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including summary



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Country report

Non-discrimination

Transposition and implementation at national level of
Council Directives 2000/43 and 2000/78

Italy

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Reporting period 1 January 2020 – 31 December 2020

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EXECUTIVE SUMMARY

1. Introduction

Italy is a country made up of 20 regions, each with its own traditions and history. The main differences, in terms of working conditions, job opportunities and the quality of public services (education, healthcare and transport), are between the northern and southern regions. The family is at the centre of the structure of society and of social welfare, with extended families still living together, in particular in the south. Organised crime, corruption, the black economy and tax evasion are structural scourges that still hinder the full development of the country, with the complicity of a political class that has never been able to tackle them adequately.

Some relevant data on the Italian population are provided by Istat, the Istituto nazionale di statistica (Italian National Institute for Statistics). According to the most recent surveys, in a population of 60 244 639,¹ there are about 3 100 000 people with disabilities, which represents about 5.2 % of the total population.² Pupils with disability number 272 000. One million people identify themselves as homosexual or bisexual.³ There are 5 250 000 foreign nationals, but no data are available on the racial or ethnic origin of the population. With regard to religion, 76.5 % of the total population have been baptised into the Catholic Church, although only around 25 % declare themselves to be practising Catholics. Muslims represent around 2 % of the population; the same percentage as Orthodox Christians. The Jewish community has a historical presence in Italy and has about 30 000 members.

The majority of judgments in the field of discrimination law are still based on the ground of nationality, although the application of anti-discrimination law on other grounds is increasing. However, discrimination law is still not perceived as a specific sector of the law, and is ignored even in databases that are commonly used by judges and lawyers. Both on political platforms and in the social sciences, discrimination is still a low-priority issue. The marginalisation of the activity of the Ufficio Nazionale Antidiscriminazioni Razziali (UNAR) (National Office Against Racial Discrimination), an office of the Government that is supposed to be the equality body, is both a cause and an effect of this lack of awareness, at least among politicians.

Surveys about perceptions of discrimination are very rare, so it is difficult to provide accurate estimates of the frequency and magnitude of discrimination in all fields – and media reports are often very inaccurate. Certainly, hostile attitudes can be observed towards different groups of people, mostly in relation to the recent waves of asylum seekers. Moreover, hostility against the Roma is still present among the population, with several politicians openly supporting policies of segregation in housing and education. School drop-out rates among Roma pupils are an issue of serious concern. They may be a direct consequence of housing segregation, with camps based far from schools and sudden transfers of people from one camp to another.

Racial and ethnic discrimination often overlaps with discrimination on the ground of religion and belief, mostly in the case of ethno-religious groups such as 'Arabs' and 'Muslims', when discrimination occurs without any distinction being made between the two terms.⁴ The large influx of refugees and asylum applicants has worsened the general picture still further. With regard to religious minorities not linked to immigration (Jews, Waldensians and others), there are no reports of serious cases of discrimination or of a general climate of hostility.

¹ Istat statistics on population, available at: <https://www.istat.it/it/archivio/bilancio+demografico>.

² Istat (2019), *Disability in Italy (La disabilità in Italia)*, available at: <https://www.istat.it/it/files//2019/12/Disabilit%C3%A0-1.pdf>.

³ Istat (2012), *The homosexual population in Italian society – 2011 (La popolazione omosessuale nella società italiana – 2011)*, available at: http://www.istat.it/it/files/2012/05/report-omofobia_6giugno.pdf.

⁴ See the extensive and up-to-date press record on hate speech edited by Associazione Carta di Roma, available at: <http://www.cartadiroma.org/>.

2. Main legislation

Article 3 of the Italian Constitution contains a general clause on equality and banning discrimination. It clearly prohibits any discriminatory legislation and, although there is not much case law on this point, it offers sufficient grounds for action by an individual who has faced discrimination. In addition, Law 300/1970 (the Workers Act) contains a provision banning discriminatory acts against workers, and a specific legal tool is provided for by criminal legislation on 'hate speech' which includes references to discriminatory acts of a different nature.

The first enactment of advanced anti-discrimination regulations took place with Legislative Decree 286/1998 (the Immigration Decree). This Decree prohibits direct and indirect discrimination by individuals and public authorities, with definitions roughly corresponding to those of the directives but with an open-ended list of fields of application. Protection extends to discrimination on the ground of national origin, which is understood as nationality, as in citizenship.

Implementation of the EU anti-discrimination directives has triggered a new era of anti-discrimination law in Italy. In order to transpose Directive 2000/43/EC and Directive 2000/78/EC into Italian law, the Government approved two decrees in July 2003: Legislative Decree 215/2003 (transposing Directive 2000/43) and Legislative Decree 216/2003 (transposing Directive 2000/78), which are still in force and constitute the main anti-discrimination laws.

Legislative Decree 215/2003 is applicable to discrimination on the grounds of race and ethnic origin in all the fields mentioned in Directive 2000/43/EC, while Legislative Decree 216/2003 applies within the field of employment to discrimination based on religion and belief, sexual orientation, disability and age. Both decrees basically aim to transpose the directives into the legal system as they are, without any attempt at coordination between them or with other existing Italian laws. Some drafting mistakes were corrected by a later decree, and legislation passed in early 2008 amended some of the major discrepancies with the directives.

A further law was passed in 2006 to extend the prohibition of direct and indirect discrimination on the ground of disability beyond the field of employment, with remedies similar to those provided for by the decrees transposing the directives.

One criticism of this sort of law-making concerns the fact that, since it does not abolish pre-existing anti-discrimination laws nor attempt consolidation, it adds further legal regimes, creating a complex legal framework. A step towards coordination was taken in 2011, with the general fast-track procedure applying expressly to all the grounds covered by the directives, plus national origin, language and colour.

It should be recalled that Italy is party to the major international treaties and conventions against discrimination – for example, the Convention on the Elimination of All Forms of Racial Discrimination, International Labour Organization Convention No. 111 on Discrimination and the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD), which have all been transposed into domestic law. However, while Italy has ratified the European Social Charter, the European Convention on Human Rights (ECHR) and additional protocols, it has not yet ratified Protocol 12 to the ECHR, thus limiting the potential of the Convention as a tool for anti-discrimination litigation.

3. Main principles and definitions

The 2003 decrees forbid direct as well as indirect discrimination, with wording that is based on that of the directives, on all the grounds concerned. Harassment is also defined and prohibited. Instructions to discriminate are explicitly considered to be a form of

discrimination. Victimisation is provided with the same level of judicial protection as other forms of discrimination, and is an element to be taken into consideration in the assessment of the amount of damages to be awarded. Discrimination by association is not explicitly covered, but the decrees can probably be interpreted as covering such discrimination, which could also be considered as a deprivation of personal freedom.

For all grounds of discrimination, occupational requirements can justify an exception to the prohibition of discrimination within the limits of 'proportionality and reasonableness', along the lines of the relevant provisions of the directives. However, this unfortunately cannot be said of the scope of application of the Decree provisions on 'work suitability' tests.

Italy chose to use the possibility of maintaining ad hoc rules for organisations with a special ethos. A partial exemption from the non-discrimination obligation for organisations with a specific ethos was developed by judges before the transposition of the directive, while in terms of legislation, the only provision on this point was a very limited one enacted in 1990 with regard to organisations characterised by a certain 'ideology' in a broad sense, such as churches, political parties and trade unions. In cases of unfair dismissal, employees of these organisations are granted only the remedy of damages and not the right to reinstatement that is otherwise available. However, according to many scholars, Legislative Decree 216/2003 gives employers with an ethos based on religion and belief a power that they did not have before the transposition of the directive.

With regard to religion, a problem exists for faiths (such as Islam) that have not signed an agreement with the state and thus do not enjoy automatic legal recognition of their specific needs (such as holidays and ritual obligations). However, they enjoy freedom of religion and the right to equality of churches under the Italian Constitution.

The provisions in relation to the reasonable accommodation duty, which was introduced after it was found that Italy had failed to implement Directive 2000/78/EC correctly, do not include a definition of 'reasonable accommodation', nor do they offer employers any sort of guidance on how to respect this duty; the legislation simply compels employers to make provision for reasonable accommodation. Courts have applied Article 3 of Legislative Decree 216/2003 in line with Directive 2000/78/EC and the UNCRPD, finding that the failure to meet the duty of reasonable accommodation counts as discrimination. It should be noted that public bodies must respect this duty only if no additional financial or human resources are required. This may be highly problematic, and could result in a breach of Article 5 of Directive 2000/78/EC, according to which employers must bear a burden if necessary, unless it is disproportionate. However, an improvement in the practical implementation of the duty of reasonable accommodation may be reached thanks to a provision introduced in 2017, which requires public bodies with more than 200 workers to appoint a person in charge of the integration of persons with disability (*Responsabile dei processi di inserimento delle persone con disabilità* – RPI).

Jurisprudence regarding discrimination on the ground of age is in line with EU anti-discrimination directives and with CJEU case law. An assessment of the lawfulness of the age limit is made for each case. In 2019, the Council of State referred a question to the CJEU in respect of the age limit of 50 years for access to the profession of notary.⁵ The Ministry of Justice had appealed to the Council of State in opposition to the interim decision issued by the Regional Administrative Tribunal to allow a person older than 50 years to enter into competition for a notary post, based on the discriminatory nature of the age limit of 50 years.

Multiple and assumed discrimination is not dealt with as such in Italian anti-discrimination legislation. However, multiple discrimination is taken into account in the annual activity

⁵ Case still pending, *Ministero della Giustizia*, C-914/19.

reports of UNAR, the national equality body for the promotion of equal treatment and prevention of discrimination on the grounds of race or ethnic origin.⁶

4. Material scope

The scope of application includes the same fields listed in the directives, and the provisions apply to both the private and public sectors. An interesting legal development took place in 2018, with the inclusion of a prohibition on discrimination on the grounds of sex, gender identity, sexual orientation, race, nationality, social and economic conditions, political opinions and religious belief as part of the reform of the prison system.

Unlike in the Immigration Decree, discrimination on the ground of nationality is explicitly excluded from the scope of application of Legislative Decree 215/2003, as are all legal provisions concerning the status of third-country nationals and stateless persons. In this regard, both decrees mention rules not only on entry and residence but on access to employment, assistance and welfare. As mentioned above, a 2006 law extends protection from discrimination on the ground of disability beyond the field of employment.

The exclusion of discrimination on the ground of nationality has been overcome by judges who apply the same legal framework, consisting of the Immigration Decree and Legislative Decree 215/2003, to every case of racial or nationality discrimination. This allows judges to handle cases of discrimination on the ground of nationality as direct discrimination and not as indirect racial discrimination.

Along these lines, the hostility of certain political actors towards ethnic and racial groups perceived as 'different' and, for one reason or another, 'strange' or 'dangerous' is increasingly reflected in formally 'ethnically blind' legislation (in particular, legislation introduced by municipalities) which uses various pretexts (requirements on residence, nationality, etc.) to exclude members of these groups from becoming full members of society. Despite the existence of settled case law, municipalities and regions persist in introducing these differentiating rules, which are then challenged in tribunals.

5. Enforcing the law

Action against discrimination is based on a claim being filed with the courts by the victim. In 2011, a procedural change was made, enhancing coordination between the various laws enacted in recent years. Article 28 of Legislative Decree 150/2011 revoked the special procedure for anti-discrimination cases provided by the Immigration Decree, which was replaced by the general fast-track procedure provided by Article 702-*bis* of the Civil Procedural Code. In especially urgent cases, the judge can issue an interim order, the violation of which (as well as that of the order issued in the final decision) is a criminal offence. The judge can order a plan to be produced for the rectification of discrimination. Moreover, the general law on pre-trial mediation now applies to all anti-discrimination claims, thus extending the provisions of Decree 216/2003, which previously applied solely to employment and occupation-related claims.

Concerning standing to litigate, both decrees contain special rules. Generally, in the first instance, the victim can act personally without representation by a lawyer. With regard to race and ethnic origin, the Department for Equal Opportunities of the Presidency of the Council of Ministers keeps a list, approved by the Ministry of Labour and Social Policies and the Department for Equal Opportunities, of associations and bodies selected on the basis of 'their purpose and the degree of continuity in their action' which have standing to litigate in support of or on behalf of victims of discrimination. They can also act through *actio popularis* against discrimination when the victim is not identified. In cases concerning the other grounds of discrimination, the decree transposing Directive 2000/78/EC now grants

⁶ UNAR reports are available at: <http://www.unar.it/cosa-facciamo/relazioni/>.

similar legal standing to relevant organisations without introducing a special register. For discrimination on the ground of disability outside employment, Law 67/2006 (the Disability Discrimination Act) introduced a system similar to that in force according to the decrees, with a special register held by the Ministry of Labour. Associations and trade unions are more aware of their key role in strategic litigations, in particular with regard to migration, Roma, sexual orientation and belief.⁷

Class action in discrimination cases is allowed, although the relevant law does not mention discrimination expressly as a field of application and no such case has been brought so far.

With regard to penalties, general legislation provides labour law sanctions such as the invalidity of any discriminatory act as well as measures against unlawful dismissal (including compulsory reinstatement in the workplace). Judges are allowed to order compensation for non-pecuniary damages as well, and they usually do, sometimes taking into account the dissuasive effect, in accordance with the 2000 Directives. In a case decided in 2018, *FILT CGIL v. Ryanair Dac*,⁸ concerning discrimination on the ground of belief, the Tribunal of Bergamo condemned the flight company and required it to pay EUR 50 000 to the trade union. The Tribunal classified the compensation as punitive damages, making reference to the CJEU *Asociația Accept* case and to anti-discrimination directives. The same principle has been stated in two cases decided in 2020. The first is the Deliveroo case, which is very similar to the Ryanair case and also concerns discrimination on the ground of belief: the Court of Bologna sentenced the company to publish the order on its website and an extract from it in the national newspaper *La Repubblica*, as well as to pay the applicants, three trade unions, compensation of EUR 50 000 and legal fees.⁹ The second is the TC case, in which the defendant was ordered to pay compensation of EUR 10 000 to the claimant, an NGO.¹⁰

Article 28 of Legislative Decree 150/2011 provides a rule on the burden of proof, which is applicable to all grounds of discrimination. This rule introduces a reversal of the burden once the claimant produces evidence (which may include statistical data) that can precisely and consistently establish a presumption of the existence of discriminatory acts, agreements or behaviours. The point of the shift in the burden of proof has been scrutinised thoroughly in the case decided in 2020 concerning discrimination against workers on the ground of their belief for belonging to a trade union. Here, the Supreme Court takes stock of the rules applying in Italy on the burden of proof and interprets them in line with the specific provision coming from Directive 2000/78/EC on the shift in the burden of proof.¹¹

Situation testing can be used as evidence in civil proceedings. However, while there are no legal obstacles to its use, there is also no express provision allowing it, and evidence gathered through situation testing has not as yet been presented as such to a court.

⁷ Supreme Court, judgment of 8 May 2017, *ASGI v. INPS*, available at: https://www.asgi.it/wp-content/uploads/2017/05/Corte_di_Cassazione_sez_lavoro_sentenza_n_11166_del_8517_pres_D%E2%80%99Antonio_est_Rivero_INPS_avv_Coretti_Stumpo_e_Triolo_c_ASIGI-APN.pdf; Supreme Court, judgment of 15 December 2020, *T.C. v. Associazione diritti LGBTI – Rete Lenford*, No. 28646, available at: https://www.cortedicassazione.it/cassazione-resources/resources/cms/documents/28646_12_2020_no-index.pdf.

This greater awareness of their role is reflected in a greater number of legal actions brought to court by NGOs and trade unions.

⁸ Tribunal of Bergamo, judgment of 30 March 2018, *FILT CGIL v. Ryanair Dac*, No. 1586.

⁹ Tribunal of Bologna, judgment of 31 December 2020, *FILCAMS CGIL BOLOGNA, NIDIL CGIL BOLOGNA, FILT CGIL BOLOGNA v. Deliveroo Italia*, No. 2949, available at: <http://www.bollettinoadapt.it/wp-content/uploads/2021/01/Ordinanza-Bologna.pdf>.

¹⁰ Supreme Court, judgment of 15 December 2020, *T.C. v. Associazione diritti LGBTI – Rete Lenford*, No. 28646, available at: https://www.cortedicassazione.it/cassazione-resources/resources/cms/documents/28646_12_2020_no-index.pdf.

¹¹ Supreme Court, judgment of 2 January 2020, *S.L.A.I. COBAS v. F.C.A. ITALY S.P.A.*, No. 2, available at: http://www.bollettinoadapt.it/wp-content/uploads/2020/01/20200102_snciv@sL0@a2020@n00001@tS.clea n .pdf.

6. Equality bodies

The equality body, UNAR, was originally created to deal only with race and ethnic origin, hence its full name: the National Office Against Racial Discrimination. In 2010, a Governmental directive extended UNAR's remit to cover nationality, sex, religion or personal belief, disability, age and sexual orientation, and it became known as the Ufficio per la promozione della parità di trattamento e la rimozione delle discriminazioni fondate sulla razza o sull'origine etnica (Office for the promotion of equal treatment and prevention of discrimination on the grounds of race or ethnic origin). It is not an independent body, since it was established as a section of the Department for Equal Opportunities of the Presidency of the Council of Ministers, which previously dealt exclusively with gender discrimination. UNAR can use staff from other Government departments, including judges and state attorneys as well as external experts and advisers.

According to its founding legislation, UNAR's competences include providing independent assistance to victims of discrimination in pursuing their complaints; carrying out independent surveys on discrimination; promoting the adoption of specific measures aimed at eliminating or compensating for disadvantages incurred by people who have been victims of discrimination; issuing opinions and proposing legislative reforms concerning racial and ethnic discrimination; issuing recommendations on matters relating to racial and ethnic discrimination; and disseminating information on the rules on equal treatment irrespective of racial or ethnic origin.

UNAR has two different units, one focusing primarily on legal assistance and dispute resolution and the other on study and research. It reports every year to Parliament and to the executive. It has been operational since November 2004 and, according to its annual reports to the Government, it offers significant assistance to victims of discrimination through the free telephone number that can be called by those who feel they are victims of discrimination. In addition to legal assistance, UNAR has cooperated with external lawyers to issue a number of opinions on the status of undocumented immigrants. It has also run seminars and workshops to disseminate information and provide training to lawyers and NGOs. The annual reports are rich in information on UNAR activities and on complaints received via the green (freephone) number. During 2018, UNAR restarted its activities after a change of directors and several years during which its work was at a standstill. For instance, the annual reports of its activities were finally published in 2017, after a hiatus of five years following the previous report, which was published in 2012. In June 2019, a new director of the organisation was appointed by the Government.

In 2012, UNAR was appointed as a national contact point in accordance with European Commission Communication COM(2011)173 and was charged with the task of coordinating Italy's national Roma strategy. It was also appointed as a national contact point for the implementation of Council of Europe Recommendation CM/Rec (2010)5 on discrimination on the ground of sexual orientation, despite the fact that its original remit did not extend beyond discrimination on the grounds of race and ethnic origin. However, the practical implementation of such strategies is extremely limited. Nevertheless, during 2018, UNAR restarted the promotion of activities in the field of sexual orientation, such as setting up a permanent consultative group comprised of associations acting in the field of LGBT rights.¹²

In addition, a special body called the Osservatorio per la sicurezza contro gli atti discriminatori (Observatory for Security against Discrimination – OSCAD) was set up in 2010 as part of the Department of Public Security of the Ministry of the Interior. It is a special body, operated by the police and the *carabinieri* (military police). Its members belong to the Ministry of the Interior (police) and to the Ministry of Defence (*carabinieri*).

¹² Decree setting up a permanent consultative group promoting and defending rights of LGBT rights, (*Costituzione del tavolo di consultazione permanente per la promozione dei diritti e la tutela delle persone LGBT*), 22 December 2018, available at: <http://www.unar.it/wp-content/uploads/2018/10/Decreto-composizione-tavolo-LGBT.pdf>.

Therefore, it is not an independent body but a governmental one. It has a mandate to act in all fields of discrimination and has the following tasks: it receives reports of discriminatory acts relating to the security sector, from institutions, professional or trade associations and private individuals, in order to monitor discrimination based on race or ethnic origin, nationality, religion, gender, age, language, physical or mental disability, sexual orientation and gender identity. Based on the reports it receives, OSCAD initiates targeted interventions and follows up on the outcome of discrimination complaints lodged with police agencies; maintains contact with other bodies and institutions dedicated to combating discrimination; promotes trainings and appropriate measures to prevent and fight discrimination.

7. Key issues

Anti-discrimination seems to have a very marginal role in Government policies, and this is illustrated by several facts, including the lack of a ministry for integration and the limited powers granted to UNAR. With regard to the national Roma strategy, for instance, there is still a lack of effective implementation following its adoption. However, a positive trend on housing policy regarding Roma, Sinti and Camminanti has been recorded in 2019, with the reduction of camps in several cities. The situation in Rome appears to be still highly problematic.

As far as UNAR, its lack of independence makes it more an office operating within the Department for Equal Opportunities, than an equality body with a certain degree of autonomy from the Government. As confirmed by the ECRI report published in 2019, UNAR is clearly and completely linked to the executive and cannot perform any independent activity whatsoever, despite the fact that it has at times adopted a critical position in relation to the Government. However, it must be noted that the majority of these cases were initially highlighted by the media or individual lawyers, and UNAR became involved only later after significant pressure from different organisations. This shows that, in general, UNAR does not take the initiative autonomously, although it may issue opinions after being requested to intervene by other associations or NGOs. Evidence of its close connection with the political majority can be seen in the 'spoils system', as applied to the roles of the director and experts. The renewal of their tenure is completely at the discretion of the head of the Department and the Minister.

The lack of a clear policy against discrimination is also reflected in the lack of positive actions in favour of vulnerable groups, aside from traditional social inclusion measures for people with disabilities and the linguistic minorities. Several changes should be made in order to ensure the greater effectiveness of anti-discrimination laws. First, in relation to the duty of reasonable accommodation, a definition and guidelines on how to respect the duty are needed, not least in order to avoid recurrent legal action on this point.

With respect to differences in treatment by organisations with a special ethos, the exception as formulated in Legislative Decree 216/2003 also applies to organisations without an ethos actually based on religion or belief, and is likely to go beyond what was provided for under pre-existing national rules in the field.

Developments in case law in relation to sanctions highlighted in 2019 have been confirmed in 2020. While compensation for non-pecuniary damages is ensured in every judgment, the amount is calculated taking into account the dissuasive nature of such a sanction, in accordance with Article 17 of Directive 2000/78/EC. The 2020 judgment of the Tribunal of Bologna against Deliveroo is a clear example in this regard.¹³

¹³ Tribunal of Bologna, judgment of 31 December 2020, *FILCAMS CGIL BOLOGNA, NIDIL CGIL BOLOGNA, FILT CGIL BOLOGNA v. Deliveroo Italia*, no. 2949, available at: <http://www.bollettinoadapt.it/wp-content/uploads/2021/01/Ordinanza-Bologna.pdf>.

Finally, the coexistence of different legal texts that are very similar is unnecessary and could create legal uncertainty, but no consolidation is planned.

INTRODUCTION

The national legal system

The Italian legal system is based on a written Constitution, which entered into force on 1 January 1948 and is guaranteed by a relatively centralised judicial review of enacted laws adopted by either the national Parliament or regional legislative bodies.

