

REPORT
on the Free Movement of Workers
in Italy in 2004

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General Remarks

Of particular interest:

- Administrative measures adopted in relation to access to work for new Member States citizens (Ch. VII).
- Constitutional Court 2004 no 86, which adopt a “Marleasing style” reasoning in order to avoid a conflict between Italian and Community law (Ch. VI).
- Judgments of the administrative courts of first and last instance about the European School of Economics in Italy, which are not always in line with the ECJ judgment in the case C-153/02, *Valentina Neri* (Ch. X).
- Case law and doctrine about ECJ judgment in the case C-148/02, *Garcia Avello* (Ch. II).

Note:

- The primary source of enforcement, to conform Italian legal system to EC law is called “*Legge Comunitaria*” (*Disposizioni per l’adempimento di obblighi derivanti dall’appartenenza dell’Italia alle Comunità europee*). It has been established by Law no 1989 no 86 and has to be adopted, every year, within March, the 30th. However this date is not peremptory and it is often subjected to postponements. As a result, the “*Legge Comunitaria 2004*” has been adopted in 2005 (Law 18-4-2005, no 62, in *Gazzetta Ufficiale della Repubblica italiana*, no 96, SO no 76). It will be examined in next year’s report.

As regards the Commission’s comments to the Italian report:

The additional information required about the taking into account of professional experience and about sportsmen will be provided for in the 2005 Report.

Chapter I

Entry, Residence, Departure

Text in force

- DPR 2002 no 54 regulates European Union citizens' entry, residence and departure conditions.
- DPR 1998 no 286 (law on immigration) is also applicable to the European Union citizen, as far as it is more favourable.

Entry

The general conditions on entry are applicable to citizens of the new Member States other than workers. On entry conditions for the worker coming from the new Member States, see Ch. VII.

Court of Cassation (criminal I), judgment of 8-4-2004 no 19022, Bass

In the criminal proceedings against a non EU foreigner who was accused of not having showed his identity document when required by the police (*Carabinieri*), the Supreme Court made an *obiter dictum* useful for our report. It states that the duty to possess an identity document at least at the moment of entering Italy and to produce it at any request, imposed to the European Union citizen by art. 1 DPR 2002 no. 54, pursues the limited aim of permitting to ascertain the identity of the person.

Court of Cassation, judgment of 15-12-2004 no 9233, Buglione e Lucaci.

The Supreme Court states that the offence of facilitating illegal immigration (art. 12 DPR 1998 no. 286) occurs even when the foreigners who had illicitly entered Italy, are nationals of a state (Latvia) which, in the meantime, has become a member of the Union. The facts that amounted to the offence happened before accession.

Residence

Ministero dell'Interno, Dipartimento della pubblica sicurezza, Direzione centrale dell'immigrazione e della polizia delle frontiere, Circolare no. 400/A/206/ P.10.4.39, 12-3-2004, *Rilascio di documenti di soggiorno a cittadini di Stati membri dell' Unione europea.*

The circular was adopted following a letter from the European Commission about the many claims that were lodged criticizing the administrative practice of the residence permit issuing. The Minister for the Interior reminds the Police Headquarters to apply Articles 5 and 6 of DPR 2002 no 54 to European Union citizens and to interpret it in the most favourable way. That means that a statement equivalent to an official document (*dichiarazione sostitutiva*) has to be accepted whenever possible.

The third Commission (Foreign and Community affairs section) of the Italian Chamber of Deputies passed the resolution no. 7-00341 of 27-1-2004 dealing with the implementation

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of the joint declaration of 28-7-2000 among France, Germany, Spain, and Italy on the abrogation of residence permit within these countries. The Parliamentary Commission suggests the Italian government to take the necessary measures in order to implement both the resolution and all the Community provisions on the matter in question, as soon as possible.

The declaration of 28-7-2000 was signed in Marseille. The main purpose was to facilitate the free movement and residence of citizens belonging to the countries that signed it. However, the intentions were to make this benefit available to all Community citizens, once the reciprocity conditions would have occurred. The declaration pointed out that the free movement of European citizens and their residence were based on EC law and, above all, on the European citizenship requirement. A passport or an identity card would have been enough in order to prove such a condition.

The Parliamentary Commission also underlines that the implementation of the joint declaration would be very helpful along those Italians who reside in Germany. In fact, it would eliminate a lot of administrative and sometimes humbling practices to which Italian citizens, residing abroad, are forced to deal with.

The enforcement of the declaration would also, according to the Parliamentary Commission, represent a big step ahead towards the full achievement of the European citizenship condition.

Mr Rocco Buttiglione, Minister for Community Policies at that time, affirmed that the shortest way to have a fast implementation of the joint declaration on resident permits would be to insert in the “*Legge Comunitaria*” all the European directives considering the matter in question. As a result, the declaration content would concern not only the four countries that have signed the document, but also the other Member States.

Doctrine

On ECJ (2004) case C-138/02, *Collins*:

M. Borzaga, Nozione di “lavoratore”, libertà di circolazione e diritto di soggiorno in ambito comunitario, *Rivista italiana di diritto del lavoro*, 2004, p. 683.

F. Del Conte, Lavoratore versus cittadino: i giudici comunitari inseguono la chimera dell’integrazione sociale europea, *Diritto pubblico comparato ed europeo*, 2004, p. 1281.

M. Gnes, Il “turismo sociale” tra scelta ed abuso del diritto europeo, *Giornale di diritto amministrativo*, 2004, p. 1082.

Departure

Court of Cassation (criminal I), judgment of 22-9-2004, no. 38656, Romcevic.

The Supreme Court states that a European citizen, convicted to a term of imprisonment, can not be expelled on request. Article 16.5 of DPR 1998 no. 286 allows a foreign prisoner to be expelled upon requested instead of serving his term of imprisonment, when certain conditions are met. According to the Court, Article 16.5 is applicable only to non-EU foreigners and it is a special rule, unsuitable to be applied by analogy to a EU citizen, who enjoys the right of free movement and can be expelled only on ground of public policy, public security and public health.

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Note: The aim of the provision is to cut down the prison population. The Court rightly states that DPR 1998 no 286 can be applied to a European citizen, provided that it is more favourable, but excluded *a priori* that expulsion on request could be more favourable. It can not be excluded that, from the point of view of the EU prisoner, to be expelled could be more favourable than to serve a term of imprisonment.

Tribunale amministrativo regionale – Lombardia, Milano, I, judgment of 30-12-2003, no. 7976, Haralambos vs Ministero interno.

The administrative court of first instance states that a Community citizen's expulsion order is lawful when the verbal conduct of the individual concerned clearly shows the intent to create public disorder and to disturb public security. In this case, the Court argued that the declaration made by a person, who was moving towards Genoa in order to take part in the demonstration against the G8 meeting, and addressed to the Border Police, had nothing to do with the unquestionable right to manifest his own ideas during the demonstration. On the contrary, the words used by the individual concerned clearly showed that he intended to interfere with a collective fundamental right, such as the right to safeguard public order. As a result, a Community citizen can be expelled on the grounds of public order and public security.

Tribunale regionale giustizia amministrativa – Trentino Alto Adige, Trento, judgment of 17-4-2004, no. 305, Sorrache Fernandenz vs Questore di Trento.

The administrative court of first instance states that it has no jurisdiction about an action challenging an expulsion order from the Italian territory, including the prohibition to come back, of a European Union citizen who was living on the street and was considered socially dangerous by the Police. That kind of cases is within the jurisdiction of the ordinary court (not the administrative one). It refers to the principle of law stated by the Court of Cassation (judgment 2002 no 2513), in a case about the review of an expulsion order of a non Community citizen. The administrative court applies this principle by way of analogy to the review of an expulsion order of a Community citizen.

On statistics about expulsions of EU citizens, see Ch. VIII (Expulsion orders of foreign prisoners).

Doctrine

- P. Balbo, L'allontanamento di un cittadino dell'Unione europea da uno Stato membro, *Gli stranieri*, 2004, 417 (description of EU rules about departure)
- N. Coggiola, *Art. 39 del Trattato CE: diritto alla libera circolazione dei lavoratori e derogabilità dello stesso da parte dello Stato membro per esigenze di ordine pubblico, Responsabilità civile e previdenza*, 2004, p. 389 (on ECJ (2002) C-100/01, *Oteira Olazabal*)
- R. Calvano, Il caso Orfanopoulos e Oliveri: ovvero come la Corte di giustizia tutela i diritti di due detenuti tossicodipendenti, *Quaderni costituzionali*, 2004, p. 635 (on ECJ (2004) case C-482/01 and C-493/01, *Orfanopoulos*)
- M.T. Lattarulo, I diritti del cittadino comunitario nel procedimento di espulsione: la Corte di giustizia fa il punto, *Diritto pubblico comparato ed europeo*, 2004, p. 1288 (on ECJ (2004) case C-482/01 and C-493/01, *Orfanopoulos*)

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The A. states that Italian law on expulsion seems not to be consistent with Community requirements. The expulsion of the European Union citizens is regulated by DPR 2002 no. 54, as far as substantial requirements are concerned, and by DPR 1998 no 286 (law on immigration), which determines when an expulsion order can be issued and what is the competent authority. The judicial review of an expulsion order is limited and the judge has limited powers to verify if it is founded on the “personal conduct” requirement. The A. believes that this situation can change, thanks to the judgements of the Constitutional Court about the need of effective judicial review of orders limiting the (non Community) foreigner’s personal freedom.

