



Reports of Cases

JUDGMENT OF THE COURT (Third Chamber)

25 November 2021 *

(Reference for a preliminary ruling – Directive 2002/58/EC – Processing of personal data and the protection of privacy in the electronic communications sector – Article 2(h) – Concept of ‘electronic mail’ – Article 13(1) – Concept of ‘use of ... electronic mail for the purposes of direct marketing’ – Directive 2005/29/EC – Unfair commercial practices – Annex I, point 26 – Concept of ‘persistent and unwanted solicitations by email’ – Advertising messages – Inbox advertising)

In Case C-102/20,

REQUEST for a preliminary ruling under Article 267 TFEU from the Bundesgerichtshof (Federal Court of Justice, Germany), made by decision of 30 January 2020, received at the Court on 26 February 2020, in the proceedings

StWL Städtische Werke Lauf a.d. Pegnitz GmbH

v

eprimo GmbH,

intervening party:

Interactive Media CCSP GmbH,

THE COURT (Third Chamber),

composed of A. Prechal, President of the Second Chamber, acting as President of the Third Chamber, J. Passer, F. Biltgen, L.S. Rossi (Rapporteur) and N. Wahl, Judges,

Advocate General: J. Richard de la Tour,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– eprimo GmbH, by R. Hall, Rechtsanwalt,

* Language of the case: German.

- Interactive Media CCSP GmbH, by D. Frey and M. Rudolph, Rechtsanwälte,
- the Portuguese Government, by L. Inez Fernandes, A. Guerra and P. Barros da Costa, acting as Agents,
- the European Commission, by C. Hödlmayr, F. Wilman, N. Ruiz García and S. Kalèda, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 24 June 2021,

gives the following

Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Article 2(h) and Article 13(1) of Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) (OJ 2002 L 201, p. 37), as amended by Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009 (OJ 2009 L 337, p. 11) ('Directive 2002/58'), and Annex I, point 26, to Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive') (OJ 2005 L 149, p. 22).
- 2 The request has been made in two sets of proceedings between StWL Städtische Werke Lauf a.d. Pegnitz GmbH ('StWL') and eprimo GmbH, which are two companies that supply electricity to final customers, concerning an advertising activity by Interactive Media CCSP GmbH, at eprimo's request, consisting in posting advertising messages in the inboxes of users of the free email service 'T-Online'.

Legal context

EU law

- 3 Recitals 4 and 40 of Directive 2002/58 read as follows:
 - '(4) Directive 97/66/EC of the European Parliament and of the Council of 15 December 1997 concerning the processing of personal data and the protection of privacy in the telecommunications sector [(OJ 1998 L 24, p. 1)] translated the principles set out in Directive 95/46/EC [of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ 1995 L 281, p. 31)] into specific rules for the telecommunications sector. Directive 97/66/EC has to be adapted to developments in the markets and technologies for electronic communications services in order to provide an

equal level of protection of personal data and privacy for users of publicly available electronic communications services, regardless of the technologies used. That Directive should therefore be repealed and replaced by this Directive.

...

- (40) Safeguards should be provided for subscribers against intrusion of their privacy by unsolicited communications for direct marketing purposes in particular by means of automated calling machines, telefaxes, and emails, including SMS messages. These forms of unsolicited commercial communications may on the one hand be relatively easy and cheap to send and on the other may impose a burden and/or cost on the recipient. Moreover, in some cases their volume may also cause difficulties for electronic communications networks and terminal equipment. For such forms of unsolicited communications for direct marketing, it is justified to require that prior explicit consent of the recipients is obtained before such communications are addressed to them. The single market requires a harmonised approach to ensure simple, [European Union-wide] rules for businesses and users.'

- 4 Article 1(1) of that directive provides:

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

- 5 Under Article 2(d), (f) and (h), of the directive, entitled 'Definitions':

'The following definitions shall also apply:

- (d) "communication" means any information exchanged or conveyed between a finite number of parties by means of a publicly available electronic communications service. This does not include any information conveyed as part of a broadcasting service to the public over an electronic communications network except to the extent that the information can be related to the identifiable subscriber or user receiving the information;

...

- (f) "consent" by a user or subscriber corresponds to the data subject's consent in Directive 95/46/EC

...

