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Making the Market Work: Enhancing Consumer Sovereignty Through the Telemarketing Sales Rule and the Distance Selling Directive

ABSTRACT. This article analyzes the provisions of the Telemarketing Sales Rule, which the Federal Trade Commission promulgated in 1995 pursuant to the 1994 Telemarketing and Consumer Fraud and Abuse Prevention Act. The author proposes a framework through which the Rule may be understood as embodying a regulatory strategy of controlling abusive telemarketing by enhancing the effectiveness of market forces. In particular, the Rule works by improving the quantity and quality of information flowing to consumers, preventing the occurrence of transactions that the consumer does not truly intend, preventing telemarketers from evading the effects of market forces governing availability of payment mechanisms, and enhancing the effectiveness of the contract regime.

The article then applies the same framework to the 1997 Distance Selling Directive of the European Union, yielding several recommendations that EU member countries may find useful when transposing the Directive into national law. The author also discusses some of the special considerations that EU member countries should take account of when transposing the Directive's requirements in the context of electronic commerce.

During the past two decades, telemarketing in the United States has grown from a niche marketing technique into an enormous industry.[1] Telemarketing excites great passion from the various sectors of society that are affected by it. For businesses, particularly start-ups and others that are trying to break into a market, telemarketing is a salvation. Using telemarketing, a business that operates from a single location can reach large numbers of potential customers who are geographically widely dispersed, and can do so relatively cheaply and easily. Many consumers regard telemarketing calls as a daily annoyance that interrupts them during the dinner hour and drags them from the shower only to receive unwanted solicitations.[2] The darker side of telemarketing, which has been characterized as a "scourge,"[3] is its use as a tool of deception, to defraud consumers, in particular the elderly, of billions of dollars each year.[4]

To control the abuses of telemarketing, in 1994 the U.S. Congress

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enacted the Telemarketing and Consumer Fraud and Abuse Prevention Act. The Act directs the U.S. Federal Trade Commission ("FTC") to prescribe regulations prohibiting deceptive and abusive telemarketing acts and practices. The FTC's regulation, known as the Telemarketing Sales Rule ("TSR" or "the Rule"), accomplishes this through an approach that emphasizes empowerment of consumers, enabling them to register their preferences in the marketplace.

In 1997, the European Union finalized its Directive on Distance Selling, which requires EU member states to enact laws that protect consumers against abusive distance selling techniques. The Directive, whose scope includes telemarketing, makes use of many of the same strategies that are employed by the Telemarketing Sales Rule.

This article analyzes the provisions of the Telemarketing Sales Rule, and proposes a framework through which the Rule may be understood as embodying a regulatory strategy of controlling abusive telemarketing by enhancing the effectiveness of market forces. The article then applies the same framework to the Distance Selling Directive, yielding several recommendations that EU member countries may find useful when transposing the Directive into national law.

CONTEXT OF THE TELEMARKETING AND CONSUMER FRAUD AND ABUSE PREVENTION ACT

Efforts by U.S. authorities to control the excesses of telemarketing have resulted in a multi-faceted regulatory scheme, involving federal law, state law, and self-regulation. In addition, the burgeoning international dimension of telemarketing fraud has given impetus to efforts to coordinate enforcement across the U.S.-Canada border (Schneider, 1997, p. A21).[5] The primary elements of the regulatory scheme are as follows.

Federal Law

The general consumer protection provisions of the Federal Trade Commission Act, forbidding unfair and deceptive trade practices,[6] are applicable to deceptive telemarketing. The FTC has brought numerous actions against telemarketers for deceptive conduct relating to investment schemes, health care products, real estate sales, travel and vacation packages, prize promotions, special purchasing opportunities, pay-per-call (audiotext) services, water purifiers, financial services, office supplies, rental car reservations, and charitable solicitations (Rosden & Rosden, 1997, § 58.04 at 58-12 to 58-17).

The Telephone Consumer Protection Act[7] restricts the use of automatic telephone dialing devices to deliver pre-recorded commercial messages to residential telephones.[8] The Act's implementing regulations[9] additionally impose time-of-day calling restrictions, require telemarketers to maintain and honor a do-not-call list of consumers who request not to receive calls, and require telephone solicitors to make certain disclosures to the called party.

The FTC's 900 Number Rule,[10] promulgated pursuant to the Telephone Disclosure and Dispute Resolution Act,[11] regulates the use of pay-per-call numbers. The Rule calls for certain disclosures to be made in advertisements for pay-per-call services, in the introductory portion of the calls themselves, and in the billing statement. It also prescribes a procedure for resolving billing disputes.

The FTC's Mail Order Rule[12] addresses the time within which goods ordered by telephone or mail must be shipped, and requires notice to the consumer if the goods cannot be shipped on time.

The U.S. Postal Service has jurisdiction over fraudulent activities that involve the U.S. mail. If the Postal Service finds that a person is obtaining money or property through the mail by means of false representations, it may either stop delivering mail responsive to the scheme or it may issue a cease and desist order.[13] Since fraudulent telemarketing frequently involves payment of money or sending of materials by mail, this statutory provision will often apply.

State Law

A number of states also have laws prohibiting or regulating the use of automatic telephone dialing devices ("ATDD's").[14] In fact, the federal Telephone Consumer Protection Act came about partly in response to lobbying by the states, which were unable to regulate interstate calls.[15] These statutes commonly forbid the use of ATDD's for commercial solicitations,[16] prescribe limited time periods during which they may be used,[17] or require that they be used only with the consent of the called party.[18] Although some state ATDD laws have been found in violation of state or federal constitutional free speech guarantees on grounds of impermissible content discrimination,[19] other statutes have withstood constitutional challenge.[20]

Another type of state law requires telemarketers to register with the state before doing business from a location in the state, or with citizens of the state, and may require the telemarketer to post a bond that may be used to redress consumers injured by the telemarketer's fraudulent conduct.[21] Other states prohibit telemarketing calls outside a particular time period, or prohibit calling patterns that impair the recipient's ability to use his telephone (Nadel, 1986, p. 106). Still other state laws prohibit telephone solicitation of pre-need funeral services.[22] Several state laws prohibiting the use of paid telemarketers to solicit charitable contributions have been found in violation of the free-speech guarantee of the First Amendment to the U.S. Constitution.[23]

Self-Regulation

The major telemarketing trade associations have established two types of self-regulatory mechanisms. The first is issuance of industry codes of conduct. The American Telemarketing Association's *Code of Ethics*,[24] the U.S. Direct Marketing Association's *Guidelines for Marketing by Telephone*,[25] and the International Chamber of Commerce's *International Code of Direct Marketing*[26] are examples of such voluntary codes. The second is an opt-out list maintained by the U.S. Direct Marketing Association ("DMA"), known as the Telephone Preference Service. With this system, consumers may contact the DMA and request to be placed on a list of those who do not wish to receive telemarketing calls. The DMA makes the list available to its membership.[27]

The International Dimension

In recent years fraudulent cross-border telemarketing between Canada and the U.S. has become a major problem. According to complaint data collected by the FTC, during the past few years companies located in three Canadian provinces have been among the top ten sources of telemarketing complaints from U.S. consumers.[28]

One technique that has become popular with professional perpetrators of consumer fraud is to set up operations in one country, but to target only residents of the other. They hope that by doing so they will avoid being subject to law enforcement efforts, as authorities in the country in which they are located will perceive little interest in expending resources to protect foreign consumers, and authorities in the country where the victims are located will face practical difficulties in taking action against a seller located outside the country (Schneider, 1997, p. A22). In some cases, the laws are inadequate to respond to this problem.[29] A U.S.-Canada working group set up to study the problem of cross-border telemarketing fraud found that cross-border targeting raises several obstacles to effective law enforcement: the geographic dispersal of victims makes it difficult to identify the extent of a fraudulent telemarketing operation, and hinders investigation by raising costs of travel and creating logistical difficulties; effective law enforcement action requires cooperation among two or more law enforcement agencies in different jurisdictions; the requirement that witnesses travel to a different jurisdiction may make it difficult to present evidence at trial; applying remedies such as terminating a telemarketer's telephone service becomes more complicated when two jurisdictions are involved; and the need to extradite defendants creates procedural hurdles and delays.[30]

The Federal Trade Commission has brought several enforcement actions against telemarketers based in Canada who target U.S. consumers,[31] and against U.S.-based companies that facilitate cross-border deceptive telemarketing.[32]

THE TELEMARKETING AND CONSUMER FRAUD AND ABUSE PREVENTION ACT

Congress's Explanation of the Need for Legislation

Perceived inadequacies in the existing regulatory regime led Congress to enact the Telemarketing and Consumer Fraud and Abuse Prevention Act[33] ("Telemarketing Act" or "the Act") in 1994. The Act directs the Federal Trade Commission to prescribe regulations prohibiting deceptive and abusive telemarketing acts and practices.[34] In its findings, Congress explained that "[i]nterstate telemarketing fraud has become a problem of such magnitude that the resources of the Federal Trade Commission are not sufficient to ensure adequate consumer protection from such fraud."[35] The congressional reports identified several characteristics of telemarketing that make it a particularly potent vehicle for fraud. First, telemarketing "can be carried on without any direct contact between sellers who may be based in one State and customers who may be based in another State."[36] This allows fraudulent telemarketers to evade orders obtained against them in state enforcement actions, simply by directing their efforts at consumers residing in other states.[37] Second, "telemarketers are not dependent upon a fixed location as a point of sale, [so] they can be very mobile, easily moving from State to State."[38] This mobility "precludes the consumer from any recourse if goods are deficient or undelivered."[39]

The legislative history clearly states that Congress did not intend to add another layer of regulation on legitimate telemarketers, but rather to address "unscrupulous activities from which no one benefits but the perpetrator."[40]

Congress identified several shortcomings of the existing regulatory regime. First, enforcement of the general prohibition of § 5 of the FTC Act[41] against telemarketers could be unwieldy and time-consuming, given the need for the FTC as enforcement authority to establish that a telemarketer was engaged in activity that was unfair or deceptive.[42] Second, because there was no regulation specifically addressing telemarketing, the FTC was unable to make use of one of the most potent weapons in its arsenal, the civil penalty provisions of the FTC Act, against fraudulent telemarketers.[43] Third, the magnitude of the interstate telemarketing fraud problem was so great that it outstripped the law enforcement resources available to the FTC.[44]

