

**SEX-BASED QUOTAS RESERVING MOST PRISON POLICE INSPECTOR POSITIONS
FOR MALE CANDIDATES ARE DISCRIMINATORY**

In Judgment No 181/2024, the Constitutional Court held that **the staffing rules governing the hiring of prison inspectors violated Articles 3 and 117(1) of the Italian Constitution, in conjunction with EU law**, by reserving significantly more positions for male candidates than for female candidates.

The sex-based imbalance did not correspond to a genuine occupational requirement. While certain prison staff must be of the same sex as the inmates in the sections to which they are assigned, the tasks of inspectors primarily involve cooperating with superiors and overseeing the activities of other prison staff.

Therefore, **the significant imbalance in access to inspector positions in favour of male candidates constituted unjustifiable sex-based discrimination** and violated the principles of equality enshrined in the Constitution and in EU law.

Main proceedings

Several female employees of the Prison Police Corps challenged, before the President of the Republic, the publication of the final list of candidates eligible for an internal hiring process for 606 prison police inspector positions. The applicants complained that the job was open only to male candidates. The Supreme Administrative Court (*Consiglio di Stato*) (the “**referring court**”) was asked to issue a legal opinion on the matter.

The referring court observed that the male-only selection was in accordance with Article 44, paragraphs 7 to 11 of Legislative Decree No 95/2017¹ and staffing Table 37 annexed thereto, and complied with staffing Table A, annexed to Legislative Decree No 443/1992² (the “**challenged provisions**”). These provisions regulate the number of inspectors employed by the Prison Police Corps and reserve the vast majority of posts for male candidates. Consequently, the referring court questioned whether the challenged provisions violated the Constitution on the grounds of sex-based discrimination.

In November 2023, the referring court stayed the proceedings and referred the matter to the Constitutional Court (the “**Court**”), asserting that the challenged provisions violated the Italian Constitution (**IC**).

¹ Legislative Decree No 95/2017, concerning changes to the roles of the police forces.

² Legislative Decree No 443/1992, concerning the personnel of the Prison Police Corps.

Complaints

The referring court argued that the challenged provisions established a discriminatory system for accessing the position of prison police inspector based on sex, which was not justified by genuine occupational requirements.

Therefore, the challenged provisions contradicted the principle of equality between men and women under European Union (EU) law and, as a result, breached **Article 117 IC (Compliance with international obligations)**. In addition, the provisions amounted to unjustifiable discrimination in breach of **Article 3 IC (Principle of equality and non-discrimination)**.

Decision of the Court

The Court ruled that the challenged provisions **violated Article 117 IC**, in relation to several measures of EU law, and **Article 3 IC**.

Reasons for the decision

At the outset, the Court confirmed the admissibility of the challenge. Specifically, it stated that **the referring court alleging a breach of EU law does not preclude the review of the merits** of the constitutional challenges by the Court.

If a domestic court finds that a national law is incompatible with directly applicable EU law, it may choose between two options. It can set aside the domestic law, if necessary, after referring the matter to the Court of Justice of the European Union (**CJEU**) for a preliminary ruling on the interpretation of EU law under Article 267 of the Treaty on the Functioning of the European Union (**TFEU**). Alternatively, it can raise a question of constitutionality for violation of Articles 117(1) and 11 IC. In the latter scenario, the Court may decide to seek clarification from the CJEU on the scope of EU law guarantees, particularly when they affect constitutional principles, which evolve constantly and stand in a relationship of mutual support and integration with EU law.³

Since Judgment No 269/2017, the Constitutional Court has clarified on several occasions the approach to be followed **in cases of “double preliminary questions” (*doppia pregiudizialità*)**, that is, when a domestic measure raises both questions of constitutionality and issues of compliance with EU law. Domestic courts can choose which issue to prioritise⁴ and act accordingly. **Both remedies – disapplying Italian law in the main proceedings or raising a constitutional question – serve to promote the fundamental value of the primacy of EU law.**

In particular, the disapplication of domestic law that conflicts with directly applicable EU norms is always possible, irrespective of the option to seise the Constitutional Court. Conversely, **if a challenge is raised, which presents a “constitutional dimension” on account of its relationship with constitutional principles, the Court will determine under Article 117(1) IC whether Italian law complies with any applicable rule of EU law.**

³ Constitutional Court, [Order No 182/2020](#), point 3.2 of the *Conclusions on points of law*.

⁴ Constitutional Court, Orders Nos 217/2021 and 216/2021.

Directive 2006/54/EC, which implements the principles of non-discrimination and equality between men and women protected under the Charter, indeed concerns fundamental principles of the constitutional system and interacts with them. The challenge therefore has a constitutional dimension.

Within this framework of concurrent remedies, ordinary courts and the Constitutional Court both contribute to the implementation of EU law. Each uses its own instruments and operates within its respective jurisdictions.⁵ **The Court's centralised review of constitutionality does not contradict the decentralised and diffuse nature of EU law implementation, which is entrusted to all ordinary courts.** When faced with a scenario of double preliminary questions, ordinary courts can choose the appropriate remedy in each case.

