



Reports of Cases

OPINION OF ADVOCATE GENERAL
MENGOZZI
delivered on 6 March 2012¹

Case C-49/11

Content Services Ltd
v
Bundesarbeitskammer

(Reference for a preliminary ruling from the Oberlandesgericht, Vienna (Austria))

(Consumer protection — Distance contracts — Directive 97/7/EC — Article 5 — Information that the consumer must ‘receive’ in a ‘durable medium’ — Information available on a website which the consumer can access via a hyperlink)

1. This case, arising from a reference for a preliminary ruling from the Oberlandesgericht, Vienna (Higher Regional Court, Vienna), will give the Court the opportunity to define the ways in which consumers who enter into distance contracts must receive the information required under European Union law, and specifically, in this case, under Directive 97/7/EC² (also ‘the Directive’). Article 5 of the Directive provides, in particular, that on conclusion of a distance contract, the consumer must ‘receive’ confirmation of certain information in a ‘durable medium’. The issue raised by the Oberlandesgericht is whether information available on the vendor’s website, that consumers can access by clicking on a link displayed at the time when the contract is concluded, must be regarded as having been given to the consumer in a durable medium.

I – Legislative context

2. Directive 97/7/EC contains a series of minimum provisions³ designed to protect consumers entering into distance contracts.

3. Under Article 4 of the Directive, before concluding any distance contract, the consumer is to be provided with⁴ a range of information concerning, in particular, the identity of the supplier, the characteristics of the goods or services, the price, the delivery costs, the arrangements for payment and the existence of a right of withdrawal.

1 — Original language: Italian.

2 — 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).

3 — According to Article 14, in fact, the Member States may adopt more stringent provisions to ensure a higher level of consumer protection.

4 — The Italian text of the Directive uses the same verb ‘ricevere’ (to receive) for the information required under both Article 4 and Article 5. However, in most of the other language versions, under Article 4, the consumer has merely to be ‘provided with’ the information, and only in regard to the information under Article 5 must the consumer ‘receive’ that information. See, for example, the French, English, German, Spanish and Dutch versions of the Directive. See also point 24 of this Opinion.

4. Article 5 is headed ‘Written confirmation of information’ and lists certain information that the consumer must (again) receive, at the time of performance of the contract, in a ‘durable medium’. Article 5 is worded as follows:

‘1. The consumer must receive written confirmation or confirmation in another durable medium available and accessible to him of the information referred to in Article 4 (1) (a) to (f), in good time during the performance of the contract, and at the latest at the time of delivery where goods not for delivery to third parties are concerned, unless the information has already been given to the consumer prior to conclusion of the contract in writing or on another durable medium available and accessible to him.

...

2. Paragraph 1 shall not apply to services which are performed through the use of a means of distance communication, where they are supplied on only one occasion and are invoiced by the operator of the means of distance communication. Nevertheless, the consumer must in all cases be able to obtain the geographical address of the place of business of the supplier to which he may address any complaints’.

5. The Directive does not contain a definition of ‘durable medium’. That term is, however, defined by the European Union legislature in other legislative texts.⁵ I shall now list the principal texts among them.

6. According to Article 2(f) of Directive 2002/65/EC,⁶ durable medium means ‘any instrument which enables the consumer to store information addressed personally to him in a way accessible for future reference for a period of time adequate for the purposes of the information and which allows the unchanged reproduction of the information stored’.

7. According to Article 2(12) of Directive 2002/92/EC,⁷ a durable medium means ‘any instrument which enables the customer to store information addressed personally to him in a way accessible for future reference for a period of time adequate to the purposes of the information and which allows the unchanged reproduction of the information stored’. And, according to the next subparagraph, in particular, durable medium ‘covers floppy disks, CD-ROMs, DVDs and hard drives of personal computers on which electronic mail is stored, but it excludes internet sites, unless such sites meet the criteria specified in the first paragraph’.

