

**Case C-575/23****Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice****Date lodged:**

15 September 2023

**Referring court:**

Conseil d'État (Belgium)

**Date of the decision to refer:**

31 August 2023

**Applicants:**

FT

AL

ON

**Defendant:**

Belgian State

**Intervener:**

Orchestre national de Belgique

**I. Facts and the contested measure**

- 1 By an application lodged on 26 July 2021, FT, AL and ON seek the annulment of the Royal Decree of 1 June 2021 concerning the related rights of artistic personnel of the Belgian National Orchestra (*Moniteur belge* No 2021042025 of 4 June 2021).
- 2 Before the adoption of the contested measure, the exploitation of the related rights of musicians of the Belgian National Orchestra ('the BNO'), intervener, were negotiated, on a case-by-case basis, within the framework of the Basic Consultative Committee.

- 3 Since 2016, negotiations have taken place between the BNO and the musicians' delegations, within the framework of the Basic Consultative Committee, in order to reach an agreement on the subject of remuneration for related rights. To date, the negotiations have not been successful.
- 4 In September 2019, the BNO decided to offer musicians the opportunity of signing individualised contracts providing for certain lump sum amounts, with those amounts being paid immediately to the musicians signing the contract in question and being reserved pending the adoption of the Royal Decree for the others.
- 5 The Royal Decree – the contested measure – was adopted on 1 June 2021. The preamble thereto states, in particular, the following:

‘Having regard to 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;

...

Whereas Article XI.205(4) of the Belgian Code of Economic Law allows, where performances are given by performers pursuant to an employment contract or under a statute, the economic rights resulting from the related rights to be transferred to the employer provided that the transfer of rights is expressly provided for and that the performance falls within the scope of the contract or statute;

Whereas the proper functioning of the Belgian National Orchestra requires all rights related to the performance or exploitation of a performance by performers of the Belgian National Orchestra to be transferred to it;

Whereas Directive (EU) 2019/790 ... enshrines in Article 18 thereof the principle of appropriate and proportionate remuneration for performers, taking into account the principle of contractual freedom and a fair balance of rights and interests;

Whereas recital 73 of that directive states that a lump sum payment can also constitute proportionate remuneration and that Member States may take into account the specificities of each sector;

Whereas the remuneration provided for in the present decree seems appropriate and proportionate, taking into account the specificities of the sector, the profits generated by the exploitation of the related rights of musicians of the Belgian National Orchestra and the remuneration for the related rights applied within Belgian orchestras of a similar size and legal position;

...’.

The wording of the Royal Decree states the following:

‘Article 1. Within the meaning of this directive,

1. “performer” shall mean a musician of the Belgian National Orchestra engaged under an administrative law statute or under an employment contract, excluding any musician engaged as a musical director or soloist.

...

8. “service” shall mean any performance by performers which is distributed, audio-visually recorded or incorporated in a phonogram with a view to its exploitation by the Belgian National Orchestra or its beneficiaries, for a duration of at least three hours and at most four hours or the duration of a “live” concert. ...

Article 2. The performer shall transfer to the Belgian National Orchestra[,] in accordance with the provisions of this decree, the related rights in any performances carried out within the framework of the Belgian National Orchestra.

Article 3

1. The following related rights shall be transferred to the Belgian National Orchestra under Article 2 in return for the allowances set out in Articles 4 and 6: ...

2. The rights transferred under Article 2 and in the first paragraph of this article shall be for the entire duration of the related rights and shall apply worldwide.

...

Article 4.

1. In return for the transfer of the rights transferred under Articles 2 and 3, performers who have given a full year of service shall be granted an annual allowance of EUR 600 gross. Performers who have not given a full year of service shall be granted an annual allowance of EUR 24 per performance. ...

2. That amount shall be paid to the performers as “related rights”.

3. The annual allocation of EUR 600 provided for in the first paragraph of this article covers the transfer of related rights provided for in Articles 2 and 3 up to a maximum of 25 performances. ...

...

Studio recordings of phonograms ... are not included in that quota. They shall give rise to a specific allowance of EUR 3000 per phonogram, to be shared equally between the performers involved.

