

Kluwer Copyright Blog

Polish Parliament: proposed directive on collective rights management does not comply with principle of subsidiarity

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“The Polish Parliament is of the opinion the draft proposal does not adequately explain why these goals can be “better” realised on the EU level.
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Friday, October 12th 2012 was packed with action in the Polish Parliament (Sejm), because on that day the prime minister subject his government to the vote of confidence and delivered a speech explaining his plans and endeavours for the next three years. The turnout in the often empty house was therefore extraordinary.

Amid this political turmoil (in fact just after the Parliament gave its vote of confidence to the government) the Sejm passed almost unanimously a [resolution](#) declaring the proposal for a directive on collective rights management and multi-territorial licensing of rights in musical works for online use incompatible with the principle of subsidiarity. The Polish Sejm consists of 460 MPs. 450 voted, 445 of them in favour of declaring the proposal incompatible with the principle of subsidiarity, 1 against and 4 abstained. The message is therefore very clear.

The principle of subsidiarity has been enshrined in art. 5 of the [Treaty on European Union](#). Art. 5 (3) of this Treaty states that “[u]nder the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.” As we are all aware the EU does not always take this principle seriously, however there exists a special procedure for national parliaments to express their opinion concerning the proposed EU legislation. This is governed by the [Protocol on the Application of The Principles of Subsidiarity and Proportionality](#). According to its art. 6: “Any national Parliament or any chamber of a national Parliament may, within six weeks from the date of transmission of a draft European legislative act, send to the Presidents of the European Parliament,

the Council and the Commission a reasoned opinion stating why it considers that the draft in question does not comply with the principle of subsidiarity.” Art. 7 (3) of the Protocol adds that “Where reasoned opinions on a draft European legislative act’s non-compliance with the principle of subsidiarity represent at least one third of all the votes allocated to the national Parliaments in accordance with the second paragraph, the draft must be reviewed.” Since the time frame is rather short, the overall European results should be known soon.

As follows from the provisions cited above, the opinion of the national Parliament must be reasoned and must explain why the draft goes beyond what the principle of subsidiarity would allow. The Polish resolution may disappoint in this department, because the “reasoning” takes about 2 not very densely printed pages. The major points of criticism are nevertheless easy to find. The resolution reminds us that there are three basic goals the Commission seeks to achieve with the proposed directive: improving the functioning of collecting societies, protection of the interests of the members of collecting societies, rightholders and third parties and coordinating national rules concerning the access to the activity of managing copyright and related rights by collecting societies, the modalities for their governance, and their supervisory framework. The Polish Parliament is of the opinion the draft proposal does not adequately explain why these goals can be “better” realised on the EU level. The resolution argues in particular that ensuring transparency of collective societies can be achieved by EU member states and that existing examples, including Poland, prove this can be done better than in the proposed directive (as regards Poland this is perhaps a little too bold). The resolution also voices explicitly three concerns:

- a. that the proposed directive may adversely affect freedom of economic activity by imposing new obligations on collecting societies;
- b. that the proposed directive may reduce private party autonomy by imposing numerous, though often imprecise contracting obligations on collective management organisations and by forcing EU states to shape the modalities of governance of such organisations in a way similar to commercial companies, which could undermine the model of governance applied for societies/associations (this is how collective management organisations in Poland operate);
- c. that the level of protection of copyright may be impaired by outsourcing collective management to other entities (art. 27 of the proposal).

With respect to multi-territorial licensing the resolution only states that the Commission has not proven why European actions will be more efficient.

Discussing the merits of the mentioned concerns and the draft proposal in general would require a rather lengthy piece but at this moment I think it is safe to say that, at least in Poland, collective management organisations are not great fans of the planned EU legislation. This may be guessed from the Polish Parliament’s resolution because it is safe to assume over 90 % of the MPs have no idea whatsoever what collecting societies actually do and how they operate. They must have been therefore persuaded by someone and experience suggests the most interested actors were involved.

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