

REPORT ON MEASURES TO COMBAT DISCRIMINATION

Directives 2000/43/EC and 2000/78/EC

COUNTRY REPORT

Italy

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State of affairs up to 8 January 2007

This report has been drafted for the **European Network of Legal Experts in the non-discrimination field** (on the grounds of Race or Ethnic origin, Age, Disability, Religion or belief and Sexual Orientation), established and managed by:

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INTRODUCTION

0.1 The national legal system

Explain briefly the key aspects of the national legal system that are essential to understanding the legal framework on discrimination. For example, in federal systems, it would be necessary to outline how legal competence for anti-discrimination law is distributed between different levels of government.

The legal framework for the guarantee of equal treatment is in Italy mainly based on statute law, in the form of acts of parliament or acts of the same force however originating in a decision of the national parliament. Case law has instead been – at least until now - quite marginal in legal development. This was the case already before the transposition of the Directives, when quite advanced antidiscrimination rules were contained in an act of 1998¹, otherwise dealing with general immigration law (and the lack of visibility of antidiscrimination provisions dispersed in a piece of legislation with another subject matter was indeed a problem). Judge-made law had a very limited role for the grounds of discrimination covered by the Directives, also because of the lack of significant litigation in the field.

The fact that the state of the art must be evaluated by looking primarily at statute law does not mean that other sets of legal rules could not be potentially relevant. But such relevance is indeed only *potential*, and certainty of adequate legal protection can be obtained insofar only through reference to positive statutory rules. This applies particularly with regard to the possibility to enforce the equality principles contained in the Constitution. Notwithstanding the theoretical possibility to base a civil action (for instance in tort) on the violation of general equality provision of the Constitution, this has never been clearly accepted by the courts.

With regard to sub-national levels of legislation, i.e. the possible relevance of rules promulgated by the regions - that in Italy have increasingly important lawmaking powers -, these have been in the field of equal treatment traditionally quite marginal. Following the recent reform of article 117 of the Constitution, the boundary between the legislative powers of State and the regions as to employment law and discrimination (in particular with respect to equal treatment between men and women), although far from clear, leaves more space to the regions. If the State has the exclusive competence on the “determination of the basic standards of welfare related to those civil and social rights that must be guaranteed in the entire national territory”, the new article 117(7) explicitly establishes that “regional laws shall remove all obstacles which prevent the full equality of men and women in social, cultural and economic life, and shall promote equal access of men and women to elective offices”. The provision recognises thus a regional legislative power in the implementation of substantive equality, with reference to gender equality.

Although there is no clear reference to the grounds covered by the Directives in the constitutional provisions on sub-national legislative competences, pioneering experiences can be observed at the regional level. Very recently, the *Regione Toscana* enacted for instance a law prohibiting discrimination on ground of sexual orientation, although its key provision on equal treatment in the provision of services seems to be applicable also to different forms of discrimination². The validity of this regional law was challenged by the government before

¹ Decreto legislativo 25 luglio 1998, n. 286 *Testo unico delle disposizioni concernenti la disciplina dell'immigrazione e norme sulla condizione dello straniero*. A comparison between the protection provided by the 1998 Act and the Directive is contained in the EUMC report by A.Simoni-G.Boni, *Italian report to the project “Implementing European Antidiscrimination Law”*, 2001.

² *Legge Regionale Toscana 15 novembre 2004, n. 63 Norme contro le discriminazioni determinate dall'orientamento sessuale e dall'identità di genere*, *Bollettino ufficiale della Regione Toscana n. 46 del 24 novembre 2004*.

the Constitutional court, which in a recent judgment quashed the section of the law which imposed (under administrative sanction) an obligation of non-discrimination on ground of sexual orientation for commercial activities since such the imposition of such obligations would be an exclusive competence of the state³.

The key legislative provisions in order to assess the transposition in Italy of the Directives are, therefore, those of the two Decrees enacted [in the following referred to as “the Decrees”] by the government in 2003⁴ on the basis of the lawmaking powers delegated by the parliament with the “omnibus act” for implementation of EC law approved in 2002 (*legge comunitaria 2001*)⁵. The two Decrees simply follow each one the wording of one of the directives, and the discrepancies with these can easily go unnoticed by the layperson. They have been introduced without relevant preparatory work, and in the case of the decree implementing directive 78/2000 the “omnibus act” did not contain specific guidelines, while those referring to the transposition of directive 43/2000 were however very poor. The decrees did not abolish the pre-existing anti-discrimination rules, nor did it unify them, but just add a further legal regime, thus realising a complex situation which could bring into litigation many legalistic arguments about *jus superveniens*. It is interesting to note, for instance, that in a recent decision on racial and ethnic discrimination (see under 0.3) the judge, although mentioning the decrees transposing the directives, founds its judgment on the pre-existing law. A straight modification of the relevant articles of the Immigration Act, or their repeal and substitution with a separate text, would probably have been more rational. The coordination of the legislative texts in the fields covered by the Directives could have been significantly improved if the government used the possibility deriving from a 2005 act that gave it the power to enact, within one year, decrees aimed at the coordination of all rules on equal opportunities (all grounds, included gender). This possibility has, however, been used only for rules concerning gender equality⁶. A new act, which extends the prohibition of direct and indirect discrimination beyond the field of employment, with remedies similar to those foreseen by the decrees transposing the directives, has been instead approved with regards to discrimination on the ground of disability⁷.

0.2 State of implementation

List below the points where national law is in breach of the Directives. This paragraph should provide a concise summary, which may take the form of a bullet point list. Further explanation of the reasons supporting your analysis can be provided later in the report.

Has the Member State taken advantage of the option to defer implementation of Directive 2000/78 to 2 December 2006 in relation to age and disability?

After the implementation of the Directives with the two decrees above mentioned, the assessment of the implementation can be based on the review of the latter. The main discrepancies between the Decrees and the Directives can be considered to be the following:

³ Corte Costituzionale, pronuncia del 21 giugno 2001, n. 253 (other measures contained in the same law introducing social actions for the fight against discrimination in employment were not declared in conflict with the Constitution).

⁴ Decreto legislativo 9 luglio 2003, n. 215 Attuazione della direttiva 2000/43/CE per la parità di trattamento tra le persone indipendentemente dalla razza e dall'origine etnica (published in Gazzetta Ufficiale n. 186 of August 12, 2003).

Decreto legislativo 9 luglio 2003, n. 216 Attuazione della direttiva 2000/78/CE per la parità di trattamento in materia di occupazione e di condizioni di lavoro (published in Gazzetta Ufficiale n. 187 of August 13, 2003).

⁵ Legge 1 marzo 2002, n. 39 “Disposizioni per l'adempimento di obblighi derivanti dall'appartenenza dell'Italia alle Comunità europee. Legge comunitaria 2001”. On the characters of this act with regard to discrimination see A.Simoni, “La discriminazione razziale alla vigilia dell'attuazione della direttiva 43/2000: considerazioni a partire da alcune recenti pronunce giurisprudenziali”, in *Diritto, Immigrazione e Cittadinanza*, 4/2002, pp. 81 ss.

⁶ Legge 28 novembre 2005 n. 246 . Semplificazione e riassetto normativo per l'anno 2005, published in Gazzetta Ufficiale, n. 280 of 1 december 2005, art. 6.

⁷ Legge 1° marzo 2006, n. 67, “Misure per la tutela giudiziaria delle persone con disabilità vittime di discriminazioni” (published in Gazzetta Ufficiale, n. 54 of march 6, 2006).

- 1) With regard to both Directives, the provision on the burden of proof does not seem to introduce a shift in line with that prescribed by articles 8 (race) and 10 (framework).
- 2) The provision on standing to litigate for interest groups in the decree transposing Directive 78/2000 admits standing only for trade unions.
- 3) With regard to directive 43/2000 the possibility to perform “independent activities” on the part of the new Office against Racial Discriminations seems to be quite limited, at least if independence is understood as independence toward the executive.
- 4) The provisions of the decree transposing Directive 78/2000 on genuine occupational requirements, on “work suitability tests”, and on differences in treatment with reference to armed forces and the police, prison or emergency services, seem - taken all together - to give too broad discretion to admit exceptions to equal treatment.
- 5) Victimisation is mentioned merely as a parameter to assess the amount of damages.
- 6) In the decree transposing directive 78/2000 there is no mention of the requirement of reasonable accommodation.
- 7) The Decree concerning race and ethnicity says that the unwanted conduct must have the effect of “creating an intimidating, hostile, degrading, humiliating *and* offensive environment” (while the Directive says or). The Decree concerning Directive 78/2000 corresponds instead to the Directive.
- 8) With regard to differences of treatment by organisations with a special ethos, it can appear from the text that the exception applies also to organisations without an ethos actually based on religion or belief. Pre-existing national rules in the field appear to be more restrictive in admitting exceptions than the decree, which thus goes beyond the discretion left to the member states.

Italy did not make use of the possibility to defer the implementation of Directive 78/2000 with regard to age and disability.

0.3 Case-law

Provide a list of any important case-law within the national legal system relating to the application and interpretation of the Directives. This should take the following format:

- a. Name of the court
- b. Date of decision and reference number (or place where the case is reported). If the decision is available electronically, provide the address of the webpage.
- c. Name of the parties
- d. Brief summary of the key points of law (no more than several sentences)

Even now that significant time has elapsed from the transposition of the directives, litigation is scarce. Two interesting cases have, however, been reported.

With regard to race and ethnicity, on 19 May 2005, the court of first instance of Padua (*Tribunale di Padova*) issued an order (*ordinanza*) against a company which owned a bar as it was proved that higher prices were applied to persons of non-Italian origin, as a way of decreasing the number of clients perceived as *extracomunitari* (“non community citizens”, a term usually used to refer to immigrants of non-Western or “remote” origin). The order was issued on the basis of the summary procedure foreseen in the 1998 Immigration Act, which is also applied in cases arising under the decree (2003/215) transposing Directive 2000/43.

The court recognised the existence of discrimination against the *extracomunitari* (the exact nationality of the nine claimants does not appear in the decision). However, the court does not specify whether the discrimination is on the ground of ethnic origin or on the ground of nationality, the latter only being prohibited by the 1998 Immigration Act not by the decree transposing Directive 43/2000.

The defendant was ordered to cease the discriminating activity and pay damages for non-pecuniary loss to the claimants and costs. The court did not respond to the claimant's request for publication in the press and on website of the judgment.

In the same decision the court denied the standing of two associations ("Razzismo Stop" and "Associazione per gli Studi Giuridici sull'Immigrazione - ASGI") to engage in legal proceedings on behalf or in support of the claimants despite requests from both to intervene in the proceedings.

According to the Court, the ground for this exclusion lies in the fact that according to Article 5 of Decree 2003/215, legal standing is restricted to associations and bodies which are active in the field of combating discrimination which are included in a list approved by a joint decree of the Ministries of Labour/Welfare and Equal Opportunities, and since no such decree had been issued at the time of the decision, no association or organisation can be deemed to have legal standing. This interpretation was also based on an opinion of the Department of Equal Opportunities of the Presidency of the Council of Ministers, which was issued on request of one of the organisations taking part in the present case.

A few months later, the court partly revised its decision, admitting the standing to litigate (still pending the approval of the official register) of one of the two associations on the basis of the provision of a different act. The very recent official approval of the register (see *infra* at 6.2) should limit the practical impact of this opening toward alternative ways to standing (the association admitted in this case was one of those which applied for inclusion in the register).

The first decision and a comment to it can be found (in Italian) on the website of UNAR (<http://www.pariopportunita.gov.it/IL-DIPARTI/--Ufficio-/Le-pronunc/sentenza-padova.pdf>). The second decision has not been included on the website.

With regard to disability, the Court of Pistoia, section for labour cases, on September 30, 2005, decided the first known Italian case on discrimination on ground of disability. The case started from an alleged indirect discrimination in deciding the transfer to a different office of a disabled employee of the Ministry of Justice. According to the competent administrative commission, the plaintiff was to avoid displacement on foot, both during employment and to reach the working place, and she consequently asked to be moved from the judicial office where she worked to a different one. The request was accepted and such temporary appointment renewed twice. Upon request of a further renewal, the Ministry invited the plaintiff to apply for appointment in a third nearby court office. She accepted the new position, but after a series of renewals the Ministry decided that she had to serve again in the place of the second assignment.

The plaintiff decided then to bring action against the Ministry of Justice, without previously using the pre-trial mediation procedure foreseen in decree 216/2003. The court decided as a preliminary question that the pre-trial mediation foreseen by the decree is not compulsory. It then declared that the decision to deny renewal of the temporary appointment (which otherwise is in the discretion of the Ministry) constituted indirect discrimination on ground of disability, ordering to the Ministry to stop the discriminatory behaviour and to pay the costs of the proceeding.

Since the defendant did not appear in court, legal arguments were not developed in great detail. It is interesting, however, to note that the court mentions the definition of indirect discrimination contained in decree 216/2003, but in order to qualify as discriminatory the behaviour of the administration it refers to section 6, 9, and 20 of the preamble and to article 5

of Directive 78/2000. This is explained also because the Italian government decided not to include any mention of the requirement of “reasonable accommodation” in the decree transposing the directive. Since the defendant did not take part in the proceeding there was, as observed by the court, no possibility to assess whether the indirect discrimination could be considered as one of the “differences in treatment that, even if indirectly discriminatory, are objectively justified by legitimate aims carried out through appropriate and necessary means”, as foreseen by article 3(6) of decree 216/2003, For the judge, it is indeed up to the employer to prove in court the existence of such aims.

It is worth to note that the media sometimes reported cases of discrimination, on mainly racial and ethnic grounds, that caused action by the political actors. At the end of 2006, for instance, an Italian citizen of African origin was allegedly denied employment as a waiter in a vacation resort on the Alps once the prospective employer, after a telephone contact, discovered her racial background. Statement on the illegality of such a behaviour were issued even by the Minister of Labour, but no legal action was undertaken. The person allegedly discriminated against (the facts were partly controversial, since the prospective employer said his decision was based on non-racial factors) was subsequently hired by another employer who learned of the facts from the press.

It can be relevant to note that in a recent judgment (referring to facts of 1999) the Court of Cassation⁸ clarified that even the simple refusal to serve clients on racial grounds is not only a civil and administrative wrong, but is also enough to declare the existence of the crime according to the 1993 act on hate speech and discriminatory acts. Potentially interesting in principle, it is not clear whether this clarification will have any practical implication for minor discriminatory facts, taking into account the length and evidentiary problems of criminal proceedings.

1. GENERAL LEGAL FRAMEWORK

Constitutional provisions on protection against discrimination and the promotion of equality

a) Briefly specify the grounds covered (explicitly and implicitly) and the material scope of the relevant provisions. Do they apply to all areas covered by the Directives? Are they broader than the material scope of the Directives?

b) Are constitutional anti-discrimination provisions directly applicable?

c) In particular, where a constitutional equality clause exists, can it (also) be enforced against private actors (as opposed to the State)?

A general protection against discrimination is established by article 3 of the 1948 Constitution, which recognises equal dignity and equality under the law without distinctions on grounds of sex, race, language, religion, political opinions, and personal or social conditions, accompanied by a principle of substantive equality, calling on the State to remove the social and economical obstacles which limit the freedom and equality of the citizens and prevent the full development of the human being.

