Privileged and confidential

Twitter's response to the Swedish consultation on the draft bill of 8 October 2021 implementing the CDSM Directive

Introduction

Twitter International Company ("Twitter") welcomes and appreciates the opportunity provided by the Swedish government to participate in the consultation on the draft bill and memorandum published by the Ministry of Justice on 8 October 2021, transposing Directive 2019/790/EU on copyright and related rights in the Digital Single Market ("CDSM Directive" or "CDSMD"). Twitter's response is limited to the transposition of Article 15 CDSMD regarding the protection of press publications and Article 17 CDSMD regarding the use of protected content by online content sharing service providers ("OCSSPs").

We note at the outset that Twitter's current service does not fall within the scope of either Article 15 or Article 17 CDSM. However, both we and our users have an interest in ensuring that the implementation is adopted in as precise and balanced a manner as possible, which respects the rights and interests involved and creates a predictable regulatory landscape for online content-sharing services.

Article 15 CDSMD

Sections 48 b to 48 d of the Swedish Copyright Act ("SCA") implement Article 15 of the CDSMD and contain the new press publishers' right.

Twitter's platform is constrained to 280 characters and is uniquely limited in terms of the content which can be placed in a post. When using the Twitter service, press publishers grant Twitter a licence which is extended to Twitter users so that they can enjoy the content posted by the press publications. Press publishers typically design, draft and promote headlines and articles themselves and upload these to Twitter with the purpose of attracting their Twitter followers and other users to their websites. Twitter does not search on the web for press publishers' content, nor copy it and bring that content to the Twitter platform. When press publishers upload their content to Twitter, they intend to use Twitter as a distribution and marketing channel to attract an audience through their followers and a broader audience by engagement with other users on the platform.

Consequently, Twitter does not provide news aggregation services as targeted by Article 15. However, both we and our users have an interest in ensuring a correct implementation of Article 15 that upholds the principles of freedom of contract and maintaining the free flow of news and other information vital to a democratic society.

Definition of "press publication"

Section 48 c SCA implements the definition of a "press publication" from Article 2(4) CDSM Directive with no significant changes. Twitter recommends further clarifying the definition of "press publication" to avoid online platforms acting as arbiters when they define what constitutes a press publication. This will also mitigate any inconsistencies between different online platforms. From the recitals of the CDSM Directive, it is clear that Article 15 is targeted at providers that make their main money from reuse of press publications, specifically news aggregators & press clipping services. In Twitter's view, personal and non-personal blogs & social media feeds should not qualify as being protected as new

press publications, even if they are “regularly updated” and “have the purpose of providing the general public with information”. To do so would generate unintended consequences and undermine the intention of the CDSM Directive. The explanatory memorandum states that the protection should not apply to blogs, but it would be useful to specify this in the operative provisions.

Section 48 c (3) states that a “press publisher” is the provider who publishes the press publication on his initiative and under his editorial responsibility and control. This is in line with the definition provided in Article 2(4) of the CDSM Directive. It would, however, be useful to state more explicitly in the operative provisions or in the explanatory memorandum that news agencies who license a press publication to a press publisher but who do not publish the press publication themselves, are not a publisher of a press publication. No permission should be required from news agencies for the use of publications with content that is created by them but that is published by a press publisher. In such circumstances, the publication is not published under the initiative, editorial responsibility and control of the news agency. This would be in line with recital 55 CDSMD which states that the concept of publisher of press publication “should be understood as covering service providers, such as news publishers or news agencies, when they publish publications within the meaning of the Directive”. Having to obtain authorisation from not only the press publisher, but also the news agency that licensed the content, would be extremely burdensome, as it would require double authorisation and identification of the underlying news agency for each press publication.

Scope

Section 48 b SCA lays down the right of press publishers and the limitations to the scope of the press publishers’ right as determined by Article 15(1) CDSM Directive. This transposition mainly sticks to the text of Article 15(1) of the CDSM Directive.

