



**DOES SECTION 69 OF THE PROTECTION OF  
PERSONAL INFORMATION ACT 4 OF 2013 ("POPIA")  
EXTEND TO TELEMARKETING?: A COMPARATIVE  
ANALYSIS**

by

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## **DECLARATION**

I, 607739, declare that this Research Report is my own unaided work. It is submitted in partial fulfillment of the requirements for the degree of Master of Laws (by Coursework and Research Report) at the University of the Witwatersrand, Johannesburg. It has not been submitted before for any degree or examination in this or any other university.

I have submitted my final Research Report through TurnItIn and have attached the report to my submission.

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## **ABSTRACT**

The regulation of direct marketing in South African law is not a foreign concept. Direct marketing has been regulated in the Consumer Protection Act 68 of 2008 and its Regulations, the Electronic Communications and Transactions Act 25 of 2002 to now the Protection of Personal Information Act 4 of 2013 (POPIA). POPIA is South Africa's first ever dedicated piece of legislation to the protection personal information of data subjects, unlike its predecessors which were consumer centric.

POPIA was enacted with the main aim of protecting the processing of data subject's personal information. Since its inception, we have not seen much litigation on it, and there remains some uncertainty regarding the applicability and interpretation of certain of its provisions. This research paper focuses on section 69 of POPIA, which deals with direct marketing by means of unsolicited electronic communication. In terms of section 69(1), direct marketing by means of unsolicited electronic communication is prohibited unless certain requirements such as prior consent are met.

Around February 2024, the Information Regulator made pronouncements that telemarketing falls within the ambit of section 69 and thus prohibited unless certain requirements such as prior consent are met. The remarks by the Information Regulator sparked a debate on whether telemarketing falls under section 69 of POPIA within the legal fraternity. This research will show that section 69 of POPIA does not extend to telemarketing, and that there is a need for an amendment of section 69 of POPIA to create legal certainty in the interpretation of section 69 and the Guidance Note issued.

## I INTRODUCTION

The right to privacy is entrenched in section 14 of the Constitution of the Republic of South Africa, 1996 (the Constitution) and recognises that human beings have a right to a sphere of intimacy and autonomy that should be protected from invasion.<sup>1</sup> Information privacy is considered an important characteristic of the right to privacy.<sup>2</sup> Neethling describes privacy as 'a condition of human life characterised by seclusion from the public and publicity, which embraces all those personal facts a person has determined to be excluded from the knowledge of outsiders and wishes to be kept private'.<sup>3</sup>

It is most likely that we have all experienced direct marketing in at least one form or another, either by way of telephone or emails amongst others.<sup>4</sup> Marketing often involves processing a data subject's personal information, such as name, surname, identity numbers, and cell phone numbers. Access to such personal information plays a critical role in a business's success, and direct marketing is one of the most popular forms of marketing used by companies.<sup>5</sup> Companies involved in direct marketing have in the past enjoyed the processing of personal information for marketing purposes without restrictions.<sup>6</sup> Previously, many companies processed personal information without the individual's consent, which at times resulted in excessive direct marketing practices. The processing of personal information of data subject without their consent in an attempt to market goods or services results in a violation of the right to privacy.<sup>7</sup> These practices were not only a nuisance but also a violation of the right to privacy, which is a constitutionally entrenched right.<sup>8</sup>

To ensure that the right to privacy is maintained and to give effect to the right to privacy as enshrined in South Africa's Constitution<sup>9</sup>, data privacy laws have been enacted. Direct marketing

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<sup>1</sup> *Khumalo and others v Holomisa* 2002 (5) SA 401 (CC) para 27. Also see *National Coalition for Gay and Lesbian Equality and another v Minister of Justice and others* 1999 (1) SA 6 (CC) para 32.

<sup>2</sup> J Malindi *The Protection of Personal Information Act 4 of 2013 and direct marketing (with specific reference to behavioural advertising) in South Africa* (unpublished LLM dissertation, University of Witwatersrand, 2018) 2.

<sup>3</sup> *Ibid* at 5. Also see J Neethling 'The Concept of Privacy in South African Law' (2005) 122 *SALJ* 19.

<sup>4</sup> Y Rasool *An examination of how the Protection of Personal Information Act 4 of 2013 (POPI) will impact direct marketing and the current legislative framework in South Africa* (unpublished LLM dissertation, University of Kwazulu-Natal, 2017) 25.

<sup>5</sup> SERR Synergy 'Navigating direct marketing in the business environment' available at <https://serr.co.za/navigating-direct-marketing-in-the-business-environment>, accessed on 11 November 2024.

<sup>6</sup> Malindi op cit note 2 at 1.

<sup>7</sup> *Ibid* at 6.

<sup>8</sup> *Ibid* at 20.

<sup>9</sup> The Constitution of the Republic of South Africa, 1996.

companies have found themselves having to comply with various stringent data privacy laws before they can use an individual's and other companies' personal information for marketing purposes.<sup>10</sup> The regulation of direct marketing in South African law is not a foreign or new concept.<sup>11</sup> Direct marketing has been regulated by the Consumer Protection Act (CPA)<sup>12</sup> and its Regulations and the Electronic Communications and Transactions Act (ECTA)<sup>13</sup> long before the enactment of the Protection of Personal Information Act (POPIA).<sup>14</sup> POPIA is the first dedicated piece of legislation in South Africa to protect data subject's personal information unlike its predecessors who were consumer-centric.<sup>15</sup>

POPIA was enacted with the main aim of protecting the processing of personal information in South Africa.<sup>16</sup> POPIA has been in effect since 1 July 2021, however, we have not seen its application in full force as it has not yet been fully tested in South African courts. Since its inception, many data subjects have alleged that there has been an infringement of their privacy right due to the use or misuse of their personal information by direct marketing messages or telephone calls. Data subjects have also expressed their frustrations and sought to rely on POPIA for protection.<sup>17</sup>

The examination of the provisions dealing with direct marketing under POPIA is prompted by an enforcement notice that the Information Regulator (IR) issued in February 2024. The enforcement notice was issued against a training institution who marketed certain of its services by way of telephone calls without the data subject's consent.<sup>18</sup> Direct marketing by means of

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<sup>10</sup> SERR Synergy op cit note 5.

<sup>11</sup> B Harmann & S Papadopoulou 'Direct marketing and spam via electronic communications: an analysis of the regulatory framework in South Africa' (2014) 47 *De Jure* 42-3.

<sup>12</sup> Consumer Protection Act 68 of 2008 (CPA).

<sup>13</sup> Electronic Communications and Transactions Act 25 of 2002 (ECTA).

<sup>14</sup> Protection of Personal Information Act 4 of 2013 (POPIA).

<sup>15</sup> L Swales 'Protection of Personal Information: South Africa's answer to the global phenomenon in the context of unsolicited electronic messages (spam)' (2016) 28 *SAMLJ* 49 at 50. Also see JS Baumann and N Ismail 'The concept of "personal information" in the Protection of Personal Information Act 4 of 2013 – a comparative analysis from a European perspective' (2021) *TSAR* 718 at 719.

<sup>16</sup> POPIA op cit note 14, preamble.

<sup>17</sup> L Sifile 'Frustrated consumers want companies to mute tele-sales calls' available at [https://www.sowetanlive.co.za/news/south-africa/2024-08-19-frustrated-consumers-want-companies-to-mute-tele-sales-calls/#google\\_vignette](https://www.sowetanlive.co.za/news/south-africa/2024-08-19-frustrated-consumers-want-companies-to-mute-tele-sales-calls/#google_vignette), accessed on 22 November 2024.

