EU competence to create a neighbouring right for publishers? The small pieces make up the big picture

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Abstract

The case of the neighbouring right for publishers: does the EU have competence to create a neighbouring right for publishers? The small pieces make up the big picture.

Introduction

The case of the neighbouring right for publishers: does the EU have competence to create a neighbouring right for publishers? The small pieces make up the big picture.

Step 2

Following Article 8(5) TFEU, the use of competence must be accompanied by subsidiarity and proportionality checks. It is necessary to define the concepts of subsidiarity and proportionality, as they are used in legal texts. If the combination of both concepts is not met in the case of a potential EU action, the action must be denied. Furthermore, the definitions of both concepts are likely to depend on each other.

Proportionality requires the analysis of three factors: suitability (the measure must be appropriate to achieve its objective); necessity (the measure must be the least restrictive alternative from a range of equally effective options). Subsidiarity implies an examination of efficiency gains from EU action, considering all the goals of the measure.

Subsidiarity and proportionality are closely linked, in particular if the cases of European actions are complex, and the final decision is taken by a multiple-stage procedure, the subsidiarity and proportionality checks must be done against the internal market goals and protecting the publishing industry (or a particular branch thereof, such as news publishing). The question of internal market goals is unimportant — as argued above, no internal market for news publishers). The requirement of contribution to building an internal market would thus not be fulfilled.

Moreover, since a new right would constitute a new legal form, and given that there are no successful cases of similar rights that the neighbouring right for publishers could be built upon, the scope of the new right and valuable interests would be deprived.

Based on these benchmarks, the following assessment was performed for the introduction of a neighbouring right for publishers in the news publishing market.

Table 1 Summary of assessment of “internal market need”

Table 2

Problematic cases of European actions

<table>
<thead>
<tr>
<th>Problematic case</th>
<th>Solution</th>
</tr>
</thead>
<tbody>
<tr>
<td>Cross-border trade</td>
<td>Need for cross-border trade to be prohibited</td>
</tr>
<tr>
<td>Tobacco advertising</td>
<td>Need for tobacco advertising to be prohibited</td>
</tr>
<tr>
<td>Non-legislative solutions</td>
<td>Agreement for non-legislative solutions to be considered</td>
</tr>
</tbody>
</table>

Conclusion

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Appendix

List of case law


References

objective of protecting the publishing industry. The assessment of subsidiarity and proportionality compliance was performed as displayed below:

**Subsidiarity:** The efficiency gains from EU action do not clearly outweigh those of Member States. The EU legislator would probably not be better placed than national legislators to cater for the needs of national publishers (especially in the case of news publishers), given the strong links of the sector with national cultures and identities. In any case, agreements have been reached at Member State level between the different stakeholders, casting doubt on whether legislative intervention even at national level is at all necessary.

**Proportionality:** the measure is not suitable. The neighbouring right is unsuitable to achieve the goal of protecting the news publishing industry, as demonstrated by the failed national experiences of Germany and Spain.

**Proportionality:** the measure is not necessary. The neighbouring right is not the least restrictive alternative. Other actions, such as non-binding recommendations or facilitating dialogue between stakeholders at national level, could be both more effective and less restrictive.

**Proportionality:** the measure is not proportionate sensu stricto. The burden imposed on other operators (e.g., news aggregators in the case of the news industry) could have a significant negative economic impact on that sector, with the result that the balance between different interests required by this factor would not be achieved.

Table 2: Summary of procedural checks

<table>
<thead>
<tr>
<th>Subsidiarity</th>
<th>Proportionality</th>
</tr>
</thead>
<tbody>
<tr>
<td>EU action clearly outweighs Member States?</td>
<td>Yes</td>
</tr>
<tr>
<td>EU action necessary?</td>
<td>Yes</td>
</tr>
<tr>
<td>EU action proportionate sensu stricto?</td>
<td>No</td>
</tr>
</tbody>
</table>

By failing to comply with the competence benchmarks of the first two steps of the competence test, the EU powers to introduce a neighbouring right for publishers (or for a specific branch of the publishing industry, such as news publishers) are limited. The characteristics of the publishing sector and of the status quo at Member State level do not lead to a need for intervention through legislative measures such as directives or regulations, although non-binding recommendations or facilitating dialogue between stakeholders at national level could be adequate courses of action.