

REPORT
on the Free Movement of Workers
in Italy in 2009-2010

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Chapter I

The Worker: Entry, Residence, Departure and Remedies

No significant developments took place during the years 2009-10.

Text in force:

Legislative Decree no. 30 of 2007, transposing Directive 2004/38/CE.

After the publication of Commission's Communication no. 313 of 2009, the Ministry of the Interior issued two important circular letters to the public administration on the correct interpretation of some key-elements of the Directive: sufficient resources and comprehensive sickness insurance cover (no. 18 of 21-7-2009), and third countries members of the family (see Chapter II) and expulsion (Prot. 400/A/2009/10.4.39.1 of 28-8-2009). While the first circular letter gives effective guidance to the public authorities in charge of evaluating the conditions for granting the registration of residence, the latter only recalls the Commission's wording, without providing further guidance to properly implement the law (which is not perfectly in line with the Directive, as the present author discussed in *Free Movement of Workers and Residence Rights: An Italian Story of a Difficult Implementation*, in P. Minderhoud & N. Trimikliniotis (eds), *Rethinking the free movement of workers: the European challenges ahead*, Wolf Legal Publishers, Nijmegen, 2009, 155-166).

1. TRANSPOSITION OF PROVISIONS SPECIFIC FOR WORKERS

As far as the worker is concerned, Legislative Decree no. 30 of 2007 does not state which documents the citizen of the Union is required to submit in order to prove his/her status. It only states that the citizen of the Union has to submit appropriate documentation to support his/her status (see Article 9). More details are provided for in the circular letter of the Ministry of the Interior no. 45 of 2007. The status of worker is proved by a pay slip, or a receipt for payment of pension contributions, or a work contract bearing the INPS (National Social Welfare Institution) and INAIL (National Institution for Insurance against Accidents at Work) code of the worker, or a communication of the hiring to the employment centre, or a receipt for the notification of the employment relationship to INPS; or a notification of the employment relationship to INAIL. The status of self-employed worker is proved by a certificate of registration in the register of the chamber of commerce, or a VAT number, or a certificate of registration with a professional association. The status of posted worker is proved by a declaration issued by the Italian branch of the parent company. The provision offers workers a wide range of documents to prove their status and shall be deemed in line with the spirit of EU law.

If the applicant is a Romanian or Bulgarian citizen, the '*nulla osta*' required to work (when it is required: see Chapter VII) shall be attached to the application for residence (see circular of the Ministry of the Interior no. 19 of 2007). This document is not necessary if the applicant was already legally resident in Italy before the entry into force of the Accession Treaty (see circular of the Ministry of the Interior no. 45 of 2007).

Article 7 (3) of Legislative Decree no. 30 of 2007 transposes *Article 7 (3) of Directive 2004/38/EC* but states that when one of the four circumstances listed thereafter are met, the worker or self-employed person retains the right to reside and not the status of worker or

self-employed person as required by the Directive. As far as the four circumstances, two points are worthy of comment. Firstly, the act states that the worker in involuntary unemployment retains the right to reside 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 Legislative Decree no. 181 of 2000. Secondly, if the worker is in the condition of Article 7 (3) 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 13 (3 a-b) of Legislative Decree no. 30 of 2007 transposes *Article 14 (4 a-b) of the Directive*: workers and self-employed persons are therefore protected from expulsion except when based on reasons of public policy or public security.

Article 15 of Legislative Decree no. 30 of 2007 corresponds almost verbatim to *Article 17 of the Directive* (Exemptions for persons no longer working in the host Member State and their family). The only point worthy of notice is that while the Directive states that 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, 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, and have to keep on satisfying the conditions for registration into the population registry.

Article 19 (3) of Legislative Decree no. 30 of 2007 implements *Article 24 (2) of the Directive*. Under this provision, workers are entitled, even during the first three months, to those social benefits which are automatically connected to his/her job or are otherwise provided for by the law.

2. SITUATION OF JOBSEEKERS

As far as the job-seeker is concerned, whether s/he would be treated as a worker or as a non-worker, and therefore required to have sufficient economic resources, is not clear. Neither Legislative Decree no. 30 of 2007, nor the implementing circular letters devote specific provisions to the registration of the job-seeker's residence. Nevertheless, the protection of the job-seeker from expulsion is stated (Article 13 (3) corresponding to Article 14 (4) of the Directive) and applies both if the Union citizen can prove that s/he has been registered with an employment centre for less than six months, or if s/he has offered her/his availability to work within a new job.

No reference to the *Antonissen* case can be found in the law nor in administrative guidelines.

3. OTHER ISSUES OF CONCERN

Residence: Italy decided that by the same application the citizen of the Union asks for the registration of residence for the purpose of Directive 2004/38/EC and to be entered into the registry of the population residing in Italy. Legal scholars have highlighted that this decision is a cause for concern and confusion, since the legal condition to be entered into the population registry, i.e. to be established in one Municipality, is not a condition for the residence for the purpose of free movement of persons (see P. Morozzo della Rocca, *Anagrafe e stato civile. L'attuale disciplina e le novità previste dal disegno di legge sulla sicurezza, Diritto immigrazione e cittadinanza*, 2009, no. 2, 48-68, at 59).

A potential conflict between Italian e EU law could stem from the 2009 amendment of the law on the population registry. Under the new rules, the Municipal authorities that receive an application to be entered into the population registry can check the health and sanitary conditions of the house where the applicant is going to live.¹ The provision is to be applied both to Italian and non-Italian applicants, and in which cases the Municipal authorities will exercise their discretionary power is not clear. The instructions given by circular letter 7-8-2009 no. 19 of the Ministry of the Interior are silent on this subject. Neither is it clear which consequences could stem from a negative assessment of the health and sanitary conditions of the house. If a negative assessment led to the rejection of the application, it could happen that the request of the citizen of the Union to have his/her residence registered for the purpose of EU law be dismissed for reasons related to his/her dwelling, not provided for by EU law.

Expulsion: The Prefects have enacted a number of expulsion decisions based on the grounds of public security or imperative reasons of public security against citizens of the Union (mainly of Romanian nationality) because they had been previously convicted for minor crimes, or there were police reports against them, or because they were prostitutes. Those decisions are often quashed by courts, because they are not duly motivated,² but it is difficult to know how many cases are not challenged. Sometimes, judges show a deferential attitude towards public authorities and place on the applicant the burden to prove not only that the decision is not motivated, but even that the facts upon which the decision is based did not take place. For instance, one case can be recalled: *Tribunale* (judge of first instance) of Salerno, decree 4-9-2009.

The judge decides on the appeal against the expulsion decree based on public security enacted by the Prefect and motivated on the fact that the applicant had not complied 37 times to a '*foglio di via obbligatorio*' (an order to leave the Municipality which is not the one of residence) issued by the Head of the Police, conduct she was committed to trial for (in Italy not to comply with an order of the authority is an offence), that she made herself scarce, that she was a prostitute, which is evidence of a personality inclined to committing crimes and rouses public alarm and imperils public security.

1 Art. 1(2) Law no. 1228 of 1954, as amended by Art. 1(18) of Law no. 94 of 2009: 'L'iscrizione e la richiesta di variazione anagrafica possono dar luogo alla verifica da parte dei competenti uffici comunali, delle condizioni igienico-sanitarie dell'immobile in cui il richiedente intende fissare la propria residenza, ai sensi delle vigenti norme sanitarie.'

2 See, for instance, Tribunale of Roma, decree 9-3-2009; Tribunale of Torino, decree 6-7-2009.

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The judge states that Article 20 of Legislative Decree no. 30 of 2007 leaves the Prefect a wide discretion as regards the conducts and the breaches of the law that can justify an expulsion decision. Therefore, the judge shall only limit himself to determining the existence of the conduct which justifies the decision and its reasons. Since the applicant did not contest the existence of the basis of the expulsion decision, the act is duly motivated. The judge adds that the fact that the applicant did not comply with the orders of the Head of the Police for so many times is evidence of a personality unwilling to respect the authority and of disturbance of the peace, which the law intends avoiding.

In an article published on an on-line journal on immigration, a lawyer explained how the court of first of Rome is deferent to the public authorities (V. De Napoli, Allontanamento dei cittadini comunitari: orientamenti del Tribunale Civile di Roma in contrasto con le garanzie di difesa poste dall'ordinamento europeo, *immigrazione.it*, 1-7-2009 no. 99).

The same journal published an article by a director of the Police, demonstrating that in the Italian legal system there are no impediments preventing the Police from expelling a prostitute (at least those who work on the streets) for imperative reason of public security (P. Pomponio, Prostituzione e diritto di soggiorno del cittadino comunitario e dello straniero appartenente a Paese terzo: riflessioni alla luce della normativa vigente, *immigrazione.it*, 1-3-2009 no. 91).

Chapter II

Members of the Worker's Family

1. THE DEFINITION OF FAMILY MEMBERS AND THE ISSUE OF REVERSE DISCRIMINATION

Text in force:

Legislative Decree 6-2-2007 no. 30, in force from 11-4-2007, transposing Directive 2004/38/EC into the Italian legal system.

Legislative Decree no. 30 of 2007 follows the same pattern, and even the same language, of Directive 2004/38/EC in order to define the members the family: 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.

Under Article 2(1) b of Legislative Decree no. 30 of 2007, a member of the family is:

- 1) the spouse,
- 2) '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',
- 3) the direct descendants who are under the age of 21 or are dependants and those of the spouse or partner as defined in point 2);
- 4) the dependent direct relatives in the ascending line and those of the spouse or partner as defined in point 2).

Under Article 3 of the Legislative Decree, family members as defined in Article 2(1) b enjoy the right to enter and stay, while the host State shall facilitate entry and residence for the following persons:

- a) any other family members, irrespective of their nationality, not falling under the definition in Article 2(1) b, who, in the country from which they have come, are dependants or members of the household of the Union citizen having the primary right of residence, or where serious health grounds strictly require the personal care of the family member by the Union citizen;
- b) 'the partner with whom the Union citizen has a durable relationship duly attested by the Union citizen's State'.

The law is not clear as far as the partner is concerned. At a first reading, the partner should be considered as a family member *stricto sensu* and enjoy a right to enter and stay, but Italy (the host State under Articles 2 and 3 of the Legislative Decree) neither regulates registered partnerships nor equates them to marriage.³ In any case, even if – contrary to the present author's view – the provision should be interpreted as granting a right to the partner, it has to

3 The extent to which the provision is misleading is demonstrated by the fact that the European Commission classified Italy among the States where 'Same-sex couples enjoy full rights of free movement and residence' considering 'registered partners as family members' (COM/2009/840, at 4).

be pointed out that the Legislative Decree does not transpose Article 13 of the Directive, as far as the retention of the right of residence by family members in the event of termination of the registered partnership is concerned.

