Reports of Cases

OPINION OF ADVOCATE GENERAL
BOBEK
delivered on 15 September 2016[1]

Case C-375/15

BAWAG PSK Bank für Arbeit und Wirtschaft und Österreichische Postsparkasse AG
v

Verein für Konsumenteninformation

(Request for a preliminary ruling from the Oberster Gerichtshof (Supreme Court, Austria) — Approximation of laws — Directive 2007/64/EC — Payment services in the internal market — Framework contracts — Prior general information — Information relating to changes to the conditions of framework contracts — Requirement to provide information on a durable medium — Information 'provided' or 'made available' — Transmission of information through the mailbox of an internet e-banking website)

I – Introduction

1. Directive 2007/64/EC on payment services in the internal market[2] requires changes in framework contracts to *be provided* by the payment service provider to the payment service user on paper or on another *durable medium.*

2. BAWAG PSK Bank für Arbeit und Wirtschaft und Österreichische Postsparkasse AG ('BAWAG') is a bank operating in Austria. It offers contracts for internet e-banking to its customers. As part of the general terms in such e-banking contracts, BAWAG includes a contractual term according to which 'notices of changes' will be communicated to the customer through the internal mailbox of its internet e-banking system. The Verein für Konsumenteninformation, a consumer association, considers that such a contractual term does not comply with the duty of providing information on a 'durable medium' set out in Directive 2007/64.

1 — Original language: English.

2 — Directive 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 (OJ 2007 L 319, p. 1) ('Directive 2007/64'). Directive 2007/64 is repealed and replaced, with effect from 13 January 2018, by Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No 1093/2010 (OJ 2015 L 337, p. 35).

3. In the present case, the Court is asked to ascertain whether information given through an e-banking mailbox is 'provided' (as opposed to merely being 'made available') through a 'durable medium', in the sense of Directive 2007/64. More broadly, the Court is again [3] invited to strike a balance between, on the one hand, the minimum requirements of consumer information and protection, and, on the other, technological developments represented by the growing trend among economic operators (also fuelled no doubt by consumer preferences) to set up online and paperless environments to communicate with their customers.

II – Legal framework

A – *EU law*

4. Directive 2007/64 lays down rules concerning transparency of conditions and information requirements for payment services. [4] Those rules specify the obligations of payment service providers concerning the provision of information to payment service users who, according to recital 21, '… should receive the same high level of clear information … in order to make well-informed choices and be able to shop around within the EU …'.

5. According to recital 23 of Directive 2007/64, the information required should be proportionate to the needs of users and should be communicated in a standard manner. However, that recital states that the information requirements for single payment transactions should be different from those of framework contracts (which provide for a series of payment transactions). Recital 24 clarifies the requirements for prior information on framework contracts and gives guidance on what constitutes a 'durable medium', providing examples thereof. Recital 25 clarifies the information requirements applicable to single payment transactions by contrast to framework contracts, stating that it is not necessary that information should in every case be provided on paper or another durable medium, unless the consumer so requests.

6. Recital 27 of Directive 2007/64 distinguishes between two ways in which information is to be given by the payment service provider: 'either the information should be provided, i.e. actively communicated by the payment service provider at the appropriate time as required by this Directive without further prompting by the payment service user, or the information should be made available to the payment service user, taking into account any request he may have for further information'. That recital further clarifies and gives examples of situations in which the information is 'made available' and the customer has to take active steps to have access to it.

7. Article 4 of Directive 2007/64 provides definitions. Article 4(12) establishes that '"framework contract" means a payment service contract which governs the future execution of individual and successive payment transactions and which may contain the obligation and conditions for setting up a payment account'. According to Article 4(25) '"durable medium" means any instrument which enables the payment service user 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'.

3 — See judgment of 5 July 2012, *Content Services* (C-49/11, EU:C:2012:419). On the interpretation of the words 'on paper or on another durable medium' in the context of Article 10 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 (OJ 2008 L 133, p. 66), see Opinion of Advocate General Sharpston in *Home Credit Slovakia* (C-42/15, EU:C:2016:431). The Court has also had the opportunity to interpret Article 23(2) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2001 L 12, p. 1) (the 'Brussels I Regulation'), which refers to 'communication by electronic means which provides a durable record …' in the judgment of 21 May 2015, *El Majdoub* (C-322/14, EU:C:2015:334).

4 — See Article 1(2) and recital 18.

8. Title III of Directive 2007/64, entitled 'Transparency of conditions and information requirements for payment services' contains in its second chapter the provisions applicable to 'single payment transactions' (Articles 35 to 39). Its third chapter features the provisions applicable to 'framework contracts' (Articles 40 to 48).

9. Article 41 of Directive 2007/64 on 'prior general information', applicable to 'framework contracts', reads as follows:

'1. Member States shall require that, in good time before the payment service user is bound by any framework contract or offer, the payment service provider provide the payment service user on paper or on another durable medium with the information and conditions specified in Article 42. The information and conditions shall be given in easily understandable words and in a clear and comprehensible form, in an official language of the Member State where the payment service is offered or in any other language agreed between the parties.

...'

