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Rosier, Karen

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Have adopted this Directive:**[Scope and aim]****Article 1**

(1) This Directive provides for the harmonisation of the national provisions required to ensure an equivalent level of protection of fundamental rights and freedoms, and in particular the right to privacy and confidentiality, with respect to the processing of personal data in the electronic communication sector and to ensure the free movement of such data and of electronic communication equipment and services in the Community.

(2) The provisions of this Directive particularise and complement Directive 95/46/EC for the purposes mentioned in paragraph 1. Moreover, they provide for protection of the legitimate interests of subscribers who are legal persons.

(3) This Directive shall not apply to activities which fall outside the scope of the Treaty establishing the European Community, such as those covered by Titles V and VI of the Treaty on European Union, and in any case to activities concerning public security, defence, State security (including the economic well-being of the State when the activities relate to State security matters) and the activities of the State in areas of criminal law.

1. Scope and aim (para. 1). The Directive aims at defining principles of protection with regard to the processing of personal data specifically in the electronic communications sector. It is therefore more specific than the Data Protection Directive which governs the processing of personal data regardless of the processing context. The Directive replaces the Old Directive which ruled the processing of personal data in the telecommunication sector. Art. 1(1) is similar to art. 1(1) of the Old Directive. The only innovation in para. 1 lies in the replacement of the term 'telecommunications' by the more technology neutral terms 'electronic communications'. This adaptation reflects the intention of the European legislator, concomitantly with the telecom reform and the adoption of a package of directives in this regard, to broaden the scope of application of the Directive to include clearly new technologies such as internet and electronic mail and to provide an equal level of protection of personal data and privacy for users of publicly available electronic communications services, regardless of the technologies used. However, if the new text removes any doubts as to its application to these new means of communication, there was already a large consensus that the Old Directive applied to internet and electronic mail. The main merit of the Directive is therefore to establish rules specifically dedicated to new services rendered available through the evolution of technologies such as the provision of value added services (see comment on art. 2(2)(g)). The Directive

has been revised by the Amending Directive in 2009 in the framework of a review of the five directives comprising the existing regulatory framework for electronic communications networks and services.

2. Link with Data Protection Directive (para. 2). (a) Specific regulation. The Directive particularises and complements the Data Protection Directive. According to recital 10, the Data Protection Directive will apply in the electronic communication sector to all matters concerning protection of fundamental rights and freedoms, which are not specifically covered by the provisions of the Directive, including the obligations of the controller and the rights of individuals. Consequently, both Directives will be applicable to the processing in the electronic communication sector, the Data Protection Directive being subsidiary to the Directive. **(b) Scope of application.** Because the Directive particularises the Data Protection Directive, the Directive should only govern data processing within the electronic communication sector to the extent that processing of personal data is involved, just as in the Data Protection Directive. The text of the Directive, however, does not clearly endorse this principle. Indeed, most of provisions of the Directive are expressed with concepts that differ from those of the Data Protection Directive (see comment on art. 2, note 1(a)). It is therefore not always clear whether the exact scope of the provision should be determined only in the light of the definitions provided within the Directive or if it is also necessary to determine the scope of the terms of the Directive in the light of the provisions of the Data Protection Directive. For instance, art. 5(3) seems to relate to the processing of 'information', regardless of whether this information consists of personal data. It is unclear whether this provision should be construed as governing the processing of any kind of data or it concerns only personal data within the meaning given to these terms in the Data Protection Directive. This lack of consistency in the text of the Directive creates some doubts as to a definition of the scope of application of the Directive *rationae materiae* and *rationae personae* by reference to the criteria determining the scope of application of the Data Protection Directive. Moreover, it is quite clear that the Directive define their scope of application *rationae loci* according to divergent criteria (see comment on art. 3(1)). **(c) Protection of legal persons' interests.** Besides, there is a remarkable difference between the Directive and the Data Protection Directive. Where the Data Protection Directive only governs the processing of personal data relating to individuals, the Directive contains certain provisions affording a protection of the legitimate interests of the subscribers who are legal persons. Recital 12, however, makes clear that the Directive does not entail an obligation for the Member States to extend the application of the Data Protection Directive to the protection of the legitimate interests of legal persons. The Directive does not define the concept of 'legitimate interest' of legal persons. This might lead to significant discrepancies in the Member States national laws implementing the Directive. For instance, some Member States may consider that authorising, transmitting or sending electronic mail for marketing purposes

