



JUDGMENT OF THE COURT

27 January 2010*

(Admissibility – Directive 2002/92/EC on insurance mediation – Concept of a “durable medium”)

In Case E-4/09,

REQUEST to the Court under Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice by the Appeals Commission of the Financial Market Authority (Beschwerdekommision der Finanzmarktaufsicht), Liechtenstein, in a case pending before it between

Inconsult Anstalt

and

the Financial Market Authority (Finanzmarktaufsicht)

concerning the interpretation of Article 2(12) of Directive 2002/92/EC of the European Parliament and of the Council of 9 December 2002 on insurance mediation, in relation to the criteria which have to be fulfilled for an Internet site to constitute a “durable medium” under the said Article.

THE COURT,

composed of: Carl Baudenbacher, President, Thorgeir Örlygsson (Judge-Rapporteur) and Henrik Bull, Judges,

Registrar: Skúli Magnússon,

having considered the written observations submitted on behalf of:

- The Appellant in the national proceedings, Inconsult Anstalt, represented by Michael Schädler, Managing Director;
- The Principality of Liechtenstein, represented by Dr Andrea Entner-Koch, Director, EEA Coordination Unit, and Monika Zelger-Jarnig, Legal Officer, EEA Coordination Unit, acting as Agents;

* Language of the Request: German.

- The Czech Republic, represented by Martin Smolek, Agent for the Czech Republic before the Court of Justice of the European Communities (hereinafter “the ECJ”), acting as Agent;
- The Republic of Estonia, represented by Lembit Uibo, acting as Agent;
- The Federal Republic of Germany, represented by Moritz Lumma and Dr Jutta Kemper, acting as Agents;
- The EFTA Surveillance Authority (hereinafter “ESA”), represented by Bjørnar Alterskjær, Deputy Director, and Ólafur Jóhannes Einarsson, Senior Officer, Department of Legal & Executive Affairs, acting as Agents; and
- The Commission of the European Communities (hereinafter “the European Commission”), represented by Nicola Yerrell, Member of its Legal Service, acting as Agent,

having regard to the Report for the Hearing,

having heard oral argument of the Government of the Principality of Liechtenstein, represented by Dr Andrea Entner-Koch, the Government of the Czech Republic, represented by Martin Smolek, the Government of Estonia, represented by Lembit Uibo, the Government of the Federal Republic of Germany, represented by Dr Jutta Kemper, ESA, represented by Ólafur Jóhannes Einarsson, and the European Commission, represented by Nicola Yerrell, at the hearing on 7 October 2009,

gives the following

Judgment

I Facts and Procedure

- 1 By a decision dated 27 March 2009, the Appeals Commission of the Financial Market Authority (hereinafter “the Appeals Commission”) made a request for an Advisory Opinion, registered at the Court on 14 April 2009 on a question concerning the interpretation of Article 2(12) in Directive 2002/92/EC of the European Parliament and of the Council of 9 December 2002 on insurance mediation, hereinafter “the Directive”.
- 2 This question has arisen in a case pending before the Appeals Commission between Inconsult Anstalt (hereinafter “the Appellant”) and the Financial Market Authority of Liechtenstein (hereinafter “the Defendant”). The case concerns a dispute on whether the Appellant has complied with certain information obligations as stated in Articles 13 and 15 of the Act of 17 May 2006 on Insurance Mediation (*Gesetz vom 17. Mai 2006 über die*

Versicherungsvermittlung, hereinafter “the VersVermG”) and the Regulation of 27 June 2006 on Insurance Mediation (*Verordnung vom 27. Juni 2006 über die Versicherungsvermittlung*, hereinafter “the VersVermV”).

