



RECENT DEVELOPMENTS IN THE ITALIAN EXPORT CONTROL SYSTEM

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*Ministry of Economic Development
Export Control Unit*

Massimo Cipolletti



1 COMMON SYSTEM, 29 AUTHORITIES (EC + 28 MEMBER STATES)

An efficient export control system rests on a multilateral legal basis providing for agreed rules and control lists.

In the EU, where a common commercial policy is established (articles 206 and 207 of TFEU), the same system is in force, even if each Member State has its own national Authority supervising the control activity.

In Union law, Regulations are directly applicable in all EU Member States. They have general application and are binding in their entirety. EU Regulations take precedence over conflicting measures of a Member State.



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THE NEW ITALIAN EXPORT CONTROL ACT

On February 1st 2018 a reform of the Italian export control system came into force.

What is the spirit of this reform?

- To unify in one single act (Legislative Decree n. 221/2017) the three pillars of European export control system:

- Dual use
- Anti-torture
- Restrictive measures

- To put the national implementation activities related to these EU pillars under the umbrella of one single body: the Ministry of economic development.



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DUAL USE

Dual use items are being controlled under European legislation since 1994.

In 1994 (Regulation n. 3381) the main scope was to assure the free circulation of dual use items in the European single market.

In 2000 (Regulation n. 1334) the priority was to implement an efficient, common export control system.

In 2009 (Regulation n. 428) the objective was to go into further details (information sharing -DUES-, brokering and transit, list adopted yearly by delegated act of the European Commission).

In 2016 (the Regulation is still under recast) the European Commission launched the human rights dimension.



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ANTI-TORTURE



One of the aims of the EU's foreign policy is to promote respect for fundamental rights in non-member countries.

Council Regulation (EC) 1236/2005 defines two categories:

- goods/equipment whose export and import are banned as they can only be used for torture or capital punishment. Such goods are listed in Annex II (e.g. gallows, guillotines, electric chairs, electric shows devices);
- goods/equipment requiring specific licences for exports as they could be used for torture or capital punishment, but also have legitimate applications. Such goods are subject to a case-by-case assessment and are listed in Annexes III and IIIA (e.g. Sodium thiopental and similar substances, which are used in lethal injections in several countries where death penalty is still being applied).



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EU RESTRICTIVE MEASURES



Article 215 of TFEU provides a legal basis for the interruption or reduction, in part or completely, of the Union's economic and financial relations with one or more third countries, where such restrictive measures are necessary to achieve the objectives of the CFSP.

EU restrictive measures include:

- arms embargoes;
- restrictions on admission of listed persons (travel ban);
- freezing of assets belonging to listed persons or entities: all their assets in the EU are frozen and EU persons and entities cannot make any funds available to those listed;
- restrictions concerning specific economic sectors, including import or export bans/controls on certain goods and services, investment prohibitions.



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EU RESTRICTIVE MEASURES IN FORCE

The list of third countries, target of EU restrictive measures, is fairly extensive (from Afghanistan to Zimbabwe, passing through Iran, North Korea, Russia and Syria).

The Italian new law identifies an elastic definition of «listed items according to EU restrictive measures», in order to enable the immediate implementation to the concrete case of EU restrictive measures adopted followed the above mentioned art. 215 TFEU (concerning mainly licensing and enforcement).

Thanks to this mechanism, it is not necessary anymore to adopt a specific legislative act (after the specific EU restrictive Regulation), for each target country.



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THE EXPORT CONTROL UNIT

In Italy, the Export Control Unit, within the Ministry of Economic Development, Directorate General for International Trade Policy, is the National Authority for export control (dual use, antitorture and EU restrictive measures).

Main activities: policy making, participation in the international control regimes, licensing, law enforcement, *ex-ante* and *ex-post* controls on trade operations, inreach to industry and academia, outreach to third countries.



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THE ADVISORY BOARD

The Board is made up by all the Public agencies involved in the export control assessment: Foreign Affairs; Interior; Defence; Economy and Finances; Economic Development; Health; Customs Agency; plus some technical experts.

The Board, now chaired by the Ministry of Economic Development (previously it was chaired by Foreign Affairs), gives a compulsory, but not binding opinion, on each and every export case previously processed by the Export Control Unit.



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LICENSING PROCEDURE

PRELIMINARY SCREENING
WITHIN THE UNIT

ADVISORY BOARD
ASSESSMENT

FINAL DECISION BY THE
EXPORT CONTROL UNIT:
LICENCE OR DENIAL



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ZERO LICENCE

According to the new Italian law, the Export Control Unit can issue, upon request, a declaration which states the item(s) concerned do not need a licence and consequently can be freely exported.

This declaration already exists in other jurisdictions. It is usually referred to as «Zero Licence».

Zero Licence is a step forward legal certainty and operational clarity.

It helps exporters, especially SMEs.

In the future implementation of Zero Licence, not yet operational, Academia and Industry are expected to actively contribute.



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ENFORCEMENT

The new law gives policy responsibility in enforcing export controls to the Export Control Unit and in investigating breaches to the Customs Agency and the Financial Police.

The Customs Agency works to risk based and intelligence-led enforcement strategies. It can immediately seize goods under licencing requirement on end use/end user ground.

The Financial Police is empowered to make inspections directly in the archives of the exporting firms.

The new law makes explicit for the first time the relevant contribution of the Intelligence Community to counter-proliferation activities.

An export of dual use items without a licence is a serious criminal offence: the maximum penalty is up to six years imprisonment and asset confiscation.



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CATCH-ALL CONTROLS

The new law stresses the importance of catch-all controls.

The catch-all clause consists of an administrative act, adopted on a combined legal basis (European and National), by the Export Control Unit, and directly addressed to the exporter, with a three-year validity.

In the Italian legal system, administrative acts:

- shall state the reasons on which they are based;
- can be scrutinized by the Judicial Power at request of the addressee and eventually canceled (if deemed not to be in accordance with the Law).



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HOW CATCH-ALL CONTROLS WORK?

In order to establish a clear and direct link between the export of a non-listed item and a WMD/missile programme, the Export Control Unit usually needs intelligence information.

This kind of information comes from different sources (internal and external), is restricted and cannot obviously be disclosed.

Consequently, the motivation of the administrative act implementing the catch-all clause cannot go into full details. This represents a structural element of weakness in case of legal dispute.



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Massimo Cipolletti



THANKS FOR THE ATTENTION!

MASSIMO CIPOLLETTI
HEAD OF EXPORT CONTROL UNIT
MINISTRY OF ECONOMIC DEVELOPMENT
DIRECTORATE GENERAL
FOR INTERNATIONAL TRADE POLICY

massimo.cipolletti@mise.gov.it



*Ministry of Economic Development
Export Control Unit*

Massimo Cipolletti