

THE END OF UNWANTED COMMERCIAL CALLS^{*}

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On June 28, 2022, the Telecommunications Act 11/2022 was published. The new regulation includes in its article 66.1 b) the following right in favor of final users of interpersonal communications services available to the public based on numbering:

b) not to receive unwanted calls for commercial communication purposes, unless the user has given prior consent to receive such commercial communications or unless the communication can be justified by another legal basis as provided in article 6.1 of Regulation (EU) 2016/679 on the processing of personal data.

The Sixth Final Provision established that this right would come into effect one year after the promulgation of this Act, on June 29, 2023. One year later, and in light of the doubts raised by the interpretation of the article for individuals and data controllers, the Spanish Data Protection Agency (known in Spanish as "AEPD") has published a Circular on its

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application that continues the report it issued on this matter in May of this year¹, with the aim of providing legal certainty to the parties involved.

The article 66.1 b) of the Telecommunications Act represents a substantial change from the legal framework presented by the repealed Act 9/2014. Under the previous regulation, final users were recognized the right to object to receiving calls; the new Telecommunications Act recognizes the right of users not to receive unsolicited commercial calls unless there is prior consent from the user or the call is justified by the Spanish Data Protection Law. In other words, users will not have to explicitly request not to receive commercial calls; the new regulation inherently acknowledges their right not to receive them and imposes an obligation on those who make commercial calls not to carry them out. It will now be the consent that needs to be explicitly communicated, rather than opposition to the calls. Therefore, commercial calls can only be considered lawful in cases where there is express consent from the final user or there is a legitimate interest of the data controller or third parties. In this sense, the Circular establishes that the consent must have been given in accordance with the European General Data Protection Regulation and Spanish Data Protection Law. In cases where users are listed in subscriber directories, specific prior consent must also have been given for their data to be used for commercial purposes.

As for the legitimate interest of providers or third parties to make commercial calls, this will be justified when it does not override the interests or fundamental rights of the data subject, particularly when the data subject is a child. Given the legislator's change in the new Telecommunications Act, this exception contemplated for the right not to receive unwanted calls must be interpreted restrictively. In order to do this, the data controller must carry out balancing of conflicting rights, that may be required by the AEPD. To achieve an appropriate balance, a presumption *iuris tantum* of the controller's legitimate interest prevailing is established in cases provided for in article 21.2 of Act 34/2002, of July 11, on information society services and electronic commerce. Thus, it is established that, unless proven otherwise, a commercial call will be lawful when there is a prior contractual relationship, and the controller obtained the user's contact data lawfully and used them solely for commercial communications regarding products or services similar to those initially contracted. In any case, the provider must inform the user of the possibility to object to commercial calls. This presumption only covers the company with which the contract was made and not other companies within the same corporate group, that will need to obtain the user's required prior consent. If the contractual relationship is

¹ Cabinet legal report from the AEPD regarding the interpretation of article 66.1(b) of the Telecommunications Act of June 28, 2022. Available in <https://www.aepd.es/es/documento/2023-0040.pdf>



no longer in force or no interaction has occurred with the company in the last year, the commercial call will not be covered by this presumption. The legitimate interest of the company does not override the right of users not to be called in cases of calls to randomly generated numbers, for which explicit prior user consent must be obtained. Those working for a company or as self-employed professionals may receive commercial calls related to commercial products and services related to business activities but not on an individual basis.

According to the AEPD, additional safeguards must be adopted to protect the user's right, such as informing about the identity of the calling entity and indicating the commercial purpose of the call, providing information about the possibility to revoke consent or exercise the right to object to receiving unwanted commercial calls. Any unambiguous indication by the user not to receive commercial calls should be understood as a revocation of consent or the exercise of its right of opposition, and this preference should be immediately addressed. Calls will be recorded as a means to demonstrate compliance with data protection regulations.