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ECLI:EU:C:2020:677

JUDGMENT OF THE COURT (Grand Chamber)

8 September 2020 (*)

(Reference for a preliminary ruling – Intellectual property – Rights related to copyright – Directive 2006/115/EC – Article 8(2) – Use of phonograms in the European Union – Right of the performers to equitable remuneration shared with the phonogram producers – Applicability to nationals of third States – Performances and Phonograms Treaty – Articles 4 and 15 – Reservations notified by third States – Limitations of the right to equitable remuneration that may, on the basis of reciprocity, follow, in the European Union, for nationals of third States from those reservations – Article 17(2) and Article 52(1) of the Charter of Fundamental Rights of the European Union – Fundamental right to the protection of intellectual property – Requirement that any limitation must be provided for by law, respect the essence of the fundamental right and be proportionate – Division between the European Union and the Member States of competences to set those limitations – Division of competences in relations with third States – Article 3(2) TFEU – Exclusive competence of the European Union)

In Case C-265/19,

REQUEST for a preliminary ruling under Article 267 TFEU from the High Court (Ireland), made by decision of 11 January 2019, received at the Court on 29 March 2019, in the proceedings

Recorded Artists Actors Performers Ltd

v

**Phonographic Performance (Ireland) Ltd,
Minister for Jobs, Enterprise and Innovation,
Ireland,**

Attorney General,

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, R. Silva de Lapuerta, Vice-President, J.-C. Bonichot, M. Vilaras, E. Regan, M. Safjan, P.G. Xuereb, L.S. Rossi and I. Jarukaitis, Presidents of Chambers, M. Ilešič (Rapporteur), L. Bay Larsen, T. von Danwitz, C. Toader, D. Šváby and N. Piçarra, Judges, Advocate General: E. Tanchev,

Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 4 February 2020,

after considering the observations submitted on behalf of:

- Recorded Artists Actors Performers Ltd, by Y. McNamara, Barrister-at-Law, L. Scales, Solicitor, and M. Collins, Senior Counsel,
- Phonographic Performance (Ireland) Ltd, by H. Sheehy, Solicitor, P. Gallagher, Senior Counsel, J. Newman, Senior Counsel, and J. O’Connell, Barrister-at-Law,
- Ireland, by M. Browne, P. Clifford and A. Joyce, acting as Agents, P. McCann, Senior Counsel, and J. Bridgeman, Senior Counsel,

– the European Commission, by J. Samnadda, J. Norris, É. Gippini Fournier and A. Biolan, acting as Agents,
after hearing the Opinion of the Advocate General at the sitting on 2 July 2020,
gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 8 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 (OJ 2006 L 376, p. 28), read in the light, in particular, of the World Intellectual Property Organisation (WIPO) Performances and Phonograms Treaty, adopted in Geneva on 20 December 1996 and approved on behalf of the European Community by Council Decision 2000/278/EC of 16 March 2000 (OJ 2000 L 89, p. 6; ‘the WPPT’).

2 The request has been made in proceedings between, on the one hand, Recorded Artists Actors Performers Ltd (‘RAAP’) and, on the other, Phonographic Performance (Ireland) Ltd (‘PPI’), the Minister for Jobs, Enterprise and Innovation (Ireland), Ireland and the Attorney General concerning the right of nationals of third States to a single equitable remuneration when they have contributed to a phonogram which is used in Ireland.

Legal context

The Vienna Convention on the Law of Treaties

3 Article 19 of the Vienna Convention on the Law of Treaties of 23 May 1969 (*United Nations Treaty Series*, vol. 1155, p. 331) provides:

‘A State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation ...’

4 Article 21 of that convention provides:

‘1. A reservation established with regard to another party in accordance with Articles 19, 20 and 23:

(a) modifies for the reserving State in its relations with that other party the provisions of the treaty to which the reservation relates to the extent of the reservation; and

(b) modifies those provisions to the same extent for that other party in its relations with the reserving State.

2. The reservation does not modify the provisions of the treaty for the other parties to the treaty *inter se*.

...’

The Rome Convention

5 The International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations was concluded in Rome on 26 October 1961 (‘the Rome Convention’).

6 The European Union is not a party to the Rome Convention. However, all of its Member States other than the Republic of Malta are.

7 Article 2 of the Rome Convention provides:

‘1. For the purposes of this Convention, national treatment shall mean the treatment accorded by the domestic law of the Contracting State in which protection is claimed:

(a) to performers who are its nationals, as regards performances taking place, broadcast, or first fixed, on its territory;

(b) to producers of phonograms who are its nationals, as regards phonograms first fixed or first published on its territory;

...’

2. National treatment shall be subject to the protection specifically guaranteed, and the limitations specifically provided for, in this Convention.’

8 As set out in Article 4 of the Rome Convention:

‘Each Contracting State shall grant national treatment to performers if any of the following conditions is met:

- (a) the performance takes place in another Contracting State;
- (b) the performance is incorporated in a phonogram which is protected under Article 5 of this Convention;

...'

9 Article 5 of the Rome Convention provides:

'1. Each Contracting State shall grant national treatment to producers of phonograms if any of the following conditions is met:

- (a) the producer of the phonogram is a national of another Contracting State (criterion of nationality);
 - (b) the first fixation of the sound was made in another Contracting State (criterion of fixation);
 - (c) the phonogram was first published in another Contracting State (criterion of publication).
2. If a phonogram was first published in a non-contracting State but if it was also published, within thirty days of its first publication, in a Contracting State (simultaneous publication), it shall be considered as first published in the Contracting State.

