Network on the Free Movement of Workers within the European Union

Italy

Report 2006

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CHAPTER I. ENTRY, RESIDENCE, DEPARTURE

Entry, residence and departure conditions are laid down by the Presidential Decree (DPR) 18-1-2002 no. 54 (*GURI*, no. 83 of 9-4-2002 OS). It is a consolidated law (*testo unico*), aimed at simplifying existing legislation that implements Directives no. 64/221/EEC, 68/360/EEC, 73/148/EEC, 75/34/EEC, 90/364/EEC, 90/365/EEC, and 90/366/EEC. According to its limited purpose, the opportunity to take account of the principles on the free movement of persons, as they come out of the jurisprudence of the Court of Justice, was missed.

Information on the transposition of Directive 2004/38

The Parliament enabled the Government to issue a decree having the strength of ordinary law (i.e. a legislative decree) for the transposition of Directive no. 2004/38/EC by 12-11-2006 (within 18 months of the entry into force of the law. See Article 1 of Law 15-4-2005 no. 62, Provisions for the fulfilment of obligations deriving from Italy's membership to the European Community (Legge Comunitaria 2004, GURI no. 96 of 27-4-2005 OS). According to this Article, before passing the decree, the Government must forward the draft to both the Chamber of Deputies and the Senate with a request for their opinions.

The Government issued a draft on 11-11-2006, and sent it to the Presidents of both Chambers of the Parliament. Both the Senate First Committee on Constitutional Affairs and the Chamber First Committee on Constitutional Affairs gave their opinions on 19-12-2006.

During the discussions that took place within the Parliament, the main issues debated were the recognition of the right to entry and stay of the EU citizen's partner and the alleged modification of the law on immigration.

Regarding the first point, the Government decided simply to reproduce Articles 2 and 3 of Directive no. 2004/38, without adapting it to the Italian legal order. The aim of the Government was to allow the right to entry to the partner of the EU citizen even if the Italian legal system did not treat a registered partnership or a de facto relationship as equivalent to marriage. The MPs, both in the Senate and in the Chamber, divided into two clashing groups according to political belief. The centre-right wing criticised the choice of the Government, claiming that it surreptitiously introduced de facto relationships into the Italian legal order. The centre-left wing supported the Government, stating that the recognition of the right to enter and stay to the EU citizen's partner did not amount to a general recognition of de facto relationships.

When it comes to the second – marginal – point, some centre-right wing MPs criticized the draft for amending the law on immigration beyond any comprehensive parliamentary debate on the subject.

Nevertheless, both Committees gave positive opinions on the draft, but they suggested some amendments. Both suggested that the draft should state that the condition of partner was to be certified by a public authority of the State from which the applicant originates (according to the Senate Committee) or comes (according to the Chamber Committee).

The Government passed the act in its meeting of 19-1-2007 and the President of the Republic signed it on 6-2-2007. The act was published as Legislative Decree no. 30 in the Official Journal no. 72 of 27-3-2007, 5-15, and entered into force on 11-4-2007.

Recent literature

F. COSTANTINI, Mancato recepimento della direttiva 2004/38/CE sull'ingresso e soggiorno dei cittadini comunitari: la questione dell'iscrizione anagrafica alla luce del principio del "self-executing", *Immigrazione.it*, no. 35, 1-11-2006.

M. CONDINANZI, A. LANG, B. NASCIMBENE, *Cittadinanza dell'Unione e libera circolazione delle persone*, 2nd ed., 2006.

C. SANNA, La direttiva 2004/38/CE relativa al diritto dei cittadini dell'Unione e dei loro familiari di circolare liberamente nel territorio degli Stati membri, *Rivista di diritto internazionale privato e processuale*, 2006, 1157-1163.

A. Entry

Text in force: Article 1 of Presidential Decree 18-1-2002 no. 54 (*GURI*, no. 83 of 9-4-2002 OS)
Article 1 provides that the citizen of an EU Member State enjoys the rights to enter Italy, except for limitations provided for by criminal law or on grounds of public policy, public security or public health. It is not clear what "limitations provided for by criminal law" exactly means.
Draft implementing Directive 2004/38/EC:

Article 5 is devoted to the right of entry. The valid identity card that the Union citizen has to bear has to be "*valida per l'espatrio*", that is, it has to be a document that enables the holder to travel abroad.

An Union citizen or a family member that on the occasion of a border control does not have the travel documents or the required visa, is given a 24 hours period to bring the necessary documents or to prove by any mean allowed by the law that s/he is entitled with the right to move. If s/he fails to bring the documents or to prove his/her right, the public authority can turn him/her back. The reasonable period of time of the Directive is quantified in 24 hours.

B. Residence

Text in force: Articles 2 to 6 of Presidential Decree 18-1-2002 no. 54 (*GURI*, no. 83 of 9-4-2002 OS), as modified by Article 20 of Law 25-1-2006 no. 29[1] (GURI, no. 83 of 9-4-2002 OS).

Article 2 of the DPR 2002 no. 54 recognizes the right to stay to the nationals of the Member States. The beneficiaries of the right to stay are listed in Article 3 (1): a) nationals of a Member State who wish to establish themselves in Italy in order to pursue activities as self-employed persons; b) workers according to Article 39 and 40 ECT; c) nationals of a Member State who wish to enter Italy in order to provide services or as recipients of services; d) students (included University students); e) "nationals of a Member State who either have worked in another Member State or not". For a stay of more than three months, a residency card has to be awarded, except for those beneficiaries listed in Article 3 (2): a) workers exercising an activity as an employed person, where the activity is not expected to last for more than three months, and b) seasonal workers who hold a contract of employment stamped by the competent authority of the Member State on whose territory they have come to exercise their activity.

The application for the residency card is to be submitted to the Police Headquarters, directly or through a Post Office. The application is exempt from stamp duty. The Police Headquarters issue a receipt when receive the application. As far as the documents to attach to the application, a photocopy of an identity card and a picture is required to all the beneficiaries. In addition, the employee has to produce proof of his/her contract of employment. The seasonal worker was treated differently compared to the employee, as far as the documents s/he had to submit in order to prove her/his condition (the employee could submit a certificate of employment or a confirmation of engagement from the employer; the seasonal workers only a copy of the work contract). Thanks to the 2006 amendment, a certificate of employment or a confirmation of engagement from the employer is required to both seasonal and non seasonal workers. The document submitted by the seasonal worker shall state the duration of the employment relationship. The self-employed and the provider or recipient of services has to produce the authorizations required by the Italian law in order to perform the desired activities or proofs that the person comes within one of the classes of per-

1 See Chapter XII.

sons referred to in Article 3 (1) (a) and (c). Students have to prove to be registered at the Italian health care scheme (*Servizio sanitario nazionale*) or to be covered by sickness insurance, and to have sufficient resources to avoid becoming a burden on the Italian social assistance system, and to have a certificate of enrolment in the University or in an establishment for the purpose of attending a vocational training course and a certificate of studies duration. Persons covered by Directives no. 90/364/EEC and no. 90/365/EEC have to provide proof to be registered at the Italian health care scheme (*Servizio sanitario nazionale*) or to be covered by sickness insurance, and proof to have sufficient resources to avoid becoming a burden on the Italian social assistance system. Article 20 of Law no. 29 of 2006 modifying Article 5 of DPR 2002 no. 54 simplified the formalities required to beneficiaries of Directives no. 90/364/EEC, no. 90/365/EEC, and 93/96/EC: they do not have any more to prove to have sufficient resources to avoid becoming a burden on the Italian social assistance system; they can simply state that they have such resources.

According to Article 6 of DPR no. 54 of 2002, the residency card shall be issued within 120 days of the request. It is valid throughout the Italian territory for five years or for the duration of the stay. It is renewable. The residency card may replace the identity card for no more than five years from the date of the first issue.

DPR no. 54 of 2002 left out Article 5 of Directive 68/360 ("Completion of the formalities for obtaining a residency card shall not hinder the immediate beginning of employment under a contract concluded by the applicants"). Thanks to the amendment by Article 20 of Law no. 29 of 2006, Article 6 § 1 now states that pending the examination of the application for the residency card, the European citizen who is a worker, a self-employed person, a provider or recipient of services, or a student, is entitled to exercise the activity s/he is in Italy for.

Article 6 § 5 of DPR no. 54 of 2002 transposed Article 7 § 1 of Directive 68/360 ("A valid residence permit may not be withdrawn from a worker solely on the grounds that he is no longer in employment, either because he is temporarily incapable of work as a result of illness or accident, or because he is involuntarily unemployed, this being duly confirmed by the competent employment office"), but reserved it only to the self-employed worker, not to the employee. Thanks to the 2006 amendment, both the self-employed and the employee are protected in case of a temporary incapacity to work.

Draft implementing Directive 2004/38/EC:

Article 6 is devoted to the right of residence up to three months. This right is conditional upon the holding of an identity card "*valida per l'espatrio*". In this regard, one could recall that the Court of Justice held that "Article 4(1) of Council Directive 68/360/EEC ... must be interpreted as meaning that a Member State is obliged to recognize the right of residence within its territory of the workers referred to in Article 1 of that directive when they produce a valid identity card, even if that card does not authorize its holder to leave the territory of the Member State in which it was issued" (Case C-376/89 *Giagounidis* [1991] ECR I-1069).

Article 7 deals with the right of residence for more than three months and transposes Article 7 of the Directive. The worker in unvoluntary unemployment retains the status of worker if s/he is registered with a "*centro per l'impiego*" (employment centre) or has offered his/her availability to work a new job, pursuant to Article 2 (1) of the Legislative decree 2000 no. 181. If the worker is in the condition of Article 7 (2) c, s/he retains the status of worker for one year (the Directive reads "for no less than six months").

According to Article 8 of the act of transposition, the refusal of the right to reside (for up to three months and for more than three months) and the repeal of it can be challenged in front of the tribunal of the place where the applicant resides. The judge decides the case according to Article 737 of the Italian Code of Civil Procedure, after hearing the complainant.

Article 9 deals with the administrative formalities for Union citizens and their family members. According to Article 8 of the Directive, "the host Member State may require Union citizens to register with the relevant authorities". The act of transposition states that the EU citizen shall register with the Commune of the place of residence, submitting an application

to be entered in the population register. The registration is mandatory after three months from the day of arrival, but the failure to comply does not render the person liable of any specific sanction. The applicant has to attach to his/her application all the documents necessary to prove that s/he satisfies the conditions laid down in Article 7 (which reproduces Article 7 of the Directive). As far as the "sufficient economic resources" are concerned, a reference is made to Article 29 (3) b of the Legislative Decree 1998 no. 286 (general law on immigration). This provision regulates the family reunification of the foreigner. It requires the foreigner to has a minimum income per year not below the annual amount of the social allowance, in case of reunification with one family member or when no reunification occurs, not below twice the annual amount of the social allowance, in case of reunification with two or three family members, and not below three time the annual amount of the social allowance, in case of reunification with four or more family members. In order to calculate the income, due account has been taken of the incomes of the family members living under the same roof. In order to prove that s/he has "sufficient economic resources", the EU citizen may make a self-declaration. Each category of EU citizens (workers or non-workers) are allowed the same treatment as far as this proof is concerned.

Article 13 of the Italian act transposes Article 14 of the Directive. It must be underlined that para. 3 ("An expulsion measure shall not be the automatic consequence of an Union citizen's or his or her family member's recourse to the social assistance system of the host Member State") is not reproduced. Neither is reproduced Article 15 of the Directive.

Articles 14-18 of the act of transposition are devoted to the right of permanent residence and reproduce Articles 16-21 of the Directive. The following points are worth of notice.

While the Directive reads "Once acquired, the right of permanent residence shall be lost *only* through absence from the host State for a period exceeding two consecutive years", the act of transposition reads "Once acquired, the right of permanent residence shall be lost *in any case* through absence from the Italian territory for a period exceeding two consecutive years" (art. 14 (4)).

EU citizens "who, after three years of continuous employment and residence in the host Member State, work in an employed or self-employed capacity in another Member State, while retaining their place of residence in the host Member State, *to which they return, as a rule, each day or at least once a week*" acquire the right of permanent residence by way of derogation even though they do not fulfill the general requirements laid down in Article 16 of the Directive. The act of transposition states that, in order to benefit from this exemption, these EU citizens have to retain their place of residence in Italy, while being employed in another Member State, provided all conditions of the registration persist.

The right of permanent residence is certified by a document issued by the Commune of the place of residence, within thirty days of the request (Article 16 of the act of transposition).

According to Article 21 of the Directive, "Continuity of residence is broken by any expulsion decision *duly enforced* against the person concerned". On the contrary, Article 18 of the act of transposition reads as follows: "Continuity of residence is broken by the expulsion decision *adopted* against the person concerned".

Recent literature

Ministero dell'Interno, circolare n. 38/2006 18-10-2006 (Iscrizione anagrafica cittadini comunitari. Applicazione direttiva del Consiglio e del Parlamento dell'Unione europea relative al diritto dei cittadini dell'Unione di circolare e di soggiornare liberamente nel territorio degli Stati membri 2004/38/CE).

The Ministry of the Interior issued an explicatory note about the entry of EU citizens in the population register. According to a previous decree, the EU citizen could be registered upon showing his/her residency card. Since the period for implementing Directive 2004/38 expired, the Ministry stated that the residency card was no more needed and the EU citizen could be registered provided that s/he lived in the Commune (it is up to the Police to check that the applicant really lived at the address s/he entered in her/his

request) and, if coming from abroad, s/he presented his/her passport, which is the same requirement that an Italian citizen has to satisfy.

C. Departure

Administrative expulsion

Text in force: Articles 7 to 9 of Presidential Decree 18-1-2002 no. 54 (GURI, no. 83 of 9-4-2002 OS), implementing Directive no. 64/221/EEC

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

Article 7.1 of the Presidential Decree literally declares that measures may be taken derogating from provisions 1 to 6 of DPR no. 54 of 2002 and from an expulsion order from Italy on grounds of public policy, public security and public health. The provision should mean that a measure taken derogating from Articles 1 to 6 of DPR no. 54 of 2002 and a deportation order from Italy are justifiable only on grounds of public policy, public security and public health.

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

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

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

Draft implementing Directive 2004/38

Articles 20 to 22 are devoted to expulsion orders and related safeguards. Unlike the rest of the act, these articles do not follow the Directive to the letter, but are less articulate.

Article 20 lays down the procedure and conditions for the restrictions of the right to entry and the right of residence on grounds of public policy, public security and public health. The Union citizen who has resided for 10 years or is a minor can be expelled only on grounds of public security that imperils the security of the State. The expulsion order is issued by the Ministry of Interiors. The order shall be written in a language that the addressee can understand or in English, and notified. The order shall state the reasons in fact and in law, the available legal remedies, the time allowed to leave the territory, and the re-entry ban for a period not exceeding three years. The Union citizen who breaches the re-entry ban shall be liable to a term of imprisonment of 3 months to 1 year and a fine of €500 to €5.000, and shall be expelled again. The Questore shall enforce the expulsion order, if the Union citizen

does not leave the country within the time allowed to him/her, or if the expulsion order is grounded on reasons of public security that imperils the security of the State.

Article 21 regulates the expulsion orders issued by the Prefect if the conditions that grounded the right of residence end. In that case, a re-entry ban can not be issued.

According to Article 21, the refusal of the right to reside or the repeal of it can be challenged in front of the tribunal of the place where the applicant resides. The expulsion order taken by the Ministry of the Interior on grounds of public order, public security or public health can be challenged in front of the administrative tribunal in Rome. The expulsion order that the Prefect issues in case that the conditions allowing the right of residence cease to exist, can be challenged in front of the tribunal (ordinary judge) of the place where the authority which issued the decision is located.

Judicial practice

Tribunale regionale di giustizia amministrativa, Trentino Alto Adige, sec. Bolzano, 23-3-2006 no. 118 and no. 119 (on the case N. CANESTRINI, P.A. PERINI, *Nullo il respingimento di cittadini comunitari alla frontiera senza tassativi requisiti*, *Altalex* 28-4-2006, www.altalex.com).

The administrative tribunal of the Province of Alto Adige annulled two decisions of the border police refusing to German nationals admittance to the Italian territory coming from Austria. Checks at the border between Italy and Austria were carried out, in accordance with article 2(2) CISA, on the occasion of the 2002 Florence meeting of the European Social Forum. As no reasons were stated for the refusal, the decisions were held to be contrary both to EC and Italian law.

Literature

A. IANNUZZI, F. BENIGNI, *Il diritto delle espulsioni: evoluzione legislativa e prassi applicativa*, Napoli: Edizioni Scientifiche italiane 2006, p. 152-154.
A. SCOGNAMIGLIO, I ricorsi contro i provvedimenti di allontanamento di cittadini comunitari, *Giornale di diritto amministrativo*, 2006, 611-615 (on case C- 136/03 *Dorr* [2005] ECR I-4759).

Judicial expulsion

Italian criminal law requires courts to order expulsion from Italian territory of foreigners found guilty of particular offences (persons sentenced for crimes against the State: Article 312 of the Penal Code; persons sentenced for serious crimes related to drug: Article 86 of Decree of the President of the Republic no. 309 of 1990) or sentenced to a term of imprisonment of ten years, irrespective of the offence committed (Article 235 of the Penal Code). Those provisions are drafted in general terms and are applicable to EC nationals too. The expulsion order is a security measure (misura di sicurezza), that is a measure decided by the same judgment convicting the defendant, if the judge is persuaded that the defendant will probably commit an other crime. Therefore, the judge has to order the expulsion only after having ascertained that the person concerned represents a danger for the general public, and the supervising court has to renew the judgment on the danger the foreign represents at the moment of executing such an order. In addition to that, the duration of security measures is undetermined, but can be repealed if the person ceased to be a danger for the general public. Thus, even if the expulsion order is permanent, it can be repealed.

According to the law on immigration, a foreigner sentenced to a term of imprisonment can ask to be expelled instead of serving his term in jail (Article 16.5 of Legislative decree no. 286 of 1998). The aim of the provision is to cut down the prison population. The Supreme Court held that this provision did not apply to EU nationals. According to the judge, Article 16.5 is applicable only to non-EU foreigners and it is a special rule, unsuitable to be applied by analogy to an EU citizen, who enjoys the right of free movement and can be expelled only

on ground of public policy, public security and public health (judgment of 30-9-2004 no. 38656).

Treatment of jobseekers

Jobseekers are not expressly mentioned among the beneficiaries of EC law on free movement by the Presidential Decree no. 54 of 2002. They do not face particular problems about entry, since the identity card is the only document required. After three months, the EU citizen has to ask for a residency card and no exception is provided for in this case. In order to obtain the residency card, the jobseeker has to fall within one of the categories listed in Article 3 of the Presidential Decree no. 54 of 2002. As the ECJ has stated that a jobseeker is to be considered as a worker, the provision of Italian law could be read in the light of the jurisprudence. Nevertheless, according to Article 5 of the Presidential Decree no. 54 of 2002 , the worker has to attach to his/her application for the residency card, a certificate of employment or a confirmation of engagement from the employer. The jobseeker can hardly satisfy this requirement. Neither is provided a special protection in case of expulsion.

The legal regime is going to change with the entry into force of the act transposing Directive 2004/38. Article 14 (4) b of the Directive limits the power of the State to expel the EU citizens who "entered the territory of the host Member State in order to seek employment … as long as the Union citizens can provide evidence that they are continuing to seek employment and that they have a genuine chance of being engaged". The act of transposition states that the jobseeker can not be expelled provided that s/he can prove to be registered with a "*centro per l'impiego*" (employment centre) since no more than six months, or to have offered his/her availability to work a new job, pursuant to Article 2 (1) of the Legislative decree 2000 no. 181 and not to have been excluded from benefiting of this law.

CHAPTER II. ACCESS TO EMPLOYMENT

1. Equal treatment in access to employment

The equal treatment in relation to access to employment is not stated in general terms (at least until the entry into force of the act transposing Directive no. 2004/38/EC), but equality of treatment is a general principle of the Italian legal order, embodied in Article 3 of the Constitution.

Draft transposing Directive no. 2004/38/EC

Article 6 (3) states that, subject to special regulations in line with the EC Treaty and EC laws, Union citizens staying in Italy for up to three months, are subjects to the same obligations as Italian nationals in the exercise of allowed activities. It seems not clear what is the ambit of application or the content of the provision.

According to Article 19 (1), Union citizens are entitled to take up employment or self-employment in Italy, with the exclusion of those activities that the law, in conformity with EC law, reserves to Italian nationals.

2. Language requirement

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.

The recognition of a primary and secondary school teacher diploma is conditional upon the proof of knowledge of Italian language. According to the Circular letter of the Ministry of Education no. 39 of 21-3-2005, the applicant must produce a certificate called "CELI 5 Doc", awarded by the University for foreigners of Perugia (http://www.cvcl.it/). Those who attended the primary and secondary schools in Italy or at an Italian school abroad, or graduated and acquired a teaching qualification of Italian as a foreign language, or graduated at an Italian University, are exempted from the "CELI 5 Doc".