- 3 The Appellant, a private entity incorporated under Liechtenstein law, received on 29 May 2007 a licence from the Defendant to operate as an insurance intermediary in the form of a broker.
- 4 On 25 November 2008, following an on-site audit on the premises of the Appellant, the Defendant issued an order requiring the Appellant to comply with information obligations laid down in Articles 13 and 15 of the VersVermG.
- 5 The Appellant brought an action before the Appeals Commission on 6 February 2009, in which it contested the order of the Defendant in its entirety and submitted that it had satisfied the information obligations under Articles 13 and 15 of the VersVermG by means of operating a website.
- 6 According to Article 15(1) of the VersVermG, an insurance intermediary is required to provide a customer with the information described, *inter alia*, in Article 13 of the VersVermG, in writing on paper or on another “durable medium”. What constitutes a durable medium is defined in Article 12 of the VersVermV, which implements Article 2(12) of the Directive.
- 7 The request of the Appeals Commission concerns the following question:

What are the criteria by which an Internet site may be regarded as constituting a “durable medium”, as it is to be understood under Article 2(12) of Directive 2002/92/EC of the European Parliament and of the Council of 9 December 2002 on insurance mediation?

The Appeals Commission particularly highlights the following points:

- *Do the criteria in the first paragraph of Article 2(12) of the Directive entail that only password-protected Internet sites are covered by the term “durable medium” or that the customer must be sent a link to a particular Internet address?*
- *Is it necessary that the relevant Internet site is “personally” addressed to a particular person in such a way that only that person can access the Internet site?*
- *Is it necessary for the customer to have expressly consented (in writing) to the information being provided via the Internet?*
- *What are the criteria to be applied in order to establish that particular information was accessible unchanged over a particular period of time?*

- *What is an “adequate” period of time and how can it be established/proved that the information was accessible unchanged over such an adequate period of time?*

- 8 In answer to a written question from the Court, the Financial Market Authority, whose order is the subject of the dispute in the case at hand, confirmed that it is headed by Mr René H. Melliger who, since 2002, has also served as a member of the EFTA Board of Auditors, the body responsible for auditing the Court’s financial statement. This relation between one of the parties to the case before the national court and the Court could cause concerns as to the neutrality of the judges required under Article 15 of the Court’s Statute.
- 9 At the hearing, the agent of the Principality of Liechtenstein stated that the mandate of Mr Melliger as a member of the EFTA Board of Auditors would terminate at the end of 2009 and would not be renewed. The Court’s Financial Statements for 2008 have been approved by the EFTA Board of Auditors. As Mr Melliger will not participate in the audit of the Court’s financial statement for 2009, the Court has come to the conclusion that there are no sufficient grounds for the judges to recuse themselves *en banc* from the case pursuant to Article 15 of the Court’s Statute.

II Legal Background

National law

- 10 According to Article 6(1) and (2) of the VersVermG, licences to operate as insurance intermediaries, either as insurance agents or brokers, are issued by the Defendant. On the basis of the Act of 18 June 2004 on Financial Market Regulation, (*Gesetz vom 18. Juni 2004 über die Finanzmarktaufsicht*, hereinafter “the FMAG”), the Defendant is responsible for implementing and monitoring the enforcement of the VersVermG.
- 11 Article 34(1) of the FMAG establishes an Appeals Commission in accordance with Article 78(3) of the Constitution of the Principality of Liechtenstein (*Verfassung des Fürstentums Liechtensteins*), which states that special commissions for dealing with complaints may be set up by law to act on behalf of the Collegial Government. According to Article 102(5) of the Constitution, all decisions or orders made by the Government and by the special commissions appointed *in lieu* of the Collegial Government are subject to an appeal before the Administrative Court, unless otherwise provided for by law.
- 12 According to Article 34(2) of the FMAG, the Appeals Commission is composed of three members and two alternate members, elected by Parliament for a term of five years. Article 34(3) of the FMAG provides that government ministers, members of parliament, civil servants and employees of the national administration, members of the governing bodies and staff of the Financial Market Authority, and individuals and corporate entities currently subject to the

Financial Authority’s supervision, as well as their employees and the members of their governing bodies, may not serve on the Appeals Commission. According to Article 34(5) of the FMAG, the Appeals Commission must establish its own rules of procedure.

