Combating sexual orientation discrimination in employment:

legislation in fifteen EU member states

Report of the *European Group of Experts on Combating Sexual Orientation Discrimination* [1]

about the implementation up to April 2004 of *Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation*

11 Italy

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The contents of the Group's report do not necessarily reflect the opinion or position of national authorities or of the European Commission. The report, submitted in November 2004, aims to represent the law as it was at the end of April 2004; only occasionally have later developments been taken into account.
The full text of the report (including English versions of all 20 chapters and French versions of most chapters, plus summaries of all chapters both in English and French) will be published on the website just mentioned; links to it will be given on www.emmeijers.nl/experts.

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11.1 General legal situation

11.1.1 Constitutional protection against discrimination

A general protection against discrimination is established by article 3 of the Italian Constitution, which recognises equal dignity and equality under the law without distinctions on grounds of sex, race, language, religion, political opinions, and personal or social conditions. A peculiarity of this Constitution[3] is represented by article 3(2), which contains a principle of substantive equality[4], calling on the State to remove the social and economical obstacles which limit the freedom and equality of the citizens and prevent the full development of the human being. The principle of non-discrimination is an unbreachable principle of the legal system.

The grounds of discrimination listed in article 3 are more restricted if compared with the ones mentioned in article 13 of the EC Treaty: however, the expression 'personal or social conditions' allows an open interpretation of the constitutional principle, covering, as the authors unanimously assert, the protection against discrimination of lesbians and gays; some argue that it would also be possible to make reference to the prohibition of discrimination on grounds of sex, if conceived not only as gender, but as inclusive of other gender-based characteristics, such as the individual's sexual preference[5].

Three constitutional Bills[6] have been presented to Parliament with the purpose of amending article 3 by adding the words *'orientamento sessuale'* [sexual orientation] to the grounds already listed. Even though this reform would be relevant from a symbolic point of view, in fact it would not offer new and effective instruments against discrimination. Indeed, in order to guarantee the effectiveness of the normative precept, it is necessary that the constitutional principle is commuted into a legal rule. Nevertheless, the doctrine argues, the anti-discrimination principle is not only binding on the lawmaker, but it is a criterion which courts and public administration must follow in the application and interpretation of the law; according to some authors and some courts it must be applied as well among legal persons, associations and within relationships governed by the private law: this is particularly important since it would allow for an extensive interpretation of the anti-discriminatory provisions in labour legislation[7]. The opinion expressed by the Supreme Court[8] still tends to be more restrictive, considering that article 3 is binding on public powers, but not on private subjects.

The role of the international institutions, and in particular of the European Convention of Human Rights and the European Union, must also be considered: Article 10 of the Constitution contains a general principle

[3] Dal Punta, 2002, 202.
[4] See infra 11.1.2.
[5] Balletti, 1996, 243.
[6] *Proposta di legge costituzionale* (Constitutional Bill) no. 605 presented to the Chamber of Deputies by Franco Grillini and others (7 June 2001); *Proposta di legge costituzionale* no. 657 presented to the Chamber of Deputies by Titti De Simone and others (8 June 2001); *Disegno di legge costituzionale* (Constitutional Bill) no. 306 presented to the Senate by Luigi Malabarba and others (25 June 2001)
[7] Martines, 1992, 633.
[8] *Corte di Cassazione*, 11 November 1976, no. 4177; *Corte di Cassazione*, 29 May 1993, no. 6030; *Corte di Cassazione*, 17 May 1996, no. 4570.

establishing the conformity of the legal system to the generally recognised rules of international law, which are pre-eminent with respect to the national law. Articles 80 and 87 recognise as sources of law the rules of international law coming from international agreements. European law has a particular position because of the primacy (*primauté*) of European Community law. The Treaty establishing the European Communities and the regulations are self-executing and can be applied by the national courts. The directives must be enforced by the national judge when having vertical effect (when the obligation established by the directive pertains to the relationship between the State and the citizen[9]). The rights protected by the European Convention of Human Rights create direct obligations[10] and (in vertical relationships) are binding within the legal system[11].

11.1.2 General principles and concepts of equality

The principle of equality is a basic principle of the Italian legal system[12]. This concept is particularly clear in labour law, with respect to the constitutional protection of the fundamental rights of workers. The link between labour law and the principle of equality is even more evident by reading the Italian Constitution, and precisely article 36 (right to a fair remuneration), article 37 and 51 (principle of equal treatment between men and women), article 38 (recognition and protection of the social rights of the workers).

As mentioned above, article 3(2) contains the principle of substantive equality. If an anti-discrimination rule can be read as a *negative* statement of the principle of equality[13], since it is expressed by a prohibition, the expression of substantive equality has a relevant meaning, since it is a positive principle of law. According to some authors[14], the concept of substantive equality of article 3 is not particularly innovative, being aspirational in nature. Other authors give a different reading of the value of that concept, which has become a characteristic of any branch of positive law[15].

A rule which differentiates, taking into account different situations, is not only allowed by the Constitution but, I would say, is a duty for the lawmaker. Labour law is the typical field where the system must protect different identities through respect of formal equality and promote equal opportunities in different situations by means of implementing substantive equality. The concept of equality in the Italian legal system, therefore, allows differentiation as well as positive actions, even though the Supreme Court asserted that there is no general principle of equal treatment, which creates duties within the labour relations[16]. This orientation will presumably change due to the recent explicit introduction of the

[9] As recently confirmed by the *Corte di Cassazione - Sez. Lavoro* [Supreme Court - labour section], 18 March 2002, no. 3914.
[10] The European Convention of Human Rights has been ratified by Act no. 848 of 4 August 1955.
[11] *Corte di Cassazione - Sez. Civ*. [Supreme Court - civil section], 8 July 1998, no. 6672.
[12] For an extensive comprehension of the concept of equality, with reference to labour law, see De Simone, 2001; Dal Punta, 2002; Barbera, 1991.
[13] Barbera, 1991, 11.
[14] Gianformaggio, 1996, 1961.
[15] De Simone, 2001, 7.
[16] *Corte di Cassazione*, 4 February 1987, no. 1101, confirmed by *Corte di Cassazione*, 8 July 1994, no. 6448 and *Corte di Cassazione*, 17 May 1996, no. 4570, after a controversial decision of the *Corte Costituzionale* [Constitutional Court] 22 February 1989, no. 103.

principle of equal treatment between men and women in article 51 of the Constitution.

11.1.3 Division of legislative powers relating to discrimination in employment

The main source of law is the *'legge'* [Act], which is approved by the two branches of the Parliament. The Government has the legislative powers in some circumstances: in particular cases due to urgency or necessity, it may issue a *'decreto-legge'*, a temporary decree having force of law, which must be validated by the Parliament. In other circumstances the Parliament may delegate the Government to issue a *'decreto legislativo'* [Legislative Decree], having force of law; in this case, the Parliament must approve a delegating law which contains: criteria and principles which have to be followed by the Government; a deadline for the issue of the Decree; the exact object of the Decree. The Parliament usually makes use of its power of delegation when the object or the drafting procedure are assumed to be particularly complex; in particular, this instrument is often used for the implementation of the European directives, by means of the so-called *'legge comunitaria'* [European Community Act].

After the recent reform of article 117 of the Constitution, the regions enjoy legislative powers in new matters. As to employment law and discrimination (in particular with respect to equal treatment between men and women), the boundary between the legislative powers of State and the regions is not clear. If the State has the exclusive competence on the 'determination of the basic standards of welfare related to those civil and social rights that must be guaranteed in the entire national territory', the new article 117(7) explicitly establishes that 'regional laws shall remove all obstacles which prevent the full equality of men and women in social, cultural and economic life, and shall promote equal access of men and women to elective offices'. The provision recognises a regional legislative power in the implementation of substantive equality, with reference to equal treatment between men and women.

The collective agreements may also contain equal treatment provisions.

11.1.4 Basic structure of employment law

The sources of employment law can be divided into three groups: constitutional, legislative and, more in general, state sources, international or supra-national sources, contractual sources.

The articles of the fifth book of the Civil Code for a long time have been the main legislative provisions regulating labour law. Ordinary acts and decrees are currently the main sources[17], in particular with reference to discrimination and equal treatment. The most relevant legislative source is represented by Act 300/1970[18], the so-called *'Statuto dei Lavoratori'* [Workers' Statute]. With

[17] Zoli, 1998, XCV.
[18] *Legge 20 maggio 1970, n. 300, Norme sulla tutela della libertà e dignità dei lavoratori, della libertà sindacale nei luoghi di lavoro e nome sul collocamento* [Act no. 300 of 20 May 1970, Provisions on protection of freedom and dignity of workers and rules on employment agencies], (*Gazzetta Ufficiale* [Official Journal] no. 131 of 27 May 1970).

reference to equal treatment, I must mention the Act 903/1977[19] on equal treatment between men and women, and Act 125/1991[20] (recently amended by Legislative Decree 196/2000[21]), introducing provisions on positive action into Act 903/1977. The Acts 604/1966[22] and 108/1990[23] contain provisions on individual dismissal.

As to the international and supra-national sources, European law is the most incisive and relevant source[24]. A second major international source is represented by the conventions of the International Labour Organisation[25], which are implemented by means of an Act. In case of conflict between an implemented convention and a following national Act, the latter prevails[26] (while in the case of conflict between national and European law, the latter always prevails). Some authors argue that, according to article 10 of the Constitution, all provisions coming from international agreements are self-executing[27]. The Supreme Court has rejected this interpretation[28].

The third source is represented by contractual sources. The *'contratto collettivo di diritto comune'* [common law collective agreement] is one of the main sources of labour law. According to article 39 of the Constitution, only registered trade unions are permitted to stipulate collective agreements which are valid for the whole category of workers. Since the procedure of registration foreseen in article 39 has never been accepted by unions, the social partners and the courts (more recently also the legislation) tended to give weight to the common law collective agreement, which is stipulated by the social partners and is considered valid if the employer or the employee belongs to a signing organisation or in case of tacit consent. From the 1950's, the courts also began to use the collective agreements as parameters for their decisions (in particular on minimum pay)[29]. Finally, many legislative provisions make reference to those agreements, so that some authors have argued that the legislation confers normative powers to such agreements[30].