3. Recognition of diplomas

– Professional diplomas

Legislative decree 27-1-1992 no. 115, transposing Directive no. 89/48/EEC
Legislative decree 2-5-1994 no. 319, transposing Directive no. 92/51/EEC
In the case where the matters covered by the education and training received by the applicant differ substantially from those covered by the diploma required in Italy, the competent Ministry can subject the recognition of the applicant's diploma to a compensatory measure. The competent authority shall take account of the knowledge acquired by the applicant during his/her professional experience and ascertain if that knowledge can completely fill the gap or just part of it.

The recognition of professional diplomas is subject to (the passing of) an aptitude test in the following cases:

a) cases provided for by the Legislative decree no. 115 of 1992:
   - professions of lawyer, accountant and industrial property agent
b) cases provided for by Legislative Decree no. 319 of 1994:
   - professions the access to which require the possession of a diploma awarded after the completion of a post-secondary course for a period of at least four years

- professions which, in order to be practised, require a precise knowledge of Italian laws and in respect of which the provision of advice and/or assistance concerning Italian laws is an essential and constant feature of the professional activity
- when the applicant has only professional experience
- professions of ski-monitor and mountain guide.

The aptitude test consists in a written and/or in an oral exam in Italian. The competent Ministry determines the content of the test on a case by case basis.

The Ministry can also determine the content of the aptitude test and of the adaptation period for each profession in general terms. Such a decision has been adopted for the professions of lawyer (Decree of the Ministry of Justice no. 191 of 28-5-2003, *Regolamento in materia di prova attitudinale per l'esercizio della professione in materia di avvocato*, *GURI*, no. 171 of 25-7-2003), biologist (Decree of the Ministry of Justice no. 260 of 3-11-2005, *Regolamento in materia di misure compensative per l'esercizio della professione di biologo*, *GURI*, no. 300 of 27-12-2005), social assistant (Decree of the Ministry of Justice no. 264 of 14-11-2005, *Regolamento in materia di misure compensative per l'esercizio della professione di assistente sociale*, *GURI*, no. 301 of 28-12-2005), chemist (Decree of the Ministry of Justice no. 265 of 14-11-2005, *Regolamento in materia di misure compensative per l'esercizio della professione di chimico*, *GURI*, no. 301 of 28-12-2005), geologist (Decree of the Ministry of Justice no. 268 of 14-11-2005, *Regolamento in materia di misure compensative per l'esercizio della professione di geologo*, *GURI*, no. 302 of 29-12-2005); measuring surveyor (Decree of the Ministry of Justice no. 238 of 21-6-2006, *Regolamento in materia di misure compensative per l'esercizio della professione di geometra*, *GURI*, no. 172 of 26-7-2006, 6), journalist (Decree of the Ministry of Justice no. 304 of 17-11-2006, *Regolamento in materia di misure compensative per l'esercizio della professione di giornalista*, *GURI*, no. 7 of 10-1-2007, 5).

All relevant documents to be attached to the application shall be accompanied by an Italian translation that must be certified as true to the original by the Italian diplomatic or consular authorities located in the Member State in which the documents were drawn up, or by an approved translator.

Directive 2005/36/EC: The Parliament enabled the Government to issue a decree having the strength of ordinary law (i.e. a legislative decree) for the transposition of Directive no. 2005/36/EC by August 2007 (within 18 months of the entry into force of the law. See Article 1 of Law 25-1-2006 no. 29, Provisions for the fulfilment of obligations deriving from Italy's membership to the European Community. Legge Comunitaria 2005, GURI no. 32 of 8-2-2006 OS). According to this Article, before passing the decree, the Government must forward the draft to both the Chamber of Deputies and the Senate with a request for their opinions. No draft was issued in 2006.

– Academic diplomas

According to Article 170 of the Royal Decree no. 1592 of 21-8-1933, the academic diplomas awarded abroad are devoid of value, except where otherwise stated by a special law.

Article 6 § 6 of the Ministerial Decree no. 270 of 22-10-2004 (Modifiche al regolamento recante norme concernenti l'autonomia didattica degli atenei, approvato con D.M. 3 novembre 1999, n. 509 del Ministro dell'università e della ricerca scientifica e tecnologica, GURI, no. 266 of 12-11-2004) states that the recognition of a foreign educational degree for the sole purpose of admission to a higher academic course is decided by each University according to the international treaties in force.

The recognition of foreign educational degree is provided for by Law no. 148 of 11-7-2002 ratifying and implementing the Convention of the Council of Europe on the Recognition of Qualifications concerning Higher Education in the European Region (Lisbon 11-4-1997). It only establishes that it is to each University to recognize a foreign degree for admission to higher education, and to the State administration to recognize a foreign degree for any other purpose.

An academic foreign degree can be recognized on a case by case basis or with general scope. In this latter case, a declaration of equivalency must be obtained by Universities.

The recognition of a foreign degree for the access to a post in the public service is laid down in the Legislative Decree no. 165 of 30-3-2001, Article 38 (see below, chapter IV).

A doctorate degree awarded abroad can be recognized in Italy by the Ministry of Education (DPR no. 382 of 11-7-1980, Riordinamento della docenza universitaria, relativa fascia di formazione nonché sperimentazione organizzativa e didattica, GURI no. 209 of 31-7-1980 OS).

Recognition of other (non professional) diplomas:

a) Diplomas corresponding to Italian elementary and secondary schools' diplomas: a national of an EU State, an EEA State, or Switzerland is entitled to the recognition, conditional upon passing an examination on Italian language and culture. The document that states the recognition of the diploma is issued by the Local Director of Education (*provveditore agli studi*) (legislative decree 1994 n. 297, article 379 §§ 1-3, as modified by law 2006 no. 29, article 13).
b) Diplomas corresponding to Italian upper secondary education or vocational education' diplomas: a national of an EU State, an EEA State, or Switzerland is entitled to the recognition, conditional upon passing an examination, if so decides a seven-member Committee appointed by the Ministry of Education. The document that states the recognition of the diploma is issued by the Local Director of Education (*provveditore agli studi*) (legislative decree 1994 n. 297, article 379 §§ 4-7, as modified by law 2006 no. 29, article 13).

Law 25-1-2006 no. 29[2] (*Disposizioni per l'adempimento di obblighi derivanti dall'appartenenza dell'Italia alle Comunità europee. Legge comunitaria 2005, GURI*, 8-2-2006 no. 32 OS), Article 12 states that, without prejudice to existing legislation, whenever it is necessary to evaluate if a degree or an attestation of competence awarded by another Member State is equivalent to one awarded in Italy, the responsible body decides on the case, subject to an opinion by the Ministry of Education, University and Research, which has to be delivered within 180 days of the request. [NoA: it is not clear what the scope of this provision is.]

Judicial practice

Cases about the recognition of diplomas awarded by the New Member State before the entry into force of the Accession Treaty:

T.A.R. Lazio Roma Sez. III, 22-3-2006, no. 2042
A Polish citizen challenged the refusal – adopted on 3-5-2004 – of recognition of her Polish qualifications in midwifery. The judge dismissed the claim. It held that the claimant was not entitled to the application of the acquired rights provision of the Directive, because she had not effectively and lawfully been engaged in the activities of a midwife in Poland for the prescribed period of time stated by Article 5b of Directive 80/155/EEC.

T.A.R. Lazio Roma Sez. III, 10-4-2006, n. 2547
A Polish citizen challenged the refusal – adopted on 28-6-2004 – of recognition of her Polish qualifications of nurse responsible for general care. The judge dismissed the claim. It held that the accession of Poland to the European Union did not have the effect of transforming a Polish diploma into one admitted to recognition according to Directive no. 77/452. Neither was the applicant entitled to compensation measures, because she had never effectively been engaged in the activities of a nurse in Poland. [The judge does not take

2 See Chapter XII.

into consideration Article 4b of Directive no. 77/452/EEC on acquired rights, even though, however, it was not applicable to the present case]

The Council of State submitted a request for a preliminary ruling to the ECJ on a very delicate question (order n. 4141 of 27-6-2006. The case is registered as C-311/06, *Consiglio Nazionale degli Ingegneri v Ministero della Giustizia, Marco Cavallera*, OJ C 249 of 14-10-2006, 3). The case originated in the action brought by the National Council of Engineers against the decision of the Ministry of Justice recognizing the Spanish diploma of Mr Cavallera according to the Legislative Decree no. 115 of 1992, implementing Directive 89/48/EEC. Mr Cavallera, an Italian citizen, graduated in an Italian University, and had his academic degree recognized in Spain as being equivalent to a Spanish one. This academic recognition allowed him to enrol in the Spanish register of engineers, but he never pursued the profession in Spain. He asked the Italian Ministry of Justice for the recognition of the Spanish professional diploma and obtained it: he therefore could enrol in the Italian register of engineers. In other words, he obtains to pursue as an engineer without passing the examination required by the law to Italian engineers. The National Council of Engineers challenged this decision. The judge of first instance rejected the claim and the applicant appealed to the Council of State.

The Council of State was ready to quash the appealed decision: it holds that only those diplomas which are awarded at the end of a course can be recognized according to the Legislative Decree no. 115 of 1992, and as Mr Cavallera's Spanish diploma does not state that he concluded a course of study, but simply that the Italian academic diploma is equivalent to a Spanish one, it can not be considered as a diploma for the purpose of professional recognition. In spite of that, the Court is persuaded that the Directive can be given a different meaning, and allows the recognition of every professional diploma awarded by a Member State, even when it simply states that a foreign diploma is equivalent to a national one. For these reasons, the Court submitted the case to the ECJ.

Recent legal literature

E. BERGAMINI, La posizione del praticante legale nel diritto comunitario fra riconoscimento accademico e riconoscimento professionale, *Diritto comunitario e degli scambi internazionali*, 2006, p. 265-285 (on recognition of trainee lawyers' diplomas).

on directive no. 2005/36:

E. CHIARETTO, Il riconoscimento delle qualifiche professionali nell'Unione europea, *Rivista di diritto internazionale privato e processuale*, 2006, p. 689-716.

A. MARI, La nuova direttiva sul riconoscimento delle qualifiche professionali, *Giornale di diritto amministrativo*, 2006, p. 398-400.

R. ROTIGLIANO, Primo commento alla recente direttiva 2005/36/Ce sul riconoscimento delle qualifiche professionali, *Servizi pubblici e appalti*, 2006, 398.

4. Nationality condition for captains of ships

According to cases C-405/01 (*Colegio de Oficiales de la Marina Mercante Española vs Administratión del Estado*) and C-47/02 (*Albert Anker and others vs Bundersrepublik 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.

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 no. 30 of 1998 modified Article 318 and added a specific reference to European Union citizens. Now an EU citizen is entitled to matriculate as crew of Italian ships.

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 no. 472 of 1999

modified Article 119 and added a specific reference to Community citizens. Now an EU citizen is entitled to matriculate as a seafarer.

It has to be noted that the implementing regulation of the Navigation Code (DPR no. 328 of 1952) 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). However Article 23 of Legislative Decree no. 319 of 1994 states in general terms that EU citizens are treated as Italian citizens for the purpose of Article 133 of the Navigation Code.

CHAPTER III. EQUALITY OF TREATMENT ON THE BASIS OF NATIONALITY

The Italian legal system does not provide for a general statement of non discrimination on ground of nationality in the working environment. Nonetheless, most of 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.

It can be recalled here the legislative decree no. 215 of 2003, transposing Directive 2000/43/EC into Italian legal system, and the National office against racial discrimination (UNAR) created by that act. In line with the Directive, the legislative decree excludes nationality from its field of application. Nevertheless, cases of discrimination on the ground of nationality can be brought to the UNAR, provided that they amount to discrimination on racial or ethnic reason. In fact, the 2006 UNAR report gives notice of a few cases.

1. Working conditions, social and tax advantages

Articles 43 and 44 of the legislative decree no. 286 of 1998 (general law on immigration) set a specific judicial remedy for foreigners (either non-Community or Community nationals) against discrimination based on nationality. Article 44 states that "when an act of a private person or a public administration causes a racial, ethnic, *national origin* or religious discrimination, the judge may order, on request of the person concerned, discriminations to cease and may adopt every other measures appropriate for removing discriminatory effects". In accordance with article 43 of the same Legislative decree, "discrimination means every act or behaviour, which directly or indirectly constitutes a distinction, an exclusion, a restriction or a preference based on race, colour, national or ethnic origin, and religion or beliefs, and has as its purpose or effect of destroying or jeopardizing the recognition, the enjoyment or the exercise of human rights and fundamental freedoms in politic, economic, social and cultural fields and in every other field of public life".

Article 10 of the legislative decree no. 276 of 2003 prohibits bodies in charged of serving as an intermediary between supply and demand on the employment market (for instance providing temporary staff for third parties) from pre-selecting employees on ground of (among others) national origin.

The unemployment benefit and the children and family allowance are the two main social security mechanisms that EU workers in economic difficulties may benefit from. All salaried employees are entitled to the unemployment benefit, without distinctions of status. The children and family allowance is distributed along with the monthly salary to those with very low incomes.

Draft transposing Directive no. 2004/38/EC

Article 6 (3) states that, subject to special regulations in line with the EC Treaty and EC laws, the Union citizen staying in Italy for up to three months, is subjects to the same obligations as Italian nationals in the exercise of allowed activities.

According to Article 19 (2), the Union citizen enjoys equal treatment with Italian nationals. The derogation from the equal treatment provision, laid down by Article 24 (2) of the Directive, is implemented in more liberal terms by the Draft. While the Directive allows the Member States to deny both entitlement to social assistance during the first three months or the longer period the EU citizen can stay and search for a job, and maintenance aid for students, the implementing provision restricts the application of this derogation. The derogation is limited to the grant of social security benefits. In any case rights to social benefit associated with the activity pursued or otherwise granted by the law shall not be affected by the derogation (see Article 19 (3) of the Draft).

Judicial practice

Corte di Cassazione, sezione lavoro, 12-1-2006 no. 430.
The applicants, associates and linguistic experts dismissed by the University of Salerno, contested the decision. The Supreme Court dismissed the application, stating that:

a) the laws implementing the directives about collective redundancies were not applicable in the case, because Universities were not included in their ambit of application. For that reason, no discrimination on the ground of nationality was detected.
b) the regulation on staff mobility within the public administration was not applicable in the case, because the relationship between an associate and linguistic expert and an University was governed by private law and was not a public service relationship. As the different treatment followed the different applicable regimes, and as relationships governed by private law and public service relationships were not comparable, no discrimination on the ground on nationality could occur.

Recent legal literature

N. AL NAJJARI, E. MUSSATO, *L'impatto del diritto comunitario nell'ordinamento interno: in particolare, il problema della discriminazione "a rovescio" nell'accesso alle professioni tra giurisprudenza e interventi normativi*, *Contratto e impresa / Europa*, 2006, 961-997 (essay on reverse discrimination in the access and exercise of professional activities. The AA. examine the ways to redress a reverse discrimination, both through a reference to the Constitutional Court, which is an *ex post* remedy, and through legislative acts, that while regulating access to professions guarantee that Italians are not treated in a less favourable way than EC nationals).

R. FOGLIA, La libera circolazione dei lavoratori, in: A. TIZZANO (ed.), *Il diritto privato dell'Unione europea*, 2nd ed., Giappichelli editore, Torino, 2006, p. 982-1019.

2. Other obstacles to free movement of workers?

Legge regionale della Sardegna, 11-5-2006 no. 4[3] (Bollettino Ufficiale Sardegna 13-5-2006 no. 15, supplemento ordinario no. 15)

The Region of Sardinia passed a legislation concerning the taxation of capital gains arising from the sale of residential buildings sited within three km. of the shoreline and used as second homes. Taxable person is the vendor who is not resident in the territory of the Region or who is resident in the territory of the Region from less than twenty-four months. Vendors born in Sardinia and their spouses, irrespective of the place of residence, are exempted from the tax.

The Italian government challenged the law, claiming that it exceeded the competences that the Constitution conferred on Regions. The case is pending in front of the Constitutional Court.

3. Specific issue: frontier workers

Fiscal treatment

For the year 2006 a worker who, while residing in Italy, is employed in a neighbouring country on a permanent and exclusive basis, is entitled to a lump-sum exempt amount in respect of income tax. That means that only the income exceeding eur 8.000 is a taxable income for employment in Italy (Article 1 § 122 of law 2005 no. 266, modifying Article 2 § 11 of law 2002 no. 289).

If the income of the frontier worker is taxable both in Italy and in the country of employment, and if there is no double taxation convention, the tax already paid abroad will

3 See Chapter XII.

have to be deduced from the income taxable in Italy (Article 165 of Decree of the President of the Republic 1986 no. 917).

CHARTER IV. EMPLOYMENT IN THE PUBLIC SECTOR

Access to public sector

Before dealing with the issue of the access of EU citizens to public sector, it seems appropriate to briefly discuss the Italian general framework regulations related to the public sector in general and the employment in the public sector in particular, because of the general reform of the structure of the Italian State from a centralized organization to a de-centralized one (Constitutional Law 18-10-2001 no. 3) and the specific reform of the employment in the public sector (Legislative Decree 30-3-2001 no. 165, General Rules on the status of employment in the public sector).

With regard to the first question, it is sufficient to recall that following the 2001 Constitutional reform and its implementation, every Italian Region has an exclusive competence related to the organization of its own Regional public sector as well as the State has an exclusive competence related to the organization of the national public sector, meaning the employment in the national administrative structure, as State Ministries and national State bodies.

Thus within its exclusive competence every Italian Region is not actually subjected to the State legislation on the employment in the public sector, which properly regulates only the public sector with regard to the central level, but is free to organize its own Regional public sector through Regional laws, within the limitations set by the Italian Constitution (such as Art. 97), which both State and Regions are subject to, and the general principles as contains in the State legislation (Legislative Decree no. 165 of 2001, Article 2.3).

With regard to the second question, it seems necessary to outline that Legislative Decree no. 165 of 2001 has modified the nature of the work relationship with the Public Authorities (to understand in a broad meaning, including national, Regional or local authorities and every public body) under the Italian legal system. In particular this law transformed the previous status of the personnel in the Italian public sector as civil servants subjected to a public law regime into employees subjected to the ordinary rules of the Italian Civil Code as the employees in the private sector. However according to Article 3 of the Legislative Decree no. 165 of 2001, some specific categories of workers in the public sector are still regarded as civil servants subject to a public law regime. These category are: a) the judges irrespective of whatever jurisdictional specialized competence they exercise (for instance civil or administrative), the counsellors-at-law of the State, the Armed Force personnel and the police personnel, the diplomatic corps and the officers of the Interior Ministry (*carriera prefettizia*), the personnel of Public Entities which exercise functions related to the safeguarding of a general public interest, such as the function to protect the public savings, the function to safeguard the credit institutions' sector and the vigilance function in the currency field (par. 1); b) the fire fighters of the National Fire Department, which status of civil servants is regulated by Decree of the President of the Republic no. 76 of 6-2-2004 (par. 1-bis).

Following the so-called privatization of the employment in the public sector, it is worth noting that, notwithstanding any employment relationship with a public employer is established by a single contract, every single contract has to adapt to the regulation laid down by the collective agreements between the A.R.A.N. (*Agenzia per la rappresentanza negoziale delle pubbliche amministrazioni*), that is the Agent of the Public Employer, and the trade unions related to the public sector.

It is important to outline that a key role is attributed by Legislative Decree no. 165 of 2001 (art. 24) to the collective agreements with regard to the economic treatment of the employees in the public sector (both fundamental and accessory economic treatment), to the career's advances and professional development in general, and to the determination of the tasks of the employees related to every kind of office in the Public Administration.

The access to public employments is dependent upon the passing of an open competition, as it is stated by the Constitution and the Constitutional Court (see para. 1.3 below).

1.1. Nationality condition for access to positions in the public sector

Under the Italian legal system, the Italian nationality is a general requirement for access to positions in the public sector, enshrined in Art 51 (1) of the Constitution and in ordinary regulations. The sole exception is provided for access to the employment in the public sector guaranteed to the EU citizens by Art. 38, paras 1-2, of Legislative Decree no. 165 of 2001.

Article 51 (1) of the Italian Constitution states that: "All citizens of both sexes are eligible for public office and for elected positions on equal terms, according to the conditions established by law". Since the first regulation (Decree of the President of the Republic 10-1-1957 no. 3, article 2) ordinary regulations on the status of civil servants in the Italian public sector requires the Italian nationality as a general requirement to access to public service.

The large majority of legal scholars say that Article 51 cannot be interpreted as imposing a Constitutional prohibition to recruit 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.

Notwithstanding some doubts expressed by both legal scholars and judges on the Italian nationality as a requirement still asked for access to public service, this point has been definitively clarified by the Supreme Civil Court (Corte di Cassazione, labor section, judgement 13-11-2006 no. 24170).

Even if the case before the Supreme Court concerned the question whether a non-EU citizen (in particular an Albanian citizen) may have access to employment in the Italian public sector, the decision has dealt with the Italian nationality as a general requirement to accede to posts in public sector. In particular the Supreme Court stated that the foreigners (to understand as non-EU citizens) could not accede to positions in the public sector due to the general requirement of the Italian nationality. As held by the Supreme Court in this decision, the only exception to the afore-mentioned general requirement of the Italian nationality, also based on a constitutional rule (that is Art. 11 of the Italian Constitution), is the access to the employment in the public sector guaranteed to the EU citizens by Legislative Decree no. 165 of 2001.