- 13 The powers of the Appeals Commission are defined in Article 35 of the FMAG. Article 35(1) provides that contestable decisions and orders issued by the Financial Market Authority may be brought on appeal before the Appeals Commission within 14 days of service. According to Article 35(2), decisions and orders issued by the Appeals Commission may be brought on appeal before the Administrative Court within 14 days of service.
- 14 Article 13 of the VersVermG sets out certain information obligations with which insurance intermediaries are required to comply prior to the conclusion of insurance contracts. The same applies upon the amendment and renewal of such contracts. Article 13 reads:

Information obligations

1) Prior to the conclusion of the initial insurance contract an insurance intermediary shall provide the customer with at least the following information:

- a) his identity and address;*
- b) the name of the register in which he is registered and the possibility of verifying entries in the register either on the Internet free of charge or by means of a register extract issued by the Financial Market Authority subject to payment of a fee;*
- c) whether he operates as a broker or as an agent;*
- d) the complaints procedures available in relation to insurance mediation; and*
- e) any economic ties that he may have with insurance companies.*

2) Upon the amendment or renewal of the insurance contract or upon the making of further insurance contracts, the information referred to in paragraph (1) has to be provided afresh only if its content has changed in the intervening period.

- 15 Article 15 of the VersVermG requires an insurance intermediary to provide customers with the information prescribed, *inter alia*, in Article 13 of the VersVermG in a certain form. According to Article 15, an intermediary must provide this information either in writing on paper or on another “durable medium” that is available and accessible to the customer.

- 16 What constitutes a “durable medium” under Article 15 of the VersVermG is defined in Article 12 of the VersVermV. Article 12 of the VersVermV, which implements Article 2(12) of the Directive, reads:

A durable medium for the purposes of Article 15(1)(a) of the Act is 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. In particular, durable medium covers floppy disks, CD-ROMs, DVDs and hard drives of personal computers on which electronic data is stored, but excludes Internet sites, unless such sites meet the criteria specified above.

EEA law

- 17 Directive 2002/92/EC was incorporated into the EEA Agreement as point 13b of Annex IX thereto by Decision No 115/2003 of the EEA Joint Committee, which entered into force on 1 May 2004.
- 18 In Articles 12 and 13, the Directive sets out certain information requirements for insurance intermediaries which apply prior to the conclusion of insurance contracts, as well as upon their amendment and renewal. Article 12 of the Directive reads:

Information provided by the insurance intermediary

1. Prior to the conclusion of any initial insurance contract, and, if necessary, upon amendment or renewal thereof, an insurance intermediary shall provide the customer with at least the following information:

(a) his identity and address;

(b) the register in which he has been included and the means for verifying that he has been registered;

(c) whether he has a holding, direct or indirect, representing more than 10 % of the voting rights or of the capital in a given insurance undertaking;

(d) whether a given insurance undertaking or parent undertaking of a given insurance undertaking has a holding, direct or indirect, representing more than 10 % of the voting rights or of the capital in the insurance intermediary;

(e) the procedures referred to in Article 10 allowing customers and other interested parties to register complaints about insurance and reinsurance intermediaries and, if appropriate, about the out-of-court complaint and redress procedures referred to in Article 11.

...

19 Article 13 of the Directive reads:

1. All information to be provided to customers in accordance with Article 12 shall be communicated:

(a) on paper or on any other durable medium available and accessible to the customer;

(b) in a clear and accurate manner, comprehensible to the customer;

(c) in an official language of the Member State of the commitment or in any other language agreed by the parties.

2. By way of derogation from paragraph 1(a), the information referred to in Article 12 may be provided orally where the customer requests it, or where immediate cover is necessary. In those cases, the information shall be provided to the customer in accordance with paragraph 1 immediately after the conclusion of the insurance contract.

3. In the case of telephone selling, the prior information given to the customer shall be in accordance with Community rules applicable to the distance marketing of consumer financial services. Moreover, information shall be provided to the customer in accordance with paragraph 1 immediately after the conclusion of the insurance contract.

20 The term “durable medium” is defined in Article 2(12) of the Directive which reads:

‘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.

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.

21 Reference is made to the Report for the Hearing for a fuller account of the legal framework, the facts, the procedure and the written observations submitted to the

Court, which are mentioned or discussed hereinafter only insofar as is necessary for the reasoning of the Court.

