

## LAW AND DIGITAL TECHNOLOGIES ELECTRONIC COMMUNICATIONS

### ePrivacy

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### Council of the EU Released a (New) Draft of the ePrivacy Regulation

By Dan Cooper and Anna Oberschelp de Meneses on January 6, 2021

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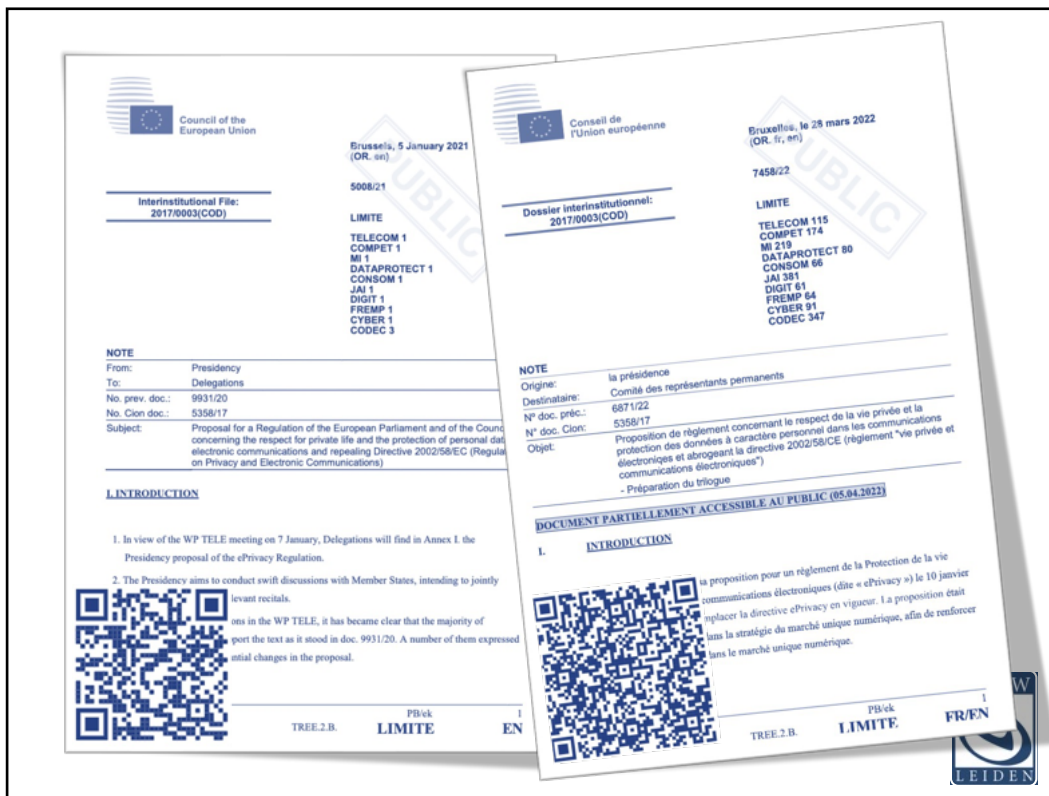
On January 5, 2021, the Council of the European Union released a new **draft version** of the ePrivacy Regulation, which is meant to replace the ePrivacy Directive. The European Commission approved a first draft of the ePrivacy Regulation in January 2017. The draft regulation has since then been under discussion in the Council.

On January 1, 2021, Portugal took over the presidency of the Council for six months. Ahead of the next meeting of the Council's working party responsible for the draft ePrivacy Regulation, the Portuguese Presidency issued a revised version of the draft regulation. This is the **14th draft version** of the ePrivacy Regulation (including the European Commission's first draft).

Once approved, the ePrivacy Regulation will set out requirements and limitations for publicly available electronic communications service providers ("service providers") processing data of, or accessing devices belonging to, natural and legal persons "who are in the [European] Union" ("end-user"). The regulation aims to safeguard the privacy of the end-users, the confidentiality of their communications, and the integrity of their devices. These requirements and limitations will apply uniformly in all EU Member States. However, EU Member States have the power to restrict the scope of these requirements and limitations where this is a "necessary, appropriate and proportionate measure in a democratic society to safeguard one or more of the general public interests."