Nevertheless, the Swedish draft omits some important elements of the Article 15(1) text. Contrary to Article 15(1) CDSMD, Section 48 b does not explicitly exclude the private use of press publications by individual users from the scope of the press publishers’ right. The explanatory memorandum underlines that the exclusion of private uses is superfluous as the press publishers’ right only applies to use made by information society service providers. Still, it would benefit legal certainty to add this exclusion to the operative provisions. Additionally, Section 48 b only refers to “very short extracts” but not “individual words”. The memorandum clarifies that “individual words” are covered by “very short extracts”. Nevertheless, including the term would benefit legal certainty and avoid fragmented implementation of Article 15. In the same vein, it would be helpful to explicitly exclude pure facts from the scope of Article 15, even though the explanatory memorandum states this is so obvious that it does not have to be included.

With respect to “very short extracts”, the explanatory memorandum rightly notes that the CDSMD does not require those extracts to be limited to textual content. As such, images (especially thumbnails, i.e. reduced-size images), videos, and other content that may appear in press publications would be able to be in scope of the exception. This is a welcome clarification that would benefit from being transposed in the operative provisions.

Regarding the exclusion of acts of hyperlinking, the explanatory memorandum refers to the rulings of the CJEU on hyperlinking and stipulates that the CDSMD does not seem to intend to change the existing legal situation. It is important to make it more explicit that the CDSMD excludes acts of hyperlinking in general, and not only hyperlinks that do not form a communication to the public according to existing CJEU rulings.

Moreover, the explanatory memorandum suggests that, in order to fall within the excluded “acts of hyperlinking” ex. Article 15(1), hyperlinks ought not to go beyond what is allowed under “individual

words" or "very short extracts" as laid down in the same article. The explanatory memorandum foresees that hyperlinks in the form of snippets or richlinks could, in some cases, be out of Article 15(1)'s scope. It also states that the question of whether other material from a press publication can also be freely used in connection with linking depends on how the exception for single words and very short extracts is to be understood (page 199). However, the nature of a hyperlink (referring to the original content) justifies the use of longer extracts and other material than might be allowed under the "very short extracts" exception. The use of extracts and other content as a hyperlink is less likely to replace the original content and the referral to the original content provides an advantage for the press publisher.

The explanatory memorandum elaborates that "individual users" can refer to both natural and legal persons. This is a welcome clarification that allows the notion of "individual user" to be understood as referring to an individual account holder using the platform to share content. Such a flexible interpretation is crucial as service providers generally do not know in what capacity a user is sharing a piece of content.

Article 15(2) of the CDSM Directive stipulates that the press publishers' right must leave intact and in no way affect EU rights of authors and other rightholders of works and/or subject matter included in the press publication. The explanatory memorandum to the Swedish draft states that there is no reason to implement this provision because the use of such works is not prevented by an exclusive right limited to the publication as such. However, Twitter submits that including Article 15(2) in the operative provisions could clarify that the relationship between the press publisher and other rightholders does not fall under the responsibility of the information society service providers and must be seen as completely separate from the obligations of the service provider under Article 15. Therefore, it is advisable to transpose this part of Article 15 CDSMD.

Finally, in the interest of both a positive user experience and transparency, Twitter recommends that headlines be excluded from the protection provided under Article 15 CDSM Directive and Section 48 b SCA regardless of how they are featured on the online platform (i.e. contained in hyperlinks or displayed in very short extracts) or their length, particularly where press publishers publish to a platform themselves. This will allow online platforms to provide context to their users about the content of these extracts or hyperlinks which is an essential factor that users rely upon to decide whether to read the content or not; and of course, this is the very intent of publishers to distribute their works on the platforms where they have selected to upload the content themselves.

Article 17 CDSMD

Sections 52 i to 52 t of the proposed draft modifying the SCA implement Article 17 of the CDSMD and contain the new liability rules for use of protected content by OCSSPs.