The Approach of the Telemarketing Act

The Telemarketing Act directs the FTC to promulgate rules, within one year after passage of the Act, prohibiting deceptive and abusive telemarketing practices.[45] The Act specifies little more than a framework for the rule, and grants the FTC nearly unfettered discretion to devise the rule's content. The Act directs inclusion in the rule of only a few specific provisions: the rule must include "a requirement that telemarketers may not undertake a pattern of unsolicited telephone calls which the reasonable consumer would consider coercive or abusive of such consumer's right to privacy";[46] "restrictions on the hours of the day and night when unsolicited telephone calls can be made";[47] and a requirement that telemarketers disclose "that the purpose of the call is to sell goods or services."[48] The Act also contains a definition of "telemarketing,"[49] which is included nearly verbatim in the rule.[50]

The Telemarketing Act also establishes a multi-faceted enforcement scheme. The Act gives the FTC authority to enforce the TSR through the same procedures that apply to its enforcement of all other rules within its purview.[51] This enables FTC enforcement to proceed through an injunctive action in federal district court,[52] a civil penalty action in federal district court,[53] or an administrative action before the Commission itself.[54]

The states, acting as *parens patriae*, are also authorized to bring federal district court actions to enforce the TSR.[55] However, enforcement by the states is secondary to that by the FTC. A state must notify the FTC when it initiates an action, and the FTC has the right to intervene in the state action. Moreover, a state may not bring an enforcement action against a defendant that is named in an action instituted by the FTC.[56]

In addition, private parties may bring an action for violation of the TSR in federal district court, but only if the amount in controversy exceeds US$50,000.[57] As with actions instituted by states, the FTC has the right to intervene in a private action, and no private party may bring an action against a defendant that has already been sued by the FTC.[58]

Prior to enactment of the Telemarketing Act, the FTC had the authority, under its general rulemaking powers,[59] to promulgate a rule prohibiting deceptive and abusive telemarketing practices. Indeed, Congress makes a point of stating that the Act does not augment the substantive scope of the FTC's authorities: "no activity which is outside the jurisdiction of [the Federal Trade Commission Act] shall be affected by this Act."[60] What, then, does the Act accomplish? Most significantly, it establishes an enforcement scheme that the FTC would not otherwise have had authority to put in place – namely, one allowing enforcement by the states and private parties in addition to the FTC.

Enabling state law enforcement authorities to obtain federal court injunctions, valid throughout the United States, against fraudulent telemarketers is probably the most significant innovation of the Telemarketing Act. Under the prior regime, state law enforcement authorities could enforce only their own state deceptive trade practices laws, and could obtain judgments that were valid only in the state where rendered. A telemarketer that was subjected to such an enforcement action would simply stop doing business in that jurisdiction – a minor inconvenience, with the residents of 49 other states remaining as potential customers. Each state whose residents were targeted would have to bring its own enforcement action. The result was a great duplication of effort, with very similar enforcement actions being undertaken in a number of states. Now that they have the authority to bring actions for violation of the TSR in federal court, a state enforcement agency can in a single action obtain an order that is effective throughout the United States. This provision, which the National Association of Attorneys General urged Congress to enact,[61] responds to two of the problems with the existing regulatory regime cited in the Act's legislative history: insufficiency of the FTC's resources alone, and ability of telemarketers to evade state court orders.

THE TELEMARKETING SALES RULE

Course of the Rulemaking

The Telemarketing Act required the FTC to promulgate a rule regulating telemarketing within one year after enactment, and to do so by following the rulemaking procedure set forth in the Administrative Procedure Act.[62] The APA requires the rulemaking agency to publish a notice of proposed rulemaking containing the terms of the proposed rule or the subjects and issues that are involved; provide interested parties an opportunity to submit comments; and publish a final rule including a concise statement of its basis and purpose.[63]

Pursuant to the applicable rulemaking procedure, the FTC commenced the rulemaking by publishing a Notice of Proposed Rulemaking, which contains an initial proposed rule, a section-by-section discussion of the proposed rule, and a set of questions on the proposed rule.[64] The questions were designed to elicit comments from interested members of the public on the legal determinations and policy choices that the FTC made in formulating the proposed rule. The NPR also announced that a public workshop-conference would be convened to allow public comment and discussion of the proposal, and invited written comments.

After receiving comments on its proposed rule through the public workshop-conference and written submissions, the FTC published a substantially revised proposed rule in the form of a Revised Notice of Proposed Rulemaking.[65] As the FTC explained, the revision (a) "addresses many commenters' concerns that the initially proposed

Rule cast too broad a net and imposed unnecessary burdens on the legitimate telemarketing industry without adequately focussing on deceptive and abusive telemarketing practices," and in addition (b) "addresses law enforcement concerns that the Rule needs to provide enough enforcement flexibility to reach deceptive and abusive telemarketing acts or practices currently unknown."[66] The FTC once again invited members of the public to submit written comments.

The FTC subsequently published the final version of the rule, together with a statement of basis and purpose in the form of a section-by-section analysis.[67] The final rule, which became effective December 31, 1995, reflected substantive changes from the revised proposed rule, but the modifications at this stage were less significant than the changes from the initial proposed rule to the revised proposed rule.

Overall Plan of the Rule

The main substantive provisions of the Rule are contained in two sections: one defining and prohibiting specific deceptive telemarketing acts and practices,[68] and another defining and prohibiting certain abusive telemarketing acts and practices.[69] Forbidden *deceptive* practices include (a) failing to make prescribed disclosures to customers before they pay for the goods or services;[70] (b) making specified types of material misrepresentations;[71] (c) debiting a customer's checking account without proper authorization;[72] (d) making any other false or misleading statement to induce payment;[73] (e) providing substantial assistance to others who violate the Rule;[74] and (f) engaging in credit card laundering.[75] Forbidden *abusive* practices include (a) using abusive language in telemarketing solicitations;[76] (b) receiving advance payment for services promised to improve one's credit rating, recover money lost in a prior telemarketing transaction, or procure a loan;[77] (c) engaging in an abusive pattern of telephone solicitations;[78] (d) calling outside of a prescribed time period;[79] and (e) failing to make certain prescribed disclosures in outbound telephone calls.[80]

The scope of the Rule's applicability is prescribed through a definition of "telemarketing" combined with a series of exemptions from the Rule's coverage. "Telemarketing" is defined quite broadly, in keeping with the statutory definition.[81] The Rule defines exceptions for (a) catalogue sales;[82] (b) pay-per-call services regulated elsewhere;[83] (c) sale of franchises regulated elsewhere;[84] (d) sales involving face-to-face sales presentations;[85] (e) certain categories of inbound calls;[86] and (f) most telemarketing to businesses.[87]

The Rule also contains recordkeeping requirements,[88] a set of definitions,[89] and a provision requiring notification of the FTC by states and individuals that file suits under the Rule.[90]

Role of Government Regulation of Consumer Transactions

The role of a regulation such as the TSR is necessarily an interstitial one. In market economies, commercial transactions are presumptively regulated by market forces, not by the government. The utilitarian justification for this presumption is the premise that "free markets promote an efficient resource allocation which accords most closely with individual preferences" (Utton, 1986, p. 1).[91] However, there is widespread recognition that "in a number of contexts completely free markets do not yield the best performance in terms of economic welfare, with the implied corollary that the performance can be improved by some form of regulation (Utton, 1986, p. 4).[92] The standard justification for government intervention in these situations is that it helps to correct market imperfections, yielding benefits generally to society.[93]

Commercial transactions associated with telemarketing are likewise presumptively best regulated by market forces. Yet due to market failures, unregulated market forces cannot be counted upon to bring about optimal societal welfare.

The least intrusive type of government regulation is that which reinforces the workings of market forces. The market-based mechanisms that are of greatest importance in regulating consumer transactions are consumer sovereignty, contract, and industry self-regulation. Governments can facilitate the operation of these mechanisms through several strategies. To facilitate the operation of consumer sovereignty, governments may prescribe disclosure requirements, which require vendors to provide consumers with more information, or they may prohibit the making of false statements, which tends to result in consumers receiving higher quality information. Governments can encourage the development of industry self-regulatory regimes by establishing goals that industry must achieve on its own in order to avoid the imposition of government regulation, by developing model codes or other sorts of guidance on the elements of an effective self-regulatory code, and by serving as an enforcement authority of last resort for industry outliers. Governments are inevitably involved in facilitating the operation of the regime of contract, as they must provide a forum for the enforcement of contractual obligations that are in dispute. In addition to acting as the adjudicator of contract disputes, and the enforcer of the resulting resolution, government can facilitate the effectiveness of a contract regime by taking the part of one of the disputants. This is in effect what occurs when a government agency brings a civil enforcement action based on violation of laws prohibiting deceptive marketing practices.

The Rule as a Means of Improving the Operation of Market Forces

The regulatory approach of the Telemarketing Sales Rule is designed to reinforce the workings of market forces in consumer transactions. First, the Rule improves the quantity and quality of information flowing to consumers through disclosure requirements and prohibitions against misrepresentations. Second, it forbids telemarketers to make use of techniques that tend to cause consumers to enter into transactions that they do not truly intend. Third, it prevents interference with the operation of market forces that limit the availability to telemarketers of payment mechanisms. Fourth, the Rule facilitates the enforcement of contractual obligations through recordkeeping requirements, an enforcement scheme, and in certain types of transactions requiring the seller to deliver promised services before receiving payment.

