

REPORT
on the Free Movement of Workers
in Italy in 2002-2003

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Introduction

The main 2002-2003 development occurred to the Italian legislation about the free movement of persons into the European Community was the adoption of the *Testo unico* (Presidential decree 2002 no 54) related to the community citizens' right of entrance and residence in Italy.

Generally speaking, the Italian attention towards the European principle of free movement of persons and its implementation is quite low. In particular, neither the Italian public administration nor the Italian lawmaker are so careful when they have to deal with the community citizens' treatment. There isn't also a great attention from both the ones who deal with the immigration matters (knowing the fact that the community citizens are not subject to the general principles normally required for aliens), and the ones dealing with the national law who, not without difficulties, guarantee that community citizens will be treated as nationals according with the EC equal treatment principle.

Moreover Italian institutions are quite responsible, too. They pay little attention to the provisions laid down by the EC law. Most of the European directives are converted into Italian laws too late (just before the dates of expire, or once the date is actually expired). As a result, it seems that the EC law and, first of all, the equal treatment principle, is not holding a very importance position on the Italian legislator's agenda.

The yearly regulatory instrument, though which Italy conforms its legal system to the EC one, is called *legge comunitaria*. This national measure has turned out to be very useful, not only with regard to the implementation of the European directives, but also because it allows to make focused interventions on the laws in force, when they have shown to be conflicting with the EC law. In this case, the national dispositions need to be adjusted in order to become compatible with the EC law. The *legge comunitaria* is mainly used to implement the judgments of the European Court of Justice.

Finally, the access to the public administration has not been characterized by great changes. The old contrast between the Italian Courts, concerning the linguistic associates' treatment is still going on, and it has been the object of several ECJ's judgments.

Of particular interests are the judgments of the Consiglio di Stato about the postponement of the military service. They seem to contrast with the ECJ's judgment in the case C-153/02, *Valentina Neri* (not yet published).

Chapter I

Entry, Residence, Departure

Introduction

The basic regulation on entry, residence and expulsion of Community citizens was the decree of the President of the Republic (DPR) 1965 no 1656. At first adopted to implement Directives no 64/220/EEC, 64/221/EEC, 64/224/EEC and 64/240/EEC, it was subsequently modified in order to implement all the EC Directives on free movement of persons, according to the following table:

DPR. 29-12-1969 no 1225	Directive no 68/360/EEC
act 4-4-1977 no 127	Directives no 73/148/EEC and 75/34/EEC
DPR 26-11-1992 no 470	Directives no 90/364/EEC, 90/365/EEC and 90/366/EEC
DPR 2-8-1999 no 358	

DPR 1965 no 1656 was repealed by DPR 18-1-2002 no 54 (*Gazzetta Ufficiale della Repubblica italiana*, 9-4-2002 no 83 S.O.) and replaced by it. The entire regulation has been rewritten, without introducing major changes. DPR 2002 no 54 is a consolidated law (*testo unico*), aimed at simplifying existing legislation. According to its limited purpose, the opportunity to codify the principles on the free movement of persons, as they come out of the jurisprudence of the Court of Justice, was missed.

Literature

- F. Dini, *Circolazione dei lavoratori comunitari, Il lavoro nella giurisprudenza*, 2002, p. 518.
- M. Condinanzi, A. Lang, B. Nascimbene, *Cittadinanza dell'Unione e libera circolazione delle persone*, Milano, Giuffrè, 2003, p. XIII-287.

A. Entry

a) Text(s) in force

Article 1 DPR 18-1-2002 no 54 (*Gazzetta Ufficiale della Repubblica italiana*, 9-4-2002 no 83 S.O.)

See the following table of correspondence:

Directives no 68/360/EEC and 73/148/EEC	DPR 18-1-2002 no 54
Article 2 (right to leave one's country and documents required)	Articles 10-11
Article 3.1 (right to enter another Member State and documents required)	Article 1 (right to enter Italy)

Article 1 states that citizens of a EU Member State enjoy the rights to enter Italy, except for limitations provided for by criminal law or on grounds of public policy, public security or public health. It is not clear what "limitations provided for by criminal law" exactly means.

Legge costituzionale 23-10-2002 no 1, Cessazione degli effetti dei commi primo e secondo della XIII disposizione transitoria e finale della Costituzione, *Gazzetta Ufficiale della Repubblica italiana*, 26-10-2003 no 252.

The first and second paragraphs of transitory and final provision no. XIII of the Italian Constitution (“The members and descendants of the House of Savoy shall not be voters and they shall not hold public office or elected offices. To the ex-kings of the House of Savoy, to their consorts and their male descendants shall be forbidden access and sojourn in the national territory”) cease to be applicable as of the date of the entry into force of Constitutional act 2002 no 1 (10-11-2002). As a result, male descendants of the House of Savoy can freely enter and reside in Italy.

B. Residence

a) Text(s) in force

Article 2-6, DPR 18-1-2002 no 54 (*Gazzetta Ufficiale della Repubblica italiana*, 9-4-2002 no 83 S.O.)

DPR 18-1-2002 no 54	
Article 2	Right to short-term residence (for periods not exceeding three months)
Article 3	Beneficiaries of the right of residence (Directives no 68/360/EEC, 73/148/EEC, 90/364/EEC, 90/365/EEC, 93/96/EEC)
Article 4	Corresponding to Article 3 of Directive no 90/364/EEC and Article 3 of Directive no 90/365/EEC
Article 5	Substantial requirements necessary in order to obtain a residence permit (Directives no 68/360/EEC, 73/148/EEC, 90/364/EEC, 90/365/EEC, 93/96/EEC)
Article 6	Proceedings for the grant of a residence permit

DPR 2002 no 54 does not implement Directive no 75/34/EEC, neither Article 5 of Directive no 68/360/EEC.

Article 3, DPR 18-1-2002 no 54		
Paragraph 1	The right of residence is granted to:	
	a) nationals of a Member State who wish to establish themselves in Italy in order to pursue activities as self-employed persons	Directive no 73/148/EEC, article 1.1 a)
	b) workers	Directive no 68/360/EEC
	c) nationals of a Member State who wish to enter Italy in order to provide services or as recipients of services	Directive no 73/148/EEC, article 1.1 a) and b)
	d) students (included University students)	Directive no 93/96/EEC
	e) “nationals of a Member State who have worked in another Member State or not”	Directive no 90/365/EEC and Directive no 90/365/EEC

Paragraph 2	a) workers pursuing an activity as an employed person, where the activity is not expected to last for more than three months, and b) seasonal workers who hold a contract of employment stamped by the competent authority of the Member State on whose territory they have come to pursue their activity do not need a residence permit	Article 8 a) and c), Directive no. 68/360/EEC
Paragraph 3	The right of residence is granted to the members of the family of the national of a Member State listed in paragraph 1 a) to c), irrespective of their nationality.	Article 1.1 c) and d) Directive no 73/148/EEC
Paragraph 4	Conditions upon which the right of residence of nationals listed in paragraph 1 d) and e) and of their family is subject.	Article 1 Directive no 90/364/EEC, Article 1 Directive no 90/365/EEC, Article 1 Directive no 93/96/EEC.
Paragraph 5	Family members of the beneficiary are entitled to take up any employed or self-employed activity in Italy, with the exception of employments in the public service	Article 2.2 second sentence of Directive no 90/364/EEC; Article 2.2 second sentence of Directive no 90/365/EEC; Article 2.2 second sentence of Directive no 93/96/EEC.
Paragraph 6	Worker who is employed in Italy, while, having his residence in the territory of a Member State to which he returns as a rule each day or at least once a week, is issued with a special permit.	Article 8 b) Directive no. 68/360/EEC

Residence permit:

Article 5: substantial requirement		
Paragraph 1	Questura (police headquarters) is the authority empowered to issue the residence permit. Content of the request.	
Paragraph 2	A picture shall be attached to the request	
Paragraph 3	Documents that have to be produced while submitting the request for the resident permit	
Paragraph 4	Request for the family members' residence permit	
Paragraph 5	Requirements for the request for the family members' residence permit	
Paragraph 6	Issue of a receipt by the police headquarters	
Paragraph 7	The issue of the resident permit is free of charge	Article 9.1 Directive no 68/360/EEC; article 7.1 Directive no 73/148/EEC

For the issue of the residence permit, Italy requires the production of the following documents:

Workers (Article 5.3 b)	A certificate of employment or a confirmation of engagement from the employer or (only for seasonal workers) copy of the work contract
Self-employed persons and providers/recipients of services (Article 5.3 a) and c)	The authorisations required by the Italian law in order to perform the desired activities or Proofs that the person comes within one of the classes of persons referred to in Article 3.1 a) and c)

Students (Article 5.3 d) and e)	Proof to be registered at the Italian health care scheme (Servizio sanitario nazionale) or to be covered by sickness insurance and proof to have sufficient resources to avoid becoming a burden on the Italian social assistance system and a certificate of enrolment in the University or in an establishment for the purpose of following a vocational training course and a studies duration certificate.
Persons covered by Directives no 90/364/EEC and no 90/365/EEC (Article 5.3 d)	Proof to be registered at the Italian health care scheme (Servizio sanitario nazionale) or to be covered by sickness insurance and proof to have sufficient resources to avoid becoming a burden on the Italian social assistance system

Article 6: issue of the residence permit		
Paragraph 1	The residence permit shall be issued within 120 days from the request.	
Paragraph 2	The residence permit - is valid throughout the Italian territory; - is valid for five years or for the duration of the stay.	Article 6.1 Directive no 68/360/EEC
Paragraph 3	The residence permit is renewable.	
Paragraph 4	The residence permit may replace the identity card for no more than five years from the date of the first issue.	
Paragraph 5	Events that can not affect the validity of the residence permit	Articles 6.2 and 7 Directive 68/360/EEC.

Literature

- A. Lang, Libera circolazione delle persone in ipotesi atipiche, *Diritto pubblico comparato ed europeo*, 2003, p. 470 (comments on ECJ's judgment of 17-9-2002, case C-413/99, *Baumbast*, ECR I-7091).
- S. Marzucchi, Efficacia diretta del diritto comunitario di soggiorno: posso andare a vivere dove voglio?, *Giurisprudenza italiana*, 2003, p. 861 (comments on ECJ's judgment of 17-9-2002, case C-413/99, *Baumbast*, ECR I-7091). The author attributes to the judgment a political rather than a legal value, as the Court does not add anything new to the right of residence. In addition, it limits itself to providing the national judge of a set of criteria to evaluate the compatibility between national decisions and Community law.

C. Departure

a) Text(s) in force

Articles 7 to 9, DPR 18-1-2002 no 54 (*Gazzetta Ufficiale della Repubblica italiana*, 9-4-2002 no 83 S.O.)

Articles 7 to 9 implement Directive no 64/221/EEC, according to the following table of correspondence:

DPR 18-1-2002 no 54	Directive no 64/221/EEC
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Article 7.1	Article 2.1
Article 7.1 last sentence	Article 3.1
Article 7.2	Article 3.2
Article 7.3	Article 3.3
Article 7.4	Article 6
Article 7.5	Article 4.1
Article 7.6	Article 4.2
Article 8.1	Article 7
Article 9	Article 9
Article 11.3	Article 3.4
Article 6.1, second sentence	Article 5.2

Article 6 paragraph 7 of DPR 1965 n. 1656 is no more reproduced. It stated that the police had to be informed of each complaint lodged to the judicial authority against a foreigner.