Chapter II Equality of Treatment

Equality conditions in working environment: the Italian legal system does not provide for a general statement of non-discrimination on the ground of nationality in the working environment. Instead, most of the Italian pieces of legislation are drafted in a way that encompasses both Italian and foreign workers. In other words, they apply to workers, irrespective of their nationality.

Nationality condition for access to the posts of captains and first officers of ships flying the Italian flag

According to the ECJ judgments C-405/01 (*Colegio de Oficiales de la Marina Mercante Española vs Administración del Estado*) and C-47/02 (*Albert Anker and others vs Bundesrepublik Deutschland*) a Member State may restrict the posts of master and chief mate of ships flying that Member State's flag to its nationals only if the rights under powers conferred by a public law on masters and chief mates are actually exercised on a regular basis and do not represent a very minor part of their activities.

In case C-405/01 the Italian government, supporting Spanish opinion, agrees that the posts of master and chief mate of merchants ships flying a Member State flag may, in accordance with article 39.4 EC, be reserved for nationals of that Member States in so far as those holding such a post may, by virtue of the domestic law and several international instruments, perform duties belonging to the public service, within the meaning of such provision as interpreted by the ECJ. Italy justifies its view by pointing to the increased potential risks of the high seas and the fact that ships, there, are beyond the reach of the public authorities, which necessitates the presence on board of a representative of the State, with decision-making power, in the person of the master.

Till 1998, Article 318 of the Italian Navigation Code (*Codice della navigazione*) stated that the crew of national ships, flying the Italian flag, had to be entirely consisting of Italian citizens. Law 1998 no 30 modified Article 318 and added a specific reference to European Union citizens.

Till 1999, Article 119 of the Navigation Code stated that only Italian citizens could apply in order to matriculate as seafarer. The captain belongs to the seafarers. Law 1999 no 472 modified Article 119 and added a specific reference to Community citizens.

It has to be noted that the implementing regulation of the Navigation Code (DPR 1952 no. 328) was not amended, and Article 239 still requires an Italian citizenship certificate in order to matriculate as seafarer.

The Navigation Code still requires Italian citizenship as a condition to matriculate as crew in the inland waterways sector (Article 133).

Garcia Avello case

The ECJ judgment in the case C-148/02 (*Garcia Avello*) gave rise to much debate in Italy, as Italian law is very similar to Belgian one.

Law and practice about surname conferral to a dual national with Italian citizenship require applying Italian law. According to Italian law, the legitimate child bears his father's surname. The official of the Register of Births registers the father's surname and who is con-

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cerned can apply for an amendment in order to have the surname modified according to the law of the State, the child is also a national of (for the description of Italian law and practice, see C. Fioravanti, *Attribuzione del cognome e cittadinanza "comunitaria": gli effetti, per l'ordinamento italiano, della sentenza Garcia Avello*, *Studium iuris*, 2004, p. 1181).

Jurisprudence

Tribunale di Roma, sez. I, decree of 15-10-2004.

The Tribunal upholds the request for amending the birth certificate of a child bearing Italian and Spanish nationality and who was born in Spain, where her surname was registered according to Spanish law. In Italy she was conferred only her father's surname, according to Italian law. The Tribunal explicitly relies on *Garcia Avello* to adjudicate the case and states that the child's surname has to be registered according to the will of her parents, i.e. as formed by Spanish law (similarly, Tribunale di Bologna decree of 9-6-2004).

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M.N. Bugetti, L'attribuzione del cognome tra normative interna e principi comunitari, *Famiglia e diritto*, 2004, p. 437.

E. Castorina, Il caso «Garcia Avello» innanzi alla corte di giustizia: conferme e caute aperture in materia di cittadinanza europea, *Giurisprudenza italiana*, 2004, p. 2011.

A. Lang, Cittadinanza dell'Unione, non discriminazione in base alla nazionalità e scelta del nome, *Diritto pubblico comparato ed europeo*, 2004, p. 247.

G. Palmeri, Doppia cittadinanza e diritto al nome, *Europa e diritto privato*, 2004, p. 217.

G. Rossolillo, Territorio comunitario, situazione interna all'ordinamento comunitario e diritto internazionale privato, *Rivista di diritto internazionale*, 2004, p. 695.

The A. believes that the ECJ judgment goes beyond the difference between purely internal situations and situations in which there is a Community connection.

S. Tonolo, La legge applicabile al diritto al nome dei bipoliti nell'ordinamento comunitario, *Rivista di diritto internazionale privato e processuale*, 2004, p. 957.

The A. believes that a Garcia Avello case is likely to happen in Italy, because Italian private international law grants priority to Italian citizenship. As a remedy, she refers to a Supreme Court jurisprudence (Court of Cassation, Combined Chambers, 9-1-2001 no 1) concerning custody of a child with dual nationality. According to it, Italian citizenship can not prevail over another Community citizenship, if it amount to discrimination on the ground of nationality, forbidden by Article 12 EC.

M. Rossi, Principi fondamentali del trattato CE e normativa statale in materia d'imposte dirette nella giurisprudenza della Corte di Giustizia CE, *Diritto e pratica tributaria*, 2004, 2, p. 687.

The article is an in-depth study of the ECJ case law about relations between free movement of persons and national tax provisions. The A. concludes that some Italian tax provisions seem to be contrary to EC law, because they discriminate between a non-resident taxpayer who receives all or almost all of his taxable income in Italy and a resident one. The following provisions are criticised:

- Art. 25 of Decree of the President of the Republic 1973 no 600, which states that the deduction at source of income derived in respect of an activity of an independent char-

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acter exercised in Italy amounts to 20% for a resident taxpayer and to 30% for a non-resident taxpayer.

- Art. 24 of Decree of the President of the Republic 1986 no 917, which states that a non-resident taxpayer can not deduct from his taxable income received in Italy the same tax burdens and expenses that a resident taxpayer can deduct.

- Art. 166 of Decree of the President of the Republic 1986 no 917/1986, which states that a taxpayer who moves abroad and loses his residence for tax purposes in Italy, is taxed on the increases in value determined in the company securities which remain in his ownership. This provision is similar to the French law that was found to be contrary to EC law in case C-9/02 (Lasteyrie du Saillant).

- A. Cicchetti, *La cultura discrimina il turista europeo?*, *Rivista italiana di diritto pubblico comunitario*, 2004, p. 249 (on ECJ (2003) case C-388/01, *Commission vs Italy*)

The A. criticizes the ECJ judgment, since she believes that tourists and residents are not in a comparable position. The non-discrimination principle requires that different situations are not treated in the same way. A tourist visits a museum for pleasure; a resident is fully a citizen if he/she can enjoy his/her place and its cultural goods. To treat the resident in the same way as a tourist will amount to a reverse discrimination. Italy should have justified the free admittance for residents by relying on ground of public order.

The A. states that museums are entrusted with the operation of a service of general economic interest and could rely on Article 86 (2) EC to introduce differentiated tickets for admission, in order to treat in a different way different classes of users with a different willingness-to-pay for the same service.

Chapter III Employment in the public sector

General texts 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 say that Article 51 cannot 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 qualifica-

tions, 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*, in 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 Article 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;

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- 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:

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- 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;

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

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.”

Linguistic requirements

Article 3.1 of Italian Constitution states that

“All citizens have equal social dignity and are equal before the law, without distinction of sex, race, *language*, religion, political opinion, personal and social conditions”.

The official language is Italian, but a special status is reserved to French in Valle d’Aosta, German in Trentino-Alto Adige, and Slovenian in Friuli-Venezia Giulia.

Valle d’Aosta

The Offices of the central government in the Region should possibly recruit officials from the Region or speaking French (Article 38, Constitutional Law 1948 no. 4, *Statuto speciale per la Valle d’Aosta*).

A full knowledge of French is required for the posts in the educational institutions that are under the authority of the Region. It is to the commission of each competition to ascertain the linguistic capacity. Otherwise, one can obtain a linguistic certificate by passing an examination held once a year by the Regional Office of education (Regional Law 1993 no. 12, *Accertamento della piena conoscenza della lingua francese per il personale ispettivo, direttivo, docente ed educativo delle istituzioni scolastiche dipendenti dalla Regione*).