to legal persons when the legal person did not expressly oppose such sending affords a satisfactory level of protection of their legitimate interests. By contrast, other Member States may consider it necessary to require consent from the legal person prior to sending unsolicited communication.

3. Matters out of scope (para. 3). The activities falling outside the scope of the Treaty establishing the European Community (Third Pillar's activities) also fall outside the scope of the Directive. Consequently, this Directive does not affect the ability of Member States to carry out lawful interception of electronic communications, or to take other measures referred to in art. 15(1), if necessary for the protection of public security, defence, State security (including the economic well-being of the State when the activities relate to State security matters) neither does it affect the enforcement of criminal law for any of these purposes and in accordance with the European Convention for the Protection of Human Rights and Fundamental Freedoms, as interpreted by the rulings of the European Court of Human Rights.

[Definitions]

Article 2

(1) Save as otherwise provided, the definitions in Directive 95/46/EC and in Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive on electronic communications) shall apply.

(2) The following definitions shall also apply:

- (a) 'user' means any natural person using a publicly available electronic communications service, for private or business purposes, without necessarily having subscribed to this service;
- (b) 'traffic data' means any data processed for the purpose of the conveyance of a communication on an electronic communications network or for the billing thereof;
- (c) 'location data' means any data processed in an electronic communications network or by an electronic communications service, indicating the geographic position of the terminal equipment of a user of a publicly available electronic communications service;
- (d) 'communication' means any information exchanged or conveyed between a finite number of parties by means of a publicly available electronic communications service. This does not include any information conveyed as part of a broadcasting service to the public over an electronic communications network except to the extent that the information can be related to the identifiable subscriber or user receiving the information;

- (e) 'consent' by a user or subscriber corresponds to the data subject's consent in Directive 95/46/EC;
- (f) 'value added service' means any service which requires the processing of traffic data or location data other than traffic data beyond what is necessary for the transmission of a communication or the billing thereof;
- (g) '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;
- (h) 'personal data breach' means a breach of security leading to the accidental or unlawful destruction, loss, alteration, unauthorised disclosure of, or access to, personal data transmitted, stored or otherwise processed in connection with the provision of a publicly available electronic communications service in the Community.

1. Applicability of definitions provided by the Data Protection Directive and by the Framework Directive on electronic communications (para. 1). At the crossroads of data protection and data conveyance, the Directive takes concepts that are typically proper to these two areas. (a) Definitions provided in the Data Protection Directive. The reference to the definitions provided by the Data Protection Directive is logical in light of art. 1(1) since the provisions of the Directive are intended to complement and particularise the provisions of the Data Protection Directive. The definitions provided in art. 2 of the Data Protection Directive relate to key concepts of the application of data protection legislation such as 'personal data', 'processing of personal data', 'controller' or 'processor'. However, the Directive makes rather limited use of these key concepts and more generally relies on specific proper concepts that are not based on these definitions. For instance, the Directive uses the terms 'traffic data' in arts. 6 and 9, 'location data' in art. 9 or 'information' in art. 5(3) which data or information are not necessarily 'personal data' per se. Likewise, the Directive often imposes obligations and restrictions on providers of a public communications network (in arts. 6 and 10) and providers of publicly available electronic communications services (in arts. 6, 8 and 9) without specifying that it only concerns service providers who are 'controllers' according to the Data Protection Directive's definition thereof. This also raises difficulties in determining the exact territorial scope of the Directive. (b) Definitions provided in the Framework Directive on electronic communications. The reliance on definitions provided in the Framework Directive on electronic communications is essential to understand the territorial, material and personal scopes of application of the Directive. Art. 3 defines the material and territorial scopes of application of the Directive by reference to 'publicly available electronic communications services in public communications networks'. Indeed, the Directive is not

