OPINION OF ADVOCATE GENERAL TIZZANO

delivered on 26 September 2002 [1]

Introduction

1. By order of 9 June 2000, the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) ('the Hoge Raad') referred to the Court of Justice for a preliminary ruling three questions concerning the interpretation of Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (hereinafter 'Directive 92/100' or 'the Directive'). [2] The three questions concern the interpretation of the concept of 'equitable remuneration' in Article 8(2) of the Directive and in essence seek to establish whether or not that is a Community concept and, whatever the conclusion, the relevant consequences for the purpose of determining the criteria to be used to calculate the level of that remuneration.

1 — Original language: Italian.

2 — OJ 1992 L 346, p. 61.

The relevant legislation

Directive 92/100/EEC

2. The aim of the Directive is to provide a harmonised framework for the national legislation relating to rental right and lending right in relation to copyright, as well as certain rights described as being related to copyright, to the extent necessary to ensure the proper functioning of the common market.

3. The preamble sets out the reasons for and aims of the Directive, in particular, to the extent relevant to this case, as follows:

'whereas differences exist in the legal protection provided by the laws and practices of the Member States for copyright works and subject-matter of related rights protection as regards rental and lending; whereas such differences are sources of barriers to trade and distortions of compe-

tition which impede the achievement and proper functioning of the internal market;

...

whereas 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; whereas the possibility for securing that income and recouping that investment can only effectively be guaranteed through adequate legal protection of the rightholders concerned;

...

whereas the Community's legal framework on the rental right and lending right and on certain rights related to copyright can be limited to establishing that Member States provide rights for certain groups of rightholders and further to establishing the rights of fixation, reproduction, distribution, broadcasting and communication to the public for certain groups of rightholders in the field of related rights protection.'

4. In accordance with the above provisions and, again, as far as is relevant to this case, the Directive provides for the harmonised protection of all related rights pertaining to phonograms, films and broadcasting, for the benefit of performers, producers and broadcasters, none of whom enjoy the protection of copyright.

5. More particularly, Article 8 governs the activities of broadcasting and communication to the public of 'performances' and provides that:

'1. Member States shall provide for performers the exclusive right to authorise or prohibit the broadcasting by wireless means and the communication to the public of their performances, except where the performance is itself already a broadcast performance or is made from a fixation.

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 remuner-

ation is shared between the relevant performers and phonogram producers. Member States may, in the absence of agreement between the performers and phonogram producers, lay down the conditions as to the sharing of this remuneration between them.'

6. The protection thus accorded is the minimum level of harmonisation, as is apparent from the 20th recital in the preamble to the Directive, which provides as follows:

'whereas the Member States may provide for more far-reaching protection for the owners of rights related to copyright than that required by Article 8 of this Directive.'

7. The equitable remuneration mentioned in Article 8(2) is not specifically defined in the Directive, nor is there any direct reference to it in the preamble.

8. The preamble does, however, contain some information concerning the equitable remuneration due to the rightholder in the various circumstance where the rental right is assigned; in particular, it makes it clear that such remuneration is provided for because:

'... it is necessary to introduce arrangements ensuring that an unwaived equitable remuneration is obtained by authors and performers who must retain the possibility to entrust the administration of this right to collecting societies representing them;

... 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;

... the equitable remuneration must take account of the importance of the contribution of the authors or performers concerned to the phonogram or film.'

The international rules

9. The Directive and, in particular, the provisions material to this case must be construed in the light of the relevant international rules, and the 10th recital states that the provisions of the Directive are without prejudice to the international rules, emphasising that 'the legislation of the Member States should be approximated in such a way... as not to conflict with the

international conventions on which many Member States' copyright and related rights laws are based.'

10. The international rules are essentially contained, in so far as is relevant to this case, in the TRIPS Agreement [3] and the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations, signed in Rome on 26 October 1961, to which all the Member States, except Portugal, are party, and to which the TRIPS Agreement refers.

11. Under Article 14 of the TRIPS Agreement, Members are required to ensure that:

'1. In respect of a fixation of their performance on a phonogram, performers shall have the possibility of preventing the following acts when undertaken without their authorisation: the broadcasting by wireless means and the communication to the public of their live performance.

...

6. Any Member may, in relation to the rights conferred under paragraphs 1, 2 and 3, provide for conditions, limitations, exceptions and reservations to the extent permitted by the Rome Convention...'.

