

European Court of Justice, 16 October 1997, Bundesverband v Deutsche Internet Versicherung

deutscheinternetversicherung.de



ELECTRONIC COMMERCE DIRECTIVE

Contact information service provider

- a service provider is required to supply, before the conclusion of a contract, in addition to its electronic mail address, other information, which does not necessarily have to be a telephone number.
- That information may be in the form of an electronic enquiry template through which the recipients of the service can contact the service provider via the internet, except in situations where a recipient of the service, who, after contacting the service provider electronically, finds himself without access to the electronic network, requests the latter to provide access to another, non-electronic, means of communication.

Article 5(1)(c) 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 meaning that a service provider is required to supply to recipients of the service, before the conclusion of a contract with them, in addition to its electronic mail address, other information which allows the service provider to be contacted rapidly and communicated with in a direct and effective manner. That information does not necessarily have to be a telephone number. That information may be in the form of an electronic enquiry template through which the recipients of the service can contact the service provider via the internet, to whom the service provider replies by electronic mail except in situations where a recipient of the service, who, after contacting the service provider electronically, finds himself without access to the electronic network, requests the latter to provide access to another, non-electronic, means of communication.

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European Court of Justice, 16 October 2008

(K. Lenaerts, G. Arestis, R. Silva de Lapuerta, E. Juhász and J. Malenovský (Rapporteur))

JUDGMENT OF THE COURT (Fourth Chamber)

16 October 2008 (*)

(Directive 2000/31/EC – Article 5(1)(c) – Electronic commerce – Internet service provider – Electronic mail)

In Case C-298/07,

REFERENCE for a preliminary ruling under Article 234 EC from the Bundesgerichtshof (Germany), made by decision of 26 April 2007, received at the Court on 22 June 2007, in the proceedings

Bundesverband der Verbraucherzentralen und Verbraucherverbände – Verbraucherzentrale Bundesverband eV

v

deutsche internet versicherung AG,

THE COURT (Fourth Chamber),

composed of K. Lenaerts, President of the of Chamber, G. Arestis, R. Silva de Lapuerta, E. Juhász and J. Malenovský (Rapporteur), Judges,

Advocate General: D. Ruiz-Jarabo Colomer,

Registrar: R. Grass,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– the Bundesverband der Verbraucherzentralen und Verbraucherverbände – Verbraucherzentrale Bundesverband eV, by H. Büttner, Rechtsanwalt,

– deutsche internet versicherung AG, by J. Kummer, Rechtsanwalt,

– the Italian Government, by I.M. Braguglia, acting as Agent, and F. Arena, avvocato dello Stato,

– the Polish Government, by T. Nowakowski, acting as Agent,

– the Swedish Government, by S. Johannesson, acting as Agent,

– the Commission of the European Communities, by E. Montaguti and G. Braun, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 15 May 2008,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 5(1)(c) 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') (OJ 2000 L 178, p. 1) ('the Directive').

2 The reference was made in the course of proceedings between the Bundesverband der Verbraucherzentralen und Verbraucherverbände – Verbraucherzentrale Bundesverband eV ('the Bundesverband') and deutsche internet versicherung AG ('DIV') concerning whether a service provider operating exclusively on the internet is under an obligation to communicate its telephone number to clients prior to the conclusion of a contract.

Legal background

Community law

3 Article 2 of the Directive 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 [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)] as amended by Directive 98/48/EC [of the European Parliament and of the Council of 20 July 1998];

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

...

(d) “recipient of the service”: any natural or legal person who, for professional ends or otherwise, uses an information society service, in particular for the purposes of seeking information or making it accessible;

...’

4 Article 5(1) of the Directive provides:

‘1. In addition to other information requirements established by Community law, Member States shall ensure that the service provider shall render easily, directly and permanently accessible to the recipients of the service and competent authorities, at least the following information:

(a) the name of the service provider;

(b) the geographic address at which the service provider is established;

(c) the details of the service provider, including his electronic mail address, which allow him to be contacted rapidly and communicated with in a direct and effective manner;

...’

National legislation

5 Points 1 and 2 of Paragraph 5(1) of the Law on electronic media (Telemediengesetz), of 26 February 2007 (BGBl. 2007 I, p. 179), provides:

‘1. With respect to electronic media provided for commercial purposes, as a general rule, for consideration, service providers are to render easy, direct and permanent access to the following information:

(1) the name and address at which they are established and, with respect to legal persons, their legal form, their authorised representatives and, in so far as information on the company capital exists, the share capital and, if the cash contributions have not been paid up, the total amount of the share capital outstanding;

(2) their details, including their electronic mail address, which allow them to be contacted rapidly and communicated with in a direct manner electronically ...’