10. Article 44 of Directive 2007/64 concerns changes in the conditions of framework contracts. According to Article 44(1), first paragraph, 'any changes in the framework contract as well as the information and conditions specified in Article 42, shall be proposed by the payment service provider in the same way as provided for in Article 41(1) and no later than two months before their proposed date of application'. According to Article 44(1), second paragraph, 'where applicable in accordance with point (6)(a) of Article 42, the payment service provider shall inform the payment service user that he is to be deemed to have accepted these changes if he does not notify the payment service provider that he does not accept them before the proposed date of their entry into force. In this case, the payment service provider shall also specify that the payment service user has the right to terminate the framework contract immediately and without charge before the date of the proposed application of the changes'.

B – *Austrian law*

11. Directive 2007/64 has been transposed into Austrian law by means of the Bundesgesetz über die Erbringung von Zahlungsdiensten (Zahlungsdienstegesetz) (Law on Payment Services (BGBl. 2009 I, No 66)). Paragraph 26 of that law reads as follows:

'(1) The payment service provider must in good time, before the payment service user is bound by a contract or a contractual offer,

1. in the case of a framework contract in accordance with Paragraph 28, communicate the information and terms of the contract to the payment service user in paper form or, where the payment service user agrees, on another durable medium, …

…'

12. Paragraph 29 of the Law on Payment Services, concerning amendments to framework contracts, is worded as follows:

'(1) The payment service provider must

1. propose amendments to the framework contract to the payment service user at the latest two months before the planned time of their application, in the manner provided for in Paragraph 26(1)(1) and Paragraph 26(2), and,

2. where an agreement in accordance with Paragraph 28(1)(6)(a) has been made, point out

   (a) that the consent of the payment service user to the changes is deemed to have been given if he has not notified the payment service provider of his rejection before the proposed time of application of the amendments, and

   (b) that the payment service user has the right to terminate the framework contract without notice, free of charge, before the amendments come into force.'

III – The dispute in the main proceedings, the questions referred and the procedure before the Court

13. For contracts for banking services with customers, BAWAG uses general contracts with standard terms and conditions. The contractual term at issue in the main proceedings concerns, in particular, the participation of customers in BAWAG's internet e-banking system. It reads as follows:

'Notices and statements (in particular account information, account statements, credit card statements, notices of changes, etc.) which the bank has to transmit to the customer or make available to him shall, where a customer has agreed to e-banking, be received by him by post or electronically by making them retrievable or transmitting them by means of BAWAG P.S.K. E-Banking.'

14. Communication through the e-banking system at issue, as described by the referring court, works as follows: in the framework of its e-banking system, BAWAG creates a mailbox for every customer. Customers can access that mailbox logging in with their personal password through the e-banking website. Electronic messages are then transmitted by the bank to that mailbox. There is no supplementary communication, for example, through a message sent to the personal private email of the client informing him that a message has been sent to the e-banking mailbox.

15. In the main proceedings, the Verein für Konsumenteninformation has brought an action seeking to prevent BAWAG from including the contractual term at issue in contracts it concludes with its customers and from applying such a term to those customers. That action was successful at first instance and confirmed on appeal. The contract term at issue was found to be in violation of the imperative requirements of Paragraph 26(1)(1) in conjunction with Paragraph 29(1)(1) of the Law on Payment Services. BAWAG has lodged an appeal on a point of law before the Oberster Gerichtshof (Supreme Court, Austria). In that context, the Oberster Gerichtshof (Supreme Court) has stayed the proceedings and referred the following questions for a preliminary ruling:

'(1) Is Article 41(1) in conjunction with Article 36(1) of Directive 2007/64 … to be interpreted as meaning that information (in electronic format) transmitted by the bank to the email inbox of the customer as part of online banking (e-banking), so that the customer can retrieve this information by clicking on it after logging in to the e-banking website, has been provided on a durable medium?

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

   Is Article 41(1) in conjunction with Article 36(1) of [Directive 2007/64] to be interpreted as meaning that in such a case

   (a) the information from the bank is indeed provided on a durable medium, but not notified to the customer, merely made accessible to him, or

   (b) all that happens is that the information is made accessible without the use of a durable medium?'

16. The reference for a preliminary ruling was lodged at the Court on 15 July 2015. BAWAG, the Verein für Konsumenteninformation, the Italian and Polish Governments, and the European Commission lodged written observations. A hearing took place on 30 June 2016 at which the Verein für Konsumenteninformation, BAWAG and the Commission submitted oral observations.

IV – Analysis

A – *Preliminary observations*

17. Before analysing the substance of the questions posed by the Oberster Gerichtshof (Supreme Court), three clarifications are necessary.

1. The relevant provisions of Directive 2007/64

18. First, even though the referring court has posed its questions with regard to Article 41(1) of Directive 2007/64 'in conjunction' with Article 36(1) of that Directive, only the former provision is directly relevant for the present case.

19. From the information contained in the request for a preliminary ruling, it appears that the contractual term concerned in the present case is contained in an e-banking agreement. The e-banking agreement is concluded as a complement to a framework contract. Therefore, the contractual term at issue concerns the provision of information under framework contracts. As a consequence, Article 36(1) of Directive 2007/64, which concerns only single payment transactions, that is, payment transactions not covered by a framework contract, is not directly applicable to the present case.

20. However, Article 36(1) still represents a factor relevant for the systemic interpretation of the directive as a whole. It regulates the way in which information is to be made available for single payment transactions, which explicitly differs from the way in which information is to be provided for framework contracts. The reference to Article 36(1) in the questions of the referring court is therefore to be understood as asking for a relational interpretation of these two provisions, since the two provisions governing information requirements — Article 36 and Article 41 — have been construed by the directive by reference to one another.

