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**REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE
COUNCIL AND THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE**

**Report on the application of Directive 2011/77/EU amending Directive 2006/116/EC on
the term of protection of copyright and certain related rights**

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I. INTRODUCTION

Directive 2011/77/EU (the ‘2011 Term Directive’ or ‘the Directive’) amending Directive 2006/116/EC on the term of protection of copyright and certain related rights was adopted in 2011 to enhance protection of music performers and phonogram producers and improve the social situation of performers. The Directive extended the term of protection of the rights of performers and producers in phonograms from the first lawful publication or communication to the public by 20 years and introduced a set of accompanying measures aimed at rebalancing the bargaining position of performers in their contractual relationships with producers.

The 2011 Term Directive, under Article 3(1), requires the Commission to submit a report by 1 November 2016 assessing its application in the light of the development of the digital market accompanied, where appropriate, by a proposal for the further amendment of Directive 2006/116/EC. The report referred to under Article 3(2) of the Directive, related to the assessment of the possible need for an extension of the term of protection of rights to performers and producers in the audiovisual sector, was published in 2020.

The late publication of this Report is linked to the latest developments in EU copyright law and the need to take into account the new rules on remuneration of authors and performers introduced in the directive on Copyright in the Digital Single Market (hereinafter DSM Directive)¹, adopted in 2019. The DSM Directive contains provisions² aimed at further improving the contractual position of performers, which have been implemented in Member States in the past few years. The Commission services consider that it was important to take account of these new provisions, together with market and technological developments in the digital music market, to assess the 2011 Term Directive.

The main source of information supporting this report is a targeted study (hereinafter referred to as ‘the Study’)³. The study is published alongside this report. It includes stakeholders’ feedback collected through an online survey targeting relevant stakeholders from the music sector (mainly performers, phonogram producers and collective management organisations (CMOs),⁴ but also public domain record labels, online service

¹ Proposal for a Directive of the European Parliament and of the Council on Copyright in the Digital Single Market, COM (2016) 593 final

² Chapter 3 of Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC

³ [Targeted study on the application of the Directive 2011/77/EU on the term of protection of copyright and certain related rights](#). The data collection (desk research, survey, interviews) for the purposes of the Study was conducted in late 2021 and early 2022.

⁴ According to Article 3(a) of Directive 2014/26/EU: ‘Collective management organisation’ means 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.

providers, distributors and broadcasters), complemented by a series of interviews. The desk research of the study covers all the Member States and the field research covers 18 Member States.

In addition, the Commission services endeavored to complement the evidence gathered in the Study through other available sources, in particular contacts with stakeholders and available information on the implementation of the 2011 Term Directive. In this context, a complementary source of evidence is the 2018 Study commissioned by the JURI Committee of the European Parliament ('the EP study').⁵ This EP study looked at the state of play of the implementation of the 2011 Term Directive in several Member States and considered some potential long-term effects.

II. BACKGROUND

1. Legal background

Works and other subject matter are protected under copyright for a limited period of time. The 'term of protection' for copyright and related rights is the period during which rightholders hold rights in their works that are protected by copyright, and other subject matter which are protected by related rights⁶. After the term of protection has expired, a work or subject matter falls into the public domain.

At international level, a minimum term of protection for authors was introduced in the Berne Convention⁷ and later for performers, phonogram producers and broadcasting organisations in the Rome Convention.⁸ Under the 1996 WIPO Copyright Treaty ('WCT') the same term of protection applies as under the Berne Convention for authors⁹. The 1996 WIPO Performances and Phonograms Treaty ('WPPT') established a term of protection of 50 years for performers, counting from the end of the year when the relevant fixation or publication was made.¹⁰

CMOs are relevant stakeholders of the recorded music value chain with regard to the term extension as they contribute to specific aspects of the practical implementation of the 2011 Term Directive when they collect and distribute revenues which performers and producers are entitled to, on their behalf. These revenues can be based on uses of exclusive rights or remuneration rights. While performers' exclusive rights are typically transferred to the producers, CMOs are typically entrusted with the management of performers' remuneration rights.

