



*Permanent Mission of Italy
to the International Organisations
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Geneva, **15 MAI 2018**

Dear Prof. David Kaye,

Following your Letter dated March 20, 2018, by which you requested the Italian Authorities to provide you with information about the Red Button Operational Protocol for the fight against the diffusion of fake news through the Web, on behalf of the Italian Minister of Foreign Affairs and International Cooperation, I have the honor to transmit the Italian reply.

More specifically, through this Communication we would like to give you both updated information about the above-mentioned Protocol and broader indications on the relevant Italian system, including information about defamation, the situation of journalists, the Italian Communication Regulatory Authority, as well as the Italian Data Protection Authority.

Finally, we would like to reiterate our firm willingness to fully and extensively cooperate with you and all UN Special Procedures.

Please accept, Prof. Kaye, as UN Special Rapporteur on the promotion and protection of the rights to freedom of opinion and expression, the assurances of my highest consideration.

Regards,


Ambassador Massimo Bellelli
Chargé d'Affaires, a.i.

To the attention of Prof. David Kaye
Special Rapporteur on the promotion and protection
of the right to freedom of opinion and expression
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MINISTRY OF FOREIGN AFFAIRS AND INTERNATIONAL COOPERATION
Inter-ministerial Committee for Human Rights
Comitato Interministeriale per i Diritti Umani

**ITALY'S REMARKS
FOLLOWING COMMUNICATION FROM
UN SPECIAL RAPPORTEUR ON THE PROMOTION AND
PROTECTION OF THE RIGHT TO FREEDOM OF
OPINION AND EXPRESSION
ON THE RED BUTTON PROTOCOL,
MR. DAVID KAYE**

May 2018

ITALY'S REMARKS

Following UN Special Rapporteur's communication, dated March 20th, 2018, the Government of Italy is in a position to provide the following information:

Introductory remarks

1. The Basic Law (Constitution) of Italy (1948) 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 (Arts. 2 and 5); the importance of work, as a central value of the Italian community (Arts. 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/welfare, the rule of law and the respect for human rights and fundamental freedoms, such as freedom of correspondence, freedom of movement, freedom of religion or belief, and freedom of opinion and expression.

2. 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. In practical terms, before affecting such rights, the Italian legal system provides individuals with a wide range of protection means. No arbitrary conduct against fundamental freedoms is allowed by the Italian legal system.

3. An additional consideration refers to the "rationale" behind the Italian legislation on fundamental rights. When an Italian legal provision apparently seems to affect the basic individual needs expectations, in reality we are facing a "*modus procedendi*" aimed at protecting fundamental rights, such as the right to life, safety, personal freedom and security. This is somehow a method of "damage containing"; by which a higher requirement is protected while other simply legitimate requirements of the individual are temporarily compressed.

4. Within our national system of human rights protection, mention has to be made, among others, of the Italian Constitutional Court that deals only with infringements of a constitutional level (The Constitutional Court consists of fifteen judges; one-third being appointed by the President of the Republic/Head of State, one-third by the Parliament in joint session, and one-third by ordinary and administrative supreme court)¹. The Constitutional Court exercises its duty as one of the highest guardian of the Constitution in various ways. It becomes active when it is called on. For example, it supervises the preliminary stages of referenda and is competent in case of presidential impeachment. Complaints of unconstitutionality may be submitted to the Italian Constitutional Court by central and local authorities claiming that a state or a regional Act might be unconstitutional. Therefore, the Court monitors Authorities to see whether they have observed the Constitution in their actions. It also arbitrates in cases of disagreements between the highest State's organs and decides in proceedings between central and local Authorities.

¹ The constitutional court consists of fifteen judges; one-third being appointed by the Head of State, one-third by the Parliament in joint session, and one-third by ordinary and administrative supreme court.

- Procedurally, the court must examine *ex officio* (the prosecutor) or upon request of the plaintiff/defendant whether the provisions to be applied are in compliance with the Basic Law. When the court considers that an act is unconstitutional, such evaluation brings to a suspension of the *a quo* proceeding. Accordingly, a decision is made by the Court itself, pursuant to Art. 134 of the Italian Constitution. The constitutional court decides (and its decisions cannot be appealed) disputes: 1. concerning the constitutionality of laws and acts with the force of law adopted by state or regions; 2. arising over the allocation of powers between branches of government, within the state, between the state and the regions, and between regions; 3. on accusations raised against the head of State in accordance with the Constitution. More generally, this Court decides on the validity of legislation, its interpretation and if its implementation, in form and substance, is in line with the Basic Law. Thus, when the court declares a law or an act with the force of law unconstitutional, the norm ceases its force by the day after the publication of its decision.