The dispute in the main proceedings and the questions referred for a preliminary ruling

6 DIV is an automobile insurance company which offers its services exclusively on the internet. On its web pages DIV mentions its postal and electronic mail addresses but not its telephone number. Its telephone number is communicated only after the conclusion of

an insurance contract. However, persons interested in DIV’s services are able to ask questions via an on-line enquiry template, the answers to which are sent by electronic mail.

7 The Bundesverband, the German Federation of Consumers’ Associations, takes the view that DIV has an obligation to mention its telephone number on its internet site. That is the only means of guaranteeing direct communication between a potential client and the insurance company. Therefore, the Bundesverband brought an action before the Landgericht Dortmund (Regional Court, Dortmund) against DIV seeking an order that it cease advertising its insurance services to consumers on the internet without allowing them to communicate with it directly by telephone.

8 The Landgericht Dortmund upheld the Bundesverband’s application. The court of appeal, however, rejected it. The court of appeal took the view that it was unnecessary to mention a telephone number in order to allow direct communication between the client and the service provider. Such communication could in fact be guaranteed by means of the enquiry mask, since no independent third party was an intermediary in the communication between the potential client and DIV. Furthermore, in so far as DIV replies to the questions sent by consumers within a period of 30 to 60 minutes the requirement of rapid communication was also satisfied.

9 The Bundesverband brought an appeal on a point of law before the Bundesgerichtshof in which it sought a ruling against DIV.

10 According to the Bundesgerichtshof, although the text of Article 5(1)(c) of the Directive does not require a telephone number to be supplied, the purpose of that provision may however require it. That issue is also a matter of dispute in German case-law and legal writing. In the same way, the explanatory memorandum for the governmental bill on electronic commerce (Elektronischer Geschäftsverkehr-Gesetz) declared it necessary to mention a telephone number. The Bundesgerichtshof also submits that it is only by telephone that a communication in the form of an exchange of words, in the sense of an actual dialogue, is possible.

11 On the other hand, the constraint resulting from the obligation to answer telephone enquiries from potential clients would require DIV to change its business model which consists in acquiring clients exclusively via the internet which might hinder the promotion of electronic commerce. Furthermore, an overburdened telephone number discourages consumers from contacting the service provider, the consequence of which is to render that means of communication ineffective.

12 In those circumstances, the Bundesgerichtshof decided to stay the proceedings and refer the following questions to the Court for a preliminary ruling:

‘1. Is a service provider required under Article 5(1)(c) of Directive 2000/31/EC to provide a telephone number before entering into a contract with a recipient of the service, so that he can be contacted rapidly and communicated with in a direct and effective manner?

2. If the answer to Question 1 is in the negative:

(a) Is a service provider required under Article 5(1)(c) of Directive 2003/31/EC to offer a second means of communication, in addition to indicating his electronic mail address, prior to entering into a contract with a user of the service?

(b) If so, does it suffice, for purposes of a second means of communication, that the service provider installs an enquiry template enabling the user to consult the service provider via the internet, the user's enquiry then being answered by the service provider by means of electronic mail?'

The questions referred for a preliminary ruling

13 By its questions, which it is appropriate to examine together, the referring court asks essentially whether Article 5(1)(c) of the Directive must be interpreted as meaning that the service provider must provide recipients of the service, before conclusion of a contract with them, in addition to its electronic mail address, other information giving access to an additional means of communication and, if such an obligation exists, whether that information must necessarily include a telephone number or whether an on-line enquiry template is sufficient.

14 The Bundesverband and the Italian Government take the view that in addition to the electronic mail address other information giving access to an additional means of communication must be supplied by the service provider to recipients of the service. DIV, the Polish and Swedish Governments and the Commission of the European Communities take the opposite view.

15 First of all, it should be recalled that according to settled case-law, in interpreting a provision of Community law it is necessary to consider not only its wording but also the context in which it occurs and the objectives pursued by the rules of which it is part (see, in particular, Case C-301/98 KVS International [2000] ECR I-3583, paragraph 21; Case C-156/98 Germany v Commission [2000] ECR I-6857, paragraph 50; Case C-53/05 Commission v Portugal [2006] ECR I-6215, paragraph 20; and Case C-300/05 ZVK [2006] ECR I-11169, paragraph 15).

16 Pursuant to Article 5(1)(c) of the Directive, the service provider must enable users to access certain basic information, among which are its details, including its electronic mail address, which allow recipients of the service to contact it rapidly and to communicate with it in a direct and effective manner.

17 Thus, it is clear from the wording of Article 5(1)(c), and in particular the word 'including', that the Community legislature intended to require the service provider to supply recipients of the service, in addition to its electronic mail address, with other information in order to achieve the result intended by that provision.

