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THE IMPACT OF THE PROTECTION OF PERSONAL INFORMATION ACT NO 69 OF 2013 ON DIRECT MARKETING AND INSURANCE CONSUMER PROTECTION IN SOUTH AFRICA

by

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ABSTRACT

This dissertation seeks to examine the impact of the Protection of Personal Information Act 69 of 2013 ("POPI Act") on direct marketing and insurance consumer in the insurance industry. This is important because the advancements in technology call for a delicate balanced between the protections of consumers Constitutional rights with an enabled economic growth market.

Technology makes it easy for personal information to be collected and be disseminated in huge volumes across the globe within seconds. The personal information such as names and contact details therefore become available and can be collected for purposes of direct marketing. Before the enactment of POPI Act, unwanted direct marketing in the insurance sector was regulated by section 45 of the Electronic Communications and Transactions Act 25 of 2002 ("ECTA") as well as various insurance statutes. The Consumer Protection Act 68 of 2008 ("CPA") does not apply in to the insurance industry, however, will be discussed briefly to create context and an appreciation of the adequacy of the protection provided by insurance statutes on direct marketing.

This dissertation therefore argues that insurance legislation was not adequate to protect the insurance consumers from the unlawful processing of their personal information by direct marketers. The inconsistencies in different statutes before POPI Act was enacted made it easy for the direct marketers to infringe on the consumers' right to privacy by sending the unwanted direct marketing communication or by disclosing these consumers' personal information to third parties without the consumer's knowledge or consent.

In examining the efficacy of the POPI Act, the study shows that its provisions are sufficient to protect insurance consumers from unwanted direct marketing. This conclusion is supported by the fact that the POPI Act is a personal information protection legislative instrument and more specifically because section 69 of this Act is dedicated to the regulation of direct marketing in all industries. The POPI Act provides guidelines for lawful processing of personal information, thus supporting the free flow of information for purposes of direct marketing, while securing privacy of consumers.

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1.1 Introduction

The insurance industry is renowned for collecting large amounts of personal information gleaned from its clients.[1] The rapid growth in technology has enabled many new promotional techniques in most industries, especially relating to direct marketing of products and services.[2] The insurance industry has also embraced this changing digital landscape to talk directly to their customers as a way of improving their profits.[3] This modern-day computerised society, however, poses a huge threat to people's privacy, more so than ever before, as their information is utilised for different purposes from those it was originally collected for, such as for purposes of direct marketing[4]. The South African consumer was given relief, however, with the enactment of the Protection of Personal Information Act, which seeks to protect consumers against the use of their information for purposes of direct marketing without their consent.[5]

This dissertation seeks to examine the impact of the Protection of Personal Information Act 69 of 2013 ("POPI Act") on direct marketing and insurance consumer protection in South Africa by focusing specifically on the insurance regulatory framework.

1.2 Background

Developments in technology have transformed the way businesses record personal information of individuals, thus changing the way business is conducted in all sectors of the economy. [6] The insurance industry is one of the industries that manages vast computerised databases.[7] While these technological developments make it economical for marketers to run their businesses by enabling them to approach clients with individualised offerings, they also expose individuals whose information have been recorded, sometimes leading to irritating and intrusive unsolicited communication.[8]

[1] Kuschcke (2007) *De Jure* 305.
[2] Jordaan (2007) *International Retail and Marketing Review* 42.
[3] Jeyakumar (2017) 11.
[4] Neethling (2012) 75 *THRHR* 241.
[5] Zenda *et al* (2020) 114. *SACJ* 32(1).
[6] Helveston (2016) *Washington University Law Review* 93.
[7] South African Law Reform Commission (SALR) 'Privacy and Data Report' para 1.2.9 available at www.justice.gov.za/salrc/dpapers/dp109.pdf (accessed 17 June 2019).
[8] Millard (2013) *JCRDL* 621.

As pointed out earlier, the insurance industry is noted for being one of the industries that is heavily dependent on the personal information of individuals, as they need to tailor their offerings according to each individual's risk profile.[9] This business imperative, while coupled with the promotional activities such as direct marketing, can lead to invasion of the individual's right to privacy.[10]

Privacy is considered a fundamental right in South Africa and is protected by the Constitution. It is, however, not the aim of the Constitution to provide aggrieved parties with remedies, as this lies within the realm of specialised legislation.[11] Until recently, the practice of unsolicited communications was only addressed in the FAIS Act and not under any other legislation in the insurance industry.[12]

Generally, unsolicited communication in South Africa is regulated by the CPA[13] and the newly promulgated POPI Act[14]. The core section dealing with the lawful processing of information and direct marketing under the POPI Act came into effect on the 1st of July 2020. Both public and private institutions have time until the 1st of July 2021 to comply with the provisions of the POPI Act.[15] It is envisaged that once this Act becomes fully operational after the grace period, the consumer will enjoy greater privacy protection than is currently provided for under the existing regulation.[16] Section 45 of the ECTA, which regulated electronic communication, was repealed by section 69 of the POPI Act when the latter came into force.

There have been several studies about the issue of protecting consumers from direct marketing and how this practice exposes individuals to the infringement of their right to privacy.[17] These discussions focused mostly on the CPA provisions and the impact the POPI Act is going to have on direct market of these general products and services. Insurance services are, however, different from other services in many respects and as a result they

[9] Abdulrauf (2015) *The Legal Protection of data privacy in Nigeria. Lessons from Canada and South Africa*, unpublished LLD thesis, University of Pretoria 35.
[10] Hamman (2014) D.
[11] Millard (2013) 621.
[12] Only the Long-term Insurance Act and the Short-term Insurance Act were applicable in this space.
[13] FAIS Act and the PPR in terms of insurance contracts.
[14] Act 69 of 2013.
[15] www.justice.gov.za/inforeg/docs/ms-20200622-POPI ACT-SectionsCommencement-IR.pdf (accessed 4 September 2020).
[16] Da Viega (2017) South African Institute of Electrical Engineers 59.
[17] Different authors such as Swales, Hamman and Papadopoulos, as well as De Stadler have conducted studies on direct marketing and its impact on privacy from general goods perspective.

have been exempted from the application of the CPA. This dissertation therefore seeks to extend the previous studies done on non-financial services that are regulated by the CPA, by considering the impact that direct marketing has on insurance services specifically, and whether the POPI Act will be effective compared to the current insurance protection legislation. It adds to the discussion by assessing how the CPA and the insurance regulatory framework regulate the practice of direct marketing. It will then determine the impact that the POPI Act will have on this practice in relation to the CPA and insurance legislation as a whole.

1.3 Research aim and research questions

The purpose of this research is to examine the impact of the Protection of Personal Information Act 69 of 2013 ("POPI Act") on direct marketing and insurance consumer protection in South Africa, by focusing on the insurance regulatory framework.

This contribution will therefore seek to answer the following questions:

To what extent was the pre-POPI Act insurance legislation efficient in dealing with the direct marketing practice?

What impact does the POPI Act have on the practice of direct marketing in the insurance industry?

What role will the POPI Act have in the current consumer protection insurance legal framework and in direct marketing practice?

1.4 Methodology

In order to answer the questions noted in 1.3 above, a critical and analytical study approach was followed. This was done by analysing both primary sources[18] and secondary sources[19] relating to privacy and direct marketing, with insurance marketing as the main focus. A brief

[18] Legislation, common law, and case law where possible.
[19] Journal articles and textbooks.

comparative analysis of the CPA and the insurance legal framework with regard to direct marketing regulation in non-financial and insurance industries is carried out in chapter 5.

1.5 Chapter breakdown

Chapter One introduces the research by stating the basis of the study. It then provides the background and sets out the research problem that motivated this study. It establishes the purpose of the research and sets out the questions that the study seeks to answer.

Chapter Two analyses the right to privacy and the general practice of direct marketing in South Africa. It commences with a critical analysis of the concept of privacy under common law and the Constitution.

This discussion is then followed by a discussion of the direct marketing practice. An analysis of how this practice infringes on the consumer's rights through the disclosure of and unauthorised access to personal information is conducted.

Chapter Three examines the regulatory framework regarding the practice of direct marketing under the ECTA, CPA, and POPI Act. In order to assess the impact and the efficacy of the protective provisions of the POPI Act, it was necessary to carry out a critical review of the legislation that preceded it. This necessitated the discussion of section 45 of the ECTA, which has just been repealed by section 69 of POPI Act. The inclusion of a brief discussion of the CPA was also necessary, as it will create a context for the general principles on protection of personal information and direct marketing outside the insurance space.

Chapter Four involves a study of the insurance legal framework that regulates the practice of direct marketing. The critical provisions of various industry-specific statutes that seek to protect the insurance consumer from direct marketing are analysed. This was crucial, because it would provide a clear understanding of the impact that POPI Act is going to have in this industry relation to the direct marketing practice.

Chapter Five entails a comparison of the protection provided by the CPA on direct marketing and the protection enjoyed under the insurance industry-specific legislation. This

comparison is then followed by a general comparison between all pre-POPI Act statutes for all products and services, and the new POPI Act provisions.

Chapter Six records the conclusions on whether the aim of the study was achieved. It confirms the findings on the impact that the provisions of the POPI Act on direct marketing and lawful processing of personal information have on the insurance industry.

1.6 Limitations

This research only focused on the impact of the practice of direct marketing and the protection of personal information by thoroughly analysing the POPI Act and insurance legislation such as the Financial Advisory and Intermediary Services Act,[20] ("FAIS"), Long-term Insurance Act,[21] ("LTIA") and the Short-term Insurance Act,[22] ("STIA") and their respective Policyholder Protection Rules ("PPRs"). A comprehensive review of all legislation is beyond the scope of this study.

The other statutes such as the CPA and the ECTA was discussed merely to provide context. A brief discussion of the CPA provisions on privacy and direct marketing was necessary to create an understanding of the efficiency of the insurance specific protection measures. Section 45 of the ECTA, although it has since been repealed, had to be discussed briefly as it was the first statute to regulate electronic communication.

The study does not address other data protection provisions in other legislative instruments such as the Promotion of Access to Information Act ("PAIA"), ECTA, and the Regulation of Interception of Communications and Provision of Communication-Related Information Act ("RICA").

The scope and time limitations also did not allow for the inclusion of a comparison of the POPI Act provisions with international data protection laws such as the General Data Protection Regulation ("GDPR")[23] which also has an impact on some South African businesses.

[20] Act 37 of 2002.
[21] Act 52 of 1998.
[22] Act 53 of 1998.
[23] Which replaced the Directive 95/46/EC (European Union's Data Protection Directive).

1.7 Conclusions

The POPI Act, although not yet fully in operation, was introduced to protect consumers against threats to their privacy associated with direct marketing practices and as facilitated by technological developments. The protection of personal information requires a delicate balancing act between the various interests of persons. The interests at play include personal, societal and commercial interests. The study examines whether the POPI Act will be the most effective legislation to address the challenges brought about by direct marketing practices with a specific focus on the insurance legal framework. It is clear that the POPI Act does contain provisions that address consumers' concerns about their privacy during direct marketing. It is clear that the provisions of the POPI Act achieve a balance, in which the control of personal information remains vested in the consumer by ensuring that insurers obtain the prior consent of the insurance consumer before utilising their personal information.

2 CHAPTER 2: THE RIGHT TO PRIVACY AND UNWANTED DIRECT MARKETING

2.1 Introduction

The need to protect one's privacy and personal information has become a basic need in the digital era, as more and more persons conduct their lives online via the internet.[24] Technological advances such as computer databases have increased the need to protect consumers' rights to privacy.[25] These advances have resulted in a dramatic increase in the use of personal information for purposes of direct marketing,[26] giving rise to a heightened concern among consumers regarding their privacy.[27] The right to privacy is safeguarded when measures are in place to ensure that a person's information is collected, stored, used and communicated lawfully.[28]

"Direct marketers"[29] engage in a variety of practices of information collection and compilation to gain access to their audiences and potential clients. In order to communicate with their target markets, they compile personal information electronically. Some of the electronic methods they use may be intrusive and may infringe on the consumer's right to privacy. Technological advances make it possible for individuals and the state to, in a matter of a few minutes, compile a personal dossier that would otherwise take ages to compile.[30] This information is highly valuable in the hands of marketers for the generation of business revenue. While the importance of commerce can never be ignored, many consumers would be uncomfortable with the monitoring of their personal information by direct marketers, especially if they had not consented to such monitoring, and in some instances when they are not even aware that it is being collected.[31]

[24] Swales (2016) *South African Mercantile Law Journal* 49.
[25] Currie (2013) 303.
[26] From a commercial point of view this relates to a situation where the business communicates directly with the consumer to influence her to transact with them.
[27] Jordaan (2007) *International Retail and Marketing Review* 42.
[28] South African Law Reform Commission (SALRC) (2009) *Privacy and data protection report* VI.
[29] A direct marketer is someone who engages in the promotion of goods and services to consumers as shown in note 3.
[30] Burchell (2009) 13.*Journal of Comparative Law* 1.
[31] Papadopoulos (2012) 276.

It is acknowledged that advertising plays an important role in the economy as a source of information and as motivation for technological developments.[32] However, unwanted direct marketing can be seen as a great source of irritation to consumers.[33] The report of the South African Law Reform Commission ("SALRC" or "the Commission") showed that direct marketing as a promotional tool has overtaken traditional advertising.[34] The Commission also showed that direct marketing industry and the insurance industry are some of the largest users of personal data per industry in the private sector.[35] It can therefore be inferred that direct insurers would be on top of the list of institutions that are in possession of the most personal information of persons as they fall within both industries.

This chapter will discuss the right to privacy in relation to unwanted direct marketing under common law and the Constitution of South Africa[36] (hereafter "the Constitution"). The discussion will be twofold: the first part will focus on the analysis of the right to privacy under the Constitution and common law; after that, the discussion will shift to the practice of direct marketing and how it affects privacy. A thorough investigation of the right to privacy in terms of direct marketing will be follow in Chapter 3, where the provisions of the POPI Act will also be examined.

2.2 The concept of the right to privacy

According to Currie and De Waal, the right to privacy is protected under both common law and Section 14 of the Constitution[37]. These authors further noted that the Constitution provides a wider conception of privacy than common law. Burchell had already shown that the common law, the Bill of Rights and legislation have all played an important role in the development of the law of privacy in South Africa, and that this should be an inspiration for other jurisdictions.[38] Thus, after the current general analysis of the concept of privacy, the discussion focuses on privacy under common law and the Constitution separately. The last

[32] Geissler (2009) *Bulk unsolicited electronic messages (spam): A South African perspective*, LLD thesis, University of South Africa 305.
[33] Millard (2013) 76 *Journal of Contemporary Roman-Dutch Law (JCRDL)* 604-622.
[34] South African Law Reform Commission (SALRC) (2009) Report para 5.1.4 at www.justice.gov.za/salrc/reports/r_prj124_privacy%20and%20data%20protection2009.pdf (accessed 1 May 2020).
[35] SALRC (2009) paragraph 1.2.9.
[36] The Constitution of the Republic of South Africa.
[37] Constitution of the Republic of South Africa, 1996.
[38] Burchell (2009) 3.

part will be on the protection provided by the relevant legislation, with the specific focus being on direct marketing through unwanted communication.

Privacy as a concept is characterised by vagueness because of the different meanings that have been assigned to it by different people. The courts have also considered different interpretations in defining it.[39] Currie attributes the difficulty of defining privacy to an attempt by its definers to find its 'core', because such a 'core' does not exist. According to Currie, at the heart of the difficulty of defining this concept is the misunderstanding of its nature.[40] It is therefore submitted that, inasmuch as it is difficult to provide a specific definition of privacy because it tends to be influenced by time and place, an attempt to assign a certain definition is crucial because it will shape this discussion on the concept.

In 1954, in the case of *O'Keeffe v Argus Printing and Publishing Co Ltd,*[41] the court successfully recognised privacy as an independent personality right, but it failed to define it.[42] The court in *Grutter v Lombard*[43] confirmed that the concept *dignitas* included both identity and privacy, thus confirming privacy as an independent personality right.

Neethling *et al* [44] describe a continuum in which privacy starts in the inner self, which is completely inviolable, and continues to decline as one moves towards the public space. The *Hyundai Motor Distributors v Smit NO*[45] case extended this concept by showing that privacy does not only protect the value of human dignity, because the law also acknowledges the protection of privacy of juristic entities such as companies. The Constitutional Court confirmed, in the case of *Gaertner and Others v Minister of Finance*,[46] that businesses do indeed possess a right to privacy, although not as strongly as natural persons. It was shown that this right is even further reduced if the business is a public company. Rautenbach[47] also attempts to define privacy from the Constitutional perspective by ways of pointing out the purpose of the right to privacy under the Constitution.

[39] Currie (2008) 550.
[40] *Ibid*.
[41] 1954 3 SA 244 C.
[42] Roos (2003) 567.
[43] *Grütter v Lombard and another* 2007 (4) SA 89 (SCA), par [12].
[44] Neethling (1996) 221.
[45] *Hyundai Motor Distributors v Smit* NO 2000 (2) SA 934.
[46] *Gaertner and Others v Minister of Finance* 2014 (1) BCLR 38 (CC) para 36.
[47] Rautenbach (2009) *TSAR* 554.

The above interpretations of the concept of privacy provide a comprehensive and useful approach to this concept. The approach taken by the Constitutional Court in *Gaertner and Others v Minister of Finance* in interpreting this concept provides a useful authority for this study. Unlike the *Bernstein v Bester* definition, Neethling's definition does not limit privacy to space or place.[48] It can be deduced from the different definitions given above that while privacy is a very fluid concept that changes according to circumstances, it is a right that has always been protected in our law. This right has existed for a long time under common law and was ultimately reinforced under the Constitution.[49]

2.3 Common law definition of privacy

As indicated above, South African common law recognises the right to privacy as an independent right[50]. This right can be violated when a party acquaints herself or himself with the personal facts of another, against the will or determination of that other party.[51] For purposes of common law, the privacy right can be defined in line with Neethling's interpretation, where he states that the best way to define privacy is by simply aligning the definition with its factual reality. He defines it as:

> "…a condition of human life characterised by seclusion from the public and publicity. This condition embraces all those personal facts which the person concerned has himself determined to be excluded from the knowledge of outsiders and in respect of which he has the will that they be kept private."

