



**The New EU Legal Regime on Labour  
Migration and its Effects on Italy:  
The Implementation of Directives 2009/50,  
2011/98 and 2014/36.  
Towards a Human Rights-Based Approach?**

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Towards a Human Rights-Based Approach?<sup>α</sup>**

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## 1. The Italian Regulation on Labour Migration: General Features

Historically, the Italian system has been – and still is – characterized by the lack of an effective and unified strategy, both medium and long term, regarding migration policies. In addition, the substantial failure of several consecutive legislative attempts to regulate migration for economic reasons, often of an emergency nature, should also be noted.

Similarly – and perhaps especially – because of the complex and cumbersome nature of the procedure provided by current legislation (Legislative Decree no. 286/1998, the so-called ‘Consolidated Law on Immigration’, which has been changed many times over the last few years), entry and residence for the purposes of work in the Italian territory of third-country citizens are particularly complex. While migrant workers have become a structural feature of the Italian labour market,<sup>1</sup> immigration law assumes that migrant workers would only be employed in limited circumstances. One could, paradoxically, say that immigration law acts as a strong disincentive to regular migration and working.<sup>2</sup>

The outcome of such a situation is represented in practice by the constant circumvention of the rules governing entry and residence and, therefore, by the continuous illegal entry to the territory. The large number of irregular foreign workers present in the Italian black economy is, at least in part, the result of the evident inadequacy of the system set up, since the 1980s, to regulate migration.<sup>3</sup>

The effects produced, even recently, by the measures adopted by the national legislator in order to further reduce entry of both regular foreigners, and especially irregular ones, were very few.<sup>4</sup> Only a small

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<sup>1</sup> According to the Italian National Statistics Institute (ISTAT), in 2014 foreign nationals resident in Italy – both EU citizens and third-country nationals – were more than 5 million (source: <http://www.istat.it/it/archivio/162251>, accessed 26 June 2015), and in addition it is estimated that there were about 540,000 undocumented foreigners. In the same year, 2,3 million were regularly employed, while there are no reliable data on the number of irregular migrant workers: see ISTAT, *Rapporto annuale 2015. La situazione del Paese* (Roma: Istituto nazionale di statistica, 2015) 148.

<sup>2</sup> Silvana Sciarra, William Chiaromonte, ‘Migration Status in Labour and Social Security Law. Between Inclusion and Exclusion in Italy’, in Cathryn Costello, Mark Freedland (eds.), *Migrants at Work. Immigration and Vulnerability in Labour Law* (Oxford: Oxford University Press, 2014) 122.

<sup>3</sup> Emilio Reyneri, ‘The Role of the Underground Economy in Irregular Migration in Italy: Cause or Effect?’ (1998) 31 *Journal of Ethnic & Migrations Studies* 313; Anna Montanari, *Stranieri extracomunitari e lavoro* (Padova: Cedam, 2010) 94.

<sup>4</sup> Maurizio Ambrosini, ‘Immigration in Italy: Between Economic Acceptance and Political Rejection’ (2013) 14 *Journal of International Migration and Integration* 175.

number of foreign workers currently residing in Italy have, in fact, officially entered the country for work purposes. Regularization (*'sanatoria'*) measures were taken periodically to cope with such an ex post situation.<sup>5</sup> These measures have proven to be the only tools capable of giving legal status to foreign workers, who are unable to legally enter the country because of a quota management that is too narrow and intricate, and a labour market that is characterized by excessive demand for illegal workers.<sup>6</sup>

Moreover, the legislative mania for securitization policies has relegated the role of labour law to an ancillary position in the regulation of migration issues: from 2008 onwards, the so-called 'security packages' were repeatedly introduced,<sup>7</sup> all focusing on measures against irregular migration and having as a common denominator restrictions on the legal status of migrants.<sup>8</sup> Measures relating to work and social integration have been omitted in favour of a strong emphasis on national security and public order; these measures were designed to marginalize migrants and to weaken their social rights.

Briefly, the main feature of Italian immigration policy is identified as the mismatch between the legal hurdles of access to work for migrants, on the one hand, and the structural demand for migrant workers – especially for seasonal workers – in the Italian labour market, on the other.<sup>9</sup> This conclusion, however, does not appear significantly affected even by the repercussions that the recent economic crisis has caused also to the overseas employment market, which has led to a slowdown in arrivals and a reduction of foreign occupation as a result of the decrease in demand of foreign labour coming mainly from businesses and services.

### 1.1. The Background and Aims of Italian Migration Policies

In the Italian system it is accepted that the State can subordinate the entry of foreigners to its territory under certain authorizations,<sup>10</sup> and

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<sup>5</sup> The last of which was provided for in Art. 5 of Law no. 109/2012.

<sup>6</sup> Monica Mc Britton, 'Prestazione di fatto e lavoro immigrato' (2010) *Rivista giuridica del lavoro e della previdenza sociale* II 549.

<sup>7</sup> Law no. 125/2008; Law no. 94/2009; Law no. 217/2010.

<sup>8</sup> See Maurizio Ambrosini, "'We are against a multi-ethnic society': policies of exclusion at the urban level in Italy' (2012) *Ethnic and Racial Studies* 1; E. Çetin, 'Exclusionary Rhetoric Expansionist Policies? Right-wing Parties and Immigration Policy-making in Italy' (2012) *COMPAS Working Paper* no. 95.

<sup>9</sup> Sciarra, Chiaromonte, *supra* n. 2, at 124.

<sup>10</sup> Notwithstanding, primarily, international law and European human rights law. Cf. Bruno Nascimbene, *Il trattamento dello straniero nel diritto internazionale ed europeo* (Milano: Giuffrè, 1984).

then treat the foreigner in a different way with regard to access to employment.<sup>11</sup>

However, once the foreigner has been admitted and authorized to work in Italy, labour protection laws are applied 'in all their forms and applications' (Art. 35.1, Constitution),<sup>12</sup> as well as other constitutional guarantees like Arts 35-40 and legislation arranged in favour of the worker as such, regardless of nationality. This is an application of the principle of equal working conditions for foreign and national workers, reiterated by the Consolidated Law on Immigration (Art. 2.3). Therefore, it is clear that the rules governing legal residency and access to employment represent a crucial point, because national legislation binds the regular presence of foreigners in Italy primarily to employment.

Italian immigration policy operates at two levels. A centralized procedure at the national level sets admission quotas, while local administrative authorities grant residence and work permits.<sup>13</sup>

Under the national procedure, the State determines the maximum admission quotas. Every three years a governmental planning document is issued, setting out the general criteria for determining the permitted entry quotas (Arts 3.1-3.3, Consolidated Law on Immigration). These criteria entail an assessment of labour market shortages by sector, related to national demands.

Based on these general criteria, an annual governmental decree issued by the Ministry of Internal Affairs – known as the '*decreto flussi*' – which sets the admission quotas, is adopted, covering all legal entry and residence permits for reasons of work, for both employees (including short-term and seasonal) and self-employed workers (Art. 3.4, Consolidated Law on Immigration). This quota is determined with reference to family reunification and measures of temporary protection due to significant humanitarian needs; two other priority selection criteria are also provided for, respectively, nationals of a third country that has cooperation agreements with Italy in the area of migration, and those who have at least one relative (within a certain degree) of Italian nationality. Lastly, there are restrictions to entry of citizens from countries that do not cooperate in the fight against illegal immigration or

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<sup>11</sup> Unlike what happens, for example, for citizens of European Union Member States.

<sup>12</sup> Antonio Viscomi, *Immigrati extracomunitari e lavoro subordinato. Tutele costituzionali, garanzie legali e regime contrattuale* (Napoli: ESI, 1991) 70; Severino Nappi, *Il lavoro degli extracomunitari* (Napoli: ESI, 2005) 161.

<sup>13</sup> William Chiaromonte, *Lavoro e diritti sociali degli stranieri. Il governo delle migrazioni economiche in Italia e in Europa* (Torino: Giappichelli, 2013) 145-151. See also Nunzia Castelli, 'Politiche dell'immigrazione e accesso al lavoro nella legge Bossi-Fini' (2003) *Lavoro e diritto* 297; Donata Gottardi, 'Politiche migratorie e programmazione dei flussi', in Armando Tursi (ed.), *Lavoro e immigrazione* (Torino: Giappichelli, 2005) 139.



do not cooperate in the re-entry of their citizens who are recipients of a return measure (Art. 21, Consolidated Law on Immigration). While the planning decree is to take into account sector shortages, the overall annual quota is not based on sectors of employment, but applies generally to admissions of labour migrants.

The last approved planning document, however, dates back to the 2004-2006 period, and has resulted in a mismatch of the quota with the labour market realities.

Without this planning document, which should represent on paper the focus in planning national migration policies, government action of recent years has acted without pursuing a real unified and medium term strategy.<sup>14</sup> In other words, the planning of migration flows towards Italy has been managed exclusively through the '*decreto flussi*'. Such a diversion from the original arrangement of national migration policies raises concern from many viewpoints: firstly, because the '*decreto flussi*' is a tool adopted at the discretion of the Ministry of Internal Affairs, and moreover not always on a regular basis (for instance, between 2009 and 2010 it was suspended, with the sole exception of the entry of seasonal workers); secondly, because this tool should theoretically fulfil the role of regulating entries ex ante and preventively determining the number of new entries from abroad on the basis of a careful assessment of the labour market needs. However, in practice, this has become the means by which the position of foreigners, who are already illegally present in Italy, becomes 'rectified' ex post (usually once a year).

## 1.2. Admission Provisions for Labour Migrants

At the local level, labour migration is subject to a long and complex administrative procedure.<sup>15</sup> The process of stipulating a work contract between an employer present in Italy, an Italian or foreign legal resident, and a foreign worker residing abroad can only be started once the '*decreto flussi*' has been issued, providing that the relative quotas would allow it. The administrative procedure, moreover, requires the employer to apply for the work permit while the migrant is still resident outside the EU, as long as the employee is not already legally resident in the country (Art. 22, Consolidate Law on Immigration)<sup>16</sup>, a condition that

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<sup>14</sup> Massimo Livi Bacci, 'Cronache di due fallimenti. L'Europa, l'Italia e le politiche migratorie' (2011) *Il Mulino* 437.

<sup>15</sup> Chiaromonte, *supra* n. 13, at 163-183. See also Chiara Favilli, 'Italy', in Dirk Vanheule (ed.), *International Encyclopaedia of Laws: Migration Law* (Alphen aan den Rijn: Kluwer Law International, 2013) 61-66.

<sup>16</sup> See also Corte di Cassazione 9 September 2002 no. 13054.

accentuates the illegal contours of the phenomenon, in addition to not facilitating the employment of foreigners.

Third-country national migrants must first obtain an entrance permit, and then, from the police headquarters,<sup>17</sup> a residence permit. In addition, once a job offer has been received, a migrant worker relies on a request made by the employer for authorization to work, which is issued by the local immigration office.<sup>18</sup> Access to the territory depends on access to employment. This link, already found in the Consolidated Law on Immigration, was strengthened by the Bossi-Fini Law,<sup>19</sup> which made entrance dependent on the existence of an employment contract. The workers' legal status becomes, in this way, dependent on the employer, and consequently the loss of job can affect the residence permit. However, the termination of employment does not automatically invalidate the residence permit, which continues to be effective until its expiry. This period may not be less than one year, except in the case of a residence permit issued for seasonal work (Art. 22.11, Consolidated Law on Immigration). Workers dismissed, or those who have resigned from their jobs, can then obtain unemployment benefits, as well as being able to search for a new job in Italy, for the remaining period of validity of the permit. Admittedly, if migrant workers become unemployed, their residence permit is in jeopardy, so the right to unemployment benefits – even if available – may be, in practice, ineffective.

In particular, the employer who intends to establish a permanent or temporary employment relationship with a foreigner residing abroad must submit an application for employment with the foreigner's name, or more rarely a number, to the local immigration office. The application must comprise, in addition to the identification data of the employer and the employee (if requested by name), guarantees as to the availability of accommodation for the worker, the commitment to bear necessary travel expenses in case of repatriation, and a proposal to enter into an indefinite, definite or seasonal, full-time or part-time 'residence contract for dependent employment' (of no less than 20 hours per week). Employment is subject to verification, at the competent *Centro per l'impiego*,<sup>20</sup> that no worker already in the national territory is available to occupy the specific job.

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<sup>17</sup> The *Questure* organize and manage all the activities of the State Police at local level.

<sup>18</sup> The *Sportello unico per l'immigrazione* is the entity responsible for the entire process of recruitment of foreign workers, and it is established in each province within the *Prefettura* (local governmental Prefecture office).

<sup>19</sup> Law no. 189/2002.

<sup>20</sup> The public administration office that manages the labour market at local level.

The local immigration office is required to verify some aspects; in particular, they must assess the compatibility of the request with the limits set by the *'decreto flussi'*. In the case of a positive outcome of the investigation, the local immigration office releases, within 60 days of the submission of the application, an authorization to work. The authorization is then sent electronically by the local immigration office, at the request of the employer, to the consular offices of the country of the worker. The worker, informed by the employer that authorization has been granted, can ask these same offices to issue the visa for work in Italy. Within 6 months from the issue of the visa the foreign worker must enter Italy and, within 8 days upon arrival, must go to the local immigration office that issued the authorization and sign the 'residence contract for dependent employment' filed by the employer. Only then can the foreign worker request, at the police headquarters (through the local immigration office), the residence permit that will allow him to live and work legally in Italy.

The most relevant aspect of the Consolidated Law on Immigration, as modified mainly by the Bossi-Fini Law, is that the already cumbersome entrance procedures for migrant workers were aggravated by making entrance to the territory, permanent stay, and rights guarantees conditional on the lawful exercise of some form of working activity. On the other hand, the legislator showed no interest in integration policy and fundamental rights guarantees for third-country nationals. The interest in protecting public order by controlling admissions is the most prominent feature of migration policy.<sup>21</sup> As mentioned earlier, the paradox is that migration policy seems to prevent regular employment of migrant workers, while encouraging irregular migration. Several features of the legislation confirm this impression.

In fact, the criticisms of this procedure are many, which results in making legal entry for work almost impossible. A thorough reconsideration of the whole process is needed.

First, as we have seen, the law presumes that migrants are recruited individually from abroad. The law also seems to presume that recruitment is based on the employer's direct knowledge of the migrant to be hired. This mechanism, precluding the direct encounter between labour offer and demand, generates irregular work in the vast majority of

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<sup>21</sup> Anna Triandafyllidou, Maurizio Ambrosini, 'Irregular immigration control in Italy and Greece: Strong fencing and weak gate-keeping serving in the labour market' (2011) 13 *European Journal of Migration and Law* 251.

cases.<sup>22</sup> In practice, it is common that a migrant resides irregularly in Italy, then returns to his country of origin, to return to Italy again, this time legally, in order to follow the procedure described. These inconsistencies partially justify recourse to frequent mass regularizations. The latter have become, over the years, the prevailing instrument to regularize migrant workers.<sup>23</sup>

A second notable feature in the Bossi-Fini Law is the reintroduction of the so-called 'economic needs test'. The test requires that employers prove 'with appropriate documentation' (Art. 9.7, Law no. 99/2013), and on an individual basis (each and every employer has to prove this), the unavailability of suitable Italian or EU workers to perform the tasks in question. Upon receipt of a request by an employer, the local immigration office communicates the specific job through the national network of Employment Centres, in order to verify whether there are any Italian or EU workers interested. This procedure confirms the self-referential attitude of the legislator, who intervenes to regulate migration with a declared preference for Italian and EU workers.<sup>24</sup> However, and again this is contradictory, there is a way to hire third-country nationals, since the requirement to prove that no Italian or EU worker is available is not an onerous one, and is easily circumvented in practice.

