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Committee on Legal Affairs
The Chair

19.12.2018

Mr Pavel Svoboda
Chair
Committee on Legal Affairs
BRUSSELS

Subject: Opinion on the legal basis of on the proposal for a directive on copyright in digital single market (COM(2018)0280 – C8-0383/2016 – 2016/0280(COD))

Dear Mr Chair,

On 10 October 2018 the Coordinators of the Committee on Legal Affairs took note of the fact that, in the course of the ongoing interinstitutional negotiations on the proposal for a directive on copyright in the digital single market, the addition of Articles 53(1) and 62 TFEU to Article 114 TFEU as legal bases was proposed. The Committee on Legal Affairs has therefore decided, in accordance with Rule 39(2) of the Rules of Procedure, to verify the legal basis of the said proposal and in particular the potential additions proposed.

The Committee on Legal Affairs considered the above question at its meeting of 10 December 2018.

I - Background

On 14 September 2016, the European Commission made a legislative proposal for the modernisation of the EU copyright rules, including a directive on copyright in the Digital Single Market. The Council received a mandate for negotiation on 25 May 20181.

The legal basis originally proposed by the Commission was Article 114 of the Treaty on the Functioning of the European Union (TFEU), which is the general legal basis concerning measures for the harmonisation of Member States' legislation in the internal market. The aforementioned Council mandate added two new legal bases: Articles 53(1) and 62 TFEU and

[1] Document 9134/18 of 25 May 2018.

the Commission agreed to that change1.

On 12 September 2018, Parliament voted on the proposal for a directive on copyright in the digital single market and adopted its mandate2 for negotiations by 438 votes in favour. On that basis, on 2 October 2018 the Parliament negotiating team has entered into negotiations with Council and Commission with the aim to finalise a text and adopt the directive.

In the context of pending interinstitutional negotiations, it is therefore important to determine whether the proposed addition of Articles 53(1) and 62 TFEU is justified. Article 62 is part of the chapter on services and provides that Articles 51 to 54 TFEU shall apply to the matters covered by the chapter on services. Article 53(1) TFEU is the legal basis for the adoption of directives in the ordinary legislative procedure. Article 53(1) used in combination with Article 62 TFEU may be used as legal basis for the adoption of directives in the field of services.

II - Relevant Treaty Articles

Article 114 TFEU reads as follows:

Article 114
(ex Article 95 TEC)

1. Save where otherwise provided in the Treaties, the following provisions shall apply for the achievement of the objectives set out in Article 26. The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market.

2. Paragraph 1 shall not apply to fiscal provisions, to those relating to the free movement of persons nor to those relating to the rights and interests of employed persons.

3. The Commission, in its proposals envisaged in paragraph 1 concerning health, safety, environmental protection and consumer protection, will take as a base a high level of protection, taking account in particular of any new development based on scientific facts. Within their respective powers, the European Parliament and the Council will also seek to achieve this objective.

4. If, after the adoption of a harmonisation measure by the European Parliament and the Council, by the Council or by the Commission, a Member State deems it necessary to maintain national provisions on grounds of major needs referred to in Article 36, or relating to the protection of the environment or the working environment, it shall notify the Commission of these provisions as well as the grounds for maintaining them.

5. Moreover, without prejudice to paragraph 4, if, after the adoption of a harmonisation measure by the European Parliament and the Council, by the Council or by the Commission,

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1 According to the request for a legal advice sent to the Legal Service by letter of 23 October 2018 by the Chair of the Committee on Legal Affairs.

2 P8_TA(2018)0337.

a Member State deems it necessary to introduce national provisions based on new scientific evidence relating to the protection of the environment or the working environment on grounds of a problem specific to that Member State arising after the adoption of the harmonisation measure, it shall notify the Commission of the envisaged provisions as well as the grounds for introducing them.

6. The Commission shall, within six months of the notifications as referred to in paragraphs 4 and 5, approve or reject the national provisions involved after having verified whether or not they are a means of arbitrary discrimination or a disguised restriction on trade between Member States and whether or not they shall constitute an obstacle to the functioning of the internal market.