[19] *Legge 9 dicembre 1977, n. 903, Parità di trattamento tra uomini e donne in materia di lavoro* [Act no. 903 of 9 December 1977, Equal treatment between men and women at the workplace], (*Gazzetta Ufficiale* no. 343 of 17 December 1977).
[20] *Legge 10 aprile 1991, n. 125, Azioni positive per la realizzazione della parità uomo-donna nel lavoro* [Act no. 125 of 10 April 1991, Positive actions for the implementation of equal treatment between men and women at the workplace], (*Gazzetta Ufficiale* no. 88 of 15 April 1991).
[21] *Decreto legislativo 23 maggio 2000, n. 196, Disciplina dell'attivita' delle consigliere e dei consiglieri di parita' e disposizioni in materia di azioni positive, a norma dell'articolo 47 della legge 17 maggio 1999, n. 144* [Legislative Decree no. 196 of 23 May 2000, Provisions on the activities of the Equality Councillors and provisions concerning positive actions, according to article 47 of the Act no. 144 of 17 May 1999], (*Gazzetta Ufficiale* no. 166 of 18 July 2000).
[22] *Legge 15 luglio 1966, n. 604, Norme sui licenziamenti individuali* [Act no. 604 of 15 July 1966, Provisions on individual dismissals], (*Gazzetta Ufficiale* no. 195 of 6 August 1966).
[23] *Legge 11 maggio 1990, n. 108, Disciplina dei licenziamenti individuali* [Act no. 108 of 11 May 1990, Legal framework on individual dismissals], (*Gazzetta Ufficiale* no. 108 of 11 May 1990).
[24] See 11.1.1.
[25] With reference to discrimination at the workplace, Italy has ratified the ILO conventions no. 111/1958 and 117/1962.
[26] Nicolini, 2000, 27.
[27] Galantino, 2001, 2.
[28] *Corte di Cassazione*, 21 May 1973, no. 1455; *Corte di Cassazione*, 17 October 1983, no. 6078; *Corte di Cassazione*, 12 February 1992, no. 1786.
[29] Carinci, De Luca Tamajo, Tosi, Treu, 2002, 166.
[30] Zoli, 1998, XCIX.

Minor sources of labour law are customs that, according to article 1340 of the Civil Code, become clauses of the contract even when unknown or not explicitly wanted. On the contrary, only in case of explicit exclusion customs are not applied[31].

The recently passed Legislative Decree 276/2003[32] introduces a new framework concerning the labour market and regulates the so-called atypical working agreements, such as part time and flexible agreements, practical training agreements and agreements for access to employment of specific disadvantaged groups (on ground of age, sex, disability, unemployment condition), occasional agreements and agreements for the realisation of a project.

The main source for public employment law is national legislation: Legislative Decree 29/1993[33] has deeply reformed the discipline, which tends now to be subjected to the same rules as private employment.

11.1.5 Provisions on sexual orientation discrimination in employment or occupation

The only Italian provisions mentioning sexual orientation are the ones implementing the Directive: first of all the Legislative Decree concerning the implementation of the Framework Directive, which will be analysed in this chapter; furthermore, article 10 of Legislative Decree 276/2003 on labour market introduces a prohibition for public and private job agencies to investigate or manage, even with the explicit consent, any data concerning, among others, the sexual orientation of the job-seeker or worker.

Three Bills had been previously presented to Parliament in order to amend antidiscrimination legislation in employment and occupation on this purpose[34]. In particular, Bill no. 2755, aimed at amending article 15 of the Workers' Statute[35] as well as Act 903/1977 on equal treatment between men and women

[31] Among others, *Corte di Cassazione* [Supreme Court], 19 April 1980, no. 2583.
[32] *Decreto Legislativo 10 settembre 2003, n. 276, Attuazione delle deleghe in materia di occupazione e mercato del lavoro, di cui alla legge 14 febbraio 2003, n. 30* [Legislative Decree no. 276 of 10 September 2003, Implementation of delegations on occupation and labour market, as to Act no. 30 of 12 February 2003], (*Gazzetta Ufficiale* no. 235 of 9 October 2003).
[33] *Decreto Legislativo 3 febbraio 1993, n. 29, Razionalizzazione dell'organizzazione delle amministrazioni pubbliche e revisione della disciplina in materia di pubblico impiego* [Legislative Decree no. 29 of 3 February 1993, Rationalisation of the organisation of public administrations and revision of the legal framework concerning public employment], amended by Decreto Legislativo 31 marzo 1998, n. 80, (*Gazzetta Ufficiale* no. 119 of 25 May 1998).
[34] *Proposta di legge* [Bill] no. 2755 presented to the Chamber of Deputies by Franco Grillini, Titti De Simone and others (15 May 2002); *proposta di legge* no. 715 presented to the Chamber of Deputies by Titti De Simone and others (12 June 2001); *Disegno di legge* [Bill] no. 303 presented to the Senate by Luigi Malabarba and others (25 June 2001).
[35] Art. 15 of the Workers' Statute: '*(Atti discriminatori). (1) E'nullo qualsiasi patto od atto diretto a: a) subordinare l'occupazione di un lavoratore alla condizione che aderisca o non aderisca ad una associazione sindacale ovvero cessi di farne parte; b) licenziare un lavoratore, discriminarlo nella assegnazione di qualifiche o mansioni, nei trasferimenti, nei provvedimenti disciplinari, o recargli altrimenti pregiudizio a causa della sua affiliazione o attivitá sindacale ovvero della sua partecipazione ad uno sciopero. (2) Le disposizioni di cui al comma precedente si applicano altresí ai patti a atti diretti a fini di discriminazione politica, religiosa, razziale, di lingua o di sesso, di handicap, di etá o basata sull'orientamento sessuale o sulle convinzioni personali*'. [(1) Every covenant or act shall be void, if it aims at: a) subordinate the occupation of a worker to the condition that he/she adheres or does not adhere to a trade union or ceases to take part in it; b) dismiss a worker, discriminate him/her in the allocation of posts or functions, in transfers, in disciplinary sanctions, or otherwise prejudge him/her on grounds of his or her

and Act 125/1991 on positive actions, by including explicitly the ground of sexual orientation. The Bill is not expected to be discussed in the near future.

It must be noted that article 4(1) of the Decree implementing the Directive does amend article 15 of the Workers' Statute (applicable to both private and public employment), which now explicitly prohibits discrimination on grounds of sexual orientation.

Following the introduction of the Decree implementing the Directive, a Bill has been presented to Parliament with the purpose of modifying the Decree itself[36]. According to its proposers, the Bill aims at making the Decree fully compatible with the Framework Directive, precisely by amending those provisions that are not in compliance with it. In compliance with the Regulation of the Chamber of Deputies, the proposers have formally requested that the Bill is scheduled for discussion and vote. The petition enacts a sort of priority procedure that, in principle, makes it plausible that the Bill is voted before the end of the current legislature, that is to say by the first half of 2006.

Some bills aiming at introducing anti-discriminatory provisions on ground of sexual orientation and gender identity have been presented at regional level[37]. In particular, the mentioned bills would introduce anti-discriminatory norms within the sectors of employment law that are left to the jurisdiction of regions, namely training, social integration, access to employment, training for regional employees.

11.1.6 Important case law precedents on sexual orientation discrimination in employment or occupation

There are no known case law precedents on sexual orientation discrimination in employment, and no known cases arising within the new framework so far. Despite the lack of case law, we cannot affirm that there is no discrimination in employment on the grounds of sexual orientation. From research promoted by the largest Italian trade union, the *CGIL*[38] in 1992, it emerged that 48% of the interviewed homosexual workers knew about cases of discrimination on the grounds of sexual orientation in the workplace[39]. This sensitive situation clearly highlights the inadequacy of the previous protection and, if persisting, might raise some questions about the effectiveness of the new framework or, at least, of the process of dissemination of information.

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affiliation to a trade union or union activity or of his or her participation to a strike. (2) The same rules shall apply to covenants or acts aimed at discriminating on the grounds of political or religious opinions, language, sex, handicap, age, sexual orientation or belief'].

[36] *Proposta di legge* [Bill] no. 4389 presented to the Chamber of Deputies by Titti De Simone and others (16 October 2003), *Modifiche al decreto legislativo 9 luglio 2003, n. 216, recante attuazione della direttiva 2000/78/CE per la parita' di trattamento in materia di occupazione e di condizioni di lavoro* [Revision of the legislative decree no. 216 of July 9, 2003 on the implementation of the Directive 2000/78/CE on equal treatment in employment and occupation]. The Bill has been supported by a large group of MPs from all the parties of the center-left coalition and by the trade union *CGIL*. A very short description of its articles will be provided below, with respect to their specific topic.

[37] Among others, *proposta di legge* [Bill] no. 266 presented to the Regional Council of Tuscany by Councillor Zoppi; *proposta di legge* no. 417 presented to the Regional Council of Piedmont by Marisa Suino and others. Only the Bill introduced in Tuscany has been approved by the regional government so far and it is scheduled for discussion by the regional assembly for final approval.

[38] *Confederazione Generale Italiana del Lavoro*.

[39] Ruspini, Zajczyk, 1993, 256.

11.1.7 Provisions on discrimination in employment or occupation that do not (yet) cover sexual orientation

The legal framework combating discrimination on grounds of sex, specifically Act 903/1977 on equal treatment between men and women, and Act 125/1991 on positive actions (containing judicial remedies and creating the bodies for the promotion of equal treatment), does not explicitly cover sexual orientation.

The anti-discrimination framework on grounds of racial or ethnic origin as provided by the legislative decree implementing Directive 2000/43/EC, and by legislative decree n. 286/1998[40]; in particular, articles 43 and 44 of the latter (respectively prohibiting discrimination in the workplace and introducing judicial remedies) do not apply to sexual orientation discrimination with the exception of the provisions concerning judicial remedies established by article 44(1) to 44(6), 44(8) and 44(11)[41].

11.1.8 Provisions on sexual orientation discrimination in other fields than employment and occupation

There are no provisions on sexual orientation discrimination in other fields. The three Bills mentioned in subparagraph 11.1.5 actually aim at introducing a broader reform, not limited to employment law. In particular, the Bills propose: a reform of hate crime legislation, including sexual orientation; the formulation of a stronger protection of personal data concerning sexual life, by affirming a general right to sexual privacy; a special protection against discrimination and homophobia in schools; the explicit prohibition of discrimination in health insurances; the recognition of the right to asylum for persecution based on sexual orientation. Two further proposed Bills[42] specifically focus on hate crime legislation (violent crimes and incitement to hatred) aiming at amending the Decree 122/1993[43].

A Bill amending the Act on immigration in order to include sexual orientation and sex in the anti-discrimination clause of that Act, has been voted and not approved in a recent session of the Parliament.

The regional Bills mentioned above[44] provide a broader anti-discrimination framework, banning discrimination based on sexual orientation (and gender identity) in health care and tourist services.