8. Finally, Article 2(10) of new Directive 2011/83/EU,⁸ which will, in future, take the place of Directive 97/7/EC too, defines a durable medium as ‘any instrument which enables the consumer or the trader to store information addressed personally to him in a way accessible for future reference for a period of time adequate for the purposes of the information and which allows the unchanged reproduction

5 — In point of fact, the concept in Article 5(1) of Directive 97/7/EC does not have the same name in all the language versions as the concept defined by other directives. For example, the Italian text of the provisions defining the concept does not employ the expression ‘supporto durato’ but instead uses ‘supporto durevole’. It seems clear, however, that the legislature intended to refer to the same concept, as is also apparent from a comparison of those language versions of the directives that include a definition, in most of which the terminology used is identical to that used in Directive 97/7/EC. See, for example, the English (‘durable medium’), French (‘support durable’), German (‘dauerhafter Datenträger’) and Spanish (‘Soporte duradero’) versions of the abovementioned legislative texts.

6 — 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).

7 — Directive 2002/92/EC of the European Parliament and of the Council of 9 December 2002 on insurance mediation (OJ 2003 L 9, p. 3.)

8 — Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council (OJ 2011 L 304, p. 64). Directive 97/7/EC will be repealed as of 13 June 2014 (see Article 31 of Directive 2011/83/EU).

of the information stored'. According to recital 23 in the preamble to that directive, durable media 'should enable the consumer to store the information for as long as it is necessary for him to protect his interests' and 'should include in particular paper, USB sticks, CD-ROMs, DVDs, memory cards or the hard disks of computers as well as e-mails'.

II – Facts, main proceedings and the question referred

9. The company Content Services runs the internet site opendownload.de, which is configured in German. The website can also be accessed, and the services it offers be used, by internet users in Austria. [Opendownload.de](http://opendownload.de) is a website through which it is possible to download free software or trial versions of software which incur a charge. Moreover, the case-file shows that the company's server does not store the files to be downloaded, but simply directs users to the official sites of the program manufacturers. In other words, the opendownload.de website consists of a collection of links to programs that are freely available on the net.

10. In order to be able to use the site, and so download the various programs using the links provided on opendownload.de, it is necessary to sign up to a subscription, and, at the time of the facts in the main proceedings, the cost was EUR 96 for one year. The contract is entered into online, with the customer filling in an interactive web page form on which, in particular, he declares, by ticking a box, that he accepts the general terms and conditions and waives the right of withdrawal. The information required under Articles 4 and 5 of the Directive, particularly the information concerning the right of withdrawal, is not shown directly to the customer who may, however, view it by clicking on a hyperlink on the contract sign-up page.

11. After concluding the contract on the website, the customer receives an email message containing a user name and a password in order to use the opendownload.de website. The message contains no information, in particular, with respect to the right of withdrawal. The customer subsequently receives an invoice for EUR 96 and reminding him that he has waived the right of withdrawal.

12. The action in the main proceedings was brought by the Bundesarbeitskammer (Federal Chamber of Labour), a body which is also responsible for consumer protection: it takes the view that the business practice of Content Services is unlawful and is in breach of various provisions of European Union and domestic law in regard to consumer protection.

13. Content Services, the unsuccessful party at first instance, appealed against that decision before the Oberlandesgericht. Considering it necessary, in order to resolve the dispute, to obtain a ruling from the Court of Justice on the scope of Article 5 of the Directive, the Oberlandesgericht stayed the proceedings and referred the following question for a preliminary ruling:

'Is the requirement in Article 5(1) of the Distance Contracts Directive to the effect that a consumer must receive confirmation of the information specified there in a durable medium available and accessible to him, unless the information has already been given to him on conclusion of the contract in a durable medium available and accessible to him, satisfied where that information is made available to the consumer by means of a hyperlink on the trader's website which is contained in a line of text that the consumer must mark as read by ticking a box in order to be able to enter into a contractual relationship?'