The grounds of discrimination listed in article 3 are more restricted if compared with the ones mentioned in article 13 of the EC Treaty: however, the expression “personal or social conditions” allows potentially an open interpretation, covering for instance ethnic origin, sexual orientation, age and disability, although the lack of clear case law does not permit to provide a definite answer. Disability is not mentioned in the general equality clause, but the

⁸ Corte di Cassazione, terza sezione penale, sentenza 2006/1583, released on november 16, 2006.

disabled, referred to in the antiquated wording *inabili e minorati*, have according to article 38 a right to education and professional training. Indeed, many scholars argue that the anti-discrimination principle is not only binding on the lawmaker, but is also a criterion which courts and public administration must follow in the application and interpretation of the law. According to some authors, it is binding as well among legal persons, associations and within relationships governed by private law: this is particularly important since it would allow for an extensive interpretation of the anti-discriminatory provisions contained in labour legislation. Notwithstanding the open attitude of some scholars, the Supreme Court has still a quite restrictive position⁹, considering that article 3 is binding on public powers, but not on private subjects.

Substantive equality takes, however, also the form of an obligation to differentiate taking into account different situations. Labour law is considered a paramount example of field where the system must protect different identities through respect of formal equality, while promoting equal opportunities in different situations. The concept of equality in the Italian legal system, therefore, allows differentiation as well as positive actions, even though the Supreme Court declared that there is no general constitutional duty of equal treatment directly binding on the employer¹⁰. This is an orientation that will be likely to change due to the recent explicit introduction in the Constitution (articles 51 and 117) of the principle of equal treatment between men and women beyond the general equality clause of article 3.

At the constitutional level, the situation becomes quite more complicated with regard to discrimination on the ground of religion. The 1948 constitution mentions religion within the general equality clause contained in article 3. It establishes also (article 8, section 1) that “All religious beliefs are equally free before the law”, and (article 19) that “[all] shall be entitled to profess their religious beliefs freely in any form, individually or in association with others, to promote them, and to celebrate their rites in public or in private, provided that they are not offensive to public morality”¹¹.

The practical enforcement of the general principle of religious freedom has been somewhat difficult because of its coexistence with other provisions deeply marked by the strong role of the Catholic Church. With regard to this aspect, the Constitution establishes (article 7, section 1) that “The State and the Catholic Church are both, each one within its own order, independent and sovereign”. The same article establishes that the relationship between the State and the Catholic Church is regulated by the Lateran Treaty (*Patti lateranensi*) with the Holy See of 1929, the modifications of which do not need a revision of the constitution. Some of the rules of the 1929 *Patti lateranensi* (according to which Catholicism was the official religion of the State) establishing privileges for the Catholic religion were difficult to harmonise with the fundamental rights introduced in 1948, and became the object of review by the Constitutional Court. The Court was, for instance, called to evaluate whether the limits to the security of tenure of the professors of the Catholic universities (which are recognised by the Italian State) were compatible with the freedom of academic teaching, since their appointment required the authorisation of the Holy See “in order to ensure that there is nothing to object from the moral and religious points of view”. The Court¹² upheld this rule, considering it as a specification of “a principle intrinsic in the liberty of school and of religion, applicable to any religion or ideology”.

With regard to the religious confessions different from the Catholic one, the constitution establishes (article 8) that they can “organise themselves according to their own charters,

⁹ *Corte di Cassazione*, 11 November 1976, no. 4177; *Corte di Cassazione*, 29 May 1993, no. 6030; *Corte di Cassazione*, 17 May 1996, no. 4570.

¹⁰ *Corte di Cassazione*, 4 February 1987, no. 1101, confirmed by *Corte di Cassazione*, 8 July 1994, no. 6448 and *Corte di Cassazione*, 17 May 1996, no. 4570, after a controversial decision of the *Corte Costituzionale*, 22 February 1989, no. 103.

¹¹ G.Casuscelli, *Uguaglianza e fattore religioso*, in *Digesto IV, Discipline pubblicistiche*, Torino, UTET, vol. XV, 1999, pp. 428 ss.

¹² *Corte costituzionale, sentenza 195/1972*.

provided that these are not in conflict with the Italian legal system” and that their “relations with the State are regulated by the law on the basis of agreements with their representative bodies”, thus leaving open to possibility of more favourable treatment for the religious associations that have signed those agreements. This provision was implemented after the revision of the *Patti lateranensi* in 1984, which corrected some of the major discrepancies with the Constitution, and was followed by the introduction of the first agreements - transposed in statutes approved by the parliament - with the representations of some religious confessions (these are the Adventists, the Waldensian movement, the Jewish Communities, the Assemblies of God, the Baptist movement, and the Lutheran Church). These agreements regulate the effects for the Italian state of the internal acts of the confessions, while solving several problems specific to each of these, like for instance holidays¹³. Within the scope of application of directive 78/2000, it is therefore clear that the employer enjoys a wider discretion to refuse taking into consideration the specific needs related to a religion or belief when the employee is a believer of a “religion without agreement”. Even more relevant problems exist out of the employment field, in any case where there a degree of judicial and administrative discretion, as for instance proved by the outright and explicit denial of some local authorities of the administrative authorisations required to start any kind of place of worship for Muslims. Because of the piecemeal approach followed with the agreements, the legal protection of freedom of religion in Italy is currently felt as still being unsatisfactory, primarily concerning the position of those confessions that were not able to sign the agreements or to have them transposed in an act of parliament. (besides Islam, this is the case for instance of Jehovah’s Witnesses), the situation of which is thus still regulated by the antiquated 1929 act on “tolerated cults”¹⁴.

In order to define the status of the religious confessions that did not finalise agreements with the Italian State, the Italian parliament has for a long time discussed bills¹⁵ which give effect to the principles of art. 9 ECHR and other relevant international instruments, while trying to identify a minimum set of guarantees that any religious confession should enjoy also in the absence of any agreement whatsoever with the State.

2. THE DEFINITION OF DISCRIMINATION

2.1 Grounds of unlawful discrimination

Which grounds of discrimination are explicitly prohibited in national law? All grounds covered by national law should be listed, including those not covered by the Directives.

If one puts together the Immigration Act and the recent Decrees, the grounds of discrimination prohibited by statute law (beyond the equal treatment provisions contained in the Constitution) coincide with those covered by the Directives, with the relevant addendum of discrimination on ground of nationality.

¹³ Legge 11 agosto 1984 n. 449 Norme per la regolazione dei rapporti tra lo Stato e le Chiese rappresentate nella Tavola Valdese; Legge 22 novembre 1988 n. 516 Norme per la regolazione dei rapporti tra lo Stato e l’Unione Italiana delle Chiese Cristiane Avventiste del settimo giorno; Legge 22 novembre 1988 n. 517 Norme per la regolazione dei rapporti tra lo Stato e le Assemblee di Dio in Italia; Legge 8 marzo 1989 n. 101 Norme per la regolazione dei rapporti tra lo Stato e l’Unione delle Comunità ebraiche italiane; Legge 5 ottobre 1993 n. 409 Integrazione dell’intesa stipulata nel 1984 con la Tavola Valdese; Legge 12 aprile 1995 n. 116 Norme per la regolazione dei rapporti tra lo Stato e l’Unione delle Comunità Evangeliche Battiste Italiane; Legge 29 novembre 1995 n. 520 Norme per la regolazione dei rapporti tra lo Stato e le Comunità evangeliche luterane. Agreements have been signed with Buddhists and Jehovah’s Witnesses, but their transposition in an act of parliament has not yet taken place.

¹⁴ Legge 24 giugno 1929, n. 1159 Disposizioni sull’esercizio dei culti ammessi nello Stato e sul matrimonio celebrato davanti ai ministri dei culti medesimi.

¹⁵ Camera dei Deputati A.C. 2531 Disegno di legge “Norme sulla libertà religiosa e abrogazione della legislazione sui culti ammessi”.

A statutory principle of equal treatment was indeed already in force in the Italian legal system before the enactment of the Decrees transposing the Directives, due to the antidiscrimination provisions contained in the 1998 Immigration Act¹⁶ which provides in its article 43 a definition of direct and indirect discrimination which is in general in line with that of the Directives, applicable to the grounds of race and colour, ethnic origin, “religious beliefs and practices” (*le convinzioni e le pratiche religiose*), and nationality (national origin). The Immigration Act contains a “black list” of discriminatory acts, roughly corresponding to the scope of application of the Race Directive (although the list in the Immigration Act is a non-exhaustive one), providing remedies from the realm of civil law. Besides these rules, existed (and are still in force) some criminal law provisions contained in the 1993 act aimed at sanctioning the diffusion of “hate speech” and racist propaganda¹⁷, which provide harsh punishments for “acts of discrimination on racial, ethnic, national or religious grounds”. Since the government did not abolish the pre-existing statutes, these antidiscrimination rules coexist with the provisions aimed at implementing the Directives.

Another relevant pre-existing set of statutory rules about discrimination is that pertaining to labour law. On the basis of the Workers’ Act (*statuto dei lavoratori*) of 1970¹⁸ it was illegal – even before the enactment of the Directives - to dismiss, or discriminate– even indirectly – a worker in the assignment of qualifications or duties, in transfers, in disciplinary proceedings, or let him/her suffer otherwise harm, for political, religious, racial and linguistic reasons or because of gender. A dismissal based on such grounds is explicitly declared as void¹⁹, and in the Italian legal system this brings to *both* the award of damages and to an order of the judge to the employer to “reintegrate” the worker in his/her employment²⁰.

The Decrees superimposed to these rules provisions that in their overall structure are very close to those of the Directives, concerning grounds of discrimination that simply reproduce the wording of the latter. The provision of the Worker’s Act has been integrated, explicitly adding to the grounds of discrimination that make dismissal or other prejudice (as above described) unlawful those of age, disability, sexual orientation and personal belief. This was not the case for “ethnic origin”, for reasons which are not clear. However, in Italy the differences between the concepts of race and ethnic origin are not so sharp (especially against the background of the broad equality clause of the Constitution) to make the absence of the latter in the Workers’ Act practically important.

2.1.1 Definition of the grounds of unlawful discrimination within the Directives

a) How does national law on discrimination define the following terms: racial or ethnic origin, religion or belief, disability, age, sexual orientation?

Is there a definition of disability on national level and how does it compare with the concept adopted by the European Court of Justice in case C-13/05, Chacón Navas, Paragraph 43, according to which “the concept of ‘disability’ must be understood as referring to a limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life”?

¹⁶ The 1998 Act is studied in detail by G.Scarselli, “Appunti sulla discriminazione razziale e la sua tutela giurisdizionale”, in *Rivista di diritto civile*, 2001, I, pp. 804 ff., and in the perspective of religion by P.Cavana, *Pluralismo religioso e modelli di cittadinanza: l’azione civile contro la discriminazione*, in *Il diritto ecclesiastico*, 2000, I, pp. 165 ff.

¹⁷ *Legge 25 giugno 1993, n. 205, Conversione in legge, con modificazioni, del decreto legge 26 aprile 1993 n. 122 Misure urgenti in materia di discriminazione razziale, etnica e religiosa.*

¹⁸ *Legge 20 maggio 1970, n. 300, Norme sulla tutela della libertà e dignità dei lavoratori, della libertà sindacale e dell’attività sindacale nei luoghi di lavoro e norme sul collocamento* (published in *Gazzetta Ufficiale*, 27 maggio 1970, n. 31), art. 15, comma 2.

¹⁹ *Legge 15 luglio 1966, n. 604, Norme sui licenziamenti individuali* (published in *Gazzetta Ufficiale*, August 6, 1966, n. 95) art. 4 (as amended in 1970 and 1990).

²⁰ The order of “reintegration” following unfair dismissal ordinarily applies only to employers having a minimum number of workers (*i.e.* in case of small companies the only remedy is represented by damages), but such a limit does not apply to discriminatory dismissals.

b) Where national law on discrimination does not define these grounds, how far have equivalent terms been used and interpreted elsewhere in national law (e.g. the interpretation of what is a 'religion')?

c) Are there any restrictions related to the scope of 'age' as a protected ground (e.g. a minimum age below which the anti-discrimination law does not apply)?

d) Please describe any legal rules (or plans for the adoption of rules) or case-law (and its outcome) in the field of anti-discrimination which deal with situations of multiple discrimination.

a) Italian law on discrimination, both the Decrees and the pre-existing statutes, do not contain any definition of these terms, which in the case of the Decrees are simply borrowed from the Directives. With regard to sexual orientation, it can be noted that the words used in the relevant decree are *orientamento sessuale*, that is to say the direct translation of the English term used in Directive 78/2000, although the Italian words used for sexual orientation in the Directive (and in art. 13 EC Treaty) are '*tendenze sessuali*' [sexual tendencies]. A first draft of the Decree used the same words, but it has been amended upon proposal of the Committee on Labour of the Chamber of Deputies²¹, following the request of some members of Parliament, of gay and lesbian organisations and of the *Confederazione Generale Italiana del Lavoro* (one of the major trade unions). The majority of scholars, in making reference to sexual orientation, does not distinguish between behaviour or identity, emotional or sexual aspects. Sexual orientation includes homosexual, heterosexual and bisexual orientation.

b) Definitions formulated within other legislation are absent (see only infra for the case of disability), and this is also the case for the concept of "religion", for which the Italian legal system does not include a statutory definition. Neither the bill on religious freedom now pending in parliament includes any general definition of "religion", "church", "belief" or "religious denomination" (*confessione religiosa*), which is the term ordinarily used when it comes to the discussion on the status of religious organisations/groups and their relation with the State. Criteria for the identification of the religious character of social groups have been developed in the case law of the Constitutional Court. The main set of standards has been set by the Court in a 1995 case²², where it is said that, in the absence of agreements with the State, the character of "religious denomination" of a social group can be established on the basis of "public recognitions" (*pubblici riconoscimenti*), or on the basis of its charter (not, alone but examined against the backdrop of the actual activity of the organisation) or on the basis of the "common opinion" (*comune considerazione*). These criteria have been applied and further detailed specially with regard to the case of Scientology, which according to the case law of the Supreme Court meets the criteria for the inclusion among the "religious denominations" protected under the Constitution.

A statutory definition out of the antidiscrimination field exists instead with regard to disability, and is contained in act n. 104/92²³, which is the basis of current legislation regarding the rights of disabled persons. This act provides a clear definition of disabled person (art. 3.1, "*Persons entitled*"), following the definition developed within the WHO in 1976²⁴: "A disabled person is anyone who has a physical, mental or sensory impairment, of a stable or progressive nature, that causes difficulty in learning, establishing relationships or obtaining employment and is such as to place the person in a situation of social disadvantage or exclusion". No new definition of disability is provided by the new law on discrimination on

²¹ Opinion of the XI Permanent Commission (Public and private labour) of the Chamber of Deputies. Act n. 217. See also XI Commission Report, 4 June 2003, p. 96.

²² *Sentenza n. 195 del 27 aprile 1993, in Foro italiano, 1994, I, 2986.*

²³ *Legge-Quadro 5 febbraio 1992 n. 104, per l'assistenza, l'integrazione sociale e i diritti delle persone handicappate, in Gazzetta Ufficiale, 17 febbraio 1992, n. 39* (Act of 5 February 1992 n. 104 on the care, social integration and rights of disabled persons, Supplement to Official Journal, n. 39 of February 17, 1992).

²⁴ *World Health Organisation. Document A29/INFDOCI/1, Geneva, Switzerland, 1976*

ground of disability out of employment, but the definition just mentioned can be considered covering the definition provided in the *Chacón Navas* case.

c) Age as a protected ground is not submitted to any general restriction in the Decree transposing Directive 78/2000, besides the exceptions described in the following at section 4 of this paper.

d) Situations of multiple discriminations are not the object of explicit treatment in legislation, nor there is any case law on them.