III Findings of the Court

Admissibility

- 22 Under Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (hereinafter “the SCA”), any court or tribunal in an EFTA State may refer questions on the interpretation of the EEA Agreement to the Court, if it considers it necessary to enable it to give judgment.
- 23 In order to determine whether a referring body qualifies as a court or tribunal within the meaning of Article 34 SCA the Court takes account of a number of factors. These include whether the referring body is established by law, has a permanent existence, exercises binding jurisdiction, applies rules of law, is independent and, as the case may be, whether its procedure is *inter partes* and similar to the procedure in court, see Case E-1/94 *Restamark* [1994–95] EFTA Ct. Rep. 15, at paragraph 24 et seq. and Joined Cases E-8/94 and E-9/94 *Mattel and Lego* [1994–95] EFTA Ct. Rep. 113, at paragraph 15. For comparison, see also Case C-54/96 *Dorsch Consult* [1997] ECR I-4961, at paragraph 23 and Case C-178/99 *Salzmann* [2001] ECR I-4421, at paragraph 13.
- 24 The composition and powers of the Appeals Commission are defined in the legislative provisions described at paragraphs 11–13 above. According to those provisions, the Appeals Commission is established by law and has a permanent character. As regards its independence, the provisions of the Liechtenstein Constitution mentioned at paragraph 11 and the provisions of the FMAG mentioned at paragraphs 12–13 demonstrate that the Appeals Commission gives rulings, without receiving any instructions and in total impartiality, on decisions adopted by the Financial Market Authority. In this respect the Appeals Commission has a status separate from the authority which adopted the decision under appeal. As is apparent from the documents of the case, the procedure before the Appeals Commission is *inter partes*. Thus, the Court finds that the Appeals Commission exercises a judicial function and qualifies as a court or tribunal within the meaning of Article 34 SCA.

General remarks

- 25 The request of the referring court contains an adequate description of the facts in order for the Court to give a reply. However, the order for reference does not contain specific information on the nature and function of the Internet site by which the Appellant claims to have fulfilled the requirements of the VersVermG to provide the customer with information on a “durable medium”.

- 26 The Appellant simply claims that all the requisite statutory information is to be found on its website, from which every customer can download the relevant documents and/or print these out and file them away for their own information needs. The Appellant argues furthermore that all files printed from the website are automatically marked with the date of printing. In the Appellant's view, the storage and/or provision of the relevant information on the website fulfils the requirement of providing information on a "durable medium".
- 27 By its question, the referring court essentially asks under what conditions an Internet site can constitute a "durable medium" within the meaning of Article 2(12) of the Directive.
- 28 According to Recital 8 of the preamble to the Directive, the coordination of national provisions on professional requirements and registration of persons taking up and pursuing the activity of insurance mediation can contribute both to the completion of the single market for financial services and to the enhancement of customer protection in this field.
- 29 For the purposes of consumer protection, the Directive sets out certain minimum obligations on the information which insurance intermediaries must provide to their customers (see Article 12 of the Directive). Article 13(1)(a) of the Directive requires that all information provided to customers in accordance with Article 12 must be communicated on "paper or on any other durable medium available and accessible to the customer".
- 30 By requiring information provided under Article 12 of the Directive to be communicated in a certain form, Article 13(1)(a) facilitates the subsequent verification of the information which an intermediary has provided to his customer. Furthermore, such a requirement enables the customer to access the information at a later stage and resort to it, if needed in order to protect his interests.
- 31 According to the second subparagraph of Article 2(12) of the Directive, in principle, an Internet site may constitute a "durable medium" within the meaning of that Article, provided that the conditions laid down in the first subparagraph of the Article are met.
- 32 In view of the question referred to the Court and the manner in which the case has been argued, it seems appropriate to address those conditions as follows: The Internet site in question must constitute an instrument which (a) enables the customer to store information addressed personally to him, (b) enables him to store such information in a way accessible for future reference for a period of time adequate to the purposes of the information, and (c) allows for the unchanged reproduction of the information stored.
- 33 In this respect, the instruments listed as examples of durable media in the second subparagraph of Article 2(12) provide guidance as to the substance of those conditions. The second subparagraph of Article 2(12) of the Directive

specifically defines floppy disks, CD-ROMs, DVDs and hard drives of personal computers on which electronic mail is stored as durable media.

