



**REPORT FOR THE HEARING**  
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 (hereinafter the “Directive”), as referred to in point 13b of Chapter I of Annex IX to the EEA Agreement, as to the criteria by which a website may be regarded as constituting a “durable medium” within the meaning of Article 2(12) of the Directive.

**I Introduction**

1. By a decision dated 27 March 2009 the Appeals Commission made a request for an Advisory Opinion, registered at the Court on 14 April 2009, in a case pending before it between Inconsult Anstalt (hereinafter the “Plaintiff”) and the Financial Market Authority of Liechtenstein, (hereinafter “the Defendant”).

**II Facts and procedure**

2. The case concerns the administrative appeal of an order issued by the Defendant on 27 January 2009, by which the Plaintiff was required to comply with certain information obligations as stated in Articles 13 and 15 of the Act of 17 May 2006, LR 961.1, on Insurance Mediation (Gesetz vom 17. Mai 2006 über die Versicherungsvermittlung, LR 961.1 hereinafter the “VVG”).

3. The Plaintiff, a private entity incorporated under Liechtenstein law, received a licence from the Defendant on 29 May 2007 pursuant to Article 6(1) and (2) of the VVG to take up and carry on business as an insurance intermediary in the form of a broker.

4. On 25 November 2008, the Defendant carried out an on-site audit at the premises of the Plaintiff. Subsequently, the Defendant issued the disputed order whereby it *inter alia* summoned the Plaintiff to comply with information obligations laid down in Article 13 of the VVG.

5. On 6 February 2009, the Plaintiff brought an action at the Appeals Commission, where it has contested the order of the Defendant in its entirety. *Inter alia*, the Plaintiff has submitted that it has satisfied its information obligations under Article 13 of the VVG, *inter alia* by means of operating a website ([www.inconsult.li](http://www.inconsult.li)).

6. According to the request for an Advisory Opinion the website does in fact contain information which in terms of its content satisfies Article 13 of the VVG, at least since 11 March 2008. However, under Article 15(1) of the VVG, an insurance intermediary is required to provide the customer with the information prescribed by *inter alia* Article 13 of the VVG, in writing on paper or on another “durable medium” that is available and accessible to the customer. What constitutes a “durable medium” is defined in Article 12 of the Regulation of 27 June 2006 on Insurance Mediation, LR 961.11 (Verordnung vom 27. Juni 2006, über die Versicherungsvermittlung, LR 961.11, hereinafter the “VVV”). Article 12 of the VVV is a verbatim implementation of Article 2(12) of the Directive, reading as follows:

*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.*

7. Regarding the right to make a reference, the Appeals Commission notes that under the second paragraph of Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (hereinafter the “SCA”), a court or tribunal of an EFTA State may request the EFTA Court to give an advisory opinion on a question raised regarding the interpretation of the EEA Agreement, if the court or tribunal considers such an opinion necessary to enable it to give judgment. The Appeals Commission considers that it qualifies as a court or tribunal within the meaning of this provision.

8. As regards the organisational criteria required to be met in this respect, the Appeals Commission notes that it is established by law on the basis of Article 34(1) of the Act of 18 June 2004 on Financial Market Regulation, LR 952.3 (Gesetz vom 18. Juni über die Finanzmarktaufsicht, LR 952.3, hereinafter the “FMAG”) and has permanent character, taking up its activity on 1 January 2005 with its activity not being limited in time. Furthermore, Article 35(1) of the FMAG provides that contestable decisions and orders may be challenged before the Appeals Commission and that they acquire binding force, once the time-limit for appeals has passed.

9. Moreover, the Appeals Commission states that it is independent in its functions, with its members being elected by the Parliament of the Principality of Liechtenstein for a term of five years, cf. Article 34(2) of the FMAG. According to Article 34(3) of FMAG, members of government, parliament, governing bodies and staff of the Financial Market Authority are not eligible to sit on the Appeals Commission, along with civil servants and employees of the national administration.

10. Concerning the relevance of the advisory opinion for the issue at hand, the Appeals Commission submits that while at first it must only have regard to the facts at the time the disputed order was issued, and that the Plaintiff’s website has since then been brought into conformity with the requirements of Article 13 of the VVG only as of 11 March 2009, the Appeals Commission's decision also has legal effect in the future.

11. If the website were indeed held to satisfy the criteria of Article 12 of the VVV and hence those of Article 2(12) of the Directive, the order to comply and the threat of the imposition of a fine in respect of that order would be nugatory. Under Article 26(2)(d) of the VVG it is a necessary condition for the imposition of a fine by the Financial Market Authority that the Plaintiff has failed to obey an order to comply. In that respect the decision on the appeal at hand is relevant to the issue as to whether or not a fine can be imposed on the Plaintiff in the future.

12. The Appeals Commission considers Article 12 of the VVV to be not clearly worded and feels that an interpretation by the EFTA Court on Article 2(12) of the Directive is necessary in order to enable it to render judgment on the Plaintiff’s appeal. In that regard, the following aspects may, in the opinion of the Appeals Committee, in particular be relevant for the interpretation of Article 2(12) of the Directive:

- Do the criteria in the first paragraph of Article 2(12) of the Directive entail that only password-protected websites 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 website is “personally” addressed to a particular person e.g. in such a way that only that person can access the website?
- 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?

### III Question

13. The following question was referred to the Court:

**What are the criteria by which a website 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?**

### IV Legal background

#### *National law*

14. Insurance mediation in Liechtenstein is governed by the VVG and VVV. According to Article 6(1) of the VVG, licenses to operate as insurance intermediaries, either as insurance agents or brokers, are issued by the Defendant. On the basis of the FMAG, the Defendant is responsible for implementing and monitoring the operation of the VVG.