⁵ [Implementation of the Directive 2011/77/EU: copyright term of protection](#)

⁶ While the term 'copyright' covers economic and moral rights granted to the authors of works, 'related rights' are the economic and moral rights granted to performers, producers and broadcasters on the specific subject matter. Related rights are often granted to encourage investment and are not subject to any condition of "originality" or "creativity." Moral rights are not harmonised under EU copyright law.

⁷ Article 7 of the Berne Convention for the Protection of Literary and Artistic Works provides for a protection of 50 years after the end of the year of death of the author.

⁸ Article 14 of the Rome Convention for the protection of performers, producers of phonograms and broadcasting organisations provides a protection of 20 years from the end of the year in which the fixation, performance or broadcast was made.

⁹ Article 1 of the WCT

¹⁰ Article 17 of the WPPT

In the EU, the term of protection for authors and holders of related rights was first harmonised by Council Directive 93/98/EEC¹¹, followed by Directive 2006/116/EC¹². The term of protection for all related rights¹³ was harmonised at 50 years counting from the relevant acts of performance or fixation, lawful publication, lawful communication to the public or broadcasting.¹⁴

The 2011 Term Directive, which amended Directive 2006/116/EC, was adopted on 27 September 2011 and had to be transposed by Member States by 1 November 2013¹⁵.

It extended the term of protection for performers and producers regarding fixations of music performances and phonograms from 50 to 70 years from the first lawful publication or communication to the public of the recording. This extension of the term of protection applies to the exclusive and remuneration rights granted to phonogram producers and performers in Directive 2001/29/EC¹⁶, Directive 93/83/EEC¹⁷ and in Directive 2006/115/EC¹⁸, as well as to the fair compensation due under certain exceptions provided in EU copyright law.

The 2011 Term Directive also harmonised the term of protection for musical compositions with words clarifying that it shall expire 70 years after the death of the last following person to survive: the author of the lyrics and the composer.¹⁹

Additionally, the Directive introduced a set of accompanying measures essentially aimed at ensuring that the performers having transferred or assigned their exclusive rights to phonogram producers could actually benefit from the term extension: (i) the use-it-or-lose-it clause, (ii) the annual supplementary remuneration and (iii) the clean slate clause (see section VI). Furthermore, a separate provision was introduced as an optional measure for Member States enabling performers to renegotiate in their favour contracts entitling them to recurring payments after the 50th year from the lawful publication of the recording or of its communication to the public.

It is worth noting that further provisions aimed at improving contractual situation of performers have been introduced in the DSM Directive (principle of appropriate and proportionate remuneration, transparency obligation, contract adjustment mechanism,

¹¹ Council Directive 93/98/EEC of 29 October 1993 harmonising the term of protection of copyright and certain related rights (OJ L 290, 24.11.1993, p. 9. Directive as amended by Directive 2001/29/EC of the European Parliament and of the Council (OJ L 167, 22.6.2001, p. 10)

¹² Directive 2006/116/EC on the term of protection of copyright and certain related rights (OJ L 372, 27.12.2006, p. 12.)

¹³ The related rights of phonogram producers, performers and broadcasting organisations

¹⁴ Article 3 of Council Directive 93/98/EEC and Directive 2006/116/EC

¹⁵ 2011 Term Directive Article 2(1)

¹⁶ Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (OJ L 167, 22.6.2001, p. 10)

¹⁷ Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission (OJ L 248, 6.10.1993, p. 15)

¹⁸ Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (OJ L 376, 27.12.2006, p. 28)

¹⁹ 2011 Term Directive, Article 1(1)

alternative dispute resolution procedure and the right of revocation). These provisions are broader than the accompanying measures described above, and they apply to both authors and performers across creative sectors.