Improving the quantity and quality of information flowing to consumers. The TSR requires telemarketers to disclose several categories of information in their calls to prospective purchasers. The required disclosures include certain material terms of the proposed transaction: the consumer's total cost, the quantity of goods that the consumer will receive, conditions applying to the purchase or use of the offered goods or services, the seller's refund policy (if it is a no-refund policy, or if the seller makes reference to its policy), and specified information in connection with prize promotions.[94] In the case of outbound calls, telemarketers are required to disclose the identity of the seller, that the purpose of the call is to sell goods or services, the nature of the goods or services offered, and (if applicable) that no purchase is required to participate in a prize promotion.[95]

The TSR aims to prevent dissemination of misinformation in the consumer marketplace by forbidding specific categories of misrepresentations. Thus, the Rule prohibits misrepresenting the cost to the consumer, the quantity of goods that the consumer will receive, and conditions applying to the transaction or to use of the goods or services. It also prohibits misrepresenting material aspects of several items: the goods that are the subject of the transaction, the seller's refund policy, any prize promotion, and any investment opportunity. The Rule also prohibits misrepresenting the seller's affiliation with any government or other third-party organization.[96]

Preventing the occurrence of transactions that the consumer does not truly intend. Another consumer-sovereignty-enhancing strategy contained in the TSR is a provision prohibiting sellers from debiting a consumer's bank account without "express verifiable authorization."[97] This provision is aimed at the increasingly popular technique, employed by telemarketers, of extracting payment from consumers without their authorization through the use of demand drafts.[98] Although they are legal, and have many legitimate uses, "demand drafts have surfaced as the most frequent form of payment in deceptive telemarketing over the past two to three years."[99] Unauthorized use of demand drafts results in the occurrence of a transaction that the consumer did not intend, thereby interfering with consumers' marketplace sovereignty.[100]

The Rule prohibits telemarketers from using "[t]hreats, intimidation, or . . . profane or obscene language" in telemarketing solicitations.[101] The purpose of this provision is to prevent telemarketers from bullying consumers into making a purchasing decision that they would reject if they were making the decision in a calm and non-emotional state. The FTC's commentary explains that "threats are a means of perpetrating a fraud on vulnerable victims, and that many older people can be particularly vulnerable to threats and intimidation."[102]

Two other provisions of the Rule appear to have the same purpose. The Rule forbids telemarketers from engaging in an abusive pattern of telephone solicitations,[103] and also restricts telemarketing calls to particular hours during the day.[104] Each of these forbidden techniques has coercive effects similar to those presented by the use of threats, intimidation, and obscene and profane language.[105]

The version of the Rule that the FTC initially proposed contained another provision intended to make it less likely that consumers will enter into transactions that they do not truly desire. The proposed provision would have prohibited telemarketers from "[p]roviding for or directing a courier to pick up payment from a customer."[106] The commentary explains that the purpose of this provision was "to address a prevalent practice used by fraudulent telemarketers of sending an overnight courier to a consumer's home to pick up cash or a check shortly after a successful sales pitch. In this manner, the telemarketer obtains payment from the consumer before the consumer has adequate time to think about the transaction or obtain information about the telemarketer."[107] The second version of the proposed Rule dropped this provision, explaining that "[t]here is nothing inherently deceptive or abusive about the use of couriers by legitimate business, and . . . many legitimate businesses use them."[108]

Preventing telemarketers from evading the effects of market forces governing availability of payment mechanisms. Another provision of the TSR prevents interference with market forces that limit sellers' access to a payment mechanism that is nearly indispensable in telemarketing – the credit card system. This provision[109] prohibits credit card laundering, a practice whereby a merchant that holds a merchant account with an acquirer, and is therefore able to accept payment by credit card, makes the account available to a telemarketer, thereby enabling the telemarketer to accept payment by credit card.[110] The FTC's commentary explains that "[m]ost deceptive telemarketers are unable to establish a merchant account with an acquirer. . . . Credit card laundering facilitates deceptive telemarketing acts or practices by providing telemarketers with ready access to cash through the credit card system."[111] Through credit card laundering, deceptive telemarketers seek to avoid the effects of market forces that impel acquirers to deny merchant accounts to sellers that they view as unqualified – a category that, for most banks, includes telemarketers without a track record or with a history of a high level of chargebacks. The TSR's anti-credit-laundering provision makes it more difficult for telemarketers to evade this market force.

Enhancing the effectiveness of the contract regime. The Telemarketing Act calls for enforcement of the Rule through several types of enforcement actions that serve to reinforce the contract regime. The FTC may bring enforcement actions under the same procedures that apply to enforcement actions brought pursuant to the FTC Act.[112] One form of judgment available in such actions is rescission of a contract that was illegally procured.[113] Where rescission is not feasible, a money judgment may be entered representing the monetary equivalent of rescission.[114] In addition, an injured consumer who meets the amount-in-controversy requirement may bring an action for damages,[115] and a state may bring an action on behalf of its residents, for "damages, restitution, or other compensation."[116] To the extent that these actions yield judgments based on contract measures of damages, they are surrogates for ordinary breach-of-contract actions.

The Rule's requirement that telemarketers maintain records of their activities for two years[117] is also designed to facilitate operation of the contract regime. Maintenance of these records helps enforcement authorities bring the sort of actions envisioned in the Telemarketing Act's enforcement scheme.

The Rule also seeks to enhance the effectiveness of the contract regime in a more innovative way, in the context of transactions in which the seller promises to provide a service that is difficult or impossible to deliver. In such transactions, the seller is required to perform the service as promised before receiving payment. Thus, the Rule prohibits sellers from collecting *advance fees* for services promised to improve a consumer's credit record, to recover money that the consumer lost in a previous telemarketing transaction, or to obtain a loan for the consumer. Sellers may not request or receive any such fees until *after* the service in question has been successfully provided to the consumer.[118] This provision reflects a judgment, based on experience, that sellers are highly likely to breach certain categories of contractual undertakings.[119] The prohibition of advance fees in such transactions protects consumers against the consequences of such breaches of contract by the seller, in that the consumer is required to perform his contract obligations only if the seller first performs his.

THE DISTANCE SELLING DIRECTIVE

The European Union's Distance Selling Directive[120] addresses various aspects of consumer protection in the context of sales made at a distance. It requires EU Member States to enact laws implementing its provisions within three years after the Directive enters into force.[121]

The Directive does not strive for uniformity among Member States, but rather prescribes minimum protections that each country must implement. It explicitly allows Member States to implement "more stringent provisions compatible with the Treaty, to ensure a higher level of consumer protection."[122]

The main substantive provisions of the Directive are: (a) a pre-sale disclosure requirement;[123] (b) a seven-day right of withdrawal;[124] (c) a requirement that goods be shipped within thirty days;[125] (d) a right to receive reimbursement for fraudulent use of a payment card;[126] (e) a prohibition on inertia selling;[127] and (f) a prohibition on uncon-sented use of automatic calling machines, fax machines, and other forms of distance communication.[128] The Directive's scope encompasses all transactions concluded through "exclusive use of one or more means of distance communication."[129] "Means of distance communication" is defined as any means that may be used to conclude a contract "without the simultaneous physical presence of the supplier and the consumer."[130] A non-exhaustive list of the covered modes of communication includes direct mail, print advertising, catalogues, telephone, radio, television, fax, and electronic mail.[131]

The Directive covers a number of substantive areas that in the U.S. are treated through regulations other than the TSR.[132] One important provision of the Directive that has no counterpart in U.S. law is the seven-day right of withdrawal. Federal and state laws in the U.S. provide a right of withdrawal in particular situations, such as door-to-door sales,[133] extensions of residential mortgage loans,[134] sales of time-share units,[135] contracts between student athletes and agents,[136] and a debtor's agreement to waive discharge of a debt in bankruptcy.[137] However, there is no general right of withdrawal with respect to distance sales. Indeed, the federal cooling-off rule explicitly *excludes* coverage of transactions "[c]onducted and consummated entirely by mail or telephone."[138]

This circumstance – that the European Commission and the Federal Trade Commission, each attempting to craft rules protective of consumer interests, came to opposite conclusions on the desirability of a cooling-off rule for distant selling transactions – is an oddity. The inconsistency likely derives from tensions inherent in the nature of legal rules allowing consumers to withdraw from contracts that they have entered. A cooling-off rule allows a consumer to reconsider the consequences of a contractual commitment into which he has entered, and to withdraw from the commitment if upon reflection it does not seem to advance his interests. It allows a consumer to avoid the negative consequences of a temporary lapse in good judgment. Yet cooling-off rules are an anomaly in a legal regime that is based on the sanctity of contract. "If every contract were subject to a mandatory cooling-off period, the whole system of market exchange on which our modern economy rests would be impaired" (Kronman, 1983, p. 796). In addition, "it would be almost impossible to apply such a rule to all credit transactions without substantially undercutting the certainty of expectations essential to the functioning of our credit economy" (Jackson, 1985, p. 1409). The non-waivability of many cooling-off rules[139] may be viewed as a "paternalistic" restriction on a consumer's ability to make a certain type of bargain (Kronman, 1983, p. 765). Cooling-off rules carry an economic cost, such as additional transaction costs that result when a consumer exercises her right of withdrawal. To the extent they apply selectively to particular modes of selling, they may also distort competition: A purchaser may prefer a seller who is not subject to a cooling-off rule, to avoid either a delay in shipment of the goods or higher prices resulting from additional transaction costs.

As a derogation from the general rules of contract, cooling-off rules require some justification. The conventional explanation is based on the principle that a contract represents a meeting of the contractors' minds. This implies that a consumer should have a right to withdraw from a contract entered under circumstances that raise a substantial question as to whether her expression of assent truly reflects her will. In the case of home solicitations, these circumstances are present in view of the well-known tendency of door-to-door sellers to use high-pressure tactics, and the difficulty many consumers experience objectively evaluating a sales pitch that is delivered in their home (Bryson & Dunham, 1969, pp. 618, 628 n.39; Sher, 1968). A consumer may find it more difficult to say "no" to a salesperson who is physically present in her home – especially if she would like the salesperson to leave – than to one on the other end of a telephone connection or even on the other side of a shop counter. Time-share sales tactics are also notoriously high-pressure, and a consumer may be tempted to sign a contract simply to escape from a grueling and psychologically oppressive site visit.

Certain distant selling techniques exhibit some of these characteristics. For example, telemarketing salespersons are known for using aggressive sales tactics, making it difficult for some consumers to escape from a phone solicitation without agreeing to buy a product.

However, other types of distance selling do not implicate these concerns. Thus, in the case of direct mail solicitations, catalogue sales, print advertising, and several other forms of selling within the scope of the Directive, there need be no personal interaction with any salesperson, and the consumer is unlikely to feel any sort of psychological pressure. The justification for a broad cooling-off rule applying to distant sales must therefore lie elsewhere.

The most likely justification for such a rule is the fact that a geographical separation between the parties to a transaction makes it more difficult for the buyer to evaluate both the seller's reputation and essential characteristics of the goods. Because a distant seller may have few customers in the buyer's geographical vicinity, it will be more difficult for the buyer to inquire into the seller's reputation. If the buyer is unable to examine the goods before purchasing them, she may find only upon delivery that they do not meet her expectations. A buyer's ability to exercise good judgment before entering into a transaction is therefore more limited in the case of distant sales than it is when the buyer visits the seller's physical establishment.

