

SYNOPSIS REPORT

Targeted consultation on the conditions for the remuneration of certain third country performers and phonogram producers for their phonograms played in the EU

1. INTRODUCTION

The Commission conducted a targeted consultation on the conditions for the remuneration of certain third country performers and phonogram producers when their phonograms are played in the EU between 11 September and 19 November 2023.

Article 8(2) of Directive 2006/115/EC¹ ('RLR Directive') provides for a remuneration right for performers and record producers (so-called 'single equitable remuneration right' or 'SER'), when their sound recordings are used, i.e. broadcast to the public (such as on radio and TV) and played in public places (such as bars and restaurants). This remuneration is typically collected by collective rights management organisations ('CMOs') from the users (such as broadcasters and various venues) and shared between the relevant performers and record producers.

In the judgement in case C-265/19² ('RAAP'), the Court of the Justice of the European Union ('CJEU') held that, as the EU law currently stands, Article 8(2) of RLR Directive interpreted in the light of the EU's international obligations applies to use of phonograms published for commercial purposes in the territory of the Union irrespective of the nationality of performers. The CJEU also held that as the RLR directive makes no reference to national law, Member States cannot themselves choose the beneficiaries of the single equitable remuneration right. In addition, as far as the EU's obligations under the WIPO Performances and Phonograms Treaty ('WPPT') are concerned, the CJEU held that this is a matter of exclusive competence and it is for the EU and not Member States to limit the SER of the third country nationals, should it choose to do so.

The purpose of this consultation was to gather information on the application of the single equitable remuneration right under Article 8(2) of RLR Directive in the different Member States. It also sought to gather information and evidence on the consequences of the RAAP judgment until 19 November 2023, as well as feedback on the consequences of changes in national systems for the collection and distribution of SER for third-country performers and phonogram producers. The consultation is a follow-up to the Call for Evidence³ published in July 2022 and complements the

¹ 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, OJ L 130, 17.5.2019, p. 92–125

² Judgment of 8 September 2020, C-265/19, Recorded Artists Actors Performers Ltd v Phonographic Performance (Ireland) Ltd and Others, ECLI:EU:C:2020:677

³ <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13530-Remuneration-of-music-performers-and-record-producers-from-third-non-EU-countries-for-recorded-music-played-in-the-EU>

study published by the Commission on the remuneration of music performers and producers from third countries when their records are played in the EU⁴ ('Study') in April 2023.

The consultation was addressed to stakeholders in the recorded music industry, such as music performers, record producers, other players within the value chain of the recorded music industry, including collective rights management organisations, and commercial users of recorded music such as TV and radio broadcasters, public venues such as bars, restaurants, clubs, hotels, and their industry organisations.

This report gives an overview of the input received within the targeted consultation. As such, it does not aim to provide an assessment by the Commission of the specific arguments, positions and evidence submitted by stakeholders.

This report does not intend to assess compliance of reported practices with the Directive 2006/115/EC and Directive 2014/26/EU nor should anything in this report be read as an endorsement by the Commission of the reported practices and their compliance with Union law.

2. OVERVIEW OF RESPONDENTS

In total 115 replies were submitted in the EU Survey. Duplicate or empty replies were excluded from the submissions. Some respondents submitted their replies by e-mail. However, most of such replies were rather policy statements than specific replies to the questions asked in the consultation.

Participation by Member State

Respondents from 22 Member States participated to the targeted consultation⁵, in particular: Austria (3), Belgium (7), Bulgaria (2), Croatia (1), Czechia (3), Denmark (12), Estonia (2), Finland (6), France (7), Germany (6), Greece (2), Hungary (4), Ireland (2), Italy (7), Lithuania (1), Netherlands (18), Poland (1), Portugal (2), Romania (3), Slovenia (2), Spain (12), Sweden (7). No response was received from Cyprus, Latvia, Luxembourg, Malta and Slovakia. Remaining 5 replies came from third countries.

Out of these submissions, 85 submissions focused on a specific Member State, 25 submissions referred to the EU as a whole, while 5 submissions concerned non-EU countries (Norway, USA, UK).

