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OBJECT: Some remarks about lack of proper implementation of Directives 2000/43 and 2000/78 in Italy.

In Italy, anti-discrimination provisions are included in both 1998 Immigration Act (d.lgs. n. 286/98) and in the 2003 Race Directive Implementation Act (d.lgs. n. 215/2003). The overlapping of the two legal acts raises issues of interpretation, especially when nationality discrimination is at stake.
Indeed, nationality discrimination is covered by anti-discrimination provisions in 1998 Immigration Act whereas 2003 Race Directive Implementation Act expressly does not cover difference of treatment based on nationality. The issue is mainly relevant in relation to legal standing of associations and organizations in judicial proceedings concerning cases of collective forms of discrimination.
The 1998 Immigration Act foresees a legal standing only in favour of trade Union organizations in alleged cases of discrimination in the field of employment only, whereas the 2003 Race Directive Implementation Act provides associations enrolled in a special registry for legal standing in judicial proceedings on behalf of the victims or directly in case of collective discrimination in all the fields covered by 2000/43 Directive.
The judicial case-law has interpreted the overlapping of anti-discrimination provisions in two opposing and conflicting way:

a) by interpreting the provisions in combination or b) by interpreting the provisions in parallel.

The first manner of interpreting the provisions have been adopted in the large majority of judicial cases. According to this interpretation, a collective and illegitimate discrimination based on nationality (discrimination against foreigners in general) is also a form of indirect discrimination

based on racial and ethnic grounds, since it affects mainly 'ethnic groups' that are not 'autochthon' in Italian society, taking into account that in Italian citizenship law, acquisition of Italian citizenship is still largely based on 'jus sanguinis' rule and 'jus soli' rule has only a marginal role.
Moreover, in some instances, judicial case-law has made reference to the implementation of 2003 Directive Implementation Act, despite the exception of the nationality clause, when discrimination based on nationality could be interpreted as a "proxy" for "racial discrimination", because it could be understood as an expression of xenophobic attitudes and of prejudicial hostility against foreigners as such.
The second manner of interpreting the provisions have been adopted only by a minority of judicial case law. According to this interpretation, anti-discrimination provisions in Immigration Act are separated and distinct from those of the Race Directive Implementation Act and accordingly the specific rules for legal standing of associations foreseeing by the latter cannot be used in case when nationality is the prohibited ground for discrimination.

The second aspect of the implementation of the Race and Employment Directives which is still not very satisfying in the overall Italian case-law is related to the provision according to which infringements of the anti-discrimination laws must be met with effective, proportionate and dissuasive sanctions, which may include compensation being paid to the victim. The 2003 Race and Employment Directives implementation Acts (d.lgs. n. 215/2003 e 216/2003) have foreseen the right for the victims of discrimination to be compensated for patrimonial and non- patrimonial damages. The Supreme Court of Cassation has recognized the legitimacy of the compensation for non-patrimonial damages in case of infringement of a fundamental right. Accordingly, legal framework certainly allows the judge to issue sanction in judicial remedies against discrimination also in terms of ordering compensation awards for non -patrimonial damaged suffered by the victim to be calculate in equitative form and taking into account the dissuasive effect foreseen by the Directives. However, only in a small minority of judicial proceedings, the judges have ordered compensation awards in form of non-patrimonial damages for victims of discrimination and in most of the cases financial sanctions have been modest in value, so to raise the issue whether they can comply with the requisite of dissuasive effect required by the Directives (as a positive exception to this general trend, we can mention the following cases: Court of Catania, 2 July 2008, in which the Judge ordered a compensation of the amount of 100.000 euro for the claimant whose driving license was revoked because his homosexuality - revealed during examinations and interviews for military conscription - was considered as equivalent to a psychological disorder making him unfit to drive a vehicle, so substantiating a discrimination based on sexual orientation; Court of Brescia, 31 January 2012, where the Judge ordered non-patrimonial compensation for the amount of 2.500 euro in favour of a Trade Union militant who was racially harassed by an insulting and defamatory poster posted on a public space because of her engagement in favour of the immigrants rights within her local community; however, judges even recognizing the infringement of prohibition of discrimination, usually do not order any compensation in favour of the victim for non-patrimonial damage or order it for a very symbolic value not susceptible to have a real dissuasive effect(for example, Court of Padua 19 May 2005 in a case involving a coffeshop owner practising higher prices for foreign customers in order to disincentive them to attend the place, the judge ordered compensation for victims of racial discrimination for the amount of 100 euro only for each of the plaintiff).

