

Court of Justice EU, 16 July 2015, Coty Germany v Stadtsparkasse

COTY

LITIGATION

Article 8(3)(e) of Directive must be interpreted as precluding a national provision, which allows, in an unlimited and unconditional manner, a banking institution to invoke banking secrecy in order to refuse to provide, information concerning the name and address of an account holder

• It follows from the foregoing that a national provision, such as that at issue in the main proceedings, taken in isolation, is such as to seriously infringe the fundamental right to an effective remedy and, ultimately, the fundamental right to intellectual property, enjoyed by the holders of those rights, and that it does not, therefore, comply with the requirement to ensure a fair balance between, on the one hand, the various fundamental rights, and, on the other, Article 8 of Directive 2004/48.

• It follows from all the foregoing that the answer to the question referred is that Article 8(3)(e) of Directive 2004/48 must be interpreted as precluding a national provision, such as that at issue in the main proceedings, which allows, in an unlimited and unconditional manner, a banking institution to invoke banking secrecy in order to refuse to provide, pursuant to Article 8(1)(c) of that directive, information concerning the name and address of an account holder.

Source: curia.europa.eu

Court of Justice EU, 16 July 2015

(L. Bay Larsen, K. Jürimäe, J. Malenovský (rapporteur), M. Safjan and A. Prechal)

JUDGMENT OF THE COURT (Fourth Chamber)

16 July 2015 (*)

(Reference for a preliminary ruling — Intellectual and industrial property — Directive 2004/48/EC — Article 8(3)(e) — Sale of counterfeit goods — Right to information in the context of proceedings for infringement of an intellectual property right — Legislation of a Member State which allows banking institutions to refuse a request for information relating to a bank account (banking secrecy))

In Case C-580/13,

REQUEST for a preliminary ruling under Article 267 TFEU from the Bundesgerichtshof (Germany), made by decision of 17 October 2013, received at the Court on 18 November 2013, in the proceedings

Coty Germany GmbH

v

Stadtsparkasse Magdeburg,

THE COURT (Fourth Chamber),

composed of L. Bay Larsen, President of the Chamber, K. Jürimäe, J. Malenovský (Rapporteur), M. Safjan and A. Prechal, Judges,

Advocate General: P. Cruz Villalón,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– Coty Germany GmbH, by M. Fiebig, Rechtsanwalt,

– the Stadtsparkasse Magdeburg, by N. Gross, Rechtsanwalt,

– the German Government, by T. Henze and J. Kemper, acting as Agents,

– the European Commission, by F. Bulst and F. Wilman, acting as Agents,

after hearing the **Opinion of the Advocate General** at the sitting on 16 April 2015,

gives the following

Judgment

1. This request for a preliminary ruling concerns the interpretation of Article 8(3)(e) of Directive 2004/48/EC 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, and corrigendum OJ 2004 L 195, p. 16).

2. The request has been made in proceedings between Coty Germany GmbH ('Coty Germany'), a company which owns intellectual property rights, and a banking institution, the Stadtsparkasse Magdeburg ('the Stadtsparkasse'), concerning the refusal of the Stadtsparkasse to provide Coty Germany with information relating to a bank account.

Legal context

EU law

3. Recitals 2, 10, 13, 15, 17 and 32 in the preamble to Directive 2004/48 are worded as follows:

'(2) The protection of intellectual property should allow the inventor or creator to derive a legitimate profit from his/her invention or creation. It should also allow the widest possible dissemination of works, ideas and new know-how. At the same time, it should not hamper freedom of expression, the free movement of information, or the protection of personal data, including on the Internet.

...

(10) The objective of this Directive is to approximate legislative systems so as to ensure a high, equivalent and homogeneous level of protection in the internal market.

...

(13) It is necessary to define the scope of this Directive as widely as possible in order to encompass all the intellectual property rights covered by Community provisions in this field and/or by the national law of the Member State concerned. ...

...

(15) This Directive should not affect substantive law on intellectual property, Directive 95/46/EC of 24 October 1995 of the European Parliament and of the Council 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)], Directive 1999/93/EC of the European Parliament and of the Council of 13 December 1999 on a Community framework for electronic signatures [(OJ 2000, L 13, p. 12)] and 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 [(OJ 2000 L 178, p. 1)].

...

(17) The measures, procedures and remedies provided for in this Directive should be determined in each case in such a manner as to take due account of the specific characteristics of that case, including the specific features of each intellectual property right and, where appropriate, the intentional or unintentional character of the infringement.

...

(32) This Directive respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union [("the Charter")]. In particular, this Directive seeks to ensure full respect for intellectual property, in accordance with Article 17(2) of [the] Charter.'

4. Under Article 2(3)(a) of Directive 2004/48:

'This Directive shall not affect:

(a) the Community provisions governing the substantive law on intellectual property, Directive 95/46/EC, Directive 1999/93/EC or Directive 2000/31/EC, in general, and Articles 12 to 15 of Directive 2000/31/EC in particular.'

5. Article 8 of Directive 2004/48, which is entitled 'Right of information', states:

'1. Member States shall ensure that, in the context of proceedings concerning an infringement of an intellectual property right and in response to a justified and proportionate request of the claimant, the competent judicial authorities may order that information on the origin and distribution networks of the goods or services which infringe an intellectual property right be provided by the infringer and/or any other person who:

(a) was found in possession of the infringing goods on a commercial scale;

(b) was found to be using the infringing services on a commercial scale;

(c) was found to be providing on a commercial scale services used in infringing activities;

or

(d) was indicated by a person referred to in point (a), (b) or (c) as being involved in the production, manufacture or distribution of the goods or the provision of the services.

2. The information referred to in paragraph 1 shall, as appropriate, comprise:

(a) the names and addresses of the producers, manufacturers, distributors, suppliers and other previous holders of the goods or services, as well as the intended wholesalers and retailers;

(b) information on the quantities produced, manufactured, delivered, received or ordered, as well as the price obtained for the goods or services in question.

3. Paragraphs 1 and 2 shall apply without prejudice to other statutory provisions which:

(a) grant the right holder rights to receive fuller information;

(b) govern the use in civil or criminal proceedings of the information communicated pursuant to this Article;

(c) govern responsibility for misuse of the right of information;

or

(d) afford an opportunity for refusing to provide information which would force the person referred to in paragraph 1 to admit to his/her own participation or that of his/her close relatives in an infringement of an intellectual property right;

or

(e) govern the protection of confidentiality of information sources or the processing of personal data.'

6. Directive 95/46/EC provides in Article 2, entitled 'Definitions':

'For the purpose of this Directive:

(a) "personal data" shall mean any information relating to an identified or identifiable natural person ("data subject"); an identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity;

(b) "processing of personal data" ("processing") shall mean any operation or set of operations which is performed upon personal data, whether or not by automatic means, such as collection, recording, organisation, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, blocking, erasure or destruction;

...'