3. By means of a notification deposited with the Secretary-General of the United Nations, any Contracting State may declare that it will not apply the criterion of publication or, alternatively, the criterion of fixation. Such notification may be deposited at the time of ratification, acceptance or accession, or at any time thereafter; in the last case, it shall become effective six months after it has been deposited.'

10 Article 17 of the Rome Convention provides:

'Any State which, on October 26, 1961, grants protection to producers of phonograms solely on the basis of the criterion of fixation may, by a notification deposited with the Secretary-General of the United Nations at the time of ratification, acceptance or accession, declare that it will apply, for the purposes of Article 5, the criterion of fixation alone ...'

The WPPT

11 The European Union and its Member States are parties to the WPPT. This international agreement entered into force for the European Union and certain Member States, including Ireland, on 14 March 2010. For the remaining Member States, it entered into force on an earlier date. About 100 States in total are parties to the WPPT.

12 Article 1(1) of the WPPT is worded as follows:

'Nothing in this Treaty shall derogate from existing obligations that Contracting Parties have to each other under the [Rome Convention].'

13 Article 2 of the WPPT states:

'For the purposes of this Treaty:

- (a) "performers" are actors, singers, musicians, dancers, and other persons who act, sing, deliver, declaim, play in, interpret, or otherwise perform literary or artistic works or expressions of folklore;
- (b) "phonogram" means the fixation of the sounds of a performance or of other sounds, or of a representation of sounds, other than in the form of a fixation incorporated in a cinematographic or other audiovisual work;
- (c) "fixation" means the embodiment of sounds, or of the representations thereof, from which they can be perceived, reproduced or communicated through a device;
- (d) "producer of a phonogram" means the person, or the legal entity, who or which takes the initiative and has the responsibility for the first fixation of the sounds of a performance or other sounds, or the representations of sounds;

...'

14 As set out in Article 3 of the WPPT, headed 'Beneficiaries of Protection under this Treaty':

- 1. Contracting Parties shall accord the protection provided under this Treaty to the performers and producers of phonograms who are nationals of other Contracting Parties.
- 2. The nationals of other Contracting Parties shall be understood to be those performers or producers of phonograms who would meet the criteria for eligibility for protection provided under the Rome Convention, were all the Contracting Parties to this Treaty Contracting States of that

Convention. In respect of these criteria of eligibility, Contracting Parties shall apply the relevant definitions in Article 2 of this Treaty.

3. Any Contracting Party availing itself of the possibilities provided in Article 5(3) of the Rome Convention or, for the purposes of Article 5 of the same Convention, Article 17 thereof shall make a notification as foreseen in those provisions to the Director General of [WIPO].’

15 Article 4 of the WPPT, headed ‘National Treatment’, provides:

‘1. Each Contracting Party shall accord to nationals of other Contracting Parties, as defined in Article 3(2) [of this Treaty], the treatment it accords to its own nationals with regard to the exclusive rights specifically granted in this Treaty, and to the right to equitable remuneration provided for in Article 15 of this Treaty.

2. The obligation provided for in paragraph 1 does not apply to the extent that another Contracting Party makes use of the reservations permitted by Article 15(3) of this Treaty.’

16 Article 15 of the WPPT, headed ‘Right to Remuneration for Broadcasting and Communication to the Public’, is worded as follows:

‘1. Performers and producers of phonograms shall enjoy the right to a single equitable remuneration for the direct or indirect use of phonograms published for commercial purposes for broadcasting or for any communication to the public.

2. Contracting Parties may establish in their national legislation that the single equitable remuneration shall be claimed from the user by the performer or by the producer of a phonogram or by both. Contracting Parties may enact national legislation that, in the absence of an agreement between the performer and the producer of a phonogram, sets the terms according to which performers and producers of phonograms shall share the single equitable remuneration.

3. Any Contracting Party may, in a notification deposited with the Director General of WIPO, declare that it will apply the provisions of paragraph 1 only in respect of certain uses, or that it will limit their application in some other way, or that it will not apply these provisions at all.

4. For the purposes of this Article, phonograms made available to the public by wire or wireless means in such a way that members of the public may access them from a place and at a time individually chosen by them shall be considered as if they had been published for commercial purposes.’

17 Article 23(1) of the WPPT provides:

‘Contracting Parties undertake to adopt, in accordance with their legal systems, the measures necessary to ensure the application of this Treaty.’

18 As stated in Article 33 of the WPPT:

‘The Director General of WIPO is the depositary of this Treaty.’

19 Whilst the ratifications of the WPPT by the Member States of the European Union, the European Union itself and numerous third States were not coupled with reservations under Article 15(3) thereof, certain third States, including the United States of America, the Republic of Chile, the Republic of Singapore, the People’s Republic of China, the Commonwealth of Australia, the Russian Federation, the Republic of Korea, Canada, the Republic of India and New Zealand, have, on the other hand, entered such reservations.

20 Thus, inter alia, Notifications Nos 8, 66 and 92 relating to the WPPT contain the following declarations:

‘Pursuant to Article 15(3) of the [WPPT], the United States will apply the provisions of Article 15(1) of [that treaty] only in respect of certain acts of broadcasting and communication to the public by digital means for which a direct or indirect fee is charged for reception, and for other retransmissions and digital phonorecord deliveries, as provided under the United States law.’

‘... The People’s Republic of China does not consider itself bound by paragraph 1 of Article 15 of the [WPPT]. ...’

‘... In accordance with Article 15(3) of the [WPPT], ... the Republic of India declares that the provisions of Article 15(1) of the Treaty relating to a single equitable remuneration for performers and producers of phonograms will not be applied in India.’

