Statement
by the [VDAV] – Verband Deutscher Auskunfts- und Verzeichnismedien e.V.
on the Draft of Directive 2002/58/EC – Directive on Privacy and Electronic Communications

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[vdav] – Verband Deutscher Auskunfts- und Verzeichnismedien e.V.
Mitglied im ZAW, SIINDA

Postfach 20 27, D-47861 Willich
Geschäftsstelle
Jakob-Krebs-Str. 126 a, D-47877 Willich

Tel. +49 2156.774 385-6
Fax +49 2156.774 385-5

Mail info@vdav.org
URL www.vdav.org

Commerzbank AG Düsseldorf
Konto 1 700 277 IBAN DE67 3004 0000 0170 0277 00
BLZ 300 400 00 BIC COBADEFFXXX

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I. Introducing the [VDAV] Verband Deutscher Auskunfts- und Verzeichnismedien e.V.

The [VDAV] Verband Deutscher Auskunfts- und Verzeichnismedien e.V. (Association of German Information and Directory Media) is the industry association of which companies and publishers operating in Germany are members, whose products and offers in all media areas are based on the publication of systematically organised data. These companies primarily include the providers of telecommunication directories, B2B information, city address directories and similar products.

For example, our member companies – currently numbering around 150 – provide Das Telefonbuch, Das Örtliche and Gelbe Seiten, in conjunction with DeTeMedien, Deutsche Telekom Medien GmbH, gewusst-wo, billiger.de and many other directory media as print, online and mobile offerings.

Directory media are an integral part of everyday life for people in Germany; according to the latest IPSOS study from November 2016, almost 94% of people aged over 14 years use these local search providers to find and contact service providers, suppliers, doctors and other freelance professionals as well as private individuals.

Moreover, over 70% of Germans search for the contact addresses of private individuals and over 80% for business contacts. Approximately 2,800 million searches are performed every year using Das Örtliche and Das Telefonbuch alone; this equates to around eight million searches per day through only these two offerings.

The use of directory media is free for the user and print products are also provided at no charge. The directories are financed by means of ads placed by commercial advertisers. Advertising revenue through what are known as 'white pages' (media with private entries sorted alphabetically by name) amounts to roughly € 500 million per year in Germany.

Over 100, typically medium-sized and often family-run media companies issue the branded products Das Telefonbuch, Das Örtliche and Gelbe Seiten in Germany. Additional providers have also emerged since the liberalisation of the market around 15 years ago, who produce communication directories under other titles. The companies affiliated with the [VDAV] directly and indirectly secure about 30,000 jobs in Germany. They represent essential and indispensable drivers of a healthy market economy and strive to be able to provide the most comprehensiveness possible, taking into account any necessary protection mechanisms for the listed contacts.

II. Current procedure and legal foundation

How are telephone book entries made today?

(to be equated with entries in an online or mobile directory and telephone information services)

The legal foundations in the EU and Germany today:

EU:

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)

Article 12

Directories of subscribers

1. Member States shall ensure that subscribers are informed, free of charge and before they are included in the directory, about the purpose(s) of a printed or electronic directory of subscribers available to the public or obtainable through directory enquiry services, in which their personal data can be included and of any further usage possibilities based on search functions embedded in electronic versions of the directory.
2. Member States shall ensure that subscribers are given the opportunity to determine whether their personal data are included in a public directory, and if so, which, to the extent that such data are relevant for the purpose of the directory as determined by the provider of the directory, and to verify, correct or withdraw such data. Not being included in a public subscriber directory, verifying, correcting or withdrawing personal data from it shall be free of charge.
3. Member States may require that for any purpose of a public directory other than the search of contact details of persons on the basis of their name and, where necessary, a minimum of other identifiers, additional consent be asked of the subscribers.
4. Paragraphs 1 and 2 shall apply to subscribers who are natural persons. Member States shall also ensure, in the framework of Community law and applicable national legislation, that the legitimate interests of subscribers other than natural persons with regard to their entry in public directories are sufficiently protected.

Germany:

In Germany, entry in a subscriber directory is subject to Articles 45m, 47 and 104 of the German Telecommunications Act (TKG) and occurs at the request of the subscriber to their provider.

Article 45m states: **the subscriber may request at any time from their provider of a public telephone service to be entered with their telephone number, surname, first name and address into a publicly accessible subscriber directory, which may not necessarily be the provider's own proprietary directory, free of charge.**

Article 104 governs the terms, stipulating that: subscribers may be entered into public, printed or electronic directories with their name, address and additional information including occupation, industry and nature of the entry, **insofar as they request their inclusion in such directories**.

