REPORT
on the Free Movement of Workers in Italy in 2007

Rapporteur: Dr. Alessandra Lang
University of Milan

September 2008

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Introduction

- Transposition of Directive 2004/38/EC into Italian law, by way of the Legislative Decree 2007 no. 30, entered into force on April 2007. The most important point to be underlined is that the task to ascertain that Union citizens satisfy with the requirements for free movement passed from the Police to the municipal authorities. The first version of the Legislative Decree was more or less in line with the directive. It was even more favorable to Union citizens in some respects. For instance, the act does not exclude students from maintenance aids, while the Directive allows States to do that. In other respect, however, the Legislative Decree and its implementing circulars make some regressions in comparison with previous regulations. For instance, as far as non-EU members of the family of Union citizens are concerned, they can be issued with a residence card only if their entrance and stay in Italy have been regular.
- Decision not to apply a transitional period to Bulgarians and Romanians comparable to the one decided in 2004: while only a limited (but not little) numbers of nationals of the A8 were allowed to enter yearly, entrance for national of the A2 is free for the access to specific jobs and conditional upon a check on contractual conditions for the access to the other jobs.
- Amendments to the provisions on expulsion. Only a few months after the entry into force of the Legislative Decree the Government and the Parliament began discussing about amending it. In particular, they wanted to make expulsions easier to decide and enforce. The reasons for this change are to be found in a widespread feeling of insecurity that Italians are experiencing. People in Italy are very worried about crime and immigration and they easily link the two issues. It has to be stressed that Italy has undergone a dramatic transformation from a demographical point of view in the last ten years: ten years ago, there were less than one million foreigners, while today they are nearly three million. The reaction to this new challenge is a request for more security. Therefore some proposals to strengthen security were under discussion before the Parliament. One of these proposals entered into force at the beginning of November emending the rules on Union citizens' expulsion. The aims were twofold: to confer the power to expel Union citizens to the Prefect (that is the local representative of the Government), and to lower guarantees in case expulsion is decided for very serious reasons (grounds of State security and imperative grounds of public security). In these cases, the expulsion decision is immediately enforced by the *Questore* (that is the head of the Police) and pending approval of the justice of the peace the Union citizen can be detained in a temporary holding center. Sanctions in case of breach of exclusion orders are also increased. These rules were enacted by a Decree-Law, that is a law of the Government with limited duration. If the Parliament doesn't turn a Decree-Law into Law within sixty days, the Decree-Law ceases to produce effects retroactively. That is what happened: the Parliament failed to turn it into law. This was due not because it disagreed with the Government, but for lack of time.

Chapter I
Entry, Residence, Departure

During 2007 the act transposing Directive 2004/38/EC entered into force and repealed the previous acts on the treatment of EU nationals. The act has been 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.

Therefore, the previous regulation on free movement of persons (the Presidential Decree 2002 no. 54) was in force from 1-1-2007 to 10-4-2007.

The provisions on expulsion have been amended twice, by way of Decree-Laws. A Decree-Law is a provisional measure having the force of law enacted by the Government in extraordinary cases of necessity and urgency. The Parliament shall approve the Decree-Law within 60 days from the publication, turning it into Law and modifying it if it deems necessary; otherwise the act loses effect *ex tunc*. Neither of the two Decree-Laws has been approved by the Parliament. The first one (DL 1-11-2007 no. 181) was applicable from 2-11-2007 to 30-12-2007 and the second one (DL 29-1-2007 no. 249) from 2-1-2008 to 1-3-2008. Nevertheless the Government has drawn on the two Decree-Laws and amended the Legislative Decree 2007 no. 30 by enacting a Legislative Decree 2008 no. 32 which reproduces many of their provisions.

The Ministries concerned have laid down a number of circulars with regard to the Legislative Decree 2007 no. 30. The most important are:

- Circular 6-4-2007 no. 19, by the Ministry of the Interiors, Department for internal and territorial affairs;
- Circular 10-4-2007 no. 400/C/2007/1409/P/10.4.39/II DIV, by the Ministry of the Interiors, Department for public security, Central Direction for immigration and border police;
- Circular 18-7-2007 no. 200704165/15100/14865(39), by the Ministry of the Interiors, Department for internal and territorial affairs;
- Circular 3-8-2007 no. DG RUERI/II/12712/I.3.b, by the Ministry for Health;
- Circular 8-8-2007 no. 45, by the Ministry of the Interiors, Department for internal and territorial affairs;
- Circular 8-10-2007 no. 54, by the Ministry of the Interiors, Department for internal and territorial affairs;
- Circular 2-11-2007 no. 2007.17.292.11050/110, by the Ministry of the Interiors, private office of the Minister;
- Circular 3-11-2007 no. 555/410/2007 by the Ministry of the Interiors, Department for public security, Central Direction for immigration and border police.

Beneficiaries

The Legislative Decree 2007 no. 30 follows the same pattern of the Directive in order to define beneficiaries of the rights of entry and residence. Article 2 gives the same definitions as the Directive, and Article 3 lists the beneficiaries. Both Article 2 and Article 3 reproduce Articles 2 and 3 of the Directive literally.

The Circular 18-7-2007 no. 200704165/15100/14865(39) states that the Legislative Decree shall be applied also to nationals of Iceland, Liechtenstein, Norway, San Marino, and Switzerland.

The Legislative Decree does not regulate the case of dual nationality. Article 19 (2) of the Law 1995 no. 218 (Reform of the Italian system of private international law) lays down in general terms that: “If a person has more than one nationality, the law of the State to which he is most closely connected shall be applied. Where the person has Italian nationality as well as oth-

ers, the Italian nationality shall take priority."[1] The grand chamber of the *Corte di Cassazione* (judgement 9-1-2001 no 1, *Schindler*) stated that in order to ascertain the competent judge of the adoption of a minor holding dual (Italian and German) nationality and residing in Germany, Article 19 (2) does not apply, since the rule that Italian citizenship must prevail constitutes, *inter alia*, a discrimination on the ground of nationality, prohibited by Article 12 EC.

A. ENTRY

Article 5 of the Legislative Decree 2007 no. 30 is devoted to the right of entry. The valid identity card that the Union citizen shall bear has to be "*valida per l'espatrio*", that is, it has to be a document that enables the holder to travel abroad.

A beneficiary of the right of entry 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 present 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 present 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.

The Legislative Decree does not require the Union citizen to report his/her presence within the Italian territory. Nevertheless, the 2008 amendment states that the Union citizen may report his/her presence to a police office. If the Union citizen has not reported to the police office, s/he shall be regarded as having been stayed in Italy for more than three months, unless s/he can prove otherwise (see Article 5 para. 5-bis of the Legislative Decree 2007 no. 30).

B. RESIDENCE

Residence up to three months

Article 6 of the Legislative Decree 2007 no. 30 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 may 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).

Union citizens and their family members enjoy the right of residence as long as they have sufficient resources not to become an unreasonable burden on the Italian social assistance system (Article 13 (1) of the Legislative Decree 2007 no. 30, corresponding to Article 14 (1) of Directive 2004/38). The resources are deemed to be sufficient when they are tantamount to the social pension (that is, for the year 2007, eur 5.061,68 per year). It is to be pointed out that Article 14(3) of the Directive is not transposed into the Legislative Decree, which therefore has to be interpreted in accordance with it.

If the right of residence up to three months is denied, the Union citizen has the right to apply to the court of the place of stay (see Article 8 of the Legislative Decree 2007 no. 30: the competent court is the *Tribunale*, acting as a single judge).

[1] 35 I.L.M. 760 (1996).

Residence for more than three months

Article 7 of the Legislative Decree 2007 no. 30 deals with the right of residence for more than three months and transposes Article 7 of the Directive. The act identifies the beneficiaries in the same way as the directive. It is worth noting that the act states that the worker in involuntary 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 within 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 (worker in involuntary unemployment after completing a fixed-term employment contract of less than a year or after having become involuntarily unemployed during the first twelve months), s/he retains the status of worker for one year (the Directive reads "for no less than six months").
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 Legislative Decree 2007 no. 30 states that the Union citizen shall register with the Municipality of the place of residence, submitting an application to be entered in the population register. Registration entails residence, according to Italian law. The registration is mandatory after three months from the day of arrival. The failure to comply renders the person liable of the administrative pecuniary sanction provided for by the law on the population registry.

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). A fee stamp is due (euro 14,62) because the Legislative Decree 2007 no. 30 does not expressly exempt the application (see circular 8-10-2007 no. 54). This charge does not exceed that imposed on nationals for the issuing of the identity card.

It is not clear whether a job-seeker would be treated as a worker or as a non-worker, and therefore required to have sufficient economic resources.

If the Union citizen already holds a residence card issued in accordance with the previous regulations, s/he is exempted from proving the fulfilment of the substantial requirements (see circular 18-7-2007 no. 200704165/15100/14865(39)).

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 (consolidated law on immigration). This provision regulates the family reunification of the non-EU foreigner. It requires the foreigner to have a minimum income per year no less than the annual amount of the social allowance (that is euro 5.061,68 for the year 2007), in case of reunification with one family member or when no reunification occurs; no less than twice the annual amount of the social allowance, in case of reunification with two or three family members; and no less than three times 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 is 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 Union citizen may make a self-declaration. Each category of Union citizens (workers or non-workers) is allowed the same treatment as far as this proof is concerned. Therefore, students are not reserved a better treatment.

The circular 18-7-2007 no. 200704165/15100/14865(39) states that the Union citizen has to dispose of his/her own resources and therefore has to personally fulfil this requirement. This provision can turn difficult to satisfy for instance by the housewife spouse of an Italian national.

The application of the worker is admitted irrespective of the duration of the work contract (see circular 8-8-2007 no. 45).

In order to prove that the applicant enjoys a comprehensive sickness insurance cover, in case of a private insurance policy, an Italian translation of the policy shall be attached to the application (see circular 3-8-2007 no. DG RUERI/II/12712/I.3.b). The previous act (DPR 2002 no. 54) stated that a voluntary registration with the Italian health care office, granted upon payment of a

charge, was a valid sickness insurance for the purpose of the right of residence. It is regrettable that the law now in force does not envisage it any more.

If the applicant is a Romanian or Bulgarian citizen, the "*nulla osta*" required to work is to be attached to the application for residence (see circular 6-4-2007 no. 19). This document is not necessary if the applicant has been already legally resident in Italy before the entry into force of the Accession Treaty (see circular 8-8-2007 no. 45).

The office that receives an application for entrance into the population registry has to check that the applicant (both Italian and Union citizen) has his/her habitual residence (*dimora abituale*) at the address entered in the form. This control is performed by police officers.

According to Article 8 of the Legislative Decree 2007 no. 30, the refusal of the right to reside and its repeal can be challenged in front of the tribunal of the place where the applicant resides. The court decides the case according to Article 737 of the Italian Code of Civil Procedure, after hearing the complainant. Otherwise the applicant can fill a petition with the *Prefetto* as provided for by the Law on the population registry.

The circular 2007 no. 19 lays down the transitional period of the Legislative Decree 2007 no. 30. Indeed, before 11-4-2007 (entry into force of the Legislative Decree) the Union citizen should apply for a residence card to the *Questura*. From then on the *Questura* shall file the applications for a residence card still pending, since the residence card is no more required. The Union citizen shall address the Municipality and apply for the entrance into the population registry, only attaching to the application the receipt of the application for the residence card and a self-declaration that s/he fulfils the requirements upon which residence is conditional. The Municipality shall check the self-declaration by sampling.

Article 13 of the Legislative Decree 2007 no. 30 deals with the retention of the right of residence and transposes Article 14 of the Directive. The fact that para. 3 ("An expulsion measure shall not be the automatic consequence of a Union citizen's or his or her family member's recourse to the social assistance system of the host Member State") is not reproduced must be underlined. Neither is reproduced Article 15(2) of the Directive ("Expiry of the identity card or passport on the basis of which the person concerned entered the host Member State and was issued with a registration certificate or residence card shall not constitute a ground for expulsion from the host Member State.").

The mayor of Cittadella, a small Municipality in the Veneto Region, issued a much contested order on the registration into the population registry. The order requests the keepers of the registry to check each application from Union citizens in order to detect whether the conditions prescribed by the law are met. If the applicant is not a worker, the keepers shall be satisfied that the economic resources exist and are of legal origin. They shall pass any information on the fact that the applicant might represent a danger to society to the Police. The Police shall also be satisfied that the applicant is living and keeps on living in a decent house (even though the circular 1995 no. 8 by the Ministry of the Interiors explicitly says that registration is not conditional upon a decent house). Other mayors are reported to have issued similar order (on these events, see G. Campo, Cittadella e dintorni, *Diritto immigrazione e cittadinanza*, 2007, 4, 63-69).

Union citizens can prove to be entitled with the right to stay for more than three months by way of their identity card, by a self-declaration, or by a certificate issued upon request by the keeper of the population registry (on the legal value of this certificate, see R. Minardi, L'attestazione di iscrizione anagrafica dei cittadini comunitari, *Lo stato civile italiano*, 2007, 678-684). However, the practice shows that some administrative bodies ask for a certificate of regular residence, a document not requested by the law, issued by the keepers of the population registry, and often subject to a stamp fee.

Right of permanent residence

Articles 14-18 of the Legislative Decree 2007 no. 30 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 Legislative Decree 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)).

Union 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 fulfil the general requirements laid down in Article 16 of the Directive. Indeed, the Legislative Decree states that, in order to benefit from this exemption, these Union citizens have to retain their place of residence in Italy, while being employed in another Member State, provided that all the conditions of registration persist.

The right of permanent residence is certified by a document issued by the Municipality of the place of residence, within thirty days of the request (Article 16 of the Legislative Decree 2007 no. 30). A fee stamp is due (euro 14,62) because the Legislative Decree 2007 no. 30 does not expressly exempt the application (see circular 8-10-2007 no. 54). This charge does not exceed that imposed on nationals for the issuing of the identity card.

The applicant shall prove the continuity of residence by any means allowed. To have been entered into the population registry is a valid proof (see circular 6-4-2007 no. 19). Temporary absences not exceeding a total of six months a year, or absences of a longer duration for compulsory military service, or the absence of a maximum of 12 consecutive months for important reasons such as pregnancy and childbirth, serious illness, study or vocational training, or a posting in another Member State or a third country, are to be considered as periods of residence in Italy (see circular 6-4-2007 no. 19). 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 Legislative Decree 2007 no. 30 reads as follows: "Continuity of residence is broken by any expulsion decision *adopted* against the person concerned" (emphasis added).

Periods of residence in Italy prior to the date of the entry into force of the Legislative Decree 2007 no. 30 can be taken into account when calculating the five years of continued residence. The day *a quo* of the five years period is when the residence card under the previous regulations has been issued. This transitional regime is applicable also to Bulgarians and Romanians (see circular 18-7-2007 no. 200704165/15100/14865(39).

Neither the Legislative Decree nor the implementing circulars has clearly given to any authority the power to ascertain that the conditions for permanent residence are met. Therefore, it is not clear whether the keeper of the registry has to be satisfied with the documents produced by the applicant or is to perform some kind of verification of them.

C. DEPARTURE

Administrative expulsion

Articles 20 to 22 of the Legislative Decree 2007 no. 30 are devoted to expulsion orders and related safeguards. Unlike the rest of the act, these articles do not follow the Directive literally, but are less articulate. They have been amended twice (by the Decree-Law 2007 no. 181 and by the Legislative Decree 2008 no. 32), and the Decree-Law 2007 no. 249 laid down other reasons for

expulsion. In the following pages the original version of the Legislative Decree 2007 no. 30 is presented; then we will turn to the amendments that were in force during 2007.

Article 20 of the Legislative Decree 2007 no. 30 (before the amendments) lays down the procedure and conditions for the restrictions of the right of entry on the grounds of public order, public security, and public health, and of the right of residence on the grounds of public policy and public security. Union citizens and their family members who enjoy the right of permanent residence may be expelled only on serious grounds of public order and security. The Union citizen who has resided for 10 years or is a minor may be expelled only on the grounds of public security that endanger the security of the State. The expulsion order is issued by the Ministry of the Interiors, taking into account all the guarantees provided for by the Directive 2004/38/EC. It is likely that the Ministry of the Interiors has been charged with expulsion of Union citizens because it has competence to expel foreigners pursuant to the consolidated law on immigration. It is worth of mention that the consolidated law on immigration reserves any decision on the expulsion of a minor to the juvenile court (*tribunale per i minorenni*) upon a request from the *Questore* (Article 31 (4) of the Legislative Decree 1989 no. 286): this provision is more favourable to the minor and should be applied to the Union citizen too.

