G

"I'd tell you everything if you'd pick up that telephone"—Political Expression and Data Protection

Daithí Mac Síthigh*
Lecturer, UEA Law School, University of East Anglia

Automated calling systems; Data protection; Direct marketing; EU law; Freedom of expression; Political activities; Political parties

Introduction

While the relationship between data protection and freedom of expression is proving to be of ongoing interest, particularly regarding the application of an "exemption" for purposes such as journalism,[1] the focus of this article is the particular problem of Directive 2002/58 on privacy and electronic communications.[2] Although the adoption and implementation of this Directive, which amends the EU's original Data Protection Directive 95/46, is not specific to political communication—onsidering electronic communication such as SMS, email and fax more broadly—it will be argued here that its impact on democratic political activities is significant. The implementation of the Directive in the UK (and subsequent disputes and determinations) will be the focus, although other jurisdictions, the EU and the European Convention on Human Rights ("ECHR") will be considered where appropriate. The first section sets out the UK legal framework and reviews some recent applications of the law. The second section then considers questions of scope and definition within the existing law, followed by a consideration of the objections to the provisions from a fundamental rights perspective. The final section brings together these points and suggests that data protection law as currently applied fails to protect communication by parties and candidates, to the detriment of citizen participation in the political process.

1. Data protection in the UK

The transmission of "communications comprising recorded matter for direct marketing purposes by way of an automated calling system" without the consent of the telephone service subscriber is prohibited under UK and EU data protection law.[3] Where such communications are permitted, the sender must also provide their names as well as an address or freephone number. In spite of these requirements a number of UK political parties have found themselves the subject of bad publicity in the media and formal action by the Information Commissioner's Office ("ICO"), in particular through enforcement notices issued

*Email: d.mac-sithigh@uea.ac.uk. The author is grateful to the following for comments on a draft of this paper: David Mead, Michael Harker (both UEA), Nick Anstead (LSE) and David Erdos (Oxford).

[1] The matter has been considered by the Court of Justice of the EU on a number of occasions over the past decade, e.g. *Lindqvist* [2003] C-101/01; *Satakunnan Markkinapörssi* [2008] C-73/07. Commentary includes A White, 'Data Protection and the Media' [2003] EHRLR 25; A Sharpe, "Data protection reaches the European Court of Justice" (2004) 9 *Communications Law* 22; S Vousden, "Satamedia and the Single European Audiovisual Area" [2009] EIPR 527; see further the work of the Data Protection and the Open Society (DPOS) project at the University of Oxford: *http://www.csls.ox.ac.uk/dataprotection/* [Accessed February 21, 2011].

[2] Directive 2002/58/EC of the European Parliament and of the Council concerning the processing of personal data and the protection of privacy in the electronic communications sector.

[3] The Directive is transposed by way of SI 2426/2003, the Privacy and Electronic Communications (EC Directive) Regulations 2003.

under section 40 of the Data Protection Act 1998. While the rules have been clearly explained and reiterated on a number of occasions,[4] the schadenfreude that inevitably follows the declaration that a group of persons seeking the power to write the law has failed to comply with the law masks the more serious issue that the Directive may prevent legitimate and beneficial political activities.

In a competitive political environment, political parties continue to explore various methods of promotion and communication, ranging from posters to Twitter.[5] A recent problem regarding telephone communications which came to public attention was an enforcement notice issued to the Labour Party on February 4, 2010. Labour compiled a list of just under half a million telephone numbers (purchasing most of them) and placed automatic calls (voiced by actress Elizabeth (Liz) Dawn[6]) in the days before the 2009 local and European elections. It was not surprising, then, that the ICO used its powers to issue an enforcement notice, having already received an undertaking from the party not to make automated calls after a previous incident in 2007. While doing so, the ICO reiterated its view on the matter in an accompanying press statement and reminded the public that "automated calls can cause annoyance and disruption which is why it is so important for organisations making such calls to gain the consent of individuals".[7] This is an interesting turn of phrase that is more explanatory or normative than regulatory; this is a theme of the various statements issued by the ICO regarding these matters although it does not reflect the full spectrum of reasonable views on the question of political communication.