Article 47 TKG stipulates that any company that performs telecommunications services and allocates telephone numbers must provide any other company with subscriber data pursuant to Article 104 TKG for the purpose of providing publicly accessible information services and subscriber directories.

The procedure currently occurs as follows:

The end user enters into a contract for a landline or mobile network connection in their capacity as a private individual, trader, freelancer or representative of a company.

This may take place, for example:

- in person in a shop at the point of sale (PoS);
- via starter packages purchased at a discount store, for example, completing and submitting the forms contained therein;
- online on the respective web pages of the provider.

In all alternatives, the end user is to be informed that they have the option **to request a subscriber entry**. In order to be found in a directory or information service, such request is absolutely necessary as mandatory entry in Germany was replaced by the request requirement in 1996.

In practice, however, this information is not regularly provided. At the PoS, the end user is typically informed of the option to request a subscriber entry only on rare occasions; the default setting in the entry form is often therefore 'customer does not want an entry'. In other cases, these forms are not acknowledged or are difficult to discern in a 'pile' of required documents and forms. In many cases, the end user also assumes that it is not necessary to request an entry, since they are used to having had 'automatic' entries in the past.

If a request for entry is submitted, the subscriber record is added to the subscriber database of their carrier or provider.

According to Article 47 TKG, every provider is obligated to provide subscriber records for information and directory services. In order to facilitate this, Deutsche Telekom AG also hosts all subscriber records provided by all other providers (i.e. also its direct competitors); this practice has proved to be effective for many years.

Providers of information and directory services are able to purchase this complete directory or parts thereof from the DTAG at fair and non-discriminatory rates – monitored by the Federal Network Agency – in order to perform their own information services, publish a telephone book for a certain region or city, or offer an online directory.

The subscriber data may only be used for this purpose exclusively and may not be sold or used for marketing purposes.

III. General statement on the draft directive:

Particularly with Article 15 and the explanations in No. 30 and 31, the draft of Directive 2002/58/EC dated 10th January 2017 defines essential framework conditions for our industry.

We naturally welcome the efforts of the EU Commission to safeguard the protection of personal data in electronic communication, improve areas that still exhibit deficiencies and prevent the misuse of personal data.

However, the formulations of Article 15 in the draft misjudge essential foundations of processes and business models for operators of information and directory services.

The proposed formulation of Article 15 entails problems which would render the further publication of 'white pages' (i.e. directories in all medial forms containing the communication data of private individuals

sorted by name in alphabetical order) and information services with private communication data practically impossible in the future.

The implementation of Article 15 in its current draft version would accordingly have the effect that:

- **the publication of directories or the provision of information with private communication data would no longer be possible;**
- **over 60% of the directory market in Germany would collapse;**
- **around 80% of typically medium-sized and often family-run directory providers in Germany would be bereft of their business;**
- **several tens of thousands of jobs at the providers themselves and their service providers, such as IT firms, printers and paper suppliers, would be wiped out;**
- **citizens would be denied access to absolutely essential communication media without compelling reason precisely in times of a modern communication and information society, and;**
- **competition would be severely restricted in this market segment, if not wholly eliminated in favour of providers like WhatsApp.**

Article 15 in its current version requires fundamental revision because:

- it not only impairs fair and non-discriminatory competition in favour of communication service operators, it even prevents this de facto;
- it places virtually insurmountable barriers to the market entry of new competitors or new business models;
- it fails to relieve processes of bureaucracy and, instead, creates new bureaucratic hurdles including for end users;
- it demands processes that cannot already be realised due to data protection reasons;
- it misjudges the data protection needs of those concerned.

This cannot and should not be in the interest of European legislature.

On the contrary – the unequal treatment carried out in recent years compared to new communication services like WhatsApp, Skype, Facebook or similar offerings has considerably encumbered companies in our industry; this has to stop. All providers must be treated equally with respect to access to communication data. In this respect, however, Article 15 is currently unsuitable in its current version.

> **In this connection, we explicitly welcome expansion to the application of the draft directive to OTTs such as Skype, WhatsApp, etc., which have largely replaced conventional communication services due to their frequency of use particularly among younger users.**

Viewed in the overall context, the provisions of the directive must ensure that the communication possibilities regarding information and directory services are regulated identically for all providers of electronic communication services.

To date, conventional European providers are restricted and encumbered without compelling reason, while new providers like WhatsApp or Skype are not subject to any restrictive framework conditions or even obligations whatsoever.