2.3.1 The protection of the right to privacy under common law

In South Africa, a person can rely on the common law of delict to protect their right to privacy by providing remedies when this right is infringed upon. The generally accepted main

[48] Currie (2013) 302.
[49] McQuoid-Mason (2000) 228 *Acta Juridica* 248.
[50] Neethling *et al* (1996) 217 argue that in terms of the common law every person has personality rights such as the rights to physical integrity, freedom, reputation, dignity and privacy.
[51] Neethling (2005) 122 (1) *SALJ* 18.

remedies for common law invasions of privacy are: (i) *the actio iniuriarum*; (ii) the *actio legis Aquiliae*; and (iii) the interdict.[52]

McQuoid-Mason shows that invasions of privacy take the form of either intrusion or public disclosure. He shows that the South African courts have always regarded an invasion of a person's privacy rights as aggression against that person's personality rights, entitling that person to a delictual claim under the *actio iniuriarum*; which is a common law remedy for protection against dignity. Neethling also mentions that the *amemde honourable* is another remedy that can be claimed under the *action iniurarum* for defamation. He shows that recent cases show that this old Roman-Dutch remedy has been resurrected in South Africa.[53] As a result, a person whose personal information has been wrongfully disclosed to third parties by the insurer can require a public apology as an exclusive remedy or require both damages and an apology.

Thus *actio iniuriarum* is the action for wrongful and intentional injury to personality and can be used where an individual's privacy has been infringed to claim for non-patrimonial damages.[54] In order to be successful under this action, all five elements of a delict, namely act, wrongfulness, fault, causation and damage need to be proven before the conduct can be regarded as a delict.[55]

Act

A delict can only exist when a person's action or conduct has caused damage to another.[56] For purposes of privacy, one commits an act of infringement of privacy through an unauthorised acquaintance with another person's affairs (*intrusion*) and when one discloses the personal information of another to a third party.[57]

From a direct marketing perspective, direct marketers infringe on the privacy rights of others in both ways when they obtain the personal information of their potential clients from third parties or from freely circulating databases and consequently approach them through their mobile phones or by sending emails to their electronic equipment to advertise their products

[52] Naude (2016) 54.
[53] Neethling *et al* (2015) 268
[54] Neethling *et al* (2015) 342.
[55] Neethling *et al* (2015)4.
[56] Neethling *et a*l (2015)25.
[57] Neethling *et al* (2015)371.

without the customers' consent.[58] Hamman and Papadopoulos stated that a successful marketing campaign requires the marketer to have information in the form of names and contact details.[59] These direct marketers also require the prospective clients' private information, such as demographics and purchasing habits. Advances in technology have made it easy and cheap for direct marketers to collect, share and process persons' information in their databases.[60] It is therefore clear that the processing of information for e-commerce purposes exposes customers to a heightened risk of invasions of privacy, as individuals' online footprints can be followed and a consumer profile can be created and sold to the direct marketers.[61]

According to Geisler, technological developments have rendered some of the common law principles inadequate, because such an intrusion of privacy may be undetectable. In most cases, the victim of such intrusion would not even be aware that their privacy had been infringed, as the information is taken from computer storage banks and used or disclosed to third parties.[62] This then results in consumers being exposed to, among other risks, unsolicited sales and subscriptions.[63] The conduct or actions of the direct marketer causing the infringement of privacy will only entitle the consumer to delictual remedies if the actions of the marketer are wrongful, intentional or negligent, and factually and legally cause damage.

Wrongfulness

Conduct is basically wrongful if the legally protected subjective right – in our case, in the form of privacy – has been infringed in a legally reprehensible way, or where there is a breach of a legal duty (such as one created by statute). The determination of wrongfulness is ta two-legged process. Firstly, it entails the determination whether there was indeed an infringement of the right. The second consideration is whether the infringement is unacceptable according to the legal convictions of the community or a statute.[64]

[58] Roos (2012) 11.
[59] Hamman & Papadopoulos (2014) 46.
[60] Jordaan (2007) *International Retail and Marketing Review* 43.
[61] Roos (2003) 402.
[62] Geissler (2009) 143.
[63] Van Eeden (2017) 554.
[64] Neethling *et al* (2015) 35.

According to Neethling *et al*, the infringement of privacy is only wrongful if the expectation of the protection of personal facts is reasonable and should also, when viewed objectively, be contrary to the legal convictions of society.[65] It is therefore submitted that the expectation that personal information will be kept confidential by businesses or the institution that has collected it is reasonable, and that the selling of such information for purposes of direct marketing is *contra bonos mores* or a breach of a legal duty not to do so.

Fault

Neethling shows that another important requirement for *delictual* liability for the infringement of the right to privacy is fault. He shows that for purposes of *actio iniuriarum*, the form of that is generally required is intention as negligence is usually regarded as insufficient.[66] There is, however, a rebuttable presumption of *animo iniuriarandi* or intention once the act of infringement of privacy has been established.

The onus of proving intention is however very onerous and compliance of proving it factually difficult. In the case of *NM and others v Smith and others*, [67] the Constitutional Court declined the call for the development of common law of privacy by finding liable those who negligently infringe on a person's privacy right. Madala J confirmed that the common law action of invasion of privacy based on *action iniuriarum* can only succeed if intention (*animus iniuriandi)* is proven. He showed that as a general rule, negligence is still not sufficient to render the wrongdoer liable.[68]

It is evident from the above discussion that the common law remedies for infringement of privacy by the direct marketers are surrounded by legal technical challenges. There hardly any motivation for a complainant who has received an unsolicited communication from the insurer or whose information has been disclosed to third parties engage in prolonged litigation and try to prove all elements of an *actio iniuriarium.* It is therefore usually easier to just delete the electronic communication or ignore or block the unwanted call from a direct marketer.

[65] Neethling (1996) 221.
[66] Neethling *et al* (2015) 130.
[67] *NM and Others v Smith and Others* 2007 (7) 551 CC.
[68] *NM and others v Smith* [55].

2.4 The Constitutional right to privacy

The South African Constitution is the supreme law of the land. Any law or conduct that contradicts its provisions will have no force of law. The Bill of Rights is binding on both state and non-state organs. The state has a duty to respect, protect and fulfil the rights in the Bill of Rights. The rights noted in the Bill of Rights are, however, not absolute. They are limited by the law of general application, to the extent that the limitation is reasonable and justifiable in an open and democratic society.[69] The South African Constitution guarantees the right to privacy in a general sense in section 14. This section stipulates that:

"Everyone has a right to privacy, which shall include the right not to have –

(a) their person or home searched;

(b) their property searched;

(c) their possessions seized; or

(d) privacy of their communications infringed."

It is important to note that although section 14 specifically notes the right against searches, seizures and infringement of communication, this list is not exhaustive. It extends to any other method of obtaining information or making unauthorised disclosures. There is a direct vertical application on this provision for conduct by the state toward its citizens, yet only an indirect horizontal application regulating the conduct of persons between each other.

Just like all the other rights noted in the Bill of Rights, the right to privacy is not absolute and is subject to the general limitation section,[70] which sets out the circumstances under which the rights noted in the Bill may be restricted.[71] For instance, for the purpose of this study, a marketer could argue that they have a right of expression,[72] and an insurer can reason that it needs to have access to personal information,[73] of its policyholders in order to make claims and underwriting decisions. Thus, it is apparent that protection of the right to privacy requires a delicate balance with the other Constitutionally protected rights.

[69] Currie & De Waal (2013) 150.
[70] Section 36(1).
[71] Currie & De Waal (2013) 150.
[72] Section 16.
[73] Section 32(1) (b).

Section 14 has also been used by some writers to arrest the fluid nature of the concept of privacy. Currie argues that Rautenbach, in defining privacy, attempted to introduce a new and narrow definition of privacy by focusing on processing of informational privacy and thus associating the concept of privacy with informational determination. As mentioned in paragraph 2.2 above, Rautenbach defines the right to privacy protected under section 14 of the Constitution by looking at the conduct and interests that this section seeks to protect. It is submitted that Rautenbach's definition, in this case, speaks to the protection of autonomy reflected under the Constitutional right to privacy. Roos, on the other hand, correctly points out that the Constitutional right to privacy as provided under section 14 is broader than the common law privacy right, because it includes autonomy by specifying the individual's information privacy rights.

According to Currie and De Waal, the Constitutional Court has played a crucial role in shaping the Constitutional right of privacy through different interpretations.[74] In *Bernstein v Bester,*[75] Ackerman J provided a more helpful approach towards dealing with privacy by showing that the privacy right lies along a continuum. He showed that the right to privacy is recognised easily in a truly personal space and less so as one moves further into the communal arena.[76] This means that a person's right to privacy depends on the extent to which they interact with the public.

In the case of *MN v Smith and Others*[77], the court found the publication of the HIV status of the applicants to have been a wrongful publication of private facts. In assessing whether these were private facts, Madala J noted that private facts have been defined as those matters which, when disclosed, "will cause mental distress and injury to anyone possessed of ordinary feelings and intelligence in the same circumstances and in respect of which there is a will to keep them private."[78]

The most important aspect of the court's development of the right to privacy for our discussion is the individual's right to informational privacy.[79] Accordingly, Currie concludes

[74] Currie & De Waal (2013) 297.
[75] *Bernstein v Bester* NO 1996 (2) SA 751 (CC).
[76] Currie & De Waal (2013) 300.
[77] *NM and Others v Smith and Others* (CCT 69/06) [2007] ZACC 6.
[78] NM and Others v Smith and Others (CCT 69/06) [2007] ZACC para 34.
[79] Currie & De Waal (2013) 303.

that an individual has a recognisable right of informational self-determination which seeks to limit the collection, use and disclosure of personal information.

In the context of direct marketing, the collection of personal information from different platforms for purposes of approaching the owners for direct marketing would amount to a breach of the person's informational right to privacy, thus confirming that most direct marketing practices may be found to be an intrusion into the private space of individuals. It seems, therefore, that individuals have little or no control over their personal information in the hands of direct marketers. Unlike the common law, the Constitution does not have any remedies but merely confirms the right, and the remedies for the breach can be found in either common law or the statute. Geissler states that a person whose right to privacy has been infringed may, in line with Section 38 of the Constitution, approach a competent court for appropriate relief, including a declaration of rights.[80]

This brings us to the next section, which investigates how direct marketing affects a person's right to privacy.

2.5 Direct marketing and privacy

Direct marketing is one of many tools that marketers use to grow their business and increase sales.[81] Direct marketing can be defined from a marketing and a legal perspective.[82] The different legislative definitions will be discussed in Chapter 3. From the marketing perspective, the Direct Marketing Association of South Africa ("DMASA") defines direct marketing as a form of advertising that enables organisations to communicate directly with consumers on different platforms.[83] Internationally, direct marketing is seen as an interactive data-driven process of interacting directly with the target market and prospective clients through different channels, with the purpose of creating convenience for the consumer, while enabling the marketer to provide personalised messages and reach most interested consumers.[84]

[80] Geissler (2009) 147.
[81] Strachan (2016) 2.
[82] Hamman (2014) 42.
[83] See https://dmasa.org/page/what-direct-marketing (accessed 20 September 2020).
[84] Fotea (2011) 112.

The importance of direct marketing in the growth of the economy is therefore indisputable. However, this practice is frowned upon, because of the privacy risks it poses to consumers' personal information.[85]

The privacy concerns caused by this practice are twofold. The first concern is with the sending of the unsolicited communication, causing spam and nuisance, and the second arises where the contact details of the consumer have been obtained from third parties or disclosed to these third parties for direct marketing purposes without the consumer's consent.

2.5.1 Unsolicited communication

Since direct marketing practice is solely about making contact with the consumer through different means, the direct marketer will have to have access to the personal information of both current and prospective customers.[86] Direct marketing can be done in person, by mail, by mobile telephone or through electronic delivery systems. The last two methods are regarded as the most effective and the most cost effective, but they are prone to being the main sources of unsolicited communication (spam).[87]

Tladi shows that even though spam is associated mainly with internet or electronic communication, consumers still receive spam on their mobile telephones via short message services (SMS). South Africa has been identified as one of the 20 countries with the highest number of spam calls and SMSes. Apart from scams, most complaints about spam calls and SMSes in South Africa were about insurance companies trying to upsell car insurance to consumers with whom they do not have an existing contractual relationship.[88]

The internet is the most popular form of communication for marketers because it enables them to communicate their products to people all over the world with one click of a button.[89]

[85] Botha (2015). See discussions on https://www.researchgate.net/publication/28372451 (accessed 23 April 2020).
[86] See https://dmasa.org/page/what-direct-marketing (accessed 20 September 2020).
[87] Tladi (2008) *SALJ* 179.
[88] See http://www.truecaller.blog/2019/12/03/truecaller-insights-top-20-countries-affected-by-spam-calls-sms-in-2019/ (accessed 20 September 2020).
[89] Tladi (2008) *SALJ* 178.

Hamman and Papadopoulos identified the following as some of the electronic communication forms that marketers are using to promote their goods or services:

- Mobile cellular text and video messaging (SMS or MMS) which is sent directly to the user's device;
- Mobile device applications (apps) often contain interactive advertisements that appear inside the app;
- Email marketing;
- Search engine optimisation uses meta-tags to target persons using a particular website.
- Pay-per-click advertising is a form of advertising that uses the keywords that consumers are searching for to deliver the electronic communication (website) directly to the searcher.
- Social media marketing;
- Affiliate marketing;
- Banner advertising (mobile and internet);
- Voicemail marketing;
- Couponing, where manufacturers and retailers make coupons/discounts available for online electronic orders. Customers then sign up to receive notices of these discounted offers or coupons.

As can be seen, not all the forms of communication used by direct marketing pose risks to consumers. The call for protection against the unwanted messages has however been growing louder with the ever-increasing number of modes of communication. The next discussion will focus on the risks that technological advancements pose to consumers as their information is exposed to unscrupulous marketers.

2.5.2 Accessing and disclosing of personal information

Technological advances make it easy for marketers to create a new economy by collecting personal information and selling it to third parties. They also enable huge volumes of information to be sent very cheaply and at the click of a button to millions of recipients all over the world.

Organisations are now able to use technology to build huge databases that can be sold and to create profiles of information technology users through the use of information tracking tools such as cookies.[90] Geissler shows that consumers' main concern is about the impact of technology on their privacy. This concern arises when consumers realise how easy it is for personal information to be collected and handled.[91] According to Hamman and Papadopoulos, the consumer's privacy can be invaded through the use of different technological means to collect personal information such as email addresses, demographic details and consumption patterns and to sell these to third parties such as direct marketers.[92]

It is evident from the above that the common law protection measures are no longer sufficient for the protection of consumers. According to Tladi, technological development has increased the complexity of the invasion of privacy, thus rendering the common law protection measures inadequate.[93] It is therefore understandable that there is a growing call for protection under the Constitution and by statutory interventions such as the POPI Act to close this gap in common law which is being exploited by direct marketers. Apart from the common law and the legislation which will be discussed in Chapter 3 and Chapter 4, the direct marketing industry has self-regulation measures through which they are trying to amplify the current legislation.[94]

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[90] See Law Reform Commission Report at para 5.2.20 at https://www.justice.gov.za/salrc/reports/r_prj124_privacy%20and%20data%20protection2009.pdf . (accessed 23 April 2020).
[91] Geissler (2009) 26.
[92] Hamman (2014) 46. Also see the ISPA website (https://ispa.org.za/spam/) where the different methods used by spammers to get consumers' email addresses are described as follows:
- They can write a program which searches the web in spider-like fashion, following links to pages, and the links of those pages to other pages, to infinity. As part of this link following process, the program will search for obvious email addresses such as email@address.com or HTML mailto: links. In a short space of time many thousands of email addresses can be harvested in this fashion.
- They can purchase an existing email address database from someone who runs a continuous spider program. Often selling for a few dollars and amounting to millions of email addresses, the purchase of such databases occurs not just by spammers but also more legitimate firms seeking new methods of advertising their product or service in a state of ignorance over spam.
- They can brute force an SMTP server, trying various common names for people and well-known role accounts.
- Someone might willingly or unwittingly add your address to an opt-in mailing list for adverts.
[93] Tladi (2008) *SALJ* 179.
[94] Strachan (2016) *PELJ* 4.

2.6 Self-regulation of direct marketing

The role played by self-regulation in consumer protection has been alluded to by various authors. Woker states that, self-regulation acts as a mechanism through which industries create codes of conduct that contribute towards the prevention of harmful business consumer practices.[95] These codes have the benefit of providing specific industry guidance through the involvement of experts.[96] The Direct Marketing Association of South Africa ("DMASA") and the Internet Service Providers' Association of South Africa ("ISPA") are examples of industry bodies created by the specific industries in which they operate to amplify the existing consumer legislation.

The ISPA is a voluntary self-regulatory organisation recognised as an Industry Representative Body ("IRB") under the ECTA. The threats of privacy infringements through technological developments result in a lack of trust in the internet, and this can be negative for the internet service providers. The ISPA has therefore created codes which provide for minimum conduct standards for their members. These standards are in terms of general consumer protection, protection of vulnerable persons and protection of consumer privacy.[97] It is submitted that the above is an example of self-regulation ensuring that consumers are protected, while at the same time ensuring that the proper functioning and credibility of the industry are not impaired.