The decision 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 (unless this is contrary to the interests of security of the State), the available legal remedies, the time allowed to leave the territory (not less than one month, except in case of proven urgency) 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 imperil the security of the State.

The expulsion order taken by the Ministry of the Interiors can be challenged in front of the administrative tribunal in Rome (Article 22 of the Legislative Decree 2007 no. 30).[2]

Article 21 of the Legislative Decree 2007 no. 30 regulates the expulsion orders issued by the Prefect if the conditions that supported the right of residence end. The Municipality reports to the Prefect whether the Union citizen does not satisfy the requirements for the right to reside or ceases to satisfy these requirements (see circular 6-4-2007 no. 19). Article 13 of the Legislative Decree 2007 no. 30 has to be recalled here: an expulsion measure may not be adopted against Union citizens or their family members if the Union citizens are workers or self-employed persons, or the Union citizens entered Italy in order to seek employment. The expulsion order shall be adopted taking into account all the guarantees provided for by the Directive 2004/38/EC. It 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 (not less than one month). A re-entry ban can not be issued. The order can be challenged in front of the tribunal (ordinary judge) of the place where the authority which issued the decision is located (Article 22 of the Legislative Decree).

The Prefect passes the expulsion order on to the Municipality of residence that will enter it in the population registry (see circular 10-4-2007 no. 400/C/2007/1409/P/10.4.39/II DIV). The Legislative Decree 2008 no. 32 makes it clear that the expulsion order entails the cancellation of the registration into the population registry.

The Decree-Law 2007 no. 181 modified the Legislative Decree 2007 no. 30, but since the Parliament did not turn it into law within 60 days, it ceased to produce effects from the begin-

[2] In the Italian legal system, a decision by a central authority of the State, the effects of which have no territorial limitations, is challenged in front of the administrative court in Rome (see Article 3 of Law 1971 no. 1034).

ning.[3] Nonetheless, it has been in force from 2-11-2007 to 30-12-2007. According to the amendments, the Ministry of the Interiors has competence to issue expulsion orders on the grounds of public order or security of the State, and expulsion orders of Union citizens who have resided for 10 years or are minors (who may be expelled on grounds of security of the State and imperative grounds of public security). The Prefect has competence to issue expulsion orders on grounds of public security. The Decree-Law does not define the notion of public order, security of the State, or public security, even thus they are central to ascertain which authority has competence to issue expulsion orders. It defines only the imperative grounds of public security: the behaviour of the Union citizen or his/her family members that jeopardizes the respect for human dignity or the fundamental human rights, or endangers public safety, and makes his/her stay irreconcilable with society (Article 20 (7-*ter*) of the Legislative Decree 2007 no. 30 as amended by the Decree-Law 2007 no. 181).

The expulsion order is immediately enforceable by the *Questore* when it is grounded on reasons of security of the State (this kind of expulsion order is issued by the Ministry) or on imperative grounds of public security (this kind of expulsion order is issued by the Prefect). The decision of the *Questore* enforcing the expulsion order issued by the Prefect has to be submitted to the justice of the peace (*giudice di pace*) within 48 hours for ratification. Pending the judgment (the justice of the peace shall decide within 48 hours), the person struck by the expulsion order is detained in a temporary holding center (*centro di permanenza temporanea)*. The decision of the *Questore* is enforceable upon ratification and the judgment of ratification can be challenged to the *Corte di Cassazione*.

Sanctions for breaches of the re-entry ban are rendered more severe: the offender shall be liable to a term of imprisonment of up to 3 years.

The Decree-Law 2007 no. 181 added Article 20-*bis* to the Legislative Decree 2007 no. 30. This provision regulates cases in which the person struck by an expulsion order on imperative grounds of public security is also subject to criminal proceedings. The consolidated law on immigration governs these cases. The *Questore* shall ask the court for approval (*nulla osta*). The court approves the enforcement of the expulsion within 15 days unless exceptionally pressing procedural exigencies prevent it. Pending the judgment, the *Questore* may order that the person to expel is detained in a temporary holding center. The expulsion may not be enforced if the person, who is subject to criminal proceedings for the criminal offences under Article 380 of the Code of criminal procedure (cases in which police officers and agents have the power to arrest persons engaged in the commission of an offence), is in pre-trial detention.

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[3] The Decree-Law has been enacted as an answer to the public upsetting due to a murder committed by a Romanian national in Rome (on the events that led to the Decree-Law, see P. Schlesinger, Tragedie recenti e disciplina dovuta in Italia ad immigrati appartenenti a Stati membri dell'Unione europea, *Corriere giuridico*, 2007, 1633-1639). Political struggle for leadership among the Left party was not alien to the decision. However, the Government has been discussing since a few months on how to render expulsions easier and whether to give to the Prefects (i.e. the representatives of the State in each province) the power to decide expulsions on grounds of public security. Indeed some draft laws were under examination. The Decree-Law 2007 no. 181 is nothing else than one of these draft laws. The Government wanted to strengthen the law in force in an attempt to face security problems due to a reported increase of immigration from EU countries and of crimes. During the days that immediately followed the adoption of the Decree-Law the media anticipated thousands of expulsions and even mass expulsions. Media are not devoid of responsibility for the mounting xenophobia of those days (see P. Vulpiani, Cattiva fede dei media e criminalizzazione dello straniero, *immigrazione.it*, no. 60, 2007). Members of the Parliament submitted many amendments to the Decree-Law, some of them accepted by all political parties (for instance: to give to the tribunal and not to the justice of the peace the power to approve the expulsion order immediately enforceable; to better define the imperative grounds of public security and the reasons of urgency). The proposals to make the punishment for the crime of xenophobia harsher and to criminalize homophobia have been much discussed. The compromise reached and approved by the Senate made the entire act wrecked. In fact, the Law approving the Decree-Law would have modified the existing law on the crime of xenophobia. The new provision would have stated that "whoever commits or incites to commit one of the acts of discrimination under Article 13 of the Treaty of Amsterdam shall be sentenced to a term of imprisonment of up to 3 years." The President of the Republic made clear that he would not pass the law unless the Parliament amended or cancelled this provision. Since the Parliament did not succeed in finding a solution, the Decree-Law was abandoned.

The expulsion order issued by the Prefect when the conditions that supported the right of residence end, is accompanied by a document that the Italian Consulate of the State of origin of the person deported shall validate. If the person is in Italy after the date s/he was allowed to leave the country and does not show the document duly validated by the Italian Consulate, s/he is liable of a term of imprisonment of 1 to 6 months and of a fine of 200 to 2.000 eur.

As far as remedies are concerned, the order issued by the Prefect can be challenged to the Tribunal of the place of residence.

Official data on the number of expulsions decided under the Decree-Law 2007 no. 181 are still missing. Press reports that 510 Union citizens have been expelled at 28-12-2007. 181 orders out of 510 have been grounded on imperative reasons of public security. Information on judicial review that Union citizens have undertaken against expulsion orders are also lacking.

The following is the only judgment published on legal journals that the rapporteur has found. The judge of Genova declared an expulsion order issued by the Prefect and grounded on imperative reasons of public security to be void (judgment of 24-12-2007, *Foro italiano*, 2008, I, 624). The Prefect issued an expulsion order of a Romanian citizen accused to be a prostitute and to have kept on pursuing her activity even so the police repeatedly asked her to cease it. Since the order was grounded on imperative reasons of public security, it had immediate effect. Therefore the Head of the Police (*Questore*) asked the justice of the peace (*giudice di pace*) for ratification, in order to execute it. The justice of the peace refused ratification. In the meantime, the expulsion order was challenged before the ordinary judge (*Tribunale in composizione monocratica*). The judge pointed out that the decision did not give any evidence of the statements it was grounded on. In addition to that, the "imperative grounds of public security" are to be interpreted restrictively and only a conduct that amounts to a crime can justify an expulsion. In the case before it, the fact that the person was a prostitute was not sufficient to ground the decision of expulsion.

The consolidated law on immigration laid down some cases of protection against expulsion of the non-EU foreigner. Since this law may be applied to Union citizens when it is more favourable to them, they are worth of mention. Nevertheless, no case-law can be recalled to uphold the claim that Union citizens can benefit from these provisions. Article 19 (2) d of the Legislative Decree 1998 no. 286 prohibits the expulsion of a woman during her pregnancy or within six months from the birth of her child. The Constitutional Court has declared this provision unconstitutional unless it is interpreted as to protect also the husband living under the same roof (judgment of 17-7-2000 no. 376).

Judicial expulsion

Italian criminal law requires courts to order the expulsion from the 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 Union citizens too (see, most recently, Corte di Cassazione judgment 8-6-2007 no. 22511, concerning Article 86 of DPR 1990 no. 309). The expulsion order is a security measure (*misura di sicurezza*), i.e. a measure decided by the same judgment convicting the defendant, if the judge is persuaded that the defendant is likely to commit another crime. Therefore, the judge may order the expulsion only after having ascertained that the person concerned represents a danger for the general public, and the supervising court shall renew the judgment on the danger the foreigner represents at the moment of executing this order. In addition to that, the duration of security measures is undetermined, but can be repealed if the person ceases to be a danger for the general public. Thus, even if the expulsion order is permanent, it can be repealed.

According to the consolidated 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 Union nationals. According to the judge, Article 16.5 is applicable only to non-EU foreigners and it is a special rule, unsuitable to be extended by analogy to an Union citizen, who enjoys the right of free movement and can be expelled only on the grounds of public policy, public security, and public health (judgment of 30-9-2004 no. 38656).

D. REMEDIES

The ordinary court (Tribunal) has competence to review the denial of entry or residence, and expulsion orders issued by the Prefect, both those grounded on reasons of public security and those in case the Union citizens or their family members do not satisfy the requirements provided for by the law.

The administrative tribunal of Lazio has competence to review the expulsion orders issued by Ministry of the Interiors.

Procedural guarantees have changed over time.

Article 22 of the Legislative Decree 2007 no. 30 states that when the application for judicial review of the expulsion decision is accompanied by an application for an interim order to suspend enforcement of that decision, the effects of the decision are deferred, pending the judgment. The effects are not deferred when the expulsion order issued by the Ministry of the Interiors is based on a previous judicial decision or on reasons of public security that imperil the security of the State; and when the expulsion order issued by the Prefect is based on a previous judicial decision.

The Decree-Law 2007 no. 181 amended Article 22 of the Legislative Decree 2007 no. 30. As a consequence, an application for an interim order may not defer the effects of the order issued by the Prefect and based on imperative grounds of public security or on a previous judicial decision, and may not defer the expulsion order issued by the Ministry of the Interiors and based on grounds of security of the State or on a previous judicial decision.

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M. Condinanzi, B. Nascimbene, Cittadinanza dell'Unione e libera circolazione delle persone, *Trattato di diritto amministrativo europeo – Parte generale* (M. Chiti, G. Greco eds.) Milano, Giuffrè, 2007, 87-143.

V. De Napoli, Le nuove procedure di allontanamento dei cittadini comunitari: la nuova normativa introdotta dal D.Lgs. di recepimento della direttiva 2004/38/CE, in attesa di pubblicazione in GU, *immigrazione.it*, no. 42, 15-2-2007 (brief comparison between expulsion rules pursuant to the old and new acts on free movement of Union citizens.)

A. Lang, B. Nascimbene, L'attuazione in Italia della direttiva 2004/38/CE sulla libera circolazione dei cittadini dell'Unione europea, *Diritto Immigrazione e Cittadinanza*, 2007, n. 2, p. 43-63 (comments on the Legislative Decree 2007 no. 30 transposing Directive 2004/38/EC into Italian legal order).

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O. Vercelli, I cittadini comunitari già iscritti in anagrafe alla data di entrata in vigore (11 aprile 2007) del decreto legislativo n. 30 del 6 febbraio 2007 – Esame di alcune problematiche connesse, *Lo stato civile italiano*, 2007, 514-516.

O. Vercelli, Conservazione del diritto di soggiorno (artt. 11, 12 e 13 D.Lgs. n. 30/2007) e diritto di soggiorno permanente del cittadino UE (artt. 14, 15, 16 e 18, medesimo decreto): quali sono i compiti dell'ufficiale d'anagrafe?, *Lo stato civile italiano*, 2007, 674-677.

Chapter II
Access to Employment

1. Equal treatment in access to employment

Article 6 (3) of the Legislative Decree 2007 no. 30[4] states that, subject to special regulations in line with the EC Treaty and EC laws, Union citizens and their 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.

Article 19 (1) of the Legislative Decree 2007 no. 30[5] states that Union citizens and their family members who enjoy the right of residence or the right of permanent residence 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.

Article 10 of the Legislative Decree no. 276 of 2003 prohibits bodies in charge of serving as intermediaries between supply and demand on the employment market (for instance providing temporary staff for third parties) from pre-selecting employees on the grounds of (among others) national origin.

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, since linguistic minorities live in these Regions.

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 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 exempt from the "CELI 5 Doc".

3. RECOGNITION OF DIPLOMAS (INCLUDING THE ACADEMIC DIPLOMAS)

Transposition of Directive 2005/36/EC

During 2007 Directive 2005/36/EC has been transposed into Italian legal system by the Legislative Decree 9-11-2007 no. 206 (*Gazzetta Ufficiale della Repubblica italiana*, 9-11-2007, no. 261, S.O.).

The following points are worth of notice.

The access to professions which in Italy are connected, even occasionally, with the exercise of official authority, and particularly activities reserved to notary are outside the scope of application of Legislative Decree 2007 no. 206 (article 1).

A decision issued by another Member State simply recognizing a qualification obtained in Italy is not a professional qualification for the purpose of recognition (article 4 (1) b).

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[4] The Legislative Decree has transposed Directive 2004/38/EC into the Italian legal system.

[5] The Legislative Decree has transposed Directive 2004/38/EC into the Italian legal system.

Article 7, on knowledge of languages, reproduces Article 53 of the Directive and does not make clear what level of knowledge is necessary for the practising of the profession.

Article 8 (5) lays down the procedure to follow in case of recognition of a foreign diploma obtained after attending courses wholly or partially in Italy. This provision can give an answer to the problem of the recognition of degrees awarded by a University from the United Kingdom outsourcing the teaching to private schools like the European School of Economics.

The recognition may be subject to an aptitude test. According to article 22, an aptitude test is mandatory for the following professions (the list is longer than the previous one): lawyer, accountant, professional accountant, estimator, industrial property agent, employment consultant, registrar, auditor, ski-monitor, and mountain guide. The competent ministry may make the aptitude test mandatory for professions entailing the provision of advice and/or assistance concerning Italian laws as an essential and constant feature (para. 3) or even for other professions if duly motivated reasons so require (para. 8).

The applicant has to bear the costs of the aptitude test or the adaptation period (article 25).

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 up 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 may 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 in 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 decided by a seven-member Committee appointed by the Ministry of Education. The document that states the recognition of the di-

ploma 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).

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C. Morviducci, Professioni, *Trattato di diritto amministrativo europeo – Parte speciale* (M. Chiti, G. Greco eds.) Milano, Giuffrè, 2007, 1483-1551 (on professions and professionals in EU law. The last paragraph surveys the implementation of the directives on recognition of diplomas in Italy)

Chapter III
Equality of Treatment on the Basis of Nationality

As a rule, Italian laws define persons they apply to by reference to general categories, such as workers, taxpayers, etc. There are cases in which even the word "citizen" has to be understood as a synonym of "person" and it is not meant to refer only to Italian citizens. For instance, the Decree of the Ministry for Health of 16-11-2007 (*Norme concernenti la detenzione ed il trasporto di medicinali stupefacenti o psicotropi da parte di cittadini che si recano all'estero e di cittadini in arrivo nel territorio italiano*, Gazzetta Ufficiale della Repubblica italiana, no. 278 of 29-11-2007) approves the certificate model that allows citizens residing in Italy to travel abroad carrying the drugs they need for medical reasons, and states that citizens residing abroad are allowed to enter Italy carrying the drugs they are treated with for medical reasons if they present a certificate issued by the competent authority of the State of residence. Even though the Decree does not define the word "citizen", the preamble makes it clear that it encompasses both Italian and foreigners.