15. Article 13 of the VVG sets out certain information obligations that insurance intermediaries are required to comply with prior to the conclusion of insurance 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 Finanzmarktaufsicht 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.”*

16. Under Article 15 of the VVG the insurance intermediary is required to provide the customer with the information prescribed in Article 13 and 14 of the VVG in a certain form. According to the Article, the intermediary shall provide this information either in writing on paper or on another “durable medium” that is available and accessible to the customer.

17. What constitutes a “durable medium” under Article 15 of the Act is defined in Article 12 of the VVV. Article 12 of the VVV 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*

18. Article 13 of the VVG was adopted as part of the implementation of the Directive into Liechtenstein Law. The Directive was incorporated into the EEA Agreement at point 13b of Chapter I of Annex IX thereto, by Decision No 115/2003 of the EEA Joint Committee, which entered into force on 27 September 2003.<sup>1</sup>

19. The Directive was incorporated into Annex IX of the EEA Agreement, as a specific provision under Article 36 of the EEA Agreement, which reads:

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<sup>1</sup> Decision of the EEA Joint Committee of 26 September 2003 amending Annex IX (Financial Services) to the EEA Agreement, OJ 2003 L 331, p. 34. and EEA Supplement No 64, 18.12.2003, p. 21.

*1. Within the framework of the provisions of this Agreement, there shall be no restrictions on freedom to provide services within the territory of the Contracting Parties in respect of nationals of EC Member States and EFTA States who are established in an EC Member State or an EFTA State other than that of the person for whom the services are intended.*

*2. Annexes IX to XI contain specific provisions on the freedom to provide services.*

20. Chapter III of the Directive sets out certain information requirements for intermediaries. 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.*

...

21. 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.*

22. The term “durable medium” is defined in Article 2, Paragraph 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, CDRoms, 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.*

## **V Written Observations**

23. Pursuant to Article 20 of the Statute of the Court and Article 97 of the Rules of Procedure, written observations have been received from:

- The Plaintiff, represented by Michael Schädler, Managing Director;
- The Defendant, represented by Martina Tschanz, Head of Legal Department, and Sandra Madlener, Legal Adviser;
- 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;
- The Czech Republic, represented by Martin Smolek, Agent for the Czech Republic before the ECJ, acting as Agent;
- The Republic of Estonia, represented by Lembit Uiibo, acting as Agent;
- The Federal Republic of Germany, represented by Moritz Lumma, acting as Agent;
- The EFTA Surveillance Authority, represented by Bjørnar Alterskjær, Acting Director, and Ólafur Jóhannes Einarsson, Senior

Officer, Department of Legal & Executive Affairs, acting as Agents; and

- The Commission of the European Communities, represented by Nicola Yerrell, Member of its Legal Service, acting as Agent.

*The Plaintiff*

24. The Plaintiff argues that the questions referred by the Appeals Commission are redundant and irrelevant to the facts at hand.

25. The Plaintiff claims that most of its customers have been with the company for many years and long before the VVG entered into force. The Plaintiff submits that all of these customers have signed a letter of engagement which sets out the information about the firm required by the law in force at the relevant time. As regards new customers of the company, the Plaintiff claims that they are given an “information sheet”, which is also available on the website of the Plaintiff to be viewed and downloaded.

26. As for the questions referred, the Plaintiff claims that all the requisite statutory information is to be found on its website, where every customer can download the relevant information and documents and/or print these out and file them away for their own information needs. The Plaintiff argues that all files printed from the website are automatically marked with the date of printing. In the Plaintiff’s view, the storage and/or provision of the relevant information on the website of a firm subject to the regulations fulfils the requirements for a “durable medium”.

*The Defendant*

27. The Defendant submits that it has not adopted a view on what constitutes a “durable medium” within the meaning of Article 2(12) of the Directive and Article 12 of the VVV, and awaits the judgment of the EFTA Court in this respect.

*The Principality of Liechtenstein*

28. The Principality of Liechtenstein argues that it is for the national authorities and courts, within the limits of their discretion, to assess the suitability of the measures chosen to ensure the required durability of a medium in each individual case.

29. The Principality of Liechtenstein submits that by reading the definition of “durable medium” in Article 2(12) it is evident that not every ordinary Internet site shall be deemed to be a “durable medium” and a regular website does not meet the criteria set out in the Article. According to this provision, it is however



possible to create an Internet site which meets the qualifications established by EEA law.

30. In the opinion of the Principality of Liechtenstein, the core problem with information on an Internet site is that it may be modified at any time and that websites are in general meant to be dynamic information tools. Consequently, an Internet site qualifying as a “durable medium” should be designed with measures safeguarding the durability and permanent availability of certain information. These measures need to be assessed and ensured by the competent authority when it grants the authorisation to operate as an insurance intermediary.

31. Furthermore, the Principality of Liechtenstein submits that since directives only form a statutory framework, it falls to the national legislator to choose the form and methods as to the result to be achieved by a directive. In case of Article 2(12) of the Directive, it is argued that the competent national authority needs to assess the solution chosen by the applicant in each individual case, if the national legislator does not provide for a detailed catalogue of conditions specifying what is meant by “durable medium”.

32. The Principality of Liechtenstein maintains that there are various options to ensure that information is provided on a website by means of a “durable medium”. One option would be for the website itself to be developed in a way that it fulfils the criteria of a “durable medium”, e.g. by creating individual user storages, which would be accessible at any time for an unlimited period and where the content would remain unchanged.

33. Another option would be to provide information on a website – which in itself is not considered a “durable medium” – in any file format that allows visitors of the website to print, download or attach it to an e-mail. That way, information would be provided through a medium which could be considered a “durable medium”, fulfilling the criteria set out by the Directive, although the website would not be a durable medium itself.