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## Directive (EU) 2018/1972 of 11 December 2018 establishing the European Electronic Communications Code (Telecoms Code)

### Art. 2(4)

‘electronic communications service’ means a service normally provided for remuneration via electronic communications networks, which encompasses, with the exception of services providing, or exercising editorial control over, content transmitted using electronic communications networks and services, the following types of services

- (a) ‘internet access service’ as defined in point (2) of the second paragraph of Article 2 of Regulation (EU) 2015/2120;
- (b) **interpersonal communications service**
- (c) services consisting wholly or mainly in the conveyance of signals such as transmission services used for the provision of machine-to-machine services and for broadcasting

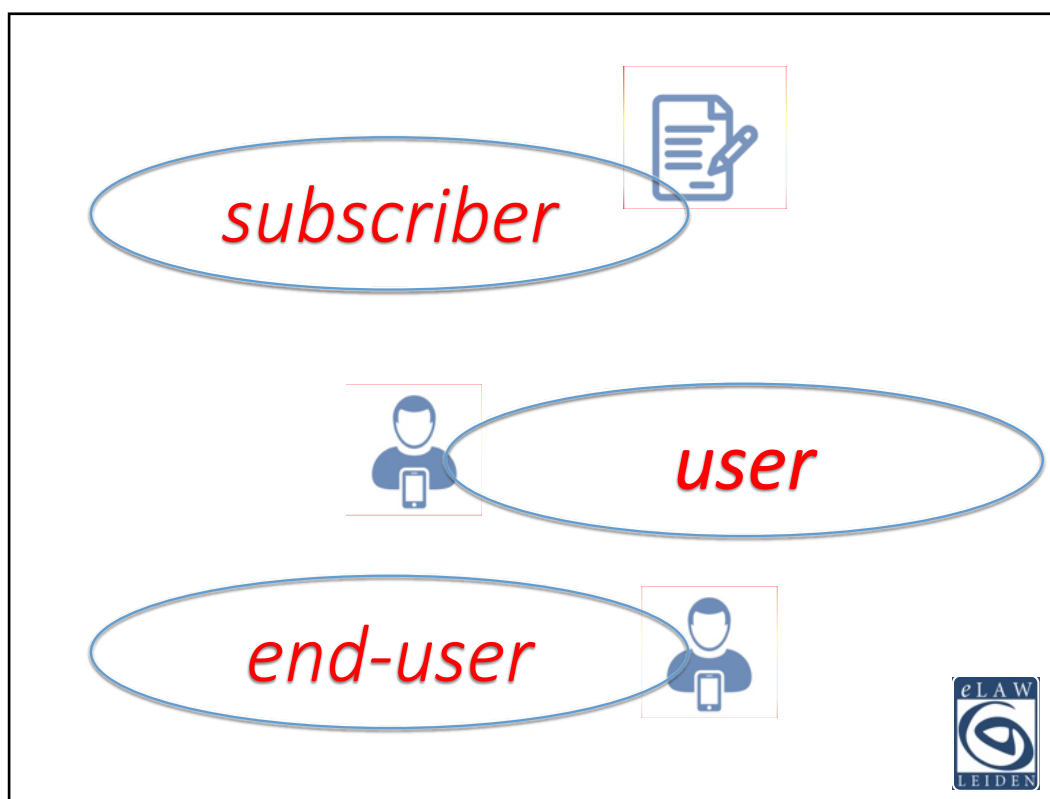
Over The Top (“OTT”) Services e.g. Whatsapp, Signal, Telegram etc. Facebook? Twitter?

