DIRECTIVE 2019 / 790 ON COPYRIGHT IN THE DIGITAL SINGLE MARKET

Analysis and checklist

IMPLEMENTATION PLAYBOOK

This document is prepared by FERA with input from FSE and presented to the members of both organisations.

- Basic information about the implementation process.
- Key provisions of interest for European Film and TV Directors and Screenwriters, focusing on the Directive provisions on Fair Remuneration in Contracts.

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INTRODUCTION

- After three years of negotiations, Directive 2019/790 on Copyright in the Digital Single Market has been published in the Official Journal on May 17, 2019. EU Member States have until June 7, 2021 to transpose its provisions into their national legislation.

- Full text is available in all EU languages[1].

- This Directive sets out **a new EU approach to copyright :** it includes market regulation aspects, in contrast to the Copyright Directive 2001/29/EU general approach.

- In the 2001 Directive, Authors' remuneration is addressed by half a sentence in a recital : "*if authors or performers are to continue their creative and artistic work, they have to receive an appropriate reward for the use of their work* ".

- In the 2019 Directive, Title IV "Measures to achieve a well-functioning marketplace for copyright", Chapter 3 focuses on "Fair remuneration in exploitation contracts of authors and performers " through six articles setting out new harmonized rights for authors and performers. This stems from an **explicit acknowledgement by the EU legislator of the systemic weak bargaining power of author negotiating his/her contract.**

1. **Directive 2019/790 on Copyright in the Digital Single Market**
https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2019.130.01.0092.01.ENG

INTRODUCTION

- EU Copyright legislation interfacing with market regulation and contracts is new, unchartered territory, which presents the risk of a limited implementation and numerous challenges in the interpretation of this new legal framework.

- Each Member State will likely transpose these provisions taking into account the existing national framework, their current political context and the influence of the local audiovisual industry stakeholders. While a number of provisions in the Directive leave an important margin for manoeuvre for the national legislator, they may also choose to proceed with a simple "copy-pasting" exercise which could result in lost opportunities.

- The current pandemic will have far-reaching negative impacts on the lives and work of FERA and FSE's members. It may also impact on the capacity of national administrations to address the complexities of the implementation of the Directive but, as of the date of this document, no proposal to delay the implementation of the Directive has been made.

- In the coming years, FERA and FSE will support their members throughout the implementation process from transposition into national legislation to introduction of these new rights in day-to-day industry practice.

- This paper aims at providing basic information about the implementation process and the key provisions of interest for European Film and TV Directors and Screenwriters, focusing on the Directive provisions on Fair Remuneration in Contracts in the Checklist and Analysis below.

INTRODUCTION

- The **European Directors and Screenwriters Contracts Database** [2] developed by FERA and FSE and launched in 2019 will be one of the key resources available to members.

- As the transposition process unfolds, FERA and FSE will monitor the trends in interpretation of these provisions and inform its members regularly on these developments.

- In parallel, FERA and FSE will continue their dialogue with the European Commission as it will play an essential part in assessing if national legislations correctly apply the Directive's provisions, in close coordination with other European organisations representing authors, performers and collective management organisations.

2. Database
www.authorscontracts.eu

IN A NUTSHELL

- The 2019 Copyright Directive presents essential opportunities for European filmmakers :
  - Get access to detailed information on their works' exploitation and revenues generated – including for worldwide exploitation (Art. 19) ;
  - Receive a fair share of all exploitation revenues, through collective mechanisms to enforce the principle of appropriate and proportionate remuneration (Art. 18) and the contract adjustment mechanism (Art. 20) ;
  - Strengthen their collective representation through collective bargaining agreements implementing provisions relating to Fair remuneration in exploitation contracts of authors and performers.
- While the Directive's provisions may be transposed in a way that remains open to various legal interpretation, collective bargaining and binding collective agreements between representatives of authors and their contractual counterparts offer a credible option to ensure legal security to users of copyrighted works.
- This requires professional organisations to organise (building membership and financing) and develop alliances with sister organisations during the implementation, which will reinforce the collective representation of directors and screenwriters overall.

KEY POINTS TO PROMOTE

Why the 2019 Copyright Directive is an essential step forward :

1. **Acknowledgment of systemic weak bargaining power of individual authors in negotiating their contracts.**
2. **Affirmation of the essential importance of collective representation through professional organisations to get a fair bargain in negotiating contracts : a historic opportunity to build strength.**
3. **Transparency on exploitation and revenues generated worldwide.**
4. **Right to remuneration based on actual exploitation of the work.**
5. **An opportunity to abolish buy-outs in the European Union for exploitation rights worldwide.**

THE IMPLEMENTATION PROCESS : WHAT TO EXPECT ?

TIMELINE

June 7, 2019	▶ Directive entry into force.
June 7, 2021	▶ **Deadline of Directive transposition in national law.** ▶ All contracts must comply with new provisions, except the transparency obligation.
June 7, 2022	▶ End of transitional period for the implementation of the transparency obligation. ▶ **All contracts must comply with all the new provisions.**
2026 (or later)	▶ Review of the Directive by EU institutions.