The Bossi-Fini Law also repealed the provision for individuals to sponsor migrants to seek work. Formerly, sponsors able to guarantee salary and accommodation were entitled to obtain – within the quota limits – authorization to allow third-country nationals into the labour market for one year, with the objective of finding a job. Eligible sponsors were: individuals, both Italian and foreign, legally residing in Italy; associations working in the field of immigration; trade unions; and local authorities, such as Regions or municipalities. This regulation was repealed in 2002, and was replaced by a much weaker device intended to give migrants attending educational activities and training courses organized by various Italian associations in their country of origin, an advantage in entering the Italian labour market.<sup>25</sup> The new provision,

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<sup>22</sup> Antonio Viscomi, 'Lavoro sommerso e immigrazione' (2008) *Il lavoro nella giurisprudenza* 19; Maurizio Ambrosini, 'Irregular immigration: economic convenience and other factors' (2008) 14 *Transfer* 557.

<sup>23</sup> Ester Salis, 'Labour migration governance in contemporary Europe. The case of Italy' (2012) *FIERI Working Papers* (at 30: 'Regularizations as a functional equivalent of labour migration policies').

<sup>24</sup> Castelli, *supra* n. 11, at 312; Gianni Loy, 'Lavoratori extracomunitari. Disparità di trattamento e discriminazione' (2009) *Rivista giuridica del lavoro e della previdenza sociale* I 544.

<sup>25</sup> Giuseppe Ludovico, 'Profili sostanziali: la disciplina del lavoro subordinato', in Bruno Nascimbene (ed.), *Diritto degli stranieri* (Padova: Cedam, 2004) 799.

however, makes this initiative a mere possibility, dependent on promoters who can rely on sound finances to support training programmes.<sup>26</sup>

Finally, a peculiar characteristic of migration law is the introduction of the new 'residence contract for dependent employment'.<sup>27</sup> After entering the country, and at the beginning of the employment relationship, migrants obtain work permits enabling them to reside and work legally in Italy. This particular kind of contract – reserved only for third-country citizens – places additional obligations on the employer. In particular, they must include, in addition to the working conditions, details of the accommodation for the migrant worker and a written commitment to pay the travel expenses of the migrant to return to the country of origin at the end of the contract, if no renewal occurs. As for the accommodation, the employer is required to demonstrate that housing meets the parameters set by law on public housing. Following the submission of the request to the local immigration office, the employer has to arrange accommodation. As for travel expenses, they are to be fully covered by the employer or employers. If the employer fails to meet these obligations, the entire residence contract becomes null and void. Accordingly, the work permit will not be issued. It should, once again, be emphasised how this perverse mechanism places migrants in an irregular position, often arising from the employer's lack of compliance with the requirements. It also tends to discourage the hiring of third-country national workers.<sup>28</sup>

The observations made about the recruitment procedure also apply to the special procedure under Art. 24, the only text about recruitment of seasonal employees, which largely follows the procedure just described, apart from certain adjustments that have made it easier and faster, in order to further facilitate the spread of this phenomenon (which, however, is already a reality in practice, more prevalent than

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<sup>26</sup> The Italian Ministry of Labour has entered into several bilateral agreements with non-EU countries in order to regulate and manage labour migration, namely Albania, Egypt, Morocco, Moldova, Sri Lanka, and Mauritius. These agreements also aim to facilitate access to educational activities and training courses in the country of origin. The agreements envisage that would-be migrants who attend educational activities and training courses in their countries of origin may access work permits reserved to them under the general quota system set by the annual decree. This is a preferential quota system, which guarantees preferential access to labour visas for these countries.

<sup>27</sup> Chiaromonte, *supra* n. 13, at 186-192; Laura Calafà, *Migrazione economica e contratto di lavoro degli stranieri* (Bologna: il Mulino, 2013) 109-127. In particular, as Calafà noted (at 120), this contract can be defined as an 'impossible employment contract (...) mostly because of the impossibility of classifying it under the traditional labour law canons'.

<sup>28</sup> Livio Neri, Alberto Guariso, 'La legge Bossi-Fini sull'immigrazione: le innovazioni in materia di lavoro' (2002) *Rivista critica di diritto del lavoro* 241.

immigration for temporary or permanent positions).<sup>29</sup> We will return later in this chapter to examining Directive 2014/36 on the provisions for seasonal work (see paragraphs 4.1.1 ff.).

### **1.3. The Work Permits: Time Limits and Withdrawal (and Some Data)**

Work permits – as we have seen – are not easy to acquire. They are issued subject to a strict quota system and are invariably temporary (Art. 5, Consolidate Law on Immigration).<sup>30</sup> It is only after the formal stipulation of the employment contract that the Police Headquarters issues a residence permit for reasons of work, valid for the time indicated in the entrance permit, and for a maximum of nine months for short-term work, one year for a fixed-term employment contract, and two years for a standard employment contract. The residence permit is renewable. The renewal will be granted, upon request of the migrant, only if the same conditions required for the original permit are maintained. The duration of the renewal cannot be longer than the permit initially granted. The permit may also be withdrawn, should the requirements for entry and residence in the territory of the state be absent.

Over the last few years, the issue of residence permits for work purposes has suffered a sharp decline. According to the data released in 2014 by the Ministry of Labour, 70.892 residence permits for work purposes were issued in 2012; this number represents 29,6% of the total number of residence permits issued that year, which is about one-fifth of the residence permits issued in 2010 (358.870, 59,9% of the total) and about half of those issued in 2007 (150.098, 56% of the overall number)<sup>31</sup>. Continuing to look at the situation in 2012, the largest number of permits issued were those with a duration exceeding 12 months (43,6%), followed by those lasting between 6 and 12 months (38,1%) and those lasting less than 6 months (18,3%). Employment represents the main reason for the issue of a residence permit for citizens coming from the Philippines (44,4%), from Bangladesh (43,1%), India (41,5%) and Moldova (38,4%). Lastly, women's permits are more stable

<sup>29</sup> Marco Ferraresi, 'Le discipline speciali: lavoratori stagionali, sportivi, infermieri', in Armando Tursi (ed.), *Lavoro e immigrazione* (Torino: Giappichelli, 2005), 254.

<sup>30</sup> Giuseppe Ludovico, 'Il permesso di soggiorno per motivi di lavoro (e per altri motivi che consentono comunque il lavoro)', in Germano Dondi (ed.), *Il lavoro degli immigrati* (Milano: Ipsoa, 2003) 111; Paolo Bonetti, 'Ingresso, soggiorno e allontanamento. Profili generali e costituzionali', in Bruno Nascimbene (ed.), *Diritto degli stranieri* (Padova: Cedam, 2004) 343.

<sup>31</sup> Ministero del Lavoro e delle Politiche Sociali - Direzione Generale dell'Immigrazione e delle Politiche di Integrazione, *Quarto rapporto annuale. Gli immigrati nel mercato del lavoro in Italia* (Roma, 2014) 46.

than men's: 47,7% of women received a permit that exceeded a year, compared to 39,7% of men.

#### **1.4. Entry for Work 'in Excess of Quota'**

In exception of the general principle, according to which it is not possible to issue visas for work in excess of the quotas annually predetermined, it is possible for special categories of foreign workers requesting entry to Italy to receive 'entry in excess of quota' to carry out a dependent employment or self-employed work activities (Arts 27-27c, Consolidated Law on Immigration). In such cases, the granting of permits to work, entry visas and residence permits is done more quickly and with no limit in number, because of the highly qualified nature of the activities and in view of the peculiar traits of mobility and of the temporary nature of such services.<sup>32</sup> The responsibility for carrying out the entry procedure is always borne by the local immigration office. It is concluded, in the case of entry for employment, with the stipulation of a 'residence contract for dependent employment', without any prior verification of the unavailability of national or European manpower.

The categories that are exempt from quotas are listed exhaustively in the Consolidated Law on Immigration;<sup>33</sup> workers who have entered Italy 'in excess of quota', unlike those who have followed the procedure described in Art. 22, Consolidated Law on Immigration, remain bound, in carrying out their work, to the qualification by virtue of which they had been allowed entry. We will focus on one of the categories for which 'in excess of quota' entry is allowed, namely that of highly skilled workers, when we discuss the implementation of Directive 2009/50 (see § 3 ff.).

#### **1.5. Access to Labour and Social Rights for the Permit Holder (and for Irregular Migrants)**

As we have seen, Italian labour law – including the freedom of association regulation – applies to all workers employed by an Italian employer in Italy; all of these provisions also apply to migrant workers. In addition, minimum wage is not protected by the law in Italy: wages are decided in individual employment agreements according to a minimum established by collective agreements at national level. Minimum wage, set by national collective agreements, is mandatory for all workers,

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<sup>32</sup> Nappi, *supra* n. 12, at 336.

<sup>33</sup> They are, among others, university professors and researchers, translators and interpreters, maritime workers, workers in the entertainment and sports industries, journalists, nurses, those who provide their activities in voluntary organizations or for scientific research.

even if they are not party to a collective agreement.<sup>34</sup>

As for social rights, the main difference outlined in the Consolidated Law on Immigration is between foreigners legally residing in the country, on the one hand, and those who are residing in the country illegally, on the other. However, the law stipulates that foreigners present in the State are entitled to the fundamental rights of a human being under the rules of national law and international agreements in force, and the generally recognized principles of international law (Art. 2.1).

However, broader protection is granted to foreigners legally residing in the country, giving them the same civil rights as Italian citizens (Art. 2.2): equal treatment for citizens regarding the judicial protection of rights in relationship to the public administration and in the exercise of public services (Art. 2.5); and, with specific reference to foreign workers, who are legal residents, and their families, equal treatment and full equality of rights with respect to Italian workers (Art. 2.3).<sup>35</sup>

The right to health care, recognized by Art. 32 of the Constitution, is subject, on the one hand to registration with the national health service, and on the other to legal residency status in the country.<sup>36</sup> Foreigners residing illegally in the country have access to outpatient care and emergency or essential hospital care, even long-term, for illness and injury, with no costs payable by the illegal foreigners if they do not have sufficient resources (Arts 34-35, Consolidated Law on Immigration).<sup>37</sup>

The right to education (Arts 33-34 Constitution) is governed, with particular reference to foreigners, by the provisions found in Arts 38 and

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<sup>34</sup> For a general overview of the Italian labour law system cf. Silvana Sciarra, William Chiaromonte, 'Labour law: An overview', in Alessandra De Luca, Alessandro Simoni (eds.), *Fundamentals of Italian Law* (Milano: Giuffrè, 2014) 113.

<sup>35</sup> Chiaromonte, *supra* n. 13, at 205; William Chiaromonte, Alberto Guariso, 'Le discriminazioni nell'accesso a beni, prestazioni e servizi pubblici', forthcoming in Marzia Barbera, Alberto Guariso (eds.), *La tutela antidiscriminatoria. Lavoro, welfare e accesso al mercato di beni e servizi* (Torino: Giappichelli).

<sup>36</sup> Vincenzo Casamassima, 'Il diritto all'assistenza sanitaria degli stranieri in Italia', in Miguel Revenga Sánchez (ed.), *I problemi costituzionali dell'immigrazione in Italia e Spagna* (Milano: Giuffrè, 2005) 433; Francesca Biondi Dal Monte, *Dai diritti sociali alla cittadinanza. La condizione giuridica dello straniero tra ordinamento italiano e prospettive sovranazionali* (Torino: Giappichelli, 2013) 153; Chiara Gabrielli, 'Il diritto di accedere alla prevenzione sanitaria e di ottenere cure mediche', in Giandonato Caggiano (ed.), *I percorsi giuridici per l'integrazione* (Torino: Giappichelli, 2014) 607.

<sup>37</sup> Enrico Grosso, 'Stranieri irregolari e diritto alla salute: l'esperienza giurisprudenziale', in Renato Balduzzi (ed.), *Cittadinanza, corti, salute* (Padova: Cedam, 2007) 157; Filippo Scuto, 'Il diritto sociale alla salute, all'istruzione e all'abitazione degli stranieri «irregolari»: livelli di tutela' (2008) *Rassegna parlamentare* 381; Aldo Rosano, Amedeo Spagnolo, 'Access to health services of undocumented migrants and xenophobic attitudes in EU countries', 4th Conference on Migrant and Ethnic Minority Health in Europe, 21-23 June 2012, Milan.



39, Consolidated Law on Immigration, which make a distinction between minors and adults. Minors, present in any capacity in the national territory, are required to attend school, and all the provisions currently governing the right to education, access to educational services and participation in the life of the school community are applied to them. In this regard, there can be no limitation in access to compulsory education for minors. With reference to adults, however, regular residence status is required in order to attend school, and even university.<sup>38</sup>

The right to housing, not specifically mentioned in the constitutional provisions (although it was identified as a fundamental right by the case law of the Constitutional Court), is upheld in Art. 40 Consolidated Law on Immigration, which regulates the access of foreigners to housing depending on the residence permit they retain.<sup>39</sup>

Finally, with regard to social security benefits, the right to non-contributory social security benefits (Art. 38.1, Constitution), guaranteed to every citizen unable to work and without the means to live, differs from the situation with contributory social security benefits (38.2, Constitution). Non-contributory social security benefits cover all workers, regardless of their nationality, and relate to benefits with respect to accidents at work and occupational diseases, sickness benefits, invalidity benefits, old-age benefits and unemployment benefits. While the provisions of the law do not provide substantive distinctions between citizens and foreigners with respect to the right to receive contributory social security benefits (or work-based benefits), they do often differ with regard to non-contributory social security benefits, on the basis of the residence permit held by the applicant (for example, it is tied to long-term residence status under the Directive 2003/109, and then to a residency in Italy of at least 5 years: Art. 41, Consolidated Law on

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<sup>38</sup> Patrizia De Pasquale, 'L'accesso degli immigrati irregolari ai servizi pubblici', in Giandonato Caggiano (ed.), *I percorsi giuridici per l'integrazione* (Torino: Giappichelli, 2014) 624.