2.1.2 Assumed and associated discrimination

a) Does national law prohibit discrimination based on assumed characteristics? e.g. where a woman is discriminated against because another person assumes that she is a Muslim, even though that turns out to be an incorrect assumption.

a) In Italy there is no relevant legal debate on the issue of assumed characteristics. However, the wording of the Decrees and of other existing antidiscrimination rules, specially if interpreted in the light of the Constitution, seems able to include also this kind of discrimination among those prohibited. This is even more likely with regard to discrimination in employment. A discriminatory dismissal based on such a ground can hardly fall within the concept of “just cause” or “justified reason”. It is according to case law firmly excluded that personal behaviours or private facts and acts can be considered just cause or justified reason for the dismissal if they have no actual or potential negative consequences on the working activities or the nature of the employment relationship.

b) Does national law or case law prohibit discrimination based on association with persons with particular characteristics (e.g. association with persons of a particular ethnic group)? If so, how?

b) The same can be said *mutatis mutandis* concerning discrimination on the ground of a person’s association with persons with special characteristics, or with events or organisations linked to these. There is absolutely no case law on the point, but admitting discrimination of this kind could also be considered as an infringement of the freedoms of expression and association protected by articles 21 and 18 respectively of the Constitution.

2.2 Direct discrimination (Article 2(2)(a))

a) How is direct discrimination defined in national law?

a) The definition of direct discrimination is provided by the Decrees transposing the Directives, and is –as mentioned - very faithful to these. According to their article 2, direct discrimination occurs when “one person is treated less favourably than another is, has been or would be treated in a comparable situation”.

b) Does the law permit justification of direct discrimination generally, or in relation to particular grounds? If so, what test must be satisfied to justify direct discrimination? (See also 4.7.1 below).

b) Justification of direct discrimination is not admitted generally, but on the grounds related to the exceptions foreseen in the Directives with regard to professional requirements, in the forms and with the problems described *infra* under section 4.

c) *In relation to age discrimination, if the definition is based on 'less favourable treatment' does the law specify how a comparison is to be made?*

c) No indication is provided on how to realize the comparison in case of age discrimination.

2.2.1 Situation Testing

- a) *Does national law permit the use of 'situational testing'? If so, how is this defined and what are the procedural conditions for admissibility of such evidence in court.*
- b) *Is there any reluctance to use situational testing as evidence in court (e.g. ethical or methodology issues)? In this respect, does evolution in other countries influence your national law (European strategic litigation issue)?*
- c) *Outline important case-law within the national legal system on this issue.*
- d) *Outline how situation-testing is used in practice and by whom (e.g. NGOs)*

“Situational testing” is not defined nor treated in Italian law, and there are no cases reported discussing its use. In principle, situation testing can provide indicators of discrimination which can be used as any other means of evidence in civil cases. It is possible that in a case like the Padua one mentioned under 0.3 some of the persons discriminated actually had decided, in coordination with the involved NGOs, to test the behaviour of the defendant. The facts were, however, not presented as such, nor the court discussed the admissibility in principle of situational testing. It is possible that the knowledge of the practice of situational testing in other legal systems can increase its use in Italy, at least after a stronger expansion of anti-discrimination litigation.

2.3 Indirect discrimination (Article 2(2)(b))

a) *How is indirect discrimination defined in national law?*

a) Article 2 of the Decrees defines indirect discrimination as the case “where an apparently neutral provision, criterion, practice, act, pact or behaviour would put persons [follows reference to the specific grounds] at a particular disadvantage compared with other persons”.

b) *What test must be satisfied to justify indirect discrimination?*

b). Articles 3(4) (race) and 3(6) (other grounds) of the Decrees establish that “the differences in treatment that, even if indirectly discriminatory, are objectively justified by legitimate aims carried out through appropriate and necessary means, are not discriminatory acts (...)”²⁵. The first draft of the Decree referred to “adequate and proportionate means”, but since the notion of proportionality was elaborated by Italian courts with reference to the concept of indirect discrimination on the grounds of gender, with different implications, the final version is more appropriate. It can be interesting to remark that article 3(6) continues saying that “[I]n particular, the acts directed to exclude from a working activity concerning care, assistance, education of minors those persons who have been condemned for offences related to sexual freedom of minors or child pornography are legitimate”²⁶. This provision has quite limited practical implications, since the dismissal on the ground of criminal conviction is always lawful once the crime is related to the working activity, nor it is understandable what of the

²⁵ *‘Non costituiscono comunque atti di discriminazione (...) quelle differenze di trattamento che, pur risultando indirettamente discriminatorie, siano giustificate oggettivamente da finalità legittime perseguite attraverso mezzi appropriati e necessari’.*

²⁶ *‘In particolare, resta ferma la legittimità di atti diretti all’esclusione dallo svolgimento di attività lavorativa che riguardi la cura, l’assistenza, l’istruzione e l’educazione di soggetti minorenni nei confronti di coloro che siano stati condannati in via definitiva per reati che concernono la libertà sessuale dei minori e la pornografia minorile’.*

grounds of the Directives can be relevant in case of a criminal conviction of the kind here described, at least if one refuses the inclusion of paedophilia among sexual orientations. It is clear that the roots of this provision are to be explained on a purely political and symbolic plan which is not relevant here, since in any case we are not facing a formal violation of the Directive.

c) Is this compatible with the Directives?

The test as described above is in line with the Directives.

d) In relation to age discrimination, does the law specify how a comparison is to be made?

No specification is made in relation to age discrimination.

2.3.1 Statistical Evidence

a) Does national law permit the use of statistical evidence to establish indirect discrimination? If so, what are the conditions for it to be admissible in court.

b) Is the use of such evidence commonly used? Is there any reluctance to use statistical data as evidence in court (e.g. ethical or methodology issues)? In this respect, does evolution in other countries influence your national law?

c) Please illustrate the most important case law in this area.

a-b-c) There have not been in Italy cases involving discrimination in the fields covered by the directives (unlike gender discrimination) where statistics played a significant role. According to the decrees transposing directives 43/2000 and 78/2000 (identical wording, articles 4.3 and 4.4 respectively), if the person who considers himself or herself wronged by discrimination submits elements of fact suitable to establish “serious, exact and consistent elements” about the existence of a direct or indirect discrimination, *also on the basis of statistical data*, the judge can evaluate such elements on the basis of the rule of the Civil Code (article 2729²⁷) allowing a “prudent appreciation” of presumptions. In the Italian context, where antidiscrimination litigation is scarce, there has not yet been an opportunity to rely on this provision. It is possible that the knowledge of the importance of statistical evidence in other legal systems can increase its use in Italy, at least after a stronger expansion of anti-discrimination litigation.

d) Are there national rules which permit data collection? Please answer in respect of all 5 grounds.

Employers are prohibited by article 8 of the Workers’ Act (*Statuto dei lavoratori*, act 1970/300) to collect information on their employees concerning “their political, religious, trade-unionist ideas, or facts which are not relevant for the evaluation of the professional skills of the worker”. Information concerning these issues can exist in the files of the employer for different specific purposes in the interest of the employer (for instance, special benefits for disabled persons, special menus for religious purposes). Data on racial and ethnic origin, religious beliefs and those that can disclose health conditions and sexual life (thus all information on disability and sexual orientation), are considered as “sensitive data” according to art. 22 of the Data Protection Act²⁸ which regulates data collection within and outside

²⁷ Art. 4(4) of the Decree: *‘Il ricorrente, al fine di dimostrare la sussistenza di un comportamento discriminatorio a proprio danno, può dedurre in giudizio, anche sulla base di dati statistici, elementi di fatto, in termini gravi, precisi e concordanti, che il giudice valuta ai sensi dell’articolo 2729, primo comma, del codice civile’.*

²⁸ Legge n. 675 del 31 dicembre 1996, *Tutela delle persone e di altri soggetti rispetto al trattamento dei dati personali.*

employment, and are therefore of extremely restricted access, and can be stored and treated only with the authorization of the individuals concerned and of the State Agency for the Protection of Privacy.

2.4 Harassment (Article 2(3))

a) *How is harassment defined in national law? Include reference to criminal offences of harassment insofar as these could be used to tackle discrimination falling within the scope of the Directives.*

The Decrees contain the first statutory definition of harassment introduced in the Italian legal system. The two Decrees use the same wording (taken from the Directives), with a difference of detail which is probably a mistake due to hasty drafting, as it can be seen from legislative history. The Decree concerning race and ethnicity says indeed that the unwanted conduct must have the effect of “creating an intimidating, hostile, degrading, humiliating *and* offensive environment” (while the Directive says *or*). The Decree concerning Directive 78/2000 corresponds instead to the Directive.

Until recently it was easy to classify this textual difference as a pure *lapsus calami* without implications for interpretation. This view must now probably be revised if one considers that a recent decree²⁹ corrected some other formal mistakes of both decrees (something which is revealing of the low quality of the drafting work), without making mention of this point, which should have been quite striking for the reader. Formally, we are therefore facing to a violation – albeit a minor one – of Directive 43/2000.

Notwithstanding the lack until recently of statutory definitions, scholars and case law, however, previously developed a set of principles which to a considerable extent corresponded to the idea of harassment, and provided protection in situations comparable to those foreseen by the Directives. Much has been done for instance under the label of “mobbing”. This notion can still be useful in some cases that could not be precisely covered by the Decrees, since the courts have identified a ground for civil liability in some articles of the Civil Code as article 2087, bearing on the duty of protection of the employer³⁰ and article 2103³¹ concerning duties assigned to the employee (as well as article 2043 on damage compensation), and the case law in the field is now abundant³². Criminal liability can be established in some extreme cases, but the procedural and evidentiary implications of the use of criminal law make it a quite impractical tool for protection against harassment. Although the case law does not seem to include cases of harassment or “mobbing” based on the grounds of discrimination foreseen by the Directives, the approaches developed are fully applicable to our context, and build a legal regime potentially concurring with those of the Decrees.

b) *Is harassment prohibited as a form of discrimination?*

Harassment is clearly defined as a form of discrimination in the Decrees.

²⁹ Decreto legislativo 2 agosto 2004, n. 256, “Correzione di errori materiali nei decreti legislativi 9 luglio 2003, n. 215 e n. 216, concernenti disposizioni per la parità di trattamento tra le persone indipendentemente dalla razza e dall’origine etnica, nonché in materia di occupazione e condizioni di lavoro”, in Gazzetta Ufficiale n. 244 del 16 ottobre 2004.

³⁰ Art. 2087 Civil Code: ‘The entrepreneur must adopt, in the exercise of the business, and according to the nature of the work, the experience and the technique, the necessary measures to protect the physical integrity and the moral personality of the workers’.

³¹ Art. 2103 Civil Code: ‘The worker must be assigned to the tasks [*mansioni*, i.e. the position and all the activities which make up that position] for which he was recruited, or to the tasks related to the superior category successively reached, or to the last actually carried out tasks, without any cut of his/her salary. If the worker is assigned to superior tasks, he/she has the right to the treatment corresponding to the activity carried out; the assignment cannot be modified, unless the worker substituted another worker who has the right to be reinstated (...). The worker can be transferred to other productive units only if the organization, production or technical needs are proved’.

³² See S.Mazzamuto, *Il mobbing*, Milano, Giuffrè, 2004, including the text of relevant decisions.

c) Are there any additional sources on the concept of harassment (e.g. an official Code of Practice)?

There are no additional sources on the concept of harassment which are valid and binding at the national level. Codes of practice have been identified within specific fields and administrations.

2.5 Instructions to discriminate (Article 2(4))

Does national law prohibit instructions to discriminate?

In the Decrees instructions to discriminate are declared equated with ordinary discrimination in article 2(4) of both texts.

2.6 Reasonable accommodation duties (Article 2(2)(b)(ii) and Article 5 Directive 2000/78)

a) How does national law implement the duty to provide reasonable accommodation for disabled people? In particular, specify when the duty applies, the criteria for assessing the extent of the duty and any definition of ‘reasonable’. e.g. does national law define what would be a "disproportionate burden" for employers or is the availability of financial assistance from the State taken into account in assessing whether there is a disproportionate burden?

b) Does failure to meet the duty count as discrimination? Is there a justification defence? How does this relate to the prohibition of direct and indirect discrimination?

c) Has national law implemented the duty to provide reasonable accommodation in respect of any of the other grounds?

d) Does national law require buildings and infrastructure to be designed and built in a disability-accessible way? If so, could and has a failure to comply with such legislation be relied upon in a discrimination case based on the legislation transposing Directive 2000/78?

a-b-c) The Italian government decided not to include the requirement of “reasonable accommodation” in the decree transposing Directive 78/2000, where it is not mentioned. There is therefore no clear statutory ground to establish whether failure to meet the duty will count as discrimination, or to establish the extent of any justification defence. This is an exception to the general style of the Decrees, which otherwise tried to transplant in their text the wording of the Directives.

In the absence of a general duty on the employer to provide reasonable accommodation, one has to evaluate whether provisions of other statutes achieve similar effects. The Italian legislation relating to the problems of people with disabilities is extensive, and includes very different actions concerning arrangements in the educational system, support to integration by local authorities, and so on. Rules of this kind are contained in the “framework act” of February 1992 n. 104 on the care, social integration and rights of disabled persons³³. This act represented a radical change compared to previous legislation, which was almost exclusively based on assistance in specific sectors, but it still contains a quite fragmented policy, dealing with specific categories of disabled people or specific needs and rights (economic support, health, education, mobility, etc.). This law, however, does not prescribe a general equal treatment duty for the employer.

The author does not believe that the content of the present legislation and of that mentioned under the following point, is functionally equivalent to the duty introduced by

³³ Legge-Quadro 5 febbraio 1992 n. 104, per l’assistenza, l’integrazione sociale e i diritti delle persone handicappate, Gazzetta Ufficiale, 17 febbraio 1992, n. 39.

article 5 of Directive 78/2000, since the general obligation of the Directive is hardly compatible with the many exceptions (for instance, for minor enterprises and categories of disabilities), and the acts just mentioned do not contain any provision formulated in such broad terms as those of the directives. The case from Pistoia referred above, where the court makes an autonomous reference to article 5 of the Directive, represents however an interesting development.

d) Italian law foresees a complex set of rules for the elimination of *barriere architettoniche*, i.e. obstacles to the free movement of disabled peoples, with certain standards for public buildings, and incentives for the adaptation of private ones³⁴. The violation of the requirements contained in these rules which have a mandatory character could certainly be considered as a form of discrimination.

2.7 Sheltered or semi-sheltered accommodation/employment

- a) *To what extent does national law make provision for sheltered or semi-sheltered accommodation/employment for disabled workers?*
 b) *Would such activities be considered to constitute employment under national law?*

a-b) A further important piece of legislation is that promulgated on March 1999 (Act n. 68/99)³⁵ containing new rules on the right to work of disabled persons, which represents the most important instrument on such matter before the introduction of Directive 78/2000. The act promotes access to work for disabled people, through a compulsory employment quota system, establishing that the same standards of legislative and collectively agreed treatment must apply to disabled workers as to other workers. It is applicable to public and private agencies and enterprises with more than 15 employees. These positive actions are described under 5.

Different regulations have been introduced in order to implement this act. Specially relevant is for instance the decree of the President of the Council of Minister issued in January 2000 and containing the guidelines for the compulsory employment of Disabled Persons³⁶.

