Court of Justice EU, 12 September 2019, VG Media v Google

COPYRIGHT – DESIGN LAW

A German provision prohibiting internet search engines from using newspaper or magazine snippets without the publisher's authorisation must be disregarded in the absence of its prior notification to the Commission

- **That provision constitutes a rule on information society services and, therefore, a 'technical regulation' the draft of which is subject to prior notification to the Commission**

In the light of the foregoing, the answer to the questions referred is that Article 1(11) of Directive 98/34 must be interpreted as meaning that a provision of national law, such as that at issue in the main proceedings, which prohibits only commercial operators of search engines and commercial service providers that similarly publish content from making newspapers or magazines or parts thereof (excluding individual words and very short text excerpts) available to the public, constitutes a 'technical regulation' within the meaning of that provision, the draft of which is subject to prior notification to the Commission pursuant to the first subparagraph of Article 8(1) of that directive.

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Court of Justice EU, 12 September 2019

(M. Vilaras, K. Jürimäe, D. Šváby, S. Rodin and N. Piçarr)

JUDGMENT OF THE COURT (Fourth Chamber)

12 September 2019 (*[1])

(*Reference for a preliminary ruling — Industrial policy — Approximation of laws — Directive 98/34/EC — Procedure for the provision of information in the field of technical standards and regulations and of rules on Information Society services — Article 1(11) — Concept of 'technical regulation'*)

In Case C–299/17,

REQUEST for a preliminary ruling under Article 267 TFEU from the Landgericht Berlin (Regional Court, Berlin, Germany), made by decision of 8 May 2017, received at the Court on 23 May 2017, in the proceedings

VG Media Gesellschaft zur Verwertung der Urheber- und Leistungsschutzrechte von Medienunternehmen mbH

v

Google LLC, successor in law to Google Inc.,

THE COURT (Fourth Chamber),

composed of M. Vilaras, President of the Chamber, K. Jürimäe, D. Šváby (Rapporteur), S. Rodin and N. Piçarra, Judges,

Advocate General: G. Hogan,

Registrar: D. Dittert, Head of Unit,

having regard to the written procedure and further to the hearing on 24 October 2018,

after considering the observations submitted on behalf of:

– VG Media Gesellschaft zur Verwertung der Urheber- und Leistungsschutzrechte von Medienunternehmen mbH, by U. Karpenstein, M. Kottmann, R. Heine and J. Hegemann, Rechtsanwälte,

– Google LLC, successor in title to Google Inc., by A. Conrad, W. Spoerr and T. Schubert, Rechtsanwälte,

– the German Government, by T. Henze, M. Hellmann and M. Kall, acting as Agents,

– the Greek Government, by E.-M. Mamouna and N. Dafniou, acting as Agents,

– the Spanish Government, by L. Aguilera Ruiz and by V. Ester Casas, acting as Agents,

– the Portuguese Government, by L. Inez Fernandes and M. Figueiredo, acting as Agents,

– the European Commission, by K. Petersen, Y. Marinova and J. Samnadda, acting as Agents,

after hearing **the Opinion of the Advocate General** at the sitting on 13 December 2018,

gives the following

Judgment

1. This request for a preliminary ruling concerns the interpretation of Article 1(2), (5) and (11) of Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on Information Society services (OJ 1998 L 204, p. 37), as amended by Directive 98/48/EC of the European Parliament and of the Council of 20 July 1998 (OJ 1998 L 217, p. 18) (*'Directive 98/34'*).

2. The request has been made in proceedings between VG Media Gesellschaft zur Verwertung der Urheber- und Leistungsschutzrechte von Medienunternehmen mbH ('VG Media') and Google LLC concerning the alleged infringement by Google of rights related to copyright.

Legal context

Directive 98/34

3. Article 1(2) to (5) and (11) of Directive 98/34 provides:

'For the purposes of this Directive, the following meanings shall apply:

…

2. *"service"*, any Information Society service, that is to say, any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services.

For the purposes of this definition:

[1] Language of the case: German

– *"at a distance"* means that the service is provided without the parties being simultaneously present,
– *"by electronic means"* means that the service is sent initially and received at its destination by means of electronic equipment for the processing (including digital compression) and storage of data, and entirely transmitted, conveyed and received by wire, by radio, by optical means or by other electromagnetic means,
– *"at the individual request of a recipient of services"* means that the service is provided through the transmission of data on individual request.
An indicative list of services not covered by this definition is set out in Annex V.
…
3. *"technical specification"*, a specification contained in a document which lays down the characteristics required of a product such as levels of quality, performance, safety or dimensions, including the requirements applicable to the product as regards the name under which the product is sold, terminology, symbols, testing and test methods, packaging, marking or labelling and conformity assessment procedures.
The term *"technical specification"* also covers production methods and processes used in respect of agricultural products as referred to Article 38(1) of the Treaty, products intended for human and animal consumption, and medicinal products as defined in Article 1 of Directive 65/65/EEC …, as well as production methods and processes relating to other products, where these have an effect on their characteristics;
4. *"other requirements"*, a requirement, other than a technical specification, imposed on a product for the purpose of protecting, in particular, consumers or the environment, and which affects its life cycle after it has been placed on the market, such as conditions of use, recycling, reuse or disposal, where such conditions can significantly influence the composition or nature of the product or its marketing;
5. *"rule on services"*, requirement of a general nature relating to the taking-up and pursuit of service activities within the meaning of point 2, in particular provisions concerning the service provider, the services and the recipient of services, excluding any rules which are not specifically aimed at the services defined in that point.
…
For the purposes of this definition:
– a rule shall be considered to be specifically aimed at Information Society services where, having regard to its statement of reasons and its operative part, the specific aim and object of all or some of its individual provisions is to regulate such services in an explicit and targeted manner,
– a rule shall not be considered to be specifically aimed at Information Society services if it affects such services only in an implicit or incidental manner.
…
11. *"technical regulation"*, technical specifications and other requirements or rules on services, including the relevant administrative provisions, the observance of which is compulsory, de jure or de facto, in the case of marketing, provision of a service, establishment of a service operator or use in a Member State or a major part thereof, as well as laws, regulations or administrative provisions of Member States, except those provided for in Article 10, prohibiting the manufacture, importation, marketing or use of a product or prohibiting the provision or use of a service, or establishment as a service provider.
De facto technical regulations include:
– laws, regulations or administrative provisions of a Member State which refer either to technical specifications or to other requirements or to rules on services, or to professional codes or codes of practice which in turn refer to technical specifications or to other requirements or to rules on services, compliance with which confers a presumption of conformity with the obligations imposed by the aforementioned laws, regulations or administrative provisions,
– voluntary agreements to which a public authority is a contracting party and which provide, in the general interest, for compliance with technical specifications or other requirements or rules on services, excluding public procurement tender specifications,
– technical specifications or other requirements or rules on services which are linked to fiscal or financial measures affecting the consumption of products or services by encouraging compliance with such technical specifications or other requirements or rules on services; technical specifications or other requirements or rules on services linked to national social security systems are not included.
This comprises technical regulations imposed by the authorities designated by the Member States and appearing on a list to be drawn up by the [European] Commission before 5 August 1999, in the framework of the Committee referred to in Article 5.
The same procedure shall be used for amending this list.'
4. The first subparagraph of Article 8(1) of that directive provides:
'Subject to Article 10, Member States shall immediately communicate to the Commission any draft technical regulation, except where it merely transposes the full text of an international or European standard, in which case information regarding the relevant standard shall suffice; they shall also let the Commission have a statement of the grounds which make the enactment of such a technical regulation necessary, where these have not already been made clear in the draft.'
5. Directive 98/34 was repealed by Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services (OJ 2015 L 241, p. 1), which came into force on 7 October 2015 which was subsequent to the events at issue in the main proceedings.
German law
6. By the achtes Gesetz zur Änderung des Urheberrechtsgesetzes (Eight Law amending the Law on copyright) of 7 May 2013 (BGBl. 2013 I, p. 1161), Section 7 headed *'Protection of publishers of*