In fact Art. 38, paras 1-2, of Legislative Decree no. 165 of 2001,[4] states that:

> "1. EU citizens may accede to those posts in the public sector, which do not involve the direct or indirect exercise of public authority or are not designed to safeguard the general interest of the State.
> 2. A Decree of the President of the Council of Ministers shall determine the posts and the functions that require the possession of Italian nationality and the essential requirements to access with regard to the citizens mentioned in paragraph 1.
> *Omissis*"

Thus, as states by Art. 38 para. 1, the Italian legal system formally guarantees in general terms to EU citizens the treatment reserved to Italian citizens with regard to access to posts in the public sector, excluding those posts which entail the direct or indirect exercise of public authority or are designed to safeguard the general interest of the State.

To try to clarify the contents of this provision, it seems useful to recall some remarks that legal scholars expressed on the provision as formulated in the old text contained in Arti-

4 "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 prescindersi dal possesso della cittadinanza italiana, nonché i requisiti indispensabili all'accesso dei cittadini di cui al comma 1.
Omissis"

cle 37 of DPR no. 29 of 1993 (which laid down the previous regulations on the employment in the public sector), taking into account that Art. 38 of the Legislative Decree no. 165 of 2001 reproduces *verbatim* Art. 37.

First of all, paragraph 1 of the above mentioned Legislative Decree closely echoed par. 10 of the judgment of the ECJ in case 149/79, *European Commission v. Belgium* [1980] ECR 3881.[5] Secondly the word "or" in paragraph 1 ("employment in the public sector which do not involve the direct or indirect exercise of powers of public authority *or* which are not designed to safeguard the general interest of the State") seems to imply that the requirements necessary for a post or function need to be alternative and not cumulative in order to be lawfully reserved for the Italian citizens.[6] However because 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.[7]

In any case Art. 38 para. 2 ascribes to a Decree of the President of the Council of Ministers the task to specify the posts which are surely reserved to the Italian nationals.

For the purpose of identifying those posts and functions (that are surely reserved to Italian nationals) it is necessary to refer to the Decree of the President of the Council of Ministers (DPCM) 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* no. 61 of 15-3-1994), adopted in accordance to Article 37 para. 2 of the Legislative Decree no. 29 of 1993, but indirectly recalled by Art. 38, para. 2, of Legislative Decree no. 165 of 2001.

Taking into account that the preamble of DPCM no. 174 of 1994 explicitly refers to the European Commission's 1988 action plan, Art. 1 lists the posts reserved for the Italian nationals and Art. 2 described the functions that have to be performed by Italian nationals.

According to Art. 1, the posts reserved for the Italian citizens[8] are: a) the management posts in the State administrations and the management posts in other public services; b) the 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; c) the posts of ordinary, administrative, military and accounting magistrates, the posts of Government lawyers; d) the 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 Law no. 56 of 1987 (which derogates to competitive examinations in order to employ workers for posts that does not require academic qualifications other than those delivered at the end of obligatory schooling).

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5 R. CARANTA, *La libertà di circolazione dei lavoratori nel settore pubblico*, *Diritto dell'Unione europea*, 1999, 21, at 44.

6 P. PASCUCCI, *Accesso agli impieghi nelle pubbliche amministrazioni*, A. BAYLOS GRAU, B. CARUSO, M. D'ANTONA, S. SCIARPA (eds.), *Dizionario di diritto del lavoro comunitario*, Bologna, Monduzzi, 1996, at 394 note 16.

7 CARANTA, at 44.

8 "1. I posti delle amministrazioni pubbliche per l'accesso ai quali non può prescindersi 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, nonché i posti dei corrispondenti livelli delle altre pubbliche amministrazioni;
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.
2. Resta fermo il disposto di cui all'art. 1, comma 3, del D.Lgs. 3 febbraio 1993, n. 29."

According to Art. 2.1, the functions that have to be performed by the Italian nationals are: a) those which entail adopting, developing, and enforcing licences and coercive measures; b) those which involve the review of legality and the review as to the substance.[9]

According to Art. 2.2, in case of doubts on the nature of the functions to be performed by the employee, 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.

Finally Article 3 defines the general requirements that the European Union citizens have to possess in order to access to the public service.[10] They must enjoy full rights of citizenship both in Italy and in the State of origin; must satisfy the other prescribed conditions, except for nationality; must have an adequate knowledge of the Italian language.

With regard to Articles 1 and 2 of DPCM no. 174 of 1994 it seems necessary to emphasise some key points. First of all, as correctly observed by legal scholars even before the Communication from the Commission, *Free movement of workers: achieving the full benefits and potential* (COM/2002/694 final), the list of posts reserved for Italian nationals under Art. 1 is too broad, and particularly the categories contained in Article 1 (a) and (d) (on Article 1 (a) see also para. 2.1. below).

On the one hand it can be questioned whether only posts regulated by Article 16 of Act 28-2-1987 n. 56 are not connected with the exercise of official authority,[11] on the other hand the administrations concerned are not the same mentioned by the European Commission action plan.[12]

Article 1 does not seem in accordance with the EC Treaty, because Community law does not allow to reserve for Italian nationals posts of mere technical or administrative nature when the employer is a body entrusted with the exercise of public powers.[13]

The doubtful conformity of the list of the posts reserved for Italian nationals ex Art. 1 with Community law seems to result also from a concrete case.

As an example, the Decree of the Foreign Minister 18-10-2006 no. 292 (*Regolamento recante la disciplina per il reclutamento del personale dell'area della promozione culturale, area funzionale C, posizione economica C1, profilo professionale di addetto/coordinatore linguistico, GURI* no. 290 of 14-12-2006) lays down the general requirement of the Italian nationality as necessary to the participation to the competition for the assignment to the post of "*addetto/coordinatore linguistico*" in the Foreign Affairs Ministry. It is important to note that the post of "*addetto/coordinatore linguistico*" in the Foreign Affair Ministry, involving only administrative tasks, does not imply the exercise of public authority and responsibility of the safeguarding the general interests of the State, although this post is probably included in the category of Art. 1.d.

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9 "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."

10 "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;
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".

11 R. CARANTA, at 45 s.

12 R. CARANTA, at 46.

13 C. DE ROSE, *L'accesso ai pubblici impieghi dei cittadini dell'Unione europea*, *Consiglio di Stato*, 1994, II, 1741, at 1748.

Secondly, as Community law and the rationale of Article 48.4 (now 39.4) have to be held in due consideration, Art. 2 of DPCM no. 174 of 1994 must be interpreted restrictively (P. PASCUCCI, *Accesso agli impieghi nelle pubbliche amministrazioni*, A. BAYLOS GRAU, B. CARUSO, M. D'ANTONA, S. SCIARPA (eds.), *Dizionario di diritto del lavoro comunitario*, Bologna, Monduzzi, 1996, 397) and the functions listed in Article 2 are without doubts connected with the exercise of official authority (R. CARANTA, at 46).

Finally, the list of posts reserved to Italian citizens ex Art. 1 of DPCM no. 174 of 1994 and the posts entrusted with the functions that have to be performed only by Italian citizens ex Art. 2 seem to coincide partially with those specific categories of workers in the public sector which are still regarded as civil servants subject to a public law regime (DPR no. 165 of 2001, Art. 3, paragraphs 1 and 1-bis).

This fact seems to be supported by the circumstance that the access to a post as fire fighter in the National Fire Department[14] (posts which are still subjected to a public law regime under the Italian law) is subordinated to the requirement of the Italian nationality, even if not included in the list of Art. 1 of DPCM no. 174 of 1994: the access to the posts in the fire brigade is conditional upon Italian nationality.

To conclude, notwithstanding the general principle of access to the employment in the Italian public sector guaranteed to the EU citizens by Art. 38 Legislative Decree no. 165 of 2001, DPCM no. 174 of 1994 and its implementation practice does not seem in accordance with the position of the European Commission on posts which a Member State may lawfully reserved under Art. 39.4 ECT, as expressed in the aforementioned Communication, *Free movement of workers: achieving the full benefits and potential.*

First of all, the free movement of EU workers in the Italian public sector and the open access to the public work that has to be guaranteed to EU citizens does not seem either independent of any specific sector or only post-related, as should be according to the position of the European Commission.

Secondly, even if "the Commission still considers (as stated in 1988) that the derogation in Article 39(4) EC covers specific functions of the State and similar bodies such as the armed forces, the police and other forces of the maintenance of order, the judiciary, the tax authorities and the diplomatic corps" as stated in its Communication, "However, not all posts in these fields imply the exercise of public authority and responsibility of the safeguarding the general interests of the State; for example: administrative tasks; technical consultation; maintenance. These posts may therefore not be restricted to nationals of the host Member State".

The Italian regulations, as already said, do not seem to distinguish, within the fields afore-mentioned by the Commission, the posts implying the exercise of public authority and responsibility of safeguarding the general interests of the State which are therefore lawfully reserved to Italian citizens, from those posts involving administrative tasks, technical consultation or maintenance, which have to be opened to EU citizens.

Moreover, the national regulations do not limit the posts reserved to Italian nationals with regard to the "specific functions of the State and similar bodies such as the armed forces, the police and other forces of the maintenance of order, the judiciary, the tax authorities and the diplomatic corps" but extends the posts reserved with regard to other sectors not included by the Commission.

As clarified by the Commission in its Communication, "in relation to posts in State ministries, Regional government authorities, local authorities, central banks and other public bodies, which deal with the preparation of legal acts, their implementation, monitoring their application and the supervision of subordinate bodies, the Commission takes a stricter approach than it did in 1988. These functions were then described in a general way giving the impression that all posts linked to such activities were covered by the derogation of Article 39(4) EC. This would have allowed Member States to restrict nearly all posts (apart from administrative tasks, technical consultation and maintenance) to their nationals, a point of view which has to be re-examined in the light of the Court's jurisprudence of the 1990's. It is

14 *Ordinamento del personale del Corpo nazionale dei vigili del fuoco a norma dell'articolo 2 della L. 30 settembre 2004, n. 252, GURI* no 249 of 25-10-2005, OS.

important to note that even if management and decision-making posts which involve the exercise of public authority and responsibility for safeguarding the general interests of the State may be restricted to nationals of the host Member State, this is not the case in relation to all jobs in the same field. For example, the post of an official who helps prepare decisions on granting planning permission should not be restricted to nationals of the host Member State".

On the contrary the Italian regulations formulate in general and broad terms the exceptions to the open access to employment in the public sector for EU citizens (that is in general the employment related to posts "in State ministries, Regional government authorities, local authorities, central banks and other public bodies, which deal with the preparation of legal acts, their implementation, monitoring their application and the supervision of subordinate bodies"), instead of formulating the exceptions in more specific terms, that is the public employment can be reserved to Italian nationals only in relation to the single post which involves specifically the exercise of the afore mentioned functions.

To sum up, it is doubtful whether the Italian legal system with regard to its practice (but not its legislation) complies with Article 39(4) EC as interpreted by the European Commission. As observed by the same Commission in its aforementioned Communication, *Free movement of workers: achieving the full benefits and potential*, "Member States are also not allowed to exclude migrant workers from recruitment competitions unless all posts accessible via that competition fulfil the criteria of Article 39(4) EC (e.g. a competition for judicial posts could be restricted to nationals, whereas a competition for senior posts in general administration should in principle be open to migrant workers). After the competition the hiring authority then has the duty to evaluate the fulfilment of those criteria according to the tasks and responsibilities of the post in question".

1.2. Language requirement

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".

According to Article 3 of Legislative Decree no. 165 of 2001, EU citizens must have an adequate knowledge of the Italian language in order to access to posts in the public sector.

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 no. 4 of 1948, *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 no. 12 of 1993, *Accertamento della piena conoscenza della lingua francese per il personale ispettivo, direttivo, docente ed educativo delle istituzioni scolastiche dipendenti dalla Regione*).

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 no. 38 of 2001, *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 no. 38 of 2001, *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 no. 297 of 1994, *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 no. 752 of 1976, *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 no. 297 of 1994, *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 no. 75 of 1976). 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 no. 670 of 1972, *Approvazione del testo unico delle leggi costituzionali concernenti lo statuto speciale per il Trentino-Alto Adige*).

Finally the Legislative Decree no. 165 of 2001 lays down the knowledge of at least one foreign language (beside the knowledge of the most widespread information applications) as general requirement to the access to posts in the public sector. According to Article 37, since 1-1-2000 notifications of competition related to the assignment of posts in the public sector provide that the knowledge of at least one foreign language and of the most widespread information applications by every candidate has to be checked.

1.3. Recruitment procedures

The Italian Constitution states that: "employment in public administration is accessed through competitive examinations, except in the cases established by law" (Article 97, paragraph 3).

Thus the Constitutional Court held many times that the main mean of recruitment of civil servants is the open competition (for example see Constitutional Court, judgment 24-7-2003 no. 274). According to an unambiguous constitutional jurisprudence, taking into account that the rule of the open competition as mean of recruiting employees in the public sector is a constitutional principle, the administration can avoid opening the selection procedure only if important reasons require it. In particular a selection procedure to assign posts in a specific public service reserved only to persons working in the same service is qualified as an exception to the general principle of the open competition and has therefore to respond reasonably and proportionally to reasons of general interest.

As a result, when the competition notice lists specific requirements, such as a fixed-term professional experience or a specific professional qualification in a particular field, that the applicant has to fulfil, these requirements have to respond to a real need of the administration and cannot amount to a discrimination among applicants, prohibited by the Constitution (Art. 3). For example the Council of State (judgment no. 288 of 1999) held that a provision concerning open competitions for the access to a post in the public sector reserving a better treatment to Italian national than EU citizens is illegal.

Therefore, according to Article 35 of Legislative Decree no. 165 of 2001, the assignment of posts in the public sector has to be done by a single contract following a selection proce-

dure in conformity with the principles contained in paragraph 3, aimed to control the required skill, which has to be suitable for guaranteeing the open access. For the purpose of the open access Article 35, paragraph 3, states that every selection procedure aimed to the assignment of positions in the public administration has to comply with the principles, also enshrined in Art. 97, paragraph 3, of the Constitution, that: a) a proper notice of the selection procedure has to be done to the public and the procedure has to be carried out through fair modalities able to guarantee the inexpensiveness and the promptness; b) the procedure adopts objective and transparent criteria in order to check that the candidates enjoy the ability and the skill required by the position to be assigned; c) the procedure guarantees the equal treatment to men and women; the procedure is de-centralised with regard to the level of the public employer in the national structure (to understand in its broad meaning); the examination commission is formed by persons of recognized competence in the specific field related to every single competition and selected among public employees, professors and persons from outside the Public administration, which are not part of the top management of the public employer, are not entrusted with a political office, and are not agent of trade unions in the public sector.

In conclusion the Italian legal system, providing for the open competition as principal mean of recruitment of public employees for the purposes of avoiding discrimination between citizens, indirectly may guarantee equal treatment among nationals and EU citizens with regard to the access to employment in the public sector.

Notwithstanding the principle of the open competition is well established under Italian law, as already said, it is useful to recall that the Italian Regions have an exclusive competence related to the organization of their own Regional public sector that they exercise by Regional laws.

Even if Italian Regions are subject to the general rule of the open competition enshrined in the Constitution (Article 97, paragraph 3) and also in Legislative Decree no. 165 of 2001 (which in any case shall apply entirely only to the central level of public administration), it does not seem that they always comply with constitutional and ordinary laws within the exercise of their own competence in this field, as results from a rich constitutional jurisprudence.

To make an example, this was the case of the Regional law of *Regione Abruzzo* no. 6 of 8-2-2005, that the Italian Government submitted to the Constitutional Court with regard to its conformity with the constitutional principle of the open competition. On the one hand this Regional law provided for the assignment of 60% of the vacant posts in the management staff of Regional administration to persons already working in the Regional public sector through a reserved selection procedure (Article 35); on the other hand it totally reserved the access to a specific office in the Regional Council to a particular category of Regional employees through a reserved *corso-concorso*, a special kind of selection procedure (Article 39).

The Constitutional Court held Articles 35 and 39 Regional law of *Regione Abruzzo* no. 6 of 2005 contrary to the constitutional principle of the open competition. As stated by the Court in its judgement 3-3-2006 no. 81 at paragraph 4, "this Court stated many times (see the latest judgements no. 159 of 2005 and no. 34 of 2004) that the principle of the competition open to the public constitutes the rule for the access to the employment in the public sector, due to the constitutional purpose of guaranteeing the neutrality and the efficiency of the public service. This well-established principle has to be interpreted as to mean that any possible waiver can be justified only by specific and extraordinary reasons of public interest". In particular with regard to the posts totally reserved to a specific category of employees already working in the Regional administration *ex* Article 39 Regional law of *Regione Abruzzo* no. 6 of 2005, the Court, after noting that this specific category is already assigned to posts implying the same tasks of the posts to be assigned by the new selection procedure, stated that there is no specific reason suitable to justify the waiver to the principle of the open competition.

The case of Regional law of *Regione Abruzzo* is not isolated but represents only the last case among many others.[15]

On the one hand, it could occur that the Regional regulations related to the access to employment in the public sector, amounting to a discrimination among applicants (irrespective of their Italian or EU citizenship) – as results from the quoted constitutional case-law –, do not guarantee at same time equal treatment to EU citizens. On the other hand, the Italian Regions, within the exercise of their own competence, are subject to Community law besides the constitutional rules under Article 117, paragraph 1, of the Italian Constitution. Therefore the Constitutional Court may be requested by the Italian Government to hold a Regional law contrary not only with the constitutional law but also with Community law. For instance this was the case of the Regional law of *Regione Abruzzo* no. 14 of 1-4-2004 that stopped the vaccination program against the bluetongue up till 31 December 2004 (Article 1) and allowed at the same time the free movement and the butchering of the animals in the Regional territory by a rule repealing in part every other contrary provision (Article 2). The Constitution Court held Articles 1 and 2 not in conformity with the Constitution because of their clear contrast to Council Directive 2000/75/EC laying down specific provisions for the control and eradication of bluetongue (judgement 3-11-2005 n. 406).

Last but not least a key role is attributed by Legislative Decree no. 165 of 2001 (Article 24) to the collective agreements with regard to the economic treatment of the employees in the public sector (both fundamental and accessory economic treatment), to the career's advances and professional development in general, and to the determination of the tasks of the employees related to each office (to understand in the meaning of each service in the public sector) within the Public Administration.

Thus because the collective contracts concluded between the A.R.A.N.[16] and the trade unions regulate the issues related to the career's advances and the professional development in general within each office, they determine also the question of upgrading of employees to superior tasks within the same public office. Therefore to assign the posts related to superior tasks within a specific public office a public employer could open up an internal recruiting procedure, that is a competition reserved only to its employees in the same office charged with inferior tasks.

To open up an internal recruiting procedure by a public employer in accordance with a collective agreement could be concretely contrary to the principle of the open competition, due to the fact that the posts to be assigned, even if qualified as an upgrade to superior tasks within the same office by a collective agreement, have to be recognized actually as posts related to the superior office. It is sometimes difficult to distinguish between posts related to superior tasks within the same office and posts related to a different and superior office.
Thus the Constitutional Court could recognize *in concreto* the professional advancement as regulated by collective contracts as a form of recruitment, which requires the passing of a procedure aimed at verifying the ability of the person, on the basis of Article 97 of the Constitution.
To conclude, even if, according to the position of the Commission (*Free movement of workers: achieving the full benefits and potential*), "Member States do not have to open up internal recruiting procedures to migrant workers, as long as nationals who are not working in

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15 See also for instance other judgments of the Constitutional Court: 26-5-2006 no. 205 holding the Regional law of *Regione Umbria* no. 2 of 1-2-2005 that reserved 40% of vacant posts to be assigned by open competition to persons which had been working for the same Region during a period of at least twenty-four months up from 1 January 1995 to 31 December 2004 contrary to principle of the open competition; judgement 10-5-2005 no. 190 holding the Regional law of *Regione Marche* no. 4 of 24-2-2004 that reserved entirely the vacant posts to be assigned in the Regional department of the National Health Care Service to the staff already working under short-term employment contracts in private hospitals entrusted by contract with Regione Marche to exercise the public service in the health care sector contrary to the Constitution; 6-7-2004 no. 205, holding the Regional law of *Regione Valle d'Aosta* no. 23 of 14-11-2002 that reserved 100% of the vacant posts to be assigned in the labour politics department of the Regional administration to persons already working in the same sector through a *corso-concorso* (Articles 1 and 2) contrary to the principle of the competition open to the public.

16 The official web site of A.R.A.N. is: http://www.aranagenzia.it/.

the same service of the public sector would also not be allowed to apply to these kind of posts or competitions", the internal recruiting procedure could amount to a discrimination among applicants contrary to the principles of the competition open to the public and of equal treatment under the Italian legal system.

Follow-up of Burbaud case
With regard to follow-up of Burbaud case it is necessary to remark that 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*. The *corso-concorso* 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 training. It is important to note that this mean of recruiting, even if it seems similar to the French recruiting system (in the Burbaud case through the *École nationale de la santé publique*), is different with regard to at least two important features. First of all, at the end of the training course and the training organized by the *Scuola superiore* the candidate has to pass a final exam. Secondly, 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 training is 30% above the total number of vacant posts (see Article 28 of Legislative Decree no. 165 of 2001). Thus the *corso-concorso* has to be qualified as an open competition under Italian law.