21. Second, it is clear that the contractual term at issue refers to a number of — from the point of view of the Directive 2007/64 — rather different elements. It reads: 'notices and statements (in particular account information, account statements, credit card statements, notices of changes, etc.) …' However, as confirmed by the written and oral observations submitted to the Court, the present case in fact only concerns the last of those elements, namely 'notices of changes', which is the only element potentially entailing changes to framework contracts.

22. The provision of Directive 2007/64 relevant to changes to framework contracts is Article 44. Article 44(1) establishes that 'any changes in the framework contract … shall be proposed by the payment provider in the same way as provided for in Article 41(1) …'. For these reasons, I conclude that the relevant provisions for the purposes of the present case are Articles 41(1) and 44(1) of Directive 2007/64.

2. Formulation of the questions posed

23. An assumption which emerges from the formulation of the preliminary reference in the present case is the existence of a link between the kind of *support* used for communications and the *way* in which information is communicated. Does the fact that a durable medium exists necessarily mean that the information is 'provided'? If the information is not communicated through a durable medium, is it only 'made available'?

24. In my opinion, those two elements — the kind of support used for communications and the way in which information is communicated — should be considered separately. The medium is a separate issue from the way in which information is delivered.

25. There is nothing in Directive 2007/64 to indicate that the support used for information and the way in which information is transmitted must go hand in hand. On the contrary, various recitals of the directive explain that they are two different issues. Recital 24 states what a 'durable medium' is and gives examples thereof. Recital 27 sets out the two ways of communicating information according to the directive ('providing' and 'making available'). It is therefore possible to envisage a situation where information, even if contained on a 'durable medium', is not effectively 'provided to the consumer, but merely 'made available', as exemplified by various provisions of the directive. [5]

26. For these reasons, the two questions posed by the referring court can be simplified and reformulated as follows: (1) does the information in the e-banking mailbox constitute information on a 'durable medium', and (2) is that information 'provided' by the bank (as opposed to merely being 'made available')?

3. The facts as set out by the national court

27. The referring court has established that, for the purposes of the present proceedings, it has to be considered that the electronic messages communicated by the bank through its e-banking system to the e-banking mailbox of customers cannot be modified. They are not erased by the bank for a period which is adequate for the objectives of the information. The information can be consulted and reproduced in an identical way (electronically or printed). The messages can be managed by the client, who can also erase them.

28. Those statements are however contested by the Verein für Konsumenteninformation. It considers that the referring court is already proceeding to a legal qualification of the facts.

29. It is established case-law that proceedings under Article 267 TFEU are based on a clear separation of the functions of national courts and the Court. It is for the referring court alone to find and assess the facts of the case before it. [6]

30. In this case, the referring court has given fairly detailed consideration to the features of the mailbox and the e-banking system at issue. Therefore, the analysis that follows in Section B.1 of this Opinion aims at clarifying the scope of the notion of 'durable medium' under Directive 2007/64.

5 — For example, Article 43 states that the service user shall have a right to receive the contract terms upon request (so the initiative would be on the customer) 'on paper or on another durable medium'.

6 — See, for example, judgments of 18 February 2016, *Finanmadrid EFC* (C-49/14, EU:C:2016:98, paragraph 27 and the case-law cited), and of 3 September 2015, *Costea* (C-110/14, EU:C:2015:538, paragraph 13 and the case-law cited).

31. The observations submitted to the Court raise questions concerning the requirements that internet-based communication systems have to fulfil in order to be considered as 'durable media'. Against this background, even if it is solely for the national court to assess, as factual elements, the technical features of BAWAG's e-banking system at issue in the present case, some useful criteria can be provided through the interpretation of the definition of 'durable medium' in Directive 2007/64.

B – *Analysis*

1. Durable medium

32. The substantive requirements for a support or device to be considered as a 'durable medium' are contained in the definition given in Article 4(25) of Directive 2007/64: (a) it should enable the storage of information personally addressed to the customer in a way accessible for future reference for an adequate period of time and (b) it should guarantee the unchanged reproduction of the stored information.

33. Those same elements are also present in the several other instruments of EU secondary law that refer to the notion of 'durable medium'. That concept, first coined by Directive 97/7/EC in the field of distance contracts,[7] provides an alternative to paper as the support or medium for information. Even though Directive 97/7 did not contain a definition of 'durable medium', the Court confirmed the uniform understanding of this concept in EU law by relying on the elements present in the definition of 'durable medium' given by the EU legislature in other legislative texts.[8] The elements of the definition mentioned in paragraph 32 above are also present in subsequent secondary legislation[9] and in implementing acts.[10]

34. The core components of the definition — storability and reproduction — can also be found in other instruments that do not explicitly refer to the notion of 'durable medium', such as Directive 2000/31/EC on electronic commerce.[11]

7 — Directive of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts (OJ 1997 L 144, p. 19), repealed by Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council (OJ 2011 L 304, p. 64). Article 5 of Directive 97/7 established that the consumer must receive written confirmation or confirmation 'in another durable medium' accessible to him of the prior information referred to in Article 4(1)(a) to (f) of that directive.

8 — Judgment of 5 July 2012, *Content Services* (C-49/11, EU:C:2012:419, paragraph 44). The Court referred to Article 2(f) of Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC (OJ 2002 L 271, p. 16); Article 2(12) of Directive 2002/92/EC of the European Parliament and of the Council of 9 December 2002 on insurance mediation (OJ 2003 L 9, p. 3); Article 3(m) of Directive 2008/48 and Article 2(10) of Directive 2011/83.