34. The Principality of Liechtenstein maintains that it is for the Plaintiff to prove the requested durability. In case of doubts, the competent authority can either refuse the authorization or require further conditions to be fulfilled.

35. Following the observations made above, the Government of the Principality of Liechtenstein suggests that the question of the Appeals Commission should be answered as follows:

*Article 2 point 12 of Directive 2002/92/EC of the European Parliament and of the Council of 9 December 2002 on insurance mediation leaves it up to the Member States to implement specific criteria on how a medium qualifies as durable, and in particular, how a website may – according to the framework set out by the Directive – be considered a “durable medium”.*

*It is for the national authorities and courts, within the limits of their discretion, to assess the suitability of the measures chosen to ensure the requested durability of a medium in each individual case.*

### *The Czech Republic*

36. The Czech Republic submits that a website can fall under the definition of “durable medium” and satisfy the criteria to qualify as such.

37. The Czech Republic argues that it is apparent from the reasoning in the Directive that one of its main purposes is the protection of the customer as the weaker party in the contracts concerned, cf. recitals 8, 9 and 17 in the preamble of the Directive. A durable medium is an instrument which guarantees that the weaker party to the contract will have access to the information necessary for the realisation of the contract for the time necessary.

38. In this respect, the Czech Republic argues that the definition of the term “durable medium” in Article 2(12) of the Directive in principle consists of four basic elements (criteria).

39. Firstly, it must enable the customer to store information addressed personally to him. Secondly, it must enable the customer to store this information in a way accessible for future reference. Thirdly, it must permit the customer to store the information for a period of time adequate for the purposes of the information, which, fourthly, allows the unchanged reproduction of the information stored. The Czech Republic points out that according to the second paragraph of Article 2(12), Internet sites are excluded from the definition of “durable medium”, unless such sites meet the four criteria specified in the first paragraph.

40. The Czech Republic highlights that the term “durable medium” appears in several other Community legal acts, as well as drafts for a new directive. According to the Czech Republic, the increased occurrence of the term in the last few years fully corresponds to the overall progress in EC law, which intends to react to the technical reality and therefore emphasizes the role of the website as a possible information storage. The Czech Republic argues that recent directives often contain a more elaborate and consistent approach to the provision of the information to the weaker party to the contract via websites; hence, the Directive should also be interpreted in light of these recent developments.

41. The Czech Republic submits that a website can satisfy the four criteria mentioned and therefore constitute a durable medium within the meaning of Article 2(12) of the Directive. Regarding the purpose of the requirement for a durable medium, the Czech Republic maintains that websites are in some regard more suitable media for the information duty than paper, floppy disks or some other forms of media.

42. It is argued that a website is a collection of related web pages, images, videos or other digital assets that are addressed with a common domain name or IP address in an Internet Protocol-based network. Each website is hosted on at least one web server, accessible via the Internet or a private local area network, which stores all data on a hard disk. From a technical point of view, it is therefore not the website itself which can constitute a durable medium, but a hard disk of the web server from which the website is displayed to the users.

43. As regards the criterion “personally addressed” the Czech Republic argues that information can be considered personally addressed even if it is freely accessible by the public, since the purpose of the information requirement, that is to provide the customer with relevant information in the meaning of Article 12 of the Directive, can be clearly achieved through a publicly accessible website. In the view of the Czech Republic, the suggested interpretation of the words “personally addressed”, is fully in line with the approach adopted in Article 3(2)(c) of Directive 2006/73/EC.<sup>2</sup>

44. In respect to the criterion of the information being accessible for future reference, the Czech Republic submits that it contains two requirements: firstly, that the way the information in question is provided does not prevent the customer from utilizing the information in the future; secondly, the customer must be able to get access to the relevant information objectively.

45. The Czech Republic argues that it is obvious that a customer without Internet access does not have an objective possibility to access the information and therefore the information is not accessible to him for future reference. The Czech Republic points out that some directives mentioned by the referring court already take this situation into account, cf. Article 3(2)(b) of Directive 2006/73/EC, which requires that the customer specifically gives prior consent to the provision of information in the form of a website, and recital 24 of the preamble of Directive 2007/64/EC,<sup>3</sup> which requires that the Internet website concerned be accessible for future reference for a period of time adequate for the purposes of the information and allows the unchanged reproduction of the information stored.

46. In light of this, the Czech Republic argues that Article 12 of the Insurance Mediation Directive should be interpreted in such a way that information provided to the customer via the Internet be accessible for future reference, in light of the approach of Directive 2007/64/EC, which requires that the customer specifically gives a prior consent to the provision of information in the form of a website.

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<sup>2</sup> Commission Directive 2006/73/EC of 10 August 2006 implementing Directive 2004/39/EC of the European Parliament and of the Council as regards organizational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive.

<sup>3</sup> Directive 2007/64/EC of the European Parliament and of the Council of 13 November 2007 on payment services in the internal market amending Directives 97/7/EC, 2002/65/EC, 2005/60/EC and 2006/48/EC and repealing Directive 97/5/EC.

47. As for the criterion of the customer being able to store the information for a period of time adequate for the purposes of the information, the Czech Republic argues that this time refers to the overall duration of the legal relationship between the customer and the service provider. For the provision of pre-contract information, the adequate period of time shall cover the period starting from the initiation of the bargaining of the future contract until the moment when there is no doubt that a contract will not be concluded with that particular customer.