German law

7. The Law on Trade Marks (Markengesetz) of 25 October 1994 (BGBl. 1994 I, p. 3082), as amended by the Law of 19 October 2013 (BGBl. 2013 I, p. 3830, 'the Markengesetz'), provides in Paragraph 19, entitled 'Right to information':

'1. The proprietor of a trade mark or a trade name may, in the cases referred to in Paragraphs 14, 15 and 17, require the infringer to provide immediately information on the origin and distribution networks of the goods or services identified as being illicit.

2. In the case of an obvious infringement or in cases where the proprietor of a trade mark or a trade name has brought an action against the infringer, the right shall also stand (notwithstanding subparagraph 1) against a person who, on a commercial scale,

(1) was in possession of the infringing goods;

(2) used the infringing services;

(3) provided services used in the infringing activities, or

(4) was indicated by the person referred to in points 1, 2 or 3 as being involved in the production, manufacture or distribution of those goods or in the provision of those services,

unless that person is permitted to refuse to give evidence in proceedings against the infringer under Paragraphs 383 to 385 of the Civil Procedure Code (*Zivilprozessordnung*). In the event that the right to information under the first sentence is asserted, the court may, on request, stay proceedings against the infringer until resolution of the dispute for the right to information. The person required to provide information may demand, from the person harmed, compensation for the necessary costs incurred in providing that information.'

8. Paragraph 383 of the Civil Procedure Code, in the version published on 5 December 2005 (BGBl. 2005 I, p. 3202), entitled 'Refusal to give evidence on personal grounds', provides, in subparagraph 1:

'The following persons are entitled to refuse to give evidence:

...

6. persons who, as a result of their office, position or trade, have been entrusted with facts which, owing to their nature or in accordance with a legal provision, must be kept secret, the right to refuse to give evidence concerning facts to which the obligation of secrecy relates.'

The dispute in the main proceedings and the question referred

9. Coty Germany produces and distributes perfumes and holds an exclusive licence for the Community trade mark Davidoff Hot Water, registered under number 968661, for perfumery.

10. In January 2011, Coty Germany purchased a bottle of perfume bearing the trade mark Davidoff Hot Water on an Internet auction platform. It paid the sum corresponding to the price of that product into the bank account opened with the Stadtparkasse which had been supplied to it by the seller.

11. After finding that it had purchased a counterfeit product, Coty Germany asked that auction platform to provide it with the real name of the holder of the account of that platform from which the perfume had been sold to it (the sale having been made under an alias). The person named admitted to being the holder of that account, but denied being the seller of the product concerned and, relying on her right not to give evidence, refused to provide further information.

12. Coty Germany contacted the Stadtparkasse to ask it, on the basis of Paragraph 19(2) of the *Markengesetz*, for the name and address of the holder of the bank account into which it had paid the amount corresponding to the price of the counterfeit goods purchased. The Stadtparkasse, invoking banking secrecy, refused to provide Coty Germany with that information.

13. Coty Germany brought an action before the Landgericht Magdeburg (Regional Court, Magdeburg),

which ordered the Stadtparkasse to provide the information requested.

14. The Oberlandesgericht Naumburg (Higher Regional Court, Naumburg), the appeal court seised by the Stadtparkasse, quashed the judgment at first instance, holding that the request to be provided with the information concerned was not justified under point 3 of the first sentence of Paragraph 19(2) of the *Markengesetz*.

15. The Oberlandesgericht Naumburg took the view that although the services provided by the Stadtparkasse — in the case before the referring court, the holding of a current account — had been used to carry out the infringing activity, the Stadtparkasse, as a banking institution, was entitled, under the first sentence of Paragraph 19(2) of the *Markengesetz*, in conjunction with Paragraph 383(1) of the Civil Procedure Code, to refuse to give evidence in civil proceedings.

16. That court held that that conclusion was not invalidated by the interpretation which must be made of those provisions in the light of Directive 2004/48.

17. Coty Germany brought an appeal on a point of law before the Bundesgerichtshof (Federal Court of Justice) maintaining its claims. Entertaining doubts as to the interpretation to be made of Directive 2004/48, in particular of Article 8 thereof, the Bundesgerichtshof decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Must Article 8(3)(e) of Directive 2004/48 be interpreted as precluding a national provision which, in a case such as that in the main proceedings, allows a banking institution to refuse, by invoking banking secrecy, to provide information pursuant to Article 8(1)(c) of that directive concerning the name and address of an account holder?'

Admissibility

18. The Stadtparkasse argues that the request for a preliminary ruling is inadmissible, maintaining that the dispute before the referring court is governed not by Directive 2004/48, but by national law alone, since the request for information at issue in the main proceedings does not relate to proceedings concerning an infringement of an intellectual property right but rather to a case of obvious infringement of rights attached to a Community trade mark. In its view, such a case does not fall within Directive 2004/48.

19. In that regard, as stated [by the Advocate General in point 20 of his Opinion](#), a request for information made in the context of proceedings relating to an obvious infringement of rights attached to a trade mark falls within the scope of Article 8(1) of Directive 2004/48.

20. That conclusion is borne out by recital 13 in the preamble to Directive 2004/48, which states that it is necessary to define the scope of the directive as widely as possible in order to encompass all the intellectual property rights covered by Community provisions in this field and/or by the national law of the Member State concerned. Therefore it is appropriate to consider

that that directive also applies to proceedings concerning an infringement of rights attached to a Community trade mark.

21. The request for a preliminary ruling must therefore be regarded as admissible.

Consideration of the question referred

22. By its question, the referring court asks, in essence, whether Article 8(3)(e) of Directive 2004/48 must be interpreted as precluding a provision which, in a situation such as that at issue in the main proceedings, allows a banking institution to invoke banking secrecy in order to refuse to provide, pursuant to Article 8(1)(c) of that directive, information concerning the name and address of an account holder.

23. In the first place, it can be seen from the wording of Article 8(1)(c) of Directive 2004/48 that the Member States are to ensure that, in the context of proceedings concerning an infringement of an intellectual property right and in response to a justified and proportionate request of the claimant, the competent judicial authorities may order that information on the origin and distribution networks of the goods or services which infringe an intellectual property right be provided by any person who was found to be providing on a commercial scale services used in the infringing activities.

24. That provision must be read in the light of recital 17 in the preamble to Directive 2004/48, which states that the measures, procedures and remedies provided for in that directive should be determined in each case in such a manner as to take due account of the specific features of each intellectual property right and, where appropriate, the intentional or unintentional character of the infringement.

25. In the second place, it follows from Article 8(3)(e) of Directive 2004/48 that Article 8(1) thereof applies without prejudice to other statutory provisions which govern the protection of confidentiality of information sources or the processing of personal data.

26. It is common ground that a banking institution, such as that at issue in the main proceedings, is capable of falling within the scope of Article 8(1)(c) of Directive 2004/48. It is also common ground that the communication, by such a banking institution, of the name and address of one of its customers constitutes processing of personal data, as defined in Article 2(a) and (b) of Directive 95/46.

27. A national provision, such as that at issue in the main proceedings, which allows a banking institution to withhold the information requested in the context of civil proceedings by invoking banking secrecy, is therefore capable of falling within the scope of Article 8(3)(e) of Directive 2004/48.

