Conformity Study for Italy
Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States
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The views expressed herein are those of the consultants alone and do not necessarily represent the official views of the European Commission. The national report reflects that legal situation as it stands on 1 August 2008. No subsequent changes have been taken into account.

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ANALYSIS OF THE LEGISLATION TRANSPOSING
DIRECTIVE 2004/38/EC ON FREE MOVEMENT OF UNION CITIZENS

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EXECUTIVE SUMMARY

1. Introduction

Transposition of Directive 2004/38/EC was very complex. After the adoption of the first transposing Decree (D.Lgs. n. 30/07) that entered into force almost one year after the date requested by the Directive, other Law Decrees have been adopted in response to a public outcry following a violent murder committed by a Romanian citizen against an Italian woman. Both acts introduced more severe provisions dealing with expulsion.

These Law Decrees, however, have not been converted into a Law by the Italian Parliament within the deadline of sixty days foreseen by the Italian procedure and finally, a new Legislative Decree was adopted on 28 February 2008 and entered into force on 2 March 2008 (D.Lgs. n. 32/08).

Recently, another Law Decree has been adopted (Law Decree n. 92/08 on urgent public security measures); this Decree is also relevant for transposition of Directive 2004/38/EC since it has modified several provisions of the legislation that are in force (e.g., the criminal code, other pieces of legislation also referred to by the transposing legislation), affecting the position of EU citizens and their family members. This Decree has been converted into a Law with amendments on 24 July 2008 (Law 24 July 2008, n. 125).

The Italian legislation has been complemented by several Ministry of Interior’s Circulars that have clarified the meaning of certain provisions.

The main competence in the field of freedom of movement of EU citizens lies with the Ministry of Interior. The local autonomous entities only have powers related to implementation aspects. In particular the two entities that have some power that derive from the Ministry of Interior are the Prefetto and the Questore.

Contact with the national competent authorities has not been an easy exercise. It has been difficult to identify the persons responsible for the subject matter under discussion having being transferred by phone to one person to another. The various officials contacted by phone have been quite eager to answer the various questions and clarifications submitted to them but the general impression was that they were not always updated about more recent issues such as the status of the draft legislative decree amending the original transposing Decree. Moreover, they could not always provide satisfactory explanations to several issues that have been submitted to them.

The overall transposing picture is not sufficiently clear since there are various pieces of legislation that are still under revision or adoption.

In addition, the texts of the main acts are difficult to obtain since consolidated versions are not always available online and legal publications are not easy to find. The analysis of the transposition is therefore complicated.

The analysis carried out on the Italian legislation has shown that transposition of Directive 2004/38/EC is deficient. Numerous gaps, incorrect/ambiguous and incomplete transposition have been identified. The main non-conformity problems that have been identified are the following:
2. Conformity problems

a. Main non-conformity problems due to gaps / incomplete transposition:

In Article 20(1) second part of the Directive, the sentence “The permanent residence card shall be renewable automatically every 10 years” is not transposed; this may be considered as more stringent since the person concerned is obliged to go through all the administrative procedures again, in order to have a new residence card issued.

The Italian provision omits any reference, while transposing Article 25(1) first part, to an important point, i.e., the fact that the Union citizen should not be obliged to prove the possession of the registration certificate or of a document certifying permanent residence, in order to be able to exercise a right or in order to complete an administrative formality. Therefore this gap is an important one.

Another important gap concerns the omission, with reference to Article 27(2) of the Directive, second indent, of “justifications that are isolated from the particulars of the case or that rely on considerations of general prevention shall not be accepted”. Although the transposing provision refers in the beginning to the “personal conduct of the individual concerned”, this is not the same and is not enough to comply with the requirement of the Directive.

As concerns Article 27(4) on the obligation for the State to allow the citizen who has been expelled on grounds of public policy, public security, or public health, to re-enter its territory without any formality even if the document is no longer valid or the nationality of the holder is in dispute has not been transposed as such. However, Italy is a party to the European Convention on Human Rights (ECHR) and has incorporated its provisions by Law n. 848 of 1955. Therefore, Italy is obliged to readmit its nationals when they have been expelled by another MS.

The gap concerning the transposition of Article 30(2) is important since the Italian provision fails to specify that the grounds on which the decision is taken shall be “precise and explained in full”. It only refers, more generally to “explain the grounds”. Therefore, this is a breach of the specific procedural safeguards that are an essential part of the Directive.

b. Main issues of incorrect or/and ambiguous transposition:

Article 5(5) of the Directive is a discretionary provision on reporting the presence in the territory within a reasonable and non-discriminatory period of time. Italy has decided to transpose this option but it has done it incorrectly since the sanctions that apply in case of failure to comply with the provision, (expulsion of the person concerned) are not “proportionate nor non-discriminatory” In case of failure to comply with the requirements concerning the declaration of presence in the Italian territory, within eight days, Italy has foreseen the expulsion of the person concerned.

A new Article 5-bis as added by Article 1.1 a) of D.Lgs n. 32/08 that is also relevant for the transposition of this provision, does not oblige the Union citizen or family member to declare his/her presence; however, in case of failure to do this, it is presumed that he/she is in Italy for longer than three months. This implies that if the person concerned does not fulfil the conditions referred to in Article 7 of the Directive, then he/she might be expelled (according to Article 21 of the Italian main transposing Decree).

The provisions transposing Article 6(2), and Article 10(2)(a) of the Directive add that family members not nationals of a MS also have to show “an entry visa when required”. The Directive only prescribes to show a valid passport.
As concerns the “sufficient resources” that the person concerns shall have in order to maintain or acquire the right of residence (e.g., Article 8(3) second indent). Article 8(4) requires that MS may not lay down a fixed amount but shall take into account the personal situation of that person. Italy has incorrectly transposed those provisions also referring to Article 29.3 b) of Legislative Decree n. 286 of 1998 and to the Circular of the Ministry of Interior n. 19 of 6 April 2007. The Decree and the Circular refer to specific amounts setting the limits which the resources will not go, i.e., the amount of the social allowance/assistance giving precise amounts that the person concerned shall satisfy. Moreover, the official authorities that have been contacted have confirmed that the personal situation of the person is not taken into account; therefore, if the quantities that have been established are not met, then the person concerned is automatically not registered.

Article 15(1) of the Directive applies by way of analogy the guarantees of Articles 30 and 31 to decisions restricting free movement of Union citizens and their family members on grounds other than public policy, public security or public health. Italy has transposed this provisions without reaching the objective of the Directive, since the transposing acts omit several procedural safeguards, such as: the person concerned should be informed “precisely and in full” of the grounds of expulsion; or the condition to suspend enforcement of such decisions.

Another important gap that renders the transposition more stringent concerns Article 15(2) according to which the expiry of the identity card or passport shall not constitute a ground for expulsion from the host Member State. On the contrary, in Italy this may be an expulsion ground as per Article 21. In this regard, new Law Decree n. 92/08 has also had an impact on transposition of Article 15(2). These issues are, however, described in detail under section 2 to this Report.

In Article 21 the Directive requires that the continuity of residence is broken by any expulsion decision duly enforced against the person concerned. In relation to the terms used in the Italian provision, namely, “adottato” (“taken/adopted” in English), transposition seems incorrect since this is more stringent (as it implies that the continuity is interrupted more easily).

As concerns Article 23, the Italian transposing Decree makes an ambiguous reference to activities “reserved” to Italian citizens, in accordance to the European Union Treaty and European legislation. This provision does not refer to the transitional measures of Bulgaria and Romania since it refers to activities that only Italian citizens can carry out, excluding Bulgarians and Romanians but also other foreign nationals.

Various points shall be discussed under Article 27 of the Directive. The new transposing act (D.Lgs. 32/08) that has amended the main transposing Legislative Decree n. 30/07, has specifically treated the expulsion measures and its grounds. This was probably also due in response to the crime of an Italian woman by a Romanian citizen referred above. Italy has transposed all 27 principles literally. However, the overall assessment of the transposition of the provisions on expulsion is incorrect for the following reasons that are analysed in detail under section 2 of this Report:

The definition given by the Italian provisions of “State security” grounds cannot be considered in conformity with the Directive since almost anything could be considered as a crime against State Security. Moreover, although the convictions for the crimes referred are not (from a literal analysis of the text) a ground of expulsion themselves, it is difficult to know how in practice those convictions are considered while deciding whether to expel an EU national.

In addition, the new Law Decree recently adopted (Law Decree n. 92/08 as converted, with amendments, into Law n. 125/2008) has modified the Criminal code (Article 235 and 312) to include EU citizens. Basically these two provisions (Article 235 and 312 of CP) are establishing a mechanism for automatic expulsion which conflicts with the Directive and the ECJ rulings in Calfa and Commission v Netherlands).
Other amendments made by Law Decree n. 92/08 as amended by Law n. 125/08 concerns Article 61 of the CP on aggravating circumstances. An analysis of the impact of these provisions on transposition of this Directive is made under Chapter 3 of this Report on “Recent developments”.

Another problem with the Italian transposing provision, in relation to transposition of Article 27(1), is the lack of reference to “sufficiently serious threat” when referring to the personal conduct of the individual concerned. The importance of such requirement has also been confirmed by several ECJ cases.¹

On top of that, the Italian Law includes an open clause when defining state security grounds since it says “State security grounds are ALSO […]”. This is very ambiguous since it is not clear which should be/are those other grounds. This implies that the person applying the legislation has an enormous flexibility to include any other crime a state security issue. This is a crucial issue that renders transposition incorrect.

It can therefore be concluded that considering the wideness of the circumstances that are relevant for taking an expulsion measure, the authority/person applying the legislation has a flexibility that will allow him/her to very easily expel EU nationals. It will in any case depend how the Italian authorities and courts apply the principles that have been transposed in the Italian regime.

Moreover, another incorrectness (strictly connected with the previous part) regards, Article 27(2) second indent where the Italian provision fails to refer to “sufficiently serious” threats; therefore the conduct of a person seems to be assessed more widely as compared to the Directive being possible de facto to order an expulsion for behaviours that represent a “threat” but not to the extent to be a ground of expulsion. In this regard, several ECJ cases have also confirmed the importance of such a requirement.

Moreover, instead of referring to “affecting one of the fundamental interests of society” the Italian Decree says “threat to the public policy or public security”. These are not equivalent. In particular the definition given by Italy to state security is so broad that almost “everything” can violate “fundamental interests of society”.

The same comment made for the transposition of Article 27 is also valid for Article 28(2), Article 28(3) and Article 28(3)(b). In particular, as per Article 28(2), the transposing Decree refers to a wider range of grounds as compared to the Directive, namely state security, imperative public security and other serious public order or public security grounds. State security is considered as serious public policy/public security grounds; however, the scope of State security covers almost “everything” so overall transposition is incorrect.

In transposing Article 28(3)(a) the transposing Decree also refers to “State security” grounds but inserts the word “OR”, so there is a choice between state security and imperative public security grounds, that the Directive does not anticipate (since it refers to “imperative grounds of public security”). Moreover, the definition of imperative grounds of public security, except for the fact that it is too broad, says that an expulsion can be “urgent” because the stay of the person concerned in the territory is incompatible with the “civil and safe coexistence”. This last sentence is again broad and a number of circumstances may be included.

In addition, past convictions issued by an Italian or foreign judge are also taken into account as an element to consider when making an expulsion decision.

¹ As Case C-50/06 Commission v Netherlands par 43, Commission v. Spain, par. 46, C-441/02 Commission v. Germany, par 35.
Article 30(3) of the Directive says that only in duly substantiated cases of urgency the time allowed to leave the territory shall be not less than one month from the date of notification. Italy seems to more easily permit immediate expulsions (in case of case of state security or imperative public security grounds) and this is incorrect.

Article 31(2) denies the entry of the persons concerned during an application for appeal when the expulsion decision is based on “imperative public security grounds”. Italy, as in the cases referred above, also refers to state security grounds. So in this regard, as already explained, the provision is incorrect since state security is very broad and there is a concrete risk that the expulsion decision is in practice never suspended.

An issue that is worth discussing concerns the concept of registered partnership that does not currently exist in Italy. On the one hand Italy has literally transposed its definition in Article 2 and Article 3 recognises partners as beneficiaries of the Directive. On the other hand, in the body of the Directive (for instance Articles 8(5)(b), 10(2)(b), 13(1), 13(2)(b), 13(2)(c)) all references to registered partnership are not transposed. The assessment made in the ToC in relation to the above mentioned Articles in the body of the Directive is “effective transposition” since in our view the States have no obligation to recognise registered partnerships. In relation to this aspect, the Italian Authority that has been contacted (at the Presidency of the Council of Ministers) has specified that although partners with whom an EU citizen has a stable relationship” are not recognised as a “family member” (because in Italy it is not equivalent to marriage), they are however facilitated and allowed to enter and reside in the national territory.

Overall transposition of the Directive cannot be considered as satisfactory, considering a number of reasons: the various acts that have been adopted in a short time period, without entering into force (not been converted into Law, so into a final text), the numerous acts that are pertinent for the transposition of this Directive, the large amount of issues of incorrect or incomplete. And this is confirmed by the fact that there are also ambiguities in relation to important principles such as “sufficient resources”.

Also in practice problems have occurred concerning the implementation of certain aspects dealt with by the Directive. For example, Article 7.1 of the Italian Decree, states that the Union citizen shall have the right of residence on the national territory for a period of longer than three months if he/she is a worker or self-employed person in the State. The transposing Decree (and the Directive) does not mention the duration of the contract; however, in practice it happens that the questure denies this right of residence to workers who have a fixed-term contract.
1. Transposing legislation

In Italy, the requirements of the Directive 2004/38/EC have been transposed by the way of primary legislation, namely by Legislative Decree n. 30 of 6 February 2007 “Attuazione della Direttiva 2004/38/EC relativa al diritto dei cittadini dell’Unione e dei loro familiari di circolare e di soggiornare liberamente nel territorio degli Stati membri” (on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States) and by Legislative Decree n. 32 of 1 March 2008 “Modifiche e integrazioni al decreto legislativo 6 febbraio 2007, n. 30, recante attuazione della direttiva 2004/38/CE relativa al diritto dei cittadini dell’Unione e loro familiari di circolare e di soggiornare liberamente nel territorio degli Stati membri” (concerning amendments and supplementing D.Lgs. 30/07 on the right of citizens of the Union and their family members to move and reside freely within the territories of the Member States).

According to Article 40 of the Directive the national transposing measures should have been adopted by 30 April 2006. D.Lgs n. 30/07 entered into force on 11 April 2007, while D.Lgs n. 32/08 entered into force on 2 March 2008, therefore Italy was late in transposing the Directive.

Law Decree n. 92/08 on urgent public security measures (as converted, with amendments, into a Law) is also relevant for transposition of Directive 2004/38/EC since it has modified several provisions of the legislation that are in force (e.g., the criminal code, other pieces of legislation referred to by the transposing legislation), affecting the position of EU citizens and their family members. This Decree has been converted into a Law on 24 July 2008 (Law n.125/2008) with amendments.

The legislation has been supplemented by Ministry of Interior’s Circulars (n. 19 of 6 April 2007; 10 April 2007; 18 July 2007; n. 45 of 8 August 2007; n. 54 of 8 October 2007) containing explanatory indications concerning the implementation of the Italian Decrees and clarifying the meaning of certain provisions.

2. Assessment of the transposition

The transposition of Directive 2004/38/EC into Italian legislation is incorrect and incomplete in several instances. While certain inconsistencies do not impinge on conformity, the following inaccuracies do, and the national legislation on these issues cannot currently be deemed to comply with the Directive.

a) Incomplete transposition or non-transposition

<table>
<thead>
<tr>
<th>Article</th>
<th>Transposition Status</th>
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</thead>
<tbody>
<tr>
<td>Article 8(5)(f)</td>
<td>Not transposed;</td>
</tr>
<tr>
<td>Article 9(3)</td>
<td>Not transposed, so more favourable;</td>
</tr>
<tr>
<td>Article 10(2)(f)</td>
<td>Not transposed;</td>
</tr>
<tr>
<td>Article 12(2) third indent</td>
<td>Not transposed;</td>
</tr>
<tr>
<td>Article 13(2)(d) third indent</td>
<td>Not transposed;</td>
</tr>
<tr>
<td>Article 14(2) second indent</td>
<td>Not transposed;</td>
</tr>
<tr>
<td>Article 15(1)</td>
<td>Incompletely transposed since a provision framed as the one of the Directive does not exist in Italy (see below as per the incorrectness of this provision);</td>
</tr>
<tr>
<td>Article 20(1) second part</td>
<td>Incompletely transposed since the sentence “The permanent residence card shall be renewable automatically every 10 years” is</td>
</tr>
<tr>
<td>Article</td>
<td>Status</td>
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<tr>
<td>Article 22 second indent</td>
<td>Not transposed;</td>
</tr>
<tr>
<td>Article 24(2) last part</td>
<td>Incompletely transposed ;</td>
</tr>
<tr>
<td>Article 25(1) first part</td>
<td>Not transposed and this represents an important gap since the Italian provision does not seem to give the right that is ensured by the Directive;</td>
</tr>
<tr>
<td>Article 27(2) second indent</td>
<td>The transposing provision does not refer to ‘sufficiently serious threat’ or “Justifications that are isolated from the particulars of the case or that rely on considerations of general prevention shall not be accepted’;</td>
</tr>
<tr>
<td>Article 27(3)</td>
<td>Not transposed;</td>
</tr>
<tr>
<td>Article 29(3)</td>
<td>Not transposed;</td>
</tr>
<tr>
<td>Article 30(2)</td>
<td>The Italian provision fails to specify that the grounds shall be “precise and explained in full”; this is also incorrect;</td>
</tr>
<tr>
<td>Article 33(1)</td>
<td>Not transposed;</td>
</tr>
<tr>
<td>Article 33(2)</td>
<td>Not transposed;</td>
</tr>
<tr>
<td>Article 35</td>
<td>Not transposed;</td>
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</tbody>
</table>

**b) Incorrect or imprecise/ambiguous transposition**

<table>
<thead>
<tr>
<th>Article</th>
<th>Status</th>
<th>Comments</th>
</tr>
</thead>
<tbody>
<tr>
<td>Article 5(4)</td>
<td>Incorrect transposition</td>
<td>Incorrect transposition: instead of giving the persons concerned reasonable opportunities and a reasonable period of time, the Italian Decree only gives 24 hours from the request of the necessary documents;</td>
</tr>
<tr>
<td>Article 5(5)</td>
<td>Discretionary provision but transposed incorrectly. Particularly, according to the Italian provision, failure to comply with the requirements is a ground of expulsion, while the Directive refers to proportionate and non-discriminatory sanctions;</td>
<td></td>
</tr>
<tr>
<td>Article 6(2)</td>
<td>Incorrect transposition since the Italian Decree, contrary to the Directive, imposes an entry visa for residence up to three months to family members who are not nationals of a Member State;</td>
<td></td>
</tr>
<tr>
<td>Article 7(3)(a)</td>
<td>Incorrect transposition since the Directive refers to “the status of worker or self-employed person” while the transposing Decree refers to “right of residence”. This is not the same;</td>
<td></td>
</tr>
<tr>
<td>Article 8(3) second indent</td>
<td>The reference to the quantification (fixed amount) of the amount of “sufficient resources” made by the Italian Decree and Circulars is incorrect;</td>
<td></td>
</tr>
<tr>
<td>Article 8(3) third indent</td>
<td>The reference to the quantification (fixed amount) of the amount of the “sufficient resources” made by the Italian Decree and Circulars is incorrect; students also have to declare a fixed amount;</td>
<td></td>
</tr>
<tr>
<td>Article 8(4)</td>
<td>Incorrect and ambiguous transposition: as per comment on Article 8(3), the transposing provision and Circulars refer to a fixed amount of “sufficient resources”. There is</td>
<td></td>
</tr>
</tbody>
</table>
ambiguity in the wording of the Circulars that refer to amounts given as an example and at the same time to amounts that are fixed;

| Article 10(1) | Incorrect transposition as per the different timing for issuing the document called ‘Residence card’; |
| Article 10(2)(a) | Incorrect transposition since the Italian act refers to “entry visa when required”;
| Article 13(2)(c) | Incorrect transposition (and more stringent); the Italian act requires that a criminal proceeding has begun, which is not required by the Directive;
| Article 15(1) | Incorrect transposition as not all the procedural safeguards are met, particularly the one saying that the person concerned should be informed “precisely and in full”. The Italian act only requires to explain the grounds; moreover, the application for an interim order to suspend enforcement of the decision is not included for grounds other than public policy, public security or public health;
| Article 15(2) | More stringent transposition as Articles 21, 6 and 7 of the Italian Decree seem to foresee expulsion on grounds of expiry of the identity card and passport, contrary to the Directive’s provision;
| Article 17(1)(c) | Ambiguous transposition since on the one hand Italy seems to request something more than the Directive since it refers to “conditions for the registration still exist.” On the other hand, Italy allows that the conditions for anagrafico (population) residence (residence registry) remain although the person concerned does not return, each day or at least once a week;
| Article 21 | Incorrect transposition based on the terminology used, namely the Italian term “adottato” seems to be more stringent than the term used by the Directive “enforced-eseguito”;
| Article 23 | Ambiguous reference made by the Italian Decree to the Treaty;
| Article 27 | Overall incorrectly transposed. Par. (1) is an incorrect transposition considering the wideness of the circumstances that are relevant for taking an expulsion measure; the authority/person applying the legislation has a flexibility that will allow him/her to very easily expel EU nationals;
| Article 27(2) second indent | The Italian provision is too broad. In addition, instead of referring to “affecting one of the fundamental interests of society” the Italian Decree says “threat to the public policy or public security”; these are not equivalent. In this regard refer to what is stated under Article 27(1); in particular the definition given to State security is so broad that almost “everything” can violate the “fundamental interests of society”;
| Article 28(2) | Incorrectly transposed since the transposing Decree refers to a wider range of grounds as compared to the Directive, namely state security, imperative public security and other serious public order or public security grounds. State security is considered as a serious public
policy/public security ground; however, the scope of state security covers almost “everything” so overall transposition is incorrect;

| Article 28(3)(a) | Incorrect transposition for several reasons. The Directive only refers to “imperative grounds of public security”, while the transposing Decree also refers to “state security” grounds inserting the word “OR”, so there is a choice between state security and imperative public security grounds, that the Directive does not have. Then, the definition of imperative grounds of public security also specifies that the expulsion is “urgent” because the stay of the person concerned in the territory is incompatible with the “civil and safe coexistence”. This last sentence is again broad, generic and quite a number of circumstances may be included. In addition, past convictions issued by an Italian or foreign judge are also taken into account as an element when making an expulsion decision; |
| Article 28(3)(b) | Incorrect and ambiguous for the same reason explained above under Article 28(3)(a); |
| Article 30(2) | The Italian provision fails to specify that the grounds shall be “precise and explained in full”; this represents at the same time an issue of incomplete transposition; |
| Article 30(3) | Incorrectly transposed since Italy seems to require less condition to take an immediate expulsion decision; |
| Article 31(2) | Ambiguous transposition as per Article 28(3) comment; |
| Article 32(1) | Incorrectly transposed because more stringent since it refers to “at least half of the duration of the ban”; limit not imposed by the Directive, which refers to a change in circumstances that could occur before that half has elapsed. |

c) Minor instances of non-conformity

<p>| Article 10(2)(c) | Incorrect transposition since the transposing provision refers to the certificate of the application for registration and not to the registration certificate as the Directive requires. |</p>
<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Full Form</th>
</tr>
</thead>
<tbody>
<tr>
<td>CA</td>
<td>Competent Authority</td>
</tr>
<tr>
<td>ECJ</td>
<td>European Court of Justice</td>
</tr>
<tr>
<td>Const.</td>
<td>Constitution</td>
</tr>
<tr>
<td>D.Lgs.</td>
<td>Legislative Decree</td>
</tr>
<tr>
<td>MS</td>
<td>Member State</td>
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</table>
1 INTRODUCTION

This conformity study analyses in detail the provisions of Directive 2004/38/EC on the free movement of EU citizens in its consolidated version, and it compares it with the legislation in place in Italy.


EU citizenship gives every Union citizen the right to move and to reside freely within the territory of the Member States. The facilitation and promotion of this right, which is at the same time one of the fundamental freedoms of the internal market, is the objective of Directive 2004/38/EC. A second objective of Directive 2004/38/EC was to codify and review the various pieces of legislation and case law dealing with this issue.

Free movement as a fundamental freedom of the internal market

Free movement is one of the fundamental freedoms of the internal market and can therefore only be restricted in a limited number of pre-determined circumstances. Thus, national legislation cannot adopt more restrictive legislation than provided for in the Directive.

Directive 2004/38/EC introduces, on the one hand, a uniform approach regarding the formalities that Member States can impose upon EU citizens residing in their territory. These formalities are expressly established in the Directive and restricted in function of the duration of the stay in the Member States.

- For a stay of less than three months, the only formality a Member State can impose is the presentation of a valid passport or national identity card.

- For residence of more than three months, a Member State can only require the EU citizen to register in the population register of the place of residence. This registration needs to be validated immediately if a certain number of conditions are complied with. The Member State can only require the EU citizen to present proof that he/she is a worker, self-employed person, student or has sufficient resources not to become a burden upon the social security system of the Member State. Member States cannot lay down a fixed amount of what they consider to be “sufficient resources”, but must always take into account the personal situation of the person concerned. Family members of the EU citizen will have to present an identity document and proof of the family link to an EU citizen.

- After five years of continuous residence in a Member State, an EU citizen obtains a right to permanent residence. The host Member State shall issue a document certifying permanent residence. A permanent resident has the right to be treated equally to a national of the Member State.

On the other hand, the Directive also determines and clarifies the only acceptable reasons for restriction of the free movement of citizens by Member State authorities, namely for reasons of public order, public security and public health. (For the interpretation and conditions of such exceptions, it is important to rely upon the case law of the Court of Justice.)

These measures guarantee strong protection against expulsion for EU citizens who have been long-term residents in another Member State. Such measures need to be proportionate and shall always look at the personal conduct of the individual concerned which must represent a “genuine, present and sufficiently serious threat affecting one of the fundamental interests of society”. In addition, the Directive establishes some procedural safeguards in case an expulsion decision is considered.
1.1 OVERVIEW OF THE LEGAL FRAMEWORK IN ITALY

The Italian legal system is based on the continental system of codification. According to Article 1 of the Preliminary general norms of the Italian Civil Code (part I Delle fonti del diritto - Sources of Law),² Laws (constitutional or primary sources of law), regulations (Government regulations which are secondary sources of law) and common practice (usi), are sources of law and are therefore binding. International treaties and EC-legislation are also legally binding in Italy but following different procedures.³

Regarding the term Laws, the Civil Code and the Italian Constitution⁴ refer to legal acts and acts adopted by the Government having legal status (decreti legislativi/Legislative Decrees and decreti legge/Law Decrees).

In particular, different types of Laws can be distinguished:

- Laws amending the Constitution (leggi di revisione Costituzionale) are the laws that revise the text of the Constitution, amending it, replacing it or repealing it and other Constitutional Laws; the latter are those laws that are so defined by the Const., those that only derogate a Constitutional provision without amending it in a definitive way, and any other Law that the Parliament wishes to adopt with a special procedure referred to in Article 138 of the Const.;
- Ordinary Laws of the State (Leggi ordinarie dello Stato) are the laws adopted by the Parliament according to the procedures set out in Articles 70 to 74 of the Const. and with more detail in specific Parliamentary regulations;
- Acts having legal status, namely Legislative Decrees and Law Decrees. The Const.⁵ allows the Parliament to delegate to the Government the faculty to approve normative acts having legal status. This delegation must be granted explicitly for specific matters, specifying the principles and guidelines that are to be followed by the Government, with a precise deadline; the delegation has to be made through a Law and only to the Government. The texts prepared under a delegation are called Decreti Legislativi. Additionally, the Const.⁶ allows the Government to pass norms with the status of a legal act if there is an extraordinary and urgent need (decreto legge). The existence of the extraordinary and urgent need is controlled either by the President of the Republic, by the Parliament or by the Constitutional Court (Corte Costituzionale). It is required that the Law Decree is converted into Law within 60 days otherwise it loses its legal force from the beginning.

³ For instance, Community obligations, i.e., mainly Directives, are executed by approving the so-called Community Law through which the Parliament periodically updates the national legal order to the Community one. In particular the Law indicates the directives of the European Community regarding environmental protection which Italy must implement. It indicates the timing for transposition and the manner in which EC laws are to be implemented: Parliamentary laws; delegation of powers to the Government; regional laws; or general governmental regulations or administrative acts. The implementation of Community laws can also be entrusted directly to the Regions. In addition, the national Parliament is competent to authorise the ratification of international conventions to which Italy is a party to, which involves environmental protection, and also approves the corresponding implementing laws.
⁵ Article 76 Const.
⁶ Article 77 Const.
Court judgments are an essential instrument for the implementation of the law itself; the judiciary does not have law-making powers. As a general rule, as laws and other legislative acts are considered compulsory legal sources, the courts cannot deviate from them. The role of jurisprudence in Italy is to mainly guide interpretation of the various sources of law and to fill gaps in the legal system. However, where there is a lacuna, the judge may “create” new laws.

1.2 FRAMEWORK FOR TRANSPOSITION & IMPLEMENTATION OF DIRECTIVE 2004/38/EC IN ITALY

1.2.1 Distribution of competences according to the national Constitution

Article 117 par. 1 lett.b of the Italian Constitution establishes that the State has exclusive powers in the area of immigration. There is, therefore, no distribution of the legislature to legislate between the regional and the central levels.

In accordance with the Constitution, the State, and namely the Ministry of Interior, has transposed Directive 2004/38/EC fixing the rules that are valid and enforceable in the entire Italian territory. In particular, the Ministry of Interior has transposed the Directive by two Legislative Decrees, i.e., n. 30 of 6 February 2007 and n. 32 of 1 March 2008. This latter act has finally amended and integrated the first transposing Decree.

The Ministry of Interior has issued several Circulars (n. 19 of 6 April 2007; 10 April 2007; 18 July 2007; n. 45 of 8 August 2007; n. 54 of 8 October) containing explanatory indications (guidelines) for the implementation of the Italian Decrees, and clarifying the meaning of certain provisions.