Other parties have also attempted to use automated messages during campaigning, drawing the consistent and critical attention of the ICO. The most comprehensively argued complaint related to the Scottish National Party ("SNP"), the subject of a 2005 enforcement notice from the ICO, which was appealed to the then-Information Tribunal in 2006.[8] In this case, a series of automated calls using the voice of another actor (Sean Connery) were placed during March and April 2005, before the UK-wide general election that took place in May of that year. Like Labour, the SNP had used this method before, and the decision came at a time of significant speculation and discussion regarding telephone marketing by political parties,[9] including a separate enforcement notice issued to the Conservative Party. Subsequently, during a speech at the Liberal Democrat conference in 2008, party leader Nick Clegg announced that he would be calling thousands of households to talk about his party's policies. Clegg argued that it was time for politics to "connect with people again" and set out a number of actions, including "knock(ing) on a million doors in Britain", speaking face-to-face to voters and "calling 250,000 people to hear their views on the challenges facing our country".[10] As reported at the time, the calls were in fact "automated 30 second voice message(s) ... with recipients tapping numbers on their handsets to respond to questions about education, health, tax, crime, environmental and economic policies".[11] These calls were both unsolicited and automated, and

[4] Information Commissioner's Office, "Promotion of a Political Party", April 5, 2005, formerly available (copy on file with author) at *http://www.ico.gov.uk/upload/documents/library/data_protection/practical_application/promotion_of_a_political_party.pdf* ["Promotion of a Political Party"]; Information Commissioner's Office, "Guidance for political parties for campaigning or promotional purposes", March 4, 2010, available at *http://www.ico.gov.uk/upload/documents/library/data_protection/practical_application/promotion_of_a_political_party.pdf* ["Guidance for Political Parties"] [Accessed February 21, 2011].

[5] See, e.g. P. Bazalgette, "Politics in Primetime" (*Guardian*, May 10, 2010), p.M1, available at *http://www.guardian.co.uk/media/2010/may/10/television-general-election* [Accessed February 21, 2011].

[6] Well known to many recipients through her role as Vera Duckworth on the soap Coronation Street between 1974 and 2008.

[7] Information Commissioner's Office, "Labour Party found in breach of privacy rules" (press release) February 9, 2010, available at *http://www.ico.gov.uk/upload/documents/pressreleases/2010/labour_party_enforcement_notice_final_090210.pdf* [Accessed February 21, 2011].

[8] *Scottish National Party v Information Commissioner* [2006] UKIT EA_2005_0021 (May 15, 2006) [*SNP v IC*]. For discussion, see G. Brooks, "Information Tribunal makes Cold Calling Ruling" (2006) 11 *Communications Law* 211.

[9] *SNP v IC* [14–19] (agreed facts).

[10] Speech to the Liberal Democrat Conference, September 17, 2008, available at *http://www.libdems.org.uk/speeches_detail.aspx?title=Nick_Clegg%E2%80%99s_speech_to_the_Liberal_Democrat_Conference&pPK=2ebf8cc7-32df-4b97-8065-1fdd33793384* [Accessed February 21, 2011].

[11] "Lib Dems told to end 'robocalls'" (*BBC News* September 25, 2008), available at *http://news.bbc.co.uk/1/hi/uk_politics/7635799.stm* [Accessed February 21, 2011].

drew quite a reaction, with the *Daily Mail* describing it in a headline as "pester(ing) voters ... during TV soaps".[12] The Information Commissioner determined that the calls constituted direct marketing, issuing an enforcement notice to the party shortly afterwards.[13]

It is already clear that the share of political budgets spent on direct forms of marketing (particularly the maintenance of databases and the use of direct mail) increased in the 2005 general election in the UK and has been the subject of significant planning across the political parties.[14] However, the outcome of the legal and regulatory developments discussed above is that major political parties across the UK have made use of various telephone marketing approaches, and the ICO has firmly and consistently opposed them. As in the USA, where the situation was described as "thoroughly nonpartisan" in 2004,[15] there is little evidence of any relationship between ideology and willingness to use these methods, although the various complaints by political parties about each other are quite bizarre, given the variety of cases that have arisen. It is therefore necessary to consider, while not minimising the scourge of unwanted telephone messages, the impact of general controls on political expression as a wider principle.

2. Scope and definition

(a) What is direct marketing?

It has proven difficult to establish whether the key issues are of EU law or of decisions made at a national level, and whether the problem (if there is one) is with statutory language or ICO and Information Tribunal decisions. However, with a view to the evolving EU arrangements regarding fundamental rights, it is possible to continue this analysis based on general principles (primarily art.10 ECHR) while noting that the resolution of any fundamental rights claim might need further attention. As the Court of Justice of the European Union ("CJEU") noted in *Lindqvist*, one of the few cases where the tension between data protection (in its general form) and freedom of expression is explored, the Directive itself does not (in its view) violate fundamental rights, but national application of its provisions must take rights including art.10 into account in a proportionate fashion.[16] However, this approach does depend on there being a sufficient degree of flexibility in terms of transposition, which may not always be present, depending on the provision in question.