The ISPA members receive monthly briefings on industry developments and regulations. Further to this, their code of conduct requires members to protect the confidentiality and privacy of consumers. Section 4 specifically confirmed the sentiments of the POPI Act even before it was signed into law by requiring the following:

"ISPA members must only gather or retain customer information as permitted by law, and must not sell or distribute such information to any other party without the written consent of the customer, except where required to do so by law"[98]

The above is an illustration of the value of self-regulation in consumer protection through the contribution of experts who can easily identify abusive behaviour in the industry. Unlike the

[95] Woker (2010) *Obiter* 222.
[96] Strachan (2016) 4.
[97] See https://ispa.org.za/about-ispa/ (accessed 17 September 2020).
[98] See https://ispa.org.za/code-of-conduct/ (accessed 17/September 2020).

legislation, the codes of conduct can easily be amended to address the challenges that arise.

The DMASA was incorporated under the CPA. Although the CPA is not applicable to the insurance industry, the DMASA plays a crucial role in the protection of consumers against unwanted direct marketing. The purpose of this association is to foster the responsible growth of all interactive and direct marketing disciplines and technologies through voluntary membership.[99] Swales indicates that the DMASA created a register in line with the provisions of section 11 of the CPA in order to facilitate compliance with the opt-out mechanism. The DMASA members must comply by ensuring that they do not contact those consumers who have blocked suppliers from obtaining their contact details for direct marketing purposes.[100]

It is submitted that the DMASA registry is a good example of how self-regulation can play an important role in consumer protection. Almost ten years after the CPA came into force, the Consumer Commissioner has not yet established the direct marketing registry envisaged in this Act. Although this registry will no longer be as useful when the POPI Act comes into effect when the grace period ends on the 1st of July 2021, the DMASA registry has, however, played an important role in protecting their members' clients.

2.7 Conclusion

From the above discussion, it is clear that protection of the right to privacy, and curbing unwanted direct marketing, require a delicate balancing act. The current legal framework (specifically traditional common law) is not effective in protecting a consumer's right to privacy. At common law, a breach of privacy in the form of intrusion or disclosure forms an *injuria*. However, most consumers are not able to enforce their rights against the perpetrators because in most instances these consumers would not be able to identify the wrongdoer, nor will it be possible to satisfy all the delictual action elements.

Unwanted direct marketing through unsolicited communication has been confirmed as the most common way in which the personal information of consumers is being infringed. The

[99] See https://www.dmasa.org/page/about-us (accessed 10 July 2020).
[100] Swales (2016) 66.

Constitution merely confirms an individual's right to privacy; it does not offer a specific remedy. The person whose right of privacy is infringed is required to approach the court for a competent remedy or to have their right declared to ensure protection thereof.

Self-regulation plays an important role through the involvement of experts and the easily amendable codes of conduct. The ISPA provides for the protection of the consumer's right to privacy and prohibits unauthorised use of personal information, while the DMASA also plays an important role in discouraging spam and unsolicited communications through the opt-out registry. The drawback of industry self-regulation, however, is the fact that it only applies to the members of that association, and its success depends largely on the members' cooperation with the association's regulatory body.

It is clear that the above measures are not sufficient; therefore, the legislature has had to enact legislation that will provide protection and close the gaps that exposed consumers. Consumers have to be protected by legislation, as the courts are not agile nor versatile enough to cater for protection and indemnification against the risks that are being introduced by technological developments.

3 CHAPTER 3: REGULATORY FRAMEWORK ON DIRECT MARKETING

3.1 Introduction

As the focus of this study is on the impact of the POPI Act on direct marketing in insurance, an examination of the current regulatory framework for the direct marketing practice is necessary. Advances in technology have resulted in vast amounts of personal information being available for target marketing such as direct marketing. The collection of personal information and the sending of unsolicited communication to consumers is regarded as invasion of these consumers' privacy.[101] According to Snail and Papadopoulos, personal information and the right to privacy were protected in one way or another by different legislation in South Africa before the POPI Act.

The ECTA was the first legislation to protect consumers against the practice of direct marketing through the regulation of unsolicited electronic communication. The CPA on the other hand, although not applicable to the insurance industry which is the focus of this study, plays an important role in confirming consumers' Constitutional right to privacy. This Act also has specific provisions that address direct marketing. The discussion of these consumer protection legislation will illustrate the extent to which direct marketing and consumer privacy were protected before the POPI Act. This discussion will in turn lead to an appreciation of the impact of the newly enacted POPI Act on direct marketing in South African commercial space. The POPI Act has been commended for being an improvement on both section 45 of ECTA and the CPA in as far as it requires the consent of the consumer before their information is used for direct marketing.[102]

The discussion that follows analyses the legislation that protects consumers against invasion of their privacy by direct marketers. The discussion will focus on consumer protection provisions found in section 45 of the ECTA, the CPA and the POPI Act, specifically sections that have just been signed into law. Although the CPA is one of the statutes that protects the consumer against the invasion of consumer privacy by direct marketers. It however excludes some financial services such as insurance from its scope.

[101] Zenda et al (2020) 32(1) *SACJ* 113.
[102] Van Eeden & Barnard (2017) 589.

The insurance industry has specific regulations with provisions that regulate direct marketing. These provisions will be discussed in Chapter 4.

The following discussion will be on the ECTA as the first statute to regulate unsolicited electronic communications through section 45. This section was effectively repealed on the 1st of July 2020 when the POPI Act was signed into law. Since the responsible parties still have until the 30th of June 2021 to comply with the POPI Act, the discussion of the ECTA is still important as it will provide perspective on the motivation for the promulgation of data- or information-specific legislation in South Africa.

3.2 The Electronic Communications and Transactions Act 25 of 2002

3.2.1 Background and application of the ECTA

The Electronic Communications and Transactions Act ("ECTA") 25 of 2002 came into effect on the 30th of August 2002. Its main purpose is to provide for the facilitation and regulation of electronic communications and transactions in the public interest and to create a safe and effective environment for the consumer. Since the purpose of this chapter is to analyse the impact of direct marketing on the privacy of the consumer, the focus of the discussion of this Act will be limited to sections dealing with direct marketing in the form of unsolicited electronic communications (section 45 in chapter VII) and personal information (section 51 in chapter VIII). Chapter VII addresses consumer protection by providing for additional rights over and above the traditional consumer rights reflected in other consumer legislation.[103] For instance, before its promulgation, the communication of electronic transactions was not regulated.

3.2.2 Important definitions under the ECTA

"Consumer"[104] is any natural person who enters or intends entering into an electronic transaction with a supplier, as the end-user of the goods or services offered by that supplier.

[103] Buys & Cronje (2004) 140.
[104] Section 1.

It is clear from this statement that chapter VII is not intended for the protection of juristic persons, regardless of their size. Thus, its application is very restricted, as all business-to-business transactions and business-to-consumer transactions where the consumer is not the end-user would not qualify for protection under this chapter.[105] Hamman and Papadopoulos point out correctly that the exclusion of all juristic persons from the protection under chapter VII is a shortfall in this Act because juristic persons are often in the same practical position as a natural person (consumer) and would, therefore, require the same additional rights with regard to online transactions.[106]

"Electronic transaction" is not defined in the ECTA as a phrase.[107] This Act only defines a "transaction" as "a transaction of either a commercial or non-commercial nature" and includes "the provision of information and e-government services."[108] Buys and Cronje[109] however point out that for the purposes of chapter VII, electronic transactions would not include non-commercial transactions. For purposes of certainty or clarity, they provide the following tentative definition of the electronic transaction:

"All commercial transactions between consumers (as defined in the ECTA) and suppliers of goods and/or services, concluded wholly or partially through electronic means by exchange of data messages (as defined in the ECTA) notwithstanding the fact that payment and or delivery is affected through non-electronic means."

3.2.3 Direct marketing under ECTA

The ECTA does not provide a specific definition of "direct marketing", hence this phrase will be used in line with the definition provided in 2.1 above in the introduction. Section 45 is an important part of consumer protection provided under chapter VII of the ECTA. It contains provisions that regulate the sending of unsolicited commercial communications ("spam"), which form an important element of direct marketing. According to Hamman and Papadopoulos,[110] direct marketing is only one of the different forms of spam because spam

[105] Buys & Cronje (2004) 142.
[106] Hamman & Papadopoulos (2014) 44.
[107] Hamman & Papadopoulos (2014) 45.
[108] ECTA section 1.
[109] Buys & Cronje (2004) 143.
[110] Hamman & Papadopoulos (2014) 44.

is not limited to commercial transactions. They show that the definition of spam is much wider than direct marketing because it "may also take the form of solicitation for questionable products, or services, or contain fraudulent or deceptive content." Spam generally regards unsolicited bulk electronic communication regardless of its motive.

3.2.3.1 Section 45 of the ECTA

The ECTA regulates the conduct of direct marketers through section 45 by making the following provisions:

"(1) Any person who sends unsolicited commercial communications to consumers, must provide the consumer:

(a) with the option to cancel his or her subscription to the mailing list of that person; and

(b) with the identifying particulars of the source from which that person obtained the consumer's personal information, on request of the consumer."

Since most direct marketing will fall within the definition of a commercial transaction, the above provision will apply to an electronic advertisement. Thus, Papadopoulos confirms that the word "commercial" used in this section seems to relate to messages whose main purpose is to advertise or promote services.

Under section 45 (1) (a) of ECTA, unwanted direct marketing is lawful until the consumer requests the direct marketer to remove them from the mailing list. Thus, it is clear from this provision that unsolicited commercial electronic communications are currently not prohibited in South Africa[111] but are merely regulated.[112]

This provision has been criticised for being ineffective in dealing with spam.[113] For instance, Tladi lists several problems posed by section 45, the most critical one being the opt-out mechanism which places the burden on the consumer in the sense that the direct marketer need only stop if the consumer requests them to stop. He further shows that the section is silent on how the marketer should make the 'opt-out' mechanism available,[114] thus leaving

[111] Tladi (2008) 186.
[112] Papadopoulos & Snail (2012) 63.
[113] Hamman & Papadopoulos (2014) 50.
[114] Tladi (2008) 186.

the consumer exposed to the dubious ways of some spammers, who do not wish to comply with this request. Buys and Cronje[115] add that not all unwanted electronic communication is the result of the consumer's subscription to the mailing list: some of it results, rather, from the "harvesting" of the consumer's contact details from various websites. It is thus submitted that the assumption in section 45 (1) (a) that the consumer would have subscribed to the marketing list of the marketer is outdated and does not serve its intended purpose.

Section 45 (1)(b) placed another obligation on the consumer to request the sender of unwanted direct marketing to disclose where they had obtained their personal information. Buys and Cronje[116] show that the e-mail address will qualify as personal information. They state that, upon knowing who the source of this information is, the consumer will be able to institute either a criminal or a civil claim if such information was obtained through infringement of the consumer's Constitutional rights, such as the right to privacy.[117] In the case of *Ketler investments CC t/a Ketler Presentations v Internet Service Providers' Association*,[118] evidence was led that the applicant was requested by several consumers to disclose the sources of their personal information which the applicant had used to send the unwanted commercial advertisements.

The *Ketler* case is important for the current study, as no previous case served before the court to make a determination on different provisions under the ECTA affecting spam.[119] Consumers are always more inclined to install spam protection measures rather than to pursue litigation. This case provides a different interpretation from the usual legal academic one.[120] Reference will therefore be made to the court's interpretations of the following discussion.

"(2) No agreement is concluded where a consumer has failed to respond to an unsolicited communication."

The clause above protects the consumer against negative marketing. Van Der Merwe *et al* correctly show that this provision is important as it deters web traders from sending offers

[115] Ibid.
[116] Buys & Cronje (2004) 165.
[117] *Ibid.*
[118] *Ketler Investment CC t/a Ketler Presentations v Internet Service Providers' Association* 2014 (2) SA 569.
[119] Maheeph (2014) *Electronic spamming within South Africa: a comparative analysis* unpublished LLM Thesis, University of Kwa-Zulu Natal 20
[120] Maheeph (2014) 23.

accompanied by clauses stating that if a consumer does not respond to the electronic messages, this would be regarded as assent to the contract that they were proposing.[121]

In the *Ketler* case,[122] the court found that Ketler's failure to provide consumers with the details of the source from which the personal details of the recipients had been obtained, amounted to a contravention of section 45 (3).[123]

As has been shown above, the ECTA in its current form does not provide an effective way of dealing with unsolicited electronic commercial communication or unwanted direct marketing. Van Der Merwe *et al*[124] show that one of the challenges with ECTA is the difficulty of enforcing its provisions. It is evidently difficult to trace the spammers, and in some instances an attempt to enforce these provisions may be hindered by different jurisdictions. The provisions of the POPI Act are a welcome relief in this regard, because its approach to the issue of direct marketing or unsolicited commercial communication is to require some form of previous relationship between the sender and the recipient. This Act will repeal section 45 of the ECTA once it becomes fully operational.[125]

3.2.4 Privacy under ECTA

Chapter VIII in the context of possible privacy infringement during direct marketing processes contains some of the universally accepted data protection principles on the protection of personal information. Section 50 however clearly shows that compliance with these privacy principles, which are contained in section 51, is voluntary. That is, the consumer can only be assured of lawful processing of their information if the party with whom they are contracting has voluntarily agreed to protect their personal information. Section 51 lays down rules that need to be followed when collecting, using, and disposing of personal information that has been obtained through electronic transactions.

[121] Van Der Merwe *et al. Information and Communications Technology Law* (2008) 190.
[122] *Ketler Investment CC t/a Ketler Presentations v Internet Service Providers' Association*
[123] Any person who fails to comply with or contravenes subsection (1) is guilty of an offence and liable, upon conviction, to the penalties prescribed in section 89 (1).
[124] Van Der Merwe *et al.* (2008) 190.
[125] Schedule 2 of the POPI Act.

These principles have been commended for setting the stage for transparency in how the consumer's personal information is collected, managed and used.[126] It is however disappointing that these principles are voluntary, leaving an option for the data controller[127] to choose not to adopt them. This means that the data controller - who has chosen not to adopt these principles - would be entitled to use the personal information without obtaining the consent of the data subject. The consumer would have to rely on delictual remedies in cases of the infringement of their right to privacy or infringement of their "identity rights" where incorrect information has been published about them.[128] It is evident from this that Section 45 of the ECTA did not offer the consumers the necessary protection against unwanted direct marketing. Comprehensive cover is therefore sought from the other legislation such as the CPA and the POPI Act.

3.3 The Consumer Protection Act

The focus of the study is on the insurance industry, and the CPA is not applicable to this industry.[129] However, a brief discussion of this Act is crucial, because the CPA has been touted as paving the way for improved consumer protection. According to Huneberg, the CPA has had a positive influence in other industries, such as financial services; in particular, provisions that provide for consumer protection measures in their legislation.[130]

This part of the study therefore focuses the provisions of the CPA with regard to general goods and services so as to get an idea of the extent of protection enjoyed by consumers against direct marketing, as opposed to the protection under the insurance legal framework.

The CPA confirms most of the rights in the Bill of Rights, including the right to privacy.[131] As a result, the CPA is regarded as a powerful tool to solve many problems faced by consumers in South Africa today.[132] It is the first Act in the consumer protection space to declare that one of its primary purposes is to ensure honest and fair dealings in the marketing of services

[126] Buys & Cronje (2004) 175.
[127] Sec 1 of the ECTA defines it as 'any person who electronically requests, collects, collates, processes or stores personal information from or in respect of a data subject.'
[128] *Ibid*.
[129] Huneberg (2019) *Obiter* 170.
[130] *Ibid.*
[131] *Ibid*
[132] Woker (2010) *Obiter* 217-231.

and goods.[133] It also emphasises the consumer's right to privacy with regard to direct marketing.[134]

In addition to providing for general standards for marketing, the CPA has specific provisions for some marketing practices, such as direct marketing.[135] The following discussion will analysis direct marketing under the CPA and the extent to which the Act confirms the consumer's right to privacy as far as direct marketing is concerned.

3.3.1 Application of the CPA

The CPA applies to a wide range of goods and services.[136] It applies to all transactions happening in South Africa and to the promotion of all goods or services happening in the Republic, unless the goods or services or the promotion thereof has been specifically excluded.[137] Woker refers to the CPA as being the most comprehensive statute, as it covers almost every business activity in South Africa.[138]

The goods and services exempted under the CPA include goods or services provided by or to the State and, in the credit agreements regulated under the NCA, transactions that have been exempted from the application by the Minister. More importantly, for this discussion, the services that are regulated by the FAIS Act, and the Long-term and Short-term Insurance Act have been excluded from the application of the CPA. Woker correctly points out that it was reasonable to exclude the insurance industry, pension funds, and collective investment schemes from the operation of the CPA because of their complexity. She shows that many of the CPA provisions could not be applied to most financial services and that greater protection than that offered under the CPA would be required for this industry.[139]

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[133] Van Eeden & Barnard (2017) 587.
[134] Section 11.
[135] Section 11, 16, and 32.
[136] Hamman & Papadopoulos (2014) *De Jure* 51.
[137] Section 5 (1) (a) every transaction occurring within the Republic, unless it is exempted by subsection (2), or in terms of subsections (3) and (4) ;
(b) the promotion of any goods or services, or of the supplier of any goods or services, within the Republic, unless—
(i) those goods or services could not reasonably be the subject of a transaction to which this Act applies in terms of paragraph (a); or
(ii) the promotion of those goods or services has been exempted in terms of subsections (3) and (4)
[138] Woker (2019) *Stellenbosch Law Review* 97.
[139] Woker (2016) 22.

3.3.2 Definitions of the CPA

The CPA assigned new meanings to specific words to suit its purpose. A clear understanding of these words as they relate to direct marketing is essential for the current discussion.

A "consumer" means a natural and juristic[140] person to whom particular goods or services are marketed in the ordinary course of a supplier's business; or a person who has entered into a transaction with a supplier in the ordinary course of the supplier's business, unless the transaction is exempt from the application of this Act by section 5 (2) or in terms of section 5 (3) ; or if the context so requires or permits, a user of those particular goods or a recipient or beneficiary of those particular services, irrespective of whether that user, recipient or beneficiary was a party to a transaction concerning the supply of those particular goods or services; and a franchisee in terms of a franchise agreement, to the extent applicable in terms of section 5 (6) (b) to (e).[141] This definition is an immediate improvement of section 45 of the ECTA, as it extends the definition of consumer to include the juristic persons who are still as vulnerable as natural persons in relation to direct marketing and information abuse.