2. Assessment of the possible need for an extension of the term of protection of rights to performers and producers in the audiovisual sector

The 2011 Term Directive did not extend the term of protection for audiovisual performers and producers. This was addressed in a Commission Staff Working Document (‘SWD’) of 9 December 2020, which assessed the possible need for an extension of the term of protection of the rights of performers and producers in the audiovisual sector as required by Article 3(2) of the 2011 Term Directive²⁰. In this SWD the Commission services concluded that the available evidence did not call for an extension of the term of protection of performers and film producers in the audiovisual sector and indicated that this matter would be also examined in the broader context of the assessment of the functioning of the 2011 Term Directive.

Therefore, in order to complement the analysis carried out in 2020, the Commission services tasked the contractor of the Study to gather further evidence on this matter. The contractor carried out a dedicated online survey, interviews and web-based search in order to gather additional findings.

The Study confirmed the information presented in the 2020 Commission SWD with regard to legal presumptions on transfer of rights and the contractual practices in the audiovisual sector, with the result of audiovisual performers rights being concentrated rather with the producers than with CMOs.²¹ The study further analysed the potential revenues linked to the exploitation of films after 50 years from their release in order to better assess the need for and possible benefits of a term extension. The data from theatrical release indicates that most of the revenues from the commercial distribution of films happen in the first three years after the first release. Films older than 50 years are available to a smaller extent in TV broadcasts and on-demand channels; however, no data is available on the revenues generated by these distribution channels, making it difficult to fully assess the revenues generated by the exploitation of films after 50 years. The Study also showed that the share of old films (published between 1970 and 1980) in the catalogues that CMOs manage on behalf of their affiliates is rather small, leading to marginal revenues received by performers for such films.²²

The Study did not find any new evidence that would challenge the previous findings presented in the 2020 Commission SWD. The results of the complementary evidence

²⁰ <https://digital-strategy.ec.europa.eu/en/library/staff-working-document-pursuant-reporting-obligation-laid-down-directive-201177eu-term-protection>

²¹ Study, pages 91-94

²² Study, pages 94-103. See also the recent study published by the European Audiovisual Observatory: “[Heritage Films in Cinemas – a 2014-2023 analysis](#)” in particular slide 15

gathering therefore do not point to a need, at this stage, to extend the term of protection of performers and film producers in the audiovisual sector.

III. TRANSPOSITION AND IMPLEMENTATION OF THE DIRECTIVE IN THE MEMBER STATES

All Member States have by now transposed the 2011 Term Directive. The transposition deadline was 1 November 2013. However, some Member States were late in transposing the directive and infringement cases for non-communication of transposition measures had to be opened.

The EP study examined the transposition of the 2011 Term Directive in seven Member States and raised specific questions with regard to some of the provisions of the 2011 Term Directive, namely the interpretation of the terms “lawfully published” and “lawfully communicated to the public” regarding the calculation of the term of protection and whether remasters may be considered as new phonograms, as well as a question on the alignment between the term of protection for phonogram producers and performers.²³

The Commission has not received any complaint about Member States’ transposition or application of the 2011 Term Directive since its entry into force. There has also been no preliminary reference from any Member State on the provisions of the 2011 Term Directive and hence there is no case law of the Court of Justice of the European Union related to this Directive.

The Study found that the implementation of the 2011 Term Directive was overall successful, while it also identified a few issues in relation to the national implementation of specific provisions, which delayed the actual application of the rules included in the 2011 Term Directive²⁴. Some of these issues stem from questions related to national copyright law and practice, beyond the scope of application of the 2011 Term Directive and the rules harmonised at EU level. Given that they are related to the accompanying measures, notably the use-it or lose-it clause and the annual supplementary remuneration (or ‘ASR’), these specific issues are explained in detail below (see section V).

