Reports of Cases

OPINION OF ADVOCATE GENERAL
SZPUNAR
delivered on 16 March 2016[1]

Case C-484/14

Tobias Mc Fadden
v
Sony Music Entertainment Germany GmbH

(Request for a preliminary ruling from the Landgericht München I (Regional Court, Munich I, Germany))

(Request for a preliminary ruling — Free movement of information society services — Directive 2000/31/EC — Article 2(a) and (b) — Concept of 'information society services' — Concept of 'service provider' — Services of an economic nature — Article 12 — Limitation of liability of a provider of 'mere conduit' services — Article 15 — Exclusion of general obligation to monitor — Professional making a wireless local network with Internet access available to the public free of charge — Infringement of copyright and related rights by third-party users — Injunction entailing an obligation to password-protect an Internet connection)

I – **Introduction**

1. Is a professional who, in the course of business, operates a wireless local area network with Internet access (a 'Wi-Fi network'[2]) that is accessible to the public free of charge providing an information society service within the meaning of Directive 2000/31/EC?[3] To what extent may his liability be limited in respect of copyright infringements committed by third parties? May the operator of such a public Wi-Fi network be constrained by injunction to make access to the network secure by means of a password?

2. Those questions outline the issues raised in a dispute between Mr Mc Fadden and Sony Music Entertainment Germany GmbH ('Sony Music') concerning actions for damages and injunctive relief in connection with the making available for downloading of copyright-protected musical works via the public Wi-Fi network operated by Mr Mc Fadden.

1 — Original language: French.

2 — The term 'Wi-Fi', which is now commonly used to designate wireless networks, is a brand name which refers to the most widely used wireless network standard. The general term for all types of wireless network is 'WLAN' (wireless local area network).

3 — 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).

II – **Legal framework**

A – *EU law*

1. Legislation relating to information society services

3. Directive 2000/31, as is apparent from recital 40 thereof, is intended, amongst other things, to harmonise national provisions concerning the liability of intermediary service providers, so that the single market for information society services can function smoothly.

4. Article 2 of Directive 2000/31, entitled ‘Definitions’, provides:

‘For the purpose of this directive, the following terms shall bear the following meanings:

(a) “information society services”: services within the meaning of Article 1(2) of Directive 98/34/EC [[4]] as amended by Directive 98/48/EC; [[5]]

(b) “service provider”: any natural or legal person providing an information society service;

…’

5. Three categories of intermediary services are covered by Articles 12, 13 and 14 of Directive 2000/31. They are, respectively, ‘mere conduit’, ‘caching’ and ‘hosting’.

6. Article 12 of Directive 2000/31, entitled ‘Mere conduit’, provides:

‘1. Where an information society service is provided that consists of the transmission in a communication network of information provided by a recipient of the service, or the provision of access to a communication network, Member States shall ensure that the service provider is not liable for the information transmitted, on condition that the provider:

(a) does not initiate the transmission;

(b) does not select the receiver of the transmission;

and

(c) does not select or modify the information contained in the transmission.

…

3. This Article shall not affect the possibility for a court or administrative authority, in accordance with Member States’ legal systems, of requiring the service provider to terminate or prevent an infringement.’

4 — Directive of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations (OJ 1998 L 204, p. 37).

5 — Directive of the European Parliament and of the Council of 20 July 1998 amending Directive 98/34 (OJ 1998 L 217, p. 18).

7. Paragraph 1 of Article 15 of Directive 2000/31, which is entitled 'No general obligation to monitor', provides:

'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. Legislation relating to the protection of intellectual property

8. Article 8 of Directive 2001/29/EC,[6] headed 'Sanctions and remedies', provides, in paragraph 3 thereof:

'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.'

9. A substantially identical provision concerning infringements of intellectual property rights in general is laid down in the third sentence of Article 11 of Directive 2004/48/EC,[7] entitled 'Injunctions'. According to recital 23 thereof, that directive is without prejudice to Article 8(3) of Directive 2001/29, which already provided for a comprehensive level of harmonisation in so far as concerns the infringement of copyright and related rights.

10. Article 3 of Directive 2004/48, entitled 'General obligation', provides:

'1. Member States shall provide for the measures, procedures and remedies necessary to ensure the enforcement of the intellectual property rights covered by this directive. Those measures, procedures and remedies shall be fair and equitable and shall not be unnecessarily complicated or costly, or entail unreasonable time-limits or unwarranted delays.

2. Those measures, procedures and remedies shall also be effective, proportionate and dissuasive and shall be applied in such a manner as to avoid the creation of barriers to legitimate trade and to provide for safeguards against their abuse.'

B – *German law*

1. Legislation transposing Directive 2000/31

11. Articles 12 to 15 of Directive 2000/31 were transposed into German law by Paragraphs 7 to 10 of the Law on electronic media (Telemediengesetz).[8]

6 — 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).

7 — 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).

8 — Law of 26 February 2007 (BGBl. I, p. 179), as amended by the Law of 31 March 2010 (BGBl. I, p. 692).

2. Legislative provisions relating to the protection of copyright and related rights

12. Paragraph 97 of the Law on copyright and related rights (Gesetz über Urheberrecht und verwandte Schutzrechte — Urheberrechtsgesetz)[9] provides:

‘1. Any person who unlawfully infringes copyright or any other right protected under this law may be the subject of an action by the injured party for an injunction ordering the termination of the infringement or, where there is a risk of recurrence, for an injunction prohibiting any further commission of the infringement. The right to seek a prohibitory injunction shall exist even where the risk of infringement arises for the first time.

2. Any person who intentionally or negligently commits such an infringement shall be obliged to make good the damage arising from it. …’

13. Paragraph 97a of the Law on copyright and related rights in force at the time when the formal notice was issued in 2010 provided:

‘1. Before instituting judicial proceedings for a prohibitory injunction, the injured party shall give formal notice to the infringer, allowing him an opportunity to settle the dispute by giving an undertaking to refrain from further commission of the infringement, coupled with an appropriate penalty. Provided that the formal notice is justified, reimbursement of the costs necessarily so incurred may be sought.

2. In straightforward cases involving only a minor infringement not committed in the course of trade, reimbursement of the costs incurred in connection with the instruction of a lawyer for the purposes of a first formal notice shall be limited to EUR 100.’

14. Paragraph 97a of the Law on copyright and related rights in the version currently in force provides:

‘1. Before instituting judicial proceedings for a prohibitory injunction, the injured party shall give formal notice to the infringer, allowing him an opportunity to settle the dispute by giving an undertaking to refrain from further commission of the infringement, coupled with an appropriate penalty.

…

3. Provided that the formal notice is justified … reimbursement of the costs necessarily so incurred may be sought. …

…’

3. Case-law

15. It is apparent from the order for reference that, in German law, liability for infringements of copyright and related rights may arise either directly (‘Täterhaftung’) or indirectly (‘Störerhaftung’).

16. Paragraph 97 of the Law on copyright and related rights has been interpreted by German courts as meaning that liability for an infringement may be incurred by a person who, without being the author of the infringement or complicit in it, contributes to the infringement in some way or other, either deliberately or with a sufficient degree of causation (‘Störer’).