Because a non-waivable right of withdrawal entails economic costs, which must be borne by affected buyers and sellers, the benefits of such a rule must be balanced against the costs in each particular application. In situations where a consumer's judgment may be impaired by virtue of aggressive sales techniques or by the presence of a salesperson at the consumer's home, the benefits may well outweigh the costs, justifying a fully non-waivable right of withdrawal. In other circumstances, where the buyer may be assumed to have made a cool-headed decision but may be lacking certain items of information that would improve his decision-making, the costs may exceed the benefits. In such circumstances, it may be advantageous to both buyers and sellers to apply a *waivable* right of withdrawal. With such a rule, the default position is that the buyer has an unconditional right of withdrawal within a specified time period. But the rule allows the buyer to waive the right of withdrawal, in accordance with a procedure that is designed to assure that the buyer is fully aware that he is bargaining away a right. For example, for a waiver to be effective the buyer might be required to sign a clearly worded waiver clause, in the case of sales via catalogue or print-medium advertisements. In a sale consummated online, the equivalent procedure might be for the buyer to click an "I accept" button on a Web page that clearly states the waiver. A consumer might find it advantageous to agree to such a waiver, if it allowed him to receive the goods immediately rather than waiting for expiration of the withdrawal period, and if the consumer was confident that he would be satisfied with the transaction (as, for example, might be the case if he had previously purchased the same item from the same seller). Alternatively, a consumer might benefit from the seller's willingness to offer a discount to a buyer who waives the right of withdrawal.

A waivable right of withdrawal results in a relatively minor change to conditions that already exist in the unregulated marketplace. Many sellers offer an unconditional money-back guarantee – in effect, a right of withdrawal – in response to market forces: the expectation is that such a guarantee will encourage consumers to make purchases, even if they are unsure they will be happy with the purchase. The additional costs resulting from such a policy, such as costs of shipping, handling, repackaging, and restocking the returned goods, as well as costs resulting from the inability to resell the returned item as new, are borne by the seller (directly or in additional costs passed through from its suppliers) and buyer in some combination. The seller is willing to incur these additional costs because it expects a net gain due to increased sales; the additional cost may be accounted as marketing. The buyer is willing to pay a higher price to avoid the risk of being stuck with an item she does not want; the price increment may be viewed as a form of insurance.

Other sellers take the opposite route, with a policy of giving no refunds. Notice of such a policy may be conveyed by prominently disclosing to potential buyers that "All sales are final," or that the seller provides "No refunds." Such a no-refunds policy is often used in connection with items that are on sale, or offered at a reduced price. The seller, offering goods at a slim profit margin, does not want to bear the costs of accepting returned items. The buyer is happy to have the item at a reduced price, and is willing to bear the risk of dissatisfaction.

A waivable right of withdrawal has the effect of putting all covered sellers by default into the first category, offering an unconditional money-back guarantee. To move itself into the latter category, a seller must take some affirmative action, by asking buyers to agree to waive their withdrawal right. Because of inertia, we might expect that the net result of a waivable right of withdrawal will be that more sellers will offer a money-back guarantee. The Directive provides that consumers may not waive the rights conferred upon them by transposition of the Directive into national law.[140] Presumably this applies to the Directive's right of withdrawal.[141] In view of the limited justification for a right of withdrawal with respect to most sorts of distance contracts, and the economic costs inherent in a non-waivable right of withdrawal, the Directive might have better served consumer interests by allowing consumers to waive the right of withdrawal under certain circumstances.

A comparison between the Directive and the Telemarketing Sales Rule gives rise to several observations that may be of value to EU Member States facing the task of transposing the Directive into national law.

In Framing Legislation to Transpose the Directive Into National Law, EU Member States Should Seek to Enhance the Effectiveness of Market Forces in Protecting Consumers Wherever Possible

The Directive, like the TSR, follows a regulatory strategy of enhancing the effectiveness of market-based corrective forces. Thus, the Directive increases the flow of information to consumers, through its pre-sale disclosure requirement. The Directive also forbids conduct by sellers that tends to cause consumers to enter into transactions that they do not truly desire, through its right of withdrawal, requirement that goods be shipped within thirty days, right of reimbursement for fraudulent use of a payment card, and prohibition on inertia selling.

In other respects, the degree to which the Directive enhances the market's ability to protect consumers will depend upon legislative choices that Member States make in transposing the Directive into national law.

First, the Directive's enforcement scheme will help enhance the regime of contract if appropriately implemented. The Directive requires that member states "ensure that adequate and effective means exist to ensure compliance with this Directive in the interests of consumers," through the availability of enforcement actions under national law.[142] But the Directive does not specify the types of enforcement actions that must be available, or the measure of redress that should be applied. The regime of contract will be best enhanced if through such actions consumers are able to receive redress measured either by the benefit of the bargain that they struck, or by rescission of the contract (or its monetary equivalent).

Second, the Directive does not embody a provision designed to enhance consumer sovereignty by reducing the amount of misinformation that consumers receive, analogous to the TSR's prohibition of misrepresenting material information.[143] To the extent that national laws of Member States do not already prohibit with specificity the types of misrepresentations that are common in distance selling, Member States should consider including such a provision in their distant selling legislation.

Third, the Directive does not include any provision preventing sellers from insulating themselves from the effects of market forces, analogous to the TSR's prohibition of credit card laundering.[144] Member States may wish to consider whether sellers who use distant selling techniques are evading the effect of market forces in any analogous way. If so, consumer sovereignty would be enhanced by rules forbidding such practices.

Fourth, the Directive does not employ the contract-regime-enhancing strategy of requiring sellers to perform their end of the bargain before receiving payment, analogous to the TSR's prohibition of certain advance-fee arrangements.[145] Member States may wish to consider whether distant sellers in the EU are failing to perform certain categories of services after receiving payment, and if so to legislate accordingly.

In Framing Implementing Legislation, Member States Should Take Heed of the Special Issues Raised by Online Communications

Geographical indeterminacy. While the scope of the Telemarketing Sales Rule is limited to telephone communications, the scope of the Directive is much broader, encompassing the gamut of means of communication at a distance.[146] In particular, the Directive apparently applies to communications via the Internet and other online services. The primary facilities of online communication that are relevant to commercial transactions are the World Wide Web, electronic mail, newsgroups, and chat sessions. These means of communication would appear to fit cleanly within the definition of covered means of communication: "any means which, without the simultaneous physical presence of the supplier and the consumer, may be used for the conclusion of a contract between those parties."[147] In fact, the Directive's non-exclusive enumeration of covered means of communication specifically names "[e]lectronic mail."[148]

Several means of online communication share the peculiar characteristic of geographic indeterminacy. This characteristic has two aspects. First, in most cases it is impossible for the sender of an online communication to identify the geographical location of the recipients of the communication. Because an e-mail address does not divulge the geographical location of its holder, the sender of an e-mail message will not necessarily know the location of the recipient of the message.[149] The owner of a Web site can in general know, at most, the domain name of the access provider of site visitors, which, as with e-mail, does not convey the location of the visitor. Messages posted in newsgroups or in chat rooms may be read by all visitors, who need reveal no trace of their identity or location.

The second aspect of geographical indeterminacy of online communications is the fact that it is generally impossible or infeasible for the sender to limit the availability of a communication to a geographical or other subset of the online community. World Wide Web sites are available simultaneously to everyone with an Internet connection, unless access is restricted by the site owner or blocked by the recipient's Internet service provider. A site owner can control access through a password system, which allows access only to visitors who enter a pre-approved user name and password. This might be done by requiring the visitor to pre-register via postal mail or fax, and thereafter providing a password. This is, however, a cumbersome procedure that is very rarely employed in the Web context,[150] and would deter all but the most determined visitors from accessing a site.

One who posts a newsgroup message has no ability at all to restrict who may access it. Unless access to the newsgroup is blocked at the recipient's end, a posting is available for all the world to see. The same is true for postings in chat sessions. The sender of an e-mail message may choose quite specifically to send the message to certain e-mail addresses and not others. However, for the reasons discussed above, the sender has no way to ascertain the geographical location of any particular recipient.

Geographical indeterminacy has profound implications for regulatory schemes that, like the Directive, seek to regulate cross-border online commercial communications. As explained above, a communication made via the Internet may in general be accessed from any country in the world with an Internet connection, regardless of whether the maker of the communication seeks a local, regional, or global audience. This means that online marketers are potentially subject to the regulatory regime of every jurisdiction that prescribes rules applying to online communications. Those who would use the Internet as a medium for making commercial communications are thus faced with an unpalatable choice: They may conform their communications to the requirements of the most restrictive regulatory regime, even if that regime belongs to a country that the speaker does not intend his communication to reach. Or they may make communications that violate the regulatory regimes of certain countries, enduring the risk of being subject to enforcement actions instituted anywhere on Earth.

In order to avoid placing online marketers in such a dilemma, governments must exercise restraint in prescribing rules applicable to online communications, and in enforcing those rules. Member States should take heed of this consideration when transposing the Directive into national law. To this end, Member States may wish to consider applying the following two principles.

First, a seller who engages in commercial speech that is available to residents of a particular state should not be deemed subject to that state's prescriptive or adjudicative jurisdiction solely by virtue of that speech, if it was transmitted via a medium that, by its very nature, prevents the maker of the communication from restricting the geographical area in which it may be received, or from ascertaining the geographical location of one's interlocutor. Thus, for example, a seller should not be deemed subject to the jurisdiction of a state solely by virtue of maintaining a World Wide Web site that is accessible by residents of that state; posting a message in a Usenet newsgroup, or on any other electronic bulletin board system, that is accessible by residents of that state; transmitting a message to an Internet mailing list whose membership includes residents of that state; or making a statement in a chat session that includes a participant who is a resident of that state. A state should assert jurisdiction based on an online communication only where the maker of the communication intentionally directed the communication towards the state's own residents. An online communication may be found to be intentionally directed to a particular state if it meets the following criteria: (a) the communication resulted in a commercial transaction involving the shipment of a physical good to an address located in that state; (b) the communication resulted in a commercial transaction involving the transmission of a digital good[151] to a recipient who resides in that state, if at the time of the transmission of the good the sender knew or reasonably should have known that the recipient resided in that state; (c) the maker of the communication made affirmative and unmistakable efforts to direct the communication or transmission to residents of that state,[152] or to injure a person located in that state; or (d) the person knew, or reasonably should have known, that the transaction would have effects within that state.