Friuli-Venezia Giulia

In Friuli-Venezia Giulia Italian citizens members of recognized linguistic minorities enjoy particular linguistic rights, such as the rights to write to the public administration in Slovenian and to have an answer in the same language (Article 8 Law 2001 no 38, *Norme a tutela della minoranza linguistica slovena della regione Friuli-Venezia Giulia*).

A full knowledge of Slovenian is required for the posts in the Office for Slovenian educational affairs of the Regional Office of education (Article 13, Law 2001 no 38, *Norme a tutela della minoranza linguistica slovena della regione Friuli-Venezia Giulia*).

Some schools hold classes in Slovenian. In order to teach in that kind of school the law asks for Italian citizens being of Slovenian mother-tongue (Article 425 of Legislative Decree 1994 no 297, *Approvazione del testo unico delle disposizioni legislative vigenti in materia di istruzione, relative alle scuole di ogni ordine e grado*).

Trentino-Alto Adige

German enjoys the same status as Italian. That means that the public administration is required to correspond with the public in the language chosen by him/her and to draw up acts addressed to the general public in both languages. Therefore, the knowledge of both languages is a condition required to candidates to a public office (See Article 1 of Decree of the President of the Republic 1976 no 752, *Norme di attuazione dello statuto speciale della regione Trentino-Alto Adige in materia di proporzione negli uffici statali siti nella provincia di Bolzano e di conoscenza delle due lingue nel pubblico impiego*). In order to prove the knowledge of Italian and German, a certificate of bilingualism is required. The certificate is issued by a local commission appointed by the Government Commissioner.

Some schools hold classes in German. In order to teach in that kind of school the law asks for Italian citizens being of German mother-tongue (Article 427 of Legislative Decree 1994

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no 297, *Approvazione del testo unico delle disposizioni legislative vigenti in materia di istruzione, relative alle scuole di ogni ordine e grado*).

In the Province of Bolzano applies the so called “*proporzionale etnica*” (ethnic proportional system: Article 8 of Decree of the President of the Republic 1976 no. 75). The posts in the public administrations are shared among the three linguistic groups (German, Italian, and Ladin) according to their respective amount. The vacant posts reserved to one linguistic group can be filled by candidates belonging to that group. If there are no available candidates of that group, the post can be filled by a person belonging to the other groups, provided that it does not exceed the total number of posts attributed to each groups.

Those who are resident in the Province of Bolzano enjoy priority as regards employment (Article 10 of the Decree of the President of the Republic 1972 no 670, *Approvazione del testo unico delle leggi costituzionali concernenti lo statuto speciale per il Trentino-Alto Adige*).

Follow-up of case *Burbaud*

The Italian procedures for the recruitment of the management staff in the public sector are similar but not identical to the French ones.

The management staff in the public service (*dirigenza pubblica*) is recruited both by a competition based on tests and by a special kind of competition called *corso-concorso* (that is a competition based on tests to access to a twelve months training course organized by the *Scuola superiore della pubblica istruzione* and a six months stage. At the end of that period the candidate has to pass a final exam. Not all the candidates that passed the final exam are recruited, because the number of candidates who have access to the course and to the stage is 30% more than the total number of vacant posts) (see Article 28 of Legislative Decree 2001 no 165). 70% of vacant posts are filled by the ordinary competition and 30% by the *corso-concorso* (Decree of the President of the Republic, 2004 no 272).

It is not possible to exempt from the training course and the stage a national of a Member State in a position similar to Ms *Burbaud*'s one, as the Court required in its judgment. No study about the effects of the *Burbaud* case is available.

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- A. Sitran, L'accesso dei cittadini dell'Unione europea agli impieghi nelle pubbliche amministrazioni, *Rivista amministrativa della Repubblica italiana*, 2004, p. 633. (a review of the ECJ case law about access to public sector. The A. illustrates some aspects of Italian law not in line with European law, already pointed out in the 2002-2003 Report).
- A. Latino, Il riconoscimento dei diplomi e la libera circolazione dei lavoratori nei rapporti di pubblico impiego ospedaliero, *Diritto pubblico comparato ed europeo*, 2004, p. 422 (on ECJ (2003) case C-285/01, *Burbaud*)
- M. Grimaldi, Il rapporto tra normativa interna e normativa comunitaria in campo marittimo – Brevi note sulla situazione italiana, *Diritto marittimo*, 2004, p. 66 (on ECJ (2003) case C-405/01 *Colegio de Oficiales de la Marina Mercante Española*)
- C. Licini, Esercizio di pubbliche funzioni: la condizione di nazionalità fra libertà di circolazione e vincolo di cittadinanza, *Notariato*, 2004, p. 11 (on ECJ (2003) case C-405/01 *Colegio de Oficiales de la Marina Mercante Española*)

Chapter IV Members of the family

Texts in force

Article 3 of DPR 2002 no 54 regulates entry and residence conditions of the members of the family of the EU citizens.

According to Article 29 of the Decree of the President of the Republic 1998 no 286 (law on immigration), the members of the family of an Italian national can stay in Italy at the same conditions required to the members of the family of the European Union citizens. Therefore, Courts judgments about family reunification of an Italian citizen can be relevant to Community citizens too.

It is much discussed whether it is necessary that the spouses live together for the purpose of issuing a residence permit. Although the regulations applicable to EU citizens does not provide for this requirement, prevailing Court cases have always ruled that cohabitation is necessary. In particular, the judgement of 22-5-2003 no 8034 of 2003, issued by the Supreme Court of Cassation, in a case concerning a non EU-citizen and his Italian wife, has established that the right to reside does not arise from the marriage, but from cohabitation.

However, an interesting decision was issued in 2004 by the Court of Appeal of Catania (judgment of 31-3-2004). The case concerned the denial of a residence permit based upon the circumstance that the parties did not actually live together. It must be pointed out that Article 30, 1-bis, DPR 1998 no 286, states that the residence permit is immediately revoked, if it is ascertained that the spouses have not lived together after their marriage, except if they had children. The Court has considered that this provision infringes the rights arising from the marriage as set in the Constitution and in other law provisions. The Court has therefore ruled that the foreign spouse of an Italian citizen has a perfect right to reside on the Italian territory and the competent administrative authority is obliged to issue a residence permit.

Court of Cassation, I, judgment of 24-2-2004 no 3622, Ufficio del Governo di Sondrio vs Cedano Alcivar

The Supreme Court states that a non-Community citizen, who is the cohabitee of an Italian citizen, can receive an expulsion order and be forced to leave Italy. Marriage and life together are, in fact, different concepts. The first one safeguards the unity of the family and deals with individuals that enjoy specific and clear legal links. These features are absent in a cohabitation since the legitimate family and the de facto family relation can not be equated. As a result, article 19.2 letter c) of DPR 1998 no 286, which prohibits to expel a foreigner married with an Italian citizen, cannot be invoked in the case in point.

Tribunale amministrativo regionale – Liguria, II, judgment of 26-2-2004 no 202, Del Orbe Reynoso vs Ministero interno ed altro.

The administrative tribunal of first instance states that the refusal to issue a resident permit to a non Community citizen, who is married with, or is an under-age son/daughter of, or is parent of Italian citizen living under the same roof, is unlawful. However the resident permit can be revoked once the cohabitation ends.

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- F. Costantini, Alcune riflessioni sulla carta di soggiorno per il cittadino di paese terzo coniuge, figlio minore o genitore convivente di cittadino italiano o di altro paese appartenente all'Unione europea, *Gli stranieri*, 2004, p. 433.

It is an interesting analysis of Italian provisions about family members' rights to entry and to reside, in comparison to Community law.

Pursuant to article 9.2 of DPR 1998 no 286, foreign citizens who are married, minor children or parents living together with an Italian citizen or a citizen from another EU member State, are entitled to request a long term residence permit (*Carta di soggiorno*).

This provision raises some doubts as to the scope of its application. In fact, although article 9.1 clearly states the legal conditions that must subsist with respect to third country nationals, the requirements that ground the issuance of the relevant documents in relation to the members of the family of Italian and EU citizens have not been specifically indicated.

Legal requirements must therefore be inferred from a systematic interpretation as well as from Court cases and administrative practice.

It appears that article 9.2 is based upon the assessment of a real "family integration": the possibility to obtain a *Carta di soggiorno* basically depends on the stability of the foreigner's condition as long as it is unequivocally showed his/her integration and the non instrumentality of the marriage or family relationship.

Residence on the Italian territory for at least six years does not seem to be necessary as it is required for third country nationals, pursuant to article 8.1. However, the member of the family of the Italian or EU citizen would be allowed to immediately request the *Carta di soggiorno*, only if he/she has entered the Italian territory with a visa for family reunification or for the purpose of following the member of the family. Should this not be the case, the foreign national would be entitled to request the *Carta di soggiorno* provided that he/she already possesses a residence permit for family reunification.

