



The social borders of EU Immigration Policy (in the Italian perspective)

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1. Introduction: the European social model and its double

In the bibliographic archives of the International Labour Organisation (ILO) of one can locate a reassuring typed letter dated 1975 by the then Commission of the EEC, hand-annotated by an unknown clerk. In the correspondence with ILO in the context of a comparison regarding the protection of migrant workers, the sender emphasizes that the attention concerning extra-EU workers is not of less importance than that of *intra-EU* migrants¹. In support of the good intentions the letter mentions the presentation to the Council of a specific Action Programme in Favour of Migrant Workers and their families only a few months after the approval of the Resolution by the Council regarding the then first programme of social action. Dated 21st January 1974, the former; 18th December the latter also sealing a temporal continuity not only axiological of the appreciation of the shared roots of the free circulation of workers.

Some forty years later, these documents deserve careful attention rather than a superficial glance. Above all, they raise questions about the real impact of EU immigration policy especially after the Treaty of Lisbon. The document originating in the early seventies was supposed to give political rigour to the undertaking in the first document with a view to *"bringing about equality between EU and non-EU workers and their families in all respects, social and economic, taking into account current EU regulations"* and *"harmonizing immigration policy in respect of non EU countries"*.

Leaving aside the real regulatory responsibilities as set out in the treaties and the interpretation of the rules contained in Title V and in Title X of TFEU², a second reading of the documents reveals the borders

¹ The letter, protocol 023839, notes that the programme of 18th December 1974 *"concerns not only migrants from EC member states who are entitled to circulate freely under the terms of the Treaty of Rome, but also migrants from other countries"*.

² Reference is made to L. CALAFÀ, *Migrazione economica e contratto di lavoro degli stranieri*, Bologna, 2012, in particular to page 11. Examining the reality of the common immigration policy, one is confronted by a comparison between the immigration policies and the social policies (regulated respectively in Chapters V and X TFEU). Here the overall sense is confirmed with great clarity: the «social question» including the employment of foreigners, seems to be inserted into a kind of vicious circle of various responsibilities. The Union has no say in the specific definitions (general and the systematic interpretation of the provisions set out in Chapter V concerning immigration, of Article 79 in particular, seems quite insufficient) of regularity and irregularity, also in employment, but is supposed to manage the consequences of their actual recurrence, without being able to intervene so as to harmonise such notions of regularity, irregularity and/or the possible measures for the social integration of foreigners. They remain, more or less, only exercises of harmonization

(territorial but also theoretical) of the EU social model. Notwithstanding the farsightedness of the initial project, such a model over time rested on a single root, (with exclusion of non-EU citizens) and on an important semantic ambiguity: the ontological and solitary relevance of the single worker (first) and (later) citizen of the European Union. The other, the double, which is reflected in the social model and from which it draws structural balance, simply does not exist³. Except when its relevance is felt when the economic crisis (or its political rhetoric)⁴ happens to impact on the socio-economic balance of EU policies or when the so-called Arab Spring forces us to face the thorny question of the external borders on the Union.

“As happens so often in European social policies, the gradual reaching of very ambitious regulatory targets is characterized by the unpredictability of the choices and solutions actually adopted”⁵. This simple statement introduces a different reasoning into the scientific comparison, its opposite, which makes one realize that the initial ambitions of immigration policy were followed by negative and reductive choices of a very evident cultural, social and economic complexity.

This article seeks to focus on and explain those “irresistible” factors which affect precisely these regulatory choices concerning immigration through support of a social integration process within the EU which is accompanied by a parallel process of social negation *vis-a-vis* non-EU subjects⁶.

One of the most obvious signs of this process is the transformation of the regulatory approach concerning economic migration, rather the movement directed at employment seeking, from horizontal to category

concerning pathological workings of the labour market (a difficult undertaking since there are 27 different national regulatory systems dealing with the specific point) and on the subject of returning illegally-staying persons which also include the practicalities. Responsibility for the respect for the basic rights of migrant people therefore does not rest only on the actions of member states but also on the regulation of the Union in such delicate matters for which, however, it does not manage the basic regulatory conditions.

