CENTRE FOR EUROPEAN POLICY STUDIES

ECONOMISTI ASSOCIATI

Study on the implementation, application and effects of Directive 2001/29/EC (InfoSoc Directive) and of its related instruments

28th May 2015

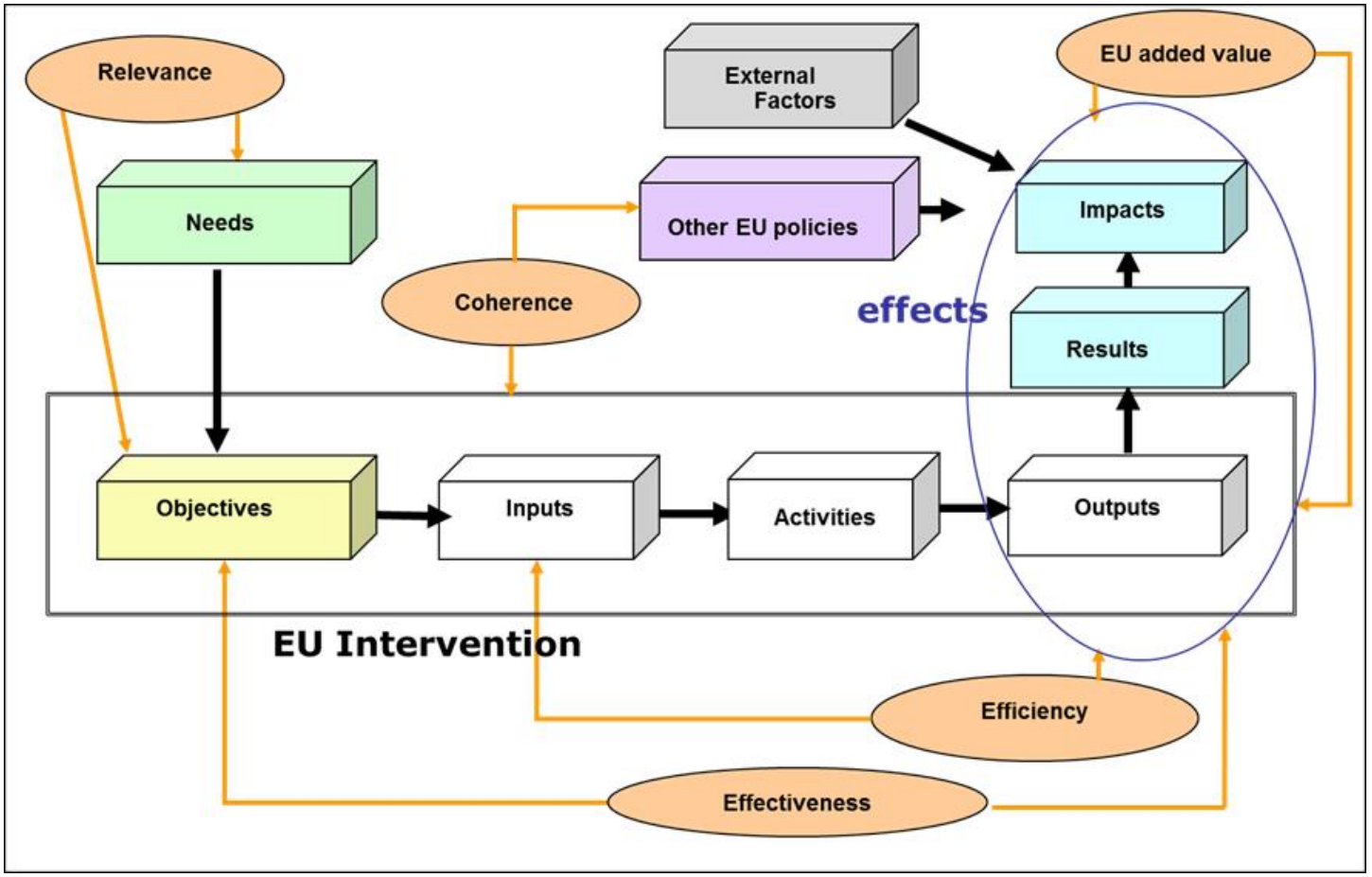
Agenda

- Framework for ex post evaluation
- InfoSoc Directive: the intervention logic
- Evaluation of specific aspects
  - Legal aspects
  - Internal market issues
  - Industrial policy issues
- Evaluation questions