A service like **WhatsApp**, which has no registered address or personnel in Europe, may already have access to almost **100% of mobile telephone numbers used in Germany** due to the uncritical acceptance of its terms of business by end users. A large portion of those concerned may not have even noticed this because their data have been transmitted as they are listed in a third party's internal telephone book.

Their data have been sent to Facebook via WhatsApp in this way, although those concerned have never agreed to this transmission, nor do they possess a right to object.

Indeed, in **German directory and information services, only around 5%** of these communication data have been requested to be included in information and directory services by their actual users; this is **a flagrant discrepancy that cannot be tolerated any longer**.

> **In any case, the OTTs must be treated equally in all respects with conventional providers of telecommunication services.**

The example of WhatsApp especially – with around 35 to 40 million estimated users in Germany who have practically uncritically accepted their terms of business – also shows that **there is much less need for data protection** in favour of consumers than politicians and legislators claim.

> **Network and provider-neutral, free-to-use directory services as well as barrier-free and network-independent communication options for the greatest possible number of communication partners guarantee a modern, open communication and information society, and are hence absolutely essential.**

It cannot and should not be in the interest of legislature to create framework conditions for the future, which promote communication within closed and fee-based networks such as Xing or LinkedIn, prevent directory services which are not offered by the providers of electronic communication services themselves and restrict free competition and hence information and directory media as easy-to-use and barrier-free communication services without compelling reason.

To ensure equal conditions for all players the right to be forgotten according to the DSGVO should apply for directory publishers and information providers regarding the data of endusers too. A special data protection regulation is not necessary.

IV. Detailed statement:

1. An interface does not exist between 'operators of publicly accessible directories' and end users. Article 15 in the draft version states:

„The providers of publicly available directories shall obtain the consent of end-users who are natural persons to include their personal data in the directory and, consequently, shall obtain consent from these end-users for inclusion of data per category of personal data, to the extent that such data are relevant for the purpose of the directory as determined by the provider of the directory. Providers shall give end-users who are natural persons the means to verify, correct and delete such data."

Article 15 thereby specifies for the first time that the 'providers of publicly available directories' (i.e. ultimately the companies affiliated with the [VDAV]) shall obtain the consent of endusers who are natural persons listed in the directories and inform them of further details related to the entry.

In Germany, the publication of contact data in telecommunications has already been subject to the **request** of the subscriber for around two decades (see above Article 104 TKG).

This request is submitted upon concluding a contract with a carrier or provider at the point of sale (i.e. in the provider's shop) or, in the case of concluding a contract online, via corresponding forms attached to the contract documents.

The directory providers in Germany – but the situation is identical in many other EU member states – have no contact whatsoever with subscribers (definition pursuant to the previous version of Article 12) or endusers, and they are not even permitted to contact them due to data protection provisions already in effect.

Likewise, end users who, for whatever reason, have not been informed about their entry options or have not acknowledged this possibility, cannot be identified by directory providers; it is already practically impossible to contact them.

Providers of directory services are accordingly unable to comply with the obligations set down in Article 15 of the draft.

The system proven for decades, wherein communication data are recorded by the providers of electronic communication services, must therefore be maintained.

2. The requirement of 'consent' from the end user

The personal data that are to be handled according to Article 15 concern names and communication addresses, which are absolutely necessary in order to maintain as broad, barrier-free and network-independent communication as possible.

Moreover, these data may only be used for directory and information purposes. Any use of the data beyond these aforementioned purposes, such as direct marketing, is not permitted. Directory and information services merely concern the publication or use of data for enabling communication.

In this respect, it is inconceivable why the explicit consent of the end user should be required. Indeed, in the vast majority of member states, end users have hitherto been granted a basic right to object against the publication of their data, which likewise completely satisfies end users' need for data protection.

Experience with the request requirement pursuant to Article 104 TKG in Germany has clearly shown that the application of a request or consent regulation for the publication of communication data is not expected by those concerned due to their own perceived limited need for data protection.

In many cases, the negative consequences of unsubmitted consent due to lack of awareness of the regulation and its implications are only realised after several months; at which point, the damage can scarcely be undone.

In practice, this means that not an insignificant number of customers only notice that they can no longer be found using an information or directory service weeks after entering into a contract or amending a contract. Many are not informed about the need to provide consent at the point of sale; they fail to understand the regulation itself or its implications, or they associate it with other encumbrances (such as direct marketing, spam, etc.), although they still actually want to be found.

Based on our 20 years of experience, we therefore expressly deny that explicit consent or even a request on the part of the end user is really necessary for directory entries.