Performances that are audiovisually recorded and broadcast on television for which the organiser pays a remuneration to the Belgian National Orchestra shall not be included in that quota. The remuneration received by the Belgian National Orchestra for the television broadcast is shared equally between the performers involved.

If the quota set out in this paragraph is exceeded, an additional allowance of EUR 24 gross per performance shall be due to the performers.

4. In addition to the allowance provided for in paragraph 1 of this article, the performer shall be entitled to an additional allowance in respect of related rights in the context of the performance of a contract concluded between a company governed exclusively by private law and the Belgian National Orchestra. The payment of that additional allowance cannot under any circumstances make the performance of that contract by the Belgian National Orchestra unprofitable.

That allowance shall be set, for all performers, at 50% of the Belgian National Orchestra's net revenue after deduction of variable production costs (conductor, additional musicians, choirs and soloists, venue, recording fees, marketing, dramaturgy) to be shared equally between the performers involved.

...?

## II. Legal framework

### 1. EU law

6 Directive (EU) 2019/70 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 (OJ 2019 L 130, p. 92) strengthens the protection of authors and performers. It lays down a right to fair remuneration in exploitation contracts of authors and performers.

7 Recitals 72 and 73 state:

'72. Authors and performers tend to be in the weaker contractual position when they grant a licence or transfer their rights, including through their own companies, for the purposes of exploitation in return for remuneration, and those natural persons need the protection provided for by this Directive to be able to fully benefit from the rights harmonised under Union law. That need for protection does not arise where the contractual counterpart acts as

an end user and does not exploit the work or performance itself, which could, for instance, be the case in some employment contracts.

73. The remuneration of authors and performers should be appropriate and proportionate to the actual or potential economic value of the licensed or transferred rights, taking into account the author's or performer's contribution to the overall work or other subject matter and all other circumstances of the case, such as market practices or the actual exploitation of the work. A lump sum payment can also constitute proportionate remuneration, but it should not be the rule. Member States should have the freedom to define specific cases for the application of lump sums, taking into account the specificities of each sector. Member States should be free to implement the principle of appropriate and proportionate remuneration through different existing or newly introduced mechanisms, which could include collective bargaining and other mechanisms, provided that such mechanisms are in conformity with applicable Union law<sup>7</sup>.

- 8 Recitals 74 to 78 concern the need for authors and performers to have information to assess the continued economic value of their rights, including in comparison to the remuneration received for their transfer, the need for transparency in this area and the need for a remuneration adjustment mechanism.
- 9 Recital 82 states: 'Nothing in this Directive should be interpreted as preventing holders of exclusive rights under Union copyright law from authorising the use of their works or other subject matter for free, including through non-exclusive free licences for the benefit of any users'.
- 10 Chapter 3, entitled 'Fair remuneration in exploitation contracts of authors and performers', includes, in particular, the following provisions:

#### Article 18 – Principle of appropriate and proportionate remuneration

1. Member States shall ensure that where authors and performers license or transfer their exclusive rights for the exploitation of their works or other subject matter, they are entitled to receive appropriate and proportionate remuneration.

2. In the implementation in national law of the principle set out in paragraph 1, Member States shall be free to use different mechanisms and take into account the principle of contractual freedom and a fair balance of rights and interests.

#### Article 19 – Transparency obligation

#### Article 20 – Contract adjustment mechanism

1. Member States shall ensure that, in the absence of an applicable collective bargaining agreement providing for a mechanism comparable to

that set out in this Article, authors and performers or their representatives are entitled to claim additional, appropriate and fair remuneration from the party with whom they entered into a contract for the exploitation of their rights, or from the successors in title of such party, when the remuneration originally agreed turns out to be disproportionately low compared to all the subsequent relevant revenues derived from the exploitation of the works or performances.

...

#### Article 22 – Right of revocation

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

2. Specific provisions for the revocation mechanism provided for in paragraph 1 may be provided for in national law

...

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

...

#### Article 26 – Application in time

1. This Directive shall apply in respect of all works and other subject matter that are protected by national law in the field of copyright on or after 7 June 2021.

2. This Directive shall apply without prejudice to any acts concluded and rights acquired before 7 June 2021.

...

#### Article 29 – Transposition

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 7 June 2021. ...