<sup>18</sup> Information Regulator (South Africa) 'The Information Regulator issues its first enforcement notice relating to direct marketing complaint' available at <https://inforegulator.org.za/wp-content/uploads/2020/07/MEDIA-STATEMENT-ENFORCEMENT-NOTICE-ON-DIRECT-MARKETING-COMPLAINT.pdf>, accessed on 20 July 2024.

telephone is also referred to as telemarketing.<sup>19</sup> Amid public interest following the issuance of the enforcement notice, the Chairperson of the IR, Ms Pansy Tlakula, made the following remarks:

*'Our leniency regarding direct marketing through unsolicited electronic communication is going to be a thing of the past....'*<sup>20</sup>

*'The big issue in direct marketing...is whether a telephone constitute electronic communication. If you receive a call from a telemarketer is that electronic communication or not? Some people say telephone is not electronic communication. ...we have taken [a decision] that a telephone is a form of electronic communication. Telemarketing will then come within section 69 of POPIA because these telephone calls have become such an inconvenience...'*<sup>21</sup> (own emphasis).

Section 69 of POPIA deals with direct marketing by means of unsolicited electronic communication. In terms of section 69(1) of POPIA direct marketing by means of unsolicited electronic communication is prohibited unless certain requirements are met.<sup>22</sup> The IR's remarks above have sparked debate on whether telemarketing falls under section 69 of POPIA.<sup>23</sup> The debate further raises questions around whether the IR has the powers in terms of POPIA and whether it can commission or qualify an act that is not contemplated in POPIA.<sup>24</sup> Some argue that the IR exceeded its powers by their pronouncements that telemarketing is contemplated under section 69 of POPIA and in particular in the definition of electronic communications under POPIA.<sup>25</sup>

This research paper aims to examine whether section 69 of POPIA dealing with unsolicited direct marketing extends to telemarketing. This research paper will begin by conducting an analysis of the conditions for the lawful processing of personal information under POPIA. In doing so, it will provide an overview of the principles or conditions relating to the processing of personal information under POPIA. Second, it will analyse the regulation of direct marketing in South Africa under the CPA as well as in POPIA with specific focus on section 69 of POPIA. It will also consider the role of the IR, and its power to issue enforcement notices under POPIA for non-

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<sup>19</sup> SERR Synergy 'Telemarketing and the POPI Act – simple guide' available at <https://serr.co.za/telemarketing-and-the-popi-act-a-simple-guide>, accessed on 20 July 2024.

<sup>20</sup> Masthead 'Direct marketing and POPIA – what you need to know' available at <https://www.masthead.co.za/media-articles/direct-marketing-and-popia-what-you-need-to-know/>, accessed on 25 July 2024.

<sup>21</sup> S Mzekandaba 'Exclusive: Inforeg cracks whip on pesky direct marketing calls' *ITweb* 21 February 2024 available at <https://www.itweb.co.za/article/exclusive-inforeg-cracks-whip-on-pesky-direct-marketing-calls/KzQenvjy6oeqZd2r>, accessed on 25 July 2024.

<sup>22</sup> Section 69 of POPIA.

<sup>23</sup> A Burger-Smidt and D Adams 'Regulator or Legislature' available at <https://www.werksmans.com/legal-updates-and-opinions/regulator-or-legislature/>, accessed on 25 July 2024.

<sup>24</sup> *Ibid.*

<sup>25</sup> *Ibid.*

compliance with its provisions. It will also consider how the overlapping legislative framework provides for both opt-in and opt-out regimes. Third, it will investigate how the European Union (EU) regulates direct marketing and in particular, telemarketing. It will further compare the EU regulations to South Africa's POPIA, noting the similarities and differences in the regulation. The EU and South African regime are largely similar in relation to the protection of personal information, and this shows how much South African aligns with international standards. Lastly, it will provide a conclusion and recommendation on the research topic.

## II PROCESSING OF PERSONAL INFORMATION UNDER POPIA

This section will examine the processing of personal information under POPIA. POPIA is intended to strike a balance between the right to privacy with other rights such as the right to access to information.<sup>26</sup> It further seeks to protect the free flow of information which is vital to the successful running of various businesses who depend on information.<sup>27</sup> POPIA was also enacted to establish a regulatory body known as the IR to ensure respect and enforcement of the processing of personal information under POPIA.<sup>28</sup>

POPIA recognises that the constitutional right to privacy includes a right to protection against unlawful collection, retention, dissemination and use of personal information.<sup>29</sup> In addition, it introduces minimum requirements for the processing of personal information, as well as, providing for the rights of persons regarding unsolicited electronic communications and automated decision making.<sup>30</sup> These minimum requirements play a pivotal role, and are discussed below.

### *(a) Conditions for the processing of personal information in general*

Part A of Chapter 3 of POPIA deals with the general principles of lawful processing of personal information. The key role players in the lawful processing of personal information are the data subject, responsible party, operator and the IR.<sup>31</sup> Processing in terms of POPIA is defined as

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<sup>26</sup> The right to access to information is contained in section 32 of the Constitution of the Republic of South Africa, 1996, and it is given effect in the Promotion of Access to Information Act 2 of 2000 (PAIA).

<sup>27</sup> POPIA op cit note 15, preamble

<sup>28</sup> Ibid.

<sup>29</sup> Ibid.

<sup>30</sup> See Chapter 3 and 8 of POPIA.

<sup>31</sup> IR is a juristic person established in terms of section 39 of POPIA.

*‘any operation or activity or any set of operations, whether or not by automatic means, concerning personal information including (a) the collection, receipt, recording, organisation, collation, storage, updating or modification, retrieval, alteration, consultation or use (b) dissemination by means of transmission, distribution or making available in any other form (c) merging, linking, as well as restriction, degradation, erasure or destruction of information.’<sup>32</sup>*

Data subject is defined ‘as the person to whom personal information relates’.<sup>33</sup> A responsible party is defined as ‘a public or private body which alone or in conjunction with others determines the purpose of and means for processing personal information’.<sup>34</sup> An operator is defined as ‘the person who processes personal information for a responsible party in terms of a contract or a mandate’.<sup>35</sup>

The eight conditions for the lawful processing of personal information are accountability, processing limitation, purpose specification, further processing limitation, information quality, openness, security safeguard, and data subject participation.<sup>36</sup> Each of the conditions for the lawful processing of personal information will be discussed in greater detail below.

#### *(b) Accountability and Processing Limitation Condition*

Accountability requires a responsible party to comply with all the conditions for lawful processing.<sup>37</sup> It further requires compliance with the measures that give effect to such conditions.<sup>38</sup> Personal information must be processed in a lawful and reasonable manner that does not infringe a data subject's right to privacy.<sup>39</sup> This processing limitation provides that processing of personal information must be adequate, relevant and not excessive. The processing of personal information requires, *inter alia*, a data's subject's consent, which may be revoked at any time.<sup>40</sup> As a general rule, personal information must be collected directly from the data subject unless the exceptions as set out in POPIA apply.<sup>41</sup>

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<sup>32</sup>Section 1 of POPIA.

<sup>33</sup> Ibid.

<sup>34</sup> Ibid.

<sup>35</sup> Ibid.

<sup>36</sup> Chapter 3 of POPIA.

<sup>37</sup> Y Burns and A Burger-Smidt *Protection of Personal Information Act 2<sup>nd</sup> ed* (2023) 189.

<sup>38</sup> Section 8 of POPIA.

<sup>39</sup> Section 9 of POPIA. Also see Malindi op cit note 2 at 13.

<sup>40</sup> Section 11(1)(a) and 11(2)(b) of POPIA.

<sup>41</sup> Section 12(1) of POPIA. The exceptions are set out in 12(2) of POPIA and for purposes of this research report they are not relevant and hence they are not listed.