3. PERSONAL AND MATERIAL SCOPE

3.1 Personal scope

3.1.1 EU and non-EU nationals (Recital 13 and Article 3(2) Directive 2000/43 and Recital 12 and Article 3(2) Directive 2000/78)

Are there residence or citizenship/nationality requirements for protection under the relevant national laws transposing the Directives?

The Decrees – as well as the pre-existing antidiscrimination provisions of immigration law – apply to all persons without requirements of citizenship or nationality. The exclusion of nationality from their field of application – formally in line with the Directives- implies, however, some problems described under the relevant section *infra* at 4.4.

³⁴ Legge 9 gennaio 1989, n. 13 Disposizioni per favorire il superamento e l'eliminazione delle barriere architettoniche negli edifici privati, in Gazzetta Ufficiale, 26 gennaio 1989, n. 21; Decreto del Presidente della Repubblica 24 luglio 1996, n. 503, in Gazzetta Ufficiale, S.O., 27 settembre 1996, n. 227.

³⁵ Legge 12 marzo 1999, n. 68: Norme per il diritto al lavoro dei disabili, pubblicata nel Supplemento Ordinario n. 57/L alla Gazzetta Ufficiale 23 marzo 1999

³⁶ Decreto del Presidente del Consiglio dei Ministri, 13 gennaio 2000, Atti di indirizzo e coordinamento in materia di collocamento obbligatorio dei disabili a norma dell'art. 1, comma 4 della legge 12 marzo 1999 n. 68, in Gazzetta Ufficiale, 13 gennaio 2000 n. 43.

3.1.2 Natural persons and legal persons (Recital 16 Directive 2000/43)

Does national law distinguish between natural persons and legal persons, either for purposes of protection against discrimination or liability for discrimination?

The prohibition of discrimination provided by the Decree and the anti-discriminatory provisions of pre-existing labour law statutes apply to all natural and legal persons, including organizations of workers and employers.

3.1.3 Scope of liability

What is the scope of liability for discrimination (including harassment and instruction to discriminate)? Specifically, can employers or (in the case of racial or ethnic origin) service-providers (e.g. landlords, schools, hospitals) be held liable for the actions of employees? Can they be held liable for actions of third parties (e.g. tenants, clients or customers)? Can the individual harasser or discriminator (e.g. co-worker or client) be held liable? Can trade unions or other trade/professional associations be held liable for actions of their members?

The Decrees are silent concerning the scope of liability for discrimination, and since the sanctions provided are civil sanctions (primarily the payment of damages), the extension of the liability of persons different from the individual harasser must be established on the basis of the general principles of liability in contract and tort. In the case of a contractual relationship, like that between employer and employee, the debtor is liable for the fault of persons he is relying upon in order to implement his contractual obligations³⁷. This is for instance the case of harassment, where one of the obligations of the employer is that mentioned above of ensuring protection in the working environment. Also in the absence of a contractual relationship with the discriminated (even in the form of harassment) person, the employer will be held liable in tort on the basis of the general principle of liability of the master for the acts of his servant³⁸ (acts committed performing their duties). Liability is not however without limits, since it does not extend to acts which are not linked to the working place or the performance of professional duties, and problems can arise when the discriminating activity (like harassment) takes place partly on the working place and partly outside of it³⁹. The individual worker who harassed somebody can always be held liable as an individual, apart from the action against his master.

Liability for acts of third parties is more limited, and must be linked to a direct act or omission of the defendant. The individual harasser or other discriminator is jointly liable with his master. If the employer or other principal defendant is liable without personal fault, or on the basis of a slighter degree of fault, he can bring an action against the discriminator to obtain the complete or partial refund of the amount paid as damages.

There is in my opinion no ground for holding trade unions and professional associations liable for the actions of their members, if they did not contribute actively to the discriminating activity (for instance, in case of instructions to discriminate).

³⁷ Article 1228 Civil Code.

³⁸ Article 2049 Civil Code.

³⁹ See on these problems S.Mazzamuto, cit. pp. 57 ff.

3.2 Material Scope

3.2.1 Employment, self-employment and occupation

Does national legislation apply to all sectors of public and private employment and occupation, including contract work, self-employment, military service, holding statutory office?

The Decrees in general apply to all sectors of public and private employment, although some restrictions apply to specific fields, as detailed in the following. In some cases restrictions can be extensive, like in the case of armed forces, but are not technically built as exclusions from the material scope of application of the new legislation transposing the Directives, but as a specification that the new act does not prejudice the validity of other legislation presently in force.

3.2.2 Conditions for access to employment, to self-employment or to occupation, including selection criteria, recruitment conditions and promotion, whatever the branch of activity and at all levels of the professional hierarchy (Article 3(1)(a))

Is the public sector dealt with differently to the private sector?

The key provision (Article 3(1)) on material scope of the Decrees transposing the Directives expressly establishes that the prohibition of discrimination and the related judicial remedies apply to all persons in the public and private sectors with reference to the following fields

For both decrees:

- a) access to employment, to self-employment or to occupation, including selection criteria and recruitment conditions;
- b) employment and working conditions, including promotions, dismissals and pay;
- c) access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience;
- d) membership of, and involvement in, an organisation of workers or employers, or any organisation, whose members carry on a particular profession, including the benefits provided for by such organisations.

For the decree transposing Directive 43/2000 must be added:

- a) social protection, including social security
- b) health care
- c) education
- d) access to goods and services, included housing

The area is fully and expressly covered by the Decrees. Although the second part of the sentence is not reproduced, no distinctions apply for branch of activity or level of professional hierarchy. A problematic point concerns the exclusion of the applicability of the decree to the access to employment of third country nationals (see *infra* at 4.4).

It must again be stressed that the scope of application of the Decrees partly correspond to other pre-existing legislation still in force. It is the case primarily of the Immigration Act of 1998 which offers a protection mostly overlapping with that of the Decrees. Before the

development of general antidiscrimination rules, labour law already knew a good level of protection. On the basis of the Workers' Act (*statuto dei lavoratori*) of 1970⁴⁰ nobody can be dismissed, or discriminated – even indirectly - in the assignment of qualifications or duties, in transfers, in disciplinary proceedings, or suffer otherwise harm, for political, religious, racial, linguistic reasons or because of gender, a list to which the decree transposing Directive 78/2000 added the grounds of disability, age, sexual orientation and personal beliefs. A dismissal based on such grounds is explicitly declared as void⁴¹, and in the Italian legal system this brings to *both* the award of damages and to an order of the judge to the employer to “reintegrate” the worker in his/her employment⁴². Also forbidden, and punished with heavy pecuniary sanctions, are collective economic privileges in favour of special groups of workers identified on the grounds of prohibited discrimination⁴³. The antidiscrimination provisions apply to both private and public sector. In the later field, the highly formalised rules on recruitment and career make discrimination less likely.

3.2.3 Employment and working conditions, including pay and dismissals (Article 3(1)(c))

a) Note that this can include contractual conditions of employment as well as the conditions in which work is, or is expected to be, carried out.

The area is fully and expressly covered by the Decrees for all the grounds of the two Directives, plus nationality on the basis of the Immigration Act 1998. Contractual and non-contractual conditions of employment should be both covered according to general principles of labour law.

b) In respect of occupational pensions, how does national law ensure the prohibition of discrimination on all the grounds covered by Directive 2000/78 ?

Occupational pensions are built in a very formalized way which do not allow to take into consideration factors different from age, gender and kind of profession. Indirect discrimination on one of the grounds concerned by directive 78/2000 could be attacked on the basis of general constitutional equal treatment principles.

3.2.4 Access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience (Article 3(1)(b))

Note that there is an overlap between ‘vocational training’ and ‘education’. For example, university courses have been treated as vocational training in the past by the Court of Justice. Other courses, especially those taken after leaving school, may fall into this category. Does the national Anti-discrimination law apply to vocational training outside the employment relationship, such as that provided by technical schools or universities ?

The area is fully and expressly covered by the Decrees for all the grounds of the two Directives. Disabled children are placed in mainstream education with support of specialised tutors assisting ordinary teachers, and they can in no way be denied access to education at any level including universities. There is no legislation authorising any form of segregation. Act

⁴⁰ Legge 20 maggio 1970, n. 300, art. 15, comma 2..

⁴¹ Legge 15 luglio 1966, n. 604, art. 4 (as amended in 1970 and 1990).

⁴² The order of “reintegration” following unfair dismissal ordinarily applies only to employers having a minimum number of workers (*i.e.* in case of small companies the only remedy is represented by damages), but such a limit does not apply to discriminatory dismissals.

⁴³ Legge 20 maggio 1970, n. 300, art. 16.

1992/104 provides at articles 12 ff. a comprehensive set of rules on integration in all levels of education including professional education, and the same applies to universities. Implementation problems can arise, but they are not linked to any deficiencies in legislation.

3.2.5 Membership of, and involvement in, an organisation of workers or employers, or any organisation whose members carry on a particular profession, including the benefits provided for by such organisations (Article 3(1)(d))

The area is fully and expressly covered by the Decrees for all the grounds of the two Directives, plus nationality on the basis of the Immigration Act 1998 (a first draft of the Decrees did not include membership, but this was included again in the final text).

3.2.6 Social protection, including social security and healthcare (Article 3(1)(e) Directive 2000/43)

In relation to religion or belief, age, disability and sexual orientation, does national law seek to rely on the exception in Article 3(3), Directive 2000/78?

The decree transposing Directive 43/2000 fully and expressly covers this area, for race and ethnicity. Religion and nationality are covered grounds on the basis of the Immigration Act 1998. The other decree expressly establishes (article 3(2)(b)) that its content shall be without prejudice to the provisions already in force concerning social security and social protection.

3.2.7 Social advantages (Article 3(1)(f) Directive 2000/43)

This covers a broad category of benefits that may be provided by either public or private actors granted to people because of their employment or residence status, for example, e.g. reduced rate train travel for large families, child birth grants, funeral grants and discounts on access to municipal leisure facilities. It may be difficult to give an exhaustive analysis of whether this category is fully covered in national law, but you should indicate whether national law explicitly addresses the category of 'social advantages' or if discrimination in this area is likely to be unlawful.

The decree transposing Directive 43/2000 expressly covers this area. Religion and nationality are covered grounds on the basis of the Immigration Act 1998, and the new law against discrimination of disabled people (act 2006/67), with its broad scope of application, it is likely to be applicable. It must, however, be noted that exclusion from social advantages can be most easily be linked to requirements of nationality (see also under housing). The Constitutional Court quashed, for instance, a regional law of *Regione Lombardia* which excluded non-Italian citizens from the benefit of free public transport granted to persons with total disabilities⁴⁴.

3.2.8 Education (Article 3(1)(g) Directive 2000/43)

This covers all aspects of education, including all types of schools. Please also consider cases of segregation in schools, affecting notably the Roma community. If these cases exist, please refer also to relevant legal/political discussions that may exist in your country on the issue.

⁴⁴ Corte costituzionale, sentenza 28 novembre 2005.

The decree transposing Directive 43/2000 expressly covers this area. Religion and nationality are covered grounds on the basis of the Immigration Act 1998. No type of school is excluded. For disabled children/adults see the evaluation under 3.2.4. Cases of discrimination on ground of ethnicity have not a central role in legal/political debate. Inclusion of Roma children in classes has been sometimes cause of overreaction by a majority of parents, but recent cases of special problems are not reported, and there is no basis to say that there are marked discriminatory patterns, being the obstacles to schooling of Roma children more linked to other problems than discrimination in school admission.

3.2.9 Access to and supply of goods and services which are available to the public (Article 3(1)(h) Directive 2000/43)

Does the law distinguish between goods and services available to the public (e.g. in shops, restaurants, banks) and those only available privately (e.g. limited to members of a private association)? If so, explain the content of this distinction.

The decree transposing Directive 43/2000 expressly covers this area, with no distinction of the kind above mentioned. Religion and nationality are covered grounds on the basis of the Immigration Act 1998, while disability is covered through the new law against discrimination of disabled people (act 2006/67).

3.2.10 Housing (Article 3(1)(h) Directive 2000/43)

To which aspects of housing does the law apply? Are there any exceptions?

The decree transposing Directive 43/2000 expressly covers this area, mentioning “housing” without further distinctions, thus including both private and public ones. Religion and nationality are covered grounds on the basis of the Immigration Act 1998, while disability is covered through the new law against discrimination of disabled people (act 2006/67). The problem of housing is relevant with regard to rules which are beyond the scope of application of the Directive, since limitation to access to public housing for ethnic and religious groups can be a practical effect of discrimination formally based on nationality. See infra sub 4.4. Recently a debate is developing on the existence of a discrimination against the Roma that would have its most visible sign in the existence of “camps” established by the local authorities, leading to segregation. None has, however, yet tried to put the problem of camps in the framework of antidiscrimination law nor significant litigation has been attempted. The absence of an absolute right to be provided housing makes litigation difficult.

4. EXCEPTIONS

4.1 Genuine and determining occupational requirements (Article 4)

Does national law provide an exception for genuine and determining occupational requirements? If so, does this comply with Article 4 of Directive 2000/43 and Article 4(1) of Directive 2000/78?

The first part of article 3(3) of both Decrees establishes that “in compliance with the principles of proportionality and reasonableness” (*proporzionalità e ragionevolezza*), within the employment relationship or the entrepreneurial activity, differences in treatment due to characteristics related to the different grounds foreseen in the Directives are not considered as discriminatory acts where, “by reason of the nature of the particular occupational activity concerned or of the context in which it is carried out, such characteristics constitute a genuine and determining occupational requirement for its carrying out”. No definition is given of

“proportionality” and “reasonableness”. The substitution of the requirement of “legitimate objective” with “reasonableness” has been criticised, since it can allow a broader discretion in admitting exceptions to equal treatment, but the courts may not give a significantly different meaning to the provision on the basis of this wording.

In the case of the decree transposing Directive 78/2000, the same section establishes also that it is not considered as a discrimination “the evaluation of such characteristics when they are relevant to establish whether a person is suitable to carry out the functions that the armed forces, and the police, prison and rescue services can be called to carry out”, while the following section establishes (without distinction between the different grounds of discrimination) that “however, the provision remain unaffected which impose a control of suitability for a specific occupation and the provisions admitting the possibility of differential treatments with regard to adolescents and young people linked to the special nature of the occupation and to legitimate objectives of labour policy, labour market and professional education”. The inclusion of all the grounds under this provision on “work suitability tests” provides probably too much discretion in admitting exceptions to equal treatment going beyond the case of genuine and determining occupational requirements.

4.2 Employers with an ethos based on religion or belief

a) *Does national law provide an exception for employers with an ethos based on religion or belief? If so, does this comply with Article 4(2) of Directive 2000/78?*

b) *Are there any specific provisions or case-law in this area relating to conflicts between the rights of organisations with an ethos based on religion or belief and other rights to non-discrimination?*

a-b) Article 3(5) of the Decree transposing Directive 78/2000 establishes that “differences in treatment based on religion or belief and enacted within churches and other public or private organisations, do not constitute discriminatory acts where, by reason of the nature of the particular occupational activity carried out by such entities or organisations or of the context in which they are carried out, such religion or belief constitutes a genuine, legitimate and justified occupational requirement”. The provision corresponds to article 4(2) of the Directive with the exception that it makes reference to “churches and other public or private organisations” without specifying that also the ethos of the latter must be based on religion or belief. This textual difference raises problems because of the risk of its use in order to admit discrimination by public and private organisations the ethos of which is not actually based on religion or belief.