"Direct marketing" is defined in the CPA as occurring when a person is approached, either in person or by mail or electronic communication, for the direct or indirect purpose of promoting or offering to supply, in the ordinary course of business, any goods or services to the person; or requesting the person to make a donation of any kind for any reason.[142] The legislators needed to include the definition of "direct marketing" because the definition of direct marketing from a commercial marketing perspective is pro-marketers and would not be helpful for consumer protection.

"Electronic communication" means communication by means of electronic transmission, including by telephone, fax SMS, wireless computer access, email or any similar technology or device. It is deduced from the word "including" in the definition that the list is not exhaustive and is therefore flexible enough to include other innovations that come after the Act.

[140] Whose asset value or annual turnover at the time of the transaction is less than R2million or as determined by the Minister in the Government Gazette from time to time.
[141] Section 1.
[142] *Ibid.*

The CPA provides a general standard that should be met in the marketing of goods or services to consumers. Over and above this, certain marketing practices, such as direct marketing, which may result in deception or unfairness are specifically regulated.[143] Because of the nature of this discussion, the general standard requirement for marketing will be examined briefly, because the main focus will be on the unsolicited communication emanating from direct marketing.

3.3.3 Right to fair and responsible marketing

The CPA emphasis the need for the suppliers to be fair, honest, and responsible when marketing goods and services.[144] The introduction of the CPA saw a number of previously accepted marketing practices being outlawed or regulated. This requirement is a general standard of marketing and is not specific to a particular marketing practice.[145] Direct marketing is one of the marketing practices that are specifically regulated by the Act. Over and above the general marketing standards reflected in section 29, the direct marketer has to comply with the general requirement of fair and responsible marketing, as reflected in Section 29. In addition to this general provision, the CPA provides for mechanisms that the consumer can use to limit direct marketing.[146] For instance, this clause will be applicable to direct marketing even though the Act has a specific section under which direct marketing is addressed. This approach by the legislator is an indication that direct marketing is regarded as one of the more exploitative marketing practices.

3.3.4 Direct marketing and the right to privacy

Part B of the CPA under sections 11 and 12 deals with the consumer's right to privacy by firstly confirming the consumer's right to the restriction of unwanted direct marketing and secondly regulating suitable times for contacting the consumer.

[143] Van Eeden & Barnard (2017)125.
[144] Hamman & Papadopoulos (2014: 53).
[145] Barnard (2015) *South African Mercantile Law Journal* 454.
[146] Van Eeden & Barnard (2017)587.

3.3.4.1 The consumer right to restricting unwanted direct marketing

This right to privacy entails the consumer's right to refuse to accept unwanted direct marketing; to require another person to discontinue direct marketing; and in the case of an approach other than in person, to pre-emptively block any approach or communication from that person, if the approach or communication is primarily for direct marketing.[147]

The confirmation of the consumer's right to refuse unwanted direct marketing under the CPA is regarded as a welcome relief for consumers.[148] The Act requires the consumer to take specific measures to stop the unwanted direct marketing. Van Eeden and Barnard however, show that Section 11(1)(a) and (b) are reactive. There is also a possibility of a direct marker who has been requested by the consumer to stop contacting a consumer through one means under this section using a different mode or medium for further contact. This way the consumer will still vulnerable to other approaches from the same or a different marketer.[149]

The Act has adopted the opt-out mechanism by leaving the responsibility for stopping the direct marketing with the consumer.[150] In order to make it possible for the consumer to pre-emptively block direct marketing, the Act in section 11(3) states that the Consumer Commission may establish or recognise as authoritative a registry in which any person may register a pre-emptive block against any communication that is primarily for purposes of direct marketing. The registry would therefore enable the consumer to block the unwanted marketing communication proactively.

This provision in Section 11(3) is problematic in that it does not place any obligation on the Commission. It merely states that it may establish the registry or recognise another registry that is already established by an industry body. It is therefore not surprising that the Commission has so far not established the registry, because the Act makes it optional. The DMASA has however heeded the call and established such a registry. The role of DMASA in direct marketing will be discussed briefly below. Under section 11 (3) the consumer is

[147] Section 11.
[148] Hamman & Papadopoulos (2014)69.
[149] Van Eeden & Barnard (2017)127.
[150] See https://www.justice.gov.za/salrc/dpapers/dp339.pdf (accessed 18 July 2020).

given an option to actively approach the supplier and block its direct marketing or register the block in the current DMASA registry at no cost to them.[151]

The registry created by the Consumer Commissioner ("CC") would provide important protection from unwanted direct marketing for both existing and prospective clients of all suppliers and not only the members of DMASA. Regulation 4(3) (g) provides that the direct marketer must assume that the comprehensive pre-emptive block has been registered by a consumer. The direct marker will then have to get confirmation from the administrator of the registry that a pre-emptive block has not been registered in respect of a particular name, identity number, fixed line telephone number, page number, physical address, postal address, email address, website uniform resources locator ("URL"), global positioning system co-ordinates or other identifier.

It is submitted that the above means that the marketer is required to obtain consent from the existing clients after the publication of these regulations, before sending any direct marketing communication to the consumer. Secondly, the direct marketer has to assume that the prospective clients have entered a pre-emptive block against receiving any direct marketing. The direct marketer would therefore have to consult the administrator of the register before sending any communication that is primarily for purposes of direct marketing to the consumer.[152] Thus the effect of Section 11 is such that the marketer is prohibited from sending any direct marketing to consumers who have requested the marketer to discontinue the direct marketing, who have withdrawn their consent, and or have pre-emptively blocked direct marketing.

3.3.4.2 Times for contacting the consumer

Section 12 (1) of the Act protects the consumer's right to privacy by prohibiting the direct marketer from contacting consumers at home at certain times, as specified by the Minister in the Gazette.[153] Jacobs, Stoop and Van Niekerk point out correctly that the reference to "home" under the Act in the era of mobile phones should not be limited to the insured's own

[151] Section 11(5) "No person may charge a consumer a fee for making a demand in terms of subsection (2) or registering a pre-emptive block as contemplated in subsection (3)."
[152] Section 11(4).
[153] Section 12 (2). Currently, the consumer cannot be contacted for direct marketing purposes while at home on public holidays and Sundays. On Saturdays, they can be contacted between 09h00 and 13h00 only, and on any other day from 8h00 and 20h00.

home. The interpretation of this word should be in line with the purpose of the Act as shown in Section 3 and should ensure the realisation of the consumer rights.[154] The direct marketer will not be found to have been in breach of this provision if they have written consent from the consumer to be contacted during the stated periods, and if they can show that the communication, even if received within the prohibited times, was actually sent off before these time frames.[155]

3.3.5 Enforcement of CPA

In terms of section 69, consumers may enforce their rights under the CPA by resolving the matter with the supplier; by referring it directly to either the consumer Tribunal, applicable ombud with jurisdiction, industry ombud,[156] provincial consumer court with jurisdiction, or alternative dispute resolution agent;[157] by filing a complaint with the Commission;[158] or by approaching the court with jurisdiction on the matter after exhausting all the remedies available under the Act. Jacobs, Stoop and Van Niekerk correctly argue that the consumer can only approach the court after they have approached one of these different dispute mechanisms. The writers further argue that this approach may lead to confusion and forum shopping.[159] De Stadler submits that, despite the above confusion, the consumer can still approach the National Consumer Commission for contraventions of general marketing conduct and also for contraventions of specific marketing conduct such as direct marketing. It is submitted however that this remedy will be highly ineffective in the case of privacy breaches by direct marketers through unsolicited marketing. It is highly unlikely that someone who has been receiving unsolicited communication will have the time or resources to enforce these rights through these mechanisms.

The CPA places the enforcement powers of this Act with the Consumer Commissioner ("CC"). In terms of section 99, the Commission is responsible for enforcing the Act by, among other things,

[154] Jacobs, Stoop & Van Niekerk (2010) *PELJ* 321.
[155] *Ibid*.
[156] Section 82.
[157] Section 70.
[158] Section 71.
[159] Jacobs, Stoop & Van Niekerk (2010) 308

i. receiving complaints concerning alleged prohibited conduct or offences;[160]

ii. investigating and evaluating alleged prohibited conduct and offences;[161]

iii. issuing and enforcing compliance notices.[162]

The consequences of non-compliance with the CPA can be dire, as they include a fine or imprisonment or both. Anyone convicted of an offence under this Act could be imprisoned for a maximum of 12 months.[163] The Tribunal can issue fines not exceeding 10 percent of the annual turnover of the preceding year,[164] or R1 000 000.[165] The penalties for breach of confidentiality are even higher. The Tribunal can sentence a supplier who has been convicted of disclosing the personal or private information of a consumer in contravention of section 107 to a fine or imprisonment of a period not exceeding 10 years.[166] Jacobs, Stoop and Van Niekerk correctly submit that this is an indication of how the legislature wanted to ensure protection of personal information.[167]

It is evident from this discussion that while the legislature has tried to insert different provisions addressing the consumer's right to privacy through different pieces of legislation, these provisions have proven to be inadequate to protect the consumer's personal information. The POPI Act was therefore enacted to close the gaps left by these regulations concerning the processing of personal information.

3.4 The Protection of Personal Information Act 4 of 2013

POPI Act came into force on the 19th of November 2013 and was set to usher in a new era in the processing of personal information by both public and private bodies. Different sections of the POPI Act have been put into place incrementally, with the first ones being those that set up the Information Regulator's office which came into effect in April 2014, and another regarding the effecting of the Act's regulations.[168]

[160] Section 99.
[161] Section 99(d).
[162] Section 99(e).
[163] Section 111(b).
[164] Section 112(2)(a).
[165] Section 112(2)(b).
[166] Section 111(a).
[167] Jacobs (2010) 308.
[168] Swales (2016) 82.

The most important sections, which include regulation of the lawful processing of personal information and direct marketing through unsolicited communication the by Code of Conduct to be issued by the Regulator, commenced on the 1st of July 2020.[169] The responsible party has a grace period until the 30th of July 2021 to comply with the Act.[170]

The POPI Act's main purpose is to give effect to the Constitutional right to privacy by stipulating the safeguards to be followed by the responsible party when processing personal information.[171] In the preamble of the POPI Act, it is recognised that the right to privacy as stated in the Constitution includes the right to protection against the unlawful collection, retention, dissemination and use of personal information. It further realises the importance of ensuring economic progress through the removal of unnecessary barriers to the free flow of all kinds of information, including personal information. Swales[172] states that this Act is strongly influenced by the European Union's Data Protection Directive.[173] It also seeks to give effect to the universally accepted standards of protection through the regulation of information use, abuse, processing, dissemination and distribution within and across South African borders.[174]

3.4.1 Background and application POPI Act

The POPI Act applies to the processing of personal information recorded by a responsible party by both automated and non-automated means.[175] The shortcomings of the protection of personal information under pre-POPI Act legislation justified an overhaul in the form of new legislation focusing specifically on the protection of person information.[176]

The POPI Act applies to both public and private bodies that are domiciled in South Africa. It will still apply to bodies that are not domiciled in South Africa if such bodies make use of automated and non-automated means to process personal information in South Africa,

[169] Sections 2 to 38; sections 55 to 109; section 111; and section 114 (1), (2) and (3).
[170] The presidency signed some of the sections of POPI ACT into law. https://www.justice.gov.za/inforeg/docs/ms-20200622-POPI ACT-SectionsCommencement.pdf (accessed 8/07/2020).
[171] Van Eeden and Barnard (2017) 568.
[172] Swales (2016) 59.
[173] Directive 95/46/EC of the European Parliament.
[174] Section 2 of the POPI ACT.
[175] Section 3 *Ibid*.
[176] Naude (2016) 59.

unless the automated or non-automated means are used only to forward personal information without processing it.[177]

POPI Act, however, does not apply to the processing of personal information in certain instances, such as those noted in sections 6 and 7. For instance, it does not apply to the processing of personal information carried out solely for a personal or household activity, and if the personal information has been de-identified to the extent that it can no longer be re-identified.[178] In addition to this, it does not apply to the processing of information that is purely for journalistic, literary or artistic purposes, or where the responsible party is subject to a code of ethics providing adequate protection of personal information.[179] This means therefore that the freedom of expression, as reflected in the Constitution,[180] is also protected under POPI Act as long as that expression is journalistic in nature.[181]

3.4.2 Key definitions of POPI Act

A "responsible party" is defined as a public or private body or any other person which, alone or in conjunction with others, determines the purpose of and means for processing personal information.[182] For purposes of this dissertation, a responsible person would be an insurer.

The Act further defines a *person* as a natural person or a juristic person, thus providing the definition of "personal information" as information relating to an identifiable, living, natural person, and where it is applicable, an identifiable, existing juristic person.[183] The inclusion of a juristic person with no reference to a certain threshold in the Act will go a long way in rectifying the gap that was in section 45 of the ECTA in line with the comment made by Hamman and Papadopoulos: That juristic persons are in the same space of vulnerability as the natural persons with regard to the risks of and exposures to spam.[184]

[177] Section 3 (b).
[178] Section 6 (a) and (b).
[179] Section 7 (1) and (2).
[180] Section 16(1).
[181] Coetzee (2014).
[182] Section 1 of POPI ACT.
[183] Section 1 of POPI ACT.
[184] Hamman & Papadopoulos (2014) 49.

"Data subject" refers to the person to whom the personal information relates.[185] For purposes of direct marketing, a data subject would be a recipient of the promotional communications.

The term "processing" relates to any operation or activity or any set of operations, whether or not by automatic means, concerning personal information, including any use of such information.[186] The Act provides a wide definition of processing and it can thus be safe for one to conclude that it means any action carried out on the data subject's personal information.[187] The Act further prescribes how a direct marketer must process the data in a manner that can be regarded as reasonable and responsible.[188] The processing can only be regarded as lawful if it complies with the eight conditions that are discussed below,[189] as these conditions are considered to be the regulatory regime. It should be noted that most of these principles are the ones that are set out in section VIII of the ECTA. Unlike the ECTA, which only provides for voluntary adoptions, POPI Act makes it unlawful if the processor does not abide by these rules.

"Direct marketing" means approaching a data subject, either in person or by mail or electronic communication, for the direct or indirect purpose of promoting or offering to supply, in the ordinary course of business, any goods or services to the data subject; or requesting the data subject to make a donation of any kind for any reason. It is interesting to see that the Act enlarges the scope of protection against unsolicited electronic commercial communication to donation requests, which can also be very invasive in the electronic space. Further to this, it provides a new definition of "electronic communication" to mean any text, voice, sound or image message sent over an electronic communications network which is stored in the network or the recipient's terminal equipment until it is collected by the recipient. Papadopoulos and Snail, however, warns that the different definitions in legislation dealing with spam or unsolicited communication could be a major cause of future litigation.[190]

[185] Section 1.
[186] Section 1.
[187] Van der Merwe *et al* (2008) 368
[188] Swales (2016) 69.
[189] Van der Merwe *et a* (2008) 371.
[190] Papadopoulos & Snail (2012) 90.

3.4.3 POPI Act on unwanted direct marketing

The POPI Act seeks to protect the data subject's right to privacy in different ways. For the purpose of direct marketing, section 69 in chapter VII has to be read together with sections 5 and 9. Section 5 (3) (e) confirms the data subject's right to have their personal information processed lawfully and further to object to any processing for direct marketing. Section 9 prescribes that the processing should be lawful and should not infringe on the rights of the data subjects. Since the purpose of the study is to determine the impact of the POPI Act on direct marketing within the insurance sector, the focus of the discussion under this Act will be on the provisions regulating direct marketing as well as the provisions that prescribe the lawful processing of personal information. As Van Eeden and Barnard confirm, this Act sets out the data subject's rights against direct marketing through unsolicited electronic communication under section 69, and it also prohibits the processing of the consumer's personal information without their consent.[191] The following discussion will therefore t the provisions of section 69; this will be followed by a discussion of the lawful processing of information.

3.4.3.1 Direct marketing under Section 69 of POPI Act

Section 69 prohibits the processing of personal information for the purpose of direct marketing through any form of electronic communication if the consumer has not given their consent to that processing.[192] The data subject's personal information may not be processed for purposes of direct marketing unless the data subject is the customer of the responsible party. It is required that, in such an instance, the contact details of this customer should have been obtained during the sale of a product or in a service environment. In addition to this, the direct marketing should be for the purpose of the responsible party's products or services, and the customer should be allowed to object to the electronic messages being sent to them at any time.[193]

This section, unlike section 45 of the ECTA which requires the data subject to opt out, provides the data subject with complete control over their information, as the subject first

[191] Van Eeden & Barnard (2017) 590.
[192] Section 69(1)(a).
[193] Section 69.

needs to consent to being contacted. Van Eeden and Barnard caution against obtaining blanket consent to use information, as this will be contrary to the requirement of consent under the POPI Act. They show that consent to process personal information will only be valid if it is obtained directly from the data subject who has been informed in full about how and for what purpose the information is going to be processed, and who is going to have access to that information.[194] Under common law, consent can only be given by a person who is legally capable of expressing their will to injury or harm.[195] It is therefore submitted that for purposes of the POPI Act, information that has been collected by an insurer for purposes of assessing risk cannot be used for purposes of direct marketing unless express specific consent to marketing was also given by the data subject.