## 2. National law

- 11 At the time of the adoption of the contested measure, Book XI of the Code of Economic Law included the following provisions, in Chapter 3 ‘Related rights’ of Title 5 ‘Copyright and related rights’:

‘Article XI.203. ...

The related rights recognised in this chapter shall be movable, transferable and transmissible, in full or in part, in accordance with the rules laid down in the Civil Code. They may, in particular, be disposed of or be the subject of an ordinary or exclusive licence.

...

Article XI.205

1. The performer alone shall have the right to reproduce his performance or to have it reproduced in any manner or form whatsoever (direct or indirect, provisional or permanent, in full or in part).

...

4. Where performances are carried out by a performer pursuant to a contract of employment or under a statute, the economic rights may be transferred to the employer, provided that the transfer of those rights is expressly provided for and that the performance falls within the scope of the contract or statute.

...

Collective agreements may determine the scope and terms of the transfer.

...

Article XI.206 [...]

4. The amount of remuneration shall be, unless otherwise provided, proportionate to the revenue from the performance of the audiovisual work. In that case, the producer shall send the performer, at least once a year, a statement of the revenue received according to each mode of exploitation of the work.

...’.

- 12 The law transposing Directive 2019/70 was promulgated on 19 June 2022. That law amended some of the aforementioned provisions.

Article XI.205 now reads as follows:

‘1. The performer alone shall have the right to reproduce his performance or to have it reproduced in any manner or form whatsoever (direct or indirect, provisional or permanent, in full or in part).

...

4. Where performances are carried out by a performer pursuant to a contract of employment or under a statute, the economic rights may be transferred or licensed to the employer, provided that the transfer or licence is expressly provided for and that the performance falls within the scope of the contract or statute.

...’.

The right to appropriate and proportionate remuneration in the context of exploitation agreements is enshrined in the following terms:

‘Article XI.205/1. Where performers transfer or license their exclusive rights for the exploitation of their performances in the context of an exploitation agreement, they shall retain the right to receive appropriate and proportionate remuneration’.

Lastly, the new Article XI.205/5 provides as follows:

‘Article XI.205/5. Collective agreements may, in particular, determine:

1. the extent of the transfer or licensing of rights;
2. the conditions for the transfer or licensing of rights;
3. the rules relating to the remuneration for the transfer or licensing;

...’.

### **III. Essential arguments of the parties in the main proceedings**

#### ***1. The first plea in law***

- 13 The applicants submit that a possible transfer of related rights can take place only with authorisation from their holder. They interpret the fourth subparagraph of Article XI.205(4) of the Code of Economic law as providing for the transfer of related rights under collective agreements, in particular where performances are carried out pursuant to a contract of employment or under a statute and the economic rights are transferred to the employer. They submit that the transfer of performers’ statutory related rights can take place only under a regulatory act, such as the statute, but with authorisation from the holders of those rights, by means of a collective agreement resulting from union consultation. However, no

collective agreement has been concluded concerning the extent and terms of the transfer of their related rights under the contested measure.

- 14 The defendant and intervener contend that paragraph 4 of Article XI.205 establishes special arrangements for the transfer of related rights, in particular where performances are carried out pursuant to a contract of employment or under a statute. They submit that there would be no need, in that case, to comply with civil law rules. The transfer of related rights could be provided for by the contract of employment or under the statute, as the case may be. The conclusion of a collective agreement concerning the extent and terms of the transfer is only an option.

## ***2. The fifth plea in law***

### *Argument of the applicants*

- 15 The fifth plea alleges, in particular, an infringement of Article 17 of the Charter of Fundamental Rights of the European Union ('the Charter'), Articles 10 and 288 TFEU and Articles 18 to 20 and 22 of Directive 2019/790.

