Provisional text

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
v
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 provisionsso 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 wordsand 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 wordsand 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 wordsand 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.

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

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3 OJ 1998 L 204, p. 37.

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4 OJ 2006 L 363, p. 81.

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

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

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

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

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

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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).

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

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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.

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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.

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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.

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

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16 See paragraphs 98 and 99.

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17 OJ 2004 L 157, p. 45.

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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).

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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.

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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.

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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.

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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’.

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

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24 Subject to verification by the referring court.

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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.

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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.

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

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

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