OPINION OF ADVOCATE GENERAL
CRUZ VILLALÓN
delivered on 14 April 2011 (1)

Case C‑70/10

Scarlet Extended SA
v
Société belge des auteurs compositeurs et éditeurs (SABAM)

Interveners:

Belgian Entertainement Association Video ASBL (BEA Video),
Belgian Entertainement Association Music ASBL (BEA Music),
Internet Service Provider Association ASBL (ISPA),

(Reference for a preliminary ruling from the cour d'appel de Bruxelles (Belgium))

(Information society – Intellectual property rights – Directive 2004/48/EC – Copyright and related rights – Directive 2001/29/EC – Unlawful downloading on the internet – File sharing via peer-to-peer software – System for filtering electronic communications – Mechanism for blocking files shared in infringement of intellectual property rights – Right to privacy – Protection of personal data – Articles 7 and 8 of the Charter – Article 8 of the ECHR – Directive 95/46/EC – Directive 2002/58/EC – Confidentiality of communications – Right to freedom of expression – Article 11 of the Charter – Article 10 of the ECHR – Liability of intermediary service providers – General obligation to monitor information – Directive 2000/31/EC – State governed by the rule of law – Limitation on rights and freedoms 'provided for by law' – Quality of the law – Supremacy of law)

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Introduction

1. This case offers the Court the opportunity to examine in its turn the question of infringement of copyright and related rights on the internet, the unlawful downloading of protected works, a phenomenon commonly known as 'piracy' of musical, cinematographic, audiovisual or even literary works, and to take an interest in the campaign undertaken by the holders of those rights or persons entitled under them against what is described as a worldwide scourge. (2) More specifically, it is called upon to adjudicate on a new question, the viability, from the point of view of European Union (also 'Union') law, of certain techniques for combating piracy which, although their reliability is not wholly established and they are permanently subject to technological progress and to the evolution of practices, are presented as a possible adequate response to the infringements of intellectual property rights committed daily on 'the web'.

2. The questions referred to the Court for a preliminary ruling in this case call for an interpretation both of a complex body of provisions of secondary legislation and provisions of primary legislation, more specifically of the Charter of Fundamental Rights of the European Union, (3) in the light of the European Convention for the Protection of Human Rights and Fundamental Freedoms. (4) However, it must be pointed out at once that this Opinion cannot address all the legal queries and technical problems (5) to which the measures at issue give rise. On the basis of the actual formulation of the questions raised by the national court and on the terms in which it sets out the legal and factual circumstances of the case in the main proceedings, I shall attempt to provide it with a useful reply by concentrating on the most fundamental aspects.

3. In that regard, the Court is called upon, principally, to tell the national court explicitly whether, under European Union law, a national court is permitted to adopt a measure such as that requested in the main proceedings, ordering an internet service provider (6) to introduce a system for filtering and blocking electronic communications. However, as the measure thus requested has a scope which is quite different for that ISP, on the one hand, and for the users of the services of that ISP and, more widely, the internet users, on the other hand, I shall have to take this dual perspective into account, even though the first question raised refers very particularly to the rights of users.

4. It must also be stated at the outset that the present case differs from the Promusicae case, (7) although their legal framework and general context show evident similarities. Although the present case requires, as in Promusicae, the reconciliation of the requirements linked to the

protection of various fundamental rights, the two cases have differences which, as the national court itself points out, preclude the lessons drawn from the judgment in Promusicae, in particular the principle that there should be a fair balance between the rights it defines, being sufficient to enable it to give a ruling. In Promusicae, in fact, an ISP was asked to disclose, in legal proceedings, the identities and physical addresses of persons identified by their IP addresses, (8) and the date and time of their connection. What was at issue, therefore, was a communication, in a legal context, of data which were known and identified. In the main proceedings, on the other hand, an internet service provider is required to introduce a system for filtering electronic communications and blocking electronic files deemed to infringe an intellectual property right. It is not an interference a posteriori, once an infringement of copyright or related rights has been established, which is required, but an interference a priori, with the aim of avoiding such an infringement and, more specifically, in order to introduce a preventive system to avoid any future infringement of an intellectual property right, (9) in accordance with rules which, as we shall see, are marked by numerous uncertainties.

5. That said, it is nevertheless mainly from the angle of fundamental rights that the examination of the situation at issue in the main proceedings will, naturally enough, be conducted.

I – Legal framework

A – European Union law

6. The Court is asked, principally, about the interpretation of Directives 2001/29/EC (10) and 2004/48/EC, (11) relating to the protection of intellectual property, Directives 95/46/EC (12) and 2002/58/EC, (13)concerning the protection of personal data, and Directive 2000/31/EC (14) on electronic commerce, which have a complex relationship. In the light of that complexity, the presentation of the legal framework of the case will contain only the provisions necessary for an understanding of the main proceedings.

1. Legislation concerning the protection of intellectual property

a) Directive 2001/29 on the harmonisation of certain aspects of copyright and related rights in the information society

7. Article 8 of Directive 2001/29, entitled ‘Sanctions and remedies’, is worded as follows:

‘1. Member States shall provide appropriate sanctions and remedies in respect of infringements of the rights and obligations set out in this Directive and shall take all the measures necessary to ensure that those sanctions and remedies are applied. The sanctions thus provided for shall be effective, proportionate and dissuasive.

2. Each Member State shall take the measures necessary to ensure that rightholders whose interests are affected by an infringing activity carried out on its territory can bring an action for damages and/or apply for an injunction and, where appropriate, for the seizure of infringing material as well as of devices, products or components referred to in Article 6(2).

3. Member States shall ensure that rightholders are in a position to apply for an injunction against intermediaries whose services are used by a third party to infringe a copyright or related right.’

b) Directive 2004/48 on the enforcement of intellectual property rights

8. Article 9(1)(a) of Directive 2004/48 provides:

‘Member States shall ensure that the judicial authorities may, at the request of the applicant:

(a) issue against the alleged infringer an interlocutory injunction intended to prevent any imminent infringement of an intellectual property right, or to forbid, on a provisional basis and subject, where appropriate, to a recurring penalty payment where provided for by national law, the continuation of the alleged infringements of that right, or to make such continuation subject to the lodging of guarantees intended to ensure the compensation of the rightholder; an interlocutory injunction may also be issued, under the same conditions, against an intermediary whose services are being used by a third party to infringe an intellectual property right; injunctions against intermediaries whose services are used by a third party to infringe a copyright or a related right are covered by Directive 2001/29/EC’.

9. Article 11 of Directive 2004/48, entitled ‘Injunctions’, provides:

‘Member States shall ensure that, where a judicial decision is taken finding an infringement of an intellectual property right, the judicial authorities may issue against the infringer an injunction aimed at prohibiting the continuation of the infringement. Where provided for by national law, non-compliance with an injunction shall, where appropriate, be subject to a recurring penalty payment, with a view to ensuring compliance. Member States shall also ensure that rightholders are in a position to apply for an injunction against intermediaries whose services are used by a third party to infringe an intellectual property right, without prejudice to Article 8(3) of Directive 2001/29/EC.’

2. Legislation concerning the protection of personal data

a) Directive 95/46 on the protection of individuals with regard to the processing of personal data and on the free movement of such data

10. Article 13(1)(g) of Directive 95/46 provides:

Member States may adopt legislative measures to restrict the scope of the obligations and rights provided for in Articles 6(1), 10, 11(1), 12 and 21 when such a restriction constitutes a necessary measure to safeguard:

…

(g) the protection of the data subject or of the rights and freedoms of others.’

b) Directive 2002/58 concerning the processing of personal data and the protection of privacy in the electronic communications sector

11. Article 5 of Directive 2002/58 is devoted to the confidentiality of communications; Article 5(1) provides:

‘Member States shall ensure the confidentiality of communications and the related traffic data by means of a public communications network and publicly available electronic communications services, through national legislation. In particular, they shall prohibit listening, tapping, storage or other kinds of interception or surveillance of communications and the related traffic data by persons other than users, without the consent of the users concerned, except when legally

authorised to do so in accordance with Article 15(1). This paragraph shall not prevent technical storage which is necessary for the conveyance of a communication without prejudice to the principle of confidentiality.'

12. Article 15(1) of Directive 2002/58, which provides for the application of certain provisions of Directive 95/46, provides:

'Member States may adopt legislative measures to restrict the scope of the rights and obligations provided for in Article 5, Article 6, Article 8(1), (2), (3) and (4), and Article 9 of this Directive when such restriction constitutes a necessary, appropriate and proportionate measure within a democratic society to safeguard national security – State security – defence, public security, and the prevention, investigation, detection and prosecution of criminal offences or of unauthorised use of the electronic communication system, as referred to in Article 13(1) of Directive 95/46/EC. To this end, Member States may, inter alia, adopt legislative measures providing for the retention of data for a limited period justified on the grounds laid down in this paragraph. All the measures referred to in this paragraph shall be in accordance with the general principles of Community law, including those referred to in Article 6(1) and (2) of the Treaty on European Union.'

3. Legislation concerning electronic commerce: Directive 2000/31

13. Article 15 of Directive 2000/31, which concludes Section IV, devoted to the liability of intermediary service providers, establishes the principle that there is no general obligation to monitor in the following terms:

'1. Member States shall not impose a general obligation on providers, when providing the services covered by Articles 12, 13 and 14, to monitor the information which they transmit or store, nor a general obligation actively to seek facts or circumstances indicating illegal activity.

2. Member States may establish obligations for information society service providers promptly to inform the competent public authorities of alleged illegal activities undertaken or information provided by recipients of their service or obligations to communicate to the competent authorities, at their request, information enabling the identification of recipients of their service with whom they have storage agreements.'

B – National law

14. Article 87(1) of the Law of 30 June 1994 on copyright and related rights, (15) as amended by the Law of 10 May 2007 transposing Article 8(3) of Directive 2001/29 and Article 11 of Directive 2004/48, provides:

'The President of the Court of First Instance and the President of the Commercial Court ... shall determine the existence and order that any infringement of a copyright or related right must be brought to an end.

They may also issue an injunction against intermediaries whose services are used by a third party to infringe a copyright or related right.'

II – The facts in the main proceedings and the questions referred for a preliminary ruling

A – The facts and the main proceedings

15. On 24 June 2004, the Société belge des auteurs compositeurs et éditeurs (SABAM) brought interlocutory proceedings pursuant to the Belgian Law of 30 June 1994 on copyright and related rights before the President of the tribunal de première instance de Bruxelles (Court of First Instance, Brussels) seeking an injunction against Scarlet Extended SA, an ISP. (16)

16. SABAM claimed that Scarlet, as an ISP, was ideally placed to take measures to bring to an end copyright infringements committed by its customers, internet users who unlawfully download works in its catalogue by means of peer-to-peer software without paying royalties, a practice from which Scarlet benefited since they are likely to increase the volume of its traffic and, hence, the demand for its services.

17. SABAM sought, first, a declaration that the copyright in musical works contained in its repertoire had been infringed, in particular the right of reproduction and the right of communication to the public, owing to the unauthorised sharing, through the services provided by Scarlet, of electronic music files by means of peer-to-peer software.

18. SABAM also claimed that Scarlet should be ordered, on pain of a penalty payment, to bring such infringements to an end by blocking, or making it impossible for its customers to send or receive in any way, files containing a musical work without the permission of the rightholders, using peer-to-peer software.

19. Finally, SABAM called for Scarlet to provide it, within eight days of service of the judgment on pain of a periodic penalty payment, with details of the measures adopted, to publish a message on the homepage of its website and to publish the judgment in two daily newspapers and a weekly newspaper of its choice.

20. By judgment of 26 November 2004, the President of the tribunal de première instance de Bruxelles found that copyright had been infringed as claimed. However, before ruling on the application for cessation, he appointed an expert to examine whether the technical solutions proposed by SABAM were technically feasible, whether they would make it possible to filter out only illicit file sharing and whether there were other ways of monitoring the use of peer-to-peer software, and also to determine the cost of the measures envisaged.