#### First part

- 16 Related rights constitute intellectual property rights the protection of which is guaranteed by, inter alia, Article 17 of the Charter. The transfer of such rights is possible, but only under the conditions laid down in paragraph 4 of Article XI.205 of the Code of Economic Law, so that the extent and terms of the transfer of those rights can be determined either by means of an individual agreement or by means of a 'collective agreement' under civil law, which assumes agreement between the parties.
- 17 In the public sector, employment relationships between employers and employees and, in particular, the conditions of remuneration, are, by their nature, set unilaterally by the administrative authority through regulatory acts adopted after negotiation in accordance with the law. The BNO and its personnel, whether statutory or contractual, are part of this legal situation under administrative law. It is against that background that the contested measure allows for the unilateral transfer of the related rights of statutory and contractual musicians, without the individual or collective agreement of the interested parties. However, with regard to economic rights, they cannot be transferred without the agreement of their holder, which could take the form of a collective agreement. In so far as it fails to provide for the agreement of each musician individually – which does not fit well with the principles of equality and non-discrimination which should govern the determination of similar situations in a regulatory act – the contested measure cannot be adopted without a collective agreement.
- 18 As statutory employees, the applicants consider that they are covered by the provisions of Chapter 3 of Directive 2019/790. The performers engaged under

contracts of employment are covered by the scope *ratione personae* of those provisions, whereas performers engaged under a statute are not expressly excluded.

- 19 Article 18 of Directive 2019/790 must be read in the light of recitals 72 and 73 thereof. The BNO does not act as an end user within the meaning of recital 72 of the directive but intends to acquire the rights of performers to exploit their performances itself with third parties. It follows that both performers engaged under a contract of employment and those engaged under the Statute of the Belgian National Orchestra must benefit from the protection provided for by the directive.

#### Second part

- 20 In a second part, the applicants note that, adopted on 1 June 2021 to enter into force on the day of its publication in the *Moniteur belge*, namely Friday 4 June 2021, the contested measure was published *in extremis*, on the last working day before Monday 7 June 2021, the deadline for transposing Directive 2019/790.
- 21 According to the applicants, by adopting the contested measure just before the deadline for transposing the directive, the defendant believed it could escape the requirements of that directive which strengthen the protection of performers and provide for their right to negotiate contractual terms for the transfer of their rights, to receive appropriate and proportionate remuneration and to claim additional remuneration in the event the performance is successful.
- 22 The contested measure infringes those obligations to the extent it involves the compulsory transfer of related rights, provides, in return for that transfer, for remuneration, which is neither appropriate nor proportionate, does not provide for any additional remuneration in the event the performance is successful and offers no right to information or right of scrutiny over the exploitation of such rights.
- 23 It follows from the judgment of 18 December 1997, *Inter-Environnement Wallonie* (C-129/96, EU:C:1997:628) that, during the period laid down in a directive for its implementation, the Member States must refrain from taking any measures liable seriously to compromise the result prescribed by the directive in question. That conclusion was confirmed in the judgment of 4 July 2006, *Adeneler and Others* (C-212/04, EU:C:2006:443). In accordance with that case-law, the national authority cannot adopt provisions that infringe the directive that is being implemented but must, on the contrary, already comply with it.
- 24 The ‘acts concluded’ before 7 June 2021, referred to in Article 26(2) of Directive 2019/790, cannot be acts ‘adopted’ by the public authorities, which must comply with the directive already in force. The contested measure is a general rule, which is subordinate to the directive’s regime, even though it was adopted between 9 June 2019 and 7 June 2021. Article 26 of the directive must be interpreted as protecting the rights acquired by the performers and not the rights acquired by the users. Lastly, that provision protects only the rights acquired lawfully, that is to

say in accordance with EU law. Article 26(2) applies to rights acquired after 6 June 2019 only if they do not seriously compromise the objectives of Directive 2019/790.

- 25 Article 26 of the directive must be interpreted in the light of recital 82 thereto, as protecting the rights acquired by the performers and not the rights acquired by the users.

*Argument of the defendant*

First part

- 26 The defendant notes that Article 26 of Directive 2019/790 applies without prejudice to acts concluded and rights acquired before 7 June 2021. On the other hand, the financial status of statutory employees, such as musicians of the BNO, does not fall within the scope of Directive 2019/790. The applicants could not therefore claim the application of Articles 18 to 23 of the directive, which concern only performers bound by contracts for the exploitation of their related rights, and not statutory employees.

