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### Commentary on Directive 2002/58/EC, article 9

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absence of such a provision Member States have to oblige service providers in the Community to integrate these privacy options when negotiating roaming or interconnection agreements with providers in third countries (cf. Part B (b) of Annex I to the Universal Service Directive).

**7. Duty to inform the public (para. 6).** Data subjects can only make an informed choice about privacy facilities they may want to use if they have been informed of the existing options. Therefore Member States have to ensure that the providers of publicly available electronic communications services inform the public whether they are offering calling and/or connected line identification and about the privacy options provided for in paras. 1 to 5 (see recital 34). Interested parties should also be informed of cases where it is technically impossible or would require a disproportionate economic effort to comply with the requirements of art. 8(1) to (5) in cases of subscriber lines connected to analogue exchanges (see recital 19).

#### [Location data other than traffic data]

#### Article 9

(1) Where location data other than traffic data, relating to users or subscribers of public communications networks or publicly available electronic communications services, can be processed, such data may only be processed when they are made anonymous, or with the consent of the users or subscribers to the extent and for the duration necessary for the provision of a value added service. The service provider must inform the users or subscribers, prior to obtaining their consent, of the type of location data other than traffic data which will be processed, of the purposes and duration of the processing and whether the data will be transmitted to a third party for the purpose of providing the value added service. Users or subscribers shall be given the possibility to withdraw their consent for the processing of location data other than traffic data at any time.

(2) Where consent of the users or subscribers has been obtained for the processing of location data other than traffic data, the user or subscriber must continue to have the possibility, using a simple means and free of charge, of temporarily refusing the processing of such data for each connection to the network or for each transmission of a communication.

(3) Processing of location data other than traffic data in accordance with paragraphs 1 and 2 must be restricted to persons acting under the authority of the provider of the public communications network or publicly available communications service or of the third party providing the value added service, and must be restricted to what is necessary for the purposes of providing the value added service.

**1. General.** This provision governs the processing of certain location data obtained in the context of the provision of a public communications net-

work and of publicly available electronic communications services. Indeed it exclusively governs the processing of certain location data, that is, those that are not to be considered traffic data. The processing of location data which are a by-product of the communication transmission service remain, as before under the Old Directive, governed by art. 6 of the Directive. The European Commission noticed that, since the adoption of the Old Directive, technologies involving the processing of data allowing the exact positioning of a mobile user's terminal equipment (such as the Global Positioning System (GPS)) had been emerging. These technologies support the provision of new services, such as road transport telematic services providing traffic information and guidance to drivers, and allow the exact positioning of a mobile user's terminal equipment. Therefore, the European Commission considered it necessary to define a specific regime for the processing of these data ensuring appropriate data protection and privacy safeguards. The requirements imposed in art. 9 are not the only ones applicable to the processing of location data. As explained in art. 6, note 3 in fine, the Data Protection Directive remains applicable for all the aspects that are not specifically regulated by the Directive (see comments in this regard under art. 6, note 1).

**2. Processing of location data other than traffic data (para. 1). (a) Prohibition of processing and exception.** Art. 9(1) states that where processing of location data other than traffic data is possible, it can only be carried out on anonymous data or for the purpose of providing value added services. **(b) Provision of value added services. Requirement of the consent of the user or of the subscriber.** The processing of location data carried out in the framework of the provision of a value added service is however subject to the prior consent of the subscriber or of the user. As mentioned in art. 6, note 6, recital 31 states that whether the consent to be obtained for the processing of personal data with a view to providing a particular value added service should be that of the user or of the subscriber will not only depend on the data to be processed and on the type of service to be provided but also on whether it is technically, procedurally and contractually possible to distinguish the individual using an electronic communications service from the legal or natural person having subscribed to it. *Definition of 'consent'.* The requirements regarding the consent to be provided by the subscriber or the user are the same as those specified in the Data Protection Directive, also for what concerns a legal person's consent. According to recital 17, the consent may be given by any appropriate method such as ticking a box when visiting an internet website as long as the consent is a freely given, specific and informed indication of the user's wishes. Special regulations have been created regarding the processing of location data by organisations dealing with emergency calls in spite of the absence of consent for the processing of such data (see art. 10, note 6 c)). *Right of withdrawal.* Moreover, users or subscribers must be given the possibility to withdraw, at any time, their consent for the processing of location data. This not only requires that the user or subscriber have the right to withdraw its consent at any time but