9 — Law of 9 September 1965 (BGBl. I, p. 1273), as amended by the Law of 1 October 2013 (BGBl. I, p. 3728).

17. In this connection, the Bundesgerichtshof (Federal Court of Justice) held, in its judgment of 12 May 2010 in *Sommer unseres Lebens* (I ZR 121/08), that a private person operating a Wi-Fi network with Internet access may be regarded as an indirect infringer ('Störer') where he has failed to make his network secure by means of a password and thus enabled a third party to infringe a copyright or related right. According to that judgment, it is reasonable for such a network operator to take measures to secure the network, such as a system for identification by means of a password.

III – **The dispute in the main proceedings**

18. The applicant in the main proceedings operates a business selling and renting lighting and sound systems for various events.

19. He is the owner of an Internet connection which he uses via a Wi-Fi network. On 4 September 2010, a musical work was unlawfully offered for downloading via that Internet connection.

20. Sony Music is a phonogram producer and the holder of the rights in that musical work. By letter of 29 October 2010, Sony Music gave Mr Mc Fadden formal notice concerning the infringement of its rights.

21. As is apparent from the order for reference, Mr Mc Fadden argues in this connection that, in the course of his business, he operated a Wi-Fi network, accessible to any user, over which he exercised no control. He deliberately did not password-protect that network so as to give the public access to the Internet. Mr Mc Fadden asserts that he did not commit the infringement alleged, but does not rule out the possibility that it was committed by one of the users of his network.

22. Following the formal notice, Mr Mc Fadden brought before the referring court an action for a negative declaration ('negative Feststellungsklage'). Sony Music brought a counterclaim, seeking an injunction and damages.

23. By judgment of 16 January 2014, given in default of appearance, the referring court dismissed Mr Mc Fadden's application and upheld the counterclaim, granting an injunction against Mr Mc Fadden on the ground of his directly liability for the infringement at issue and ordering him to pay damages, the costs of the formal notice, and costs.

24. Mr Mc Fadden brought an appeal against that judgment in default. In particular, he has argued that he cannot be held liable by reason of the provisions of German law transposing Article 12(1) of Directive 2000/31.

25. In the appeal, Sony Music asks the court to uphold the default judgment and, in the alternative, to issue an injunction and order Mr Mc Fadden to pay damages and the costs of the formal notice on the ground of his indirect liability ('Störerhaftung').

26. The referring court states that, at this stage, it does not believe that Mr Mc Fadden is directly liable, but is minded to reach a finding of indirect liability ('Störerhaftung') on the ground that his Wi-Fi network had not been made secure.

27. In this connection, the referring court states that it is inclined to apply, by analogy, the Bundesgerichtshof's ruling of 12 May 2010 in *Sommer unseres Lebens* (I ZR 121/08), taking the view that that judgment, which concerned private persons, should apply *a fortiori* in the case of a professional person operating a Wi-Fi network that is accessible to the public. According to the

referring court, such a finding of liability on that ground would not, however, be possible if the facts of the dispute in the main proceedings fell within the scope of application of Article 12(1) of Directive 2000/31, transposed into German law by Paragraph 8(1) of the Law on electronic media of 26 February 2007, as amended by the Law of 31 March 2010.

IV – **The questions referred for a preliminary ruling and the procedure before the Court**

28. It was in those circumstances that the Landgericht München I (Regional Court, Munich I) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) Is … Article 12(1) of Directive [2000/31], read together with Article 2(a) of [that directive] and Article 1(2) of Directive [98/34], as amended by Directive [98/48] to be interpreted as meaning that the expression ‘normally provided for remuneration’ means that the national court must establish whether

(a) the person specifically concerned, who claims the status of service provider, normally provides this specific service for remuneration, or

(b) there are on the market any persons at all who provide this service or similar services for remuneration, or

(c) the majority of these or similar services are provided for remuneration?

(2) Is … Article 12(1) of Directive [2000/31] to be interpreted as meaning that the expression ‘provision of access to a communication network’ means that the only criterion for provision in conformity with the directive is that access to a communication network (for example, the Internet) should be successfully provided?

(3) Is … Article 12(1) of Directive [2000/31], read together with Article 2(b) of [that directive] to be interpreted as meaning that, for the purposes of ‘provision’ within the meaning of Article 2(b) … it is sufficient for the information society service to be made available, that being, in this case, the making available of an open-access WLAN, or is ‘active promotion’, for example, also necessary?

(4) Is … Article 12(1) of Directive [2000/31] to be interpreted as meaning that the expression ‘not liable for the information transmitted’ precludes as a matter of principle, or in any event in relation to a first established copyright infringement, any claims for injunctive relief, damages or the payment of the costs of giving formal notice or court costs which a person affected by a copyright infringement might make against the access provider?

(5) Is … Article 12(1) of Directive [2000/31], read together with Article 12(3) of [that directive] to be interpreted as meaning that the Member States may not permit a national court, in substantive proceedings, to make an order requiring an access provider to refrain in future from enabling third parties to make a particular copyright-protected work available for electronic retrieval from an online exchange platform via a specific Internet connection?

(6) Is … Article 12(1) of Directive [2000/31] to be interpreted as meaning that, in circumstances such as those in the main proceedings, the provision contained in Article 14(1)(b) of [that directive] is to be applied *mutatis mutandis* to an application for a prohibitory injunction?

(7) Is … Article 12(1) of Directive [2000/31], read together with Article 2(b) of [that directive] to be interpreted as meaning that the requirements applicable to a service provider are limited to the condition that a service provider is any natural or legal person providing an information society service?

(8) If Question 7 is answered in the negative, what additional requirements must be imposed on a service provider for the purposes of interpreting Article 2(b) of Directive [2000/31]?

(9) (a) Is … Article 12(1) of Directive [2000/31], taking into account the existing protection of intellectual property as a fundamental right forming part of the right to property (Article 17(2) of the Charter of Fundamental Rights of the European Union ('the Charter')) and the provisions of [Directives 2001/29 and 2004/48], and taking into account the freedom of information and the fundamental right under EU law of the freedom to conduct business (Article 16 of the [Charter]), to be interpreted as not precluding a national court from deciding, in substantive proceedings in which an access provider is ordered, on pain of payment of a fine, to refrain in the future from enabling third parties to make a particular copyright-protected work or parts thereof available for electronic retrieval from an online exchange platform via a specific Internet connection, that it may be left to the access provider to determine what specific technical measures to take in order to comply with that order?

(b) Does this also apply where the access provider is in fact able to comply with the court's injunction only by terminating or password-protecting the Internet connection or examining all communications passing through it in order to ascertain whether the copyright-protected work in question is unlawfully transmitted again, and that fact is apparent from the outset rather than coming to light only in the course of enforcement or penalty proceedings?'

29. The order for reference, dated 18 September 2014, was received at the Registry of the Court of Justice on 3 November 2014. Written observations were submitted by the parties to the main proceedings, the Polish Government and the European Commission.

