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ADDENDUM

to the report

on the proposal for a directive of the European Parliament and of the Council on certain permitted uses of orphan works
(COM(2011)0289 – C7-0138/2011 – 2011/0136(COD))

Committee on Legal Affairs

Rapporteur: Lidia Joanna Geringer de Oedenberg
A7-0055/2012

Before the opinion of the Committee on the Internal Market and Consumer Protection, insert the following opinion:

OPINION OF THE COMMITTEE ON LEGAL AFFAIRS ON THE LEGAL BASIS

Subject: Opinion on the legal basis of the proposal for a directive of the European Parliament and of the Council on certain permitted uses of orphan works

I. Background

The legal bases proposed by the Commission for the above proposal were Articles 49 and 56 TFEU together with Article 114 TFEU.

In the context of trilogue negotiations, the Council took the position that the legal bases should be changed to Articles 53(1) and 62 TFEU together with Article 114 TFEU, since the legal bases originally suggested did not include any explicit competence for the legislator to adopt legislative acts. This position was also supported by the Commission.

The rapporteur, Mrs Lidia Geringer de Oedenberg, therefore asked the Committee on Legal

Affairs, pursuant to Rule 37(3) of the Rules of Procedure, to verify the legal bases of the proposal and the suggested alternative legal bases.

II. Aim and content of the proposed directive

The proposal is aimed at allowing mass digitisation while protecting the owner's copyright. It is mandatory to have the due authorisation of the copyright owner when making works available to the public. If the relevant copyright owner cannot be reached, the work in question will therefore be considered to be an orphan work under the proposal since authorisation is not possible and there is a risk of infringing copyrights when putting such works online. The proposal is aimed at creating a legal framework to prevent any violations of rights from occurring and to favour the cross-border digitisation and dissemination of works within the single market.

III. Relevant articles of the TFEU

The following articles of the TFEU were presented as the legal bases in the Commission proposal (emphasis added):

Article 49

Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State.

Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 54, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the Chapter relating to capital.

Article 56

Within the framework of the provisions set out below, restrictions on freedom to provide services within the Union shall be prohibited in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended.

The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may extend the provisions of the Chapter to nationals of a third country who provide services and who are established within the Union.

Article 114

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.

[...]

It is proposed that the following two articles substitute Articles 49 and 56 TFEU to form the legal basis together with Article 114 (emphasis added):

Article 53

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

The provisions of Articles 51 to 54 shall apply to the matters covered by this Chapter.

IV. Case law on 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 at stake.

V. Determination of the appropriate legal basis

Article 114 TFEU is the general legal basis for the approximation of laws in the Member States which have as their object the establishment and functioning of the internal market. This provision constitutes the overarching legal basis in this case, since the aim and content of the proposal relates to creating a legal framework in order to prevent any violations of rights from occurring and to favour the cross-border digitisation and dissemination of works within the single market.

The supporting legal bases originally selected, Articles 49 and 56 TFEU, are found in Title IV, entitled ‘Free Movement of Persons, Services and Capital’, of Part Three of the

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* (8 September 2009) (OJ C 267 of 7.11.2009, p. 8).

Treaty, entitled 'Union Policies and Internal Action', under the respective chapter headings 'Right of Establishment' and 'Services'. Although they relate to the relevant policies for the proposed directive, they do not include provisions allowing the adoption of directives. Article 56 TFEU merely provides that directives could be adopted to extend the provisions of the chapter to nationals of a third country who provide services and who are established within the Union.

The suggested Article 53(1) TFEU is also placed under 'Right of Establishment', but does provide 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 in the 'Services' chapter provides that Article 53 shall apply to the matters covered by that chapter.

VI. Conclusion and recommendation

The Committee on Legal Affairs considered the above question at its meeting of 31 May 2012.

At that meeting, the committee accordingly decided unanimously¹ to recommend as follows: In light of the foregoing analysis, Articles 53(1) and 62 TFEU must take the place of Articles 49 and 56 TFEU in order to form the legal basis of the proposed directive together with Article 114 TFEU.

(Affects all language versions.)

¹ The following were present for the final vote: Klaus-Heiner Lehne (Chair), Evelyn Regner (Vice-Chair), Raffaele Baldassarre (Vice-Chair), Françoise Castex (Vice-Chair), Sebastian Valentin Bodu (Vice-Chair), Axel Voss (rapporteur), Luigi Berlinguer, Sergio Gaetano Cofferati, Christian Engström, Marielle Gallo, Giuseppe Gargani, Lidia Joanna Geringer de Oedenberg, Luis de Grandes Pascual, Sajjad Karim, Eva Lichtenberger, Antonio Masip Hidalgo, Francesco Enrico Speroni, Keith Taylor, Alexandra Thein, Cecilia Wikström, Tadeusz Zwiefka, and Elisabeth Morin-Chartier (pursuant to Rule 187(2)).