# NEGOTIATION OF REMUNERATION PAYABLE TO PERFORMERS AND PHONOGRAMS PRODUCERS FOR PUBLIC COMMUNICATION OF PHONOGRAMS AND AUDIOVISUAL ARTISTIC PERFORMANCES

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## Abstract

*Given that certain categories of authors' rights or neighboring rights holders do not exercise them individually, but is mandatory collective management by collecting societies, as CREDIDAM - art. 123[1] of the Romanian Copyright Law no.8/1996 provides for the categories of rights that requires mandatory collective management, including, in letter f) recognized the right to equitable remuneration of performers for communication to the public and broadcasting of commercial phonograms or reproductions thereof, stipulating the art. 123[1] par.2 that collecting societies, for these two categories of rights, are representing also the rights holders who have not given the mandates to them.*

*The mandate given by right holders, members of CREDIDAM, is thus extended to non-members, Romanian and foreign performers, that can benefit from equitable remuneration as required by art.146 d) of Romanian Copyright Law and art.12 of the Rome Convention – the latter article providing that "if a phonogram published for commercial purposes, or a reproduction of such 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."*

**Keywords:** *public communication; performers; phonograms producers; negotiation; mandate.*

## 1. Introduction

According to **art. 15 paragraph 1** of Law no. 8/1996 on copyright and related rights, as amended and supplemented (hereinater referred to as Law/the Law): *„It iscontemplated* ***as public communicationany communication of a work, made directly or through any technical means, made in a place open to the public or in any place where a number of people exceeding the normal circle of family members or their acquaintances is gathered,*** *including the representation on stage,reciting or any other form of direct performance or presentation of a work, the public display of work of fine art, applied art, photography and architecture, the public projection of cinematographic and other audiovisual works, including works of digital art, presentation in a public place, through sound or audiovisual recordings, as well as the presentation by any means of a broadcasted work in a public place. It is also considered public any communication of a work,either by wire or wireless means, achieved by making available to the public, including via the Internet or other computer networks, so that any member of the public may access it from any place or at any time individually chosen".*

According to paragraph 2 „The right to authorize or prohibit the communication or

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making available to the public of works shall not be deemed exhausted by any act of communication to the public or making available to the public".

In order to determine the final form of the Methodology regarding the remuneration payable to the performers and producers of phonograms for public communication of trade phonograms/ phonograms published for commercial purposes or reproductions thereof and/or of audiovisual artistic performances, for ambient and profit purposes, and the tables including performers' and phonogram producers' royalties for the phonograms and audiovisual, through compulsory collective management, the collective management organizations and the users in the field must negotiate.

The negotiation procedure is prescribed by Law[1], meaning that collecting societies should proprose a Draft Methodology to be submitted to ORDA. Within five (5) days ORDA should issue a decision establishing a negotiating committee, a decision to be published in the O.G. (Official Gazette)

The parties negotiate within 30 days. At the end of the negotiation period, if the parties have agreed, they conclude a protocol to be submitted to ORDA in order to be published in the O.G. If the parties do not reach an agreement they switch to the second stage, that of arbitration. After arbitration, the party which is not satisfied by the arbitration award pronounced by the Arbitration Panel may address the Court, by submitting an appeal in this regard.

**2. Content**

Such a negotiation took place between the collecting society which represents the rights of performers – CREDIDAM, the collecting society which represents the rights of phonogram producers – UPFR, on the one hand, and the representatives of users in the field on the other hand, meaning the carriers which were represented by COTAR[2], the hoteliers which were represented by FIHR[3] and FPTR[4], the large stores (supermakets) which were represented by FPRC[5] and three major users, i.e. Altex Romania, OMV Petrom Marketing and Dedeman.

The above mentioned parties were members of the Methodology Negotiation Committee, established by the Decision of ORDA General Manager no. 65/19.06.2015 amended by the Decision of ORDA General Manager no. 76/14.07.2015 (publihed in the Official Gazette of Romania no. 542/21.07.2015), conducted negotiations on the determination of the final form of the Methodology, in accordance with the provision of art. 131[1] of Law no. 8/1996, within the meetings dated 20.07.2015, 24.07.2015, 29.07.2015, 30.07.2015 (two of the meetings on different branches of activity), 05.08.2015, 12.08.2015; 14.08.2015, 18.08.2015, 27.08.2015 and 02.09.2015. The meetings were held according to the schedule agreed by the parties at their first meeting.

During the above mentioned meetings, the representatives of collective management organizations, CREDIDAM and UPFR, have proposed the Methodology form to be negotiated as it was determined

[1] Art.131, art. 131[1] and art. 131[2] of Law no. 8/1996 on copyright and related rights define the negotiation and arbitration procedures.

[2] Confederația Operatorilor și Transportatorilor Autorizați din România (Confederation of Licensed Transport Operators and Hauliers from Romania).

[3] Federația industriei hoteliere din România (Federation of Hoteling Industry from Romania).

[4] Federația Patronatelor din Turismul Românesc (Romanian Tourism Employers Federation).

[5] Federația Patronală a Rețelelor de Comerț (Employers' Federation of Trade Network).

by the Court through the Civil Judgment no. 192A/27.12.2012 of the Bucharest Court of Appeal - IX Civil Section and for intellectual property, labor disputes and social security cases, published in the Official Gazette no. 120/04.03.2013, by ORDA Decision no. 14/2013.