The requirement of consent to the processing of personal information, especially for purposes of direct marketing, is thus defined as an opt-in model. In this way the data subject has more control over how and by whom their personal information may be used. The opt-in model provided by section 69 is thus an effective improvement on the inefficacies experienced under the opt-out model in accordance with section 45 of the ECTA and the CPA. Under this new Act the burden of stopping the unwanted messages is now removed from the data subject.[196]

3.4.3.2 Criticism on section 69 of POPI Act

According to section 69 (2) of the POPI Act, a responsible party may contact a data subject only once to obtain consent for direct marketing. This once-off request provided for under section 69 (2) has been met with different opinions. Some consider this a welcome approach because it protects the consumer's right to privacy while protecting them from constant irritation experienced by repeated approaches from direct marketers.[197] Hamman and Papadopoulos[198] on the other hand comment that the once-off request for consent under section 69 is open to abuse by direct marketers and has the potential for reverting to the opt-out mechanism. They argue that by "allowing a responsible party to process personal

[194] Van Eeden & Barnard (2017) 573.
[195] Neethling *el al* (2015)108.
[196] Hamman & Papadopoulos (2014) 59.
[197] Maheeph (2014) 41.
[198] Hamman & Papadopoulos (2014) 54.

information 'once', to get consent, the prohibition in section 69(1) is reduced to a second level protection mechanism." They further state that this allowance goes against the established position under the CPA, where the marketer has to assume pre-emptive blocks against direct marketing messages before contacting the consumer for direct marketing.

It is worth noting however that the POPI Act makes allowances for other legislation that offer better protection for lawful processing of personal information to be applied where the Act offers lesser protection.[199] It is therefore submitted that the data controller would still be bound by the provisions of the CPA or any other legislation which requires them to assume a pre-emptive block, as this would offer the consumer greater protection. It is also submitted that this section could however still be open for abuse in the insurance sector, as the insurance legislation does not provide for a pre-emptive block.

Another criticism raised by Hamman and Papadopoulos concerns the restrictive definition of "electronic communication", as it leaves out the use of data software and cookies for purposes of data collection. They show that protection of information that is being collected in this manner would be covered under ECTA and CPA, as these legislation offer wider definitions.[200] It is submitted that this assertion of a supposed 'gap' created by restrictive definition of electronic communication under the POPI Act is not completely correct. Swales correctly points out that the consumer would still be protected under personal information processing principles.[201] Non-compliance with the lawful processing under these principles would enable the data subject to lodge a complaint with the Information Regulator for any misuse of their personal information. It is therefore clear that the data subject, in this case, would not have to rely solely on the section 69 provisions. Further to this, section 69 prohibits direct marketing that is done through unsolicited electronic communications only and by no other means such as unsolicited mail or telephone calls.

Once again, protection against this conduct would be available because the Act requires the collection of and use of data to be lawful. Thus, it can be argued that the unauthorised collection and use of the data subject's personal information (even if it is for non-electronic direct marketing purposes) would be tantamount to unlawful processing of personal information. The right of the data subject to object to the processing of their personal

[199] Section 3 (2) (b).
[200] Hamman & Papadopoulos (2014)59.
[201] See the discussion of these principles in 3.4.3.2.

information in this manner is stated under section 5 (e) (i) of the Act; anyone found to be in breach of the Act could be subject to a fine or imprisonment.

It has been shown in the definition of processing above that this definition has been given a wide definition, and it is clear that the intention was to cover possible action that requires personal information.[202]

3.4.3.3 Principles on the Lawful processing of personal information under the POPI Act

Principle 1: Accountability

This condition places the responsibility for compliance on the responsible party (as defined in section 1 and 7) who ultimately is the one who determines the purpose of collecting information.[203] As Swales points out,[204] the consumer's right to privacy is protected, as direct marketers will no longer be able to harass consumers with unwanted communication without facing the consequences of non-compliance.

Principle 2: Processing limitation

This principle covers provisions of sections 9 to 12, which encompass lawfulness, limitation, minimalism, consent and direct collection from the owner of the information.[205] Its main focus seems to be ensuring that the collection and the processing of personal information by the direct marketer are both responsible and reasonable. It prescribes where, how, and the amount and quality of the information that should be collected, thus ensuring that the consumer's right to privacy is not infringed.[206]

Principle 3: Purpose specification

The only personal information to be collected should be related to the specific lawful purpose of which the data subject is aware, and such information should not be retained for longer than necessary. Once the purpose of its retention has been fulfilled, the data should be erased and never recovered.[207]

[202] Papadopoulos & Snail (2012) 300.
[203] Section 8.
[204] Swales (2016) 61.
[205] Van Eeden & Barnard (2017) 572.
[206] Papadopoulos & Snail (2012) 302.
[207] Papadopoulos & Snail (2012) 303.

Principle 4: Further processing

The personal information can only be processed for the specific reason for which it was collected. Further processing outside this initial reason would be unlawful.[208] The nature of the relationship and the purpose for which the information was collected will be the guiding principle for the responsible party.[209] Thus a mobile communication company cannot transfer the personal information of its clients to its subsidiary insurer for purposes of direct marketing.

Principle 5: Information quality

The responsible party has to ensure the accuracy and reliability of the personal information that has been collected. It should also be up to date or corrected where necessary.[210]

Principle 6: Openness

This principle requires the responsible party to inform the data subject that their personal information will be collected and processed. This should preferably be done before the information is collected.[211]

Principle 7: Security safeguards

This condition requires effective technical measures to be taken to ensure the integrity and confidentiality of the personal information. This is to safeguard against the risk of destruction and unauthorised use.[212]

Principle 8: Data and subject participation

This principle is aimed at giving the data subject control over the personal information that is in the possession of a responsible person or to which the latter has access. This will entail different rights such as the right to access the information, to have inaccuracies corrected, and to have correct information communicated to third parties who received inaccurate information.[213] In essence this principle speaks to the requirement for transparency as protected under section 50 of the Promotion of Access to Information Act 2000 (PAIA).

[208] Van Eeden & Barnard (2017) 575.
[209] Swales (2016) 63.
[210] Section 16.
[211] Van der Merwe *et al* (2008) 377.
[212] Van der Merwe *et al* (2008) 378.
[213] Papadopoulos & Snail (2012) 305.

Section 50 of PAIA gives effect to the right of access to information held by private bodies. The purpose of this section is to advance the right to personal information held by both private and public entities. It gives the owner the right to such information and the right to have it corrected if it is incorrect.[214]

The above-mentioned principles apply to all direct marketers as well as other businesses unless they can show that they fall under the exclusions reflected in sections 6 and 7. The SALRC has recommended this principle-based approach, as it is a globally accepted way to protect personal information.[215]

3.4.4 Enforcement of the POPI Act

3.4.4.1 Information Regulator

The Information Regulator was appointed on the 1st of December 2014 in line with section 39 of the Act.[216] Apart from handling and resolving disputes under the Act, the powers and duties of the Regulator include the provision of education and advice on the data subjects to enforce their rights, conduct research on the possible adverse effects of developments in the ways in which personal information is being processed and to monitor and enforce compliance with the Act by direct marketers.[217] The Information Regulator ("IR") further has the power to issue enforcement notices in which the direct marketer can be requested to take certain steps to ensure compliance; it can even issue a notice requesting the defaulting responsible person to stop processing the personal information.[218] The IR can also institute civil action on behalf of data subjects whose personal information has been processed illegally.[219] Penalties for failing to comply with the POPI Act include prosecution, with a possible prison term of up to 12 months and a fine of up to an amount of R10 million.[220]

It is clear from the above discussion that the POPI Act has brought fundamental changes in the regulation of personal privacy in South Africa. The POPI Act has replaced Section 45 of the ECTA which regulated unsolicited electronic communication. This section was however

[214] Currie & De Waal (2013) 699.
[215] *SARLR* (2006) 258.
[216] Kandeh (2018) *SAJIM* 1.
[217] Van Eeden & Barnard (2017) 571.
[218] Papadopoulos & Snail (2012) 308.
[219] Section 99 (1).
[220] Section 107 read with 109.

not repealed by the CPA, which came into force after the ECTA and contained specific provisions dealing with direct marketing. Since the POPI Act has repealed section 45, there will effectively be two statutes from the 30th of June 2021 regulating direct marketing, namely the CPA and the POPI Act. A brief overview of the provision of the two statutes is therefore important.

3.5 POPI Act and CPA

The coming into force of the entire POPI Act will bring about significant changes in the practice of direct marketing. This Act has not repealed the CPA, so they apply concurrently in the regulation of the aspects of direct marketing. The definition of "direct marketing" in the POPI Act is the same as in the CPA.[221] They both define direct marketing as "to approach a data subject, either in person or by mail or electronic communication, for the direct or indirect purpose of:

(a) promoting or offering to supply, in the ordinary course of business, any goods or services to the data subject; or

(b) requesting the data subject to make a donation of any kind for any reason."

The two Acts protect the consumer's right to privacy in relation to direct marketing conduct. However, the CPA merely restricts direct marketing and does not prohibit it. The POPI Act, on the other hand, protects the consumer's right to privacy by prescribing the circumstances under which personal information for purposes of direct marketing can be gathered.[222] Section 11(1) of the CPA confirms that every person's right to privacy includes the right to restrict direct marketing initiatives by refusing to accept them, requesting the direct marketer to stop sending the direct marketing or pre-emptively blocking all communication intended for direct marketing.

There is an important interplay of the right to privacy under the POPI Act and the CPA with regard to the consumer's rights in the restriction of unsolicited electronic communication. An edited version of section 5 of the POPI Act reads as follows:

[221] Van Eeden & Barnard (2017) 588.
[222] Van Eeden & Barnard (2017) 587.

"A data subject has the right not to have his, her or its personal information processed for purposes of direct marketing by means of unsolicited electronic communications except as referred to in section 69 (1)."

Section 69 specifies the conditions under which direct marketing through electronic communication may be lawful. It has been shown by other authors, however, that the protection under Section 69, although it may seem more efficient because of the opt-out mechanism, might leave a gap in so far as the protection from unwanted electronic communication is limited to the POPI Act definition of electronic communication.[223] For instance, according to Swales, the protection against unwanted direct marketing under section 69 (1) is limited to electronic communication, so there will be no remedy under the POPI Act for unwanted direct marketing falling outside electronic communication.[224] Hamman and Papadopoulos show that direct electronic marketing is not limited to the sending of text, sound, voice or image, as it can include other software that can collect different forms of data files. The POPI Act does not prescribe remedies for this kind of marketing conduct. Section 3(2 (b) provides that "if any other legislation provides for the conditions of lawful processing of personal information that are more extensive than these set out in chapter 3, the extensive conditions will prevail." Hamman and Papadopoulos therefore propose a solution to the issue of the narrow definition of electronic communication in the POPI Act, will be provided by applying the more extensive definitions found in the CPA and the ECTA.[225]

3.6 Conclusion

From the discussion, the main purpose of the ECTA, although it had some provisions that could be used to protect consumers from unsolicited commercial communication, was to facilitate regulation of electronic communication and transactions. Two of the gaps or loopholes recognised under this Act are that it does not apply to all juristic persons regardless of size and also that it merely requires the consumer to opt out of the

[223] Section 1 defines "electronic communication" as any text, voice, sound or image message sent over an electronic communications network which is stored in the network or in the recipient's terminal equipment until it is collected by the recipient.
[224] Swales (2016) 72.
[225] Hamman & Papadopoulos (2014) 60.

communication. The opt-out mechanism under section 45 meant that the marketer could still collect and disclose the consumer's personal data without their consent without breaking any provision under the Act. It has been established that the opt-out model applicable under the ECTA is not effective in protecting consumers' rights to their personal information from invasive conduct by direct marketers. The Act also introduced important privacy principles on the processing of personal information but makes these provisions optional at the choice of the marketer. These principles are however compulsory under the POPI Act.

It is also evident that POPI Act has a number of provisions that are useful in protecting the personal information of consumers who find their personal information vulnerable in the hands of the direct marketers. This protection extends to the use of this information for purposes of direct marketing. The direct marketer will first have to obtain the consent of the data subject before contacting the consumer. The POPI Act creates the Information Regulator who will investigate information breaches and will be empowered to issue various forms of penalties in cases of breach. It is therefore submitted that the changes that have been introduced by the POPI Act go a long way in acting as a deterrent to an infringement of the right to privacy, and in protecting the personal information of consumers against abuse by direct marketers. The requirement for lawful processing of personal information also creates trust in the use of technology by consumers, as the POPI Act provisions create confidence in the lawful processing of this information.

4 CHAPTER 4: THE RIGHT TO PRIVACY AND UNWANTED DIRECT MARKETING UNDER INSURANCE LEGISLATION

4.1 Introduction

As the nature of insurance business requires the disclosure and processing of personal information, the collection and storage of personal information is central to the operations of the insurance sector.[226] Apart from underwriting the risk, insurers need personal information about their policyholders for purposes of product innovation and improved customised offerings.[227] Just as in the non-insurance sector, advances in technology expose insurance consumers to privacy infringement concerns, as some insurers with whom they have no connection send out unwanted marketing communication to them. In some instances, the information supplied to the insurers for risk assessment is used by insurers or third parties for direct marketing purposes without the consent of these policyholders.[228]

According to Jordaan, more consumers are becoming aware of the dangers they face from the unrestricted collection and processing of their personal information.[229] They want to know whether companies are managing their digital identities responsibly. This heightened awareness has had a great impact on the government's need to promulgate laws that protect consumers against the infringement of their constitutionally protected right to privacy.[230]

As shown in chapter 3, there are separate consumer protection statutes that apply to financial and non-financial products in South Africa. The Consumer Protection Act (CPA)[231] and the National Credit Act (NCA)[232] are important statutory instruments that contribute to consumer protection in South Africa. Although these Acts do not apply to financial products such as insurance, evidence from recent developments indicates that this sector is on par with the protection afforded in other industries. For example, Woker points out correctly that the purpose of the recently promulgated Financial Services Regulations Act,[233] (“FSRA”)

[226] Kuschke (2007) 305.
[227] Moodley (2019) 11.
[228] Da Viega & Swartz (2017) 67.
[229] Jordaan (2007) *International Retail and Marketing Review* 348.
[230] https://www.transunion.co.za/blog/insurance-consumer-consent (accessed 30 August 2020).
[231] Act 68 of 2008.
[232] Act 34 of 2005.
[233] Act 9 of 2017.

was to provide increased protection to consumers against unfair conduct by financial service providers within that sector.[234]

This chapter assesses the adequacy of the insurance sector-specific legislation in protecting consumers against unwanted direct marketing. The discussion will commence with a brief overview of the statutory legal framework for insurance. It will then be followed by a discussion of the insurance legislation provisions that seek to address privacy concerns associated with the direct marketing practice.

4.2 Sources of South African Insurance Law

The sources of South African insurance law are the common law, statutes and legal precedents. This industry is highly regulated by legislation, subordinate regulations, rules and codes of conduct, serving as the most important source of law.[235] Reinecke *et al* concede that statutory interventions in the form of legislation have been on the increase recently in the insurance industry.[236] These sources of insurance law are subject to the scrutiny of the Constitution as the supreme law of the Republic. Any term or practice that is contrary to these Constitutional provisions will be declared invalid.[237]

The common law principles on direct marketing and privacy discussed in chapter 2 apply to insurance as well, as privacy is not peculiar to insurance. It was shown in chapter 2 that the recognition of both the right to privacy and the right to identity form part of the South African common law, and remedies for infringement - even in insurance-related matters - are dealt with under the law of delict and the law of contract. The South African law of insurance has developed over a long period and for historical reasons has been strongly influenced by English law principles, especially in instances where our common law provides little or no guidance.[238] These principles of insurance law, however, apply to specifically insurance-related matters, whereas issues relating to contract and delict are handled under the general common law rules of contract and delict.[239] The imbalance of power between the insurer

[234] Woker (2019) *Stellenbosch Law Review* 97.
[235] Millard (2013) *JCRDL*. Also, see Reinecke *et al* where they show that the regulation is necessary for the protection of consumers for solvency and against unfair contract terms as well as unfair practices.
[236] Reinecke (2013) 20.
[237] Millard (2013) 6.
[238] Reinecke (2013) 19.
[239] Millard (2013) *Modern Insurance Law in South Africa* 5.

and the policyholder necessitated the promulgation of specific statutes to introduce industry-specific protection to insurance consumers.

4.2.1 Legislative Reforms

Millard advises that the first point of call when interpreting an insurance contract is always to access the statute applicable to that contract.[240] Although the primary legislation in the insurance industry still consists of the Short Term Insurance Act (STIA),[241] Long Term Insurance Act (LTIA),[242] and Financial and Advisory and Intermediary Services Act (FAIS),[243] the current legislative framework is in a state of disarray.[244] The enactment of the FSRA adopted the twin peaks model into our law.

The Prudential Authority is tasked with ensuring the safety and financial soundness of financial institutions, while the role of the Financial Services Conduct Centre Authority ("FSCA" or "the Authority") will be to ensure that these institutions conduct their business fairly towards their customers.[245]

The move towards the twin peaks model required different amendments to the current financial legislation, including insurance legislation. This move has led to overlaps between different statutory measures and has the potential to cause great confusion during this transition period.[246]

The Insurance Act[247] ("IA") has been enacted with the purpose of regulating the prudential matters, while the proposed Conduct of Financial Institutions ("CoFI") Act,[248] which has not yet been finalised, will consolidate the current market conduct legislation[249] into one Act that regulates the market conduct.[250] The National Treasury[251] indicates that the CoFI Bill is

[240] Millard (2013) 5.
[241] Act 53 of 1998.
[242] Act 52 of 1998.
[243] Act 37 of 2002.
[244] Huneberg (2019) 171.
[245] Millard (2016) 3.
[246] Millard (2018) *THRHR* 391.
[247] Act 18 of 2017.
[248] Currently still a Bill.
[249] The PPRs established in terms of STIA as well as the FAIS Act with its GCC.
[250] Millard (2018) 392.
[251] http://www.treasury.gov.za/twinpeaks/CoFI%20Bill%20policy%20paper.pdf. Explanatory paper accompanying the code of Financial Institutions Bill, page 20 para 3. Accessed 11 August 2020.

intended to replace the conduct provisions of most existing financial sector laws. This Act, once signed into law, will address the conduct requirements across all sectors and not just the insurance sector.[252] As the CoFI Bill is far from culminating into final legislation, an analysis of the Bill in its current form is not included in this dissertation.