Articles 43 and 44 of the Legislative Decree no. 286 of 1998 (consolidated law on immigration) set a specific judicial remedy for foreigners (both non-EU and EU 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, "discrimination means every act or conduct 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 political, economic, social and cultural fields and in every other field of public life".

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S. Giubboni, G. Orlandini, *La libera circolazione dei lavoratori nell'Unione europea*, Bologna, Il mulino, 2007 (handbook on free movement of workers and social security).

B. Nascimbene, Le discriminazioni all'inverso: Corte di giustizia e Corte costituzionale a confronto, *Diritto dell'Unione europea*, 2007, 717-733 (a comparison of the case-law of the European Court of Justice and of the Italian Constitutional Court on reverse discrimination)

F. Spitaleri, Le discriminazioni alla rovescia nella recente giurisprudenza comunitaria: rimedi insufficienti o esorbitanti?, *Diritto dell'Unione europea*, 2007, 917-939 (According to the A., the Court of Justice should better distinguish a reverse discrimination from a situation purely internal to a Member State: the former is a matter for the Court, since a reverse discrimination is caused by EC law and could jeopardy the unity of Community law. A reverse discrimination has to be judged as a violation of the Treaty whether it is devoid of an objective justification from the point of view of EC law.)

1. WORKING CONDITIONS, SOCIAL AND TAX ADVANTAGES (DIRECT, INDIRECT DISCRIMINATION)

Article 6 (3) of the Legislative Decree 2007 no. 30[6] states that, subject to special regulations in line with the EC Treaty and EC laws, Union citizens and their 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.

Article 19 (2) of the Legislative Decree 2007 no. 30[7] states that Union citizens residing in Italy on the basis of the act enjoy equal treatment with Italian nationals within the scope of application of the EC Treaty. The derogation from the equal treatment provision, laid down by Article 24 (2) of Directive 2004/38/EC, is implemented in more liberal terms by the Legislative Decree 2007 no. 30. While the Directive allows the Member States to deny both entitlement to social assistance during the first three months or during the longer period of stay for Union citizens in search of a job, and maintenance aid for students, the implementing provision restricts the application of this derogation. The derogation is limited to the granting of social security benefits. In any case rights to social benefits associated with the activity pursued or otherwise granted by the law shall not be affected by the derogation (see Article 19 (3) of the Legislative Decree 2007 no. 30). Therefore, Union citizens who entered Italy in search for a job are not entitled to social assistance for the first six months of stay, unless these allowances are granted by the law.

The labour legislation protects workers from discriminatory behaviours of the employer (see articles 15 and 16 of Law 1970 no. 300 the so called *Statuto dei lavoratori*).

The consolidated law on income tax states that a taxpayer is resident in Italy for the purpose of income tax if s/he has been registered in the population registry for most of the tax period (Article 2 of the Decree of the President of the Republic 1986 no. 917, *Testo unico delle imposte sui redditi*).

Article 38 (1) and (2) of the Constitution read 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.

The circular 3-8-2007 no. DG RUERI/II/12712/I.3.b issued by the Ministry for Health clarifies the effects of the implementation of Directive 2004/38/EC on registration with the national health care institutions. The Ministry says that its previous decree 18-3-1999 is no more applicable. This decree stated that an Union citizen when been entered into the population registry could ask to be registered with the health care system. From now on, the health care local offices shall register only Union citizens and their family already entered into the population registry and provided that they belong to the following groups: workers and self-employers and their family members; family members of Italian nationals; Union citizens entitle with the right of permanent residence; Union citizens unemployed or attending a vocational training course; Union citizens holding forms E106, E109, E120, E121. Union citizens not belonging to the abovementioned groups are not entitled to free health care. Therefore, the rapporteur recalls that Article 35 of the Legislative Decree 1998 no. 286 lays down a more favourable health treatment for non-EU foreigners – even irregularly in Italy – and should also be extended to Union citizens. Indeed Article 35 of the consolidated law on immigration grants urgent and necessary treatments in case of sickness or accident to foreigners who are in Italy but do not fulfill the entry and residence conditions.

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[6] The Legislative Decree has transposed Directive 2004/38/EC into Italian legal system.

[7] The Legislative Decree has transposed Directive 2004/38/EC into Italian legal system.

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M. Salerno, Libertà economiche e prestazioni sociali: la Corte esclude il diritto all'indennità di disoccupazione, *Diritto pubblico comparato ed europeo*, 2007, 465-467 (comment on case C-346/05 *Chateignier* [2006] ECR I-10951)

2. OTHER OBSTACLES TO FREE MOVEMENT OF WORKERS

Legge regionale della Sardegna, 29-5-2007 no. 2 (*Bollettino Ufficiale Sardegna* 31-5-2007 no. 18, supplemento ordinario no. 2)

The Region of Sardinia modified the Law no. 4 of 2006 which provided for the taxation of capital gains arising from the sale of residential buildings sited within three km. of the shoreline and used as second homes. The 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 since less than twenty-four months. The 2006 Law exempted vendors born in Sardinia and their spouses, irrespective of the place of residence from the tax; the 2007 Law repealed this exemption.

The Government challenged the 2006 and the 2007 laws for infringement of the Constitution. The Constitutional Court partly upheld the claims and declared the tax contrary to the Constitution (see judgment of 2008 no. 102).

3. SPECIFIC ISSUES: FRONTIER WORKERS (OTHER THAN SOCIAL SECURITY ISSUES), SPORTSMEN/SPORTSWOMEN, MARITIME SECTOR, RESEARCHERS, ARTISTS

Frontier workers

On case C-212/05 *Hartmann*, see below, chapter VI.

Sportsmen / sportswomen:

General framework

There are two kinds of athletes: professional athletes and amateur athletes. According to the directives enacted by the *Comitato Olimpico Nazionale Italiano* (the Italian National Olympic Committee – hereafter the CONI), only few Italian Sports Federations allow athletes to practise sporting activities as a profession (football, cycling, golf, motorcycling, boxing, and basketball). Other sporting activities can be practised only by persons affiliated to a National Sports Federation and formally qualified as "amateur athletes", notwithstanding the actual character of their sporting activity as an effective economic activity.

The professional athletes' employment relationship is regulated by Law no. 91 of 1981. The law applies to athletes who: a) pursue sporting activities for a certain period in return for remuneration; b) are affiliated to a National Sports Federation on request of the national club employer; and c) are officially qualified as "professional athletes" by the same Sports Federation. The relationship between an athlete and a national club must be regulated by a written employment contract.

The movement of foreign athletes is governed by the legislation on Union citizens (Legislative Decree no. 30 of 2007) or by the consolidated legislation on immigration (Legislative Decree no. 286 of 1998) depending on their EU or non-EU nationality, respectively.

With regard to EU athletes, their right of free movement is also recognised 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 CONI's Circular no. 232 of 28-8-2006 addressed to the National Sports Federations. The first circular states that "professional athletes of a Member State of the Union hold the right to move freely and to pursue sporting activities as a profession within the Italian territory" (para. A.12), and the second states that the consolidated legislation on immigration no longer apply to EU-8 nationals following the Italian revocation of the transitional arrangements.

With regard to non-EU nationals, the consolidated legislation on immigration shall apply. A regime for the admittance of non-EU athletes is laid down (Legislative Decree no. 286 of 1998, art. 27, para. 1, letter p, and para. 5-bis, and Presidential Decree no. 394 of 1999, art. 40, paras 16 to 18). The admission of non-EU athletes is regulated by quotas determined yearly by Decree of the *Ministero per i beni e le attività culturali* (the Ministry for Cultural heritage and activities). This quota in fact is decided by the CONI and sets annual limits for admittance of foreign athletes who intend to practice sporting activities either professionally or in return for any kind of remuneration. The Circular no. 8 of 5-3-2007 issued by the *Ministero dell'interno* makes it clear that also non-EU amateur athletes are to be included within the quota (see also the CONI's circulars 2006 no. 2024 on professional athletes, and 2007 no. 252 on amateur athletes). The annual quota has to be shared between all National Sports Federations according to the general standards that CONI sets out every season. The need to protect the national training youth has to be taken into account when deciding on the annual quota.

It is worthwhile to remark that on July 2004 the CONI National Council approved a directive in order to protect the national training youth and safeguard the national sport environment and the competitiveness of Italian teams and clubs. The directive states that starting from the 2006/2007 season no less than 50% of total team players included in the referee's report and competing at national level, have to come from an Italian training colt. In order to reach the overall purpose of the directive, in the 2004/2005 season, Italian sporting associations and the affiliated sporting activities had to submit to the CONI, in relation to each sporting group and to the championship they took part in, proposals and detailed projects dealing with the promotion and the safeguard of the national training colts.

Within the year's quota both athletes coming from abroad and foreigners who are already in Italy with a permit for work or family reasons (that is foreigners who entered Italy not in order to be affiliated to a National Federation), or foreign athletes already affiliated to a National Federation shall be comprised. The permit for sport lasts one year and may be renewed (see CONI's Circulars no. 2024 of 19-6-2006, and no. 4662 of 18-7-2007).

Foootball

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 Foreign Football Federation to which the player belongs to releases an international transfer indicating the professional or amateur qualification of the player in question (Article 40.6 last sentence). According to Article 40.7, clubs taking part in football championships, organized by the National 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 application for affiliation of an EU or EEA player shall be accompanied by a certificate of nationality.

According to Article 40.11, the Amateur National League can affiliate and field only one foreign (EU or non-EU) non-professional player coming from a foreign association. As to the affiliation of a non-EU non-professional player it is required: a) that her/his amateur qualification results from the "international transfer"; b) that a qualified Body attests that she/he undertakes a

work activity; c) as an alternative, if she/he is student, the exhibition of a certificate of registration or of attendance to educational courses or similar courses recognised by the competent Authorities; d) that she/he is resident in the Commune where the club's headquarters are located or in a different Commune of the same Province or in a neighbouring Province and her/his permit of stay lasts not less than one year or in any case it remains valid during the entire time of affiliation. Residence and permit of stay shall result at the indicated Communes (Article 40.11 point 1). As to the affiliation of an EU non-professional player it is required: a) that her/his amateur qualification results from the international transfer; b) that she/he is resident in the Commune where the club's headquarters are located (necessarily if the player is an underage person) or in a different Commune of the same Province or in a neighbouring Province (Article 40.11 point 2). All the players affiliated in accordance with Article 40.11 point 1 and 2 cannot be subject to transfer and their affiliation remains valid for one season.

On the contrary, although coming from a foreign Federation, Italian football players are not subject to the affiliation regime addressed to players coming from a foreign Federation if they have maintained continuously their Italian nationality, are sons of Italian citizens born in Italy (therefore their parents shall not be foreign-born), have their permanent residence in Italy and have never been summoned to play for a National team different from Italian one (Article 40.10). Furthermore an Italian non-professional player coming from a foreign association and residing in Italy is equated to an Italian player and his/her affiliation as well as his/her transfer is not subject to any limit (Article 40.11 point 3). An Italian non-professional player transferred abroad cannot be affiliated by Italian football clubs in the course of the same season during which she/he was released the international transfer, unless the affiliation is requested by the same club to which she/he was affiliated to before the international transfer (Article 40.11 point 3 (a)).

According to Article 40.11 bis, foreign players resident in Italy who are more than 16 years old and have never been affiliated to a foreign Football Federation can join a club belonging to the Amateur National League. To this purpose they shall exhibit a statement attesting that they have never been affiliated to a foreign Federation, a certificate of residence released by the Registry attesting that they have been residing in Italy for at least 12 months. Moreover, if foreign players are non-EU citizens they shall also exhibit a permit of stay valid at least until the end of the season.

Basketball

Basketball players are qualified as non-professional athletes except those who pursue basketball for a club taking part to the men's professional championship. According to Article 4bis of the Regulation of the Italian Basketball Federation (*Federazione Italiana Pallacanestro* – hereafter the FIP), an amateur player cannot work either as an employee or as a self-employed. Even if these players cannot sign contracts with non-professional clubs under Italian legal system, in any case clubs are allowed to pay their players remunerations such as payment for sporting activity during competitions, reimbursement and prize money. To this end it is necessary a payment agreement signed by the parties.

Article 30 of the FIP Regulation provides that players coming from non-EU Federations can only be affiliated to the Italian Basketball Federation on request of a national basketball club taking part to the men's professional championship or a national basketball club taking part to the women's A1 championship. According to Article 31, only men's basketball clubs affiliated to the professional division of the FIP can affiliate "professional" players who are EU citizens and have stable residence in an EU Member State without any limitation.

According to Article 32.1, women's basketball clubs taking part to the A1 Championship do not belong to the professional division of the FIP and can therefore affiliate a maximum of six foreign players (Community and non-Community nationals). Double nationals shall be considered for the purpose of calculating this numerical restriction too, unless they satisfy the require-

ments under Article 10.4. This article provides that basketball clubs taking part to National non-professional championships can affiliate for the first time players who have participated for at least two years to the following Italian youth championships: under 13, 14, 16, 18 championships. Furthermore these clubs can affiliate players already affiliated as professional athletes as long as they took part to these Italian youth championships for at least two years. Thus double nationals will not be considered as foreigners for the purpose of this numerical restriction only if they have participated to the above-mentioned Italian youth championships for at least two years. These clubs can include in the referee's report a maximum of four foreign athletes or double national athletes (no more than two non-EU national players) for each match. Moreover, they cannot field more than three foreign players (or double national players) at the same time and must field at least two Italian players during the match.

Basketball clubs taking part to the women's A2 championship can affiliate only one EU player or one Italian national player who is foreign-born or one foreign player who acquired Italian nationality or one Italian player coming from a foreign Federation as set out in Article 38. This affiliation lasts only one year and the request by the team shall be forwarded to the Federation by 11.00 a.m. of the second day prior to the game in the second sports day of Championship's first round. The above-mentioned categories of players are not free to transfer between one team and another.

According to Article 38, men's teams taking part to Regional C2 and D championships and Youth Under 21 Championship can include in the referee's report a maximum of two players of the following categories: a) Italian national players who are foreign-born and are not coming from a foreign Federation, Italian national players coming from a foreign Federation; b) foreign players who acquired Italian nationality; and c) underage players coming from a foreign Federation affiliated to the International Basketball Federation, irrespective of their nationality.

Finally, in order to comply with the CONI's directive on the safeguard of national training colts, the FIP provides that in the 2007/2008 season national clubs taking part to the main professional championship have to include in the referee's report at least six players trained in Italy, irrespective of their nationality. For the purpose to reaching this requirement they can also include in the referee's report two Italian national players even if not trained in Italy. Players who have taken part to the Italian youth championship for at least four seasons (under 13, 14, 16, 18 championships) are qualified as players trained in Italy, irrespective of their nationality.

Water polo

According to Article 9.5 of the General Regulation of the Italian Water polo Federation for the 2007/2008 season, the sporting club taking part to Italian championships 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 comes from an association affiliated to the LEN. According to article 9.7, the 2007/2008 quota of non-EU athletes assigned by the CONI to the Italian Swimming Federation (*Federatione Italiana Nuoto*) amounts to 110 units. Affiliation of foreign athletes is possible only if it is expressly set out in specific regulations on each championship. Italian water polo clubs taking part to the National men's A1 Championship can affiliate no more than three foreign athletes and starting from the 2008/2009 season no more than two. Italian water polo clubs taking part to the National women's A1 Championship can affiliate no more than two foreign athletes and starting from the 2008/2009 season no more than one. Italian water polo clubs taking part to the National men's A2 Championship can affiliate no more than one foreign athlete. Italian clubs taking part to National Youth men's Championships can affiliate only a foreign player who is under 20 upon condition that his parents have been residing in Italy since at least one year. This affiliation has to be licensed by a Federal Council's resolution. Foreign players cannot join water polo clubs taking part to the National women's A2 Championship nor to Youth women's Championships.