STAGE 1

Transposition of the Directive into national law by June 7, 2021

- A Directive is an EU legal act that needs to be incorporated into national law by EU Member States before a given deadline, with notification to the Commission. It sets out goals that all Member States **must achieve**, while giving them discretion as to how to reach them.
- The transposition process is the procedure by which EU Member States incorporate EU directives into their national law in order to make their objectives, requirements and deadlines directly applicable. Member States transposing directives into national law can choose the form and methods for doing so, but are **bound by the terms of the directive** as to the result to be achieved and the deadline by which transposition should take place.
- The European Commission has an oversight function to ensure the correct transposition and implementation of EU law and is linked with discretion to launch infringement proceedings against Member States that have breached EU law (Article 258 TFEU). As part of this role, the Commission monitors implementation of EU directives[3], adopts annual reports monitoring the application of EU law[4] and can commence infringement procedures[5].

3. https://ec.europa.eu/info/law/law-making-process/applying-eu-law/monitoring-implementation-eu-directives_en
4. https://ec.europa.eu/info/publications/annual-reports-monitoring-application-eu-law_en
5. https://ec.europa.eu/info/law/law-making-process/applying-eu-law/infringement-procedure_en

Transposition of the Directive into national law by June 7, 2021

STAGE 1

- The European Commission supports Member States during the transposition phase through a contact committee which can address specific issues (such as Directive text interpretation), monitor and inform the process overall. FERA and FSE will follow up on this process with the EU Commission.

- The 2019 Copyright Directive is a text with EEA relevance. One of the main principles of the Agreement on the European Economic Area (EEA unites EU Member States and EEA EFTA States Iceland, Liechtenstein, Norway) is the existence of common rules and equal conditions of competition throughout the EEA. Article 102 EEA provides that as soon as an EEA-relevant EU legal act has been adopted in the EU, the EEA Joint Committee shall take a decision concerning the appropriate amendment of the EEA Agreement with a view to permitting simultaneous application of the legislation in the whole of the EEA[6].

6. More details regarding this process available here : https://www.efta.int/eea/eea-institutions/eea-decision-making

STAGE 1

Transposition of the Directive into national law by June 7, 2021

Key steps to consider at national level :

1. **Identify the Ministry in charge of drafting the corresponding national legislation.**
2. **Identify the parliamentary adoption timeline and key players.**
3. **Get information on stakeholders' consultation process and deadlines to target input on draft legislation tabled.**
4. **Provide input stressing the importance of the essential new provisions to include in national law.**
5. **Build strategic alliances with sister organisations (e.g. composers, actors, etc).**
6. **Inform and mobilize the membership through a targeted campaign.**

Implementation in industry practice by June 7, 2022

STAGE 2

- Taking into account the transitional period for the implementation of the transparency obligation, all new provisions will have to be applied in individual contracts and possibly through collective agreements by June 2022.
- The Directive implementation presents a unique opportunity to initiate collective negotiations with producers, broadcasters, online platforms to develop common standards for relevant and efficient reporting on exploitation, proportionate remuneration framework, dispute resolution and right reversion mechanisms.
- Making sure that an incentive for binding collective negotiations is enshrined in national legislation transposing the Directive is therefore essential.
- FERA, FSE and UNI-MEI will continue to develop EU-level guidelines with trade organisations of producers, broadcasters and online platforms, in particular for the implementation of the transparency obligation : advanced reporting standards, including worldwide exploitation and audit, will be necessary to efficiently implement your new rights in a globalised cross-border exploitation market. The objective is to pre-empt the implementation of the transparency obligation key operational aspects, as contractual counterparts may attempt to escape the obligation simultaneously in national legislation and industry negotiations.

STAGE 2

Implementation in industry practice by June 7, 2022

Key steps to consider at national level :

1. **Build strategic partnerships (e.g. professional organisations of screenwriters, other audiovisual authors, performers) ;**
2. **Mobilize/organize your membership depending on the scope of the negotiation envisaged ;**
3. **Engage with producers' organisations, broadcasters, online platforms ;**
4. **Start with transparency obligation implementation.**

FAIR REMUNERATION IN CONTRACTS' PROVISIONS

FIRST RECOMMENDATIONS

- In Title IV "**Measures to achieve a well-functioning marketplace for copyright**", Chapter 3 focuses on "*Fair remuneration in exploitation contracts of authors and performers*" through six articles setting out new harmonized rights for authors and performers :

WHAT	ARTICLES	RECITALS
Principle of appropriate and proportionate remuneration	Art. 18	Rec. 72-73
Transparency obligation	Art. 19	Rec. 74-77
Contract adjustment mechanism	Art. 20	Rec. 78
Alternative dispute resolution procedure	Art. 21	Rec. 79
Right of revocation	Art. 22	Rec. 80
Common provisions	Art. 23	Rec. 81-82
Representation and collective bargaining	Art. 19 to 22	Rec. 77-79

- The initial European Commission proposal included only the "Transparency Triangle" (now Articles 19, 20 and 21). FERA, FSE and their partners successfully advocated for a number of changes to strengthen the text, as well as for the introduction of an Unwaivable Right to Remuneration (URR) with SAA (a similar proposal was advocated for by our performers colleagues), of which Article 18 is the result.

Authors' systemic weak bargaining power when negotiating contracts

- In Recital 72, the EU legislator acknowledges that individual authors and performers "*tend to be in a weaker contractual position when they grant a license or transfer their rights*", and that "*they need the protection provided for by this Directive to be able to fully benefit from [these] rights*".

RECOMMENDATION

Include into national law wording which similarly acknowledges of systemic weak bargaining power of author negotiating his/her contract, as the basis for stronger individual rights to be implemented through collective mechanisms.

- Recital 72 refers to cases where authors license/transfer their rights "*through their own companies*".

- It however excludes cases where "*the contractual counterpart acts as an end user and **does not exploit the work or performance itself**, which could, for instance, be the case **in some employment contracts***".

