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Unsolicited Communication in Social Media

JAN TRZASKOWSKI*

Abstract

This article discusses whether commercial communication in social media is covered by the European opt-in model concerning unsolicited electronic mail for direct marketing purposes found in the directive on privacy and electronic communications (2002/58). It is concluded that messages in social media – in contrast to news feeds and advertisements – may be characterised as electronic mail. However, the EU provisions on unsolicited electronic mail is found in the regulatory framework for telecommunication which as a starting point does not regulate web-based content such as social media services. The ban on unsolicited electronic mail does not apply to messaging systems in social media unless the system gives access to sending traditional e-mail. Until 12 June 2013, Member States could – in national law – uphold a broader definition of electronic mail in the light of the minimum harmonisation found in the distance selling directive (1997/7). Now, the use of electronic mail for direct marketing purposes in social media must be assessed in accordance with the full harmonisation in the unfair commercial practices directive (2005/29). This directive does not contain a ban on »unsolicited« but »unwanted« solicitations by e-mail and other remote media – i.e. an opt-out solution.

The development in platforms such as Facebook shows that such social media services are also used by businesses to communicate and interact with their »fans«. This article discusses the application of the European spam-provisions in the context of social media. In that vein it is important to understand both the definition of electronic mail and the scope of application of the regulatory framework for telecommunication in which the ban is found.

The Nordic Consumer Ombudsmen approached EU Commissioner John Dalli on 3 May 2012 with a view to encourage discussions on whether the definition of electronic mail set out in the directive on privacy and electronic communications¹ is up-to-date. The letter was sent in connection to the publishing of a *common Nordic position paper on marketing in social media*. The preceding discussions among the consumer ombudsmen questioned inter alia whether unsolicited commercial communications sent to users' news feeds should be considered electronic mail or other un-

* PhD, Associate Professor, Copenhagen Business School, Law Department. This article is based on research published (in Danish) in Danish Weekly Law Journal, 2012, p 310.

¹ Directive 2002/58/EC of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector as amended by directives 2009/136/EC (25 November 2009) and 2006/24/EC (15 March 2006).

solicited communications for the purposes of direct marketing. This and other related questions are dealt with in this article.

1. Commercial Communication in Social Media

Social media services are applications/services on the Internet which allow individuals to communicate with each other in a private, confined network. »Social media« are in the Nordic Consumer Ombudsmen's position paper understood as an online service where private persons have the opportunity to create profiles and interact with each other, including the sharing of information and content such as e.g. text, pictures, sound-files. In the present context, the focus is solely on businesses' commercial messages to private individuals on social media. Questions concerning surreptitious marketing, requirements for consent, the processing of personal data and international issues are not dealt with in this article.² In the following the focus will be on three means of approaching users in social networks:

1.1. Messages

Social networks usually allow its users to send messages which are similar to traditional electronic mail (e-mail). However, the messages are usually sent to an in-box in the social network and not to the users' traditional e-mail address. The system may have limitations which inter alia hinder businesses in sending messages to users. This is e.g. the case with Facebook where the administrator of a business page is unable to send messages to those who are »fans« of the page. Businesses may choose to establish their business' presence as a profile which is intended for private persons, and thereby gain access to the sending of messages to users who are »friends« (not »fans«) with this profile. However, this approach is not in accordance with Facebook's terms of use, and may fail to meet requirements to indicate commercial intent as provided in both the directive on electronic commerce and the unfair commercial practices directive.³

When a user creates a profile in a social network, he often has the opportunity to be informed about activities through traditional electronic mail at his »normal« e-mail address. This could be in instances where he will receive an e-mail when an individual wants to become friends with the user. The user may typically in the user settings define his preference for how often and what kind of notifications he wants – and whereto they should be sent. Such notifications are not considered to be *messages* in this context since they are messages from the social network service provider rather than from the actor whose activity gave rise to the notification.

² See e.g. Jan Trzaskowski, *User-Generated Marketing – Legal Implications when Word-of-Mouth Goes Viral* 19 International Journal of Law and Information Technology 8 (2011).

³ *Ibid.*

1.2. *News Feeds*

News feeds (or »web feeds«) are features that give users an overview of activities that are performed by other actors in the network. The information is presented on a page which is generated when the user consults the feature. The user subscribes to updates in his news feed by connecting other actors to his network. This actor may be a private individual or a business that has created a presence in the network. Thus it is the user who, in principle, decides which actors' activities he will be informed about, but the selection and prioritisation is determined by an algorithm in the social network. The user may not necessarily control which exact details he will receive information about. The information in a news feed may e.g. be information about connections between other users or that a user has updated certain information. News feeds may also comprise information about situations where a user connects to a business' profile in the network. Thereby the user is notified about the business' presence in the social network.

The business may create a profile (or another sort of presence) in the social network. The business' activities in the network may be posted in the news feed of those who have attached the business' profile to their networks. Examples may be the announcement of new products and events. However, the business does not control whether and how these updates are presented in the user's news feed. To some extent businesses can pay the social media service provider to be featured in news feeds. This is e.g. the case with »sponsored stories« and »suggested posts« in Facebook's news feed. However, the business cannot select particular individuals but only set general criteria for who should be exposed. This practice may increase the need for identification of the commercial nature of the post, but should be treated as *advertisements* as dealt with immediately below.