The Ministry of Interior shall also issue some further legislation regarding the transposition of Directive 2004/38/EC; in this regard, for instance, Article 1 par.1 lett.a of the new D.Lgs 32/08 (that has amended Article 5 of D.Lgs. 30/07) provides that “within 30 days from the entering into force of the Decree”7 the Ministry of Interior shall establish the procedures to be followed by the Union Citizen in order to declare his/her presence in the Italian territory. Recent contacts with the national authorities8 have revealed that this decree has still not yet been issued.

According to Article 20.9 of D.Lgs. 32/08, it is again the Ministry of Interior that is responsible for taking the expulsion measures for imperative grounds of public security against the subjects referred to in Article 20.7 of the same Decree or the expulsion measures for grounds of public policy or security of the State.

The central level has therefore the main competence in the field of freedom of movement of EU citizens, being the local autonomous entities only in charge of the implementation aspects.

1.2.2 General description of organisation of national authorities implementing Directive 2004/38/EC Italy

As mentioned in the previous paragraph the main competences regarding free of movement and residence belongs to the State, and almost completely to the Ministry of Interior.

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7 D.Lgs 32/08 entered into force on 2 March 2008, therefore the 30 days have already passed (this writing is of the 27 June 2008).
8 Telephone contact on the 26 June 2008 with the Ministry of Internal Affairs.
The two transposing Decrees contain actually only one reference to another Ministry: Article 21.3 of D.Lgs 32/08 says that the Ministry of Foreign Affairs shall establish together with the Ministry of Interior the measures/procedures to be followed by the Union citizen in order to execute the expulsion order.

As per the competences at the local level, the Regions have no legislative powers in the field of free movement and residence, and only two entities have some power that derive from the Ministry of Interior and that are limited to implementation issues anyway.

These two entities are:

- **“Prefetto”**: is a monocratic organ of the State that represents the Government in a territorial district. The Prefetto is at the head of the Office called “Prefettura” and is a typical organ of those States which have a centralised kind of organisation since it operates with respect to the local communities, as a direct emanation of the central government. The Prefetto has specific powers to act when public order or public safety are threatened. In addition to surveillance and coordination powers and control over the local bodies, the Prefetto is in fact responsible for maintaining the public order and supervising the police;

- **“Questore”** (Provincial Police Superintendent): is the highest public security authority in each Province and acts under control of the Ministry of Interior. The Questore coordinates and is responsible for the Police Force that acts in order to guarantee the public order and security and to prevent and resist subversive acts. The Questore’s typical acts are orders, warnings, permits, licences.

Considering the typical functions of each of the mentioned bodies, D.Lgs. 32/08 provides that the Prefetto can take expulsion measures in all those cases that do not fall within the competence of the Ministry of Interior, while the Questore monitors the execution of the expulsion measures taken against an EU citizen.

Some limited function is also given to the Majors who have the power to make grounded recommendations to the Prefetti or the Ministry of Interior who will then be responsible for taking the expulsion measure.

In this field there are also bodies called “Territorial councils for immigration” (Consigli Territoriali per l’Immigrazione), that are set up in all “Prefetture” by a Presidential Decree dated 18 December 1999 and that are chaired by the “Prefetto”. These are composed of representatives from the relevant local administrations of the State, of the Region, of Local Bodies, of the chamber of commerce, of the bodies which are locally active in the field of assistance to immigrants, of workers’ associations, of employers and of third-country nationals. They monitor immigration by promoting initiatives and making proposals, and through close cooperation between the institutions. They do not have powers regarding implementation issues related to the Directive.

## 2 LEGAL ANALYSIS OF THE TRANSPOSING MEASURES FOR DIRECTIVE 2004/38/EC

### 2.1 Preliminary remarks

Transposition of Directive 2004/38/EC appears to be complicated and therefore not always straight forward to understand. As it will be explained below, a number of acts have been adopted in a very short time period, and the process is still ongoing since there are various drafts pending which will affect the transposition of the Directive. These drafts are part of a package, called the “pacchetto sicurezza”, which introduces and amends the provisions of different pieces of legislation as the
Directive 2004/38/EC was not transposed on time. The first transposing Decree was Legislative Decree n. 30/07 that came into force on 11 April 2007, almost one year after the date indicated in the Directive, that is 30 April 2006. The last act that was adopted, which has amended and integrated the first transposing Decree, is Legislative Decree n. 32/08. This only recently came into force on 2 March 2008.

In order to clarify some implementation issues that have arisen from the late transposition of the Directive, the Ministry of Interior, on 18 October 2006 issued a Circular regarding the formalities/requirements for the registration of EU citizens. Following the adoption of Decree n. 30/07 other Circulars have been issued by the same Ministry, containing explanatory indications (guidelines) for the implementation of the Italian Decrees, dated 6 April 2007 and 18 July 2007.

On 1 November 2007 the Italian Government adopted Law Decree n. 181/2007 on “Urgent provisions concerning the expulsion from the national territory on public security reasons”. This Decree was aimed at introducing more severe rules for the expulsion of EU citizens: its provisions were meant to be amendments to D.Lgs. n. 30/2007. The adoption of the above-mentioned Law Decree has been heavily debated in Italy since the Government has acted as if there was an urgent need to combat criminality (mainly immigrants from Romania). The Government reacted to the murder of a woman in Rome on 30 October 2007, killed by a Romanian citizen.

In order to clarify the implementation issues of the Law Decree, the Ministry of Interior had issued two Circulars (on 3 and 6 November 2007). However, Law Decree n. 181/2007 has not been converted into a Law by the Parliament.

The Government then chose a different approach to the immigration problem, and approved a new Law Decree (n. 249 of 29 December 2007) where more severe provisions for EU citizens have been introduced as well as provisions dealing with expulsion in cases of terrorism and on the basis of imperative public security grounds. At the same time Italy has prepared a scheme of Legislative Decree that could have introduced the amendments to D.Lgs. n. 30/2007, once entered into force.

However, well-known problems faced by Italy at the time of the first draft of this Report (March 2008) led the Government to opt for another solution: namely, to adopt a Legislative Decree containing the amendments and integrations of the previous D.Lgs. n.30/2007. The new Legislative Decree n. 32 was adopted on 28 February 2008 and entered into force on 2 March 2008.

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9 The Pacchetto Sicurezza consists of several acts, namely, Law Decree 92/08 (as converted into a Law – Law 125/08), Draft Legislative Decree amending and supplementing Legislative Decree 8 January 2007, n. 5 transposing Directive 2003/86/EC on the right to family reunification, Draft Legislative Decree amending and supplementing Legislative Decree 28 January 2008, n. 25 transposing Directive 2005/85/EC on minimum standards on procedures in Member States for granting and withdrawing refugee status, Draft Law on provisions on public security and finally a Draft Legislative Decree amending and supplementing Legislative Decree n. 30/2007 transposing Directive 2004/38/EC. The three mentioned drafts Legislative Decrees have been adopted on 1 August 2008 but their texts are not yet definitive. Following an unusual and informal procedure, the Minister of Interior, Mr Maroni, has sent the texts of the Legislative Decrees to the Commission in order to obtain suggestions/recommendations. See also separate document on the Pacchetto Sicurezza.

10 As of January 2007, Rumania has been part of the EU and this was seen as a worry, therefore also in this sense, in addition to the delay, Italy felt the need to regulate this field.

11 As the end of the legislature (that is the period during which both Houses of the Parliament remain in office) and the tight time schedule (Law Decree n.249/2007) needed to be converted into a Law by 2 March 2008.
Another act recently issued under the new Government, and also relevant to transposition of Directive 2004/38/EC, is **Law Decree n. 92/08** on urgent public security measures. The Law Decree is in force as of 27 May 2008 but needed to be converted into a Law within sixty days (July), otherwise it would have been automatically repealed **ex-tunc** - that is, retroactively. On 24 July 2008 the Decree became Law (Law n. 125/2008) with amendments as compared to the Law Decree version.

An analysis of the impact of the new Law Decree’s provisions (as amended) is made under Chapter 3 to this Report, named “recent developments”.

Before going into a detailed analysis of the provisions transposing Directive 2004/38/EC, it is important to point out that in May 2008 the Government adopted a **draft Legislative Decree modifying the current D.I.gs. n. 30/2007**. This draft was approved by the Council of Ministers on 1 August 2008 but its text is not yet definitive since, following an unusual procedure, it has been sent to the Commission in order to get its suggestions/recommendations. The aim of this unusual route is to finally adopt a text that fully complies with the Commission’s expectations and more precisely with the EU Directive.

According to the draft Legislative Decree, not holding registration certificates and failure to request a residence card are grounds for expulsion as they are considered as imperative public security grounds. As it will be further explained in the analysis below, this is against the Directive. In addition, the request of these documents are needed on the basis of public order and public security, which will imply that these documents prove that the person is not a threat, or at least does to come to Italy with the intention of carrying out a criminal activity. The draft Decree also indicates that the analysis of whether the person has sufficient resources will not take into account resources obtained illicitly. This, in principle, is not a problem as such, but if that requirement exists, it will most probably be accompanied by a proof of the legality of the resources (which will also be against the Directive). A more detailed analysis of the impact of the draft Legislative Decree’s provisions is made under Chapter 3 to this Report, named “recent developments”.

Another issue that needs to be discussed are the **Ordinanze (orders)** that the President of the **Council of Ministers adopted at the end of May 2008**. Up until now, three **Ordinanze** have been issued, through which the Prefects of Rome, Milan and Naples have been appointed as delegated Commissioners responsible to realise all necessary interventions to overcome the “state emergency” in relation to the settlements of nomadic communities in the of the region of Lazio, Campania and Lombardy. The said Commissioners can request the cooperation of the Regions, other public entities and, under the humanitarian and the assistance aspect, of the Italian Red Cross. The prefects of the other provinces territorially involved, the questori and other competent authorities will provide full cooperation for the implementation of the measures of the Commissioner.

The issuing of the **Ordinanze** is motivated by the fact that nomadic community settlements have become in certain areas of the above-mentioned regions particularly precarious. Apparently the Government considers that there are “serious impacts in terms of public order and security for the local population”.

In particular, the **Ordinanze** requires the appointed Commissioners to, **inter alia**, define action programmes for overcoming the emergency; to monitor the authorised camps in which there are nomadic communities and identify abusive/illegal settlements; to identify and make a census of the persons, even children, and families living in those settlements; to adopt measures aimed at clearing and rehabilitating the lands occupied by abusive settlements; to adopt the necessary measures against persons when a expulsion measure has been adopted. [...].

These nomadic communities are mainly Romanian citizens. This goes beyond the Directive. EU citizens are to report their presence in the national territory (Article 5(5)) and can only be asked for a registration certificate, which should not be considered as a residence card (Article 8). So no further
requirements can be imposed or asked to EU citizens. On the top of this, the checks that the Commissioners are supposed to carry out seem to be quite systematic and therefore in this regard there is an incompatibility with Article 14(2) of the Directive according to which “in specific cases where there is a reasonable doubt as to whether a Union citizen or his/her family members satisfies the conditions set out in Articles 7, 12 and 13, Member States may verify if these conditions are fulfilled. This verification shall not be carried out systematically.”

It can therefore be concluded that, apart from concerns of the violation of the law Article 13 EC Treaty, such Ordinanze affect the transposition of the Directive and represent and entail a restriction of the free movement of EU citizens and their family members (in this case the minorities of nomadic communities).

The European Parliament, in the plenary session meeting of 10 July 2008 in Strasbour, approved a resolution that rejects the emergency measures concerning the Italian nomadic settlements proposed by Minister Maroni.

2.2 Definitions, family members and beneficiaries

Definitions: the concept of “family members” (Article 2)

Article 2 of the Directive defines the key concepts for the implementation of the Directive.

Article 2 of the Italian transposing Decree transpose almost literally the definitions given by the Directive but there are some differences that need to be carefully checked.

The first difference between the two texts concerns the definition of “Union Citizen” that according to Article 2(1) of the Directive means “any person having the nationality of a Member State”.

Article 2.1 a) of D.Lgs. 30/07 literally transposes Article 2(1) of the Directive (“union citizen means any person having the nationality of a Member State”). However, the Ministry of Interior on 18 July 2007 issued a Circular specifying that citizens of Norway, Island, Lichtenstein Switzerland (and San Marino Republic) are considered as Union citizens with reference to the transposing Decree. Considering all nationals/citizens of Norway, Island, Lichtenstein, Switzerland (and of the Republic of San Marino) as Union Citizens and consequently as Italian citizens, widens the scope of the Decree, since it recognises the rights given in the Directive (and in the Decree) to persons who would not have such rights. Therefore this does not impinge on the effective transposition of the Directive’s provision.

The definitions of “spouse”, “partner”, “direct descendant”, “dependant relatives in the ascendant line” and “host member State” (that means Italy) are literally transposed.

With regard to “registered partnerships”, this concept does not currently exist in Italy. However, the Italian Decree is ambiguous, since it transposes the definitions of partner (in its Article 2.2 b)) and in Article 3, it recognises partners as beneficiaries of the Directive. In the body of the Directive, none of the references to registered partnerships are transposed (such as Article 8(5)(b), 10(2)(b), 13(1), 13(2)(b), 13(2)(c) of the Directive). For instance, in the case referred to in Article 8(5) of the Directive concerning the documents to be presented by family members of Union citizens (who are themselves Union citizens), the transposing provision fails to refer to the document attesting the existence of a registered partnership. In relation to this aspect, the Italian Authority that has been contacted (at the Presidency of the Council of Ministers) has specified that since “registered partner” do not exist under Italian legislation, partners with whom an EU citizen has a “stable relationship” are however helped and allowed to enter and reside in the national territory.
The Italian Legislation is in line with the Directive which only requires partners to be treated as family members, whereas in most Member States they are considered equal to marriage.

**Beneficiaries and facilitation of entry and residence (Article 3)**

This provision is almost literally transposed by Article 3 of D.Lgs. 30/07.

- **Article 3(1)**

  Article 3(1) provides that the Directive shall apply to all Union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members as defined in point 2 of Article 2 who accompany or join them. This has been literally transposed.

- **Other family members**

  Article 3(2)(a) of the Directive on other dependants and members of the household, is literally transposed. However, there is an unclear implementation aspect in relation to the Circular of 18 July 2007.

  The Circular specifies that the aim of the Italian provisions, as in the Directive, is to preserve the relationship of the Union citizen with those other family members, also considering the possible financial or physical dependence of the Union citizen.

  Circular 18 July 2007 also specifies that third country nationals falling within the categories of Article 3 (on beneficiaries) and who do not hold an autonomous right of residence, may ask for the residence permit for “residenza elettiva” (elective residence). The concept of “residenza elettiva” is not a legal concept included in Article 5 of D.Lgs.289/98. Article 5 of D.Lgs.286/98 sets requirements for residence in Italy for all aliens. It is not clear what the concrete facilitation is for such “other family members” as compared to other foreigners. For this reason the transposition is incorrect.

  As per Article 3(2)(b) of the Directive on partners who shall have the entry and residence facilitated, the transposing Decree has specified that a durable relationship shall be duly attested “by the State of the Union citizen”. However, this limits the scope of application of the provision to couples from the home Member State. The relationship could also be established in the State where they were residing which does not necessarily have to be the home MS.

  As explained in the previous paragraph, in Italy “registered partnership” is not equivalent to marriage. Therefore the omission does not affect transposition of the various provisions. In addition, the Italian legislation refers to “durable relationships”; therefore it will cover all types of durable relationships and not only registered partnerships. As regards facilitation, same comment as above.

**2.3 Rights of exit and entry (Article 4-5)**

**Right of exit (Article 4)**

Article 4 provides a general right for Union citizens and family members, provided they have the required identity card or passport, to leave the territory of a Member State, with no need for exit visas. It also requires the Member States to issue and renew identity cards and passports to their own nationals (if no ID issues, then the passport shall be valid for at least 5 years).

Only paragraph 1 of the provision concerning the right of exit has been correctly transposed.
The Italian Decree has added a provision saying that “The persons mentioned in paragraph 1, who are minors or civilly-disabled or incapacitated persons, exercise their right to move according to the procedures set out by the legislation of the State of nationality”. This, however, does not affect the correct transposition of this paragraph since Italy does not regulate how other MSs have to act; the Italian provision simply affirms that the persons concerned by this paragraph can exercise their right to move according to the procedures set by the State of nationality.

Article 4(2) on not imposing an exit visa or equivalent formality to the person to whom par. 1 applies, is effectively transposed by referring to Article 4(1) of the transposing Decree - requiring Union citizens and his/her family members to only have an identity document in order to leave the territory, so, no further requirements. *A contrario*, no exit visa is required.

Article 4(3) and 4(4) of the Directive on the issue, renew and validity of passports and identity cards, have been correctly transposed by the deficient Italian acts regulating ID and passport.

**Right of entry (Article 5)**

Article 5 provides a general right of entry for Union citizens and family members upon presentation of an ID or passport, and in the case of family members upon presentation of passport and, when required, visa - although visa is not needed if the person holds a family member of a Union citizen issued by any Member State.

Overall, the provision on the right of entry has been correctly transposed by the Italian Decree, supplemented by Ministry of Interior’s Circulars.

- **Article 5(1)**

Article 5(1) second indent of the Directive, on not imposing an entry visa or equivalent formality to Union citizens, is effectively transposed by referring to Article 5(1) of the transposing Decree – requiring Union citizens and his/her family members to only have an identity document in order to enter the territory: so, no further limitation or requirements are imposed.

- **Article 5(2)**

The reference to Regulation 539/2001 is missing in Article 5(2) of D.Lgs n. 30/07. The Italian Decree more generally states “entry visa when requested”. As explained in the ToC it would have been more appropriate to add such references but this cannot be considered as a conformity issue since the Regulation is directly applicable.

The second indent of Article 5(2), states that family members who are not nationals of a Member State shall be facilitated to obtain the necessary visas which “shall be issued free of charge as soon as possible and on the basis of an accelerated procedure”. Italy has effectively transposed this provision; however, it remains difficult to ascertain whether in practice the procedure to obtain a visa is dealt with priority. It is difficult to obtain an answer from the competent service at the Ministry of External Affairs. The question has not yet been answered.

- **Article 5(4)**

Article 5(4) of the Directive providing that where a Union citizen, or a family member who is not a national of a Member State, does not have the necessary travel documents or, if required, the necessary visas, the Member State concerned shall, before turning them back, give such persons every reasonable opportunity to obtain the necessary documents or have them brought to them within a reasonable period of time or to corroborate or prove by other means that they are covered by the right of free movement and residence, has been incorrectly transposed. The slightly different wording used...
by the national Decree does not guarantee that reasonable opportunities are given in order to obtain the necessary documents and that a reasonable period of time is given to have them brought to them. Article 5.5 of D.Lgs n. 30/07 gives in fact only 24 hours to obtain the necessary documents.

- **Article 5(5)**

The main problems regarding the transposition of Article 5 of the Directive relates to paragraph 5 which allows Member States to require the person concerned to report his/her presence within its territory within a reasonable and non-discriminatory period of time. Under the general regime of the Law of 28 May 2007, aliens coming from a country outside the Schengen area have to report their presence immediately. This provision does not seem to apply to EU citizens and family members because it refers to general Alien law. A new Article 5-bis was introduced to Law 32/08 to regulate the obligation to report the presence in the territory by EU citizens and family members. The provision is vague since it has to be developed by a Ministerial Decree which will establish the conduit to report presence. However, in this case, if the Union citizen or his/her family member does not fulfil the conditions referred to in Article 7 of D.Lgs n. 30/07 (on the right of residence for more than three months) it seems that he/she could be expelled according to Article 21 of the same Decree (that regards the expulsion on grounds of cessation of the conditions that give the right of residence).

Article 5-bis of D.Lgs n. 30/07 mentions a Decree of the Ministry of Internal Affairs that should specify the procedures for the Union citizen or his/her family member to declare his/her presence in the national territory. This Decree should have been adopted by 2 April, 30 days after the entry into force of the Decree amending D.Lgs n. 30/07. However, as of 27 June 2008 the Decree had not yet been adopted.

### 2.4 Right of residence

#### 2.4.1 Right of residence for up to three months Article 6:

Article 6 grants an initial right of residence for up to three months with no conditions or formalities other than holding a valid ID or passport, and in the case of third country family members, holding a passport.

This provision has been correctly and almost literally transposed except for paragraph 2 that is incorrectly transposed. This provision seems to create a link between lawful residence and lawful entry, which would be against the Directive and the recent decision of the ECJ in *Metlock*. Paragraph 2 is incorrectly transposed because it would require third country nationals to hold a visa during the first 3 months (and not a passport as referred to in the Directive).

The impacts associated with may be insignificant for third country family members. This transposition should be analysed in connection with the amendments made by *Law Decree n. 92/08 (as amended by Law n. 125/08)* which has added a new paragraph to Article 61 (paragraph 11-bis) of the criminal code that deals with aggravating circumstances. The new par. says “having the convicted committed the fact while he/she was illegally in the national territory”. If legality of residence is linked to legality of entry, then the consequences would be that this aggravating circumstance could apply to third country family members. Please see comments under Chapter 3 to this Report for an extensive comment on the impacts of this provision.

#### 2.4.1 Right of residence for more than 3 months Article 7-13:

**a) Conditions under Article 7**

The provision on the right of residence for more than three months has been correctly transposed.
• Limitation of the scope of family member for students

Paragraph 4 according to which only the spouse, the registered partner and dependent children shall have the right of residence as family members of a Union citizen […], has not been transposed therefore the Italian system appears to be more favourable since ALL family members of a Union citizen, who fulfil the conditions referred to in paragraph 1(c), have the right of residence in Italy.

Conformity problems arise concerning the following provisions:
Although the Italian provision was correctly transposed, the situation described is Article 7(3), and there is a substantial difference since according to the transposing Decree the EU citizen shall retain the right of residence according to paragraph 1(a) (i.e., if they are workers or self-employed persons), while the Directive specifies that in such cases the EU citizen shall retain his/her status of worker or self-employed person. Therefore, if it is not possible to presume that the retention of the right of residence presumes the retention of the status of worker (or self-employed). The transposition is therefore considered incorrect.

(b) Administrative formalities for Union citizens (Article 8)

• General aspects

The Directive's provisions on administrative formalities for Union citizens have not been correctly transposed by Article 9 of D.Lgs 30/07.

Article 8(2) of the Directive on the deadline for registration is effectively transposed although the Italian provision refers to the date of the request of registration and not to the date of registration as requested by the Directive. In Italy it is sufficient to register after three months from the date of arrival (but a registration certificate is issued immediately, stating the name and address of the person registering and the date of the request of registration); the Directive says that the deadline for registration may not be less than three months. This is the same and does not change the substance of this provision.

Moreover, as explained in the ToC, the Directive requires stating the “address” of the person that in Italian would be “domicilio”. The transposing provision says: “dimora”, which is technically not the same. The Italian system makes a difference between these terms. In particular “dimora” is the place where a person is even only for a short period, i.e., when he/she is in a hotel during holidays. “Domicilio” is the principal/main seat of his/her business and interests, that is of the economic, financial and property activities. However, “dimora” is the minimum requirement that a foreign national shall have and communicate to the authorities. In this regard, until the person concerned is not registered, his/her address is a “dimora” and only after registration at the appropriate Office of anagrafe (personal details registry), one can refer to residence. In this regard it is not possible to assess the provision as incorrect. The aim of the Italian provision is to facilitate other Member States’ citizens: it is important for them to communicate the address where they can be found. Therefore there is no incorrectness but only a way of facilitating foreign nationals’ citizens. The residence is the place where the person usually lives.

The Italian act has been complemented by Circulars of the Ministry of Interior that have been issued in order to clarify some aspect of the transposing Decree. Particularly, Circular n. 45 of 8 August 2007 explains that the certificate stating the name and address of the person registering and the date of the request of registration does not constitute a document that authorises the residence but has the aim of showing Union citizen’s compliance with the obligation regarding the registration according to the procedures described in the Decree. This means that it is clear that the person has the right to reside and the certificate simply proves but does not grant such rights.
In case of non-registration the sanctions (fines) are the ones established in Law 1128/54, Article 11 as amended (namely: 1.000.000 to 5.000.000 Lire that would be approximately 516,00 € to approximately 2500,00 €).

The main incorrectness concerns the transposition of Article 8(3) (third indent) of the Directive that establishes that, in several specified cases (i.e., Union Citizen to whom point c) of Article 7(1) of the Directive applies) for the registration certificate to be issued Member States may not require a declaration to refer to any specific amount of resources. In Italy there are three provisions that deal with this particular matter, namely: Article 9 of D.Lgs. 30/07, Article 29.3 b) of Legislative Decree 286/1998 and Circular of the Ministry of Interior n. 19 of 6 April 2007.

The Circular and D.Lgs. 286/98 set the criteria to be taken into account when making the declaration referred to in point (c) of Article 7(1) since they refer to specific amounts, contrary to the Directive’s provision. In order to quantify sufficient economic resources, the Circular specifies that the parameter of the amount of the social allowance shall be used. This amount consists, for the year 2007, of 5.061,68 € (in one year). Article 29.3 b) of D.Lgs. 286/98 specifies that the annual amount shall not be lower than the amount of the social allowance, if only one member rejoins; double of that amount, if two or three family members rejoin, three times the annual amount if four or more members rejoin. In order to determine the annual salary of the person making the request, even the annual salary of the cohabitants is taken into account. In this way Italy is precisely setting the limits under which the resources shall not go, i.e., the amount of the social allowance/assistance.

The officials who were recently contacted at the Ministry of Internal Affairs have confirmed that students also need to declare to have “sufficient resources” in line with Article 9.3 of the transposing provision if they want to stay for longer than three months. Therefore the issues of incorrect transposition are quite important.

Article 8(3) (second indent) is assessed as incorrectly transposed because of the reference made by the transposing Decree to Article 29.3 b) of D.Lgs. 286/98. However, transposition might be considered as correct if we consider that in this case the Directive allows a “quantification” of the “sufficient resources”.

Article 8(4) provides that Member States may not lay down a fixed amount which they regard as ‘sufficient resources’, but must take into account the personal situation of the person concerned. In all cases this amount shall not be higher than the threshold below which nationals of the host Member State become eligible for social assistance, or, where this criterion is not applicable, higher than the minimum social security pension paid by the host Member State: this provision is incorrectly and ambiguously transposed. As previously explained, the Italian provisions refer to a fixed amount that is considered as sufficient for the citizen and his/her family member to reside in the national territory. This is not in line with what clarified by the Big Refont document, that explains that Article 8(4) “provides certain criteria which may provide guidance but no fixed amount might be imposed in the legislation, implementing regulations may however set some indicative amount, subject to the precision that it is only indicative”. The ambiguity arises from Circular 6 April 2007. On the one hand it seems to impose a fix amount but then, it refers to a table with salaries threshold that is given “as an example”. Moreover, Circular of 18 July 2007, clearly states, referring to Circular n. 19 of 6 April 2007 that “precise information” are given as to the entity of such resources that the concerned person shall have and declare. However, overall this reference to fix amounts is assessed as an issue of incorrect transposition. Recent contacts with the national authorities have confirmed that if the person concerned does not meet the established quantities, then automatically he/she will not be registered. No assessment of the personal circumstance is made.
The introductory part of **Article 8(5)**, is effectively transposed by Article 9.5 of D.Lgs. 30/07 and the Italian provision seems to be wider since it refers to family members of a Union citizen apart from referring that they are themselves Union citizens. Therefore it refers to family members who are not themselves Union citizens but also to family members who are themselves Union citizens.

Regarding the documents to be presented for the registration certificate to be issued:
- **Article 8(5)(b)** is effectively transposed. The omission of the reference to “registered partnership” does not represent a conformity problem since that concept does not currently exist in Italy.
- **Article 8(5)(d)** on documentary evidence is considered as transposed since family members provided for in Article 2.2 c) and d) of the Directive can be descendants or ascendants as per Article 8.5 b).
- Finally, **Article 8(5)(e)** of the Directive has been effectively transposed since the Italian provision is more favourable as it says that is sufficient to prove that the person concerned is a dependant family member without specifying the grounds of health;
- **Article 8(5)(f)** on the proof of the existence of a durable relationship has not been transposed by the Italian Decree. However, the Circular of 18 July 2007 of the Ministry of Interior specifies that the documents that are requested for the registration are: […] document of the State of the Union citizen, who is the holder of the right of residence, from which it appears the relationship or the durable relationship registered in the same State; […]

(c) **Family members who are not nationals of a Member State (Article 9-11)**

- **Administrative formalities (Article 9)**

  Articles 10.1 and 9.7 of the Italian Decree transposes **Article 9(1)** providing that a Member State shall issue a residence card to family members of a Union citizen who are not nationals of a Member State, where the planned period of residence is for more than three months. In this regards the Circular 6 April 2007 specifies that the registration of the family member who is not national of a MS is subject to the release of the Carta di soggiorno di familiare di un cittadino dell’Unione, although the person can also request the registration before obtaining the said Carta di soggiorno.

  **Article 9(2)** relating to administrative formalities for family members who are not nationals of a MS if they plan to reside for more than three months is almost literally transposed.

  In principle, Italy has not foreseen sanctions for not requesting a residence card (Article 9(3) of the Directive). However, as explained in the ToC, if the draft legislative decree (currently blocked) modifying the current Legislative Decree 30/2007 transposing Directive 2004/38 is finally adopted, this particular provision will be considered as incorrectly transposed. According to the draft decree, not holding a registration certificate and failure to request a residence card are grounds for expulsion and this cannot be considered as “proportionate and non-discriminatory sanctions”; therefore the provision would not be in compliance with the Directive.

- **Issue of residence cards (Article 10)**

  Article 10 par. 1 of D.Lgs. 30/07 also transposes **Article 10 par. 1** of the Directive concerning the issue of residence cards. The time limit for issuing the residence card, namely, “[…] not later than six months from the date on which they submit the application” has not been correctly transposed. D.Lgs. 30/07 refers to “within six months from the date of entry for the national provision (that is 11 of April 2007) that is not the 11 April, there is no time limit within which Italy shall issue the residence card.