Ice-Hockey

According to the Regulation of the Italian Ice Sports Federation (*Federazione Italiana Sport del Ghiaccio* – hereunder FISG), teams affiliated to the Federation can affiliate players coming from a foreign Federation. The application for affiliation of these players shall be forwarded to the Federal Secretariat and shall be accompanied by: a) a "Transfer Card" meaning the international license released by the International Ice-Hockey Federation (hereunder the IIHF) as set out in International Hockey Regulations or b) an authorization by the foreign Federation of origin (for other ice sports); c) a document attesting payment of the annual fee fixed by the FISG; d) a permit of stay for foreign players or, for double nationals players, a certificate of nationality and a document released by the foreign Federation attesting that athletes in question have never joined the Foreign National team for international competitions (see Article 46 paras. 1-4). According to the rules on affiliation of athletes for the 2007-2008 season, affiliation of athletes coming from a foreign Federation costs euro 20 (in contrast to the amount of euro 10 and 6 fixed as to affiliation of other athletes). Moreover affiliation of ice-hockey players coming from a foreign Federation costs 1.100 Swiss francs if they are senior athletes (more than 20 years old). This amount includes transfer's fee assigned to the Federation of origin and the International Federation, costs for the affiliation's procedure. This transfer's fee grants the acquisition of the Senior Transfer Card. Affiliation's renewal costs 130 Swiss francs for senior athletes and an unlimited Transfer Card costs 104 Swiss francs. It is worth taking into account that affiliation of athletes coming from a foreign Federation cannot be renewed if they possess a limited Transfer Card.

In order to comply with the CONI directive on the national training colts' safeguard, the FISG lays down annually limitations to the affiliation of foreign players for each ice sport (Article 46.6). Furthermore the FISG will decide how many Italian players each teams have to field during each match on the basis of the rules laid down by the CONI (Article 46.7).

According to the Federal Annual Rules on Italian Ice-Hockey men's Under 26 Championship for the 2007-2008 season, it is necessary to distinguish between Italian players trained in Italy or having Italian nationality and players having foreign nationality and/or trained abroad. The first category includes: - Italian national players affiliated to the FISG for the first time; - Italian national players coming from a foreign Federation if they have already played in Italy for two consecutive seasons or are eligible to join the Italian National team; - foreign national players even if coming from a foreign Federation provided that they have played in the National Youth Championships organized by the FISG for at least three consecutive seasons; - Italian national players coming from a foreign Federation who played in Italian championships for at least two seasons in so far as they played as foreign players not over quota. The second category includes:

- players already affiliated to a foreign Federation and having EU nationality or an equivalent nationality (that is a nationality of a country having concluded a treaty providing free movement of people and, in any case, whom entrance in Italy does not require a visa);
- non-EU players already affiliated to a foreign Federation;
- players having Italian nationality coming from a foreign Federation if they have not played in Italy for at least two seasons or are not eligible to join the Italian National team.

It is worth noting that Ice-Hockey cannot be pursued as a professional sporting activity. Finally the Federal Annual Rules state that every Ice-Hockey player coming from a foreign Federation over the age of 18 or taking part in a senior championship needs the International Transfer Card released by the IIHF (even if she/he possesses Italian nationality) on payment of the above-mentioned transfer's fee. Ice-Hockey associations are not free to affiliate non-EU players without limitations. They can affiliate and field two non-EU players who are under the age of 18 in the Under 19 Championship. Furthermore they can affiliate non-EU players without any numerical restriction in the Under 16, 14, 12, 10 and 8 Championships but use them within the limits agreed

for each category. In particular, in the Under 16 championship, no more than two non-EU players can be field, while in the Under 14 Championship no more than three non-EU players and in the Under 12 no more than four non-EU players. Teams taking part to the Under 10 and 8 Championships are free to field non-EU players. In any case every foreign athlete (EU and non-EU national) taking part to youth Ice-Hockey competitions for the 2007/2008 season needs a written authorization by the foreign Federation of origin and an international "letter of approval" in accordance with the IIHF's Regulation. These authorizations remain valid for one year. Therefore Italian associations have to be authorized annually by the FISG to affiliate and field this category of athletes. Every Ice-Hockey association can affiliate only a foreign coach for each team taking part to the Youth Championships.

According to the Federal Annual Rules on Italian Ice-Hockey women's A Championship for the 2007-2008 season, every clubs taking part to the National women's A championship can affiliate a maximum of two athletes coming from a foreign Federation, one having Italian nationality and one having EU nationality or non-EU nationality. In this case non-EU players shall possess a regular permit of stay not granted for sporting activity. In order to field the foreign player coming from foreign Federation Ice-Hockey women's clubs shall meet two requirements. In the first place these clubs must organize a sports day devoted to the women's Ice-Hockey's development. In the second place these clubs shall take part to the activities promoting youth sectors with at least one mixed team. This mixed team can be Under 12 or Under 10 or Under 8 and must include a minimum of six female players. Ice-Hockey associations taking part to youth women's sporting activities are not free to affiliate non-EU players without limitations in the same way as associations taking part to youth men's sporting activities. They can affiliate and field two non-EU players who are under the age of 18 in the Under 19 Championship. Furthermore they can affiliate non-EU players without any numerical restriction in the Under 16, 14, 12, 10 and 8 Championships but use them within the limits agreed for each category. In particular, in the Under 16 championship, no more than two non-EU players can be field, while in the Under 14 Championship no more than three non-EU players and in the Under 12 no more than four non-EU players. Teams taking part to the Under 10 and 8 Championships are free to field non-EU players. In any case every foreign athlete (EU and non-EU national) taking part to youth Ice-Hockey competitions for the 2007/2008 season needs a written authorization by the foreign Federation of origin and an international "letter of approval" in accordance with the IIHF Regulation. These authorizations remain valid for one year. Therefore Italian associations have to be authorized annually by the FISG to affiliate and field this category of athletes.

Cycling

According to the *Statuto* of the Italian Cycling Federation (*Federazione Ciclistica Italiana* – hereunder FCI), every cyclist who pursues sporting activity as both a professional athlete and an amateur one for an affiliated club can be affiliated to the FCI, irrespective of his/her nationality (Article 3). Cyclists having Italian nationality (even if resident abroad) and foreign cyclists resident in Italy can be licensed by an *ad hoc* Federal Committee to pursue cycling as a professional athlete.

Teams can affiliate young foreigners residing with their families in Italy since at least three months and their application for affiliation shall be forwarded to the competent Regional Committee. These athletes can take part to every competition organized by the FCI. Young foreigners (EU and non-EU nationals) between 7 and 12 years old and staying in Italy for study reasons or tourism can take part to sporting activities organized by the FCI if they have a membership card and an authorization granted by their Federation of origin.

As to juniors categories, affiliation of foreign athletes is allowed only in the following cases: they have been resided in Italy for at least five years or are resident in Italy with their families

and have been already affiliated to the FCI as *esordienti* and/or *allievi* (see Article 15.6.1 of the 2008 Rules).

As to men's Elite and Under 23 categories, Italian teams can be joined only by one foreign athlete if they have already affiliated at least eight Italian athletes (and at least two of them born in 1989 and coming from the "juniors" category). This foreign athlete cannot be replaced during the season (Article 15.6.2). Foreign athletes affiliated to the FCI for at least three years as *allievi/juniores* shall not be considered for the purpose of calculating the above-mentioned restrictions.

As to women's "Elite" category, limits to affiliation to *Union Cicliste Internationale* women's teams are regulated by the same *Union Cicliste Internationale* (Article 15.6.3 (a)). Italian women's teams competing in the Elite category can affiliate no more than four foreign athletes affiliated to the FCI or their Federation of origin, if they have already affiliated at least six Italian athletes. These foreign athletes cannot be replaced during the season (Article 15.6.3 (b)).

Volleyball

Volleyball athletes can be affiliated to the Italian Volleyball Federation (*Federazione Italiana Pallavolo* - hereunder FIPAV), irrespective of their nationality (Article 20 of the Affiliation's Regulation). The same Article distinguishes between "Italian athletes" and "foreign athletes". Italian athletes are:

- Italian citizens who are not coming from a foreign Federation;
- foreign citizens never affiliated to a foreign Federation who possess a certificate of residence in Italy, with the exclusion of a residence permit for tourism (Article 43) and foreign citizens, already affiliated as "Italian athletes" and then transferred abroad, at the expiry date of the international transfer card (Article 54);
- athletes coming from a foreign Federation within the limitations set under Article 44. According to Article 44, an athlete coming from a foreign Federation can be affiliated as an Italian one if s/he has not taken part to sporting activities organized by the foreign Federation for the last four seasons and possesses a certificate of residence in Italy (residence permit for tourism is excluded).

The category of athletes under Article 43 can be field by National clubs without numerical restrictions (Article 43.4). Foreign athletes are those athletes coming from a foreign Federation who do not meet the requirements under Article 44. According to Article 45, the application for affiliation of foreign athletes shall be accompanied by a receipt's copy attesting the payment of a FIPAV's fee fixed in the amount of eur 1.100, an international transfer card released by the Federation of origin, a receipt attesting the payment of a 2.000 US dollars fee fixed by the *Fédération Internationale de Volleyball*'s, and an authorization by the national club which the athletes joined. It is worth taking note that affiliation's procedure relating to foreign athletes is managed by the *Fédération Internationale de Volleyball* (see also the 2007/2008 Affiliation's Rules). As to international transfer of Italian athletes, the international transfer card is released by the FIPAV on payment of transfer's fees determined as follows:

- euro 3.000 for athletes in the A division;
- euro 1.000 for athletes in the B division;
- euro 200 for all other athletes.

Athletes qualified as "foreign athletes" can take part to Italian National A Championships only (Article 20.2). Athletes coming from a foreign Federation can be affiliated as "foreign athletes" without numerical restriction only with regard to National women's and men's A Championships (Article 45.1). Furthermore, as to National Women's A Championships, clubs cannot affiliate more than two athletes coming from the same foreign Federation. According to Article 53.1, a "foreign athlete" not taking part to National A Championships can be affiliated to the FIPAV as

an "Italian athlete" when s/he satisfies the following requirements at the same time: a) s/he acquired Italian nationality; b) has resided in Italy for at least two years starting from the date of acquisition of Italian nationality; and c) has never been affiliated to a Federation during this period. According to Article 53.2, a "foreign athlete" taking part to National A Championships can be affiliated to the FIPAV as an "Italian athlete" when s/he meets the following requirements: a) s/he acquired Italian nationality; b) s/he was released by his/her Federation of origin a definitive International Transfer Card, not subject to conditions or s/he has been affiliated to the FIPAV for at least two seasons starting from the date of acquisition of Italian citizenship or has not played during the same two years; c) played as a "foreign athletes" in the three seasons before the acquisition of Italian nationality; d) never joined the Foreign National team in the two years before the acquisition of Italian nationality.

Athlete's affiliation to the FIPAV at the instance of an Italian Volleyball club entails establishing a tie between the affiliated athlete and the concerned club as set out in Article 30. This tie entails the obligation by athletes to pursue their sporting activity only on behalf of the club they are affiliated to. Athletes are allowed to pursue their sporting activity joining a second club with the original club's consent. This tie usually lasts five years starting from the season in which athletes become 25 years old but lasts only one year for athletes who are under 14 or above 34, for athletes borrowed by a second club from the first club, and for foreign athletes.

Finally, according to the 2007/2008 Affiliation's Rules, starting from the 2008/2009 season affiliation of foreign athletes who are under 23 is not allowed. For the 2007/2008 season Italian clubs taking part to Italian National A Championships shall field a minimum of Italian athletes varying depending on the kind of championship: for the men's A1 Championship at least three Italian players (3/7); for the men's A2 Championship at least four Italian players (4/7); for the women's A1 Championship at least three Italian players (3/7) (at least six Italian athletes shall be included in the referee's report); for the women's A2 Championship at least five Italian players (5/7).

Remedies

Article 44 of Legislative Decree no. 286 of 1998 (consolidated legislation 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 measure appropriate for removing discriminatory effects". Discrimination means every act or conduct, 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 the purpose or effect of destroying or jeopardizing the recognition, the enjoyment or the exercise of human rights and fundamental freedoms in political, economic, social and cultural fields and in every other field of public life (Article 43).

Articles 43 and 44 set a specific judicial remedy for foreigners (either non-EU or EU nationals) against discrimination based on nationality. Therefore, foreign athletes may challenge Sports Federations' regulations limiting the affiliation of foreign athletes or the number of foreign players who might be fielded in national competitions.[8] 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 Sports Federation.

[8] 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 4-5-2001, *Foro italiano*, III, 529, holding 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.

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 CONI's Chamber of arbitration for sport. The leading case is *Hernandez Paz* about water polo.[9]

Hernandez Paz, a Spanish national and a very renowned water polo player, was denied the affiliation to the *Federazione Italiana Nuoto* requested by the water polo club Cus D'Annunzio, which wanted to field the Spanish champion in the main Italian championship. The main ground for the denial was Paz's foreign nationality: considering the limited number of foreign players (three at that moment), which Italian water polo clubs could field in national competitions, Cus D'Annunzio had already engaged three foreign players. Thus, Hernandez Paz brought an action based on article 44 before the courts of Pescara against the alleged 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) the practise of sporting activities could not be recognized as human rights or fundamental freedoms; and b) the practise of water polo could not be regarded as included in the right to work because water polo players are classified 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*,[10] under the rules of CONI's Chamber of arbitration for sport, notwithstanding the statement in general terms of the freedom to practice sporting activities affirmed by Law no. 242 of 1999 reforming the CONI. Nevertheless, the CONI has to promote parity of treatment among athletes. In fact, Article 16 states that "National Sports Federations and the affiliated sporting activities are governed 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." Article 2 adds that "… the CONI takes and support any initiative necessary for fighting discriminations and violence in the sports sector."

Recent legal literature

C.G. Izzo, A. Merone, M. Tortora, *Il diritto dello sport*, UTET, Torino, 2007.

The Maritime sector

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 Bundesrepublik Deutschland*) a Member State may restrict the posts of master and chief mate of ships flying that Member State's flag to its nationals only if the rights under the 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.

Up to 1998, Article 318 of the Italian Navigation Code (*Codice della navigazione*) stated that the crew of national ships, flying the Italian flag, had to consist entirely of Italian citizens. Law no. 30 of 1998 modified Article 318 and added a specific reference to Union citizens. Now an Union citizen is entitled to enrol as crew of Italian ships.

Up to 1999, Article 119 of the Navigation Code stated that only Italian citizens could apply in order to enrol as seafarer. The captain belongs to the seafarers. Law no. 472 of 1999 modified

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

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

Article 119 and added a specific reference to Community citizens. Now a Union citizen is entitled to enrol as a seafarer.

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

The Navigation Code still requires Italian citizenship as a condition to enrol as crew in the inland waterways sector (Article 133). However Article 23 of Legislative Decree no. 319 of 1994 states in general terms that Union citizens are treated as Italian citizens for the purpose of Article 133 of the Navigation Code.

The Commission brought an action for infringement against Italy to the Court, pending as case C-447/07.

Researchers/artists

The employment relationship in the cultural sector is not specifically regulated under the Italian legal system and the employment's status of artists is not specifically defined. Therefore it is subject to the ordinary rules of the Italian Civil Code. An artist who works in Italy is qualified as self-employed or as an employee depending on the individual situation. It does not seem that the legal status of an artist varies depending on her/his (Italian or of another Member State) nationality and no case-law points to the contrary.

With regard to social security issues it is worth taking notice of the case *ENPALS v. Rudas* (Corte di Cassazione, sezione lavoro, judgment of 20-6-1997 no. 5513). The ENPALS (*Ente nazionale di previdenza e assistenza per i lavoratori dello spettacolo*) is the National Body for social security of entertainment industry staff which deals with pensions and social benefits of persons who work as artists or in the sports sector, as listed in the Ministerial Decree of 15-3-2005 (*Adeguamentento delle categorie dei lavoratori assicurati obbligatoriamente presso l'Ente nazionale di previdenza ed assistenza dei lavoratori dello spettacolo*). Dancers are insured under a special social security scheme. This social security scheme provides that dancers can retire with an entitlement to a basic pension when they are 45 if men or 40 if women (Art. 6 Decree of the President of the Republic no. 1420 of 1971). According to Article 6, dancers' entitlement to the pension is subject to the following conditions: a) they shall be insured under the scheme administered by the ENPALS for at least 20 years and b) it is necessary a *minimum* amount of paid pension contributions. Mr. Rodrigo Rudas, a 45 years old dancer who have worked in Italy, in Sweden, in the Netherlands, and in Germany, submits an application for the basic pension claiming the totalisation of pension contributions paid under different national social security schemes, even if he does not fulfil the condition under a). The ENPALS opposes Mr. Rudas' application, lacking the condition under a). The Supreme Court holds that the requirement under a) shall be disregarded because it contradicts the treaty between Italy and Sweden of 25-9-1979 and Regulation no. 1408/71/EEC. Therefore the requirement of the insurance under the scheme administered by the ENPALS for at least 20 years shall be replaced by the possibility of cumulating pension contributions, even if paid abroad.