28. Article 8(1)(c) of Directive 2004/48 and Article 8(3)(e) thereof, read together, require that various rights be complied with. First, the right to information and, second, the right to protection of personal data must be complied with.

29. The right to information which is intended to benefit the applicant in the context of proceedings concerning an infringement of his right to property thus

seeks, in the field concerned, to apply and implement the fundamental right to an effective remedy guaranteed in Article 47 of the Charter, and thereby to ensure the effective exercise of the fundamental right to property, which includes the intellectual property right protected in Article 17(2) of the Charter. As noted by the [Advocate General in point 31 of his Opinion](#), the first of those fundamental rights is a necessary instrument for the purpose of protecting the second.

30. The right to protection of personal data, granted to the persons referred to in Article 8(1) of Directive 2004/48, is part of the fundamental right of every person to the protection of personal data concerning him, as guaranteed by Article 8 of the Charter and by Directive 95/46.

31. As regards those rights, it is clear from recital 32 in the preamble to Directive 2004/48 that the directive respects the fundamental rights and observes the principles recognised by the Charter. In particular, that directive seeks to ensure full respect for intellectual property, in accordance with Article 17(2) of the Charter.

32. At the same time, as is clear from Article 2(3)(a) of Directive 2004/48 and from recitals 2 and 15 in the preamble thereto, the protection of intellectual property is not to hamper, inter alia, the protection of personal data, so that Directive 2004/48 cannot, in particular, affect Directive 95/46.

33. The present request for a preliminary ruling thus raises the question of the need to reconcile the requirements of the protection of different fundamental rights, namely the right to an effective remedy and the right to intellectual property, on the one hand, and the right to protection of personal data, on the other (see, to that effect, judgment in [Promusicae, C-275/06, EU:C:2008:54, paragraph 65](#)).

34. In that regard, it must be borne in mind, in the first place, that, according to the case-law of the Court, EU law requires that, when transposing directives, the Member States take care to rely on an interpretation of them which allows a fair balance to be struck between the various fundamental rights protected by the EU legal order. Subsequently, when implementing the measures transposing those directives, the authorities and courts of the Member States must not only interpret their national law in a manner consistent with those directives but also make sure that they do not rely on an interpretation of them which would be in conflict with those fundamental rights or with the other general principles of EU law (see judgment in [Promusicae, C-275/06, EU:C:2008:54, paragraph 70](#)).

35. In the second place, it should be noted that Article 52(1) of the Charter states, inter alia, that any limitation on the exercise of the rights and freedoms recognised must respect the essence of those rights and freedoms and that it is apparent from the case-law of the Court that a measure which results in serious infringement of a right protected by the Charter is to be regarded as not respecting the requirement that such a fair balance be struck between the fundamental rights which must be reconciled (see, as regards an injunction, judgments in

[Scarlet Extended, C-70/10, EU:C:2011:771, paragraphs 48 and 49](#), and [Sabam, C-360/10, EU:C:2012:85, paragraphs 46 and 47](#)).

36. In the present case, the national provision at issue in the main proceedings allows a banking institution to invoke banking secrecy in order to refuse to provide, pursuant to Article 8(1)(c) of Directive 2004/48, information concerning the name and address of an account holder. However, although it is true that Article 8(1) of that directive does not recognise an autonomous right to information which individuals may exercise directly against the infringer or the persons covered by Article 8(1)(a) to (d) of that directive, it nevertheless imposes on the Member States an obligation to ensure that that information can be obtained by means of measures of enquiry ordered by a court.

37. It appears that the provision of national law at issue in the main proceedings, taken in isolation, allows such an unlimited refusal, since its wording does not contain any condition or qualification, a matter which is, however, for the referring court to determine.

38. Accordingly, such a provision of national law, taken in isolation, is liable to frustrate the right to information recognised in Article 8(1) of Directive 2004/48 and is therefore, as follows from paragraph 29 of the present judgment, such as to infringe the fundamental right to an effective remedy and the fundamental right to intellectual property.

39. In that regard, that unlimited and unconditional authorisation to invoke banking secrecy is such as to prevent the procedures laid down by Directive 2004/48 and the measures taken by the competent national authorities, in particular when they seek to order the disclosure of necessary information under Article 8(1) of that directive, from taking due account of the specific characteristics of each intellectual property right and, where appropriate, the intentional or unintentional character of the infringement.

40. It follows that an authorisation of that kind is capable of seriously impairing, in the context of Article 8 of Directive 2004/48, the effective exercise of the fundamental right to intellectual property — to the benefit of the right of persons covered by Article 8(1) of Directive 2004/48 to the protection of personal data concerning them — as a result of the obligation, for a banking institution, to respect banking secrecy.

41. It follows from the foregoing that a national provision, such as that at issue in the main proceedings, taken in isolation, is such as to seriously infringe the fundamental right to an effective remedy and, ultimately, the fundamental right to intellectual property, enjoyed by the holders of those rights, and that it does not, therefore, comply with the requirement to ensure a fair balance between, on the one hand, the various fundamental rights, and, on the other, Article 8 of Directive 2004/48.

42. It is, however, for the referring court to determine whether there are, in the national law concerned, any other means or other remedies which would allow the competent judicial authorities to order that the necessary information concerning the identity of

persons who are covered by Article 8(1) of Directive 2004/48 be provided, in view of the specific circumstances of each case, in accordance with recital 17 in the preamble to that directive.

43. It follows from all the foregoing that the answer to the question referred is that Article 8(3)(e) of Directive 2004/48 must be interpreted as precluding a national provision, such as that at issue in the main proceedings, which allows, in an unlimited and unconditional manner, a banking institution to invoke banking secrecy in order to refuse to provide, pursuant to Article 8(1)(c) of that directive, information concerning the name and address of an account holder.

Costs

44. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fourth Chamber) hereby rules:

Article 8(3)(e) of Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights must be interpreted as precluding a national provision, such as that at issue in the main proceedings, which allows, in an unlimited and unconditional manner, a banking institution to invoke banking secrecy in order to refuse to provide, pursuant to Article 8(1)(c) of that directive, information concerning the name and address of an account holder.

[Signatures]

* Language of the case: German.

OPINION OF ADVOCATE GENERAL CRUZ VILLALÓN

delivered on 16 April 2015 (1)

Case C-580/13

Coty Germany GmbH

v

Stadtparkasse Magdeburg

(Request for a preliminary ruling from the Bundesgerichtshof (Germany))

(Intellectual property — Sale of counterfeit goods — Directive 2004/48/EC — Article 8(1) and (3)(e) — Right to information in the context of proceedings for infringement of an intellectual property right — Legislation of a Member State which allows banking institutions to refuse a request for information relating to a bank account (banking secrecy) — Charter of Fundamental Rights of the European Union — Articles 8, 17(2), 47 and 52(1) — Proportionality of the limitation of a fundamental right)

1. The question referred by the Bundesgerichtshof gives the Court of Justice the opportunity to develop in more detail its case-law in relation to Article 8 of Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights (2) in an area which has not

been examined until now. To date, the Court has dealt in particular with disputes between, on the one hand, holders of intellectual property rights and, on the other, internet users who download or share content protected by copyright, whose details are sought from internet service providers so that action can be taken against them once they have been identified. (3) On this occasion, however, it is a banking institution which, relying on banking secrecy, refuses to furnish the information needed to bring civil proceedings against a person using the technical possibilities offered by the internet to trade in counterfeit goods.