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[40] *Decreto legislativo 25 luglio 1998, n. 286, Testo unico delle disposizioni concernenti la disciplina dell'immigrazione e norme sulla condizione dello straniero* [Legislative Decree no. 286 of 25 July 1998, General framework on immigration and provisions on legal conditions of foreigners], (*Gazzetta Ufficiale* no. 191 of 18 August 1998), as revised by the Act no. 189 of 30 July 2002.
[41] See 11.5.2 and 11.5.3.
[42] *Proposta di legge* no. 635 presented to the Chamber of Deputies by Titti De Simone and others (7 June 2001); *Disegno di legge no. 304* presented to the Senate by Luigi Malabarba and others (25 June 2001).
[43] *Decreto legge 26 aprile 1993, n.122, Misure urgenti in materia di discriminazione razziale, etnica e religiosa* [Decree no. 122 of 26 April 1993, Urgent measures on discrimination based on race, ethnicity and religion], converted and modified by the *legge 25 giugno 1993*, n. 205 [Act no. 205 of 25 June 1993], (*Gazzetta Ufficiale* no. 148 of 26 June 1993).
[44] See 11.1.5.

11.2 The prohibition of discrimination required by the Directive

11.2.1 Instrument(s) used to implement the Directive

The Directive has been implemented by a Legislative Decree. The act no. 39 of 1 March 2002[45] (European Community Act 2001) conferred to the Government the delegated power to issue the Decree so to implement the Directive 2000/78/EC (hereinafter the Decree).

In compliance with the Act 39/2002, the first version of the Decree has been drafted by the legislative offices of the Ministry of Equal Opportunities and the Ministry of Welfare and approved by the Council of Ministers. As established by article 1(3) of the Delegation Act, the draft has been transmitted to the Parliament for the opinion of the competent parliamentary Committees (namely, the Committee on Labour and on Community Affairs of the Chamber of Deputies, the Committee on Labour, on Constitutional Affairs, on Justice, on Community Affairs of the Senate). The final version of the Legislative Decree[46] has been modified taking into account some of the remarks of the Committee but, still, it is not in compliance with the Directive on several points.

The Decree n. 216 of 9 July 2003 has been published in the Official Journal on 13 August 2003, and entered into force on 28 August 2003.

Since article 1(4) of the Delegation Act establishes that within one year from the entry into force of the decree, the Government is entitled to issue, by means of one or more legislative decrees, supplementary or corrective provisions, an intervention aimed to correctly implement all of the provisions of the Directive would be most appropriate.

The Government has not involved social partners or interest groups in the drafting process. Nevertheless, the *Confederazione Generale Italiana del Lavoro* (one of the trade unions) has formally sent to the competent parliamentary commissions mentioned above, a document containing an analysis and some amending proposals.

Decree 276 entered into force on 24 October 2003.

11.2.2 Concept of sexual orientation (art. 1 Directive)

The words used in the decree, as in other Bills presented to the Parliament, are '*orientamento sessuale*', that is to say the direct translation of the English words, but there is not any legal definition. The doctrine, in making reference to sexual orientation, does not distinguish between behaviour or identity, emotional or sexual aspects. Sexual orientation includes homosexual, heterosexual and bisexual orientation. The Decree does not use possessive pronouns.

[45] *Legge 1 marzo 2002, n. 39, Disposizioni per l'adempimento di obblighi derivanti dall'appartenenza dell'Italia alle Comunità europee. Legge comunitaria 2001* (*Gazzetta Ufficiale* no. 72 of 26 March 2002).
[46] *Decreto legislativo 9 luglio 2003, n.216. Attuazione della direttiva 2000/78/CE per la parita' di trattamento in materia di occupazione e di condizioni di lavoro* [Legislative Decree no. 216 of 9 July 2003. Implementation of the Directive 2000/78/EC on equal treatment in employment and occupation] (*Gazzetta Ufficiale* no. 187 of 13 August 2003).

The Italian words used for sexual orientation in the Directive (and in art. 13 EC Treaty) are '*tendenze sessuali*' [sexual tendencies]. A first draft of the Decree used the same words, but it has been amended upon proposal of the Committee on Labour of the Chamber of Deputies[47], following the request of some members of Parliament, of gay and lesbian organisations and of the *Confederazione Generale Italiana del Lavoro*.

11.2.3 Direct discrimination (art. 2(2)(a) Directive)

The notion of direct discrimination provided by the Decree is exactly the same as the Directive. Indeed, the Decree uses the same words as the Italian version of the Directive[48]. This definition does not mention the author of the discrimination (which is not necessarily the employer); on the contrary, it does not focus on the effects of the act or behaviour: it seems therefore that the psychological element (e.g. the purpose of the author) is relevant, unlike what is established by Act 125/1991.

11.2.4 Indirect discrimination (art. 2(2)(b) Directive)

The notion of indirect discrimination of article 2(1)(b) of the Decree is almost identical to the one of the Directive. Indeed, indirect discrimination occurs 'where an apparently neutral provision, criterion, practice, act, pact or behaviour would put persons having a particular (...) sexual orientation at a particular disadvantage compared with other persons'[49].

The notion mentioned above is opportunely different from the notion of indirect discrimination as defined by the Act 125/1991 with respect to sex discrimination (any detrimental treatment which is the consequence of the adoption of criteria creating a disadvantage that disproportionately affects a group of workers and concerns requirements not essential for the development of the working activity). Indeed, as pointed out in the explanatory note of the Decree[50], and as argued by some authors[51], the concept of indirect discrimination as adopted in sex discrimination would not have been appropriate because it focuses on the idea of statistical proportionality of (sex) discrimination rather than the disadvantage provoked by an 'apparently neutral provision, criterion or practice', as stated by the Directive. The *ratio* of the definition of indirect discrimination provided by that provision essentially makes reference to the idea that

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[47] Opinion of the XI Permanent Commission (Public and private labour) of the Chamber of Deputies. Act n. 217. See also XI Commission Report, 4 June 2003, p. 96. During the debate the Vice-minister of Labour agreed that the words *'tendenze sessuali'* are not appropriate and are not consistent with the words used in the Act no. 30 of 12 February 2003, the delegating act on the reform of labour market.

[48] *'Discriminazione diretta quando, per religione, per convinzioni personali, per handicap, per età o per orientamento sessuale, una persona è trattata meno favorevolmente di quanto sia, sia stata o sarebbe trattata un'altra in una situazione analoga'* [direct discrimination when, on grounds of religion, belief, disability, age or sexual orientation one person is treated less favourably than another is, has been or would be treated in a comparable situation].

[49] *'Discriminazione indiretta quando una disposizione, un criterio, una prassi, un atto, un patto o un comportamento apparentemente neutri possono mettere le persone (…) di un orientamento sessuale in una situazione di particolare svantaggio rispetto ad altre persone'*. The first version used the words '*mettono*' instead of *'possono mettere'* ['put' instead of 'would put']: that notion would have been more restrictive than the one expressed by the Directive.

[50] The opinion of the XI Permanent Commission of the Chamber of Deputies (above n. 42) was proposing to adopt the same definition.

[51] Roccella, Treu, 2002, 241.

discrimination on the ground of sex affects a social group which is not in fact a minority[52], and that indirect discrimination occurs when a (apparently non discriminatory) criterion causes a disproportionate disadvantage based on sex.

11.2.5 Prohibition and concept of harassment (art. 2(3) Directive)

The Decree elaborates for the first time in the Italian legal system the notion of harassment, which is defined by article 2(3) as the 'unwanted conduct related to any of the grounds referred to in article 2(1) with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment', and it is considered a discrimination.

The notion corresponds to the one of the Directive and partly seems to correspond to the concept of 'mobbing', or moral and psychological harassment as elaborated by doctrine and courts[53]. Indeed mobbing is defined as an intentional process, by the employer (bossing), colleagues (horizontal mobbing) or superiors (vertical mobbing), aiming at isolating, humiliating, creating a hostile and intimidating environment and the loss of professional competitiveness of the worker; the discriminatory intention may be the cause of such a process[54].

Mobbing, however, is characterised by the systematic repetition of behaviours in a lapse of time (temporal element), while the notion of harassment used by the Decree makes reference to 'unwanted conduct', also including isolated behaviour. Mobbing is not characterised by a typical conduct: verbal harassment, intimidating or vexatious expressions, unlawful conducts (such as sexual harassment, menaces, etc.), even a series of behaviours, lawful when considered one by one, are considered cases of mobbing if aimed at causing the previously defined effects and if they are part of an environmental, psychological and pathological process. The character of the notion of mobbing could be useful in some cases that could not be precisely covered by the Decree: apart from the protection offered in some cases[55] by the criminal law, the courts and the doctrine have identified in articles 2087[56] and 2103[57] of the Civil Code (and article 2043 for damage compensation) the instruments and remedies to combat this behaviour[58].

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[52] De Simone, 2001, 60.
[53] The word had been used by the German sociologist Leymann who in 1984 defined the process of mobbing. The Italian case law and doctrine preferred not to change it and it is now part of Italian vocabulary. However, the bills presented to the Parliament normally use Italian words, such as moral harassment or psychological persecution.
[54] Monateri, Bona, Oliva, 2000, 10; Di Giuseppe, 2002, 9.
[55] When the conducts are criminal offences or provoke a psychological disease or physical illness.
[56] Art. 2087 Civil Code: 'The entrepreneur must adopt, in the exercise of the business, and according to the nature of the work, the experience and the technique, the necessary measures to protect the physical integrity and the moral personality of the workers'.
[57] Art. 2103 Civil Code: 'Art. 2103 Civil Code: 'The worker must be assigned to the *mansions* [i.e. the position and all the activities which make up that position] for which he was recruited, or to the *mansions* related to the superior category successively reached, or to the last actually carried out *mansions*, without any cut of his/her salary. If the worker is assigned to superior *mansions*, he has the right to the treatment corresponding to the activity carried out; the assignment cannot be modified, unless the worker substituted another worker who has the right to be reinstated (...). The worker can be transfered to other productive unities only if the organization, production or technical needs are proved'.
[58] Lazzari, 2001, 59.

The notion contained in the Decree covers sexual harassment. As to its concept, the definition elaborated by doctrine and courts covered all the sexually relevant (verbal or not) conducts at the workplace that are unwanted and that violate the dignity and freedom of the victim. In general the courts tended to apply the concept of harassment as stated in the Commission Recommendation of 27 November 1991[59]. Harassment against clients[60] or any other individual at the workplace is punishable. Harassment is sanctioned by criminal law and entitles the victim to compensation; according to article 2087 of the Civil Code, the employer may be considered responsible even if he is not the author[61].

Some Bills have been presented to the Parliament: some of them define moral or psychological harassment; others specifically deal with sexual harassment and consider sexual blackmail an aggravating circumstance.

11.2.6 Instruction to discriminate (art. 2(4) Directive)

Article 2(4) of the Decree establishes that 'an instruction to discriminate against persons on ground of religion, belief, disability, age or sexual orientation is deemed to be discrimination'[62]. A general prohibition on instructions to discriminate falls under article 2087 of the Civil Code, providing the obligation for the employer to guarantee the physical and moral integrity of his workers.