21. On 29 January 2007, the expert appointed submitted his report, the conclusions of which, reproduced in the order for reference, read as follows:

‘1. A peer-to-peer network is a transparent method of file sharing, which is independent, decentralised and has advanced search and download functions;

2. With the exception of the solution offered by Audible Magic, all the solutions attempt to prevent the use of peer-to-peer networks irrespective of the content of the file sent;

3. In addition, the permanence of the peer-to-peer filtering solutions is far from assured in the medium term (two to three years) in view of the growing use of encryption in this type of application;

4. The solution offered by the Audible Magic company is therefore the only one that attempts to deal with the specific problem. That solution, essentially designed for the world of education, is not however intrinsically on a scale that would cope with the volume of traffic of an ISP. As a result, use of that technique in an ISP context would mean high acquisition and operating costs in order to overcome the lack of appropriate scale;

5. Those costs should be set against the length of time for which that solution would be effective since encryption, referred to above, will make that solution ineffective also in the context of transit filtering;

6. The internal investigation methods used within a peer-to-peer network are more complicated to put into operation but provide better results. A priori those methods tackle only the objectionable part of the file sharing and are capable of taking into account the context in which files are shared;

7. Those methods are in addition not, or are significantly less, sensitive to encryption and in our view constitute the best type of investment in the medium and long term in order to guarantee copyright compliance whilst respecting the rights of all.'

22. On the basis of that expert's report, on 29 June 2007 the President of the tribunal de première instance de Bruxelles gave a second judgment, by which he ordered Scarlet to bring the copyright infringements established in the judgment of 26 November 2004 to an end by making it impossible for its customers to send or receive in any way, by means of peer-to-peer software, electronic files containing a musical work in SABAM's repertoire, on pain of a penalty payment of EUR 2 500 per day should Scarlet fail to comply with the judgment, after the expiry of a period of six months.

23. Scarlet brought an appeal against that judgment before the cour d'appel de Bruxelles (Court of Appeal, Brussels) on 6 September 2007.

24. Scarlet also brought proceedings before the President of the tribunal de première instance de Bruxelles on 7 December 2007 for the removal, or at least the suspension, of the periodic penalty payment ordered against it. Scarlet claimed that it was both substantively and temporally impossible for it to comply with the injunction, since the Audible Magic system was not operational and it had not been established that it was technically feasible for an internet service provider to block or filter peer-to-peer traffic.

25. The President of the tribunal de première instance de Bruxelles dismissed that action by decision of 22 October 2008, holding that the effect of the appeal prevented the parties from setting out their cases again before him. He acknowledged that the Audible Magic solution had not been successfully introduced but he noted that Scarlet had not tried any other filtering or blocking solutions and that it had not, therefore, shown that it was impossible to comply with the injunction. Nevertheless, he suspended the periodic penalty payment until 31 October 2008, in order to enable Scarlet to explore other means.

B – The questions referred for a preliminary ruling

26. In those circumstances, the cour d'appel de Bruxelles decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Do Directives 2001/29 and 2004/48, in conjunction with Directives 95/46, 2000/31 and 2002/58, construed in particular in the light of Articles 8 and 10 of the European Convention on the Protection of Human Rights and Fundamental Freedoms, permit Member States to authorise a national court, before which substantive proceedings have been brought and on the basis merely of a statutory provision stating that: "[The national courts] may also issue an injunction against intermediaries whose services are used by a third party to infringe a copyright or related right", to order an [i]nternet [s]ervice [p]rovider (ISP) to introduce, for all its customers, in abstracto and as a preventive measure, exclusively at the cost of that ISP and for an unlimited

period, a system for filtering all electronic communications, both incoming and outgoing, passing via its services, in particular those involving the use of peer-to-peer software, in order to identify on its network the sharing of electronic files containing a musical, cinematographic or audio-visual work in respect of which the applicant claims to hold rights, and subsequently to block the transfer of such files, either at the point at which they are requested or at which they are sent?

(2) If the answer to the [first] question is in the affirmative, do those directives require a national court, called upon to give a ruling on an application for an injunction against an intermediary whose services are used by a third party to infringe a copyright, to apply the principle of proportionality when deciding on the effectiveness and dissuasive effect of the measure sought?'

C – Procedure before the Court of Justice

27. Scarlet, SABAM in conjunction with the Belgian Entertainement Association Video (BEA Video) and the Belgian Entertainement Association Music (BEA Music), as well as the Internet Service Provider Association (ISPA) and the Kingdom of Belgium, the Czech Republic, the Kingdom of the Netherlands, the Republic of Poland, the Republic of Finland and the European Commission have submitted written observations.

28. The Court heard the representatives of Scarlet, SABAM, ISPA, the agents of the Kingdom of Belgium, the Czech Republic, the Italian Republic, the Kingdom of the Netherlands, the Republic of Poland, and the agent of the European Commission at the hearing held on 13 January 2011.

III – Analysis

A – Preliminary observations

1. Reformulation of the first question: the ECHR and the Charter

29. The national court points out that the first question it has referred for a preliminary ruling relates to the interpretation of several provisions of secondary Union legislation 'in the light of Articles 8 and 10 of the ECHR'. In so doing, it may most certainly rely on Article 6(3) TEU, under which '[f]undamental rights, as guaranteed by the [ECHR] ... shall constitute general principles of the Union's law'. However, in that regard it is necessary to make preliminary observations, which will lead me to a specific reformulation of the question.

30. First of all, Article 6 TEU begins by stating, in the first subparagraph of paragraph 1, that the Charter 'shall have the same legal value as the Treaties', as the Court has not failed to point out in the most recent developments in its case-law. (17) Since the rights, freedoms and principles stated in the Charter have, in themselves, a legal value which, furthermore, is of the highest level, recourse to the aforementioned general principles is, in so far as the former may be identified with the latter, no longer necessary. That is a first point in favour of examining the question in the light of the provisions of the Charter rather than in relation to those of the ECHR, ceteris paribus. (18)

31. Also, Article 52(3) of the Charter provides that, '[i]n so far as [it] contains rights which correspond to rights guaranteed by the [ECHR], the meaning and scope of those rights shall be the same as those laid down by the said Convention', and adds that '[t]his provision shall not prevent Union law providing more extensive protection'. (19) However, in the circumstances of

the main action, the rights guaranteed in Article 8 of the ECHR 'correspond', within the meaning of Article 52(3) of the Charter, to those guaranteed in Articles 7 ('respect for private and family life') and 8 ('protection of personal data') of the Charter, just as the rights guaranteed in Article 10 of the ECHR 'correspond' to those guaranteed in Article 11 of the Charter ('freedom of expression and information'), notwithstanding the differences concerning the expressions used and the terms employed, respectively. (20)

32. Finally, it is important to point out that the provisions of the ECHR authorising, subject to conditions, measures which restrict the rights and freedoms thus guaranteed, in the present case Articles 8(2) and 10(2), also correspond, with a slightly different formulation, to the transverse provision of the Charter, common to all the rights and freedoms which it guarantees, namely Article 52(1), entitled 'Scope and interpretation of rights and principles'.

33. This last provision subjects '[a]ny limitation on the exercise of the rights and freedoms' to a series of conditions. The term 'limitation' itself corresponds in turn to the term 'interference', used in Article 8 of the ECHR, and 'restriction', used in Article 10 of the ECHR, provisions which list several conditions which also correspond, to a large extent, to the conditions laid down in Article 52(1) of the Charter and the interpretation of which by the European Court of Human Rights must be taken into account by the Court of Justice. (21) However, I think it is clear that, to the extent that those conditions are different, it will be necessary to give the provisions of the Charter an independent interpretation. (22)

34. Consequently, and with the reservations expressed above, I propose to amend the question from the national court so that the reference to Articles 8 and 10 of the ECHR is replaced by a reference to 'Articles 7, 8 and 11 of the Charter, in conjunction with Article 52(1) thereof, as interpreted, in so far as necessary, in the light of Articles 8 and 10 of the ECHR'.

2. Structure of the reply

35. Scarlet and ISPA, and also the Belgium, Czech, Italian, Netherlands, Polish and Finnish Governments consider, in general, after conducting a substantial analysis of the relevant provisions but taking different approaches to the problem, that Union law precludes the adoption of a measure such as the one requested. The Commission, for its part, considers that, although the directives at issue do not, in themselves, preclude the introduction of a filtering and blocking system such as the one requested, the specific rules for implementing it, however, do not comply with the principle of proportionality. It therefore considers, in essence, that, at the end of the day, the national court of first instance has misinterpreted the requirements of the principle of proportionality, and that the national legal provisions in themselves cannot be criticised.

36. Indeed, it must be pointed out, in that regard, that Article 52(1) of the Charter requires that any limitation on the exercise of rights and freedoms be imposed, amongst other conditions, in compliance with principle of proportionality. Without a doubt, compliance with the principle of proportionality is necessary since the question of a limitation, within the meaning of that provision, is raised, that is to say, not only at the stage of the application in concreto of the provision by the court, which is precisely the subject-matter of the second question, but also beforehand, at the stage of its definition in abstracto, its formulation by the legislature. In my view, it is in respect of this aspect of the problem that the Commission's line of argument is flawed.

37. In any event, there is little doubt that, although the 'law' must itself be subject to a review of proportionality, that review can take place only after the finding, as appropriate, of the very 'existence' of that law. In that regard, it is not accidental that the first of the conditions for any

limitation on the exercise of the rights and freedoms recognised by the Charter established by Article 52(1) thereof is that it should be 'provided for by law'. However, it happens that, by asking us whether the measure at issue may be adopted 'on the basis merely of a statutory provision', to which it refers, the national court invites us, first and foremost, to examine compliance with that first condition. This aspect of the question is, in my view, unavoidable and takes precedence over any other. (23) In the absence of 'law' within the meaning of Article 52(1) of the Charter, it is not in fact necessary to examine, in turn, the conditions to which any limitation on the exercise of the rights and freedoms recognised by the Charter is subject and in particular the condition of proportionality. Although the Court has only rarely had the opportunity to consider this condition, (24) it is nevertheless common to Articles 8 and 10 of the ECHR and has long given rise to abundant case-law of the European Court of Human Rights, for which reason I shall have to make particular use of that case-law in order to give a full and, above all, useful reply to the national court.

3. A four-stage approach

38. The cour d'appel de Bruxelles makes its reference for a preliminary ruling in the form of two questions, the second of which, relating to compliance by national courts with the principle of proportionality, is submitted only in the alternative, in the event, in the present case, that the Court gives a positive answer to the first question. May I be permitted to say that, since I am going to conclude that a negative reply should be given to the first question, there will be no need to examine the second. (25)

39. That said, the very formulation of the first question referred for a preliminary ruling, which is remarkably elaborate and precise, will enable me to develop my arguments by relying directly on the different points it contains. To that end, I propose to present my arguments in four stages.

40. First and foremost, I shall have to deal in detail with the nature and characteristics of the measure which the national court is asked to adopt, or more precisely to confirm or set aside on appeal, in the present case the installation of a filtering and blocking system, by distinguishing between the characteristics of the measure requested, that is to say, the injunction itself, and those of its content. An analysis of this measure ought already to enable me to reply in principle to the question raised, at least from the point of view of Scarlet's rights and interests. However, as I am principally required to reply to the question raised from the point of view of the fundamental rights of the users of Scarlet's services and more broadly of internet users, my examination must be conducted in a more detailed manner from that point of view.

41. On the basis of this analysis, it will therefore be possible, secondly, to examine the measure requested in the light of the different directives invoked and, most particularly, of the relevant provisions of the Charter as interpreted, if appropriate, in the light of the corresponding provisions of the ECHR referred to by the national court. The in-depth analysis of the measure concerned must, in fact, enable me to consider the measure in the light of the limitations on the rights and freedoms provided for in Article 52(1) of the Charter.

42. Since it is apparent that, as will be established, that measure is a 'limitation' on the exercise of the rights and freedoms recognised by the Charter within the meaning of Article 52(1) thereof, it will be necessary to examine, thirdly, under what conditions it is admissible, drawing attention in particular to the requirement that it is 'provided for by law'. It is not necessary, in the light of the terms of the question referred for a preliminary ruling and in order to give it a useful reply, to consider the measure in the light of the other conditions laid down in that provision.

43. It is in the light of these arguments that, fourthly and lastly, I shall examine the matter of whether, from the point of view of the users of Scarlet's services and more widely of internet users, a measure such as that requested may be adopted on the basis only of the legal provisions of national law invoked by the national court.

