OPINION OF ADVOCATE GENERAL TIZZANO

delivered on 21 April 2005 [1]

I — Introduction

1. By a judgment of 17 February 2004, the Cour de cassation (Court of Cassation, France) referred to the Court for a preliminary ruling under Article 234 EC two questions concerning the interpretation of Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (hereinafter 'Directive 92/100') [2] and 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 (hereinafter 'Directive 93/83'). [3]

2. The national court seeks primarily to establish which Member State is competent to regulate the remuneration payable to the performers of a phonogram where the signal used to broadcast that phonogram is transmitted from one Member State to a satellite which directs it to a terrestrial repeater station located in another Member State, from which it is retransmitted to the first State. If the legislation of more than one Member State is applicable, it further asks whether under Community law it is possible to deduct in one Member State the amount paid in the other.

II — Legal background

The relevant Community law

3. The purpose of Directive 92/100 is to create a harmonised framework of national legislation on rental right and lending right with regard to copyright and certain rights related to copyright, to the extent necessary to ensure the proper functioning of the common market.

1 — Original language: Italian.
2 — OJ 1992 L 346, p. 61.
3 — OJ 1993 L 248, p. 15.

4. This is, however, only minimum harmonisation, as is evident from the 20th recital in the preamble to the directive, which explicitly recognises that the Member States may provide for more far-reaching protection for owners of rights related to copyright than that laid down in the directive.

5. That protection is dealt with in particular in Article 8(2) of the directive, which provides as follows:

'Member States shall provide a right in order to ensure that a single equitable remuneration is paid by the user, if a phonogram published for commercial purposes, or a reproduction of such phonogram, is used for broadcasting by wireless means or for any communication to the public, and to ensure that this remuneration is shared between the relevant performers and phonogram producers. Member States may, in the absence of agreement between the performers and phonogram producers, lay down the conditions as to the sharing of this remuneration between them.'

6. In turn, Directive 93/83 is intended to coordinate certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission in order 'to avoid the cumulative application of several national laws to one single act of [satellite] broadcasting' (14th recital).

7. Having stated in that recital that 'normal technical procedures relating to the programme-carrying signals should not be considered as interruptions to the chain of broadcasting', the directive defines the concepts it employs.

8. In particular, Article 1(1) defines 'satellite' as 'any satellite operating on frequency bands which, under telecommunications law, are reserved for the broadcast of signals for reception by the public or which are reserved for closed, point-to-point communication. In the latter case, however, the circumstances in which individual reception of the signals takes place must be comparable to those which apply in the first case'.

9. The second paragraph of that article provides, in so far as is relevant to the present case, that:

'(a) For the purpose of this directive, "communication to the public by satellite"

means the act of introducing, under the control and responsibility of the broadcasting organisation, the programme-carrying signals intended for reception by the public into an uninterrupted chain of communication leading to the satellite and down towards the earth.

(b) The act of communication to the public by satellite occurs solely in the Member State where, under the control and responsibility of the broadcasting organisation, the programme-carrying signals are introduced into an uninterrupted chain of communication leading to the satellite and down towards the earth.'

10. With regard to the rights of performers, phonogram producers and broadcasting organisations, Article 4(1) lays down that 'for the purposes of communication to the public by satellite, [they] shall be protected in accordance with the provisions of Articles 6, 7, 8 and 10 of Directive [92/100]'.

National law

11. Turning now to the French legislation, mention need merely be made of Article L. 214-1 of the Code de la propriété intellectuelle (Intellectual Property Code), under which:

'Where a phonogram has been published for commercial purposes the performer and the producer shall not be entitled to prevent:

...

2. broadcast thereof or the simultaneous and integral distribution of that broadcast by cable.

The said uses of phonograms published for commercial purposes, whatever the place of fixation thereof, shall entitle the performers and producers to receive remuneration. That remuneration shall be paid by those persons who use the phonograms published for commercial purposes under the conditions indicated in paragraphs 1 and 2 of this article.

The remuneration shall be based on the income from exploitation, failing which it shall be assessed on a flat-rate basis ...'[4]

4 — Unofficial translation.