18 Such a literal interpretation is confirmed by the background to Article 5(1)(c) of the Directive. According to Article 5(1)(b) of the Directive, the information that the service provider must render accessible to recipients of the service includes its geographic address. It is therefore clear from the wording of that provision that the Community legislature did not intend to limit the possibility of entering in contact and communi-

cating with the service provider solely to electronic mail, but that it sought to offer recipients of the service access to a postal address.

19 As regards the objectives pursued by the Directive, it is appropriate to note from the outset that, according to Article 1(1) and recitals 3 to 6 and 8 in the preamble thereto, it aims to contribute to the development of information society services and to maximise the opportunities afforded to electronic commerce by the internal market.

20 Although the Community legislature thereby intended to encourage the development of electronic commerce it does not follow, however, from any of the recitals in the preamble to the Directive that it sought to isolate electronic commerce from the rest of the internal market. Accordingly, the mention of the 'electronic mail address' in Article 5 (1)(c) of the Directive reflects the Community legislature's wish to ensure that information giving access to an electronic communication is to be supplied by the service provider to the recipients of the service, but does not mean that it intended to dispense with other types of non-electronic communication which may be used in addition to it.

21 In the event that they were unable to make use of another type of communication if necessary, in a situation where after making contact electronically with the service provider they were temporarily deprived of access to the electronic network, the recipients of the service might find themselves unable to conclude a contract and, thereby excluded from the market. Such exclusion is likely to undermine and cut off the sector concerned from the rest of the market and, therefore, is liable to constitute an obstacle to the functioning of the internal market, depriving the Directive of part of its effectiveness.

22 Second, the Directive, as is clear in particular from Article 1(3) and the 7th, 10th and 11th recitals in the preamble, also intends to guarantee the protection of consumer interests. Such protection must be ensured at all stages of contact between the service provider and recipients of the service.

23 It follows that, in so far as the information communicated by the service provider enables recipients of the service to evaluate the extent of their future commitments, protecting them in particular against the risk of errors which might lead to the conclusion of an unfavourable contract, an additional means of communication may also be necessary prior to the conclusion of a contract.

24 Offering the recipients of the service an additional non-electronic means of communication where necessary cannot be regarded as a heavy financial burden for service providers which offer their services on the internet. Such service providers usually offer their services to consumers who have easy access to the electronic network and are familiar with that type of communication. Therefore, it is only in exceptional circumstances that electronic communication will have to be supplemented by non-electronic means.

25 It is clear from all those considerations that under Article 5(1)(c) of the Directive the service provider is

required to offer recipients of the service a rapid, direct and effective means of communication in addition to his electronic mail address.

26 Therefore, the question arises as to whether information giving the recipients of the service access to another means of communication must necessarily include a telephone number.

27 Contrary to the arguments of DIV, the Polish and Swedish Governments and the Commission, the Bundesverband and the Italian Government submit that a service provider must indicate to the recipients of the service his telephone number, because only the telephone is capable of satisfying the requirements of direct and effective communication within the meaning of the Directive. Direct communication, they argue, necessarily involves person-to-person communication, and effective communication requires not postponed handling of the information transmitted, but handling which is virtually instantaneous.

28 It is common ground that communication by telephone may be regarded as direct and effective communication, even if it does not leave any tangible record and does not as a rule provide any evidence of its content once it is terminated.

29 In that connection, it should be noted from the outset that the adverb ‘directly’ within the meaning of Article 5(1)(c) of the Directive, does not necessarily require communication in the form of an exchange of words, that is an actual dialogue, but only the absence of an intermediary.

30 Furthermore, effective communication does not mean that the response given to a question posed must be instantaneous. On the contrary, a communication is to be regarded as effective if it permits adequate information to be obtained within a period compatible with the needs or legitimate expectations of the recipient.

31 It is clear that there are forms of communication other than by telephone able to satisfy the criteria of direct and effective communication referred to in Article 5(1)(c) of the Directive, that is communication without an intermediary which would be sufficiently fluid, such as those established by personal contact at the premises of the service provider with a person in charge or by fax.

32 In light of all those factors, information giving access to that other means of communication that the service provider is required to supply to recipients of the service before the conclusion of a contract with the latter does not necessarily include a telephone number.

33 The answers arising from the foregoing analysis also provide an answer to the question whether an online enquiry template, through which recipients of the service, are able contact the service provider via the internet, which replies by electronic mail, satisfies the requirements of the Directive.

34 The Bundesverband, supported in substance by the Italian Government, takes the view that the enquiry template is not relevant, in so far as it does not allow rapid direct and effective content. By contrast, DIV and the Commission take the view that an enquiry template

is sufficient, in particular because the Directive does not require, ‘parallel-simultaneous’ communication.