³ On how the EU is seen by others, the excluded, the literature (including juridical) is vast. In this context one recalls the classic by S. SASSEN, *Migranti, coloni, rifugiati. Dall'emigrazione di massa alla fortezza Europa*, 1999, Milan; the political theories of exclusion are analyzed by S. BENHABIB, *The Rights of Others*, 2004, Cambridge University Press, 2004. The collection edited by L. DUBIN (ed.), *La légalité de la lutte contre l'immigration irrégulière par l'Union européenne*, Bruxelles, Bruylant, p. 268.

⁴ A. LYON CAEN, *Les réactions du droit du travail à la crise*, in *Droit Ouvrier*, 2012, p. 763.

⁵ S. SCIARRA, *Manuale di diritto sociale europeo*, 2010, Turin.

⁶ G. BRONZINI, *La sentenza El Dridi: la Corte di giustizia fissa i «paletti» delle politiche europee sull'immigrazione*, in *La cittadinanza europea*, 2, p. 121, analyzing the statement of fundamental rights made by the Court in the *El Dridi* case, referring to “the image of the project of European integration overturned” offered by the dir. 2008/15.

based (rather some rules exclusively dedicated to defined categories such as seasonal workers or highly qualified workers). In the attempt to furnish an up-to-date reading of the most recent acts in the law of this subject (v. *infra* par. 3), one particularly dwells on dir. 2011/98, the so-called directive concerning permits and equal treatment of non-EU regular workers, and which reminds one of the first formal statement of such a principle in 1974.

2. From the horizontal approach to the category based approach to economic migration: the parabola of the Commission policy from Tampere to the aims of Europe 2020

If a precise date can be found for the common policy concerning immigration in the European Union, it is certainly the date of the European Council held in Tampere on 15th and 16th October, 1999. At that meeting and after the Amsterdam Treaty came into force the preceding May, the projected targets attained their maximum profile. The development prospects, however, were at once seen to be inadequate to the initial premises. Later experience, in fact, overwhelmingly demonstrated that, at least in economic migration, the official consensus achieved by the Council was only apparent⁷. The directive proposal concerning the conditions of entry and residence of non-EU citizens who intend to undertake employment or self employment (Com (2001) 386 def., of 11 July 2001), the principal result of the positions taken at Tampere, has never been approved by the Council. The failure of that directive proposal is clearly seen in the forced withdrawal of the proposal by the Commission⁸, formalized five years later. The reason lies in the impossibility of reaching an agreement in the heart of the Council, among the most representative states.

More than ten years later, this episode represents a crucial unresolved

⁷ S. CARRERA, *Building a Common Policy on Labour Immigration. Towards a Comprehensive and Global Approach in the EU?*, CESP Working Document No. 256, 2007 in www.cesp.be; S. CARRERA, A. FAURE ATGER, E. GUILD, D. KOSTAKOPOULOU, *Labour Immigration Policy in the EU: A Renewed Agenda for Europe 2020*, Centre for European Policy Studies, 2011, Brussels, in www.ceps.eu.

⁸ Cf. *European Commission, Withdrawal of Commission Proposal Following Screening for their General Relevance, their Impact on Competitiveness and Other Aspects*, 2006/C 64/03 published in the Official Journal of the European Community 17 March 2006.

problem in economic migration. Standardized rules for access to employment in the 27 member states do not yet exist⁹, which shows that, as in the past, the inconsistent dialectic between the Commission and the Council seems destined to affect future projected developments characterized by the evident hostility of the member states to renouncing specific responsibilities which is much more evident in this sphere than in others.