2. In short, the issue which arises in the present case is whether a third party who did not participate in an alleged infringement of the intellectual property right concerned but who ‘was found to be providing on a commercial scale services used in infringing activities’ (Article 8(1)(c) of Directive 2004/48) — in this particular case, a banking institution — may, under that directive and relying on banking secrecy, refuse to provide the information (specifically, the name and address of the holder of a bank account) requested from it by the holder of the intellectual property right or the person entitled to defend that right. (4)

I – Legislative framework

A – EU law

3. According to recital 10 in the preamble to Directive 2004/48, the objective of the directive is to approximate the legislation of the Member States in relation to protection of intellectual property rights so as to ensure a high, equivalent and homogeneous level of protection of such rights in the internal market. Recital 8 states that ‘[t]he disparities between the systems of the Member States as regards the means of enforcing intellectual property rights are prejudicial to the proper functioning of the Internal Market and make it impossible to ensure that intellectual property rights enjoy an equivalent level of protection throughout the Community. This situation does not promote free movement within the Internal Market or create an environment conducive to healthy competition’. Recital 9 in the preamble to the directive observes that ‘... [i]ncreasing use of the internet enables pirated products to be distributed instantly around the globe’.

4. Article 2(3) of Directive 2004/48 stipulates: ‘This directive shall not affect: (a) ... Directive 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]’, a fact which is also referred to in recital 15 in the preamble to the directive.

5. Article 3 of Directive 2004/48 provides that:

‘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.’

6. Article 8 of Directive 2004/48, entitled ‘Right of information’, stipulates as follows:

‘1. Member States shall ensure that, in the context of proceedings concerning an infringement of an intellectual property right and in response to a justified and proportionate request of the claimant, the competent judicial authorities may order that information on the origin and distribution networks of the goods or services which infringe an intellectual property right be provided by the infringer and/or any other person who:

...

(c) was found to be providing on a commercial scale services used in infringing activities,

...

2. The information referred to in paragraph 1 shall, as appropriate, comprise:

(a) the names and addresses of the producers, manufacturers, distributors, suppliers and other previous holders of the goods or services, as well as the intended wholesalers and retailers;

...

3. Paragraphs 1 and 2 shall apply without prejudice to other statutory provisions which:

...

(e) govern the protection of confidentiality of information sources or the processing of personal data.’

B – National law

7. Paragraph 19 of the German Law on trade marks of 25 October 1994, as subsequently amended (Markengesetz; ‘Law on trade marks’), is entitled ‘Right to information’ and transposes into German law the right laid down in Article 8 of Directive 2004/48.

Paragraph 19(2) is worded as follows:

‘In the case of an obvious infringement or in cases where the proprietor of a trade mark or a trade name has brought an action against the infringer, the right also stands (notwithstanding subparagraph 1) against a person who, on a commercial scale,

1. was in possession of the infringing goods;

2. used the infringing services;

3. provided services used in the infringing activities, or

4. was indicated by a person referred to in points 1, 2 or 3 as being involved in the production, manufacture or distribution of those goods or in the provision of those services, unless that person is permitted to refuse to give evidence in proceedings against the infringer under Paragraphs 383 to 385 of the Civil Procedure Code ...’

8. Paragraph 383(1)(6) of the German Civil Procedure Code (Zivilprozessordnung, in the version of 5 December 2005, as subsequently amended; ‘ZPO’) grants persons who, as a result of their office, position or trade, have been entrusted with facts which, owing to their nature or in accordance with a legal provision, must be kept secret, the right to refuse to give evidence

concerning facts to which the obligation of secrecy relates.

II – The dispute in the main proceedings and the question referred for a preliminary ruling

9. The request for a preliminary ruling has arisen in the context of a dispute between the German company Coty Germany GmbH ('Coty Germany'), exclusive licensee of the Community trade mark 'Davidoff Hot Water', and Stadtsparkasse Magdeburg ('the Sparkasse').

10. In January 2011, Coty Germany purchased a bottle of perfume bearing the trade mark 'Davidoff Hot Water' on an online auction platform. It paid the price of the product into the Sparkasse bank account supplied by the seller. After Coty Germany discovered that it had purchased a counterfeit product, it asked the auction platform to provide it with the real name of the holder of the user account from which the perfume was sold to it (the sale had been made under an alias). The person named admitted to being the holder of the user account on the online auction platform but denied being the seller of the product and, relying on her right not to give evidence, refused to provide further information. Coty Germany then contacted the Sparkasse under Paragraph 19(2) of the Law on trade marks, asking it for the name and address of the holder of the bank account into which it had been required to pay the price of the counterfeit goods purchased. The Sparkasse invoked banking secrecy and refused to provide Coty Germany with that information. Coty Germany then brought an action before the Landgericht Magdeburg (Magdeburg Regional Court), which ordered the Sparkasse to provide the information requested. The Sparkasse lodged an appeal with the Oberlandesgericht Naumburg (Naumburg Higher Regional Court), relying on Paragraph 383 (1)(6) of the ZPO (to which Paragraph 19(2) of the Law on trade marks refers), which protects, inter alia, the right of banking institutions not to give evidence in civil proceedings by invoking banking secrecy. The appeal court found in favour of the Sparkasse. Coty Germany then appealed in cassation to the Bundesgerichtshof (Federal Court of Justice), claiming again that the banking institution should be ordered to provide it with the information requested.

11. In those circumstances, the Bundesgerichtshof decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Must Article 8(3)(e) of Directive 2004/48/EC be interpreted as precluding a national provision which, in a case such as that in the main proceedings, allows a banking institution to refuse, by invoking banking secrecy, to provide information pursuant to Article 8(1)(c) of that directive concerning the name and address of an account holder?'

12. Written observations were lodged in the present proceedings by Coty Germany, the Sparkasse, the European Commission and the German Government.

III – Summary of the parties' positions

13. In its observations, Coty Germany argues that Article 8(3) of Directive 2004/48 precludes a national provision which allows a banking institution to invoke banking secrecy in order to refuse to supply the name and address of a bank account holder to a person requesting that information under Article 8(1)(c) of the directive. Coty Germany submits that anyone who infringes a trade mark right will never give permission for someone who provides a service to him within the meaning of Article 8(1)(c) of Directive 2004/48 to transmit data relating to his identity (which are personal data for the purposes of Directive 95/46) to the proprietor of an infringed right. Coty Germany claims that the conflicting interests should be weighed up in the light of the facts of the particular case, bearing in mind that anyone who sells clearly counterfeit goods does not deserve to have his identity protected.