On the other hand, the study also identified specific national practices (regarding the implementation of ASR, historical hampering factors and the bargaining position of performers) in several Member States that have the potential to facilitate the implementation of specific provisions of the 2011 Term Directive.²⁵

²³ EP study, pages 15-16

²⁴ Study, page 81

²⁵ Study, pages 116, 120, 122

IV. THE GENERAL IMPACT OF THE TERM EXTENSION INTRODUCED IN THE 2011 TERM DIRECTIVE

The main goal of the extension by 20 years of the term of protection for music performers and phonogram producers was to maintain the existing revenue streams of these rightholders for an additional time period. As indicated in the explanatory memorandum accompanying the legislative proposal, this was needed in order to improve the social situation of performers, in particular to address the income gap that music performers faced at the end of their lifetimes²⁶, as well as to cope with the revenue losses of phonogram producers resulting from piracy and the challenges related to digital distribution.²⁷

It is difficult to isolate the contribution of the term extension to the achievement of these goals, as several important factors affected the music market since the entry into force of the 2011 Term Directive.

Digitalisation and the growing popularity of on-demand music consumption through music streaming services led to important changes in the recorded music sector as the distribution of phonograms is mostly delivered digitally or online, increasing the availability of music and helping artists and producers to reach wider audiences. Also, more and more artists are self-releasing on streaming platforms. As a result, since the 2011 Term Directive came into force, whilst more music is available to users online, most other channels of distribution in analogue formats have almost disappeared completely or become niche. These changing trends in the music industry have not been coupled with price increase for music in digital formats, and any price increases in analogue formats are likely due to other factors beyond the creative content²⁸. That said, as most analogue formats are now obsolete or not widely available, consumers tend to have to repurchase some form of digital access to music which was once part of their private collections. Piracy, although decreasing in the past decade²⁹, still undermines the revenues of the music industry.³⁰

It is also important to consider the size and market relevance of the catalogues covered so far by the term extension from 50 to 70 years after the first publication of the phonogram. Until recently, the extension provided under the 2011 Term Directive benefitted only to older recordings from the 1960s. There are less recordings in these repertoires, and they are typically less popular nowadays. As more and more recordings from the 70's, 80's and 90's will benefit from the extension of the term of protection, the implementation of the

²⁶ Recital 5 of Directive 2011/77/EU

²⁷ Proposal for a Directive amending Directive 2006/116/EC of the European Parliament and of the Council on the term of protection of copyright and related rights (COM(2008) 464 final) Explanatory memorandum; Commission Staff Working Document - Impact Assessment on the legal and economic situation of performers and record producers in the European Union (SEC(2008) 2288), page 26.

²⁸ Study, pages 52-54

²⁹ According to the EUIPO report on "Trends in digital copyright infringement in the European Union" (2023), pirated accesses to music content have been at a constant level since mid-2020, at about one fifth of the 2017 level.

³⁰ Study, page 55

2011 Term Directive will probably translate into more revenues for the relevant rightholders.³¹

Also, the generally small amount of quantitative data available influences the assessment of the impacts of the 2011 Term Directive. Notwithstanding that, an overall qualitative assessment can be made based on the information available.

The additional 20 years of protection introduced by the 2011 Term Directive brought the term of protection of music performers and producers in the EU closer to the term of protection applied in the US³², a major market. The former difference of 45 years between the term of protection in the US and in the EU risked having a negative impact on the cultural diversity in music in the EU by reducing the incentives to create music for European tastes, due to the potentially higher revenues from the US market.³³

The term extension, by narrowing this gap in protection and by allowing to continue the marketing of older phonograms, contributed to foster the digitalisation of the affected repertoires. Phonograms from the 1960s were the first group of recordings that could benefit from the extension of the term of protection. The term extension allowed phonogram producers to exploit their back catalogue for a longer period of time and to continue marketing them. This, coupled with technological and market developments, incentivised producers to digitize these older phonograms. Keeping these songs in the catalogues, often with better sound quality in the digital format, helped to generate revenues. This has also led to more music being more easily available for consumers.³⁴

The survey conducted for the purposes of the Study showed diverging views on the impact of the term extension on the turnover of national music markets in the EU.³⁵ Music producers and their associations view this specific aspect of the 2011 Term Directive rather positively, and some of them mentioned that older phonograms can continue to generate some revenues. CMOs have more dispersed opinions and performers do not see much increase in that regard.