newspapers and magazines', concerning rights related to publishers of newspapers and magazines, was inserted, with effect from 1 August 2013, in Part 2 of the Gesetz über Urheberrecht und verwandte Schutzrechte (Law on copyright and related rights, 'the UrhG'). Section 7 contains the following three paragraphs.

7. Paragraph 87f of the UrhG entitled 'Publishers of newspapers and magazines' provides:

'1. The publishers of newspapers and magazines shall have the exclusive right to make the newspaper or magazine or parts thereof available to the public for commercial purposes, unless it consists of individual words or very short text excerpts. Where the newspaper or magazine has been produced within a company, the owner of the company shall be the publisher.

2. A newspaper or magazine is defined as the editorial and technical preparation of journalistic contributions which are compiled and published periodically on any media under one title, which, following an assessment of the overall circumstances, is to be regarded as largely typical for the publishing house and the overwhelming majority of which does not serve self-advertising purposes. Journalistic contributions are, more specifically, articles and illustrations which serve to disseminate information, form opinions or entertain.'

8. Paragraph 87g of the UrhG, entitled *'Transferability, expiry of and limitations on the right'*, is worded as follows:

'1. The right of publishers of newspapers and magazines referred to in Paragraph 87f(1), first sentence, shall be transferable. Paragraphs 31 and 33 shall apply mutatis mutandis.

2. The right shall expire one year after publication of the newspaper or magazine.

3. The right of publishers of newspapers and magazines may not be asserted to the detriment of the author or the holder of a right related to copyright whose work or subject matter protected under the present legislation is contained in the newspaper or magazine.

4. It shall be permissible to make the newspaper or magazine or parts thereof available to the public unless this is done by commercial operators of search engines or commercial operators of services that similarly publish content. Moreover, the provisions of Section 6 of Part 1 shall apply mutatis mutandis.'

9. Paragraph 87h of the UrhG entitled *'Right of participation of the author'* provides:

'The author shall be entitled to an equitable share of the remuneration.'

The dispute in the main proceedings and the questions referred for a preliminary ruling

10. VG Media is a collective management organisation, authorised in Germany, that defends copyright and rights related to copyright of television channels and private radio stations, as well as rights to digital editorial content. Against this background, VG Media concludes with rights holders the *'administration agreement for television, radio and publishers'*, in which those rights holders grant it, for exclusive administration, their current rights as well as those accruing to them during the term of the agreement, in respect of the newspapers or magazines produced by them.

11. Google operates several internet search engines including, in particular, the search engine of the same name, together with an automated news site (*'Google News'*). On the *'Google'* search engine, after the search term has been entered and the search function has been initiated, a short text or text excerpt (*'the Snippet'*) appears with a thumbnail image that is intended to enable users to gauge the relevance of the displayed website in the light of the information they are looking for. As regards the news site *'Google News'*, it displays news from a limited number of news sources in a format akin to that of a magazine. The information on that site is collected by computers by means of an algorithm using a large number of sources of information. On that site, *'the Snippet'* appears in the form of a short summary of the article from the website concerned, often containing the introductory sentences of that article.

12. In addition, Google publishes, by means of its online services, third-party advertisements on its own websites and on third party websites for a fee.

13. VG Media brought an action for damages against Google before the referring court in which it disputes, in essence, the use by Google, since 1 August 2013, of text excerpts, images and animated images produced by its members, without paying a fee in return for displaying search results and news summaries.

14. The referring court seeks to ascertain whether Paragraphs 87f and 87g of the UrhG are applicable to the dispute in the main proceedings. That court seeks guidance on whether those provisions, arising from the amendment, with effect from 1 August 2013, to the UrhG, should have been notified to the Commission during their drafting stage as foreseen in the first subparagraph of Article 8(1) of Directive 98/34. In that connection, the referring court relies on the case-law of the Court according to which the provisions adopted in breach of the duty of notification under that provision are inapplicable and are, therefore, unenforceable against individuals.

15. In those circumstances, the Landgericht Berlin (Regional Court, Berlin, Germany) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Does a national rule which prohibits only commercial operators of search engines and commercial service providers which edit content, but not other users, including commercial users, from making press products or parts thereof (excluding individual words and very short text excerpts) available to the public constitute, under Article 1(2) and (5) of [Directive 98/34], a rule which is not specifically aimed at the services defined in [Article 1(2)],

and, if that is not the case,

(2) does a national rule which prohibits only commercial operators of search engines and commercial service providers which edit content, but not other users, including commercial users, from making press products or parts thereof (excluding individual words

and very short text excerpts) available to the public constitute a technical regulation within the meaning of Article 1(11) of [Directive 98/34], namely a compulsory rule on the provision of a service?'

The request to have the oral procedure reopened

16. Following the delivery of the Opinion of the Advocate General, VG Media, by documents lodged at the Court Registry on 16 January and 18 February 2019, applied for the oral procedure to be reopened.

17. In support of its request, VG Media claims, in essence, first, that the Advocate General, in particular in points 34 and 38 of his Opinion, made incorrect assessments of the national provisions at issue in the main proceedings and relied on facts that required a more detailed discussion. Secondly, VG Media claims that the political agreement between the European Parliament, the Council of the European Union and the Commission, which preceded the adoption of Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC (OJ 2019 L 130, p. 92), must be taken into account by the Court of Justice for the purpose of the answers to the questions referred for a preliminary ruling.