35 It is true that an electronic enquiry template may be regarded as offering a direct and effective means of communication within the meaning of Article 5(1)(c) of the Directive, where, as is clear in the case in the main proceedings from evidence in the file, the service provider answers questions sent by consumers within a period of 30 to 60 minutes.

36 However, in exceptional circumstances where a recipient of the service, after making contact by electronic means with the service provider, is, for various reasons, such as a journey, holiday or a business trip, deprived of access to the electronic network, communication by an enquiry template can no longer be regarded as effective within the meaning of Article 5(1)(c) of the Directive.

37 Since that template is also a means of electronic communication, the need to use a form on the internet would not, in such situations, enable fluid and therefore effective communication to be maintained between the service provider and the recipient of the service, contrary to Article 5(1)(c) of the Directive.

38 In the circumstances described in paragraph 36 of this judgment, offering only an electronic enquiry template is also incompatible with the intention of the Community legislature, which, as stated in paragraph 20 of this judgment, was to encourage the development of electronic commerce without, however, wishing to isolate it from the rest of the internal market.

39 Therefore, in those circumstances, on request by the recipient of the services, the service provider must provide the latter with access to a non-electronic means of communication, enabling him to maintain effective communication.

40 Taking account of all of the foregoing considerations, the answers to the questions referred must be that Article 5(1)(c) of the Directive must be interpreted as meaning that a service provider is required to supply to recipients of the service, before the conclusion of a contract with them, in addition to its electronic mail address, other information which allows the service provider to be contacted rapidly and communicated with in a direct and effective manner. That information does not necessarily have to be a telephone number. That information may be in the form of an electronic enquiry template through which the recipients of the service can contact the service provider via the internet, to whom the service provider replies by electronic mail except in situations where a recipient of the service, who, after contacting the service provider electronically, finds himself without access to the electronic network, requests the latter to provide access to another, non-electronic means of communication.

Costs

41 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:

I. Article 5(1)(c) 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 meaning that a service provider is required to supply to recipients of the service, before the conclusion of a contract with them, in addition to its electronic mail address, other information which allows the service provider to be contacted rapidly and communicated with in a direct and effective manner. That information does not necessarily have to be a telephone number. That information may be in the form of an electronic enquiry template through which the recipients of the service can contact the service provider via the internet, to whom the service provider replies by electronic mail except in situations where a recipient of the service, who, after contacting the service provider electronically, finds himself without access to the electronic network, requests the latter to provide access to another, non-electronic, means of communication.

Opinion of Advocate General Ruiz-Jarabo Colomer

delivered on 15 May 2008 1(1)

Case C-298/07

Bundesverband der Verbraucherzentralen und Verbraucherverbände

v

deutsche internet versicherung AG

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

(Directive 2000/31/EC – Electronic commerce – Internet service provider – Electronic mail)

I – Introduction

1. The Civil Chamber of the Bundesgerichtshof (German Federal Court of Justice) refers its doubts as to the interpretation of Article 5(1)(c) of Directive 2000/31/EC (2) to the Court of Justice. The referring court wishes to know whether the directive requires an insurance company which operates exclusively via the internet to provide a telephone number on its web site so that potential clients can contact its employees without difficulty. Alternatively, the referring court asks whether it is sufficient to give an electronic mail address or whether it is necessary to provide a second means of communication and, if so, whether an on-line enquiry template is acceptable.

2. The reason for the uncertainty is that Article 5(1)(c) of the directive requires the service provider to provide details which enable him to be contacted rapidly and communicated with in a direct and effective manner but only makes express reference to the electronic mail address.

II – Legal framework

A – Community law

3. The questions referred for a preliminary ruling are based on Article 5(1)(c) of the Directive on electronic commerce.

4. In accordance with recitals 3 to 6 in the preamble, the directive seeks to establish a genuine area without internal borders for information society services by removing the legal obstacles hindering the development of that area and the proper functioning of the internal market which make the exercise of the freedom of establishment and freedom of movement less attractive.

5. Furthermore, recital 9 in the preamble to the directive is one of a number of recitals which ensure that activity is pursued in accordance with the freedom of expression enshrined in Article 10(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms. In the same way, recital 10 states that, in accordance with the principle of proportionality, the measures provided for in this Directive are strictly limited to the minimum needed to achieve the objective of the proper functioning of the internal market, and recital 11 undertakes not to affect the level of protection in Directive 97/7/EC. (3)

6. Article 5(1)(c) governs the information that a provider of an information society service must supply to users and to the competent authorities, among which are the details which allow him to be contacted immediately, 'including his electronic mail address' (letter c).