Second part

- 27 The defendant disputes having taken measures liable seriously to compromise the result prescribed by the directive. That directive is not intended to apply to performers engaged under statute but only to those engaged under a contract. Although the contested act falls, according to the defendant, outside the scope of the directive, it states that it chose to follow its general line when drawing up the contested measure. It therefore expressly referred to the directive in the preamble and provided for appropriate and proportionate remuneration for the musicians of the BNO.
- 28 The contested measure does not exclude the possibility, for the performers to whom the contested measure is addressed, to conclude an individual or collective agreement with the BNO to determine the terms and extent of the transfer. The contested measure itself contains all the information that the musicians of the orchestra need to be able to determine whether their remuneration is appropriate and proportionate.
- 29 The defendant disputes the failure to comply with Article 20 of the directive, since the applicants do not demonstrate that the remuneration provided for by the contested measure turns out to be excessively low compared to the income derived from the exploitation of the work or performances. The fact that the contested measure does not provide for appropriate and fair additional remuneration in the event the performance is successful does not compromise the result prescribed by the directive and does not exclude the possibility for performers to claim additional remuneration in the event the performance successful and to negotiate that remuneration with the BNO by means of a separate agreement.

30 Furthermore, the fact that the contested measure does not provide for the possibility of revoking the transfer of rights where there is a lack of exploitation, in particular for performers engaged under a contract of employment, does not compromise the result prescribed by the directive. Orchestral performances, which involve performances by all the musicians that make up the orchestra, fall within the scope of the optional exclusion referred to in the second subparagraph of Article 22(2) of Directive 2019/790.

*Argument of the intervener*

31 The intervener considers that Articles 18 to 23 of Directive 2019/790, which were not included in the original Commission Proposal, are worded in vague terms which give the Member States a wide margin of discretion for transposing the directive.

32 According to the intervener, the applicants cannot invoke that directive for the following reasons:

- it is not directly applicable under Belgian law;
- for reasons of legal certainty, Article 26 states that the directive (and therefore the transposing provisions) do not in any event apply to rights acquired before 7 June 2021. Transfers carried out before 7 June 2021 are not therefore covered by the directive. The contested measure entered into force on 4 June 2021, so that the provisions of that directive cannot in any way affect it;
- the directive is invoked only with regard to Articles 18 to 22 thereof, concerning ‘exploitation contracts’, although it is doubtful that those articles are applicable to the transfer of related rights in performances carried out pursuant to a contract of employment or under a statute.

33 In any event, the contested measure is not liable to compromise the result prescribed by Directive 2019/790. The system of remuneration provided for by the contested measure fully complies with the result prescribed by Directive 2019/790.

34 A right may be acquired pursuant to a contract or other legal or regulatory provision that result in the right being acquired. According to Article 26 of Directive 2019/790, the rights that have been transferred pursuant to a contract or otherwise before 7 June 2021 are not affected by the directive. The rules laid down in that directive do not apply to legal acts prior to 7 June 2021.

**3. The sixth plea in law**

35 The sixth plea in law alleges infringement of various provisions, including Article 17 of the Charter and Articles 18 to 22 of Directive 2019/790.

*Argument of the applicants*

- 36 As to whether the directive is applicable, the applicants submit that the contested measure was not ‘concluded’ but ‘adopted’ unilaterally by the defendant.

## First part

- 37 The remuneration for related rights as provided for by the contested measure is neither appropriate nor proportionate and is not based on any objective or relevant factor that would establish its reasonableness.
- 38 It follows from recital 73 of Directive 2019/790 that, in order for the remuneration to be considered appropriate and proportionate to the actual or potential economic value of the transferred rights, it is necessary to take into account the performer’s contribution to the performance and all other circumstances, such as market practices or the actual exploitation of the work. A lump sum payment can constitute proportionate remuneration, taking into account the specificities of each sector but the amount must be set objectively and with regard to the aforementioned relevant factors.

To determine the remuneration provided for by the contested measure, the defendant did not rely on any existing data in the sector, taking into account the specificities of that sector. By way of example, the revenue generated by the exploitation of the related rights of musicians of the BNO is unknown and cannot therefore serve as a benchmark.

