Case C-37/24

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:

19 January 2024

Referring court:

Curtea de Apel București (Romania)

Date of the decision to refer:

23 May 2023

Applicant at first instance and appellant on appeal:

Uniunea Producătorilor de Fonograme din România (UPFR)

Defendant at first instance and appellant on appeal:

DADA Music SRL

Intervener at first instance and respondent on appeal:

Asociația Radiourilor Locale și Regionale (ARLR)

Subject matter of the main proceedings

Appeals brought before the referring court, the Curtea de Apel București (Court of Appeal, Bucharest), against the judgment by which the Tribunalul București (Regional Court, Bucharest) dismissed in part an action seeking an order for payment of certain outstanding remuneration, in a dispute between the Uniunea Producătorilor de Fonograme din România (Romanian Phonogram Producers Union; 'the UPFR') and SC DADA Music SRL ('DADA Music SRL').

Subject matter and legal basis of the request

On the basis of Article 267 TFEU, the referring court seeks the interpretation of Article 8(2) of Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property ('Directive

2006/11[5]') and of the second paragraph of Article 16(2) of 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 ('Directive 2014/26'), read in conjunction with Articles 17 and 52 of the Charter of Fundamental Rights of the European Union.

Questions referred for a preliminary ruling

Must Article 8(2) of Directive 2006/115/EC and the second paragraph of Article 16(2) of Directive 2014/26/EU, read in conjunction with Articles 17 and 52 of the Charter of Fundamental Rights of the European Union, be interpreted as meaning that they:

(1) preclude national legislation which does not guarantee a minimum (flat-rate) equitable remuneration for rightholders (phonogram producers), represented by collective management organisations, irrespective of the revenues obtained or the costs incurred by broadcasting organisations?

(2) If the first question is answered in the negative, do those articles preclude national legislation which abolishes, with immediate effect, the minimum (flat-rate) remuneration determined on the basis of a methodology previously negotiated between the collective management organisation and the users, without altering the criteria for calculating remuneration and without providing for a maximum period for negotiating new agreements (methodologies) for quantifying equitable remuneration?

(3) If the first two questions are answered in the negative, is the national court entitled and, if so, required to ascertain whether the remuneration percentages calculated in relation to the actual revenues declared by broadcasting organisations are equitable and reasonable for rightholders, on the one hand, and users, on the other, or, on the contrary, whether they are manifestly derisory or, as the case may be, manifestly excessive, and what are the criteria that may be used for the purposes of such an assessment?

(4) If the third question is answered in the affirmative, if the national court finds that the remuneration due under the methodology amended by the new national legislation is derisory, is that court entitled and/or required to apply criteria other than that of declared revenue – such as, for example, the determination of remuneration on the basis of the costs incurred by broadcasters in respect of the broadcasting activity, the remuneration paid by similar broadcasters, or other similar criteria – in order to ensure that rightholders receive appropriate remuneration, without prejudice to the legitimate interests of users, that is to say, without being derisory, but also without being unduly burdensome for broadcasting organisations?

Provisions of European Union law and case-law relied on

Article 8(2) of Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property.

Second paragraph of Article 16(1) of 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.

Articles 17 and 52 of the Charter of Fundamental Rights of the European Union.

Judgment of 19 November 1991, *Francovich and Bonifaci* v *Italy*, Joined Cases C-6/90 and C-9/90, EU:C:1991:428; judgment of 5 October 2004, *Pfeiffer and Others*, Joined Cases C-397/01 to C-403/01, EU:C:2004:584; judgment of 18 January 2022, *Thelen Technopark Berlin*, C-261/20, EU:C:2022:33.

Provisions of national law relied on

Articles 112, 145, 164 and 166 of *Legea nr. 8/1996 privind dreptul de autor și drepturile conexe, republicată în Monitorul Oficial al României, Partea I, nr. 489 din 14 iunie 2018* (Law No 8/1996 on copyright and related rights, as republished in Monitorul Oficial al României, Part I, No 489, of 14 June 2018; 'Law No 8/1996').

Article 112 provides, in paragraph 1, for the right to equitable remuneration of performers and phonogram producers for the direct or indirect use of phonograms published for commercial purposes or the reproduction of such phonograms by broadcasting or any other means of communication to the public, and, in paragraph 2, that the amount of such remuneration is to be determined using methodologies in accordance with the procedures provided for in Articles 163 to 165.

Article 145(1)(c) and (d) lay down the mandatory nature of collective management for the exercise of the right to broadcast musical works and the right to single equitable remuneration.

