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# Country report

## Gender equality



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# **Country report**

## **Gender equality**

How are EU rules transposed into  
national law?

### **Italy**

Simonetta Renga

Reporting period 1 July 2015 – 1 April 2016

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## **1. Introduction**

### **1.1 Basic structure of the national legal system**

The structure of the national legal system for guaranteeing equal treatment in Italy is mainly based on constitutional and statutory law. Statutory law can take the form of Acts of Parliament or Governmental Decrees; governmental decrees are issued following an act of delegation sent by Parliament to the Government (a legislative decree). The Constitution ensures the fundamental rights of the person and sets limits on property rights and on private economic initiatives in relation to fundamental rights and the public interest. Civil actions are based on the fundamental rights contained in Article 2 of the Constitution (tort law, Article 2059 c.c.) in all cases of non-economic loss (pain and suffering). The principle of equality provided in Article 3 of the Constitution is generally not relied upon in civil actions although, theoretically, it could indeed be relied upon; however, reference to this principle of equality is quite often made by the Constitutional Court to verify the constitutional legitimacy of legislation.

EU equality directives are normally implemented by legislative decrees. Such a Decree quite often repeats word for word the text of the Directive. The verbatim reproduction of directives in our system can be regarded as a bad practice: indeed, this does not ensure the necessary coordination with other existing provisions and does not promote knowledge of European legislation.

In the field of gender equality case law plays only a marginal role, which could be both a cause and an effect of the merely formal implementation of directives. No recent and innovative case law can be recorded as regards equal treatment. There are only a few cases that have found that a dismissal on the ground of maternity was discriminatory. The majority of cases deal with maternity issues from the point of view of protection rights. Some cases also deal with the issue of sexual harassment, and particularly with the right of the victim to have non-patrimonial damages refunded.

As regards local legislation, Article 117 of the Constitution provides for the boundary between the legislative powers of the State and those of the regions. The State has exclusive competence in the 'determination of the basic standards of welfare relating to those civil and social rights that must be guaranteed in the entire national territory;' Article 117 then states: '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 office.' The regions can thus legislate on substantive equality and gender equality.

### **1.2 List of main legislation transposing and implementing Directives**

- Decree No. 151 of 14 September 2015 on the Simplification of bureaucracy and other provisions, OJ No. 221 of 23 September 2015;
- Decree No. 80 of 15 June 2015 on the Protection of motherhood and fatherhood, the promotion of reconciliation measures, protection against gender violence, OJ No. 144 of 24 June 2015;
- Act No. 65/2014 on Amendments to Act No. 18/79 on the election of Italian members of the European Parliament, as regards gender balance and transitory provisions for the 2014 elections, OJ No. 95 of 24 April 2014;
- Decree No. 149/2013 on the Revocation of direct public financing of parties and on the regulations of voluntary and indirect forms of financing, implemented by Act No. 13/2014, OJ No. 47 of 26 February 2014;
- Decree No. 76/2013 on Urgent regulations on occupation, social cohesion, VAT and other financial measures, implemented by Act No. 99/2013, OJ No. 150 of 22 August 2013;



- Act No. 228/2012, Budgeting regulations, OJ No. 302 of 29 December 2012, Ordinary Supplement No. 212;
- Act No. 215/2012 on the Promotion of Gender Balance in Local Government Bodies and on the Promotion of Equal Opportunities in the Composition of Public Competition Commissions in the Public Sector, OJ No. 288 of 11 December 2012;
- Act No. 92/2012, Reform of the Labour Market in a Perspective of Growth, OJ – Ordinary Supplement No. 136 of 3 July 2012;
- Act No. 214/2011, Growth, Equity and Consolidation of Public Spending, OJ No. 284, Supplement No. 251 of 6 December 2011;
- Act No. 120/2011, Appointment of Managing Directors and Auditors of Listed Companies and State Subsidiary Companies, OJ No.174 of 28 July 2011;
- Decree No. 5/2010, Implementation of Directive 2006/54/EC, OJ No. 29 of 5 February 2010;
- Act No. 101/2008, Implementation in an Act, with modifications; Decree No. 59/2008 on the Implementation of EU Obligations and Court of Justice Decisions, published in OJ No. 132 of 7 June 2008;
- Decree No. 196/2007, Implementation of Directive 2004/113/EC Implementing the Principle of Equal Treatment between Men and Women in the Access to and Supply of Goods and Services, OJ No. 261 of 9 November 2007;
- Decree No. 116/2007, Regulations of the Commission for Equal Opportunities between Men and Women (following Article 29 of Decree No. 223/2006), as implemented by Act No. 248/2006, OJ No. 177 of 1 August 2007;
- Decree No. 198/2006, Code of Equal Opportunities between Men and Women under Article 6 of Decree No. 246/2006, OJ No. 125 of 31 May 2006;
- Decree No. 145/2005, implementing EU Directive 2002/73/EC amending Council Directive 76/207/EEC on the Implementation of the Principle of Equal Treatment for Men and Women as Regards Access to Employment, Vocational Training, Promotion and working conditions, OJ No. 173 of 27 July 2005;
- Article 57 of Decree No. 165/2001 on Work relationships in the Public Sector, OJ No. 106 (S.O. No. 112) of 9 May 2001;
- Decree No. 151/2001 on Sustaining Motherhood and Fatherhood, OJ No. 96 of 26 April 2001;
- Act No. 53/2000, on Sustaining Motherhood and Fatherhood, Time for Care and for Vocational Training, and Coordinating Hours of the Public Services of Towns, OJ No. 60 of 13 March 2000;
- Decree No. 645/1996, implementing EU Directive 92/85/EEC on the Introduction of Measures to Encourage Improvements in the Safety and Health at Work of Pregnant Workers and Workers Who Have Recently Given Birth or are Breastfeeding, OJ No. 299 of 21 December 1996.

## **2. General legal framework**

### **2.1 Constitution**

#### 2.1.1 Does your national Constitution prohibit sex discrimination?

Article 3 of the 1948 Italian Constitution provides the general framework for protection against discrimination. It states: 'All citizens are equal and have equal dignity under the law, without distinctions on grounds of sex, race, language, religion, political opinions and personal or social conditions.' The second paragraph of Article 3 confirms the principle of substantive equality, according to which the State is called upon to remove social and economic obstacles which limit the freedom and equality of citizens, prevent the full development of the human being and the effective participation of all the workers in the political, economic and social organization of the country. Paragraph 2 of Article 3 provides a constitutional basis for different treatment aimed at the pursuit of equal opportunities and positive actions.

#### 2.1.2 Does the Constitution contain other Articles pertaining to equality between men and women?

Article 37, Paragraph 1 of the Constitution states that a female worker shall have the same rights and, in the case of equal work, the same remuneration as a male worker. Article 37 also lays down certain working conditions for women such as allowing them to fulfil their essential family functions and granting adequate protection to the mother and the child.

Article 51 of the Constitution lays down the principle of equality between men and women as regards eligibility for public office and for elected positions. It also provides that the Republic shall promote equal opportunities for men and women.

Article 117 states 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 office.'

#### 2.1.3 Can the Article(s) mentioned in the two previous questions be invoked in horizontal relations (between private parties)?

Articles of the Constitution are directly applicable. According to many authors, they can also be invoked in horizontal relations (between private parties); however, this has never been fully accepted by the Courts and therefore they are mainly used in constitutional court cases to assess whether the ordinary legislation complies with the principles of equality. In particular, Article 3 has been extensively used to address infringements of the principle of equality by ordinary legislation.

### **2.2 Equal treatment legislation**

#### 2.2.1 Does your country have specific equal treatment legislation?

Several legislative interventions during the last 20 years have resulted in, on the whole, an effective implementation of EU directives on gender discrimination in Italy and sometimes domestic legislation has gone even further than EU law.

Decree No. 198/2006, a consolidating act called the Code of Equal Opportunities between Men and Women, contains all anti-discriminatory provisions relating to gender which were issued to implement EU directives or which were already in conformity therewith. It combined all the provisions on gender discrimination and equal opportunities in all civil, political, social and economic fields, including working relationships. The Code was then

amended on several occasions and also by Decree No. 5 of 25 January 2010 which transposed Recast Directive 2006/54/EC. Another important piece of legislation in this field is Act No. 53/2000 (and the subsequent amendments) on Sustaining Motherhood and Fatherhood, Time for Care and for Vocational Training, and Coordination of Hours in the Town's Public Services.

These provisions consider that direct discrimination can amount to, among other things, less favourable treatment based on a worker's rejection of or submission to harassment or sexual harassment, while less favourable treatment related to pregnancy, motherhood or fatherhood, also adoptive, as well as to the respective rights emanating therefrom is considered to be direct gender discrimination. The same holds true for an instruction to discriminate. Positive actions are not merely permitted but are also promoted and financed by the allocation of a specific Fund, both in the private and in the public sector.

A quota system has been introduced by Act No. 120 of 12 July 2011 for the appointment of managing directors and auditors of listed companies and state subsidiary companies, where each sex cannot be represented in a proportion lower than one third.

Furthermore, Act No. 215 of 23 November 2012, Act No. 13/2014 and Act No. 65/2014 introduced new regulations aimed at achieving gender equality in politics and in hiring procedures in public administration.

Other grounds of discrimination such as politics, religion, race, language or sex are covered by Art. 15 of the Workers' Statute. Art. 2 of Decree No. 215 of 9 July 2003,<sup>1</sup> which implements EU Directive 43/2000, provides for a prohibition on discrimination on the ground of racial or ethnic origin. Art. 2 of Decree No. 216 of 9 July 2003,<sup>2</sup> implementing EU Directive 78/2000, provides for a prohibition on discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation.

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<sup>1</sup> Published in OJ No. 186 of 12 August 2003, <http://www.normattiva.it/atto/caricaDettaglioAtto?atto.dataPubblicazioneGazzetta=2003-08-12&atto.codiceRedazionale=003G0239&currentPage=1>, accessed 6 November 2015.

<sup>2</sup> Published in OJ No. 187 of 13 August 2003, <http://www.normattiva.it/atto/caricaDettaglioAtto?atto.dataPubblicazioneGazzetta=2003-08-13&atto.codiceRedazionale=003G0240&currentPage=1>, accessed 6 November 2015.

### **3. Implementation of central concepts**

#### **3.1 Sex/gender/transgender**

3.1.1 Are the terms gender/sex defined in your national legislation?

The terms gender/sex are not defined in our national legislation and neither does the Italian legislation on equal opportunities expressly refer to gender reassignment, although the latter can probably be included in the wider concept of sex discrimination and in the concept of 'sexual orientation.'

3.1.2 Is discrimination due to gender reassignment explicitly prohibited in your national legislation?

Act No. 164 of 1982 allows gender reassignment for transgender persons. Decree No. 216/2003 implementing Directive 78/2000/EC expressly included sexual orientation, but not gender reassignment, among the grounds of discrimination. Indeed, there are many provisions that prohibit direct and indirect discrimination related to sexual orientation. Gender reassignment, therefore, should be included among the grounds of discrimination. We have seen no case law involving gender reassignment.

#### **3.2 Direct sex discrimination**

3.2.1 Is direct sex discrimination explicitly prohibited in national legislation?

Direct sex discrimination is explicitly prohibited by Articles 25 to 35 of Decree No. 198/2006 as regards equal pay and equal treatment at work, statutory and occupational pensions, access to public employment, and equal treatment in a military career. Less favourable treatment based on a worker's rejection of or submission to harassment or sexual harassment shall be considered to be discrimination. The same holds true for an instruction to discriminate.

Direct discrimination is defined by Article 25 of Decree No. 198/2006. Direct discrimination occurs when 'one person is treated less favourably than another is, has been or would be treated in a comparable situation.' The notion of direct discrimination literally reflects the respective concepts determined by the Recast Directive.

The role of the concept of direct discrimination provided by legislation is crucial for the assessment of gender discrimination. The notion of direct discrimination is regarded as a relative concept which needs a comparator in order to be assessed. The symmetrical nature of the notion of direct discrimination, which addresses both women and men, and the irrelevance of the discriminatory intention, as the notion is based on the disparate impact of the treatment, have also been recognised by case law.

3.2.2 Are pregnancy and maternity discrimination explicitly prohibited in legislation as forms of direct sex discrimination?

Less favourable treatment related to marriage, pregnancy, motherhood or fatherhood, also adoptive, as well as relating to the respective rights emanating therefrom, is considered to be direct gender discrimination (Articles 25 of Decree No. 198/2006). The provision complies with EU legislation.

3.2.3 Are there specific difficulties in your country in applying the concept of direct sex discrimination?

None.

### **3.3 Indirect sex discrimination**

#### 3.3.1 Is indirect sex discrimination explicitly prohibited in national legislation?

Indirect sex discrimination is explicitly prohibited by Articles 25 to 35 of Decree No. 198/2006 as regards equal pay and equal treatment at work, statutory and occupational pensions, access to public employment, and equal treatment in a military career.

Indirect discrimination is defined by Article 25 of Decree No. 198/2006. Indirect discrimination is 'where an apparently neutral provision, criterion or practice would put workers of one sex at a particular disadvantage compared with workers of the other sex, unless that provision, criterion or practice concern essential requirements for the job objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary.'

The concept fulfils the requirements of the Recast Directive and, as regards the justification clauses, the notion of indirect discrimination is stricter than EU law: in fact, neutral criteria which result in a disparate impact are only legitimate if they are essential requirements for the job.

#### 3.3.2 Is statistical evidence used in your country in order to establish a presumption of indirect sex discrimination?

As regards the use of quantitative/statistical data, Decree No. 198/2006 goes further than EU law as Article 46 requires companies with more than 100 employees to draw up reports every two years (and to deliver them to the company union representatives and to the Regional Equality Advisers) on the workers' situation (male and female) as regards, e.g., recruitment, professional training, career opportunities, remuneration, dismissals and retirement.

#### 3.3.3 Is in your view the objective justification test applied correctly by national courts?

With respect to indirect discrimination, case law takes into consideration the apparent neutrality of the criterion under examination, the particular disadvantage for one sex as compared with persons of the other sex and the absence of an objective justification. However, litigation concerning gender discrimination remains scarce in our country.

#### 3.3.4 Are there specific difficulties in your country in applying the concept of indirect sex discrimination?

None.

### **3.4 Multiple discrimination and intersectional discrimination**

#### 3.4.1 Is multiple discrimination – i.e. discrimination based on two or more grounds simultaneously – and/or intersectional discrimination – i.e. discrimination resulting from the interaction of grounds of discrimination which interact to produce a new and different type of discrimination – explicitly addressed in national legislation?