III — Facts and procedure

12. The company Europe 1 communication, to whose rights the company Lagardère Active Broadcast has succeeded (hereinafter 'Europe 1' and 'Lagardère' respectively), is a broadcasting company established in France. Its radio programmes are produced in Paris and transmitted initially to a satellite. The signal then returns to earth to repeater stations situated on French territory, which broadcast it in France in frequency modulation (FM).

13. The broadcasting system I have just described is not the only one used by Europe 1. The company also has a transmitter located beyond the German border in Felsberg, Saarland, which it has used ever since it commenced operations in order to get around the French legislation then in force, which permitted only public broadcasting bodies to have retransmitting aerials on French territory.

14. The satellite also transmits the signal to that repeater station, which broadcasts it in long wave to France, under a licence granted in Germany to Compagnie européenne de radiodiffusion et de télévision Europe 1 (hereinafter 'CERT'), a German company in which Europe 1 holds 99.7% of the share capital.

15. I would add in this regard that in the event of faults in the satellite system the signal from the Paris studios can still reach the German transmitter via the terrestrial digital audio circuit, which was the normal means of transmission before the changeover to the satellite system.

16. I would further add that, although the programmes broadcast from the booster in Felsberg are intended exclusively for a French-speaking audience, they can also be received in a limited area of German territory.

17. In France, Europe 1 paid Société pour la perception de la rémunération équitable (hereinafter 'SPRE') the remuneration payable to the performers and producers of the phonograms used in its broadcasts. CERT, for its part, paid an annual flat-rate fee in Germany to the Gesellschaft zur Verwertung von Leisungsschutzrechten (hereinafter 'GVL'), the German counterpart of SPRE, for the broadcast of the same phonograms.

18. In order to avoid duplicating the remuneration paid for the use of the same phonograms, an agreement between Europe 1 and SPRE, which was renewed until

31 December 1993, authorised Europe 1 to deduct the amount paid by CERT to GVL from the sum owed to SPRE.

19. Although there was no agreement authorising such a deduction after 1 January 1994, Europe 1 continued with the practice.

20. SPRE, which considered that that deduction was not justified, brought an action before the Tribunal de grande instance (Regional Court) de Paris which ruled in its favour.

21. Faced with that situation, CERT terminated the contract that provided for the payment of the remuneration to GVL, which therefore brought legal proceedings in Germany. Following a ruling by the court of first instance in favour of GVL and a decision by the Saarländisches Oberlandesgericht (Court of Appeal of the Saarland) in favour of CERT, the question was referred to the Bundesgerichtshof (German Federal Court of Justice).

22. That court held that the transmissions at issue were subject to German law because they were broadcast from transmitters located in Germany but that the remuneration payable to GVL should be reduced by the amount paid in France. Without referring questions to the Court for a preliminary ruling, it concluded that Directive 93/83 was not applicable, quashed the judgment of the Oberlandesgericht and referred the case back to that court. The latter decided to stay its proceedings pending the Court of Justice's decision in the present case.

23. In the meantime, at the instigation of Lagardère, to which the rights of Europe 1 had been assigned, the legal proceedings in France had continued, first with an appeal to the Cour d'appel (Court of Appeal) de Paris against the decision of the court of first instance in favour of SPRE and then, when that action had also been dismissed, with a further appeal to the Cour de cassation. Entertaining doubts as to the interpretation of certain provisions of Community law, the latter stayed its proceedings and referred the following questions to the Court of Justice for a preliminary ruling:

'1. Where a broadcasting company transmitting from the territory of one Member State uses, in order to extend the transmission of its programmes to a part of its national audience, a transmitter situated nearby on the territory of another Member State, of which its majority-held subsidiary is the licence holder, does the legislation of the latter State govern the single equitable remuneration which is required by Article 8 (2) of Directive 92/100/EEC of 19 November 1992 and Article 4 of Directive 93/83/EEC of 27 September 1993 and payable in respect of the phonograms published for commercial purposes included in the programmes retransmitted?

2. If so, is the original broadcasting company entitled to deduct the sums paid by its subsidiary from the remuneration claimed from it in respect of all the transmissions received within national territory?'

