**ITALY**

***Ministry of Foreign Affairs and International Cooperation***

*Inter-ministerial Committee for Human Rights*

*Comitato Interministeriale per i Diritti Umani*

**ITALY’S REMARKS**

**ON** **SURVEILLANCE INDUSTRY**

**AND HUMAN RIGHTS**

***June 2019***

**ITALY’S REMARKS**

**Introduction**

1. Italian Authorities thank the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression and want to provide the following remarks for your information only.

2. The (rigid) Italian Constitution determines the political framework for action and organization of the State. The fundamental elements or structural principles of the constitutional law governing the organization of the State are as follows: Democracy, as laid down in Article 1; the so-called personalistic principle, as laid down in Article 2, which guarantees the full and effective respect for human rights; the pluralist principle, within the framework of the value of democracy (Articles 2 and 5); the importance of work, as a central value of the Italian community (Articles 1 and 4); the principle of solidarity (Article 2); the principle of equality, as laid down in Article 3 (it is also the fundamental criterion applied in the judiciary system when bringing in a verdict); the principles of unity and territorial integrity (Article 5); and, above all, the relevant principles, including the social state, the rule of law and the respect for human rights and fundamental freedoms.

3. The Italian legal system aims at ensuring an effective framework of guarantees, to fully and extensively protect the fundamental rights of the individual. Indeed, we rely on a solid framework of rules, primarily of a constitutional nature, by which the respect for human rights is one of the main pillars.

**Background**

4. On a more specific note, the Italian Constitution envisages the protection of all rights - be it civil and political, economic, social and cultural - and fundamental freedoms included in relevant international standards, such as the European Convention on Human Rights and Fundamental Freedoms, the Human Rights Universal Declaration or the International Covenant on Civil and Political Rights (ICCPR).

5. In particular, Italy fully respect article 19 of the ICCPR and is aware that any restrictions to expression in accordance with article 19 must always meet the test of legality, necessity and proportionality, and legitimacy of objective and must be narrowly drawn and clearly defined.

6. The basic rights contained in the Constitution are primarily rights to freedom, protecting the individual from State interference in one’s freedom. At the same time, they provide the framework within which individuals can develop themselves freely in society, and their individuality, independence, self-determination and responsibility for one’s own actions are to be respected by the State.

7. Article 21 of the Italian Constitution envisages the right to freely express and disseminate opinions, which includes the freedom of the press. More broadly, the protection and promotion of freedom of expression constitutes one of the fundamental pillars of both domestic and foreign Italian policies.

**Recent Developments**

8. Italy have developed the first Italian National Action Plan on Business and Human Rights for 2016-2021 in line with the implementation of the “Guiding Principles on Business and Human Rights” unanimously endorsed by the UN Human Rights Council in 2011. In 2018 Italy, first country to do so, did a mid-term review of the Italian National Action Plan on Business and Human Rights, and shared the outcome at the 2018 UN BHR FORUM.

9. The above mentioned Action Plan was elaborated and revised by an *ad hoc* working group, coordinated by the Inter-ministerial Committee for Human Rights, composed of representatives of several ministries and institutions. Its contents have also emerged from wide consultations with experts, business representatives, trade unions and non-governmental organizations.

10. The Action Plan, as revised, contains a specific measure in order to promote, with the assistance of the Inter-ministerial Committee for Human Rights (CIDU) and the cooperation with NGOs - as proposed by the NGO “Ossigeno per l’Informazione” and the Agency for the guarantee in telecommunication (AGCOM) - training programmes on business and human rights for journalists and editors.

11. The Ministry of Economic Development (MISE) is the dicastery of the Italian government which includes industrial policy, international trade, communications and energy. It was established in 2006, following the reorganization of the Ministry of production activities (until 2001 Ministry of Industry, Commerce and Crafts), to which the Ministry of Communications and the Ministry of International Trade were merged in 2008. It is the reference administration for the main sectors of the Italian economy, both in terms of promotion and development of the competitiveness of the national production system, and in terms of harmonization and monitoring of the internal market.