48. Moreover, the Czech Republic submits that such information should also be accessible after the termination of a contract for customer protection purposes, but the length of that time should be reviewed on a case-by-case basis. In the opinion of the Czech Republic, the information should nevertheless be stored at least until the obligations arising from the contract are settled, e.g. until the invoices are paid, excess payments and funds received are returned or accepted securities are transferred. In case of insurance contracts, the whole time period until all insured accidents, which arose from the contract, are duly settled, should be covered. Herein, the Czech Republic notes that a similar approach was adopted by Article 51(1) second subparagraph of Directive 2006/73/EC.

49. Concerning the condition that the information be stored “unchanged” for the time adequate to its purpose, the Czech Republic argues that the intermediary who intends to use his websites as a durable medium for the purpose of the Directive must ensure that he stores the original version and makes it accessible to the customer, if he changes the information to which this duty applies, and then clearly indicates when the change took place.

50. Based on this, the Czech Republic suggests that questions from the referring body should be answered as follows:

*A website can constitute a durable medium within the meaning of Article 2(12) of Directive 2002/92/EC, on insurance mediation.*

*If the customer specifically gives a prior consent to the information according to Article 12 of Directive 2002/92/EC on insurance mediation being provided to him via the Internet and is notified of the information necessary for the access to that information, typically by a notice including a link to the particular Internet address and the place on the website where the information may be accessed, then both password-protected websites and public websites which are addressed to and can be addressed by everybody are covered.*

*The particular information was accessible unchanged over a particular period of time if, after the change of the content of information, also the original information is directly accessible on the website which also indicates clearly when it was changed.*

*The “adequate” period of time is to be reviewed by the national court on a case-by-case basis taking into account the purpose of the customer’s protection; however, it always covers the duration of the legal relationship between the customer and the service provider.*

*The Republic of Estonia*

51. The Republic of Estonia submits that Article 2(12) of the Directive contains an open list of instruments which may constitute a durable medium. The article also lists criteria that have to be met in order for an instrument to constitute a durable medium. It is argued that this wording enables new instruments to be categorised as durable media, with the development of various technologies taken into account.

52. In the opinion of the Republic of Estonia, a website may constitute a durable medium if it meets the criteria set forth in Article 2(12). It is not necessary to lay down technical requirements for a website to be considered a durable medium. Instead, the relevant court should examine in every single case whether a website meets the relevant criteria. For a website to constitute a durable medium, it is necessary to look at the specific criteria and the objectives of these criteria that have to be met.

53. Regarding the criterion of addressing a person personally, it is submitted that this is to let the customer know which information is of his/her direct concern. The aim is to protect the customer from a situation where it is not clear what information is relevant to him and what not. Therefore a website addressed to the general public might not meet this criterion.

54. However, the Republic of Estonia finds that this criterion could be met if the customer had his/her own personal account on a webpage, accessible with a secure personal password. A service provider would upload the relevant information to the webpage.

55. It is argued that information is personally addressed if it is clear that the addressee of particular information is a specific customer and not the general public. Different possibilities of addressing information personally must be evaluated in each individual case, taking into account the abovementioned objective of addressing the customer personally.

56. As concerns the question of whether the information stored on a website can be reproduced unchanged, the Republic of Estonia emphasises two aspects for the purpose of analysing whether information can be reproduced unchanged: firstly, storing the information without it being changed, and secondly, the reproduction of that information.

57. The Republic of Estonia argues that according to the Directive it is especially important that the stored information on the durable medium does not

change unfavourably for the customer since he/she is usually considered to be the weaker party of a legal relationship.

58. The Republic of Estonia submits that, while it is in principle possible to store the information on a website without changing it, it is difficult for the customer to ascertain that the administrator has not arbitrarily altered the information on the website, as the website is controlled by the administrator.

59. Considering that it is for the relevant court to assess in each individual case whether the stored information has been changed, the Republic of Estonia mentions the difficulty of using what one has read on a computer screen as evidence in a court of law, and suggests that customers be required to print or store information on their personal hard drives in order to prove what the original information that the parties agreed upon was. In this case, the website may not in itself constitute a durable medium – it has become a means through which information is stored on another durable medium.

60. The Republic of Estonia remarks that due to technological progress, it may become feasible (e.g. by tracking server logs), 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 relevant court to assess this in each individual case.

61. Regarding the issue of reproduction, the Republic of Estonia argues that in order for a website to be a durable medium the relevant information must be in a form which enables the customer to independently reproduce it later, regardless of the actions of third parties. The Republic of Estonia submits that this criterion is not met when the web administrator reproduces the information for the customer; however the relevant court must assess in each individual case whether the necessary information can be reproduced unchanged by the customer.

62. Finally, the Republic of Estonia submits that as regards the criterion for the accessibility of information for future reference for a period of time adequate to the purposes of the information, the relevant court should not determine a specific period, but rather take into account the specific circumstances of every individual case.

63. The Republic of Estonia's position in this respect is that one must take into account the purpose of the information, as customers not only need the information in order to decide whether to enter into a contract, they also need to rely on it in matters of dispute and to defend their rights. Therefore the adequate period of time must take into account the period during which a dispute might arise between the parties and where that information is relevant to the dispute. Presumably that period might depend on the expiry of the notice to bring legal action, which in the Republic of Estonia varies from 3 to 10 years.

64. The Republic of Estonia notes that the aim of this criterion is that a decision on what is to be considered an adequate period of time should not only depend on the provider of the information but also the customer. However, it might be difficult to guarantee that the customer has any control over deciding what the adequate period is, since the control over the information remains with the web administrator.

65. The Republic of Estonia endorses the approach where the relevant court does not determine a specific period of time as adequate but rather takes into account the specific circumstances of a case. In this assessment, the EFTA Court should primarily look to the objective of the criterion, which is that the customer should also have control over deciding what is an adequate period of time to access the relevant information.