Even if the responsibilities of the Union in this sphere have greatly accumulated in a short time particularly with requests, action plans, programmes, positions, documents, projects always under the banner of that dialectical relationship between the member states and the Commission which characterizes in a real and visible way the overall route covered by the common policy concerning economic migration. Following the failure of the 2001 proposal, economic migration became part of a global policy concerning general immigration rather than specifically relating to employment: it is no longer subject to direct and immediate (hence problematic) regulation by the Union but has lost focus and become diluted and mixed with other matters. That's to say that only the indirect political approach has allowed the Commission to include the rules concerning foreign workers among the projected tasks starting from the responsibilities in Title IV TEC first, and Title V TFEU, second (excluded even from the doctrine and from the operative sphere in Title X)¹⁰.

3.1. Before Lisbon

After 2001 with all the weight of the violent events which had such an impact upon the development of rules concerning economic migration, there were three steps which came together to outline the overall approach to the movement of non-EU persons for employment. The first step came between 2005 and 2007. In particular there was The Green

⁹ The same can ideally accompany the complicated events of the earlier decision no. 85/381/EEC, when another attempt was made to draw up a first draft concerning immigration: G. F. MANCINI, *Il governo dei movimenti migratori in Europa*, in *Democrazia e costituzionalismo nell'Unione europea*, 2004, Bologna, p. 193; S. GIUBBONI, *Immigrazione e politiche dell'Unione europea, dal Trattato di Roma alla Costituzione per l'Europa*, in *Dir. Lav. Rel. ind.*, 2005, p. 205.

¹⁰ Cf. S. PEESR, *Legislative Update, EU Immigration and Asylum Competence and Decision-Making in the Treaty of Lisbon*, in *European Journal of Migration and Law*, 2008, 10, p. 219.

Paper on economic migration at the beginning of 2005¹¹, which was anticipated by the work of the Council of The Hague ending that year in December with the Commission's Plan for Legal Migration in which the selective dismantling of the figure of the worker became the model for the Commission's subsequent Legislative and Work Programme adopted in November 2006¹². This was where the already approved directive proposals and those still to be approved concerning employment of foreigners appeared and where a directive proposal was inserted concerning the rights of foreign regular workers which disappeared from the list the following month at the European Council in Brussels at the end of the Finnish presidency. The respective conclusions reaffirmed the unease of some member states about taking decisions in these matters euphemistically expressed as "fully respecting national powers" and made evident in the attitude assumed during negotiations of the subsequently

¹¹ In the *Introduction*, penultimate section, the Commission explains that the initiative "does not aim [...] either to illustrate the policies of the EU 25, or to compare them to those of other regions in the world, but rather to point out the main problems and possible options for a Community legislative discipline concerning economic immigration. In doing so, the Commission has taken account of the reservations and worries raised by the member states during the discussions which took place concerning the 2001 directive and proposes possible alternatives". In the *Conclusions*, first section, it adds: the "Commission holds that the admission of migrants for economic motives is the milestone in the policy concerning immigration and it is therefore necessary to deal with it at a European level in the context of a progressive evolution of a coherent Community policy for immigration". Coherence and progression are terms which accompany every consideration on this matter, joined then by the term global which effectively obscures the economic/employment question.

¹² The activism of the Commission and the Council in 2005 to overcome the impasse caused by the failed agreement on the 2001 proposal was considerable also on the basis of the mandate received at the Council of The Hague at the end of 2004 (Communication of the Commission to the Council and the European Parliament, *The programme of the Hague: ten priorities for the next five years, Partnership for the renewal of Europe in the areas of freedom, security and justice*, Com(2005) 184 def.). After the Green Paper on economic migration [Com(2004) 811 def., of 1st November 2005], the Commission published the first document of reply to the consultation the following 30th November 2005 (Communication of the Commission to the Council and the European Parliament – Action priority in response to the challenges of immigration – First initiative taken after the Hampton Court meeting, Com(2005) 621 def.), during the six month English presidency of the Council, followed on 21 December 2005 by the Communication of the Commission, *Action Plan on Legal Immigration* [Sec(2005) 1680, Com(2005) 669]. With regard to the Council, we should remember the Note of the Presidency on the global approach to immigration: priority actions regarding Africa and the Mediterranean (15744/05 presented at Brussels on 13 December 2005, notes which are inspired by the Pact on immigration and asylum of 2008) and the *Conclusions of the Presidency to the European Council at Brussels of 15th and 16th December 2005* (SN 15914/01/05, 30/12/05). Worth noting is the matter of the outcome of the consultation on the Green Book of 2005 as a demonstration of the dialectical rapport between Commission and Council. The conclusions were widely laid aside, as S. CARRERA recalls in *Building a Common Policy on Labour Immigration ... cit.*

approved directives¹³.