But...

New rights unwaivable by contract

- *Article 23 provides that "Member States shall ensure that any contractual provision that prevents compliance with Articles 19, 20 and 21 shall be unenforceable in relation to authors and performers".*

- Recital 81 importantly adds that this provision extends to "*agreements between [authors, performers and their contractual counterparts] and third parties, such as non-disclosure agreements*".

- Recital 81 also limits the possibility to circumvent its application by the choice of another applicable law : "*where all other elements relevant to the situation at the time of the choice of applicable law are located in one or more Member States, the parties' choice of applicable law other than that of a Member State does not prejudice the application of the provisions regarding transparency, contract adjustment mechanisms and alternative dispute resolution procedures laid down in this Directive, as implemented in the Member State of the forum."*

New rights unwaivable by contract

- This however does not apply to the principle of appropriate and proportionate remuneration (Article 18) or the right of revocation (Article 22), which however can be enforced through various collective mechanisms (Art. 18) or implemented through collective bargaining (Art. 22).

RECOMMENDATION

- **Extend these provisions to all provisions aiming at securing fair remuneration of authors in contracts.**
- **Ensure that this is watertight in your local national law.**

- Recital 82 sets out that free licenses can still be considered appropriate: "*Nothing in this Directive should be interpreted as preventing holders of exclusive rights under Union copyright law from authorising the use of their works or other subject matter for free, including through non-exclusive free licences for the benefit of any users.*"

Principle of appropriate and proportionate remuneration (Art. 18)

- Article 18 is the result of campaigns led by audiovisual authors (FERA, FSE, SAA) and performers for an unwaivable right to remuneration subject to collective management.

- It sets out a statutory right to remuneration for the exploitation of the work : "*Member States shall ensure that where authors and performers license or transfer their exclusive rights for the exploitation of their works or other subject matter, they are entitled to receive appropriate and proportionate remuneration*".

- The term "proportionate" is expected to be debated during transposition, as its translation differs from one EU language to the other. It is likely that national courts and the CJEU (Court of Justice of the European Union) will eventually have to provide their interpretation.

RECOMMENDATION

Refining the right to "appropriate and proportionate remuneration" as authors' entitlement to a share of the income generated by the ongoing use of their work.

- Significant margin for manoeuvre is left to Member States in implementing this new right : "*In the implementation in national law of the principle set out in Paragraph 1, Member States shall be free to use different mechanisms and take into account the principle of contractual freedom and a fair balance of rights and interests*".

Principle of appropriate and proportionate remuneration (Art. 18)

- While important flexibility is left to Member States in the way in which they implement Article 18, they are required to examine current practices and introduce new mechanisms if necessary : this presents a unique opportunity to make a case in areas of blatant lack of fair remuneration – be it theatrical exploitation, broadcasting, online exploitation or worldwide licensing. The results of the European audiovisual authors remuneration study[7] can be used to that end.

- While Recital 73 refers to **two distinct ways of calculating economic value of the rights (in advance or after the fact)**, determining "appropriate and proportionate remuneration" necessarily requires eventually considering "all [...] circumstances of the case" including actual exploitation of the work.

RECOMMENDATION

The principle of proportionate remuneration should be clearly established in implementing legislation, on the basis not only of "potential" but most importantly of "actual" economic value.

- Taking into consideration the author's contribution to the overall work should not be an issue for directors or screenwriters – except in cases where they do not have authorship or exclusive rights.

7. **Summary :** https://federationscreenwriters.eu/wp-content/uploads/2019/04/AV-authors-remuneration-Summary.pdf

   Detailed report : https://screendirectors.eu/wp-content/uploads/2019/03/EU-Audiovisual-Authors-remuneration-study-2019_FINAL.pdf

Principle of appropriate and proportionate remuneration (Art. 18)

- Recital 73 refers to **lump-sum payments** which "*can also constitute proportionate remuneration but it **should not be the rule**.*" However the term is not defined in the text.

- Defining the principle of proportionate remuneration on the basis of actual economic value of the work (see above) is essential in ending the abusive practices of buy-outs – upfront flat fees covering all uses, know or unknown, for the entire copyright term – in audiovisual authors' contracts.

- The flexibility provided to "*to define specific cases for the application of lump sums, taking into account the specificities of each sector*" presents a risk : contractual counterparts could argue that lack of access to data does not allow them to assess the potential or actual value generated by exploitation, platforms with mixed business models (e.g. Prime Video) could argue difficulties in identifying revenues generated worldwide by one single work.

RECOMMENDATION

Provide for a strictly restrictive definition of lump-sum payment constituting proportionate remuneration only where there is no prospect of a work earning any other income in the future (e.g. corporate films). If it has the possibility to earn income in the future, proportionate remuneration based on actual exploitation of the work must apply – flexibility on the mechanisms to calculate such remuneration is already provided by Article 18.

Principle of appropriate and proportionate remuneration (Art. 18)

RECOMMENDATION

Bundling of one/several use entitlement(s) into one single payment can only be considered acceptable when coupled with additional remuneration based on agreed thresholds (e.g. minimum guarantee upfront payment) through regular monitoring of the economic performance of the work.

- Recital 73 finally specifies that "*Member States should be free to implement the principle of appropriate and proportionate remuneration through different existing or newly introduced mechanisms, which could include collective bargaining and other mechanisms, provided that such mechanisms are in conformity with applicable Union law.*"

- Such mechanisms include mandatory or voluntary collective rights management, collective bargaining (e.g. providing benchmarks triggering the payment of royalties/residuals).