Second, jurisdiction should not depend on such vagaries as the physical location of the various *computers* that enable online communications (or the location of the owners of those computers), but rather on the location of the *parties* to online communications. An online communication may involve a number of computers, such as (a) the computer on which the files constituting a World Wide Web site are maintained; (b) the computer through which the sender or recipient of an online communication obtains access to the Internet or any other computer network; (c) computers that store or forward a transmission on its course from the sender to the recipient; (d) a computer holding data that one downloads using file transfer protocol or some other method; or (e) the computer from which one downloads electronic mail or newsgroup postings. These computers may be located in a multiplicity of jurisdictions around the world, which may have only a tenuous connection to the online communication, and the owners of these computers (such as online service providers) may be located in still other countries. To the extent that assertion of jurisdiction is based on the location of online communications, the location of associated computers and their owners should be accorded very little weight.

Indeed, the Directive itself expresses a requirement that Member States exercise restraint in making national rules applicable to online communications originating from outside the forum jurisdiction. The Directive authorizes Member States to prescribe "more stringent provisions *compatible with the Treaty*, to ensure a higher level of consumer protection."[153] Provisions of the Treaty that are of particular relevance in this context include Article 30, which guarantees the free movement of goods within the EU's internal market, and Articles 59 and 60, which similarly guarantee the freedom to provide services. To the extent that inconsistent regulations applying to distance communications hinder the conduct of online commerce, they may be incompatible with the free-commerce provisions of the Treaty and therefore inconsistent with the Directive.[154]

Digital goods. Transposition of several of the Directive's provisions will require careful attention due to the special characteristics of digital goods. Thus, the right-of-withdrawal rule prescribes different periods for exercise of the right depending on whether the item purchased is a "good" or a "service."[155] It is unclear, however, whether a digital good is a "good" or a "service" for these purposes. As an item that is transmitted from seller to buyer, and then remains with the buyer for continued use, digital goods share characteristics of physical goods. But viewed as a stream of bits, with no corporeal existence, a digital good may appear more closely akin to a service: The item purchased is the seller's service of transmitting bits to the buyer.

The exclusion from the right-of-withdrawal rule for certain types of digital goods also raises issues of interpretation. The Directive provides that the right of withdrawal does not extend to contracts "for the supply of audio or video recordings or computer software which were unsealed by the consumer."[156] When such an item is delivered to the buyer digitally via a computer network, rather than by sending a package through the mail, it may be unclear what constitutes "unsealing" by the consumer, and there will be significant evidentiary issues involved in establishing whether "unsealing" has occurred. In addition, the listing of the varieties of digital goods covered by the exclusion is evidently incomplete: there appears to be no reason, for example, why digitized images or data files should not be subject to the same exclusion.

CONCLUSION

The Telemarketing Sales Rule is a regulatory regime that seeks to protect consumers from the abuses of fraudulent telemarketers, while imposing only a minimal burden on legitimate telemarketers. It does so by application of several strategies that are designed to enhance the effectiveness of market forces, with the goal of requiring offerings in the marketplace to undergo the full rigors of consumer sovereignty.

The Distance Selling Directive follows similar consumer-sovereignty-enhancing strategies. In transposing the Directive into national law, Member States may wish to prescribe rules that exceed the minimum protections that the Directive requires, and in doing so may find it helpful to adapt some of the TSR's strategies to the marketplace conditions prevailing in their own jurisdictions. But Member States should exercise restraint when prescribing rules applying to online communications, in order to avoid hindering the free movement of goods and services within the internal market.

NOTES

[1] In 1990, total sales generated through telemarketing were estimated at US$435 billion, a greater than four-fold increase over 1984 (Arcadi, 1991, p. 417).

[2] "[T]he residential telephone is uniquely intrusive. The caller . . . is able to enter the home for expressive purposes without contending with such barriers as time or distance, doors or fences. . . . Moreover, the shrill and imperious ring of the telephone demands immediate attention. Unlike the unsolicited bulk mail advertisement found in the mail collected at the resident's leisure, the ring of the telephone mandates prompt response, interrupting a meal, a restful soak in the bathtub, even intruding on the intimacy of the bedroom." *State v. Casino Marketing Group, Inc.*, 491 N.W.2d 882, 888 (Minn. 1992), *cert. denied*, 507 U.S. 1006 (1993).

[3] The scourge of telemarketing fraud: What can be done against it?, H.R. Rep. 421, 102d Cong., 1st Sess. 7 (1991).

[4] "Consumers and others [in the United States] are estimated to lose $40 billion a year in telemarketing fraud." Telemarketing and Consumer Fraud and Abuse Prevention Act, 15 U.S.C. § 6101(3). For an overview of the problem of telemarketing fraud, see Michela (1994).

[5] A U.S.-Canada working group set up to study the problem of cross-border telemarketing fraud found that cross-border targeting raises a variety of obstacles to effective law enforcement. See United States–Canada Cooperation Against Cross-Border Telemarketing Fraud: Report of the United States–Canada Working Group to President Bill Clinton and Prime Minister Jean Chrétien (Nov. 1997).

[6] See 15 U.S.C. § 45(a) (prohibiting "unfair and deceptive acts and practices in or affecting commerce"). The FTC has authority to enforce this provision through administrative proceedings, id. § 45(b), and injunctive actions in federal district court, id. § 53(b).

[7] 47 U.S.C. § 227.

[8] This portion of the TCPA was challenged as an unconstitutional infringement on free-speech rights, in violation of the First Amendment to the U.S. Constitution. The Court of Appeals found the statute to be constitutional, reversing a holding to the contrary by the District Court. *Moser v. FCC*, 46 F.3d 970 (9th Cir. 1995), *reversing* 826 F. Supp. 360 (D. Or. 1993), *cert. denied*, 515 U.S. 1161 (1995). The Court of Appeals has also upheld the TCPA's ban on unsolicited faxes against a First Amendment challenge. *Destination Ventures, Ltd. v. FCC*, 46 F.3d 54 (9th Cir. 1995). For an argument that portions of the TCPA violate the First Amendment, see Berkenblit (1994).

[9] 47 C.F.R. § 64.1200. The Federal Communications Commission promulgated these regulations.

[10] Trade Regulation Rule Pursuant to the Telephone Disclosure and Dispute Resolution Act of 1992, 16 C.F.R. Part 308.

[11] 15 U.S.C. §§ 5711–14, 5721–24.

[12] Mail or Telephone Order Merchandise Rule, 16 C.F.R. Part 435.

[13] 39 U.S.C. § 3005.

[14] At the time the TCPA was under consideration, more than 40 states had enacted restrictions on the use of automatic telephone dialing equipment. See S. Rep. No. 178, 102d Cong., 1st Sess. (1991), reprinted in 1991 U.S.C.C.A.N. 1968, 1970.

[15] See McConathy (1996). The TCPA explicitly preserves state laws that impose more stringent requirements on intrastate telemarketing than does federal law. 47 U.S.C. § 227(e)(1).

[16] See, e.g., Or. Rev. Stat. § 759.290.

[17] See, e.g., Cal. Pub. Util. Code § 2872(c); Minn. Stat. § 325E.30.

[18] See, e.g., Cal. Civ. Code § 1770(v)(1); Minn. Stat. § 325E.27; N.J. Stat. Ann. 48: 17–28.

[19] See *Lysaght v. New Jersey*, 837 F. Supp. 646 (D.N.J. 1993) (differential treatment of commercial and noncommercial speech likely to violate the First Amendment to the U.S. Constitution); *Moser v. Frohnmayer*, 315 Or. 372, 845 P.2d 1284 (1993) (regulation of speech that is not content neutral and does not fit within a well established historical exception violates state free-speech guarantee of state constitution).

[20] See *Bland v. Fessler*, 88 F.3d 729 (9th Cir.), *cert. denied*, 117 S. Ct. 513 (1996); *Van Bergen v. Minnesota*, 59 F.3d 1541 (8th Cir. 1995); *State v. Casino Marketing Group, Inc.*, 491 N.W.2d 882 (Minn. 1992), *cert. denied*, 507 U.S. 1006 (1993).

[21] See, e.g., Nev. Rev. Stat. 599B.090. This law was upheld against a free-speech challenge in *Erwin v. State*, 111 Nev. 1535, 908 P.2d 1367 (1995).

[22] See, e.g., W. Va. Code § 47-14-10(a)(5). This statute was upheld in *National Funeral Services, Inc. v. Rockefeller*, 870 F.2d 136 (4th Cir.), *cert. denied*, 493 U.S. 966 (1989).

[23] See *Planned Parenthood League, Inc. v. Attorney General*, 391 Mass. 709, 464 N.E.2d 55, *cert. denied*, 469 U.S. 858 (1984); *Optimist Club of North Raleigh v. Riley*, 563 F. Supp. 847 (E.D.N.C. 1982); *WRG Enterprises, Inc. v. Crowell*, 758 S.W.2d 214 (Tenn. 1988).

The Federal Trade Commission has brought several cases against telemarketers who engage in fraudulent "telefunding": soliciting contributions to bogus charities, or making misrepresentations about how a donation will be used. See *FTC v. Saja*, Civil Action No. CIV 97-0666 PHX sm (D. Ariz. filed March 31, 1997); *FTC v. The Baylis Co.*, Civil No. 94-0017-S-LMB (D. Idaho filed Jan. 10, 1994); *FTC v. NCH, Inc.*, Civil No. CV-S-94-00138-LDG (LRL) (D. Nev. filed Feb. 14, 1994); *FTC v. International Charity Consultants*, Civil No. CV-S-94-00195-DWH (LRL) (D. Nev. filed Mar. 1, 1994); *FTC v. United Holdings Group, Inc.*, CV-S-94-331-LDG (RLH) (D. Nev. Oct. 21, 1994); *FTC v. Voices for Freedom*, Civil No. 91-1542-A (E.D. Va. filed Oct. 21, 1991).

