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Recent changes to Italian law applicable to call centres

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Legal background

New provisions recently came into force in Italy regulating the activities of call centres pursuant to the 2017 Italian budget law (L. 232/2016) which amended sect. 24-*bis* of decree law 83/2012 ("**DL 83/2012**"), setting out various provisions applicable to call centres in Italy.

Following the change introduced by the budget law, the Ministry for Economic Development ("**MED**"): (*i*) issued on January 31st, 2017 some clarifications concerning the various formalities to be carried out by call centres as towards the MED and other competent authorities and (*ii*) on February 24th 2017 published an update of the Frequently Asked Questions *(FAQ)* available on its website, in an effort to provide call centre operators with some initial directions in the face of the rather fragmentary and ambiguous provisions applicable to their business.

For its part, on February 13th, 2017, the Communications Authority ("**AGCOM**"), which is responsible for keeping a Register of Operators in Communications ("**ROC**") set up pursuant to previous legislation, published some FAQ concerning the "*Obligation of economic operators conducting activities as call centres and third parties to whom call centre services are outsourced to enrol in the Register of Operators in Communications*".

Shortly afterwards, the Italian Data Protection Authority ("**DPA**"), which had already issued two orders containing detailed directions relating to call centres in 2013, published on February 28th, 2017 an information note concerning the new provisions regulating the activities of call centres. This note contained clarifications intended to avoid the duplication of notifications to the DPA itself and other competent authorities (see below) and specified that its two 2013 orders on the subject of call centres should be deemed to have lapsed.

In fact, it is essential to bear in mind that the activities of call centres should at all times be in compliance with the Italian data protection law, contained in Legislative Decree196/2003 (so-called "**Privacy Code**"), with particular reference - but not only - to its provisions relating to "Unsolicited Communications", and those relating to the transfer of personal data to countries outside the European Union and, finally, insofar as applicable, such activities should also comply with Legislative Decree 70/2003, the so-called "E-commerce Code".

Obligations of economic operators conducting call centre activities

The provisions referred to above impose a number of obligations on call centre operators, with stiff penalties for non-compliance.

1. *Information to be given to the user*

   From January 1st, 2017, call centre workers must **immediately inform users of where they are physically located.** Non-compliance may result in a fine of € 50,000 per day (in addition to any fines that might result from failure to comply with the Privacy Code).

From April 1st, 2017, call centre workers located outside the European Union must also **immediately offer users the possibility of their call being immediately transferred to another call centre worker physically located in Italy or another country of the EU**. The fine for non-compliance is again € 50,000 per day in addition to any fines that might result from failure to comply with the Privacy Code).

The amendments to DL 83/2012 also make a fundamental change to the position from the data protection point of view of third party service providers to whom call centre services are outsourced. In fact, it states that the service provider, as well as the customer, should be deemed to be the data controller for the purposes of the Privacy Code, which is in complete contrast to the direction of the DPA in one of its 2013 orders as mentioned above, which indicated that the service provider should be appointed as data processor by the customer on whose behalf it would be processing any personal data in the course of the call centre activity. Third party call centres are therefore also obliged to give **an information notice of their own pursuant to sect. 13 of the Privacy Code** and failure to provide to all users of the call centre the information referred to in the first two paragraphs of this section will also be a violation of sect. 13 of the Privacy Code as such. The customer and the service provider are jointly and severally liable for such violation.

By way of comment, it may be pointed out that, while this change to the position of a (non-EU) service provider (from data processor to data controller) was clearly intended to make it easier for the Italian authorities to make them directly liable for violations of the Privacy Code, it could in some cases and until the General Data Protection Regulation ("**GDPR**") comes into force of May 25th, 2018, have the paradoxical effect of transferring non-EU service providers outside the sphere of application of Italian law. In fact, sect. 5 of the Privacy Code provides that its provisions will apply to data controllers established in Italy and those established outside the EU which use means/equipment for the processing situated in Italy. So call centres outside the EU which do not use means/equipment for the processing of personal data in the course of their activities **will not be subject to Italian law.** This will change when the GDPR becomes applicable because under its art. 3, the GDPR applies to the processing of personal data of persons situated in the EU, for, inter alia, the purpose of providing services to them, irrespective of where the processing is carried out; at the same time, the GDPR makes data processors as well as controllers liable for violations for which they are responsible (art. 82), so the new provision of DL 83/2012, defining service providers as data controllers in order to make them directly liable for privacy violations, will no longer be necessary.