30. The parties to the main proceedings and the Commission also attended the hearing on 9 December 2015.

V – **Assessment**

31. The questions referred for a preliminary ruling may be grouped together by reference to the two specific issues they raise.

32. First, the referring court seeks, by questions 1 to 3, to establish whether a professional person, such as the appellant in the main proceedings, who, in the course of business, operates a free, public Wi-Fi network, falls within the scope of application of Article 12 of Directive 2000/31.

33. Secondly, in the event that Article 12 of Directive 2000/31 does apply, the referring court asks this Court, in questions 4 to 9, to interpret the limitation of the liability of intermediary service providers laid down in that provision.

A – *The scope of Article 12 of Directive 2000/31*

34. By its first three questions, the national court asks, in essence, whether a professional person who, in the course of business, operates a free, public Wi-Fi network, is to be regarded as the provider of a service consisting in the provision of access to a communication network, within the meaning of Article 12(1) of Directive 2000/31.

35. The national court raises two concerns in this regard: first, the economic nature of the service in question and, secondly, the fact that the operator of the Wi-Fi network may simply make the network available to the public, without specifically holding himself out to potential users as a service provider.

1. A service 'of an economic nature' (first issue)

36. In so far as concerns the concept of 'services', Article 2(a) of Directive 2000/31 refers to Article 1(2) of Directive 98/34,[10] which refers to 'any information society service, that is to say, any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services'.

37. The condition that the service in question must 'normally' be 'provided for remuneration' is taken from Article 57 TFEU and reflects the principle, which is well established in the case-law, that only services of an economic nature are covered by the provisions of the FEU Treaty relating to the internal market.[11]

38. According to settled case-law, the concepts of economic activity and of the provision of services in the context of the internal market must be given a broad interpretation.[12]

39. In this connection, the national court queries the economic nature of the service at issue, whilst expressing the view that the making available of access to the Internet, even if not against payment, is an economic activity, since the provision of Internet access is normally a service that is provided for remuneration.

40. I would observe that, as the national court and the majority of the parties and interested parties, with the exception of Sony Music, have contended, the provision of Internet access is normally an economic activity. That conclusion applies equally to the provision of Internet access via a Wi-Fi network.

41. In my view, where, in the course of his business, an economic operator offers Internet access to the public, even if not against payment, he is providing a service of an economic nature, even if it is merely ancillary to his principal activity.

42. The very operation of a Wi-Fi network that is accessible to the public, in connection with another economic activity, necessarily takes place in an economic context.

10 — As amended by Directive 98/48. That definition is taken up in Article 1(1)(b) of Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services (OJ 2015 L 241, p. 1), which repealed Directive 98/34.

11 — Judgments in *Smits and Peerbooms* (C-157/99, EU:C:2001:404, paragraph 58) and *Humbel and Edel* (263/86, EU:C:1988:451, paragraph 17).

12 — See the judgment in *Deliège* (C-51/96 and C-191/97, EU:C:2000:199, paragraph 52 and the case-law cited).

43. Access to the Internet may constitute a form of marketing designed to attract customers and gain their loyalty. In so far as it contributes to the carrying on of the principal activity, the fact that the service provider may not be directly remunerated by recipients of the service is not decisive. In accordance with consistent case-law, the requirement for pecuniary consideration laid down in Article 57 TFEU does not mean that the service must be paid for directly by those who benefit from it. [13]

44. Sony Music's argument, by which it disputes the fact that the service in question is 'normally' provided for consideration, fails to convince me.

45. Admittedly, Internet access is often provided, in a hotel or bar, free of charge. However, that fact in no way contradicts the conclusion that the service in question is matched with a pecuniary consideration that is incorporated into the price of other services.

46. I see no reason why the provision of Internet access should be viewed differently when it is offered in connection with other economic activities.

47. In the present case, Mr Mc Fadden has stated that he operated the Wi-Fi network, initially under the name 'mcfadden.de', in order to draw the attention of customers of near-by shops and of passers-by to his business specialising in lighting and sound systems and to encourage them to visit his shop or his website.

48. In my opinion, the provision of Internet access in such circumstances takes place in an economic context, even if it is offered free of charge.

49. Moreover, even though it appears from the order for reference that, at around the time of the relevant facts in the main proceedings, Mr Mc Fadden probably changed the name of his Wi-Fi network to 'Freiheitstattangst.de' (freedom, not fear) so as to show his support for the fight against State surveillance of the Internet, that fact in itself has no bearing on the definition of the activity in question as 'economic'. The change in the name of the Wi-Fi network does not seem to me to be decisive, since, in any event, the network was operated from Mr Mc Fadden's business premises.

50. Furthermore, given that Mr Mc Fadden operated the publicly accessible Wi-Fi network in the context of his business, there is no need to consider whether the scope of Directive 2000/31 might also extend to the operation of such a network in circumstances where there is no other economic context. [14]

13 — See, to that effect, regarding a service consisting in the provision of online information which is not paid for but is financed from revenue generated from advertisements posted on the Internet, the judgment in *Papasavvas* (C-291/13, EU:C:2014:2209, paragraphs 29 and 30 and the case-law cited). It is apparent from the preparatory work for Directive 2000/31 that services which are not paid for by those who receive them are also covered if they are provided in the context of an economic activity (see the Proposal for a European Parliament and Council Directive on certain legal aspects of electronic commerce in the internal market (COM(1998) 586 final) (OJ 1999 C 30, p. 4, in particular p. 15)).

14 — The concept of 'economic activity', for the purposes of the FEU Treaty provisions relating to the internal market, calls for a case-by-case analysis in which the context in which the activity in question is carried on must be taken into account. See, to that effect, the judgments in *Factortame and Others* (C-221/89, EU:C:1991:320, paragraphs 20 to 22) and *International Transport Workers' Federation and Finnish Seamen's Union* (C-438/05, EU:C:2007:772, paragraph 70).

2. The service of 'providing' access to a network (second issue)

51. In accordance with Article 12(1) of Directive 2000/31, the concept of 'information society service' includes any economic activity that consists of making a communication network available, which in turn includes the operation of a public Wi-Fi network with Internet access.[15]

52. In my opinion, the term 'to provide' simply means that the activity in question enables the public to have access to a network and takes place in an economic context.

53. Indeed, the classification of a given activity as a 'service' is an objective matter. It is therefore not necessary, to my mind, for the person in question to hold himself out to the public as a service provider or that he should expressly promote his activity to potential customers.

54. Moreover, in accordance with the case-law relating to Article 8(3) of Directive 2001/29, the provision of an intermediary service must be understood in the broad sense and is not conditional upon the existence of a contractual bond between the service provider and users.[16] I would observe that the question of whether or not a contractual relationship does exist is a matter purely of national law.

55. Nevertheless, it is clear from the seventh question referred for a preliminary ruling that the national court entertains doubts regarding that last point, for the reason that the German version of Article 2(b) of Directive 2000/31, which defines 'service provider' ('Diensteanbieter'), refers to a person who 'provides' a service using a German word ('anbietet') that might be understood as implying the active promotion of a service to customers.

