

**Case C-102/20**

**Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice**

**Date lodged:**

26 February 2020

**Referring court:**

Bundesgerichtshof (Germany)

**Date of the decision to refer:**

30 January 2020

**Applicant and appellant on a point of law:**

StWL Städtische Werke Lauf a.d. Pegnitz GmbH

**Defendant and respondent on a point of law:**

eprimo GmbH

**Intervener in support of the defendant:**

Interactive Media CCSP GmbH

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**Subject matter of the main proceedings**

Unfair competition; injunction prohibiting anticompetitive advertising

**Subject matter and legal basis of the reference**

Interpretation of EU law; Article 267 TFEU

**Questions referred for a preliminary ruling**

1. Does the concept of ‘sending’ within the meaning of Article 2(h) of Directive 2002/58/EC cover a situation in which a message is not transmitted by a user of an electronic communications service, via a service provider, to the electronic ‘address’ of a second user, but, as a consequence

- of the opening of the password-protected web page of an email account, is automatically displayed by ad servers in certain areas designated for that purpose in the email inbox of a randomly selected user (inbox advertising)?
2. Does the collection of a message within the meaning of Article 2(h) of Directive 2002/58/EC presuppose that, after becoming aware of the existence of a message, the recipient triggers the programmatically prescribed transmission of the message data by making an intentional collection request, or is it sufficient for the appearance of a message in an email account inbox to be triggered by the user opening the password-protected web page of his e-mail account?
  3. Does a message constitute electronic mail within the meaning of Article 13(1) of Directive 2002/58/EC even where it is not sent to an individual recipient already specifically identified prior to transmission but is displayed in the inbox of a randomly selected user?
  4. Is electronic mail used for the purposes of direct marketing within the meaning of Article 13(1) of Directive 2002/58/EC only where the user is found to be the subject of a burden that is greater than a nuisance?
  5. Does individual advertising meet the conditions governing the presence of ‘solicitation’, for the purposes of the first sentence of point 26 of Annex I to Directive 2005/29/EC, only where a customer is contacted via a medium traditionally used for individual communication between a sender and a recipient, or is it sufficient if — as with the advertisement at issue in the case in point — an individual connection is established by the fact that the advertisement is displayed in the inbox of a private email account, and thus in an area in which the customer expects to find messages addressed to him personally?

### **Provisions of EU law cited**

Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) (OJ 2002 L 201, p. 37); recitals 1, 12, 26, 27 and 40; Article 1(1); Article 2(h); the first sentence of Article 2(d); Article 6(1) and Article 13(1).

Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council (‘Unfair Commercial Practices Directive’) (OJ 2005 L 149, p. 22); first sentence of point 26 of Annex I.

### **Provisions of national law cited**

Gesetz gegen den unlauteren Wettbewerb (Law to combat unfair competition) ('the UWG'); Paragraph 3; Paragraph 7(1) and (2), points 1, 2 and 3; Paragraph 8(1) and (2).

### **Brief summary of the facts and procedure**

- 1 The parties supply electricity to final customers. The intervener acting in support of the defendant is an advertising agency.
- 2 The defendant commissioned the intervener to insert pop-up advertisements in the electronic mailboxes of users of the T-Online free email service. It did so as follows: on 15 January 2017, pop-up advertising was included with the e-mails received in that part of the private mailbox of a T-Online email service user in which incoming emails are displayed in list form ('the inbox'). It contained the following text: 'eprimo Mehr Sparen: Günstig Strom und Gas. Jetzt top eprimo-Preise mit attraktivem Bonus sichern! Mehr erfahren auf eprimo.de' (eprimo save more: cheap electricity and gas. Get the best eprimo prices with an attractive bonus! More information at eprimo.de). Similar pop-ups had previously appeared in the user's inbox on 12 December 2016 and 13 January 2017.
- 3 Such advertising is displayed in specific advertising spaces in the inbox forming part of the mailbox of the free email service provided by Telekom Deutschland GmbH. It is called a 'T-Online.de Mail Ad' and was available for purchase by that service provider's advertising customers. An ad server's JavaScript code (tag) was embedded in the appropriate place in the inbox on the web page visited by the user of such a free email mailbox. Thus, when the website was opened, the ad server was sent a request (an ad request) to display an advertising banner from its inventory. The ad server then sent the corresponding parameters to the user's internet browser, causing a randomly selected advertising banner to pop up in the user's inbox. If the user clicked on the pop-up advertisement, his input was first conveyed to the ad server, which recorded the click and redirected the browser to the advertiser's page. The advertisement displayed in the inbox contained the word 'Anzeige' (advertisement) and could be removed from the inbox by clicking on the cross symbol 'x' located alongside it. Unlike the emails displayed in the user's inbox, the advertisement appeared against a grey background and did not indicate either a date or a sender. Moreover, it could not be archived, replied to or forwarded by using the email processing options supplied by the email service provider. Nor was it included in the number of the user's unread emails indicated by the service and did not take up any storage space in the user's inbox.
- 4 The applicant claims that that advertising is anticompetitive in that it constitutes an unacceptable nuisance and is misleading.
- 5 The Landgericht (Regional Court, Germany) ordered the defendant to refrain, in the course of trade, from engaging in advertising such as that described above via

