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to prevent their use for secondary purposes (e.g. direct marketing). Therefore complete information for subscribers is a necessary prerequisite for them to make informed choices according to paras. 2 and 3. The Directive, when referring to 'purpose(s)', envisages that directories may have more than one purpose and these may be purposes which go beyond the mere identification of a subscriber. New products and business models are conceivable and legal as long as their purpose is made completely transparent to the data subjects. The duty to inform the subscriber lies with the party (provider) collecting the data for inclusion in a directory or database (see recital 39 and arts. 20(1) (c), 23(3)(e) of the amended Universal Service Directive 2002/22/EC).

3. Subscribers' privacy options (para. 2). With the necessary information according to para. 1 in hand subscribers are in a position to exercise their privacy options. First of all they have the right to stay out of any telephone directory altogether. No charge may be raised if they choose to do so. Also subscribers do not have to give reasons for their choice. If subscribers choose to have personal data included in the directory they may limit the inclusion to specific data. They may also opt for the inclusion of additional data as long as these data are 'relevant for the purpose of the directory as determined by the provider.' Here again the Directive makes it clear that it is for the provider to determine the purpose of the directory or enquiry service which he is offering. Data subjects, after having been informed about this purpose (see para. 1), can then decide if they want to have their personal data included in such a directory or database. Furthermore subscribers have the right at any time and without charge or having to give reasons to withdraw their consent and to have their data removed from the directory or database. This will encounter practical problems in printed directories which have been published; the withdrawal will only take effect in later printed versions of the directory. Indeed it may not become effective at all since old versions of the directory may have been sold or scanned by third parties. Although the Directive does not say so explicitly Member States are well advised to oblige providers of directory services (esp. those under universal service obligations) who receive the request for withdrawal from a subscriber to inform those third parties to whom they have transmitted the data in the meantime that the subscriber has withdrawn his consent. Although the Directive does not legally bind them to do so Member States should also ensure that subscribers can limit the publication of their data to printed directories and exclude their integration in electronic databases. If the entry into the printed directory included a mark (e.g., asterisk) documenting the subscriber's preference digital copies of such a printed directory could either be made without these data or – if the subscriber's preference was not taken into account – the author of the digital copy could be held liable.

4. Opt-in for reverse searching (para. 3). Since reverse searching facilities change the purpose and possible use of an electronic directory (see note 2 above) the Directive enables the Member States to require additional opt-in

of subscribers. It does not require such an opt-in, an opt-out would equally be in line with the Directive. Indeed, one could argue that in the digital era it is hard to prevent individual users of directory services to reverse databases which they bought on offline media (CD-ROM, DVD) with their own hardware and software. But at any rate the providers of directory services collecting data are obliged to inform subscribers of any opt-in or opt-out option they offer with regard to reverse searching facilities.

5. Extension to legal persons (para. 4). Although paras. 1 and 2 primarily apply to natural persons Member States are called upon to ensure the sufficient protection of legitimate interests of legal persons with regard to their entry in public directories. Neither the notions of legitimate interests of legal persons nor 'sufficient protection' are defined in the Directive (see art. 1, note 2 c)). There is no obligation under Community Law to extend the protection afforded by the Data Protection Directive to legal persons (cf. recital 12). Even if Member States provide for a certain degree of protection of legal persons it may be different and at a lower level than the protection provided for natural persons under the Directive.