Objective and scope

- **Interim evaluation of the implementation, application, and effects of the InfoSoc Directive and its related instruments**
  - **Comprehensive evaluation of the InfoSoc Directive**
  - **Evaluation of relevant provisions included in other legislation**
  - **Analysis of the gaps that recent legislation is trying to bridge**
    - ***Directive on certain uses of orphan works 2012/28***
    - ***Directive on collective management of copyright and related rights and on multi-territorial licensing of online rights in musical works 2014/26***
- **Not covered by the analysis**
  - **Options for reform**
  - **Added value of a modernisation of the EU copyright framework**

Overall framework for ex post evaluation



Source European Commission's 2015 Better Regulation Guidelines - Toolkit

InfoSoc: intervention logic

1. **Why did the EU intervene in the field of copyright?**

2. **How did the EU intervene in the field of copyright?**

3. **What are/were the expected effects, impacts and outcomes of the EU intervention?**

InfoSoc: why? (1)

- **Background analysis:**
  - **The birth and diffusion of the Internet jeopardised the effectiveness of copyright law scope and enforcement**
  - **International treaties (1996 WIPO) called for an intervention to adapt the scope of EU copyright laws to the new context**
  - **Need to clarify the applicability of the exhaustion principle to the act of making content available on the Internet**
  - **Legal fragmentation in Member States was seen as a potential obstacle to EU competitiveness and growth**

InfoSoc: why? (2)

- **The birth of the Internet**
  - **Digitization of information + e2e architecture**
  - **The "end of copyright" argument (J. Perry Barlow) v. the "perfect technology of justice" argument (Lessig 1996 and 1999)**
  - **Re-intermediation process and new business models based on advertising**
  - **"Net neutrality" embedded in early legislative approaches to internet law: ISPs generally not responsible for the conduct of their users, and not heavily involved in enforcement of legal rules**

Legal basis of EU copyright

- **EU copyright legislation has been enacted mostly as Internal Market legislation (TFEU), not only because of the lack of direct competences for the EU to legislate in this field until the entry into force of the Lisbon Treaty, but also because of the considerable 'distance' between Member States when it comes to certain aspects of copyright**
- **The French *droit d'auteur* and the Anglo-Saxon copyright models treat copyright exceptions in a very different way and shape protection on the grounds of different concepts of authors' rights**
- **The Information Society Directive 2001/29/EC, for the first time, aimed at providing a horizontal set of rules that should have been applied uniformly throughout the EU**

Goals of the InfoSoc Directive

- **The *primary* objective of the Directive was the adaptation of copyright to the digital environment and the definition of broader exclusive rights on a EU-wide basis with the aim of incentivising content creation and industrial production at a time when copyright had become much easier to infringe**
- **What was shaped, at least on paper, as a *secondary* goal was in fact the legal basis that the adoption of the Directive was based upon, i.e. the removal of barriers and disparities in order to facilitate trans-border exploitations of copyright works**

Aspects not covered by InfoSoc Directive

- Sectors where specific pieces of legislation apply (i.e., software and databases)
- Regulation of transformative uses and derivative works
- Standard of originality for copyright to subsist
- Collective rights management
- Private international law aspects such as the criteria to apply for the determination of the applicable law in case of copyright infringements occurring online

Areas of copyright where harmonisation was 'deliberate'

(i) Definition of the exclusive rights of reproduction, communication to the public and distribution – and their adaptation to the digital environment

(ii) Exceptions and limitations to copyright, especially when it comes to the definition of their exhaustive number and to the restriction of their field of application through the three-step test

(iii) Legal protection of technological protection measures and its relationship with copyright exceptions

(iv) Sanctions and remedies, in particular injunctions targeted at online intermediaries

Making copyright compatible with other EU policy goals

- **'High level of protection': all exclusive rights harmonised by the Directive were defined very broadly**
- **However, in certain cases the CJEU had to provide an interpretation of the scope of exclusive rights that made them compatible with other EU policy goals**
- **Landmark decisions were rendered with regard to**
  - **Exclusion of certain types of hyperlinking and embedding of works from the scope of the right of communication to the public (*Svensson, Bestwater International*)**
  - **Restricted subject matter of injunctions against online intermediaries, inspired by the principle of proportionality (*Scarlet, Netlog, Telekabel*)**
  - **Exhaustion of the right to control the sale of computer programs (*Usedsoft*)**