The Italian regions have increasingly important law-making powers within the limits of the state's exclusive competences, in accordance with Article 117 of the Italian Constitution. Measures for social integration and the practical organisation of public services (social and health services, for instance) fall within the competence of the regions; however, it is the role of central Government to determine 'the basic level of benefits relating to civil and social entitlements to be guaranteed throughout the national territory' (Article 117(2)(m)). Moreover, according to Article 177(7) of the Italian Constitution, '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 elected office.'

The regions and the autonomous provinces of Trento and Bolzano participate in the EU legislative process and apply and implement international agreements and European Union legal acts. The regions with special constitutional status (Friuli Venezia Giulia, Sardinia, Sicily, Trentino-Alto Adige and Valle d'Aosta) have particularly extensive legislative powers.

The municipalities, provinces and metropolitan cities have regulatory powers in accordance with the system of organisation and mode of operation that has been granted to them.

This division of competences is far from clear and has generated considerable case law from the Constitutional Court. As far as discrimination laws are concerned, in a judgment of 2006 the Constitutional Court quashed the section of a law enacted by the region of Tuscany, which imposed (subject to an administrative sanction) an obligation of non-discrimination on the ground of sexual orientation in commercial activities, since the imposition of such an obligation falls under the exclusive competence of the state at national rather than regional level, being an infringement of the individual's freedom of contract.

Any laws, regulations, administrative acts or municipal acts must comply with the Constitution. In addition, provisions derived from international human rights instruments (and the related jurisprudence from international courts) are also employed by Italian courts, either in order to interpret Italian enacted law or to directly decide cases.

The equality principle and anti-discrimination laws can be applied by either ordinary or administrative courts; case law is therefore generated by decisions of the Constitutional Court, ordinary judges and administrative judges, depending on whether the case concerns a constitutional review, a dispute among private individuals, a dispute with public entities or a specific action against discrimination.

List of main legislation transposing and implementing the directives

The two anti-discrimination directives have been implemented in Italy through the adoption of two legislative decrees in 2003. Those legislative decrees are still in force and only minor changes have been adopted later on.

- Legislative Decree 215/2003 implementing Directive 2000/43/EC on equality of treatment between persons irrespective of racial or ethnic origin¹⁴
 Date of adoption: 9 July 2003
 Grounds covered: Race and ethnic origin
 Material scope: Public employment, private employment, access to goods or services (including housing), social protection, social advantages, education
- Legislative Decree 216/2003 on the implementation of Directive 2000/78/EC for equal treatment in employment and occupation¹⁵
 Date of adoption: 9 July 2003
 Grounds covered: Religion or belief, disability, age, sexual orientation
 Material scope: Private and public employment

¹⁴ Legislative Decree 215/2003 implementing Directive 2000/43/EC on equality of treatment between persons irrespective of racial or ethnic origin (*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*), available at: www.normattiva.it/uri-res/N2Ls?urn:nir:stato:decreto.legislativo:2003-07-09;215.

¹⁵ Legislative Decree 216/2003 implementing Directive 2000/78/EC for equal treatment in employment and occupation (*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*), available at: www.normattiva.it/uri-res/N2Ls?urn:nir:stato:decreto.legislativo:2003-07-09;216!vig=.

1 GENERAL LEGAL FRAMEWORK

Constitutional provisions on protection against discrimination and the promotion of equality

The constitution of Italy includes the following articles dealing with non-discrimination:

Article 3: provides a general clause. It recognises equal dignity and equality under the law without distinction on the grounds of sex, race, language, religion (belief is not mentioned per se), political opinion and personal or social conditions. The grounds of discrimination listed in Article 3 are more restricted than those mentioned in Article 19 of the Treaty on the Functioning of the European Union (TFEU); however, the list has been interpreted as non-exhaustive and the 'reasonable clause test' has been applied by the Constitutional Court to any ground of unjustified difference and in any fields.¹⁶ Article 3 also includes the principle of substantive equality and calls on the state to remove the social and economic obstacles which limit the freedom and equality of citizens and prevent the full development of the human being.

Article 8(1): contains a specific clause regarding freedom and equality of religions.

Article 37(1): contains a specific clause regarding sex discrimination in labour law.

Article 37(3): contains a specific clause providing for equal pay for equal work for minors.

Article 51: contains a specific clause regarding equal access for women and men to elected office.

These provisions apply to all areas covered by the directives and there is no restriction to their material scope. Their material scope is broader than the scope of the directives.

These provisions are directly applicable in theory and can be enforced against private actors (as well as against the state). However, there are not many cases of this type, while the majority of judgments applying constitutional provisions are issued by the Constitutional Court with regard to the validity of laws.

¹⁶ Several judgments have been issued by the Constitutional Court applying Article 3 of the Italian Constitution. One of the most relevant judgments in the field of sexual orientation is the Court's judgment of 21 April 2010, No. 10, available at: <http://www.cortecostituzionale.it/actionSchedaPronuncia.do?anno=2010&numero=138>. One of the few judgments in the field of disability is the judgment of 22 February 2010, No. 80, available at: <http://www.cortecostituzionale.it/actionSchedaPronuncia.do?anno=2010&numero=80>.

2 THE DEFINITION OF DISCRIMINATION

2.1 Grounds of unlawful discrimination explicitly covered

The following grounds of discrimination are explicitly prohibited in the main legislation (listed under section Introduction, the main legislation transposing and implementing the directives) transposing the two EU anti-discrimination directives: race and ethnic origin; religion and personal belief; age; disability; sexual orientation.

2.1.1 Definition of the grounds of unlawful discrimination within the directives

The two legislative decrees transposing the directives do not contain any definition of the grounds of unlawful discrimination.

a) Racial and ethnic origin

No definition is provided elsewhere in national law for either of the two elements of this ground. It is worth mentioning that, according to Article 43 of the Immigration Decree, which was inspired mainly by the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), discrimination on the ground of national origin is prohibited and is interpreted as covering nationality (as in citizenship). In fact, discrimination against migrants is one of the most common grounds for claims of discrimination, in particular when it comes to legal distinctions on the access of third-country nationals to social protection measures and social advantages.¹⁷

No definition is given even in the field of equality data collection. For instance, within the framework of the first survey on discrimination, carried out in 2011-12 by Istat, ethnic origin was one of the grounds taken into consideration but without giving any definitions and taking migrants as a proxy.

b) Disability

Regarding disability, a definition is given by Article 3(2) of Law 104/1992 (the Framework Law on care, social integration and rights of people with disability,¹⁸ according to which, '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'.

Moreover, the guidance on the concept of 'persons with disabilities' provided by Article 1 of the UNCRPD, ratified by Italy through Law 18/2009, is now part of the Italian legal order.¹⁹ Owing to this Convention and in particular to the concept of 'interaction with various barriers', a social model of disability has been formally introduced into national law. This definition is in line with the CJEU's judgment in the joined cases of *HK Danmark (Ring and Skouboe Werge)*²⁰ but with a wider material scope: in *Ring and Skouboe Werge*, as well in the previous *Chacón Navas* case,²¹ the definition of disability concerns 'professional life', while both the definitions provided by the UNCRPD and Law 104/1992

¹⁷ A large number of judgments dealing with discrimination on grounds of nationality have been delivered thanks to the active role played by members of an association of lawyers specialising in migration – ASGI – who in some cases take part in proceedings. See the specialised database available at: <http://www.asgi.it/tematica/discriminazioni/>.

¹⁸ Framework Law on the care, social integration and rights of disabled persons (*Legge-quadro per l'assistenza, l'integrazione sociale e i diritti delle persone handicappate*), 5 February 1992, No. 104, available at: <http://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:1992-02-05;104:vig>.

¹⁹ No judgment has been delivered concerning the so-called 'social model' of disability as set out in Article 1 of the UN CRPD.

²⁰ Judgment of 11 April 2013, *HK Danmark*, C-335/11 and C-337/11, EU:C:2013:222, paragraph 54.

²¹ Judgment of 11 July 2006, *Chacón Navas*, C-13/05, EU:C:2006:456.

apply to any kind of 'participation in society'. Case law on disability is slowly increasing each year. Italian courts are applying all the relevant rules coming from the international, European and national legal order. An interesting case was decided during 2019 by the Supreme Court, in which the concept of disability was interpreted in line with the CRPD.²²

c) Religion

Criteria for identifying the religious character of social groups have been developed in the case law of the Constitutional Court. The main set of standards were set by the Court in a 1995 case²³ in which it stated that, in the absence of agreements with the State under Article 8 of the Italian Constitution, the 'religious denomination' of a social group can be established on the basis of 'public recognition' or on the basis of its charter (not alone but examined against the backdrop of the organisation's actual activity) or on the basis of 'common opinion'. These criteria have been applied and further detailed, especially with regard to Scientology, which, according to the case law of the Supreme Court, meets the criteria for inclusion as a 'religious denomination' protected under the Constitution. However, such criteria have never been tested in the context of anti-discrimination cases. In a judgment issued in 2016, the Constitutional Court clarified that, under Article 8 of the Italian Constitution, the Government does not have a duty to open negotiations in order to sign an agreement with every 'church'. Moreover, the refusal by the Government to open or to sign an agreement as requested by the Union of Rationalist Atheists and Agnostics does not entail a denial of the rights granted by the Constitution to churches or other religious groups.²⁴ In 2020, the Supreme Court has endorsed the definition of religion as encompassing also atheist and agnostic beliefs.²⁵

d) Belief

Regarding the definition of belief, it is worth mentioning that, according to the case law, the notion of belief laid down by Directive 2000/78/EC has been interpreted as including trade union membership. The first judgment in which such an approach was taken was the 2013 judgment of the Tribunal of Rome in the case of *FIOM CGIL v. FIAT, Fabbrica Italia*.²⁶ In 2018, the Tribunal of Bergamo followed the same approach in a case involving Ryanair,²⁷ while in 2020 the same interpretation has been applied in two cases brought to justice; one case once again against F.C.A. Italia, and another against Deliveroo Italy.²⁸

Therefore, discrimination suffered by members of a left-wing union was dealt with according to that Directive and its implementing legislation, Legislative Decree 216/2003, while the traditional case law on similar cases usually applies the 1970 Workers Act (Law No. 300), which provides for the protection of freedom of association and the freedom to join a trade union.²⁹

e) Age

²² Supreme Court, judgment of 12 November 2019, *Marangoni S.P.A. v. T.D.*, No. 29289, available at: <https://sentenze.ialleggepertutti.it/sentenza/cassazione-civile-n-29289-del-12-11-2019>.

²³ Constitutional Court, judgment of 27 April 1993, No. 195, available at: <http://www.cortecostituzionale.it/actionSchedaPronuncia.do?anno=1993&numero=195>.

²⁴ Constitutional Court, judgment of 10 March 2016, No. 52, <http://www.cortecostituzionale.it/actionSchedaPronuncia.do?anno=2016&numero=52>.

²⁵ Supreme Court, judgment of 17 April 2020, *UAAR (Unione degli atei e degli agnostici razionalisti) v. Comune di Verona*, No. 7893, available at <https://www.questionegiustizia.it/data/doc/2558/7893-2020.pdf>.

²⁶ Court of Rome, judgment of 19 June 2012, available at: www.dplmodena.it/Fiat-Fiom%20-%20Corte%20Appello%20Roma%209-10-12.pdf.

²⁷ Tribunal of Bergamo, judgment of 30 March 2018, *FILT CGIL v. Ryanair Dac*, No. 1586.

²⁸ Tribunal of Bologna, judgment of 31 December 2020, *FILCAMS CGIL BOLOGNA, NIDIL CGIL BOLOGNA, FILT CGIL BOLOGNA v. Deliveroo Italia*, No. 2949, available at: <http://www.bollettinoadapt.it/wp-content/uploads/2021/01/Ordinanza-Bologna.pdf>; Supreme Court, judgment of 2 January 2020, *S.L.A.I. COBAS v. F.C.A. ITALY S.P.A.*, No. 2, available at http://www.bollettinoadapt.it/wp-content/uploads/2020/01/20200102_snciv@sL0@a2020@n00001@tS.clean_.pdf.

²⁹ Workers Act, Law No. 300 of 20 May 1970, available at: www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:1970-05-20;300!vig=.

Age is taken into account in several pieces of legislation, in particular with regard to labour policy, social issues and social security. Despite the fact that the Italian Constitution provides express protection only to young people, (Article 37(2)), scholars believe that there is a general prohibition of discrimination on the ground of age deriving from Article 3 of the Italian Constitution ('personal conditions') and from the interpretation of Article 37(3) afforded by the Constitutional Court, which has also applied the same Article to workers aged between 18 and 21.³⁰

f) Sexual orientation

No definition is given either of this term or of others used in the same context, such as 'gender identity', or 'transsexual and transgender' (see, for instance, Tuscany Regional Law 63/2004). Furthermore, the Italian courts do not provide their own definition of 'sexual orientation'. Even in the most recent case law concerning the extension of rights expressly afforded to heterosexual couples to same-sex couples, sexual orientation is considered, but it is not defined.

A definition of sexual orientation is provided by the Italian strategy to prevent and combat discrimination on the grounds of sexual orientation and gender identity, enacted to implement Council of Europe Recommendation CM/Rec (2010)5, which was approved in 2013 by UNAR, the Italian equality body.³¹ The strategy has no timeframe and has not thus far been replaced with another one. It is a non-binding document, the implementation of which depends on the Government. Although it could potentially have been referred to by national courts or other bodies dealing with equality and non-discrimination issues, it is not perceived as a key document, and no reference to it has yet been made in judgments. The strategy includes a glossary in which several definitions are given. In particular, sexual orientation is defined as: 'the direction of affective and sexual attraction towards other people: it can be heterosexual, homosexual or bisexual'.³²

2.1.2 Multiple discrimination

In Italy, multiple discrimination is not prohibited by law. A very limited exception is the opening provision (Article 1) of Legislative Decree 216/2003 transposing Directive 2000/78/EC, which says that the decree has been adopted 'in a perspective that takes into account the different impact that the same forms of discrimination can have on men and women respectively'. Likewise, Article 1 of Legislative Decree 215/2003 transposing Directive 2000/43/EC contains the same statement but with the addition of the 'existence of forms of racism of a cultural and religious character'. The same wording is repeated in Article 2 of the Prime Minister's Decree of 11 December 2003, designating UNAR as the equality body according to Article 7 of Directive 2000/43/EC.³³ Multiple discrimination is indeed taken into account in UNAR's activity as it is covered in the organisation's annual reports.³⁴

³⁰ Constitutional Court, judgment of 10 March 2016, No. 52, available at:

<http://www.cortecostituzionale.it/actionSchedaPronuncia.do?anno=2016&numero=52>.

³¹ UNAR, *National strategy to prevent and combat discrimination on the grounds of sexual orientation and gender identity 2013-2015* (*Strategia nazionale per la prevenzione ed il contrasto della discriminazione basate sull'orientamento sessuale e l'identità di genere*), available at: http://www.unar.it/wp-content/uploads/2017/12/LGBT-strategia-unar-17_24.pdf.

³² UNAR, *National strategy to prevent and combat discrimination on the grounds of sexual orientation and gender identity 2013-2015*.

³³ Decree of the President of the Council of Ministers, 'Designation and organisation of the Office promoting equality of treatment and fighting against discrimination' (*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*), available at: <http://www.unar.it/unar/portal/wp-content/uploads/2013/11/Decreto-del-Presidente-del-Consiglio-dei-Ministri-11-dicembre-20031.pdf>.

³⁴ UNAR, *Report to the Prime Minister for the year 2018*, p. 8, available at: <http://www.unar.it/wp-content/uploads/2020/01/Relazione-al-Parlamento-e-al-Presidente-del-Consiglio-2018.pdf>.

An explicit reference to multiple discrimination is provided for in the Programme of Action for the Integration of People with Disabilities, which was approved in 2013.³⁵ On page 7 of the Programme, multiple discrimination is taken into account in order to define new criteria to collect data on the integration of people with disabilities so that it will be possible to verify their effective integration and the other factors which ease or hinder integration. The same explicit reference is not made in the third Programme of Action, officially approved during 2017, in which there is only a generic reference to the several different types of diversity that exist in modern societies.³⁶

In Italy, there is no case law dealing with multiple discrimination.

2.1.3 Assumed and associated discrimination

a) Discrimination by assumption

In Italy, discrimination based on a perception or assumption of a person's characteristics is not prohibited in national law.

The issue of assumed discrimination has not yet led to any relevant legal debate, not least because relevant case law is lacking. However, the wording of Article 2 of both decrees and of other existing anti-discrimination rules does not rule out discrimination by assumption, and the text of Article 2 allows a wide interpretation that includes assumed discrimination among the kinds of discrimination prohibited.

b) Discrimination by association

In Italy, discrimination based on association with persons with particular characteristics is not prohibited in national law.

The issue of associated discrimination has not yet led to any relevant legal debate. However, the wording of Article 2 of both decrees and of other existing anti-discrimination does not rule out discrimination by association, and the text of Article 2 allows for a wide interpretation that includes this type of discrimination among the kinds of discrimination prohibited.

It is worth mentioning that, in a case decided in 2018, the Tribunal of Matera did not take into account the issue of discrimination by association. A worker had argued that a change in her working hours amounted to discrimination on the ground of disability, because of her duty to take care of her disabled father. However, the Tribunal did not consider the Coleman principle and held that, since the claimant herself was not a person with disability, she could not claim to have been discriminated against on the ground of disability.

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

a) Prohibition and definition of direct discrimination

In Italy, direct discrimination is prohibited in national law.

It is defined in Article 2(1)(a) of both legislative decrees implementing the two directives, with a faithful transposition of the directives' definition: direct discrimination occurs when

³⁵ Presidential Decree of 4 October 2013, 'Biannual programme of action for the integration of people with disabilities' (*Adozione del programma di azione biennale per la promozione dei diritti e l'integrazione delle persone con disabilità*), *Gazzetta Ufficiale*, 28 December 2013, No. 303, p. 37, available at: www.gazzettaufficiale.it/eli/id/2013/12/28/13A10469/sg.

³⁶ Presidential Decree of 12 October 2017, 'Second Biannual Programme of Action for the Integration of People with Disabilities' (*Adozione del secondo programma di azione biennale per la promozione dei diritti e l'integrazione delle persone con disabilità*) *Gazzetta Ufficiale*, 12 December 2017, No. 289, available at: <http://www.handylex.org/stato/d121017.shtml>.

'one person is treated less favourably than another is, has been or would be treated in a comparable situation'. An identical definition is provided for by Article 2 of Law 67/2006 on measures for the judicial protection of persons with disabilities who are victims of discrimination in fields outside employment.

b) Justification for direct discrimination

Justification of direct discrimination is not permitted. Legislative decrees implementing the two EU anti-discrimination directives contains provisions identical to the ones provided for by the directives as far as genuine and determining occupational requirements are concerned.

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

a) Prohibition and definition of indirect discrimination

In Italy, indirect discrimination is prohibited in national law. It is defined in Article 2.1.b of both legislative decrees as a situation 'where an apparently neutral provision, criterion, practice, act, pact or behaviour would put persons [followed by reference to the specific grounds] at a particular disadvantage compared with other persons'.

An analogous definition is given in Article 2(3) of Law 67/2006 on discrimination on the ground of disability.

b) Justification test for indirect discrimination

Article 3(4) (race) and Article 3(6) (other grounds) of the legislative decrees establish that '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 (...).'

The justification test is in line with the relevant directives, and its application by the courts has not raised any particular issues.

It is interesting to note that Article 3(6) goes on to say that 'in particular, acts aiming to exclude from an occupation involving the care, assistance or education of minor's persons who have been convicted of offences related to sexual freedom of minors or child pornography are legitimate'. This provision has quite limited practical implications, since dismissal on the ground of criminal conviction is always lawful if the crime is related to an occupational activity. Legislators may have wished to prevent the misuse of the ground of 'sexual orientation', but making an indirect allusion to a link between paedophilia and sexual orientation is hazardous.

No express reference to justification is made by Law 67/2006 on discrimination on the ground of disability.

2.3.1 Statistical evidence

a) Legal framework

In Italy, there is legislation regulating the collection of personal data, which has been adopted to integrate Regulation 2016/679/EU.³⁷ The definition of 'sensitive data' is that set out in Regulation 2016/679/EU.

³⁷ Personal Data Protection Code (*Codice in materia di protezione dei dati personali*), 30 June 2003, No. 196 (as amended in line with the EU GDPR) available at: <http://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:decreto.legislativo:2003-06-30;196!vig>.

In Italy, statistical evidence is permitted by national law in order to establish indirect discrimination. According to Article 28(4) of Legislative Decree 150/2011, when a claimant establishes 'facts, including facts of a statistical character, on which a presumption of discrimination can be based, it is up to the defendant to prove that there has been no discrimination'.

In Italy, statistical evidence may be admitted under national law in order to establish discrimination, both direct and indirect, according to the general rule on conditions for the admissibility of such evidence in court.

b) Practice

In practice, statistical evidence is not used in Italy in order to establish indirect discrimination.

The first statistical research into gender, sexual orientation and ethnic origin was conducted by Istat during 2011 and was funded by the Government in order to collect data regarding actual discrimination experienced by people on the grounds of sexual orientation and homophobia.³⁸ The national strategies adopted by UNAR have taken this research as a basis for developing a number of activities to be promoted. However, none of these activities has been carried out effectively and no more recent research has been undertaken.³⁹

An important piece of case law on this issue is the Court of Rome's judgment of 19 June 2012 in the case of *FIOM CGIL v. Fiat, Fabbrica Italia*. In fact, this was the only case to be decided mainly on the basis of statistics. In this case, statistics were employed as proof of discrimination against workers on the ground of belief. In particular, the defendant held that workers were recruited in an impartial way and through objective criteria, without any discriminatory intent. However, no worker who was a member of the trade union FIOM was employed by Fiat. Statistics showed that the chances were only one in 10 million that this had happened by coincidence and not as a consequence of a deliberate intention to discriminate against the workers who had most strongly contested Fiat's new industrial strategy. A similar case was decided in 2020 against the same company, F.C.A. Italy, in which the Supreme Court considered that the percentage of transferred workers belonging to the claimant trade union (77) out of the total number of transferred workers (336) was objectively high. These numbers were sufficient to prove discrimination, requiring the claimant to prove the contrary.⁴⁰ However, F.C.A. Italy lost the case because it did not manage to justify that this difference of treatment could be explained otherwise than by discrimination.

2.4 Harassment (Article 2(3))

a) Prohibition and definition of harassment

In Italy, harassment is prohibited in national law. It is defined in Article 2(3) of both legislative decrees implementing the directives, using the same wording taken from the directives, which states that the unwanted conduct must have the purpose or the effect of 'creating an intimidating, hostile, degrading, humiliating or offensive environment'.

In Italy, harassment explicitly constitutes a form of discrimination.

³⁸ Istat (2012), *The Homosexual Population in Italian Society – 2011 (La popolazione omosessuale nella società italiana – 2011)*, available at: <http://www.istat.it/it/archivio/62168>.

³⁹ UNAR, *National strategy to prevent and combat discrimination on the grounds of sexual orientation and gender identity 2013-2015*; UNAR, *National Strategy for the Inclusion of Roma, Sinti and Caminanti Communities*, in particular pp. 33-34, available at: http://ec.europa.eu/justice/discrimination/files/roma_italy_strategy_en.pdf.