RECOMMENDATION

Stress in national law the importance of collective mechanisms providing legal certainty to operators licensing/exploiting the works in order to effectively enforce the general principle of appropriate and proportionate remuneration, in the same way that various existing models allow the valuation of the actual exploitation rights and proceed with related payments over time.

Principle of appropriate and proportionate remuneration (Art. 18)

RECOMMENDATION

In the absence of a binding collective agreement providing for ongoing payments for the use of the work beyond the initial fee, the new right to remuneration could be subject to collective management and collected directly from users (ref. to Art. 5 Directive 92/100 on rental rights).

- Collective bargaining for audiovisual authors, which are in their vast majority freelancers, could raise **competition law** issues which would therefore not be "in conformity with applicable Union law". This issue will need to be monitored closely as the implementation process unfolds, and existing best practices promoted.

Transparency obligation (Art. 19)

- Article 19 is the cornerstone of the EU legislator's approach to fair and proportionate remuneration in authors' contracts : transparency on the exploitation of their works and revenues generated is a pre-requisite for the valuation of the rights transferred/licensed. As per Article 23, this right to information cannot be waived by contract.

- The transparency obligation entails that "*authors […] receive on a regular basis, at least once a year, and taking into account the specificities of each sector, up to date, relevant and comprehensive information on the exploitation of their works […] in particular as regards modes of exploitation, all revenues generated and remuneration due*".

- It is strengthened by the right to appropriate and proportionate remuneration (Article 18).

- In addition to the detailed provisions in the article and corresponding recitals, Recital 76 states that "*Member States should have the option, in compliance with Union law, to provide for further measures to ensure transparency for authors and performers*".

- The transparency obligation does not apply to agreements concluded by collective management organisations and entities subject to the CRM Directive (2014/26/EU), which sets out that information must be provided to rightholders "no less than once a year" : this Directive levels the playing field with regards to transparency requirements.

Transparency obligation (Art. 19)

- **The scope** of the transparency obligation is defined in Article 18 Paragraph 1 and Recital 75 :
  - up-to-date accurate data,
  - to be received on a yearly basis,
  - as long as exploitation is ongoing,
  - comprehensive to include identification of all modes of exploitation,
  - all relevant revenues worldwide (including merchandising),
  - and remuneration due,
  - reporting should be comprehensible for individual recipient,
  - and fit for the purpose of an "*effective assessment of the rights in question*".
- The responsibility for the transparency obligation lies with the contractual counterpart (e.g. producer, broadcaster or SVOD producer) or its successor in title (e.g. catalogue sold to another company, liquidator in case of production company bankruptcy).
- Data processing related to the obligation (contact details and information on remuneration) are deemed consistent with General Data Protection Regulation (GDPR) legal framework.

Transparency obligation (Art. 19)

RECOMMENDATION

Specify the need to list all modes of exploitation and revenues separately. A work can perform differently on different modes of exploitation ; the share of revenues must be assessed in details in order to inform the use of the contract renegotiation mechanism.

RECOMMENDATION

Insist on the transposition of the term "worldwide" (Recital 75) to define the scope of the transparency obligation. Detailed worldwide exploitation reporting will provide essential leverage in securing fair remuneration for the online use of works in an era of rights' concentration by global streaming platforms pushing for buy-outs in authors' contracts when producing original content in the EU.

RECOMMENDATION

Contractual counterparts should have the responsibility to notify authors when exploitation of the work has ceased, thereby suspending their transparency obligation.

Transparency obligation (Art. 19)

- Paragraph 2 and Recital 76 ensures, in cases where the contractual counterpart does not hold the information necessary to fulfil the transparency obligation, that **additional information will provided upon request to authors "or their representatives" by sub-licensees** (i.e. users granted a license to exploit the work in a particular format).

- Authors' contractual counterparts are to provide information on the identity of sub-licensees.

RECOMMENDATION

Setting out a legal obligation of the sub-licensee to provide relevant information to the author or its representative upon request.

- Recital 76 sets out that authors must be able to use the information shared between authors and contractual counterparts on a confidential basis "*for the purpose of exercising their rights under this Directive*", which is reinforced in Recital 81 stating that "*agreements between [authors'] contractual] counterparts and third parties, such as non-disclosure agreements*" cannot allow derogation from provisions laid out in Articles 19, 20 and 21.

RECOMMENDATION

Authors' representatives can include individual counsel (agents, lawyer, etc) but must include their duly mandated representative professional organisation and define the possibility of presumption of representation.

RECOMMENDATION

Necessary collective enforcement of the transparency obligation, where duly mandated representative organisations are entitled to receive the data in addition to the individual author.

RECOMMENDATION

Introduce the notion of authors' contractual counterparts due diligence in collecting the data from sub-licensees necessary to fulfil the transparency obligation.

RECOMMENDATION

Introduce an alternative through collective enforcement of the transparency obligation directly between authors' representative organisations and sub-licensees.

RECOMMENDATION

Introduce the notion that confidentiality agreements cannot prevent the use of information in the scope of the transparency obligation by authors or their representatives (including representative organisations) in enforcing the right to remuneration, the contract adjustment mechanism, the right of revocation or in using the dispute resolution procedure – individually or collectively.

Transparency obligation (Art. 19)

- Recital 77 sets out the possibility for Member States to take a sector-specific approach to the transparency obligation implementation and insist that "*all relevant stakeholders should be involved when deciding on such sector-specific obligations*", mentioning collective bargaining as an option for such an agreement.