[Unsolicited communications]

Article 13

(1) **The use of automated calling and communication systems without human intervention (automatic calling machines), facsimile machines (fax) or electronic mail for the purposes of direct marketing may be allowed only in respect of subscribers or users who have given their prior consent.**

(2) **Notwithstanding paragraph 1, where a natural or legal person obtains from its customers their electronic contact details for electronic mail, in the context of the sale of a product or a service, in accordance with Directive 95/46/EC, the same natural or legal person may use these electronic contact details for direct marketing of its own similar products or services provided that customers clearly and distinctly are given the opportunity to object, free of charge and in an easy manner, to such use of electronic contact details at the time of their collection and on the occasion of each message in case the customer has not initially refused such use.**

(3) **Member States shall take appropriate measures to ensure that unsolicited communications for the purposes of direct marketing, in cases other than those referred to in paragraphs 1 and 2, are not allowed either without the consent of the subscribers or users concerned or in respect of subscribers or users who do not wish to receive these communications, the choice between these options to be determined by national legislation, taking into account that both options must be free of charge for the subscriber or user.**

(4) In any event, the practice of sending electronic mail for the purposes of direct marketing which disguise or conceal the identity of the sender on whose behalf the communication is made, which contravene Article 6 of Directive 2000/31/EC, which do not have a valid address to which the recipient may send a request that such communications cease or which encourage recipients to visit websites that contravene that Article shall be prohibited.

(5) Paragraphs 1 and 3 shall apply to subscribers who are natural persons. Member States shall also ensure, in the framework of Community law and applicable national legislation, that the legitimate interests of subscribers other than natural persons with regard to unsolicited communications are sufficiently protected.

(6) Without prejudice to any administrative remedy for which provision may be made, *inter alia*, under Article 15a(2), Member States shall ensure that any natural or legal person adversely affected by infringements of national provisions adopted pursuant to this Article and therefore having a legitimate interest in the cessation or prohibition of such infringements, including an electronic communications service provider protecting its legitimate business interests, may bring legal proceedings in respect of such infringements. Member States may also lay down specific rules on penalties applicable to providers of electronic communications services which by their negligence contribute to infringements of national provisions adopted pursuant to this Article.

1. General. (a) Legal framework. This article relates to the sending of unsolicited communications. This is not the only text regulating the sending of unsolicited communication. The Directive on distance marketing of consumer financial services, the Directive on distance contracts, the Directive on electronic commerce as well as the Data Protection Directive also define specific conditions with regard to the sending of unsolicited communications for commercial or for direct marketing purposes. These directives remain applicable to the matter, in particular with respect to recipients who are not affected by the provisions of art. 13. The Directive also expressly states in recital 45 that where Member States establish an opt-out register for unsolicited communications to legal persons, the provisions of the Directive on electronic commerce remain fully applicable. The Old Directive also contained a specific provision with respect to unsolicited communications. The Directive, however, innovates in this regard. First, it extends the application of the opt-in rule to the use of electronic mail for direct marketing purposes. Second, the Directive creates an exemption regime, that is, the 'soft opt-in' rule in the context of an existing customer relationship between a client and a supplier. Finally, the Directive strengthens the protection afforded recipients of direct marketing communications by introducing specific rules with respect to the self-identification of the sender of unsolicited communications. **(b) Extraterritorial aspects.** As mentioned in art. 3, note 3, the

criteria determining the territorial scope of application of the Directive differ from those defined in art. 4 of the Data Protection Directive. Therefore, the Directive binds controllers who are processing personal data in the context of the activities of an establishment which is not located on the European Community territory. Art. 13 thus applies to data controllers who are established outside the European Community territory as soon as they are sending unsolicited communications to persons established on this territory.