⁴⁰ Supreme Court, judgment of 2 January 2020, *S.L.A.I. COBAS v. F.C.A. ITALY S.P.A.*, No. 2, available at http://www.bollettinoadapt.it/wp-content/uploads/2020/01/20200102_snciv@sL0@a2020@n00001@tS.clea n .pdf.

The Court of Appeal of Brescia, in a judgment delivered in 2019, decided that statements made by a politician in the Lega Nord party against asylum seekers and NGOs working in the reception system qualified as harassment on the ground of race.⁴¹

b) Scope of liability for harassment

Where harassment is perpetrated by an employee, the employer and the employee are liable.

Since the legislative decrees are silent on the scope of liability for discrimination, the liability of those other than the individual discriminator must be established on the basis of the general principles of liability in contract and tort.

In the case of a contractual relationship, such as that between employer and employee, the former is liable for the action of the latter, because there is a duty to ensure protection in the working environment.

In the absence of a contractual relationship with the victim of discrimination (even in the form of harassment), 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 servant (acts committed while performing their duties).

With regard to trade unions and professional associations, there is no ground for holding them liable for the actions of their members, if they did not contribute actively to the discrimination (for instance, in the case of instructions to discriminate).

The only relevant case dates from 2012, when the Court of Milan convicted a legal person, a bank, of harassment on the ground of race perpetrated by its managers. According to the judge, the bank was to be held liable because the harassment was perpetrated by managers in top positions in the bank who were thus able to influence the majority of employees; the latter were not individually convicted, but in theory it is possible that both the legal person and the individual harasser or discriminator could be held liable for the same acts of discrimination, since Legislative Decree 215/2003 expressly applies to both physical and legal persons.

2.5 Instructions to discriminate (Article 2(4))

a) Prohibition of instructions to discriminate

In Italy, instructions to discriminate are prohibited in national law, in Article 2(4) of both legislative decrees implementing the two directives. Instructions are not defined.

In Italy, instructions explicitly constitute a form of discrimination.

b) Scope of liability for instructions to discriminate

In Italy, the instructor and the discriminator are liable.

Since the decrees are silent on the scope of liability for discrimination, the sanctions provided for persons other than the individual discriminator must be established on the basis of the general principles of liability in contract and tort.

Liability for the acts of third parties is more limited and must be linked to a direct act or omission by the defendant. The individual harasser or other discriminator is jointly liable

⁴¹ Court of Appeal of Brescia, judgment of 18 January 2019, *F.P.E. v. ASGI and others*.

with their employer. If the employer or other principal defendant is liable without personal fault, or on the basis of a slighter degree of fault, they can bring an action against the discriminator to obtain complete or partial compensation of the amount paid as damages.

With regard to instructions to discriminate, a case from 2013 is relevant. The Court of Catanzaro dismissed an appeal from the parents of a disabled student against an order to discriminate given by the local administrative director to teachers and schoolmates. According to the court, the order to discriminate could not be condemned per se since it did not produce any discriminatory effects and the administrative director was sanctioned by the Regional Department of Education.

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

- a) Implementation of the duty to provide reasonable accommodation for people with disabilities in the area of employment

In Italy, the duty on employers to provide reasonable accommodation for people with disabilities is included in the law and is not defined.

The relevant provision is Article 3(3-*bis*) of Legislative Decree 216/2003, which was inserted in order to comply with an infringement judgment by the CJEU.⁴² According to the Article: 'in order to apply the principle of equal treatment of persons with disabilities, private and public employers shall provide for reasonable accommodation according to the UN Convention on the Rights of Persons with Disabilities, ratified by Act 18/2009, in workplaces, to guarantee persons with disabilities full equality with other workers. Public employers shall apply this provision without any additional burden and with the human, financial and technical resources already available'. This means not that they are not bound to provide reasonable accommodation, but that no additional funding is allocated for this. This is a standard formula included in various laws in Italy in order to limit public spending; however, it is likely to breach the duty to provide reasonable accommodation in accordance with Article 5 of Directive 2000/78/EC, which excludes 'disproportionate' burdens, thus entailing the necessity of a sort of 'soft' burden that may have to be borne by employers. This rule applies to private sector employers: they are supposed to bear the costs of the reasonable accommodation duty, unless those costs are disproportionate.

National law does not define what would be a 'disproportionate burden' on employers. In 2015, a law was introduced in order to compensate employers for the costs incurred in providing reasonable accommodation.⁴³ According to the new Article 14 of Law 68/1999, the Regional Fund for the Employment of Persons with Disability shall fund regional programmes for the inclusion of workers with a disability. This includes the reimbursement of costs incurred by employers to provide for reasonable accommodation for persons with limited working capacity (below 50 %). This is the only fund available to employers specifically targeting costs related to the reasonable accommodation duty. National discrimination law does not take into account the availability of funds in order to assess whether there is a disproportionate burden.

⁴² Law Decree converted into law regarding preliminary urgent measures for the promotion of employment, in particular of young people, of social cohesion and on other urgent financial measures (*Conversione in legge, con modificazioni, del decreto-legge 28 giugno 2013, n. 76, recante primi interventi urgenti per la promozione dell'occupazione, in particolare giovanile, della coesione sociale, nonché in materia di Imposta sul valore aggiunto (IVA) e altre misure finanziarie urgenti*), 9 August 2013, No. 99, available at: <http://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:2013-08-09:99!vig>.

⁴³ Legislative Decree 151 of 14 September 2015, on simplification of procedures and duties upon citizens and companies (*Disposizioni di razionalizzazione e semplificazione delle procedure e degli adempimenti a carico di cittadini e imprese e altre disposizioni in materia di rapporto di lavoro e pari opportunità, in attuazione della legge 10 dicembre 2014, n. 183*), available at: <http://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:decreto.legislativo:2015-09-14:151!vig>.

In addition, Law 68/1999 provides for a set of policies to be applied only to people with severe disabilities as defined by its opening provisions, including the duty to adapt workplaces through the use of equipment and specific solutions to problems connected with the working environment etc.⁴⁴

With regard to practical implementation, problems are associated with the requirement at the end of the provision, which is addressed to public employers who are bound to respect the duty to provide for reasonable accommodation 'without any additional burden and with the human, financial and technical resources already available'. This is a sort of ritual clause in Italian laws in an era of economic crisis and financial constrictions, but it is hardly likely that an employer, either public or private, will be able to afford to provide reasonable accommodation without any additional financial or human resources. Only those accommodations that do not involve cost, but instead require a flexible attitude and adaption to standard policy – e.g. adaptations to policies regarding allocation of office spaces or parking spaces – would be feasible. In general, there is no practical guidance on how to implement the provision, and there could be some difficulties around the interpretation of the exact duty on employers.

In this regard, a positive development was introduced thanks to a provision included in a package of laws aiming to reform the public administration.⁴⁵ Within this framework, according to Article 17(1)(z) of Law 124/2015, public bodies with more than 200 workers shall appoint a person in charge of integration (*Responsabile dei processi di inserimento delle persone con disabilità* – RPI). Among the RPI's tasks is the identification of reasonable accommodation solutions for workers with disability. The first implementation of this provision appears to be more formal than substantial, lacking any report on the practical effects of this measure.⁴⁶

b) Case law

Case law on reasonable accommodation shows that it is hard for employers to change their organisation or to bear the burden of additional costs in order to provide the necessary accommodations for persons with disability. A relevant decision was issued by the Court of Bologna in 2013, anticipating the CJEU judgment against Italy and applying both Directive 2000/78/EC and the UNCRPD.⁴⁷ The court held that the local health service was liable for the failure to provide reasonable accommodation for a disabled employee on a fixed-term contract and required it to pay compensation of damages equivalent to the six months' salary the claimant would have earned had he been hired.⁴⁸

c) Definition of disability and non-discrimination protection

There is no specific definition of 'disability' for the purposes of claiming reasonable accommodation. The issue of definition has been dealt with in a judgment of 16 April 2015 by the Court of Pisa: The court held that an employer should provide reasonable accommodation in order to allow an employee, who was no longer able to perform her

⁴⁴ Law 68/1999, on provisions on the right to work of persons with disability (*Norme per il diritto al lavoro dei disabili*), 12 March 1999, available at: <http://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:1999-03-12:68!vig>, amended by Legislative Decree 151/2015, on the simplification of procedures and duties upon citizens and companies (*Disposizioni di razionalizzazione e semplificazione delle procedure e degli adempimenti a carico di cittadini e imprese e altre disposizioni in materia di rapporto di lavoro e pari opportunità, in attuazione della legge 10 dicembre 2014, n. 183*), 14 September 2015, available at: <http://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:decreto.legislativo:2015-09-14:151!vig>.

⁴⁵ Article 17(1) of Legislative Decree 75 of 25 May 2017 no. 75, available at http://www.normattiva.it/eli/stato/DECRETO_LEGISLATIVO/2017/05/25/75/CONSOLIDATED/20201231.

⁴⁶ A. Lamanna, *Disabilità: il Responsabile dei processi di inserimento nelle pubbliche amministrazioni*, 10 September 2020, available at: <https://www.filodiritto.com/disabilita-il-responsabile-dei-processi-di-inserimento-nelle-pubbliche-amministrazioni>.

⁴⁷ Court of Bologna, judgment of 17 June 2013, available at: http://adapt.it/adapt-indice-a-z/wp-content/uploads/2013/08/trib_bq_18_6_13.pdf.

⁴⁸ Court of Bologna, judgment of 17 June 2013, available at: http://adapt.it/adapt-indice-a-z/wp-content/uploads/2013/08/trib_bq_18_6_13.pdf.

tasks on account of her status as a person with a disability, to continue working in the same company, and it therefore annulled her dismissal.⁴⁹

The employee was declared disabled after having contracted an incurable illness, which resulted in a physical impairment; in particular, she was unable to perform the activities that she was employed for and, for this reason, she was dismissed. The Court quoted the CJEU case law and held that the notion of disability includes the state of health of a person who has an illness 'which, in interaction with various barriers may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers, and the limitation is a long-term one [...]'.⁵⁰ The Court found the dismissal discriminatory on the ground of disability, because the employer had a duty to provide reasonable accommodation and a duty to explore the feasibility of accommodations that could allow the employee to continue working in the same company. According to the Court, the employer had made no effort to find alternative arrangements and share the burden between workers, and it therefore annulled the employee's dismissal. The employer was ordered to reinstate the worker in her job and to pay her the salary not earned as well as EUR 10 000 in compensation for non-material damages caused.

d) Failure to meet the duty of reasonable accommodation for people with disabilities

In Italy, failure to meet the duty of reasonable accommodation in employment for people with disabilities is recognised as a form of discrimination.

Provisions of Article 3(3-*bis*) of Legislative Decree 216/2003 on reasonable accommodation are included not in Article 2, regarding the definition of discrimination, but in Article 3, on the scope of application. According to Article 3(3-*bis*), the duty to provide reasonable accommodation is a means to respect the principle of equality of treatment of people with disabilities. There is no other specific link to the prohibition of discrimination nor any specific sanction other than the general ones provided for discrimination in general. Reference to the UNCRPD (thanks to its ratification by Law 18/2009) leads to the same conclusion.

In any event, the Courts have interpreted a breach of the duty to provide reasonable accommodation as a violation of the prohibition of discrimination.

This was stated in a judgment of 18 June 2013 by the Court of Bologna: the Court held that the local health service was liable for a failure to provide reasonable accommodation for a disabled fixed-term employee and required it to pay compensation for damages amounting to the equivalent of the six months' salary the claimant would have earned had he been hired. The same stance was taken by the Court of Pisa in its judgment of 16 April 2015:⁵¹ the Court held that an employer should provide reasonable accommodation in order to allow the employee, who was no longer able to perform her tasks on account of her status as a person with a disability, to continue working in the same company, and it therefore annulled her dismissal. Similarly, in 2016, the Tribunal of Ivrea found that the dismissal of an employee with a disability was discriminatory, in particular because the employer had violated his duty to provide for reasonable accommodation for persons with disability according to Article 5 of Directive 2000/78/EC and its implementing legislation, Article 3(3-*bis*) of Legislative Decree 216/2003. The Tribunal annulled the dismissal and

⁴⁹ Court of Pisa, judgment of 16 April 2015, available at: <http://www.osservatoriodiscriminazioni.org/index.php/2015/10/19/tribunale-pisa-ordinanza-del-16-aprile-2015/>.

⁵⁰ Judgment of 11 April 2013, *HK Danmark*, C-335/11, paragraph 41.

⁵¹ Tribunal of Pisa, judgment of 16 April 2015, *GC c L.SRL*, available at: <http://www.osservatoriodiscriminazioni.org/index.php/2015/10/19/tribunale-pisa-ordinanza-del-16-aprile-2015/>.

ordered the employer to let the worker return to her previous post, and to pay her EUR 1 824.92 for 12 months (net) and EUR 7 500 for legal fees.⁵²

During 2019, the Supreme Court issued several judgments declaring unlawful the dismissal of a worker with disability because the employer had not made reasonable accommodation for the worker, with wide reference to Directive 2000/78/EC.

- e) Duties to provide reasonable accommodation in areas other than employment for people with disabilities

In Italy, there is a legal duty to provide reasonable accommodation for people with disabilities outside the area of employment.

A positive development in this regard has been triggered by the UNCRPD, which was ratified in Italy by Law 18/2009. According to the Convention, the denial of reasonable accommodation amounts to discrimination and specific duties are placed upon governments in the field of education and in cases of deprivation of personal freedom. During 2019, a specific reference to the duty of reasonable accommodation was introduced in Article 3 of Legislative Decree No. 66/2017 in respect of measures to favour the inclusion in education of students with disability.⁵³

Italian law regarding people with disabilities is not based on the general concept of 'reasonable accommodation' outside the field of employment. This was clarified by the CJEU in its judgment of 4 July 2013 against Italy. Indeed, the Court rejected the basic argument raised by the Italian Government, according to which Article 5 of Directive 2000/78/EC was implemented not in Legislative Decree 216/2003 but in other laws that were already in force before the transposition of the anti-discrimination directives. In this regard, the Government referred to Law 104/1992 (the Framework Law on the care, social integration and rights of disabled persons); Act 68/1999 on the right of disabled people to work; Law 381/1991 on social co-operatives; and Legislative Decree 81/2008 on work health and safety. According to the CJEU, while all these laws provide for measures of aid and support, social integration and protection for people with disabilities, none of them provide for a general duty to provide reasonable accommodation – that is, to offer effective solutions to eliminate 'the various barriers that hinder the full and effective participation of persons with disabilities in professional life [...]'.

- f) Duties to provide reasonable accommodation in respect of other grounds

In Italy, there is no legal duty to provide reasonable accommodation in respect of other grounds in the public and/or the private sector.

It is worth mentioning the type of reasonable accommodation measures that are provided for in the field of religion. Forms of favourable differential treatment exist with regard to religion for religious organisations which have signed agreements with the state, but they do not expressly mention the duty of reasonable accommodation. Such positive action relates mostly to holidays for Jews and Seventh-Day Adventists. The statute transposing the agreement with the Adventists, for instance, establishes the right of those employed by either private or public employers to refrain from working on Saturdays, with the limitation that this should not affect 'essential public services' and that the right is enjoyed 'within the framework of the organisation of work'; incompatibility with the organisation of work must be proved by the employer. With regard to Adventists, these legislative rules

⁵² Tribunal of Ivrea, judgment of 24 February 2016, *TG v. OMP S.r.l.*, No. 8248, available at: <http://www.osservatoriodiscriminazioni.org/index.php/2016/04/20/licenziamento-giustificato-motivo-oggettivo-consistente-nella-sopravvenuta-inidoneita-fisica-psichica-del-lavoratore-lobbigo-datoriale-dei-ragionevoli-adattamenti-tribunale-ivrea-ordina/>.

⁵³ Legislative Decree of 13 April 2017, No. 66, as amended by Legislative Decree of 7 August 2019, No. 96, available at: <https://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:decreto.legislativo:2017-04-13;66!vig=>.

have usually been interpreted by courts in favour of employees through a narrow interpretation of the limitations. Dismissals based on a refusal to work on Saturdays have normally been considered illegal, and the court has ordered the reinstatement of the worker and payment of damages. With regard to Jewish people, the relevant law also establishes an obligation to take into consideration the obligation to rest on Saturdays when setting dates of tests for public sector employment.

In the absence of an agreement with the state, Muslims do not enjoy a legal right to special measures. Proposals for such an agreement drafted by various Italian Islamic associations include a range of measures, such as the adaptation of working time in order to respect Friday rest, daily prayers, Ramadan and so on.

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)

In Italy, there are no residence or citizenship/nationality requirements for protection under the relevant national laws transposing the directives. In theory, anti-discrimination provisions should apply even to irregularly staying migrants, although it is in practice impossible and no claim has been brought to justice by an irregular migrant. For instance, in the employment field, an irregularly staying migrant as a worker has the right to the same economic treatment that other workers enjoy. The inability of irregular migrants to enforce their rights is one of the causes of the phenomenon of labour exploitation.

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

a) Protection against discrimination

In Italy, the personal scope of anti-discrimination law covers natural and legal persons for the purpose of protection against discrimination. This comes from Article 3(1) of both decrees implementing the two directives, which provides for the application of the principle of equal treatment to all persons in both the public and private sectors. The same wide scope of application comes from Articles 43(1-2) and 44(1) of Legislative Decree 286/1998 (the Immigration Decree) and Article 1 of Law 67/2006 on disability discrimination.

b) Liability for discrimination

In Italy, the personal scope of anti-discrimination law covers natural and legal persons for the purpose of liability for discrimination. This is derived from the general provision in Article 3(1) of both decrees implementing the two directives and from the provision in Article 1 of Law 67/2006 on discrimination against persons with disability in fields outside employment.⁵⁴ Moreover, two liability provisions are mentioned the Immigration Decree.⁵⁵ According to Article 43(2)(e), there is discrimination in the case of an act or treatment promoted by an employer which places workers in a situation of particular disadvantage on grounds of their race, ethnic or linguistic origin, religion or citizenship. No specific provision covers other grounds of discrimination. Article 44(10-11) specifically addresses the liability of employers by giving trade unions the right to legal standing in cases of collective discrimination. Finally, the following paragraph of the same Article concerns sanctions against legal persons, such as the suspension of entitlement to any sort of public financial assistance and, in the most serious cases, disqualification from entitlement to any public financial assistance or tenders for up to two years.

3.1.3 Private and public sector including public bodies (Article 3(1))

a) Protection against discrimination

In Italy, the personal scope of national anti-discrimination law covers the private and public sectors, including public bodies, for the purpose of protection against discrimination.

⁵⁴ Law of 1 March 2006, on measures for the judicial protection of persons with disabilities who are victims of discrimination (*Misure per la tutela giudiziaria delle persone con disabilità vittime di discriminazioni*), No. 67, available at: <http://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:2006-03-01:67!vig>.

⁵⁵ Legislative Decree of 25 July 1998, on immigration and the treatment of foreign citizens (Immigration Decree) (*Testo Unico delle disposizioni concernenti la disciplina dell'immigrazione e norme sulla condizione dello straniero*), No. 286.

This is derived from Article 3(1) of both decrees implementing the two directives, and provides for the application of the principle of equal treatment to all persons in both the public and private sectors.

The same wide scope of application is found in Article 1 of Law 67/2006, on disability discrimination, and in Article 43(2)(e) and Article 44(1-10-11) of the Immigration Decree.

b) Liability for discrimination

In Italy, the personal scope of anti-discrimination law covers private and public sector including public bodies for the purpose of liability for discrimination.

This is derived from Article 3(1) of both decrees implementing the two directives, and provides for the application of the principle of equal treatment to all persons in both the public and private sectors, without any further specification or exception regarding liability.

The same wide scope of application is found in Article 1 of Law 67/2006 on disability discrimination and in Article 43(2)(e) and Article 44(1-10-11) of the Immigration Decree.

3.2 Material scope

3.2.1 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))

In Italy, national legislation prohibits discrimination in relation to conditions for access to employment, self-employment or occupation, including selection criteria, recruitment conditions and promotion, whatever the branch of activity and at all levels of the professional hierarchy, for the five grounds and in both private and public sectors, as described in the directives. No question of interpretation has so far emerged in the implementation of this provision.

The key provision – Article 3(1)(a) – on the material scope of the decrees transposing the directives (Legislative Decrees 215/2003 and 216/2003) 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 ‘access to employment, to self-employment or to occupation, including selection criteria and recruitment conditions’.

A similar provision is contained in Article 43(2)(e) and Article 44(10) of the Immigration Decree.

No distinctions apply between branches of activity or levels of professional hierarchy.

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

In Italy, national legislation prohibits discrimination in working conditions, including pay and dismissals, for all five grounds and for both private and public employment.

The key provision – Article 3(1)(b) – on the material scope of the legislative 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 ‘employment and working conditions, including promotions, dismissals and pay’.

Similarly, Article 43(2) of the Immigration Decree provides for the general protection of workers from discrimination.

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

In Italy, national legislation prohibits discrimination in vocational training outside the employment relationship, such as adult lifelong learning courses or vocational training provided by technical schools or universities.

The key provision – Article 3(1)(c) – on the material scope of the legislative decrees transposing the directives expressly establishes that the prohibition of discrimination and related judicial remedies apply to all persons in the public and private sectors with reference to ‘access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience’.

3.2.4 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))

In Italy, national legislation prohibits discrimination in relation to membership of and involvement in workers’ or employers’ organisations, as formulated in the directives for all five grounds and for both private and public employment.

The key provision – Article 3(1)(d) – on the material scope of the legislative 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 ‘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’.

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

In Italy, national legislation prohibits discrimination in social protection, including social security and healthcare, as formulated in the Racial Equality Directive.

The key provision is Article 3(1)(e) and (f) of Legislative Decree 215/2003.

Protection against discrimination on grounds of ancestry, religion, national or ethnic origin, religious beliefs and practices in the field of social protection, including social security and healthcare, is also found in Article 43 of the Immigration Decree.

With regard to disability, according to Article 1 of Law 67/2006, this law has a general application and therefore also covers social protection, including social security and healthcare.

In these fields, national anti-discrimination laws do not cover discrimination on the grounds of age and sexual orientation.

There is as yet no political initiative aimed at extending the scope of application of the prohibition against discrimination to other fields.

As far as third-country nationals are concerned, the Constitutional Court has clarified the limits that national Government, regions and municipalities face when they differentiate on the ground of nationality. According to the Court, no limit may be applied to access to

social protection measures relating to the basic needs of persons, which are protected as fundamental rights by the Italian Constitution.⁵⁶

a) Article 3(3) exception (Directive 2000/78)

National law relies on the exception in Article 3.3, but this point has not yet caused any difficulties.

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

In Italy, national legislation prohibits discrimination in social advantages, as formulated in the Racial Equality Directive.

The national provision contains the same wording as the directive ('prestazioni sociali' in Italian) and is included in the provisions of Legislative Decree 215/2003 concerning the scope of application – that is Article 3(1)(g). The inclusion of social advantages is also derived from Article 43 of Legislative Decree 286/1998 (the Immigration Decree) and Article 1 of the Disability act 67/2006, stating that both are acts with general application. In these fields, national anti-discrimination laws do not cover discrimination on the grounds of age or sexual orientation.

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

In Italy, national legislation prohibits discrimination in education, as formulated in the Racial Equality Directive.

The relevant provision is Article 3(1)(h) of Legislative Decree 215/2003. Religion and nationality are covered by Article 43 of Legislative Decree 286/1998 (the Immigration Decree), while disability is covered by the law against disability discrimination (Article 1 of Act 67/2006).