RECOMMENDATION

Ensure that professional organisations must be involved in binding collective negotiations (see above).

- Paragraph 3 introduces a possible **exception to the transparency obligation** "*where the **administrative burden** resulting of the obligation [...] would become disproportionate in the light of the revenues generated by the exploitation of the work*", but only in "duly justified cases" and limiting the obligation to "*the types and level of information that can reasonably be expected in such cases*".
- This provision reinforces the importance of actual (vs potential) revenues of the individual work to assess administrative burden generated by the transparency obligation – and consequently of the determination of proportionate remuneration through Art. 18 and/or Art. 20.
- Paragraph 3 doesn't provide the possibility to exclude a category of works (e.g. smaller budget) or a category of companies (e.g. based on size) from the transparency obligation : economic success comes to audiovisual works of all shapes and sizes.

RECOMMENDATION

Paragraph 3 clearly sets out that all revenues generated by the work must be taken into account to assess the exemption. Duly justified cases where the transparency obligation generates a disproportionate administrative burden on the contractual counterpart should therefore be duly justified and assessed on a case-by-case basis. Collective bargaining should set out a procedure for such assessment.

RECOMMENDATION

Possibility for an alternative, lighter reporting obligation based on a threshold level of revenues generated.

- Paragraph 4 enables Member States to introduce an **exception** to the transparency obligation when the author/performer's **contribution is "*not significant, having regard to the overall work*** or performance".

RECOMMENDATION

Introduction in national legislation of enforcement measures and sanctions in case of non-compliance, such as ineligibility of the project or of the infringing contractual counterpart company to public funding, including tax breaks, losing the European works qualification (no longer eligible to fill the production/broadcasting/online distribution quotas).

Contract adjustment mechanism (Art. 20)

- Article 20 set out that "*authors […] are entitled to claim additional, appropriate and fair remuneration […] when the remuneration originally agreed turns out to be disproportionately low compared to all subsequent relevant revenues derived from the exploitation of the works.*"

RECOMMENDATION

"Disproportionately low" should be understood as "not proportional" and not in a more restrictive way, as set out by certain translations in various EU languages.

- Recital 78 provides that "***all*** *revenues relevant to the case in question, including, where applicable, merchandising revenues, should be taken into account for the assessment of whether the remuneration is disproportionately low*" :

RECOMMENDATION

Insist that the scope of information on exploitation and revenues generated by the work obtained through the transparency obligation must be sufficiently detailed and comprehensive to allow for a fair assessment of the level of remuneration above what was initially agreed.

- The assessment will take into account "*specificities and remuneration practices in the different content sectors*" thus the importance of a clear definition of the right to appropriate and proportionate remuneration based on the actual exploitation revenues of the work and a restrictive definition of acceptable lump-sum payments.

Contract adjustment mechanism (Art. 20)

- The contract adjustment mechanism applies on an individual basis "*in the absence of an applicable collective bargaining agreement providing for a [comparable] mechanism comparable to that set out in this article*".

- Authors can be represented in making the claim for additional remuneration by "*duly mandated*" representatives, who can act on behalf of "*one or more*" authors in processing the request for contract adjustment. Said representatives are entitled to protect the identity of the author in order to mitigate blacklisting risks.

RECOMMENDATION

A collective negotiation implementing clearly identified thresholds of remuneration based on the actual exploitation of AV works. It would avoid the risk of an unclear definition or an overly low trigger for the readjustment mechanism and widespread risk of blacklisting – provided that the agreement sets out regular audits and possible sanctions.

If this is not possible, an alternative would be to collectively negotiate a common framework for the assessment of the remuneration initially agreed upon compared to actual exploitation results including a definition of the work's budget and recoupment threshold, and excluding the possible exhaustion of the right to renegotiate after a certain amount of time.

- If the renegotiation fails, the author is entitled to bring a claim before a court.

- The mechanism does not apply to contracts concluded by collective management organisations and entities subject to the CRM Directive (2014/26/EU).

Alternative dispute resolution procedure (Art. 21)

- Article 21 sets out that Member States must provide for "*voluntary, alternative dispute resolution procedure*" to handle disputes concerning the transparency obligation and the contract renegotiation mechanism.

RECOMMENDATION

Sector-specific procedure involving professional organisations of authors, performers and their contractual counterparts providing binding arbitration.

- Importantly, Member States are required in addition to "*ensure that representative organisations of authors may initiate such procedures at the specific request of one or more authors*".

- Article 23 and Recital 81 add that this procedure is of a "*mandatory nature, and parties should not be able to derogate from those provisions*".

RECOMMENDATION

If a satisfactory dispute resolution procedure already exists at national level, introduce an extension of its framework to collective actions by duly mandated representative organisations including professional organisations and guilds.

Right of revocation (Art. 22)

- Member States must provide a right of revocation of the license/transfer by the author to its contractual counterpart "*where there is a lack of exploitation of that work*".

- To be noted : the right of revocation trigger has been translated into a more restrictive way in certain EU languages. However in certain MS, more ambitious concepts such as "**continuous and permanent exploitation**" or "exploitation according to common usages" are used.

- Member States also have significant margin for manoeuvre to adjust the right of revocation in national law for example by excluding works from the application of the revocation mechanism if they "*usually contain contributions of a plurality of authors or performers*". This could de facto lead to exclude audiovisual works once production has started, especially as Recital 80 points out the need to consider the specificities of the AV sector.