Article 2.2 of Directive no 64/221/EEC is not implemented (“Such grounds shall not be invoked to service economic ends”), neither is Article 8 (“The concerned person shall have the same legal remedies in respect of any decision concerning the entry, or the refusal of the issuing or renewing of the residence permit, or the order of expulsion from the territory, as are available to nationals of the concerned State in respect of acts of the administration”). Nevertheless, according to the general principles of the Italian legal order (see Article 24.1 of Italian Constitution: “All persons are entitled to take judicial action to protect their individual rights and legitimate interests”), each decision encroaching on fundamental rights of individual is reviewable by a judge.

Article 7.1 is not well drafted: it literally declares that a derogation to provisions from 1 to 6 of DPR 2002 no 54 and to an expulsion from Italy is permissible on grounds of public policy, public security and public health. A much more correct reading is that a derogation to Articles 1 to 6 of DPR 2002 no 54 and a deportation order from Italy are justifiable only on grounds of public policy, public security and public health.

A literal interpretation of Article 7.5 of DPR 2002 no 54 leads to declare that diseases and disabilities can justify not only the refusal of the first residence permit, but also the refusal of the renewal of it. The provision shall be read in conformity with Directive no 64/221/EEC, which permits only the refusal of entry into a territory or the refusal to issue a first residence on grounds of diseases or disabilities listed in the annex.

If the individual does not leave the country within the time allowed to him, the public authority will expel him by issuing a banishment order (foglio di via obbligatorio: Article 8.2).

The Questura (police headquarters) is the competent authority to issue or renew a residence permit. It has to obtain a prior opinion by a commission, attached to the Ministry of the Interior and consisting of a prefetto (provincial governor), a questore, and three persons appointed by the Ministry of Foreign Affairs and by the Ministry of Welfare. This commission does not seem to fulfil the independence requirement stressed by the Court of Justice in Santillo, at least when the questore is the authority requesting the commission for opinion.

b) Judicial practice

Consiglio di Stato, judgment of 29-11-2002, no. 6523

A very debated question is the applicability to the European citizens of article 7 of Act 1990 no 39. [Act 1990 no 39 is no longer in force, repealed by the act 1998 no 40. It was nevertheless applicable to the case.]

The Court states that the status of the European citizens is regulated primarily by the DPR 1965 no 1656 and by act 1990 no 39 (on immigration) when the first is not applicable. If decided on the ground of public policy or public security, the expulsion order ex Article 7 of act 1990 no 39 is not in conflict with Community law.

In that case, the DPR 1965 no 1656 was not applicable, because the European citizen was neither a worker, nor a self-employed, nor he had any financial resources, as he had entered Italy with the purpose of registering at the unemployment office. As a result, he could be expelled on the ground of public policy or public security, provided that the decision was based on the personal conduct of the concerned individual.

NoA: the Court omitted to consider that the Court of Justice in Antonissen qualifies as a worker an individual who was in search of an employment.

Tribunale di Catania, order 21-1-2003, *Dem'Yanenko* (with comments by M. Balboni, Compatibilità col diritto comunitario dell'espulsione e dell'accompagnamento coattivo alla frontiera, immediatamente esecutivi: alcuni spunti di riflessione, *Diritto, immigrazione e cittadinanza*, 2003, 2, p. 53).

The judge makes a reference for a preliminary ruling to the Court of Justice, since he believes that the forcible removal of foreigners, ordered according to the Italian law, was inconsistent with Community law. In the case, the judge was asked by the Questore to validate the deportation order of an Ukrainian national (the decision was taken upon the grounds of unlawful residence in Italy), but the order was already enforced in such a way that he considered it inconsistent with the basic human rights, stated and granted by Community law. Although the judge recognized that Directive no 64/221/EEC could not be applied to non-EC nationals, he believed that Community law grants individuals (non Community nationals included) a right to an effective remedy, which is disregarded by the Italian law and the practice. The case was dismissed by the Court of Justice for lack of jurisdiction (order of 16-3-2004, case C-45/03, OJEU C 106/2004).

During the G8 meeting held in Genoa on July 2001, the Police issued several deportation orders as well as orders refusing entrance into the Italian territory. Among the foreign nationals who were expelled, some of the were citizens of the European Union. These orders were often poorly motivated and, if appealed, were subsequently annulled by the courts, on the grounds of inadequate statement of reasons and procedural irregularities.

With reference to the first ground for annulment (inadequate statement of reasons), the courts state that a Community citizen can be expelled only on grounds of public order or public security, and that the decision must be based on the personal conduct of the concerned individual. The orders submitted to the courts were not correctly motivated according to Community law (see Tribunale of Genoa, decree 27-2-2002, *Wegh-*

enkel, annulling the order taken by the prefetto to expel a German citizen, escorting him to the border and to ban him from returning to Italy without special authorisation of the Ministry of the Interior; Tribunale regionale di giustizia amministrativa of Bolzano, judgment of 17-10-2002 n. 447, *Granzer*, annulling the order taken by the Border Police Office of Brennero, which refused an Austrian national to enter Italy).

With reference to the second ground for annulment (procedural irregularities) the court declares that the authority empowered to take a deportation order of a Community citizen is not the prefetto, but the Ministry of the Interior, after obtaining an opinion from the Ministry commission, as it was established by DPR 1965 no 1656 (Tribunale of Genoa, decree 27-2-2002, *Weghenkel*, cit.).

c) Recent legal literature

- P. Morozzo della Rocca, Espulsione e danno: la normativa italiana sull'allontanamento dello straniero, *Diritto, immigrazione e cittadinanza*, 2002, 4, p. 31. The author envisages the possibility of a civil action for damages in case of illegal expulsion. Even though he develops his thesis with particular attention to illegal deportation order taken against a non-Community national, it has a general value, and could be extended in favour of Community citizens. According to this interesting thesis, the State would be responsible for damages occurred to the foreigner expelled in force of a decision subsequently annulled by a court. It is a Francovich-style responsibility.
- C. De Rose, La libera circolazione delle persone dell'Unione europea: profili generali ed istituzionali anche con riferimento alla normativa italiana, *Il Consiglio di Stato*, 2003, 2, p. 599. The author notes that, at the present stage of European integration, expulsion as provided for by the Articles from 7 to 9 of DPR 2002 no 54 [NoA: and by Directive no 64/221/EEC] is not acceptable any more. Instead of getting rid of the alien by dumping it at the border, a better police coordination would help in the fight against foreigners infringing the law; and that the foreigner affected by one of the diseases or disabilities listed would better be hospitalised and cured.
- A. Lang, Divieto di soggiorno parziale e riserva di ordine pubblico, *Diritto pubblico comparato ed europeo*, 2003, p. 848 (comments on ECJ's judgment of 26-11-2002, case C-100/01, *Oteira Olazabal*, ECR I-10981).
- S. Riondato, Misure di polizia contro cittadini comunitari sospetti terroristi, *Diritto penale e processo*, 2003, p. 385 (comments on ECJ's judgment of 26-11-2002, case C-100/01, *Oteira Olazabal*, ECR I-10981).

Chapter II Equality of Treatment

Judicial practice

Corte di Cassazione, 22-2-2002, n. 15139, *Priebke*

The Supreme Court states that neither the principle of non-discrimination on ground of nationality nor the citizenship of European Union allowed it to apply to Mr Priebke (German by nationality) the amnesty law of 4-6-1966 n. 332 (article 2, paragraph 2, b). This law granted amnesty to Italian citizens who committed crimes between 25-7-1943 and 2-6-1946. The purpose of the law was national reconciliation with the events that occurred after the end of the fascist regime and the following disorders.

Corte di Cassazione, labour section, judgment 6-5-2002 no 6441, *Meuter v. Università di Salerno*

The Supreme Court states that, in case of dismissals of linguistic associates, Italian law on collective redundancies does not apply, because a University is not an employer in the sense required by the law. Since the University is not an entity engaged in an economic activity, the Court refuses to ask the ECJ for a preliminary ruling, because no conflict with Community law emerges.

Recent legal literature

- C. Schepisi, Cosa si nasconde dietro il caso *Angonese*? Novità e conferme in materia di libera circolazione dei lavoratori, *Il Diritto dell'Unione europea*, 2002, p. 327. The author states that the *Angonese* case (ECJ's judgment of 6-6-2000, case C-281/98, ECR I-4139) was a situation purely internal to a Member State, and the Court of Justice gave an abstract answer to the questions submitted to it by the Italian judge, without prior qualification in terms of Community or internal situation. For these reasons, she believes that the judgment in *Angonese* is not authority for the proposition that Community law applies to purely internal situations too.
- D. D'Alessandro, Cittadinanza e disoccupazione. La Corte di Lussemburgo tra la discriminazione dei propri cittadini ad opera degli Stati membri, la costruzione di uno status civitatis europeo ed i limiti di una concezione geograficamente determinata della cittadinanza, *Diritto pubblico comparato ed europeo*, 2002, p. 1638 (comments on ECJ's judgment 11-7-2002, case C-224/98, *d'Hoop*, ECR I-6191).
- S. D'Acunto, Sentenza "musei italiani": un freno comunitario alle preferenze locali, *Diritto comunitario e degli scambi internazionali*, 2003, p. 451 (comments on ECJ's judgment 16-1-2003, case C-388/01, *Commission v. Italy*, ECR I-721).
- Garcia Avello, On ECJ's judgment 2-10-2003, case C-148/02: Article 19, second paragraph, of the act 1995 no 218 resembles to Belgian law examined by the Court of Justice, and states that when an Italian national has at the same time one or more other nationalities, precedence will be given to Italian nationality. It shall be recalled here the judgment of the Corte di Cassazione (plenary session), 9-1-2001 no 1, *Schindler*: the Supreme Court stated that in order to ascertain the competent judge of the adoption of a minor holding dual (Italian and German) nationality and resid-

- ing in Germany, Article 19, second paragraph, does not apply, since the rule that Italian citizenship must prevail constitute, *inter alia*, a discrimination on the ground of nationality, prohibited by Article 12 EC.
- M. Castellaneta, Limitare la trasmissione del cognome viola il principio di non discriminazione, *Guida al diritto*, 2003, 40, p. 111 s. The author examines the effects that the *Garcia Avello* judgment could produce on the Italian legal order. She does not see any conflict between Article 19 *per se* and Community law; however a conflict may arise if the preference accorded to the Italian citizenship leads to discriminatory effects. Anyhow, she recognizes that attributing the prevalence to the law of the country with which the person is most closely connected, in order to decide which citizenship prevails in case of multiple citizenships, is more suitable and in accordance with Community law.
- R. Conti & R. Foglia, Cittadini di Stati membri, doppia cittadinanza e trasmissione del doppio cognome, *Corriere giuridico*, 2003, p. 1649. They note that Italian law and administrative practice about handing down the surname of the Italian national are in conflict with the judgment in *Garcia Avello*.
- S. Gianoncelli, La coerenza fiscale e il principio di non discriminazione nella giurisprudenza comunitaria, *Giurisprudenza italiana*, 2003, p. 1963 (comments on ECJ's judgment of 3-10-2002, case C-136/00, Danner, ECR I-8147).
- M. Cittadini, L'orientamento della Corte di giustizia in materia di residenza a fini fiscali, *Giurisprudenza italiana*, 2002, p. 869 (comments on ECJ's judgment of 12-7-2001, case C-262/99, Louloudakis, ECR I-5547).
- F. Agnino, Statuti sportivi discriminatori ed attività sportiva: quale futuro?, *Il foro italiano*, 2002, I, 897. The article comments four judgments released by some Italian courts of first instance. Of particular interest is Tribunale of Pescara, order 14-12-2001: the judge accepted that water polo is an amateur sport, because it is the way CONI (Comitato olimpico nazionale italiano) classifies it, and refuses to consider it as an economic activity. The Author criticizes the solution adopted by the tribunal, because it does not apply the standards developed by the Court of Justice according to which sports are to be considered as an economic activity.
- V. Vigoriti, Problemi di diritto comunitario e sport: applicabilità, eccezione sportiva, trasferimenti, nazionalità, *La nuova giurisprudenza civile commentata*, 2002, 2, p. 628.