In the field of education, national laws against discrimination do not cover discrimination on the grounds of age or sexual orientation.

With regard to discrimination on the ground of sexual orientation, education is one of the four pillars of the Italian strategy to prevent and fight discrimination on the grounds of sexual orientation and gender identity, developed by UNAR to implement the Council of Europe Recommendation CM/Rec (2010)5. In the past, UNAR promoted educational activities in this field, such as the publication of educational materials, but the disapproval expressed by Catholic and centre-right members of Parliament, together with Catholic associations, eventually induced the organisation to cease those activities. This example shows that in Italy, it is very difficult to deal with discrimination on the ground of sexual orientation, notwithstanding evidence of the existence of discrimination on this ground.

As far as education for pupils with disabilities is concerned, problems are raised by the lack of funding that forces local administrators to reduce or only allow minimum hours of input from support teachers in schools.

The Italian approach in this regard is definitely to include children with disabilities in mainstream education, with individualised special support. Children therefore attend the same schools they would attend according to the ordinary admission rules and are assisted in by support teachers, in addition to their ordinary teachers, depending on the nature of their disability.

⁵⁶ Legislative Decree of 25 January 1998, on immigration and the treatment of foreign citizens (Immigration Decree) (*Testo Unico delle disposizioni concernenti la disciplina dell'immigrazione e norme sulla condizione dello straniero*), No. 286.

It should be noted that in 2010, the Italian Constitutional Court found illegal legislative provisions which set limits on the number of teachers employed to support disabled students and which revoked the previous option of employing new, specialist teachers for students with particularly severe disabilities on fixed-term contracts.⁵⁷ Subsequent case law has regarded schools' decisions to reduce support teachers' hours as amounting to indirect discrimination on the ground of disability.⁵⁸ Beyond questions of merit, the case law has focused on jurisdiction, coming to the conclusion that, in the case of a reduction in the hours of support teachers in schools after they have been already required by the competent authorities, the competence lies with ordinary, rather than administrative, judges.⁵⁹

a) Trends and patterns regarding Roma pupils

In Italy, there are no specific trends (whether legal or societal) in education regarding Roma pupils, such as segregation.

Inclusion of Roma children in classes has sometimes caused an overreaction by majority-population parents and the current anti-Roma hostility can entail further problems. However, there is as yet no basis for saying that structural discriminatory patterns exist within the education system. The limited schooling of Roma derives from factors other than obstacles to their admission to schools. One very dramatic problem is the impact of the housing system on children's school attendance. In particular, Roma segregation in camps, often established far from public services, including schools, has an adverse impact on school attendance by Roma pupils. Moreover, the evictions of illegal settlements are devastating. Since some of the children living in these settlements attend school, the eviction of their camp without attention to their situation can disrupt an otherwise relatively successful educational path. With regard to Roma pupils, the main concern is a school drop-out rate that is much higher than the average, with 50 % of Roma children dropping out between the primary and elementary school levels and 95 % dropping out between the elementary and higher levels.⁶⁰

The national Roma strategy focuses on school drop-out rates and promotes actions to prevent it, including specific training for teachers within the framework agreement of cooperation agreed with the most representative associations. Since the main reason for dropping out of school by Roma pupils is their living conditions, these measures are likely to produce minimal results.

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

In Italy, national legislation prohibits discrimination in access to and the supply of goods and services, as formulated in the Racial Equality Directive.

The relevant provision is Article 3(1)(i) of Legislative Decree 215/2003 on racial discrimination. In this field protection against discrimination on grounds of ancestry, religion, national or ethnic origin, religious beliefs and practices is also included in Article 43 of the Immigration Decree.

⁵⁷ Constitutional Court, judgment of 22 February 2010, No. 80, available at: www.cortecostituzionale.it.

⁵⁸ Supreme Court, judgment of 8 October 2019, No. 25101, available at: <https://www.superabile.it/cs/superabile/normativa-e-diritti/direttive-sentenze-e-pareri-ordinanze/20191031e-corte-di-cassazione-ordinanza-8-ottobre-2019-n-25101.html>; Tribunal of Rieti, judgment of 12 February 2020, *X v. Ministero dell'Istruzione, dell'Università e della Ricerca*, available at: <https://www.centrostudiliviatino.it/sostegno-ai-disabili-a-scuola-il-trib-rieti-cancella-una-discriminazione/>.

⁵⁹ Lazio Regional Administrative Tribunal, III Section, judgment of 3 September 2020, No. 9312, available at: <https://www.giustizia-amministrativa.it/provvedimenti-tar-roma>.

⁶⁰ Associazione 21 Luglio (2020), *Periferie lontane*, p. 83, available at: <https://www.21luglio.org/2018/wp-content/uploads/2020/01/drlb-divulgativo.pdf>.

Disability is covered by Law 67/2006 on measures for the judicial protection of persons with disabilities who are victims of discrimination. The relevant provision is Article 1, which provides for a general scope of application, so that the act may apply to discrimination in access to and the supply of goods and services. This law is directly connected to Framework Law 102/1994 on the rights and social integration of persons with disability. Both these provisions are of a general character, and they do not provide for specific duties such as good manufacture or design in order to make goods more suitable for persons with disability.

In these fields, national laws against discrimination do not cover discrimination on grounds of age and sexual orientation.

a) Distinction between goods and services available publicly or privately

In Italy, national law does not distinguish between goods and services that are available to the public.

In Italy, national law does not distinguish between goods and services that are available to the public (e.g. in shops, restaurants, banks) and those that are available only privately (e.g. limited to members of a private association).

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

In Italy, national legislation prohibits discrimination in the area of housing, as formulated in the Racial Equality Directive.

The relevant provision is Article 3(1)(i) of Legislative Decree 215/2003 on race. Protection against discrimination on grounds of ancestry, religion, national or ethnic origin, religious beliefs and practices in the field of housing is also included in Article 43 of the Immigration Decree.

Disability is covered by Law 67/2006 on disability discrimination. The relevant provision is Article 1, which provides a general protection against discrimination, therefore covering housing. There is no positive duty in this law regarding adaptations to housing, nor is such a duty provided for elsewhere, except for the building of new blocks of flats.

People with disabilities (and, in some cases, older people) can enjoy a variety of priority rights in the allocation of public housing, since the rankings are based on a complex system of points which takes into account a number of social factors, including disabilities. Rankings are created at regional and municipal levels through regional laws and local regulations, thus making a general description difficult.

In these areas, national laws against discrimination do not cover discrimination on grounds of age or sexual orientation.

The issue of housing is relevant with regard to rules which are beyond the scope of application of the directive, since limitations to access to public housing for ethnic and religious groups can be a practical effect of formal distinctions based on nationality or length of residence, which could possibly lead in some cases to an interpretation that nationality may amount to discrimination on the basis of racial or ethnic origin. The majority of Italian regions have adopted laws requiring a minimum of five years of residence in the territory of each region in order to access social housing. This requirement is most likely to affect migrants negatively, as the large majority of Italian citizens will be able to satisfy the condition.

a) Trends and patterns regarding housing segregation for Roma

In Italy, there are trends and patterns of housing segregation and discrimination against the Roma.

In past years, in many cities throughout Italy, public administrations have been spending a huge amount of money on Roma camps, contributing to the segregation of the Roma community.⁶¹ Finally, after years of protests and lawsuits,⁶² there is a positive trend in several cities, with a reduction in the number of settlements as reported by an association that deals with living conditions of Roma, Sinti and Camminanti.⁶³ This is only an initial decrease and, moreover, it is difficult to make a general assessment, since for each closed settlement there are different solutions for the persons involved. An individual or family project is agreed with the municipality and financial support is provided, especially for housing. However, the most critical situation still concerns the municipality of Rome, which is where most of the Roma, Sinti and Camminanti in Italy live.⁶⁴

⁶¹ Associazione 21 Luglio, *Activity report 2015*, pp. 42-65, available at: http://www.21luglio.org/wp-content/uploads/2016/04/Rapporto_annuale_2015_def_web.pdf. The trial is still pending and will last for at least two years, given that there are more than 200 defendants involved; see: <http://www.iltempo.it/roma-capitale/2016/04/13/mafia-capitale-imputati-tutti-agli-arresti-1.1528927>.

⁶² Court of Rome, judgment of 4 June 2016, *ASGI, Associazione 21 luglio v. Rome Capital and Italian Government*, available at: <http://www.asgi.it/wp-content/uploads/2015/06/Ordinanza-La-Barbuta.pdf>.

⁶³ Associazione 21 Luglio (2020), *Periferie lontane*, pp. 30-40, available at: <https://www.21luglio.org/2018/wp-content/uploads/2020/01/drlb-divulgativo.pdf>.

⁶⁴ Associazione 21 Luglio (2020), *Periferie lontane*, pp. 31-32, available at: <https://www.21luglio.org/2018/wp-content/uploads/2020/01/drlb-divulgativo.pdf>.

4 EXCEPTIONS

4.1 Genuine and determining occupational requirements (Article 4)

In Italy, national legislation provides for an exception for genuine and determining occupational requirements.

The first part of Article 3(3) of Legislative Decrees 215/2003 and 216/2003 establishes that 'in compliance with the principles of proportionality and reasonableness', within the employment relationship or entrepreneurial activity, differences in treatment due to characteristics related to the grounds set out 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'. No definition of 'proportionality' and 'reasonableness' is given. The substitution of the requirement for a 'legitimate objective' with 'reasonableness' has not led to any practical effects.

In the case of Legislative Decree 216/2003 transposing Directive 2000/78/EC, the same section also establishes that it is not discriminatory to evaluate '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 on to carry out', while the following section establishes (without distinguishing between the different grounds of discrimination) that 'however, the provision remains unaffected that imposes a suitability test for a specific occupation and the provisions allowing different treatment with regard to adolescents and young people linked to the special nature of the occupation and to legitimate objectives of labour policy, the labour market and professional education'. The inclusion of all the grounds under this provision on 'work suitability tests' probably provides too much discretion in admitting exceptions to equal treatment going beyond genuine and determining occupational requirements.

A reference to genuine and determining occupational requirements as exceptions to the prohibition of discrimination is provided in Article 43(2)(e) of the Immigration Decree. There are no specifications for how to apply this exception.

In a case decided in 2016, a Muslim woman claimed that a company had not selected her because she wore a headscarf and would not agree to take it off. She had applied for a job as a hostess at an exhibition, where she had to hand out leaflets. The job requirements were all related to physical characteristics, including 'flowing hair'. Only some of them were highlighted as basic requirements: shoe size 37 and dress size 40-42. The Tribunal of Milan, in the first instance, rejected the claim of discrimination on the grounds of religion on account of the 'genuine and determining occupational requirement' exception. However, the Court of Appeal of Milan, in the second instance, found that this was a case of direct discrimination on the grounds of religion and that the 'genuine and determining occupational requirement' exception was not satisfied, since the advertisement was for the post of hostess, and 'flowing hair' was not required as a genuine and determining characteristic, but as a secondary requirement. The Court of Appeal ordered the company to pay EUR 500 in non-pecuniary damages.⁶⁵

4.2 Employers with an ethos based on religion or belief (Article 4(2) Directive 2000/78)

In Italy, national law provides for an exception for employers with an ethos based on religion or belief.

⁶⁵ Court of Appeal of Milan, judgment of 20 May 2016, *Mahmoud Sara v. Evolution Events Srl*, available at: <http://www.asgi.it/wp-content/uploads/2016/05/Corte-d%E2%80%99Appello-di-Milano-sentenza-del-20-maggio-2016-pres.-Vitali-rel.-Casella-XXX-avv.ti-Guariso-e-Neri-c.-Evolution-Events-srl-avv.to-Bertozzi.pdf>.

Article 3(5) of Legislative Decree 216/2003 transposing Directive 2000/78/EC 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 the ethos of the latter must also be based on religion or belief. This textual difference raises problems because of the risk that it may be used in order to admit discrimination by public and private organisations whose ethos is not actually based on religion or belief.

However, even beyond this textual problem (which may be the result of a further drafting mistake), the choice of the Italian legislator is, in the author's opinion, not compatible with Directive 2000/78/EC,⁶⁶ since the Directive does not allow the Member States to introduce during transposition exceptions to equal treatment for the needs of churches and similar organisations that are broader than any exceptions (in legislative or other form) that existed in the legal system at the time of transposition. Before the transposition of Directive 2000/78/EC, the only relevant provision was Article 4 of Law 108/1990, which ruled out the application of protection against discriminatory dismissal in the case of non-profit employers performing religious, cultural, political or trade union activities. Thus, any discretion has been excluded for organisations that operate on a for-profit basis, and in cases where the duties of the individual worker do not have an actual link with the organisation's ideology. Moreover, there is no transposition of the last sentence of Article 4(2), which says that this exception cannot lead to discrimination on other grounds. Legislative Decree 216/2003 implementing Directive 2000/78/EC thus grants employers with an ethos based on religion and belief (and potentially all employers, if a literal interpretation is applied) a power they did not enjoy before the adoption of the directive.

- Conflicts between rights of organisations with an ethos based on religion or belief and other rights to non-discrimination

In Italy, there are specific provisions and case law relating to conflicts between the rights of organisations with an ethos based on religion or belief and other rights to non-discrimination in the context of employment.

Catholic institutions are permitted to select teachers on the basis of their religion to be hired for or dismissed from a job even when that job is in a state entity, or in an entity financed by the state.

In the Italian legal system, at legislative (statutory) level, the only explicit exception to equal treatment is represented by a section of Law 108/1990 concerning, among other things, ideologically orientated organisations, which are defined as 'employers of a non-entrepreneurial character which undertake political or trade unionist activities, cultural instruction or religious activities on a non-profit basis'.⁶⁷ This Law only limits the remedies that are available in the case of unfair dismissal. A worker who is unfairly dismissed by an organisation covered by the 1990 Law is entitled only to damages and not to reinstatement by order of the judge as in ordinary cases.

With arguments based partly 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 the discretionary power of the employer

⁶⁶ For an extensive discussion of this point, see N. Fiorita (2004), 'Le direttive comunitarie in tema di lotta alla discriminazione, la loro tempestiva attuazione e l'eterogenesi dei fini', *Quaderni di diritto e politica ecclesiastica*, p. 361 ff.

⁶⁷ Law 108 of 11 May 1990, on rules on individual dismissals (*Disciplina dei licenziamenti individuali*), available at <http://www.normattiva.it/eli/stato/LEGGE/1990/05/11/108/CONSOLIDATED/20030714>.

based on an ethos or religion to hire or dismiss a worker, as in the case of Catholic universities. In addition, the exceptions to equal treatment as developed in the case law are more limited than those covered in Legislative Decree 216/2003, which transposes Directive 2000/78/EC.⁶⁸

Teachers of religion in state schools must have authorisation from the bishop, which can be denied or withdrawn if the person does not fully comply with the moral standards of a Catholic believer. In a 2003 case, the Supreme Court recognised the validity of the termination of an employment relationship when an unmarried female teacher became pregnant. The legal ground for such discretionary power lies in the revised Lateran Treaty and its protocols, and in a law enacted in 2003.⁶⁹

In a case decided in 2016, a teacher at a Catholic school claimed that she was being discriminated against on the ground of sexual orientation.⁷⁰ The school had not renewed her annual contract on account of rumours about her living with another woman, who was assumed to be her partner. According to the school, the exception provided for under Article 3(5) of Legislative Decree 216/2003 applied, such that this was a case of legitimate different treatment and not discrimination. However, the tribunal rejected this argument and found that it was a case of discrimination on the ground of sexual orientation, which was not covered by the exception, since the 'sexual orientation of a teacher ... is surely beyond the religious ethos of the school'. This case is similar to others involving Catholic schools and universities. The limits of the discretionary power have been discussed primarily in relation to the tenure of teachers and other staff. In this context, the problem related to internal control of respect for moral codes (for instance, requiring religious marriage instead of civil marriage). It is worth mentioning that Catholic universities enjoy the discretion to hire or dismiss, which has been the subject of long and complex litigation in two famous cases (*Cordero* and *Lombardi Vallauri*). Those cases went before the Constitutional Court and the Supreme Administrative Court, which in both cases decided in favour of the discretionary power of the institutions.⁷¹

4.3 Armed forces and other specific occupations (Article 3(4) and Recitals 18 and 19, Directive 2000/78)

In Italy, national legislation provides for an exception for the armed forces in relation to age or disability discrimination (Article 3(4) of Directive 2000/78). The relevant provision is Article 3(2)(e) of Legislative Decree 216/2003.

In Italy, the scope of the exception is not limited to safeguarding the combat effectiveness of the armed forces.

The scope of the exception extends to other non-combatant staff, such as civilians employed in administrative positions in the army.

Legislative Decree 216/2003 establishes in 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.

⁶⁸ Supreme Court, judgment of 13 July 1995, No. 7680; Supreme Court, judgment of 11 April 1994, No. 3353; Supreme Court, judgment of 12 October 1995, No. 10636.

⁶⁹ Law of 18 July 2003, on the legal status of teachers of Catholicism in institutes and schools of any category and level (*Norme sullo stato giuridico degli insegnanti di religione cattolica degli istituti e delle scuole di ogni ordine e grado*), No. 186, available at: <http://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:2003-07-18:186!vig>. If the authorisation is withdrawn, however, the Act (in Article 4) foresees a system allowing the person to move to another job within the education system under certain conditions.

⁷⁰ Tribunal of Rovereto, 21 June 2016, *X and Associazione radicale certi diritti, CGIL v. Istituto delle figlie del Sacro Cuore di Gesù*, available at: <http://www.osservatoriodiscriminazioni.org/index.php/2017/03/01/tribunale-di-rovereto-ordinanza-ex-art-702-ter-cpc>.

⁷¹ The *Lombardi Vallauri* case went up to the European Court of Human Rights; the Court focused more on fair trial rights than on the prohibition of discrimination. Judgment of 20 October 2009, *Lombardi Vallauri v. Italy*, No. 39128/05.

This provision does not make any distinction between combatant or non-combatant staff. This specific provision has been interpreted as endorsing the limits already in force at the time of implementation of the EU Directive in national law regarding access to the armed forces, and it has not been challenged before a court. More recent judgments question not the age limits themselves, but their concrete interpretation and application. For instance, in a judgment issued in 2015, the Council of State declared that a provision raising the age limit for accessing public sector competitions by three years when a person has served in the army applies only to civil servants, and not to a person who has already undertaken military service and reapplies to join the armed forces and pursue a military career.⁷²

4.4 Nationality discrimination (Article 3(2))

a) Discrimination on the ground of nationality

In Italy, national law includes exceptions relating to difference of treatment based on nationality.

In Italy, nationality (as in citizenship) is explicitly mentioned as a protected ground in national anti-discrimination law, under the Immigration Decree (Article 43).

Discrimination on the ground of nationality (which also covers statelessness) is explicitly excluded from the scope of application of Legislative Decrees 215/2003 and 216/2003 implementing the directives, but is covered by Legislative Decree 286/1998 (the Immigration Decree).

Since 1998, several actions have been brought before the courts contesting discrimination against third-country nationals on the basis of nationality.⁷³ Most concern discrimination regarding access to social benefits by local authorities (regions or municipalities) and access to public employment. In these cases, the courts have applied the same legal framework, consisting of the Immigration Decree and Legislative Decree 215/2003, to every case of racial or national discrimination. This allows judges to handle cases of discrimination on the ground of nationality as direct discrimination and not as indirect racial discrimination.

In principle, differences of treatment on the grounds of nationality are not allowed, in particular in the enjoyment of fundamental rights and liberties. A right to equal treatment comes from Article 3 of the Italian Constitution, as broadly interpreted by the Constitutional Court, and from Article 2 of the Immigration Decree. A certain degree of differentiation may be allowed, on account of the duty of loyalty to the homeland and the special powers that are typical of some jobs (e.g., the diplomatic service, the armed forces, the police and security forces and the judiciary and tax authorities). In this regard, the same rules apply for EU citizens and third-country citizens.

An interesting case decided in 2016 involved third-country nationals' access to the civil service. Both the Supreme Court and the Constitutional Court delivered a judgment on this matter. The Government published vacancies in community services, for posts in several public sector and private organisations all over Italy. Access to the Italian civil service was limited to Italian citizens, according to rules similar to those that apply to military service on the basis of the required loyalty to the homeland under Article 52 of the Italian Constitution. The Supreme Court found that the exclusion of aliens from the civil service

⁷² Council of State, judgment of 12 November 2015, No. 5157, available at: <http://www.ildirittomilitare.it/wordpress/wp-content/uploads/2015/12/Consiglio-di-Stato-sez.-IV-12.11.2015-n.-5157-Mancata-ammissione-concorso.pdf>.

⁷³ A database containing dozens of cases dealing with discrimination on grounds of nationality is available at: <http://www.asgi.it/tematica/discriminazioni/>. The large majority of these cases are brought to court by members of the previously mentioned association of lawyers specialising in migration – ASGI (the Association of Legal Studies on Migration) – which in some cases takes part in proceedings as a third-party intervener.

was discriminatory and ordered the Government to open it up to all persons, including migrants legally staying in Italy regardless of their status, i.e. not just long-term residents. The Supreme Court referred the question to the Constitutional Court, which issued judgment No. 119 in 2015, and the Supreme Court followed this in delivering its judgment. According to the Constitutional Court, the concept of loyalty to the homeland has to be interpreted according to an evolutionary approach and in line with Article 2 on the fundamental rights of persons. Loyalty has to be interpreted together with solidarity, and the civil service shall be viewed as an instrument of integration in society.

b) Relationship between nationality and 'racial or ethnic origin'

With few exceptions as yet, when courts make their decisions, they tend to mix up provisions regarding discrimination on the ground of nationality (Legislative Decree 286/1998 – the Immigration Decree) and discrimination on the ground of racial and ethnic origin, without expressly exploring the issue of indirect racial discrimination. One relevant point is that of language requirements, which in theory may result in indirect discrimination on the grounds of racial or ethnic origin. However, no action in this regard has been brought to the courts so far.

4.5 Health and safety (Article 7(2) Directive 2000/78)

In Italy, there are no exceptions in relation to disability and health and safety as allowed under Article 7(2) of the Employment Equality Directive.

4.6 Exceptions related to discrimination on the ground of age (Article 6 Directive 2000/78)

4.6.1 Direct discrimination

a) Exceptions to the prohibition of direct discrimination on grounds of age

In Italy, national law provides for specific exceptions for direct discrimination on the ground of age.

Exceptions are provided for in Article 3(4-*bis*) of Legislative Decree 216/2003, which transposes Article 6(1), points a), b) and c) of Directive 2000/78/EC. According to the text, the prohibition of discrimination does not affect the rules providing for differential treatment of workers based on age in the following fields: access to and treatment in employment and occupational training, including dismissal and payment, by young workers, older workers and those with caring responsibilities, in order to promote their integration into employment or their protection (point a). Exceptions are also made for 'the determination of minimum age levels, professional experience or seniority in employment for access to employment or to certain benefits linked to employment' (point b) and 'the determination of a maximum age for recruitment, based on the training requirements for a specific occupation or on the need for a reasonable period of work before retirement' (point c).

The text of the decree can be considered to be generally in line with the standards imposed by Article 6 of Directive 2000/78/EC.

b) Justification of direct discrimination on the ground of age

In Italy, national law provides for justifications for direct discrimination on the ground of age.