Directive 2006/115

21 Recitals 5 to 7, 12 and 13 of Directive 2006/115 state:

‘(5) The creative and artistic work of authors and performers necessitates an adequate income as a basis for further creative and artistic work, and the investments required particularly for the production of phonograms and films are especially high and risky. The possibility of securing that income and recouping that investment can be effectively guaranteed only through adequate legal protection of the rightholders concerned.

(6) These creative, artistic and entrepreneurial activities are, to a large extent, activities of self-employed persons. The pursuit of such activities should be made easier by providing a harmonised legal protection within the [European Union]. ...

(7) The legislation of the Member States should be approximated in such a way as not to conflict with the international conventions on which the copyright and related rights laws of many Member States are based.

...

(12) It is necessary to introduce arrangements ensuring that an unwaivable equitable remuneration is obtained by authors and performers who must remain able to entrust the administration of this right to collecting societies representing them.

(13) The equitable remuneration may be paid on the basis of one or several payments at any time on or after the conclusion of the contract. It should take account of the importance of the contribution of the authors and performers concerned to the phonogram or film.’

22 Article 8 of Directive 2006/115, which is in Chapter II, headed ‘Rights related to copyright’, provides in paragraph 2:

‘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.’

23 Article 11 of Directive 2006/115, headed ‘Application in time’, states:

‘1. This Directive shall apply in respect of all copyright works, performances, phonograms, broadcasts and first fixations of films referred to in this Directive which were, on 1 July 1994, still protected by the legislation of the Member States in the field of copyright and related rights or which met the criteria for protection under this Directive on that date.

2. This Directive shall apply without prejudice to any acts of exploitation performed before 1 July 1994.

...

24 Directive 2006/115 codified and repealed 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 (OJ 1992 L 346, p. 61). It does not lay down a time limit for transposition, but refers, in Article 14 and Part B of Annex I, to the time limits for transposition of Directive 92/100 and the directives that amended it. Those time limits expired on 1 July 1994, 30 June 1995 and 21 December 2002 respectively.

25 The wording of Article 8(2) of Directive 2006/115 is identical to the wording of Article 8(2) of Directive 92/100.

Irish law

26 The Copyright and Related Rights Act 2000, in the version applicable in the main proceedings (‘the CRRA’), provides in section 38(1):

‘... where a person proposes to—

- (a) play a sound recording in public, or
- (b) include a sound recording in a broadcast or a cable programme service,

he or she may do so as of right where he or she—

- (i) agrees to make payments in respect of such playing or inclusion in a broadcast or a cable programme service to a licensing body, and
- (ii) complies with the requirements of this section.’

27 Section 184 of the CRRA, which is in Part II of that act, provides:

‘(1) A literary, dramatic, musical or artistic work, sound recording, film, typographical arrangement of a published edition or an original database, shall qualify for copyright protection where it is first lawfully made available to the public—

- (a) in the State; or
 - (b) in any country, territory, state or area to which the relevant provision of this Part extends.
- (2) For the purposes of this section, lawfully making available to the public a work in one country, territory, state or area shall be deemed to be the first lawful making available to the public of the work even where the work is simultaneously lawfully made available to the public elsewhere; and for this purpose, lawfully making available to the public of a work elsewhere within the previous 30 days shall be deemed to be simultaneous.’

28 Section 208(1) of the CRRA, which is in Part III thereof, states:

‘A performer has a right to equitable remuneration from the owner of the copyright in a sound recording where the sound recording of the whole or any substantial part of a qualifying performance which has been made available to the public for commercial purposes is—

- (a) played in public, or
- (b) included in a broadcast or cable programme service.’

29 Section 287 of the CRRA, which is also in Part III, provides:

‘In this Part, and in Part IV—

“qualifying country” means—

- (a) Ireland,
- (b) another Member State of the [European Economic Area (EEA)], or
- (c) to the extent that an order under section 289 so provides, a country designated under that section;

“qualifying individual” means a citizen or subject of, or an individual domiciled or ordinarily resident in, a qualifying country; and

“qualifying person” means an Irish citizen, or an individual domiciled or ordinarily resident in the State.’

30 Section 288 of the CRRA states:

‘A performance is a qualifying performance for the purposes of the provisions of this Part [III] and Part IV if it is given by a qualifying individual or a qualifying person, or takes place in a qualifying country, territory, state or area, in accordance with this Chapter.’

31 Section 289(1) of the CRRA states:

‘The Government may by order designate as a qualifying country enjoying protection under this Part [III] and Part IV any country, territory, state or area, as to which the government is satisfied that provision has been or will be made under its law giving adequate protection for Irish performances.’

The dispute in the main proceedings and the questions referred for a preliminary ruling

32 The plaintiff in the main proceedings, RAAP, a company governed by Irish law, is a collective management organisation for performers.

33 The first defendant in the main proceedings, PPI, likewise a company governed by Irish law, is a collective management organisation for phonogram producers.

34 RAAP and PPI entered into an agreement which stipulates how fees payable in Ireland for the playing in public – in bars and other publicly accessible places – or the broadcasting of recorded music must, after being paid by the users to PPI, be shared with the performers and, for that purpose, be paid on in part by PPI to RAAP. They are in disagreement, however, in relation to the

operation of that agreement as regards fees paid to PPI in cases where the music played was performed by a person who is neither a national nor a resident of an EEA Member State.

35 RAAP submits that all the fees payable must, in accordance with Article 8(2) of Directive 2006/115 and the international agreements to which that directive refers, be shared between the phonogram producer and the performer. The performer's nationality and residence are, in its view, irrelevant in that regard.

