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Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs

Director-General

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NOTE FOR THE ATTENTION OF MR L. ROMERO REQUENA
DIRECTOR GENERAL, LEGAL SERVICE

Subject: Legal guidance on the scope of Directive (EU) 2015/1535 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services in relation to the rules on ancillary copyright adopted in Germany and Spain

1. Application of Directive (EU) 2015/1535 to online news aggregators services

Germany and Spain have adopted rules concerning online news aggregators which could fall under Directive (EU) 2015/1535, as detailed below. However the draft acts had not been notified to the Commission. We would like to ask the Legal Service for its opinion on the application of Directive (EU) 2015/1535 to these rules.

Member States are required to notify to the Commission under Directive (EU) 2015/1535, at draft stage, technical regulations, including rules on information society services. Information society services are defined as services normally provided for remuneration, at a distance, by electronic means, at the individual request of a recipient of services. Only rules that are specifically aimed at information society services and do not concern these services in an implicit and incidental manner have to be notified.

Online news aggregators display the news published online by press publishers, via hyperlinks accompanied by short extracts. Such services are thus offered online, at a distance, at the request (search query) of the beneficiary.

As concerns the element of remuneration, Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, mentions in recital 18 that "*information society services are not solely restricted to services giving rise to on-line contracting but also, in so far as they represent an economic activity, extend to services which are not remunerated by those who receive them, such as those offering on-line information or commercial communications, or those providing tools allowing for search, access and retrieval of data; information society services also include services consisting of the transmission of information via a communication network, in providing access to a communication network or in hosting information provided by a*

recipient of the service". The CJEU case law also recognises that information society services extend, in so far as they represent an economic activity, to services "*which are not remunerated by those who receive them, such as those offering on-line information or commercial communications*" (Case C-291/13 Sotiris Papasavvas, par 28). CJEU has furthermore established that services of online searching, including paid referencing services for advertisement ("sponsored links" displayed by Google) constitute information society services (see judgment in joined cases C-236/08 to C-238/08 Google France par 22, 23 and 110).

I. German legislation

In May 2013, Germany adopted a law amending the Copyright law, by which they introduced an exclusive right for publishers to make available to the public, press products, for commercial purposes, making an exception for single words or small snippets. An English version of the act is available at http://www.gesetze-im-internet.de/englisch_urhg/englisch_urhg.html.

The relevant provision for the purposes of the Directive (EU) 2015/1535 is Article 87g, and especially paragraph 4 thereof which states that the provision of public access to news publications or parts thereof shall be permissible to the extent that this access is not provided by commercial operators of search engines or commercial providers of services that aggregate this content in a like manner:

(1) The right of the press publisher in accordance with Article 87f (1), first sentence, shall be transferable. Articles 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 press publisher 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 providers of search engines or commercial providers of services which process the content accordingly. For the rest, the provisions of Part 1, Section VI shall apply mutatis mutandis.

In February 2013, the Commission asked the German authorities to notify the draft law in case it contains technical regulations and to provide explanations to the Commission in relation to this draft. The German authorities replied that, in their view, the rule did not specifically target information society services and therefore it did not require notification. They stated that Section 87f intends to establish an exclusive right for press publishers, in order to ensure that online press publishers are not placed in a less favourable position compared to other intermediaries. As concerns Article 87g(4), the German authorities appreciated that the restriction placed on this exclusive right by that provision does not regulate the operation of search engines or access as such (their reply is in Annex 1).

As mentioned in the beginning of this note, the notification obligation in Directive (EU) 2015/1535 applies to those requirements of a general nature relating to the taking-up and pursuit of information society services, in particular provisions concerning the service provider, the services and the recipient of services, **with the exception of rules which are not specifically aimed at information society services**. This condition is detailed in the text of the Directive as follows:

"*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."(Article 1.1.e)

Recitals 17 and 18 of Directive 98/48/EC provide further elements for the interpretation of this condition:

"*a provision specifically aimed at information society services must be considered as being such a rule even if part of a more general regulation*"

"*Whereas specific rules on the taking-up and pursuit of service activities which are capable of being carried on in the manner described above should thus be communicated even where they are included in rules and regulations with a more general purpose; whereas, however, general regulations which do not contain any provision specifically aimed at such services need not be notified*;"