12. Article 7 of the Rome Convention itself provides for a minimum level of protection which the contracting States must guarantee performers. It states in particular that:

'1. The protection provided for performers by this Convention shall include the possibility of preventing:

(a) the broadcasting and the communication to the public, without their consent, of their performance, except

3 — Agreement on the Trade-related aspects of Intellectual Property Rights, Annex 1C to the Agreement Establishing the World Trade Organisation (OJ 1994 L 336, pp. 214-233), adopted by Council Decision 94/800/EC of 22 December 1994 concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986-1994) (OJ 1994 L 336, p. 1).

where the performance used in the broadcasting or the public communication is itself already a broadcast performance or is made from a fixation;... .' [4]

13. Article 12 regulates the so-called secondary use of phonograms and provides:

'If a phonogram is published for commercial purposes, or a reproduction of a phonogram is used directly for broadcasting or for any communication to the public, a single equitable remuneration shall be paid by the user to the performers, or to the producers of the phonograms, or to both. Domestic law may, in the absence of agreement between these parties, lay down the conditions as to the sharing of this remuneration'. [5]

14. The Convention lays down largely harmonised rules and, in addition, Articles 2, 4 and 5 contain rules on national treatment to which Article 1(3) of the TRIPS Agreement itself refers. According to the latter, 'Members shall accord the treatment provided for in this Agreement to other Members'; and, so far as is relevant to this case, it goes on to state that 'the nationals of other Members shall be understood as those natural or legal persons that would meet the criteria for eligibility for protection provided for in... the Rome Convention'. [6]

The national legislation

15. Article 7 of the Wet op de naburige rechten (Netherlands law on related rights, hereinafter 'the WNR') of 18 March 1993, in force since 1 July 1993 and subsequently amended by the Law of 21 December 1995 (*Staatsblad* 1995, No 653), adapts domestic legislation to meet the requirements of Article 8(2) of the Directive and, at the same time, ensures that Netherlands law is compatible with the Rome Convention.

16. Article 7 provides:

'1. A phonogram produced for commercial purposes, or a reproduction thereof, may be broadcast without the permission of the producer of the phonogram and the per-

4 — Footnote not relevant to the English version.

5 — Footnote not relevant to the English version.

6 — The Netherlands became a contracting party to the Convention with effect from 7 October 1993.

forming artists or their successors in title or otherwise made public, provided equitable remuneration is paid therefor.

2. Failing an agreement concerning the amount of equitable remuneration, the Hague District Court shall have exclusive jurisdiction at first instance to determine the amount of remuneration at the suit of the first party to make application in that regard.

3. The remuneration shall be payable both to the performing artist and to the producer, or to their successors in title, and shall be shared equally between them.'[7]

17. Article 15 of the WNR provides that the payment is to be made to a legal person representing the performers and producers, to be appointed by the Minister of Justice, and that that legal person is to represent the persons entitled in connection with the determination of the amount of remuneration, and in the exercise of their exclusive right.

Facts and procedure

18. The case pending before the national court involves a dispute between the Stichting ter Exploitatie van Naburige Rechten ('SENA'), a Netherlands foundation representing the interests of performers and producers and an importer of phonograms, and the Nederlandse Omroep Stichting ('NOS'), the body that coordinates public broadcasting, and concerns the determination of the equitable remuneration payable by NOS to SENA in accordance with Article 7 of the WNR.

19. In 1986, and thus before the WNR entered into force, the Nederlandse Vereniging van Producenten en Importeurs van Beeld en Geluidsdragers (Netherlands Association of Producers and Importers of image and sound media) ('the NVPI'), the body then representing the interests of phonogram producers, entered into an agreement with NOS, whereby the latter undertook to pay NVPI a certain sum by way of compensation for the transmission of phonograms by the Dutch public broadcasters. That sum, calculated on an annual basis, amounted to NLG 605 000 for use in 1984 and increased to NLG 700 000 in 1994.

20. When the WNR entered into force, representation of the interests of producers and performers passed, by operation of law, to SENA. Consequently, in December 1993, NVPI terminated the abovementioned agreement. The subsequent negotiations between NOS and SENA on a new agreement, provided for by Article 7 of the WNR, proved unsuccessful. SENA therefore brought an action before the Arron-

7 — Unofficial translation.

dissementsrechtbank te 's-Gravenhage ('the Hague District Court') seeking an order that the equitable remuneration be set at the level of NLG 7 500 000. The Hague District Court set the amount for 1995 at NLG 2 000 000, and reserved judgment for the subsequent years.