<sup>39</sup> With regard to the newly arrived, foreigners legally residing for reasons other than tourism temporarily unable to provide for their own housing needs and livelihood can access centres made available by the Regions. However, access to collective or private social housing, within the housing facilities made available by the local authorities, is granted only to foreign residents. Finally, access to public housing and brokering services may exist, on an equal footing with Italian citizens, but solely to foreigners who hold a long-term residence status or to those who have a residence permit lasting at least two years. See Fabio Corvaja, 'L'accesso dello straniero extracomunitario all'edilizia residenziale pubblica' (2009) *Diritto, immigrazione e cittadinanza* 89; Antonello Ciervo, 'Il diritto all'abitazione dei migranti', in Laura Ronchetti (ed.), *I diritti di cittadinanza dei migranti. Il ruolo delle Regioni* (Milano: Giuffrè, 2012) 265; Biondi Dal Monte, *supra* n. 36, at 197; Paolo Bonetti, 'Il diritto all'abitazione', in Giandonato Caggiano (ed.), *I percorsi giuridici per l'integrazione* (Torino: Giappichelli, 2014) 547.

Immigration).<sup>40</sup>

As for the enforcement of labour and social rights, it is obvious that the value of any rights depends, ultimately, on whether they can be enforced; and enforcement is a particular challenge when it comes to third-country migrant workers. In particular, the acknowledgement and protection of illegal immigrants' rights do not have the same importance, nor the same extension, as those given to legal immigrants and their restriction mainly derives from the workers being 'illegal'. This is the situation, notwithstanding the fact that the Constitutional Court has extended fundamental rights to all 'persons', regardless of the legality of their presence in Italy. Therefore, every foreigner is 'entitled to all fundamental rights as acknowledged by the Constitution to all persons',<sup>41</sup> not because part of a certain political community, but as a consequence of being a human being,<sup>42</sup> for the constitutional principle of equality (Art. 3) does not tolerate discrimination between the status of a citizen and that of a foreigner, if the status refers to the enjoyment of fundamental human rights.<sup>43</sup> The foreigner's legal status thus cannot be a justification for a differentiated and pejorative treatment; both the core of equality and non-discrimination and the basis for the extension of citizens' rights to the foreigner must be identified in the protection of human dignity.

The enjoyment of rights by the illegal immigrant, and especially the right to have access to justice, is deeply affected by the crime of illegal entry and residence in the territory of the State (Art. 10-bis Consolidated Law on Immigration): Italy has criminalized illegal entry and residence in Italy; on conviction, irregular migrants are subject to a fine of between EUR 5,000 and 10,000. The introduction of such a crime (Law no. 94/2009) has negatively affected the possibility for illegal immigrants to have access to justice and, at the same time, it has strongly limited the use of means for the protection of rights.<sup>44</sup> Therefore, even though the public officials (social workers, doctors or, most importantly in this

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<sup>40</sup> Chiaromonte, *supra* n. 13, at 230. In order to get a long-term residence status in Italian law you need five years legal presence in Italy.

<sup>41</sup> Constitutional Court 16 May 2008 no. 148.

<sup>42</sup> Constitutional Court 10 April 2001 no. 105.

<sup>43</sup> Constitutional Court 10-24 February 1994 no. 62.

<sup>44</sup> De Pasquale, *supra* n. 38, at 634. The ILO Committee of Experts expressed concern that the criminalization of irregular migration would 'further marginalize and stigmatize migrant workers in an irregular situation, and increase their vulnerability to exploitation and violation of their basic human rights' (ILO Committee of Experts on the Application of Conventions and Recommendations, Direct Request concerning Forced Labour Convention no. 29/1930, Italy, 2010). Delegated Law no. 67 of 28 April 2014 has delegated the Government to abrogate the crime of illegal immigration in Italy within 18 months and through a Legislative Decree, turning it into an administrative offence; this will de-penalize the first illegal entry in Italy (but not the recurrence of the behaviour).

case, the judge) that come into contact with the illegal immigrant cannot be obliged to report them,<sup>45</sup> undoubtedly this provision worsens the marginalization of illegal immigrants who, in fear of being reported, prefer to stay in the shadows, regardless of their fundamental rights. This appears to be particularly serious in relation to the issues on labour and the regulation on safety at the workplace.

## **2. The EU Single Permit Directive (2011/98/EU), Implemented into Italian Law by Legislative Decree No. 40 of 4 March 2014**

Italy has implemented the single permit Directive no. 2011/98/EU<sup>46</sup> – which establishes a single permit for work and residence and sets up a common set of rights for third-country workers legally residing in a Member State – through Legislative Decree no. 40 of 4 March 2014 (the deadline for transposition was 25 December 2013), in force from 6 April 2014. As we shall see, the implementation is minimal and unsatisfactory: the Decree, which is composed of only two articles, is limited to a minor modification of the Consolidated Law on Immigration of 1998, apart from repealing some old dispositions, and does not implement the rules concerning the principle of equal treatment.

With regard to the subjective scope of application of the rules regarding the single permit, these apply to foreigners who want to live and be employed in a Member State or who already reside and/or are employed in a Member State, with the only exceptions provided for in Art. 3.2 of the Directive. Italy decided not to use the possible exceptions contained in Art. 3.3 for residence that are based on a period of presence that is less than six months and for study purposes.

### **2.1. The Application Procedure**

Depending on the decision taken by the Member States at the time of the transposition, the single procedure outlined by the Directive prescribes that the applicant or the employer (Italy opted for the employer) submit a request for the issue, amendment or renewal of the single permit, without prejudice for the issuing of a visa, when a request is made for initial entry (Arts 4.1 and 4.3).

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<sup>45</sup> The prohibition to report is provided for in Art. 35 of the Consolidated Law on Immigration but exclusively in relation to the access to health facilities.

<sup>46</sup> Steve Peers, 'Single Permits and Workers' Rights', in Steve Peers, Elspeth Guild, Diego Acosta Arcarazo, Kees Groenendijk, Violeta Moreno Lax (eds.), *EU Immigration Law: Text and Commentary* (Leiden: Martinus Nijhoff, 2012); Y. Pascouau, S. McLoughlin, 'EU Single Permit Directive: A Small Step Forward in EU Migration Policy' (2012) *European Policy Centre*, Policy Brief, 24 January 2012.

Italian legislators did not introduce a new single procedure, given that they believe that the procedure described in paragraph 1.2 is already in line with the simplification demanded by the Directive, and that the local immigration office already exists and is responsible for the entire procedure relating to the hiring of foreigners for employment, on the employers' behalf, as part of the entry quotas established for that purpose.<sup>47</sup>

The competent State institution, that is the local immigration office, examines the application and, if the requirements are met, it issues a single administrative act combining both a residence and work permit (Arts 4.2 and 4.4 of Directive 2011/98). Legislative Decree no. 40/2014 explains how the requests to obtain a work permit are examined according to the numerical limits set by the '*decreto flussi*' in relation to non-seasonal work. Any application exceeding the numerical limits set by the decree at the time of submission must be taken into consideration if, after evaluating the applications previously presented, unused quotas are left (Art. 1.1.f). The Ministry of Internal Affairs' Information Technology (IT) system will be specially adjusted in order to allow the employer to ascertain the position of the request submitted in relation to the quotas assigned in real time by the competent Province.

Art. 1.1.b of Legislative Decree no. 40/2014 provides that the residence permits authorizing employment (i.e. a residence permit released for family reasons) must contain the wording 'single working permit', except for residence permits for long-term EU citizens, for those issued for humanitarian reasons, for those issued following the granting of status of refugee or for subsidiary protection, for study reasons, for seasonal employment, for self-employment, and for certain special categories for whom entry is permitted without regard to the established quotas.

According to the Directive, the decision regarding the application must be made within four months from the date of submission (Art. 5.2). Art. 1.1.c-e of Legislative Decree no. 40/2014 stipulates that the deadline for the issue of all residence permits must be 60 days. Such a provision will, paradoxically, have detrimental effects on the national legal system as, before the modification and according to the cases, the Consolidated Law on Immigration provided a deadline of 20 or 40 days at the most to issue the different types of residence permits. The Italian government has motivated such a modification (however unconvincingly) with the need to align the regulations to the actual time needed for the request

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<sup>47</sup> Circular of the Ministry of Internal Affairs no. 2460 of 4 April 2014.

and issue of an electronic residence permit by the State Printing Institution.

Art. 10 of the Directive provides that the amount of fee rights to be acknowledged for the release of the single permit must be proportionate and based on the services actually payable for the submission of the request. Such a provision is only partially implemented in the Italian legal system, where that amount is invested for the partial financing of a fund used for repatriation, and is therefore alien to the procedures to issue residence permits. In fact, Art. 5.2-ter of the Consolidated Law on Immigration has delegated the establishment of the so-called 'residence tax', a contribution to be paid for the issue and renewal of the residence permit, to a decree of the Ministry of Economy and Finance.<sup>48</sup> The criticism towards this measure has mainly focused on the use of the amounts deriving from the 'residence tax' charged to foreigners, which only minimally represent the equivalent charge for a service given by a public entity. Particularly contested was the allocation of the costs, related to activities that benefit the entire community (among which the ones regarding the so-called 'repatriation fund'), only to legally residing foreigners, which should instead weigh on general taxation.

Moreover, the Court of Justice has already shown evidence for how the Member States can easily make the issuing of residence permits (in this specific case, related to the EU residence permit of long-term residents, according to Directive 2003/109/CE) subordinate to the payment of contributions, and that in setting the amount of these contributions, they have a margin of discretion. However, the contribution paid to issue a residence permit must be proportionate, which is to say a reasonable and fair amount, and it must have neither the purpose nor the effect of creating an obstacle to the effective right of residence conferred by the same Directive to third-country nationals who meet the set requirements (*recital* no. 10), which would otherwise compromise the objective underlying it: the integration of third-country nationals who

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<sup>48</sup> The Decree, approved on 6 October 2011 and in force as of 30 January 2012, has set the extent of the contribution for the release of the residence permit, paid by the adult foreigner, according to the length of the permit. In particular, a contribution of EUR 80 is provided for permits for periods not exceeding one year (usually permits for study purposes, seasonal work and fixed-term employment), of EUR 100 for permits lasting between one and two years (among these, permits for permanent employment, self-employment or family purposes) or of EUR 200 for a long-term residence permit and permits for managers and highly qualified personnel. An exemption from the payment is also provided for certain categories of applicants.

settle in Member States on a long-term basis.<sup>49</sup> The above described situation is questionable in relation to this statement. Extending the Court's reasoning, the amount claimed by Italy for the issue of the residence permit for long-term residence would be even more excessive and disproportionate; such an amount is eight times greater than that paid to obtain an electronic national identity card, and almost forty times greater than the amount paid for the issue of a printed identity card.

In the event that the application is rejected, this decision must be motivated and notified in writing to the applicant (except in cases of ineligibility due to the volume of admissions of third-country nationals for purposes of work, in which case the application will not be processed), who may take action against the decision under national law (Art. 8, Directive 2011/98). During the period of validity of the single permit the holder may enter, reside and circulate in the territory of the Member State that issued it, as well as perform authorized work activity (Art. 11, Directive 2011/98). However, Legislative Decree no. 40/2014 does not provide for dispositions expressly intended to implement the rules mentioned above.

The holder of the permit also has the right to be informed of the rights conferred to him/her under the permit (Art. 11.d, Directive 2011/98). To that end, as part of the activities aimed at assisting the foreigner in signing the Integration Agreement – a document through which the State and the foreign citizen mutually assume both rights and obligations towards the integration of the foreign citizen in Italian society (i.e. through the acquisition of an adequate level of knowledge of Italian language and the corresponding commitment to organize and activate ad hoc courses for this purpose)<sup>50</sup> – Art. 1.1.a of Legislative Decree no. 40/2014 requires that information be provided in relation to rights conferred under the single permit. Moreover, at national level the forms and procedures underlying such information obligations have not been specified yet.

Art. 1.2.a of Legislative Decree no. 40/2014 requires the abrogation of the provisions contained in the implementation regulation concerning the Consolidated Law on Immigration, which provided for the

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<sup>49</sup> ECJ, 26 April 2012, C-508/10, *Commission v. The Netherlands*, which considered excessive and disproportionate the contributions requested by The Netherlands for obtaining residence permits, according to Directive no. 2003/109/CE, as they varied within a range where the lowest amount was approximately seven times greater than that paid to obtain a national identity card.

<sup>50</sup> Nazarena Zorzella, 'L'accordo di integrazione: l'ultimo colpo di coda di un governo cattivo' (2011) 4 *Diritto, immigrazione e cittadinanza* 58; Paolo Morozzo della Rocca, 'Entra in vigore l'accordo (stonato) d'integrazione', in Giandonato Caggiano (ed.), *I percorsi giuridici per l'integrazione* (Torino: Giappichelli, 2014) 213.

stipulation of a 'residence contract for dependent employment' at the time of renewal of the residence permit for work purposes.<sup>51</sup> Nevertheless, the provision (Art. 5-bis, Consolidated Law on Immigration) requiring the 'residence contract for dependent employment' during the first issue has not been repealed. However, the fact that the residence permit for purposes of work is still conditional to the prior stipulation of the residence contract is certainly one of the major points of friction between Directive 2011/98 and the Italian transposition.<sup>52</sup> In fact, this circumstance appears to be in open contrast to the single procedure as outlined by Directive 2011/98.

Finally, however, Art. 1.2.b of Legislative Decree no. 41/2014 provides for a disposition that is not directly linked to the implementation of Directive 2011/98. Such a rule, in fact, repeals an anachronistic disposition dating back to 1931, which included the requirement of Italian citizenship for workers in the automobile, train and tram sectors,<sup>53</sup> and which had also been extended to the sector of local public transportation.<sup>54</sup> Moreover, the Law of 1931 had already been implicitly considered repealed by many Italian courts, which had considered it to be in opposition to the principle of equal treatment between migrant and national workers, established by Art. 2.3 of the Consolidated Law on Immigration.<sup>55</sup>

## 2.2. Equal Treatment (with Nationals)

Regarding equal treatment, which represents the core of the European legislative intervention, the Member States can, during transposition, derogate or limit the extent of the principle of equal treatment: by restricting access to education and vocational training for foreign workers or the unemployed; by limiting access to family and unemployment benefits for foreigners who have not been employed for at least six months; or, furthermore, by limiting access to assisted housing.

Legislative Decree no. 40/2014, which transposes the Directive, does not contain any disposition relating to the implementation of the principle of equal treatment; we have not even been provided with dispositions pertaining to the three derogatory possibilities that we have

<sup>51</sup> Art. 13.2-bis and Art. 36-bis, Presidential Decree no. 394 of 31 August 1999.

<sup>52</sup> Laura Calafà, 'The social borders of EU immigration policy (in the Italian perspective)', Working Paper C.S.D.L.E. "Massimo D'Antona".INT no. 105/2014 (<http://csdle.lex.unict.it/docs/workingpapers/The-social-borders-of-EU-Immigration-Policy-in-the-Italian-perspective/4775.aspx>, accessed 26 June 2015), 13 ff.

<sup>53</sup> Art. 10.1, Annex A to the Royal Decree 8 January 1931 no. 148.

<sup>54</sup> Laws 3 November 1952 no. 628 and 22 September 1960 no. 1054.