The instrument must enable the customer to store information addressed personally to him

- 34 The first criterion under Article 2(12) of the Directive is that the instrument in question must enable a customer to store information which is addressed personally to that customer.
- 35 The parties submitting observations to the Court on that point have commented upon the notion of “information addressed personally” to the customer. The Federal Republic of Germany, ESA and the European Commission address this mainly from the perspective of content, raising the question whether that phrase means that the information must be of personal relevance to the customer and not of such a general character that it concerns all customers. The Czech Republic and the Republic of Estonia approach the issue primarily from the perspective of accessibility, that is, whether or not information on an Internet site freely accessible to the general public may qualify as “addressed personally” to a particular customer. In that respect, the Czech Republic argues that information may be considered personally addressed even if freely accessible to the public, whereas the Republic of Estonia argues that this requirement may be met if a customer has his own personal account on a webpage, accessible via a secure personal password.
- 36 The Court notes that the case before the Appeals Commission concerns the alleged failure by the Appellant to provide on a “durable medium” the information listed in Article 13 of the VersVermG, which corresponds to Article 12(1) of Directive 2002/92/EC. Under Article 15 of the VersVermG, an insurance intermediary is required to provide this information to his customers either in writing or on another “durable medium”. Article 12 VersVermV defines “durable medium” in the same way as Article 2(12) of the Directive. Thus, within the framework of the present case, it is clear what kind of information must be provided either in writing or on a “durable medium”. It is clear, furthermore, that this includes information, such as the address of the insurance intermediary, which has the same content regardless of whether published on a website as information freely accessible to the general public or as a message accessible only to a specific customer.
- 37 The issue whether information published on a website freely accessible to the general public may qualify as information “personally addressed” to that customer, is linked to the obligation, also included under Article 12(1) of the Directive, to “provide the customer with” the information required. In relation to the present Directive, the notion of “information addressed personally” to the customer in Article 2(12) refers, in effect, to the information which must be provided to a customer under Article 12.

- 38 This question is linked also to another element of Article 2(12), that is, that the customer himself must be able to store this information. This requirement, in turn, is functionally linked to the third criterion, concerning unchanged reproduction. Based on the information which the Court has received, it appears difficult to conceive of a website which allows such unchanged reproduction without there having been first some kind of personalised message to the customer containing or referring to the information in question. In this respect, the Court refers to its observations at paragraphs 61–67 below.
- 39 In the light of the above, in relation to the first criterion under Article 2(12), it suffices to conclude that in order to qualify as a “durable medium” within the meaning of Article 2(12) of Directive 2002/92/EC, a website must enable the customer to store the information listed in Article 12 of the Directive.

Accessibility for a period of time adequate to the purposes of the information

- 40 The second criterion is that the instrument in question enables the customer to store the information provided to him in a way accessible for future reference for a period of time adequate to the purposes of the information.
- 41 The Czech Republic, the Republic of Estonia, the Federal Republic of Germany and ESA are all of the view that this period must cover the duration of the legal relationship between the customer and the service provider.
- 42 As regards the accessibility of information supplied prior to the conclusion of a contract, the Czech Republic submits that the period must cover the time from when negotiations on the future contract begin until the moment when no doubt remains that no contract will be concluded with the customer concerned. In a similar vein, the Federal Republic of Germany argues that this period covers, at any rate, the duration of contractual negotiations.
- 43 In relation to the accessibility of information after the termination of a contract, the Czech Republic, the Republic of Estonia, the Federal Republic of Germany and ESA all agree that for purposes of customer protection and the purpose of informing the customer of redress possibilities in case of a dispute, such information should also be accessible after the termination of the contract. The Republic of Estonia submits that account must be taken of the period during which a dispute might arise between the parties, which may depend on national provisions on time limits for bringing legal action.
- 44 With regard to the question of what period of accessibility is adequate to the purposes of the information, the Court finds that the information must be accessible for as long as it is relevant to the customer in order to protect his interests stemming from his relations with the insurance intermediary. The length of this period will depend upon the content of the information, the contractual relationship and the circumstances of the case. Thus, the period of accessibility may cover both the time during which contractual negotiations were conducted, even if not resulting in the conclusion of an insurance contract, and the period

during which an insurance contract concluded is in force. Furthermore, in order to allow a customer, where necessary, to seek redress, the adequate period of accessibility may also cover the period after such a contract has lapsed.