24. In the proceedings before this Court, Lagardère, CERT, SPRE, GVL, the French and German Governments and the Commission have submitted observations.

25. The same parties attended the hearing on 2 March 2005.

IV — Assessment

The first question

26. By its first question, the national court asks whether the fact that part of the audience receives radio programmes produced in one Member State via a signal transmitted first to a satellite and then to a terrestrial repeater station located in another Member State which broadcasts the programmes towards the first Member State means that it is the legislation of the second Member State that governs the remuneration payable to performers and producers of the phonograms used as far as programmes retransmitted from that State are concerned.

27. As the Commission and GVL point out, the reply to that question depends on the definition of the transmission at issue. If it were considered a 'communication to the public by satellite' within the meaning of Directive 93/83, the remuneration payable to the performers and producers of the phonograms used should, in accordance with Article 1(2)(b) of that directive, be governed solely by the law of the State from which the signal is transmitted and hence, in the present case, by French law. If not, they maintain, it would undoubtedly fall outside the scope of Directive 93/83, with the consequence that it could not be precluded that German law applied to the remuneration payable for the use of the phonograms broadcast from the Felsberg transmitter.

28. Clearly, however, it may be found that the directive is not applicable to the present case by virtue of the answer to be given to another question that is linked to the first and is in a way preliminary to it, a question which the parties have also discussed in the course of the case. Since the directive does not relate to every type of satellite but only to those meeting certain conditions, it is

legitimate to enquire whether the satellite under discussion is in fact a 'satellite' within the meaning of the relevant directive. If not, there is all the more reason why the directive is not applicable to the present case.

29. On that premiss, I would point out in that connection that, in accordance with Article 1(1) of the directive, 'satellites' are only those operating 'on frequency bands which, under telecommunications law, are reserved': (i) 'for the broadcast of signals for reception by the public', or (ii) 'for closed, point-to-point communication. In the latter case, however, the circumstances in which individual reception of the signals takes place must be comparable to those which apply in the first case'.

30. In this instance, it is evident from the replies given in response to a specific question asked by the Court that the signal transmitted by the satellite to the repeater station in Felsberg cannot be received directly by the public. It is therefore beyond question that the first case envisaged in Article 1(1) of the directive does not apply.

31. It is more difficult to determine whether the second case applies, particularly as it is not clear what 'comparable circumstances' should mean. Without a doubt, in fact, this expression implies that the programmes coming from the satellite must reach the public; however, the parties in the present case come to diametrically opposed conclusions when assessing in concrete terms whether that condition is met.

32. The French Government, Lagardère and SPRE maintain that in the present case the condition is fulfilled because the public can in any case receive the programmes, thanks to terrestrial retransmission of the signal from the satellite. The German Government and GVL take the opposite view, namely that since the public can receive the programmes only by means of a different signal from that coming from the satellite, the circumstances are not 'comparable'; according to them, the directive is therefore not applicable. The Commission, which had not expressed an opinion in that regard in its written submissions, essentially endorsed that view at the hearing.

33. An inquiry as to whether a 'satellite' within the meaning of the directive exists in the present case must therefore concentrate on the consequences of the fact that the public can receive the signal from the satellite only if it is retransmitted in Hertzian waves.

34. However, the reply to that question is also decisive for resolving the doubt men-

tioned above (in point 27) about the classification of the transmission under discussion in the present case as a 'communication to the public by satellite'.

35. Under Article 1(2)(a) of the directive, such a 'communication' means 'the act of introducing, under the control and responsibility of the broadcasting organisation, the programme-carrying signals intended for reception by the public into an *uninterrupted chain* of communication leading to the satellite and down towards the earth', [5] subject to the qualification stated in the 14th recital of the directive that *normal technical procedures* should not be considered as interruptions to the chain of broadcasting.

36. Hence, in one way or another the central issue in the present case remains essentially the same. Either way, it has to be established whether and in what manner it is relevant that, in the circumstances of this case, the public can receive the signal from the satellite only thanks to the retransmission of that signal in Hertzian waves.