Chapter III

Employment in the Public Sector

Text(s) in force

Constitutional law:

Article 51, paragraph 1, of the Italian Constitution reads as follows:

“All citizens of both sexes are eligible for public office and for elected positions on equal terms, according to the conditions established by law”.

Article 97, paragraph 3, reads as follows:

“Employment in public administration is accessed through competitive examinations, except in the cases established by law”.

Article 51 has a broader meaning than article 97.

The large majority of legal scholars says that Article 51 can not be interpreted as imposing a Constitutional prohibition recruiting foreigners in the public sector.

But according to others, Article 51 implicitly imposes a nationality requirement to access to posts forming part of the public service (for references, see D. Traina, *Libertà di circolazione nella Comunità economica europea e pubblico impiego in Italia*, *Rivista trimestrale di diritto pubblico*, 1991, 331), even though they admit that the condition concerned must be discarded, in view of the primacy of Community law.

Statutory acts:

- The Decree of the President of the Republic of 10-1-1957 no 3 (*Testo unico delle disposizioni concernenti lo Statuto degli impiegati civili dello Stato e norme di esecuzione*) (art. 2) asked for Italian nationality as a general requirement to access to public service.
- The Act 28-2-1990 no 39 (art. 9) allowed foreigners (Community citizens included, according to art. 13) access to some posts forming part of the public service (to those posts covered by Article 16 (*Disposizioni concernenti lo Stato e gli enti pubblici*) of Act 28-2-1987 no 56 (*Norme sull'organizzazione del mercato del lavoro*, which derogates to competitive examinations in order to employ workers for posts that does not require academic qualifications other than that delivered at the end of obligatory schooling).
- The Legislative Decree of 3-2-1993, no 29 (Article 37) introduced a very important novelty: it plainly stated that the European citizens have access to those employment in the public sector which are not connected with the direct or indirect exercise of powers of public authority or which are not designed to safeguard the general interest of the State.

The posts and the functions lawfully reserved for the Italian citizens are enumerated by a Decree of the President of Council of Ministers (see below).

The same article stated that, in the absence of Community directives, it is to the Council of Ministers to decide about the recognitions of diplomas, professional

qualifications, academic qualifications and experience necessary to the Community citizens to participate to the open competition or to be appointed.¹

Legal scholars noted that:

- paragraph 1 of the above mentioned Legislative Decree closely echoed par. 10 of ECJ's judgment of 17-12-1980, 149/79, *European Commission v. Belgium*, ECR, 3881 (R. Caranta, *La libertà di circolazione dei lavoratori nel settore pubblico, Diritto dell'Unione europea*, 1999, 21, at 44);
- the word "or" in paragraph 1 (employment in the public sector which are not connected with the direct or indirect exercise of powers of public authority or which are not designed to safeguard the general interest of the State) implies that the requirements necessary for a post or function need to be alternative and not cumulative in order to be lawfully and reserved for the Italian citizens (P. Pascucci, *Accesso agli impieghi nelle pubbliche amministrazioni*, A. Baylos Grau, B. Caruso, M. D'Antona, S. Sciarpa (eds.), *Dizionario di diritto del lavoro comunitario*, Bologna, Monduzzi, 1996, at 394 note 16). A clear distinction between the two groups of posts and functions is far to be easy to draw: the two requirements seem to be two different wordings of the same, single requirement (Caranta, at 44);
- paragraph 3 is merely a residual rule, which applies only to cases not covered by Directives no. 89/48/EEC and 92/51/EEC (See V. Lucani, *Commento all'art. 37 d.lg 3-2-1993 no 29, AAVV, La riforma dell'organizzazione, dei rapporti di lavoro e del processo nelle amministrazioni pubbliche, Le nuove leggi civili commentate*, 1999, at 1298).
- The Decree of the President of the Council of Ministers 7-2-1994 no 174 (*Regolamento recante norme sull'accesso dei cittadini degli Stati membri dell'Unione europea ai posti di lavoro presso le amministrazioni pubbliche, GURI 15-3-1994 no 61*), adopted in accordance to Article 37.2 of the Legislative Decree of 3-2-1993, no 29, defines which posts and functions are reserved for the Italian nationals. The preamble explicitly refers to the European Commission's 1988 action plan. Article 1 is devoted to enumerate the posts reserved for the Italian citizens.²

1 See art. 37 "Accesso dei cittadini degli Stati membri dell'Unione europea" (as modified by art. 24 of Legislative Decree of 31-3-1998 no 80):

"1. I cittadini degli Stati membri dell'Unione europea possono accedere ai posti di lavoro presso le amministrazioni pubbliche che non implicano esercizio diretto o indiretto di pubblici poteri, ovvero non attengono alla tutela dell'interesse nazionale.

2. Con decreto del Presidente del Consiglio dei Ministri, ai sensi dell'articolo 17 della legge 23 agosto 1988, n. 400, sono individuati i posti e le funzioni per i quali non può prescindere dal possesso della cittadinanza italiana, nonché i requisiti indispensabili all'accesso dei cittadini di cui al comma 1.

3. Nei casi in cui non sia intervenuta una disciplina di livello comunitario, all'equiparazione dei titoli di studio e professionali si provvede con decreto del presidente del Consiglio dei Ministri, adottato su proposta dei Ministri competenti. Con eguale procedura si stabilisce la equivalenza tra i titoli accademici e di servizio rilevanti ai fini dell'ammissione al concorso e della nomina."

2 "1. I posti delle amministrazioni pubbliche per l'accesso ai quali non può prescindere dal possesso della cittadinanza italiana sono i seguenti:

a) i posti dei livelli dirigenziali delle amministrazioni dello Stato, anche ad ordinamento autonomo, individuati ai sensi dell'art. 6 del decreto legislativo 3 febbraio 1993, n. 29 (3), nonché i posti dei corrispondenti livelli delle altre pubbliche amministrazioni;

- management posts in the State administrations, as defined by article 6 of the Legislative Decree of 3-2-1993 no 29, and management posts in other public services;
- top-level posts in the local structures of State administrations, in the non-economic public bodies, in the Provinces, in the Municipalities, in the Regions and in the Bank of Italy;
- posts of ordinary, administrative, military and accounting magistrates, posts of Government lawyers;
- civil and military rolls of the Presidency of the Council of Ministers, of the Ministry of Foreign Affairs, of the Ministry of the Interior, of the Ministry of Justice, of the Ministry of Defence, of the Ministry of Finance, of the State Corps of Foresters, with the exception of those posts the access to which is regulated by Article 16 of Act 28-2-1987 no. 56 (see above).

Article 2 describes those functions which have to be performed by the Italian nationals:³

- functions which entail adopting, developing, enforcing licences and coercive measures;
- functions which involve the review of legality and the review as to the substance.

In case of doubts on the nature of the functions to be performed by the worker, the President of the Council of Ministers, given a reasoned refusal, can deny the access to a specific employment or to the conferral of specific responsibilities, if they involve functions defined as above. Such a refusal has general prohibitive effect.

Article 3 defines the general requirements that the European Union citizens have to possess in order to access to the public service.⁴ They:

b) i posti con funzioni di vertice amministrativo delle strutture periferiche delle amministrazioni pubbliche dello Stato, anche ad ordinamento autonomo, degli enti pubblici non economici, delle province e dei comuni nonché delle regioni e della Banca d'Italia;

c) i posti dei magistrati ordinari, amministrativi, militari e contabili, nonché i posti degli avvocati e procuratori dello Stato;

d) i posti dei ruoli civili e militari della Presidenza del Consiglio dei Ministri, del Ministero degli affari esteri, del Ministero dell'interno, del Ministero di grazia e giustizia, del Ministero della difesa, del Ministero delle finanze e del Corpo forestale dello Stato, eccettuati i posti a cui si accede in applicazione dell'art. 16 della L. 28 febbraio 1987, n. 56 (1).

2. Resta fermo il disposto di cui all'art. 1, comma 3, del D.Lgs. 3 febbraio 1993, n. 29.”

(1) Lettera così sostituita dall'art. 1, D.P.C.M. 5-10-1994 no 623 (GURI 8-11-1994 no 261).

3 “1. Le tipologie di funzioni delle amministrazioni pubbliche per il cui esercizio si richiede il requisito della cittadinanza italiana sono le seguenti:

a) funzioni che comportano l'elaborazione, la decisione, l'esecuzione di provvedimenti autorizzativi e coercitivi;

b) funzioni di controllo di legittimità e di merito.

2. Il Presidente del Consiglio dei Ministri, su proposta del Ministro per la funzione pubblica, sentita l'amministrazione competente, esprime, entro sessanta giorni dalla ricezione della domanda dell'interessato, diniego motivato all'accesso a specifici impieghi o all'affidamento di incarichi che comportino esercizio di taluna delle funzioni indicate al comma 1. Tale decreto è pubblicato nella Gazzetta Ufficiale della Repubblica italiana ed ha efficacia preclusiva sino a che non intervengano modifiche della situazione di fatto o di diritto che facciano venir meno l'impedimento all'accesso.

3. Resta fermo il disposto di cui all'art. 1, comma 3, del decreto legislativo 3 febbraio 1993, n. 29.”

4 “1. I cittadini degli Stati membri dell'Unione Europea devono possedere, ai fini dell'accesso ai posti della pubblica amministrazione, i seguenti requisiti:

a) godere dei diritti civili e politici anche negli Stati di appartenenza o di provenienza;

- must enjoy full rights of citizenship both in Italy and in the origin or destination State;
- must enjoy the other prescribed conditions, except for nationality;
- must have an adequate knowledge of the Italian language.

Legal scholars noted that:

- when applying Article 2, Community law and the rationale of Article 48.4 (now 39.4) have to be held in due consideration. It must be interpreted restrictively (P. Pascucci, *Accesso agli impieghi nelle pubbliche amministrazioni*, A. Baylos Grau, B. Caruso, M. D'Antona, S. Sciarpa (eds.), *Dizionario di diritto del lavoro comunitario*, Bologna, Monduzzi, 1996, 397).
 - the list of posts reserved for Italian nationals is too broad, and particularly its letter d): it can be questioned if only posts provided for Article 16 of Act 28-2-1987 n. 56 are not connected with the exercise of official authority (R. Caranta, at 45 s.); the administrations concerned are not the same mentioned by the European Commission action plan (R. Caranta, at 46).
 - Article 1 is not in line with the EC Treaty, because Community law does not allow to reserve for the Italian nationals posts of mere technical or administrative nature when the employer is a body entrusted with the exercise of public powers (C. De Rose, *L'accesso ai pubblici impieghi dei cittadini dell'Unione europea*, *Consiglio di Stato*, 1994, II, 1741, at 1748);
 - functions listed in article 2 are without doubts connected with the exercise of official authority (R. Caranta, at 46).
- The Decree of the President of the Republic 1993 no 29 has been repealed by the Decree of the President of the Republic 30-3-2001 no 165 (*Norme generali sull'ordinamento del lavoro alle dipendenze delle amministrazioni pubbliche*, GURI 9-5-2001, no 106, S.O.). Article 38 reproduces verbatim Article 37 of DPR 1993 no 29 (see above).⁵

In general terms, legal scholars agree to consider the Italian legislation to be in line with Community law, even though they do not spare criticisms about it (see V. Lucani, *Commento all'art. 37 d.lg 3-2-1993 no 29, AAVV, La riforma dell'organizzazione, dei rapporti di lavoro e del processo nelle amministrazioni*

b) essere in possesso, fatta eccezione della titolarità della cittadinanza italiana, di tutti gli altri requisiti previsti per i cittadini della Repubblica;

c) avere adeguata conoscenza della lingua italiana”.