- (h) "electronic mail" means any text, voice, sound or image message sent over a public communications network which can be stored in the network or in the recipient's terminal equipment until it is collected by the recipient.'

- 6 Article 13(1) of the same directive, entitled ‘Unsolicited communications’, provides:
- ‘The use of automated calling and communication systems without human intervention (automatic calling machines), facsimile machines (fax) or electronic mail for the purposes of direct marketing may be allowed only in respect of subscribers or users who have given their prior consent.’
- 7 Recital 67 of Directive 2009/136 reads:
- ‘Safeguards provided for subscribers against intrusion into their privacy by unsolicited communications for direct marketing purposes by means of electronic mail should also be applicable to SMS, [multi-media messages (MMS)] and other kinds of similar applications.’
- 8 Article 2(h) of Directive 95/46/EC provides:
- ‘For the purposes of this Directive:
- ...
- (h) “the data subject’s consent” shall mean any freely given specific and informed indication of his wishes by which the data subject signifies his agreement to personal data relating to him being processed.’
- 9 Article 94(2) of Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (OJ 2016 L 119, p. 1, and corrigendum OJ 2018 L 127, p. 2), entitled ‘Repeal of Directive 95/46/EC’ provides:
- ‘References to the repealed Directive shall be construed as references to this Regulation. ...’
- 10 Article 4(11) of that regulation is worded as follows:
- ‘For the purposes of this Regulation:
- ...
- (11) “consent” of the data subject means any freely given, specific, informed and unambiguous indication of the data subject’s wishes by which he or she, by a statement or by a clear affirmative action, signifies agreement to the processing of personal data relating to him or her’.
- 11 Recital 17 of Directive 2005/29 is worded as follows:
- ‘(17) It is desirable that those commercial practices which are in all circumstances unfair be identified to provide greater legal certainty. Annex I therefore contains the full list of all such practices. These are the only commercial practices which can be deemed to be unfair without a case-by-case assessment against the provisions of Articles 5 to 9. The list may only be modified by revision of the Directive.’
- 12 Article 5 of the directive provides:
- ‘1. Unfair commercial practices shall be prohibited.

2. A commercial practice shall be unfair if:

- (a) it is contrary to the requirements of professional diligence,
and
- (b) it materially distorts or is likely to materially distort the economic behaviour with regard to the product of the average consumer whom it reaches or to whom it is addressed, or of the average member of the group when a commercial practice is directed to a particular group of consumers.

...

4. In particular, commercial practices shall be unfair which:

- (a) are misleading as set out in Articles 6 and 7,
or
- (b) are aggressive as set out in Articles 8 and 9.

5. Annex I contains the list of those commercial practices which shall in all circumstances be regarded as unfair. The same single list shall apply in all Member States and may only be modified by revision of this Directive.'

13 Article 8 of that directive states:

'A commercial practice shall be regarded as aggressive if, in its factual context, taking account of all its features and circumstances, by harassment, coercion, including the use of physical force, or undue influence, it significantly impairs or is likely to significantly impair the average consumer's freedom of choice or conduct with regard to the product and thereby causes him or is likely to cause him to take a transactional decision that he would not have taken otherwise.'

14 Point 26 of Annex I to that directive, which contains the list of commercial practices considered unfair in all circumstances, provides:

'Aggressive commercial practices

...

(26) Making persistent and unwanted solicitations by telephone, fax, e-mail or other remote media except in circumstances and to the extent justified under national law to enforce a contractual obligation. This is without prejudice to ... Directives 95/46/EC and [2002/58].'

German law

- 15 Paragraph 3(1) and (2) of the Gesetz gegen den unlauteren Wettbewerb (Law against unfair competition, of 3 July 2004, BGBl. 2004 I, p. 1414, ‘the UWG’) in the version applicable in the dispute in the main proceedings, provides:

‘(1) Unfair commercial practices shall be unlawful.

(2) Commercial practices addressed to or reaching consumers are unfair where they do not meet the level of diligence required of undertakings and are likely to materially distort the economic behaviour of consumers.’