18. Pursuant to Article 83 of its Rules of Procedure, the Court may at any time, after hearing the Advocate General, order the oral part of the procedure to be reopened, in particular if it considers that it lacks sufficient information or where a party has, after the close of that part of the procedure, submitted a new fact which is of such a nature as to be a decisive factor for the decision of the Court, or where the case must be decided on the basis of an argument which has not been debated between the parties or the interested persons referred to in Article 23 of the Statute of the Court of Justice of the European Union.

19. In that regard, it should be noted that, in his Opinion, the Advocate General relied on the matters of fact and of law as submitted to the Court by the referring court. In proceedings under Article 267 TFEU, which are based on a clear division of responsibilities between the national courts and the Court of Justice, the national court alone has jurisdiction to find and assess the facts in the case before it and to interpret and apply national law (judgment of 26 April 2017, Farkas, C-564/15, EU:C:2017:302, paragraph 37 and the case-law cited).

20. Moreover, it is apparent from the documents before the Court that the facts of the case in the main proceedings predate the entry into force of Directive 2019/790, which is therefore not applicable ratione temporis to the dispute in the main proceedings.

21. Accordingly, the Court considers that it has all the information necessary to rule on the request for a preliminary ruling and that none of the evidence relied on by VG Media in support of its request justifies the reopening of the oral part of the procedure, in accordance with Article 83 of the Rules of Procedure.

22. In those circumstances, the Court, after hearing the Advocate General, considers that there is no need to order that the oral part of the procedure be reopened.

Consideration of the questions referred

23. It should be observed as a preliminary point that, according to settled case-law, in the procedure laid down by Article 267 TFEU, providing for cooperation between national courts and the Court of Justice, it is for the latter to provide the referring court with an answer which will be of use to it and enable it to determine the case before it. To that end, the Court may have to reformulate the questions referred to it. Further, the Court may decide to take into consideration rules of EU law to which the national court has made no reference in the wording of its question (judgment of 1 February 2017, Município de Palmela, C-144/16, EU:C:2017:76, paragraph 20 and the case-law cited).

24. In the present case, by its two questions, which it is appropriate to examine together, the referring court asks, in essence, whether Article 1(11) of Directive 98/34 must be interpreted as meaning that a provision of national law, such as that at issue in the main proceedings, which prohibits only commercial operators of search engines and commercial service providers that similarly publish content from making newspapers or magazines or parts thereof (excluding individual words and very short text excerpts) available to the public, constitutes a *'technical regulation'* within the meaning of that provision, the draft of which is subject to prior notification to the Commission pursuant to the first subparagraph of Article 8(1) of that directive.

25. It should be recalled that the concept of a *'technical regulation'* extends to four categories of measures, namely, (i) the *'technical specification'*, within the meaning of Article 1(3) of Directive 98/34; (ii) *'other requirements'*, as defined in Article 1(4) of that directive; (iii) the *'rule on services'*, covered in Article 1(5), of that directive, and (iv) the *'laws, regulations or administrative provisions of Member States prohibiting the manufacture, importation, marketing or use of a product or prohibiting the provision or use of a service, or establishment as a service provider'*, under Article 1(11) of that directive (judgment of 26 September, Van Gennip and Others, C-137/17, EU:C:2018:771, paragraph 37 and the case-law cited).

26. In that connection, it must be stated that in order for a national measure to fall within the first category of technical regulations that is referred to in Article 1(3) of Directive 98/34, that is to say, within the concept of *'technical specification'*, that measure must necessarily refer to the product or its packaging as such and thus lay down one of the characteristics required of a product (judgment of 19 July 2012, Fortuna and Others, C-213/11, C-214/11 and C-217/11, EU:C:2012:495, paragraph 28 and the case-law cited). Moreover, the concept of *'other requirements'* within the meaning of Article 1(4) of that directive concerns the life cycle of a product after it has been placed on the market (judgment of 4 February 2016, Ince, C-336/14, EU:C:2016:72, paragraph 72).

27. In the present case, the national provision at issue in the main proceedings does not fall within the first and second categories of measures mentioned in paragraph

25 of the present judgment. That provision does not refer to products themselves, in this case newspapers or magazines, but, as the Advocate General observed in point 22 of his Opinion, to the prohibition on commercial operators of internet search engines or commercial service providers that similarly publish content from making newspapers or magazines available to the public.

28. As regards the question whether the national provision at issue in the main proceedings is a *'rule on services'*, within the meaning of Article 1(5) of Directive 98/34, it must first be recalled that, under Article 1(2) of that directive, a *'service'* is defined as *'any Information Society service, that is to say, any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services'*.

29. In that regard, it is apparent from the order for reference and from the wording of the first question that the referring court takes the view that the national provision at issue in the main proceedings is a *'rule on services'*, without explaining its reasoning. It merely states that search engine providers supply — at a distance, by electronic means and at the individual request of the recipient of services, who initiates the search after entering a search term — an information society service within the meaning of Article 1(2) of that directive.

30. As regards the services provided by commercial operators of internet search engines, there is in fact no doubt that they constitute such services. By contrast, that is not necessarily the case for services provided by commercial service providers that similarly publish content. As the Commission points out, the similar publication of the contents of newspapers or magazines can be done other than via the internet or by means of electronic communications, such as, for example, on paper.

31. Next, in order to determine whether a rule can be classified as a *'rule on services'*, the definition in Article 1(5) of Directive 98/34 requires that rule to be *'specifically'* aimed at information society services.

32. In that regard it should be noted that under the first indent of Article 1(5) of that directive, a rule shall be considered as specifically aimed at information society services having regard to both its statement of reasons and its operative part. Under that same provision, moreover, it is not required that *'the specific aim and object'* of all of the rule in question be to regulate information society services, as it is sufficient that the rule pursue that aim or object in some of its provisions (judgment of 20 December 2017, Falbert and Others, C-255/16, EU:C:2017:983, paragraph 32).

33. In addition, even where it is not apparent solely from the wording of a national rule that it is aimed, at least in part, at regulating information society services specifically, that object may nevertheless be gleaned quite readily from the stated reasons given for the rule, as they appear, in accordance with the relevant national rules of interpretation in that regard, inter alia from the travaux préparatoires for the rule (see, to that effect, judgment of 20 December 2017, Falbert and Others, C-255/16, EU:C:2017:983, paragraph 33).

34. In the present case, first, it should be noted that Paragraph 87g(4) of the UrhG expressly refers, inter alia, to the commercial providers of search engines for which it is common ground that they provide services falling within the scope of Article 1(2) of Directive 98/34.

35. Secondly, it appears that the national rule at issue in the main proceedings has as its specific aim and object the regulation of information society services in an explicit and targeted manner.