5 “Articolo 38: Accesso dei cittadini degli Stati membri della Unione europea.

1. I cittadini degli Stati membri dell'Unione europea possono accedere ai posti di lavoro presso le amministrazioni pubbliche che non implicano esercizio diretto o indiretto di pubblici poteri, ovvero non attengono alla tutela dell'interesse nazionale.

2. Con decreto del Presidente del Consiglio dei ministri, ai sensi dell'articolo 17 della legge 23 agosto 1988, n. 400, e successive modificazioni ed integrazioni, sono individuati i posti e le funzioni per i quali non può prescindere dal possesso della cittadinanza italiana, nonché i requisiti indispensabili all'accesso dei cittadini di cui al comma 1.

3. Nei casi in cui non sia intervenuta una disciplina di livello comunitario, all'equiparazione dei titoli di studio e professionali si provvede con decreto del Presidente del Consiglio dei ministri, adottato su proposta dei Ministri competenti. Con eguale procedura si stabilisce l'equivalenza tra i titoli accademici e di servizio rilevanti ai fini dell'ammissione al concorso e della nomina.”

pubbliche, *Le nuove leggi civili commentate*, 1999, at 1296; P. Pascucci, at 397; R. Caranta, at 50).

- Legislative decree 28-12-2001 no 477, Disposizioni integrative e correttive del decreto legislativo 5 ottobre 2000, n. 334, in materia di riordino dei ruoli del personale direttivo e dirigente della Polizia di Stato, *Gazzetta Ufficiale della Repubblica italiana*, 6-2-2002, no 31.

Italian citizenship is required for the access to the State Police career (Article 3 and Article 6). Even though the law is silent on the point, these posts are connected with the exercise of official authority.

Legislative trends following procedures of infringement set in motion by the Commission Linguistic associates:

Corte di Cassazione, labour section, judgment of 19-3-2003, no 4051, *Rowe v. Università di Lecce*.

The Supreme Court says that, following the ECJ's judgments on former foreign-language assistants, now linguistic associates, and Act 1995 no 236 implementing them, linguistic associates are no longer discriminate. As a consequence, the employment relationship between a linguistic associate and a University is based on an employment contract of indeterminate duration from the date of his original recruitment. A linguistic associate retains all his acquired rights with regard to increases in salary, seniority and to the payment of social security contributions by the employer.

Corte di Cassazione, labour section, judgment of 8-8-2003, no 12019, *Behrmann v. Università degli studi di Trento*.

The Supreme Court states that the duties performed by linguistic associates are different from those performed by tenure professors. Such a difference leads to exclude to allow a linguistic associate a pay equivalent to a professor.

Judicial practice

Consiglio di Stato, judgment of 27-1-2003, no 406, *Ministero Pubblica Istruzione v. Caraglio*.

Italian law provides that a teacher can ask for a transfer only if he or she is on a list. Teachers are ranked in the list on the basis of a score. Having a degree (other than the decree necessary to the access to the profession) adds five points (Article 19 of the Ministerial Order 1992 no 332).

The judge of first instance decided that five points was to be attributed to the *Licence en lettres modernes* delivered by the University of Nice, because, thanks to the directives no 89/48/EEC and 92/51/EEC, academic degrees delivered in an other member State are automatically recognized in Italy. On the contrary, the Consiglio di Stato rejects the idea of automatic recognition, and examines if a French licence has the same characteristics of an Italian laurea. It concludes that it does not, as the licence is delivered after attending a three years course, while the laurea requires a four years course. A different conclusion would give an undeserved advantage to individuals who obtained a French licence, and would place at a disadvantage those who have an Italian laurea or a

three years course Italian University diploma, because no extra points are assigned to them by the law.

Miscellaneous (administrative practices, etc.)

Ministero della Salute, decree 12-2-2002, Revisione parziale delle autorizzazioni all'imbarco quale medico di bordo e degli attestati di iscrizione nell'elenco dei medici di bordo supplenti, *Gazzetta Ufficiale della Repubblica italiana*, 4-3-2002, no 53.

The Health Ministry is empowered to grant the ship's doctor leave to embark. The boarding authorization has to be reviewed regularly.

Italian citizenship is the condition necessary for issuing and renewing the authorisation. The reason why medical services on board is reserved to Italian citizens is not explained.

The following invitations to propose candidates ask for Italian citizenship in order to participate:

- Decree of the Ministry of Interior, 2-12-2002, no 276, *Regolamento recante norme per la disciplina dei concorsi per l'accesso ai ruoli dei commissari, dei direttori tecnici e dei direttivi medici della Polizia di Stato e dei concorsi per l'accesso al ruolo direttivo speciale ed al ruolo speciale ad esaurimento dei direttori tecnici della Polizia di Stato* (GURI no 298 of 20-12-2002 SO):

Article 2 requires the Italian citizenship to participate to competitive examination, awarding access to the roll of commissioners, technical directors and medical directors of the State Police.

The Decree contains no reference to D.P.C.M. 1994 no 174, but the posts concerned are among those listed in Article 1 (State Police).

From the web site of the Ministry of Interior:

(<http://www.mininterni/bandiconcorsi/pages/c-00000009.htm>)

- Department of firemen, Department of Public Emergency and Department of Civil Defence. Direction General of General Affairs, ministerial decree (D.M.) no 2730/500/6: six posts available for administrative Director (functional area C, position C2, National Body of firemen's administrative sector. Admission requirements: Italian citizenship (art. 2 establishes: "the qualifications required to be admitted to the competitive examination are the following: a) to be an Italian citizen; as provided by art 1, letter d) of the President of Ministers' Council decree (D.P.C.M) 1994, no 174. The Italian citizenship is the condition without which the admittance to the new civil and military rolls of the Ministry of Interior will not be allowed (*omissis*)".
- Department of internal and territorial affairs. Public competitive examination, based on academic qualifications and exams, awarding sixty three posts for the admittance to the prefectorial career (date of publication: 31-12-2002). The preamble refers to the D.P.C.M 1994, no 174, whose article 2 requires the Italian citizenship in order to participate.

- State Police Department. Public competitive examination, based on academic qualifications and exams, awarding fifty-six posts for doctors, representing the medical leading staff of State Police (date of publication: 4-2-2003).
Admission requirements: Italian citizenship, as provided by art. 3.
- Department of firemen, Department of Public Emergency and Department of Civil Defence.
Direction General of General Affairs, D.M. no. 2733/500/5 (date of publication: 31-12-2002).
Art. 1: “ A competitive examination, based on exams, has been called, awarding five posts for “Medical Inspector” professional register; functional area C, position C1, National Body of firemen’ executive sector. The Italian citizens, of both sexes, are able to participate”.
Art. 2: admission requisites: “art. 2 establishes: “the qualifications required to be admitted to the competitive examination are the following: A) to be an Italian citizen; as provided by art 1, letter d) of the D.P.C.M. 1994, no 174. The Italian citizenship is the condition without which the admittance to the new civil and military rolls of the Ministry of the Interior will not be allowed (*omissis*)”.

Recent legal literature

Notary: Till 2003 (see below), notary was an activity reserved to Italian citizens. A lot of discussions took place in the literature about the opportunity of maintaining this reservation, or opening the access to European citizens, and in that case, to what extent.

S.M. Carbone, *Il notaio tra regole nazionali ed europee: diritto societario e professioni regolamentate alla prova delle libertà comunitarie*, *Il Diritto dell’Unione europea*, 2003, p. 689. The author states that according to the Directive no 89/48/EEC a European citizen should have the access to the notary. But he admits that the particular nature of the activity, as the State entrusts the notary with services of public interest, asks for severe requirements relating to the access and the exercise of the profession.

G. Laurini, *La proposta di nuova Direttiva sul riconoscimento delle qualifiche professionali*, *Notariato*, 2003, 216 s. The author agrees with the CNUE (Conferenza permanente dei notariati dell’UE) statement, according to which the EC Directive on mutual recognition of diplomas does not apply to the notary. In addition, Italian nationality is a necessary requirement, because the notary is entrusted, by a sovereign act of the State, with a public function and is involved (like the judge) in the administration of justice.

Article 6, Act 31-10-2003 no 306 (Disposizioni per l’adempimento di obblighi derivanti dall’appartenenza dell’Italia alle Comunità europee. Legge comunitaria 2003, *Gazzetta Ufficiale della Repubblica italiana*, 15-11-2003 no 266, SO), states that in order to be appointed notary, neither the Italian citizenship, nor an Italian law degree, is required anymore.

Chapter IV Family Members

Text(s) in force

According to Italian DPR 2002 no 54, the members of the family of the European Union citizens entitled to stay in Italy are defined in two different ways:

<p>Members of the family of the worker, of the self-employed, of the provider of services or recipient of services (Article 3.3 DPR 2002 no 54)</p>	<p>Spouse minor children or dependent children dependent relatives in the ascending or descending line other relatives of the worker/ self-employed/ provider of services/ recipient of services, or of the spouse, which relatives are dependent on them or on relatives in the ascending line, or who in the country of origin was living under the same roof, irrespective of their nationality.</p>
<p>Members of the family of the student or other national of a Member State who enjoys the right of residence in Italy (Article 3.4 second paragraph DPR 2002 no 54 which refers to Article 29.1 DPR 1998 no 286)</p>	<p>Spouse not judicially separated Minor children of the European Union citizen or of his/her spouse, dependent on the European Union citizen, where not married or judicially separated Dependent parents of the European Union citizen Relatives within the third degree of kinship, dependent and disabled according to Italian law</p>

Family members of beneficiaries of Directives no 90/364/EEC, 90/365/EEC and 93/96/EEC are defined in a much stricter way than Community Directives require. (For entry, residence and departure conditions, see above, Chapter I.)

Recent legal literature

- S. Acierno, La sentenza Carpenter: diritti fondamentali e limiti dell'ordinamento comunitario, *Il Diritto dell'Unione europea*, 2002, p. 653 (comments on ECJ's judgment of 11-7-2002, case C-60/00, *Carpenter*, ECR I-6279).
- R. Nunin, Libera circolazione dei lavoratori comunitari e diritti del coniuge extracomunitario, *Famiglia e diritto*, 2002, 577 (comments on ECJ's judgments of 11-7-2002, case C-60/00, *Carpenter*, ECR I-6279 and 25-7-2002, case C-459/99, *MRAX*, ECR I-6591).
- M. Castellaneta, Solo il matrimonio con un cittadino comunitario rende incondizionato il diritto al ricongiungimento, *Guida al diritto*, 2002, 36, 103 s. (comments on ECJ's judgment of 25-7-2002, case C-459/99, *MRAX*, ECR I-6591)

Chapter V

Relevance/Influence/Follow-up of Recent Court of Justice Judgments.

Article 17, Act 1-1-2002 no 39 (Disposizioni per l'adempimento di obblighi derivanti dall'appartenenza dell'Italia alle Comunità europee. Legge comunitaria 2001, *Gazzetta Ufficiale della Repubblica italiana*, 26-3-2002 no 72, SO) modifies Article 12 of Act 8-3-1991 no 81, *Legge-quadro per la professione di maestro di sci e ulteriori disposizioni in materia di ordinamento della professione di guida alpina* (Framework Law for the profession of ski monitor and supplementary provisions relating to the regulation of the profession of mountain guide), which the Court of Justice held inconsistent with Community law (see ECJ's judgment of 16-5-2002, case C-142/01, *Commission of the European Communities v. Italy*, E.C.R. I-4541).