- 16 Under Paragraph 5a(6) of the UWG, entitled ‘Misleading by omission’:

‘Unfairness also occurs ... where the commercial intent of a commercial practice is not identified, unless this is directly apparent from the context, and where such failure to identify the commercial intent is likely to cause the consumer to take a transactional decision which he or she would not have taken otherwise.’

- 17 Paragraph 7 of the UWG provides:

‘(1) Commercial practices which cause unacceptable nuisance to a market participant shall be unlawful. That applies in particular to advertising that takes place although it is clear that the market participant concerned does not want it.

(2) Unacceptable nuisance must always be assumed in the case of:

1. advertising using a means of commercial communication for distance marketing not listed in points 2 and 3, whereby a consumer is persistently solicited although he or she clearly does not want this;

...

3. advertising using an automated calling machine, a fax machine or electronic mail, without the express prior consent of the recipient, or

4. advertising in the form of a message

(a) where the identity of the sender on whose behalf the communication is made is disguised or concealed ...

...’

- 18 Paragraph 8 of the UWG provides:

‘(1) Where a person engages in an unlawful commercial practice under Paragraphs 3 or 7, an action to eliminate that unlawful practice may be brought against that person and, where there is a risk of recurrence, an action to obtain a prohibitory injunction. The right to seek a prohibitory injunction exists where such a practice in breach of Paragraph 3 or Paragraph 7 threatens to occur.

...

(3) The rights under subparagraph 1 shall be conferred on:

1. any competitor;

...'

The dispute in the main proceedings and the questions referred for a preliminary ruling

- 19 It is apparent from the order for reference that StWL and eprimo are two competing electricity suppliers. At the request of eprimo, Interactive Media CCSP, an advertising agency, inserted advertisements into the email inboxes of users of the T-Online free email service. That service is funded by advertising paid for by advertisers and provided free to users.
- 20 Those advertisements appeared in the private email inboxes of those users, specifically in the section in which incoming emails are listed, and were inserted between the emails received.
- 21 Those users thus received, on 12 December 2016, 13 January 2017 and 15 January 2017, advertising messages in their inboxes. Entries appeared therein which were not visually distinguishable in the list from other emails in the user's account except for the fact that: (i) the date was replaced by the word '*Anzeige*' (advertisement), (ii) no sender was mentioned and (iii) the text appeared against a grey background. The 'subject' section corresponding to that entry in the list contained text intended to promote advantageous prices for electricity and gas services.
- 22 From a technical point of view, a JavaScript code of an advertising server (TAG) is connected with the place in question in the inbox on the internet page consulted by the user of such an email inbox. For that reason, when a user opens the internet page, a request (*Adrequest*) is sent to the advertising server in order to randomly select an advertising banner from a basket constituted by advertisers and transmit it, such that it appears in the user's inbox. If the user clicks on the advertisement displayed, the input is conveyed to the advertising server, which records it and redirects the browser to the advertiser's website.
- 23 The functionality of the T-Online email service treats the insertion of the advertising messages in question into users' inboxes differently from ordinary emails: the advertising message, which appears in the form of an email, may be deleted from the list, but may not be archived, altered or forwarded, and it is not possible to reply to it. Finally, the advertising message is not counted amongst the total number of emails in the inbox, and nor does it take up storage space.
- 24 StWL considered that that advertising practice involving the use of email without the recipient's express prior consent was contrary to the rules of unfair competition in that it constituted an 'unacceptable nuisance' within the meaning of Paragraph 7(2)(3) of the UWG and that it was misleading, within the meaning of Paragraph 5a(6) of the UWG. On that basis, StWL commenced an action to desist against eprimo before the Landgericht Nürnberg-Fürth (Regional Court, Nuremberg-Fürth, Germany). That court upheld StWL's application and ordered eprimo, on pain of a fine, to cease disseminating, to final consumers, such advertising relating to the supply of electricity via the T-online.de email account.