In the absence of a decision by the Commission within this period the national provisions referred to in paragraphs 4 and 5 shall be deemed to have been approved.

When justified by the complexity of the matter and in the absence of danger for human health, the Commission may notify the Member State concerned that the period referred to in this paragraph may be extended for a further period of up to six months.

7. When, pursuant to paragraph 6, a Member State is authorised to maintain or introduce national provisions derogating from a harmonisation measure, the Commission shall immediately examine whether to propose an adaptation to that measure.

8. When a Member State raises a specific problem on public health in a field which has been the subject of prior harmonisation measures, it shall bring it to the attention of the Commission which shall immediately examine whether to propose appropriate measures to the Council.

9. By way of derogation from the procedure laid down in Articles 258 and 259, the Commission and any Member State may bring the matter directly before the Court of Justice of the European Union if it considers that another Member State is making improper use of the powers provided for in this Article.

10. The harmonisation measures referred to above shall, in appropriate cases, include a safeguard clause authorising the Member States to take, for one or more of the non-economic reasons referred to in Article 36, provisional measures subject to a Union control procedure.

Article 53(1) TFEU reads as follows:

Article 53
(ex Article 47 TEC)

1. In order to make it easier for persons to take up and pursue activities as self-employed persons, the European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure, issue directives for the mutual recognition of diplomas, certificates and other evidence of formal qualifications and for the coordination of the provisions laid down by law, regulation or administrative action in Member States concerning the taking-up and pursuit of activities as self-employed persons.

Article 62 TFEU reads as follows:

Article 62
(ex Article 55 TEC)

The provisions of Articles 51 to 54 shall apply to the matters covered by this Chapter [which has the heading "Services"].

III – CJEU case law on the choice of legal basis

It is settled case-law of the Court of Justice that "*the choice of legal basis for a Community measure must rest on objective factors amenable to judicial review, which include in particular the aim and content of the measure*".[1] The choice of an incorrect legal basis may therefore justify the annulment of the act in question.

If examination of a measure reveals that it pursues a twofold purpose or that it has a twofold component one of which is identifiable as the main or predominant purpose or component, whereas the other is merely incidental, that measure must be based on a single legal basis, namely that required by the main or predominant purpose or component.[2]. It is only exceptionally, if it is established that the act simultaneously pursues a number of objectives or has several components that are indissociably linked, without one being secondary and indirect in relation to the other, that such an act will have to be founded on the various corresponding legal bases, provided that they are procedurally compatible. [3]

IV - Analysis and determination of the appropriate legal basis in consideration of the aim and content of the proposal, the Parliament's mandate and the Council's mandate

The possible addition of Articles 53(1) and 62 TFEU and Article 114 TFEU is directly expressed in the Council mandate.

It should first be noted that Article 17 aims to amend Directives 96/9/EC and 2001/29/EC, which are both based on a similar combination of the three legal bases in question. Basing the amending act on legal bases that are the equivalents of those of the amended acts seems to be an appropriate approach from a formal aspect.

Taking into account the substantive aspects and the aim and content of the text, being it the Commission's proposal, Council's or Parliament's respective mandate, it is clear that the text aims at regulating copyright and related aspects but it does so in the context of the digital single market, in particular services provided online. The scope of the instrument would also be extended to rules "*aiming at ensuring a well-functioning marketplace for the exploitation of works and other subject matter"4* which is carried out in the framework of *"activities of a*

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1 Case C-45/86, *Commission* v. *Council* (Generalised Tariff Preferences) [1987] ECR 1439, para. 5; Case C-440/05 *Commission* v. *Council* [2007] E.C.R. I-9097; Case C-411/06 *Commission* v. *Parliament and Council* [2009] ECR I-7585.
2 Case C-137/12, *Commission* v *Council*, EU:C:2013:675, para. 53; Case C-411/06, *Commission v Parliament and Council,* EU:C:2009:518, para. 46 and case-law cited therein; Case C-490/10, *Parliament* v *Council*, EU:C:2012:525, para. 45; Case C-155/07, *Parliament* v *Council*, EU:C:2008:605, para. 34.
3 Case C-300/89, *Commission* v *Council* ("Titanium dioxide"), EU:C:1991:244, paras. 17-25.
4 Article 1.

commercial character"1 that are *"provided for remuneration"2*, among other by online content sharing service providers.

