have applied the term extension to this category of performers and producers. Despite the differences between the film industry and the music sector, this does not seem justified, not least because it creates difficulties where the same performance is recorded both on a phonogram and an audio-visual media. A deeper analysis of a possible legislative intervention on this matter is needed.

In relation to the “use it or lose it” clause, the expression “offering for sale in sufficient quantity” raises interpretation problems that have only been partially addressed in some of the Member States surveyed (UK and Spain). It should be considered that “offering for sale in sufficient quantity” exists where the performance is made available on the Internet in a manner that satisfies the reasonable needs of the public, taking into account the nature and aim of the phonogram. The fulfilment of this requirement would need to be established on a case by case basis, although it can be safely assumed that making a new record available on popular streaming services such as Spotify or Deezer, where it can be easily located by the general public, should be enough to comply with the threshold of “sufficient quantity”. Likewise, uploading a new recording of a piano concerto on a website specialised in piano music would also meet the requirement; while uploading a pop record exclusively on the website of an independent record company that does not make any promotion on third party’s websites or social networks would probably not amount to offering for sale sufficient quantities of said record.

This interpretation entails that, contrary to what is explicitly or implicitly established in the laws of the Member States surveyed, producers do not need to release the record in tangible copies and make it available on the Internet to make sure that the “use it or lose it” clause is not triggered. The opposite interpretation (where both acts of exploitation are needed) would be more beneficial to performers; however, it would also be unrealistic having in mind actual practices in the music sector.

Considering that **music performances with a plurality of performers** is the general rule in many music genres, a deeper analysis of the exercise of the “use it or lose it” clause in these cases seems necessary. Very different solutions exist in the Member State surveyed. These divergences may create obstacles to the functioning of the internal market. In certain Member States, the solution provided by law is so complex that the effectiveness of the measure is at risk. Because of that, a simple rule should be proposed according to which a majority of performers shall agree to terminate the contract, and they should select one representative to exercise the right. Such rule may grant more weight to the vote of featured artists as a recognition for the essential role they play on the conception of the performance.

Only the implementing measures in UK and Portugal make clear that the clause can be **exercised against producers or against third parties** (exclusive licensees) to whom the economic rights over the performance may have been transferred. This interpretation should be adopted in other Member States (either through legislative amendments or through case law), but it should be clarified that it only applies in the case of exclusive licenses.

In relation to the **annual supplementary remuneration**, the expert reports point out that obtaining accurate information is essential. Divergences exist in the Member States surveyed regarding the **person entitled to request that information to the producer**. It should be interpreted that such request can be made either by the CMO administering the right, or by the performer himself/herself. In addition, the regulation of the obligation of the producer to provide information should be

reinforced and thus further developed. The obligation should be mandatory and it should be made clear that producers should provide such information free of charge. Following the example of the UK, if a producer does not provide the required information within a reasonable time or provides incomplete information, the performer or the CMO should be entitled to bring the producer to court. However, the producer should be allowed to deny the provision of the information in justified cases (e.g., if the collection of the information is excessively burdensome)

The expert reports also show **that clarification is needed in relation to certain aspects of the functioning of the annual supplementary remuneration**. This may be easily accomplished by competent authorities in the Member States through the publication of guidelines. Such document should identify the information producers are obliged to provide. The broader the interpretation of the terms of the Directive – “any information which may be necessary in order to secure payment” – the more it facilitates the accomplishment of the Directive’s objective of increasing the protection of performers. However, some limits should be established so that producers are not unfairly affected: the amount of information requested should not make its provision excessively burdensome for producers; the obligation should not extend to information that can be considered trade secrets, or personal data of third parties. The guidelines should also provide clear information for the calculation of the 20% fund. This would be beneficial for performers, since they would be able to know how the annual supplementary remuneration is calculated, and it would provide guidance to producers on how to adequately comply with their obligation. Finally, it should be made clear that the remuneration should be paid by the exclusive licensee in those cases where the producer has transferred the rights over the performance.

In relation to the **“clean slate” provision**, while the Directive explicitly states the mandatory nature of the “use it or lose it” clause, nothing is said with respect to this provision. As a consequence, Sweden has established that the “clean slate” provision can be derogated by contract. This diminishes the effectiveness of the Directive. Taking into account the objective of the provision, the “clean slate” clause must be understood as an overriding mandatory rule in the sense of Art. 9 of the Regulation 593/2008 on the law applicable to contractual obligations (Rome I): such a clause cannot be derogated by contract and it is applicable even if the parties have chosen the law of a non-EU country. This should have been clearly established in the Directive to avoid other Member States following Sweden’s stance.

Expert reports have also pointed out the problems that exist in interpreting the terms “advance payments” and “contractually defined deductions”. The abovementioned guidelines could be used to shed some light on these concepts.

Finally, with regard to **the potential long term effects of the Directive, it is also too early to draw solid conclusions**. No data exists in relation to the impact on other EU policies and sectors. It is foreseeable that the term extension’s impact on performers and producers, while marginal in the first years, might grow steadily, but no evidence is available to support this forecast. The impact of the Directive on consumer protection policies is also not known: due to the absence of data, it could not be established whether consumers have to bear any extra costs derived from an extended period of protection, or whether the quality and breadth of consumer choices have increased. Some data mentioned by a Portuguese collecting society show an increase in record releases in Portugal, but a correlation between such increase and the Directive could not be proven. Likewise, no proof of distortion of competition could be found, even though in one Member State (Spain) the Competition Authority was extremely critical of the term extension. In relation to cultural diversity, one national

expert (UK) has stated that increased marketing spend on back catalogue items is likely to have happened, but again no data was provided to sustain this.

Regarding the **competitiveness of the European music industry vis-à-vis foreign trading partners**, the research shows that from a legal point of view the “comparison of terms” argument used by the Commission to justify the term extension is unfounded. Such argument was based on the premise that non-EU countries were allowed to not grant longer protection to EU right holders as they granted their nationals, thus putting EU performers and producers at a disadvantage. Due to the obligations assumed in the Rome Convention, EU trading partners cannot apply a rule on comparison of terms. The only exceptions are the United States and India, which are not parties to the Rome Convention. However, in the case of the United States, its national legislation does not apply a comparison of terms, with the consequence that its term of protection applies equally to national and foreign sound recordings (provided of course that such sound recordings are protectable under US law). In the case of India, any negative impact on the EU’s exports to India would likely derive from the latter’s weak enforcement and pervasive piracy rather than on the rule on comparison of terms.

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ANNEX 1 – NATIONAL REGULATIONS IMPLEMENTING THE DIRECTIVE

COUNTRY	IMPLEMENTATION				
	Term of musical composition with words (art 1(7))	Term extension (art 3(1) and 3(2))	Use it or lose it clause (art 3(2)a)	20% fund (art 3(2)b and c)	Clean slate (art 3(2)e)
AUSTRIA	§ 60(2) Gesamte Rechtsvorschrift für Urheberrechtsgesetz, Fassung vom 11.02.2016	§ 68(3) & § 76(6)	§ 76(7)	§ 76(8)	§ 76(9)
BELGIUM	ART XI.166 §2, 3 rd par, Boek XI "Intellectuele eigendom" Wetboek van economisch recht – Code for economic rights	ART XI.208 ART XI.209 §1, 6 th	ART XI.210 §1	ART XI.210 §2 & §3	ART XI.210 §5
BULGARIA	ART. 27 (3) of the Copyright and Related Rights Act	ART. 82 (1-4) and ART. 89 (1-4) of the	ART. 77 (3)	ART. 77a (1-4)	ART. 77 (2)
CROATIA	ART. 100a of the Copyright and Related Rights Act	ART. 131 (2-3) and ART. 137 (1-2)	ART. 137a(1-5)	ART. 137b (1-5)	ART. 137c (1-4)
CYPRUS	ART 5(1) – table - (i) of the Copyright and Related Rights Act	ART. 5(1) – table - (iii) and (vii)	ART. 12(8a)(i)	ART. 12 (8b)-(8e)	ART. 12 (8f) t
CZECH REPUBLIC	Section 27 (6) of the Copyright Act	Section 73 and Section 77	Section 72a (1)-(2) and Section 77a	Section 71(4) and Section 76(a)	Section 72b
DENMARK	ART. 63(2) of the Consolidated Act on Copyright 2014	ART. 65 (3-4) and ART. 66 (1)	ART. 66a (1-3)	ART. 66b (1-5)	ART. 66c
ESTONIA	§ 39 of the Copyright Act	§ 74(1-2)	§ 68 (5-8)	§ 67 ¹ (1-3 and 5)	§ 67 ¹ (3 and 4)
FINLAND	Section 43(2) of the Copyright Act	Section 45 (4-5) and Section 46(2)	Section 46b (1-4)	Section 46c(1-2)	Section 46c (3)
FRANCE	Art. L-123-2 Code de la propriété intellectuelle	Art. L-211-4	Art. L-212-3-1 and 2	Art. L-212-3-3	Art. L-212-3-4
GERMANY	§ 65 (3) Gesetz über Urheberrecht und verwandte Schutzrechte (Urheberrechtsgesetz,	§§ 82 and 85	§ 79 (3)	§ 79a	§ 79a (5)

COUNTRY	IMPLEMENTATION				
	Term of musical composition with words (art 1(7))	Term extension (art 3(1) and 3(2))	Use it or lose it clause (art 3(2)a)	20% fund (art 3(2)b and c)	Clean slate (art 3(2)e)
	geändert durch Gesetzes vom 4. April 2016)				
GREECE	ART. 30 of Law 2121/1993	ART. 52(c) and 52(d)	ART. 52(d)(aa) o	ART. 52(d)(bb)-(ee) and (gg) o	ART. 52(d)(ff) and (gg)
HUNGARY	ART. 31 (2) of the Copyright Act	ART. 84(1)(a)-(c) and (d)	ART. 55 (2)-(4)	ART. 74/A (1)-(2)	ART. 74/A (3)
IRELAND	Section 24(1A) of the Copyright and Related Rights Act 2000	Section 26 (C) and Section 291 (2A-B)	Section 299A (1-5)	Section 299B (1-7)	Section 299C
ITALY	ART. 26 – Law n. 633 of April 22, 1941	ART. 75 and ART. 85	ART. 84ter	ART. 84bis	ART. 84bis
LATVIA	Section 37 (3) of the Copyright Law	Section 55(1) and (2)	Section 48 (9)-(11)	Section 48 (12)-(14)	Section 48 (15)
LITHUANIA	ART 35(8), Law No. VIII-1185 of May 18, 1999, on Copyright and Related Rights (as amended up to Law No. XII-1183 of October 7, 2014)	ART 59 (1) and (2)	ART 59 ₁	ART 59 ₂	ART 59 ₂
LUXEMBOURG	ART 9(2), Loi du 18 avril 2001 sur les droits d'auteur, les droits voisins et les bases de données	ART 45(1)-(2)	ART 45 (2bis)	ART 45 (2ter – quarter)	ART 45 (2sexies)
MALTA	ART. 4 of the Extension to Term of Protection (Neighbouring Rights)	ART. 5 (2-3) and ART. 6(2)	ART. 7(1-4)	ART. 8 (1-5)	ART. 8(6)
NETHERLANDS	ART 1 Jo Art 10(1)5° & ART 37 Aw	ART 12(1)-(4) WNR	ART 9A WNR Jo ART 25e(3) Aw	ART 9B, 15C, 15G WNR	ART 9B, 15C, 15G WNR
POLAND	ART. 36 (5) of the Copyright and Neighbouring Rights Act	ART. 89, 89, and 95 (1)-(3)	ART. 95 ₂	Art. 95 ₃ of	Art. 95 ₄
PORTUGAL	Art. 32 (1) Código do	Art. 183 and	Art. 183a (1)	Art. 183a (4)	Art. 183a

COUNTRY	IMPLEMENTATION				
	Term of musical composition with words (art 1(7))	Term extension (art 3(1) and 3(2))	Use it or lose it clause (art 3(2)a)	20% fund (art 3(2)b and c)	Clean slate (art 3(2)e)
	Direito de Autor e dos Direitos Conexos (conforme alterado de acordo com DL n.º 100/2017, de 23/08)	102 (1) (b)	to (3)	to (7)	(5) in fine
ROMANIA	Art. 102 ^{d1} para. (4) LEGE nr. 53 din 24 martie 2015 pentru modificarea și completarea Legii nr. 8/1996 privind dreptul de autor și drepturile conexe	Art. 102 para. (1) letter b) and art. 106 para. (1)	Art. 102 ¹ para. (1) - (4)	Art. 102 ¹ para. (5) - (9)	Art. 102 ¹ para. (10)
SLOVAKIA	Section 32 (5) of the Act on Copyright and Related Rights	Section 102(2) and Section 111(1)	Section 105	Section 100 and Section 112	Section 101
SLOVENIA	ART. 60 (2) of the Copyright and Related Rights Act	Art. 127 and ART. 132	ART.83 and ART. 122	ART. 122.b	ART. 122.c
SPAIN	Art. 28.1 Texto refundido de la Ley de Propiedad Intelectual, regularizando, aclarando y armonizando las Disposiciones Legales Vigentes sobre la Materia (aprobado por el Real Decreto legislativo N° 1/1996 de 12 de abril, y modificado hasta la Ley N° 12/2017, de 3 de julio de 2017)	Arts. 112 and 119 Copyright Act	Arts. 110 bis.1 Copyright Act	Art. 110 bis.2 Copyright Act	Art. 110 bis.3 Copyright Act
SWEDEN	§ 43 (1) Lag (1960:729) om upphovsrätt till litterära och konstnärliga verk	§§ 45 and 46	§ 45d	§ 45a to 45d	§ 45c
UNITED KINGDOM	Section 12 (8) Copyright, Design and Patent Act 1988	Section 191 (2)	Section 191HA	Section 191HB	Section 191HB (9)

Austria:

Bundesgesetz über das Urheberrecht an Werken der Literatur und der Kunst und über verwandte Schutzrechte – Copyright and Related Rights Act

<http://www.wipo.int/edocs/lexdocs/laws/de/at/at122de.pdf>

1. Term of musical composition with words: implemented completely, paraphrased
 - No mention of co-authorship is included, making the requirement implicitly unrequired
2. Term extension: Implemented with different wording, but effect remains the same
3. Use it or lose it clause: Implemented with different wording, and
 - The right to dissolve the contract is to be used by a “common representative”
4. 20% fund: Implemented with different wording
5. Clean slate: Implemented with different wording, but
 - “Advance payments” are not included in the article, but this can perhaps be included in the “contractually defined deductions”

Belgium:

Boek XI “Intellectuele eigendom” Wetboek van economisch recht – Code for economic rights

<http://www.wipo.int/edocs/lexdocs/laws/fr/be/be166fr.pdf>

1. Term of musical composition with words:
2. Term extension: Implemented quasi-verbatim, and;
 - A standard provision is included assigning the rights to the successor in title after the passing of the performer
3. Use it or lose it clause: implemented quasi-verbatim, but;
 - The term “contract on transfer or assignment” was replaced with only “contract on assignment”. This is in standing with art. XI.167 and XI.203. The term “assignment” is receives a broad enough interpretation at Belgian law to adhere to the Directive.
4. 20% fund: Implemented verbatim
5. Clean slate: Implemented verbatim

Bulgaria:

Amendment to the Copyright and Related Rights Act, published on 8 March 2014 in State Gazette issue 21/2014, available at <http://dv.parliament.bg/DVWeb/showMaterialDV.jsp?idMat=83222>

1. Term of musical composition with words: implemented verbatim.
2. Term extension: implemented completely, with the remark that the rights of the phonogram producer cease to exist if the performer has exercised his right of termination of the transfer or assignment of his exclusive rights in the phonogram.
3. Use it or lose it clause: implemented verbatim.
4. 20% fund: implemented verbatim.
5. Clean slate: implemented verbatim.

Croatia:

NN 141/13, in force from 5 December 2013, which amended the Copyright and Related Rights Act, available at http://www.dziv.hr/files/File/eng/zakon_autor_ENG.pdf

1. Term of musical composition with words: implemented completely, with the remark that, if the musical composition and the words were not created specifically to be used together, the general rule applies. No mention was made to the situation in which the authors were not designated as co-authors.
2. Term extension: implemented completely, with two remarks: a) the term of protection for the phonogram producer was also extended to 70 years from the fixation (before any publication or communication to the public); and b) the term extension does not apply to the rights of the phonogram producer if there is a termination of the contract between him and the performer.
3. Use it or lose it clause: implemented completely, with the addition that, if more than one performer participated in the performance fixed in a phonogram, the termination can be exercised by the representative of the artistic ensemble, according to art. 123 of the Copyright and Related Rights Act.
4. 20% fund: implemented completely.
5. Clean slate: implemented completely, with the addition that, if the performer and the phonogram producer fail to achieve an agreement concerning an equitable rebalance of the contract, the rights of the phonogram producer are deemed to have expired 50 years after the publication of the phonogram or its communication to the public.

Cyprus:

2014 Amendment to the Copyright and Related Rights Act, available at http://www.cylaw.org/nomoi/enop/non-ind/1976_1_59/index.html

1. Term of musical composition with words: implemented verbatim.
2. Term extension: implemented verbatim.
3. Use it or lose it clause: implemented completely, with the addition that, when a phonogram contains more than one performance, the performers can terminate the transfer or assignment according to Contract Law.
4. 20% fund: implemented verbatim. From the language of the provision, it seems that the annual supplementary remuneration will be always based on the "revenue earned by the record producer during the year prior to the 50th year after the record was lawfully published" or lawfully communicated to the public, and not calculated each year based on the previous' year revenue.
5. Clean slate: implemented verbatim.

Czech Republic:

Copyright Act, available at <https://www.zakonyprolidi.cz/cs/2000-121>

1. Term of musical composition with words: implemented completely.
2. Term extension: implemented verbatim.
3. Use it or lose it clause: implemented completely, with the addition that, when the phonogram contains the record of performances of more than one performer, paragraph 68 (which refers to the

joint representative of performers) shall apply mutatis mutandis to their termination of the assignment or transfer contract.

4. 20% fund: implemented completely, with the addition that the producer shall pay the annual supplementary remuneration to the competent collective administrator who pays the annual supplementary remuneration to the performers no later than 31 March of the calendar year following the year for which such remuneration is due. Moreover, revenues from payments made to a collective society which fails to make a reasonable effort within 3 years of their receipt expire and go to the State Cultural Fund of the Czech Republic.

5. Clean slate: implemented completely.

Denmark:

Consolidated Act on Copyright (2014), available at <http://www.wipo.int/edocs/lexdocs/laws/en/dk/dk091en.pdf>

1. Term of musical composition with words: implemented, but no mention was made to the situation in which the authors were not designated as co-authors.

2. Term extension: implemented completely with regard to the performers. The term extension of the rights of the phonogram producers, however, was not implemented. They still enjoy 50 years of protection from the fixation and, then, 50 years from the publication or communication to the public.

3. Use it or lose it clause: implemented completely.

4. 20% fund: implemented completely, with the addition that the supplementary remuneration must be paid and managed by a management organization approved by the Danish Minister for Culture.

5. Clean slate: implemented verbatim.

Estonia:

Copyright Act (Consolidated Text of January 1, 2017), available at <http://www.wipo.int/edocs/lexdocs/laws/en/ee/ee184en.pdf>

1. Term of musical composition with words: not explicitly implemented, but Section 39, which may apply, affirms that in the case of joint or co-authorship, the term of protection is the life of the last surviving author and seventy years after his or her death.

2. Term extension: implemented completely concerning the rights of the performers. However, with respect to the phonogram producers, the term was extended only if there is a publication. If there is a communication to the public less than fifty years from the fixation, the work is protected for fifty years (and not for seventy years) from the communication to the public.

3. Use it or lose it clause: implemented completely, with the addition that, if there are several performers in a fixed performance, each one may terminate a separately concluded agreement for assignment or transfer, and a jointly concluded agreement for assignment or transfer can be cancelled by the leader of an ensemble (or another person authorized by the group to do so). Also, the termination cannot occur if, within less than one year from the notice of the intention to terminate, the phonogram producer either offers the phonogram for sale or make it available to the public (according to the language of the Directive, both of those acts should be done in order to prevent the termination).

4. 20% fund: implemented completely, with the remark that this annual additional remuneration does not apply to a business whose turnover for reproduction, distribution and making available of such phonograms which were lawfully published, or if no such publication occurred, then lawfully communicated to the public fifty years ago, was less than 100 euros in the year preceding the year of payment of the remuneration.

5. Clean slate: implemented completely.

Finland:

Copyright Act (404/1961, amended by Act n. 2015/608 of May 22, 2015), available at <http://www.wipo.int/edocs/lexdocs/laws/en/fi/fi115en.pdf>

1. Term of musical composition with words: implemented verbatim.

2. Term extension: implemented completely, but it specifies that the fixation of a performance will be protected after the publication or communication to the public of the phonogram or the video recording (whereas the directive refers more generically to “fixation of the performance otherwise than in a phonogram”). Moreover, it adds that, if there is a termination, this term extension does not apply to the phonogram producer.

3. Use it or lose it clause: implemented completely, with the addition that, if the phonogram contains a performance by multiple artists, they all must file the notification to the phonogram producer with their intention to terminate their contracts and, after a year, the notice of termination.

4. 20% fund: implemented completely.

5. Clean slate: implemented completely.

France:

Loi du 20 février 2015 portant diverses dispositions d'adaptation au droit de l'Union européenne dans les domaines de la propriété littéraire et artistique et du patrimoine culturel, (JO 22 février 2015, p. 3294) <https://www.legifrance.gouv.fr/eli/loi/2015/2/20/MCCB1421649L/jo/texte>

The implementing measures are discussed in chapter 3.

Germany:

Gesetz über Urheberrecht und verwandte Schutzrechte (Urheberrechtsgesetz, geändert durch Gesetzes vom 4. April 2016) <http://www.wipo.int/wipolex/es/details.jsp?id=16047>

The implementing measures are discussed in chapter 3.

Greece:

Law 4212/2013, which amended the Copyright, Related Rights and Other Cultural Issues Act (Law 2121/1993), available at http://www.wipo.int/wipolex/en/text.jsp?file_id=430896

1. Term of musical composition: implemented, but no mention was made to the situation in which the authors were not designated as co-authors.

2. Term extension: implemented verbatim.

3. Use it or lose it clause: implemented completely, with the addition that, if the rights assigned by the performer to the phonogram producer were transferred to a third party, the written notification of

the intention to terminate the contract will be exercised against the producer. Moreover, when a phonogram contains a fixation of the performances of a plurality of performers, they may terminate the contract according to paragraph 4, article 46 (representative). If no representative is determined, the provisions of the community of right shall be applied.

4. 20% fund: implemented completely, with the addition that the payment of the annual supplementary remuneration must be made within six months from the end of each financial year. Moreover, for the purposes of this remuneration, as well as the clean slate, a phonogram producer is considered to be the primary beneficiary or the successor in title or any third party that the relevant rights have been transferred to.

5. Clean slate: implemented completely.

Hungary:

Act LXXVI of 1999 on Copyright, consolidated text (15.03.2014-28.10.2014), available at http://www.hipo.gov.hu/en/English/jogforras/hungarian_copyright_act.pdf

1. Term of musical composition: not expressly implemented, but art. 31(2), which refers to cases of joint authorship, may apply.

2. Term extension: implemented, but with slightly different concepts. With respect to performers, the extension occurs when the phonogram or other media in which it was fixed is put into circulation or, if not put into circulation, when the fixation occurred (whereas in the Directive the extension occurs with the publication or the communication to the public of the fixation of the performance). With respect to phonograms, they are protected for 50 years from the fixation and, if they are put into circulation during that time, for 70 years from the putting into circulation.

3. Use it or lose it clause: implemented verbatim.

4. 20% Fund: implemented completely.

5. Clean slate: implemented in regard to the 20% fund.

Ireland:

S.I. No. 411/2013 – European Union (Term of Protection of Copyright and Certain Related Rights)(Directive 2011/77/EU) Regulations 2013 (available at <http://www.irishstatutebook.ie/eli/2013/si/411/made/en/print>), which amended the Copyright and Related Rights Act 2000.

1. Term of musical composition with words: implemented, but no mention was made to the situation in which the authors were not designated as co-authors.

