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Italy Introduces New Measures to Simplify Dual-Use Export Transactions and Sets the Sanctions Related to Trade Embargoes and Proliferating Materials

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I. Overview

Legislative Decree No. 221 ("Decree") 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").

The 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.¹

The Decree becomes the only 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 Ministry of Economic Development ("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 (Italy is the eighth biggest exporter of dual-use items and technologies). 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 the EU, the U.S.A., and their allies. 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. For instance, investigations recently made known found that most of the components used to design and manufacture the weapons used by the Islamic State are suitable to be classified as dual-use items and technologies. Therefore, besides the economic and criminal sanctions that may apply, the breach of the export control measures may cause enormous reputational damages to corporations and financial institutions, which actually have key roles in ensuring an effective enforcement of the measures preventing the proliferation of weapons of mass destruction and human rights violations.



Below is a preliminary overview of the main provisions of the Decree.

II. 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.² 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.

III. 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;³ 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.⁴
- 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.⁵
- 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.⁶

The competent authority has to conclude the administrative proceedings for the issuance of an authorization within 180 days from the receipt of the application.⁷ The duration of the relevant procedure can be (and often is) even shorter.

The Decree also introduces an innovative tool, the so-called *Licenza Zero* (already existing in other EU Countries):⁸ 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.⁹

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.¹⁰

IV. 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.¹¹ The competent authority can request documents which prove the effective arrival of authorized items in the designated country.

V. 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:¹²

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).

VI. Sanctions Regarding Items Listed Under EU Restrictive Measures

The Decree also sets the sanctions applicable to breaches of EU restrictive measures:¹³

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.

VII. Conclusive Remarks

The Decree is a welcome effort from the Italian Government to simplify and complete the legal framework applicable to dual-use items exports, as well as to items and products relevant in light of anti-torture measures and of EU restrictive measures. Italian companies and multinational companies delivering their products from an Italian subsidiary (especially to risky areas in Africa, the Middle East, and China, sometimes involved in triangulations with Iran and North Korea) need to take the new set of rules into account.

The overall legal framework is complex, especially for companies dealing with different jurisdictions and for the financial institutions providing support. Different levels of control apply, and what is legal for the subsidiary may not be legal for the controlling company based abroad and vice versa. The relevant monitoring is not always easy: complex transactions, structured to hide the real final destination of the items, as well as forged documents and false authorizations may be difficult to be detected at a first sight. The consequences of a breach are serious, both from an economic and a reputational perspective. This sometimes leads to tensions between exporters and financial institutions called to monitor the relevant documentation before processing a transaction or providing financing, due to the different approaches and experience in dealing with dual-use item trades. An in-depth risk analysis, a careful monitoring of any change in the legal framework, the implementation of a robust compliance structure, and—especially for financial institutions—an efficient management of suspicious transactions can ensure a satisfying result, both from a business and risk prevention perspective.



If you have any questions concerning these developing issues, please do not hesitate to contact either of the following Paul Hastings Milan lawyers:

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¹ According to the Regulation, dual-use items consist of products, including software and technology, which can be used for both civil and military purposes and may be or not listed in Annex I of the Regulation. Other “not listed” items can be subject to authorization for reasons of public security or human rights considerations. Finally, the Decree deals with those items that are the object of some restrictions under the anti-torture Regulation and restrictive measures, adopted in accordance with article 215 of the Treaty on the Functioning of European Union (“TFUE”).



2 See Article 6 of the Decree.

3 See Article 10 of the Decree.

4 See Article 11 of the Decree.

5 See Article 12 of the Decree.

6 See Article 13 of the Decree. This authorization cannot be applied to items, listed in the Annex II octies of the Regulation.

7 See Article 8 para 6.

8 See Article 8 para 5 of the Decree.

9 See also Paolucci P.M., *Dual Use – Ostacolo o potenzialità per l'export*, 2017, p. IX.

10 See Article 9 of the Decree.

11 See Article 17 of the Decree.

12 See Articles 18-19 of the Decree.

13 See Article 20 of the Decree.