Turning to specific issue at stake

The Red Button operational Protocol

5. On January 18, 2018, in view of the upcoming general elections scheduled for March 4th, 2018, the Ministry of Interior issued a specific press release to introduce the so-called “Red Button” operational Protocol, which is available at the following web-link of the above Ministry’s website: https://www.commissariatodips.it/notizie/articolo/protocollo-operativo-per-il-contrasto-alle-fake-news.html?no_cache=1

6. More specifically mention has to be made of the following: The Ministry of Interior decided to introduce this specific online procedure to “*limiting, with specific regard to the current period of electoral competition, the action of those who, for the sole purpose of conditioning public opinion, tendentiously orienting their thoughts and choices, design and spread news without any foundations, relating to topics or subjects of public interest.*”

Far from being an expression of the indispensable constitutional values of freedom of thought and the right to report (diritto di cronaca), the dissemination of fake news during the electoral campaign lays, unfortunately, in a context radically opposed to the one of the legitimate exercise of democracy: in fact the objective is the violation of the personal liberty of the citizens, the systematic induction of false convictions and the macroscopic alteration of the smooth democratic competition; all this, to favour particular interests - not always lawful, clear or recognizable - by single individuals or pressure groups.

From a procedural standpoint, the Protocol to fight against fake news is based upon "an idea of shared security, which provides alongside the State Police, the active and proactive action of providers and citizens. It will be divided into the following phases:

1. Collection of Information

A central role is given to the "Online Public Security Office", a structure being active in the dissemination of the culture of security and of proximity services to the citizens. It has been able, since its establishment in 2005, through its channels of institutional communication (its web page; the Facebook page of the state Police; "Una vita da social", "Agente Lisa") to aggregate around itself a virtual community, which as of today exceeds 900 thousand contacts.

"There is more security together (C'e' piu' sicurezza insieme)", to better use the potential offered by such a large community; and thus on the website www.commissariatodips.it, it has been introduced and made available to citizens, a special Red Button for fake news which can be reported.

2. OSINT activity (Open Source INTelligence) and content analysis aimed at possible rebuttal

Upon receiving the news, the Postal Police will check, as far as possible, the information, with the aim of directing the next activity to the news clearly unfounded and biased, or openly defamatory.

The news, in particular, will be taken in charge by a dedicated team of CNAIPIC experts who, in real time, 24 hours a day, will carry out in-depth analyses, through the use of specific techniques and software for OSINT on the Internet, with the aim of identifying the presence of significant indicators which allow to qualify, with the maximum certainty possible, the news as a fake news (i.e. official denials; falsity of the content already proven by objective sources; origin of the alleged fake from non-accredited or certified sources, etc.).

This special team will also take care of an autonomous information gathering activity, in order to early identify the dissemination/network of news markedly characterized by groundlessness and tendentiousness, or openly defamatory.

3. Emphasis on official rebuttal; support for removal requests

*On the basis of the elements highlighted in the analysis reports – should it be possible to identify exactly a fake news - **on the website of Online State Police and on institutional social channels it will be published a clear rebuttal** (...) so that the citizen can benefit from a more comprehensive description of the fact or of the phenomenon, and thus regain possession of that freedom of choice denied to them.*

*In any case, to the extent that the news is able to directly affect the reputation and honour of the persons, the Postal Police **will give notice, through the aforementioned institutional channels, of the possible existence of medio tempore official rebuttals** as received by the parties concerned.*

Finally, if necessary, the Postal Police, thanks to the professionalism acquired over the years, will be able to provide possible assistance to the citizen victim of the fake news, supporting him/her in the dialogue with the major social platforms besides indicating how to request the removal of the contents deemed harmful - requests which, in any case, will have to be subsequently evaluated by the single social network”.

7. On March 21st, 2018, ANSA (the Italian National Agency of Associated Press) reported that “the red button”, being an anti-fake button put at disposal by the Ministry of Interior on its social channels, was solely aimed at “facilitating during the pre-electoral period, the possibility for the citizens of reporting fake news, which could condition public opinion and thus impact on thinking and choices”, as said by the Public Security Department of the Ministry of Interior. The latter also stressed that this procedure has been concluded some days after the general elections held on March 4th, 2018, since it had been conceived for the electoral period.