<sup>55</sup> For example, the Court of Milan, order of 20 July 2009 and the Court of Turin, order of 13 October 2013.

just mentioned. Such a choice is based on the assumption that Italian legislation complies fully with the principles laid down in the Directive. In reality, that is not the case. Especially in relation to the transposition dispositions, the most critical aspect is certainly the one on equal treatment in the field of social security as defined by Regulation no. 883/2004. To date, many dispositions in the Italian legal system still provide unequal treatment between Italian and European Union citizens, on the one hand, and third-country citizens, on the other, in the enjoyment of non-contributory social security benefits:

1. Maternity allowances (a financial contribution that the State recognizes to mothers who do not have social security coverage during the first months following the birth of a child) are only granted to women who have residency, are Italian citizens, or citizens of another EU country, or are in possession of a long-term residence status (therefore, with the exclusion of third-country citizens not holding such status);<sup>56</sup>
2. The 'ordinary purchase card' and the 'experimental purchase card' (which are economic non-contributory benefits granted to persons who find themselves in greater financial hardship, with the aim to supply goods and services) are reserved – in the case of certain income prerequisites – for residents (in the first case exclusively to those who are 65 and older or under three years of age) who are Italian or EU citizens, to the family members of an Italian or EU citizen, even without having citizenship of another Member State, provided that they are holders of a residence permit or a permanent residence permit, for foreign citizens who hold long-term residence status, and for political refugees or holders of subsidiary protection, but excluding foreigners regularly residing in the country, and holders of a residence permit that allows them to work;<sup>57</sup>
3. Lastly, the allowance for large families (which is an economic benefit granted to those families who have more than three children under-age and whose annual income is below the access threshold determined by the law) has been extended by Art. 13 of Law no.

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<sup>56</sup> Art. 74, Legislative Decree no. 151/2001. Recently, some judges recognized the right to receive a basic maternity allowance also to third-country citizens regularly residing in the country, although lacking long-term residence status: Court of Monza, labour section, order 28 January 2014; Court of Bergamo, labour section, order 30 March 2014; Court of Verona, labour section, order 13 May 2014.

<sup>57</sup> Art. 81.32, Decree Law no. 112/2008, converted into Law no. 133/2008 (as modified at last by Art. 1.216 of the '*Legge di stabilità 2014*', Law no. 147/2013, in response to the infringement proceedings for the violation of EU law initiated by the European Commission) and Art. 60, Decree Law no. 5/2012, converted into Law no. 35/2012 and supplemented by Decree Law no. 76/2013, converted with modifications into Law no. 99/2013.



97/2013 also to third-country nationals holding a long-term residence status, as well as to family members of Italian or EU citizens, but excluding foreigners regularly residing in the country and holders of a residence permit that allows them to work.<sup>58</sup>

Such a situation is certainly in contrast with the principle set by Art. 12.1.e of the Directive, which requires that third-country workers enjoy the same treatment as that given to citizens of the Member State in which they reside. This applies in particular to those branches of social security identified by the Regulation no. 883/2004 on the coordination of national social security systems (and therefore the same parts accessible by EU citizens).<sup>59</sup> In fact, the non-contributory social security benefits for families that we have mentioned definitely fall within the notion of 'social security', as defined in Regulation no. 883/2004 (and therein lies the link with Art. 12.1 of the Directive). In fact, even though the benefit systems providing social and medical assistance are generally excluded from the *ratione materiae* scope of application of the Regulation no. 883/2004 (Art. 3.5.a), starting in the 1970s the case law of the Court of Justice confirmed a wide notion of 'social security'.<sup>60</sup> In fact, according to the Court, any benefit attributed to beneficiaries must be considered as social security, regardless of any single or discretionary assessment of their personal needs, according to a situation legally defined and referring to one of the risks listed in Art. 4.1 of Regulation no. 883/2004.<sup>61</sup> This has the result that, under certain circumstances, non-contributory social security benefits according to national legislators (such as those we have mentioned) are also included in the scope of the greater notion of social security laid down by the Court, and therefore fall within the scope of the principle of equal treatment set by the Directive.

<sup>58</sup> Art. 65 of Law no. 448/1998.

<sup>59</sup> This way, equal treatment, currently provided for by Regulation no. 1231/2010/EU, is extended to third-country citizens that move from one Member State to another, and also for the benefit of those directly arriving from a third country.

<sup>60</sup> Among many judgments, see at least ECJ, 9 October 1974, C-24/74, *Biason, Rep.*, 1974, 999; ECJ, 13 November 1974, C-39/74, *Costa, Rep.*, 1974, 1251; ECJ, 5 May 1983, C-139/82, *Piscitello, Rep.*, 1983, 1427; ECJ, 24 February 1987, from C-379 to C-381/85 e C-93/86, *Giletti, Rep.*, 1977, 955; ECJ, 20 June 1991, C-356/89, *Stanton Newton, Rep.*, 1991, I, 3017. On these topics cf. William Chiaromonte, 'Mobilità intraeuropea e sicurezza sociale', in Laura Calafà, Donata Gottardi, Marco Peruzzi (eds.), *La mobilità del lavoro: prospettive europee e internazionali* (Napoli: ESI, 2012) especially 139 ff.

<sup>61</sup> Within the wide European notion of social security not only do we find 'special non-contributory monetary benefits', referred to Art. 70.2.c of Regulation no. 883/2004, listed in annex X, but we also find 'family benefits' (Art. 3.1.j), that is 'all benefits in kind or in cash destined to compensate family expenses, excluding advances on maintenance allowances and special birth or adoption grants mentioned in annex I' (Art. 1.z).

Legislative Decree no. 40/2014 has not effectively conformed national law to European legislation, as it did not extend the possibility of receiving those benefits to foreigners holding a residence permit, allowing them to pursue an occupation. As we have already highlighted, to date there are many national provisions that exclude foreigners from certain social security benefits, provisions that should have been removed during transposition. This certainly puts Italy at risk of being subject to infringement proceedings for the violation of the obligations deriving from EU law (Artt. 258-259 TFEU). This is especially so if we consider that the Directive provides for the possibility that, during transposition, the Member States may restrict equal treatment, although safeguarding the rights of third-country workers who pursue or have pursued an occupation for a minimum period of six months and are registered as unemployed (Art. 12.2.b). However, Italy has not made use of the possibility of limiting the application of the principle of equal treatment.

The European Court of Human Rights (ECHR) has also recently ruled on the issue relating to the *Dhahbi* judgment, which condemned Italy for violating the rules of the European Convention on Human Rights.<sup>62</sup> The ECHR has, in fact, admitted that the exclusion of foreign citizens, legally resident under a long-term permit, from the enjoyment of a family social benefit by reason of the nationality of the applicant is inconsistent with the principle of non-discrimination under Art. 14 of the Convention.

With regard to the access to goods and services offered to the public, including procedures for obtaining housing, the transposing Legislative Decree should have provided the abrogation of the national law of 2008, according to which, for third-country citizens, access to the national fund for support towards leased housing is subject to the requirement of residency in the national territory for at least 10 years, and at least five years in the same region.<sup>63</sup> Conversely, no disposition had been adopted for that purpose. In this case, Italian legislation is in sharp contrast with Art. 12.1.g of Directive 2011/98, which establishes the principle of equal treatment in reference to the 'access to goods and services and the supply of goods and services made available to the public including procedures for obtaining housing as provided by national law' (also as a result of the fact that Italy has made use of the possibility

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<sup>62</sup> ECHR, *Dhahbi v. Italy*, 8 April 2014, app. no. 17120/09. See William Chiaromonte, 'Prestazioni sociali familiari e discriminazione per nazionalità. La posizione della Corte di Strasburgo' (2014) II *Rivista italiana di diritto del lavoro* 900; Vincenzo Ferrante, 'Prestazioni assistenziali ai cittadini extraeuropei e tutela dei diritti individuali' (2014) II *Rivista giuridica del lavoro e della previdenza sociale* 508.

<sup>63</sup> Art. 11.13, Law no. 133/2008.

of restricting access to housing, allowed by Art. 12.2.d.ii). Moreover, such legislation also appears incompatible with the principle of equal treatment asserted by Directive 2003/109, concerning the status of third-country nationals who are long-term residents (Art. 11.1), as reflected by the *Kamberaj* judgment of the Court of Justice.<sup>64</sup> This case also puts Italy at risk of being subject to infringement proceedings for the violation of the obligations deriving from EU law.

However, compatibility issues between Italian legislation and the principle of equal treatment, which should be reported here, do not arise for the remaining areas listed in Art. 12.1 of the Directive, as we noted earlier. This is mainly because the principle of equal treatment relating to employment and national workers is established by the Consolidated Law on Immigration (Art. 2.3), and before that by the Constitution (in particular by Art. 35.1, which protects labour 'in all its forms and applications').

### 2.3. Directive 2011/98: Effects on Italian Law

Directive 2011/98 is only one of the many compromises on migration policies between European institutions needing to find common rules on the entrance and the residence of foreign workers, which at the moment still appears to be a difficult road to travel, and the continuous reluctance shown by the Member States who were called upon to take them in. This is certainly a wide reaching and ambitious legislation, affecting a vast number of potential immigrants. Nonetheless, we must not underestimate the opportunities that have been left open to the States for limiting the *ratione personae* scope of the application of this legislation. For example, it has been possible to exclude self-employed workers, or those workers whose contract lasts less than six months, from being a beneficiary. Moreover, if the issue of a residence and work permit is actually just one procedure, thus allowing the migrant to receive a response to his application in a relatively short amount of time, it is also true that the determination of the conditions for admission remains in the hands of the single States, who determine and manage the entry flows for work purposes. Finally, the single permit grants the social and

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<sup>64</sup> ECJ, 24 April 2012, C-571/10, *Servet Kamberaj v. Istituto per l'Edilizia sociale della Provincia autonoma di Bolzano (IPES) and others*. On *Kamberaj* cf. (among others): Karin de Vries, 'Towards Integration and Equality for Third-country Nationals? Reflection on *Kamberaj*', (2013) 38 *European Law Review* 248; Francesco Costamagna, Marianna Pace, 'Diritti fondamentali e prestazioni sociali essenziali tra diritto dell'Unione europea e ordinamenti interni: il caso *Kamberaj*', (2012) *Diritti umani e diritto internazionale* 672; Giuseppe Bronzini, Andrea Allamprese, 'Cittadini stranieri e discriminazione nell'accesso a prestazioni sociali a carattere essenziale: la Corte di Giustizia valorizza la Carta di Nizza', (2012) *Rivista critica di diritto del lavoro* 68.

economic rights of EU citizens also to foreign workers regularly residing in the country, thus accepting an extended application of the principle of equal treatment. However, in this case the latitude left to the Member States during the transposition is likely to reduce the scope of this principle, as the Italian situation demonstrates.<sup>65</sup>

In fact, as we have seen, Directive 2011/98 was implemented by Italy in a very minimal and unsatisfactory way. On the one hand, the rules introduced were quite unclear, as were the ones deriving from the repeal of the rules in the Regulation for the transposition of the Consolidated Law on Immigration related to the 'residence contract for dependent employment', that were introduced without having repealed the law provisions that regulate this legal institution. On the other hand, the rules introduced will, paradoxically, worsen the pre-existing situation, by, for example, extending the deadline for the issue of all types of residence permits to 60 days. However, the Italian transposition proved to be unsatisfactory in relation to the implementation of the provisions regarding the principle of equal treatment. The Legislative Decree for transposition should have adjusted those national sector rules related to the sphere of welfare, since, to date, they still contain exclusion clauses for third-country citizens from certain non-contributory social security benefits, such as the procedures to obtain housing. Having failed to do this, Italy is now exposed to the risk of possible proceedings for infringement of EU law, as well as disputes in court. In fact, the plaintiffs will be able to rely on the principle of direct and immediate application of EU law and of its primacy over the provisions of national law that may appear to be incompatible with it.

### **3. The EU Directive on Highly Qualified Employment (2009/50/EC), Implemented into Italian Law by Legislative Decree No. 108 of 28 June 2012**

Directive no. 2009/50 on highly qualified employment establishes a special procedure, which is facilitated and accelerated, for the input of highly qualified workers in the labour market of a Member State. The rationale behind this Directive clearly consists of making EU Member States more attractive to foreign citizens with high competences and professional skills, through the introduction of a particular permit, the so-called 'EU Blue Card' (modelled on the American *blue card*) in order to 'sustain the Union's competitiveness and economic growth' (*recital* no. 7).

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<sup>65</sup> Ana Beduschi, 'An Empty Shell? The Protection of Social Rights of Third-Country Workers in the EU after the Single Permit Directive' (2015) 17 *European Journal of Migration and Law* (210).

Occupational and geographical mobility of highly qualified foreign workers is considered to be 'a primary mechanism to improve the efficiency of the labour market, prevent any competence deficiencies and compensate regional imbalances' (*recital* no. 15).

The dispositions contained in the Directive revolve around two different core themes: firstly, the entry of a highly qualified foreign worker into a Member State, and especially the rules on the request, granting, rejection and revocation of the Blue Card; secondly, the treatment that the worker receives, as well as the recognition of social and economic rights and the opportunities for moving within the Union.<sup>66</sup>

Legislative Decree no. 108 of 26 June 2012, entered into force on 8 August 2012, gave execution to Directive 2009/50 more than one year later than the deadline originally set (19 June 2011), after the European Commission had initiated an infringement proceeding against Italy (no. 2011/0843) in relation to the failure to notify the measures taken to give effect to the Directive.<sup>67</sup>

### 3.1. The Definition of Highly Qualified Employment

Like the majority of EU Member States, Italy has not opted to set a maximum limit for admission of highly qualified migrants. In fact, in transposing Directive 2009/50, Legislative Decree no. 108/2012 provided for a further possibility for 'excess of quotas' entry for purposes of work (cf. *retro* paragraph 1.4), in derogation of the general principle according to which Italy cannot issue entry visas for purposes of work in a number that exceeds the predetermined annual quotas. Such a possibility is now ruled by the new Art. 27-quarter of the Consolidated Law on Immigration, which identifies the possibility of entry and residence for work purposes in excess of quotas for highly qualified foreign workers, establishing

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<sup>66</sup> Donata Gottardi, 'La normativa e le politiche europee recenti sull'immigrazione. Due volti o uno solo?', (2009) *Lavoro e diritto* 530; Yasin Kerem Gümüs, 'EU Blue Card Scheme: The Right Step in the Right Direction?', (2010) 12 *European Journal of Migration and Law* 435; Tesseltje De Lange, 'The EU Blue Card Directive: A Low Level of Trust in EU Labour Migration Regulation', in Tineke Strik, Carolus Grutters (eds.), *The Blue Card Directive: Central Themes, Problem Issues, and Implementation in Selected Member States* (Oisterwijk: Wolf Legal Publishers, 2013) 17; Katharina Eisele, 'Why come here if I can go there? Assessing the 'Attractiveness' of the EU's Blue Card Directive for 'Highly Qualified' Immigrants', (2013) *CEPS Papers in Liberty and Security in Europe* no. 60, October 2013.