1.3. *Advertisements*

In most social media services, businesses may buy advertising space that appears as such to the consumers. Such advertising may be used to promote the business to market its profile/page in the social network – and there encourage the user to connect to the business with a view to gain access to the user's news feed. Such advertising is akin to traditional banner ads on websites.

2. EU Law

The primary regulation of unsolicited electronic messages is found in article 13 of the directive on privacy and electronic communications,⁴ which is part of the common

⁴ This provision replaced article 12 in directive 97/66 of 15 December 1997 concerning the processing of personal data and the protection of privacy in the telecommunications sector. This provision, however, only contained a ban on the use of automated calling systems without human intervention

regulatory framework for telecommunication. Unsolicited communication is understood as messages where the subscribers or users have not given their prior consent. The provision applies only to subscribers who are natural persons.⁵ The ban comprises the use of automated calling and communication systems without human intervention (automatic calling machines), facsimile machines (fax) and electronic mail for the purposes of direct marketing. It follows from recital 40 that SMS are considered electronic mail.⁶

There is an exemption in Article 13(2), according to which a natural or legal person may use electronic contact details for electronic mail for direct marketing if this person has obtained the electronic contact details in the context of the sale of a product or a service given to this particular person. However, this can only be used to market his own similar products or services and provided that customers are clearly and distinctly given the opportunity to object, free of charge and in an easy manner, to such use of electronic contact details at the time of the collection of data and on the occasion of each message in case the customer has not initially refused such use.

2.1. *Electronic Mail*

According to article 2(1)(h) of the Directive on privacy and electronic communications »electronic mail« is defined as: *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 this definition that has caused the Nordic Consumer Ombudsmen's doubt, as it follows from the letter to EU-Commissioner John Dalli that »... users of the social media Facebook experience that unsolicited commercial communications are sent to them at their News Feed page. However, Facebook is technically designed in such a way that communications are probably not *sent* to users, which is a condition for considering communications to fall within the definition of electronic mail, but are retrieved by, shown, or otherwise presented to the social media user.«⁷

The definition of electronic mail contains five cumulative requirements:

1. there should be a message (any text, voice, sound or image),
2. the message should be »sent«,

(automatic calling machine) and facsimile machines (fax) for the purposes of direct marketing – but not electronic mail.

⁵ Art. 13(5), according to which Member States must 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 See also the European Parliament's second report on the proposal for a European Parliament and Council directive concerning the processing of personal data and the protection of privacy in the electronic communications sector (COM(2000) 385 – C5-0439/2000 – 2000/0189(COD), 24 October 2001, Amendment 35 to Art. 13.

⁷ The Nordic consumer ombudsmen's letter to EU Commissioner John Dalli, 3 May 2012. <http://www.forbrugerombudsmanden.dk/Nyheder-fra-FO/Pressemeddelelser/Brev-til-kommissaer-om-elektronisk-post/Brev-om-definition-af-elektronisk-post> (last visited September 2012).

3. the transmission should happen over a »public communications network«,
4. it must be possible to store the message in the network or in the recipient's terminal equipment, and
5. it must be possible for the recipient to collect the message.

2.1.1. *Message*

A message is generally understood as information that is transmitted from a sender to a recipient. *Messages*, *news feeds*, and *advertisements* must be understood as messages originating from the business and directed to users (actual or potential customers).

In the context of electronic mail, it is relevant to consider whether the communication must be »individual« and what that entails. It follows from the directive on electronic commerce⁸ that – in another context – an exception applies to the exchange of electronic mail with the addition »or by equivalent individual communications«. Even though only *messages* seem to be sent by individual communication to an identified recipient, it could be argued that also *news feeds* and *advertisements* are generated on an individual basis – by an algorithm.

2.1.2. *Sent*

Technically speaking, an electronic mail is not sent but transferred by way of copying data from the sender's equipment to the recipient's equipment. Thus the requirement that the message must be sent, must be interpreted as *disseminated* from the sender to the recipient. I.e. the sender makes a decision and performs the steps necessary for the message to be available to the recipient.

Messages must necessarily fulfil this requirement, but *news feeds* and *advertisements* may not. The information in *news feeds* and *advertisements* does not seem to be sent from a sender to a recipient, but they are rather generated or made available to an often well-defined group of people by an algorithm deployed by the social network. One could argue that the business through its actions in the social network decides which messages are to be publicised. However, the business does not exercise any control over whether and how the information is presented to the individual users. This is determined by the algorithm applied by the social network. The businesses' control is usually more extensive for *advertisements* than for *news feeds*. However, the businesses will usually not be able to decide which specific individuals will be exposed to the *advertisement*.

2.1.3. *Public communications network*

That the transmission must happen over a »public communications network« is discussed more detailed below under 3, as this requirement is closely connected with the scope of application for the regulatory framework for telecommunication.

⁸ Directive 2000/31/EC of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market.