2. Term extension: fully implemented.

3. Use it or lose it clause: completely implemented, with the addition that, if the performance of more than one performer is captured in a phonogram and more than one assignment agreement has been made, the expiry of the producer's rights will not take effect until the last of the existing assignment agreements has been terminated. The termination may occur if, not later than one year from the date of notification, the producer has not offered copies of the sound recording or made it available to the public (whereas, from the language of the Directive, both acts should take place).

4. 20% fund: fully implemented, with the following additions: a) the producer shall pay the annual supplementary remuneration to a collecting society within one month of its having been set aside; b)

the collecting society shall then distribute the annual supplementary remuneration to the performer; c) any information required by the performer in order to secure the payment of that remuneration must be given by the producer in writing as soon as may be, and in any event not more than 40 days after receipt of the said request; d) if the producer fails to supply the information within this period, the performer may seek an injunction from the High Court requiring the producer to provide the information.

5. Clean slate: implemented verbatim.

Italy:

Decree-Law n. 22 of February 21, 2014, which modified Law n. 633 of April 22, 1941, available at <http://www.gazzettaufficiale.it/eli/id/2014/03/11/14G00034/sg>

1. Term of musical composition with words: no implementation was required, since article 26 provides for protection for 70 years after the death of the last of the authors to die, in cases of joint authorship (<http://documenti.camera.it/Leg17/Dossier/pdf/CU0081A.pdf> p. 1).

2. Term extension: implemented verbatim.

3. Use it or lose it clause: implemented completely, with the following additions: a) if the phonogram contains the fixation of the performances of a plurality of performers, they may terminate their contracts on transfer or assignment when there is a consensus, according to article 10; and b) if there is an unjustified refusal of one or more performers to agree with the termination, the judiciary authority shall ensure the termination rights.

4. 20% fund: implemented completely.

5. Clean Slate: implemented verbatim.

Latvia:

Copyright Law, as amended up to December 31, 2014), available at http://www.wipo.int/wipolex/en/text.jsp?file_id=417220

1. Term of musical composition: not implemented expressly, but the provision on co-authorship, according to which copyright is granted for 70 years after the death of the last surviving author, may apply.

2. Term extension: implemented completely.

3. Use it or lose it clause: implemented completely, with the addition that, if the performances of a plurality of performers are fixed in a phonogram, they may terminate the transfer or assignment contract if they do it jointly, including with the intermediation of a joint representative. None of them may refuse, without sufficient justification, other performers from exercising that right.

4. 20% Fund: implemented completely.

5. Clean slate: implemented completely.

Lithuania:

Law available at: <http://www.wipo.int/edocs/lexdocs/laws/en/lt/lt081en.pdf>

1. Term of musical composition with words: implemented verbatim

2. Term extension: implemented verbatim

3. Use it or lose it clause: implemented completely with the following additions:

- Also applicable if the successor in title of producer hasn't commercialised the record
- Where a phonogram contains the fixation of the performances of a plurality of performers: the right to terminate its contract on transfer or assignment of the rights shall be implemented by a representative authorised by the group, and in the absence of authorisation to terminate the contract on transfer or assignment of the rights, by the leader of the group.

4. 20% fund: implemented with the following additions:

- The successor in title of the producer is also liable for the payment
- Calculation and payment of the annual supplementary remuneration shall not be affected by any advance payments or deductions defined by a phonogram producer or his successor in title in the contract of the performer and the phonogram producer or his successor in title regarding the use of a fixation of the performance in a phonogram.
- remuneration payable by producer (or his successor in title) once a year, following the end of the year in which the relevant fixations were used

5. Clean slate: implemented in regard to the 20% fund (see above)

Luxemburg:

Loi du 18 avril 2001 sur les droits d'auteur, les droits voisins et les bases de données
<http://legilux.public.lu/eli/etat/leg/loi/2001/04/18/n2/jo>

Note: Implementation comes from « Loi du 10 février 2015 portant transposition de la directive 2011/77/UE » changes may not be reflected in copyright act

1. Term of musical composition with words: Implemented verbatim

2. Term extension: Implemented verbatim

3. Use it or lose it clause: Implemented verbatim

4. 20% fund: Implemented verbatim

5. Clean slate: Implemented verbatim

Malta:

Subsidiary Legislation n. 415.04 (Legal Notice 81 of 2014) – Extension to Term of Protection (Neighbouring Rights) Regulations, available at
<http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=12164&l=1>

1. Term of musical composition with words: implemented verbatim.

2. Term extension: implemented verbatim.

3. Use it or lose it clause: implemented verbatim.

4. 20% fund: implemented verbatim.

5. Clean slate: implemented verbatim.

The Netherlands:

Auteurswet (Aw) – Copyright Act <http://www.wipo.int/edocs/lexdocs/laws/nl/nl/nl099nl.pdf>

Wet op de Naburige Rechten (WNR) – Neighboring Rights Act
<http://www.wipo.int/edocs/lexdocs/laws/en/nl/nl079en.pdf>

1. Term of musical composition with words: No implementation was required. Copyright extends to musical works, which are given protection for 70 years from the time of death of the author
2. Term extension: implemented completely
3. Use it or lose it clause: implemented, however
 - No provisions are given in the event of a plurality of performers but explanatory memorandum clarifies that this is catered for
 - Economic feasibility for economic exploitation is a prerequisite
 - Definition of “does not offer ... for sale” is replaced with “is not or no longer exploited” to tie up with existing jurisprudence (see Hof Amsterdam 23 december 2008, AMI 2009, 2 Intersong Basart/Hans van Hemert)
4. 20% fund: Implemented completely, with addition of:
 - A criminal penalty is imposed in the event information on revenue is withheld after a request therefore is made (max 3 years and/or €8,200 fine)
5. Clean slate: implemented in regard to the 20% fund (see above)

Poland:

Act of February 4, 1994, on Copyright and Neighbouring Rights (as amended up to May 20, 2016), available at http://www.wipo.int/wipolex/en/text.jsp?file_id=408585

1. Term of musical composition: implemented, but no mention was made to the situation in which the authors were not designated as co-authors.
2. Term extension: implemented completely.
3. Use it or lose it clause: implemented, with the addition that, if a phonogram contains the fixation of the performances of several performers, the right to terminate is available to any of them and, in case of an effective termination of the contracts concluded for all performances fixed in a phonogram, the phonogram producer's right expires. The termination cannot take place if, within a year from the notification, the producer start using the phonogram in any of the possible ways (whereas, from the language of the Directive, both acts should be taken).
4. 20% Fund: implemented completely, with the addition that the payment of the supplementary annual remuneration shall be made through organizations for collective management of rights related to performances scheduled for a period of no more than five years by the minister responsible for culture and national heritage protection after a competition, whose requirements are set forth in the provision. The minister shall specify by regulation how the annual supplementary remuneration will be paid, bearing in mind the need to ensure that the collection and payment of remuneration were carried out in an efficient and transparent way, and that deductions are justified and documented.
5. Clean slate: implemented completely.

Portugal:

Código do Direito de Autor e dos Direitos Conexos (conforme alterado de acordo com DL n.º 100/2017, de 23/08) available at <http://www.wipo.int/wipolex/es/details.jsp?id=17387>

The implementing measures are discussed in chapter 3.

Romania:

LEGE nr. 53 din 24 martie 2015 pentru modificarea și completarea Legii nr. 8/1996 privind dreptul de autor și drepturile conexe, available at <http://www.monitoruljuridic.ro/act/lege-nr-53-din-24-martie-2015-pentru-modificarea-i-completarea-legii-nr-8-1996-privind-dreptul-de-autor-i-drepturile-conexe-emitent-166598.html>

The implementing measures are discussed in chapter 3.

Slovakia:

Act n. 185/2015 Coll. on Copyright and Related Rights (as amended by Act n. 125/2016 Coll), available at http://www.wipo.int/wipolex/en/text.jsp?file_id=451098

1. Term of musical composition: implemented, but no mention was made to the situation in which the authors were not designated as co-authors.
2. Term extension: implemented completely, but it specifies that the fixation of a performance will be protected after the publication or communication to the public of a phonogram or an audio-visual recording (whereas the directive refers more generically to “any form of recording other than phonogram”).
3. Use it or lose it clause: implemented completely.
4. 20% Fund: implemented completely.
5. Clean slate: implemented completely.

Slovenia:

Copyright and Related Rights Act (as amended up to October 22, 2016), available at http://www.wipo.int/wipolex/en/text.jsp?file_id=422515

1. Term of musical composition: implemented verbatim.
2. Term extension: implemented completely.
3. Use it or lose it clause: implemented completely.
4. 20% Fund: implemented completely.
5. Clean slate: implemented completely.

Spain:

Ley 21/2014, de 4 de noviembre, por la que se modifica el texto refundido de la Ley de Propiedad Intelectual, aprobado por Real Decreto Legislativo 1/1996, de 12 de abril, y la Ley 1/2000, de 7 de enero, de Enjuiciamiento Civil, available at <https://www.boe.es/buscar/doc.php?id=BOE-A-2014-11404>

The implementing measures are discussed in chapter 3.

Sweden:

SFS 2013:691 amending the Copyright Act ("SFS 1960:729"). A consolidated text of the Copyright Act is available at <http://www.wipo.int/wipolex/es/details.jsp?id=16268>

The implementing measures are discussed in chapter 3.

United Kingdom:

The Copyright and Duration of Rights in Performances Regulations 2013 amending the Copyright, Designs and Patents Act 1988 are available at http://www.legislation.gov.uk/uksi/2013/1782/pdfs/uksi_20131782_en.pdf

The implementing measures are discussed in chapter 3.

ANNEX 2 – LIST OF STAKEHOLDERS CONTACTED DIRECTLY BY THE AUTHORS

(Please note that the stakeholders contacted by national experts are listed in the national reports included in Annex 3)

Type of stakeholder	Name of stakeholder	Member State	Contact
Users	Younion / Sektion Musik	Austria	(through FIM – International Federation of Musicians) Mag. Thomas Dürrer
Users	Spotify		At the time of closing the research, we have not received an answer
Users	Deezer		At the time of closing the research, we have not received an answer
CMO (performers and producers)	Gesellschaft zur Verwertung von Leistungsschutzrechten mbH (GVL)	Germany	(through FIM) Tilo Gerlach
Performers	Musicians' Union	UK	(through FIM)
Performers	AEPO-ARTIS		Nicole Schulze
Producers	IFPI		Kristina Janusauskaite

ANNEX 3 – NATIONAL REPORTS

FRANCE

National expert: Oleksandr Bulayenko⁸⁰

1. National implementation of the Directive

a) Through which legislation was the Directive implemented in national law? Please provide a short history of the implementation, highlighting any legal or practical difficulties in implementing the Directive (for example, strong opposition from any interest groups, or difficulties in implementing the clauses of the Directive given national legal constraints – for instance, from contract law - or established practices)

The Directive was implemented in national law through adoption of the law of 20 February 2015 containing various provisions amending national law according to the law of the European Union in the domains of copyright and of cultural heritage (Loi du 20 février 2015 portant diverses dispositions d'adaptation au droit de l'Union européenne dans les domaines de la propriété littéraire et artistique et du patrimoine culturel, JO 22 février 2015, p. 3294). This law modified the French Intellectual Property Code (Code de la propriété intellectuelle) (CPI), notably by amending Article L211-4 and by creating Articles L212-3-1 to L212-3-4.

Normative implementation of Articles L212-3-1 and L212-3-3 of the CPI was completed by the adoption by the Decree of the Council of State (Conseil d'Etat) 7 May 2015 (Décret n° 2015-506 du 6 mai 2015 pris pour l'application des articles L. 135-7, L. 212-3-1 et L. 212-3-3 du code de la propriété intellectuelle, JORF n°0106 du 7 mai 2015 page 7848, texte n° 28) and of the Order of the Ministry of Culture and Communication (Ministère de la Culture et de la Communication) of 27 September 2016 (Arrêté du 27 septembre 2016 portant agrément de la société des artistes-interprètes en vue de la gestion de la rémunération annuelle supplémentaire due aux artistes-interprètes, JORF n°0234 du 7 octobre 2016, texte n° 38).

2. Term extension (Art. 1.7, 3.1 and 2).

****a) Have the provisions concerning the term extension been adequately implemented into national law?***

With regard to the duration of rights to phonograms the Directive was adequately implemented by Article L211-4 of the CPI.

With regard to the duration of rights to works, respective provisions of the Directive were already a part of the French law before its adoption (Articles L123-1 and L123-2 of the CPI).

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b) Having in mind the “de minimis” character of the Directive, does national law provide for the application of the term extension when the performance is fixed in a media different from a phonogram?

French law does not provide for the term extension when the performance is fixed in a media different from a phonogram (Article L211-4 of the CPI).

c) Is the term extension also applicable to performers and producers in the audio-visual sector?

According to Article L211-4 of the CPI the term extension was not applied to performers and producers in the audio-visual sector.

****d) General assessment of the term extension/other remarks***

Recital 12 of the Directive provides that “national rules on non-distributable revenue may be applied” to the distribution of the annual supplementary remuneration. No special rule was adopted with regard to the non-distributed sums collected for the annual supplementary remuneration in France. Hence the general regime for non-distributed revenues of CMOs of Article L321-9 of the CPI is applicable. The general assembly of the CMO may decide on the use of the sums five years after their allocation for distribution. One of conditions for the CMO to be appointed by the Ministry of Culture for managing the rights to the annual supplementary remuneration is the provision by the former of the necessary information regarding identification and location of performers for the purpose of distribution of collected sums (Article R328-1, 5° of the CPI).

3. The “use it or lose it” clause (Art. 3.2a): how does it work in practice?

****a) How shall the term “in sufficient quantity” be interpreted?***

No answer

b) Does the offering of copies or the making available of the work need to be done by the producer himself or does the provision also apply when these acts are carried out by third parties?

No answer

c) Are there any mechanisms in place to inform performers of this clause (having in mind that this right can only be exercised 50 years after the fixation or publication of the performance)?

No answer

d) What is the procedure in cases where a phonogram contains the fixation of the performances from a plurality of performers?

With regard to the exercise of this right in case when a phonogram contains the fixation of the performances of a plurality of performers the French law requires a common agreement of those performers. In case of disagreement, it is for the courts of civil jurisdiction to rule. (Article L212-3-2 of the CPI). If there is a common agreement on the intention to terminate the contract, the performers need to undertake together the same sequence of acts as individual performers (R212-8, III of the CPI). For the description of the sequence of acts, see response to the question “g” below.

e) To your knowledge, have performers already made use of this clause vis-à-vis phonogram producers?

No answer

f) Have phonogram producers (e. g. record companies) amended the model contracts they use with performers to reflect this mandatory clause?

No answer

***g) General assessment of the “use it or lose it” clause/other remarks**

The right of a performer to terminate the contract, its exercise and its unwaivable character (as provided by Recital 2a of the Directive) were transposed into the French law by Articles L211-4, II and L212-3-1 of the CPI. The performer can *notify phonogram producer of his intention to terminate* the contract if the latter does not offer copies of the phonogram for sale in sufficient quantity or does not make it available in such a way that members of the public may access them at their own initiative. The notification has to be made by sending a registered letter with acknowledgement of receipt (Article R212-8, I of the CPI). The performer can exercise his unwaivable rights to terminate the contract one year after the aforementioned notification (counting from the postmark date) by *notifying the producer of his decision to terminate the contract* in the same manner in which he notified him of his intention to do this (i.e., by sending a registered letter with acknowledgement of receipt). The termination becomes effective the day after the postmark date (Article R212-8, II of the CPI).

4. The annual supplementary remuneration (the “20% fund”): how does it work in practice? (art. 3.2b – 2d)

a) What kind of measures have been adopted to ensure that performers are informed of this annual supplementary remuneration?

No answer

b) Are phonogram producers obliged by national law to inform performers of this right?

No

c) How has the Member State implemented in national law the obligation of phonogram producers to provide performers, upon request, “any information which may be necessary in order to secure payment of that remuneration”?

The obligation of phonogram producers under the second paragraph of Article 3(2c) of the Directive to provide performers with any information which may be necessary in order to secure payment of the supplementary remuneration was transposed into the French law by Article L212-3-3, III of the CPI. This article obliges phonogram producers to provide on the request of performers or of collective management organisations exercising their rights statement of revenue relevant for the calculation of the supplementary remuneration as well as all the justifications for establishing the accuracy of the statement.

d) Have phonogram producers (e. g. record companies) amended the model contracts they use with performers to inform them of this right?

No answer

e) Have collecting societies in the Member State adopted any measure to inform performers of this right?

It can be affirmed that the two CMOs having performers as their members informed them about this rights at least indirectly, through the annual report (in case of ADAMI⁸¹) and through their websites (ADAMI⁸² and SPEDIDAM⁸³).

f) Which collecting society is responsible for administering the “20 % fund”? How has this collecting society organized the administration and distribution of the annual supplementary remuneration?

The Order of the Ministry of Culture and Communication (*Ministère de la Culture et de la Communication*) of 27 September 2016 (*Arrêté du 27 septembre 2016 portant agrément de la société des artistes-interprètes en vue de la gestion de la rémunération annuelle supplémentaire due aux artistes-interprètes*, JORF n°0234 du 7 octobre 2016, texte n° 38) authorised SAI (*Société des artistes-interprètes*) to manage the annual supplementary remuneration.

SAI was created in 2004 by the two CMOs representing performers, ADAMI (*Société pour l'administration des droits des artistes et musiciens-interprètes*) and SPEDIDAM (*Société de perception et de distribution des droits des artistes-interprètes*),⁸⁴ which are its only shareholders today.⁸⁵ According to the annual report of the Permanent Commission for the Control of CMOs, a joint work plan of ADAMI and SPEDIDAM foreseeing, among other things, use of SAI for the management of the annual supplementary remuneration, was signed 17 October 2016.⁸⁶

g) How many performers represented by collecting societies have benefited so far from this right in each of the fiscal years following the deadline for transposition of the Directive (1 November 2013)?

Publicly available reports of the CMOs representing performers do not specifically mention the sums collected through the right to the annual supplementary remuneration, while they do this with regard to other rights.

h) How much have collecting societies collected each year as a consequence of the 20%-fund provision?

⁸¹ ADAMI, Rapport d'activité 2016, pp. 28-29, available at:

https://www.adami.fr/fileadmin/user_upload/pdf_docs/05_Connaître/Bilan/2017/ADAMI_RAPPORT_ACTIVITE_2016_BD.pdf (last visited 10 October 2017).

⁸² Accord Adami-Spedidam: Un accord majeur pour les artistes-interprètes: <https://www.adami.fr/connaître-ladami/accord-adami-spedidam.html> (last visited 10 October 2017).

⁸³ Accord avec l'ADAMI: Accord entre l'Adami et la Spedidam, réactivation de la Société des artistes-interprètes Paris (this news was published 17 October 2016, Essentiel n° 78628): <https://spedidam.fr/actualites/accord-entre-la-spedidam-et-ladami/> (last visited 10 October 2017).

⁸⁴ Commission permanente de contrôle des sociétés de perception et de répartition des droits, Treizième rapport annuel 2016, April 2016, pp. 53-54.

⁸⁵ Commission permanente de contrôle des sociétés de perception et de répartition des droits, Quatorzième rapport annuel 2017, April 2017, p. 207.

⁸⁶ Commission permanente de contrôle des sociétés de perception et de répartition des droits, Quatorzième rapport annuel 2017, April 2017, p. 206. ADAMI, Rapport d'activité 2016, pp. 28-29, available at: https://www.adami.fr/fileadmin/user_upload/pdf_docs/05_Connaître/Bilan/2017/ADAMI_RAPPORT_ACTIVITE_2016_BD.pdf (last accessed 10 October 2017).

Publicly available reports of the CMOs representing performers do not specifically mention the sums collected through the right to the annual supplementary remuneration, while they do this with regard to other rights.

i) Following Recital 12 of the Term Extension Directive, has national law exempted micro-enterprises from the obligation to contribute? If so, under which circumstances?

Micro-enterprises of phonogram producers are exempted from the obligation to pay to performers the annual supplementary remuneration in cases when the costs of operations of calculation and control would be out of proportion with the amounts of remuneration to be transferred (Article L212-3-3, I of the CPI). The same article defines micro-enterprises of phonogram producers as those that employ fewer than 10 persons and whose annual revenue or the annual balance sheet total does not exceed 2 million euros.

****j) General assessment of the 20% fund/other remarks***

Article L212-3-3 of the CPI transposed the right of performer to an annual supplementary remuneration in case of the contract foreseeing a non-recurring remuneration.

According to Article L212-3-3, II of the CPI, the annual supplementary remuneration of 20% should be calculated from the totality of revenues of the preceding year collected by producers of phonograms from reproduction, communication to the public and making available of phonograms, but excluding the remuneration collected from certain types of communication to the public of commercial phonograms (provided by Article L214-1 of the CPI) and from private copying (provided by Article L311-1 of the CPI). This Article transposes Recital 13 of the Directive.

Recital 11 of the Directive states that the phonogram producers should be obliged to set aside “at least once a year [...] 20% of the revenue [...] before deducting costs”. Article L212-3-3 opt for the minimum of compliance with the Directive and renders the payment annual (i.e., once a year). The implementing law does not contain a specific indication that the revenue taken into consideration for the purpose of calculating the 20% remuneration to authors should be the revenue before deducting costs.

Article 3(2d) of the Directive, providing for the mandatory collective management of the rights to supplementary remuneration, was transposed by Article L212-3-3, III of the CPI. As it is the case with the mandatory collective management of rights in other domains in France, the collective management organisation(s) (CMO) managing rights to the annual supplementary remuneration have to be approved by the Minister of Culture (Article R328-3 of the CPI). The requirements to CMOs and the procedure for obtaining, renewing and withdrawing of the authorisation are established by Articles R328-1 to R328-6 of the CPI. The authorisation is issued for the period of five years, renewable for the same duration and under the same condition as the initial authorisation (Article R328-4 of the CPI).

5. The “clear state” provision (Art. 3.2e): how does it work in practice

a) Can the clean slate rule be waived by contract?

Given that the purpose of the legislative provision is to limit contracts, the answer to this question shall be negative.

b) What are the mechanisms Member States have established to enforce this measure in national law?

It seems that there are no special measures in national law to enforce this measure.

c) Is there an obligation to inform performers of this measure?

There is no legal obligation to inform performers of this measure.

d) Have phonogram producers (e. g. record companies) amended the model contracts they use with performers to reflect this mandatory clause?

No answer

****e) General assessment of the “clean slate” provision/other remarks***

Article 3(2e) and Recital 14 of the Directive was transposed by Article L212-3-4 of the CPI. The national law unambiguously states that when performers under their contracts with producers of phonograms are entitled to recurring payments, no advances or any contractually defined deductions can be applied to the payments due to the artists during the term of protection after the first 50 years.

6. Transitional provisions (Art. 10.5 and 6, art. 10a)

****a) Have the transitional measures of arts. 10.5, 10.6 and 10a been adequately implemented into national law?***

Article 2 of the Term Extension Directive of 2011 obliged member states to implement the Directive by 1 November 2013. The French law transposing the Directive was adopted with a delay 20 February 2015. The transitional provisions of the law retroactively apply to the events from 1 November 2013 (Article 8, I of the law).

Article 10(5) of the Directive provides that its Articles 3(1) (on the term extension) and 3(2e) (containing the “clean slate” provision) should apply to fixations of performances and phonograms the duration of protection of which did not expire as of 1 November 2013. Article 8, I of the transposition law states that the law does not revive the rights to fixations of performances and phonograms which expired before 1 November 2013, thus having a retroactive effect and “resurrecting” rights that expired between 1 November and the entry into force of the law of 20 February 2015. At the same time, Article 8, IV of the transposition law stipulates that only infringements of related rights occurring after the publication of the law (20 February 2015) can lead to criminal prosecution.

Article 10a(1) of the Directive, providing that in the absence of clear contractual indications to the contrary, a contract on transfer or assignment concluded before 1 November 2013 shall be deemed

to continue to produce its effects beyond the former 50 years term of protection, was accurately transposed by Article 8, II of the transposition law.

b) Does national legislation allow performers to modify their contracts on transfer or assignment after the 50-year period has expired (see Art. 10a.2)?