Multiple discrimination has been included in the Italian legislation in the extremely simplified form of double discrimination. The only references thereto are in legislative Decree nos. 215 and 216 of 2003, transposing Directives 43/2000 and 78/2000, and in the corresponding act of delegation. In particular, Article 1 of Decree No. 215/2003 provides that the implementation of equal treatment, irrespective of race and ethnic origin, must take place 'also in a perspective that takes into account the different impact

that the same forms of discrimination can have on women and men, and the existence of forms of racism with a cultural and religious character;’ this formula is repeated in Article 7 of the Decree, where the tasks of the National Office against Racial Discrimination (UNAR) are defined. In this respect, the Decree fulfils the guideline provided by Delegation Act No. 39/2002, which in Article 29 requires that the implementation of Directive 43/2000 should take into account the existence of discrimination on the double ground of gender and race and ethnic origin. A similar concept of multiple discrimination is provided by Article 1 of Decree No. 216/2003, which states that the implementation of equal treatment, irrespective of religion or belief, disability, age or sexual orientation, as regards employment and occupation must be carried out in a ‘perspective that also takes into account the different impact that the same forms of discrimination can have on women and men.’ Multiple discrimination, therefore, is not properly defined and it is perceived by the legislator only as a sum of the grounds of gender and other discriminatory factors.

#### 3.4.2 Is there any case law that addresses multiple discrimination and/or intersectional discrimination (where gender is one of the grounds at stake)?

There is a group of cases in which gender could be recorded in combination with another ground of discrimination. These are cases where reaching the pensionable age or the possibility to rely on early retirement is used as a criterion for redundancy. In general, a person can work after reaching the pensionable age. In our system, the pensionable age, and consequently the age of early retirement, is lower for women than it is for men, although women can choose to keep on working until the age provided for men (this will be so until 2018, by which time the pensionable age will be equalized). This means that the criterion of reaching the age of retirement, irrespective of the lower pensionable age for women, is discriminatory both on the ground of gender and age, as it causes women to be dismissed at a younger age and earlier than men, despite the fact that women can choose to keep on working until the retirement age provided for men. Nevertheless, the case law that deals with this issue, which is very limited, is absolutely unaware of the hypothesis of multiple discrimination. Therefore, there are cases where the criterion of reaching retirement is regarded as discriminatory exclusively on grounds of age, the ground of gender being ignored (*Tribunale Milano* 27/4/2005) and cases where the existence of gender discrimination is denied and the age ground is not taken into consideration at all either (*Cassazione* No. 9866/2007; *Cassazione* No. 20455/2006; *Tribunale Genova* 30/9/1997).

Another group of cases concerns non-EU disabled residents which do not qualify for social protection benefits and advantages: the grounds of discrimination are those of nationality and disability. Here, indeed, the intervention of the Constitutional Court was crucial in order to recognize the hypothesis of double discrimination. Thus, in one of these decisions the Court granted the mobility allowance to non-EU residents as well (case No. 306/2008): the Court recognised the double grounds of nationality and disability by referring to Articles 3 (principle of equality), 10 (status of foreign persons), 32 (health rights) and 38 (social protection) of the Constitution. Also, the Constitutional Court gave non-EU disabled residents the right to use public transport free of charge on the basis of the equality principle and of Article 32 of the Constitution (health rights), thus recognising once more the two discriminatory grounds of nationality and disability (case No. 432/2005). In 1998, the Court had already acknowledged the relevance of the grounds of nationality and disability in an interpretative decision (case No. 454), when it gave non-EU disabled residents certain advantages in employment procedures (see also case No. 324/2006). Although various grounds were recognised, this has not resulted in a combined effect of such grounds acknowledged by the courts. In particular, the occurrence of more than one ground has not resulted in higher sanctions or awards of damages, mainly because double grounds were relevant in cases decided by the Constitutional Court, which is competent only regarding the legitimacy of legislation with respect to the Constitution and cannot evaluate the merits of each single case.

### 3.5 Positive action

#### 3.5.1 Is positive action explicitly allowed in national legislation?

Under Article 42 of the Code of Equal Opportunities (Decree No. 198/2006), positive actions are defined as measures designed to encourage female employment and to achieve substantial equality between men and women at work by removing obstacles which in practice prevent the achievement of equal opportunities; in particular, positive actions shall aim at eliminating disparities which affect women in education and professional training, in professional choices (both as regards labour relationships and self-employment), in working conditions and organization, in activities, professional sectors and levels where they are underrepresented, and in the division of family and professional responsibilities between the two sexes. They go beyond formal equality as they can include preferential measures for workers belonging to the disadvantaged gender, consistent with Article 3 of the Constitution and with the principle of substantive equality. Positive actions are voluntary measures. According to Article 43 of the Code, positive actions may be promoted by different subjects, both public and private alike. Employers, professional training centres, associations, and trade unions promoting positive actions can also apply for public funding, which is paid according to the available funds; positive actions organized by employers and the most representative trade unions and positive actions geared towards professional training have preferential access to public funding (Articles 44 and 45 of the Code).

Also in the field of entrepreneurial activity positive actions are provided as preferential measures meant to favour access to bank credits and public funds (Articles 52 to 55). Before the implementation of Directive 2010/41/EU the Code of Equal Opportunities already provided for positive actions in the field of entrepreneurial activity. In fact, the Code implements the principle of substantial equality, providing for the promotion of female self-employment through preferential measures meant to favour access to bank credits and public funds, to improve professional training and qualifications for women in this field, and to promote the presence of businesses owned or managed by a high percentage of women in the most innovative sections of different production sectors. These kinds of measures can be very helpful, since possible problems of effectiveness are mainly linked to insufficient funds, to bureaucratic aspects such as the complexity of the applications and timing in the estimation and payment for the projects. A study by the Union of Chambers of Commerce has highlighted that positive action plans implemented during the last few years have had a positive effect on the existence of start-up enterprises, while improvements of the enterprises' performances were not homogeneous and their real success seemed to be quite random.<sup>3</sup> In any case, the expectations for these projects are rather high as the applications definitively exceed the amount of funds allocated.

As regards the public sector, public employers are also entitled to request financing for positive action plans and shall draw up three-year positive action plans aimed at achieving a better balance between the sexes in jobs and professions where women are underrepresented (that is, they make up less than one third of the total) (Article 48). Moreover, with this aim, in hiring procedures and in promotion when there are male and female applicants with the same level and qualifications and the male is chosen, the Civil Service has to provide an express and suitable reason for this choice.

Article 9 of Act No. 53/2000 provides for other kinds of positive action, which are symmetrical, that is they can address both women and men; that is the allocation of part of the Fund for Family Policies to undertakings which enforce collective agreements on positive action aimed at: allowing parents to adopt a flexible working time schedule,

<sup>3</sup> Second national report on Female Entrepreneurship, 2011, available at: <http://www.unioncamere.gov.it/P42A532C311S144/II-Rapporto-nazionale-sull-imprenditoria-femminile.htm>, accessed 2 July 2015.

through part-time, teleworking, home work, flexitime and other measures; reintroducing parents to the workplace after a period of leave linked to reconciliation reasons; and promoting innovative services for the reconciliation of private and professional life. Positive actions have to address parents with minor children; priority is given to parents with children under 12 (or under 15 in the case of temporary custody or adoption) and to parents with disabled children. Funds are accessible to private employers and some public bodies, such as Local Health Units and Hospitals. Moreover, the Family Fund can also support the promotion of, the professional advice on, the planning and the monitoring of the measures to be carried out also through territorial networks. The performance of these tasks by the Fund could be useful as far as the quality of the projects is concerned, but it could also conceal the risk of wasting resources.

Positive actions are also used as sanctions against discrimination in the complaint model of the Code of Equal Opportunities. Thus equality bodies can require the implementation of positive action plans by the author of collective discrimination during a conciliation procedure or this can also be ordered by a judge (Article 37 of the Code of Equal Opportunities).

The definition of positive action provided by our legislation complies with the EU definition in Article 157 TFEU (4).

### 3.5.2 Are there specific difficulties in your country in relation to positive action?

We do not have any specific difficulties in relation to positive action, apart from the scarcity of public funding.

### 3.5.3 Has your country adopted measures that aim to improve the gender balance in company boards?

A quota system has been introduced by Act No. 120 of 12 July 2011 for the appointment of managing directors and auditors of listed companies and state subsidiary companies, where each sex cannot be represented in a proportion lower than one third. This rule shall be enforced for three periods of tenure for directors and auditors. The sanction procedure in the event of an infringement of the rule is very gradual and only after two warnings by the *Consob* (the National Securities and Exchange Commission), which is also charged with monitoring compliance with the gender balance principle, can the penalty of the dissolution of the Company Board be applied. As regards state subsidiary companies not quoted on the regulated market, the same principles are enforceable (Decree No. 251/2012).

### 3.5.4 Has your country adopted other positive action measures to improve the gender balance in some fields, e.g. in political candidate lists or political bodies?

Act No. 215 of 23 November 2012 introduced new regulations aimed at achieving gender equality in politics and in hiring procedures in public administration. One of the main interventions concerns the statutes of municipalities and provinces, which must now provide regulations to ensure (and not only to 'promote' as under previous legislation) the representation of both sexes in government bodies and in other corporate bodies (not elective ones) of the municipality or the province or in businesses and institutions depending thereon. Moreover, it is provided that the regulations governing the election of municipality and provincial councils and governing the appointment of the respective local government bodies must also respect the principle of gender equality and guarantee the representation of both sexes. In particular, as regards the election of the councils of local bodies, in the lists of candidates neither of the two sexes can be represented in a proportion higher than two thirds and if the statutes provide for the possibility to express two preferential votes, they cannot both go to candidates of the same sex. Moreover, if the list fails to respect this proportion, candidates of the higher represented sex will be



removed by the Electoral Commission so as to ensure the proportion mentioned above. The provisions regulating regional elections are still subject to the competence of the Regions, but Act No. 215/2012 expressly states that the Regions must ensure the promotion of gender equality in access to elective posts. Article 4 also provides that the media, as regards broadcasts concerning politics, shall respect the principle of gender equality in access to public posts and elective offices provided by Article 51 of the Constitution for the promotion of equal opportunities. Finally, Article 5 amends Article 57 of Decree No. 165/2001 (regarding equal opportunities in public administration) by providing that the Equality Adviser must be informed of the appointment of each commission for hiring competitions in the public sector, so as to check that at least one third of the members are women. If women's representation in the commission is lower, the Equality Adviser must compel the public administration to eliminate the infringement and if it persists she/he must take the public administration to court.

Act No. 65/2014 recently modified previous regulations so as to ensure a better gender balance in the election of Italian members of the European Parliament. Under these regulations, no more than 50 % of the candidates on each list can be of the same sex; the first and the second candidates on the list cannot be of the same sex; in case of two or three preferential votes, they must be given to candidates of different sex, and if not, the second and the third preferential vote must be cancelled. Finally, a gender balance in politics is also supported by Act No. 13/2014, which recently provided for a reduction in parties' public financing if they do not fulfil gender-balance requirements regarding the list of candidates for political elections.

Finally, the Constitutional Act of 15 April 2016,<sup>4</sup> which mainly concerns Parliament and Local Bodies, provides an amendment to Art. 55 of the Constitution stating that 'The ruling of the elections of the two Chambers of Parliament shall promote gender balance in political representation.' Another amendment to Art. 122 entitles national legislation to determine the framework aimed at assuring a gender balance in political representation at the regional level. The whole reform is still conditional as it will soon be submitted to a confirmative referendum as required by at least a fifth of the members of Parliament. Even though recent legislation, both at the national and regional level, already provided for the promotion of the principle of gender equality in politics, the express acknowledgment of this principle as being fundamental would mark a very important step forward in the achievement of substantial equality in this field.

### **3.6 Harassment and sexual harassment**

#### **3.6.1 Is harassment explicitly prohibited in national legislation?**

Directives 2006/54/EC and 2004/113/EC have been transposed as regards harassment in Articles 26, 50 bis, 55 bis, and 55 ter Paragraph 6 of the Code of Equal Opportunities (Decree No. 198/2006, as modified by Decree No. 196/2007 and by Decree No. 5/2010). In particular, harassment on the grounds of sex and sexual harassment have been equated to discrimination on the ground of gender.

Article 26 of the Code of Equal Opportunities between men and women states: 'Harassment, that is unwanted conduct related to the sex of a worker with the purpose or effect of violating the dignity of a person, and of creating an intimidating, hostile, degrading, humiliating or offensive environment, is regarded as discrimination on the ground of gender.' The conduct can also be unintentional.

Article 55 bis of the Code provides, in relation to goods and services, basically the same definition of harassment on the ground of sex/sexual harassment quoted above.

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<sup>4</sup> Published in OJ N. 88 of 15 April 2016.

The relevant legislation basically repeats the same wording as the directives.

3.6.2 Please specify the scope of the prohibition on harassment (e.g. does it cover employment and access to goods and services; is it broader?).

The scope of the domestic prohibitions is basically the same as that of the directive. The only relevant difference is that Directive 2006/54/EC refers to 'persons' as being victims of harassment, while Article 26 of the Code refers to 'workers', thus excluding any third parties present in the undertaking.

Article 55 bis of the Code refers to, in relation to goods and services, 'persons' as being victims of harassment.

3.6.3 Is sexual harassment explicitly prohibited in national legislation?

Article 26 of the Code states that 'Sexual harassment, that is any form of unwanted verbal, non-verbal or physical conduct of a sexual nature with the purpose or effect of violating the dignity of a worker, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment' is also regarded as discrimination on the ground of gender.

Article 55 bis of the Code provides, in relation to goods and services, basically the same definition of harassment on the ground of sex/sexual harassment quoted above.

The relevant legislation basically repeats the same wording as the directives.

3.6.4 Please specify the scope of the prohibition on sexual harassment (e.g. does it cover employment and access to goods and services; is it broader?).

The scope of the domestic prohibitions is basically the same as that of the directive. The only relevant difference is that Directive 2006/54/EC refers to 'persons' as being victims of sexual harassment, while Article 26 of the Code refers to 'workers', thus excluding any third parties present in the undertaking.

Article 55 bis of the Code refers to, in relation to goods and services, 'persons' as being victims of sexual harassment.

3.6.5 Does national legislation specify that harassment and sexual harassment as well as any less favourable treatment based on the person's rejection of or submission to such conduct amounts to discrimination (see Article 2(2)(a) of Directive 2006/54)?