45 The Court further notes that, as is clear from Article 12(5) of the Directive and Recital 19 of the preamble, the Directive establishes only minimum requirements regarding the information to be provided to customers. Thus, the content to be provided under the national provisions on information, which may differ from one EEA State to another, may affect the length of the adequate period of accessibility.

46 Consequently, the second criterion under Article 2(12) must be understood to mean that in order to qualify as a “durable medium”, an Internet site must enable the customer to store the information required under Article 12 of the Directive in a way which makes it accessible for a period of time adequate to the purposes of the information, that is, for as long as it is relevant for the customer in order to protect his interests stemming from his relations with the insurance intermediary. This may cover the time during which contractual negotiations were conducted even if not resulting in the conclusion of an insurance contract, the period during which an insurance contract is in force and, to the extent necessary, the period after such a contract has lapsed.

Unchanged reproduction of the information stored

47 The third criterion is that the instrument must allow for the unchanged reproduction of the information stored.

48 The Czech Republic argues in this regard that an intermediary who intends to use his website as a durable medium for the purposes of the Directive must ensure that he stores the original version of the information and makes such accessible to the customer. If he changes the information, he must indicate clearly when exactly the change took place.

49 The Republic of Estonia argues that it is important that the stored information on the durable medium does not change to the disadvantage of the customer, generally considered to be the weaker party to a contractual relationship. It notes that while, in principle, it is possible to store the information on a website unchanged, for a customer it is difficult to ascertain whether or not the administrator controlling the website has amended the information. In view of the difficulties to obtain evidence in that respect, the Republic of Estonia suggests that customers be required to print out the information or store it on their personal hard drives in order to prove the content of the original information. In that situation, the website itself may not constitute a durable medium but a means through which information is stored on another durable medium.

50 The Republic of Estonia further remarks that as a result of technological progress it may become feasible to prove the unchanged nature of information on a

webpage. In that case, the website itself would constitute a durable medium, although it remains for the competent court to assess this in an individual case. Moreover, in order for a website to constitute a durable medium, the relevant information must be in a form which enables the customer to reproduce it independently later, regardless of the actions of third parties. Consequently, this criterion is not met when the web administrator reproduces the information for the customer.

- 51 The Federal Republic of Germany argues that it follows from a schematic consideration of Article 2(12) and Article 13(1) of the Directive that the customer has to be able to reproduce the information unchanged. This is because the provision of information required by Article 13(1) aims to ensure that the customer may access this information as a contracting partner of the insurance intermediary. In the view of the Federal Republic of Germany, the unchanged reproduction of the information stored is generally not guaranteed in the case of an insurance intermediary's Internet site, since the intermediary may change the information or amend its content at any time.
- 52 The Federal Republic of Germany argues that since it must be possible to reproduce the information for a period of time adequate to the purposes of the information, one cannot be guided by whether the information was provided on an Internet site for an adequate period of time in an unchanged form in an individual case. In line with the argument presented by the Republic of Estonia, the Federal Republic of Germany argues that this would lead to considerable difficulties of proof, both for the insurance intermediary and the customer. In particular, a customer wishing to read the information on the Internet during the period of time regarded as adequate could never be sure that the information is unchanged and complete because he is neither informed of any amendment to the information nor has the possibility to make a comparison.
- 53 The Federal Republic of Germany submits further that the possibility of unchanged reproduction would exist in the case of an intermediary's corporate Internet site only if a mandatory framework was present guaranteeing that the customer could reproduce unchanged the information provided on the Internet site. This could take the form, for example, of an undertaking by the intermediary to provide information on his Internet site in a form that cannot be changed by the intermediary himself, which the customer may access at any time for a period adequate to the purposes of the information. To the knowledge of the Federal Republic of Germany, this cannot currently be ensured, neither legally nor technically. It notes that the Appeals Commission gives no indication of any special legal or technical obligations on the insurance intermediary concerned.
- 54 Nevertheless, in the view of the Federal Republic of Germany, an insurance intermediary's Internet site is not completely unsuitable for the provision of information within the meaning of Article 13 of the Directive. While it does not in itself fulfil the requirements of a durable medium within the meaning of Article 2(12), an Internet site can provide the customer with the possibility of storing information from the site on a medium in the customer's domain. If this

medium allows the customer to make an unchanged reproduction of the information stored for a period of time adequate to the purposes of the information, the information is available to the customer on a durable medium.

