Provisional text

JUDGMENT OF THE COURT (Fourth Chamber)

12 September 2019 (*)

(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

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').

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

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

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

…

"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:

"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.

"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;

"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;

"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.

"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.'

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.'

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

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.

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.'

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*.'

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

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.

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.

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.

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.

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.

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:

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,

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

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.

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.

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.

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).

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.

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.

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

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).

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.

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).

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).

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.

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'.

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.

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.

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.

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).

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).

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.

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.

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.

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).

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.

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).

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

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]

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* Language of the case: German.