Taking into account that the access to employment in the public sector is subjected to the rule of the competition open to the public under the Italian legal system, 70% of vacant posts that have to be assigned are usually filled by the ordinary competition and 30% by the *corso-concorso* (Decree of the President of the Republic no. 272 of 2004).

To sum up, it is not possible to exempt from the training course and the training a national of a Member State in a position similar to Ms Burbaud's one, as the ECJ required in its judgment, because the *corso-concorso* is different from the French procedure. No study about the effects of the Burbaud case on the Italian system is available.

1.4. Recognition of diplomas

A special procedure for the recognition of diplomas for the access to posts in the public sector is laid down by art. 38, paragraph 3, of Legislative Decree no. 165 of 2001,[17] which states that:

> Omissis
> "3. In those cases that are not regulated by Community legislations [i.e. those cases not covered by Directives no. 89/48/EEC and 92/51/EEC], a Decree of the President of the Council of Ministers, issued at the request of the competent Ministers, provides for recognitions of diplomas and professional qualifications. The recognition of academic qualifications and experience necessary to the Community citizens to participate to the open competition or to be appointed is to be decided by reference to the same proceeding."

In addition to this procedure, Law 25-1-2006 no. 29[18] (*Disposizioni per l'adempimento di obblighi derivanti dall'appartenenza dell'Italia alle Comunità europee. Legge comunitaria 2005*, *GURI*, 8-2-2006 no. 32 OS), Article 12, states that, without prejudice to existing legislation, whenever it is necessary to evaluate if a degree or an attestation of competence awarded by another Member State is equivalent to one awarded in Italy, the responsible body decides on the case, subject to an opinion by the Ministry of Education, University and

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17 "Articolo 38: Accesso dei cittadini degli Stati membri della Unione europea.
omissis
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."

18 See Chapter XII.

Research, which has to be delivered within 180 days of the request. It is important to note that it is not clear what the scope of this provision is.

2. Equality of treatment

As already said, in the Italian legal system the principle of equality of treatment and the open competition as mean of recruitment of employers in the public sector are enshrined in the Constitution (respectively Articles 3 and 97). The violation of the principle of equality is more probable with regard to the access to employment and, on the contrary, rare with regard to the treatment after becoming public employees.

2.1. Recognition of professional experience for access for access to the public sector

In the Italian legal system there is no general legislation on the recognition of professional experience gained by applicants to a post in the public sector in Italy or in other Member States. This depends on the constitution principle of the open competition and the related principle of equal treatment with regard to the access to employment in the public sector. As already said, the civil servant who wants to attain a higher office has to pass an open competition or an equivalent mean of selection, that are selection procedures open to the public (see above paragraph 1.3). The public servant performing tasks higher than his/her office is not entitled to the corresponding office but receives the economic treatment corresponding to the higher office (Article 52 Legislative Decree no. 165 of 2001).

Even if the requirement of professional experience (wherever gained) and its recognition is not the rule within the Italian legal framework, there are however some exceptions.

In the first place, the professional experience is a formal requirement to participate to a selection procedure to assign posts as managers in the public sector (it has to be recalled that, according to the DPCM no. 174 of 1994, the access to these posts can be reserved to Italian citizens). According to Article 28 Legislative Decree no. 165 of 2001 the management staff in the public service (*dirigenza pubblica*) is recruited both by a competition based on tests (Article 28, paragraph 2) and by a special kind of competition called *corso-concorso* (Article 28, paragraph 3). According to Article 28, paragraph 2, to participate in the competition based on tests it is necessary (besides a degree) a professional experience in the public service, the duration of which depends on the kind of service the applicant has performed. Italian nationals with an academic degree, who do not work as public employees, may participate in the competition if they have worked for an international organization for at least four years in a position that requires an academic degree (nothing is said about the participation of UE citizens). According to Article 28, paragraph 3, to participate in the *corso-concorso* it is necessary (besides a degree) a post-graduate degree, or a professional experience of at least five years in the public or private sector. The *corso-concorso* is the main mean of recruitment of managers in the public sector among persons who are not yet public employers, but have (besides a degree) a post-graduate degree, acquired in Italy or abroad.

In the second place, a special procedure for the recognition of professional experience for the access to posts in the public sector is laid down by art. 38, paragraph 3, of Legislative Decree no. 165 of 2001. According to this provision, the experience necessary to the Community citizens to participate to the open competition or to be appointed in the public sector is recognized by a Decree of the President of the Council of Ministers, issued at the request of the competent Ministry. It is not clear the scope of application of this procedure and its relationship with the above-mentioned Article 28 Legislative Decree no. 165 of 2001.

In the third place, a further exception is provided for in the special regulation concerning the recruiting of the teachers.

As results from the case C-278/03 *Commission vs Italy* [2005], with regard to the teaching sector, the

> "[...] recruitment of teachers in Italy is carried out by three distinct methods, namely, for 50% of the posts available per academic year, by way of competitions based on qualifications and tests in accordance with Article 400 of Legislative Decree No 297 approving the single text of the legislative provisions applicable to teaching and relating to schools of all types and levels (Decreto Legislativo n° 297,

recante approvazione del testo unico delle disposizioni legislative vigenti in materia di istruzione, relative alle scuole di ogni ordine e grado) of 16 April 1994 (ordinary supplement to GURI No 115 of 19 May 1994, hereinafter Legislative Decree No 297/1994'), and, for the remaining 50%, by way of permanent aptitude lists under Article 401 of that legislative decree; special lists of supply teachers, comprising the names of teachers authorised to act as replacements, are used to fill posts temporarily vacant" (par. 10).

With regard to the recruitment of teaching staff by means of permanent aptitude lists, according to Decree-Law no. 97 of 2004 (now Law no. 143 of 2004), Annex B, paragraph 3 (letter e), the Public administration has to award the same points either to the teaching professional experience acquired in other Member States or to the teaching professional experience acquired in Italy. From the academic year 2005/2006 the professional teaching experience acquired abroad (working for Italian schools abroad or for schools of any Member State) is recognized as equal to the professional teaching experience acquired in Italy, no matter when the experience abroad is acquired.

It was doubtful whether it could be recognized the professional experience acquired before the academic year 2005/2006.[19] The Council of State stated (judgement 17-2-2006, no. 673[20]) that the service performed abroad during academic years before the 2005/2006 was subjected to the principle of the equal recognition. This interpretation results from the literal meaning of the provision, that do not distinguish between the service performed before or the service performed after the effective date, and from the ratio of the provision aimed to guarantee equal treatment of the candidates from the academic year 2005/2006, irrespective of when the service was performed.

This case-law has been followed by the administrative tribunal of first instance of *Campania* with regard to the recognition of the teaching experience acquired in Great Britain for the purpose of fulfilling a requirement necessary to participate to a recruiting competition (see T.A.R. Campania, Salerno, section 1, judgement 29-6-2006, no. 880).

2.1. Recognition of professional experience for the purpose of determining the professional advantages

The economic treatment of civil servants is set by the national collective employment agreement for each sector of the public administration. According to Article 45 of the Legislative Decree 2001 no. 165, each public administration has to grant equality of treatment to its employees. The economic treatment is related to the office. More then one salary-scale is usually set for each office. In order to attain a high salary scale within the same office, the employee has to pass an internal selection. An open competition is not required, because the civil servant does not accede to a higher office, but s/he only improves her/his remuneration.

19 See, for instance, T.A.R. Veneto, section II, judgement 5-11-2004 no. 3872.
20 See Chapter XII.

CHAPTER V. MEMBERS OF THE FAMILY

1. Residence rights

Concept of "member of the family"

Law in force in 2006: Article 3 of DPR no. 54 of 2002, as modified by Article 20 of Law 25-1-2006 no. 29;[21] Article 29 of DPR no. 286 of 1998.

According to DPR 2002 no. 54, the members of the family of the European Union citizens entitled to stay in Italy are defined in two different ways. Those who are considered members of the family of the worker, of the self-employed, of the provider of services or recipient of services are: the spouse, minor children or dependent children, dependent relatives in the ascending or descending line, and other relatives of the worker, self-employed, provider of services, recipient of services, or of the spouse, if they are dependent on them or on relatives in the ascending line, or if they in the country of origin were living under the same roof, irrespective of their nationality. Those who are considered members of the family of students or other nationals of a Member State who enjoy the right of residence in Italy, are defined by reference to Article 29 of DPR no. 286 of 1998 (general law on immigration) and are: dependent spouse not judicially separated; minor children of the European Union citizen or of his/her spouse, dependent on the European Union citizen, provided that they are not married or judicially separated; dependent parents of the European Union citizen; relatives within the third degree of kinship, dependent and disabled according to Italian law.

The definition of those members of the family who are entitled with Community rights seemed not to be completely in line with EC law, both because the law required the children of the EC citizens to be a "minor" (in Italy the legal age is 18), and because the members of the family of beneficiaries of Directives no. 90/364/EEC, 90/365/EEC and 93/96/EEC were defined in a much stricter way than Community Directives require.

Article 20 of Law 25-1-2006 no. 29 amended Article 3 of DPR no. 54 of 2002: it now stated that the children under the age of 21 of the worker, of the self-employed, of the provider or recipient of services, enjoy the right to stay and the members of the family of the beneficiaries of Directives no. 90/364/EEC, 90/365/EEC and 93/96/EEC are no more defined by reference to Article 29.1 of DPR 1998 no. 286, but directly by the law: the right to stay is now recognized to the spouse not judicially separated, to the children under the age of 21 or to dependent children, to the parents of the European Union or of his/her spouse.

Draft transposing Directive no. 2004/38/EC

The act of transposition follows the same pattern of the Directive. Article 2 gives the same definitions as the Directive, Article 3 lists the beneficiaries. Both Article 2 and Article 3 reproduce literally Article 2 and 3 of the Directive. That means that in both Article 2 we read "the partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a Member State, if the legislation of the host Member State treats registered partnerships as equivalent to marriage and in accordance with the condition laid down in the relevant legislation of the host State". Since Italy neither regulates registered partnership nor equates them to marriage, the scope of the provision is not clear. The Government said that that act of transposition was going to entitle the unmarried partner with the right to enter and reside. Nevertheless, the provision is far from clear, and, given its literally meaning, it is not sure that it will be interpreted according to the meaning envisaged by the Government.

When it comes to Article 3, the only amendment to it relates to the sentence "the partner with whom the Union citizen has a durable relationship duly attested", to which the Government added "by the Union citizen's State". This amendment had been suggested by both Parliamentary Committees. It is not clear however if only the State of origin is compe-

21 See Chapter XII.

tent (as a literal interpretation would suggest) or also the State from which the Union citizen comes. Moreover, the Union citizen seems denied of the possibility to prove his/her partnership by other means but a document issued by his/her State. As in the following articles of the act partners are never contemplated as people entitled to entry and stay, it is not clear which scope the provision could have.

Entry and residence conditions of members of the family

Texts in force: Articles 3 and 5 of DPR no. 54 of 2002 and DPR no. 286 of 1998.
Entry and residence conditions of members of the family who are not Union citizens are laid down both in the general law on immigration and in the special law devoted to Union citizens, and often have to be constructed by way of interpretation. A general provision that clearly regulates their treatment is missing. This situation has been a source of confusion and has sometimes led to treat non EU members of family as the other foreigners.

Visa requirements

DPR 2002 no. 54 was silent about visa requirements. Hence the matter was regulated by the general law on immigration. According to Article 4 of DPR 1998 no. 286, a visa is necessary to enter the Italian territory. The applicant must prove the reasons of the stay and be in possession of sufficient economic resources to live on during his/her stay in Italy and to come back to his/her country. In case of visa for family reunification, the diplomatic or consulate authority verifies if the marriage is real. A visa for family reunification is refused if the person represents a concrete and present threat to public policy and public security. The refusal of a visa for family reunification must be motivated and can be challenged in front of the administrative judge (Corte di Cassazione, sezioni unite, 23-3-2005 no. 6426). It was doubtful if the leave of the Police Headquarters, that the law makes mandatory for the reunification of foreigners, was necessary. By an explanatory note, the Ministry of Interior makes clear that it is not requested (Circolare del Ministero dell'Interno, Dipartimento per le libertà civili e l'immigrazione, Direzione centrale per le politiche dell'immigrazione e dell'asilo, 19-12-2006). The mere fact that the explanatory note was issued is a sign that a non correct application of the law to the detriment of non EU members of the family could not have been taken place.

Draft transposing Directive no. 2004/38/EC

According to Article 5 (2) the non EU members of the family are required to have an entry visa. A family member that on the occasion of a border control does not have the travel documents or the required visa, is given a 24 hours period to bring the necessary documents or to prove by any means allowed by the law that s/he is entitled with the right to move. If s/he fails to bring the documents or to prove his/her right, the public authority can turn him/her back. The "reasonable period of time" of the Directive is quantified in 24 hours.

Alert issued for the purposes of refusing entry

The ECJ has stated that the national authorities could not refuse the entry or a visa for the purpose of entry to a national of a third country who is the spouse of a Member State national, on the sole ground that he or she was a person for whom an alert was entered in the Schengen Information System for the purposes of refusing him or her entry (case C-503/03, *Commission v. Spain*, 2006 ECR, I-1097).

If a case had been introduced in Italy, there are good reasons to believe that the Italian authorities – or the judges, if the case would be – would have reached a different conclusion from that of the Spanish authorities.

M. PAVONE (*Unione europea e Sistema Informativo Schengen*, *immigrazione.it*, no. 18 of 15-2-2006) gives notice of some decisions of judges of first instance stating that an alert

entered in the SIS by an other Member State does not free the Italian Police from the duty to ask the other Member State for the reasons underlying the alert and to communicate those reasons to the foreigner.

Although given in a totally different case, not linked to EC law, an order of the Italian Constitutional Court has to be recalled. Two Italian judges referred to the Constitutional Court a question about the constitutional legitimacy of a law (article 1 § 8 *b* of law 2002 n. 222) which laid down that a (non EC) foreigner worker could not benefit from an amnesty if he or she was a person for whom an alert has been issued for the purposes of refusing entry. The Constitutional Court rejected the reference (order 3-3-2006 no. 86), stating that the referring judges could interpret the law in accordance to the Constitution. Even if the order does not state it explicitly, it is clear that the correct interpretation is the one according to which the SIS alert can not be the sole ground on which to refuse a benefit (for this interpretation, see B. NASCIMBENE, *Corte di giustizia e Corte costituzionale sulla «segnalazione Schengen»*, *Quaderni costituzionali*, 2006, 360-365; C. AMALFITANO, *Segnalazione nel SIS ai fini della non ammissione nello «spazio Schengen». Profili di incompatibilità comunitaria e di legittimità costituzionale*, *Diritto dell'Unione europea*, 2006, 487-508). Although an order of the Constitutional Court is not binding, it can be relied upon by other judges. It should be noted, however, that a judge of first instance (TAR Lombardy, sec. I, judgment 5-7-2006 no. 2020), called upon to adjudicate on facts similar to those in the case submitted to the Constitutional Court, ruled that the alert prevented the (non EC) foreign worker to benefit from the amnesty and stated not to have any duty to ask the State that entered the alert in the SIS for the reasons of the entry.

Residence conditions and related administrative formalities

The general law on immigration states that, in case of a stay for more than 90 days, the foreigner has to submit an application for a residency permit within eight business days of entry. The residency permit is for the same reason as the visa. Non EU members of the family are not exempted.

The residency permit for non EU members of the family is the residency card regulated by Article 9 (2) of DPR no. 286 of 1998 (general law on immigration). According to Article 9, two kinds of residency card can be issued: the first is regulated by para. 1 and is issued to foreigners; the second is regulated by para. 2 and is issued to non EU family members. Whereas para. 1 lays down the substantial conditions that the applicant has to satisfy, para. 2 is silent on the matter (the only condition to prove is the status of spouse or member of the family). Hence, it is doubtful whether the requirements of para. 1 are also relevant for para. 2. In addition to that, very few explanatory notes were issued with reference to para. 2.

The applicant may be issued with a residency card according to para. 1, if s/he: a) is regularly residing in Italy for at least six years, b) has an income not below the total amount of the social security allowance, c) presents a certificate of housing suitability, d) has not been sentenced for one of the offences mentioned in Article 380 of the Code of Criminal Procedure, as well as, premeditated offences mentioned in Article 381 of the Code of Criminal Procedure, or had a sentence pronounced, even not definite, unless a rehabilitation has been obtained.

Non EU members of family have not to satisfy the condition of letter a) (Circolare del Ministero dell'Interno, no. 300/C/2001/6357/A12.214.9/1ª Div.). As far as the other requirements were concerned, the situation was not clear before Article 20 of Law 25-1-2006 no. 29, which modified Article 5 of DPR no. 54 of 2002, about the administrative formalities for non EU members of the family. After the amendments the documents to be attached to the application are the same as those required to the member of the family who is a citizen of the Union, putting an end to the previous difference of treatment.

Notwithstanding the amendment, still unresolved was the matter of the legal regime of the residency card, about the duration (the residence permit ex Article 9 was of unlimited duration) and the terms of repeal (which were different according to each law. In particular, according to Article 9, the residency card is annulled by the Questore, if a sentence has been

pronounced, even not definitive, for the offences mentioned in Article 380 of the Code of Criminal Procedure, as well as, premeditated offences mentioned in Article 381 of the Code of Criminal Procedure).

Article 9 of law on immigration was subsequently modified and now it regulates the permit for third-country nationals who are long-term residents, provided for by Directive 2003/109/EC. Hence, from 14-2-2007 (date of entry into force of the amendment to Article 9) to 11-4-2007 (entry into force of the act transposing Directive no. 2004/38/EC) a legal void was created.

If a foreigner marries an Italian national in Italy, Article 19 c) of DPR no. 286 of 1998 is applicable. According to this provision, a foreigner can not be deported – unless in a restricted number of cases – if s/he lives with his/her Italian spouse. The (even illegal) foreigner is thus issued with a residency permit for family reasons. It is not clear if this provision applies to the EU citizen's spouse. If the answer was positive, it would be to ascertain what kind of residency permit (the residency card or the residency permit for family reasons) should have to be issued.

Draft transposing Directive no. 2004/38/EC

In case of a stay for more than three months, the Union citizen has to register with the Commune of the place of residence. When the Commune receives an application to enter the non EU family member in the population register, it forwards it to the Police Headquarters (Questura).

It is worth of note that Article 7 (4) of the Directive is not transposed. That means that students can be accompanied or joined not only by their spouses and children, but also by their direct relatives in the ascending line.

Article 10 of the act of transposition is devoted to the residency card of the family members of an Union citizen who are not nationals of a Member State. It transposes Articles 9 to 11 of the Directive. These persons have to submit a request for a residence card to the Police Headquarters (Questura) of the place of residence. Among other documents, the entry visa has to be attached to the application. The provision does not regulate which relevant authority has to certify that the family members are dependant on the Union citizen. The residence card is valid for five years, irrespective of the duration of the stay in Italy.

Articles 11 (about the retention of the right of residence by family members in the event of death or departure of the Union citizen) and 12 (about the retention of the right of residence by family members in the event of divorce or annulment of marriage), reproduce Articles 12 and 13 of the Directive. The main points are the followings.

Nothing is stated in the event of the family member being the partner: s/he enjoys no protection in case of annulment of the registered partership, unless has a personal right of residence.

If the family member who is not a Member State national has not been residing in Italy for one year – condition laid down by the Directive, and reproduced by the act of transposition – s/he can nonetheless be granted the right of residence. This can happen if s/he fulfils the conditions laid down by Article 30 (5) of the Legislative Decree 1998 no. 286 (general law on immigration). This provision regulates the residency permit for family reasons. It states that in case of death, divorce or annulment of the marriage, the residency permit for family reason can be converted into a residency permit for work or study reasons.

The Directive states that the family member retains the right of residence if "this is warranted by particularly difficult circumstances, such having been victim of domestic violence while the marriage or registered partnership was subsisting" (Article 13 (2) c of the Directive). The act of transposition makes clear that the family member retains the right of residence if the person is a victim of a crime directed against the person committed in the family, either if the criminal proceeding is pending or where a sentence has been passed.

The right of permanent residence is certified by a document issued by the Commune of the place of residence, within thirty days of the request (Article 16 of the act of transposition). The non EU family's member entitled with the right of permanent residence, have to

ask the Police Headquarters for a "permanent residency card". The Police Headquarters has to issue this document within ninety days of the request (Article 17 of the act of transposition).

Recent literature

E. BERGAMINI, Il difficile equilibrio fra riconoscimento del diritto alla libera circolazione, rispetto della vita privata e abuso di diritto, *Diritto dell'Unione europea*, 2006, 347-368: on the case law of the ECJ about the rights of family members.
F. COSTANTINI, *La carta di soggiorno per il cittadino di paese terzo familiare del cittadino italiano o di altro Paese appartenente all'Unione europea*, immigrazione.it, 2006.
L. FADIGA, Genitori extracomunitari di cittadino dell'UE: la Cina è vicina, *Famiglia e diritto*, 2006, 19 (on case C-200/02, Zhu [2004] ECR I-9925).