the ‘T-online.de’ email account for the purposes of competition in connection with the sale of electricity to final consumers.

- 6 On appeal by the defendant, the appeal court dismissed the action on the ground that the contested placement of advertising in the inbox of private email mailboxes did not constitute an unlawful commercial practice under competition law.
- 7 By its appeal on a point of law, which the appeal court granted it leave to bring and which the defendant claims should be dismissed, the applicant seeks to have the judgment of the Landgericht (Regional Court) reinstated.

### **Brief summary of the grounds for referral**

- 8 The success of the appeal on a point of law depends on whether the applicant has a right, as it claims, to obtain a prohibitory injunction. Under the first sentence of Paragraph 8(1) of the UWG, the existence of that right presupposes that the defendant or, in accordance with Paragraph 8(2) of the UWG, the intervener commissioned to carry out the advertising at issue has engaged in an unlawful commercial practice within the meaning of Paragraphs 3 or 7 of the UWG. The practice of which the defendant is accused may be unlawful under Paragraph 7(2), point 3, of the UWG. It may also be unlawful under Paragraph 7(2), point 1, of the UWG.
- 9 Whether those heads of claim are well founded depends on the interpretation that is to be given to Paragraph 7(2), point 3, of the UWG in the light of the provisions of Directive 2002/58. This raises questions, requiring answers from the Court, on the interpretation to be given to Article 2(h) and Article 13(1) of Directive 2002/58.
- 10 In accordance with the first sentence of Paragraph 7(1) of the UWG, a commercial practice is unlawful where it constitutes an unacceptable nuisance to a market participant. Under Paragraph 7(2), point 3, of the UWG, unacceptable nuisance must always be assumed to be present in the case of, inter alia, advertising using electronic mail without the express prior consent of the addressee. The provision in Paragraph 7(2), point 3, of the UWG is consistent with point 26 of Annex I to Directive 2005/29 and transposes Article 13(1) of Directive 2002/58 into German law. It must therefore be interpreted consistently with EU law, in the light of Article 13(1) of Directive 2002/58.
- 11 Under Article 13(1) of Directive 2002/58, the use of, inter alia, electronic mail for the purposes of direct marketing may be allowed only in respect of subscribers or users who have given their prior consent. In accordance with Article 2(h) of Directive 2002/58, ‘electronic mail’ means any text, voice, sound or image message sent over a public communications network which can be stored in the network or in the recipient’s terminal equipment until it is collected by the recipient. It is doubtful whether those conditions are satisfied in the circumstances of the main proceedings.

- 12 It is open to question first of all whether the advertising initiated by the defendant or, in accordance with Article 8(2) of the UWG, by the intervener commissioned by the defendant, which appears in specific advertising spaces in the inboxes forming part of the mailboxes of users of a free email service, must be regarded as electronic mail within the meaning of Article 2(h) of Directive 2002/58.
- 13 The advertisement at issue is a text message [‘Textnachricht’] within the meaning of Article 2(h) of Directive 2002/58. Under the first sentence of Article 2 (d) of Directive 2002/58, ‘communication’ [‘Nachricht’] means any information exchanged or conveyed between a finite number of parties by means of a publicly available electronic communications service. Those conditions are satisfied. The defendant’s advertisement contains information in text form which advertises services offered by the defendant. That information was conveyed between a finite number of parties. The procedure by which it was conveyed to the user of the email account was as follows: the user entered his log-in details in order to open the web page of his email account and thus caused the message to be sent by the ad server operator in real time to the inbox of the email account page, where it was displayed to the user of that email account. In addition, the advertising information was conveyed by means of a publicly available electronic communications service. The advertisement was triggered by the opening of the user’s email account, which is accessible on the internet, and was reproduced in the inbox provided on the web page for the purpose of displaying incoming emails. The advertisement was therefore, like the emails, conveyed in electronic form over the internet and thus via a publicly available medium. An email service accessible to users over the internet is an electronic communications service.