Finally, the Vademecum to Directive 98/48/EC exemplifies the condition that the rules must be specifically aimed at information society services as follows … *draft regulations need not be notified which relate only indirectly, implicitly or incidentally to information society services, i.e. which concern an economic activity in general without taking into consideration the* ***typical technical procedures*** [our highlighting] *for supplying the information society services (e.g. a provision which prohibits the distribution of paedophile material by any means of transmission, including the Internet or electronic mail, among the various possible means of dissemination).*"

The explanatory statement accompanying the German draft act mentions that the right introduced by the act aims to improve the protection of press products on the Internet. It furthermore highlights that such protection is granted in relation to commercial providers of search engines or commercial providers of services which process the content accordingly. It can be inferred thus that the regulation is aimed to regulate the right of making available of press products taking account especially of the activity of online search engines. The legislation is intended, especially in Article 87g(4), to regulate relations between search engines and press publishers – namely to allow press publishers to prevent the publication of press clippings, unless the operator has obtained the required licence (see Drucksache 17/11470 in Annex 2).

Therefore, it cannot be argued that the legislation affects the information society services (online search services) in an indirect and implicit manner, as it targets, at least in Article 87g(4), the provision of such services in relation to press products. Concluding, in our opinion the legislation concerns specifically the online search services and thus falls under Directive (EU) 2015/1535.

We would welcome the opinion of Legal Service on this assessment.

II. Spanish legislation

Spain notified an initial draft law on copyright on 10 May 2013 (notification 2013/244/E); however the provisions on ancillary copyright were added at a later stage and the draft was not re-notified. The law was adopted on 5 November 2014. (see Annex 3)

Under Directive (EU) 2015/1535, Member States have to notify draft technical regulations again to the Commission (and allow for the three months standstill) "*if they make changes to the draft that have the effect of significantly altering its scope, shortening the timetable originally envisaged for implementation, adding specifications or requirements, or making the latter more restrictive*"(Article 5(1) 3rd indent). According to CJEU case law, the requirement that changes be significant applies to all of the situations referred to in Article 5(1) 3rd indent (see case C-307/13 Ivansson, par 44). Therefore, a draft with a newly introduced requirement should be re-notified to the Commission, if it constitutes a substantial change compared to the initially notified draft.

As a preliminary point, the definition of technical regulations in Article 1(1)(f) of Directive (EU) 2015/1535 includes: technical specifications, other requirements, rule on services and measures prohibiting the manufacture, importation or use marketing of service or establishment of a service provider. It should be noted that Article 5(1) 3rd indent refers to changes to specifications and requirements, ("*changes to the draft that have the effect of significantly altering its scope, shortening the timetable originally envisaged for implementation, **adding specifications or requirements,** or making the latter more restrictive*") and does not refer expressly to changes to rules on services. At the same time, the rules on services are defined as "*requirement of a general nature …*". Therefore, Article 5(1) 3rd indent which establishes the rules for the notification of modified drafts applies also to rules on services, which are included under the concept of *requirements*.

Article 32.2 of the Spanish copyright law establishes a new exception to copyright, under which the electronic content aggregation service providers can make available to the public non-significant fragments of aggregated content without authorisation from the right holder; however, the right holders have an unwaivable right to receive fair compensation from the electronic service provider. The Spanish law makes an exception for service providers that provide instruments to search for isolated words, where the making available to the public is produced without commercial purposes.

Article 32.2. La puesta a disposición del público por parte de prestadores de servicios electrónicos de agregación de contenidos de fragmentos no significativos de contenidos, divulgados en publicaciones periódicas o en sitios Web de actualización periódica y que tengan una finalidad informativa, de creación de opinión pública o de entretenimiento, no

requerirá autorización, sin perjuicio del derecho del editor o, en su caso, de otros titulares de derechos a percibir una compensación equitativa. Este derecho será irrenunciable y se hará efectivo a través de las entidades de gestión de los derechos de propiedad intelectual. En cualquier caso, la puesta a disposición del público por terceros de cualquier imagen, obra fotográfica o mera fotografía divulgada en publicaciones periódicas o en sitios Web de actualización periódica estará sujeta a autorización.