  Article 10.1 of D.Lgs. 30/07 mentions the decree of the Ministry of Internal Affairs that should prepare a model of residence cards for family member of a Union citizen. This Decree had not been adopted as of 27 June 2008.
Article 10 par. 2 of D.Lgs. 30/07 correctly transposes the **second part of Directive’s Article 10(1)** concerning the certificate of application for the residence card. According to the Italian provision the certificate is issued according to the model indicated by a decree of the Ministry of Interior, which has not yet been adopted.

**Article 10(2)** of the Directive that lists the documents required for issuing the residence card, has been incorrectly and incompletely transposed by Article 10.3 of D.Lgs. 30/07:
- Article 10.3 a) of D.Lgs. 30/07 (transposing Article 10(2)(a)) adds the requirement of the entry visa (when required);
- Art 10.3 c) of D.Lgs. 30/07 (transposing Article 10(2)(c) refers to the certificate of the application for registration and not to the registration certificate as the Directive requires. Probably this is only a linguistic “nuance”. However, the Italian provision is more stringent, since it asks for an additional requirement (photo) that makes the Italian provision incorrect as compared to the Directive;
- Article 10.3 b) of D.Lgs. 30/07 has effectively transposed Article 10(2)(d) on documentary evidence and Article 10(2)(e) of the Directive. In Italy in order to have the personal data (anagrafe) registration as a family member of a Union citizen, as well as to have the Residence Card, no specific evidences are required as of being child minor of 21 of the citizen or partner or of the direct ascendant and neither the health grounds; only the document showing the quality of dependant family member is more generally required. Therefore Italy puts less of a condition in this regard.
- 10(2)(f) on the proof of the existence of a durable relationship is not transposed, however, the Circular specifies that the documents that are requested for the registration are: […] document of the State of the Union citizen, who is the holder of the right of residence, from which it appears the relationship or the durable relationship registered in the same State; […]

**Validity of residence cards (Article 11)**

Article 10 paragraphs 4 and 5 of of D.Lgs 30/07 have effectively transposed Article 11 of the Directive providing that the residence card provided for by Article 10(1) shall be valid for five years from the date of issue or for the envisaged period of residence of the Union citizen, if this period is less than five years and that the validity of the residence card shall not be affected by temporary absences not exceeding six months a year, or by absences of a longer duration for compulsory military service or by one absence of a maximum of 12 consecutive months for important reasons such as pregnancy and childbirth, serious illness, study or vocational training, or a posting in another Member State or a third country.

(d) **Retention of the right of residence in the event of death, departure, divorce, annulment or termination**

**Retention of the right of residence by family members in the event of death or departure of the Union citizen (Article 12)**

Article 12 provides that family members retain the right to reside where the Union citizen dies or leaves the Member State. The Article deals with a number of different groups of people.

Article 12 has been correctly transposed by Article 11 of D.Lgs 30/07.

- **Family members who are EU citizens (Article 12(1))**

Par. 1 has been effectively transposed although the Italian provision is differently framed. It expressly refers in fact to the right of permanent residence “according to Article 14”, instead of only referring to the conditions laid down in Article 7(1) [of the Directive] (on residence for longer than 3 months), as
the Directive does. As explained in the ToC, if the conditions for permanent residence exist (Article 14 of D.Lgs n. 30/07), then *a fortiori* the person concerned has the right of residence.

- **Family members who are not EU citizens (Article 12(2))**

Transposition of paragraph 2 – second indent, is almost literal. The Italian Decree has added a provision that does not exist in the Directive and that applies when the requirement of residence within the national territory for at least one year is not fulfilled. In this case, according to the transposing provision, Article 30.5 of Legislative Decree of 25 July 1998, n. 286 and its amendments, shall apply and in particular: the right of residence is converted into right of residence as workers or self-employed persons or for study reasons (basically if the death Union citizen had the right of residence, that right goes to his/her the family member but converted into a right of residence for specific reasons). The provision is therefore not only applicable to children but also to all family members of a Union citizen who are not nationals of a Member State. However, last part of the transposing provision, the reference to Article 9(3) of Italian Decree (Article 8(4) of the Directive), namely to “sufficient resources” could render transposition not in conformity Article 8(4) of the Directive has actually not been correctly transposed in itself.

**Article 12(2) third indent** providing that such family members shall retain their right of residence exclusively on a personal basis has not been transposed. Nevertheless, this right can be deduced from the logic and the wording of the transposing provision. Especially from the transformation of the right of residence explained above.

- Retention of the right of residence by family members in the event of divorce, annulment of marriage or termination of registered partnership (Article 13)

Most of Article 13 provisions have been almost literally transposed.

**Family members who are EU citizens (Article 13(1))**

This provision has been correctly transposed although the reference to registered partnership is missing. This is due to the fact that the concept of registered partnership does not currently exist in Italy. (See also comment under Article 2(2)(b) of the Directive).

**Family members who are not EU citizens (Article 13(2))**

There are issues of incorrect transposition relating to paragraph 2(c) providing the condition that retention of right of residence is warranted by particularly difficult circumstances, such as having been a victim of domestic violence while the marriage or registered partnership was subsisting; Article 12(2)(c) of the Italian provision seems to transpose this provision in a more stringent way.

First, the Directive more generally refers to “particularly difficult circumstances”, that is not the same as the situations mentioned in the transposing Decree, that is in fact more stringent since it requires that “the concerned person is an offending party in a criminal proceeding, which is still going on or settles/concluded with a conviction judgment regarding crimes against the person committed within the family orbit/environment”.

Second, the Directive says that the annulment or divorce [...] does not affect the right of residence of the partner or spouse for having been victim of domestic violence. The Italian provision says that the person concerned (the spouse) “is offended part in a criminal proceeding, which is still going on or settles/concluded with a conviction judgment regarding crimes against the person committed within the family orbit/environment”; in this regard the transposing provision seems also to be more stringent, since for the Directive does not impose a “criminal proceeding”. However, before assessing
the existence of a conformity problem it is necessary to clarify whether according to the Directive the person concerned has to show that he/she has been victim of domestic violence.

Article 13(2)(d) is almost literally transposed; however, the reference to the “partner” is omitted by Article 12.2 d) of D.Lgs n. 30/07 since the concept of registered partnership does not currently exist in Italy.

Article 13(2)(d) second indent, on the requirement to be met in order to acquire the right of permanent residence is assessed as transposed although, in the last part of the provision, the reference to Article 9.3 of Italian Decree – Article 8(4) of the Directive, namely to “sufficient resources’ could make transposition not in conformity because it is more stringent. Moreover, D.Lgs n. 30/07 has added a provision (Article 12.3) concerning the rights recognised to family members of a Union citizen who are not nationals of a Member State in case of divorce, annulment of the Union citizen's marriage. In this case, the right of residence is converted into permit of residence as workers or self employed persons or for study reasons. This implies that the right of the Union citizen goes to his/her family member but converted into a permit of residence for the specific reasons explained above and thus it implies that the right is retained.

Article 13(2)(d) last indent that specifies that family members shall retain their right of residence exclusively on personal basis is not transposed. Nevertheless, this right can be deduced from the logic and the wording of the transposing provision.

2.4.2 Retention of the right of residence (Article 14):

Article 14 provides for the circumstances in which persons retain the rights of residence granted by Article 6 and Article 7 respectively.

There are several conformity problems relating the transposition of Article 14 of the Directive.

(a) Residence for less than 3 months (Article 14(1))

Article 14(1) is assessed as correctly transposed: the sentence added by the Italian provision namely, “as long as they do not represent a danger for public policy or public security” seems to put an additional requirement to justify the expulsion measure. Therefore transposition is even more favourable in this regard.

In addition although the Directive says “as long as they do not become a burden” while the Italian provision says “as long as they have the resources not to become a burden” this does not necessarily represent a conformity problem since it is not obvious that if you ask for social assistance you are considered as an unreasonable burden. It shall also be considered that Italy will not “take the initiative” to check the existence of the resources referred to in Article 1. Italy might become aware of the “insufficient resources” because the person asks for the social assistance or because he/she declares it.

(b) Residence for more than 3 months (Article 14(2))

Article 14(2) has been incorrectly transposed because the obligation that the verification of the conditions of Articles 7, 12 and 13 have not been systematically transposed.
(c) Protection against expulsion (Article 14(3)-(4))

- General protection (Article 14(3))

This provision, according to which an expulsion measure shall not be the automatic consequence of a Union citizen's or his or her family member's recourse to the social assistance system of the host Member State, has not been transposed.

- Workers and self-employed persons, and job seekers (Article 14(4))

Transposition of Article 14(4)(a) and (b) that refer to cases when an expulsion measure cannot be taken against a Union citizen and their family members is considered as more favourable. In the specific case referred in lett. a) of the Italian Decree only mentions grounds of public policy and public security, and not, as the Directive does, to the whole of Chapter VI (which includes provisions on public health); therefore the Italian provision is more favourable. It should be therefore highlighted that Italy in this case cannot order an expulsion on grounds of public health.

Regarding job seekers, Italy does not request evidence to “have a genuine chance of being engaged.” However, this renders the Italian provision even more favourable.

Article 15: Procedural safeguards

Transposition of Article 15(1), providing that the procedures provided for by Articles 30 and 31 shall apply by analogy to all decisions restricting free movement of Union citizens and their family members on grounds other than public policy, public security or public health, is incomplete and incorrect. The Italian provisions do not exactly refer to the same wording of the Directive. Article 8 of D.Lgs n. 30/07 only mentions the possibility to appeal for the non-recognition of the right provided for in Article 6 and 7. Article 8 does not refer to expulsion and therefore does not include the guarantees provided for in Article 15 and therefore in Article 30 and 31 of the Directive.

Article 21 of the transposing provision (on expulsion on grounds of cessation of the conditions that give the right of residence) refers to few but not all the guarantees set in Article 30 and 31 with the following differences:
- according to the Directive the person concerned shall be informed precisely and in full of the grounds of expulsion, while the Italian provision requests that the act shall explain the grounds;
- the application for an interim order to suspend enforcement of that decision is not included in Italy for grounds other than public policy, public security or public health.

In this regard the ECJ13 that has stated that “Member States must take all steps to ensure that the safeguard of the provisions of the Directive is available to any national of another Member State who is subject to a decision ordering expulsion”. This reinforces the assessment of incorrect transposition of this particular provision.

See also comment below under Articles 30 and 31.

(b) Protection

The transposition of Article 15(2) of the Directive saying that the expiry of the identity card or passport shall not constitute a ground for expulsion from the host Member State has not been transposed.

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13 E.g., Case C-136/03 Dörr and Ünal par. 49.
An “expulsion decision of other Member States’ citizens and their family members irrespective of nationality, may also be adopted when the conditions that give the person concerned the right of residence, referred to in Articles 6, 7 and 13 do not exist. Article 6.1 of the transposing Decree requires as an essential condition in order to have the right of residence for up to three months, a valid identity document which is valid for expatriation according to the legislation of the State of nationality. Therefore, this may imply that the expiry of the document would also make the residence unlawful and thus the presence in the Italian territory would be illegal. However, it should be interpreted that the right of residence derives from meeting the conditions and these documents only prove identity and nationality. So they should not be considered as a ground for expulsion.

2.5 Right of permanent residence

2.5.1 General rule for Union citizens and their family members (Article 16: Eligibility)

Article 16 of the Directive recognises the right of permanent residence to Union citizens and their family members who have resided legally for a continuous period of five years. The right is no longer subject to the conditions of Chapter III.

Overall Article 16 has been transposed by Article 14 of the Italian Decree.

Article 16(1) and 16(2) of the Directive (providing that Union citizens who have resided legally for a continuous period of five years in the host Member State and family members who are not nationals of a Member State and have legally resided with the Union citizen in the host Member State for a continuous period of five years shall have the right of permanent residence there) have been correctly transposed by Article 14(1) and (2) that transpose respectively. The transposition ensures that the right is unconditional. Article 14(1) and (2) refer to the specific provision under the Italian legislation transposing the requirements included in Chapter III of the Directive. Although not all the provisions in Chapter III are covered, those not referred to by the Directive have no real impact on the conditions of residence.

Article 16(3) provides that continuity of residence shall not be affected by temporary absences and Article 16(4) of the Directive (providing that once acquired, the right of permanent residence shall be lost only through absence from the host Member State for a period exceeding two consecutive years) have been almost literally transposed by the Article 14 of the Italian Decree.

2.5.2 Acquisition of the right of permanent residence for workers/self employed person and their family members (Article 17)

Most of Article 17’s provisions have been literally transposed by Article 15 of D.Lgs n. 30/07. Transposition of the other provisions is overall correct and effective.

Article 17(1)(a), providing that the right of permanent residence in the host Member State shall be enjoyed before completion of a continuous period of five years of residence by workers or self-employed persons who, at the time they stop working, have reached the age laid down by the law of that Member State for entitlement to an old age pension or workers who cease paid employment to take early retirement, provided that they have been working in that Member State for at least the preceding twelve months and have resided there continuously for more than three years, is almost literally transposed by Article 15.1 a) of D.Lgs n. 30/07.

Article 17(1)(b), providing that the right of permanent residence in the host Member State shall be enjoyed before completion of a continuous period of five years of residence by workers or self-employed persons who have resided continuously in the host Member State for more than two years...
and stop working there as a result of permanent incapacity to work, and that if such incapacity is the result of an accident at work or an occupational disease entitling the person concerned to a benefit payable in full or in part by an institution in the host Member State, no condition shall be imposed as to length of residence is literally transposed by Article 15.1 b) of D.Lgs n. 30/07.

Under Article 17(1)(c), providing that the right of permanent residence in the host Member State shall be enjoyed before completion of a continuous period of five years of residence by workers or self-employed persons 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, is ambiguously transposed by Article 15.1 c) of D.Lgs n. 30/07. As explained in the ToC, the last part of the provision is not transposed as such and the Italian provision refers to “conditions for the registration still exist”. These conditions are the ones referred to in Article 9 of D.Lgs 30/07 that are different as compared to the requirements set in the Directive. So in this regard, Italy seems to request something more than the Directive.

On the other hand the Italian provision appears to be less restrictive since the Union citizen is not required to go back in the State each day or at least once a week but to keep his domicile in Italy. However, the conditions referred for the registrations are yet to be fulfilled.

Article 17(2), providing that the right of permanent residence in the host Member State shall be enjoyed before completion of a continuous period of five years of residence by the worker's or the self-employed person's spouse or partner as referred to in point 2(b) of Article 2 if this spouse or partner is a national of the host Member State or has lost the nationality of that Member State by marriage to that worker or self-employed person have been correctly transposed by Article 15(4) of D. LGS. N. 30/07. The acquisition of the right of residence by family members included in Article 17(3) and 17(4) of the Directive has been correctly transposed by Article 15(5) and (6) of D. LgS. N. 30/07.

2.5.3 Article 18: Acquisition of the right of permanent residence by family members who are not nationals of a MS and retained their right of residence (Article 18)

Article 18 of the Directive providing that the family members of a Union citizen to whom Articles 12(2) and 13(2) apply, who satisfy the conditions laid down therein, shall acquire the right of permanent residence after residing legally for a period of five consecutive years in the host Member State has been literally transposed by Article 15.7 of D.Lgs n. 30/07.

2.5.4 Documents certifying permanent residence for Union citizens (Article 19)

Article 16.1 of D.Lgs n. 30/07 effectively transposes Article 19(1) and 19(2) of the Directive. The Italian Decree adds a provision that is not contained in the Directive, specifying how the entitlement to permanent residence can be certified, so it does not affect the correct transposition of the Directive’s provision.

The Italian provision is complemented by Circular n. 19 of 6 April 2007 that clarifies some concepts, such as “continuity” (that might be proved by the registration of the concerned person), and “legally resided”. In this regard the Circular says that this last concept has to be understood in the sense that during the period of five years the person concerned has resided in the territory under the condition laid down by the transposing Decree and without ever being expelled.
2.5.5 Permanent residence card for family members who are not nationals of a MS (Article 20)

Article 20(1) about the obligation to issue family members who are not nationals of a Member State entitled to permanent residence with a permanent residence card within six months of the submission of the application is overall not correctly transposed. In particular, transposition is incomplete, since the transposing provision does not mention that a residence card shall be renewable automatically every 10 years.

Italian acts refer to issuance of the card “within 90 days” instead of “within six months of the submission of the application”; it is more favourable.

Article 20(2) of the Directive about the obligation for family members to submit the application before the residence card expires and the possibility to envisage sanctions for the failure to the requirement to apply for a permanent residence card. Transposition is more favourable since the Italian provision does not impose sanctions. We will discuss further in this Report as in the Italian Decree the sanctions are often important and disproportionate.

Article 20(3) providing that interruption in residence not exceeding two consecutive years shall not affect the validity of the permanent residence card has been literally transposed by Article 17.4 of D.Lgs n. 30/07.

2.5.6 Continuity of residence (Article 21)

Article 18 of D.Lgs n. 30/07 (as amended by D.Lgs 32/08) provides an incorrect transposition of the Directive’s provision providing that for the purposes of this Directive, continuity of residence may be attested by any means of proof in use in the host Member State and that continuity of residence is broken by any expulsion decision duly enforced against the person concerned; however, for the first part, no conformity issue arises. In fact the Italian reference to Articles 13, 14, 15 and 16 of the Decree is correct since these provisions are linked to the continuity except Article 13 that concerns the retention of the right of residence. This does not affect transposition.

In relation to the means of proof, according to the Italian provision “continuity of residence and the requirements set out by Articles 13, 14, 15 and 16 may be attested according to the procedures set out by the legislation in force”. This means that continuity may be attested by any means of proof provided that those are the ones in use by the national existing legislation. This is in line with the Directive.

Relating to the continuity of residence the Italian provision refers to “expulsion decision taken […]” and not to “expulsion decision duly enforced” as the Directive does. The Italian term used “adottato” in itself might be interpreted as “enforced-eseguito”. However, in this context the text of the Italian provision should have been more precise. Transposition is therefore incorrect.

2.6 Common provisions (Articles 22-26)

2.6.1 Territorial scope (Article 22)

Although there is no specific transposing provision in this regard, Article 22(1) of the Directive. The Italian legislation applies to the entire territory of Italy. A Directive cannot be applied to only a part of the Italian territory. In addition, the transposing Decree throughout its text, always refer to the national territory, that is, the whole Italian territory.
As concerns Article 22(2) on territorial restrictions on the right of residence and the right of permanent residence, this has not been transposed as such. However, paragraph 2 of Article 19 says that within the scope of the Treaty, every Union citizen shall enjoy equal treatment with the Italian nationals, […] This would also cover all territorial restrictions.

Under Article 22 second indent of the Directive “Member States may impose territorial restrictions on the right of residence and the right of permanent residence only where the same restrictions apply to their own nationals”.

This provision is to be considered as transposed. In particular, Article 16 of the Italian Constitution says that “every citizen may freely move and reside in any part of the national territory, except general limitations which the law establishes for reasons of health or security. […]”

So in this perspective, there are several acts that foresee territorial restrictions. For instance, Law n. 575/65 on provisions against mafia, foresee that persons suspected to belong to mafia type of associations (or camorra or to other associations that act with methods that correspond to mafia type of associations – Art. 2) may be obliged to reside/stay (obligation to stay) in the Commune of residence or in the place where they usually lives (dimora abituale).

Moreover, in the framework of general criminal law, the ban or obligation of residence may be imposed by the judge as a coactive precautionary measure in case of serious indication of guilt (indizi di coplevolezza) in relation to crimes for which the law establish life long imprisonment or […] and if certain precautionary need exist (according to Art. 274 of CPP).

Another example may be Article 233 of the CP that says that the person convicted for a crime against the personality of the State or against public order […] may be subject to the ban of residence in one or more Communes or in one or more Province that are decided by the judge.

2.6.2 Right to take up employment by family members (Article 23)

Article 23 is about the right to take up employment or self employment in the host Member State. The first part of the provision is effectively transposed. In fact although the Italian Decree is framed slightly differently it seems to have the same personal scope as the Directive.

The transposing provision also refers to Union citizens; this in principle does not represent a problem since it is implicit in the original text that the Union citizens are a fortiori entitled to take up employment.

The Italian provision refers to the EC Treaty. This reference to the Treaty does not seem to refer to the transitional measures for Bulgarian and Romanian citizens since it seems to refer to jobs that ONLY Italian citizens can carry out (but in accord with the Treaty and EU legislation). In this regards the Italian provision is however ambiguous.

2.6.3 Equal treatment (Article 24)

Article 24(1) of the Directive grants the right of equal treatment to Union citizens and their family members (including third country family)

Paragraph 1 of this provision about equal treatment for Union citizens residing on the basis of the Directive in the territory of the host Member State with the nationals of that Member State has been literally transposed by Article 19.2 and by Article 6.3 of D.Lgs n. 30/07.

The two provisions establish that Union citizens enjoy equal treatment and are subjects to the same duties as the Italian nationals. In this regard Circular 18 July specifies that the worker who is a Union
citizen and his/her family members are covered by the national health system (*Servizio Sanitario Nazionale*).

Article 24(2) allows Member States to establish exceptions to the principle of equal treatment. Although the provision has been transposed the Italian act has omitted the last part, which ensures that workers and self-employed persons and their family members benefit from social assistance and other benefits. The national authorities that have been contacted confirmed that the wording of the transposing Decree refer to workers and self-employed persons.

### 2.6.4 General provisions concerning residence documents (Article 25)

Article 19.4 of D.Lgs n. 30/07 concerns the transposition of Article 25(1) of the Directive providing that possession of residence documents may under no circumstances be made a precondition for the exercise of a right or the completion of an administrative formality, as entitlement to rights may be attested by any other means of proof. However, transposition is incomplete. The Italian provision therefore does not clearly establish that possession of the document may not be a precondition. As this is the most relevant part of the provision the incompleteness represents an important gap since it does not ensures the right given by the Directive (e.g., if a Union citizen goes to the administration to request a loan, the possession of the documents listed in the Directive may under no circumstances be made precondition for the exercise of the right to obtain a loan).

Art 10.6, 5.3 and 17.3. of D.Lgs n. 30/07 effectively transpose Article 25(2) of the Directive; Art 10.6 refers to the residence card. Circular n. 54 of 8 October 2007 has specified that the documents that certify the registration and the permanent residence as well as the respective applications, are subject to a charge of 14,62 €. Italian citizens are charged the same for issuing ID cards. The transposition is therefore correct.

### 2.6.5 Checks (Article 26)

This provision concerning the checks on compliance with the national legislation’s requirements can be considered as transposed by Article 6.3 of D.Lgs n. 30/07 that says that even in cases of short residence (that is the right of residence up to three months), EU citizens and their family members who are in Italy, have to behave as Italian citizens (“are subjects to the same duties as Italian nationals, while pursuing activities which are allowed.”). In Italy, there is no legislative provision imposing on Italian citizens to carry their ID card. Article 4 of Testo Unico – consolidated text of the Law on Public security (approved by RD 773/1931) states that public security authorities have the power (*facoltà*: in the sense of freedom) to order dangerous and suspicious persons, and persons who are not able or refuse to prove their identity, to denounce them (in the sense of reporting their situation).

### 2.7 Restrictions on the right of entry and residence on grounds of public policy, public security and public health

#### 2.7.1 General principles (Article 27)

**Article 27** of the Directive establish that the freedom of movement and residence of a Union citizen can be restricted only for grounds of public policy, public security or public health.

Overall this Article is not correctly transposed. In general, the reference made by the Italian transposing provision, to a number of other Laws, decrees, codes, Articles, etc, makes it difficult to understand for which crimes and in what situations an EU national may be expelled.

Several behaviours might fit in the definitions and situations that are described and referred to by the Italian transposing provision.
The other problem with the Italian transposing provision, in relation to transposition of Article 27(1) is the lack of reference to “sufficiently serious threat” when referring to the personal conduct of the individual concerned. The importance of such requirement has also been confirmed by several ECJ cases.\(^\text{14}\) This omission renders the transposition of the whole Article 27 as incorrect and incomplete.

Finally, there is a minor incorrectness since Article 20 of the transposing act fails to mention “public health” that is, however, transposed in the relevant Article (Article 20.6 of D.Lgs n. 30/07).

**Article 27(2) first indent** on the principle of proportionality of the expulsion measures is almost literally transposed by Article 20.2 of D.Lgs. 30/07 as it would be shown below the situation falling under public policy and public security grounds are so broad that it can hardly be considered proportional leaving a great margin of discretion in the hands of the administration and courts. Expulsion measures do not appear to be proportionate since the circumstances that can lead to expulsion are very broad (see the example above e.g., one of the behaviours taken into consideration is to live from the benefits obtained from the commission of crimes. This could easily include thieves whose main living resources come from stealing (thus a crime). Or the new added provisions amending the Criminal Code that expressly provide automatic expulsion for convictions of more than 2 years of prison).

Transposition of **Article 27(2) second indent** on the personal conduct of the individual concerned is incorrect and incomplete.

Article 20.4 of the transposition decree does not refer to “sufficiently serious” threat that, as confirmed by to settled ECJ case law\(^\text{15}\) it is an important concept to take into consideration in order to assess the conduct of the individual concerned. In the Italian case, the conduct seems to be assessed more widely as compared to the Directive being possible de facto to order an expulsion for behaviours/conducts/actions that represent a “threat” but not to the extend (“sufficiently serious”) to be a ground of expulsion. In this regard there is recent case law of the Italian Court of Cassation\(^\text{16}\) that says that expulsion shall not be automatically adopted but after an assessment of the “pericolosità” that is the “dangerousness” of the person concerned. However, this is not the same and cannot be considered as enough to fill the gap left by the Italian transposing provision.

Also, settled ECJ case law confirmed the importance of the requirement of “sufficiently serious threat” stating “public policy exception, like all derogations from a fundamental principle of the Treaty, must be interpreted restrictively”.\(^\text{17}\) In the Case Commission v Netherlands the ECJ also highlights that “in addition to the perturbation of the social order which any infringement of the law involves, of a genuine and sufficiently serious threat to one of the fundamental interests of society”. In this regard transposition is therefore incorrect.

Moreover, instead of referring to “affecting one of the fundamental interests of society” the Italian Decree says “threat to the public policy or public security”; these are not equivalent. In this regard refer to what stated under Article 27(1); in particular the definition given to State security is so broad that finally almost “everything” can violate “fundamental interests of society”.

Instead of saying “genuine” (“reale” in Italian), the national provision says “concreta” (“concrete” in English); this might not represent a problem in itself since the two term are to be considered as equivalent.

\(^{14}\) As Case C-50/06 Commission v Netherlands par 43, Commission v. Spain, par. 46, C-441/02 Commission v. Germany, par 35.

\(^{15}\) See, e.g., Case C-50/06 Commission v Netherlands par 43, Case 36/75 Rutili, par 28, Case 30/77 Bouchezou, par 35, Case C-493/01 Orfanopoulos, par 66.

\(^{16}\) Sent n. 22511 Cassazione Penale Sez. IV, 3 May 2007.

\(^{17}\) Case C-348/96, Calfa par 23. See also Case C-50/06 Commission v Netherlands par 42 and 43.
Article 27(3) and 27(4) of the Directive have not been transposed and this represents an important gap. The first provision establishes the right of the host Member State to request, if considered as essential, the Member State of origin and, if need be, other Member States, to provide information concerning any previous police record the person concerned may have. The second mentioned Directive provision deals with the right of re-entering the territory of his/her MS, without any formality.

- The transposition of Article 27

Below there is an analysis of the grounds that may be considered as public policy and public security (for public health see Article 29). These laws apply to both EU citizens and Nationals but different punitive measures apply to EU citizens (namely expulsion is the penalty applied to EU citizens). This is not in itself against EU law, since the ECJ has ruled in Ministere de l’Interieur v. Olazabal¹⁸ that EU law does not require that identical measures are taken against nationals and EU citizens. Furthermore the ECJ stated that MS may adopt “with respect to nationals of other Member States, and in particular on the grounds of public policy, measures which they cannot apply to their own nationals, inasmuch as they have no authority to expel the latter from the territory or to deny them access thereto”.

However, despite the fact the MS have authority to take different measures (including expulsion of EU citizens), these have to comply with the Directive in particular with the principle of proportionality. The analysis below takes into account ECJ jurisprudence and the Directive’s requirements to determine whether the grounds referred to by the Italian legislation and for which an expulsion measure may be adopted are in conformity with the Directive:

1. State Security grounds (Public security):

The definition given by the Italian provisions of “State security” grounds cannot be considered in conformity with Directive. Each situation defined as grounds of state security are analysed in this section.

Article 20.2 of D.Lgs n. 30/07, defines State security grounds by reference to several Italian acts, including the CPP and CP. Three situations are considered as grounds of State Security:

1.1 Article 18 of Law 152/1975 which is the law against Mafia. This provision further refers to several crimes of the Criminal Code. The crimes referred by Article 18 Law 152/75 are the following which can be grouped in 3 situation:

a) preparatory acts (in group or alone) that are objectively relevant, aiming at subverting State order, by committing the following crimes of the CP:
Article 422 - Slaughter
Article 423 – Fire
Article 423 bis Forest fire
Article 424 – Damage followed by fire
Article 425 – Aggravating circumstances
Article 426 – Floods, landslides and avalanches
Article 427 – Damage followed by flood, landslide or avalanche
Article 428 - Shipwreck, sinking or aviation disaster
Article 429 – Damage followed by shipwreck
Article 430 – Railway disaster
Article 431 – Danger of railway disaster caused by damage
Article 432 – Attacks on the safety of transportation systems

¹⁸ See Case C-100/01 Ministere de l’Interieur v. Olazabal. In particular par. 40
Article 433 – Attacks on the safety of electricity, gas and public communications installations
Article 434 – Collapse of constructions or other malicious disasters
Article 435 – Manufacture or ownership of explosives
Article 436 – Removal, concealment or damage to public safety equipment
Article 437 – Malicious removal or omission of protection against injury in the workplace

Crimes against the State
Article 284 CP. Armed insurrection against the powers of the State.
Article 285 CP. Devastation, pillaging and slaughter.
Article 286 CP. Civil war.
Article 306. Armed gangs: formation and participation.

Crimes against public safety
Article 438. Epidemic.
Article 439. Poisoning water or foodstuffs.