The new regulations proposed in the draft Methodology as well as the increased remunerations (compared to the current ones), as they are stipulated in the draft methodology, are justified against:

a) the circumstances that current remunerations (provided by ORDA Decision no. 399/2006, amended by ORDA Decision no. 189/2013) have not been negotiated since 2006, being maintained at the same value for 9 years;

b) the circumstances that, within the period 2006 – 2014, the remunerations were not indexed to inflation rate, so their value was devalued by the inflation accumulated within the period 2006 – 2014;

c) the circumstances that, within the period 2006 – 2015, the turnover of the users in the incidental industries (tourism, public catering/restaurants, bars, accommodation premises, etc., public passenger transport, retail chains/commercial spaces) significantly increased, bing necessary to correlate the remunerations in relation to the evolution of users' revenues over time;

d) the need to ensure an equitable remuneration and likely to support the creative activity of rightholders (performers and phonogram producers), especially in a context where public communication for ambient/profit purposes is one of the main sources of income for these rihthlders;

e) the need to correlate these remuneration with the European practice and also with remunerations determined for other categories of rightholders, especially those of the authors of musical works, which registered an important increase during 2011 - 2012 (compared to the remunerations envisaged in 2006), especially in the context in which it was declared as unconstitutional by the provisions of art. 134 paragraph 2, letter g) of Law no. 8/1996 (which limited the related rights to one third of the copyrights), by the Decision no. 571/2010 o the Constitutional Court, under the reasoning that in many circumstances the artistic performance of an atist can be more valuable than the work he/she plays;

f) the incorporation of some legislative changes in certain industries incidental to ambient public communication (mainly in the tourism and public passenger transportation) that require regulation of certain aspects (such as the requirement of submission by users of supporting documents during their licensing) which the old methodology has not taken into account;

g) the need to determine a predictable methodology, easy to be applied in practice, enabling a better collection of remunerations and corresponding decrease of collecting costs;

In turn, the representatives of users have submitted for debate proposals for amending or supplementing the Methodology, in order to reasonably increase the remunerations provided by ORDA Decision no. 399/2006, but with some nuances which I shall present below.

The issues on which the parties have agreed in the sense of determining the final form of the methodology have resulted in concluding of protocols, as required by law.

Thus, UPFR, CREDIDAM, FPRC, ALTEX and OMV signed a protocol on 22.09.2015 regarding the final form of the methodology as well as of the remunerations contained in the table at letter B, representing the remunerations due by the supermarkets.

On 28.09.2015, UPFR-CREDIDAM-FIHR-OMV also signed another protocol by which they agreed on the final form of the

methodology, as well as on the remuneratins due by hotels, restaurants, bars, swimming pools, elevators etc.

Those agreed under the Protocol of 22.09.2015 (between UPFR, CREDIDAM, FPRC, ALTEX, OMV) are similar to those provided by the Protocol of 28.09.2015 (between UPFR, CREDIDAM, FIHR and OMV), noting that in the latter Protocol was further agreed:

**a)** „inside the hotels, for the reception/public catering area", justified removal of the reception/public catring areas from the remuneration set per accomodation premises;

**b)** exemption from indexing to inflation rate of the remuneration provided for accommodation premises, in the frame of interest of determining a differentiated remuneration per each year, for the years from 2016 to 2020, with a gradual increase;

**c)** if inside an accomodation premises there are accomodation places (rooms) having different classifications (stars/daisies), the remuneration for all accommodation rooms shall be paid based on the higher classification, as according to the classification certificate of the accommodation premises"**.**

The changes stipulated in the Protocol of 28.09.2015 are relevant only for the the users in the hotel and public catering industry represented by OMV and FIHR.

During the negotiations for the remunerations proposed by the collecting societies for fairs, exhibitions, advertising events, bus/railway stations, railway passanger transportation, train stations, subway stations and waiting areas, passangers plane transportation, airports and passangers waiting areas, ships/boats for recreational transportation, cable transportation, parking areas, sports and recreation, offices/production areas, telecommunications, the users' representatives in the negotiation committee have not express any criticism, proposals or changes in remunerations.

Also during the negotiations, the methodology text has been determined with the following exceptions:

**a)** COTAR formulated criticism, in that it disagrees with bringing up the supporting documents required for their licensing, and willing to agree only with the *Agreement Certificates* related to the passengers' public transportation vehicles.

We find as ungrounded such criticism because the collective management organization has the legal right to request, according to art. 130 paragraph 1, letter h) of Law no. 8/1996, both the information and the submission of the documents required in order to determine the remunerations, so that the proposed regulation appears completely justified in assuming obvious that the documents which the methodology text refers to are necessary in order to determine the obligation to pay remuneration. Relating only to *Agreement Certificates*, which are specific only to Taxi transportation activity (not to other means of transportation - bus, motor coach, minibus), is not sufficient and does not allow a clear representation of the payment obligations of the remunerations due by users in the passengers' transportation category.

**b)** COTAR criticized the amount of penalties stipulated by this article (of 0.1% per day of delay), requiring, as an alternative, the applying of legal interest. COTAR criticism is inconsistent with the position initially expressed during negotiations, when it was willing to sustain the regulation of severe monetary penalties for those who delay the payment of remuneration. However, applying the legal interest would represent only a general remedy that would not take into account the specifics of the collection activity and that would neither improve the collection system nor discourage late payments. On the other

hand, this late payment fee is also used in other collection areas, being also agreed in the license agreements by the users in the field of public communication.