But even beyond this textual problem which can – maybe – be the result of a further drafting mistake, the choice of the Italian legislator is in the opinion of the author not compatible with the Directive⁴⁵, since this does not allow the member States to introduce in the context of transposition exceptions to equal treatment for the needs of churches and similar organisations which are broader than those already existing (in legislative or other form) in the legal system when the directive was adopted.

In the Italian legal system, on the legislative (statutory law) plan, the only explicit exception to equal treatment is represented by a section of an Act of 1990⁴⁶ concerning among other things *organizzazioni di tendenza*, defined as “employers of a non-entrepreneurial character that perform on a no-profit basis political, trade unionist, cultural instruction or religion or cult activities”. This act only limits the remedies available in case of unfair dismissal. The worker unfairly dismissed by an organisation covered by the 1990 provision will be entitled

⁴⁵ See on this point and in the same line extensively N.Fiorita, “Le direttive comunitarie in tema di lotta alla discriminazione, la loro tempestiva attuazione e l’eterogenesi dei fini”, in *Quaderni di diritto e politica ecclesiastica*, 2004, pp. 361 ff.

⁴⁶ *Legge 11 maggio 1990 n. 108, Disciplina dei licenziamenti individuali*, art. 4 (Regulation of individual dismissals).

only to damages and not to the reintegration in his/her position upon order of the judge as in ordinary cases.

With arguments partly based on the existence of this limited legislative provision, and partly on constitutional grounds, judges and scholars (in a very intricate debate which cannot be described here in all its nuances) have admitted a discretionary power of the employer whether to hire or dismiss, or otherwise discriminate. Also the exceptions to equal treatment as developed by case law are, however, more limited than those foreseen in the decree transposing directive 78/2000⁴⁷. Any discretion is thus excluded for organisations working on a profit basis and when the duties of the individual worker have not an actual link with the ideology of the organisation⁴⁸. The provision of the decree attributes thus to employers with an ethos based on religion and belief (and potentially to all employers, if one makes a literary interpretation) a power they did not enjoy before the adoption of the directive.

4.3 Armed forces and other specific occupations

a) *Does national law provide for an exception for the armed forces in relation to age or disability discrimination (Article 3(4), Directive 2000/78)?*

b) *Are there any provisions or exceptions relating to employment in the police, prison or emergency services (Recital 18, Directive 2000/78)?*

a) The Decree transposing Directive 78/2000 establishes (article 3.2 e) that it does not affect the validity of rules presently in force concerning the armed forces in relation to age and disability.

b) The Decree transposing Directive 78/2000 establishes (article 3.3) that “the evaluation of such characteristics [all the grounds of the Directive] when they are relevant to establish whether a person is suitable to carry out the functions that the armed forces, and the police, prison and rescue services can be called to carry out” is not considered as discrimination⁴⁹. It can be questioned whether this provision is fully in line with Directive 78/2000, since it establishes an exception to the application of the principle of equal treatment on ground of religion and belief, disability, age and sexual orientation which goes beyond that mentioned by recital 18 of the Directive. This recital, in fact, focuses on the required capacities, without considering religion, sexual orientation, disability and age as a justification *per se* for an exception and the object itself of the evaluation of the required capacities. Therefore, art. 3(3) goes beyond “the legitimate objective of preserving the operational capacity of those services” (which is not mentioned by the Decree).

4.4 Nationality discrimination

Both the Race Directive and the Framework Employment Directive include exceptions relating to difference of treatment based on nationality (Art 3(2) in both Directives).

a) *How does national law treat nationality discrimination?*

b) *Are there exceptions in anti-discrimination law that seek to rely on Art 3(2)?*

a-b) Discrimination on ground of nationality is explicitly excluded from the scope of application of the Decrees, as are all legal rules concerning immigration, work, and assistance

⁴⁷ Cass. 13 luglio 1995, n. 7680 Cass, S.U. 11 aprile 1994, n. 3353 Cass. 12 ottobre 1995, n. 10636.

⁴⁸ In the religious field, the limits of such discretionary power have been discussed primarily with regard to Catholic schools, as regards the tenure of teachers and other staff. In this context, however, the problem was not so much that of discrimination between different religions or beliefs, but internal control of the respect of moral codes (for instance, requiring religious marriage instead than civil marriage)

⁴⁹ Art. 3(3) of the Decree: ‘(...) non costituisce atto di discriminazione la valutazione delle caratteristiche suddette ove esse assumano rilevanza ai fini dell’idoneità allo svolgimento delle funzioni che le forze armate e i servizi di polizia, penitenziari o di soccorso possono essere chiamati a esercitare’.

to citizens of non-EU countries. The exclusion of discrimination on ground of nationality, although admitted by the Directive, raises problems, since in Italy racial discrimination is often disguised under the appearance of discrimination against “non-EU citizens”, which can lead to indirect discrimination.

The practical importance of the problem is shown by a decision of the Court of first instance in Milan that applied the antidiscrimination provisions of the 1998 Immigration Act to declare the voidness of the regulation on public housing emanated by the town council, in the part which established that Italian citizens had a certain degree of priority when public accommodations had to be assigned. This decision, which is an application of the prohibition of discrimination on ground of nationality, raised strong political reactions from representatives of *Lega Nord* (which proposed the introduction of the priority for Italian citizens). The decision, which also granted damages (2500 Euro each) to the three plaintiffs, was the first known application of the antidiscrimination provisions of the 1998 Immigration Act against public bodies⁵⁰. Although the case was decided as one of direct discrimination on the basis of nationality, it was clear that the political decision behind it was taken in a context where the ethnic identity of the foreign citizens involved was a crucial factor. It must be also mentioned that proposals for a “national priority” in public housing are increasingly popular. In the first draft of the recent reform of immigration law, the government included a section where it was established that foreigners could have access to facilities for public housing only within the limits of 5% of resources available⁵¹. The provision has been in the following deleted, but including however quite restrictive requirements for the access to public housing. It is clear that any restriction to access to public housing for “foreigners” have a significantly greater impact on persons with non Western/non European racial and ethnic identities (and the groups actually targeted easily appear from the minutes of political assemblies). Nationality discrimination is presently still covered by the 1998 Immigration Act, which offers a protection similar to that offered by the Directives and that has been expressly left into force by the Decrees. Concerning discrimination on ground of nationality, where there is no supranational link, the Immigration Act can be of course derogated by later statutes.

A further doubt concerning the appropriateness of the technique of transposition can be mentioned with regard to access to employment. Both decrees (at article 3.2) exclude immigration law from their own scope of application. This exclusion applies not only to the rules on entry and residence of third country nationals (as per the Directives) but also to their “access to employment” (and assistance and welfare), regarding which, in the view of the author, they should instead be protected.⁵²

4.5 Work-related family benefits

Some employers, both public and private, provide benefits to employees in respect of their partners. For example, an employer might provide employees with free or subsidised private health insurance, covering both the employee and their partner. Certain employers limit these benefits to the married partners or unmarried opposite-sex partners of employees. This question aims to establish how national law treats such practices. Please note this question is focused on benefits provided by the employer. We are not looking for information on state social security arrangements.

⁵⁰ Tribunale di Milano, sez. I, sentenza 20/21 3.2002 n. 3624, published in *Diritto, Immigrazione e Cittadinanza*, 4, 2002, with a comment by Alessandro Simoni.

⁵¹ D.d.l. XIV-795 (modifiche all'articolo 40 d.l. 286/1998), approvato il 28.2.2002, art. 24, co. 1.

⁵² Article 3(2) of both Directives provides that: "This Directive does not cover difference of treatment based on nationality and is without prejudice to provisions and conditions relating to the entry into and residence of third-country nationals and stateless persons on the territory of Member States, and to any treatment which arises from the legal status of the third-country nationals and stateless persons concerned."

(a) Does national law permit an employer to provide benefits that are limited to those employees who are married?

(b) Does national law permit an employer to provide benefits that are limited to those employees with opposite-sex partners?

a-b) Policies aiming at extending the benefits to same-sex partners are still rare⁵³. As far as collective agreements and the law are concerned, marital status has been used to justify differences in treatment (for unmarried different-sex and same-sex partners), even if the current trend is to extend the recognition of some rights to de facto cohabitants. Indeed, with respect to the regulation of bereavement and compassionate leave, act 53/2000⁵⁴, and the consequent Regulation adopted by the Decree of the Prime Minister 278/2000⁵⁵, extend this right in cases of infirmity or death of the '*convivente anagrafico*' [stable cohabitant]⁵⁶. These provisions, therefore, cover same-sex partners. As a consequence of these rules, many collective agreements extend to cohabitants (without having regard to sexual orientation) the rights to leave or temporary retirement⁵⁷.

Many problems for same-sex partners derive from the limitation of several benefits to married couples (Italy does not recognise same-sex marriage or registered partnerships). A major discriminatory consequence affecting unmarried partners in general concerns the pension system, with particular reference to survivors' pensions: according to the revised Royal Decree 636/1939⁵⁸, only the spouse of the worker in the public or private sector is entitled to be the beneficiary of the pension. The legitimacy of this provision has been recently confirmed by the Constitutional Court⁵⁹.

Considering that article 3(1)(b) of the Decree has implemented article 3(1)(c) of the Directive, it is possible to argue that the denial of the extension to same-sex partners of the benefits granted to opposite-sex cohabitants constitutes direct discrimination being, in fact, not a direct consequence of the national law, but rather the consequence of the initiative of the employer.

Article 3(2)(d) explicitly states that the Decree shall be without prejudice to the provisions already in force concerning marital status and the benefits dependent thereon, as provided by recital 22 of the Directive: however, it could be possible to challenge the different treatment

⁵³ The health insurance of the professional category of journalists (*CASAGIT*) extends its benefits to de facto cohabitants, expressly including same-sex partners (see: www.casagit.it).

⁵⁴ *Legge 8 marzo 2000, n. 53, Disposizioni per il sostegno della maternità e della paternità, per il diritto alla cura e alla formazione e per il coordinamento dei tempi delle città* [Act no. 53 of 8 March 2000, Provisions to support motherhood and fatherhood, on the right to care and formation, on the co-ordination of time in cities], (*Gazzetta Ufficiale* no. 60 of 13 March 2000).

⁵⁵ *Decreto Presidenza del Consiglio dei Ministri - Dipartimento per gli affari sociali 21 luglio 2000, n.278, Regolamento recante disposizioni di attuazione dell'articolo 4 della legge 8 marzo 2000, n. 53, concernente congedi per eventi e cause particolari* [Decree of the President of the Council of Ministers– Department for Social Affairs no. 278 of 21 July 2000, Regulation concerning provisions for the implementation of article 4 of the Act no. 53 of 8 March 2000, concerning leaves for particular causes and events].

⁵⁶ The Act makes reference to the *famiglia anagrafica* [registered family] as defined by article 4 of the Presidential Decree no. 223 of 30 May 1989: this registration is conceived for residence purposes, has no legal consequences and, despite the grounds on which leave may be granted, cannot be considered as a form of recognition of de facto couples. The right to a leave is provided as well for non-cohabiting relatives (e.g. brothers/sisters, grandparents, grandsons/granddaughters).

⁵⁷ See as example the national collective agreement for postal workers of 11 January 2001. The regulation for the *Confederazione Generale Italiana del Lavoro* employees even grants a substitutive marriage-licence for same-sex and different-sex cohabitants. In other cases collective agreements do not yet include rights for cohabitant: for instance, the national collective agreement for workers in metallurgical and mechanical industry of 8 June 1999 excludes de facto partners from damage compensation for worker's death or from benefits in case the worker has to leave her/his residence. Temporary retirement ('*aspettativa*') is a period during which a worker may be temporarily substituted, although they maintain the right to keep their workplace even if after a period of time they are no longer entitled to their salary.

⁵⁸ *Regio decreto 14 aprile 1939, n. 636, Disposizioni in materia di pensioni* [Royal Decree no. 636 of 14 April 1939, Provisions on pensions] (converted and revised by Act no 1272 of 6 July 1939).

⁵⁹ *Corte Costituzionale*, 3 November 2000, no. 461.

based on marital status, as provided by a collective agreement or by employers, as a form of indirect sexual orientation discrimination.

Finally, the Italian system does not provide specific protection in the case of a person not being the legal parent of a child. The Legislative Decree 151/2001⁶⁰ establishes the rules concerning the position of parents with reference to rights and benefits at the workplace: according to article 1, only the legal or adoptive parent, or the person who has the legal custody of the child⁶¹ is admitted to the benefits provided by the law. Extra benefits (namely, temporal extension of the leaves and absences) are granted to single parents. Only legal or adoptive children may obtain the survivor's pension. In all these respects, it is possible that changes could take place following the ongoing discussion on the adoption of a law on cohabiting couples. When this report was prepared, the sharpness of the political conflicts was such to make unpredictable the outcome of the discussion.

4.6 Health and safety

Are there exceptions in relation to disability and health and safety (Article 7(2), Directive 2000/78)?

Are there exceptions relating to health and safety law in relation to other grounds, for example, ethnic origin or religion where there may be issues of dress or personal appearance (turbans, hair, beards, jewellery etc)?

No specific exception is mentioned in the decree transposing directive 78/2000 in relation to disability, nor exceptions in relation to health and safety apply to other grounds. These issues are unexplored in Italian law.

Outside the decree the provisions on health/safety and disability are to be found in act 68/1999 on the integration of the disabled in the labour market. This act applies only to the persons with severe disabilities for whom it provides different forms of protected employment. Special public commissions establish what are the most appropriate measures to adapt working conditions. Otherwise, the suitability of a person to specific employment is always established by a medical screening. The employer cannot exclude a worker considered suitable for its employment, nor the employee bear the risk of working without proper medical approval.

4.7 Exceptions related to discrimination on the ground of age

4.7.1 Direct discrimination

a) Is it possible, generally, or in specified circumstances, to justify direct discrimination on the ground of age? If so, is the test compliant with the test in Article 6, Directive 2000/78, account being taken of the European Court of Justice in the Case C-144/04, Mangold ?

a) The decree transposing Directive 78/2000 establishes at article 3.4 that it leaves into force provisions of other statutes “establishing differential treatments for adolescents, young people, older workers and workers with caring responsibilities, required by the special character of employment, and legitimate employment policy, labour market, and vocational training objectives”. The vagueness of this provision makes impossible an assessment of the Italian situation against the background of the Mangold case, which seems to be problematic

⁶⁰ Decreto Legislativo 26 marzo 2001, n.151, Testo unico delle disposizioni legislative in materia di tutela e di sostegno della maternità e della paternità a norma dell'articolo 15 della legge 8 marzo 2000, n. 53 [Legislative Decree no. 151 of 26 March 2001, General framework of the legislative provisions concerning the protection and support to motherhood and fatherhood, in compliance with article 15 of the Act no. 53 of 8 March 2000], (*Gazzetta Ufficiale* no. 96 of 26 April 2001).

⁶¹ In principle, also the same-sex partner of the parent.

for many existing provisions of Italian law. A more precise evaluation will be possible after scholars and practitioners will evaluate more in detail the potentialities of the Mangold test in the Italian perspective.

b) Does national law permit differences of treatment based on age for any activities within the material scope of Directive 2000/78?

b) It is not possible to provide here a list of all possible cases of differences of treatment based on age within the material scope of the Directive. For instance, employment with a contract of *apprendistato* (on-the-job training) is, until the regions will implement they own rules (being this field within their competence), limited to persons with a maximum age of 24, 26 or 29, according to different factors, while the general limit for access to public employment is 40⁶².

c) Does national legislation allow occupational pension schemes to fix ages for admission to the scheme or entitlement to benefits under it taking up the possibility provided for by article 6(2) ?