Reciprocity is no longer required as a condition for the recognition of a ski-monitor diploma.

Italian Regions are empowered to regulate the activity of ski-monitors coming from another EU Member State, to be carried out on a permanent basis.

Article 33, Act 1-1-2002 no 39 (Disposizioni per l'adempimento di obblighi derivanti dall'appartenenza dell'Italia alle Comunità europee. Legge comunitaria 2001, *Gazzetta Ufficiale della Repubblica italiana*, 26-3-2002 no 72, SO) complies with the ECJ's judgment of 31-5-2001 case C-283/99, *Commission of the European Communities v. Italy* (E.C.R. I-4363). Italian citizenship is no more required to undertake private security work (including surveillance or caretaking of movable property and buildings).

Article 13, Act 3-2-2003 no 14 (Disposizioni per l'adempimento di obblighi derivanti dall'appartenenza dell'Italia alle Comunità europee. Legge comunitaria 2002, *Gazzetta Ufficiale della Repubblica italiana*, 7-2-2003 no 31, SO) complies with the ECJ's judgment of 29-11-2001 case C-202/99, *Commission of the European Communities v. Italy* (E.C.R. I-9319). It repeals the possibility for doctors to practise as dentists and to be doubly registered in the registers of medical and dental practitioners.

Article 16, Act 3-2-2003 no 14 (Disposizioni per l'adempimento di obblighi derivanti dall'appartenenza dell'Italia alle Comunità europee. Legge comunitaria 2002, *Gazzetta Ufficiale della Repubblica italiana*, 7-2-2003 no 31, SO) complies with the ECJ's judgment of 21-3-2002, case C-298/99, *Commission of the European Communities v. Italy* (E.C.R. I-9319), on mutual recognition of formal qualifications in architecture and access to the profession of architect.

Article 25, Act 3-2-2003 no 14 (Disposizioni per l'adempimento di obblighi derivanti dall'appartenenza dell'Italia alle Comunità europee. Legge comunitaria 2002, *Gazzetta Ufficiale della Repubblica italiana*, 7-2-2003 no 31, SO) adds Article 2-bis to the legislative decree 1992 no 285, in order to comply with the ECJ's judgment of 19-3-2002 case C-224/00, *Commission of the European Communities v. Italy* (E.C.R. I-2965), which declares "that, by maintaining in force, in Article 207 of the Italian highway code, a dis-

proportionate difference in treatment between offenders based on the place of registration of their vehicles, the Italian Republic has failed to fulfil its obligations under Article 12 EC” (see comments by P. Cerbo, La Corte di giustizia e il codice della strada: problemi di disparità di trattamento per i veicoli non immatricolati in Italia, *Il foro italiano*, 2002, IV, 358). Article 207 of the highway code now states that the offender in possession of a vehicle registered in another Member State may pay to the booking office, by way of security, a sum equal to the amount of the reduced payment.

Article 2-bis was further modified by Act 31-10-2003 no 306 (Disposizioni per l’adempimento di obblighi derivanti dall’appartenenza dell’Italia alle Comunità europee. Legge comunitaria 2003, *Gazzetta Ufficiale della Repubblica italiana*, 15-11-2003 no 266, SO), in order to add reference to vehicles registered in EEA States.

Chapter VI

Policies of a General Nature with Possible Repercussions on the Free Movement of Union Citizens

The Italian treatment of non-Community citizens is regulated by the consolidated law on immigration (legislative decree of 25-7-1998, no 286).

As provided by article 1 of the consolidated law, it will apply to Community citizens only if its dispositions are more favourable compared to those enclosed in the general system of rules normally applied to them (which is the legislative decree 2002 n. 54, previously pointed out in Chapter I).

The consolidated law on immigration has been modified by the law of 30-7-2002 no 189, also known as Bossi-Fini Act (*Gazzetta Ufficiale della Repubblica italiana*, 26-8-2002, no 199, SO). The just mentioned Bossi-Fini Act, however, does not apply to Community citizens.

Chapter VII

EU Enlargement

After the enlargement of the European Union, Italy has decided to apply nation measures, for the biennium 2004-2006, in order to regulate its labour market, as provided by the Act concerning the conditions of accession. As a result, the workers coming from the new eight European countries, who will look for a job in Italy, will have to satisfy the requirements provided by the Italian legislation, even though they will be entitled to preferential treatment *vis-à-vis* non-Community citizens.

In general terms, the admittance to enter the Italian territory of non-Community nationals for independent or subordinate working reasons is defined by quotas yearly decided by the Prime minister. For the year 2004, the transitional quota fixed for seasonal foreign workers, who will be able to join the Italian labour market, is 50 000, while the non-seasonal independent or subordinated workers' quota is 29 500. Each amount is then, divided and reserved to those foreigners who fit the conditions provided by the decrees (Decrees of the President of the Council of Ministers, 19-12-2003, *Programmazione transitoria dei flussi d'ingresso dei lavoratori stagionali e non stagionali extracomunitari nel territorio dello Stato per l'anno 2004*, *Gazzetta Ufficiale della Repubblica italiana*, 23-1-2004, no 18, 15-16).

In addition to these national measures, laid down for foreigners in general, the Prime Minister's decree of 20-4-2004 (*Programmazione dei flussi d'ingresso dei lavoratori dei cittadini dei nuovi Stati membri dell'Unione europea nel territorio dello Stato per l'anno 2004*, *Gazzetta Ufficiale della Repubblica italiana*, 3-5-2004, no 102) has added a new quota equivalent to 20 000 admittances. The quota is addressed to new European citizens only, who have a paid job no matter if it is seasonal or non-seasonal, fixed or ended duration. The management of the admittance quota is entirely handled by the State level.

The reason why the new quota has been fixed to 20 000 is due only to the fact that, as can be read in the preamble of the decree, this is the same admittance quota that has been planned to be reserved to the foreigners in search of an occupation in Europe for the running year. In other words, the quota has not been fixed thinking to the real needs of the Italian labour market, or on the basis of the past recorded admittances, or the potential once, but only taking into consideration the previous number of foreigner workers who were able to entry to Italy, established by the expected 2004 admittance planning.

The employer, who is going to hire a worker coming from one of the new European member States, shall send an authorization release to the Provincial Labour Office, attaching to it the work contract. The contract's efficacy is tied to the working authorization and to the residence permit, which has to be presented to the Police headquarter.

The application will be accepted chronologically and will be subject to the availability of the admittance quota. Furthermore, the working authorization for the European citizens is not subordinated to the substantial condition normally required for non-Community citizens.

Even though the new Community citizens have to deal with the procedure just described in order to join the Italian labour market, they are free to stay in Italy for a

three-month period during which a valid identification document is the only condition required. Moreover, their admittance is not subject to any constraint or exceptions.

Chapter VIII Statistics

Foreign population living in Italy, by country of origin (EU States emphasized)

ITALIA: POPOLAZIONE IMMIGRATA SOGGIORNANTE PER PROVENIENZA CONTINENTALE (2000 - 2002)						
Provenienza continentale	2000		2001		2002	
	v.a.	%	v.a.	%	v.a.	%
Unione Europea	159.799	10,9	147.495	10,8	154.076	10,2
Altri paesi europei	404.768	29,2	416.390	30,5	488.277	32,3
Africa	385.630	27,8	366.598	26,9	401.440	26,5
Asia	277.644	20,0	259.783	19,1	279.816	18,5
America	164.942	11,9	158.206	11,6	178.593	11,8
Oceania/Apolidi	3.370	0,3	3.285	0,3	3.509	0,2
Nazionalità ignota	-	-	10.873	0,8	6.614	0,4
TOTALE	1.396.153	100,0	1.362.630	100,0	1.512.325	100,0

FONTE: Dossier Statistico Immigrazione Caritas/Migrantes. Elaborazioni su dati Ministero dell'Interno (http://www.anolf.it/statistiche/dossier_caritas_2003.htm)
XIII° rapporto CARITAS sull'immigrazione

Tavola: Popolazione straniera residente per area geografica e paese di cittadinanza - Italia - Censimento 2001, istat (<http://www.istat.it>)

<i>Aree geografiche e paesi di cittadinanza</i>	<i>Popolazione straniera residente</i>	<i>Aree geografiche e paesi di cittadinanza</i>	<i>Popolazione straniera residente</i>
		Slovenia	3.045
		Ungheria	3.186
		Europa Centro-orientale	396.506
Europa	586.379	Albania	173.064
Unione Europea 15	132.067	Bielorussia	1.056
di cui: Austria	6.369	Bosnia-Erzegovina	16.927
Belgio	5.734	Bulgaria	6.559
Danimarca	1.646	Croazia	18.362
Finlandia	1.394	Rep. Federale di Jugoslavia	49.324
Francia	29.313	Ex Rep. Jugoslava di Macedonia	28.073
Germania	35.091	Moldavia	4.199
Grecia	6.330	Romania	74.885
Irlanda	1.455	Russia	9.344
Lussemburgo	396	Turchia	6.066
Paesi Bassi	6.200	Ucraina	8.647
Portogallo	3.308		
Regno Unito	19.957		
Spagna	12.327		
Svezia	2.547		
		<i>Aree geografiche e paesi di cittadinanza</i>	<i>Popolazione straniera residente</i>
Paesi die nuova adesione ell'		Altri paesi europei	16.858
Unione Europea	40.948	di cui: San Marino	1.958
Rep. Ceca	3.579	Svizzera	13.957
Cipro	123		
Estonia	247	Africa	386.494
Lettonia	401	Africa Settentrionale	267.700
Lituania	366	di cui: Algeria	9.971
Malta	717	Egitto	27.331
Polonia	27.220	Marocco	180.103
Rep. Slovacca	2.064		

Tunisia	47.656
Africa Occidentale	88.102
di cui: Burkina Faso	3.069
Capo Verde	3.177
Costa d'Avorio	7.783
Ghana	21.676
Nigeria	16.890
Senegal	31.174
Africa Orientale	22.964
di cui: Eritrea	4.678
Etiopia	3.512
Maurizio	6.646
Somalia	4.315
Africa Centro-meridionale	7.728
di cui: Camerun	2.187
Congo	2.073
Asia	214.728
Asia Occidentale	15.830
di cui: Giordania	1.875
Iran	5.658
Israele	1.610
Libano	2.617
Siria	2.144
Paesi ex Urss	438
Asia Centro-meridionale	85.427
di cui: Bangladesh	14.695
India	27.188
Pakistan	15.619
Sri Lanka	26.474
Paesi ex Urss	1.171
Asia Orientale	113.471
di cui: Cina	46.887
Corea del Sud	2.457
Filippine	53.994
Giappone	4.497
Thailandia	2.423
America	143.018
America Settentrionale	20.832
Canada	3.961
Stati Uniti	16.871
America Centro-Meridionale	122.186
di cui: Argentina	12.768
Bolivia	1.225
Brasile	18.216
Cile	3.257
Colombia	9.456
Cuba	7.353
Rep. Dominicana	11.222
Ecuador	13.716
El Salvador	3.344
Messico	2.537
Perù	29.452
Venezuela	5.517
Oceania	3.668
di cui: Australia	3.296
Apolidi	602
TOTALE	1.334.889