14. The Sparkasse, which focuses in its observations on the inadmissibility of the question referred for a preliminary ruling, a point with which I shall deal shortly, submits, as regards the substance, that there is another simple remedy available to Coty Germany for the purpose of revealing the identity of the alleged infringer of the trade mark right, namely criminal proceedings, which would enable it to have access to the information gathered by the prosecutor's office, against which banking secrecy cannot be invoked. In addition, the Sparkasse states that its right not to give evidence cannot be contingent on a weighing-up of the conflicting interests in the particular case. Moreover, the Sparkasse points out that, when it comes to deciding whether or not to supply the information requested, a banking institution is not in a position to evaluate whether or not an infringement of a trade mark is obvious for the purposes of Paragraph 19(2)(1) of the Law on trade marks.

15. The German Government contends that Article 8(1)(c) of Directive 2004/48 should be interpreted as meaning that the reply to a request for information submitted under that provision must take into account the circumstances of the specific case and satisfy the requirements of the principle of proportionality when weighing up the conflicting fundamental rights. According to the German Government, EU data protection law (in particular, Directive 95/46) does not preclude a priori, in the circumstances of the present case, the disclosure of the information requested. The German Government further submits that what it describes as the 'exception' in Article 8(3)(e) of Directive 2004/48 is not applicable to the present case. The national provision under which it is possible to refuse to supply the information requested by invoking banking secrecy is not a provision governing the processing of personal data within the meaning of Article 8(3)(e). In the German Government's opinion, it is instead a provision protecting the confidentiality of information sources within the meaning of Article 8(3)(e), a concept which, according to the German Government, also includes the confidentiality of the information itself. The German Government maintains that that provision of the directive must, in any event,

be interpreted as allowing the national court to weigh up the conflicting fundamental rights and assess the circumstances of each individual case.

16. Lastly, the Commission states in its observations that Article 8(3)(e) of Directive 2004/48 does not preclude a national provision which allows a banking institution to invoke banking secrecy in order to refuse to provide the information requested, provided that that provision meets certain conditions; in particular, it must satisfy the requirements of the principle of legal certainty, must govern the processing of personal data and must enable the national court in each individual case to weigh up the conflicting fundamental rights.

IV – Analysis

A – Admissibility

17. Before addressing the substantive issue raised in the question referred by the Bundesgerichtshof, it is necessary to deal with the question of admissibility raised by the Sparkasse, the defendant in the main proceedings. The Sparkasse argues that the dispute before the referring court is not governed by Directive 2004/48 but by national law alone, in view of the fact that the request for information was not submitted in the context of proceedings concerning an infringement of an intellectual property right (Article 8(1) of Directive 2004/48, in conjunction with Paragraph 19(2)(2) of the Law on trade marks) but rather in a case of ‘obvious infringement’ of a trade mark (Paragraph 19(2)(1) of the Law on trade marks) — which, according to the defendant, is not provided for in the directive — in the following manner.

18. According to the Sparkasse, Article 8(1) of Directive 2004/48 does not provide for an autonomous substantive right to request information from a third party but instead grants that right only in the context of proceedings concerning an infringement of an intellectual property right — in the present case, a Community trade mark — and in response to a justified and proportionate request from the applicant. The Sparkasse maintains that, in the present case, no proceedings for infringement have been brought by the proprietor of the trade mark (or by the licensee in this case) against the infringer of its right, in the context of which the applicant requests certain information from a third party, and that instead the applicant is exercising an autonomous substantive right which is governed not by the directive but by national law alone.

19. I believe that that objection to admissibility should be rejected. It seems to me significant that the case of ‘obvious infringement’ was inserted into the Law on trade marks in 2008, with account specifically being taken also of those situations where, as a result of the inherent features of German procedural law, which does not allow civil proceedings to be brought against an unidentified person, there may still be no proceedings for infringement of an intellectual property right because the person against whom the action will be brought has not yet been identified. (5)

20. In my opinion, the expression used, *inter alia*, in the Spanish version of Article 8(1) of Directive 2004/48, ‘*en el contexto de los procedimientos relativos a una*

infracción de un derecho de propiedad intelectual’ (‘*in the context of proceedings concerning an infringement of an intellectual property right*’), (6) is sufficiently broad to include situations such as the present one where, since there is sufficient evidence of infringement of an intellectual property right (‘obvious infringement’), the request for information is clearly targeted at the objective of bringing proceedings for infringement of a trade mark. In that respect, it must be said that the request for information at issue arose ‘in the context’ of proceedings ‘concerning’ infringement of a trade mark. (7)

21. Accordingly, I believe that it must be concluded that the present case also falls within the scope of Directive 2004/48 and that the question referred for a preliminary ruling by the Bundesgerichtshof is admissible.

B – Substance

22. Turning now to the substance of the question, it should first of all be observed that the fundamental basis for the question referred by the Bundesgerichtshof, which the wording of the question does not state explicitly, is the provision made by Paragraph 19(2) of the Law on trade marks. As stated above, that provision expressly affords a third party from whom information is requested the possibility of refusing to provide that information if, in accordance with Paragraphs 383 to 385 of the ZPO, that party would have the right to refuse to give evidence in civil proceedings brought against the infringer. In the present case, the Sparkasse availed itself of that possibility, by invoking banking secrecy. (8)

23. It is necessary to determine whether that possibility, laid down in German law, of refusing to provide information by relying on banking secrecy respects the right to information granted to the holder or licensee of a trade mark in Article 8 of Directive 2004/48.

24. The right to information laid down in Article 8 of Directive 2004/48 is an instrumental right aimed at ensuring effective protection of intellectual property, as is apparent from recital 21 in the preamble to the directive. Its immediate objective is to level out, to a certain extent, the different amounts of information held by the alleged infringer of an intellectual property right and the holder of that right, (9) with the related impact on the effectiveness of judicial protection which the fact that the rightholder lacks the minimum information needed to bring an action against the alleged infringer may have. Naturally, the right to information is not an absolute right and, in fact, Article 8 provides that Member States may establish certain restrictions on the exercise of that right. In that connection, although banking secrecy is not expressly included among those restrictions, paragraph 3 stipulates as follows: ‘*Paragraphs 1 and 2 shall apply without prejudice to other statutory provisions which ... (e) govern the protection of confidentiality of information sources or the processing of personal data.*’ In addition, Article 2(3)(a) of Directive 2004/48 limits the right to information laid down in Article 8 by

providing that that directive ‘shall not affect’, inter alia, Directive 95/46.

25. In the question referred for a preliminary ruling, the referring court expressly refers only to Article 8(3)(e) of Directive 2004/48 as the provision which might cover banking secrecy as a limitation of, or even an exception to, the right to information laid down in Article 8(1)(c) of the directive. The question is, therefore, whether, in the circumstances of the present case, Article 8(3)(e) of the directive allows a banking institution, relying on a national statutory provision which provides for a right to refuse to give evidence in certain circumstances, to invoke banking secrecy in order to refuse to supply the information requested in the exercise of the right laid down in Article 8(1).

26. I must point out first that, in the present case, it is necessary to focus on the second situation referred to in Article 8(3)(e), which refers to the processing of personal data, and to disregard the first, relating to the protection of confidentiality of information sources. It seems clear to me that, in the present case, that situation does not arise since it does not involve the protection of the identity of an ‘information source’.