11.2.7 Material scope of applicability of the prohibition (art. 3 Directive)

Article 3(1) of the Decree establishes that the prohibition of discrimination and the judicial remedies apply to all persons in the public and private sectors with reference to the following fields:

a) access to employment, to self-employment or to occupation, including selection criteria and recruitment conditions;

b) employment and working conditions, including promotions, dismissals and pay;

c) access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience;

d) membership of, and involvement in, an organisation of workers or employers, or any organisation, whose members carry on a particular profession, including the benefits provided for by such organisations[63].

Furthermore, the amended article 15 of the Workers' Statute explicitly makes reference to functions, transfers, disciplinary sanctions and dismissals; the Supreme Court has stated, and as is also affirmed by legal doctrine, that the list

[59] 27 November 1991, OJ 24/02/92 L 49/1. Endorsed by the Council with Declaration 19 December 1991, OJ 4/2/92 C 27/1; see Roccella, Treu, 2002, 218.
[60] *Tribunale di Milano*, 4 November 2000.
[61] See 11.2.6.
[62] Art. 2(4) of the Decree: *'L'ordine di discriminare persone a causa della religione, delle convinzioni personali, dell'handicap, dell'età o dell'orientamento sessuale è considerata discriminazione ai sensi del comma 1'*.
[63] The first draft, then modified upon a proposal of Commissions on Labour of the Chamber of Deputies and of the Senate, limited the protection to 'the involvement in an organisation of workers or employers'.

of discriminatory behaviours is not strictly exhaustive and binding, and must be considered an open list[64]. Article 15 is therefore applicable to all the fields of the employment relationship, including access to employment, working conditions, career development, and retribution. According to the doctrine[65] and courts[66], the prohibition of discrimination under article 15 also includes omissive behaviours.

11.2.8 Personal scope of applicability: natural and legal persons whose actions are the object of the prohibition

As to the persons protected, the provisions mentioned in the previous subparagraph are applied to *all* persons and cover collective discriminations, as pointed out by article 5(2) of the Decree[67].

As to the possible author of the discrimination, again, the provisions apply to all persons in the public and private sectors. The prohibition provided by article 15 of the Workers' Statute (see 11.1.5) applies to the any kind of employer (natural or legal person) and also to organisations of workers or employers[68].

As to the personnel of temporary job agencies and temporary workers, Act 196/1997[69] explicitly extends the provisions of the Workers' Statute to those workers. Furthermore, article 10 of the Legislative Decree 276/2003 on labour market, contains a prohibition on job agencies from seeking, keeping or processing data about sexual orientation[70]. Article 10 of the Legislative Decree 469/1997[71] applies the provisions of article 15 of the Workers' Statute to labour market intermediators.

11.3 What forms of conduct in the field of employment are prohibited as sexual orientation discrimination?

11.3.1 Discrimination on grounds of a person's actual or assumed heterosexual, homosexual or bisexual preference or behaviour

In Italy there is no relevant legal debate evidentiating a difference between the sexual preference and the sexual (or sexually relevant) behaviour. Nor does such a difference emerge from the text of the Decree. Therefore, the legal conception of sexual orientation covers both aspects.

Even if there is no doctrine or case law concerning the new explicit prohibition of sexual orientation discrimination, which is completely new to the Italian legal system, there is no doubt that any discrimination on grounds of a person's

[64] *Corte di Cassazione*, 1 February 1988, no. 868.
[65] Carinci, De Luca Tamajo, Tosi, Treu, 1992, 135.
[66] *Corte di Cassazione* [Supreme Court], 28 March 1980, no. 2054.
[67] See 11.5.7.
[68] Carinci, De Luca Tamajo, Tosi, Treu, 1992, 136.
[69] *Legge 24 giugno 1997, n. 196, Norme in materia di promozione dell'occupazione* [Act no. 196 of 24 June 1997, Provisions on promotion of employment], (*Gazzetta Ufficiale* no. 154 of 4 July 1997).
[70] See 11.1.5.
[71] *Decreto legislativo 23 dicembre 1997, n. 469, Conferimento alle regioni e agli enti locali di funzioni e compiti in materia di mercato del lavoro, a norma dell'articolo 1 della legge 15 marzo 1997, n. 59* [Legislative Decree no. 469 of 23 December 1997, Grant of functions and duties concerning the labour market to Regions and local governments, in compliance with article 1 of the Act no. 59 of 15 March 1997], (*Gazzetta Ufficiale* no. 5 of 4 July 1997).

actual heterosexual, homosexual or bisexual preference or behaviour is prohibited by the new provisions. The amended version of article 15 of the Workers' Statute represents an important strengthening of such protection.

As far as dismissals are concerned, discriminatory dismissal is governed by article 3 of Act 108/1990 on individual dismissals, which is in fact a consolidated version of article 4 of Act 604/1966, and by the amended version of article 15 of the Workers' Statute: discriminatory dismissal (also on grounds of sexual orientation) is always void.

In the light of the new provisions, there is not any possibility that a dismissal on the grounds of homosexual, heterosexual or bisexual behaviour can be considered lawful, falling within the concept of just cause or justified reason, since doctrine and case law definitely exclude that personal behaviours or private facts and acts can be considered just cause or justified reason for the dismissal if they have no effective or potential consequences on the working activities or the substantial nature of the work relationship[72].

It is important to note that, from a Constitutional point of view, *the freedom of economical enterprise of the employer protected by the Constitution in article 41 has an inderogable limit represented by the respect for the safety, freedom and dignity of human beings*: the respect for the worker as a person, for her/his fundamental rights and liberties, for her/his characteristics and qualities represents a constitutional limit to the rights and freedoms that the Constitution itself guarantees to the employer.

From the analysis of the text of the Decree, it emerges that the provisions also apply in cases of a mistaken assumption as to the sexual orientation of a worker. Indeed, the relevant point is represented by the fact that any discrimination based on (presumed or real) *sexual orientation* is prohibited.

11.3.2 Discrimination on grounds of a person's coming out with, or not hiding, his or her sexual orientation

Discrimination based on verbal expression of sexual orientation is not allowed in the light of the provisions of the Decree. This form of discrimination also involves arguments concerning the protection of the freedom of expression.

The fundamental right expressed by article 21 of the Constitution has been embodied in article 1 of the Workers' Statute[73], which states that workers have the right to express their thoughts at their workplace. This concept must be interpreted in a broader way, to include the freedom to express one's personality[74].

11.3.3 Discrimination between same-sex partners and different-sex partners

Difference in treatment between same-sex partners and different-sex partners is generally and essentially the consequence of the lack of any form of legal recognition for the former. Therefore, the recognition of any right or benefit

[72] Carinci, De Luca Tamajo, Tosi, Treu, 1998, 439.
[73] Avio, 2001, 133.
[74] De Simone, 2001, 75.

granted by law, collective agreement or by the employer primarily depends on its extension to de facto cohabitants.

Even if a generalisation is not appropriate, I can assert that discrimination between same-sex and different-sex partners particularly affects the benefits granted by the employers. Policies aiming at extending the benefits to same-sex partners are still rare[75].

As far as collective agreements and the law are concerned, marital status has been the ground that has justified differences in treatment (for unmarried different-sex and same-sex partners), even if the current trend is to extend the recognition of some rights to de facto cohabitants. Indeed, with respect to the regulation of bereavement and compassionate leave, Act 53/2000[76], and the consequent Regulation adopted by the Decree of the Prime Minister 278/2000[77], extend this right in cases of infirmity or death of the *'convivente anagrafico'* [stable cohabitant][78]. These provisions do not make reference to sexual orientation and, therefore, cover same-sex partners. As a consequence of these rules, many collective agreements extend to cohabitants (without having regard to sexual orientation) the rights to leave or temporary retirement[79].

In my view, a major discriminatory consequence affecting unmarried partners in general concerns the pension system, with particular reference to survivors' pensions: according to the revised Royal Decree 636/1939[80], only the spouse of the worker in the public or private sector is entitled to be the beneficiary of the pension. The legitimacy of this provision has been recently confirmed by the Constitutional Court[81].

Considering that article 3(1)(b) of the Decree has implemented article 3(1)(c) of the Directive, I think that the denial of the extension to same-sex partners of the benefits granted to opposite-sex cohabitants constitutes direct discrimination

[75] The health insurance of the professional category of journalists (*CASAGIT*) extends its benefits to de facto cohabitants, explicitly including same-sex partners (see: www.casagit.it).
[76] *Legge 8 marzo 2000, n. 53, Disposizioni per il sostegno della maternità e della paternità, per il diritto alla cura e alla formazione e per il coordinamento dei tempi delle città* [Act no. 53 of 8 March 2000, Provisions to support motherhood and fatherhood, on the right to care and formation, on the co-ordination of time in cities], (*Gazzetta Ufficiale* no. 60 of 13 March 2000).
[77] *Decreto Presidenza del Consiglio dei Ministri - Dipartimento per gli affari sociali 21 luglio 2000, n.278, Regolamento recante disposizioni di attuazione dell'articolo 4 della legge 8 marzo 2000, n. 53, concernente congedi per eventi e cause particolari* [Decree of the Prime Minister – Department for Social Affaire no. 278 of 21 July 2000, Regulation concerning provisions for the implementation of article 4 of the Act no. 53 of 8 March 2000, concerning leaves for particular causes and events].
[78] The Act makes reference to the *famiglia anagrafica* [registered family] as defined by article 4 of the Presidential Decree no. 223 of 30 May 1989: this registration is conceived for residence purposes, has no legal consequences and, despite the grounds on which leave may be granted, cannot be considered as a form of recognition of de facto couples. The right to a leave is provided as well for non-cohabiting relatives (e.g. brothers/sisters, grandparents, grandsons/granddaughters).
[79] See as example the national collective agreement for postal workers of 11 January 2001. The regulation for the *Confederazione Generale Italiana del Lavoro* employees even grants a substitutive marriage-licence for same-sex and different-sex cohabitants. In other cases collective agreements do not yet include rights for cohabitant: for instance, the national collective agreement for workers in metallurgical and mechanical industry of 8 June 1999 excludes de facto partners from damage compensation for worker's death or from benefits in case the worker has to leave her/his residence. Temporary retirement (*'aspettativa'*) is a period during which a worker may be temporarily substituted, although they maintain the right to keep their workplace even if after a period of time they are no longer entitled to their salary.
[80] *Regio decreto 14 aprile 1939, n. 636, Disposizioni in materia di pensioni* [Royal Decree no. 636 of 14 April 1939, Provisions on pensions] (converted and revised by Act no 1272 of 6 July 1939**).**
[81] *Corte Costituzionale*, 3 November 2000, no. 461.

being, in fact, not a direct consequence of the national law, but rather the consequence of the initiative of the employer, as pointed out by some authors[82]. In this sense, it should be possible to go beyond the decision in *Grant*[83] which, according to the unanimous opinion of legal scholars[84], had a troubling impact on national legislation.