56. However, such a reading of the expression 'to provide [a service]', in addition to not being supported by the other language versions,[17] does not seem to me to be justified by the case-law relating to Article 56 TFEU, which assumes a broad interpretation of the concept of services and does not include any requirement of active promotion.[18]

3. Interim conclusion

57. In light of the foregoing, I consider that Articles 2(a) and (b) and 12(1) of Directive 2000/31 must be interpreted as applying to a person who, as an adjunct to his principal economic activity, operates a Wi-Fi network with an Internet connection that is accessible to the public free of charge.

B – *Interpretation of Article 12 of Directive 2000/31*

1. Preliminary remarks

58. I should like to organise the rather complex issue raised by questions 4 to 9.

59. Questions 4 and 5, which I propose to examine together, concern the delimitation of the liability of a provider of mere conduit services which results from Article 12(1) and (3) of Directive 2000/31.

15 — As the Commission observes, a Wi-Fi network with an Internet connection is an 'electronic communications network' within the meaning of Article 2(a) of Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) (OJ 2002 L 108, p. 33), as amended by Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009 (OJ 2009 L 337, p. 37).

16 — See, to that effect, the judgment in *UPC Telekabel Wien* (C-314/12, EU:C:2014:192, paragraphs 34 and 35).

17 — See, inter alia, the Spanish version ('suministre [un servicio]'), the English version ('providing [a service]', the Lithuanian version ('teikiantis [paslaugą]') and the Polish version ('świadczy [usługę]')).

18 — See point 38 of this Opinion.

60. The national court questions, in particular, whether it is permissible to penalise an intermediary service provider by way of an injunction and an award of damages, pre-litigation costs and court costs in the event of a copyright infringement committed by a third party. It also seeks to ascertain whether a national court is entitled to order an intermediary service provider to refrain from doing something which would enable a third party to commit the infringement in question.

61. In the event that it is not possible to envisage any effective action against an intermediary service provider, the national court asks whether it might be possible to limit the scope of Article 12 of Directive 2000/31 by applying, by analogy, the requirement laid down in Article 14(1)(b) of that directive (question 6) or by means of other unwritten requirements (questions 7 and 8).

62. Question 9 concerns the limits on any injunction that may be granted against an intermediary service provider. In order to provide a useful answer to that question, it will be necessary to refer not only to Articles 12 and 15 of Directive 2000/31, but also to the provisions on injunctive relief which are set out in Directives 2001/29 and 2004/48 with reference to the protection of intellectual property and to the fundamental rights which inform the balance that is established by all of those provisions as a whole.

2. The extent of the liability of an intermediary service provider (questions 4 and 5)

63. Article 12(1) of Directive 2000/31 limits the liability of providers of mere conduit services for unlawful acts committed by a third party with respect to the information transmitted.

64. As is apparent from the preparatory work for that legislative act, the limitation of liability in question extends, horizontally, to all forms of liability for unlawful acts of any kind, and thus to liability under criminal law, administrative law and civil law, and also to direct liability and secondary liability for acts committed by third parties. [19]

65. In accordance with Article 12(1)(a) to (c), this limitation of liability takes effect provided that three cumulative conditions are fulfilled: the provider of the mere conduit service must not have initiated the transmission, must not have selected the recipient of the transmission and must not have selected or modified the information contained in the transmission.

66. According to recital 42 of Directive 2000/31, the exemptions from liability solely cover activities of a merely technical, automatic and passive nature, which implies that the service provider has neither knowledge of nor control over the information that is transmitted or stored.

67. The questions referred by the national court are based on the assumption that those conditions are fulfilled in the present case.

68. I would observe that it is clear from a combined reading of paragraphs 1 and 3 of Article 12 of Directive 2000/31 that the provisions in question limit the liability of an intermediary service provider with respect to the information transmitted, but do not shield him from injunctions.

69. Equally, according to recital 45 of Directive 2000/31, the limitations of the liability of intermediary service providers do not affect the possibility of injunctive relief, which may, in particular, consist of orders by courts or administrative authorities requiring the termination or prevention of any infringement.

19 — See the proposal for a directive COM(1998) 586 final, p. 27.

70. Article 12 of Directive 2000/31, read as a whole, therefore makes a distinction between actions for damages and injunctions which must be taken into account when it comes to identifying the delimitation of liability prescribed in that provision.

71. In the present case, the national court asks whether it is permissible to penalise an intermediary service provider, on grounds of indirect liability ('Störerhaftung'), by way of:

— an injunction, non-compliance with which is punishable by a fine, designed to prevent third parties from infringing the rights in a specific protected work;

— an award of damages;

— an award of the costs of giving formal notice, that is to say, the pre-litigation costs relating to the formal notice which is a necessary pre-condition of bringing a legal action for an injunction, and

— an award of the court costs incurred in an action for an injunction and damages.

72. The national court itself considers that, pursuant to Article 12(1) of Directive 2000/31, Mr Mc Fadden cannot be held liable toward Sony Music in so far as any of the abovementioned penalties are concerned because he is not responsible for the information transmitted by third parties. In this connection I shall analyse, first of all, whether it is permissible to make pecuniary awards, those being, in this case, an award of damages, pre-litigation costs and court costs and, secondly, whether it is permissible to grant an injunction non-compliance with which is punishable by a fine.

a) Claims for damages and other pecuniary claims

73. I would recall that Article 12(1) of Directive 2000/31 limits the civil liability of intermediary service providers and precludes actions for damages based on any form of civil liability. [20]

74. In my opinion, that limitation of liability extends not only to claims for compensation, but also to any other pecuniary claim that entails a finding of liability for copyright infringement with respect to the information transmitted, such as a claim for the reimbursement of pre-litigation costs or court costs.

75. In this connection, I am not convinced of the relevance of Sony Music's argument that it would be fair if the 'person who has committed the infringement' were required to bear the costs resulting from it.

76. Pursuant to Article 12 of Directive 2000/31, a provider of mere conduit services cannot be held liable for a copyright infringement committed as a result of the information transmitted. Therefore, he may not be ordered to pay pre-litigation costs or court costs incurred in connection with that infringement, which cannot be imputed to him.

77. I would also observe that the making of an order to pay the pre-litigation costs or court costs relating to such an infringement could compromise the objective pursued by Article 12 of Directive 2000/31 of ensuring that no undue restrictions are imposed on the activities to which it relates. An order to pay pre-litigation costs or court costs could potentially have the same punitive effect as an order to pay damages and could in the same way hinder the development of the intermediary services in question.

20 — See the proposal for a directive COM(1998) 586 final, p. 28.

78. Admittedly, Article 12(3) of Directive 2000/31 provides for the possibility of a court or administrative authority imposing certain obligations upon an intermediary service provider following the commission of an infringement, in particular by means of an injunction.

79. However, given the provisions of Article 12(1) of that directive, a judicial or administrative decision imposing certain obligations on a service provider may not be based on a finding of the latter's liability. An intermediary service provider cannot be held liable for failing to take the initiative to prevent a possible infringement or for failing to act as a *bonus pater familias*. He may incur liability only after a specific obligation contemplated by Article 12(3) of Directive 2000/31 has been imposed on him.