B – The measure requested (injunction) and the 'system' required (filtering and blocking)

44. As regards this aspect, the national court is asking, in essence, whether a Member State is permitted 'to order an [ISP] to introduce, for all its customers, in abstracto and as a preventive measure, exclusively at [its own] cost and for an unlimited period, a system for filtering all electronic communications, both incoming and outgoing, passing via its services, in particular those involving the use of peer-to-peer software, in order to identify on its network the sharing of electronic files containing a musical, cinematographic or audio-visual work in respect of which the applicant claims to hold rights, and subsequently to block transfer of such files, either at the point at which they are requested or at which they are sent', and all that in the form of an injunction.

45. I shall take the terms and expressions used in that part of the question as a basis for my examination of the characteristics both of the filtering and blocking system itself and of the injunction requested.

1. The filtering and blocking system

46. The system to be implemented is a dual system. First, it must filter any communication of data passing through Scarlet's network, in order to detect or, if preferred, to isolate those indicating an infringement of copyright. (26) Secondly, apart from filtering, the system must block communications which actually involve an infringement of copyright, whether 'at the point at which they are requested' or 'at which they are sent'. (27) Since the effectiveness of the filtering system is a condition of the effectiveness of the blocking system, those two operations, although closely linked, are very different and therefore have different consequences.

a) The 'filtering' system

47. The national court informs us that the measure requested would require Scarlet, first of all, to introduce, for all its customers, a system for filtering all electronic communications, both incoming and outgoing, passing via its services, in particular peer-to-peer communications. It states that the aim of such filtering is 'to identify ... the sharing of electronic files containing a musical, cinematographic or audio-visual work in respect of which [SABAM] claims to hold rights'.

48. The object of the monitoring is specifically defined as having to make it possible to filter the electronic communications passing through Scarlet's services, both incoming and outgoing. That filtering must itself make it possible to identify the 'electronic files' sent and received by the subscribers to Scarlet's services which are deemed to have infringed copyright or related rights. The monitoring to be introduced, which includes a filtering stage and an identification stage, is therefore essentially defined by the results produced, in relation to the objective of blocking the files detected as infringing an intellectual property right. It must also be able to adapt to technological developments. To be effective, it must be at the same time systematic, universal and progressive. (28)

49. It must be said that neither the national court nor SABAM makes the slightest reference to the specific rules according to which that monitoring may or must be conducted, or to the filtering techniques or to the processes for identifying the files deemed to have been pirated. (29) In particular, the Court has no information regarding either the intensity or the depth of the monitoring to be carried out.

50. Although it must be pointed out, in that regard, that it is not for the Court of Justice, but only for the national court, if necessary, to examine the technical aspects of this matter, (30) it is nevertheless important to state that the nature of the filtering to be carried out is clearly not without impact at a legal level. (31)

b) The 'blocking' mechanism

51. The national court states that the blocking mechanism must be able to come into operation either 'at the point at which they are sent' or 'at the point at which they are requested', but provides no additional information regarding the modus operandi of such a mechanism. SABAM stresses that the mechanism to be deployed is defined essentially by its aim, its suitability for 'making it impossible for its customers to send or receive in any way, by means of peer-to-peer software, electronic files containing a musical work in SABAM's repertoire'. It states that it is a question of preventing the transmission of certain information by sending 'time out' messages indicating that it is impossible to proceed with transmission.

52. The fact is that it is impossible (32) to describe the specific manner of operation, modus operandi, of the filtering system and of the blocking mechanism which the requested measure requires to be introduced. The scope of the filtering required, that is to say, the persons concerned by the monitoring, the communications affected by the monitoring and the intensity of the monitoring to be carried out, is both very general and partly unspecified. Consequently, neither its specific impact on the exchange of data nor its overall economic cost, in particular installation and maintenance costs, may be determined a priori.

2. Characteristics of the injunction

53. The nature and principal characteristics of the filtering and blocking system required, as described, have a direct impact on the very nature of the measure requested by the court. The very general scope of the system to be deployed necessarily renders the scope ratione personae and the scope ratione materiae of the measure requested in the form of an injunction themselves general, just as its scope ratione temporis is general, as the national court states.

54. The requested measure also has other characteristics which it is important to highlight. It imposes upon Scarlet, as a preventive measure, an obligation to achieve a certain result on pain of a periodic penalty payment, and makes it responsible for the costs of introducing the filtering and blocking system. This measure is therefore also defined by its principal aim, which is to delegate to ISPs the legal and economic responsibility for combating the unlawful downloading of pirated work on the internet. Let us look at them more closely.

a) '… for an unlimited period …': the scope ratione temporis of the measure

55. The national court tells us that the measure is requested 'for an unlimited period'. SABAM, for its part, confirmed in its written pleadings that the only temporal limit on requested injunction should be that related to the duration of the copyright itself. It also stresses the developmental aspect of the measure, which must be adapted to technological development and must therefore be adaptable.

56. The requested measure imposes on Scarlet and, as we shall see, more widely ISPs in general, a permanent and perpetual obligation to examine, test, introduce and update a filtering and blocking system defined exclusively according to its results in the light of the desired objective of protecting intellectual property rights.

b) '… all electronic communications, both incoming and outgoing …': the scope ratione materiae of the measure

57. The communications subject to filtering and, if appropriate, blocking, are, as we have seen, unspecified. It is impossible to determine whether the monitoring should apply to all communications or only to those effected by means of peer-to-peer software, but it seems, however, that the monitoring to be implemented must, in order to produce effective results, be systematic and universal.

58. Consequently, the requested measure, presented as a straightforward injunction addressed to an ISP in civil proceedings seeking the declaration and penalising of an infringement of intellectual property rights and compensation for the consequent damage, is in fact designed to introduce, permanently and perpetually, a systematic and universal system for filtering all electronic communications passing through the services of those ISPs.

c) '… for all its customers …': the scope ratione personae of the measure

59. The system to be introduced is designed, as a direct consequence of monitoring all filtering of communications, to curb the behaviour of all the users of the ISP services in question, not only those of its subscribers. As SABAM stated in its written pleadings, it is irrelevant whether the communication is sent by or to a customer of the ISP. The system, to be effective, must operate, according to the terms used in the question referred for a preliminary ruling, without the persons deemed to have infringed copyright being individualised beforehand and irrespective of any contractual relationship between those persons and the ISP.

60. The system to be introduced must be able to block the sending by any internet user subscribing to Scarlet to any other internet user, whether or not subscribing to Scarlet, any file deemed to infringe a right which is managed, collected and protected by SABAM. But it must also be able to block the reception by any internet user who is a Scarlet subscriber of any file infringing copyright from any other internet user, whether or not a Scarlet subscriber. The system must make it possible to block any file with content from SABAM's repertoire without the infringement of copyright having been specifically identified beforehand.

61. Another aspect of the very broad scope of the requested measure must also be emphasised. Although it is clear that the dispute in the main proceedings is between only SABAM and Scarlet, it is apparent from the order for reference and from the submissions of the various interveners that the scope of the dispute necessarily goes beyond the interests of the parties to the main action. The outcome of the main action is undeniably intended to be extended and generalised not only to all ISPs but also and more widely to other important internet participants, (33) not only in the Member State from which the questions have been referred for a preliminary ruling, but also to all Member States, and even beyond. (34) What the national court is in fact asking the Court to do is, as I have already pointed out, to indicate to it whether Union law precludes recognition of its power to adopt a measure such as the one requested and, more widely, if it precludes rightholders from intensifying their struggle against unlawful downloading by multiplying requests of this nature in all Member States and beyond. (35)

62. Consequently, the requested measure, presented as an injunction addressed to an identified legal person requiring it to introduce a filtering and blocking system, is in fact designed to have a long-term effect on an unspecified number of legal or natural persons, ISPs or internet users, providers of services in the information society and users of those services.

d) '… in abstracto and as a preventive measure …': the preventive and dissuasive function of the requested measure

63. The national court takes care to point out that it is called upon to impose the requested measure on Scarlet 'in abstracto' and 'as a preventive measure', without, however, stating exactly what it means by that. However, it may be assumed that the aim of the requested measure is not to impose on an ISP an obligation to act based on the finding, in concreto, by the court, in civil proceedings, of an actual infringement, or even of imminent risk of an infringement, of copyright or related rights. It is just conceived as a measure which is both preventive and dissuasive. (36)

e) '… at [its own] cost …': the burden of the costs of implementing the requested measure

64. The national court states, finally, that the cost of introducing the filtering and blocking system requested must be borne by the supplier. From that point of view, the measure at issue has the effect of transferring to Scarlet the not insignificant burden of the costs involved in bringing civil proceedings which must normally be brought by the holders of copyright or related rights or persons claiming under them in order to obtain the finding of, the penalty for and, if appropriate, compensation for infringements of those rights.

65. The direct economic impact of the measure at issue, (37) which has not been and cannot be, in fact, (38) the subject of the evaluation is further aggravated by the periodic penalty payments which may accompany the requested measure, and in particular the periodic penalty payment designed to penalise delays in introducing the filtering and blocking system.

3. Intermediate conclusion

66. It is apparent from the foregoing arguments that the requested measure, by requiring an ISP to introduce a filtering and blocking system such as the one described above, appears in fact to be a new general 'obligation' designed to be extended, in due course, permanently to all ISPs. It does not have, in itself, the characteristics of precision and individualisation which are usually expected in any response or reaction to behaviour alleged to be specific and particular. The national court is requested, in reaction to more or less individualised infringements of intellectual property rights, to adopt a measure which, I repeat, by its very nature, can only be general in every regard, personal spatial and temporal.

67. I must be permitted to state here that, from this point of view and although the question from the national court only had to be addressed from the point of view of the rights and interests of Scarlet, it could, in accordance with the principle of legality in its most general sense, be answered in the negative. As the Court pointed out in Hoechst v Commission, (39) 'any intervention by the public authorities in the sphere of private activities of any person, whether natural or legal, must have a legal basis and be justified on the grounds laid down by law'. This requirement of protection, recognised as a general principle of Union law, is the corollary of the principles of legality and legal certainty, which themselves arise from the concept of State governed by the rule of law. (40) The Court has repeatedly held that the principle of legal certainty requires that rules imposing charges on the taxpayer, (41) involving negative consequences for individuals, (42) or imposing restrictive measures having considerable impact

on the rights and freedoms of designated persons, (43) must be clear and precise so that he may know without ambiguity what his rights and obligations are and may take steps accordingly. (44) However, as I shall have the opportunity to show in more detail below, (45) when I focus on the point of view of the users of Scarlet's services and, more widely, of internet users, the national legal provisions on the basis of which the obligation imposed on Scarlet may be adopted does not meet, inter alia, these requirements.

68. Moreover, and taking an approach in particular rightly defended by the Commission, it seems quite clear that, between the infringement of intellectual property rights complained of and the requested measure, there is a lack of proportionality. However, in my view, this is not the question raised in the main proceedings. The question which is raised is whether this new 'obligation' to introduce a filtering and blocking system with the characteristics described above may, in the light of its impact on the fundamental rights of the users of the services of the aforementioned ISPs, namely the internet users, be imposed on ISPs in the form of an injunction and on a legal basis which I have yet to examine.

C – Qualification of the measure in the light of the directives and of Articles 7, 8 and 11 of the Charter: a 'limitation' within the meaning of Article 52(1) of the Charter

69. The question referred for a preliminary ruling relates to the interpretation by the Court of 'Directives 2001/29 and 2004/48, in conjunction with Directives 95/46, 2000/31 and 2002/58, construed in particular in the light of Articles [7, 8 and 11 and Article 52(1) of the Charter]'. It is a matter, in essence, of determining whether, in the light of current national legislation, this body of provisions, composed of primary and secondary Union law, gives the courts of the Member States the opportunity to grant, by means of an injunction, a measure such as that described above. However, it is in the light of primary law that the main action must principally be examined and secondary law interpreted, since the rights and freedoms guaranteed by Articles 7, 8 and 11 of the Charter are directly concerned, as we shall see, by the measure in question. This statement calls for a few preliminary observations.

70. It is important to point out here that the directives referred to in the question constitute the legal framework for the adoption of the requested measure, (46) some considering that they authorise or do not impede that adoption, others considering, on the contrary, that they do not allow or even preclude that adoption. (47) These directives refer, more or less explicitly, to the fundamental rights guaranteed by the ECHR and now by the Charter. (48) In Promusicae, the Court held that it was for the Member States to ensure, when transposing and applying these directives, that they kept a fair balance between the fundamental rights which they help to guarantee.