III – Preliminary observations

14. The circumstances giving rise to the main proceedings are in many ways curious, but are not an isolated case. In German-speaking countries in particular, there are frequent press reports of situations in which some internet users, who were looking for freely available software, downloaded it from sites like that run by Content Services, and signed up to subscription agreements without even realising it. In Austria and, above all, in Germany, the litigation linked to such cases has already resulted in a number of court judgments.

15. Overall, this case has raised many interesting legal issues.⁹ However, the subject-matter of the reference for a preliminary ruling is very circumscribed, as it relates only to the methods of communicating information to the customer for the purposes of Article 5 of the Directive: I shall therefore confine my observations to that particular aspect.

16. Furthermore, I would point out that the question referred does not ask the Court to provide an exact definition of what, in general, constitutes a 'durable medium', but merely asks it to determine whether a business practice, such as that of Content Services, satisfies the requirements of the Directive regarding the obligation to give certain information in a durable medium. In other words, the Court is not asked to provide an exhaustive definition of the term, but merely to establish whether or not making the information available on a web page, which may be accessed via a hyperlink that the consumer is able to view before entering into the contract, constitutes the provision of information in a durable medium.

17. Even though the idea of providing an exhaustive definition of 'durable medium' may be attractive, I consider that the 'minimalist' approach implicitly suggested by the national court is the right one to adopt: rather than furnishing a general and detailed definition, it is appropriate simply to establish whether, in circumstances such as those of this case, the conditions constituting the provision of a durable medium have or have not been satisfied. To be more specific, a general definition can be provided, but it must be formulated in abstract terms, without entering into the detail of the technical methods by which a durable medium may be set in place. It must, in fact, be borne in mind that, in a sector like the new technologies sector, the imposition of excessively rigid constraints may produce negative results and, when all is said and done, be damaging to the consumer. What matters is that the technological methods of carrying out a specific activity (entering into a contract, for instance, or giving certain information to the consumer) should comply with the guidance set out in the Directive. It is not, however, appropriate to indicate in advance *what* those methods may be, because technological developments could, within a very short time, result in new methods, at present inconceivable but which might actually provide an even better way of satisfying the requirements laid down by the legislature.

⁹ — More particularly, for example, it is doubtful whether the 'waiving' of the right of withdrawal which Content Services requires of its customers is lawful. According to the information provided by the national court, the position of Content Services on this point is not clearly defined. The company sometimes refers to a waiver of the right of withdrawal on the part of the consumer, and sometimes maintains that, as far as its services are concerned, the right of withdrawal does not exist in accordance with Article 6(3), first indent, of the Directive.

IV – Analysis

A – *General considerations*

18. It is common ground that, after the contract had been concluded, Content Services did not provide its customers with specific *confirmation* of all of the information pursuant to Article 5 of the Directive. According to Content Services, however, confirmation of that nature was not required, since the methods by which the information was made available to customers in accordance with Article 4 also satisfied the criteria under Article 5, particularly the need for the information to be received by the customer in a ‘durable medium’: in such cases, as Article 5 itself provides, further confirmation of the information is not required.

19. As we saw when setting out the facts, in order to conclude the contract, potential customers had explicitly to declare, by ticking a box provided for the purpose, that they waived their right of withdrawal and accepted the general conditions of the contract. The general conditions of the contract, the rules governing the right of withdrawal and the information on personal data protection were not shown on the web page itself, but could be viewed by clicking on a hyperlink placed next to the acceptance box.

20. It is not disputed that the information contained on the web pages which the potential customer could access, before entering into the contract, by clicking on the hyperlinks on the sign-up page, included all the information required under Articles 4 and 5 of the Directive. The national court appears to take as a starting-point the assumption that such methods of presentation satisfy the requirements of Article 4, but questions whether they are also sufficient for the purpose of Article 5.