36 On the other hand, according to PPI, the regime established by the CRRA, under which performers who are neither nationals nor residents of an EEA Member State, and whose performances do not come from a sound recording carried out in the EEA either, are not entitled to receive a share of the fees that become payable when those performances are played in Ireland, is compatible with both Directive 2006/115 and the international agreements to which that directive refers. To pay those performers for the use in Ireland of phonograms to which they have contributed would fail to have regard to the approach of international reciprocity legitimately adopted by Ireland. In particular, if RAAP's position were followed, United States performers would be paid in Ireland even though, according to PPI, that third State grants Irish performers the right to equitable remuneration only to a very limited extent.

37 Because of that disagreement, RAAP takes the view that the sums that PPI pays it are insufficient and it brought an action against PPI before the High Court (Ireland), the referring court.

38 The referring court observes that sections 38, 184, 208, 287 and 288 of the CRRA have the combined effect that, except in the situation, which has not yet occurred, of an order being made under section 289 thereof, the CRRA precludes performers who are nationals of States outside the EEA and not domiciled or resident in the EEA from receiving a share of the fees that are payable when their performances recorded outside the EEA are played in Ireland, with the result that the phonogram producers, including those established outside the EEA, receive the totality of those fees.

39 Thus, in the case of sound recordings involving United States phonogram producers and United States performers, the entirety of the fees payable by users in Ireland may accrue for the benefit of those producers.

40 The referring court explains that that situation is due to the fact that the criteria for qualifying for remuneration that are set out in the CRRA are different for phonogram producers and for performers. However, it is, in its view, doubtful that such national legislation is compatible with Article 8(2) of Directive 2006/115 as that provision requires Member States to provide for a single equitable remuneration paid by the user which must be shared between the phonogram producer and the performer.

41 The referring court observes in that regard that the CRRA, which treats in the same way all performers who are nationals or residents of a Member State of the European Union, or of the EEA, complies with the rules of the FEU Treaty prohibiting any discrimination. The fact remains that the CRRA must also be compatible with Article 8(2) of Directive 2006/115, which lays down in general terms that each Member State must ensure that equitable remuneration is shared 'between the relevant performers and phonogram producers'. It needs to be determined to what extent, and how, that directive must be interpreted in the light of the Rome Convention, to which Ireland is a party, and of the WPPT, to which both Ireland and the European Union are parties.

42 The referring court adds that it is also necessary to make clear what the consequences are of the reservations entered by certain third States, such as the United States of America, under the WPPT. This issue raises in particular the question whether a Member State of the European Union has a discretion for the purpose of reacting to those reservations.

43 In view of what was at stake in the main proceedings, the Minister for Jobs, Enterprise and Innovation, Ireland and the Attorney General were involved in the proceedings as the second, third and fourth defendants.

44 In those circumstances, the High Court decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

(1) Is the obligation on a national court to interpret ... Directive 2006/115 ... in the light of the purpose and objective of the Rome Convention and/or the WPPT confined to concepts which are expressly referenced in the directive, or does it, alternatively, extend to concepts which are only to be found in the two international agreements? In particular, to what extent must Article 8 of the directive be interpreted in light of the requirement for “national treatment” under Article 4 of the WPPT?

(2) Does a Member State have discretion to prescribe criteria for determining which performers qualify as “relevant performers” under Article 8 of the directive? In particular, can a Member State restrict the right to share in equitable remuneration to circumstances where either (i) the performance takes place in [an EEA] country, or (ii) the performers are domiciles or residents of an EEA country?

(3) What discretion does a Member State enjoy in responding to a reservation entered by another Contracting Party under Article 15(3) of the WPPT? In particular, is the Member State required to mirror precisely the terms of the reservation entered by the other Contracting Party? Is a Contracting Party required not to apply the 30-day rule in Article 5 of the Rome Convention to the extent that it may result in a producer from the reserving party receiving remuneration under Article 15(1) but not the performers of the same recording receiving remuneration? Alternatively, is the responding party entitled to provide rights to the nationals of the reserving party on a more generous basis than the reserving party has done, i.e. can the responding party provide rights which are not reciprocated by the reserving party?

(4) Is it permissible in any circumstances to confine the right to equitable remuneration to the producers of a sound recording, i.e. to deny the right to the performers whose performances have been fixed in that sound recording?

Consideration of the questions referred

The first and second questions

45 By its first and second questions, which it is appropriate to examine together, the referring court asks, in essence, whether Article 8(2) of Directive 2006/115 must, in the light of the Rome Convention and/or the WPPT, be interpreted as precluding a Member State from excluding, when it transposes into its legislation the words ‘relevant performers’ which are contained in that provision and designate the performers entitled to a part of the single equitable remuneration referred to therein, performers who are nationals of States outside the EEA, with the sole exception of those who are domiciled or resident in the EEA and those whose contribution to the phonogram was made in the EEA.

46 It should be noted first of all that the terms of a provision of EU law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the European Union; that interpretation must take into account the wording of that provision, its context and the objectives pursued by the rules of which it forms part (see, to that effect, judgments of 19 September 2000, *Linster*, C-287/98, EU:C:2000:468, paragraph 43; of 22 September 2011, *Budějovický Budvar*, C-482/09, EU:C:2011:605, paragraph 29; and of 1 October 2019, *Planet49*, C-673/17, EU:C:2019:801, paragraph 47).

47 Applying that case-law, the Court has pointed out that it is not for the Member States to define concepts that appear in the directives on copyright and related rights without express reference to the law of the Member States, such as the concepts of ‘public’ and ‘equitable remuneration’ (judgments of 6 February 2003, *SENA*, C-245/00, EU:C:2003:68, paragraph 24; of 7 December 2006, *SGAE*, C-306/05, EU:C:2006:764, paragraph 31; and of 30 June 2011, *VEWA*, C-271/10, EU:C:2011:442, paragraphs 25 and 26).