Article 2(2)(a) of Directive 2006/54/EC has been specifically transposed. Article 26 also provides that any less favourable treatment based on a worker's rejection of or submission to harassment on the ground of sex or sexual harassment are regarded as discrimination. Moreover it states that: 'Acts, pacts or provisions taken in relation to the employment relationship towards workers who are victims of harassment are null and void if adopted as a consequence of the worker's rejection of or submission to harassment on the ground of sex or sexual harassment' and that 'Any adverse treatment by the employer as a reaction to a complaint within the undertaking or to any legal proceedings aimed at enforcing compliance with the principle of equal treatment is regarded as discrimination on the ground of gender.'

Article 55 ter, Paragraph 6, provides, as regards access to goods and services, that 'The refusal of harassment or sexual harassment by a person cannot be the reason for a decision that is relevant for that person.'

Moreover, Article 26 of Directive 2006/54/EC has been transposed in Article 50 bis of the Code of Equal Opportunities, which states: 'Collective agreements can provide for specific measures, such as codes of conduct, guidelines and good practices, in order to prevent all forms of discrimination on grounds of sex, in particular harassment and sexual harassment in the workplace, in access to employment, vocational training and promotion.' In the national implementation the emphasis in the rule has been moved from the employers' responsibility, foreseen by the directive, to that of collective bargaining. And, in fact, in Italy it is not the employer on its own that takes measures to prevent harassment as these actions have always been left to collective bargaining.

### **3.7 Instruction to discriminate**

3.7.1 Is an instruction to discriminate explicitly prohibited in national legislation?

An instruction to discriminate against persons on grounds of sex is explicitly prohibited in national legislation by Article 25, Paragraph 1, of the Code of Equal Opportunities (Decree No. 198/2006) as it is regarded as discrimination.

3.7.2 Are there specific difficulties in your country in relation to the concept of instruction to discriminate?

There are no specific difficulties in relation to the concept of an instruction to discriminate.

### **3.8 Other forms of discrimination**

There are no other forms of discrimination prohibited in national law.

## **4. Equal pay and equal treatment at work (Article 157 TFEU and Recast Directive 2006/54)**

### **4.1 Equal pay**

#### **4.1.1 Is the principle of equal pay for equal work or work of equal value implemented in national legislation?**

Legislation regarding equal pay applies to all employees in the private as well as in the public sector. Article 37 of the Constitution states that 'a working woman shall have the same rights and, for equal work, the same remuneration as a male worker.'

The latter constitutional principle was reworded and clarified by Article 28 of the Code of Equal Opportunities which states: 'For the same work or for work to which equal value is attributed, direct and indirect discrimination with regard to all aspects and conditions of remuneration are forbidden.'

#### **4.1.2 Is the concept of pay defined in national legislation?**

The concept of pay is not defined by the law, but has widely been construed by the Italian courts, on the basis of collective agreements, as including any economic benefit in cash or in kind directly and indirectly paid on the ground of the employment relationship. Therefore it fully complies with the definition of Article 157(2) TFEU.

The Tribunal of Venice of 2 May 2005 and the Tribunal of Padova of 26 October 2007<sup>5</sup> stated that, consistent with Art. 37 of the Constitution, as regards the pay incentive provided by sectoral collective agreements, the period of compulsory maternity leave is to be calculated on the mere criterion of presence, unless the bonus pay is linked by the collective agreement itself to a specific project aimed at boosting productivity or to reward the strenuous nature of specific work.

#### **4.1.3 Does national law explicitly implement Article 4 of Recast Directive 2006/54 (prohibition of direct and indirect discrimination on grounds of sex with regard to all aspects and conditions of remuneration)?**

Article 4 of Recast Directive 2006/54 is explicitly implemented as the same Article 28 mentioned above provides that occupational classification systems applied for the purpose of determining remuneration shall adopt common criteria for men and women and be drawn up so as to eliminate any discrimination.

#### **4.1.4 Is a comparator required in national law as regards equal pay?**

The general notion of both direct and indirect discrimination provided by Article 25 of the Code of Equal Opportunities, as described in Paragraph 3.2 and 3.3, refers to a comparator and is enforceable with regard to all working conditions, including remuneration.

Actually, both the laconic wording of the notion of direct discrimination and the reference to the conditional ('could put') in the notion of indirect discrimination, together with the reference to 'a particular disadvantage' instead of 'a proportionally higher disadvantage' (which was provided by the previous text) opened a debate on the real need for a comparison. No overriding opinion has been recorded, which has called for the need for an actual comparator.

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<sup>5</sup> Published on the official website of the National Equality Adviser respectively at <http://consigliera nazionale.lavoro.gov.it/FileCaricati/file%2035.pdf>, and at <http://consigliera nazionale.lavoro.gov.it/FileCaricati/file%2048.pdf>, accessed 28 August 2015.

Case law on equal pay, and broadly speaking on gender discrimination, is scarce and does not indicate whether the claimant should point to an actual comparator. However, an old case on professional classification deserves to be mentioned. In this case, a female worker claimed discrimination as she had been placed at a lower level compared to male workers performing the same job. The judgment of the Pretura of Milan of 22 December 1989<sup>6</sup> ascertained that there had been discrimination, including during a period when male workers had not yet been hired. The judge made a finding of discrimination, as male workers were hired at a higher level compared to the female worker who was already performing the same job. As a consequence, according to the judge, there was a double possibility: either the level of male workers was the right one, considering the job (then the female worker was also entitled to the same level), or it was the incorrect level, and the female worker had already been discriminated against. In both cases, discrimination against the female worker was proved. The judgment did not expressly refer to a hypothetical comparator, but revealed a particular sensitivity in the reasoning and anticipated results, which are easier to achieve under the new notion of discrimination.

4.1.5 Does national law lay down parameters for establishing the equal value of the work performed, such as the nature of the work, training and working conditions?

The national law does not lay down any parameters for establishing the equal value of the work performed.

4.1.6 Does national (case) law address wage transparency in any way?

As regards wage transparency, Article 46 of the Code of Equal Opportunities on the release of information on pay to individuals and other data at firm level is worth mentioning. It provides that, every two years, public and private companies employing more than 100 employees shall submit to Regional Equality Advisers and trade unions a report concerning the situation of male and female employees in all jobs existing in a company, in relation to appointments, training, professional promotion, pay levels, mobility between categories and grades, other mobility aspects, redundancy funds, dismissals, early retirement and retirement, and the remuneration actually paid. Moreover, the Regional Equality Adviser shall also elaborate the data of the report and send them to the National Equality Adviser, to the Ministry of Labour and to the Department for Equal Opportunities that is part of the Prime Minister's Office. This should assist in the readability, usability and circulation of the data contained in the report.

Moreover, under Article 10 Paragraph 1, h), of the Code the National Equality Committee can request the local Labour Inspectorate to obtain gender-differentiated data at the workplace as regards hiring, vocational training and career opportunities.

4.1.7 Is the European Commission's Recommendation of 7 March 2014 on strengthening the principle of equal pay between men and women through transparency applied in your country?

The European Commission's Recommendation of 7 March 2014 on strengthening the principle of equal pay between men and women through transparency has not yet been applied. A Draft Delegation Act was presented to Parliament on 31 March 2015 and from 30 June 2015 it has been under examination by the Commission for Labour.<sup>7</sup>

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<sup>6</sup> Pretura of Milan 22 December 1989, published in *Orientamenti di Giurisprudenza del Lavoro* 1990, I, 53.

<sup>7</sup> Draft Delegation Act No. 3000 of 31 March 2015, published on <http://www.camera.it/dati/leg17/lavori/stampati/pdf/17PDL0032100.pdf>, accessed 28 August 2015, is aimed at assuring both to workers and unions detailed information on all items of the remuneration of each employee (in respect of private data but clearly distinguished by gender), including bonuses, at assuring that employers of more than 50 workers give periodical information on the average wage of each level of a

#### 4.1.8 Which justifications for pay differences are allowed in legislation and/or case law?

No justifications for differences in pay are provided by the Code, except those permitted on the ground of the general notion of indirect discrimination.

The Pretura of Turin of 4 December 1991 and the Pretura of Parma of 24 November 1981<sup>8</sup> held that a collective agreement bargained at enterprise level which entitled only working women to a contribution for crèche expenses infringed the principle of equal treatment between male and female workers. Following their reasoning, the contribution was linked to an array of duties which burden both parents. A different interpretation would contradict the constitutional principle of equality as it would imply that the working mother is the main and/or the only subject who is charged with family duties. This reversed the traditional guideline which, until the 1980s, allowed such clauses considering women's essential family function as protected by Article 37 of the Constitution (Court of Cassation of 5 March 1986 No. 1444).

#### 4.1.9 Are there specific difficulties related to the application of the principle of equal pay for equal work and work of equal value in practice? For example in case of out-sourcing?

The main problem as regards the gender pay gap is probably difficulties in detecting it, as it can reside in gender-neutral criteria; most of the time, these criteria can easily be explained by the employer as being objectively necessary and proportionate criteria, responding to a real need of the business.

Case law on this issues is very scarce.

## 4.2 Access to work and working conditions

#### 4.2.1 Is the personal scope in relation to access to employment, vocational training, working conditions etc. defined in national law (see Article 14 of Directive 2006/54)?

Under the broad definition of Article 27 Paragraph 1 of the Code of Equal Opportunities the personal scope in relation to access to work and vocational training expressly encompasses all types of contracts, subordinate, autonomous or 'any other.' The same provision is enforceable, under Paragraph 3, for membership of, and involvement in, an organisation of workers or employers, or any organisation whose members carry out a particular profession (here including the benefits provided by such organisations).

As regards equal pay and working conditions, including dismissals, just as for labour law in general, the text of the law does not expressly refer to non-subordinate or quasi-subordinate workers, so it could be applied to these forms as well, but only by way of interpretation; however, no specific case law can be found on this point.

With regard to the implementation of Article 14 of Directive 54/2006 we also have to underline that the prohibition on discrimination provided by the Code of Equal Opportunities applies to all persons employed in any sector (both public and private), irrespective of the length of the employment relationship, including part-time workers, fixed-term workers, apprentices, employees on education contracts, home workers, working spouses or relatives, as well as persons working in cooperatives, and irrespective of the size of the enterprise/employer. On the whole the personal scope of these

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career, distinguished by gender, and assuring that employers of more than 250 workers conduct auditing on wages and that this be made widely available to workers' representatives and unions.

<sup>8</sup> Respectively published in *Diritto e Pratica del Lavoro* (1992) p. 1387, and in *Giustizia Civile* (1981) p. 1406.

provisions is very wide and covers the notion of a worker as defined by CJEU, but we have no national case law on this specific issue.

#### 4.2.2 Is the material scope in relation to (access to) employment defined in national law (see Article 14(1) of the Recast Directive 2006/54)?

Under Article 27 of the Code the material scope of the ban on discrimination as regards access to employment includes vocational training, selection criteria, recruitment conditions at all levels of the professional hierarchy and promotion in all sectors, irrespective of the hiring procedures, as well as the setting up or broadening of a business or of any other form of autonomous work. Actually this Article merely translates the wording of the Recast Directive and of Article 4(1) of Directive 41/2010, except as regards vocational training where the prohibition on discrimination expressly includes both access to and the content of vocational training.

#### 4.2.3 Has the exception on occupational activities been implemented into national law (see Article 14(2) of Recast Directive 2006/54)?

Article 27 allows for a gender requirement in hiring in artistic and fashion activities and with regard to public performances, when such a requirement is essential to the nature of the work/job. It also entitles collective agreements to provide for specific exceptions to the prohibition on discrimination in access to work for women in cases of particularly strenuous jobs. The first exception (artistic, fashion, performance activities) goes beyond the principle of proportionality, as it is stricter: the exception is only legitimate if sex is really a genuine occupational requirement which is essential for performing the activity in question, taking into account its nature.

The second exception (strenuous work) is worded in terms of a 'derogation' from the general rule and is only admitted if and when collective agreements identify a 'particularly strenuous' job, task, duties. So it is based on the nature (particularly strenuous) of the specific occupational activity. Even if the principle of proportionality is not directly considered, and neither does the law provide that the exclusion of women must be 'essential' (to the protection of women's health), this exception has always been deemed to comply with the exceptions provided by EU law.

The legislator's choice to allow collective bargaining to identify these jobs is considered to be a rational choice and better than listing them in an Act once and for all.<sup>9</sup>

#### 4.2.4 Has the exception on protection for women, in particular as regards pregnancy and maternity, been implemented in national law (see Article 28(1) of Recast Directive 2006/54)?

The exception on the protection of women as regards pregnancy and maternity (Article 28 of the Recast Directive) has not been expressly provided. Nevertheless, Decree No. 198/2006 on Equal Opportunities refers to Decree No. 151/2001 for the protection of maternity and paternity, which provides for all specific rights linked to motherhood and fatherhood involving the safeguarding of these provisions, and also states (in Article 1 Paragraph 3) that the principle of equality is without prejudice to more favourable provisions for the gender which is underrepresented. Moreover, following the first interpretation of Article 37 of the Constitution (providing for women's right to working

<sup>9</sup> This last remark is based on the effective implementation of this exception starting from the issuing of Act No. 903 in 1977 (which was later included in Decree No. 151/2001). In fact, during subsequent years collective bargaining has progressively removed a great number of exclusions, narrowing them down to a few tasks even in activities traditionally considered to be 'strenuous' and, for this reason, 'closed' to women (for instance, in the past all activities carried out in the mining industry were considered to be 'strenuous' and forbidden for women). No case law can be recorded in the last few years (in the 1980s, the small number of cases were followed by collective agreements which removed many exceptions which could be deemed to go beyond the principle of proportionality).

conditions so as to allow them to fulfil their essential family functions and to grant adequate protection to the mother and the child) we used to have the opposite problem of a logic of protection which prevailed over that of equality (see Paragraph 12).

4.2.5 Are there particular difficulties related to the personal and/or material scope of national law in relation to access to work, vocational training, employment, working conditions etc.?

As regards subordinate workers there are no specific problems with regard to the personal or the material scope of the Directive. As regards other forms of work the latter has been implemented by a mere reproduction of its wording. Therefore some problems could rise from its ambiguous text but we lack any case law or debate on these issues.



## **5. Pregnancy, maternity, and leave related to work-life balance (Directive 92/85, relevant provisions of the Directives 2006/54 and 2010/18)**

### **5.1 Pregnancy and maternity protection**

#### 5.1.1 Does national law define a pregnant worker?

Decree No. 151/2001 on the Protection of Motherhood and Fatherhood, which includes all rules on this subject, also implementing Directives 2006/54 and 2010/18, does not provide for a specific notion of a pregnant worker. Nevertheless, some specific rights regarding the health of the pregnant worker (provided under Chapter II of Decree No. 151/2001) are assured to workers from the beginning of pregnancy until the child is seven months old subject to the condition that the employer has been informed.