B – German law

7. Paragraph 5(1) and (2) of the Telemediengesetz (German Law on electronic media, of 26 February 2007) ('TMG') repeats almost word for word the contents of the directive, requiring providers of those services to provide easy, direct and permanent access, supplying their details, with their electronic mail address.

III – The dispute in the main proceedings and the questions referred for a preliminary ruling

8. Deutsche internet versicherung ('DIV') is a company which sells automobile insurance exclusively via the internet. On its website the company provides its postal address and electronic mail address but no telephone number, which is given only to clients which have concluded a contract with it. However, potential clients may send it questions via an on-line enquiry template and receive the answers by e-mail.

9. The Bundesverband der Verbraucherzentralen und Verbraucherverbände (German Federation of Consumers' Associations) ('the Bundesverband') brought an action against DIV before the Landgericht Dortmund (Regional Court, Dortmund) seeking an order that DIV display a telephone number on its web site enabling direct contact with potential clients. In particular, it sought an order that DIV cease its principal activity which was granted by the Landgericht.

10. The defendant brought an appeal before the Oberlandesgericht Hamm (Higher Regional Court, Hamm) which upheld the appeal and held that the direct contact with the service provider required by law was possible by the electronic means used by DIV

without using telephone contact. The Oberlandesgericht found that the company dealt with questions without the involvement of a third party and that the answer arrived rapidly at the client's electronic mail address (between 30 and 60 minutes later according to the court experts).

11. The Bundesverband appealed to the Bundesgerichtshof which, taking the view that the resolution of the dispute depends on the interpretation of the Directive on electronic commerce, referred the following questions to the Court of Justice for a preliminary ruling:

(1) Is a service provider required under Article 5(1)(c) of Directive 2000/31/EC to provide a telephone number before entering into a contract with a user of the service, so that he can be contacted rapidly and communicated with in a direct and effective manner?

(2) If the answer to Question 1 is in the negative:

(a) Is a service provider required under Article 5(1)(c) of Directive 2003/31/EC to offer a second means of communication, in addition to indicating his electronic mail address, prior to entering into a contract with a user of the service?

(b) If so, does it suffice, for purposes of a second means of communication, that the service provider installs an enquiry template enabling the user to consult the service provider via the Internet, the user's enquiry then being answered by the service provider by means of electronic mail?

IV – The proceedings before the Court of Justice

12. The reference for a preliminary ruling was lodged at the Registry of the Court on 22 June 2007.

13. The Commission and the Polish, Swedish and Italian Governments have all submitted written observations.

14. Since a hearing was not requested, after the general meeting of 1 April 2008, the case became ready for the preparation of this opinion.

V – Analysis of the questions referred for a preliminary ruling

15. The Bundesgerichtshof asks the Court of Justice to clarify the scope of Article 5(1)(c) of the Directive on electronic commerce.

16. Therefore, it must be determined whether the web site of a German company which only contains an electronic mail address and an enquiry template to which replies are sent by e-mail, but no telephone number, satisfies the requirements laid down in that provision and the relevant national legislation.

17. According to Community law the service provider must provide to recipients of the service direct and permanent access to the details, including its electronic mail address, which enable them to contact it rapidly and communicate with it in a direct and effective manner.

18. A satisfactory and unambiguous answer to the questions referred cannot be discerned from a strictly grammatical interpretation, especially if the various language versions of the provision are compared. However, it is necessary to use a teleological and systematic analysis, as only consideration of all the interpretative

elements (drafting, the objectives and the context of the directive) can assist in resolving the uncertainties in this case.

A – The literal meaning of Article 5(1)(c) of the directive

19. At first sight the syntax of the provision gives rise to a number of uncertainties deriving from the use of the words 'including' and 'details'.

20. The use of the gerund 'including' before the specific reference to the electronic mail address ('y compris' in the French version; 'einschließlich' in German) appears to suggest the idea that the undertaking must provide another means of communication which is not e-mail, which would otherwise be insufficient to satisfy the directive. According to that reading, the service provider would have to provide the recipients of the service with at least two means of communication, one of those being electronic mail. That interpretation, which is suggested in the question referred, has been adopted by the Austrian Oberster Gerichtshof (Supreme Court) with respect to the national implementing law, namely, Paragraph 5(1)(3) of the E-Commerce-Gesetz.

21. However, the text of the directive does not indicate what additional contact information is to be provided to the consumer. In fact, an examination of several versions of the article leads to different conclusions. Thus, the word 'señas' in the Spanish version usually refers in everyday language to a person's address, (4) while 'coordonnées' in French also refers to a telephone number. (5) The expressions in English and German are, by contrast, much more neutral and general ('details' and 'Angaben', respectively, designate any kind of information).