2. Access to work

Text in force in 2006: Article 3 (5) of DPR 2002 no. 54

The equal treatment of the Union citizen's members of the family, irrespective of their nationality, in relation to access to employment is stated in general terms by Article 3 (5) of DPR 2002 no. 54. In relation to the taking up and conduct of employed and self-employed activities, regulations in force that apply to Italian nationals are also applicable to the members of the family of all the beneficiaries of the right to stay, except for those employments in the public sector that can be reserved to Italian nationals.

Draft transposing Directive no. 2004/38/EC

Article 6 (3) states that, subject to special regulations in line with the EC Treaty and EC laws, the Union citizen's family members staying in Italy for up to three months, are subject to the same obligations as Italian nationals in the exercise of allowed activities. It seems not clear what is the scope or the content of the provision.

According to Article 19 (1), the Union citizen's members of the family are entitled to take up employment or self-employment in Italy, except those activities that the law, in conformity with EC law, reserves to Italian nationals.

3. Access to education (study grants)

Grants and other benefits for students are awarded on a non discriminatory basis. Article 20 of Law 1991 no. 390 states in general terms that the benefits regulated by this law and by other Regional laws are given to foreign students in the same ways and under the same conditions as Italian students.

4. Other issues concerning equal treatment (social and tax advantages)

The unemployment benefit and the children and family allowance are the two main social security mechanisms that EU workers in economic difficulties may benefit from. All salaried employees are entitled to the unemployment benefit, without distinctions of status. The children and family allowance is distributed along with the monthly salary to those with very low incomes.

Draft transposing Directive no. 2004/38/EC

According to Article 19 (2) the Union citizen's members of the family, irrespective of their nationality, enjoy equal treatment with Italian nationals. During the first three months, the grant of social security benefits is not possible, but those rights to social benefit that are associated with the activity pursued or otherwise granted by the law, shall not be affected (see Article 19 (3)).

CHAPTER VI. RELEVANE/INFLUENCE/FOLLOW-UP OF RECENT COURT OF JUSTICE JUDGMENTS

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*, *GURI* 20-7-1998 no. 167) in 39 Italian Municipalities till 31-12-2000, and subsequently extended to 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*, *GURI* 1-4-2005, no. 75). Italian nationality is not required in order to ask for the "*reddito minimo di inserimento*". This special allowance turned out to be ineffective: see S. SACCHI, *Reddito minimo e politiche di contrasto alla povertà in Italia*, *Rivista del diritto della sicurezza sociale*, 2005, 467-508.

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 no. 54 of 2002 (which reproduces Article 3 of Directive no. 1990/364/EEC) provides that as long as the beneficiary fulfils the minimum conditions set by the law (i.e. sufficient resources) s/he is entitled to reside. The provision should be interpreted according to the *Trojani* judgment.

The Collins *case*

In Italy 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.

The Joannidis *case*

In Italy it does not exist any unemployment benefits for young people who have just completed their studies and are seeking their first employment equivalent to the one which was in question in the *Joannidis* case.

The van Lent *case*

According to Article 132 of the Italian traffic rules (Codice della strada – Cds), a motor vehicle shall circulate in Italy with a non Italian registration plate for one year max., provided that the tax obligations deriving from the intra-Community acquisition are fulfilled.

Article 134 Cds states that vehicles registered abroad and owned by an European citizen or a legal person formed in accordance with the law of a Member State,[22] provided that the owner has at least a firm link with the Italian territory, can be registered, on demand, and following the conditions of article 93 Cds, if the person who is asking for the registration has a domicile of choice with a physical person residing in Italy or one of the subjects referred to in Law no. 264 of 8-8-1991, on the activity of transport consultancy.

According to Article 91 Cds, a leased vehicle is to be registered in the name of the owner. The registration certificates shall indicate the name of the leaseholder and the duration of the contract.

The temporary import from another Member State of motor vehicles owned by a person residing abroad is exempted from the tax set out by Law 1953 no. 39 called *tassa di circolazione* for a period of three months, subject to a condition of reciprocity. After the third month and for other nine months, the motor vehicle can be driven in Italy provided that an amount equivalent to 1/12 of the annual tax is paid for each month, subject to a condition of reciprocity.

The Department of Finances issued a circular letter (no. 174/D of 5-8-1999) stating that the fulfillment of the condition of reciprocity could not be required to EU citizens.

Sports sector

General framework

The employment relationship in sports sector is specifically regulated by Law no. 91 of 1981.

First of all, it is necessary to define exactly the scope of Law no. 91 of 1981, according to which the relationship between an athlete and a national club must be regulated by a written employment contract. In particular, the law applies to athletes who: a) pursue sporting activities for a certain period in return of remuneration; b) are affiliated to a National Sport Federation on request of the national club employer; and c) are officially qualified as "professional athletes" by the same Sport Federation.

Therefore application of this law to contracts in sports sector depends solely on the attribution to athletes of "professional status" by the competent National Sport Federation (Law no. 91 of 1981, Art. 2). It is necessary to remark that only few Italian Sport Federations allow athletes to practise sporting activities as a profession (football, cycling, golf, motorcycling, boxing and basketball) according to the directives enacted by the Comitato Olimpico Nazionale Italiano (the Italian National Olympic Committee - hereinafter the C.O.N.I.).

Thus, except the sporting activities afore-mentioned, the other sporting activities can be practised only by persons affiliated to a National Sport Federation and formally qualified "amateur athletes", notwithstanding the actual character of their sporting activity as an effective economic activity.

These considerations are prominent with regard to discriminations based on nationality against either Community or non-Community athletes, which can still be found in some regulations drawn up by Italian Sport Federations, and the legal protection ensured by Italian anti-discrimination law.

For example, there can be found discriminations based on nationality in regulations of Italian Sport Federations, with regard to Football, Rugby and Water-polo.

With regard to Football, Article 40.6 of the Internal Regulation of the Italian Football Federation (Federazione Italiana Giuoco Calcio – FIGC) states that football players resident in Italy, who have never been affiliated to a foreign association, can be affiliated to an Italian football club. However the Federal President may allow the affiliation of football players, coming from foreign clubs, if the club to which the player belongs to, releases an international transfer indicating the professional or amateur qualification of the player in question. According to Article 40.7 clubs taking part in football championships, organized by the Na-

22 The reference to the legal persons was added by Article 25 of Law no. 29 of 25-1-2006, *Disposizioni per l'adempimento di obblighi derivanti dall'appartenenza dell'Italia alle Comunità europee. Legge comunitaria 2005* (*GURI* no. 32 of 8-2-2006 OS)

tional Professionals' League and by the Third Division (Italian Serie C) National Professionals' League, shall affiliate football players coming from, or come from, foreign clubs without any restrictions if they are citizens of EU or EEA Member States. The Amateur National League can affiliate and field only one foreign (Community or non Community) non professional player coming from a foreign association. An Italian non professional player coming from a foreign association and residing in Italy is equated to an Italian player and his/her affiliation is not subject to any limit.

With regard to Rugby, rugby players can be divided in two categories: a) Italian players and b) foreign players (EU or non EU players). EU players can be affiliated without any numerical restriction, but used within the limits agreed for each category. In particular, in first division (Italian Serie A) men's and women's championship, not more than two EU players (2/22) can be field, while in second division championship (Italian Serie B) it is possible to field just one EU player (1/22), while in third division championship (Italian Serie C) only one Community player is allowed (1/22).

With regard to Water-polo, according to article 9.5 of the General Regulation of the Italian Water-polo Federation, the sporting club that is going to affiliate a non "Italian athlete" shall pay a 500 € fee to the Italian Swimming Federation, require a visa, a residence permit and a transfer certificate to the Ligue Européenne de Natation (LEN) in case the athlete in question comes from an association affiliated to the LEN.

As regards the Italian anti-discrimination law, article 44 of Legislative Decree no. 286 of 1998 (general law on immigration) states that "when an act of a private person or a public administration causes a racial, ethnic, national origin or religious discrimination, the judge may order, on request of the person concerned, discriminations to cease and may adopt every other measures appropriate for removing discriminatory effects".

In accordance with article 43 of the aforementioned Legislative Decree, "discrimination means every act or behaviour, which directly or indirectly constitutes a distinction, an exclusion, a restriction or a preference based on race, colour, national or ethnic origin, and religion or beliefs, and has as its purpose or effect of destroying or jeopardizing the recognition, the enjoyment or the exercise of human rights and fundamental freedoms in politic, economic, social and cultural fields and in every other field of public life".

As shown by case-law based on Legislative Decree no. 286 of 1998, articles 43 and 44, which set a specific judicial remedy for foreigners (either non-Community or Community nationals) against discrimination based on nationality, it is possible for foreign athletes to bring an action before tribunals of first instance against regulations laid down by Sport Federations which limit the affiliation of a foreign athlete or the number of foreign players who might be fielded in national competitions.[23]

So, discriminations on grounds of nationality may be removed case by case by a judicial order issued with a special and fast procedure and addressed to the competent Sport Federation.

However, it remains uncertain whether the action against discriminations based on nationality *ex* articles 43 and 44 can be brought by foreign athletes with "amateur status", as a result of case law based on Legislative Decree no. 286 of 1998 and arbitral practice of C.O.N.I.'s Chamber of arbitration for sport.

For example, this seems to be the case of foreigners (Community or non-Community nationals) who would like to practise water polo following the *Hernandez Paz* case.[24]

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23 See Tribunale Reggio Emilia, order of 2-11-2000, Ekong c. Federazione Italiana Gioco Calcio, *Foro italiano*, 2002, I, 897; Tribunale Teramo-Giulianova, order of 30-3-2001, Sheppard c. Federazione italiana pallacanestro, *Foro italiano*, I, 897; Tribunale Pescara, order of 18-10-2001, Hernandez Paz c. Federazione Italiana Nuoto, *Foro italiano*, I, 897. See also Corte federale della Federazione giuoco calcio (the Federazione Italiana gioco calcio dispute settlement body), decision of 04-05-2001, *Foro italiano*, III, 529, which held the limited number of non-Community athletes, which Italian football clubs could field in professional championships *ex* art. 40.7 of the Internal Regulation of the Italian Football Federation, contrary to the principle of non discrimination and therefore void.

24 See Tribunale Pescara, order of 14-12-2001, Federazione italiana nuoto c. Hernandez Paz, *Foro italiano*, 2002 III, 529.

In fact, on the one hand water-polo – not included on the sports list afore-mentioned - can be practised officially only by 'amateur athletes' and on the other hand general regulations of the Italian Water-polo laid down by the Federazione Italiana Nuoto (the Italian Swimming Federation) limit affiliation of foreign (Community and non-Community) athletes and the number of foreign water polo players who might be fielded in national competitions.

It could be worthwhile to provide a brief summary of facts of the *Hernandez Paz* case.

Hernandez Paz, a EU citizen (in particular a Spanish national) and a very famous water-polo player, was denied the affiliation to Federazione italiana nuoto on request of the water polo club Cus D'annunzio, which wanted to field the Spanish champion in the main Italian championship.

The main ground of Federazione Italiana Nuoto's denial of affiliation of Hernandez Paz was his foreign nationality, considering the limited number of foreign players (three at that moment), which Italian water-polo clubs could field in national competitions and taking into account that Cus D'annunzio had already engaged three foreign players.

So that, Hernandez Paz brought an action based on article 44 before the judge of Pescara against discriminatory denial of the Federazione Italiana Nuoto.

Contrary to the opinion of the first judge, as expressed in the order of 18-10-2001, the second judge conclusively ruled that: a) to practise sporting activities could not be recognized as human rights or fundamental freedoms; and b) to practise water-polo could not be regarded as included in right to work because of the character of water-polo players as "amateur athletes".

Such interpretation and the resulting different treatment of foreign athletes depending on their professional or amateur status seems to be confirmed by the arbitral award of 22-5-2003, *Volley Calabria Srl and Federazione italiana pallavolo,*[25] under the rules of C.O.N.I.'s Chamber of arbitration for sport, notwithstanding the statement in general terms of freedom to practice sporting activities affirmed by Law no. 242 of 1999, art. 16.[26]

Free movement of foreign professional athletes

The movement of foreign 'professional athletes' is subject to the general immigration law (Legislative Decree no. 286 of 1998) or to the general law concerning movement and residence of citizens of a Member State of European Union (DPR 18-1-2002 no. 54) depending on their non EU or EU nationality.

Thus, it is necessary to distinguish foreign 'professional athletes' who are nationals of a Member State of the European Union from the ones who are not.

With regard to the first category, besides the statement in general terms of the right of free movement for EU citizens, it seems that the right of free movement of Community athletes is recognised directly by two secondary regulations, which precisely deal with sports sector: Circular no. 20 of 4-6-2002 on professional athletes and sports facilities staff issued by the Ente nazionale di previdenza e assistenza per i lavoratori dello spettacolo (the National Body for social security of entertainment industry staff) and the C.O.N.I.'s Circular no. 232 of 28-8-2006.

According to the first explanatory note, "professional athletes of an EC Member State hold the right of free movement and to pursue sporting activities as a profession within Italian territory, [...]" (para. A.12).

According to the second general note enacted by the C.O.N.I. and addressed to the National Sport Federations, the general immigration law (Legislative Decree no. 286 of 1998) and its implementation regulations (Presidential Decree no. 394 of 1999) do not apply any-

25 The arbitral award is available at http://www.coni.it/index.php?funzione_arbitrale . In particular see paras. IV.3-IV.5.

26 Article 16 of Law no. 242 of 1999 states that "National Sport Federations and the affiliated sporting activities are regulated by rules and regulations based on democratic principles and the principle of participation by everyone in sporting activities on equal terms and according to national and international sporting order".

more to nationals of new EU countries (in particular Estonia, Latvia, Lithuania, Poland, Slovenia, Hungary, Slovakia, Czech republic) due to the Italian revocation of the provisional limitation of free movement of new EU workers on 31-7-2006. Therefore, the entry, residence and departure of athletes holding the nationality of a new Member State are subject to the DPR 2002 no. 54.

With regard to non EU nationals, as already said, general immigration law shall apply. In particular a special regime for the admittance of non-Community athletes is laid down by Legislative Decree no. 286 of 1998, art. 27, para. 1, letter p, and para. 5-bis, and by the implementation regulations (Presidential Decree no. 394 of 1999, art. 40, paras 16 to 18).

The admission of non-Community athletes, whom national clubs attempt to employ, is regulated by quotas yearly determinated by Decree of the Ministro per i Beni e le attività culturali (the Minister for Cultural heritage and activities) but actually decided by the C.O.N.I.

In fact, the C.O.N.I. decides the annual limitation for admittance of foreign athletes who intend to practice sporting activities either professionally or in return of any kind of remuneration.

This annual quota has to be shared out between each National Sport Federation. At the same time the C.O.N.I. sets general standards for assignment and membership of non-Community athletes to each National Federation every season.

The decision on the annual quota is taken on by the C.O.N.I, considering also the need to protect the national training colts.

It is worthwhile to remark that on July 2004 the National Council of the Italian National Olympic Committee (C.O.N.I.) approved a directive in order to protect the national training colts and safeguard the national sport environment and the competitiveness of the Italian teams and clubs. The directive states that starting from the 2006/2007 season not less than 50% of total team players, included in the refeere's report and competing at national level, have to come from an Italian training colt. Within the 2004/2005 season, Italian sporting associations and the affiliated sporting activities had to submit to the C.O.N.I., in relation to each sporting group and to the championship they take part in, proposals and detailed projects dealing with the promotion and the safeguard of the national training colts in order to reach the overall purpose of the directive.

It remains doubtful whether a non-Community national, who is already living in Italy with a regular residence permit and a regular permit of work (not in sports sector), may be affiliated to a National Sport Federation as a "professional athlete" without limitation. In fact it seems that the affiliation to an Italian Federation of a non-Community national legally resident in Italy could be denied either as an "amateur athlete" or as a "professional one" if it is over quota.

Recent literature

C. ALVISI, *Il diritto sportivo nel contesto nazionale ed europeo*, Giuffrè, Milano, 2006.
G. IANNIRUBERTO, *Sport e diritto del lavoro*, *Foro italiano*, 2006, V, 233.

Linguistic associates – former foreign language assistants and linguistic experts: ECJ case C-212/99, European Commission vs. Italy *[2001] ECR I-4923).*

Law no. 63 of 2004 (*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 no. 2 of 2004) was adopted to implement the judgment of the ECJ in case C-212/99. It states that 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 art. 28 of DPR no. 382 of 1980 (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 a financial treatment corresponding to that afforded to part-time tenured researchers, with effect from the original date of recruitment. The fi-

nancial treatment is proportionate on the number of hours done, out of 500 working hours. This equalization is merely a financial one so that it does not regulate other aspects of the work relationship.

The problem of the treatment of linguistic associates is not completely resolved. First, Law no. 63 of 2004 only deals with the economic treatment of linguistic associates. Second, Law no. 63 of 2004 relates not to linguistic associates in general, but only to those employed at the mentioned Universities. The other linguistic associates are still subject to the less favorable treatment laid down by Law no. 236 of 1995, which the Court of Justice already considered to be inconsistent with EC law. The Court of Cassation held that the treatment provided for by Law no. 63 of 2004 had to be extended to all linguistic associates (see judgment of 18-3-2005 no. 5909), but in order to obtain that a legal action has to be taken. For those reasons, Italian judges have to deal with many cases about the substantial treatment of linguistic associates, or the financial treatment of linguistic associates at other Universities than these mentioned by the Law no. 63 of 2004.

The Court of Cassation was confronted with a number of cases of linguistic associates at the University of Salerno (not envisaged by the Law). The Court upheld the decisions of the courts hearing the merits, which stated that the financial treatment of linguistic associates was to correspond to that of part-time tenured professors (no. 90, no. 160, no. 761, no. 762, no. 1081, no. 1386, no. 19494, and no. 19495 of 2006).

As far as the treatment of linguistic associates other than financial treatment, a judgment of the administrative tribunal of first instance has to be recalled (TAR Marche, sezione I, 11-7-2006 no. 524). The plaintiff, a linguistic associate at the University of Macerata, challenged the decision of her University not to accept her application to teach supplementary courses. The University reserved eligibility for appointment to fill temporary teaching vacancies to tenured teachers and established researchers, and excluded the plaintiff's application on the ground that she was neither a tenured teacher nor an established researcher. The judge upheld the plaintiff's claim and adjudicated the case applying the judgment in case *Petrie* (case C-90/96 [1997] ECR I-6527). It stated that since the appointment in question was open to other categories of staff appointed to university teaching otherwise than by way of open competition, the University could not exclude the plaintiff's application.

Recent literature

E. ADOBATI, L'annosa questione concernente i lettori di lingua straniera. L'ultima sentenza della Corte di giustizia, *Diritto comunitario e degli scambi internazionali*, 2006, 511-512.

R. GAROFALO, Gli ex lettori di lingua straniera al vaglio della Corte di giustizia, *Il lavoro nella giurisprudenza*, 2006, 1103-1112.

CHAPTER VII. POLICIES, TEXTS AND/OR PRACTICES WITH REPURCUSSIONS ON FREE MOVEMENT OF WORKERS

The Italian treatment of third-country nationals is regulated by the consolidated law on immigration (Legislative Decree no. 286 of 25-7-1998). The consolidated law on immigration was the first comprehensive legal text introduced in Italy to regulate the position of thirds-country national and was subsequently partially amended in 2002 by the Law no. 189 of 2002, also known as Bossi-Fini Act (GURI no. 199 of 26-8-2002, OS). Further to the elections held in April 2006, the Government announced its intention to review these rules and a first draft law of amendment was actually presented in October 2006.

As a general matter, the consolidated law on immigration does not apply to EU citizens, unless the provisions contained therein are more favourable in comparison with those that are provided for in the general set of rules normally applied to them (i.e. Legislative Decree no. 54 of 2002, see above Chapter I). This principle is clearly affirmed under Article 1, para. 2, of the above mentioned consolidated law, and was upheld by the Supreme Court (see judgment 27-1-2000 no. 439).

A similar provision is also set under article 28, para. 2, of the same consolidated text on immigration in relation to family reunification: it is stated that the relevant provisions on family reunification contained therein and in the enactment regulation do not apply to family members of an Italian citizen or of an EU citizen, unless they set a more favourable treatment.

Also in relation to family reunification, it must be highlighted that the consolidated text on immigration specifies that the third country national family member of an Italian or EU citizen is entitled to receive a long-term residency card ("carta di soggiorno").

CHAPTER VIII. EU ENLARGEMENT

1. Information on transitional arrangements regarding EU 8

Law no. 380 of 24-12-2003, *GURI* no. 37 of 22-1-2004 OS, instrument of ratification of the 2003 Accession Treaty.

Decreto del Presidente del Consiglio dei Ministri 14-2-2006, Programmazione dei flussi di ingresso dei lavoratori cittadini dei nuovi Stati membri dell'Unione europea nel territorio dello Stato, per l'anno 2006, GURI no. 51 of 2-3-2006, 33.

For the year 2006, the nationals of the new Member States are allowed 170.000 entries for working reasons (compared to 20.000 for 2004 and 79.500 for 2005). The preamble of the decree states that the quota for new Community nationals is the same as for non EU foreigners. As it happened in 2004 and 2005, the quota was fixed by only taking into consideration the number of foreign workers admitted into Italy in the same year.