The Study found a general upward trend between 2010 and 2020 in relation to the evolution of total revenues distributed both to performers and phonogram producers; however based on the data available it is difficult to disentangle the effect of the term extension from other legal and technical developments.³⁶ According to some of the CMOs, interviewed this general increase in revenue is linked to other aspects related to collective rights

³¹ See pages 69, 73-74 and 110 of the Study where several CMOs mention the importance of the popularity of the recording with regard to the revenues generated. Also, with regard to some Member States, CMOs expect a revenue increase linked to the political, legal and economic changes that occurred since the early 90s.

³² In the US sound recordings enjoy a protection of 95 years counting from their creation (17 U.S.C. 302 (c))

³³ Commission Staff Working Document Impact Assessment on the Legal and Economic Situation of performers and Record Producers in the European Union, 2008, p. 19-20

³⁴ Study, page 79

³⁵ Study, page 58

³⁶ Study pages 63-64

management, such as the implementation of the Collective Rights Management Directive³⁷ and improved rights management systems used by CMOs.³⁸

V. ACCOMPANYING MEASURES

Besides extending the term of protection, the 2011 Term Directive introduced three sets of accompanying measures applying specifically to performers for the period of the term extension in Article 1(2)(c) of the 2011 Term Directive. These measures aimed to address the specificities of the contractual practices in the music industry, under which performers transfer or assign their rights to phonogram producers when signing a record agreement, in return for royalties or one-off payments³⁹.

The measures included in the 2011 Term Directive are the ‘Use-it-or-lose-it clause’, the Annual Supplementary Remuneration and the ‘Clean slate’ provision. Lastly, the Directive introduced an optional measure for Member States which enables performers to renegotiate in their favour contracts signed before November 2013, “the right to renegotiate”⁴⁰. All these provisions are only applicable during the 20-year extension period⁴¹.

The purpose of these accompanying measures is to ensure that performers, whose exclusive rights are being exploited, can benefit from the term extension, either by improving their remuneration or their contractual position towards record producers.

The DSM Directive introduced further provisions in EU copyright law in order to strengthen the contractual position of authors and performers and ensure that they receive fair remuneration when they transfer or assign their rights for exploitation⁴². These provisions have been implemented in all Member States. The Commission will assess the effectiveness of these measures in the context of the review of the Directive, which is due no sooner than 7 June 2026, taking into account the views expressed by the stakeholders affected⁴³.

Moreover, the Commission has recently published a study to examine the contractual practices used in the creative sectors (in particular buy-out practices) to transfer copyright

³⁷ 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

³⁸ Study, page 65

³⁹ For more information on contractual practices in the music sector, see 2015 Study [Remuneration of authors and performers for the use of their works and the fixations of their performances - Publications Office of the EU \(europa.eu\)](#)

⁴⁰ Article 1(4) of the 2011 Term Directive

⁴¹ Recital 10 of the 2011 Term Directive

⁴² Articles 18 to 23 of Directive (EU) 2019/790

⁴³ The recent report “[Streams and Dreams part 2](#)” by D. Johansson includes the results of a survey on the impact of the DSM Directive on EU artists and musicians conducted by AEPO-ARTIS and its members in collaboration with IAO.

and related rights from authors, performers and producers to contractual counterparts exploiting these rights and assess the impact of such practices on remuneration⁴⁴.

1. ‘Use-it or lose-it’ clause

Article 1(2) c (new paragraph 2a) of the 2011 Term Directive entitles performers, under certain conditions, to terminate their contract on transfer or assignment of their rights to a producer for the exploitation of a phonogram after the 50th year from its lawful publication or communication to the public, if the phonogram producer fails to offer or make available the recording in sufficient quantity. This right is unwaivable by the performer.