*(c) Purpose specification Condition and Further Processing Limitation Condition*

The purpose specification condition prescribes that personal information must be collected for a specific, explicitly defined and lawful purpose related to the function or activity of the responsible party.<sup>42</sup> This requires that steps must be taken to ensure that the data subject is aware of the purpose of the collection of the information unless the provisions of section 18(4) of POPIA apply.<sup>43</sup> The further procession limitation condition means that the responsible party must adhere to the original purpose of the processing, if and when further processing might be required at a later stage.<sup>44</sup> Consequently, the responsible party may not add extra or other purposes, unless such new purposes can be accommodated within the sphere of the original purpose.<sup>45</sup>

*(d) Information Quality Condition and Openness Condition*

In terms of the information quality condition, when processing personal information, a responsible party must take reasonably practicable steps<sup>46</sup> to ensure that the personal information is complete, accurate, not misleading and updated where necessary.<sup>47</sup> In taking these steps, the responsible party must have regard to the purpose for which the personal information is collected or further processed.<sup>48</sup>

The legislature has provided a clear and unambiguous requirement relating to the quality of information.<sup>49</sup> Burns and Burger-Smidt submit that this obviates any interpretative problems that could arise. Inaccurate, incomplete, misleading and outdated information could potentially be damaging to data subjects and it is for this reason that a data subject must always be aware of the content of personal information which is in the possession of the responsible party.<sup>50</sup> The openness condition requires that a responsible party must maintain documentation of all processing operations under its responsibility<sup>51</sup> and is required to take reasonably practicable steps to notify data subjects when collecting their personal information.<sup>52</sup>

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<sup>42</sup> Section 13 of POPIA.

<sup>43</sup> The steps to be taken by a responsible party are contained in section 18(1).

<sup>44</sup> Section 15 of POPIA. Also see Burns *et al* op cit note 37 at 246.

<sup>45</sup> *Ibid.*

<sup>46</sup> Y Burns and A Burger-Smidt *Commentary on the Protection of Personal Information Act* (2018) 63

<sup>47</sup> Section 16(1) of POPIA. *Ibid*, 260.

<sup>48</sup> Section 16(2) of POPIA.

<sup>49</sup> Burns *et al* op cit note 37 at 260.

<sup>50</sup> *Ibid.*

<sup>51</sup> Section 17 (1) of POPIA.

<sup>52</sup> Section 18(1) of POPIA.

*(e) Security Safeguard Condition and Data Subject Participation Condition*

The security safeguard condition requires a responsible party to secure the integrity and confidentiality of personal information in its possession or under its control.<sup>53</sup> The application of the security measures extends to any operator or anyone processing personal information on behalf of a responsible party or an operator.<sup>54</sup> An operator may process such information only with the knowledge or authorisation of the responsible party, unless required by law or in the course of the proper performance of their duties.<sup>55</sup>

In addition, a responsible party is required to enter into a written contract with an operator regarding the processing of personal information. The operator is required to notify the responsible party immediately where there are reasonable grounds to believe that the personal information of a data subject has been accessed or acquired by any unauthorised person.<sup>56</sup> The obligation to notify the IR and the data subject of security breaches also rests on responsible parties.<sup>57</sup> The operator or responsible party does not need to notify the IR if a public body such as the South African Police Services responsible for the prevention, detection or investigation of offences determines that notification of the security breach to the data subject will impede a criminal investigation.<sup>58</sup>

On 13 August 2023, the IR issued an enforcement notice to Dis-Chem Pharmacies Limited (Dis-Chem) for non-compliance with their duty to notify data subjects of a security compromise.<sup>59</sup> Dis-Chem became aware of a brute attack that occurred at one of its service providers which exposed its employees' personal information and it failed to notify the employees' of such security compromise.<sup>60</sup> Dis-Chem's failure to report the breach placed them in violation of POPIA's security conditions. The IR ordered Dis-Chem to develop and maintain a compliance framework which clearly makes provision for the reporting obligations of Dis-Chem and all its operators.<sup>61</sup>

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<sup>53</sup> Section 19 of POPIA.

<sup>54</sup> Burns *et al* op cit note 37 at 274. Also see section 20 of POPIA.

<sup>55</sup> Ibid.

<sup>56</sup> Section 21 of POPIA.

<sup>57</sup> Ibid.

<sup>58</sup> In terms of section 22(1)(b) of POPIA.

<sup>59</sup> Information Regulator (South Africa) 'Enforcement Notice in terms of section 95 of the Protection of Personal Information Act 4 of 2013' Reference number: SC 30/2022 – Dis-chem Pharmacies Limited, available at <https://inforegulator.org.za/wp-content/uploads/2020/07/DIS-CHEM-ENFORCEMENT-NOTICE.pdf>, accessed on 20 August 2024.

<sup>60</sup> Ibid.

<sup>61</sup> Ibid.

The last condition deals with the data subject's participation in the processing of their personal information in that they have a right to access their personal information as well as to correct any errors or omissions or to request for the deletion of their personal information.<sup>62</sup> The processing of the data subject's personal information may include the data subject's names, surnames, contact details or identity numbers, to name a few, for direct marketing. When processing information, the responsible party must comply with the eight conditions of processing personal information discussed above. If the responsible party fails to do so, it will not be considered lawful processing that falls within the ambit of POPIA. As will be highlighted in the next section, direct marketing by unsolicited means is further regulated by section 69 of POPIA, and the requirements contained in section 69 of POPIA must be complied with for direct marketing purposes.

### III DIRECT MARKETING IN SOUTH AFRICA

This section analyses the regulation of direct marketing in South Africa under the CPA and POPIA with specific focus on section 69 of POPIA.

#### *(a) Consumer Protection Act 68 of 2008*

The CPA was enacted to promote and protect the economic interests of consumers as well as improve access to protect the interests of all consumers, ensure accessible, transparent and efficient redress for consumers who are subjected to abuse or exploitation in the marketplace.<sup>63</sup> Chapter 2 of the CPA contains fundamental consumer rights<sup>64</sup> which includes the right to privacy.<sup>65</sup>

Section 11 of the CPA provides for the consumer's right to restrict unwanted direct marketing. Direct marketing is defined in the CPA as

*'approaching a person, either in person or by mail or electronic communication, for the direct or indirect purpose of promoting or offering to supply, in the ordinary course of business, any goods or services to the person or requesting the person to make a donation of any kind for any reason'.*<sup>66</sup>

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<sup>62</sup> Section 24 of POPIA.

<sup>63</sup> Preamble of the CPA.

<sup>64</sup> The only fundamental consumer right applicable for purposes of this research paper is the right to privacy. Other consumer rights contained in the CPA will accordingly not be discussed as they are irrelevant for purposes of this research paper.

<sup>65</sup> See section 11 and 12 of the CPA.

<sup>66</sup> Section 1 of CPA. Also see S Tennant *Consumer Law Compliance* (2016).

Electronic communication is defined '*as communication by means of electronic transmission, including telephone, fax, wireless computer access, email or any other similar technology*'.<sup>67</sup>

In terms of section 11(1) of the CPA, '*the right to privacy of every person includes the right to refuse to accept, to require another person to discontinue or ... pre-emptively block any approach or communication to that person, if the approach or communication is primarily for the purpose of direct marketing*'.<sup>68</sup> In order to facilitate the realisation of each consumer's right to privacy, and to enable consumers to effectively protect themselves against direct marketing activities, a person who has been approached for the purpose of direct marketing may demand during or within a reasonable time after that communication that the person responsible for initiating the communication desist from initiation any further communication.<sup>69</sup> This is commonly known as "opting out".<sup>70</sup> The consumer must also have an opportunity to put a pre-emptive block on a direct marketing supplier.<sup>71</sup>

The CPA provides for consumers to have the right to "opt-out" of any direct marketing by whatever means. Considering the "opting-out" right, a person conducting any direct marketing must implement appropriate procedures to facilitate the receipt of any opt-out demands.<sup>72</sup> Where a consumer exercises their right to "opt out", the supplier should suppress their contact details. This means that a supplier should retain a record of those individuals that may not be sent marketing communications, unless the consumer changes their mind to opt back in later.<sup>73</sup> It is for this reason that suppliers should always cleanse, cross-reference, and update their contact lists against their internal opt-out records before initiating marketing communications.<sup>74</sup>

The National Consumer Commission is empowered by the CPA to establish a registry in which any person may register a pre-emptive block, against direct marketing.<sup>75</sup> To date, the registry has not yet been established, which is concerning as it brings into question the effectiveness of section 11 of the CPA. However, the Direct Marketing Association of South

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<sup>67</sup> Ibid.