37. In order to answer that question it is necessary to examine both aspects, that is to say to establish whether in the present case it is possible to speak of a transmission: (i) that takes place in 'circumstances ... comparable' to those in which the satellite broadcasts signals that can be received by the public, and (ii) that constitutes a 'communication to the public by satellite' in that it consists of an 'uninterrupted chain of communication'.

38. (i) As to the first aspect, I would observe first that, as indicated in its sixth recital, Directive 93/83 deals with two different types of satellite: direct broadcast satellites and telecommunications satellites. After noting that 'individual reception is possible and affordable nowadays with both types' but that in the Member States 'a distinction is ... drawn for copyright purposes' between communication to the public by one or other type of satellite, [6] the directive states that it aims to lay down common rules applicable no matter which of the two types of satellite is used. [7]

39. In my opinion, it is precisely in the light of that premiss that the two cases referred to in point 29 above should be viewed. In the past, only direct broadcasting satellites transmitted signals that could be received by the public, using frequency bands expressly intended for that purpose. Telecommunications satellites, by contrast, used

5 — Emphasis added.

6 — Sixth recital.

7 — Thirteenth recital.

(and still use) bands not reserved for reception by the public. However, thanks to technological advances, it has since become possible to transmit higher-power signals on the latter bands than in the past, so that affordable non-professional satellite dishes can also receive programmes transmitted from satellites in this way. As a result, although the bands used are not reserved for communication to the public, the public can nevertheless receive programmes directly from the satellite.

40. It seems to me that these, and only these, are the 'comparable circumstances' referred to in the final sentence of Article 1(1) of the directive. In the case that concerns us here, by contrast, the satellite does not transmit in circumstances such as to allow individual reception of the signal it broadcasts, no matter what bands are used; on the contrary, for the signal to reach the audience, it must in any case be retransmitted in Hertzian waves.

41. I therefore consider, along with the German Government, the Commission and GVL, that in the present case the circumstances are not 'comparable' and that it is therefore not even possible to speak of a 'satellite' within the meaning of the directive.

42. (ii) Similarly, turning to the other aspect mentioned, I agree with the German Government, the Commission and GVL that in the present case there is not even a 'communication to the public by satellite', in that the chain of communication is not uninterrupted, as required by the directive.

43. In the situation I have just described, the public does not receive the signal direct from the satellite using a satellite dish; instead, it captures it using a simple aerial, as the signal has been converted and retransmitted by repeater stations situated in France and Germany, in FM and long wave respectively.

44. Moreover, as GVL pointed out at the hearing, the role of the satellite in the present case is merely to replace the previous terrestrial digital audio circuit, which carried the signal from the Paris studios to the Felsberg facility from the inception of operations by Europe 1 and which continues to be used if the satellite malfunctions (see points 13 to 15 above). The only innovation brought about by the switch to the satellite system is therefore in the method of feeding the repeater station, without entailing any change from the point of view of the public

receiving the signal from Felsberg. As the repeater station located there continues to transmit on long wave — as in the past, when the signal arrived by cable and not by satellite — listeners have not had to make any modification to the equipment they have always used to receive the programmes of Europe 1.

45. Directive 93/83 introduced special rules for a 'communication to the public by satellite' specifically to take account of the fact that 'individual reception [of the satellite signal] is possible and affordable *nowadays*', as stated in the sixth recital. [8] From this I deduce, as does GVL, that the rules laid down for that type of communication relate to the new means by which the public can receive the signal, which have been made possible by technological advances, and not to those that have long been available, as in the case of Hertzian waves.

46. Nor is it possible, to my mind, to get around the obstacle represented by the interruption of the chain of communication by proposing a broad interpretation of 'normal technical procedures', as do the French Government, Lagardère and SPRE.

47. In particular, the French Government maintained at the hearing that the fact that the signal is retransmitted in Hertzian waves does not preclude referring in this regard to an 'uninterrupted chain' of communication, because in its opinion satellites that do not transmit signals directly receivable by the public are also covered by the directive. In the view of that government, therefore, to deny that the insertion of a terrestrial stage between the satellite and the public is 'a normal technical procedure', and hence not to hold that there is communication to the public by satellite in the present case, would render meaningless the part of Article 1(1) of Directive 93/83 that also defines as satellites those satellites which, while not using frequency bands reserved for transmission to the public, carry signals that can be received individually in 'circumstances ... comparable' to those encountered when such frequency bands are used.