4. RELATIONSHIP BETWEEN REGULATION 1408/71 AND ARTICLE 39 AND REGULATION 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.

Recent legal literature on the free movement of patients:

R. Cisotta, Principi giurisprudenziali e nuove iniziative della Commissione in materia di *patient mobility* nell'Unione europea: un piccolo (o grande?) terremoto è in atto? *Studi sull'integrazione europea*, 2007, 161-182 (on the so called free movement of patients.)

A. Di Rienzo, L'esclusione assoluta del rimborso delle spese di ricovero all'estero è contraria al diritto comunitario, *Diritto pubblico comparato ed europeo*, 2007, 1275-1279 (on case C-444/05 *Stamatelaki* [2007] I-3185: restrictions on the freedom to provide services and reimbursement of the cost of treatment in private hospitals.)

E. Longo, Il diritto ai migliori trattamenti sanitari nella giurisprudenza di Lussemburgo, *Quaderni Costituzionali*, 2007, 662-666 (on case C-444/05 *Stamatelaki* [2007] I-3185: restrictions on the freedom to provide services and reimbursement of the cost of treatment in private hospitals.)

Chapter IV
Employment in the Public Sector

1. Access to public sector

Preliminary remarks

The Italian general framework legislation on the public sector in general and the employment in the public sector in particular will be briefly outlined, and 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) will be explained.

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, while the State has an exclusive competence related to the organization of the national public sector, meaning employment in the national administrative structure, as State Ministries and national State bodies. Thus within their exclusive competence, Italian Regions are not actually subject to State legislation regarding employment in the public sector. Every Italian Region is, therefore, 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 reform of the employment in the public sector, the Legislative Decree no. 165 of 2001 has modified the nature of the work relationship with the Public Authorities (to be understood in a broad meaning, including national, Regional or local authorities and every public body) under the Italian legal system. This law transformed the status of the personnel in the Italian public sector from civil servants subjected to a public law regime, into employees subjected to the ordinary rules of the Italian Civil Code, on the same footing with 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 categories 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 Ministry of the Interior (*carriera prefettizia*); the personnel of public bodies 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, whose status of civil servants is regulated by Decree of the President of the Republic no. 76 of 6-2-2004 (par. 1-bis). These specific categories seem to coincide partially with those posts reserved to Italian nationals under Art. 1 of DPCM no. 174 of 1994 and the posts entrusted with the functions that have to be performed only by Italian citizens under Art. 2 (see hereunder).

Any employment relationship with a public employer but those still regarded as civil servants is established through 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.

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

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 have set out Italian nationality as a general requirement to access to public service.

Notwithstanding some doubts formerly expressed by both legal scholars[11] and judges, the point has been definitively clarified by the Supreme Civil Court (*Corte di Cassazione*, labour chamber, judgement 13-11-2006 no. 24170). Even if the case before the Supreme Court concerned the question of 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 access posts in the public sector. First of all the Supreme Court stated that foreigners (to be understood as non-EU citizens) could not access positions in the public sector due to the general requirement of the Italian nationality. Secondly it held that 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 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,[12] states in general terms that:

> "1. EU citizens may access 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, the Italian legal system formally extends the treatment reserved to Italian citizens with regard to access to posts in the public sector to Union citizens, 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 Article 37 of the Decree of the President of the Republic 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 closely echoed par. 10 of the judgment of the ECJ in case 149/79, *European Commission v. Belgium* [1980] ECR 3881.[13] Secondly the word "or" in paragraph 1 ("employment in the public sector which

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[11] For references see D. Traina, Libertà di circolazione nella Comunità economica europea e pubblico impiego in Italia, *Rivista trimestrale di diritto pubblico*, 1991, 331.

[12] "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"

[13] R. Caranta, La libertà di circolazione dei lavoratori nel settore pubblico, *Diritto dell'Unione europea*, 1999, 21, at 44.

does not involve the direct or indirect exercise of powers of public authority *or* which is 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.[14] However because a clear distinction between the two groups of posts and functions is far from being easy to draw, the two requirements seem to be two different wordings of the same single requirement.[15] In any case Art. 38 (2) ascribes the task of specifying the posts which are surely reserved to the Italian nationals to a Decree of the President of the Council of Ministers (see hereunder).

Besides Article 38 (1), equal treatment among nationals and EU citizens with regard to the recruitment procedures in the public sector is also guaranteed by secondary rules such as those contained in Decree of the President of the Republic 9-5-1994 no. 487 (*Regolamento recante norme sull'accesso agli impieghi nelle pubbliche amministrazioni e le modalità di svolgimento dei concorsi, dei concorsi unici e delle altre forme di assunzione nei pubblici impieghi*) which Legislative Decree no. 165 of 2001 referred to (see Art. 70 para. 13). Article 2 para. 1 (1) of Decree of the President of the Republic 1994 no. 487 states that Italian nationality is a general requirement for access to employment in the public sector, but may not be applicable to Union citizens, except for the access to posts expressly reserved to Italian nationals by the Decree of the President of the Council of Ministries 5-7-1994 (see hereunder)

Notwithstanding these provisions, the Italian public administrations' practice does not seem always in line with Community law. To make an example, this was the case involving Mr Claus-Peter Saecker, an EU citizen excluded by a regional administration (*Consiglio Regionale della Sardegna*) from the participation to a competition based on titles for a position as skilled worker. The competition notice lists Italian nationality and a five years professional experience as maintenance man of technical installations of the *Consiglio Regionale* as conditions for participation in the recruiting procedure. The administrative tribunal (Tribunale amministrativo regionale Sardegna, judgment no. 1722 of 2007) rejects the regional administration's interpretation and holds that the nationality of an EU Member State shall be considered as equivalent to Italian one as provided for by Art. 2 para. 1 (1) of Decree of the President of the Republic 1994 no. 487. According to the administrative tribunal, the requirement of Italian nationality contained in a competition notice shall be interpreted in conformity with Italian and Community law (Article 39 ECT and Regulation no. 1612/68/EEC). Hence, Mr. Saecker's exclusion from the participation to the competition shall be qualified as a practice contrary to both Italian and Community law.

In order to ascertain which posts and functions are 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, now repealed but indirectly recalled by Art. 38 para. 2, of Legislative Decree no. 165 of 2001 (and which Art. 2 para. 1 (1) of the Decree of the President of the Republic no. 487 of 1994 directly refers to).

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 Italian nationals and Art. 2 describes the functions that have to be performed by Italian nationals.

According to Art. 1, the posts reserved for the Italian citizens16 are:

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[14] 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.

[15] Caranta, at 44.

[16] "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;

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 do not require academic qualifications other than those delivered at the end of obligatory schooling).

According to Art. 2.1, the functions reserved to 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.[17]

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 as defined above. Such a refusal has general prohibitive effect.

Finally, Article 3 defines the general requirements that European Union citizens have to possess in order to access to the public service.[18] 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 Commission's Communication, 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, particularly the categories contained in Article 1 (a), (b) and (d).

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b) i posti con funzioni di vertice amministrativo delle strutture periferiche delle amministrazioni pubbliche dello Stato, anche ad ordinamento autonomo, degli enti pubblici non economici, delle province e dei comuni nonché delle Regioni e della Banca d'Italia;
c) i posti dei magistrati ordinari, amministrativi, militari e contabili, nonché i posti degli avvocati e procuratori dello Stato;
d) i posti dei ruoli civili e militari della Presidenza del Consiglio dei Ministri, del Ministero degli affari esteri, del Ministero dell'interno, del Ministero di grazia e giustizia, del Ministero della difesa, del Ministero delle finanze e del Corpo forestale dello Stato, eccettuati i posti a cui si accede in applicazione dell'art. 16 della L. 28 febbraio 1987, n. 56.
2. Resta fermo il disposto di cui all'art. 1, comma 3, del D.Lgs. 3 febbraio 1993, n. 29."

17 "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."

18 "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".

On the one hand, one can question whether only the posts regulated by Article 16 of Law 28-2-1987 n. 56 are not connected with the exercise of official authority;[19] on the other hand the administrations concerned are not the same mentioned by the European Commission action plan.[20]

Article 1 does not seem to be in accordance with Art. 39(4) ECT, because Community law does not allow a Member State to reserve for its nationals posts of mere technical or administrative nature when the employer is a body entrusted with the exercise of public powers.[21] According to the Court of Justice in case C-405/01 (*Colegio de Oficiales de la Marina Mercante Española vs Administratión del Estado*), as a derogation from the fundamental principle of freedom of movement of workers "Article 39(4) EC must be construed in such a way as to limit its scope to what is strictly necessary for safeguarding the interests which that provision allows the Member States to protect" (para. 41). On account of this, not every management post in the State administrations (Art. 1(a)) and top-level post in the local structures of State administrations (Art. 1(b)) involves in concreto the exercise of public powers on a regular basis and not every position in the public administrations as determined by Art. 1(d) entails duties and responsibilities involving the performance of police powers or functions which entail adopting, developing, and enforcing licences and coercive measures or involve the review of legality and the review as to the substance. In fact the exercise of police powers and the performance of the above mentioned functions can represent a very minor part of activities of the holders of positions reserved to Italian national listed in Articles 1(a), 1(b) and 1(d), contrary to the scope of Art. 39 (4) as determinated by the Court of justice (see also case C-47/02, *Albert Anker and Others v. Bundesrepublik Deutschland*, para. 63).

Secondly, notwithstanding the functions listed in Article 2 are without doubt connected with the exercise of official authority (R. Caranta, at 46), the reservation for Italian nationals of every position connected with these functions could not be covered any more by the derogation provided for by Art. 39(4) in the light of the Court's well settled case-law developed since 1990's, because posts in the public sector should be reserved for Italian nationals only on a case-by-case analysis and depending on specific tasks related to every position to be assigned.

Finally, it is not clear whether only posts listed in Art. 1 of DPCM no. 174 of 1994 or connected with those functions laid down by Art. 2 of DPCM no. 174 of 1994 are reserved to Italian nationals. To make an example, access to a post as fire fighter in the National Fire Department[22] (posts which are still subject to a public law regime) is subordinated to the requirement of Italian nationality, even if not included in the list of Art. 1 of DPCM no. 174 of 1994.

In conclusion, under the Italian legal system it is impossible to distinguish posts implying concretely 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. On the contrary, the above-mentioned exceptions to open access to employment in the public sector for EU citizens are formulated in general and broad terms rather than in specific terms. Furthermore, it is doubtful whether the above-mentioned exceptions under Articles 1 and 2 of DPCM no. 174 of 1994 are exhaustive under the Italian legal system as the example of fire fighters makes clear.

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19 R. Caranta, at 45 s.

20 R. Caranta, at 46.

21 C. De Rose, L'accesso ai pubblici impieghi dei cittadini dell'Unione europea, *Consiglio di Stato*, 1994, II, 1741, at 1748.

22 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.

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 shall have an adequate knowledge of the Italian language in order to access to posts in the public sector.

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.

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 group.

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*).

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 means of recruitment of civil servants is the open competition (for example see Constitutional Court, judgment 24-7-2003 no. 274). According to the Constitutional Court's settled case-law, the rule of the open competition as a means of recruiting employees in the public sector is a constitutional principle and an 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 interests.

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, these requirements have to respond to a real need of the administration and cannot amount to discrimination among applicants, prohibited by the Constitution (Art. 3). For example the supreme administrative court (Consiglio di Stato, 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 nationals than EU citizens was illegal.

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 procedure which shall guarantee the open access. Therefore Article 35 (3) states that every selection procedure has to comply with the following principles, also enshrined in Art. 97 (3) of the Constitution: a) a proper notice of the selection procedure has to be given to the public and the procedure has to be carried out through fair modalities that guarantee inexpensiveness and promptness; b) the procedure shall adopt objective and transparent criteria in order to check that the candidates possess the ability and the skill required by the position to be assigned; c) the procedure shall guarantee the equal treatment of men and women; d) the procedure is de-centralised with regard to the level of the public employer in the national structure (to be understood in its broadest meaning); e) the examination commission shall be formed of 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.

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.* 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). The *corso-concorso* is a competition based on tests to access a twelve-month training course organized by the *Scuola superiore della pubblica istruzione* and six month's training. It is important to note that this means 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 impor-

tant 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 pass the final exam are recruited, because the number of candidates who have access to the course and to the training outnumbers by 30% 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.

In conclusion the Italian legal system provides for the open competition as the principal means of recruitment of public employees and considers the procedure reserved to people who have a fixed-term professional experience or a specific professional qualification in a particular field as an exceptional mean of recruitment justified only if specific reasons of general interests require it. Therefore this system may indirectly guarantee equal treatment among nationals and EU citizens with regard to the access to employment in the public sector.

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,[23] which states that:

> "In those cases that are not regulated by Community legislations, 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."

As to recognition of diplomas in relation to posts in the public sector it is worth taking notice of the *Consiglio di Stato*, section 6, judgment 21-5-2007 no. 2545. According to the Supreme Administrative Tribunal, Article 10 of the Legislative Decree 27-1-1992 no. 115, transposing into the Italian legal system the Directive 89/48/EEC, applies not only in case of recognition of diplomas awarded in another Member State for the purpose of exercising a profession but also in case of recognition of diplomas for the purpose of participating to a recruitment procedure in the public sector provided that the possession of a certain diploma is required as condition for participation.[24] Article 10 provided that the documents necessary for the purpose of the recognition of a diploma awarded in another Member State if edited in a foreign language shall be accompanied by a translation certified by Italian Diplomatic or Consular Authorities sited in the Member State of origin or by an official translator.

Nevertheless, the Legislative decree 27-1-1992 no. 115 is no more in force due to the enactment of the Legislative Decree 9-11-2007 no. 206, transposing the Directive 2005/36/EC. Article 1(2) of Legislative Decree no. 261 provides that the specific provisions related to access to employment in the public sector shall not be affected. Therefore, the application of the Legislative Decree no. 115 is excluded because it is no more in force and the application of the Legislative Decree no. 261 is very doubtful because of the exception regarding access to employment in the public sector provided for by Article 1(2).

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[23] "Articolo 38: Accesso dei cittadini degli Stati membri della Unione europea.
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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."

[24] See also C. Morviducci, Professioni, Chiti, Greco (eds.), *Trattato di diritto amministrativo europeo*, parte speciale, Milano, Giuffré, 2007, at p. 1548-1549.

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

In the Italian legal system there is no general legislation regarding 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 constitutional 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 means of selection. The public servant performing tasks higher than his/her office is not entitled to the corresponding office but only 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, 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 is 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 professional experience in the public service is necessary (besides a degree), 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 to the competition if they have worked for an international organization for at least four years in a position requiring an academic degree. According to Article 28, paragraph 3, to participate to the *corso-concorso* a post-graduate degree, or professional experience of at least five years in the public or private sector, is necessary (besides a degree). The *corso-concorso* is the main means 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, awarded 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 Union 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. The scope of application of this procedure is not clear.

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

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

> "[...] 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 temporarily vacant posts" (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 to both the teaching professional experience

acquired in other Member States and 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.

Recognition of professional experience acquired before the academic year 2005/2006 was in doubt.[25] The Council of State stated (judgement 17-2-2006, no. 673) that the service performed abroad during academic years prior to 2005/2006 was subjected to the principle of the equal recognition. This interpretation results from the literal meaning of the provision, that does not distinguish between services performed before or 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 a teaching experience acquired in Great Britain (see *Tribunale amministrativo regionale* Campania, Salerno, section 1, judgment 29-6-2006, no. 880).

The principle of recognition of the teaching professional experience acquired in other Member States as equivalent to the experience acquired in Italy for granting additional points within the recruiting procedure of teaching staff by means of permanent aptitude lists according to Decree-Law no. 97 of 2004 (now Law no. 143 of 2004) is restated by the administrative tribunal of first instance of Campania as to music instrument teaching in the *Amato c. Ministero dell'istruzione, dell'univesità e della ricerca (MIUR)* case (see *Tribunale amministrativo regionale* Campania, Napoli, section 8, judgement 17-1-2007 no. 374; see also between the same parties *Tribunale amministrativo regionale* Campania, Napoli, section 2, judgement 7-9-2006 no. 7973).