Some legal scholars say that at least those partners whose relationship is duly attested by a Member State are family members and therefore entitled with the right to enter and stay (see E. Calò, *La Cassazione e le convivenze omosessuali fra diritto e (discriminazione) rovescio*, *Foro italiano*, 2009, I, 2078-2082, at 2082). This reading is not convincing, because the wording of the provision is not as unequivocal as the author thinks.

Calò comments on a judgment of the Supreme Court which attracted much attention from Italian legal scholars. The case concerned a national of New Zealand who entered into a registered partnership with an Italian national in New Zealand. When the man arrived to Italy, he asked to be awarded with a residence permit for family reasons, to live with his Italian same-sex partner. At first instance the judge recognized the right of the applicant to stay as family member of a Union citizen, directly applying Directive 2004/38/EC even if the deadline for transposition had not yet passed by that time (Tribunale of Firenze, decree 24-1-2004). The judgment was reverted by the appeal court (Corte d'Appello of Firenze, decree 6-12-2006) and the Supreme Court upheld the latter decision (Corte di Cassazione, judgment 17-3-2009 no. 6441). The Supreme Court ruled out that the directive may apply because only the person who exercised the right of freedom of movement can invoke it, and the persons involved in the case did not, since the case concerned the right of family reunification of an Italian citizen living in Italy. The Court failed to consider that Art. 23 of Legislative Decree no. 30 of 2007 makes the rules on family reunification of the citizen of the Union apply to Italian citizen (see below, under 'reverse discrimination').

A document of the Ministry of Foreign Affairs⁴ states that only the parents and the brothers or sisters of the Union citizen (and not other relatives) are under the provision of Article 3(2) a of Legislative Decree no. 30 of 2007 (other family members whose entry and residence the State is under an obligation to facilitate). As far as the parents of the citizens of the Union are concerned, this reading is inconsistent with the Directive and even with the Legislative Decree, since their case is regulated by Article 3(1) and not by Article 3(2). In any case, it seems unduly restrictive to limit the other family members to brothers and sisters. On the contrary, the Ministry of the Interior rightly pointed out that the law does not place any limit to the degree of relatedness, neither does it require that the citizens of the Union and their family members live under the same roof (Prot. 0000637 of 2-2-2010. It is worthy of notice that the Ministry answers a specific question submitted by the Police Headquarters, showing that while the law is very clear, practical application is not yet so.)

The judge of first instance (*Tribunale*) of Bologna (decree 20-1-2009) annulled the refusal of the entry visa for family reunification of the (non-EU) brother of an Italian national. It stated that since the brother was dependent on the applicant and his serious health conditions require the personal care of the applicant, his case was within the scope of Article 3(2) of Legislative Decree no. 30 of 2007, which grants a right to enter and stay to those family members who satisfy the requirement provided therein. The judge's interpretation of the

4 Ministero degli affari esteri, Messaggio 21-8-2009, Legge n. 94/2009 – Modifiche al Testo unico sull'immigrazione.

word ‘to facilitate’, while very favourable to the member of the family, seems wider than allowed by the law.

The courts of first and second instance of Florence (Corte d’appello di Firenze, decree 13-11-2009, *Diritto, immigrazione e cittadinanza*, 2010, 1, 206-207) declared null and void the denial of the entry visa for family reunification asked by a citizen of the Union for her sister, third country national, not taking in any account the result of the DNA test demanded by the consular authority and the declaration of the applicant that she would provide maintenance of her sister in Italy. The public administration on the contrary claimed that by stating that entry of family members other than the spouse and the direct descendants or relatives should be ‘facilitated’, the law means that only an entry visa for tourism should be issued at the most.

Some courts of first and last instance held that a minor whose custody the citizen of the Union obtained in a third country (Morocco) under a customary rule called *kafalah*, is not a family member for the purposes of Legislative Decree no. 30 of 2007.

See Judge of first instance (*Tribunale*) of Torino, decree 11-7-2008 (*Diritto immigrazione e cittadinanza*, 2009, 3, 210 ss.) and particularly Corte di Cassazione – Supreme Court – judgment of 1-3-2010 no. 4868, quashing the judgment of the lower court stating the right of family reunification. The same Supreme Court has followed a different approach when a non-EU foreigner applied for family reunification of a minor under *kafalah*. In that case, *kafalah* is considered as a valid assumption for family reunification under the general legislation on immigration (Corte di Cassazione, judgment of 28-1-2010 no. 1908).

In order to avoid reverse discrimination, Article 23 of Legislative Decree no. 30 of 2007 states that it applies to non-Italian members of the family of Italian citizens whether its provisions are more favourable to them than any others. For its part, the consolidated legislation on immigration (Legislative Decree no. 286 of 1998, Article 28, para. 2) states that family reunification of Italian nationals is regulated by Decree of the President of the Republic no. 1656 of 1965 (now replaced by Legislative Decree no. 30 of 2007), unless its provisions are more favourable to them.

Nevertheless, under which rules the case of the non-EU spouse of an Italian national shall be assessed seems not always clear to the public administration, as the following judgment shows. The court of first instance of Imperia (*Tribunale*, decree 15-10-2009, *Diritto, immigrazione e cittadinanza*, 2010, 1, 216-218) quashed the withdrawal of the residence card for family member issued to the spouse of an Italian national, for reasons not provided for by EU law, but by the general legislation on immigration, namely the fact that the spouses had ceased to live under the same roof.

Under Article 19(2) c) of Legislative Decree no. 286 of 1998 (Consolidated legislation on immigration) the non-EU foreigner who is the spouse or relative within the second degree of kinship⁵ of an Italian citizen, and lives under the same roof, is protected from expulsion. Whether this provision applies to non-EU members of the family of the citizen of the Union is not clear.

5 The Parliament amended this provision by Law no. 94 of 2009: before the amendment, also relatives within the fourth degree of kinship were protected.

2. ENTRY AND RESIDENCE RIGHTS

The conditions for entry and for registration of the residence of the member of the family who is a citizen of the Union are the same as the ones required to the citizen of the Union. 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.

The non-EU family members are subject to the following rules.

Entry: In accordance to Article 5(2) of Legislative Decree no. 30 of 2007 they can be 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.A.]). 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 of free movement. If s/he fails to present the documents or to prove his/her right, the public authority can turn him/her back (Article 5, para. 5 of Legislative Decree no. 30 of 2007)⁶.

Short-term residence: 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).

Residence: In case of a stay for over three months, the member of the family not having the nationality of a Member States must submit both an application 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 Legislative Decree no. 30 of 2007, transposing Articles 9 to 11 of the Directive), and an application to be entered into the population registry to the Municipality (Article 9 of Legislative Decree no. 30 of 2007). In both cases the entry visa, when entry is conditional upon it, shall be attached to the applications among the other documents required (see para. 5 of Article 9 and para. 3 of Article 10).

When the Municipality receives the application, it forwards it to the Police Headquarters. The Municipality can enter the applicant into the population registry only after the Police Headquarters has issued the residence card: 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 of the Ministry of the Interior 6-4-2007 no. 19).

Article 10 of Legislative Decree no. 30 of 2007 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. The other family members, which may be granted the right to stay pursuant to Article 3(2), apply for a permit for elective residence. It is governed by the consolidated legislation on immigration, lasts two years and does not protect against expulsion. A circular letter of the Ministry of the Interior states that the non-EU partner of a Union citizen

⁶ Article 5, para. 5, of Legislative Decree no. 30 of 2007 transposes Article 5, para. 4, of Directive 2004/38/EC. In the opinion of the present author, the European Commission is incorrect in classifying Italy among the Member States that have not transposed the provision: see COM/2009/840, at 5, note 17.

can apply for a permit for elective residence too (Circular 18-7-2007 no. 200704165/15100/14865(39)).

The application for the residence card is subject to the payment of a fee stamp (eur 14,62) because the Legislative Decree no. 30 of 2007 does not expressly exempt the application (see circular letter by the Ministry of the Interior, 18-9-2009 no. 5879). This charge does not exceed that imposed on Union citizens for the registration of their residence or on nationals for the issuing of the identity card.

The *Metock* case attracted significant attention from both legal scholars and judges. The judgment has acquired an even greater significance since illegal immigration has become a crime (for further details, see Chapter VIII, para. 3.2).

In a number of cases Italian judges applied this judgment and held that the administrative authorities can not make the right to stay conditional upon the proof that the non-EU foreigner legally stayed in the country⁷.

The Minister for the Interior even issued a circular letter expressly reminding the public authorities to correctly apply the *Metock* case (Circular of 28-8-2009).

Among legal scholars, see:

- M. Gnes, Il diritto comunitario ed i limiti nazionali al ricongiungimento familiare, *Giornale di diritto amministrativo*, 2009, 137-146.
- M. Lughezzani, Libera circolazione e politiche nazionali di controllo dell'immigrazione. Il caso del ricongiungimento dei familiari extracomunitari di cittadini Ue, *Lavoro e diritto*, 2009, 613-637 (who points out that this judgment could lead Member States to reduce the number of foreigners allowed to enter the country within annual quotas, since they are compelled to accept family members of the citizens of the Union.)
- R. Palladino, L'interpretazione della direttiva n. 2004/38/CE sulla libertà di circolazione dei cittadini nell'Unione europea ad opera della Corte di giustizia ed i riflessi nell'ordinamento italiano: commento alla sentenza *Metock*, *Diritto comunitario e degli scambi internazionali*, 2009, 471-488.

To avoid *marriages of convenience*, the Parliament amended the rules on marriage of foreigners (Article 116 of the Civil Code⁸): each foreigner who wants to get married in Italy shall submit to the registrar not only a declaration by the competent authority of her/his country of origin stating that there are no impediments to marriage, but s/he also must prove that her/his presence in Italy is legal. The provision is clearly aimed at preventing the illegal foreigner from getting married in Italy and subsequently benefitting from the *Metock* ruling. The provision does not define who is a foreigner for the purpose of its application. Since broadly drafted, it should be applicable to every foreigner, even to citizens of the Union. Legal opinion was divided on this point: while the majority answered in the positive because within the Civil Code a foreigner is a person not having Italian nationality (while only within the consolidated legislation on immigration a foreigner is a person who is neither an Italian national nor a citizen of the Union: see D. Berloco, La legge n. 94 del 15 luglio 2009 in tema di sicurezza. Sua connessione con la materia di stato civile, *Lo stato civile italiano*, 2009, 564-575; P. Morozzo della Rocca, Sul matrimonio in Italia dei cittadini comunitari secondo

⁷ Corte d'Appello di Venezia (judge of second instance), decree 23-3-2009.