Twitter has previously submitted a response to the Ministry of Justice's public consultation on the transposition into Swedish law of the CDSMD. In that response, Twitter explained that its current service does not fall within the scope of Article 17 of the CDSMD and made five main recommendations to the Swedish government for a balanced, consistent, and uniform transposition of Article 17 CDSMD in Swedish law. This earlier response forms a basis for Twitter's current response. We emphasise again that Twitter's current service does not fall within the scope of Article 17 but that a precise and balanced implementation is in our and in our users' interest.

Scope: platforms covered

Under the draft bill, an OCSSP as defined under Article 2(6) CDSM Directive is referred to as a "service provider" and is defined under Section 52 i SCA. The definition under 52 i is similar to the first paragraph of the definition in the CDSM Directive.

The second requirement of Section 52 i implements part of recital 62 of the CDSM Directive by explicitly stating that service providers "[play] an important role in the content market by competing with other types of online content services". This implicit inclusion of recital 62 of the CDSM Directive is important because it clarifies the scope of the definition. However, the full passage of recital 62 that is salient in this context determines that the definition of an online content-sharing service provider "targets only services that play an important role in the content market by competing with other online content services, such as online audio and video streaming services, for the same audiences". In order to compete for the same audience(s) as another online content service, a service must contain a similar amount of the same type of copyright protected content as the other content service. Otherwise, the audience of the first service will not be interested in the second service, and the services do not compete. Therefore, a service with a small amount of copyright-protected content cannot be considered to compete with another service with a big amount of (or another type of) copyright-protected content. Although it is referred to in the explanatory memorandum, it would be useful to add this complete passage of recital 62 to Section 52 i SCA.

The definition in Section 52 i does not implement the second paragraph of the definition in 2(6) DSM Directive, which provides several examples of services that are excluded from the definition of OCSSP. The explanatory memorandum notes, on p. 284, that this list was not included in the Swedish draft bill as it merely forms an illustration of what is excluded and that it is clear from the clarifications of the definition that the services on that list are not in scope. In addition, the explanatory memorandum asserts that "*services such as blogs, forums, dating sites, and a variety of other phenomena, but also services consisting mainly of user-created content*" are out of scope. This is a welcome and vital clarification of the definition of an OCSSP. However, to ensure a proper transposition and to benefit legal certainty, it is paramount that both the non-exhaustive list in the second paragraph of Article 2(6) and the non-targeted services from the excerpt above are included in the operative provisions. The exclusions contained in the second paragraph of Article 2(6) and the explanatory memorandum are not merely illustrative, but are necessary to exclude certain non-targeted services that might otherwise fall within (a strict interpretation) of the definition. If the Swedish government follows this recommendation and includes an illustrative list of excluded services in the operative provision, it is important to highlight that that list is not exhaustive.

Twitter also suggests clarifying the requirement of having the sharing of copyright-protected works as a "main purpose". Criteria that determine whether this requirement is fulfilled are that (i) the sharing of the protected content should be the normal use for which the service was designed (see the first sentence of Recital 62) and (ii) the service should clearly be competing with licensed services offering comparable protected content. The fact that the "designed" normal use of the service is relevant (first sentence of Recital 62), implies that one should not look at actual, possible or foreseeable uses of the service. Rather, a service's designed normal use will probably need to be assessed by looking at aspects such as user interface, features, marketing, FAQ, terms of service etc. Therefore, Twitter also suggests implementing the first sentence of Recital 62, containing the "normal use" requirement, in the operative provisions.

Additionally, the consideration in the explanatory memorandum (p. 139) that services which essentially provide content created entirely by users fall outside the scope of Article 17, is vital. Indeed, first-party content is not part of the licensing problem Article 17 seeks to address. It is important to include this carve-out in the final provisions. By extension, Twitter suggests to clarify

explicitly that only the amount of *unlawfully uploaded third-party content* must be taken into account in the assessment of whether a service qualifies as an OCSSP.