2. Use of automated calling systems without human intervention, facsimile machines or electronic mail automated means (para. 1). (a) Use of automated means. Art. 13 distinguishes between the sending of unsolicited communications via the use of automated calling or communication systems without human intervention, facsimile machines or electronic mail automated means ruled in para. 1 and the use for other means, such as person-to-person telephony calls governed by para. 3. Recitals 40 and 42 explain this differentiation by the fact that, contrary to other forms of direct marketing, the sending of unsolicited communications by such automated means is relatively easy and cheap and may impose a burden and/or cost on the recipient and the volume of communications may cause difficulties for electronic communications networks and terminal equipment. The guarantees set in art. 13 also include the use of SMS, MMS and similar applications. Pursuant to the Amending Directive, this paragraph does not anymore only refer to 'automated calling systems' but also relates to 'automated communication systems' in order to cover the constant development and changes of technologies, and maintain a technology neutral approach (Opinion on 2/2008 on the review of the ePrivacy Directive, p. 5). The exact impact of this amendment is however subject to some doubts. The Working Party expressed the opinion that the insertion of the term 'communication' would ensure the applicability of para. 1 to short range wireless media such as Bluetooth marketing applications (Opinion on 1/2009 on the review of the ePrivacy Directive, p. 9) The extension of the scope of para. 1 to automated communication systems might also at first be seen as entailing the application of art. 13 to all messages sent for marketing purposes that are communicated by automated means, including pop up messages which were excluded from the scope of para. 1 because they do not qualify as electronic mail (see also Answer to written question E-3392/02, 2003/C 155 E/164). However, the precision indicating that it concerns automatic calling machines seem to limit the extension to calls carried out to communication systems. **(b) Opt-in rule. Consent.** Art. 13(1) regulates the use of automated calling or communication systems without human intervention such as automatic calling machines, facsimile machines or electronic mail (see definition in art. 2, note 2 g) for the purposes of direct marketing. Such use can only be allowed for the purpose of sending this kind of unsolicited communications to subscribers who have given their prior consent in this regard. In order to be valid, the consent needs to respect the requirements of the Data Protection Directive, that is to be informed, specific and freely given. This rule raises a practical issue: the mere fact of

contacting recipients to ask them whether they would consent to receiving unsolicited material has been considered as already constituting an electronic mail for marketing purpose. This is a major issue when the sender has gathered information of potential recipients under an opt-out regime and wishes to continue to use the list for direct marketing purposes under the opt-in rule introduced by the Directive (Opinion on unsolicited communications, p. 6). **Prior information.** The consent must be preceded by the provision of the information required by the Data Protection Directive (see comment on art. 2(2)(f) with respect of the concept of 'consent'). **Modalities of the obtaining of the consent.** The Working Party points out that it would not be compatible with art. 13 simply to ask, by a general e-mail sent to recipients, their consent to receive marketing e-mails, because of the requirement that the purpose be legitimate, explicit and specific. Moreover, the Working Party also excludes any form of implied consent including consent that may be assumed unless objection is made, such as through the use of pre-ticked boxes. Nevertheless, methods whereby subscribers give prior consent by registering on a website and who are later asked to confirm that they were the ones who registered and to confirm consent are in compliance with the Directive (Opinion on unsolicited communications, p. 5; see also comment on definition of the term 'consent' in art. 2(2)(f)). **(c) Senders bound by the opt-in rule.** The persons addressed by this rule are not limited to the providers of publicly available electronic communications or the provider of a public communications network. Art. 13(1) prohibits the use of certain automatic means for the purpose of sending unsolicited communication regardless of the type of sender. **(d) Persons protected.** Despite the fact that para. 1 refers to subscribers without excluding subscribers who are legal persons, para. 5 states that para. 1 only applies to subscribers who are natural persons. In its original version, art. 13 only addressed 'subscribers' and not 'users' of a publicly available electronic communications service which raised the question of whether the sending of unsolicited communications for direct marketing purposes to users who are not subscribers was or not subject to any conditions under the Directive. The Amending Directive clearly extends the application of the conditions to users. Therefore, the conditions defined in art. 13 applies regardless of the fact that the recipient is a subscriber or a user of a communication service in order to assess whether the opt-in rule applies, the sender will only need to determine whether the recipient is a legal or a natural person. **(e) Concept of direct marketing.** The Directive does not provide for any definition of the terms 'direct marketing'. The Working Party, however, considers that art. 13 not only relates to communication of a pure commercial nature but also covers any form of sales promotion, including direct marketing by charities and political organisations such as fund raising, and so forth. Newsletters sent by e-mail also fall under the scope of this definition (Opinion on unsolicited communications, pp. 4 and 7).