- The European Commission has explicitly confirmed that the revocation right is intended to require that rights can revert to an author in the event of a failure by the producer to bring the project to production.

- Member States may also provide that authors "*can choose to terminate the exclusivity of the contract instead of revoking the licence or transfer of the rights*".

Right of revocation (Art. 22)

- Contractual provisions derogating from the revocation mechanism are only enforceable if based on a collective bargaining agreement.

RECOMMENDATION

Include audiovisual works in the scope of the right of revocation to include individual contracts at development stage, to mitigate poorly compensated yet binding exclusivity clauses with possible chilling effect on a project.

RECOMMENDATION

Avoid weakening the trigger for the right of revocation (e.g. from the Directive's "lack of exploitation" to "absence of exploitation") and state the need for the contractual counterpart to exercise best efforts in exploiting the rights licensed/transferred by the author.

Representation and Collective Bargaining (Art. 19, 20 and 21)

- Specific reference is made in Recitals 77, 78 and 79 and in Articles 19 (transparency), 20 (renegotiation) and 21 (dispute resolution) to the possible role of representative organisations and collective bargaining agreements. The logic is that individual authors are in a weak negotiating position and may be able better to affect their rights if those rights are managed by a representative organisation or by a collective agreement.

- For the sake of clarity, it is the European Commission's view that representative organisations mean guilds and unions and that any form of collectively negotiated agreement (such as a joint remuneration agreement in Germany or an inter-professional agreement in France), provided it meets that standards of the Directive, is understood as a collective bargaining agreement.

- Recital 77 states that when implementing the transparency obligation provided for in this Directive **all relevant stakeholders should be involved** when deciding on sector-specific obligations.

- Recital 77 says that " ***Collective bargaining should be considered as an option*** *for the relevant stakeholders to reach an agreement regarding transparency. Such agreements should ensure that authors and performers have the same level of transparency as or a higher level of transparency than the minimum requirements provided for in this Directive.*"

Representation and Collective Bargaining (Art. 19, 20 and 21)

- The phrase " *should be considered"* implies an active investigation of this possibility. And in the article itself at Article 19.5 says that " *Member States* ***may*** *provide that, for agreements* ***subject to or based on collective bargaining agreements****, the transparency rules of the relevant collective bargaining agreement are applicable, on condition that those rules meet the criteria provided for in Paragraphs 1 to 4."*

- A collectively bargained agreement that only deals with transparency arrangements is not in conflict with Competition law anywhere in the EU. Competition law restrictions relate to the setting of prices or rates of pay, not transparency arrangements such as provided for in the Directive.

- **Recital 78** says that **whether the contract is based on a collective bargaining agreement** must be part of the assessment of each case, meaning that the rules for decisions on renegotiating contracts could be managed in a collective agreement (as is already the case in Germany).

- Recital 78 also says that **representatives of authors and performers duly mandated in accordance with national law in compliance with Union law, should be able to provide assistance** to one or more authors. This would be regardless of whether there is a collective agreement or not.

- This ideas are applied in the Directive in **Article 20.1** which that says **Member States shall ensure that, in the absence of an applicable collective bargaining agreement providing for a mechanism comparable to that set out in this article, authors and performers or their representatives are entitled to claim additional, appropriate and fair remuneration.**

Representation and Collective Bargaining (Art. 19, 20 and 21)

RECOMMENDATION

Ensure that the legislation provides for the possibility of a collectively bargained agreement to manage the renegotiation of contracts with where income is greater than anticipated.

- **Recital 79** says that there should be an alternative dispute resolution procedure that addresses claims by authors and performers, **or by their representatives on their behalf**, related to obligations of transparency and the contract adjustment mechanism.

RECOMMENDATION

Ensure that the role of representative organisation in bringing cases to the dispute resolution system is recognised in the legislation.

- This idea is reflected in **Article 21** which says that **Member States shall ensure that representative organisations of authors and performers may initiate such procedures at the specific request of one or more authors or performers.**

RECOMMENDATION

The reference to authors' representative organisations in national legislation must systematically and explicitly include duly mandated professional organisations and guilds.

Representation and Collective Bargaining (Art. 19, 20 and 21)

RECOMMENDATION

In order to avoid lack of implementation due to uncertainties in legal interpretation of certain provisions, national legislation should refer to the need to conduct negotiations between representatives of authors and their contractual counterparts resulting into binding collective agreements by June 2022 in order to ensure legal security to operators licensing audiovisual works for exploitation once these new rights will have to be applied in individual contracts.

RECOMMENDATION

These collective agreements should systematically include sanctions for the non-application of its provisions, in accordance to Article 23 of the Directive which sets out the mandatory nature of Articles 19 to 21.

RECOMMENDATION

In order to avoid the multiplication of bilateral negotiations with various market operators, national legislation should set out a requirement to include all relevant representative organisations in a framework agreement to be extended to rightholders not affiliated to the representative organisations involved in the negotiation (e.g. transparency agreement extended by decree).

Representation and Collective Bargaining (Art. 19, 20 and 21)

- FERA and FSE intend to collect and translate existing and future related collective bargaining agreements to include them in the European Directors and Screenwriters Contracts Database[8] accessible to FERA and FSE members.

- In monitoring the trends in transposition of the Directive provisions in national law, particular attention will be brought to possible issues regarding collective bargaining and representation of freelance authors due to unhelpful interpretation of competition law.

8. Database
www.authorscontracts.eu

CHECKLIST

A checklist to ensure that everything we want is included in the draft national legislation.