48 The same is true of the words ‘relevant performers’ in Article 8(2) of Directive 2006/115. Since that directive makes no reference to national law as regards the scope of those words, they must be interpreted uniformly throughout the European Union, taking into account the wording of that provision, its context and the objective pursued by the directive.

49 As regards the wording of Article 8(2) of Directive 2006/115, that provision does not expressly state whether the words ‘relevant performers’ refer solely to performers who are nationals of a State in which that directive applies or whether they equally refer to performers who are nationals of another State.

50 As regards that provision’s context and the objectives of Directive 2006/115, it is clear from recitals 5 to 7 that the directive seeks to ensure further creative and artistic work of authors and performers, by providing for harmonised legal protection which guarantees the possibility of securing an adequate income and recouping investments, ‘in such a way as not to conflict with the international conventions on which the copyright and related rights laws of many Member States are based’.

51 It follows that the concepts in Directive 2006/115 must be interpreted in a manner consistent with the equivalent concepts contained in those conventions (see, to that effect, judgments of 15 March 2012, *SCF*, C-135/10, EU:C:2012:140, paragraph 55; of 10 November 2016, *Vereniging Openbare Bibliotheken*, C-174/15, EU:C:2016:856, paragraph 33; and of 29 July 2019, *Pelham and Others*, C-476/17, EU:C:2019:624, paragraph 53).

52 Those conventions include the WPPT, to which the European Union and all its Member States are contracting parties.

53 Under Article 2(a) of the WPPT, the concept of ‘performers’ refers to all persons ‘who act, sing, deliver, declaim, play in, interpret, or otherwise perform literary or artistic works or expressions of folklore’. In addition, according to Article 2(b) thereof, a phonogram is, inter alia, the fixation of the sounds of such a performance.

54 Article 8(2) of Directive 2006/115 confers on those persons a right that is compensatory in nature, triggered by communication to the public of the performance of the work fixed on a phonogram published for commercial purposes (see, to that effect, judgment of 31 May 2016, *Reha Training*, C-117/15, EU:C:2016:379, paragraphs 30 and 32).

55 More specifically, it follows from that provision that the legislation of each Member State must ensure, first, that a single equitable remuneration is paid by the user if a phonogram published for commercial purposes, or a reproduction of such a phonogram, is used for broadcasting by wireless means or for any communication to the public and, second, that this remuneration is shared between the performer and the phonogram producer.

56 Whilst Article 8(2) of Directive 2006/115 leaves each Member State the possibility of laying down, in the absence of agreement between the performers and phonogram producers, the manner in which that remuneration is shared, it nevertheless sets out a clear and unconditional obligation to grant the performers and phonogram producers the right to equitable remuneration, which must be shared between them. As follows from recitals 5, 12 and 13 of the directive, the share of the remuneration paid to the performer must be adequate, reflecting the importance of his or her contribution to the phonogram.

57 That compensatory right – as is attested by the heading of Chapter II of Directive 2006/115, within which Article 8 falls – is a right related to copyright.

58 As the Advocate General has observed in point 80 of his Opinion, the obligation laid down in Article 8(2) of Directive 2006/115 to ensure remuneration that is equitable and shared between the phonogram producer and the performer applies where the use of the phonogram or of a reproduction thereof takes place in the European Union.

59 That is so where the communication of the phonogram, as the trigger of the aforementioned related right, is addressed to an audience located in one or more Member States. Since Directive 2006/115 does not specify its territorial scope, the latter corresponds to that of the Treaties, laid down in Article 52 TEU (judgment of 4 May 2017, *El Dakkak and Intercontinental*, C-17/16, EU:C:2017:341, paragraphs 22 and 23 and the case-law cited). Subject to Article 355 TFEU, that territorial scope comprises the territories of the Member States.

60 Furthermore, in order for that obligation laid down in Article 8(2) of Directive 2006/115 to apply, the phonogram must fulfil the criteria concerning application in time that are laid down in Article 11 of the directive.

61 On the other hand, Directive 2006/115, which refers without further specification to ‘performers’ and ‘phonogram producers’, lays down no condition under which the performer or phonogram producer should be a national of an EEA Member State or domiciled or resident in such a State, nor a condition under which the place where the creative or artistic work is carried out should fall within the territory of an EEA Member State.

62 On the contrary, the context of Article 8(2) of Directive 2006/115 and the objectives of that directive, which are noted in paragraph 50 of the present judgment, as well as the primacy, resulting from Article 216(2) TFEU, which international agreements concluded by the European Union have over other categories of secondary legislation (judgment of 21 December 2011, *Air Transport Association of America and Others*, C-366/10, EU:C:2011:864, paragraph 50), mean that Article 8(2) of the directive must be interpreted, as far as possible, in a manner consistent with the WPPT (see, by analogy, judgment of 18 March 2014, *Z*, C-363/12, EU:C:2014:159, paragraph 72). That international agreement, which forms an integral part of the EU legal order (see, inter alia, judgments of 30 April 1974, *Haegeman*, 181/73, EU:C:1974:41, paragraph 5, and of 11 April 2013, *HK Danmark*, C-335/11 and C-337/11, EU:C:2013:222, paragraphs 28 to 30), in principle obliges the European Union and its Member States to grant the right to a single equitable remuneration both to performers and phonogram producers who are nationals of Member States of the European Union and to those who are nationals of other contracting parties to the WPPT.