The basic defect imputed by the specialist doctrine to the policy set out by the EU is that of so-called *proximity* with some of the more significant and representative member states of the Union showing that in the dialectical rapport between the Commission and the Council, the latter has prevailed. If such proximity with the single or several national interests allows the approval of the acts, it is the same proximity which puts at risk: *the overall approach of the Community and the building of a comprehensive immigration policy rooted in the principles of solidarity and openness whose long-term effects would bring efficiency in terms of security of employment and a high level of protection for the legal employability and working conditions of immigrant workers*¹⁴.

Before the Lisbon Treaty came into force, the so-called Labour Immigration Policy, taking into consideration the principles of subsidiarity and national proximity, was deemed to be substantially without transnational coherence – even if expressed in different terms – divided between the various needs of national labour markets, fluctuating on the basis of local economic needs and bound up with the political priorities of individual member states. The merely formal common policy was substantially represented by the different rules and policies in the 28 EU States, an apparent unity only which inspires the EU immigration strategy.

3.2. After Lisbon

With the restyling of the powers and the generalization of the ordinary directive approval procedure carried out at Lisbon, has the overall picture changed? The basic question to ask is if the Commission's strategy concerning economic migration has become proactive after 13th December 2007 stimulated by the rules which came into effect two years later. To fully understand the reality of the situation concerning developments following the Lisbon Treaty, at least two further geopolitical steps must be added which complete the developing picture briefly outlined: the signing of the European Pact on immigration and asylum proposed by the French presidency of Nicolas Sarkozy on 15th and 16th

¹³ S. CARRERA, *Building a Common Policy* cit;

¹⁴ S. CARRERA, *Building a Common Policy* ... cit.

October 2008¹⁵; the Stockholm Programme of May 2010, and the subsequent action plan which gives guidelines for intervention by the Union in this matter so as to link up to (more or less completely) the objectives of Europe 2020. The French doctrine in particular, recognizes the central role of the French president in the definition of a clear physiognomy of EU common policy: "So there isn't a European immigration policy, but a European police of foreigners governed by the commands of the labour market"¹⁶. The directives approved between 2008 and 2009 are the tangible result of this line of argument stemming from the Council document of 2005 on the global approach to immigration of which the 2007 legislative programme is the tangible result politically supported by the Pact of 2008¹⁷. The Pact, presented as brand new to great media attention, does nothing other than re-propose measures already approved and concentrates on the concept of chosen immigration (*choisie*), a policy of strongly utilitarian approach, at various speeds, from the tendency to place the foreigner in a precarious legal status¹⁸, a series of checks which in the theoretical analysis of the models carried out in the 80s, showed their complete inadequacy in particular with regard to the development of *ad hoc* international relations, which appear to be much more efficient¹⁹.

¹⁵ S. CARRERA, E. GUILD, *The French Presidency's European Pact on Immigration and Asylum: Intergovernmentalism vs. Europeanisation? Security vs. Rights?* Centre for European Policy Studies, 2008, Brussels, in www.ceps.eu.

¹⁶ M. CHEMILLIER-GENDRAU, *Un régime juridique pour l'immigration clandestine*, in V. CHETAIL, *Mondialisation, migration et droits de l'homme: le droit international en question*, Vol. II, 2007, p. 336; I. DAUGAREILH, *La pénalisation du travail irrégulier en droit européen*, in L. DUBIN (ed.), *La légalité de la lutte contre l'immigration irrégulière par l'Union européenne*, Bruxelles, Bruylant, p. 268.