71. Articles 7, 8 and 11 of the Charter guarantee, respectively, as we know, the right to respect for private and family life, the right to protection of personal data and freedom of expression and information. It is hardly necessary to point out that other fundamental rights are at issue in the present case, and in particular the right to property, guaranteed by Article 17(1) of the Charter, and, more specifically, the right to respect for intellectual property, guaranteed by Article 17(2) of the Charter, the infringement of which owing to unlawful downloading on the internet has reached massive proportions, which are clearly at the heart of the main proceedings. However, in the light of the requested measure and of the filtering and blocking system required and of the terms of the question referred, it is mainly the rights guaranteed by Articles 7, 8 and 11 of the Charter which are involved, since the right to property is only concerned on a secondary basis, in so far as the system must be introduced exclusively at the cost of the ISP. (49)

72. It is in these terms that I must now examine the question of whether the requested measure may be qualified as a ‘limitation’ on rights and freedoms within the meaning of Article 52(1) of the Charter, as construed in the light of Articles 8(2) and 10(2) of the ECHR. If that measure were, as such, to be qualified as a limitation, (50) it would then be necessary to ensure that it satisfies the different conditions imposed by those provisions.

1. ‘… construed in particular in the light of Articles 7 and 8 of the Charter …’: concerning the respect for a private life and the right to protection of personal data

73. It is necessary to examine in turn the requested measure as a possible limitation on the right to protection of personal data, on the one hand, and on the right to respect for confidentiality of communications, on the other hand. In general, as the Commission has sometimes held, (51) the opportunity to remain anonymous is essential if it is wished to preserve the fundamental right to a private life in cyberspace. However, although it is clear that Directives 95/46 and 2002/58 must be interpreted having regard to Articles 7 and 8 of the Charter, (52) construed if appropriate in the light of Article 8 of the ECHR, (53) the link between the right to the protection of personal data (Article 8 of the Charter) and the deployment of the filtering and blocking system requested is much less clear. (54)

a) Protection of personal data (Article 8 of the Charter)

74. There is some difficulty in making a specific evaluation of the impact of a filtering and blocking system on the right to protection of personal data. An initial difficulty consists in identifying the personal data at issue, since they are not clearly identified, except as regards ‘IP addresses’. (55) The technological neutrality proclaimed by SABAM means, in fact, that it is not possible, a priori, to determine whether the system to be introduced involves processing personal data. A fortiori, it is not possible to determine whether it involves the collection and resolution of IP addresses.

75. A second difficulty consists in determining whether IP addresses constitute personal data. Until now, the Court has had to hear only cases in which names linked to IP addresses were at issue. (56) However, it has never had occasion to consider whether an IP address would be considered, as such, as personal data. (57)

76. For his part, the European Data Protection Supervisor has had occasion to state (58) that ‘the monitoring of [i]nternet user’s behaviour and further collection of their IP addresses amounts to an interference with their rights to respect for their private life and their correspondence’. (59) The Working Party on the Protection of Individuals with regard to the Processing of Personal Data, established by Directive 95/46, (60) also considers that, without a shadow of a doubt, IP addresses constitute personal data within the meaning of Article 2(a) of that directive. (61)

77. These positions correspond to the legal situation arising under Article 5 of Directive 2006/24/EC, (62) which requires internet service providers, inter alia, to retain a certain number of data for the purpose of the investigation, detection and prosecution of serious crime. Those most specifically referred to are the ‘data necessary to trace and identify the source of a communication’, among them the name and address of the subscriber or registered user to whom an IP address has been allocated, and the data necessary to determine ‘the date and time of the log-in and log-off of the [i]nternet access service, based on a certain time zone, together with the IP address, whether dynamic or static, allocated by the [i]nternet access service provider to a communication ...’.

78. From this perspective, an IP address may be classified as personal data inasmuch as it may allow a person to be identified by reference to an identification number or any other information specific to him. (63)

79. The question is, therefore, to determine not so much the legal status of IP addresses as the circumstances in which and the purposes for which they may be collected, the circumstances in which the resulting personal data may be resolved and processed, or even the conditions under which their collection and resolution may be requested. (64)

80. What is important to bear in mind here is that a filtering and blocking system such as that which is requested is, notwithstanding the technological uncertainties referred to above, without question likely to affect the right to protection of personal data (65) to a sufficient degree to enable it to be classified as a limitation within the meaning of Article 52(1) of the Charter.

b) Confidentiality of electronic communications (Article 7 of the Charter)

81. The deployment of a system to filter electronic communications such as the one required is likewise not without consequences for the right to respect for correspondence and, more widely, the right to confidentiality of communications guaranteed by Article 7 of the Charter (66) as interpreted in the light of Article 8 of the ECHR and of the relevant case-law of the European Court of Human Rights.

82. The European Court of Human Rights has not yet had the opportunity to rule on the compatibility with the ECHR of specific measures to monitor electronic communications or a fortiori of a filtering and blocking system such as the one required. It may be considered, however, that, having regard to the case-law on phone-tapping, (67) such measures constitute interferences within the meaning of Article 8 of the ECHR. Besides, that court has had occasion to hold that the collection and preservation, without a person's knowledge, of personal data relating to his use of the telephone, electronic mail and internet constituted an 'interference' in the exercise of that person's right to respect for his private life and his correspondence, within the meaning of Article 8 of the ECHR. (68)

83. For its part, Article 5 of Directive 2002/58 (69) defines and guarantees the confidentiality of communications effected by means of a public communications network and publicly available electronic communications services, and the confidentiality of the related traffic data. That provision imposes in particular on the Member States the obligation to prohibit any interception or surveillance of those communications except in cases legally provided for in accordance with Article 15(1). This latter provision permits the Member States to adopt legislative measures to restrict the scope of the right to confidentiality of communications, when such restriction constitutes a necessary measure to safeguard, inter alia, the prevention, investigation, detection and prosecution of criminal offences. The measures which may be adopted in this regard must, in any event, be taken 'in accordance with the general principles of Community law, including those referred to in Article 6(1) and (2) of the Treaty on European Union'.

2. '… construed in particular in the light of Article 11 of the Charter …': the guarantee of freedom of expression and the right to information

84. Article 11 of the Charter, which guarantees not only the right to communicate information but also to receive it, (70) is clearly designed to apply to the internet. (71) As the European Court of Human Rights has pointed out, '[i]n light of its accessibility and its capacity to store and

communicate vast amounts of information, the [i]nternet plays an important role in enhancing the public's access to news and facilitating the dissemination of information generally'. (72)

85. There can hardly be any doubt, as Scarlet has pointed out, that the introduction of a filtering and blocking system such as that requested, and most particularly the blocking mechanism, which may involve monitoring all electronic communications passing through its services constitutes, by its very nature, a 'restriction', within the meaning of Article 10 of the ECHR, on the freedom of communication enshrined in Article 11(1) of the Charter, (73) whatever the technical rules according to which the monitoring of communications is actually carried out, whatever the extent and depth of the monitoring and whatever the effectiveness and reliability or of the monitoring actually carried out, which are points to be discussed, as I have indicated above.

86. As Scarlet has argued, a combined filtering and blocking system will inevitably affect lawful exchanges of content, and will therefore have repercussions on the content of the rights guaranteed by Article 11 of the Charter, if only because the lawfulness or otherwise of a given communication, which depends on the scope of the copyright concerned, varies from country to country and therefore falls outside the sphere of technology. So far as it is possible to judge, no filtering and blocking system appears able to guarantee, in a manner compatible with the requirements of Articles 11 and 52(1) of the Charter, the blockage only of exchanges specifically identifiable as unlawful.

3. Intermediate conclusion

87. It is apparent from the foregoing argument that the requested measure, in that it requires the introduction of a system for filtering and blocking electronic communications such as described above, may adversely affect enjoyment of the rights and freedoms protected by the Charter, as analysed above, and must therefore be classified, in relation to the users of Scarlet's services and more generally users of the internet, as 'limitation' within the meaning of Article 52(1) of the Charter. (74) However, limitations on the exercise of the fundamental rights of users which the introduction of such a filtering and blocking system would involve are acceptable only in so far as they comply with a certain number of conditions which I must now examine.

D – The conditions for limitation of the exercise of the rights and freedoms recognised by the Charter and singularly the condition relating to 'quality of the law' in particular (Article 52(1) of the Charter)

88. The Charter states, in well-known terms, the conditions to which any limitation on the exercise of the rights and freedoms which it recognises are subject, just as the ECHR defines the circumstances in which, inter alia, any interference in the right to a private life or any restriction on freedom of expression may be considered lawful.

89. Article 52 of the Charter thus refers to 'the need to protect the rights and freedoms of others' and also to the necessity for any measure of that kind to pursue 'objectives of general interest' and to comply with the principle of proportionality. Although the protection of intellectual property rights definitely constitutes an objective of general interest, as Directives 2001/29 and 2004/48 show, the filtering and blocking system requested nevertheless finds its main justification, in the circumstances of the main proceedings, in the need to protect the 'rights and freedoms of others'. The 'need to protect the rights' of the holders of copyright or related rights is at the heart of the present case; it is the fundamental cause of the civil proceedings brought by SABAM against Scarlet.

90. At this point, it must be categorically stated that the right to property is now enshrined in Article 17 of the Charter, paragraph 2 of which, we must not forget, expressly states that 'intellectual property shall be protected'. It will also be noted that the Court of Justice had previously enshrined the right to property as a fundamental right forming part of the general principles of law (75) and had recognised that copyright formed part of the right to property. (76) The purpose of Directives 2001/29 and 2004/48 (77) themselves is to guarantee a high level of protection of intellectual property. Moreover, according to repeated precedents of the Commission and of the European Court of Human Rights, intellectual property unquestionably benefits, as such, from the protection afforded by Article 1 of Protocol No 1 to the ECHR. (78)

91. The Court has stated, finally, that the fundamental raison d'être of copyright is to confer on the creator of inventive and original works the exclusive right to exploit those works. (79) Copyright and related rights are thus economic in nature, in that they include, inter alia, the right to exploit commercially the marketing of the protected work, particularly in the form of licences granted in return for payment of royalties. (80)

92. We are therefore definitely faced with a 'need to protect a right' within the meaning of Article 52(1) of the Charter which may legitimise the 'limitation' on other rights and freedoms within the meaning of the same provision.

93. That said, it must be pointed out that we shall not need to examine in detail all the conditions for admissibility of limitations on the rights and freedoms recognised by the Charter in order to provide the national court with a useful reply to its question. That court is asking us very specifically about the limitation on the exercise of the rights and freedoms which, according to what has just been stated, is constituted by the deployment of the filtering and blocking system required and which may be imposed 'on the basis merely of a statutory provision', Article 87(1) of the Law of 30 June 1994 on copyright and related rights, which it cites, furthermore, in full. This aspect of the question referred for a preliminary ruling calls, as a matter of priority, for an examination of the first condition defined in Article 52(1) of the Charter, that of being 'provided for by law' which is identically worded in that provision and in Articles 8(2) and 10(2) of the ECHR, an examination which will be conducted in the light of the relevant decisions of the European Court of Human Rights interpreting these two latter provisions which, as I have already stated, in time will form a particularly rich body of case-law that will enable me to identify the contours of that condition.

94. The European Court of Human Rights has repeatedly held that the provisions of the ECHR making interference in the exercise of a right or the restriction on the exercise of a freedom which it guarantees subject to the condition that it is 'provided for by law' (81) means not only that the measure is founded on a legal basis as such, has 'a basis in domestic law', but also imposes requirements relating, to use the expression which it has enshrined, to 'the quality of the law in question'. (82) That 'law' must, in effect, be 'adequately accessible and foreseeable, that is, formulated with sufficient precision to enable the individual – if need be with appropriate advice – to regulate his conduct', to 'foresee its consequences for him', (83) 'to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail'. (84)

95. The 'law' must therefore be sufficiently clear (85) and foreseeable as to the meaning and nature of the applicable measures, (86) and must define with sufficient clarity the scope and manner of exercise of the power of interference in the exercise of the rights guaranteed by the ECHR. (87) A law which confers a discretion is not in itself inconsistent with that requirement, provided that the scope of the discretion and the manner of its exercise are indicated with sufficient clarity, having regard to the legitimate aim in question, to give the individual adequate

protection against arbitrary interference. (88) A law which confers a discretion must also establish the scope of that discretion. (89)

96. A limitation is therefore acceptable only if it is founded on a legal basis in domestic law, a legal basis which must be accessible, clear, foreseeable, (90) conditions which all stem from the idea of the supremacy of the law. (91) From that requirement of the supremacy of the law stems (92) the need for the law to be accessible and foreseeable to the person concerned. (93)

97. The condition that any limitation must be 'provided for by law' therefore means, according to the case-law of the European Court of Human Rights, that the action of the public authorities must observe the limits defined in advance by the rules of law, which 'imposes certain requirements which must be satisfied both by the rules of law themselves and by the procedures designed to impose effective observance of those rules'. (94)

98. The European Court of Human Rights has also held that the scope of the concept of foreseeability and accessibility depends to a considerable degree on the content of the instrument in issue, the field it covers and the number and status of those to whom it is addressed. (95)A law may still satisfy the requirement of foreseeability even if the person concerned has to take appropriate legal advice to assess, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. (96) This is particularly true in the case of persons engaged in a professional activity, who are used to having to proceed with a high degree of caution when pursuing their occupation.