No explicit use of the possibility under article 6(2) is reported. One must take into account that the reform of pension schemes is now in the middle of a harsh political debate, with its development very difficult to predict.

4.7.2 Special conditions for young people, older workers and persons with caring responsibilities

Are there any special conditions set by law for older or younger workers in order to promote their vocational integration, or for persons with caring responsibilities to ensure their protection? If so, please describe these.

Labour law provides an extensive number of rules making exceptions to ordinary rules in order to promote employment and vocational training of young people. It must be noted that not all these rules provide more favourable treatments, but instead many of these authorise reduced salaries or lesser guarantees as a policy to increase employment among these categories.

Many are also the rules providing protection of persons with caring responsibilities, in the form of maternity leaves and similar.

4.7.3 Minimum and maximum age requirements

Are there exceptions permitting minimum and/or maximum age requirements in relation to access to employment (notably in the public sector) and training?

No specific exception is provided in the decree transposing Directive 78/2000. Against this backdrop, it is quite meaningless to try an overview of the practice of private employers (age limits for public employment are established by law). Maximum age requirements are commonly applied in many fields, and are until now as such considered legal (minimum age requirement are established by labour law for fighting children's work), although often perceived as a social problem for the reintegration in the labour market of senior

⁶² 9 maggio 1994 - DPR n. 487 Regolamento recante norme sull'accesso agli impieghi nelle pubbliche Amministrazioni.

unemployed.. The problem of conflict with the decree transposing the directive seems still not part of public debate.

4.7.4 Retirement

In this question it is important to distinguish between pensionable age (the age set by the state, or by employers or by collective agreements, at which individuals become entitled to a state pension, as distinct from the age at which individuals retire from work), and mandatory retirement ages (which can be state-imposed, employer-imposed, imposed by an employee's employment contract or imposed by a collective agreement).

a) Is there a state pension age, at which individuals must begin to collect their state pensions? Can this be deferred if an individual wishes to work for longer, or can an individual collect a pension and still work?

b) Is there a normal age when individuals can begin to receive payments from occupational pension schemes and other employer-funded pension arrangements? Can payments from such occupational pension schemes be deferred if an individual wishes to work for longer, or can an individual collect a pension and still work?

c) Is there a state-imposed mandatory retirement age(s)? Please state whether this is generally applicable or only in respect of certain sectors, if so please state which. Have there been recent changes in this respect or are any planned in the near future?

d) Does national law permit employers to set retirement ages (or ages at which the termination of an employment contract is possible) by contract, collective bargaining or unilaterally?

e) Does the law on protection against dismissal and other laws protecting employment rights apply to all workers irrespective of age, if they remain in employment or are these rights lost on attaining pensionable age or another age (please specify)?

For these above questions, please indicate whether the ages are different for women and men.'

a-b-c-d-e) The retirement age has been the object of many reforms, and different special situations exist with regard to specific fields and occupations, also on the basis of collective agreements with the relevant trade unions. In a nutshell, the present state of the art can be described as follows: the compulsory retirement age is for public employment presently unified at 65 years for men and women, while in the private sector is 65 for men and 60 for women. In private employment female workers can – however- obtain retirement upon request also when reaching the age of 60. Voluntary retirement can start after payment of a certain number of years of payment of social security benefits, but however not before the age of 57, which will be increased to 60 as of 2008.

The age of 65 (60 for women in private employment) is in principle the compulsory retirement age, at which workers are required to retire. A recent act (2004/186) has, however, introduced for both the private and public sectors, the possibility to postpone retirement to the age of 70 years (women and men) upon request of the worker. Such extension is, however, submitted to the approval of the employer.

The employer cannot request the worker to retire before the reaching of the compulsory retirement age. Previously, it was possible to dismiss against his/her will the worker when he

reached the minimum retirement age. Protection against dismissal applies to all workers irrespective of age.

4.7.5 Redundancy

a) Does national law permit age or seniority to be taken into account in selecting workers for redundancy?

a) There is no legislation authorising to take into account age or seniority in selecting workers for redundancy. Rules on redundancy procedures are different not only between the private and public sectors, but also between the State and the local authorities. Age or seniority can become a relevant factor when employers must negotiate the plans of dismissals with the trade unions.

b) If national law provides compensation for redundancy, is this affected by the age of the worker?

b) The social security system provides a “mobility compensation” for workers who are dismissed for redundancy. The system applies to workers who are dismissed after having previously enjoyed the social security benefits granted to workers of enterprises in difficulty (*Cassa Integrazione Guadagni*). The length of the period for which mobility compensation is granted changes according to the age of the worker (the older the worker, the longer the period during which he/she can be granted compensation).

4.8 Public security, public order, criminal offences, protection of health, protection of the rights and freedoms of others (Article 2(5), Directive 2000/78)

Does national law include any exceptions that seek to rely on Article 2(5) of the Framework Employment Directive?

Article 3(2)(c) establishes that the Decree shall be without prejudice to the provisions already in force concerning public security, maintenance of public order, prevention of criminal offences, protection of health. There is no ground to understand what could be the actual meaning of this provision, which seems to allow too great a discretion to the legislator, since there is no possibility of screening actual compatibility with the needs of a democratic society.

4.9 Any other exceptions

Please mention any other exceptions to the prohibition of discrimination (on any ground) provided in national law.

Article 3(4) of the Decree transposing Directive 78/2000 establishes that this is without prejudice to the “provisions that establish work suitability tests as far as the necessity of suitability for specific work is concerned (...)”⁶³. The provision is unclear. Considering that the second part of article 3(4) specifically states that differences of treatment are justified with reference to “adolescents, young people, older workers and workers with caring responsibilities, required by the special character of employment, and legitimate employment policy, labour market, and vocational training objectives”, it seems that the first part makes

⁶³ Art. 3(4) of the Decree: ‘Sono, comunque, fatte salve le disposizioni che prevedono accertamenti di idoneità al lavoro per quanto riguarda la necessità di una idoneità ad uno specifico lavoro (...)’.

reference to more general and vague work suitability tests, without specifying the nature of the working activity for which a test is required, the reference to a specific ground, or even the purpose or nature of the test. Even assuming that such tests would be lawful only when based on a separate statutory provision, and would not justify a differential treatment, the current version of the decree is quite suspect, since it allows a general evaluation of the worker's suitability not provided by the Directive itself and not defined in its aims, criteria and limits.

5. POSITIVE ACTION (Article 5 Directive 2000/43, Article 7 Directive 2000/78)

a) What scope does national law provide for taking positive action in respect of racial or ethnic origin, religion or belief, disability, age or sexual orientation? Please refer to any important case-law or relevant legal/political discussions on this topic.

b) Do measures of positive action exist in your country? Which are the most important? Refer to measures taken in respect of all 5 grounds, in particular refer to the measures related to disability and any quotas for access of disabled persons to the labour market and any related to Roma.

The Decrees did not introduce anything new concerning positive actions. These are in principle legitimate according to our constitutional system, in the light of the principle of substantive equality under article 3(2). They do exist and are applied with regard to gender on the basis of Act 125/1991.

In relation to the grounds covered by the Directives, positive actions strictly speaking do apply in practice only to disabled persons, on the basis of a complex set of rules contained in act 162/1998. As far as this act is concerned, one has to remark that its aim is to amend and partly fill the gaps of the "framework act" of 1992 providing some interventions in favour of persons with severe disabilities. In fact it shall: 1) provide some new concrete interventions and services; 2) realize some experimental projects; 3) promote inquiries and the collection of statistical data regarding the disability; 4) foresees a national conference on the policies concerning disabled people to be held every third year. The act is addressed to local authorities, which have specific competences to promote, to draft programs and to realize services relating to disability.

During the first phase of its implementation this law was financed directly by the State (Ministry of Labour and Social Policy), which has transferred the financial resources to the local authorities (till year 2000). Actually the same local authorities provide by themselves the funding.

The interventions concern different forms of personal assistance, service of personal help, services of accommodation in emergency of short periods, partial refund of expenses for assistance.

In the field of employment, the act 1992/104 establishes a set of policies, to be applied only to people with severe disabilities as described in its first provisions, which can be summarised as follows:

1) the enrolment of Disabled Persons in a place adapted to their abilities with aids and support-aids, by means of specific actions for the solution of the problems connected with the environment etc.,

2) the placement of disabled persons in a specific employment is decided by a medical commission. This commission has the task: i) to formulate a functional diagnosis in order to determine the whole ability of disabled persons, specifying the grade and quality of his/her impairments and ii) to propose how to facilitate his/her placement in employment. The commission will precise the position of disabled persons inside his/her environment, attitudes, family relations, taking into account the educational background and the work already effected;

3) there is an obligation to hire people with disabilities for public and private enterprises for 7% of the total working force if the private enterprise has more than 50 employees. Exceptions to this obligation apply to political parties, trade unions, organizations of social solidarity. For the police and civil protection disabled persons are enrolled only for administrative tasks. Moreover, other cases of derogation are set out in articles 3 and 5.

In certain cases the employer, who proves not to be in a position to hire disabled persons for one of the reasons there indicated (e.g. the type of activity etc.) will pay to the Regional Fund for the Employment a financial contribution.

Moreover the act provides some services in order to facilitate the access to work of Disabled Persons in conformity with article 7; other rules regard lists for the employment, the regulation of labour relations (art. 10); support for the enterprises which comply with the law (art. 11); the creation of social cooperatives in order to support the access to work (art. 12); some facilities for the assumption (art. 13); the institution of a Regional Fund for the employment of Disabled Persons (*Fondo regionale per l'occupazione dei disabili*). Sanctions of different kinds are applied to the employers who do not fulfill their obligations.

Forms of favourable differential treatment exist as already mentioned with regard to religion, for those confessions which obtained the "agreements" with the State. Such "positive actions" concern mainly holidays, with regard to Jews and to the members of the *Unione Italiana delle Chiese Cristiane Avventiste del 7° giorno*⁶⁴. The statute transposing the agreement with the Adventists, for instance, establish a right for those employed by private or public employers to refrain from occupational activity on Saturday, with the limit that this should not affect "essential public services" and that the right is enjoyed "within the framework of the organisation of work"; incompatibility with organisation of work must be proved by the employer. With regard to employment of Adventists, such legislative rules have been usually interpreted by courts in favour of the employees through a narrow construction of the limits. Dismissals based on the refusal of working on Saturday have normally been considered illegal, ordering the reintegration of the worker in the employment and awarding damages⁶⁵. Concerning the Jews, the relevant act establishes also an obligation to take into consideration the obligation of Saturday rest in the determination of the dates of recruitment tests for public employment.

What remains open is the problem of the needs of the Islamic believers, that in the absence of agreements do not enjoy any legal right to special measures. The various proposals of agreement with the Italian state, drafted by the different associations of Islamic believers existing in Italy, include different proposals of specific measures, ranging from the adaptation of working time in order to respect Friday rest, to daily prayers, Ramadan obligation, and so on. Until now there is not in my knowledge any case law trying to assess the limits within which such indicators of religious identity can enjoy legal protection on the basis of general principles (like freedom of expression or religion or good faith in employment relations)⁶⁶. The comparative disadvantage of Islam can represent an infringement of the Directive.

There is no organized state policy aimed at promoting specific measures to prevent disadvantages linked to religion or belief beyond what is already granted in the agreements just mentioned.

Positive actions concerning the Roma do not exist at the national level. Some regional legislation provide the possibility of very weak forms of support to integration of Romani groups, but such measures are currently very marginal in the overall picture, often

⁶⁴ See article 17 of the 1988 Act for the Adventists and art. 3 of the 1989 Act (see the references of the relevant acts at note 6) for the Jews.

⁶⁵ See for instance *Pretura circondariale Roma 6 novembre 1998*, in *Il diritto ecclesiastico*, II, 2000, pp. 95 ss. and the previous case law presented in the comments by Rimoldi and Valsiglio.

⁶⁶ The absence of clear solutions in the absence of agreements is discussed in G.Dondi, *Immigrazione e lavoro: riflessioni e spunti critici*, Padova, CEDAM, 2001, pp. 129 ff.

completely unimplemented, and initiatives in favour of the Roma are most often decisions taken at the municipal level.

6. REMEDIES AND ENFORCEMENT

6.1 Judicial and/or administrative procedures (Article 7 Directive 2000/43, Article 9 Directive 2000/78)

- a) *What procedures exist for enforcing the principle of equal treatment (judicial/administrative/alternative dispute resolution such as mediation)?*
 b) *Are these binding or non-binding?*

a-b) Because of the legislative technique chosen by the government, the system for the enforcement of rules against discrimination is based on the integration of pre-existing procedural tools with rules introduced in the context of the transposition of the Directives. To discrimination on grounds foreseen by the Directives is still applicable the special procedure for anti-discrimination suits provided by the 1998 Immigration Act, to which the Decrees make reference, which is more rapid and effective than the ordinary one.

Should discrimination arise, the victim can apply, even in person (while in ordinary cases assistance by a lawyer is compulsory) to the judge (the ordinary civil court *Tribunale*) of the place of his/her residence (an exception to the general principle of suing in the residence of the defendant) to obtain an order of interruption of the discriminatory activity as well as damages (including non-pecuniary losses, ordinarily excluded in civil cases). The hearing takes place “avoiding all unnecessary formality”, with free choice by the judge of the most suitable method to gather evidentiary materials. In case of special urgency, the judge can issue an interim order, the violation of which (as that of the order issued in the final decision) is a criminal offence. The Decrees add to the procedure of the Immigration Act the possibility (not the obligation) of making use of pre-trial mediation and the possibility for the judge to order - together with the judgment - the production of a plan for the removal of discrimination, as well as the possibility to order the publication of the judgment in a major newspaper. The short time that the decrees have been in force and the almost non-existing litigation in the field does not make possible to evaluate the actual importance of pre-trial mediation. When litigation concerns employment, the labour judge is competent. The function of “labour judge” is however up to the ordinary civil courts (the biggest ones have specialised sections), that apply special procedural rules which are to some extent smoother than ordinary procedure. After recent reforms, the difference between ordinary and labour procedure is becoming less marked than before. The composition of the court is the same as in civil cases, with no lay participation.

The reform in the public sector provided by Legislative Decree no. 29/1993 has moved the competence of hearing cases concerning public employees from the administrative judge to the ordinary courts (with some exceptions).

Concerning accessibility for the disabled, courts as all public buildings must have special access for wheelchair users. Information in Braille, as far as the author is aware, is not generally available, but the actual impact of this is limited since the discriminated person in practice is assisted by a lawyer. The code of civil procedure (article 124) prescribes that the judge must appoint an interpreter (if the case, one for sign language) in case of necessity of hearing “deaf or dumb persons”.

- c) *Can a person bring a case after the employment relationship has ended?*

c) The discriminated person can bring the action also after the employment relationship has ended, subject to the ordinary statutes of limitations applicable in labour law.

In relation to each, please note whether there are different procedures for employment in the private and public sectors.

In relation to the procedures described, please indicate any costs or other barriers litigants will face (e.g. necessity to instruct a lawyer?) and any other factors that may act as deterrents to seeking redress (e.g. strict time limits, complex procedures, location of court or other relevant body)?

6.2 Legal standing and associations (Article 7(2) Directive 2000/43, Article 9(2) Directive 2000/78)

Please list the ways in which associations may engage in judicial or other procedures

a) in support of a complainant

b) on behalf of one or more complaints (please indicate if class actions are possible)

a-b) The situation concerning standing to litigate is different for the grounds concerned by the two Directives.