Prior to the enactment of the Insurance Act,[253] the STIA and the LTIA regulated both the solvency requirements of the insurers and their conduct. The Insurance Act however has repealed the sections dealing with prudential requirements.[254] Matters pertaining to advertising or promotion of the insurer's product fall under the market conduct function, as they relate to the insurer's relationship with its policyholders.[255] Thus in determining the efficacy of insurance consumer protection against direct marketing, the focus is on the current market conduct legislation. Currently these remain the relevant sections in the Short-term Insurance Act (STIA),[256] the Long-term Insurance Act (LTIA),[257] their amended regulations and PPRs, as well as the FAIS Act and its General Code of Conduct ("GCC"). This GCC is also currently undergoing amendments.[258] One of the important changes for the purpose of this study is the definition of direct marketing. The discussion will however start by analysing the impact of unwanted direct marketing on the consumer.

4.3 Direct Marketing and the Right to Privacy in Insurance

4.3.1 The practice of direct marketing in insurance

The direct marketing strategy requires access to the personal information of insurance consumers in the form of names and contact details so that the marketer can approach the persons. As shown in Chapter 2, technology has made it easier for direct marketers to access clients' personal information and to contact those clients or prospective clients, thus invading their privacy. Hamman and Papadopoulos stated that personal information could

[252] http://www.treasury.gov.za/twinpeaks/CoFI%20Bill%20policy%20paper.pdf. Explanatory paper accompanying the code of Financial Institutions Bill, page 20 para 3. Accessed 11 August 2020.
[253] Act 18 of 2017.
[254] Huneberg (2019) 172.
[255] Millard (2016) *THRHR* 5.
[256] Act 53 of 1998.
[257] Act 52 of 1998.
[258] GG 43474 of 26 June 2020.

easily be compiled by electronic means without the owner of such information even being aware that the marketer has that information.[259]

The practice of direct marketing becomes a problem, however, when the insurer disguises the fact that the personal information that has been collected is going to be used for direct marketing and not for its own legitimate risk assessment and administration processes.[260] Buys and Cronjé argue with merit that the unsolicited communication amounts to an abuse of resources and can become a threat to email and internet security. It may also be irritating and offensive. Hence Millard comments that the practice by direct marketers of sending unsolicited communication can be not only irritating but also illegal.[261]

4.3.2 Privacy in insurance

The right to privacy remains protected under both common law and the Constitution in South Africa. Financial institutions like insurance companies have always been under a legal duty to protect the confidential information of their customers even before the POPI Act was enacted. The legislature introduced the data protection legislation in response to the perceived threat posed by the processing of personal information for e-commerce practices such as direct marketing.[262] The reason for the enactment of this data protection legislation in South Africa was not only to remedy the shortcomings of common law measures but also to ensure that the constitutionally guaranteed right to privacy is respected and protected.[263]

Mismanagement and misuse of consumers' personal information by insurers not only violates consumers' right to privacy but can also expose them to cybercrimes, and this can lead to mistrust on the part of consumers.[264] Trust is one of the key success factors in the insurance industry, as customers need assurance that their personal and confidential information is secure after disclosing it for purposes of obtaining insurance products.

According to Kuschke, a breach of privacy in the insurance industry can arise when insurers release their clients' personal information to others or use it for purposes other than for which

[259] Hamman & Papadopoulos (2014) 46.
[260] Da Viega & Swartz (2017) *South African Institute of Industrial Engineers* 56.
[261] Millard D (2013) *JCRDL* 605.
[262] Roos (2007) *South African Law Journal* 402.
[263] Millard (2013) *Journal of Contemporary Roman-Dutch Law (JCRDL)* 614.
[264] Da Viega & Swartz (2017) 57.

it was originally disclosed, or where third parties unlawfully gain access to insurers' databases, obtain personal information and use it to the clients' detriment.[265]

It seems apparent that some insurers who ask consumers to request an insurance quotation on their websites later use that information for purposes of unwanted direct marketing. Most of these insurers do not have privacy disclaimers or the option to opt in or out of receiving direct marketing after requesting a quote on their website.[266]

It appears to be, however, almost impossible for a consumer whose right to privacy has been breached by a direct insurance marketer to enforce their rights under common law. Millard points out correctly that it is practically impossible to identify the parties who sell the personal information of insurance consumers to third parties for purposes of the latter's direct marketing activities. She elaborates that a successful action under common law against the wrongdoer is made more difficult by the fact that wrongfulness, fault, causation and harm have to be proven.[267]

It can be deduced from the above that, without legislation protecting consumers against the abuse of their personal information, their right to privacy would be threatened. The following discussion will examine the extent of the protection that insurance consumers have for their privacy under the insurance industry statutes.

4.4 Regulation of Direct Marketing in Insurance

McQuoid-Mason submits that regulation remains an important form of social control to address problems that may be caused by dubious marketers, where such problems cannot be addressed by private arrangement, self-regulation or even the common law.[268] This submission was later supported by Woker,[269] who states that proper protection of the South African consumer is through legislation, because the consumer law principles that existed before the promulgation of the CPA were fragmented. It furthermore did not protect consumers with the rights to transparent marketing and advertising practices that are enjoyed internationally.

[265] Kuschke (2007) *De Jure* 309.
[266] Da Viega & Swartz 2017 67.
[267] Millard (2013) 613.
[268] McQuoid-Mason (1997) 267.
[269] Woker (2010) *Obiter*. 230.

It is submitted, though, that the financial sector has always been ahead of other industries in the enactment of consumer protection legislation. The FAIS Act, which was signed into law in 2002, addressed matters that were only introduced and addressed by the CPA in 2011. These include issues such as direct marketing and the cooling-off rights of consumers.

The legislative framework of the financial sector and, more importantly, the insurance sector still remains fragmented.[270] In addition to the general legislation[271] regulating direct marketing as discussed in chapter 2, with the exception of the CPA, the insurance industry-specific legislation contains provisions that provide some regulation of this practice. The main Acts in this regard are the Financial Advisory and Intermediaries Act [272] through the GCC, and the STIA and LTIA in terms of their respective regulations and their respective PPRs.[273] The following discussion investigates these legislative measures to determine their efficacy and the extent to which the POPI Act is enhancing insurance consumer protection.

4.4.1 Direct marketing in terms of the FAIS Act

The FAIS Act is regarded as one of the statutes that revolutionised market conduct in insurance and the financial sector as a whole.[274] It aims to protect consumers by presenting minimum codes of conduct which intermediaries and direct insurers have to adhere to when providing advice or in selling the product. It places a great deal of emphasis on the duty of financial service providers and representatives to "act honestly and fairly, and with due skill and care and diligence." The purpose of the FAIS Act is to "regulate the rendering of certain financial advisory and intermediary services to clients."[275] It therefore sets guidelines for the advisors' and intermediaries' activities. Section 1 of this Act provides definitions of certain words; some of those that are important for this study are analysed below.

[270] Huneberg (2019) 171.
[271] ECTA and POPI ACT. These statutes are not directly peculiar to insurance but are important to the way the insurance business is run in as far as the right to privacy and direct marketing are concerned. Section 45 of the ECTA has been repealed and will cease to apply from the 1st of July 2021.
[272] Act 37 of 2002.
[273] These rules were published in 2018 and insurers were given 12 months to comply. They incorporate the six TCF outcomes and contain micro insurance provisions.
[274] See Millard (2019) 118 where she states that the FAIS Act was enacted in response to the general feeling of inadequate protection under the common law and the LTIA and the STIA.
[275] The Act's preamble page 1.

4.4.1.1 Definitions under FAIS

"Financial product means"[276] "…a long-term or a short-term insurance contract or policy, referred to in the Long-term Insurance Act, 1998 (Act No. 52 of 1998), and the Short-term Insurance Act, 1998 (Act No. 53 of 1998), respectively."[277] As Millard correctly points out, the Act provides a wide range of financial products because the legislator wanted to cover a wide variety of products to ensure that the protection envisaged under the FAIS is attained in all instances pertaining to financial products and services.[278] The Act combined this definition with that of "*financial service*" by showing that "financial service is any service offered in line with these financial products." It thus has a broad scope.

"Intermediary service" "means any act other than the furnishing of advice, performed by a person for or on behalf of a client or product supplier, the result of which is that a client may enter into, offers to enter into or enters into any transaction in respect of a financial product with a product supplier or with a view to buying, selling or otherwise dealing in (whether on a discretionary or nondiscretionary basis), managing, administering, keeping in safe custody, maintaining or servicing a financial product purchased by a client from a product supplier or in which the client has invested; collecting or accounting for premiums or other moneys payable by the client to a product supplier in respect of a financial product; or receiving, submitting or processing the claims of a client against a product supplier." An intermediary is someone who at one point acts on behalf of the product provider or advisor.

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[276] Section 1. Full definition states that "financial product" means, subject to subsection (2)—
(a) securities and instruments, including—
(i) shares in a company other than a "share block company" as defined in the Share Blocks Control Act, 1980 (Act No. 59 of 1980);
(ii) debentures and securitised debt;
(iii) any money market instrument;
(iv) any warrant, certificate, and other instrument acknowledging, conferring or creating rights to subscribe to, acquire, dispose of, or convert securities and instruments referred to in subparagraphs (i), (ii) and (iii);
(v) any "securities" as defined in section 1 of the Financial Markets Act, 2012 (Act No. 19 of 2012);
(v) substituted by s. 175 (d) of Act No. 45 of 2013.]
(b) a participatory interest in one or more collective investment schemes;
(c) a long-term
or a short-term
insurance contract or policy, referred to in the Long-term Insurance Act,
1998 (Act No. 52 of 1998), and the Short-term Insurance Act, 1998 (Act No. 53 of 1998), respectively

[277] Section 1 FAIS Act. The extract has pulled only the insurance products as the study is dealing with insurance services, the Act deals with a wide range of products which are not relevant for the current study. Hence these were excluded for ease of reference.

[278] Millard (2013) 620.

The intermediary can however only operate as such if properly accredited under FAIS and enjoy recognition by the product suppliers.[279]

"Client" means a specific person or group of persons, excluding the general public, who is or may become the subject to whom a financial service is rendered intentionally, or is the successor-in-title of such person or the beneficiary of such service."[280] Millard and Hattingh state that the inclusion of both the successor-in-title and beneficiaries in the definition of "client" is an indication that the legislature wanted this concept to be interpreted widely. It is thus submitted that whether one is a client or not will depend on facts that have been proven by a party claiming to be a client.[281]

"Product supplier" "means any person who issues a financial product."[282] As was shown above, the Act aims to cover a wide range of financial products. Thus, anyone supplying these products will fall within the definition of a financial product supplier.

According to Millard, the evidence that the FAIS Act provides an overarching market conduct regulation is found in chapter IV of the Act, which sets out the establishment of various professional codes.[283] Section 16 (a) of this Act requires the financial service provider or a representative to "act honestly and fairly, and with due skill, care and diligence, in the interests of clients and the integrity of the financial service industry." The GCC sets out the minimum conduct that direct marketers have to comply with when dealing with consumers, and provides the minimum standards of conduct that the financial service providers[284] have to abide by. The code is an important part of consumer protection because it requires fair treatment of policyholders in general.[285] There are some specific definitions under the GCC which are essential to take note of to evaluate confidentiality during direct marketing:

"Advertisement", "in relation to a provider, means any written, printed, electronic or oral communication (including a communication by means of a public radio service), which is

[279] Millard & Hattingh (2016) 25.
[280] Section 1 of FAIS Act.
[281] Millard & Hattingh (2016) 26.
[282] Section 1 of FAIS Act.
[283] Millard & Hattingh (2016) 26.
[284] "financial services provider" means any person, other than a representative, who as a regular feature of the business of such person—
(a) furnishes advice; or
(b) furnishes advice and renders any intermediary service; or
(c) renders an intermediary service;
[285] Huneberg (2019) 176.

directed to the general public, or any section thereof, or to any client on request, by any such person, which is intended merely to call attention to the marketing or promotion of financial services offered by such person, and which does not purport to provide detailed information regarding any such financial services; and "advertising" or "advertises" has a corresponding meaning."[286] This therefore relates to general information to the general public meant to draw attention to the product being offered.

"Direct marketing" "means the rendering of financial services by way of telephone, internet, media insert, direct mail, or electronic mail, excluding any such means which are advertisements not containing transaction requirements."[287] This definition does not include an approach in person or cell phone messages. The definition has however been amended and from the 26th of December 2020 it will be extended to include communication through digital platforms. It will therefore define direct marketing as "the rendering of financial services by way of telephone, internet, digital application platform, media insert, direct or electronic mail" but will exclude "publication of an advertisement." Further to this, the Act defines a "direct marketer" as a provider who, in the normal course of business, provides all or the predominant part of the financial services concerned in the form of direct marketing.[288] What can be inferred from this definition is that a provider who does not use direct marketing as a predominant business promotion will not be regarded as a direct marketer.

4.4.1.2 General Code of Conduct

The GCC stipulates that the insurer as a financial service provider[289] has a general duty to render financial services honestly, fairly, with due skill, care and diligence, and in the interests of clients and the integrity of the financial services industry.[290] Sections 3, 6 and 15 should be read together while keeping in mind the definitions discussed in Section 1 of FAIS and section 1(1) of the GCC. Section 15 of the GCC provides extensive duties and disclosures that a direct marketer has to abide by when rendering the service,[291] when

[286] Section 1 (1) of the GCC.
[287] Section 1 (1) of the GCC.
[288] Section 1 (1).
[289] "provider" means an authorised financial services provider and includes a representative.
[290] Section 1 (1).
[291] Section 15 (1).

advice is rendered,[292] and prior to conclusion of the transaction.[293] A more stringent protection is extended where direct marketing is conducted by telephone. A direct marketer shall be obliged to record all telephone conversations with clients during direct marketing, and such records and voice-logged records of advice should be stored appropriately and should be easily retrieved upon request by the client or the Registrar of Financial Services Providers.[294] It is submitted that the legislature's intention with this clause is merely to ensure safe keeping of advice given to the consumer, and not necessarily to protect the information provided by the consumer. Neither the FAIS Act nor the GCC addresses the consumer's right to privacy directly.

Millard correctly points out that the Enforcement Committee, in making a determination in the case of the *Register of Financial Services Providers v Catsicadellis and another,*[295] never made any reference to the privacy rights of the affected parties. In this case the provider had directly marketed the financial products to clients who had no relationship with the business. The personal information and contact details used to approach the prospective investors were obtained from marketing lists of other businesses without these consumers' prior consent. The focus of the Registrar was on misrepresentations made during the direct marketing, and the issue of invasion of privacy of the affected consumers was not raised nor addressed.

It is submitted, however, that even though the FAIS Act does not directly prohibit the provider from obtaining personal information for purposes of unwanted direct marketing, section 3(3) of the GCC protects clients' confidential information from disclosure. To this extent, it can be argued that the GCC provides a shield against a provider that sells its client database for commercial gain. According to Section 3(3):

"A provider may not disclose any confidential information acquired or obtained from a client or, subject to section 4(1), a product supplier in regard to such client or supplier, unless the written consent of the client or product supplier, as the case may be, has been obtained beforehand or disclosure of the information is required in the public interest or under any law."

[292] Section 15(2).
[293] Section 15 (3).
[294] Section 15 (4).
[295] Enforcement Committee Case No 6 of 6 November 2012 (accessed at http://www.fsca.co.za on 18 February 2013).

In the case of *The Registrar of Financial Service Providers v Iozzo and Insurance Underwriting Managers*,[296] the respondent was found to have contravened Section 3(3). The first respondent is Mr Iozzo, the owner and manager of IUM, and the second respondent is IUM, which is the authorised financial provider and is represented by Mr. Iozzo as its director. The respondent had disclosed personal information of their clients to different underwriting managers without obtaining their written consent in contravention of section 3(3) of the GCC. In another case, the Registrar of Financial Service Providers also issued fines payable by Dominium Consulting for disclosing policyholders' policy information to a member of the public. In this case,[297] the information was released under the circumstances where Mr Rutherford, who was acting on behalf of Dominium, was under the impression that the consent had been given, while this was not the case. The Act requires the consent to be in writing. A mere verbal or implied consent would amount to a contravention of the Act.

It would seem from the above cases that the Act deters only one aspect of privacy invasion—namely, disclosure of information. Although there was evidence of unsolicited calls in the *Catsicadellis* case, the Registrar of Financial Services did not make any pronouncement on this conduct. Zenda *el at* argue correctly that in the absence of the POPI Act, the insurers could use the personal information of their policyholders or other prospective clients who have no relationships with them for purposes of unwanted direct marketing.[298]

4.4.2 Policyholder Protection Rules

The Policyholder Protection Rules ("the PPRs") were initially effected in 2004 and amended in 2010 and again in 2018 ("new PPRs"). Unlike the FAIS Act, which regulates the relationship between the policyholders and the intermediaries, these rules are concerned with the relationship between the insurers and their policyholders. It will be evident during the following discussion that there is large overlap in the provisions dealing with direct marketing under the FAIS GCC and the PPRs.[299]

[296] Enforcement Committee Case No 13 of 6 July 2013 accessed at http://www.fsca.co.za on 18 August 2020.
[297] *The Registrar of financial services providers v Dominium Consulting (Pty) Ltd*, Enforcement Committee Case No 1 of 29 January 2014 accessed at http://www.fsca.co.za on 10 October 2020.
[298] 2020:119.
[299] Millard & Hattingh (2016) 3.