#### **The first question referred for a preliminary ruling**

- 14 The first question seeks to determine whether the inbox advertising at issue was also ‘sent’ within the meaning of Article 2(h) of Directive 2002/58/EC.
- 15 The appeal court found that it is clear from the concept of ‘sending’, read in conjunction with the terms ‘mail’ and ‘communications network’ also used in Article 2(h) of Directive 2002/58/EC, that a message constitutes ‘electronic mail’ only in the case where it is sent from one user to another via a service provider (such as an email provider) which carries out the electronic transfer to the second user’s electronic ‘address’ (such as an email address); in the dispute in the main proceedings, messages are not addressed to specific customers because the advertisement appears in a specifically defined space on a web page only by dint of an ad server acting in response to predefined ad tags/ad slots embedded in the web page.
- 16 In support of that view, which is based on the characteristics of a traditional email, it must be acknowledged that, when Directive 2002/58 was adopted, the EU legislature, too, is likely to have regarded email, along with SMS messages, which

are expressly mentioned in recital 40 of Directive 2002/58, as a classical form of electronic mail.

- 17 If Article 2(h) of Directive 2002/58/EC is interpreted by reference to the aforementioned requirements, which have been held to be sound by the appeal court and are based on the characteristics of a traditional email, no message has been ‘sent’ in the present case and the contested inbox advertising does not therefore constitute electronic mail. The inbox advertising is not transmitted by a user of an electronic communications service to the electronic ‘address’ (such as an email address) of a second user selected by that first user, via a service provider (such as an email provider), but, as a consequence of the opening of an email account, is displayed by ad servers in specific spaces designated for that purpose in the inbox of a randomly selected user.
- 18 The interpretation of the characteristic ‘sent’ adopted by the appeal court, which is based on the characteristics of a traditional email, could be called into question by the protective purpose of Article 13(1) of Directive 2002/58. That provision, which employs the concept of electronic mail as defined in Article 2(h) of Directive 2002/58/EC and regulates the use of electronic mail, seeks to protect users against intrusion upon their privacy by unsolicited communications for the purposes of direct marketing (see recital 40 of Directive 2002/58). There is nothing to indicate that, in the light of the rapid pace at which technology could be expected to develop, the legislature intended to prescribe a static definition of electronic mail as being that attaching to the ‘classical’ forms of email, SMS or MMS messages, known at the time when the directive entered into force. It is more likely that, in the interests of protecting users’ privacy, it opted for a dynamic and technically neutral term that is capable, for example, of also including the kind of electronic messaging in evidence in the context of social networks, which has only recently become relevant. Since the privacy of users of electronic means of communication may be infringed not only by unsolicited communications sent via classical forms of individual electronic communication such as email, SMS or MMS messages, but also by new forms of mass electronic communication, it seems appropriate to interpret the concept of ‘sending’ not, by reference to traditional forms of electronic communication, as a transmission from one particular user to another previously designated user, but, functionally, as a mode of a distribution.
- 19 On the basis of that functional interpretation of the concept in question, arrived at by reference to the protective objective pursued by Article 13(1) of Directive 2002/58, the inbox advertising at issue in the main proceedings was probably ‘sent’ within the meaning of Article 2(h) of Directive 2002/58/EC. That proposition is also supported by recital 40 of Directive 2002/58. According to that recital, users of public electronic communications networks should be protected against intrusion of their privacy by unsolicited communications for the purposes of direct marketing, since those forms of unsolicited advertising messages are relatively easy and cheap to send. Those criteria are met by the inbox advertising at issue.