- 25 On an appeal brought by eprimo before the Oberlandesgericht Nürnberg (Higher Regional Court, Nuremberg, Germany), that court considered that the contested placement of advertising in the T-Online private email inbox did not constitute an unlawful commercial practice under competition law.
- 26 In particular, according to that court, first, the defendant's advertising was not an unacceptable nuisance involving the use of 'electronic mail', within the meaning of Paragraph 7(2)(3) of the UWG since that advertising could not be regarded as an 'electronic mail', within the meaning of that provision. In any event, the advertising at issue did not entail, for the user of the T-Online email service, any charges or costs greater than the 'normal' nuisance occasioned by any advertising and did not therefore cause an 'unacceptable nuisance' within the meaning of the general provision contained in the first sentence of Paragraph 7(1) of the UWG, in particular having regard to the fact that the email service was provided free of charge.
- 27 Secondly, that court found that the advertising at issue was not unlawful under Paragraph 7(2)(4)(a) of the UWG, since it was not advertising in the form of messages. Paragraph 7(2)(1) of the UWG was also inapplicable, since it presupposes 'solicitation', in the sense of 'conduct inconveniencing' a consumer, which was lacking in the present case. Furthermore, the defendant's advertisements, which did not conceal the fact that they were advertisements, could not be considered to be unfair on the ground that they were misleading, within the meaning of Paragraph 5a(6) of the UWG.
- 28 Hearing an appeal on a point of law brought before it by StWL, the Bundesgerichtshof (Federal Court of Justice, Germany) considers that the success of the appeal depends on the interpretation of Article 2(d) and (h) and Article 13(1) of Directive 2002/58 and of Annex I, point 26, to Directive 2005/29.
- 29 According to the referring court, the conduct for which eprimo is criticised may be unlawful under Paragraph 7(2)(3) of the UWG, which transposes Article 13(1) of Directive 2002/58. It states that it is also possible that the advertising is unlawful under Paragraph 7(2)(1) of the UWG, which transposes point 26 of Annex I to Directive 2005/29.
- 30 In that regard, the referring court seeks clarification from the Court of Justice regarding the criteria governing the concept of 'electronic mail', within the meaning of Article 2(h) of Directive 2002/58 and the concept of 'use' of the latter for the purposes of direct marketing within the meaning of Article 13(1) thereof. In addition, the referring court asks the Court to specify the criteria for 'solicitation', within the meaning of point 26 of Annex I to Directive 2005/29.
- 31 In those circumstances, the Bundesgerichtshof (Federal Court of Justice) decided to stay the proceedings and refer the following questions to the Court of Justice for a preliminary ruling:
- '(1) Does the concept of "sending" within the meaning of Article 2(h) of Directive [2002/58] cover a situation in which a message is not transmitted by a user of an electronic communications service, via a service provider, to the electronic "address" of a second user, but, as a consequence of the opening of the password-protected internet page of an email account, is automatically displayed by ad servers in certain areas designated for that purpose in the email inbox of a randomly selected user (inbox advertising)?

- (2) Does the collection of a message within the meaning of Article 2(h) of Directive [2002/58] presuppose that, after becoming aware of the existence of a message, the recipient triggers the programmatically prescribed transmission of the message data by making an intentional collection request, or is it sufficient for the appearance of a message in an email account inbox to be triggered by the user opening the password-protected internet page of his or her e-mail account?
- (3) Does a message, which is not sent to an individual recipient already specifically identified prior to transmission but is inserted into the inbox of a randomly selected user, constitute an electronic mail within the meaning of Article 13(1) of Directive [2002/58]?
- (4) Is electronic mail used for the purposes of direct marketing, within the meaning of Article 13(1) of Directive [2002/58], only where the user is found to be the subject of a burden that is greater than a nuisance?
- (5) Does individual advertising meet the conditions governing the presence of “solicitation”, for the purposes of the first sentence of point 26 of Annex I to Directive [2005/29], only where a customer is contacted via a medium traditionally used for individual communication between a sender and a recipient, or is it sufficient if – as with the advertisement at issue in the present case – an individual connection is established by the fact that the advertisement is displayed in the inbox of a private email account, and thus in a section in which the customer expects to find messages addressed to him or her personally?

