The first Italian case on the application of Directive 2000/78/EC for discrimination on the grounds of sexual orientation reaches the European Court of Justice.

Last July, the Italian Court of Cassation requested a preliminary ruling to the ECJ on the application of the Directive 2000/78/CE for a case of discrimination on the ground of sexual orientation and access to work. Since the Directive entered into force eighteen years ago, it is only the second time the Court of Justice deals with this matter[1].

The case.

On July 2013 Mr. Taormina, a famous lawyer and former member of the Italian parliament, made some strong remarks during a radio interview declaring that he would never hire a gay lawyer in his law firm[2]. Following this event, the Italian association Rete Lenford brought an action before the Tribunal of Bergamo, claiming that those statements constituted a direct discrimination prohibited by Legislative Decree no. 216/2003 implementing the Directive 2000/78/EC on equal treatment in employment and occupation.

The Tribunal of Bergamo ruled in favour of Rete Lenford, condemned Mr. Taormina to the payment of € 10.000,00 and ordered the publication of the ruling on a national newspaper at his expense. Mr. Taormina consequently filed an appeal against this decision, which the Court of Appeal of Brescia upheld. He then filed an appeal to the Court of Cassation, which requested a preliminary ruling in relation to two profiles that sit at the core of Mr. Taormina's defence.

The questions referred.

The Court of Cassation asks:

1) whether Article 9 of the Directive 2000/78/CE must be interpreted as meaning that an association, composed by lawyers specialised in the judicial defence of people with a different sexual orientation, which in its statute declares the aim of promoting the culture and the respect of the rights of that category, should be automatically considered as having a legitimate interest in the compliance of the Directive and therefore entitled to bring a proceeding for its enforcement.
2) whether a statement against homosexuals, pronounced during a radio interview through which the interviewed declared he would never hire or benefit from the collaboration of homosexuals in his law firm even though a recruitment procedure was not ongoing or planned, actually falls within the scope of application of the Directive 2000/78/CE.

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[1] Five cases for discrimination on the ground of sexual orientation based on Directive 2000/78/EC have been decided by the Court of Justice, but only one concerns access to work (Asociația Accept C- 81/12). The others are Maruko (C-267/06), Romer (C-147/08), Hay (C-267/12) and Parris (C-443/15).

[2] Mr. Taormina declared: "*I don't care about homosexuality, the important thing is that they are not around me" … "they bother me*". Then, after the interviewer replied that gay people are everywhere in society, Mr Taormina replied: "*for instance, in my law firm I do a proper selection in order that this does not happen*". He then stated clearly that he would never hire an homosexual lawyer.

The absence of an identifiable compliant and the *locus standing* for associations in EU anti-discrimination law.

On the first question referred, it is worth noting that the Court of Justice, in the cases *Feryn* and *Asociatia,* already clarified that Article 9(2) of the Directive does not impose nor prohibit Member States to confer associations with the right to bring legal proceedings without acting in the name of a specific compliant or in the absence of an identifiable compliant[3]. The Italian legislation expressly provides such rights to associations at article 5 of Legislative Decree No. 216/2003, a norm amended and broadened in 2008.

This been illustrated, it becomes then crucial to determine when an association has legitimate interest in ensuring the compliance of the Directive, which is a condition for the *locus standi* according to either EU law and the national implementation measure. The Italian Court of Cassation doubts that the legitimate interest derives from the fact that the association is composed by lawyers specialised in a certain type of judicial actions. It therefore asks if the objective of the association, as indicated in the statute, does constitute a sufficient element of legitimacy.

At this regard, it is important to clarify the difference between the notion of *interests of the association* and *interest of its members*. Indeed, it is not required neither from Directive 2000/78/EC nor from Legislative Decree No. 216/2003 that the members of the association should have themselves, individually, a legitimate interest in the compliance of the antidiscrimination dispositions at stake. Especially in cases where the victims of the discrimination are not directly and immediately identifiable, requiring so would also lead to an evident contradiction. Therefore, the attention should be focused on the interest of the association as legal entity, while the procedure should be the one followed by the Court of Appeal of Brescia via the examination of the Statute of the association. Arguably, in doubtful cases it could be of interest also to look at the actual activities undertaken by the actor in order to further support the analysis.