36. Although the referring court does not provide any clear indications as to the specific aim and object of the national legislation at issue in the main proceedings, it is, however, apparent from the observations submitted by the German Government at the hearing before the Court that, initially, the amendment of the UrhG specifically concerned internet search engine providers. Moreover, the parties to the main proceedings and the Commission state, in their written observations, that the purpose of that legislation was to protect the legitimate interests of publishers of newspapers and magazines in the digital world. It appears, therefore, that the main aim and object of the national provision at issue in the main proceedings was to protect those publishers from copyright infringements by online search engines. In that context, protection appears to have been considered necessary only for systematic infringements of works of online publishers by information society service providers.

37. It is true that the prohibition on making newspapers or magazines available to the public, provided for in Paragraph 87g(4) of the UrhG, relates not only to online service providers but also to offline service providers. However, it is apparent from recitals 7 and 8 of Directive 98/48, by which Directive 98/34 was amended, that the purpose of Directive 94/48 was to adapt existing national legislation to take account of new information society services and avoid restrictions on the freedom to provide services and freedom of establishment leading to *'refragmentation of the internal market'*. It would, however, run counter to that objective to exclude a rule, the aim and object of which is in all probability to regulate online services relating to newspapers or magazines, from classification as a rule specifically targeting such services within the meaning of Article 1(5) of Directive 98/34 on the sole ground that its wording not only refers to online services, but also to services provided offline (see, to that effect, judgment of 20 December 2017, Falbert and Others, C-255/16, EU:C:2017:983, paragraphs 34 and 35).

38. Moreover, the fact that Paragraph 87g(4) of the UrhG forms part of national legislation on copyright or rights related to copyright is not such as to call that assessment into question. Technical rules on intellectual property are not expressly excluded from the scope of Article 1(5) of Directive 98/34, unlike those forming the subject matter of European legislation in the field of telecommunications services or financial services. In addition, it is apparent from the judgment of 8 November

2007, Schwibbert (C-20/05, EU:C:2007:652) that provisions of national intellectual property legislation may constitute a *'technical regulation'* subject to notification pursuant to Article 8(1) of that directive.

39. In so far as a rule, such as that at issue in the main proceedings, is specifically aimed at information society services, the draft technical regulation must be subject to prior notification to the Commission pursuant to Article 8(1) of Directive 98/34. Failing that, according to settled case-law, the inapplicability of a technical regulation that has not been notified in accordance with that provision may be relied upon in proceedings between individuals (judgment of 27 October 2016, James Elliott Construction, C-613/14, EU:C:2016:821, paragraph 64 and the case-law cited).

40. In the light of the foregoing, the answer to the questions referred is that Article 1(11) of Directive 98/34 must be interpreted as meaning that a provision of national law, such as that at issue in the main proceedings, which prohibits only commercial operators of search engines and commercial service providers that similarly publish content from making newspapers or magazines or parts thereof (excluding individual words and very short text excerpts) available to the public, constitutes a *'technical regulation'* within the meaning of that provision, the draft of which is subject to prior notification to the Commission pursuant to the first subparagraph of Article 8(1) of that directive.

Costs

41. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fourth Chamber) hereby rules:

Article 1(11) of Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on Information Society services (as amended by Directive 98/48/EC of the European Parliament and of the Council of 20 July 1998), must be interpreted as meaning that a provision of national law, such as that at issue in the main proceedings, which prohibits only commercial operators of search engines and commercial service providers that similarly publish content from making newspapers or magazines or parts thereof (excluding individual words and very short text excerpts) available to the public, constitutes a *'technical regulation'* within the meaning of that provision, the draft of which is subject to prior notification to the Commission pursuant to the first subparagraph of Article 8(1) of Directive 98/34, as amended by Directive 98/48.

[Signatures]

OPINION OF ADVOCATE GENERAL

HOGAN

delivered on 13 December 2018(1)

Case C-299/17

VG Media Gesellschaft zur Verwertung der Urheber- und Leistungsschutzrechte von Medienunternehmen mbH

z

Google LLC, successor in law to Google Inc.

(Request for a preliminary ruling from the Landgericht Berlin (Regional Court, Berlin, Germany))

(Reference for a preliminary ruling — Approximation of laws — Directive 98/34/EC — Procedure for the provision of information in the field of technical regulations and of rules on Information Society Services — Obligation on Member States to notify the European Commission of all draft technical regulations — Inapplicability of rules classifiable as technical regulations not notified to the Commission — National rule which prohibits commercial operators of search engines and commercial service providers which edit content from making press products available to the public, a rule which is not specifically aimed at the services defined in that point — Technical regulation — Rule which is not specifically aimed at Information Society services)

1. Where a Member State introduces new provisions in its copyright law providing that the commercial operators of an internet search engine are not entitled without appropriate authorisation to provide excerpts (2) of certain text, images and video content provided by press publishers does this rule require notification to the European Commission in accordance with the requirements of Article 8(1) of Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on Information Society services, (3) as amended by Council Directive 2006/96/EC of 20 November 2006 adapting certain Directives in the field of free movement of goods, by reason of the accession of Bulgaria and Romania (4) (*'Directive 98/34'*)?

2. This, in essence, is the question presented by this reference for a preliminary ruling. It is accepted that the German law in question was not so notified to the Commission. It is also clear that, in the event that notification was so required by the provisions of Directive 98/34, the national court must decline to apply the national law in question even in proceedings involving private parties, pending such notification. (5) The fundamental question, therefore, is whether the provisions of Directive 98/34 apply to these new provisions of German copyright law.

3. The request for a reference has been made in proceedings before the Landgericht Berlin (Regional Court, Berlin, Germany) between VG Media Gesellschaft zur Verwertung der Urheber- und Leistungsschutzrechte von Medienunternehmen mbH ('VG Media'), a collective management organisation authorised under German law to manage copyright and rights related to copyright on behalf inter alia of press publishers, and Google LLC (*'Google'*), which operates

the search engine Google search under the domains www.google.de and www.google.com and the Google News service, which can be accessed separately in Germany under news.google.de or news.google.com.

4. VG Media brought, on behalf of its members, an action for damages against Google in respect of the latter's use from 1 August 2013 onwards, for its own services, of text excerpts, images and videos from press and media content produced by VG Media's members without paying a fee.