3. 'Soft opt-in' for the use of electronic mail in customer relationships (para. 2). **(a) The 'soft opt-in' concept.** Art. 13(2) introduces an exception

to the opt-in rule defined in para. 1 for the use of electronic contact details for electronic mail in a customer relationship between the sender and the recipient. Subject to certain conditions, the opt-out rule replaces the opt-in rule in such a context. The opt-out rule means that the recipient will be entitled to oppose to the use of its contact details for e-mailing of direct marketing content but will not be required to give its prior consent for such use. Since the benefit of this exception is subject to several cumulative conditions, including the existence of a prior customer relationship, this regime is generally called 'soft opt-in'. **(b) Conditions for 'soft opt-in'.** Firstly, the contact details for electronic mail must have been obtained by the sender from its customer and not from a third party. Second, these data must have been collected in the context of the sale of a product or a service. Third, they must have been collected in accordance with the provisions of the Data Protection Directive, which includes complying with the requirement of information of the data subjects regarding the purpose of direct marketing and the respect of the data subjects' right to oppose to such use. Art. 13(2) expressly indicates that the customers must clearly and distinctly have been given the opportunity to object, free of charge and without difficulty, to such use of electronic contact details when they have been collected. In addition to these conditions, art. 13(2) limits the use that can be further made of the electronic contact details: only the natural or the legal person who collected the contact details can use these data. For instance, they could not be used by other companies of the group to which the company that collected the data pertains. Moreover, the use of these data will only be possible for direct marketing of the sender's own similar products or services. The Working Party indicated that such similarity should be judged on an objective basis, that is, the reasonable expectations of the recipient, rather than from the perspective of the sender (Opinion on unsolicited communications, p. 9). Finally, the sender must, at the time of the data collection and at the occasion of each direct marketing message sent, give clearly and distinctly the opportunity to the customer to object, free of charge and without difficulty, to such use of electronic contact details in the event the customer has not initially refused such use. **(c) Beneficiaries of the soft opt-in rule.** Art. 13(2) has a broad application since it addresses any natural or legal person who provides products or services. **(d) Persons protected.** Art. 13(2) uses the term 'customer' to identify the recipients concerned by this exemption. Since art. 13(1) appears only to protect natural persons who are subscribers, it would be reasonable to consider that the exception to the regime defined under para. 1 also targets the same category of recipients.

4. Use of other means (para. 3). **(a) Choice between opt-in and opt-out.** Art. 13(3) relates to cases other than those referred to in art. 13(1) and (2). Prior to the Amending Directive, the European Commission expressed the view that pop-up messages fall under the scope of art. 13(3) (Answer to written question E-3392/02, 2003/C 155 E/164). Pursuant to art. 13(3), Member States will have the possibility of subjecting the use of means other than

automated calling systems without human intervention, facsimile machines or electronic mail for direct marketing purpose either to the opt-in or to the opt-out rule. Member States will indeed have to take appropriate measures to ensure that, free of charge, unsolicited communications for purposes of direct marketing are not allowed either without the consent of the subscribers concerned or in respect of subscribers who do not wish to receive these communications. The choice between these options is, therefore, to be determined by national legislation. This will allow the Member States which had implemented an opt-in regime to the use of this communications prior to the Directive to maintain this level of protection. **(b) Senders concerned by para. 3.** The persons addressed by this paragraph are not limited to the provider of publicly available electronic communications or the provider of a public communications network since art. 13(3) governs the use of the non-automated means for the purpose of sending unsolicited communication regardless of the quality of the sender. **(c) Persons protected.** Pursuant to art. 13(5), art. 13(1) only applies to subscribers who are natural persons. Furthermore, like art. 13(1), art. 13(3) relates to data subjects who are 'subscribers' and not to the 'users' of a publicly available electronic communications service.