Crimes against the person
Article 605. Kidnapping

Crimes against property
Article 630. Kidnapping for purposes of robbery or extortion
(as per Article 18 of Law 22 May 1975, n. 152)

b) having being member of a dissolved fascist organisation, he continues carrying out an activity that may be considered equivalent to those carried out by the dissolved organisation (fascist meaning having antidemocratic objectives);

c) carrying out preparatory acts aiming at the reconstitution of a fascist party (with antidemocratic objectives), in particular using exaltation or violence. The following activities are considered as reconstitution of a fascist party:

- an attempt by an association, movement or group of no less than five people to pursue the antidemocratic ends of the fascist party, praising, threatening or using violence as a method of political struggle, promoting suppression of the freedoms guaranteed by the Constitution or denigrating democracy, its institutions and the values of the Resistance, distributing racist propaganda, directing its activities toward praise of the members, principles, acts and methods of the fascist party or conducting external manifestations of a fascist character.

d) somebody not covered under (a)-(c) who has been convicted for a series of crimes (see below) and due to his subsequent behaviour it is believed that he aims at subverting State Order.

The crimes committed are those referred to in Law n.895/1967 reproduced in the ToC which are basically crimes related to the possession of weapons, war weapons, chemical explosive materials and related trade or elaboration etc. and in Article 8 and following of Law 49/1974.

This is a very good example of how intricate the transposition made by Italy is. Article 8 and altera of Law 49/1974 is actually modifying another Law, 1423/1956 (on measures against persons dangerous to public security and morality). Even then, Article 8 refers to Article 9 of Law 1423/1956 which simply states the sanctions but not the actual crimes that have to be committed to trigger the application of point d) above and that will lead to an expulsion measure. When analysing Article 9, the crimes referred to are those listed in Article 1 of Law 1423/1956 which includes:

- offences to physical or moral integrity of minors and public health, safety or tranquillity (and who is habitually dedicated to unlawful dealings, who habitually lives, even in part, on income from criminal activities).

- Analysis based on proportionality

As shown above any crimes may lead to expulsion measure.
Points (a) to (c) discussed above could be considered as complying with the principle of proportionality since it is related to a form of organised crime (Mafia) that is one of the main concerns in Italy and is heavily fought against. However, as seen above (d) includes all types of crimes, including those that could be considered petty criminality.

Almost anything could therefore be considered as a crime against State Security. Basically, the law (in particular Law 1423/1956) refers to any type of illegal traffic (which may be drugs but also waste, wild life and any other activity that could be considered as illegal traffic). Of course this is linked to the aim of subverting the State order. However, there is no definition of State order and some of the behaviours listed in Law 1423/1956 imply a very broad understanding of State order. For example, one of the behaviours is to live from the benefits obtained from the commission of crimes. This could easily include thieves whose main living resources come from stealing (thus a crime). Similarly, the law also includes acts against the physical and moral integrity of persons. Again, this shows that State order could be a simple alteration of the public social order in Italy. This is clearly against ECJ case law\(^{19}\) - in Case 50/06 it was ruled that public order could not be a simple “perturbation of the social order”. The Court stated that “reliance by a national authority on the concept of public policy presupposes, in any event, the existence, in addition to the perturbation of the social order which any infringement of the law involves, of a genuine and sufficiently serious threat to one of the fundamental interests of society”.

Moreover, although the convictions for the crimes referred are not (from the literal analysis of the text) a ground of expulsion themselves, it is difficult to know how in practice those convictions are considered while deciding whether to expel an EU national. It is important to mention that the commission of those crimes is included in Articles 20 and 21 of D.Lgs. n. 30/07 do not lead to automatic expulsion. The principles listed in Article 20 D.Lgs. n. 30/07 which are those of Article 27 of the Directive have to be taken into account. However, the definition of state security is so broad that it would be easy to consider that someone is a threat against public order and public security. In this regard settled case law has confirmed that previous criminal convictions cannot themselves constitute a justification for expulsion on public policy ground.\(^{20}\)

No particular issues arise concerning the grounds specified in point b) and c) such as carrying out and activity equivalent to that carried out by the dissolved fascist organisation and the reconstruction of the fascist party\(^{21}\) itself since it is reasonable to consider them as a state security reason having antidemocratic objectives and the use violence.

1.2. Facilitate terrorist organisations or activities

The “sounds grounds” “reasonable grounds” (fondati motivi) [to believe that the permanence in the territory of the State may in anyway facilitate terrorist organisations or activities], referred by Article 20.2 as a State security ground for expulsion implies that not just a “suspect” is enough to take an

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\(^{19}\) Case C-50/06 Commission v Netherlands par, 43. In this regard also Rutili, paragraph 28; Bouchereau, paragraph 35.

\(^{20}\) Case C-50/06 Commission v Netherlands par, 29 ("[…] the expulsion of such a citizen on grounds of public policy must be based on his personal conduct and may not be justified by previous criminal convictions in themselves"); 41 ("[…] “A previous criminal conviction can therefore be taken into account only in so far as the circumstances which gave rise to that conviction are evidence of personal conduct constituting a present threat to the requirements of public policy”").

\(^{21}\) See XII provisional and final provision of the Italian Constitution that says: “The reorganisation of the dissolved fascist party, under whatever form, is banned/prohibited”. [In deroga all’articolo 48, sono stabilite con legge, per non oltre un quinquennio dalla entrata in vigore della Costituzione, limitazioni temporanee al diritto di voto e alla eleggibilità per i capi responsabili del regime fascista.]
expulsion measure; the behaviour will be assessed restrictively, in accordance with the scope of the Directive’s provision and ECJ case law. 22

In relation to terrorist activities the court in the case Ministere de l’Interieur v. Olazabal23 accepted the fact that the person concerned who was a member of the ETA (terrorist organisation) was a threat to public policy.

1.3. The open clause

The Italian Law includes an open clause when defining State security grounds since it says “State security grounds are ALSO [...]”. This is very ambiguous since it is not clear which should be/are those other grounds (apart from those commented above which are already very general and broad). This implies that the person applying the legislation has enormous flexibility to include any other activity as state security issues. This is a crucial issue that renders transposition incorrect.

1.4. The recent reform

In addition, the recent reform adopted 23 May 2008 and amended by the Law of conversion (Law n. 125/2998) has modified the Criminal code (Article 235 and 312 [and also Article 61 on aggravating circumstances]) to include EU citizens.

See Chapter 3 to this Report for a detailed analysis of the said provisions and their impact on transposition of Article 27 of the Directive.

Another issue that is important to mention when assessing the incorrect transposition of Article 27 of the Directive and that will be discussed under Article 28(3), is the definition given by the Italian legislation to “imperative public security grounds”.

For instance the crimes of the Law 1423/56 (that is, crimes consisting of offences to physical and moral integrity of minors, and public security, and public health, safety or tranquillity), are also considered when adopting an expulsion measure on imperative public security grounds. This represents an even bigger issue of incorrectness leading to take measures that are not proportionate.

It can therefore be concluded that considering the wideness of the circumstances that are relevant for taking an expulsion measure, the authority/person applying the legislation has a flexibility that will allow him/her to very easily expel EU nationals.

- Conclusions

The omission renders actual transposition of the whole Article 27 as incorrect and this even though the Italian transposing legislation literally transposes the provisions stating that the measures taken shall be proportional, shall be based on the personal conduct of the person concerned, previous criminal convictions shall not themselves represent a ground of expulsion and although the expulsion measures are notified to the individual concerned in accordance with the Directive (so although some procedural safeguards are guaranteed). However, the grounds that could be actually used to expel an EU citizen do not comply with the principle of proportionality as shown in previous rows.

22 E.g., C-348/96: Calfa par 23“However, as the Court has repeatedly stated, the public policy exception, like all derogations from a fundamental principle of the Treaty, must be interpreted restrictively”.
23 Case C- 100/01 Ministere de l’Interieur v. Olazabal. In that case, M. Olazabal, convicted of being a member of ETA (the Basque terrorist group) was prevented from staying on French territory because his presence was considered to be a menace for the public order. The court accepts this idea but curtails the rules France imposed upon Mr. Olazabal and only accepts some of them, the others being considered as encroaching too much on his fundamental right of freedom of circulation as a European citizen.
The legislation is therefore contradictory and this confirms what was said above under Article 27(1) that has been transposed, incorrectly, through a legislation that is very broad.

2.7.1 Protection against expulsion (Article 28)

This Article has been ambiguously transposed by new Article 20.6 D.Lgs n. 30/07 as replaced by Article 1.1 c) D.Lgs n. 32/08.

- The criteria under Article 28(1)

Article 28(1) of the Directive provides that before taking an expulsion decision on grounds of public policy or public security, the host Member State shall take account of considerations such as how long the individual concerned has resided on its territory, his/her age, state of health, family and economic situation, social and cultural integration into the host Member State and the extent of his/her links with the country of origin. The provision has been almost literally transposed. The transposing provision is actually even more favourable since the Italian legislation does not specify the grounds, then for any ground of expulsion the elements indicated in the Directive are taken into account.

- Expulsion of permanent residents (Article 28(2))

Article 20(6) (transposing Article 28(2) of the Directive provides that an expulsion decision against Union citizens or their family members, irrespective of nationality, who have the right of permanent residence on its territory, is only possible on serious grounds of public policy or public security).

The transposing Decree refers to a wider range of grounds as compared to the Directive, namely:
- State security;
- imperative public security;
- other serious public order or public security grounds.

As derived from the structure of the Italian provisions, State security is considered a serious public policy/public security ground. However, as explained in the analysis of Article 27(1) the scope of state security covers almost “everything” so transposition is considered incorrect. There is no such thing as the qualification of seriousness in the Italian transposition in practice.

- Expulsion of people residing for 10 years and minors

Article 28(3) of the Directive on restrictions concerning expulsion measures taken against particular persons has been transposed by new Article 20.7 D.Lgs n.30/07 as replaced by Article 1.1 c) D.Lgs n.32/08. Transposition is incorrect. The Directive only refers to “imperative grounds of public security”, while the transposing Decree also refers to “state security” grounds putting an “OR”, so a choice between state security and imperative public security grounds, that the Directive does not leave. From the literal point of view this represents an incorrectness itself (in this regard the Italian provision might seem to be more stringent). This means that Italy might expel e.g., a person residing for 10 years in Italy even only on state security grounds which, however, cover a broad range of circumstances.

Paragraph 3 of new Article 20 defines imperative public security grounds.

The Italian provision does not refer to “murder” as a ground of expulsion (that would not be to consider as “imperative ground”): it says that “the expulsion decision is issued (if relevant) taking into account possible convictions (for “old”/previous committed crimes) given by an Italian or foreign/alien judge for one or more non culpable offence […]” (so not the criminal conviction itself).

What is relevant for an expulsion decision to be taken in this context is that the “conduct of the person concerned” has to represent” a concrete, real and serious threat to the fundamental right of the person
or to the public safety [...]”. This is in line with the ECJ settled case law. On the other hand, this condition should apply to all expulsion decisions on public policy and public security grounds, and not apply to decisions taken on imperative grounds.

However, the definition also specifies that the expulsion (on imperative public security grounds) is “urgent because the stay of the person concerned in the territory is incompatible with the “civil and safe coexistence”. This last sentence is again broad and generic and quite a number of circumstances may be included; in principle even robbery or rape may be considered as an imperative ground for expulsion.

Moreover, past convictions issued by an Italian or foreign judge are also taken into account as an element to decide on an expulsion:
- convictions for one or more non culpable offences, attempted or consummated, against the life/ personal safety of a person, or
- for one or more offences that correspond to the ones referred to in Article 8 of Law n. 69/2005 (so basically participating in an association having the objective of committing crimes, do acts of threat against public safety…)
- of possible cases of sentences’ enforcement upon request, according to Article 444 of CPP (plea bargain. This is a conviction judgment – the proceeding has been however shortened under certain circumstances);
- or the belonging to one of the categories referred to in Article 1 of Law n. 1423/1956 on measures against persons dangerous to public security and morality (crimes consisting of offences to physical and moral integrity of minors, and public security, and public health, safety or tranquillity
- or referred to in Article 1 of Law n. n. 575/1965 namely to persons suspected to belong to mafia or similar organisations
- as well as prevention measures given by foreign authorities or expulsion measures given by foreign authorities.

As per transposition of Article 27(1), the Italian legislation refers to a series of crimes that are not all reasonable to consider so “important”- “imperative”- to be able to justify an expulsion decision. For instance the crimes indicated in Article 1 Law n. 1423/1956.

The situation is therefore again ambiguous, intricate and not straight forward to assess. It is the expert’s opinion for all the above that the transposition is incorrect because they are disproportionate.

Fianlly, the transposing Decree contains a provision saying that “The expulsion decision on State security and imperative public security grounds is immediately executed by the Questore and the provisions of Article 13.5bis of Legislative Decree of 25 July 1998, n. 286 apply.

According to Article 13.5bis of Legislative Decree n. 286/1998, the enforcement of the expulsion measure is suspended until the decision validating of the judge. The person concerned is kept in Detention centres for immigrants (centri di permanenza temporanea). After the validation of the measure concerning the accompanying to the border becomes executive. The person concerned may appeal the measure of validation before the court of cassation; so there is a certain procedural guarantee that is recognised although the fact of being kept in the mentioned centres represents a privation of the liberty of the person concerned. This provision is therefore not in compliance with the scope of the Directive. (Bear in mind that in the hearing of validation of the judge (giudice di pace) always assess the legitimacy of the requirements for the expulsion.)

24 See e.g., C-493/01 Orfanopoulos par. 67 […] the existence of a previous criminal conviction can justify an expulsion only in so far as the circumstances which gave rise to that conviction are evidence of personal conduct constituting a present threat […]. The same is stated in Case C-50/60 Commission v Netherlands, par 41, and others (Case C-384/96 Califa.).
Law Decree 92/08 as converted with amendments by Law n. 125/2008 has changed the names of the Detention centres for the immigrants (centri di permanenza temporanea e assistenza). They are now called “centro di identificazione ed espulsione”, that is “Identification and expulsion centres”. This does not change the assessment since in any case they represent a privation of the liberty of the person concerned.

2.7.2 Public health (Article 29)

Although the ground of public health justifying an expulsion measure against a Union citizen is never mentioned in the main provisions providing for the restriction of the rights of entry and of residence (i.e., Article 27(1), 31(1), 31(2) of the Directive), new Article 20.8 of D.Lgs n.30/07 almost literally transposes Article 29(1) of the Directive in line with this provision, the D. Lgs. N. 30/07 defines diseases justifying measures restricting freedom of movement as to the diseases with epidemic potential as defined by the relevant instruments of the World Health Organisation and other infectious diseases or contagious parasitic diseases if they are the subject of protection provisions applying to nationals of the host Member State.

The transposing Decree refers to “diseases” and also to illnesses/infirmities. This, however, cannot be considered as a problem because according to the dictionary “infirmity” is defined as a disease (person who is ill); moreover the Italian provision specifies, as the Directive, that those diseases and illnesses are those defined by the World Health Organisation and that therefore have an “epidemic potential”.

As regards Article 29(2) of the Directive on the diseases occurring after the arrival in the host Member State, new Article 20.8 D.Lgs n.30/07 as replaced by Article 1.1 c) D.Lgs n. 32/08 effectively transposes the Directive’s provision and is more favourable diseases occurring even before the three-month period from the date of arrival, cannot constitute a ground for expulsion from the territory.

Italy has not used the possibility of Article 29(3) to require a medical examination. In this regard there is therefore a gap in the Italian legislation.

2.7.3 (Article 33)

There are no specific transposing provisions with regard to Article 33(1) and (2) providing that an expulsion order may not be issued automatically as a penalty or legal consequence of a custodial penalty.

2.8 Procedural safeguards against decisions restricting free movement (Article 15, and Articles 30-31)

Articles 30-31 of the Directive includes a range of procedural guarantees that need to respected in the application of expulsion measures as well as in the adoption of decisions to restrict free movement not based on public order, public security and public health (Article 15 RD 240/2007).

2.8.1 Notifications of the decisions (Article 31)

New Article 20.9, 20.17 and 20.10 of D.Lgs n.30/07 as replaced by Article 1.1 c) D.Lgs n.32/08 effectively transpose Article 30(1) of the Directive providing that persons shall be notified in writing, in such a way that they are able to comprehend the decision pronouncing the loss of right of free
movement; the wording used is different but the substance of the Italian provision corresponds to the one of the Directive.

- Article 20.9 of D.Lgs n.30/07 refers to the subjects that have the power to adopt the expulsion measures (the Ministry of Interior adopts the expulsion measures based on imperative public security grounds of the persons referred to in par. 7 and it also adopts the expulsion measures based on public order or security of the State grounds. In the other cases, the expulsion measures are adopted by the Prefetto of the place of residence or dimora/address of the person concerned;
- Art 20.17 says that expulsion measures referred to in the Article are adopted taking also into account the grounded recommendations of the Major;
- Finally, Article 20.10 accurately explains the requirements concerning the expulsion measures, in particular the translation and the requirement to notify the expulsion measure.

From the practical point of view, lawyers working on a daily basis on these issues, namely on expulsion of foreign nationals, have reported that the expulsion measure and all procedural documents are always translated or a translator is always present even when the person concerned understands Italian very well. This is an important guarantee.

Article 30(2) of the Directive provides that the persons concerned shall be informed, precisely and in full, of the public policy, public security or public health grounds on which the decision taken in their case is based, unless this is contrary to the interests of state security. This provision has been incorrectly and incompletely transposed by the new Article 20.10 of D.Lgs n. 30/07\(^\text{26}\) since the national provision fails to specify that the grounds shall be precise and explained in full. This represents a gap, and at the same time an issue of incorrect transposition of the provision. General Administrative law does not ensure the same level of protection as the Directive.

Also Article 30(3) has been incorrectly transposed by the new Article 20.10 of D.Lgs n. 30/07 as replaced by Article 1.1 c) D.Lgs n.32/08. As a general comment, the Directive has a more uniform structure as compared to the transposing provision. Regarding the incorrectness in the new Article 20.10 of D.Lgs n. 30/07 “the time limit for the appeal” is not mentioned; these, however, are included in general administrative procedural law. Precisely, according to the common practice all measures must indicate a time limit since the lack of this is considered as a breach of the right of defence.

Moreover, while the Directive refers to any expulsion decision, the transposing Decree recalling par. 11 of Article 20, only refers to expulsions that are immediately enforced (in the case of State security or imperative public security grounds). Therefore, the provision requiring the time allowed for the person to leave the territory of the Member State is obviously not inserted. The time limit “no less than a month and 10 days for urgent [...]” are foreseen for measures other than the ones referred to in par. 11 of Article 20. In this sense the Italian provision appears to be incorrect since Italy seems to require less condition to take an immediate expulsion decision: the Directive says “duly substantiated cases of urgency” while the Italian Decree refers simply to “case of State security or imperative public security grounds”.

New Article 20-bis as replaced by Article 1(1) d) D.Lgs n.32/08 is introduced in this chapter since the provision concerns some general principles relating to the expulsion measures taken in the cases referred to in Article 20 of the Decree that are not considered by the Directive. In particular, Article 20-bis sets several procedural rules by referring to the provisions of D.Lgs n. 286/98 that will apply when the expulsion measure of a person who is subject to a criminal proceeding is based on:
- State security
- imperative public security grounds

\(^{26}\) As replaced by Article 1.1 c) D.Lgs n.32/08.
2.8.2 Procedural safeguards

As regard Article 31(1) of the Directive providing the right of access to judicial and where appropriate administrative redress procedures, it has been transposed by new Article 22.1 and 22.2 D.Lgs n.30/07 as replaced by Article 1.1 e) D.Lgs n.32/08. The transposing provisions, as they are structured, do not refer to “public health” grounds; therefore they seem not to allow the possibility of appeal on public health grounds. This is because in Italy expulsions on grounds of public health do not seem to be possible.

The Italian Decree also specifies that the TAR (Administrative jurisdiction) has the competence for the appeal against the expulsion measure taken for grounds referred to in Article 20.1 and 20.2 based on grounds of State security and public order. The ordinary court (monocratic composition) has the competence for the appeal against the expulsion measure based on public security, imperative public security and on Article 21’s grounds. According to the same national provision the decision must be appealed within 20 days from the notification. Finally, (par. 3 of the Article 22) says that the appeal might also be brought before an Italian diplomatic or consular representation.

Article 31(2) providing the possibility to apply for an interim order to suspend enforcement of the decision restricting the right of free movement, has been transposed by new Article 22.4 of D.Lgs n. 30/07 as replaced by Article 1.1 e) D.Lgs n. 32/08. The provision only refers to expulsion decisions taken on the grounds of public policy and public security but it does not cover decisions taken on other grounds such as those included in Article 15 of the Directive. Therefore transposition is incomplete.

Finally, state security grounds that are referred to in the Italian provision are also terrorist activities. So, although the Directive only refers to “imperative grounds of public security”, it would seem reasonable to consider terrorism as “imperative grounds”. In this case no conformity problem would occur.

There are no specific transposing provision concerning Article 31(3) about the obligation to guarantee that the redress procedures shall allow for an examination of the legality of the decision, as well as of the facts and circumstances on which the proposed measure is based and that they shall ensure that the decision is not disproportionate, particularly in view of the requirements laid down in Article 28; however, in this case it seems possible to apply the general principles in matter of the redress procedures (contained in the Civil Procedural Code) that allows the examination of the legality of the decision, as well as the facts and circumstances on which the proposed measure is based.

Paragraph 5 of Article 20-bis sets a derogation from the provisions concerning the ban on re-entry in the territory, since it provides that the person concerned with the expulsion measure, who is subject to a criminal proceeding or offended party in the same proceeding, may be authorised to enter the territory of the State, after the enforcement of the measure, for the time that is strictly necessary to exercise the right of defence, and on the only purpose to participate to the judgment or to do acts for which his/her presence is necessary. Unless the presence of the interested party may cause serious disturbance/troubles or serious danger to the public order or public security. For Article 20-ter the ordinary court composed of one judge (monocratic) shall be competent for the validation of the measures given by the questore according to Articles 20 and 20-bis.

2.8.3 Exclusion orders (Article 32)

Article 32(1) on the possibility to submit an application for lifting of the exclusion order after a reasonable period is more stringent since the limit of “at least half of the duration of the ban” is not imposed by the Directive which refers to a change in circumstances that could occur before that half elapsed.
New Article 20.13 of D.Lgs n. 30/07 correctly transposes the second indent of the provision since it declares that the Authority that takes the expulsion measure shall reach a decision on this application within six months from its submission.

Also Article 32(2) providing that the persons applying for lifting of their exclusion order shall have no right of entry to the territory of the Member State concerned while their application is being considered, has been almost literally transposed by new Article 20.13 of D.Lgs n.30/07 as replaced by Article 1.1 c) D.Lgs n.32/08.

2.9 Final provisions (Chapter VII)

2.9.1 Publicity (Article 34)

Article 34 is a discretionary provision concerning the obligation of the MS to disseminate information concerning the rights and obligations of Union citizens and their family members on the subjects covered by this Directive. Article 25 of D.Lgs n.30/07 only refers to the obligation for the competent authorities to disseminate through their internet websites the content of this decree. This has been done through the website of the Ministry of Internal Affairs (http://www.interno.it/mininterno/export/sites/default/it/temi/immigrazione/). This can be considered as sufficient to transpose the present provision.

The press has also given a certain emphasis to the subject matter of the Directive mostly after the murder of a woman in Rome on 30 October 2007, killed by a Romanian citizen. This fact has provoked important reactions that have also induced the Government to adopt different Law Decrees (as explained in the introductory part of par. 2 to this Report).

There are then different intern sites that deal with the topics covered by the Directive, as for example http://www.meltingpot.org/. This website published and publishes the relevant legislation in force, the Circulars and various comments on the legislation.

2.9.2 Abuse of rights (Article 35)

There is no specific transposing provision in regard to Article 35 of the Directive.

In this regard, there is a project of Law that has been discussed at the Italian Council of Ministers on 21 May 2008 and that intends to change the provision on marriages of convenience amending Article 5 Law 91/1992. If this act is finally adopted, it will be more difficult to obtain the Italian nationality by marriage.

2.9.3 Sanctions (Article 36)

In Italy there are several provisions dealing with sanctions; in particular those sanctions are provided against a breach of a ban on entry:

- New Article 20.12 of D.Lgs n.30/07 deals with expulsion in case the person concerned with the expulsion decision that needed to be immediately enforced, remains in the territory of the State;
- New Article 21.4 of D.Lgs n.30/07 deals with sanctions in case the person concerned is expelled but located in the territory of the State for longer than what provided for in the expulsion measure, without having produced the certificate referred to in paragraph 3 (Together with the expulsion decision the person concerned is given a certificate concerning the obligation to fulfil the expulsion, according to the procedures set by a decree of the Ministries of Internal and External Affairs; the mentioned certificate shall be produced with an Italian Consulate.
- New Article 20.14 of D.Lgs n.30/07 deals with sanction in case the person concerned with the expulsion decision enters in the national territory breaching the ban of entry;
- New Article 20.15 of D.Lgs n.30/07 deals with sanctions in case the person concerned with the expulsion decision breached the expulsion order given according to paragraph 14 second indent.

2.9.4 More favourable provisions (Article 37)

Article 37 is a discretionary provision stating that the provisions of this Directive shall not affect any laws, regulations or administrative provisions laid down by a Member State which would be more favourable to the persons covered by this Directive. The provision has been transposed by Article 23 of D.Lgs n.30/07 that simply says that its provisions shall apply if more favourable as compared to other existing provisions.

2.9.5 Transposition (Article 40)

Transposition of the Directive was almost one year late (date set by the Directive: 30 April 2006). D.Lgs n.30/07 entered into force on 11 April 2007, while the last adopted Legislative Decree n. 32 of 2008, entered into force on 2 March 2008.

3 Recent developments

3.1. Law Decree 23 May 2008, n. 92 on Urgent public security measures as converted with amendments into a Law (Law 125/2008)

Most of the provisions included in the Decree Law (as amended by Law n. 125/2008) do not specifically affect EU citizens or their family members. However there are some provisions that may have a significant impact on them. These are: the amendments to Article 235, 312 and 61 of the Criminal Code; Article 416 bis, 495 and 495 bis of the Criminal Code in relation to the amendments to Articles 235 and 312 of the Criminal code; and to a lesser extent (because the non suspension of the expulsion decision was already largely possible under the current legislation) Article 656 para 9 a) of the criminal procedural code and Article 54 par. 5 bis of Legislative Decree n. 267/00 since it widens the competences of the Mayors.

On 24 of July 2008 Law Decree n. 92/2008 has been converted into a Law by Law n. 125/2008 that is in force as of 26 of July 2008.

Article 1. 
Modifiche al codice penale

1. Al codice penale sono apportate le seguenti modificazioni:
   a) l'articolo 235 e' sostituito dal seguente:

   «Article 235 (Espulsione od allontanamento dello straniero dallo Stato). - Il giudice ordina l'espulsione dello straniero ovvero l'allontanamento dal territorio dello Stato del cittadino appartenente ad uno Stato membro dell'Unione europea, oltre che nei casi espressamente preveduti dalla legge, quando lo straniero o il cittadino appartenente ad uno Stato membro dell'Unione europea sia condannato alla reclusione per un tempo superiore ai due anni.

   Il trasgressore dell'ordine di espulsione od allontanamento pronunciato dal giudice e' punito con la reclusione da uno a quattro anni. In tal caso e' obbligatorio l'arresto dell'autore del fatto, anche
The recent reform has modified the Criminal code (Article 235 and 312) to include EU citizens.

The new Article 235 implies that any EU citizen convicted for more than 2 years of prison will be expelled of the territory of Italy.

It would also be against D. Lgs. N. 30/07, which imposes an assessment of the circumstance. But since Article 33 has not been transposed, the transposition, albeit soft, of Article 27 does not apply to the Criminal Code.

The new Article 312 implies that any EU citizen convicted for crimes against the personality of the State and punished with a penalty involving restrictions of freedom (therefore, not only imprisonment) can also be expelled. These crimes are included in the Second Book, Title I of the Criminal code and are listed below (Article 241-313):

- Art 241 Attack against the integrity, independence and unity of the State
- Article 242 Military revolt against the State
- Art.243Spying on the State
- Art 244 Hostility activities against a third country which may exposed Italy to danger of war
- Art 245 Spying for a foreign State to induce Italy to war or neutrality
- Art 246 Corruption of a national by a foreigner
- Art 247 Collaboration in a time of war
- Art 248 Supply of material to the enemy
- Art 249 Participation to a loaning to the enemy
- Art 250 Deal with the enemy
- Art 251 Non observance of supply contracts in a time of war
- Art 252 Fraudulous supply in a time of war
- Art 253 Destruction or sabotage of military facilities
- Art 254 Unintentional facilitation
- Art 255 Destruction, falsification and subtraction of acts and documents related to national security
- Art 256 Obtainment of information concerning national security
- Art 257 Political and military espionage
- Art 258 Spying of restricted information
- Art 259 Unintentional facilitation of the criminal offences foreseen in articles 255, 256, 257 and 258
- Art 260 Illegal intrusion in military premises and unjustified possession of means of spying
- Art 261 Revelation of State secrets
- Art 262 Revelation of restricted information
- Art 263 Use of State secrets
- Art 264 Treason in state affairs
- Art 265 Political defeatism
- Art 266 Incitement of military forces to disobey the law
- Art 267 Economic defeatism
• Art 268 Application of articles 247 and following to allied States
• Art 270 Subversive association
• Art 270-bis Association for terrorist purposes, including international terrorism, or for the subversion of the democratic order
• Art 270-ter Support to associations within the meaning of articles 270 and 270-bis
• Art 270-quarter Enrolment with terrorist purposes, including international terrorism
• Art 270-quinquies Provision of training with terrorist purposes, including international terrorism
• Art 270 sexies Behaviour with terrorist intentions
• Art 271 Antinational associations

CHAPTER II

Offences against the internal person of the State
• Art 276 Attempt against the President of the Republic
• Art 277 Offence against the freedom of the President of the Republic
• Art 278 Offence against the honour and status of the President of the Republic
• Art 280 Attempt with terrorist or subversion purposes
• Art 280-bis Act of terrorism with the use of lethal and explosive weaponry
• Art 283 Attempt against the Constitution of the State
• Art 284 Armed insurrection against the State authorities
• Art 285 Destruction, looting and slaughtering
• Art 286 Civil war
• Art 287 Usurpation of political or military authority
• Art 288 Unauthorised enrolment or military equipment to the benefit of a foreign State
• Art 289 Attempt against constitutional institutions and against regional assemblies
• Art 289-bis Sequestration of persons of terrorist or subversion purposes
• Art 290 Vilification of the Republic, the constitutional Institutions and the armed forces
• Art 290-bis Application mutatis mutandis of articles 276 to 279 and 289 to the President of the Republic
• Art 291 Vilification of the Italian nation
• Art 292 Vilification of or damage to the flag or any other symbol of the State

CHAPTER III

Offences against the political rights of the citizen
• Art 294 Attempt against the political rights of the citizen

CHAPTER IV

Offences against foreign States, their Heads and their representatives
• Art 295 Attempt against the Heads of foreign States
• Art 296 Offence against the freedom of the Heads of foreign States
• Art 299 Offence against the flag or any other symbol of a foreign State
• Art 300 Conditions of reciprocity

CHAPTER V

General provisions and common to previous chapters
• Art 301 Joint offences
• Art 302 Incitation to commit offences provided for in chapter I and II
• Art 304 Political conspiracy by means of agreement
• Art 305 Political conspiracy by means of association
• Art 306 Armed groups: constitution and participation
• Art 307 Assistance to participants to conspiracy or armed groups
• Art 308 Conspiracy: cases of non punishment
• Art 309 Armed groups: cases of non punishment
• Art 310 Time of war
• Art 311 Mitigating circumstances: leniency
• Article 312 Expulsion of the foreign national from the State
• Art 313 Authorisation to proceed or request to proceed

These two provisions establish an automatic expulsion for cases where an EU citizen is condemned with a penalty of more than 2 years of prison (or restriction of freedom for 1-4 years in the case of crimes against the State). These provisions are thus establishing an automatic expulsion which is in conflict with the Directive (Article 27 and 33) and the ECJ ruling in Calfa and Commission v Netherlands).