Consideration of the questions referred

The first to fourth questions

- 32 By its first to fourth questions, which it is appropriate to examine together, the referring court asks, in essence, first, whether Article 2(h) and Article 13(1) of Directive 2002/58 must be interpreted as meaning that the criteria governing the concept of ‘electronic mail’, within the meaning of those provisions, are met when an advertising message displayed following the opening of the internet page, which is protected by a password, corresponding to an email account, in certain spaces allocated for that purpose in the electronic inbox of a user selected at random; and, second, whether Article 13(1) of that directive must be interpreted as meaning that such an advertising activity falls within the concept of ‘use of ... electronic mail for the purposes of direct marketing’, within the meaning of that provision, which requires that the user of the email service concerned has given his or her prior consent to such activity, only if the user is found to be the subject of a burden that is greater than a nuisance.
- 33 In order to reply to those questions, it should be borne in mind that, under Article 1(1) thereof, Directive 2002/58 provides, inter alia, for the harmonisation of the national provisions required to ensure an equivalent level of protection of fundamental rights and freedoms, and in particular the right to privacy and confidentiality, with respect to the processing of personal data in the electronic communications sector.
- 34 As recital 40 thereof states, that directive intends safeguards to be provided for subscribers against intrusion of their privacy by unsolicited communications for direct marketing purposes in particular by means of automated calling machines, telefaxes, and emails, including SMS messages.

- 35 Article 2(d) of Directive 2002/58 lays down a broad definition of the concept of ‘communication’ that includes any information exchanged or conveyed between a finite number of parties by means of a publicly available electronic communications service.
- 36 In that regard, Article 13(1) of that directive, entitled ‘Unsolicited communications’ allows the use of various types of communication, namely automated calling machines without human intervention (automatic calling machines), facsimile machines, and emails, for the purposes of direct marketing, on the condition that they target subscribers or users who have given their prior consent.
- 37 In order to apply that provision, it is necessary therefore to ascertain, in the first place, whether the type of communication used for those direct marketing purposes is amongst those covered by that provision; in the second place, whether such a communication has the purpose of direct marketing; and, in the third place, whether the requirement to obtain prior consent from the user has been complied with.
- 38 As regards, in the first place, the means of electronic communication through which direct marketing is conducted, it should be noted, at the outset, as the Advocate General observed in point 53 of his Opinion, that the list of means of communication referred to in recital 40 and in Article 13(1) of that directive is not exhaustive.
- 39 First, Directive 2009/136, which amended Directive 2002/58, refers, in recital 67 thereof, to kinds of communication other than those mentioned in Directive 2002/58 when it states that the safeguards provided for subscribers against intrusion into their privacy by unsolicited communications for direct marketing purposes by means of electronic mail ‘should also be applicable to SMS, MMS and other kinds of similar applications’. Second, as specified in recital 4 of Directive 2002/58, the objective of providing an equal level of protection of personal data and privacy for users of publicly available electronic communications services must be ensured ‘regardless of the technologies used’, which confirms that it is necessary to adopt an interpretation that is broad, and evolving from a technological perspective, of the types of communication covered by that directive.
- 40 Having made those observations, it must be held that, in the present case, the advertising message at issue in the main proceedings was distributed to the persons concerned using a means of communication expressly referred to in Article 13(1) of Directive 2002/58, namely electronic mail.
- 41 In that regard, from the recipient’s point of view, the advertising message is displayed in the user’s email inbox, namely in a space normally reserved for private emails. The user is only able to free that space in order to obtain a view of all of his or her exclusively private emails after having checked the content of that advertising message, and only after having actively deleted it. If the user clicks on an advertising message, such as the one at issue in the main proceedings, he or she is redirected to an internet site containing the advertising in question, rather than continuing with the reading of his or her private emails.
- 42 Thus, by contrast with advertising banners or pop-up windows, which are displayed at the edges of, or separately from, the list of private messages, the appearance of the advertising messages at issue in the main proceedings within the list of the user’s private emails, impedes access to those emails in a manner similar to that used for unsolicited emails (also known as ‘spam’) to the extent that such a method requires the same decision to be taken by the subscriber concerning the processing of those messages.