Sin perjuicio de lo establecido en el párrafo anterior, la puesta a disposición del público por parte de prestadores de servicios que faciliten instrumentos de búsqueda de palabras aisladas incluidas en los contenidos referidos en el párrafo anterior no estará sujeta a autorización ni compensación equitativa siempre que tal puesta a disposición del público se produzca sin finalidad comercial propia y se realice estrictamente circunscrita a lo imprescindible para ofrecer resultados de búsqueda en respuesta a consultas previamente formuladas por un usuario al buscador y siempre que la puesta a disposición del público incluya un enlace a la página de origen de los contenidos

As mentioned in the introduction to this note, online search services constitute an information society service[1].

Furthermore, a provision such as Article 32.2 of the Spanish legislation, regulating the conditions under which electronic service providers can make available press snippets to the public can be considered a rule on services in the sense of Directive (EU) 2015/1535, i.e. a requirement of a general nature relating to the taking-up and pursuit of information society services, which is specifically aimed at information society services.

The provisions in Article 32.2 constitute an additional requirement which appears to affect in a substantial way the provision of the news aggregation service, as they make mandatory for the online operators to pay compensation to the right holder. According to the established case law, any national measure which prohibits, impedes or renders less attractive the exercise of providing services constitutes a restriction to that fundamental freedom, even if such a measure is applicable without discrimination on grounds of nationality (see for instance Case C-65/05, Commission v Hellenic Republic, par 48). These are the type of measures that should be the object of assessment under the Directive (EU) 2015/1535, taking account of its aim to establish the smooth functioning of the internal market. Furthermore, the significance of this amendment can also be inferred from its practical consequences, such as the decision of Google to stop providing the news services in Spain as an effect of this legislation. (see for instance http://www.theguardian.com/technology/2014/dec/11/google-news-spain-to-close-in-response-to-tax-on-story-links.)

In addition, as operators informed us, the introduction of this requirement in the draft law prompted the Spanish Commission for Markets and Competition to adopt on own initiative a report on the implications of Article 32.2. In that report, the authority considered that a more

[1] Google declared that it does not make money from the news services, as it does not display adds on those pages. http://www.theguardian.com/technology/2014/dec/11/google-news-spain-to-close-in-response-to-tax-on-story-links. In any event, the condition of remuneration in the sense of Article 56 is aimed at excluding those activities that are gratuitous. The activity of online searching, to which the news services are connected, remains an activity provided for economic purposes.

in depth analysis is required and that, if that is not possible due to time constraints, they recommended *inter alia* the elimination of the unwaivable character of the compensation. This report constitutes an additional circumstance indicating the substantial relevance of this requirement for the market of online news aggregators

In correspondence with the Spanish authorities in May and September 2014, we had inquired about potential substantial changes to the act that would need to be re-notified. The Spanish authorities argued that there had been no substantial changes that require re-notification. As concerns specifically the press clipping provision, they argued that the measures are proposed under Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society and thus would benefit from the provisions in Article 7(1)(a) of Directive (EU) 2015/1535, which exempts from notification the rules by means of which Member States "*comply with binding Union acts which result in the adoption of technical specifications or rules on services*" (the Spanish replies are in Annex 4 and 4a).

However, if the provisions introduced by the Spanish law were to fall under the scope of Directive 2001/29/EC, as part of the catalogue of exceptions in Article 5 (2) and (3) thereof, it should be noted that the exceptions set up by Directive 2001/29/EC are not mandatory. In this sense, the CJEU has held that a national provision cannot be considered to conform to a binding Community act in the sense of Article 10 of Directive 89/139/EEC (replaced by Article 7 of Directive (EU) 2015/1535) if it transposes a directive drafted in general terms, which leaves the Member States sufficient room for manoeuvre (see judgment in case C-443/98 Unilever, par 29).

Therefore, if the Spanish provisions fall under Directive 2001/29/EC, we consider that they are covered nonetheless by Directive (EU) 2015/1535 given the margin of discretion that Directive 2001/29/EC allows Member States.

Concluding, we take the view that the rules on ancillary copyright in the Spanish legislation constitute substantial changes that should have been re-notified to the Commission.

We would welcome the opinion of Legal Service on this assessment.

Yours faithfully

(electronically signed)

Lowri Evans

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