[DE] Extent of the Obligation to Identify a Provider

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The courts are being repeatedly called upon to deal with issues relating to the identification of Internet providers. The reason for this lies in the requirements of section 5 of the *Telemediengesetz* (Telemedia Act – TMG), according to which service providers must keep certain easily recognisable information directly accessible and constantly available to commercial telemedia, which customers are normally offered against payment. According to section 5(1)(2) of the Telemedia Act, which transposes Article 5(1)(c) of Directive 2000/31/EC ("Directive on Electronic Commerce") into German law, this concerns details, including the e-mail addresses, that enable the service provider to be contacted rapidly and communicated with in a direct manner. In a judgment of 21 April 2008 (Case 3 W 64/07), the *Hanseatisches Oberlandesgericht* (Hamburg Court of Appeal – OLG) ruled that the scope of the TMG – and therefore the obligation to properly identify the provider – is not limited to Internet services for which a charge is imposed. In the court's opinion, all commercial telemedia services are subject to the requirements of the TMG and are accordingly obliged to provide the details of the provider. Only Internet offerings of private individuals or non-profit associations, that is to say services that are clearly non-commercial, should not fall within the scope of the TMG. A breach of the provisions on identifying the provider constitutes a violation of competition law. However, in the court's opinion, the failure to name the supervisory authority and the number on the register of commercial firms does not have "more than an insubstantial impact on competition" within the meaning of section 3 of the *Gesetz gegen den unlauteren Wettbewerb* (Unfair Competition Act – UWG).

In a judgment dated 21 April 2008 (Case 44 O 79/07), the *Landgericht Essen* (Essen Regional Court – LG) ruled that the requirements are not met when a commercial provider's website only contains a contact form without an e-mail address.

So far the question as to whether a telephone number must be given in connection with identifying a provider has not been definitively addressed.

While the *Oberlandesgericht Köln* (Cologne Court of Appeal – OLG) ruled in its judgment of 13 February 2004 (Case 6 U 109/03) that it was necessary to provide a telephone number, the *Oberlandesgericht Hamm* (Hamm Court of Appeal) ruled in its decision of 17 April 2004 (Case 20 U 222/03) that this was not required. An

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appeal on points of law against the Hamm Court of Appeal judgment is pending.

In proceedings to provide a preliminary ruling, the *Bundesgerichtshof* (Federal Court of Justice – BGH) referred the case to the European Court of Justice. In his final submission of 15 May 2008, Advocate General Colomer also came to the conclusion that there was no obligation to provide a telephone number in connection with the identification of a provider when a German company's website only contained an e-mail address and a form for questions to be answered by e-mail. The telephone, he said, was not the only means of ensuring direct and effective communication. The word "direct" Article 5(1)(c) of Directive 2000/31/EC only pointed out that the contact took place without an intermediary, which could be done both by telephone and e-mail. Moreover, the concept of consumer protection does not give rise to a different conclusion since there was no contractual relationship between the parties at the time relevant to this case. The BGH also requested an answer to the question as to whether a service provider is obliged, not only to give an e-mail address but also, to ensure that there is another channel for receiving enquiries from users when e-mail is an appropriate and sufficient means of quickly establishing contacts. In the Advocate General's opinion, a service provider is not obliged to make a second channel available for receiving enquiries from users when e-mail is an appropriate and sufficient means of establishing contacts quickly, and of initiating direct and effective communication.

Schlussanträge von Generalanwalt Colomer vom 15. Mai 2008

http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62007C0298:DE:HTML

Advocate General Colomer's final submission of 15 May 2008

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