¹⁷ Although having merely a programmatic political value, the Pact establishes with clarity the distinguishing marks of the common EU policy. In particular, the five points which rather characterize it should be remembered: 1. To organize legal immigration taking account of the priorities, the needs and the precise reception capacities of every member state and to favour integration; 2. Combat irregular immigration, in particular, making secure and efficient the return of foreigners in irregular situations to their country of origin or towards a country of transit; 3. Improve the efficiency of external border checks; 4. Construct a Europe for asylum; 5. Consolidate a global partnership with the countries of origin and transit to encourage co-operation between migration and development. Worth noting in the context of Objective 2, is the undertaking by member states to resort to the regularizations case by case only for humanitarian or economic motives. The horizontal policy for economic migration is thus definitively abandoned.

¹⁸ I. DAUGAREILH, *La pénalisation du travail irrégulier ...cit.*, p. 268.

¹⁹ M. A. SCHAIN M. A., *The State Strikes Back: Immigration policy in the European Union*, in *The European Journal of International Law*, 2009, 20, p. 93; on the external responsibilities of the EU concerning immigration, E. NEFRAMI, *La repartition des compétences entre l'Union européenne et ses Etats membres en matière d'immigration irrégulière*, in L. DUBIN (Editor), *La légalité de la lutte contre l'immigration irrégulière par l'Union européenne*, 2012,

One cannot but notice an imbalance, a kind of identity crisis between EU immigration policy which claims to aspire to a global policy and which demonstrates, on the other hand, only a concentration on the repression of illegal immigration and strengthening frontier controls. With regard to economic immigration, the political apparatus is judged as fragmented, incoherent, restrictive, inefficient, unfocussed²⁰, a long series of adjectives which have brought the doctrine attentive to the evolution of EU policies to wonder if such a programmatic picture can be held to be compatible with the strategic priorities of Europe 2020 and capable of contributing to their achievement. In particular, this question arises where they indicate «inclusive growth» as the specific target which the Commission proposes to reach even facilitating and promoting mobility of the workforce within the EU to guarantee a greater balance between labour supply and demand, with adequate financial support from the structural funds, in particular from the European Social Fund (ESF) and to promote a policy of worker migration which is both global and long-term so as to respond to the priorities and needs of the labour markets with the necessary flexibility²¹.

As examined in depth elsewhere²², it is the paradigm of the border as metaphor for the barrier which seems to inspire EU policy²³. It is precisely this term barrier which today seems most suited to catch the moods of the legislators, not only national, and to mark the most recent regulative results, the real theme of this research as indicated in the foreword. With the disappearance of the physical borders shown on geographical maps (the internal borders of the EU, for example), one notes a multiplication of borders in the economic, political, anthropological and social reality. Law cannot remain unaffected by this dynamic; on the contrary, it can seek to enlarge or reduce the extent even at the level of the European

Brussels, p. 35. For the dialogue in the South of the Mediterranean, S. CARRERA, *The EU's Dialogue on Migration, Mobility and Security with the Southern Mediterranean. Filling the Gaps in the Global Approach*, Centre for European Policy Studies, 2011, Brussels, www.ceps.eu.

²⁰ Cf. S. CARRERA, A FAURE ATGER, E. GUILD, D. KOSTAKOPOULOU, *Labour Immigration Policy in the EU ...*, spec. 10 ss.

²¹ Communication of the European Commission 2020, *A Strategy for an intelligent, sustainable and inclusive growth*, Brussels, 3.3.2010, Com(2010) 2020 def.

²² L. CALAFÀ, *La migrazione economica ...*, cit.

²³ Like that of the other national states, on the other hand, the first being a kind of extended representation of the national policies: L. DUBIN, *Propos introductifs. La lutte contre l'immigration irrégulière par l'Union Européenne, quelle légalité pour quels effets?* in *La légalité de la lutte contre l'immigration irrégulière par l'Union Européenne*, 2012, Brussels, p. 8, which also notes the multiplication of frontiers both internal and external, but of the further representations which these latter have taken on – “supplementary”, “numerical”, “negotiated”.