2.1.4. *Stored*

Messages in social media are automatically stored in the network (and not in the recipient's terminal equipment). *News feeds* and *advertisements* are in principle stored in the network (in order to be generated), however, they are not stored in a way that allows the user to access it as he sees fit. News feeds and advertisements are generated for the purpose of display every time the user access or updates a web-page in the social network.

2.1.5. *Collected*

That the message must be collectable may prove to be the most problematic requirement in the definition. Traditional e-mail is usually collected (by way of copying) from a mail-server to the recipient's computer. But in many instances, the e-mail messages are stored on an external server. This could be on a company-server or on the server of an online e-mail provider such as Hotmail and Gmail from where they may be read, but not collected (transferred). One must assume the pragmatic attitude that at least in these situations »being collected« does also comprise situations where such messages are being read. Alternatively, this would exclude online mail services from the definition. In that case *messages* in social media are covered by the definition in contrast to *news feeds* and *advertisements*. However, if »reading« would correspond to »collect« generally, this would entail that also *news feeds* and *advertisements* are collected. These latter means of communication would, however, under all circumstances fail to satisfy all of the requirements above, and can thus not be considered electronic mail within the meaning of the Directive on privacy and electronic communications.

2.2. *Purposes of Direct Marketing*

There is no definition of »direct marketing« in neither the specific or the general telecommunications directives. It is the Article 29 Data Protection Working Party's⁹ opinion that Article 13 of the directive on privacy and electronic communication covers »any form of sales promotion, including direct marketing by charities and political organisations (e.g. fund raising, etc.)«. ¹⁰ In the preparatory works to the Danish implementation of the provision on spam, direct marketing is defined as businesses' approach to one or more particular person(s) in opposition to unaddressed mail, sales material, television commercials etc. sent to an unspecified group of potential purchasers.¹¹ According to the Danish Consumer Ombudsmand, direct marketing covers commercial approaches in a broad sense, i.e. not only advertisement

⁹ This Working Party was set up under Art. 29 of Directive 95/46/EC. It is an independent European advisory body on data protection and privacy.

¹⁰ Opinion 5/2004 on unsolicited communications for marketing purposes under Art. 13 of Directive 2002/58/EC, p 7. This definition was also used in the Federation of European Direct Marketing (FEDMA) code of practice for the use of personal data in direct marketing. See Working Party Opinion 3/2003 on the European Code of conduct of FEDMA for the use of personal data in direct marketing.

¹¹ Draft law No. L 213 of 1 March 2000, Section 3.2.

for specific products but also approaches which solely serve the purpose of creating awareness of the businesses' name (»branding«).¹²

It must be assumed that the concept is to be interpreted broadly but because of the lack of actual grounds for interpretation, it is likely that the Court of Justice of the European Union will apply a narrower autonomous definition. Direct marketing must be understood as a narrower concept than e.g. commercial communication, which in the Directive on electronic commerce is defined as »*any form of communication designed to promote, directly or indirectly, the goods, services or image of a company, organisation or person pursuing a commercial, industrial or craft activity or exercising a regulated profession.*« It must be a defining characteristic for direct marketing that the approach is done by individual communication,¹³ possible to particular (known) recipients with a view to enter a future sales agreement. It remains an open question how close the connection needs to be between the approach and the future sales agreement.

2.3. *The Purpose of the Spam Provision*

The first EU legislation on the use of certain means of distance communication for commercial purposes was introduced with the distance selling directive¹⁴ and the directive on privacy in the telecommunications sector.¹⁵ The provisions were, according to recital 17 of the distance selling directive, introduced with reference to the principles set out in Articles 8 and 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 noting that the consumer's right to privacy, particularly as regards freedom from certain particularly intrusive means of communication, should be recognized.¹⁶ It is thus a fundamental aim of the provision to protect fundamental rights in order to respect private life and communications and to the protection of their personal data.¹⁷ Similarly in the Danish implementation it is noted that electronic mail may inflict costs on the recipient and occupy bandwidth in the same way as the use of a telefax does.¹⁸

¹² The Danish Consumer Ombudsman guidelines on Section 6 of the Danish Marketing Practices Act (unsolicited approaches to particular purchasers), 1 July, pp 1 and 5.

¹³ See also Art. 10(2) of the distance selling directive which imposes on Member States to ensure that means of distance communication, other than those referred to in Para. 1, *which allow individual communications* may be used only where there is no clear objection from the consumer.

¹⁴ Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts.

¹⁵ Directive 97/66/EC of the European Parliament and of the Council of 15 December 1997 concerning the processing of personal data and the protection of privacy in the telecommunications sector.

¹⁶ See also recital 22 of directive 97/66: »... safeguards must be provided for subscribers against intrusion into their privacy by means of unsolicited calls and telefax messages ...«. In the directive on privacy and electronic communications, there are further references to Arts 7 and 8 in the Charter of Fundamental Rights of the European Union (recital 22).

¹⁷ See also proposal for a directive concerning the processing of personal data and the protection of privacy in the electronic communications sector, 12 July 2000, COM(2000) 385 final, 2000/0189 (COD), p 2.