22. It should be recalled that, according to settled case-law, all the language versions have the same weight and that the need for a uniform interpretation of Community acts 'makes it impossible for a provision to be considered in isolation', requiring that it be interpreted and applied in the light of the versions existing in the other official languages; where there are discrepancies reference is to be made to the general scheme and purpose of the provision. (6)

23. If any conclusions can be drawn from that brief comparative analysis it is that the Community legislature sought a general formula for that article by allowing any valid details for a direct and effective connection with the service provider, the sole mandatory requirement being to provide an electronic mail address.

B – Meaning of 'communicate with in a direct and effective manner' in the light of the context and the objectives of the directive

24. The problem is therefore to determine what 'communicate with in a direct and effective manner', as provided by Article 5, means.

25. The applicant in the main proceedings and the Italian Government submit that communication with those characteristics is made only by telephone, since direct communication means 'person to person' and effective requires an almost immediate answer, and it is

not sufficient for the information sent to be dealt with at a later time. I am also of the opinion that the wording of the provision requires another means of communication in addition to e-mail.

26. However, that position is excessively restrictive and, more importantly, does not take account of the specific context in which the directive applies or the objectives it pursues.

27. Therefore, in my view a comprehensive and wide-ranging study of the article concerned includes the following elements: first, whether the telephone constitutes the only means of 'direct and effective' communication; second, whether electronic mail is an effective tool in the context of the directive; third, whether merely requiring an e-mail address is consistent with the objectives of the directive itself; and, fourth, whether in these circumstances there is any infringement of the rights of consumers.

1. The telephone does not constitute the only means of ensuring 'direct and effective' communication

28. I do not share the view that direct communication only takes place when there is an exchange of information 'person to person', since the adjective 'direct' does not refer to the verbal or written nature of the contact, but to the fact that it is made without intermediaries (in this case between the client and a representative of the undertaking), a requirement which may be satisfied both by telephone and by e-mail.

29. I also disagree with the refusal to treat as effective a means of communication by which (in the words of the applicant) the processing of the information transmitted is postponed, as that amounts to saying that a written reply is ineffective.

30. As long as the response time is not too long, a written answer offers more certainty as it is normally more purposive and well thought-out and has an undeniable evidential advantage. Effective communication is achieved when the client receives a rapid response – not immediate, but prompt. The disputed provision mentions the possibility of entering into 'direct and effective' communication with the service provider and also of contacting him 'rapidly'.

31. Finally, I believe it is important to point out that 'effective' communication promotes real dialogue between the parties concerned, so that each question is followed by a flexible response with additional information, which does not always happen with telephone call-centre services since often calls are not dealt with by a person and the client concerned is confronted with a vocal menu from which he has to select the options most appropriate to the matter on which he seeks advice.

32. It is clear from the above that the telephone is not the only means of direct and effective communication between the service provider and the potential client. Written contact via the internet (7) satisfies those conditions so long as it takes place without intermediaries and with a certain amount of fluidity. That is the case with respect to the defendant company in the main proceedings – according to the expert evidence

produced at the hearing the answers to the requests for further information by the persons concerned arrived in their electronic mail boxes between 30 and 60 minutes later.

33. That solution, which allows for additional means of communication other than the telephone in order to provide direct and effective communication, appears to be more in keeping with and respectful of the objectives of and background to the Directive on electronic commerce, which are matters of interpretation which, according to settled case-law, supplement the strictly literal interpretation of a provision of Community law. (8)

2. Electronic mail as a means of effective communication within the meaning of the directive

34. First of all, the directive applies in the very specific context of commercial relations via the internet, in which the information concerning the services offered, the preliminary contacts and the actual conclusion of the contract are conducted via the internet. Article 5(1)(c) expressly refers only to electronic mail as the means of communication most appropriate to that medium.

35. When a user decides to make contact with a trader which operates only via the internet he impliedly accepts that correspondence with that undertaking will be conducted exclusively by electronic means, ruling out (at least in the preliminary phase, prior to signing the contract) any contact in person or by telephone. Moreover, anyone who contacts an undertaking which sells its services only on the internet usually has an e-mail address (or is able to create one relatively easily).