During 2006 Italy first notified to the European Commission that it would continue applying national measures (see Ministry for employment and welfare, circular letter 3-5-2006 no. 15), then that it would give up the transitional period (see Council of Ministers, Press Release no. 8 of 21-7-2006, at 4; Ministry for social solidarity, circular letter 31-7-2006 no. 21).

2. Information on discussion in 2006 on possible transitional measures for workers from Bulgaria and Romania

Law no. 16 of 9-1-2006, *GURI* no. 20 of 25-1-2006 OS, instrument of ratification of the 2005 Accession Treaty.

During the year 2006, the entry of Bulgarian and Romanian citizens was conditional upon the quota allotted yearly. While they were not granted preferential treatment as regards entry for working reasons, when it comes to seasonal employment a special quota was reserved to them.

Ministero dell'Interno, circolare no. 400/A/2006/291, 1-3-2006 (*Decreti di espulsione adottati nei confronti di cittadini rumeni*).

An explanatory letter sent by the Ministry of Interior to the Police Headquarters makes it clear that, until the Accession Treaty enters into force, Romanians and Bulgarians are not EU citizens but have to be treated as foreigners. This explanation was intended to react to some judgments of first instance[27] stating that Romanian nationals ought to be treated like EU citizens and not like foreigners subject to immigration laws. The cases were about the legality of some expulsion orders of Romanian nationals who did not apply for a residence permit after having lawfully entered the Italian territory. These judges considered that Romania would join the European Union on 1-1-2007 [a set date, according to the courts] and that the free movement of persons was already regulated [but they do not mention any regulation]. Hence they held that Romanian nationals were to be considered EU nationals and, for that reason, Italian immigration law was not applicable to them.

Nevertheless, some judges still held that Romanians were to be considered EU citizens even before the entry into force of the 2005 Accession Treaty. A Romanian citizen was acquitted of the charge of staying illegally in Italy in breach of the Questore's expulsion order, since there was no case to answer. According to the judge of first instance, the circumstance that Romania was about to join the European Union was a valid excuse (Tribunale di Napoli, sez. IX penale, 28-7-2006 no. 6107).

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27 *Giudice di Pace* of Messina, decree 19-7-2005; *Giudice di Pace* of Torino, decree 25-10-2005; *Giudice di Pace* of Ascoli Piceno, decree 31-12-2005; *Giudice di Pace* of Lecce, decree 21-9-2006. On the contrary, some other judges treated Romanian or Bulgarian nationals as foreigners subject to the immigration law (see, among ordinary judges: *Giudice di Pace di Pordenone*, decree 1-3-2005; Corte d'Appello di Milano Sez. II: 14-11-2006, 21-11-2006. Among administrative judges, T.A.R. Umbria Perugia Sez. I, 24-2-2006, no. 67; T.A.R. Piemonte Torino Sez. II, 13-2-2006, n. 898).

The number of Romanians residing in Italy has grown enormously over the last years, from 75.000 in 2002 to 250.000 in 2005, and, because of a variety of factors, it is expected to keep growing (see F. Mascellini, *Migrazioni in Italia e flussi dalla Romania*, *immigrazione.it*). It is therefore surprising to note that no real debate took place about the decision on the transitional period. On the contrary, the newspapers often publish stories on the "dark side" of the Romanian presence, that is illegal immigration, illegal employment, and crime.

The Government decided about the free movement of Bulgarian and Romanian citizens only a few days before the Accession Treaty entered into force.

Ministero dell'Interno e Ministero della Solidarietà sociale, Circolare no. 2, 28-12-2006 (*Ingresso nell'U.E. dei cittadini della Romania e della Bulgaria*)

The 2007 transitional period – which will last one year – is very different from the one of 2004. The entry for work reasons is not subject to any condition in the following areas: agriculture, tourism and hotel business; construction; domestic work and personal assistance; mechanical engineering; management and highly skilled work; seasonal work. The employment of a Bulgarian or Romanian citizen in other areas is conditional upon the leave ("nulla osta") issued by the Immigration Office. It is the employer who has to submit a request for the leave. In the application, the employer has to state the conditions of work s/he is going to apply to the worker. Before its decision, the Immigration Office has to ask the Provincial Labour Administration for its opinion about the contractual conditions applied to the contract of employment in the area in question. The worker provided with the leave is not required to ask for a visa to enter Italy.

Expulsion orders issued until 31-12-2006 shall expire beginning 1-1-2007, unless grounded on reasons of public order, public security or public health.

The applications for family reunification submitted by Bulgarian and Romanian citizens before 1-1-2007, are filed. From 1-1-2007 on, family reunification is regulated by DPR 2002 no. 54 and the leave from the Police Headquarters is no longer required.

Recent literature

C. GAZZETTA, La circolazione finalmente libera dei lavoratori neocomunitari, *Il lavoro nella giurisprudenza*, 2006, 729-738.

M. BROLLO, Immigrazione e libertà di circolazione, *Il lavoro nella giurisprudenza*, 2006, 1069-1078.

CHAPTER IX. STATISTICS

ISTAT: foreigners lawfully residing in Italy at 1-1-2006 (+ 11,2% compared to 2005)

	M	F	Total
World	1.350.588	1.319.926	2.670.514
EU-24	76.910	146.627	223.537
EU-14 (old MS)	55.243	87.622	142.865
EU-10 (new MS)	21.667	59.005	80.672
Poland (biggest national group among EU States)	16.512	44.311	60.823
Romania	143.376	154.194	297.570

Caritas/Migrantes: Dossier statistico Immigrazione

EU nationals lawfully residing in Italy at 31-12-2005: distribution for each region

Country of origin	Piemonte	Valle d'Aosta	Lombardia	Liguria	Total North-West regions
Austria	143	0	1.022	122	1.287
Belgium	207	14	1.076	137	1.434
Cyprus	4	0	24	3	31
Czech Republic	241	11	767	92	1.111
Denmark	75	1	527	95	698
Estonia	37	1	147	27	212
Finland	96	1	631	80	808
France	2.101	71	6.847	1.373	10.392
Germany	1.228	13	6.456	1.313	9.010
Greece	205	0	1.028	121	1.354
Hungary	208	9	892	96	1.205
Ireland	88	0	660	46	794
Latvia	64	1	304	28	397
Lithuania	224	4	376	49	653
Luxembourg	12	0	40	3	55
Malta	12	1	77	16	106
Netherlands	267	5	1.653	378	2.303
Poland	2.376	129	5.626	981	9.112
Portugal	232	11	1.274	165	1.682
Slovakia	356	11	894	175	1.436
Slovenia	59	0	250	17	326
Spain	1.248	5	5.354	479	7.086
Sweden	128	6	1.055	147	1.336
United Kingdom	1.190	35	5.484	743	7.452
EU-24	10.801	329	42.464	6.686	60.280
Bulgaria	910	11	4.730	181	5.832
Romania	45.558	560	41.195	3.101	90.414

Country of origin	Trentino Alto Adige	Veneto	Friuli Venezia Giulia	Emilia Romagna	Total North-East regions
Austria	1.892	584	384	278	3.138
Belgium	113	286	80	291	770
Cyprus	1	12	3	6	22
Denmark	61	172	24	113	370
Estonia	10	54	16	77	157
Finland	66	126	47	126	365
France	273	1.297	344	1.488	3.402
Germany	5.663	2.408	506	1.425	10.002
Greece	50	306	94	491	941
Ireland	34	119	35	155	343
Latvia	19	75	27	241	362
Lithuania	58	158	22	292	530
Luxembourg	8	14	9	17	48
Malta	3	15	4	25	47
Netherlands	230	479	113	412	1.234
Poland	1.630	4.012	1.225	8.898	15.765
Portugal	92	277	106	250	725
United Kingdom	318	1.495	402	1.388	3.603
Czech Republic	483	671	236	619	2.009
Slovakia	1.648	954	327	832	3.761
Slovenia	56	330	3.038	96	3.520
Spain	247	1.135	307	1.095	2.784
Sweden	54	209	66	312	641
Hungary	587	677	265	513	2.042
EU-24	13.596	15.865	7.680	19.440	56.581
Bulgaria	191	810	212	1.993	3.206
Romania	3.910	34.773	6.638	20.319	65.640

Country of origin	Toscana	Umbria	Marche	Lazio	Total region of central Italy
Austria	435	79	66	818	1.398
Belgium	385	123	88	900	1.496
Cyprus	17	21	2	24	64
Czech Republic	435	143	233	543	1.354
Denmark	233	50	18	458	759
Estonia	103	19	28	47	197
Finland	164	29	28	351	572
France	1.729	331	270	5.079	7.409
Germany	3.723	839	762	4.203	9.528
Greece	313	185	148	1.203	1.849
Hungary	377	79	154	409	1.019
Ireland	207	61	35	933	1.236
Latvia	90	27	45	67	229
Lithuania	145	63	70	188	466
Luxembourg	19	10	8	31	68
Malta	41	32	18	265	356
Netherlands	652	198	151	1.024	2.025
Poland	5.780	2.083	3.252	20.089	31.204
Portugal	318	33	49	1.130	1.530
Slovakia	335	136	260	469	1.200
Slovenia	75	12	30	148	265
Spain	1.162	277	287	5.262	6.988
Sweden	487	76	37	838	1.438
United Kingdom	2.481	925	712	4.627	8.745
EU-24	19.706	5.831	6.752	49.106	81.395
Bulgaria	1.206	499	620	3.474	5.799
Romania	21.956	6.228	6.949	63.879	99.012

Country of origin	Abruzzo	Molise	Campania	Puglia	Basilicata	Calabria	Total Sud
Austria	29	28	107	41	0	17	222
Belgium	72	5	81	64	0	22	244
Cyprus	0	0	3	0	0	0	3
Czech Republic	105	11	91	100	10	52	369
Denmark	16	2	43	18	0	8	87
Estonia	23	1	9	9	1	2	45
Finland	8	3	35	14	0	7	67
France	213	25	405	236	11	108	998
Germany	260	52	687	560	14	201	1.774
Greece	96	5	232	114	2	20	469
Hungary	105	3	84	39	2	22	255
Ireland	13	3	35	16	0	4	71
Latvia	33	8	29	10	1	20	101
Lithuania	158	31	66	50	11	64	380
Luxembourg	0	1	1	6	0	1	9
Malta	1	0	25	9	0	6	41
Netherlands	51	3	100	37	2	28	221
Poland	1.826	331	7.293	1.345	308	2.050	13.153
Portugal	34	5	125	55	4	19	242
Slovakia	113	17	68	125	10	126	459
Slovenia	19	1	39	13	1	7	80
Spain	111	20	443	142	14	69	799
Sweden	13	-	54	20	2	14	103
United King-dom	193	31	1.068	287	13	78	1.670
EU-24	3.492	586	11.123	3.310	406	2.945	21.862
Bulgaria	548	35	450	369	153	777	2.332
Romania	4.637	745	2.617	1.803	633	1.676	12.111

Country of origin	Sicilia	Sardegna	Total islands	Total Italy
Austria	79	81	160	6.205
Belgium	118	146	264	4.208
Cyprus	1	0	1	121
Czech Republic	81	53	134	4.977
Denmark	37	22	59	1.973
Estonia	8	11	19	630
Finland	55	25	80	1.892
France	498	460	958	23.159
Germany	799	1.026	1.825	32.139
Greece	113	77	190	4.803
Hungary	73	202	275	4.796
Ireland	33	53	86	2.530
Latvia	30	26	56	1.145
Lithuania	33	31	64	2.093
Luxembourg	4	4	8	188
Malta	148	1	149	699
Netherlands	112	130	242	6.025
Poland	2.393	602	2.995	72.229
Portugal	53	53	106	4.285
Slovakia	83	81	164	7.020
Slovenia	20	11	31	4.222
Spain	264	328	592	18.249
Sweden	75	48	123	3.641
United Kingdom	408	423	831	22.301
EU-24	5.518	3.894	9.412	229.530
Bulgaria	210	91	301	17.470
Romania	2.767	901	3.668	270.845

Rank of EU States among the first 150 countries of origin of foreigners residing in Italy: 1° Romania (270.845 - 11,9%), 7° Poland (72.229 - 3,2%), 20° Germany (32.139 - 1,4%), 25° France (23.159 - 1,0%), 26° United Kingdom (22.301 - 1,0%), 29° Spain (18.249 - 0,8%), 31° Bulgaria (17.470 - 0,8%), 42° Slovakia (7.020 - 0,3%), 43° Austria (6.205 - 0,3%), 45° the Netherlands (6.025 - 0,3%), 49° Czech Republic (4.977 - 0,2%), 50° Greece (4.803 - 0,2%), 51° Hungary (4.796 - 0,2%), 55° Portugal (4.285 - 0,2%), 57° Slovenia (4.222 - 0,2%), 58° Belgium (4.208 - 0,2%), 63° Sweden (3.641 - 0,2%), 69° Ireland (2.530 - 0,1%), 73° Lithuania (2.093 - 0,1%), 74° Denmark (1.973 - 0,1%), 76° Finland (1.892 - 0,1%), 87° Latvia (1.145 - 0,1%), 102° Malta (699 - 0,0%), 105° Estonia (630 - 0,0%), 132° Luxembourg (188 - 0,0%), 137° Cyprus (121 - 0,0%).

From March 16th 2000			
Distribution of EU workers for each region			
Region	Employments	Terminations	Company change-over
PIEMONTE	25.502	23.230	21.151
VALLE D AOSTA	2.806	2.618	2.736
LOMBARDIA	78.418	68.703	61.829
TRENTINO	32.148	26.608	24.691
VENETO	47.943	43.717	38.076
FRIULI VENEZIA GIULIA	13.167	12.362	13.055
LIGURIA	11.965	10.329	9.610
EMILIA ROMAGNA	45.894	40.397	43.147
TOSCANA	37.181	32.958	29.965
UMBRIA	8.697	8.154	6.487
MARCHE	11.959	10.686	10.784
LAZIO	56.124	50.378	37.513
ABRUZZO	17.726	15.425	15.962
MOLISE	3.477	3.064	3.003
CAMPANIA	25.279	21.394	16.852
PUGLIA	41.465	36.848	35.978
BASILICATA	3.918	3.570	3.432
CALABRIA	15.111	12.794	10.654
SICILIA	42.075	35.743	29.882
SARDEGNA	14.660	12.651	12.160
NOT DETERMINED	33.925	27.301	25.946
Totals	569.440	498.930	452.913

Source: INAIL's processing made at 18:30:32 of 28/08/2006 on data coming from insured nominative report.

CHAPTER X. SOCIAL SECURITY

Article 38 (1) and (2) of the Constitution reads as follows: "Every citizen unable to work and without the resources necessary to live has a right to social maintenance and assistance. Workers have the right to be provided with and assured adequate means for their needs and necessities in cases of accidents, illness, disability and old age, and involuntary unemployment". While the first paragraph only deals with Italian nationals, the second addresses all workers, irrespective of their nationality.

Relationship between 1408/71 and 1612/68

The national case-law on Regulation no. 1408/71/EEC is very abundant. On the contrary, Regulation no. 1612/68/EEC is seldom invoked in front of national judges in cases that involve social security allowances. As far as we can know, no discussion about the relationship between Regulation no. 1408/71/EEC and Regulation no. 1612/68/EEC has taken place.

Supplementary pension schemes

The establishment of supplementary social security in Italy is not very completed. A complex reform is in train to be completed. The so called second pillar is not compulsory and is mainly linked to the individual contractual components. Workers have not yet developed an interest on this subject.
Directive no. 98/49/EC on safeguarding the supplementary pension rights of employed and self-employed persons moving within the Community has not yet been transposed into Italian legal system. The Parliament enabled the Government to issue a decree having the strength of ordinary law (i.e. a legislative decree) for the transposition of this directive by 2-2-2001 (within 12 months of the entry into force of the law. See Article 1 of Law 1999 no. 526, Provisions for the fulfilment of obligations deriving from Italy's membership to the European Community. Legge Comunitaria 1999). Nevertheless, the Government did not enact any act.

Recent legal literature

S. BORELLI, Libertà di circolazione e scelta del sistema di protezione sociale più vantaggioso, *Rivista del diritto della sicurezza sociale*, 2006, 671-696: on the exercise of freedoms entrusted by the Treaty with the goal either of taking advantage of social security benefits (free movement of persons or of recipients of services, citizenship of the Union) or to avoid the application of the social security rules of the State where the service is provided for, thanks to the principle of mutual recognition (freedom to provide services, posting of workers).

W. CHIAROMONTE, La limitata esportabilità delle prestazioni di disoccupazione alla luce dei regolamenti 1408/71/CEE e 883/2004/CE, *Rivista del diritto della sicurezza sociale*, 2006, 171-183: on unemployment benefits according to the EC social security system.

R. FOGLIA, La sicurezza sociale, in A. Tizzano (ed.), *Il diritto privato dell'Unione europea*, 2nd ed., Giappichelli editore, Torino, 2006, 1166-1193.

S. GIUBBONI, Libera circolazione delle persone e solidarietà europea, *Lavoro e diritto*, 2006, 611-637: in-deep study of the different grounds and rationales of the right to benefit from social security allowances in the host Member State.

A. LEPORE, Principi di sicurezza sociale U.E. e prestazioni familiari del lavoratore migrante, *Europa e diritto privato*, 2006, 838-849: comment on case C-543/03, *Dodl and Oberhollenzer*, [2005] ECR I-5049. The A. points that a case like *Oberhollenzer* could not have happened in Italy, because Italian law, unlike German one, does not grant family benefits to unmarried partners. If the aim of the EC social security system is to avoid social dumping, the lack of a common definition of family members entitled to receive family benefits would result in a competitive advantage for those States which

family benefits would result in a competitive advantage for those States which do not put unmarried and married couples on an equal footing.

G. ROSIN, Il problema dell'applicazione solo parziale del regime previdenziale nazionale ai lavoratori migranti, *Diritto delle relazioni industriali*, 2006, 271-274: summary of case C-227/03, *van Pommeren-Bourgondiën* [2005] ECR I-6101.

CHAPTER XI. ESTABLISHMENT, PROVISION OF SERVICES, STUDENTS

Establishment

Italy has undertaken a reform process of the access and exercise of professional and other economic activities. The draft on professions, presented by the Ministry of Justice on December 2006, takes care of the rights of Union citizens and of professional diplomas awarded in other Member States. This attitude is welcome, because not always Italian laws on specific professions take expressly into account the case of a professional qualified in another Member State. That does not mean that Union citizens are discriminated, but their cases are not regulated.

The Decree-Law 4-7-2006 no. 223 (GURI, 4-7-2006 no. 153), converted with amendments into Law 4-8-2006 no. 248 (GURI 11-8-2006 no. 186, O.S.), on economic and social renewal (Disposizioni urgenti per il rilancio economico e sociale, per il contenimento e la razionalizzazione della spesa pubblica, nonché interventi in materia di entrate e di contrasto all'evasione fiscale) aims at ensuring that Articles 43, 49, 81, 82, and 86 of the EC Treaty are respected.

Lawyers:

The ECJ held that: "Article 9 of Directive 98/5/EC of the European Parliament and of the Council of 16 February 1998 to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained must be interpreted as meaning that it precludes an appeal procedure in which the decision refusing registration, referred to in Article 3 of that directive, must be challenged at first instance before a body composed exclusively of lawyers practising under the professional title of the host Member State and on appeal before a body composed for the most part of such lawyers, where the appeal before the supreme court of that Member State permits judicial review of the law only and not the facts" (case C-506/04 *Commission v. Luxembourg* [2006] ECR I-8613). The Italian law shows the same reasons of contrast with EC law as the Luxembourgian one. In fact, according to the Legislative Decree 2001 no. 96, transposing Directive no. 98/5/EC, the decision refusing registration must be challenged at first instance before the Bar Council (Consiglio dell'ordine degli avvocati) composed exclusively of lawyers. This decision can be appealed to the the National Council of the Bar (Consiglio nazionale forense), composed exclusive by lawyers appointed by the Ministry of Justice. Against the decision of the National Council of the Bar an appeal can be lodged to the Supreme Court (Corte di Cassazione), on grounds of lack of competence, abuse of power or infringement of the law (see Article 56 of Law no. 36 of 1934).

Cassazione civile, sezione lavoro, 11-1-2006 no. 233, L.C.E. vs Cassa nazionale di previdenza e assistenza forense (on the case, see L. CARBONE, *Le comunicazioni reddituali obbligatorie alla cassa di previdenza forense (c.d. mod. 5) nella giurisprudenza*, *Foro italiano*, 2006, I, 3156-3161).

The applicant is a French lawyer, who is registered in the registers of both a Bar Association established in France and a Bar Association established in Italy, and is affiliated to the scheme of the French pension fund for lawyers and not to the Italian one. Notwithstanding that, the Italian pension fund asked her to communicate every year the amount of her income and fined her for not having complied. The applicant claimed that she was not obliged to comply, as she was affiliated to the scheme of the French pension fund, and that that request amounted to discrimination on the ground of nationality forbidden by Article 12 TEC. The courts of first and second instance rejected the application, stating that the request of the Italian pension fund was linked to the monitoring duties assigned to it.