⁸ Law no. 94 of 2009, Article 1(15): 'All'articolo 116, primo comma, del codice civile, sono aggiunte, in fine, le seguenti parole: «nonché un documento attestante la regolarità del soggiorno nel territorio italiano».'

il nuovo testo dell'art. 116 cod.civ., *Lo stato civile italiano*, 2009, 734-736; G. Nencini, La legge sulla sicurezza pubblica e la modifica dell'art. 116 del codice civile, *Lo stato civile italiano*, 2009, 646-649; Lenti, Il matrimonio dello straniero e la regolarità del soggiorno, *La nuova giurisprudenza civile commentata*, 2010, 196-203), others pointed out that the rationale of the law which introduced the amendment to the Civil Code was to address the case of irregular migrants (the same law made irregular presence in Italy a criminal offence) and therefore only non-EU nationals were concerned (M. Ius, Modifica dell'art. 116 c.c. ad opera della legge n. 94/2009, in rapporto alla normativa comunitaria sulla libera circolazione, *Lo stato civile italiano*, 2009, 727-733).

By means of a circular letter, the Ministry of the Interior made it clear that only non-EU foreigners are required to prove that they are legally in Italy, and listed the documents proving that condition (Circular 7-8-2009, no. 19). Nencini (La legge sulla sicurezza pubblica e la modifica dell'art. 116 del codice civile, *Lo stato civile italiano*, 2009 cit.) stated that this circular letter modifies the personal scope of application of the law and the registrar who had asked the EU citizen to prove his/her regular presence in Italy would not have misapplied the law.

Legal scholars point out that this provision could jeopardize the rights of Italian nationals to get married (A. Casadonte and M. Pipponzi, Il divieto di accesso agli atti di stato civile, *Diritto immigrazione e cittadinanza*, 2009, 4, 158-166; P. Morozzo della Rocca, Il diritto dell'immigrazione ed i malintesi sensi (degli obblighi) dell'integrazione, *Corriere giuridico*, 2009, 441-448. In addition Morozzo highlights that the provision could easily be circumvented: the spouses could get married under canon law and get their marriage recognized under the Concordat between the Holy See and Italy).

3. ACCESS TO WORK

Article 6 (3) of Legislative Decree no. 30 of 2007 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 activities permitted by law.

Article 19 (1) of Legislative Decree no. 30 of 2007 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.

Besides these general provisions, a specific provision stating that the members of the family not having the nationality of a Member State are equated with Italian nationals as far as access to the public sector is concerned is missing.

4. THE SITUATION OF FAMILY MEMBERS OF JOB-SEEKERS

No specific provisions address this issue.

Chapter III

Access to Employment: a) Private sector and b) Public sector

A) ACCESS TO EMPLOYMENT IN THE PRIVATE SECTOR

A new procedure has been established for the recognition of foreign educational qualifications for (among other purposes) the access to the period of practice necessary for the admission to a profession. The interested party submits his/her application to the local professional body and the receiving body addresses the Ministry for Education, Universities and Research (MIUR) which is in charge of deciding on the recognition of the foreign educational qualification within 90 days, upon opinions of the national professional body and of the national university council. The foreign educational qualification and a list of the exams passed in order to obtain the qualification are to be submitted in the Italian translation (but shall not be authenticated). (Decree of the President of the Republic 30-7-2009 no. 189, Regolamento concernente il riconoscimento dei titoli di studio accademici, GURI 28-12-2009 no. 300)

a.1. Equal treatment in access to employment (e.g. assistance of employment agencies).

A new procedure has been established for the recognition of foreign educational qualifications for (among other purposes) the registration with a 'centro per l'impiego' (employment centre). The interested person submits his/her application to the employment centre and the receiving body addresses the Ministry for Education, Universities and Research (MIUR) which is in charge of deciding on the recognition of the foreign educational qualification within 90 days. The foreign educational qualification and a list of the exams passed in order to obtain the qualification are to be submitted in the Italian translation (but shall not be authenticated). (Decree of the President of the Republic 30-7-2009 no. 189, Regolamento concernente il riconoscimento dei titoli di studio accademici, GURI 28-12-2009 no. 300).
Nothing else to report.

a.2. Language requirements

Nothing to report.

B) ACCESS TO EMPLOYMENT IN THE PUBLIC SECTOR

Legal Framework: Legislative Decree no. 165 of 2001, on the General legislation on the employment in the public sector, regulates access to, and employment in the public sector (to be understood in a broad meaning, including national, Regional or local authorities and all public bodies).

Legislative Decree no. 165 of 2001 states three core-principles as to the legal regime of the employment in the public sector. Firstly, it 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 (Article 2.2). However, according to Article 3 of 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. Secondly, each employment relationship, except those still regarded as civil servants, is established through a single contract, which has to adapt to 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 (Article 2.3). Thirdly, access to public employment is dependent upon the passing of an open competition (Article 35), which is a principle enshrined into the Constitution and upheld by the Constitutional Court. A proper notice of the selection procedure has to be given to the public in order to guarantee open access on a national basis.

Reform: in 2009 the Parliament empowered the Government to reform the legal regime of employment in the public sector, by amending Legislative Decree no. 165 of 2001. For this purpose, the Government enacted Legislative Decree no. 150 of 2009. Among other goals, this reform aimed at ensuring a more effective management of selection procedures on a local basis, in accordance with the principle of equal conditions of access to public employment. For this purpose, competition notices can provide for admittance requirements based on the place of residence of applicants, provided that these requirements are necessary in order to guarantee the performance of services otherwise totally unfeasible or at least unfeasible with the same results (Article 2, objective h, of Law no. 15 of 2009).⁹ The new Article 35, section 5-ter, third sentence of Legislative Decree no. 165, provides that: ‘with regard to admittance requirements based on the place of residence of applicants the principle of equal conditions of access to public employment is guaranteed by specific provisions set forth in the competition notice, where the admittance requirement based on the place of residence is necessary in order to guarantee the performance of services otherwise totally unfeasible or at least unfeasible with the same results’.¹⁰ Essentially this provision reproduces verbatim Article 2, objective h, of Law no. 15 of 2009 and neither lays down more specific criteria, nor specifies those situations where the place of residence of the applicants is necessary to guarantee the feasibility of the performance of the services.

The law tries to justify residence requirements on a general basis, but it is difficult to find out how being resident in a particular place before the competition could improve the quality of the administration, also taking into account that winners of selection procedures shall remain in the place of the position of first assignment for at least five years (and this is a peremptory norm). Having said that, it cannot be excluded that a competition notice containing an admittance requirement based on the place of residence of applicants could qualify *in concreto* as an indirect discrimination against EU citizens.

9 Article 2, objective h of Law no. 15 of 2009 reads as follow: ‘introduzione di strumenti che assicurino una più efficace organizzazione delle procedure concorsuali su base territoriale, conformemente al principio della parità di condizioni per l'accesso ai pubblici uffici, da garantire, mediante specifiche disposizioni del bando, con riferimento al luogo di residenza dei concorrenti, quando tale requisito sia strumentale all'assolvimento di servizi altrimenti non attuabili o almeno non attuabili con identico risultato’.

10 Article 35, section 5-ter, third sentence: ‘Il principio della parità delle condizioni per l'accesso ai pubblici uffici è garantito, mediante specifiche disposizioni del bando, con riferimento al luogo di residenza dei concorrenti, quando tale requisito sia strumentale all'assolvimento di servizi altrimenti non attuabili o almeno non attuabili con identico risultato’.

b.1. Nationality condition for access to positions in the public sector

Legal Framework: Italian nationality is a general requirement for access to positions in the public sector, enshrined in Article 51 para. 1 of the Constitution. An 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 Union citizens. This provision lays down in general terms the principle of equal treatment among nationals and Union citizens as to the access to positions in the public sector, excluding those posts which entail the direct or indirect exercise of public authority or are designed to safeguard the general interest of the State. Article 38 para. 2 ascribes the task of specifying the posts which are surely reserved to Italian nationals to a Decree of the President of the Council of Ministers.

Besides Article 38 para. 1, equal treatment among nationals and Union citizens with regard to the recruitment procedures in the public sector is also guaranteed by Article 2 para. 1 (1) of Decree of the President of the Republic no. 487 of 1994, referred to by Article 70 para. 13 of Legislative Decree no. 165 of 2001.

Posts and functions which are reserved to Italian nationals are still listed in Articles 1 and 2 of Decree of the President of the Council of Ministers no. 174 of 1994 respectively. According to Article 2 para. 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 access to a specific employment or to the conferral of specific responsibilities, if they involve reserved functions. Such a refusal has general prohibitive effect. Finally, Article 3 defines the general requirements that Union citizens have to possess in order to have access to the public service: 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.

No reform or cases to report.

b.2. Language requirements

The official language is Italian, but a special status is reserved to French in Valle d'Aosta (see Article 38, Constitutional Law no. 4 of 1948), German in Trentino-Alto Adige (see Article 1 of Decree of the President of the Republic no. 752 of 1976, Article 427 of Legislative Decree no. 297 of 1994, and Article 8 of Decree of the President of the Republic no. 75 of 1976 as to the so called '*proporzionale etnica*') and Slovenian in Friuli-Venezia Giulia (see Article 8 Law no. 38 of 2001 and Article 425 of Legislative Decree no. 297 of 1994).

According to Article 3 of Decree of the President of the Council of Ministers no. 174 of 1994, Union citizens shall have an adequate knowledge of the Italian language in order to access to posts in the public sector. Furthermore, Legislative Decree no. 165 of 2001 requires the knowledge of at least one foreign language (beside the knowledge of the most widespread information applications) for access to posts in the public sector (Article 37).

No reform or cases to report.

b.3. Recognition of professional experience for access to the public sector

Legal Framework: open competitions are the principal means of recruitment of public employees in Italy. In order to guarantee the principle of equal conditions of access, competition notices should not require, as a rule, a fixed-term professional experience or a specific professional qualification in a particular field as a condition for participation in recruitment procedures.

Nonetheless, when the competition notice requires some kind of professional experience, the following provisions apply.