Article 3(2)(d) explicitly states that the Decree shall be without prejudice to the provisions already in force concerning marital status and the benefits dependent thereon, as provided by recital 22 of the Directive: however, it could be possible to challenge the different treatment based on marital status, as provided by a collective agreement or by employers, as a form of indirect sexual orientation discrimination.

Ten Bills have been presented to the Parliament aiming at legally recognising de facto couples or same-sex partnerships: all of them explicitly or implicitly extending all the rights of married workers, to workers involved in a same-sex relationship, according to the aim of the Bill: the opening up of marriage, the legal recognition of cohabitation, or the introduction of civil union, registered partnership or PaCS. The Bill aiming at introducing a legal recognition modelled on the French PaCS is the one that obtained the strongest support within the Parliament: the proposers have formally requested that the Bill is scheduled for discussion and vote.

Finally, the Italian system does not provide specific protection in the case of a person not being the legal parent of a child. The Legislative Decree 151/2001[85] establishes the rules concerning the position of parents with reference to rights and benefits at the workplace: according to article 1, only the legal or adoptive parent, or the person who has the legal custody of the child[86] is admitted to the benefits provided by the law. Extra benefits (namely, temporal extension of the leaves and absences) are granted to single parents. Only legal or adoptive children may obtain the survivor's pension.

11.3.4 Discrimination on grounds of a person's association with gay/lesbian/bisexuals/heterosexual individuals, events or organisations

The Decree prohibits any form of discrimination on grounds of sexual orientation, and this is not limited to discrimination based on the victim's sexual orientation. Therefore, the discrimination based on the worker's association with a lesbian/gay/bisexual individual, event or organisation is covered under the new legal framework.

[82] Bell, 2002, 116; Bell, 2001, 667.
[83] ECJ, 17 February 1998, Case C-249/96, *Grant v. South-West Trains,* [1998] ECR I-621.
[84] De Simone, 2001, 84; Izzi, 1998, 308; Pallaro, 1998, 617; Ballestrero, 1998, 309.
[85] *Decreto Legislativo 26 marzo 2001, n.151, Testo unico delle disposizioni legislative in materia di tutela e di sostegno della maternità e della paternità a norma dell'articolo 15 della legge 8 marzo 2000, n. 53* [Legislative Decree no. 151 of 26 March 2001, General framework of the legislative provisions concerning the protection and support to motherhood and fatherhood, in compliance with article 15 of the Act no. 53 of 8 March 2000], (*Gazzetta Ufficiale* no. 96 of 26 April 2001).
[86] In principle, also the same-sex partner of the parent.

To some extent, this is also the case for a worker who tries to protect a colleague from other workers', superiors' or employer's discrimination. In case of discrimination, the judicial remedies established by the Decree apply[87].

There is no doubt that discrimination on the grounds of a person's association with a gay/lesbian/bisexual individual, event or organisation is unlawful also in the light of the freedom of expression and freedom of association respectively protected by article 21 and 18 of the Constitution.

11.3.5 Discrimination against groups, organisations, events or information of/for/on lesbians, gays or bisexuals

This is a very sensitive issue, not appropriately covered by the Decree. Indeed, if the discrimination against the group, organisation, event or information consists of discriminatory behaviour against members of the group or organisers of the event, the protection provided by the Decree shall apply. If not, the protection offered by articles 18 and 21 of the Constitution, as well as the provision of article 1 of the Workers' Statute, should cover the case of the discrimination against groups, organisations, events or information (particularly in the last two cases I think the protection is far from being effective).

If a group is formed as a trade union (or within the trade union) a stronger protection of the group itself, but also of its activities, events and information, would be guaranteed by article 39 of the Constitution, stating the freedom to organise as trade unions, article 14 of the Workers' Statute which recognises the right to create or be a member of a trade union, and article 25 establishing the right to put up publications, texts concerning the trade union's activities or the rights of workers. In this case, apart from the protection for individuals offered by article 15 of the Workers' Statute, the provisions of article 28 of the Workers' Statute, which specifically provides a judicial procedure against the employer who prohibits or limits the activities of the trade unions, shall apply. According to the Supreme Court this procedure applies only if the discriminatory behaviour is a *direct* consequence of the activity of the worker[88].

11.3.6 Discrimination on ground of a person's refusal to answer, or answering accurately, a question about sexual orientation

Discrimination on the ground of a person's refusal to answer questions concerning their sexual orientation is definitely unlawful. The protection offered by the provisions on personal data protection *explicitly* covers the '*vita sessuale*' [sexual life] of the worker[89].

Article 8 of the Workers' Statute states that the prohibition on the employer from investigating political, religious, trade union opinions or any other fact not relevant for the evaluation of the working attitudes of the employee. The protection granted by article 8 is extensive and concerns *any* attempt by the employer to investigate[90]: it covers the workers as well as the job seekers[91] and

[87] See 11.5.10.
[88] *Corte di Cassazione*, 6 September 1980, no. 5154; *Corte di Cassazione*, 29 June 1989, no. 3016.
[89] De Simone, 89.
[90] Scognamiglio, 2000, 354.
[91] *Corte di Cassazione* [Supreme Court], 18 February 1975, no. 643.

prohibits any form of direct or indirect investigation. The case law has established that this prohibition also concerns investigations regarding the sexual, emotional, family or social life of the worker or job seeker[92] or her/his moral principles[93]. The breach of this rule is punishable by the criminal sanctions as provided under article 38 of the Workers' Statute and any related discriminatory behaviour is sanctioned. According to some authors[94], article 8 has a preventive role in the enforcement of the anti-discriminatory framework.

The legislative decree 196/2003[95] on personal data protection has strengthened the prohibition: although the employer and any other authorised subject are allowed to process personal data within the limits established by the law, article 26 states that a certain category of data (so called *'dati sensibili'*), among which the ones concerning the sexual life of the person, as established by article 4 of the decree itself, cannot be processed without the written consent of the interested person and the authorisation of the Authority for data protection. The protection is extended to any sector and to all the persons, including co-workers and clients.

These provisions are further fortified by the prohibition to discriminate on the ground of sexual orientation in access to employment or to occupation, including selection criteria and recruitment conditions (article 3(1)(a) of the Decree) and by the limitation to investigate and process personal data provided by the legislative decree 276/2003 [96].

Since there is the prohibition on investigations, any inaccurate answer regarding sexual orientation is irrelevant, any question being unlawful.

The real problem, with particular reference to the job seeker, is making protection effective: the current provisions on the burden of proof risk to make this rule ineffective in many circumstances.

11.3.7 Discrimination on grounds of a person's previous criminal record due to a conviction for a homosexual offence without heterosexual equivalent

According to the Italian criminal system, there have been no homosexual offences since 1889. Cases of discrimination on ground of foreign criminal records are not known.

Generally speaking, I must say that, according to the case law and the doctrine, dismissal on the grounds of a person's criminal conviction is always unlawful if the crime is not related to the work activity, or has not been committed at the workplace.

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[92] Among others: *Pretura di Treviso* [Lower Court of Treviso], 28 May 1977; *Pretura di Milano* [Lower Court of Milan], 15 December 1976.
[93] *Pretura di Milano* [Lower Court of Milan], 7 February 1974.
[94] Ghera, 1975, 424.
[95] *Decreto legislativo 30 giugno 2003, n. 196, Codice in materia di protezione dei dati personali* [legislative decree no. 196 of 30 June 2003, Personal data protection code], (*Gazzetta Ufficiale* no. 174 of 29 July 2003)
[96] See 11.1.5.

11.3.8 Harassment

The extensive notion of harassment contained in the Decree may cover any form of harassing conduct[97]. In principle the new concept could strengthen the protection against verbal harassment in particular.

There is no doubt that unwelcome sexual advances to a person of the same sex or of the opposite sex are covered, sex and sexual orientation of both the author and the victim not being distinctive elements characterising the new notion of harassment (and the notion elaborated by doctrine and case law).

Revealing a person's sexual orientation against his or her will is, without any doubt, harassing conduct, falling within the concept of 'unwanted conduct (...) with the *purpose* or *effect* of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment' under article 2(3) of the Decree. The author of the harassing conduct may be any person, according to article 3(1) of the Decree. As already stated, the employer is not allowed to investigate and circulate data concerning the worker's sexual orientation; he also has a specific duty, under article 2087 of the Civil Code, to guarantee the physical and moral personality of the worker, even in the case that a third party reveals the person's sexual orientation at the workplace.

The notion of verbal harassment covers the case of a person's use of derogatory language about homosexuality or about a gay, lesbian or bisexual person, as well as the case of expressing negative opinions about homosexuality, if such opinions have the discriminatory purpose or effect of offending the worker or creating an hostile environment. On the contrary, I think that freedom of expression prevails if, due to the psychological element of the behaviour and the general circumstances, the negative opinions have no discriminatory or harassing nature and fall within the right of an individual to express his/her own thoughts (the situation is different, of course, where the worker is in a situation of subjection, e.g. with reference to a superior).

In both cases, the employer's duty under article 2087 of the Civil Code obliges the employer to prevent or prohibit any form of verbal harassment against the worker[98].

If the derogatory language is used referring to one specific person or if it is intended to insult or offend a homosexual or bisexual person, a form of protection is also guaranteed by articles 594 and 595 of the Criminal Code, which respectively punish the offences of insult and defamation.

All instances of harassing conduct might constitute elements of the mobbing process[99].

[97] See 11.2.5.
[98] *Tribunale di Milano*, 17 October 2000.
[99] See 11.2.5.

11.4 Exceptions to the prohibition of discrimination

11.4.1 Objectively justified indirect disadvantages (art. 2(2)(b)(i) Directive)

Article 3(6) of the Decree establishes that 'the differences in treatment that, even if indirectly discriminatory, are objectively justified by legitimate aims carried out through appropriate and necessary means, are not discriminatory acts (...)'[100]. This provision is in conformity with the Directive. The first draft of the Decree referred to 'adequate and proportionate means': since the notion of proportionality was elaborated by the courts with reference to the concept of indirect discrimination on the grounds of sex has a different meaning[101], the final version is more appropriate.