related to 'content' services (governed by the e-commerce Directive) but rather to 'transmission' services. *Definition of 'electronic communications service'*. According to art. 2(c) of the Framework Directive on electronic communications, an 'electronic communications service' means 'a service normally provided for remuneration which consists wholly or mainly in the conveyance of signals on electronic communications networks, including telecommunications services and transmission services in networks used for broadcasting, but exclude services providing, or exercising editorial control over, content transmitted using electronic communications networks and services; it does not include information society services, as defined in art. 1 of Directive 98/34/EC, which do not consist wholly or mainly in the conveyance of signals on electronic communications networks'. For instance, voice telephony services, internet access and electronic mail conveyance are typical electronic communications services. *Definition of 'electronic communications network'*. These terms refer to 'transmission systems and, where applicable, switching or routing equipment and other resources which permit the conveyance of signals by wire, by radio, by optical or by other electromagnetic means, including satellite networks, fixed (circuit- and packet-switched, including internet) and mobile terrestrial networks, electricity cable systems, to the extent that they are used for the purpose of transmitting signals, networks used for radio and television broadcasting, and cable television networks, irrespective of the type of information conveyed'. *Definition of 'public communications network'*. Art. 2(d) of the Directive on a common framework for electronic communications networks and services defines a 'public communications network' as 'an electronic communications network used wholly or mainly for the provision of publicly available electronic communications services'. According to this definition, the 'public' character of the network depends on the fact that it is used to provide electronic communications services that are 'publicly available'. Recital 55 of the Amending Directive states that the Directive 'focuses on public electronic communications networks and services, and does not apply to closed user groups and corporate networks'. As to the personal scope of application of the Directive, several provisions impose specific obligations on the provider of publicly available electronic communications services and on the provider of a public communication network, such as arts. 6 and 9. Art. 2(m) of the Framework Directive on electronic communications states that the provision of an electronic communications network implies the establishment, operation, control or making available of such a network.

2. Definitions of the Directive (para. 2). (a) Definitions of 'subscriber' and 'user' (para. 2(a)). *Concept of subscriber.* Art. 2(2)(a) indirectly defines the concept of subscriber to which it is often referred in the Directive. Subscribers are persons who pay for a publicly available electronic communications service whether for private or business purpose. Recital 13 specifies that the contractual relationship between a subscriber and a service provider may entail either a periodic or a one-time payment for the service

provided or to be provided. Prepaid cards are also considered a contract. As confirmed in recital 12, subscribers may be legal or natural persons, as compared to the users who are always natural persons. *Concept of user.* According to para. 2(a), a user means any natural person using a publicly available electronic communications service, for private or business purposes, without necessarily having subscribed to this service. For instance, the head of a family may sign a contract with an internet access provider to obtain an e-mail account and to access the internet. This account may allow for the creation of several e-mail addresses for other members of the family. In such a case, members of the family are 'users' who benefit from communications services without being the actual service subscriber. Another example of users would be employees who are benefiting from mobile phone services or internet access services based on a subscription taken by their employer. Some provisions of the Directive afford a protection to both users and subscribers (such as arts. 6 and 9) while others only relate to the subscribers (see art. 13).