[24] The *Code of Ethics: Recommended Standards for Professional and Ethical Telemarketing* suggests that ATA members provide their telemarketers with adequate training, state their offers clearly and honestly, limit their hours of calling, avoid untargeted calling, and monitor their telemarketers' compliance. See *www.atancal.com.*

[25] The *Guidelines for Marketing by Telephone* advises telemarketers to identify the seller and purpose of the call (Art. 1), avoid unsubstantiated or deceptive representations (Art. 2), disclose the terms of the offer (Art. 3), limit calls to reasonable hours (Art. 4), use a live operator to obtain consent before delivering a recorded message (Art. 5), tape telephone conversations only with consent (Art. 6), monitor telemarketers' compliance (Art. 7), remove consumers' names from marketing lists upon request (Art. 8), avoid random and sequential dialing techniques, and calls to unlisted numbers (Art. 8), limit collection and sale of personal transactional data (Art. 9), make appropriate use of toll-free and pay-per-call numbers (Art. 10), avoid inappro-

priate marketing to children (Art. 11), and ship orders as soon as practical (Art. 12). See *www.the-dma.org*.

[26] The *ICC International Code of Direct Marketing*, in addition to general marketing guidelines, advises telemarketers to identify themselves, state the purpose of the call, and call during reasonable hours (Art. 26), avoid taping without consent (Art. 27), honor consumers' requests to be removed from marketing lists (Art. 28), avoid calling unlisted numbers (Art. 29), disclose the terms of the offer (Art. 30), and avoid high-pressure tactics (Art. 30). See *www.iccwbo.org*.

[27] The DMA's Telephone Preference Service is described at the DMA's Web site, *www.the-dma.org*. As of October 1997, the DMA reported that 1,458,947 individuals and 876,804 households had expressed their preference not to receive telemarketing calls (DMA, 1998, p. 44). Although use of the Telemarketing Preference Service is currently voluntary, beginning July 1, 1999, DMA members will be required as a condition of membership to honor the preferences of consumers who ask not to receive telemarketing calls (Chandrasekaran, 1997, p. C3).

[28] Similar statistics have been compiled by the National Fraud Information Center, a U.S.-based non-governmental organization that maintains a database of consumer complaints concerning fraudulent telemarketing. "While California remains the top location for illegal telemarketing operations targeting U.S. citizens, the Province of Québec ranked #3 in 1996, up from #25; the Province of Ontario was #8, up from #20; British Columbia was #9, up from #10. . . ." National Fraud Information Center, 1996 Telemarketing Scam Statistics, *www.fraud.org*.

[29] For example, enforcement authorities in the Canadian province of British Columbia brought an action against a company located in the province that was making deceptive solicitations to residents of the U.S. The trial court dismissed the action, on the ground that the British Columbia deceptive trade practices law only applied to conduct that directly targeted residents of the province. The decision was, however, reversed on appeal. *Director of Trade Practices v. Ideal Credit Referral Services Ltd.*, 145 D.L.R.4th 20 (British Columbia Ct. App. 1997).

[30] United States–Canada Cooperation Against Cross-Border Telemarketing Fraud: Report of the United States–Canada Working Group to President Bill Clinton and Prime Minister Jean Chrétien (Nov. 1997).

[31] See *FTC v. Pacific Rim Pools International*, No. C97-1748R (W.D. Wash. filed Nov. 7, 1997) (deceptive telemarketing of foreign lottery shares); *FTC v. 9013-0980 Québec Inc.*, Civ. No. 1:96CV-1567 (N.D. Oh. filed July 18, 1996) (prize promotion scheme); *FTC v. Ideal Credit Referral Services Ltd.*, C96-0874 (W.D. Wash. filed June 5, 1996) (advance-fee loan scam).

[32] See *FTC v. The Tracker Corp. of America*, Civ. No. 1-97CV2654-JEC (N.D. Ga. filed Sept. 11, 1997) (U.S. company deceptively selling credit card protection services through telemarketers in Canada and U.S.); *FTC v. Woofter Investment Corporation*, CV-S-97-00515-LDG (RLH) (D. Nev. filed Apr. 28, 1997) (credit laundering for Canadian telemarketers of foreign lottery shares).

[33] Pub. L. No. 103-297, 108 Stat. 1545 (1994).

[34] 15 U.S.C. § 6102(a). The Act also directs two other federal trade regulatory agencies, the Securities and Exchange Commission and the Commodity Futures Trading Commission, to promulgate rules that are "substantially similar" to the rules promulgated by the FTC, unless those agencies determine that such additional rules are unnecessary. Id. § 3(d), 3(e). Both agencies determined not to promulgate such additional rules. See 62 Fed. Reg. 18,666 (Apr. 16, 1997) (SEC); 61 Fed. Reg. 32,323 (June 24, 1996) (CFTC).

[35] 15 U.S.C. § 6101(2).

[36] H.R. Rep. No. 20, 103d Cong., 1st Sess. 2 (1993).
[37] S. Rep. No. 80, 103d Cong., 1st Sess. 3 (1993).
[38] H.R. Rep. No. 20, 103d Cong., 1st Sess. 2 (1993).
[39] S. Rep. No. 80, 103d Cong., 1st Sess. 3 (1993).
[40] H.R. Rep. No. 20, 103d Cong., 1st Sess. 2 (1993).
[41] "[U]nfair and deceptive acts and practices . . . are hereby declared unlawful." 15 U.S.C. § 45(a).
[42] H.R. Rep. No. 20, 103d Cong., 1st Sess. 3 (1993).
[43] H.R. Rep. No. 20, 103d Cong., 1st Sess. 3 (1993). Section 5(m)(1)(a) of the FTC Act, 15 U.S.C. § 45(m)(1)(a), allows the FTC to seek civil penalties of up to $11,000 per violation against those who violate regulations that it enforces.
[44] H.R. Rep. No. 20, 103d Cong., 1st Sess. 3 (1993).
[45] 15 U.S.C. § 6102(a)(1), (b). The Act directs that the rules be promulgated in accordance with the procedure set forth in the Administrative Procedure Act, 5 U.S.C. § 553. 15 U.S.C. § 6102(b).
[46] 15 U.S.C. § 6102(a)(3)(A).
[47] 15 U.S.C. § 6102(a)(3)(B).
[48] 15 U.S.C. § 6102(a)(3)(C). The Act's other directives as to the content of the rule are general and suggestive: The rule must prohibit deceptive and abusive telemarketing practices, § 6102(a)(1); must define deceptive practices, which may include assisting or facilitating violations, including through credit card laundering, § 6102(a)(2); and must consider including recordkeeping requirements, § 6102(a)(3).
[49] 15 U.S.C. § 6106(4).
[50] 16 C.F.R. § 310.2(u).
[51] 15 U.S.C. § 6105(b).
[52] A violation of the Telemarketing Sales Rule is deemed to be a violation of a rule promulgated pursuant to section 18 of the FTC Act, and therefore to constitute an unfair or deceptive act or practice in violation of 15 U.S.C. § 45. See 15 U.S.C. §§ 6102(c), 57a(d)(3). As such, a violation of the TSR may be enforced through a federal district court action under 15 U.S.C. § 53(b), which allows the FTC to bring district court actions to enjoin violation of any provisions of law that it enforces.
[53] Under 15 U.S.C. § 45(m)(1)(A), the FTC may bring a civil penalty action for violations of the rules it enforces.
[54] Since a violation of the TSR is *ipso facto* a violation of 15 U.S.C. § 9, see note 45, the TSR may be enforced through an administrative action brought before the Commission.
[55] 15 U.S.C. § 6103(a).
[56] 15 U.S.C. § 6103(b) & (d).
[57] 15 U.S.C. § 6104(a). The amount-in-controversy requirement severely limits the availability of private actions. The House Report states that in meeting the $50,000 threshold only actual, and not punitive, damages may be considered. In addition, "more than one person may not aggregate damages for purposes of meeting this threshold. Rather, each person must be able to allege $50,000 in actual damages." H.R. Rep. No. 20, 103d Cong., 1st Sess. 10 (1993). Only a small proportion of telemarketing victims will meet the $50,000 jurisdictional requirement – notably among them credit card issuers, who must absorb some of the losses resulting from fraudulent telemarketing.
[58] 15 U.S.C. § 6104(b) & (c).
[59] 15 U.S.C. § 57a.
[60] 15 U.S.C. § 6105(a).
[61] In a 1993 Resolution, NAAG stated that it "[u]rges Congress to adopt federal

legislation . . . which allow[s] state Attorneys General to enforce a federal telemarketing Rule in federal court." See Rosden and Rosden (1997, § 58.04 at 58-22 to 58-23 n.35).

62 15 U.S.C. § 6102(b) (requires following the procedures specified in 5 U.S.C. § 553).

63 5 U.S.C. § 553(b) & (c). When the FTC promulgates rules under its general rule-making authority, pursuant to § 18 of the FTC Act, 15 U.S.C. § 57a, it must follow a more intricate procedure. For example, it must publish an advance notice of proposed rulemaking, publish the text of the proposed rule in the notice of proposed rule-making, and conduct an informal hearing. See 15 U.S.C. § 57a(b), 16 C.F.R. §§ 1.7 – 1.20, and Davis & Pierce (1994, § 7.7). The procedure that the FTC followed in promulgating the TSR allowed for more public input than required by the Administrative Procedure Act (for example, through convening a public workshop-conference, and publishing a revised notice of proposed rulemaking), but did not comply strictly with the requirements of a § 18 rulemaking (for example, the workshop-conference did not follow all the procedural requirements set forth in 15 U.S.C. § 57a(c)).

64 60 Fed. Reg. 8313–33 (Feb. 14, 1995).

65 60 Fed. Reg. 30,406–28 (June 8, 1995).

66 60 Fed. Reg. 30,406.

67 60 Fed. Reg. 43,842–77 (Aug. 23, 1995).

68 16 C.F.R. § 310.3.

69 16 C.F.R. § 310.4.

70 16 C.F.R. § 310.3(a)(1).

71 16 C.F.R. § 310.3(a)(2).

72 16 C.F.R. § 310.3(a)(3).

73 16 C.F.R. § 310.3(a)(4).

74 16 C.F.R. § 310.3(b).

75 16 C.F.R. § 310.3(c).

76 16 C.F.R. § 310.4(a)(1).

77 16 C.F.R. § 310.4(a)(2)–(a)(4).

78 16 C.F.R. § 310.4(b).

79 16 C.F.R. § 310.4(c).

80 16 C.F.R. § 310.4(d).

81 "*Telemarketing* means a plan, program, or campaign which is conducted to induce the purchase of goods or services by use of one or more telephones and which involves more than one interstate telephone call." 16 C.F.R. § 310.2(u). Cf. 15 U.S.C. § 6106(4).