9 — See, for example, Article 2(1)(h) of 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 (OJ 2009 L 33, p. 10); Article 2(1)(m) of Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) (OJ 2009 L 302, p. 32); Article 2(17) of Directive 2014/92/EU of the European Parliament and of the Council of 23 July 2014 on the comparability of fees related to payment accounts, payment account switching and access to payment accounts with basic features (OJ 2014 L 257, p. 214); Article 4(1)(62) of Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (OJ 2014 L 173, p. 349); Article 2(1)(18) of Directive (EU) 2016/97 of the European Parliament and of the Council of 20 January 2016 on insurance distribution (recast) (OJ 2016 L 26, p. 19).

10 — See, for example, 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 (OJ 2006 L 241, p. 26).

11 — Directive of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (OJ 2000 L 178, p. 1) Article 10(3) of which provides that 'contract terms and general conditions provided to the recipient must be made available in a way that allows him to store and reproduce them'.

a) Durable media and the internet

35. The introduction of the concept of 'durable medium' and the elements of its definition indicate the will of the EU legislator to reconcile the tension between (i) the need to adjust to the evolution of technology which makes commercial transactions more agile via the internet and other means of electronic communication and (ii) the protection of consumer rights through consumer information. By equating paper support with other 'durable media' in specific situations, EU law acknowledges technological evolution and the economic interest of both customers and service providers to move away from paper support.

36. At the same time, however, the elements of the definition of 'durable medium' — storability and unchanged reproduction — aim at protecting consumers as the more vulnerable party in contractual relationships by preventing information from being given to them in a merely ephemeral manner [12] and by preventing the unilateral modification of information by service providers. Those features mean, as Advocate General Mengozzi has put it, 'that the information has been placed under the customer's control and is no longer under the control of the person giving it'. [13]

37. Despite the relative clarity of the definition of the concept of 'durable medium', the debate in the present case is whether the messages transmitted through an e-banking mailbox comply with the elements of 'durable media' expounded in paragraph 32 above.

38. As a point of departure, the Verein für Konsumenteninformation considers that email and internet sites cannot be considered as 'durable media' because they are incapable of constituting a physical instrument of storage.

39. In my view, that argument cannot be upheld.

40. It is by now clear that the concept of 'durable medium' is defined in a flexible manner. The Court has viewed that concept as a 'functional equivalent' to paper, [14] therefore emancipating it from any preconception as to what the material support of the information should be.

41. Furthermore, the reference in Article 4(25) of Directive 2007/64 to 'any instrument' confirms that 'durable medium' is to be defined in a broad way, a priori not excluding any potential modes of communication.

42. The concept of 'durable medium' is thus independent from the physical structure or hardware characteristics of a medium or support. It relies, rather, on the *functional* features that govern its operation and that allow it to fulfil the requirements of storability and unchanged reproduction, in the sense of Article 4(25) of the directive. Thus, as long as those conditions are fulfilled, the actual type and shape of a 'durable medium' may change with the evolution of technical possibility over time.

43. Admittedly, the evolution of EU legislation shows some degree of uncertainty when it comes to assessing whether internet-based communication can fulfil the requirements of 'durable media'. Indeed, recital 20 of Directive 2002/65 and Article 2(12) of Directive 2002/92 reveal some reticence towards the internet, by stating that internet websites are not covered by the notion of 'durable medium' unless they fulfil the criteria of the definition.

12 — See, by analogy, Opinion of Advocate General Sharpston in *Home Credit Slovakia* (C-42/15, EU:C:2016:431, point 24).

13 — Opinion of Advocate General Mengozzi in *Content Services* (C-49/11, EU:C:2012:126, point 42).

14 — Judgment of 5 July 2012, *Content Services* (C-49/11, EU:C:2012:419, paragraphs 40 and 42).

44. However, recital 23 of Directive 2011/83 lists emails among the examples of durable media. Moreover, Directive 2007/64 has arguably reversed the reticent approach towards internet sites. Recital 24 of that directive now explicitly includes as an example of 'durable media' those internet sites that 'are accessible for future reference for a period of time adequate for the purposes of information and allow the unchanged reproduction of the information stored'.

45. Finally, the qualification of an internet website as a 'durable medium' depending on its functional characteristics has also been confirmed by the EFTA Court in *Inconsult Anstalt* v *Finanzmarktaufsicht*,[15] in the context of a case involving the interpretation of the concept of 'durable medium' under Directive 2002/92. In that case, the EFTA Court declared that, whereas 'ordinary' websites would not comply with the requirements to be considered a durable medium,[16] 'sophisticated' websites may, if they comply with the requirements laid down in the applicable definition.[17]

46. At this point, it must therefore be concluded that internet-based communication systems are not *per se* excluded from being 'durable media'. In order to do so, however, their functionality and operation must comply with the requirements of Article 4(25) of Directive 2007/64, set out above in point 32 of this Opinion.

b) An 'e-banking mailbox' as a durable medium

47. BAWAG and the Commission consider, in view of the information provided in the request for a preliminary ruling, that the e-banking mailbox at issue does comply with the requirements of Article 4(25) of the directive.