⁴ <https://digital-strategy.ec.europa.eu/en/library/study-international-dimension-single-equitable-remuneration-right-phonogram-performers-and>

⁵ The number includes submissions received in the EU Survey platform and by email due to technical difficulties with the platform. The number does not take into consideration duplicate or empty submissions.

Respondents by category

As regards the categories of respondents⁶, submissions were sent by 4 national authorities, 29 collective management organisations, 28 users including broadcasters and public venues playing recorded music (or their representatives), 26 performers (or their representatives), 36 producers (or their representatives), and 7 uncategorised (i.e. ‘other’) respondents were represented in the targeted consultation. Respondents were allowed to select more than one category.

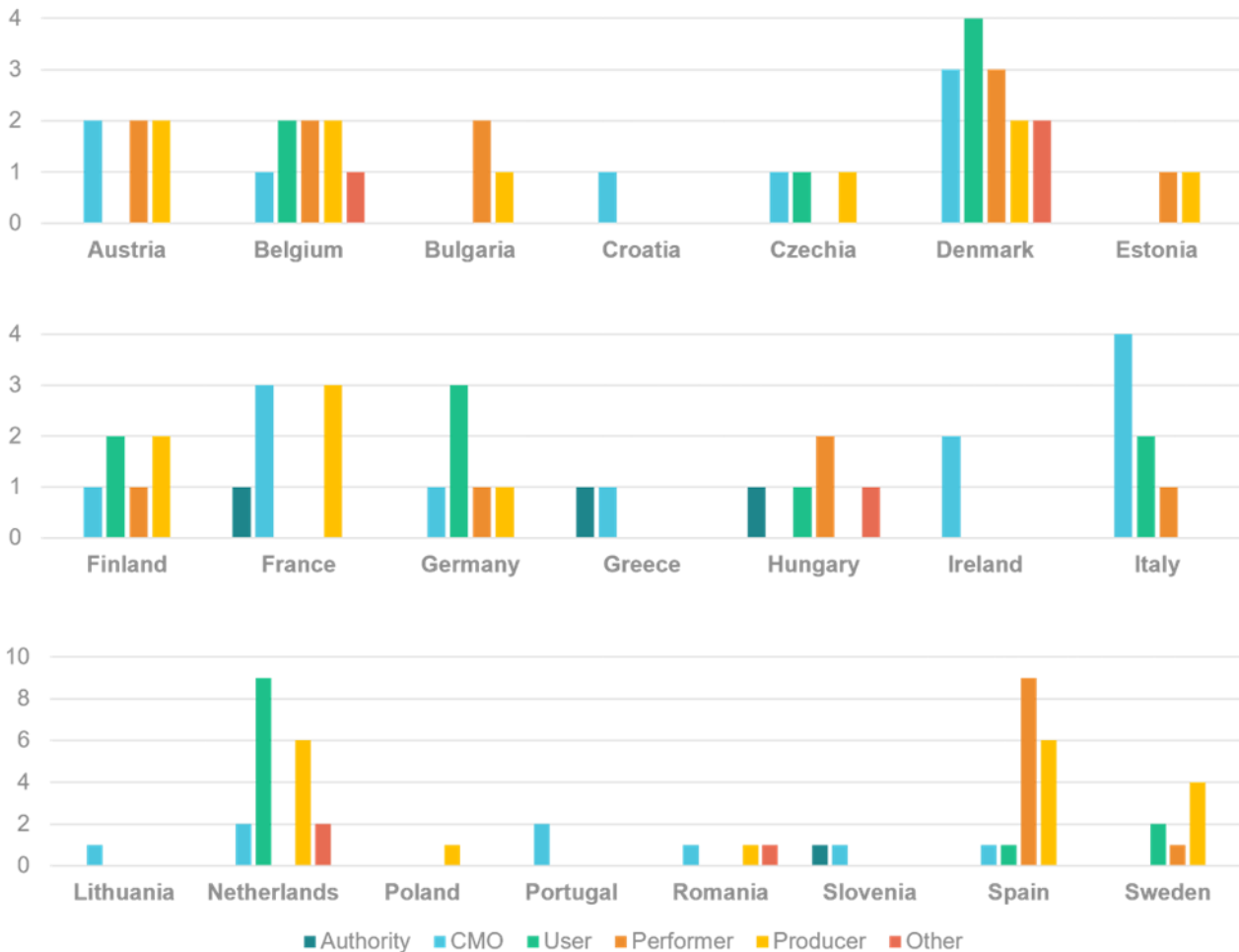


Figure 1: The charts show the number of submissions per each category of respondents per Member State. Respondents were allowed to select multiple categories.