It is worth taking notice of another case regarding an EU citizen (Mrs Arbe Acha Maria Lourdes) excluded by the public administration from the participation to a competition to assign posts as teacher of Spanish language (the competition specifically qualified as *3C-Conversazione in lingua spagnola*). Participation to this competition was exclusively based on two conditions: a 360 days teaching professional experience and a professional diploma as certified teacher. According to the public administration, Mrs Arbe Acha Maria Lourdes lacks both conditions because her teaching professional experience was not gained in Italy but in Spain and her professional diploma as certified teacher was awarded in her State of origin. Mrs Lourdes challenged the decree of exclusion from the competition before the administrative tribunal of first instance of Campania (see *Tribunale amministrativo regionale* Campania, Napoli, section 1, judgment 19-12-2007 no. 56/2008). According to this Tribunal, the decree of exclusion addressed to Mrs Lourdes was based on the refusal by the public administration of taking into account of her 360 days teaching professional experience gained in Spain and her diploma as certified teacher awarded in Spain. As stressed by the administrative tribunal, this practice is contrary to Art. 39 ECT and the Regulation no. 1612/68/EEC as to the refusal of recognition of professional experience gained in other Member States and to the Directive no. 89/48/EEC as to the refusal of recognition of a professional diploma awarded in other Member States. Since the competition notice should be interpreted in conformity with Community law, the Tribunal declared the decree of exclusion from the competition addressed to Mrs Lourdes to be void.

2. EQUALITY OF TREATMENT

As already said, in the Italian legal system the principle of equality of treatment and the open competition as means 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 prob-

[25] See, for instance, Tribunale amministrativo regionale Veneto, section II, judgement 5-11-2004 no. 3872.

able with regard to the access to employment and, on the contrary, rare with regard to treatment after becoming public employees.

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

According to Article 24 of the Legislative Decree no. 165 of 2001, a key role is attributed to the collective agreements as to the economic treatment of employees in the public sector (both fundamental and accessory economic treatment), career advances and professional development in general, and the determination of the tasks of the employees related to every kind of office in the Public Administration. The economic treatment of civil servants is set by the national collective employment agreement for each sector of the public administration. Every national collective employment agreement provides for a minimum basic economic treatment and an accessory economic treatment which varies depending on duties and responsibilities related to each single position and the success of each employee in achieving the objectives set by the public employer.

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 than one salary-scale is usually set for each office. In order to attain a higher salary scale within the same office, the employee has to pass an internal selection. An open competition is not required, because the civil servant concerned does not access to a different office but to a higher position within the same office, improving her/his remuneration.

Chapter V
Members of the family

1. RESIDENCE RIGHTS

The Legislative Decree 2007 no. 30 follows the same pattern of the Directive 2004/38/EC in order to define family members. Article 2 gives the same definitions as the Directive, Article 3 lists the beneficiaries. Both Article 2 and Article 3 reproduce Articles 2 and 3 of the Directive literally. This means that in Article 2 of the Legislative Decree 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 partnerships nor equates them to marriage, the scope of the provision is not clear. The Government said that the 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 literal meaning, interpretation in accordance to the meaning envisaged by the Government is not ensured.

When it comes to Article 3, the only difference from the directive 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 during the legislative procedure by both Parliamentary Committees. It is not clear however if only the State of origin is competent (as the 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 provisions of the Legislative Decree partners are never contemplated as people entitled to enter and stay, it is not clear which scope the provision could have.

The Circular 18-7-2007 no. 200704165/15100/14865(39), issued by the Ministry of the Interiors, Department for internal and territorial affairs, lays down the documents required for the registration of the partner in the population registers. Nevertheless, Italian laws say neither which authority has competence to decide on the request from the partner nor which factors are to be taken into account when examining an application.

Article 23 of the Legislative Decree 2007 no. 30 states that it applies to non-Italian members of the family of Italian citizens whether its provisions are more favourable to them. Article 28 of the Legislative Decree 1998 no. 286 (consolidated law on immigration) states that foreign members of the family of Italian or Union nationals are subject to the law on Union citizens, unless the consolidated law on immigration lays down provisions more favourable to them. A number of courts of first instance have stated that the legislative Decree 2007 no. 30 indeed applies to the non-EU spouse of Italian citizens (Tribunale amministrativo regionale del Piemonte, iudgment of 16-5-2007 no. 2676, *Diritto immigrazione e cittadinanza*, 2007, 3, 156-158; Tribunale di Torino, decree 11-7-2007, *Diritto immigrazione e cittadinanza*, 2007, 4, 143-146; Tribunale di Reggio Emilia, order 12-7-2007, *Diritto immigrazione e cittadinanza*, 2007, 4, 146-150). Therefore, the residence permit for family reasons can not depend on the spouses living under the same roof and may not be repealed when cohabitation ends, provided the marital link still exists. Article 30 of the Legislative Decree 1998 no. 286 (consolidated law on immigration) expressly asking for cohabitation shall be set aside (on this point see also G. Perin, La disciplina applicabile ai coniugi stranieri di cittadini italiani: chiarimenti giurisprudenziali e nuovi interrogative, *Diritto immigrazione e cittadinanza*, 2007, 4, 70-81).

Some Member States allow spouses of the same sex to get married. Such weddings are devoid of effects in Italy as contrary to public order. The Circular 18-10-2007 no. 55 by the Ministry of the Interiors asks the local keepers of the population registry receiving an application for

the registration of the marital status to check, in case of doubts, whether the spouses are of the opposite sex. Therefore, for the purpose of the rights to enter and stay, the recognition of the status of "spouse" to the persons of the same sex is questionable.

The Court of Appeal of Florence quashed the decree of the Court of first instance recognizing the right of residence to the partner of the same sex of an Italian national, the relationship being established in New Zealand. The first court adjudicated the case by directly applying Article 3 of Directive 2004/38. The second court holds that partners are not entitled with a right under Article 3 of the directive, but simply with having their situation duly considered. The court adds that public order opposes the recognition of a homosexual relationship (Corte d'Appello di Firenze, decree 6-12-2006, *Rivista di diritto internazionale privato e processuale*, 2007, 1088-1090. On this case see V. De Lisa, Ricongiungimento familiare di coppia omosessuale, *Nuova giurisprudenza civile commentata*, 2007, I, 1171-1175).

Visa requirements:

In accordance with Article 5 para. 2 of the Legislative Decree 2007 no. 30 the non-EU members of the family are required to have an entry visa. The entry visa is not required if the member of the family holds a valid residency card "referred to in Article 10" (Article 10 of the Legislative Decree is about the residence card of a family member of a Union citizen: a literal interpretation of the provision leads to the conclusion that the member of the family is exempted of the visa requirement only if s/he already holds a residence card issued by an Italian authority [N.o.R.]).
The documents required for a visa for family reasons as listed in the Foreign Ministry web site are:

- visa application form;
- recent passport-style photo;
- passport or travel document valid for at least three months after visa expiry date;
- copy of the EU or European Economic Area citizen's identity document or passport along with a declaration requesting the presence of the family member in Italy and swearing to be in possession of the requisites foreseen by the law;
- administrative documentation (marriage certificate, birth certificate, etc.) attesting to the familial relationship
- in the case of minor children, written permission from the child's other parent for visa to be issued.

The same documents are requested irrespective of the place (inside or outside the European Union) where the applicant resides.

The member of the family of a non-EU foreigner has to submit, in addition to the documents listed above, the "*nulla osta*" (entry clearance) issued no more than 6 months earlier by the competent "*Sportello Unico*" (Unified Immigration Desk).

The non-EU partner can not apply for a visa for family reasons, since s/he is not a member of the family according to Italian law. Therefore, s/he could apply for a visa for elective residence. In that case, the following documents have to be attached to the application:

- recent passport-style photo;
- passport or travel document valid for at least three months after visa expiry date;
- documented and detailed guarantee of substantial and steady private income private income (pensions or annuities) from property, stable economic and commercial activities or from other sources;
- availability of adequate lodgings in Italy.

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-hour period to present 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 present 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.

The non-EU member of the family enjoys the right of residence up to three months if s/he holds a valid passport and has regularly entered the Italian territory (that is, holding an entry visa when required).

In case of a stay for over three months, the family member has to register with the Municipality of the place of residence (Article 9 of the Legislative Decree 2007 no. 30). Family members entitled with the right to reside are identified with reference to Article 2 of the Legislative Decree 2007 no. 30. This means that the partner of an Union citizen has no right of residence. Nonetheless, the circular 18-7-2007 no. 200704165/15100/14865(39) lists the documents to be attached to the request for entry into the population registry submitted by the partner of the Union citizen.

The fact that Article 7 (4) of the Directive is not transposed is worthy of note. This 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.

When the Municipality receives an application to enter the non-EU family member in the population register, it forwards it to the Police Headquarters (*Questura*). Indeed the non-EU family member has to submit a request for a residence card to the Police Headquarters (*Questura*) of the place of residence within three months from the date of entry (see Article 10 of the Legislative Decree 2007 no. 30 devoted to the residency card of the family members of an Union citizen who are not nationals of a Member State, transposing Articles 9 to 11 of the Directive. The residence card is valid for five years, irrespective of the duration of the stay in Italy.) Since the entry into the population registry of a non-EU foreigner is conditional upon the regularity of his/her presence in Italy, the Municipality shall wait for the Police Headquarters to issue the residence card (see circular 6-4-2007 no. 19). The application for the residence card can be submitted directly to the Police Headquarters or through a Post Office (using the yellow band kit) (circular 10-4-2007 no. 400/C/2007/1409/P/10.4.39/II DIV). It seems that the residence card for non-EU members of the family is the same as the residence card for long-term residents under Directive 2003/109/EC.

Article 10 of the Legislative Decree 2007 no. 30 establishes the residence card for non-EU family members *stricto sensu*, that is those who are entitled with the right to reside pursuant to Article 2. Other family members may be granted the right to stay pursuant to Article 3. The circular 18-7-2007 no. 200704165/15100/14865(39) lays down that these family members can apply for a permit for elective residence. It is governed by the consolidated law on immigration, lasts two years and does not protect against expulsion. The non-EU partner of a Union citizen can ask for a permit for elective residence too (Circular 18-7-2007 no. 200704165/15100/14865(39)).[26]

The application to be entered into the population registry shall be accompanied by the entry visa when required, by a document attesting the existence of a family relationship issued by the State of origin of the Union citizen, and, as appropriate, the proof that the family member is dependant on the Union citizen (the Union citizen can self-declare that the family member is dependent on him/her): see circular 18-7-2007 no. 200704165/15100/14865(39).

In a case brought before the justice of the peace of Torino the claimant, a man from Ivory Coast married to a German woman, lodged an appeal against the decision refusing him the residence permit for family reasons. The man arrived to Italy in 2001 and did not apply for a residence permit within 8 days as the law required. In 2007 he married a German national and applied for a residence permit for family reasons. The *Questore* denied him the residence permit

[26] The Government in the meeting of 8-2-2007 approved a draft law on rights and obligations of persons living together on a stable basis. Article 6 stated that the foreign partner of an Italian or Union citizen could apply for residence permit for cohabitation; if the partner of an Italian national was a Union citizen, s/he was entitled to be entered into the population registry. The draft law has been subsequently abandoned.

because he was illegally in Italy when the wedding took place, and issued an expulsion decision. The justice of the peace holds that the Legislative Decree 2007 no. 30 grants the right of residence to a spouse of an Union citizen fulfilling the conditions of Article 7 (being a worker, having resources, etc). Since during the process no evidence that the wife was entitled with the right of residence has been given, the husband could not claim any right to stay (Giudice di pace di Torino, decree 16-11-2007, *Diritto immigrazione e cittadinanza*, 2007, 4, 136-138.)

Articles 11 (regarding the retention of the right of residence by family members in the event of death or departure of the Union citizen) and 12 (regarding the retention of the right of residence by family members in the event of divorce or annulment of marriage) of the Legislative Decree 2007 no. 30 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: therefore s/he enjoys no protection in case of annulment of the registered partnership, unless s/he 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 (consolidated 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.

Directive 2004/38/EC 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 Legislative Decree 2007 no. 30 makes it clear that the family member retains the right of residence if s/he is a victim of a crime directed against the person committed within 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 Municipality of the place of residence, within thirty days of the request (Article 16 of the Legislative Decree 2007 no. 30). The non-EU family's member entitled with the right of permanent residence shall ask the Police Headquarters for a "permanent residency card". The Police Headquarters shall issue this document within ninety days of the request (Article 17 of the Legislative Decree 2007 no. 30). The non-EU family's member acquires the right of permanent residence if s/he has lawfully remained for five years in Italy (Circular 10-4-2007 no. 400/C/2007/1409/P/10.4.39/II DIV).

As far as expulsion is concerned, family members (irrespective of nationality) are submitted to the same rules as Union citizens. The consolidated law on immigration adds some cases of protection against expulsion of the non-EU foreigner. Since this law may be applied to Union citizens where it is more favourable to them, they are worth of mention. Nevertheless, no caselaw can be recalled to uphold the claim that Union citizens can benefit from these provisions.

Article 19 (2) d of the Legislative Decree 1998 no. 286 prohibits the expulsion of a woman during her pregnancy or within six months from the birth of her child. The Constitutional Court has stated that this provision is unconstitutional unless it is interpreted as to protect also the husband living under the same roof (judgment of 17-7-2000 no. 376).

During 2007 the Constitutional Court has dismissed a question of constitutionality of Article 19 (2) d as evidently inadmissible. The remitting court asked whether not to protect the not married father of the child rendered the provision unconstitutional. The Constitutional Court holds to be unable to answer, since the remitting court has not stated which citizenship the foreigner holds. The fact that the foreigner might be a national of a new Member State is of relevance to the resolution of the case (order 23-11-2007 no. 397).

Article 19 (2) c of the Legislative Decree 1998 no. 286 prohibits the expulsion of relatives to the forth degree inclusive in the household of an Italian citizen and the spouse of an Italian citi-

zen. The Constitutional Court has stated that the provision can not be applicable to the members of the family of a non-EU foreigner, since the foreigner married to a foreigner is not on the same footing as the foreigner married to an Italian national (order of 14-4-2006 no. 158). Article 19 (2) c does not require legal residence. Nevertheless, it can not be applied to a foreigner who has already been expelled. Therefore if the foreigner gets married to an Italian national after being expelled, s/he can not benefit from any protection (see Corte di Cassazione, sez. I civ., judgments of 11-7-2006, no. 15753 and 17-7-2006, n. 16208). The family member who can not be expelled pursuant to Article 19 (2) is issued with a residence permit (see Article 28 of the Legislative Decree 1994 no. 394). The only requirement is cohabitation. Therefore, in order to be granted a residence permit, the spouse of an Italian national has not to demonstrate that s/he legally stays in Italy but only that s/he cohabits with her/his Italian spouse (see Corte di Cassazione, sez. I civ., judgment of 3-11-2006 no. 23598). A de facto separation does not grant protection (see Corte di Cassazione sez. I civ., judgment of 2-8-2006 no. 18220).

This case-law, if extended to Union citizens, might partly overcome the condition of legal residence and be in line with the case-law of the European Court of Justice.

2. ACCESS TO WORK

Article 6 (3) of the Legislative Decree 2007 no. 30 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. The scope or the content of the provision are unclear.

Article 19 (1) of the Legislative Decree 2007 no. 30 states that the Union citizen's members of the family who enjoy the right of residence or of permanent residence, are entitled to engage in employment or self-employment in Italy, with the exception of those activities that the law, in conformity with EC law, reserves to Italian nationals.

3. ACCESS TO EDUCATION AND 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)

Article 19 (2) of the Legislative Decree 2007 no. 30 states that the Union citizen's members of the family, irrespective of their nationality, who enjoy the right of residence or of permanent residence, are entitled to equal treatment with Italian nationals. During the first three months, social security benefits are not granted, 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)).
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 low incomes.

The National Social Welfare Institution (INPS – *Istituto nazionale di previdenza sociale*) has made clear that Romanians and Bulgarians were entitled to the children and family allowances from the date of accession (circular 23-2-2007 no. 46).