“Unintended” areas of copyright harmonisation

- Harmonisation has occurred also in the form of judge-made law in areas of copyright where the Directive had remained silent (at least on paper)
- The approach of the CJEU in a number of judgments has been described as ‘teleological’ or ‘interventionist’
- Various Member States claim that the unexpected extension of the scope of copyright harmonisation, especially in certain areas (e.g., online communication to the public and copyright exceptions), has deviated from the original intent of the Directive

State of the art on copyright exceptions and limitations

- **The harmonisation of exceptions and limitations was deliberately shaped as minimal at EU level**
  - **Optional character**
  - **No protection from contractual overrides/technical restrictions**
  - **Possibility to replace them with licences**
  - **No distinction between exceptions having an impact on cross-border exploitations of content and exceptional that could have remained 'local'**
- **CJEU acknowledged the autonomous status of exceptions under EU law and recognised their potential to protect constitutional values such as freedom of expression and communication**

Problems of alignment

- **e-Commerce Directive (because of the un-coordinated implementation of Art. 12-15 Directive 2000/31)**
- **IPRED (because of the inapplicability of a few of its provisions to online copyright infringement)**
- **EU directive on data protection (due to the absence of an interface between the protection of Internet user privacy and the disclosure of infringers' identity in the context of civil enforcement proceedings)**

The territorial application of copyright rules (1)

- **Principle of territoriality**
  - Copyright and related rights conferred by national laws and limited to the territory of the granting State
- **Lack of harmonisation**
  - **Definition of originality** (elaborated by EU case law and based on the «author's intellectual creation standard»)
  - **Definition of derivative works/transformative uses** (left to Member States' discretion and increasingly central in the digital environment)
  - **Authorship of copyrighted works** (left to Member States' discretion and with potential impact on both the demand and supply side of the Internal Market)

The territorial application of copyright rules (2)

- **Exercise of the right**
  - **Principle of territoriality**
    - Right-holders entitled to exercise 28 different national rights
  - **Principle of exhaustion**
    - Limited to the distribution of tangible copyrighted goods
    - Does not apply to the reproduction right nor to the communication/«making available» to the public right
    - Territorial licensing of intangible copyrighted works is lawful
      - «Download-to-own» issue

Territorial licensing and geo-blocking

- **Limited cross-border portability**
- **Limited cross-border trade**
  - Access to content that are available to other EU consumers
  - Access limited to the «national offer»
- **Main sources of market fragmentation**
  - **Transaction costs** to clear rights at a national level
    - Reproduction
    - Communication/«making available» to the public
  - **Market opportunities**
    - Service differentiation
    - Price discrimination
    - Geo-blocking in e-commerce of non-copyrighted goods
  - **Additional obstacles**
    - Lack of harmonisation in other areas of the law
    - Cultural and linguistic diversity
    - ...

Territorial licensing and geo-blocking: the audio-visual sector

- **Centralisation** of the majority of relevant exploitation rights (film producers)
- **Main obstacles** to pan-European licenses
  - **Cultural and linguistic diversity**
    - Subtitling, dubbing, tailoring marketing investment, versioning content, meeting national demand
  - **Financing schemes**
    - Pre-selling exclusive exploitation rights on a territorial basis
  - **Lock-up** of online exploitation rights in existing contractual agreements
  - Communication and making available right of music works (music sector licensing chain)
- **Geo-blocking as a lawful technical measure**
  - Compliance with territorial and multi-territorial licensing schemes
  - Commercial users and end users avoid copyright infringement and breach of contracts

Territorial licensing and geo-blocking: the music sector

- **Fragmentation of rights and right-holders**
  - Authors & publishers (copyright)
    - National collecting management societies or regional hubs (making available + reproduction)
    - Right management organisations (multi-territorial reproduction for Anglo-Amerinca repertoires)
  - Performers & phonogram producers (related rights)
    - Aggregators
- **Main obstacles to pan-European licenses**
  - **Transaction costs** to clear copyright and related rights
  - Cultural and linguistic diversity
  - Commercial decisions (especially for advertsiment-funded music service)
- **Geo-blocking as a lawful technical measure (see audio-visual sector)**