- Article 38 para. 3 of Legislative Decree no. 165 of 2001 lays down a special procedure for the recognition of professional experience or professional diplomas for access to posts in the public sector, provided that no other EU rules applies. 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.
- Article 5 of Decree-Law no. 59 of 2008 (*Disposizioni urgenti per l'attuazione di obblighi comunitari e l'esecuzioni di sentenze della Corte di giustizia delle Comunità europee*, turned into Law no. 101 of 2008) states that Public Administration (in accordance with Art. 39 TEC and Article 7 of Regulation no. 1612/68/EEC) has to recognize the professional experience and seniority gained by Union citizens in the exercise of a comparable activity within the public administration of another Member State (even before accession) or of a EU body as equivalent to the experience or seniority acquired in Italy, when professional experience or seniority is considered relevant by Public Administration for any economic or legal purpose. In any case, Article 5 does not modify Article 38 of Legislative Decree no. 165 regarding Union citizens' access to public employment.¹¹ The provision refers in its title to the need to implement the judgment of the Court of Justice in the case C-371/04.¹² It remains to be seen whether it could have a wider scope of application.
- Recognition of professional experience is provided for in the special regulation concerning the recruitment of teachers. With regard to the recruitment of teaching staff by means of permanent aptitude lists, according to Decree-Law no. 97 of 2004 (turned into Law

11 Art. 5, Disposizioni in materia di riconoscimento del servizio pubblico svolto nell'ambito dell'Unione europea. Esecuzione della sentenza della Corte di giustizia resa in data 26 dicembre 2006 nella causa C-371/04. Procedura di infrazione n. 2002/4888 – 1. Le amministrazioni pubbliche tenute al rispetto del principio di libera circolazione dei lavoratori di cui agli articoli 39 del Trattato che istituisce la Comunità europea e 7 del regolamento (CEE) n. 1612/68 del Consiglio, del 15 ottobre 1968, salve più favorevoli previsioni, valutano, ai fini giuridici ed economici, l'esperienza professionale e l'anzianità acquisite da cittadini comunitari nell'esercizio di un'attività analoga a quella considerata rilevante e svolta presso pubbliche amministrazioni di un altro Stato membro, anche in periodi antecedenti all'adesione del medesimo all'Unione europea, o presso organismi dell'Unione europea secondo condizioni di parità rispetto a quelle maturate nell'ambito dell'ordinamento italiano. Sono inapplicabili le disposizioni normative e le clausole dei contratti collettivi contrastanti con il presente comma. Ai fini dell'accesso rimane fermo quanto previsto dall'articolo 38 del decreto legislativo 30 marzo 2001, n. 165.

12 Case C-371/04 Commission v. Italy [2006] ECR I-10257: 'A Member State which fails to take into account the professional experience and seniority gained in the exercise of a comparable activity within the public administration of another Member State by a Community worker employed in the national civil service fails to fulfil its obligations under Article 39 EC and Article 7(1) of Regulation No 1612/68 on freedom of movement for workers within the Community.'

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 that 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 was acquired (see Consiglio di Stato, judgement 17-2-2006, no. 673).

In this respect, two judgments are worthy of notice.

Case *P.G. c. Ministero dell'istruzione, dell'Università e della Ricerca e Conservatorio di musica di Pesaro* (Regional Administrative Tribunal – TAR Lazio, Roma, section III bis, judgment 18-12-2009 no. 13133/09): the claimant, a fixed-term piano teacher, was excluded by the public administration from participation in a competition to assign posts as a permanent piano teacher. The competition notice required a 360-days teaching professional experience in 'Istituzioni di alta cultura artistica e musicale' as a condition for access to the selection procedure, no matter where the experience was acquired. The claimant had taught more than one year in a number of Portuguese Regional Conservatories (Horta, Beja and Evora). This notwithstanding, according to the public administration, Mrs P.G. lacked the aforementioned condition because her teaching professional experience in Portugal was not gained at schools or educational institutions qualified as 'istituzioni di alta cultura artistica e musicale'. Recalling ECJ's case-law, the judge found the decree of exclusion contrary to the principle of free movement of workers. Since the competition notice should be interpreted in conformity with EU law and Italian Law (more specifically Law no. 143 of 2004, Annex B, paragraph 3, letter e), the Tribunal declared the contested decree null and void and annulled Article 2 of the competition notice in so far as it provides for recognition of professional experience acquired in other Member States only if it was gained at Musical and Artistic educational institutions qualified as 'istituzioni di alta cultura artistica e musicale dell'Unione Europea'.

Case *Ministero dell'Istruzione, dell'Università e della Ricerca c. Esposito* (Consiglio di Stato, section VI, judgment 3-2-2009 no. 1687/09): the claimant, an Italian national, was excluded by the public administration from the participation to a competition to assign posts as teacher of English language (the competition specifically qualified as *K05B-Inglese*). Participation in 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, Mr Esposito lacked the first condition because his teaching professional experience was not gained in Italy or in Italian schools abroad but in Sweden, in an education institution called popular university of Stockholm. According to the judge of first instance, the decree of exclusion was contrary to Article 39 TEC (see Regional Administrative Tribunal – TAR Campania, section II, judgement no. 89/04). The public administration appealed against the judgment of first instance. The judge of appeal upheld public administration's appeal because the educational institution in which Mr. Esposito taught in Sweden was not an Italian school abroad.

Recognition of professional experience is also provided for in the special regulation concerning the recruitment of doctors and paramedics in the National Health Service. According to Article 1 of Law no. 735 of 1960, *Riconoscimento del servizio sanitario prestato dai medici italiani negli ospedali all'estero*, the professional experience gained abroad by applicants for a position in the National Health Service is recognized as equivalent to that gained

in Italy for access to (and for granting points within) selection procedures.¹³ On the contrary, the professional experience gained abroad is expressly considered as irrelevant for other purposes (salary or seniority) (Article 26 of Decree of the President of the Republic no. 761 of 1979, *Stato giuridico del personale delle unità sanitarie locali*).

Within 2010, the Public administration can call a particular kind of competition called ‘*stabilizzazione*’, the access to which is reserved to fixed-term employees who have worked, even if not continuously, in the public sector for at least three years during a period of five years. Management staff is excluded. The rationale of the ‘*stabilizzazione*’ is to tackle the problems resulting from the use by Italian public administrations of successive fixed-term and temporary employment relationships in order to face permanent needs. Its aim is two-fold: transforming successive fixed-term employment contracts in the public sector into open-ended employment contracts within budgetary constraints; and preventing the same public employers from resorting to fixed-term employment relationships in the five years following the so-called ‘*stabilizzazione*’. The regulation of the subject matter, very complex and not easy to summarize, is laid down in two provisions: Article 1 of Law no. 296 of 2006 (*Disposizioni per la formazione del bilancio annuale e pluriennale dello Stato – legge finanziaria 2007*) and Article 3 of Law no. 244 of 2007 (*Disposizioni per la formazione del bilancio annuale e pluriennale dello Stato – legge finanziaria 2008*). Two circular letters laid down additional rules: Directive no. 7 of 2007 enacted by the Ministry for the Civil Service (*Applicazione dei commi 519, 520, 529 e 940 dell’articolo 1 della Legge 27 dicembre 2006, n. 296 (legge finanziaria per l’anno 2007), in materia di stabilizzazione e proroga dei contratti a tempo determinato, nonché di riserve in favore di soggetti con incarichi di collaborazione*) and Circular no. 5 of 2008 enacted by the Presidency of the Council of Ministers (*Linee di indirizzo in merito all’interpretazione e all’applicazione dell’art. 3, commi da 90 a 95 e comma 106, della legge 24 dicembre 2007, n. 244 – legge finanziaria 2008*).

The rationale of this regime is to resolve the general problems arising from the abusive use by public administrations of successive fixed-term and temporary employment contracts. This rationale is a relevant objective also from a EU law perspective.¹⁴ Had this legal regime provided for the transformation of fixed-term employments into permanent positions in the same Public Administration in which fixed-term employees gained a three years professional experience, it could have been regarded as legitimate under EU law. On the contrary, this legal regime could not be deemed to be compatible with EU law as far as a three year professional experience gained in any public administration in Italy is a condition for participation in the special recruitment procedures or for granting additional points within these procedures, for access to employment in any other public administration. In fact, the recognition of professional experience gained in the public sector of other Member States for access to

13 Article 1 of Law no. 735 of 1960 refers only to doctors holding Italian nationality but the words ‘*medici italiani*’ in the text of the said Article should be interpreted as including also EU citizens. In fact, Article 11, section 1 of Decree of the President of the Republic no. 761 of 1979, *Stato giuridico del personale delle unità sanitarie locali*, equates EU citizens to Italian nationals: ‘*I cittadini degli Stati membri della Comunità economica europea, esercenti le professioni mediche, paramediche e farmaceutiche possono prestare la loro attività nell’ambito del Servizio sanitario nazionale, in base alle condizioni e ai requisiti previsti dalle norme di attuazione dell’art. 57 del trattato di Roma.*’

14 See Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP. Italy transposed the directive into the Italian legal system in 2001: Legislative Decree no. 368 of 2001.

these special selection procedures can be excluded taking account of the aforementioned rationale of the ‘*stabilizzazione*’.

b.4. Other aspects of access to employment

Legal framework: Decree of the President of the Republic no. 189 of 2009 (*Regolamento concernente il riconoscimento dei titoli di studio accademici, a norma dell’articolo 5 della legge 11 luglio 2002, n. 148*) regulates the recognition of diplomas, degrees or other higher education qualifications obtained in Member States of the EU and the EEA or Switzerland or obtained in States Parties to the Convention on Recognition of Qualifications concerning Higher Education in the European Region (and issued by a competent authority of the State of origin). The procedure is not applicable to the recognition of professional qualifications regulated by EU law (Article 1, section 3). Article 3 of the Decree identifies the *Ministero dell’istruzione, dell’università e della ricerca* as competent recognition authority. The Ministry evaluates academic qualifications and provides the recognition thereof (among other purposes) for the purpose of allocating points where it is necessary to set permanent lists of open competitions and to get career advancements at the request of the public administration concerned. The request of the applicant is submitted to the Ministry by the public administration concerned, attaching a copy of the diploma translated in the Italian language and a certified list of all passed exams issued by the higher education institution which awarded the diploma. The Ministry decides on recognition within 90 days of the receipt of the request, and communicates its decision to the public administration concerned and the applicant. Ministry’s refusal to grant recognition of a diploma can be challenged by both the applicant and public administration within 30 days, pursuant to Article 5.

Judicial practice: A professional qualification as teacher is required as a condition for participation in recruitment procedures of teaching staff. Competition notices usually recognize diplomas as certified teacher gained in other Member States as equivalent to the ones acquired in Italy. This is in line with the EU principle of equal treatment in access to employment but is not sufficient to prevent public administration from any kind of discrimination in access to positions as a teacher. The case reported hereunder shows this point.