¹⁸ Draft law no. L 213 of 1 March 2000, Section 3.2.

The purpose of the ban on the use of certain means for distance communication is thus to protect users¹⁹ against certain aggressive means of distance communication. This is also clear from recital 40 of the directive on privacy and electronic communications which provides that »[s]afeguards should be provided for subscribers against intrusion of their privacy by unsolicited communications for direct marketing purposes ...«. In the recital, there is a focus on the fact that inter alia electronic mail; 1) is relatively easy and cheap to send, 2) imposes a burden and/or cost on the recipient, and 3) in some cases their volume may also cause difficulties for electronic communications networks and terminal equipment.²⁰

For both *messages* and *news feeds* in social media, the cost of sending the messages is very low since there, in contrast to advertisements, is not paid a premium to the social media provider. Since *news feeds* and *advertisements* are created and displayed dynamically, there is no cost on the user connected with deleting it – in contrast to messages which must be deleted actively in the user’s in-box in the social media. This deletion does not inflict costs on the user, but a burden similar to the inconvenience experienced by deleting traditional electronic mail. In the assessment of the burden inflicted on the user emphasis should be put on whether the messages are delivered to the same in-box which is used for private content.²¹

None of the three means of communication in social media are likely to cause difficulties for electronic communications networks and terminal equipment.²² Spam in social media may, however, cause difficulties for the social network itself and for its users. *Messages* may by their nature be more burdensome on the social network than *news feeds* and *advertisements*, and may eventually cause users to leave the network. This also are reasons in favour for that only *messages* resembles electronic mail enough to be comprised in the definition hereof – in contrast to *news feeds* and *advertisements* that are of a more fleeting nature. Furthermore, it should be emphasised that *news feeds* and *advertisements* are displayed in accordance with the algorithm applied by the social media – even though the content is created by the business activities in the social media.

2.4. *Considerations of Consequence*

News feeds and *advertisements* lack some of the defining characteristics of traditional electronic mail, including a reply-address. In case *news feeds* and *advertisements* were to be considered electronic mail, the use of these means should comply with other requirements to the use of electronic mail. It follows from the directive on pri-

¹⁹ The terms »consumer« and »subscribers or users« are used in the Distance Selling Directive and the Directive on Privacy and Electronic Communications, respectively.

²⁰ See also recital 42 per contra where it is provided that e.g. direct marketing by way of person-to-person voice telephony calls are more costly for the sender and impose no financial costs on subscribers and users.

²¹ Jan Trzaskowski, *User-Generated Marketing – Legal Implications when Word-of-Mouth Goes Viral* 19 International Journal of Law and Information Technology 8, 11 (under 3.1) (2011).

²² See about the definition of electronic communications networks below, under 3.

vacy and electronic communications that the practice of sending electronic mail for the purposes of direct marketing must have a valid address to which the recipient may send a request that such communications cease.²³ This requirement could possibly be met by inserting the identity and address in the text that will be posted in *news feeds* or shown in *advertisements*.

It is relevant to note that *news feeds* often are a central feature of a social network and that the user himself decides which persons he will »follow« and thus whose activities he will be notified about. One could argue that by signing up to a social media service, the user also agrees to be notified about others' activities in his *news feed* and to be exposed to *advertisements*. Furthermore, it seems problematic if the business was obliged to honour users' requests to not receive information provided to the user based on an algorithm which the business does not have any influence on.

2.5. Preliminary Conclusion

From the wording of the provision on unsolicited communication in the directive on privacy and electronic communication, it appears that *messages* in social media may be considered electronic mail, whereas *news feeds* and *advertisement* fall outside of the scope of application. Also when considering the purpose of the ban, it seems problematic to include *news feeds* and *advertisements* in the definition; as those means of communication not in the same way as *messages* impose a burden on the recipients. Under all circumstances *news feeds* and *advertisements* do in fact appear to be more like traditional advertisement than actual electronic mail.

3. The Scope of Application for the Telecommunication Directives

As mentioned above, the ban on unsolicited electronic communication in European law is found in a telecommunication. It follows from the definition of electronic mail (Article 2(1)(h)) and the directive's scope of application (Article 3(1)) that the message/communication must be carried out in a »public communication network«. The common regulatory framework for telecommunications consists of a framework directive²⁴ and several specific directives,²⁵ including the directive on privacy and electronic communications. The general framework directive defines in Article 2(1)(d) *public communications network* as »an electronic communications network used whol-

²³ Art. 13(4). See also recital 43.

²⁴ Directive 2002/21/EC of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive).

²⁵ See Directive 2002/19/EC of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive), Directive 2002/20/EC of 7 March 2002 on the authorisation of electronic communications networks and services (Authorisation Directive), and Directive 2002/22/EC of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive).

ly or mainly for the provision of publicly available electronic communications services».

Electronic communications network is understood as »systems ... 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.«²⁶ It is thus a significantly characteristic feature of the regulated services that information is conveyed from one place to another. Generally speaking, the regulatory framework for telecommunication concerns *transmission services*, but not *content services*,²⁷ which are regulated by other instruments, including in particular the directive on electronic commerce concerning information society services.