48. It seems to me, however, that the end result of that objection is to readmit through the window (of the concept of an 'uninterrupted chain') what has been ejected through the door (of the concept of 'comparable circumstances'). In any case, I feel bound to reply that accepting a concept of 'normal technical procedures' covering only technical modifications to the signal that do not alter its status as a satellite transmission, [9] which I consider correct and which the Commission also suggests, will not

8 — Emphasis added.

9 — As in the case of procedures that allow the signal to be transmitted from the studios to the satellite (such as the use of a cable from the studios to the station transmitting to the satellite) and to be received by the public upon its return to earth (such as the connection to a satellite dish and the cabling of a house).

render the directive meaningless. On the contrary, it appears to me that this would provide a more consistent interpretation of the concepts of 'satellite' and 'communication to the public by satellite'.

49. As I have pointed out above, the fact that listeners cannot receive the satellite signal direct means that it cannot be claimed that the individual reception of the signal takes place in 'circumstances ... comparable' to those in which the signal is received direct by the public, with the consequence that it is not possible to speak here of a 'satellite' within the meaning of the directive (see points 39 to 41 above).

50. Similarly, the essential conversion of the satellite signal into Hertzian waves before it can be received by the public cannot be described as a 'normal technical procedure', with the consequence that in the present case there is no 'uninterrupted chain' and hence no communication to the public by satellite.

51. I therefore believe that it follows that a broadcast such as that at issue here does not fall within the concept of a 'communication to the public by satellite' within the meaning of Directive 93/83.

52. As I have stated several times, it is only if this type of communication takes place that, within the meaning of the directive, the remuneration payable to the performers and producers of the phonograms used is governed solely by the law of the State from which the signal is broadcast. It follows that in the present case it will not be possible to apply that rule.

53. I would add, finally, that I consider this conclusion to be further supported by a systematic interpretation of Directive 93/83.

54. In the part of the directive dealing with retransmission to the public by cable of programmes from other Member States that were originally broadcast by satellite, the directive does not in fact require the exclusive application of the law of the country of origin of the signal, as is the case where there is a 'communication to the public by satellite'. On the contrary, according to Article 8(1), the Member States in which retransmission takes place must ensure that 'the applicable copyright and related rights are observed', obviously applying their own legislation in this regard and not that of the country of origin of the initial (satellite) broadcast of the signal.

55. If the rule that only the law of the State from which the satellite signal originates

applies is inoperative where the programme is received by the public by means of a cable retransmission, there is no reason, as the Commission observes, to preclude the same solution from applying where the retransmission is effected not via cable but via Hertzian waves, as in the present case.

56. On the basis of the foregoing, I therefore propose that the answer to be given to the first question from the Cour de cassation should be that, where part of the public receives radio programmes produced in a Member State via a signal sent first to a satellite and then from the satellite to a terrestrial transmitter located in another Member State, which in turn broadcasts the said programmes in long wave towards the first State, a 'communication to the public by satellite' within the meaning of Directive 93/83 does not occur, so that, as regards the phonograms broadcast from the Member State in which the terrestrial transmitter is located, Community law does not prevent the single equitable remuneration provided for in Directive 92/100 for the performers and producers of the phonograms from being determined on the basis of the law of the said State.

The second question

57. If the reply to the first question is in the affirmative, the national court asks a second question, by which it seeks to establish in particular whether a company broadcasting the original signal from a Member State may deduct from the fee claimed from it in respect of all the transmissions carried out in the national territory the sums paid by its subsidiary in the Member State where a terrestrial transmitter is located which, although broadcasting the signal mainly towards the first Member State, enables it to be received as well in areas of the other Member State close to the transmitter.

58. According to the German Government, there are no provisions of Community law of which the interpretation could be of use in replying to the question under examination. GVL adopts the same line of argument, asserting that if Directive 93/83 is not applicable in the present case, then Directive 92/100 cannot be applicable either.