#### 5.1.2 Are the protective measures mentioned in the Articles 4-7 of Directive 92/85 implemented in national law?

The protective measures mentioned in Articles 4-7 of Directive 92/85 have been implemented by Decree No. 645/1996, which was later included in Decree No. 151/2001 (Chapter II mentioned above).

Article 11 of the latter Decree provides for a specific 'health and safety risk assessment' related to pregnancy, which must be included in the general assessment to be drawn up for all workers under Decree No. 81/2008, and also provides that the employees and their representatives must be informed of the results and the respective measures to be enacted.

Under Article 7 a ban on performing duties which involve the lifting of weights or which could be too strenuous, or pose a risk to the health of the mother and/or of the child, as specifically listed in two annexes to the Decree, is provided and the worker is transferred to another job. The Labour Inspectorate can also order a change of job where the worker or the child has serious health problems or if the working or environmental conditions are held to be prejudicial to their state of health. In both cases maternity leave is anticipated if no different jobs are available.

Under Article 12, following the results of the risk assessment mentioned above, the employer must change the working conditions or schedule so as to avoid possible risks to the worker and, if this is not possible, the worker must be transferred to another job and the Labour Inspectorate must be duly informed and it can then order an extension of the compulsory maternity leave to the whole period (until the child is seven months old).

Article 53 provides for a ban on night work from the certified beginning of pregnancy until the child is one year old.

#### 5.1.3 Is dismissal prohibited in national law from the beginning of the pregnancy until the end of the maternity leave (see Article 10(1) of Directive 92/85)?

As regards dismissal, the protection afforded is ensured purely on grounds of pregnancy, regardless of whether the employer has been informed or not. Moreover, protection is granted for a period of 12 months following the date of confinement. A dismissal in this situation is considered to be equal to a discriminatory dismissal and the special remedy (reinstatement) provided by Article 18 of the Worker's Statute is enforceable (Article 54 Decree No. 151/2001).

The type and size of the employer and the length of service do not influence the scope of application of the anti-discriminatory legislation.

Article 54 of Decree No. 151/2001 only allows the working mother to be dismissed in four exceptional cases (i.e. a serious offence by the female worker, the cessation of the activities of the company; the end of a fixed-term contract and the negative result of the probationary period if the ban on discrimination has not been infringed),<sup>10</sup> in which case she will continue to receive the maternity allowance which is directly paid by the INPS (the National Social Welfare Institute), except in the latter case.

During the period covered by the ban on dismissal, the worker cannot be made redundant in a collective procedure except in the case of the cessation of the company's activities.

5.1.4 In cases of dismissal from the beginning of pregnancy until the end of maternity leave, is the employer obliged to indicate substantiated grounds for the dismissal in writing (see Article 10(2) of Directive 92/85)?

In case of dismissal from the beginning of the pregnancy until the end of the maternity leave, general rules are enforceable which provide the obligation to indicate the substantiated grounds for the dismissal in writing (Article 2 Paragraph 2 of Act No. 604/1966). In case of an infringement of this provision the dismissal does not produce any effect. Both Act No. 42/1992 for enterprises employing more than 15 workers and Decree No. 23/2015, which is enforceable to workers hired from 7 March 2015 onwards, limited the consequences of such an infringement to the restitution of damages. Actually this difference is not likely to jeopardise the working mother's protection as it is up to the employer to provide evidence of the real reason for the dismissal in order to demonstrate that it is included in the four legitimate exceptions mentioned above.

## 5.2 Maternity leave

5.2.1 How long (in days or weeks) is maternity leave? Please specify the relevant legislation and Article(s).

Maternity leave, under Decree No. 151/2001, lasts for five months: two to be taken before the birth, three after the birth. This entire period can be postponed by one month if a National Health Service specialist deems that there is no risk to the mother and to the unborn child, or it can be advanced when the worker's job involves a risk for the pregnancy.

5.2.2 Is there an obligatory period of maternity leave before and/or after birth?

The period described above under 5.2.1 is obligatory.

5.2.3 Is there a legal provision insuring that the employment rights relating to the employment contract are ensured in the cases referred to in Articles 5, 6 and 7 of Directive 92/85?

Yes. See on this issue above under 5.1.2.

5.2.4 Is there a legal provision that ensures the employment rights relating to the employment contract (including pay or an adequate allowance) during the pregnancy and maternity leave?

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<sup>10</sup> The Constitutional Court (judgment of 27 May 1996, No. 172, registered on 31 May 1996, published in <http://www.giurcost.org/decisioni/index.html>) ruled that an employer may dismiss a pregnant employee on the grounds of the negative result of the probationary period only if he can prove - or if there is objective evidence - that he did not know of the woman's pregnancy; otherwise, he must explain the reasons justifying the negative evaluation of the probationary period, in order to disprove that the reason for the dismissal was the pregnancy of the woman.

This period is counted as actual work as regards seniority, the annual vacation, the thirteenth month and shall be deemed, for the purposes of promotion, to be a period of employment, unless any special requirements are laid down for the purpose by collective agreements. The same provision also applies when the compulsory maternity leave is anticipated or extended by the Labour Inspectorate or arises from the impossibility to transfer the worker from a risky job or from night work.<sup>11</sup>

During the whole period of maternity leave, mothers are entitled to a daily benefit paid by the National Institute for Social Protection (INPS). This benefit is granted to those working in the private and public employment sectors, to self-employed persons and to professionals. In the private sector, the amount of the maternity benefit is 80 % of the average overall daily wage, but most collective agreements (such as, for instance, the collective agreement of the industries of the chemical sector of 18 December 2009 and of the tourism sector of 9 July 2010) provide for an integration of up to 100 % for the first five months to be paid by the employer. Women in the civil service, according to their employment contract, are entitled to an amount equal to their full wage.

Article 22 of Decree No. 151/2001 also stipulates that compulsory maternity leave is to be counted as actual work as regards seniority, the annual vacation and the thirteenth month. During the leave, figurative contributions are taken into account for pension rights and amounts. Furthermore, the Budget Act for 2016 (Act No. 208/2015, Art. 1, par. 183) clarified that compulsory maternity leave is to take into account the aim of the productivity bonus, that is the suspension of the working relationship in this period cannot jeopardise the mother's income as regards wage incentives.

5.2.5 Is pay or an allowance during the pregnancy and maternity leave at the same level as sick leave or is it higher?

The maternity leave allowance is considerably higher than the sick leave in both the private and public sector (from 20 % to 40 % higher).

5.2.6 Are statutory maternity benefits supplemented by some employers up to the normal remuneration?

Yes. See on the issue above under 5.2.4.

5.2.7 Are there conditions for eligibility for benefits applicable in national legislation (see Article 11(4) of Directive 92/85)?

Maternity benefits do not require a minimum amount of national insurance contributions to have been paid: it is enough that the claimant was employed at the time the compulsory leave period began and no minimum length of service is required.<sup>12</sup>

5.2.8 In national law, is there a provision that guarantees the right of a woman to return after maternity leave to her job or to an equivalent job, on terms and conditions that are no less favourable to her, and to benefit from any improvement in working conditions to which she would have been entitled during her absence (see Article 15 of Directive 2006/54)?

Article 56 of Decree No. 151/2001 guarantees the right of a woman to return to her job or to an equivalent job after her maternity leave, on terms and conditions that are no less favourable to her, and to benefit from any improvement in working conditions to

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<sup>11</sup> In case the worker has been transferred to a different job at a lower level she has the right to retain her previous remuneration and level; while if the job is at a higher level, she is entitled to be promoted under the conditions provided by the ordinary ruling for all other workers.

<sup>12</sup> There is also a right to the maternity leave allowance in cases where the dismissal is exceptionally justified within the first year of the life of the child (Art. 3 Decree No. 80/2015).

which she would have been entitled during her absence. It also provides for the right to return to the same workplace or to another workplace in the same municipality and to work there until the child is one year old.

### **5.3 Adoption leave**

#### 5.3.1 Does national legislation provide for adoption leave?

Decree No. 151/2001 extends the same ruling on maternity leave and the respective rights/protection to cases of the national and international adoption and official custody of a child. The Italian regulations fulfil the EU requirements, as the general discipline of forms of leave provided by the latter Decree has been adapted to the particular necessities of adoption and official custody: for example, for adoption, maternity leave must be taken during the first five months after the minor comes to live with the family and it lasts for five months (with no limits as to the age of the child); in the case of an international adoption, maternity leave can also be taken before the child has entered the family, that is during the stay in the territory of the country involved in the adoption. In case of fostering the leave must be taken within five months of the minor coming to live with the family and it lasts for three months. As well as for natural mothers, these periods can be postponed once only if the child is in hospital.

#### 5.3.2 Does national legislation provide for protection against dismissal of workers who take adoption leave and/or specify their rights after the end of adoption leave (see Article 16 of Directive 2006/54)?

Also the same protection against dismissal as for natural parents is granted to adoptive or foster parents until one year after the child has entered the family. In the case of an international adoption the ban on dismissal provided by Article 54 of Decree No. 151/2001 is enforceable from the communication of the proposal by the association that is in charge of the case. Article 56 of Decree No. 151/2001 also extends the same rights after the end of adoption leave, as provided for the maternity leave, to adoptive and foster parents until one year after the child has entered the family.

### **5.4 Parental leave**

#### 5.4.1 Has Directive 2010/18 been explicitly implemented in your country?

Directive 2010/18 was implemented by the 2013 Budget Act: Act No. 228/2012 (Article 1 Paragraph 339) which provided some slight amendments to Decree No. 151/2001.<sup>13</sup> The terms of the implementation were very limited, however. This was because Articles 32 to 38 of the latter Decree already provided for a scheme on parental leave that was very comprehensive in comparison with EU standards.

#### 5.4.2 Is the national legislation applicable to both the public and the private sector (see Clause 1 of Directive 2010/18)?

The ruling of parental leave provided by Decree No. 151/2001 applies to: all the employees of the private and the public sector, including apprentices; employee partners of cooperative companies (i.e. companies formed by workers who work within the company but who are at the same time associated with the company).

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<sup>13</sup> Act 228/2012 did not mention its implementing nature and no tables were drawn up to illustrate the correlation between the Directive and transposition measures. Indeed, the implementing nature of Paragraph 339 of Article 1 of Act 228/2012 can be assumed by a previous attempt at fulfilling Directive 2010/18/EU, which mentioned its objective and the content of which was identical to that of Paragraph 339. This Government Decree (No. 216/2011), however, was never converted into law and has thus lapsed.

5.4.3 Does the scope of the national transposing legislation include contracts of employment or employment relationships related to part-time workers, fixed-term contract workers or persons with a contract of employment or employment relationship with a temporary agency?

The ruling on parental leave provided by Decree No. 151/2001 also applies to: contracts of employment or employment relationships related to part-time workers; fixed-term contract workers or persons with a contract of employment; or an employment relationship with a temporary agency.

5.4.4 What is the total duration of parental leave?

Parental leave lasts for a total of ten months for both parents. As a general rule, each parent cannot take up more than six months and single parents are entitled to ten months. It may be taken by either the father or the mother during the first 12 years of the child's life or when the child entered the family in the case of adoption or fostering. If a working father decides to take no less than three months off from work, the total time allowed to both parents is eleven months. This law is evidently an incentive for working fathers to take leave.

5.4.5 Is the right of parental leave individual for each of the parents?

Parental leave is an individual right for each of the parents. As the total period of parental leave is ten months, and the total for each parent is six months, the result is that two months of leave can be transferred from one parent to the other; in this case the 'donor parent' retains the right to four months of leave for his/her own use.

5.4.6 What form can parental leave take (full-time or part-time, piecemeal, or in the form of a time-credit system)? Do the various available options allow taking into account the needs of both employers and workers and if so, how is that done (see Clause 3 of Directive 2010/18)?

Parental leave can be taken for one continuous period or various periods. The means of application of the parental leave on an hourly basis are stipulated by collective agreements or by the law.

As an alternative to parental leave for mothers and as a temporary measure until 2016, Art. 4, par. 24, b), of Act No. 92/2012 (as modified by Art. 1, par. 282 and 283 of Act No. 208/2015), provides for the introduction of paid vouchers for baby-sitting services that these will be made available to mothers from the end of compulsory maternity leave for the following eleven months (this is now available also for professionals and autonomous workers). The fact that the vouchers are not made available for fathers can be regarded as a retrograde step in relation to the recognition of the relevance of the role of paternity in the labour market, which is very difficult to reconcile with the principle of equality.

5.4.7 Is there a notice period and if so, how long is it? Does the national legislation take sufficient account of the interests of workers and of employers in specifying the length of such notice periods and how is that done? (see Clause 3 of Directive 2010/18)?

Notice must be given by the employee to the employer when exercising the right to parental leave and cannot be less than five days or two days in case of hourly use. The worker, as a consequence of the implementation of Directive 2010/18/EU, has to specify the beginning and the end of the period of leave. As regards parental leave the worker's interests have priority. The previous notice is not required in case of an objective impossibility (Art. 32 Decree No. 151/2001, as modified by Decree No. 80/2015). The

Ministry of Labour has, however, issued a lawful interpretation (under Art. 9 of Decree No. 124/2004, the so-called 'interpello', specifically No. 13 of 11 April 2016)<sup>14</sup> of Art. 32 of Decree No. 151/2001. As regards the amendment provided by Decree No. 80/2015, which reduced the notice to take up parental leave from fifteen to five days, it stated that clauses of collective agreements signed before the issuing of the amendment and providing for a longer period of notice of fifteen days (by reference to the previous text of the Decree) are still enforceable.

5.4.8 Did the Government take measures to address the specific needs of adoptive parents (see Clause 4 of Directive 2010/18)?

Parental leave is granted on the same conditions for national and international adoption and official custody of the child, at any age of the child, within eight years from the day that the child enters the family, provided that he/she is a minor. However, there are no additional measures to address the specific needs of adoptive parents.

5.4.9 Is there a work and/or length of service requirement in order to benefit from parental leave?

There is no work and/or length of service requirement in order to benefit from parental leave.

5.4.10 Are there situations where the granting of parental leave may be postponed for justifiable reasons related to the operation of the organisation?