<sup>68</sup> Burns *et al* op cit note 37 at 548.

<sup>69</sup> Ibid.

<sup>70</sup> Tennant op cit note 66 at 173

<sup>71</sup> Ibid. Also see section 11(3) and Regulation 4(3) – (5) of the CPA.

<sup>72</sup> T Fourie and K Nevin – Eversheds Sutherland 'Direct Marketing in South Africa' available at <https://www.golegal.co.za/legislation-direct-marketing/>, accessed on 20 August 2024.

<sup>73</sup> Ibid.

<sup>74</sup> Ibid.

<sup>75</sup> Section 11(3) of CPA.

Africa (DMSA) hosts a national opt-out register, whereby users can indicate their intention not to receive direct marketing messages.<sup>76</sup> DMSA is an independent body that direct marketing companies have set up, which they pay for to ensure that the industry's self-regulation system works in the public interest.<sup>77</sup> Being a member of the DMSA is voluntary,<sup>78</sup> and this poses the risk to consumer as other companies may not want to associate themselves with it because it is not compulsory. Its influence may also be futile to the direct marketing industry if there are only certain categories of direct marketing companies who will subscribe to it and its rules and other choose not to be bound by it. It would be very helpful if subscription to DMSA was compulsory for all companies involved in direct marketing so that compliance with the opt-out registry under the DMA would apply to all companies involved in direct marketing.

On 28 October 2024, the Department of Trade, Industry and Competition published draft amendments to the Regulations under the CPA dealing with the pre-emptive block. The proposed amendment outlines the procedure regarding when, who, how and where individuals can register a pre-emptive block and the establishment of an opt-out registry.<sup>79</sup> The proposed amendments are significant for both consumers and direct marketers, as they could directly influence the dynamics of their interactions and the future of direct marketing activities.<sup>80</sup> The effectiveness of the aforesaid amendments will only be determined or assessed once they have been implemented.

A consumer may rescind a transaction resulting from any direct marketing, without reason or penalty, by notice to the supplier in writing or in any other recorded manner within five business days after the transaction was concluded, or the goods were delivered to the consumer. These five days are called "cooling off period".<sup>81</sup>

The CPA further provide times when consumers may not be contacted for purposes of direct marketing.<sup>82</sup> A consumer may not, without consent, be contacted at home for any promotional

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<sup>76</sup> Direct Marketing Association of South Africa (DMSA) Direct Marketing POPIA Code of Conduct, at [https://dmasa.org/sites/dmasa.org/files/20230227\\_dmasa\\_popia\\_coc\\_v4.pdf](https://dmasa.org/sites/dmasa.org/files/20230227_dmasa_popia_coc_v4.pdf), accessed on 20 August 2024.

<sup>77</sup> Section 1 of DMSA Direct Marketing POPIA Code of Conduct.

<sup>78</sup> Ibid.

<sup>79</sup> A Burger-Smidt and D Adams 'Going nowhere fast, proposed amendments to the direct marketing regulations under the CPA published, and your comments are sought!' available at [https://www.werksmans.com/legal-updates-and-opinions/going-nowhere-fast-proposed-amendments-to-the-direct-marketing-regulations-under-the-cpa-published-and-your-comments-are-sought/#:~:text=On%20October%2028%2C%202024%2C%20the,invited%20until%20January%2015%2C%202025.](https://www.werksmans.com/legal-updates-and-opinions/going-nowhere-fast-proposed-amendments-to-the-direct-marketing-regulations-under-the-cpa-published-and-your-comments-are-sought/#:~:text=On%20October%2028%2C%202024%2C%20the,invited%20until%20January%2015%2C%202025.,), accessed on 10 November 2024.

<sup>80</sup> Ibid. The proposed amendments are published in GG 51436 of 28 October 2024.

<sup>81</sup> Section 16 of the CPA.

<sup>82</sup> Section 12 of the CPA.

purpose during prohibited periods.<sup>83</sup> In the context of the CPA, there is no debate or uncertainty on whether or not direct marketing extends to telemarketing because even the definition of electronic communication specifically refers to telephone.

*(b) Protection of Personal Information Act 4 of 2013*

The definition of direct marketing under POPIA is the same as that used in the CPA. Chapter 8 of POPIA contain the rights of data subjects regarding direct marketing by means of unsolicited electronic communications, directories and automated decision making. Section 69 of POPIA deals with direct marketing by means of unsolicited electronic communications. The conditions for lawful processing of personal information by or for a responsible party for the purpose of direct marketing by means of any form of electronic communication, read together with section 69 of POPIA, relates to direct marketing by means of unsolicited electronic communications.<sup>84</sup>

Section 5(d) of POPIA provides that a data subject has the right to have their personal information processed in accordance with the conditions for lawful processing, which includes the right to object<sup>85</sup> to the processing of their personal information at any time for purposes of direct marketing, other than direct marketing by means of unsolicited electronic communications referred to in section 69. In addition, a data subject has the right not to have their personal information processed for purposes of direct marketing by means of electronic communications except in the instances referred to in section 69(1).<sup>86</sup> A data subject further has the right not to be subject, in certain circumstances, to a decision based solely on the basis of automated processing of personal information intended to provide a profile of such person as provided in section 71.<sup>87</sup>

As a general rule, direct marketing by means of unsolicited electronic communications is prohibited in terms of section 69(1) of POPIA unless the data subject has consented to the processing<sup>88</sup> or is a customer of the responsible party.<sup>89</sup> In this regard, POPIA, introduces a concept of "opting-in" as opposed to the "opting out" which is introduced by the CPA.<sup>90</sup> The prohibition

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<sup>83</sup> section 12(2) of the CPA.

<sup>84</sup> section 4(6) of POPIA.

<sup>85</sup> The right to object is dealt with in section 11 of POPIA.

<sup>86</sup> Section 69 of POPIA.

<sup>87</sup> Section 71 of POPIA.

<sup>88</sup> Section 69(1)(a) of POPIA.

<sup>89</sup> Section 69(1)(b) of POPIA.

<sup>90</sup> Malindi op cit note 2 at 28. Also see SERR Synergy 'POPI Act and direct marketing – opting in and opting out' available at <https://serr.co.za/popi-act-and-direct-marketing-opting-in-and-opting-out>, accessed on 20 August 2024.

in section 69(1) has been interpreted as providing the data subject with a right not to have their personal information processed for the purposes of direct marketing by unsolicited means.<sup>91</sup> POPIA allows a responsible party to approach a data subject once whose consent is required in terms of section 69(1)(a) of POPIA, and who has not previously withheld such consent.<sup>92</sup>

The responsible party must request the data subject's consent in the prescribed manner and form.<sup>93</sup> In this regard, Regulation 6 of the Regulations relating to the Protection of Personal Information<sup>94</sup> ('Regulations') prescribes that a responsible party who wishes to process personal information of a data subject for the purpose of direct marketing by electronic communication must submit a request for written consent to that data subject on the prescribed Form 4.

*(c) Section 69 of POPIA and telemarketing*

Unlike the CPA which regulates direct marketing more generally, section 69 of POPIA only regulates direct marketing by way of unsolicited electronic communications. POPIA defines electronic communication as '*any text, voice, sound, or image message sent over an electronic communications network, which is stored in the network or in the recipient's terminal equipment until it is collected by the recipient*'.<sup>95</sup> Section 69(1) of POPIA reads

*'the processing of personal information of a data subject for the purpose of direct marketing by means of any form of electronic communication, including automatic calling machines, facsimile machines, SMSs or email is prohibited unless...'*

There has been some debate on whether telemarketing falls within the ambit of 'direct marketing by means of any form of electronic communication' as contemplated in section 69(1) of POPIA.<sup>96</sup> In order to formulate a view of whether section 69(1) of POPIA extends to telemarketing one will need to consider the definition of electronic communication in POPIA.