59. The French Government and SPRE, on the other hand, submit that there is no need to answer this question, the answer to the first having been that no payment may be claimed in Germany. In the alternative, however, SPRE observes that no possibility of a deduction mechanism can be inferred from Directives 93/83 and 92/100; in any event, and in the further alternative, it maintains that it should be permissible to deduct the sum paid in France from the amount payable in Germany.

60. Lastly, the Commission and Lagardère consider that a double payment would not be in compliance with Article 8(2) of Direc-

tive 92/100, which provides that the user of a phonogram for any communication to the public is required to pay a 'single equitable' remuneration to the performers and producers of the phonogram. According to Lagardère, it follows that it should be permissible to deduct the sum paid in Germany from the amount payable in France. The Commission reaches the opposite conclusion, arguing instead that the amount paid in France should be deducted in Germany. In the Commission's view, however, such a solution should be applied only in the alternative; in its opinion, in the absence of greater harmonisation in that regard the Court should confine itself to establishing that the total of the amounts claimed as a single equitable remuneration does not exceed a level that permits the broadcasting of phonograms on reasonable terms and takes account of the actual and potential size of the audience, without going so far as to impose a deduction mechanism directly.

61. For my part, I would observe first that Directive 92/100 harmonised certain aspects of various rules applied in the Member States but did not alter the predominant role that the principle of territoriality plays in the field of copyright and related rights, a principle which, moreover, is also recognised by international law in this regard. [10]

10 — See Article 11*bis* of the Convention for the Protection of Literary and Artistic Works signed in Berne on 9 September 1886 (last revised in Paris on 24 July 1971), which states that 'it shall be a matter for legislation in the countries of the Union [established by the Convention] to determine the conditions under which the rights [in question] may be exercised, but these conditions shall apply only in the countries where they have been prescribed'.

62. Community law therefore permits the competent authorities of the two Member States concerned each to require, under their own national law, payment of the remuneration accruing to the performers and producers of the phonograms broadcast to the public from their own territory.

63. As we have just seen, however, Article 8 (2) of the directive provides that a 'single equitable' remuneration is to be paid to the performers. From this it can be deduced — the view taken by the Commission and Lagardère — that, when they each demand payment of the remuneration due to the performers under their own national law, the aforesaid national authorities must take account of the requirements I have indicated regarding the remuneration.

64. It is therefore necessary to ascertain whether, and to what extent, those requirements may also play a role in the present case: an examination of them may provide useful guidance for a case such as this, in which the remuneration to be classified is decided by reference to phonograms that fall, so to speak, under the jurisdiction of several national authorities.

65. It appears to me that Article 8(2) describes the remuneration per se in general

terms, not as something linked to a single Member State. I therefore believe that the requirements in question can also be relied on for classification of the remuneration in the situation under consideration here.

66. I shall therefore proceed to examine them in that way, but I would state straight away that in reality the debate relates solely to the requirement that the remuneration be 'equitable'. It seems obvious to me that the requirement of a single remuneration cannot provide useful guidance in the present case, given that it means simply that the remuneration paid by the user of the phonogram must take overall account of the rights of the various parties involved (performers and producers) but without even implicitly suggesting that payment must take place in a single Member State. That is the only reading of the requirement in question that is consistent with the spirit of the provision in question, which provides that 'this remuneration [shall be] shared between the relevant performers and phonogram producers. Member States may, in the absence of agreement between [those persons], lay down the conditions as to the sharing of this remuneration between them'.

67. That said, let us see whether on the other hand it is possible to provide an answer to the question under examination by analysing the requirement for the remuneration to be equitable.

68. In that regard I would point out first of all that, as I indicated in my Opinion in the *SENA* case [11] and as the Court confirmed in its judgment, the concept of 'equitable remuneration' is a Community concept, given that it is used in a directive that contains no — direct or indirect — reference to domestic legislation for its interpretation. Hence in such cases, it must be given 'an autonomous and uniform interpretation throughout the Community; that interpretation must take into account the context of the provision and the purpose of the legislation in question'. [12]

69. However, not only does the directive not provide a precise definition of the concept in question, it does not even provide direct or indirect indications in that regard. It must therefore be deduced that the intention was to allow a considerable degree of latitude to national systems of law, presumably in the belief that more far-reaching harmonisation in this field was neither necessary nor appropriate. [13] It is therefore for the Member States and national courts to determine the

11 — Case C-245/00 [2003] ECR I-1251.