- 55 ESA submits that from examining the elements that make up the definition of a durable medium, it is clear that the purpose of providing information on such a medium is to ensure that the customer can easily document the information which he has been provided, and that the insurance intermediary cannot alter it without the customer's consent. ESA argues that it follows from this that "ordinary" websites (see paragraph 56 below) cannot be regarded as durable media, since such websites normally may be changed by those who operate them, whereas the purpose of storing information on a durable medium is to ensure that it cannot be changed unilaterally.
- 56 ESA observes that the European Securities Markets Expert Group (hereinafter "ESME") issued a report on the concept of a "durable medium" in 2007 (Report of 11 July 2007 on Durable Medium - Distance Marketing Directive and Markets in Financial Instruments Directive). In that report, ESME concluded that ordinary websites, which are frequently changed and from which the user cannot necessarily save or print pages, cannot be regarded as durable media. ESA notes that the report examined the concept of durable medium as used in certain provisions of Directive 2002/65/EC concerning the distance marketing of consumer financial services and Directive 2004/39/EC on markets in financial instruments. Both those directives contain the same definition of durable medium as the Directive at issue in the present case. In ESA's view, the concept should be interpreted uniformly in all these instruments.
- 57 ESA points out that the ESME report considers that "sophisticated" websites may constitute durable media. This category of websites can be divided into two sub-categories: (i) those that act as portals for the provision of information in another durable medium, and (ii) those that may actually constitute durable media themselves. The first type of sophisticated website allows users to access information which can be either printed off or copied and stored on an external drive. The information may be reproduced, therefore, on a durable medium, either paper or movable disk, even if the website itself does not constitute a durable medium.
- 58 According to ESA, the ESME report describes the second type of sophisticated website as containing secure storage areas for individual users which are accessed by a user code and password. This type of storage can be compared to a user's own hard disk, except that in this case he can access the information remotely via the Internet.
- 59 ESA shares the opinion presented in the ESME report that a website that provides secure and individual personal storage areas continuously available to users could be considered to constitute a durable medium within the meaning of Article 2(12) of the Directive. ESA considers that it would be incumbent on the

insurance intermediary to demonstrate that the technical solutions used by him ensure that his website fulfils the conditions for constituting a durable medium.

- 60 The European Commission concurs with the views expressed in the ESME report. It adds that other technological solutions may be found in the future which will similarly enable a website to comply with the requirements laid down in Article 2(12) of Directive 2002/92/EC and thus constitute a durable medium.
- 61 The Court notes that according to Recital 8 of the preamble to the Directive, one of the key objectives of the Directive is to enhance protection for consumers concluding insurance contracts via insurance intermediaries. This means, *inter alia*, that it must be possible for consumers to make an informed decision prior to the conclusion of an initial insurance contract or upon its amendment or renewal, and thereby to protect their interests in case of a conflict with the intermediary. To that end, consumers must be able to reproduce the information unchanged, which in the Court's view means that the information provided must be stored in a way that makes it impossible for the insurance intermediary to change it unilaterally.
- 62 There may be several technical methods available for guaranteeing unchanged reproduction. It is for the insurance intermediary in each case to ensure that the methods of electronic communication he employs permit this kind of reproduction.
- 63 As pointed out by ESA and the European Commission, a distinction may be made between "ordinary" websites on the one hand and "sophisticated" websites on the other. An ordinary website serves as a dynamic electronic host or portal for the provision of information which, generally, may freely be changed by the website proprietor. The Court finds that a website which exhibits these characteristics, including freedom for the proprietor to change the content, does not meet the requirements laid down in the first subparagraph of Article 2(12) of the Directive with respect to guaranteeing unchanged reproduction. Therefore, it cannot be regarded as durable medium within the meaning of that Article.
- 64 With regard to sophisticated websites, a further distinction must be made between those sophisticated websites that act as a portal for the provision of information on another instrument which can qualify as a durable medium and those sophisticated websites that may actually constitute durable media themselves.
- 65 The first type of sophisticated website in essence allows the user to access information, for example in the form of an e-mail with an attachment, which he can copy and store on his own computer. For this method to constitute the communication to the customer of information on a durable medium, as required under Article 13(1)(a) of the Directive, the website must contain features which will lead the customer almost certainly to either secure the information on paper or to store it on another durable medium.