5. On 1 August 2013, the Federal Republic of Germany introduced a right related to copyright for press publishers pursuant to Paragraphs 87f and 87h of the Urheberrechtsgesetz (Act on Copyright and Related Rights; *'the UrhG'*). Given that the draft legislation in question was not notified to the Commission under Article 8(1) of Directive 98/34 — and, as I have already observed, the penalty for failure to comply with that provision being the inapplicability of the national legislative provisions so that they may not be enforced against individuals in the event that there was no notification — the Landgericht Berlin (Regional Court, Berlin) has referred two questions to the Court in order to determine whether or not the provisions of the UrhG in question constitute in accordance with Article 1(5) of Directive 98/34 a *'rule on services'* and thus a requirement of a general nature relating to the taking-up and pursuit of Information Society services (6) rather than 'rules which are not specifically aimed at' those services. (7)

6. The referring Court has also asked for an interpretation of the terms *'technical regulation'* pursuant to Article 1(11) of that Directive. Before considering these questions, it is necessary first to set out the applicable law.

I. Legal context

A. European Union law

7. Article 1(2), (5) and (11) of Directive 98/34 provides: 'For the purposes of this Directive, the following meanings shall apply:

…

2. *"service"*, any Information Society service, that is to say, any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services.

…

5. *"rule on services"*, requirement of a general nature relating to the taking-up and pursuit of service activities within the meaning of point 2, in particular provisions concerning the service provider, the services and the recipient of services, excluding any rules which are not specifically aimed at the services defined in that point.

…

For the purposes of this definition:

– a rule shall be considered to be specifically aimed at Information Society services where, having regard to its statement of reasons and its operative part, the specific aim and object of all or some of its operative provisions is to regulate such services in an explicit and targeted manner,

– a rule shall not be considered to be specifically aimed at Information Society services if it affects such services only in an implicit or incidental manner;

…

11. *"technical regulation"*, technical specifications and other requirements or rules on services, including the relevant administrative provisions, the observance of which is compulsory, de jure or de facto, in the case of marketing, provision of a service, establishment of a service operator or use in a Member State or a major part thereof, as well as laws, regulations or administrative provisions of Member States, except those provided for in Article 10, prohibiting the manufacture, importation, marketing or use of a product or prohibiting the provision or use of a service, or establishment as a service provider.'

8. The first subparagraph of Article 8(1) of Directive 98/34 provides:

'Subject to Article 10, Member States shall immediately communicate to the Commission any draft technical regulation, except where it merely transposes the full text of an international or European standard, in which case information regarding the relevant standard shall suffice; they shall also let the Commission have a statement of the grounds which make the enactment of such a technical regulation necessary, where these have not already been made clear in the draft.'

B. National law

9. Paragraph 87f of the UrhG entitled 'Publishers of newspapers and magazines' provides:

'(1) The producer of a press product (publisher of newspapers and magazines) shall have the exclusive right to make the press product or parts thereof available to the public for commercial purposes, unless it consists of individual words or very short text excerpts. Where the press product has been produced within a company, the owner of the company shall be the producer.

(2) A press product shall be the editorial and technical preparation of journalistic contributions in the context of a collection published periodically on any media under one title, which, following an assessment of the overall circumstances, can be regarded as largely typical for the publishing house and the overwhelming majority of which does not serve self-advertising purposes. Journalistic contributions are, more specifically, articles and illustrations which serve to disseminate information, form opinions or entertain.'

10. Paragraph 87g of the UrhG entitled *'transferability, duration of and limitations on the right'* provides:

'(1) The right of the publisher of newspapers and magazines in accordance with paragraph 87f(1), first sentence, shall be transferable. Sections 31 and 33 shall apply mutatis mutandis.

(2) The right shall expire one year after publication of the press product.

(3) The right of the publisher of newspapers and magazines may not be asserted to the detriment of the author or the holder of a right related to copyright whose work or subject matter protected under this Act is contained in the press product.

(4) It shall be permissible to make press products or parts thereof available to the public unless this is done by commercial operators of search engines or commercial operators of services which edit content accordingly. Moreover, the provisions of Chapter 6 of Part 1 shall apply mutatis mutandis.'

11. Paragraph 87h of the UrhG entitled *'Right of participation of the author'* provides:

'The author shall be entitled to an equitable share of the remuneration.'

II. The main proceedings and the questions referred for a preliminary ruling

12. VG Media concludes with rightholders the *'administration agreement for television, radio and publishers'*, in which the rightholders grant it, for exclusive administration, the rights and claims (8) in respect of press products produced by them as referred to in Paragraph 87f(2) of the UrhG.

13. As indicated above, Google operates the well-known search engine for finding websites (Google search) under the domains www.google.de and www.google.com. After the search term has been entered and the search function has been initiated, a short text or text excerpt appears with a thumbnail image, which is intended to enable users to gauge the relevance of the displayed website for their specific need for information. It consists of a word combination from the displayed website formed from a number of words connected with the search term. The search engine also contains a menu which enables users to access further specialised search services, such as Google Image Search, Google Video Search and Google News Search (*'News'* on the menu). In addition, Google operates the Google News service, which can be accessed separately in Germany under news.google.de or news.google.com, in which it displays news from a limited number of news sources in magazine form. In such instances the extracts in question consist of a brief summary from the website, in many cases using the introductory sentences. Through its AdWords and AdSense services Google places third-party advertisements on its own websites and on third-party websites for a fee.

14. In its action before the referring court, VG Media objects to Google's use, for its own services, of text excerpts and images from content produced by its members, without paying a fee. The referring court considers that as VG Media's action before it is well founded, at least in part, the outcome of the proceedings before it depends on the extent to which Paragraphs 87f to 87g of the UrhG are applicable as they were not notified to the Commission in accordance Article 8(1) of Directive 98/34.

15. That court considers, in particular, that the outcome of the proceedings depends on whether Paragraph 87g(4) of the UrhG (when read in conjunction with Paragraph 87f(1) of the UrhG) constitutes a requirement of a general nature according to Article 1(5) of Directive 98/34 relating to the pursuit of an Information Society service rather than rules not specifically aimed at such services.

16. In those circumstances, the Landgericht Berlin (Regional Court, Berlin) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Does a national rule which prohibits only commercial operators of search engines and commercial service providers which edit content, but not other users, including commercial users, from making press products or parts thereof (excluding individual words and very short text excerpts) available to the public constitute, under Article 1(2) and (5) of Directive [98/34], a rule which is not specifically aimed at the services defined in that point,

and, if that is not the case,

(2) does a national rule which prohibits only commercial operators of search engines and commercial service providers which edit content, but not other users, including commercial users, from making press products or parts thereof (excluding individual words and very short text excerpts) available to the public constitute a technical regulation within the meaning of Article 1(11) of Directive [98/34], namely a compulsory rule on the provision of a service'.

III. Analysis

17. The two questions asked by the referring court together may conveniently be answered as one and I propose to adopt this course in this Opinion.

A. Whether the changes effected to the UrhG are capable of amounting to a 'technical regulation' within the meaning of Directive 98/34

18. The first question which calls for examination is whether a provision such as the changes effected to the UrhG is capable of being a *'technical regulation'* within the meaning of Directive 98/34.