Recent legal literature:

F. Dallagiacoma, DICO e nuova disciplina del diritto di circolazione e di soggiorno nel territorio degli Stati UE, *Giurisprudenza di merito*, 2007, 2812-2820 (the A. examines a draft law of the Government on rights and obligations for partners and wonders whether it equates partnership and marriage for the purpose of free movement of persons. He gives a negative answer to his question, since an express equation – which is missing in the draft – is necessary.)

P. Franco, Sul diritto all'unità familiare nel diritto europeo e nel diritto italiano, *Il dirito di famiglia e delle persone*, 2007, 522-547 (a survey of international and EC law on family reunification.)

R. Miele, Ingresso e soggiorno del convivente e dei familiari del cittadino comunitario diversi dal coniuge, figli ed ascendenti. Dubbi sul corretto recepimento della direttiva 2004/38 da parte italiana, *immigrazione.it*, 1-9-2007 no. 55 (the A. expresses his doubts about the choice to issue a permit for elective residence to those who are allowed to stay pursuant to Article 3 of the legislative Decree 2007 no. 30).

R. Plender, The case-law of the Court of Justice: the *Akrich* and the *Chen* cases, in S. Bariatti and C. Ricci (eds.), *Lo scioglimento del matrimonio nei regolamenti europei: da Bruxelles II a Roma II*, CEDAM, Padova, 2007, 107-114.

C. Ricci, La "famiglia" nella giurisprudenza comunitaria, in S. Bariatti, *La famiglia nel diritto internazionale privato*, Milano, Giuffrè editore, 2007, 91-151 (a survey on the concept of "family" as defined by the case-law of the European Court of Justice).

L. Tomasi, La nozione di famiglia negli atti dell'Unione europea, in S. Bariatti, *La famiglia nel diritto internazionale privato*, Milano, Giuffrè editore, 2007, 47-90 (a survey on the concept of "family" as defined by secondary legislation of the European Union).

L. Tomasi, *La tutela degli status familiari nel diritto dell'Unione europea*, CEDAM, Padova, 2007 (on protection of family rights in EU law)

Chapter VI
Relevance/Influence/Follow-up of Recent Court of Justice Judgments

C-212/05 Hartmann and C-213/05 Geven

Italian law does provide for two social advantages for women similar to the Child-raising allowance set in the Bundeserziehungsgeldgesetz and subordinate to the condition of residence in Italy. These two social advantages are maternity benefits and are set in Articles 74 and 75 of the Legislative Decree no. 151 of 2001 (*Testo unico delle disposizioni legislative in materia di tutela e sostegno della maternità e della paternità*). These benefits are granted for every child born or adopted.

Under Art. 74 (*Assegno di maternità di base*) women resident in Italy, who are not entitled to other kind of maternity benefits as workers or self-employed workers (such those set in Articles 22, 66 and 70), are granted a maternity benefit of about 1.495 euro for every child born or adopted since 1 January 2001, irrespective of their nationality (Italian or EU nationality or non-EU nationality: in the latter case, they have to be entitled with a residence permit). They shall not have an income higher than about 31.000 euro per year.

Under Art. 75 (*Assegno di maternità per lavori atipici e discontinui*) women resident in Italy, who are not entitled to other kind of maternity benefits as workers or self-employed workers (such those set in Articles 22, 66 and 70), but who paid welfare contributions for at least three months, are granted a maternity benefit of about 1.800 euro for every child born or adopted since 2 July 2000, irrespective of their nationality (Italian or EU nationality or non-EU nationality: in the latter case, they have to be entitled with a residence permit). No minimum amount of income is required.

On these cases, see W. Chiaromonte, Le nozioni di “lavoratore migrante” e di “vantaggio sociale” nel regolamento n. 1612 del 1968, *Rivista del diritto della sicurezza sociale*, 2007, 723-728.

C-287/05 Hendrix

The Italian legal order does not envisage a benefit such as the one under review in this case.

C-291/05 Eind

Non-EU members of the family of Italian nationals are within the scope of the provisions of Legislative Decree 2007 no. 30, implementing Directive 2004/38/EC (Article 23). Therefore, if Miss Eind had been the daughter of an Italian national coming back to Italy after staying in another Member State for working reasons, the right to stay would not have been refused to her, since she would have claimed the benefit of the Legislative Decree which entrusts a family member with the right to stay. Moreover, Article 19 of the Legislative Decree 1998 no. 286 (consolidated law on immigration) states that the non-EU daughter of an Italian national living under the same roof may not be expelled (unless for reasons of public order) and shall be issued with a residence permit.

C-208/05 ITC

Contrary to German law, Italian law does not provide for a “recruitment voucher” in favour of an employee who is seeking work. On the contrary, under Italian legal system private-sector recruitment agencies are expressly not allowed to receive, directly or indirectly, any kind of payment from workers for their services (Art. 11 Legislative Decree no. 276 of 2003).

C-1/05 Jia

The Italian legislation states that in order to be issued with the residence card, the non-EU family member shall submit a document certifying his/her being dependent on the EU citizen (see Article 10(3)(b) of the Legislative Decree 2007 no. 30). Neither the Legislative Decree nor the implementing circulars make it clear what means of proof of the status of 'dependent' family member are acceptable, or when a family member shall be considered dependent.

C-97/05 Gattoussi

Contrary to German law, Italian law does not provide for "a work permit" issued by the Public administration as an authorization different from a residence permit. On the contrary, under Italian law there are different kinds of residence permits depending on the purpose for which they are issued. Under Article 5 para. 3-bis of the Legislative Decree no. 286 of 1998 (consolidated legislation on immigration), a non-EU national may be issued with a residence permit for working reasons only as a consequence of the conclusion of an employment contract under Article 5-bis. Residence permit for working reasons usually lasts as long as the employment contract which it is connected to, but in any case it cannot last more than two years (even if the employment contract is concluded for an unlimited period). Given the strong link between the residence permit for working reasons and the employment contract under Italian law, residence permit is renewable almost automatically if there is an ongoing employment contract.

Had a situation like that involved in the *Gattoussi* case occurred in Italy, a regime totally different from the German one would regulate the case.

Italian citizen's family members who are not Italian nationals are treated as EU citizen's family members who are non-EU nationals. According to Article 23 of Legislative Decree no. 30 of 2007, implementing Directive 2004/38/EC, rules contained therein, if more favorable, shall apply to Italian citizen's family members (including husband and wife) who are not Italian nationals.

Therefore a non-EU national who was in the same position as Mr. Gattoussi would be entitled to a residence card lasting five years (Article 10 of Legislative Decree no. 30 of 2007). The spouse keeps his/her status also pending a de facto separation. In the event of divorce or annulment of the marriage, the non-EU spouse benefits from the protection laid down under Article 12.

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*, turning into law and amending 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 the Decree of the President of the Republic 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 financial 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.

Contracts of linguistic associates are governed by private law, while the employment relationship of researchers and professors is governed by public law. This statement entails other differences. Firstly, different courts have jurisdiction to adjudicate disputes related to the work rela-

tionships: the ordinary courts have jurisdiction for contracts of linguistic associates (see Corte di Cassazione, order of 4-1-2007 no. 18), while the administrative courts have jurisdiction for cases of professors and researchers. No discrimination on grounds of nationality takes place, since Italian linguistic associate or linguistic associate in Italian language are treated the same way as any EU ones (see as far as the competent judge is concerned: Corte di Cassazione, grand chamber, judgment of 14-2-2007 no. 3200; as far as the qualification of the contract is concerned: Corte di Cassazione, labour chamber, judgment of 14-5-2007 no. 10939). Secondly, a linguistic associate can be dismissed on fair grounds pursuant to labour laws, while these laws do not apply to researches and professors (Corte di Cassazione, 10-5-2005 n. 9737; 12-1-2006 no. 430; 7-8-2006 no. 17788).

The problem of the treatment of linguistic associates is not completely resolved. Firstly, Law no. 63 of 2004 only deals with the economic treatment of linguistic associates (b). Secondly, Law no. 63 of 2004 does not relate to linguistic associates in general, but only to those employed at the mentioned Universities (a).

(a) The effective economic treatment paid to a specific linguistic associate depends on a number of factors. First of all, it is necessary to check if the linguistic associate is employed by one of the University listed by Law no. 63 of 2004. If the answer is negative, the case-law of Italian courts shows that the economic treatment can be calculated either with reference to the aforementioned law (and this solution has been upheld by the Corte di Cassazione: see judgments of 18-11-2004 no. 21856; 18-3-2005 no. 5909; 22-2-2007 no. 4147. In the same way, see Consiglio di Stato 20-2-2008 no. 589. On the contrary, see judgment of the Corte di Cassazione 14-4-2005 no. 7727, stating that this law is not applicable to Universities other than those listed), or on the grounds of equity. If it is calculated on the grounds of equity, reference is made to Article 36 (1) of the Constitution prescribing that "Workers have the right to a remuneration commensurate to the quantity and quality of their work and in all cases to an adequate remuneration ensuring them and their families a free and dignified existence" and Article 28 of the Decree of the President of the Republic 1980 no. 382 stating that the foreign languages assistants' salary shall not exceed the economic treatment of part-time tenured professors. The parameter can therefore be more favourable to linguistic associate. The case-law shows that the Supreme Court is not likely to quote Law no. 63 of 2004 when the economic treatment under review has been calculated with reference to a more favourable parameter than the one envisaged by this law. 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 corresponded to that of part-time tenured professors (judgments of 2005: no. 28152 to 28159, no. 28281, no. 28282, no. 28287, 28383 to 28385, no. 28396 to 28398, no. 28650, no. 28651; judgments of 2006: no. 90, no. 160, no. 761, no. 762, no. 1081, no. 1386, no. 19494, and no. 19495).

If the linguistic associate is employed by one of the Universities of the list, nonetheless s/he can be paid a higher economic treatment. In fact, the Law no. 63 of 2004 is without prejudice to any better treatment. Therefore, if the specific linguistic associate has received a better economic treatment for whichever reasons, his/her vested rights are protected (see Corte di Cassazione 22-2-2007 no. 4147: the court of first instance decided that the applicant should be paid a salary amounting to 80% of the salary of a tenured professor. She challenged the decision, claiming a higher pay. The Corte di Cassazione dismissed the appeal, saying that Law 2004 no. 63 protected the higher salary she had already been paid as a vested right but prevented her from claiming an even higher salary.).

(b) As far as the treatment other than financial of linguistic associates is concerned, the Consiglio di Stato has made clear that they are not entitled to teach supplementary courses (see Consiglio di Stato, judgement of 19-1-2007 no. 101; sezione VI, judgment of 20-2-2008 no. 589). The reasons pertain to the fact that in Italian Universities teaching tasks are reserved to established researchers and tenured professors who have been employed by way of an open competi-

tion aimed at verifying scientific and teaching capabilities. As hiring a linguistic associate does not require on open competition of this kind, they are not entitled to perform tasks that are reserved to researchers and professors. It is true that University rules allow eligibility for appointment to fill temporary teaching vacancies also to tenured assistants (*assistenti ordinari*) and some qualified technicians (*tecnici laureati*). Yet, they enjoy a special status. Qualified technicians as a rule can not teach: only those who were in charge of a course when the 1980 law on University entered into force have their rights protected. Tenured assistants are staff that disappeared when the 1980 law entered into force (*ruoli ad esaurimento*).

Yet some lower administrative courts took a different view stating that a supplementary course can not be refused to a linguistic associate (see Tribunale amministrativo regionale Marche, sezione I, 11-7-2006 no. 524). The court upheld the plaintiff's claim and adjudicated the case applying the *Petrie* judgment (case C-90/96 [1997] ECR I-6527). Therefore, according to the Italian court the appointment might not be restricted to tenured teachers or established researchers, because it was open to tenured assistants and qualified technicians which are appointed by ways other than that of open competition. Thus the University might not exclude the plaintiff's application.

Even the Ministry of the University stated that linguistic associates are entitled to supplementary courses (circulars of 28-6-2006 no. 1232, 2-8-2006 no. 1430). The Consiglio di Stato incidentally says that these decisions are not binding on Universities and moreover are not in line with the current law on University teaching staff (Consiglio di Stato, sezione VI 20-2-2008 no. 589).

Chapter VII
Policies, Texts and/or Practices of a General Nature with Repercussions on Free Movement of Workers

The treatment of third-country nationals in Italy 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 third-country national and was subsequently partially amended in 2002 by the Law no. 189 of 2002, also known as Bossi-Fini law (GURI no. 199 of 26-8-2002, OS).

Pursuant to Italian law, third-country nationals who intend to enter the Italian territory must hold an entry visa (some States are exempted from this requirement). The visa is issued by the Italian diplomatic and consular representations of the country where the concerned person has his/her stable residence. Within a deadline of 8 days from the entry, a residence permit on the same grounds as the visa must be requested (except if the stay has a duration shorter than 3 months and is grounded on tourism, business or study reasons). The Italian immigration legislation is based upon a system of quotas: a decree is published every year and states the number of persons that can be admitted legally as employed and self-employed workers. It is important to note that this system would like to promote the "encounter of demand and offer": perspective employers must submit to the competent authority a request to hire a specified or an unknown third-country national along with a draft work contract. As a consequence, immigration is linked to a concrete opportunity of a work. Third-country nationals are not allowed to enter the national territory if they are not already in contact with an employer willing to hire him/her.

A draft law that is supposed to amend the consolidated law on immigration was presented in 2007. The most relevant new provisions contained in the draft law concern the planning of the quotas on a three year basis and the possibility to be admitted on the Italian territory for the purpose of entering the work environment, even if the person is not already in contact with a perspective employer. Nevertheless s/he shall have a sufficient income in relation to the duration of the stay or must be supported by an Italian/Union citizen or an EC long-term resident who has secured his/her stay with an appropriate economic guarantee. The new Parliament, appointed further to the 2008 general elections, abandoned the draft law.

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 2007 no. 30, see above Chapter I). This principle is clearly affirmed under Article 1, para. 2, of the consolidated law on immigration, 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 consolidated law 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 Union citizen, unless they set a more favourable treatment. The position of third-country nationals who are family members of an EU citizen is now regulated by Legislative Decree no. 30 of 2007. This provision also applies to family members of Italian citizens (see above Chapter V).

During 2007, amendments have been brought to the consolidated law on immigration, due to the implementation of various EC Directives on the matter. More in details the consolidated law on immigration has been amended in relation to family reunification (Directive 2003/86/EC), the status of long-term residents (Directive 2003/109/EC), and the conditions of admission of third-country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service (Directive 2004/114/EC). The previous system has not been deeply modified further to the implementation of the above directives, although some changes are rather relevant

such as the extension of the right to family reunification to refugees and the possibility to move from another EC member State and settle in Italy for EC long-term residents.

Finally, an amendment has been brought to Article 18 of the consolidated law on immigration. This provision concerns the issuance of a permit of stay for humanitarian reasons and is basically aimed at protecting the victims of trafficking through an innovative system. A new paragraph has been introduced by Decree Law no. 300 of 2006, turned into law by the Law no. 17 of 2007, which has extended the application of this provision to Union citizens as well.

Chapter VIII
EU Enlargement

1. INFORMATION ON TRANSITIONAL ARRANGEMENTS REGARDING MEMBER STATES WHO JOINED THE EU IN 2004

Italy lifted the transitional period during 2006.

2. INFORMATION ON TRANSITIONAL ARRANGEMENTS REGARDING MEMBER STATES WHO JOINED THE EU IN 2007

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

The Ministries of the Interior and for Social Solidarity (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*) communicate that from 1-1-2007 Bulgaria and Romania are members of the European Union and thus the consolidated law on immigration is no more applicable to their citizens whose status is from now on regulated by the Law on Union citizens. Therefore, expulsion orders issued until 31-12-2006 pursuant to the consolidated law on immigration shall expire beginning 1-1-2007, unless grounded on reasons of public order, public security, or public health. As far as the access to work is concerned, the Ministerial circular 2006 no. 2 provides for a transitional period. The 2007 transitional period – which last one year and can be extended for a further 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 a no objection certificate ("*nulla osta*") issued by the Immigration Office. It is the employer who has to submit a request for the authorization. In the application, the employer has to enter the conditions of work s/he is going to apply to the worker. Before deciding, the Immigration Office shall ask the Provincial Labour Administration for its opinion on the contractual conditions applied to the contract of employment in the area in question. The worker provided with the "*nulla osta*" is not required to ask for a visa to enter Italy.