### Art. 2(5)

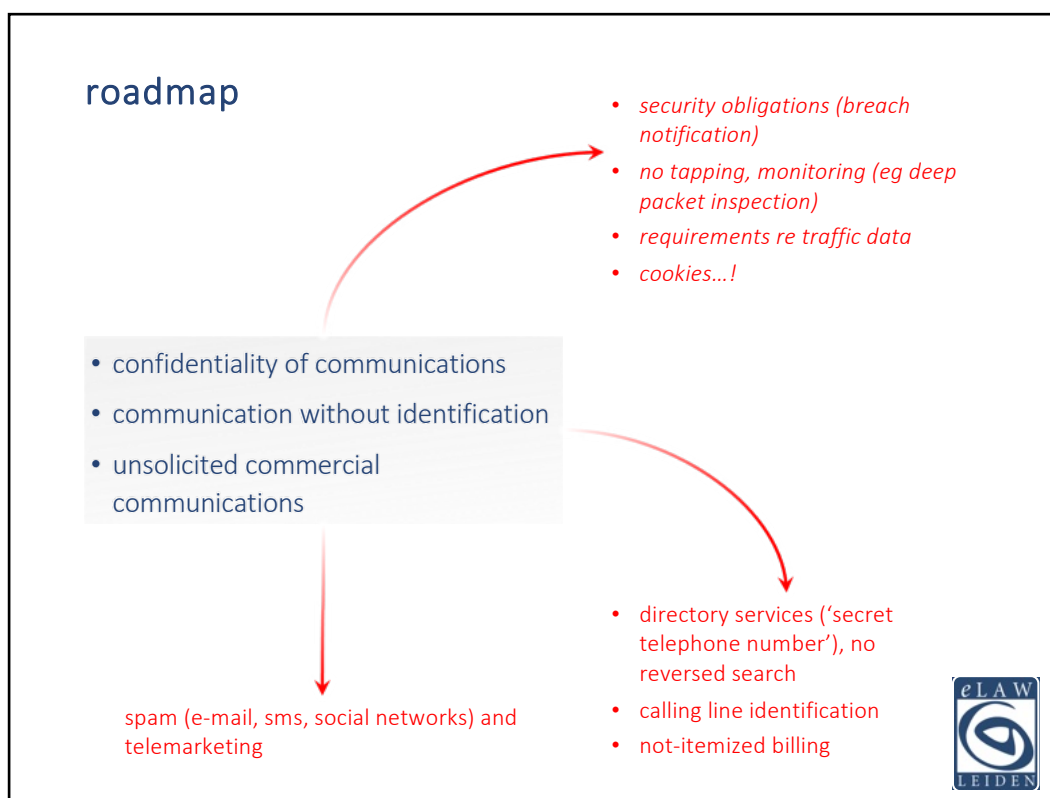
a service normally provided for remuneration that enables direct interpersonal and interactive exchange of information via electronic communications networks between a finite number of persons, whereby the persons initiating or participating in the communication determine its recipient(s) and does not include services which enable interpersonal and interactive communication merely as a minor ancillary feature that is intrinsically linked to another service



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## confidentiality of communications



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security obligation

appropriate technical and organisational measures to safeguard security of the [electronic communication] services, if necessary in conjunction with the provider of the public communications network with respect to network security

*having regard to the state of the art and the cost of their implementation, these measures shall ensure a level of security appropriate to the risk presented.*



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Art. 33-34 GDPR

Art. 4(3) ePD

## breach notification

- notify the personal data breach to the competent national authority
- also notify the subscriber or individual, if likely to adversely affect the personal data or privacy of a subscriber or individual, of the breach without undue delay

24 hours? 72 hours?  
what's the startingpoint?



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**breach notification to DPA**

In the case of a personal data breach, the controller shall without undue delay and, where feasible, not later than 72 hours after having become aware of it, notify the personal data breach to the supervisory authority [...], unless the personal data breach is unlikely to result in a risk to the rights and freedoms of natural persons

**notification to data subject**

When the personal data breach is likely to result in a high risk to the rights and freedoms of natural persons, the controller shall communicate the personal data breach to the data subject without undue delay.