The aim of the proposal, as stated in its Article 1(1), is *"further harmonising the Union law applicable to copyright and related rights in the framework of the internal market, taking into account in particular digital and cross-border uses of protected content. It also lays down rules on exceptions and limitations, on the facilitation of licences as well as* ***rules aiming at ensuring a well-functioning marketplace for the exploitation of works and other subject-matter****" [emphasis added]*.

This exploitation of works and other subject-matter, in particular, shall be considered to be a "service" within the meaning of Article 57(b) TFEU, namely an activity of a commercial character which is normally provided for remuneration.

This is notably the scope of the Article 13 of the Commission's proposal, which, following the Explanatory Memorandum, "*creates an obligation on information society service providers storing and giving access to large amounts of works and other subject-matter uploaded by their users to take appropriate and proportionate measures to ensure the functioning of agreements concluded with rightholders and to prevent the availability on their services of content identified by rightholders in cooperation with the service providers*".

One of the focal points of the Council's and Parliament's texts is, again, Article 13 on the use of protected content by online content sharing service providers seeking to address the so-called "value gap", i.e. to strike the right balance between the remuneration received by authors and performers and the profits made by internet platforms when they make their works accessible. In Article 2(5) of the Council mandate, Internet platforms are defined as "online content sharing service providers" of "an information society service whose main aim or one of the main purposes is to store and give to the public access to a large amount of works or other subject-matter uploaded by its users which it organises and promotes for profit-making purposes." In accordance with Article 13 of the Council text these providers would be subject to rules regulating conditions under which they provide services, thus influencing their business model.

In the Parliament's mandate, this provider, also defined as 'online content sharing service provider' 3, is "*a provider of an information society service one of the main purposes of which is to store and give access to the public to a significant amount of copyright protected works or other protected subject-matter uploaded by its users, which the service optimises and promotes for profit making purposes*". Based on Article 13(1) of the Parliament's text, platforms would be required to conclude licensing agreements with rightholders.

An additional obligation for online content sharing service providers and right holders to cooperate with each other in good faith in order to ensure that unauthorised protected works or other subject matter are not available on their services is provided by the Parliament's mandate in the event that the rightholder refuses to conclude licensing agreement4. In case

1 Article 57(b) TFEU.
2 Heading of Article 57 TFEU.
3 Article 2 – paragraph 4b (new).
4 Article 13 - paragraph 2a (new).

that this cooperation led to an unjustified removals of the content, online content sharing service providers are to put in place complaint and redress mechanisms that are available to users1.

Clearly, Article 13 is one of the most prominent provisions of the Parliament's text and, in general, of the proposal. The measures provided for by the Parliament's mandate include significant additions to the online content sharing service providers' operating models.

In the Council's text, service providers would be subject to an obligation to implement effective and proportionate measures to prevent that specific works or subject matter is available on their services2. Moreover, they would be obliged to remove or disable access to these works and prevent their future availability. Such measures are to take into account the nature and size of the services, in particular whether they are provided by a micro- or a small-sized enterprise.3 In addition, the Council text foresees an obligation for online content sharing service providers and rightholders to cooperate with each other. Online content sharing service providers are to put in place complaint and redress mechanisms that are available to users of the service. A stakeholder dialogue is also to be established.4

Those rules and mechanisms created by Article 13 constitute one of the main regulatory aspects of the text. They do not seem to be of a secondary or ancillary nature looking at the proposal as a whole.