The subsequent Ministries of the Interiors and for Social Solidarity circular of 3-1-2007 no. 3 lays down the procedures the employer has to follow to obtain the "nulla osta" to hire the worker.

The circular no. 1 of 4-1-2008 issued by the Ministries of the Interiors and for Social Solidarity has extended the same transitional period for 2008. The press has pointed out that the Ministries made the decision to repeat the transitional period public only on 9-1-2008. Thus during the very first days of the year, some employers might have hired Romanian or Bulgarian citizens without asking for a *nulla osta* on the assumption that it was no more required. The circular says nothing on the point.

The above mentioned Ministerial circular 2007 no. 3 also lays down that 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 the law on Union citizens and the "no objection certificate" from the Police Headquarters is no longer required.

Ministero dell'Interno, Dipartimento della pubblica sicurezza, Direzione centrale dell'immigrazione e della polizia delle frontiere, servizio delle frontiere e degli stranieri. Telegramma urgente no. 400/C/2006/P/10.2.45.1/I div. of 29-12-2006.
The Ministry of the Interiors reminds the Border Police that from 1-1-2007 Bulgarians and Romanians enjoy the right of entry and stay provided for by Article 18 TEC. As a result, they can enter Italy on production of a valid identity card, no entry visa is necessary for them, but may be required for their family members if they are non-EU citizens; they can be sent back at the border solely on grounds of public order, public security, public health, or if they represent a genuine, present and sufficiently serious threat to the internal security, public policy, international relations of the Member States, or a threat to the public health.

Ministero dell'Interno, Dipartimento della pubblica sicurezza, Direzione centrale dell'immigrazione e della polizia delle frontiere. Telegramma urgentissimo no. 400/C/2007/8/P/10.2.45.1 of 3-1-2007.
The Ministry of the Interiors reiterates its previous telegram of 29-12-2006 (see above) and adds that it is in the process of repealing the alerts for the purposes of refusing entry from SIS, except those issued by a judge following a sentence and those founded on grounds of public policy and security of the State.

A number of decrees issued by the Ministry of the Interiors (and attached to the circular 14-3-2007) file the applications submitted by Bulgarians and Romanians for the work clearance in areas where the "*nulla osta*" is no more required, for the conversion of the residence permit held by the applicant into a work permit, and for family reunification.

The appeals against the denial of a residence permit renewal application, or of a regularization application, issued before 1-1-2007, are dismissed as inadmissible (see TAR Toscana, judgment no. 20 of 18-1-2007; TAR Lazio, judgment no. 1376 of 19-12-2007; TAR Veneto, judgment no. 4114 of 31-12-2007). The appeals against an expulsion order are dismissed because the order, even if legal, ceases to produce its effects from the date of accession (see Corte di Cassazione, judgment no. 14056 of 18-6-2007).

Ministero dell'Interno, Dipartimento per le libertà civili e l'immigrazione, circolare 9-2-2007 no. 553 (Assistenza sanitaria ai cittadini provenienti dai nuovi paesi in ingresso nell'Unione europea: Romania e Bulgaria) and Ministero della salute, Dipartimento delle prevenzione e della comunicazione, Direzione generale per I rapporti con l'Unione europea e per i rapporti internazionali, nota DGRUERI/P/2259/I.3.B of 13-2-2007 (Assistenza sanitaria ai cittadini provenienti dalla Romania e dalla Bulgaria, privi di copertura sanitaria)
The Ministries of the Interiors and for Health have issued two circulars identical in terms of content stating that from the date of accession, Bulgarians and Romanians can be registered with the health service as EU workers. Those Romanians and Bulgarians who have already been entitled to health care pursuant to Article 35 of the Legislative Decree no. 286 of 1998 (consolidated law on immigration) and lack the necessary requirements to register as Union citizens (because they have no financial resources at the moment due to their health conditions that prevent them from working) can keep their vested rights and will receive health care for the year 2007. Article 35 of the consolidated law on immigration grants urgent and necessary treatments in case of sickness or accident to foreigners who are in Italy but do not fulfill the entry and residence conditions. Indeed, the consolidated law on immigration is applicable to Union citizens where its provisions are more favorable to Union citizens than any others.

Legal consequences of the entry into force of the accession treaty on criminal proceedings in respect of criminal offences related to illegal immigration

The Legislative Decree 1998 no. 286 (consolidated law on immigration) provides for a number of offences which only a foreigner can commit or the victim of which can only be a foreigner. The following conducts are prohibited:

- not to show a passport or other identity card or the residence permit when asked by the police (Article 6).
- to stay in Italy in breach of an order of the *Questore* to leave the country within five days (Article 14 para. 5-ter)
- to be in Italy after having been expelled (Article 14 para. 5-quarter)
- to return to Italy before the expiring of the re-entry ban (Article 13 para. 13 and para. 13-bis).
- to facilitate unauthorised entry, movement and residence of foreigners (Article 12)
- to employ illegally staying third-country nationals (Articles 22 para. 12 and 24 para. 6)

The courts have to decide the effects of accession of Romania and Bulgaria upon those crimes committed before the entry into force of the Accession Treaty.

The *Corte di Cassazione* has decided that the offence of facilitating illegal immigration was still punishable in the case where the victims were citizen of a State which, after the conduct took place, entered into the European Union (first criminal chamber, judgement no. 1815 of 22-1-2007, *Ferlazzo* – the victims were Polish; first criminal chamber judgements no. 22805 of 12-6-2007 *Mathe* and no. 29728 of 20-7-2007 *Afloarei* – the victims were Romanian).

The *Corte di Cassazione* has followed a similar reasoning with regard to the criminal offence committed by the employer who employs foreigners without a residence permit: the subsequent accession of Romania to the EU does not alter the circumstance that the Romanian workers did not hold the required residence permit when the conduct took place (first criminal chamber, judgement no. 12467 of 26-3-2007 *Novello*).

The *Corte di Cassazione* was also asked to decide whether the conduct of a Romanian who did not leave Italy in breach of an expulsion order issued by the *Questore* amounted to the criminal offence under Article 14 para. 5-*ter* of the Legislative Decree 1998 no. 286 (consolidated law on immigration) and was punishable when the conduct took place before the accession of Romania to the European Union. While some cases have been decided without attaching particular importance to the possible consequences of accession (judgements no. 9345 of 6-3-2007 *Trandafir*, no. 19096 of 17-5-2007 *Iordache*, no. 17576 of 8-5-2007 *Todeanca*), by its judgement no. 17578 of 8-5-2007 the first criminal chamber referred the matter to the grand chamber of the *Corte di Cassazione*. The first chamber wonders whether, since only foreigners can commit the offence and Romanian citizens are no more foreigners from 1-1-2007, the action before them has lost its criminal relevance and is no more punishable. The chamber believes that the question is an important one that can not be solved on the basis of the previous case-law, and for that reason refers the matter to the grand chamber (*Sezioni Unite*) of the *Corte di Cassazione*, which decides cases of the utmost importance, in order to avoid or prevent the other courts from rendering conflicting judgments.

Indeed the lower courts have rendered contradictory judgements. For instance, the Tribunal of Turin decided that the offence was no more punishable (judgement of 15-1-2007), while the Tribunal of Milan rendered one decision in the same terms (judgement of 24-1-2007), and another saying the opposite (8-2-2007) (see *Il corriere del merito*, 2007, at 497, 764, 499).

The grand chamber (judgement no. 2451 of 16-1-2008) states that the accession of a new State to the European Union turns a foreigner into a Union citizen, but cannot be given retroactive effect. When the conduct took place, the defendant was a foreigner and his then status is not

changed by his subsequently becoming a Union citizen. Thus, the conduct of the defendant amounted to a crime when it took place and is still punishable.

The Supreme Court has not yet had the opportunity to rule on the consequences of accession on the other criminal offences under the consolidated law on immigration.

On the contrary, some legal scholars have taken their position on the point:

F. Antezza, Stranieri: ingresso nell'Unione europea e successione di leggi, *Merito*, 2007, 6, 44-50.

A. Caputo, Prime note sulle conseguenze penali dell'ingresso di nuovi paesi nell'Unione europea, *Cassazione penale*, 2007, 1487-1494.

S. Corbetta, Adesione di Romania e Bulgaria all'U.E.: quale l'impatto sulle norme incriminatrici della "Bossi-Fini"?, *Il Corriere del merito*, 2007, 331-335.

V. De Napoli, L'odierna punibilità dei cittadini bulgari e romeni per il reato di cui all'art. 14 comma 5-ter del D. Lgs. n. 286/98 commesso prima del loro ingresso nell'UE: orientamenti e prospettive, *immigrazione.it*. no. 41, 1-2-2007

R. Gargiulo, La successione "mediata" di norme penali e il reato di cui all'art. 14 comma 5-ter del D.LG. n. 286 del 1998, *Giurisprudenza di merito*, 2007, 2974-2988.

V. Savio, Nuovi cittadini comunitari e diritto penale, *Questione giustizia*, 2007, 183-187.

Recent legal literature

V. Campagna, L'adesione di Bulgaria e Romania all'Unione europea, *Diritto del commercio internazionale*, 2007, 273-284 (on the 2005 AA)

R. Nunin, La circolazione dei lavoratori neocomunitari dopo il recente allargamento dell'Unione europea, *Il lavoro nella giurisprudenza*, 2007, 245-246 (The A. points out that the Ministerial circular 2006 no. 2 is somehow vague about the exact characterisation of the areas where the employment is not subject to any conditions. The A. wonders whether these areas are to be identified solely with reference to the collective agreement applied by the employer or other evidence is necessary.)

M. Pedrazzi, Il Comitato europeo dei diritti sociali riscontra la violazione da parte dell'Italia del diritto dei rom ad un alloggio adeguato, *Diritti umani e diritto internazionale*, 2007, 155-160 (comment on the decision of the European Committee of Social Rights of the Council of Europe stating that Italy has infringed the European Social Charter with respect to the right to housing of Roma)

Chapter IX
Statistics

ISTAT: Legal foreigners in Italy at 1-1-2007 (+ 10,1% compared to 2006)

	M	F	Total
Population resident in Italy	28.718.441	30.412.846	59.131.287
World	1.473.073	1.465.849	2.938.922
EU-26	254.824	351.364	606.188
EU-14 (old MS)	57.648	91.263	148.911
Bulgaria	8.486	11.438	19.924
Poland	20.516	51.941	72.457
Romania	162.154	180.046	342.200
Albania (bigger national group)	209.209	166.738	375.947

Romanians are the biggest national group in 3 regions out of 20, and in 11 provinces out of 107 (ISTAT data).

Caritas estimates a presence of 3.690.000 legal foreign citizens (communitarian and non-communitarian) at the end of 2006, and of 556.000 Romanians. These numbers are bigger than those of ISTAT, because the latter only counts resident foreigners, while the former adds foreigners legally staying in Italy.

Caritas estimates a presence of approximately 2.000 Romanian unaccompanied minors.

As far as illegal foreigners is concerned, Caritas states: “In 2006, of the 124,383 illegal residents designated by the police, only 36.5% (45,449) were effectively repatriated”.

ISTAT: residence permits at 1-1-2007

	M	F	Total
EU-26	220.301 (married: 109.644)	317.621 (married: 158.610)	537.922 (married: 268.254)
Austria	2.251	4.052	6.303
Belgium	1.818	2.536	4.354
Bulgaria	7.074	10.387	17.461
Cyprus	45	76	121
Czech Republic	1.062	4.171	5.233
Denmark	757	1.271	2.028
Estonia	58	604	662
Finland	398	1.508	1.906
France	9.461	14.530	23.991
Germany	13.766	19.727	33.493
Greece	2.430	2.262	4.692
Hungary	1.442	3.680	5.122
Ireland	1.190	1.366	2.556
Latvia	149	1.122	1.271
Lithuania	362	1.994	2.356
Luxembourg	94	114	208
Malta	172	494	666
Netherlands	2.736	3.613	6.349
Poland	22.451	56.479	78.930
Portugal	1.969	2.474	4.443
Romania	127.777	150.805	278.582
Slovakia	3.196	4.517	7.713
Slovenia	2.957	1.499	4.456
Spain	5.165	12.904	18.069
Sweden	1.217	2.514	3.731
United Kingdom	10.304	12.922	23.226

Residence permits according to grounds, at 1-1-2007

	Work	Self-employ-ment	Search for work	Family	Religion	Elective Residence	Study	Human-itarian	Others*	total
EU-26 M+F	**290.168**	**30.157**	**17.746**	**144.819**	**8.350**	**31.659**	**8.018**	**293**	**6.712**	**537.922**
EU-26 M	145.384	20.203	6.347	26.554	3.860	12.642	3.010	40	2.261	220.301
EU-26 F	144.784	9.954	11.399	118.265	4.490	19.017	5.008	253	4.451	317.621
EU-14 M+F	**43.603**	**9.140**	**12.244**	**33.670**	**5.044**	**28.416**	**3.097**	**-**	**135**	**135.349**
EU-14 M	22.175	5.076	4.177	6.719	2.191	11.893	1.264	-	61	53.556
EU-14 F	21.428	4.064	8.067	26.951	2.853	16.523	1.833	-	74	81.793
EU-12 M+F	**246.565**	**21.017**	**5.502**	**111.149**	**3.306**	**3.243**	**4.921**	**293**	**6.577**	**402.573**
EU-12 M	123.209	15.127	2.170	19.835	1.69	749	1.746	40	2.200	166.745
EU-12 F	123.356	5.890	3.332	91.314	1.637	2.494	3.175	253	4.487	235.828

* Asylum, Request for asylum, Health, Adoption, Tourism.

Residence permits at 1-1-2007, according to the year of entry:

	<1999	2000	2001	2002*	2003	2004	2005	2006	total
EU-26	136.481	27.016	33.399	149.514	32.214	45.230	55.171	58.897	537.922
EU-14	59.787	8.842	10.186	12.635	11.549	11.573	11.259	9.508	135.349
EU-12	76.694	18.174	23.203	136.879	20.65	33.647	43.912	49.389	402.573
Bulgaria	4.001	620	1.073	6.215	888	1.179	1.566	1.919	17.461
Poland	19.208	2.636	3.528	22.880	2.829	6.655	10.712	10.482	78.930
Romania	46.067	13.607	16.945	103.653	15.525	22.671	27.603	32.511	278.582

* An amnesty took place.

Italian living abroad, registered at Italian consular registries, 2006:

Austria: 15.121; Belgium: 234.445; Bulgaria: 492; Cyprus: 491; Czech Republic: 2.090; Denmark: 3.917; Estonia: 124; Finland: 2.052; France: 324.713; Germany: 626.078; Greece: 10.384; Hungary: 1.790; Ireland: 6.249; Latvia: 67; Lithuania: 75; Luxembourg: 23.236; Malta: 1.264; the Netherlands: 30.394; Poland: 2.394; Portugal: 3.742; Romania: 2.408; Slovakia: 392; Slovenia: 2.486; Spain: 76.200; Sweden: 6.913; United Kingdom: 165.878.

Chapter X
Miscellaneous

PROVIDERS AND RECIPIENTS OF SERVICES

Stay

The Legislative Decree 2007 no. 30 transposing Directive 2004/38/EC into the Italian legal system imposes on Union citizens the obligation to be entered into the population registry after three months of entry. According to Italian law, registration entails residence, for instance for tax reasons. Neither the law nor its implementing circulars envisage the case of a provider or recipient of service, who is going to stay in Italy for more than three months, but keeping his/her residence in another member State. A solution could be that the provider/recipient of services is entered into the temporary population registry (see Article 32 of the Decree of the President of the Republic no. 223 of 1989). This solution is inferred from the circular no. 200704165/15100/14865(39) which states that the seasonal worker is entered into the temporary population registry.

Treatment

Article 6 (3) of the Legislative Decree 2007 no. 30 states that, subject to special regulations in line with the EC Treaty and EC laws, Union citizens and their 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. The scope and the content of the provision do not seem clear. In fact, if Union citizens are in Italy as providers of services, to be subject to Italian law on the same footing as Italian nationals might amount to a breach of Article 49 EC.