48. Conversely, the Verein für Konsumenteninformation claims that the e-banking system at issue does not fulfil the abovementioned requirements since BAWAG itself manages the server hosting the mailbox. It is therefore not guaranteed that the information contained in the mailbox will remain unaltered. Furthermore, the service provider can block access to users. In the same vein, the Polish Government considers that emails and messages transmitted through e-banking constitute two distinct instruments, since the latter generally allow payment service providers to modify unilaterally the messages or to block access, particularly after the termination of a contract, so that there is no guarantee of identical reproduction of the information.

49. In my opinion, whether or not an e-banking mailbox can be considered as a 'durable medium' depends on the fulfilment of the conditions laid down in Article 4(25) of Directive 2007/64, which is for the national court to assess in the light of the interpretative criteria laid down by the Court.

15 — Judgment of 27 January 2010 (E-4/09, EFTA Court Report 2010, p. 86).

16 — The EFTA Court found, in paragraph 63 of its judgment of 27 January 2010, *Inconsult Anstalt* v *Finanzmarktaufsicht* (E-4/09, EFTA Court Report 2010, p. 86), that 'an ordinary website' — which serves as a dynamic electronic host or portal for the provision of information which, generally, may freely be changed by the website proprietor — does not meet the requirements with respect to guaranteeing unchanged reproduction and cannot therefore be regarded as a durable medium.

17 — This distinction is to be found in the 2007 Report of the European Securities Markets Expert Group (ESME) 'On durable medium - Distance Marketing Directive and Markets in Financial Instruments Directive', available at http://ec.europa.eu/finance/securities/docs/esme/durable_medium_en.pdf.

50. The judgment of the Court in *Content Services* is of limited utility for present purposes. In that case, in the context of Directive 97/7, the Court found that information communicated to the consumer only via a hyperlink on a website could not be regarded as a 'durable medium' within the meaning of Article 5(1) of that directive.[18] The Court did not, however, have the opportunity to address the situation in which a website ensures that information can be stored, accessed and reproduced by the consumer.[19] Such a situation has been considered, however, by the EFTA Court in *Inconsult Anstalt* v *Finanzmarktaufsicht*.[20]

51. Taking a similar approach to the EFTA Court in *Inconsult Anstalt* v *Finanzmarktaufsicht*, I consider that different kinds of technical arrangements such as internet-based mailbox systems can, depending on their features and functionalities, comply with the requirements of 'durable media'.

52. Without seeking to be exhaustive or to limit the range of existing or possible technical arrangements that could comply with the requirements of Article 4(25) of Directive 2007/64, in my view, e-banking mailboxes could be considered as 'durable media' in two scenarios.[21] First, an e-banking mailbox could be regarded as fulfilling the conditions for being a 'durable medium' per se. Second, such a system could be considered as constituting an avenue for transmitting electronic documents, which, if provided in an appropriate format, may constitute 'durable media' in themselves. The key question in both cases is whether the information can be stored for an adequate period and whether its unchanged reproduction is guaranteed. In both scenarios, however, the existence of a 'mailbox' presupposes a secured independent storage space that users access with a username and password.

53. In the first scenario, an e-banking mailbox constitutes a system that permits payment service providers to transmit information and allows payment service users to store and reproduce that information. However, in that case, the separate functions of the mailbox as a 'durable medium', on the one hand, and as a 'storage support', on the other, are elided to a considerable extent.

54. As regards the requirement of storability, the information should be accessible for a period of time adequate for the purposes of the information concerned, that is, as long as it is relevant to the payment service user for the protection of his interests in relation to the payment service provider.[22] Therefore, the period of availability of the information may vary, depending on the content of that information and on the contractual rights and obligations affected.[23] With regard to changes in the conditions of the framework contract, the period of accessibility may continue after the closing of the account or termination of the contract to allow the payment service user to know his contractual rights and if necessary, seek redress.

55. Once the issue of storability of information for an adequate period has been addressed, the requirement of 'unchanged reproduction' must also be fulfilled. Unchanged reproduction means that it ought to be technically impossible for the payment service provider to unilaterally change or delete information once transmitted to the user.[24] As a result, a mailbox hosted and administered by the payment service provider is unlikely to comply with the requirement of guaranteeing 'unchanged reproduction', since it is technically under the control of the payment service provider.

18 — Judgment of 5 July 2012, *Content Services* (C-49/11, EU:C:2012:419, paragraph 51).

19 — Judgment of 5 July 2012, *Content Services* (C-49/11, EU:C:2012:419, paragraph 46).

20 — Judgment of the EFTA Court of 27 January 2010, *Inconsult Anstalt* v *Finanzmarktaufsicht* (E-4/09, EFTA Court Report 2010, p. 86).

21 — Judgment of the EFTA Court of 27 January 2010, *Inconsult Anstalt* v *Finanzmarktaufsicht* (E-4/09, EFTA Court Report 2010, p. 86), identified those two scenarios in the context of websites, in general. See paragraph 64 et seq. of that judgment.

22 — See, by analogy, judgment of the EFTA Court of 27 January 2010, *Inconsult Anstalt* v *Finanzmarktaufsicht* (E-4/09, EFTA Court Report 2010, p. 86, paragraph 44).

23 — Ibid.

24 — See, by analogy, judgment of the EFTA Court of 27 January 2010, *Inconsult Anstalt* v *Finanzmarktaufsicht* (E-4/09, EFTA Court Report 2010, p. 86, paragraph 66).