(b) Definition of 'traffic data' (para. 2(b)). The Old Directive made use of these terms without providing a definition for them. The reason for introducing such a definition in the Directive was to be able to distinguish between such data and the location data (see definition of 'location data' under para. 2(c)). Traffic data are defined by reference to the purpose for which they are processed: these are any data processed for the purpose of the conveyance of a communication on an electronic communications network (such as the phone number calling or being called, the e-mail addresses, IP address of the sender and of the receiver, etc.) or for the billing thereof (such as for the duration of the communication, size of the e-mail sent, phone number calling, etc.). They include data supplied by the sender (URL, e-mail address of the recipient, etc.) as well as data generated by the traffic. According to recital 15, 'traffic data may, inter alia, consist of data referring to the routing, duration, time or volume of a communication, to the protocol used, to the location of the terminal equipment of the sender or recipient, to the network on which the communication originates or terminates, to the beginning, end or duration of a connection. They may also consist of the format in which the communication is conveyed by the network'. Traffic data also include data which qualify as 'location data' (see definition of 'location data' of para. 2(c)) when and to the extent these location data are being processed for transmission and billing activities purposes.

(c) Definition of 'location data' (para. 2(c)). According to para. 2(c), 'location data' were defined as 'any data processed in an electronic communications network or by an electronic communications service, indicating the geographic position of the terminal equipment of a user of a publicly available electronic communications service'. This definition first requires that, in order to be considered as 'location data', the data should relate to the localisation of terminal equipment. The Directive does not provide for a definition of 'terminal equipment'. This term may have various meanings depending on the context in which it is used. In data communication, the term generally applies to a device that terminates one end,

the sender's or receiver's, of a communication. Terminal equipment targeted by the Directive are typically telephone, or Global Positioning System (GPS) devices, for instance. The terminal equipment must then belong to a user of publicly available communications services (see definition under comment on para. 1). Location data will therefore always be data processed in an electronic communications network or by a communication service. According to recital 14, 'location data may refer to the latitude, longitude and altitude of the user's terminal equipment, to the direction of travel, to the level of accuracy of the location information, to the identification of the network cell in which the terminal equipment is located at a certain point in time and to the time the location information was recorded'.

(d) Definition of 'communication' (para. 2(d)). Within the framework of the Directive, the term 'communication' means any information exchanged or conveyed between a finite number of parties by means of a publicly available electronic communications service. Art. 5(1) states that traffic data are not included in the concept of communication where it imposes the confidentiality for 'communications and the related traffic data' (see comment on art. 5(1)). Recital 15 confirms this interpretation by indicating that 'a communication may include any naming, numbering or addressing information provided by the sender of a communication or the user of a connection to carry out the communication' while 'traffic data may include any translation of this information by the network over which the communication is transmitted for the purpose of carrying out the transmission'. Moreover, the communication does not include any information conveyed as part of a broadcasting service over an electronic communications network intended for a potentially unlimited audience, such as TV broadcasting. This exclusion marks the difference between the concept of 'communication' in the Directive and the concept of 'electronic communication' in the Framework Directive on electronic communications. Indeed, under the Framework Directive on electronic communications, the terms 'electronic communication network' and 'electronic communications services' include broadcasting services (see definitions under comment of para. 1, note 1(b)). Information conveyed as part of a broadcasting service will, however, still be considered a communication within the framework of the Directive when the information conveyed can be related to the identifiable subscriber or user receiving the information. This would for example be the case in the framework of the provision of video-on-demand services. The Directive thus only aims at including point-to-point communications which require an address to receive and send the communication, and exclude point-to-multipoint communications unless there is a possibility to identify the recipient of the communication.

(e) Definition of 'consent' (para. 2(e)). The Directive indicates that the concept of consent of a user or a subscriber shall have the same meaning as in the definition provided for the terms 'data subject's consent' in the Data Protection Directive. According to art. 2(h) of the Data Protection Directive, these terms refer to 'any freely given specific and informed indication of his wishes by