82 16 C.F.R. § 310.2(u).

83 16 C.F.R. § 310.6(a). Pay-per-call services are regulated in the FTC's Trade Regulation Rule Pursuant to the Telephone Disclosure and Dispute Resolution Act of 1992, 16 C.F.R. Part 308.

84 16 C.F.R. § 310.6(b). Franchising is regulated in the FTC's rule titled Disclosure Requirements and Prohibitions Concerning Franchising and Business Opportunity Ventures, 16 C.F.R. Part 436.

85 16 C.F.R. § 310.6(c).

86 16 C.F.R. § 310.6(d)–(f).

87 16 C.F.R. § 310.6(g).

88 16 C.F.R. § 310.5.

89 16 C.F.R. § 310.2.

90 16 C.F.R. § 310.7.

91 See also Sunstein (1989, p. 281): "The basic position is that people know what

is in their own best interests and that respect for preferences, as expressed in market transactions, is the best way to promote aggregate social welfare." Other justifications for the view that governments should ordinarily respect voluntary market transactions are rooted in the notion of respect for individual autonomy, and a distrust in the rationality of the majoritarian process (Sunstein, pp. 281–282).

[92] See also Asch & Seneca (1985, pp. 397–420), discussing the rationale for government regulation to protect consumers.

[93] See, e.g., Posner (1977, p. 81): Allowing private or public rights of action against consumer fraud is economically justified, since this costs society less than uncontrolled fraud.

[94] 16 C.F.R. § 310.3(a)(1).

[95] 16 C.F.R. § 310.4(d).

[96] 16 C.F.R. § 310.3(a)(2). During the course of the rulemaking, the FTC proposed a number of other categories of forbidden misrepresentations, but dropped them from the final rule. These included the duration of the offer, that a person has been selected to win a prize, that a premium is a prize, the odds of winning a prize, the telemarketer's compliance with the law, the purpose for which the telemarketer will use a consumer's account number, the status or identity of the telemarketer, a consumer's eligibility to receive a tax deduction or other benefit, the nature of a relationship with any other person, the nature of any prior purchase agreement, aspects of an investment opportunity, the seller's success in reselling consumer purchases, the likelihood that a person can improve his credit record, the likelihood that a person will receive a loan, and the likelihood of recovering lost money. 60 Fed. Reg. 8329–30. In dropping this language, the FTC explained that this lengthy enumeration of prohibited misrepresentations was unnecessary, as it was "subsumed in the general prohibitions against misrepresentations set forth in Section 310.3(a)(2)." 60 Fed. Reg. 30,413.

The FTC also initially proposed including in the Rule prohibitions on certain misrepresentations related to business ventures. 60 Fed. Reg. 8330. It decided to drop those provisions in favor of treatment of business ventures in a more narrowly focused regulation, the FTC's Franchise Rule. 60 Fed. Reg. 30,413.

[97] 16 C.F.R. § 310.3(a)(3). Acceptable types of authorization include written authorization by the consumer; oral authorization by the consumer, if it is tape-recorded and is accompanied by specified categories of disclosures by the seller; and written confirmation by the seller, containing prescribed disclosures (Id.).

The Rule also forbids sellers from "[m]aking a false or misleading statement to induce any person to pay for goods or services." C.F.R. § 310.3(a)(4). Although in isolation this provision would seem to forbid any sort of misrepresentation that would mislead a consumer into making a purchase, including misrepresentations about the characteristics of the item in question, the FTC's commentary indicates that the provision's purpose is limited to reinforcing the demand draft provision by including coverage of payment systems other than consumers' bank accounts. See 60 Fed. Reg. 43,851; 60 Fed. Reg. 30,413–14.

[98] Using a "demand draft" is "the practice of obtaining funds from a person's bank account without that person's signature on a negotiable instrument." 60 Fed. Reg. 43,850.

[99] 60 Fed. Reg. 43,850. The FTC describes fraudulent use of demand drafts as follows: "[I]n many instances deceptive telemarketers induce consumers to disclose certain bank account information, after which they withdraw funds from the consumers' bank accounts without the consumers authorizing such withdrawals or realizing that such withdrawals are occurring" (Id.).

[100] For the view that the TSR's approach to preventing abuse of demand drafts is inadequate, see Hiller (1996, p. 306, n.2).

[101] 16 C.F.R. § 310.4(a)(1).
[102] 60 Fed. Reg. 30,415.
[103] 16 C.F.R. § 310.4(b). Examples of such abusive practices include calling a person repeatedly in order to annoy or harass the person, and calling a person who has previously requested not to be called. 16 C.F.R. § 310.4(b)(1).
[104] 16 C.F.R. § 310.4(c) limits outbound telemarketing calls to the period 8:00 a.m. to 9:00 p.m. local time at the recipient's location.
[105] The FTC's commentary does not identify the purpose behind these two provisions, beyond noting that the Telemarketing Act requires that the Rule contain such provisions. 60 Fed. Reg. 8318-8319; 60 Fed. Reg. 30,417-418; 60 Fed. Reg. 43,854–855.
[106] 60 Fed. Reg. 8330.
[107] 60 Fed. Reg. 8318.
[108] 60 Fed. Reg. 30,415.
[109] 16 C.F.R. § 310.3(c).
[110] "Obtaining access to the credit card system through another merchant's account without the authorization of the financial institution is credit card laundering." 60 Fed. Reg. 43,853.
[111] 60 Fed. Reg. 43,853.
[112] 15 U.S.C. § 6105(b).
[113] See *FTC v. H.N. Singer, Inc.*, 668 F.2d 1107, 1113 (9th Cir. 1982).
[114] See *FTC v. Security Rare Coin & Bullion Corp.*, 931 F.2d 1312, 1316 (8th Cir. 1991).
[115] 15 U.S.C. § 6104.
[116] 15 U.S.C. § 6103(a).
[117] 16 C.F.R. § 310.5.
[118] 16 U.S.C. § 310.4(a)(2) to (4).
[119] The FTC has brought a number of enforcement actions based on fraudulent offerings of advance-fee credit repair services, see *FTC v. Ellis*, Civil Action No. 96-114-LHM(EEx) (C.D. Cal. filed Feb. 7, 1996); *FTC v. Consumer Credit Advocates, P.C.*, 96 Civ. 1990 (S.D.N.Y filed Mar. 19, 1996); *Martha Clark*, [U.S. FTC] Docket No. C-3667 (June 10, 1996); *Bryan Coryat*, [U.S. FTC] Docket No. C-3666 (June 10, 1996); *Lyle R. Larson*, [U.S. FTC] Docket No. C-3672 (June 12, 1996); *Rick A. Rahim*, [U.S. FTC] Docket No. C-3671 (June 12, 1996); *FTC v. Corzine*, CIV-S-94-1446 (E.D. Cal. filed Sept. 12, 1994); promises to recover funds lost in prior scams, see *FTC v. Telecommunications Protection Agency, Inc.*, No. CIV-96-344-5 (E.D. Okla. filed July 24, 1996); *FTC v. Desert Financial Group, Inc.*, No. CV-S-95-0151-LDG (D. Nev. filed Dec. 5, 1995); *FTC v. Meridian Capital Management, Inc.*, CV-S-96-63 PMP (RLH), 1996 U.S. Dist. LEXIS 19746 (D. Nev. Nov. 21, 1996); *FTC v. USM Corp.*, No. CV-S-95-0668-LDG (D. Nev. filed July 12, 1995); *FTC v. PFR, Inc.*, No. CV-S-95-74-PMP (LRL) (D. Nev. filed Jan. 25, 1995); *FTC v. Thadow, Inc.*, No. CV-S-95-75-HDM (LRL) (D. Nev. filed Jan. 25, 1995); *FTC v. Canicatti*, CV-S-94-859-HDM (RLH) (D. Nev. June 14, 1995); *FTC v. United Consumer Services*, No. 1:94-CV-3164-CAM (N.D. Ga. filed Nov. 30, 1994); and advance-fee loans, see *FTC v. Amstar Finance Corp.*, Civ. No. 96-3973 HLH (Jrx) (C.D. Cal. Mar. 4, 1997); *FTC v. Popp*, Civ. No. 4:96CV183 (E.D. Tex. filed June 7, 1996); *FTC v. Silvers*, Civ. No. 96-3977 (Mcx) (C.D. Cal. filed June 5, 1996); *FTC v. Ideal Credit Referral Services Ltd.*, C96-0874 (W.D. Wash. filed June 5, 1996).
[120] Directive on the Protection of Consumers in Respect of Distance Contracts, 97/7/EC (May 20, 1997) (hereafter "Directive").
[121] Directive, Art. 15.
[122] Directive, Art. 14.