- 43 Moreover, as the Advocate General observed in point 55 of his Opinion, since the advertising messages occupy lines in the inbox that are normally designated for private emails and because of their similarity to the latter, there is a likelihood of confusion between those two categories of messages that may cause a user who clicks on the line corresponding to the advertising message to be redirected unintentionally to a website offering the advertisement at issue instead of continuing to access his or her private emails.
- 44 And, as the Commission observed, if advertising entries of any kind are displayed in the inbox of an internet email account, namely in the section in which all of the emails addressed to the user are displayed, that email inbox must be regarded as constituting a means by which the advertising messages concerned are communicated to that user, which involves the use of his or her email for the purposes of direct marketing, within the meaning of Article 13(1) of Directive 2002/58. In other words, the defendant and the intervener in the main proceedings, and also the email service provider involved, use the existence of the list of private emails, taking into account the particular interest and trust of the subscriber with regard to that list, to place their direct advertising, giving it the appearance of a real email.
- 45 Proceeding in that manner constitutes a use of electronic mail, within the meaning of Article 13(1) of Directive 2002/58, likely to breach the objective, pursued by that provision, of protecting users from any intrusion into their private life by unsolicited communications for the purposes of direct marketing.
- 46 Accordingly, the question of whether advertising messages such as those at issue in the main proceedings themselves fulfil the criteria to be classified as ‘electronic mail’, within the meaning of Article 2(h) of that directive, becomes superfluous in so far as those messages are communicated to the users concerned by means of their email inbox and thus their electronic mail.
- 47 As regards, in the second place, the question of whether communications covered by Article 13(1) of that directive are made for the purpose of direct marketing, it must be ascertained whether such a communication pursues a commercial purpose and is addressed directly and individually to a consumer.
- 48 In the present case, the very nature of the advertising messages at issue in the main proceedings, which promote services, and the fact that they are distributed in the form of an email such that they are directly displayed in the inbox of the private email service of the user concerned, allows those messages to be classified as communications for the purposes of direct marketing, within the meaning of Article 13(1) of Directive 2002/58.
- 49 The fact that the recipient of those advertising messages is chosen at random, which is raised as part of the third question posed by the referring court, cannot call that conclusion into question.
- 50 In that regard, it suffices to observe, as the Advocate General has done in point 61 of his Opinion, that the random or predefined selection of the recipient is not one of the conditions for the application of Article 13(1) of Directive 2002/58. In other words, it is irrelevant whether the advertising at issue is addressed to a predetermined and individually identified recipient or is sent on a mass, random basis to multiple recipients. What matters is that there is a communication for a commercial purpose, which reaches, directly and individually, one or more email service users by being inserted in the inboxes of those users’ email accounts.

- 51 The recipients of such advertising messages are individual, inter alia, in their capacity as users of a provider's individual email service in so far as the user obtains access to his or her inbox only after having entered his or her registration data and password. Consequently, the display occurs following that authentication procedure by the user in a private space reserved to him or her and which is intended for the consultation of private content, in the form of emails.
- 52 In the third place, as regards specifically the requirement to obtain prior consent, laid down in Article 13(1) of Directive 2002/58, it must be recalled that a communication which falls within the field of application of that provision is allowed, on condition that its recipient has given prior consent.
- 53 In that respect, it is clear from Article 2(f) of Directive 2002/58, read in conjunction with Article 94(2) of Regulation 2016/679, that such consent must meet the requirements under Article 2(h) of Directive 95/46 or Article 4(11) of that regulation, depending on which of those two rules is applicable *ratione temporis* to the facts at issue in the main proceedings.
- 54 Article 2(h) of Directive 95/46, defines the term 'consent' as meaning 'any freely given specific and informed indication of his [or her] wishes by which the data subject signifies his [or her] agreement to personal data relating to him [or her] being processed'.
- 55 That same requirement also applies in the context of Regulation 2016/679. Indeed, Article 4(11) of that regulation defines the 'consent of the data subject' as meaning that it requires a 'freely given, specific, informed and unambiguous' indication of the data subject's wishes in the form of a statement or by 'a clear affirmative action' signifying agreement to the processing of personal data relating to him or her.
- 56 In the case of an action to bring about the end of an illicit commercial practice, such as the case at issue in the main proceedings, it is not inconceivable that, as the Advocate General observed in point 50 of his Opinion, supposing the proceedings brought by StWL seek an order that eprimo refrain from future action, Regulation 2016/679 would be applicable *ratione temporis* to the dispute in the main proceedings although the facts giving rise to that dispute occurred prior to 25 May 2018, the date on which that regulation became applicable, since Directive 95/46 was repealed with effect from that date.
- 57 It follows from the foregoing that such consent must be indicated, at least, in a manifestation of a free, specific and informed wish on the part of the person concerned ('the data subject').
- 58 In the present case, it is clear from the case file submitted to the Court that, during the registration process for the email address at issue in the main proceedings, the T-Online email service is offered to users in the form of two categories of email services, namely, first, a free email service funded by advertising and, second, a paid-for email service, without advertising. Thus, users who choose the free service, as in the case in the main proceedings, accept that they will receive advertisements in order not to pay any consideration in exchange for the use of that email service.
- 59 In that regard, it is however for the referring court to determine whether the user concerned, having opted for the free T-Online email service, was duly informed of precise means of distribution of such advertising and in fact consented to receiving advertising messages such as those at issue in the main proceedings. In particular, it is necessary for that court to be satisfied, first, that that user was clearly and precisely informed in particular of the fact that advertising messages are displayed within the list of private emails received and, second, that he or she