Furthermore, the explanatory memorandum (p. 138) explains that the making available of live broadcasts or links (to copyright protected material) does not amount to storage within the meaning of Article 2(6) CDSMD. It therefore follows that a service providing live broadcasts or links to copyrighted material uploaded by users falls outside the definition. This is a relevant addition that dispels some confusion about what service providers are in scope of Article 17. To benefit legal certainty, it would be helpful to add it to the operative provisions.

Finally, the explanatory memorandum offers a helpful clarification of the profit motive for OCSSPs (p. 139). It asserts that the profit motive refers to the measures taken by the service provider to organise the content and to use it to attract a wider audience to the service. Whether activities of the provider are generally carried out for profit does not matter. As the profit motive is such an integral part of the OCSSP definition, it would greatly benefit legal certainty if this clarification was added to Section 52 i.

Twitter believes it is precisely the combination of key features discussed above that excludes its operations from the definition of an OCSSP. The main use case of Twitter is that it allows users to upload their own content, i.e. Tweets, rather than copyrighted third-party works. The fact that Twitter doesn't compete, or seek to compete, with licensed audio and audiovisual content services is also obvious from its product design, which shows users their timeline, rather than videos, music or any other specific type or source of works. To the extent that users attach images to their Tweets, or include hyperlinks in them, the main use case is as an illustration of a point made in a Tweet, so that an exception or limitation (quotation, parody, etc.) will often be applicable. Twitter is neither a market-dominant platform which makes large quantities of (let alone third-party, unlawfully uploaded) copyright-protected works accessible, nor does it build its business model on the exploitation of user-uploaded third-party copyrighted works. Twitter also does not compete with any licensed, paid audio or video streaming services. Its users don't access their Twitter feed to find and watch protected content online. They do so because they want to know and engage with what's going on in the world, and what people are talking about. Thus, its service belongs in the list of out-of-scope services referred to in the explanatory memorandum. As an example, we also refer to a German government statement from 15 April 2019 on the draft CDSM Directive[1]:

> *The requirements laid down in Article 2(6) of the Directive must be addressed and clarified, since the rules are aimed solely at those market-dominant platforms which make large quantities of copyright-protected uploads accessible and which base their commercial business model on such a practice, i.e. services such as YouTube or Facebook. At the same time, we will make it clear that services such as Wikipedia, university repositories, blogs and forums, software platforms such as Github, special-interest offers without any connection to the creative industry, messenger services such as WhatsApp, sales portals or cloud services are not platforms within the meaning of Article 17.*

Twitter started with the idea of an individual using an SMS service to communicate with a small group. Its service is also often referred to as "microblogging". Both types of services – an electronic communications service (SMS) and a (micro) blogging service – are excluded from the definition of an OCSSP. By way of illustration, approximately only five percent (5%) of daily tweets in the EU include some sort of video or image. Of that five percent of Tweets in the EU that include a video or an image, most are users posting, for example, their own photos or videos.

[1] https://data.consilium.europa.eu/doc/document/ST-7986-2019-ADD-1-REV-2/en/pdf.

A statutory definition along the lines described above would provide much needed legal clarity in conformity with the letter and spirit of the CDSM Directive, protecting the many permissible ways in which users interact with copyright-protected works online. It is also necessary to safeguard an interpretation of the CDSM Directive that allows a fair balance to be struck between the protected interests of rightholders and the exercise of the right to freedom of information and freedom to conduct a business by users and exempted online services.