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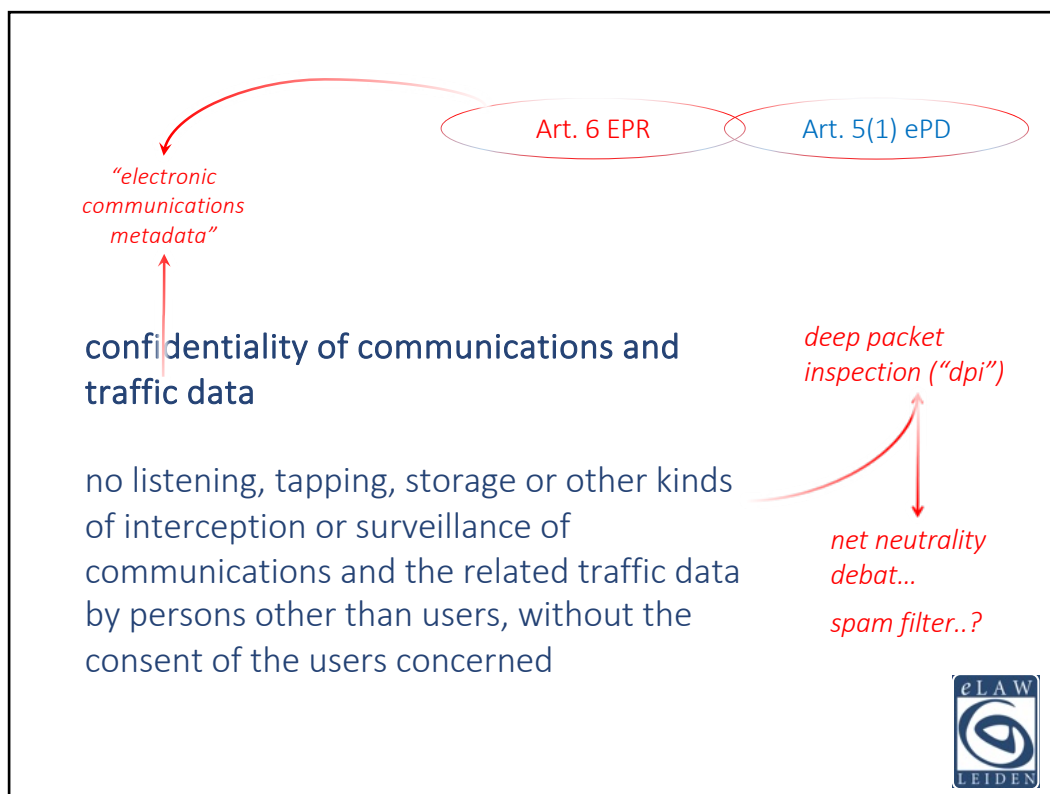
**Meldloket datalekken Autoriteit Persoonsgegevens**

**Een nieuwe melding indienen**

**Gegevens over het datalek**

authentication...?

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Art. 6 ePD

traffic data relating to subscribers and users must be erased or made anonymous when it is no longer needed for the purpose of the transmission of a communication

*with user or subscriber data may be used for the purpose of marketing electronic communications services or for the provision of value added services.*



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*processed and stored by the provider of a public communications network or publicly available electronic communications service*

2006/24/EC

6 to 24 months

data retention obligation for the purpose of the investigation, detection and prosecution of serious crime

*Data Retention Directive 2006/24/EC annulled by CJEU 8 April 2014 C-293/12 and C-594/12*