specifically and on a fully informed basis, indicated his or her consent to receive such advertising messages (see, to that effect, judgment of 11 November 2020, *Orange Romania*, C-61/19, EU:C:2020:901, paragraph 52).

- 60 Finally, in response to the fourth question by which the referring court asks whether, in order for advertising such as that at issue in the main proceedings to be classified as ‘use of ... electronic mail for the purposes of direct marketing’, within the meaning of Article 13(1) of Directive 2002/58, it is necessary to find that the burden to which the user is subject is greater than a nuisance, it must be held that the directive does not require such a test to be met.
- 61 As the Advocate General observed in point 62 of his Opinion, it is clear from recital 40 of that directive that the requirement to obtain prior consent laid down in that provision stems, in particular, from the fact that unsolicited communications for direct marketing purposes may ‘impose a burden and/or cost on the recipient’. Since such communications fall within the scope of Article 13(1) of Directive 2002/58, it is not therefore necessary to ascertain whether the resulting burden for the recipient is greater than a nuisance.
- 62 In the present case, it is moreover common ground that advertising activity such as that at issue in the main proceedings does indeed impose a burden on the user concerned to the extent that, as has been observed in paragraph 42 of this judgment, the appearance of advertising messages within the list of the user’s private emails in a manner similar to that used for unsolicited emails (spam), requires the same decisions to be taken by the subscriber as regards the processing of those messages.
- 63 Having regard to all the foregoing considerations, the answer to the first to fourth questions is that Article 13(1) of Directive 2002/58 must be interpreted as meaning that the display, in the inbox of an electronic mail service user, of advertising messages in a form similar to that of real emails, and placed in the same position as those emails, without the fact that recipients are randomly determined or an assessment of the level of intensity and burden imposed on that user being relevant in that regard, constitutes ‘use of ... electronic mail for the purposes of direct marketing’, such use being allowed only on the condition that the user was clearly and specifically informed of the distribution methods of such advertising, including within the list of private emails received, and indicated his or her specific and fully informed consent to receive such messages.

The fifth question

- 64 By its fifth question, the referring court asks, in essence, whether Annex I, point 26, to Directive 2005/29 must be interpreted as meaning that an activity consisting of the display in the inbox of an email service user of advertising messages in a form similar to that of real emails, and placed in the same position as those emails, falls within the concept of ‘persistent and unwanted solicitations’ of users of email services, within the meaning of that provision.
- 65 Article 5 of that directive prohibits, in paragraph 1 thereof, unfair commercial practices and lays down, in paragraph 2, the criteria for determining whether a commercial practice is unfair.
- 66 Article 5(4) of that directive provides, in particular, that commercial practices which are ‘misleading’, within the meaning of Articles 6 and 7 of Directive 2005/29, and those which are ‘aggressive’ within the meaning of Articles 8 and 9 of that directive, are unfair.