Article 10a(2) of the Directive, providing for the possibility to renegotiate contracts on transfer or assignment of related rights which entitle a performer to recurring payments and which were concluded before 1 November 2013, was transposed by Article 8, III of the transposition law. The French law specifies that the contracts can be renegotiated for the benefit of performers.

c) Have phonogram producers (e. g. record companies) amended the model contracts they use with performers to reflect this?

No answer

7. General assessment of the Directive

****a) Are performers aware of the benefits brought about by the Directive? Do they effectively reclaim them? How long on average does it take for performers to receive the benefits they are entitled to?***

No answer

****b) What are roughly the estimated yearly benefits for (1) record producers and (2) performers, taking into consideration the musical repertoire affected by the term extension? In the case of record producers, is there any data on how these benefits have been used?***

No answer

****c) Has the Directive had a negative impact on other stakeholders, such as users (e.g., higher prices in cultural goods, or lower production volume)?***

No answer

d) How much money (estimate) would users of music repertoires have saved each fiscal year since 1 November 2013 if the Directive had not been adopted?

No answer

e) Have the effects of the Directive been watered down due to contractual practices? Please describe such practices if applicable.

No answer

****f) In your opinion, have the cultural and creative sectors benefited from the term extension (e.g., have marketing opportunities in third countries increased? Are there more revenue streams? Have***

producers been marketing back catalogue items, and if so how is that received by users)? Please give reasons.

No answer

g) Have users of music repertoires become less competitive vis-à-vis companies in third countries due to the amount of royalties they will have to pay to performers and phonogram producers as a consequence of the term extension? In your opinion, can this be an obstacle for off-line / on-line music business models to flourish in Europe?

No answer

h) Other remarks

No answer

Stakeholders effectively contacted:

Type of stakeholder	Name of stakeholder	Contact
Academic centre	CEIPI	Oleksandr Bulayenko with Prof Christophe Geiger, Director General of CEIPI.

GERMANY

National expert: Ana María Pacón⁸⁷

1. National implementation of the Directive

a) Through which legislation was the Directive implemented in national law? Please provide a short history of the implementation, highlighting any legal or practical difficulties in implementing the Directive (for example, strong opposition from any interest groups, or difficulties in implementing the clauses of the Directive given national legal constraints – for instance, from contract law - or established practices)

By law of July 2, 2013 (Federal Law Gazette (*Bundesgesetzblatt*) I, p. 1940) §§ 82 and 85 of the German Copyright Law (*Urheberrechtsgesetz*, *UrhG*) regarding the duration of performer's and producer's rights was amended (9. *Urheberänderungsgesetz*, *UrhÄndG* of July 2, 2013). The law was published on July 5, 2013 and it took place on July 6, 2013.

The adoption of the Directive was highly criticized by the German academy (see, for example, Hilty/Kur/Klass/Geiger/Peukert/Drexler/Katzenberger, *Stellungnahme des Max-Planck-Instituts für Geistiges Eigentum, Wettbewerbs- und Steuerrecht zum Vorschlag der Kommission für eine Richtlinie zur Änderung der Richtlinie 2006/116 EG des Europäischen Parlaments und des Rates über die Schutzdauer des Urheberrechts und bestimmter verwandter Schutzrechte*, *GRUR Int.* 2008, p. 907; *GRUR*, *Stellungnahme zum Vorschlag der Kommission für eine Richtlinie zur Änderung der Richtlinie 2006/116 EG des Europäischen Parlaments und des Rates über die Schutzdauer des Urheberrechts und bestimmter verwandter Schutzrechte*, 2008; Dietz, *Zusammenhänge zwischen Vertragsdauer und Schutzdauer (insbesondere am Beispiel der jüngsten Schutzdauererländerung bei ausübenden Künstlern)*, *GRUR Int.* 2015, p. 635).

2. Term extension (Art. 1.7, 3.1 and 2).

***a) Have the provisions concerning the term extension been adequately implemented into national law?**

If the performance is recorded on a phonogram, then a 70-year protection period for the rights arising from §§ 77 and 78 *UrhG* (recording, reproduction and public broadcasting rights) shall apply in accordance with § 82 paragraph 1 *UrhG*. Relevant calculation time is either the appearance of the phonogram or its first permitted use for public reproduction, should this have been done earlier. For performances that have not been recorded on phonograms, the 50-year term of protection (§ 82 paragraph (1) *UrhG*) remains the same. If the recording of a performance has not been published within 50 years, nor has it been permitted to use it publicly, the rights of the performer will continue to expire after 50 years (§ 82 paragraph (2) and (3) *UrhG*).

Section 82

Duration of exploitation rights

⁸⁷ Ph.D. (Dr.iur) and Master in Law (LL.M.) (University of Augsburg, Germany), Guest Researcher at the Max-Planck-Institut für Innovation und Competition Law (Munich, Germany), Fellow Researcher at the Max-Planck-Institut (1991-1998), Lecturer at different European and Latin American Universities (since 2001), Co-Director of online courses on Patent - and Trademark Law at the International University Menéndez Pelayo (Spain, since 2013); Partner at Pacón & Schiantarelli (since 2013).

(1) Where a performance has been recorded on an audio medium, the rights of the performer referred to in sections 77 and 78 shall expire 70 years after the release of the audio recording, or, if its first legal use for communication to the public took place earlier, 70 years after the latter. Where the performance was not recorded on an audio medium, the rights of the performer referred to in sections 77 and 78 shall expire 50 years after the release of the recording or, if its first legal use for communication to the public occurred earlier, 50 years thereafter. However, the rights of the performer shall already expire 50 years after the performance if a recording has not been released or not legally used for communication to the public within that period of time.

The phonogram producers also receive a 20-year extension. The duration of the exploitation rights of the phonogram producer shall be extended by 20 years for recorded or non-published phonograms which have been published within 50 years after the production, but which may be used for public reproduction. This is done by simply changing the "50" to "70" in § 85 paragraph (3) UrhG. For neither published, nor for the public reproduction used sound carriers it remains with the 50-year protection period.

Section 85

Exploitation rights

(3) The right shall expire 70 years after release of the audio recording. If the audio recording was not released within 70 years of production, but was used legally for communication to the public, the right shall expire 50 years after the latter. If the audio recording has not been released or legally used for communication to the public during that period, the right shall expire 50 years after production of the audio recording. The period shall be calculated in accordance with section 69. The right shall expire 70 years after release of the audio recording. If the audio recording was not released within 70 years of production, but was used legally for communication to the public, the right shall expire 50 years after the latter. If the audio recording has not been released or legally used for communication to the public during that period, the right shall expire 50 years after production of the audio recording. The period shall be calculated in accordance with section 69.

The transitional provision of § 137m paragraph (1) UrhG applies to the provisions concerning the term of protection in accordance with §§ 82 and 85 UrhG:

Section 137m

Transitional provision occasioned by implementation of Directive 2011/77/EU

(1) The provisions concerning the term of protection in accordance with sections 82 and 85 (3) and concerning the rights and claims of the performer in accordance with section 79 (3) and section 79a shall apply to recordings of performances and audio media whose term of protection for the performer and producer of the audio medium had not yet expired on 1 November 2013 in accordance with the provisions of this Act as amended on 6 July 2013, and to recordings of performances and audio media created after 1 November 2013.

b) Having in mind the "de minimis" character of the Directive, does national law provide for the application of the term extension when the performance is fixed in a media different from a phonogram?

No, in accordance to § 82 paragraph (1) UrhG the term extension only applies when the performance is fixed in a phonogram. For performances that have not been fixed in a phonogram the term extension does not apply.

c) Is the term extension also applicable to performers and producers in the audio-visual sector?

The performance on an audiovisual medium is not covered (see, for example, only Pakuscher, Der Richtlinienentwurf der EU-Kommission zur Schutzfristenverlängerung für ausübende Künstler und Tonträgerhersteller, ZUM 2009, 89, 90).

****d) General assessment of the term extension/other remarks***

The German Association for Intellectual Property Protection and Copyright (GRUR) proposed a number of amendments which had partly been adopted in the now adopted law. The legal amendment contains two parts. On the one hand, the harmonization of the duration of protection for musical compositions is implemented with text; on the other hand, the prolongation of the term of protection of rights of performers and phonogram producers is extended from 50 to 70 years. This is supplemented by the introduction of accompanying rights. The performer shall be given a new right to dismiss, as well as a right to remuneration and disclosure.

It is also argued in the scientific literature that, in order to strengthen the position of performers, the appropriate and appropriate instrument should be chosen: at the European level, harmonization of copyright law should also be used, in particular the "buy- Contracts "which dominated in this market Segment.

This proposal for a regulation raises questions not only from a dogmatic but also from a practical point of view, For example, in the event that a performance has been recorded both on phonograms and on audiovisual media.

3. The "use it or lose it" clause (Art. 3.2a): how does it work in practice?

The right to terminate is regulated in a new third paragraph of § 79 UrhG. The performing artist now has an indispensable option in the event that the phonogram producer, with whom he has concluded a transfer agreement with regard to the rights in his recorded performance fails to offer phonograms for sale in sufficient quantity or to make the phonograms publicly accessible (§ 79 paragraph (3) UrhG).

The termination is only possible 50 years after the event relevant for the duration of the protection (appearance of the phonogram or first permitted use of the phonogram for public reproduction, if this has not been published) (§ 79 paragraph (3) 2. UrhG). On the other hand, the phonogram producer can dispense with the admissibility of the termination of the transfer contract by notifying the performer of the transfer agreement within a period of one year after the performer has informed him that he wishes to terminate the transfer contract terminate the contract and extinguish the rights of the phonogram producer to the phonogram (§ 79 paragraph (3) UrhG).

For the right to cancel is according to § 137m paragraph (1) UrhG November 1, 2013 the relevant deadline. The recording of the performance must be protected by then or be created thereafter.

****a) How shall the term "in sufficient quantity" be interpreted?***

In order to ensure that performers who have transferred or assigned their exclusive rights to the phonogram producer actually benefit from the extension of the period of protection, performing artists are given the opportunity to terminate the agreement with the phonogram producer where the latter fails to offer copies of the phonogram in a sufficient quantity for the sale or to make the phonograms publicly available (§ 79 paragraph (3) UrhG).

The term “in sufficient quantity” (in ausreichender Menge) shall be interpreted according to § 17 paragraph (1) UrhG (see, for example Dreier/Schulze, Urheberrechtsgesetz, 5th. Edition, 2015, §79). So the distribution of the phonogram must only take place in public (BGH GRUR 1991, 316, 317 - individual offer). This is also the case when phonograms are sent to the general public of interested parties, such as broadcasters. It is not necessary for the phonograms to be directly acquired by the public (cf. BGH GRUR 1981, 360, 361 - publication of phonograms).

b) Does the offering of copies or the making available of the work need to be done by the producer himself or does the provision also apply when these acts are carried out by third parties?

The law is not explicit at this point.

c) Are there any mechanisms in place to inform performers of this clause (having in mind that this right can only be exercised 50 years after the fixation or publication of the performance)?

In accordance to § 79 (4) UrhG the producer of the audio medium shall be obliged, upon request, to provide the performer with information concerning the income generated and other information required to quantify the entitlement to remuneration in accordance with subsection (1).

d) What is the procedure in cases where a phonogram contains the fixation of the performances from a plurality of performers?

If a work is performed by several performers, the exercise of the right of termination pursuant to § 80 paragraph (2) UrhG is determined by reference to § 74 paragraph (2) 2. and 3. UrhG.

Therefore if the group of artists has an elected representative acting as a board, the latter shall be the sole representative in respect of third parties and is authorized to exercise the right of termination with effect for all group members.

If a group does not have a representative, the right to terminate can only be exercised by the group leader or, in the absence of one, only by a representative to be elected by the group.

e) To your knowledge, have performers already made use of this clause vis-à-vis phonogram producers?

No one of the performers I interviewed has made use of this right. The phonogram producers interviewed also have no knowledge that any performer has made use of this right.

f) Have phonogram producers (e. g. record companies) amended the model contracts they use with performers to reflect this mandatory clause?

No one of the phonogram producers I interviewed has modified its contracts to incorporate this right.

I had access to a contract recently signed by one of the big Labels and a clause on the right of termination has not been included.

An explanation of the above could be that because they are mandatory legal provisions, there is no need to modify contracts.

****g) General assessment of the “use it or lose it” clause/other remarks***

4. The annual supplementary remuneration (the “20% fund”): how does it work in practice? (art. 3.2b – 2d)

a) What kind of measures have been adopted to ensure that performers are informed of this annual supplementary remuneration?

So far, no action has been taken.

b) Are phonogram producers obliged by national law to inform performers of this right?

In accordance to § 79a paragraph (4) 1. UrhG the phonogram producers are obliged, upon request, to provide the performer with information concerning the income generated and other information required to quantify the entitlement to the annual supplementary remuneration. This provision seems to be in discrepancy with § 79a paragraph (3) UrhG, since the claim for compensation can only be asserted by a collecting society and not by the performing artist. But only this can demand information from the phonogram producer.

c) How has the Member State implemented in national law the obligation of phonogram producers to provide performers, upon request, “any information which may be necessary in order to secure payment of that remuneration”?

In order to quantify the amount of its claim and to verify its proper calculation, § 79a paragraph (4) UrhG sets out the legal obligation of the phonogram producer to provide the performer with information on the revenues generated and other information required for that purpose. However, the performer must request the information. The claim of the performing artist, however, relates only to revenue, since the 20% amount of the remuneration is calculated before deduction of expenditure, but not the latter. On the other hand, the performer does not have a claim to insight into the books of the sound carrier. If there is any doubt about the correctness of the information, only the submission of an affidavit (§ 260 Abs. 2 BGB) will help. Irrespective of any band-transfer agreements, the right to information only applies to the phonogram producer and not to its licensees, even if they generate the actual revenue (see, for example, Dreier/Schulze/Dreier, Urheberrechtsgesetz, 5th. Edition, 2015, §79a Rn. 11-12).

d) Have phonogram producers (e. g. record companies) amended the model contracts they use with performers to inform them of this right?

No one of the phonogram producers I interviewed has modified its contracts to incorporate this right.

An explanation of the above could be that because they are mandatory legal provisions, there is no need to modify contracts.

e) Have collecting societies in the Member State adopted any measure to inform performers of this right?

No, they have not.

f) Which collecting society is responsible for administering the “20 % fund”? How has this collecting society organized the administration and distribution of the annual supplementary remuneration?

Gesellschaft zur Verwertung von Leistungsschutzrechten (GVL).

Until now it has done nothing for the administration and distribution of the annual supplementary remuneration.

For the GVL the implementation of the Directive 2011/77/EU is not a priority at the moment. Shortly after the implementation of the Directive in Germany (July 2013), the EU Directive on Collective Societies was adopted. Therefore the GVL has been involved in an internal restructuring process. Along with this, the GVL decided two years ago to modify its payment structure. This has generated that in the last two years there has been no payment to its members. For this reason, the GVL is currently under a lot of pressure to conclude this restructuring process and to start making regular payments. There is no time to implement the annual supplementary remuneration.

g) How many performers represented by collecting societies have benefited so far from this right in each of the fiscal years following the deadline for transposition of the Directive (1 November 2013)?

No performers so far have benefited from this right.

h) How much have collecting societies collected each year as a consequence of the 20%-fund provision?

Nothing so far.

i) Following Recital 12 of the Term Extension Directive, has national law exempted micro-enterprises from the obligation to contribute? If so, under which circumstances?

No, micro-enterprises are not exempted from the obligation to contribute.

****j) General assessment of the 20% fund/other remarks***

Regarding the right of information of the performer of the 20% supplementary remuneration, § 79a UrhG has splitting the two closely related claims. This is not appropriate. The collecting society cannot be granted a separate claim for information based on the clear legal wording of § 79a paragraph (4) UrhG. But since only they the compensation claim according to § 79a (paragraph 3) 2. UrhG can assert that the collecting society receives the right to obtain information on the basis of explicit or implied assignment by the performing artist.

5. The “clean slate” provision (Art. 3.2e): how does it work in practice?

a) Can the clean slate rule be waived by contract?

No, the “clean slate” rule cannot be waived by contract.

b) What are the mechanisms Member States have established to enforce this measure in national law?

§79a paragraph (5) UrhG regulates the case when the performer has granted or transferred to a phonogram producer rights to its performance against recurring remuneration (in particular the percentage or number of royalties of the performing artist on the revenues). Since this agreeing in accordance to § 137m paragraph (3) UrhG also extends to the extension period from 50 to 70 years, unless there are clear contractual indications to the contrary, the performer is therefore also involved in the exploitation on the basis of the contract in the extension period on the basis of the contract. There is therefore a need for protection only in so far as the phonogram producer could be tempted to make any advances or other contractually agreed deductions for the extension period.

In order to protect the performing artist in this respect, the phonogram producer is prohibited under § 79a paragraph (5) UrhG, after 50 years after the release of the phonogram or in case of non-appearance after the 50th year after the first permitted public reproduction, to withdraw advances or other contractually agreed deductions from the remuneration.

Advances are to be understood as future cash receivable but non-repayable advance payments to the performer (see, for example, Loewenheim, Handbuch des Urheberrechts, 2nd. Edition, 2010, § 69 Rn 37) and under contractually specified deductions real deductible costs to charge from the costs of the phonogram producer (see Dreier/Schulze, Urheberrechtsgesetz, 5th. Edition, 2015, §79a).

c) Is there an obligation to inform performers of this measure?

No, the law has not provided an obligation to inform performers of this provision.

d) Have phonogram producers (e. g. record companies) amended the model contracts they use with performers to reflect this mandatory clause?

No one of the phonogram producers I interviewed has modified its contracts to incorporate this provision.

An explanation of the above could be that because they are mandatory legal provisions, there is no need to modify contracts.

***e) General assessment of the “clean slate” provision/other remarks**

6. Transitional provisions (Art. 10.5 and 6, art. 10a)

***a) Have the transitional measures of arts. 10.5, 10.6 and 10a been adequately implemented into national law?**

The transitional provisions of the Directive are adequately implemented in § 137m paragraph (1) and (2) UrhG.

Section 137m

Transitional provision occasioned by implementation of Directive 2011/77/EU

(1) The provisions concerning the term of protection in accordance with sections 82 and 85 (3) and concerning the rights and claims of the performer in accordance with section 79 (3) and section 79a shall apply to recordings of performances and audio media whose term of protection for the performer and producer of the audio medium had not yet expired on 1 November 2013 in accordance with the provisions of this Act as amended on 6 July 2013, and to recordings of performances and audio media created after 1 November 2013.

(2) Section 65 (3) shall apply to musical compositions with text whose musical composition or text was protected in at least one Member State of the European Union on 1 November 2013 and for musical compositions with text created after that date. Where the protection of the musical composition or of the text is revived in accordance with the first sentence, the revived rights are accorded the author. However, any act of use commencing before 1 November 2013 may be continued in the context provided for. Appropriate remuneration shall be paid for any use after 1 November 2013.

A substantive transitional arrangement for the interim period, from the day the Directive was adopted until the end of the transitional period, is available in the Directive only to performers and phonogram producers. For musical compositions with text such a transitional arrangement was missing. This can lead to problems, for example, with works composers, where the text is in the public domain but the music composition was still protected until 2013. The German legislator did not want to regulate this period. This is unsatisfactory, because as of 1.11.2013 at least a retroactivity of the copyright protection of public domain contributions of the genre »music composition with text« is given. Only use acts remained untouched in this case.

b) Does national legislation allow performers to modify their contracts on transfer or assignment after the 50-year period has expired (see Art. 10a.2)?

In accordance to § 137m paragraph (3) UrhG where a transfer agreement was concluded between a performer and a producer of an audio medium before 1 November 2013, in the case of the extension of the term of protection the transfer shall extend to this period unless there are clear, contractual indications to the contrary.

c) Have phonogram producers (e. g. record companies) amended the model contracts they use with performers to reflect this?

No one of the phonogram producers I interviewed has modified its contracts to incorporate this provision.

7. General assessment of the Directive

****a) Are performers aware of the benefits brought about by the Directive? Do they effectively reclaim them? How long on average does it take for performers to receive the benefits they are entitled to?***

No, they are not aware of the benefits.

****b) What are roughly the estimated yearly benefits for (1) record producers and (2) performers, taking into consideration the musical repertoire affected by the term extension? In the case of record producers, is there any data on how these benefits have been used?***

No information was obtained on this point.

****c) Has the Directive had a negative impact on other stakeholders, such as users (e.g., higher prices in cultural goods, or lower production volume)?***

No negative impacts can be seen so far.

d) How much money (estimate) would users of music repertoires have saved each fiscal year since 1 November 2013 if the Directive had not been adopted?

No information was obtained on this point.

e) Have the effects of the Directive been watered down due to contractual practices? Please describe such practices if applicable.

As far as I can get information, not until now.

****f) In your opinion, have the cultural and creative sectors benefited from the term extension (e.g., have marketing opportunities in third countries increased? Are there more revenue streams? Have producers been marketing back catalogue items, and if so how is that received by users)? Please give reasons.***

It has not been possible to contact the big Labels, the real beneficiaries of the extension. For the independent producers the extension has not brought them so far benefits.

g) Have users of music repertoires become less competitive vis-à-vis companies in third countries due to the amount of royalties they will have to pay to performers and phonogram producers as a consequence of the term extension? In your opinion, can this be an obstacle for off-line / on-line music business models to flourish in Europe?

No information was obtained on this point.

h) Other remarks

The implementation of Directive 2011/77/EU into national law has been generally successful. The German legislator inserts the new regulations meaningfully into the copyright law.

However, great benefits for performers and small phonogram producers cannot yet be observed. It seems that performers are not be involved until now from additional revenues the phonogram producers generate due to the extended term of protection. There is no association in Germany - as there is in the United States or in the United Kingdom - that groups and cares for artists. They have therefore not been aware in many cases of the benefits that the Directive has brought to them.

The rights of performing artists are strengthened in the long term, in particular by the accompanying termination option with which they can force the phonogram producer to optimally use the recording. However, the impact on the system of copyright itself should not be underestimated. Prolonged periods of protection mean that the protected recordings will become public domain later and can be used by anyone. It may therefore be necessary to think about a more creative interpretation of the boundaries in order to take the interests of the general public into account.

Stakeholders effectively contacted:

Type of stakeholder	Name of stakeholder	Contact
CMO	Gesellschaft zur Verwertung von Leistungsschutzrechten mbH (GVL)	Dr. Tilo Gerlach gerlach@gvl.de
CMO	VG Bild-Kunst	Dr. Anke Schierholz schierholz@bildkunst.de
Association of independent phonogram producers	Verband der unabhängigen Musikunternehmen VUT e.V.	Reinher Karl karl@vut.de
Phonogram producer	enja & yellowbird records	Werner Aldinger enja@jazzrecords.com
Music Publisher	Kompetenzzentrum für Kultur- und Kreativwirtschaft, City of Munich	Jürgen Enninger kreativ@muenchen.de
Performer	Luis Borda	luis@luisborda.de
Phonogram producer and performer	Robert Popp	rpopp@munichre.com
Performer	Violinist at the Munich Philharmonic and at the Orchestra of the Bayreuth Festival	Bernhard Metz berni.metz@gmx.de
Performer	Roman Bunka	r@romanbunka.de
Performer	Weigold & Böhm International Artists & Tours GmbH	Teresa Brunnmüller teresa@weigold-boehm.de
Academic and representative of a copyright association	Max Planck Institute for Innovation and Competition ALAI Germany	Dr. Silke von Lewinski svl@ip.mpg.de
Academic	Max Planck Institute for Innovation and Competition	Dr. Adolf Dietz a.dietz@ip.mpg.de
Academic	Max Planck Institute for Innovation and Competition	Prof. Dr. Annette Kur Annete.kur@ip.mpg.de
Academic	Ludwig-Maximilians-Universität München (LMU)	Dr. Agnès Lucas-Schloetter Agnes.Lucas-Schloetter@jura.uni-muenchen.de
Academic	Zentrum für Angewandte Rechtswissenschaft (ZAR)	Prof. Dr. Thomas Dreier MCJ dreier@kit.edu
Copyright lawyer	Dr. Roth & Kollegen Dr. Nikolaus Reber (Partner)	reber@copyroth.de

PORTUGAL

National expert: Teresa Nobre⁸⁸

1. National implementation of the Directive

a) Through which legislation was the Directive implemented in national law? Please provide a short history of the implementation, highlighting any legal or practical difficulties in implementing the Directive (for example, strong opposition from any interest groups, or difficulties in implementing the clauses of the Directive given national legal constraints – for instance, from contract law - or established practices)

The Directive was implemented through Law no. 82/2013 of 6 December 2013. This law amended art. 183.^o (term of protection of related rights) of the Portuguese Code of Author's Rights and Related Rights ("CDADC"), and introduced a new article – art. 183.^o-A (making available phonograms by producers). The legal provision concerning the term extension (art. 183.^o CDADC) was amended two years later by Law no. 32/2015 of 24 April 2015.