8. The so-called anti-fake button, continued the Police, falls within its relevant activity – which it carried out and will continue to do -, meaning the publication of fake news on its online channels, obviously after the necessary investigations. The only difference with the past is that “during the electoral period it has been felt the need to put an easy to use tool at disposal of the citizens for possible reporting of fake news”.

Defamation

9. Freedom of expression and freedom of the press are protected by the Italian Constitution of 1948 in its Article 21, which sets forth: “*Anyone has the right to freely express their thoughts in speech, writing, or any other form of communication. The press may not be subjected to any authorization or censorship [...]*”.

10. Article 594 of the Italian Criminal Code addressed insult (“*ingiuria*”), an offence which is distinct from defamation and has been abolished by Legislative Decree No. 7/2016. Defamation is defined under Article 595 as a damage to the reputation/honor of a person through communication with several persons. There are three forms of aggravated defamation: through the allegation of a specific act (Article 595 § 2); through the press or any other means of publicity, or through a public deed (§ 3); and if it is directed to a political, administrative or judicial body (§ 4).

11. Article 596 excludes the defence of justification (proving the truth of the allegation, *exceptio veritatis*), except for the cases of defamation through the allegation of a given act, in three cases: 1) when the defamed person is a public official and the alleged act relates to the exercise of his functions; 2) if criminal proceedings are still pending on the alleged act on the part of the defamed person, or if proceedings are brought against him or her; 3) if the complainant formally requests that the judgment should extend to ascertaining the truth or falsity of the alleged act.

12. Article 596bis extends to the editor, deputy editor, publisher and printer, the application of the provisions of Article 596 dealing with the defence of the truth. Plus, Articles 57 and 57bis of the Criminal Code provide for liability of the editors/deputy editor and publisher or the printer, in case the offence of defamation is committed, for failure to conduct supervision of the content of the publication. Article 58 extends the scope of these provisions to the clandestine press.

13. More specifically, the aim and the rationale behind the relevant provisions of the domestic criminal code indicate the constant balancing between opposite stances: as for the “reputation/honour”, there is a common understanding to refer to “those conditions on the basis of which the social value of the individual is expressed”; as for “the dignity”, there is a common understanding to refer to “the intellectual, physical and social features of individuals”. Thus, consideration should be given to the fact that the protection of the reputation/honour of individuals may result in a stance opposite to freedom of expression, including press, and vice-versa.

14. Hence, the limits to the so-called “right to chronicle” are of the utmost importance and are to be considered therein. Both the Italian legal literature and case-law have constantly affirmed that the exercise of the right to news reporting (*diritto di cronaca*) and of the freedom of the press guaranteed in Article 21 of the Constitution represents a cause of justification within the meaning of Article 51 of the Criminal Code, thus making the acts (the communication of information damaging the honour, the dignity or the reputation of another person) non-punishable.

15. A landmark judgment of the Court of Cassation (*Cassazione civile*, sez. I, October 18, 1984), constantly applied by civil and criminal courts, has set out the three criteria for the application of the above Article 51: the social utility or social relevance of the information; the truthfulness of the information (which may be presumed (*verità putativa*) if the journalist has seriously verified his or her sources of information); restraint (“*continenza*”), referring to the civilized form of expression, which must not “violate the minimum dignity to which any human being is entitled”.

16. The case-law has further clarified that these three criteria cannot fully operate in relation to the right to criticize and to satire. Also, the Italian Constitutional Court (see Decision No. 175, 5 July 1971, in *Raccolta Ufficiale delle Sentenze e Ordinanze della Corte Costituzionale*, Vol. XXXIV, 1971, p. 550) states that the exclusions and the limitations of the *exceptio veritatis* provided for in Article 596 of the Criminal Code are not applicable when the defendant exercises the cause of

justification related to the freedom of expression recognized by Article 21 of the Constitution, asserting the truthfulness of the information. Importantly, in most cases the truthfulness of the communicated information excludes criminal defamation.

17. The Supreme Court has often stated that such a right is lawful when it is exercised under the following circumstances/requirements: 1. social value; 2. truth; 3. correct exposition of the episode under consideration. Along these lines, the so-called “right to criticism” must be exercised within specific borders: 1. correctness of the language; 2. respect for one’s rights (Cass. Verdict No. 40930/13). However, as a matter of fact, freedom of the press and freedom of expression relating to politics and trade union-areas enjoy more extensive interpretations.