According to Article 4-ter of Legislative Decree 216/2003, exceptions listed in Article 4-bis are legitimate if they are justified by an objective aim of labour law, the labour market and professional training and are appropriate and necessary.

The text of the decree can be considered to be generally in line with the standards imposed by Article 6(1) of Directive 2000/78/EC. Practical guidelines could be very useful, in particular regarding the 'objective justification test'.

In 2018, the Administrative Tribunal of Rome held that a maximum age limit set at 37 years old for access to the post of fireman was in line with the EU anti-discrimination directive.⁷⁴ In addition, the Tribunal held that the same limit cannot be exceeded taking into account personal conditions, such as the status of spouse or the period of military service, as is the case in other sectors.

c) Permitted differences of treatment based on age

In Italy, national law permits differences of treatment based on age for any activities within the material scope of Directive 2000/78, except for membership of organisations of workers and employers; this is because the fields listed in Article 4(4-bis) (a) to (c) Decree 216/2003 coincide with the material scope of the directive as set out in Article 3(1)(a) to (c).

The most relevant judgment was delivered in a case decided by the Court of Appeal of Milan on 15 April 2014 (*Bordonaro v. Abercrombie & Fitch Italia S.r.l.*). The Court found that Article 34 of Legislative Decree 273/2003 on fixed-term contracts was in breach of Legislative Decree 216/2003, to be interpreted in line with CJEU case law on discrimination on the ground of age.⁷⁵ A worker had been employed at the age of 20, in accordance with a national law which gave benefits to employers taking on workers under the age of 25 and over 45, and was dismissed in 2014 at the age of 25. The Court of Appeal expressly cited the CJEU judgments in *Mangold* and *Kücükdeveci* in its finding that the dismissal was unlawful. According to the Court, the dismissal of the claimant was based solely on his age and was not proportionate and necessary for the pursuit of a legitimate aim. Moreover, the Court ruled that it was irrelevant that the company had acted according to the law, because the subjective intent of the perpetrator when discrimination is involved is not relevant. Finally, the law, which allows discriminatory measures on the basis 'only' of age, violates the general principle of non-discrimination on the ground of age to which Directive 2000/78/EC gives specific expression. However, the judgment was appealed to the Supreme Court, which referred the case to the CJEU for a preliminary ruling, in order to receive guidance on applying the *Mangold/Kücükdeveci* principle to the national rule. According to the judgment issued by the CJEU, 'Article 21 of the Charter of Fundamental Rights of the European Union and Article 2(1), Article 2(2)(a) and Article 6(1) of Directive 2000/78/EC must be interpreted as not precluding a provision, such as that at issue in the main proceedings, which authorises an employer to conclude an on-call contract with a worker of under 25 years of age, whatever the nature of the services to be provided, and to dismiss that worker as soon as he reaches the age of 25 years, since that provision pursues a legitimate aim of employment and labour market policy and the means laid down for the attainment of that objective are appropriate and necessary.'⁷⁶

c) Fixing of ages for admission to occupational pension schemes

In Italy, national law allows occupational pension schemes to fix ages for admission to the scheme, taking up the possibility provided for by Article 6(2). However, there is no explicit

⁷⁴ Lazio Regional Administrative Tribunal, section I, judgment of 28 May 2018, *Do. De Sa. v. Home Office, firemen department*.

⁷⁵ Court of Appeal of Milan, judgment of 15 April 2014, *Bordonaro v. Abercrombie & Fitch Italia S.r.l.*, available at: www.europeanrights.eu/public/sentenze/CdA_Milano.pdf.

⁷⁶ Judgment of 19 July 2017, *Abercrombie & Fitch Italia*, C-143/16.

reference in Legislative Decree 216/2003 to Article 6(2), although occupational social security schemes contain several different ages for admission or entitlement to retirement or invalidity benefits.

4.6.2 Special conditions for younger or older workers

In Italy, there are special conditions set by law for older and younger workers in order to promote their vocational integration.

Labour law provides an extensive number of exceptions to ordinary rules in order to promote the employment and vocational integration of young people. It should be noted that not all these rules provide more favourable treatment but instead allow a reduction in salaries or a lower degree of protection as a policy to increase youth employment. A wide reform of labour law was introduced through Law 183/2014 (the Jobs Act) which was enacted during 2014 but implemented by the Government for the first time in January 2015.⁷⁷

Of particular note is Law 23/2015, which introduces a new kind of contract: the 'Contract with an increasing degree of protection'.⁷⁸ This new contract may be applied only to new recruits and includes financial benefits for employers. A vigorous debate has developed between supporters of the reform who see it as a symbol of the modernisation of Italian labour law, and those who view it merely as another means of weakening workers' rights. In fact, the law does not include any provisions on treatment and pay, but concerns only dismissal. The key issue in the debate concerns the sanctions that apply to illegal dismissals: according to the new law, employers may be required only to pay compensation, meaning that reinstatement in the job is no longer available as a remedy in the case of illegal dismissal. However, no change was made to discriminatory dismissals, for which both compensation and reinstatement remedies continue to be available.

4.6.3 Minimum and maximum age requirements

In Italy, there are exceptions permitting minimum and maximum age requirements in relation to access to employment and training.

The current version of Legislative Decree 216/2003 transposing Directive 2000/78/EC allows exceptions for 'the determination of minimum age levels, professional experience or seniority in employment for access to employment or to certain benefits linked to employment' (point b) and 'the determination of a maximum age for recruitment, based on the training requirements for a specific occupation or on the need for a reasonable period of work before retirement' (point c).

As far as the public sector is concerned, employment is in principle free of any age limit, but each public body can set a specific age limit by issuing a special decree.⁷⁹ Such decrees must state the reasons for the age limit. It is possible to seek judicial review of these decrees. On 28 November 2019, the Consiglio di Stato raised a preliminary question with the Court of Justice regarding the compatibility of Italian legislation, which imposes an age

⁷⁷ Law of 10 December 2014 (Jobs Act) (*Deleghe al Governo in materia di riforma degli ammortizzatori sociali, dei servizi per il lavoro e delle politiche attive, nonché in materia di riordino della disciplina dei rapporti di lavoro e dell'attività ispettiva e di tutela e conciliazione delle esigenze di cura, di vita e di lavoro*), No. 183, available at: www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:2014-12-10:183!vig.

⁷⁸ Legislative Decree of 4 March 2015, on contract with increasing degree of protection (*Disposizioni in materia di contratto di lavoro a tempo indeterminato a tutele crescenti, in attuazione della legge 10 dicembre 2014, n. 183*), No. 23, available at: www.normattiva.it/uri-res/N2Ls?urn:nir:stato:decreto.legislativo:2015-03-04:23!vig.

⁷⁹ Law of 15 May 1997, on measures to simplify administrative activity, procedures to adopt decisions and monitoring activity (*Misure urgenti per lo snellimento dell'attività amministrativa e dei procedimenti di decisione e di controllo*), No. 127, Article 3(6), available at: <http://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:1997-05-15:127!vig>.

limit of 50 years old on access to the profession of notary, with the principle of non-discrimination on the grounds of age.⁸⁰

4.6.4 Retirement

a) State pension age

In Italy, there is a state pension age at which individuals must begin to collect their state pensions.

If an individual wishes to work beyond the state pension age, the pension can be deferred up to the age of 70, provided that the employer agrees – the worker's wish to defer their pension age is not sufficient on its own. Beyond the age of 70, the pension may not be deferred further. At the age of 70, at least five years of contributions are necessary to receive the pension.

An individual can collect a pension and still work in a self-employed capacity.

The pension age for men and women in both the public and private sectors will gradually be equalised: from 2018, men and women in both sectors retire at the age of 66 and seven months. They will be able to retire before the age of 66 and seven months only if they have worked for 42 years and three months (for men) or 41 years and three months (for women), and with a 2 % cut in their pension for each year of early retirement (that is, before the age of 66 and seven months). This is the only chance for people to retire earlier than the age of 66 years and seven months. A complex system of flexibility will operate between the ages of 62 and 70 years. In all these cases, the state pension is granted only to those who have worked for a minimum of 20 years.

During 2019, a new law was approved that explicitly aims to limit the effects of the 2018 reform. The so called 'Quota 100', which is currently in force until 2021, allows workers to retire after having worked for a minimum of 38 years, at a minimum age of 62 years, without any cut in their pension.⁸¹

b) Occupational pension schemes

In Italy, there is a standard age at which people can begin to receive payments from occupational pension schemes and other employer-funded pension arrangements.

If an individual wishes to work for longer, payments from such occupational pension schemes cannot be deferred.

An individual can collect a pension and still work.

There are several occupational pension schemes currently in existence, generally based on employer-funded pension arrangements (e.g. for lawyers, notaries and physicians). They each fix minimum and maximum ages for starting to collect pensions, with a mix of requirements in relation to age and years of contribution. Pensions can be deferred until the compulsory retirement age, which is around 70 years, is reached, and potentially for longer. For notaries, for example, the limit for deferral is 75 years of age.

c) State-imposed mandatory retirement ages

In Italy, there are state-imposed mandatory retirement ages. The general mandatory retirement age imposed by the state is 70, with adjustments in line with life expectancy. For doctors, the mandatory retirement age is 65.

⁸⁰ Case still pending, *Ministero della Giustizia*, C-914/19.

⁸¹ See: <https://www.inps.it/nuovoportaleinps/default.aspx?itemdir=52405>.

There is no way that an employee may continue to work past the mandatory retirement age in the same role and with the same contract. However, it is possible to continue to work on a self-employed basis or as a consultant.

In addition, it is possible for the mandatory retirement age in public sector employment to be set below the age of 70 for employees who have worked for at least 40 years. In one case decided in 2016, the Supreme Court rejected the claim of discrimination on the ground of age alleged by a teacher who had been forced to leave his job since, according to Article 6 of Directive 2000/78/EC, implemented in Italy through Legislative Decree 216/2003, a Member State may differentiate between workers on the ground of age if an objective and reasonable justification applies. The Supreme Court found that mandatory retirement ages do not infringe on Directive 2000/78/EC, since they pursue a legitimate policy aim of ensuring a turnover of staff, and the means employed are appropriate and necessary.⁸²

d) Retirement ages imposed by employers

In Italy, national law does not permit employers to set retirement ages (or ages at which the termination of an employment contract is possible) by contract or collective bargaining or unilaterally.

An employment contract cannot be terminated on the ground of age before the employee fulfils the conditions (age included) required to receive a pension. Employers are thus bound by national law on pension ages.

e) Employment rights applicable to all workers irrespective of age

In the event that a person keeps working even after reaching pension age, the law on protection against dismissal and other laws protecting employment rights apply to all workers.

f) Compliance of national law with CJEU case law

In Italy, national legislation is in line with CJEU case law on age regarding compulsory retirement.

Rules providing for difference of treatment on the ground of age, in particular in the field of employment, are generally justified by reference to the need to avoid exclusion of older people from the labour market or, on the contrary, to favour the entry of young people (generally up to 29 years old).

With regard to different regimes concerning mandatory retirement ages or early retirement ages (for instance, for the armed forces, police, and airline employees), the legal framework is in line with CJEU case law, but several limits still exist, which should be changed or removed if they cannot be properly justified.

4.6.5 Redundancy

a) Age and seniority taken into account for redundancy selection

In Italy, national law permits age or seniority to be taken into account in selecting workers for redundancy, within the framework of special arrangements made in the case of financial crisis followed by so-called 'solidarity contracts': in this case, agreements with trade unions make provision for financial incentives for voluntary retirement, switching to part-time

⁸² Supreme Court, judgment of 9 June 2016, *B.F., C.F. v. Ufficio scolastico regionale Basilicata (Basilicata Regional School Office) and MIUR (Ministry of Education, Universities and Research)*, No. 11859, available at: <http://www.tcnnotiziario.it>.

contracts and even the dismissal of only a proportion of the workers, in accordance with Law 223/1991. The selection of workers for the new contracts is based on several criteria, including age. This is clearly discriminatory, and judges have ruled this to be the case in several judgments, but no significant amendment has been enacted.⁸³

The compliance of this situation with the directive has not been the subject of significant discussion.

b) Age taken into account for redundancy compensation

In Italy, national law provides compensation for redundancy. This is affected by the age of the worker. The system applies to workers who are dismissed after having previously enjoyed the social security benefits granted to workers in enterprises in difficulty (redundancy insurance). The length of the period for which mobility compensation is granted depends on the age of the worker (the older the worker, the longer the period during which they are eligible for compensation).

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

In Italy, national law includes exceptions that seek to rely on Article 2(5) of the Employment Equality Directive. Article 3(2)(c) establishes that Legislative Decree 216/2003 shall be without prejudice to the provisions already in force concerning public security, the maintenance of public order, the prevention of criminal offences and the protection of health. This provision seems to allow the legislator too much discretion, since there is no express limit and no means of verifying its compatibility with the needs of a democratic society.

4.8 Any other exceptions

In Italy, other exceptions to the prohibition of discrimination (on any ground covered by this report) provided in national law are as follows. Article 3(4) of Legislative Decree 216/2003 establishes that its provisions are without prejudice to the 'provisions that establish work suitability tests with respect to the necessity of suitability for a specific occupation (...)'. This 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 if they are required by the specific nature of the occupation and by legitimate employment policy, labour market and vocational training objectives, it seems that the first part makes reference to more general and vague work suitability tests without specifying the nature of the work for which a test is required, 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 different treatment, the current version of the decree is quite suspect since it allows a general appraisal of the worker's suitability not provided by the directive itself and not defined in its aims, criteria and limits.

⁸³ The point is clearly explained in UNAR's report for 2012, pp. 40-43, available at: www.unar.it/unar/portal/wp-content/uploads/2013/09/Relazione-2012.pdf.

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

a) Scope for positive action measures

In Italy, positive action is permitted in national law in respect of racial or ethnic origin, according to Article 5 of Legislative Decree 215/2003. Moreover, according to Article 7(2)(c) of the same Decree, the tasks of UNAR, the equality body, include promoting the adoption of positive actions by private parties.

Relevant provisions related to disability, in particular those concerning employment, have come into force under Law 68/1999 (Articles 1 and 23), which was most recently amended in 2015.⁸⁴

National law does not require special conditions regarding positive actions: they are required only to offset situations of disadvantage on one of the relevant grounds.

It is in any event possible to argue that the adoption of positive actions is in principle legitimate under the Italian Constitution in the light of the principle of substantive equality in Article 3(2).

Specific projects have been funded by UNAR and labelled as positive actions. In particular, special events are promoted during Anti-Racism Week, which is held yearly. However, these activities appear to be aimed more at raising awareness than at the implementation of positive actions. The same applies to projects which are funded by UNAR to promote a culture of diversity in the workplace. No measure of positive action exists at the national level in relation to the Roma. Specific measures that are aimed at enhancing the integration of Roma groups are promoted generally through the funding of projects of limited duration. Despite the positive results of some of these projects, they still appear to be very marginal in the context of the overall picture of segregation and racism perpetrated against the Roma population. Moreover, they are addressed to 'nomad groups' or people living in the camps, without taking into account the specific characteristics of Roma, Sinti and Traveller minorities who do not live in a camp or who are sedentary.⁸⁵

Disability

In relation to the grounds covered by the directives, positive action applies in practice, strictly speaking, only to people with disabilities on the basis of a complex set of rules contained in Law 68/1999. It should be noted that the aim of this Law is to amend and partly fill the gaps in Law 104/1992, which provides for measures to support people with a disability – including those with severe disabilities – in Article 3. In fact, Law 68/1999: 1) provides for some new concrete interventions and services; 2) allows some experimental projects to be implemented; 3) promotes the use of surveys and the collection of statistical data on disability; and 4) makes provision for a national conference on disability policy to be held every third year. The Law targets local authorities, which have specific competences to promote actions to support disabled people, to draft programmes and to provide services for people with disabilities. During the first phase of its implementation, this law was financed directly by the state (Ministry of Labour and Social Policies), which

⁸⁴ Law of 12 March 1999, on provisions on the right to work of persons with disability (*Norme per il diritto al lavoro dei disabili*), No. 69, available at: <http://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:1999-03-12;68!vig>. Amended by Legislative Decree of 14 September 2015, on simplification of procedures and duties upon citizens and companies (*Disposizioni di razionalizzazione e semplificazione delle procedure e degli adempimenti a carico di cittadini e imprese e altre disposizioni in materia di rapporto di lavoro e pari opportunità, in attuazione della legge 10 dicembre 2014, n. 183*), No. 151, available at: <http://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:decreto.legislativo:2015-09-14;151!vig>.

⁸⁵ See, for instance, the inquiry undertaken by the Italian Senate on the situation of Roma, Sinti and Travellers. The final report stresses the lack of reliable data to enable a better understanding of the situation of the groups considered and the need to provide better data collection and analysis tools.

transferred the financial resources to the local authorities (by the year 2000). Local authorities now provide their own funding.

Interventions include different forms of personal care, personal assistance, emergency short-term accommodation and partial refunds of expenditure on assistance.

Linguistic minorities

Some linguistic minorities enjoy special protection in the charters of regions with a special constitutional status. In the case of the German-speaking minority of Trentino-Alto Adige (South Tyrol), this entails an extremely complex system of quotas for public employment and for the enjoyment of certain rights such as the use of language in court proceedings.

Much weaker protection is granted at the national level to other linguistic minorities defined as 'historic' by a law of 1999 – i.e. the languages 'of the Albanian, Catalan, Germanic, Greek, Slovenian and Croatian populations and of those speaking French, Franco-Provençal, Friulan, Ladin, Occitan and Sardinian'.

b) Quotas in employment for people with disabilities

In Italy, national law provides for quotas for the employment of people with disabilities.

An obligation on public bodies and private enterprises with more than 50 workers to ensure that persons with disability make up 7 % of their total workforce. For enterprises with more than 15 workers, it is sufficient that one worker with disability is employed, while for those with 30 to 50 workers, two persons with disability have to be employed. An exception to this obligation, which had been granted to political parties, trade unions and organisations for social development and support, was removed in 2015.⁸⁶ For police and civil protection jobs, people with disabilities are employed only in administrative roles. Other cases of derogation are set out in Articles 3 and 5. These quotas are generally complied with. Statistics on the enforcement of the quotas are available from the Ministry of Labour; 25 000 to 30 000 people are hired under this system each year. In certain cases, an employer who is not in a position to hire people with disabilities for a stated reason (e.g. the type of activity involved) must make a financial contribution to the Regional Fund for the Employment of Persons with Disability. The contribution is of EUR 153.20 per day per unfilled place.

In addition, Law 68/1999 provides for: some services in order to facilitate access to work for people with disabilities (Article 7); lists of unemployed people with disabilities (Article 8); labour relations (Article 10); support for enterprises which comply with the law (Article 11); the creation of social cooperatives in order to support access to work (Article 12); benefits for employers who employ people with disability (Article 13); and the institution of a Regional Fund for the Employment of Persons with Disability. A fine of EUR 635.11 is applied to employers who do not fulfil their obligations, in particular if they do not send to the local employment office the organisational chart and the number of workers with disability employed (Article 15). An additional fine of EUR 30.76 per day is foreseen for each day of delay.

As has already been mentioned, amendments to Law 68/1999 were introduced in 2015 by Legislative Decree 151/2015, with the aim of simplifying the procedures for placing persons

⁸⁶ Law of 12 March 1999, on provisions on the right to work of persons with disability, (*Norme per il diritto al lavoro dei disabili*), No. 69, available at: <http://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:1999-03-12;68!vig>. Amended by Legislative Decree of 14 September 2015, on simplification of procedures and duties upon citizens and companies (*Disposizioni di razionalizzazione e semplificazione delle procedure e degli adempimenti a carico di cittadini e imprese e altre disposizioni in materia di rapporto di lavoro e pari opportunità, in attuazione della legge 10 dicembre 2014, n. 183*), No. 151, available at: <http://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:decreto.legislativo:2015-09-14;151!vig>.

with disability in jobs.⁸⁷ One controversial issue concerns the extension to all employers of the options for choosing a worker with disability. Before the entry into force of Decree 151/2015, this applied only to enterprises with fewer than 15 workers, while larger firms could hire from among people included in the list of unemployed people with disability, but without choosing the individual. A complaint was submitted to the European Commission claiming that this provision infringes Article 5 of Directive 2000/78/EC, because leaving the choice of workers up to the employer risks excluding persons with more severe disabilities from the labour market.⁸⁸ This is particularly true in the context of high unemployment. However, no legal action was taken by the European Commission following the complaint.

⁸⁷ Law of 12 March 1999, on provisions on the right to work of persons with disability, No. 69, available at: <http://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:1999-03-12;68!vig>. Amended by Legislative Decree of 14 September 2015, on simplification of procedures and duties upon citizens and companies (*Disposizioni di razionalizzazione e semplificazione delle procedure e degli adempimenti a carico di cittadini e imprese e altre disposizioni in materia di rapporto di lavoro e pari opportunità, in attuazione della legge 10 dicembre 2014, n. 183*), No. 151, available at: <http://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:decreto.legislativo:2015-09-14;151!vig>.

⁸⁸ See: <http://www.disabili.com/lavoro/articoli-lavoro/assunzioni-disabili-ricorso-alla-commissione-europea-contro-il-jobs-act>.

6 REMEDIES AND ENFORCEMENT

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

- a) Available procedures for enforcing the principle of equal treatment

In Italy, the following procedures exist for enforcing the principle of equal treatment: according to Article 28 of Legislative Decree 150/2011,⁸⁹ the general provisions on fast-track procedures apply to discrimination litigation. The relevant article is Article 702-*bis* of the Civil Procedural Code.

Under the general fast-track procedure, a victim of discrimination can apply, even in person (whereas in ordinary cases the assistance of a lawyer is compulsory), to the judge (the ordinary civil court) with jurisdiction over their place of residence (an exception to the general principle of suing in the court with jurisdiction over the place of residence of the defendant). The judge can issue a judgment ordering cessation of the discriminatory activity as well as damages (including for non-pecuniary losses, ordinarily excluded in civil cases). The judge can order an anti-discrimination plan to be drafted. In the case of collective discrimination, the judge decides whether an anti-discrimination plan is needed after hearing the opinion of the association which brought the complaint. The judgment can be appealed before the Court of Appeal (second instance) within 30 days; the decision on appeal can be challenged before the Supreme Court (third instance). The main difference between the ordinary and fast-track procedures is that a final ruling can be given in the former, while the latter may always be followed by a full trial, the only forum in which a final judgment may be given. It must be recalled that pre-trial mediation is now mandatory in anti-discrimination cases.

The civil action against discrimination prevails over other special procedures applying in the fields of labour law or administrative law. With regard to administrative law, according to a general principle of Italian law, ordinary administrative procedure applies when public bodies are involved.⁹⁰ However, the Supreme Court has stated that in discrimination cases, the discrimination decrees apply, including the special procedure provided for in Legislative Decree 150/2011. Therefore, the civil action against discrimination applies and not the ordinary administrative one with the competence of ordinary civil courts.

With regard to the field of employment, the prevalence of civil action against discrimination over labour law and labour procedural law was expressly confirmed by the Milan Court of Appeal in its judgment of 15 April 2014.⁹¹ The Court of Appeal held that, when an action of discrimination has been brought before a labour court, it shall apply a civil action against discrimination rather than labour procedural law. In addition, ordinary proceedings are available. In particular, with regard to employment, labour inspections could take place, while no administrative or criminal investigations are applicable for infringements of the prohibition of non-discrimination.