36. Transactions on the internet give rise to a certain amount of caution, in so far as they require special safeguards concerning the identity and reliability of the service provider. Nowadays, however, it is not feasible to include amongst those safeguards a requirement to provide a means of communication external to the actual sphere in which the commercial activity takes place on the ground that it is more traditional and familiar, and in short, more secure. Reticence and scepticism concerning new businesses has always existed in human history and even the telephone, nowadays so basic and reliable, aroused great mistrust when it began to be widely used in human relationships. (9)

37. The internet has experienced a similar evolution: initial reservations (which influenced albeit anecdotally the bursting of the 'dotcom' bubble at the beginning of this century (10)) have given way to a very different attitude characterised by an extraordinary generalisation of access to the internet and greater consumer confidence in the medium, (11) thanks to the improvement of encryption methods for securing transactions and the increase in the number of instruments for personal data protection. (12)

38. In summary, data transmission is part and parcel of electronic commerce, to which it is inextricably linked, since it is perfectly obvious that the communications between a company which operates on the net

and a potential client are made exclusively via that medium.

3. The requirement of electronic mail alone is more consistent with the objectives of the directive.

39. Requiring only electronic mail appears more consistent with both the general objectives of the directive and the aim pursued by Article 5 thereof.

40. According to recitals 3, 4, 5, 6 and 8, the directive seeks to develop the information society and capitalise on the opportunities in the internal market with electronic commerce.

41. Accordingly I agree with the Swedish and Polish Governments that the need for a telephone line might pose a serious obstacle for this type of business and, in any event, for the proper functioning of the internal market in that sphere.

42. Moreover, simply mentioning a telephone number on a web page does not guarantee the direct and effective communication referred to in the directive, which would only be achieved with a 'call centre'. Such telephone help-lines have a high economic cost for the company, (13) which has a negative impact on prices and affects the viability of internet commerce with respect to small companies which are often the most innovative and dynamic in the economy.

43. It is therefore inconceivable to imagine that the directive requires businesses operating on the internet to consistently offer consumers the option of telephone assistance, as that is not required either by the Directive on the protection of consumers in respect of distance contracts or the Directive concerning the distance marketing of consumer financial services. (14) What is more, those two directives, by regulating the information that all users have available prior to concluding the contract, allow that information to be provided in any way appropriate to the means of distance communication used (Article 4(2) of Directive 97/7 and Article 3(2) of Directive 2002/65).

44. In the same way, the principle of proportionality comes into play as recital 10 in the preamble to the directive limits the measures provided for to the minimum needed to achieve the objective of the proper functioning of the internal market. A literal interpretation of the provision at issue, as well as being detrimental to the development of electronic commerce, would go beyond what is strictly necessary in order to ensure both the proper functioning of the internal market and 'direct and effective' communication with the service provider.

4. In this case there is no infringement of consumers' rights.

45. A general notion of consumer protection cannot be relied on since this is a case in which a consumer approaches an undertaking in order to obtain further information about the services that it sells on the internet. There is not yet any contractual relationship between the parties nor, therefore, any possibility of seriously harming consumer interests. The undertaking chooses to trade exclusively on the internet and the potential buyer opts for a service provider with those characteristics.

46. The medium used by the service provider is an additional aspect of its offer – if the client does not want to formulate his questions in writing or if he prefers a more personal relationship he can always go to another company which does respond to him by telephone (and also face-to-face). The client thus renounces one proposition in favour of another more suited to his requirements, in the same way as he compares prices or insurance terms or someone who goes in person to his bank and who does not entrust his savings to a financial entity without branches.

C – Summary

47. In the light of all of the foregoing, qualification of the literal interpretation of Article 5(1)(c) of the Directive on electronic commerce appears unavoidable in order to facilitate the attainment of its objectives, taking account of the context in which it applies, and giving priority to the aim of ensuring that the consumer has an initial contact with the provider of services which is rapid, direct and effective.

48. The answer to the first question referred for a preliminary ruling by the Bundesgerichtshof must be that Article 5(1)(c) does not require either expressly or impliedly the inclusion of a telephone number on the web page of the service provider, even if it does expressly refer to providing a contact electronic mail address.

49. With respect to the second question, I agree with the Commission that rapid, effective and direct electronic communication is sufficient to provide the limited access required by the directive, without there being any need to provide other additional means of contact with the service provider. However, the provision under consideration should be interpreted as providing that the internet page must contain at least the electronic mail address. In accordance with that interpretation, only where e-mail does not guarantee that kind of contact would it be necessary to add another means of communication, making an assessment as to whether the telephone would be able to achieve the aim of Article 5(1)(c).

50. If the directive is understood in that way there is no need to examine the third question referred by the Bundesgerichtshof. However, if the Court of Justice adopts a literal interpretation of the directive which requires the addition of another means of communication an on-line enquiry template would be appropriate, in spite of its proximity to the simple mention of the electronic mail address.

VI – Conclusion

51. In the light of the foregoing considerations, I propose that the Court of Justice reply as follows to the questions referred for a preliminary ruling by the Bundesgerichtshof:

'(1) In accordance with Article 5(1)(c) 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, a service provider is not required to provide a telephone number in order to

communicate with consumers before the conclusion of a contract.