For the remuneration due by the public catering establishments, restaurants, bars, coffe shops, etc., users' representatives have agreed to increase remunerations, but in a reasonable way, especially given that for the public catering establishments (dining room, restaurant, etc.) inside the accommodation premises the remuneration corresponding to these areas is to be included in the remuneration per accommodation premises, as proposed by the representatives of FIHR and FPTR.

By the Protocol dated 22.09.2015, concluded between CREDIDAM-UPFR-OM-FIHR, they determined an appropriate remuneration for public catering areas being reduced by 10% compared to the ones proposed by the collective management organizations during negotiations (in relation to those determined by the Decision of the Bucharest Court of Appeal) and set differently depending on the area (on area levels - up to 100 square meters, between 101 to 200 sqm, and over 200 sqm) and location (A1 for those in the cities and resorts and A2 for those in the communes and villages).

FPTR did not suggest for negotiation certain values of remuneration corresponding to such areas, but asked that they should be differentiated depending on area and location, which requirements we believe that the said Protocol meets.

**In relation to the remuneration payable for commercial premises**, the associative structures and designated users in the negotiation committee, which had been interested in negotiating and determining the final methodology form, were FPRC, ALTEX, DEDEMAN and OMV.

As we mentioned above, UPFR, CREDIDAM, FPRC, ALTEX and OMV have signed the Protocol dated 22.9.2015, having as object both the methodology text and the amount of remuneration.

The only interested party that has not signed this protocol was DEDEMAN, but given that DEDEMAN did not raise any objection either on the text of the methodology or on the remunerations determined by the parties at the negotiating table, we believe that it also concured with those agreed.

**In relation with the remuneration due by the hotel, tourism and public catering industry** (hotels, villas, pensions, etc.), users' representatives in this branch of activity, FPTR and FIHR, have proposed several versions for calculating the remunerations for the public communication inside the accomodation and public catering units. The positions of the two representative associations have been convergent regarding some aspects, and different (and somewhat divergent) regarding others, so that negotiating and finding a common ground with the representative collecting societies was difficult, without being able to materialize in an understanding of the parties.

In order to better understand the reasons for which UPFR, CREDIDAM, FIHR and OMV have signed a protocol on 28.09.2015 regarding the methodology form and the due remunerations, in a different form than the initial one (which was subject to negotiations), I will display the position of each party in relation to which the elements contained in the Protocol have been adapted.

FIHR originally referred to the parties two negotiation proposals about how to determine the remunerations for the tourism accomodation premises:

**a)** the first being related to maintaining the current fees structure (the one in the ORDA Decision no. 399/2006, also

maintained in the Decision no. 189/2013, but with updated fees), exclusively for hotel rooms, however, with the remark to determine differentiated remunerations for hotels of 4 * and 5 * stars and to maintain or, at most, to reasonably raise the remuneration for all accommodation premises, regardless of the occupancy of accommodations premises;

**b)** the second is about *setting a flat rate fee per room* (proposals similarly submitted by CREDIDAM and UPFR during negotiations), differentiated according to the classification of the accommodation premises by stars/daisies, but which should be weighted with the occupancy degree of the rooms and expected that such occupancy to be estimated, either by reference to the statistics of the Institutul National de Statistica INS (National Statistics Institute (NSI)) regaring the occupancy in the previous year, or by judgment of the parties during the negotiations, and taken into account for determining a remuneration flat rate per room.

FPTR supported the second option proposed by FIHR, for the purpose of determining a remuneration flat rate per room, but which takes into account the occupancy degree of the accommodation premises.

The representatives of CREDIDAM and UPFR have showed that the occupancy degree of rooms in the accommodation premises represent a criterion which in practice is difficult to assess and verify, because one can not ignore the lack of reporting in this area, and the alternative **assessment of the occupancy degree based solely** on statistical data applied consistently to all the hotels, it is not fair neither towards users, ignoring here the principles of competition (being inequitable to apply the same values of occupancy degree of rooms to all the users), nor towards the rightholders, while reducing remuneration after an arbitrary criterion that would greatly complicate the collecting of remuneration.

On the other hand, the introduction of such criterion as a way of weighting the value of the flat rate remuneration is contrary to the notion of "public communication" that the ECJ has construed in Case C-162/10, meaning that the act of public communication is conducted by hotels operator, by placing TVs for its customers in the hotel rooms, not being relevant if they (the customers) actually use them, so that the degree of use of the works is not given by the occupancy degree of the rooms, but by the number of rooms equipped with such devices for playback and reception of works.

We consider that CREDIDAM and UPFR position was clearly understood by the representatives of the users, the proof being also the circumstance that FIHR proposed a new calculation version to be negotiated, by which they requested ***to determine a single remuneration rate for the entire accommodation premises*** that includes, besides the remuneration corresponding to the hotel rooms, also the remuneration corresponding to the reception, the bar and restaurant inside the accommodation premises.