The leave cannot be postponed. Act No. 228/2012, however, provided that special modalities of the application of parental leave, including the possibility to postpone the granting of the leave, are stipulated by collective agreements for the sectors of security/defence and the fire service, in order to take into account the specific necessities of the organisation of these services. Moreover, the Ministry of Labour issued a lawful interpretation (under Art. 9 of Decree No. 124/2004, the so-called 'interpello', specifically No. 13 of 11 April 2016)<sup>15</sup> that, as regards the possibility for the employer to postpone the parental leave, reiterated that the workers' interest has priority, although it opened the possibility for possible monthly agreements with the worker or union representative aimed at reconciling this right with the needs of the enterprise.

5.4.11 Are there special arrangements for small firms?

There are no special arrangements for small firms.

5.4.12 Are there any special rules/exceptional conditions for access and modalities of application of parental leave to the needs of parents of children with a disability or a long-term illness?

Under Article 33 of Decree No. 151/2001 the parents of severely handicapped children may take up to three years off from work, in total, as parental leave during the first twelve years of the child's life, provided the child is not hospitalized in a specialised institution (unless the presence of the parents is required by doctors).

5.4.13 Are there provisions to protect workers against less favourable treatment or dismissal on the grounds of an application for, or the taking of, parental leave (see Clause 5 of Directive 2010/18)?

According to Article 25 of the Code of Equal Opportunities (Decree No. 198/2006) and Article 3 of Decree No. 151/2001, less favourable treatment related to pregnancy,

<sup>14</sup> <http://www.lavoro.gov.it/notizie/Documents/13-2016.pdf>, last accessed 26 May 2016.

<sup>15</sup> <http://www.lavoro.gov.it/notizie/Documents/13-2016.pdf>, last accessed 26 May 2016.

motherhood or fatherhood, also adoptive, as well as to the respective rights, are regarded as direct gender discrimination. Dismissal on the grounds of an application for or the taking of parental leave is null and void and the special remedy of reinstatement provided by Article 18 of the Worker's Statute is enforceable (Article 54 Decree No. 151/2001).

5.4.14 Do workers benefitting from parental leave have the right to return to the same job or, if this is not possible, to an equivalent or similar job consistent with their employment contract or relationship?

Under Article 56 Paragraph 3 of Decree No. 151/2001 at the end of the parental leave workers have the right to return to the same workplace or, if this is not possible, to a workplace in the same municipality as the previous one, to the same job or, if that is not possible, to an equivalent job.

5.4.15 Are rights acquired or in the process of being acquired by the worker on the date on which parental leave starts maintained as they stand until the end of the parental leave?

As regards parental leave we lack an express provision that states that all rights acquired or in the process of being acquired by the worker on the date on which parental leave starts are maintained as they stand until the end of the parental leave. In any case, under Article 34 periods of leave count towards the worker's length of service. They do not count as regards paid or unpaid holidays and Christmas bonuses.

5.4.16 What is the status of the employment contract or employment relationship for the period of the parental leave?

During the parental leave the employment relationship is suspended.

5.4.17 Is there continuity of the entitlements to social security cover under the different schemes, in particular healthcare, during the period of parental leave?

The continuity of the entitlements to social security covered under the different schemes, in particular healthcare, is granted.

5.4.18 Is parental leave remunerated by the employer? If so, how much and in which sectors?

During the leave period the employer only anticipates an allowance which is actually paid by the INPS (National Social Welfare Institute).

5.4.19 Does the social security system in your country provide for an allowance during parental leave? If so, how much and in which sectors?

During the periods of parental leave, for the first six years of the child's life (or during the first six years from the day that the child enters the family in the case of adoption or official custody),<sup>16</sup> parents are entitled to a benefit equal to 30 % of their normal wages for a total of six months for both parents. So out of the 10 (or 11) months only 6 are paid. Notional contributions are taken into account for pension rights and amounts. This also applies to the period of an extension of the leave for parents of severely handicapped children. For any leave taken after the child reaches the age of eight, or over the maximum period of six months, the benefit is only paid if the claimant's earnings are less than 2½ times the minimum pension paid under the general compulsory insurance system. In this case, the notional contribution calculations for

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<sup>16</sup> Article 9 of Decree No. 80/2015, which recently amended Decree No. 151/2001, extended this period to six years.

pension purposes are reduced, but the amount can be fully supplemented through a redemption of contributions (Articles 34 and 35 of Decree No. 151/2001).

5.4.20 In your view, regarding which issues does the national legislation apply or introduce more favourable provisions (see Clause 8 of Directive 2010/18)?

Italian legislation provides for more favourable provisions than those laid down by Directive 2010/18/EU. These concern the length of the leave; provision on a non-transferrable basis (just two months out of six for each parent can be transferred); the parental leave and the allowance paid during that period are not subject to qualification periods whatsoever; there is no provision for special arrangements as regards small enterprises; high-level provisions for parents of children with a disability or long-term illness; incentives for working fathers to take the leave; the application of the same sanctions system as that which applies to discrimination in relation to any threat to the enjoyment of parental leave and respective rights; the availability of forms of leave paid by the social security system.

## **5.5 Paternity leave**

5.5.1 Does national legislation provide for paternity leave?

Under Article 28 of Decree No. 151/2001 paternity leave is granted to the father after the birth for the whole length of the maternity leave or for the remaining period in special cases (the mother, including a professional and self-employed mother, dies or becomes seriously ill, or in the event of the abandonment of the child, or if the child is in the exclusive custody of the father then he is entitled to the same period of leave as the mother). Adoptive and foster fathers can also take the paternity leave in place of the maternity leave of the mothers in the same special cases (Article 31). The same economic and working conditions as well as notional contributions provided for the maternity leave are granted to the father.

According to Article 4, Paragraph 24, of Act No. 92/2012<sup>17</sup> (temporarily, from 2012 to 2016), fathers are also entitled to four days of paternity leave in the first five months following the child's birth, of which two days can be an alternative for the mother and two days are compulsory for the father. The latter can also be used at the same time as the mother's compulsory leave and is added to the paternity leave of the father; in the case of the mother's death or serious illness the father is entitled to the mother's leave. These forms of leave are also granted in the case of national and international adoption or fostering.

5.5.2 Does national legislation provide for protection against dismissal of workers who take paternity leave and/or specify their rights after the end of paternity leave (see Article 16 of Directive 2006/54)?

Under Article 54 of Decree No. 151/2001 the same protection against dismissal provided for the maternity leave is extended to the father, natural or adoptive/foster, from the birth/entrance into the family of the child until he or she is one year old. The same holds true for the rights after the end of the paternity leave (Article 56 Paragraph 2).

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<sup>17</sup> Act No. 92 of 28 June 2012 on the Reform of the Labour Market, published in OJ No. 153 of 3 July 2012, ordinary supplement No. 136, as modified by Art. 1, par. 205 of Act No. 208 of 28 December 2015 (Budget Act 2016), published in Official Journal No. 302 of 30 December 2015, ordinary supplement No. 70, <http://www.gazzettaufficiale.it/eli/id/2015/12/30/15G00222/sg>, accessed 1 June 2016.



## **5.6 Time off/care leave**

5.6.1 Does national legislation entitle workers to time off from work on grounds of force majeure for urgent family reasons in case of sickness or accident (see Clause 7 of Directive 2010/18)?

According to Articles 47 to 52 of Decree No. 151/2001, both parents, alternatively, may take time off from work if a child younger than three becomes ill; the leave is allowed to last for the whole duration of the child's illness (without any limits). The parents, alternatively, may also take up to five days off from work per annum if a child aged between three and eight becomes ill. Leave of absence for a sick child is unpaid. However, notional contributions are calculated when the child is younger than three. These are reduced when the child is between three and eight, but the amount can be fully made up through the redemption of contributions. Periods of leave of absence for a sick child count toward a worker's length of service, but they do not count as regards paid or unpaid holidays and Christmas bonuses. Leave is also allowed, with higher age limits, when the child has been adopted or a parent has official custody. The same regulations apply to the civil service. Civil servants, however, enjoy more favourable collective bargaining conditions than workers in the private sector.

Article 4 of Act No. 53/2000 (implemented by Ministerial Decree No. 78/200) provides for three days off from work per year, paid by the employer, in case of the death or serious illness of a close relative - where the worker can choose, as an alternative, to agree with the employer to modify his or her working conditions (i.e. part-time, telework, a change of workplace) - and two years unpaid leave for serious family reasons which can be taken all at once or in fractions and may be used only once in an entire working life. The employer may deny such a leave of absence, provided an adequate explanation linked to organizational or productive reasons is given.

Article 42, Paragraph 5 of Decree No. 151/2001 states that workers in the private or public sector who take care of a severely disabled cohabiting spouse who is not hospitalized (unless continuous assistance is required in hospital) may take a continuous or split period of up to two years off from work. If there is no cohabiting spouse, then this right belongs to the parents of the disabled person. This two-year period may be used only once in an entire working life. The benefit during this period is the same as the last salary earned, up to a maximum of EUR 43 579 per year; this figure is constantly reviewed; the period of leave is covered by notional contributions but it does not accrue the length of service. The leave is paid by the employer, who then deducts the amount from what is owed to the relative welfare agency.

Under Article 33 of Decree No. 151/2001 an extension of parental leave up to three years in total during the first twelve years of the child's life is provided on condition that the child is not hospitalized in a specialised institution (unless the presence of the parents is required by doctors). This leave can be taken for a continuous period or during various periods, and is alternative to legally sanctioned rest periods for the parents of handicapped children (amounting to two hours paid rest each day, or three days paid rest each month). The time off/leave is paid by the employer who then deducts the amount from what is owed to the relative welfare agency.

## **5.7 Leave in relation to surrogacy**

5.7.1 Is parental leave available in case of surrogacy?

There are no provisions on surrogacy.

## **5.8 Leave sharing arrangements**

5.8.1 Does national law provide a legal right to share (part of) maternity leave?

According to Article 28 of Decree No. 151/2001, working fathers may obtain maternity leave in cases provided by Article 28 of Decree No. 151/2001 and by Article 4 of Act No. 92/2012, as described in section 5.5

5.8.2 Is there a possibility for one parent to transfer part of the parental leave to the other parent?

Parental leave, which is an individual right, can be transferred to the other parent for two months, as the total amount of leave parents are entitled to for each child is 10 months and the maximum leave each parent can take is 6 months (see above section 5.4).

## **5.9 Flexible working time arrangements**

5.9.1 Does national law provide workers with a legal right (temporarily or otherwise) to reduce working time on request?

Workers/employees have no a general legal right to reduce working time on request, save as regards time off for breastfeeding (two hours a day until the child is one year old under Article 39 of Decree No. 151/2001), the use of the parental leave on an hourly basis, or as non-continuous periods/days (Article 32 of Decree No. 151/2001), or as a conversion to part time with a maximum reduction of 50 %, or other time off/leave care which we mentioned above. There are a few cases where workers have a right to work part time or the shift to part time is made easier or encouraged.

Under Article 8 (par. 3) of Decree No. 81/2015<sup>18</sup> a private or public employee has a right to work part time when he or she suffers from an oncological disease that impairs his/her working capacity. The worker who has changed to part time has a right to return to full-time work.

Under the same rule, a priority in converting to part-time work and in returning to full time is recognised when an employee's relative is suffering from oncological diseases, when he or she assists a live-in relative who is not self-sufficient or when an employee takes care of a live-in child who is younger than 13 or who is disabled.

Under Article 1, Paragraph 58 of Act No. 662/1996, as modified by Article 73 of Decree No. 112/2008 and Article 16 of Act No. 183/2010, the Public Administration can authorize a shift from full-time work to part time, within 60 days from the request, on condition that it does not clash with organisational needs. Under Article 6, Paragraph 4 of Decree No. 79/1997, the worker has the right to return to full-time work after two years.

Part-time work is mainly addressed as a reconciliation measure in certain policies. For instance, Article 9 of Act No. 53/2000 provides for the allocation of a part of the Fund for Family Policies to public subjects (such as Local Health Units and Hospitals), and to private businesses and associated businesses (with priority) that enforce collective agreements concerning targeted positive actions adopting a flexible working schedule through different measures, including part-time work.

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<sup>18</sup> Decree No. 81 of 15 June 2015 on the reform of different kinds of contract of employment, including part-time employment, published in OJ No. 144 of 24 June 2015, <http://www.normattiva.it/atto/caricaDettaglioAtto?atto.dataPubblicazioneGazzetta=2015-06-24&atto.codiceRedazionale=15G00095&currentPage=1>, accessed 28 August 2015.

5.9.2 Does national law provide workers with a legal right to adjust working time patterns (temporarily or otherwise) on request?

A right to adjust working time patterns is provided in limited hypotheses.

Article 53 of Decree No. 151/2001 and Article 11 of Decree No. 66 of 8 April 2003 provide the right not to perform night work for: the working mother of a child up to three years old or alternatively for the cohabiting father (also adoptive or foster until the third year after the child entered the family, subject to the condition that the child is not older than 12); the working mother or father (also adoptive or foster) who is the only person taking care of the child up to 12 years old living with her/him; and the female or male employee who takes care of a seriously disabled person under Act No. 104/1992.

Article 4 of Act No. 53/2000 states that in cases of the certified serious illness of the spouse, the cohabitant or relatives within the second degree, the worker can either take up to three days a month in time off or agree with the employer to modify his or her working conditions (i.e. part time, telework, a change of workplace).

5.9.3 Does national law provide workers with a legal right to work from home or remotely (temporarily or otherwise) on request?

No legal right to work from home or remotely on request is provided neither in the private neither nor in the public sector.<sup>19</sup>

5.9.4 Are there any other legal rights to flexible working arrangements, such as arrangements by which workers can "bank" hours to take time off in the future?

Decree No. 151/2015<sup>20</sup> provides for the possibility for people working for the same employer to transfer for free a part of their days of rest to the parent of children who need continuous care and the parent's presence for health reasons. Limits and criteria of this transfer are to be provided by collective agreements signed by most representative unions.

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<sup>19</sup> Article 23 of Decree No. 80/2015 states that with the aim of promoting telework as a reconciliation measure employees on telework are not counted as regards the application of the employer's obligation depending on the size of the undertaking.

<sup>20</sup> Decree No. 151 of 14 September 2015 on the simplification of bureaucracy and other provisions has been published in OJ No. 221 of 23 September 2015; the Decree implements Delegation Act No. 183/2014, which provides for a wide reform of the labour market.

## **6. Occupational social security schemes (Chapter 2 of Directive 2006/54)**

### **6.1 Is direct and indirect discrimination on grounds of sex in occupational social security schemes prohibited in national law?**

Article 30 bis of Decree No. 198/2006, introduced by Article 1 of Decree No. 5/2010 as the implementation of the Recast Directive, states: 'There shall be no direct or indirect discrimination on grounds of sex in occupational social security schemes, in particular as regards: a) the scope of such schemes and the conditions of access to them; b) the obligation to contribute to and the calculation of contributions; c) the calculation of benefits, including supplementary benefits due in respect of a spouse or dependants, and the conditions governing the duration and retention of an entitlement to benefits'.