The Directive was implemented into national law following a legislative initiative by the Portuguese Government. The legislative proposal presented by the Government was not subject to opposition from any interest group. There was a general agreement from the political parties represented in the Portuguese Parliament that the term of protection of the rights of performers should be extended, and that the accompanying measures should be approved. The extension of the term of protection of the producers' rights was less consensual, with two political parties showing some opposition to it. The political debate was, nevertheless, brief, and only a few stakeholders took part in the public consultation. No users' rights organization contributed to the debate. The main amendments to the legislative proposal originated from the collecting societies that represent the performers and the producers in Portugal. All the documentation related to this legislative initiative is available here.

Perhaps due to the low level of involvement of the political parties and stakeholders in the discussions surrounding the national implementation of the Directive, the resulting law is tainted by several flaws: the provision regarding the term of protection in respect of musical compositions with words was not implemented; the provision regarding the term of protection of the producers' rights was revoked; the provisions regarding the extension of the term of protection of the rights of producers were inadequately implemented; the provisions regarding the extension of the term of protection of the rights of performers were only partially implemented; the "clean slate" provision was not implemented; and only one transitional measure has been adequately implemented.

2. Term extension (Art. 1.7, 3.1 and 2).

****a) Have the provisions concerning the term extension been adequately implemented into national law?***

⁸⁸ Attorney-at-law (since 2005) based in Lisbon, Portugal; University Degree in Law (University of Lisbon Faculty of Law, 2003); LL.M. in Intellectual Property and Competition Law (Munich Intellectual Property Law Center, 2009); Legal Expert on Copyright at Communia International Association on the Digital Public Domain; Creative Commons Portugal Legal Lead.

Art. 1.7 of the Directive, concerning the harmonization of the term of protection in respect of co-written musical compositions, has not to this date been implemented into national law. The Portuguese Government did not include in its proposal the implementation of this provision, and no other political party or stakeholder suggested it either. During the public consultation, the Portuguese collecting society that represents authors in Portugal (SPA – Sociedade Portuguesa de Autores) presented a short opinion, praising the legislative initiative, and did not make any comments with regards to this provision.

Under the Portuguese law, works of joint authorship are given a single term of protection (see art. 32.º n.º 1 CDADC) calculated from the death of the last surviving author. However, a musical composition with words is not necessarily a work of joint authorship. Therefore, one cannot consider that the Portuguese law has any rule similar to the new rule introduced by art. 1.7 of the Directive.

Art. 3.1. of the Directive, concerning the extension of the term of protection of the performers' rights, was only partially implemented into national law:

- the first subparagraph of the second sentence of art. 3.1. of the Directive was not implemented: the national law does not foresee the situation where the fixation of the performance is made otherwise than in a phonogram;
- the second subparagraph of the second sentence of art. 3.1. of the Directive was not adequately implemented by Law no. 82/2013 of 6 December 2013 (see art. 183.º, n.º 3 CDADC as amended by such law). Indeed, in this first implementation attempt, the national lawmaker did not state that the phonogram had to be lawfully published or lawfully communicated to the public within the 50-year period following the date of the performance. This error was corrected by the lawmaker through the Law no. 32/2015 of 24 April 2015 (see current version of art. 183.º, n.º 3 CDADC).

Art. 3.2 of the Directive, concerning the extension of the term of protection of the producers' rights, was inadequately implemented into national law:

- first and most importantly, the lawmaker revoked, through Law no. 82/2013 of 6 December 2013, the CDADC rule that stated that the rights of producers shall expire 50 years after the fixation is made (see art. 183.º, n.º 1 b) CDADC as amended by Law no. 82/2013 of 6 December 2013, which has not been amendment since then, as shown in the current version of art. 183.º, n.º 1 b) CDADC);
- second, the lawmaker mixed the second and third sentences of art. 3.2 of the Directive and ended up saying that the rights of producers shall expire 70 years from the date of the first lawful communication to the public if no lawful publication or communication to the public has taken place within the period mentioned in art. 183.º n.º 1 CDADC (we assume that the lawmaker intended to refer to the 50-years period following the fixation, but as mentioned above he lawmaker also revoked that rule, so we are not sure) (see art. 183.º, n.º 4 CDADC as amended by Law no. 82/2013 of 6 December 2013);
- third, the national lawmaker tried to correct the errors regarding the national implementation of art. 3.2 of the Directive, and simply revoked art. 183.º, n.º 4 of the CDADC through Law no. 32/2015 of 24 April 2015.

It is extremely difficult to interpret the national framework with regards to the term of protection of the producers' rights after these amendments. Following the revocation of art. 183.º, n.º 4 of the CDADC, one could ask if the lawmaker intended to apply art. 183.º, n.º 3 CDADC to the producer's

rights, since this legal provision reads as follows: *“If the fixation of the performance of a performer in a phonogram is lawfully published or lawfully communicated to the public, within the period mentioned in the no. 1, the term of protection of the right is 70 years following the date of the first publication or the first communication to the public, whichever is the earlier”*.

The law only refers to the “right” without mentioning performers and/or phonogram producers, so one could attempt to make a broad interpretation in order to apply this rule to the producers’ rights. Such interpretation would not be, however, without inconsistencies, because the only relevant period that is mentioned in the current version of art. 183.º, n.º 1 CDADC is the 50-year period following the date of the performance (see art. 183.º, n.º 1 a) CDADC). As mentioned above, the 50-years period following the fixation was revoked. This means that, if art. 183.º, n.º 3 CDADC was to apply to the producers rights, one would end up with the following rule: if the fixation of the performance of a performer in a phonogram is lawfully published or lawfully communicated to the public, within the 50-year period following the date of the performance, the rights of producers shall expire 70 years following the date of (such) first publication or (such) first communication to the public.

Such difference with regards to the periods within which the phonogram would have to be published or communicated to the public in order to enjoy of the term extension, is somewhat insignificant when compared to the revocation of the main rule on the term of the producer’s rights. Under the current version of the Portuguese law, producers’ rights will simply not expire if the phonogram is not lawfully published or communicated to the public within a certain period of time!

We asked GDA – the collecting society that represents artists, musicians and dancers in Portugal – and AUDIOGEST – the collecting society that represents record producers in Portugal – if they considered that the provisions concerning the term extension had been adequately implemented into national law, and their answers were positive. The only remark made by AUDIOGEST was that only the current versions of the term extension provisions are adequately implemented in the Portuguese law (that is, the text versions introduced by Law no. 32/2015 of 24 April 2015).

b) Having in mind the “de minimis” character of the Directive, does national law provide for the application of the term extension when the performance is fixed in a media different from a phonogram?

No.

c) Is the term extension also applicable to performers and producers in the audio-visual sector?

No. During the public consultations, GDA proposed an amendment to the legislative proposal presented by the Government, in order to apply the term extension to performers and producers in the audio-visual sector, but no political party subscribed such an amendment.

****d) General assessment of the term extension/other remarks***

On GDA’s view, Directive 2011/77/EU is extremely important for artists and producers, and also for consumers. This collecting society considers that the term extension is important for artists since it represents an approximation of the EU laws with the laws of the USA, which is the biggest music market in the world. It also represents a step forward in the direction of approximation of the EU laws with the laws of Brazil and other significant music markets for Portugal, where the term of protection is equal to or greater than 70 years post mortem. GDA believes that the Directive has significantly

reduced the number of performances that will enter into the public domain during the life of their performing artists. However, GDA cannot quantify such performances. GDA takes the view that these new rules are intrinsically righteous, regardless of their economic impact.

D3 Direitos Digitais – a Portuguese non-profit association that advocates for user rights – considers that the existence of neighbouring rights makes the access to culture more expensive, due to the increase of the amount of rights that have to be paid by users. The term extension only exacerbates this problem. This non-profit takes the view that term extensions are, therefore, not appropriate.

3. The “use it or lose it” clause (Art. 3.2a): how does it work in practice?

***a) How shall the term “in sufficient quantity” be interpreted?**

On GDA’s view, this expression should be interpreted as meaning *“in sufficient quantity to be acquired in normal market conditions (in the market at stake), that is with a balanced distribution in the territory at stake”*. However, this collecting society adds, *“considering that the physical recorded music market is tending to disappear (...), we should also address (the offer of copies of records through) online distribution”*, namely through streaming platforms. GDA recalls that, if one looks only to the physical recorded music market, the offer of copies of phonograms for sale may not be “in sufficient quantity”. This collecting society believes that, in order for the offer to be considered “in sufficient quantity” in the market for recorded music in digital formats, the records should be available not only in one online platform, but in a significant part of the platforms that are active in the market.

On AUDIOGEST’s view, the requirement to offer for sale “in sufficient quantity” is not relevant in the market for recorded music in digital formats. This collecting society underlines that, for the purposes of the “use it or lose it” clause, producers may make the phonogram available to the public through a digital platform (for download or interactive streaming), and, in such cases, one does not need to assess if the offering is “in sufficient quantity”. This requirement will only be pertinent if the producer decides to exclusively market physical copies of the record (which is a scenario that is more and more rare). According to AUDIOGEST, in such scenario, the term “in sufficient quantity” should be interpreted as meaning a quantity that is sufficient in order to ensure the effective market demand. When doing such an assessment, one should take into account the stocks policies of the distributors of physical records, which the producers do not control.

b) Does the offering of copies or the making available of the work need to be done by the producer himself or does the provision also apply when these acts are carried out by third parties?

The provision also applies when the acts carried about by the producer’s assignees.

c) Are there any mechanisms in place to inform performers of this clause (having in mind that this right can only be exercised 50 years after the fixation or publication of the performance)?

GDA is unaware of any mechanisms in place to inform performers of this clause. Nevertheless, this collecting society informed its members of the national implementation of the Directive, through its usual channels of communication.

AUDIOGEST does not know if the collecting society that represents the performing artists has in place any mechanisms to inform them of this clause, but recalls that this right is not administered by

collecting societies. AUDIOGEST also does not know of any specific case of producers informing the performers of this clause.

d) What is the procedure in cases where a phonogram contains the fixation of the performances from a plurality of performers?

According to art. 183º-A no. 3 CDADC, where a phonogram contains the fixation of the performances of a plurality of performers, they may terminate their contracts on transfer or assignment, provided that the rules contained in art. 17.º (rules regarding works of joint authorship) are respected.

It is not entirely clear what is the intention of the lawmaker when referring to a legal provision that deals with joint ownership of works of joint authorship. One could ask if the lawmaker aim was to apply such rules *mutatis mutandis* to performances. If that is the case, where a phonogram contains the fixation of the performances from a plurality of performers, performers could terminate their contracts on transfer or assignment of their rights in the fixation of the performance, provided that they are in agreement.

e) To your knowledge, have performers already made use of this clause vis-à-vis phonogram producers?

GDA is not aware of any cases where performers have already made use of the “use it or lose it” clause vis-à-vis phonogram producers.

The music performers André Simão, João Barbosa and André Molarinho were not aware of any cases where performers have made use of this clause vis-à-vis phonogram producers.

AUDIOGEST is also unaware of any such cases. AUDIOGEST underlines that it sent this questionnaire to all of its members. 17 record producers answered to the questionnaire. From those, only 4 record producers have in their catalogue phonograms that are subject to this clause. None of those producers have reported any cases where performers have already made use of this clause vis-à-vis producers.

f) Have phonogram producers (e. g. record companies) amended the model contracts they use with performers to reflect this mandatory clause?

GDA is unaware of any cases in which phonogram producers have amended the model contracts they use with performers to reflect the “use it or lose it” clause.

AUDIOGEST is also unaware of any such cases. Again, AUDIOGEST sent this questionnaire to all of its members. 17 record producers answered to the questionnaire. From those, only 4 record producers have a repertoire of phonograms that is subject to this clause. None of those producers have reported any amendments.

****g) General assessment of the “use it or lose it” clause/other remarks***

None of the interviewees made a general assessment or gave any other remarks regarding the “use it or lose it” clause.

4. The annual supplementary remuneration (the “20% fund”): how does it work in practice? (art. 3.2b – 2d)

a) What kind of measures have been adopted to ensure that performers are informed of this annual supplementary remuneration?

To date, no measures have been adopted to ensure that performers are informed of this annual supplementary remuneration. GDA is planning to inform its members and those whose rights are collected by this society on the date of the first payment of this remuneration. So far, no payments have been made because the amounts collected from the main record producers total less than € 3,000.00 (three thousand euros). This collecting society foresees to start paying this supplementary remuneration once it has collected 2 or 3 years of payments. GDA expects to make the first round of payments this year (2017).

b) Are phonogram producers obliged by national law to inform performers of this right?

No.

c) How has the Member State implemented in national law the obligation of phonogram producers to provide performers, upon request, “any information which may be necessary in order to secure payment of that remuneration”?

The national lawmaker only introduced a legal provision (Art. 183.º-A no. 6 of the CDADC) according to which phonogram producers and collecting societies are required on request to provide to performers who are entitled to the annual supplementary remuneration any information that may be necessary in order to secure payment of that remuneration.

d) Have phonogram producers (e. g. record companies) amended the model contracts they use with performers to inform them of this right?

GDA is unaware of any cases in which phonogram producers have amended the model contracts they use with performers to inform them of this right.

AUDIOGEST is also unaware of any such cases, and underlines that phonogram producers are not obliged to inform performers of this right. On AUDIOGEST’s view, the performers should be informed by their collecting society, which is the entity that is responsible for administering such right.

e) Have collecting societies in the Member State adopted any measure to inform performers of this right?

Please see answer to question a) regarding the collecting society that represents performers in Portugal (GDA).

AUDIOGEST has not adopted any measure to inform performers, since they only represent record producers and therefore do not take responsibility for providing such information to performers.

f) Which collecting society is responsible for administering the “20 % fund”? How has this collecting society organized the administration and distribution of the annual supplementary remuneration?

GDA is the only collecting society representing performers in Portugal, therefore GDA considers that the “20% fund” should be administered by them. GDA has informed us that, so far, no record producers have contested GDA’s legitimacy to administer the fund.

GDA has not yet organized the administration and distribution of the annual supplementary remuneration. GDA has already initiated the process of collection of information from the record producers that operate in Portugal, and intends to continue such process in the short run. According to this collecting society, in order to organize the administration and distribution of the annual supplementary remuneration, the collecting society must first have an idea of the amount of revenues that it has to collect and distribute.

GDA considers that the administration of this remuneration has specific characteristics, mainly because the information-gathering process depends on the reports provided by the producers. Typically, for the other remuneration rights that are administered by GDA, the information is provided by the users. GDA believes that, for this right, it is advisable to monitor the records that are marketed in Portugal, in order to double-check the information collected from the producers.

Concerning the distribution of this remuneration, GDA does not foresee any problems, since it will use the producer’s sales list, which contain the number of records sold and also, when available, a technical sheet. GDA will gather information from other sources, namely from the Internet, when the phonogram’s technical sheet is not available.

GDA stated that it will take into consideration the above-mentioned specificities when organizing the administration and distribution of the annual supplementary remuneration.

g) How many performers represented by collecting societies have benefited so far from this right in each of the fiscal years following the deadline for transposition of the Directive (1 November 2013)?

As explained above, to this date, no performers have benefited from this remuneration right. According to GDA, the precise number of performers that will benefit from the monies that have been collected so far will only be determined on the moment of the payment of such amounts.

h) How much have collecting societies collected each year as a consequence of the 20%-fund provision?

According to GDA, no amounts have been collected yet, because the amounts available are small. Nevertheless, this collecting society already knows how much it will collect with regards to years of 2014 and 2015:

2014: € 801.45

2015: € 2,371.79

i) Following Recital 12 of the Term Extension Directive, has national law exempted micro-enterprises from the obligation to contribute? If so, under which circumstances?

No.

****j) General assessment of the 20% fund/other remarks***

GDA believes that, despite the fact that the initial amounts available for collection are modest, they will tend to increase over the years, since each year new phonograms will be added to the group of phonograms that is subject to the “20% fund”. According to this collecting society, between 2014 to 2016, there was already an enlargement of the set of phonograms that is subject to the fund. In other words, there are more phonograms in 1965 than in 1964, and less in 1963 than in 1964. Furthermore, GDA considers that in such a small music market, like the Portuguese market, it is enough to have a strong marketing campaign for a specific phonogram or artist (e.g. a marketing campaign that includes TV advertisements of records or sound tracks of movies) to have a significant increase of the amount of revenues available for collection and distribution. GDA considers, however, that it is early to draw any conclusions on the financial aspects of the 20% fund.

AUDIOGEST stated that the record producers that are members of this collecting society, which have replied to this questionnaire and which have in their catalogue phonograms that are subject to the “20% fund”, are reporting to GDA the information that is needed for the collection of revenues by such collecting society.

5. The “clean slate” provision (Art. 3.2e): how does it work in practice?

a) Can the clean slate rule be waived by contract?

Not applicable.

b) What are the mechanisms Member States have established to enforce this measure in national law?

Not applicable.

c) Is there an obligation to inform performers of this measure?

Not applicable.

d) Have phonogram producers (e. g. record companies) amended the model contracts they use with performers to reflect this mandatory clause?

Not applicable.

***e) General assessment of the “clean slate” provision/other remarks**

The “clean slate” provision has not been implemented in Portugal. None of the stakeholders that we interviewed were able to explain the reason behind the lack of implementation of this clause. Apparently, the Portuguese lawmaker misinterpreted art. 3.2-E of the Directive. Indeed, the national lawmaker introduced a similar rule but for the annual supplementary remuneration (see art. 183.º-A no.5 “in fine” of the CDADC). According to this rule, the overall amount that the producer should set aside for performers who receive non-recurring payments shall be unencumbered by advance payments or contractually defined deductions.

GDA considers that the non-implementation of the “clean slate” provision was unintentional. On GDA’s view, the European Commission should intervene with the Portuguese Government to implement the “clean slate” provision in Portugal.

6. Transitional provisions (Art. 10.5 and 6, art. 10a)

****a) Have the transitional measures of arts. 10.5, 10.6 and 10a been adequately implemented into national law?***

Art. 10.5 has been implemented into national law through art. 4.º no. 1 of Law no. 82/2013 of 6 December 2013. The national transitional measure states that every provision of Law no. 82/2013 of 6 December 2013 (and not only to the term extension provisions embodied in art. 3.1 and 2-E of the Directive) shall apply to fixations of performances and phonograms in regard to which the performer and the phonogram producer are still protected as at 1 November 2013 and to fixations of performances and phonograms which come into being after that date. Despite the excessive zeal of the Portuguese lawmaker, we consider that art. 10.5 has been adequately implemented into national law. Indeed, the remaining provisions of the national law – the “use it or lose it” clause and the annual supplementary remuneration – are conditional to the term-extension.

Art. 10.6 has not been implemented into national law. As mentioned before, art. 1.7 of the Directive, concerning the harmonization of the term of protection in respect of co-written musical compositions, has not to this date been implemented into national law. So, naturally, art. 10.6 has also not been implemented.

Art.10a has also not been implemented into national law. Instead, the Portuguese lawmaker created a specific transitional measure, which is embodied in art. 4.º no. 2 of Law no. 82/2013 of 6 December 2013, and reads as follows: *“The provisions of the preceding paragraph [art. 4.º n.º 1] shall be without prejudice to any contracts and acts of exploitation performed before the entry into force of the national law, and acquired rights of third parties”*. There are several problems with this transitional measure:

- first, it limits the scope of application of the transitional measure embodied in art. 10.5 of the Directive, which is implemented in art. 4.º, no. 2 of Law no. 82/2013;
- second, this transitional measure does not foresee that a contractual transfer or assignment of rights in the fixation of the performance shall continue to produce its effects for the extended term in the absence of clear contractual indications to the contrary;
- finally, the reference date used therein is 7 December 2013 (the date of the “entry into force of the national law”), and not 1 November 2013.

We asked GDA and AUDIOGEST if they considered that the transitional measures had been adequately implemented into national law, and their answers were positive. GDA further added that it did not have any problems with the producers that have already contacted and, on the other hand no situation has been identified that would suggest that the measures had not been correctly implemented.

It should be, however, underlined that, when such collecting societies contributed their written comments and amendments to the public consultation, they were apparently given a version of the legislative proposal, which was not the proposal that ended up being discussed by the Parliament. It is not possible for us to assess why did these stakeholders provided comments on a version of the legislative proposal that was not the one made publicly available. It is clear, however, in what respects

the transitional measures, that the collecting societies could not have identified some of the errors that ended up in the law that implemented the Directive into national law. In fact, the version of the legislative proposal commented by such entities contained not only a provision that adequately implemented art. 10a.1 of the Directive, but also contained a provision that implemented art. 10a.2.

b) Does national legislation allow performers to modify their contracts on transfer or assignment after the 50-year period has expired (see Art. 10a.2)?

No. As stated above, a version of the legislative proposal which circulated through at least some stakeholders contained a provision that implemented art. 10a.2. For reasons unknown to us, that text did not made into the final version of the legislative proposal that was made available to the general public and that was debated by the Parliament.

c) Have phonogram producers (e. g. record companies) amended the model contracts they use with performers to reflect this?

GDA is unaware of any cases in which phonogram producers have amended the model contracts they use with performers to reflect the transitional provisions.

AUDIOGEST is also unaware of any such cases. Again, AUDIOGEST sent this questionnaire to all of its members. 17 record producers answered to the questionnaire. From those, only 4 record producers have a repertoire of phonograms that is subject to this clause. None of those producers have reported any amendments.

7. General assessment of the Directive

****a) Are performers aware of the benefits brought about by the Directive? Do they effectively reclaim them? How long on average does it take for performers to receive the benefits they are entitled to?***

The music performers André Simão, João Barbosa and André Molarinho were not aware of any of the benefits brought about by the Directive.

GDA does not know if the performers are aware of these benefits. This collecting society informed its members of the national implementation of the Directive, through its usual channels of communication, but does not have any other mechanisms in place to inform performers of these benefits. Regarding the benefits that are administered by GDA, this entity has not yet organized the administration and distribution of the same, so one does not know how long on average does it take for performers to receive these benefits.

AUDIOGEST does not have the necessary information to answer to any of these questions. According to AUDIOGEST, the performers that enjoy recurring payments are paid within the contractually agreed time limits (typically, on a quarterly or annual basis), whilst the performers that get a one-off payment should get the benefits on an annual basis, since the producers have to report those benefits once a year. AUDIOGEST considers that the speed at which the performers get the annual supplementary remuneration depends on how fast the collecting society that represents the performers collects and distributes the revenues.

****b) What are roughly the estimated yearly benefits for (1) record producers and (2) performers, taking into consideration the musical repertoire affected by the term extension? In the case of record producers, is there any data on how these benefits have been used?***

GDA is not able to provide any estimate as to the yearly benefits for performers. GDA will only be able to provide such estimate once it has collected monies during a period of 3-5 years.

AUDIOGEST does not have the necessary information to estimate the yearly benefits for record producers. This collecting society recalls that the term extension allows producers who have a musical repertoire with more than 50 and less than 70 years old to obtain gains that otherwise would not be possible, because the phonograms would have entered into the public domain. Nevertheless, the data usually collected by AUDIOGEST does not allow them to draw any conclusions on the basis of the "age" of the repertoire. This collecting society adds that some of the producers who answered to this questionnaire were able to identify some of the revenues obtained. This sample is not, however, enough to draw conclusions with the regards to yearly benefits for record producers.