66. In light of this the Republic of Estonia submits the following conclusion:

*Estonia's position is that the Directive 2002/92/EU Article 2(12) does not exclude a website as a durable medium. Satisfying all the criteria set out in Article 2(12) of the Directive can prove to be difficult, however, possible. Estonia finds that it is for the relevant court to assess in each individual case if a specific website meets all the criteria set out in Article 2(12) of the Directive.*

*The Federal Republic of Germany*

67. In the view of the Government of the Federal Republic of Germany, an insurance intermediary's publicly accessible Internet site is not generally a "durable medium" within the meaning of Article 2(12) of the Directive. While such an Internet site does enable the customer 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, it does not allow the unchanged reproduction of the information stored.

68. In the view of the Federal Government, the requirement of the possibility of unchanged reproduction would only be fulfilled if it is guaranteed in the case of an insurance intermediary's Internet site that the customer can access data on the Internet site at any time for a period of time adequate to the purposes of the information and that the data cannot be changed by the insurance intermediary. As long as the unchanged reproduction of the information stored by the Internet site is neither technically nor legally guaranteed, the requirement that the insurance intermediary provides information on a durable medium can only be fulfilled if the customer stores the information from the Internet site on a medium in his domain, allowing him the unchanged reproduction of the information stored for a period of time adequate for the purposes of the information.

69. It is argued that according to the definition of "durable medium" in Article 2(12) subparagraph 1 of the Directive, the term is to be understood as meaning

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 Article 13(1)(a) of the Directive, a “durable medium” is specified as being a medium by means of which information required under Article 12 of the Directive can be provided to insurance intermediary customers.

70. The Federal Government highlights that the definition of “durable medium” in Article 2(12) of the Directive corresponds to the term “durable medium” used in many European acts of law.<sup>4</sup> Although the circumstances regulated by the quoted directives are not always identical, the provisions in connection with the term “durable medium” always regulate the duty to supply information to customers or to the non-entrepreneurial party to the agreement. The Federal Government argues that it may be concluded from this overall context that a uniform definition should apply in European law. In the view of the Federal Government, the term “durable medium” is to be interpreted autonomously and uniformly for this act of law.

71. It is pointed out that the second subparagraph of Article 2(12) of the Directive also contains a list of examples of media within the meaning of the definition. Floppy disks, CD-ROMs, DVDs and hard drives of personal computers are given explicit mention, all of which fulfil all the required criteria of the definition. In contrast, Internet sites are excluded in principle. However, they can be seen as “durable medium”, according to the definition, if they conform to the criteria laid out in subparagraph 1. For Internet sites, an examination and approval that the conditions of subparagraph 1 have been met in the individual case are required.

72. The Federal Government notes that in most other acts of law containing the same definition of the term “durable medium” there is no specification by means of a list of examples. Only in the twenty-fourth recital in the preamble of Directive 2007/64/EC is the same information given using a different wording.

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<sup>4</sup> The Federal Republic of Germany refers to Article 2(2) of Commission Directive 2006/73/EC of 10 August 2006 implementing Directive 2004/39/EC of the European Parliament and of the Council as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive (EU Official Journal No. L 241 of 2 September 2006, p. 26), in conjunction with the Decision of the EEA Joint Committee No 21/2007, EU Official Journal No. L 209 of 9 August 2007, p. 38; Article 4 (25) of Directive 2007/64/EC of the European Parliament and of the Council of 13 November 2007 on payment services in the internal market amending Directives 97/7/EC, 2002/65/EC, 2005/60/EC and 2006/48/EC and repealing Directive 97/5/EC (EU Official Journal No. L 319 of 5 December 2007 p. 1), in conjunction with the Decision of the EEA Joint Committee No. 11/2008, EU Official Journal No. L 339 of 18 December 2008, p. 103; Article 3 (m) of Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC (EU Official Journal No. 133 of 22 May 2008 p. 6); Article 2 (1) (h) of the Directive 2008/122/EC of the European Parliament and of the Council of 14 January 2009 on the protection of consumers in respect of certain aspects of timeshare, long-term holiday product, resale and exchange contracts (EU Official Journal No. L 33 of 3 February, p. 10).



73. Thus, in the first instance, the Federal Government argues that it may only be inferred from the text of Article 2(12) of the Directive that an Internet site may be regarded as a durable medium under certain circumstances.

74. The Federal Government further submits that the requirements of Article 2(12) of the Directive are not fulfilled by Internet sites. While an insurance intermediary's Internet site fulfils the requirement of enabling information to be stored for access at any time, it does not allow for the unchanged reproduction of the information stored at any time.

75. On one hand, this requirement may be understood to cover only a medium on which the customer can store the information. On the other hand, the criterion may also be understood to mean that the consumer can store the information from a medium in any other place, i.e. it is stored and accessible to him there.

76. As regards this criterion, the Federal Government argues that although the text of Article 2(12) does not contain any more detailed information which contributes to understanding the criterion, it follows from the Directive's systematic arrangement that the first requirement is to be understood to mean that the customer can store the information from a medium in any other place.

77. According to the Federal Government, this is because the definition serves to explain a medium through which the insurance intermediary's duty to supply information to the customer can be fulfilled. Article 13(1)(a) of the Directive regulates here that the information shall be communicated to the customer on paper or on a "durable medium". This obligation exists for the insurance intermediary, who can only communicate the information if he provides the customer with a medium on which the information is stored or from which the customer can store it.

78. The Federal Government submits that this information is also supported by the twenty-fourth recital of the preamble of Directive 2007/64/EC. In this recital, a number of durable media are listed as examples. According to this recital, Internet sites may also be durable media as long as such sites are accessible for future reference for a period of time adequate for the purposes of the information and allow the unchanged reproduction of the information stored. Internet sites are usually accessible for a lengthy period of time. As a rule, information may also be reproduced from them for storage.

