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Goodbye to unsolicited calls in Spain! New regulation prohibiting unauthorised commercial calls

Circular 1/2023, of 26 June, on the application of Article 66.1.b) of Law 11/2022, of 28 June, on General Telecommunications.

1. Aim and purpose of the Circular

The purpose of the Circular is to establish the criteria with which the Spanish Data Protection Agency ("AEPD") will comply in relation to the right of end users of publicly available interpersonal communications services based on numbering not to receive unwanted calls for commercial communication purposes, in relation to the recently published Law 11/2022, of 28 June, on General Communications, specifically, the provisions of Article 66.1.b).

This new regulation involves a substantial change regarding the legal regime applicable under the repealed Law 9/2014, of 9 May, on General Telecommunications, as it prioritises the right of end users not to receive calls and the obligation of those responsible to refrain from making calls unless they can prove the existence of any of the exceptions provided for in the regulation, which must be interpreted in a restrictive manner.

In other words, such communications may only be carried out if there is prior consent from the end user or if there is another legitimate basis for such communications as provided for in Article 6.1 of Regulation (EU) 2016/679.

Regarding the consent of end-users, this must be express, specific and given by the end-user. Commercial calls may not be made to randomly generated numbers on the basis of the legitimate interest of the company, as this does not override the right of users not to receive commercial calls. Nor may calls be made to numbers that appear in subscriber directories, if consent is not expressly stated, as is generally the case, in such directories.

On the other hand, under the provisions of Article 66.1.b) of Law 11/2022, citing Article 6.1 of Regulation (EU) 2016/679, processing may be carried out provided that it is necessary for the satisfaction of legitimate interests pursued by the data controller or a third party. Under no circumstances shall such interests override the fundamental freedoms of the data subject, in particular, in the case of a child, under Article 6.1.f) of Regulation (EU) 2016/679. Therefore, a balancing of conflicting rights and interests must be carried out and criteria must be established to facilitate the balancing by the data controller, taking into account the restrictive purpose of the new regulation and establishing a rebuttable presumption of the prevalence of the legitimate interest of the data controller.

2. Criteria of the AEPD and implications

The AEPD will presume that the processing is lawful if there is a prior contractual relationship, provided that there is no evidence to the contrary and the data controller lawfully obtains the recipient's contact details and uses them for commercial communications about its own company's products and provided that these are similar to those which were the object of the customer's contract. If this contractual relationship is no longer in force and no request or interaction with the data controller has taken place within the last year, the call may not be made.

If required by the Agency, the data controller must justify the corresponding assessment carried out before the AEPD.

3. Additional guarantees and conclusions

The duty of transparency, as set out in Articles 13 and 14 of Regulation (EU) 2016/679, must be complied with and the exercise of the right to object must always be facilitated. To reinforce the lawfulness of compliance with the principles of fairness and transparency, as well as the principle of proactive responsibility, a number of additional safeguards must be adopted such as (i) the disclosure of the identity of the business at the beginning of the call, and if applicable, the identity of the person making the call. The commercial purpose and the option to revoke consent or exercise the right of objection must also be disclosed; (ii) the treatment of any unequivocal objection by the user to receiving calls as the revocation of consent or the exercise of the right of objection; and (iii) the recording of the call as a means of demonstrating compliance with personal data regulations.

In any case, the advertising opt-out systems provided for in Article 23 of Organic Law 3/2018, of 5 December, on Personal Data Protection, must be consulted. If the data subject has registered with an advertising exclusion system (e.g., a *Robinson List*), commercial calls may only be made to him/her if he/she has given his/her specific consent to the caller. In the absence of such consent, all data controllers are obliged to check such systems.

If the data controller is a business owner or liberal professional, commercial calls may only be made for products and services related to his or her business or professional activity, not on an individual basis.

These changes will apply to commercial calls made by an individual and not to those made using automatic dialling systems where there is no human intervention.

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