21. An appeal against that judgment was brought before the Gerechtshof te 's-Gravenhage ('the Hague Court of Appeal'), and on 6 May 1999 it delivered an interlocutory judgment in which it held that neither the Netherlands legislation nor the Directive provided any yardsticks capable of being used to define the concept of equitable remuneration and that, in particular, the Directive was not intended to harmonise the method of calculating such payments. The Hague Court of Appeal further held that the equitable remuneration provided for by the Netherlands legislation must be more or less equivalent to the amount payable by NOS to NVPI under the 1986 agreement, since the preparatory work for that Law indicated that this was the aim of the legislature. NOS should, however, consent to increase the amount of the remuneration if one or more of the following factors underwent an increase: the number of hours during which the phonograms were broadcast, the audience for the networks represented by NOS, the amount of the remuneration determined by contract for use of works protected by copyright, the amount of the remuneration paid by broadcasters in the neighbouring Member States and the remuneration paid in the Netherlands by commercial broadcasters.

22. SENA appealed against that judgment, claiming that it was incompatible with the Directive. By introducing an autonomous concept of equitable remuneration, the Directive in fact required that the concept be given a uniform interpretation in the various Member States, but the judgment at issue would not permit that outcome.

23. Since it had therefore to interpret a provision of Directive 92/100/EEC, by order of 9 June 2000 the Hoge Raad referred to the Court of Justice the following questions for a preliminary ruling:

'(1) Is the term "equitable remuneration" used in Article 8(2) of the Directive a Community concept which must be interpreted and applied in the same way in all the Member States of the European Community?

(2) If so

(a) what are the yardsticks for determining the amount of such equitable remuneration?

(b) should guidance be sought from the levels of remuneration which were agreed or were customary as between the organisations concerned prior to entry into force of the Directive in the relevant Member State?

(c) must or may regard be had to the expectations of the persons concerned at the time of enactment of the national legislation implementing the Directive in regard to the amount of remuneration?

(d) should guidance be sought from the levels of remuneration for broadcasts paid under music copyright by broadcasters?

(e) must the remuneration be related to the potential numbers of listeners or viewers, or to actual numbers, or partly to the former and partly to the latter and, if so, in what proportions?

(3) If the answer to Question 1 is in the negative, does that mean that the Member States are entirely free to lay down the yardsticks for determining equitable remuneration? Or is that freedom subject to certain limits and, if so, what are those limits?'

24. In the proceedings before the Court of Justice, the Commission, the Netherlands, German, Finnish, Portuguese and United Kingdom Governments all submitted observations, in addition to the parties to the main proceedings.

Analysis

25. By its three questions, the national court is in essence asking the Court of Justice to rule whether or not the concept of 'equitable remuneration' under Article 8(2) of the Directive is a Community concept and, whatever the conclusion, to set out the consequences for the purpose of determining the criteria to be used to calculate the level of that remuneration.

Arguments of the parties

(a) The concept of equitable remuneration

26. According to SENA, the concept of equitable remuneration is a Community

concept and, as such, must be interpreted on the basis of uniform parameters in all the Member States. As well as being dictated by the general principles of equal treatment and non-discrimination, that solution follows above all from the aim of the Directive and from the Rome Convention, on which the Directive is directly based. Both have the same aim of securing effective harmonisation, in order to compensate for the economic disadvantage performers or producers may suffer as a result of the broadcasting of their works. That outcome cannot be achieved unless the concept of equitable remuneration is interpreted uniformly. That thesis is borne out *a contrario*, moreover, by Article 5 of the Directive which provides for derogations from the exclusive public lending right, provided that the authors 'obtain a remuneration'. In those circumstances, the Directive specifically provides that the Member States are 'free to determine this remuneration taking account of their cultural promotion objectives'; the fact that there is no similar proviso relating to the 'equitable remuneration' under Article 8 demonstrates that here the Member States do not enjoy the discretion they are allowed in the circumstances with which Article 5 is concerned.

27. NOS, the Commission and the Netherlands, Portuguese and United Kingdom Governments consider 'equitable remuneration' to be a Community concept. It refers, however, to an 'open' concept, namely fairness, which is defined neither in the Directive nor in the Rome Convention and which actually refers, as emphasised by NOS and the Portuguese and United Kingdom Governments in particular, to the concept of justice in each individual case. The Member States therefore retain a substantial degree of freedom in interpreting that concept, particularly bearing in mind that the Directive requires only minimum harmonisation.