The amended provision specifies that the expulsion of the foreigner (non EU national) is made according to Article 13.4 of the Immigration Act (“the expulsion is always executed by Questore by
accompanying the person concerned to the border by the police […]”), while the expulsion of EU citizens is made according to Article 20.11 of Legislative Decree 30/07. This latter provision says that the expulsion decision […] is immediately executed by the Questore and that the provisions of Article 13.5bis27 of Legislative Decree of 25 July 1998, n. 286 shall apply. So, in this case there is an express reference to the Immigration Act that specifies, in Article 13(5)bis, that the enforcement of the questore’s expulsion measure is suspended until the decision of the judge validating the decision is taken. Moreover, pending the definition of the procedure on validation, the foreigner (in this case EU citizens also) is kept in Detention centres for the immigrants (centri di permanenza temporanea) except when the procedure can be carried out in the place where the expulsion was adopted even before moving to an available centre. When the validation is given, the measure to accompany to the border becomes enforceable. According to the same provision (Article 13.4), the person concerned may appeal the measure of validation before the court of cassation.

Considering this, the two provisions of the CP (new Article 235 and 312 of the CP) may not comply with Article 30(3) of the Directive. Under that provision the time to leave the country should not be less than a month (save in duly substantiated cases of emergency). In this case Article 312 may be creating a rule for immediate enforcement of one expulsion decision. In fact, the expulsion order has been issued by the Judge. Therefore the validation that the questore needs in order to enforce the expulsion could be considered as already given. Since there is a risk that the expulsion decision will be executed immediately.

Moreover, the fact of being kept in a detention centre represents a restriction of the liberty of the person concerned who is treated as any other foreigner which would not seem in line with the spirit of the Directive.

The last sentence of the two provisions rendering compulsory the arrest and the initiation of the giudizio direttissimo (sort of summary procedure) even outside of cases of flagrancy, of the person breaching an order of expulsion (given by a judge) […] may be considered “reasonable” as such since Article 30(3) of the Directive gives at least one month to leave the territory “Save in duly substantiated cases of urgency”. The fact of not complying with an order of expulsion given by a judge may be considered as a “case of urgency”.

«b-bis) all’articolo 416-bis, sono apportate le seguenti modificazioni:
1) al primo comma, le parole: «da cinque a dieci anni» sono sostituite dalle seguenti:

27 Article 13.5 5 bis. In the cases identified in paragraphs 4* and 5* the chief of police shall notify the judge of peace (giudice di pace) with territorial jurisdiction of the order to accompany the foreign citizen to the border immediately, and in all cases within forty-eight hours of giving the order. Execution of the chief of police’s order to leave national territory shall be suspended until a decision is passed validating the order. The validation hearing shall be held in the council chambers, with the essential participation of a defence attorney, who shall be notified in sufficient time. The person involved shall likewise be notified in sufficient time and accompanied to the place where the hearing is held. The provisions of the sixth and seventh sentences of paragraph 8 shall apply where compatible. The judge shall validate the order with motivation within forty-eight hours, having checked compliance with the deadlines and the existence of the requirements stated under this Article and consulted the person concerned, if this person appears in court. While awaiting conclusion of the validation procedure, the expelled foreign citizen shall be detained in facilities for temporary accommodation and assistance as stated in Article 14, unless the proceedings may be completed in the place in which the expulsion order was adopted prior to transfer to one of the available facilities. If validation is granted, the order to accompany the foreign citizen to the border shall become enforceable. If validation is not granted or the deadline for decision is not met, the order issued by the chief of police shall become entirely ineffective. The validation order may be appealed in the court of cassation. The appeal shall not suspend execution of expulsion from national territory. The forty-eight hour deadline within which the justice of the peace must validate the order is calculated from the time at which the order is served to the office of the clerk.

* PAR 4 Expulsion is always performed by the chief of police with accompaniment to the border by the police except in the cases identified in paragraph 5.

* PAR 5 In the case of foreign citizens who remain in the territory of the State when their permit to stay expired more than sixty days previously without requesting renewal, the expulsion order contains an order to leave the territory of the State within fifteen days. The chief of police shall immediately accompany the foreign citizen to the border if the prefect finds that there is clear danger that the person will not obey the order.
Article 416-bis of the CP concerns mafia type of associations. The amendment adds that mafia type of associations may also be “aliens” associations, that is associations created and with Alien membership.

The amendment then increases the various penalties foreseen by Article 416bis.

These amendments may in principle do not affect EU citizens and their family members in a different way as it would affect Italians. The inclusion of aliens’s type of mafia organisations in itself is not aimed at having a specific impact on EU citizens or their family members. It is motivated by the “seriousness” of the crime/activity carried out by these type of associations and probably the reform covered a loophole in the current legislation. The increase of the penalties is because of the committed crime that is considered as particularly “serious”.

No discrimination is made between Italian or foreigner’s associations; the penalties will be the same.

However, in those cases where the person is condemned with more than 2 years prison, as a consequence of the application of Article 235 mentioned above, the penalty will be expulsion. So, under this point, the provision may affect EU citizens.

b-ter) l’articolo 495 e’ sostituito dal seguente:

«Article 495 (Falsa attestazione o dichiarazione a un pubblico ufficiale sulla identita’ o su qualita’ personali proprie o di altri). - Chiunque dichiara o attesta falsamente al pubblico ufficiale l'identita', lo stato o altre qualita' della propria o dell'altrui persona e' punito con la reclusione da uno a sei anni. La reclusione non e' inferiore a due anni: 1) se si tratta di dichiarazioni in atti dello stato civile; 2) se la falsa dichiarazione sulla propria identita', sul proprio stato o sulle proprie qualita' personali e' resa all'autorita' giudiziaria da un imputato o da una persona sottoposta ad indagini, ovvero se, per effetto della falsa dichiarazione, nel casellario giudiziale una decisione penale viene iscritta sotto falso nome»;

This provision is on fake certificate/attestation or statement to a public official on own or other’s identity or personal qualities.

The amendment does not affect EU citizens and their family members in a different way as it would affect Italians.

The only different effect will derive as a consequence of the application of Article 235 according to which any person sentenced to more than 2 years of prison will be expelled. Therefore, when an EU citizen is condemned for the crime described in new Article 495 for more than 2 years of prison, he/she will be expelled. However, this is not a consequence of the amendment of Article 495 of the Criminal Code but a consequence of the amendment of Article 235 above. There are many other crimes in Italy that can be subject to a 2 years imprisonment penalty.

It should be noted that according to Article 35 of the Directive Member States are allowed to adopt measures against fraud. Expulsion may be considered as a measure complying with this provision of the Directive (Article 35 says “the necessary measures to refuse, terminate or withdraw any right
conferred by this Directive”). However, the application of Article 235 of the CP would imply that the measure taken by the MS can be **automatic** expulsion which therefore does not take into consideration the procedural safeguards provided for in Articles 30 and 31 that are required by Article 35 of the Directive.

**b-quater) dopo l'articolo 495-bis, e' inserito il seguente:**

«Article 495-ter (Fraudolente alterazioni per impedire l'identificazione o l'accertamento di qualita' personali). - Chiunque, al fine di impedire la propria o altrui identificazione, altera parti del proprio o dell'altrui corpo utili per consentire l'accertamento di identita' o di altre qualita' personali, e' punito con la reclusione da uno a sei anni.

Il fatto e' aggravato se commesso nell'esercizio di una professione sanitaria»;

This new provision is on fraudulent alterations to prevent the identification or the verification of personal qualities/situations. Same comment as above.

**b-quinquies) l'articolo 496 e' sostituito dal seguente:**

«Article 496 (False dichiarazioni sulla identita' o su qualita' personali proprie o di altri). - Chiunque, fuori dei casi indicati negli articoli precedenti, interrogato sulla identita', sullo stato o su altre qualita' della propria o dell'altrui persona, fa mendaci dichiarazioni a un pubblico ufficiale o a persona incaricata di un pubblico servizio, nell'esercizio delle funzioni o del servizio, e' punito con la reclusione da uno a cinque anni».

Article 496 is on false statements on the identity or on own or other’s personal qualities/situations. Same comment as above.

**«b-sexies) all'articolo 576, primo comma, e' aggiunto il seguente numero:**

"5-bis) contro un ufficiale o agente di polizia giudiziaria, ovvero un ufficiale o agente di pubblica sicurezza, nell'atto o a causa dell'adempimento delle funzioni o del servizio"».

Article 576 is on aggravating circumstances and Life imprisonment. The amendment adds a new paragraph to paragraph 1. If the fact is committed against an officer or judicial police officer or an officer or agent of public security, while or by reason of carrying out his/her duties or service. This amendment does not affect EU citizens and their family members in a different way as it would affect Italians.

**c) all'articolo 589 sono apportate le seguenti modificazioni:**

1) al secondo comma, la parola: «cinque» e' sostituita dalla seguente: «sette»;
2) dopo il secondo comma, e' inserito il seguente:

«Si applica la pena della reclusione da tre a dieci anni se il fatto e' commesso con violazione delle norme sulla disciplina della circolazione stradale da:

1) soggetto in stato di ebbrezza alcolica ai sensi dell'articolo 186, comma 2, lettera c), del decreto legislativo 30 aprile 1992, n. 285, e successive modificazioni;
2) soggetto sotto l'effetto di sostanze stupefacenti o psicotrope.»;
3) al terzo comma, le parole: «anni dodici» sono sostituite dalle seguenti: «anni quindici»;

Article 589 of the Criminal Code regulates the crime of homicide. The amendment is simply increases the penalty from 5 to 7 years and from 12 to 15 years. The most important modifications concern the inclusion of the commission of a homicide while driving under the effects of alcohol or drugs as aggravating circumstances. These measures are part of the efforts to reduce mortality in car accidents. Therefore, these amendments do not affect EU citizens and their family members in a different way as it would affect Italians.
The only different effect will derive as a consequence of the application of new Article 235 mentioned above according to which any person sentenced to more than 2 years of prison will be expelled. Therefore, when a EU citizen causes somebody’s death as a consequence of driving under the effects of drugs and alcohol, if the person is condemned for more than 2 years of prison, he/she will be expelled. However, this is not a consequence of the amendment of Article 589 of the Criminal Code but a consequence of the amendment of Article 235 above. There are many other crimes in Italy that can be subject to a 2 year imprisonment penalty.

c-bis) all’articolo 157, sesto comma, le parole: «589, secondo e terzo comma», sono sostituite dalle seguenti: «589, secondo, terzo e quarto comma».

Article 157 is on prescription and on time necessary to prescribe a crime (time-based crimes). The amendment only adds the reference to another paragraph of another provision (Article 589 of the CP) regulating the crime of homicide. In particular, according to par. 6 of Article 157, the terms for the prescription of the crime are doubled for crimes referred to in […] art 589 par. 2, 3 &4 CP so ………if the fact is committed breaching the rules governing road [circolazione stradale] or those for the prevention of accidents at work, or in the case of death of several persons, or the death of one or more persons and injury of one or more persons.

As explained above, these measures are part of the efforts to reduce mortality in car accidents. Therefore, these amendments do not affect EU citizens and their family members in a different way as it would affect Italians.

d) al terzo comma dell’articolo 590, e’ aggiunto il seguente periodo:
«Nei casi di violazione delle norme sulla circolazione stradale, se il fatto e’ commesso da soggetto in stato di ebbrezza alcolica ai sensi dell’articolo 186, comma 2, lettera c), del decreto legislativo 30 aprile 1992, n. 285, e successive modificazioni, ovvero da soggetto sotto l’effetto di sostanze stupefacenti o psicotrope, la pena per le lesioni gravi e’ della reclusione da sei mesi a due anni e la pena per le lesioni gravissime e’ della reclusione da un anno e sei mesi a quattro anni»;

Article 590 of the Criminal Code regulates the crime of body harm (lesione). This amendment is as the case of amendment to Article 589, to include harm caused by driving under the effects of alcohol or under the effects of drugs. The penalties are from 6 months to 2 years or for very serious cases from 1 year to 4 years. These amendments do not affect EU citizens and their family members in a different way than it would affect Italians.

The only different effect will derive as a consequence of the application of the new Article 235 mentioned above according to which any person sentenced to more than 2 years of prison will be expelled. Therefore, when a EU citizens harms somebody as a consequence of driving under the effects of drugs and alcohol, if the person is condemned for more than 2 years prison, he/she will be expelled. However, this is not a consequence of the amendment of Article 589 of the Criminal Code but a consequence of the amendment of Article 235 above. There are many other crimes in Italy that can be subject to a 2 year imprisonment penalty.

e) dopo l’articolo 590 e’ inserito il seguente:
«Article 590-bis (Computo delle circostanze). - Quando ricorre la circostanza di cui all’articolo 589, terzo comma, ovvero quella di cui all’articolo 590, terzo comma, ultimo periodo, le concorrenti circostanze attenuanti, diverse da quelle previste dagli articoli 98 e 114, non possono essere ritenute equivalenti o prevalenti rispetto a queste e le diminuzioni si operano sulla quantità’ di pena determinata ai sensi delle predette circostanze aggravanti.»;
This provision does not allow the application of attenuating circumstances other than those listed in Article 98 (having between 14-18 years old) and 114 (persons contributing to the crime but having a minimum influence in the result) of the Criminal Code in cases of death and harm committed as a consequence of driving under the effects of alcohols or drugs. These amendments do not affect EU citizens and their family members in a different way as it would affect Italians.

f) all'articolo 61, primo comma, dopo il numero 11 e' aggiunto il seguente:
«11-bis. l'avere il colpevole commesso il fatto mentre si trova illegalmente sul territorio nazionale.»

This is a problematic provision. In principle it creates an aggravating circumstance for persons committing a crime who are illegally in the territory of Italy. This provision can have a significant impact on EU citizens and their family members and could be considered as discriminatory and disproportionate.

Apart from that, an initial problem with the provision is the philosophy behind it. An aggravating circumstance always implies an element or factor that is considered particularly repellent and external to the actus reus or guilty conduct; the mens rea or guilty mental state. Adding the unlawfulness of the presence in Italy may already imply that this illegal presence is a threat to public order. In addition, this aggravating circumstance can be considered as external to the personal conduct of the individual concerned and thus as such could be considered contrary to Article 27 of the Directive and ECJ case law (Boucherau, Adoui, Bonsigniore).

Apart from this problem, this aggravating circumstance only applies to foreigners (including EU citizens and third country family members) and as such is discriminatory. Therefore, for similar crimes, Italian citizens may be condemned with a lesser penalty than EU citizens and their family members.

Even if the Member States have certain freedom to impose penalties on EU citizens (and family members) different from those imposed on nationals (see Olazábal), these penalties have to be proportional. This aggravating circumstance may lead to a disproportionate impact, i.e., an automatic expulsion, since it would be easier, as a consequence of the application of the aggravation, that EU citizens or family members are condemned with a penalty of more than 2 years imprisonment. This commendation will lead to the automatic expulsion under Article 235 of the Criminal Code commented above.

For the reasons above the measure is considered as having a discriminatory and disproportional impact on EU citizens and their family members.

Regarding the practical impacts of the aggravating circumstance, the issue remains of what is to be understood as being illegally in the territory of Italy as interpreted in the context of the Legislative Decree 30/2007 transposing Directive 2004/38/EC. As mentioned in the ToC when commenting on Articles 6(2) and 15(2) of the Directive, it is not clear from the text of the Decree the interpretation given to “legally entering” and “legally residing”. The Directive implies that someone meeting the requirements laid down in the Directive are legally in a country but the requirements of the Directive have not always been correctly transposed.

A first problem in the interpretation of “illegal presence in Italy” appears in relation to the “right of entry” (and residence for up to 3 months) and it specifically affects third country family members. Article 6(2) of Legislative Decree 30/2007 which transposes Article 6(2) of the Directive grants the right of residence up to three months to family members who have entered the country in accordance with Article 5(2) of the Legislative Decree. This would imply that they have to enter with a visa if required as well as with a valid passport, creating an additional requirement that it is not foreseen in the Directive which only requires residence for up to 3 months holding a valid passport (see ToC for
more details). This provision may therefore lead to interpret that those entering the country without requesting the necessary visa or without a valid passport will be illegally entering Italy and their situation could therefore be considered as an illegal presence in Italy. The reference to entry in order to have a right of residence for up to 3 months is only made in connection to the right of residence of third country family members and it does not apply to EU citizens. Therefore, it would seem that the legality of entry to the country is conditional on the right to legally reside in Italy for up to 3 months. The contradiction is that this requirement will not apply to family members who join or accompany Union Citizens for more than 3 months. In this case, the right derives from the EU citizen and it would seem that the way the family member entered the territory does not have any impact on the legality of the family member’s situation in Italy. Although Italian authorities could easily apply an a fortiori argument to also require the lawful entry in the country (see below). This would be against the ECJ case Commission v. Spain (C-516103) and Metlock.

Therefore, for family members residing for up to 3 months, the aggravating circumstance could significantly affect them if they commit a crime within those 3 months. The application of the aggravating circumstances would more easily lead to the application of penalties of more than 2 years of prison and thus to the automatic expulsion under Article 235 of the Criminal Code commented above, which can be considered as a disproportionate indirect consequence for having entry unlawfully in the country (see below analysis in the light of MRAX and Metlock).

The second problem is how the provision would be interpreted and would apply to EU citizens and family members residing for more than 3 months in the country. As mentioned above, reference to entry into the country is not made in the case of residence for more than 3 months and thus there is no impact on the legality of the presence of the EU citizen and his/her family member in the country. Registration and the request for a residence card is rightly considered by the authorities as a simply manifestation of the right of residence and the lack of it does not imply that the residence is unlawful or illegal. The residence rights derive from meeting the criteria and not from holding a residence card or registration certificate.

However, the Italian authorities could use an a fortiori argument to consider that the legality of the presence in Italy, regardless of the duration of residence, is also conditional to the lawfulness of the entrance in the territory of the Member State. In addition, if the EU citizen or his/her family member commits a crime, most probably there will be an analysis on whether the conditions for residing in Italy are met. If those conditions are not met, then the residence will probably be considered as illegal (according to Article 21 of the D Legs 30/2007 mentioned above) and thus the aggravating circumstance would apply.

These interpretations would be against the ECJ jurisprudence in MRAX and Jia. In MRAX the ECJ ruled that although a MS could impose proportionate sanctions for violation of entry requirements on a third-country national who was the spouse of an EU worker, the State could not “refuse issue of a residence permit and issue an expulsion order against a third country national who is able to furnish proof of his identity and of his marriage to a national of a MS on the sole ground that he has entered the territory of the MS concerned unlawful”. It can be argued that in light of Akrich and Jia the situation maybe different “if the family member in question was residing unlawfully in a Member State or that she was seeking to evade national immigration legislation illicitly”. In that case, the ECJ may permit a MS to rely on national immigration rules to restrict the rights of a non-EU national family member. However, those restrictions have to be proportionate. This issue has been finally clarified by Metlock.

In addition the provision (i.e., imposing the aggravating circumstance of new Article 61.11bis of the CP) is against the logic of the Metock case28 according to which in case of an illegal presence in the

28 Metock Case - C-127/08. See paragraph 97.
country, Member States can adopt proportionate measures, such as fines; expulsion cannot be considered as a “proportionate” measure.

In this case, an “unlawful or illegal presence” will lead to the application of the aggravating circumstances of Article 61 which would make it easier for the family member, and eventually the EU citizen, to be condemned to a penalty of more than 2 years imprisonment and thus to the automatic expulsion under Article 235 of the Criminal Code commented above. This consequence can be considered a disproportionate sanction for an unlawful presence in the country (regarding the disproportional character of Article 235 of the Criminal Code and its non conformity with the Directive for being an automatic expulsion, please see above comments to Article 235).

This is a likely interpretation of Article 61 in connection with Legislative Decree 30/2007. The doubts raised regarding the interpretation of certain provisions of Legislative Decree 30/2007 would be solved if the legislative decree sent to the Commission, modifying the current Legislative Decree 30/2007 transposing Directive 2004/38 is finally adopted. According to the draft Decree not holding registrations certificate and failure to request a residence card are grounds for expulsion. In addition, the request of these documents are needed on the basis of public order and public security, which will imply that these documents prove that the person is not a threat, or at least comes to Italy with the intention of carrying out a criminal activity. So it would be easier to argue that those residing in Italy without a residence certificate or a residence card are “unlawfully” in Italy which will be in clear violation of the Directive. The Decree also indicates that the analysis of whether the person has sufficient resources will not take into account resources obtained illicitly. This, in principle, is not a problem as such, but if that requirement exists, it will most probably be accompanied by proof of the legality of the resources (which will also be against the Directive).

«f-bis» all’articolo 62-bis, dopo il secondo comma, e’ aggiunto il seguente:
«In ogni caso, l’assenza di precedenti condanne per altri reati a carico del condannato non puo’ essere, per cio’ solo, posta a fondamento della concessione delle circostanze di cui al primo comma.».

Article 62 bis of the CP is on generic mitigating circumstances.

In particular, the judge may consider other circumstances (as compared to the ones referred to in Article 62, e.g., having acted for reasons of particular moral or social value; to have reacted to a state of anger, determined by an unfair fact of others etc.) if they are deemed to be sufficient to justify a reduction of the penalty. The amendments introduce a new paragraph stating that “in any case, the absence of previous convictions for other crimes charged to the offender cannot be, just for this, a basis for granting of the circumstances referred to the first paragraph”.

This amendment therefore does not affect EU citizens and their family members in a different way as it would affect Italians.

**Article 2.**

**Modifiche al codice di procedura penale**

1. Al codice di procedura penale sono apportate le seguenti modificazioni:

As will be explained below, these provisions are mostly expanding the competence to adopt preventive measures, including seizure, and do not affect EU citizens and their family members in a discriminatory way as regard Italian citizens. They are not disproportionate either. It also has to be understood that many of the provisions are amending the legislation to fight against mafia and organised crime. Even though some of the measures might have been adopted as a consequence of the presence of organised crime associations managed by certain Member States national (e.g., Romanians) they do not have a specific or discriminatory impact on them. In addition, these measures
should also be read within the context of the scandal of waste management in the South of Italy which is mainly governed by the Mafia which has nothing to do with Romanian organised crime:

«0a) all'articolo 51:
1) al comma 3-ter, dopo le parole: «Nei casi previsti dal comma 3-bis» sono inserite le seguenti: «e dai commi 3-quater e 3-quinquies»;
2) al comma 3-quater, il secondo periodo e’ soppresso;

Article 51 of the CPP concerns the offices of public prosecutor and in particular the powers of the district prosecutor (procuratore della Repubblica distrettuale). The amendment adds the reference to an additional paragraph to par 3-ter, namely par 3-quater and 3-quinquies.

In general, Article 51 provides who shall exercise the functions/competences of Public Prosecutor, e.g., in the preliminary investigations and in the first instance proceeding the above functions are carried out by the public prosecutors of the district court (pretura); in the appeal proceedings the Public Prosecutor shall be the prosecutor of the general court (procura) at the appeal court or at the court of cassation. When the crimes listed in Article 600, 601, 602, and 630 are committed meeting the conditions of Article 416-bis, (basically by an organised crime organisation), and also for crimes of drug trafficking committed by organised crime, and smuggling by organised crime the Mafia prosecutor is given the power to carry out preliminary investigations in the first instance case and is assigned as the Public Prosecutor (magistratura della procura della Repubblica) at the court competent to solve the case (these are the powers mentioned in 1(a).

When the crimes listed in Article 600-bis (Child Prostitution) 600-ter, (Child Pornography) 600-quater, (Possession of pornographic material). 600-quater.1, 600-quinquies, 615-ter, (abusive Access to a computer system or telematic), 615-quater, 615-quinquies, 617-bis, 617-ter, 617-quater, (Interception, hindrance or interruption of illicit information communications or telematics), 617-quinquies, 617-sexies, 635-bis, 635-ter, 635-quater, 640-ter (Fraud informatics) e 640-quinquies CP are committed, then the function of public prosecutor (in the preliminary hearing and in the first instance proceedings) is carried out by the public prosecutor in the court of the main city of the district in which the competent judge has his/her seat.

This provision therefore does not have any specific impact on EU citizens and their family members.

Ob) all'articolo 328:
1) al comma 1-bis le parole: «comma 3-bis» sono sostituite dalle seguenti: «commi 3-bis e 3-quater»;
2) il comma 1-ter e’ abrogato;
3) e’ aggiunto, in fine, il seguente comma:
1-quater. Quando si tratta di procedimenti per i delitti indicati nell'articolo 51, comma 3-quinquies, le funzioni di giudice per le indagini preliminari e le funzioni di giudice per l'udienza preliminare sono esercitate, salve specifiche disposizioni di legge, da un magistrato del tribunale del capoluogo del distretto nel cui ambito ha sede il giudice competente»;»

Article 328 is about the judge for preliminary investigations (Giudice per le indagini preliminar) describing who will act as a judge for preliminary investigations in different cases according to the crimes that are committed. This provision concerns procedural rules and therefore does not have any specific impact on EU citizens and their family members.

a) all'articolo 260, dopo il comma 3 sono aggiunti i seguenti:
«3-bis. L'autorità giudiziaria procede, altresì, anche su richiesta dell'organo accertatore, alla distruzione delle merci di cui sono comunque vietati la fabbricazione, il possesso, la detenzione o la commercializzazione quando le stesse sono di difficile custodia, ovvero
quando la custodia risulta particolarmente onerosa o pericolosa per la sicurezza, la salute o l'igiene pubblica ovvero quando, anche all'esito di accertamenti compiuti ai sensi dell'articolo 360, risulti evidente la violazione dei predetti divieti. L'autorita' giudiziaria dispone il prelievo di uno o piu' campioni con l'osservanza delle formalita' di cui all'articolo 364 e ordina la distruzione della merce residua.

3-ter. Nei casi di sequestro nei procedimenti a carico di ignoti, la polizia giudiziaria, decorso il termine di tre mesi dalla data di effettuazione del sequestro, puo' procedere alla distruzione delle merci contraffatte sequestrate, previa comunicazione all'autorita' giudiziaria. La distruzione puo' avvenire dopo 15 giorni dalla comunicazione salva diversa decisione dell'autorita' giudiziaria. E' fatta salva la facolta' di conservazione di campioni da utilizzare a fini giudiziari.»;

«a-bis) nella rubrica dell'articolo 260 sono aggiunte le seguenti parole: «. Distruzione di cose sequestrate”».

This provision regulates the seizure of the res delicti and the timeframe to adopt seizure and when needed the destruction of the goods seized. It does not have specific impact on EU citizens or family members.

b) al comma 1 dell'articolo 371-bis, dopo le parole:
«nell'articolo 51, comma 3-bis» sono inserire le seguenti: «in relazione ai procedimenti di prevenzione antimafia»;

Article 51(3-bis): Quando si tratta dei procedimenti per i delitti, consumati o tentati, di cui agli articoli 416, sesto comma, 600, 601, 602, 416-bis e 630 del codice penale, per i delitti commessi avvalendosi delle condizioni previste dal predetto articolo 416-bis ovvero al fine di agevolare l'attività delle associazioni previste dallo stesso articolo, nonché per i delitti previsti dall'articolo 74 del testo unico approvato con decreto del Presidente della Repubblica 9 ottobre 1990, n. 309,29 e dall'articolo 291-quater del testo unico approvato con decreto del Presidente della Repubblica 23 gennaio 1973, n. 4330 le funzioni indicate nel comma 1 lettera a) sono attribuite all'ufficio del pubblico ministero presso il tribunale del capoluogo del distretto nel cui ambito ha sede il giudice competente.

Powers referred to in Article 51(1)(a):
Le funzioni di pubblico ministero sono esercitate:
a) nelle indagini preliminari e nei procedimenti di primo grado, dai magistrati della procura della Repubblica presso il tribunale;
the function of the public prosecutor are to:
a) carry out preliminary investigations in the first instance procedure as well as to exercise the role of Prosecutor of the Republic in the court competent to decide a case.