Article 3(6) continues saying that '[I]n particular, the acts directed to exclude from a working activity concerning care, assistance, education of minors those persons who have been condemned for offences related to sexual freedom of minors or child pornography are legitimate'[102]. The meaning of this provision is not understandable. Indeed, the dismissal on the grounds of a person's criminal conviction is always lawful if the crime is related to the working activity. This provision simply seems to confirm the legitimacy of acts, which are already legitimate. The aim of the provision cannot be the introduction of an objectively justified indirect distinction, because paedophilia is not considered a sexual orientation within the purposes of the Directive and of the Decree. *Even if, from a strictly legal point of view, this provision does not violate the Directive, it is without any doubt politically suspect, since it could have the effect to feed the bias towards homosexuals instead of combating it.*

11.4.2 Measures necessary for public security, for the protection of rights of others, etc. (art. 2(5) Directive)

Article 3(2)(c) establishes that the Decree shall be without prejudice to the provisions already in force concerning public security, maintenance of public order, prevention of criminal offences, protection of health.

11.4.3 Social security and similar payments (art. 3(3) Directive)

Even if, in my opinion, different treatment with reference to pensions, subsidies, compulsory health insurance is a major field of discrimination for homosexual workers, article 3(2)(b) explicitly establishes that the Decree shall be without prejudice to the provisions already in force concerning social security and social protection.

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[100] Art. 3(6) of the Decree: *'Non costituiscono comunque atti di discriminazione (…) quelle differenze di trattamento che, pur risultando indirettamente discriminatorie, siano giustificate oggettivamente da finalità legittime perseguite attraverso mezzi appropriati e necessari*'.
[101] See 11.2.4.
[102] Art. 3(6) of the Decree: *'In particolare, resta ferma la legittimità di atti diretti all'esclusione dallo svolgimento di attività lavorativa che riguardi la cura, l'assistenza, l'istruzione e l'educazione di soggetti minorenni nei confronti di coloro che siano stati condannati in via definitiva per reati che concernono la libertà sessuale dei minori e la pornografia minorile'*.

11.4.4 Occupational requirements (art. 4(1) Directive)

The first part of article 3(3) of the Decree establishes that 'in compliance with the principles of proportionality and reasonableness, within the working or business activity, differences in treatment due to characteristics related to the person's religion, belief, disability, age or sexual orientation are not discriminatory acts where, by reason of the nature of the particular occupational activity concerned or of the context in which it is carried out, such characteristics constitute a genuine and determining occupational requirement for the carrying out of the working activity itself'.

Apart from the inappropriate reference to the principles of proportionality and reasonableness, not exactly corresponding to the notions of legitimate objective and proportionate requirement (in particular, the notion of reasonableness has a broader meaning compared to the concept of legitimate objective)[103]*,* this provision corresponds to article 4(1) of the Directive; it introduces a framework which has some differences compared to the provisions in force concerning occupational requirements for organisations defined as *'organizzazioni di tendenza'* [literally, tendency organisations]. These organisations are exempted from the application of the general rules with reference to the prohibition of investigation of article 8 of the Workers' Statute (forbidding investigations unless they are relevant in order to evaluate the professional attitude of the worker or the carrying out of the working activity), and to dismissal. A definition of *'organizzazione di tendenza'* is provided by article 4 of the Act 108/1990 on individual dismissals, stating that article 18 of the Workers' Statute (establishing the reinstatement of the worker unlawfully dismissed) does not apply to those employers whose activities are 'non profit' and are characterised by having a political, cultural, educational, religious or trade-union nature. The Supreme Court has established that the special rules may be enforced only if the characteristics established by article 4 do co-exist [104].

Article 3(3) seems to have a broader field of applicability: it provides a general exception, not limited to the prohibition of investigation and dismissal. Secondly, the new rule would be applicable not only to non profit organisations (indeed, it makes reference to the business activities); on the contrary, the notion of 'context in which the activity is carried out' could be interpreted in the light of the second requirement established by article 4 of the Act 108/1990 (peculiar nature of the organisation).

The extension of the application of the already existing rules is controversial[105], in particular with respect to the workers who are involved; the Supreme Court has intervened on this point establishing that the exceptions to the general rules are enforced only for workers whose functions are directly connected to the purposes characterising the organisation[106]. This interpretative approach could be applicable in the new framework with reference to the concept of the 'nature of the particular occupational activity'.

[103] Bill no. 4389 makes use of the language used by the Directive (that is to say the legitimate / objective / proportionate requirement language).
[104] *Corte di Cassazione*, 16 September 1998, no. 9237.
[105] De Simone, 2002, 89.
[106] *Corte di Cassazione*, 16 June 1994, no. 5832. For the case of the conformation to the principles of the institution, see the decision of the *Corte Costituzionale* [Constitutional Court], 29 December 1972, no. 195.

The first draft introduced a general exception which would have completely reversed the meaning of the notion of occupational requirement, establishing that differences in treatment based on religion, belief, disability, age or sexual orientation were allowed if those characteristics would have affected the carrying out of the working activity[107]. The strong protest of some members of Parliament, organisations, *Confederazione Generale Italiana del Lavoro* and the contrary opinion of a part of the Parliamentary Commissions has induced the Government to modify the text. However, a similar provision is still contained in article 10 of Legislative Decree 276/2003 on labour market with reference to the limitation to investigate and process personal data by job agencies and other 'authorised public or private subjects'. *For the reasons mentioned above this provision introduces a broad exception concerning the access to employment, namely the selection criteria, not allowed by the Directive*.

11.4.5 Loyalty to the organisation's ethos based on religion or belief (art. 4(2) Directive)

Article 3(5) of the Decree 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'. In this case, the notion of organisation fully corresponds to the notion of tendency organisation.

The provision contained in article 3(5) establishes a more restrictive exception than is permitted by article 4(2) of the Directive, since it has not introduced the requirement of acting in good faith and with loyalty to the organisation's ethos. On the other hand, it would be appropriate to specify that the exception 'should not justify discrimination on another ground'. Also, the Decree makes reference to 'churches and other public or private organisations' without specifying that the ethos of such organisations must be based on religion or belief[108]. However, in the light of the current version, I do not believe the courts, with reference to the discriminatory act, will modify the criteria they have elaborated[109].

There is one case where different treatment beyond article 3(5) has been considered lawful by the Italian system: in light of the bilateral agreements between the State and the Catholic Church, teachers of religion in schools are appointed after the bishop has expressed his positive opinion. The Supreme Court has recently confirmed that the evaluation of suitability by the Church may take into account an individual's beliefs and private life: this specific exception, which is apparently unacceptable under the new Framework Directive, is based on agreements between the Italian State and the Catholic Church in compliance with article 7 of the Constitution.

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[107] The Italian expression is *'caratteristiche che incidono sulle modalità di svolgimento della attività lavorativa'*.
[108] On this purpose, the text of article 3(5) proposed by Bill no. 4389 is in compliance with the Directive.
[109] See 11.4.4.

11.4.6 Positive action (art. 7(1) Directive)

Positive actions are legitimate according to our constitutional system, in the light of the principle of substantive equality under article 3(2) and the new article 51 of the Italian Constitution. They have been introduced into our system by article 1 of the Act 125/1991 with reference to the equal opportunities between men and women. There is no obligation to adopt positive actions, with the exception of the public sector. Case law concerning positive action is not particularly developed, but the Constitutional Court has intervened in the debate, establishing that 'unequal measures' can be implemented in order to remove substantive economical and social differences between individuals which prevent them from the fully exercising of fundamental rights, but they cannot directly affect the fundamental rights themselves[110].

The Decree does not introduce any form of positive action. Without examining the quantitative and substantive differences between the categories of gender and sexual orientation, which imply different approaches, I exclude that Act 125/1991 can be considered at the moment as an instrument to eventually introduce positive actions on ground of sexual orientation, this aim being established by article 1, which is clearly directed at promoting equal treatment between men and women.

11.4.7 Exceptions beyond the Directive

Article 3(3) of the Decree establishes that 'the evaluation of the mentioned characteristics [among others, sexual orientation] is not a discrimination if they are relevant with regard to the capacity to carry out the functions that the armed forces and the police, prison or emergency services may be called upon to perform' [111]. *This provision is not in conformity with the text of the Directive; in my opinion, it does not meet the requirements of the Directive. It establishes an exception to the application of the principle of equal treatment on ground of religion and belief, disability, age and sexual orientation which is not allowed by recital 18 of the Directive*. This recital, in fact, focuses on the required capacities, without considering the mentioned grounds as a justification *per se* for an exception and the object itself of the evaluation of the required capacities. Therefore art. 3(3) goes beyond 'the legitimate objective of preserving the operational capacity of those services' (not mentioned by the Decree)[112]. Furthermore, considering that article 3(2)(e) of the Decree introduces the exception established by article 3(4) of the Directive, one of the implicit aims of the provision of article 3(3) seems to be limiting the access of homosexuals to the mentioned functions. This does not even comply with the Italian legal system. The military service will be compulsory in Italy until 31 December 2006 as established by the Legislative Decree 215/2001[113]. There is no explicit ban

[110] *Corte Costituzionale*, 12 September 1995, no. 422, with reference to the quotas in the electoral system.
[111] Art. 3(3) of the Decree: *'(…) non costituisce atto di discriminazione la valutazione delle caratteristiche suddette ove esse assumano rilevanza ai fini dell'idoneità allo svolgimento delle funzioni che le forze armate e i servizi di polizia, penitenziari o di soccorso possono essere chiamati a esercitare'*.
[112] Bill no. 4389 proposes to drop this provision from article 3(3).
[113] *Decreto Legislativo 8 maggio 2001, n. 215, Disposizioni per disciplinare la trasformazione progressiva dello strumento militare in professionale, a norma dell'articolo 3, comma 1, della legge 14 novembre 2000, n. 331* [Legislative Decree no. 215 of 8 May 2001, Provisions to regulate the modification of the professional Army, in compliance with article 3(1) of the Act no. 331 of 14 November 2000], (*Gazzetta Ufficiale* no. 133 of 11 June 2001).

for homosexual employees in the armed forces or police, but there are some rules concerning the possible exemption from military service. On this purpose, a ministerial Decree[114] establishes that the *'disturbi della sessualità'* [sexuality disorders] are a reason for exemption; a previous Regulation of the Ministry of Defence of 8 August 1991 stated that homosexuality is considered as a reason for exemption when it is the cause of further psychological disorders or deviant behaviour. The Decree could allow a general exclusion of homosexuals from the military: this would clearly be contrary to the Directive and to the European Convention of Human Rights.

Secondly, article 3(4) establishes that the Decree is without prejudice to the 'provisions that establish work suitability tests as far as the necessity of suitability for specific work is concerned (...)'[115]. The provision is unclear. Considering that the second part of article 3(4) specifically states that differences of treatment are justified on ground of age, it seems that the first part makes reference to more general and vague work suitability tests, without specifying the nature of the working activity for which a test is required, the reference to a specific ground, or even the purpose or nature of the test. Even though the mentioned tests would be lawful only if they were established by a norm, and do not justify a different treatment to be carried out by the employer, *I believe that the current version of the provision violates the Directive for allowing a general evaluation of the worker's suitability not provided by the Directive itself and not defined in its aims, criteria and limits*[116].