2. *Notification obligations*

Economic operators who offer – or use – call centre services must inform the Ministry for Employment, the MED or the DPA, **within 10 days of any**

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request thereby, **of the location of their call centres** used for either inbound or outbound calls. Failure to do so will result in a fine of € 50,000 per each violation.

Where an economic operator decides to locate call centre activities in a non-EU State – whether directly or outsourced to a service provider – it must notify such transfer at least 30 days in advance, to the Ministry for Employment, the MED and the DPA, according to the procedure set out by DL 83/2012 (as amended) and in accordance with the instructions published by each of the said authorities. Failure to do so may result in a fine of € 150,000 for each failure or delay to notify.

Economic operators which on January 1st, 2017 already conducted call centre activities (whether directly or outsourced) located outside the EU, had to file the said notification by March 2nd, 2017, the penalty for failure to notify or delay being € 10,000 for each day of delay.

It should be noted, in particular, that the notification to the DPA must describe the measures adopted to ensure compliance with Italian law, including - but not limited to – the rules contained in the Privacy Code relating to the transfer of personal data outside the EU and the provisions concerning the public register of subscribers not wishing to receive unsolicited calls[1].

3. *Enrolling in the ROC*

All economic operators conducting call center activities using Italian numbers, irrespective of the number of people employed in such activities (which, prior to the amendment to DL 83/2012 was determinative), must enrol with the ROC, and supplì AGCOM with all the telephone numbers made available to the public and used for call centre services. Failure to comply may result in a fine of € 50,000.

In the FAQ published on its website on February 13th, 2017, as mentioned above, AGCOM specified that, where a call centre is outsourced to third parties, only the third parties are under an obligation to enrol with the ROC. Where, on the other hand, the call centre activities are carried out both directly and via a third party, both the economic operator and the third party must enrol.

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[1] The public register of subscribers not wishing to receive unsolicited calls was set up pursuant to Presidential Decree 178/2010, allows subscribers listed in public telephone directories to be listed in the register, which makes it illegal to contact them for promotional purposes.

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What comes within the definition of "call centre activities"?

Unfortunately, the Decree does not define "*economic operators conducting call centre activities*"; in view of the significant obligations referred to above, this is important.

To find out, it is useful (as suggested by the MED in the FAQ referred to above) to refer to other resolutions issued by AGCOM. In particular, resolution 79/09/CSP (which referred to call centres run or used by telecommunications companies) defines a call centre as a '"*a combination of human resources and specialised infrastructures allowing multichannel contacts and communications with users (by different means, such as telephone, internet, mail)* ".

The definition of a call centre used by AGCOM in practice seems to be even broader, since it has informally indicated that it applies the following criterion: there is a "call centre activity" wherever an economic operator dedicates a company function to dealing with inbound and/or outbound telephone calls irrespective of the specific purpose of such calls.

According to this interpretation, even economic operators which, for example, dedicate even minor corporate resources to dealing with telephone calls for customer or post-sales assistance will be subject to the new rules.
The vast number of companies thus caught within the sphere of these provisions casts doubts as to their usefulness and the legal logic behind them. Such doubts increase in the light of the very title of the article of the Decree in question, which reads "Measures **to support** personal data protection, national security, competition and **employment in activities carried out by call centres**" and, on the other, that the same article of the Decree had the original purpose of avoiding dips in employment. The Employment Ministry, with reference to the 2012 version, specified in circular no. 14 of April 2nd, 2013, that the provisions affected "…*only those companies which carry out call centre activities as their core business and which, therefore, operate as call centre service providers, while they do not apply to resources which simply support or integrate a company's business, being in effect a mere front office contact*".

Furthermore, the 2016 amendment to the Decree provides that "…*pending a redefinition of the system of incentives to boost employment in the call centre sector …*", no benefits of any kind, including of a tax and contributory nature, which may be available for the activities in question can be made to call centre operators which relocate such activities outside the EU, thus reinforcing the impression that the provision in question was intended to cover call centres as defined in the circular of the Ministry of Employment referred to above.

Nevertheless, it should be borne in mind that the AGCOM officials contacted, while sharing the doubts concerning its extremely broad definition of call centre for the purposes of the Decree, confirmed that at the moment they can't diverge from it, at least until further clarifications are given either by the legislator or by the competent ministerial authorities – hopefully in the not too distant future.