⁶ Respondents themselves selected the category to which they belong under Section 1 of the Targeted Consultation. It was possible to select multiple categories.

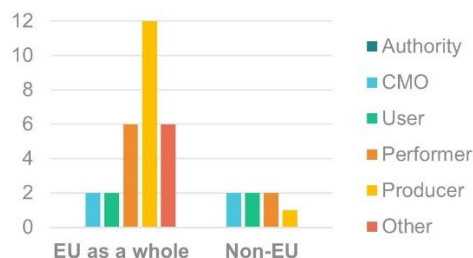


Figure 2: Respondents referring to EU as a whole or to non-EU MS. Respondents were allowed to select multiple categories.

3. SUMMARY OF THE REPLIES

Description of national laws and business practices on the application of SER (Sections 1-3)

The first three sections of the questionnaire focused on national laws and business practices related to the application of SER. The aim was to identify the specific rules implementing SER at national level, with a particular focus on how it applies to phonogram producers and performers from third countries (non-EU/EEA). Additionally, the questionnaire also sought information on the most important recorded music markets for consumers and the music industry in Europe, as well as tariffs for SER.

Stakeholders reported that prior to the RAAP judgment, 16 Member States⁷ applied national treatment when remunerating third-country music performers and producers, while 9 Member States applied material reciprocity⁸. No information was provided for Malta and Luxembourg.

The input received shows considerable variation, among Member States, concerning the points of attachment. Points of attachment refer to eligibility criteria determining which performers and producers of phonograms are eligible for protection in other countries. They are provided for in the Rome Convention for the protection of performers, producers of phonograms and broadcasting organizations⁹ and apply also to the WPPT¹⁰.

When it comes to the types of phonograms usage that trigger the payment of the SER by users, all Member States collect SER for TV and radio broadcasting, as well as from public venues, except for Belgium which does not collect SER for TV broadcasting. The collection of SER for non-interactive digital streaming¹¹ showed more varied responses. It was noted by some respondents that a few countries, such as Italy and Croatia, do not collect SER for this type of use. In Belgium,

⁷ Bulgaria, Croatia, Cyprus, Czechia, Estonia, Germany, Greece, Hungary, Lithuania, Italy, Latvia, Poland, Portugal, Romania, Slovakia, Spain.

⁸ Austria, Belgium, Denmark, Finland, France, Ireland, Netherlands, Slovenia, Sweden.

⁹ The EU and Malta are not contracting parties; other EU Member States are.

¹⁰ One stakeholder pointed out that in practice some Member States do not only apply the points of attachment they notified to WIPO when ratifying the Rome Convention. Notifications can be accessed on the WIPO website: https://www.wipo.int/wipolex/en/treaties/ShowResults?search_what=C&treaty_id=17

¹¹ E.g. webcasting and simulcasting; on-demand streaming is excluded.

SER is collected for simulcasting (simultaneous broadcasting online), but not for webcasting (streaming of content over internet).

Regarding the rules for remunerating performers from outside the EU/EEA when they perform alongside EU/EEA performers on the same phonogram, the majority of respondents did not reply. Among those few responses received, practices appear to differ between Member States. For instance, it was reported that in Sweden, all performers performing on a phonogram that qualifies for SER are remunerated, regardless of their nationality.

Some stakeholders replied that there are bilateral agreements between their Member States and third countries which concern SER. However, there was very limited information on the relevant provisions in these agreements.