There is no definition of "direct marketing" in the UK statutory instrument or indeed in the original Directive. However, the former refers back to the Data Protection Acts. From the Act, it can be noted that direct marketing is defined as "any advertising or marketing material" directed to an individual (section 11(3)). The position of the Information Commissioner is that this concept includes political communications,[17] although this point is not backed by any incontestable legal source, relying instead in the 2005 statement on the most vague of definitions and on the SNP decision in the 2010 statement. On various occasions, the Commissioner has supplied three definitions of direct marketing that are argued to support his view. It is worth considering them in turn.

[12] I. Drury, "Nick Clegg to pester voters with 250,000 automated phone calls during TV soaps" (*Daily Mail*, September 17, 2008), available at *http://www.dailymail.co.uk/news/article-1056820/Nick-Clegg-pester-voters-250-000-automated-phone-calls-TV-soaps.html* [Accessed February 21, 2011].

[13] Enforcement notice: Liberal Democrats (September 24, 2008), available at *http://www.ico.gov.uk/upload/documents/library/privacy_and_electronic/notices/lib_dem_enforcement_notice.pdf* [Accessed February 21, 2011].

[14] P. Harris and A. Lock, "Political Marketing Funding and Expenditure in the UK General Election Campaign of 2005" (2005) 21 *Journal of Marketing Management* 1117.

[15] D. McCullagh, "Political spam as national pastime" (*CNET News* 17 May 2004), available at *http://news.cnet.com/Political-spam-as-national-pastime/2010-1028_3-5213287.html* [Accessed February 21, 2011].

[16] *Lindqvist* [88]–[90].

[17] "Promotion of a Political Party", pp.7–8; "Guidance for Political Parties", p.2.

The first is taken from a 1985 Council of Europe recommendation,[18] which includes a statement that direct marketing:

> "comprises all activities which make it possible to offer goods or services or to transmit other messages to a segment of the population by post, telephone or other direct means aimed at informing or soliciting a response from the data subject as well as any service ancillary thereto."

There is absolutely no mention of non-commercial communications here. We can presume (as the Information Commissioner's statements do not explain which aspects of the statement point to political communication) that the references to transmitting "other messages" aimed at "informing or soliciting a response" include these communications. However, this in itself is a very broad statement (surely all statements inform?) and does not really determine the matter one way or another.

The second is taken from the Distance Selling Directive,[19] where "advertising" is defined as including "all forms of direct marketing communication, including any sales promotion or fund raising whether or not it contains an offer or an invitation to treat". This appears to be a less clear statement, as the only elaboration of direct marketing communication (itself undefined) is the reference to sales promotions and fund raising, neither of which are at issue here. Clearly, the purpose of the definition is to ensure that advertisements such as sales promotions and fundraising endeavours that do not include invitations to treat do not fall outside the Directive—a sensible approach.

The third is the most problematic and it is questionable whether it should be included at all. The Information Commissioner relies on a 1998 statement issued by the Federation of European Direct Marketing ("FEDMA"), as do others such as the Data Protection Commissioner in Ireland.[20] The statement is clearly a descriptive one and the language (e.g. "not a homogenous marketing discipline but rather a series of different strategies") is clear evidence of its context as an analysis of a marketing concept of little relevance to the interpretation of the Data Protection Directive. Indeed, although the Information Commissioner simply refers to the statement being 'in a paper', it is never cited, but it may be fair to assume that the organisation may be inclined to take a broad approach to defining its own discipline and membership. This is appropriate for FEDMA but not for a public authority, and the separate recognition of FEDMA's code of conduct under art.27 of the Directive does not mean that an un-cited definition of this nature should be given such force in this particular context.