In light of this latest proposal, FIHR presented two value alternatives of the remuneration proposed, namely:

**a)** either the increase by 65% of current remunerations (stipulated by the Decision 189/2013) for hotels, rise justified in order to also include the appropriate remuneration for the restaurant, bar and reception and, at the same time, a 5% increase of such increased remuneration per each year, from 2015 through 2018 inclusive, as follows: 10% (in 2015), 15% (in 2016), 20% (in 2017) and 25% (in 2018);

**b)** or the increase by 70% of the current remunerations for hotels, rise justified in order to also include the

appropriate remuneration for the restaurant, bar and reception, and, at the same time, a 5% increase of such increased remuneration per each year, from 2015 through 2018 inclusive, as follows: 5% (in 2015), 10% (in 2016), 15% (in 2017), 20% (in 2018).

The increases targeted by FIHR proposal were based on the current reference value of remunerations provided by ORDA Decision no. 399/2006, amended by ORDA Decision no. 189/2013, as well as on the fees structure and differentiation of remuneration in the ORDA Decision no. 399/2006.

Although FPTR stated that they disagree with the values submitted by FIHR, however they agreed with this option to determine a single remuneration for the whole accommodation premises, showing that remuneration should include all the areas which are prescribed mandatory for the classification of the accommodation premises, according to the ANT Order no. 65/2013, and for the areas that exceed the classification compulsory criteria and that are found inside the accommodation premises, to determine a distinct remuneration for each area, according to their size and destination. In reply, FIHR showed that the said Order is considering a number of criteria against which the accommodation premises are classified, without necessarily binding certain areas inside the accommodation premises, which, however, still have relevance in terms of the score which the accommodation premises can get, points relevant, in turn, as of the classification by stars/daisies. Precisely for this reason, FIHR considered that there should be clearly determined and right from the start for which areas inside the accommodation premises the remuneration is to be included in the one set per unit of accommodation, otherwise, questionable analyzes would be generated in terms of determining the areas for which the remuneration is included in the one set per unit of accommodation.

In relation to the things shown by FIHR, FPTR did not present counterarguments but they required for that remuneration per accommodation premises to be represented by a remuneration per room (accommodation area), as they are provided in the Annex to the Classification Certificate of the accommodation premises, irrespective of their level of occupancy, in this manner not sustaining the theory of remuneration weighting with the occupancy degree of the accommodation premises. This remuneration per room/accommodation area[6] would also include the appropriate remuneration for the reception area, the bar and the restaurant inside the accommodation premises. This remuneration per room would also be differentiated depending on the location of the unit and on the classification level by stars / daisies. In this regard, FPTR proposed the determination of some remunerations differentiated per room for the villages/communes, for cities, municipalities, for touristic areas of national and local interest, which in turn, to be differentiated by each section depending on the number of stars of the accommodation premises, or depending on where they are located in the city, town, etc. As a reference, they refered to a draft law on determining a flat rate tax in the hospitality (hotels) industry, a draft containing such a complex scheme of taxation based on many criteria (related to the location, the rating on stars/daisies, the number of rooms, etc.), the flat tax being set, in turn, per room.

[6] FPTR criticizes the notion of room in comparison with the circumstance that an accommodation area may be composed of several rooms, as is the case of the apartments inside the accommodation units; such a distinction between "room" and "accomodation area" we believe it's irrelevant given that the fee relates to the room/apartment booked and not to the number of rooms from an apartment.

FIHR showed that even the current methodology (which I agree with in principle) contains such criteria of differentiation in remunerations per villages / communes and towns, namely depending on the levels as per the number of rooms and depending on the classification by the stars and by the categories of accommodation premises, but, in their opinion, the introduction of other additional criteria to differentiate remuneration is not justified because such an approach would greatly complicate the pricing structure of the accommodation premises and thus would generate significant costs for both sides when collecting the remuneration.

The same arguments were also presented by CREDIDAM and UPFR, showing that the application of the fee structure requested by FPTR would entail significantly higher costs in the collection of remunerations and, implicitly, the determining of much higher remunerations than those originally proposed. CREDIDAM and UPFR have shown that in order to collect remunerations they can only carry costs within the legal limit of 15% from the collected remunerations and therefore they prefer a more predictable form of methodology and easy to apply in practice. As the financial resources and also the logistics of the two collective management organizations are limited by law, they cannot be required to apply the " taxation scheme" of a draft law in differentiating the remuneration, because the collecting societies cannot compare with ANAF in terms of the number of inspectors in the field or in terms of pecuniary sanctions provided by the law for ANAF.

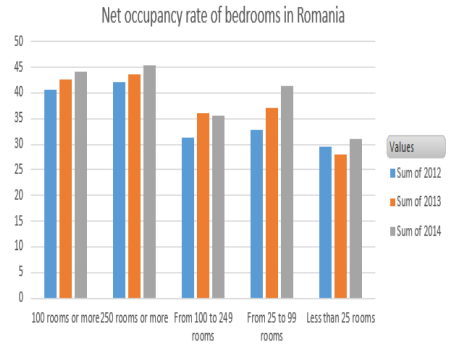
FPTR returned on its proposal, simplifying the scheme originally proposed, meaning that differentiation of remunerations should be made depending on the number of stars/daisies and depending on area in villages/ communes, the area in city/municipality/resort, and on this occasion they sent by e-mail to the representatives of the collective management organizations the values of required remunerations, which is lower by 40% compared to those in force (provided by ORDA Decision no. 189/2013). This latest proposal was considered by all other parties involved in the negotiation (including by FIHR) as absurd, especially given that the FPTR position was not consistent during the negotiations, alternating between opposing to the right to an equitable remuneration in comparison with construing the concept of "public space", and submitting proposals for remuneration differentiation by too many criteria, perhaps only in order to aggravate the collection system and the application of methodology in practice. This is the reason why we could not negotiate reasonable terms and sign a possible protocol with FPTR.