Copyright liability

First, it would be good to stipulate in the draft bill that Article 17(1) CDSM Directive points to the rightholders referred to in Article 3(1) and 3(2) of the InfoSoc Directive, namely: authors, performers, phonogram producers, producers of the first fixations of films and broadcasting organisations. This list does not include the new category of rightholders created by Article 15 CDSM Directive – the press publishers – so that these do not qualify as "relevant rightholders" from whom authorisation must be sought. The same is the case for producers of databases, holders of rights in computer programs, trademark owners etc. The explanatory memorandum to the Swedish draft includes language on the exclusion of press publishers and database producers, but it would be useful to explicitly exclude such rightholders from the scope of the obligations for service providers in the operative provisions.

Article 17(3) CDMS Directive provides that an OCSSP cannot rely on the safe harbour exception ex. art. 14(1) e-Commerce Directive for the situations in which that OCSSP is liable for communications to the public within the meaning of Article 17(1). The second paragraph of Article 17(3) as well as recital 65 to the CDSM Directive expressly state that this does not affect the possible application of Article 14(1) e-Commerce Directive to OCSSPs for purposes falling outside the scope of the CDSM Directive. Section 52j SCA deviates from this imperative by stating that: "[t]he provisions of Section 18 of the Swedish Law on e-commerce and other information society services (2002:562) [implementing Article 14 of the e-Commerce Directive] shall not be applied when a service provider transfers works to the public in accordance with the first paragraph". The Swedish provision can be read such that OCSSPs are never able to rely on the safe harbour for hosting providers. It is essential to rephrase this provision in alignment with the CDSMD text in order to dispel confusion about the potential applicability of the safe harbour to OCSSPs for purposes beyond the scope of the CDSMD.

Article 52 k SCA implements Article 17(2) CDSMD. The CDSM Directive and the draft bill do not define the meaning of "acting on a commercial basis" or "generate significant revenues", which can lead to important legal uncertainty. By means of an example (theoretical, since Twitter is not an OCSSP), while a user of Twitter who posts a Tweet once a year, with only a handful of views, will be clearly non-commercial, and Tweets of content by accounts owned by broadcasters may be clearly commercial, there is a lack of clarity as to where the line should be drawn. This potentially makes it very difficult for OCSSPs to determine whether their users are considered commercial or non-commercial users in certain situations. Social media influencers may for example be particularly difficult to categorise, especially when they are not (yet) very popular.

The explanatory memorandum states that no authorisation is required for reproductions made in the context of Article 17, which is an important point to maintain.

Elimination of liability

Section 52 l Swedish draft bill implements the English term "best efforts" from Article 17(4) as "have done what can reasonably be required". The explanatory memorandum explains that this is done to avoid confusion about the scope of the requirements and the proportionality assessment that it is subject to. This is a helpful clarification, as it rightly asserts that there is no obligation for platforms to

do essentially everything in their power to obtain authorisations from rightholders or ensure that infringing content is made inaccessible (even if it requires disproportionate effort and/or comes with a commercial loss). It is important that this clarification is retained in the final operative text.

Best efforts to obtain authorisation

According to Article 17(4)(a), OCSSPs must make “best efforts” to obtain an authorisation from rightholders. This provision is implemented in Section 52 l (1).

The explanatory memorandum includes some helpful considerations on this point. Firstly, the clarification that service providers are not always under an obligation to enter into a license agreement, for instance when certain content only appears on the service “exceptionally”, is important. It is essential that service providers are not obliged to license content which they do not typically offer. To ensure that this interest is respected, the Swedish government should emphasise that the contractual freedom of OCSSPs must be respected. However, in the case of “exceptional" appearances of certain content on a service, the service provider should be deemed out of Article 17’s scope altogether. This should also be the case if such content is prohibited under the OCSSP’s terms of service.

Furthermore, the limitation on the obligation for OCSSPs to actively seek out rightholders, as laid down in the explanatory memorandum, should be maintained. It is vital to retain in the final draft that OCSSPs may not need to actively seek out rightholders who are more difficult to find or who represent a more limited repertoire. For a balanced transposition of Article 17(4), it may be sufficient to offer potential rightholders avenues through which they can contact OCSSPs themselves.