29 Articolo 74 (Legge 26 giugno 1990, n. 162, articoli 14, comma 1, e 38, comma 2)
Associazione finalizzata al traffico illecito di sostanze stupefacenti o psicotrope
1. Quando tre o più persone si associano allo scopo di commettere più delitti tra quelli previsti dall'articolo 73, chi promuove, costituisce, dirige, organizza o finanzia l'associazione è punito per ciò solo con la reclusione non inferiore a venti anni.
2. Chi partecipa all'associazione è punito con la reclusione non inferiore a dieci anni.
3. La pena è aumentata se il numero degli associati è di dieci o più o se tra i partecipanti vi sono persone dette all'uso di sostanze stupefacenti o psicotrope.
4. Se l'associazione è armata, nei casi indicati dai commi 1 e 3, non può essere inferiore a ventiquattro anni di reclusione e, nel caso previsto dal comma 2, a dodici anni di reclusione. L'associazione si considera armata quando i partecipanti hanno la disponibilità di armi o materie esplodenti, anche se occultate o tenute in luogo di deposito.
5. La pena è aumentata se ricorre la circostanza di cui alla lettera e) del comma 1 dell'articolo 80.
6. Se l'associazione è costituita per commettere i fatti descritti dal comma 5 dell'articolo 416 del codice penale.
7. Le pene previste dai commi da 1 a 6 sono diminuite dalla metà a due terzi per chi si sia efficacemente adoperato per assicurare le prove del reato o per sottrarre all'associazione risorse decisive per la commissione dei delitti.
8. Quando in leggi e decreti è richiamato il reato previsto dall'articolo 75 della legge 22 dicembre 1975, n. 685, abrogato dall'articolo 38, comma 1, della legge 26 giugno 1990, n. 162, il richiamo si intende riferito al presente articolo.
Chiumne nelle operazioni di importazione o di esportazione temporanea o nelle operazioni di risportazione e di reimportazione, allo scopo di sottrarre merci al pagamento di diritti che sarebbero dovuti, sottopone le merci stesse a manipolazioni artificiose ovvero usa altri mezzi fraudolenti, è punito con la multa non minore di due e non maggiore di dieci volte l'ammontare dei diritti evasi o che tentava di evadere
Article 371-bis gives general powers to the Mafia prosecutor for crimes committed under Article 51(3bis). This Article refers to the following crimes (including tentative):

- Article 600: slavery
- Article 601: minors prostitution
- Article 602: slaves
- Article 630: kidnap with extortion and rape
- Article 416: organised crime (mafia-type organisation)
- Article 74: Association aiming at drug trafficking
- Article 291: Smuggling

When the crimes listed in Article 600, 601, 602, and 630 are committed meeting the conditions of Article 416-bis, (basically by an organised crime organisation), and also when the crimes of drug trafficking by organised crime, and smuggling by organised crime have been committed the Mafia prosecutor is given the power to carry out preliminary investigations in the first instance case and is assigned as the Public Prosecutor (magistratura della procura della Repubblica) at the court competent to solve the case (these are the powers mentioned in 1(a)).

This provision therefore does not have any specific impact on EU citizens and their family members.

**b-bis)** all'articolo 381, comma 2, sono aggiunte, in fine, le seguenti lettere:
"m-ter) falsa attestazione o dichiarazione a un pubblico ufficiale sulla identita' o su qualita' personali proprie o di altri, prevista dall'articolo 495 del codice penale; 
m-quater) fraudolente alterazioni per impedire l'identificazione o l'accertamento di qualita' personali, previste dall'articolo 495-ter del codice penale;"

Article 381 deals with the cases of optional arrest in flagrante delicto. According to its par. 2 the officers and the agents of the judicial police are (also) given the power to arrest anyone who is caught in flagrante delicto for one of the crimes listed in that par. (e.g., corruption of minors, personal injury, etc). The amendment adds other cases according to which the officers above are entitled to proceed with arrest in flagrante delicto and namely in case of false statement or declaration to a public official on the own or other’s identity or personal quality/situation as referred to in Article 495 of CP; and in case of fraudulent alterations to impede the identification of or the verification of personal qualities referred to in Article 495-ter of CP.

This provision therefore does not have any specific impact on EU citizens and their family members.

**c) il comma 4 dell'articolo 449 e' sostituito dal seguente:**
«4. Il pubblico ministero, quando l'arresto in flagranza e' gia' stato convalidato, procede al giudizio diretissimo presentando l'imputato in udienza non oltre il trentesimo giorno dall'arresto, salvo che cio' pregiudichi gravemente le indagini.»;

**d) al comma 5 dell'articolo 449, il primo periodo e' sostituito dal seguente:** «Il pubblico ministero procede inoltre al giudizio diretissimo, salvo che cio' pregiudichi gravemente le indagini, nei confronti della persona che nel corso dell'interrogatorio ha reso confessione.» Al medesimo comma 5 dell'articolo 449, al secondo periodo, la parola «quindicesimo» e' sostituita dalla seguente: «trentesimo»;

**e) al comma 1 dell'articolo 450, le parole:** «Se ritiene di procedere a giudizio diretissimo,» sono sostituite dalle seguenti: «Quando procede a giudizio diretissimo,»;

These provisions are amendments to the so called “giudizio diretissimo” (sort of summary procedure). This procedure, already regulated in the current Code of Criminal Procedure allows for a quick procedure in specific cases (i.e., in flagranti crimes and when the person confesses the
commission of a crime. The amendments in Article 449(4) and (5) simply are requiring the prosecutor to initiate the *giudizio diretissimo* in the case of arrest in *flaganti* and validated (Article 449(4)) and crimes confessed during interrogation (Article 449(5). The former provision gave the prosecutor the possibility to initiate the *giudizio diretissimo* but he/she was not obliged to do so. The amendment thus renders compulsory the initiation of the *giudizio diretissimo* in these two cases.

These amendments therefore do not have any specific impact on EU citizens and their family members. These procedures offer procedural guarantees in line with the European Convention of Fundamental Rights and are not particularly designed to impact EU citizens or their family members but rather to accelerate the procedures and lighten the significant number of cases to be solved by criminal courts (therefore to lighten the criminal courts).

f) al comma 1 dell'articolo 453, le parole: «il pubblico ministero puo' chiedere», sono sostituite dalle seguenti «salvo che cio' pregiudichi gravemente le indagini, il pubblico ministero chiede»;

g) all'articolo 453, dopo il comma 1 sono inseriti i seguenti:
«1-bis. Il pubblico ministero richiede il giudizio immediato, anche fuori dai termini di cui all'articolo 454, comma 1, e comunque entro centottanta giorni dall'esecuzione della misura, per il reato in relazione al quale la persona sottoposta alle indagini si trova in stato di custodia cautelare, salvo che la richiesta pregiudichi gravemente le indagini.
1-ter. La richiesta di cui al comma 1-bis e' formulata dopo la definizione del procedimento di cui all'articolo 309, ovvero dopo il decorso dei termini per la proposizione della richiesta di riesame.»;

h) all'articolo 455, dopo il comma 1 e' aggiunto il seguente:
«1-bis. Nei casi di cui all'articolo 453, comma 1-bis, il giudice rigetta la richiesta se l'ordinanza che dispone la custodia cautelare e' stata revocata o annullata per sopravvenuta insussistenza dei gravi indizi di colpevolezza.»;

These provisions are amendments to the so-called “*giudizio immediato*”. This type of even more accelerated procedure (there is no preliminary hearing) applies when the evidence seem to be irrefutable. As in the case of the previous commented amendments, these revisions obliges the Public prosecutor to initiate the *giudizio immediato* when the conditions for its initiation are met (before the Public prosecutor had the faculty to initiate the procedures when the conditions were met and now he/she has the obligation to initiate it). This is the amendment under 453(1). Regarding the new 453(bis), it provides for a new situation where the Public prosecutor has the obligation to initiate the *giudizio immediato*, i.e., when the person is under preventive custody for already 100 days unless the initiation of the procedure have negative impacts in the investigations. Article 453(ter) only includes the procedural rules for the request to initiate the *giudizio immediato* (it can be requested after 100 days mentioned above or after the re-examination of the coercive measures).

New Article 455(1bis) is linked to new Article 453(1bis). Basically the judge will order the end of the preventive custody or its annulment when the grounds for adopting it (serious evidence of guiltiness) are not duly substantiated.

Therefore, as in the case of the previous amendments, they do not have any specific impact on EU citizens and their family members. These procedures offer procedural guarantees in line with the European Convention of Fundamental Rights and are not particularly designed to impact EU citizens or their family members but rather to accelerate the procedures and lighten the significant number of cases to be solved by criminal courts (therefore to lighten the criminal courts).

i) all'articolo 599, i commi 4 e 5 sono abrogati;

l) all'articolo 602, il comma 2 e' abrogato;
Article 599 regulates the cases where the court decides behind close doors (in camera di consiglio). 599(4) regulated the case of a party renouncing to the appeal (which is regulated in Article 589 of the Code of criminal procedure). Therefore, this amendment implies that debates over the express renounce to appeal have to be public. Article 599(5) gave the possibility to the judge to request the order the presence of the parties to debate in case of express renounce but since the repeal of Article 599(4) implies that in case of express renounce the debate are public and with the presence of the parties, Article 599(5) is no longer needed.

Article 602(2) regulated more in detail the debate of the renounce to the appeal under Article 599(4) of the Code of criminal procedure. Since Article 599(4) has been repealed, Article 602(2) is no longer needed.

Therefore, as in the case of the previous amendments, they do not have any specific impact on EU citizens and their family members.

Article 656, par. 9 lett a) specifies the cases when the suspension of the execution of the penalty shall not be given. With the amendments such cases have been enlarged.

The type of crimes referred to by Law 26 July 1975 n. 354 (barring the granting of benefits and assessment of the social dangerousness of persons convicted for certain crimes), are mafia type of crimes (or mafia organisation), terrorism, subversion of the constitutional order, kidnap with extortion and rape, criminal association dealing with criminal smuggling of tobacco products abroad, homicide, robbery, extortion [...].

The amendment adds the following crimes of the criminal code (CP): forest fire (Article 423bis), theft (Article 624) in particular when one or more circumstances amongst the ones referred in Article 625 of the CP [as for instance if the person responsible uses violence against things or uses any fraudulent means; if the fact is committed with dexterity; if the fact is committed by three or more persons, or by only one person, who is dragged into or simulate the quality of public official or of person in charge of a public service] occurs, theft at home and theft with tear (Article 624bis) and the crimes for which the aggravating circumstance of Article 61.1 -11 bis applies, namely having the convicted person committed the fact while he/she was illegally in the national territory.

These amendments may in principle do not affect EU citizens and their family members in a different way as it would affect Italians. In particular the fact that the execution of the penalty shall not be suspended simply means that in those cases the persons concerned (Italian, French, Romanians etc.) remain in prison on grounds of the committed crime that is apparently considered as particularly “serious”.

However, in those cases where the person is convicted with more than 2 years prison, as a consequence of the application of Article 235 mentioned above, the penalty will be expulsion. The application of Article 656(9)(a) combined with Article 235 would imply that the expulsion is not suspended in case of appeal. This provision needs to be further analysed together with Article 31(2) of the Directive according to which the actual removal from the territory of the Member State in case of an application for appeal accompanied with an application for interim order to suspend the expulsion shall only take place under the conditions laid down in the Directive, in particular and relevant for this provision, when the expulsion decision is based on imperative grounds of public security. As mentioned in the ToC, Italy has only transposed the third indent of Article 31(2) of the Directive. This
implies that only for “imperative grounds” will the appeal not have suspensory effect. However, Italy has enlarged the possibilities for removal pending the appeal to include State security grounds and State Security grounds are so broadly described that there is a risk that the expulsion decision will never be suspended. The provision of Article 65(9)(a) would therefore only serve to confirm those risks. To make Article 656 compatible with transposition of Article 31(2) made by Italy, this would imply that the commission of the crimes above may be considered as against state security.

An unclear point is the fact that suspension is granted for e.g., forest fire BUT NOT FOR Child Prostitution (600bis CP) as the Law Decree stated before being amended.

**Article 2-bis.**  
Modifiche alle norme di attuazione, di coordinamento e transitorie del codice di procedura penale, di cui al decreto legislativo 28 luglio 1989, n. 271. 

I. L’articolo 132-bis delle norme di attuazione, di coordinamento e transitorie del codice di procedura penale, di cui al decreto legislativo 28 luglio 1989, n. 271, e' sostituito dal seguente:  

«Article 132-bis (Formazione dei ruoli di udienza e trattazione dei processi). - 1. Nella formazione dei ruoli di udienza e nella trattazione dei processi e' assicurata la priorita' assoluta:  
a) ai processi relativi ai delitti di cui all'articolo 407, comma 2, lettera a), del codice e ai delitti di criminalita' organizzata, anche terroristica;  
b) ai processi relativi ai delitti commessi in violazione delle norme relative alla prevenzione degli infortuni e all'igiene sul lavoro e delle norme in materia di circolazione stradale, ai delitti di cui al testo unico delle disposizioni concernenti la disciplina dell'immigrazione e norme sulla condizione dello straniero, di cui al decreto legislativo 25 luglio 1998, n. 286, nonche' ai delitti puniti con la pena della reclusione non inferiore nel massimo a quattro anni;  
c) ai processi a carico di imputati detenuti, anche per reato diverso da quello per cui si procede;  
d) ai processi nei quali l'imputato e' stato sottoposto ad arresto o a fermo di indiziato di delitto, ovvero a misura cautelare personale, anche revocata o la cui efficacia sia cessata;  
e) ai processi nei quali e' contestata la recidiva, ai sensi dell'articolo 99, quarto comma, del codice penale;  
f) ai processi da celebrare con giudizio direttissimo e con giudizio immediato. 2. I dirigenti degli uffici giudicanti adottano i provvedimenti organizzativi necessari per assicurare la rapida definizione dei processi per i quali e' prevista la trattazione prioritaria.».

These are amendments to the implementation, coordination and transitional provisions of the Criminal Procedural Code.

In particular, new Article 132-bis specifies the proceedings that are dealt with “absolute priority” in the hearing before the judge. These proceedings are those related to crimes such as terrorism, mafia type of crimes, and illegal immigration. This provision does not have any specific impact on EU citizens and their family members.

In particular:

a) proceedings relating to the crimes referred to in Article 407.2 a) of the CPP and organised crimes including terrorism.

Under Article 407.2 a):
- crimes referred to in Article 285 Devastation, pillage and massacre, 286 civil war, 416-bis basically crimes committed by organised crime organisations, 422 massacre of the CP, Article 291-ter of DPR n.43/73 in relation to the aggravating circumstances indicated in lett. a), namely in committing the offence or behaviour to ensure price, product, the profit or the impunity of the crime, the culpable person uses of weapons or was holding weapons while committing the crime; lett. d) in committing the crime the author has used means of transport, which contains … changes or modifications to hinder the intervention of police forces or cause danger to public safety; and e) in committing the crime the author has used a company (SPA) of persons or capital or availed himself of funds available in any way formed in those States that have not ratified the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, signed in Strasbourg on November 8, 1990, ratified and enforced under the law on August 9, 1993, n. 328.

- Crimes such as homicide (Article 575 CP), Article 628, 3 par CP, if violence or threat is committed with weapons, […] and 630 CP kidnap with extortion and rape.

- Crimes committed meeting the conditions of Article 416-bis (basically organised crimes organisation).

- Crimes committed for purposes of terrorism or subversion of the constitutional for which the law foresees imprisonment not less in at least five years or a maximum of ten years, and crimes referred to Articles 270 subversive associations, the third paragraph and 306 in the second paragraph (armed organisation) of the penal code.

- Crimes related to illegal manufacture, introduction in the State, sale, transfer, possession … of military weapons or explosives, illegal weapons etc.

- Crimes related to the Crimes related to the production and illicit trafficking in narcotic drugs or psychotropic substances and Association aimed at illicit trafficking in narcotic drugs or psychotropic substances (DPR 309/90 as amended).

- Association for murder referred to in Article 416 CP in cases when arrest flagrante delicto is compulsory.

- Crimes referred to in Art 600 (slavery), 600-bis, comma 1 (minors prostitution), 600-ter, comma 1 (child pornography), 601 (tratta di persone - traffic of human beings), 602 (slaves), 609-bis (sexual violence) in the cases for which the aggravating circumstances of Article 609-ter, 609-quater, 609-octies of CP apply (eg., acts committed on minors of 14 years old, sexual violence committed in group, etc).

b) processes relating to crimes committed in violation of rules relating to accident prevention and hygiene at work and the rules on road traffic, the crimes mentioned in the text of provisions governing immigration and the status of aliens to whom Legislative Decree on July 25, 1998, n. 286, as well as the crimes punished with imprisonment of not less costs of up to four years;

c) proceedings against defendants who are in prison also for different crimes a s compared the one for which it is proceeded.

d) proceedings in which the defendants has been subjected to arrest or detention of suspect of crime, or to personal precautionary measure (misura cutelare), also revoked or whose effectiveness has ceased;

e) proceedings in which the recidivism is contested;

f) proceedings to be dealt with the direttissimo procedure (sort of summary proceeding) and immediato procedure (accelerated procedure where there is no preliminary hearing).

This is not a change in the procedural safeguards but simply to prioritise the procedures before the courts.

**Article 2-ter.**

**Misure per assicurare la rapida definizione dei processi relativi a reati per i quali e’ prevista la trattazione prioritaria**

1. Al fine di assicurare la rapida definizione dei processi pendenti alla data di entrata in vigore della legge di conversione del presente decreto, per i quali e’ prevista la trattazione prioritaria, nei provvedimenti adottati ai sensi del comma 2 dell’articolo 132-bis delle norme di attuazione, di coordinamento e transitorie del codice di procedura
penale, di cui al decreto legislativo 28 luglio 1989, n. 271, come sostituito dall'articolo 2-bis del presente decreto, i dirigenti degli uffici possono individuare i criteri e le modalità di rinvio della trattazione dei processi per reati commessi fino al 2 maggio 2006 in ordine ai quali ricorrano le condizioni per l'applicazione dell'indulto, ai sensi della legge 31 luglio 2006, n. 241, e la pena eventualmente da infliggere puo' essere contenuta nei limiti di cui all'articolo 1, comma 1, della predetta legge n. 241 del 2006. Nell'individuazione dei criteri di rinvio di cui al presente comma i dirigenti degli uffici tengono, altresi', conto della gravita' e della concreta offensivita' del reato, del pregiudizio che puo' derivare dal ritardo per la formazione della prova e per l'accertamento dei fatti, nonche' dell'interesse della persona offesa.

2. Il rinvio della trattazione del processo non puo' avere durata superiore a diciotto mesi e il termine di prescrizione del reato rimane sospeso per tutta la durata del rinvio.

3. Il rinvio non puo' essere disposto se l'imputato si oppone ovvero se e' gia' stato dichiarato chiuso il dibattimento.

4. I provvedimenti di cui al comma 1 sono tempestivamente comunicati al Consiglio superiore della magistratura. Il Consiglio superiore della magistratura e il Ministro della giustizia valutano gli effetti dei provvedimenti adottati dai dirigenti degli uffici sull'organizzazione e sul funzionamento dei servizi relativi alla giustizia, nonche' sulla trattazione prioritaria e sulla durata dei processi. In sede di comunicazioni sull'amministrazione della giustizia, ai sensi dell'articolo 86 dell'ordinamento giudiziario, di cui al regio decreto 30 gennaio 1941, n. 12, e successive modificazioni, il Ministro della giustizia riferisce alle Camere le valutazioni effettuate ai sensi del presente comma.

5. La parte civile costituita puo' trasferire l'azione in sede civile. In tal caso, i termini per comparire, di cui all'articolo 163-bis del codice di procedura civile, sono abbreviati fino alla meta' e il giudice fissa l'ordine di trattazione delle cause dando precedenza al processo relativo all'azione trasferita. Non si applica la disposizione dell'articolo 75, comma 3, del codice di procedura penale.

6. Nel corso dei processi di primo grado relativi ai reati in ordine ai quali, in caso di condanna, deve trovare applicazione la legge 31 luglio 2006, n. 241, l'imputato o il suo difensore munito di procura speciale e il pubblico ministero, se ritengono che la pena possa essere contenuta nei limiti di cui all'articolo 1, comma 1, della medesima legge n. 241 del 2006, nella prima udienza successiva alla data di entrata in vigore della legge di conversione del presente decreto possono formulare richiesta di applicazione della pena ai sensi degli articoli 444 e seguenti del codice di procedura penale, anche se risulti decorso il termine previsto dall'articolo 446, comma 1, del medesimo codice di procedura penale.

7. La richiesta di cui al comma 6 puo' essere formulata anche quando sia gia' stata in precedenza presentata altra richiesta di applicazione della pena, ma vi sia stato il dissenso da parte del pubblico ministero ovvero la stessa sia stata rigettata dal giudice, sempre che la nuova richiesta non costituisca mera riproposizione della precedente.

This provision is on discretional (up to the judges to decide) suspension (for up to 18 months) of proceedings relating to crimes committed until 2 May 2006 and that do not generate “social alarm”; basically it relates to crimes for which the conditions to issue a “pardon” (indulto in Italian) exist.

This implies that priority is given to proceeding concerning more serious crimes (see comment above under new Article 132-bis). In principle the provision would not affect EU citizens and their family members in a different way as it would affect Italians.
Article 3. Modifiche al decreto legislativo 28 agosto 2000, n. 274[^31] which regulates the competence of the Justice of Peace

1. All'articolo 4, comma 1, lettera a), del decreto legislativo 28 agosto 2000, n. 274, dopo le parole: «derivati una malattia di durata superiore a venti giorni» sono inserite le seguenti: «, nonché' ad esclusione delle fattispecie di cui all'articolo 590, terzo comma, quando si tratta di fatto commesso da soggetto in stato di ebbrezza alcolica ai sensi dell'articolo 186, comma 2, lettera c), del decreto legislativo 30 aprile 1992, n. 285, e successive modificazioni, ovvero da soggetto sotto l'effetto di sostanze stupefacenti o psicotrope.».

1. Il giudice di pace è competente:

   a. per i delitti consumati o tentati previsti dagli articoli 581, 582, limitatamente alle fattispecie di cui al comma 2 perseguiti a querela di parte, 590, limitatamente alle fattispecie perseguiti a querela di parte e ad esclusione delle fattispecie connesse alla colpa professionale e dei fatti commessi con violazione delle norme per la prevenzione degli infortuni sul lavoro o relative all'igiene del lavoro o che abbiano determinato una malattia professionale nonché ad esclusione delle fattispecie di cui all'articolo 590, terzo comma, quando si tratta di fatto commesso da soggetto in stato di ebbrezza alcolica ai sensi dell'articolo 186, comma 2, lettera c), del decreto legislativo 30 aprile 1992, n. 285, e successive modificazioni, ovvero da soggetto sotto l'effetto di sostanze stupefacenti o psicotrope quando, nei casi anzidetti, derivi una malattia di durata superiore a venti giorni, 594, 595 commi 1 e 2, 612 comma 1, 626, 627, 631, salvo che ricorra l'ipotesi di cui all'articolo 639-bis, 632, salvo che ricorra l'ipotesi di cui all'articolo 639-bis, 633 comma 1, salvo che ricorra l'ipotesi di cui all'articolo 639-bis, 635 comma 1, 636, salvo che ricorra l'ipotesi di cui all'articolo 639-bis 637, 638 comma 1, 639 e 647 del codice penale;

Article 4 of the Legislative Decree regulates the areas where the Justice of Peace is competent. This provision is limiting the competence of the justice of peace to rule on crimes under Article 590 of the Criminal Code. As mentioned before, Article 590 regulates body harm (lesione corporea). The third paragraph regulates harm caused by violation of the driving code and violation of the labour laws (provisions on health and safety at workplace). The reform excludes from the competence of the justice of peace those crimes under Article 590(3) which are committed under the effects of alcohol or under the effects of drugs. This reform is therefore in line with the changes to the criminal code mentioned above which includes these two aggravating circumstances.


This is the driving code- Codice della Strada[^32]

These amendments reinforce the circumstances and penalties for driving under the effects of alcohol and drugs. These measures are part of the efforts to reduce mortality in car accidents. The amendments are mostly increasing sanctions.


1. All'articolo 186 del decreto legislativo 30 aprile 1992, n. 285, e successive modificazioni, sono apportate le seguenti modificazioni:

   Article 186 is on driving under the effects of alcohol

   a) al comma 2, lettera b), le parole: «l'arresto fino a tre mesi» sono sostituite dalle seguenti: «l'arresto fino a sei mesi»; the penalty is raised up from arrest 1-3 months to 1 to 6 months.

[^31]: http://www.giustizia.it/cassazione/leggi/dlgs274_00.html This Legislative Decree regulates the competence of the Justice of Peace
b) al comma 2, lettera c), le parole: «l'arresto fino a sei mesi» sono sostituite dalle seguenti: «l'arresto da tre mesi ad un anno» e sono aggiunti, in fine, i seguenti periodi: «Con la sentenza di condanna ovvero di applicazione della pena a richiesta delle parti, anche se e' stata applicata la sospensione condizionale della pena, e' sempre disposta la confisca del veicolo con il quale e' stato commesso il reato ai sensi dell'articolo 240, secondo comma, del codice penale, salvo che il veicolo stesso appartenga a persona estranea al reato. Il veicolo sottoposto a sequestro puo' essere affidato in custodia al trasgressore, salvo che risulti che abbia commesso in precedenza altre violazioni della disposizione di cui alla presente lettera. La procedura di cui ai due periodi precedenti si applica anche nel caso di cui al comma 2-bis.»; The amendment includes the seizure of the car unless the car does not belong to the person who committed the infraction. The car can be given in custody to the infringer.

«b-bis) il comma 2-bis e' sostituito dal seguente: "2-bis. Se il conducente in stato di ebbrezza provoca un incidente stradale, le pene di cui al comma 2 sono raddoppiate e, fatto salvo quanto previsto dalla lettera c) del medesimo comma 2, e' disposto il fermo amministrativo del veicolo per novanta giorni ai sensi del Capo I, sezione II, del titolo VI, salvo che il veicolo appartenga a persona estranea al reato. E' fatta salva in ogni caso l'applicazione delle sanzioni accessorie previste dagli articoli 222 e 223»;

This new amendment specifies that the penalties for the person, who under the influence/effect of alcohol causes a car accident, are doubled. This provision does not have any specific impact on EU citizens and their family members.

c) dopo il comma 2-querter e' inserito il seguente: «2-quinquies. Salvo che non sia disposto il sequestro ai sensi del comma 2, il veicolo, qualora non possa essere guidato da altra persona idonea, puo' essere fatto trasportare fino al luogo indicato dall'interessato o fino alla piu' vicina autorimessa e lasciato in consegna al proprietario o al gestore di essa con le normali garanzie per la custodia. Le spese per il recupero ed il trasporto sono interamente a carico del trasgressore.»;

The car can be given in custody to the owner or manager upon the normal guarantees for its custody.

d) al comma 7, il primo e il secondo periodo sono sostituiti dal seguente: «Salvo che il fatto costituisca piu' grave reato, in caso di rifiuto dell'accertamento di cui ai commi 3, 4 o 5, il conducente e’ punito con le pene di cui al comma 2, lettera c);

When the driver refuses to undergo the tests referred to in par. 3, 4 and 5 (mainly tests that aim at ascertain the driver's alcohol level), then he/she will be punished according to the sanctions referred to in par. 2 c), namely, Euro 1.500 to 6.000 and arrest until 6 months.

These amendments do not affect EU citizens and their family members in a different way as it would affect Italians.

e) al comma 7, il terzo periodo e' sostituito dal seguente: «La condanna per il reato di cui al periodo che precede comporta la sanzione amministrativa accessoria della sospensione della patente di guida per un periodo da sei mesi a due anni e della confisca del veicolo con le stesse modalità' e procedure previste dal comma 2, lettera c), salvo che il veicolo appartenga a persona estranea alla violazione»;
This is an amendment that only changes the original wording of the provision and does not affect EU citizens and their family members in a different way as it would affect Italians: the provision refers to “if the breach is committed during a car accident in which the driver is involved, […]”.

The amendment specifies that the original wording has been changed with the following one: “administrative accessory sanction of the suspension of the driving licence for a period of six months to 2 years and the seizure of the car […]”.

f) al comma 7, quinto periodo, le parole: «Quando lo stesso soggetto compie più violazioni nel corso di un biennio,», sono sostituite dalle seguenti: «Se il fatto e' commesso da soggetto gia' condannato nei due anni precedenti per il medesimo reato,».

This is an amendment that only changes the original wording of the provision and does not affect EU citizens and their family members in a different way as it would affect Italians. The original provision stated “when the same person commits more violations/breaches during two years ….” The new provision now says “If the fact is committed by person already convicted in the two previous years for the same offence […]”.

2. Al comma 1 dell'articolo 187 del decreto legislativo 30 aprile 1992, n. 285, sono apportate le seguenti modificazioni:

**Article 187 is driving under the effects of drugs**

a) le parole: «e' punito con l'ammenda da euro 1000 a euro 4000 e l'arresto fino a tre mesi», sono sostituite dalle seguenti: «e' punito con l'ammenda da euro 1.500 a euro 6.000 e l'arresto da tre mesi ad un anno»;

Initial penalty 1000-4000€ and arrest of 1-3 months. After amendment: fine of 1500-6000€ and arrest of 1-3 months.

b) alla fine e' aggiunto il seguente periodo: «Si applicano le disposizioni dell'articolo 186, comma 2, lettera c), quinto e sesto periodo, nonche' quelle di cui al comma 2-quinquies del medesimo articolo 186.».

Application of the same provisions as for driving under the effects of alcohol mentioned above.

**2-bis. All'articolo 187, comma 1-bis, del decreto legislativo 30 aprile 1992, n. 285, e successive modificazioni, le parole: «ed e' disposto il ferro amministrativo del veicolo per novanta giorni ai sensi del capo I, sezione II, del titolo VI,» sono sostituite dalle seguenti: «e si applicano le disposizioni dell'ultimo periodo del comma 1,».

The new amendment does not affect EU citizens and their family members in a different way as it would affect Italians: the provision modifies the original wording of the provision saying that when the driver causes a car accident while he/she is in a state of psycho-physical alteration after taking drugs or psychotropic substances, the driving license will be revoked […]

3. All'articolo 189 del decreto legislativo 30 aprile 1992, n. 285, e successive modificazioni, sono apportate le seguenti modifiche:

**Article 189 regulates the behaviour in case of accident**

a) al comma 6, le parole: «da tre mesi a tre anni» sono sostituite dalle seguenti: «da sei mesi a tre anni»; penalty in case of “hit and run” cases: suspending the license from 6
months to 3 years.

b) al comma 7, le parole: «da sei mesi a tre anni» sono sostituite dalle seguenti: «da un anno a tre anni». Penalty for omission of assistance in case of accident: is reclusion of 1-3 years.