28. None the less, the fact remains, as both the Commission and the Netherlands Government point out, that the freedom of the States to expound the meaning of the concept at issue is not absolute but is subject to limits deriving from the scheme of the Directive; that freedom must in fact be directed towards striking a fair compromise between the interests of the producers and performers, on the one hand, and the interests of third party users on the other.

29. Furthermore, according to the Netherlands Government, the Community character of the concept at issue means that while the Member States enjoy a considerable degree of latitude here, they are not exempt from the limits and controls its Community character dictates; the same applies to other Community concepts, such as the concept of public policy.

In that connection, the Netherlands Government draws attention in particular to *Van Duyn* [8] and *Rutili*, [9] in which the Court acknowledged that 'Member States continue to be, in principle, free to determine the requirements of public policy in the light of their national needs. Nevertheless, the concept of public policy must, in the Community context, and where, in particular, it is used as a justification for derogating from the fundamental principles... be interpreted strictly, so that its scope cannot be determined unilaterally by each Member State without being subject to control by the Institutions of the Community'. [10]

30. Finally, the German and Finnish Governments put forward a view which, though formally at odds with the positions adopted by the other governments that submitted observations, is in substance not dissimilar to them. Though they do not accept that equitable remuneration is a Community concept, they point out that this does not mean that the Member States enjoy unbounded freedom. According to the German Government in particular, the limits the national legal systems face in determining equitable remuneration derive from the sense and purpose of the Directive itself and consist in the need to secure an adequate income for performers, as well as a distribution of profits commensurate with the contribution of the authors or performers.

8 — Case 41/74 *Van Duyn* v *Home Office* [1974] ECR 1337.

9 — Case 36/75 *Rutili* v *Ministre de l'Intérieur* [1975] ECR 1219.

10 — *Rutili*, paragraphs 26 and 27.

(b) The individual criteria for determining equitable remuneration

31. Not all the participants in these proceedings devote much attention to the criteria mentioned in Question 2(a), and, in any event, in the light of what I shall say below, I do not consider it necessary to dwell on the submissions made in this regard. I shall merely point out here that the various participants do not consider it appropriate for the Court to give a ruling on this point and, although the German Government discusses the individual criteria at length, it actually contests the admissibility of the question on the ground that it concerns not so much an interpretation of the Directive as the application of domestic law in the present case. Consequently, what is required is not a judgment by the Court but an expert opinion to be made available to the national court.

Assessment

32. From an examination of the questions submitted, it seems to me first of all difficult to deny the Community character of the concept of 'equitable remuneration', given that it is used in a Directive that contains no — direct or indirect — reference to the domestic legislation of the Member States for its interpretation. As the Court itself has held on several occasions, 'the need for uniform application of Community law and the principles of

equality require that the terms of a provision of Community 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 uniform interpretation throughout the Community; that interpretation must take into account the context of the provision and the purpose of the legislation in question'. [11]

33. That said, there is scant detail as to the definition of the concept in question, since the Directive merely refers to it but in no way defines it. That is hardly surprising, bearing in mind that it is a concept based on the idea of fairness, and, as almost all the parties have stated, albeit with differing emphases, fairness is by its very nature an 'open' concept conveying a general principle of appropriateness and balance, and leaving considerable discretion to whoever has to apply it. As has been underlined in the views expressed in this case (particularly by the Portuguese and United Kingdom Governments), the reference to fairness means that, except, of course, where there is agreement between the parties, the court will take a decision on the parties' conflicting interests on the basis of the particular features of the individual case and not predetermined legislative criteria of a general and abstract nature.

34. Consequently, it is not surprising, as I have already mentioned, that the concept of 'equitable remuneration' is not specifically defined in the Directive. But it is worth pointing out that, as well as refraining from providing such a definition, the Directive provides no — direct or indirect — pointers as to the possible criteria which may be usefully applied in assessing whether remuneration is 'equitable'. That contrasts, for example, with the provisions of the Directive relating to the assignment of rental rights. In that regard, at least one uniform — albeit fairly general — criterion is mentioned for determining the equitable remuneration payable to authors and performers (Article 4(1)), [12] namely the criterion based on the importance of the contribution to the phonogram or film (17th recital). [13]

35. Directive 2001/29/EC on the harmonisation of certain aspects of copyright and

11 — See, most recently, Case C-287/98 *Linster* [2000] ECR I-6917, paragraph 43; Case C-357/98 *Yiadom* [2000] ECR I-9265, paragraph 26; and, earlier, Case 327/82 *Ekro* [1984] ECR 107, paragraph 11.