On the other hand, the explanatory memorandum determines that “a service provider wishing to benefit from the exemption rules has an absolute obligation to enter into the contracts which are offered” (p. 153). This statement is incorrect and should be deleted, as it is contrary to the contractual freedom of OCSSPs.

Best efforts to prevent availability

The obligation of best efforts to prevent availability ex. Article 17(4)(b) CDSM Directive is implemented in Section 52 l (2).

Section 52 l (2) does not transpose the requirement of Article 17(4)(b) of best efforts “in accordance with high industry standards of professional diligence”. It would be useful, however, for the draft bill to clarify that a different standard of “best efforts” should be applied in this context to platforms who carry copyright-protected content which is residual to the main service as compared to larger platforms who carry a high percentage of copyright-protected content on their service and have spent years building advanced content recognition tools which are proprietary to them.

The explanatory memorandum determines that the principle of proportionality can mean that a service on which illegal material of a particular type is only rarely or very rarely found can hardly be expected to invest in expensive technical solutions to identify that particular type of content. It states that the same is true for service providers who generally keep the amount of infringing material down through various preventive measures such as clear terms of use, rules and sanctions for copyright infringements. In these cases the provider should typically not be expected to do more than remove the material upon the right holder's request. This is a welcome clarification that helps identify reasonable thresholds with respect to the obligation to prevent availability. Nevertheless, it is crucial to emphasise that service providers should be excluded from the scope of Article 17 CDSMD altogether

when it comes to infringing content of a particular type that is rarely found on the platform and/or that is prohibited per their terms of service.

Also, the explanatory memorandum states that the interests of users in not preventing lawful material has priority over the requirement to prevent unlawful material. It continues that blocking of uploaded content should be limited to "manifestly infringing material" and that, in any event, it should be restricted to content that is likely to infringe someone's copyright. This provides some clarity on the balance that should be sought by service providers.

Finally, it would be useful for the draft bill to clarify what should be done when the OCSSP is provided with conflicting information. Content recognition systems operated by online platforms are often plagued by multiple claims, made multiple times, by multiple rightholders. In that situation, an online platform is poorly equipped to assess the ownership of particular copyrighted material. Twitter therefore recommends the Swedish government to clarify that an OCSSP which receives conflicting information from rightholders is not required to do more than notify this conflict to the other rightholder. In order to safeguard freedom of expression and avoid blocking access to lawful content, any measures to prevent the availability of content should be suspended pending such conflict unless a court order provides otherwise.

Best efforts to remove content

The obligation to remove unauthorised content upon notification by the rightholder is also transposed in Section 52 l.

The explanatory memorandum states that rightholders should explain in their notification why the content is illegal. It states that it should not be up to service providers to make, for example, complex legal assessments of whether or not an infringement is applicable in a particular case. It continues that this not only leads to an unreasonable burden on OCSSPs, but also risks major legal uncertainty for rightholders, OCSSPs, and users. It clarifies that the provision can hardly be understood in any other way than that the obligation of the service provider to remove material already on the service applies only to those situations where it is clear from the notification that there is infringement. This forms a welcome clarification that should be maintained. In addition to that, Twitter suggests a clarification that the complainant should not only explain why the content is illegal, but also provide the OCSSP with sufficient evidence to support that it is illegal and that the complainant is the rightholder.

Users' rights and enforcement

Section 52 o introduces an obligation to "promptly" notify a user when content has been removed. This obligation may increase time pressure and operational costs for service providers, without offering the clarity and certainty needed on how to comply with it.

Section 52 o also stipulates that automated blocking may only be used to prevent access to content that has a "high probability" of infringing copyright. Although this is a welcome clarification, it is important that this is also reflected in the obligations imposed on the OCSSP based on Article 17(4). If the OCSSP has to meet a high threshold in preventing access to infringing content but cannot use automated blocking to meet this threshold, the OCSSP will face a squeeze.