56. In spite of the apparent complexity in the context of new technologies, the basic point remains remarkably simple: the underlying objective of legislation relating to consumer information in contract formation or modification is that consumers are informed in a certain way and that they can retain that information in a safe format for later evidentiary purposes. Without implying any ill will on the part of either contracting party, a 'mailbox' placed under the control of the service provider cannot, by definition, ensure that consumers can retain information delivered to that mailbox in a safe format for future reference or use. To draw a parallel with the 'pre-virtual' age, such a mailbox resembles a situation in which customers were given paper versions of their contracts with a bank, but where all of those contractual documents would have to be obligatorily stored in an archive room in the bank itself. Even if paper is fairly durable, the information in those archived contractual documents could hardly be classified, from the point of view of the customer, as 'accessible for future reference' and, allowing 'unchanged reproduction' in the sense of Article 4(25) of Directive 2007/64.

57. There is, however, the second scenario mentioned above. Under the first scenario, and equally in most of the observations submitted in the present case, the discussion has focused on the issue of whether the mailbox itself can be considered as a 'durable medium'. However, that focus might be somewhat misleading. A mailbox can be conceived of as a portal for providing information. In this scenario the mailbox is not considered as the support of the information itself. In other words, the mailbox of an e-banking system could be considered as a 'gateway' through which the relevant information is transmitted in the form of electronic documents. If that view is accepted, the key question becomes not 'what are the technical parameters of the mailbox?', but rather 'what do the individual messages which are sent through it look like?'

58. Zooming in on the required format of the information provided, the information personally addressed to the customer should be given in an electronic document the format of which guarantees the unchanged reproduction of that information. Without prejudging possible technical solutions, that could be ensured through an electronic format, which, in principle, prevents alterations, guaranteeing a reasonable amount of authenticity of the information, if later potentially relied upon by the customer.

59. Since, in the second scenario, the mailbox is the channel for the transmission of documents but not a storage device itself, the electronic documents should be capable of being stored separately in a way which permits the user to download and/or to print the document. Indeed, given the conceptual separation between the mailbox as a gateway and the storage device, the requirement of storability means, in this scenario, that the mailbox should bring information passing through it and the storage possibilities to the attention of the customer via a user-friendly interface. As highlighted by the EFTA Court, it should 'contain features which will lead the consumer almost certainly to either secure the information on paper or to store it on another durable medium'. [25]

60. When the relevant information has been transmitted in the form of an electronic document which constitutes a 'durable medium' in itself, the possibility of storing the electronic document on the personal hard-drive or conservation of the printout on a personal file by the customer would, in principle, fulfil the temporal criterion relating to the accessibility of the stored information. It must, however, be pointed out that, by setting up a 'mailbox', the payment service provider creates the appearance of an independent space with a certain capacity for storage for the consumer. That means that the duration of the accessibility of the messages in the form of electronic documents in the mailbox itself has to be adequate for the purposes of the information concerned unless it is clearly indicated to the customer that the electronic document may only be temporarily stored in the e-banking mailbox and that it will disappear after a reasonable time period explicitly stated.

25 — Judgment of the EFTA Court of 27 January 2010, *Inconsult Anstalt* v *Finanzmarktaufsicht* (E-4/09, EFTA Court Report 2010, p. 86, paragraphs 64 and 65).

61. Thus, in my view, the requirement of information on a 'durable medium' in the sense of Article 4(25) of Directive 2007/64 is fulfilled if it is offered to customers in an easily accessible and safe format through an electronic mailbox and where the customers are free to handle that information in the way that they see fit. To compare that situation with a post office: it is effectively the same as handing a 'letter' over to the customer. What the individual customers do with it — whether they store it or throw away — is entirely up to them.

62. Finally, it ought to be added that the two scenarios outlined above are not mutually exclusive. Certainly, in order to comply, in my opinion, with the requirements of communication through a 'durable medium', at least one of the two scenarios must exist. However, the technical features of both alternatives can also be combined. For example, an e-banking system that guarantees the service users' control over their mailbox and which prevents the service provider from unilaterally modifying or erasing content can at the same time operate as the gateway through which relevant information is delivered through electronic documents in a format that guarantees their inalterability and storability, and that permits the user to store the document by printing or downloading it.

63. As a result of the foregoing, it is my view that Article 44(1) in conjunction with Article 41(1) and Article 4(25) of Directive 2007/64 should be interpreted as meaning that the information transmitted by a payment service provider to the e-banking mailbox of the customer constitutes information on a 'durable medium' provided that the e-banking mailbox enables the payment service user to store information personally addressed to him in a way which is accessible for future reference for a period of time adequate in the light of the purposes of the information. It must furthermore allow the unchanged reproduction of the information stored, thus preventing the service provider from accessing, modifying or erasing that information. An e-banking mailbox can also constitute a suitable channel for the transmission of information in the form of electronic documents if those documents themselves comply with the requirements of being a 'durable medium' and if such a system incites the user to electronically store and/or print those documents through an easily accessible function.

2. Information 'provided' or 'made available'

64. In the event that the national court finds that the e-banking mailbox at issue or the information provided therein fulfils the requirements to be considered as a 'durable medium', it still needs to be ascertained whether the information concerning 'notices of changes' can be considered as being 'provided' in the sense of Article 41(1) of Directive 2007/64.

65. As already outlined above in point 25 of this Opinion, Directive 2007/64 establishes two different regimes of communication with different requirements.