<sup>67</sup> William Chiaromonte, 'L'accesso al mercato del lavoro nazionale degli stranieri altamente qualificati fra diritto dell'Unione europea e disciplina italiana: la direttiva 2009/50/CE ed il d.lgs. 108/2012', (2012) 4 *Diritto, immigrazione e cittadinanza* 13; Marco Fasciglione, 'L'accesso al mercato del lavoro in Italia di lavoratori stranieri altamente qualificati: l'attuazione della direttiva *Blue Card* tra disciplina dell'Unione europea e normativa italiana', in Giandonato Caggiano (ed.), *I percorsi giuridici per l'integrazione* (Torino: Giappichelli, 2014) 317.

requirements and conditions that enable the issue of the Blue Card, as well as the refusal or revocation of the same.

In particular, the entry and residence for a period exceeding three months is permitted for highly qualified foreign workers or for those having an educational qualification, issued by a higher education institution, that certifies the completion of at least a three-year training course, with the achievement of a higher professional qualification certified by the country of origin and recognized by Italy. According to Art. 2.b, last line, of Directive 2009/50, it is possible to qualify for this status through professional experience. Italy requires professionals to fall within levels 1 ('legislators, entrepreneurs and senior management'), 2 ('intellectual, scientific and highly specialized professions') or 3 ('technical professions') of the national 'CP2011' classification of professions defined by the National Institute of Statistics (ISTAT).<sup>68</sup>

Alternatively, in order to practise regulated professions, highly qualified workers must meet other requirements under Legislative Decree no. 206/2007, which has transposed Directive 2005/36/CE on the recognition of professional qualifications into the Italian legal system. The recognition requirement is expressly demanded by the law only in relation to professional qualification, but not for educational qualifications, except for the practice of regulated professions, for which the requirements stated in Legislative Decree no. 206/2007 must be met. These persons are identified for having the above mentioned requirements and also for carrying out remunerated performances on behalf or under the direction or coordination of another person or entity (Art. 27-*quater*.1).

### 3.2. The Ratione Personae Scope

Paragraphs 2 and 3 of Art. 27-*quater* define the *ratione personae* scope of the Legislative Decree, both positively and negatively. On one hand, the decree applies: to foreigners who have the requirements and

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<sup>68</sup> This classification can be seen on the following website: <http://cp2011.istat.it/> (accessed 26 June 2015). The Circular from the Ministry of Internal Affairs no. 5209 of 3 August 2012 stated that educational qualifications and other foreign titles must be presented after being duly translated and legalized by the Italian diplomatic representatives in the workers' States of origin. Further indications on the modalities for the recognition of the professional qualifications have been given by the Circular from the Ministry of Internal Affairs no. 7591 of 7 December 2012. As for the recognition of the professions regulated in Italy, the authorities competent for receiving the applications are mentioned in Art. 5 of Legislative Decree no. 206/2007 (among which the Ministry of Health). In relation to the recognition of non-regulated professional qualifications in Italy, the foreign worker (or also the company that wants to hire the worker) must submit a special application of recognition to the Ministry of Education, stating the work activity that the worker intends to carry out.

also the qualifications requested by paragraph 1; to residents of a third country or in a Member State or in the State for other reasons (as long as the residence permit is not attributable to one of the hypotheses provided in the following paragraph 3); as well as to highly qualified foreign workers who already hold a Blue Card issued by a different Member State. On the other hand, the decree does not apply to the categories of persons defined by Art. 3 of Directive 2009/50 (Art. 1.3): the same categories that are excluded from the coverage of the Directive according to Art. 3.2 are excluded from the application of the Italian rules.

The circular of the Ministry of Internal Affairs no. 5209 of 3 August 2012 stated that among the recipients of the disposition we can find foreign workers already present within the national territory, as holders of a residence permit for research purposes.

### 3.3. Conditions for an EU Blue Card. The Application

In relation to the procedure for presenting the application for a work permit, and the subsequent issue of the authorization by the qualified local immigration office, the Legislative Decree refers to the provisions in Art. 22 of the Consolidated Law on Immigration concerning the generality of employed foreign workers (see *retro*, paragraph 1.2), except if otherwise provided.

In particular, in relation to the freedom of choice between the worker and/or the employer, given by Art. 10.1 of the Directive, the procedure outlined by the Italian transposing decree identifies the employer as the only person entitled to file an application for a work permit (Art. 27-quater.4). A majority of Member States, however, requires that the migrant file the application for the EU Blue Card.<sup>69</sup> Once the employer identifies the highly qualified foreign workers who are going to be hired, he is required to file the application for a work permit at the local immigration office.<sup>70</sup> On penalty of dismissal, this application must be accompanied by the provisions under Art. 22.2 of the Consolidated

<sup>69</sup> Communication from the Commission to the European Parliament and the Council on the implementation of Directive 2009/50/EC, COM(2014) 287 final, 8.

<sup>70</sup> Under Art. 27.1-ter, paragraph 8 of Art. 27-quater states that the application for authorization be replaced by a communication from the employer of a contract proposal or a binding job offer in the event that, after consulting with the Ministry of Labour, the same employer has signed a specific memorandum of understanding with the Ministry of Internal Affairs, according to which the employer guarantees for the existence of the requirements necessary when applying to the procedure (see also the circular of the Ministry of Internal Affairs and of the Ministry of Labour of 5 May 2015). In this sense, the circular of the Ministry of Internal Affairs no. 5209 of 3 August 2012 has stated that 'they are special memoranda of understanding, distinct from those already stipulated under Art. 27, paragraph 1-ter and 1-quater, whose requirements and related underwriting, will be disclosed with a specific circular'.

Law on Immigration,<sup>71</sup> as well as by a proposed employment contract (or a binding job offer) lasting at least one year,<sup>72</sup> and also by a certification issued by the worker's country of origin stating the title of education attained and the related professional qualification. A minimum gross pay requirement is provided, which cannot be less than three times the minimum level for exemption from participation in health care spending (Art. 27-quater.5).<sup>73</sup>

Within 90 days from filing the application, the local immigration office is required to issue a work permit or communicate the rejection of the application to the employer (Art. 27-quater.5). The law provides a longer deadline than the normal 60 days, under Art. 22.5 of the Consolidated Law on Immigration, for the issue (or rejection) of the permit.

Foreigners already regularly residing in the national territory may have access to the procedure for the issue of the work permit regardless of the requirement of effective residency abroad, usually imposed by Art. 22.2 of the Consolidated Law on Immigration for the foreign worker, to have access to employment. In any case, the issue of the permit is subject to a prior verification of the unavailability of national or European workforce, assured by advertising the offer through the network of employment centres (*Centri per l'impiego*, Art. 27-quater.7). This way, Italy chose to benefit from the option of verifying whether the concerned vacancy could, or could not, be filled by national or EU workforce.

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<sup>71</sup> In addition to the nominal application for the work permit, the minimum requirements under Art. 22.2 are the proof of adequate housing for the migrant worker, the offer of a residence contract with the specification of the related conditions, comprehensive of the commitment by the employer to pay for the repatriation costs of the foreign worker, and the statement of commitment to communicate any variation regarding the employment relationship.

<sup>72</sup> In case the employer is unavailable to hire, the unjustified form of the decision taken by the employer is relevant for statutory purposes. Therefore, the worker will be able to bring court proceedings for compensation of the damage undergone in the event that the employer has decided to revoke his/her availability to hire, without any valid reason, and this decision has caused unfair damage to the worker.

<sup>73</sup> For 2015, such an amount totalled EUR 24.789,00, making reference to the minimum annual level required by Art. 8, paragraph 16, third period, of Law no. 537/1993 and subsequent amendments, and it referred to the exemption from participating to health care expenses for the unemployed and their family members, of EUR 8.263,00, and increasing it to EUR 11.362,00 in case of the presence of the spouse, and further increased by EUR 516,00 for every dependent family member.



### 3.4. Rejecting an Application

Paragraphs 9 and 10 of Art. 27-*quater* introduce a new possibility for the rejection of a work permit, as well as a revocation of the same in case it has already been issued.

Such paragraphs contemplate the attainment of the permit by means of fraud, falsification or forgery of the documents presented and necessary for the issue of the authorization, as specified in paragraph 5, as well as the failure to sign the contract of residence on the part of the foreign worker at the local immigration office within 8 days from entry in Italy, unless the delay is due to force majeure. Moreover, the possible revocation adopted by the local immigration office must be communicated electronically to the Ministry of Foreign Affairs, in order to facilitate potential activities related to the subsequent revocation of the entry visa.

An equally relevant motivation for rejection is if, during the past five years, the employer has been convicted, in criminal court, even if not definitely, for offences relating to: abetting illegal immigration to Italy and illegal emigration from Italy towards other States; recruiting people for prostitution or minors for illegal activities; illegal intermediation and exploitation of labour, under Art. 603-*ter* of the penal code; and finally, the employment of foreign workers without a residence permit or whose permit has expired and for which renewal has not been filed within the pertinent legal time framework, or whose permit has been revoked or annulled under Art. 22.12 of the Consolidated Law on Immigration (in its version subsequent to the modifications introduced by Legislative Decree no. 109/2012 in transposing Directive 2009/52).

### 3.5. The Length of the Permit

Following the stipulation of a 'residence contract for dependent employment' and the communication of the establishment of an employment relationship, the highly qualified foreign worker, authorized to work in Italy, is given a new residence permit called an EU Blue Card, issued by the pertinent *Questura*. Italy has differentiated between employment contracts of indefinite duration, for which the period of validity is set at two years, and all other contracts, for which the period is the duration of the contract plus three months (Art. 27-*quater*.11).

As recently highlighted by a circular from the Ministry of Internal Affairs,<sup>74</sup> among the requirements that must be verified by the *Questura* for the issue of the residence permit, is the signed Integration Agreement, under Art. 4-*bis*.2 of the Consolidated Law on Immigration,

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<sup>74</sup> Cf. Circular of the Ministry of Internal Affairs no. 6385 of 27 July 2012.

and the payment – by the worker, and according to the length of the permit – of the contribution related to the issue and renewal of the permit (the so-called 'residence tax'), under Art. 5.2-ter of the Consolidated Law on Immigration (see retro, paragraph 2.1).

### **3.6. The Permit and Access to the Labour Market**

Access to employment for EU Blue Card holders has limitations for the first two years of legal occupation on national territory for work that is not highly qualified and for which an absolute prohibition is set, and also in relation to the change of employers, which shall be preliminarily authorized by the pertinent *Direzioni territoriali del lavoro* (local offices of the Ministry of Labour) through a mechanism of silent consent: the authorization is assumed to be granted when the local offices do not give notification regarding the application within 15 days from receiving the communication regarding the new contract or binding offer (Art. 27-querter.13). Moreover, it is not possible for the worker to perform activities that involve the direct or indirect exercise of public authority, even if occasionally, or activities attaining to the protection of public interest, or that are reserved for nationals, EU citizens or citizens of the European Economic Area (Art. 27-querter.14).

With special reference to the requirement for the possession of Italian citizenship, another disposition, contained in the Consolidated Law on Immigration at Art. 27.3, prevents foreign workers from undertaking 'certain activities' for which, according to the law, the possession of Italian citizenship is required. This disposition has been disputed by the doctrine based on the assumption that, in transposing the Consolidated Law on Immigration to the internal legal system, the Italian legislators exceeded the limits imposed by Delegated Law no. 40/1998, which did not set the requirement for performing these 'special jobs'. By imposing the requirement of Italian citizenship for performing 'certain' (and unspecified) activities, the Consolidated Law on Immigration infringed the principles inspiring the reformation law, that is of equal treatment and non-discrimination.

### **3.7. Denied Extension and Withdrawal**

The reasons for which the EU Blue Card cannot be issued, or that cause its rejection or revocation, are defined by the following paragraph 12. They basically coincide with the reasons in Art. 9 of Directive 2009/50, even though in the transposition any reference to public policy, security or health (Art. 9.3.a), failure to communicate a residence address (Art. 9.3.c) or a request for social assistance (Art. 9.3.d) has

been omitted. In other words, Italy has not used the possibilities according to Art. 9.3.a, Art. 9.3.c and Art. 9.3.d of the Directive.

As for the revocation or failure to renew the EU Blue Card in case of protracted unemployment of the foreign worker, letter d of the rule does not identify the period of unemployment tolerated, in contrast to what is provided for under Art. 13 of Directive 2009/50, which expressly states three months.

Therefore, it is not clear whether the disposition in Art. 22.1 of the Consolidated Law on Immigration may be applied analogically or not, being that, in case of job loss also due to resignation, it quantifies the related period as at least twelve months, in a way that is much more favourable to the foreign worker.

### **3.8. Equal Treatment (with Nationals) and Family Members**

The Italian transposing legislation related to the equal treatment principle, set by Art. 14 of the Directive, merely states that the holder of the EU Blue Card benefits from a treatment that is equal to the one given to citizens, according to the national legislation in force, except for the access to the labour market during the first two years (Art. 27-*quater*.15). In transposing Directive 2009/50 in relation to the principle of equal treatment, Italian legislators have therefore merely referred to what is already provided for by national law. As for the transposition of Directive 2011/98, the legislators did not duly recall the rights enjoyed by the EU Blue Card holder. Therefore, in this case the issues regarding equal treatment arise just as we have reported in relation to the Legislative Decree for the transposition of Directive 2011/98 (see *retro*, paragraph 2.3). The most critical aspect is once again the one regarding equal treatment in the branches of social security as determined by Regulation 883/2004.<sup>75</sup> In fact, as we have seen, many national dispositions provide for the unequal treatment of citizens from Italy and the EU, on the one hand, and third-country citizens, on the other, in relation to the enjoyment of non-contributory social security benefits. This certainly puts Italy at risk of being subject to infringement proceedings for the violation of obligations deriving from EU law, *ex Arts* 258-259 TFEU.

The European Commission has found that equal treatment provisions are applied in most Member States, although there are variations in scope of application and explicit transpositions are absent in some Member States; the European Commission is currently analysing

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<sup>75</sup> In the field of social security, the Directive refers to Regulations no. 1408/1971 and 859/2003. In the meantime, the new general regulatory framework on the subject has converged into Regulations no. 883/2004 and 1231/2010.

the situation further and seeking clarification from Member States related to a number of deficiencies in the transposition of the Directive.<sup>76</sup>

Entry for family reasons is also allowed if there is already a family member that is legally resident with a EU Blue Card (there are no annual quotas that set a maximum inflow for family reasons, and the application may be submitted at any time of the year). According to Art. 29 of the Consolidated Law on Immigration, family members that may be reunited are live-in spouses, minor children, parents of 65 years and over who are totally disabled or are dependents of aliens resident in Italy and without other children in their country of origin. An alien who applies for family reunification must give proof of adequate resources to support all family members,<sup>77</sup> and it is also necessary to have an accommodation that is suitable to house the family members, demonstrated by presenting a certificate to that effect issued by the authorities of the municipality of residence. Family members of EU Blue Card holders may be issued with a permit with equal duration (Art. 27-quater.16). To give some more detail: the EU Blue Card holder may also have access – notwithstanding the length of the residence permit – to the above mentioned procedures of family reunification ruled by Art. 29 of the Consolidated Law on Immigration, and the consequent issue of a residence permit for family reunification, with equal duration to the one held by the EU Blue Card holder.