**The second question referred for a preliminary ruling**

- 20 The second question seeks to determine which requirements are to be attached to the condition, laid down in Article 2(h) of Directive 2002/58/EC, that the communication can be stored in the network or in the recipient's terminal equipment until it is collected by the recipient.
- 21 The appeal court held that, in the case of the inbox advertising at issue, no such collection takes place. It stated that it follows from recital 27 of Directive 2002/58 that collection of the message presupposes a conscious act on the part of the addressee. After becoming aware of the communication, the recipient of the message must access the online data by performing an operation, that is to say by means of an externally directed intervention made of his own free will. What matters is that, by requesting the collection, the collector can trigger a programmatically prescribed transfer of the data in question. According to the appeal court, there is no message collection in that sense in the present case. On the contrary, the user of the email service has only to open the email service, via an internet browser, on Deutsche Telekom's website in order to prompt an ad server to display the advertising banner in real time, the user being unaware that this process is under way and unable to opt for or against the display of his own free will.
- 22 That interpretation is consistent with the possible meaning of the term 'collection' in Article 2(h) of Directive 2002/58/EC. It might also be supported by recital 27 of Directive 2002/58. This states that, in the case of electronic mail, the transmission of a communication is completed as soon as the addressee collects the message, typically from the server of his service provider. That wording could indicate that the collection of an email presupposes an activity on the part of the user the purpose of which is to transmit a message, typically from the service provider's server.
- 23 According to that strict interpretation, again based on the standard definition of an email, the inbox advertising at issue does not meet the criteria of an electronic mail within the meaning of Article 2(h) of Directive 2002/58/EC. By opening his email account on the service provider's web page, the user registers his intention to have his emails, which are stored on the service's email server, displayed and transferred to him. Experience shows, however, that it is not usually his intention also to have additional advertising messages inserted into his e-mail account inbox by an ad server.
- 24 Militating against the view taken by the appeal court, on the other hand, is, once again, a functional interpretation informed by the protective objective pursued by Article 13(1) of Directive 2002/58. In accordance with that objective, users are to be protected from unsolicited advertising communications, which may be relatively easily and cheaply sent by advertisers via an electronic communications network and may impose a burden on the user (recital 40 of Directive 2002/58). In the light of that objective, there seems to be little to support the idea of

distinguishing between an email with advertising content — which may or may not be in the form of a mass mailing — that indisputably falls within the definition of electronic mail, on the one hand, and the advertising message at issue, on the other. Both messages appear in the inbox, and therefore within that part of the web page opened by the user in order to view his emails which is expressly designated for them. Moreover, from the point of view of the burdensome effect to be prevented by Article 13(1) of Directive 2002/58, it makes no difference whether the advertisement is inserted into the email account inbox by one of the service provider's mail servers, by one of its ad servers or by an undertaking working in conjunction with that provider. On the contrary, the correct interpretation is once again less likely to be technical and more probably one that is a function of the objective of protection and takes into account the burdensome effect that a particular form of advertising has on the user. This might follow from the fact that the contested advertisement is displayed in the email account inbox and thus transmitted to an area in which the user expects to find only email messages which are individually addressed to him.

- 25 Such an interpretation based on the objective of protection is also compatible with the wording of Article 2(h) of the directive. There is a 'collection' in the sense of an operation performed by the user with the purpose of consulting the messages delivered to his email account inbox. According to the appeal court's findings, the conveyance of the advertisement from the ad server to the inbox is triggered by the user navigating to his email account page on the internet and, once there, logging in using his personal access data. The fact that, in so doing, the user usually intends to consult only private and business emails, rather than advertising messages which are uninteresting or a nuisance to him, such as spam or pop-ups, does nothing to detract from the existence of a purposive act of collection performed by opening the email account on the internet.
- 26 Until the point at which its insertion was triggered by the login, the inbox advertising at issue was stored on an ad server and therefore on the internet.
- 27 Recital 27 of Directive 2002/58, which states that, in the case of electronic mail, the transmission is completed when the addressee collects the message, typically from the server of his service provider, does not appear to indicate otherwise. It does not support the inference that the concept of electronic mail covers only messages stored on the service provider's own server, not least because it follows from the use of the term 'typically' that the legislature did not thereby lay down an exhaustive definitional condition, but merely described the situation that usually obtains in practice. Account must also be taken of the regulatory context of recital 27 of Directive 2002/58. That recital concerns the point at which traffic data must be deleted. The key criterion in this regard is the point at which the transmission of a communication is completed (see Article 6(1) and recital 26 of Directive 2002/58). In that context, recital 27 of Directive 2002/58 identifies this as being the point at which the transmission of electronic mail is completed by the collection of the message by the addressee. It is not evident that this supports the inference of decisive interpretative criteria for the protection of users' privacy

against unsolicited direct marketing by electronic mail as provided for in Article 13(1) of Directive 2002/58.