99. Finally, the European Court of Human Rights has had occasion to state that the term 'law' should be understood in its 'substantive' sense, not only its 'formal' one, as meaning that it may include both 'written law' and 'unwritten law' or even 'judge-made law'. (97) From this point of view, it may be necessary inter alia to take account, if appropriate, of the case-law. 'Consistent decisions' which are published and therefore accessible and are followed by the lower courts are able, in some circumstances, to supplement a legislative provision and clarify it to the point of rendering it foreseeable. (98)

100. In conclusion, both the Charter and the ECHR acknowledge the possibility of a limitation on the exercise of the rights and freedoms, of an interference in the exercise of the rights or of a restriction on the exercise of the freedoms, which they guarantee on condition, inter alia, that they are 'provided for by law'. The European Court of Human Rights, principally on the basis of the supremacy of law enshrined in the preamble to the ECHR, has constructed from that expression, and essentially through the concept of 'quality of the law', (99) an actual doctrine, according to which any limitation, interference or restriction must previously have been the subject of a legal framework, at least in the substantive sense of the term, which is sufficiently precise having regard to the objective it pursues, that is, in accordance with minimum requirements. That case-law must be taken into consideration by the Court of Justice when interpreting the scope of the corresponding provisions of the Charter.

E – '… on the basis merely of a statutory provision …': examination of the national legislation in the light of the condition relating to the 'quality of the law' (Article 52(1) of the Charter)

101. Having reached this stage of my examination, it remains only to reply to the question whether the legal basis which the national court has identified in the legal order of the Member State is, from the point of view of the users of the services of the ISPs and, more widely, of all internet users, actually such as to constitute the 'law' required by the Charter, within the meaning of the case-law of the European Court of Human Rights examined above, adapted if necessary to the specific features of the legal order of the European Union.

102. Let me begin by recalling the wording of the national legal provision at issue, in this case the second subparagraph of Article 87(1) of the Law of 30 June 1994 on copyright and related rights which the national court has taken great care to reproduce in extenso in the question it has referred for a preliminary ruling: '[The President of the Court of First Instance and the President of the Commercial Court] may also issue an injunction against intermediaries whose services are used by a third party to infringe a copyright or related right.'

103. That said, there is no doubt that Belgian law contains 'a' legal basis for the adoption, in civil proceedings seeking the declaration, sanction and reparation of an infringement of copyright or related rights, of an injunction against, as in the main proceedings, an ISP such as Scarlet with the aim of ensuring effective cessation of that infringement. However, the problem raised by the question from the national court is not whether the competent Belgian court may, in general, adopt an injunction in that context and with that objective, but whether it may, in the light of the requirements stemming from the 'quality of the law' within the meaning of the ECHR and, now, of the Charter, order a measure such as the one which is requested in the present case on the basis of that power to grant injunctions.

104. From that point of view, I must first set out my initial thoughts on the character and, at the end of the day, the 'nature' of the requested measure.

105. As we have seen above, from the point of view of Scarlet and the ISPs, the obligation to introduce, at their own expense, a filtering and blocking system such as that at issue is so characterised or even singular, on the one hand, and 'new' or even unexpected, on the other hand, that it can only be accepted on condition that it has been expressly provided for beforehand, clearly and precisely, in a 'law' within the meaning of the Charter. However, it is difficult to believe that, by adopting the requested measure on the basis of the national provision at issue, the competent national court would be within the limits expressly, previously, clearly and precisely defined by the 'law', particularly taking into account the provisions of Article 15 of Directive 2000/31. (100) From Scarlet's point of view, the adoption by a Belgian court of a measure of that nature is difficult to foresee (101) and, in the light of its potential economic consequences, would restrict even the arbitrary power.

106. From the point of view of the users of Scarlet's services and of internet users more generally, the filtering system requested is designed, irrespective of the specific manner in which it is used, to apply systematically and universally, permanently and perpetually, but its introduction is not supported by any specific guarantee as regards in particular the protection of personal data and the confidentiality of communication. Moreover, the blocking mechanism is required, also irrespective of the specific manner in which it is used, to function with no express provision being made for the persons concerned, that is the internet users, to oppose the blocking of a given file or to challenge the justification for it.

107. It could hardly be otherwise since the national law at issue does not have the objective of authorising the competent national courts to adopt a measure to filter all the electronic communications of the subscribers of the ISPs exercising their activity in the territory of the Member State concerned.

108. The necessary conclusion is therefore that the national law provision at issue cannot, in the light of Articles 7, 8 and 11 of the Charter and in particular of the requirements relating to the 'quality of the law' and, more generally, the requirements of the supremacy of the law, be an adequate legal base on which to adopt an injunction imposing a filtering and blocking system such as that requested in the main proceedings.

109. Besides, from the point of view of the ‘substantive’ concept of the ‘law’, it must also be stated that no mention has been made of the existence of a substantial body of case-law of the Belgian courts, which has restated and refined the interpretation and application of the national law provision, in accordance with Union law and the law of the ECHR, in line with the requested measure and thus permitted the conclusion that the requirement for foreseeability of the law is satisfied. (102)

110. In the light of the point made above, it is unnecessary to examine the impact of Union law (103) on the ‘quality’ of the national legal basis. Advocate General Kokott pointed out, in that regard, in her Opinion in Promusicae, (104) that ‘[t]he balance between the relevant fundamental rights must first be struck by the Community legislature’ and that ‘[h]owever, the Member States are also obliged to observe it when using up any remaining margin for regulation in the implementation of directives’.

111. This raises the particularly delicate question of the respective ‘liability’ of the European Union and the Member States, in the light of the requirements of supremacy of the law examined above, in a situation in which directives, together with the national implementing measures, are the subject of an application involving ‘limitation’ of a right guaranteed or of a freedom recognised by the Charter. However, the terms of the question posed by the national court, which expressly refers to the provisions of the national legislation deemed to transpose Directives 2001/29 and 2004/48 on the protection of intellectual property, allow, once it is established that none of the directives at issue imposes the introduction of a filtering and blocking system such as that requested in the main proceedings, that matter to be left to one side provisionally.

112. Finally, the idea that the directives at issue, and in particular Directive 2000/31, should be given an updated interpretation, taking into account developments in technology and internet usage, must, in this context, be rejected. Although, clearly, the requirement for foreseeability does not mean absolute certainty, as the European Court of Human Rights has repeatedly held, (105) the approach which supports a ‘living’ interpretation of provisions cannot compensate for the lack of any national legal basis expressly mentioning a system to filter and block electronic communications. An interpretation of Union law, and most particularly of Article 15 of Directive 2000/31, as permitting or not precluding the adoption of a measure such as that requested does not comply with the requirements of ‘quality of the law’ and infringes the principles of legal certainty (106) and the protection of legitimate expectations.

113. Allow me to add a few final observations. The Charter, just like the ECHR, by requiring that any ‘limitation’ (or ‘interference’ or ‘restriction’) on rights and freedoms is ‘provided for by law’, refers, very specifically, to the role of the law, of Law strictly speaking, as a source of tranquillitas publica in the extremely sensitive area with which we are concerned. However, the Charter does not only want the law to ‘pre-exist’ any limitation on rights and freedoms, but also wants that limitation to respect its ‘essential content’, which almost unavoidably calls for the legislature to define the border between the limitation on the right and the territory, in principle intangible, of that essential content. Similarly, the Charter requires any limitation on the exercise of the rights and freedoms which it recognises to observe the principle of proportionality, satisfy the principle of necessity and effectively pursue objectives of public interest recognised by the European Union or respond to the need to protect the rights and freedoms of others. In the light of all these conditions, it is the very existence of that ‘law’ which, once again, is lacking, in my view, ‘law’ understood to be ‘deliberated’ law, that is, democratically legitimised. Indeed, only a law in the parliamentary sense of the term would have made it possible to examine the other conditions in Article 52(1) of the Charter. In that regard, it could be argued that Article 52(1) of the Charter incorporates an implicit requirement for a ‘deliberated’ law, in line with the intensity

of public debate.. However, it is the express requirement of a law, as ‘prior law’, which is at issue here. Since it has been established that this is lacking in the present case, it is possible to reply to the first question posed by the national court.

114. In conclusion, I propose that the Court reply in the negative to the first question referred for a preliminary ruling by the cour d’appel de Bruxelles and, consequently, declare that it is not necessary to reply to the second question, posed in the alternative.

IV – Conclusion

115. In conclusion, I propose that the Court answer the question referred by the cour d’appel de Bruxelles for a preliminary ruling as follows:

Directives 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society and 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights, in conjunction with Directives 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector and 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (‘Directive on electronic commerce’), interpreted in the light of Articles 7, 8, 11 and 52(1) of the Charter of Fundamental Rights of the European Union having regard to Articles 8 and 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, are to be interpreted as precluding the adoption by a national court, on the sole basis of a statutory provision providing that ‘[the competent courts] may also issue an injunction against intermediaries whose services are used by a third party to infringe a copyright or related right’, to order an ‘[internet service provider] to introduce, for all its customers, in abstracto and as a preventive measure, exclusively at the cost of [the latter] and for an unlimited period, a system for filtering all electronic communications, both incoming and outgoing, passing via its services, in particular those involving the use of peer-to-peer software, in order to identify on its network the sharing of electronic files containing a musical, cinematographic or audio-visual work in respect of which the applicant claims to hold rights, and subsequently to block the transfer of such files, either at the point at which they are requested or at which they are sent’.

1 – Original language: French.

2 – It hardly seems necessary to point out that the problem of internet piracy is global, that it has given rise to varied responses depending on the countries, most often judicial responses (whether against internet users themselves or against service providers, internet access providers, hosting service providers, editors of ‘peer-to-peer’ or services software (see, inter alia Napster (A&M Records v Napster, 239 F.3d 1004, 9th Cir. 201) and Grokster (Metro-Goldwyn-Mayer Studios v Grokster, 125 S. Ct. 2764, 2005) in the United States, Kazaa in Australia (Kazaa [2005] F. C. A. 1242) or even PirateBay in Sweden (Court of Appeal (Svea hovrätt), 26 November 2010, Case No B 4041-09)), sometimes legislative (for example, in France, the Hadopi law, named after the High Authority for the broadcasting of works and the protection of rights on the internet, which it establishes (Law No 2009-669 of 12 June 2009 promoting the dissemination and protection of creation on the internet, JORF No 135 of 13 June 2009, p. 9666); in Spain, Final Provision 43 of Act 2/2011 of 4 March 2011 on the Sustainable Economy (BOE of 5 March 2011, p. 25033)), sometimes sui generis (see, for example, the Joint Memorandum of Understanding on an

approach to reduce unlawful file sharing, signed in 2008 between the main internet access providers in the United Kingdom and representatives of the creative industries), which have been widely commented on and of which it is clearly impossible to give an account here, even a brief one, and that the debate to which it gives rise is itself worldwide and particularly controversial; for an outline of the French approach to the problem, see, inter alia, Derieux, E. and Granchet, A., La lutte contre le téléchargement illégal, Lois DADVSI et HADOPI, Lamy Axe Droit, 2010; for an outline of the Commission's approach, see its First Report on the application of Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market of 21 November 2003 (COM(2003) 702 final, point 4.7); its Report on the application of Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights of 22 December 2010 (COM(2010) 779 final, point 3.3) and its communication of 16 July 2008, 'An Industrial Property Rights Strategy for Europe' (COM(2008) 465 final, point 5.3). Reference may also be had, among the works carried out in the Council of Europe, to Recommendation CM/Rec(2008)6 of the Committee of Ministers to Member States on measures to promote the respect for freedom of expression and information with regard to internet filters, and the guidelines designed to help internet service providers, of July 2008; see also the OECD report presented on 13 December 2005 to the Working Party on the Information Economy, Digital Broadband Content: Music, DSTI/ICCP/IE(2004)12/FINAL.