19. It is clear that the concept of a 'technical regulation' extends to four categories of measures, namely, (i) the 'technical specification', within the meaning of Article 1(3) of Directive 98/34; (ii) 'other requirements', as defined in Article 1(4) of that directive; (iii) the *'rule on services'*, covered in Article 1(5) of that directive, and (iv) the *'laws, regulations or administrative provisions of Member States prohibiting the manufacture, importation, marketing or use of a product or prohibiting the provision or use of a service, or establishment as a service provider'*, under Article 1(11) of that directive. (9)

20. One may first observe that it is, of course, well established by reference to settled case-law that national provisions which merely lay down the conditions governing the establishment or the provision of services by undertakings such as provisions making the exercise of a business activity subject to prior authorisation do not constitute technical regulations within the meaning of Article 1(11) of Directive 98/34. (10)

21. Second, it is clear that measures which are essentially limited to reproducing or replacing existing technical measures which have already been notified to the Commission also fall outside the scope of this definition. (11)

22. It should be pointed out, however, that the key parts of these provisions so far as this preliminary reference is

concerned are those contained in Paragraph 87g(4) of the UrhG because the net effect of this measure is to permit the public to have access to press products without copyright (12) infringement, save where this is done by either the commercial operators of search engines or by commercial operators who provide services which edit the content of such products. (13) This is the critical provision of the new law because it is this provision which effectively curtails or restricts the provision of these services by internet search engine providers (such as Google) by providing that such services amount to copyright infringement and expose the service provider to the possibility of an injunction or a monetary claim. (14) As the Landgericht Berlin (Regional Court, Berlin) observed in its request for a reference, the effect of this change is that:

'… it is unlawful to make press products or parts thereof available to the public only where they are supplied by a commercial provider of search engines or a commercial service provider of search engines or a commercial service provider which edits content accordingly, but it is still permissible where this is done by other users, including other commercial users. The law grants holders of related rights a ius prohibendi only vis-à-vis commercial providers of search engines or service providers which edit content accordingly, while it does not exist for making available to the public by other users, including commercial users.'

23. Save for the related provisions of Paragraph 87f(1), other provisions of the new Paragraphs 87f to 87h of the UrhG appear to me to be largely adjectival or ancillary to this key provision and do not present any significant issues regarding compliance with the directive.

24. For my part, I do not think that Paragraphs 87f(1) and 87g(4) of the UrhG can be regarded as simply the equivalent of a condition governing the exercise of a business activity such as a prior authorisation requirement. As the referring court has pointed out, this change has the effect in practice of making the provision of the service subject to either a form of a prohibitory order or a monetary claim at the instance of the publisher of newspapers or magazines. It is true, of course, that the search engine operator may avail of the copyright exception, but only if the publication is confined either to a few words or a very short excerpt.

25. It may be noted that in its judgment in Berlington Hungary and Others, (15)the Court held that Hungarian legislation which restricted the organisation of certain games of chance to casinos constitutes a 'technical regulation' within the meaning of Article 1(11) of Directive 98/48 only insofar as it could significantly influence the nature of the products or the marketing of the products. The Court further held, however, that a prohibition on operating slot machines outside casinos could significantly influence the nature or the marketing of the products used in that context, which constitute goods that may be covered by Article 34 TFEU, by reducing the outlets in which they can be used'. (16)

26. If one applies this reasoning by analogy to the present case it may equally be said that the provisions of Paragraphs 87f(1) and 87g(4) of the UrhG could have the effect of significantly affecting the nature or marketing of these internet services by exposing the operators of search engines to either a prohibitory order or a claim for damages where the internet search enables the reader to access more than a few words or a very short excerpt from the press product in question. It is striking that there is no similar prohibition or the potential of legal liability in the case of other members of the public (including commercial operators who do not come within the saving exception provided for in Paragraph 87g(4) of the UrhG) accessing or using this press product. A new legislative measure of this kind clearly has the potential to affect the provision of services for press products, thus potentially engaging the application of Article 56 TFEU.

27. In these circumstances, I consider that Paragraphs 87f(1) and 87g(4) of the UrhG amount to a technical regulation within the meaning of Article 1(11) of Directive 98/34.

28. It is true that, as the representatives of several parties observed at the hearing of 24 October 2018, the copyright related right granted by Paragraphs 87f to 87h of the UrhG falls within the scope of the fundamental right to the protection of intellectual property laid down in Article 17(2) of the Charter of Fundamental Rights of the European Union ('the Charter'). It would appear from the file before the Court that the UrhG and also Union law, most notably Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights, (17) provide rightholders with a wide range of legal remedies — such as an action for injunctive relief and an action for damages — to enforce intellectual property rights and are thus aimed at ensuring, inter alia, a high level of protection for intellectual property rights.

29. It is clear, however, from the case-law of the Court that intellectual property rights are not absolute. The Court has stressed that such exclusive rights and, in particular, the possibility of seeking remedies such as injunctions in order to secure their protection may impinge on the fundamental rights of others, such as the right of freedom to conduct a business, protected under Article 16 of the Charter, and the right to freedom of information, protected under Article 11 of the Charter. Where several fundamental rights protected under EU law are at stake, a fair balance must be struck between those rights. (18) In any event, none of this means that legislation providing for intellectual property rights cannot amount to a technical regulation with the meaning of Directive 98/34.

30. It is next necessary, however, to consider whether the requirements of Article 1(2) and Article 1(5) of Directive 98/34 are also satisfied.

B. Whether Paragraphs 87f(1) and 87g(4) of the UrhG satisfy the requirements of Article 1(2) of Directive 98/34

31. It is true, of course, that Article 1(2) of Directive 98/34 provides that the term 'technical regulation' applies to regulations relating to what is described as information society services, i.e., services provided for remuneration (19) at a distance by electronic means and

at the individual request of a recipient of services. That requirement is, however, readily satisfied in the case before the referring court, concerning as it does the supply of press services which are supplied, inter alia, by means of internet search engines. (20) The referring court has, in any event, made it clear in its decision to refer questions to the Court of 8 May 2017 that this condition is satisfied.

C. Whether Paragraphs 87f(1) and 87g(4) of the UrhG are specifically aimed at information society services

32. A further requirement of Directive 98/34 is that the rule in question be 'specifically' aimed at information society services. (21) As Article 1(5) of Directive 98/34 makes clear, a national measure shall be considered to be specifically aimed at such services in this sense if the specific aim and object of at least some of its individual provisions is *'to regulate such services in an explicit and targeted manner'*. (22)'

33. Yet there can be little doubt that the provisions of Paragraph 87g(4) of the UrhG, read in conjunction with Paragraph 87f(1) of the UrhG, apply to information society services and that the rule in question is, in reality, specifically aimed at such services.