### **6.2 Is the personal scope of national law relating to occupational social security schemes the same, more restricted or broader than specified in Article 6 of Directive 2006/54? Please explain and refer to relevant case law, if any.**

Art. 30 bis of Decree No. 198/2006 applies the principle of non-discrimination to occupational schemes regulated by Decree No. 252/2005. This decree's personal scope includes workers in all sectors, private and public, self-employed, professionals and working partners of cooperative societies. Therefore, the personal scope of this rule is not as wide as that of the EU directive: persons seeking employment and those claiming under workers included in occupational schemes in accordance with national law and/or practice are not mentioned.

### **6.3 Is the material scope of national law relating to occupational social security schemes the same, more restricted or broader than specified in Article 7 of Directive 2006/54? Please explain and refer to relevant case law, if any.**

Here again, Art. 30 bis refers to Decree No. 252/2005 which regulates occupational pensions. The decree is applicable to invalidity, retirement, old-age and survivors' pensions; this leaves out: sickness, unemployment, industrial accidents and occupational diseases. Therefore the material scope of Art. 30 bis is more restricted than that of the EU directive.

### **6.4 Has national law applied the exclusions from the material scope as specified in Article 8 of Directive 2006/54 been implemented in national law?**

The exclusions from the material scope as specified in Article 8 of Directive 2006/54 have not been implemented in national law.

### **6.5 Are there laws or case law which would fall under the examples of sex discrimination as mentioned in Article 9 of Directive 2006/54?**

These provisions fail to implement the Recast Directive as regards the pensionable age (Article 9, f) of Directive 2006/54), which remains different for men and women. Indeed, the occupational old-age pension is awarded upon reaching the pensionable age as established in the statutory system, where, at present and until 2018, women's pensionable age is lower than that for men. Women can, however, carry on working until the pensionable age set for men: for this purpose, the protection against unfair dismissal has been extended to the extra period during which they can choose to work. In this respect, therefore, men are subjected to more disadvantageous treatment than women, as they cannot anticipate their pension.

On the other hand, in the civil service sector, following the Court of Justice decision C46/2007, Act No. 102/2009, as modified by Act No. 122/2010, has equalised the pensionable age of men and women.

As regards Article 9, g) of Directive 2006/54, the regime of the supplementary funds makes no provision for the recovery of 'fictional contributions'<sup>21</sup> during maternity leave or during leave for serious family reasons: the funds' regulations are allowed to omit provisions such as those on notional contributions, or on redemption (e.g. to recover the contributions by paying them). In the case of maternity, many fund regulations provide for a reduced rate of notional contributions, i.e. only the contributions corresponding to the amount of the maternity allowance are credited.

## **6.6 Is sex used as an actuarial factor in occupational social security schemes?**

Decree No. 5/2010 implementing the Recast Directive allows the setting of different levels of benefits in so far as may be necessary to take account of actuarial calculation factors, which differ according to sex in the case of defined contribution schemes; in the case of funded defined benefit schemes, certain elements may be unequal where the inequality of the amounts results from the effects of the use of actuarial factors differing according to sex at the time when the scheme's funding is implemented. The decree states that actuarial factors used must be sound, relevant and accurate; the Commission on the Vigilance on Pensions (COVIP) and the Equal Opportunities National Committee are called upon to control the legitimacy and the non-discriminatory nature of the actuarial factors used. The limits of Article 9.1 of Directive 2006/54/EC have been fulfilled; the legislation goes even further providing for control on the use of these factors.

Both the funds with defined contributions and those with defined payments take actuarial factors into account for the benefit calculation. Among the actuarial factors, the higher life expectancy of women is taken into consideration. No other gender-related factors are taken into consideration.

The funds of self-employed workers do not have different levels for workers' contributions in relation to the use of actuarial calculation factors.

## **6.7 Are there specific difficulties in your country in relation to occupational social security schemes, for example due to the fact that security schemes in your country are not comparable to either statutory social security schemes or occupational social security schemes? If so, please explain with reference to relevant case law, if any.**

The Court of Justice in case No. 46/07, *Commission v. Italy*, declared the pension scheme for civil servants managed by INPDAP to be discriminatory on the basis of Article 141 EC, since it provides that the general pensionable age for men is 65 and for women 60.

The Court, therefore, regarded the INPDAP scheme as occupational.

By contrast, our legislation deals with it as a statutory pension scheme and regulates it according to the legislation on public schemes (Act No. 335/1995).

The statutory nature of INPDAP is also shown by the following factors: subscription thereto is compulsory (occupational funds are voluntary in Italy); INPDAP has a general coverage in the public employment sector and as such replaces the general insurance

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<sup>21</sup> Those are contributions that are credited without cost to the employee for periods during which the worker has not worked (for example, in the case of illness or maternity) and therefore he or she has received benefit payments from the national social security system (INPS).

public pension scheme run by the INPS (the National Social Welfare Institute), which is consequently not operative in the area of public employees; alongside the statutory INPDAP scheme, there exist occupational funds for public servants.

Obviously, if the INPDAP pension scheme is considered to fall under the scope of Directive 79/7, then the pensionable age is a possible exception to the application of the equality principle on grounds of gender under Article 7 (1) (a).

Following the Court of Justice decision, however, Act No. 102/2009, as modified by Act No. 122/2010, equalized the pensionable age for men and women in the civil service sector. INPDAP was abolished by Article 21 of Act No. 214/2011 and no longer exists.

## **7. Statutory schemes of social security (Directive 79/7)**

### **7.1 Is the principle of equal treatment for men and women in matters of social security implemented in national legislation?**

The directives on statutory schemes of social security have never been specifically implemented. However, the contributory pension system does not reveal discriminatory features in the light of Directive 79/7/EEC.

### **7.2 Is the personal scope of national law relating to statutory social security schemes the same, more restricted or broader than specified in Article 2 of Directive 79/7? Please explain and refer to relevant case law, if any.**

The statutory system is compulsory for all types of workers and its coverage is not subject to any limitations.

### **7.3 Is the material scope of national law relating to statutory social security schemes the same, more restricted or broader than specified in Article 3 Paragraph 1 and 2 of Directive 79/7? Please explain and refer to relevant case law, if any.**

The compulsory statutory system covers the events listed in Article 3(1) of Directive 79/7.

As regards the exclusions in Article 3(2) of the Directive, the Italian family allowance falls under this clause. The scheme reveals discriminatory features as regards part-time workers working less than 24 hours a week and vertical part timers, who are entitled to benefits in proportion to the number of days spent at work, independently from the number of hours worked each day. Indeed, workers are entitled to full weekly family benefits when they work at least 24 hours a week. Part-time employees working less than 24 hours a week are entitled to family benefits in proportion to the number of days spent at work, independently from the number of hours worked per day: thus, if a part timer works one hour a day for five days a week, and receives five daily family benefits, while if she/he works 21 hours a week during three days, and receives only three daily benefits; vertical part timers do not get any benefit in relation to the spells of inactivity.

On the other hand, in relation to survivors' pensions, Article 30 of the Code of Equal Opportunities (Decree No. 198/2006) lays down the principle of gender equality.

Cohabitants and partners, however, are not included in survivors' schemes and the family allowance.

### **7.4 Has national law applied the exclusions from the material scope as specified in Article 7 of Directive 79/7 been implemented in national law? Please explain (specifying to what extent the exclusions apply) and refer to relevant case law, if any.**

The exclusions in Article 7(1) of the Directive have been used in the pension system in relation to both the pensionable age and the advantages as regards old-age pensions for the purpose of child rearing.

As regards the pensionable age, Act No. 214/2011 set the pensionable age in the public sector at 66 for men and women. In the private sector, the same provision fixed the pensionable age at 66 for men by 2012; women's pensionable age will be gradually increased to 66 in 2018. All employees, however, men and women in the private and in the public sector, will have a pensionable age of 67 by 2021. At present, however, women can carry on working until the pensionable age set for men (Article 30 Decree No.

198/2006): for this purpose, the protection against unfair dismissal has been extended to the extra period during which they can choose to work. In this respect, therefore, men are subjected to more disadvantageous treatment than women, as they cannot anticipate their pension.

Advantages as regards old-age pensions for the purpose of child rearing are provided under the new contribution system for the benefit of women. More favourable coefficients of transformation (according to which pensions are calculated) are fixed for maternity. Then, again in relation to maternity, a reduction in the age of retirement of four months per child is granted, with a maximum limit of 12 months. As an alternative to this, it is also provided that women with children are able to receive a retirement pension subject to reduced conditions.

#### **7.5 Is sex used as an actuarial factor in statutory social security schemes?**

Sex is not used as an actuarial factor in statutory schemes.

#### **7.6 Are there specific difficulties in your country in relation to implementing Directive 79/7? For example due to the fact that security schemes in your country are not comparable to either statutory social security schemes or occupational social security schemes? If so, please explain with reference to relevant case law, if any.**

The fact that domestic legislation, on the whole, is fairly in line with EU law on gender equality may explain the lack of a specific act transposing the EU Directives: the adoption of a specific act may be considered less urgent at the political level. Nonetheless, in my view, the transposition is still to be regarded as crucial. This is because EU directives in any case provide a benchmark for domestic law. Indeed, the main problems as regards gender equality can be detected in those fields which have been omitted from the EU gender anti-discrimination framework, such as social assistance or family allowances. Moreover, the latest legislation on pensions is far from women-friendly. Indeed, Act No. 214/2011 provides for an increase in the minimum contribution condition from 5 to 20 years: if the claimant has less than 20 years' contributions, the pension will be paid from the age of 70. Furthermore, it introduced a new minimum benefit amount condition according to which pensions will be paid at 70 rather than at 66 (67 by 2021) when their amount is less than EUR 643 a month. The relevant conditions are particularly difficult to fulfil for those engaged in atypical work, i.e. intermittent, temporary, occasional and part-time work, which is often done by women. This means that many women may risk receiving their pension only from the age of 70.



## **8. Self-employed workers (Directive 2010/41/EU and some relevant provisions of the Recast Directive)**

### **8.1 Has Directive 2010/41/EU been explicitly implemented in national law?**

The Code of Equal Opportunities, issued by Decree No. 198/2006, and the Code on the Protection of Motherhood and Fatherhood, issued by Decree No. 151/2001, already ensured a good level of implementation of Directive 2010/41/EU. Slight amendments to both Decrees mentioned above were issued by Act No. 228 on 24 December 2012<sup>22</sup> to avoid an action for non-compliance.

### **8.2 What is the personal scope related to self-employment in national legislation? Has your national law defined self-employed or self-employment? Please discuss relevant legislation and national case law (see Article 2 Directive 2010/41/EU)**

Neither the Code of Equal Opportunities nor the Code on the Protection of Motherhood and Fatherhood define self-employment. No specific conditions have been laid down by the legislator. So the notion of self-employment which is relevant for the enforcement of the principle of equal treatment is very broad and includes a large number of very different categories, as well as self-employed persons who employ other persons. The notions provided by other pieces of legislation define self-employed persons (Article 2222 of the Civil Code) as 'persons who commit themselves to make a service or a work totally or mainly by means of their labour and without any subordination towards the customer' and small entrepreneurs (Article 2083 of the Civil Code) as 'small independent farmers, craftsmen, traders and those who professionally perform an activity which is organized mainly with their work and with the work of their family.' Quasi-subordinated work is not defined by the law. This notion has been elaborated by case law and includes various categories such as *collaborazioni coordinate e continuative*, work on projects, a joint labour venture, and occasional self-employment over a certain annual income.

As regards the protection of the working mother, Decree No. 151/2001 provides for a notion of a worker which refers to employees save in cases where it is differently specified. In fact two chapters of the Decree specifically address the self-employed and professionals and another one addresses various categories, including quasi-subordinated workers, thereby providing for the respective maternity/paternity rights.

### **8.3 Related to the personal scope, please specify whether all self-employed workers are considered part of the same category and whether national legislation recognises life partners.**

Although the regulations covering the respective categories of self-employed persons can be remarkably different, they are fully covered by the Decree implementing Directive 2010/41/EU as they are included in the general notion of self-employment.

The agricultural sector has specific regulations but all rights provided by Directive 2010/41/EU are also guaranteed to these self-employed persons.

Italian legislation does not recognise life partners. However, as regards maternity rights, it has to be underlined that under the regulations of the Code on the Protection of Motherhood and Fatherhood these are individual rights. Moreover, also allowances for poor families which are paid by the municipalities do not depend on marriage. In case life partners (e.g., the partner whether formally married or not) habitually participate in the

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<sup>22</sup> Act No. 228 of 24 December 2012, published in OJ No. 302 of 29 December 2012, o.s. No. 212, available at: <http://www.normattiva.it/atto/caricaDettaglioAtto?atto.dataPubblicazioneGazzetta=2012-12-29&atto.codiceRedazionale=012G0252&currentPage=1>, accessed 28 August 2015.

activities of the self-employed partner and perform the same or ancillary tasks, this relationship has to be considered as a remunerated work relationship.

#### **8.4 How has national law implemented Article 4 Directive 2010/41/EU? Is the material scope of national law relating to equal treatment in self-employment more restricted or broader than specified in Article 4 Directive 2010/41/EU?**

The very wide formulation of Article 1 of the Code of Equal Opportunities, which states that 'Equal treatment between men and women must be assured in all fields, including employment, work and remuneration' assures the implementation of Article 4 of the Directive. Then, specifically as regards the ban on discrimination, the wide notion provided by Article 27 refers to all forms of work, employment, self-employment or any other, including the 'establishment, equipment or extension of a business or the launching or extension of any other form of self-employed activity.' The latter amendment provided by Act No 228/2012 has definitely clarified the personal scope of the Code, dispensing with all possible doubts arising from the fact that autonomous work and entrepreneurship do not fully correspond.

An express equalization of harassment and sexual harassment, as well as an instruction to discriminate, to discrimination is not provided although it could be deduced by interpretation (no case law on these issues is to be recorded). Therefore, if we only consider the text of the Decree, the material scope of national law relating to equal treatment could be deemed stricter than specified in Article 4 of Directive 2010/41/EU.

#### **8.5 Has your State taken advantage of the power to take positive action (see Article 5 Directive 2010/41/EU)? If so, what positive action has your country taken? In your view, how effective has this been?**

Before the implementation of Directive 2010/41/EU the Code of Equal Opportunities already provided for positive actions in the field of entrepreneurial activity. In fact, the Code implements the principle of substantial equality, providing for the promotion of female self-employment through preferential measures meant to favour access to bank credits and public funds, to improve professional training and qualifications for women in this field, and to promote the presence of businesses owned or managed by a high percentage of women in the most innovative sections of different production sectors.