Millard and Kuschke indicate that while the overlaps could cause conflict based on interpretation, they have the effect of increasing consumer protection.[300] Some of these provisions that overlap include the cooling-off rights and the use of plain language. The most significant change introduced by the current PPRs is the data management provision under Rule 13, which introduces the POPI Act through the definition of 'processing' into the insurance legislation. The data management introduction means that, for the first time, the Financial Sector Conduct Authority will be mandated to comment on the conduct of the financial service provider regarding the management and use of a policyholder's personal information.

As was shown earlier, the various legislative reforms saw the 2004 PPRs going through substantial changes over the years until the current PPRs were published in January 2018, thus introducing even greater consumer protection measures.[301] The principles of Treating Customers Fairly ("TCF"), an international regime previously adopted by the then Financial Services Board ("FSB"),[302] were incorporated into the PPRs, thus making fair treatment of customers part of the statutory regulation.[303] The six TCF initiative outcomes are now binding law that forms part of the statutory duty of the insurer and intermediaries to act fairly.[304] The insurers, just like the intermediaries under the FAIS Act, are now required to act fairly in their dealings with insurance consumers.[305]

4.4.2.1 Direct marketing and the PPRs

The PPRs make a clear distinction between advertising and direct marketing in the sense that the definition of direct marketing under the PPRs specifically excludes advertising.

[300] Millard & Kuschke (2014)2435.
[301] Millard (2018) *THRHR* 378.
[302] Now the Financial Sector Conduct Authority (FSCA).
[303] Millard (2018) 383.
[304] "(a) policyholders are confident that they are dealing with an insurer where the fair treatment of policyholders is central to the insurer's culture;
(b) products are designed to meet the needs of identified customer groups and are targeted accordingly;
(c) policyholders are given clear information and are kept appropriately informed before, during and after the time of entering into a policy;
(d) where policyholders receive advice, the advice is suitable and takes account of their circumstances;
(e) policyholders are provided with products that perform as insurers have led them to expect, and the associated service is both of an acceptable standard and what they have been led to expect; [and]
(f) policyholders do not face unreasonable post-sale barriers to change or replace a policy, submit a claim or make a complaint."
[305] (2019)127.

Under the PPRs, direct marketing relates only to communication that is directed at a specific person and not to the public in general. The PPRs further confirm the consumer's right to fair and responsible marketing, in as far as Rule 10 and Rule 11 deal with advertising and disclosures.[306]

For the purpose of this study, rules 11.1 and 10.10.1 should be read together. These provisions are important because they specifically regulate the insurer's conduct in relation to unwanted direct communication with the consumer.

In rule 11.1 "direct marketing" is defined as:

"the marketing of a policy by or on behalf of the insurer by way of a telephone, internet, digital application platform, media insert, direct or electronic mail in a manner which entails submission of an application, proposal, order, instruction or other contractual information required by the insurer in relation to the entering into of a policy or other transaction, in relation to a policy or other services, but excludes the publication of an advertisement"

The above definition is a significant improvement on the definition that was provided in the previous 2004 PPRs. It includes other direct marketing methods, such as the digital platforms, which were not part of the previous definition. This is a welcome approach, because the improvements and advancements in the technological space have evolved since 2004 when the first rules were implemented, thus presenting different avenues through which the consumer can be approached.

Rule 10.10 confirms the consumer's Constitutional right to privacy as enshrined in section 14. The rule does this by providing the consumer with the right to accept or refuse direct marketing or to request the marketer who had previously been accepted to discontinue the marketing advances. This rule 10.10 stipulates as follows:

Unwanted direct advertising

10.10.1 Where an insurer or any person acting on its behalf uses a telephone or a mobile phone call, voice or text message or other electronic communication for an advertisement, it must allow the policyholder during that call or within reasonable time after receiving the

[306] Huneberg (2018) 27.

message, the opportunity to demand that the insurer or other person does not publish any further advertisements to the policyholder through any of these mediums.

10.10.2 An insurer or any person acting on its behalf may not charge a policyholder a fee or allow a service provider to charge a policyholder any fee for making a demand in terms of rule 10.10.1."

It is submitted that the inclusion of this clause in the PPRs is an important milestone in the protection of insurance clients against unsolicited communication from direct insurance marketers. Rule 10.10.1 and 10.10.2 provide a solution for the insurance consumer to opt out of the marketer's advertising list at the marketer's cost. The previous PPRs did not have any specific clause dealing with the consumer's right to demand that the marketer stop the unwanted communications. It merely required the marketer to "act professionally and in due regard of the convenience of the policyholder".[307] The consumer would therefore have to enforce their right to privacy through other non-insurance legislation such as the ECTA, and where this was not applicable the consumer would have to revert to common law measures such as obtaining an interdict or instituting a civil damages claim. The effort and cost of enforcing such right under common law was not worth it.

Rule 10.10.1 is however still open to criticism, as it merely confirms the consumer's right to privacy by providing an opt-out solution. It does not address the main problem faced by consumers, where their personal details are being sold to third parties for purposes of unwanted direct marketing.[308] It is submitted further that this rule assumes that the direct marketer will comply with the request to stop the unwanted communication. Thus, the insurance consumer's right to privacy is not fully protected under rule 10.10.1 because the consumer will continue to be inconvenienced and inundated with unwanted advertising messages from other direct marketers who have not yet approached them.

Rule 10.10.2 provides much-needed relief for the insurance consumer who has received direct marketing through non-electronic means. Until the publication of this rule, the consumer, and not the direct insurance marketer, had to bear the cost of exercising their right to opt out of the unwanted direct marketing.

[307] Rule 4.1 (a).
[308] Millard (2013) *JCRDL* 619.

Another significant change heralded by the new PPRs concerning the consumer's right to privacy is the emphasis placed on the insurer's duty to maintain proper data management under rule 13. More specifically, rule 13.3 stipulates that the insurer:

"[m]ust have an effective data management framework that includes appropriate strategies, policies, systems, processes and controls relating to the processing of any data."

The rule specifically states that the definition of "processing" of data, in this case, should be aligned to the definition of "processing" as defined under the Protection of Personal Information Act. The definition of "processing" under this Act includes the collection, receipt and use of the personal information.[309] It has been established that some of the personal information provided to insurance companies ends up with other parties who were not part of the transaction, and this can create a problem of distrust between the insurer and the policyholders.[310] Efficient management of personal information of policyholders is important to insurers, not only for the sustainability of the industry but also for ensuring compliance with the privacy laws. The following discussion will address enforcement under the insurance legislation.

4.5 Enforcement of the FAIS Act and the PPRs

The FSCA, as established in terms of section 26 of the FSRA, is responsible for the enforcement of the FAIS Act and the remaining market conduct sections of the STIA and LTIA and their respective PPRs. The FSRA further establishes the office of the ombud for Financial Service Providers who will establish ombud schemes that will be responsible for the adjudication of disputes between policyholders and financial service providers.[311] The relationship between the FSPs and the Authority is however regulated in terms of the original FAIS Act.

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[309] "processing" means any operation or activity or any set of operations, whether or not by automatic means, concerning personal information, including—
(a) the collection, receipt, recording, organisation, collation, storage, updating or modification, retrieval, alteration, consultation or use;
(b) dissemination by means of transmission, distribution or making available in any other form; or
(c) merging, linking, as well as restriction, degradation, erasure or destruction of information;

[310] Da Viega & Swartz *SAIEE* (2017) 67.

[311] Section 211 FSRA. According to Section 211(1), the ombud schemes will be responsible for complaints involving products and services. Section 211 (3) obliges all the financial institutions offering a product or service for which there is an ombud scheme to be a member of that ombud scheme.

Section 34 of the FAIS Act empowers the Authority to declare certain conduct by the providers undesirable. Any authorised financial service provider who continues with the practice after the FSCA has declared it undesirable will be liable to a fine. According to Millard and Hattingh, although the Act does not define "undesirable practice", section 34[312] provides guidelines of what should considered before declaring a business practice undesirable. This section also prescribes the procedure that needs to be followed before such a declaration is made.[313] The FSCA is however required to publish the undesirable practices by notice in the Gazette. To date, no such publication has been directed specifically at unwanted direct marketing.

The FAIS Act does not specifically address the privacy of personal information and direct marketing.[314] However, it is submitted that the guidelines under section 34 of the FAIS Act provide such a wide scope for the Authority to declare undesirable most conducts that are prejudicial or potentially prejudicial to the consumer. Any person who continues with the conduct that has been declared undesirable will be guilty of an offence and liable to pay a fine or imprisonment upon conviction or be liable for both imprisonment and a fine. The FAIS Act empowers the Authority to impose penalties of up R1 000 000 or imprisonment of up to 10 years on any person who engages in an undesirable practice.

According to the FSRA, the responsible Authority will be responsible for adjudicating on the contravention of a sectoral law.[315] Depending of the severity of the contravention, the Authority may issue an administrative penalty of up to R15 000 000 or imprisonment or both. It is submitted that the new PPRs in terms of STIA form part of such a sectoral law. These 2018 Rules address policyholder privacy under Rule 13 and unwanted direct advertising under Rule 10. Contravention of these two rules, as mentioned earlier, could lead to an administrative penalty by the relevant Authority. The incorporation of the POPI Act definition

[312] Section 34(2) The following principles must guide the Registrar in considering whether or not a declaration contemplated in subsection (1) should be made:
(a) That the practice concerned, directly or indirectly, has or is likely to have the effect of—
(i) harming the relations between authorised financial services providers or any category of such providers, or any such provider, and clients or the general public;
(ii) unreasonably prejudicing any client;
(iii) deceiving any client; or
(iv) unfairly affecting any client; and
(b) that if the practice is allowed to continue, one or more objects of this Act will, or is likely to, be defeated.
[313] Millard & Hattingh (2016) 55.
[314] Zenda *et al* (2020) 119 *SACJ 32*(1) July.
[315] Section 167(1)(a).

of "processing" for purposes of proper data management by insurers could mean that the insurers are now exposed to enforcement from different regulators.

4.6 POPI ACT AND INSURANCE

As was demonstrated in the previous chapter, the POPI Act is a piece of legislation that is of general application as recommended by the SALRC because of inadequacies in common law and other legislation[316] to protect the abuse of consumers' personal information.

The above discussion has shown that the main insurance statutes do not have any provisions to deter insurers from using policyholders' information for purposes of direct marketing.[317]The use of personal information for purposes of direct marketing without consent the consumer's consent is specifically prohibited under section 69. Thus, the insurer is prohibited from using the personal information that was collected for purposes of risk assessment for direct marketing, unless the owner of this information has agreed to such conduct.

In addition to the direct marketing provision, the insurer will have to adhere to the lawful conditions of processing of information as laid out in the Act. According to Kuschke, the Act seeks to promote transparency by regulating the processing and protection of personal information.[318] Thus the insurer who has collected the consumer's personal information has an obligation to ensure that the information is secure and does not fall into wrong hands that could use it for unwanted direct marketing or fraud.[319]

The insurance companies are now subject to scrutiny by the Information Protection Regulator for purposes of management of personal information that they have collected. The Information Protection Regulator's functions include education of both consumers and insurers to ensure awareness of rights and duties under the Act in order to ensure compliance. The Regulator will harmonise the collection and protection of personal information, as it will have the authority to apply public policy considerations to the insurer's need to collect information and the consumer's right to privacy.[320]

[316] ECTA & CPA.
[317] Zenda *et al* (2019) 119.
[318] Kuschke (2019) 226.
[319] *Ibid*.
[320] Kuschke (2019) 226.

4.7 CONCLUSIONS

Protection of consumers against privacy infringements through direct marketing has gained momentum as consumers become aware of the dangers associated with the uncontrolled access to their personal information. The FAIS Act through the GCC was the first insurance legislation to require fair treatment of consumers. It did not, however, address the abuse of personal information of consumers by the financial intermediaries.

The PPRs in terms of the STIA and the LTIA have been adapted to suit the different consumer protection needs in 2018. The most notable change from the information privacy perspective is the incorporation of various non-insurance legislation such as the POPI Act in the PPRs. This change is the most outstanding feature in respect of the management, use and storage of personal information of policyholders in the insurance legislation. The increased consumer protection measure in the PPRs means that the Financial Conduct Authority can now enforce privacy breaches if a consumer's personal information has been processed in contravention of Rule 13 of PPRs.

Pre-POPI Act insurance legislation did not specifically address privacy and use of personal information. Its main focus was on the conduct of the providers during the direct marketing process. The FAIS Act and its GCC and the PPRs in terms of STIA and LTIA merely addressed direct marketing from a conduct perspective between the intermediaries and policyholders, and between the insurers and policyholder respectively. This problem has been addressed in the current PPRs. The new PPRs cover issues of fair conduct by insurers, the opt-out mechanism for unwanted direct advertising, and privacy through the request for lawful processing of personal data collected.

The above changes in the new PPRs is confirmation that the protection of consumers against unwanted direct marketing and unlawful use of policyholders' personal information has been aligned with other industries within the insurance legislation. It is also important to note that the POPI Act applies to the insurance industry. This means that the information collected by the insurer can only be used for the specific purpose for which it was collected. The insurer will now have to obtain specific and informed consent for any other form of processing.

The following discussion in Chapter 5 entails a comparison of the provisions of the CPA with insurance statutes in relation to the protection they provide against the invasive direct marketing practices. This analysis is crucial for the current discussion as it will create an appreciation of the adequacy of the protection that the insurance consumer enjoyed before POPI was implemented.

5 CHAPTER 5: COMPARISON OF POPI ACT DIRECT MARKETING PROVISIONS AND INSURANCE LEGISLATION

5.1 Introduction

Chapters 3 and 4 of this dissertation evaluated the direct marketing legal framework for general goods and services and the framework applicable specifically to the insurance industry. Papadopoulos and Snail correctly show that the pro-consumer era in which South Africa finds itself presents opportunities for consistent consumer protection provisions. They argue further that these opportunities will enable efficiencies and innovative fair consumer market.[321] This chapter will, therefore focus on a detailed comparison between the core provisions of direct marketing under the general goods and services and those of the insurance industry. This will then be compared with the current general regime that has been introduced by the POPI Act.

The main difference between the protection of direct marketing under the general goods and services and the insurance services is the fact that the CPA is not applicable in the insurance industry. The insurance industry legislation, on the other hand, is still in disarray and did not contain any provisions that specifically addressed unwanted direct marketing as a practice until recently, on the 1st of January 2019, when the new PPRs came into force.

The consumer protection provisions under the insurance industry are found in various pieces of legislation, and this will remain the case until the CoFI Act, which is meant to consolidate the industry conduct, is fully enacted. The CPA will be used as a point of reference for the comparative analysis of the protection against unwanted direct marketing in financial and non-financial products and services. This approach is preferred because the CPA is one of the first pieces of consumer protection legislation and has provisions that address the practice of unwanted direct marketing. The new PPRs introduced some changes to direct marketing provisions, and aligned them with those of the CPA. These changes are indicative that the CPA has had a positive effect on consumer protection provisions that apply in the insurance industry.

[321] Papadopoulos & Snail (2012) 91.

The purpose of this comparative analysis is first to analyse direct marketing provisions under the CPA and the insurance legislation. This discussion will be followed by a brief comparison of how the POPI Act has affected direct marketing in the insurance industry in relation to non-financial goods and services.

5.2 Comparison of Direct Marketing Provisions under the CPA and Insurance Legislation

5.2.1 Fair and honest marketing

When it comes to the recognition of constitutional rights, the CPA plays an important role as it includes important rights such as the right to fair and responsible marketing. It includes the right to privacy as core consumer right in direct marketing regulation. According to Barnard, the incorporation of these rights into the CPA signifies the legislature's acknowledgement of the Constitution as the supreme law in South Africa.[322] The FAIS Act and the PPRs of the LTIA and STIA, on the other hand, did not specifically declare the right to responsible and fair marketing, but the protection of this right can be inferred from the provisions that prescribe how the financial services providers are to conduct themselves during direct marketing.

Section 29 of the CPA prohibits the supplier from marketing goods a manner that is misleading or fraudulent to the consumer.[323] Dishonest and misleading marketing practices are equally prohibited in sections 14 and 15 of the GGC of the FAIS Act. Section 2 adds to the requirement of fairness by requiring a provider to always render the financial services with honesty, fairness, due skill, care and diligence in the interests of the consumer. In the same vein, the insurers are also required to exercise due skill and diligence when dealing

[322] Barnard & Scott (2015) 476.
[323] a producer, importer, distributor, retailer or service provider must not market any goods or services—
"(a) in a manner that is reasonably likely to imply a false or misleading representation concerning those goods or services, as contemplated in section 41; or
(b) in a manner that is misleading, fraudulent or deceptive in any way, including in respect of—
(i) the nature, properties, advantages or uses of the goods or services;
(ii) the manner in or conditions on which those goods or services may be supplied;
(iii) the price at which the goods may be supplied, or the existence of, or relationship of the price to, any previous price or competitor's price for comparable or similar goods or services;
(iv) the sponsoring of any event; or
(v) any other material aspect of the goods or services."

with the policyholders.[324] It is submitted that both non-financial and financial suppliers are required to engage in fair and honest marketing practices.

5.2.2 Right to restrict direct marketing

The consumer's right to privacy and protection against unwanted direct marketing is established in Part B of Chapter 2 under sections 11 and 12.[325] Section 11 regulates the consumer's right to restrict unwanted direct marketing by confirming that the right to privacy includes a person's right to refuse to accept; require another person to discontinue; pre-emptively block communication that is primarily for the purpose of direct marketing.[326] Similarly, Rule 10.10.1 of the PPR followed the opt-out mechanism of the CPA. This rule requires the insurers to enable the policy holder to request the direct marketing to cease sending such direct marketing.[327]

It is important to note, though, that Rule 10.10.1, unlike Section 11 of the CPA, does not make allowance for a pre-emptive block of direct marketing. This means that the right to restrict direct insurance marketing can only be exercised during or after the communication. It would seem however that this pre-emptive block under the CPA is merely a technical right because the registry that was intended to facilitate this right was never established. Another difference in the regulation of unwanted direct marketing is in the definition of the communication that the consumers can restrict. The CPA definition of direct marketing includes an approach in person and by post. Under the PPRs, though, the policyholder is only entitled to restrict electronic communication as defined under the CPA.