⁸⁹ Legislative Decree of 1 September 2011, on additional measures to the Civil Procedural Code in order to reduce and simplify civil proceedings in accordance with Article 54 of Law No. 69 of 19 June 2009 (*Disposizioni complementari al codice di procedura civile in materia di riduzione e semplificazione dei procedimenti civili di cognizione, ai sensi dell'articolo 54 della legge 18 giugno 2009, n. 69*), available at: <http://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:decreto.legislativo:2011-09-01;150!vig>.

⁹⁰ Supreme Court, judgment of 5 December 2014, No. 25011, available at: http://dirittocivilecontemporaneo.com/wp-content/uploads/2014/11/Cass-sez-un-25011_2014.pdf. See section 12.2 in particular.

⁹¹ Court of Appeal of Milan, judgment of 15 April 2014, *Bordonaro v. Abercrombie & Fitch Italia S.r.l.*, available at: www.europeanrights.eu/public/sentenze/CdA_Milano.pdf.

b) Barriers and other deterrents faced by litigants seeking redress

According to Article 28 of Legislative Decree 150/2011, a civil action against discrimination can be brought before the court with jurisdiction over the victim's place of residence. The law is silent about jurisdiction in instances of collective discrimination and a case is pending before the Supreme Court on this point: the question is whether NGOs may bring proceedings only in courts with jurisdiction for the place where they have their registered office or if they can choose another court. This is particularly relevant in cases where both a collective and an individual action are brought.

Legal costs, such as fees and the payment of the lawyers, may function as a barrier for victims of discrimination. The same goes for the length of proceedings, which in Italy can be quite long, even though a civil action against discrimination is faster than a general civil action. In order to overcome the barriers represented by legal costs, an Interinstitutional Agreement on Access to Justice was agreed in 2013 by UNAR and the National Lawyers' Association, which was aimed at making access to justice easier for victims of discrimination, anticipating the legal costs of actions brought before the courts (about EUR 600 for each level of judicial proceedings).⁹² This amount is not sufficient to cover the overall legal expenses, but it is sufficient to act as an incentive for lawyers engaging in discrimination cases. Applications must be sent to the National Lawyers' Association by individuals or by collective bodies with the right to legal standing (a maximum of three per year). A steering committee made up of lawyers and public officials from UNAR decides on the allocation of aid, which is an alternative to the legal aid provided by the state for those who are eligible on the basis of their income. In the event of a favourable judgment, any legal aid provided must be refunded to UNAR.

c) Number of discrimination cases brought to justice

In Italy, statistics on the number of cases related to discrimination that are brought to justice are not available.

UNAR's remit includes the drafting of an annual report to the President of the Council of Ministers, which includes data on its activity and, in particular, on the discrimination complaints made through its contact centre. However, UNAR does not conduct surveys or collect more complex data. The most recent report to be published concerns 2018. According to this report, a total of 4 368 complaints were examined during 2018, of which 2 473 were lodged in 2018. Of the 2 331 complaints deemed admissible, 70.4 % were based on the grounds of race or ethnic origin (including nationality); 10.1 % on religion or belief; 5.4 % on disability; 7 % on sexual orientation; 4.1 % on age; and 3 % on multiple grounds. It is not clear how many of these complaints were settled thanks to the intervention of UNAR as mediator and how many resulted in legal action and a case being brought to court.

d) Registration of national court decisions on discrimination

In Italy, court decisions on discrimination are not registered as such by national courts. When a case is brought to court, lawyers must fill in a form where they have to enter the subject of the case and the relevant code.⁹³ The list of subjects and codes is attached to the form and does not include discrimination. Discrimination cases are in fact classed as 'Others – Other fast-track procedures'. Cases are registered on the basis of the type of decision (judgment, decree or order) and not on the basis of their subject.

⁹² See: <http://www.consiglionazionaleforense.it/unar1>.

⁹³ See: https://www.giustizia.it/giustizia/it/mg_3_7_9.page;jsessionid=QOjnx2RDGJEF+wqumDjQUO5o?tab=d.

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

- a) Engaging in proceedings on behalf of victims of discrimination (representing them)

In Italy, associations, organisations and trade unions are entitled to act on behalf of victims of discrimination.

Article 5 of Legislative Decree 215/2003 entitles associations and legal persons to act in support of or on behalf of victims of discrimination on the grounds of racial and ethnic discrimination. Legal standing is granted to associations and bodies included in a list approved by a joint decree of the Ministry of Labour and Social Policies and the Department for Equal Opportunities.⁹⁴ Associations and other bodies must have been officially established for at least one year, and must have been operating continuously in the year immediately before registration, as well as having an official charter establishing that they have a democratic structure; that they do not operate in order to make a profit; and that the promotion of equal treatment and opposition to discrimination is their only or primary aim. Moreover, they must have a budget and a register of members that fulfils 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.

The associations included on the list are drawn partly from those included in the pre-existing register of associations and organisations operating in support of immigrants and partly from the register of associations and organisations specifically active in the anti-discrimination field established under Legislative Decree 215/2003 (all of which applied to obtain standing).⁹⁵

Article 5 of Legislative Decree 216/2003 entitles trade unions, associations and legal persons to act in support of or on behalf of victims of discrimination on the grounds of religion or personal belief, disability, age and sexual orientation. Standing to litigate – previously limited to trade unions – is now extended to other organisations and associations representing the rights or interests affected, with no special register. Legal standing is accorded on an ad hoc basis where the organisations are regarded as having a 'legitimate interest' in the enforcement of the relevant legislation. However, no relevant action has been brought to court by NGOs under this new mandate.

It is worth mentioning that legal standing according to Legislative Decree 216/2003 is much broader than that under Legislative Decree 215/2003.

The Disability Discrimination Act (Article 4) grants standing to litigate to associations identified by a joint decree of the Ministry of Labour and Social Policies and the Department for Equal Opportunities along the lines applied in the case of race and ethnicity. A decree of 2007 established a register jointly managed by the above-mentioned departments, on roughly the same model as was established for race and ethnicity under the decree transposing Directive 2000/43/EC.⁹⁶

⁹⁴ Regulation implementing Legislative Decree of 25 July 1998, No. 286 (*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*), 31 August 1999, No. 394, available at: <http://www.normattiva.it/uri-res/N2Ls?urn:nir:presidenza.repubblica:decreto.del.presidente.della.repubblica:1999-08-31;394!vig>.

⁹⁵ The list of associations and bodies with standing to litigate, drawn up for the first time in 2005, can be found on the UNAR website at: <http://www.unar.it/unar/portal/?p=7281>. The list was updated in 2013. This was the second update; the provision specifying that the list must be updated on a yearly basis has not been observed.

⁹⁶ See: <http://www.gazzettaufficiale.it/eli/id/2015/11/20/15A08638/sq>.

In addition, in the field of employment, trade unions have the right to legal standing on behalf of or in support of victims of discrimination, in accordance with Article 43(10) of Legislative Decree 286/1998 (the Immigration Decree) and Article 18 of Legislative Decree 1970/300 (on discriminatory dismissal).

- b) Engaging in proceedings in support of victims of discrimination (joining existing proceedings)

In Italy, associations, organisations and trade unions are entitled to act in support of victims of discrimination.

The same is true for NGOs. As the rise in the number of cases concerning alleged discrimination shows, associations and NGOs are increasingly entering into court proceedings in support of or on behalf of victims.

Article 5 of Legislative Decree 215/2003 entitles associations and legal persons to act in support of or on behalf of victims of racial and ethnic discrimination. Legal standing is granted to associations and bodies included in a list approved by a joint decree of the Ministries of Labour and Welfare and Equal Opportunities. Associations and other bodies must have been officially established for at least one year, and must have been operating continuously in the year immediately before registration, as well as having an official charter establishing that they have a democratic structure; that they do not operate in order to make a profit; and that the promotion of equal treatment and opposition to discrimination is their only or primary aim. Moreover, they must have a budget and a register of members that fulfils 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.

The associations included on the list are drawn partly from those included in the pre-existing register of associations and organisations operating in support of immigrants and partly from the register of associations and organisations specifically active in the anti-discrimination field established under Legislative Decree 215/2003 (all of which applied to obtain standing).⁹⁷ The register was updated in 2013. This was only the second update – the provision specifying that the list must be updated on a yearly basis has not been observed.

Article 5 of Legislative Decree 216/2003 entitles trade unions, associations and legal persons to act in support of or on behalf of victims of discrimination on the grounds covered by Directive 2000/78/EC. Standing to litigate – previously limited to trade unions – is now extended to other organisations and associations representing the rights or interests affected, with no special register. Legal standing is accorded on an ad hoc basis where the organisations are regarded as having a 'legitimate interest' in the enforcement of the relevant legislation. It is worth mentioning that legal standing according to Legislative Decree 216/2003 is much broader than that under Legislative Decree 215/2003.

Law 67/2006 (the Disability Discrimination Act) grants standing to litigate to associations identified by a joint decree of the Ministry of Labour and Social Policies and the Department for Equal Opportunities along the lines applied in the case of race and ethnicity (Article 4). A decree of 2007 established a register jointly managed by the above-mentioned departments, on roughly the same model as was established for race and ethnicity under the decree transposing Directive 2000/43/EC.⁹⁸

⁹⁷ The list of associations and bodies with standing to litigate, drawn up for the first time in 2005, can be found on the UNAR website at: <http://www.unar.it/unar/portal/wp-content/uploads/2013/09/Elenco-associazioni-UNAR-2016.pdf>.

⁹⁸ The list of associations and bodies with standing to litigate can be found at: <http://www.gazzettaufficiale.it/eli/id/2015/11/20/15A08638/sq>.

In addition, in the field of employment, trade unions have the right to legal standing on behalf of or in support of victims of discrimination, in accordance with Article 44(10) of the Immigration Decree and Article 18 of Legislative Decree 1970/300 (on discriminatory dismissal).

c) *Actio popularis*

In Italy, discrimination law allows associations, organisations and trade unions to act in the public interest on their own behalf, without a specific victim to support or represent (*actio popularis*).

In accordance with both decrees implementing the two directives of 2000, organisations with legal standing can act (obviously without the authorisation of the victim) in cases of collective discrimination when victims cannot be identified in a direct and immediate way (Legislative Decree 215/2003, Article 5(3); Legislative Decree 216/2003, Article 5(2); Legislative Decree 67/2006, Article 4(2) and (3); Immigration Decree: Article 44(10)). While the legal standing of associations is always contested by respondents, in particular when there is no individual victim, judges have constantly reiterated a reliance on the provisions of the legislative decree. During 2020, several cases were decided thanks to legal actions brought by NGOs and trade unions.⁹⁹

According to Article 4(3) of Law 67/2006, associations are entitled to act in cases of collective discrimination. The sector in which litigation promoted by the associations is livelier is that relating to discrimination on grounds of nationality, race and ethnic origin, where at least one NGO promotes so-called strategic litigations.

As far as trade unions are concerned, there is a tendency to promote causes relating to discrimination on grounds of conviction, understood as the exercise of trade union freedom

d) Class action

In Italy, national law allows associations/organisations/trade unions to act in the interest of more than one individual victim (class action) for claims arising from the same event.

After heated scholarly and political debate, in December 2007, the Government included a provision in the Finance Act introducing an opt-in class action for obtaining financial compensation for wrongs perpetrated against groups of consumers or users. After having been frozen for a time, this new piece of legislation entered into force, in a slightly modified form, on 1 January 2010 (Article 140-*bis*, Consumer Code). A new law on class action was approved in 2019, which has abrogated Article 140-*bis* of the Consumer Code.¹⁰⁰ This is a general law on class action that allows associations to bring an action to court where similar individual rights are affected. Its provisions do not limit the scope of application to particular rights or sector, therefore anti-discrimination suits are included.

⁹⁹ Supreme Court, judgment of 15 December 2020, *T.C. v. Associazione diritti LGBTI – Rete Lenford*, No. 28646, available at: https://www.cortedicassazione.it/cassazione-resources/resources/cms/documents/28646_12_2020_no-ndex.pdf; Tribunal of Bologna, judgment of 31 December 2020, *FILCAMS CGIL BOLOGNA, NIDIL CGIL BOLOGNA, FILT CGIL BOLOGNA v. Deliveroo Italia*, No. 2949, available at: <http://www.bollettinoadapt.it/wp-content/uploads/2021/01/Ordinanza-Bologna.pdf>; Supreme Court, judgment of 15 December 2020, *T.C. c. Associazione diritti LGBTI – Rete Lenford*, No. 28646, available at: https://www.cortedicassazione.it/cassazione-resources/resources/cms/documents/28646_12_2020_no-ndex.pdf; Supreme Court, judgment of 2 January 2020 no. 2, *S.L.A.I. COBAS c. F.C.A. ITALY S.P.A.*, available at http://www.bollettinoadapt.it/wp-content/uploads/2020/01/20200102_snciv@sl0@a2020@n00001@tS.clean_.pdf; Tribunal of Milan, judgment of 23 November 2020, *Ledha (Lega per i diritti delle persone con disabilità), Anffas onlus Crema, Anffas Onlus Legnano, ASGI v. Regione Lombardia*, No. 6709, available at: <https://www.asgi.it/wp-content/uploads/2020/11/Tribunale-di-Milano-ordinanza-del-24-novembre-2020-est.-Palmisani-LEDHA-ANFASS-e-ASGI-avv.ti-Guariso-Neri-e-Rizzi-c.-Regione-Lombardia.pdf>.

¹⁰⁰ Law No. 31 of 12 April 2019, on provisions on class action (*Disposizioni in materia di azione di classe*, available at: <http://www.normattiva.it/eli/id/2019/04/18/19G00038/CONSOLIDATED/20201224>).

Discrimination law does not provide a specific statutory basis for class action.

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

In Italy, national law permits a shift of the burden of proof from the complainant to the respondent.

According to Article 28(4) of Legislative Decree 150/2011,¹⁰¹ the claimant establishes facts, including facts of a statistical character, on which a presumption of discrimination can be based; it is up to the defendant to prove that there has been no discrimination. Testing is still not part of current practice.

The most interesting case in which a shift in the burden of proof was applied is the *Fiat, Fabbrica Italia* case, which was heard by the Court of Rome in 2012.¹⁰² The Court held that statistical data are sufficient to shift the burden of proof to the respondent. The Court clarified that discrimination law establishes a 'proof by presumption', according to which it is sufficient for the complainant to provide facts on which the presumption of discrimination is based, in order for the burden of proof to be placed on the employer to demonstrate that no discrimination was involved. The same principle has been applied in a case decided in 2020 against the same company, F.C.A. Italy.¹⁰³ The case concerned the transfer of 316 workers of F.C.A. Italy (6 % of the total number of workers), 77 of whom belonged to the COBAS trade union, to another location 20 kilometres away. This means that 80 % of the transferred workers belonged to COBAS. According to the Court, this is evidence of a potentially discriminatory action that shifts the burden of proof to the defendant.

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

In Italy, there are legal measures for protection against victimisation.

According to Article 4-*bis* in both legislative decrees implementing the two directives, judicial protection is 'also applied against any prejudicial behaviour towards a person affected by direct or indirect discrimination or towards any other person as a reaction against any activity aimed at obtaining equality of treatment' (the same standards of evidence apply, including the reversal of the burden of proof).

The most recent relevant case was decided in 2019 by the Supreme Court.¹⁰⁴ A member of the board of a company was dismissed after taking a position in favour of an employee who had been the victim of discrimination on the ground of race and ethnic origin. The Supreme Court stated that, according to Article 2383 of the Civil Code, such a dismissal is allowed even if it is unfair, and the person is entitled only to compensation. Nevertheless, when the dismissal represents a reaction to an initiative carried out with good faith and fairness by the dismissed person in order to assure the principle of equal treatment irrespective of race and ethnic origin, the dismissed person is in turn a victim of a discriminatory conduct according to Directive 2000/78/EC, and he or she is entitled to be reinstated in his or her position.

¹⁰¹ Legislative Decree 150/2011, complementary provisions of the Civil Procedural Code aiming to reduce and simplify civil proceedings, available at: <http://www.normattiva.it/eli/id/2011/09/21/011G0192/CONSOLIDATED/20200229>.

¹⁰² Court of Appeal of Rome, judgment of 9 October 2012, *Fabbrica Italia Pomigliano SPA v. FIOM-CGIL*, available at: www.dplmodena.it/Fiat-Fiom%20-%20Corte%20Appello%20Roma%209-10-12.pdf.

¹⁰³ Supreme Court, judgment of 2 January 2020, *S.L.A.I. COBAS v. F.C.A. ITALY S.P.A.*, No. 2, available at: http://www.bollettinoadapt.it/wp-content/uploads/2020/01/20200102_snciv@sL0@a2020@n00001@tS.clean_.pdf.

¹⁰⁴ Supreme Court, judgment of 4 December 2019, *Extrabanca SPA v. Prison B.O.*, No. 31660.

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

a) Applicable sanctions in cases of discrimination – in law and in practice

According to Article 28(5) of Legislative Decree 150/2011 – which applies to the anti-discrimination Legislative Decrees 215/2003 and 216/2003, the Immigration Decree and disability law – the judge may order the termination of the discriminatory behaviour, conduct or act and the removal of its effects, including by means of a plan aiming to rectify the discrimination identified. The basic idea of this remedy (similar to remedies against gender discrimination) is consistent with Article 15 of the Workers Act, which declares that any discriminatory act or behaviour is unlawful and consequently void. Therefore, the consequences of such acts and behaviour must be rectified and the previous situation restored. According to some authors, even though this sanction may work in cases of dismissal (when reinstatement must be ordered) or other acts, it might not be an effective remedy for omissions (e.g. denial of access to work); in these cases, only compensatory damages are available. A victim of discrimination may claim for compensation of pecuniary and non-pecuniary losses. Under Article 44(8) of the Immigration Decree, criminal sanctions are applied if the decision of the court is not enacted.

Article 28(7) of Legislative Decree 150/2011 establishes that the decision of the judge must be published in a national newspaper if this is explicitly ordered by the judge in the light of the circumstances of the case.

Article 44(11) of the Immigration Decree establishes that, if the discriminatory act or behaviour is performed by enterprises to which public bodies have awarded tenders, 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.

Discriminatory dismissals are governed by Article 3 of Law 108/1990 on individual dismissals (which is in fact a consolidated version of Article 4 of Law 604/1966 and of the amended version of Article 15 of the Workers Act), according to which they are always considered as void and entail the worker's reinstatement. This provision is confirmed by what is known as the Jobs Act.¹⁰⁵

b) Compensation – maximum and average amounts

No ceiling to the amount of compensation applies.

c) Assessment of the sanctions

It is difficult to assess the amount of non-pecuniary damages that can be awarded, which largely depends on the circumstances of the individual case. The small number of cases decided to date makes it impossible to calculate an average. The overall effectiveness of these remedies is very high in comparison with ordinary Italian civil procedure. It remains to be seen, of course, whether this effectiveness will be sufficient to overcome more general cultural obstacles that make anti-discrimination litigation quite rare, but the procedural requirements of the directives are certainly met.

An interesting case is the *Ryanair* case, which was decided in 2018 by the Tribunal of Bergamo.¹⁰⁶ The Tribunal, having found that an extinction clause included in collective and individual contracts was of a discriminatory nature, ordered the publication of the judgment

¹⁰⁵ Law of 10 December 2014 (Jobs Act) (*Deleghe al Governo in materia di riforma degli ammortizzatori sociali, dei servizi per il lavoro e delle politiche attive, nonché in materia di riordino della disciplina dei rapporti di lavoro e dell'attività ispettiva e di tutela e conciliazione delle esigenze di cura, di vita e di lavoro*), No. 183, available at: www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:2014-12-10;183!vig.

¹⁰⁶ Tribunal of Bergamo, judgment of 30 March 2018, No. 1586.

in two national newspapers and condemned the company to pay EUR 50 000 in non-pecuniary damages. The Tribunal made reference to the EU directive and the *Accept* case, requiring that 'The sanctions, which may comprise the payment of compensation to the victim, must be effective, proportionate and dissuasive' and qualifying them expressly as punitive damages.

Traditionally, doctrine and jurisprudence have always asserted that this sort of sanction is contrary to general principles of civil liability. However, an identical provision to that applied in this judgment is laid down in Article 37(3) of the Equal Opportunities Code (Legislative Decree 198/2006): in the case of collective discrimination, the sanction may include the payment of non-pecuniary damages. These are not defined as punitive damages but are paid to a collective body that has not, in fact, suffered any damage. The issue of (punitive?) damages in cases of collective discrimination is emerging from the case law as a result of a broad interpretation of the written law. Not surprisingly, the Supreme Court, with an historic judgment in the field of health, has interpreted the national system of redress as also including punitive damages.¹⁰⁷ The same principle has been stated in a case that was decided definitively in 2020, following referral to the Court of Justice.¹⁰⁸ The Court condemned the defendant to pay the claimant NGO redress of EUR 10 000.

¹⁰⁷ Supreme Court, judgment of 5 July 2017, No. 16601, available at: <https://www.ricercagiuridica.com/sentenze/sentenza.php?num=4682>.

¹⁰⁸ Supreme Court, judgment of 15 December 2020, *T.C. v. Associazione diritti LGBTI – Rete Lenford*, No. 28646, available at: https://www.cortedicassazione.it/cassazione-resources/resources/cms/documents/28646_12_2020_no-index.pdf; CJEU, 23 April 2020, C-507/18.

7 BODIES FOR THE PROMOTION OF EQUAL TREATMENT (Article 13 Directive 2000/43)

- a) Body/bodies designated for the promotion of equal treatment irrespective of racial/ethnic origin according to Article 13 of the Racial Equality Directive

The requirement to introduce a body for the promotion of equal treatment is covered in Article 7 of Legislative Decree 215/2003, transposing Directive 2000/43/EC. The decree establishes an 'office' within the Department for Equal Opportunities of the Presidency of the Council of Ministers. According to Article 7(1), the promotion of equal treatment and the elimination of any sort of discrimination on grounds of racial and ethnic origin are the general and exclusive tasks of the office. UNAR's remit has been extended to cover all grounds of discrimination by a ministerial directive (an internal act of the Government assessing the specific tasks of each Government department) issued in 2010, renewed in 2012 and confirmed up to the present time. Moreover, UNAR has been identified as the Italian equality body responsible for dealing with discrimination against EU citizens in the workplace for the purpose of free movement, in the application of Directive 2014/54/EU.¹⁰⁹

The director of the office is appointed by the Prime Minister or by a minister on his behalf (Article 7(4) of Legislative Decree 215/2003). Its internal organisation is set out by a Prime Minister's Decree adopted on 11 December 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*). The office fulfils two services: one devoted to actions against discrimination; the other devoted to research and relations with other institutions.

According to Article 3 of the Decree, 21 officials shall be employed, including one general executive, one executive for each service and 18 officials. Moreover, other officials may be recruited, seconded either from other Prime Minister's departments (up to a maximum of five), or from other Government departments. This includes judges, state attorneys, experts and advisers without civil servant status (up to a maximum of five) (Article 7(5) of Legislative Decree 215/2003). In June 2019, the Government appointed Triantafillos Loukarelis as Director General for three years.

UNAR's competences include the provision of assistance to victims of discrimination in pursuing their complaints in judicial or administrative proceedings and surveys on discrimination, but without infringing on the prerogatives of the judicial authorities.