12 — According to which: 'where an author or performer has transferred or assigned his rental right concerning a phonogram or an original or copy of a film to a phonogram or film producer, that author or performer shall retain the right to obtain an equitable remuneration for the rental'.

13 — According to which: 'the equitable remuneration must take account of the importance of the contribution of the authors and performers concerned to the phonogram or film'.

related rights in the information society [14] does, however, contain criteria that can be used to determine fair compensation. Article 5 of that Directive provides that the Member States may provide for free use, for private purposes, of objects protected by copyright or related rights, provided that rightholders receive fair compensation. In particular, Article 5 explicitly provides, in relation to one of the cases it covers, that the amount of compensation should take 'account of the application or non-application of technological measures' for protection provided for under the Directive itself; in addition, and more generally, recital 35 lists a number of other criteria which may be taken into consideration, albeit not exclusively, when the amount of fair compensation under Article 5 is determined. [15]

36. In other instances, however, the Community legislature has not considered it necessary to specify uniform implementing criteria. Directive 93/83/EC, for instance, on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission, [16] simply extends the application of Article 8 of Directive 92/100 to such forms of communication to the public.

37. It is therefore clear from the foregoing that, where it considered this necessary or appropriate, the Community legislature laid down provisions in relation to concepts entirely analogous with the concept that has to be interpreted in this case. But where, as in this case, the Community legislature has remained silent, that very fact indicates that it intended to leave the Member States a greater degree of latitude, obviously taking the view that further-reaching harmonisation was neither necessary nor appropriate in the area concerned. Moreover, I do not consider it to be the task of the Court to take the place of the Community legislature, by itself setting uniform criteria not imposed by the latter and thereby curtailing, without good reason, the freedom of the Member States.

38. That said, in general terms, it must also be made clear that this freedom is not unbounded, since it is none the less exercised in relation to the application of a Community concept and, consequently, is subject to supervision by the Community

14 — Directive 2001/29/EC of the European Parliament and the Council of 22 May 2001 (OJ 2001 L 167, p. 10).

15 — It provides in particular as follows: 'When determining the form, detailed arrangements and possible level of such fair compensation, account should be taken of the particular circumstances of each case. When evaluating these circumstances, a valuable criterion would be the possible harm to the rightholders resulting from the act in question. In cases where rightholders have already received payment in some other form, for instance as part of a licence fee, no specific or separate payment may be due. The level of fair compensation should take full account of the degree of use of technological protection measures referred to in this Directive. In certain situations where prejudice to the rightholder would be minimal, no obligation for payment may arise'.

16 — Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission (OJ 1993 L 248, p. 15).

Institutions, and by the Court of Justice in particular.

39. We are in effect dealing here, as the Netherlands Government pointed out, with circumstances not dissimilar to those pertaining to other concepts used but not defined by Community law, and largely left to national law. As the Netherlands Government also observes, that applies to the concept of public policy, particularly as mentioned in Article 39 EC as a limitation on freedom of movement for workers. According to *Van Duyn* and *Rutili*, that concept refers, by its very nature, to the sovereign powers of the Member States and thus their domestic legal systems. Therefore, as the Court ruled in those cases: 'Member States continue to be, in principle, free to determine the requirements of public policy in the light of their national needs' [17] since those needs may 'vary from one country to another and from one period to another'. [18] Nevertheless, since it falls within the 'the Community context' and involves limiting a fundamental principle of the Treaty, in this case the free movement of persons, the freedom the Member States enjoy in determining the requirements of their national public policy must be subject to the control and limitations of Community law. [19]

17 — *Rutili*, paragraph 26.
18 — *Van Duyn*, paragraph 18.
19 — *Rutili*, paragraph 27.

40. In my view, similar considerations may be applied to the concept of 'equitable remuneration' under Article 8 of the Directive. Thus, the freedom accorded to the Member States in that connection must be exercised subject to control by the Community Institutions, in accordance with the conditions and limits that flow from the Directive, as well as, more generally, the principles and scheme of the Treaty.

41. To elucidate further, it seems to me, first of all, to be evident that a Member State cannot determine 'equitable remuneration' in breach of a general principle of Community law.

42. More particularly, as the Finnish Government rightly emphasises, in this area the scope for action under the national legal systems is restricted by the need to secure the application of the principle of non-discrimination on grounds of nationality, enshrined in Article 12 EC and then further clarified, in so far as is relevant to this case, by the provisions on the free movement of goods, persons and services.