****c) Has the Directive had a negative impact on other stakeholders, such as users (e.g., higher prices in cultural goods, or lower production volume)?***

GDA believes that the Directive has not had any negative impact on other stakeholders. On the contrary, in what concerns the so-called "historical" editions offered for sale or made available online, GDA says that the copies produced using non-original masters have been forced out of the market as a result of the implementation of this Directive. There was no investment on remastering these editions, and therefore they deceived the consumer (for instance, a while ago it was released in the market a CD edition of phonograms of the artist Amália Rodrigues that did not use the original master, but a reproduction of a vinyl record, which resulted in a record with very poor sound quality).

AUDIOGEST stated that it did not observe an increase in the prices of cultural goods, by the contrary. On the other hand, this collecting society says that it has data that point to an increase of phonogram releases in Portugal. They cannot, however, establish a correlation between that rise on the new releases and the Directive.

D3 Direitos Digitais – a Portuguese non-profit association that advocates for user rights – considers that the existence of neighbouring rights makes the access to culture more expensive, due to the increase of the amount of rights that have to be paid by users. The term extension only exacerbates this problem.

DECO Associação Portuguesa para a Defesa do Consumidor – the Portuguese consumers rights organization – does not have any data that would allow them to assess if the Directive had a negative impact on the users.

d) How much money (estimate) would users of music repertoires have saved each fiscal year since 1 November 2013 if the Directive had not been adopted?

Neither GDA nor AUDIOGEST were able to answer to this question.

According to GDA, one would need to know the precise amount of money paid by Spotify to record producers, and no one has that information. This collecting society considers that the European

institutions should act urgently, in order to make sure that the accounts of platforms and record producers are transparent.

e) Have the effects of the Directive been watered down due to contractual practices? Please describe such practices if applicable.

Neither GDA nor AUDIOGEST are aware of such practices.

****f) In your opinion, have the cultural and creative sectors benefited from the term extension (e.g., have marketing opportunities in third countries increased? Are there more revenue streams? Have producers been marketing back catalogue items, and if so how is that received by users)? Please give reasons.***

GDA considers that there are already some visible benefits and they anticipate more in the future, but they underline that it is still too early to draw any conclusions.

AUDIOGEST takes the view that the term extension and, consequently, the potential increase of revenues are an incentive to investment. On the other hand, the “newness” and the frequency of new releases are essential for the music market. Therefore, this collecting society considers that it is not expectable to see in the music market the negative effects that one could see in other markets – the disinvestment in new products (in this case, cultural goods). AUDIOGEST underlines, again, that there has been an increase of new releases in Portugal, mainly new releases by new artists. We should note, however, that AUDIOGEST stated that they could not establish a correlation between that rise on the new releases and the Directive.

g) Have users of music repertoires become less competitive vis-à-vis companies in third countries due to the amount of royalties they will have to pay to performers and phonogram producers as a consequence of the term extension? In your opinion, can this be an obstacle for off-line / on-line music business models to flourish in Europe?

On GDA and AUDIOGEST’ views, users such as Spotify have not become less competitive vis-à-vis companies in third countries, and the extension of the term is not in any way an obstacle for such companies to flourish in Europe.

GDA recalls that the USA and Brazil have longer terms of protection, and nevertheless such platforms have decided to enter into those markets. Moreover, such companies have never publicly stated that they intended to leave those markets due to their existing terms of protection. Therefore, according to GDA, it is inconceivable that such scenario could happen in the European Union.

AUDIOGEST considers that the “value gap” is the biggest obstacle to the development of such services.

h) Other remarks

GDA represents musicians, actors and dancers, therefore it has always argued that the Directive should apply to the audio-visual sector. This collecting society is waiting since 01.01.2012 for the European Commission to release a strategy with regards to the audio-visual sector.

Stakeholders effectively contacted:

Type of stakeholder	Name of stakeholder	Contact
Performer	Manuel Molarinho	manuelmolarinho@gmail.com
Performer	André Simão	https://www.facebook.com/andre.simao?ref=br_rs
Performer/Record Producer	João Barbosa (aka Branko) /Enchufada	liljohn@enchufada.com
Performers CMO	GDA	Eduardo Simões (Legal Department Director): eduardo.simoes@gda.pt
Record Producers CMO	Audiogest	Miguel Carretas (General Director): miguel.carretas@audiogest.pt
Consumers Rights Organization (Users)	DECO – Associação Portuguesa para a Defesa do Consumidor	Luís Pisco (Legal Adviser, Legal and Economic Department): lpisco@deco.pt
Non-profit organization (Users)	Associação D3 Direitos Digitais	direccao@direitosdigitais.pt

ROMANIA

National experts: Ana-Maria Baci⁸⁹ / Flavia Stefura⁹⁰

1. National implementation of the Directive

a) Through which legislation was the Directive implemented in national law? Please provide a short history of the implementation, highlighting any legal or practical difficulties in implementing the Directive (for example, strong opposition from any interest groups, or difficulties in implementing the clauses of the Directive given national legal constraints – for instance, from contract law - or established practices)

Directive 2011/77/EU amending Directive 2006/116/EC on the term of protection of copyright and certain related rights ("Directive") was transposed in national Romanian law through Law no. 53/2015 on the amendment and supplementing of Law no. 8/1996 regarding copyright and related rights, published in the Official Gazette no. 198 dated 25 March 2015, and entered into force three days from publication ("Law no. 53/2015"). The Directive should have been transposed in 2013, however Romania did not meet that deadline, and as a consequence the European Commission began the infringement procedure against the Romanian State (procedure no. 2014/0189, opened on 10 July 2014).

On 6 October 2014, the first steps are being taken to implement the Directive regarding the term of protection of copyright. On that day a bill amending the law on copyright and related rights, Law no. 8/1996, was registered with the Senate for debate. The bill was further presented in the Permanent Bureau of the Senate in 18 November 2014. On 15 December 2014 it was adopted by the Senate with 115 votes in favour, 0 against and 3 abstentions. The Chamber of Deputies adopted the bill on 25 February 2015 with 331 votes in favour, 0 against and 4 abstentions.

The bill became Law no. 53/2015 on 24 March 2015.

It should be noted that the Directive, and respectively, of the law implementing the Directive in Romanian legislation would currently only affect one producer, which was the sole phonogram producer during the communist regime, and which could not be contacted.

2. Term extension (Art. 1.7, 3.1 and 2)

****a) Have the provisions concerning the term extension been adequately implemented into national law?***

The provisions transposed in the national Romanian law through Law no. 53/2015 mirror the provisions of the Directive very closely, as the provisions of Law no. 53/2015 are merely a translation of the provisions of the Directive.

⁸⁹ Partner, Nestor Nestor Diclescu Kingston Petersen. A licensed European trademark and design attorney, Ana-Maria is a member of the Romanian National Chamber of Industrial Property Attorneys and of the Bucharest Bar. Her professional affiliations include INTA, ECTA, AIPPI and MARQUES.

⁹⁰ Associate, Nestor Nestor Diclescu Kingston Petersen

However, the transitional measures have not been transposed in Romanian law, and neither has been article 1 paragraph (3) of the Directive.

Having in mind that the Law no. 53/2015 entered into force at the end of March 2015, in Romania there is a gap of protection from 1 November 2013 to 29 March 2015, stemming from the fact that Article 1 paragraph (3) of the Directive provides that Article 3(1) to (2e) of the Directive 2006/116/EC in the version thereof in force on 31 October 2011 shall apply to fixations of performances and phonograms in regard to which the performer and the phonogram producer are still protected, by virtue of those provisions in the version thereof in force on 30 October 2011, as at 1 November 2013 and to fixations of performances and phonograms which come into being after that date. So, if under Romanian law the protection of a performer or of a phonogram producer expired in the period between 1 November 2013 and the date of entry into force of Law no. 53/2015, such performer and phonogram producer seems not to benefit from the provisions of Article 3(1) to (2e) of the Directive 2006/116/EC.

Moreover, musical compositions with words whose protection ended at 1 November 2013 (and in the period between 1 November 2013 and the entry into force of Law no. 53/2015) do not benefit from the provisions of Article 10 para. (6) of Directive 2006/116/EC, introduced by article 1 paragraph (3) of the Directive, if they are not protected in Member States other than Romania.

The provisions of the national legislation regarding contracts were not harmonized with the existing legislation regarding succession of laws and contracts. Not having established transitory provisions, the Law no. 53/2015 will apply only to rights which were still protected at the moment of its entry into force. It may also be interpreted that the Law no. 53/2015 only applies to assignment contracts which were concluded after its entry into force.

b) Having in mind the “de minimis” character of the Directive, does national law provide for the application of the term extension when the performance is fixed in a media different from a phonogram?

The national law did not implement any additional provisions to the ones included in the Directive. Moreover, Romanian legislation (Law no. 8/1996 on copyright and related rights) distinguishes between phonograms, which are sound recordings, and videograms or audiovisual works, which are mainly image recordings, with or without sound. The term extension was only provided in the national law for phonograms. So the answer to the question is that national law does not provide for the term extension when the performance is fixed in a media different from a phonogram.

c) Is the term extension also applicable to performers and producers in the audio-visual sector?

Given the fact that Romanian legislation provides a distinction between phonograms, on the one hand, and videograms/audiovisual works, on the other hand, regulating them in separate chapters of the Law no. 8/1996 on copyright and related rights, and given the fact that only the term of protection of performances fixed on a phonogram and of producers of phonograms was extended through Law no. 53/2015, the answer is that the term extension is not applicable to performers and producers in the audio-visual sector.

****d) General assessment of the term extension/other remarks***

No answer

3. The “use it or lose it” clause (Art. 3.2a): how does it work in practice?

***a) How shall the term “in sufficient quantity” be interpreted?**

It will most probably be decided on a case-by-case basis.

b) Does the offering of copies or the making available of the work need to be done by the producer himself or does the provision also apply when these acts are carried out by third parties?

Law no. 53/2015 specifies that if the producer of a phonogram does not provide sufficient copies of said phonogram, the artist may rescind the assignment contract. However, these provisions of the legislation should be read in conjunction with general copyright law legislation, which allows for assignment of rights, and also with general civil legislation, which allows legal acts to be carried out by a person through its representatives.

The obligation of making available the work belongs mainly to the producer. However, in our view, if the producer assigns his contract with the performer (which can be done with the consent of the performer, by virtue of article 1315 of the Romanian Civil Code), then the rights, as well as the obligations deriving from that contract, pass onto the third party. It is also possible for the producer to mandate third parties to act on his behalf with respect to the distribution of the copies.

c) Are there any mechanisms in place to inform performers of this clause (having in mind that this right can only be exercised 50 years after the fixation or publication of the performance)?

Performers may find out about the provisions of the copyright and related rights legislation from official sources, such as the website of the Senate (<https://www.senat.ro/#>) and the Chambers of Deputies (<http://www.cdep.ro/>), where the projects of laws are published before being passed as laws (together with the legislative process). However, the main source of information for changes in legislation is the Official Gazette of Romania, where normative acts are published before entering into force.

According to the information we received from CREDIDAM, they have also informed their members of the provisions of the law through announcements on their website.

d) What is the procedure in cases where a phonogram contains the fixation of the performances from a plurality of performers?

Romanian legislation did not implement a special procedure for when a phonogram contains the fixation of the performances from a plurality of performers. The sentence “Where a phonogram contains the fixation of the performance of a plurality of performers, they may terminate their contracts on transfer or assignment in accordance with applicable law” from Article 1 (2) (c) of the Directive was translated almost word by word into Romanian and transposed in the legislation.

Although the national legislation does not provide a special procedure for the case when a phonogram contains the fixation of the performances from a plurality of performers, it does provide that the interpretation of a work is collective when the individual performances form a whole, without it being possible to grant a distinct right to one artist over the ensemble of the performance. In such cases, the group’s rights are exercised by a representative chosen from the members of the

group by the majority of that group. In our view, in such cases the representative is the person who will terminate the assignment agreement with the phonogram producer, if that is the case.

As to multiple performers who have distinct rights over a performance, the effects of termination of contracts will be regulated on a case by case basis, either by agreement of the parties, or in court.

e) To your knowledge, have performers already made use of this clause vis-à-vis phonogram producers?

The information we received from respondents with respect to this matter indicates that the performers have not yet made use of hits clause vis-à-vis phonogram producers. And when they have tried to bring the subject up with producers, the producers were reluctant to enter into a conversation on this topic.

f) Have phonogram producers (e. g. record companies) amended the model contracts they use with performers to reflect this mandatory clause?

The information we received from respondents with respect to this matter indicates that record companies have not amended the model contracts they use with performers to reflect this mandatory clause.

****g) General assessment of the “use it or lose it” clause/other remarks***

No answer

4. The annual supplementary remuneration (the “20% fund”): how does it work in practice? (art. 3.2b – 2d)

a) What kind of measures have been adopted to ensure that performers are informed of this annual supplementary remuneration?

Performers may find out about the provisions of the copyright and related rights legislation from official sources, such as the website of the Senate (<https://www.senat.ro/#>) and the Chambers of Deputies (<http://www.cdep.ro/>), where the projects of laws are published before being passed as laws (together with the legislative process). However, the main source of information for changes in legislation is the Official Gazette of Romania, where normative acts are published before entering into force.

Other than that, according to the information we received from CREDIDAM, they have also informed their members of the provisions of the law through announcements on their website.

b) Are phonogram producers obliged by national law to inform performers of this right?

National Romanian law does not oblige producers to inform performers of this right.

c) How has the Member State implemented in national law the obligation of phonogram producers to provide performers, upon request, “any information which may be necessary in order to secure payment of that remuneration”?

Romania has implemented the obligation of phonogram producers to provide performers, upon request, “any information which may be necessary in order to secure payment of that remuneration” by making it a paragraph in the Law no. 8/1996 on copyright and related rights, introduced therein by Law no. 53/2015 implementing the Directive.

d) Have phonogram producers (e. g. record companies) amended the model contracts they use with performers to inform them of this right?

The information we received from respondents with respect to this matter indicates that record companies have not amended the model contracts they use with performers to reflect this mandatory clause.

e) Have collecting societies in the Member State adopted any measure to inform performers of this right?

According to the information we received from CREDIDAM, they have informed their members of the new legislative provisions. However, they have expressed the view that performers will need help in making use of their rights in practice.

f) Which collecting society is responsible for administering the “20 % fund”? How has this collecting society organized the administration and distribution of the annual supplementary remuneration?

In Romania there are three collecting societies representing artists. Currently the issue of the administration of the 20% fund has not been formally discussed, and none of the collecting societies has been designated to administer the 20% fund.

g) How many performers represented by collecting societies have benefited so far from this right in each of the fiscal years following the deadline for transposition of the Directive (1 November 2013)?

According to the information we have received, so far none of the performers represented by collecting societies has benefited from this right.

h) How much have collecting societies collected each year as a consequence of the 20%-fund provision?

According to the information we received, so far no funds have been collected as a consequence of the 20% fund provision.

i) Following Recital 12 of the Term Extension Directive, has national law exempted micro-enterprises from the obligation to contribute? If so, under which circumstances?

No, national legislation did not exempt micro-enterprises from the obligation to contribute.

****j) General assessment of the 20% fund/other remarks***

No answer

5. The “clean slate” provision (Art. 3.2e): how does it work in practice?

a) Can the clean slate rule be waived by contract?

Art. 3.2.e of the Directive was implemented into national Romanian law through art. 1021 paragraph (10) of the Law no. 8/1996 on copyright and related rights, article which was introduced by Law no. 53/2015. The wording of art. 1021 paragraph (10) is the Romanian equivalent of art. 3.2e of the Directive. In our view, even though the Law no. 8/1996 does not provide that the “clean slate” principle cannot be waived by contract, allowing clauses that would circumvent this principle would undermine the whole purpose for which it was introduced in the legislation in the first place. Therefore, in our view the clean slate rule cannot be waived by contract.

On the other hand, waiving by the performer of other rights introduced by Law no. 53/2015, i.e. the right to terminate the assignment agreement and the right to the annual supplementary remuneration, is expressly forbidden by the law. One may therefore argue that, given the fact that there is no express rule forbidding the clean slate rule to be waived by contract, this is possible under Law no. 53/2015.

Having said that, the matter will most probably left to be decided by the courts, or by further clarification in the legislation.

b) What are the mechanisms Member States have established to enforce this measure in national law?

Aside from the transposition of the relevant Directive provisions into Romanian legislation, we are not aware of any specific measures of enforcement of this measure in national law.

c) Is there an obligation to inform performers of this measure?

No, there is no express legal obligation to inform performers of this measure.

d) Have phonogram producers (e. g. record companies) amended the model contracts they use with performers to reflect this mandatory clause?

The information we received indicates that phonogram producers have not amended their model clauses they use with performers to reflect the clean slate rule.

****e) General assessment of the “clean slate” provision/other remarks***

No answer

6. Transitional provisions (Art. 10.5 and 6, art. 10a)

****a) Have the transitional measures of arts. 10.5, 10.6 and 10a been adequately implemented into national law?***

No, the transitional measures of arts. 10.5, 10.6 and 10a have not been transposed into national law in Romania.

b) Does national legislation allow performers to modify their contracts on transfer or assignment after the 50-year period has expired (see Art. 10a.2)?

As the Romanian legislator did not transpose the transitional measures of the Directive, neither was art. 10a.2 transposed. Therefore, the Romanian legislator did not provide for the possibility for performers to modify their contracts on transfer or assignment after the 50-year period has expired. Moreover, a change in a contract under Romanian law cannot be done unilaterally by one party, without the consent of the other party, unless such possibility is provided in law.

Therefore, performers who are entitled to recurring payments according to contracts concluded before March 2015 cannot unilaterally alter them following the 50th year after the phonogram was lawfully published or, failing such publication, the 50th year after it was lawfully communicated to the public.

c) Have phonogram producers (e. g. record companies) amended the model contracts they use with performers to reflect this?

The information we have received in this regard indicates that the record companies did not yet amend the contracts they use with performers to reflect the transitional measures of the Directive.

7. General assessment of the Directive

****a) Are performers aware of the benefits brought about by the Directive? Do they effectively reclaim them? How long on average does it take for performers to receive the benefits they are entitled to?***

(this answer is based on the response from CREDIDAM): Artists and performers were made aware of the provisions of the Directive and of the Law no. 153/2015. However, they are not prepared to put them in practice. They will need further assistance in this respect from collection societies. Presently, no initiative was undertaken by either performers, collecting societies or the regulators with respect to the benefits performers are entitled to.

****b) What are roughly the estimated yearly benefits for (1) record producers and (2) performers, taking into consideration the musical repertoire affected by the term extension? In the case of record producers, is there any data on how these benefits have been used?***

(this answer is based on the response from CREDIDAM): Currently we have no data on the yearly benefits for (1) record producers and (2) performers, taking into consideration the musical repertoire affected by the term extension.

****c) Has the Directive had a negative impact on other stakeholders, such as users (e.g., higher prices in cultural goods, or lower production volume)?***

Currently we have no data on the impact of the Directive on other stakeholders.

d) How much money (estimate) would users of music repertoires have saved each fiscal year since 1 November 2013 if the Directive had not been adopted?

Currently we have no data on how much money (estimate) would users of music repertoires have saved each fiscal year since 1 November 2013 if the Directive had not been adopted.

e) Have the effects of the Directive been watered down due to contractual practices? Please describe such practices if applicable.

The information we received indicates that the record companies have not amended their model contracts to reflect the changes brought by the Directive. Therefore, it cannot be said that the effects of the Directive have been watered down due to contractual practices.

***f) In your opinion, have the cultural and creative sectors benefited from the term extension (e.g., have marketing opportunities in third countries increased? Are there more revenue streams? Have producers been marketing back catalogue items, and if so how is that received by users)? Please give reasons.**

In our view (NNDKP), the changes brought by the Directive will be seen in time. So far, the legislative provisions are very fresh, and have not yet had time to penetrate the practice of the actors on the market.

***g) Have users of music repertoires become less competitive vis-à-vis companies in third countries due to the amount of royalties they will have to pay to performers and phonogram producers as a consequence of the term extension? In your opinion, can this be an obstacle for companies such as Spotify to flourish in Europe?**

It is too early to tell if users such as Spotify shall become less competitive vis-à-vis companies in third countries due to the amount of royalties they will have to pay to performers and phonogram producers as a consequence of the term extension.

h) Other remarks

No answer

Stakeholders effectively contacted:

Type of stakeholder ⁹¹	Name of stakeholder (Institution and contact person)	Contact (min e-mail)
Collecting society	Centrul Român pentru Administrarea Drepturilor Artiștilor Interpreți (CREDIDAM) – contact person: Alina Iordache	alina.iordache@credidam.ro

⁹¹ Note that in the respondents category we noted a single contact person, who is from CREDIDAM, the most important collecting society representing performers, having the largest number of members in Romania (<http://credidam.ro/wp/>). This is because they are the only ones who answered our questions in writing. Other persons we have contacted have either declined to answer (such is the case of the authority in matters of copyright, ORDA), said that they were not competent to answer (such is the case of UPFR, a collecting society that represents producers of phonograms), or they simply did not answer at all (other collecting societies and various studios). The answers from ORDA and UPFR were given on the phone.

We note especially the reason for not providing answers given by ORDA, who said that the issues raised by the questionnaire are sensitive matters, because of the potential conflict of interests between artists and phonogram producers.

SPAIN

National expert: Aurelio Lopez-Tarruella⁹²

The questionnaire includes the answers received from AISGE (Audiovisual Artists' Collecting Society) and AIE (Music Performers' Collecting Society). AGEDI (Phonogram producers' Collecting Society) was also contacted but they refused to answer the questionnaire because they understood they were not involved in the putting into practice of the Directive.

1. National implementation of the Directive

a) Through which legislation was the Directive implemented in national law? Please provide a short history of the implementation, highlighting any legal or practical difficulties in implementing the Directive (for example, strong opposition from any interest groups, or difficulties in implementing the clauses of the Directive given national legal constraints – for instance, from contract law - or established practices)

Directive 2011/77 was implemented in the Spanish legal order through Law 21/2014 of 4 November 2014 (BOE 5 November 2014) and entered into force on 1 January 2015. Art. 1 of that Law amended several provisions in the Spanish Copyright Act (arts. 28.1, art. 112 and 119) and introduced a new Art. 110 bis.

Implementation of Directive 2011/77 was not the exclusive purpose of Law 21/2014. In fact, this Law included several important amendments to the Spanish Copyright Act (hereinafter SCA) including: a) the implementation of Directive 2012/28 on orphan works; b) the modification of the copyright exception for use of the work for research and educational purposes; c) a new unwaivable ancillary right for publishers consisting of an equitable remuneration to be paid by news aggregators; d) a reform of the private copy exception to reflect the existing CJUE case law; e) regulation of the competences of a new administrative body (Sección 2a Comisión de Propiedad Intelectual) whose main function is to administer a fast-track procedure for web site blocking injunctions; f) the introduction of new provisions aimed at subjecting the activities of collecting societies to further controls to improve their transparency and efficiency; g) the reform also introduced a centralised payment system (one-stop shop) to collect and redistribute the income by collecting societies amongst right holders.

Having in mind the controversial nature of other of the questions of the Law, the implementation of Directive 2011/77 did not raise much concerns. However, as it will be explained, some of the advisory bodies that were consulted during the legislative process mentioned some issues that could have been taken into account.

AISGE: Not. The implementation of these specific provisions was not controversial, mainly because they were introduced in our legislation together with other measures having a much greater impact on Copyright and its collective management. Indeed, the national Law that incorporated the Directive 2011/77 into the Spanish legislation was the Law 21/2014, of November 4th, amending the Spanish Intellectual Property Law in areas such as the private copying compensation scheme and

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collective management, the fair remuneration for press publishers for the making available of their works by content aggregators, etc. All these measures were so controversial that other aspects of the new regulation (including the term extension for sound recordings, or the orphan works regulation) were not even noticed by the general public.

AIE. We consider that, in general terms, the Spanish Law No. 21/2014, of 4 November, amending the consolidated text of the Law on Intellectual Property, has adopted legal provisions included in the Directive 2011/77/EC in an appropriate manner.