18. During the last parliamentary term (Legislature XVII) concluded in late December 2017, various pieces of draft legislation, aimed at amending the criminal discipline of defamation, were under discussion before the Italian Parliament – and the new parliamentary term (Legislature 2018) just started on March 23, 2018.

19. In the above context, it is worth-recalling Bill A.S. 1119-B, which reached the second reading before the relevant Senate Committee in October 2017, following previous approval by the Chamber of Deputies:

- It aimed at limiting the use of criminal sanctions for defamation, and introducing the abolishment of imprisonment as a sanction for defamation. The overall purpose of the Bill was also to more clearly delineate defamation, related procedures and remedies, including by extending the scope of the relevant provisions to the audio-visual media and the internet.
- That Bill, aimed at a more appropriate balance between the safeguards required by the protection of reputation and the unhindered exercise of freedom of expression, including freedom of the press, envisaged the simultaneous amendment of the provisions of civil and criminal law as a way to respond to the concern for a comprehensive and consistent approach in this field. Efforts have been made to ensure improved criteria for assessing damages resulting from defamation, and a two year time-limit for civil actions for damages had been envisaged, too. As for civil liability for offences committed by means of the media, when assessing damage, courts should take into account, in addition to the seriousness of the injury and the circulation and local or national relevance of the concerned media, the reparatory effect of the publication of the rectification with the subsequent effect of excluding the penal punishability.
 - In brief, it envisaged: a two year time-limit for civil actions for damages; an aggravating circumstance if a fact attributed to a person results to be false; prohibitory measures in case of recurrence; a specific increased focus on the role of the editor and the relating liability in case of defamation, as well as the reformulation of Art.57 of the criminal code; the strengthening of the system to discourage the frivolous litigation to avoid mismanagement of the civil action; and the extension of the protection of journalistic sources, to independent journalists and "contributors".

20. The Venice Commission commended the above Bill in its relevant Opinion 715/2013.

21. Against this background, it is important to provide an overview of the role and work carried out particularly by AGCOM, standing for the Communication Regulatory Authority² and the Italian DPA, standing for the Italian Data Protection Authority.

The Communication Regulatory Authority (acronym in Italian, AGCOM)

² <https://www.agcom.it/>

22. The Communication Regulatory Authority is an independent Authority, established by Act 249/1997.

23. Independence and autonomy are key elements that characterize its activities and resolutions. AGCOM is first and foremost a guarantee Authority: its law of establishment entrusts the Authority with the double task of ensuring the correct competition of operators on the market and of protecting consumers' fundamental freedoms.

24. The Communication Authority is a "convergent" Authority. As such, it performs regulatory and supervisory functions in the telecommunications, audiovisual, publishing and, more recently, postal sectors. The profound changes brought about by the digitalization process, which has ensured the uniform broadcast of audio (including voice), video (including television) and data (including Internet access), are the basis for the choice of convergent model, as adopted by the Italian legislator and shared by other sector Authorities, such as Ofcom in Great Britain and Fcc in the United States.

25. Like the other Authorities provided for by the Italian legislation, the AGCOM report on its work to the Parliament. The latter established this Authority's powers, defined the statute and elected the members (Authority's bodies are: the President, the Commission for infrastructures and networks, the Commission for services and products, the Council. The Commissions and the Council are collegial bodies. The Commissions are made up of the President and the two Commissioners. The Council is composed of the President and all the Commissioners).

26. On a more specific note, Act 215/2004³, which deals with the mass media and information sector and covers possible conflicts of interest, including between government responsibilities and professional and business activities in general, details *inter alia* the powers, functions and procedures of the independent administrative Authorities responsible for oversight, prevention and imposing penalties to combat such cases, together with the applicable penalties:

- For companies in general, this responsibility lies with the Anti-trust Authority established by Act 287/1990 (Art. 6);
- For companies of the printed press and media sector, the responsibility lies not only with the above Authority but also with AGCOM, as instituted by Act 249/1997.
 - o The above Authorities are characterized by their neutrality with regard to the parties with conflicting interests to be resolved and third parties, and are therefore *iusdicenti* in any relevant conflicts. Specifically, Act 215/2004 entrusts AGCOM to conduct audits against companies operating in the Integrated Communications System (acronym, SIC) and are headed by the holder of governmental position (or by relatives).
 - The SIC comprises all the main media business sectors, and may be considered to be the result of the multimedia convergence process in which apparently heterogeneous media (radio, television, newspapers, the Internet, cinema) are gradually drawing closer together and becoming integrated⁴.