34. The Spanish Government stated in its observations that the aim of the national provisions in question is to protect the rights related to copyright of publishers of newspapers and magazines and not to regulate, in any manner, information society services. In my view, the fact that the national legislative provisions in question grant intellectual property rights to such publishers does not in itself establish that such provisions do not seek to regulate, in any manner or merely in an incidental manner, information society services. Indeed, the Commission stated in its observations that it considered that intellectual property did not fall outside the scope of application of Directive 98/34. It is clear from the judgment in Schwibbert (23)that provisions of national intellectual property law may constitute a *'technical regulation'* subject to notification pursuant to Article 8(1) of Directive 98/34.

35. The Greek Government considers that an obligation to notify a copyright related right, such as the right granted to press publishers by the UrhG, in accordance with Article 8(1) of Directive 98/34 constitutes a formality contrary to Article 5(2) of the Berne Convention for the Protection of Literary and Artistic Works (Paris Act 1971) ('the Berne Convention'), Article 9 of the Agreement on Trade-Related Aspects of Intellectual Property Rights ('the TRIPS Agreement') and Article 3 of the World Intellectual Property Organization ('WIPO') Copyright Treaty 1996.

36. For my part, I consider these arguments to be unpersuasive. While failure by a Member State to notify a draft technical regulation in accordance with Article 8(1) of Directive 98/34 can result in it being inapplicable, the pre-notification obligation is imposed on Member States, rather than on individual rightholders, and any analogy with the prohibition on subjecting the enjoyment and the exercise of rights to any formality seems to me to be highly artificial. There is, moreover, no ex ante exclusion of rules dealing with copyright from the scope of the notification obligations contained in Directive 98/34 and this may be contrasted with the manner in which, for example, rules in relation to the provision of telecommunications services and financial services are specifically excluded by Article 1(5) of Directive 98/34.

37. These relevant provisions of the UrhG admittedly apply to both online services provided by the operators of search engines (such as Google) and to the separate services provided by other operators which make available press products. In the latter case, it is, I suppose, possible that the provider of press product services (which, for example, might summarise press comment in relation to a particular topic or entity or individual in return for a fee) might still continue to do so offline. Indeed, at the hearing held on 24 October 2018 the representative of the German Government confirmed that the provision of the latter type of services by other operators was not common and was not the principal focus of this legislative change.

38. The scope and impact of the legislation must, of course, be approached in a realistic fashion having regard to present day circumstances. To my mind, it is clear (24) that the principal aim and object (25) of these legislative changes was to address the impact of internet search engines given that media content is increasingly read and accessed online and to provide for a special copyright rule in respect of the provision of online services in relation to press products by the operators of such search engines. Accordingly, even if there are still operators of commercial services providing such services offline, they would seem to be far from being the principal concern of the German legislator. While this would ultimately be a matter for the referring court to verify, this seems to be at least implicit in its interpretation of the UrhG.

39. It is in that sense, therefore, that the relevant provisions of the UrhG are 'specifically' aimed at the provision of information society services in the manner required by Article 1(5) of Directive 98/34, because in truth this change in Germany copyright law is designed to regulate such services in an *'explicit and targeted manner'*. (26)

40. This conclusion is, I think, supported by the Court's judgment in Falbert and Others. (27) In that case the defendants were the editors of a Danish newspaper who had arranged for the publication in that newspaper and on the newspaper's website of advertisements from bookmaking firms offering gaming and betting services within Denmark, without those firms having been issued with a licence. As it happened, the Danish law did not draw an express distinction between services provided offline and those which were provided online. This consideration was not, however, regarded by the Court as dispositive of the question of whether the law was specifically aimed at information society services. Article 1(5) of Directive 98/34 did not require that the specific aim and object of all of the rule in question was to regulate information society services, as it was *'sufficient that the rule pursue that aim or object in*

certain of its provisions'. (28) The same can just as readily be said in the present case.

41. I accept, of course, as the representatives of several parties stressed at the hearing, that the legislation in question was enacted in order to strengthen the intellectual property rights of press publishers and, by extension, to promote both media diversity and press freedom. The ubiquitous presence of the internet and the widespread access to personal computers and smartphones has meant that, in the course of half a generation, heretofore long established consumer practices with regard to the consumption of media products — not least the actual purchase of newspapers — has changed dramatically.

42. The legislators in each of the Member States were, accordingly, in principle entitled to respond to these changing consumer habits. A free and vibrant press is part of the lifeblood of democracy, which, as Article 2 TEU recognises, is the very foundation stone of the Union and its Member States. It is quite unrealistic to expect high quality and diverse journalism which adheres to the highest standards of media ethics and respect for the truth unless newspapers and other media outlets enjoy a sustainable income stream. It would be foolish and naïve not to recognise that the traditional commercial model of newspapers right throughout the Union — sales and advertising — has been undermined within the last 20 years by online reading of newspapers by consumers, which practice has in turn been facilitated by the advent of powerful search engines such as that operated by the defendant.

43. None of this means, however, that a Member State is entitled to by-pass the notification requirements of Directive 98/34. Nor does the fact that notification of such a legislative proposal is required by the directive in itself mean that the draft legislation is necessarily defective or objectionable from the standpoint of the internal market. What, rather, Article 8(1) of Directive 98/34 seeks to attain is that the Commission (and, by extension, the other Member States) becomes aware of the proposal and at an early stage consider its possible implications for the operation of the internal market. That is essentially why this Court has so frequently stated from the decision in CIA Security International (29) onwards that failure to comply with the notification requirement has the consequence that the relevant provisions of national legislation enacted in breach of that obligation must be regarded as inapplicable by the national courts in appropriate proceedings.

44. Summing up, therefore, I am of the view that, for the reasons just stated, the provisions of Paragraphs 87f(1) and 87g(4) of the UrhG constitute a technical regulation specifically aimed at a particular information society service, namely, in this instance, the provision of press products through the use of internet search engines, thus satisfying the requirements of the definition of these terms contained in Article 1(2), Article 1(5) and Article 1(11) of Directive 98/34.

45. As these national provisions were not notified to the Commission in the manner required by Article 8(1) of Directive 98/34, it follows, therefore, that, in line with the established case-law of the Court, the Landgericht Berlin (Regional Court, Berlin) must decline to apply the provisions of Paragraphs 87f(1) and 87g(4) of the UrhG in the proceedings involving the parties before that court.