It can be concluded from the above that the scope of the relevant laws and regulations is ambiguous, and that the Information Commissioner has adopted the approach that favours the protection of the individual subscriber to a telephone service (and the right to privacy of that subscriber). Turning to EU law a whole, the art.29 Working Party has attended to the matter, albeit without adding complete clarity. In a 2004 Opinion, the provisions of recital 30 of the original Data Protection Directive[21] (which is not referred to by the Information Commissioner) are reproduced. This recital deals with the disclosure of data for marketing purposes "whether carried out commercially or by a charitable organization or by any other association or foundation, of a political nature for example". This does suggest that marketing can include non-commercial activities, although it should be noted that this is an option for Member States who can set the conditions for disclosure. Nonetheless, this reference is followed by a statement that it is the Working Party's opinion that art.23 of 2002/58 "consequently covers any form of sales promotion,

[18] Recommendation No.R (85) 20 of the Committee of Ministers to Member States on the protection of personal data used for the purposes of direct marketing (October 25, 1985), available at: *https://wcd.coe.int/wcd/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=605791&SecMode=1&DocId=688244&Usage=2*

[19] 97/7/EC.

[20] Data Protection Commissioner (Ireland), "Data protection in the telecommunications area" (Case study 4/02), available at *https://www.dataprotection.ie/viewdoc.asp?DocID=113* [Accessed February 21, 2011].

[21] Directive 95/46/EC of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data.

including direct marketing by charities and political organisations (e.g. fund raising etc.)".[22] The reference to fundraising in parentheses does seem to suggest that the broader term "marketing" may not be entirely unproblematic. This is subtly but crucially different to the Information Commissioner, who repeatedly refers, in the case of political and charitable organisations, to "appeals for funds or support", despite the obvious differences between the former and the latter, with an appeal to contribute finance being easier to rationalise as in the same category as appeals to purchase goods and services.

(b) Treating political communication differently

Is there a case for treating the (non-research-based) communication of political information differently to "ordinary" marketing? The system for the regulation of non-broadcast advertising in the UK (the self-regulatory code enforced by the Advertising Standards Authority) does in fact draw a distinction between political advertising (including direct marketing) and advertising/direct marketing more generally.[23] The Code of Advertising Practice provides that: "any advertisement or direct marketing communication, whenever published or distributed, whose principal function is to influence voters in local, regional, national or international elections or referendums" is exempt from the said code.[24] This does neatly avoid the problem of having to subject political advertising to the traditional requirements of legality, honesty, truth and decency, however amusing that might be. On the other hand, it is clear that political advertising (broadly defined as including both party politics and politically motivated advertising) is not permitted under UK broadcasting legislation,[25] upheld by the House of Lords in 2008[26] but surely in question again since the decision of the European Court of Human Rights later that year in *TV Vest*.[27] However, this view is not necessarily as fatal as it might seem, as it can also serve to emphasise the need to treat "advertising" and "political advertising" in different ways. So is there a case for a political exemption to the electronic direct marketing rules? Or should the lead of broadcast law be followed and unsolicited political electronic direct marketing ruled out entirely? In order to answer this question, it is necessary to consider the right to freedom of expression in more detail.

3. Impact on human rights

(a) Application of the Convention

The future of political advertising in the UK remains unclear while the further debate (at Strasbourg)[28] of the broadcast political advertising ban is awaited. With this in mind, though, the position of the Information Commissioner is not without question. In particular, there is possible value in considering the jurisprudence of the Strasbourg Court and of the UK courts on the treatment of unpopular or intrusive speech. *Connolly*

[22] Opinion 5/2004 on unsolicited communications for marketing purposes under art.13 of Directive 2002/58/EC*http://ec.europa.eu/justice_home/fsj/privacy/docs/wpdocs/2004/wp90_en.pdf* [Accessed February 21, 2011].

[23] The Information Commissioner has, however, confirmed that genuine political research is different to marketing: "Promotion of a Political Party", p.5; "Guidance for Political Parties", p.4.

[24] Another example of a non-statutory distinction between political and commercial promotion is the guidelines surrounding "cold calling zones" established by Trading Standards authorities in the UK in areas with high populations of elderly residents. These zones are established to restrict (through the promotion of best practices and "naming and shaming") the activities of callers selling goods or services or collecting money, with it being recommended that those promoting an area explicitly decide and explain whether to target political canvassing alongside commercial activities. Trading Standards Institute, "Setting up no cold calling zones", available at *http://www.leicester.gov.uk/business/trading-standards/no-cold-calling-zones-faq/* [Accessed February 21, 2011].

[25] Communications Act 2003 ss.319–321.

[26] *R (on the application of Animal Defenders International) v SoS for Culture, Media & Sport* [2008] UKHL 15.

[27] *TV Vest & Rogaland Pensjonistparti v Norway* (2009) 48 E.H.R.R. 51.