21. According to Content Services, naturally, the answer must be that they are. It considers that providing customers with information on a web page which they themselves can access is sufficient, in particular, to allow the information to be regarded as having been given in a durable medium in accordance with Article 5. However, according to the Bundesarbeitskammer, the Commission and most of the Governments that have submitted observations, simply making the information available to the customer by giving him the opportunity to click on a hyperlink when entering into a contract is not enough to satisfy the requirements of Article 5.

22. Let me say straightaway that, in my view, the position of Content Services cannot be accepted: the methods which it used to make the information available are not compatible with the requirements of Article 5 of the Directive. I shall set out the reasons for this below.

B – *The two elements of the obligation laid down by Article 5*

23. In general, the Directive requires the provision of the information to the customer, in accordance with Article 5, to involve two fundamental elements.

24. In the first place, the customer must ‘receive’ the information. This means, more specifically, that the information must be conveyed without the customer having to make any active effort to obtain it. In that connection, it must also be pointed out that, in most language versions of the Directive, that notion is reinforced by the distinction made between the information under Article 4 — with which

the potential customer has simply to 'be provided'¹⁰ — and the information under Article 5 which the customer must actually 'receive'.¹¹ The Italian version of the Directive, which refers in both provisions to the information to be 'received', is out of step here, although it too confirms that the information under Article 5 must be given, and not merely made available, to the customer.

25. The purpose of the provision is clear: it is a requirement of the Directive that the consumer should obtain possession of certain information, essential to enable him to enforce his rights, without his having to be in any way proactive. Were that not the case, many consumers, and particularly the less careful, would enjoy a lower level of protection, not necessarily being able, in case of need, to recover the relevant information.

26. In the second place, the customer must be able *to take control* of the information he is given in accordance with Article 5. That, in my view, is the whole purpose of the obligation to provide the information in a 'durable medium'. If, in fact, the information were to be conveyed to the customer fleetingly, it is clear that the level of protection accorded to the consumer under the Directive would be significantly reduced. Only if the information remains available to him in a reliable manner and for an adequate length of time can the customer use it, if necessary, to enforce his rights.

27. The definitions of the term 'durable medium' contained in the other directives that I cited above confirm that consumer protection is the purpose of the provision on durable media. In fact, as we have seen, in those directives the essential element is that it should be possible for the consumer to store, recover and reproduce the information over an adequate period of time.

28. Moreover, as emphasised in the Court's case-law, consumer protection is one of the pillars of the Directive. More specifically, the right of withdrawal is one of the essential instruments by which that protection is given effect, and it is the purpose of the Directive to ensure that it is effective for consumers.¹²

29. It is therefore necessary to establish whether, in this case, the information required under Article 5 of the Directive has been given to the customer in accordance with the two conditions which I have set out above. I shall now look separately at whether each has been complied with.

C – The need for the customer to 'receive' the information

30. As I have pointed out above, for Article 5 of the Directive to be complied with it, it is essential that the customer should 'receive' the information, and thus that he should obtain possession of it without having to take any kind of action himself to that end.

31. In that connection, it is my view that even requiring the customer to click on a hyperlink on the contract sign-up page, in order to view the necessary information, does not fully satisfy the requirements of Article 5. Although, in fact, the action involved in clicking on a hyperlink is not, in principle, particularly difficult, the fact remains that it requires a deliberate act on the part of the consumer, and therefore requires him to take an 'active' role. On the contrary, as we have seen, the meaning of Article 5 is precisely that certain information must be provided to the user, *without any specific action on his part* (except, obviously, the action resulting in the conclusion of the contract).

10 — See, for example, the French ('le consommateur doit bénéficier des informations suivantes'), English ('the consumer shall be provided with the following information'), German ('der Verbraucher muß ... über folgende Informationen verfügen'), Spanish ('el consumidor deberá disponer de la información siguiente'), and Dutch versions ('moet de consument ... beschikken over de volgende informatie').