### **The third question referred for a preliminary ruling**

- 28 The third question seeks to ascertain whether a message constitutes electronic mail within the meaning of Article 13(1) of Directive 2002/58 even where it is sent not to an individual recipient already specifically identified before transmission but — as in case at issue — randomly.
- 29 The appeal court took the view that electronic mail within the meaning of Paragraph 7(2), point 3, of the UWG presupposes that the message is sent ‘individually’, that is to say, to a specifically addressed recipient who is identified before sending and with whom prior communication as regards his consent to the sending of the message is therefore possible. This is said to follow from the fact that the lawfulness of the forms of advertising regulated by Paragraph 7(2), point 2, of the UWG is conditional upon the existence of prior express consent on the part of the addressee. According to the appeal court, the requirement of such prior express consent logically presupposes the existence of a specific addressee who is able to tell the advertiser whether or not he consents to the advertisement; however, the advertisement at issue is displayed to customers of the free email service on a random basis, ruling out the possibility of any prior communication with regard to the customer’s consent.
- 30 The referring court has doubts as to whether that view can be endorsed. In accordance with Article 13(1) of Directive 2002/58, the use of electronic mail for the purposes of direct marketing may be allowed only in respect of subscribers or users who have given their prior consent. However, it cannot be inferred *a contrario* from that requirement that all forms of direct advertising conducted over communications networks without consent are lawful if, on account of the technological processes used by the advertiser, users’ consent cannot be obtained prior to the use of a specific advertisement.

### **The fourth question referred for a preliminary ruling**

- 31 The fourth question seeks to ascertain whether electronic mail is used for the purposes of direct marketing within the meaning of Article 13(1) of Directive 2002/58 only where the user is the subject of a burden which is greater than a nuisance (nuisance being the finding reached by the appeal court in the case at issue).
- 32 The appeal court took the view that the spirit and purpose of Paragraph 7(2), point 3, of the UWG, which must be determined in the light of recital 40 of Directive 2002/58, militate against the application of that provision to the advertising at issue. It states that it is true that the appearance of advertising within the mailbox — interspersed among the new incoming emails — is a nuisance to

the user of the email service. Moreover, since the advertising appears to the casual observer to be an email and is therefore more noticeable than advertising outside the inbox, the degree of nuisance it represents must be considered greater than that of advertising displayed at the edges of the mailbox. However, that advertising does not constitute a burden that is greater than a nuisance, or a cost, within the meaning of recital 40 of Directive 2002/58. In particular, the inbox advertisements are not included in the number of the customer's unread emails, and do not take up any storage space in the inbox. The appeal court adds that, owing to the visual differences between emails and pop-ups, no effort is required to separate important electronic messages from junk electronic advertising.

- 33 There is no clear answer to the question as to whether that interpretation can be endorsed. The wording of recital 40 of Directive 2002/58 might support the interpretation adopted by the appeal court. That recital does not concern nuisances to the user. It states rather that users of public electronic communications networks should be protected against intrusion of their privacy by unsolicited communications for direct marketing purposes because those forms of unsolicited commercial communications are on the one hand relatively easy and cheap to send and on the other impose a burden and/or cost on the recipient. Moreover, in some cases, their volume may also cause difficulties for electronic communications networks and terminal equipment. Since the present case concerns neither the cost to the user nor difficulties caused to electronic communications networks or terminal equipment, the decisive criterion is whether the inbox advertising places a burden on users' privacy. However, recital 40 of Directive 2002/58 does not expressly provide that a nuisance may be sufficient to constitute a burden.
- 34 That said, given that the key criterion is the protection of privacy against unsolicited direct marketing, the meaning of the term 'burden' also covers a disturbance of privacy in form of a nuisance, whereby the consumer is confronted with advertising (not only) in those areas of a web page which are typically used for that purpose and which the consumer can therefore readily ignore, but (also) in his email account inbox, and thus in an area of the email service provider's web page in which email messages individually directed at the user are displayed, and which he will therefore consult with purpose, and thus take note of with particular attentiveness. What is more, experience shows that the user will feel more individually targeted by advertising messages which appear in the inbox expressly designated for messages personally addressed to him than by an advertising banner which is located, for example, at the outer edges of the web page and is clearly aimed at the general public. Such individually targeted communications may also — depending on the message and the subject matter of the advertising — produce an enhanced nuisance effect.
- 35 It is also important to take into account in this regard that a private, password-protected email account falls within the sphere of private life protected by the general right of personality. In that sphere, the person concerned must be protected not only against the effort he expends in having to screen messages addressed to him and separate advertising from other messages. As an emanation

of his right to personal self-determination, the desire of the person concerned to keep his private life free of any forced confrontation with advertising and its suggestive effect warrants protection too. In accordance with Article 1(1) and recitals 1, 12 and 40 of Directive 2002/58, Article 13(1) of that directive also serves to protect a user's privacy in the area of electronic communications. In addition, it is important to take into account, when assessing the nuisance effect of an advertising measure which is detrimental to privacy, that experience attests to the risk that a proliferation of advertising may increase the number of instances of nuisance.