4. All'articolo 222, comma 2, del decreto legislativo 30 aprile 1992, n. 285, e' aggiunto, in fine, il seguente periodo: «Se il fatto di cui al terzo periodo e' commesso da soggetto in stato di ebbrezza alcolica ai sensi dell'articolo 186, comma 2, lettera c), ovvero da soggetto sotto l'effetto di sostanze stupefacenti o psicotrope, il giudice applica la sanzione amministrativa accessoria della revoca della patente.».

Article 222 regulates the accessory administrative sanction. If the accident has been caused under the effects of alcohol or drugs the judge can impose the administrative sanction of revocation of driving license.

Article 5.

Modifiche al testo unico di cui al decreto legislativo 25 luglio 1998, n. 286

01. All'articolo 12, comma 5 del testo unico delle disposizioni concernenti la disciplina dell'immigrazione e norme sulla condizione dello straniero, di cui al decreto legislativo 25 luglio 1998, n. 286, e' aggiunto, in fine, il seguente periodo: “Quando il fatto e' commesso in concorso da due o piu' persone, ovvero riguarda la permanenza di cinque o piu' persone, la pena e' aumentata da un terzo alla meta”.

The new amendment does not apply to EU citizens and their family members. It states that the penalties are raised (from one third to half) when the fact is committed by two or more persons together or it relates to the permanence of five or more persons.

Article 12.5 punishes the person (Italian nationals or foreigner) who favours the permanence of foreign nationals in the territory of the State in violation of the rules of the Immigration act, which is not in the Directive.

See comments below concerning the Immigration Act and its applicability to EU citizens.

1. All'articolo 12 del testo unico delle disposizioni concernenti la disciplina dell'immigrazione e norme sulla condizione dello straniero, di cui al decreto legislativo 25 luglio 1998, n. 286, e successive modificazioni, dopo il comma 5 e' inserito il seguente:

«5-bis. Salvo che il fatto costituisca piu' grave reato, chiamate a titolo oneroso, al fine di trarre ingiusto profitto, da' alloggio ad uno straniero, privo di titolo di soggiorno in un immobile di cui abbia disponibilita', ovvero lo cede allo stesso, anche in locazione, e' punito con la reclusione da sei mesi a tre anni. La condanna con provvedimento irrevocabile ovvero l'applicazione della pena su richiesta delle parti a norma dell'articolo 444 del codice di procedura penale, anche se e' stata concessa la sospensione condizionale della pena, comporta la confisca dell'immobile, salvo che appartenga a persona estranea al reato. Si osservano, in quanto applicabili, le disposizioni vigenti in materia di gestione e destinazione dei beni confiscati. Le somme di denaro ricavate dalla vendita, ove disposta, dei beni confiscati sono destinate al potenziamento delle attivita' di prevenzione e repressione dei reati in tema di immigrazione clandestina.».

33 http://www.giustizia.it/cassazione/leggi/dlgs286_98.html#ART1
This provision is amending the Immigration Act. The immigration act does not apply to EU citizens and their family members. It is clear from Article 1 of the Immigration Act that it does not apply to EU citizens except when otherwise stated in the Act (Article 1(1)). In addition, the Immigration Act only applies to EU citizen when it can be considered as a more favourable measure (Article 1(2)). Regarding third country family members, the Immigration Act states that reference in other acts to citizens from countries other than Italy should be understood as reference to the Immigration Act except when other acts (national, international and Community law) is more favourable. Legislative Decree 30/2007 is a lex specialis specifically regulating third country family members. When the Legislative Decree requires the application of the Immigration Act, it expressly refers to it. For this reason, it can be considered that this act in principle does not apply to EU citizens and their family members even when the family member could be considered as having entered illegally in the territory of Italy (the provision of entrance of third country nationals under the immigration act do not apply to third country family members). The Legislative Decree already includes provisions regarding entry and residence. In no place of the Legislative Decree is it indicated that the provisions of the Immigration Act should apply on a subsidiary basis. Only those provisions of the Immigration Act if directly referred to by the Legislative Decree.

Article 12 of the Immigration Act already included many provisions to fight against illegal immigration. These provisions mostly address those persons obtaining an unjust profit from illegal immigration.  

34. 1. Il presente testo unico, in attuazione dell'articolo 10, secondo comma, della Costituzione, si applica, salvo che sia diversamente disposto, ai cittadini di Stati non appartenenti all'Unione europea e agli apolidi, di seguito indicati come stranieri.
2. Il presente testo unico non si applica ai cittadini degli Stati membri dell'Unione europea, se non in quanto si tratti di norme più favorevoli, e salvo il disposto dell'articolo 45 della legge 6 marzo 1998, n. 40.
3. Quando altre disposizioni di legge fanno riferimento a istituti concernenti persone di cittadinanza diversa da quella italiana ovvero ad apolidi, il riferimento deve intendersi agli istituti previsti dal presente testo unico. Sono fatte salve le disposizioni interne, comunitarie e internazionali più favorevoli comunque vigenti nel territorio dello Stato.
35. Disposizioni contro le immigrazioni clandestine (Legge 6 marzo 1998, n. 40, Article 10)
immigration from third countries. The new provision simply adds another case that can be considered as obtaining profits from illegal immigration, namely *renting an apartment to persons who do not have a title allowing the residence (permit)*. Firstly, it should be noted that this provision does not punish the person living in Italy without a residence permit but it punishes those renting the house. Secondly, given the context of the act, and the condition of *lex specialis* of Legislative Decree 30/2007, it does not seem that third country family members could be considered as person part of the “illegal immigration” which this provision is trying to combat.

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Furthermore, given the context of the act, and the condition of *lex specialis* of Legislative Decree 30/2007, it does not seem that third country family members could be considered as person part of the “illegal immigration” which this provision is trying to combat.

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In this sense, it is important to analyse the provision together with the requirements of the Legislative Decree. Firstly, to be covered by the Directive and thus by the Legislative Decree 30/2007, the family member has to join or accompany the EU citizen. This implies that the family member would have to reside most probably (see also many provisions of the Directive requiring this residence with the Union citizen) with the EU citizen (he/she is a spouse, ascendant or descendant, is part of the household or because he/she is dependant of the EU family member). **EU citizens are clearly excluded from the scope of the act** and thus renting a house to the EU citizen can never be considered as an illegal activity in the sense of Article 12 of the Immigration Act since EU citizen are not foreigners in the sense of the act. If the family member is a third country national and is not accompany or joining the EU citizen, the Directive does not apply and Member States can apply its immigration rules.

**Third country family members within the meaning of the Legislative Decree 30/2007 should not be covered by the Immigration Act.** Even if it is interpreted that Article 12 could apply to third country family members, in this particular case the potential illegal activity would be to rent a house to the third country family member directly. But this could never be considered as a way of obtaining “unjust profit”. There should be a clear intention that will not be present in the case of EU citizens or third country family members renting houses to family members within the meaning of the Directive.

The problem is that this rule will have a more negative impact on EU citizens and family members than to an Italian because of Article 235 CP as amended (see comment on impacts under Article 235 above).

1-bis) all’articolo 13, comma 3, quinto periodo, del testo unico di cui al decreto legislativo 25 luglio 1998, n. 286, la parola: “quindici” e’ sostituita dalla seguente: “sett”.

The Immigration Act does not usually apply to EU citizens and their family members. It is clear from Article 138 of the Immigration Act that it does not apply to EU citizens except when otherwise stated in the Act (Article 1(1)). In addition, the Immigration Act only applies to EU citizen when it can be considered as a more favourable measure (Article 1(2)). Regarding third country family members, the Immigration Act states that reference in other acts to citizens from countries other than Italy should be understood as reference to the Immigration Act except when other acts (national, international and Community law) is more favourable. Legislative Decree 30/2007 is a **lex specialis** specifically regulating third country family members. When the Legislative Decree requires the application of the Immigration Act, it expressly refers to it.

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37 The original version of the Law Decree was referring to renting an apartment to a foreigner who was “unlawfully residing in the national territory”. So the issue was to understand what was understood as an “unlawful residence”. The lawfulness of the residence is to be determined under the Legislative Decree and not under the Immigration Act. The third country family member will have to meet the criteria laid down in the legislative decree which are those of the Directive. So if the identity and family link is verified, the residence cannot be considered unlawful and thus renting a house to a third country family member cannot be considered as an illegal activity within the context of Article 12.

The problem remains in relation to the connection between the unlawful entry and the right of residence mentioned above. However, the conditions and objectives of the Immigration Act greatly defer from those of the Legislative Decree and it would seem very difficult to apply Article 12 and in particular this new amendment to persons renting a house to a family member of an EU citizens. Mostly probably in those cases there would be a presumption of legality of the residence, especially when the family member is residing with the EU citizen. It is therefore the conclusion, that this new measure does not specially affect EU citizens and their family members.

38 1. Il presente testo unico, in attuazione dell’articolo 10, secondo comma, della Costituzione, si applica, salvo che sia diversamente disposto, ai cittadini di Stati non appartenenti all’Unione europea e agli apolidi, di seguito indicati come stranieri.

2. Il presente testo unico non si applica ai cittadini degli Stati membri dell’Unione europea, se non in quanto si tratti di norme più favorevoli, e salvo il disposto dell’articolo 45 della legge 6 marzo 1998, n. 40.

3. Quando altre disposizioni di legge fanno riferimento a istituti concernenti persone di cittadinanza diversa da quella italiana ovvero ad apolidi, il riferimento deve intendersi agli istituti previsti dal presente testo unico. Sono fatte salve le disposizioni interne, comunitarie e internazionali più favorevoli comunque vigenti nel territorio dello Stato.
However, Article 20-bis, as introduced by Article 1.1 d) D.Lgs n. 32/08 expressly refers to Article 13.3 of the Immigration Act and in particular to the authorisation referred to in par. 3 of Article 13.

In particular, as explained in the TOC, Article 20-bis says that when the person concerned with the expulsion measure referred to in Article 20.11 and 20.12 [State security & imperative public security grounds], is subject to a criminal proceeding, the provisions of Article 13 par. 3, […] of Legislative Decree 25 July 1998, n. 286 shall apply.

The amendment above refers to the authorisation of the judicial authority (to expel the foreign national) that shall be deemed as given (positive silent) if the said authority fails to act within seven days from the date of receipt of the request; the original version of the provision said “15 days” instead.

There is however an internal contradiction since Article 20-bis par. 2 expressly provides that “the authorisation referred to in Article 13.3 of Legislative Decree 25 July 1998, n. 286, is considered as granted when the judicial authority does not act within 48 hours from the date of receiving the request. 3.” So a special timing is given in relation to EU citizens by the transposing provision.

1-ter. All'articolo 22, comma 12, del testo unico di cui al decreto legislativo 25 luglio 1998, n. 286, le parole: «con l'arresto da tre mesi ad un anno e con l'ammenda di 5000 euro per ogni lavoratore impiegato» sono sostituite dalle seguenti: «con la reclusione da sei mesi a tre anni e con la multa di 5000 euro per ogni lavoratore impiegato.

Article 22.12 punishes the employer who employs foreign workers without residence permits or whose permit has expired and has not been asked, the renewal, revoked or cancelled. The amendments do not affect EU citizens since they simply raise the penalty for the said employer.

Article 6.
Modifica del testo unico di cui al decreto legislativo 18 agosto 2000, n. 267, in materia di attribuzioni del sindaco nelle funzioni di competenza statale

This provision modifies the competence of the mayor. Mostly of the new competence attributed to the mayor are aimed at improving the coordination between the different police services (municipal, national and so on). There were two new powers that could raise more concerns: those of Article 54(4) and (7). See below.

1. L'articolo 54 del testo unico delle leggi sull'ordinamento degli enti locali, di cui al decreto legislativo 18 agosto 2000, n. 267, e' sostituito dal seguente:
«Article 54 (Attribuzioni del sindaco nelle funzioni di competenza statale). - 1. Il sindaco, quale ufficiale del Governo, sovrintende:
   a) all'emanazione degli atti che gli sono attribuiti dalla legge e dai regolamenti in materia di ordine e sicurezza pubblica;
   b) allo svolgimento delle funzioni affidategli dalla legge in materia di pubblica sicurezza e di polizia giudiziaria;
   c) alla vigilanza su tutto quanto possa interessare la sicurezza e l'ordine pubblico, informandone preventivamente il prefetto.
2. Il sindaco, nell'esercizio delle funzioni di cui al comma 1, concorre ad assicurare anche la cooperazione della polizia locale con le Forze di polizia statali, nell'ambito delle direttive di coordinamento impartite dal Ministro dell'interno-Autorità nazionale di pubblica sicurezza.
3. Il sindaco, quale ufficiale del Governo, sovrintende, altresì, alla tenuta dei registri di stato civile e di popolazione e agli adempimenti demandatigli dalle leggi in materia elettorale, di leva militare e di statistica.
4. Il sindaco, quale ufficiale del Governo, adotta con atto motivato provvedimenti, anche contingibili e urgenti nel rispetto dei principi generali dell'ordinamento, al fine di prevenire e di eliminare gravi pericoli che minacciano l'incolumità pubblica e la sicurezza urbana. I provvedimenti di cui al presente comma sono preventivamente comunicati al prefetto anche ai fini della predisposizione degli strumenti ritenuti necessari alla loro attuazione.

Translation:

The mayor, as the government official, shall adopt motivated measures, also urgent and unpredictable (contingibil)i measures, in accordance with the general principles of the Italian legal order, aiming at preventing and eliminating serious dangers that threat public safety and urban security. The measures referred to in this par. shall be immediately communicated to the Questore also in order to be able to put in place implementation measures.

4-bis. Con decreto del Ministro dell'interno e' disciplinato l'ambito di applicazione delle disposizioni di cui ai commi 1 e 4 anche con riferimento alle definizioni relative alla incolumità pubblica e alla sicurezza urbana.

Translation:

A Decree of the Minister of Internal Affairs shall regulate the scope of the provisions of paragraphs 1 and 4 with reference to the definitions on the “public safety and urban security”.

[This Decree has been approved on the 5 of August 2008].

5. Qualora i provvedimenti adottati dai sindaci ai sensi dei commi 1 e 4 comportino conseguenze sull'ordinata convivenza delle popolazioni dei comuni contigui o limitrofi, il prefetto indice un'apposita conferenza alla quale prendono parte i sindaci interessati, il presidente della provincia e, qualora ritenuto opportuno, soggetti pubblici e privati dell'ambito territoriale interessato dall'intervento.

5-bis. Il Sindaco segnala alle competenti autorità', giudiziaria o di pubblica sicurezza, la condizione irregolare dello straniero o del cittadino appartenente ad uno Stato membro dell'Unione europea, per la eventuale adozione di provvedimenti di espulsione o di allontanamento dal territorio dello Stato.

This new paragraph that has been added provides that the Majors shall indicate/inform the competent judicial or public security authorities, about the irregular condition of a foreigner or of an EU citizen for the possible adoption of expulsion measures.

This provision therefore expands the competences of the Majors and has somehow an impact on EU citizens or their family members although something similar was already foreseen; as mentioned in the Conformity Study to Directive 2004/38/EC, the Majors have the power to make grounded recommendations to the Prefetti or the Ministry of Interior who will then be responsible for taking the expulsion measure.

The unclear point under the new amendment is the meaning of “unlawful/irregular condition”.

It also remains to be clarified what are the powers of the Mayors, and in particular whether under this amendment they would or not be allowed to take an expulsion measure. As explained below, at present the Mayors do not have such competence. In addition, it will need to be clarified how the Mayors should become aware of such “irregular condition”.

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6. In casi di emergenza, connessi con il traffico o con l'inquinamento atmosferico o acustico, ovvero quando a causa di circostanze straordinarie si verifichino particolari necessità dell'utenza o per motivi di sicurezza urbana, il sindaco può modificare gli orari degli esercizi commerciali, dei pubblici esercizi e dei servizi pubblici, nonché, d'intesa con i responsabili territorialmente competenti delle amministrazioni interessate, gli orari di apertura al pubblico degli uffici pubblici localizzati nel territorio, adottando i provvedimenti di cui al comma 4.
7. Se l'ordinanza adottata ai sensi del comma 4 e' rivolta a persone determinate e queste non ottemperano all'ordine impartito, il sindaco può provvedere d'ufficio a spese degli interessati, senza pregiudizio dell'azione penale per i reati in cui siano incorsi.

Translation:

If the measure adopted according to Par. 4 is against specific persons and these fail to comply with the order in it contained, the mayor can provide ex officio at the expense of the persons concerned, without prejudice to prosecution for offences for which they are incurred.

8. Chi sostituisce il sindaco esercita anche le funzioni di cui al presente articolo.
9. Nell'ambito delle funzioni di cui al presente articolo, il prefetto può disporre ispezioni per accertare il regolare svolgimento dei compiti affidati, nonché' per l'acquisizione di dati e notizie interessanti altri servizi di carattere generale.
10. Nelle materie previste dai commi 1 e 3, nonché' dall'articolo 14, il sindaco, previa comunicazione al prefetto, può delegare l'esercizio delle funzioni ivi indicate al presidente del consiglio circoscrizionale; ove non siano costituiti gli organi di decentramento comunale, il sindaco può conferire la delega a un consigliere comunale per l'esercizio delle funzioni nei quartieri e nelle frazioni.
11. Nelle fattispecie di cui ai commi 1, 3 e 4, nel caso di inerzia del sindaco o del suo delegato nell'esercizio delle funzioni previste dal comma 10, il prefetto può intervenire con proprio provvedimento.
12. Il Ministro dell'interno può adottare atti di indirizzo per l'esercizio delle funzioni previste dal presente articolo da parte del sindaco.

According to the amendment, the Mayors are given new powers to take urgent measures in order to prevent and eliminate serious dangers for the public safety and urban security. It is not clear form the wording of the provision which powers exactly the Mayor shall have in this regard and which is to be considered as “serious dangers”. Given this broad and vague wording, the expert feared the possibility that the mayor could take an expulsion decision.

However, the Ministry of Internal Affairs has clarified that those urgent measures are not expulsion and are more related to the safety of the buildings and public health. These amendments therefore do not affect EU citizens and their family members in a different way as it would affect Italians.

Article 6-bis.
Modifiche all'articolo 16, comma 2, della legge 24 novembre 1981, n. 689

1. Il secondo comma dell'articolo 16 della legge 24 novembre 1981, n. 689, è sostituito dal seguente:
   «Per le violazioni ai regolamenti ed alle ordinanze comunali e provinciali, la Giunta comunale o provinciale, all'interno del limite edittale minimo e massimo della sanzione prevista, può stabilire un diverso importo del pagamento in misura ridotta, in deroga alle disposizioni del primo comma».

Law n. 689/81 is on amendments to the penal system. Article 16 of this Law is on administrative sanctions and deals in particular with “reduced payment”. This provision does not affect EU citizens and their family members in a different way as it would affect Italians.
Article 7.
Collaborazione della polizia municipale e provinciale nell'ambito dei piani coordinati di controllo del territorio

1. I piani coordinati di controllo del territorio di cui al comma 1 dell'articolo 17 della legge 26 marzo 2001, n. 128, che possono realizzarsi anche per specifiche esigenze dei comuni diversi da quelli dei maggiori centri urbani, determinano i rapporti di reciproca collaborazione fra i contingenti di personale della polizia municipale e provinciale e gli organi di Polizia dello Stato.

2. Con decreto da adottare entro tre mesi dalla data di entrata in vigore della legge di conversione del presente decreto, il Ministro dell'interno, di concerto con il Ministro della giustizia, con il Ministro dell'economia e delle finanze e con il Ministro della difesa, determina le procedure da osservare per assicurare, nel corso dello svolgimento di tali piani coordinati di controllo del territorio, le modalità di raccordo operativo tra la polizia municipale, la polizia provinciale e gli organi di Polizia dello Stato».

This provision regards improving coordination of the different police corps and different ministries. No special impact on EU citizens and family members.

Article 7-bis.
Concorso delle Forze armate nel controllo del territorio

1. Per specifiche ed eccezionali esigenze di prevenzione della criminalità, ove risulti opportuno un accresciuto controllo del territorio, può essere autorizzato un piano di impiego di un contingente di personale militare appartenente alle Forze armate, preferibilmente carabinieri impiegati in compiti militari o comunque volontari delle stesse Forze armate specificatamente addestrati per i compiti da svolgere. Detto personale è posto a disposizione dei prefetti delle province comprendenti aree metropolitanhe e comunque aree densamente popolate, ai sensi dell'articolo 13 della legge 1° aprile 1981, n. 121, per servizi di vigilanza a siti e obiettivi sensibili, nonché' di perlustrazione e pattuglia in concorso e congiuntamente alle Forze di polizia. Il piano può essere autorizzato per un periodo di sei mesi, rinnovabile per una volta, per un contingente non superiore a 3.000 unità'.

2. Il piano di impiego del personale delle Forze armate di cui al comma 1 è adottato con decreto del Ministro dell'interno, di concerto con il Ministro della difesa, sentito il Comitato nazionale dell'ordine e della sicurezza pubblica integrato dal Capo di stato maggiore della difesa e previa informazione al Presidente del Consiglio dei Ministri. Il Ministro dell'interno riferisce in proposito alle competenti Commissioni parlamentari.

3. Nell'esecuzione dei servizi di cui al comma 1, il personale delle Forze armate non appartenente all'Arma dei carabinieri agisce con le funzioni di agente di pubblica sicurezza e può procedere alla identificazione e alla immediata perquisizione sul posto di persone e mezzi di trasporto a norma dell'articolo 4 della legge 22 maggio 1975, n. 152, anche al fine di prevenire o impedire comportamenti che possono mettere in pericolo l'incolpita' di persone o la sicurezza dei luoghi vigilati, con esclusione delle funzioni di polizia giudiziaria. Ai fini di identificazione, per completare gli accertamenti e per procedere a tutti gli atti di polizia giudiziaria, il personale delle Forze armate accompagna le persone indicate presso i piu' vicini uffici o comandi della Polizia di Stato o dell'Arma dei carabinieri. Nei confronti delle persone accompagnate si applicano le disposizioni dell'articolo 349 del codice di procedura penale. [Art 349 CPP is on Identification of the persons who are under investigation and of other persons]

4. Agli oneri derivanti dall'attuazione del decreto di cui al comma 2, stabiliti entro il limite di spesa di 31,2 milioni di euro per ciascuno degli anni 2008 e 2009, comprendenti le spese per il trasferimento e l'impiego del personale e dei mezzi e la corresponsione dei compensi per lavoro straordinario e di un indennita' onnicomprensiva determinata ai sensi dell'articolo 20 della legge 26 marzo 2001, n. 128, e comunque non superiore al trattamento economico accessorio previsto per le Forze di polizia, individuati con
decreto del Ministro dell'economia e delle finanze, di concerto con i Ministri dell'interno e della difesa, si provvede mediante corrispondente riduzione dello stanziamento del fondo speciale di parte corrente iscritto, ai fini del bilancio triennale 2008-2010, nell'ambito del programma «Fondi di riserva speciali» della missione «Fondi da ripartire» dello stato di previsione del Ministero dell'economia e delle finanze per l'anno 2008, allo scopo parzialmente utilizzando: quanto a 4 milioni di euro per l'anno 2008 e a 16 milioni di euro per l'anno 2009, l'accantonamento relativo al Ministero dell'economia e delle finanze; quanto a 9 milioni di euro per l'anno 2008 e a 8 milioni di euro per l'anno 2009, l'accantonamento relativo al Ministero della giustizia; quanto a 18,2 milioni di euro per l'anno 2008 e a 7,2 milioni di euro per l'anno 2009, l'accantonamento relativo al Ministero degli affari esteri.

5. Il Ministro dell'economia e delle finanze e’ autorizzato ad apportare, con propri decreti, le occorrenti variazioni di bilancio».

This provision improves coordination of the different police corps for the control of the territory.

This is when specific and exceptional reasons of crime prevention occur and it is needed to increase control of the territory. This provision does not affect EU citizens and their family members in a different way as it would affect Italians.

Article 8.

Accesso della polizia municipale al Centro elaborazione dati del Ministero dell'interno

This provision regards access of the municipal police to Data Processing Centre of the Ministry of Interior.

1. All'articolo 16-quater del decreto-legge 18 gennaio 1993, n. 8, convertito, con modificazioni, dalla legge 19 marzo 1993, n. 68, sono apportate le seguenti modificazioni:

a) al comma 1, le parole: «schedario dei veicoli rubati operante» fino alla fine del comma sono sostituite dalle seguenti: «schedario dei veicoli rubati e allo schedario dei documenti d'identita' rubati o smarriti operanti presso il Centro elaborazione dati di cui all'articolo 8 della predetta legge n. 121. Il personale della polizia municipale in possesso della qualifica di agente di pubblica sicurezza puo' altresi' accedere alle informazioni concernenti i permessi di soggiorno rilasciati e rinnovati, in relazione a quanto previsto dall'articolo 54, comma 5-bis, del testo unico di cui al decreto legislativo 18 agosto 2000, n. 267, e successive modificazioni»;

Law n. 68/93 on urgent provisions relating to derivative finance and public accounting.

Article 16 quater contains provisions relating to traffic police or municipal police’s services and it expands the competences of the municipal police and in particular of the traffic police since they can under certain circumstances, have access to information concerning residence permits issued and renewed, according to new proposed par. 5bis (of Article 54) of legislative decree 267/00. Article 54 par. 5 bis provides that the Mayors shall indicate/inform the competent judicial or public security authorities, about the unlawful condition of a foreigner or of an EU citizen for the possible adoption of expulsion measures.

This provision seems to imply that the new power given to the traffic police may allow them to report the Mayors about any condition (or unlawful condition) concerning foreigners in general and EU nationals.
However, these additional forms of control/check may be considered as contrary to Article 14(2) second indent of the Directive according to which “Member States may verify if the conditions set out in Articles 7, 12 and 13, are fulfilled” but that “This verification shall not be carried out systematically”. The Italian provision seems to allow a systematic verification. It is the Expert’s opinion that this is the only impact that the provision may have on EU citizens and their family members as per the Directive.

b) dopo il comma 1 e’ inserito il seguente:
«1-bis. Il personale di cui al comma 1 addetto ai servizi di polizia stradale ed in possesso della qualifica di agente di pubblica sicurezza può’ essere, altresì, abilizzato all’inserimento, presso il Centro elaborazione dati ivi indicato, dei dati relativi ai veicoli rubati e ai documenti rubati o smarriti, di cui al comma 1, acquisiti autonomamente.».

1-bis. I collegamenti, anche a mezzo della rete informativa telematica dell'Associazione nazionale dei comuni italiani (ANCI), per l'accesso allo schedario dei documenti d'identità rubati o smarriti, nonché alle informazioni concernenti i permessi di soggiorno di cui al comma 1, sono effettuati con le modalità stabilite con decreto del Ministro dell'interno, di concerto con il Ministro dell'economia e delle finanze, sentita l'ANCI.

This provision specifies that the connections for the access to the register regarding stolen or lost identity documents as well as to information concerning residence permits referred to in paragraph 1, are made according to decree of Ministry of Internal Affairs.

Article 8-bis.
Accesso degli ufficiali e agenti di polizia giudiziaria appartenenti al Corpo delle capitanerie di porto al Centro elaborazione dati del Ministero dell'interno

1. Gli ufficiali e agenti di polizia giudiziaria appartenenti al Corpo delle capitanerie di porto, per finalità di sicurezza portuale e dei trasporti marittimi, possono accedere ai dati e alle informazioni del Centro elaborazione dati di cui al primo comma dell'articolo 9 della legge 1° aprile 1981, n. 121, in deroga a quanto previsto dallo stesso articolo, limitatamente a quelli correlati alle funzioni attribuite agli stessi ufficiali e agenti di polizia giudiziaria. Detto personale può’ essere, altresì, abilitato all'inserimento presso il medesimo Centro dei corrispondenti dati autonomamente acquisiti.

2. Con decreto del Ministro dell'interno, di concerto con il Ministro delle infrastrutture e dei trasporti, sono individuati i dati e le informazioni di cui al comma 1 e sono stabilite le modalità per effettuare i collegamenti per il relativo accesso.


The provision concerns the access of the judicial police officers or agents belonging to the harbour office to the data processing centre of the Ministry of Internal Affairs.

Article 9.
Centri di identificazione ed espulsione

These ones are already analysed in the ToC (Article 28(3) of the Directive). The amendment does not have itself an impact on EU citizens or their family members. As explained in the ToC, those centres (whatever called) they do represent a privation of the liberty of the person concerned.

**Article 10.**

**Modifiche alla legge 31 maggio 1965, n. 575.** This is the law on Mafia. 39

The amendments introduced affect both Italian nationals and EU citizens/family members. Two types of amendments included in the fight against Mafia and organised crime:

- **a)** Expansion of the preventive and precautionary measures, including the time periods for banishment from a given municipality (this ban does not imply any kind of expulsion from the Italian territory. It is a restriction within the Italian territory in compliance with Article 22 of the Directive);
- **b)** Extension of the powers of the Prosecutor so that now not only the Prosecutor of the Republic and the Questore can ask for the adoption of the preventive measures and measures of special surveillance but also the Prosecutor assigned to the court competent to solve the case.

According to current Article 1 the Law applies to persons suspected to belong to Mafia-type of organisations, to the Camorra or other associations (whatever they are called locally) and who pursue objectives or act using methods that correspond to those of Mafia-type associations. The amendment provides that the law shall also apply to persons who are suspected to have committed one or more crimes referred to in Article 51, paragraph 3-bis of the Code of Criminal Procedure.

The amendments introduced affect both Italian nationals and EU citizens/family members since it widens the scope of application of the provisions against mafia.