With regard to race and ethnicity, the decree establishes (art. 5) that standing to litigate in support or on behalf (no distinction between the two forms) of complainants in antidiscrimination suits is recognised to associations and bodies active in the field of fight against discrimination that are included in a list approved with a joint decree of the Ministries of Labour/Welfare and Equal Opportunities. Can be included in the list those associations and organisations that respect certain requirements, which are verified by the involved ministries⁶⁷. The decree is extremely short (two succinct articles saying that the register is established and that it must be updated every year)⁶⁸. In the preamble it is specified that the associations admitted in the list are partly taken from those included in the pre-existing register of associations and organisations operating in favour of immigrants (235 among which applied to obtain standing) and partly from the register of associations and organisations specifically active in the field of fight discrimination established according to decree 215/2003 (all of which applied to obtain standing). The list of the associations and bodies with standing to litigate can be found on the UNAR website at <http://www.pariopportunita.gov.it/IL-DIPARTI/--Ufficio-/Notizie/Elenco-associazioni.pdf>

With regard to the other grounds, article 5(1) the original version of the decree transposing Directive 78/2000 used concerning standing to litigate a rather obscure wording, since it mentioned the “local branches of the national organisations most represented at the national level” which is the wording ordinarily used concerning trade unions, but without naming them, since it did not say “organisations of workers”. It would thus have been possible to

⁶⁷*Decreto del Presidente della Repubblica, 31 agosto 1999, n. 394 Regolamento recante norme di attuazione del testo unico delle disposizioni concernenti la disciplina dell'immigrazione e norme sulla condizione dello straniero, a norma dell'articolo 1, comma 6, del decreto legislativo 25 luglio 1998, n. 286. Gazzetta Ufficiale n. 258 del 3 novembre 1998 (Supplemento Ordinario n. 190). Article 6 (2) of the decree establishes the requirements for inclusion in the register. Associations and other bodies must be officially established since at least one year and continuously operating in the year immediately before registration, as well as have an official charter where it is established that they have a democratic structure, do not act for profit and that promotion of equal treatment and fight to discrimination is their only or primary aim. Moreover, they must have a budget and a register of members respecting certain legal standards, while their legal representatives must not have been sentenced for crimes related to the activity of the association, nor act in any form as entrepreneurs or board members of commercial enterprises operating in the same field.*

⁶⁸*Decreto interministeriale 16 dicembre 2005, Istituzione dell'elenco delle associazioni ed enti legittimati ad agire in giudizio in nome, per conto o a sostegno del soggetto passivo di discriminazione basata su motivi razziali o etnici di cui all'articolo 5 del decreto legislativo 9 luglio 2003, n. 215 (Institution of the list of associations having standing to litigate in support or on behalf of victims of discrimination based on racial or ethnic grounds), [the decree has been published after the cut-off date for this report in Gazzetta Ufficiale serie generale n. 9, January 12, 2006].*

think that the range of organisations having standing to litigate was actually broader. Since this would have been quite an innovation, we mentioned in our previous reports that it seemed strange that the government really implied this without a more detailed provision (specially since the rules on standing in the draft decree on race discrimination, that explicitly innovate, are indeed much more detailed). The interpretative problem has been solved by the government itself, that in a specific decree declared that the first wording was just a mistake and corrected it, by deleting the first adjective “national” and substituting it with the adjective *sindacali* (trade unionist)⁶⁹. Being thus eventually clearly restricted to trade unions, this rule on standing poses difficulties for those groups insufficiently related to trade unions. Concerning, for instance, standing to litigate in religious discrimination, churches and comparable organizations are excluded, since ordinary Italian civil procedure does not allow them to engage in antidiscrimination procedures concerning employment. The new law 67/2006 against discrimination of disabled persons foresees (article 4) the possibility of standing to litigate of associations identified by a joint decree of the Ministries of labour and equal opportunities.

Class actions are not yet possible in Italy, although their introduction is advocated by many political and social actors.

6.3 Burden of proof (Article 8 Directive 2000/43, Article 10 Directive 2000/78)

Does national law require or permit a shift of the burden of proof from the complainant to the respondent? Identify the criteria applicable in the full range of existing procedures and concerning the different types of discrimination, as defined by the Directives (including harassment).

The major weakness in the procedural system assisting the anti-discrimination legislation lies in the rule on the burden of proof, where the legislator continues to be very prudent. According to the Decrees (identical wording, articles 4.3 and 4.4 respectively), if the person who considers himself or herself wronged by discrimination submits elements of fact suitable to establish “serious, exact and consistent elements” about the existence of a direct or indirect discrimination, also on the basis of statistical data, the judge can evaluate such elements on the basis of the rule of the Civil Code (article 2729⁷⁰) allowing a “prudent appreciation” of presumptions. The absence of an explicit shift in the burden of proof has been raised in parliament by members of the majority, but without significant impact on the final text. The absence of decisions on the basis of the new decree does not allow to evaluate which approach the judges will have in evaluating evidence. In gender discrimination, however, judges begin to use statistical evidence without problems⁷¹. Testing is instead still not part of current practice.

That the approach of the legislator has been particularly prudent, is particularly evident if compared to the provision on gender discrimination of article 4 of act 125/1991 (on positive actions), which introduces a partial shift of the burden of proof toward the respondent. Indeed article 4(6) indicates that the complainant must show factual elements suitable for clearly establishing the presumption of the existence of the discriminatory behaviour; the respondent has thus the burden to prove that the discrimination is not existing. The exact

⁶⁹ Decreto legislativo 2 agosto 2004, n. 256, “Correzione di errori materiali nei decreti legislativi 9 luglio 2003, n. 215 e n. 216, concernenti disposizioni per la parità di trattamento tra le persone indipendentemente dalla razza e dall’origine etnica, nonché in materia di occupazione e condizioni di lavoro”, art. 2.

⁷⁰ Art. 4(4) of the Decree: ‘Il ricorrente, al fine di dimostrare la sussistenza di un comportamento discriminatorio a proprio danno, può dedurre in giudizio, anche sulla base di dati statistici, elementi di fatto, in termini gravi, precisi e concordanti, che il giudice valuta ai sensi dell’articolo 2729, primo comma, del codice civile’.

⁷¹ See for instance (Pret. Bologna, 27 giugno 1998, in *Rivista Giuridica del Lavoro*, 1999, II, 217).

definition is *presunzione precisa e concordante*, that is to say precise and non-contradictory presumption, which is more favourable for the complainant than the formula of article 2729 of the Civil Code.

6.4 Victimisation (Article 9 Directive 2000/43, Article 11 Directive 2000/78)

What protection exists against victimisation? Does the protection against victimisation extend to persons other than the complainant? (e.g. witnesses, or person that help the victim of discrimination to present a complaint)

Victimisation is included in the Decrees (articles 4.5 and 4.6 respectively), but only as an element to be taken into consideration in the assessment of the amount of damages. Because of this peculiar structure of the provision, it is impossible to establish with a degree of certainty whether protection against victimisation would apply also to persons other than the complainant. General rules against unfair dismissal allow, however, a good degree of protection against retaliatory acts.

6.5 Sanctions and remedies (Article 15 Directive 2000/43, Article 17 Directive 2000/78)

a) What are the sanctions applicable where unlawful discrimination has occurred? Consider the different sanctions that may apply where the discrimination occurs in private or public employment, or in a field outside employment.

b) Is there any ceiling on the maximum amount of compensation that can be awarded?

c) Is there any information available concerning:

- the average amount of compensation available to victims

- the extent to which the available sanctions have been shown to be - or are likely to be - effective, proportionate and dissuasive, as is required by the Directives?

a) According to article 4(5) of the Decree, the judge orders the termination of the discriminatory behaviour, conduct or act and the removal of its effects, also by means of a plan aiming at the removal of the identified discriminations. The basic idea of this remedy (also provided by remedies against gender discrimination) is consistent with article 15 of the Workers' Act, which declares that every discriminatory act or behaviour is unlawful and consequently void. Therefore, the consequences of such acts and behaviour must be removed and the previous situation must be restored. According to some authors, even though this sanction may work in cases of dismissal (when the reinstatement must be ordered) or other acts, it might not be an effective remedy in circumstances of omissive behaviour (e.g. denied access to work); in those cases only compensatory damages might be granted. The victim of discrimination may claim for compensation of pecuniary and non-pecuniary losses, as established by article 4(5). According to article 44(8) of the Immigration Act, criminal sanctions are applied if the decision of the court is not complied with.

Article 44(11) of the Immigration Act, establishes that, if the discriminatory act or behaviour is performed by enterprises to which public bodies have awarded tenders, or supply contracts or public financial assistance, such benefits can be withdrawn; in particular cases these enterprises may be excluded for up to two years from tenders / financial assistance.

Article 4(7) of the Decree establishes that the decision of the judge must be published in a national newspaper, if this is explicitly ordered by the judge considering the circumstances of the case.

Discriminatory dismissals are governed by article 3 of Act 108/1990 on individual dismissals (which is in fact a consolidated version of article 4 of Act 604/1966, and of the amended

version of article 15 of the Workers' Act), according to which they are always considered as void. As established by article 3 of Act 108/1990 on individual dismissals (which makes reference to article 15 of the Workers' Act), to discriminatory dismissal applies the reintegration of the worker at the workplace.

b-c) No ceilings to the amount of compensation apply. It is difficult to assess the amount of non-pecuniary losses which can be awarded, which much depend on the circumstances of the individual case. The small number of cases decided makes impossible to calculate an average.

The overall effectiveness of these remedies, if compared with ordinary Italian civil procedure, is very high. It must be seen, of course, whether this effectiveness will be sufficient to overcome more general cultural obstacles that make antidiscrimination litigation quite rare, but the procedural requirements of the Directives are certainly met.

7. SPECIALISED BODIES

Body for the promotion of equal treatment (Article 13 Directive 2000/43)

When answering this question if there is any data regarding the activities of the body (or bodies), include reference to this (keeping in mind the need to examine whether the race equality body is functioning properly). For example, annual reports, statistics on the number of complaints received in each year or the number of complainants assisted in bringing legal proceedings.

a) Does a 'specialised body' or 'bodies' exist for the promotion of equal treatment irrespective of racial or ethnic origin?

a) The requirement of the introduction of a body for the promotion of equal treatment is dealt with in article 7 of the decree transposing Directive 43/2000, which in this respect closely followed the guidelines contained in the *legge comunitaria 2001* (art. 29, comma 1, punto i). The decree establishes that the government shall provide for the creation of an office charged of the implementation, in "an autonomous and impartial way", of the activities concerning the promotion of equal treatment and the elimination of discriminations based on race or ethnic origin.

b) Describe briefly the status of this body (or bodies) including how its governing body is selected, its sources of funding and to whom it is accountable.

b) The office has, according to the decree, been created within the Department for Rights Equal Opportunities (*Dipartimento per i Diritti e le Pari Opportunità* – previously dealing uniquely with gender discrimination) of the Presidency of the Council of Ministers, and is directed by a person appointed by the President of the Council of Ministers or by a Minister on his behalf. The office can make use also of staff from other public administrations, including judges and state attorneys, and of experts and advisers (the latter without civil servant status). The yearly budget is established by law in 2.035.357 Euro. The choice has thus been that of an office completely within the structure of state administration.

The decree on the internal organisation of the office for the fight against discrimination has been published on the Italian Official Journal on March 2004⁷². This further decree is very short, and does not add anything substantial to what was provided by the main decree. The

⁷² *Decreto del Presidente del Consiglio dei Ministri, 11 dicembre 2003, Costituzione e organizzazione interna dell'Ufficio per la promozione della parità di trattamento e la rimozione delle discriminazioni, di cui all'art. 29 della legge comunitaria 1 marzo 2002, n. 39, in Gazzetta Ufficiale, n. 66, 19 marzo 2004.*

further decree states again at art. 2 that the office shall act “with full autonomy of judgment and in conditions of impartiality”..

The official presentation of the new Office in Rome took place on November 16, 2004. Its official name (different from that contained in the decrees, which was much longer) is National Office against Racial Discriminations (*Ufficio Nazionale Antidiscriminazioni Razziali* - UNAR), and its staff of experts has indeed mostly been taken from the staff of other public administrations, including the judiciary. The inclusion of judges in the staff of ministries or other public agencies is a quite common procedure in Italy. It must be remembered that, when serving in administrative positions, judges do not enjoy the special guarantees of independence which they have when exercising judicial functions, although they certainly provide adequate competence.

c) Describe the competences of this body (or bodies), including a reference to whether it deals with other grounds of discrimination and/or wider human rights issues.

c) The competences of the office include 1) assistance to victims of discrimination in pursuing their complaints in judicial or administrative proceedings 2) surveys on discriminations, without infringing the prerogatives of the judicial authorities 3) the promotion of the adoption, by private or public subjects, of specific measures – including projects of positive actions – aimed at eliminating or compensating the disadvantages related to a certain race or ethnic origin 4) the issuing of opinions and proposals for the reform of the laws concerning racial and ethnic discrimination 5) the issuing of recommendations on matters related to racial and ethnic discrimination 6) the drafting every year of a report to the Parliament on the application of the principle of equal treatment, and of a report to the President of the Council of Ministers on the activities of the previous year⁷³ 7) the diffusion of information concerning the rules on equal treatment between persons irrespective of racial or ethnic origin.

The office has no competence on discrimination on grounds different from race and ethnic,origin, nor a serious discussion on a possible expansion of its competences took place, apart from the recent proposals of the office itself. In the present normative context, a limited expansion of its competence to multiple discrimination and “borderline cases” could possibly be based on a passage of article 1 of the decree transposing directive 43/2000, where it is said that the implementation of equal treatment irrespective of race and ethnic origin must take place “also in a perspective that takes into account the different impact that the same forms of discrimination can have on women and men, and of the existence of forms of racism with a cultural and religious character”. Most of the grounds foreseen in Directive 78/2000 are, however, without a body charged of the supervision of the rules on equal treatment. Ordinary control agencies like Labour Inspectorates and so on are however, at least theoretically, in charge of their implementation.

d) Does it / do they have the competence to provide assistance to victims, conduct surveys and publish reports and issue recommendations on discrimination issues?

d) In presenting the new office, the former Minister for Equal Opportunities, Stefania Prestigiacomo, strongly stressed the importance of the activity of assistance - including assistance in litigation - to victims of discrimination . This is provided through a contact center administered by a consortium lead by ACLI (*Associazioni Cristiane Lavoratori Italiani*) a federation of - primarily Catholic - NGOs rooted in the whole country. The relationship between the government and ACLI is of a contractual nature, being the

⁷³ The first issues of both the report to the President of the Council of Ministers and that to the Parliament are available on the UNAR's website (which can be reached through the link of the Minister of Equal Opportunities www.pariopportunita.gov.it).

management of the contact center assigned through a restricted public procurement procedure. The contact center has a toll-free number with service in several languages (Italian, English, French, Spanish, Arabic, Russian, Rumanian, Chinese). The contact center has the only task of receiving and “filtering” requests of help from victims of discrimination, while decisions on action are taken by the staff of UNAR. According to its first annual report to the President of the Council of Ministers, the center has received around 10000 calls, among which more than 3400 concerned its field of competence, mostly in the form of request of information. In 282 cases the office established that the person was alleging a case of racial and ethnic discrimination to be followed for further action. All contacts are classified in a data base, which provides relevant information on the diffusion of racial and ethnic discrimination in the country, which has been analysed in the just mentioned annual report.

e) Does the body (or bodies) have legal standing to bring discrimination complaints or to intervene in legal cases concerning discrimination?