Referrals to the Constitutional Court are particularly useful when the interpretation or validity of Italian law can have systemic effects beyond the main proceedings,⁶ or when the matter entails a balancing of constitutional principles. Moreover, when it is not certain that the EU norm has direct effect – thus raising doubt as to whether the domestic court can disapply the Italian provision – the Court can uphold the constitutional challenge if there is a conflict between Italian law and the EU law standard, irrespective of whether the latter has direct effect.

Citing its Judgment No 15/2024, the Court recalled:

a declaration that internal legislation is unconstitutional offers a further guarantee of the primacy of EU law in terms of its certainty and uniform application. Indeed, even though the obligation to apply provisions with direct effect applies not only to all courts but also to public authorities – with the result that, where any internal legislation is incompatible with those provisions, it must not be applied – it is also possible that internal provisions may continue to be used and applied as a result of any failure to appreciate that incompatibility or in the event that an interpretative approach considers there to be no such incompatibility. Precisely with the aim of avoiding such an outcome, and without prejudice obviously to any other remedies that the legal system adopts in order to ensure the uniform application of the law whenever this occurs, the referral of a question of constitutionality offers the opportunity, where the prerequisites are met, to achieve the removal from the legal order, with the binding effect inherent to a judgment accepting a question of constitutionality, of any provisions that are considered to violate EU law.⁷

The CJEU emphasised also the primary importance of the Constitutional Court. The Court adjudicates questions “in the light both of the rules of national law and of the rules of EU law, in order to provide not only to its own referring court but also to all the Italian courts a decision having *erga omnes* effect, which those courts must apply in any relevant dispute upon which they may be called to adjudicate ”.⁸

⁵ Constitutional Court, [Judgment No 149/2022](#), paragraph 2.2.2. of the *Conclusions on points of law*.

⁶ The Court's judgments of unconstitutionality have *erga omnes* effects, that is, they remove the challenged norm from the Italian legal system.

⁷ Constitutional Court, [Judgment No 15/2024](#), point 8.2. of the *Conclusions on points of law*.

⁸ CJEU, Grand Chamber, judgment of 2 September 2021, Case C-350/20, *O.D.*, paragraph 40.

In this case, a clarification by the Court with systemic (*erga omnes*) effects was desirable, given the lack of uniformity in the practice of domestic courts.

Turning to **the merits of the challenge**, the Court began by referring to the principle of equality under Article 3 IC. Differences based on sex are admissible in the interest of providing public services, considering the different aptitudes of persons of each sex.⁹ EU law also requires that – in the workplace – **any exception to the principle of non-discrimination based on sex must be proportionate and relate to genuine occupational requirements**.¹⁰ For this reason, the constitutional review simultaneously concerns Articles 3 and 117(1) IC, the latter in conjunction with EU law.

Italian law implements the principle of equality between men and women in the operation of the Prison Police Corps.¹¹ Staff assigned to prison services must be of the same sex as the inmates confined in the prison unit in which they operate.¹² However, this requirement does not apply to inspectors and therefore could not explain the large predominance of males in the staffing table, which listed more than 3,200 posts for men and only 425 for women.

For inspectors, **this discrepancy did not stem from genuine occupational requirements**. Inspectors must have adequate professional preparation and familiarity with prison rules and procedures. They are responsible for coordinating operational units, participating in group meetings to observe inmates' personalities, and designing individualised treatment plans. Moreover, inspectors normally supervise and assist prison staff and their operations; monitor inspections of inmates, their cells, and common areas; and attend inmate transfers. Therefore, the inspectors' main tasks concern cooperating with superiors and controlling the work of prison staff.

Direct and continuous contact with prisoners is not a defining or essential feature of inspectors' role. In this light, the significant gender imbalance reflected in the staffing tables for inspector positions did not correspond to a genuine occupational requirement necessary for the efficiency of the Prison Police Corps and was disproportionate. This imbalance also hindered career advancement for women, who could be excluded from the ranking of eligible candidates based on sex, even when their scores were higher than those of eligible male candidates. It is noteworthy that Italian law has already eliminated sex-based distinctions for the careers of officials within the Prison Police Corps.

Once all unreasonable disparate treatment is removed, the ranking for employment purposes should depend solely on the scores achieved by each candidate, rather than on disparities arising from sex-based quotas.

For these reasons, the challenged provisions are unconstitutional.

Type of proceedings	Constitutional review by referral order
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⁹ Constitutional Court, Judgment No 56/1958.

¹⁰ Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), Article 14(2).

¹¹ Law No 395/1990, Article 6(1).

¹² Law No 395/1990, Article 6(2).

President of the Court	Augusto Antonio Barbera
Judge rapporteur	Giovanni Pitruzzella
Composition of the Court	Augusto Antonio Barbera (President), Giulio Prosperetti, Giovanni Amoroso, Francesco Viganò, Luca Antonini, Stefano Petitti, Angelo Buscema, Emanuela Navarretta, Maria Rosaria San Giorgio, Filippo Patroni Griffi, Marco D'Alberti, Giovanni Pitruzzella, Antonella Sciarrone Alibrandi
Delivery of the judgment	19 November 2024
Challenged provisions	Article 44, paragraphs 7 to 11, and Table 37 of Legislative Decree No 95 of 29 May 2017; Table A of Legislative Decree No 443 of 30 October 1992.