80. In the present case, in my view, Article 12(1) of Directive 2000/31 therefore precludes the making of orders against intermediary service providers not only for the payment of damages, but also for the payment of the costs of giving formal notice or other costs relating to copyright infringements committed by third parties as a result of the information transmitted.

b) Injunctions

81. The obligation for Member States to make provision for injunctions against intermediary service providers arises under Article 8(3) of Directive 2001/29 and under the substantially identical provisions of the third sentence of Article 11 of Directive 2004/48.

82. The possibility of granting an injunction against an intermediary who provides Internet access and whose services are used by a third party to infringe a copyright or a related right is also clear from the case-law relating to those two directives.[21]

83. Directive 2001/29 is, as stated in recital 16 thereof, without prejudice to the provisions of Directive 2000/31. Notwithstanding, pursuant to Article 12(3) of Directive 2000/31, the limitation of the liability of an intermediary service provider does not in turn affect the possibility of bringing an action for a prohibitory injunction aimed at requiring the intermediary to bring an infringement to an end or to prevent an infringement.[22]

84. It follows that Article 12(1) and (3) of Directive 2000/31 does not preclude the granting of an injunction against a provider of mere conduit services.

85. Moreover, the conditions and detailed procedures relating to such injunctions are matters for national law.[23]

86. I would nevertheless reiterate that, in accordance with Article 12(1) of Directive 2000/31, the grant of an injunction cannot entail a finding of civil liability against an intermediary service provider of any kind whatsoever for infringement of copyright resulting from the information transmitted.

87. Moreover, Article 12 of that directive, read together with other relevant provisions of EU law, prescribes certain boundaries for such injunctions, which I shall examine in the context of my analysis of the ninth question referred for a preliminary ruling.

21 — Judgments in *Scarlet Extended* (C-70/10, EU:C:2011:771, paragraph 31), *SABAM* (C-360/10, EU:C:2012:85, paragraph 29) and *UPC Telekabel Wien* (C-314/12, EU:C:2014:192, paragraph 26).

22 — See also the proposal for a directive COM(1998) 586 final, p. 28.

23 — See recital 46 of Directive 2000/31 and recital 59 of Directive 2001/29, and the judgment in *UPC Telekabel Wien* (C-314/12, EU:C:2014:192, paragraphs 43 and 44).

c) Penalties attaching to an injunction

88. In order to provide a useful answer to the questions referred, it is still necessary to establish whether Article 12 of Directive 2000/31 limits the liability of intermediary service providers with regard to penalties for non-compliance with an injunction.

89. It is apparent from the order for reference that the prohibitory injunction which the court envisages in the main proceedings would be backed by a fine of up to EUR 250 000 which could be converted into a custodial sentence. That penalty could only be imposed in the event of failure to comply with the injunction.

90. I am of the view that, whilst Article 12(1) of Directive 2000/31 precludes any finding of liability against an intermediary service provider in connection with an infringement of copyright resulting from the information transmitted, it does not limit a service provider’s liability for non-compliance with an injunction granted in connection with such an infringement.

91. Given that that is a ground of accessory liability ancillary to the action for an injunction and that its purpose is purely to ensure the effectiveness of the injunction, it is covered by Article 12(3) of Directive 2000/31, which provides that courts are entitled to require intermediary service providers to bring an infringement to an end or to prevent an infringement.

d) Interim conclusion

92. In light of the foregoing, I consider that Article 12(1) and (3) of Directive 2000/31 precludes the making of any order against a provider of mere conduit services that entails a finding of civil liability against that service provider. Article 12 therefore precludes the making of orders against intermediary service providers not only for the payment of damages, but also for the payment of the costs of giving formal notice or other costs relating to copyright infringements committed by third parties as a result of the information transmitted. It does not preclude the granting of an injunction, non-compliance with which is punishable by a fine.

3. Possible additional requirements relating to the limitation of liability (questions 6 to 8)

93. I would observe that, with questions 6, 7 and 8, the national court appears to proceed on the premiss that Article 12 of Directive 2000/31 excludes any action being taken against an intermediary service provider. Consequently, it asks about the compatibility of such a situation with the fair balance between the various interests at stake to which recital 41 of the directive refers.

94. That therefore appears to be the reason for which the national court asks this Court whether it is permissible to limit the scope of Article 12 of Directive 2000/31 by means of the application, by analogy, of the condition referred to in Article 14(1)(b) of Directive 2000/31 (question 6) or by the addition of other conditions not stipulated in that directive (questions 7 and 8).

95. I am not sure that those questions will remain relevant if the Court decides, as I suggest, that Article 12 of Directive 2000/31 does, in principle, permit the grant of an injunction against an intermediary service provider.

96. In any event, I consider that these questions, in so far as they envisage the possibility of limiting the application of Article 12 of Directive 2000/31 by means of certain additional requirements, should immediately be answered in the negative.

97. Article 12(1)(a) to (c) of Directive 2000/31 makes the limitation of the liability of a provider of mere conduit services subject to certain conditions that are cumulative and also exhaustive.[24] The addition of further conditions for the application of that provision seems to me to be ruled out by its express terms.

98. As regards question 6, which refers to the possibility of applying, by analogy, the condition mentioned in Article 14(1)(b) of Directive 2000/31, I would observe that that provision stipulates that the provider of a hosting service is not liable for the information stored, provided that he acts expeditiously to remove or to disable access to that information as soon as he becomes aware of illegal activity.

99. I would reiterate in this connection that Articles 12 to 14 of Directive 2000/31 relate to three distinct categories of activity and make the limitation of the liability of providers of the relevant services subject to different conditions, account being taken of the nature of each of the activities in turn. Since the application of those conditions by analogy would have the effect of making the conditions for liability in relation to each of those activities — which the legislature clearly differentiated — the same, it would be incompatible with the general scheme of those provisions.

100. That is especially true in the case in the main proceedings. As the Commission observes, the ‘mere conduit’ activity referred to in Article 2000/31, which consists purely in the transmission of information, is different in nature from the activity referred to in Article 14 of the directive, which consists in the storage of information provided by a recipient of the service. The latter activity implies a certain degree of involvement in the storage of the information and thus a certain degree of control over it, which explains the hypothesis referred to in Article 14(1)(b) of Directive 2000/31, which contemplates the possibility that the provider of the storage service may learn of circumstances that indicate an unlawful activity, whereupon he must, of his own initiative, take action.

101. As regards questions 7 and 8, the national court wonders whether the conditions laid down in Article 12(1) of Directive 2000/31 and those flowing from the definitions set out in Article 2(a), (b) and (d) of the directive may be supplemented by other, unwritten requirements.

102. It appears from the order for reference that one such additional requirement might be, for example, the existence of a close relationship between the principal economic activity and the provision of free Internet access in the context of that principal activity.