Furthermore, Article 10 concerning negotiation mechanism seeks to create modalities for discussions to facilitate negotiations on the online exploitation of audiovisual works between parties facing difficulties related to the licensing of rights when seeking to conclude an agreement for making available audiovisual works on video-on-demand services. This provision clearly touches upon the framework within which services are provided in the internal market. In addition, theParliament's text foresees a fostered dialogue between representative organisations of authors, producers, video-on-demand platforms and other relevant stakeholders in order to encourage the availability of audiovisual works on video-on-demand.

Article 11 on the protection of press publications concerning online uses grants publishers copyright over "*digital use of their press publications by information society service providers*"5. This provision regulates the online use of press publications by information society services providers. Like Article 13, it is part of Title IV dealing with "measures to achieve a well-functioning marketplace for copyright" and relates partly to the conditions of providing services in the internal market.

All the provisions referred to above seem to constitute one of the centres of gravity of the Commission proposal and both EP and Council's texts, the other being further harmonisation of Union law on copyright and related rights.

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1 Article 13 - paragraph 2b (new).
2 Article 13(1) and (4).
3 Article 13(5).
4 Article 13(6)-(8).
5 Article 11 - paragraph 1.

V - Conclusion and recommendation

The aforementioned provisions of the Parliament's and of the Council's texts are undoubtedly major in the proposal and aim at regulating the conditions for providing services in the internal market. This purpose is not incidental compared to the harmonisation of Union law applicable to copyright and related rights. On the contrary, these two objectives are linked and in a direct relation.

The suggested Article 53 TFEU is placed under the "Right of Establishment" heading in the TFEU and provides for the adoption of directives for the coordination of the provisions laid down by law, regulation or administrative action in Member States. Furthermore, Article 62 TFEU under the "Services" heading provides that Article 53 shall apply to the matters covered by that chapter. It is to be noted that these two articles provided the legal basis for several directives in the intellectual property field: Directive 96/9/EC,1 Directive 2000/31/EC,2 Directive 2001/29/EC,3 Directive 2006/115/EC,4 Directive 2006/116/EC,5 Directive 2010/13/EU,6 Directive 2012/28/EU,7 Directive 2014/26/EU.8

This analysis of the legal basis is based on Parliament and Council mandates. Further analysis of the legal basis could be necessary if the result of interinstitutional negotiations would substantially altered the proposal, in particular the objective of regulating the conditions for providing services in the internal market.

At its meeting of 10 December 2018 the Committee on Legal Affairs accordingly decided, unanimously 9, that the addition of Articles 53(1) and 62 TFEU to Article 114 TFEU as legal basis of the proposal for a directive on copyright in the digital single market is consistent with the purpose of the proposal and with the relevant case law.

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1 Directive on the legal protection of databases (OJ L 77, 27.3.96, p. 20).

2 Directive on certain legal aspects of information society services, in particular electronic commerce in the Internal Market (OJ L 178, 17.7.2000, p. 1).

3 Directive on the harmonisation of certain aspects of copyright and related rights in the information society (OJ L 167, 22.6.2001, p. 10).

4 Directive on rental right and lending right and on certain rights related to copyright in the field of intellectual property (OJ L 376, 27.12.2006, p. 28).

5 Directive on the term of protection of copyright and certain related rights (OJ L 372, 27.12.2006, p. 12).

6 Directive on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (OJ L 95, 15.4.2010, p. 1).

7 Directive on certain permitted uses of orphan works (OJ L 299, 27.10.2012, p. 5).

8 Directive on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market (OJ L 84, 20.3.2014, p. 72).

9 The following were present for the final vote: Pavel Svoboda (Chair), Jean-Marie Cavada, Mady Delvaux (Vice-Chair), Axel Voss (rapporteur for opinion), Joëlle Bergeron, Kostas Chrysogonos, Sergio Gaetano Cofferati, Mary Honeyball, Sajjad Karim, Sylvia-Yvonne Kaufmann, António Marinho e Pinto, Julia Reda, Evelyn Regner, Tiemo Wölken, Francis Zammit Dimech, Tadeusz Zwiefka, Kosma Złotowski, Luis de Grandes Pascual.

Yours sincerely,

Pavel Svoboda