The targeted consultation also aimed to identify patterns in the export of music from EU Member States and its popularity abroad. The responses showed significant variation and were not comparable. Spanish music, for example, was mentioned as enjoying considerable popularity in the US and Latin American countries. One stakeholder noted that Sweden stands out as a net exporter of music, ranking third worldwide after the US and the UK. This success is attributed to the fact that a large portion of Swedish music is recorded in English, which facilitates its global reach, independent of specific cultural or linguistic connections.

As for the music imports, it was reported that the US music is predominately featured in broadcasts and played in public venues across the EU. In some instances, the share of US repertoire was reported to be around 40%. For such popularity, stakeholders largely credited the widespread use of the English language and popularity of the US entertainment industries (audiovisual, music, videogames, etc.). Other third countries mentioned in the responses showed a clear linguistic correlation with a specific Member State in question. Thus, Spanish stakeholders emphasised the significance of Latin American markets, where Spanish is widely spoken. Similarly, Portuguese stakeholders noted the relevance of markets where Portuguese is spoken.

In general, the majority of respondents recognised the relevance of historical, geographical, cultural, and linguistic connections between the countries. These ties manifest in relationship with neighbouring countries or through the presence of bigger minority groups that reside within those countries.

The targeted consultation also revealed some insights into how tariffs for SER are determined in Member States. In particular, SER tariffs are usually negotiated directly between the CMOs and users. In a few cases, stakeholders reported different roles of public authorities. For instance, in Czechia it appears that the Ministry of Culture supervises the negotiations. In Belgium, tariffs are set by a royal decree.

As regards the factors taken into account when determining the tariff, some stakeholders reported the economic value of the use of the rights in trade, nature and scope of the use of the work and other subject-matter, and relation to the economic value of the service provided by the collective

management organisation. This aligns with Article 16(2) of Directive 2014/26/EU¹² ('CRM Directive'). However, in some cases, such as in Spain, national law lists the specific criteria.

In practice, it follows from the replies that generally different factors are applied for broadcasters compared to venues that communicate to the public.

For TV and radio broadcasters, it was generally observed that a combination of factors is used, such as income of the broadcasters, advertising revenue, potential audience (by number of households) or actual audience, percentage or minutes of music broadcasted. In some Member States, the factors for determining tariffs vary between public and private broadcasters. Similarly, for public venues, factors such as the size of the venue, the number of visitors or customers, importance of the music for the business, etc. are being taken into account.

The majority of stakeholders indicated that the origin of repertoire does not influence the tariff. This appears to be the case for Member States that apply national treatment, but not exclusively.

Several stakeholders noted that the tariffs for licences covering authors' rights in phonograms are usually set higher compared to SER, with reported differences ranging significantly from 30% to as much as 85-90%. Nonetheless, in two Member States, it was reported that tariffs for SER are higher than royalties collected for authors' rights in phonograms.

Collection and distribution of SER (Sections 4-6)

Sections 4 to 6 of the questionnaire focused on gathering information and evidence on the management of the single equitable remuneration right, in particular regarding the practices applied and amounts collected and distributed, in particular for the 9 Member States which were not covered by the Study. Indeed, the Study already covered most of these issues related to the SER in 18 Member States. Mostly CMOs and users replied to the specific questions related to their respective activities.

The input received in relation to the collection and distribution of SER confirms the four schemes identified in the Study: joint CMO, separate CMOs of performers or producers, one-stop-shop for centralised collection, mixed model combining one-stop-shop with separate CMOs.

The feedback received for these sections of the questionnaire also corroborates the findings of the Study. CMOs represent rightsholders who have authorised them to manage their rights, regardless of their nationality. In some cases, foreign rightsholders appoint a local agent or representative, such as a record company or distributor, to collect the SER revenues on their behalf. The existence of bilateral or unilateral agreements between foreign and local CMOs have been reported as a prerequisite for taking part in the distribution of SER revenues. In a few instances, CMOs are legally mandated to represent all rightsholders, including those who have not authorised that CMO to represent them, and are therefore responsible for distributing all collected revenue to the relevant

¹² 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, p. 72–98

rightsholders. Such reciprocal agreements between local CMOs and foreign CMOs appear to be common practice.