IV. Conclusion

46. I would accordingly propose that the two questions referred by the Landgericht Berlin (Regional Court, Berlin, Germany) be answered as follows:

Article 1(2) and (5) of Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on Information Society services, as amended by Council Directive 2006/96/EC of 20 November 2006 adapting certain Directives in the field of free movement of goods, by reason of the accession of Bulgaria and Romania, must be interpreted as meaning that national provisions such as those at issue in the main proceedings, which prohibit only commercial operators of search engines and commercial service providers which edit content, but not other users, including commercial users, from making press products or parts thereof (excluding individual words and very short text excerpts) available to the public constitute rules specifically aimed at information society services. Article 1(11) of Directive 98/34 must be interpreted as meaning that national provisions such as those at issue in the main proceedings constitute a technical regulation within the meaning of that provision, subject to the notification obligation under Article 8(1) of that directive.

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1 Original language: English.

2 Other than individual words or very short text excerpts: see below at point 9.

3 OJ 1998 L 204, p. 37.

4 OJ 2006 L 363, p. 81.

5 Judgment of 30 April 1996, CIA Security International (C-194/94, EU:C:1996:172, paragraph 44 et seq.).

6 As defined by Article 1(2) of Directive 98/34.

7 See Article 1(5) of Directive 98/34.

8 To which they are currently entitled or will be entitled during the term of the contract.

9 See, for example, judgment of 4 February 2016, Ince (C-336/14, EU:C:2016:72EU:C:2016:72, paragraph 70).

10 See, to that effect, the judgment of 20 December 2017, Falbert and Others (C-255/16, EU:C:2017:983, paragraph 16 and the case-law cited).

11 See, to that effect, the judgment of 21 April 2005, Lindberg (C-267/03, EU:C:2005:246, paragraph 85).

12 It would appear from the file before the Court, subject to verification by the referring court, that the right granted by the provisions of the UrhG in question is, in fact, a copyright related right. I propose, however,

to refer for convenience to it in this Opinion as a copyright.

13 While the exclusive right granted to the producer of a press product pursuant to Paragraph 87f(1) of the UrhG is very broadly drafted, it is clear from Paragraph 87g(4) of the UrhG — which is drafted in the form of an exception — that that exclusive right, in reality, targets or is limited to *'commercial operators of search engines or commercial operators of services which edit content'*. I therefore consider that the Commission's statement that the exclusive right applies erga omnes and that the making available of press products is *'always illegal'* — and not only when it is done by operators of search engines or operators of services which edit the content — is in truth highly artificial when viewed in the context of the application of Directive 98/34. While Paragraph 87g(4) of the UrhG is undoubtedly drafted as an exception to the exclusive right granted in Paragraph 87f(1) of the UrhG, the real effect of those provisions is that the exclusive right only relates to the services referred to in Paragraph 87g(4) of the UrhG. I also consider that VG Media's and the Spanish Government's observation that the German legislation in question is not aimed at regulating the supply of press products online but rather at protecting publishers' rights is unpersuasive for reasons set out elsewhere in this Opinion.

14 Given the legal rights granted under the provisions in question to the publishers of newspapers and magazines, observance of the rules in question is compulsory in respect of the provision of press products by *'commercial operators of search engines or commercial operators of services which edit the content'* as required by Article 1(11) of Directive 98/34.

15 Judgment of 11 June 2015 (C-98/14 EU:C:2015:386).

16 See paragraphs 98 and 99.

17 OJ 2004 L 157, p. 45.

18 See, to that effect, judgment of 15 September 2016, McFadden (C-484/14, EU:C:2016:689, paragraphs 81 to 84): see also judgment of 16 July 2015, Huawei Technologies (C-170/13, EU:C:2015:477, paragraphs 57 to 59).

19 It is clear from paragraphs 26 to 30 of the judgment of 11 September 2014, Papasavvas (C-291/13, EU:C:2014:2209), that the concept of *'information society services'*, within the meaning of Article 1(2) of Directive 98/34, covers the provision of online information services for which the service provider is remunerated, not by the recipient of those, but by income generated for example by advertisements posted on a website.

20 The Portuguese Government considers that the text of Paragraph 87g(4) of the UrhG does not fulfil two of the requirements imposed by Article 1(2) of Directive 98/34, namely, that the service normally be provided for remuneration and at the individual request of a recipient of services.

21 While the Commission accepts that the making available by commercial operators of search engines of press products or parts thereof to the public is an information society service, it considers that the terms *'commercial operators of services which edit the content'* may relate not only to online services but also to offline services.

22 See Opinion of Advocate General Szpunar in Uber France (C-320/16, EU:C:2017:511, points 23 and 24). In that Opinion Advocate General Szpunar stated that 'not every provision that concerns, in one way or another, information society services automatically falls within the category of technical regulations. Indeed, among the various categories of technical regulations, Directive 98/34, as amended, distinguishes those which relate to services and clearly states that it deals only with information society services. According to the definition given in Article 1(5) of the directive, a rule on services is a requirement of a general nature relating to the taking-up and pursuit of service activities. In order to be classified as a technical regulation, it is also necessary that the specific aim and object of such a requirement should be to regulate such services in an explicit and targeted manner. By contrast, rules which affect such services only in an implicit or incidental manner are excluded'.

23 Judgment of 8 November 2007 (C-20/05, EU:C:2007:652).

24 Subject to verification by the referring court.

25 See by analogy, judgments of 20 December 2017, Asociación Profesional Elite Taxi (C-434/15, EU:C:2017:981, paragraph 40), and of 10 April 2018, Uber France (C-320/16, EU:C:2018:221, paragraph 22), in which the Court found that the *'main component'* of a service which combined an *'information society service'* and a transport service was the latter service. In my view, the same exercise can be performed in relation to the legislation at hand. Given that legislation may have a number of aims and have to be tailored to meet a number of specific requirements and interests, I believe that in the context of the requirement of pre-notification imposed by Article 8(1) of Directive 98/34, it is imperative to ascertain the principal aim and object or the main component of the national legislation or provision at hand, otherwise the inclusion therein of services which are of no great importance in terms for example of volume or value could lead to the erroneous conclusion that the services which are in reality being regulated are not *'information society services'*. The inclusion in legislation of relatively unimportant services which are not traded online along with information society services could lead to the very purpose of Directive 98/34 being undermined.

26 I therefore disagree with the argument of the German Government that the provisions of the UrhG in question do not have a direct impact on the supply of services or the cross-border supply of services. That government considers that those provisions are merely general conditions relating to the supply of services which do not

come within the scope of Article 1(5) of Directive 98/34. According to that government, the provisions in question merely affect search engines' and data aggregators' access to data for indexing their research.

27 Judgment of 20 December 2017 (C-255/16, EU:C:2017:983).

28 Judgment of 20 December 2017, Falbert and Others (C-255/16, EU:C:2017:983, paragraph 32).

29 Judgment of 30 April 1996 (C-194/94, EU:C:1996:172).