



Legal Alert

October 2022

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Electronic Communications Act: unsolicited communications and cookies

Act No. 452/2021 Coll. on electronic communications (hereinafter referred to as "**the Act**") transposes the so-called European Electronic Communications Code (EU Directive 2018/1972), the main objective of which is to promote competition, the development of the internal market and the protection of the interests of end users. Although the bulk of the provisions of the Act have already entered into force on **1 February 2022**, the provisions governing the obligation to use a telephone number with the dial code (0)888 for direct marketing by electronic means (as defined below; subject to consent being obtained without the use of electronic means) or where consent is to be obtained for the purposes of direct marketing in the context of an individual call have entered into force on **1 August 2022**. The establishment of a list of numbers that will be prohibited from being called for the purpose of direct marketing will not be effective until **1 November 2022**.

In this LA, we will focus on the regulation of unsolicited communications, in particular with regard to the obligation to call from the (0)888 dial code and the list of "prohibited" telephone numbers. The final part of the LA will be devoted to the obligations in connection with the processing of so-called cookies.

Unsolicited communication

Definition of direct marketing

Compared to the previous legislation in force until 31 January 2022, the Act defines direct marketing. This means any form of presentation of goods or services in written or oral form that is sent or presented via a publicly available service (e.g. internet,

telephone) directly to one or more subscribers who use or request the provision of the publicly available service or to users who have entered into a contract with the undertaking for the provision of the publicly available services (hereinafter referred to as the "**recipient**").

Need for consent of the recipient

Use of:

- ▶ automatic call and communication systems without human intervention,
- ▶ telefax,
- ▶ electronic mail and short message service (hereinafter together referred to as „**electronic means**“)

is permitted for the purposes of direct marketing with recipient only with prior demonstrably obtained consent before contacting him (hereinafter referred to as "**consent**").

Consent cannot be obtained by electronic means (i.e. automated dialling and communication systems without human intervention, telefax, electronic mail and short message service), and the means by which consent can be easily withdrawn must be indicated when consent is obtained.

The person to whom consent has been given shall keep a record of it for the period of its validity and for at least four years after any revocation.

The consent of the recipient of the **electronic mail** is not required if:

- ▶ direct marketing is addressed to the published contact details of a natural person entrepreneur or legal entity, or
- ▶ own similar goods and services are subject of direct marketing and contact details for delivery of the electronic mail have been obtained by the sender in connection with the sale of the goods or services.



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However, these recipients must also be given the possibility to easily and free of charge refuse the use of their contact details at any time.

Consent withdrawal and objecting to a call

The person to whom consent has been given is obliged, when obtaining it, to inform the person giving the consent of the way how he or she can simply withdraw the consent. In the event that consent is withdrawn or a call is objected to for the purpose of direct marketing or obtaining consent, that person shall furthermore be obliged to evidence and retain the withdrawal or acceptance of the objection to the call, again for a period of four years. Calls for direct marketing purposes shall be prohibited in the event of an objection to a call until such time as the objection is withdrawn, if any.

Obligation to use a number with a special dial code

As of 1 August, persons who:

- ▶ carry out direct marketing via automated calling and communication systems without human intervention, telefax or short message services; or
- ▶ obtain prior consent to call for direct marketing purposes

the obligation to use for direct marketing purposes only the number identified by the national target code for this purpose in the numbering plan (hereafter referred to as the '**number with dial code (0)888**').

If you are interested in setting up a number with the dial code (0)888, based on the information provided to us by the Office for the Regulation of Electronic Communications and Postal Services (hereinafter referred to as "**Office**"), it is necessary for you to contact your telephone operator, which should have numbers with this dial code at its disposal.

List of "banned" phone numbers

Effective as of November 1, 2022, the Office shall establish and

maintain on its website a list of telephone numbers listed by recipients who do not consent to being called for direct marketing purposes ("**List**"). Calling a telephone number listed on the List is prohibited. However, an exception to this prohibition shall be made for consent to be given at a time after the last update of a telephone number on the List.

The recipient will have the right to enter or update his/her number in the List at any time, free of charge, and the effects of entering or updating the number will always take place on the first or sixteenth calendar day of the month in question.

A person carrying out direct marketing will be able to verify the inclusion of a telephone number in the List on the website of the Office subject to a verification charge.

Exceptions to the ban on calls to numbers on the List and exceptions to the obligation to use the (0)888 dial code

The ban on calling numbers on the List and obligation to use dial code (0)888, apart from the above-mentioned granting of consent at the time after the last update of the phone number on the List, does not apply even in the case of direct marketing of own similar goods and services of a person who obtained the contact details of the recipient in connection with the sale of similar goods or services or with whom he is in a contractual relationship or for the purposes of direct marketing to the recipient who himself demonstrably requested such communication in advance. However, the recipient must be able to refuse the use of their contact data at any time, simply and free of charge. In addition to the above in the area of unsolicited advertising, **the Act also prohibits the sending of e-mail from which the identity and address of the sender is unknown, to which the recipient can send a request to stop sending messages**, and encouragement to visit a website in violation of the prohibition on the delivery of commercial communication information without its prior request by the recipient.

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Sanctions

For non-compliance with the above-mentioned obligations related to unsolicited communications, a legal person or a natural person entrepreneur may be imposed a fine of between EUR 200 and 5 % of their turnover for the preceding accounting period.

REGULATION OF "COOKIES"

The Act also affects the regulation of so-called cookies (i.e. information stored on the user's end device). Under the legislation in force until 31 January 2022, the user's consent was required for the processing of any cookies, which included the user's setting of the web browser. Thus, until 31 January, it was sufficient for website operators to notify the processing of cookies and not to require the user's consent to process them.

However, the Act does not consider the setting of a web browser to be the user's consent to the processing of personal data. Thus, as of 1 February, website operators need freely given, specific, informed consent to process certain cookies, as an unambiguous expression of the user's will.

However, the obligation to obtain consent does not apply to cookies necessary for the proper functioning of the site. It is therefore not necessary to obtain consent for the storage of cookies which sole purpose is to transmit or facilitate the transmission of a message, or which are absolutely necessary for the provision of an information society service that the user expressly requests.

Sanctions

A legal or natural person who is an entrepreneur may be imposed a fine of **between EUR 200 and 10% of its turnover for the preceding accounting period** for non-compliance with the obligations related to the regulation of cookies.

The information contained in this bulletin is presented to the best of our knowledge and belief at the time of going to press. However, specific information related to the topics covered in this bulletin should be consulted before any decision is made. The information contained in this bulletin should not be construed as an exhaustive description of the relevant issues and any possible consequences, and should not be fully relied on in any decision-making processes or treated as a substitute for specific legal advice, which would be relevant to particular circumstances. Neither Weinhold Legal, v.o.s. advokátní kancelář nor any individual lawyer listed as an author of the information accepts any responsibility for any detriment which may arise from reliance on information published here. Furthermore, it should be noted that there may be various legal opinions on some of the issues raised in this bulletin due to the ambiguity of the relevant provisions and an interpretation other than the one we give us may prevail in the future.

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