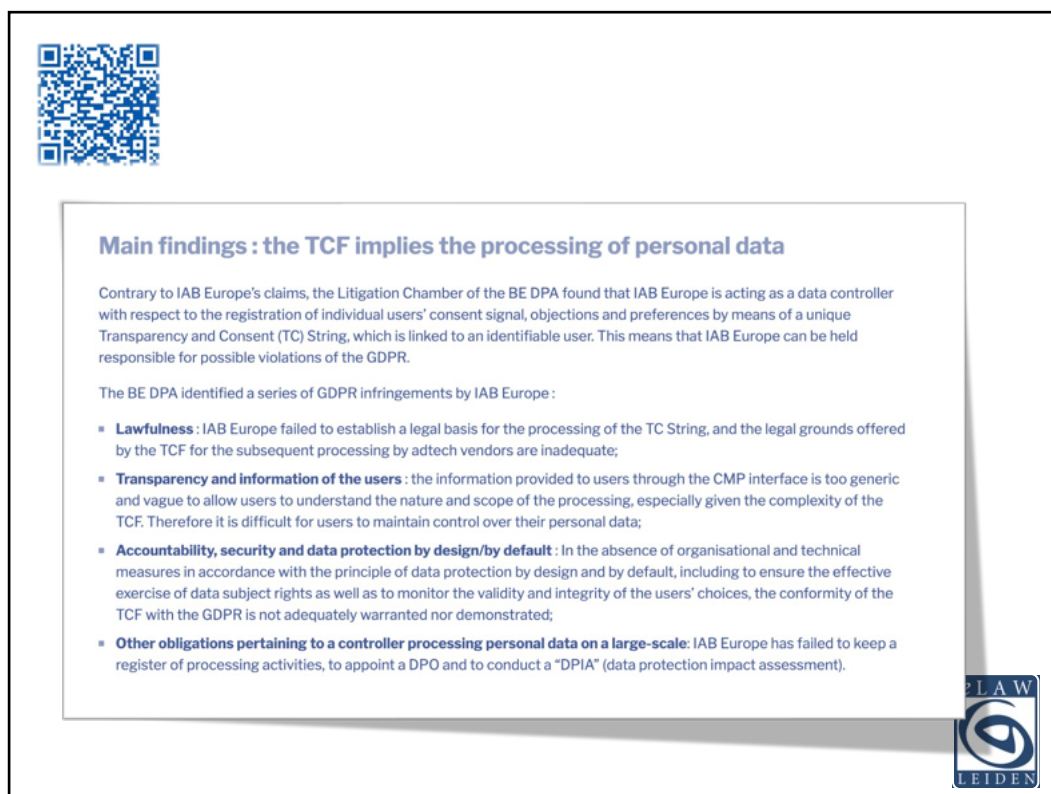
*as defined by each Member State in its national law*



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Art. 8 ePR
Art. 5(3) ePD

*cookies, pixels etc..*


the storing of information, or the gaining of access to information already stored, in the terminal equipment of a subscriber or user is only allowed on condition that the subscriber or user concerned has given his or her consent, having been provided with clear and comprehensive information

*but functional or technical cookies are allowed nevertheless*




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*where technically possible and feasible [...] consent may be expressed by using the appropriate technical settings of a software application enabling access to the internet.*





*Consent should not be regarded as freely given if the data subject has no genuine or free choice or is unable to refuse or withdraw consent without detriment*




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pay or okay

**aa) Making access to website content provided without direct monetary payment dependent on the consent of the end-user to the storage and reading of cookies for additional purpose would normally not be considered as depriving the end-user of a genuine choice if the end-user is able to choose between services, on the basis of clear, precise and user-friendly information about the purposes of cookies and similar techniques, between an offer that includes consenting to the use of cookies for additional purposes on the one hand, and an equivalent offer by the same provider that does not involve consenting to data use for additional purposes, on the other hand. Conversely, in some cases, making access to website content dependent on consent to the use of such cookies may be considered, in the presence of a clear imbalance between the end-user and the service provider as depriving the end-user of a genuine choice. This would normally be the case for websites providing certain services, such as those provided by public authorities. Similarly, such imbalance could exist where the end-user has only few or no alternatives to the service, and thus has no real choice as to the usage of cookies for instance in case of service providers in a dominant position.**

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Article 8

Protection of end-users' terminal equipment information stored in terminal equipment of end-users and related to or processed by or emitted by end-users' terminal such equipment

1. The use of processing and storage capabilities of terminal equipment and the collection of information from end-users' terminal equipment, including about its software and hardware, other than by the end-user concerned shall be prohibited, except on the following grounds:

(g1) it is necessary for a purpose other than that for which the information have been collected under this Regulation. Where it is not based on the end-user's consent or on a Union or Member State law which constitutes a necessary and proportionate measure in a democratic society to safeguard the objectives referred to in Article 11 the person using processing and storage capabilities or collecting information processed by or emitted by or stored in the end-users' terminal equipment shall, in order to ascertain whether processing for another purpose is compatible with the purpose for which the electronic communications data are initially collected, take into account, inter alia:

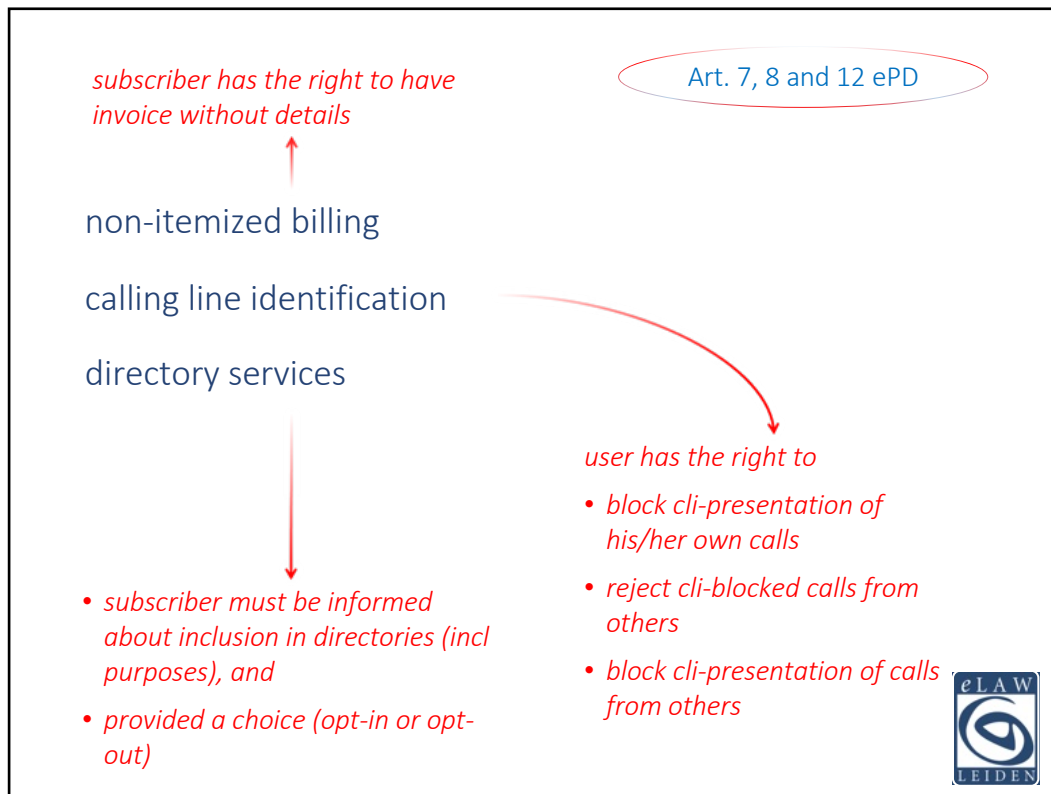


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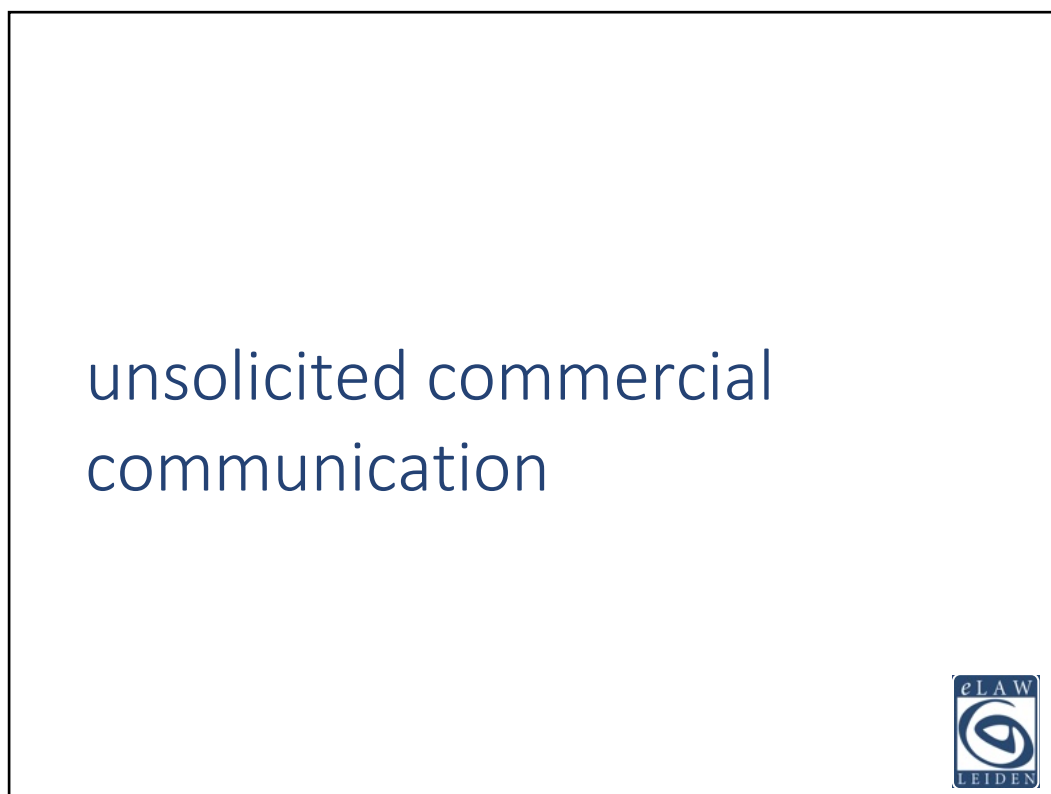
communication without  
identification