12. MISE has competences related to four major areas of the Italian economy:

a) Industrial policy: competitiveness, industrial research and innovation, technology transfer, patents and trademarks, fight against counterfeiting, funds and subsidies for companies, redevelopment and reorganization of production, management of corporate crises, support for small and medium-sized enterprises, promotion of competition, liberalization, consumer protection, business simplification, price monitoring (through the Observatory for monitoring prices and tariffs, better known as Mister prices), legal metrology and precious metals, product and plant safety, business register and chambers of commerce, supervision of the cooperative system, agrarian consortia, commission management and extraordinary administration procedures of large companies, trust companies and auditing firms.

b) Policy for internationalisation: exports, facilitation of foreign trade, trade strategies within the European Union, multilateral and bilateral trade agreements, promotion of Italian investments abroad, attraction of foreign investments in Italy, defence commercial instruments, promotion of Made in Italy.

c) Energy policy: national energy balance and strategy, transport networks, energy infrastructure, security of supply, single electricity market, promotion of renewable energy and energy efficiency, reduction of greenhouse gas emissions, dismantling of nuclear installations abandoned, national gas market, market and oil and mineral plants, hydrocarbon extraction on land and in the sea, storage of natural gas and methane in southern Italy.

d) Communications policy: regulation of electronic communications, radio and television broadcasting and the postal sector, service contract with RAI and Poste Italiane, distribution of frequencies for radio and television broadcasting services, mobile telephony and emergency services, monitoring and control of the national radio spectrum, infrastructure program for broadband.

**Recent Developments**

13. Legislative Decree No. 221 entered into force on 17 January 2018 and aimed to organize and simplify the authorization procedures for the export of dual-use items and technologies. The Decree definitively adapts the Italian legal framework to applicable European regulations, i.e., the Council Regulation (EC) No 428/2009 of 5 May 2009 setting up a Community regime for the control of exports and transfer, brokering, and transit of dual-use items (currently under recasting procedure; “Regulation 428/2009”); Council Regulation (EC) No 1236/2005 of 27 June 2005 concerning trade in certain goods which could be used for capital punishment, torture, or other cruel, inhumane, or degrading treatment or punishment (“Regulation 1236/2005”); Regulations disposed by Council, according to article 215 of TFUE concerning restrictive financial and economic measures to certain third countries (all of the above-mentioned regulations will be hereinafter referred to as the “EC Regulations”).

14. The above mentioned Decree also establishes the sanctions applicable to infringements of the rules governing dual-use and not listed items transactions, and transactions involving items covered by anti-torture measures or listed under the EC Regulations.

15. Decree 221/2018 is the national source governing dual-use items/technologies transactions, replacing previous obsolete and fragmented rules, with the aim of providing companies with a more friendly and clear legal framework. Considering that the MISE is granting, every year, 1500 to 1800 authorizations for dual-use and strategic items with an overall value of 1 billion Euros, the new legal framework will have a significant impact in supporting a key area of the Italian economy. The final goal is to create, at a national and European level, a satisfying balance between, on one side, commercial policies (and thus to support exports) and, on the other side, foreign and security policies, in a context in which the fight against terrorism is at the top of the agenda of many States. Actually, ensuring an effective control on dual-use technologies exports is an essential tool to prevent terrorist organizations and dangerous regimes from manufacturing weapons of mass destruction or even nuclear weapons.

16. Below is an overview of the main provisions of the above mentioned Decree:

a) Intangible Transfer of Data

The intangible transfer by telematics means (including the access to a server for information sharing) to natural or legal persons outside the European Union, a project, design, formula, software, and technology connected with the planning, development, production, or use of items subject to control under the Decree requires a prior authorization. The authorization is not required for the publishing of advertising material (for commercial purposes) not involving the disclosure of the technical details of the item. With respect to access to a server for information sharing, exporters, brokers, and providers of technical assistance using such a data transfer mode have to adopt safe and traceable access procedures as well as an access reporting system, in order to allow appropriate controls by the competent authority.

b) The Available Authorizations, the Zero License, and the “Catch All” Clause

The Decree sets out four types of authorizations applicable to the different categories of items (dual-use products, “not listed” dual-use items, and goods subject to the anti-torture Regulation or restrictive measures, adopted in accordance with article 215 TFUE).