(2) Service providers are also not required, in accordance with that provision, to provide a second means of contacting users, different from the electronic mail address, so long as the latter is adequate and sufficient to enable rapid contact and establish direct and effective communication.’

1 – Original language: Spanish.

2 – 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).

3 – Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts (OJ 1997 L 144, p. 19).

4 – The *Diccionario de la Real Academia Española* (Dictionary of the Spanish Royal Academy) does not recognise that meaning (it refers only to ‘señas personales’ which it defines as ‘rasgos característicos de una persona’ (characteristic features of a person) which distinguishes them from the rest; and the expression ‘dar señas de algo’ as ‘manifestar sus circunstancias individuales’ (show one’s individual particularities) describirlo de forma que destaque de otra cosa (describe someone in such a way so to distinguish them from someone else). It is however recognised by the *Diccionario de Uso del Español de María Moliner* which states, as a third meaning of the word (in plural), the ‘indicación precisa del sitio donde vive una persona’ (exact description of the place where a person lives).

5 – Curiously, the Dictionary of the French Academy includes the phrase, with a colloquial and figurative meaning ‘donnez-moi vos coordonnées’ as a synonym for the address and telephone number but advises against its use.

6 – Case 29/69 *Stauder v Ulm* [1969] ECR 419; Case 30/77 *Bouchereau* [1977] ECR 1999; Case 9/79 *Koschniske* [1979] ECR 2717; Case 55/87 *Alexander Moksel Import und Export* [1988] ECR 3845; Case C-296/95 *EMU Tabac and Others* [1998] ECR I-1605; Case C-482/98 *Italy v Commission* [2000] ECR I-10861; Case C-1/02 *Borgmann* [2004] ECR I-3219; Case C-63/07 *Profisa* [2007] ECR I-3239; and Case C-457/05 *Schutzverband der Spirituosen* [2007] I-0000.

7 – Whether it is simultaneous (as in so-called ‘chats’) or delayed (as in electronic mail), to use a term widely used in the domain of information technology.

8 – Case C-300/05 *ZVK* [2006] ECR I-11169; Case C-53/05 *Commission v Portugal* [2006] ECR I-6215; Case C-301/98 *KVS International* [2000] ECR I-3583; Case C-156/98 *Germany v Commission* [2000] ECR I-6857; and Case 292/82 *Merck* [1983] ECR 3781).

9 – Marcel Proust, *À la recherche du temps perdu*, *À l’ombre des jeunes filles en fleur*, Ed. Gallimard, La Pléiade, Paris, 1987, Volume I, p. 596, in which Mme

Bontemps and Mme Swann discuss, with respect to the fact that Mme Verdurin is having electricity in her new house, the story of the sister-in-law of an acquaintance who has had a telephone installed at her home with which she can amongst other things order what she wants without leaving her room. Mme Bontemps admits being intrigued by the telephone and having an irresistible temptation to see how it works, but prefers to do so in another person’s house because, in her opinion, once her curiosity has been satiated it would cause a perfect racket.

10 – Castell, M., *La Glaxaia Internet*, Plaza y Janés Editores S.A. Barcelona, 2001.

11 – According to Eurostat, the percentage of families with broadband access at home has increased in the European Union from 14% in 2004 to 42% in 2007; in Germany that percentage increased from 9% in 2003 to 50% in 2007. It is also revealing (again according to Eurostat) that the number of transactions by European undertakings arising from electronic commerce which has risen from 2.1% in 2004 to 4.2% in 2007 (total figures for the European Union).

12 – The study *Realities of the European on line marketplace* by the European Consumer Centre’s Network, talks about a second wave of e-commerce stemming from the increase in consumer confidence in electronic media; however, it acknowledges that there much progress has to be made before the predictions of market success

materialise
http://ec.europa.eu/consumers/redress/ecc_network/european_online_marketplace2003.pdf). According to Luc Grynbaum ‘one can easily imagine that tomorrow the invisible hand of the market, so desired by some economists, will no longer be only a financial but also a commercial reality in the form of a vast intangible and permanent market created by the web’ (Grynbaum, L. *La Directive ‘commerce électronique’ ou l’inquietant retour de l’individualisme juridique*, in *La Semaine Juridique Edition Générale* No 12, 21 March 2001, I 307).

13 – The high cost of these services can be demonstrated by comparing them to other written answering services, since it has been proved that telephone calls are usually concentrated in certain time bands (*Empirical Analysis of a Call Centre*, Avishai Mandelbaum, Anat Sakov and Sergey Zeltyn, Israel Institute of Technology, 2001).

14 – Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC (OJ 2002 L 271, p. 16).