[28] See, e.g. T. Lewis, "Reasserting the Primacy of Broadcast Political Speech after Animal Defenders International? Rogaland Pensioners Party v Norway" (2009) 1 *Journal of Media Law* 37, 42 ("The Court's judgment in *Pensioners Party*, strongly reaffirming as it does its earlier approach in VgT, undermines the decision of the House of Lords in *ADI*, as well as the view of the UK government") and 46 ("it would seem that [ADI] has a very strong chance of success").

v DPP,[29] for example, turns in part on the level of intrusion of the ("gratuitously") offensive communications through the post, despite the importance of the abortion issue in public debate. In the case of political communications through automated calls, the level of intrusion is similar to, or somewhat short of that in *Connolly* (a telephone call can be terminated before the substance is reached, as compared with a letter that is immediately before the reader's eyes in full), and the level of offence greatly different. The Malicious Communications Act at issue in *Connolly* and Directive 2002/58 at issue in this article both address (in different ways) the protection of the receiver of a communication, but of course the threat to individual rights of communications relevant to the MCA is a more serious one. In addition, in his critique of the decision in *Connolly*, Wragg has argued that there is a need (not properly addressed in the decision) to consider the importance of political expression outside of the institutional media.[30] Although Connolly's political speech may have been at the further fringes of Convention protection, according to the UK courts at least, the ability to use direct forms of communication between campaigner and audience is certainly a part of a mature political debate. Dyson L.J. recognises this in *Connolly*, explaining the difference between the particular communications found to be appropriate for the conviction in this case and hypothetical others, including the same content being sent to doctors and Members of Parliament, and drawing a strong link between the protection against receipt and the offensiveness of the content.[31]

Indeed, one disappointing aspect of the record to date is the absence of a thorough published analysis of the impact of the ICO's interpretation and actions on the right to freedom of expression as guaranteed by art.10 of the Convention. The decision of the then-Information Tribunal in *SNP* does reproduce a number of excellent points made by the legal representatives of the parties in respect of the question of fundamental rights (including useful submissions on proportionality), but it is then all the more surprising that the disposal of the issue is so terse. The Tribunal simply finds that:

> The only limitation being placed on the SNP is as to the method of conveyance of a communication, not as to its content, and only to the extent that an individual or data subject had not previously consented or opted-in to receiving automated calls. In our view this does not amount to a breach of the ECHR.[32]

It is impossible to assess the extent of the consideration of Convention rights from such a minimalist finding. If the Tribunal had taken the step of setting out *why* the restriction on freedom of expression was considered to be necessary, based on a detailed evaluation of the submissions of the parties and a consideration of relevant legal principles, then the matter would be clear to all concerned and the interference with fundamental rights would be properly explained and circulated. The Information Commissioner, too, frequently makes reference to "taking account of" the ECHR and the Human Rights Act, and mentions the qualified rights under arts 8 and 10 of the Convention. Again, though, there is little discussion of how the question of the conflict between these rights is approached, let alone resolved. Nor is the link between free elections and free speech considered (as discussed, for example, in *Bowman v UK*[33] in the context of election expenditure). This reference is little more than a *pro forma* statement that acknowledges the duty of the Commissioner as a public authority to act in a lawful manner. Of course, following the decisions of the House of Lords in *Begum*,[34] there is no duty on decision-makers subject to section 6 of the Human Rights Act to give specific consideration to the impact of decisions on the Convention rights of individuals.[35]

[29] *Connolly v DPP* [2007] EWHC 237 (Admin).

[30] P. Wragg, "Free Speech is Not Valued if Only Valued Speech is Free: Connolly, Consistency and Some Article 10 Concerns" (2009) 15 *European Public Law* 111, 129.

[31] *Connolly v DPP* [28].

[32] *SNP v ICO* [99].

[33] *Bowman v UK* (1998) 26 E.H.R.R. 1.

[34] *R (on the application of Begum) v Denbigh High School Governors* [2006] UKHL 15.

[35] See further T. Poole, "The Reformation of English Administrative Law" (2009) 68 CLJ 142, 154–5; compare D. Mead, "Judicial Miss Behavin": a defence of process-based review of public authority decisions under the HRA" [2008] Norwich Law School Working Paper 08/02, available at *http://lawwp.webapp2.uea.ac.uk/wp/index.php/workingpapers/article/view/6/7* [Accessed February 21, 2011].

However, public authorities remain free to provide as much information as they determine appropriate in relevant decisions, so there is no legal obstacle to a more thorough consideration of the impact of the decisions discussed in this note.