66. As the Italian Government correctly pointed out in its written observations, the different terminology used in Articles 36 to 37 (information being 'made available'), as opposed to Articles 41 to 42 (information being 'provided') of Directive 2007/64 expresses two different standards of transmitting information to payment service users. When the directive uses the verb '(to) provide', it is my view that it refers to a reinforced information obligation.

67. Information relating to changes in the conditions of framework contracts, which is the issue in the present case, is regulated by Article 44(1) of Directive 2007/64. That provision states in its first paragraph that any change in a framework contract, as well as the information and conditions specified in Article 42, has to be proposed by the payment service provider in accordance with the requirements of Article 41(1) and no later than two months before their proposed date of application. The information has to be 'provided' in the sense of Article 41(1) of the directive.

68. Recital 27 of Directive 2007/64 gives useful guidance on the terms 'provided' and 'making available'. According to that recital, information is '*provided*' if it is 'actively communicated by the payment service provider at the appropriate time … without further prompting by the payment service user'.

69. When information is '*made available*', the user has to take a more active role by requesting the information from the payment service provider. Recital 27 of Directive 2007/64 gives the following examples of 'making available': requesting it explicitly from the payment service provider, *logging into a bank account mailbox*, or inserting a bank card into a printer for account statements. Therefore, the concept of 'making available' envisages a more active role for the payment service user, who should approach the service provider to get the information.

70. The fact that recital 27 refers to 'logging into a bank account mailbox' as an example of information being 'made available' is not, in contrast to the assertion of the referring court, in contradiction with recital 24 of the Directive, which mentions internet sites as possible 'durable media'. The fact that an e-banking mailbox could comply with the conditions to be considered as a 'durable medium' does not lead to the conclusion that that information has been 'provided' by the bank to the customer. As already explained above at points 23 to 26 of this Opinion, the support on which the information is provided is separate from the way in which the information is transmitted.

71. The inclusion of 'bank account mailbox' as an example of information being 'made available' in recital 27 of the directive is precisely motivated by the specific features of communication through e-banking systems.

72. For BAWAG (as well as for the referring court), what is decisive is determining who has taken the initiative to communicate the information. Following this line of argument, since the payment service provider has taken the initiative to transmit the information through the e-banking mailbox to the customer, the information has been 'provided' in the sense of Article 41(1) of Directive 2007/64.

73. I do not share that view. In my opinion, the original initiative is not the sole or conclusive factor in ascertaining whether the information has been 'provided' or merely been 'made available'. What is more important is the effective transmission of the information. The information must cross the line from the domain of the service provider in order to enter into the sphere of awareness of the user. As a result, even though the initiative of transmitting the information through an internal e-banking mailbox may lie with the payment service provider, that channel in itself does not ensure, as such, that the information is effectively transmitted to the sphere of the customer so that he is made aware of its existence.

74. Coming back to the already used parallel with the 'pre-virtual world', an e-banking mailbox administered by the service provider is much like a postbox at a post office or a personal safety box located within the premises of a bank. In the absence of any notification or alert, letters placed in such a box and addressed to the customer could hardly be seen as effectively reaching the personal sphere of the customer.

75. I agree with the Polish Government that a distinction must be drawn between a personal email and the internal inbox of an e-banking system. An email account constitutes, in our days, a regular and normal mode of communication and forms part of most average consumers' everyday life. Conversely, even if it could be eventually technically assimilated to email, albeit with some reservations, the mailbox of an e-banking system can hardly be equated to a regularly used tool for consumers' general and everyday communications. It constitutes an environment particular to their relationship with a specific entity (that is, in the present case, a bank) in the specific framework of their banking

operations. Typically, it does not, however, permit general communications with other third parties. Furthermore, it cannot be reasonably expected that consumers will consult on a daily basis the ever-multiplying e-communication systems of each service provider in their multifarious contractual relationships.

76. As a result, information placed in an e-banking mailbox, even at the initiative of the payment service provider, does not leave the particular sphere of the bank to penetrate the domain of the regular communication instruments used by customers in their everyday life. In this sense, the information is not 'provided'.

77. This is all the more so when, if informed according to the second paragraph of Article 44(1) (when agreed, in line with Article 42(6)(a) of the directive), the consumer is deemed to have accepted changes in the conditions of a framework contract if he does not notify the payment service provider that he does not accept them before the proposed date of their entry into force. As the Polish Government suggests, if that information is communicated only through an internal e-banking mailbox, it is possible, or even quite likely, that customers are not aware that new important information is available to them.

78. However, for the sake of completeness, it ought to be noted that other technical solutions might be used to ensure that information is effectively 'provided' by payment service providers to their users.

79. In my view, the 'provision' of information may occur as a result of a 'two-tier' operation. A system may be set up which ensures that a notice or alert is sent to the customer's private email address (or a text message to their personal telephone, or even a simple letter of alert), making the customer aware that there are new messages available in their e-banking mailbox. Such a procedure would, in my view, be a suitable complement to information communicated through an e-banking mailbox on a durable medium so as to constitute 'provision' of information. That kind of technical solution would ensure the effective provision of information to the payment service user and preserve, at the same time, the benefits of the e-banking mailbox system, such as the possibility to ensure acknowledgement of receipt.