Papadopoulos states that by including the postal services under the definition of direct marketing, the CPA essentially gives the consumer the right to place signs on a postal gate to restrict this kind of marketing. The PPR and the FAIS Act, on the other hand, do not offer any protection against postal and personal direct marketing. Thus, the direct insurer could continue to send the direct marketing advertisements through the post even after the

[324] Rule 1.2 of PPR "an insurer, at all times, must act with due skill, care and diligence when acting with policyholders."
[325] Van Eeden & Barnard (2017) 587.
[326] Section 11(a)-(c).
[327] "when an insurer or any person acting on its behalf uses telephone or mobile phone call, voice or text message or other electronic communication, for an advertisement, it must allow the policyholder during that call or within reasonable time after receiving the message, the opportunity to demand that the insurer or the other person does not publish any further advertisement to the policyholder through these mediums."

policyholder has shown their displeasure with these advertisements. Fortunately, this can no longer be the case under the POPI Act.

Another aspect that bears mentioning is the fact that the FAIS Act, which has been applicable since 2002, has always protected consumers' personal and confidential information. The Financial Regulator, as shown in cases that were discussed in chapter 4,[328] has issued fines for breach of these confidentiality provisions. To this extent, it may seem that the insurance legislation provides greater protection on confidentiality and the enforcement of compliance with these provisions.

5.2.3 Times for contacting consumers

The CPA further guarantees the consumer's right not to receive any direct marketing at certain specified times, even in cases where they have not exercised their right to restrict direct marketing as shown in section 11. Thus, the marketer may not contact the consumer during these times unless the consumer has explicitly or impliedly agreed otherwise. It is interesting to realise that, under this section, the consumer's prior consent to receiving direct marketing is required. By contrast, the insurance statutes do not regulate the times at which the policyholders may be contacted. This absence of direct marketing communication regulation can be seen as a loophole for unscrupulous direct insurers to contact the policyholders when they least expect it or when it is inconvenient.

5.2.4 Industry bodies' approach to direct marketing

In South Africa, Section 82 of the CPA provides for the creation of industry codes and accreditation of industry ombuds.[329] Barnard and Scott point out that these codes are important because the industry bodies such as the DMASA use these codes to guide their members' conduct of promotional activities such as direct marketing to ensure that it is in line with the CPA.[330] As part of the effort to protect consumers from unwanted direct marketing, the DMASA has created a registry for consumers who do not want to receive

[328] Paragraph 4.1.1.1.
[329] Strachan (2016)5.
[330] Barnard & Scott (2015) *SAMLJ* 475.

direct marketing to pre-emptively block direct marketing communication.[331] The DMASA members, therefore, have to ensure that there is no pre-emptive block against the consumer before contacting them. However, this list is created in line with the CPA, thus providing better protection to consumers of non-insurance products because the direct insurer is not obliged to assume that there is a pre-emptive block against the consumer.

5.3 The Impact of POPI Act on Financial and Non-Financial Services

As discussed in chapter 3, the main purpose of the POPI Act is to protect consumers from negligent disclosure and use of their personal information.[332] What is important about this Act is the fact that it applies in most industries,[333] including the insurance industry, and that it applies concurrently with the CPA.[334] It is therefore important to discuss how the POPI Act will protect the disclosure and the use of personal information for purposes of direct marketing under the insurance legislation as well as the general products that are regulated by CPA.

5.3.1 Direct marketing and law processing of personal information

The POPI Act provides greater protection of the consumer's right to privacy than the statutes that pre-existed it. Over and above confirmation of the right to privacy in its preamble, the POPI Act definition of privacy is wider than the definition provided under the CPA.

According to the POPI Act, the right to privacy includes the right to control over one's personal information.[335] This entails the right to protection against the unlawful collection, retention, dissemination and use of personal information. As discussed in Chapter 3, the POPI Act adopted the international principles on information protection that the responsible party is required to abide by. The CPA, on the other hand, limited the definition of the right to privacy to the consumer's right to restrict direct marketing. Although the FAIS Act and the PPRs do not specifically confirm the right to privacy, the rules protect this right through confidentiality and unwanted direct marketing provisions. It is submitted that the POPI Act

[331] https://dmasa.org/page/register-opt-out-service.
[332] Swales (2016) 50.
[333] Swales (2016) 65.
[334] Van Eeden & Barnard (2017) 591. Also see CPA section 2 (9)(a)-(b).
[335] Pre-amble of POPI Act.

has in essence provided a much-needed protection of the most basic and valuable information that is exposed to abuse while in the digital spaces.[336] In Chapter 2 it was shown that the consumer's personal information is more at risk because of the technological advances that have made it easy for this information to be shared and obtained without the consumer being aware.

The consumer statutes that existed before the POPI Act focused mainly on direct marketing, but they did not address how the marketer obtained this information nor how they used it once the sale had been concluded or rejected. This concern has been fully addressed by the POPI Act, especially by section 11 which requires the consumer's consent before their personal information can be used. For instance, it is now unlawful for a bank to share the personal information of its customers with an insurer without the consumer's consent, unless obtaining consent has been exempted under section 11. It is important to note, though, that the POPI Act has had a positive influence in the insurance consumer legislation, to the extent that Rule 13.2 has incorporated the definition of "processing" under the PPR into the rules. Rule 13.3 (c) represents a welcome change in the insurance industry, as the insurer is required to ensure that the privacy rights of policyholders are protected.

5.3.2 Direct marketing under the POPI Act

In addition to the protection measures on processing of personal information, the POPI Act prescribes how processing of personal information for purposes of direct marketing should be carried out. Section 69, as discussed in Chapter 3, introduces the much-celebrated opt-in mechanism. Section 69 (1) prohibits the insurer from processing the personal information of the policyholders or prospective policyholders by means of electronic communication unless the policyholder has given their consent for their information to be processed for this purpose. Alternatively, where the insurer has not received this consent, the policyholder should be the client of this insurer.

Furthermore, in terms of this section,[337] the insurer will only process personal information of its policyholders on condition that the contact details of the policyholder were obtained for purposes of a sale of an insurance product or service; for direct marketing of the insurer's

[336] Swales (2016) 51.
[337] Section 69 (3).

own similar product or services. The insurer is only allowed to send this electronic communication to the policyholder for purposes of direct marketing, on condition that the insurer has given this policyholder reasonable opportunity to object to the continued electronic direct marketing communication, free of charge and without any unnecessarily difficult procedures.

It is evident from the above discussion that the POPI Act will provide greater protection for unwanted direct marketing than the industry-specific legislation, which has followed the CPA route and adopted the opt-out mechanism. Various authors have expressed disappointment in the legislature for making allowance for the responsible party to contact the consumer who had not previously declined to consent only once. This once off allowance creates an apprehension of abuse by some direct marketers. Van Eeden and Barnard,[338] however, correctly point out that the concurrent application of the POPI Act and the CPA will mean that the responsible party will still be bound by the pre-emptive block. In this case, the responsible party who is a member of the DMASA will have to consult the DMASA registry as the CC has not yet created the registry. Thus, it would seem that the CPA, through the self-regulation of the codes under the DMASA, offers greater protection to the extent that the direct marketer is a member of the DMASA. It is, however, submitted that the apprehension that section 69(2) could be open to abuse by direct marketers is exaggerated because the responsible party will still be bound to process the personal information lawfully. Apart from these concerns about the practical application of section 69(2), it is clear that the POPI Act provides greater protection against unwanted direct marketing communication under this section.

5.3.3 Enforcement

If protection were to be measured in line with access to enforcement mechanisms, it would seem that insurance industry consumers are better protected than the consumers in other industries. Woker correctly states that access to justice is one of the most important factors for effective consumer protection.[339] The CPA is regarded as the most progressive consumer legislation as it guarantees the constitutional rights and, more specifically, the

[338] Van Eeden & Barnard (2017) 591.
[339] Woker (2016) 22.

right to privacy. Direct marketing is one of the practices most highly regulated by the Act. However, Barnard and Scott deplore the fact that the avenues of redress under section 69 are not yet in place.[340] Woker recommends that the structures that would ensure access to redress under the CPA, such as Alternative Dispute Resolution (ADR) agents, consumer courts and industry ombuds, should be given urgent attention to enable the consumers to enjoy their rights.[341]The insurance sector is recognised as being the best in providing consumers with redress, having embraced the co-regulation mechanism in which self-regulatory ombuds in the financial sectors such as insurance have received legislative support through the enactment of the Financial Service Ombuds Schemes Act,[342] as far back as 2004. In addition to this, it was shown in Chapter 4 that the Financial Services Registrar has issued fines for breaches of confidentiality under the FAIS Act.

It is currently still premature to comment on the effectiveness of the Information Regulator (IR) in enforcing the privacy breaches. It is, however, sufficient to comment that the enforcement provisions of up to 10 years' imprisonment or R10 million fine in instances of breach signals the legislature's intention to empower the IR take a firm stance on non-compliance. The POPI Act has also introduced strict liability, which means that no intent nor negligence is required for liability. So an insurer who is found to have been sending electronic communication to policyholders who has no relationship with them, or even intended to direct marketing to them, can be found liable without the policyholder having to prove fault, whether intention or negligence. The Act also empowers a policyholder whose personal information has been abused, and whose right to privacy was infringed upon, to institute a civil action. The Act also empowers the policyholder to request the IR to institute this action on their behalf and claim for damages.[343] It is submitted that the option to have the IR institute a civil claim on behalf of the plaintiffs is a welcome improvement, as judicial proceedings are not only expensive and lengthy but can also be intimidating where technology is involved.

[340] Barnard & Scott (2015) SAMLJ 474.
[341] Woker (2016) 47.
[342] Financial Services Ombud Schemes (FSOS) Act 37 of 2004.
[343] Section 99 of the POPI Act.

5.4 Conclusion

When the protection against direct marketing is compared with the legislation that pre-existed it under the financial and financial products and services industries as discussed above, it is quite evident that the POPI Act has introduced a long-awaited effective intervention for the benefit of consumers. The specific provisions in the CPA protecting consumers against direct marketing and the right to privacy; however, in comparison to the insurance consumer, are not optimally protected or respected, because the redress structures provided are not yet in place. It is however evident from the above discussion that although the insurance consumer has always generally enjoyed greater consumer protection in comparison to other industries, because of their access to redress, the protection against abuse of personal information for purposes of direct marketing under sectoral insurance legislation was inadequate.

There is no question that the POPI Act has introduced a comprehensive personal information protection framework that is more comprehensive than the one that existed before the Act was implemented. The Act introduced principles of lawful processing of personal information. It further prescribes how direct marketing can be conducted. The POPI Act has therefore provided the best protection against abusive conduct by scrupulous direct marketers by balancing the need for the preservation of the commercial value of direct marketing, with the need of consumers to have control over their personal information. The direct marketer can, therefore, only contact the consumer who has consented to their information being used or shared with third parties for purposes of direct marketing. The enactment of the POPI Act in the insurance industry means that insurers cannot disclose personal information to any third parties, they can also not buy personal information from third-party data companies for purposes of direct marketing, unless they have been authorised to do so by the data subject or owner of the personal information.

6 CHAPTER 6: CONCLUSION

6.1 Introduction

It was shown in Chapter 1 that this study aims to investigate the impact of the "POPI Act" on direct marketing and insurance consumer protection in South Africa, by focusing on the insurance regulatory framework.[344] The investigation commenced by making a general analysis of consumer protection against unsolicited direct marketing under the common law and the Constitution.[345] This was then followed by an examination of how direct marketing was regulated by the general legislation and by the insurance specific statutes (in Chapters 3 and 4 respectively) before the POPI Act was enacted. The study followed a critical analytical approach. The limitations on time also meant that the scope of the investigation had to be limited to certain legislation only.

Further to this, it was postulated at the beginning of the study that the POPI Act has provisions that will address the insurance consumer concerns about the breach of their privacy during direct marketing. Thus, the nature and extent of the study necessitated the discussion of the insurance legal framework and the POPI Act provisions in relation to direct marketing. Some of these provisions were discussed in more depth than others, with the focus being on section 69 of the POPI Act as it is dedicated to the regulation of direct marketing.

It has been established from the above discussion that the POPI Act has provisions that will protect the insurance consumers from the aggressive direct marketing communications. The POPI Act has a more holistic approach to the protection of personal information, which is usually threatened by direct marketing practices. The Act not only prescribes how personal information should be managed but also introduces a more consumer-oriented approach of opting-in, thus giving control of personal information to the data subjects.

The purpose of this chapter is to provide conclusion on the study and comment on the extent to which the aim was reached.

[344] See paragraph 1.7.
[345] See Chapter 3.

6.2 Final comments and conclusions

The inherent nature of the insurance industry requires that a lot of personal information be collected from the insurance consumer for risk assessment purposes. The investigation has revealed that the exposure of this information through technology, and the intentional or negligent exposure of this information to third parties who use it for direct marketing purposes without the consumer's consent, led to diminishing trust by insurance industry consumers with their personal information.[346] This conduct was detrimental to insurers, as they can only operate on behalf of consumers with personal information because, without quality personal information, product development and innovation and accurate risk analysis would be hampered.

It was established further that although the right to privacy is recognised as one of the important rights and is protected in the South African Constitution, the insurance legislation did not provide adequate protection for this right. The study showed that the main purpose of the POPI Act is to give effect to this right of privacy.[347] The insurer's conduct, therefore, must be in line with the Constitutional requirement in ensuring that the privacy of their clients and policyholders is protected. Although insurance legislation contains provisions that regulate the conduct of direct marketers, no provision specifically prohibits the use of personal information and the sending of unsolicited communication to policyholders for purposes of direct marketing. It is therefore apparent that the South African common law, the Constitution, as well as the insurance-specific legislation,[348] were completely inadequate to protect the consumers against the abuse of their personal information by unscrupulous insurance direct marketers.

The sending of electronic communications in the insurance industry was regulated by section 45 of the ECTA as the law of general application. The ECTA regulated unsolicited communication through the opt-out mechanism. This approach had some flaws that were easily taken advantage of by unethical direct marketers. Some of the gaps in the ECTA in respect of unwanted direct marketing were addressed by the CPA on 1st April 2011. The

[346] See paragraph 4.3.2.
[347] See paragraph 3.4.
[348] See paragraph 2.7 and 4.7.

CPA does, however, not apply to insurance. The pre-POPI Act insurance legislation has been found to have been inadequate in addressing the personal information abuses caused during direct marketing because this legislation it was silent on this aspect.

Various pieces of legislation regulate consumer protection in the insurance industry, but this study focused on the provisions of the FAIS Act and its GCC, as well as PPRs under STIA and LTIA. These statutes, just like the CPA and the ECTA, merely address unwanted direct marketing through the opt-out mechanism.

A brief discussion of the CPA provisions on consumer protection against direct marketing was necessary. The CPA has provisions that confirm the privacy rights of consumers, and the practice of direct marketing is specifically regulated by section 11 of this Act. The CPA was enacted to protect the consumers of general goods and services. It specifically excludes financial services such as insurance because this sector, apart from being too complex, the insurance sector is already regulated by various legislative consumer protection instruments and industry schemes that preceded the enactment of the CPA for a long time. The study, however, showed that the CPA had a positive impact in the insurance sector, and some of the CPA provisions on direct marketing were incorporated into the PPRs.

Although the insurance legislation has been specific and has always outlawed the disclosure of personal information by financial service providers, it has been silent about the sending out of unwanted direct marketing by insurers. This practice only changed in 2019 when the new PPRs became effective. The new PPRs have incorporated some provisions that are found in the POPI Act that provide protection against the unwanted direct marketing. It also did not regulate the acquisition of the personal information of prospective policyholders without the consent of these consumers.

The POPI Act was written with the sole purpose of protecting the privacy and the rights enshrined in the Constitution. Section 69 of this Act is dedicated to the regulation of direct marketing, thus making it the first legislation to require insurers to obtain the consumer's consent before they can be contacted through electronic means for purposes of direct marketing. The insurance companies, therefore, have the onerous task of having to evaluate their current business practices to ensure compliance with this personal information regulation by the 1st of July 2021, once the POPI Act grace period ends.

The review of insurers' business practices for purposes of compliance with the POPI Act will have huge cost implications. For instance, insurers will have to train all their employees, agents and representatives. In some instances, they will have to invest in new systems and software to prevent unauthorised access to their customers' personal information. Insurance consumers, on the other hand, will welcome the implementation of the POPI Act, as its consumer-focused approach will halt exploitative business practices such as unwanted direct marketing.

Another important contribution of the POPI Act to enhance consumer protection is the establishment of an independent IR who will have powers to regulate data privacy breaches and levy fines or issue enforcement notices to unethical direct marketers. In paragraph 2.7 above, it was shown the insurance consumers who received unwanted direct marketing messages were unable to enforce their privacy rights because they could not identify where the insurer had obtained their personal information. This problem has been arrested through the investigative powers given to the IR.

It is submitted that, as a whole, the insurance legislation had loopholes that exposed the insurance consumer to hostile direct marketing tactics. The discussion above showed that this was leading to diminishing trust by the policyholders in providing their personal information to insurers. The POPI Act will have a positive impact on the industry, as the consumer will now trust insurers with their personal information, hence enhancing the insurer's ability to be innovative and offer improved services to the consumer. This Act does not seek to abolish the important economic benefits of allowing direct marketing as part of a business strategy to stimulate economic growth, but rather to support this strategy by placing control of the personal information back into the hands of the consumer. This way, the consumer will be a willing participant in this important economic development strategy.

Regardless of the above observations though, the POPI Act is still a new legislation. The benefits of the protection envisaged by the legislature with POPI Act in the insurance industry will be depend on the extent of its enforcement. The consumers will need to be educated on their rights so they can enforce them. There should also be effective enforcement mechanisms.

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