Case *Martinelli c. Ministero dell’Istruzione, dell’Università e della Ricerca* (Regional Administrative Tribunal – TAR Lazio, section III bis, judgment 23-12-2009 no. 13297/09): the claimant, an Italian national, was excluded by the public administration from the participation in a recruiting competition of teaching staff for the years 2007/2009 by means of permanent and temporary aptitude lists. Among the admittance requirements laid down in the competition notice there was the possession of a diploma as certified teacher (no matter whether the diploma was acquired in Italy or in another Member State). In addition, the competition notice (Art. 8) allowed a particular category of people to be provisionally admitted to the competition, notwithstanding they lacked the required diploma as certified teacher. More specifically, persons who were attending courses of specialization as certified teacher as of the academic year 2006/2007 in Italy (at ‘*Scuole di specializzazione all’insegnamento secondario (SSIS)*’, ‘*Accademie di Belle Arti (COBASLID)*’ or ‘*Scuola di Didattica della musica*’) were provisionally admitted to the competition upon the condition of gaining the diploma after the two-year course (therefore during the academic year 2007/2008).

At the time of his application the claimant was attending a Postgraduate Certificate in Education (Science) course in UK (University of York) as of 2006/2007 and about to obtain

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a diploma as qualified teacher there. He was interested in a post as teacher of chemistry and natural sciences in Italian secondary schools (the competition specifically qualified as *A013-Chemistry and A060-Natural Sciences*). According to the public administration, the claimant could not be admitted provisionally to the competition, as the competition notice granted the provisional admittance to persons who were attending courses of specialization as certified teacher as of the academic year 2006/2007 in Italy only. Moreover, it was the public administration's position that a diploma gained in another Member State could be recognized as equivalent to that acquired in Italy provided that the applicant has already gained it. According to the Administrative Tribunal, the claimant's exclusion amounted to a discrimination contrary to EU law (in particular the freedom of movement of workers and the principle of equal treatment in access to employment). Therefore, the Administrative Tribunal upheld the claimant's position and annulled the temporary and permanent aptitude lists in so far as the claimant was first not provisionally admitted and then permanently excluded thereto, despite the acquisition of the diploma as certified teacher in UK.

Chapter IV

Equality of Treatment on the Basis of Nationality

1. WORKING CONDITIONS – DIRECT AND INDIRECT DISCRIMINATION

Nothing to report.

Specific issue: Working conditions in the public sector

According to Article 45 of Legislative Decree no. 165 of 2001, every public administration department has to grant equality of treatment to its employees. A key role is attributed to the collective agreements as to establishment of working conditions (Article 24 of Legislative Decree no. 165 of 2001): economic treatment of employees in the public sector (both fundamental and accessory economic treatment), career advances and professional development in general, and determination of the tasks of the employees related to every kind of office in the Public Administration.

The 2009-reform of the legal regime of employment in the public sector is aimed at strengthening the application of the meritocratic principle as to career advancement, therefore limiting the scope of collective agreements in setting accessory economic treatments and career advances of public employees as well as in determining their tasks.

When the *possession of a diploma* is needed for the purpose of determining the working conditions, the procedure for recognition is set down by Decree of the President of the Republic no. 189 of 2009 (*Regolamento concernente il riconoscimento dei titoli di studio accademici, a norma dell'articolo 5 della legge 11 luglio 2002, n. 148*). The *Ministero dell'istruzione, dell'università e della ricerca* is the recognition authority. The request of the applicant is submitted to the Ministry by the public administration concerned, attaching a copy of the diploma translated in the Italian language and a certificated list of all passed exams issued by the higher education institution which awarded the diploma. The Ministry decides on recognition within 90 days of the receipt of the request, and communicates its decision to the public administration concerned and the applicant. The Ministry's refusal to grant recognition of a diploma can be challenged by both the applicant and public administration within 30 days.

When *professional experience* is needed for the purpose of determining the working conditions, Article 5 of Decree-Law no. 59 of 2008 applies. It states in general terms the principle of recognition of professional experience and seniority gained by Union citizens in the public administration of other Member States (or working for EU bodies) as equivalent to the experience or seniority acquired in Italy. Any legal provision or national collective employment agreements' clause in contrast with this principle is not applicable.

Case *C.G. c. Azienda Usl di Frosinone* (Regional Administrative Tribunal – TAR Lazio, Latina, section I, judgement 26-5-2009 no. 502): an Italian national working as permanent anaesthetist in the Public Hospital of Sora asked the public administration to recognize the professional experience gained in the United Kingdom for seniority purposes. The public administration rejected the request. According to the judge, the public administration's position and the provision according to which the professional experience gained abroad is con-

sidered as irrelevant for other purposes than that of being admitted to (or being granted points within) recruitment procedures in the National Health Service (Article 26 of Decree of the President of the Republic no. 761 of 1979) were not contrary to EU law and the principle of equal treatment. Due to the brief reasoning of the ruling, it is not clear whether the judge found no disparity of treatment because professional experience is always irrelevant for seniority purposes, no matter where it was gained, or because professional experience is irrelevant solely where it is gained abroad. In any case, the judge made no reference to the already mentioned Article 5 of Decree-Law no. 59 of 2008 because the facts of the case occurred before its enactment.

2. SOCIAL AND TAX ADVANTAGES

2.1. General situation as laid down in Art. 7 (2) Regulation 1612/68

In general terms, Italian legislation seems to be in line with EU law since the principle of non-discrimination for workers is well established. No case law is reported on Art. 7 (2) of Regulation 1612/68.

2.2. Specific issue: the situation of jobseekers

Under Article 19(3) of Legislative Decree no. 30 of 2007 (transposing Directive 2004/38/EC), 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.

Financial benefits equivalent to the ones which were in question in the *Collins, Ioannidis* and *Vatsouras* cases do not exist in Italy.

During a conference in the memory of Marco Biagi, a University professor killed by Italian terrorists, the Ministry of Labour publicly stated that the Government is against any form of guaranteed minimum income, because it is an inducement not to find a job (see E. Bonicelli, Sacconi: «Governo contrario al salario minimo garantito» *Il Sole-24 ore*, 20-3-2010).

On the contrary, some regional laws provide for minimum incomes for unemployed or not employed persons. For instance, Lazio grants a maximum amount of € 7.000 to people who have resided in the territory of the Region for two years, are registered with an employment center, have an annual income not exceeding € 8.000 (see Regional Law 20-3-2009, no. 4).

Chapter V

Other Obstacles to Free Movement

During 2008 the Ministry of the Interior made it clear that the registration into the population registry is necessary to be granted both non-contributory benefits (as it was even previously) and contributory benefits (which the National Social Welfare Institution – INPS – did not require till then). In other words, both benefits are now subject to a residence condition.

INPS decided to pay the unemployment benefits for the year 2008 (a contributory benefit) to agricultural workers whose residence where not registered in 2008, provided that they are for the year 2009 or they applied for after submitting their request for the unemployment benefit (Message 18-9-2009 no. 20819).

It is established case-law that courts have the power to judge whether the requirement of the Italian citizenship in a notice of open competition for a benefit or for a job amounts to a discrimination on the ground of national origin, prohibited by Article 44 of the consolidated legislation on immigration, unless justified on the basis of the aims pursued by the competition. The following subjects have a *locus standi*:

- the victim of the discrimination, when his/her request to participate has been rejected, or even when no request has been submitted, if it is clear from the words of the notice that a request from a non-Italian would be rejected (see Tribunale of Milano, order 13-7-2009, for the case of a non-EU foreigner challenging the notice of competition for a streetcar driver asking for Italian nationality).
- associations and bodies entered in a specific registry kept by the Ministries of Labour and of Equal Opportunities, on behalf of the victim.
- associations and bodies entered in a specific registry kept by the Ministries of Labour and of Equal Opportunities, in its name for the general interest, when the victims can not be directly and immediately identified (new opportunity created in 2008).

The latter option is of particular interest. Some associations, created to safeguard the rights of the foreigners (mainly non-EU foreigners), have successfully challenged discriminatory provisions of some public administrations. Also the citizens of the Union can benefit from the outcome, because the court can compel the respondent to cease from its discriminatory behavior and to adopt all acts necessary to avoid the same discrimination occur in the future. Through this kind of action, the following discriminatory behaviors (benefits reserved to Italian nationals) have been redressed:

- the notice of an open competition for allocating apartments in Milan to students from the Province of Sondrio (Tribunal of Milano, order of 28-7-2009. The appeal against the order was rejected by order 4-2-2010).
- the decision of the Municipality of Brignano Gera d'Adda to award a financial benefit to Italian nationals living in the Municipality who have been made redundant (Tribunale di Bergamo, order 28-11-2009).
- the notice of an open competition for awarding personal computers to deserving students by the Municipality of Chiari (Tribunale of Brescia, order 16-1-2010. The appeal against the order was rejected by order 18-2-2010).

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Among the benefits for low income household established in recent years is the so-called '*buono vacanza*' (holiday voucher), that is a financial contribution that can be only used to take an holiday during low season (Decree of the President of the Council of Ministers, 21-10-2008, *GURI* 6-2-2009 no. 30). The act establishing the benefit describes the beneficiaries in general terms, only with regard to income not to nationality. Nonetheless, the instructions for the application for the year 2010, published on the Internet (www.buonivacanze.it) mention Italian nationals only.

A circular letter by the Ministry for Education, Universities and Research (8-1-2010 no. 101/R.U.U.) addresses the case of non-Italian pupils in Italian schools. Stressing the importance of the knowledge of the language, it provides that from the school year 2010-11 each class at all level must not, as a rule, have more than 30% of non-Italian pupils. The quota can be heightened if the non-Italian pupils can speak Italian, or lowered if they cannot. Even though the legal value of the act (whether binding or not) is at present under dispute, if applied could lead to the consequence that the son or daughter of the citizen of the Union could be forced to move to a class or even a school other than the one chosen by his/her parents.

Chapter VI

Specific Issues

1. FRONTIER WORKERS

As already stated in the 2008-9 Report, Italian law provides for maternity benefits, set in Articles 74 (*Assegno di maternità di base*) and 75 (*Assegno di maternità per lavori atipici e discontinui*) of 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 to women, who have their place of residence in Italy, for every child born or adopted.

The Parliament established a mechanism called *scudo fiscale* (tax shield) to tax income sources detained abroad by Italian taxpayers and not declared to the tax authority in breach of the law. Italian taxpayers have to declare their income sources abroad in their annual tax return even though their income is taxed abroad and not in Italy.

Under the *scudo fiscale* each taxpayer should communicate to the tax authority their not previously declared income sources abroad by 15-12-2009 and pay a sum of 5%. No taxpayer was exempted (see Article 13 bis of Decree-Law 1-7-2009 no. 78, turned into Law 3-8-2009 no. 102).