63 First, under Article 15(1) of the WPPT, the contracting parties thereto must confer on performers and phonogram producers the right to a single equitable remuneration where phonograms published for commercial purposes are used for broadcasting or for any communication to the public. As the Advocate General has, in essence, observed in points 72 and 73 of his Opinion, when the WPPT entered into force for the European Union, that is to say, on 14 March 2010, that obligation had already been transposed into EU law by Article 8(2) of Directive 2006/115, which replaced without amendment Article 8(2) of Directive 92/100.

64 Second, Article 4(1) of the WPPT states that each contracting party must grant that right without distinction to its own nationals and to ‘nationals of other Contracting Parties’, as defined in Article 3(2) thereof.

65 Article 3(2) of the WPPT states that the term ‘nationals of other Contracting Parties’ refers to those performers and producers who would meet the criteria for eligibility for protection provided under the Rome Convention, were all the contracting parties to the WPPT contracting States to that Convention, and that the terms appearing in those criteria have the scope defined in Article 2 of the WPPT.

66 Since the WPPT thus takes up, by the combined effect of Article 3(2) and Article 4(1) thereof, the criteria set out in the Rome Convention, those criteria are relevant for determining the scope of Article 15 of the WPPT, to which Article 4(1) is expressly linked.

67 In that regard, it is to be noted that, under Article 4 of the Rome Convention, any performer who is a national of a contracting State to that convention must enjoy the national treatment accorded by the other contracting States to their own nationals where, inter alia, the performance is incorporated in a phonogram which is protected under Article 5 of that convention. That is the case inter alia, as is apparent from Article 5(1)(a), where the phonogram producer is a national of a contracting State to the Rome Convention other than that on whose territory the phonogram is used.

68 It follows from all those considerations that the right to a single equitable remuneration – conferred in Article 8(2) of Directive 2006/115, which ensures the application of Article 15(1) of the WPPT in EU law – cannot be limited by the national legislature solely to nationals of the EEA Member States.

69 It is true that, under Article 15(3) of the WPPT, any party to that international agreement may, by giving notification of a reservation to the Director General of WIPO, declare that it does

not recognise the right to a single equitable remuneration laid down in Article 15(1) of that agreement or that, while recognising that right, it will limit the application thereof on its territory. As Article 4(2) of the WPPT states, the obligation provided for in Article 15(1) does not apply to the extent that such reservations have been notified.

70 However, as is apparent from WIPO's register of notifications, the European Union, its Member States, and a large number of third States which are contracting parties to the WPPT have not given notification of a reservation under Article 15(3) of the WPPT and are, consequently, mutually bound by Article 4(1) and Article 15(1) thereof.

71 Accordingly, if the WPPT is not to be disregarded, Article 8(2) of Directive 2006/115 simply cannot be implemented by a Member State in such a way as to exclude from the right to equitable remuneration all performers who are nationals of States outside the EEA, with the sole exception of those who are domiciled or resident in the EEA or whose contribution to the phonogram was made in the EEA.

72 That conclusion is not affected by the fact that certain Member States have given notification of a reservation under Article 5(3) or Article 17 of the Rome Convention and forwarded it to the Director General of WIPO under Article 3(3) of the WPPT. Whilst it follows from Article 1 of the WPPT that none of its provisions can exempt the Member States from their obligations under the Rome Convention (see, to that effect, judgment of 15 March 2012, *SCF*, C-135/10, EU:C:2012:140, paragraph 50), the fact remains that, by its nature, such a reservation solely enables the commitments entered into by a Member State under that convention to be restricted, and does not create any obligation for that Member State. It follows that it cannot in any event be regarded as an obligation of that State that is liable to be impeded by the interpretation of Article 8(2) of Directive 2006/115 set out in paragraph 68 of the present judgment.

73 Nor is the conclusion set out in paragraph 71 of the present judgment affected by the fact, pleaded by Ireland in its observations submitted to the Court, that private parties, such as performers or their collecting society, cannot rely directly on Articles 4 and 15 of the WPPT before the Irish courts because those provisions, as pointed out by the Court (see, to that effect, judgment of 15 March 2012, *SCF*, C-135/10, EU:C:2012:140, paragraph 48), lack direct effect.

74 As the Advocate General has observed in point 127 of his Opinion, that fact in no way diminishes the need to interpret Article 8(2) of Directive 2006/115 in a manner consistent with that international agreement (see, by analogy, judgment of 15 March 2012, *SCF*, C-135/10, EU:C:2012:140, paragraphs 48, 51 and 52). Any interested private party may rely upon Article 8(2) of that directive before the Irish courts in order to call into question, in a dispute such as that in the main proceedings, in which Ireland is indeed involved as a defendant, the compatibility of the Irish legislation with that provision. In such a dispute, the Irish courts are obliged to interpret that provision in a manner consistent with the WPPT.

75 In the light of all the foregoing, the answer to the first and second questions referred is that Article 8(2) of Directive 2006/115 must, in the light of Article 4(1) and Article 15(1) of the WPPT, be interpreted as precluding a Member State from excluding, when it transposes into its legislation the words 'relevant performers' which are contained in Article 8(2) of the directive and designate the performers entitled to a part of the single equitable remuneration referred to therein, performers who are nationals of States outside the EEA, with the sole exception of those who are domiciled or resident in the EEA and those whose contribution to the phonogram was made in the EEA.

The third question

76 By its third question, the referring court asks, in essence, whether Article 15(3) of the WPPT and Article 8(2) of Directive 2006/115 must be interpreted as meaning that reservations notified by third States under Article 15(3) of the WPPT that have the effect of limiting on their territories the right to a single equitable remuneration laid down in Article 15(1) of the WPPT lead in the European Union to limitations, which may be established by each Member State, of the right provided for in Article 8(2) of Directive 2006/115, in respect of nationals of those third States.