- b) Political, economic and social context of the designated body

In Italy, there is a general lack of interest regarding the equality body and regarding bodies dealing with human rights in general. No independent body has been designated to deal with discrimination (not even on the grounds of gender) or human rights. On the contrary, there appears to be sharp hostility, judging from recurring questions asked by Members of Parliament to the Government, sometimes including requests to close UNAR or to limit its remit to race and ethnic origin, as required by Legislative Decree 215/2003.¹¹⁰

There is no evidence of a popular debate on the designated body, which is not even known about by most people, even those who are more supportive of equality and diversity. UNAR took centre stage in the national media only recently, when a scandal on its allocation of funding was discovered, in addition to one previous occasion when an MP reacted to a letter sent by UNAR's director asking for more balanced speeches when dealing with migrants.¹¹¹ As far as equality and diversity in general are concerned, the popular debate

¹⁰⁹ UNAR, *Report to the Parliament for the year 2019*, p. 10, available at: <http://www.unar.it/wp-content/uploads/2020/11/RELAZIONE-UNAR-2019.pdf.pdf>.

¹¹⁰ See: <http://www.camera.it/leg17/410?idSeduta=0748&tipo=stenografico>.

¹¹¹ See: http://www.camera.it/leg17/410?idSeduta=0746&tipo=documenti_seduta.

has mostly been influenced by hostility against migrants. In particular, there is an increasing trend to link crimes committed by migrants to the general policy regarding migration and expulsion, and even to integration policies. It appears that there is no place for a popular consensus on equality and diversity.

UNAR's budget is provided for by law and has been the same since its designation, which dates back to 2003. It is established by Article 8 of Legislative Decree 215/2003 and is set at EUR 2 035 357; in addition, UNAR manages funds, including structural funds, linked to special projects. The management of these projects has increased the administrative work of the office; therefore, most of the staff are dealing with administrative issues. Moreover, the extension of UNAR's remit to other grounds of discrimination has not been reflected through a proportionate extension of the budget.

c) Institutional architecture

In Italy, the designated body does not form part of a larger body with multiple mandates. It was created as a result of the implementation of Directive 2000/43/EC.

It should be mentioned that, in Italy, there is no national human rights body – not even one in charge of UN reporting. The reporting activity is performed through the Human Rights National Commission, which is led by a diplomat and made up of officials and academics, and which reports to the Ministry of Foreign Affairs.

d) Status of the designated body – general independence

i) Status of the body

Italy has chosen to set up an office completely within the structure of the state administration.¹¹² UNAR is an 'office' of a ministry of the Government, and fulfils two services: one devoted to actions against discrimination; the other devoted to research and relations with other institutions. It is currently set up within the Department for Equal Opportunities, which previously only dealt with gender discrimination.

UNAR's budget is part of the budget of the Department for Equal Opportunities and is made up by a fixed amount set by Article 8 of Legislative Decree 215/2003, plus the additional funds arising from specific projects. Additional funding can be assigned, depending on the body's activities and projects, from either another Government department or an international organisation (Article 3(3) of Legislative Decree 215/2003).

The director is appointed by the Department for Equal Opportunities and the staff reports directly to the director. The office and its staff are together accountable to the Minister for Equal Opportunities and, in the second instance, to the Prime Minister.

ii) Independence of the body

The body is fully answerable to the Department for Equal Opportunities and to the Prime Minister. The General Director has a certain degree of discretion, like any general director in the Government Administration, but has to implement the political will of the Government in office. This is also clear regarding the competences of the Department for Equal Opportunities, which comprise those performed by UNAR according to Article 7 of Legislative Decree 215/2003. In practice, the functions of UNAR are listed among the functions of the Department for Equal Opportunities.

¹¹² See: <http://www.pariopportunita.gov.it/dipartimento/competenze/>.

UNAR has only a certain degree of financial independence, because funds are provided under Article 8 of Legislative Decree 215/2003 and the budget is spent on the basis of an autonomous decision by the Director General.

A clear example of this lack of independence occurred in March 2014, after the promotion by UNAR of an educational activity aiming to improve knowledge about sexual orientation and related issues through the publication of leaflets. Catholic associations and members of Parliament complained against the Government, which denied any responsibility regarding the publications, ascribing the initiative to UNAR's director, who was addressed with a dishonourable mention. The Government then took the decision to stop the educational campaign. During 2018, UNAR relaunched its activities in the field of LGBT issues, promoting the creation of a consultative group made up of representative of associations and NGOs. The group was set up on 23 October 2018.¹¹³ However, no new LGBT educational activity has been promoted so far.

A similar but more serious event took place in 2015, when UNAR sent a letter, signed by its director and dated 30 September 2015, to a member of Parliament, Giorgia Meloni, targeting her exhortations to close the country's borders to aliens from Muslim countries. According to her comments, people from those countries are more violent and linked to acts of terrorism than others. The letter closed with a very gentle invitation to the MP Giorgia Meloni to consider taking the opportunity, in her future speeches, to send people different messages that are not based on stereotypes. Giorgia Meloni reacted very badly to the letter, invoking freedom of speech and the immunity of all members of Parliament and writing to the Prime Minister and the President of the Chamber of Deputies. A request for clarification was sent by the Prime Minister's Secretary General to the director of UNAR, Marco De Giorgi, and a vacancy was then published for the role of director, which has now been taken on by another person, who is an external expert. The former director, Marco De Giorgi, has challenged the Prime Minister's sanctions at the Tribunal of Rome, claiming that they violate Directive 2000/43/EC.¹¹⁴ The Tribunal upheld the complaint by interpreting Article 7 of Legislative Decree 215/2003 in line with the Directive. In particular, according to the Tribunal, although UNAR is based within the Government, Italian law is in line with Directive 2000/43/EC only if UNAR can perform independent activities, and this entails that no disciplinary sanctions can be imposed on the director or other staff acting in the exercise of their duties. The judgment, which has not been appealed by the Government, is very relevant, because the Tribunal sets out clear guidelines to interpret the relationship between UNAR and the Government and the requirement for independent functions as set forth in Directive 2000/43/EC. On 1 October 2018, the General Secretary of the Office of the Prime Minister adopted an administrative circular underlining the limits of the disciplinary sanctions that can be applied to UNAR's director and the need to ensure his/her broad autonomy in order to allow UNAR to perform independent activities.¹¹⁵ The judgment and the circular could prevent similar events from happening again, but there is clear evidence that the link between the Government and UNAR is very close, and domestic law does not expressly provide any special provision in order to guarantee UNAR's effective independence. Moreover, judicial interpretation cannot always be sufficient, and it is worth mentioning that, in the case at hand, Marco De Giorgi has nonetheless been transferred to another service. The Tribunal dismissed a specific claim for compensation for damages caused by the transfer on the basis of a lack of sufficient evidence showing the causal link between the events that occurred and Marco De Giorgi's transfer to another service.¹¹⁶

The appointment of a new Director General of UNAR in 2018, who was then substituted in June 2019, has allowed the office to restart its activities, since it appeared to have been

¹¹³ See: <http://www.unar.it/bandi/costituzione-del-tavolo-di-consultazione-permanente-per-la-promozione-dei-diritti-e-la-tutela-delle-persone-lgbt/>.

¹¹⁴ Tribunal of Rome, judgment of 17 May 2017, *MDG v. PCM*, No. 37262/2016.

¹¹⁵ Circular on operational aspects of UNAR (*Circolare inerente aspetti operative dell'Ufficio per la promozione della parità di trattamento e la rimozione delle discriminazioni fondate sulla razza o sull'origine etnica - UNAR*), 1 October 2018 – not published.

¹¹⁶ Tribunal of Rome, judgment of 17 May 2017, *MDG v. PCM*, No. 37262/2016, paragraph 42.

put in a sort of 'stand-by' mode in recent years. For instance, the yearly reports up to 2017 were finally published in 2018, and the most relevant elements of the work performed by UNAR – including the establishment of the contact centre and Anti-Racism Week – have been renewed.

The issue of the body's lack of independence is underlined in ECRI's 2015 report regarding Italy, and in 2019 ECRI confirmed that there had been no substantial change.¹¹⁷ In particular, ECRI's 2019 report found that the recommendations that were issued in 2015 had not been fully implemented. The recommendations focused on the enhancement of UNAR's activity by formally extending its powers so that the relevant legislation, and not just internal administrative acts, clearly covers discrimination based not only on ethnic origin but also on colour, language, religion, nationality and national origin; by granting it the right to bring legal proceedings rather than just supporting victims; and by ensuring that its full independence is secured both in law and in fact. These measures have not been implemented. In particular, ECRI finds that the office is not de jure independent, in breach of ECRI's general policy recommendations 2 and 7, which state that the office should be placed 'under the Department for Equal Opportunities of the Presidency of the Council of Ministers, its Director who is a civil servant appointed by the Government and part of its staff seconded to UNAR from various ministries'. Moreover, despite the widening of the grounds of discrimination covered by UNAR, ECRI underlines that 'no legislation has yet been enacted to extend formally UNAR's competence'.

UNAR's budget is made up of resources established by law, and additional funding from several projects and activities for which UNAR acts as the responsible body for Italy. Decisions on how to use the budget are taken mainly by the Director; however, the Ministry can intervene, both when activities are planned and when they are implemented.

e) Grounds covered by the designated body

UNAR's remit has been extended to cover all grounds of discrimination listed in Article 19 of the TFEU. The proposal to extend UNAR's powers was put forward by UNAR itself in its first report to Parliament, and this was implemented in a ministerial directive (an internal act of the Government assessing the specific tasks of each Government department) issued in 2010 and renewed up to 2019.¹¹⁸ The annual reports of activities reflect this extension of competences by paying attention to areas of activity as provided for by the Ministerial Directive of 2010 (sexual orientation and gender; age; disability; religion; Roma, Sinti and Travellers; race and ethnic origin; and nationality).

The extension of competence to other grounds has allowed UNAR to act as a point of reference for the management of governmental projects related to equality and social exclusion, in particular those funded through structural funds. UNAR also acts as coordinator for the national Roma strategy and the LGBT strategy. However, this extension has not been reflected by an increase in the staff. Moreover, no additional experts have been recruited, even though this is expressly allowed according to Article 3(3) of Legislative Decree 215/2003. More recently, UNAR has been identified as the Italian equality body responsible for dealing with discrimination against EU citizens in the workplace within the framework of Directive 2014/54/EU.

Nationality, issues relating to Roma and sexual orientation appear to be the areas in which more projects have been promoted and to which a greater budget has been allocated. For other grounds, such as racial discrimination in general, age and religion and belief, no special action has been put in place and no dedicated staff have been assigned. These

¹¹⁷ ECRI, *Conclusions on the Implementation of the Recommendations in Respect of Italy subject to Interim Follow-Up*, 3 April 2019, available at: <https://rm.coe.int/interim-follow-up-conclusions-on-italy-5th-monitoring-cycle-/168094ce16>.

¹¹⁸ UNAR, *Report to the Parliament for the year 2019*, p. 9, available at: <http://www.unar.it/wp-content/uploads/2020/11/RELAZIONE-UNAR-2019.pdf.pdf>.

grounds are dealt with through the activities that cover all grounds, such as the work of the contact centre. On disability, projects and other activities are promoted by the various ministries within the Government. Moreover, a national observatory for persons with disability has been created as part of the implementation of the UNCRPD. The observatory is in charge of promoting the effective implementation of the convention, conducting studies and analysis, proposing the adoption of specific measures and reporting yearly on the activities performed.

- f) Competences of the designated body/bodies – and their independent exercise
 - i) Independent assistance to victims

In Italy, the designated body has the competence to provide independent assistance to victims according to Article 7 of Legislative Decree 215/2003.

UNAR's remit includes the provision of assistance to victims of discrimination. This is provided through a contact centre with a freephone number and operators speaking several languages (Italian, English, French, Spanish, Arabic, Russian, Romanian and Chinese). The contact centre's only task is to receive and 'filter' requests for help from victims of discrimination, while decisions on action are taken by UNAR staff. Actions may include writing a letter to the relevant authority asking for the removal of the discriminatory measure or behaviour, writing a public opinion and/or, following the case, assuming the role of a sort of mediator between the claimant and the perpetrator of the discrimination.

The contracts to manage the contact centre have been renewed for a three-year period, starting in 2020. The contact centre is one of the most visible activities put in place by UNAR and its mandate has always been renewed, notwithstanding the turnover of UNAR staff and, in particular, the change of directors general. A report relating to activities in 2019, including complaints received, was published in 2020.¹¹⁹ According to this report, a total of 3 665 complaints were examined during 2019, of which 1 552 were lodged in 2019. Of the 3 394 complaints deemed as admissible, 73.5 % were based on the grounds of race or ethnic origin (including nationality); 9.6 % on religion or belief; 5.5 % on disability; 6.5 % on sexual orientation; 3.2 % on age; and 1.6 % on multiple grounds.

The follow-up to these cases is not available, so it is very hard to assess the effectiveness of this activity.

It should be mentioned that UNAR has promoted the creation of a solidarity fund for access to justice for victims of discrimination (Fondo di solidarietà per la tutela giurisdizionale delle vittime di discriminazione). The fund was created by UNAR in order to facilitate access to justice for victims of discrimination, giving to the lawyers EUR 600 in advance to meet the legal costs of actions brought before the courts.

On independence, there is no indication of a lack of independence regarding how the contact centre is managed.

- ii) Independent surveys and reports

In Italy, the designated body has the competence to conduct independent surveys and publish independent reports according to Article 7 of Legislative Decree 215/2003.

However, UNAR does not conduct surveys or collect more complex data than those collected through the contact centre. Only one statistical survey was commissioned by UNAR from Istat in 2011-12. The survey was conducted and funded by the Government in order to collect data regarding actual discrimination experienced by people on the grounds

¹¹⁹ UNAR, *Report to the Parliament for the year 2019*, p. 50, available at: <http://www.unar.it/wp-content/uploads/2020/11/RELAZIONE-UNAR-2019.pdf>.

of sexual orientation, homophobia and ethnic origin. The survey was conducted independently, in accordance with the rules and standards applied by Istat.

UNAR publishes an annual report on its activity, as well as reporting on the application of the principle of equal treatment. However, no report was published for four years since 2014 and only in 2018 four reports have been published: two referring to 2015-2016 years and the latest two regarding 2017. The report relating to 2018 was published in 2019 – as usual, it reflects the activities performed during the previous year and provides only a brief analysis of the data gathered through the contact centre.

Resources dedicated to this activity are too few, in particular regarding surveys, since only one survey has been conducted and there is a general lack of data available in this field.

iii) Recommendations

According to Article 7(e) of Legislative Decree 215/2003, UNAR may make recommendations and give opinions on discrimination issues and put forward proposals amending the laws in force.

In its first years of activity, UNAR issued a fairly high number of opinions, even against acts adopted by municipalities or by the Government, and it also asked for the revision of laws that were in force. However, it seems that this activity is no longer being performed, or at least it is no longer published on the website or in the annual report.

iv) Other competences

In particular, according to Article 2(2)(a) and (b) of the Prime Minister's Decree of 11 December 2003, UNAR's remit includes conducting inquiries to verify the existence of discrimination and promoting the adoption, by private or public entities, of specific measures – including positive action initiatives – aimed at eliminating or compensating for the disadvantages linked to a certain race or ethnic origin. It also includes the dissemination of information concerning the rules on equal treatment irrespective of racial or ethnic origin.

As part of its activity, UNAR has not performed any inquiries. As for the promotion of positive actions, UNAR has awarded private companies with a prize for good practice on anti-discrimination adopted in their businesses.

As regards the dissemination of information, UNAR has continually funded several training courses addressed to lawyers, judges and journalists – thanks also to the initiatives of the NGOs responsible for organising the courses.

g) Legal standing of the designated body/bodies

In Italy, the designated body does not have legal standing to:

- bring discrimination complaints on behalf of identified victims to court;
- bring discrimination complaints on behalf of non-identified victims to court;
- bring discrimination complaints *ex officio* to court;
- intervene in legal cases concerning discrimination, for example, as an *amicus curiae*.

According to Article 7(2) of Legislative Decree 215/2003, UNAR can support victims of discrimination during judicial proceedings, even intervening to provide factual information to the judge, in accordance with Article 425 of the Italian Civil Procedural Code. So far, UNAR has never intervened in a judicial proceeding. It has, however, promoted a solidarity fund to assist victims of discrimination, with a financial contribution towards the legal costs.

h) Quasi-judicial competences

In Italy, the body is not a quasi-judicial institution.

i) Registration by the body/bodies of complaints and decisions

In Italy, the body registers the number of inquiries received through its contact centre. These data are available to the public via the annual reports. According to the 2019 report, the centre dealt with around 4 368 calls from potential victims of discrimination. All contacts are recorded in a database, which provides information that has been analysed and published by UNAR.¹²⁰

j) Roma and Travellers

UNAR usually gives Roma issues considerable space in its annual reports to Parliament and to the President of the Council of Ministers. It organises awareness campaigns on prejudice against people from the Roma community and informally monitors critical situations when they occur. Since its appointment as the national contact point in accordance with European Commission Communication COM(2011)173, UNAR has increased its activity in support of the Roma, involving NGOs and organisations devoted to the protection of Roma, Sinti and Travellers in order to ensure their contribution to the development of Italy's Roma strategy. In terms of its approach, UNAR does not have a specific strategy separate from that of the Government: indeed, UNAR is the body which has the task of coordinating the implementation of the Italian national strategy on Roma, Sinti and Travellers. Some activities, in particular the dissemination of information and awareness-raising, are run directly by UNAR, while the large majority of activities included in the national strategy should be implemented at regional and local level, without any coercive powers given to UNAR to act against omissions.

¹²⁰ No updated figures are available up to 4 June 2021.

8 IMPLEMENTATION ISSUES

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

- a) Dissemination of information about legal protection against discrimination (Article 10 Directive 2000/43 and Article 12 Directive 2000/78)

After its institution, UNAR launched a number of initiatives aimed at raising awareness (seminars and other public relations events), some of which have had an impact. According to its annual reports, UNAR has achieved a good degree of visibility, and this has been accompanied by an increase in the attention paid by legal scholars to anti-discrimination issues. Since 2014, however, there has been a gradual decrease in the intensity of these sorts of activities. Notwithstanding that some work, beside the activity of the contact centre, was undertaken during 2018 after the appointment of the new director, this is still a weak point. It is worth mentioning that a consultative committee on LGBT issues has been set up, comprising representative of NGOs and associations working on LGBT issues.¹²¹

Beyond UNAR's activities, there are no specific government initiatives to disseminate information about legal protection against discrimination. In fact, OSCAD, which was set up in 2010 as part of the Department of Public Security within the Central Directorate of the Criminal Police, has the task of protecting victims rather than disseminating information on anti-discrimination law. Occasional actions have been promoted by the regions and local authorities.

- b) Measures 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)

Dialogue with NGOs on race and ethnicity should be one of UNAR's priorities. The most relevant activity in this regard is the creation of the consultative committee on LGBT issues, since it comprises representative of associations and NGOs working on LGBT issues.¹²²

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

In Italy, no measure has been taken to promote dialogue between social partners so as to combat discrimination.

- d) Addressing the situation of Roma and Travellers

As coordinator of Italy's national Roma strategy, UNAR continues to promote the application of the strategy at both national and regional levels.¹²³ So far, however, there have been no visible results, nor have any actions been carried out to apply the strategy. At any rate, no public documents, reports or projects have been disseminated to explain how UNAR is implementing the strategy.

¹²¹ See: <http://www.unar.it/bandi/costituzione-del-tavolo-di-consultazione-permanente-per-la-promozione-dei-diritti-e-la-tutela-delle-persone-lgbt/>.

¹²² See: <http://www.unar.it/bandi/costituzione-del-tavolo-di-consultazione-permanente-per-la-promozione-dei-diritti-e-la-tutela-delle-persone-lgbt/>.

¹²³ UNAR, *National Strategy for the inclusion of Roma, Sinti and Travellers 2012-2020 (Strategia nazionale d'inclusione dei Rom, dei Sinti, e dei Caminanti 2012/2020)*, pp. 22-32.

8.2 Measures to ensure compliance with the principle of equal treatment (Article 14 Directive 2000/43, Article 16 Directive 2000/78)

a) Compliance of national legislation (Articles 14(a) and 16(a))

No statutory or administrative provision has been abolished because of conflict with the principle of equal treatment in relation to any of the grounds covered by the directives.

The only available mechanism to ensure the enforcement of the principle of equality is bringing a case to court or making a complaint to the equality body, which can in turn make proposals to the Government and to Parliament.

b) Compliance of other rules/clauses (Articles 14(b) and 16(b))

No special measure has been taken to ensure compliance with Article 14(b) of Directive 2000/43 and Article 16(b) of Directive 2000/78. According to a general principle of the Italian legal order, any contract, collective agreement or internal rules of undertaking contrary to the principle of equal treatment is invalid. The anti-discrimination decrees do not contain provisions establishing the invalidity of discriminatory provisions included in contracts, agreements or other rules, but this follows from the application of Article 15 of the Workers Act in the field of labour law and from general principles on the invalidity of contractual clauses contrary to binding statutory rules in other fields.

9 COORDINATION AT NATIONAL LEVEL

The Ministry of Labour and Social Policies and the Department for Equal Opportunities share responsibility for coordinating equal treatment issues in the fields covered by the directives.

A national anti-racism action plan was presented by the Ministry of Labour and Social Policies during the meeting that the Government held on 7 August 2015. Several press releases were made available regarding this presentation, but no further information has been given about it subsequently. The official document of the plan remains unavailable on the UNAR website, and it is not on the Ministry of Labour website either. It could not even be found in a search of the Official Journal and legal databases. Up to the time of drafting this report, no official document has been available except for the press release for the Government's meeting at which the strategy was presented. Following a request made directly to UNAR, copies of the plan and of the related decree were forwarded to a mailing list of migration lawyers. However, there is no official record of the plan. Even more seriously, there is no record of its effective implementation. The restructuring of UNAR (the change of director and the majority of its staff) may be one of the reasons for the plan not being implemented and/or for information about it not being disseminated. Another reason might be the absence in Government of any ministerial office with responsibility for integration affairs whereas, thanks to the previous existence of such an arrangement, the national Roma strategy was adopted, and the drafting of the Anti-Racism Action Plan was begun. It seems that the Government lacks a minister who is willing and able to act in the field of anti-racism, with the paradoxical situation that the only relevant governmental office is UNAR, the equality body, which is supposed to be independent.

There is a certain uneasiness in commenting on a document whose nature and legal effects are so uncertain, especially in the absence of any practical impact. Therefore, as far as we are concerned, the plan has been formally adopted, yet without having any effectiveness. This is equivalent to non-adoption, and during the years following its adoption no significant step has been taken to change this situation of inactivity. The situation has not changed during 2020.

10 CURRENT BEST PRACTICES

Several projects and publications have been promoted and published by UNAR and are still active.¹²⁴

The project 'CO.N.T.R.O. – Counter Narratives Against Racism Online' aims to combat hate speech, while the project 'To.Be.Roma – Towards a better cooperation and dialogue between stakeholders inside the National Roma Platform', aims to make the integration of people of Roma origin easier.