Given the implications of the Information Commissioner's view, and the scope for criticism of the sources relied upon in forming that view, greater public confidence in the protection of freedom of expression would come from an explicit elaboration of the various relevant factors instead of a selective list of supportive sources and a bare acknowledgement of the existence of various fundamental rights. Such an analysis might consider the development of a doctrine in Strasbourg regarding political expression, such as the association between press freedom and the wider notion of a core Europe-wide concept of "freedom of political debate" in *Lingens*,[36] the subsequent distinctions made between political and other expression (e.g. *Wingrove*[37] regarding artistic expression), and the emerging recognition of the importance of sensitivity to protected rights where there is a mixture of "types" (e.g. between political/general interest and commercial in *VgT*).[38] In all cases, the speech considered above would be considered more deserving of protection rather than less, a point which could plausibly be dealt with in measures of national execution through a specific mention of the need to consider freedom of expression.

Within the UK, the relationship between freedom of expression and political campaigning has very recently come into focus after the decision regarding the electoral literature of Phil Woolas, who was found by an Electoral Court to have breached electoral law (and thus disqualified from sitting in Parliament). On appeal to the Court of Appeal, an art.10 assessment was carried out, and art.3 of the First Protocol mentioned, although there was a further element of the protection of reputation under art.8. While privacy is of course closely related to data protection (and both are listed as fundamental rights in the EU Charter),[39] the direct consequences of widely distributed dishonest comments about an opposing candidate are surely much more serious (and deserving of art.8 protection) than an unwanted telephone call. Finally, it should be noted that there may be room for further analysis under art.3 of the First Protocol. Although this is not the focus of this article, the regulation of political communication could also be seen as having an impact on the right to participate in the electoral process. However, it is unlikely that, in the absence of a strong argument in term of art.10, that any separate violation could be sustained.

(b) Data protection law

UK data protection law is almost entirely a creature of the relevant EU instruments, and EU law itself is subject to fundamental rights constraints, particularly after the Lisbon Treaty changes and the legally binding status of the EU Charter of Fundamental Rights, as well as the EU's planned accession to the ECHR as enabled by art.6 TEU.

There is also scope for comparing national approaches to the relevant EU directives. The law in neighbouring Ireland has taken a different path. The relevant regulations transposing 2002/58, like their UK equivalents, rely on existing data protection definitions, but the Irish Data Protection Act explicitly excludes political direct mailing from its definition of direct marketing, excluding "direct mailing carried out in the course of political activities by a political party or its members ... or a candidate for election to, or a holder of, elective political office". Although the reference to mailing is potentially ambiguous, it would certainly give political parties much greater confidence in the use of methods that 2002/58 would appear to prevent non-political marketers from using. It does of course still exclude political activities by non-partisan organisations; remember that many laws on television advertising do not distinguish between

[36] *Lingens v Austria* (1986) 8 E.H.R.R. 407 [42].
[37] *Wingrove v UK* (1996) 24 E.H.R.R. 1
[38] *VgT Verein gegen Tierfabriken* (2002) 34 E.H.R.R. 4 [69]–[71].
[39] Although not yet tested, this point may yet be significant, not least because the autonomy of data protection as a right is pointed to by Murphy and Ó Cuinn as an example of the EU's leading role in exploring new technologies and human rights: T. Murphy and G. Ó Cuinn, "Works in Progress: New Technologies and the European Court of Human Rights" (2010) 10 H.R.L.R. 601, 607.

party and non-party advertising. As this provision was inserted as part of the package implementing the 2002 Directive, we can wonder if it is meant to have a broader technological meaning. Indeed, the Irish Data Protection Commissioner did investigate political marketing in the brief period between the entry into force of the new regulations and the statutory change in question, but described the change permitting direct mailing—perhaps through gritted teeth—as bringing "necessary clarity" to the area.[40]

On the other hand, the Portuguese instrument of implementation specifically notes the inclusion of messages of a civil or political nature within the scope of provisions on marketing.[41] In the UK, the position with relation to direct mailing is also affected by the language of the statute, which means that unaddressed mail (leaflets through a door, or indeed mail addressed to "The Occupier") is not caught by the data protection legislation.[42]

We can also note, in the context of a different Data Protection Directive dispute, the wide scope given to the exception for "journalistic purposes" under art.9 of the Directive. In *Satakunnan Markkinapörssi*,[43] the question was whether the publication of data (albeit of taxation information already in the public domain) by a commercial service (using a range of technologies including SMS) could be covered by this exemption. In an important passage, the ECJ held that, in this context, activities:

> "may be classified as 'journalistic activities' if their object is the disclosure to the public of information, opinions or ideas, irrespective of the medium which is used to transmit them. They are not limited to media undertakings and may be undertaken for profit-making purposes."