### **3.9. Residence in Other Member States**

Eighteen months after legal residence in a Member State, the foreign holder of an EU Blue Card issued by that State can enter Italy without the need of a visa to continue conducting a highly qualified work activity. In this case, within a month from the worker's entry into the national territory and according to the procedures already mentioned, the employer must file an application for a work permit, which must be issued within the (reduced) deadline of 60 days. The application for the permit may be filed by the employer, even if the EU Blue Card holder is still residing in the first Member State he entered. The specific residence

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<sup>76</sup> Communication from the Commission to the European Parliament and the Council on the Implementation of Directive 2009/50/EC, COM(2014) 287 final, 9. See also paragraph 10: 'the Commission is concerned about flaws in the transposition, the low level of coherence, the limited set of rights and barriers to intra-EU mobility'.

<sup>77</sup> Gross annual income required to apply for family reunion in 2015 is EUR 8.746,14 (one family member), EUR 11.661,52 (two family members), EUR 14.576,9 (three family members), EUR 17.492,28 (four family members), EUR 11.661,52 (two or more children under the age of 14), EUR 14.576,9 (one family member and two or more children under the age of 14) and EUR 17.492,28 (two family members and two or more children under the age of 14).

permit issued to EU Blue Card holders is issued by the *Questura* in favour of the highly qualified worker who was authorized to work by the local immigration office. In such a case the residence permit is granted for a two-year period, in the case of a permanent job, and with a length equivalent to the duration of the job contract plus three months, in all other cases. Under Art. 13 of the Consolidated Law on Immigration, if the work permit or EU Blue Card is rejected or revoked, or if the latter fails to be renewed, the worker is ordered instead to be expelled towards the Member State that had previously issued the residence permit, even if that permit is expired or has been revoked by that State (Art. 27-quarter.17).

Finally, in the case of an expulsion carried out towards Italy, the law provides for the foreign worker to be readmitted into the national territory and it also stipulates the issue of a residence permit for subordinate employment 'awaiting employment', therefore allowing the worker to be registered in the employment lists for the remaining period of validity of the residence permit, but not less than for one year, or for the entire duration of the income support provision, if perceived and if longer (Art. 22.11 of the Consolidated Law on Immigration). Furthermore, after the one-year time limit, the worker may continue to stay in Italy so long as he proves to have a minimum annual income resulting from legitimate sources and that this not less than the annual social allowance.<sup>78</sup>

### **3.10. Family Members and the Right to Move to a Second Member State**

Paragraph 17 of Art. 27-quarter provides that family members of the foreign holder of an EU Blue Card, issued by another EU Member State and authorized to reside in Italy, if in possession of a valid residence permit issued by the previous Member State of origin, as well as valid travel documentation, may be issued a residence permit for family purposes, if they can prove that, as family members of the EU Blue Card holder, they have resided in the same Member State of origin and meet the requirements under Art. 29.3 of the Consolidated Law on Immigration.

### **3.11. Long Term Residence Status for EU Blue Card Holders**

Art. 9-ter of the Consolidated Law on Immigration, introduced by Art. 1.18 of the Legislative Decree no. 108/2012, regulates the conferral

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<sup>78</sup> The social allowance is an economic provision delivered on demand, in favour of citizens who find themselves in financial need and whose income does not exceed the annual thresholds set by the law.

of a long-term residence status in the case that the applicant is already a holder of the EU Blue Card.

In more detail: the foreign holder of an EU Blue Card issued by a different Member State, and authorized to reside in Italy as a result of holding a specific EU Blue Card, is entitled to a long-term residence status, under Art. 9 of the Consolidated Law on Immigration, legally and uninterruptedly for five years in the EU territory as a result of having an EU Blue Card, provided that he is in possession of a residence permit under Art. 27-quarter of the Consolidated Law on Immigration, lasting at least two years. Moreover, it is stated that the periods of absence from the EU territory must not interrupt the length of that period; on the contrary, these must be considered if they are less than 12 consecutive months and they do not exceed a total of eighteen months within a five year time frame (Art. 9-ter.1-2). The holders of an EU Blue Card, who are in possession of the above mentioned requirements, are issued a long-term CE residence permit by the *Questura*, bearing the statement 'ex holder of an EU Blue Card' in the 'records' (Art. 9-ter.3).

Art. 9-ter.4 specifies that the residence permit is revoked if: it was acquired fraudulently; in case of expulsion; when the conditions for its issue are lacking or fail; in case of absence from the EU territory for a period of twenty-four consecutive months; and lastly, in case of conferral of a long-term residence permit by another Member State, upon notice by the latter and, in any case, on absence from the territory of the State for a period exceeding six years.

The subsequent paragraph 5 regulates the issue of a residence permit for family purposes for the family members of the foreign holder of a long-term residence permit who is an ex EU Blue Card holder; this is if, according to Art. 29.3, they can prove: the availability of housing compliant with health standards, as well as housing suitability, verified by the competent municipal offices; the availability of a minimum annual income resulting from legitimate sources and that is not less than the annual social allowance, increased by half of the amount of the social allowance for each family member to be reunited; and lastly, the availability of a health insurance.

Finally, paragraph 6 of the same Article requires that the residence permit for long-term residents be issued to the family members of the foreign holder of a residence permit for long-term residents, who is an ex EU Blue Card holder, if they have legally and uninterruptedly resided in the EU territory for five years, of which the last one in the national territory.

### 3.12. Directive 2009/50: Effects on Italian Law

The strong resistance of the Member States against giving the EU the competencies in regulating migration and entry flows, always considered an effective range of state sovereignty, especially due to the strong bonds between internal safety and public order, has greatly hindered the creation, and then the development, of an extended European legislation in this area.<sup>79</sup> Member States still, directly or indirectly, demonstrate how firmly they want to maintain their control over policies pertaining to migration flows and integration strategies.

However, with specific reference to the entry and residence related to highly qualified jobs, Italy is promoting a partial turnaround (from which, nonetheless, entry conditions are excluded, as they are still a prerogative of Member States, unlike the administrative aspects, for example), that is justified precisely because the migrations mentioned are exclusively linked to vocational training, knowledge and innovation.<sup>80</sup> After all, the same references made by the Directive to the principles on ethical recruitment<sup>81</sup> or to the promotion of circular migration, which can be found in other coeval EU documents,<sup>82</sup> may be read as further signals of the willingness to close the frontiers towards the so-called 'unwanted' immigration, being that they represent a way to legitimize entries into the Member States that are only temporary and/or functional to the economic growth of the EU system. The favour expressed only towards 'privileged' migrations is clear, which is for those entries that facilitate knowledge and innovation, for example through the provision of more favourable procedures for family reunification and the acquisition of the status of long-term resident. The EU is becoming inclusive only due to convenience (entries for study and research purposes and highly qualified jobs) or necessity (asylum, family reunification); as a consequence, such a tendency has ended up characterizing Italian legislation as well.

In fact, it is no surprise that, in order to lay a more solid basis for the acquisition of qualified human capital from abroad through the facilitation of brain-gain policies in the different Member States, in applying Legislative Decree no. 108/2012 national legislators have

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<sup>79</sup> Samuel Engblom, 'Labour Migration, Trade in Services, Equal Treatment, and the Role of the EU', in Jan O. Karlsson, Lisa Pelling (eds.), *Moving Beyond Demographics. Perspectives for a Common European Migration Policy* (Stockholm: Global Utmaning, 2011), 69.

<sup>80</sup> Gottardi, *supra* n. 66, at 532.

<sup>81</sup> In this sense, cf. the recitals no. 21 and 22, as well as Art. 3.3.

<sup>82</sup> See, i.e., the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on circular migration and mobility partnerships between the European Union and third countries, COM (2007) 248 final.

introduced a further possibility for work-related entries 'in excess of quota', reserved for highly qualified foreign workers. Beyond the obligations deriving from the execution of Directive 2009/50, in fact, such a decree is located along a well-defined line of development of national migration policies, which largely follows the path traced by EU policies, implemented both by EU institutions and some Member States who are already familiar with the EU Blue Card practice. As a result of the closure of national frontiers towards new entries for work purposes, except the (limited) predetermined annual quotas and the periodic regularizations, there are limited exceptions that continue to be accepted. These exceptions are designed to ensure those entries of workforce that are temporary and, especially, considered to be functional to the economic growth of the country. In other words – and specifically related to highly qualified workers having many competencies and considerable professional skills, often in sectors lacking these at national level – inclusion is often due to contingent reasons of convenience and to boost Italy's competitiveness and economic growth.

A conclusion of this type, characterizing the framework of Directive 2009/50 and, more generally, the recent EU migration policies, has been taken to an even more extreme level, if possible, through the transposition legislation. In this case, the instrumentality of the entry of highly qualified workers in relation to the national economic growth appears to be even more evident. Notwithstanding the limited use made, up to now, of the dispositions recently introduced by the national legislators, as a consequence of the quite limited scope of application *ratione personae*,<sup>83</sup> and therefore despite the presumable poor significance of the former in terms of incentives for policies on innovation and quality, what is important to point out is the trend that characterizes the national migration policy, which once again clearly identifies the foreign worker as an economic factor, more than as a person.<sup>84</sup> Just

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<sup>83</sup> Italy only issued 8 Blue Cards in 2013, and only 112 in 2014: Communication from the Commission to the European Parliament and the Council on the implementation of Directive 2009/50/EC, COM(2014) 287 final, 11. As we mentioned, such a limited propagation is mainly due to the limited subjective scope of the regulations of reference, which applies only to foreigners who have the requirements and also the qualifications requested by Art. 27-quarter.1, to residents of a third country or in a Member State or in the State for other reasons (as long as the residence permit is not attributable to one of the hypotheses provided in the following paragraph 3), as well as to highly qualified foreign workers who already hold a Blue Card issued by a different Member State; moreover, the decree does not apply to the categories of persons defined by Art. 3 of Directive 2009/50. It is likely that foreigners who do not fit in this limited scope try to enter Italy following the ordinary (and more severe) admission provisions for labour migrants.

<sup>84</sup> Such a tendency, which certainly is not new to the evolution of Italian migration laws, especially for work purposes, is in contrast with the opposite propensity towards the



consider the fact that Legislative Decree no. 108/2012 does not make any reference to measures facilitating circular migration nor that guarantee, more so, ethical recruitment in those areas, from health to education, which inevitably tend to coincide with those from which the greater migration flows move towards Europe.<sup>85</sup> Instead – according to a spirit that is more compliant to the wording of the Directive – it would have been preferable to provide direct measures to reduce the negative effects that immigration of highly qualified workers has on developing countries as well, and at the same time increase the positive ones, ‘in order to transform the “brain drain” in a “brain gain”’ (recital no. 22 of the Directive).

#### **4. The EU Seasonal Workers Directive (2014/36/EU)**

The Directive 2014/36/EU on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers, entered into force on 29 March 2014, is not yet transposed in Italy (it will be transposed by 30 September 2016).<sup>86</sup> Nevertheless, it is still possible to assess whether, and to what extent, Italian legislation on seasonal migrant workers is already in compliance with the requirements of the Directive, and which aspects will necessarily need to be modified after its transposition.

##### **4.1. Italian Legislation on Seasonal Work: an Assessment of Compliance to Directive 2014/36**

Specific Italian legislation regarding seasonal work is a derogation to the general legislation regulating dependent employment for foreigners. The purpose of this difference consists in making recruitment of season workers more rapid and flexible through the implementation of

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establishment of an international regime of human rights and the spread of ‘cosmopolitan norms’ that are the sign of the ultimate legalization of the claim of persons to human rights, wherever they may be, regardless of their belonging to set communities – see Seyla Benhabib, *Another Cosmopolitanism* (Oxford: Oxford University Press, 2008) –, and whose legal bases are also found at national level.

<sup>85</sup> No Member State has entered into an agreement with a third country that lists professions which should not fall under the Directive in order to assure ethical recruitment in sectors suffering from a lack of personnel in developing countries. See the Communication from the Commission to the European Parliament and the Council on the implementation of Directive 2009/50/EC, COM(2014) 287 final, 5.

<sup>86</sup> Judy Fudge, Petra Herzfeld Olsson, ‘The EU Seasonal Workers Directive: When Immigration Controls Meet Labour Rights’, (2014) 16 *European Journal of Migration* 439; Alex Lazarowicz, ‘A success story for the EU and seasonal workers’ rights without reinventing the wheel’, (2014) *European Policy Centre*, Policy Brief, 28 March 2014; Ágnes Tóttós, ‘The Past, the Present and the Future of the Seasonal Workers Directive’, (2014) I *Pécs Journal of International and European Law* 45.

simplifications, compared to the intricate ordinary procedure that we have already described (cf. retro, paragraph 1.2). Nevertheless, this procedure does not do justice to the importance of the phenomenon, which in practice represents such a macroscopic reality that it should definitely be considered prevalent compared to other types of contract, both temporary and permanent.<sup>87</sup>

#### 4.1.1. Admission Rules: Criteria and Requirements

Art. 24 of the Consolidated Law on Immigration states that the employer, whether Italian or foreign, but nevertheless legally residing in Italy, or the employer's associations on behalf of their members, who intend to establish a relationship of seasonal dependent employment in Italy with a foreigner residing outside the national territory (in accordance with the provisions of Art. 21.1 of the Directive), must submit a nominal application for a work permit to the pertinent local immigration office.<sup>88</sup> The assumption is that the '*decreto flussi*' – that annually sets the quotas of foreign workers admitted to carry out a seasonal work activity in Italy<sup>89</sup> – is published, and that such quotas are not exhausted. The institutionalization of the interdependence between legal residence in the host state and a previous employment contract (or a binding job offer to work), which generates – as we have seen – irregular work and vulnerability in the migrants' legal status, has recently (and regrettably) been introduced through Art. 6 of the Seasonal Workers Directive.<sup>90</sup>

The entry for purposes of seasonal work in Italy is only provided for certain employment sectors (within the scope of the activities listed in the Presidential Decree no. 1525/1963) and it is limited to workers in the tourism and hotel, and agricultural sectors, according to the Province in which the work activity takes place. From this point of view, Italy has

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<sup>87</sup> Ferraresi, *supra* n. 29, at 255.

<sup>88</sup> Again Italy preferred to require that the application be submitted by the employer and not by the third-country citizen; Art. 12.3 of the Directive puts back this decision to each Member State.

<sup>89</sup> The Decree of the President of the Council of Ministries of 2 April 2015, i.e., provided for the entry of 13.000 foreign citizens for 2015, to perform seasonal work (compared to the 15.000 the entries authorized in 2014 and the 30.000 entries authorized in 2013), especially for the demands of the agricultural, tourism and hotel sectors, to the benefit of the citizens of the countries listed (Albania, Algeria, Bosnia-Herzegovina, Egypt, Republic of the Philippines, Gambia, Ghana, Japan, India, Kosovo, ex Yugoslavian Republic of Macedonia, Morocco, Mauritius, Moldova, Montenegro, Niger, Nigeria, Pakistan, Republic of Korea, Senegal, Serbia, Sri Lanka, Ukraine, Tunisia).