It is not clear whether the parameters concerning revenues and lodging, which apply to third country nationals who request the *Carta di soggiorno*, also pertain to members of the family of Italian and EU citizens.

More relevant differences are contained in the Directive 2004/58/CE that provides for a full equalization of third country nationals who are married or bound by a family relationship with EU citizens, with the consequent granting of a residence permit for EU citizens. In particular, basing upon the Directive provisions the members of the family would be allowed to reside on the Italian territory also in case the EU citizen dies or leaves the state, whereas Italian provisions currently into force only provide for the conversion of the residence permit for family reunification into a residence permit for work or study reasons, provided that the age requirements subsist (this provision does not apply in the event that the *Carta di Soggiorno* has been granted). Similarly, the member of the family would be allowed to remain in the state also in case of divorce or annulment of the marriage.

- A. Ianniello-Saliceti, Il diritto di soggiorno del familiare extracomunitario di un cittadino dell'Unione europea: alcuni orientamenti della giurisprudenza europea, *Gli stranieri*, 2004, p. 606 (on *Singh*, *Carpenter*, *Baumbast*, *Akrich* case law)

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- A. Belmonte, Sul diritto dei cittadini di Stati terzi (coniugati con cittadini di Stati membri) a soggiornare nella Comunità, *Giustizia civile*, 2004, p. 1664 (on ECJ (2003) case C-109/01, *Akrich*)
- A. Lang, Ingresso e soggiorno nell'Unione europea del coniuge non comunitario del lavoratore migrante, *Diritto pubblico comparato ed europeo*, 2004, p. 241 (on ECJ (2003) case C-109/01, *Akrich*)
- A. Zanobetti Pagnetti, Il ricongiungimento familiare fra diritto comunitario, norme sull'immigrazione e rispetto del diritto alla vita familiare, *Famiglia e diritto*, 2004, p. 552 (on ECJ (2003) case C-109/01, *Akrich*)

Chapter V

Follow up in Italy of Judgments of the European Court of Justice

Associates and mother-tongue linguistic experts

Law 5-3-2004 no 63 (*Disposizioni urgenti relative al trattamento economico dei collaboratori linguistici presso talune Università ed in materia di titoli equivalenti*, Law that converts with amendments the Decree-Law 14-1-2004 no 2, in *Gazzetta ufficiale della Repubblica italiana*, 12-3-2004 no 60).

The law implements the ECJ judgment (2001) case C-212/99 (*Comission vs Italy*). Present associates and mother-tongue linguistic experts employed at the Universities of Basilicata, Milan, Palermo, Pisa, Rome “La Sapienza” and Naples “L’Orientale”, whose employment relationship was based on Article 28 of DPR 1980 no. 382 (repealed by art 4.5 of Decree-Law 21-4-1995 no. 120, as amended and modified by Law 21-6-1995 no. 236) have to receive an economic treatment equal to an established researcher working part-time, from the date of which they were firstly employed.

The economic treatment is proportionate on the number of hours done, out of 500 working hours. The total amount set for 2004 is € 10.000.000. This equalization is merely an economic one so that it does not allow linguistic associates to perform as professors.

Note: The law partly complies with the European Court of Justice. But it does not explain the choice made to use the economic treatment of an established researcher working part-time as the basis to calculate the economic treatment of associates and mother-tongue linguistic experts. Moreover, the law does not deal with the recognition of rights acquired other than economic ones.

Certificate of bilingualism (c.d. Patentino di bilinguismo)

Court of Cassation, labour I, judgment of 11-10-2004 no 20116, Cassa di risparmio di Bolzano vs Angonese.

The *Angonese* case reached its last stage. The Tribunal of first instance, which submitted a preliminary ruling to the ECJ, had declared the recruitment competition, issued by a bank in Bolzano, void. The appeal lodged by the bank was rejected. The bank lodged an appeal in cassation, which was dismissed. The bank claimed that the court of appeals was wrong in applying the ECJ judgment, because it failed to demonstrate that the case has a Community connecting factor. The Supreme Court states that the ECJ did not left to the Italian court to find a Community connecting factor, but it was the requesting court that had been identified this factor when it submitted the request for preliminary ruling. Therefore, the Court of appeals rightly applied the ECJ judgment.

Chapter VI Issues of a General Nature

Interpretation of national provisions in conformity with Community law

Constitutional Court, judgment 26-2-2004 no 86.

In 2002, the Council of State (*Consiglio di Stato*) raised a question of constitutional legitimacy before the Constitutional Court with regard to Article 17 of Law 1990 no 223 (Regulations on the public and private radio-television broadcasting system) and Article 1 of the Decree-Law 1992 no 407 (Prorogation of terms with regard to radio-diffusion plants), converted into Law 1992 no 482, with some amendments. The question was raised within the framework of a proceeding against a decree issued by the Ministry of Post and Telecommunication that had rejected an application filed by an Italian company, on the assumption that this latter was controlled by a foreign individual person.

In particular, the Council of State maintained that the challenged provision set an unjustified difference of treatment between Italian and foreign companies under the same conditions (majority of shares or quotas held by foreign citizens), since national companies were prohibited from, whereas foreign companies were allowed to, obtain the authorization for sound diffusion. The difference of treatment between Italian and foreign companies belonging to other EU member States, or to third countries applying a reciprocity regime, would have affected the principle of equality, thus causing a discrimination to the detriment of national operators, that also belong to the EU, within a common economic space.

The Constitutional Court rejects the arguments of the claimant, stating that the challenged provision must be interpreted in a different way. In particular, the Constitutional Court points out that although the wording of this provision excludes the application of the prohibitions to foreign companies, a systematic criterion, which takes into consideration the reason of this provision and avoids attributing an inconsistent meaning, that may conflict with constitutional and EU principles, must bring to a different interpretation: the requirements applicable to the companies of other EU member States and to Italian companies are equal.

The challenged provision is aimed at ensuring that the prevailing management influence associated to control over concessionary companies, which are authorized to manage sound and broadcasting plants, is reserved to Italian or from other EU member States companies, in accordance with the concern to protect European “cultural diversity” and to promote European works. These objectives require that not only the concessionary individual person, but also the enterprise that directly or indirectly actually control the concessionary companies are citizens of an EU member State (except for the derogations admitted pursuant to the principle of reciprocity or by virtue of special agreements). On the contrary, this objective would be impeded if a company incorporated in an EU member State would be allowed to obtain the authorization despite the fact that it is possessed by a majority, or controlled, by third countries’ enterprises.

In the light of the above, failing the absence of the asserted discrimination between Italian companies and companies from other EU member States, the question of constitutional legitimacy has been rejected.

Acquisition of Italian nationality

An EU citizen can acquire Italian nationality by naturalization after four years of legal residence in Italy. Nationality is granted by the President of the Republic, on a proposal from the Ministry for the Interior and after consulting the Council of State (art. 9 d of Law 1992 no 91).

In order to demonstrate that there is no impediment to naturalisation, the EU citizen can produce statements equivalent to an official document in every case the Italian citizen can do it, even when the document in question is issued by his/her home country (e.g., a certificate about pending proceedings).

According to Ministerial Decree 22-11-1994, the applicant had to produce a certificate stating that he/she was loosed from his/her other nationality (*certificato di svincolo*). The law did not require the loss of the other nationality as a condition for acquiring Italian one, but it was a de facto condition, upheld by the Council of State. In fact, it stated that this condition was necessary in order to demonstrate that the applicant did not applied as a convenient solution, but he/she really wanted to integrate into the Italian community (opinion 1983 no 77).

More recently, the Council of State changed its attitude and stated that not to provide the *certificato di svincolo* cannot amount to an obstacle to the acquisition of Italian nationality (opinion 1995 no 1144). The *certificato di svincolo* is not required any more (Ministerial Decree 25-5-2002 eliminated it for EU applicant subject to a condition of reciprocity, and Ministerial Decree 7-10-2004 eliminated it in general terms).

According to Article 11 Law 1992 no 91, an Italian citizen who acquires another nationality maintains his/her nationality, but he/she can release it if he/she resides abroad.

Chapter VII EU Enlargement

Law 24-12-2003 no 380, in *Gazzetta Ufficiale della Repubblica italiana*, 22-1-2004, no. 37 SO, instrument of ratification of the Accession Treaty.

After the enlargement of the European Union, Italy has deemed it appropriate to limit the access of employees of the new EU countries to its employment market, for the biennium 2004-2006, in order to avoid the risk of disturbance of its labour market. As a result, the workers coming from the new eight European countries (Cyprus and Malta excluded), 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 of non Community citizens who want to enter the Italian territory, because in search of an independent or subordinate job, 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 divided and reserved for 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 extra-comunitari nel territorio dello Stato per l'anno 2004*, in *Gazzetta Ufficiale della Repubblica italiana*, 23-1-2004, no. 18).