We believe a clear and straightforward 'NO' in this respect is also considered completely sufficient by the majority of end users and takes adequate account of the need for protection – as demonstrated in particular by the predominantly uncritical use of services like WhatsApp etc.

There is **another problem** in relation to the opt-in system and the information obligations on the part of directory service providers:

3. The greater, rather than reduced degree of bureaucratisation

Due to the pronounced competitive situation in Germany, there are at least two nationwide (print) directories with the communication data of natural persons that are offered by various directory providers, and additional such directories can also be found within certain regions. There are likewise more online and mobile offerings. Simply for the operation of telephone information services, the Federal Network Agency has allocated corresponding telephone numbers to around 50 companies, which themselves would be required to obtain such consent – with the exception of the few proprietary information services provided by carriers.

If every single one of these providers had to obtain their own opt-in consent and inform end users accordingly, **this would result in several dozen directory and information providers having to retrieve the consent of each and every subscriber**.

Even if just two different providers had to obtain consent, end users would feel unduly inconvenienced. As a possible consequence, they might therefore take a critical or negative view of such services and deny their consent or opt-in for these rather irrelevant reasons.

> **The regulation formulated in the draft is also therefore impractical for this reason and would unduly restrict fair competition as well as market entry for new players or offerings without fulfilling any compelling need.**

4. Definition of natural and legal persons

Although our proposed general opt-out solution does not strictly necessitate a distinction between natural and legal persons as stipulated in Article 15, a number of brief explanations are included below as it is imperative to precisely define the terminology before proceeding in greater detail.

In Germany, according to surveys by the German Institute for Economic Research (DIW), there were more than two million independent self-employed people at the end of 2014 and approximately a further 1.7 million self-employed people with employees. According to a publication by the industry association Bitkom in 2014, there were around 4.9 million people in employment who operated in an independent, freelance capacity.

These groups of freelance people typically depend on potential customers being able to contact them. Generally, they do not have separate communication channels for private and commercial contacts; instead, they only use a single interface. In the event these freelancers were to fall under the definition of 'natural persons', an opt-in system would make it unduly difficult for them to be listed in directories – which is necessarily in their own interest for the most part.

> **We therefore advocate that the term 'legal persons' also be expanded to encompass natural persons such as freelancers and small traders and that these persons are likewise granted a right to object against the publication of their communication data as soon as they develop commercial activities of any kind.**

5. Competition is restricted or eliminated and an unduly high barrier to market entry is placed for potential new players.

In the event Article 15 were to be implemented as proposed, this would result in a contract being concluded at the point of sale of an operator of electronic communication services and the end user being allocated a telephone number or user identification. This telephone number and other personal details, such as name and address, would be stored by the provider in accordance with their terms of

business and released for use in the operator's own information and directory service by means of a simple signature.

Provision or release for other services not provided by the operator would not be able to be requested nor granted.

> **Competition in information and directory services would no longer be possible as only the direct contract partner of end users would hold their data and have the relevant approval for publication. There is no stipulated obligation to forward the same to other providers.**

The communications provider itself has the option to retrieve an opt-in from its customer 'P' for the approval of use of their data record by other directory services, for instance by amending its terms of business.

> **The provider could unilaterally set the price for such 'external use' without taking into account the 'fairness' and 'non-discrimination' aspects previously necessary, thereby eliminating, diminishing and controlling the competition.**

Every single information and directory service not provided by the operator itself, which also seeks to publish this subscriber record (this may concern **several dozen different providers** due to the competitive situation surrounding directory and information services), would have to collect the data of P again and obtain their 'own' opt-in from P. However, written or telephone contact with the end user is already prohibited for these services due to reasons relating to data protection. In practice, this would result in multiple information services at every point of sale, each vying for the subscriber data of end users and their opt-in for use in their own service; this is absurd and detached from any sense of reality.

Likewise, the same would of course apply in the event the end user sought to revoke their consent or change their entry. In this case, they would have to communicate this wish to all directory and information services in possession of their data – **an additional, practically insurmountable bureaucratic hurdle**.

This cannot and should not be in the interest of legislature.

6. Amendment regarding user-entry tools

A number of operators of directory services offer user-entry tools, such as "Mein Telefonbuch", due to the shortcomings of the request system outlined above. These tools give end users the ability to easily submit their own entries. Needless to say, data provided directly by end users in this way should not be affected by the provisions of Article 15. The same applies to data that come from publicly accessible sources.

We therefore recommend the amendment of Article 15 with Paragraph 5:

> *(5) This regulation shall not apply to data and information published in other publicly accessible sources, nor to data which are provided by end users themselves.*

Article 15 should be extensively redrafted for the reasons stated above.