43. Moreover, the scope of the prohibition of discrimination on grounds of nationality in this area extends beyond the terms of Article 12 EC alone. In fact, as far as related rights are concerned, that prohibition encompasses a range of operators who, although citizens of third countries and therefore not protected under Article 12 EC, enjoy the protection provided by the World Trade Organisation TRIPS Agreement and the Rome Convention.

44. The TRIPS Agreement binds the Community and all its Member States; it is also common ground that, notwithstanding the debate on its direct applicability, the rules on national treatment which it contains are an integral part of the law with which the Court must ensure compliance, in accordance with Article 220 EC. The effect of the reference in Article 1(3) of the TRIPS Agreement is to incorporate within it Articles 2, 4 and 5 of the Rome Convention, which require the application of the principle of national treatment to a broad category of operators and situations that have no defined link with the Community, be it membership or establishment, and are not therefore, in principle, protected under Article 12 EC. Consequently, it is as a result of those provisions of TRIPS and the Rome Convention, as well as the provisions of Article 12 EC, that the freedom of action of the Member States in applying the Directive, and particularly Article 8(2) thereof, is limited.

45. So much for the general principles. But I consider that factors likely to limit the discretion accorded to the Member States may also be inferred from the scheme of the Directive, and particularly the need to safeguard its effectiveness.

46. In this context, it seems to me to be immediately clear that remuneration cannot be considered to be equitable if it is likely to prejudice the outcome sought by the Directive, and particularly Article 8(2) thereof. Indeed, since that provision is designed to guarantee rightholders 'remuneration' for the use to which it refers, it seems plain to me that, in so far as it is to be 'equitable', that remuneration must in any event be effective and substantial, to avoid the risk of depriving performers or producers of the right accorded them. In other words, and as the Netherlands Government rightly points out, otherwise than in quite exceptional instances, assessment of the circumstances of the individual case cannot result in the determination of merely token compensation which, in the final analysis, amounts to a denial of the right to remuneration.

47. I consider that view to be corroborated by the terms of the seventh recital to the Directive, according to which the legal protection of performers and producers, provided for under the Directive as a whole, is designed to guarantee an adequate income for the former and a return on their investment for the latter. Consequently, the remuneration mentioned in Article 8(2) of the Directive must be such as to make an effective contribution to securing the profitability of artistic activity and production.

48. There might even be grounds for considering whether the abovementioned objective might not serve as the *sole* criterion for determining equitable remuneration. But the fact that the profitability of artistic activity and production is guaranteed on the basis of all the measures set in place by the Directive for the benefit of performers and producers militates against that approach. Profitability, in particular, is usually ensured, first and foremost, on the basis of the exclusive rights accorded to performers and producers, such as rental and lending rights under Article 2,[20] the fixation right under Article 6,[21] the reproduction right under Article 7,[22] and the right in respect of live broadcasting and communication to the public under Article 8(1) of the Directive. However, broadcasting or communication to the public from a phonogram already published for commercial purposes is not covered by an exclusive right ('to authorise or prohibit', in the words of the Directive) of either the performer or the producer (Article 8(1)). Consequently, the right to equitable remuneration provided for in such circumstances by Article 8(2) is merely an ancillary element in the system of guaranteeing profitability, in keeping with the 'weak' nature of that right as compared with the abovementioned exclusive rights.

49. In short, I am of the opinion that the concept of 'equitable remuneration' under Article 8(2) of the Directive is a concept of Community law, but that the Directive does not lay down uniform criteria for determining the level of that remuneration. Therefore, the Member States retain the freedom to determine those criteria, albeit in accordance with the aims of the Directive and the principles of Community law.

20 — According to which: 'The exclusive right to authorise or prohibit rental and lending shall belong:
...
— to the performer in respect of fixations of his performance,
— to the phonogram producer in respect of his phonograms,...'.

21 — 'Member States shall provide for performers the exclusive right to authorise or prohibit the fixation of their performances...'.

22 — 'Member States shall provide the exclusive right to authorise or prohibit the direct or indirect reproduction:
— for performers, of fixations of their performances,
— for phonogram producers, of their phonograms,...'.

Conclusion

50. In the light of the foregoing, I propose that the Court answer the questions referred to it to the effect that the concept of equitable remuneration under Article 8(2) of the Directive is a concept of Community law, but that the Directive does not lay down uniform criteria for determining the level of that remuneration. Therefore, the Member States retain the freedom to determine those criteria, albeit in accordance with the aims of the Directive and the principles of Community law.