There are conflicting views about whether telemarketing is allowed or prohibited under section 69 of POPIA, as telephone calls are received instantly and not "stored" in the network or in the recipient's terminal equipment until it is "collected" by the recipient, as is required by the

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<sup>91</sup> Burns *et al* op cit note 37 at 520.

<sup>92</sup> Section 69(2)(a) of POPIA.

<sup>93</sup> Section 69(2)(b) of POPIA.

<sup>94</sup> Regulations relating to the Protection of Personal Information in GN 1383 GG 42110 of 14 December 2018.

<sup>95</sup> Section 1 of POPIA.

<sup>96</sup> Rasool op cit note 3 at 45. Also see Fourie and Nevin op cit note 72.

definition of electronic communication in POPIA.<sup>97</sup> From the plain reading of the definition of electronic communication, one would argue that telephone calls do not meet the requirements of 'electronic communication' for purposes of POPIA, as they are not 'stored in the network or in the recipient's terminal equipment' except, if one leaves a voice message.<sup>98</sup> Burger-Smidt and Adams have opined that live telephone calls do not fall within the ambit of the definition of electronic communication under POPIA as they are not stored in the network or in the recipient's terminal equipment except if one leaves a message.<sup>99</sup> Furthermore, Rasool is also of the view that the definition of electronic communication in POPIA does not cover telephone direct marketing.<sup>100</sup> Rasool argues that a direct marketing attempt via a telephone call is unlikely to be stored as required by POPIA.<sup>101</sup>

What brings further confusion as to whether direct marketing under section 69 extends to telemarketing is the recent enforcement notice issued by the IR against FT Ram Consulting<sup>102</sup> and the IR public remarks discussed above on this issue. The IR ordered FR Ram, to '*immediately stop sending unsolicited direct marketing messages by means of any electronic communication, including telephone, fax, SMS, email or automated calling machine, to any data subject who has not consented, including the complainant*'.<sup>103</sup> The IR, on its own accord, included telephone, which then raised a question as to whether section 69 extends to telemarketing, and if not, whether the IR has the power to extend the provisions of POPIA. In this instance, the IR included the word "telephone" to the definition of electronic communication, which is not specifically mentioned in POPIA.

Katzav<sup>104</sup> argues that telemarketing practice can fall within the opt-in regime under section 69 of POPIA. In his view, telephone calls constitute the sending of a voice message, and further argues that automatic calling machines are expressly included under section 69 of POPIA, which

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<sup>97</sup> G Katzav 'Opting out: how does POPIA impact telemarketing?' available at <https://www.derebus.org.za/optiming-out-how-does-popia-impact-telemarketing/>, accessed on 20 August 2024. Also see Masthead op cit note 20; Mzekandaba op cit note 21; Burger-Smidt and Adams op cit note 23; and Fourie and Nevin op cit note 72.

<sup>98</sup> Burger-Smidt and Adams op cit note 23.

<sup>99</sup> Ibid.

<sup>100</sup> Rasool op cit note 3 at 45.

<sup>101</sup> Ibid.

<sup>102</sup> Information Regulator (South Africa) 'Enforcement Notice in terms of section 95 of the Protection of Personal Information Act 4 of 2013' Reference number: CDR 464-21 – FT Rams Consulting, available at [https://inforegulator.org.za/wp-content/uploads/2020/07/FT-RAMS-CONSULTING-ENFORCEMENT-NOTICE-210224\\_Redacted.pdf](https://inforegulator.org.za/wp-content/uploads/2020/07/FT-RAMS-CONSULTING-ENFORCEMENT-NOTICE-210224_Redacted.pdf), accessed on 20 August 2024. Also see Masthead op cit note 20; and Fourie and Nevin op cit note 72.

<sup>103</sup> Ibid.

<sup>104</sup> Katzav op cit note 97.

indicates that telephonic communication is a 'voice message'.<sup>105</sup> It is submitted that Katzav adopts a narrow approach in considering whether a telephone call can fall under section 69 by referencing the fact that automatic calling machine qualifies, which by their very own nature and as provided in POPIA are automated.<sup>106</sup> Katzav fails to consider a situation of a live telephone call. He also referred to a recent judgment of *Samsung Electronics SA (Pty) Ltd v The Commissioner for the South African Revenue Services*<sup>107</sup> where the court in paragraph 19 held that smartphones are 'simply an evolved and more advanced cell phone than earlier cell phones' and that a message makes its way through intermediaries (such as cell phone towers) and it is eventually transmitted to the recipient's telephone to be reconstructed as an audible voice message.

Katzav further argues that there is nothing inherent in the definition of 'electronic communication' to exclude reciprocity or dialogue and that even if we accept that the meaning of electronic communication requires a 'once-off' message, this actually does not result in the exclusion of telemarketing.<sup>108</sup> The act of direct marketing is triggered the moment the telemarketer approaches the data subject for the purposes of promoting goods and services over the telephone. Whatever happens after that is beside the point. Katzav further argues that telemarketers will satisfy the storage element of electronic communication when they record their telephone calls for the purposes of direct marketing; bearing in mind that section 50(3) of the CPA, states that where consumer agreements are not in writing, suppliers are required to keep a record of transactions entered into over the telephone or any other recordable forms.

It is submitted that the view held by Burger-Smidt and Adams is more convincing and can be argued to be correct. For one to determine whether or not a telephone call falls within the ambit of the definition of electronic communication, we need to look at two essential elements. These elements are the storage of voice in the network or in the recipient's terminal and its collection by the recipient. As already alluded to above, telephone calls are instant and not stored unless one leaves a voice mail message which can later be retrieved by the recipient.

It is submitted that Katzav is confusing direct marketing under the CPA and direct marketing under section 69 of POPIA. His arguments are convincing and apply when one considers direct marketing and the definition of electronic communication under the ambit of CPA but not under

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<sup>105</sup> Ibid.

<sup>106</sup> Ibid. Section 69(5) defines automatic calling machine as 'a machine that is able to do automated calls without human intervention'.

<sup>107</sup> *Samsung Electronics SA (Pty) Ltd v The Commissioner for the South African Revenue Services* (764/2021) [2022] ZASCA 126; 85 SATC 24 (28 September 2022).

<sup>108</sup> Katzav op cit note 97.

section 69 of POPIA. He refers to automatic calling machines to justify that electronic communications are a voice message, but that is not at issue when determining whether or not telephone falls within the ambit of electronic communication in POPIA. POPIA has already defined automatic calling machines as not needing human intervention, due to their automated nature.<sup>109</sup> It is correct that direct marketing is triggered the moment a telemarketer approaches a data subject for purposes of promoting goods over the telephone, however, the submission made that what happens after is beside the point, is incorrect. It is important that one needs to determine whether such direct marketing falls within the ambit of section 69. Katzav's analysis does not adequately delve into the main features of the definition of electronic communication to include telephone calls.

On 3 December 2024 and months after the IR has made its views of direct marketing under POPIA known to the public, published a Guidance Note on direct marketing in terms of POPIA (Guidance Note).<sup>110</sup> The Guidance Note was promulgated to assist in the interpretation of POPIA in relation to direct marketing as defined in POPIA.<sup>111</sup> Furthermore, the Guidance Note is intended to guide responsible parties on how to comply with POPIA when processing personal information of data subjects for direct marketing by means of unsolicited non-electronic communication in terms of section 11<sup>112</sup> and unsolicited electronic communications in terms of section 69 of POPIA.