Furthermore, in some cases the Spanish legislation goes further than the provisions set out in the Directive. By way of example, Spanish legislation specifically foresees that the supplementary remuneration, which shall not be waived by the performer, shall be effective through the performers' CMO, and establishes that phonogram producers or exclusive assignees shall provide to such CMO all information that may be needed to ensure the payment of such supplementary remuneration.

Although the Directive has not included a specific definition of producer, the Spanish legislation has adopted a legal provision about the debtor of this supplementary remuneration which foresees that it shall be the phonogram producer or the exclusive assignee, as the case may be.

2. Term extension (Art. 1.7, 3.1 and 2).

****a) Have the provisions concerning the term extension been adequately implemented into national law?***

New Art. 1.7 D. 2006/116 was implemented in the Spanish Copyright Act by introducing a new Paragraph 2, in Art 28.1.

Spain was one of the Member State that at the time of the adoption of the Directive already established that the term of protection of musical compositions with lyrics and music from different authors starts counting after the death of the last of these persons. While no amendment was needed, the legislator opted for introducing a new paragraph in Art. 28.1 SCA. The wording of such new paragraph is almost identical to that of Art. 1.7, so it can be affirmed that it was adequately implemented.

To implement Art. 3.1 and 2 D. 2011/77, amendments in Paragraph 2, art. 112 (performers' rights) and Paragraph 2, art. 119 (phonogram producers' rights) were introduced. The wordings of such paragraphs are almost identical to that of Art. 3.1 and 2, so it can be affirmed that it was adequately implemented.

In relation to Art. 119 SCA, academics has raised the question on whether the making available of a phonogram in the Internet should be considered as "lawfully published" or as "lawfully communicated to the public". The question is relevant since "lawfully published" prevails. So, what happens if the phonogram is first made available in the Internet and later on it is released as a record? Will the release be taken into account for the term extension? Or should it be considered that the making available in the Internet counts as a "lawful publication"?

The doubt is also relevant for the interpretation of Art. 3.2 D. 2006/116. In particular, this is so because the music business is focusing on Internet downloading or streaming, and not in distribution of tangible copies of the works.

Scholars understand that the making available in the Internet should be considered as “lawfully published” for the purpose of art. 119 SCA. This is more in line with the existing practices in the music business (Gonzalez Gozalo, 2015)⁹³.

b) Having in mind the “de minimis” character of the Directive, does national law provide for the application of the term extension when the performance is fixed in a media different from a phonogram?

No. this has been criticised by some scholars because it creates an unjustified discrimination between phonograph performers and the rest. That is performances fixed in a phonogram enjoy 70 years of protection; those fixed in a different audio-visual format, 50.

Furthermore, it might create problems where the same performance is exploited in different media, since different terms of protection may apply (Gonzalez Gozalo, 2015). depending on the media in which the performance is fixed.

AISGE. On the other hand, and for us, the controversy on this particular topic (term extension) was raised in Brussels during the debates in 2009. As soon as the Commission made it clear that the proposed Directive (subject of this work) would only benefit performances in sound recordings we, together with the Association of European Performers Organizations (AEPO-ARTIS) and the International Federation of Actors (FIA), organized a series of meetings with members of both the Commission and the Parliament, pointing out the discrimination against the performers whose performances are fixed in an audiovisual recording. Thanks to such effort, the Parliament finally introduced in the Directive the obligation of the Commission to carry out a study on the situation of the audiovisual sector, which should have already determined the need to extend the term of protection equally to the actors and other audiovisual artists. This obligation is long due; however, we do not currently have information about the Commission’s undertakings about this matter. Because of that, certain MEPs have already asked questions to the Commission, and are even asking whether the current process for reviewing the Copyright legislation in the EU would be suitable for analysing the need of AV performers to have an extended term of protection.

c) Is the term extension also applicable to performers and producers in the audio-visual sector?

No. This creates an unjustified discrimination between phonograph performers and audiovisual performers (Gonzalez Gozalo, 2015).

****d) General assessment of the term extension/other remarks***

No answer

3. The “use it or lose it” clause (Art. 3.2a): how does it work in practice?

****a) How shall the term “in sufficient quantity” be interpreted?***

Art. 3.2a has been implemented in Art. 110 bis.1 SCA. The problem to interpret “sufficient quantity” was raised during the legislative process in the *Dictamen del Consejo de Estado sobre el Anteproyecto de Ley de modificación de la LPI* (p. 89). According to this Report: “... la suficiencia del número de

⁹³ Gonzalez Gozalo, A., “La ampliación del plazo de protección de los fonogramas y de las interpretaciones y ejecuciones fijadas en los mismos”, en Bercovitz Rodríguez-Cano (coord), *La reforma de la Ley de propiedad intelectual*, Valencia, Tirant lo blanch, 2015, pp. 22 ss

copias dependerá del tipo de obra producida – calidad del product, calidad del artista, Mercado objetivo... - “. El criterio de la previsible demanda por el público “no añade seguridad adicional para las partes, la idea de la suficiencia remite a una determinación que puede realizarse, por ejemplo, en el propio contrato de cession, sin que la idea de la previsibilidad del comportamiento del Mercado de fonogramas, con los márgenes temporales que maneja este concepto, parezca aportar un elemento sobre el que hacer descansar el derecho del artista a la resolución del contrato”.

The provision finally adopted refers to “a sufficient quantity of copies so as to satisfy the reasonable needs of the public having regards to the nature and aim of the phonogram” . The definition derives from Art. 3(3) Berne Convention. As explained by legal doctrine (Gonzalez Gozalo, 2017), the definition requires an analysis of the particular circumstances of the phonogram in question (its content, the featured artist, the producer, its aim, the market and the targeted audience) to determine whether the offer of copies is sufficient or not.

The concept should be the object of an autonomous interpretation. In this sense, Recital 8 of the Directive states: “The rights in the fixation of the performance should revert to the performer if a phonogram producer refrains from offering for sale in sufficient quantity, within the meaning of the International Convention on the Protection of Performers, Producers of Phonograms and Broadcasting Organisations, copies of a phonogram”.

It should be understood that the offering for sale should take place in the territory of the European Union.

Is it enough for the performer to make use of this right if the producer has not offered for sale or made it available?

The Staff Working Document accompanying the Proposal for a Directive (Doc. COM(2008) 464 FINAL, p. 26) give an affirmative answer: if one of these means of exploitation is missing, the performer can claim his right.

This means that producers are obliged to offer for sale and make available if they do not want problems.

This is contrary to the existing practices in the music industry: it is more and more common that music work are just make available in the internet. Distribution of tangible copies is not the general rule anymore. An interpretation according to the present practice is needed. If not, performers may make an abusive use of this clause.

For AIE, Spanish legislation contains some ambiguous concepts such as “sufficient” or “reasonably” referred to the number of copies that the phonogram producer shall offer for sale, which make difficult its practical application, since there is no objective way to establish a number of copies under these parameters.

b) Does the offering of copies or the making available of the work need to be done by the producer himself or does the provision also apply when these acts are carried out by third parties?

At this point, Spanish rule differs from the Directive. While the second explicitly refers to the producers, the Spanish legislator purposefully avoided any reference to the person that has to

distribute or make available the phonogram. So the offering of copies can be made by the producer or a third party (assignee). In any case, the consent of the producer is needed.

The text of the directive should be interpreted to include those cases where the distribution or the making available of the phonogram is made by a third party with the consent of the producer.

This is also important to determine the person that must be notified of the intention of the performer of terminating the contract.

c) Are there any mechanisms in place to inform performers of this clause (having in mind that this right can only be exercised 50 years after the fixation or publication of the performance)?

No answer

d) What is the procedure in cases where a phonogram contains the fixation of the performances from a plurality of performers?

For the solution of these situations, Art. 110 bis.1 make a reference to art. 111. According to this provision, all the performers involved shall choose a representative among themselves by majority of votes. The agreement shall designate the person and his/her powers. This means that he/she would only be able to terminate the contract if the majority has agreed that he/she has powers for doing so.

As an exemption, Art. 111 states that orchestra directors and soloists can decide autonomously.

This regulation may create problems in cases where the soloist or the orchestra directors choose to terminate the contract, but the rest of the performers not. In this case, the first would not be able to use the phonogram that combines the contributions of all the parties concern.

As a consequence, while the directive impedes producers to block the exploitation of performances by performers, the way Spain has implemented this provision opens the door to other situations where obstacles may appear for the exploitation of performances.

This solution differs from the one chosen by the Commission in the Proposal for a Directive: all the performers need to agree in the termination of the contract. Unfortunately, it was not finally adopted.

e) To your knowledge, have performers already made use of this clause vis-à-vis phonogram producers?

Stakeholders questioned did not know of any example

f) Have phonogram producers (e. g. record companies) amended the model contracts they use with performers to reflect this mandatory clause?

No answer

****g) General assessment of the “use it or lose it” clause/other remarks***

Spanish legislator has specified that the notification by the performer has to be reliable (“fehaciente”). This is important because the 1-year period starts counting from that date. The performer must clearly identify the performance.

According to legal doctrine, performers can exercise this right after 12 months from the notification. For that, the performer must communicate the producers the termination of the contract (Gonzalez Gozalo, 2017).

4. The annual supplementary remuneration (the “20% fund”): how does it work in practice? (art. 3.2b – 2d)

a) What kind of measures have been adopted to ensure that performers are informed of this annual supplementary remuneration?

Art. 110.bis.2 SCA is almost identical to Arts. 3.2 b – d of the Directive. Therefore, the provision does not include any measure to inform performers.

Since “lawfully published” prevails over “lawfully communicated to the public”, a similar interpretative question to that in Art. 119 SCA exists: should the making available in the Internet of the performance be considered as “lawfully published”? or would a subsequent publication in tangible media prevailed?

Again, this is also relevant for the interpretation of Art. 3.2.b since this right only exists 50 years after the “lawfully publication” or, on default, “the communication to the public”, an autonomous interpretation of the provision is needed.

Legal doctrine (Gonzalez Gozalo, 2017) have pointed out the problem that may exist for performers to demonstrate that they are entitled to this remuneration. In particular, non-featured performers. In Spain, according to the Civil procedural Law (art. 217 LEC), the *onus probandi* lies in the party claiming his rights. It is certainly not easy for performers or their heirs to provide evidence (a contract, a bill, an invoice, pictures...) that demonstrate that they participated in the recording of a song or a record that took place at least 50 years ago (this period can be even longer if the record was lawfully published later). Easier to demonstrate is the fact that the contract does not provide a recurring remuneration. If that would be so, documentary evidence would exist.

In this expert’s opinion, it is possible to interpret that collecting societies may request to producers information about the participation of their performers in the performances fixed in a phonogram. This should be considered “*information which may be necessary in order to secure payment of that remuneration*” for the purpose of Art. 110.bis.2 SCA and Art. 3.2.c D. 2011/77.

In the SCA the person in charge of paying the annual remuneration is the phonogram producer or “*en su caso, su cesionario en exclusiva*” (the exclusive licensee or assignee). According to the *Memoria de análisis de impacto normativo del Anteproyecto de Ley de modificación de la LPI*, p. 42, this applies to the integral transfer of the rights over the phonogram: an assignment of the phonogram producer’s rights. *This will not apply to an exclusive license of limited rights over the phonogram or a license limited in time* (Gonzalez Gozalo, 2015). *This might be problematic: how should Art. 3.2.b DIRECTIVE be interpreted in cases where the rights over the phonogram are licensed to different parties? Who has to pay the annual remuneration?*

b) Are phonogram producers obliged by national law to inform performers of this right?

Not by law, and it seems collecting societies have not adopt any practice in this sense.

c) How has the Member State implemented in national law the obligation of phonogram producers to provide performers, upon request, “any information which may be necessary in order to secure payment of that remuneration”?

This part of the Directive has not been correctly implemented. According to Art. 110.bis.2 producers are obliged to provide information to collecting societies, not to performers. Scholars do not consider that this is incompatible with the directive because at the end of the day it is for the collecting societies to collect the remuneration (Gonzalez Gozalo, 2015).

As previously explained this obligation needs to be widely interpreted so that producers are obliged to provide all information including whether a particular performer participated in the recording of a particular phonogram.

The provision does not provide for any sanction against those producers who do not provide the information requested or they provide an incomplete or false information.

d) Have phonogram producers (e. g. record companies) amended the model contracts they use with performers to inform them of this right?

No information has been received by stakeholders in this regard

e) Have collecting societies in the Member State adopted any measure to inform performers of this right?

AIE. Initially, AIE addressed the main record companies (“majors”), but also AGEDI (the Spanish producers’ collecting society) contacted all its members to inform them about the terms of the new regulation. Currently, AIE addresses directly all AGEDI’s members and requires them annually to provide the necessary information to make that annual supplementary remuneration effective, as the Directive and the Spanish legislation provided.

f) Which collecting society is responsible for administering the “20 % fund”? How has this collecting society organized the administration and distribution of the annual supplementary remuneration?

As stated in Art. 3.2.b of the Directive the annual remuneration is equal to the “20 % of the revenue which the phonogram producer has derived, during the year preceding that for which the said remuneration is paid, from the reproduction, distribution and making available of the phonogram in question”

Art. 110.bis.2 provides further rules:

- a) 20% of the revenue refers to “gross revenue” (before deducting costs)
- b) Art. 110.bis.2 states: *“Quedan excluidas del calculo de los ingresos a que se refiere el parrafo anterior las cantidades percibidas por el deudor en concepto de compensación equitativa por copia privada y alquiler de fonogramas”*. This is in line with Recital 13: such gross revenue shall not include the amount producers obtain from the the fair compensation received for private copying (Art. 5.2 D. 2001/29, art. 25.2 LPI) and the equitable remuneration for the rental of phonograms (art. 5 D. 2006/115, Art. 109.3.2 LPI). The provision does not refer to the single equitable remuneration for broadcasting and communication to the public (art. 8.2 D.

2006/115, Arts. 108.4 and 116.2 LPI). This is so because no reference was needed since no revenue from communication to the public (except for the making available, already mentioned in Art. 3.2.b D. 2011/77) is considered as such (*Gonzalez Gozalo, 2015*).

- c) In cases where there are several performers in one phonogram, the distribution would be proportional to the number of performers that participate in it.

The fact that the gross revenue should include the amount deriving from the “making available of the phonogram in question” is a problem in Spanish Law. Under EU Law, this inclusion makes sense because, performers do not have a right to obtain from a producer a remuneration for the making available of their performances. However, according to art. 108.3 LPI, performers do enjoy this right under Spanish Law. Scholars believe this latter right is not compatible with EU Law (*Gonzalez Gozalo, 2015*). In any case, it should not be included in the revenue to calculate the annual remuneration fund.

AIE. AIE, as the only CMO which represents music performers in Spain, collects annually from the phonogram producers the amounts which correspond to 20% of the remuneration obtained for the distribution (physical sales), making available (online sales) and reproduction (synchronisation) of phonograms published from 1963.

AIE distributes annually this supplementary remuneration during the last term of the year among performers.

In addition, a 5 years limitation period is established in the Article 154 section 3 and 4 TRLPI regarding amounts for identified and unidentified rightholders. After this period if applicable, the amount shall be allocated in accordance with Article 154 section 5 TRLPI.

g) How many performers represented by collecting societies have benefited so far from this right in each of the fiscal years following the deadline for transposition of the Directive (1 November 2013)?

According to AIE data, currently more than 1.000 artists will be paid from the record companies through AIE.

h) How much have collecting societies collected each year as a consequence of the 20%-fund provision?

AIE. The producers haven't provided all the information about the incomes, which should be applied to annual supplementary remuneration.

i) Following Recital 12 of the Term Extension Directive, has national law exempted micro-enterprises from the obligation to contribute? If so, under which circumstances?

No.

****j) General assessment of the 20% fund/other remarks***

No answer.

5. The “clean slate” provision (Art. 3.2e): how does it work in practice?

a) Can the clean slate rule be waived by contract?

The “clean slate” provision has been implemented in Art. 110.bis.3.

Nothing is mentioned in this regard. Having in mind the nature of the provision and the fact that the measure applies automatically (contrary to the “use-it-or-lose-it” provision, there is no need for the performer to request it), it shall be interpreted that it’s an unwaivable right.

Even if the measure is mandatory, there might be problems to establish which contractual measures are to be considered “advance payments” or “contractually defined deductions” and which not.

b) What are the mechanisms Member States have established to enforce this measure in national law?

Art. 110.bis.3 is a copy of art. 3.2.e D. 2011/77. No further legislative measure has been adopted to facilitate the enforcement.

c) Is there an obligation to inform performers of this measure?

No

d) Have phonogram producers (e. g. record companies) amended the model contracts they use with performers to reflect this mandatory clause?

No information was received in this regard

***e) General assessment of the “clean slate” provision/other remarks**

Again, there might be a problem to calculate the 50-year term: should “making available in the Internet” be considered as “lawfully published”?

AIE has no information on this matter at present.

6. Transitional provisions (Art. 10.5 and 6, art. 10a)***a) Have the transitional measures of arts. 10.5, 10.6 and 10a been adequately implemented into national law?**

Arts. 10.5 and 10.6 have been implemented in DT 21 SCA. However, attention needs to be paid also to DT 1, 13 and 19.

The new term of protection applies to phonograms and performances that are still protected in 1 November 2013. This means that it applies to phonograms recorded and performances fixed in phonograms later than 1 January 1963, or to phonograms or performances previously recorded or fixed, but lawfully published or communicated to the public later than 1 January 1963.

Due to the delay of implementation of the Directive by the Spanish government, there is an anomalous situation. Law 21/2014 entered into force in 1 January 2015: therefore, phonograms and performances whose protection expired 31 December 2013 were not protected during 2014, and following DT 21 SCA their protection was resumed in 2015, and will last until 31 December 2033. This creates a lot of uncertainty: on the one side, rightholders cannot claim payment of the acts of

exploitation of these performances and phonograms made during 2014; on the other side, users cannot keep using these performances and phonograms for free from 2015 onwards (Gonzalez Gozalo, 2015).

b) Does national legislation allow performers to modify their contracts on transfer or assignment after the 50-year period has expired (see Art. 10a.2)?

No, Spain has not implemented this optional measure. This might be detrimental in cases where Art. 110. bis.2 (art. 3.2 b-c) applies. After 50 years, a performer who has agreed very reduced royalties cannot terminate his contract. In contrast, a performer who has not agree a royalty payment will be able to ask for the 20% annual remuneration fund.

c) Have phonogram producers (e. g. record companies) amended the model contracts they use with performers to reflect this?

7. General assessment of the Directive

****a) Are performers aware of the benefits brought about by the Directive? Do they effectively reclaim them? How long on average does it take for performers to receive the benefits they are entitled to?***

No answer.

****b) What are roughly the estimated yearly benefits for (1) record producers and (2) performers, taking into consideration the musical repertoire affected by the term extension? In the case of record producers, is there any data on how these benefits have been used?***

No answer.

****c) Has the Directive had a negative impact on other stakeholders, such as users (e.g., higher prices in cultural goods, or lower production volume)?***

No answer.

d) How much money (estimate) would users of music repertoires have saved each fiscal year since 1 November 2013 if the Directive had not been adopted?

No answer.

e) Have the effects of the Directive been watered down due to contractual practices? Please describe such practices if applicable.

No answer.

****f) In your opinion, have the cultural and creative sectors benefited from the term extension (e.g., have marketing opportunities in third countries increased? Are there more revenue streams? Have producers been marketing back catalogue items, and if so how is that received by users)? Please give reasons.***

No answer.

****g) Have users of music repertoires become less competitive vis-à-vis companies in third countries due to the amount of royalties they will have to pay to performers and phonogram producers as a consequence of the term extension? In your opinion, can this be an obstacle for companies such as Spotify to flourish in Europe?***

No answer.

h) Other remarks

AIE. In our opinion, the Directive ensures that performers receiving non-recurring remuneration also benefit from the term extension. It means that featured and non-featured performers not benefiting from royalties on the exploitation of the recordings are granted an unwaivable right to obtain an annual supplementary remuneration from the record producer (following the 50th year of the term of protection).

Nevertheless, we are interested in knowing how does the collection of this right operate in practice in other countries, particularly with regard to mechanisms of verification of the data provided by the phonogram producers, and how such CMOs distribute the supplementary remuneration among performers subject to this right. This is because in most of the cases, it is not easy to verify whether the assessments actually contain all profits subject to the additional annual remuneration or not, due to the age of these data.

AISGE. Our opinion on this topic is limited to the unfair discrimination between performers, on the basis of the nature of the fixation in which they incorporate their performances. Please see our answer to question 2 above.

Stakeholders effectively contacted:

Type of stakeholder	Name of stakeholder	Contact
CMO	AIE	Alvaro Hernandez-Pinzon alvaro.hpinzon@aie.es
CMO	AISGE	Jose María Montes jmmontes@aisge.es

SWEDEN

National expert: Nedin Malovic⁹⁴ /

1. National implementation of the Directive

a) Through which legislation was the Directive implemented in national law? Please provide a short history of the implementation, highlighting any legal or practical difficulties in implementing the Directive (for example, strong opposition from any interest groups, or difficulties in implementing the clauses of the Directive given national legal constraints – for instance, from contract law - or established practices)

N. Malovic: Over time the relevant directives have implemented into Swedish law by amending the Copyright Act (SCA) ("SFS 1960:729"). The term of protection was first amended in 1996 in connection with the implementation of Directive 93/98/EEC (SFS 1995:1273). Directive 2011/77 was implemented by means of SFS 2013:691 (attached). SFS 2013:691 amended §§ 45-46 SCA, and changed the term of protection period for sound recordings from 50 to 70 years.

With regard to Directive 2011/77, at the implementation stage a number of practical issues was raised by interest groups.

The Swedish Television (the Swedish national public TV broadcaster), Sweden's Radio and Sweden's Education Radio (Sweden's public broadcasting organisations) submitted that the rules on sound recordings should be limited to commercial phonograms. They also submitted that the producer's right to compensation due to compulsory licences should remain in force even if an artist has exercised his right of withdrawal.

Other smaller agencies argued that smaller production companies should be excluded from the obligation to pay supplementary compensation.

Other agencies and companies, e.g. KLYS, Copyswede and SAMI, argued that the provisions on royalty determination for withdrawals in relation to sound recording older than 50 years should be mandatory.

The Swedish Law Society noted that it should be clarified whether the artists' right to receive supplementary compensation and terminate the transfer agreement is personal, or whether it can be instead enforced by the person who acquired the right. According to the Law Society, it was also necessary to clarify whether customary limitation rules apply to the performance of performers in relation to the organization.

SAMI: The Directive was implemented in the Swedish Copyright Act 1 November 2013. The implementation was preceded by Ministry Publications Series 2014:44 where interested parties were able to submit consultation comments and by government bill No. 2012/13:141.

The extension of the term of protection is the result of many and long discussions and a lot of influences from, among others, SAMI. Initially, it was primarily the record companies who wanted an extension, something which the performers came to support. For the performers, the rules of

⁹⁴ Trainee (Sandart & Partners, Stockholm); IPKat contributor (2018); LLM in Intellectual Property Law (Stockholm University, 2016); LLB (Southampton University, 2015).

supplementary remuneration became important for them not to end up without compensation. SAMI participated in the effort to coordinate the collection of signatures in the second half of the 2000s through which Swedish artists and musicians contributed to making the EU pay attention to the fairness of performers getting paid for their recordings during their lifetime. At the same time, the EU was made aware of the fact that the term of protection of European recordings is, in many cases, shorter than recordings from other key music markets such as the USA (95 years) and, moreover, significantly shorter than concerning the authors of musical compositions. Sweden was one of the countries that contributed with the most signatures in Europe. Of course, this is because Sweden has many active and committed artists and musicians. It should also be seen as a confirmation that Swedish music and Swedish artists and musicians have a strong position even internationally and constitute an important export industry to Sweden. SAMI is of the opinion that, with an international and vigorous repertoire, the extension, as well as increased harmonization of the countries' term of extension, are highly relevant. The Directive (2011/77/EU) on extension of the term of protection for performers and phonogram producers from 50 to 70 years was therefore very welcome when adopted in September 2011.

2. Term extension (Art. 1.7, 3.1 and 2).

a) Have the provisions concerning the term extension been adequately implemented into national law?