When the office establishes that it is facing a relevant case, it provides several forms of assistance, providing legal advice, acquiring further information and contacting the counterparts to see whether the discriminating activity can be removed spontaneously. In any case the office has no standing to litigate on behalf of discriminated persons, and can just provide external assistance before and during litigation. One of the main characteristics of its activity (based on several policy statements in the annual report) seems to be a strong focus on mediation in order to reach a satisfying settlement between the parties without judicial proceedings. Until now, none among the persons assisted has brought an action on the merits before a court of justice (although the report mentions at least one case in which an interim injunction has been requested by the discriminated person). Besides legal assistance, the office has undertaken also a relevant activity of dissemination and training for lawyers and NGOs, with seminars and workshops. On its website, it is available a relevant amount of legal information (as a handbook for practitioners).

f) Is the work undertaken independently?

f) In the first issue of the separate annual report addressed to Parliament, the office makes a comprehensive analysis of the shortcomings of the present antidiscrimination legislation, proposing to strengthen its own role in the legal system, with the extension of its competence to other grounds of discrimination, stronger powers of intervention (with for instance the possibility to issue binding orders for the disclosure of documents or the interruption of discriminatory activities) and the introduction of at least some form of standing in judicial proceedings. The office recently financed projects of NGOs for positive actions in the field of discrimination on grounds of race and ethnicity⁷⁴.

8. IMPLEMENTATION ISSUES

8.1 Dissemination of information, dialogue with NGOs and between social partners

Describe briefly the action taken by the Member State

a) to disseminate information about legal protection against discrimination (Article 10 Directive 2000/43 and Article 12 Directive 2000/78)

⁷⁴ Gazzetta Ufficiale della Repubblica Italiana, Serie generale, n. 286 del 9 dicembre 2005 - sezione Atti amministrativi Avviso per la presentazione di progetti di analisi dei fattori, dei processi e delle buone prassi connesse con la discriminazione su base etnica e razziale, rivolto alle associazioni e fondazioni senza fini di lucro.

a) After its institution, the new National Office against Racial Discriminations started a number of initiatives aimed at spreading awareness (seminars, public relations actions), some of which has a relevant impact. According to the first yearly reports, the office has obtained a good degree of visibility, and this has also been accompanied by an increasing attention for antidiscrimination issues in legal scholarship. More problematic is the issue of dissemination with regard to the grounds of discrimination which are out of the competence of the new office, since the absence of a specialised body leaves implementation of dissemination to ordinary authorities which until now seem to have a quite passive attitude.

b) to encourage dialogue with NGOs with a view to promoting the principle of equal treatment (Article 12 Directive 2000/43 and Article 14 Directive 2000/78) and

c) to promote dialogue between social partners to give effect to the principle of equal treatment within workplace practices, codes of practice, workforce monitoring (Article 11 Directive 2000/43 and Article 13 Directive 2000/78)

b-c) Here also the implementation of dialogue with NGOs and social partners seems to be a priority of UNAR with regard to race and ethnicity. According to the first report, there have been a number of opportunities where NGOs have been involved in joint seminars and discussions, and members of UNAR staff ordinarily attend public events in the field of antidiscrimination. Here also, there is no centralised action with regard to grounds of discrimination different from race and ethnic origin, although the Minister of Equal Opportunities is quite active, paying for instance special attention to the empowerment of organisations of disabled persons.

8.2 Compliance (Article 14 Directive 2000/43, Article 16 Directive 2000/78)

a) Are there mechanisms to ensure that contracts, collective agreements, internal rules of undertakings and the rules governing independent occupations, professions, workers' associations or employers' associations do not conflict with the principle of equal treatment? These may include general principles of the national system, such as, for example, "lex specialis derogat legi generali (special rules prevail over general rules) and lex posteriori derogat legi priori (more recent rules prevail over less recent rules).

b) Are any laws, regulations or rules contrary to the principle of equality still in force?

a-b) Because of the existence of equal treatment rules predating the Decrees, for most of the grounds concerned contractual rules in conflict with the principle of equal treatment were in any case illegal. Although the case law was quite limited, with the exception of gender discrimination, equal treatment was commonly considered as a general principle at least with regard to the grounds of article 3 of the constitution. This was not the case with regard to sexual orientation, concerning which scholars were somehow divided about whether prohibition of discrimination was implied in labour law. On all the grounds concerned by the Directives, no statutory or administrative provision has been abolished because of conflict with the principle of equal treatment.

The Decrees do not contain provisions establishing the nullity of discriminatory provisions included in contracts, agreements or other rules, but this follows quite easily from the application of article 15 of the Workers' Act in the field of labour law, and from general principles on voidness of contractual clauses contrary to binding statutory rules in other fields.

Statutory provisions explicitly discriminating can be found with regard to age, where it is probably required a screening of all provisions containing differences of treatment. If one

looks at the legislative history of the Decrees, one sees clearly that no substantial discussion took place on the compatibility of Italian laws and regulations with equal treatment irrespective of age, especially since Italy has decided not to use the possibility to defer implementation.

The absence of provisions that expressly directly discriminate on the basis of the grounds covered by the Directives, does not eliminate the problem of their compatibility with Italian law, but moves it instead on the plan of indirect discrimination. This is specially the case of discrimination on grounds of race and ethnic origin, and partly religion. In such cases indirect discrimination can take place through differences of treatment formally based on nationality (as exclusion of non-EU citizens) or on insufficient attention to the needs of specific groups. This is specially the case in some contexts where the community of non-EU citizens is primarily composed of those groups that are normally targeted by discrimination. An exemplary case was the above mentioned decision of the Tribunale di Milano concerning the regulation on public housing which limited the access to non-Italian citizens, where clearly among non-EU applicants to public housing the majority comes from groups with a racial and ethnic identity which is usually perceived as “different”. With regard to discrimination on ground of nationality, the problem is made even more significant by the still postponed ratification of Protocol 12 to the ECHR.

With regard to religion, the problem is primarily connected to the absence of an ad hoc regulation, unlike other religious confessions, for Islam, which can open the way to indirect discrimination related to issues of specific needs of Islamic believers, for which there is until now no litigation, but which is increasingly the object of public discussions, also fuelled by cases on crucifixes in schools much inflated by the media.

9. OVERVIEW

The compliance with the Directives of present Italian legislation is in many respects of difficult evaluation. The Decrees enacted for the purpose of their transposition were not the object of extensive debate even on their purely technical implications, something which is reflected in the difficult interpretation of several provisions. Apart from the legislative history and the minutes of the debate, which evidences little interest by all political groups (at least in the early decisive stage), the limited attention paid to the transposition of the Directives is more than well proved by the issuing one year after the entry into force of the Decrees of a further decree correcting formal mistakes (see above concerning standing to litigate), and by remaining discrepancies between the two decrees (see concerning harassment). Mistakes that are of difficult explanation if one thinks that the Decrees are by and large just an attempt at a repetition of the content of the Directives. The adoption of the reform proposals contained in the report of UNAR to the Parliament could certainly represent a significant advancement.

Against this background, we did not try to concentrate on technicalities, although highlighting textual discrepancies – assuming that the problem of equal treatment is so charged of values, that it is likely that – at least in courts of first instance – interpretations of the provisions of the Decrees will not take place in a formalistic approach, but in conformity with the spirit of the Directives. We have therefore always tried to give to legislation a meaning based on a “mainstream” interpretation, avoiding stressing possible violations of the Directives which would derive from a formalistic construction of some rules of the Decrees. It is beyond doubt, however, that their text does not show a special effort to ensure a consistent interpretation in favour of equal treatment, and can be seen as a sort of “minimalistic” transposition of the Directives. The scarcity of case law not only on the Decrees but also on pre-existing antidiscrimination rules makes the evaluation of the former even more difficult, and the same applies to the limited amount of scholarly work still existing, although this is rapidly expanding.

It is also true that much of the values involved by the Directives are at stake not in the text of the Decrees but on different plans, as the curtailing of the principle of equal treatment on ground of nationality with the effect of indirect discrimination, and the expansion under the umbrella of Directive 78/2000 of certain limits to equal treatment in organisations with a special ethos which were previously narrowly constructed (but relatively unclear as far as their actual extension was concerned).

10. CO-ORDINATION AT NATIONAL LEVEL

Which government department/ other authority is/ are responsible for dealing with or co-ordinating issues regarding anti-discrimination on the grounds covered by this report?

Competence for the coordination of issues on equal treatment in the fields concerned by the Directive is split between two Ministries, that of Labour/Welfare and that of Equal Opportunities.

Annex

- 1. Table of key national anti-discrimination legislation**
- 2. Table of international instruments**

ANNEX 1: TABLE OF KEY NATIONAL ANTI-DISCRIMINATION LEGISLATION

Name of Country **ITALY**

Date **1 February 2007**

Title of Legislation (including amending legislation)	In force from:	Grounds covered	Civil/Administrati ve/ Criminal Law	Material Scope	Principal content
<p><i>Decreto legislativo 9 luglio 2003, n. 215 Attuazione della direttiva 2000/43/CE per la parità di trattamento tra le persone indipendentemente dalla razza e dall'origine etnica</i> (published in <i>Gazzetta Ufficiale</i> n. 186 of August 12, 2003). http://www.pariopportunita.gov.it/IL-DIPARTI/--Ufficio-/Normativa/Decreto-Legislativo-215--2003_web.doc_cvt.htm</p> <p>Formal mistakes have been corrected with:</p> <p><i>Decreto legislativo 2 agosto 2004, n. 256, "Correzione di errori materiali nei decreti legislativi 9 luglio 2003, n. 215 e n. 216, concernenti disposizioni per la parità di trattamento tra le persone indipendentemente dalla</i></p>	<p>August / 2003</p>	<p>Race and ethnic origin</p>	<p>Civil law/Labour law</p>	<p>Public employment, private employment, social protection including social security, health care, welfare, education, access to goods or services included housing</p>	<p>Prohibition of direct and indirect discrimination, procedural remedies and creation of a specialised body</p>

<p><i>razza e dall'origine etnica, nonché in materia di occupazione e condizioni di lavoro”, in Gazzetta Ufficiale n. 244 del 16 ottobre 2004.</i></p> <p>http://www.parlamento.it/parlam/leggi/deleghe/04256dl.htm</p>					
<p><i>Decreto legislativo 9 luglio 2003, n.. 216 Attuazione della direttiva 2000/78/CE per la parità di trattamento in materia di occupazione e di condizioni di lavoro</i> (published in Gazzetta Ufficiale n. 187 of August 13, 2003). http://www.parlamento.it/parlam/leggi/deleghe/03216dl.htm Formal mistakes have been corrected with:</p> <p>Decreto legislativo 2 agosto 2004, n. 256, “Correzione di errori materiali nei decreti legislativi 9 luglio 2003, n. 215 e n. 216, concernenti disposizioni per la parità di trattamento tra le persone indipendentemente dalla razza e dall'origine etnica, nonché in materia di occupazione e condizioni di lavoro”, in Gazzetta Ufficiale n. 244 del 16 ottobre 2004.</p>	August 2003	Religion or belief, disability, age, sexual orientation	Labour law	Public employment, private employment,	Prohibition of direct and indirect discrimination, procedural remedies

http://www.parlamento.it/parlam/leggi/deleghe/04256dl.htm					
Decreto legislativo 25 luglio 1998, n. 286 Testo unico delle disposizioni concernenti la disciplina dell'immigrazione e norme sulla condizione dello straniero (published in. Gazzetta Ufficiale n. 191 of August 18, 1998 – S.O. n. 139), articles 43 and 44. http://www.camera.it/parlam/leggi/deleghe/testi/98286dl.htm	September 1998	Race/colour, religion, national or ethnic origin	Civil law (inclusive labour law)	Public employment, private employment, access to goods or services listed, but potentially general	Prohibition of direct and indirect discrimination, procedural remedies
Legge 25 giugno 1993, n. 205, Conversione in legge, con modificazioni, del decreto legge 26 aprile 1993 n. 122 Misure urgenti in materia di discriminazione razziale, etnica e religiosa. http://www.osservatorioimmigrazionesud.it/osservatorio/normativa_NA/normativa/1186.html http://www.osservatorioimmigrazionesud.it/osservatorio/normativa_NA/normativa/118	May 1993	Race, ethnicity, religion	Criminal law	General	Hate speech, discriminatory acts

6.html					
<p><i>Legge-Quadro 5 febbraio 1992 n. 104, per l'assistenza, l'integrazione sociale e i diritti delle persone handicappate</i> (published in <i>Gazzetta Ufficiale</i>, february 17, 1992, n. 39, S.O.)</p> <p>http://www.handylex.org/stato/1050292.shtml</p>	February 1992	Disability	Administrative law	All fields	Integration of disabled people
<p><i>Legge 12 marzo 1999, n. 68: Norme per il diritto al lavoro dei disabili, pubblicata nel Supplemento Ordinario n. 57/L alla Gazzetta Ufficiale 23 marzo 1999</i></p> <p>http://www.parlamento.it/parlam/leggi/990681.htm</p>	April 1999	Disability	Administrative law/ Labour law	Public and private employment	Integration of disabled people
<p><i>Legge 20 maggio 1970, n. 300, Norme sulla tutela della libertà e dignità dei lavoratori, della libertà sindacale e dell'attività sindacale nei luoghi di lavoro e norme sul collocamento</i> (published in <i>Gazzetta Ufficiale</i>, 27 maggio 1970, n. 31), art. 15</p> <p>http://www.dirette.it/Leggi/70-300.htm</p>	June 1970	Race, sexual orientation, disability, age, religion or personal belief	Labour law	Private employment	Unfair dismissal and discrimination on the working place

<u>Legge 1° marzo 2006, n. 67,</u> <i>"Misure per la tutela giudiziaria delle persone con disabilità vittime di discriminazioni"</i> (published in <i>Gazzetta Ufficiale</i> , n. 54 of march 6, 2006)	March 2006	Disability	Civil law	All fields (the law does not limit its scope of application)	Prohibition of direct or indirect discrimination
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ANNEX 2: TABLE OF INTERNATIONAL INSTRUMENTS

Name of country	Italy				Date	08-01-07
Instrument	Signed (yes/no)	Ratified (yes/no)	Derogations/ reservations relevant to equality and non-discrimination	Right of individual petition accepted?	Can this instrument be directly relied upon in domestic courts by individuals? (this point can hardly be the object of answers on a yes/no basis, because of the many nuances of the field)	
European Convention on Human Rights (ECHR)	Yes	Yes	No	Yes	Yes	
Protocol 12, ECHR	Yes	No	No	--	--	
Revised European Social Charter	Yes	Yes	No	Ratified collective complaints protocol? Yes	Yes	
International Covenant on Civil and Political Rights	Yes	Yes	No	Yes	No	
Framework Convention for the Protection of National Minorities	Yes	Yes	No	--	No	
International Convention on Economic, Social and Cultural Rights	Yes	Yes	No	---	No	
Convention on the Elimination of All Forms of Racial Discrimination	Yes	Yes	No	Yes	Yes	
Convention on the Elimination of Discrimination Against Women	Yes	Yes	No	Yes	Yes	
ILO Convention No. 111 on Discrimination	Yes	Yes	No	--	No	
Convention on the Rights of the Child	Yes	Yes	No	--	Yes	