In terms of paragraph 4.1.2 of the Guidance Note, direct marketing by means of unsolicited electronic communication in terms of section 69 of POPIA include direct marketing by means of telephone. It is important to note that this insertion of telephone is new and not provided for in POPIA under the definition of electronic communication. The IR justifies the inclusion of telephone based on the technical opinion received, which explains how voice over internet protocol (VoIP) calls work and argues that call data is stored on various networks, including the recipient terminal equipment, and that the recipient collects the data when accepting a call.<sup>113</sup> The IR is of

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<sup>109</sup> Section 69(5) of POPIA.

<sup>110</sup> Information Regulator (South Africa) *Guidance Note on Direct Marketing in terms of the Protection of Personal Information Act 4 of 2013* ("Guidance Note").

<sup>111</sup> *Ibid* at para 1.3.

<sup>112</sup> This research paper does not focus on section 11 of POPIA. Accordingly, it will not deal with the aspects of the Guidance Note in this regard but will focus on what the Guidance Note provides in relation to section 69 of POPIA.

<sup>113</sup> Paragraph 7.1 of the Guidance Note. Also see IL Hattingh 'Updated guidance on direct marketing and POPIA, part one' available at <https://novcon.co.za/2024/12/04/updated-guidance-on-direct-marketing-and-popia-part-one/>, accessed on 15 January 2025.

the view that telephone calling is electronic communication by virtue of telephone communications technology having become digital over time.<sup>114</sup> The IR argues that telephone calls predominantly use VoIP which is packet-switched telephony rather than the public-switched telephony, which was previously used for analogue communication.<sup>115</sup> The IR goes further to argue that:

*"the analogue voice is encoded into a digital stream that is divided into small data packets which are labelled according to their order. These voice data packets that are transmitted using real-time protocols during a telephone call are stored on the network. The voice data packets are re-assembled to match the original order of transmission, error correction is applied to digital data stream to compensate for the delay caused by packet re-assembly and finally relayed to the recipient's terminal equipment to be decoded into analogue voice for consumption upon the recipient's acceptance of the call."*<sup>116</sup>

The definition of electronic communication contained in POPIA is contentious as it does not specifically refer to 'telephone' but refers to 'voice or sound which is stored in the network or in the recipient's terminal equipment until it is collected'. The IR provides a technical explanation in justifying its view that telephone calls fall within the ambit of electronic communication as provided for in POPIA.

Considering the definition of electronic communication in POPIA, I am not convinced by the explanation and reasons provided by the IR in the Guidance Note to include telephone within the ambit of section 69. The IR's inclusion of telephone within the ambit of the definition of electronic communications fails to consider that real-time telephone calls are not stored in any network to be received by a recipient unless it is recorded, or a voice message is left. In this regard, I am of the view that the IR's view is incorrect and if the legislature wanted to include telephone in the definition of electronic communication to fall within the ambit of section 69, it would have explicitly done so. The uncertainty of whether telephone calls for purposes of direct marketing or telemarketing falls within the ambit of section 69 remains uncertain and I foresee that litigation will ensue to provide more clarity.

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<sup>114</sup> Paragraph 7.1.1 of the Guidance Note.

<sup>115</sup> Ibid.

<sup>116</sup> Paragraph 7.1.2 of the Guidance Note.

In my view, only our courts and the legislature through an amendment of POPIA can cure this uncertainty. Guidance notes by their very nature are advisory, and do not have the same standing as legislation and regulations.<sup>117</sup> Guidance notes merely set out the IR's current interpretation of the law, and which may be wrong, and as it is argued herein the issue at hand is not fully and finally resolved until a court of law makes a pronouncement on it to create a judicial precedent and legal certainty or the legislature intervenes by amending POPIA in line with the IR's interpretation.

It is argued that the legislature intentionally excluded telephone from section 69. A live telephone call does not get stored anywhere unless it is a recorded voice message, and for this reason alone, section 69 of POPIA does not extend to telemarketing. It is submitted that, the only voice which can be stored, is a voicemail, which can be left or stored on the network and retrieved by recipient on a later stage.

The next section will consider the role of the IR and how it enforces the provisions of POPIA regarding the processing of personal information in general and also for direct marketing.

#### IV INFORMATION REGULATOR AND ENFORCEMENT NOTICE

This section will discuss the role of IR and the issuance of enforcement notices under POPIA for non-compliance with the provisions of POPIA.

##### *(a) Information Regulator*

The IR is a juristic person which has jurisdiction throughout the Republic of South Africa.<sup>118</sup> The IR is independent and subject only to the Constitution and the rule of law. The IR is required to be impartial in the performance of its functions and in exercising its powers without fear, favour or prejudice.<sup>119</sup> The IR is accountable to the National Assembly.<sup>120</sup> The exercise of the IRs powers and functions are governed by POPIA, PAIA<sup>121</sup> and the principles of administrative law.<sup>122</sup>

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<sup>117</sup> Paragraph 11 of the Guidance Note. Also see Hattingh op cit note 113.

<sup>118</sup> Section 39(1)(a) of POPIA

<sup>119</sup> Section 39(b).

<sup>120</sup> Section 39(d).

<sup>121</sup> Section 39 (c) of POPIA.

<sup>122</sup> Burns *et al* op cit note 37 at 681.

The IR consists of a chairperson who directs the work and staff of the IR;<sup>123</sup> four ordinary members;<sup>124</sup> committees whose members are designated or appointed by the IR;<sup>125</sup> an enforcement committee, which is an independent body who considers complaints referred to it by the IR<sup>126</sup> as well as Chief Executive Officer.<sup>127</sup>

The powers, duties and functions of the IR are contained in section 40 of POPIA and includes monitoring and enforcing compliance with POPIA. The IR is not empowered in terms of POPIA to make or amend the provisions of POPIA. The power to make laws lies with the legislative branch of South Africa's government. In addition, the IR is only empowered under POPIA to issue, amend and revoke a code of conduct, and does not have legislative powers, since it is governed by the principles of administrative law. Anything done by it which is not sanctioned by POPIA will be subject to judicial review under the Promotion of Administrative Justice Act.<sup>128</sup>

The primary function of the IR is to ensure the lawful processing of personal information by public and private bodies, and ensuring the protection of personal information, by applying the statutory principles set out in the POPIA as well as the statutory provisions of PAIA.<sup>129</sup> Accordingly, the IR is required to monitor and enforce compliance with the provisions of POPIA by private and public bodies.<sup>130</sup> When a person alleges that there has been an interference with their personal information, they may lodge a complaint with the IR. Accordingly, where such a person has made or filed a complaint with the IR in the prescribed manner alleging interference with the protection of personal information,<sup>131</sup> the IR may conduct a full investigation of the complaint or refer the complaint to the Enforcement Committee.<sup>132</sup> When a complaint is referred to it, the Enforcement Committee is required to consider it and may make recommendations to the IR.<sup>133</sup>

*(b) Enforcement Notice*

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<sup>123</sup> Section 41(1)(a)(i) and (f) of POPIA.

<sup>124</sup> Section 41(1)(a)(ii) of POPIA.

<sup>125</sup> Section 49 of POPIA.

<sup>126</sup> Section 50 of POPIA.

<sup>127</sup> Section 47 of POPIA.

<sup>128</sup> Promotion of Administrative Justice Act 3 of 2000.

<sup>129</sup> Burns *et al* op cit note 37 at 686.

<sup>130</sup> Section 40(1)(b) of POPIA.

<sup>131</sup> Section 74 of POPIA.

<sup>132</sup> Section 76 and 92 of POPIA.

<sup>133</sup> Section 92 of POPIA.