103. I would repeat that it is clear from the wording of Article 12(1) of Directive 2000/31 that the three conditions for the application of that provision are exhaustive. In so far as the present questions concern the interpretation of the concepts of services and economic activity, I would refer to my analysis relating to the first three questions.[25]

104. In the light of those observations, I consider that the conditions referred to in Article 12(1)(a) to (c) of Directive 2000/31 are exhaustive and leave no scope for the application, by analogy, of the condition laid down in Article 14(1)(b) of that directive or for the imposition of any other additional requirements.

24 — See the proposal for a directive COM(1998) 586 final. p. 28.

25 — See point 55 of this Opinion.

4. The scope of injunctions (question 9)

105. By its ninth question, the national court asks this Court whether Article 12(1) of Directive 2000/31, taking into account other provisions of EU law relevant to its application, precludes a national court from ordering an intermediary service provider to refrain in the future from enabling third parties to infringe the rights in a particular protected work via the service provider's Internet connection where the court leaves it to the service provider to determine what specific technical measures should be taken (question 9(a)). It also asks whether such an injunction is consistent with the provision in question where it is established from the outset that the addressee is in fact able to comply with the court's injunction only by terminating or password-protecting the Internet connection or examining all communications passing through it (question 9(b)).

a) Limits on injunctions

106. As I made clear in my analysis of questions 4 and 5, Article 12 of Directive 2000/31 does not, in principle, preclude the granting of injunctions, such as those referred to in Article 8(3) of Directive 2001/29 and the third sentence of Article 11 of Directive 2004/48, against providers of mere conduit services.

107. When adopting such a measure, however, a national court must nevertheless have regard to the limitations which flow from those provisions.

108. The measures provided for in Article 8(3) of Directive 2001/29 and the third sentence of Article 11 of Directive 2004/48 must, having regard to Article 3 of the latter directive, be fair and equitable and must not be unnecessarily complicated or costly or entail unreasonable time-limits or unwarranted delays. They must also be effective, proportionate and dissuasive and be applied in such a manner as to avoid the creation of barriers to legitimate trade and to provide for safeguards against their abuse. [26] When granting a court injunction, it is also necessary to weigh the interests of the parties concerned. [27]

109. Moreover, since the application of Directive 2001/29 must not affect the application of Directive 2000/31, when granting an injunction against a provider of mere conduit services, a national court must have regard to the limitations flowing from the latter directive. [28]

110. In this connection, it is clear from Articles 12(3) and 15(1) of Directive 2000/31 that the obligations imposed on such a service provider in the context of injunctive relief must be aimed at bringing an infringement to an end or preventing a specific infringement and may not include a general observation to monitor.

111. When those provisions are applied, account must also be taken of the principles and fundamental rights that are protected under EU law, in particular, freedom of expression and information and the freedom to conduct business, enshrined in Articles 11 and 16 of the Charter respectively. [29]

26 — See, to that effect, the judgments in *L'Oréal and Others* (C-324/09, EU:C:2011:474, paragraph 139) and *Scarlet Extended* (C-70/10, EU:C:2011:771, paragraph 36).

27 — See, with regard to this principle, Jakubecki, A., '*Dochodzenie roszczeń z zakresu prawa własności przemysłowej*', in System prawa prywatnego (The System of Private Law), Volume 14b, Prawo własności przemysłowej (Intellectual Property Law), Warsaw, CH Beck, Instytut Nauk Prawnych PAN, 2012, p. 1651.

28 — Judgment in *Scarlet Extended* (C-70/10, EU:C:2011:771, paragraph 34).

29 — See, on this point, recitals 1 and 9 of Directive 2000/31.

112. Since those fundamental rights are restricted in order to give effect to the right to the protection of intellectual property enshrined in Article 17(2) of the Charter, it is necessary when restricting them to strike a fair balance between the fundamental interests involved.[30]

113. The mechanisms which make it possible to strike that balance are contained in Directives 2001/29 and 2000/31 themselves, in that they provide for certain limits on measures taken against intermediaries. They must also flow from the application of national law,[31] since it is national law that determines the specific detailed procedures which relate to actions for injunctive relief.

114. In this connection, the authorities and courts of the Member States must not only interpret their national law in a manner consistent with the directives in question, but also make sure that they do not rely on an interpretation of those directives which would be in conflict with relevant fundamental rights.[32]

115. In the light of those considerations, national courts must, when issuing an injunction against an intermediary service provider, ensure:

— that the measures in question comply with Article 3 of Directive 2004/48 and, in particular, are effective, proportionate and dissuasive,

— that, in accordance with Articles 12(3) and 15(1) of Directive 2000/31, they are aimed at bringing a specific infringement to an end or preventing a specific infringement and do not entail a general obligation to monitor,

— that the application of the provisions mentioned, and of other detailed procedures laid down in national law, achieves a fair balance between the relevant fundamental rights, in particular, those protected by Articles 11 and 16 and by Article 17(2) of the Charter.

b) The compatibility of injunctions formulated in general terms

116. The national court asks whether Article 12 of Directive 2000/31 precludes injunctions which contain prohibitions formulated in general terms and leave it to the addressee of the injunction to determine what specific measures should be adopted.

117. The measure envisaged in the main proceedings consists in an order requiring the intermediary service provider to refrain in the future from enabling third parties to make a particular protected work available for electronic retrieval from an online exchange platform via a specific Internet connection. The question of what technical measures are to be taken remains open.

118. I would observe that a prohibitory injunction that is formulated in general terms and does not prescribe specific measures is potentially a source of significant legal uncertainty for the addressee thereof. The fact that the addressee will be entitled, in any proceedings concerning alleged failure to comply with such an injunction, to show that he has taken all reasonable measures does not entirely remove that uncertainty.

119. Moreover, given that determining what measures it is appropriate to adopt entails striking a fair balance between the various fundamental rights involved, that task ought to be undertaken by a court, rather than left entirely to the addressee of an injunction.[33]

30 — Judgment in *UPC Telekabel Wien* (C-314/12, EU:C:2014:192, paragraph 47).

31 — See, to that effect, the judgment in *Promusicae* (C-275/06, EU:C:2008:54, paragraph 66).

32 — Judgments in *Promusicae* (C-275/06, EU:C:2008:54, paragraph 68) and *UPC Telekabel Wien* (C-314/12, EU:C:2014:192, paragraph 46).

33 — See, on this point, the Opinion of Advocate General Cruz Villalón in *UPC Telekabel Wien* (C-314/12, EU:C:2013:781, points 87 to 90).

120. Admittedly, the Court has already held that an injunction addressed to a provider of Internet access which leaves it to the addressee to determine what specific measures should be taken is, in principle, consistent with EU law.[34]

121. That solution was based, in particular, on the consideration that an injunction formulated in general terms had the advantage of enabling the addressee to decide which measures were best adapted to his resources and abilities and compatible with his other legal obligations.[35]

122. However, it does not seem to me that that reasoning can be applied in a case, such as the case in the main proceedings, in which the very existence of appropriate measures is the subject of debate.