77 As set out in the order for reference, the relevance of this question for resolving the dispute in the main proceedings lies in the fact that the reservations notified in accordance with Article 15(3) of the WPPT by certain third States, including the United States of America, could reduce the scope of Ireland's obligations and thus constitute a factor which should be taken into account when examining the compatibility with EU law of the situation, created by the CRRA, in which the use in Ireland of phonograms containing sound recordings of performers who are nationals of third States may give rise to remuneration for the producer which is not shared with the performer. The CRRA is stated in particular to have the effect of limiting in Ireland the right related to copyright of United States performers.

78 In that regard, it should be pointed out first of all that, as has been noted in paragraphs 19 and 20 of the present judgment, a number of third States have, by a reservation founded on Article 15(3) of the WPPT, declared that they do not consider themselves bound by Article 15(1) thereof. Other third States, including the United States of America, have declared that their application of Article 15(1) will be limited.

79 Each of those reservations reduces to the same extent, for the European Union and its Member States, the obligation provided for in Article 15(1) of the WPPT, vis-à-vis the third State which has entered the reservation. That consequence is laid down in Article 4(2) of the WPPT, which must be interpreted in the light of the relevant rules of international law that are applicable in the relations between the contracting parties (see, to that effect, judgments of 25 February 2010, *Brita*, C-386/08, EU:C:2010:91, paragraph 43, and of 27 February 2018, *Western Sahara Campaign*, C-266/16, EU:C:2018:118, paragraph 58). Those rules include the principle of reciprocity codified in Article 21(1) of the Vienna Convention on the Law of Treaties. Under that principle, a reservation entered by a contracting party with regard to the other contracting parties modifies the provision of the international agreement to which it relates for the reserving State in its relations with those other parties and modifies that provision to the same extent for those other parties in their relations with the reserving State.

80 It follows from those considerations that, pursuant to the relevant rules of international law that are applicable in the relations between the contracting parties, the European Union and its Member States are not required to grant, without limitation, the right to a single equitable remuneration laid down in Article 15(1) of the WPPT to nationals of a third State which, by means of a reservation notified in accordance with Article 15(3) of that international agreement, excludes or limits the grant of such a right on its territory.

81 Nor are the European Union and its Member States required to grant, without limitation, the right to a single equitable remuneration to nationals of a third State which is not a contracting party to the WPPT.

82 The refusal of third States to grant, for all or certain uses on their territory of phonograms published for commercial purposes, the right to a single equitable remuneration to phonogram producers and performers who have contributed to the phonograms may have the consequence that nationals of Member States who operate in the – frequently international – recorded music business do not receive an adequate income and have greater difficulty in recouping their investments.

83 Such a refusal may, moreover, prejudice the ability of performers and phonogram producers of the Member States of the European Union to be involved in that business on equal terms with performers and phonogram producers of the third State that has given notification of a reservation in accordance with Article 15(3) of the WPPT, by creating a situation in which the latter performers and producers receive income whenever their recorded music is played in the European Union whereas that third State distances itself, by the reservation notified under Article 15(3) of the WPPT, not only from Article 15(1) thereof but also from Article 4(1), which lays down the obligation of equal treatment regarding the right to equitable remuneration for the use of phonograms published for commercial purposes.

84 It follows that the need to safeguard fair conditions of involvement in the recorded music business constitutes an objective in the public interest capable of justifying a limitation of the right

related to copyright provided for in Article 8(2) of Directive 2006/115, in respect of nationals of a third State which does not grant that right or grants it only partially.

85 That said, as is clear from paragraph 57 of the present judgment, that right to a single equitable remuneration constitutes, in the European Union, a right related to copyright. It is accordingly an integral part of the protection of intellectual property enshrined in Article 17(2) of the Charter of Fundamental Rights of the European Union ('the Charter') (see, by analogy, judgments of 27 March 2014, *UPC Telekabel Wien*, C-314/12, EU:C:2014:192, paragraph 47; of 7 August 2018, *Renckhoff*, C-161/17, EU:C:2018:634, paragraph 41; and of 29 July 2019, *Pelham and Others*, C-476/17, EU:C:2019:624, paragraph 32).

86 Consequently, pursuant to Article 52(1) of the Charter, any limitation on the exercise of that right related to copyright must be provided for by law, which implies that the legal basis which permits the interference with that right must itself define, clearly and precisely, the scope of the limitation on its exercise (see, to that effect, judgment of 17 December 2015, *WebMindLicenses*, C-419/14, EU:C:2015:832, paragraph 81; Opinion 1/15 (*EU-Canada PNR Agreement*) of 26 July 2017, EU:C:2017:592, paragraph 139; and judgment of 16 July 2020, *Facebook Ireland and Schrems*, C-311/18, EU:C:2020:559, paragraphs 175 and 176).

87 The mere existence of a reservation duly notified in accordance with Article 15(3) of the WPPT does not fulfil that requirement, because such a reservation does not enable nationals of the third State in question to ascertain in precisely what way their right to a single equitable remuneration would, consequently, be limited in the European Union. For that purpose, a clear rule of EU law itself is necessary.

88 Since Article 8(2) of Directive 2006/115 is a harmonised rule, it is for the EU legislature alone and not the national legislatures to determine whether the grant in the European Union of that right related to copyright should be limited in respect of the nationals of third States and, if so, to define that limitation clearly and precisely. As the Commission has pointed out in its observations, as EU law currently stands, neither that provision nor any other provision of EU law contains a limitation of that kind.