27. As regards the second situation referred to in Article 8(3)(e) of Directive 2004/48, I must begin my analysis by stating that, in my view, the national legislation at issue, as presented to the Court by the referring court, has two different consequences: first, a direct consequence, consisting in ‘frustration’ of the right to information granted in Article 8(1) of Directive 2004/48; and, second, an indirect consequence, consisting in an ‘effect’ on the fundamental right to an effective remedy and, as a possible ultimate consequence, on the fundamental right to intellectual property.

28. It must be observed at the outset that the frustration of the right to information referred to above (and, indirectly, the limitation of the fundamental rights concerned) is in turn the result of the requirements of ‘banking secrecy’, as the latter is set out in Paragraph 383(1)(6) of the ZPO. The referring court asks whether the objective of maintaining banking secrecy could fall within the scope of the qualification which Article 8(3)(e) of Directive 2004/48 lays down in relation to the exercise of the right to information provided for in Article 8(1), inasmuch as that right is granted ‘without prejudice’, in particular, ‘to other statutory provisions which ... govern ... the processing of personal data’.

29. Accordingly, it is debatable whether the qualification in question is applicable to the present case, in view of the fact that there may be some doubt as to whether ‘banking secrecy’ itself, as provided for in German law, is a ‘statutory provision’ for the purposes of Article 8(3)(e) of Directive 2004/48, and whether the provision in Paragraph 383(1)(6) of the ZPO — to which Paragraph 19(2) of the Law on trade marks refers — is intended to govern the ‘processing of personal data’, as the German Government, in particular, has pointed out in its observations. (10)

30. However, it must be borne in mind that in many situations, as occurs in the present case, what underlies

the application of that provision is whether or not certain personal data relating to particular individuals should be disclosed to the court. (11) Furthermore, it must also be borne in mind that, in any event, Article 2(3)(a) of Directive 2004/48 includes a general clause on respect for the provisions of Directive 95/46 relating to the protection of personal data. Accordingly, an interpretation of Article 8(3)(e) of Directive 2004/48 in accordance with the fundamental right to protection of personal data enshrined in Article 8 of the Charter of Fundamental Rights of the European Union (‘Charter’) leads me to believe that the national legislation at issue is covered by Article 8(3)(e) of Directive 2004/48.

31. With the meaning of the national legislation thus defined, I believe that, in order to examine whether that legislation is compatible with Directive 2004/48, it is first necessary to make an assessment of it from the perspective of the guarantee of the fundamental rights involved. In that regard, it must be concluded at the outset that the effect of the national legislation concerned is to impose a ‘limitation on the exercise’ of the fundamental rights to an effective remedy and to intellectual property, within the meaning of Article 52(1) of the Charter. The legitimate interest of the banking institution in maintaining banking secrecy, a manifestation of the duty of confidentiality which governs the relationship with its customer, has the effect of limiting two fundamental rights of the proprietor or licensee of the trade mark (the latter in so far as it is the holder of certain financial rights relating to the trade mark) within the meaning of Article 52(1) of the Charter, specifically its right to intellectual property (Article 17(2) of the Charter) and its right to an effective remedy laid down in Article 47 of the Charter, (12) which is a necessary instrument for the purpose of protecting the former right.

32. Article 52(1) of the Charter allows a limitation on the exercise of fundamental rights based on two alternative objectives: the limitation must meet an objective of general interest recognised by the Union (first alternative) or the need to protect the rights and freedoms of others (second alternative). While I am aware that it falls to the national court to identify definitively the legitimate aim pursued by the legislation at issue, it is to my mind clear that the present case comes within the scope of the second alternative (although I am not ruling out the possibility that there may also be ‘objectives of general interest’ within the meaning of the first, related to the fact that banking institutions carry out an activity essential to the functioning of the economic system as a whole). In that respect, I believe that the limitation of the licensee’s right to an effective remedy and his right to intellectual property, arising from the effect of banking secrecy — as a result of which the banking institution is obliged not to disclose data relating to its customer’s identity and banking activities without that person’s consent — essentially meets the need of safeguarding the customer’s right (also recognised as a fundamental right in Article 8 of the Charter) to protection of personal data held by the banking institution.

33. Article 52(1) of the Charter contains detailed rules on the conditions in which it is lawful to provide for a 'limitation' of a fundamental right. In that regard, for the limitation of fundamental rights at issue in this case to be lawful, it must satisfy all the conditions laid down in that provision; that is, it must be provided for by law, it must respect the essence of the rights and freedoms concerned, and, finally, it must be appropriate and necessary in order to attain the objective pursued and it must respect the principle of proportionality.

34. The task of examining whether the German legislation at issue satisfies the requirements of Article 52(1) of the Charter falls to the national court. Because of its better knowledge of the specific features of 'a case such as that in the main proceedings', of which the referring court makes mention, it falls to that court to determine, definitively, whether or not the circumstances are present which would render lawful a limitation of the fundamental rights arising from the effect of banking secrecy.

35. I shall now outline below, drawing attention to the Court's case-law on the subject, the elements necessary to enable the national court to examine, in the light of Article 52(1) of the Charter, the extent to which the legitimate interest of the banking institution in maintaining banking secrecy (i) may validly limit the right to an effective remedy of a person who, as a preliminary step for defending before the courts the rights derived from a Community trade mark, seeks to assert the right to information granted to him under Article 8(1) of Directive 2004/48, and (ii) may also limit, as a possible final consequence, that person's fundamental right to intellectual property.

1. Legality and essence

36. Article 52(1) of the Charter provides that the limitation 'must be provided for by law'; in other words, it must respect the principle of legality so that a limitation will be acceptable only if it is founded on a legal basis in national law, which must be accessible, clear and foreseeable. (13) As the referring court states at point 22 of its order for reference, the situation in the present case is that '[b]anking secrecy in Germany is not ... directly established by statutory provision but is derived in German law from the general duty of a bank to safeguard the financial interests of its contractual partner and not to damage those interests'. The Bundesgerichtshof goes on to state that, in Germany, 'the protection of banking secrecy results indirectly from Paragraph 383(1)(6) of the ZPO, which establishes a right to refuse to give evidence in respect of facts which are covered by banking secrecy ... [which] normally also include the name and address of the account holder'.

37. As I observed in my opinion in *Scarlet Extended*, (14) for the purposes of Article 52 (1) of the Charter, the term 'law' should be understood in its 'substantive' sense, and not only its 'formal' one, as meaning that it may include both 'written law' and 'unwritten law' or even 'judge-made law', so that '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.

38. It is for the referring court to confirm the extent to which the case-law on Paragraph 383(1)(6) of the ZPO makes it possible to establish that although banking secrecy is not expressly enshrined in German law in any legislative provision, it satisfies the requirements of the principle of legality in the terms set out above (in particular, the requirements of accessibility, clarity and foreseeability) and may, in principle, render lawful the limitation of the fundamental rights referred to above, provided that the other requirements of Article 52(1) of the Charter are met.