FPTR allegations regarding the "user" definition in the draft methodology according to which it is contrary both to the "grammatical" definition and to the "Romanian jurisprudence in the field" as well as to the "European precedents and acquis communautaire", is completely ungrounded. By the definition of the term "user" in the new methodology draft no extension was made for the payment obligation of the persons communicating publicly trade phonograms/phonograms published for commercial purposes or reproductions thereof and/or audiovisual artistic performances, for ambient or lucrative purposes. The definition of this term in the current methodology is "*By user of the audiovisual artistic performances we understand any natural or legal person authorized to use under any title (ownership, management, rental/lease, sublease, etc.) the spaces in which audiovisual works are used for ambient purposes"*, so it is easy to see that the new definition does not extend

this concept, but simply outlines it in order to be more understandable. Moreover, the obligation to pay the remuneration due to performers and to producers of phonograms turns only to users that communicate publicly trade phonograms/phonograms published for commercial purposes or reproductions thereof, and/or audiovisual artistic performances.

We also believe that it is very important to note, in comparison with FPTR allegation regarding the average occupancy of tourist accomodation structures functioning as accomodation premises for the period 2010-2015, that the occupancy of the bedrooms in Romania, in principle, is in an uptrend, or at least it is steady (fig. 1).

Fig. 1




Moreover, we specify that in Europe, the occupancy is not used as main criterion, for instance in: France, Spain, Slovenia, Moldova, etc. One of the problems we predict where the payable remuneration would be calculated based on occupancy, is the need for transmission by users of monthly financial reports in which they declare on their own responsibility the occupancy degree. This is to the disadvantage of users, given that for establishing a flat rate per room there must be also determined a minimum remuneration (in order not to negate the legal provisions and to protect the holders of neighboring rights). Moreover, in case CREDIDAM and UPFR will receive from the users these financial reports on monthly basis, we see ourselves in the situation where the fiscal inspection bodies request information about these users, or taking into account the increased number of tourist accomodation structures with functions of tourist accommodation, this will result in the obstruction of CREDIDAM and UPFR activity.

Given that rightholders cannot exercise individually certain categories of copyright or related rights, and a collective management by collecting societies, as CREDIDAM and UPFR, is mandatory – the art. $123^1$ of the Law provides for the categories of rights for which collective management is mandatory, among which, at letter f), the right to equitable remuneration acknowledged to performers for the public communication and broadcasting of trade phonograms or of reproductions thereof, stipulating at art. $123^1$ paragraph 2 that for these two categories of rights the collecting societies also represent the rights holders who have not granted a mandate. The mandate given by rightholders, i.e. members of CREDIDAM and UPFR, is thus extended to non-members, both Romanian and foreign artists and producers of phonograms, as provided by art. 146 letter d) of the Romanian law and art. 12 of the Rome Convention - the latter article providing that "when a phonogram published for commercial purposes or a reproduction is used directly for any type of broadcasting or for any type of public communication to the public, the one who uses it shall pay an equitable remuneration to performers or to producers of phonograms or to both of them".

If the collected amounts of money are due to foreign performers and to phonogram producers, such amounts shall be transmitted to the collecting societies in that country, with which CREDIDAM or UPFR have

concluded a reciprocal representation agreement.

Whereas, in accordance with Article 123[1] the collective management of copyright or neighboring rights, in certain cases provided by law, is mandatory, in the same manner according to the provisions of Article 129[1] of the Law no. 8/1996 "*in case of compulsory collective management, if a holder is not a member in any organization, jurisdiction lies with the organization in the field with the largest number of members. Claiming by the unrepresented rightholders of the amounts due can be made within 3 years from the date of notification. After this period, undistributed or unclaimed amounts are used according to the decision of the general meeting, excluding the management costs."*

As concerning the supplementation of the documentation for the authorization-exclusive license with the documents indicated by FPTR, we do not see an opportunity in such an endeavor, and we believe that the draft methodology requested documents are sufficient in order to issue the authorization-exclusive license. It is completely irrelevant the allegation that all permits and regulations refer to seats and not to areas, as long as we require "any justifying document that shows the area where the phonograms /audiovisual artistic performances are broadcasted", and not the total surface area.

We believe that removing the article on requesting the authorization from the Draft Methodology is completely inappropriate and meaningless as long as not all users publicly communicating trade phonograms/phonograms published for commercial purposes or reproductions thereof are willing to obtain an authorization - license from CREDIDAM and from UPFR, and/or to be in compliance with the law. Thus, this point in the Methodology is required in order to establish a guarantee regarding the payment of the remuneration due to the performers and to the phonogram producers.

Complying with the defined process and the basic principle of negotiation, one should bear in mind that CREDIDAM and UPFR are two collecting societies representing holders of rights related to copyright, performers or producers of phonograms, and they are bound by a special law applicable in the field to defend their rights and to not create any damage to them.

**In the article 124 of the Law no. 8/1996 is stated that** "*the collective management organizations of copyright and related rights, referred to in the Law as collecting societis, are, in the present law, legal entities established by free association and* ***having as main activity, the collection and distribution of royalties which maangement has been entrusted to them by the holders***."