N. Malovic. Yes. Generally speaking the Swedish implementation is compliant with what Directive 2011/77 requires.

SAMI: Yes

b) Having in mind the “de minimis” character of the Directive, does national law provide for the application of the term extension when the performance is fixed in a media different from a phonogram?

SAMI: No – but this was recommended by SAMI in connection with the referral being circulated for consultation.

c) Is the term extension also applicable to performers and producers in the audio-visual sector?

N. Malovic: No: see § 46 SCA.

This is because audio recordings made for use in audiovisual productions are not covered by Directive 2011/77. The sound is usually taken in connection with the production of movies and television. In addition, the soundtrack in a audiovisual work is a sound recording when used separately. However, the extension of the term of protection of performers and producers only covers published or published sound recordings. This means that they should have been published or published as recordings of sound only.

SAMI: No – but this was recommended by SAMI in connection with the referral being circulated for consultation.

d) General assessment of the term extension/other remarks

N. Malovic: Concerns have been raised by various organisations and the government alike.

The extension of the term protection for sound recordings has meant that anyone who wishes to use a sound recording for a further 20-year period will be dependent on permission from the rights holder. Such conditions often require that compensation be paid for the utilization. Accordingly, an extension of the term of protection entails a cost increase for those who use sound recordings in their business activities and, ultimately, also for consumers.

The term extension has affected all audio recordings and musical works with lyrics for which protection has not expired. The number of recordings in question is difficult to estimate, not least since the extended term of protection also covers a very high proportion of foreign recordings used in Sweden. According to STIM, the Swedish CMO for music creators and publishers, the same difficulties also arise for jointly authored musical works where there is often no information about whether lyrics and music have been created specifically for the work. The amount of possible cost increases can also be governed by the individual agreements and the proportion of older works and acquisitions used in the case at issue. Thus, it is not possible to make a general assessment of the cost increases that may result from the extended term of protection.

SAMI argues that it is important that there are clauses that ensure the rights of the performers since they often take on a subordinate position towards the producers. Contractual safeguards are rarely enough, but rather it is necessary that there are clauses that protect the performers so that they receive their rightful compensation. In the present situation, there are problems in this area regarding so-called "on-demand services", where SAMI, together with performers all around Europe, is behind a campaign for an indispensable right of compensation, see <https://www.fair-internet.eu/>.

As far as the extension of the term of protection as such (50 to 70 years), it is fully implemented in SAMI's system so that the performers participating in these recordings receive compensation, as far as the recordings are used.

3. The "use it or lose it" clause (Art. 3.2a): how does it work in practice?

a) How shall the term "in sufficient quantity" be interpreted?

SAMI: Interpretation of "in sufficient quantity": Government bill No. 2012/13:14 page 67 states that the Government does not think it is reasonable for a producer to be required to issue a certain number of physical copies of a recording in situations where such publishing never has taken place before or been intended in connection with the transfer. The Government believes that the purpose of the clause is to ensure that the producer utilizes the rights acquired by him or her as agreed upon at the time of the transfer. According to SAMI's assessment, it is important that the producer does not attempt to circumvent the clause. Sweden is a frontrunner of digitization and today's sales of physical copies are negligible in comparison.

The assessment of whether the producer offers a fixation for sale in a sufficient number of copies must, according to Ministry Publications Series 2014:44, be based on the circumstances of the individual case. The decisive factor is whether the demand for the current acquisition is met in a reasonable manner by the published copies. This also means that sales must have a certain duration, i.e. that the producer will not only sell for a limited period of time. If the producer has undertaken to offer a certain number of copies, the producer may provide guidance in the assessment of what is considered to be a sufficient quantity. However, in the individual case, what is considered to be a

sufficient quantity of copies may be above, as well as below, what the producer has committed to in the agreement.

b) Does the offering of copies or the making available of the work need to be done by the producer himself or does the provision also apply when these acts are carried out by third parties?

SAMI: The Swedish legislature is talking about the producer and the legislative history does not indicate whether this may be a third party.

c) Are there any mechanisms in place to inform performers of this clause (having in mind that this right can only be exercised 50 years after the fixation or publication of the performance)?

SAMI does not know any "external" mechanisms that have informed performers about this, but have themselves to some extent informed in news letters to affiliates and members and also on our website.

d) What is the procedure in cases where a phonogram contains the fixation of the performances from a plurality of performers?

N. Malovic: Swedish law requires that, in case of a plurality of performances, the use it or lose it clause can be only exercised jointly by the various performers. If only part of the performing artists participating in a recording cancels the transfer agreement, the producer retains the rights of the other contributors. The fact that the performers can only jointly exercise their right of withdrawal may limit the number of cases in which the right of withdrawal can be effectively exercised. In addition, the right of cancellation does not subsist after the 50-year period.

SAMI: All of the performers must stand behind the termination of their contracts.

e) To your knowledge, have performers already made use of this clause vis-à-vis phonogram producers?

N. Malovic: Not that I know of.

SAMI: As far as SAMI is aware, this right has not been exercised

f) Have phonogram producers (e. g. record companies) amended the model contracts they use with performers to reflect this mandatory clause?

SAMI: Not that SAMI knows of.

g) General assessment of the "use it or lose it" clause/other remarks

SAMI: In general, it is too early to draw any major conclusions. It is of course also a difficulty that all of the performers must stand behind the termination of their contracts, even if in some way it is also natural.

4. The annual supplementary remuneration (the "20% fund"): how does it work in practice? (art. 3.2b – 2d)

a) What kind of measures have been adopted to ensure that performers are informed of this annual supplementary remuneration?

N. Malovic: § 45a SCA regulates the annual supplementary remuneration. The provision stipulates that supplementary compensation shall amount to 20% of the revenue obtained by phonographic producer as a result of the right to exploit the recording. The 20% fund is applicable to both the phonographic producer's income from his/her own exploitations of the work, and income from the rights that have been assigned to someone else.

The phonographic producer may not make any deductions for any costs incurred. Some of the revenue that the phonographic producer has made from the exploitation of the recording is exempt and not included in the calculation. This includes part of the income that the artist typically obtains from the producer by means of the latter's dealings with the recording and compensation for the producer pursuant to the provisions on private copying compensation (§ 26K SCA) and compulsory licenses for public performances and for certain communications to the public (§47 SCA).

The supplementary remuneration shall be paid to artists jointly if more than one artist has contributed to the performance. The supplementary remuneration will therefore be allocated between them and they will together be entitled to 20% of the producer's income. How the distribution is to be performed is not regulated by law. Swedish legislature left this to customary allocation principles in the industry.

SAMI is not familiar with any external information channel, but they have on its website and in the newsletter informed of this right.

b) Are phonogram producers obliged by national law to inform performers of this right?

SAMI: No

c) How has the Member State implemented in national law the obligation of phonogram producers to provide performers, upon request, "any information which may be necessary in order to secure payment of that remuneration"?

SAMI: "At the request of the organization, the producer shall provide the information required for the compensation to be calculated." According to SAMI, in addition to reporting gross revenues that the producer has had (including type and extent), the organization also needs information about the fixation as such (title, main artist, recording/release year, information about participating musician).

d) Have phonogram producers (e. g. record companies) amended the model contracts they use with performers to inform them of this right?

SAMI: Not that SAMI is aware, but SAMI, together with IFPI, have prepared an information letter on what is important to consider and what is intended for the producer (record companies).

e) Have collecting societies in the Member State adopted any measure to inform performers of this right?

SAMI: Yes, see 4 a).

f) Which collecting society is responsible for administering the “20 % fund”? How has this collecting society organized the administration and distribution of the annual supplementary remuneration?

N. Malovic: An organization responsible for administering the 20% fund must be authorized to enter into a contractual license agreement. Furthermore, the organization is required to represent a number of eligible artists in the field. This means that there will be primarily one or more Swedish organizations that are entitled to claim the compensation. In Sweden, one of the collecting societies responsible for administering the 20% fund is SAMI.

For the purpose of calculating the compensation due, phonographic producers may at the request of the relevant collecting society – as far as they deem necessary – provide information on the exploitation of the work in question.

At the time of enacting the Directive, SAMI and the the Swedish Theatre Association considered that phonographic producers should be also required to provide an authorized or approved auditor with the necessary accounting documents in order for the documentation to be checked.

Swedish Government interpreted Directive 2011/77 as entailing an obligation for the phonographic producer in question to also report such material as is necessary to make it possible to check the compensation. Thus, if an organization so requests, the phonographic producer may be required to issue documents that allow such control.

SAMI: According to Swedish law, "only an organization representing a number of eligible artists may require supplementary remuneration under section 45 a." According to the legislative history, it is not excluded that several organizations may claim the remuneration, but it emphasizes that the organization in the distribution of remuneration is required to treat third parties' performing artists in the same way as artists represented by the organization. In Sweden, the Swedish Musicians Association has declared themselves as being representative, but instructed SAMI to handle the collection itself, as well as distribution and payment to companies in other countries through our exchange agreements. However, SAMI experiences it as a problem that there is no designated organization to handle the collection. There is also ambiguities in the legislation regarding the representativeness requirement, whether it should only cover Swedish fixations or how this should be interpreted? SAMI has prepared information letters etc. to record companies, reporting forms, etc. The system is prepared for us to receive and pay remuneration, but so far, collection and payment have not been fully implemented.

g) How many performers represented by collecting societies have benefited so far from this right in each of the fiscal years following the deadline for transposition of the Directive (1 November 2013)?

SAMI: Too soon to tell.

h) How much have collecting societies collected each year as a consequence of the 20%-fund provision?

SAMI: SAMI does not have a figure supporting this, but there is reason to assume that the first few years will concern small amounts. It is too early to make an economic evaluation of this. The

colleagues (collecting societies in other countries) who have a collection going at this time have received very little money.

i) Following Recital 12 of the Term Extension Directive, has national law exempted micro-enterprises from the obligation to contribute? If so, under which circumstances?

SAMI: No – which SAMI thinks is good and has pointed out in their consultation response.

j) General assessment of the 20% fund/other remarks

SAMI: In general, it is currently too early to evaluate this compensation. One of the reasons that it has been difficult with the practical management is that it is not entirely clear which exploits are covered. The government bill states that a condition for supplementary remuneration is that the transfer is to be assessed under Swedish law which, in normal circumstances, would mean that remuneration should not be paid when a foreign fixation is used in Sweden. There is also difficulty in identifying who is responsible for obtaining information about who has participated in the fixations entitled to remuneration. SAMI thinks it would be natural for the producers to provide SAMI with that information. SAMI thinks the following needs to be clarified:

- Who is seen as a producer / is liable for payment in case of transfer / license etc? The laws concept of what a producer is gives little guidance as it is often someone else apart from the original producer who exploits and earns on the exploitation.

- Which producers are covered by the remuneration right - according to the legislative history it are those whose contracts are governed by Swedish law, typically fixations made in Sweden - how does the collection work when the exploitation takes place in the EEA (which organization should collect?) and in terms of non-EU use? As for foreign fixations used in Sweden, can collection only happen if there is a representation agreement that gives SAMI the right to collect on the other country's behalf? In fact, is it exploitation on Swedish territory which should be guiding?

- There have been many, long and complicated discussions about this within the framework of our international networks - who will do what to whom?.

5. The “clean slate” provision (Art. 3.2e): how does it work in practice?

a) Can the clean slate rule be waived by contract?

SAMI: The rule is not mandatory, but in Swedish law there is the addition: "Offsetting may be made if the artist explicitly approved it".

b) What are the mechanisms Member States have established to enforce this measure in national law?

SAMI: Do not know

c) Is there an obligation to inform performers of this measure?

N. Malovic: Not that I am aware of.

SAMI: Not that SAMI is aware of.

d) Have phonogram producers (e. g. record companies) amended the model contracts they use with performers to reflect this mandatory clause?

N. Malovic: No – see answer below.

SAMI: Do not know.

e) General assessment of the “clean slate” provision/other remarks

N. Malovic: The Swedish Government stated in its preparatory works to the Directive (see attached, pg. 66) that:

"The Directive leaves the Member States the power to decide that royalty agreements entered into before 1 November 2013 may be renegotiated in favor of performers after the expiry of 50 years (Article 1.4). The purpose is to counter contractual terms that seem unfair to the performer. In the Swedish context, it can be noted that there is an opportunity to correct such conditions. The provisions of the Act (1915: 218) on agreements and other legal acts in the field of property law (the contract) are also applicable to this type of agreement. These include that contractual terms may be adjusted or left unrelated if the condition is unfair in view of the content of the agreement, the circumstances at the time of the agreement, the circumstances that have arisen and the circumstances in general.

However, the parties are free to agree to change the terms of the contract without being governed by law. It is therefore difficult to see that such a system would in practice be of significance. There is also no reason for a mandatory right to renegotiation. Instead, the same conditions should apply to the assessment of remuneration levels and other terms in older transfer agreements as in the copyright area in general. Against this background, the Government agrees with the assessment made in the memorandum that there is no justification for introducing a statutory possibility of renegotiation of such agreements."

It would appear that the government abandoned its position in this regard, most likely because the Swedish Council on Legislation (Lagrådet) was of another view. This resulted in the adoption of provision 45 C. However, I would like to emphasise my reply below to this question which is still of relevance to the clean slate provision, namely that the relevant provisions in the Swedish Contracts Law Act are of a disposable nature. This means that the parties can, whenever they wish, contract out of the provisions in the Act. In addition, despite Art 45 C being adopted - the Contracts Law Act (§ 36) sets out that - contractual terms may be adjusted if the condition is unfair in view of the content of the agreement, the circumstances of it, and circumstances in general.

Taking the latter into account, because the provisions of the Directive on the calculation of royalties for recordings over the age of 50 are also seen as an advantage for the performers (in addition to the extension of the term of protection), 45 C in the Contracts Law Act can in my view, be circumvented by § 36 in most situations (as noted by the government in the property works, see above).

SAMI: As far as we are concerned, advances were not to a large extent common at that time (50 years ago). To the extent that it occurred, the amounts were probably very small. Since the 90's, it has become much more common and the amounts a lot higher.

6. Transitional provisions (Art. 10.5 and 6, art. 10a)

****a) Have the transitional measures of arts. 10.5, 10.6 and 10a been adequately implemented into national law?***

SAMI: Yes

b) Does national legislation allow performers to modify their contracts on transfer or assignment after the 50-year period has expired (see Art. 10a.2)?

SAMI: No, no statutory possibility of renegotiation has been introduced; instead the legislator refers to that a renegotiation based on voluntary action by both parties can be made.

c) Have phonogram producers (e. g. record companies) amended the model contracts they use with performers to reflect this?

SAMI: SAMI does not have a direct picture of this.

7. General assessment of the Directive

a) Are performers aware of the benefits brought about by the Directive? Do they effectively reclaim them? How long on average does it take for performers to receive the benefits they are entitled to?

SAMI: Knowledge is likely to be very limited. Possibly it is known that the term of protection as such is prolonged, but otherwise the knowledge is probably low. It will probably take time before the remuneration reaches high sums.

b) What are roughly the estimated yearly benefits for (1) record producers and (2) performers, taking into consideration the musical repertoire affected by the term extension? In the case of record producers, is there any data on how these benefits have been used?

SAMI: At the moment, it is impossible to answer.

c) Has the Directive had a negative impact on other stakeholders, such as users (e.g., higher prices in cultural goods, or lower production volume)?

SAMI: Not that SAMI is aware of. SAMI has not made changes in the pricing.

d) How much money (estimate) would users of music repertoires have saved each fiscal year since 1 November 2013 if the Directive had not been adopted?

SAMI: SAMI does not have a direct picture of this

e) Have the effects of the Directive been watered down due to contractual practices? Please describe such practices if applicable.

N. Malovic: No – but an exception would be the application of The Contracts Law Act (§36) in relation to the 'clean slate' provision and the possibility of waiver.

SAMI: SAMI does not have a direct picture of this

f) In your opinion, have the cultural and creative sectors benefited from the term extension (e.g., have marketing opportunities in third countries increased? Are there more revenue streams? Have producers been marketing back catalogue items, and if so how is that received by users)? Please give reasons.

N. Malovic: Not entirely related to term – but nonetheless interesting – is that Sweden has seen a 6.2% growth in recorded-music revenues in 2016 – with streaming services accounting for 82.3% – suggesting that the music market is still expanding at good rate.

SAMI: SAMI does not know - although in the long run, we believe that the cultural sector can profit from this. On behalf of the Swedes, it is conceivable that the term of protection will eventually benefit several actors in the cultural sector. For example, ABBA's repertoire is still very popular and new areas of exploitation are popping up.

g) Have users of music repertoires become less competitive vis-à-vis companies in third countries due to the amount of royalties they will have to pay to performers and phonogram producers as a consequence of the term extension? In your opinion, can this be an obstacle for off-line / on-line music business models to flourish in Europe?

N. Malovic: This is a complex economic assessment that I am not in a position to make. You can however find this discussion helpful: <http://www.ifpi.org/content/library/legc-study.pdf>.

SAMI: SAMI does not think so. In that case it probably does not have to do with term of protection-clauses. Perhaps rather the competition with Google, Facebook etc. The Safe harbor rules benefit these actors.

h) Other remarks

SAMI: For SAMI's part, the extension of the term of protection has of course influenced their daily work, insofar as a recording is eligible under section 47 of the Swedish Copyright Act for a longer period of time. This is fully implemented in SAMI's operations. They also mean that it is important and appropriate to, through legislation, protect the rights of performers who often find it difficult to claim this because they are inferior to the record companies. SAMI therefore recommends that even the performers on the audiovisual side should be covered.

Stakeholders effectively contacted:

Type of stakeholder	Name of stakeholder	Contact
CMO	SAMI, Swedish Artists' and Musicians' Interest Organization	Ulrika.wendt@sami.se

UNITED KINGDOM

National expert: David Stopps⁹⁵

1. National implementation of the Directive

a) Through which legislation was the Directive implemented in national law? Please provide a short history of the implementation, highlighting any legal or practical difficulties in implementing the Directive (for example, strong opposition from any interest groups, or difficulties in implementing the clauses of the Directive given national legal constraints – for instance, from contract law - or established practices)

The UK IPO (United Kingdom Intellectual Property Office) experienced strong lobbying from phonogram producer trade bodies BPI and AIM as well as from the Musicians Union, FAC (Featured Artist Coalition) and the MMF (Music Managers Forum) and other organisations who had performer interests. The industry suggested that instead of the 20% Supplementary Remuneration there should be a simpler arrangement where performers who were not receiving recurring payments should receive a percentage of the phonogram producer's equitable remuneration PPL (UK CMO for music performers and producers) income identified with the recording in question. This was rejected by UK IPO as they did not feel the Directive gave them the flexibility to do that. The performers organisations also lobbied hard for the Directive's renegotiation provision to be included in the UK legislation but in the end this was omitted.

The legislation was The Copyright and Duration of Rights in Performances Regulations 2013 amends the Copyright, Designs and Patents Act 1988. The Copyright and Duration of Rights in Performances Regulations 2013 came in to force on 1st November 2013. You can see the text here:

http://www.legislation.gov.uk/uksi/2013/1782/pdfs/ukxi_20131782_en.pdf

2. Term extension (Art. 1.7, 3.1 and 2).

****a) Have the provisions concerning the term extension been adequately implemented into national law?***

In a legal sense the answer is probably 'Yes' but performers would argue that because the renegotiation right was omitted and there is so little guidance on clarity it has not been. It would have been helpful if the regulations had given more guidance on how each provision should be applied. For example, the UK regulations implementing Term Extension are silent as to whether it is possible for a performer and a phonogram producer to agree contractually to override the Clean Slate provisions. There is confusion about the definition of 'deductions' in the context of Clean Slate.

b) Having in mind the “de minimis” character of the Directive, does national law provide for the application of the term extension when the performance is fixed in a media different from a phonogram?

⁹⁵ International Music Business Consultant and Music Business Educator; Author of 'How to Make a Living from Music' published by WIPO; Director of PPL; Managing Director of FML International Artist Management; Promoter of Friars Aylesbury; Director of Copyright and Related Rights for the Music Managers Forum UK; Senior Advisor on Copyright and Related Rights for the Featured Artist Coalition.

The legislation refers only to ‘sound recordings’ and does not specify or differentiate between different media applications.

c) Is the term extension also applicable to performers and producers in the audio-visual sector?

Where sound recording rights exist, the extension exists no matter what media. PPL have issued a list of applicable income streams that should be included in the Supplementary Remuneration as follows:

Right	Examples
Reproduction	<ul style="list-style-type: none"> • Copying of sound recordings for sale of physical copies • Copying of sound recordings for hire of physical copies • Copying of sound recordings for other distributions (such as cover-mounts) • Copying of sound recordings for inclusion in samples • Licensing of television and film companies to include sound recordings in their pre-recorded television programmes and films • Licensing by PPL of copying for subsequent public performance and/or broadcast
Issue to the public	<ul style="list-style-type: none"> • Sale of physical copies (whether in retail stores or via online retailers) • Sales of DVDs/CDs of television/radio programmes containing sound recordings • Supply of cover-mounts
Making available	<ul style="list-style-type: none"> • Provision of digital downloads via online retail services • On demand streaming services where a track or collection of tracks can be accessed by the user, such that the “making available” right is being exercised • Customised streaming services where the level of interaction means that the service involves the exercise of the “making available” right (either in place of or in addition to the exercise of the standard broadcast right that applies for straightforward non-interactive webcasts) • Temporary downloads of television and radio programmes • “Download to own” services

***d) General assessment of the term extension/other remarks**

According to the 2017 IFPI Global Report the UK was the third largest music market in the world and the largest music market in Europe in 2016. The UK was ranked worldwide as No. 2 in digital sales, No.3 in performance rights (PPL), No. 3 in synchronisation of recordings and No. 4 in physical sales. The only two music markets for recorded music larger than the UK were USA and Japan.

In general, the extension of copyright in sound recordings from 50 years to 70 years has been valuable to the creative industries in the UK and welcomed by both phonogram producers and performers. The extension has meant a further 20 years of exploitation for phonogram producers for recordings first published in 1963 and later years. For performers, however, the Directive and the way it has been transposed into UK Law has been less beneficial

Whilst the duration of copyright protection from 50 years to 70 years has been very beneficial for phonogram producers, it has not been so beneficial for performers. Some artist managers consulted for this report would have preferred the term to have remained at 50 years as they could then have released their artist’s recordings in the public domain. Because it would have been the artist themselves releasing their own recordings (with their own authentic photographs and sleeve notes) the recordings would be regarded as ‘authentic’ by the public thus giving them the edge over any other public domain releases of the same recordings.

3. The “use it or lose it” clause (Art. 3.2a): how does it work in practice?

***a) How shall the term “in sufficient quantity” be interpreted?**

The term 'in sufficient quantities' is defined as 'such quantity as to satisfy the reasonable requirements of the public for copies of the sound recording'.

b) Does the offering of copies or the making available of the work need to be done by the producer himself or does the provision also apply when these acts are carried out by third parties?

The offering of copies and the making available of a recording needs to be actioned by the copyright owner, or if there is an exclusive licensee, by that exclusive licensee.

c) Are there any mechanisms in place to inform performers of this clause (having in mind that this right can only be exercised 50 years after the fixation or publication of the performance)?

There is a very clear explanation of the rights granted to performers on the PPL website.

PPL have very clear 'Frequently Asked Questions' for both Performers and for Recording Rightsholders here:

<http://www.ppluk.com/Documents/Member%20Services/PPL%20Copyright%20Term%20Extension%20FAQs%20-RRH%20-%20v1%20July%202014.pdf>

<http://www.ppluk.com/Documents/Member%20Services/PPL%20Copyright%20Term%20Extension%20FAQs%20-%20Performers%202014.pdf>

PPL has also highlighted the performer rights granted in the Extension Period in their Annual Review and their Annual Performer Review.

Almost all UK performers are PPL performer members so PPL would be the first place they would go for this information. More could be done by the phonogram producer trade bodies BPI and AIM as well as the Music Managers Forum, the FAC and the Musicians Union to inform their members of the Term Extension regulations and I will suggest this to them.

d) What is the procedure in cases where a phonogram contains the fixation of the performances from a plurality of performers?

This is complicated and almost certainly unworkable.