The Supreme Court quashed the contested judgment, stating that, only those lawyers, who were affiliated to the scheme of the Italian pension fund for lawyers, were under an obligation to submit a statement about their income, as the law clearly laid down. The Court

held that there was no discrimination on the ground of nationality, unless the law was to be interpreted as stating that only those lawyers who were affiliated to the scheme of another Italian pension fund would not be obliged to submit the annual communication. According to the correct meaning of the law, those lawyers, who are associated to the scheme of a French pension fund, are not under any obligation toward the Italian pension fund for lawyers.

Provision of services

Corte di Cassazione, sect. I civ., no. 11751 of 18-5-2006.

The Supreme Court holds that the judgement of the ECJ in case C-180/89 *Commission v. Italy* [1991] ECR I-709, prevents a Regional law (in that case the Region of Veneto) that reserved to a tourist guide qualified in Italy any guided tour of the town of Venice, to be applied to a German tourist guide, properly qualified in his Member State, who is accompanying a German group. In the case, the German tourist guide was fined by the police because he was considered to practice without the prescribed authorization, no relevance being given to his German qualification.

D. GALLO, I centri di assistenza fiscale (CAF) al vaglio della Corte di giustizia delle Comunità europee, *Diritto del commercio internazionale*, 2006, 455-467: on case C-451/03, *Servizi Ausiliari Dottori Commercialisti Srl vs Giuseppe Calafiori*, 2006.

The A. states that the ECJ founded its judgment of the case on an incorrect reading of Italian law. The ECJ concluded that Italian legislation which reserved exclusively to Tax Advice Centres the right to pursue certain tax advice and assistance activities breached Articles 43 and 49. According to the A. the ECJ omitted to take into account that the Tax Advice Centres did not merely exercise commercial activities. Since they were entitled with public prerogatives, they were private bodies exercising public functions. Their activities would have been considered as connected with the exercise of official authority, in the sense of Article 45 EC. Therefore, the ECJ would have reached the opposite interpretation and would have stated that Articles 43 and 49 did not preclude Italian law to reserve some activities to those Centres. According to the A., the case C-451/03 would have been decided with reference to case C-55/93 (1994) *Van Schaik*, where the ECJ stated that no piece of EC law prevented a State to reserve to a body established in that State the issuance of test certificates in respect of cars registered in that State.

Recent literature

M. CONDINANZI and B. NASCIMBENE, La libera pretazione dei servizi e delle professioni in generale, in A. Tizzano (ed.), *Il diritto privato dell'Unione europea*, 2nd ed., Giappichelli editore, Torino, 2006, 330-374.

S. MENTO, I sistemi sanitari nazionali e il principio di libera circolazione dei servizi nella Comunità europea, *Giornale di diritto amministrativo*, 2006, 1310-1317 (on the case law of the ECJ on the free movement in the health sector).

Students

The enrolment in Italian University courses is open to EU and Italian students on an equal footing. A foreign secondary school qualification is considered as equivalent to an Italian one, if it allows access to the University in the State that awarded it.

Italy operates a numerus clausus system for regulating access to a limited number of University courses, but in that case again, equality of treatment is granted. Law no. 264 of 1999 identifies those courses for which the numerus clausus is to be fixed at national level by the Ministry for University (art. 1), and those courses the access to which can be limited by a decision of the University concerned (art. 2). It is interesting to note that the quotas annually assessed by Ministerial Decrees are reserved to Community citizens (which encompass both

Italian and EU citizens), and to third countries nationals resident in Italy. On the contrary, a foreign students' quota is allotted yearly to non EU nationals residing abroad. These students have to pass an examination even for the access to University courses without numerus clausus.

Non discrimination is also assured when it comes to grants and other benefits for students. Article 20 of Law 1991 no. 390 states in general terms that the benefits regulated by this law and by other Regional laws are given to foreign students in the same ways and under the same conditions as Italian students.

In transposing Directive no. 2004/38/EC, Italy does not reproduce Article 24 (2) of the Directive which allows the Member States to deny the entitlement to maintenance aid for students (see Article 19 of the Draft).

Private institutions that organize courses of studies in Italy which prepare students for a degree to be granted by foreign Universities give raise to two groups of case-law.

The first group relates to the fact if a student, enrolled in a course organized by these private institutions, can postpone his military service. According to the Law 1997 no. 504, a student can obtain to postpone his military service, if he is enrolled in a State University or in other University recognized by the law (art. 3) or if he is attending a University course in the European Union or if he is attending a course abroad, at the end of which he will obtain a 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.

Administrative courts of first and last instance keep on taking a different approach toward the compatibility of the Ministry of Defence practice to EC law. Some hold that Italian law and practice comply 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 (see, for instance, Council of State, IV, judgment of 17-2-2004 no. 637, Ministero difesa vs Cafà). Others state that the decisions of the Ministry of Defence denying students to postpone the military service were inconsistency with EC law. The reasons 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 courses of preparation abroad at the same conditions provided for students enrolled in an Italian public University or in a lawfully recognized one (see for instance TAR Lazio, judgment of 5-2-2003, no. 705; TAR Lazio, Roma, I, judgment of 7-5-2004 no. 3961).

The second group of cases relates to the legal value of the degree these private institutions award. In 2006 the judge of second instance of Naples adjudicated one of these cases (Corte d'Appello di Napoli, sez. IV civ., sentenza 22-2-2006[28]). The facts of the case are similar to those which the ECJ examined in the case *Neri* (C-153/02 [2003] I-13555). In 2001 the complainant enrolled in the European School of Economics, the Italian branch of the Nottingham Trent University and paid a first part of the fee. A few days layer, the complainant heard from a TV program that the degrees awarded by the European School of Economics were not valid in Italy, because the Ministry for Education instructed Italian Universities not to recognize degrees awarded by foreign Universities to students who had attended courses given in Italy. The complainant decided to go to court, asking to have the contract rescinded, on the ground that she was misled by the European School of Economics which assured her of the validity of the degree she would be awarded. The defendant quoted in defence the judgment of the ECJ in case *Neri*, in which the Court had stated that: "An ad-

28 See Chapter XII.

ministrative practice such as the one at issue in the main proceedings, under which degrees awarded by a university of one Member State cannot be recognised in another Member State when the courses of preparation for those degrees were provided in the latter Member State by another educational establishment in accordance with an agreement made between the two establishments, is incompatible with Article 43 EC". The defendant also claimed that the Ministry for Education modified its practice and let the Italian Universities recognize these degrees.

The court upheld the complaint. It stated that neither the judgment of the ECJ nor the new administrative practice changed the fact that the complainant was given incorrect information about the degree: even though the degree awarded was not invalid, nevertheless it had to be recognised by Italian authorities.

Recent literature

E. BELLEZZA, Condizioni di accesso agli studi universitari, *Diritto delle relazioni industriali*, 2006, 268-270: summary of case C-147/03, *Commission v. Austria* [2005] ECR I-5969.

CHAPTER XII. MISCELLANEOUS

Web sites

Legislation	http://www.normeinrete.it/ http://www.parlamento.it/leggi/home.htm
Court of Cassation	http://www.cortedicassazione.it/Notizie/Notizie.asp
Constitutional Court	http://www.cortecostituzionale.it/indexita.asp
Administrative courts	http://www.giustizia-amministrativa.it/Mie.html

Law 25-1-2006 no. 29, Disposizioni per l'adempimento di obblighi derivanti dall'appartenenza dell'Italia alle Comunità europee - Legge comunitaria 2005, GURI no. 32 of 8-2-2006, Ordinary Supplement.
Articolo 12. (Valutazione di titoli e certificazioni comunitarie)
1. Fatta salva la normativa vigente in materia, in caso di procedimento nel quale è richiesto quale requisito il possesso di un titolo di studio, corso di perfezionamento, certificazione di esperienze professionali e ogni altro attestato che certifichi competenze acquisite dall'interessato, l'ente responsabile valuta la corrispondenza agli indicati requisiti dei titoli e delle certificazioni acquisiti in altri Stati membri dell'Unione europea o in Stati aderenti all'Accordo sullo Spazio economico europeo o nella Confederazione elvetica.
2. La valutazione dei titoli di studio è subordinata alla preventiva acquisizione sugli stessi del parere favorevole espresso dal Ministero dell'istruzione, dell'università e della ricerca tenuto conto dell'oggetto del procedimento. Il parere deve essere comunque reso entro centottanta giorni dal ricevimento della documentazione completa.

Articolo 20. (Modifiche al testo unico delle disposizioni legislative e regolamentari in materia di circolazione e soggiorno dei cittadini degli Stati membri dell'Unione europea, di cui al decreto del Presidente della Repubblica 18 gennaio 2002, n. 54)
1. Al fine di interrompere le procedure di infrazione 2003/2134 e 2003/2166 avviate dalla Commissione europea nei confronti del Governo italiano, e in attesa del completo riordino della materia, da attuare mediante il recepimento della direttiva 2004/38/CE del Parlamento europeo e del Consiglio, del 29 aprile 2004, al testo unico di cui al decreto del Presidente della Repubblica 18 gennaio 2002, n. 54, sono apportate le seguenti modificazioni:
a) all'articolo 3 (L):
1) al comma 3, le parole: "ai figli di età minore» sono sostituite dalle seguenti: «ai figli di età inferiore ai ventuno anni";
2) al comma 4, le parole: "Il diritto di soggiorno è inoltre riconosciuto ai familiari a carico del titolare del diritto di soggiorno, come individuati dall'articolo 29, comma 1, del decreto legislativo 25 luglio 1998, n. 286, a condizione che:" sono sostituite dalle seguenti: «Il diritto di soggiorno è inoltre riconosciuto al coniuge non legalmente separato, ai figli di età inferiore agli anni ventuno e ai figli di età superiore agli anni ventuno, se a carico, nonchè ai genitori del titolare del diritto di soggiorno e del coniuge, a condizione che:";
b) all'articolo 5 (R):
1) al comma 3, la lettera b) è sostituita dalla seguente:
"b) per i lavoratori subordinati e per i lavoratori stagionali, un attestato di lavoro o una dichiarazione di assunzione del datore di lavoro; per i lavoratori stagionali l'attestato di lavoro o la dichiarazione di assunzione deve specificare la durata del rapporto di lavoro";
2) al comma 3, lettera d), secondo periodo, dopo le parole: "Detta prova è fornita» sono inserite le seguenti:", nel caso dei cittadini di cui all'articolo 3, comma 1, lettera e),"; dopo le parole: "con l'indicazione del relativo importo, ovvero" sono inserite le seguenti:", nel caso dei cittadini di cui all'articolo 3, comma 1, lettera d)," e le parole: «comprovante la disponibilità del reddito medesimo» sono sostituite dalle seguenti: «attestante la disponibilità di risorse economiche tali da non costituire un onere per l'assistenza sociale";

3) il comma 4 è sostituito dal seguente:
"4. Con la domanda, l'interessato può richiedere il rilascio della relativa carta di soggiorno anche per i familiari di cui all'articolo 3, commi 3 e 4, quale che sia la loro cittadinanza. Qualora questi ultimi abbiano la cittadinanza di un Paese non appartenente all'Unione europea, ad essi è rilasciato il titolo di soggiorno ai sensi dell'articolo 9 del testo unico di cui al decreto legislativo 25 luglio 1998, n. 286, e successive modificazioni";
4) al comma 5, le parole: ", nonché, se si tratta di cittadini di uno Stato non appartenente all'Unione europea, della documentazione richiesta dall'articolo 16, commi 5 e 6, del decreto del Presidente della Repubblica 31 agosto 1999, n. 394" sono soppresse;
c) all'articolo 6 (R):
1) al comma 1, dopo le parole: "L'interessato può dimorare provvisoriamente sul territorio,» sono inserite le seguenti: «nonchè svolgere le attività di cui all'articolo 3, comma 1,";
2) al comma 5, le parole: "ai cittadini di cui all'articolo 3, comma 1, lettera a)" sono sostituite dalle seguenti: "ai cittadini di cui all'articolo 3, comma 1, lettere a) e b)".

Legge Regionale della Sardegna 11-5-2006 no. 4, Disposizioni varie in materia di entrate, riqualificazione della spesa, politiche sociali e di sviluppo, B.U. Sardegna 13-5-2006, no. 15, suppl. ord. n. 6.
Art. 2 (Imposta regionale sulle plusvalenze dei fabbricati adibiti a seconde case)
1. È istituita l'imposta regionale sulle plusvalenze dei fabbricati adibiti a seconde case.
2. L'imposta sì applica sulle plusvalenze derivanti dalla cessione a titolo oneroso:
a) di fabbricati, siti in Sardegna entro tre chilometri dalla battigia marina, destinati ad uso abitativo, escluse le unità immobiliari che per la maggior parte del periodo intercorso tra l'acquisto o la costruzione e la cessione sono state adibite ad abitazione principale del cedente o del coniuge;
b) di quote o di azioni non negoziate sui mercati regolamentati di società titolari della proprietà o di altro diritto reale sui fabbricati di cui alla lettera a), per la parte ascrivibile ai predetti fabbricati. Per i diritti o titoli attraverso cui possono essere acquisite partecipazioni si tiene conto delle percentuali potenzialmente collegabili alle predette partecipazioni.
3. Soggetto passivo dell'imposta è l'alienante a titolo oneroso avente domicilio fiscale fuori dal territorio regionale o avente domicilio fiscale in Sardegna da meno di ventiquattro mesi.
4. Non sono soggetti passivi dell'imposta i nati in Sardegna e i rispettivi coniugi.
5. La plusvalenza di cui alla lettera a) del comma 2 è costituita dalla differenza tra il prezzo o il corrispettivo di cessione ed il prezzo d'acquisto o il costo di costruzione del bene ceduto, aumentato di ogni altro costo inerente al miglioramento del bene medesimo e rivalutato in base alla variazione dell'indice dei prezzi al consumo per le famiglie di operai e impiegati.
6. La plusvalenza di cui alla lettera b) del comma 2 sì calcola raffrontando il prezzo o corrispettivo di cessione con il costo d'acquisto di partecipazione. La parte delle plusvalenze derivanti dalla cessione di quote o azioni ascrivibili ai fabbricati di cui alla lettera a) del comma 2, sì calcola facendo riferimento ai valori contabili emergenti dall'ultimo bilancio o rendiconto approvato, rapportando il valore netto di bilancio delle seconde case site in Sardegna nei tre chilometri dalla battigia marina e il totale dell'attivo di bilancio o rendiconto approvato.
7. L'imposta regionale si applica nella misura del 20 per cento sulle plusvalenze calcolate ai sensi dei commi 5 e 6.
8. L'imposta dovuta sulla plusvalenza realizzata per effetto della cessione del fabbricato deve essere versata in tesoreria regionale entro venti giorni dalla data dell'atto di cessione, se formato in Italia, entro sessanta giorni se formato all'estero. Negli stessi termini deve essere inviata alla Regione Sardegna, da parte del cedente, apposita dichiarazione di conseguimento della plusvalenza recante i dati che ne consentono la determinazione, utilizzando moduli approvati con deliberazione della Giunta regionale, adottata su proposta dell'Assessore regionale della programmazione, bilancio, credito e assetto del territorio di concerto con l'Assessore regionale degli enti locali, finanze e urbanistica. All'atto della cessione l'alienante può chiedere al notaio, fornendo la necessaria provvista, di provvedere alla presentazione della dichiarazione, all'applicazione e al versamento dell'imposta nella tesoreria regionale nei termini suddetti. Di tale circostanza deve essere fatta menzione nell'atto avente ad oggetto la cessione a titolo oneroso del fabbricato. Il notaio è comunque

to la cessione a titolo oneroso del fabbricato. Il notaio è comunque obbligato a comunicare alla Regione Sardegna entro venti giorni dalla stipulazione, e secondo le modalità previste con deliberazione della Giunta regionale adottata su proposta dell'Assessore regionale della programmazione, bilancio, credito e assetto del territorio di concerto con l'Assessore regionale degli enti locali, finanze e urbanistica, gli estremi dell'atto avente ad oggetto la cessione del fabbricato con le caratteristiche di cui alla lettera a) del comma 2.
9. L'imposta dovuta sulla plusvalenza realizzata per effetto del trasferimento delle quote o delle azioni delle società titolari del diritto di proprietà o di altro diritto reale sui fabbricati di cui alla lettera a) del comma 2 deve essere versata nella tesoreria regionale entro sessanta giorni dalla data della cessione. L'organo amministrativo delle anzidette società è obbligato a comunicare, entro trenta giorni dalla cessione, l'avvenuto trasferimento alla Regione Sardegna secondo le modalità previste con deliberazione della Giunta regionale adottata su proposta dell'Assessore regionale della programmazione, bilancio, credito e assetto del territorio di concerto con l'Assessore regionale agli enti locali, finanze e urbanistica. Nel medesimo termine, l'organo amministrativo deve, altresì, comunicare al socio cedente che la cessione delle quote potrebbe implicare obbligo di versamento dell'imposta e mettere a disposizione, qualora quest'ultimo ne faccia richiesta, tutta la documentazione necessaria per il calcolo della plusvalenza. Nei trenta giorni successivi, il cedente deve, qualora ne sussistano le condizioni, presentare la dichiarazione prevista nel comma 8.
10. La Regione Sardegna dispone, ai fini del controllo dell'adempimento degli obblighi strumentali al regolare adempimento dell'obbligazione tributaria, dei poteri previsti dagli articoli 51 e 52 del decreto del Presidente della Repubblica 26 ottobre 1972, n. 633. Con le stesse prerogative possono intervenire, previa richiesta dell'Amministrazione regionale, i funzionari degli uffici tributi dei comuni in cui è situato l'immobile ceduto.
11. Il recupero dell'imposta dovuta avviene con avviso di accertamento recante la liquidazione dell'imposta dovuta e delle relative sanzioni ed interessi al saggio legale, da notificarsi, a pena di decadenza, entro il 31 dicembre del quarto anno successivo a quello dell'avvenuta cessione. La notificazione dell'avviso di accertamento può essere effettuata, oltre che con le regole previste dall'articolo 60 del decreto del Presidente della Repubblica 29 settembre 1973, n. 600, anche a mezzo posta mediante raccomandata con avviso di ricevimento. L'avviso di accertamento deve essere motivato in relazione ai presupposti di fatto e alle ragioni giuridiche che lo hanno determinato. Se la motivazione fa riferimento ad un altro atto non conosciuto né ricevuto dal contribuente, questo deve essere allegato all'atto che lo richiama, salvo che quest'ultimo non ne riproduca il contenuto essenziale.
12. Il contribuente destinatario dell'avviso di accertamento può, entro il termine previsto per la proposizione del ricorso, procedere alla definizione dell'atto con le regole e con gli effetti previsti dall'articolo 15 del decreto legislativo 19 giugno 1997, n. 218, o, in alternativa, instaurare la procedura di accertamento con adesione. Sono applicabili le norme regolatrici dell'istituto contenute nel decreto legislativo n. 218 del 1997.
13. Le somme che risultano dovute sulla base della dichiarazione, unitamente agli interessi e alle sanzioni, e le somme liquidate nell'avviso di accertamento dalla Regione per imposta, sanzioni ed interessi e non versate entro il termine previsto dal comma 12 sono riscosse coattivamente mediante iscrizione a ruolo, da effettuarsi, a pena di decadenza e secondo le disposizioni contenute nel decreto del Presidente della Repubblica 29 settembre 1973, n. 602, entro il 31 dicembre dell'anno successivo a quello di presentazione della dichiarazione e a quello in cui l'avviso di accertamento è divenuto definitivo per mancata impugnazione o a seguito di sentenza passata in giudicato favorevole in tutto o in parte all'Amministrazione.
14. Il contribuente può chiedere alla Regione Sardegna il rimborso delle somme versate e non dovute entro il termine decadenziale di tre anni dal giorno del pagamento dell'imposta.
15. Per l'omessa o infedele dichiarazione della plusvalenza conseguita sì applica la sanzione amministrativa dal 100 al 200 per cento dell'ammontare dell'imposta dovuta.
16. Chi non esegue in tutto o in parte i versamenti dell'imposta dovuta quali risultano dalla dichiarazione presentata o li esegue tardivamente è soggetto alla sanzione amministrativa pari al 30 per cento dell'importo non versato.