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*, in *Gazzetta Ufficiale della Repubblica italiana*, 3-5-2004, no. 102) has added a special quota of 20,000 admittances. The quota is addressed only to new European citizens, 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 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 for foreigners in search of an occupation in Italy for that year. In other words, the quota has not been fixed considering the real needs of the Italian labour market, or on the basis of the past recorded admittances, or on the potential ones, but only taking into consideration the previous number of foreign workers admitted in Italy, as established by the 2004 admittance planning.

An extra quota of 16,000 admittance was decided (Decreto del Presidente del Consiglio dei Ministri 8-10-2004, *Programmazione dei flussi di ingresso dei lavoratori cittadini dei nuovi Stati membri della UE nel territorio dello Stato, per l'anno 2004*, in *Gazzetta Ufficiale della Repubblica italiana*, 16-11-2004 no 269, p. 17). The Decree states that the extra quota is for workers, with particular regard to seasonal workers to be employed in agriculture. The Ministerial Circular 2004 no. 43 gives a narrow interpretation and states that the extra quota is for seasonal workers only.

The requests for agricultural seasonal workers are to be served first.

It is for the Welfare Ministry to oversee the respect of entry limitations and to implement the necessary measures to avoid that conditions for access to the labour markets are made more restrictive than those prevailing on the date of signature of the Treaty of Accession.

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Ministero dell'interno, Dipartimento della pubblica sicurezza, Direzione centrale dell'immigrazione e della polizia delle frontiere, Telegramma urgente, no. 400/c/2004/395/p/10.2.45/i/div., 27-4-2004, *Allargamento UE 1° maggio 2004*.

The Ministry for the Interior reminds the Border Police that from 1-5-2004 the citizens from the new Member States are European Union citizens. As a consequence, they are subject to the border control as European citizens and they can be refused entry at the border only on grounds of public policy, public security or public health. They are subject to the same border controls as the European citizens from non Schengen Countries.

Presidenza del Consiglio dei Ministri, Circolare 2004 no. 14, 28-4-2004, *Disposizioni applicative, relative al decreto del Presidente del Consiglio dei Ministri 20-4-2004, di programmazione dei flussi di ingresso dei lavoratori cittadini dei nuovi Stati membri della UE, nel territorio dello Stato, per l'anno 2004, Gazzetta Ufficiale della Repubblica italiana, 29-6-2004 no. 150, p. 24*.

Instructions for the issuing of the work permit and residence permit for the new Member States citizens.

- 1) Persons who are legally residing and working in Italy at 1-5-2004 can enjoy market access. In order to prove it, the worker has to obtain a certification issued by the Provincial Labour Administration (*Direzione provinciale del lavoro*). They can ask for the residence permit according to DPR 2002 no. 54.
- 2) Self-employed workers enjoy the right to work.
- 3) How to apply for work permits. The employer has to send an application for a work permit to the Provincial Labour Administration for the place where the employee will carry out his work, by registered mail. The contract of employment has to be attached to the request for work permit. It can produce its effects only if the work permit is issued and the application for a residence permit is submitted to the Police Headquarters. The Provincial Labour Administration will examine the requests chronologically.

The Provincial Labour Administration will send the work permit to the employer and to the Police Headquarters.

The new Member States nationals admitted to the labour market for an uninterrupted period of 12 months or longer will enjoy access to the Italian labour market. The worker can prove that this condition is satisfied by producing a certificate issued by the Provincial Labour Administration.

In order to employ a new Member State's citizens being in Italy for studying purposes, the employer has to ask for a work permit, which is to be issued within the limit of the quota available at the moment.

Non-quota admissions are allowed in cases provided for Article 27 DPR 1998 no 286 (law on immigration). The worker has to satisfy the conditions laid down by that provision.

The application for a work permit must be presented to the competent Provincial Labour Administration for:

- executives or highly specialized personnel employed by companies with headquarters or branch offices in Italy;
- university professors, university lecturers and researchers;
- translators and interpreters;

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- domestic employees of Italian or Community citizens who move to Italy exclusively for the purpose of continuing the relationship of domestic employment;
- individuals who perform temporary periods of vocational training and education at facilities of Italian employers;
- workers employed by organizations and enterprises operating in Italy, temporarily admitted to perform specific functions, for a limited period of time;
- employees of enterprises with headquarters abroad transferred temporarily to enterprises established in Italy, in order to carry out services as a result of a contract;
- professional nurses hired by public or private health-care structures.

The application for a work permit must be submitted to the Welfare Ministry for:

- workers employed with circuses or shows travelling abroad;
- artistic or technical personnel for opera, theatre, concert or ballet performances;
- dancers, artists, and musicians to be employed at entertainment establishments;
- artists employed by theatre or cinema enterprises, or by radio or television broadcasters, whether public or private, or by public organizations, as part of cultural or folkloristic events.

For foreigners destined to carry out any type of professional sports activity, the nominative statement of approval is issued by CONI.

Ministero dell'Interno, Dipartimento di Pubblica sicurezza, no. 400/C/2004/500/ P/10.2.45.1, 28-4-2004: *Allargamento dell'Unione europea e libera circolazione dei cittadini dei nuovi Paesi membri.*

It reminds that from 1-5-2004 the citizens of the eight new Member States are not foreigners any more, but are European Union citizens, and they will be subject to DPR 2002 no. 54 and not to DPR 1998 no. 286. As a result:

- a) they can enter Italy on production of a valid identity card;
- b) no entry visa can be demanded;
- c) they will ask the Police Headquarters for a residence permit;
- d) the "no objection procedure" is no more required for family reunification and members of the family can enter Italy without formalities;
- e) according to Article 7 DPR 2002 no 54, an expulsion order can be issued only on grounds of public order, public security or public health. Every expulsion orders but those founded on grounds of public order or public security will cease to produce their effects from 1-5-2004;
- f) all the alerts for the purposes of refusing entry will be repealed, except those issued by a judge following a sentence, if the Ministry of Justice's opinion is still pending, and those founded on grounds of public policy and State security;
- g) from 1-5-2004, a "no objection" procedure will not be needed any more in order to issue the work permit. As a result, the applications for a work permit not yet dealt with, will be returned to the employers;
- h) a special procedure is established in order to admit in Italy children, citizens of the new Member States, adopted by Italian nationals. The diplomatic representatives in the new Member States will issue a certificate stating that the child is entering Italy with his/her adoptive parent, on the basis of the authorization issued by the International Adoption Commission.

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Ministero del Lavoro e delle politiche sociali, Direzione generale per l'immigrazione, circular no 15, 30-4-2004, *procedura operativa per l'utilizzo della applicazione di gestione della richiesta di autorizzazione al lavoro dei lavoratori neo comunitari* (management of applications for work permit).

The employer must send the request for a work permit to the Local Labour Administration. The local Labour Administration enters the data using a special software. The Welfare Ministry will put the requests in chronological order and it will communicate every fortnight to the local authority the list of the permits granted within the quota awarded.

INPS, messaggio no 13887, 6-5-2004

The Central Office of the National Institute of Social Insurance reminds the local offices that regulations no 1408/71 and no 574/72 are applicable to the citizens of new Member States from 1-5-2004.

INPS, messaggio no 16371, 25-5-2004

Nationals of the new Member States will be entitled to apply for the grant of a maternity or paternity allowance, on condition that they satisfy the necessary requirements (residence in Italy, for instance). In order to be eligible, the event (birth, adoption, custody) must occur after 1-5-2004.

Ministero dell'interno, Dipartimento della pubblica sicurezza, Direzione centrale dell'immigrazione e della polizia delle frontiere, circolare no. 400/A/2004/1045BIS/P/10.2.45, 29-10-2004, *Regime dell'autorizzazione al lavoro stagionale concessa nei confronti di cittadini neocomunitari*.

The permit for seasonal work allows working in Italy for a maxim period of nine months. After that period, the worker can set up a new job only if the employer obtains a new work permit, which has to be issued within the limits of the quota available at the time of the request.

Ministero del Lavoro e delle Politiche sociali, Direzione generale dell'immigrazione, Circular 15-11-2004 no 43, *Disposizioni applicative relative al DPCM 8-10-2004*.

The procedure to allocate the extra quota of October 2004 is the one described in Ministerial Circular 2004 no 14. In case an application, submitted before the new quota was adopted, could not have been met because the first quota was exhausted, it can not be ascribed to the new quota, due to administrative reasons. A new request is necessary.

According to the Welfare Minister, 20 000 applications from workers coming from the new EU States were received in 2004 (See data quoted by *Il Sole-24 ore*, 12-5-2005, p. 27).

Doctrine

J. Chaloff, Impatto dell'allargamento dell'Unione europea sulla composizione della popolazione straniera in Italia, *Gli stranieri*, 2004, p. 297.