Although there is no equivalent exemption in 2002/58, it is a useful correction to the idea that data protection effects all spheres of activity without distinction. It is also an example of a content-based restriction on freedom of expression, in that speech falling outside the journalistic (or artistic or literary categories) is subject to greater restriction.[44] However, the exact nature of the link between this specific exemption and a vindication of the right to freedom of expression has not yet emerged, with Korff arguing that the limits themselves suggest inconsistency with art.10,[45] and the Advocate General's Opinion in this case suggesting that there was some distance between the two.[46] If it is possible to protect "the media" or others from the impact of the 1995 Directive (noting that some jurisdictions offer a generous interpretation of the exception),[47] then is it so unreasonable to expect a parallel protection of political communication to potential voters under the 2002 Directive?

Unsurprisingly given the high protection of political speech under the First Amendment tradition, the question of political marketing has been the subject of judicial and legislative attention in the United States. In *Van Bergen v Minnesota*,[48] a Minnesota prohibition on automatic telephone direct marketing of a type that UK political parties would easily recognise was found to be unconstitutional. The Minnesota legislation was specifically amended after an earlier decision (which upheld existing legislation in so far as it affected commercial speech only) to clarify that "any call, regardless of its content" would—if it used the technological approach in question—be prohibited. The 8th Circuit Court of Appeal rejected the contentions of the unhappy politician regarding content neutrality and the public forum doctrine, meaning that intermediate rather than strict scrutiny was the analytical approach in use. The Court did, however,

[40] "Case Study 4/02".

[41] Privacy International, *Privacy and Human Rights 2006: Portugal* (December 2007), available at *https://www.privacyinternational.org/article/phr2006-republic-portugal* [Accessed February 21, 2011].

[42] "Guidance for political parties" 5.

[43] C-73/07.

[44] Hare classifies this section along with exceptions to otherwise restrictive statutes, such as the artistic merit defence to an obscenity charge. I. Hare, "Method and Objectivity in Free Speech Adjudication: Lessons from America" (2005) 54 I.C.L.Q. 49, 79 fn 135.

[45] D. Korff, *Data Protection Law in the EU* (Brussels: FEDMA, 2005), p.24.

[46] As discussed in Vousden, p.528.

[47] Such as chapter 11 of loi 78-17 (as amended) in France as compared with s.32 of the Data Protection Act 1998 in the UK; see M. Tugendhat and I. Christie, *The Law of Privacy and the Media* (Oxford: OUP, 2006), pp.155, 184.

[48] (1995) 59 F 3d 1541 (8th Circuit CA).

give detailed consideration to the restriction as a time, manner or place restriction on speech, and ultimately found that the government interest in "citizens' residential privacy and business efficiency" was substantial and dismissed the case.

On the other hand, the more recent federal legislation in the USA that deals with the problem of "spam"[49] contains a broad exemption for political messages, as it applies to emails with a primary purpose of "the commercial advertisement or promotion of a commercial product or service (including content on an Internet website operated for a commercial purpose)",[50] with the Federal Trade Commission adding (somewhat obviously) that the elaboration of the primary purpose is not intended "to treat as a 'commercial electronic mail message' anything that is not commercial speech".[51] While this may serve to underline the differences between US and Convention approaches to freedom of expression—a point made apparent in 2010 by the decision in *Citizens United*[52] regarding the unconstitutionality of aspects of the 2002 campaign finance reforms—it does represent a firm definition of the line between commercial messages on the one hand (conventionally more susceptible to regulation) and high-value political expression on the other. This is consistent with the views of those opposing the protection of commercial expression such as Shiner, who argued that lifestyle advertising is not normally consistent with a "public good" defence of (some) commercial expression as speech.[53] In the case of political calls, though, this would be easier to argue, even in a situation where (as Shiner would favour) advertising is approached by human rights courts with some scepticism.