39. Article 52(1) of the Charter also provides that the limitation must respect the 'essence' of the fundamental right or rights concerned. In that connection, the most serious doubts which arise concern, in particular, Coty Germany's right to an effective remedy. In Germany, the effectiveness of the remedy sought by the licensee of an infringed trade mark appears to be contingent, in circumstances such as those in the present case, solely and exclusively on whether the banking institution from whom the information is requested, which has a contractual duty of confidentiality to its customer, waives, for whatever reason, the right not to give evidence conferred on it under Paragraph 383(1)(6) of the ZPO. (15) It is for the national law of the different Member States to govern the procedure for application of EU law in accordance with the principle of procedural autonomy (so that, in principle, each Member State may decide the terms in which it governs the right of certain persons not to give evidence on facts of which they have knowledge). The degree of latitude available to the Member States when exercising that competence is limited by the requirement that the effectiveness of the protection must be guaranteed at all times, so that the exercise of the rights conferred by EU law is not rendered impossible in practice or excessively difficult. (16) In any event, it is clear that the essence of the rights would not be respected if the national legislation at issue resulted in the frustration of the right of any holders of intellectual property rights to obtain protection from the courts.

2. Proportionality in the broad sense

40. In accordance with the second sentence of Article 52(1) of the Charter, '[s]ubject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet ... the need to protect the rights and freedoms of others'. In that connection, it will be necessary to assess whether, in the circumstances of the present case, preventing Coty Germany, by virtue of reliance on banking secrecy, from exercising the right to an effective remedy, thereby also leaving unprotected its right to intellectual property, is appropriate, necessary and proportionate for the purpose of achieving the legitimate objective pursued, which, in my view, as I have stated above, is to safeguard the alleged infringer's right to protection of the data held by the banking institution with which the infringer holds an account.

a) Appropriateness

41. First, as far as compliance with the first requirement is concerned, the question of appropriateness necessitates an examination of whether the limitation of the licensee's fundamental rights to an effective remedy and intellectual property is appropriate in order to achieve the objective pursued; that is, in the words of Article 52(1) of the Charter, whether 'it genuinely meets' the need, in this case, to safeguard the account holder's right to data protection.

b) Necessity

42. Second, and this appears to be particularly important in the circumstances of the present case, it must be established whether the limitation is really necessary in order to achieve that objective. The limitation of Coty Germany's fundamental rights will be necessary only if the aim pursued (protection by the bank of its customer's data) cannot be achieved by a measure which limits those rights to a lesser degree. I believe that, in this regard, it will be necessary to assess, in particular, whether the data which Coty Germany has requested from the Sparkasse could possibly be obtained by other means or from a different source, other than the banking institution. (17) In addition, it will also be necessary to examine here the feasibility of the suggestion made by the Sparkasse in its observations, to the effect that Coty Germany could bring criminal proceedings against an unknown person in order to obtain the name of the alleged infringer by that route. For that purpose, the national court will have to determine to what extent the holder or licensee of the mark can be required to have recourse to criminal proceedings and, as a preliminary point, whether that is even possible in practice under the relevant national law (and, if it is, whether it might constitute an unacceptable abuse of criminal proceedings for purposes unrelated to such proceedings).

c) Proportionality in the strict sense

43. Finally, the analysis of proportionality will require an examination of the extent to which the objective of protection of certain rights vis-à-vis other fundamental rights sufficiently compensates for the sacrifices involved. The national court must take into account, amongst other factors, the type and extent of the information requested by Coty Germany, which, on the basis of the case-file, appears to be limited to what is strictly necessary in order to bring legal proceedings against the alleged infringer; the degree of evidence which exists of an infringement of an intellectual property right; (18) the degree of evidence which exists that the account holder whom Coty Germany seeks to identify may have acted unlawfully; (19) the extent to which the person allegedly trading in counterfeit goods deserves to have their identity protected, in particular because, as Coty Germany argues in its observations, provision of a correct name and address is amongst the obligations of anyone acting in good faith in the course of trade; (20) the existence of substantial damage caused to the proprietor of the protected trade mark; and the guarantees regarding the use which Coty Germany will make of any data it succeeds in

obtaining, so that the information disclosed is used only to commence proceedings against the alleged infringer and not for other purposes unrelated to that objective. In any event, in the context of that examination of proportionality, the national court must take into account all the fundamental rights affected and, accordingly, proceed to strike a balance between the conflicting fundamental rights. (21)

44. Having regard to the foregoing considerations, I believe that Article 8(3)(e) of Directive 2004/48 must be interpreted as precluding national legislation which has the effect of unconditionally allowing a banking institution to refuse, by relying on banking secrecy, to provide information concerning the name and address of a bank account holder which has been requested from it under Article 8(1)(c) of that directive. Such an effect will be compatible with the aforementioned provision of the directive only in so far as it results from a prior assessment, which it falls to the national court to carry out, which ensures the lawfulness of the limitation of the fundamental rights affected by the national legislation at issue, in accordance with Article 52(1) of the Charter of Fundamental Rights of the European Union.

V – Conclusion

45. In the light of the foregoing considerations, I propose that the Court of Justice should reply to the Bundesgerichtshof as follows:

Article 8(3)(e) of Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights must be interpreted as precluding national legislation which has the effect of unconditionally allowing a banking institution to refuse, by relying on banking secrecy, to provide information concerning the name and address of a bank account holder which has been requested from it under Article 8 (1)(c) of that directive. Such an effect will be compatible with the aforementioned provision of the directive only in so far as it results from a prior assessment, which it falls to the national court to carry out, which ensures the lawfulness of the limitation of the fundamental rights affected by the national legislation at issue, in accordance with Article 52(1) of the Charter of Fundamental Rights of the European Union.

1. Original language: Spanish.

2. OJ 2004 L 157, p. 45. According to the second sentence of Article 1 of Directive 2004/48, '[f]or the purposes of this directive, the term "intellectual property rights" includes industrial property rights', so from now on I shall use the term 'intellectual property' in that broad sense.

3. See judgments in *Promusicae*, C-275/06, EU:C:2008:54; *Scarlet Extended*, C-70/10, EU:C:2011:771; *Bonnier Audio and Others*, C-461/10, EU:C:2012:219; *UPC Telekabel Wien*, C-314/12, EU:C:2014:192, and the order in *LSG-Gesellschaft zur Wahrnehmung von Leistungsschutzrechten*, C-577/07, EU:C:2009:107.

4. According to Article 4 of Directive 2004/48, Member States must recognise as persons entitled to seek application of the measures, procedures and remedies referred to in Chapter II of the directive, inter alia, ‘all other persons authorised to use those [intellectual property] rights, in particular licensees, in so far as permitted by and in accordance with the provisions of the applicable law’.

5. BT-Drs. 16/5048, pp. 38 and 39, in conjunction with the draft German law transposing Directive 2004/48.

6. My emphasis. The Spanish version, like the Italian (‘nel contesto dei procedimenti riguardanti la violazione di un diritto di proprietà intellettuale’) and the Portuguese (‘no context dos procedimentos relativos à violação de um direito de propriedade intelectual’), is a literal translation of the English-language version (‘in the context of proceedings concerning an infringement of an intellectual property right’). The wording of the German version is ‘im Zusammenhang mit einem Verfahren wegen Verletzung eines Rechts des geistigen Eigentums’ (my emphasis), while the French version uses the expression ‘dans le cadre’.