which the data subject signifies his agreement to personal data relating to him being processed'. The consent must be free, specific and informed. This definition first of all implies that the consent is not obtained under any form of pressure. Economic or moral pressure could, for instance, possibly be an issue in a situation where the employee's consent is required in its capacity of user of a service involving the processing of its data and for which the employer subscribes. Moreover, the consent cannot be global; it must be granted for specific purposes of processing of personal data. Finally, the consent must have been given on the basis of adequate information, that is, the information required by law. In some cases, such as in art. 5(3), the Directive specifically refers to the Data Protection Directive to identify the information to be provided. A particularity in this respect within the framework of the Directive is that the consent of legal person may be required by certain provisions of the Directive, whereas the Data Protection Directive only concerns individuals. The requirements with regard to the data subjects will therefore apply as such to subscribers regardless of the fact that they are legal persons. As to the manner according to which consent may be validly given, recital 17 of the Directive specifies that 'the consent may be given by any appropriate method enabling a freely given specific and informed indication of the user's wishes, including by ticking a box when visiting an internet website'. This mechanism envisaged by the Directive is already widely used on the internet and enables the internet user to express acceptance of a given option by selecting a box associated to this option. (f) **Definition of 'value added service' (para. 2(f)).** This is a new concept that did not exist in the Old Directive. It means any service which requires the processing of traffic data or location data other than traffic data beyond that which is necessary for the transmission of a communication or the billing thereof. The precision indicating that it concerns the processing of location data 'other than traffic data' is not absolutely necessary since location data not used for the purpose of conveying transmission of a communication will not be considered traffic data anyway (see definition of 'traffic data' under para. 2(b)). The range of services concerned is potentially very great since the only requirement is that in order to provide the service, the services provider needs to process either traffic data or location data but not in the context of the transmission of communication data. According to recital 30, 'any activity that goes beyond the transmission of a communication and the billing thereof and that is not based on aggregated data should be considered as value added service'. The value added services do not necessarily need to have a link with the related electronic communications service. Recital 18 gives several examples of value added services: advice on least expensive tariff packages, route guidance, traffic information, weather forecasts and tourist information. (g) **Definition of 'electronic mail' (para. 2(g)).** By this term, the Directive refers to 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. This definition is intended to be technology neutral

and to cover any message by electronic communications where the simultaneous participation of the sender and the recipient is not required. This concept is thus much broader than that of e-mail. It also includes SMS (Short Message Service), MMS (Multimedia Messaging Service), messages left on answering machines, voice mail service systems including mobile services and 'net send' communications addressed directly to an IP address (Opinion on unsolicited communications, p. 4). Pop-up messages were however not considered by the European Commission as electronic mail (Answer to written question E-3392/02). (g) **Definition of 'personal data breach' (para. 2(h)).** *Purpose.* This definition has been added by the Amending Directive in view of ensuring that citizens are being informed of security failures which could result in their personal data being lost or otherwise compromised. This definition is an essential part of what might be considered as the emerging EU security breach legal framework, which is described more in detail in the comments under art. 4 of the Directive. *Scope.* The terms 'personal data breach' refer to any breach of security leading to the accidental or unlawful destruction, loss, alteration, unauthorised disclosure of, or access to, personal data transmitted, stored or otherwise processed in connection with the provision of a publicly available electronic communications service in the Community. Therefore, a data breach is not only existing in cases of unauthorised access to personal data but also in cases of accidental modification or loss of data. The definition covers all breaches occurring in connexion with the provision of communication services, including incidents concerning data processed by an external data processor. Moreover, the breach not only concerns the data which are subject to the communication service but also, and mainly, include data which are processed in the framework of other services provided in connection with the communication service, such as data stored in an electronic mailbox provided together with the internet access service. Finally, the terms 'personal data' are to be construed in the broadest sense – the contrary of the US approach – and include any personal data regardless of the fact that they may not have any economic value or that no economic damages is to be suffered if compromised.

[Services concerned]

Article 3

This Directive shall apply to the processing of personal data in connection with the provision of publicly available electronic communications services in public communications networks in the Community, including public communications networks supporting data collection and identification devices.

1. Scope of the Directive. *Services covered.* The scope of the Directive is defined as follows. It covers all the processing of personal data in connection