123. The possibility of choosing which measures are most appropriate can, in certain situations, be compatible with the interests of the addressee of an injunction, but it is not so where that choice is the source of legal uncertainty. In such circumstances, leaving it entirely to the addressee to choose the most appropriate measures would upset the balance between the rights and interests involved.

124. I therefore consider that, whilst Article 12(3) of Directive 2000/31 and Article 8(3) of Directive 2001/29 do not, in principle, preclude the issuing of an injunction which leaves it to the addressee thereof to decide what specific measures should be taken, it nevertheless falls to the national court hearing an application for an injunction to ensure that appropriate measures do indeed exist that are consistent with the restrictions imposed by EU law.

c) The consistency with EU law of the measures contemplated in the present case

125. Next, the national court questions whether the three measures referred to in question 9(b), namely the termination of the Internet connection, the password-protection of the Internet connection and the examination of all communications passing through that connection, may be regarded as consistent with Directive 2000/31.

126. While the application of the restrictions flowing from Directives 2001/29 and 2000/31 and the requirement for a fair balance to be struck between the various fundamental rights involved are, for the specific case, matters for the national court, the Court of Justice may nevertheless provide useful guidance in that regard.

127. In its judgment in *Scarlet Extended*,[36] the Court held that the relevant provisions of Directives 2001/29 and 2000/31, having regard to the applicable fundamental rights, precluded the issuing of an injunction against a provider of Internet access which required it to install a system for filtering all electronic communications that applied to all its customers, as a preventive measure, exclusively at its own expense and for an unlimited period.

128. In its judgment in *SABAM*,[37] the Court held that those provisions of EU law precluded the issuing of a similar injunction against a hosting service provider.

129. In its judgment in *UPC Telekabel Wien*,[38] the Court held that those provisions did not, in certain circumstances, preclude the adoption of a measure requiring a provider of Internet access to block users' access to a specific website.

34 — Judgment in *UPC Telekabel Wien* (C-314/12, EU:C:2014:192, paragraph 64).

35 — Judgment in *UPC Telekabel Wien* (C-314/12, EU:C:2014:192, paragraph 52).

36 — C-70/10, EU:C:2011:771.

37 — C-360/10, EU:C:2012:85.

38 — C-314/12, EU:C:2014:192.

130. I consider that, in the present case, the inconsistency with EU law of the first and third hypothetical measures mentioned by the national court is immediately evident.

131. Indeed, a measure which requires an Internet connection to be terminated is manifestly incompatible with the need for a fair balance to be struck between the fundamental rights involved, since it compromises the essence of the freedom to conduct business of persons who, if only in ancillary fashion, pursue the economic activity of providing Internet access.[39] Moreover, such a measure would be contrary to Article 3 of Directive 2004/48, pursuant to which a court issuing an injunction must ensure that the measures imposed do not create a barrier to legitimate trade.[40]

132. In so far as concerns a measure requiring the owner of an Internet connection to examine all communications transmitted through that connection, that would clearly conflict with the prohibition on imposing a general monitoring obligation laid down in Article 15(1) of Directive 2000/31. Indeed, in order to constitute a monitoring obligation 'in a specific case',[41] such as is permitted under Article 15(1), the measure in question must be limited in terms of the subject and duration of the monitoring, and that would not be the case with a measure that entailed the examination of all communications passing through a network.[42]

133. The debate thus focusses on the second hypothesis, that is to say, whether the operator of a Wi-Fi network can be obliged, by way of injunction, to make access to his network secure.

d) The compatibility of an obligation to make Wi-Fi networks secure

134. The matter here at issue forms part of the ongoing debate in several Member States concerning the appropriateness of an obligation to make Wi-Fi networks secure in the interests of protecting intellectual property.[43] That debate is of particular concern to subscribers to Internet access services who make that access available to third parties by offering the public access to the Internet via their Wi-Fi network.

135. It is also one of the issues under discussion in a current legislative procedure in Germany that was initiated in the context of the government's 'Digital Agenda',[44] which is aimed at clarifying the system of liability applicable to operators of public Wi-Fi networks, with a view to making that activity more attractive.[45]

39 — See, *a contrario*, the judgment in *UPC Telekabel Wien* (C-314/12, EU:C:2014:192, paragraphs 50 and 51).

40 — See, to that effect, the judgment in *L'Oréal and Others* (C-324/09, EU:C:2011:474, paragraph 140).

41 — See recital 47 of Directive 2000/31.

42 — In the context of the preparatory work, the Commission cited, as an example of a specific obligation, a measure entailing the monitoring of a specific website for a specified period of time, in order to bring to an end or prevent a particular illegal activity (proposal for a directive COM(1998) 586 final, p. 30). See also, on this point, the Opinion of Advocate General Jääskinen in *L'Oréal and Others* (C-324/09, EU:C:2010:757, point 182).

43 — In addition to the legislative procedure which is underway in Germany, which I refer to below, I would mention the debate surrounding the enactment of the Digital Economy Act in the United Kingdom and the public consultation opened by Ofcom (the telecommunications authority) in 2012 concerning obligations imposed on Internet service providers and, potentially, operators of public Wi-Fi networks (see 'Consultation related to the draft Online Infringement of Copyright Order', section 5.52, at http://stakeholders.ofcom.org.uk/consultations/infringement-notice/). In France, since the adoption of the — extensively debated — Loi No 2009-669, du 12 juin 2009, favorisant la diffusion et la protection de la création sur internet (Law promoting the distribution and protection of creative works on the Internet) (*JORF*, 13 June 2009, p. 9666) and Loi No 2009-1311, du 28 octobre 2009, relative à la protection pénale de la propriété littéraire et artistique sur internet (Law on the protection under criminal law of literary and artistic property on the Internet) (*JORF*, 29 October 2009, p. 18290), Internet subscribers, including operators of Wi-Fi networks, have been required to make their Wi-Fi connections secure in order to avoid incurring liability for infringements by third parties of protected works and objects.

44 — One of the objectives of the German Government's 'Digital Agenda' is to improve the availability of Internet access via Wi-Fi networks (see http://www.bmwi.de/EN/Topics/Technology/digital-agenda.html).

45 — Entwurf eines Zweiten Gesetzes zur Änderung des Telemediengesetzes (Draft second law amending the law on telemedia) (BT-Drs 18/6745). In its opinion on this draft law (BR-Drs 440/15), the Bundesrat proposed the removal of the provision requiring Wi-Fi network operators to take measures to secure their networks.

136. While that debate is centred upon the concept of indirect liability under German law ('Störerhaftung'), the issues raised are potentially of wider significance, given that the national legal systems of certain other Member States also contain instruments under which owners of Internet connections may incur liability as a result of their failure to take appropriate security measures in order to prevent possible infringements by third parties. [46]

137. I would observe that an obligation to make access to such a network secure would potentially meet with a number of objections of a legal nature.

138. First of all, the introduction of a security obligation could potentially undermine the business model of undertakings that offer Internet access as an adjunct to their other services.