The framework directive points out in recital 10 that the definition of *information society service*²⁸ spans a wide range of economic activities which take place on-line, and that most of these activities are not covered by the scope of telecommunication directives because they do not consist wholly or mainly in the *conveyance of signals* on electronic communications networks. Voice telephony and electronic mail conveyance services are on the other hand covered by the telecommunication directives. It is noted that the same undertaking, for example an Internet service provider, can offer both an electronic communications service, such as access to the Internet, and services not covered under the directive, such as the provision of *web-based content*.

It is thus of crucial importance for the understanding of whether the ban on unsolicited electronic mail applies to *messages* in social networks to determine whether social media services are considered to be web-based content falling outside the scope of the telecommunications directives. There is, however, no doubt that social media services must be considered an information society service comprised in the scope of application of the directive on electronic commerce. Thus, the starting point must be that social media services are considered to be web-based content falling outside the scope of the telecommunications directives, including in particular the directive on privacy and electronic communications. This was also supported in connection with the revision of the common telecommunication package,²⁹ where it was stressed that the directive on privacy and electronic communications focuses on public electronic

²⁶ Art. 2(1)(a).

²⁷ See Paul Nihoul and Peter Rodford, *EU Electronic Communications Law*, 2, 409 (5.61) and 412 (5.85) (Second edn, Oxford University Press 2011). about the distinction between *transmission* and *content* services.

²⁸ Art. 1 of Directive 98/34/EC of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations and of rules of information society services

²⁹ Directive 2009/136/EC of 25 November 2009 amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services, Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector and Regulation (EC) No 2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws.

communications networks and services, and does not apply to closed user groups and corporate networks (recital 55).

The narrow focus on transmission services is also evident from the preparatory works in connection with the revision of the regulatory framework for telecommunication in 1999. In that context, the Article 29 Data Protection Working Party addressed the issue of a growing impact of software and software-driven configurations of technology. The Working Party found that the increasingly bigger role of software in the telecommunications field should be taken into account in the revision of the directives.³⁰ In the proposed directive, it is admitted that some of the software which is necessary for new telecommunications services such as software used for sending e-mails and browsers used for surfing the Internet, does not comply with data protection rules as pointed out by the Article 29 Working Party. However, the option of amending the directive by extending its coverage from electronic communications services and networks to terminal equipment including software, was considered inappropriate.³¹ Even though this issue concerns terminal equipment, it does emphasise that the intentions with the directive is to confine its scope of application to communications services and networks, understood as that *in between* user's terminal equipment.

The scope of the directive on privacy and electronic communications was also discussed in connection to the requirement of notification in cases of personal data breach.³² In a declaration, the Commission noted the desire of the European Parliament that an obligation to notify personal data breaches should not be limited to the electronic communications sector, but also apply to entities such as providers of information society services. Such an approach would according to the declaration be fully aligned with the overall public policy goal of enhancing the protection of EU citizens' personal data, and their ability to take action in the event of such data being compromised. However, the Commission reaffirmed its view, as stated in the course of the negotiations on the reform of the Regulatory Framework that the obligation for providers of publicly available electronic communications services, to notify personal data breaches, makes it appropriate to extend the debate to generally applicable breach notification requirements. The Commission promised to initiate appropriate preparatory work, including consultation with stakeholders, with a view to presenting proposals in this area, and the Commission would consult with the European Data Protection Supervisor on the potential for the application, with immediate effect, in other sectors of the principles embodied in the data breach notification rules in the directive on privacy and electronic communications, regardless of the sector or type

³⁰ Art. 29 Data Protection Working Party Opinion 2/2000 concerning the general review of the telecommunications legal framework, 5009/00/EN/final, adopted on 3 February 2000, p 3, with references to Recommendation 1/99 on Invisible and Automatic Processing of Personal Data on the Internet Performed by Software and Hardware, adopted by the Working Party on 23 February 1999, document 5093/98/EN/final.

³¹ *Proposal for a Directive Concerning the Processing of Personal Data and the Protection of Privacy in the Electronic Communications Sector*, 12 July 2000, COM(2000) 385 final, 2000/0189 (COD), p 6.

³² Art. 4(3) that was introduced by article 2(4)(c) Directive 2009/136/EC of 25 November 2009.

of data concerned.³³ The European Parliament's desire to extend the scope of the provision to include information society services, such as e.g. social network services, does not seem possible in the light of the narrow scope of application of the common regulatory framework for telecommunications.³⁴

It is clear that by creating the regulatory framework for telecommunication, it is intended that information society services such as social media services (web-based content) should be excluded from the scope of application. This speaks in favour of an interpretation where businesses' messages in social media are not covered by the scope of the ban on unsolicited electronic mail in the directive on privacy and electronic communications because such messages are not sent via a »public communication network«. This is also supported by the Article 29 Data Protection Working Party's opinion on online social networking, concluding – in the context of »retention of data« – that social networking services »fall outside the scope of the definition of electronic communication services provided in Article 2 letter c) of the Framework Directive ... [but that such social networking services] may offer additional services that fall under the scope of an electronic communications service such as a publicly accessible email service.«³⁵ This must entail that social media services that allow the sending of messages to »normal« e-mail addresses outside the social network are providing an electronic communication service. This would be the case for Hotmail and Gmail, but also for Facebook which allows users to write and receive electronic mail outside of Facebook's walled gardens.