- 39 During the discussions which took place between 2016 and 2019, the BNO’s proposals evolved, so that between May 2017 and February 2021, its proposal increased from EUR 320 to 600 for 25 concerts, without taking into account any objective or relevant factors.
- 40 No account was taken, by comparison, of the remuneration for related rights existing for many years in the only orchestra of a similar size and legal position as the BNO, namely the Royal Theatre of La Monnaie. With regard to the latter, the mechanism adopted on the basis of a ‘collective agreement’ provides for a remuneration in the amount of approximately EUR 2 500 per year. The comparison demonstrates that musicians of the BNO are allocated a remuneration which is clearly not appropriate or proportionate and is in no way justified by objective, relevant or reasonable considerations.

## Second part

- 41 In a second part, the applicants argue that the contested measure does not include any mechanism guaranteeing that additional remuneration will be paid to the holders of related rights in the event their performances are successful.
- 42 Although an additional remuneration is provided for in Article 4(4) of the contested measure, it will depend on the performance of a contract concluded

between the BNO and a private limited company, the purpose of which is to produce shows by using, in particular, a mechanism for tax relief. That collaboration will allow for maximum privatisation of profits for the benefit of the private company and will impose maximum production costs on the BNO to the detriment of the State and the musicians.

- 43 The contested measure therefore in no way addresses the principle set out in Directive 2019/790 aiming to guarantee that musicians receive fair remuneration in the event of the successful performance or exploitation of the work.
- 44 Article 4(4) of the contested measure, which does not provide any transparency in respect of the contracts and production costs, makes the payment of the additional allowance completely random, since the payment cannot in any way make the performance of the contract unprofitable for the BNP and in so far as all variable production costs are deductible.
- 45 The lump sum payment provided for by the contested measure is simply indexed. That measure brings about a transfer for the duration of the related rights (50 years) and applies worldwide. It makes no provision for amending the fixed remuneration in the event that, during that period, all of the income derived from BNO performances were to show that such remuneration was excessively low in comparison thereto. If a recording is commercially successful, that remuneration will never be adjusted. This constitutes an infringement of Article 20 of Directive 2019/790 and the principles of appropriate and proportionate remuneration.

#### Third part

- 46 None of the provisions of the contested measure allow musicians to review the criteria used to determine the remuneration for rights transferred, nor do they provide for any joint calculation involving both parties or communication or sharing of data relating to the exploitation of rights by the BNO. The musicians, in so far as they have no say over the management of the private law partner company, have no possibility of verifying the results of the exploitation of related rights generated by performances carried out pursuant to a contract between that company and the BNO.

#### Fourth part

- 47 The contested measure does not provide for any mechanism allowing for the withdrawal of related rights by their holders where there is a lack of exploitation by the BNO and does not therefore comply with the principles set out in Directive 2019/790.

#### *Argument of the defendant*

- 48 The defendant maintains that the applicants are not addressees of Directive 2019/790 and that it does not concern statutory employees.

## First part

- 49 Article 18 of Directive 2019/790 does not preclude the remuneration for related rights of performers from being set by royal decree for performers with the status of statutory employees. As for performers employed under a contract of employment, the author of the contested measure takes into account the principle of contractual freedom, as is apparent from the recitals thereof.
- 50 In order to assess whether the remuneration for performers is appropriate and proportionate, it is necessary to take into account the fact that the rights transferred by each of the musicians of the orchestra have no actual or potential economic value, without copyright of the recorded works, without the related rights of other BNO performers and without the related rights of the producer of the recordings transferred. The related rights of performers of the orchestra represent only a small proportion of the intellectual rights that must be obtained by the BNO in order to exploit freely the musicians' performances. The remuneration of performers covered by the contested measure is appropriate and proportionate to the actual and potential economic value of the rights transferred.
- 51 Furthermore, the plea raised by the applicants relates exclusively to the lump sum payment in the amount of EUR 600 and disregards the numerous other remunerations provided for by the contested measure, which correspond to all or part of the net revenue arising from the exploitation of the rights transferred and are therefore manifestly proportionate and appropriate.
- 52 Article 26(2) of Directive 2019/790 refers to an 'act' and not a 'contract' or 'agreement', so that the expression 'act concluded' also covers acts adopted by the executive power.

## Second part

- 53 The directive does not require the remuneration of BNO performers to be fixed on the basis of the possible success of their performance in all cases, but only when the remuneration proves to be excessively low in relation to the revenue generated from the exploitation of the work or performance.