The UK Government had this to say in their consultation on implementing term extension⁹⁶:

39. A sound recording may have several performers, some of whom may each enter into individual contracts with the producer assigning various rights in the fixation of their performance and others who may enter into a joint contract to do so. Once any individual performer has exercised his right to cancel his contract it would still be necessary for him to reach agreement with the other performers on the sound recording before he can exploit the sound recording.

40. In order to exploit the recording a performer ("P") would require to "clear" the rights of any other performers ("OPs") who appear on the sound recording whose rights will also have been assigned to the producer of the sound recording. Such rights would need to revert to their respective owners before they could be re-assigned to P in order to be exploited by P. The Directive does not prescribe a mechanism for how the rights of other performers might be "unpicked" in

⁹⁶ Available at <https://www.legislation.gov.uk/uksi/2013/1782/impacts>

order to arrive at a situation where a performer might exploit the recording. Paragraph 2a of the Directive provides that where a sound recording contains the fixation of the performances of a plurality of performers, they may terminate their contracts on transfer or assignment “in accordance with applicable national law”. This suggests that such matters would be determined by the law of contract in each member state rather than our prescribing new measures.

41. We consider that the way that this will operate if there are multiple performers on a sound recording is as follows. If P terminates his contract with the producer, the producer would no longer be legally entitled to exploit the recording. Depending on the terms of their contracts with the producer this may constitute an event entitling the OPs to terminate their contracts with the producer. Alternatively, such OPs may exercise their statutory right to terminate under the new provisions. Even if the OPs are legally entitled to cancel their contracts in such circumstances, there are then various steps which have to be taken before P can exploit the recording, namely that the OPs have to terminate their contracts and then have to agree to assign their rights to P (or agree jointly with P to exploit the sound recording). It appears therefore in practice, that where there are multiple performers P will need to act jointly with the OPs in exercising the right to terminate the contract under the use it or lose it provision (in which case each of the performers on any sound recording would issue notices to terminate their individual contracts under the Regulations).

e) To your knowledge, have performers already made use of this clause vis-à-vis phonogram producers?

I have not been able to discover any examples of performers exercising this clause in the time I have been working on this report. The UK’s two largest phonogram producers, Universal and Sony, tell me that they have not been approached by any performer concerning Use It or Lose It.

f) Have phonogram producers (e. g. record companies) amended the model contracts they use with performers to reflect this mandatory clause?

The phonogram producers that have been consulted for this report have not altered their model contracts to reflect the Term Extension provisions.

***g) General assessment of the “use it or lose it” clause/other remarks**

The way this provision drafted in the Directive was unfortunate. The term ‘sufficient quantities’ is subjective and should have been quantified. It is also difficult to understand why the Directive stipulates that if any performer exercises their ‘Use It or Lose It’ right the copyright in the recording expires. If the copyright in the recording expires performers can no longer enjoy equitable remuneration in the Extension Period which in itself is a disincentive for performers to exercise the right in the first place. Compare this approach with that in the US where authors and performers can exercise a reversion right after 35 years from first publication (17 U.S.C.A.#203(s) 2009). If this right is exercised the performers on a recording can affect a transfer of the copyright in the recording from the phonogram producer to themselves.

If the ‘Use it or Lose It’ right is exercised, the performers’ rights will still continue through the extension period so in theory the performers on the recording will still have control of the recording and can legally stop a third party releasing it without their permission. However, most recordings

have a plurality of performers, so all the performers (or their estates) would have to collectively agree on any such permissions, which may prove impossible.

The drafting in the Directive and in the UK's subsequent Copyright and Duration of Rights in Performances Regulations 2013 implies that any one performer on a recording can invoke the Use It or Lose It right. If the phonogram producer does not make sufficient quantities of the recording available to the public in physical form and/or fails to make the recording available on digital platforms in the 12-month period following receipt of the performer's notice, the copyright in the recording will automatically expire and the original contract between the phonogram producer and the performer will terminate. The other performers on the recording may not want the copyright in the recording to expire, as it means, for example, that they will not then enjoy equitable remuneration through the Extension Period. In this way the Use It or Lose It provision could actually harm the interests of performers.

The two biggest phonogram producers in the UK, Universal and Sony, consider that they have not been approached by any performer in regard to the right of Use It or Lose It in the four years it has existed, which is not surprising. I think it unlikely that this right will ever be exercised in the UK, although it may be useful as a threat to encourage a phonogram producer to include the recording on digital services and to manufacture perhaps 100 CDs if the recording in question is not currently included on those services, and not available physically.

4. The annual supplementary remuneration (the "20% fund"): how does it work in practice? (art. 3.2b – 2d)

a) What kind of measures have been adopted to ensure that performers are informed of this annual supplementary remuneration?

The PPL website has clear information and 'Frequently Asked Questions'. See links above in 3(c).

b) Are phonogram producers obliged by national law to inform performers of this right?

No. I am not aware of any national law that obliges phonogram producers to inform performers of this right.

c) How has the Member State implemented in national law the obligation of phonogram producers to provide performers, upon request, "any information which may be necessary in order to secure payment of that remuneration"?

Yes. The UK government has provided statutory rights for performers as follows:

If a record company fails to pay on time and/or in full PPL has a specific statutory right to claim the money as a debt.

Any performer who is entitled to supplementary remuneration also has a statutory right to request information from the copyright owner (or, if there is one, the exclusive licensee) to enable the performer to ascertain the amount of the payment to which they are entitled and/or to secure its distribution. This only covers information which is in the possession, or under the control, of the recipient of the request. The request must be made by the performer in writing to the copyright owner (or exclusive licensee). If the relevant information is not provided within 90 days, the performer

has a specific right to apply for a court order requiring the copyright owner/exclusive licensee to provide the information.

Any performer who is entitled to supplementary remuneration also has a statutory right, in the event of a dispute regarding the amount which should be remitted to PPL, to apply to the Copyright Tribunal to determine the correct amount which should be remitted by the record company to PPL.

d) Have phonogram producers (e. g. record companies) amended the model contracts they use with performers to inform them of this right?

The phonogram producers I have consulted tell me that they have not altered their model contracts to reflect the Term Extension provisions.

e) Have collecting societies in the Member State adopted any measure to inform performers of this right?

Yes. PPL have very clear information together with Frequently Asked Questions. See 3(c) above.

f) Which collecting society is responsible for administering the “20 % fund”? How has this collecting society organized the administration and distribution of the annual supplementary remuneration?

PPL are the collective management organisation responsible for administering the 20% fund in the UK.

PPL held a series of in depth meetings with interested parties including phonogram producers and performer representatives throughout the UK IPO's consultation period and following the final wording of the Statutory Instrument that brought the Term Extension provisions in to UK law. I attended all of those meetings. PPL have the most advanced related rights CMO data and IT systems in the world and immediately applied their expertise and management to providing the most accurate and efficient administration possible for the Supplementary Remuneration due to performers who are not receiving recurring payments on recordings. PPL were the first CMO in Europe to make a distribution on Supplementary Remuneration. (December 2015).

PPL have done a lot of work establishing what revenue is payable and to which performers.

Equitable remuneration is only payable to qualifying performers. e.g. because the US took a reservation on Article 15 of the WPPT, many US performers are non-qualifying so are not eligible for the performer share of equitable remuneration when their recordings are broadcast or performed in public in the UK. PPL have taken advice on this issue in the context of Supplementary Remuneration and have been advised that this criteria does not apply in that context. They are therefore paying through Supplementary Remuneration to a much broader range of non-featured performers including US performers where they are able to contact them. The precise criteria is as follows:

Relevant performers

To be entitled to supplementary remuneration for a recording that is in its extended term, a performer must have assigned certain rights in their performance on that recording to the record company. The relevant rights are the performer's right to consent to (a) the copying of a recording of

their performance, (b) the issue of copies of those recordings to the public (or the rental/lending of those copies), and (c) the electronic “making available” of those recordings to the public. If the performer assigned these rights to the record company for a recording that is now in its extended term, and the performer is not already entitled to a recurring payment from the record company in return, then the performer is potentially entitled to receive supplementary remuneration for that recording. (In this context, “recurring payments” do not include the equitable remuneration payments made to performers by PPL.)

Relevant revenue

A record company’s obligation to pay supplementary remuneration only relates to recordings from which they have earned UK revenue by exploiting (a) the right to copy that recording, (b) the right to issue copies of that recording to the public or (c) the “making available” right. This also only relates to the relevant year – for example, the payments made by record companies in 2017 are only in respect of their relevant revenues in 2016.

The obligation also only applies to recordings that are actually in their extended term. It does not apply to other versions of the recording, if those other recordings were published later and are not yet in their extended term. This could cover later re-recordings of the same songs. It could also in theory include recordings which have been remastered in such a way as to create a new recording with a new copyright term. However, PPL has not seen any evidence to suggest that record companies are remastering recordings in this way deliberately in order to avoid making supplementary remuneration payments.

g) How many performers represented by collecting societies have benefited so far from this right in each of the fiscal years following the deadline for transposition of the Directive (1 November 2013)?

In the first year of operation of the fund in 2015, receiving supplementary remuneration from phonogram producers for exploitations in 2014 of 1963 recordings, PPL received £78,924, relating to 4,800 recordings. They distributed monies in December 2015, with over 1,200 performers receiving allocations.

In the second year (2016, receiving supplementary remuneration for exploitations in 2015 of 1963 and 1964 recordings), PPL received £241,857, relating to 11,600 recordings. They distributed monies in December 2016, with over 2,000 performers receiving allocations.

Later in 2017, PPL will publish a final total for the 2017 year’s fund (covering exploitations in 2016 of 1963, 1964 and 1965 recordings), which is expected to show a further significant increase in fund value year-on-year. This will be distributed in December 2017.

h) How much have collecting societies collected each year as a consequence of the 20%-fund provision?

See (g) above.

i) Following Recital 12 of the Term Extension Directive, has national law exempted micro-enterprises from the obligation to contribute? If so, under which circumstances?

No.

****j) General assessment of the 20% fund/other remarks***

Of the four accompanying measures, this is generally functioning well with payments being made to PPL by phonogram producers increasing exponentially each year. PPL have done an exemplary job in insuring that non-featured performers are paid as accurately and promptly as possible. PPL (Public Performance Ltd) is the UK's sole CMO for related rights and represents both phonogram producers and performers.

However, if a phonogram producer creates a remaster of an original recording, the remaster is considered to create a new copyright from the date of release of the remastered recording. If the phonogram producer then deletes the original recording (i.e. makes the original recording no longer available to users and to the public) they will not be obliged to pay Supplementary Remuneration until 50 years after the remaster has been released. Whilst remastering has been taking place for a long time and often dramatically improves the sound of old recordings, the process also gives phonogram producers a legal avenue where the paying of Supplementary Remuneration is avoided. Phonogram producers contacted for the purpose of this report stated that his company had remastered their entire catalogue of old recordings and were therefore, quite legally, paying no Supplementary Remuneration.

The creation of a new copyright due to remastering benefits both featured and non-featured performers as they both effectively get a new 70-year period of equitable remuneration from PPL. Featured performers (or their estates) also receive royalties through that new 70-year period although the royalty rate is likely to be low if they have not been able to renegotiate a 50-70 year old contract.

It's been impossible to ascertain as to whether phonogram producers are taking the Supplementary Remuneration 'off the top' and then paying featured artists royalties on effectively 80% of income or whether the 20% comes out of the phonogram producer's share and thus would not affect the featured performer's royalty.

It is worth mentioning that during the legislative procedure, the UK music industry asked the UK Government to introduce a percentage of the phonogram producer's 50% equitable remuneration instead of the 20% Supplementary Remuneration. This would have been much cleaner, simpler and less administratively burdensome for both phonogram producers and PPL. Performer organisations such as the UK Musicians Union, The MMF (Music Managers Forum) and the FAC (Featured Artists Coalition) were also in favour of it. The UK Government felt that whilst they could see that this arrangement would be preferable, they did not feel that they had the flexibility within the Directive to include it in the regulations.

5. The "clean slate" provision (Art. 3.2e): how does it work in practice?

a) Can the clean slate rule be waived by contract?

The UK legislation is silent on this issue which is unhelpful.

b) What are the mechanisms Member States have established to enforce this measure in national law?

The wording in the UK legislation simply says the following:

(9) Where a performer is entitled under an assignment agreement to recurring payments in consideration of the assignment, the payments must, from the end of the 50-year period, be made in full, regardless of any provision in the agreement which entitles the producer to withhold or deduct sums from the amounts payable.

There are no mechanisms given as to how this measure is to be exercised and enforced which leaves phonogram producers in a state of confusion concerning their precise obligations.

c) Is there an obligation to inform performers of this measure?

No.

d) Have phonogram producers (e. g. record companies) amended the model contracts they use with performers to reflect this mandatory clause?

The phonogram producers consulted for the purpose of this report state that they have not altered their model contracts to reflect the Term Extension provisions.

****e) General assessment of the “clean slate” provision/other remarks***

This right is potentially useful to featured performers but phonogram producers in the UK tell me that they have had very few enquiries about it from performers. Universal tell me that they have been undergoing a full review process of artists that may have been impacted by the clean slate provision and will apply the provision where applicable.

It is not unusual that a featured artist will be un-recouped for £100,000 or more. If the entire artist's catalogue falls in the Extension Period then un-recouped balances would be fairly straight forward to write off.

The problem is that individual recordings will come into the Extension Period two at a time, if they were originally released as a single, or around ten at a time if the recordings were released as an album. In this scenario (which is the usual scenario)

it would be very difficult for the phonogram producer to find 50-year old accounting and write off the appropriate amount for that individual recording or album. (The national UK tax authority HMRC stipulate that commercial enterprises are obliged to keep accounting records for seven years, after which most businesses have them destroyed). It might be possible to pro-rate the write off. If the artist/band had recorded 200 tracks for the phonogram producer then the total un-recouped balance could be reduced by one two-hundredth of the total each time a track came in to the Extension Period, although that would not be accurate.

For featured contracted performers, the appropriate artist royalty that each track generates after it comes in to the Extension Period, should then be payable to the featured performer(s) on the recording 'regardless of any provision in the agreement which entitles the producer to withhold or deduct sums from the amounts payable'. It is therefore incumbent on the phonogram producer to identify recordings as they come in to the Extension Period and pay out royalties with no deductions to the contracted performers on income generated by those recordings in the Extension period. I have not been able to ascertain as to whether that is happening or whether such due payments are deducted from un-recouped balances still existing on recordings that have not entered the Extension Period. This needs clarification.

There is also confusion about the definition of 'deductions'. In the UK IPO Guidelines⁹⁷ they refer to 'advances' but the regulation as stated would appear to refer to all deductions.

Another problem is that phonogram producers that have purchased old catalogues of recordings often 'buy' the artist's un-recouped balances with the recordings, thus knowing that they will not

⁹⁷ Available at <https://www.gov.uk/government/publications/copyright-in-sound-recordings/copyright-in-sound-recordings>

have to pay royalties to the artist until such un-recouped balances have been recouped. If the clean slate occurs such phonogram producers would be out of pocket.

More could be done to make featured performers aware that this right exists. More could also be done to explain to phonogram producers their statutory obligations and how they should be applied.

6. Transitional provisions (Art. 10.5 and 6, art. 10a)

****a) Have the transitional measures of arts. 10.5, 10.6 and 10a been adequately implemented into national law?***

Yes. They have been adequately implemented in to UK law.

b) Does national legislation allow performers to modify their contracts on transfer or assignment after the 50-year period has expired (see Art. 10a.2)?

No. This was omitted from the UK legislation.

Subsection 16 of the preamble of the Directive gives member states the option to provide a mechanism for performers receiving royalties from a phonogram producer to be able to renegotiate certain terms in their contracts when recordings reach 50 years. This is the one provision that would really help featured performers whose 50-year old royalty rates are often far lower than is normal in the modern era.

It is very unfortunate for UK featured performers that the UK government decided not to include this provision in The Copyright and Duration of Rights in Performances Regulations 2013.

c) Have phonogram producers (e. g. record companies) amended the model contracts they use with performers to reflect this?

The phonogram producers consulted for the purpose of this report state that they have not altered their model contracts to reflect the Term Extension provisions.

7. General assessment of the Directive

****a) Are performers aware of the benefits brought about by the Directive?***

A lot more could be done to inform performers (and their estates if deceased) of the new rights brought about by the Directive. PPL have done an exemplary job in this regard but the phonogram producer trade bodies and performer representative organisations could do more.

Do they effectively reclaim them?

Performers do not seem to be exercising the Use It or Lose It and Clean Slate provisions in the UK. See Executive Summary.

How long on average does it take for performers to receive the benefits they are entitled to?

I can find no examples of the Use It or Lose It and Clean Slate provisions being exercised by performers. There is a statutory obligation on phonogram producers to operate the Clean Slate provisions anyway. I have not been able to ascertain if this is working effectively in the time given to prepare this report.

The Supplementary Remuneration arrangements are working well. (See 4(g) above) and PPL are distributing income to entitled performers within the time frame stipulated in the UK legislation. The

chart below shows the deadlines for phonogram producers to pay PPL. PPL then pay out to the relevant performers in the December following the June deadline of each year.

Year of revenue	Year of record release	Deadline for payment to PPL
2014	1963	30 June 2015
2015	1963, 1964	30 June 2016
2016	1963, 1964, 1965	30 June 2017

****b) What are roughly the estimated yearly benefits for (1) record producers and (2) performers, taking into consideration the musical repertoire affected by the term extension? In the case of record producers, is there any data on how these benefits have been used?***

In the time available to me to research and write this report, I have not been able to obtain such data.

See Executive Summary.

****c) Has the Directive had a negative impact on other stakeholders, such as users (e.g., higher prices in cultural goods, or lower production volume)?***

it was not possible to obtain any such information in the timeframe of the research.

Film and television companies may find that they are paying for Master Re-use (Synchronisation) licences that they would not have had to license had the recordings in question been in the public domain.

d) How much money (estimate) would users of music repertoires have saved each fiscal year since 1 November 2013 if the Directive had not been adopted?

I have asked Spotify this question but have not received any information from them to date.

e) Have the effects of the Directive been watered down due to contractual practices? Please describe such practices if applicable.

I have not seen any evidence of this in the time I have had to research and write this report.

****f) In your opinion, have the cultural and creative sectors benefited from the term extension (e.g., have marketing opportunities in third countries increased? Are there more revenue streams? Have producers been marketing back catalogue items, and if so how is that received by users)? Please give reasons.***

The cultural and creative sectors have most certainly benefited from term extension, particularly phonogram producers. Non-featured performers are benefiting from the Supplementary Remuneration provision and from 20 years of additional equitable remuneration from PPL provided no other performer exercises the Use It or Lose It right on the recordings on which they have performed. Featured performers (those receiving recurring payments) have benefited less due to the way the Use It or Lose It provision was drafted, the complications and lack of clarity of the Clean Slate provision and the fact that in the UK the contract renegotiation provision was omitted. Their main benefit will be equitable remuneration in the extension period provided none of their fellow performers exercise the Use It or Lose It provision on the recordings on which they performed. Also,

they will receive royalties during the Extension Period but these may be low due to the age of the contract in which they were set.

It was not possible to obtain quantifiable information on increased marketing spend on back catalogue by phonogram producers but it should be logical that this has happened. It should also be expected that opportunities in other countries have increased via exclusive licences with licensees in those countries as well as synchronisation.

I cannot see more (new) revenue streams, but those that do exist will increase with each year that falls in to the Extension Period. I have not been able to find out if online music platforms identify public domain recordings although I suspect they do.

g) Have users of music repertoires become less competitive vis-à-vis companies in third countries due to the amount of royalties they will have to pay to performers and phonogram producers as a consequence of the term extension? In your opinion, can this be an obstacle for off-line / on-line music business models to flourish in Europe?

I do not see this as an obstacle for this kind of services to flourish in Europe. As is well known although Spotify is hugely important to the global music industry it has never made a profit. Spotify has much larger issues to deal with around the percentage of their sales income that is paid to CMOs, phonogram producers and publishers. Their business model is based on the fact that with scale they will reach a tipping point in regard to profitability.

h) Other remarks

In general, the extension of copyright in sound recordings from 50 years to 70 years has been valuable to the creative industries in the UK and welcomed by both phonogram producers and performers. The extension has meant a further 20 years of exploitation for phonogram producers for recordings first published in 1963 and later years. For performers, however, the Directive and the way it has been transposed into UK Law has been less beneficial as will be explained herein.

Whilst the performer community applaud the principle in the Directive that certain safeguards should be put in place to protect performers in the extension period, due to the way the Directive was drafted and its subsequent transposition into UK law, the four provisions to protect performers all have fundamental flaws.

As can be seen above, whilst the duration of copyright protection from 50 years to 70 years has been very beneficial for phonogram producers, it has not been so beneficial for performers. Artist managers who were consulted for this report would have preferred the term to have remained at 50 years as they could then have released their artist's recordings in the public domain. Because it would have been the artist themselves releasing their own recordings (with their own authentic photographs and sleeve notes) the recordings would be regarded as 'authentic' by the public thus giving them the edge over any other public domain releases of the same recordings.

There are two laws in the international picture that really protect authors and performers:

The first is in Germany where for musical authors it is illegal to assign copyright to a third party, with transfer only being allowable by license. In this way the author always retains ownership of their works. The license could still be for life of copyright but if, for instance, the publisher went in to liquidation, the rights in the works would be returned to the author (the licensee). If, however, there had been an assignment of the works, the liquidator would sell the copyright in the works to the highest bidder. It would greatly assist authors and performers if this provision could be applied throughout Europe for both works and fixed performances.

The other law that really helps authors and performers is the aforementioned US reversion right. Although there are complications concerning the US doctrine of 'Work Made for Hire',

the principle that an author or performer can have the copyright in their works and/or the related rights in their fixed performances transferred to them after 35 years from first publication is of fundamental benefit for creators.

Both of the above provisions are simple, effective and elegant.

Recommendations

1. Supplementary Remuneration right: The Directive should be changed so that member states have the option of either applying the existing regulation or applying a percentage of the phonogram producer's equitable remuneration income on the recording from broadcasting and public performance via the appropriate collective management organisation.
2. Use It or Lose It right: This is not working and needs to be removed. It should be replaced by something similar to the US reversion arrangements wherein the related rights in the sound recording do not expire but are instead transferred to the performers. If this were done the performers right to equitable remuneration would continue throughout the Extension Period. As explained above, the existing Use It or Lose It regulations could actually be harmful to performers.
3. Clean Slate right: More work needs to be done to make performers and phonogram producers aware that this right exists. There needs to be clarification as to how phonogram producers should apply their statutory obligation in regard to this right, particularly in regard to un-recouped balances. In addition to writing off un-recouped balances and paying out royalties with no deductions in the Extension Period, performers would welcome a minimum royalty rate in the Extension Period which would go some way to updating old contracts to modern industry royalty rate standards.
4. Renegotiation right: To protect performers, it should be mandatory for all Member States to incorporate this right in to their national legislation so that contracts could be updated for income received in the modern era during the Extension Period.

Stakeholders effectively contacted:

Type of stakeholder	Name of stakeholder	Contact
Phonogram Producer	Sony Music Entertainment UK	Mike Smith
Phonogram Producer	Universal Music Group	Julian French
Phonogram Producer	Beggars Group	Martin Mills
Musicians Union	Musicians Union UK	Phil Kear
Artist Managers trade body Featured Artists trade body	UK MMF (Music Managers Forum) and FAC (Featured Artist Coalition)	Jon Webster
CMO	PPL	David Harmsworth
User	Spotify	Kevin Brown
Consumer Organisation	Which?	Policy unit
UK Government	IPO (Intellectual Property Office)	Andrew Sadler

The objective of this study, commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the JURI Committee, is to examine the current status quo of implementation of the Directive, and to carry out an in-depth review of the practices in selected Member States. The study provides a brief overview of the international framework concerning the term of protection for performers and phonogram producers, and analyses the main objectives and provisions of the Term Extension Directive. It explores in-depth the implementation and practices in seven selected Member States, and identifies best practices that can serve as a model for other EU Member States. In addition, the long term effects of the Directive are considered, both within the EU (in relation to relevant EU policies) and outside the EU (in relation to its main trading partners).