Another project promoted by UNAR is the Week of Action against Racism, where several dissemination activities are supported.¹²⁵

In 2020, Istat and UNAR have presented the main results of an in-depth study on diversity management measures for LGBT+ by companies with more than 50 workers.¹²⁶

It is worth mentioning that the Interinstitutional Agreement on Access to Justice, which was agreed in 2013 and is aimed at strengthening protection for vulnerable victims, is still active. Within this framework, a solidarity fund for access to justice by victims of discrimination was set up (Fondo di solidarietà per la tutela giurisdizionale delle vittime di discriminazione). The fund was created by UNAR in order to facilitate access to justice by victims of discrimination, providing lawyers with part of the legal costs of actions brought before the courts (about EUR 600 for each level of judicial proceedings). This amount is not sufficient to cover the overall legal expenses, but it is sufficient to act as an incentive for lawyers engaging in discrimination cases. In the event of a favourable judgment, the legal aid provided must be refunded to UNAR. Applications must be sent to the National Lawyers' Association by individuals or by collective bodies with the right to legal standing (a maximum of three per year). A steering committee made up of lawyers and public officials from UNAR decide on the allocation of aid, which is an alternative to the legal aid provided by the state for those who are eligible on the basis of their incomes.

However, no report has so far been published on the application of this financial support.

There are not best practices on the use of Artificial Intelligence and its potential discriminatory effects.

¹²⁴ See: <http://www.unar.it/cosa-facciamo/azioni-positive-e-progetti/>.

¹²⁵ www.unar.it/eventi/settimana-dazione-razzismo/.

¹²⁶ Istat/UNAR, *Il diversity management per le diversità lgbt+ e le azioni per rendere gli ambienti di lavoro più inclusivi* (Diversity Management for LGBT + and Actions to Make Work Environments More Inclusive) available at: <https://www.istat.it/it/files//2020/11/Diversity-e-inclusion-management-nelle-imprese-in-Italia-2019.pdf>.

11 SENSITIVE OR CONTROVERSIAL ISSUES

11.1 Potential breaches of the directives at the national level

The main discrepancies between the decrees and the directives can be considered to be the following:

1. It may appear that Italian law allows organisations that are not based on a religious ethos to discriminate on the ground of religion. Directive 2000/78/EC permits an exception to differences of treatment for 'churches and other public or private organisations the ethos of which is based on religion or belief', while Article 3(5) of Legislative Decree 216/2003 specifies only 'churches and other public or private organisations'. Pre-existing national rules in this area appear to be more restrictive in admitting exceptions than the decree, which thus goes beyond the discretion granted to Member States, which may implement Article 4(2) only in accordance with existing laws or practices.
2. Legislative Decree 216/2003, on reasonable accommodation for people with disabilities, which was introduced in 2013 to implement Article 5 of Directive 2000/78/EC and the CJEU decision of 4 July 2013, is not perfectly in line with EU law. As regards public bodies, reasonable accommodation is required but without any additional burden, while according to Article 5 of Directive 2000/78/EC, a certain degree of burden is implicit if it is acceptable. This may lead to the conclusion that in Italy, public bodies are bound to the reasonable accommodation duty only if no additional financial burden or additional resources are required.

11.2 Other issues of concern

With regard to the text of the transposing decrees, the main remaining issues are:

- Unnecessary complications due to the coexistence of different legal texts.
- The lack of provisions on positive action.
- The lack of instructions as regards compensation amounts.
- The non-implementation of the adopted national strategies.
- Insufficient data gathering on equality in order to assess properly the situation of vulnerable groups and to choose the most suitable action to address social exclusion and discrimination.
- Selection of workers in case of collective dismissal is based on several criteria, including age, with the serious risk of discrimination.
- Discrimination cases are not registered as such by national courts.
- National provision on the duty of reasonable accommodation risks being ineffective if it is not supported by specific guidelines addressed in particular to employers in both the private and public sectors.
- As an office belonging to the Department for Equal Opportunities of the Presidency of the Council of Ministers, UNAR appears as an equality office of the Government and not as an equality body acting in an independent manner. This may be seen as one of the reasons for the limited application of anti-discrimination law in Italy, because UNAR's activity should follow Government's guidelines and not an autonomous programme, aiming solely and exclusively at strengthening the dissemination and exploitation of anti-discrimination law. Despite the fact that UNAR has at times adopted a critical position in relation to the Government, the office is clearly and completely linked to the executive; it is only thanks to the interpretation given by the Tribunal of Rome in a judgment delivered in 2017 that the Government's disciplinary powers in respect of UNAR's director have been limited. One can argue that the same interpretation should apply to all staff, but this can hardly be said to be sufficient to guarantee that UNAR can perform its activities in an independent way.

12 LATEST DEVELOPMENTS IN 2020

12.1 Legislative amendments

N/A

12.2 Case law

Relevant discrimination ground: Sexual orientation

Name of the court: Supreme Court

Date of decision: 15.12.2020

Name of the parties: *T.C. c. Associazione diritti LGBTI – Rete Lenford*

Reference number: 28646

Link: https://www.cortedicassazione.it/cassazione-resources/resources/cms/documents/28646_12_2020_no-ndex.pdf

Brief summary: The Supreme Court has delivered the final decision in quite a well-known case, after the judgment of the Court of Justice was given following the reference for a preliminary ruling by the same Supreme Court (C-507/18).

The Court of Justice confirmed the principles already stated in its previous judgment in *Accept* (C-81/12), which was quoted at length by both the Tribunal and the Court of Appeal of Bergamo.

A well-known lawyer, Professor C. Taormina, made a public statement to a very popular broadcaster that he would not hire gay people, that he would scrutinise thoroughly each new application he received to avoid any recruitment of gay people. Moreover, he said that the presence of gay people in his office would have disrupted his law firm's 'environment'. The organisation Associazione avvocatura per i diritti LGBT - Rete Lenford lodged a claim stating that Professor Taormina had violated the prohibition on direct discrimination.

The Supreme Court has therefore confirmed the decision of the Court of Appeal without any request for revision. The main points of the decision are the following: recognition of legal standing of an association; payment of EUR 10 000 as compensation for damages even in cases where there is no individual victim; freedom of expression is not an absolute right and its exercise may face limitations, provided that these are provided for by law and respect the essential content of this right as well as the principle of proportionality.

Relevant discrimination ground: Belief

Name of the court: Tribunal of Bologna

Date of decision: 31.12.2020

Name of the parties: *FILCAMS CGIL BOLOGNA, NIDIL CGIL BOLOGNA, FILT CGIL BOLOGNA v. Deliveroo Italia*

Reference number: 2949/2019

Link: <http://www.bollettinoadapt.it/wp-content/uploads/2021/01/Ordinanza-Bologna.pdf>

Brief summary: The Tribunal of Bologna dealt with the possibility that the algorithms used by digital platforms are potentially capable of giving rise to discrimination in the workplace, to the detriment of workers. The Court upheld the appeal lodged by three trade union associations against the digital food delivery platform Deliveroo Italia S.r.l. and declared the conduct of the defendant company discriminatory in relation to access to the booking of work sessions via the digital platform. The legal action was based on Article 5 of Legislative Decree 216/2003¹²⁷ and Article 28 of Legislative Decree 150/2011,¹²⁸ and the order makes several references to EU law and to CJEU jurisprudence.

¹²⁷ Legislative Decree 216/2003 implementing Directive 2000/78/EC for equal treatment in employment and occupation (*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*), available at: www.normattiva.it/uri-res/N2Ls?urn:nir:stato:decreto.legislativo:2003-07-09:216!vig=.

¹²⁸ Additional Measures to the Civil Procedural Code in order to reduce and simplify civil proceedings, according to Article 54 of Law 69 of 19 June 2009, (*Decreto legislativo 1 settembre 2011, n. 150 Disposizioni complementari al codice di procedura civile in materia di riduzione e semplificazione dei procedimenti civili di cognizione, ai sensi dell'articolo 54 della legge 18 giugno 2009, n. 69*), 1 September 2011, No. 150, available at: <http://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:decreto.legislativo:2011-09-01:150!vig=>.

The rider profiling system adopted by the Deliveroo platform is based on two parameters: reliability and participation. This profiling system treats in the same way those who do not participate in the session booked for trivial reasons and those who do not participate because they are on strike (or because they are sick, or a person with disability, or they assist a person with disability or a sick minor) and, in practice, discriminates against the latter.

In fact, the digital platform provided, at least until 2 November 2020, two ways of booking time slots in which to perform the service, one of which – the subject of the dispute – involved staggered access to the calendar of available shifts. Specifically, the latter system, called self-service booking (SSB), made available to riders every Monday a calendar through which they could book a time slot in which to carry out their work during the week. However, access to the calendar was not simultaneous but spread over three shifts (at 11.00, 15.00 and 17.00) and subject to the rider's internal score. Consequently, those with a higher score could access the calendar earlier than others and choose the time slots deemed preferable, while those with a lower rating could only opt for the remaining shifts following the selection made by the former. The internal score of each individual rider was calculated on the basis of a periodic profiling by the system, which took as reference the individual statistics created through the use of two parameters, that of 'reliability' and that of the 'participation' of the rider.

According to the Court, the riders suffered a penalty in terms of the internal score on the occurrence of certain events, including the cancellation of a booked shift without notice, such as in the case of a strike, or with less than 24 hours' notice. This amounts to indirect discrimination on the ground of belief, understood as a political belief applied to workers and their right to strike.

The Court also sentenced the company to publish the order on its website and an extract from it in the national newspaper *La Repubblica*, and to pay the applicants compensation of EUR 50 000 and legal fees.

Relevant discrimination ground: Belief

Name of the court: Supreme Court

Date of decision: 02/01/2020

Name of the parties: *S.L.A.I. COBAS c. F.C.A. ITALY S.P.A.*

Reference number: 1

Link: http://www.bollettinoadapt.it/wp-content/uploads/2020/01/20200102_snciv@sl0@a2020@n00001@tS.clean_.pdf

Brief summary: The case concerned the complaint of discrimination on ground of belief by the transfer of 316 workers of F.C.A. Italy, of which 77 belonged to the Cobas trade union, to another location 20 kilometres away. This meant that of the 6 % of transferred workers, 80 % belonged to the Cobas.

The Supreme Court has interpreted the notion of 'belief' referred to in Articles 1 and 4 of Legislative Decree 216/2003, implementing Directive 2000/78/EC, in line with previous judgments. According to the Court, 'belief' also includes trade union affiliation which – as with religious affiliation – can well be considered an ideology characterised by specific reasons for belonging to a body qualified to represent opinions, ideas and convictions, relevant for the purposes of protection as the subject of possible prohibited discriminatory acts.

The Supreme Court quashed the appeal sentence which, by applying the ordinary rule on allocation of the burden of proof, had placed that burden on the applicant union, referring to Article 2729 of the Civil Code on presumptions. In other words, the Court of Appeal had interpreted the partial shift in the burden of proof provided for by Directive 2000/78/EC and Legislative Decree 216/2003 as proof by presumption. According to the Supreme Court, the partial shift in the burden of proof that applies in non-discrimination law entails

that workers must prove the risk factor; that is, the treatment he assumes is less favourable in comparison with the one reserved for subjects in similar conditions and not belonging to the same group. On the other side, the employer must prove facts aiming to exclude, for accuracy, gravity and concordance, the discriminatory nature of the conduct. According to the Supreme Court, the Court of Appeal had failed to consider as a proof that the transfers, which had affected 6 % of the plant workers, had nevertheless affected 80 % of the members of the same trade union.

Relevant discrimination grounds: Religion and belief

Name of the court: Supreme Court

Date of decision: 17/04/2020

Name of the parties: UAAR (*Unione degli atei e degli agnostici razionalisti*) v. *Comune di Verona*

Reference number: 7893

Link: <https://www.questionegiustizia.it/data/doc/2558/7893-2020.pdf>

Brief summary: The municipal council of Verona had rejected the applicant association's request to post posters bearing the word, 'Dio' (God) in large letters, with the 'D' in block letters crossed out by a cross and the letter 'I' in italics ('DIO'), and under the heading, in smaller print, '10 million Italians live well without 'D'. And when they are discriminated against UAAR is at their side'.

The Supreme Court quashed the Court of Appeal judgment, which had rejected the appeal by UAAR, a radical atheist society, and had ruled out the existence of discrimination in the municipality's decision not to allow the UAAR to publish the posters.

According to the Supreme Court, the primary principle of secularity entails not only the freedom of conscience of atheists and agnostics but also their freedom of expression in the forms they deem most appropriate, with the sole limit of insulting the faith of others.

The violation of the principle of equal treatment with respect to other forms of religiosity involves prohibited discrimination that occurs when, in the comparison between two or more subjects, not necessarily in the same temporal context, one of them has been, is or would have an advantage over the other, either as a result of conduct carried out directly by the authority or private, both as a consequence of behaviour, apparently neutral, but which in any case has a negative impact on the followers of the religion discriminated against.

Relevant discrimination ground: Disability

Name of the court: Supreme Court

Date of decision: 07/07/2020

Name of the parties: *Ministero delle infrastrutture e dei trasporti* v. *M.L.*

Reference number: 14075

Link: <http://www.osservatoriodiscriminazioni.org/index.php/2020/11/05/discr-handicap-esclusione-turnazione-lavoro-straordinario-cass-ord-lug-2020/>

Brief summary: The Supreme Court upheld the judgment of the Court of Appeal of L'Aquila, which had considered the discriminatory nature of the non-inclusion of a worker with disability in overtime shifts. All workers were in fact involved in such shifts, and in addition the victim had been included in the past.

According to the Supreme Court, Article 2 of Law 67/2006 provides that the principle of equal treatment means that no discrimination can be practiced to the detriment of people with disabilities. Direct discrimination occurs when, for reasons related to disability, a person is put at a particular disadvantage compared with other persons in a similar situation, and no occupational requirement applied in the specific circumstances. Therefore, according to the Court, the exclusion of the victim was based only on the ground of disability.

Relevant discrimination grounds: Disability and nationality

Name of the court: Tribunal of Milan

Date of decision: 23.11.2020

Name of the parties: *Ledha (Lega per i diritti delle persone con disabilità), Anffas onlus Crema, Anffas Onlus Legnano, ASGI v. Regione Lombardia*

Reference number: 6709

Link: <https://www.asgi.it/wp-content/uploads/2020/11/Tribunale-di-Milano-ordinanza-del-24-novembre-2020-est.-Palmisani-LEDHA-ANFASS-e-ASGI-avv.ti-Guariso-Neri-e-Rizzi-c.-Regione-Lombardia.pdf>

Brief summary: The Tribunal of Milan upheld the appeal presented by LEDHA and ASGI against the Lombardy Region for applying the requirement of two years' residence in respect of access to a financial measure of support of persons with disability – the so-called 'Measure B1'.

That measure was included in the Regional Operational Programme in favour of persons with 'very serious disability', based on the provisions of the fund for non-self-sufficiency for the three-year period 2019-2021.

According to the Court, the right to independent living for persons with disabilities should be framed as one of the fundamental rights of the individual, being a primary prerequisite to enable full participation in community life and the full exercise of all other constitutionally protected fundamental rights. Public authorities can provide for limits, but they cannot be arbitrary and totally unrelated to the need for independent life of persons with disability, such as the length of stay in the region, which amounts to indirect discrimination on the ground of nationality. Otherwise the restrictions are unlawful in violation of Article 3 of Italian Constitution and Law 67/06.

As a consequence of having recognised the discriminatory nature of the measure, the Court upheld the request made by the claimants and ordered the Lombardy Regional Authority to modify the resolution and to reopen, for at least three months, the window for the submission of applications in order to allow those who had initially been excluded to submit their applications.

ANNEX 1: MAIN TRANSPOSITION AND ANTI-DISCRIMINATION LEGISLATION

Country: Italy
Date: 31 December 2020

Title of the law: Legislative Decree 215/2003 implementing Directive 2000/43/EC on equality of treatment between persons irrespective of racial or ethnic origin

Abbreviation: Legislative Decree 215/2003

Date of adoption: 9 July 2003

Latest relevant amendment: Art. 28 of Legislative Decree 150/2011

Entry into force: 27 August 2003

Web link: www.normattiva.it/uri-res/N2Ls?urn:nir:stato:decreto.legislativo:2003-07-09;215

Grounds covered: Race and ethnic origin

Civil law

Material scope: Public employment, private employment, access to goods or services (including housing), social protection, social advantages, education

Principal content: Prohibition of direct and indirect discrimination, harassment, instructions to discriminate, remedies and sanctions, creation of a specialised body

Title of the Law: Legislative Decree 216/2003 on the implementation of Directive 2000/78/EC for equal treatment in employment and occupation

Abbreviation: Legislative Decree 216/2003

Date of adoption: 09 July 2003

Latest relevant amendment: Art. 9, para. 4-ter, Law decree no. 76/2013, converted into law no. 99/2013

Entry into force: 28 August 2003

Web link: www.normattiva.it/uri-res/N2Ls?urn:nir:stato:decreto.legislativo:2003-07-09;216!vig

Grounds covered: Religion or belief, disability, age, sexual orientation

Civil law

Material scope: Public and private employment

Principal content: Prohibition of direct and indirect discrimination, harassment, instructions to discriminate, remedies and sanctions

Title of the law: Act 67/2006, Provisions on the judicial protection of persons with disabilities who are victims of discrimination

Abbreviation: Act on the non-discrimination of disabled people

Date of adoption: 01 March 2006

Latest relevant amendment: Art. 28 of Legislative Decree 150/2011

Entry into force: 21 March 2006

Web link: www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:2006-03-01;67!vig

Grounds covered: disability

Civil law

Material scope: All fields (there is no limit to the scope of application)

Principal content: Implementation of the principle of equal treatment and equal opportunity. Prohibition of direct and indirect discrimination

Title of the Law: Legislative Decree 286/1998, Consolidated text of provisions on the regulation of immigration and the status of foreign citizens, Articles 43 and 44

Abbreviation: Immigration Decree

Date of adoption: 25 July 1998

Latest relevant amendment: Art. 28 of Legislative Decree 150/2011

Entry into force: 02 September 1998

Web link: http://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:decreto.legislativo:1998-07-25;286!vig Grounds covered: Race, colour, ancestry, religion, national or ethnic origin, religious beliefs and practices Civil Law Material scope: Public employment, private employment, access to goods or services (including housing), social protection, social services, education, economic activity. Principal content: Prohibition of direct and indirect discrimination; remedies and sanctions; creation of regional observatories
Title of the law: Framework Act 104/1992 on rights and social integration of persons with disability Abbreviation: Framework act on social assistance Date of adoption: 05 February 1992 Latest relevant amendment: Legislative Decree 119/2011 Entry into force: 18 February 1992 Web link: http://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:1992-02-05;104!vig Grounds covered: disability Administrative law Material scope: all fields Principal content: Integration of persons with disability
Title of the law: Act 68/1999, Provisions on the right to work of disabled people Abbreviation: Act on the employment of disabled people Date of adoption: 12 March 1999 Latest relevant amendment: Legislative decree 151/2015 Entry into force: 17 January 2000 Web link: http://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:1999-03-12;68!vig Grounds covered: disability
Title of the law: Legislative decree 75/2017, Provisions on the public employment Abbreviation: Reform of the public employment Date of adoption: 25 May 2017 Latest relevant amendment: N/A Entry into force: 22 June 2017 Web link: http://www.normattiva.it/eli/stato/DECRETO_LEGISLATIVO/2017/05/25/75/CONSOLIDATED/20201231 Grounds covered: disability
Title of the law: Act 300/1970, Provisions on the protection of the freedom and dignity of workers, on freedom of trade unions and their activity in the workplace, and on employment Abbreviation: Workers' Act Date of adoption: 20 May 1970 Latest relevant amendment: Law 92/2012 Entry into force: 11 June 1970 Web link: www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:1970-05-20;300!vig Grounds covered: Race, sexual orientation, disability, age, religion or personal belief Civil law Material scope: employment Principal content: Unfair dismissal and discrimination in the workplace

Title of the law: Tuscany Regional Act 63/2004, Provisions against discrimination on the ground of sexual orientation and gender identity

Abbreviation: Tuscan Regional Act 63/2004

Date of adoption: 15 November 2004

Latest relevant amendment: N/A

Entry into force: 10 December 2004

Web

link:

<http://raccoltanormativa.consiglio.regione.toscana.it/articolo?urndoc=urn:nir:regione.toscana:legge:2004-11-15;63>

Grounds covered: Sexual orientation and gender identity

Civil/administrative law

Material scope: All field

Principal content: Implementation of the principle of equal treatment and equal opportunity. Measures of social inclusion, vocational training, occupation and healthcare

Title of the law: Liguria Regional Act 52/2009, Provisions against discrimination on the ground of sexual orientation

Abbreviation: Liguria Regional Act 52/2009

Date of adoption: 10 November 2009

Latest relevant amendment: N/A

Entry into force: 26 November 2009

Web

link:

http://lrv.regione.liguria.it/liguriass_prod/articolo?urndoc=urn:nir:regione.liguria:legge:2009-11-10;52

Grounds covered: Sexual orientation

Civil/administrative law

Material scope: All fields

Principal content: Implementation of the principle of equal treatment and equal opportunity. Measures of social inclusion, vocational training, occupation and healthcare

Title of the law: Emilia Romagna Regional Act 5/2004, Provisions on the social integration of migrants

Abbreviation: Emilia Romagna Regional Act 5/2004

Date of adoption: 24 March 2004

Latest relevant amendment: N/A

Entry into force: 9 April 2004

Web

link:

<http://demetra.regione.emilia-romagna.it/al/articolo?urn=er:assemblealegislativa:legge:2004;5>

Grounds covered: Race, ethnicity, nationality and religion

Civil/administrative law

Material scope: Social integration, healthcare, education, vocational training, occupation and employment, democratic participation

Principal content: measures against discrimination, establishment of a regional observatory, measures against social exclusion in the fields of education, healthcare, employment, and occupation

Title of the law: Regional Lazio Act 10/2008 Promotion of full equality and integration of aliens

Abbreviation: Lazio Regional Act 10/2008

Date of adoption: 14 July 2010

Latest relevant amendment: N/A

Entry into force: 5 August 2010

Web

link:

<http://www.consiglio.regione.lazio.it/consiglio-regionale/?vw=leggiregionalidettaggio&id=9125&sv=vigente>

Grounds covered: race and ethnic origin, nationality

Civil/administrative law

Material scope: Social integration, healthcare, education, vocational training, occupation and employment, democratic participation
Principal content: measures against discrimination, establishment of a regional observatory, measures against social exclusion in the fields of education, healthcare, employment, and occupation

ANNEX 2: INTERNATIONAL INSTRUMENTS**Country: Italy****Date: 31 December 2020**

Instrument	Date of signature	Date of ratification	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?
European Convention on Human Rights (ECHR)	04.11.1950	26.10.1955	No	Yes	Yes
Protocol 12, ECHR	04.11.2000	Not ratified	No		
Revised European Social Charter	03.05.1996	05.07.1999	No	Ratified collective complaints protocol? Yes. The collective complaints protocol has been ratified	Yes
International Covenant on Civil and Political Rights	18.01.1967	15.09.1978	No	Yes	Yes
Framework Convention for the Protection of National Minorities	01.02.1995	03.11.1997	No	N/A	Yes
International Covenant on Economic, Social and Cultural Rights	18.01.1967	15.09.1978	No	N/A	Yes
Convention on the Elimination of All Forms of Racial Discrimination	13.03.1968	05.01.1976	No	Yes	Yes
ILO Convention No. 111 on Discrimination	25.06.1958	12.08.1963	No	N/A	Yes
Convention on the Rights of the Child	26.01.1990	05.09.1991	No	N/A	Yes

Instrument	Date of signature	Date of ratification	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?
Convention on the Rights of Persons with Disabilities	30.03.2007	15.05.2009	No	N/A	Yes

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