OPINION OF ADVOCATE GENERAL RUIZ-JARABO COLOMER

delivered on 15 May 2008 [1]

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 website 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

1 — Original language: Spanish.

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

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) 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).

3 — Directive 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).

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 email.

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 website 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 Bundesgerichthof 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 website of a German company which only contains an electronic mail address and an enquiry template to which replies are sent by email, 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 email, 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

4 — The *Diccionario de la Lengua Española* (Dictionary of the Spanish Language), 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); 'desribirlo 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*, 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 *Dictionnaire de l'Académie française* (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.

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 email.

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 email 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.

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-Industrie* [2007] ECR I-8075.

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 email.

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.

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.

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 email 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]

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 M^{me} Bontemps and M^{me} Swann discuss, with respect to the fact that M^{me} 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. M^{me} 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.

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.

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 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 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).

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.

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).

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 email 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 Bundesgrichtshof:

(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.