The consultation also sought specific feedback on management fees, deductions for social and cultural funding and the use of non-distributable royalties. These practices are harmonised by the CRM Directive. However, Member States enjoy a wide margin of discretion in this regard. The input received demonstrates that management fees vary among Member States. Some stakeholders reported specific percentages, ranging between 14% to 30% in the respective Member States, that are applied to the overall collection of royalties. The management fees that are calculated solely on the basis of the SER collected were reported between 8,27% and 31,6%. Similarly to the findings of the Study, the replies show that the national legal regimes on SER (i.e. national treatment or material reciprocity) do not seem to influence the management fees.

In the majority of Member States, CMOs make deductions for social and cultural funding as allowed under Article 12 of CRM Directive. These deduction practices vary from Member State to Member State, both in terms of regulation and intended usage. As regards the regulation, rules are usually provided in the statutes of CMOs or, in a few cases, by national laws. Concerning the usage, stakeholders reported that the deductions are used for cultural and social activities, educational purposes, support to members, anti-piracy activities, promoting cultural products of the recording industry, funding studies related to market and copyright, and international cooperation. In some cases, the funds are directed towards emerging performers, while other initiatives may focus on supporting the creation and promotion of new content, legal consultations for rightsholders, and improving CMO activities and their IT systems for better distribution.

It was reported that the deducted amounts vary significantly across Member States, ranging from a few hundred thousand euros to several million euros. The specific percentage of deductions also varies, with some CMOs deducting up to 10-20% of the collected royalties.

Under Article 13 of the CRM directive, non-distributable royalties are those which were collected but could not be distributed to the rightsholders after three years from the end of the financial year in which they were collected, despite necessary measures undertaken by the CMOs to identify and locate the rightsholders. Based on the submissions received in this consultation, it was not always possible to separate non-distributable royalties arriving from SER from the non-distributable royalties the CMO collected on the account of other related rights. Usually, such royalties are redistributed to known rightsholders proportionally to their existing remuneration or transferred to national cultural funds related to artistic creation, live performance dissemination, artistic and cultural education, and artist training. In some cases, the non-distributable royalties are also used for social and cultural activities for the benefit of the CMO members, or for the promotion of digital offerings of phonograms. The beneficiaries of these funds can be rightsholders who are members of a CMO or the general public.

Several respondents replied that through agreements within record companies or specific arrangements with CMOs, national subsidiaries of record labels retain a certain portion of the

revenues collected for the use of foreign recordings. According to these respondents, the retained amounts are used for investment in local artists and projects.

Regarding the aspects that users take into consideration when choosing the music repertoire for their broadcasting programmes and venues, respondents reported several different factors. Primarily, editorial considerations and audience preferences guide the selection. Only seldom national laws mandate a diverse cultural offering thus affecting, at least to some extent, the choice of the music repertoire. For the most part, the concerned stakeholders stated that origin of music is not a relevant factor. However, a few respondents amid the broadcasters – who already experienced or foresee higher tariffs following the RAAP judgement – indicated that any additional tariff increase might significantly undermine their investments in editorial content.

Views on the effects of applying national treatment or material reciprocity¹³ in the collection and distribution of SER (Sections 7-8)

In sections 7 to 8 of the questionnaire, respondents were asked about their views on the consequences of changes in national systems for the collection and distribution of SER for third country phonogram producers and performers. Section 7 was divided into two parts: the first part asked about the application of national treatment across the EU, while the second part focused on a potential shift to the EU-wide material reciprocity. In Section 8, the respondents had the opportunity to provide input on the current application of SER and the possible consequences of regulatory changes. Stakeholders from every category covered by the targeted consultation replied to at least one of these sections however individual performers were less represented than others. Only a few replies were accompanied with relevant data. In most of the cases the views of stakeholders tend to support the currently applicable national rules in their respective Member States, with the exception of Netherlands¹⁴. Those respondents favouring material reciprocity at EU level indicated the need to take into account different situations in Member States. Only few respondents expressed support to harmonised national treatment across the EU.

This chapter summarizes stakeholders' views both on harmonised national treatment and material reciprocity.