79. Concerning the requirement for accessibility for a period of time adequate to the purposes of the information, it is argued that the adequate period of time within the meaning of Article 2(12) subparagraph 1 must be determined in each individual case, taking into account the service provided by the insurance intermediary and the purpose of the insurance product sold.

80. The Federal Government submits that the text of Article 2(12) subparagraph 1 does not contain any indication that enables a more precise

definition of the period of time adequate to the purposes of the information. As well as regulating the information to be communicated, Article 12 of the Directive also regulates when it is to be communicated. The relevant moments in time are prior to the conclusion of any initial insurance contract and upon amendment or renewal thereof. As the purpose of the information is described in the eighteenth recital as being that the customer should be informed whether an intermediary is advising him, it is the view of the Federal Government that the period of time adequate to this purpose is in any case the duration of contractual negotiations.

81. Furthermore, some of the information to be communicated is not absolutely necessary for the conclusion of the contract but also serves purposes that continue beyond this point in time. An example is the information to be communicated in accordance with Article 12(1)(e) of the Directive on redress and complaints procedures. This information serves the purpose of informing the customer of possibilities of redress in case of dispute. The adequate period of time during which this information has to be accessible cannot be defined in abstract terms. In any case, it continues beyond the period of the contractual negotiations.

82. Finally, the Federal Government points out that another feature of “durable medium” is that it allows the unchanged reproduction of the information stored, cf. the last clause of Article 2(12) subparagraph 1 of the Directive. Although the text is not unambiguous on this point, the Federal Government argues that this possibility of reproduction must exist for a period of time adequate to the purposes of the information, since the information is intended to place the customer in a position to safeguard his rights in accordance with the purpose of the information.

83. As for this criterion, the Federal Government also argues that it follows from a systematic 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 the information required by Article 13(1) of the Directive requires the customer to be able to access this information as the contracting partner of the insurance intermediary. In addition, the information to be provided under Article 12 of the Directive not only comprises information of relevance to the conclusion of the contract, but also information that remains relevant after its conclusion, such as information on out-of-court complaint and redress procedures to settle disputes between customers and intermediaries. It has to be possible for the customer to reproduce such information unchanged.

84. In the view of the Federal Government, the unchanged reproduction of the information stored is generally not guaranteed in the case of an insurance intermediary’s Internet site, since the intermediary can change the information or amend its content at any time.

85. The Federal Government 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 changed or an unchanged form in the individual case in question. According to the Federal Government, this would lead to considerable difficulties of demonstration and proof both for the insurance intermediary and the customer. In particular, a customer wishing to read the information on the Internet during the adequate period of time could never be sure whether the information was unchanged and complete, because he is neither informed of any amendment to the information nor has he the possibility to make a comparison.

86. The Federal Government argues that the possibility of unchanged reproduction would only exist in the case of an entrepreneur's corporate Internet site if obligatory framework conditions existed for the entrepreneur, which guaranteed that the customer was able to reproduce the information provided from the Internet site unchanged. This could take the form, for example, of the entrepreneur undertaking to provide information on his Internet site that could not be changed by the entrepreneur himself, which the customer could access at any time for a period of time adequate to the purposes of the information. To the knowledge of the Federal Government, this can currently neither be ensured legally nor technically. It is pointed out that the Appeals Commission gives no indication in the facts on which the request for an advisory opinion is based, of any special legal or technical obligations of the insurance intermediary concerned in the initial case.

87. Nevertheless, an insurance intermediary's Internet site is not, in the view of the Federal Government, completely unsuitable for the provision of information within the meaning of Article 13 of the Directive. While it does not in principle 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 it on a medium in the customer's domain. If this storage medium then allows the customer the 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.

88. The Federal Government is therefore of the opinion that an insurance intermediary's Internet site does not generally fulfil the requirements of a "durable medium" within the meaning of Article 2(12) of the Directive. In particular, such an Internet site does not allow the unchanged reproduction of the information stored. In the view of the Federal Government, the requirement of the possibility for unchanged reproduction would only be fulfilled if the insurance intermediary guaranteed in respect of an Internet site that the customer could access, at any time and for a period of time adequate to the purposes of the information, data from the Internet site that cannot be changed by the insurance intermediary. As long as this is guaranteed neither technically nor legally, the requirement that the information be provided by the insurance intermediary on a

durable medium can only be fulfilled if the customer stores the information from the Internet site on a medium in his domain that allows the unchanged reproduction of the information stored for a period of time adequate to the purposes of the information.

89. The Federal Republic of Germany proposes answering the request as follows:

*An insurance intermediary's Internet site cannot generally be regarded 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. In principle, an Internet site 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. However, in principle, such an Internet site does not allow the customer the unchanged reproduction of the information stored. Only if the insurance intermediary guarantees by means of special arrangements on his Internet site that the customer can access at any time Internet site data that cannot be changed by the insurance intermediary for a period of time adequate to the purposes of the information is the Internet site a durable medium within the meaning of Article 2 (12) of the Directive.*

*As long as the unchanged reproduction of the information stored by the Internet site is neither technically nor legally guaranteed, the insurance intermediary can only communicate the required information on a durable medium if the customer stores the information from the Internet site on a medium in his domain, allowing him the unchanged reproduction of the information stored for a period of time adequate for the purposes of the information.*

#### *The EFTA Surveillance Authority*

90. The EFTA Surveillance Authority (hereinafter "ESA") points out that Article 2(12) of the Directive provides that websites can constitute a durable medium if the conditions set out therein are fulfilled. This follows from the fact that "any instrument" can constitute a durable medium. ESA highlights that the instruments used as examples of durable mediums, such as floppy disks, CDROMs, DVDs and hard drives, are all concrete, moveable items on which one can store data for an indefinite amount of time. Compared to these other mediums, websites differ substantially as they cannot physically be transported around, do not function without access to the Internet, and the information on a website can generally be changed by the operator. However, the provision does not give any further guidance as to when websites would fulfil the criteria listed in Article 2(12), nor can it be found in other Articles of the Directive. ESA also

notes that neither the EFTA Court nor the ECJ have to date rendered any judgment as regards the interpretation of the concept of durable medium.