3 – 'the Charter'.

4 – 'ECHR'.

5 – Accordingly, on a legal level, the legal classification of the acts of infringement at issue and the impact of exceptions for private copying will not be examined; on the technical level, neither the unlawful downloading techniques nor the possible means of preventing them can be examined. More generally, I shall refer in that regard to the abundant academic legal writings generated by the judicial concerns regarding the phenomenon.

6 – 'ISP'.

7 – Case C‑275/06 [2008] ECR I‑271, Opinion of Advocate General Kokott delivered on 18 July 2007.

8 – An IP address is a unique address which devices communicating according to the 'Internet Protocol' use to identify themselves and to communicate with each other on a computer network; see, in particular, Postel, J. (ed.), Internet Protocol, RFC 791, September 1981, http://www.faqs.org/rfcs/rfc791.html. See also the Opinion of Advocate General Kokott in Promusicae, points 30 and 31.

9 – To tell the truth, if, as we shall see, the ISP in question is required to introduce a 'preventive' mechanism to combat infringements of intellectual property rights, it should nevertheless be pointed out that, in the present case, it is the addressee of an injunction adopted in response to infringements of intellectual property rights established in civil proceedings.

10 – Directive of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (OJ 2001 L 167, p. 10).

11 – Directive of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights (OJ 2004 L 157, p. 45; corrections: OJ 2004 L 195, p. 16, and OJ 2007 L 204, p. 27).

12 – Directive of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ 1995 L 281, p. 31).

13 – Directive of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (OJ 2002 L 201, p. 37).

14 – Directive of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce') (OJ 2000 L 178, p. 1).

15 – Moniteur belge of 27 July 1994, p. 19297.

16 – 'Scarlet'.

17 – See, inter alia, for the most recent, Case C‑243/09 Fuß [2010] ECR I‑9849, paragraph 66); Joined Cases C‑92/09 and C‑93/09 Volker und Markus Schecke and Eifert [2010] ECR I‑0000, paragraph 45 et seq.; Joined Cases C‑57/09 and C‑101/09 B and D [2010] ECR I‑0000, paragraph 78; Case C‑339/10 Asparuhov Estovand Others [2010] ECR I‑0000, paragraph 12; Case C‑145/09 Tsakouridis [2010] ECR I‑0000, paragraph 52; Case C‑279/09 DEB Deutsche Energiehandels-und Beratungsgesellschaft [2010] ECR I‑0000, paragraph 30; Case C‑208/09 Sayn-Wittgenstein [2010] ECR I‑0000, paragraph 52; Joined Cases C‑444/09 and C‑456/09 Gavieiro Gavieiro and Iglesias Torres [2010] ECR I‑0000, paragraph 75; Case C‑491/10 PPU Aguirre Zarraga [2010] ECR I‑0000; and Case C‑236/09 Association Belge des Consommateurs Test-Achats and Others [2011] ECR I‑0000, paragraph 16.

18 – See also, to that effect, the Opinion of Advocate General Bot in Case C‑108/10 Scattolon [2011] ECR I‑0000.

19 – See Case C‑400/10 PPU McB. [2010] ECR I‑8965, paragraph 53, and DEB Deutsche Energiehandels- und Beratungsgesellschaft, paragraph 35.

20 – See also, in that regard, the explanations drawn up as a way of providing guidance in the interpretation of the Charter referred to in Article 52(7) and, in particular, the explanations of Articles 7, 8, 11 and 52 of the Charter.

21 – As the Court pointed out in paragraph 35 of DEB Deutsche Energiehandels-und Beratungsgesellschaft, 'the meaning and the scope of the guaranteed rights are to be determined not only by reference to the text of the ECHR, but also, inter alia, by reference to the case-law of the European Court of Human Rights', in accordance with the explanations drawn up as a way of providing guidance in the interpretation of the Charter referred to in Article 52(7) thereof.

22 – See, in that regard, my Opinion in Case C‑69/10 Samba Diouf, pending before the Court, point 42.

23 – That was exactly the sense of the question which I was careful to put in detail at the hearing to the various interveners.

24 – For simple ‘mentions’ of the condition, see, inter alia, Joined Cases 46/87 and 227/88 Hoechst v Commission [1989] ECR 2859, paragraph 19; Case 85/87 Dow Benelux v Commission [1989] ECR 3137, paragraph 30 et seq.; Case C‑368/95 Familiapress [1997] ECR I ‑3689, paragraph 26; Case C‑60/00 Carpenter [2002] ECR I‑6279, paragraph 42; and Case C‑407/08 P Knauf Gips v Commission [2010] ECR I‑6375, paragraph 91; for a ‘review’ of the condition, see Volker und Markus Schecke and Eifert, paragraph 66. See also the Opinion of Advocate General Kokott in Promusicae, point 53.

25 – In the following arguments, therefore, reference will simply be made to the question referred for a preliminary ruling, in the singular.

26 – ‘The filtering system’.

27 – ‘The blocking mechanism’.

28 – In its written pleadings, SABAM points out, however, that the measure sought relates only to peer-to-peer communications. The expression ‘peer-to-peer’ designates a means of communication in which computers, connected in a direct line network, employ software using specific protocols to exchange information, which may be files (the ‘file sharing’ to which the present case relates), but also, for example, telephone services such as Skype. The following file-sharing protocols and software may be decided by way of illustration: BitTorrent (Azureus, BitComet, Shareaza, MlDonkey …), eDonkey (eDonkey2000, MlDonkey), FastTrack (Kazaa, Grokster, iMesh, MlDonkey), Gnutella (BearShare, Shareaza, Casbos, LimeWire, MlDonkey …), Gnutella2 (Shareaza, Trustyfiles, Kiwi Alpha, FileScope, MlDonkey …), OpenNap (Napster, Lopster, Teknap, MlDonkey); for a more detailed presentation of peer-to-peer, see, inter alia, Stevens, R., ‘Peer-to-Peer (P2P) Resource Sharing’, July 2010 (on the Oxford University Information and Communications Technology website http://www.ict.ox.ac.uk/oxford/rules/p2p.xml). SABAM states that the aim of the measure is ‘to make it impossible ... to send or receive in any way, by means of peer-to-peer software, electronic files containing a musical work in SABAM’s repertoire’. It is for the national court to determine that that is the case, and in particular whether the system must also adapt to the new methods, alternatives to the peer-to-peer method, for exchanging files, such as ‘streaming’ (data flow) and ‘direct download’ (direct downloading via, for example, RapidShare, MegaUpload). The Court, which is bound by the terms of the question referred to it for a preliminary ruling and the grounds of the order for reference, must work on the assumption that the filtering and blocking system required relates ‘in particular’, and therefore not exclusively, to communications via peer-to-peer software.

29 – It is an unavoidable consequence of the principle of ‘technological neutrality’ defended by SABAM, according to which the measure requested does not require Scarlet to adopt any particular technology.

30 – With all the caution required of a person who is no expert, it seems that the introduction of a filtering and blocking system may be based on several detection mechanisms. It is possible to distinguish between: (1) detection of the communication protocol used: since each peer-to-peer protocol has its own mechanisms for managing the network and coordinating traffic distribution, it is possible to introduce filters which seek out in each IP package the signature of each protocol. It is then possible, once the signature is known, either to block, or to significantly slow down for deterrent purposes, all communications using that protocol, or to exploit opportunities

for in-depth monitoring of the content of the files in order to block only those identified as infringing a right; (2) detection of the content of the files exchanged: this type of system may either detect a computer tattoo previously placed in a file, or compare the computer imprint of a file with the previously introduced imprints of the works. The Audio Magic CopySense system referred to in the order for reference is a system of this kind; (3) detection of the conduct of the parties involved in the communication at issue: detection of communication portals, detection of the opening by a server/customer computer of several connections to several other customers; detection of requests for search/transfer of files or detection of encryption of exchange as an indication of an attempt to circumvent detection measures. For an outline of the different possible techniques, compare, for example, the Kahn-Brugidou report of 9 March 2005 and the Olivennes report on the development and protection of cultural works on the new networks of 23 November 2007, on which the Hadopi law is based.

31 – Notwithstanding the principle of technological neutrality defended by SABAM, the choice of the system to be introduced is not neutral on the technological level. For example, it may reasonably be considered that a system to filter by content all communications will probably have a more significant impact on the communication network than the filtering only of files exchanged via a protocol with an identified signature.

32 – That is the direct consequence of the concept of technological neutrality defended by SABAM.

33 – The Court has considered an identical question referred for a preliminary ruling in another case between SABAM and Netlog, a social network platform; see Case C‑360/10 SABAM, pending before the Court (OJ 2010 C 288, p. 18).

34 – The decisions of the Belgian courts in this matter have had considerable impact beyond the borders of Europe, as a quick search on the internet reveals.

35 – It is hardly necessary to stress the considerable advantages, for rightholders or persons entitled under them and in particular the collective rights management companies engaged in combating unlawful downloading, of the generalisation of the introduction of filtering and blocking systems, assuming that they may actually be effective, on the procedural and patrimonial level, to begin, in relation to a strategy consisting in seeking the assistance, by illegal means, of the ISPs in order to detect and draw up a list of persons who have committed infringements with a view to bringing proceedings against them.

36 – SABAM states, in that regard, that it does not intend to proceed against Scarlet as the perpetrator of the infringements of intellectual property or the person responsible for them, but to dissuade it from providing its services to third parties in so far as they use them to infringe copyright or a related right. However, it is important to point out in that regard that, at first instance, Scarlet is the subject of an injunction coupled with a periodic penalty payment, which are the subject-matter of the appeal in the main proceedings, and that SABAM seeks confirmation of the rulings of the courts of first instance and the translation and publication of the forthcoming decision on its website and in several newspapers.

37 – The expert appointed by the President of the tribunal de première instance de Bruxelles emphasises this aspect of the question. See points 4 and 5 of the conclusions of his report of 29 January 2007, cited in the order for reference and reproduced in point 21 above.

38 – Again, the principle of technological neutrality defended by SABAM means that it is ex ante to assess the overall costs of introducing such a filtering and blocking system, whether they

are the costs relating to searching for and testing the system itself, the investment costs (the filter casings, routers, and so forth), the engineering and management costs of the project or recurring maintenance and operational monitoring costs.

39 – Paragraph 19.

40 – It is hardly necessary to point out that the Union is, in the words of Article 2 TEU, founded on the values of, inter alia, the rule of law, and that the Court had long enshrined in its case-law the concept of a 'Community based on the rule of law'; see, inter alia, Case 294/83 Les Verts v Parliament [1986] ECR 1339, paragraph 23, and Joined Cases C‑402/05 P and C‑415/05 P Kadi and Al Barakaat International Foundation v Council and Commission [2008] ECR I‑6351, paragraph 281. On these matters and with all the reservations which must accompany the use of national concepts in Union law, see, inter alia, Calliess, C. and Ruffert, M., EUV/EGV, Das Verfassungsrecht der Europäischen Union mit Europäischer Grundrechtcharta, Kommentar, Beck, 2007, p. 62; Schwarze, J., Droit administratif européen, Bruylant, 2009, p. 219 et seq.; Azoulai, L., 'Le principe de légalité', in Auby, J.-B. and Dutheil de la Rochère, J. (eds), Droit administratif européen, Bruylant, 2007, p. 394, especially p. 399; Simon, D., 'La Communauté de droit', in Sudre, F. and Labayle, H., Réalité et perspectives du droit communautaire des droits fondamentaux, Bruylant, 2000, p. 85, especially p. 117 et seq.

41 – See Case 169/80 Gondrand and Garancini [1981] ECR 1931, paragraph 17; Joined Cases 92/87 and 93/87 Commission v France and United Kingdom [1989] ECR 405, paragraph 22; Case C‑143/93 Van Es Douane Agenten [1996] ECR I‑431, paragraph 27; Case C‑354/95 National Farmers' Union and Others [1997] ECR I‑4559, paragraph 57; Case C‑177/96 Banque Indosuez and Others [1997] ECR I‑5659, paragraph 27; Case C‑78/01 BGL [2003] ECR I‑9543, paragraph 71; and Case C‑338/95 Wiener SI [1997] ECR I‑6495, paragraph 19.