Where the IR is satisfied, after considering the Enforcement Committee's recommendation, that a responsible party has interfered with or is interfering with the protection of a data subject's personal information, the IR may serve the responsible party with an enforcement notice.<sup>134</sup> An enforcement notice is a written recommendation of actions that a responsible party must take.<sup>135</sup> The enforcement notice may require the responsible party to either take specified steps within a period specified in the notice, or to refrain from taking such steps; or to stop processing the personal information specified in the notice, or to stop processing personal information for a purpose or in a manner specified in the notice within a period specified in the notice or both.<sup>136</sup>

POPIA is still a fresh piece of legislation, and we have not seen any enforcement notice relating to direct marketing being issued, until February 2024, when the IR issued its first ever enforcement notice to FT Rams Consulting because of direct marketing.<sup>137</sup> The IR received a complaint from a data subject following countless direct marketing messages received by them. The IR determined that FT Rams Consulting interfered with the protection of personal information of the data subject and accordingly breached the conditions for the lawful processing of personal information. Furthermore, the IR found that FT Rams Consulting also violated section 69 of POPIA which regulates direct marketing by means of unsolicited electronic communications. The IR found that FT Rams Consulting had failed to adhere to POPIA and contravened section 69(1) and (2) and subsequently other sections of POPIA by transmitting to the data subject, without first obtaining their consent, persistent direct marketing communications through emails pertaining to the courses or webinars it offered.<sup>138</sup> The IR argued that for FR Rams to have been compliant with sections 69(1) and (2) of POPIA, the first message FT Rams Consulting sent was supposed to obtain the data subject consent.<sup>139</sup> If the data subject consented to receiving direct marketing messages, they also had to indicate the preferred means of communication which FT Rams Consulting could use to send direct messages to them.<sup>140</sup> FT Rams Consulting's failure to use the

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<sup>134</sup> Section 95 of POPIA.

<sup>135</sup> Section 95 of POPIA. Also see Michalsons 'Enforcement notice from the Information Regulator: what now?' available at <https://www.michalsons.com/blog/enforcement-notice-from-the-information-regulator-what-now/56517#:~:text=It%20is%20similar%20to%20a,from%20taking%20such%20steps%3B%20or>, accessed on 5 December 2024.

<sup>136</sup> Section 93 of POPIA.

<sup>137</sup> Masthead op cit note 20.

<sup>138</sup> Information Regulator op cit note 102.

<sup>139</sup> Information Regulator (South Africa) op cit note 102.

<sup>140</sup> Ibid.

prescribed Form 4 to obtain the data subject's written consent, resulted in the requirements not being complied with.<sup>141</sup>

The IR's enforcement notice ordered FT Rams Consulting, among other things, to immediately stop sending unsolicited direct marketing messages by means of any electronic communication, including telephone.<sup>142</sup> It is submitted that the IR exceeded its powers in relation to the order that it made against FT Rams Consulting wherein it included telephone within the ambit of section 69 and specifically the definition of electronic communication, when same is not expressly dealt with or covered by POPIA. It is further submitted that the IR does not have powers to "read into" the provisions of POPIA something which is not expressly stated.

## V COMPARATIVE ANALYSIS: EUROPEAN UNION AND SOUTH AFRICA

This section will analyse how direct marketing within the EU is regulated and will also compare South Africa's direct marketing regime. The EU has been chosen for a comparative study with South Africa because it has had a great influence in the development of POPIA,<sup>143</sup> and as a result, I believe it presents South Africa with the correct approach when interpreting and applying the provisions of POPIA. Furthermore, it is important to highlight from onset that the EU regime uses some different terminologies than POPIA, but their meanings remain the same, such as 'personal data' instead of 'personal information', and 'controller' instead of 'responsible party'.

### *(a) Direct Marketing under European Union Data Protection Law.*

Direct Marketing under EU is regulated by the General Data Protection Regulation<sup>144</sup> (GDPR) and Directive 2002/58/EC<sup>145</sup> also known as e-Privacy Directive (Directive). The GDPR applies to all member states of the EU while the Directive only applies to those member states who implement it into their national law.<sup>146</sup> The GDPR deals with the protection of natural persons with regard to the processing of personal data while the Directive deals with the processing of personal data and

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<sup>141</sup> Ibid.

<sup>142</sup> Ibid.

<sup>143</sup> Baumann op cit note 15 at 720.

<sup>144</sup> General Data Protection Regulation 2016/679 of the European Parliament and of the Council of 27 April 2016 (GDPR).

<sup>145</sup> Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 (Directive on privacy and electronic communications).

<sup>146</sup> L Sytniewski 'Electronic marketing in the European Union and in the UK-selected issues' (2019) 12(49) *International In-House Counsel Journal* 1.

protection of privacy in the electronic communications sector.<sup>147</sup> A big component of direct marketing is personal data and by reason of that, any processing of personal data by a direct marketer triggers compliance with data protection principles.<sup>148</sup>

*i. GDPR*

Article 6(1) of GDPR provides that in order to process any personal data, a controller is required to have a legal justification. These justifications include a data subject's consent,<sup>149</sup> performance of a contract to which a data subject is a party<sup>150</sup> and legitimate interests pursued by the controller or third party unless such interest are overridden by fundamental rights and freedoms of the data subject.<sup>151</sup>

A data subject has a right to object, on grounds relating to their particular situation, at any time to the processing of their personal data in terms of Article 6(1), including profiling.<sup>152</sup> This includes the right to object to and prevent profiling carried out for the purpose of direct marketing, as well as the right to prevent the transmission of unwanted marketing messages by any means whatsoever.<sup>153</sup> In the event of an objection by a data subject to the processing of their personal data for direct marketing, the controller shall no longer process such personal data unless the controller demonstrates compelling legitimate grounds for the processing which overrides the interests, rights and freedoms of the data subject.<sup>154</sup>

Furthermore, in terms of Article 21(2), where the data subject's personal data is processed for direct marketing purposes, the data subject has the right to object at any time to the processing of such personal information concerning them for such marketing.

Recital 47 of GDPR also refers to direct marketing. It provides that the processing of personal data for direct marketing purposes may be regarded as carried out for a legitimate interest.<sup>155</sup> However, it should not be inferred that in each case it is acceptable to process personal

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<sup>147</sup> A Salbert 'Compatibility of Polish Law with EU law concerning the use of electronic communications means for direct marketing purposes' (2019) 19 *YARS* 53.

<sup>148</sup> Malindi *op cit* note 2 at 31.

<sup>149</sup> Article 6(1)(a) of GDPR.

<sup>150</sup> Article 6(1)(b) of GDPR.

<sup>151</sup> Article 6(1)(f) of GDPR.

<sup>152</sup> Article 21(1) of GDPR.

<sup>153</sup> Burns *et al* *op cit* note 37 at 521.

<sup>154</sup> Article 21(1) of GDPR. Also see P Carey *Data Protection: A Practical Guide to UK Law* 6<sup>th</sup> ed (2020) 161.

<sup>155</sup> Recital 47 of GDPR.

data for direct marketing purposes and it is important to note that the basis<sup>156</sup> for the processing of personal data under recital 47 is the legitimate interest of the controller or third party.<sup>157</sup> Recital 47 requires an assessment of whether in a given case the legitimate interest pursued by the controller or third party is not overridden by the interests or fundamental rights and freedom of data subject.<sup>158</sup> The results of the balancing of interests might be in favour of the controller in the case where the data subject could foresee the use of its personal data for marketing purposes based on its relationship with the controller for instance, if it is already a client or customer of the direct marketer.<sup>159</sup>

*ii. Directive*

The Directive deals with the conditions for the processing of personal data for marketing purposes from the perspective of electronic communications.<sup>160</sup> Article 13 of the Directive deals with direct marketing by way of unsolicited communications and it provides that the use of automatic calling machines, facsimile machines or electronic mail for the purposes of direct marketing may be allowed only in respect of subscribers who have given their prior consent.<sup>161</sup> Valid consent cannot be obtained through a general message sent to prospective recipients of unsolicited communications for direct marketing, requesting their consent to receive such communication.<sup>162</sup>

To fully understand the scope and applicability of Article 13 it is important to understand how the Directive defines electronic mail, and this will also assist in answering the question of whether or not the Directive extends and/or contemplates unsolicited telemarketing. 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.<sup>163</sup>

Article 13 introduces the 'opt-in' method similar to POPIA, in that a controller is required to first obtain the consent of the data subject before they can send them marketing material directly.