5. Prohibition of the use of false identity or invalid addresses (para. 4).

Art. 13(4) defines additional requirements applying to the use of electronic mail for purposes of direct marketing regardless of the quality of the recipient (subscriber, user, natural or legal person). Art. 13(4) prohibits the practice of disguising or concealing the identity of the sender of the electronic mail on whose behalf the communication is made, in violation of art. 6 of the E-Commerce Directive which compels that the natural or legal person on whose behalf the commercial communication is made shall be clearly identifiable. It also imposes the use of a valid address or number to which the recipient may send a request that such communications cease. As explained by recital 43, these additional requirements are necessary to ensure the effective enforcement of the above-mentioned rules or of rules defined in other European directives on unsolicited messages for direct marketing. The use of false identities or false return addresses or numbers would indeed impede the data subjects to enforce their rights, in particular the right to opt-out. The Amending Directive adds a new forbidden practice, i.e. the practice consisting in encouraging recipients to visit websites that contravene that article.

6. Protection of legal person's interests (para. 5). Art. 13(5) specifies that the rules defined in these two paragraphs apply to subscribers who are natural persons. With regard to subscribers who are legal persons, art. 13(5) requires the Member States to ensure, in the framework of Community law and applicable national legislation, that their legitimate interests are sufficiently protected. This provision leaves a great freedom to the Member States since it does not provide for any recommendation as to the concrete measures that need to be implemented (opt-in, opt-out or others) or as to

the level of protection that should be afforded to subscribers who are legal persons pursuant to the protection of their 'legitimate interests'. The Working Party noticed in that respect that the implementation of this provision will raise different pragmatic issues. Firstly, it might not always be easy to identify whether the recipient is a legal or a natural person and it is not clear what efforts can be expected from a sender to verify whether the address or number belongs to a legal or a natural person. Moreover, it is likely that discrepancies between national legislations will arise and it is not clear how cross-border effects will be dealt with if the rule that applies to electronic mail originating in a Member State differs from the one that applies in the Member States where the electronic mail is received (Opinion on unsolicited communications, p. 8).

7. Specific remedies available for having a legitimate interest in the cessation or prohibition of the above mentioned infringements (para. 6). The Amending Directive provides that not only data subject may suffer for spamming but also other person which may have a legitimate interest in the cessation or prohibition of these unsolicited communications. This provision has been welcomed by the Working Party which underlined that 'This provision will undoubtedly strengthen user rights and contribute to the development of better security practices among industry players' (Opinion on 1/2009 on the review of the ePrivacy Directive, p. 10). **Beneficiaries.** Art. 13(6) should benefit at any person having a legitimate interest in the cessation or prohibition of spamming. Is deemed to have a legitimate interest the natural or legal person who is been adversely affected by the infringements. The Amending Directive does not provide any precision as to what may be considered as a being 'an adversely effect' but expressly identifies as potential beneficiaries of this provision the communications services providers. Recital 68 of the Amending Directive explains that 'Electronic communications service providers make substantial investments in order to combat unsolicited commercial communications (spam). They are also in a better position than end-users in that they possess the knowledge and resources necessary to detect and identify spammers. E-mail service providers and other service providers should therefore be able to initiate legal action against spammers, and thus defend the interests of their customers, as part of their own legitimate business interests'. **Remedies.** Art. 13(6) aims at imposing that Member States ensure that, besides potential administrative remedy that the Members States may put in place, they also guarantee that the persons concerned may bring legal proceedings. In light of the whole paragraph, it might be considered that such proceedings should at least allow to obtain the cessation or the prohibition of practices that would not comply with the national provisions adopted pursuant to art. 13.