11 — As the Commission has pointed out, the 'giving' of information to which Article 5(1) refers is entirely equivalent to the 'receipt' of information mentioned earlier in that paragraph. The only difference is the perspective, which is that of the consumer when the legislature refers to 'receipt' and of the vendor/supplier when the reference is to 'giving'.

12 — See, for example, Case C-489/07 *Messner* [2009] ECR I-7315, paragraph 19, and Case C-511/08 *Handelsgesellschaft Heinrich Heine* [2010] ECR I-3047, paragraph 54.

32. It must also be borne in mind that, in the context of electronic commerce, giving the customer the information required under Article 5 without the latter needing to take any particular form of action does not, as a rule, present any problem. Moreover, it seems to me to be particularly significant that, after they have signed up to the contract, Content Services itself sends its customers an email message containing, in particular, confirmation of the contract and the information needed (user name and password) to connect to the site. And so it is perfectly clear that, for instance, there would be no technical difficulty in including in that message the information required under Article 5.

33. Allowing operators in the field of electronic commerce to require their customers to carry out certain actions before they could access the information required under Article 5 of the Directive, even if all they had to do was to use a link shown when the contract was concluded, would risk opening the gates to possible abuses. It is in fact clear that, even though clicking on a hyperlink is an entirely commonplace action, within the capability of any internet user, not all users are in a position to understand, when the contract is concluded, that they need to click on the link in order to be able, should the need arise, to protect their own rights better in the future.

34. In this case, therefore, the first of the two conditions needed to secure compliance with Article 5 of the Directive remains unfulfilled: the consumer has not ‘received’ the requisite information. That in itself would be sufficient to provide the national court with a useful answer. However, for the sake of completeness, I shall also consider the second of the two conditions laid down by Article 5.

D – The information conveyed must be placed under the customer’s control

35. As we have seen, the second requirement laid down by Article 5 is linked to the concept of ‘durable medium’: the obligation to give the customer the information in a durable medium meets the need to provide him with the information in a way that will enable him to use it, where necessary, to enforce his rights.

36. As we have seen, in other legislation, the legislature has provided a number of definitions of the concept of ‘durable medium’ which, although not automatically applicable here, may certainly prove helpful. There is in fact nothing to indicate that they refer to a concept different from that used in Directive 97/7/EC.¹³

37. More particularly, those definitions reveal a number of key principles, specifically, that the customer should be able: (a) to record or, in any event, store the information; (b) to access the information, unchanged, for an ‘adequate’ period of time; and (c) to reproduce the information unchanged.

38. We are therefore faced with the problem of determining whether a website can constitute a ‘durable medium’ within the meaning of the Directive — and, if so, under what conditions. As we have, in fact, seen, Content Services makes the information available to its customers only on a page of the *opendownload.de* site.

39. The Court of Justice has not yet had occasion to give a ruling on the concept of durable medium. Recently, however, the issue was considered by the EFTA Court which set out its view on the matter in a judgment of January 2010.¹⁴ In that judgment, the EFTA Court found that, in principle, a website too can constitute a durable medium, provided that three cumulative conditions are met. Firstly, the site

¹³ — See footnote 5 above.

¹⁴ — EFTA Court, judgment of 27 January 2010 in Case E-4/09 *Inconsult Anstalt*. To be precise, the judgment concerned Directive 2002/92/EC. However, as I pointed out above, there is no reason to consider that the concept of ‘durable medium’ under that directive differs from that contained in Directive 97/7/EC.

must allow the consumer to store the information received. Secondly, that storage must be guaranteed for a sufficiently long period: the period of time for which it must be able to be stored cannot be specified generally, but must be determined case by case. Finally, for the user's protection, it must not be possible for the person who provided the information to change it.