- **How to get information on the transposition process.**
- **What to include in national legislation if not already explicitly mentioned : 54 items to check.**
- **(+)** indicates recommendation to reinforce the Directive provisions to transpose listed below.
- See main Playbook for reference on key concepts/provisions and further analysis (p.3).

To get information on the transposition process :

1. **Identify the Ministry in charge of drafting the corresponding national legislation.**
2. **Get information on stakeholders' consultation process (legislators are required to consult stakeholders) and deadlines for contribution.**
3. **Provide input stressing the importance of the essential new provisions to include in national law.**
4. **Build strategic alliances with sister organisations (e.g. actors, composers, etc).**
5. **Inform and mobilize the membership through a targeted campaign.**
6. **Identify the parliamentary adoption timeline and key players (Committee and Member of Parliament designated as rapporteur on the related draft legislation).**
7. **Meet the Rapporteur MP or Parliamentary Committee Chair and give input on draft legislation tabled.**

Article 18 – Principle of appropriate and proportionate remuneration

✓	WHAT	RECITALS
1	**Authors tend to be in the weaker contractual position when they grant a licence or transfer their rights, including through their own companies.**	Rec. 72
2	Where authors license or transfer their exclusive rights for the exploitation of their works, they are entitled to receive appropriate and proportionate remuneration.	Art. 18 Par. 1
3	Appropriate and proportionate remuneration means entitlement of a share of actual income generated by the ongoing use of the work, as demonstrated by the implementation of the transparency obligation (Art.19).	Rec. 73 (+)
4	Restrictive definition of lump-sum payment constituting proportionate remuneration for the AV sector only where there is no prospect of a work any other income in the future (e.g. corporate films).	Rec. 73
5	Does legislation provide mechanisms to ensure appropriate and proportionate remuneration from : – Theatrical exploitation – Broadcasting – Online/on-demand uses : (i) catch up-TV, (ii) simulcast, (iii) S-VOD, (iv) T-VOD, (v) A-VOD – Video sales – Rental/lending – Educational uses (where relevant)	Art. 18 Par. 2

Article 18 – Principle of appropriate and proportionate remuneration

✓	WHAT	RECITALS
6	Such mechanisms include : – Collective bargaining (incl. FR interprofessional agreement, DE joint remuneration rules) – Voluntary collective rights management – Statutory collective remuneration mechanisms	Rec. 72 (+) (+)
7	This provision is of a mandatory nature and parties should not be able to derogate from it.	(+)

Article 19 – Transparency obligation

✓	WHAT	RECITALS
	Minimum Scope of the Transparency obligation :	
8	▶ up-to-date accurate data,	**Article 19 Paragraph 1 and Recital 75**
9	▶ to be received on a yearly basis,	
10	▶ as long as exploitation is ongoing,	
11	▶ comprehensive to include identification of all modes of exploitation separately,	
12	▶ all relevant revenues worldwide including merchandising separately,	
13	▶ as well as remuneration due,	
14	▶ reporting should be comprehensible for individual recipient,	
15	▶ and fit for the purpose of an " effective assessment of the rights in question ".	
16	Authors' contractual counterparts should have to notify authors when exploitation has ceased, thereby suspending their transparency obligation.	**(+)**

Article 19 – Transparency obligation

✓	WHAT	RECITALS
	Obligations on contractual counterparts and sub-licensees	
17	The information is to be received from the parties to whom they have licensed or transferred their rights or their successors in title.	**Article 19 Par. 1**
18	In cases where the contractual counterpart does not hold the information necessary to fulfil the transparency obligation, additional information will be provided by sub-licensees (i.e. users granted a license to exploit the work in a particular format) : – upon request, – to authors "or their representatives" (incl. representative organisations).	**Article 19 Par. 2 and Recital 76**
19	Legal obligation of the sub-licensee to provide relevant information to the author or its representative upon request.	**(+)**
20	Authors' contractual counterparts should exercise due diligence in collecting the data from sub-licensees necessary to fulfil their transparency obligation.	**(+)**
21	Authors' contractual counterparts should systematically provide information on the identity of sub-licensees.	**Article 19 Par. 2**

Article 19 – Transparency obligation

✓	WHAT	RECITALS
	Confidentiality	
22	Authors and their contractual counterparts should be able to agree to keep the shared information confidential. Authors should always be able to use the shared information for the purpose of exercising their rights under this Directive.	Recital 76
23	Confidentiality agreements cannot prevent the use of information in the scope of the transparency obligation by authors or their representatives (including representative organisations) in enforcing the right to remuneration, the contract adjustment mechanism, the right of revocation or in using the dispute resolution procedure.	Recital 81
	Collective agreements	
24	All relevant stakeholders should be involved when deciding on such sector-specific obligations, explicitly including screenwriters' and directors' professional organisations.	Recital 77
25	Collective bargaining should be the preferred option for AV sector relevant stakeholders to decide on sector-specific obligations, at the minimum level of the Directive's transparency obligation requirements.	Article 19 Par. 5 Rec. 77 (+)
26	Such agreements should be concluded by the transitional period deadline of June 2022.	Article 26

Article 19 – Transparency obligation

✓	WHAT	RECITALS
	Limitations	
	Possible limitation of the transparency obligation :	Article 19 Par. 3
27	▶ in duly justified cases,	
28	▶ where the administrative burden resulting from the obligation would become disproportionate in the light of the revenues generated by the exploitation of the work or performance,	
29	▶ the obligation is limited to the types and level of information that can reasonably be expected in such cases.	
30	Is there a provision for sanctions on contractual counterparts not fulfilling the transparency obligation?	(+)
	Mandatory obligation	
31	This obligation is of a mandatory nature and parties should not be able to derogate from it.	Article 23 Recital 81