It turned out that many frontier workers residing in Italy and working abroad opened a current account in a bank in the place of work to which their employers credit their salary, and they often happen to have omitted to declare it in their annual tax return in Italy. The aims of the *scudo fiscale* were to discourage tax evasion and to raise tax revenue, not to penalize frontier workers. But if interpreted as it stands, it would have treated the frontier workers as tax evaders, even though their income is taxed by the State of their place of work. After much debate on the issue, the Revenue Authority made it clear that any current account of more than € 10.000 should be declared. The frontier workers could bring their situation into line with the law by correcting their 2008 tax return within 90 days and paying a fine of € 26 (Circular letter no. 48/E of 17-11-2009). If they were not required to submit the 2008 tax return (because they have no income source in Italy), they could submit a form (*modello RW*) declaring the amount of their current account and pay a fine of € 21 (Article 1, para. 7, Decree-Law 30-12-2009 no. 194 turned into Law 26-2-2010 no. 25). Only a few months later, the rules changed again and exempted frontier workers from the obligation to file the RW form with regard to investments and financial assets held in the country where they work (Article 38, para. 13, Decree-Law 31-5-2010 no. 78).

2. SPORTSMEN/SPORTSWOMEN

Football

According to Article 40.6 of the Internal Regulation of the Italian Football Federation (*Federazione Italiana Giuoco Calcio – FIGC*) Italian football clubs can affiliate players who are resident in Italy and have never been affiliated to a foreign Federation. However, the Federal President may allow the affiliation of football players coming from a foreign Federation, provided that the Federation to which the player belongs to releases an ‘international

transfer' indicating the professional or amateur qualification of the player in question. According to Article 40.7, clubs taking part in football championships, organized by the National Professionals' League and by the Third Division (*Serie C*) National Professionals' League, can affiliate players coming from a foreign Federation without limitations, provided they are citizens of EU or EEA Member States. Clubs which are members of the Amateur National League can affiliate and field only one foreign non-professional player coming from a foreign Federation (irrespective of whether s/he holds EU or non-EU nationality). Italian non-professional players who are resident in Italy are treated as Italian players even if they come from a foreign Federation. Their affiliation is not subject to limitations. Players, born of Italian parents (born in turn in Italy), who have maintained continuously Italian nationality and are resident in Italy are treated as Italian players even if they come from a foreign Federation, provided that they were not called to join a foreign National team. These players can be affiliated without restrictions. The same rule applies to non-EU (or non-EEA) players coming from a foreign Federation who acquired Italian citizenship or another EU Member State's nationality.

Basketball

Article 31 of the FIB (*Federazione italiana Basket* – Italian Basketball Federation) Regulation, as amended in 2008, states that women's basketball clubs taking part in the A1 and A2 Championships can affiliate players who are EU citizens and have their stable residence in an EU Member State. Under the rule contained in Art. 31 players having EU nationality can be affiliated by the women's A1 and A2 Championship clubs without numerical limitations, provided that they are permanently resident in an EU Member State. As reported last year, the additional requirement of the stable residence in an EU Member State (besides EU nationality) does not seem to be in line with EU Law.

According to the Annual Rules of 2009/2010 on professional divisions, clubs taking part in the men's A Championship have to include in the referee's report a minimum of 6 players coming from an Italian training colt (among which clubs can temporarily include a maximum of two Italian nationals not coming from the Italian training colt and a minimum of 4 players coming from an Italian training colt and eligible for playing in the National team) and a maximum of 6 players whom clubs have not trained. Among the latter players clubs can include a maximum of 3 players having at the same time non-EU nationality and the nationality of a country not included by the FIBA in the list of Art. 2 of the 'Bye-Laws of FIBA EUROPE' (see below). Clubs taking part in the men's A Championship can include in the referee's report more than two Italian nationals not coming from the Italian training colt, provided that they include in the referee's report 6 players coming from an Italian training colt.

Clubs taking part in the *Legadue* Championship have to include in the referee's report a minimum of 7 players coming from the national training colt (among which one Italian national not coming from the Italian training colt) and a maximum of 2 non-EU players. Players who have played in the youth Championships organized by the Federation for at least 4 successive seasons, irrespective of their nationality, are considered as coming from the national training colt ('*giocatori di formazione italiana*').

In any case clubs taking part in the men's A and *Legadue* Championships have to record at least 6 contracts concluded with players having Italian nationality.

According to the Annual Rules of 2009/2010 on non-professional divisions, clubs taking part in the women's A1 Championship can include in the referee's report no less than six players coming from the national training colt and no more than two players who hold the nationality of a country not included by the FIBA in the list of Article 2 of the 'Bye-Laws of FIBA EUROPE', which reads: '*FIBA Europe consists of those national member federations of FIBA assigned to it by FIBA. The national federations which are members of FIBA Europe are listed in Annex 1, as attached to these Bye-Laws.*'¹⁵ In other terms, the women's A1 Championship clubs cannot include in the referee's report more than two foreign players holding the nationality of a country not included in the list. The Annual Rules of 2009/2010 state that as of the 2010/2011 season in order to identify non-FIBA EUROPE players it is necessary to take account of the new provisions contained in Article 32 of Regulations of FIBA Europe Club Competitions.¹⁶ Furthermore, the women's A1 Championship clubs shall field no less than two players coming from the national training colts in each match. Clubs taking part in the women's A2 Championship can field only one EU player or one Italian player who is foreign-born or coming from a foreign Federation or one foreign player who acquired Italian nationality. Clubs taking part in the amateur Championships can affiliate one player born in Malta and having Maltese nationality, provided that s/he has played in the youth Championships organized by the Maltese Basket Federation for two years.

The rules providing for the limitations regarding the referee's report and the playing field are based on the notion of '*giocatori di formazione italiana.*' This notion is not based on nationality considerations. To the contrary, the qualification of '*giocatore di formazione italiana*' is acquired by a player after having played for at least four successive seasons in the Italian Youth Championships, irrespective of her/his nationality. Nevertheless, the rule

15 Annex 1 provides for the list of the 51 national federations which are Members of the FIBA Europe. These are the national basketball federations of the following countries: Albania, Andorra, Armenia, Austria, Azerbaijan, Belarus, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, England, Estonia, Finland, France, FYROM (Former Yugoslav Republic of Macedonia), Georgia, Federal Republic of Germany, Gibraltar, Greece, Hungary, Iceland, Ireland, Israel, Italy, Latvia, Lithuania, Luxembourg, Malta, Moldova, Principality of Monaco, Montenegro, Netherlands, Norway, Poland, Portugal, Romania, Russia, Republic of San Marino, Scotland, Serbia, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Turkey, Ukraine, Wales.

16 Article 32 of Regulations of FIBA Europe Club Competitions will be effective as of the Season 2010/2011 and provides that '1. The principle of free circulation within FIBA Europe applies to the European Club Competitions for nationals/citizens from Countries belonging to the European Zone. 2. Each club participating in a FIBA Europe Club Competitions may register an unlimited number of players who: 1) do not have the Legal Nationality of the Country of the national member federation of FIBA Europe by which these players are currently licensed, but are in possession of the Legal Nationality of another Country belonging to the European Zone or 2) have the Legal Nationality of a Country that does not belong to the European Zone, have acquired the legal nationality of a Country belonging to the European Zone by naturalisation or by any other means after having reached the age of sixteen (16) and have played for the national team of a Country belonging to the European Zone in a main official competition of FIBA or FIBA Europe. 3. Each club participating in the FIBA Europe Club Competitions may register a maximum of two (2) players who: 1) do not have the Legal Nationality of a Country belonging to the European Zone or 2) have the legal nationality of a Country that does not belong to the European Zone, have acquired the legal nationality of a Country belonging to the European Zone by naturalisation or by any other means after having reached the age of sixteen (16) and have played for the national team of a Country not belonging to the European Zone in a main official competition of FIBA or another FIBA Zone. 4. Each club participating in the FIBA Europe Club Competitions may register a maximum of one (1) player who has the Legal Nationality of a Country that does not belong to the European Zone, has acquired the Legal Nationality of a Country belonging to the European Zone by naturalisation or by any other means after having reached the age of sixteen (16) and has never played for a national team of a national federation member of FIBA in a main official competition of FIBA.'

requiring a club taking part in the men's A Championship to include a minimum of six players coming from an Italian training colt is enforced in a discriminatory way. This is because among this six '*giocatori di formazione italiana*' clubs can exceptionally include two Italian nationals not coming from the Italian training colt. Furthermore, these clubs can include in the referee's report a maximum of three non-EU players who have also the the nationality of a country not included in the list of Art. 2 of the 'Bye-Laws of FIBA EUROPE'. This limitation is clearly nationality-based. Therefore, this limitation, being directly discriminatory, could be regarded as contrary to EU Law as far as it concerns citizens belonging to countries which have concluded Association Agreements with the EU. The same conclusion can be reached as to the rule which provides that clubs taking part in the League Championship can include in the referee's report a maximum of two non-EU players.

Ice-Hockey

According to the Annual Federal Rules on Italian Ice-Hockey men's A Championship of the 2009-2010 season, it is necessary to distinguish between Italian players trained in Italy or having Italian nationality (A category) and players having foreign nationality and/or trained abroad (B category). The A category includes: 1) Italian national players who have never been affiliated to a foreign Federation and are affiliated to the FISG for the first time; 2) Italian national players coming from a foreign Federation if they have already played in Italy for two successive seasons or are eligible to join the Italian National team; 3) foreign national players even if coming from a foreign Federation provided that they have played in the FISG National Youth Championships for at least three consecutive seasons; 4) foreign national players who have never been affiliated to a foreign Federation and are affiliated to the FISG for the first time. The B category includes: 1) players already affiliated to a foreign Federation and having EU nationality or an equivalent nationality (i.e. a nationality of a country having concluded a treaty providing for free movement of people and, in any case, whose entrance in Italy does not require a visa); 2) non-EU players who have been already affiliated to a foreign Federation; 3) players coming from a foreign Federation and having Italian nationality provided that they have not played in Italy for at least two whole seasons or are not eligible to join the Italian National team. Every club taking part in the men's A Championship has to fill out the referee's report so as to include no less than 11 players and 1 goalkeeper of A category and no more than 10 players of B category. In any case, clubs must field 2 players belonging to B category point 3) and can field a maximum of 5 players belonging to B category point 2). Furthermore, clubs taking part in the men's A Championship cannot affiliate more than 5 non-EU players who have been already affiliated to a foreign Federation (B Category point 2)). Affiliation of players trained in Italy and having double nationality and players belonging to B category ('*giocatori di cittadinanza e formazione straniera*') is subject to Hockey Secretariat's authorization. Ice-Hockey associations are not free to affiliate non-EU players without limitations. A club taking part in the men's Under 20 Championship can affiliate and field no more than two non-EU players under 18. Clubs taking part in the men's Under 17, 15, 13, 11, 10 and 8 Championships can affiliate non-EU players without restrictions, but they can only field them according to the following limitations: clubs taking part in the Under 11, 10 and 8 Championships can field non-EU players without restrictions; clubs taking part in the Under 17, 15 and 13 Championships can field no more than two, three and four non-EU players, respectively. In any case, athletes of non-EU nationality who have played in the FISG National Youth Championships for at least

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three consecutive seasons are considered as Italian players trained in Italy or having Italian nationality (A category). As a consequence, clubs are free to affiliate them without restrictions. According to the Federal Annual Rules for the 2009/2010 season, clubs taking part in the Italian A2 Championship which have affiliated 2 goalkeepers belonging to A category can field 4 players belonging to B category (among these only 2 non-EU nationals) and 16 other players belonging to A category for each match. Clubs which have affiliated one goalkeeper belonging to B category can field two players and one goalkeeper belonging to B Category and 18 players belonging to A category. Clubs can affiliate no more than 6 players belonging to B category (among these only 2 non-EU nationals) provided that they have 2 goalkeepers belonging to A category. They can affiliate no more than 4 players belonging to B category (among these only 2 non-EU nationals), if they have only 1 goalkeeper belonging to A category. Clubs taking part in the men's A2 Championship can affiliate a maximum of two non-EU players belonging to B Category point 2).