17. Alle sanzioni di cui ai commi precedenti è soggetto in luogo del cedente il notaio che, avendo ricevuto la provvista, non proceda alla presentazione della dichiarazione e/o al versamento tempestivo delle somme dovute.
18. Per la mancata comunicazione prevista al comma 8, il notaio è soggetto alla sanzione amministrativa da euro 1.032 a euro 7.746. La medesima sanzione è irrogata nei confronti delle società titolari del diritto di proprietà o di altri diritti reali sui fabbricati di cui alla lettera a) del comma 2 le cui azioni o quote sono state trasferite, qualora l'organo amministrativo non provveda alla comunicazione di cui al comma 9.
19. Il gettito dell'imposta di cui al presente articolo è destinato per il 75 per cento al fondo perequativo per lo sviluppo e la coesione territoriale e per il restante 25 per cento al comune nel quale detto gettito è generato.
20. L'imposta regionale sulle plusvalenze dei fabbricati adibiti a seconde case si applica alle cessioni a titolo oneroso effettuate successivamente alla pubblicazione nel Bollettino Ufficiale della Regione Sardegna delle deliberazioni della Giunta regionale previste ai commi 8 e 9.
Consiglio di Stato, Sezione VI, 17-2-2006, n. 673
DECISIONE
sul ricorso in appello proposto da M. C. rappresentata e difesa dagli avv.ti prof. Ernesto Sticchi Damiani e Simona Manca, ed elettivamente domiciliata presso lo studio del primo in Roma, via Bocca di Leone n. 78 (Studio BDL);
contro
- Ministero dell'Istruzione, della Università e della Ricerca, in persona del Ministro p.t., rappresentato e difeso dall'Avvocatura Generale dello Stato, presso i cui uffici è legalmente domiciliato in Roma via dei Portoghesi n. 12;
- Centro Servizi Amministrativi della Provincia di Lecce, in persona del suo legale rappresentante p.t., non costituito in giudizio;
e nei confronti di
C. C. S., non costituita in giudizio;
per l'annullamento
della sentenza del Tribunale Amministrativo Regionale della Puglia, Sezione II^ di Lecce, 3 agosto 2005, n. 3937;
Visto il ricorso con i relativi allegati;
Visto l'atto di costituzione in giudizio del Ministero appellato;
Viste le memorie prodotte dalle parti a sostegno delle rispettive difese;
Visti gli atti tutti della causa;
Alla pubblica udienza del 25 ottobre 2005 relatore il Consigliere Lanfranco Balucani. Udito l'avv. Sticchi Damiani;
Ritenuto di poter definire il giudizio con sentenza succintamente motivata ai sensi dell'art. 26, ult. comma, della legge 6 dicembre 1971, n. 1034 come sostituito dall'art. 9, 1° comma, legge 21 luglio 2000, n. 205, dopo avere sentito le parti;
Considerando
- che con il ricorso introduttivo la sig.a M. C. contestava la mancata attribuzione - nella graduatoria provinciale permanente per la classe di concorso A051 formulata dal CSA di Lecce - di punti n. 36 relativi al servizio prestato all'estero negli anni scolastici 2002/03, 2003/04, 2004/05, e di punti 3 relativi al corso di "Archeologia classica" conseguito il 21.4.2004;
- che con la sentenza impugnata entrambi i motivi di doglianza avanzati dalla ricorrente sono stati ritenuti infondati;
- che quanto alla pretesa a vedersi riconosciuto un punteggio doppio per il servizio prestato all'estero, ai sensi dell'art. 10 L. 31 marzo 1971, n. 153, deve essere confermata la conclusione cui è pervenuto il primo giudice.
Deve ritenersi infatti che la disposizione contenuta nella tabella allegata al D.L. n. 97/2004 (conv. in L. n. 143/2004), secondo cui a decorrere dall'a.s. 2005-2006 il servizio prestato nelle scuole italiane all'estero è equiparato al corrispondente servizio prestato in Italia, prescinda dal periodo di effettivo esercizio dell'attività all'estero, nel senso che anche il servizio prestato in anni scolastici precedenti (come è nel caso della prof.a M.) soggiace al principio della equiparazione: in tal senso depone sia la formulazione letterale della

della equiparazione: in tal senso depone sia la formulazione letterale della disposizione normativa che nell'introdurre tale principio di equiparazione a decorrere dall'a.s. 2005-2006 non distingue tra il servizio prestato anteriormente o posteriormente alla data di decorrenza; sia la "ratio" stessa della norma nella quale è insita l'esigenza di garantire la "par condicio" tra i candidati a partire dall'a.s. 2005-2006, dovunque sia avvenuta la prestazione del servizio;
- che invece, con riguardo al mancato riconoscimento del punteggio aggiuntivo in relazione alla specializzazione in Archeologia classica (in possesso della ricorrente), non può essere condivisa la decisione del primo giudice, essendo innegabile che tra l'insegnamento di "Materie letterarie e latino nei Licei e nell'Istituto Magistrale" (classe di concorso A051) e gli argomenti del corso di "Archeologia classica" seguiti dalla ricorrente, sussista la "coerenza" richiesta dalla tabella di valutazione dei titoli: in particolare lo specifico esame di Epigrafia delle antichità greche e romane (sostenuto nell'ambito del Corso di Archeologia classica) non può non comportare un approfondimento della lingua e della grammatica latina;
- che per le considerazioni che precedono l'appello proposto dalla prof.a M. deve essere in parte accolto con conseguente riforma della sentenza impugnata nella parte in cui non ha riconosciuto alla stessa, nella graduatoria "de qua", l'attribuzione di p. 3 in graduatoria per il descritto corso di specializzazione;
- che le spese processuali inerenti il presente grado di giudizio possono essere compensate.
P.Q.M.
Il Consiglio di Stato in sede giurisdizionale, Sezione Sesta, accoglie il ricorso in appello in epigrafe indicato nei limiti e per gli effetti di cui in motivazione.
Spese compensate.
Ordina che la presente decisione sia eseguita dall'Autorità amministrativa.
Così deciso in Roma, il 25 ottobre 2005 dal Consiglio di Stato, in sede giurisdizionale - Sez.VI - nella Camera di Consiglio, con l'intervento dei Signori:
Giorgio GIOVANNINI Presidente
Carmine VOLPE Consigliere
Luciano BARRA CARACCIOLO Consigliere
Lanfranco BALUCANI Consigliere Est.
Rosanna DE NICTOLIS Consigliere

Corte di Appello di Napoli, Sez. IV civile, sentenza 22-2-2006
Svolgimento del processo
Con atto di citazione dinanzi al Tribunale di Benevento, in data 22.2.2002, gli odierni appellanti principali esponevano che, in data 23.8.2001, L.F., conseguito il diploma di scuola media superiore, intendendo compiere gli studi universitari, veniva a conoscenza tramite un opuscolo pubblicitario dell'esistenza di un università privata di economia, finanza e management denominata E. -, avente diverse sedi in Italia. L'opuscolo pubblicitario, diffuso dall'E. anche via internet e riccamente corredato di dettagli sulla qualità dei corsi e sulla garanzia che al compimento del ciclo di studi sarebbe stato certo l'inserimento nel "nuovo mondo del business internazionale, a livello di responsabilità" chiariva che "al compimento del corso quadriennale di studi, lo studente E. consegue la laurea britannica, valida in Italia ed in tutti i Paesi della Comunità europea". Anche l'incaricata dell'E., M.L.L., ribadì personalmente alla F.L. che la laurea conseguita presso la citata università, oltre a possedere ogni requisito di validità e riconoscimento in Italia ed in Europa, avrebbe consentito un immediato accesso al mondo del lavoro.
Tali affermazioni convinsero l'attrice a chiedere ai genitori l'indispensabile sostegno economico per iscriversi all'E., i cui costi ammontavano a complessive Lire 19.800.000 per il primo anno. F.L. sottoscrisse quindi il modulo adesivo d'iscrizione alla Facoltà di Scienze della Comunicazione, con sede in Capezzano (LU) e, come preteso dalla convenuta a garanzia degli obblighi economici che si assumevano con l'iscrizione, il contratto fu sottoscritto anche da C.L., padre di F., che provvide anche, tramite bonifico bancario a pagare complessive Lire 4.800.000 per iscrizione e Lire 4.000.000 quale prima rata della retta annuale di frequenza, rimanendo impegnato a corrispondere il residuo importo di Lire 15.000.000 alle scadenze indicate nel contratto di iscrizione. Tuttavia, in data 3.10.2001, gli

indicate nel contratto di iscrizione. Tuttavia, in data 3.10.2001, gli attori venivano a conoscenza, per il tramite di una trasmissione televisiva, dell'insussistenza dei requisiti di validità ed efficacia della laurea conseguita presso l'E., tanto che il Comitato di Controllo dell'Istituto di autodisciplina Pubblicitaria aveva indirizzato all'E. ben tre ingiunzioni, n. 267-290-291/2001, per pubblicità ingannevole relativamente al riconoscimento ed efficacia legale del titolo di studio in Italia, alla prospettiva di immediato inserimento nel mondo del lavoro e alla stessa validità e definizione in Inghilterra quale laurea statale del titolo rilasciato dalla Nottingham Trent University a conclusione dei corsi di studio organizzati dalla E. Gli attori comunicarono allora alla convenuta con lettera raccomandata a.r. del 18.10.2001, rimasta senza risposta, la volontà di risolvere il contratto, sul presupposto che la loro volontà negoziale si era formata solo in conseguenza della inesatta, reticente e comunque falsa rappresentazione della realtà. Per questi motivi gli attori chiedevano al giudice di dichiarare nullo o annullare il contratto di iscrizione a cagione delle inveritiere prospettazioni esposte in narrativa; dichiarare, comunque, subordinatamente, la nullità e/o annullabilità ex art. 1469 bis c.c. delle clausole vessatorie inserite sia nelle condizioni generali, che nel Regolamento generale di iscrizione dell'impugnato contratto; condannare, per l'effetto, la convenuta alla restituzione dell'importo di Lire 4.800.000 con gli interessi legali dalla data del pagamento, oltre al risarcimento dei danni nella misura dimostrata in corso di causa o da liquidare in via equitativa, con vittoria di spese di giudizio, e con attribuzione al procuratore antistatario.
Instaurato il contraddittorio, E. si costituiva in giudizio ed eccepiva in rito l'improponibilità e l'improcedibilità della domanda attorea; nel merito contestava la fondatezza in fatto ed in diritto di quanto ex adverso dedotto, in particolare evidenziando che la E. è un Higher Education college, un Istituto di istruzione britannico che esercita legittimamente la sua attività di University Business college giusta pubblica autorizzazione ricevuta con ordinanza n. 3332/2000 del Ministero dell'Educazione del Regno Unito. Obbiettivo della stessa è la preparazione dell'imprenditore e del manager, sia attraverso corsi post universitari, sia attraverso corsi di durata quadriennale per il conseguimento del diploma di laurea. Veniva in particolare evidenziato che la sede italiana dell'E. tiene su tutto il territorio nazionale dei corsi di qualità corrispondente a quella dei corsi statali britannici, tanto che, terminati i corsi E. e superati gli esami, la Nottingham Trent University, definita dalla convenuta come una delle primarie università statali del Regno Unito e quindi dell'Unione Europea, giuste ordinanze n. 293/2000 e n. 385/2000 del Ministero dell'Educazione britannica, rilascia il diploma di laurea statale britannico denominato Bachelor of Arts with honour, dove la certificazione "honour" dell'ordinamento britannico contraddistingue quello che in Italia è il diploma di laurea, distinguendolo dal diploma universitario.
La convenuta rilevava dunque che alcun vizio del consenso era stato determinato negli attori, i quali volevano solo sottrarsi agli obblighi assunti con il contratto di iscrizione, tra cui quello di pagare la differenza ancora dovuta a saldo della retta annuale di iscrizione. Per tali motivi la convenuta chiedeva al Tribunale di dichiarare in via preliminare l'improponibilità e l'improcedibilità della domanda attrice e comunque nel merito di rigettarla, con condanna in via riconvenzionale degli attori al pagamento in suo favore della somma di Euro 7.746,85, oltre vittoria di spese di giudizio.
Indi, prodotta documentazione, svolta attività istruttoria, precisate le conclusioni, la causa veniva decisa con sentenza in data 27.5.2004, con la quale veniva rigettata la domanda attrice e, in accoglimento della domanda riconvenzionale, condannati in solido gli attori al pagamento in favore della convenuta della somma di Euro 7.746,85; spese giudiziali compensate.
Avverso la sentenza proponevano appello principale i soccombenti, cui si opponevano, con appello incidentale concernente l'imputazione delle spese processuali, i convenuti in primo grado. All'udienza del 31.5.2005, sulle conclusioni di cui in epigrafe, la causa passava in decisione con i termini di cui all'art. 190 c.p.c.
Motivi della decisione
Gli appellanti principali, evidenziando che il rigetto della domanda in primo grado è stato disposto sulla base della fondamentale considerazione che non vi era alcuna prova che il

convenuto istituto fosse a conoscenza della prassi ministeriale, tesa a non riconoscere validità legale al titolo di studi in argomento, contestano l'assunto, assumendo che, ben prima dell'agosto 2001, epoca della formazione del consenso contrattuale, l'Autorità Garante della Concorrenza e del Mercato, disponeva la sospensione del messaggio pubblicitario della E. in quanto i messaggi della stessa inducevano a ritenere che l'E. godesse di un riconoscimento nell'ordinamento universitario italiano e potesse rilasciare titoli aventi valore legale in Italia. Essa era quindi obbligata, ex art. 1337 c.c., ad informare gli attori della reale valenza del titolo in concreto. Né l'intervenuta sentenza della Corte di Giustizia europea, con la quale è stata definita l'illegittimità della prassi nazionale di escludere il titolo in argomento dalla procedura di riconoscimento sposta i termini del problema, dal momento che, se l'appellante avesse saputo che occorreva adire la Corte di Giustizia della CE per ottenere il riconoscimento, certamente non si sarebbe iscritta al corso, correndo il rischio di studiare per anni, pagando una retta salatissima, senza la certezza di conseguire il risultato della "laurea valida in Italia".
L'appellante incidentale si oppone alla riforma la E., sostanzialmente non contestando la propria conoscenza della prassi amministrativa in argomento ma confermando tuttavia la correttezza del proprio operato e facendo leva, in sintesi, sulla circostanza che la prefata prassi era palesemente illegittima, al punto che non solo il Tar Lazio aveva annullato il provvedimento di condanna del Garante della concorrenza e del mercato, con sentenza in data 11.4.2002, n. 10643 (di cui peraltro produceva il solo dispositivo) ma persino il Ministero dell'Istruzione, dell'Università e della ricerca aveva emanato circolare in data 19.4.2004 che, preso atto della decisione assunta dalla Corte di Giustizia, ai sensi dell'art. 43 del trattato istitutivo della Comunità europea (libertà di stabilimento delle imprese nei paesi dell'Unione Europea, alle condizioni definite dalla legislazione nazionale nei confronti dei propri cittadini) invitava la università nazionali a non tener conto di precedenti note di indirizzo con le quali si dichiarava che non possono essere ammessi a riconoscimento i titoli di studio stranieri conseguiti con curricula svolti parzialmente in Italia presso istituti non identificati come università. Concludeva pertanto chiedendo il rigetto dell'appello principale ed impugnando la compensazione delle spese in primo grado, da imputarsi alla controparte soccombente.
Ciò premesso, e pur prendendo atto del mutamento della prassi amministrativa de qua, ritiene la Corte che l'appello sia fondato.
Preliminarmente va chiarito che risulta erronea l'affermazione in sentenza che la E., odierna appellata, non fosse a conoscenza, al momento dell'iscrizione dell'appellante, della prassi dello stato italiano di non conferire valore legale al titolo di studio dalla stessa rilasciato, dal momento che, dall'ampia documentazione prodotta dall'appellante, attore in primo grado, e non contestata ex adverso, emergeva il contrario, dal momento che, a fronte di procedimenti instaurati dall'autorità garante della concorrenza e del mercato, nei quali veniva contestato alla E. l'aver effettuato pubblicità ingannevole in merito alla citata qualità del titolo, la E. aveva appunto contestato la legittimità di tale prassi, in date ampiamente antecedenti all'iscrizione in argomento (cfr. inibitoria dell'Autorità garante della concorrenza e del mercato in data 16.3.95, nella quale è dato atto della memoria trasmessa dalla E. in data 1.2.95).
Che la citata prassi non fosse legittima, come ritenuto dalla Corte di Giustizia Europea e successivamente anche dal Ministero dell'istruzione, dell'Università e della Ricerca (che tuttavia non ha sancito la validità ipso iure del titolo, ma l'ammissibilità dello stesso a riconoscimento presso gli Atenei italiani, giusta la sentenza della Corte di Giustizia in data 13.11.2003) è importante elemento, che consente di escludere l'ipotizzata malafede nella E., ma non tuttavia l'incompletezza obbiettiva dell'informazione fornita.
Certo è tuttavia che la consapevolezza delle illegittimità della prassi restrittiva che aveva trovato applicazione in Italia quantomeno fino al 19.4.2004 (data della nuova circolare del Ministero citato, che ha segnato l'evidenziato revirement) consente di escludere che il contratto sia stato viziato dal dolo, escluso dalla fondata consapevolezza della sussistenza dei requisiti di validità legale del titolo, ad onta della contraria regolamentazione nazionale della materia.

Ciò non esclude tuttavia che l'appellante sia incontrovertibilmente caduta in errore al momento dell'iscrizione. Di tale errore è sintomo a posteriori l'immediata contestazione della validità dell'iscrizione stessa, subito dopo la conoscenza del non riconoscimento del titolo da parte delle competenti autorità italiana, con nota alla direzione dell'E., conseguita alla trasmissione televisiva che affrontava la specifica questione, con cui impugnava, per tale ragione, la validità dell'iscrizione, chiedendo la restituzione di quanto allo scopo versato. L'errore risaliva al momento della stipula, ed era certamente riconoscibile, da parte dell'E., atteso che sia le rassicurazioni fornite, anche nella pubblicità relativa al corso di studi, circa la piena validità del titolo, sia la mancata informazione in merito alla contraria prassi in atto, erano circostanze tali da occasionare, senza alcun dubbio, una formazione viziata del consenso, nella forma meno grave rilevata, ma produttiva degli stessi effetti. In tal senso anche la precisa deposizione di M.S., genitrice dell'attrice, che riferisce anche delle rassicurazioni orali circa la piena validità in Italia del titolo, fornite dal personale della E. - sig.ra M.L. - al momento dell'iscrizione, nonché il fatto decisivo che, dopo aver persino proceduto a fittare un appartamento per consentirle la frequenza degli studi presso la sede della E., la figlia non iniziò neppure la frequenza del corso, avendo appreso, tre giorni prima, della non validità del titolo, tramite una trasmissione televisiva ("Mi manda Raitre"). A tale errore non è estranea la mancata, doverosa e completa informazione sulla rilevanza del titolo di studi in argomento da parte della E., non solo con riferimento alla contestata prassi amministrativa, ma anche in ordine alla circostanza che anche il mutamento della citata prassi nel favorevole senso giustamente richiesto, non avrebbe implicato - come non implica ora, di per sé - il riconoscimento del titolo, in termini analoghi a quelli degli altri Atenei italiani, ma l'ammissione dello stesso al riconoscimento, ai sensi dell'art. 2 l. 13 gennaio 1999, n. 4; il che non esclude certo la "Validità" legale del titolo, ma ne determina una forma di condizionamento, della quale gli interessati dovevano essere informati.
E' evidente infatti che l'incondizionato riconoscimento del titolo è elemento determinante per la formazione del consenso contrattuale da parte dell'allievo; se lo stesso non viene precisamente informato sul punto, non può ritenersi che abbia accettato di versare le elevatissime tasse di iscrizione, rispetto a quelle delle università statali, per conseguire un titolo da sottoporre a procedura di riconoscimento; e ciò, soprattutto ove si consideri che, come è evidente, e come veniva avallato dalla predetta pubblicità, la prospettiva di un più rapido impiego costituisce una spinta essenziale all'iscrizione ad un ateneo, spinta che la conoscenza della controversia amministrativa in atto, avrebbe attenuato in maniera certamente decisiva; così come completa - si osserva in limine - non può non essere anche ora, con riferimento alla conseguita ammissione del titolo a riconoscimento, come qualità dello stesso diversa dal riconoscimento ipso iure.
Consegue a quanto esposto che la sentenza impugnata debba essere riformata, con accoglimento sul punto dell'appello principale (annullamento del contratto e restituzione delle somme versate in esecuzione del contratto e della sentenza di primo grado); è tuttavia evidente che non sussistono i presupposti per il riconoscimento del danno morale, non rivestendo il fatto rilevanza penale.
I contrapposti appelli tendenti ad ottenere la riforma della sentenza in punto spese (compensate in primo grado) sono infondati. Le spese di entrambi i gradi di giudizio non possono infatti che dichiararsi compensate, per tutte le ragioni sopra esposte, le quali, pur implicando l'accoglimento della domanda degli appellanti principali, giustificano la resistenza della ditta E. in entrambi i gradi, in considerazione sia della delicatezza della controversia, sia della concorrente esigenza di contrastare in ogni sede una prassi statale discriminante, riconosciuta illegittima dalla giustizia comunitaria.
P.Q.M.
La Corte di Appello di Napoli, IV sezione civile, definitivamente pronunziando, così provvede, in parziale accoglimento dell'impugnazione proposta da L.C. e L.F., avverso la sentenza del Tribunale di Benevento, in data 27.5.2004:
a) pronuncia l'annullamento del contratto di iscrizione di L.F. alla E., perché viziato da errore del privato contraente;

b) condanna la E. alla restituzione della somma di Euro 2.478,99, con gli interessi legali dal 29.8.2001, data del pagamento, al saldo, nonché della somma di Euro 7.746,85, pagata dagli appellanti alla E. in esecuzione dell'impugnata sentenza, con gli interessi legali dalla pubblicazione della presente sentenza al saldo;
c) rigetta l'appello principale, quanto alla richiesta di risarcimento del danno morale;
d) rigetta l'appello incidentale;
e) dichiara compensate le spese dei due gradi di giudizio;
Così deciso in Napoli il 9 gennaio 2006.
Depositata in Cancelleria il 22 febbraio 2006.