We did not agree with the change proposed by FPTR on reducing by 20% the amount due, in the circumstance in which the payable remuneration is paid in advance for 12 months until February 28th. Such a reduction will result in ridiculously low remunerations due to performers and producers of phonograms. It is necessary that FPTR understands that these earnings are not "fees" but rights of the author (copyrights), private rights accruing by composers and performing artists/performers as remuneration for their creation work from those using the outcome of their creative activity (music). We believe that the amounts collected by CREDIDAM and UPFR are at a reasonable level, and such a major reduction is inappropriate.

However, summarizing the proposals of both representative associations (FIHR and FPTR), we find that **both prefer to establish a *remuneration per accommodation premise***, which should

include the remuneration corresponding to the reception area, the bar, the restaurant and the dining room, the difference between the proposals of FIHR and those of FPTR being that FIHR wants to determine a *monthly flat remuneration for the entire accommodation premise*, differentiated both by stars/daisies rating of the accommodation premise, and by the levels of rooms for those which are classified; and FPTR wants to determine a *monthly flat remuneration per room*, which should also include the remuneration corresponding to the areas inside the accommodation premise which are mandatory under the classification, differentiated both by stars/daisies rating of the accommodation premise and also depending on the area where the accommodation premise is located, because there is a different remuneration for the ones in villages/communes and the ones in cities/towns and resorts.

The position of the two representative associations converges in terms of determining ***a remuneration per accommodation premises***, a situation towards which the representatives of the collective management organizations have reconsidered their original proposal (the one set by the Bucharest Court of Appeal) and expressed their willingness to determine a flat rate remuneration that includes besides the rooms/accommodation areas alsothe reception area, the restaurant, the bar, provided that they are managed by the same hotel operator, as well as the determination of different remunerations for other areas (than those mentioned above) inside the accommodation premises, such as the swimming pool, the gym, the elevator, the lobby (inside which music is played), which will be paid where appropriate and separately from the remuneration per accommodation premises.

In this respect, negotiations continued even after the expiry of the initially agreed timetable and even after the arbitration was initiated by the two collecting societies, carrying a rich correspondence by e-mail for determining the final form of the tables and the corresponding fees for the accommodations premises

Thus, depending on the proposals of FPTR and FIHR during negotiations, UPFR and CREDIDAM proposed to OMV, FIHR and FPTR a new form of fees for the accommodation premises, claiming for the determination of a monthly flat remuneration (for the entire accommodation premises, of which excluding the elevators, the fitness, massage and spa facilities, the event halls, bars with nightclub programs, night clubs and other clubs, etc.), differentiated by the type of accommodation premises, by the stars/daisies classification, by the levels on the number of accommodation spaces (rooms), estimating that such proposal is pretty close to the things proposed by FPTR and FIHR.

Following the proposal formulated on 28.09.2015, UPFR, CREDIDAM, FIHR and OMV signed a protocol in which they agreed the fee structure and the value of differentiated remunerations, so that the negotiations and the fees agreed by the representatives of OMV and FIHR users, provide an absolute position to the parties in determining a remuneration per accommodation premises, as this term was appropriated by the parties.

**Related to the remuneration payable by the users of the public road transport of passengers**, the representatives of this branch of activity, namely COTAR, made a counterproposal saying that the current fees (provided by ORDA Decision no. 189/2013) should decrease, but the collection rate of remuneration by the collective management organizations should increase, and for this purpose they have offered their support in

order to identify solutions in this regard. Thus, they discussed the solutions for charging the remuneration either at the moment of authorizing the public passenger transport (per each vehicle in part) by the state authorities (namely by the ARR[7]) or at the moment of homologation or classification on stars and/or on categories of motor vehicles by the RAR[8], and the remuneration would subsequently be allocated to the vehicles based on the number of permits/authorizations issued in this manner and notwithstanding such vehicles authorized for public passenger transport were or were not actually used in passenger transport.

The right to an equitable single remuneration of these categories of rightholders represented by CREDIDAM and UPFR is statutory, and users' obligations established by the special law are mandatory and not left to the discretion of each individual.

Thus, article $106^5$ paragraph 1) of the Law no. 8/1996 on copyright and related rights, as amended and supplemented, explicitly provides: "(1) *For direct or indirect use of the phonograms published for commercial purposes or of reproductions thereof by broadcasting or by any means of communication to the public, the performers and producers of phonograms are entitled to a single equitable remuneration. "*

COTAR showed that they categorically disagrees with differentiation of remuneration depending on the number of seats of the vehicle, showing instead that they wish to establish a remuneration depending on the type of vehicle, namely taxi, bus, coach (as means of transport for which, according to the regulations in the field, the number of places available for public passenger transport is determined), and to this purpose they have submitted alternative proposals: either to establish a single remuneration throughout the lifetime of the vehicle, payable at the moment of its agreeing or authorization by the RAR (but without indicating a remuneration value for this type of calculation) or to determine a monthly remuneration of RON 1/taxi, RON 3/bus, RON 5/domestic coach and RON 10/international transport, but which will be comparable to the number of permits/authorizations for the public passenger transport issued by the public authorities for user's fleet of vehicles and notwithstanding they were actually used in public passenger transport.