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<sup>156</sup> Please note that the legal basis for the processing of personal data is set out in article 6(1) of GDPR.

<sup>157</sup> Salbert op cit note 147 at 56.

<sup>158</sup> Ibid.

<sup>159</sup> Ibid at 57.

<sup>160</sup> Ibid at 58.

<sup>161</sup> Article 13(1) of GDPR.

<sup>162</sup> Salbert op cit note 147 at 58.

<sup>163</sup> Article 2(h) of the Directive. This definition is similar to the definition of electronic communications under POPIA.

The Directive further provides for limitations regarding the application of Article 13.<sup>164</sup> Firstly, the requirements contained in Article 13(1) requiring for prior written consent only applies to natural persons.<sup>165</sup> However, EU member states retained their freedom to determine the use of electronic communication for marketing purposes to entities other than natural persons. Second, where a natural or legal person obtains from its customers their electronic contact details for electronic mail, in the context of the sale of a product or a service in accordance with the GDPR, the same natural or legal person may use those electronic contact details for direct marketing of its own similar products or services.<sup>166</sup> The use of such details is subject to the customers clearly and distinctly be given the opportunity to object to such use of electronic contact details at the time of their collection and on the occasion of each message in case the customer has not initially refused such use.<sup>167</sup> In this regard, the Directive provides an exception to the 'opt-in' rule discussed above and provided in Article 13(1).

Within the context of an existing customer relationship, it is reasonable to allow the use of electronic contact details for the offering of similar products or services, but only by the same company that has obtained the electronic contact details in accordance with GDPR.<sup>168</sup> When electronic contact details are obtained, the customer should be informed about their further use for direct marketing and be given the opportunity to refuse usage.<sup>169</sup>

Member states are further offered freedom to choose between opt-in and opt-out rule in case of unsolicited communications for direct marketing purposes other than those specified above.<sup>170</sup> It follows that member states cannot apply a solution other than the 'opt-out' rule when it comes to using electronic communications for direct marketing of a similar product or services by a company.

#### *(b) Comparative analysis with South Africa*

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<sup>164</sup> Article 13(2) and 13(5) of GDPR.

<sup>165</sup> Article 13(5) of GDPR.

<sup>166</sup> Ibid.

<sup>167</sup> Article 13(2) of GDPR.

<sup>168</sup> Salbert op cit note 147 at 60.

<sup>169</sup> This accords with the further processing condition found in POPIA and in GDPR.

<sup>170</sup> Article 13(3) provides that '*member States shall take appropriate measures to ensure that, free of charge, unsolicited communications for purposes of direct marketing, in cases other than those referred to in paragraphs 1 and 2, are not allowed either without the consent of the subscribers concerned or in respect of subscribers who do not wish to receive these communications, the choice between these options to be determined by national legislation*'.

This section will compare POPIA with the GDPR to show how the South African data privacy legislation and in particular POPIA aligns with international standards when it comes to direct marketing and will also highlight that the question at hand is also not so clear from a GDPR perspective and more is required for clarity and certainty.

The GDPR, Directive and POPIA contain similar provisions relating to the processing of personal information or data. Like POPIA, the GDPR contains the conditions for the lawful processing of personal information or data. Furthermore, the GDPR is aligned with POPIA in that, firstly they both require a responsible party or controller to have a legal basis or justification in the processing of personal information or data, which includes the data subject's consent.

Second, they both provide data subjects with the right to object to the processing of their personal information or data, including in respect of direct marketing. The GDPR, however, includes an additional requirement, which is not included in POPIA, in its recitals that processing of personal information or data may be regarded as carried out for a legitimate purpose.

The Directive also deals with direct marketing by way of unsolicited communication like section 69 of POPIA, which is prohibited unless the data subject has given its consent. In essence, both the Directive and POPIA provide for the "opt-in" regime to the processing of personal information or data for direct marketing through unsolicited communication. It is further worth noting that the Directive also does not deal with telemarketing, just like in POPIA 'telephone' is not included in the definition of electronic mail. The definition of 'electronic mail' to which direct marketing by unsolicited communication may be initiated is similar to the definition of 'electronic communication' in POPIA in that it deals with 'storage in the network' and 'collection' of voice. By so doing, and as alluded above, the Directive does not also extend to live telephone calls, which equates to telemarketing. It is submitted that IR erred in their interpretation of section 69 of POPIA. The IR ought to have followed, the approach taken in GDPR and the Directive when determining what constitutes electronic communication.

## VI RECOMMENDATION(S) AND CONCLUSION

### *(a) Recommendation(s)*

It is important to understand and analyse what constitutes 'electronic communication' under POPIA in order to make a determination of whether section 69 extends to telemarketing. POPIA defines electronic communication '*as any text, voice, sound or image message sent over an electronic transmission which is stored in the network or in the recipient's terminal equipment until it is*

*collected by the recipient.* It is submitted that there are two requirements that must be met in order for voice or sound to qualify as electronic communication, namely storage of the voice or sound in the network or in the recipient's terminal equipment and such voice or sound must be capable of being collected.

It is submitted that live telephone calls are incapable of being stored in any network or recipient's terminal equipment unless a person leaves a voice message in the form of voice mail or voice note. On this basis alone, it can be concluded that telemarketing does not fall within the ambit of electronic communication as defined under section 69 of POPIA. Although the IR has published a Guidance Note to assist with the interpretation of section 69 of POPIA in so far as it relates to unsolicited electronic communication, I do not agree with its view and the Guidance Note is not binding but simply advisory in nature. On the basis above, and due to the uncertainty around the applicability of section 69 of POPIA, it is recommended that the definition of 'electronic communication' must be amended to specifically include telephone, if that is what the legislature initially intended to cure any uncertainty and create legal certainty and binding law. It is submitted that the IR ought to have referred this issue to the National Assembly for consideration and possible amendment of POPIA since it is accountable to Parliament than attempting to resolve the issue through the Guidance Note, when in my view, does not have the powers to expressly include 'telephone' when it is not in POPIA. In the absence of any express inclusion of telephone in the definition of electronic communication, this issue in my view remains open and will have to be determined by our courts the day a responsible party who might be fined on the basis of the IR's interpretation agrees with my views and decides to challenge the IR's interpretation of the direct marketing provisions by means of unsolicited means.

*(b) Conclusion*

Having considered the analysis in the above sections and taking into account the aim of this research paper it is submitted that section 69 of POPIA does not extend to telemarketing. Section 69 of POPIA prohibits the processing of personal information of a data subject for purposes of direct marketing by means of any form of electronic communication, among others. The IR has remarked and made an order against a responsible party to the effect that 'telephone is a form of electronic communication' and further issued a Guidance Note in this regard. It is submitted that the IR erred in its interpretation of POPIA and that telephone forms part of methods of direct marketing by means of unsolicited electronic communication. The definition of 'electronic communication' does not include nor contemplate 'telephone' as an electronic communication.

In section 3 of this research paper, it was established that section 69 of POPIA does not extend to telemarketing. It will be interesting to see how the IR's enforcement notice against FR Ram in light of the Guidance Note will impact the telemarketing industry and we might see some litigation in the future on this issue. It is interesting seeing the IR starting to be active in the monitoring and enforcement of POPIA since its inception, given that it is still fairly a new legislation, and it is no doubt that we are yet to see a number of litigation cases involving POPIA and which will provide more clarity and certainty. It is also worth commending the IR for taking pro-active steps to issue the Guidance Note to provide guidance to the direct marketing industry in this regard, although I am not in agreement with their interpretation and look forward to seeing how it will be welcomed in the coming months and years.

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