80. I do not think that such an approach would run counter the findings of the Court in *Content Services*. It is true that, in that case, the Court declared that, where information found on a website is made accessible to the customer via a link sent to him by email, that information is neither 'given' to that consumer, nor 'received' by him, within the meaning of Article 5(1) of Directive 97/7.[26] However, not only does the object of Directive 97/7 differ from that of Directive 2007/64, but the wording of the relevant provisions in each of those instruments also does not seem to follow the same pattern.[27] Moreover, the circumstances in *Content Services*, where the information was sent only via a link to a website and which did not fulfil the criteria for constituting a 'durable medium', were also radically different to the circumstances of the present case.[28]

81. In agreement with the referring court, I do not think that the number of (mouse) clicks needed to access the relevant information should determine whether or not that information has been 'provided'. After all, as regards framework contracts in the sense of Directive 2007/64, there is an agreement between the customer and the bank that communication will be done through an e-banking mailbox. Clicking several times or even typing a user name and password are actions that are not outside of what is expected from customers in order to receive information sent to them.

26 — Judgment of 5 July 2012, *Content Services* (C-49/11, EU:C:2012:419, paragraph 37).

27 — The different linguistic versions of Articles 5(1) and 4(1) of Directive 97/7 use different terms when compared with the wording of Articles 41(1) and 36(1) of Directive 2007/64. See judgment of 5 July 2012, *Content Services* (C-49/11, EU:C:2012:419, paragraph 35).

28 — See judgment of 5 July 2012, *Content Services* (C-49/11, EU:C:2012:419, paragraph 46).

82. Lastly, the Commission has made an argument suggesting that, because the payment service user has agreed to receive information through the e-banking mailbox, the steps needed to enter the mailbox should not be considered as constituting the initiative of the customer. This argument would have two consequences: first, any communication through the internal mailbox should be regarded as 'provided'. Second, consumers would be effectively free, by signing an e-banking system agreement, to 'contract out' of the protection foreseen by Directive 2007/64.

83. In my opinion, this argument should be rejected.

84. As recital 20 of Directive 2007/64 states, consumers and enterprises are not in the same position and do not need the same level of protection. Acknowledging the reality of inherently unequal bargaining positions, that recital further states that it is important to guarantee consumers' rights by provisions that cannot be derogated from by contract.[29] Without wishing to be excessively paternalistic towards consumers, this is in fact the very essence of consumer protection law.

85. Granted, it follows from Article 42(4)(a) of the directive that the parties can agree on the means of communication for the transmission of information or notifications. In this connection, recital 24 states that 'it should be possible for the payment service provider and the payment service user to agree in the framework contract on the manner in which subsequent information on executed payment transactions is given, for instance, that in internet banking all information on the payment account is made available online'. However, that statement, which concerns 'subsequent information on executed payment transactions', affects neither the requirements concerning prior general information as laid down in Article 41(1) nor the information obligations related to changes in the framework contract according to Article 44 of Directive 2007/64.

86. Furthermore, derogations from the information obligations laid down in Title III of Directive 2007/64 are explicitly provided for in Article 34. That provision only refers, according to its title, to low-value payment instruments and electronic money. According to Article 34(1)(b) of the directive, derogations from the information requirements of Article 44 by agreement are only allowed in that specific framework.[30] Moreover, the information to be provided on changes to framework contracts under Article 44(1) does not allow for any modification through agreement, as is the case of changes concerning interest or exchange rates, subject to the specific regime of Article 44(2) of Directive 2007/64.

87. In the light of those considerations, I am of the view that Article 44(1) in conjunction with Article 41(1) of Directive 2007/64 should be interpreted as meaning that information concerning changes to a framework contract transmitted by a payment service provider solely through an e-banking mailbox is not 'provided' in the sense of Article 41(1) of that directive, but merely 'made available' to a payment service user.

V – Conclusion

88. In the light of the foregoing considerations, I propose that the Court answer the questions referred by the Oberster Gerichtshof (Supreme Court, Austria) as follows:

(1) Article 44(1) in conjunction with Article 41(1) and 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

29 — This recital further states that it is, however, reasonable to let enterprises and organisations agree otherwise. Member States should, however, have the possibility to provide that microenterprises should be treated in the same way as consumers.

30 — According to that provision, derogation is only contemplated with regard to 'individual payment transactions that do not exceed EUR 30 or that either have a spending limit of EUR 150 or store funds that do not exceed EUR 150 at any time'. Those limits can be reduced or doubled for national payment transactions, and increased for prepaid payment instruments, according to Article 34(2).

repealing Directive 97/5/EC should be interpreted as meaning that the information transmitted by a payment service provider to the e-banking mailbox of the customer constitutes information on a 'durable medium' provided that the e-banking mailbox enables the payment service user to store information personally addressed to him in a way which is accessible for future reference for a period of time adequate in the light of the purposes of the information. It must furthermore allow the unchanged reproduction of the information stored, thus preventing the service provider from accessing, modifying or erasing that information. An e-banking mailbox can also constitute a suitable channel for the transmission of information in the form of electronic documents if those documents themselves comply with the requirements of being a 'durable medium' and if such a system incites the user to electronically store and/or print those documents through an easily accessible function.

(2) Article 44(1) in conjunction with Article 41(1) of Directive 2007/64 should be interpreted as meaning that information concerning changes to a framework contract transmitted by a payment service provider solely through an e-banking mailbox is not 'provided' in the sense of Article 41(1) of that directive, but merely 'made available' to a payment service user.