B. Hamende, Le prospettive dei Fondi strutturali comunitari e del mercato del lavoro, in T. Favaretto (a cura di), *Allargamento a Est e integrazione europea*, FrancoAngeli, 2004, p. 141.

Italy

A. Lang, La libera circolazione delle persone in un'Unione ampliata: il nuovo regime dopo il 1° maggio 2004, *Corriere giuridico*, 2004, p. 817.

Chapter VIII Statistics

At 1-1-2004, the total number of legally resident foreigners is 1,990,159 (1,011,927 male and 978,232 female) (ISTAT). According to EURISPES, regular foreigners are about 2,600,000. According to ISMU, regular and irregular foreigners are about 3,000,000

Foreign pupils enrolled at public and private schools

school year	EU pupils	% of total foreigners	% of total pupils
1983/1984	2.706	44,30%	0,06%
1993/1994	14.938	39,86%	0,41%
2003/2004	131.104	46,38%	3,49%

Source: E. Besozzi, ISMU, *Decimo rapporto sulle migrazioni 2004*, FrancoAngeli, 2005, p. 146.

Census of 2001: definitive data processed by ISTAT.

EU citizens resident in Italy in 2001

		masculinity ratio
EU-25	173.015	47,70
France	29.313	49,50
Germany	35.091	54,6
Poland	27.220	37,4

EU-25 citizens born abroad. Reason of the transfer in Italy:

Work	Studies	Family	others	Total
49.024	9.356	51.772	52.725	162.877
30,1%	5,7%	31,8%	32,4%	100%

EU-25 citizens born abroad, year of the transfer:

< 1992	1992-1996	1997-1999	2000	2001	Total
82.081	33.561	26.370	11.172	9.693	162.877
50,3%	20,6%	16,2%	6,9%	6%	100%

Married couple, spouses have different nationality:

- Italian husband and foreign wife:
 - German 10.759, French 10.617; Polish 8.418; UK 6.200; Spanish 5.839
- Italian wife and foreign husband:
 - German 3.750; French 3.593; UK 2.995.

EU citizens who acquired Italian nationality by naturalisation:

- EU-25: 97.121; French: 25.055; German: 20.830; Polish: 6.693.

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CARITAS

According to a research sponsored by Caritas Italia and CNEL, 297.619 Europeans from the now EU-24 (of which 143.543 from EU-14) were living in Italy at 31-12-2002. During the 2002 amnesty, 188.498 applications were submitted by foreigners from the 8 applicant countries.

O. Forti, F. Pittau, A. Ricci (a cura di), *Europa, allargamento a Est e immigrazione*, Roma, IDOS, 2004.

Dossier Statistico Immigrazione Caritas/Migrantes, 2004: In 2003, the biggest group of foreigners living in Italy were from Romania (239.426 – 10,9%). Poland was no. 7 (65.847 – 3%), Germany no. 17 (37.159 – 1,7%), France no. 23 (26.540 – 1,2%), the United Kingdom no. 24 (25.100 – 1,1%), Spain no. 27 (21.843 – 1%).

Expulsion orders of foreign prisoners

Article 15 of Law 2002 no 189 (the so called “Bossi-Fini” Law) states that an expulsion order can be issued in two cases: a) when a judge replaces a two year detention sentence with an expulsion order lasting at least five years, or b) when a surveillance judge opts for an expulsion measure, as an alternative to detention, for prisoners who have to serve a maximum of two years in prison.

In order to provide the number of the expulsion orders enforced towards foreign prisoners in Italy, the Department of Penitentiary Administration of the Italian Minister of Justice has used two different research methodologies: one based on the monthly number of expulsions and the other one based on the nationality of the foreign prisoners.

The “monthly” research shows that the number of expulsions has remained quite steady during 2004, approaching an average of 81 expulsions per month and reaching a total amount of 881 expulsions throughout 2004 (till Oct. 2004).

On the other hand, the analyse based on nationality underlines that only two (2) expelled prisoners came from the European Union (one from Spain and the other one from Austria), while the largest percentage of expelled prisoners came from Albania (159), Rumania (157) Tunisia (100) and Morocco (142).

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Total number of prisoners in Italian prisons (number of female prisoners in brackets), at 31-12-2004

Region	EU	Former Yugoslavia	Albania	Romania	Other European countries
Abruzzo	13	39 (2)	73 (1)	25 (1)	24 (6)
Basilicata	3 (1)	9 (1)	9	7 (1)	8 (1)
Calabria	14	45 (6)	58 (1)	24 (4)	43 (1)
Campania	23	88 (18)	137 (1)	43 (1)	70 (8)
Emilia R.	45 (4)	123 (14)	227 (3)	116 (9)	81 (8)
Friuli V.G.	5	81 (4)	41 (1)	26 (1)	43 (4)
Lazio	72 (3)	198 (53)	234 (3)	380 (35)	144 (14)
Liguria	30 (2)	38 (7)	97 (2)	25 (4)	23 (3)
Lombardia	110(25)	216 (28)	456 (19)	244 (23)	135 (26)
Marche	16 (3)	22 (3)	76 (3)	24 (1)	26 (2)
Molise	4	17 (1)	20 (1)	3	6
Piemonte	56 (4)	115 (13)	314 (2)	148 (16)	68 (13)
Puglia	14 (2)	28 (9)	220 (4)	22 (5)	21 (3)
Sardegna	18 (1)	27 (2)	48	15 (1)	18 (3)
Sicilia	20	67 (5)	117 (1)	38	40 (1)
Toscana	47 (8)	94 (9)	325 (2)	103 (15)	38 (10)
Trentino A.A.	5 (1)	21 (2)	31 (1)	6 (1)	11
Umbria	8 (3)	19 (3)	42 (1)	23	11
Valle d'Aosta	5	4	11	7	2
Veneto	34 (6)	98 (15)	214 (5)	142 (15)	75 (14)
Total	542 (63)	1.349 (195)	2.750 (51)	1.421 (133)	887 (117)

EU prisoners by country of origin (31-12-2004)

Country	Women	Men	Total
Austria	3	12	15
Belgium	2	26	28
Cyprus		1	1
Czech Rrpublic	3	15	18
Finland	1		1
France	13	144	157
Germany	13	67	80
Greece	2	32	34
Hungary	4	40	44
Lithuania	4	20	24
Malta		3	3
Netherlands	9	43	52
Poland	23	132	155
Portugal	3	17	20
Slovakia	3	8	11
Slovenia	2	57	59
Spain	13	111	124
Sweden		1	1
United Kingdom	4	26	30

Source: Department of Justice.

(http://www.giustizia.it/statistiche/statistiche_dap/det/2004/detg31_stranieri.htm)

Chapter IX Social Security

Medical service costs incurred in another Member State

Council of State, V, judgment of 29-1-2004 no 309, U.S.L. Provincia di Como vs Frigerio

The Court states that the reimbursement of the medical costs occurred abroad is not possible if the national Administration proves that the individual concerned could receive an equal treatment to his conditions in Italy, and clearly indicates which Italian medical centres are able to provide such a treatment. In fact, the medical assistance abroad is an exceptional provision of service that has to be available only when the national sanitary system fails both on quality and timeliness.

Council of State, V, judgment of 29-1-2004 no. 5132, A.S.L di Lecco vs. Verdolino e Vergottini

The Court states that the possibility to have a partial improvement of the general physical conditions of the patient is a valid reason to ask for a medical treatment abroad, even if technical medical opinions would suggest a national medical treatment. The request has to go through a care provider's authorisation. In the case in question, the Court argues that all the conditions to allow a medical treatment abroad were satisfied. In particular, the pathology was included among those curable abroad; there was no possibility to have the same medical treatment in Italy. Moreover, the request for authorisation was well reasoned and the medical centre abroad was a "highly specialized medical centre", as prescribed by the law. In addition to these reasons, the Court underlines that the chance to have even a small or temporary improvement on the health conditions of the patient, thanks to the treatment abroad, plays a very important role in order to choose the best medical treatment for the patient concerned.

The *Trojani* case

No study expressly devoted to the consequences of the *Trojani* judgment is available. It is not surprising, since Italian legal order does not envisage a benefit such as the Belgian *minimex*.

Those whose income is lower than the defined poverty line and who reside in some Italian Municipalities can ask for a special allowance, called "*reddito minimo di inserimento*". A pilot project was introduced by the Legislative Decree 18-6-1998 no. 237 (*Disciplina dell'introduzione in via sperimentale, in talune aree, dell'istituto del reddito minimo di inserimento, a norma dell'articolo 59, commi 47 e 48, della L. 27-12-1997, no. 449, GU 20-7-1998 no. 167*) in 39 Italian Municipalities till 31-12-2000, and subsequently extended to some others Municipalities and till 30-4-2006 (see Art. 7-undecies, Decree Law 31-1-2005, no. 7, *recante disposizioni urgenti per l'università e la ricerca, per i beni e le attività culturali, per il completamento di grandi opere strategiche, per la mobilità dei pubblici dipendenti, nonché per semplificare gli adempimenti relativi a imposte di bollo e tasse di concessione. Sanatoria degli effetti dell'articolo 4, comma 1, del D.L. 29-11-2004, no. 280,*

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GU 1-4-2005, no. 75). Italian nationality is not required in order to ask for the reddito minimo di inserimento.