also that they are given the effective possibility to do so. The withdrawal prevents the service provider from processing the subject's data in the future. *Right of temporary refusal of the processing.* Art. 9(2) provides that the user or subscriber must be offered, in addition to the right of withdrawal, the possibility to refuse temporarily the processing of location data other than traffic data for each connection to the network or for each transmission of a communication. Regarding the modalities of this refusal process, the Directive only specifies that such temporary refusal must be free of charge and should be rendered possible by the use of a simple means. The Directive does not, however, indicate whether the refusal can be contemplated as a refusal per connection or transmission or it should be conceived as a refusal over a certain period. The temporary refusal of a subscriber or user for the processing of location data does not, however, impede the processing of such data for organisations dealing with emergency calls under certain conditions (see art. 10, note 3 in fine). **(d) Information. Content of information.** In addition, the service provider must, in respect of para. 4, inform the subscriber or user of the types of traffic data which are processed, and of the duration and purposes of such processing. *Moment of information.* The information must be provided prior to obtaining the consent. *Subject of information.* As the information should be provided prior to the consent given by the user or the subscriber for the use of its data either for marketing purposes or for the provision of value added services, at least the person who will have to consent would need to receive the information.

**3. Persons entitled to process location data in the framework of para. 1 and 2 (para. 3). (a) Persons acting under the authority of the service provider.** Art. 9(3) specifies that the actual processing of location data other than traffic data carried out in accordance with art. 9(1) and (2) should be restricted to the personnel who is acting under the authority of the provider of the public communications network or publicly available communications service or of the third party providing the value added service. Moreover, the processing must be limited to what is strictly necessary to provide the value added services. This excludes that the provider of a value added service carries out processing on the location data other than traffic data in view of promoting its services, as allowed in the framework of the processing of traffic data (see comment on art. 6(3)). **(b) Communication to third parties.** Art. 9(3) does implicitly envisage a possible communication of location data other than traffic data by the service provider. Indeed, the provider of value added services is mentioned as one of the specific categories of service providers under the authority of which location data other than traffic data can be processed. This involves a communication of location data other than traffic data from the provider of the public communications network or from the provider of publicly available communications service who originally are the only ones retaining such location data. Moreover, as mentioned in art. 6, note 6 c), recital 32 expressly envisages the communication of location data to a third party providing value added services as it sets a condition to the

forwarding of data by an electronic communications service provider to a provider of value added services and requires that the subscribers or users to whom the data are related are fully informed of this forwarding before giving their consent for the processing of the data. **(c) Subcontracting of services.** Art. 9(3) only concerns the processing of location data other than traffic data by persons acting under the authority of the service provider but does not consider subcontracting part of or the whole processing carried out by the service provider on traffic data to a processor (in the sense of art. 17 of the Data Protection Directive). As mentioned in art. 6, note 6 a), the reference to the terms 'acting under the authority' of a controller does not amount to an authorisation to subcontract the processing to a processor. Nevertheless, recital 32 seems to allow such subcontracting as it states that 'where the provider of an electronic communications service or of a value added service subcontracts the processing of personal data necessary for the provision of these services to another entity, such subcontracting and subsequent data processing should be in full compliance with the requirements regarding controllers and processors of personal data as set out in the [Data Protection Directive]'. Therefore, the subcontracting of the processing of location data by an electronic service provider or by a value added service provider is not excluded. For instance, a provider of telephony services could provide location data to a third company in the framework of a processing agreement to provide end customers with weather forecast information or tourist information based on their location data. In such a case, the service provider is required to inform the users and subscribers about the forwarding of their data before they give their consent to the processing of location data other than traffic data for the provision of value added services.

#### [Exceptions]

#### Article 10

Member States shall ensure that here are transparent procedures governing the way in which a provider of a public communications network and/or a publicly available electronic communications service may override:

- (a) the elimination of the presentation of calling line identification, on a temporary basis, upon application of a subscriber requesting the tracing of malicious or nuisance calls. In this case, in accordance with national law, the data containing the identification of the calling subscriber will be stored and be made available by the provider of a public communications network and/or a publicly available electronic communications service;
- (b) the elimination of the presentation of calling line identification and the temporary denial or absence of consent of a subscriber or user for the processing of location data, on a per-line basis