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Silent Telemarketing Calls: What Companies Need to Know

When the phone rings, the automatic response is to answer it. However, what if no one is on the other end? Silent Telemarketing Calls are taking Italy by storm. Recently, the Supreme Court of Italy rejected two companies' appeal of a DPA ruling and court ruling, which had each determined that "silent calls" without consent are unlawful. Giusella Finocchiaro, founder of Finocchiaro Law Firm, addresses what Silent Telemarketing Calls are and the legal framework that govern these types of laws.

Finocchiaro Law Firm is one of the first law firms in Italy to specialize in ICT Law and Internet Law. Giusella Finocchiaro is a Full Professor of Internet Law and Private Law at the University of Bologna, Italian correspondent for various EU Commission projects, and has acted in a consultancy capacity for the Italian Government and the Russian Government as a member of the "Tacis Project" on Electronic Commerce in Russia. Also, she is the author of many publications in the field of Computer law and Internet law.

Nymity: Please describe what is meant by the term "silent telemarketing calls".

Finocchiaro: "Silent telemarketing calls" is a term used to describe phone calls of a commercial nature, in which, once the user answers the phone, there is no operator on the other end to answer (this is why they are called "silent calls"). This type of call is the result of a commercial practice carried out by call centers as an attempt to optimize their telemarketing campaigns. In order to avoid downtime between phone calls, automated calling systems are set to generate a number of calls exceeding the number of available operators, on the statistical assumption that not all the calls would receive an

answer. However, when this happens, the receiver of the call experiences an unpleasant sensation of a “mute” caller: he/she is put directly on hold waiting for a free operator, or most of the times the call is “shut down” by the system.

Nymity: Is this a rather new phenomenon or has it existed in Italy for a number of years?

Finocchiaro: The commercial practice of silent calls seems to have become an increasingly relevant phenomenon over the last few years and has gradually raised concerns both among users and authorities alike. The provision in the Italian framework of a “Public Objection Register”, which was introduced mainly to allow registered users to deny their consent to receive marketing calls (the opt-out system), was, in fact, unsuccessful in containing the phenomenon. In 2011, following a significant number of customers reporting receipt of unsolicited silent calls, the Italian Data Protection Authority publicly took the first steps towards a serious evaluation and regulation of this kind of practice. The Italian DPA intervention was carried out in accordance with similar kinds of action that had already been taken in other countries, namely the United States or the United Kingdom.

Nymity: What is the legal framework that govern these types of calls? Are they specifically forbidden by law?

Finocchiaro: Whereas the sector of marketing and telemarketing practices is extensively regulated by measures of both the Italian legislator and the Italian DPA, the commercial practice of silent calls is not explicitly addressed by any Italian law. However, as silent calls are in fact marketing calls, the provisions governing the latter can also be applied to the former. In particular it seems that the provisions of the Italian Personal Data Protection Code regulating marketing calls can also be applied to the practice of silent calls. When the extent to which the phenomenon had grown seemed to demand specific boundaries to be set for its lawful implementation, the Italian DPA adopted a “General provision on so-called ‘silent calls’” of the 20th February 2014, which prescribes compliance with a list of necessary measures. The latter are not meant to prohibit this commercial practice, but rather to bring it within reasonable and tolerable limits that ensure lawful personal data processing.

Nymity: What was the Italian DPA’s decision regarding the lawfulness of such calls?

Finocchiaro: The DPA deemed it necessary to create a fundamental balance between the different interests at stake: the safeguarding of user rights, especially the right to lawful processing of their personal data on the one hand, and on the other, the telemarketing sector’s need for business efficiency and the inevitable technical developments in marketing techniques. The result of this balancing process is a framework that allows business operators to make silent calls as long as the practice is kept within established boundaries, such as the respect of certain thresholds or the adoption of certain technical adjustments.

Nymity: Do you believe the rules administered by the Italian DPA have made a difference in the volume of silent calls?

Finocchiaro: It is not easy to estimate the actual extent of the effects that the rules implemented by the Italian DPA have had on the volume of silent calls. That general prescriptive measures were only introduced in 2014 clearly shows that the framework is still in a state of evolution. This is all the more the case after the recent decision by the Supreme Court that may lead to a breakthrough in the form of managing these calls that companies will be required to implement in order to perform in full compliance with the law.

Nymity: What challenges do companies now face when complying with the rules?

Finocchiaro: The rules established by the DPA require companies to make certain technical adjustments to the way in which silent calls are usually handled. For example, call centers will be required to register all successful marketing calls, namely those that are answered by users and classify them into two categories: the first including silent calls, the second grouping together all other calls. Moreover the DPA established that companies shall not exceed a 3% threshold of silent calls compared to calls with an active answering operator in the same commercial campaign and required there to be a gap of at least 5 days between silent calls directed to the same number. Companies shall adopt a “comfort noise” (background tone) instead of leaving the receiver of the call in an ambiguous and uncomfortable silence.

Nymity: What are the major privacy implications to these calls?

Finocchiaro: As underlined by both the Italian DPA and the Court of Rome, the use of users’ personal data (telephone number, name, family name) to make indiscriminate silent calls instead of commercial offers is a processing of personal data contrary to the fundamental principle of fairness, set out in art. 11 of the Italian Personal Data Protection Code. The principle of fairness is a wide-ranging principle that prescribes, as a general rule, that all conduct carried out by a data controller in the processing of personal data must respect a user’s position and guarantee him/her fair treatment. In the present case, the technical method applied by call centers to carry out silent calls cannot be deemed fair towards the user. This method creates an imbalance between the positions of the parties, since the discomfort caused by receiving a silent call is placed squarely on the user alone, whereas the companies, making such calls, benefit from all the advantages resulting from the adoption of this commercial practice. In addition, considering the intrusion in a user’s private sphere that these calls may cause, it is clear that the indiscriminate use of silent calls has negative effects on the privacy of private users.

Nymity: Recently, the Supreme Court (ruling N.2196/2016) dismissed an appeal by two Italian companies against a decision expressed by the Italian DPA, that telemarketing companies can not indiscriminately use the automated call system.

What are the immediate and long term privacy implications for companies due to this decision?

Finocchiaro: In the Italian framework, telemarketing calls are regulated by the user opt-out system that only allows call centers to phone those users who have not opted out by registration on the Public Objection Register. In its decision, the Court establishes that, in accordance with the Italian Personal Data Protection Code and with e-privacy Directive 2002/58/CE, since silent calls are those generated through automated systems and have no answering operator, the opt-out system provided for telemarketing calls is no longer applicable, as it only refers to “calls with an active operator”. Therefore it seems that, to lawfully process users’ personal data to make silent calls, companies will have to collect explicit user consent, thus turning the system from “opt-out” to “opt-in”.

Nymity: What steps should companies take to comply with these rules?

Finocchiaro: The decision adopted by the Supreme Court seems to inevitably make conditions for processing personal data for the purpose of silent calls more onerous. Denying applicability to the opt-out system leaves companies in a challenging position. While it remains their right to use those available user landline telephone numbers for direct marketing campaigns without any prior user consent, the same numbers cannot be used for the practice of making silent calls if user consent is not explicitly collected. This situation leads to two considerations. On the one hand, the necessity to collect user consent would inevitably undermine the original purpose of the strategy behind the practice of silent calls,

which is to optimize telemarketing campaigns in terms of time and costs. On the other hand, given the known discomfort resulting from silent calls, it is unlikely that users will give their consent to such a practice.

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