The goal of this provision is to increase performers’ bargaining power in the exploitation of the sound recording during the period of the term extension by allowing them, under certain conditions, to terminate the exploitation contract of the phonogram with the producer. When the ‘use-it or lose-it’ clause is invoked by the performer and the rights revert to them, the rights of the producer in the phonogram expire in order to avoid the co-existence of those rights.⁴⁵

The study showed that the practical application of the use-it-or-lose-it clause is more complicated in some Member States for recordings involving several performers.⁴⁶ According to the relevant provision of the 2011 Term Directive,⁴⁷ the rules for the termination of a contract involving a plurality of performers should be defined in the applicable national law. In certain Member States, national laws require a common agreement amongst the performers to invoke the ‘use-it or lose-it’ clause against the producer, and such an agreement could be difficult to reach. The study also identified a few examples of national legal provisions which facilitate the use of the clause in such specific cases.⁴⁸

Another specific challenge identified in the study concerns recordings produced during the communist era in some Member States. For example, in Romania, such recordings belong to the national patrimony and therefore only the Romanian state can take any decision in relation to those phonograms, not the relevant performers.

Our findings point to a very limited application of the ‘use-it or lose-it’ clause in practice. It seems that contracts have been terminated under this clause only in very few cases. This is mainly due to the changes in music distribution and consumption trends in the past decade and the increasing predominance of the streaming model. A phonogram that is made available on a streaming service means that the recording is being offered or made available in “sufficient amount of copies” and therefore the conditions to invoke the ‘use-it or ‘lose-it’ clause do not apply.

⁴⁴ Study on contractual practices affecting the transfer of copyright and related rights and the ability of creators and producers to exploit their rights, available at: [Commission publishes study on contractual practices affecting the transfer of copyright and related rights | Shaping Europe’s digital future](#)

⁴⁵ Last sentence of Recital (8) of the 2011 Term Directive

⁴⁶ Study page 82

⁴⁷ 2011 Term Directive, Article 1 (2) c, fourth sentence

⁴⁸ Study page 122, 123

Article 22 of the DSM Directive provides for a revocation mechanism that has a broader application than Article 1(2)(c) of the 2011 Term Directive as it is not limited only to contracts 50 years after the lawful publication or communication to the public of the phonogram. This provision is expected to strengthen the contractual position for all performers. However, Member States have a certain flexibility in implementing this new provision: they can exclude certain works or subject matter from the application of the revocation mechanism or provide that it applies only in a specific timeframe⁴⁹. As mentioned in the study on contractual practices, several Member States have added further details to adapt this mechanism to their national legal systems and national rules vary considerably⁵⁰. Therefore, the 'use-it or lose-it' clause remains relevant for music performers as it provides for an unwaivable right applicable during the period of term extension.

2. Annual Supplementary Remuneration

Under Article 1(2)(c) (new paragraphs '2b', '2c' and '2d') of the 2011 Term Directive, performers are entitled to receive an additional revenue, equivalent to 20% of the annual revenues derived by producers from the exploitation of a phonogram during the extension period. This supplementary remuneration is paid through the revenues derived from the reproduction, distribution and making available of the phonogram during the previous year.

This Annual Supplementary Remuneration (the 'ASR') applies only to those performers who transfer or assign their exclusive rights against an upfront non-recurring (flat fee) remuneration. Typically, these are session musicians, who are not entitled to a percentage-based revenue generated from the potential later success of their work. This non-waivable remuneration right does not apply to performers who are already entitled to recurring payments ('royalties') over the revenues generated by their fixed performances.

Only CMOs can collect and administer the ASR.⁵¹ After having identified the eligible recordings and the performers on these recordings who are entitled to ASR (typically either based on the information available to the CMOs and/or obtained from the record labels), CMOs collect this revenue from the record producers and distribute it to the eligible performers. The 2011 Term Directive also includes a specific provision which requires phonogram producers to provide any necessary information related to the payment of the ASR to performers upon their request.⁵²

Most of the CMOs and EU umbrella organisations interviewed in the context of the Study consider that the ASR had the greatest impact on performers' revenues among the measures introduced by the 2011 Term Directive.⁵³ Data collected for Czechia, the Netherlands, Germany, Poland, Portugal, Sweden and Spain shows a slow but steady

⁴⁹ Article 22(2) of the DSM Directive

⁵⁰ Study on contractual practices affecting the transfer of copyright and related rights and the ability of creators and producers to exploit their rights; pages 195-197