The Swedish draft bill omits a reference to the content of Article 17(7) CDSM Directive, which stipulates that the cooperation between OCSSPs and rightholders must not result in the prevention of availability of works uploaded by users that do not infringe copyright and related rights, including where those works are covered by an exception or a limitation. The explanatory memorandum states

that this paragraph of Article 17 could imply that the responsibility lies jointly with rightholders and OCSSPs. According to the explanatory memorandum, it lies solely with the OCCSP. This omission should be corrected. Both the OCSSP and the rightholder carry responsibility in identifying infringements. Rightholders possess more information on the content and context of works and should, for instance, motivate infringement claims when they submit them to the OCSSP.

According to the explanatory memorandum, the mere fact that a user's content falls within the scope of a protected copyright exception, does not disallow the OCSSP to prevent access to the content for other reasons, for example where it is contrary to the terms of use in general or other legislation. In line with our earlier comment on the desirability of including provisions about the contractual freedom of OCSSPs, it is paramount to highlight that OCSSPs remain allowed to prevent access to content for other reasons, such as when it violates the terms of use or (local) laws.

Section 52 q obliges OCSSPs to handle complaints from users whose content was made inaccessible within seven days. Although the explanatory memorandum states that the concept of "undue delay" is subject to a case-by-case assessment, it sets the ultimate deadline for handling a user complaint at seven days. Twitter notes that a hard deadline based on a specific number of days applied to the variety of OCSSPs in scope is arbitrary and unreasonably burdensome on such providers. It risks ultimately undermining the spirit of the much needed case-by-case assessment for copyright infringement complaints.

Notice-and-action procedures can sometimes be abused with bad practices or in bad faith. It would be useful if the operative provisions provided measures against such abuse. We recommend in relation to users' redress, that the transposition should state explicitly that an OCSSP, which has taken a good-faith decision in response to a user complaint, is indemnified for claims from both users and rightholders if that decision later turns out to have been wrong. Without such a safe harbour for good-faith decisions in disputed cases, OCSSPs risk being put in an impossible situation. It would also be useful if the draft bill emphasised that, when a user complains against a notice from a rightholder, the first step is for the rightholder to expeditiously duly justify the notice, providing proof of copyright infringement. The OCSSP should not be held to assess the complaint by the user if the rightholder does not provide such a justification, and in that case the content should remain available or be restored without an assessment by the OCSSP. In the case of prior removal, content should also be restored if the rightholder does not react within a reasonable timeframe.

Section 52 r provides that "if a service provider intentionally or negligently breaches his obligations under Article 52 o and a user suffers damage as a result of the breach, the service provider shall compensate the damage". This is an entirely new provision that does not find a basis in Article 17. Although the explanatory memorandum notes that additional (financial) sanctions can provide users with more recourse, it is important to note that this avenue was not the goal of the CDSM Directive. The CDSM Directive only provides that OCSSPs may be held liable for injunctions. Straying from that objective in national legislation risks jeopardising the fulfilment of the CDSM Directive's objectives as well as a harmonised transposition of EU copyright laws.

The prohibition of a general obligation to monitor as included in Article 17(8) CDSMD is not transposed in the operative provisions of the Swedish proposal because, according to the memorandum, it merely forms a reminder for Member States on how to implement the CDSMD. However, it is vital that this prohibition is explicitly transposed in the operative provisions, as this prohibition is not only important for the transposition of the CDSMD but also for the application of the Swedish transposition. It would also be useful if the draft bill explicitly refers to Article 15 of the E-Commerce Directive, or its national version.

Conclusion

We thank the Swedish Ministry of Justice for the opportunity to share our views and we are available for a more detailed discussion. Despite the fact that Twitter's service does not fall within the scope of Articles 15 and 17 CDSMD, we want to provide feedback to relevant stakeholders to ensure that the articles are adopted in a predictable, balanced manner that respects and protects all rights and interests involved.

Signed by

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