These kinds of measures can be very helpful, since possible problems of effectiveness are mainly linked to insufficient funds, to bureaucratic aspects such as the complexity of the application and timing in the estimation and payment of the projects. A study by the Union of Chambers of Commerce has highlighted that positive action plans performed in the last few years have had a positive effect on the existence of start-up enterprises, while improvements in the enterprises' performances were not homogeneous and their real success seemed quite random.<sup>23</sup> In any case, expectations for these projects are rather high as the applications definitively exceed the amount of funds allocated.

#### **8.6 Does your country have a system for social protection of self-employed workers (see Article 7 (Directive 2010/41/EU)?**

Self-employed persons fall under the protection of social insurance as regards old-age pensions, invalidity benefits and survivors' pensions, industrial accidents and occupational diseases, maternity and family allowances and sickness benefits. The pensions system is contribution-based. The self-employed are also covered by the National Health System, as are all other Italian citizens. The various categories of self-

<sup>23</sup> Second national report on Female Entrepreneurship, 2011, available at: [http://www.sviluppoeconomico.gov.it/images/stories/pubblicazioni/impresa\\_genere\\_ii.pdf](http://www.sviluppoeconomico.gov.it/images/stories/pubblicazioni/impresa_genere_ii.pdf), accessed 28 August 2015.

employed persons are protected by different pension systems, but all of them are mandatory and contribution-based.

As regards helping spouses and life partners, the Italian system includes different notions of a family business, which often overlap. What is relevant in relation to social protection, however, is both the form that the work relationship within the family enterprise takes and the fact that the work carried out produces an income. If this relationship takes the shape of a contract of employment, the assisting spouse will be covered by all provisions concerning employees. If the person engaged in a family business is regarded as self-employed – and particularly as a ‘helping relative’ – the coverage in terms of social protection is provided, as stated above, by specific public schemes.

On the other hand, it is not completely clear which kind of social protection could be reserved for those engaged in the family business described in Article 230(bis) of the Civil Code. It could be argued that when the work relationship within the enterprise is not classified as one of self-employment or as a contract of employment, it is regulated by Article 230(bis) of the Civil Code. These workers, at any rate, are covered by the old-age, invalidity and survivors’ schemes of self-employed persons, which are both contribution-based and mandatory.

If the work carried out cannot be regarded as a source of income, then there is no obligation to pay contributions for pension purposes; the sole social insurance provision that covers helping spouses in this case is the accident at work and professional diseases insurance.

### **8.7 Has Article 8 Directive 2010/41/EU regarding maternity benefits for self-employed been implemented in national law?**

The Code on the Protection of Motherhood and Fatherhood guarantees the right to maternity allowances provided by Article 8 of the Directive to all categories of self-employed persons.

The maternity allowance (also in the case of adoption) is granted to quasi-subordinated workers for a period of five months when they are also obliged to stop working. They are entitled to the allowance under a mandatory system subject to the condition that they have paid at least three months of contributions in the year before the period covered by the allowance.<sup>24</sup> The latter amounts to 80 % of 1/365 of the income based on which the contribution has actually been paid in the preceding 12 months, which is consistent with Article 8(3)(b) of the Directive, which refers to the average loss of income or profit in relation to a comparable preceding period subject to any ceiling laid down under national law.

Self-employed women, including self-employed fisherwomen in small-scale coastal and inland fishing, and helping spouses, are entitled to a maternity allowance, regardless of their decision as to whether or not to suspend their working activity.<sup>25</sup> The allowance is paid for five months and amounts to 80 % of the minimum pay for contribution purposes.

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<sup>24</sup> Article 13 of Decree No. 80/2015, which recently amended Decree No. 151/2001, also recognizes the right to the allowance when the employer does not pay the contribution (previously this rule only applied to employees).

<sup>25</sup> Article 15 of Decree No. 80/2015, which recently amended Decree No. 151/2001, states that the self-employed father is entitled to benefit from the self-employed mother’s maternity allowance after the birth for its whole length or for the remaining period in special cases (the mother dies or becomes seriously ill, or in the event of the abandonment of the child, or if the child is under the exclusive custody of the father he is entitled to the same period of leave of the mother), as well as fathers working under an employment contract. The same extension concerns professional fathers under Article 18 of the Decree, as a permanent amendment.

Women engaged in the liberal professions and members of the Welfare and Assistance Fund of their category (i.e. advocates, doctors, surveyors, architects, accountants) are also entitled to five months of maternity allowance, regardless of their interruption of work. The allowance amounts to 80 % of five months of the yearly income earned during the second year preceding the birth. Five months of contributions are credited for pension purposes here.

During the types of leave mentioned above, figurative contributions are counted towards pension rights and amounts. All these categories are obliged to pay contributions to sustain maternity allowances and they are all covered for this risk, including in cases of national and international adoption and fostering.

Italy does not have services supplying temporary replacements and the only provision that is aimed at favouring the replacement of the working mother in the enterprise has been extended to self-employed persons. Article 4 Paragraph 5 of Decree No. 151/2001 states that in businesses where self-employed women are engaged, if women go on maternity leave they can be replaced, in the first year after childbirth or after the child has entered the family in the event of an adoption, by an employee working on a fixed-term contract and (if the enterprise employs less than 20 people) with special reductions in contributions for the business.

In any case the maternity allowance is not an alternative to any national social service or services supplying temporary replacements. Social service can be accessed by everybody depending on their revenue regardless of the subordinate or autonomous nature of the working relationship.

**8.8 Has national law implemented the provisions regarding occupational social security for self-employed persons (see Article 10 of Recast Directive 2006/54)?**

The Recast Directive has been implemented as regards occupational social security by Decree No. 5/2010, which has added Article 30 bis to Decree No. 198/2006. This piece of legislation, however, does not include any provisions on self-employment. Despite this, the domestic legislation, on the whole, is fairly in line with the anti-discriminatory EU law. The main discriminatory features can be detected in the pensionable age, which is different for men and women, and in the exclusion from survivors' pensions rights of cohabitants and partners. It must also be reminded that the discipline of occupational funds makes no provisions for the recovery of wasted contributions during pregnancy/maternity.

**8.9 Has national law made use of the exceptions for self-employed persons regarding matters of occupational social security as mentioned in Article 11 of Recast Directive 2006/54? Please describe relevant law and case law.**

The Recast Directive has not been implemented as regards self-employed occupational social security.

**8.10 Is Article 14(1)(a) of Recast Directive 2006/54 implemented in national law as regards self-employment?**

Under Article 27 the prohibition on direct and indirect discrimination concerns access to employment, self-employment or any other form of work, as well as selection criteria, recruitment conditions at all levels of the professional hierarchy, and promotion. It applies to all sectors, both public and private, and encompasses all types of work relationships, subordinate, autonomous or 'any other', including entrepreneurship (see Section 4 above).

## **9. Goods and services (Directive 2004/113)**

### **9.1 Does national law prohibit direct and indirect discrimination on grounds of sex in access to goods and services?**

EC Directive 2004/113 has been implemented by Decree No. 196/2007, which adds ten articles to the Code of Equal Opportunities (Articles 55 bis to 55 decies of Decree No. 198/2006).

The Decree literally repeats the text of the Directive, including the provisions on its substantive scope and on the exceptions which are allowed. The Decree also repeats the text of the Directive where it would not be necessary at all and, as such, it may cause confusion. For instance, Article 55 *quinquies* Paragraph 2 specifies that 'the action can be brought to court also after the cessation of the relationship which is deemed to be affected by discrimination, within the limit of prescription:' this is a superfluous provision, as it adds nothing to the general principles of civil law. At any rate, the reproduction of directives in our system can be regarded as bad practice, which certainly does not ensure the necessary coordination with other existing provisions.

At present, we do not yet have any examples of cases regarding the implementation of Directive 113/2004. Neither have there been any reported cases on gender discrimination regarding goods and services before the implementation of the Directive. From a general point of view, we can underline that in Italy there is no debate as regards differences in access to or the prices of services based on sex, and that such differential treatment is, as far as we know, very rare. So substantive implementation may need measures aimed at making people and institutions aware of the importance of this issue. The sector where discrimination is more likely to take place is that of insurances and financial services.

### **9.2 Is the material scope of national law relating to access to goods and services more restricted or broader than specified in Article 3 of Directive 2004/113? Please explain and refer to relevant case law, if any.**

The Italian transposition is worded in the same way as the directive (Article 55 ter Decree No. 198/2006).

### **9.3 Has national law applied the exceptions from the material scope as specified in Article 3(3) of Directive 2004/113, regarding the content of media, advertising and education?**

The Italian transposition is worded in the same way as the directive (Article 55 ter Decree No. 198/2006).

### **9.4 Have differences in treatment in the provision of the goods and services been justified in national law (see Article 4(5) of Directive 2004/113)? Please provide references to relevant law and case law.**

The exception provided by the Directive has been copied by Article 55 bis, Paragraph 7 of Decree No. 198/2006. No express examples or specific exceptions have been provided by the national legislator.

**9.5 Does national law ensure that the use of sex as a factor in the calculation of premiums and benefits for the purposes of insurance and related financial services shall not result in differences in individuals' premiums and benefits (see Article 5(1) of Directive 2004/113)?**

Article 55 quater of Decree No. 198/2006, recently modified by Article 25, Paragraph 1 of Act No. 161/2014, states that 'in all new contracts concluded after 20 December 2012, the use of sex as a factor in the calculation of premiums and benefits for the purposes of insurance and related financial services shall not result in differences in individuals' premiums and benefits.' The rule also states that 'In any event, costs related to pregnancy and maternity shall not result in differences in individuals' premiums and benefits.' The Institutes for Insurance Vigilance (Ivass) shall ensure that Article 55 quater is respected by insurance companies. Any breach of the rule is qualified as gender discrimination.

**9.6 How has the exception of Article 5(2) of Directive 2004/113 been interpreted in your country? Please report on the implementation of the C-236/09 *Test-Achats* ruling in national legislation.**

*Test-Achats* has been implemented in Italy by Article 25, Paragraph 1 of Act 30 October 2014, No. 161, which has amended Article 55 quater of Decree No. 198/2006. The rule provides that, before 21 December 2012, proportionate differences in individuals' premiums and benefits are allowed only on condition that the Institutes for Insurance Vigilance (Ivass) ensures that the use of sex is a determining factor in the assessment of risk based on relevant and accurate actuarial and statistical data. After 20 December 2012, the use of sex as a factor in the calculation of premiums and benefits for the purposes of insurance and related financial services shall not result in differences in individuals' premiums and benefits.

**9.7 Has your country adopted positive action measures in relation to access to and the supply of goods and services (see Article 6 of Directive 2004/113)?**

Article 55 novies of Decree No. 198/2006 expressly provides for positive actions to be promoted by the Office for the promotion of equal treatment in access to goods and services at the Prime Minister's Equal Opportunities Department. Positive actions can be carried out by public and private bodies and especially by associations and organizations promoting equal treatment listed as such by a ministerial decree. At present, however, there are no records of positive actions in this field.

**9.8 Are there specific problems of discrimination on the grounds of pregnancy, maternity or parenthood in your country in relation to access to and the supply of goods and services? Please briefly describe relevant case law.**

There are no specific grounds or case law on discrimination on the grounds of pregnancy, maternity or parenthood in relation to access to and the supply of goods and services. Article 4(2) of Directive 2004/113 has been applied to maintain the exemption from fees for all clinical tests related to pregnancy and for certain clinical tests during the same period. Moreover, having children is regarded as a preferential ground to have access to public housing, while having more than one child is a preferential ground to gain access to a public kindergarten.

## **10. Violence against women and domestic violence in relation to the Istanbul Convention**

### **10.1 Has your country ratified the Istanbul Convention?**

Yes. Italy signed the IC on 27 September 2011 and ratified it with the Act of 27 June 2013, No. 77. The pre-existing legal framework was not completely in compliance with the obligations under the Convention. In particular, it did not comply as regards forced abortion, which is not mentioned by Article 18 of Act No. 194/1978 on abortion; moreover, crimes such as forced sterilisation and forced marriage were not included in the Italian Criminal Code. Also free legal aid for victims was not provided and protective measures had to be strengthened.

Following Italy's accession to the Istanbul Convention, Decree of 14 August 2013, No. 93 (implemented in Act No. 119/2013) was introduced. The Decree strengthened measures aimed at tackling crimes such as domestic violence, sexual violence, and 'persecutory acts' (stalking, which had been regulated for the first time by Decree No. 11/2009, implemented in Act No. 38/2009). Two Articles are particularly important as regards the implementation of the IC: Articles 5 and 5bis of Decree No. 93/2013. Article 5 provides for an 'Extraordinary plan against violence' to tackle such crimes to be issued by the Minister for Equal Opportunities, including multiple measures aimed at prevention, at strengthening anti-violence centres and social services, increasing the protection of victims, improving the professional training of experts, gathering figures on these cases and carrying out positive actions. Article 5bis promotes and finances both the creation and the consolidation of specialist support services and shelters, which can be set up by local authorities or voluntary associations and organizations and are due to operate in coordination with the National Health Service net of local clinics.

The issuing of Decree No. 93/2013 was a further and important step towards better protection for woman against violence. Certainly, stronger sanctions have been provided, together with further precautionary measures and some improvements in the protection of the victim. Nevertheless, criticisms have been raised concerning the merely repressive nature of this intervention and on the lack of funding which risk depriving it of any effectiveness. In particular, it has been underlined that the Decree is extremely weak as regards prevention, which is crucial to combat violence and no attention at all has been paid to the professional training of experts and to health and social help/assistance aimed at the rehabilitation of the perpetrator.

The Extraordinary Plan itself is unlikely to work at little cost. It has, however, been implemented by a Decree of the Prime Minister of 25 August 2015. The plan contains measures aimed at: realizing local-level projects on protecting women against violence; improving the professional training of experts; prevention and the support of women who have experienced violence; and social education. The plan, which will be two-yearly, will be monitored yearly by the Department of Equal Opportunities, led by the Prime Minister's Advisor on equal opportunities (we no longer have a Minister for Equal Opportunities).<sup>26</sup>

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<sup>26</sup> Article 23 of Decree No. 80 of 15 June 2015 implementing Delegation Act No. 183/2014 (which provides for a wide reform of the labour market) introduces some measures aimed at supporting victims of gender violence. A period of leave of three months will be awarded to women victims of gender-based violence who are under a protection programme certified by local authorities. The leave is remunerated and equal to the last month of remuneration; it is counted as actual work with regard to seniority, the annual vacation, and severance pay, and can be used on a daily or hourly basis, within the time frame of three years, following criteria stipulated by collective agreements or by law. Victims of gender-based violence are also entitled to convert their working relationship from full time to available part-time positions, on a temporary basis. A suspension of the working relationship for a maximum period of three months is also provided for continuous and coordinated collaborations that are a form of self-employment.