Residence permits at the date of 31-12-2002

Nazionalità	Totale stranieri	%	Motivo del soggiorno	
			% Lavoro	% Famiglia
Marocco	172.834	11,4	67,1	31,7
Albania	168.963	11,2	53,8	38,8
Romania	95.834	6,3	58,3	31,4
Filippine	65.257	4,3	78,1	15,2
Cina Popolare	62.314	4,1	64,1	33,6
Tunisia	51.384	3,4	70,7	28,3
USA	47.645	3,2	15,9	52,2
Jugoslavia	39.799	2,6	56,5	29,8
Germania	37.667	2,5	40,7	20,6
Senegal	36.310	2,4	90,1	9,1
Sri Lanka	35.845	2,4	65,0	31,4
Polonia	35.077	2,3	50,0	33,5
India	34.080	2,3	48,0	32,0
Perù	31.115	2,1	68,6	27,2
Egitto	29.861	2,0	72,0	26,0
Francia	26.846	1,8	47,3	23,6
Macedonia	26.060	1,7	57,7	40,0
Regno Unito	24.138	1,6	49,4	24,0
Bangladesh	22.061	1,5	73,8	23,9
Spagna	21.163	1,4	38,2	19,7
Pakistan	20.986	1,4	70,5	25,3
Brasile	20.804	1,4	24,1	51,1
Nigeria	19.505	1,3	67,1	21,9
Ghana	19.160	1,3	71,7	26,8
Svizzera	17.674	1,2	32,3	20,4
Croazia	16.852	1,1	61,4	25,9
Ucraina	14.035	0,9	36,7	43,9
Bosnia-Erzegovina	12.790	0,8	62,7	33,7
Russia	12.735	0,8	26,7	55,1
Ecuador	12.108	0,8	62,2	27,1
Altre nazionalità	281.422	18,6		
Totale nazionalità	1.512.324	100,0	55,2	31,2

Fonte: Ministero dell'Interno

http://www.ismu.org/docs/ps_Italia_2002.xls

Prisoners by nationality

Foreign detainees per nationality

Data till 31 December 2003

Country	Absolute			%		
	Women	Men	Total	Women	Men	Total
Afghanistan	-	3	3	-	0,0	0,0
Albania	67	2.654	2.721	6,3	16,7	16,0
Algeria	3	1.324	1.327	0,3	8,3	7,8
Andorra	-	2	2	-	0,0	0,0
Angola	-	3	3	-	0,0	0,0
Argentina	8	55	63	0,7	0,3	0,4
Armenia	-	4	4	-	0,0	0,0
Australia	1	6	7	0,1	0,0	0,0
Austria	3	16	19	0,3	0,1	0,1
Bahamas	-	2	2	-	0,0	0,0
Bangladesh	-	28	28	-	0,2	0,2
Belgium	1	21	22	0,1	0,1	0,1
Benin	3	4	7	0,3	0,0	0,0
Byelorussia	1	5	6	0,1	0,0	0,0
Bolivia	10	24	34	0,9	0,2	0,2
Bosnia-Herzegovina	10	40	50	0,9	0,3	0,3
Brasil	43	76	119	4,0	0,5	0,7
Bulgaria	14	81	95	1,3	0,5	0,6
Burkina Fasso	-	3	3	-	0,0	0,0
Burundi	-	10	10	-	0,1	0,1
Cameroon	1	15	16	0,1	0,1	0,1
Canada	1	2	3	0,1	0,0	0,0
Cape Verde	1	2	3	0,1	0,0	0,0
Chad	-	1	1	-	0,0	0,0
Chile	13	116	129	1,2	0,7	0,8
China	7	194	201	0,7	1,2	1,2
Colombia	62	210	272	5,8	1,3	1,6
Congo	-	14	14	-	0,1	0,1
Costa Rica	-	7	7	-	0,0	0,0
Croatia	33	149	182	3,1	0,9	1,1
Cuba	1	9	10	0,1	0,1	0,1
Czech Republic	1	7	8	0,1	0,0	0,0
Czechoslovakia	1	15	16	0,1	0,1	0,1
Denmark	-	2	2	-	0,0	0,0
Dominican Rep.	30	105	135	2,8	0,7	0,8
Ecuador	32	119	151	3,0	0,7	0,9
Egypt	-	146	146	-	0,9	0,9
El Salvador	2	3	5	0,2	0,0	0,0
Eritrea	-	4	4	-	0,0	0,0
Ethiopia	-	7	7	-	0,0	0,0
France	10	138	148	0,9	0,9	0,9
Gabon	-	11	11	-	0,1	0,1
Gambia	1	47	48	0,1	0,3	0,3
Georgia	-	2	2	-	0,0	0,0
Germany	15	53	68	1,4	0,3	0,4

Foreign detainees per nationality

Data till 31 December 2003

Country	Absolute			%		
	Women	Men	Total	Women	Men	Total
Ghana	8	121	129	0,7	0,8	0,8
Great Britain	2	25	27	0,2	0,2	0,2
Greece	1	27	28	0,1	0,2	0,2
Guatemala	1	9	10	0,1	0,1	0,1
Guinea	1	11	12	0,1	0,1	0,1
Guinee Bissau	-	2	2	-	0,0	0,0
Haiti	-	1	1	-	0,0	0,0
Honduras	1	-	1	0,1	-	0,0
Hungary	5	25	30	0,5	0,2	0,2
India	-	48	48	-	0,3	0,3
Iran	-	7	7	-	0,0	0,0
Iraq	-	68	68	-	0,4	0,4
Ireland	-	1	1	-	0,0	0,0
Israel	-	36	36	-	0,2	0,2
Ivory Coast	2	25	27	0,2	0,2	0,2
Jamaica	-	5	5	-	0,0	0,0
Jordan	-	11	11	-	0,1	0,1
Jugoslavia	121	729	850	11,3	4,6	5,0
Kenya	-	11	11	-	0,1	0,1
Kuwait	-	1	1	-	0,0	0,0
Latvia	-	1	1	-	0,0	0,0
Lebanon	-	30	30	-	0,2	0,2
Liberia	2	28	30	0,2	0,2	0,2
Libya	-	39	39	-	0,2	0,2
Lithuania	4	16	20	0,4	0,1	0,1
Macedonia	4	93	97	0,4	0,6	0,6
Madagascar	-	2	2	-	0,0	0,0
Malaysia	1	3	4	0,1	0,0	0,0
Mali	-	14	14	-	0,1	0,1
Malta	-	4	4	-	0,0	0,0
Mauretania	-	8	8	-	0,1	0,0
Mauritius	-	5	5	-	0,0	0,0
Mexico	4	14	18	0,4	0,1	0,1
Moldavia	21	127	148	2,0	0,8	0,9
Morocco	35	3.690	3.725	3,3	23,2	21,9
Mozambique	-	4	4	-	0,0	0,0
Netherlands	4	36	40	0,4	0,2	0,2
New Zealand	1	-	1	0,1	-	0,0
Nicaragua	-	1	1	-	0,0	0,0
Niger	-	2	2	-	0,0	0,0
Nigeria	168	409	577	15,7	2,6	3,4
Norh Yemen	-	1	1	-	0,0	0,0
Pakistan	-	43	43	-	0,3	0,3
Palestine	-	120	120	-	0,8	0,7
Panama	-	1	1	-	0,0	0,0
Paraguay	1	4	5	0,1	0,0	0,0

Foreign detainees per nationality

Data till 31 December 2003

Country	Absolute			%		
	Women	Men	Total	Women	Men	Total
Peru	33	135	168	3,1	0,8	1,0
Philippines	16	32	48	1,5	0,2	0,3
Poland	13	108	121	1,2	0,7	0,7
Portugal	1	14	15	0,1	0,1	0,1
Romania	110	1.118	1.228	10,3	7,0	7,2
Russian Federation	7	40	47	0,7	0,3	0,3
Rwanda	-	7	7	-	0,0	0,0
Senegal	1	206	207	0,1	1,3	1,2
Sierra Leone	3	28	31	0,3	0,2	0,2
Singapore	-	3	3	-	0,0	0,0
Slovakian Rep.	3	12	15	0,3	0,1	0,1
Slovenia	2	45	47	0,2	0,3	0,3
Somalia	4	28	32	0,4	0,2	0,2
South Africa	1	9	10	0,1	0,1	0,1
Spain	13	89	102	1,2	0,6	0,6
Sri Lanka	-	49	49	-	0,3	0,3
Sudan	2	16	18	0,2	0,1	0,1
Surinam	-	2	2	-	0,0	0,0
Sweden	-	2	2	-	0,0	0,0
Switzerland	2	6	8	0,2	0,0	0,0
Syria	-	13	13	-	0,1	0,1
Tanzania	1	30	31	0,1	0,2	0,2
Thailand	1	-	1	0,1	-	0,0
Togo	1	7	8	0,1	0,0	0,0
Trinidad and Tobago	-	1	1	-	0,0	0,0
Tunisia	31	1.950	1.981	2,9	12,2	11,6
Turkey	1	131	132	0,1	0,8	0,8
Ugana	3	5	8	0,3	0,0	0,0
Ukraine	16	110	126	1,5	0,7	0,7
Uruguay	6	41	47	0,6	0,3	0,3
USA	4	13	17	0,4	0,1	0,1
Uzbekistan	1	1	2	0,1	0,0	0,0
Venezuela	31	67	98	2,9	0,4	0,6
Vietnam	2	3	5	0,2	0,0	0,0
Zaire	-	4	4	-	0,0	0,0
Zambia	-	1	1	-	0,0	0,0
Unknown	1	12	13	0,1	0,1	0,1
Total	1.072	15.935	17.007	100,0	100,0	100,0
% Women	6,3					
% Men	93,7					

Nota: La nazionalità del detenuto straniero viene registrata al momento dell'ingresso in istituto dalla libertà. Pertanto l'elenco delle nazionalità dei detenuti presenti, può includere anche nomi di Paesi non più esistenti nell'attuale assetto geopolitico.

Fonte: Elaborazioni ISMU su dati del Ministero della Giustizia, 2004.

Chapter IX Social Security

Jurisprudence

Corte Costituzionale, judgment of 6-5-2002, no 198, *E.N.P.A.L.S. e Presidenza del Consiglio dei Ministri*.

The Constitutional Court refuses to take into account Article 42 EC and Regulation no 1408/71/EEC, after having examined a question of compatibility with the Italian Constitution, of Article 16 of the decree of the President of the Republic 1971 no 1420 and Article 16 of act 1990 n. 233, which do not allow aggregation of contributions paid to ENPALS (Ente Nazionale di Previdenza e di Assistenza per i Lavoratori dello Spettacolo) and of contributions paid to INPS (Istituto nazionale di previdenza sociale).

Medical service costs incurred in another Member State

Tribunale amministrativo regionale - Lombardia, Milano, section I, judgment of 22-2-2002 no 798 (with comments by L. Musselli, L'autorizzazione per cure mediche da sostenersi all'estero nell'ambito della amministrazione sanitaria "indiretta": tra libertà di cura dell'assistito e limitazione alla valutazione dell'amministrazione, *Il foro amministrativo*, 2002, p. 364).

The administrative court of first instance states that the administration bears the burden of proof where it intends to refuse the reimbursement of costs for treatment to be received abroad. The administration has to prove that an equal treatment can be provided in Italy and has to indicate where such a treatment can be provided. The administration can not deny the reimbursement on the ground that the medical necessity does not justify the treatment to be provided abroad, because this decision would encroach on the patient's freedom.

(See also Tribunale amministrativo regionale - Lombardia, Milano, section I, judgment of 15-1-2003 no 26, *Vergottini v ASL Lecco and Regione Lombardia*).

Tribunale amministrativo regionale - Sicilia, Palermo, section I, judgment of 8-9-2003 no 1314, *Lanza v. AUSL no 6 Palermo*.

The reimbursement of the treatment costs occurred abroad is only possible when the concerned person confirms that he could not receive in Italy the appropriate treatment to his conditions.