42 – See, inter alia, Case C‑17/03 VEMW and Others [2005] ECR I‑4983, paragraph 80; Case C‑226/08 Stadt Papenburg [2010] ECR I‑131, paragraph 45; Case C‑550/07 P Akzo Nobel Chemicals and Akcros Chemicals v Commission and Others [2010] ECR I‑8301, paragraph 100; and Case C‑225/09 Jakubowska [2010] ECR I‑0000, paragraph 42.

43 – Case C‑340/08 M and Others [2010] ECR I‑3913, paragraph 65.

44 – See also Case 143/83 Commission v Denmark [1985] ECR 427, paragraph 10; Case 257/86 Commission v Italy [1988] ECR 3249, paragraph 12; Case C‑325/91 France v Commission [1993] ECR I‑3283, paragraph 26; Case C‑370/07 Commission v Council [2009] ECR I‑8917, paragraph 39; Case C‑152/09 Grootes [2010] ECR I‑0000, paragraph 43; and Case C‑77/09 Gowan Comércio [2010] ECR I‑0000, paragraph 47. With regard to the requirement for clarity and precision in the measures transposing directives, see, inter alia, Case C‑6/04 Commission v United Kingdom [2005] ECR I‑9017, paragraph 21; Case C‑508/04 Commission v Austria [2007] ECR I‑3787, paragraph 73; and Case C‑50/09 Commission v Ireland [2011] ECR I‑0000, paragraph 46.

45 – See below, under E, point 101 et seq.

46 – By way of guidance, Article 8(3) of Directive 2001/29 and Article 9(1)(a) of Directive 2004/48 impose on the Member States the dual obligation of introducing legal measures to prevent and penalise infringements of intellectual property rights. Article 15(1) of Directive 2000/31 imposes on the Member States a dual obligation not to act: they must refrain from

imposing a general obligation on ‘providers’ to monitor the information which they transmit or store, or a general obligation actively to seek facts or circumstances indicating illegal activity. Directives 95/46 and 2002/58 guarantee, by their very objective, the protection of personal data. Article 4 of Directive 2006/24 provides that Member States must adopt measures to ensure that data retained in accordance with this directive are provided only to the competent national authorities in specific cases and in accordance with national law.

47 – See, in that regard, the Opinion of Advocate General Kokott in Promusicae, which examines in detail the connections between the various directives.

48 – See, in particular, recitals 2, 10 and 37 in the preamble to Directive 95/46, recitals 3, 11 and 24 in the preamble to Directive 2002/58, recital 9 in the preamble to Directive 2000/31 and recitals 9 and 25 in the preamble to and Article 4 of Directive 2006/24.

49 – Since the filtering and blocking system must be deployed exclusively at the cost of the ISP, the aforementioned measure may also appear to be a ‘deprivation’ of the right to property within the meaning of Article 17 of the Charter, as interpreted in the light of Article 1 of Protocol No 1 to the ECHR and of the relevant case-law of the European Court of Human Rights. However, this aspect of the question will not be examined in this Opinion.

50 – Or even as ‘interference’ within the meaning of Article 8 of the ECHR or as ‘restriction’ within the meaning of Article 10 of the ECHR. Regarding these concepts, see, in particular, Ganshof van der Meersch, W.J., Réflexions sur les restrictions à l’exercice des droits de l’homme dans la jurisprudence de la Cour européenne de Strasbourg, Völkerrecht als Rechtsordnung – Internationale Gerichtsbarkeit – Menschenrechte, Festschrift für H. Mosler, Springer, 1983, p. 263; Kiss, C.-A., ‘Les clauses de limitation et de dérogation dans la CEDH’, in Turp, D. and Beaudoin, G., Perspectives canadiennes et européennes des droits de la personne, Yvon Blais, 1986, p. 119; Duarte, B., Les restrictions aux droits de l’homme garantis par le Pacte international relatif aux droits civils et politiques et les Conventions américaine et européenne des droits de l’homme, Thesis, Université de Lille II, 2005; Viljanen, J., The European Court of Human Rights as a Developer of the General Doctrines of Human Rights Law. A Study of the Limitation Clauses of the European Convention on Human Rights, Thesis, University of Tampere, 2003; Loucaides, L.G., ‘Restrictions or limitations on the rights guaranteed by the European Convention on Human Rights’, The Finnish Yearbook of International Law, Vol. 3, p. 334.

51 – Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions – Creating a Safer Information Society by Improving the Security of Information Infrastructures and Combating Computer-related Crime – eEurope 2002 (COM(2000) 890 final, especially p. 23).

52 – See, in that regard, in particular, Joined Cases C‑465/00, C‑138/01 and C‑139/01 ÖsterreichischerRundfunkand Others [2003] ECR I‑4989, paragraph 68; Case C‑73/07 Satakunnan Markkinapörssi and Satamedia [2008] ECR I‑9831; and Volker und Markus Schecke and Eifert, paragraph 56 et seq. See also the Opinion of Advocate General Kokott in Promusicae, point 51 et seq.

53 – See, in particular, recital 10 in the preamble to Directive 95/46, recitals 1, 2, 7, 10, 11 and 24 in the preamble to and Article 1(1) of Directive 2002/58.

54 – Scarlet and ISPA, and also the Belgian, Czech and Netherlands Governments state, in essence, that the introduction of such a filtering and blocking system would lead ISPs to process

personal data in infringement of the provisions of Directives 95/46 and 2002/58. SABAM, the Polish and Finnish Governments and also the Commission consider, by contrast, that the introduction of such a system is not contrary to Directives 95/46 and 2002/58. For an examination of the prohibitions on processing laid down by those directives, see, in particular, the Opinion of Advocate General Kokott in Promusicae, point 64 et seq.

55 – Scarlet and ISPA consider that the IP address of each internet user constitutes a datum of a personal nature since, indeed, it enables the internet users to be identified. Consequently, the collection and resolution of IP addresses of the internet users, which are essential for identifying those users and therefore for the functioning of that system, constitute processing of personal data which is not permitted by the directives.

56 – Promusicae, paragraph 45; order in Case C‑557/07 LSG-Gesellschaft zur Wahrnehmung von Leistungsschutzrechten [2009] ECR I‑1227.

57 – It may be observed that the question is asked indirectly in Case C‑461/10 Bonnier Audio and Others, pending before the Court (OJ 2010 C 317, p. 24), in the context of which the Court is asked, in essence, whether Directive 2006/24 amending Directive 2002/58 precludes the application of a provision of national law, introduced on the basis of Article 8 of Directive 2004/48, which, for the purpose of identifying a subscriber, makes it possible to order an ISP to communicate to a copyright holder or a person claiming under him an IP address which was used to infringe that right.

58 – Opinion of the European Data Protection Supervisor of 22 February 2010 on the Anti Counterfeiting Trade Agreement (ACTA) (OJ 2010 C 147, p. 1, paragraph 24); Opinion of the European Data Protection Supervisor of 10 May 2010 on the proposal for a directive of the European Parliament and of the Council on combating the sexual abuse, sexual exploitation of children and child pornography, repealing Framework Decision 2004/68/JHA (OJ 2010 C 323, p. 6, paragraph 11).

59 – He refers, in that regard, to the case-law of the European Court of Human Rights, the decision in Weber and Saravia v. Germany [2006] no. 54934/00, Reports of Judgments and Decisions 2006-XI, and the judgment in Liberty and Others v.the United Kingdom [2008] no. 58243. However, it should be pointed out that those two cases do not relate specifically to the collection of IP addresses on the internet, but to telecommunications surveillance.

60 – ‘The “Article 29” Working Party’.

61 – See, in particular, Opinion No 4/2007 of 20 June 2007 on the concept of personal data, WP 136, available at website http://ec.europa.eu/justice/policies/privacy/. See also, more widely, Recommendation No 3/97 of 3 December 1997, Anonymity on the Internet, WP 6, and the working document entitled ‘Privacy on the Internet – An integrated EU approach to On-line Data Protection’, adopted on 21 November 2000, WP 37, especially p. 22.

62 – Directive of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC (OJ 2006 L 105, p. 54).

63 – Such is the approach taken, for example, by the Commission nationale de l’informatique et des libertés en France (French Data Protection Authority): Resolution No 2007-334 of 8 November 2007. On these questions, see, for example, González Pascual, M., ‘La Directiva de

retención de datos ante el Tribunal Constitucional Federal alemán. La convergencia de jurisprudencias en la Europa de los Derechos: un fin no siempre deseable', REDE, 2010, No 36, p. 591.

64 – On the prohibition on storage and communication of traffic data within the meaning of Directive 2002/58 and its exceptions, reference may be had to the Opinion of Advocate General Kokott in Promusicae, point 64 et seq.

65 – Article 11 of Directive 2006/24 added inter alia a paragraph 1a to Article 15 of Directive 2002/58, under which Article 15(1) of Directive 2002/58 does not apply to data specifically required by Directive 2006/24 to be retained. Article 4 of Directive 2006/24 provides, in this case, that 'Member States shall adopt measures to ensure that data retained in accordance with this Directive are provided only to the competent national authorities in specific cases and in accordance with national law. The procedures to be followed and the conditions to be fulfilled in order to gain access to retained data in accordance with necessity and proportionality requirements shall be defined by each Member State in its national law, subject to the relevant provisions of European Union law or public international law, and in particular the ECHR as interpreted by the European Court of Human Rights.'

66 – Scarlet, supported by ISPA, claims that the introduction of such a system would infringe the provisions of Directive 2002/58 concerning the confidentiality of electronic communications, referring, in that regard, to recital 26 in the preamble to and Article 5 of that directive.

67 – It was in specific reference to this case-law that it has also examined a measure to install listening devices in an apartment. See European Court of Human Rights, judgment in Vetter v. France [2005] No 59842/00, § 27, referring expressly to its reasoning in the judgments in Huvig v. France [1990] no. 11105/84, Series A no. 176-B, and Kruslin v. France [1990] no. 11801/85, Series A no. 176-A.

68 – Court of Human Rights, judgment in Copland v.the United Kingdom [2007] no. 62617/00, §§ 43 and 44.

69 – It should be noted that recital 15 in the preamble to Directive 2000/31 refers expressly to Article 5 of Directive 97/66/EC of the European Parliament and of the Council of 15 December 1997 concerning the processing of personal data and the protection of privacy in the telecommunications sector (OJ 1998 L 24, p. 1) which was repealed by Directive 2002/58.

70 – Following the example of Article 10 of the ECHR. See, inter alia, European Court of Human Rights, judgments in Observer and Guardian v.the United Kingdom [1991] no. 13585/88, Series A no. 216, § 59, and Guerra and Others v. Italy [1998] no. 14967/89, Reports of Judgments and Decisions 1998-I, § 53.

71 – It may be noted that the European Court of Human Rights has also had occasion to take into account the 'power' of the internet which, since it is per se available to all, has a significant demultiplicating effect, in its assessment of the compatibility of a 'restriction' of freedom of expression in the light of the requirements of Article 10(2) of the ECHR. See, in particular, European Court of Human Rights, judgments in Mouvement Raëlien Suisse v. Switzerland [2011] no. 16354/06, § 54 et seq.; Akdaş v. Turkey [2010] no. 41056/04, § 28; and Willem v. France [2009] no. 10883/05, §§ 36 and 38.

72 – European Court of Human Rights, judgment in Times Newspapers Limited v.the United Kingdom [2009] nos 3002/03 and 23676/03, § 27. The Court holds, in this instance, that '[t]he

maintenance of [i]nternet archives is a critical aspect of this role' and therefore falls within the scope ambit of Article 10 of the ECHR.

73 – It has been possible to maintain that the provisions of the intellectual property law of a Member State could, in themselves, constitute a restriction within the meaning of Article 10 of the ECHR; see Danay, R., 'Copyright vs. Free Expression: the Case of peer-to-peer File-sharing of Music in the United Kingdom', Yale Journal of Law & Technology, 2005-2006, Vol. 8, No 2, p. 32.

74 – Or alternatively as 'interference' within the meaning of Article 8 of the ECHR and as 'restriction' within the meaning of Article 10 of the ECHR.

75 – See, inter alia, Case C‑479/04 Laserdisken [2006] ECR I‑8089, paragraph 62.

76 – Laserdisken, paragraph 65.