[123] Directive, Art. 4. Sellers are required to provide consumers with specified categories of information concerning the transaction, including the seller's identity, characteristics of the goods or services, price, delivery costs, arrangements for payment and delivery, the existence of a right of withdrawal, the cost of premium telecommunication services, the duration of the offer, and the minimum duration of recurrent purchase obligations. Art. 4(1). The disclosures must be made "in good time prior to the conclusion of any distance contract." Id. "[I]n the case of telephone communications, the identity of the supplier and the commercial purpose of the call shall be made explicitly clear at the beginning of any conversation with the consumer." Art. 4(3). The consumer must also receive written confirmation of the disclosures, and certain additional information, no later than the time of delivery of the goods. Art. 5.
[124] "For any distance contract the consumer shall have a period of at least seven working days in which to withdraw from the contract without penalty and without giving any reason." Directive, Art. 6(1).
[125] "Unless the parties have agreed otherwise, the supplier must execute the order within a maximum of 30 days from the day following that on which the consumer forwarded his order to the supplier." Art. 7(1).
[126] Art. 8.
[127] Art. 9.
[128] Sellers may not contact consumers using automated telephone calling machines or fax transmissions without the "prior consent of the consumer." Art. 10(1). Other forms of distance communication "may be used only where there is no clear objection from the consumer." Art. 10(2).
[129] Art. 2(1).
[130] Art. 2(4).
[131] Directive, Annex I.
[132] The requirement that goods be shipped within thirty days corresponds to the FTC's Mail or Telephone Order Merchandise Rule, 16 C.F.R. Part 435. The right to receive reimbursement for fraudulent use of a payment card is treated in U.S. regulations governing billing disputes, see Fair Credit Billing Act, 15 U.S.C. § 1666; Regulation Z, 12 C.F.R. § 226.13. The prohibition on inertia selling is addressed in the FTC's rule on Use of Negative Option Plans by Sellers in Commerce, 16 C.F.R. Part 425, and in the Unordered Merchandise statute, 39 U.S.C. § 3009. The limitations on use of automatic calling machines and fax transmissions are covered in the Telephone Consumer Protection Act, 47 U.S.C. § 227, and its implementing regulations, 47 C.F.R. § 64.1200.
[133] Rule Concerning Cooling-Off Period for Sales Made at Homes or at Certain Other Locations, 16 C.F.R. Part 429 (right to withdraw within three business days after transaction). Various state laws contain a similar provision, see, e.g., Tenn. Code Ann. 47-18-703; Tex. Rev. Civ. Stat. Ann. art. 5069-13.02, as does the relevant model state law, see Uniform Consumer Credit Code §§ 3.501-3.505, 7A U.L.A. 1 (1974). The federal rule does not preempt state cooling-off rules, except to the extent they are directly inconsistent with the federal rule, 16 C.F.R. § 429(2).
[134] Truth in Lending Act § 125, 15 U.S.C. § 1635 (three-day right of withdrawal).
[135] Md. Code Ann., Real Prop. § 11A-114 (ten-day right of withdrawal); Wisc. Stat. Ann. § 707.47(2) (five-day right of withdrawal).
[136] Fla. Stat. Ann. § 468.454(4) (fifteen-day right of withdrawal).
[137] 11 U.S.C. § 524(c) (sixty-day right of withdrawal).
[138] 16 C.F.R. § 429.0(4).
[139] See 16 C.F.R. § 429.1(d); Fla. Stat. Ann. § 468.454(4); Md. Code Ann., Real Prop. § 11A-114(b); Wisc. Stat. Ann. § 707.47(4). Other cooling-off rules allow waiver only under limited circumstances; see Tenn. Code Ann. 47-18-703(5).

[140] Directive, Art. 12(1).
[141] The same non-waivability rule applies to the right of withdrawal conferred in the Directive to Protect Consumers in Respect of Contracts Negotiated Away from Business Premises, Art. 6, 85/577/EEC (Dec. 20, 1985).
[142] Directive, Art. 11(1) & (2).
[143] 16 C.F.R. § 310.3(a)(2).
[144] 16 C.F.R. § 310.3(c).
[145] 16 C.F.R. § 310.4(a)(2) to (4).
[146] See text accompanying notes 129-131 above. As initially proposed, the TSR covered communication not only by telephone but also by "the use of a facsimile machine, computer modem, or any other telephonic medium." 60 Fed. Reg. 8329. The FTC later narrowed the scope to cover telephones only, explaining that "it does not have the necessary information available to it to support coverage of on-line services under the Rule." 60 Fed. Reg. 30,411.
[147] Directive, Art. 2(4).
[148] Directive, Annex I.
[149] In some cases, an e-mail address may indicate the country that registered the domain name, via a two-letter country abbreviation forming the last two letters of the domain name. For example, an e-mail address at a domain registered in Sweden might have the form "user_name@service_provider.se." However, the fact that a domain has been registered with the registrar of a particular country does not necessarily mean that the server hosting it, or the person who owns it, is located in that country: The Internet's addressing scheme is logical, not geographical. Moreover, an Internet address belonging to one of the global top-level domains, such as .com, .org, .net, and .edu, does not even suggest the geographical location of the domain owner or user. Even when an address suggests a specific geographical location, there is no guarantee that the recipient of the communication will be located at that position when the e-mail is received. Through a variety of techniques, it is possible to log into one's access provider and receive one's e-mail from a remote location (Burk, 1996, p. 1113).
[150] There are some exceptions, involving adult-oriented materials. For example, the Italian owner of a Web site who distributes sexually explicit pictures, but is prohibited by court order from making the pictures available in the U.S. due to trademark rules, employs a password system under which "prospective users fax an 'order form' . . . along with a credit card number, and receive back a password and user ID via e-mail." *Playboy Enterprises, Inc. v. Chuckleberry Publishing, Inc.*, 939 F. Supp. 1032, 1043 (S.D.N.Y. 1996). Likewise, the owner of a computer bulletin board system offering sexually explicit pictures to subscribers required prospective subscribers to submit an application form listing the applicant's address and telephone number. *U.S. v. Thomas*, 74 F.3d 701, 705 (6th Cir.), *cert. denied*, 117 S. Ct. 74 (1996).
[151] A digital good is one consisting of a stream of digitized data, which may take the form of information, graphic images, software, music, or video content. Digital goods are "shipped" by transmitting data across a network, rather than through delivery of a physical item.
[152] Such efforts may be found where the communication is made in a language that is understood almost exclusively by residents of the recipient country; the maker of the communication advertises within the recipient country through other media; or the communication offers a means of responding to the solicitation by domestic communications, such as a local telephone number or mailing address, within the recipient country.
[153] Directive, Art. 14 (emphasis added).
[154] A U.S. court has invalidated a state statute forbidding indecent communications

on the Internet as an unconstitutional burden on interstate commerce. The court reasoned that the law in question seeks to regulate communications occurring wholly outside the state, imposes a burden on interstate commerce that is disproportionate to the local benefits, and subjects Internet users to inconsistent state obligations. *American Library Association v. Pataki*, 969 F. Supp. 160 (S.D.N.Y. 1997). See also Reynolds (1996), arguing that if each state applied its own laws to content on the Internet, the result would be an intolerable burden on interstate commerce in violation of the commerce clause of the U.S. Constitution; and Burk (1996, pp. 1096–97): "the Due Process Clause of the Fourteenth Amendment and the Commerce Clause in its dormant aspect significantly curtail the ability of states to regulate on-line activities".

[155] Directive, Art. 6(1).

[156] Directive, Art. 6(3)

REFERENCES

Arcadi, A. M. (1991). What about the lucky leprechaun? An argument against "The Telephone Consumer Protection Act of 1991." *Columbia Business Law Review, 1991*, 417–432.

Asch, P., & Seneca, R. (1985). *Government and the marketplace*. Chicago: Dryden Press.

Berkenblit, H. E. (1994). Can those telemarketing machines keep calling me? – The Telephone Consumer Protection Act of 1991 after Moser v. FCC. *Boston College Law Review, 36*, 85–123.

Bryson, J. E., & Dunham, S. S. (1969). A case study of the impact of consumer legislation: The elimination of negotiability and the cooling-off period. *Yale Law Journal, 78*, 618–661.

Burk, D. L. (1996). Federalism in cyberspace. *Connecticut Law Review, 28*, 1095–1136.

Chandrasekran, R. (1997). Direct marketing group adopts new guidelines. *Washington Post*, October 16.

Davis, K. C., & Pierce, R. J., Jr. (1994). *Administrative law treatise*. Third ed. Boston: Little, Brown.

DMA (1998). *Compendium of government issues affecting direct marketing*. New York: Direct Marketing Association.

Hiller, J. S. (1996). The check is . . . on the telephone? *South Carolina Law Review, 47*, 305–322.

Jackson, T. H. (1985). The fresh-start policy in bankruptcy law. *Harvard Law Review, 98*, 1393–1447.

Kronman, A. T. (1983). Paternalism and the law of contracts. *Yale Law Journal, 92*, 763–798.

McConathy, M. D. (1996). Destination Ventures, Ltd. v. F.C.C. and Moser v. F.C.C.: How much should the Telephone Consumer Protection Act restrict your phone, fax and computer? *Golden Gate University Law Review, 26*, 153–182.

Michela, P. E. (1994). "You may already have won . . .": Telemarketing fraud and the need for a federal legislative solution. *Pepperdine Law Review, 21*, 553–615.

Nadel, M. S. (1986). Rings of privacy: Unsolicited telephone calls and the right of privacy. *Yale Journal on Regulation, 4*, 99–128.

Posner, R. (1977). *Economic analysis of law*. Second ed. Boston: Little, Brown.

Reynolds, G. H. (1996). Virtual reality and "virtual welters": A note on the Commerce Clause implications of regulating cyberporn. *Virginia Law Review, 82*, 535–542.

Rosden, G. E., & Rosden, P. E. (1997). *The law of advertising*. New York: Matthew Bender.
Schneider, H. (1997). Telemarketing scams based in Canada increasingly target U.S. residents. *Washington Post*, August 24.
Sher, B. D. (1968). The "cooling-off" period in door-to-door sales. *University of California at Los Angeles Law Review*, *15*, 717–786.
Sunstein, C. R. (1989). Discrupting voluntary transactions. In: J. W. Chapman & J. R. Pennock (Eds.), *Markets and justice*, pp. 279–302. New York: New York University Press.
Utton, M. A. (1986). *The economics of regulating industry*. Oxford: Basil Blackwell.

ZUSAMMENFASSUNG

Verbesserung der Funktionsfähigkeit des Marktes: Förderung der Konsumentensouveränität durch die amerikanische Verordnung über Telemarketing und die europäische Fernabsatzrichtlinie. Der Beitrag analysiert die Bestimmungen der Verordnung über Telemarketing, die die amerikanische Federal Trade Commission 1995 auf der Grundlage eines Gesetzes aus dem Jahr 1994 verkündet hat. Der Autor bietet einen Bezugsrahmen, innerhalb dessen die Verordnung als Durchsetzung einer Strategie zur Kontrolle mißbräuchlicher Telemarketing-Aktivitäten durch Stärkung der Marktkräfte verstanden werden kann. Die Verordnung wirkt vor allem dadurch, daß sie die Informationen für Verbraucher quantitativ und qualitativ verbessert, daß sie Verbraucher dabei unterstützt, ungewollte Transaktionen zu vermeiden, daß sie es Anbietern erschwert, Marktmechanismen zu unterlaufen, und daß sie die Wirksamkeit vertraglicher Abmachungen stärkt.

Der Beitrag überträgt diesen Bezugsrahmen dann ebenso auf die Fernabsatzrichtlinie der Europäischen Union und gelangt zu einer Reihen von Empfehlungen an die Mitgliedstaaten der EU bei der Umsetzung der Richtlinie in nationales Recht. Dabei diskutiert der Autor insbesondere solche Gesichtspunkte, die die Mitgliedstaaten beachten sollten, wenn es um Regelungen von Markttransaktionen geht, die über elektronische Medien erfolgen.

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