In the *Trojani* case the ECJ states “that it remains open to the host Member State to take the view that a national of another Member State who has recourse to social assistance no longer fulfils the conditions of his right of residence. In such a case the host Member State may, within the limits imposed by Community law, take a measure to remove him. However, recourse to the social assistance system by a citizen of the Union may not automatically entail such a measure” (§ 45). Article 4 of the Decree of the President of the Republic 2002 no 54 (which reproduces Article 3 of Directive no 1990/364/EEC) provides that the right of residence shall remain for as long as the beneficiary fulfils the minimum conditions set by the law (i.e. sufficient resources). The provision should be interpreted according to the *Trojani* judgment.

The *Collins* case

In Italy it does not exist a benefit of a financial nature intended to facilitate access to employment in the labour market of a Member State equivalent to the one which was in question in the *Collins* case. Therefore, no study has been devoted to the effects of that judgment on the Italian social security system.

Pension benefit

Article 3.6 of Law 1995 no 335 (*Riforma del sistema pensionistico obbligatorio e complementare*) states that Italian citizens who are over 65 and resident in Italy, are entitled to the “*assegno sociale*”. It is a social benefit intended to provide a minimum level income.

Doctrine

S. Antoniazzi, Sistema sanitario nazionale e principio comunitario di libera prestazione di servizi: la scelta dell’utente per prestazioni mediche erogate in un diverso Paese membro, subordinata alla necessaria autorizzazione amministrativa dello Stato membro di appartenenza per il rimborso delle spese sostenute, *Rivista italiana di diritto pubblico comunitario*, 2004, p. 603 (on ECJ (2003) case C-385/99, *Müller-Fauré* and C-56/01, *Inizan*)

Chapter X Establishment, Provision of Services, Students

Texts in force

DPR 2002 no. 54 regulates European Union citizens' entry, residence and departure conditions. DPR 1998 no. 286 (law on immigration) is applicable to European Union citizens, as far as more favourable.

Establishment

European School of Economics in Italy

According to the Law 1997 no. 504, a student can obtain to postpone his military service, if he is enrolled at a State University or at 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 degree provided with legal value in Italy (Art. 5). The Ministry of Defence usually rejects applications submitted by students who are enrolled in a University settled in another member State (the Nottingham Trent University, in the United Kingdom), but who are attending courses at the European School of Economics in Italy.

As already stated in the 2002-2003 report, administrative courts of first and last instance keep on taking a different direction toward the compatibility of the Ministry of Defence practice to EC law.

The Council of State states that the Ministry of Defence was right in not allowing the student attending the European School of Economics in Italy to postpone his military service. According to the Court, the Italian law complies with EC law and, in particular, with the free movement of persons within the European Union. In fact, it encourages students, who want to study in another Member State's University, to move and allows them to postpone their military service while they are attending University courses abroad, at the same conditions required for those students who decide to remain in Italy (Council of State, IV, judgment of 17-2-2004 no 637, *Ministero difesa vs Cafà*).

A tribunal of first instance states that a student can legally postpone the military service if he is enrolled in a Member State's University, even though the preparation courses are held in Italy. The judge of first instance declared void the decision of the Ministry of Defence, because of its inconsistency with EC law. The reasons of such decision are based both on EC law and on legislative decree 1997 no 504. The freedom of choosing, without discrimination, among several professional studying opportunities within the European Union, in accordance with Article 39 EC, is to be granted. Articles 43 and 49 EC make irrelevant where a student attends his course or in which country the University is established. There can be no difference of treatment among Community citizens who want to obtain an academic degree awarded by another Member State's University. As a result, the student enrolled in a Member State's University has to be put in a position to attend the preparatory courses abroad at the same conditions provided for students enrolled in an Italian public University or in a lawfully recognized one. For these reasons, the tribunal finally states that the student concerned can benefit of the right to postpone his military service (Tribunale

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amministrativo regionale, Lazio, Roma, I, judgment of 7-5-2004 no 3961, *Weindelmayer vs Ministero della difesa*).

Tribunale amministrativo regionale – Lazio, I, judgment of 23-3-2004 no. 2728, *Soc. E.S.E vs Ministero università ed altri*.

The tribunal states that an Italian administrative practice, under which degrees awarded by a University of a Member State can not be recognized in an other Member State when the courses of preparation for those degrees are provided in the latter Member State by an educational establishment in accordance with an agreement made between the two establishments, is contrary to Article 43 EC.

The tribunal also states that the advertising provided by the European School of Economics in Italy (claiming that a “European degree” would have been awarded to students) has not to be considered misleading, because it does not guarantee an automatic recognition of the degree in Italy. On the contrary, it only evokes the possibility that such a “European degree” could be recognized throughout Europe but it does not ensure it. According to the tribunal, the recognition of the E.S.E degree has to be guaranteed on the basis of freedom of establishment, as provided by art. 43 EC. As the tribunal points out, the EJC reached the same conclusion in case 153/02 (*Neri*).

Ministero delle Attività produttive, Decreto 24-12-2004, Riconoscimento, al sig. Paolo Fasullo, del titolo di qualificazione e di pratica professionale, quali titoli abilitanti per l’esercizio in Italia dell’attività di parrucchiere, in *Gazzetta Ufficiale della Repubblica italiana*, 13-10-2004 no. 241.

According to Legislative Decree 2002 no. 229, implementing directive no 1999/42/EEC, the Ministry qualifies an Italian citizen for performing in Italy as hair stylist. The professional qualification in question deals with the recognition of a professional certificate of the United Kingdom awarded after having attended classes at the Hair Dressing and Beauty Industry Authority in Italy. In fact, the body just mentioned has an authorization of the British government for providing hair styling preparation courses in its establishment in Italy.

Auditors

Tribunale amministrativo regionale – Lazio, II, judgment of 5-4-2004 no. 3173, *L.A.P.E.T vs Ministero finanze*.

The administrative tribunal of first instance states that Article 36 of the Legislative Decree 1997 no. 241 that makes auditors able to issue tax certifications, is not inconsistent with the freedom of establishment and the freedom to provide services. According to Article 36, the requirements that auditors have to satisfy are: a) being registered with the association of accountants or of employment consultants; b) having performed as auditors for at least 5 years.

The tribunal affirms that the act concerned is, in its nature, able to balance and safeguard the most relevant public interests without resulting incompatible with the EC law. As a result, the tribunal considers that a preliminary ruling on this matter is not necessary. To support its decision the tribunal sends back to the judgment of the Constitutional Court 2002 no 307. In that case the Court explained why the Italian Legislator opted for such a regulation and why it is not inconsistent with EC law.

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Note: the tribunal states *a priori* the compatibility with the EC law. It does not give any reasoned opinion on the matter, regarding enough to quote the Constitutional Court. Moreover, it does not examine if art. 46 EC is applicable.

The Legislative Decree concerned seems to be inconsistent with the freedom of establishment rather than with the freedom to provide services. In particular, art. 36 requires a five-year professional seniority in order to make auditors able to issue tax certifications in Italy. However, such a regulation does not make any reference about the possibility to recognize the same professional experience gained in another Member States.

Notary

C. Fioravanti, *L'esercizio delle professioni legali in Italia nell'ottica del diritto comunitario, Le nuove leggi civili commentate*, 2004, p. 2.

Commenting the new law on the access to the notary (see 2002-2003 report), the A. believes that it will turn impossible to apply. In fact, an Italian law degree is no more required, but the foreign degree is to be recognised according to Law 2002 no 148 (ratification of the 1997 Lisbon Convention). The law does not regulate the procedure to deal with the applications for recognition and it must be implemented by a regulation which is still missing. As a consequence, a foreign degree can not be recognised in order to accede to the notary.

Engineers

Tribunale amministrativo regionale – Umbria, judgment of 10-5-2004 no. 225, *Consiglio dell'Ordine ingeneri di Perugia vs Ministero giustizia*.

The administrative tribunal of first instance states that the recognition of a professional title has to be based on the recognition of the original degree because, according with the Italian legislation implementing Directive no. 89/48/EEC there is no way that a *de facto* professional practise can substitute, at the same time, both academic qualifications and public examination needed to exercise such a professional practise. For this reason, an action against the Ministerial decree that allows a *de facto* professional experience to substitute both academic qualifications and public examination, is well grounded. As a result, an Italian degree in Geology and an engineering professional title acquired in the United Kingdom can not be recognised in order to enrol at the association of engineers. In fact, the original Italian degree has nothing to deal with an engineering professional practise, no matter if the individual concerned has, in the meantime, developed a *de facto* experience on engineering matters, or has been enrolled at the Engineering Council of another Member State (United Kingdom), under a chartered engineer title. According to the Court, the documentation provided by the individual concerned could have been used to practise as a geologist not as an engineer.