Article 164 of Law No 8/1996 sets out, in paragraph 1, the main criteria to be taken into account in the negotiation of the methodology, and, in paragraphs 2 and 3, provides as follows:

'2. In the context of the negotiations, collective management organisations may require, from the same category of users, either flat-rate remuneration, or percentage remuneration established as a percentage share of the revenue received by each user from the activity in which the repertoire is used or, in the absence of revenue, the costs generated by the use. For broadcasting activity, collective

management organisations may require percentage remuneration only, differentiated in direct proportion to the extent of use by each user – broadcasting organisation – of the repertoire collectively managed in the context of that activity.

3. The remuneration referred to in paragraph 2 shall be reasonable in relation to the economic value and the extent of the use of the rights at issue, taking into account the nature and scope of the use of the work and other subject matter, as well as in relation to the economic value of the service provided by the collective management organisation. Collective management organisations and users must give reasons for the method for calculating such remuneration.'

Article 166 of Law No 8/1996 provides as follows:

'1. Collective management organisations, users or user associations referred to in Article 163(3)(b) and (c) may submit a new request to initiate the procedures for negotiating tariffs and methodologies only after the expiry of a period of three years from the date of their publication in final form in Monitorul Oficial al României, Partea I.

2. In the case of the negotiations referred to in Article 114(4), any of the parties concerned may submit a new request to initiate the procedures for negotiating the methodologies only after the expiry of a period of three years from the date of their publication in final form in Monitorul Oficial al României, Partea I.

3. Until the new methodologies are published, the previous methodologies shall remain valid'.

Metodologia privind remunerația datorată artiștilor interpreți sau executanți și producătorilor de fonograme pentru radiodifuzarea fonogramelor publicate în scop comercial ori a reproducerilor acestora de către organismele de radiodifuziune (Methodology concerning the remuneration payable to performers and phonogram producers for the broadcasting of phonograms published for commercial purposes or the reproduction of such phonograms by broadcasting organisations) established in its final form by Decizia civilă nr. 153A/12 mai 2011 a Curții de Apel București, Secția a IX-a civilă și pentru cauze de proprietate intelectuală (judgment No 153 of 12 May 2011, Court of Appeal (Division IX – Civil and Intellectual Property Cases), Bucharest), on the basis of Decision No 216/2011 issued by the Oficiul Român pentru Drepturile de Autor (ORDA) (Romanian Copyright Office) ('the remuneration methodology'), which provides that:

'4. Broadcasting organisations, referred to as users within the meaning of this methodology, shall pay on a quarterly basis to the collective management organisations designated by ORDA as collectors for performers and phonogram producers remuneration for the economic rights associated with the use of commercial phonograms or reproductions of such phonograms, determined by applying a percentage, as indicated in the following table, to the basis of

calculation provided for in point 5 of the methodology, for each radio broadcaster owned.

Extent of the use of commercial phonograms in programmes	Performers and phonogram producers
Up to and including 35%	1.8%
More than 35%, up to and including 65%	2.4%
More than 65%	3%

Broadcasting organisations shall pay on a quarterly basis to the collective management organisations designated by ORDA as collectors for performers and phonogram producers remuneration in respect of the economic rights associated with the use of phonograms published for commercial purposes or reproductions of such phonograms, calculated by applying to the total monthly gross revenue from broadcasting activities a percentage of 3% in the case of use of phonograms for 100% of the total broadcasting time of the programmes. In the case of less use, the percentage of 3% shall be reduced in direct proportion to the extent of the use of the phonograms in relation to the total broadcasting time of the programmes. …

5. The basis of calculation to which the percentages referred to in point 3 shall apply is the total gross monthly revenue, minus value added tax, obtained by users of broadcasting activities, including, by way of example and not limited to, revenues from advertising, trade, subscriptions, announcements and information, premium-rate telephone calls and SMS messages, sponsorships, radio and television competitions and games, rental of broadcasting space, other financial contributions, reception authorisations, revenue from broadcasting made to order, revenue from associations or other activities related to broadcasting. The basis of calculation shall also include revenues of third-party companies, in particular those of production and advertising sales companies, in so far as they are received in respect of the broadcasting activity of the user in relation to the phonogram or phonograms published for commercial purposes, broadcast and, in so far as there is an unfair transfer, contrary to good faith commercial practices, specific to the sector concerned. In the absence of revenue, the basis of calculation shall be the total costs incurred by the user for the broadcasting activity (for example, personnel costs, costs of services provided by third parties, purchases of any kind, etc.) in the quarter for which the remuneration is due.