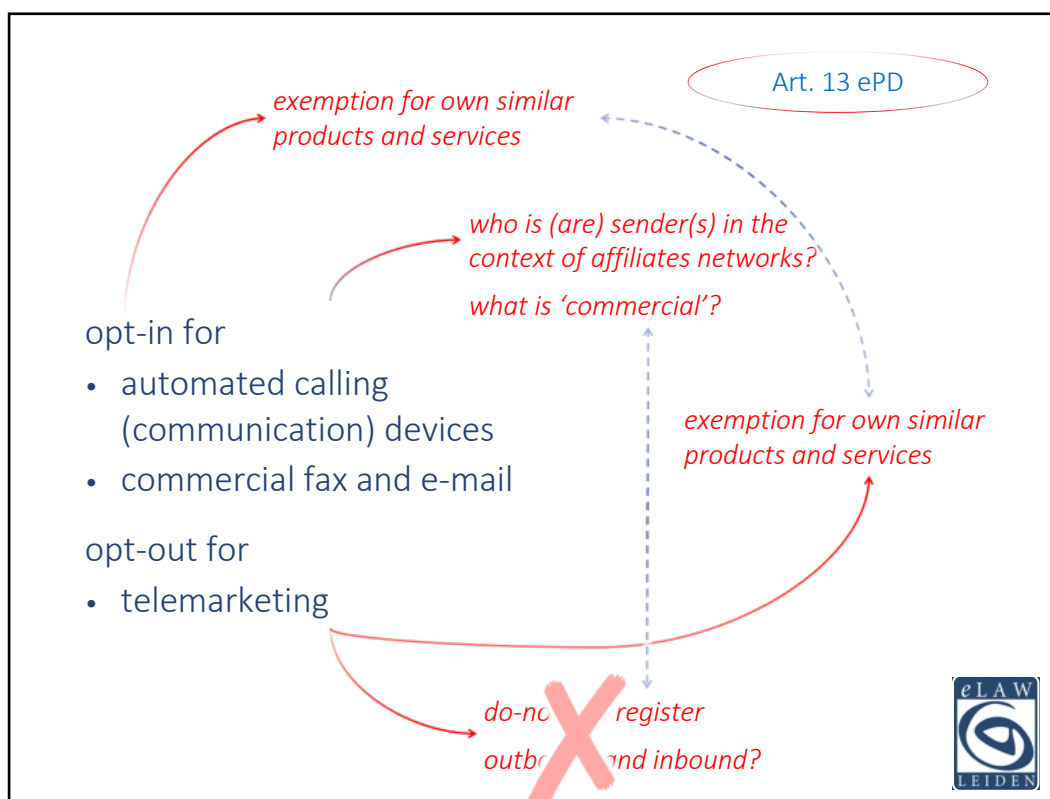
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questions?

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