The crimes referred are:

- Article 600: slavery
- Article 601: minors prostitution
- Article 602: slaves
- Article 416bis: mafia-type organisation
- Article 630: kidnap with extortion and rape
- Crimes committed using the conditions provided for by Article 416-bis
- Article 74 DPR 309/90: Association aiming at drug trafficking
- Article 291 DPR 4312/73: Smuggling

**b) l'articolo 2 e' sostituito dal seguente:**

«Article 2. - 1. Nei confronti delle persone indicate all'articolo 1 possono essere proposte dal procuratore nazionale antimafia, dal procuratore della Repubblica presso il tribunale del capoluogo di distretto ove dimora la persona, dal questore o dal direttore della Direzione investigativa antimafia, anche se non vi e' stato il preventivo avviso, le misure di prevenzione della sorveglianza speciale di pubblica sicurezza e dell'obbligo di soggiorno nel comune di residenza o di dimora abituale, di cui al primo e al terzo comma dell'articolo 3 della legge 27 dicembre 1956, n. 1423, e successive modificazioni.

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There is the possibility to adopt measures of special surveillance as well as obligation to stay (not move from) the residence or principal domicile.

2. Quando non vi e' stato il preventivo avviso e la persona risulti definitivamente condannata per un delitto non colposo, con la notificazione della proposta il questore puo' imporre all'interessato sottoposto alla misura della sorveglianza speciale il divieto di cui all'articolo 4, quarto comma, della legge 27 dicembre 1956, n. 1423. Si applicano le disposizioni dei commi quarto, ultimo periodo, e quinto del medesimo articolo 4.

If there is no previous warning and the person who is subject to a special measure of surveillance is finally convicted, the notification of the sentence may be accompanied by the proposal of the questore to ban the person from the territory of the municipality from 1-5 years.

3. Nelle udienze relative ai procedimenti per l'applicazione delle misure di prevenzione richieste ai sensi della presente legge, le funzioni di pubblico ministero sono esercitate dal procuratore della Repubblica di cui al comma 1»;

The amendments from (b) to (f) include the competence of the Prosecutor assigned to the court competent to solve the case to request the adoption of the preventive measures and measures of special surveillance

c) all’articolo 2-bis:
1) al comma 1, dopo le parole: «Il procuratore della Repubblica» sono inserite le seguenti: «, il direttore della Direzione investigativa antimafia»;
2) dopo il comma 6 e’ aggiunto il seguente: «6-bis. Le misure di prevenzione personali e patrimoniali possono essere richieste e applicate disgiuntamente. Le misure patrimoniali possono essere disposte anche in caso di morte del soggetto proposto per la loro applicazione. Nel caso la morte sopraggiunga nel corso del procedimento esso prosegue nei confronti degli eredi o comunque degli aventi causa»;

The amendments specifies how preventive measures (which can be personal or property) can be applied, saying also that the property preventive measure shall apply also in the event of death of the person to whom the measure should apply.

This does not have any specific impact on EU citizens.

d) all’articolo 2-ter:
«1) al secondo comma, dopo le parole: "A richiesta del procuratore della Repubblica," sono inserite le seguenti: "del direttore della Direzione investigativa antimafia.";
2) il primo periodo del terzo comma e’ sostituito dal seguente: "Con l’applicazione della misura di prevenzione il tribunale dispone la confisca dei beni sequestrati di cui la persona, nei cui confronti e’ instaurato il procedimento, non possa giustificare la legittima provenienza e di cui, anche per interposta persona fisica o giuridica, risulti essere titolare o avere la disponibilita’ a qualsiasi titolo in valore sproporzionato al proprio reddito, dichiarato ai fini delle imposte sul reddito, o alla propria attivita’ economica, nonche’ dei beni che risultino essere frutto di activita’ illecite o ne costituiscano il reimpiego"; The provision concerns the seizure of goods.
3) al sesto e al settimo comma, dopo le parole: "del procuratore della Repubblica," sono inserite le seguenti: "del direttore della Direzione investigativa antimafia,"; Seizure of goods
4) sono aggiunti in fine i seguenti commi:
"Se la persona nei cui confronti e' proposta la misura di prevenzione disperde, distrae, occulta o svaluta i beni al fine di eludere l'esecuzione dei provvedimenti di sequestro o di confisca su di essi, il sequestro e la confisca hanno ad oggetto denaro o altri beni di valore equivalente. Analogamente si procede quando i beni non possano essere confiscati in quanto trasferiti legittimamente, prima dell'esecuzione del sequestro, a terzi in buona fede.
La confisca puo' essere proposta, in caso di morte del soggetto nei confronti del quale potrebbe essere disposta, nei riguardi dei successori a titolo universale o particolare, entro il termine di cinque anni dal decesso.
Quando risulti che beni confiscati con provvedimento definitivo dopo l'assegnazione o la destinazione siano rientrati, anche per interposta persona, nella disponibilita' o sotto il controllo del soggetto sottoposto al provvedimento di confisca, si puo' disporre la revoca dell'assegnazione o della destinazione da parte dello stesso organo che ha disposto il relativo provvedimento.
Quando accerta che taluni beni sono stati fittiziamente intestati o trasferiti a terzi, con la sentenza che dispone la confisca il giudice dichiara la nullita' dei relativi atti di disposizione.
Ai fini di cui al comma precedente, fino a prova contraria si presumono fittizi:
a) i trasferimenti e le intestazioni, anche a titolo oneroso, effettuati nei due anni antecedenti la proposta della misura di prevenzione nei confronti dell'ascendente, del discendente, del coniuge o della persona stabilmente convivente, nonche' dei parenti entro il sesto grado e degli affini entro il quarto grado;
b) i trasferimenti e le intestazioni, a titolo gratuito o fiduciario, effettuati nei due anni antecedenti la proposta della misura di prevenzione";

This provision does not affect EU citizens since it deals with seizure of goods.

e) all'articolo 3-bis, settimo comma, dopo le parole: "su richiesta del procuratore della Repubblica" sono inserite le seguenti: "su richiesta del procuratore della Repubblica"; (request the renewal of the caution- this is about the possibility to not go to preventive prison or get the goods seized if a caution is deposit).
f) all'articolo 3-quater, ai commi 1 e 5, dopo le parole: "il procuratore della Repubblica" sono inserite le seguenti: "presso il tribunale del capoluogo del distretto, il direttore della Direzione investigativa antimafia"; request more investigations.
g) all'articolo 10-quater, secondo comma, dopo le parole: "su richiesta del procuratore della Repubblica" sono inserite le seguenti: "su richiesta del procuratore della Repubblica".

Request preventive measures on other persons and companies, e.g., when the main suspect goods are under other person’s name or the suspect is out of the country.

Article 10-bis.
1. All’articolo 12-sexies del decreto-legge 8 giugno 1992, n. 306, convertito, con modificazioni, dalla legge 7 agosto 1992, n. 356, dopo il comma 2-bis, sono inseriti i seguenti:
«2-ter. Nel caso previsto dal comma 2, quando non e’ possibile procedere alla confisca in applicazione delle disposizioni ivi richiamate, il giudice ordina la confisca delle somme...
The legislation lays down urgent changes to the new criminal procedural code and measures to combat crime mafia.

The provisions added by the new amendments deal with seizure.

**Article 11.**

**Modifiche alla legge 22 maggio 1975, n. 152**

1. Alla legge 22 maggio 1975, n. 152, sono apportate le seguenti modificazioni:

a) all’articolo 18, quarto comma, le parole: «, anche in deroga all’articolo 14 della legge 19 marzo 1990, n. 55,» sono soppresse;

b) all’articolo 19, primo comma, sono aggiunti, in fine, i seguenti periodi: «Nei casi previsti dal presente comma, le funzioni e le competenze spettanti, ai sensi della legge 31 maggio 1965, n. 575, al procuratore della Repubblica presso il tribunale del capoluogo del distretto sono attribuite al procuratore della Repubblica presso il tribunale nel cui circondario dimora la persona. Nelle udienze relative ai procedimenti per l’applicazione delle misure di prevenzione di cui al presente comma, le funzioni di pubblico ministero...»

According to Article 20.2 D.Lgs n. 30/07, State security grounds are also when the person who has to be expelled belongs to one of the categories referred to in Article 18 of Law 22 May 1975, n. 152, so:

1) who acting within a group or alone, does preparatory acts that are objectively relevant (i.e., important), directed to disturb the State order, by committing one the crimes foreseen in part I, title VI of book II of the criminal code or one of the crimes foreseen in articles 284,285,286,306,438, 439,605 and 630 of the same code;
2) who used to be part of political associations that according to Law of 20 June 1952, n. 645 (Law 1952, n. 645 on provisions transposing the XII temporary and final provisions (paragraph 1) of the Constitution) have been dissolved and it is believed that for their subsequent behaviour, they continue carrying out an activity that is equivalent to the previous one;
3) carrying out preparatory acts that are objectively relevant (i.e., important), directed to the reconstitution of the fascist party according to Article 1 of the mentioned Law 1952, n. 645, in particular using exaltation or violence;
4) the persons who, excluded the cases referred to in the previous numbers, have been convicted for one of the crimes foreseen in the Law 2 October 1967, n.895 and in articles 8 and following of the Law 14 October 1974, n. 497 and further amendments, and it is believed that, for their subsequent behaviour, they are inclined to commit a crime of the same kind with the aim indicated in the previous n.1.

The provisions of the previous par shall also apply to instigators, to principals and sponsors (financing). Sponsor is who gives an amount of money or other goods knowing the purpose to which there are destined.

For the analysis of this provision and of the provision referred by Article 18 refer also to the ToC.
Amendments also aiming at including the competence of the Prosecutor assigned to the court competent to solve the case to request the adoption of the preventive measures and measures of special surveillance. It is also specified who will act as public prosecutor in the hearing for the application of preventive measures.

Legge 27 dicembre 1956, n. 1423
(in Gazz. Uff., 31 dicembre, n. 327).
Misure di prevenzione nei confronti delle persone pericolose per la sicurezza e per la pubblica moralità.

Article 1.
Possono essere diffidati dal questore:
1) gli oziosi e i vagabondi abituali, validi al lavoro;
2) coloro che sono abitualmente o notoriamente dediti a traffici illeciti;
3) coloro che, per la condotta e il tenore di vita, debba ritenersi che vivano abitualmente, anche in parte, con il provento di delitti o con il favoreggiamento o che, per le manifestazioni cui abbiano dato luogo, diano fondato motivo di ritenere che siano proclivi a delinquere;
4) coloro che, per il loro comportamento siano ritenuti dediti a favorire o sfruttare la prostituzione o la tratta delle donne o la corruzione dei minori, ad esercitare il contrabbando, ovvero ad esercitare il traffico illecito di sostanze tossiche o stupefacenti o ad agevolare dolosamente l'uso;
5) coloro che svolgono abitualmente altre attività contrarie alla morale pubblica e al buon costume.

Il questore ingiunge alle persone diffidate di cambiare condotta, avvertendole che, in caso contrario, si farà luogo alle misure di prevenzione di cui agli articoli seguenti.

Article 11-bis.
Modifiche alla legge 3 agosto 1988, n. 327

1. All'articolo 15 della legge 3 agosto 1988, n. 327, dopo il comma 3 e’ aggiunto il seguente:
«3-bis Quando e’ stata applicata una misura di prevenzione personale nei confronti dei soggetti di cui all’articolo 1 della legge 31 maggio 1965, n. 575, la riabilitazione puo’ essere richiesta dopo cinque anni dalla cessazione della misura di prevenzione personale. La riabilitazione comporta, altresi’, la cessazione dei divieti previsti dall’articolo 10 della legge 31 maggio 1965, n. 575».

Law n. 327/88 is on personal preventive measures. Article 3bis specifies when the rehabilitation may be asked after the cessation of the personal preventive measure.

Article 11-ter.
Abrogazione


Law n. 55/90 is on new rules for the prevention of mafia kind of delinquency and other serious forms of manifestation of social dangerousness.

Article 14 of this Law that the amendment intends to repeal specifies to which subjects the provisions of Law n. 575/65 (provisions against mafia) concerning investigations and the application of preventive property (economical – patrimoniali) shall apply.

The repeal proposed by the amendments does not have a specific impact on EU citizens considering that in Article 20.2 of Legislative Decree n. 30/07 it is specified to whom provisions against Mafia shall apply. In particular while defining “State security grounds” it provides that those grounds are also when the person who has to be expelled belongs to one of the categories referred to in Article 18 of Law 22 May 1975, n. 152. This provision refers then to other acts. In any case for an analysis of this provision and its effect on EU citizens, refer to the ToC and CS.
**Article 12.**

**Modifiche al regio decreto 30 gennaio 1941, n. 12**


2. Se ne fa richiesta il procuratore distrettuale, il Procuratore generale presso la corte d'appello puo, per giustificati motivi, disporre che le funzioni di pubblico ministero per la trattazione delle misure di prevenzione siano esercitate da un magistrato designato dal Procuratore della Repubblica presso il giudice competente.».

Amendments also aiming at including the competence to request the adoption of the preventive measures and measures of special surveillance

**Special preventive measures** are measures that are applied ante delicto that is before a crime is committed. The measure is based on the assessment of the “dangerousness” of the person concerned. These measures are:

- Oral warning from the Questore informing the person concerned that he/she is under suspicion explaining the reasons/grounds.

- Repatriation with the compulsory foglio di via (that is a paper stating that the person concerned can be sent to the place of residence). If he/she does not comply then he/she will be arrested.

- Special surveillance in case the person who has been warned by the Questore has not changed his/her behaviour. This measure might be combined with the obligation to reside in a certain area or the ban of residence in a certain area.

So expulsion is not a special preventive measure and therefore these amendments do not affect EU citizens and their family members in a different way as it would affect Italians.

**Article 12-bis.**

**Modifiche alla legge 18 marzo 2008, n. 48**

1. All'articolo 11 della legge 18 marzo 2008, n. 48, dopo il comma 1 e' aggiunto il seguente: «1-bis. Le disposizioni di cui al comma 3-quinquies dell'articolo 51 del codice di procedura penale, introdotto dal comma 1 del presente articolo, si applicano solo ai procedimenti iscritti nel registro di cui all'articolo 335 del codice di procedura penale successivamente alla data di entrata in vigore della presente legge».

Law n. 48/08 is on ratification and implementation of Council of Europe Convention on Cybercrime, signed in Budapest on November 23, 2001, and rules of the internal adjustment.

The amendment introduces procedural rules which do not have an impact on EU citizens in particular.

The new par. added says that the provisions of Article 51 par 3-quinquies of the CPP shall only apply to proceedings which have been “registered” (Article 335 CPP Register of news of crime where the prosecutor inscribes the news of crime that he has received or acquired on its own initiative […]).
Article 12-ter.
Modifiche al testo unico di cui al decreto del Presidente della Repubblica 30 maggio 2002, n. 115

1. Al testo unico delle disposizioni legislative e regolamentari in materia di spese di giustizia, di cui al decreto del Presidente della Repubblica 30 maggio 2002, n. 115, sono apportate le seguenti modificazioni:
   a) all'articolo 76, dopo il comma 4 e' aggiunto il seguente:
      «4-bis. Per i soggetti gia' condannati con sentenza definitiva per i reati di cui agli articoli 416-bis del codice penale, 291-quater del testo unico di cui al decreto del Presidente della Repubblica 23 gennaio 1973, n. 43, 73, limitatamente alle ipotesi aggravate ai sensi dell'articolo 80, e 74, comma 1, del testo unico di cui al decreto del Presidente della Repubblica 9 ottobre 1990, n. 309, nonche' per i reati commessi avvalendosi delle condizioni previste dal predetto articolo 416-bis ovvero al fine di agevolare l'attivita' delle associazioni previste dallo stesso articolo, ai soli fini del presente decreto, il reddito si ritiene superiore ai limiti previsti»;

   b) all'articolo 93, il comma 2 e' abrogato;

   c) all'articolo 96, comma 1, le parole: «, ovvero immediatamente, se la stessa e' presentata in udienza a pena di nullita' assoluta ai sensi dell'articolo 179, comma 2, del codice di procedura penale,» sono soppresse;
   d) all'articolo 96, comma 2, dopo le parole: «tenuto conto» sono inserite le seguenti: «delle risultanze del casellario giudiziale,».

Decision on the request for legal aid. These are procedural provisions.

The new amendment does not affect EU citizens and their family members in a different way as it would affect Italians.

Article 25 is on special proceedings when minors are involved. The amendment inserted a new par. saying that the public prosecutor cannot proceed with the direttissimo rito or require the immediate judgement in cases where this seriously undermines the educational needs of the child. This does not have a specific impact on EU citizens.
**Article 13.**

Entrata in vigore –Entry into force

1. Il presente decreto entra in vigore il giorno successivo a quello della sua pubblicazione nella Gazzetta Ufficiale della Repubblica italiana e sarà presentato alle Camere per la conversione in legge.

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**3.2. Draft Legislative Decree amending and supplementing Legislative Decree n. 30/2007 transposing Directive 2004/38/CE**

The Draft Legislative Decree aims at introducing supplementary and amending provisions to Legislative Decree n. 30/2007 transposing Directive 2004/38/CE, as amended by Legislative Decree n. 32 of 2008. The Draft Decree intends in particular to monitor the presence of EU citizens in the Italian territory and to render the expulsion measures more effective.

In general, the amendments introduced by the present Draft do not comply with Directive 2004/38/EC for the reasons that will be commented below.

**Article 7, paragraph 1 letter. b) of D. Lgs. February 6, 2007, n. 30** has been amended. The corresponding Directive’s provision provides that the EU citizen has the right of residence for more than three months, if he/she has sufficient resources […] not to become a burden on the social assistance system of the host Member State during the period of residence […]. The draft Decree added that these resources must derive from activities that are demonstrable as lawful.

First, the amendment would be unnecessary because the obligation actually already exists in Article 29.3 b) of Legislative Decree 286/1998 to which the transposing provision refers, and that requires a foreign person who wants to rejoin his/her family member to provide evidence of having an annual salary deriving from legal sources, not lower than the social allowance […].

But the amendment seems to give emphasis not to the lawful origin of the resources but to the proof of this legality, which would be discriminatory only against EU citizens, since a systematic and formal proof regarding the lawful origin of resources is not required for foreigners (non EU nationals).

Moreover, in general this amendment would introduce an additional requirement (burden) that is in any case not in compliance with the Directive.

**Article 9, par. 2 and Article 10 par. 1 have been of D. Lgs. February 6, 2007, n. 30** have been replaced by new provisions.

The Draft Decree, in relation to the beginning of the period when the right of residence for more than three years starts to count, renders mandatory the request for registration within 10 days starting to count from the third month following the entry in the national territory; this is the requirement applying to EU citizens and their family members (also non EU citizens).

The amendment’s introduction of a time limit to register is in line with the Directive. The problem is that the registration is considered as a matter of public order and public security. Therefore, if a person does not register, this failure will be considered as a violation of public policy and public security, with all the consequences that this implies (see above sections 2.8 and new Article 20(3) of D.Lgs. February 6, 2007 below.

Article 8(2) of the Directive says that “failure to comply with the registration requirement may render the person concerned liable to proportionate and non-discriminatory sanctions” and Article 5, par. 5
states that “the Member State may require the person concerned to report his/her presence within its territory within a reasonable and non-discriminatory period of time” specifying that “failure to comply with this requirement may make the person concerned liable to proportionate and non-discriminatory sanctions.”

These issues will be analysed later in this section (under comment to new Article 20.3 of D. Lgs. February 6, 2007, n. 30). In any case the sanction of expulsion cannot be considered as “proportionate and non-discriminatory”.

The amendments therefore do not comply with the Directive and with the principle of free movement of EU citizens and their family members that is considered as an essential principle at EU level and that has been also repeated in par. 11 of the preamble to the Directive.

**Article 9, paragraph 3 c) of D. Lgs. February 6, 2007, n. 30** has been amended [new version of the Decree approved by the Council of Ministers on the 1 of August 2008]

*The original wording of the provision saying that “to be enrolled at a public or private establishment accredited by the existing legislation and a sickness insurance or any other suitable instrument whichever called, covering all the risks, and sufficient resources for themselves and their family members, according to the criteria set out in Article 29.3 b) of the above mentioned Legislative Decree n. 286 of 1998, when the registration is required according Article 7.1 c),” has been changed.*

This may actually render transposition of Article 8(3) second indent of the Directive correct.

In fact Article 29.3 b) of Legislative Decree 286/1998 sets the criteria that have to be taken into account when making the declaration referred to in point (c) of Article 7(1). In doing this, it refers to specific amounts setting the limits under which the resources shall not go, *i.e.*, the amount of the social allowance/assistance. This was contrary to the Directive that clearly states that “Member States may not require this declaration to refer to any specific amount of resources”.

**Article 9, paragraph 4 of D. Lgs. February 6, 2007, n. 30** has been amended.

The amendment gives students the possibility to self declare the existence of sufficient resources.

Such a limitation appears discriminatory against other cases that give the right of residence outside the situation of work and in particular to the worker’s family members: both the student and the worker for the purpose *e.g.*, of admission to a particular Italian course at school or university or for carrying out a work etc. may have already provided the Italian administration with tax, work information. This information may be easily reused by the same administration.

**Article 9, paragraph 6 of D. Lgs. February 6, 2007, n. 30** has been amended.

The Draft Decree makes explicit the equalisation of a third country family member to Italians concerning the obligations connected to the requirements on identity documents; it extends to third country family members the obligation of dactyloscopic/fingerprint relief.

Italian citizens are also subject to the dactyloscopic/fingerprint obligation according to Article 2, paragraph 7 of Law No 222/2002.
A new paragraph has been added to Article 14 of D. Lgs. February 6, 2007, n. 30, namely par. 14bis.

According to the new par. even outside the cases under which an expulsion order on public order or security grounds has been taken, the existence of a final judgment conviction for one of the crimes referred to in Article 380 paragraphs 1 and 2 CPP (basically serious crimes as crimes against the personality of the State, the crime of devastation and pillaging, crimes against the public safety, the crime of enslavement, crimes committed for the purposes of terrorism or subversion of the constitutional order, etc.), implies the suspension of the period of five years of uninterrupted residence (period after which the Community and national rules recognise the right of permanent residence of EU citizens and their non EU national family members who lived with him/her) and this term shall restart after the execution of the sanction/penalty.

This means that the right of permanent residence is suspended by the final conviction judgment and restarts after the execution of the penalty. This provision is intended to prevent the EU citizen to take advantage, for the most serious crimes, of the timing/length of the criminal proceedings and of the enforcement of the penalty to acquire the right of permanent residence.

Therefore, this provision introduces a period where the lapse of the terms for residence is suspended. Such a provision does not exist in the Directive that only mentions the lapse or the interruption of that period; moreover in Article 21 the Directive says that the continuity of residence is only broken by any expulsion decision duly enforced against the person concerned and in Article 27(2) it says that the mere existence of previous criminal convictions shall not automatically justify the adoption of expulsion measures. The criminality is also broken for an enforced expulsion decision.

It is clear that according to the Directive, when the EU citizen or his/her family member has been convicted for a crime, there are two possibilities: either taking an expulsion decision but on a case by case basis and on the basis of the concrete and actual threat that the behaviour of the person concerned may represent to public security; the expulsion measure also interrupts the continuity of the period of regular residence or when the person concerned (condemned) does not represent a threat or does not represent a concrete and present danger anymore, he/she will be allowed to continue exercising his/her right of residence and in case to get the right of permanent residence in the meantime acquired.

Article 20, paragraph 3 of D. Lgs. February 6, 2007, n. 30 has been replaced. The text of this provision was also previously replaced by D. Lgs. 32/2008.

The new provision added by the draft Decree adds three additional cases according to which an expulsion decision on imperative public security grounds can be taken against an EU citizen or his/her family member (also non EU national) – [the expulsion decision under D. Lgs No 30/2007, as amended by Legislative Decree no. No 32/2008 implies the immediate execution at the border accompanied by the police and if not executed, it is provided the possible stay in a detention centre for temporary stay, and the prohibition of re-entry].

In particular:

- Imperative public security grounds are (and therefore there will be expulsion) “IN ANY CASE” when the person concerned does not hold registrations certificate and when he/she fails to request a residence card. In this regard the Directive in Article 8(2) and in Article 9(3) provides that failure to comply with the registration or no holding the residence card make the persons concerned - EU citizen or non EU national family member respectively – responsible/punishable of proportionate and non-discriminatory sanctions.

It is not possible to consider the most severe sanction under the Directive, namely expulsion, because of the failure to comply with the said administrative formalities, as “proportionate and non-
discriminatory”. The Italian Government seems to consider as a sanction, almost mandatory, the expulsion that is always executed by accompanying by force the person concerned (to the borders), with the possible keeping in a detention centre, and that always implies the prohibition to re-enter the national territory.

The same sanction is applied to persons who have been convicted for serious crimes, if he/she continues to be socially dangerous.

Moreover, Article 27, paragraph 2 of the Directive provides that “measures taken on grounds of public policy or public security shall comply with the principle of proportionality and shall be based exclusively on the personal conduct of the individual concerned. […] The personal conduct of the individual concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. Justifications that are isolated from the particulars of the case or that rely on considerations of general prevention shall not be accepted”. This provision has been transposed (incorrectly) by Article 20.4 of D. Lgs No 30/2007.

The Directive in Article 15 paragraphs 1 and 3, provides for another kind of expulsion, namely for the cessation of conditions that justify the right of residence, which cannot foresee the ban on re-entry into the territory of the State. This provision has been transposed (incorrectly) by Article 21 of D. Lgs No 30/2007 as amended by D. Lgs No 32/2008.

Apart from the assessment of the transposition of the mentioned provisions, if the intention of the Italian legislator is to punish infringements of administrative requirements, it should provide for a less afflictive sanction as compared to the one that applies to persons who are dangerous for public security and in any case it should provide a sanction that complies with the Directive according to which the limits of public order and security of every State shall always be seen as exceptions that are assessed on a case-by-case basis.

- Another case of expulsion on imperative public security grounds concerns public morality and public decency (buon costume) grounds. This gives an unlawful and ambiguous administrative discretion since the mentioned grounds may be extended to a number of other circumstances, explicitly linked also to the alleged or implied incompatibility with the 'civil and save coexistence'.

- The last case for which it is possible to order an expulsion on imperative public security grounds under the amendments proposed by the Draft Decree is when the person concerned has been convicted for one or more crimes referred to in Article 380 par. 1 and 2 of the CPP. More precisely the convictions pronounced by an Italian or foreign/alien judge for one those crimes should be taken into account when issuing an expulsion decision.

The new provision appears to be ambiguous and also very strict since it seem to affirm that whenever an EU citizen has been convicted for such crimes, there is the prerequisite for expelling him/her on grounds of public security, without specifying, inter alia, that there has to be a final judgment of conviction based on the principle of innocence of the defendants until the final judgement of conviction is given according to Article 27 of the Constitution.

**Article 20, paragraph 11 of D. Lgs. February 6, 2007, n. 30** has been amended.

The new version of the provision provides that when executing an expulsion order (by accompanying the person concerned to the border) “where there are technical obstacles to the execution of the expulsion or there are difficulties in identifying the persons concerned with an expulsion order, then the said subjects shall be kept in a centre for temporary stay and assistance in accordance with the procedures set out in Article 14 of Legislative Decree on July 25, 1998, n. 286, for a maximum period of fifteen days”.

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**Milius Ltd & Europa Institute**

**Conformity Study Directive 2004/38/EC for Italy, 2008**

91/97
Further amendments to this provision (dated 1 of August 2008) have changed the name of the centres for temporary stay and assistance to “centres of identification and expulsion”.

Regardless of any consideration on whether it is reasonable to assume that for an EU citizen there are “difficulties in identifying him/her”, the amendment appears to restrict the personal freedom and it is therefore against EU citizens. This is contrary to the Directive.

Article 20, paragraphs 14 and 15 of D. Lgs. February 6, 2007, n. 30 have been amended.

The Draft Decree provides for a stricter approach as to the minimums and maximums (period) regarding imprisonment when the person concerned enters the national territory, breaching the ban on entry that has been provided as an effect of the expulsion measure (in case of breach of the ban on entry following an expulsion on State security grounds – Article 20.14) or as an effect of a new unlawful re-entry following a previous unlawful re-entry breaching an expulsion measure (imprisonment is now for all cases from one to five years – Article 20.15).

These amendments do not have a specific impact on EU citizens. It is only questionable whether the restriction of the penalties represents an appropriate approach to ensure general security within the territory of the European Union, in which public order and security should be configured as exceptions to the more general principle of freedom of movement, residence and establishment.

Article 22, paragraph 4 of D. Lgs. February 6, 2007, n. 30 has been amended.

The provision has been changed by the new version of the Decree approved by the by the Council of Ministers on the 1 of August 2008. The amendments do not substantially change the meaning of the provision.

The amendments introduced by the Draft Decree provide for a temporal limitation of the suspensive efficacy of the incidental application for an interim order to suspend the enforcement of the expulsion measure that has been appealed to Court. The amendment provides for a quicker decision on the interim order, namely 60 days. The measure would be in any case enforced if no decision is given within the said period of 60 days (the new version of the Decree says “90 days”).

The reform proposed seems to only affect the right of defence of the person expelled (applicant) since it is on him/her only that the negative consequences of a delay of the court decision will fall.

The provision has been changed by the new version of the Decree approved by the by the Council of Ministers on the 1 of August 2008.
ANNEX I: Table of concordance for Directive 2004/38/EC
ANNEX II: List of relevant national legislation and administrative acts

Main transposing legislation:


Other relevant legislation:


**RD n. 773/31**: Regio decreto 18 giugno 1931, n. 773 Approvazione del testo unico delle leggi di pubblica sicurezza, pubblicato nel Supplemento Ordinario, alla Gazzetta Ufficiale, n. 146 del 26 giugno 1931. RD 18 June 1931 n. 773 on the approval of the Laws in the field of public administration, published in the O.J. n. 146 of 26 June 1931


**Presidential Decree (PD) n. 223/89**: Decreto del Presidente della Repubblica 30 maggio 1989, n. 223 Regolamento anagrafico della popolazione residente, pubblicato nella Gazzetta Ufficiale del 8 giugno


**Criminal Procedural Code (CPP):** Codice di procedura penale, D.P.R. 22 settembre 1988, n. 447(CPP), Criminal Procedural Code, approved by Decree of the President of the Republic on 22 September 1988, n. 447


ANNEX III:  Selected national case law

Sent n. 22511 Cassazione Penale Sez. IV, 3 May 2007