⁵¹ New Article 3 paragraph 2d of the codified text of the Term Directive

⁵² New Article 3 paragraph 2c second subparagraph of the codified text of the Term Directive

⁵³ Study, page 70

increase in the collection of the ASR. This indicates that this additional remuneration scheme is promising with regard to providing a revenue source for performers.⁵⁴

The Study found that the collection and distribution of the ASR started only recently in several Member States⁵⁵, indicating that these delays stem from specific implementation issues linked to the functioning of the CMOs or to difficulties to identify rightholders in old phonograms in certain Member States. For example, in Slovenia, CMOs by law have to comply with a cost-benefit ratio for the rights that they manage. The relevant CMO considers that the anticipated impact of the ASR would be too low to meet the aforementioned ratio for the time being.⁵⁶ In Poland, the producer of the songs recorded in the 60's and 70's was the former state-owned record company, which no longer exists. Although another label has now the rights to exploit these phonograms, in Poland the term 'producer' only applies to the entity that originally recorded the phonogram. Hence the labels holding the relevant rights are not obliged to pay the ASR.⁵⁷ In Romania, the CMO managing the ASR was appointed three years after the transposition of the 2011 Term Directive.⁵⁸

Irrespective of the impact of the ASR compared to other accompanying measures, CMOs and music performers' associations consider that so far the ASR has had a limited impact on performers' revenues.⁵⁹ Apart from the issues mentioned above that may have affected the collection and/or distribution of the ASR in several Member States, it can also be explained by the low number of recordings covered so far by the term extension.⁶⁰ In other cases it could also stem from the difficulties in obtaining the necessary information needed for the calculation and payment of the ASR⁶¹. The EP Study also identified this issue,⁶² and pointed at possible solutions that involve both phonogram producers and CMOs.⁶³ CMOs also pointed out the difficulties to obtain the necessary information from producers, including to identify the performers entitled to receive the ASR.⁶⁴ Current technological developments and the use of relevant metadata could help to improve the sharing of information necessary to provide the ASR to performers. In line with Article 1(2)(c) of the Directive, paragraph 2c, Member States could facilitate such cooperation and exchange of information among the relevant stakeholders in order to secure the payment of the ASR.

These difficulties are expected to be addressed to some extent by the implementation of the transparency obligations established by Article 19 of the DSM Directive. This provision goes beyond the already existing information requirement in the 2011 Term Directive and aims to provide up to date, relevant and comprehensive information on the

⁵⁴ Study, page 72, fig. 20; see also 'Performers' Rights Study Update 2022', AEPO Artis, page 71.

⁵⁵ Study page 81

⁵⁶ Study page 88

⁵⁷ Study page 89

⁵⁸ Study page 82

⁵⁹ Study page 71

⁶⁰ Study page 73

⁶¹ Study page 72, 85

⁶² EP Study, p. 7

⁶³ EP Study, p.47

⁶⁴ Performers' Rights Study Update 2022', AEPO Artis, page 71.

exploitation of relevant works and performances.⁶⁵ Due to the specificities of different content sectors, such as the music sector⁶⁶, Member States may not apply this provision with regard to non-significant contributions unless it is required for the purposes of the contract adjustment mechanism under Article 20 of the DSM Directive.⁶⁷

The ASR is an unwaivable remuneration right and can be a relevant complementary revenue source for performers in the future. Recent transparency reports from CMOs representing performers show a positive trend illustrating an improved administration and payment of the ASR.⁶⁸ The remuneration distributed to performers is likely to increase for popular phonograms from the 1970s and 80s which will start to benefit from the term extension in the coming years.⁶⁹

3. Clean Slate provision

The ‘clean slate’ provision set out in Article 1(2)(c) of the 2011 Term Directive (new paragraph 2e) requires that royalties distributed to performers for the duration of the extension period are free of advance payments and of any contractually defined deductions, which ultimately reduce the revenues of those performers. This provision covers those performers who transferred or assigned their rights to phonogram producers in return for royalty payments and allow them to benefit from increased remuneration for the extended term of protection.