The third aspect related to the implementation of 'Race Directive" in Italy is the reluctance of the judiciary to fully apply its provisions in relation to the issue of protection of Roma and Sinti against racial discrimination. The case of the 'emergency decree' is a good example. On 16 November 2011, more than three years after Italian Government declared a State of Emergency for the presence of nomadic settlements in some regions, the Italian Council of State struck down the

Nomad Emergency Decree and its implementing orders (collectively, the "Nomad Emergency Measures"). The court found the Emergency Measures unlawful because they were not premised upon a genuine emergency connected to the presence of Romani and Sinti people. The court further found that some of the regulations restricting access to and movement within the camps were disproportionate and illegitimate and also unlawful because they infringed fundamental rights. However, the Council of State failed to enforce race antidiscrimination law and did not find that the Emergency Measures were directly or indirectly racially discriminatory with the reasoning that the measures were adopted in relation to informal settlements, regardless of the ethnic background of the people living there, but without considering that 'de facto' almost all people living in these informal settlements were belonging to Roma ethnic groups. [1] In another case, the Court of Roma, in first instance of an interim proceeding, considered that the attitude and behaviour of the Italian authorities to move and install large number of people belonging to Roma ethnic group in a large settlement (camp) in the remote outskirts of the capital of Italy, so hindering the possibility for their effective social insertion, resulted in a racial discrimination in violation of Directive 2000/43 (Court of Rome, decision 8 August 2012)[2] .However, one month later, another panel of the same Court allowed the appeal by the Italian authorities and quashed the previous decision. (Court of Rome, decision 13 September 2013) The case is still pending before the Court of Rome for the decision on the merit.

Concerning discrimination on the ground of disability, the main issue at stake is the lack of fulfilment by Italian legal framework of its obligation to fully implement Article 5 of Council Directive 2000/78/EC of 27 November 2000 imposing for all the employers a general obligation to make reasonable accommodation to enable all persons with a disability to have access to, to participate in, or to advance in employment, or to undergo training. When adopting the Decree on the implementation of Directive 2000/78, Italian lawmaker did not amend law n. 68/99 which foresees a special protection only for disabled person with an inability to work amounting to at least 46% or 34% for disability resulting from accident at work, and these obligations are not enforceable to all employers, but only to those with more than 50 employees. Accordingly, on 20 Junw 2011 European Commission brought an action against Republic of Italy before the European Court of Justice (Case C-312/11). Recently a case was brought before the Labour Court of Bologna after the refusal opposed by a Public District Hospital Unit to hire as a nurse a person despite the act that he had won a public recruitment competition, after that medical examination had shown that the candidate was affected by a form of disability preventing him to perform duty-shifts at night. The employer did not make any attempt by to envisage appropriate measures to adapt the workplace to the disability suffered by the selected candidate for recruitment, for example adapting patterns of working time and the distribution of tasks among other collegues. A judicial decision about the case is expected for the coming months.

Concerning age discrimination, the act of transposition of Directive 2000/78 into internal legal framework (d.lgs. 216/2003), simply refers to the wording of the directive without adapting it to the internal legislation and without reviewing the already existing internal labour law provisions in order to verify their compatibility with the obligations resulting from the directive.

Some rules such as the 'entry contract' (*'contratto di inserimento'*) for people aged 18 to 29, which allows collective agreements to place the worker in inferior contractual conditions than generally recognised for the same duties, seem apparently in conflict with the European Court of Justice's

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[1] See also, Open Society Foundations, *Evaluating the Implementation of the Race Equality Directive: Targeted Questions*, Policy Briefing, May 2012, available at: http://www.opensocietyfoundations.org/sites/default/files/europe-discrimination-20120501.pdf

[2] Available at the link: http://www.asgi.it/home_asgi.php?n=2331&l=it

decision in *Mangold*. Event more problematic in respect to the conclusions held by European Court of Justice in *Mangold* case are the provisions allowing *job-on-call* for people aged under 24 and over 55 (art. 34 d.lgs. 276/2003). Also the fixing of a maximum age for recruitment for certain positions in public employment (as all the positions within the Central Bank of Italy and for diplomatic career within the Ministry for Foreign Affairs) may raise doubts about their compatibility with obligations for prohibition of age discrimination arising from European Directive 2000/78. However, these rules have not yet been tested in the internal case-law.

Report drafted by Walter Citti, legal consultant in anti-discrimination law with ASGI (Italian Law Association for Immigration Studies).

The Italian Law Association for Immigration Studies originated in 1990 and gathers lawyers, university professors, legal personnel and jurists having a specific professional interest in juridical issues linked to immigration.

ASGI aims:
a) to promote information, documentation and research on juridical problems relating to immigration, to the foreigner's condition (as well as that of the person having no nationality, and the refugee), to Italian legal norms involving citizenship;
b) to promote the same activities with reference to policies aimed at harmonizing norms regulating immigration and asylum, on a European level;
c) to study and formulate proposals, and constitute a political pressure group in the prospect of the reform of the Italian legislation concerning immigration, political asylum and citizenship;
d) to contribute to the formation and professional updating of public and private workers in the sector of immigration, by way of specific courses, seminars, conferences;
e) to promote the cooperation and the creation of informational and legal consultancy services involving people, agencies, national and local associations operating in the immigration sector, by way of specific agreements;
f) to promote researches, meetings, conferences, publications and other editorial initiatives according to the above mentioned goals