The situation can be compared to the discussions concerning whether IP telephony falls under the telecommunication framework's scope of application. IP telephony may be offered both as part of a physical infrastructure (e.g. in a company's telephone network) and as a web service (e.g. Skype). This issue has previously been subject for discussions, and the Commission attaches crucial importance to whether the IP telephony service in question is connected to the »traditional« telephone network (PSTN/public switched telephone network).³⁶ If a social network would offer a voice telephony service which could only be used to make calls within the social media, it would fall outside the scope of the telecommunication framework. However, if the service would be extended to connect calls to the traditional telephone network (PSTN), the service would have to comply with the requirements in the telecommunication framework.

In this context, the relevant question may not be whether social media services fall under the scope of the telecommunication framework, but rather whether the business is using electronic mail understood as messages conveyed via a »public communica-

³³ Commission declaration on data breach notification, OJ 212 E/261 (5 August 2010).

³⁴ See also Paul Nihoul and Peter Rodford, *EU Electronic Communications Law*, 414 f. (5.95) (Second edition, Oxford University Press 2011).

³⁵ Opinion 5/2009 on online social networking, section 3.8.

³⁶ The treatment of Voice over Internet Protocol (VoIP) under the EU Regulatory Framework, Commission Staff Working Document, 14 June 2004, p 7. See also Dieter Elixmann, J Scott Marcus and Christian Wernick, *The Regulation of Voice over IP (VoIP) in Europe* (WIK-Consult: Study for the European Commission) Bad Honnef, 19 March 2008, p 2.

tion network«. This would include in the ban messages sent between a social media service and a public e-mail address and messages between two public e-mail addresses, but not messages sent between two users in the same social media. This could, however, lead to a surprising consequence for webmail services because messages sent between two users of the same webmail service are not likely to leave the service provider and may thus not be sent via a »public communication network«.

At first glance, it seems odd that *messages* fall outside the scope of the ban if a business sends electronic mail via its webmail account to other users of the same webmail service, whereas it would be illegal to send the same messages to users outside that particular webmail service. However, one could argue that the webmail service is a private and confined environment regulated by its *terms of use*, and that telecommunication laws first become relevant when the public network is utilised (for sending mails outside the closed network). The Court of Justice of the European Union may decide to interpret »electronic mail« as an autonomous definition which also comprises electronic mail in webmail service and/or social networks. Especially webmail services are very similar to traditional e-mail as they in contrast to most social media services allow users to send electronic messages to recipients outside the closed network. For good measure, it should be mentioned that the message application in Facebook does allow users to send and receive messages outside the social network, and must therefore also be considered a webmail service.

According to recital 61 of the *new* consumer rights directive,³⁷ the directive on privacy and electronic communications regulates unsolicited communications and provides for a high level of consumer protection, and therefore the corresponding provisions on the same issue contained in the *old* distance selling directive. If this was correct, the distance selling directive would under all circumstances have a broader scope of application than the telecommunications directives as the distance selling directive was not confined to telecommunication. This indicates that the narrow scope of application of the telecommunication framework has been disregarded in this context. In the correlation table (Annex II) of the consumer rights directive, there is a reference to Article 13 of the directive on privacy and electronic communications.

3.1. *Technology Neutrality*

The Nordic consumer ombudsmen pointed out in their letter to Commissioner John Dalli that the definition was drafted at a time when no social media services existed. The accuracy of this statement depends on how one decides to define social media services. The ombudsmen's own definition comprises inter alia »chat-rooms, games, and social network services« which also existed when the directive on privacy and electronic communications was adopted in 2002. Among some of the early social media services are; online dating services which e.g. played a central role in the film

³⁷ Directive 2011/83/EU of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council.

You've Got Mail (1998). The Whole Earth 'Lectronic Link (also The WELL) founded in 1985, is recognised as one of the oldest virtual communities in continuous operation. The *News feed* which is a dominant feature of Facebook, were first introduced in the early 2000s. It is obvious that the definition of electronic mail aspires to be *technology neutral* for which reason it cannot be considered necessary that the means of communication was known when the definition was drafted. Furthermore, Article 13 of the directive on privacy and electronic communications was amended in 2009 and it was not found necessary to adjust the definition.³⁸

The purpose of the proposal for a directive on privacy and electronic communications from 2000 was to create rules which are technology neutral in order to ensure that the same service is regulated in an equivalent manner, irrespective of the means by which it is delivered. In order to render the article on unsolicited communication technology neutral, the term »call« was replaced by the term »communication«.³⁹ It follows from the comments to Article 13 that the provision on unsolicited communications which gives subscribers the right to refuse unsolicited communications for direct marketing purposes is *extended to cover all forms of electronic communications*, and that electronic mail is included under the opt-in system. The amendment was carried out because *»the term 'call' has been interpreted in a narrow sense. Some of the national transposition law has only created protection against unsolicited voice telephony calls for direct marketing purposes, with the exclusion of direct marketing messages by e-mail or other new forms of communications«*.⁴⁰ It follows further from recital 4 of the adopted directive that the previous directive had to be »adapted to developments in the markets and technologies for electronic communications services in order 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 ...«. The importance of (and aim for) technology neutrality is also clear from the 2009-revision.⁴¹