- 66 The second type of sophisticated website contains a secure storage area for individual users which is accessed by a user code and password. Provided that this method of storing information excludes any possibility of the insurance intermediary changing the information, this kind of storage can be compared to the user's own hard drive. The only difference is that the customer can access the information remotely via the Internet. The Court finds that this type of sophisticated website fulfils the requirement of guaranteeing unchanged reproduction necessary to qualify as a durable medium within the meaning of Article 2(12) of the Directive.
- 67 It cannot be ruled out that other technological solutions may similarly enable a website to comply with requirements laid down in Article 2(12) of the Directive, including the condition of securing unchanged reproduction of information. This is an assessment which must be made based on the characteristics of the technology in question. It is not for the Court, within the framework of the present case, to specify which particular technological solutions may be acceptable in that regard. The Court therefore limits itself to concluding that in order to qualify as a "durable medium", an Internet site must allow for the unchanged reproduction of the information stored, that is, the information must be stored in a way that makes it impossible for the insurance intermediary to change it unilaterally.

No requirement for consent

- 68 Concerning the referring court's question on the relevance of the customer consenting to receive the information via the Internet, the Court notes that Article 13(1)(a) of the Directive grants an insurance intermediary the option to choose whether to provide the required information to the customer "on paper or on any other durable medium". By contrast, Article 3(1) of Directive 2006/73/EC implementing Directive 2004/39/EC as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive makes the communication of information on a durable medium other than paper dependent upon satisfying specific conditions, *inter alia*, that "... (b) the person to whom the information is to be provided, when offered the choice between information on paper or in that other durable medium, specifically chooses the provision of the information in that other medium". Therefore, in relation to the question raised in the case at hand, it is irrelevant whether the customer has expressly consented to the provision of information through the Internet.

IV Costs

- 69 The costs incurred by the Principality of Liechtenstein, the Czech Republic, the Republic of Estonia, the Federal Republic of Germany, ESA and the European Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are a step in the proceedings before the Financial Appeals Commission, any decision on costs for the parties to those proceedings is a matter for that court.

On those grounds,

THE COURT

in answer to the question referred to it by the Financial Appeals Commission hereby gives the following Advisory Opinion:

1. **In order for an Internet site to qualify as a “durable medium” within the meaning of Article 2(12) of Directive 2002/92/EC of the European Parliament and of the Council of 9 December 2002 on insurance mediation, it must enable the customer to store the information listed in Article 12 of the Directive.**
2. **In order to qualify as a “durable medium”, an Internet site must enable the customer to store the information required under Article 12 of the Directive in a way which makes it accessible for a period of time adequate to the purposes of the information, that is, for as long as it is relevant for the customer in order to protect his interests stemming from his relations with the insurance intermediary. This may cover the time during which contractual negotiations were conducted even if not resulting in the conclusion of an insurance contract, the period during which an insurance contract is in force and, to the extent necessary, the period after such a contract has lapsed.**
3. **In order to qualify as a “durable medium”, an Internet site must allow for the unchanged reproduction of the information stored, that is, the information must be stored in a way that makes it impossible for the insurance intermediary to change it unilaterally.**

4. **In order for an Internet site to qualify as a “durable medium”, it is irrelevant whether the customer has expressly consented to the provision of information through the Internet.**

Carl Baudenbacher

Thorgeir Örlygsson

Henrik Bull

Delivered in open court in Luxembourg on 27 January 2010.

Skúli Magnússon
Registrar

Carl Baudenbacher
President