The market fragmentation effect of exceptions and limitations

- **Exceptions and limitations with potential impact on the functioning of the Internal Market in the digital era**
  - Mandatory exception for transient copies (literally implemented in almost all Member States)
  - Private copying exception and fair remuneration
  - Exceptions for the benefit of libraries, educational establishments, archives and museum
  - Exception for the purposes of teaching or scientific research
  - Exception for the purposes of reporting of current events
  - Limitations for quotations, criticism, and review
  - Caricature, parody or pastiche exception
  - Panorama exception
- **Additional issues**
  - Interplay between exceptions and technical protection measures
  - Flexibility and adaptability to new uses (mass digitisation, text and data mining, e-lending, user generated content)

Compatibility of Directive 2004/48 with the Digital Age

- **Mechanisms endorsed by the Directive (TPM) did not consider the impact of the Internet and have been overcome by open digital standards**
  - Used only in a limited subset of business models
- **ISP filtering deemed incompatible with art. 15 e-commerce Directive**
- **Some successful cases of DRM made possible by proprietary digital standards (iPod, kindle)**
  - Tendency to walled gardens
  - Issues with interoperability
  - Issues with copyright exceptions and limitations

Compatibility of Directive 2004/48 with the Digital Age

- **Civil injunctions marginal in most MSs**
- **Most used interventions are mechanisms that were not envisaged by the InfoSoc Directive:**
  - Voluntary codes of conducts
  - Administrative mechanisms
  - Criminal proceedings against large-scale commercial infringers
- **Infringement of IPRED provisions suffered from the lack of distinction between commercial scale vs. individual subscriber dimension**
- **Conflicting opinions on appropriateness of IPRED in the Digital Environment**

Compatibility of Directive 2004/48 with the Digital Age

- **Unintended effects of IPRED and e-Commerce Directives**
- **Lack of clarity led to a patchwork implementation and the proliferation of private codes / enforcement**
  - CJEU interpreted art. 8 IPRED as leaving freedom to MSs in enforcing copyright through civil injunctions (e.g. access to infringer's data)
  - Art. 3 IPRED limits the scope of civil injunctions against Internet intermediaries (but grey areas persist)
- **Private codes: flexibility v. fragmentation**
  - Non-recognition of cross-border claims
  - Enforcement on non-signing parties?
  - Representativeness of all interests?

Compatibility of Directive 2004/48 with the Digital Age

- **EU Action Plan on Piracy and Counterfeiting**
  - **Endorsement of codes of conduct (self-regulation)**
  - **'Follow-the-money' approach: extension to other parts of the value chain**
    - *Advertisers*
    - *Payment services*
  - **Copyright infringements require cooperation of scattered operators (e.g. advertisers), hence more difficult to implement**
  - **Limited experience in the EU; usually, private regulation is complemented with the involvement of the police**
  - **Future shift from self-regulation to hard legislation is still a possible option**

Remuneration/compensation of authors and performers

- **Legal Analysis**
  - **The EU framework knows two approaches**
    - **'Hands-off' approach** (e.g. Infosoc)
    - '**Paternalistic' determination** of mandatory rights to equitable remuneration (Rental Directive, Term of Protection in Sound Recordings, Resale Right Directive)
  - **In reality, contractual mechanisms matter much more than either of the two approaches**
    - A&P contractual mechanisms and other (labour) law provisions are fully under national competence
    - Causal link between 'pay-per-use' system and equitable remuneration should not be taken for granted
  - **A matter of market power**
    - Since there is no definition of 'equitable remuneration' in the EU acquis, both approaches result in similar market outcomes: A&P remuneration depends on their counterparts' market power

Remuneration / compensation of authors and performers

- **Economic analysis**
  - **In a globalised and online Single Market for content**
    - 'Success' follows a power law: very small number of very successful authors
    - Small authors are not kicked out of the market because of the Law of the Fat Tails
    - Increasing inequality of compensations
  - **Radically new market structure of digital content economy:**
    - Disintermediation from publishers (e.g. for books, music, newspapers)
    - Re-intermediation to distribution platforms (e.g. Google, Amazon, Apple)
  - **What is the impact of the EU copyright framework on revenue allocation, once accounted for these mega-trends?**
    - Does the Law of Fat Tails protect (linguistic) diversity?
    - How to protect (intermediary) innovation?

Evaluation criteria

1. ***Effectiveness***
2. ***Efficiency***
3. ***Coherence***
4. ***Relevance***

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