Consiglio di Stato, section V, judgment of 26-3-2003 no 1561.

When the competent authority refuses to authorise a person to go abroad in order to receive there a medical treatment, it has to indicate in which Italian medical centre such a treatment can be provided.

Consiglio di Stato, section V, judgment of 10-7-2003 no 4115, *ASL Roma A v. Festa*.

When the competent authority refuses to authorise a person to go abroad for receiving a medical treatment there, it has to contact the Italian hospitals to check time availability. On the base of these information, the authority shall provide sound reasons

in order to demonstrate that an appropriate treatment can be provided in Italy. In that case, the required authorization can be refused.

Corte di Cassazione, labour section, judgment of 20-8-2003 no. 12249, *Saragoni v. A.U.S.L. Rimini*.

The Supreme Court declares that a person can receive the reimbursement of the costs paid abroad only where he can not receive the treatment strictly appropriate to his conditions in the Italian territory. The law does not grant a general right to receive medical treatment abroad.

Consiglio di Stato, section V, judgment of 21-11-2003 no 7595, *ASL Firenze v. H.K.*

An appropriate treatment is to be considered not obtainable in Italy when the patient is obliged to take steps, because no information about the possibility of receiving a medical treatment within a reasonable time were given to him.

N. Coggiola, Cittadini comunitari titolari di pensione e libera prestazione di servizi sanitari in Stato membro diverso da quello di residenza, *Il foro amministrativo: Consiglio di Stato*, 2003, p. 410 (comments on ECJ's judgment of 25-2-2003 case C-326/00, *IKA*, E.C.R. I-1703).

Recent national reports, legal literature

M. Campana, Intrecci tra i principi di libertà di circolazione, di stabilimento e di prestazione di servizi nella giurisprudenza relativa alle prestazioni sociali, *Diritto pubblico comparato ed europeo*, 2002, p. 405.

M. Campana, I principi di garanzia delle prestazioni sociali tra nozioni, normativa applicabile e libertà di circolazione nella giurisprudenza della Corte, *Diritto pubblico comparato ed europeo*, 2002, p. 1303.

G. Ferraro, La flessibilità previdenziale nell'evoluzione del lavoro e delle professioni, *Diritto del lavoro*, 2002, I, p. 367.

C. Gatta, Applicabilità delle norme anticumulo nazionali ma con garanzia del trattamento pensionistico complessivo più favorevole (Nota a CGCE 7 marzo 2002 causa n. C-107/00), *Il diritto del lavoro*, 2002, 2, p. 347.

L. Marini, Conteggio dei periodi contributivi a fini previdenziali e discriminazioni fondate sulla cittadinanza: il nuovo orientamento della Corte di Giustizia, *Il Diritto dell'Unione europea*, 2002, p. 143.

Mazziotti, L'assimilazione della normativa comunitaria alla norma nazionale nel sistema europeo delle fonti giuridiche, *Rivista giuridica del lavoro e della previdenza sociale*, 2002, 2, p. 663 (comments on ECJ's judgment of 22-2-2002, joined cases C-52/99 e C-53/99, *Camarotto and Vignone*, E.C.R. I-1395).

Mazziotti, Libera circolazione e prestazioni familiari e per orfani nel diritto comunitario, *Rivista giuridica del lavoro e della previdenza sociale*, 2002, 2, p. 844 (comments on ECJ's judgment of 24-9-2002, C-471/99, *Martínez Domínguez and others*). The author believes that the prevalence accorded to residence in Articles 77.2.b.i and 78.2.a.i of Regulation 1408/71/EEC is difficult to reconcile with the general princi-

ple of free movement of persons, and that it is an obstacle to the acquisition of the right to payment.

- N. Coggiola, Le prestazioni sanitarie tra principio di libera circolazione dei servizi e tutela dell'equilibrio finanziario e dei sistemi di assicurazione sanitaria degli Stati membri, *Giurisprudenza italiana*, 2003, p. 1697 (comments on ECJ's judgment of 3-5-2003, case C-385/99, *Müller-Fauré*, E.C.R. I-4509). The author criticizes the Court's judgment. Firstly, he states that reasons linked "to protecting the financial balance of the social security system and to maintaining a balanced medical and hospital service open to all" are not admissible grounds to limit the freedom to provide hospital services, because they are not supported by specific academic evidences. Secondly, he disagrees with the distinction made by the Court between hospital care (prior authorization required) and non-hospital care (without prior authorization). He believes that the rationale of this distinction is a false presumption: that non hospital care implies minor economic costs. The Court does not give the proper consideration to the high level of specialization and expensive investments required by some kind of non-hospital services.
- Manziotti, Diritto a prestazioni sociali non contributive e divieto di discriminazioni dirette e indirette nel diritto europeo, *Rivista giuridica del lavoro e della previdenza sociale*, 2003, 2, p. 454 (comments on ECJ's judgment of 20-6-2002, case C-299/01, *Commission v. Luxembourg*, E.C.R. I-5899).
- SgROI, Tutela della posizione previdenziale del lavoratore migrante e ambito di applicazione dell'istituto della totalizzazione, *Rivista giuridica del lavoro e della previdenza sociale*, 2003, 2, 627 (Cass. sez. lavoro 28-6-2003 n. 10305 e Trib. Milano sez. lavoro 31-3-2003 n. 959)

Chapter X Establishment, Provision of Services, Students

Establishment

(For entry, residence and departure conditions, see above, Chapter I.)

G. Coinu, Una difficoltà di recezione del diritto comunitario e l'art. 41 Cost.: la sentenza 54/01 della Corte costituzionale, *Il foro italiano*, 2002, I, 2264.

The Constitutional Court declared that article 6 of the act of Sardinia Region 1998 no 13 was constitutionally illegal, because it was inconsistent with article 41 of the Italian Constitution ("Private-sector economic initiative is freely exercised. It cannot be conducted in conflict with social usefulness or in such a manner that could damage safety, liberty and human dignity. The law shall provide for appropriate programmes and controls so that public and private-sector economic activity may be oriented and co-ordinated for social purposes"). Article 6 stated that in order to establish a branch or a subsidiary in Sardinia, a travel agent established in an other member State had to pass a regional qualifying examination, which is held every three years.

The author notes that the Constitutional Court does not give any consideration to the compatibility of the Regional act with Community law, especially Directive no 82/470/EEC.

He also notes that the Constitutional Court does not take into account article 4 of the said Regional act, which allows the Region to limit *de facto* the number of travel agencies established in its territory. It is inconsistent with Community law.

V. Febbraro, Rilascio di licenza per l'esercizio della professione di guida turistica tra normativa regionale e comunitaria, *Giudice di pace*, 2002, p. 122.

The Article comments on the judgment of Giudice di pace of Venice, 27-12-2001, which sets aside the Regional act requiring a licence released after passing an examination for practising the activity of tourist guide, because it was deemed to be conflicting with Community law.

According to the Act 1997 no 504, a student can obtain to postpone his military service, if he is enrolled in a State University or in other University recognized by the law (art. 3) or if he is attending a University course in the European Union or if he is attending a course abroad, at the end of which he will obtain a diploma provided with legal value in Italy (art. 5).

The Ministry of Defence rejected some authorization requests submitted by students who were enrolled in a University settled in another member State (the Nottingham Trent University, in the United Kingdom), but who were attending courses at the European School of Economics in Italy. Several complaints were filled against these decisions. Some judges of first instance declared void the decision of the Ministry of Defence. They stated that the decision was inconsistent with Community law on the freedom of establishment (for example, see TAR Lazio, judgment of 5-2-2003, n. 705). Some other judges followed a different reasoning. They recognized that act 1997 no 504 allows the student to postpone his military service if he is attending University abroad,

provided that diplomas delivered abroad have legal value in Italy. These judges declared that the legislative decree 1992 no 115, implementing Directive no 89/48/EEC, makes diplomas delivered in an other Member State equivalent to Italian diplomas. As diplomas delivered anywhere in the European Union have legal value in Italy, Ministry of Defence has to grant the benefit to the student (for example, see TAR Lazio, judgment of 13-5-2002, no 4167).

These judgments were overruled on appeal. The Supreme administrative Court followed a literal interpretation of the act 1997 no 504: if a student is attending courses in Italy, he must be enrolled in a State University or in an other University recognized by the law; if the student is enrolled in an University settled in an other Member State, he must attend courses there. The student enrolled in the Nottingham Trent University but attending courses given by the European School of Economics in Italy, does not satisfy any condition (Consiglio di Stato, judgments of 23-4-2002, no 1508; 21-5-2002, no 2025; 10-12-2002, no 5336; 31-5-2003, no 3047; 17-6-2003, no 3475; 18-6-2003, no 3451; 15-9-2003, no 5111; 13-10-2003, no 6114; 10-11-2003, no 7174; 30-11-2003, no 9176; 30-12-2003, no 9179).

In some cases, the Consiglio di Stato dismissed a request for preliminary ruling of the Court of Justice, stating that the organization of the military service is a matter belonging to national law, and that the Italian law does not constitute an obstacle to the free movement of persons, as students are not prevented from studying in an other member State. The Consiglio di Stato sometimes refers to ECJ's judgment in case C-186/01, Dory (E.C.R., 2003, I-2479) in order to affirm that the military service escapes Community competences.

The same Consiglio di Stato delivered an opinion upon request of the Ministry of Defence (opinion of 23-7-2002, no 2119). It was asked to state if the Ministry of Defence has to reject or to admit a request from a student asking to postpone his military service, when he is attending University courses in Italy, but he is enrolled in a University settled in an other member State. Surprisingly, the Consiglio di Stato stated that it is not important where the courses are held, as long as they are ascribable to an University settled in a member State and legally recognized by the law of that State. These conditions must be ascertained on a case-by-case analysis, in order to avoid abuse. Particular attention must be paid to the language in which the courses are held and the legal relationship between the University which will deliver the final diploma and the branch which held the courses.

Provision of services

(For entry, residence and departure conditions, see above, Chapter I.)

Article 48, Act 1-1-2002 no 39, Disposizioni per l'adempimento di obblighi derivanti dall'appartenenza dell'Italia alle Comunità europee, Legge comunitaria 2001, *Gazzetta Ufficiale della Repubblica italiana*, 26-3-2002 no 72, SO, modifies Article 788 of the Italian Code for navigation. Enterprises established in an other Member State can carry on aerial work in Italy, provided they get a temporary authorization from the Ministry of Transport.

Students

(For entry, residence and departure conditions, see above, Chapter I.)

The enrolment in scientific University courses is conditional upon passing an entrance examination, as Act 2-8-1999 no 264 (v. art. 3.1) introduced selective entry to these courses. Three quotas are provided: the first for Italian students; the second for Community students and non Community students residing in Italy; the third for non Community students residing abroad. Every year, the Ministry of the University establishes the places available to non Italian students and distributes them over all the Universities settled around Italy (See, for example, Ministry of University, decree 4-7-2002, Determinazione dei posti disponibili a livello nazionale per le immatricolazioni ai corsi di laurea specialistica in medicina veterinaria per l'anno accademico 2002/2003, *Gazzetta Ufficiale della Repubblica italiana*, 16-7-2002 no 165).

The administrative judge of first instance of Campania (TAR Campania, judgment of 5-8-2003 n. 10874, *M. v. Seconda Università degli Studi di Napoli*) stated that the notice of competition for the selection test of foreign students who can enrol in the Seconda Università di Napoli was unlawful, because it reserved some places to non Community students residing abroad and did not provide that, in case the number of non Community students residing abroad were lesser than the places reserved to them, these places could be assigned to Community students who passed the entrance examination but could not enrol as the quota reserved to them were exhausted.