89 It should be added that the European Union has the exclusive external competence referred to in Article 3(2) TFEU for the purpose of negotiating with third States new reciprocal commitments, within the framework of the WPPT or outside it, relating to the right to a single equitable remuneration for producers of phonograms published for commercial purposes and performers contributing to those phonograms.

90 Any agreement in this regard would indeed be liable to alter the scope of Article 8(2) of Directive 2006/115, which is a common EU rule. The subject matter covered by such a targeted agreement would coincide fully with the identical subject matter covered in Article 8(2) of the directive. The situation where there is such full coincidence is among those where the European Union has the exclusive external competence referred to in Article 3(2) TFEU (see, inter alia, judgments of 4 September 2014, *Commission v Council*, C-114/12, EU:C:2014:2151, paragraphs 68 to 70, and of 20 November 2018, *Commission v Council (Antarctic MPAs)*, C-626/15 and C-659/16, EU:C:2018:925, paragraph 113).

91 In the light of all the foregoing, the answer to the third question referred is that Article 15(3) of the WPPT and Article 8(2) of Directive 2006/115 must, as EU law currently stands, be interpreted as meaning that reservations notified by third States under Article 15(3) of the WPPT that have the effect of limiting on their territories the right to a single equitable remuneration laid down in Article 15(1) of the WPPT do not lead in the European Union to limitations of the right provided for in Article 8(2) of Directive 2006/115, in respect of nationals of those third States, but such limitations may be introduced by the EU legislature, provided that they comply with the requirements of Article 52(1) of the Charter. Article 8(2) of Directive 2006/115 therefore precludes a Member State from limiting the right to a single equitable remuneration in respect of performers and phonogram producers who are nationals of those third States.

The fourth question

92 By its fourth question, the referring court asks, in essence, whether Article 8(2) of Directive 2006/115 must be interpreted as precluding the right to a single equitable remuneration for which it provides from being limited in such a way that only the producer of the phonogram receives remuneration, and does not share it with the performer who has contributed to the phonogram.

93 Given that, as follows from the very wording of Article 8(2) of Directive 2006/115, both performers and phonogram producers are entitled to a single equitable remuneration, the exclusion of certain categories of performers from enjoyment of any remuneration for the use of phonograms or reproductions thereof to which those performers have contributed necessarily compromises observance of that right.

94 As that remuneration has the fundamental characteristic of being ‘shared’ between the phonogram producer and the performer, it must give rise to an apportionment between them. Whilst, as has been established in paragraph 56 of the present judgment, Article 8(2) of Directive 2006/115 leaves each Member State the possibility of laying down the conditions as to that sharing, that provision does not, on the other hand, permit a Member State to rule out the sharing of remuneration in respect of certain categories of performers and thus to confer on the producers of the phonograms to which those performers have contributed enjoyment of the entire remuneration generated by the use of those phonograms or of reproductions thereof.

95 It should, moreover, be noted that such an exclusion would undermine the objective of Directive 2006/115, noted in paragraph 50 of the present judgment, that consists in ensuring further creative and artistic work of authors and performers, by providing for harmonised legal protection which guarantees the possibility for them of securing an adequate income and recouping their investments.

96 Therefore, the answer to the fourth question referred is that Article 8(2) of Directive 2006/115 must be interpreted as precluding the right to a single equitable remuneration for which it provides from being limited in such a way that only the producer of the phonogram concerned receives remuneration, and does not share it with the performer who has contributed to that phonogram.

Costs

97 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable. On those grounds, the Court (Grand Chamber) hereby rules:

- 1. 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 must, in the light of Article 4(1) and Article 15(1) of the World Intellectual Property Organisation Performances and Phonograms Treaty, be interpreted as precluding a Member State from excluding, when it transposes into its legislation the words ‘relevant performers’ which are contained in Article 8(2) of the directive and designate the performers entitled to a part of the single equitable remuneration referred to therein, performers who are nationals of States outside the European Economic Area (EEA), with the sole exception of those who are domiciled or resident in the EEA and those whose contribution to the phonogram was made in the EEA.**
- 2. Article 15(3) of the World Intellectual Property Organisation (WIPO) Performances and Phonograms Treaty and Article 8(2) of Directive 2006/115 must, as EU law currently stands, be interpreted as meaning that reservations notified by third States under Article 15(3) of the WIPO Performances and Phonograms Treaty that have the effect of limiting on their territories the right to a single equitable remuneration laid down in Article 15(1) thereof do not lead in the European Union to limitations of the right provided for in Article 8(2) of Directive 2006/115, in respect of nationals of those third States, but such limitations may be introduced by the EU legislature, provided that they comply with the requirements of Article 52(1) of the Charter of Fundamental Rights of the European Union. Article 8(2) of**

Directive 2006/115 therefore precludes a Member State from limiting the right to a single equitable remuneration in respect of performers and phonogram producers who are nationals of those third States.

3. Article 8(2) of Directive 2006/115 must be interpreted as precluding the right to a single equitable remuneration for which it provides from being limited in such a way that only the producer of the phonogram concerned receives remuneration, and does not share it with the performer who has contributed to that phonogram.

Lenaerts	Silva de Lapuerta	Bonichot
Vilaras	Regan	Safjan
Xuereb	Rossi	Jarukaitis
Ilešič	Bay Larsen	von Danwitz
Toader	Šváby	Piçarra

Delivered in open court in Luxembourg on 8 September 2020.

A. Calot Escobar

K. Lenaerts

Registrar

President

* Language of the case: English.

Fine modulo