6. The amounts resulting from the application of the percentages to the basis of calculation may not be less than the equivalent in Romanian lei (RON) – calculated in accordance with the BNR [National Bank of Romania] rate on the due date – of EUR 500 per quarter, as minimum remuneration payable by users

for each local radio broadcaster owned, and EUR 1 000 per quarter, as minimum remuneration payable by users for each national radio broadcaster owned'.

Article II of *Legea nr.74/2018 pentru modificarea și completarea Legii nr. 8/1996 privind dreptul de autor și drepturile conexe, publicată în Monitorul Oficial al României, Partea I nr. 268 din 27 martie 2018* (Law No 74/2018 amending and supplementing Law No 8/1996 on copyright and related rights, published in Monitorul Oficial al României, Part I, No 268 of 27 March 2018; 'Law No 74/2018').

'Article II

2. The methodologies provided for in Article 131 of Law No 8/1996 on copyright and related rights, as subsequently amended and supplemented, shall remain in force until the expiry of the period for which they were adopted.

3. The provisions of the methodologies drawn up in accordance with Article 131 and 131[1] of [Law No 8/1996], which contain provisions relating to fixed or minimum amounts/remuneration applicable in the case of broadcasting, contrary to the provisions of paragraph 2 of Article 131[1], as amended by this law, shall no longer be applicable from the date of expiry of a period of 90 days from the publication of this law in Monitorul Oficial al României, Part I'.

Succinct presentation of the facts and procedure in the main proceedings

1 On 20 October 2011, the UPFR, as the collective management organisation for the related rights of phonogram producers, and DADA Music SRL, which operates a local radio broadcaster, entered into a non-exclusive licence for the broadcasting of commercial phonograms. On the basis of that licence, DADA Music SRL obtained the right to broadcast (to communicate to the public) phonograms through its radio broadcaster, and assumed the corresponding obligation to pay equitable remuneration. [In the licence], it was provided that, depending on the extent of the use of the phonograms in the radio programmes, DADA Music SRL was liable to pay remuneration established as a percentage, calculated in relation to the total revenue it obtained, and, in the absence of revenue, in relation to the total costs incurred for the broadcasting activity. It was also provided that the percentage amounts thus calculated could not be lower than the equivalent in RON of EUR 250 per quarter calculated according to the BNR rate on the due date, as the minimum remuneration payable by users for each local radio broadcaster owned, and EUR 500 per quarter for each national radio broadcaster owned.

2 After the entry into force of Law No 74/2018, DADA Music SRL refused to continue to pay the minimum flat-rate remuneration, as it considered that that law was immediately applicable and that it was therefore liable to pay remuneration only in relation to revenue actually obtained. DADA Music SRL paid, for the period from 1 July 2018 to 30 June 2019, remuneration of approximately

RON 1 000, calculated as a percentage. The UPFR, in turn, issued an invoice and subsequently claimed in legal proceedings the minimum remuneration due according to the remuneration methodology.

3 On 24 June 2019, the UPFR brought an action before the Tribunalul București (Regional Court, Bucharest) seeking an order that DADA Music SRL pay the minimum remuneration due according to the remuneration methodology. In essence, the UPFR was of the view that that minimum remuneration was applicable until the date of adoption of a new methodology. DADA Music SRL requested that the action be dismissed as unfounded.

4 The Tribunalul București granted the application for leave to intervene made by the Asociația Radiourilor Locale și Regionale (ARLR) [Association of Local and Regional Radio], which noted that the minimum remuneration imposed by the previous law on broadcasters was burdensome, particularly in the case of small radios, which are local in nature. The ARLR argued from the outset for the abolition of the minimum flat-rate remuneration, asserting that its imposition was contrary to Article 16(2) of Directive 2014/26, according to which rights to remuneration must be reasonable in relation to the economic value of the use of those rights.

5 The accounting expert's report drawn up in the proceedings pending before the Regional Court found differences in remuneration amounting to RON 16.13 (including VAT) and RON 70.68 in default interest for the scenario of non-application of the minimum remuneration, and RON 14 707.51 (including VAT) and RON 8 019.56 in default interest for the alternative scenario of application of the rules relating to minimum flat-rate remuneration.