## Third part

- 54 The criteria for determining the lump sum payment of EUR 600 referred to in Article 4(3) of the contested measure are clear and can easily be reviewed by the musicians, who know the number of performances carried out and who know whether the performances were recorded. The criteria for determining other proportionate remuneration are equally clear (net revenue after deduction of variable production costs). The musicians need only reconstruct the overall amount of net revenue from the percentage they received.

*Argument of the intervener*

- 55 According to the intervener, Articles 18 to 22 of Directive 2019/790 are applicable only in the context of an exploitation agreement. In the present case, the BNO has not concluded an exploitation agreement with its musicians.
- 56 With regard to the first part, relying on the English- and Dutch-language versions of Directive 2019/790, and also recitals 61 and 73 thereof, it argues that that the reference in Article 18 to 'proportional' rather than 'proportionate' remuneration is incorrect. Remuneration therefore complies with the directive if it is proportionate (to the actual and potential economic value of licensed or transferred rights), whether it is a lump sum payment or proportionate remuneration.
- 57 The contested measure indeed provides for 'appropriate and proportionate remuneration' within the meaning of the directive since the musicians receive an annual lump sum payment of EUR 600 covering 25 performances and several allowances proportionate to BNO's net revenue arising from the exploitation of their related rights. It is clear that the allowances provided for by the contested measure are therefore reasonably related to the actual economic value of the rights thus transferred. Lastly, the remuneration provided for by the contested measure is in line with industry practice.
- 58 Article 18 of Directive 2019/790 in no way requires that the transfer be carried out by an agreement separate from the statute of the musicians in question but provides, on the contrary, in paragraph 2 thereof, that 'Member States shall be free to use different mechanisms'.

*Second part*

- 59 The allowances provided for by the contested measure cannot be regarded as remuneration that is 'disproportionately low compared to all the subsequent relevant revenues derived from the exploitation of the works or performances' in so far as they consist, in particular, of remuneration proportionate to the net revenue arising from the exploitation of related rights and in so far as they amount to between 50 and 100% of BNO's net revenue.

**IV. The referring court's assessment**

- 60 The questions whether Directive 2019/790 applies to related rights transferred in the context of a statutory employment relationship, on the one hand, and whether that directive precludes the adoption of a regulatory unilateral act relating to the transfer of related rights before 7 June 2021, on the other, concern the substance.
- 61 For the first time in the context of the present proceedings, while the preamble to the contested measure expressly refers to Directive 2019/790 and justifies the conformity of the first with the second, the defendant argues that 'the applicants cannot claim the application of Articles 18 to 23 of the directive which form

Chapter 3 entitled “Fair remuneration in exploitation contracts of authors and performers” and which concern, as the title indicates, only performers bound by contracts for the exploitation of their related rights, and not statutory employees’.

- 62 The intervener also submits that ‘it is doubtful that those articles are applicable to the transfer of related rights in performances carried out pursuant to a contract of employment or under a statute’. It refers to recital 72 of the directive.
- 63 Furthermore, the defendant and intervener submit that the directive applies ‘without prejudice to acts concluded and rights acquired before 7 June 2021’, while the contested measure allows for the transfer of the related rights of BNO musicians as of 4 June 2021.
- 64 The arguments of the defendant and intervener raise the questions as to whether Directive 2019/790, in particular Articles 18 to 23 thereof, covers the transfer of related rights in the context of a statutory employment relationship and, if so, whether the defendant was required to comply with those provisions when it adopted the contested measure which concerns the unilateral transfer of the related rights of BNO musicians during the period laid down for transposing that directive.
- 65 Those questions concern the interpretation of EU law and must therefore be referred to the Court of Justice of the European Union under Article 267 TFEU.

#### **V. Questions referred**

1. Must Articles 18 to 23 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 be interpreted as precluding the transfer, by means of a regulatory act, of the related rights of statutory employees in performances carried out in the context of the employment relationship?
2. If Question 1 is answered in the affirmative, must the concepts of ‘acts concluded’ and ‘rights acquired’ within the meaning of Article 26(2) 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 be interpreted as covering, in particular, the transfer of related rights by means of a regulatory act adopted before 7 June 2021?