Article 20 – Contract adjustment mechanism

✓	WHAT	RECITALS
	Authors or their representatives are entitled :	**Article 20 Par. 1**
32	▶ to **claim** additional, appropriate and fair remuneration,	
33	▶ from the party with whom they entered into a contract for the exploitation of their rights (or their successor in title),	
34	▶ when the remuneration originally agreed turns out to be disproportionately low compared to **all** subsequent relevant revenues derived from the exploitation of the work.	
35	All revenues relevant to the case should be taken into account for the assessment of whether the remuneration is disproportionately low. The scope of information obtained through the transparency obligation must be sufficiently detailed and comprehensive to allow for a fair assessment.	**Recital 78** **(+)**
36	Is "disproportionately low" understood as "not proportional" and not in a more restrictive way unduly limiting the possibility to use the contract adjustment mechanism ?	**Article 20 Par. 1**
37	This mechanism is of a mandatory nature and parties should not be able to derogate from it.	**Article 23 Recital 81**

Article 20 – Contract adjustment mechanism

✓	WHAT	RECITALS
	Collective Bargianing	
	The contract adjustment mechanism applies on an individual basis in the absence of an applicable collective bargaining agreement providing for a comparable mechanism.	**Article 20**
38	Duly mandated authors' representatives should be able to provide assistance to one or more authors in relation to requests for contracts' adjustment, taking into account the interest of other authors where relevant.	**Recital 78**
39	Representatives should protect the identity of the represented authors for as long as it is possible.	**Recital 78**

Article 21 – Alternative dispute resolution procedure

✓	WHAT	RECITALS
	A voluntary, alternative dispute resolution procedure must be available to settle disputes concerning the transparency obligation and the contract adjustment mechanism.	**Article 21**
40	Authors' representative organisations can initiate such procedures at the specific request of one or more authors.	**Article 21**
41	Sector-specific procedure should involve professional organisations and provide binding arbitration.	**(+)**
42	This procedure is of a mandatory nature and parties should not be able to derogate from it.	**Article 23 Recital 81**
43	Costs of the dispute resolution procedure should be affordable for all individual authors.	**Recital 79 (+)**
44	The dispute resolution procedure is without prejudice to the right of parties to bring an action before a court.	**Recital 79**
45	Existing mechanisms should fulfil the conditions established in article 21 of the Copyright Directive.	**Recital 79**

Article 22 – Right of revocation

✓	WHAT	RECITALS
	Authors may revoke in whole or in part the license/transfer of rights where there is a lack of exploitation of the work they have licenses/transferred the rights to on an exclusive basis.	**Article 22 Par. 1**
46	Contractual counterparts should exercise best efforts in exploiting licensed/transferred by the author.	**(+)**
47	Any contractual provisions derogating from the right of revocation is enforceable only if based on a collective bargaining agreement.	**Article 22 Par. 5 (+)**
48	Taking into account the specificities of the audiovisual sector, authors should retain a right of revocation during development phase.	**Recital 80 (+)**
49	*Are audiovisual authors outright excluded for the implementation of the right of revocation?* *Or is there the possibility for audiovisual authors to use the right of revocation on option contracts for example?*	

Article 23 – Common provisions

✓	WHAT	RECITALS
	Any contractual provisions that prevent compliance with the transparency obligation, the contract adjustment mechanism or the dispute resolution procedure shall be unenforceable.	**Article 23**
50	This provision extends to the right to proportionate remuneration (Article 18) and the right of revocation (Article 22).	**(+)**
51	This provision extends to agreements between authors, their contractual counterpart and third parties, such as non-disclosure agreements.	**Recital 81**
52	The parties' choice of applicable law other than that of a Member State **does not prejudice the application of the provisions regarding transparency, contract adjustment mechanisms and alternative dispute resolution procedures** laid down in the Copyright Directive where all other elements relevant to the situation at the time of the choice of applicable law are located in one or more Member States.	**Recital 81**

Articles 19, 20 and 21 – Representation and Collective Bargaining

✓	WHAT	RECITALS
	Does the legislation allow that transparency rules of a collective bargaining agreements are applicable for the transparency requirements?	**Article 19.5**
53	Does the legislation provide that a collective bargaining agreement providing for a mechanism comparable to that set out in Article 20 (contract adjustment) is allowed?	**Article 20.1**
54	Does the legislation ensure that representative organisations of authors and performers may initiate procedures in the dispute mechanism at the specific request of one or more authors or performers?	**Article 21**

DIRECTIVE 2019 / 790 ON COPYRIGHT IN THE DIGITAL SINGLE MARKET

Analysis and checklist

IMPLEMENTATION PLAYBOOK

Federation of European Screen Directors
Fédération Européenne des Réalisateurs de l'Audiovisuel

Founded in 1980, the Federation of European Screen Directors gathers 48 organisations from 36 countries. It speaks for approximately 20,000 European screen directors, representing their cultural, creative and economic interests at national and EU level.
screendirectors.eu
@ Film_directors

fse FEDERATION OF SCREENWRITERS IN EUROPE

The Federation of Screenwriters in Europe is a network of national and regional associations, guilds and unions of writers for the screen in Europe, created in June 2001. It comprises 26 members from 21 countries, representing more than 7,000 screenwriters in Europe.
federationscreenwriters.eu
@ ScreenwritersEU