91. In the view of ESA, it follows from the definition of Article 2(12) that three conditions need to be fulfilled in order for an instrument to qualify as a durable medium. First, the information needs to be addressed personally to the customer and enable him to store information on it. Secondly, it has to be accessible for future reference for an adequate period of time. Thirdly, the instrument used must allow for the unchanged reproduction of the information.

92. Turning to the first condition, ESA argues that the instrument in question must enable the customer to “store information addressed personally to him”. ESA notes that websites are in general a means of storing information. However, the remaining issue is whether the information stored can be considered to be *addressed personally* to the customer. ESA submits that the fact that it has to be *addressed personally* to the customer does not necessarily require that the information in question must be of personal character in the sense that it must be tailored to the customer. Nevertheless, it must be clear that the information concerns this particular customer. As a consequence, it must be clear that the information is of personal relevance to the customer and not of such a general character that it concerns all customers, even though the information can be of general character to some extent.

93. The second condition, that the information must be “accessible for future reference for an adequate period of time” entails that the information stored on the website must be lasting and of permanent character. To ESA this means that the information has at least to be accessible for as long as the customer-relationship exists. Depending on the nature of the contract, the information might need to be available for some time thereafter, which ESA assumes might be a considerable period, e.g. in some insurance contracts.

94. Looking at the third condition, the instrument (the website) must allow for the “unchanged reproduction of the information stored”. This means that, in addition to providing information on a website that is accessible for an adequate period of time, the information must be stored in such a way that makes it impossible for any party to change it unilaterally. ESA submits that it is clear from examining the elements that make up the definition of a durable medium that the requirement to provide information through such a medium is to ensure that the customer can easily document what information he has been provided with, and that the insurance mediator cannot alter it without the agreement of the customer.

95. In ESA’s view, it follows from the above assessment of the three conditions, that so-called *ordinary websites* cannot be regarded as durable media, since such websites normally only provide general information, and it is doubtful that the content could be regarded as being addressed to the customer personally unless there is a portal or a personalised log-on section on the website. More

importantly, the content of these websites can, in general, be changed by those who operate it, whereas the purpose of storing information on a durable medium is exactly that it cannot be changed unilaterally.

96. ESA notes that the European Securities Markets Expert Group (hereinafter “ESME”) issued a report on the concept of “durable medium” published on 11 July 2007.<sup>5</sup> In the report the ESME also reached the conclusion that ordinary websites, which are frequently changed and from which the user cannot necessarily save or print pages, cannot be regarded as durable media. Although this report examined the concept in light of the provision in the Distance Marketing Directive<sup>6</sup> and the Markets in Financial Instruments Directive,<sup>7</sup> both contain the same definition as the Directive. ESA considers that the concept should be interpreted uniformly under all these instruments.

97. The report considers that so-called sophisticated websites can constitute durable media. This category of websites can be separated into two sub-categories: (i) those that either act as a portal for the provision of information in another durable medium, and (ii) those that may actually constitute durable media themselves.

98. 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 therefore be reproduced on a durable medium, either paper or movable disk, even if the website itself does not constitute a durable medium. The question that can be raised in this regard however, is whether the information found on these websites is *addressed personally* to the customer, or if it is simply of interest to him, but still addressed to a general public. In this connection, general conditions relating to an insurance or credit card can serve as examples. These are often found on websites; however, they are then addressed to all customers and not personally to each and everyone. When websites act as means of distributing this type of information, they cannot be said to fulfil the criteria set out in the definition.

99. The second type of sophisticated website contains secure storage areas for individual users which are accessed by a user code and password. There is no doubt in these circumstances that the information is addressed personally to the customer as he is the only person who has been given authorised access to the page. This type of storage can be compared to the user’s own hard disk, except in this case he can access the information remotely via the Internet.

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<sup>5</sup> Report of 11 July 2007 on durable medium – Distance Marketing Directive and Markets in Financial Instruments Directive. See: [http://ec.europa.eu/internal\\_market/securities/docs/esme/durable\\_medium\\_en.pdf](http://ec.europa.eu/internal_market/securities/docs/esme/durable_medium_en.pdf).

<sup>6</sup> Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of customer financial services and amending Council Directive 90/619/EEC and Directive 97/7/EC and 98/27/EC OJ, 09.10.2002, L 271, p.19.

<sup>7</sup> Directive 2008/10/EC of the European Parliament and of the Council of 11 March 2008 amending Directive 2004/39/EC on markets in financial instruments, as regards the implementing powers conferred on the Commission, OJ, 19.2.2008, L 076, p.33.

100. ESA shares the opinion of the ESME expert group that a website that provides secure and individual personal storage areas continuously available to users could also be considered to constitute a durable medium within the meaning of Article 2(12) of the Directive. In light of the purpose of the requirement of providing information on a durable medium, ESA considers that it would be incumbent on the insurance mediator to demonstrate that the technical solutions used by him ensure that a website fulfils the conditions of being regarded a durable medium.