- 36 Since, from the point of view of the interpretation based on the protective objective pursued by Article 13(1) of Directive 2002/58, the decisive criterion is protection of privacy rather than protection of the user from being misled, it is irrelevant, for the purposes of examining that provision, that the appearance of advertising displayed in the user's inbox is different from that of emails and that that distinction is also emphasised by the 'advertisement' notice that comes with inbox advertising. Moreover, experience shows that, because of the way they are constructed and displayed, and because of the need to read them superficially, such messages take up the user's time even in the case where he is immediately able to identify one appearing in his email account inbox clearly and unequivocally as advertising and delete it. For the same reasons, the facts, as cited by the appeal court, that the advertisement is not included in the number of the customer's unread emails and does not take up any storage space in his inbox do not preclude the finding that there has been an infringement of Article 13(1) of Directive 2002/58.
- 37 In the light of the foregoing, it is probably true to say, contrary to the view taken by the appeal court, that the fact that a user of a private email service is confronted with advertising not only in places typically used for such messages but also in an area of his email provider's web page which is expressly designated for emails personally addressed to him and to which he will necessarily pay particular individual attention, is definitely significant from the point of view of whether there has been an infringement of his privacy. That view is also supported by the appeal court's findings. It stated that the appearance of advertising in the inbox — interspersed among new incoming emails — is a nuisance to the user of the email service. Since advertising may appear to the casual observer to be an email and may therefore be more noticeable than advertising outside the inbox, the degree of nuisance it represents must be considered greater than that of advertising displayed at the edges of the mailbox. Those findings are consistent with practical experience.

#### **The fifth question referred for a preliminary ruling**

- 38 The advertising at issue in the present case may be unlawful under Paragraph 7(2), point 1, of the UWG. The application of those provisions raises a question,

requiring an answer from the Court, as to the interpretation of the first sentence of point 26 of Annex I to Directive 2005/29.

- 39 In accordance with Paragraph 7(2), point 1, of the UWG, an unacceptable nuisance within the meaning of the first sentence of Paragraph 7(1) of the UWG must always be assumed to be present in the case of advertising using a medium of commercial communication suitable for distance marketing which is not listed in points 2 and 3 of that provision and through which a consumer is persistently solicited even though he clearly does not want to be. That provision is intended to transpose the first sentence of point 26 of Annex I to Directive 2005/29 and must be interpreted consistently with the directive, in the light of that rule. Under point 26 of Annex I to Directive 2005/29, making persistent and unwanted solicitations by telephone, fax, email or other remote media, except in circumstances not relevant to the present case and to the extent justified under national law to enforce a contractual obligation, constitutes an aggressive commercial practice which must in all circumstances be considered unfair. The present case raises a question as to the interpretation of that provision of EU law to which no clear answer can be found.
- 40 The fifth question seeks to determine what requirements are to govern the presence of ‘solicitation’ within the meaning of point 26 of Annex I to Directive 2005/29.
- 41 Solicitation presupposes as a defining feature the targeting of advertising at an individual customer. In that regard, the question arises as to whether an advertisement targeted at an individual meets the conditions governing the presence of solicitation only where a customer is contacted via a medium traditionally used for individual communication between a sender and a recipient, such as telephone, fax or email, or whether it is sufficient if — as in the present case — a connection with a specific customer is established by the fact that the advertisement is displayed in the inbox of a private email account and thus in an area in which the customer expects to find messages addressed to him personally.
- 42 The wording of point 26 of Annex I to Directive 2005/29 is open to both interpretations. Since — as has been articulated above — inbox advertising impacts on the privacy of the customer and represents a greater nuisance to him than conventional banner advertising appearing in those areas of a web page that are usually reserved for that purpose, which have no individual connection with the user, the protective objective of that provision is probably impacted too.