According to the Annual Rules for the 2009/2010 season clubs taking part in the women's A Championship have to include in the referee's report 21 players belonging to A category and one player coming from a foreign Federation. A club taking part in the women's Under 20 Championship can affiliate and field no more than two non-EU players under 18. Clubs taking part in the women's Under 17, 15, 13, 11, 10 and 8 Championships can affiliate non-EU players without restrictions, but they can only field them according to the following limitations: clubs taking part in the Under 11, 10 and 8 Championships can field non-EU players without restrictions; clubs taking part in the Under 17, 15 and 13 Championships can field no more than two, three and four non-EU players, respectively. Clubs taking part in the men's 'C Under 26' Championship cannot field players trained abroad or players trained in Italy having dual nationality.

Volleyball

The present writer was not able to find any regulation concerning the 2009/2010 season.

Handball

According to the 'Vademecum 2009-2010', citizens of the following countries are considered as EU players: Austria, Belgium, Bulgaria, Cyprus, Denmark, Estonia, Finland, France, Germany, Great Britain, Greece, Ireland, Iceland, Latvia, Liechtenstein, Lithuania, Luxemburg, Malta, Norway, The Netherlands, Poland, Portugal, Czech Republic, Romania, Slovakia, Slovenia, Spain, Sweden, Hungary. Any other foreign national is considered a non-EU player. EU players can be affiliated by Italian clubs without restrictions. Clubs taking part in the men's A 'Elite' Championship can affiliate no more than 6 non-EU players. Clubs taking part in the women's A1 Championship can affiliate no more than 4 non-EU players. Clubs taking part in the men's A1 Championship can affiliate no more than 2 non-EU players. Clubs taking part in the other Championships cannot affiliate nor field non-EU players non-resident in Italy. No restriction is established to the affiliation of non-EU nationals who are resident in Italy, are less than 18-years old and have never been affiliated to a foreign Federation. To affiliate a foreign player belonging to a foreign federation, the international transfer authorization released by the European Handball Federation (EHF) or the International Handball Federation is necessary. Clubs taking part in the men's A 'Elite' Championship can field no more than 4 foreign players (irrespective of their nationality) for each

match. Clubs taking part in the women's A1 Championship can field no more than 3 foreign players for each match. Clubs taking part in the men's A1 Championship can field no more than 1 foreign player for each match. Club taking part in the men's and women's A2 Championships can field only 1 EU player or 1 non-EU national who are resident in Italy and have never been affiliated to a foreign Federation for each match. Clubs taking part in the men's B Championship can field only 1 EU player or 1 non-EU national who is resident in Italy and has never been affiliated to a foreign Federation for each match. Clubs taking part in the women's B Championship can field EU players and foreign players who are resident in Italy and have never been affiliated to a foreign Federation in so far as they represent 30% of total team players for each match. Clubs taking part in the National men's Under 18 Championship can field no more than two players among EU players and foreign players who are resident in Italy and have never been affiliated to a foreign Federation upon the condition that clubs field no less than 12 Italian players for each match. Clubs taking part in the men's and women's Under 18, 16, 14, 12 can field EU players and non-EU players who are resident in Italy and have never been affiliated to a foreign Federation without limitations. Clubs taking part in the men's A 'Elite' and men's and women's A1 Championships which have affiliated a foreign coach shall affiliate an assistant coach having Italian nationality.

New Developments for the seasons 2010/11, 2011/12 and 2012/2013

On March 23, 2010 the General Council of the Italian Handball Federation enacted new guidelines and rules for the next three seasons (Circular no. 5/2010).¹⁷ These new rules will be included in the annual 'Vademecum' drafted for each season. Among the reasons for enacting this new regulation were the economic crisis which hits clubs and the necessity to increase the value of national training colts. For these reasons the Council, upholding the request of clubs, identified a number of measures to be taken. The limitations to the resort to foreign players upon clubs are worthy of mention because of their relevance from a EU law perspective.

The limitations introduced by Circular no. 5 of 2010 as of the season 2010/11 can be summarized as follows:

Clubs taking part in the men's A 'Elite' Championship can affiliate no more than 4 non-EU players and EU players without restrictions. These clubs cannot include in the referee's report more than 2 foreign players (*giocatori di formazione italiana* are excluded) for each match. Moreover, they cannot include in the referee's report foreign players who are resident in Italy and have never been affiliated to a foreign Federation. Clubs will suffer a technical loss of the match for the breach of the aforementioned rules. Finally, they have to include in the referee's report a minimum of 4 Italian players born in 1990 and subsequent years.

Clubs taking part in the men's A1 Championship can affiliate EU players without restrictions and one non-EU player only. They cannot include in the referee's report more than one foreign player (*giocatori di formazione italiana* are excluded) for each match. These clubs cannot include in the referee's report foreign players who are resident in Italy and have never been affiliated to a foreign Federation. Clubs will suffer a technical loss of the match for the breach of the aforementioned rules. Finally, clubs have to include in the referee's report a minimum of 4 Italian players born in 1990 and subsequent years.

¹⁷ http://www.figh.it/Doc/CircolariFederali/2010/Circolare_05.pdf.

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Clubs taking part in the men's A2 Championship can affiliate EU players without restrictions. They can include in the referee's report only one EU player or one foreign player who is resident in Italy and has never been affiliated to a foreign Federation (*'giocatori di formazione italiana'* are excluded) for each match. Clubs will suffer a technical loss of the match for the breach of the aforementioned rules. These clubs have to include in the referee's report a minimum of 2 Italian players born in 1990 and subsequent years. Nothing is said as to the affiliation of non-EU players. In any case, it seems possible for clubs to affiliate at least one non-EU player, provided that he is resident in Italy and has never been affiliated to a foreign Federation. This can be inferred from the rule according to which clubs may include in the referee's report one foreign player who is resident in Italy and has never been affiliated to a foreign Federation or one EU player.

Clubs taking part in the men's B Championship can affiliate EU players without restrictions. They can include in the referee's report EU players or foreign players who are resident in Italy and have never been affiliated to a foreign Federation (*'giocatori di formazione italiana'* are excluded) for each match, solely provided that they represent no more than 30% of the players included in the referee's report. Clubs will suffer a technical loss of the match for the breach of the aforementioned rules.

Clubs taking part in the women's A1 Championship can affiliate EU players without restrictions and a maximum of 3 non-EU players for the season 2010/11 (a maximum of 2 non-EU players for the season 2011/12 and only one non-EU player for the season 2012/13). These clubs cannot include in the referee's report more than 3 foreign players (a maximum of 2 foreign players for the season 2011/12 and only one foreign for the season 2012/13) for each match. *'Giocatori di formazione italiana'* are excluded from the scope of application of this restriction. Moreover, they cannot include in the referee's report foreign players who are resident in Italy and have never been affiliated to a foreign Federation. Clubs will suffer a technical loss of the match for the breach of the aforementioned rules. Finally, these clubs have to include in the referee's report a minimum of 2 Italian players born in 1991 and subsequent years.

Clubs taking part in the women's A2 Championship can affiliate EU players without restrictions. They can include in the referee's report only one EU player or one foreign player who is resident in Italy and has never been affiliated to a foreign Federation (*'giocatori di formazione italiana'* are excluded). Clubs will suffer a technical loss of the match for the breach of the aforementioned rules.

Clubs taking part in the women's B Championship can affiliate EU players without restrictions. They can include in the referee's report EU players or foreign players who are resident in Italy and have never been affiliated to a foreign Federation (*'giocatori di formazione italiana'* are excluded) for each match, solely provided that they represent no more than 30% of the players included in the referee's report. Clubs will suffer a technical loss of the match for the breach of the aforementioned rules.

According to the 'Vademecum 2009-2010' foreign players are considered as *'giocatori di formazione italiana'* provided that: a) they have never been affiliated to a Foreign Federation; b) they have been affiliated to the Italian Federation for at least 4 successive seasons with the status of 'Italian player' (*'giocatore italiano'*) and/or 'resident in Italy and never affiliated abroad' (*'residente in Italia e mai tesserato all'estero'*); c) they have applied for Italian nationality; and d) they are under 21 years of age. The status of *'giocatore di formazione italiana'* is temporary. In fact, the affiliation as *'giocatore di formazione italiana'* can last no more than four successive seasons. Foreign players who acquire Italian nationality

within that period are affiliated as Italian players. On the contrary, it seems that foreign players who do not acquire Italian nationality within the four season time limit or are not eligible for Italian nationality cannot be affiliated as '*giocatori di formazione italiana*'.

The rules reported above are clearly contrary to EU law. More specifically, the restrictions as to the inclusion of foreign players (EU players included) in the referee's report are nationality-based. The restrictions regarding both affiliation of non-EU players and their inclusion in the referee's report are not compatible with EU law as far as they apply to nationals belonging to States which concluded association agreements with the European Union. Finally, the present writer notes that the definition of '*giocatori di formazione italiana*', being nationality-based, seems to be contrary to EU law, because it includes only persons who are eligible to acquire Italian nationality.

Rugby:

Nothing new compared to last year.

3. THE MARITIME SECTOR

The present writer could not find any useful information on the subject. The collective bargain agreement for the sector applies to all workers, irrespective of nationality.

4. RESEARCHERS/ARTISTS

The employment relationship in the cultural sector is not specifically regulated under the Italian legal system and the employment 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 a self-employed or as an employee depending on her/his 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.