- 67 In that regard, it should be recalled that Directive 2005/29 carries out a complete harmonisation at EU level of the rules relating to unfair commercial practices of undertakings vis-à-vis consumers and establishes, in Annex I thereto, an exhaustive list of 31 commercial practices which, in accordance with Article 5(5) of that directive, are regarded as unfair ‘in all circumstances’. Consequently, as recital 17 of that directive expressly states, these commercial practices alone can be deemed to be unfair in themselves without a case-by-case assessment pursuant to the provisions of Articles 5 to 9 of that directive (judgment of 2 September 2021, *Peek & Cloppenburg*, C-371/20, EU:C:2021:674, paragraph 34 and the case-law cited).
- 68 Thus, pursuant to Annex I, point 26, to Directive 2005/29, ‘commercial practices which shall be regarded as unfair in all circumstances’ covers, as an aggressive commercial practice, a professional ‘making persistent and unwanted solicitations by telephone, fax, email or other remote media except in circumstances and to the extent justified under national law to enforce a contractual obligation’.
- 69 As has been observed in paragraphs 48, 50 and 51 of this judgment, an advertising message, such as that at issue in the main proceedings, must be regarded as addressing the user concerned directly and individually to the extent that, since it is distributed in the form of an email, it appears directly within the inbox of the private email of the user concerned, within a private space protected by a password, which is reserved to that user and where he or she expects to receive only messages addressed to him or her individually.
- 70 For that reason, as the Advocate General observed in point 71 of his Opinion, the effect of that message is therefore similar to that of individual direct marketing, whether or not the advertiser has singled out that specific recipient during the technical preparation of the message in question and whether or not that message is processed differently from emails in terms of storage space and functionalities connected with the processing of a real electronic mail.
- 71 In those circumstances, it must be held that such an advertising message constitutes a ‘solicitation’ of email service users, within the meaning of Annex I, point 26, to Directive 2005/29.
- 72 That being so, it is necessary next to ascertain whether such a solicitation is ‘persistent and unwanted’ such that it must be prohibited in all circumstances under that provision.
- 73 In that regard, it is necessary to observe, first, that, as recalled in paragraph 21 of this judgment, the users concerned received advertising messages in their private email inboxes on three occasions, namely 12 December 2016, 13 January 2017 and 15 January 2017 respectively. In those circumstances, such a solicitation, taking into account also its frequency within a limited period of time, must be regarded as being ‘persistent’ within the meaning of Annex I, point 26, to Directive 2005/29, as the referring court found.
- 74 Second, as regards whether such an advertising activity is ‘unwanted’, within the meaning of the same point 26, it is necessary to ascertain whether the display of an advertising message such as that at issue in the main proceedings meets that condition having regard to whether or not consent was given by that user prior to that display and whether that user expressed any opposition to such an advertising practice. Such opposition is furthermore established in the case in the main proceedings, as the referring court found.

- 75 Having regard to all the foregoing considerations, the answer to the fifth question is that Annex I, point 26, to Directive 2005/29 must be interpreted as meaning that an activity consisting of the display in the inbox of an email service user of advertising messages in a form similar to that of real emails, and placed in the same position as those emails, falls within the concept of ‘persistent and unwanted solicitations’ of users of email services, within the meaning of that provision, if the display of those advertising messages is, first, sufficiently frequent and regular to be classified as ‘persistent solicitations’ and, second, may be classified as ‘unwanted solicitations’ in the absence of consent having been given by that user prior to that display.

Costs

- 76 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Third Chamber) hereby rules:

- 1. Article 13(1) of Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications), as amended by Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009, must be interpreted as meaning that the display, in the inbox of an electronic mail service user, of advertising messages in a form similar to that of real emails, and placed in the same position as those emails, without the fact that recipients are randomly determined or an assessment of the level of intensity and burden imposed on that user being relevant in that regard, constitutes ‘use of ... electronic mail for the purposes of direct marketing’, which is permitted only on the condition that the user was clearly and specifically informed of the distribution methods of such advertising, including within the list of private emails received, and the user indicated specific and fully informed consent to receive such messages.**
- 2. Annex I, point 26, to Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council (‘Unfair Commercial Practices Directive’), must be interpreted as meaning that an activity consisting of the display in the inbox of an email service user of advertising messages in a form similar to that of real emails, and placed in the same position as those emails, falls within the concept of ‘persistent and unwanted solicitations’ of users of email services, within the meaning of that provision, if the display of those advertising messages is, first, sufficiently frequent and regular to be classified as ‘persistent solicitations’ and, second, may be classified as ‘unwanted solicitations’ in the absence of consent having been given by that user prior to that display.**

[Signatures]