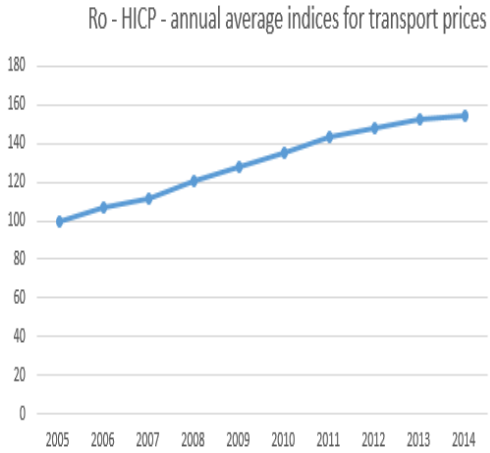
The proposal of certain fees with a sole remuneration value payable on the first registration of vehicles depending on the manufacturing year or on the type of vehicle, without specifying the appropriate amount of remuneration for each category of rightholders in part or without presenting the essential elements in determining the representation value of the proposals made, namely stating the number of CECAR members, who are they and which is the fleet of vehicles owned by each member, proves the lack of seriousness of the negotiations with this organization.

We also believe that it is very important to note, relative to CECAR allegation regarding the economic situation in the "*years of crisis*" as well as the current situation, and coming to meet the difficulties faced by the users, that starting with the beginning of 2015 the prices for the urban transport increased by 2%. Moreover, in 2010 (in full "*economic crisis*") Romania was in first place in the European Union with regard to price developments in the field of transport, with an increase of 42.66% in five years. In 2014, the annual average index of

[7] Autoritatea Rutieră Română (Romanian Road Authority).
[8] Registrul Auto Român (Romanian Motor Vehicles Registry).

prices charged by carriers was with 54%[9] higher than the reference year 2005. It had a steady upward trend between 2005 and 2014 (Fig. 2).

Fig. 2




Thus, we note that neither COTAR has met the difficulties faced by consumers of their services, and thy chose to consistently raise prices.

Also as evidence of COTAR concern for increasing the collection of remuneration by the collective management organizations, they showed that they agree with regulating by this methodology the very high pecuniary sanctions for the users who are late in payment or for those who play ambient music without previously getting a non-exclusive license from CREDIDAM and UPFR.

There were also ongoing negotiations on finding solutions to regulate the situation of collaborating taxi drivers (mostly natural persons/individuals) who drive a taxi in collaboration with major taxi companies by using their personal vehicles branded by the company and for the services provided on behalf of the Taxi Company, but without any result.

In order to have a representation of value of the proposals made by COTAR certain information were requested regarding the COTAR members (which is the number of members, who are they and what is the fleet of vehicles owned by them), information that COTAR was bound to make available for collecting societies during the negotiations, but did not meet this obligation until the end.

On the other hand, UPFR and CREDIDAM discussed a number of issues which, in fact, hinder the collection of remunerations, most problems appearing while identifying the fleet of vehicles (the number of motor vehicles for public passenger transport), the type of transport (domestic and/or international) or about the distinction between bus and coach (relevant distinction in terms of related remuneration).

Regarding the issues discussed, UPFR and CREDIDAM considered that the methodology itself must provide sufficient tools in order to clearly determine users' payment obligations in this branch, such as regulating the distinction between bus and coach in terms of the remuneration due to the performers and to the producers of phonograms, in relation to the type of transportation (urban, interurban/inter-county, international) or regulating the obligation of the user to present documentary evidence, as it clearly results from the form of the proposed methodology.

COTAR considered that a regulation is not required in the methodology in order to make the distinction between notions of bus and coach, because such a distinction is made by GO no. 27/2011 and the letter will be taken into account in determining the remuneration for the bus and the coach respectively.

Summarizing the position of COTAR during negotiations, we noted that their proposals focused on:

[9]http://ec.europa.eu/eurostat/tgm/table.do?tab=table&plugin=1&language=en&pcode=tsdtr310.

**a)** the reduction of remunerations proposed by CREDIDAM and UPFR (the fees proposed by COTAR being ridiculous and, consequently, unacceptable);

**b)** the increase in the collection rate of CREDIDAM and UPFR;

**c)** the non-differentiation of remunerations depending on the number of seats of the vehicle, especially for the bus and coach;

*The negotiation is a process that takes place between two or more parties (in which each side has needs, objectives and points of view) which attempt to reach a mutual agreement on a problem or dispute regarding the parties involved. Exchange principle states that each participant in the negotiation must win something and give up something. However, the principle of exchange does not necessarily imply equality between what we give and what we receive.*

Thus, both during the negotiation and arbitration stages, one can find that the collecting societies have taken into account the counterproposals of CECAR representatives and changed the fees structure.

However, the representatives of carriers have only submitted requests for the decrease of the payable remuneration proposed by CREDIDAM and UPFR, promoting only ridiculous fees and proposing to increase the collection of remuneration by CREDIDAM and UPFR, but without presenting viable solutions and requesting for an undifferentiated remuneration depending on vehicle's number of seats, especially for buses and coaches.

It can thus be concluded that, on the one hand CREDIDAM and UPFR have both complied with the negotiation process and with its basic principle, aiming to protect the rights of the represented holders (and not to harm users), but on the other hand, the users have the only aim *to win something, WITHOUT willing to give up something*. Furthermore, COTAR appreciates, in an entirely misrepresented manner, that a clear delimitation (regarding the remuneration increase) should be made between carriers and other categories of operators, namely those operating in public catering, hotels, retail, motivated by the fact that only in the latter's activity the use of *„devices for the communication of musical artistic creations"* is appropriate, because the essence of their activity has the *"purpose of entertainment"*. Such an assessment only reinforces the total lack of understanding of COTAR with regard to the creative industries.