77 – See, in particular, recitals 3 and 4 in the preamble to Directive 2001/29 and recitals 1 and 10 in the preamble to Directive 2004/48.

78 – See, inter alia, European Commission of Human Rights, decisions Smith Kline and FrenchLaboratories Ltd v.the Netherlands [1990] no. 12633/87, DR 66, p. 81, and A. D. v. Netherlands [1994] no. 21962/93; European Court of Human Rights, judgments in British-American Tobacco Company Ltd v.the Netherlands [1995] no. 19589/92, Series A no. 331, §§ 71 and 72; Chappel v.the United Kingdom [1989] no. 10461/83, Series A no. 152A, § 59; and Anheuser-Bush Inc. v. Portugal [2007] no. 73049/01, §§ 71 and 72; decision in Melnychuk v. Ukraine [2005] no. 28743/03, § 3.

79 – See Case 158/86 Warner Brothers and Metronome Video [1988] ECR 2605, paragraph 13.

80 – See Joined Cases 55/80 and 57/80 Musik-Vertrieb membran and K-tel International [1981] ECR 147, paragraph 12, and Joined Cases C‑92/92 and C‑326/92 Phil Collins and Others [1993] ECR I‑5145, paragraph 20.

81 – Inter alia, van Dijk, P. et al., Theory and practice of the European Convention on Human Rights, 4th ed., Intersentia, 2006, p. 336; Jacobs, F.G., White, R.C.A. and Ovey, C., The European Convention on Human Rights, 5th ed., Oxford University Press, 2010, p. 315; Harris, D.J., O'Boyle, M. and Warbrick, C., Law of the European Convention on Human Rights, 2nd ed., Oxford University Press, 2009; Grabenwarter, C., Europäische Menschenrechtskonvention : ein Studienbuch, 3rd ed., Helbing & Lichtenhahn, 2008, p. 112; Matscher, F., 'Der Gesetzesbegriff der EMRK', in Adamovich, L. and Kobzina, A., Der Rechstaat in der Krise – Festschrift Edwin Loebenstein zum 80. Geburtstag, Mainz, 1991, p. 105; Gundel, J., 'Beschränkungsmöglichkeiten', Handbuch der Grundrechte, Band. VI/1, Müller, 2010, p. 471; Weiß, R., Das Gesetz im Sinne der europäischen Menschenrechtskonvention, Duncker & Humblot, 1996.

82 – See, inter alia, Martín-Retortillo Baquer, L., 'La calidad de la ley según la jurisprudencia del Tribunal europeo de derechos humanos', Derecho Privado y Constitución, 2003, No 17, p. 377; Wachsmann, P., 'De la qualité de la loi à la qualité du système juridique', Libertés, Justice, Tolérance, Mélanges en hommage au doyen Gérard Cohen-Jonathan, Bruylant, Brussels, Vol. 2, p. 1687.

83 – European Court of Human Rights, judgment in Leander v. Sweden [1987] no. 9248/81, Series A no. 116, § 50.

84 – European Court of Human Rights, judgment in Margareta and Roger Andersson v. Sweden [1992] no. 12963/87, Series A no. 226-A, p. 25, § 75.

85 – European Court of Human Rights, Tan v. Turkey [2007] no. 9460/03, §§ 22 to 26; in that case, the Court examined the compliance with the principle of clarity of the law of legislation concerning the correspondence of prisoners. It considered that legislation which granted the governors of penal institutions, on the decision of the disciplinary committee, the power to refuse to deliver, to censor or to destroy any mail regarded as 'problematical' did not indicate with sufficient clarity the extent and manner of exercising the discretion of the authorities in the sphere considered.

86 – See, inter alia, European Court of Human Rights, judgment in Kruslin, § 30; decision in Cobanv.Spain [2006] no. 17060/02.

87 – See, inter alia, European Court of Human Rights, judgment in Sanoma Uitgeversv.the Netherlands [2010] no. 38224/03, §§ 81 and 82.

88 – Inter alia, judgment in Margareta and Roger Andersson, § 75.

89 – European Court of Human Rights, judgment in Silver and Othersv.the United Kingdom [1983] nos 5947/72, 6205/73, 7052/75, 7061/75, 7107/75, 7113/75 and 7136/75, Series A no. 61, § 88.

90 – See, in this regard, point 53 of the Opinion of Advocate General Kokott in Promusicae, citing the judgment in Österreichischer Rundfunk and Others, paragraphs 76 and 77

91 – For a concise formulation of these various requirements, see, inter alia, Court of Human Rights, judgment in Kopp v. Switzerland [1998] no. 23224/94, Reports of Judgments and Decisions 1998-II, § 55.

92 – European Court of Human Rights, judgment in Valenzuela Contreras v. Spain [1998] no. 27671/95, Reports of Judgments and Decisions 1998-V, § 46, referring to the judgment in Malone [1984] no. 8691/79, Series A no. 82, and to the judgments in Kruslin and Kopp.

93 – The principle of the supremacy of the law, which is included in the preamble to the ECHR, means that domestic law offers a certain protection against the arbitrary infringements by the public authorities of the rights which it guarantees. Although that principle 'implies that an interference by the authorities with an individual's rights should be subject to effective control (European Court of Human Rights, judgments in Klass and Others v. Germany [1978] no. 5029/71, Series A no. 28, pp. 25 and 26, § 55; Malone, § 68; Silver and Others, § 90), 'implies, inter alia, that an interference by the executive authorities with an individual's rights should be subject to an effective control which should normally be assured by the judiciary, at least in the last resort, judicial control offering the best guarantees of independence, impartiality and a proper procedure' (European Court of Human Rights, Klass and Others, § 55), it also requires 'a measure of legal protection' which would be infringed 'if a legal discretion granted to the executive to be expressed in terms of an unfettered power' (on Article 8 of the ECHR, in addition to Malone, § 68 and Kruslin, § 30; European Court of Human Rights, judgment in Rotaru v. Romania [2000] no. 28341/95, Reports of Judgments and Decisions 2000-V, § 55; Segerstedt-Wiberg and Others v. Sweden [2006] no. 62332/00, Reports of Judgments and

Decisions 2006-VII, § 76; Lupsa v. Romania [2006] no. 10337/04, Reports of Judgments and Decisions 2006-VII, § 34; decision in Weber and Saravia, § 94; on Article 10 of the ECHR, judgment in Sanoma Uitgevers, § 82) or if the discretion granted to a judge were expressed in terms of an unfettered power (European Court of Human Rights, judgment in Huvig, p. 55, § 29; decision in Weber andSaravia, § 94; judgment in Liberty and Others, § 62; judgment in Bykov v. Russia [2009] no. 4378/02, § 78).

94 – Wachsmann, P., 'La prééminence du droit', Le droit des organisations internationales, Recueil d'études à la mémoire de Jacques Schwob, p. 241, especially p. 263; see also Wiarda, G., 'La Convention européenne des droits de l'homme et la prééminence du droit', Rivista di studi politici internazionali, 1984, p. 452; Grabarczyk, K., Les principes généraux dans la jurisprudence de la Cour européenne des droits de l'homme, PUAM, 2008, especially p. 194 et seq.; Morin, J.-Y., 'La prééminence du droit dans l'ordre juridique européen', Theory of International Law at the Threshold of the 21st Century. Essays in Honour of Krzysztof Skubiszewski, Kluwer Law International, 1996, p. 643.

95 – European Court of Human Rights, judgments in Groppera Radio and Others v. Switzerland [1990] no. 10890/84, Series A no. 173, p. 26, § 68; Cantoni v. France [1996] no. 17862/91, Reports of Judgments and Decisions 1996-V, § 35. As the Court has pointed out in respect of a GPS surveillance of a person's movements in public places, the rather strict standards, set up and applied in the specific context of surveillance of telecommunications cannot apply mutatis mutandis to all forms of interference. See European Court of Human Rights, judgment in Uzun v. Germany [2009] no. 35623/05, § 66. In that case, the Court preferred to apply the general principles 'on adequate protection against arbitrary interference with Article 8 [ECHR] rights'. In this instance, as it points out, 'in the context of secret measures of surveillance by public authorities, because of the lack of public scrutiny and the risk of misuse of power, compatibility with the rule of law requires that domestic law provides adequate protection against arbitrary interference with Article 8 rights'. 'The Court must be satisfied that there exist adequate and effective guarantees against abuse. This assessment depends on all the circumstances of the case, such as the nature, scope and duration of the possible measures, the grounds required for ordering them, the authorities competent to permit, carry out and supervise them, and the kind of remedy provided by the national law'.

96 – Inter alia, judgments in Groppera Radio and Others, § 68, and Tolstoy Miloslavsky v.the United Kingdom [1995] no. 18139/91, Series A no. 316-B, § 37.

97 – See, inter alia, European Court of Human Rights, judgments in The Sunday Times v.the United Kingdom (no. 1) [1979] no. 6538/74, Series A no. 30, § 49; Tolstoy Miloslavsky, § 37; Sanoma Uitgevers, § 83.

98 – Inter alia, European Court of Human Rights, judgment in Müller and Others v. Switzerland [1988] no. 10737/84, Series A no. 133, § 29.

99 – It should be pointed out that the case-law of the European Court of Human Rights has gradually given the concept of 'quality of the law' its own meaning, adapted to achieve the objectives pursued by the ECHR, which distinguishes it from similar concepts, with a content which is often broader, found in the law of certain Members States; see, inter alia, Milano, L., 'Contrôle de constitutionnalité et qualité de la loi', Revue du droit public, 2006, No 3, p. 637; 'La mauvaise qualité de la loi: Vagueness Doctrine at the French Constitutional Council', Hastings Constitutional Law Quarterly, Winter 2010, No 37, p. 243; Reicherzer, M., 'Legitimität und Qualität von Gesetzen', Zeitschrift für Gesetzgebung, 2004, p. 121; Wachsmann, P., 'La qualité de la loi', Mélanges Paul Amselek, p. 809; de Montalivet, P., 'La "juridicisation" de la

légistique. À propos de l'objectif de valeur constitutionnelle d'accessibilité et d'intelligibilité de la loi', La confection de la loi, PUF, 2005, p. 99; Moysan, H., 'L'accessibilité et l'intelligibilité de la loi. Des objectifs à l'épreuve de la pratique normative', AJDA, 2001, p. 428.

100 – Article 15(1) of Directive 2000/31 imposes on the Member States a dual obligation not to act: they must refrain from imposing a general obligation on 'providers' to monitor the information which they transmit or store, or a general obligation actively to seek facts or circumstances indicating illegal activity. Article 12(1) of Directive 2000/31 also requires the Member States to ensure that the providers of services of provision of access to a communication network, and therefore in particular ISPs, are not liable for the information transmitted.

101 – Recital 30 in the preamble to Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009, amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services, Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector and Regulation (EC) No 2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws (OJ 2009 L 337, p. 11), also states that 'Directive 2002/22/EC does not require providers to monitor information transmitted over their networks or to bring legal proceedings against their customers on grounds of such information, nor does it make providers liable for that information'.

102 – See, in particular, European Court of Human Rights, judgment in Chappel, § 56. See also, European Court of Human Rights, judgments in Bock and Palade v. Romania [2007] no. 21740/02, §§ 61 to 64; July and Libération v. France [2008] no. 20893/03, § 55; and Brunet-Lecomte and Others v. France [2009] no. 42117/04, § 42.

103 – Regarding the consideration, by the European Court of Human Rights, of Union law when examining the quality of the law, see, inter alia, European Court of Human Rights, judgment in Cantoni, § 30 and decision in Marchiani v. France [2008] no. 30392/03.

104 – Point 56.

105 – As it points out, '[w]hilst certainty is desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances'; inter alia, judgment in TheSunday Times, § 49; European Court of Human Rights, judgment in Plon v. France [2004] no. 58148/00, Reports of Judgments and Decisions 2004-IV, § 26.

106 – Regarding the connection sometimes made by the European Court of Human Rights between the principles of supremacy of the law and 'certainty of legal situations', see, in particular, European Court of Human Rights, judgments in Sovtransavto Holding v. Ukraine [2002] no. 48553/99, Reports of Judgments and Decisions 2000-VII, § 77 and Timotiyevich v. Ukraine [2005] no. 63158/00, § 32. See also Grabarczyk, K., Les principes généraux dans la jurisprudence de la Cour européenne des droits de l'homme, especially p. 209 et seq., No 583 et seq.