12 — See *SENA*, paragraph 23, and my Opinion in that case, point 32.

13 — Opinion in *SENA*, points 34 and 37.

most appropriate criteria for ensuring adherence to that Community concept.

70. The freedom accorded to them in that connection is not unbounded, however, but must be exercised in relation to the application of a Community concept and, consequently, is subject to supervision by the Community institutions, and by the Court of Justice in particular, in accordance with the conditions and limits that flow from the directive, as well as, more generally, the principles and scheme of the Treaty. [14]

71. In particular, as the Court stated in *SENA*, 'whether the remuneration, which represents the consideration for the use of a commercial phonogram, ... is equitable is to be assessed ... in the light of the value of that use in trade'. [15] Moreover, the methods of applying the directive chosen by the Member States must be 'such as to enable a proper balance to be achieved between the interests of performing artists and producers in obtaining remuneration for the broadcast of a particular phonogram, and the interests of third parties in being able to broadcast the phonogram on *terms that are reasonable*'. [16]

14 — See the Opinion in *SENA*, points 38 and 40, and the *SENA* judgment, paragraph 38.

15 — The *SENA* judgment, paragraph 37.

16 — The *SENA* judgment, paragraph 46 (my italics).

72. It appears to me that in the circumstances of the present case, in which the legislation of two Member States is applicable and Community law makes no provision for coordination between them in order to avoid double charging, the 'equitable' nature of the remuneration must also be ensured from that standpoint, in other words by making certain that, for the broadcast of a phonogram, an undertaking does not pay in total more than the value of the use of the phonogram in trade. Otherwise, as the Commission observes, the broadcast would not take place 'on terms that are reasonable'.

73. Although it is therefore true that it is for the Member States concerned to lay down the rules applicable in the circumstances under discussion here, it is also true that they must ensure that the total amount paid as 'equitable' remuneration takes due account of the real commercial value of the use of the phonogram in the respective territories, and in particular, in so far as concerns us here, of the size of the actual and potential audience in each of them.

74. The application of that criterion may therefore also mean that, where necessary, each Member State may require payment only of the amounts due for the transmission of the phonogram in its own territory.

However, since the directive does not go so far as to impose mechanisms for dividing the remuneration, I consider that this consequence cannot be expected to come about automatically but might possibly be arrived at on the basis of the general assessment referred to above.

75. On the basis of the foregoing, I therefore propose that the answer to the second question from the national court should be that where the relevant legislation of two Member States applies to the broadcast of a phonogram, the remuneration payable to the performers and producers of the phonogram is 'equitable' within the meaning of Article 8 (2) of Directive 92/100 if its total amount takes due account of the real commercial value of the use of the phonogram in the Member States concerned and, in particular, of the size of the actual and potential audience in each of them.

V — Conclusion

76. In the light of the foregoing considerations, I propose that the Court reply as follows to the questions submitted to it for a preliminary ruling by the French Cour de cassation:

(1) Since in cases where part of the public receives radio programmes produced in a Member State via a signal sent first to a satellite and then from the satellite to a

terrestrial transmitter located in another Member State, which in turn broadcasts the said programmes in long wave towards the first State, a 'communication to the public by satellite' within the meaning of 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 does not occur, as regards the phonograms broadcast from the Member State in which the terrestrial transmitter is located, Community law does not prevent the single equitable remuneration provided for in Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property for the performers and producers of the phonograms used from being determined on the basis of the law of the said State.

(2) Where the relevant legislation of two Member States applies to the broadcast of a phonogram, the remuneration payable to the performers and producers of the phonogram is 'equitable' within the meaning of Article 8(2) of the aforementioned Council Directive 92/100/EEC of 19 November 1992 if its total amount takes due account of the real commercial value of the use of the phonogram in the Member States concerned and, in particular, of the size of the actual and potential audience in each of them.