In the case here presented, many dispositions of Rete Lenford's statute indeed clarify that the core objective of the association lies in the promotion and defence of LGBTI people's rights: it hence appears most unlikely that the Court of Justice would deny it the entitlement to bring the proceeding.

On employers' public statements concerning recruitment policies and anti-discrimination prohibitions.

Regarding the second question referred, which concerns the material scope of the Directive 2000/78/EC, it is important to highlight that the only innovative element lies in the fact that an actual recruitment procedure was indeed not being planned or ongoing. In previous years, the Court of Justice had already declared in the famous case *Feryn* (C- 54/07) that a public statement made by an employer concerning its own recruitment policies does constitute a direct discrimination, when it is likely to strongly dissuade a certain category of candidates from

[3] Cases Firma Feryn C-54/07 and Asociatia Accept C-81/12

submitting their application. The *Feryn* case concerned statements related to ethnic origins of the candidates, and therefore fell under Directive 2000/43/EC and not under Directive 2000/78/EC. However, since both are applicable to the "*conditions for access to employment, to self-employment or to occupation, including selection criteria and recruitments conditions [...]*", the principle is without doubt transposable in the case here commented.

The crucial point is therefore to establish whether the absence of a recruitment procedure constitutes a sufficient element for considering the statements to fall outside the scope of the Directive. At this regard, it seems that the Italian Court of Cassation is troubled with a broad interpretation of the anti-discrimination prohibitions, which would restrict other fundamental rights such as the freedom of speech. However, from the wording of the referred question, the Court seems also ready to accept that, if the statements fall inside the scope of application of the Directive, the balance between the right to not be discriminated against and the freedom of speech has already been struck by the EU legislator in favour of the first.

On this issue, it is worth recalling the argument put forward by former Advocate General Maduro in his opinion delivered in the *Feryn* case, according to which by publicly stating the intention not to hire a certain category of persons an employer is already excluding those persons from the application process, and consequently "*he is not merely talking about discrimination, he is discriminating. He is not simply uttering words; he is performing a speech act*". Therefore, a public statement constitutes *in itself* a discrimination if able to dissuade a certain category of persons from applying for a job. This reasoning was in essence accepted by the Court of Justice and therefore, once assessed that a statement hinders the access to the labour market for a certain category of persons, anti-discrimination protection applies and prevails over freedom of speech[4].

Another critical consideration is that even in the absence of a recruitment process, a public statement could still be able to have relevant dissuasive effects on potential applicants. As noted by the Tribunal of Bergamo, this is particularly true for the peculiar nature of the recruitment process in law firms, which is usually not done through public competition but by internally selecting the curricula received by the firm. Nobody would propose herself or himself for working in a certain place if they knew in advance that their sexual orientation would negatively determine the outcome of their application, or that they would find themselves working in a hostile environment. Hence, if a public statement such as that of the case illustrated were to be excluded from the scope of the Directive, it would be possible for employers to circumvent anti-discrimination prohibition just by making their discriminatory recruitment policy explicit some time before its start[5]. If that were the case, the effectiveness of the anti-discrimination protection would result severely hindered.

Conclusion.

[4] For a more extensive analysis on the conflict between anti-discrimination law and free speech in the case illustrated see: L. Tomasi, *L'Unico caso italiano di discriminazione fondata sull'orientamento sessuale in materia di lavoro? Nota a Tribunale di Bergamo, 6 agosto 2014 - Corte d'appello di Brescia, 11 dicembre 2014*, in Genius, issue I, 2015.

[5] As already noted by F. Rizzi, *Tre Lezioni sul caso Taormina, il ruolo della società civile come strumento di empowerment dei soggetti discriminati*, 2014, published on articolo29.it.

The case here illustrated offers to the Court of Justice the possibility to further clarify the scope of application of Directive 2000/78/EC in situations where there is no identifiable compliant. So far, the Court of Justice has interpreted Directive 2000/78/EC in light of the objective to ensure the effectiveness of the principle of equal treatment in employment, refusing to define its scope of application narrowly. It is therefore likely that the Court would continue to follow this path by establishing that public statements such as those of the proceeding here commented, when able to hinder the access to labour market of a certain category of persons, do fall within the scope of application the Directive.

Federico Micheli, Phd student in Labour Law at the University of Brescia and lawyer. He is employed at the law firm which represents *Rete Lenford* in the proceeding here illustrated but has not worked on the case.