6 By judgment of 28 January 2022, the Tribunalul București held that the percentage remuneration was applicable and that the minimum flat-rate remuneration was no longer in force during the period in question. Consequently, that court upheld the action in part and ordered DADA Music SRL to pay to the UPFR the amounts of RON 16.13 (including VAT) and RON 70.68 in default interest. In essence, the Tribunalul București declared Article 164(2) of Law No 8/1996 on copyright and related rights and Article II of Law No 74/2018 applicable.

7 The UPFR appealed against that judgment before the referring court, and submitted that the provisions of Article II of Law No 74/2018 are applicable only in the context of the negotiation of a new methodology, whereas the provisions of the remuneration methodology remain in force in the meantime.

8 It is important to note that, on 7 January 2020, following the administrative measures ordered by the Oficiul Român pentru Drepturile de Autor (ORDA) (Romanian Copyright Office) against the UPFR, DADA Music SRL concluded a new licensing agreement with the UPFR (which, however, does not concern the

period at issue in the case), in which the minimum flat-rate remuneration is no longer mentioned, but only those percentages.

9 In essence, due to insufficient (declared) revenues obtained from radio broadcasters, the UPFR often requested and required radio broadcasters to pay the minimum remuneration provided for by the remuneration methodology. ORDA issued a decision ordering the UPFR to cease collecting minimum flat-rate remuneration. The UPFR appealed against that decision before the administrative courts. On 6 May 2022, the Înalta Curte de Casație și Justiție (High Court of Cassation and Justice, Romania) dismissed that administrative appeal and upheld the same interpretation of Article II of Law No 74/2018 as that supported by DADA Music SRL and upheld by the Tribunalul București in the judgment under appeal. The referring court submits that that decision could be relevant in the context of the main proceedings, in so far as it has acquired the authority of a final decision with regard to the UPFR, and the latter therefore has an obligation, in its administrative law relations with ORDA, to stop collecting minimum flat-rate remuneration.

The essential arguments of the parties in the main proceedings

10 In essence, the UPFR maintained that an interpretation of Article II of Law No 74/2018 to the effect that it is immediately applicable to the main proceedings is contrary to Article 8(2) of Directive 2006/115 and Article 16(2) of Directive 2014/26. The UPFR submits that Directives 2006/11[5]/EC and 2014/26 and Article 15 of the World Intellectual Property Organization Performances and Phonograms Treaty do not exclude the possibility of setting minimum flat-rate remuneration and preclude interference by the national legislature in the implementation of a methodology in force which provides for such minimum remuneration.

11 DADA Music SRL considers that, under Article II of Law No 74/2018, the minimum remuneration payable to collective management organisations is no longer applicable and that that article is immediately applicable, so that it has to pay only remuneration calculated on a percentage basis.

Succinct presentation of the reasoning in the request for a preliminary ruling

12 In the context of some earlier disputes, differences of interpretation have arisen in national judicial practice as regards the meaning of the concept of local radio broadcaster (post radio local). In those disputes, the UPFR supported the position that each local radio station (emițător local) is equivalent to a separate local radio broadcaster, on the ground that those local radio stations make the radio broadcaster's broadcasts accessible to a new audience. Another argument was based on the fact that, in some cases, advertisements broadcast locally were different. In practice, those assertions – sometimes accepted by national courts – led to certain minimum remuneration being calculated at a high level, which was

considered burdensome by broadcasters with local activity and often had modest economic results. The circumstances described led to the amendment of Law No 8/1996 on copyright and related rights by Article II of Law No 74/2018.

13 The referring court considers, as a preliminary point, that Article II of Law No 74/2018 must be interpreted as meaning that the provisions of point 6 of the remuneration methodology ceased to have effect on the expiry date laid down in that article, with the result that, for the period at issue in the proceedings, DADA Music SRL was not required to pay minimum remuneration, but only remuneration in relation to the revenue actually obtained.

14 According to the Curtea de Apel, it is clear and common ground that Article 8(2) of Directive 2006/115 and the second paragraph of Article 16(2) of Directive 2014/26 do not preclude the setting of minimum flat-rate remuneration, provided that the amount of that remuneration is not excessive and burdensome for users (broadcasters). In principle, the minimum remuneration set by the remuneration methodology complied with the requirements imposed by EU law.

15 As regards the first question referred to the Court for a preliminary ruling, the referring court notes that the provisions of EU law of which interpretation is sought provide that the remuneration payable to phonogram producers must be appropriate and reasonable. However, those directives leave it to the national legislature to provide for mechanisms by which appropriate remuneration in the sense envisaged is achieved. From that perspective, nothing in the relevant provisions or the explanatory recitals justifies the interpretation that it is mandatory to provide for (minimum) flat-rate remuneration. Consequently, that question should be answered in the negative.