101. As for the remark in paragraph 13 of the order for reference, where the referring court wonders whether it might be of significance that the customer expressly consented in writing to the provision of information via the Internet, ESA argues that under Article 13(1) of the Directive the customer cannot waive his right to receive information on a durable medium. This follows from Article 13(2) which permits providing information orally when the customer so requests or where immediate cover is necessary. In both cases information in compliance with Article 13(1) has to be provided immediately after the conclusion of the contract. Thus, the Article provides that, even when the customer requests information orally, it has to be provided on a durable medium immediately afterwards.

102. ESA proposes that the question referred to the EFTA Court should be answered as follows:

*A website may only be regarded as a durable medium for the purposes of Article 2 (12) of Directive 2002/92 when the technical solutions employed ensure that the information is addressed personally to the customer, is accessible for an adequate period of time, and allows for the unchanged reproduction of the content without the possibility of unilateral alterations.*

*The Commission of the European Communities*

103. The Commission submits that the main issue of this case is whether, and if so, in which circumstances, a website can be considered as a “durable medium” for the purposes of the Directive.

104. In the opinion of the Commission it is clear from the wording of the second paragraph of Article 2 (12) of the Directive that a website can in principle constitute a “durable medium”, provided that the conditions laid down in the first paragraph are met. The Commission describes these conditions as being: i) the customer must be able to store information addressed personally to him; ii) this information must be accessible for future reference for an adequate period of time and iii) it must be possible for him to reproduce the information unchanged.

105. The Commission argues that these conditions clearly reflect one of the key general objectives of the Directive, namely to ensure protection for consumers

concluding insurance contracts via insurance intermediaries. The Commission points out that this is not only expressly recalled in the 8<sup>th</sup> recital in the preamble to the Directive, but also in the Chapter III requirements on the provision of information, which as a whole are intended to ensure that the customer receives all appropriate information relevant to his choice to conclude a particular insurance contract in a manner which is clear and comprehensible (especially Articles 13(1) (b) and (c)). In this context, the specific conditions attached to the notion of a “durable medium” can be seen simply as another means of ensuring that the customer is able to take an informed decision. Thus, the information must be addressed to the customer personally (which the Commission understands in the sense of being for his own use) and it must be available to him for future reference. To ensure that this is the case, he must be able to reproduce it unchanged (with the necessary corollary that it cannot simply be changed unilaterally by the insurance intermediary).

106. As for the question how, as a matter of fact, a website may meet these conditions, the Commission notes that the legislative history of Directive 2002/92 provides no further clarification. The original Commission proposal only contained the first paragraph of the current definition of “durable medium”, laying down the three general conditions which must be satisfied, without any further discussion regarding specific examples of instruments which might be covered.<sup>8</sup> The second paragraph of what is now Article 2(12) of the Directive appears to have had its origin in an amendment adopted by the European Parliament at first reading, which proposed adding the further explanation that a durable medium “may include floppy discs, CD ROMs, computer hard drives of the consumer’s computer on which electronic mail is stored and any other appropriate electronic means of storage”,<sup>9</sup> on the grounds that this furthered “a long-held EU ambition to modernise commercial practice by encouraging e-commerce and paperless offices.” However, no mention was made at this stage of websites, nor does there appear to have been a discussion of their particular technical characteristics.

107. The Commission submits that the only guidance it has been able to find on the concept of “durable medium” is in the form of the report produced by ESME in relation to the Distance Marketing Directive 2002/65 and the Markets in Financial Instruments Directive 2004/39 (together with its implementing Directive 2006/73/EC),<sup>10</sup> which use a definition identical to that found in Directive 2002/92/EC.

108. In this report, ESME takes the view that an ordinary website, which is a dynamic electronic host or portal, is frequently changed and from which a user cannot necessarily save or print pages, cannot be regarded as “durable medium”. However, it considers that so called “sophisticated” websites may be able to

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<sup>8</sup> COM (2000) 511 final of 20<sup>th</sup> September 2000.

<sup>9</sup> Report at First Reading, 17<sup>th</sup> October 2001, amendment 21.

<sup>10</sup> Report of 11<sup>th</sup> July 2007, available at [http://ec.europa.eu/internal\\_market/securities/docs/esme/durable\\_medium\\_en.pdf](http://ec.europa.eu/internal_market/securities/docs/esme/durable_medium_en.pdf).



satisfy the necessary conditions. The report then goes on to identify two different categories of the sophisticated website: i) those which act as portals for the provision of information in *another* durable medium and ii) those which as such constitute durable media.

109. In the first case, the website essentially allows users to access information which can then be printed off, or copied and stored on their own computer (for example in the form of an e-mail with an attachment). In this situation, the website itself is not a “durable medium” but acts as a means for making the information available on a durable medium.

110. In the second case, the website contains secure storage areas for individual users which are accessed by a user code and a password. Accordingly, this ensures that the information is addressed personally to the customer, since he is the only person to have authorised access to that part of the site. From a technological point of view, it is also possible to ensure that the information is continuously accessible to the customer by implementing back-up arrangements. In its report, ESME concludes that this type of sophisticated website can accordingly fulfil the definition of a “durable medium”, noting in particular that this form of secure storage area can be compared to a customer’s own hard disk, the only difference being that it is not his own but can be accessed remotely via the Internet.

111. The Commission adds that it simply shares the views expressed by the ESME. Of course, 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 and thus constitute a “durable medium”.

112. For these reasons the Commission considers that the question from the Appeals Commission should be answered in the following sense:

*A website can be considered to be a durable medium within the meaning of Article 2(12) of Directive 2002/92 if it is of a type which ensures that the relevant information is addressed personally to the customer and can be stored and reproduced unchanged.*

Thorgeir Örlygsson  
Judge-Rapporteur