Note: The administrative tribunal of first instance focuses its attention on the academic carrier made by the individual concerned and, in particular, on his geology degree awarded in Italy. Therefore, the attention is not addressed to the professional title achieved in United Kingdom thanks to which the person in question has been enrolled at the British Engineering Council under a chartered engineer title.

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Trainee doctors

Council of State, VI, judgment of 22-1-2004 no 164, *Abagnale ed altri vs Ministero istruzione*.

The Council of State states that the Legislative Decree 1991 no. 257, which limits the award of a remuneration to trainee doctors enrolled to a specialist school in the year 1991, does not comply with the Council directives 75/363/EEC and 82/76/EEC, as they were interpreted by the European Court of Justice (case C-137/97 and case C-371/97). As a result, the act has not to be enforced. In fact, the obligations provided by the European directive are, of their nature, unconditional and sufficiently precise to produce appropriate remuneration rights to full time trainee doctors, who were attending medical specialties before the directive was actually implemented (see also Tribunale amministrativo regionale – Sicilia, Catania, III, judgment of 11-12-2003 no. 2012, *Naso ed altri vs Ministero istruzione*; Tribunale amministrativo regionale – Lazio, I bis, judgment of 16-3-2004 no. 2506, *Sacco ed altri vs Ministero sanità*).

Lawyers

Council of State, Combined Chambers, judgment of 22-11-2004 no. 21945, *Odoardi vs Consiglio dell'Ordine degli avvocati di Roma*.

The Court states that Article 8.2 of Law 1933 no. 1578, that provides the loss of the two years practice law, after having failed the qualifying exam within a further period of six years, is compatible with Community law. The Court points out that the compatibility between national and Community law is based on the fact that the Community legal system does not establish any limit to the Member State freedom to regulate the way its nationals have to qualify in order to become lawyers.

Tribunale amministrativo regionale – Lazio, I, judgment of 15-6-2004 no 5755, *Portail vs Ministero giustizia*.

The administrative tribunal of first instance states that the conduct of the Administration is unlawful when it subordinates the recognition of a Community citizen's registration at legal prosecutors' bar upon the condition of passing an aptitude test that appears to be more difficult than the one provided by Article 17 bis of Royal Decree 1934 no. 37 for Italian candidates.

Doctrine

- L. Fabiano, A ciascuno il suo: il giudice comunitario impedisce una “contaminazione” fra le discipline del diritto di stabilimento e della libera prestazione dei servizi, *Diritto pubblico comparato ed europeo*, 2004, p. 910 (on ECJ (2003) case C-215/01, *Schnitzer*)
- S. Bastianon, La Corte di Giustizia e il riconoscimento dei diplomi: recenti sviluppi, *Il Corriere giuridico*, 2004, p. 746 (on ECJ (2003) case C-313/01, *Morgenbesser*)
- M. Berti, Pratica forense e libertà di stabilimento, *Diritto pubblico comparato ed europeo*, 2004, p. 372 (on ECJ (2003) case C-313/01, *Morgenbesser*)
- C. Fioravanti, L'esercizio delle professioni legali in Italia nell'ottica del diritto comunitario, *Le nuove leggi civili commentate*, 2004, p. 2 (on ECJ (2003) case C-313/01, *Morgenbesser*)

The A. states that, as a consequence of the Morgenbesser judgment, and in the absence of a law, it will be to each Bar Council to evaluate the candidate's curriculum for the enrolment in a register of trainee lawyers. The risk of evaluations founded on different ground is far from unlikely.

- C. Tuo, La 'professione' del praticante avvocato secondo la Corte di giustizia: alcuni rilievi sul caso Morgenbesser, *Diritto del commercio internazionale*, 2004, p. 435 (on ECJ (2003) case C-313/01, *Morgenbesser*)

The A. criticizes the judgment, because she believes that the ECJ was wrong in stating that a trainee lawyer pursues an economic activity. In fact, the prevailing, if not overwhelming, aim is directed towards the provision of training and advice. In addition, the A. states that no violation of Article 12 EC was attributable to Italy, since the Bar Council took into account Miss Morgenbesser's degree and considered it equivalent to an Italian one, providing that she would have passed only thirteen exams of the twenty-six necessary to take an Italian law degree.

- S. Baldin, La discriminazione indiretta e le sue giustificazioni: l'obbligo del tirocinio a tempo pieno per gli aspiranti medici di famiglia, *Diritto pubblico comparato ed europeo*, 2004, p. 214 (on ECJ (2003) case C-25/02, *Rinke*)
- S. Bastianon, La Corte di Giustizia e il riconoscimento dei diplomi: recenti sviluppi, *Il Corriere giuridico*, 2004, p. 746 (on ECJ (2003) case C-153/02, *Neri*)
- F. D'Oriano, La prassi amministrativa italiana ostacola l'esercizio del diritto di stabilimento, *Diritto pubblico comparato ed europeo*, 2004, p. 237 (on ECJ (2003) case C-153/02, *Neri*)

The A. states that the case *Neri* shows the need of a Community regulation about the recognition of "hybrid" degrees, such as the one that Miss *Neri* would have taken, if she had enrolled at ESE in Genoa. Member States are very reluctant to recognise such a degree, even when in doing so they infringe the fundamental freedoms granted by the Treaty.

- C. Timellini, La corte di giustizia sul riconoscimento dei titoli accademici, *Diritto del lavoro*, 2004, II, p. 3 (on ECJ (2003) case C-153/02, *Neri*)
- C. Fioravanti, Libera prestazione di servizi degli avvocati comunitari e rimborso delle spese dovute dalla parte soccombente, *Studium iuris*, 2004, p. 476 (on ECJ (2003) case C-289/02, *AMOK Verlags GmbH*)
- F. D'Oriano, Il sistema generale di riconoscimento dei diplomi rappresenta un sistema ancora non correttamente attuato, *Diritto pubblico comparato ed europeo*, 2004, p. 1431 (on ECJ (2004) case C-102/02, *Beuttenmüller*)
- S. Bastianon, Insegnanti e riconoscimento dei diplomi: il caso *Beuttenmüller*, *Diritto dell'Unione europea*, 2004, p. 589 (on ECJ (2004) case C-102/02, *Beuttenmüller*)

Provision of services

Court of Cassation, Combined Chambers, judgment of 26-4-2004

The Supreme Court states the compatibility of the Italian legislation on gaming, clandestine betting and ensuring the proper conduct of sporting contest (Law 1989 no 401), with EC law. According to the Court, this compatibility has been discussed since the *Gambelli* case (C-243/01). The Court argues that in that case the consistence between Italian and Community

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law was based on social public security reasons. In particular, betting restrictions were justified in order to moderate the incitement to squander on gaming.

The Court reaffirms, evoking *Gambelli*, that this opinion seems not to match with the Italian political tendency to encourage consumers to participate in lotteries, games in chance and betting in order to provide benefits of the public purse. As a result, as the ECJ stated and the Court quotes, the authorities of a Member State can not invoke public order concerning the need to reduce opportunities for betting in order to justify restriction measures. The Court adds, quoting the ECJ, that it is true that an expanding gaming policy does not comply with the general interest of limiting the incitement to squander on gaming. However, such a policy does not oppose to the purpose of preventing frauds, safeguarding concessionaire's prerogatives and avoiding criminal infiltrations. In this light, according to the Court, the Italian law, focusing on the safeguard of imperative requirements such as public and social security, could justify restrictions on the freedom of establishment and the freedom to provide services.

Chapter XI

Miscellaneous

Association Agreements

Law 29-12-2003 no 382 (Gazzetta Ufficiale della Repubblica italiana, 27-1-2004 no 21 SO)
Instrument of ratification of the Euro-Mediterranean Agreement establishing an Association between the European Communities and their Member States, of the one part, and the Arab Republic of Egypt.

Law 30-6-2004 no 187 (Gazzetta Ufficiale della Repubblica italiana, 30-7-2004 no 177 SO)
Instrument of ratification of the Euro-Mediterranean Agreement establishing an Association between the European Communities and their Member States, of the one part, the People's Democratic Republic of Algeria.

Law 29-7-2004 no 219 (Gazzetta Ufficiale della Repubblica italiana, 20-8-2004 no 196)
Instrument of ratification of the Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Croatia, of the other part.

Doctrine

M. Nicolosi, Accordi di associazione e libera circolazione degli sportivi cittadini di paesi terzi, *Europa e diritto privato*, 2004, p. 231 (on ECJ (2003) case C-438/00, *Kolpak*)