<sup>90</sup> Veronica Papa, 'Regulating temporariness in Italian migration law', paper presented at the Oñati International Institute for the Sociology of Law conference on *Temporary Labour Migration in a Globalised World: The Regulatory Challenges* (Oñati, 11-12 June 2015), 16 (provisional version).

already complied to Art. 2.2 of the Directive, which invites the States to list the employment sectors that include activities subject to seasonal rhythms. However, 'the transposition of this provision may encourage Italian legislators to formulate a legal definition of seasonal work under labour migration law thereby restricting it to a (closed) list of activities'.<sup>91</sup>

The work permit application must be accompanied by: documentation showing the foreign worker's housing arrangements; the proposal of a 'residence contract for dependent employment', specifying its related conditions, including the payment of the costs for the worker's return to the State of origin;<sup>92</sup> and the communication of any variations concerning the employment relationship. Providing for criteria and requirements for the admission for purposes of seasonal work for periods of residence both not exceeding or exceeding 90 days, Arts 5-6 of the Directive specify that the employment contract (or the binding job offer) must report: the place and type of work; the duration of the employment; the remuneration; the working hours per week or month; the amount of any paid leave; where applicable, other relevant working conditions; if possible, the date of commencement of the employment; evidence of possessing or, if provided for by national law, having applied for sickness insurance for all the risks normally covered for nationals of the Member State concerned for periods where no such insurance coverage and corresponding entitlement to benefits are provided in connection with, or as a result of, the work carried out in that Member State; evidence that the seasonal worker will have adequate accommodation or that adequate accommodation will be provided. Moreover, the seasonal worker must also prove to have sufficient resources to support himself/herself during the residence without recourse to the national social assistance system and, for stays over 90 days, also to be in possession of a valid travel document which covers at least the period of validity of the work authorization. The Italian legislation transposing Arts 5-6 of the Directive will explicitly refer to these elements, since these are not all provided under the current legislation; however, the wording of the Directive does not hint at what effects might flow from these documents (in particular, with regard to their enforceability).<sup>93</sup>

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<sup>91</sup> Papa, *supra* n. 90, at 12 (provisional version).

<sup>92</sup> Art. 19.2 of the Directive provides for the possibility that the States oblige the employers to take charge not only of the expenses of repatriation, but also of the costs of the travel from the place of origin of the seasonal worker to the work-place in the Member State concerned.

<sup>93</sup> Fudge, Herzfeld Olsson, *supra* n. 86, at 585.

An alternative to the nominal application for a work permit – when the employer or employer's associations do not directly know the foreign worker – may be a numerical application presented by one or more persons registered in the lists, as required by the *Centri per l'impiego*, for foreign workers who intend to enter Italy, in order for the local immigration office to verify, within five days, any availability of Italian or EU workers to cover the seasonal employment offered (Art. 24.1). Therefore, the disposition is already compliant with the principle of preference for citizens of a Member State, or of the European Union, set out by Art. 8.3 of the Directive, which, nevertheless, also refers to the prior verification of unavailability of third-country citizens who already legally reside in the State.

Among others, Art. 2.3 excludes from the scope of application of the Directive any third-country nationals who are carrying out activities on behalf of undertakings established in another Member State in the framework of the provision of services within the meaning of Art. 56 TFEU, including third-country nationals posted by undertakings established in a Member State in the framework of the provision of services in accordance with Directive 96/71. Only a few seasonal workers who come to Italy are employed by temporary agencies in third countries; therefore, this exclusion is not very significant for the Italian legal system.

#### **4.1.2. Authorisations for the Purpose of Seasonal Work**

The authorization for foreign workers, for purposes of seasonal work, is issued by the local immigration office, no more than 10 days after the communication to the *Centro per l'impiego* and within 20 days from the submission of the application by the employer, in respect of the right of precedence accrued (Art. 24.2).<sup>94</sup> In this sense, Art. 18 of the Directive states that the decision regarding the request of authorization for work purposes must be notified in writing to the applicant within 90 days from the submission of the complete application; so, in this respect too, the Italian legal system has already complied with the EU legislation.

The new paragraph 2-bis of Art. 24 sets out that, if the local immigration office does not communicate its refusal to the employer within 20 days, the application 'is considered accepted', as long as it refers to a foreigner who had already been authorized to perform seasonal work the previous year, for the same employer, and who had

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<sup>94</sup> The issue of an authorization for purposes of dependant non-seasonal work, instead, must take place within 60 days from the date of submission of the application.

been regularly hired by the employer and had obeyed the conditions set out in the residence permit.<sup>95</sup>

The authorization thus allowed has a validity that goes from a minimum of 20 days to a maximum of 9 months, according to the length of the seasonal work requested, even if it is a unification of several working periods to perform under different employers (Art. 24.3). In this last case, the simultaneous, as well as cumulative, submission of requests is provided for by the various employers, while every applicant will be issued a single authorization provision. At a later time, other employers will also be able to share the authorization already issued, within the same validity time frame.

The maximum time frame of 9 months already appears to be compliant with Art. 14 of the Directive, which sets out that the maximum residence period for seasonal workers can not be less than 5 months, nor exceed 9 months, within a period of 12 months. Within transposition, the same Article also provides for the States to set out a maximum period, no less than 9 months within a 12 month time range, during which an employer is authorized to hire seasonal workers.

In particular, as regards the authorizations for seasonal work, the Directive (Art. 12) provides that, for stays of less than 90 days, the States must issue a short-term residence visa for purposes of seasonal work and, in the case of third-country nationals exempted from visa obligations, either a permit for seasonal work, or a short-term residence permit for purposes of seasonal work together with a work permit for seasonal work. The decision about which of these options to choose will be made when transposing the Directive. As for stays longer than 90 days, the States must instead issue a long-term residence visa for purposes of seasonal work, a seasonal work permit or a seasonal work permit and a long-term residence visa (if the long-term residence visa is required by the national law for the entry into the State's territory). In this case as well, the decision will be made when transposing the Directive.

The issue of a seasonal work authorization in Italy is preliminary to the signing of the 'residence contract for dependent employment' and to the subsequent issue of the residence permit for dependent work (the length of which is provided for under the 'residence contract for dependent employment', and in any case cannot exceed 9 months in total). Such a necessary combination of acts (work authorization, 'residence contract for dependent employment', and seasonal work

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<sup>95</sup> Paragraph 2-bis has been added to Art. 17.2 of the '*decreto semplificazioni 2012*' (Law Decree no. 5/2012, transposed with modification into Law no. 35/2012).

residence permit) does not seem to be in line with the Directive, which, with specific reference to the long-term stays exceeding 90 days, imposes that the States provide only one of the authorizations mentioned (long-term residence visa for seasonal work; seasonal work permit; seasonal work permit and long-term residence visa, if the long-term residence visa is required by the national law for the entry into the State's territory).

A residence permit for seasonal work can be converted into a temporary or permanent work permit if, and when, the conditions outlined above are met, and within the limits of the quotas set each year. Without conversion, in fact, the seasonal work permit does not allow the performance of any other types of work (Art. 24.4, Consolidated Law on Immigration).

#### **4.1.3. Grounds for Rejection**

Ex Art. 22.5-bis and 22.5-ter, Consolidated Law on Immigration, the work authorization is rejected if the employer proves to have been convicted over the last five years, even if the judgment is not final: for abetting illegal immigration towards Italy or illegal migration from Italy towards other States; or for crimes involving the recruitment of persons for prostitution or exploitation of prostitution or of minors for illegal activities; for illicit brokering and work exploitation (Art. 603-bis penal code); for employing foreign workers without a residence permit, or with an expired, revoked or cancelled residence permit. The authorization is rejected (or revoked if it has been issued) even if the documents submitted have been fraudulently acquired or have been falsified or counterfeited, and also if the foreigner fails to go to the local immigration office to sign the 'residence contract for dependent employment' within 8 days from the entry into Italy, except when the delay has occurred due to force majeure.

In relation to the reasons for rejecting the authorization, the Italian legislation is partially compliant to the indications of the Directive, which, at Art. 8, identifies a larger number of possibilities for rejection,<sup>96</sup> as well as indicating some options for its revocation at Art. 9 (which, instead, do not appear in the national legislation). Therefore, when transposing, it will be necessary to integrate the reasons for rejection, already provided for by the Consolidated Law on Immigration, as well as to add the reasons for revocation. In particular, it would be useful if the

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<sup>96</sup> Among others, consider the case of a company that was liquidated in accordance with the national legislation on insolvency, or to the failure of an employer to meet the obligations concerning social security, taxation, labour rights, working conditions or terms of employment provided for in applicable law and/or collective agreements.

transposing law could make explicit reference to the possibility of rejection of the authorization to carry out work activities, when it is found that the employer does not respect the applicable labour law, whether by law or contract.

#### **4.1.4. Extension of Stay or Renewal of the Authorisation for the Purposes of Seasonal Work**

The new Art. 24.3-bis of the Consolidated Law on Immigration,<sup>97</sup> notwithstanding the limit of 9 months, provides that a seasonal work authorization is extended, and the residence permit renewed, in the case of a new seasonal work opportunity offered by the same or another employer. Moreover, the work authorization is expected to be given to other employers who employ the same worker in subsequent moments, without prejudice to the minimum (20 days) or maximum (9 months) time limits. Such authorization is issued as long as the worker, when beginning the second employment relationship, is legitimately present in the national territory as a consequence of the establishment of the first employment relationship. In this case, the worker is exempted from the obligation of returning to the State of origin for the issue of an additional visa by the consular authority, and the residence permit is renewed until the expiry of the new seasonal work relationship, notwithstanding the minimum and maximum duration limits. This disposition is totally in line with the provisions of Art. 15 of the Directive.

Nonetheless, Art. 18 of the Directive sets out that, in the event of a request of prorogation of the residence or of renewal of the authorization, the States adopt appropriate measures so that the seasonal worker is not obliged to interrupt the work relationship with the same employer, nor that the possibility of changing employer is precluded due to on-going administrative procedures. States are also compelled to authorize seasonal workers to reside in their territory until the pertinent authority makes a decision, for example by issuing a temporary residence permit. With respect to these provisions, an adjustment of the Italian legislation, which at the moment does not provide for a suitable mechanism for the purpose, is certainly necessary.

#### **4.1.5. Facilitation of Re-entry**

Art. 5.3-ter of the Consolidated Law on Immigration also provides for the possibility that the foreign worker, who can prove to have come to Italy for at least two consecutive years to perform seasonal work, and in

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<sup>97</sup> Paragraph 3-bis has also been added to Art. 17.2 of the '*decreto semplificazioni 2012*' (Law Decree no. 5/2012, converted with modifications into Law no. 35/2012).

cases of repetitive work in those production sectors characterized by seasonality (above all, the agricultural and hotel sectors), is granted a multi-annual residence permit, which will be issued year by year and last up to three years, and that is equal to the duration the worker benefited from during the two previous years. This is an additional instrument for the simplification of the bureaucracy for the hiring of seasonal workers, which benefits the employer who intends to employ the same worker every year, for the same work and for the same time frame (nevertheless, the employer is bound to hire the same worker he had hired the previous year).<sup>98</sup>

Furthermore, the foreign worker, who returns to the country of origin upon expiration of the residence permit, compared to same-country nationals who have never regularly entered Italy for work purposes, is given priority access to the authorizations to be issued the following year for seasonal work purposes. The regulation transposing the Consolidated Law on Immigration has limited such right of precedence only to cumulative or numerical requests submitted by the same employer (Art. 24.4, Consolidated Law on Immigration).

The Italian legislation appears to be also partially in line with the provisions of the Directive in relation to facilitations on re-entry. Art. 16, in fact, stipulates that the States can facilitate re-entry of third-country nationals, who have already been admitted at least once during the previous five years as seasonal workers, in compliance with the provisions of the Directive. Among the measures suitable for facilitating re-entry, the issue of more work permits in a single administrative act is also considered, which appears to be totally coherent with the multi-annual residence permit provided for by Italian legislation. The provision requiring that the worker must prove to have come to Italy for at least two consecutive years to perform seasonal work, instead, deserves an adaptation; in fact, in a sense much more favourable to the worker, the Directive states that the facilitation for re-entry must apply when the worker has already been admitted to perform seasonal work activities at least once in the previous five years (therefore it is not necessary that the entries have occurred within two consecutive years).

Among the appropriate measures, not for re-entry but for access of foreigners to seasonal work, we need to mention Art. 24.5, which empowers the tripartite Regional Commissions to stipulate special

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<sup>98</sup> Of the 13.000 entries allowed by the '*decreto flussi*' for seasonal work in 2015, the decree reserves 1.500 for third-country nationals coming from the same countries, who have entered Italy to perform seasonal dependent work for at least two consecutive years, and for the benefit of who the employer submits a multi-annual request of authorization for seasonal dependent work.



agreements with the most representative trade organizations of both workers and employers at a regional level, as well as with Regions and other local government entities, through which to facilitate the access of foreign workers to seasonal jobs and perhaps identify suitable remuneration and legal conditions to ensure levels of protection no lower than those applied to Italian workers, ensure adequate working conditions, regulate measures for the stimulation of inflows and outflows and, lastly, encourage the integration of foreign workers.

#### **4.1.6. Sanctions against Employers**

Art. 24.6 of the Consolidated Law on Immigration extends the sanctions provided for the employer who employs foreign workers without a residence permit, or whose permit has expired, has been revoked or annulled, and also for the employer who employs seasonal workers without the related residence permit, or whose permit has expired, has been revoked or annulled. This is another case where the Italian legislators should take the opportunity given to them from implementing the Directive, especially Art. 17, to extend the sanctions already provided for to the additional possibility of violation of the obligations deriving from the Directive itself (especially in relation to the option of subcontracting chains, in paragraph 3).

The disposition contained in Art. 17.2, requiring the employer to compensate migrant workers in situations in which the employer's work authorization is withdrawn, for reasons that range from insolvency and employing an undocumented worker (Art. 9.2) to violating labour laws or working conditions (Art. 9.3.b), is also particularly interesting. Moreover, the employer is liable for any 'outstanding' obligations that the employer would have had to respect if the authorization for the purpose of seasonal work had not been withdrawn. The implementation of this disposition is potentially suitable to positively affect the situation of migrant workers in Italy, being that the compensation provision protects the legitimate expectations of seasonal migrant workers in those Member States (such as Italy) that link the withdrawal of work authorizations to violations of labour law and working conditions. In other words, the legislation is designed to ensure that migrant workers do not have to choose not to complain so as not to jeopardise these expectations;<sup>99</sup> for these reasons, let's hope the implementation of the disposition in Italy happens correctly, otherwise its intentions will be in vain.

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<sup>99</sup> Fudge, Herzfeld Olsson, *supra* n. 86, at 463.