## **11. Enforcement and compliance aspects (horizontal provisions of all directives)**

### **11.1 Victimization**

11.1.1 Are the provisions on victimisation implemented in national legislation and interpreted in case law?

Art. 26 of the Code of Equal Opportunities provides protection against victimisation for employees and all other persons who are victims of detrimental treatment by their employer in reaction to requiring compliance with the principle of equal treatment between men and women and fully comply with the Directives. No case law is to be recorded on this ground of discrimination.

Art. 41bis also provides for an extension of special legal redress (assistance by the Equality Advisors, trade unions and other associations promoting equal opportunities) to cases of victimisation.

### **11.2 Burden of proof**

11.2.1 Does national legislation and/or case law provide for a shift of the burden of proof in sex discrimination cases?

The provision on the partial reversal of the burden of proof can be deemed to be a satisfactory implementation of Directive 54/2006/EC, and it has been used by the scanty case law on indirect discrimination. As regards the use of quantitative/statistical data, the Code goes further than EU law as it requires companies with more than 100 employees to draw up reports every two years (and to deliver them to the company union representatives and to the Regional Equality Advisors) on the workers' situation (male and female), as regards e.g. recruitment, professional training, career opportunities, remuneration, dismissals and retirement. On the whole, the partial reversal of the burden of proof provided by Decree No. 198/2006 can be deemed to be a satisfactory implementation also in light of case C-415/10 Kelly Meister, and also considering that in labour law disputes, under Article 421 of the Code of Civil Procedure, the judge can order the acquisition of whatever kind of proof at any time.

### **11.3 Remedies and Sanctions**

11.3.1 What types of remedies and sanctions (e.g. compensation, reinstatement, criminal sanctions, administrative fines etc.) exist in your country for breaches of EU gender equality law? Please specify the applicable legislation.

Minor criminal sanctions were provided for the infringement of the prohibition on discrimination in access to work and working conditions, The decriminalization provided by Decree No. 8 of 15 January 2016, however, involved changes in the sanctions for the infringement of the ban on gender discrimination in the working relationship: that is minor criminal sanctions (a fine from EUR 250 to 1 500) have been substituted by administrative monetary sanctions from EUR 5 000 to 10 000. The change concerns all cases of discrimination covered by the Code of Equal Opportunities (Decree No. 198/2006), that is all sectors, both public and private and all aspects of the working relationship. Both administrative and criminal sanctions are provided for the protection of motherhood and fatherhood.

Positive actions are also provided as remedies against collective discrimination ascertained by the judge. The revocation of public benefits or even the exclusion, for a certain period, from any further award of financial or credit inducements or from any public tender is also provided in the case of direct or indirect discrimination. The general



remedy of nullity is enforceable for all discriminatory acts; moreover, the special remedy (reinstatement) provided by Article 18 of the Worker's Statute is enforceable in the case of a dismissal on the ground of pregnancy or marriage after the equalization of these cases to gender discrimination. Compensation for economic damage can also be awarded following the general principles on contractual and extra-contractual liability. In general, the prohibition on setting of an upper limit for compensation or reparation is not provided by the law, as such a limit does not exist in the Italian system.

The backdating of awards follows the general rules on prescription: five years for wage credits, under contractual liability;<sup>27</sup> ten years for awards of damages under extra-contractual liability, with the right to damages to be proved by the claimant.

11.3.2 In your opinion, do the remedies and sanctions meet the standards of being effective, proportionate and dissuasive? Please explain, if possible referring to relevant legislation or case law.

This piece of national legislation can reasonably be considered to be in line with the Directive in the light of the principles stated by the ECJE case law on sanctions. However, the 2016 decriminalization provided by Decree No. 8 of 15 January 2016, even though it aims at reducing the workload of the criminal courts, represents a retrograde step in the effectiveness of sanctions. Indeed, new sanctions are harsher than previous ones, but they have lost both the greater deterrent effect of criminal sanctions and the enforceability of the special procedure of Art. 15 of Decree No. 124/2004, which allowed the employer to avoid a criminal trial by the restoration of a lawful condition (i.e. halting the unlawful situation, if possible) and the payment of a quarter of the maximum of the fine.

#### **11.4 Access to courts**

11.4.1 In your opinion, is the access to courts safeguarded for alleged victims of sex discrimination? Please explain and discuss particular difficulties and barriers victims of sex discrimination have encountered. Refer to relevant legislation and case law.

Articles 37 and 38 of Decree No. 198/2006 empower Equality Advisers to assist victims of discrimination. National and Regional Equality Advisers can act directly in their name in cases of collective discrimination, even where the employees affected by the discrimination are not immediately identifiable. Regional and Provincial Advisers can also proceed when delegated by an individual employee or can intervene in the process initiated by the latter.

National and Regional Equality Advisers can also propose a conciliation agreement before going to court, requesting the person responsible for the discrimination to set a plan to remove it within 120 days. If the plan is considered to be suitable for removing the discrimination, on the Equality Adviser's demand, the parties sign an agreement which becomes a writ of execution through a decree of the judge.

Some obstacles in relation to access to redress procedures probably arise from: the discouragement of women, that is a general lack of faith in the legal system, which is often too slow and in some cases provides sanctions (i.e. nullity of the discriminatory act which provides advantages to one gender) that do not award any benefit to the victims; the difficulty of proof as regards discrimination cases; the lack of a widespread knowledge and consciousness of these items by the victims themselves and by union representatives, lawyers, judges and labour inspectors.

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<sup>27</sup> See Court of Cassation 8 July 2002, case No. 9877.

A step forward in legal aid and the spreading of a 'culture' of bringing legal proceedings was taken by the allocation of funds to support the Equality Advisers (which strengthens the worker's financial and psychological position and assures the assistance of an expert both before and during the trial), but funding has been progressively cut every year and the possibility to fully sustain Equality Advisers has been reduced to almost zero.

11.4.2 In your opinion, is the access to courts safeguarded for anti-discrimination/gender equality interest groups or other legal entities? Please explain and refer to relevant legislation and case law.

Under Article 38 of Decree No. 198/2006, associations and organizations promoting respect for equal treatment between male and female workers, as well as trade unions, are entitled to act on workers' behalf.

The social partners' sensitivity in these issues, however, is still not uniform in all regions and sectors.

Case law is really scanty on gender anti-discrimination issues and no relevant examples are to be recorded as regards gender equality interest groups or other legal entities.

11.4.3 What kind of legal aid is available for alleged victims of gender discrimination?

See above under 11.4.1.

## **11.5 Equality body**

11.5.1 Does your country have an equality body that seeks to implement the requirements of EU gender equality law?

As regards the functions required by EU law, a central role is played by the Equal Opportunities National Committee (EONC) set up by the Labour Ministry Central Offices, which is in charge of formulating (by 31 May of each year) a programme in order to fix the targets for positive actions and of monitoring their implementation as well as the enforcement of equality principles. It can also propose solutions to collective disputes and, among other things, is entrusted with the task of stimulating social dialogue and dialogue with non-governmental organisations on equality issues and of exchanging information with the EU bodies that operate in the field of equal treatment.

The National Equality Advisor<sup>28</sup> is a member of the EONC and coordinates the Conference of Equality Advisors,<sup>29</sup> which gathers all local Equality Advisors and has been established to sustain their actions also through the spreading of information and good practices. Equality Advisors are charged of several tasks: they participate in central and local (following their respective territorial competence) employment commissions with the appropriate powers, promote positive actions, monitor their results as well as gender under-representation, employment policies, and the consistency of territorial development plans with European directives on equal opportunities. Furthermore, Decree No. 151/2015 has strengthened the collaboration of equality advisors with the Labour Inspectorate.

The law states that equality bodies shall perform independent activities, but it is up to the Minister of Labour to set the conditions for the organisation and the functioning of the Equality Advisors' staff. Equality bodies have however been excluded from the so-called 'spoil system', provided by Article 6(1) of Act No. 145 of 15 July 2002; as a consequence of this, they cannot be removed from office exclusively on the ground of a change in Government (Decree No. 151/2015).

<sup>28</sup> <http://consigliera nazionale.lavoro.gov.it>.

<sup>29</sup> That is the former Net of the Equality Advisors, which has been renamed by Decree No. 151/2015.

Assistance to the victims of discrimination is also a duty of Equality Advisers. According to the national or local significance of a case of discrimination, the National Adviser and the Regional Advisers can act directly in the worker's name in the case of collective discrimination. Regional and Provincial Advisers can also proceed under the delegation of the individual employee or intervene in the process initiated by the latter, according to their respective territorial competence.

## **11.6 Social partners**

11.6.1 What kind of role do the social partners in your country play in ensuring compliance with and enforcement of gender equality law? Are there any legislative provisions in this respect?

Under Article 44 of the Code of Equal Opportunities the social partners can accede to the financing of voluntary Positive Action Plans and priority in admission to the reimbursement of costs is provided for positive action plans adopted on the basis of collective agreements bargained between employers and trade unions. They also participate in the National Equality Committee with their representatives.

As regards legal redresses, under Art. 38 of the Code, trade unions can bring discrimination cases to court on the worker's behalf with an urgent procedure. Moreover, the Biannual Report on the working conditions distinguished by gender in enterprises employing more than 100 workers, provided by Art. 46 of the Code, must be addressed also to the workers' representatives at the workplace. It can be an important instrument to detect and to give evidence of discrimination as it summarizes the worker's situation (male and female), as regards e.g. recruitment, professional training, career opportunities, remuneration, dismissal and retirement. Nevertheless, the intervention of trade unions in this field seems quite marginal, although it must be underlined that no data are available as regards, for instance, possible extrajudicial agreements.

## **11.7 Collective agreements**

11.7.1 To what extent does your country have collective agreements that are used as means to implement EU gender equality law? Please indicate the legal status of collective agreements in your country (binding/non-binding, usually declared to be generally applicable or not).

The collective agreements are not binding and are not used as a means to implement EU gender equality law.

## 12. Overall assessment

The influence of EU law has always been absolutely crucial in the field of gender equality. Under the influence of EEC Directive Nos. 75/117 and 76/207 on equal pay and equal treatment between men and women, the legislation on working women was rewritten according to the principle of equality and women's protection was coordinated with equality. This did away with the ambiguity of Art. 37 of the Constitution which rested on the principle of equality being flanked by the necessity of protecting women as 'weak' subjects on the labour market.<sup>30</sup>

Several legislative interventions in the last 20 years have created, on the whole, a good level of implementation of EU directives. Sometimes domestic legislation has gone further than EU law. This is the case with regulations on maternity and paternity protection and leave, positive action, justification clauses for indirect discrimination, and the promotion of female self-employment.

The main remarkable gap that may be detected is found in the functions of bodies entrusted with the promotion of respect for the principle of equal treatment, the conformity of which relies on the concept of independence adopted at the EU level.

Another gap is the absence of explicit legislation on gender reassignment, although it can be included in a wider concept of sex discrimination and in the concept of sexual orientation. Moreover, gaps exist in the area of multiple and intersectional discrimination. We do not have legal definitions of the phenomenon and that may be a reason why the Italian judiciary and legislation fail to address multiple discrimination. Lawyers generally tend to choose the strongest ground to argue their case before the courts and to leave out the grounds that are difficult to prove either singularly or in combination. Most of the time they do not even consider the possibility of arguing on the basis of more than one ground.

A bigger gap is the lack of an express prohibition in national law of incitement to discriminate.

More in general, the analysis of the recent national legislation implementing EU law shows a tendency to merely transpose it by a verbatim repetition of the EU Directive, which does not ensure the necessary coordination with other provisions.

As regards statutory social security legislation, despite the fact that Directive 79/7 has never been specifically transposed, domestic legislation, on the whole, is relatively well in line with EU law. The fact that domestic legislation, on the whole, is fairly in line with EU law on gender equality may explain the lack of a specific act transposing the EU Directives: the implementation might be considered less urgent at the political level. Nonetheless, in my view, the transposition is still to be regarded as crucial. This is because EU directives in any case provide a benchmark for domestic legislation. Indeed, the main problems as regards gender equality can be detected in those fields which have been omitted by the EU gender anti-discrimination framework, such as social assistance or family allowances. Indeed, the system shows discriminatory features as regards the family allowance: in particular in relation to part-time workers working less than 24 hours a week and vertical part-timers, who are entitled to benefits in proportion to the number of days spent at work, independently from the number of hours worked each day. Another discriminatory feature concerns cohabitants and partners, who are not included in survivors' schemes and the family allowance.

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<sup>30</sup> In particular, the logic of protection prevailed over that of equality for the next 30 years from the issuing of the Constitution. During that period, alongside instruments of protection necessary to allow women to fulfil their family functions (such as protection against dismissal on grounds of marriage or pregnancy, compulsory maternity leave, a ban on strenuous and unhealthy work during pregnancy and motherhood), there was an excess of protection that led to the discouragement of women in employment.

In relation to occupational pension schemes, the Recast Directive has been implemented by Decree No. 5/2010. This piece of legislation, however, does not include any provisions on the personal and material scope of the principle of non-discrimination, on its implementation as regards self-employment or on the retroactive effects of the measures introduced. In particular, in relation to the material scope, the application of the principle of non-discrimination to public servants' benefits paid based on the employment relationship (Article 7.2 of Directive 2006/54/EC) is not mentioned at all. It also allows the setting of different levels of benefits insofar as this may be necessary to take account of actuarial calculation factors, which differ according to sex. Among the actuarial factors, the higher life expectancy of women is often taken into consideration by occupational funds. Last but not least, these provisions fail to implement the Recast Directive as regards the pensionable age, which remains different for men and women. The early retirement age will become equal when the pensionable age will become equal in 2018. Early retirement in fact is calculated as five years before retirement age, generally (sometimes three years or one year); therefore the difference between men and women will not exist any longer once the pensionable age is equalized by 2018. More in general, the regime of the supplementary funds makes no provision for the recovery of 'fictional contributions' during maternity leave or during leave for serious family reasons: the funds' regulations are allowed to omit provisions such as those on notional contributions, or on redemption (e.g. to recover the contributions by paying them).

## **Annexes**

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