Views on harmonized application of national treatment across the EU

With regard to the potential positive consequences of the harmonised application of national treatment, some respondents consider that it would end existing market discrepancies concerning third-country rightsholders in some Member States and would have a positive impact on cultural diversity. It would also help the growth of the national music markets by increasing the amount of the collected SER. Other potential positive impacts of a larger collection pool mentioned by

¹³ The majority of stakeholders replied only to these questions of the targeted consultation.

¹⁴ Netherlands applied material reciprocity until 1 January 2021 when it transitioned to national treatment, therefore Dutch respondents were in a position to submit substantiated data.

respondents include the proportional reduction of administrative costs of CMO, that would lead to more royalties being distributed to rightsholders as well as higher cultural and social funds managed by CMOs. The additional revenues could also allow more support for local talent. Few respondents also mentioned the opportunity it may create for EU performers to participate on third country recordings and benefit from the revenues generated by those recordings. Others pointed out the advantages of tariffs that cover all the repertoires irrespective of nationality.

Regarding the potential negative impacts of harmonised national treatment, many stakeholders argued that harmonised national treatment would primarily benefit US rightsholders. Some stakeholders in Member States that apply material reciprocity expressed concerns that in the current economic situation tariffs could not be increased to a sufficient level to fully cover the additional amounts due to US rightsholders. This means that EU rightsholders would receive less royalties, leading – in the case of producers – to less investment in EU artists. In addition, it was reported that such tariff increases could lead to less businesses using music in their activities or to some of them opting for royalty free music, both of which would decrease the revenues of CMOs. Few respondents suggested that gradual tariff raises could mitigate the abovementioned negative impacts.

Arguments about reduced EU trade leverage, less cultural diversity and market distortion were also mentioned. Some users, in particular broadcasters, expressed their concern that national treatment would negatively impact their editorial choices of music, other journalistic activities, and competitiveness in general.

Some respondents claim that the impact of national treatment would be worse for SMEs in the music sector. Also, some stakeholders question whether higher revenues for CMOs would indeed increase their cultural and social funds.

Views on harmonized application of material reciprocity across the EU

With regard to the potential positive consequences of the harmonised application of material reciprocity, some stakeholders are of the view that it would provide the necessary leverage for the EU in trade negotiations with third countries that do not or not fully apply the SER in their national law. In particular, introducing harmonised material reciprocity could influence the US to increase their level of protection of performers and producers. Some respondents argued that material reciprocity is key to ensure that parts of the SER collected in the EU would remain in the EU. These remaining amounts could be invested in European music productions, and support European artists. Hence many stakeholders think that material reciprocity is important to ensure cultural diversity. Some of the respondents also mentioned that there would be also positive impacts beyond the European music industry. If businesses that are typical users of music in their activities do not have to pay higher tariffs, they could invest more in their own activities, services and staff.

Regarding the potential negative impacts of harmonised material reciprocity, some respondents from Member States currently applying national treatment raised the issue of excluding third-

country phonograms. This could potentially lead to demands for tariff reductions from users, given that a high percentage of used music repertoire, in particular from the US, would not be subject to SER. Other respondents explained that the overall reduction of the collected royalties would result in higher administrative costs for CMOs, and therefore to less royalties would be distributed to the EU rightsholders and funds for supporting their cultural and social activities would decrease. The potential negative impact on investment in local talent was also mentioned. Another potential consequence of material reciprocity could be less international cooperation among artists on recordings. Some respondents added that in case less European music is played by users, the royalty reduction may affect EU rightsholders' royalties beyond the SER, even authors of musical works.

Other views

Other views have also been expressed in the various stakeholder replies. Some stakeholders suggested a gradual introduction of national treatment in order to allow affected stakeholders in Member States currently applying material reciprocity to adapt to the new circumstances. A more active role for the European Commission in monitoring of certain activities of the CMOs was also suggested.

Many stakeholders from every category suggested a legislative proposal that would allow some type of flexibility or a grandfathering clause for Member States to maintain their current or pre-RAAP judgement national legal systems.

4. CONCLUSION

The results of the targeted consultation concerning a Union wide approach to single equitable remuneration right for music performers and producers from third countries are mixed and not conclusive.