The German ‘Google Tax’ law: groovy or greedy?

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On 22 March 2013, after passing the Bundestag, the German Bundesrat approved a piece of legislation known as Leistungsschutzrecht für Presseverlege (LSR). The act extended press publishers' copyright by providing them with an ancillary right over news contents.

This piece of legislation, which has come to be known in jargon as the ‘Google Tax’ law, was backed by Chancellor Merkel's ruling coalition and is intended to recoup some of the revenues traditional news publishers have lost to the web. According to two studies by the Iowa University and ETH and Boston University respectively, not only are news aggregators unlikely to have complementary effects on the number of visits received by newspapers' homepages, but rather appear to have a substitution effect, which is said to have contributed to declining online traffic in the past few years.

The newly created sections 87f, 87g and 87h of the Urheberrechtsgesetz shall provide for the exclusive right of press publishers to exploit their contents commercially for one year, thus preventing search engines and news aggregators from displaying excerpts from newspaper articles without paying a fee.

Shortly prior to its approval, the text of the bill was amended to the effect that—contrary to the original proposal—no fees will have to be paid for displaying single words or short-text snippets. However, the text approved by the German parliament does not clarify the length required to fall within this exemption. While texts shorter than a headline might be thought to qualify, uncertainty over this point might result in litigation ensuing before the German courts.

Besides considerations pertaining to the possible impact of the LSR on fundamental rights such as freedom of information, it is apparent that this law might also set an important precedent elsewhere in Europe (to say the least).

It is worth recalling that a few months ago France was also considering adopting a bill that would require payment of a fee for displaying links to and snippets of newspaper articles. Eventually, similarly to what happened in Belgium, no such law was adopted, as Google and local newspaper publishers reached an agreement that, while exempting Google from paying fees for displaying content on its News service, provided for the creation of a fund to support transformative digital publishing initiatives in France.

In any case, discussion on whether and how the display of third parties' content over aggregators and search engines should be subject to the payment of a fee is far from settled. At the moment, the possible models for regulating these activities in Europe appear to be the German legislative approach and the conclusion of private agreements between interested parties.

A solution like the German one might have the advantage of providing a general legislative framework. While this might contribute to reducing—among other things—transaction costs, it is not be excluded that this might also have anti-competitive effects, eg raising barriers to entry for smaller players and start-ups, thus contributing to consolidating the market position of established players like Google.

Although the LSR (in compliance with earlier case law) does not expressly prohibit mere linking, from a broader EU perspective the provision of a new ancillary right for press publishers might have worrisome implications, especially considering that the Court of Justice of the European Union has been asked to clarify, inter alia, whether a clickable link might constitute a communication to the public as per Article 3(1) of Directive 2001/29/EC. The forthcoming decision in Case C-466/12 *Svensson*(a reference from the Svea hovrätt) has the potential to have a profound impact on the way the internet functions. One of the questions referred by the Swedish court is indeed whether it is possible for a Member State to give broader protection to authors' exclusive rights by enabling ‘communication to the public’ to cover a greater range of acts than provided for in Article 3(1). Should the answer to this question be in the affirmative, then the provision of an ancillary right for press publishers would indeed appear a mild solution, if compared to the possibility for Member States to provide press publishers with actual copyright protection against use of their contents by news aggregators and alike. Should this happen, then not only media pluralism would be affected, but innovative services would be prevented from continuing to exist or even emerge. Hence, it appears that the LSR is not only a bad idea for the sake of copyright health, but looks indeed to be aimed at safeguarding certain outdated models to the detriment of breakthrough services and business solutions.