The aim for technology neutrality is probably the best argument for including social media *messages* in the definition of electronic mail. However, the aim for a narrow scope focusing only on more traditional telecommunication services in »public communication networks« and notably not on web-based content is similarly evident. It would not be a surprise if the Court of Justice of the European Union chose to include at least some social media messages in the definition, but it would entail bending the

³⁸ Directive 2009/136/EC, Art. 2(1)(7).

³⁹ *Proposal for a Directive Concerning the Processing of Personal Data and the Protection of Privacy in the Electronic Communications Sector*, 12 July 2000, COM(2000) 385 final, 2000/0189 (COD), p 2 and 5.

⁴⁰ *Proposal for a Directive Concerning the Processing of Personal Data and the Protection of Privacy in the Electronic Communications Sector*, 12 July 2000, COM(2000) 385 final, 2000/0189 (COD), p 5.

⁴¹ *Amended Proposal for a Directive Amending Several Telecommunications Directives*, COM(2008) 723 final, 2007/0248 (COD), p 18, Amendment 135. »The amendment seeks to emphasise the importance of the principle of technology neutrality, but it seems more appropriate to include such a reference in a new recital«.

directive's scope of application beyond the intentions of the legal framework. It seems like the focus on technology neutrality has not taken into consideration that electronic communication services in large amounts are migrating from transmission services to content services.

A broad definition of electronic mail based on the aim of the provisions was used in the US case *MySpace v. The Globe.com*⁴² concerning the American CAN-SPAM Act (15 U.S.C. 7701, et seq.). The defendant argued that the ban on unsolicited messages did not apply because messages sent in the social media MySpace's private messaging system was not comprised in the act's scope of application. Electronic mail is defined as »a message sent to a unique electronic mail address«. The court found, however, that »the overarching intent of this legislation is to safeguard the convenience and efficiency of the electronic messaging system, and to curtail overburdening of the system's infrastructure«, and established that the social media messages were in fact electronic mail as defined in the act. It should be emphasised that this decision may inspire the Court of Justice of the European Union, but that it has no other bearing on the interpretation of European law.

The Danish Supreme Court has established that the Danish ban on unsolicited electronic communication naturally must be understood as comprising all sorts of messages sent electronically. It is mentioned that the provision is applicable for known means of electronic transmission of messages as well as new means, irrespective of whether they are denoted as e-mails, text messages, voice messages, video messages etc., and irrespective of whether they are transmitted via land- or airborne networks.⁴³ The Danish Supreme Court thus seems to use a broader definition than the one found in the directive on privacy and electronic communications which requires the message to be sent in an electronic communications network used wholly or mainly for the provision of publicly available electronic communications services as discussed above.

4. National Provisions on Unsolicited Electronic Mail

In the following, it is assumed that social media services fall outside the telecommunication framework's scope of application, and that the ban on unsolicited electronic mail in Article 13 of the directive on privacy and electronic communications consequently does not apply to social media *messages*.

The telecommunication framework does not bar Member States from applying a broader definition of »electronic mail« in national law as the Danish Supreme Court has done in the above-mentioned case. Such interpretation must, however, be in accordance with other community obligation, including the full harmonisation of *com-*

⁴² *MySpace Inc. v. The Globe.com, Inc.*, Not Reported in F.Supp.2d, 2007 WL 1686966, C.D.Cal., 2007, 27 February 2007.

⁴³ Reported in the Danish Weekly Law Journal (UFR) (2005), p 3446.

mercial practices found in the unfair commercial practices directive.⁴⁴ It follows from Article 3(4) that in the case of conflict between the provisions of the unfair commercial practices directive and other Community rules regulating specific aspects of unfair commercial practices, the latter shall prevail and apply to those specific aspects. It is obvious that the sending of unsolicited messages for the purposes of direct marketing is a commercial practice. However, if social media services fall outside the scope of the telecommunication framework, there is no conflict.

The full harmonisation in the unfair commercial practices directive entails that Member States may not maintain or introduce provisions which are more restrictive or prescriptive than the provisions of this directive. This means in particular that Member States may not apply *per se prohibitions* that are not found in Annex I of the directive (Article 5(5)).⁴⁵ This annex contains a list of 31 commercial practices which are regarded as unfair in all circumstances, i.e., without a case-by-case assessment under the provisions of Arts 5 to 9 of the Directive.