³ Because of its particular nature, the mass media and information sector is the subject matter of a number of specific provisions in the law under reference (Article 7). These particular provisions do not replace the general rules governing any type of company, but are additional to them.

⁴ Act 112/2004 has effectively moved forward the switch from analogical to digital broadcasting, with the aim of increasing the number of TV channels (a process initiated in 2008). This has actually given greater independence and organizational autonomy to the public radio and television broadcasting service franchisee. It has placed RAI on an equal footing with all other joint stock companies, also in terms of their organization and management (Article 20 (1)). In this context, mention should be made also of the following: The start-up of terrestrial digital broadcasting as a result of Act 112/2004 has increased the number of channels free of charge by between four-fold and six-fold (as of 2014), and has consequently increased the television offering and enhanced pluralism — bringing Italy to be one of the countries with the highest number of channels ever, in the world.

27. As for RAI, the public broadcasting service, a parliamentary commission ensures, inter alia, respect for pluralism. It is, however, AGCOM to oversee and ensure RAI's compliance with primary and secondary level provisions, with regard to pluralism and public service-related obligations.

28. AGCOM has been also entrusted with all those functions of a regulatory and control nature, relevant to the postal sector, in accordance with Art.1, paras.13 and 14, of Law Decree No. 201/2011, as converted into law (with amendments) by Act No. 214/2011.

29. With regard to intellectual property, AGCOM has introduced rules on the protection of copyright by Resolution (No.680/13/CONS), dated December 12, 2013, by which it identifies its jurisdiction in respect of those breaches occurring on electronic communications networks in accordance with Legislation on Copyright (Act No. 633/41 - in particular Article 182 bis, by which both this Authority and SIAE are entrusted, within their respective responsibilities, with supervisory powers) and Legislative Decree on Electronic Trade (Act No.70/2003 - entrusting AGCOM with the power to order the intermediary service providers to put an end to the violations committed in the network).

- With specific regard to the audiovisual media services, it should be stressed that Parliament has entrusted the above Authority with specific regulatory and normative powers in accordance with Art.32bis of Legislative Decree No. 177/2005 (entitled "Consolidated Text on Audiovisual and Radio Media Services").

The Italian DPA

30. The *Garante*, i.e. the Italian Data Protection Authority (DPA), is an administrative independent authority set up by the "Privacy Act" (675/1996, now merged into the consolidated Personal Data Protection Code).

- Similar authorities have been set up in all EU countries pursuant to Article 8 of the Charter of Fundamental Rights of the European Union.

31. The *Garante* is tasked with ensuring the protection of fundamental rights and freedoms as regards the processing of personal data along with respect for individuals' dignity. The *Garante* handles citizens' claims and reports and supervises over compliance with the provisions protecting private life. It decides on complaints lodged by citizens and is empowered to prohibit, also of its own motion, any processing operation that is unlawful or unfair. It can perform inspections, impose administrative penalties, and issue opinions in the cases mentioned by the Data Protection Code. It can also draw Parliament and Government's attention to the desirability of regulatory measures concerning personal data protection.

The situation of journalists

32. At the Ministry of the Interior-Department of Public Safety – mention has to be made of the Central Bureau of Inter-Forces for Personal Security (acronym in Italian, UCIS) that provides guidance to ensure that the most appropriate protection measures be implemented with regard to both domestic and foreign dignitaries, as well as with regard to those people, and their relatives, who, for their duties or for other proven reasons, are exposed to danger or threat, potential or actual (See Art.1,

let (n) of Act No.133/2002). **As for the latter, such a situation usually – and this must be stressed – mainly concerns those journalists investigating organized crime.**

- The UCIS, jointly with the prefects concerned, determines the level of risk in light of the degree of exposure to the danger by the person to be protected (from the 1st to the 4th level, in descending order of danger), in accordance with Ministerial Decree dated 28.5.2003.

33. As of February 8, 2017, 181 protection measures are in place for the protection of journalists as adopted following acts of intimidation: of which 20 individual protection measures (of close protection) arranged by the Central Office for Personal Security (in Italian, UCIS) - equal approximately to 3.5% of those of the same type operating in Italy -; and 161 supervisory measures of various kinds (generic radio-connection; dedicated dynamics at agreed times) as adopted at a local level by Prefects that are the Provincial Authorities of Public Security - equal to 1.26% of those ones of the same type operating in Italy. About 15% of the measures concern female journalists.

CONCLUSIONS

Italian Authorities take this opportunity to reiterate their firm willingness to continue cooperating fully with all UN Special Procedures.