CREDIDAM and UPFR took into account the user's position expressed during the negotiations and have reconsidered the proposal by changing the fees structure and also by reducing the remuneration proposed during negotiation, so that the **new structure proposed in Table E1** to differentiate remunerations depending on the type of vehicle and on the type of transport, following that the distinction between bus and coach to be done according to GO 27/2011[10]. The fees so proposed (as listed in the table below) are differentiated by type of transportation; the remuneration is higher for the passenger's touristic transportation by coach, both domestically and internationally, and much lower in the case of regular people transportation by bus

[10] GO no. 27/2011- regarding the road transport, with subsequent amendments and supplements, defines the coach as "a bus with more than 22 seats, designed and equipped only for the carriage of seated passengers, having special spaces for carying the luggage on long distances, arranged and equipped to ensure comfort of transported persons, with the interdiction to carry people standing up (article 3, point 4). GO no. 27/2011 makes the distinction between bus and coach, the bus being "designed and constructed for the carriage of passengers seated and standing, which has more than 9 seats including driver's seat".

at urban/suburban level or domestic-interurban/inter-county level. A differentiation of remuneration as well as of the amount thereof has been proposed considering several economic aspects, such as the price difference of the ticket depending on the type of transport carried out or on the type of vehicle used (for eg. in scheduled domestic - urban/suburban and inter-county transportation by bus the ticket price being lower than in the touristic and/or international transportation by coach).

There have also been proposed separate remunerations for both the cars used for taxi and for the minibuses. For the taxis (specific for urban or suburban transportation), the remuneration is higher than in urban transport buses, given that the price of the ticket per person is much higher than the corresponding "public" transport. For minibuses, the remuneration is determined as the average between the remuneration corresponding to urban transport and the one for the scheduled intercity transport, taking into consideration that minibuses are used both in the urban transport and in the in scheduled intercity transport.

Therefore, the user must submit a monthly report (a statement on its own responsibility - affidavit) by which it communicates the number of cars that have been used / introduced into traffic. Moreover, in the current methodology in force, and in the new structure proposed for Table E1 by CREDIDAM and UPFR, there is clearly and unequivocally stated that we talk about the means of transport equipped with sound systems, radio, TV, and headphones for individual listening. In this regard, we believe that all COTAR allegations on the exemption from payment of the remuneration for the vehicles either in terms of construction or for the ones that had the music devices removed or sealed or that belong to the "Cold Park", based on the self-statements on their own responsability submitted by the carriers to the collective management organizations, are deeply ungrounded.

| **E** | **Transports*****)** | | | |
|---|---|---|---|---|
| **E 1** | **Passenger Road Transport - means of transportation equipped with sound system, radio, TV, individual headphones for listening, whether they are in a rent-a-car system, or in a collaboration, or lease, etc.** | | | |
| | Framing type | **Monthly remuneration (excluding VAT)** | | |
| | | **Producers of phonograms (UPFR)** | **Performers for the phonograms (CREDIDAM)** | **Audio visual Performers (CREDIDAM)** |
| 1 | Recreational vehicle (tractor, small train, semitrailer, platform) | RON 10 | RON 10 | RON 5 |
| 2 | Bus, trolley bus, tram and minibus used in regular urban / suburban transportation of persons | RON 10 | RON 10 | RON 5 |
| 3 | Car up to 6 passengers seats used for taxi service ******) | RON 15 | RON 15 | RON 7 |
| 4 | Car up to 6 seats used in the rent service (rent a car) | RON 15 | RON 15 | RON 7 |
| 5 | Minivan / minibus regardless of the number of seats | RON 20 | RON 20 | RON 10 |

| | | | | |
|---|---|---|---|---|
| 6 | Bus used in domestic (national) transport,both interurban / Intercounty | RON 30 | RON 30 | RON 15 |
| 7 | Coach used in domestic transport, both interurban / Intercounty | RON 60 | RON 60 | RON 30 |
| 8 | Coach used in international transport | RON 80 | RON 80 | RON 40 |

We believe that the reconsidered form of the table in letter E1 is a fair proposal in relation to the users of this activity segment, which takes into account their position on the criteria of differentiation of remunerations but also on the reduction of the remuneration originally proposed for negotiation.

On the other hand, an increase in remunerations is justified in comparison with the current ones (in the ORDA Decision no. 399/2006, amended by ORDA Decision no. 189/2013), for the above outlined reasons.

Taking into account the preponderant position of the parties involved in the negotiation regarding the increase of the remunerations relative to the current ones, regarding their differentiation structure and regarding the methodology form, as such position was recalled by the concluded protocols, we consider the position of the two associations, i.e. PFTR and COTAR, as being an unconstructive one in the negotiations and arbitration that took place.

## 3. Conclusions

As a result of the arbitration, the Arbitral Award was rendered under no. 1/2016, published in the Official Gazette no. 146 / 25.02.2016, setting the remuneration due by the users for this collection field – i.e. the public communication, starting with March 2016.

The collecting societies CREDIDAM and UPFR believe that the remunerations determined by the Arbitration Panel are very small relative to the economic situation of the users, which is why they shall submit an appeal to the competent Court.

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