40. For my part, I am of the view that the considerations set out by the EFTA Court in its judgment are largely sound.

41. It is clear that it is not, in principle, inconceivable that a web page too may satisfy the conditions necessary in order to be regarded as a durable medium within the meaning of the Directive. As we saw above, the definition of durable medium contained in Directive 2002/92/EC specifically provides, for example, that, if it meets the conditions laid down by the definition itself, a website may be classified as a durable medium; and this is so even though there is no presumption that a website complies with the requirements of the provision, in contrast to the situation in regard, for instance, to CD-ROMs and email messages. It is therefore necessary to determine, in every specific case, whether or not the website possesses the requisite features.

42. The features in question are those that, as I mentioned above, make it possible to establish that the information *has been placed under the customer's control* and is *no longer under the control of the person giving it*. As the EFTA Court correctly pointed out, this means that the user must be able to store the information for a sufficiently long period to enable him to enforce his rights, and that the supplier must be unable to alter the information.

43. The technical methods of achieving this must be assessed in each individual case, and it is certainly not for the Court to define them here. However, the fact remains that a general web page, such as the page on which Content Services gives its customers the information, does not satisfy the conditions described. By its very nature, in fact, a normal web page is not placed under the control of the person who consults it, but under the control of the person who publishes it, who may at any time modify or delete it at will. The fact that the user may possibly act to print or store the page before it can be changed does not alter the situation: in those circumstances, in fact, the durable medium (the printed or stored version of the page) *would be generated by the user* and not the vendor, as required by the Directive.

44. It follows that the Content Services site does not satisfy the requirements of Article 5 of the Directive in regard to the nature of the medium in which the information is supplied to the consumer either.

45. Moreover, before reaching a conclusion, I must point out that although it is, in general, possible that a web page may constitute a 'durable medium' within the meaning of the Directive, it might be difficult to identify ways in which the information contained on a web page may be 'received' by the consumer, as required by Article 5. As we saw earlier, in fact, Article 5 requires the customer to be given the information without any effort on his part. It would be necessary to consider closely whether the practice of a vendor who was to send to the customer, after the contract had been entered into, an email message including a link to a web page containing the information, was compatible with the Directive: in such a case, in fact, even if the web page were held to be a 'durable medium', access to the information would be subject to *action* on the part of the user (having to click on a link sent to him). Setting aside the legal assessment of a situation of that nature, the fact remains that it is much simpler, and certainly in keeping with the spirit of the Directive, to include the information *directly in*

the text of the email message.¹⁵ That is the position even though, and let me reiterate this, it cannot be excluded a priori that there may be specific procedures whereby the information provided on a website may satisfy both the conditions laid down by Article 5 of the Directive.

E – Summary

46. To summarise the considerations set out above, the methods for presenting the information to the customer in the circumstances giving rise to the main proceedings do not satisfy the requirements of Article 5 of the Directive. In particular, the fact that the customer is given the information on a web page only, which he can access by clicking on a link shown when the contract is concluded, means both that the customer has not ‘received’ the information and that the latter has not been given in a ‘durable medium’.

V – Conclusion

47. In the light of the foregoing considerations, I suggest that the Court answer the question referred to it by the Oberlandesgericht as follows:

The requirements of Article 5(1) of 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 are not satisfied where the information required by Article 5(1) is made available on a web page which the customer can access by clicking on a hyperlink shown when the contract is concluded.

15 — It might be pointed out that, depending on the type of email service used by the consumer and the way in which he accesses it, even a message sent via email might not be placed entirely within the control of the customer who receives the information. An example would be a service which offers the possibility of electronic mail messages via a web interface only, without the option of using protocols (IMAP, POP etc) which allow the user to transfer one or more copies of messages to his own electronic devices (such as a computer or, smartphone). That objection is, however, unfounded. By its very nature, an electronic mail service is designed to channel personal messages to users: were a situation to arise in which a user lost control of his messages, this would be caused, if not by carelessness on the user's part, then by a lack of care on the part of the email service provider, but not on the part of the vendor who provided his customer with the information via email. The vendor cannot be required to refrain from using a means of communication simply because the customer might not use it properly, or not use a reliable service provider.