#### 4.1.7. Equal Treatment (with Nationals)

Regarding equal treatment, the Member States can, during the transposition, derogate or limit the extent of the principle of equal treatment, in particular in relation to the sectors of social security, under Art. 3 of Regulation no. 883/2004, by excluding family benefits and unemployment benefits; with reference to the access to goods and services available to the public and the provision of these, by limiting its application to education and vocational training that is directly linked to the specific employment activity and by excluding study and maintenance grants and loans or other grants and loans; finally, with respect to tax benefits, by limiting its application to cases where the registered or usual place of residence of the family members of the seasonal worker for whom he/she claims benefits, lies in the territory of the Member State concerned.

The aspect of the Italian legislation that more than any other deserves to be discussed, once again, relates to equal treatment in relation to social security. As regards seasonal foreign workers, the Italian legislation provides for a special social security system: the workers are granted disability, old age and survivors insurance, insurance against accidents at work and occupational diseases, health insurance and maternity insurance (Art. 25.1, Consolidated Law on Immigration). They are excluded from the right to any unemployment provision, as well as family allowances, as a consequence of the peculiar characteristics of seasonal activity – which have led the legislator to believe that there is little possibility that the worker has family in Italy, or that he enters Italy every year for a period of seasonal work–, unless more favourable provisions, descending from special international agreements, are applied.<sup>100</sup>

In place of the contributions that relate to such benefits, the employer is required to pay a sum equal to the amount of the very same contributions to the National Institute for Social Security (INPS), according to the conditions and modalities laid down for these contributions. These sums converge into the National Fund for Social Policies, for the financing of welfare interventions for foreign workers (Art. 25.2, Consolidated Law on Immigration).

The rationale behind the rule is to prevent the employer taking advantage of a reduced contribution for this category of workers.<sup>101</sup>

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<sup>100</sup> Chiaromonte, *supra* n. 13, at 226.

<sup>101</sup> Vincenzo Ferrante, 'Il caso italiano', in Vincenzo Ferrante, Laura Zanfrini (eds.), *Una parità imperfetta. Esperienze a confronto sulla tutela previdenziale dei migranti* (Roma: Edizioni Lavoro, 2008) 47.

Notwithstanding that it is a legitimate exclusion from Art. 23.2 of the Directive, this situation actually ends up generating unequal treatment in favour of permanent or temporary foreign workers, compared to the seasonal ones,<sup>102</sup> through an exclusion that does not seem reasonably justified.<sup>103</sup>

#### **4.1.8. Most Favourable Provisions: The Role of Bilateral Agreements**

Art. 4 of the Directive makes an exception for the most favourable provisions of EU law and of bilateral or multi-lateral agreements concluded between one or more Member States and one or more third countries. As for Italy, many bilateral agreements for the regulation and management of migrating flows for work purposes also involve seasonal work. They represent a tool for the strengthening of legal entrance routes for foreign workers, as well as mechanisms for the meeting-point between supply and demand. In fact, they require a collaboration between the Italian administration and the competent authorities of the country of origin, in order to facilitate: the exchange of information about the needs expressed by the Italian labour market and on the professional figures available in the country of origin; the drawing up of a list of workers from the country of origin who are available to move to work in Italy; support for the implementation of vocational training programmes and Italian language courses in the country of origin in order for the attendees to be preferentially entitled to enter Italy for work purposes (in execution of Art. 23 of the Consolidated Law on Immigration); the exchange of experiences and good practices.

These framework agreements cover all types of dependent workers, including seasonal ones. They are executed according to an execution protocol that gives very detailed information about the implementation. The objective is to: strengthen the collaboration with the most important countries of origin of the migrating flows towards Italy, regarding the management of migration for work purposes; establish a system for the regulated management of migrating flows that can guarantee safety and transparency through a connection between institutions; strengthen the mechanisms for the selection of foreign qualified manpower that meets the requirements of the Italian labour market; share technical tools (professional forms, lists of workers,

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<sup>102</sup> Germano Dondi, *Immigrazione e lavoro: riflessioni e spunti critici* (Padova: Cedam, 2001) 152.

<sup>103</sup> Olivia Bonardi, 'Diritto alla sicurezza sociale e divieti di discriminazione', (2008) I *Rivista giuridica del lavoro e della previdenza sociale* 583.

training standards) that allow management of the process based on a common language between country of origin and country of destination.

The Directorate General for Immigration and Integration Policies of the Ministry of Labour has concluded bilateral agreements regarding the regulation and management of migration flows for work purposes with the governments of the following States: Mauritius, Moldova, Albania, Sri Lanka, Morocco, and Egypt. All these agreements contain specific provisions regarding seasonal work that provide for a more favourable treatment for nationals of these States.

#### **4.1.9. Monitoring, Assessment, Inspections and Facilitation of Complaints**

Art. 24 of the Directive requires Member States to provide measures to prevent possible abuses and to sanction infringements of the Directive. Measures should include monitoring, assessment and, where appropriate, inspection according to national law or administrative practice. The rules of implementation should, therefore, allow the national inspection bodies access, not only to the workplace (a possibility that is already allowed), but also – with the agreement of the worker – to the accommodation.

As regards, however, the facilitation of complaints (Art. 25), national mechanisms that allow seasonal workers to lodge complaints against their employers, encouraging such situations, are already provided. One of the most significant provisions in this regard is contained in Art. 22.12-quater of the Consolidated Law on Immigration: in cases of particular labour exploitation it is possible to issue a residence permit on humanitarian grounds<sup>104</sup> to the foreigner who has made a complaint and who cooperates in the criminal proceedings brought against the employer. Finally, with regard to the same access as other workers in a similar position to measures protecting against dismissal or other adverse treatment by the employer, as a reaction to a complaint within the company or to any legal proceedings aimed at enforcing compliance with the Directive, Italian law already conforms to the arrangement, not foreseeing any difference between seasonal workers and non-seasonal workers.

### **5. Some Concluding Remarks. Towards a Human Rights-based Approach?**

The lack of a regulatory intervention by the EU regarding

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<sup>104</sup> The provision was included in the Consolidated Law on Immigration by Art. 1.1.b of the Legislative Decree no. 109/2012, which transposed in the Italian Law Directive 2009/52.

conditions for entry and the matching of demand and supply of labour for citizens of third-countries is probably the major flaw that also characterizes the latest developments of European immigration policies. The reasons for this situation are known: the practical difficulties (just consider the differences between migration policies and labour markets of Member States) are accompanied by the strong resistance of the Member States to cede powers to determine the flow of entry and regulation of migration.<sup>105</sup>

Nevertheless, in recent years we have seen – at least with regard to the administrative aspects – a partial reversal of the trend, mainly for the benefit of the kind of immigration deemed useful and functional to the economic growth of Europe, linked to training, knowledge and innovation (Directive 2009/50),<sup>106</sup> or intended to fill some gaps in the national labour markets (Directive 2014/36), especially in relation to global recession.<sup>107</sup> The most significant aspect is certainly represented by the affirmation of the principle of equal treatment of workers from third-countries and workers who are nationals of the host country, with particular reference to a core of rights that, from time to time, are identified by the European legislator.<sup>108</sup> The Directives under consideration, in fact, provide (albeit with different formulations and extensions) that a series of rights are guaranteed to foreigners admitted into a Member State for work, including those related to employment and social security, under the same conditions as nationals of that State (although Member States may – as we have seen – apply restrictions to some of these rights when implemented). Different categories of third-country national workers have been provided with different statuses in this regard.<sup>109</sup>

Apart from these measures, which almost always prefer short periods of immigration, of high rotation, and particularly vulnerable workers, European policy on legal immigration is still lagging behind in its implementation, and is fragmented and uneven. And the situation is not

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<sup>105</sup> Engblom, *supra* n. 79, at 78.

<sup>106</sup> Gottardi, *supra* n. 66, at 532.

<sup>107</sup> Elizabeth Collett, 'Future prospects for a common EU immigration policy', in Jan O. Karlsson, Lisa Pelling (eds.), *Moving Beyond Demographics. Perspectives for a Common European Migration Policy* (Stockholm: Global Utmaning, 2011), 47.

<sup>108</sup> Sergio Carrera, Anaïs Faure Atger, Elspeth Guild, Dora Kostakopoulou, 'Labour Immigration Policy in the EU: A Renewed Agenda for Europe 2020, (2011) *CEPS Policy Brief*, 5 April 2012, no. 240.

<sup>109</sup> See P. Herzfeld Olsson, 'The Development of an EU Policy on Workers from Third Countries – Adding New Categories of Workers to the EU Labour Market, Provided with New Combinations of Rights', in Stein Evju (ed.), *Regulating Transnational Labour in Europe: The Quandaries of Multilevel Governance*, Skriftserie 196 (University of Oslo, 2014) 279.

likely to change, not even as a result of the innovations introduced by the Lisbon Treaty, as long as Member States protectively retain their prerogatives on the regulation of the substantive aspects of the phenomenon. Therefore, institutional asymmetry is confirmed. On the subject of illegal immigration, however, regulation is much more complex, perhaps because of the perception of inadequacy of national tools to combat the phenomenon with respect to the security objectives, which remain the fulcrum around which the entire system still continues to rotate.<sup>110</sup> However, it is equally clear that European policy cannot be reduced to a problem of coordination of state policies of public order, instruments of border control and security of the administrations of EU Member States.<sup>111</sup>

With particular reference to the Italian situation, it has already been said that the implementation of Directive 2011/98 and, in part, Directive 2009/50, has proven insufficient; while waiting for Directive 2014/36 to be implemented, the existing national legislation on seasonal migrant workers presents many aspects that are not in compliance with the European guidelines.

A first critical aspect, which brings together the three national legislations considered, involves the procedures of entry for work purposes. In all three cases the object of the Directive, which is to induce Member States to introduce simplified, accelerated and easy entry regulations, does not seem to have been actually pursued by the transposing laws.

In relation to the procedure leading to the granting of the single residence and work permit, it should be noted that Italy has not introduced a new procedure, rather it has merely referred to the ordinary procedure of entry of migrants for work purposes, albeit with minor adjustments. Such a decision certainly does not involve simplification, especially because such a procedure is very long and complex and involves a high level of bureaucratization, as already mentioned (see retro, paragraph 1.2), and it ends up making it impossible for migrants to legally enter for work purposes, therefore making it appear strongly discouraged. In particular, it seems to be in contrast with the single procedure outlined by the single permit Directive, since the foreigner needs to have previously signed the 'residence contract for dependent

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<sup>110</sup> Giandonato Caggiano, 'L'integrazione europea "a due velocità" in materia di immigrazione legale ed illegale' (2008) *Diritto pubblico comparato ed europeo* 1099.

<sup>111</sup> Valerio Onida, 'Lo statuto costituzionale del non cittadino' (2009) *Diritto e società* 550; cf. also Francis Snyder, Daniel Thym (eds.), *Europe: a continent of immigration? Legal challenges in the construction of European migration policy* (Bruxelles: Bruylant, 2011).

employment' in order to obtain the issue of the single residence and work permit.

Similarly, in relation to the procedure for the issue of a Blue Card for highly qualified workers, a new simplified entry procedure failed to be approved, deferring the issue to the ordinary procedure for the entry of foreigners for work purposes, although with some adjustments due to the fact that it concerns 'out of quota' entries. Again, the same criticism made in relation to the transposition of the single permit Directive applies.

Lastly, in relation to the procedure for the entry of seasonal workers, Italy already provides for a special simplified procedure, although only for a certain economic ambit. Nonetheless, again, such a procedure links the issue of a residence permit for seasonal work purposes to the under-signing of the 'residence contract for dependent employment', which therefore repeats the same pattern already experienced by the ordinary procedure, which proved both ineffective and illegal at once (the ambit of seasonal work, especially in agriculture, presents very high rates of illegality, corresponding to very precarious, if not inhuman, working conditions, especially for migrants).<sup>112</sup> In other words, with regard to the inconsistencies of the Italian seasonal migration system, these will not be resolved by implementing the Seasonal Workers Directive, as the Directive answers to the same admission model that has already proved to be a failure in the Italian context (i.e. there must be previous valid employment contract).<sup>113</sup>

A second critical aspect, instead, deals with the implementation of the provisions concerning the principle of equal treatment. In fact, all three of the Directives considered enshrine a general principle of equal treatment, respectively between migrants allowed to work in Italy, although not yet in possession of the status of long-term residents, highly qualified foreign workers who hold a Blue Card and seasonal foreign workers, on the one hand, and workers from the host country, on the other. Also in this case, Italian application proved unsatisfactory. Although the principle of equal treatment in employment of national workers is also sanctioned by the Consolidated Law on Immigration (Art. 2.3), and even before that by the Constitution (in particular, Art. 35.1), the point of greater friction between the Italian and European regulations regards social security, and in particular those provisions that still contain exclusion clauses of third-country workers from certain non-contributory social security benefits. For the last-named, in expectation of a desirable

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<sup>112</sup> See Amnesty International, *Exploited labour. Migrant workers in Italy's agricultural sector* (London: Amnesty International, 2012).

<sup>113</sup> Papa, *supra* n. 90, at 20 (provisional version).

adjustment of the national legislation, which could be spurred by yet another infringement procedure for breach of obligations under EU law, under Arts 258-259 TFEU, there remains the possibility of invoking the principle of direct and immediate application of EU law and its primacy over domestic laws that are incompatible with it; the road is therefore, once again, non-spontaneous adjustment, but driven by the outcome of the dispute in court.

With particular reference to the national legislation implementing the single permit Directive, it has not implemented the principle of equal treatment in any way, on the assumption of the already full correspondence between the Italian legislation and the principles established by the Directive. Although this is actually not the case. In this sense, the greatest critical aspect is represented by those non-contributory social security benefits, which are not granted to migrants who hold a residence permit for work purposes, on equal terms with Italian citizens; such a situation has also been already censured by an intervention of the European Court of Human Rights, in the *Dhahbi* judgment.

Similarly, when transposing the Directive on highly qualified employment, and except for a general reference to the principle of equal treatment, the Italian legislator merely deferred to what had already been provided under the national legislation, without promptly recalling the rights enjoyed by the holder of a Blue Card. Therefore, problems regarding equal treatment, as reported in relation to the transposing of the single permit Directive, also arise in this case; paradoxically, this could end up discouraging the access of highly qualified foreign workers, in spite of the favour that the Italian legal system seems to reserve to such persons, for example by providing a facilitated acquisition of the status of long-term resident.

Finally, compliance problems related to the principle of equal treatment, specifically in the sector of social security, also arise in relation to seasonal workers, being that they are denied the enjoyment of certain social security benefits, such as unemployment benefit.

To conclude, the critical aspects that have been detected seem to demonstrate that the effects of the new EU legal regime on labour migration generally have not determined a decisive change of course on the Italian system in the management of economic migrations towards a human rights-based approach. The shift from a national security and public order-oriented model of labour migration towards a human rights-based approach of a non-EU migrant workers protection system certainly represents one of the main challenges that should be addressed by Italy (and also, of course, by the European Union) in the immediate future.