16 As regards the second question referred for a preliminary ruling, the view of the Curtea de Apel is more nuanced. It notes that the remuneration methodology provides for remuneration as a percentage, but also minimum flat-rate amounts for cases in which the user does not obtain economic results or, due to other circumstances, carries out the broadcasting activity without also obtaining economic benefits. It considers that the system established by that methodology must be regarded as a whole and that, in so far as it was anticipated that the national legislature would no longer allow minimum remuneration to be agreed upon, it is possible that the provisions relating to the remuneration percentages and/or the basis of calculation were different, precisely in order to ensure appropriate remuneration for holders of related rights.

17 By Article II of Law No 74/2018, the national legislature deprived a component of the remuneration system of effectiveness with immediate effect, without amending the criteria for calculating remuneration and without providing for a maximum period for negotiating new agreements (methodologies) in order to quantify equitable remuneration, by amending in favour of radio broadcasters the system prior to Law No 74/2018, without there being any coherent system in place to ensure that the remuneration payable to phonogram producers would also be

reasonable for those phonogram producers, and not lower, derisory [remuneration]. Moreover, in the current situation, it is foreseeable that users will not be very enthusiastic about negotiating a new methodology, as the one currently in force is favourable.

18 As regards the cases submitted by the UPFR, which show significant differences between the remuneration paid by broadcasters in 2022 (some paid quarterly remuneration equal to or even lower than RON 500, while others paid substantial remuneration, in the order of tens or hundreds of thousands of RON), the Curtea de Apel notes that, in the current system, some broadcasters may pay derisory remuneration, which probably corresponds to the economic value of the use (which may be non-profit-making or very low-profit), but it is doubtful whether it also corresponds to the economic value of the rights managed.

19 Secondly, according to the referring court, the methodologies have effects similar to a legislative act, [which is] enforceable *erga omnes*, for all rightholders and users in their respective sectors, and the legislature should be recognised as having the right to intervene, for reasons of general policy, by means of immediately applicable provisions even in relation to the methodologies currently in force. It could not therefore be held that the provisions of EU law preclude in principle a legislative provision such as that contained in Article II of Law No 74/2018, which declares minimum (flat-rate) remuneration inapplicable with immediate effect.

20 As regards the third and fourth questions referred for a preliminary ruling, the Curtea de Apel emphasises the importance of establishing remuneration for rightholders which is not derisory, since such a situation would in practice amount to expropriation in the private interest, which would constitute an infringement of Article 17 of the Charter of Fundamental Rights of the European Union. The Curtea de Apel considers that, since the national courts are required to interpret the national legislation adopted in order to transpose EU directives in such a way as to ensure their effectiveness, those courts should be recognised as having the power to ascertain whether the percentage remuneration is equitable and reasonable both for rightholders and for users or, on the contrary, whether it is manifestly derisory or, as the case may be, manifestly excessive.

21 From that perspective, the referring court asks which criteria may be used for the purposes of such an assessment, considering that those criteria are not a question of national law, but are above all a question of EU law, since directives must be interpreted and applied in a uniform manner. Similarly, it asks whether, if it were to be found that the remuneration payable under national law is derisory in nature, the national court is entitled or even obliged to apply alternative criteria to that of declared revenue.

22 Finally, the Curtea de Apel notes that, according to the judgment of the Court [of Justice] in *Francovich and Bonifaci* v *Italy*, an incorrectly transposed directive cannot be applied *contra legem* in relations between private individuals, but that

does not render the action inadmissible (as ARLR maintains) for at least two reasons. First, it is for the national court to interpret all the national rules, but not exclusively the national rules transposing a directive, in such a way as to ensure that, also in relations between individuals, the requirements of EU law are fully complied with (effectiveness) (see, to that effect, the judgment of the Court of Justice in *Pfeiffer and Others*). As is also apparent from the third and fourth questions referred for a preliminary ruling, the national court has specific means at its disposal to ensure a result that is in conformity with the binding rules of EU law. Secondly, if it were not possible to interpret the national law in such a way as to achieve an application, but not an infringement, of the binding rules of EU law, the individual harmed could have an action for damages against the State (see, to that effect, *Francovich and Bonifaci* v *Italy*). Those principles were reaffirmed relatively recently in the judgment in *Thelen Technopark Berlin*.