11.4.8 Other exceptions

Article 3(2)(a) establishes that the Decree shall be without prejudice to the provisions already in force concerning conditions relating to the entry into, residence and access to occupation, assistance and social security of third-country nationals and stateless persons in the territory of Member States.

11.5 Remedies and enforcement

11.5.1 Basic structure of enforcement of employment law

In the Italian legal system there is no special body competent to adjudicate labour disputes. The *'processo del lavoro'* or labour process is contained in the Civil Procedure Code (articles 409-441). The special procedure establishes that the competent court is the regular court in its capacity of *'giudice del lavoro'* (labour judge). In fact, in each civil court there is a section, with specific competence, applying the rules of the labour process.

[114] *Decreto ministeriale 29 novembre 1995, Approvazione del nuovo elenco delle imperfezioni e delle infermità che sono causa di non idoneità al servizio militare* [Ministerial Decree 29 November 1995, Approval of the list of imperfections and diseases causing the exemption from military service], (*Gazzetta Ufficiale no. 283 of 4 dicembre 1995*).
[115] Art. 3(4) of the Decree: *'Sono, comunque, fatte salve le disposizioni che prevedono accertamenti di idoneità al lavoro per quanto riguarda la necessità di una idoneità ad uno specifico lavoro (…)'*.
[116] Bill no. 4389 seems to make the point clear, since it explicitly and exclusively allows differences of treatment on ground of age in order to specifically protect teenagers, young and old workers, and workers in charge of the maintenance of other persons.

Therefore, the differences between the regular civil process and the labour process are procedural; nevertheless, since the labour process is not considered as an extraordinary process, but an ordinary civil process for labour disputes, it is subject to the general principles of the Civil Procedure Code concerning the civil process[117]. The labour process has substantially three characteristics: it is essentially oral, in the sense that, apart from the initial written acts, the procedure is based on oral discussion; it is rapid, since the terms established by the Code are generally abbreviated; it is concentrated, in the sense that there are only a few hearings and all the acts must be produced according to short and mandatory terms.

The labour judge is competent for all cases concerning the position of public and private employees, agents, stable co-workers, job applicants, with reference to all the aspects of the working relationship, from access to work to dismissal. The reform in the public sector provided by Legislative Decree no. 29/1993 has moved the competence of hearing cases concerning public employees from the administrative judge to the ordinary labour judge (with some exceptions).

11.5.2 Specific and/or general enforcement bodies

There is no specific or general enforcement body, which deals with discrimination based on sexual orientation. There are, on the contrary, specific bodies for sex discrimination and race discrimination.

In order to guarantee the effectiveness of an enforcement body, an independent authority should be created; alternatively, the competencies of the sex discrimination or race discrimination bodies, if opportunely revised, should be extended.

It must be noted that the Labour Inspectorate has general monitoring and investigation powers and, therefore, may have a role in cases of discrimination at the workplace: generally, the Inspectorate must inform the enforcement bodies about cases of discrimination or monitor on behalf of the bodies themselves. Considering its monitoring role, it is likely that it would report on violations of the decree, but it must be noted that it cannot be considered an enforcement body, and that the new framework has not provided any specific competences.

The enforcement body for sex discrimination is represented by the *'Consiglieri di parità'* [Equality Councillors] appointed at national, regional and provincial level by the Minister of Labour. The Legislative Decree 196/2000 has substantially modified the role of the Councillors because of the weakness of the framework established by the Act 125/1991 on positive actions. The Councillors who have an advisory and monitoring role, may propose best practices and positive actions, may engage in judicial actions or promote the conciliatory procedure on behalf of the complainant, or intervene in the action. Their powers are stronger in case of collective discrimination, having a conciliatory role and being able to directly engage in judicial actions. An advisory and monitoring body at national level, the *'Comitato nazionale per*

[117] Tarzia, 1999, 70.

l'attuazione dei principi di parità di trattamento ed uguaglianza di opportunità tra lavoratori e lavoratrici' [National Committee for the implementation of the principles of equal treatment and equal opportunities between men and women at the workplace] has also been created by the Act 125/1991.

According to article 7 of the Decree implementing the Directive 2000/43/EC, the *'Ufficio per la promozione della parità di trattamento e la rimozione delle discriminazioni fondate sulla razza e sull'origine etnica'* [Office for the promotion of equal treatment and the removal of discrimination on grounds of race and ethnic origin] will be created within the Presidency of the Council of Ministers – Department for Equal opportunities. This body which has an advisory, monitoring and information providing role, may propose studies and research, may investigate alleged cases of discrimination and may assist victims in judicial or administrative procedures. Doubts concerning the effective independence of this Office have been expressed by some authors[118].

11.5.3 Civil, penal, administrative, advisory and/or conciliatory procedures (art. 9(1) Directive)

Article 4(2) of the Decree establishes that the judicial remedies established by article 44(1) to 44(6), 44(8) and 44(11) of the Immigration Framework Act are extended to the new legal framework. The civil action against discrimination is filed at the Tribunal. The procedure is particularly quick, and the judge may omit any formality not strictly necessary for the hearing: if the complaint is accepted, the judge can order by an ordinance the end of the discriminatory behaviour and the removal of the consequences and effects of such behaviour. A special procedure is established by article 44(5) of the Act in case of urgency: the judicial remedies are immediately enforced by judicial decree,[119] and confirmed or modified by the ordinance issued during the first hearing.

According to article 4(3) of the Decree, the presumed victim may promote the conciliatory procedure established by the collective contracts; alternatively, she/he may promote the procedure established by article 410 of the Civil Procedure Code or, as far as the working activities within the public administration are concerned, by article 66 of the Legislative Decree 165/2001. The conciliatory procedure may be carried out by means provided by a trade union.

These judicial instruments seem to be effective in their characteristics[120], but the lack of implementation of the provisions on burden of proof and on legal standing for interest groups will seriously curtail their effectiveness.

When a criminal offence has been committed, or in the cases of breach of the rules concerning the protection of personal data, the ordinary criminal procedure established by the Criminal Procedure Code is applied.

[118] Favilli, 2002; Simoni, 2002, 9.
[119] Ordinances and decrees are both judicial orders but without the force of judicial decisions. Ordinances presuppose the completion of the hearing (*contraddittorio*), while decrees do not require an oral hearing to be granted but are judicial instructions limited to the final phase of the judicial procedure.
[120] Simoni, 2002, 9; Morozzo della Rocca, 2003.

11.5.4 Civil, penal and/or administrative sanctions (art. 17 Directive)

According to article 4(5) of the Decree, the judge orders the end of the discriminatory behaviour, conduct or act and the removal of its effects, also by means of a plan aiming at the removal of the identified discriminations. The basic idea of this remedy (also provided by remedies against sex discrimination) is consistent with article 15 of the Workers' Statute: every discriminatory act or behaviour is unlawful and consequently void. Therefore, the consequences of such acts and behaviour must be removed and the previous situation must be restored. According to some authors[121], even though this sanction may work in cases of dismissal (when the reinstatement must be ordered) or other acts, it might not be an effective remedy in circumstances of omissive behaviour (e.g. access to work); in those cases only compensatory damages might be granted[122]. In the last years courts have established that the worker may make a claim for the grant of the treatment refused because of the omissive discriminatory behaviour[123].

The victim of the discrimination may claim for the patrimonial and extra-patrimonial damage compensation, as established by article 4(5). According to article 44(8) of the Immigration Framework Act, criminal sanctions are applied if the decision of the court is not complied with.

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

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

As far as dismissals are concerned, discriminatory dismissals are governed by article 3 of Act 108/1990 on individual dismissals, which is in fact a consolidated version of article 4 of Act 604/1966, and of the amended version of article 15 of the Workers' Statute: discriminatory dismissal (also on grounds of sexual orientation) is always considered void. As established by article 3 of Act 108/1990 on individual dismissals with reference to article 15 of the Workers' Statute, as far as discriminatory dismissal is concerned, article 18 of the Workers' Statute, which establishes the reinstatement of the worker at the workplace, is always enforced.

Criminal sanctions are applied for the breaching the prohibition of investigating the opinions of workers (fine up to 500 euros or imprisonment up to one year) under article 38 of the Workers' Statute., In case of breaching the rules on personal data protection, and may be applied for the consequences of the harassment or mobbing.

In *any* case, the victim of the discriminatory behaviour may claim compensation for the damage.

[121] Carinci, De Luca Tamajo, Tosi, Treu, 1992, 198.
[122] Amoroso, Di Cerbo, Maresca, 2001, 462.
[123] *Corte di Cassazione* [Supreme Court], 28 March 1980, no. 2054.

I personally think that the introduction of an enforcement body and the involvement of such body in the judicial procedure, in the sense already provided by the revised article 4 of the Act 125/1991 on positive actions would be a better solution in order to effectively implement the principle of equal treatment.

11.5.5 Natural and legal persons to whom sanctions may be applied

The sanctions concerning the position of the worker (and the consequent compensatory damages or pecuniary indemnity) apply to the author of the discriminatory behaviour, conduct or act (natural or legal person, according to article 5(1) of the Decree).

On the contrary, criminal liability is personal: criminal sanctions (and the eventual consequent compensatory damages), therefore, apply to the author of the unlawful behaviour (who may be the employer as natural person, or the legal representative of the enterprise, in case of liability of the employer as a legal person), without excluding a colleague, a superior, or a client.

11.5.6 Awareness among law enforcers of sexual orientation issues

This is a sensitive issue, which involves a more global consideration. In Italy there is no specialised bench for sexual orientation in the judiciary or in other bodies. There is, on the contrary, a general and troubling lack of knowledge among lawyers of the legal issues concerning sexual orientation. There is no case law, as I said, and even the doctrine is, compared to other countries, definitely 'underdeveloped'.

11.5.7 Standing for interest groups (art. 9(2) Directive)

Article 5(1) establishes that 'the local representatives of the most representational national organisations on national level may engage in the procedure established by article 4 against the natural or legal person who is the author of the discriminatory act or behaviour, either in name and on behalf, or in support of the victim of the discrimination, with his or her delegation, released by public or private authentic deed, on pain of nullity' [124]. The definition *'rappresentanze locali delle organizzazioni nazionali maggiormente rappresentative a livello nazionale'*, a typical definition used in labour law, makes reference to national trade unions, as clearly stated by the explanatory note of the Decree.