5. ACCESS TO STUDY GRANTS

Discrimination on the ground of nationality in this field is prohibited in general terms. Nevertheless, study grants are a matter where discriminatory behaviours have happened, especially at local level. From 2009 a sort of *actio popularis* is available in cases of discrimination (for more details, see Chapter V) and it has resorted to redressing the following discriminatory behaviours (nationality requirement) in relation to study grants:

- an open competition for allocating apartments in Milan to students from the Province of Sondrio (Tribunal of Milano, order of 28-7-2009. The appeal against the order was rejected by order 4-2-2010).
- an open competition for awarding personal computers to deserving students by the Municipality of Chiari (Tribunale of Brescia, order 16-1-2010. The appeal against the order was rejected by order 18-2-2010).

When study grants or other benefits are awarded by a public administration through a selection procedure, and an educational qualification is necessary or useful in order to participate,

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the evaluation of the foreign educational qualification is conducted by the adjudicating administration, upon an opinion of the Ministry for Education, Universities and Research which shall decide within 60 days of the request. (Decree of the President of the Republic 30-7-2009 no. 189, *Regolamento concernente il riconoscimento dei titoli di studio accademici*, GURI 28-12-2009 no. 300).

Chapter VII

Application of Transitional Measures

1. TRANSITIONAL MEASURES IMPOSED ON EU-8 MEMBER STATES BY EU-15 MEMBER STATES AND SITUATION IN MALTA AND CYPRUS

Italy lifted the transitional arrangements regarding workers from A8 during 2006.

2. TRANSITIONAL MEASURES IMPOSED ON WORKERS FROM BULGARIA AND ROMANIA

The transitional period for workers from A2 decided in 2007 is still in force. The Ministries of the Interior and for Social Solidarity described the transitional period for 2009 by the circular no. 1 of 14-1-2009, and for 2010 by no. 2 of 20-1-2010 (see also circular letter by the Ministry of the Interior 3-12-2009, no. 7881). Therefore, 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 Bulgarian or Romanian citizens in other areas is conditional upon a no objection certificate (*'nulla osta'*) issued by the Immigration Office. The prospective employer shall submit a request for the authorization, attaching 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.

A Bulgarian or Romanian worker entering Italy during 2009 or 2010 who applies for registration of his/her residence with the municipal authorities has to prove that s/he is a worker and show the *'nulla osta'* when required.

Romanian citizens have grown from 342.200 at 1-1-2007 to 796.447 at 1-1-2009; Bulgarian citizens from 17.461 at 1-1-2007 to 40.880 at 1-1-2009.

No case-law to report.

Chapter VIII Miscellaneous

1. RELATIONSHIP BETWEEN REGULATION 1408/71-883/04 AND ART 45 TFEU 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 know, during the reported period no discussion regarding the relationship between Regulation no. 1408/71/EEC (not to mention Regulation no. 883/04 which is not reported to have ever been quoted) and Regulation no. 1612/68/EEC has taken place, neither in legal writings nor in front of courts.

2. RELATIONSHIP BETWEEN THE RULES OF DIRECTIVE 2004/38 AND REGULATION 1612/68 FOR FRONTIER WORKERS

As far as we know, during the reporting period no discussion regarding the relationship between Directive no. 2004/38/EC and Regulation no. 1612/68/EEC for frontier workers has taken place, neither in legal writings nor in front of courts.

3. EXISTING POLICIES, LEGISLATION AND PRACTICES OF A GENERAL NATURE THAT HAVE A CLEAR IMPACT ON FREE MOVEMENT OF EU WORKERS

3.1. *Integration measures*

The general legislation on immigration provides for the implementation of integration measures for foreigners. Since for the purpose of the said legislation foreigners are non-EU nationals, citizens of the Union do not benefit from integration measures. Nonetheless, some Regions have established integration measures which citizens of the Union can benefit from too, either in general (see Campania, Regional Law 8-2-2010 no. 6) or within the first years of residence (see Puglia, Regional Law 4-12-2009 no. 32).

As already stated in Chapter V, the Ministry for Education, Universities and Research (circular letter 8-1-2010 no. 101/R.U.U.) addresses the case of non-Italian pupils in Italian schools. In order to help them integrate in classes, starting from the school year 2010-11 each class at all level must not, as a rule, have more than 30% of non-Italian pupils. The quota can be heightened if the non-Italian pupils can speak Italian, or lowered if they cannot.

3.2. *Immigration policies for third-country nationals and the Union preference principle*

In recent years the Parliament has amended the general legislation on immigration several times, in order to make its application stricter, often through criminal provisions. The most significant provisions are:

- the so called *aggravante clandestinità*: the fact that the offence is committed by a person who is residing illegally in Italy is an aggravating circumstance (Article 61, no. 11 bis, of the Criminal Code, as amended by Decree-Law no. 92 of 2008, turned into Law no. 125 of 2008).

The applicability of the provision to the citizen of the Union was open to question, since Article 1 para. 1 of Law no. 94 of 2009¹⁸ has made it clear that the aggravating circumstance of Article 61 para. 11 bis does not address the case of the citizens of the Union. Whether non-EU family members of the citizens of the Union are within the scope of the provision or not is not clear.

- the crime of ‘irregular entry and stay on the national territory’ which should be punished, unless it constitutes a more serious offence, with a pecuniary penalty from 5 to 10 thousand Euros. If the person is expelled, the judge will adopt an order of non acquittal (Article 10 bis of the general legislation on immigration, as amended by Law 15-7-2009 no. 94).

Citizens of the Union are not within the scope of the general legislation on immigration, but since their non-EU family members are not expressly excluded, whether they could be convicted is open to question.

In addition to that, other provisions not of criminal nature are worthy of notice. Many social benefits are granted only to third-country nationals who are long-term residents (see Article 80 para. 19 of Law no. 388 of 2000). The Constitutional Court has declared that depriving other third-country nationals who legally reside in Italy of the benefits would infringe the principle of equality enshrined into Article 2 of the Constitution (judgments no. 306 of 2008, no. 11 of 2009, no. 187 of 2010).

The number of foreigners that can be admitted for working reasons is established yearly by way of a Decree of the President of the Council of Ministers (the so called ‘*decreto flussi*’ – flows decree). For the year 2009, 80.000 entries of seasonal workers is allowed (Decree 20-3-2009); for the year 2010, 80.000 entries of seasonal workers, 4.000 entries of self-employed workers, and 2.000 entries of foreigners who attended an education and training program organized in their country of origin by Italy, are allowed.

In the year 2009 a sort of amnesty was established for illegal non-EU foreigners working in families as ‘*badante*’, that is taking care of elderly or ill people (Law 3-8-2009 no. 102).

¹⁸ Article 1.1 of Law no. 94 of 2009: ‘La disposizione di cui all’articolo 61, numero 11-bis), del codice penale si intende riferita ai cittadini di Paesi non appartenenti all’Unione europea e agli apolidi.’

3.3. *Return of nationals to new EU Member States*

Despite the economic crisis and the growth of unemployment, the number of foreigners residing in Italy has grown, even if at a slower pace. As of 1-1-2009 Istat (the Italian Statistical Institute) reckoned 3.891.295 foreigners (+ 458.644 compared to 2008).¹⁹ Among them, 1.131.767 (+ 197.332 compared to 2008) are citizens of the Union. The largest group are Romanians (796.447, + 171.199 compared to 2008). The second group among EU26 are Polish nationals (99.389, + 9.171 compared to 2008). Therefore, there are no elements to say that a significant return of EU nationals to their home countries took place.

The Leone Moressa Foundation (www.fondazioneleonemoressa.org) has produced some interesting studies about foreigners in the labour market. One shows that unemployment strikes foreigner workers more than Italians,²⁰ even though in some working sectors, for instance construction, and in some Regions, more Italian workers lost their job than foreigners. The unemployed EU nationals have grown by 93,6% from the first and second quarters of 2008 to the first and second quarter of 2009.²¹ Another line of studies show that the average salary of foreign workers (€ 962) is lower than that of Italian ones (€ 1.245). The average salary of EU workers has lowered more than the average: from € 1.020 in the II quarter 2009 to € 975 in the III quarter 2009.²²

In recent years, the Government and the Parliament have enacted a number of measures to encourage Italian researchers working abroad to come back, in order to reverse the brain drain many people are complaining about. Those who have held a position at a University abroad for at least three years can sign a three- or four-year contract with a University in Italy, which assign them research and teaching tasks. The program is disappointing in that, after the expiry of the contract, the researcher can not be hired, but can either take part in open competition (when there is one) or return abroad again.

4. NATIONAL ORGANIZATIONS OR NON-JUDICIAL BODIES TO WHICH COMPLAINTS FOR VIOLATION OF COMMUNITY LAW CAN BE LAUNCHED

Italy does not have a developed tradition of non-judicial bodies or in general of alternative dispute settlement proceedings. Besides the SOLVIT system, only the UNAR (*Ufficio nazionale antidiscriminazione razziale* – National office against racial discrimination) can be pleaded to. The victim of a discrimination on the ground of race or nationality can submit his/her case to UNAR, which can issue recommendations.

The national budget law for 2009 (Law 23-12-2009 no. 191, Art. 2, para. 186) has cancelled the post of Municipal Ombudsmen. The decision was grounded on the need to save

19 See Istat, *La popolazione straniera residente in Italia al 1° gennaio 2009*, Roma 8-10-2009. According to the estimate made by Caritas, there were 4.329.000 foreigners.

20 Fondazione Leone Moressa, *Crisi: aumento boom dei disoccupati stranieri. L'aumento riguarda soprattutto le regioni del Nord*, January 2010.

21 Fondazione Leone Moressa, *Classificazione del mercato del lavoro degli stranieri comunitari ed extracomunitari*, February 2010.

22 Fondazione Leone Moressa, *I livelli retributivi dei dipendenti stranieri e i differenziali con gli italiani. Italia. II semestre 2009, October 2009 and III semestre 2009, Mach 2010.*

public money. The provision is worthy of notice, since Municipal authorities, which are in charge of the registration of the EU citizens' residence, were within the scope of the Municipal Ombudsman's office capacity. The provincial Ombudsmen can replace the Municipal Ombudsmen by way of a specially devised agreement entered with the Municipality.

As already stated in Chapter V, associations or bodies entered in a specific registry kept by the Ministries of Labour and of Equal Opportunities, can challenge discriminatory behavior of public or private bodies in their name, when the victims can not be directly and immediately identified. Some associations like [ASGI](#) or [Avvocati per niente](#) which deal with immigration issues, have successfully undertaken such kind of *actio popularis*, from which citizens of the Union have benefitted, even though they were not the main concern of the associations.

5. SEMINARS, REPORTS AND ARTICLES

Italian legal scholars do not devote much attention to the free movement of workers. The relevant articles dealing with specific problems, published during the reported period, were quoted in the other chapters of the present report. The only essay of wide breath that the present rapporteur could find is the following: C. Morviducci, *La libera circolazione dei cittadini nell'Unione Europea* (free movement of citizens in the European Union), Giapichelli editore, 2009.