8. Specific remedies against providers of electronic communications services (para. 6). Art. 13(6) entitles Member States to provide for specific rules on penalties that would be applicable to providers of electronic

communications services which by their negligence contribute to infringements of national provisions adopted pursuant to art. 13. The exact consequences of this provision are not otherwise specified. It must however be highlighted that there are no specific obligation imposed on the providers to take prevent unsolicited communications. Nevertheless, recital 44 of the Directive seems to suggest that providing for adequate tools enhancing privacy safeguards is part of the general obligations resulting from the Directive. Recital 44 indeed states, with respect with spamming issues, that 'Certain electronic mail systems allow subscribers to view the sender and subject line of an electronic mail, and also to delete the message, without having to download the rest of the electronic mail's content or any attachments, thereby reducing costs which could arise from downloading unsolicited electronic mails or attachments. These arrangements may still be useful in certain cases as an additional tool to the general obligations established in this Directive'.

[Technical features and standardisation]

Article 14

(1) In implementing the provisions of this Directive, Member States shall ensure, subject to paragraphs 2 and 3, that no mandatory requirements for specific technical features are imposed on terminal or other electronic communication equipment which could impede the placing of equipment on the market and the free circulation of such equipment in and between Member States.

(2) Where provisions of this Directive can be implemented only by requiring specific technical features in electronic communications networks, Member States shall inform the Commission in accordance with the procedure provided for by Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on information society services (Directive as amended by Directive 98/48/EC (OJ L 217/18, 5 August 1998), OJ L 204/37, 21 July 1998).

(3) Where required, measures may be adopted to ensure that terminal equipment is constructed in a way that is compatible with the right of users to protect and control the use of their personal data, in accordance with Directive 1999/5/EC and Council Decision 87/95/EEC of 22 December 1986 on standardisation in the field of information technology and communications (Decision as last amended by the 1994 Act of Accession, OJ L 36/31, 7 February 1987)

1. Regulatory objective. The Directive provides for a regulatory framework which is basically technology-neutral (See also recitals 51 and 54 of Directive 2009/136/EC). Thus the European regulator is unlikely to face a

situation in the near future where there is a need to redraft the Directive due to fundamental technological changes. However, in order to prevent negative effects on the single market Member States are either required to abstain from any regulatory requirements for terminal equipment which may inhibit free circulation of such products or to inform the Commission about specific requirements for networks. But the Directive allows for national regulations and standardisation of privacy-enhancing terminal equipment.

2. Technical requirements for equipment (para. 1). It is an important objective of the European Community to create a single and competitive market for telecommunications services as well as terminal equipment. The Directive therefore stresses that Member States – when implementing the provisions of the Directive – should ensure that no requirements for specific technical features are imposed on terminal equipment or other electronic communication equipment if such requirements could prevent this equipment from being placed on the single market or from circulating there. Requirements which do not influence the introduction in the market or the free circulation in the Community can be imposed without infringing the Directive. It is somewhat unclear what is meant by 'other electronic communication equipment'. The provision seems to refer to any hardware or software component which is not a terminal.

3. Technical requirements for networks (para. 2). If provisions of the Directive can only be implemented by requiring specific technical features in electronic communications networks, the Directive requires Member States to inform the Commission in accordance with Directive 98/34/EC. This Directive provides for a procedure to achieve transparency as well as uniformity in the field of standardisation in the Member States. Once a Member State has informed the Commission of a draft technical standard the adoption of this draft has to be postponed for a standstill period of up to twelve months if the Commission either announces its intention to propose or adopt legislation in the field where the Member State plans to adopt a national draft technical regulation or the Commission finds that this draft technical regulation is covered by existing Community legislation. The objective is to support harmonisation of technical standards in the Community. By referring to Directive 98/34/EC art. 14(2) prevents further diversity in this field which would inhibit the single telecommunications market. At least the Member States cannot adopt technical regulations in this field before the Commission has been informed and had a chance to initiate Europe-wide regulation.

4. Privacy-enhancing terminal equipment (para. 3). In a somewhat erratic fashion para. 3 returns to requirements for terminal equipment (which has been dealt with *inter alia* in para. 1 already). The Directive acknowledges that technology may be compatible or incompatible with the right of users to protect and control the use of their data. Therefore the implementation of the Directive may not be entirely technology-neutral. Member States may – where necessary – adopt measures which ensure that terminal equipment ('other electronic