7. This view is also taken by Walter and Goebel in their analysis of Article 8 of Directive 2004/48 in Walter, M.M., and von Lewinski, S. (eds.), *European Copyright Law: a commentary*, Oxford, Oxford University Press, 2010, pp. 1263 and 1264: ‘Paragraph 1 does not read “in the course of proceedings concerning an infringement of intellectual property rights”, but refers to such proceedings in using the formula “in the context of” such proceedings, thus emphasising that the information must be provided with respect to infringement proceedings but not necessarily in the course of an infringement proceeding’ (my emphasis).

8. In Germany, banking secrecy is generally agreed to be a specific duty of confidentiality derived from the general duty of banking institutions to protect and not to harm their customers’ financial interests, which is usually included in the general contractual conditions of the agreements which customers enter into with banking institutions and which require the latter to give a negative response to requests for information about their customers if the account holder has not consented. The general contractual conditions of Stadtsparkasse Magdeburg can be viewed on the internet at <https://www.sparkasse-magdeburg.de/pdf/vertragsbedingungen/AGB.pdf>.

Those conditions include an express reference to banking secrecy (point 1, paragraph 1) and to the circumstances in which the banking institution may provide information concerning the customer (point 3, paragraph 2). With regard to banking secrecy, inter alia its relationship with data protection, see in particular Kahler, T., ‘Datenschutz und Bankgeheimnis’, in Kahler, T., and Werner, S., *Electronic Banking und Datenschutz — Rechtsfragen und Praxis*, Berlin/Heidelberg, Springer, 2008, p. 143 et seq. and the bibliography cited therein.

9. McGuire, M.R., ‘Beweismittelvorlage und Auskunftsanspruch nach der Richtlinie 2004/48/EG zur Durchsetzung der Rechte des Geistigen Eigentums’,

Gewerblicher Rechtsschutz und Urheberrecht — Internationaler Teil, 2005, p. 15, and Haedicke, M., ‘Informationsbefugnisse des Schutzrechtsinhabers im Spiegel der EG-Richtlinie zur Durchsetzung der Rechte des geistigen Eigentums’, in A. Ohly and others (eds.), *Perspektiven des Geistigen Eigentums und Wettbewerbsrechts — Festschrift für Gerhard Schricker zum 70. Geburtstag*, Munich, C.H. Beck, 2005, pp. 19 and 20.

10. See point 59 et seq. of those observations.

11. Disclosure of the name and address of the holder of the account (alleged infringer) with the Sparkasse, requested by Coty Germany, would, if it occurred, constitute disclosure of personal data, that is information relating to an identified or identifiable natural person (in accordance with the definition in Article 2(a) of Directive 95/46) and also ‘processing of personal data’ (in accordance with the definition in Article 2(b) of Directive 95/46).

12. The right to an effective remedy enshrined in Article 47 of the Charter is a reaffirmation of the principle of effective judicial protection, a general principle of EU law stemming from the constitutional traditions common to the Member States (see judgments in *Unibet*, C-432/05, EU:C:2007:163, paragraph 37; *Kadi and Al Barakat International Foundation v Council and Commission*, C-402/05 P and C-415/05 P, EU:C:2008:461, paragraph 335; and *AJD Tuna*, C-221/09, EU:C:2011:153, paragraph 54).

13. See, in that connection, point 53 of the Opinion of Advocate General Kokott in *Promusicae*, C-275/06, EU:C:2007:454, which refers to the judgment in *Österreichischer Rundfunk*, C-465/00, C-138/01 and C-139/01, EU:C:2003:294, paragraphs 76 and 77.

14. C-70/10, EU:C:2011:771, point 99.

15. In that regard, the reference made in point 19 of this Opinion to the impossibility of bringing civil proceedings in Germany against an unidentified person should be borne in mind. As Advocate General Trstenjak pointed out in her Opinion in *Hypoteční banka*, C-327/10, EU:C:2011:561, ‘[i]f an applicant were unable to bring an action against a defendant who cannot be traced even after all investigations required by good conscience and good faith have been undertaken, the applicant’s right to effective legal protection could be rendered entirely devoid of meaning’ (point 131).

16. See, inter alia, judgments in *Safalero*, C-13/01, EU:C:2003:447, paragraph 49; *Weber’s Wine World and Others*, C-147/01, EU:C:2003:533, paragraph 103; *Wells*, C-201/02, EU:C:2004:12, paragraph 67; and *Unibet*, C-432/05, EU:C:2007:163, paragraph 43; and the Opinion of Advocate General Trstenjak in *N.S. and Others*, C-411/10 and C-493/10, EU:C:2011:611, points 160 and 161. The principle of effectiveness is now enshrined not only in the right to an effective remedy as recognised in Article 47 of the Charter but also, in the specific area of interest in this case, in Article 3 of Directive 2004/48.

17. In that respect, it must be borne in mind in the present case that Coty Germany had already tried,

unsuccessfully, to obtain that information from the auction platform through which it purchased the counterfeit product and from the person whom that platform identified as the holder of the user account from which the sale was made.

18. See, in that connection, *Bonnier Audio and Others*, C-461/10, EU:C:2012:219, paragraph 58, which held to be acceptable for the purposes of EU law national legislation requiring, inter alia, that, for an order for disclosure of the data in question to be made, there be clear evidence of an infringement of an intellectual property right, and the Opinion of Advocate General Trstenjak in *N.S. and Others*, C-411/10 and C-493/10, EU:C:2011:611, point 159. It should be recalled that, in the present case, the referring court states, at point 2 of the order for reference, that '[t]he perfume was clearly recognisable as counterfeit, even to a non-specialist'.

19. Unlike in *Promusicae*, C-275/06, EU:C:2008:54, in which Advocate General Kokott stated, at point 115 of her Opinion, EU:C:2007:454, that 'it does not follow conclusively from the fact that copyrights were infringed under an IP address at a particular time that those acts were also carried out by the subscriber to whom that address was assigned at that time', in the present case, the starting point is — rightly, in my view — that the holder of the account into which the price of the counterfeit goods was paid was the person (or one of the persons) who benefited financially from infringement of the trade mark right.

20. In that regard, it should be borne in mind that in *L'Oréal and Others*, C-324/09, EU:C:2011:474, paragraph 142, the Court held that 'although it is certainly necessary to respect the protection of personal data, the fact remains that when the infringer is operating in the course of trade and not in a private matter, that person must be clearly identifiable' (my emphasis). In the present case, it is clear that the person who sold the counterfeit perfume acted 'on a commercial scale' for the purposes of Directive 2004/48 since, according to the case-file, from mid-December 2010 to mid-January 2011, the turnover for the user account with the online auction platform from which the sale was made exceeded EUR 10 000.

21. See in that connection, judgments in *Promusicae*, C-275/06, EU:C:2008:54, and *Bonnier Audio and Others*, C-461/10, EU:C:2012:219; and the order in *LSG-Gesellschaft zur Wahrnehmung von Leistungsschutzrechten*, C-557/07, EU:C:2009:107.