Until 12 June 2013 it was, according to Article 3(5), possible for Member States to apply more restrictive or prescriptive provision to the extent the provisions implemented directives containing minimum harmonisation clauses and the measures were 1) essential to ensure that consumers were adequately protected against unfair commercial practices and 2) proportionate to the attainment of this objective. Thus Member States could – until the mentioned date – uphold a ban on unsolicited commercial communication in social media based on the minimum harmonisation found in the distance selling directive. Article 10(1) imposes restrictions on the use of certain means of distance communication (automatic calling machine and fax), but provides in Article 10(2) that »Member States shall ensure that means of distance communication, other than those referred to in paragraph 1, which allow individual communications may be used only where there is no clear objection from the consumer«. It should be stressed that the distance selling directive is repealed as of 13 June 2014.⁴⁶

For the sake of completeness, it should be mentioned that the directive on privacy and electronic communications in Article 13(3) imposes it on Member States to regulate unsolicited communications for the purposes of direct marketing, in cases other than those referred to in paragraphs 1 and 2 (a choice between opt-in and opt-out). This provision is similar to that in Article 10(2) of the distance selling directive. So if the directive's scope of application was not so narrow, this article could have served as basis for a broader, national ban on unsolicited messages for purposes of direct

⁴⁴ Directive 2005/29/EC of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market. See also Jules Stuyck, Evelyne Terryn & Tom van Dyck, *Confidence Through Fairness? The New Directive on Unfair Business-to-Business Commercial Practices in the Internal Market* 43 *Common Market Law review* 107–152 (2006).

⁴⁵ See in general Jules Stuyck, Evelyne Terryn & Tom van Dyck, *Confidence Through Fairness? The New Directive on Unfair Business-to-Business Commercial Practices in the Internal Market* 43 *Common Market Law review* 107–152 (2006) and Jan Trzaskowski, *Towards a Common European Marketing Law*, EUI Working Paper Series, Law, 2010–21 with references.

⁴⁶ Art. 31 of the Consumer Rights Directive.

marketing in social media. The telecommunication directive is as a starting point only *lex specialis* to the unfair commercial practices directive for transmission services.

According to Article 8 of the unfair commercial practices directive, an aggressive commercial practice may be prohibited if »... in its factual context, taking account of all its features and circumstances, by harassment, coercion, including the use of physical force, or undue influence, it significantly impairs or is likely to significantly impair the average consumer's freedom of choice or conduct with regard to the product and thereby causes him or is likely to cause him to take a transactional decision that he would not have taken otherwise«. It is considered to be an aggressive commercial practice to make persistent and unwanted solicitations by telephone, fax, e-mail or other remote media except in circumstances and to the extent justified under national law to enforce a contractual obligation (Annex I, item 26). The unfair commercial practice thus maintains a focus on »unwanted« (in contrast to »unsolicited«) solicitations, and is thus based on an opt-out model rather than the stricter opt-in model found in the directive on privacy and electronic communications.

As a little peculiarity of the unfair commercial practices directive, it should be mentioned that »branding« seems to fall outside its scope of application since the definition of commercial practices requires a »direct connection« with the promotion, sale or supply of a *product* to consumers.⁴⁷ If this (presumably unintended) exemption is recognised, Member States are free to ban messages sent only for branding-purposes in social media.

5. Conclusions

The Nordic Consumer Ombudsmen have raised a relevant issue concerning the interpretation of the ban on unsolicited electronic mails in the light of social media services. The relevant question may not be whether *news feeds* and *advertisements* are comprised in the ban, but rather whether and to what extent the telecommunication framework applies to social media services. It is obviously unclear whether social media *messages* are (to be) included in the definition of electronic mail in the directive on privacy and electronic communications.

Due to the narrow scope of the telecommunication framework, social media services must as a starting point be considered as web-based content (a *content service*) falling outside the scope of the directive on privacy and electronic communications. Therefore the ban on unsolicited messages for purposes of direct marketing does not apply to neither *messages* nor to *news feeds* and *advertisements* in social media. The intentions of technology neutrality should not influence the directive's scope of application which strictly focuses on *transmission services* in public communications network.

⁴⁷ Jan Trzaskowski, *Towards a Common European Marketing Law*, EUI Working Paper Series, Law, 2010–21, p 47.

The unfair commercial practices directive introduces a ban only on unwanted (and not unsolicited) messages. Member States could until 12 June 2013 maintain stricter national provision pursuant to the minimum clause in the distance selling directive.

The discussions illustrate the legal challenges that follow in the wake of media convergence, and in particular the development towards communications in web services rather than traditional telecommunication services. The question of unwanted or unsolicited messages are in essence an issue that falls naturally under marketing law, and the telecommunication framework is not the optimal regulatory instrument for regulating this issue. It is recommended that this issue is pursued in connection with the, for many reasons necessary, revision of the unfair commercial practices directive.

Finally, it should be stressed that a business must comply with the social media service provider's *terms of use* which often restricts the use of commercial messages to users. This is beautifully illustrated in the above-mentioned case (*MySpace v. The Globe.com*) where the plaintiff was awarded \$50 in liquidated damages for each of the 399,481 messages sent in contravention of MySpace's terms of use.⁴⁸

⁴⁸ See also Jan Trzaskowski, *User-Generated Marketing – Legal Implications when Word-of-Mouth Goes Viral* 19 *International Journal of Law and Information Technology* 8 (2011), with references.