4. Assessment

One of the regular findings in challenges to political advertising restrictions is that there are alternative means of political communication available to political parties and other affected groups. However, this means that the basis (or part of the justification) for the upholding of one restriction can ultimately have an impact on the discussion of another restriction. In the case of the techniques used by UK political parties, it can even be argued that the prohibition on contacting telephone subscribers without prior consent is an effective ban, as the very purpose of making contact will be—under normal electoral conditions—to communicate with those who are not already "known to" the political party. While it may be acceptable for a state to restrict some forms of political advertising, in terms of the protection of freedom of expression under art.10, there is a need to appreciate the overlapping impact of various bans, not solely including those expressly targeted at political expression but also considering those that have an impact on political expression despite their more general purpose. Even where restrictions exist, they may be balanced with effective "must carry" provisions, such as the statutory regulation of party political broadcasts[54] or provisions for electoral addresses to be delivered through the postal system without charge, subject to certain conditions.[55]

We can also recall here the position of Lord Bingham, who argued that the availability of other forms of communication is "of some weight" when assessing the prohibition of political advertising about television and radio.[56] In particular, as the options for political advertising are already narrower than for non-political advertising, due to the broadcast restriction in the UK, any further restrictions on communication will have a different impact on the overall opportunities to speak available to the political

[49] 15 USC 7701 (commonly known as the CAN-SPAM Act).
[50] 15 USC 7702(2)(A).
[51] 16 CFR 316.3.
[52] (2010) 558 US 50.
[53] R. Shiner, *Freedom of Commercial Expression* (Oxford University Press, 2003), ch.16.
[54] Communications Act 2003 s.333.
[55] Representation of the People Act 1983 s.91.
[56] *Animal Defenders International* [32].

speaker. *Animal Defenders International* is framed by Baroness Hale as a clash between freedom of expression and voter equality[57]—an important point—but the basis for restricting direct political communications through telephone is surely a different one.

Valued concepts of Athenian democracy depend on a high value being placed on political communication but also the requirement for the citizen to receive messages or to listen, and to be interested in political affairs. "We do not say that a man who takes no interest in politics is a man who minds his own business; we say that he has no business here at all."[58] In the present day, it is clear that methods of political communication are undergoing significant change as a result of factors including media habits, changes in work patterns, the professionalisation of public relations through "spin", and the sheer range of media messages in circulation. The existence of telephone calls regarding politics (particularly where there is some element of dialogue) can be argued to be part of a wider democratic environment for the discussion of political affairs.

Party political or election broadcasts themselves are unpopular with some viewers,[59] are limited to the established broadcast channels,[60] which occupy a diminishing share of viewer attention, and are shorter in duration than ever before.[61] Although some research indicates that turning out on the doorstep remains a more effective way of communicating certain messages than direct mail or telephone messaging,[62] times change, as do doorsteps in the modern city of gated apartment blocks. Automated messages may indeed become an appropriate way to circulate political information as the traditional role of the established media and the historical dominance of the newspaper is challenged by new technologies—maybe one day being as unexceptional as party election broadcasts or election addresses sent through the mail, or even the subject of mandatory or must carry rules. This is not to say that they should become routine without further consideration—but that the matter should be debated in a more thorough fashion. Despite the justified criticism of the disregard for well-publicised legal restrictions by political parties who should know better, restrictions on political communication of this nature and their impact on the democratic culture fostered by art.10 deserve greater scrutiny than they have received to date.

[57] *Animal Defenders International* [49]. See also Sackman's discussion of the narrowness of the reasoning in this case and her alternative proposal for explaning and appreciating democracy as participatory: S. Sackman, "Debating 'Democracy' and the Ban on Political Advertising" (2009) 72 M.L.R. 475.

[58] Attributed to Pericles (495–429 BC); reproduced in D. Held, *Models of Democracy* (3rd edn) (Cambridge: Polity, 2006), p.14.

[59] M. Scammell and A. Langer, "Political Advertising: Why is it So Boring?" (2006) 28 *Media Culture & Society* 763, 765

[60] M. Scammell and A. Langer, "Political Advertising in the United Kingdom", in L. Kaid and C. Holtz-Bacha, *The SAGE Handbook of Political Advertising* (Thousand Oaks, CA: Sage, 2006), pp.67, 72.

[61] M. Scammell and A. Langer, "Political Advertising: Why is it So Boring?", p.769; K. Rafter, *Political Advertising: The Regulatory Position and the Public View* (Dublin: Broadcasting Authority of Ireland, 2009), p.10.

[62] A. Gerber and D. Green, "The Effects of Canvassing, Telephone Calls, and Direct Mail on Voter Turnout: A Field Experiment" (2000) 94 *American Political Science Review* 653.