* Specific Individual Export Authorization: issued to a single exporter, broker, or provider of technical assistance; it applies to one or more products for a specific end user. The authorization is valid from six months to two years (if EC Regulations do not provide different terms), but the recipient may request an extension at least thirty days before its expiry. The extension may be issued only once.
* Global Individual Authorization: addressed to one specific and “not occasional” exporter (i.e., it has already been granted with other similar authorizations for dual-use items or other items subject to the Decree); it lasts for a maximum of three years, is suitable to be extended upon request, and it applies exclusively for the products and countries mentioned thereto.
* Community General Export Authorization: exports of dual-use and “not listed” items, as well as goods subject to anti-torture measures, can be carried out on the basis of a Community General Export Authorization; this authorization is limited to the materials, the purposes, and the countries of destination specified by dual-use products and anti-torture regulations.
* National General Export Authorization: applicable to certain categories of transactions involving dual-use and not listed items, and to certain destination Countries, both previously determined by the Ministry of Economic Development. In short, a single authorization (released according to Annex III (c) of the dual-use Regulation 428/2009) will cover certain groups of transactions (selected on the basis of the type of items involved and their final destinations), with the aim to simplify the procedures and reduce the costs for enterprises.

The competent authority has to conclude the administrative proceedings for the issuance of an authorization within 180 days from the receipt of the application. The duration of the relevant procedure can be (and often is) even shorter.

The above mentioned Decree also introduces an innovative tool, the so-called *Licenza Zero* (already existing in other EU Countries): the competent authority can issue a statement, upon a specific request from the applicant, stating that the export of a certain item is not subject to prior authorization, and thus such an item can circulate without restrictions. Such a declaration can be used as a “clearance letter” to obtain financial assistance.

Another new provision is the so-called “catch all” clause, concerning the export of items not subject to any restriction under applicable law. The competent authority is entitled to subject to authorization the export (as well as related brokering services) of a certain item where it has obtained notice of the fact that such an item is, or could be, used in order to develop, manufacture, preserve, or spread weapons of mass destruction, as described in Article 4 of Regulation 428/2009. The same authorization can be imposed for those items that could threaten public security and the protection of human rights.

c) Inspections

The Decree provides for inspection measures that can be carried out at different stages of the transaction and may consist of a mere document review or inspections at the exporter, broker, or provider’s premises. The competent authority can request documents which prove the effective arrival of authorized items in the designated country.

d) Sanctions Regarding Dual-use and Not Listed Items

Different sanctions apply depending on the type of item exported (dual-use items and not listed items, goods regulated under the anti-torture regulation, and listed items as an effect of restrictive measures under article 215 TFUE). The main provisions are the following:

1. Export transactions, intangible transmission of dual-use and not listed items, as well as brokering services carried out without a preventive authorization or with one obtained through false declarations and documents, are sanctioned with imprisonment from two to six years or with a fine from Euro 25,000 to Euro 250,000.
2. The transactions and services in paragraph 1 above made in breach of the terms of an existing authorization are sanctioned with imprisonment from one to four years or with a fine from Euro 15,000 to Euro 150,000.
3. The failure to communicate any changes of information and data occurring after submitting the application for the authorization, as well as the omission of indications concerning elements on documents or records, or the failure to present documents requested by the competent authority, imply an administrative sanction from Euro 15,000 to Euro 19,000.

Mandatory confiscation applies to the items used or aimed at committing the offense. When this measure is not possible, a confiscation is ordered on other goods of the offender for a value corresponding to the price or profit of the offense.

Similar sanctions apply in the case of a breach of the provisions applying to items listed under Regulation 1236/2005 (the anti-torture regulation).

e. Sanctions Regarding Items Listed Under EU Restrictive Measures

The Decree also sets the sanctions applicable to breaches of EU restrictive measures:

1. Export transactions, brokering, or technical assistance services of products listed under EU restrictive measures, in breach of the prohibitions set forth thereto, implies the sanction of imprisonment from two to six years.
2. The transactions and services in paragraph 1 above made without a preventive authorization or on the basis of an authorization obtained through false declarations or documents, are sanctioned with imprisonment from two to six years or with a fine from Euro 25,000 to Euro 250,000.
3. The transactions and services in paragraph 1 above made in breach of the provisions of an existing authorization are sanctioned with imprisonment from one to four years or with a fine from Euro 15,000 to Euro 150,000.

Mandatory confiscation also applies to offenses concerning products listed under EU restrictive measures.

f. Conclusive Remarks

Italian companies and multinational companies delivering their products from an Italian subsidiary need to take the set of rules into account.

**Conclusions**

17. Italian Authorities take this opportunity to reiterate their firm willingness to continue cooperating with all relevant UN Special Procedures, mechanisms and bodies.