139. Indeed, some such undertakings would no longer be inclined to offer that additional service if it necessitated investment and attracted regulatory constraints relating to the securing of the network and the management of users. Furthermore, some users of the service, such as customers of fast-food restaurants or other businesses, would give up using the service if it involved a systematic obligation to identify themselves and enter a password.

140. Secondly, I would observe that imposing an obligation to make a Wi-Fi network secure entails, for persons who operate that network in order to provide Internet access to their customers and to the public, a need to identify users and to retain their data.

141. In this connection, Sony Music states in its written observations, that, in order to be able to impute an infringement to a 'registered user', the operator of a Wi-Fi network would need to store the IP addresses and the external ports through which registered users have established an Internet connection. Identifying users of a Wi-Fi network essentially corresponds to the allocation of IP addresses by an access provider. The operator of the Wi-Fi network could therefore use a computer system, which would not be very costly, according to Sony Music, to enable it to register and identify users.

142. I would observe that obligations to register users and to retain their private data fall within the scope of the regulations governing the activities of telecoms operators and other Internet service providers. The imposition of such administrative constraints seems to me to be clearly disproportionate, however, in the case of persons who offer their customers and potential customers access to the Internet via a Wi-Fi network as an adjunct to their principal activity.

143. Thirdly, although an obligation to make a Wi-Fi network secure that is imposed in a particular injunction is not the same as a general obligation to monitor information or actively to seek facts or circumstances indicating illegal activities, such as is prohibited by Article 15 of Directive 2000/31, any general obligation to identify and register users could nevertheless lead to a system of liability applicable to intermediary service providers that would no longer be consistent with that provision.

144. Indeed, in the context of prosecuting copyright infringements, network security is not an end in itself, but merely a preliminary measure that enables an operator to have a certain degree of control over network activity. However, conferring an active, preventative role on intermediary service providers would be inconsistent with their particular status, which is protected under Directive 2000/31. [47]

46 — See, in French law, Article L. 336-3 of the Intellectual Property Code, which lays down an obligation for Internet subscribers to ensure that their accounts are not accessed in order to infringe protected works and objects.

47 — See Van Eecke, P., 'Online service providers and liability: A plea for a balanced approach' in *Common Market Law Review*, 2011, Vol. 48, pp. 1455 to 1502, especially p. 1501.

145. Fourthly, and lastly, I would observe that the measure at issue would not in itself be effective, and thus its appropriateness and proportionality remain open to question.

146. It must also be observed that, given the ease with which they may be circumvented, security measures are not effective in preventing specific infringements of protected works. As the Commission states, the use of passwords can potentially limit the circle of users, but does not necessarily prevent infringements of protected works. Moreover, as the Polish Government observes, providers of mere conduit services have limited means with which to follow exchanges of peer-to-peer traffic, the monitoring of which calls for the implementation of technically advanced and costly solutions about which there could be serious reservations concerning the protection of the right to privacy and the confidentiality of communications.

147. Having regard to all of the foregoing considerations, I am of the opinion that the imposition of an obligation to make access to a Wi-Fi network secure, as a means of protecting copyright on the Internet, would not be consistent with the requirement for a fair balance to be struck between, on the one hand, the protection of the intellectual property rights enjoyed by copyright holders and, on the other, that of the freedom to conduct business enjoyed by providers of the services in question.[48] By restricting access to lawful communications, the measure would also entail a restriction on freedom of expression and information.[49]

148. More generally, I would observe that any general obligation to make access to a Wi-Fi network secure, as a means of protecting copyright on the Internet, could be a disadvantage for society as a whole and one that could outweigh the potential benefits for rightholders.

149. First, public Wi-Fi networks used by a large number of people have relatively limited bandwidth and are therefore not particularly susceptible to the risk of infringement of copyright protected works and objects.[50] Secondly, Wi-Fi access points indisputably offer great potential for innovation. Any measures that could hinder the development of that activity should therefore be very carefully examined with reference to their potential benefits.

150. In view of all the foregoing considerations, I am of the opinion that Articles 12(3) and 15(1) of Directive 2000/31, interpreted in the light of the requirements stemming from the protection of the applicable fundamental rights, preclude the issuing of an injunction in which an obligation is imposed upon a person who operates a public Wi-Fi network as an adjunct to his principal economic activity to make access to that network secure.

VI – **Conclusion**

151. In the light of the foregoing considerations, I propose that the Court should answer the questions referred for a preliminary ruling by the Landgericht München I (Regional Court, Munich I) as follows:

(1) Articles 2(a) and (b) and 12(1) 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 ('Directive on electronic commerce') must be interpreted as applying to a person who, as an adjunct to his principal economic activity, operates a local wireless network with Internet access that is accessible to the public free of charge.

48 — See, to that effect, the judgments in *Scarlet Extended* (C-70/10, EU:C:2011:771, paragraph 49) and *SABAM* (C-360/10, EU:C:2012:85, paragraph 47).

49 — See, to that effect, the judgments *Scarlet Extended* (C-70/10, EU:C:2011:771, paragraph 52) and *SABAM* (C-360/10, EU:C:2012:85, paragraph 50).

50 — See, on this point, the opinion of the Bundesrat (BR-Drs 440/15, p. 18) and the Ofcom consultation, sections 3.94-3.97 (see footnotes 43 and 45 to this Opinion).

(2) Article 12(1) of Directive 2000/31 precludes the making of any order against a provider of mere conduit services that entails a finding of civil liability against that service provider. That provision therefore precludes the making of an order against a provider of such services not only for the payment of damages, but also for the payment of the costs of giving formal notice or other costs relating to an infringement of copyright or a related right committed by a third party as a result of the information transmitted.

(3) Article 12(1) and (3) of Directive 2000/31 does not preclude the granting of a court injunction non-compliance with which is punishable by a fine.

National courts must, when issuing such an injunction, ensure:

— that the measures in question comply with Article 3 of Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights and, in particular, are effective, proportionate and dissuasive;

— that, in accordance with Articles 12(3) and 15(1) of Directive 2000/31, they are aimed at bringing a specific infringement to an end or preventing a specific infringement and do not entail a general obligation to monitor, and

— that the application of those provisions, and of other detailed procedures laid down in national law, achieves a fair balance between the applicable fundamental rights, in particular, those protected by Articles 11 and 16 of the Charter of Fundament Rights of the European Union and by Article 17(2) of that Charter.

(4) Articles 12(3) and 15(1) of Directive 2000/31, interpreted in the light of the requirements stemming from the protection of the applicable fundamental rights, do not, in principle, preclude the issuing of an injunction which leaves it to the addressee thereof to decide what specific measures should be taken. It nevertheless falls to the national court hearing an application for an injunction to ensure that appropriate measures do indeed exist that are consistent with the restrictions imposed by EU law.

Those provisions preclude the issuing of an injunction against a person who operates a local wireless network with Internet access that is accessible to the public, as an adjunct to his principal economic activity, where the addressee of the injunction is able to comply with it only by:

— terminating the Internet connection, or

— password-protecting the Internet connection, or

— examining all communications transmitted through it in order to ascertain whether the copyright-protected work in question is unlawfully transmitted again.