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April 2019

European Parliament passes revolutionary change to copyright on the Internet

On 26 March 2019, the European Parliament passed a new directive on copyright and related rights in the Digital Single Market, which is to fundamentally transform the Internet in Europe. The Directive also includes controversial Articles 15 (previously 11) and 17 (previously 13), which have been highly criticised by both the public and experts.

Digital Single Market

The directive on copyright and related rights in the Digital Single Market (the "**Directive**") is supposed to be one of the further steps that the EU has taken to strengthen the Single Market and to harmonise conditions in all Member States.

Following the European Parliament's vote on the Directive in September last year and related dramatic public discussion, the legislative process entered the stage of a "trialogue" between the Commission, the European Parliament and the Council. The resulting wording was passed by the Parliament on 26 March 2019 and can essentially be considered final.

Even though the Parliament voted on the option to table amendment motions, the vote was lost by a margin of a few votes, to a significant extent due to MEPs from the United Kingdom, which might not (or may – who knows?) be affected by the new legislation at all.

While the Directive regulates numerous areas (e.g. text and data mining for scientific research purposes, using works and other protected subject-matter in distance learning and cross-border education activities, appropriate and proportionate remuneration of authors), most of the public attention was focused on Articles 11 and 13 (now Articles 15 and 17). It is these Articles in particular that are affected by the complexity of the topic and the difficult discussions preceding the adoption of the Directive.

The two articles fundamentally strengthen the liability of providers of online services such as aggregation of article content from other websites and content sharing platforms (e.g. Google, YouTube, Seznam.cz, Facebook, ulož.to and many more Czech, Slovak and other European providers). In general, we can expect the Directive to transform the Internet in Europe.

Article 15 – Print Publications Online

Article 15 regulates press publishers' rights when their publications are used online by information society service providers, in particular the right to enable or prohibit reproduction of such content.

This protection is not supposed to apply to private or non-commercial use by individuals or to insertion of hypertext links. Publishers' rights do not apply to the use of individual words or very short extracts of press publications.

Article 17 – Hosting Platforms

Article 17 focuses on a major current phenomenon – hosting platforms. While a hosting platform can be broadly understood as almost every online service from blogs, discussion forums, webhosting to file storage sites enabling further sharing, the Directive particularly regulates such platforms that give public access to large amounts of content uploaded by their users.

To this end, the Directive introduces a new definition of **online content sharing service providers**. These are information society service providers the main purpose of which or one of the main purposes of which is to store copyright-protected content uploaded by users and give public access to it, and who sort and promote these works or other protected subject-matter to make a profit.

The definition of the Directive excludes non-profit online encyclopaedias, non-profit educational and scientific repositories, open source software developing and sharing platforms, electronic communication service providers, online marketplaces, business-to-business cloud services and cloud services enabling their users to upload content for their individual use. Article 17 will not apply to these entities.

Safe Harbour II?

As opposed to the current mode of shielding providers from liability (*Safe Harbour*) under Article 14 of the e-Commerce Directive (2000/31/EC), the new Directive provides that it is the provider that performs the communication to the public or the publication (and is hence fully liable for content stored by third parties – users) if the provider gives the public access to works protected by copyright or another right, for instance by the means of publication on a website.

The provider may exempt its liability if it meets the following conditions set forth by Article 17(4) (a provision we can call *Safe Harbour* II), i.e. it has:

i. made every effort to obtain the rightholders' authorisation,

ii. made, in accordance with high industry standards of professional diligence, every effort to ensure the unavailability of specific works and other subject-matter for which the rightholders have provided the service providers with the relevant and necessary information; and in any event

iii. acted expeditiously, upon receiving a sufficiently substantiated notice from the rightholders, to disable

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access to, or to remove from, their websites the notified works or other subject-matter, and made every effort to prevent their future uploads in accordance with point (ii).

In any case, in determining whether the service provider has complied with the aforesaid obligations, the following elements should be taken into account: the type and scope of the service, the target audience and the type of works (or other protected subject-matter) made accessible as well as the availability of suitable and effective means and their cost for service providers.

Although the Directive states not to impose general monitoring obligations in paragraph 8 of the same Article, this statement actually appears to be considerably weakened by the aforementioned obligations.

Exception for Minor Providers

In respect of service providers the services of which have been available for less than three years and which have an annual turnover below EUR 10 million, the conditions under Article 17 only apply in limited scope. Such service providers must make every effort to obtain the rightholders' authorisation, and upon receiving a sufficiently substantiated notice, they must disable access to the notified works or other subject-matter (or to remove them).

Once the number of unique users exceeds 5 million per calendar year, such providers must demonstrate that they have made every effort to prevent further uploads of the notified works and other protected subject-matter on which they have received relevant and necessary information.

Exceptions for Users

In paragraph 7, the legislation makes sure that the cooperation between rightholders and providers of affected services must not result in the prevention of the availability of works or other protected subject-matter uploaded by users which do not infringe copyright and related rights, including where such works or other subject-matter are covered by an exception or limitation. Exceptions guaranteed to users apply to quotations, criticisms, reviews, or use for the purpose of caricature, parody or pastiche.

What You Can Expect

The Directive must now be discussed by the European Council and published in the Official Journal of the European Union. Members States must incorporate it in their national legislation within 24 months of its entry into force (applicability).

Member States must now process the relatively dense and complex text. Furthermore, there are many vague terms that need clarifying, for instance what amounts of content must be shared online by service providers to be considered "large", what the unavailability of "specific works and other subject-matter" means in case of the *Safe Harbour II* mode and which extracts are short enough to allow for Article 15 exceptions. After all, the text has been criticised, among other things, for being ambiguous.

Even though the Directive is supposed to enhance the (Digital) Single Market, the prospects of the Czech or any other national implementation of such a difficult text meeting this goal are anything but sure; a certain degree of fragmentation can be expected. Similarly, when Act No. 480/2004 Sb., on some information society services, incorporated the e-Commerce Directive into Czech legislation in a way that was too creative and considerably diverged from the wording of Article 14 of the e-Commerce Directive, the Czech law has given the impression that it creates and not excludes service providers' liability. That is why it will be interesting to follow the implementation process not only in the Czech Republic but also in other Member States, particularly in Germany.

Our law firm has been following the regulation in detail envisaged by the new Directive since its first proposal was presented. We are ready to assist you in addressing the new piece of legislation, especially analysing the specific impacts of the Directive (and the national law implementing it) on your business, assessing and adjusting your terms and conditions for the use of your services, introducing internal procedures in compliance with the new rules as well as to provide you with legal assistance in individual cases.

Authors:
František Korbel | *Partner*
Jan Diblík | *Partner*
Štěpán Štarha | *Partner*
Roman Cholasta | *Senior Associate*

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PRAGUE

Florentinum, Reception A
Na Florenci 2116/15
110 00 Prague 1
Czech Republic
Tel.: +420 255 000 111

BRNO

Titanium Business Complex
Nové sady 996/25
602 00 Brno
Czech Republic
Tel.: +420 545 423 420

OSTRAVA

Poděbradova 2738/16
702 00 Ostrava
Czech Republic
Tel.: +420 596 110 300

BRATISLAVA

Zuckermandel Centre
Žižkova 7803/9
811 02 Bratislava
Slovak Republic
Tel.: +421 232 113 900