According to article 5(2), the local representatives may engage in the judicial procedure in case of collective discrimination if the victims of the discrimination cannot be directly identified. This provision is more restrictive than established by article 4(6) of the Act 125/1991 on positive actions and by article 44(10) of the Immigration Framework Act, because in those two cases the local representatives (and, according to the Act 125/1991, the Equality Councillor)

[124] Art. 5(1) of the Decree: *'Le rappresentanze locali delle organizzazioni nazionali maggiormente rappresentative a livello nazionale, in forza di delega, rilasciata per atto pubblico o scrittura privata autenticata, a pena di nullità, sono legittimate ad agire ai sensi dell'articolo 4, in nome e per conto o a sostegno del soggetto passivo della discriminazione, contro la persona fisica o giuridica cui è riferibile il comportamento o l'atto discriminatorio'*.

may engage in the judicial procedure in case of collective discrimination *whether or not*[125] the victims of discrimination cannot be identified.

Therefore, while the limitation in Article 5(1) to trade unions clearly violates article 9(2) of the Directive, article 5(2) is not fully consistent with the antidiscriminatory provisions already existing in the Italian legal system[126]*.*

11.5.8 Burden of proof of discrimination (art. 10 Directive)

Article 4(4) of the Decree establishes that 'in order to prove the existence of the discriminatory behaviour, the complainant may show, also providing statistical evidence, factual elements that are grave, precise and non-contradictory, and that the judge evaluates in compliance with article 2729(1) of the Civil Code'[127].

In other words, *article 4(4) confirms the general rules on burden on proof, establishing that the complainant must prove the discrimination*. Indeed, the concept of *'presunzione grave, precisa e concordante'* [grave, precise and non-contradictory presumption] is the regular presumption, or *'presunzione semplice'* established by article 2729, which characterises the general rule concerning the evaluation of the proof. Moreover, in order to strengthen this concept, the lawmaker has explicitly established that the judge must evaluate the factual elements in compliance to article 2729, preventing from any possible extensive interpretation of the rule.

This is particularly evident if compared to the provision of article 4 of the Act 125/1991 on positive actions concerning sex discrimination, which introduces a partial shift of the burden of proof onto the respondent. Indeed article 4(6) indicates that the complainant must show factual elements suitable for clearly establishing the presumption of the existence of the discriminatory behaviour; the respondent has the burden to prove that the discrimination is not existing. The exact definition is *'presunzione precisa e concordante'*, that is to say precise and non-contradictory presumption, which is weaker and more favourable for the complainant than the grave, precise and non-contradictory presumption of article 2729 of the Civil Code.

Therefore, the new antidiscriminatory framework, like the regime of article 15 of the Workers' Statute, applies the general provision on the burden of proof established by article 2697 of the Civil Code:[128] [129] the burden of proof falls on the worker who is presumed to be victim of the discrimination; this is even more contradictory if considering that article 5 of the Act 604/1966 on individual dismissals establishes that, in case of dismissal due to just cause or justified reason, the burden of proof falls on the employer. The provisions on burden of

[125] In Italian 'anche quando', literally 'also when'.
[126] Article 4 of Bill no. 4389 aims at replacing article 5 with a new provision that establishes legal standing for organisations and associations and, in conformity with Act 125/1991, extends the field of intervention within the judicial procedure.
[127] Art. 4(4) of the Decree: *'Il ricorrente, al fine di dimostrare la sussistenza di un comportamento discriminatorio a proprio danno, può dedurre in giudizio, anche sulla base di dati statistici, elementi di fatto, in termini gravi, precisi e concordanti, che il giudice valuta ai sensi dell'articolo 2729, primo comma, del codice civile'*.
[128] According the unanimous interpretation of the judges, the complainant must prove the existence of the discriminatory reason; see *Corte di Cassazione* [Supreme Court], 19 November 1994, no. 9825 and *Corte di Cassazione*, 16 January 1996, no. 310.
[129] Nibi, 2003.

proof related to discriminatory acts and behaviours are among the most relevant reasons of the ineffectiveness of the judicial protection against discrimination at the workplace[130].

Notwithstanding the contrary opinions of two Parliamentary Commissions[131] and the requests of organisations and *Confederazione Generale Italiana del Lavoro*, the Government in its explanatory note affirms that a full shift of burden of proof is not in conformity with our legal system, and that the regime of presumptions would be enough to implement the Directive, being similar to what established by Act 125/1991. The real point is that article 4(4) is not similar to article 4 of Act 125/1991, as explained above.

Furthermore, the possibility for the complainant to prove the discriminatory behaviour by providing statistical evidence (that in any case the judge evaluates within the limits of article 2729(1) of the Civil Code) is considered ineffective to prove discrimination on ground of sexual orientation.

There is no doubt that article 4(4) violates article 10 of the Directive.

11.5.9 Burden of proof of sexual orientation

By reading the Decree it seems that this is not a relevant point. Indeed, what the complainant must in fact prove is that a discriminatory behaviour, act or conduct has been enacted on ground of (real or presumed) sexual orientation. The lack of the use of possessive pronouns confirms that the actual sexual orientation of the victim is not relevant. Furthermore, Recital 31 of the Directive is not mentioned in the provision of the Decree concerning the burden of proof.

11.5.10 Victimisation (art. 11 Directive)

Article 4(6) of the Decree states that 'while establishing the compensatory damages provided by article 4(5)[132], the judge must take into account that the discriminatory act or behaviour constitutes retaliation because of a previous judicial action or unjust reaction to a previous activity of the subject aimed at obtaining the observance of the principle of equal treatment'.

In other terms, in cases of retaliation against the victim of the discrimination or against other subjects, that is to say, for instance, witnesses, any workers who tried to protect the victim or who have been a victim of retaliation (the definition contained in article 4(6) is broad enough, and is therefore in compliance with the Directive), the judge may order the payment of a higher amount of money as extra-patrimonial damage compensation.

A part of the doctrine considers damage compensation (and in particular of extra-patrimonial damage) a form of effective and dissuasive sanction, as established by article 17 of the Directive[133]. According to the opinion of a

[130] Mazzotta, 1999, 418.
[131] Opinion of the II Permanent Commission (Justice) of the Senate of 13 May 2003. Act n. 217; remarks and proposals of the Commission for European Communities Affairs of the Senate of 14 May 2003 (217). In particular, the first document exclusively focuses on article 4(4) affirming that 'it seems that the shift of burden of proof, which was in the intentions of the delegating law-maker (the Parliament) and of the European law-maker, has not been realised.'
[132] The non-pecuniary damage.
[133] Morozzo della Rocca, 2003.

Parliamentary Commission[134] the mere increase of damages to be provided as compensation would not meet the requirements of article 11 of the Directive.

11.6 Reform of existing discriminatory laws and provisions

11.6.1 Abolition of discriminatory laws (art. 16(a) Directive)

Before the implementation of the Framework Directive, the Italian legal system did not make any reference to sexual orientation[135]. In my view, no law openly or implicitly discriminated on ground of sexual orientation. The main point for scholars, considering the absence of case law, was to establish whether labour law in general, and labour provisions concerning the prohibition of discrimination in particular, might already forbid to some extent discrimination based on sexual orientation: opinions where not unanimous. For these reasons, no law has been abolished following the introduction of Legislative Decree 216/2003.

11.6.2 Abolition of discriminatory administrative provisions (art. 16(a) Directive)

For the same reasons mentioned in the previous subparagraph, no administrative provision has been abolished following the introduction of Legislative Decree 216/2003.

11.6.3 Measures to ensure amendment or nullity of discriminatory provisions included in contracts, collective agreements, internal rules of undertakings, rules governing the independent occupations and professions, and rules governing workers' and employers' organisations (art. 16(b) Directive)

The Legislative Decree does not contain a norm establishing the nullity of discriminatory provisions included in contracts, agreements or other rules,[136] but such nullity follows from article 15 of the Workers' Statute. [See para. 11.5.4 above.]

Although no known collective agreement, contract or rule explicitly discriminates on the ground of sexual orientation, a general provision might have been useful since comprehensive monitoring of each and every contractual clause (other than collective agreements) is not realistic. Furthermore, no measure has been taken in order to ensure the extension to same-sex partners of the benefits granted to opposite-sex cohabitants, even if the lack of recognition may be considered a form of direct discrimination on the grounds of sexual orientation.[137] Even if there are no known differences in treatment provided by collective agreements for this purpose, the policies for the extension of

[134] Remarks and proposals of the Commission for European Communities Affairs of the Senate (n. 119 above).
[135] See 11.1.5
[136] Article 7 of Bill no. 4389 would add a new article to the Decree establishing the nullity of any provision of contracts, collective agreements, codes of conduct or deontological codes.
[137] See 11.3.3

employer's benefits to same-sex partners are still rare. Considering that, apparently, the entry into force of the Decree has not provoked any appreciable change in employers' policies, a high number of controversies might in principle arise.

11.6.4 Discriminatory laws and provisions still in force

Since no explicit, directly discriminatory law or provision was in force before the entry into force of the Decree, none had to be repealed. However, the leglislation on social security and pensions may be indirectly discriminatory, because of their use of the criterion marital status. Some collective agreements and labour contracts have indirectly discriminatory clauses: for instance, the addendum to the collective agreement of the railways sector, as well as the contract of the national railways company, establish that only married partners of the workers are entitled to benefits, such as free tickets. [See also para. 11.6.3.]

11.7 Concluding remarks

The Directive represents an innovative and essential legislative instrument in order to induce the Italian lawmaker to intervene in a field which has been systematically excluded from the legal analysis and legislative process. I must recognise the importance of the new anti-discriminatory framework, which introduces an explicit protection against discrimination at the workplace on ground of sexual orientation in our legal system.

Even if it is clear that the new framework does not create differences or promote discrimination, as argued by some commentators, the Directive has not been fully implemented and some provisions of the Decree are incompatible with it. The Decree introduces principles and remedies that, in theory, could guarantee an effective protection against discrimination: unfortunately, the restrictive approach in many aspects and the lack of implementation of some provisions will seriously affect the effectiveness of the whole framework, and particularly the efficacy of the judicial remedies and the awareness of workers.

The following provisions of the Decree should be revised since, in my opinion, they do not meet the requirement of the Directive:

- the provision on the burden of proof (article 4(4) of the Decree) (par. 11.5.8);
- the provision on legal standing for interest groups (article 5 of the Decree) (par. 11.5.7);
- the provision on genuine occupational requirements of article 3(3) and 3(5) of the Decree (as indicated in par. 11.4.4 and 11.4.5) and, in particular, the specific rules concerning differences in treatment based on sexual orientation with reference to armed forces and the police, prison or emergency services (par. 11.4.7);
- the provision on occupational requirements of article 10 of Legislative Decree 276/2003 (see par. 11.4.1);

- the provision of article 3(4) of the Decree on work suitability tests (par. 11.4.7);
- the provision of article 3(6) concerning the exception regarding conviction for offences related to sexual freedom of minors or child pornography (par. 11.4.1).

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