G. Caggiano, Cittadinanza europea e mobilità transnazionale degli studenti, *Gli stranieri*, 2002, 1.

Recent legal literature

Doctors and dentists:

D. Dalfino, Formazione odontoiatrica ed accesso alla formazione, *Il foro italiano*, 2002, IV, 584 (comments on ECJ's judgment of 29-11-2001, case C-202/99, Commission v Italy, E.C.R. I-9319).

S. Sassi, Abusivi i medici specialisti in odontoiatria che esercitano la professione di dentista, *Diritto pubblico comparato ed europeo*, 2002, p. 799 (Comments on ECJ's judgment of 29-11-2001, case C-202/99, *Commission v. Italy*, E.C.R. I-9319).

E. Ferletic, La libera circolazione dei medici e mutuo riconoscimento delle specializzazioni mediche in ambito comunitario, *Diritto pubblico comparato ed europeo*, 2002, p. 1773 (comments on ECJ's judgment of 16-5-2002, case C-232/99, Commission v Spain, E.C.R. I-4235).

Recognition of diplomas:

F. Lazzaro, Il riconoscimento dei diplomi stranieri nel diritto comunitario, *Giustizia civile*, 2002, p. 2690.

L. Lezzi, Principio di equivalenza, mutuo riconoscimento e libertà di circolazione delle professioni nell'Unione europea, *Diritto comunitario e degli scambi internazionali*, 2003, p. 383.

R. Nunin, Illegittima la clausola di reciprocità per il riconoscimento del diploma di maestro di sci, *Il diritto del lavoro*, 2002, 2, p. 159 (comments on ECJ's judgment of 16-5-2002, case C-142/01, *Commission v. Italy*, E.C.R. I-4541).

Lawyers

Legislation:

Article 16 Act 1-1-2002 no 39 (Disposizioni per l'adempimento di obblighi derivanti dall'appartenenza dell'Italia alle Comunità europee. Legge comunitaria 2001, *Gazzetta Ufficiale della Repubblica italiana*, 26-3-2002 no 72, SO)

Originally, Article 33 of Royal Decree-Law of 27 November 1933 no. 1478 provided that the Italian lawyers who intended to practise before the higher courts should demonstrate that they had practiced as lawyer for at least eight years, acting before First Instance and Appeal Courts. Because of this, Article 8 of Act 1982 no 31 transposing Directive no 77/249/EEC provided for a similar proof to be given by Community lawyers. Article 4 of Act 1997 no 27 regarding the abolition of bar of procuratore legale modified Royal Decree Law 1933 no 1578, replacing the eight year practice with a longer period practice of twelve years. Moreover, Article 9 of Legislative Decree 2001 no 96 transposing Directive no 98/5/EEC on the freedom of establishment of lawyers foresees that the established lawyer can be register with the special bar for practising before the higher courts if he demonstrates that he has practiced the profession for at least 12 years. In order to coordinate the legislation, Article 16 of Act 2001 no 39 modifies Article 8 of Act 1982 no 31 imposing to Community lawyers who practice in Italy under the regime of provision of services, to demonstrate that they have been practicing for twelve years, instead of eight as previously foreseen, to be able to practise before the higher courts.

Article 18, Act 3-2-2003 no 14 (Disposizioni per l'adempimento di obblighi derivanti dall'appartenenza dell'Italia alle Comunità europee. Legge comunitaria 2002, *Gazzetta Ufficiale della Repubblica italiana*, 7-2-2003 no 31, SO) modifies the Italian legal order, in order to comply with the ECJ's judgment of 7-3-2002, case C-145/99, *Commission of the European Communities v. Italy* (E.C.R. I-2235). It repeals Article 2 paragraph 2 of act 1982 no 31, which did not permitted a national of Member States authorised to practise as lawyers in another Member State, to establish in Italy either a chamber or a principal or branch office; and declares that members of the Bar are required to appoint a professional domicile (and not only to reside) in the judicial district of the court to which the Bar at which they are enrolled is attached. As a consequence, the person concerned may establish or maintain his official residence in one Member State and his professional domicile in Italy.

Decree 28-5-2003 no 91, Regolamento in materia di prova attitudinale per l'esercizio della professione in materia di avvocato, *Gazzetta Ufficiale della Repubblica italiana*, 25-7-2003 no 171.

Directive no 89/48/EEC was transposed in Italy by Decree Law 1992 no 115. Article 9 of this Decree Law provided that regulations should establish the compensation measures foreseen for the recognition of titles in the case a professional training differ-

ent from the one given in the Italian legal system. Also, the regulations should provide for the exam topics and the organisation of the professional examination for the recognition of the title of lawyer. The failure to adopt such regulations has been condemned by the ECJ's judgment 7-3-2002, case C-145/99, *Commission vs. Italy* (ERC I-2235). Following this condemnation, the Italian government adopted Decree 2003 no 191. It foresees that, in the case of professions such as "government lawyer, accountancy lawyer and intellectual property consultant", the professional examination must be passed for the professional title to be recognised. For the lawyers, such examinations will take place twice a year at the National Bar Council.

Jurisprudence:

Corte di Cassazione, judgment of 19-12-2003 no 19547, *Consiglio dell'Ordine degli Avvocati di Roma v. Aresu*.

The Supreme Court specified that the lawyer who exercises functions at the Legal Service of the European Commission, seated in Brussels, is obliged to be established in the place where he exercises the functions and is entitled to be inscribed in the special list of lawyers working for public administrations or entities, annexed to the ordinary bar, at the Council of the local bar. This inscription is not subordinate at the conservation of the professional domicile in the circumscription of origin.

Corte d'Appello di Firenze, judgment of 20-1-2003, *Lan* (with a comment by D. Notaro, *Abusivo esercizio della professione e diritto di stabilimento degli avvocati italiani, Diritto penale e processo*, 2003, 154).

The case of a German citizen accused of the offence of abusive exercise of the legal profession was submitted to the Court. The defendant exercised in Germany the profession of *Rechtsanwalt* and opened a law firm in Florence, where he exercised the legal profession under the regime of the freedom to provide services, without inscribing himself at the bar. The judge of first instance had acquitted the defendant for the offence foreseen at Article 498 of the Criminal Code (usurpation of titles and honours), but condemned him to the payment of a fine of 500,000 liras for the offence foreseen in Article 348 of the Criminal Code (abusive exercise of a profession). The appeal was admitted and the defendant acquitted. The Court of Appeal applies the test elaborated by the EC Court of Justice to verify if the lawyer is established or is exercising the profession under the regime of the freedom to provide services. The Court of Appeal concludes that the activity has a temporary character. It considers that this is demonstrated by the inscription in the special list held at the Bar Council as per Directive no 77/249/EEC. The start up of a law firm in Florence or the request for an injunction in favour of a client does not constitute elements demonstrating the contrary. Moreover, as Italy did not transpose Directive no 89/48/EEC correctly (this is established by the Court of Justice in case C-145/99), the Court of Appeal adds that the criminal provision that punishes the breach of the mandatory inscription at the bar is not applicable to this case.

Recent legal literature

- S.M. Carbone, Strutture associative di attività professionale e limiti alla libera prestazione dei relativi servizi con riguardo ai servizi resi dagli avvocati, *La nuova giurisprudenza civile commentata*, 2002, II, p. 136. The function of lawyers has a public nature as they act as intermediaries between the citizens and the judicial authorities. Therefore, it is justified to confer them exclusivities for the judicial activities but also for the consulting activities. The exclusive activities are to be exercised under the control of the State, in order to prevent abuses.
- Berlinguer, Identità e circolazione del giurista nel nuovo ordinamento europeo, *Rassegna forense*, 2003, p. 303. This comment indicates that Article 35 of Legislative decree 2001 no 96 (implementing Directive no 98/5/EEC) is not in conformity with the Directive because it prescribes that lawyers established in Italy can found a professional association under the condition that one of the partners holds the Italian legal qualification. The Directive provides that the Community lawyer must rely on the services of a member of the local bar for the exercise of the judicial activity, but it does not request that such colleague be a partner of the professional association. Article 35 is not coherent with Article 36 of the same piece of legislation. Article 36 provides that the professional association that establishes itself in Italy must rely on the services of a member of the bar. There is no reason for a different regime to be applied to a newly founded professional association and an association that establishes itself in Italy.
- S. Caracciolo, Il diritto di stabilimento per la professione forense, *Giornale di diritto amministrativo*, 2002, p. 237-245
- F. Ferraro, Avvocati: cronaca di una condanna da tempo annunciata per l'Italia, *Diritto pubblico comparato ed europeo*, 2002, p. 1270.
- E. Granziera, Il diritto di stabilimento degli avvocati: verso una nuova era?, *Giurisprudenza italiana*, 2002, p. 38 (comments on ECJ's judgment of 7-7-2000, case C-168/98, *Luxemburg v. European Parliament and Council*, E.C.R. I-9131)
- B. Nascimbene, S. Bastianon, Avvocati, diritto comunitario e diritto internazionale: recenti orientamenti della Corte di giustizia, *Il Corriere giuridico*, 2002, p. 602 (Comments on ECJ's judgment of 19-2-2002, case C-35/99, *Arduino*, E.C.R. I-1529).
- B. Nascimbene, C. Sanna, Norme comunitarie e norme nazionali sull'esercizio della professione forense in Italia, *Rivista di diritto internazionale privato e processuale*, 2002, p. 349.
- D. Notaro, Avvocati europei ed esercizio della professione in Italia, *Diritto penale e processo*, 2002, p. 346.
- S. Russo, Le società tra professionisti, *Archivio civile*, 2002, p. 533.
- M. Antonucci, I praticanti avvocati europei, *Il Consiglio di Stato*, 2003, II, p. 2155 (comments on ECJ's judgment of 13-11-2003, case 313/01, *Morgenbesser*).
- D. Latella, Le norme per l'esercizio della professione forense e la costituzione di società tra avvocati: brevi note di commento al d.lg. 2 febbraio 2001, *Diritto & Formazione*, 2002, p. 325.

A. Mari, La qualificazione del praticante avvocato nell'ordinamento comunitario, *Giornale di diritto amministrativo*, 2003, p. 1041 (comments on ECJ's judgment of 13-11-2003, case 313/01, *Morgenbesser*).

Statistics regarding the application of Directive 98/5 in Italy

Data collected by Bruno Nascimbene and Cecilia Sanna. These data, updated until 15-3-2004, have been made public through the report presented at the Congress "L'amministrazione della giustizia e la società italiana del 2000. Una ricerca interdisciplinare", held in Milan on 19 and 20-3-2004.

Bar	Established lawyers	Nationality
165 of 165	126	
		32 Spanish 37 Germans 21 Italians (5 with the title of abogado, 1 with the title of solicitor, 1 with the title of advocat, 1 with the title of Rechtsanwalt), 11 British 11 French (2 with Italian double nationality), 4 Belgians 3 Dutch 2 Greeks 1 Swiss 1 Austrian 1 Irish 1 Portuguese 1 nationality not indicated

Bar	Integrated lawyers	Nationality
165 of 165	26	
		11 Germans 5 British 5 Italians (1 title of abogado) 4 Spanish 1 Austrian

Bar	Italian lawyers established or integrated in another Member State	EU hosting country
165 of 165	61	England 27 (24 in Milan) Belgium 8 Germany 7 Austria 3 France 2 Greece 1 (established) Ireland 1 Not indicated 12

Bar	Professional associations	Società tra professionisti in which established or integrated lawyers participate
165 of 165	25 (of which 6 in Milan, 3 in Rome)	1 (Milan)

There are 151.470 lawyers in Italy (data updated until 1.2.2004; source: National Bar Council).