Evidence suggests that the clean slate provision has been implemented in practice via contractual terms between record labels and performers already before the expiry of the 50 year term.⁷⁰ The EP study pointed out the potential issue of derogation by contract between performers and record producers to the clean slate provision⁷¹, depending on how Member States transposed this measure; however the Study found no evidence of such actual practice in the Member States covered.

Despite the limited evidence collected, the clean slate provision is an important safeguard for performers to ensure that they benefit fully from the extended term of protection through the payment of royalties without any deductions after the initial 50 years of protection are over.

⁶⁵ This will also address the concern raised in the EP study (page 27) with regard to the national implementation of the information requirement of the 2011 Term Directive

⁶⁶ DSM Directive, recital (77)

⁶⁷ Article 19 (4) of the DSM Directive

⁶⁸ See for example the 2023 transparency report from the French CMO SAI [Rapport-de-transparence-exercice-2023.pdf](#)

⁶⁹ Study p 74

⁷⁰ Study p77

⁷¹ EP study, page 50

4. The Right to Renegotiate

Article 1(4) of the 2011 Term Directive is an optional provision which allows Member States to grant performers the right to renegotiate in their favour contracts concluded before 1 November 2013 after 50 years from the publication of the recording. It appears that only France implemented this measure, although such ‘right to renegotiate’ already existed at least in one Member State⁷² by the time of adoption of the 2011 Term Directive. There is no available evidence on the use of this right in practice.

Also in this case it should be noted that Article 20 of the DSM Directive contains a provision having a similar goal as the ‘right to renegotiate’. It introduces a contract adjustment mechanism allowing authors and performers or their representatives, under certain conditions, to claim additional remuneration in case the originally agreed remuneration turns out to be disproportionately low compared to subsequent relevant revenues. Since this more recent provision is mandatory for Member States, in practice it could be applied more frequently than the ‘right to renegotiate’ under the 2011 Term Directive.

VI. CONCLUSION

Overall, by introducing an additional period of protection for producers and performers in the music sector, coupled with specific accompanying measures, the 2011 Term Directive has met its general (‘promoting music production in Europe’) and specific (‘contribute to enhancing the welfare of performers in the music industry’; ‘contribute to enhancing the competitiveness of the European music industry’; ‘increase available music repertoire’) objectives.⁷³

While it is difficult to isolate the economic impact of the extension of the term of protection in the music sector, the evidence collected showed that it allowed to ensure the continuous exploitation of older phonograms and the remuneration of music performers for the exploitation of their earlier performances also when they reach an older age, therefore helping to improve their financial situation.

The term extension also contributed to maintaining the revenue flows for phonogram producers for the exploitation of old catalogues. This encourages the digitisation of older recordings which now can be also exploited through digital music distribution services and contribute to the wider availability of European music.

The term extension is expected to have a stronger impact on the revenues of music performers and producers in the near future, when popular songs from different musical genres from the late 20th century will come under the scope of the 2011 Term Directive. This phenomenon is expected to be coupled with higher collection and distribution rate

⁷² For example in Germany

⁷³ Impact Assessment, p. 26

applying to the Annual Supplementary Remuneration, which is expected to further improve performers' financial situation.

Based on the evidence available, the other accompanying measures included in the 2011 Term Directive ('use-it or lose-it', 'clean slate' and 'right to renegotiate') appear to be less impactful than expected. Nevertheless, they provide performers with important safeguards in their contractual relationships with producers, as regards the exploitation of their rights and the remuneration due during the extended term of protection. The provisions on creators' remuneration of the DSM Directive are expected to further contribute to strengthen performers' bargaining position.

Based on this assessment, a further revision to Directive 2006/116/EC does not seem necessary. The Commission will continue to monitor the evolution of the European music market. It will assess the impacts of the fair remuneration provisions included in the DSM Directive in the context of the review of that Directive, due no sooner than 7 June 2026.