Union. In the context, the presumed neutrality of law seems more a theoretical alibi than a fact of legislative reality as the recent experience of labour law concerning immigration shows²⁴. In this respect it has been noted that the topic of economic mobility from outside the Union assumes a peculiar valency as shown by the above reconstruction and there appears to have developed a policy with the vice of exclusion imported into EU lawmaking from the struggle against irregular immigration rather than its opposite – the virtuous relationship between citizenship and employment. The status of irregular is not even a risk or a threat; it becomes simply a juridical situation of those people who stay irregularly on the territory of a member state while the Union works out *ad hoc* juridical instruments to which must be given particular attention: behind the rhetoric of the struggle against irregular immigration hides the criminalization of foreigners in irregular situations and following this, their expulsion.

It is clear that a regulatory system which considers the foreigner as a threat or meriting repression must be strictly examined also on the basis of its respect for fundamental human rights (even if moving to find employment). From a labour law point of view, a necessary comparison with the aims of the Union's economic growth, for verification of the efficiency of the joint measures promoted²⁵, must not be separated from a further aim with the safeguarding of rights as a general limit, both for EU and national regulation. The labour law approach in particular does not distinguish between legal and illegal immigration; as a consequence the role of the employment contract is crucial besides the fact (highly significant for the entire disciplinary balance of labour immigration law) that labour law gives precedence to the status of worker over that of migrant.

Arguing from the French doctrine²⁶, the uncomfortable slope on which EU law has placed labour experts is such as to make one constantly

²⁴ This is not the place to go into a detailed reconstruction of the historical evolution of community rules concerning immigration. For this reference can be made to the first contribution on the topic of Italian Labour Law, G. GHEZZI, *Il lavoratore extracomunitario in Italia, problemi giuridici e sindacali*, in *Politica del diritto*, 1982, p. 195 and to another with a community background A. ADINOLFI, *I lavoratori extracomunitari*, 1992, Bologna; the development of national and community regulations in a comparative light can be read in B. NASCIBENE (editor), *Diritti degli stranieri*, 2004, Padova and in B. VENEZIANI (editor), *Lavoratore extracomunitario ed integrazione europea. Profili giuridici*, 2007, Bari.

²⁵ M. AMBROSINI, *Richiesti e respinti. L'immigrazione in Italia come e perché*, 2010, Milan, A. TRIANDAFYLIDOU, M. AMBROSINI, *Irregular Immigration Control in Italy and Greece: Strong Fencing and Weak Gate-keeping serving the Labour Market*, in *European Journal of Migration and Law*, 2011, 13, p. 251.

²⁶ I. DAUGAREILH, *La pénalisation du travail irrégulier ...*, p. 268.

wonder if the worker is to be punished or protected. A far-from-simple reply which requires the reconstruction of the entire multi-layered context regarding the safeguards for personal rights up to the relevance of questions concerning so-called decent work and which touches on the roles of the various courts as guardians of fundamental rights²⁷.

If these observations are to be considered valid for the post Lisbon Treaty period it is not an easy question to answer given that a large number of the acts passed after 2009 are the result of earlier policies and programmatic decisions. Yet to be evaluated completely is, therefore, the reality of the EU order strongly shaken by the inflow of people following the so-called «Arab Spring»²⁸, events which induce one to see EU policy as a clear example of the failure of a «non policy» in the field of migration²⁹. These very events which have not helped to qualify the Mediterranean countries as decision makers but always as spectators in this field³⁰.

The extreme difficulty in finding a complete answer to such a wide question does not mean we cannot offer a further comparative element to the technicalities of the discussion. Article 68 TFEU recognizes the European Council's responsibility in "strategic direction of the legislative programme and its application in the area of freedom, security and justice". On 4 May 2010 the Programme of Stockholm, which gives political form and substance to Title V of TFEU was published in the Official Journal of the European Union³¹. It is the most recent programme and deserves attention also for the part of the single planned actions indicated with the relative deadline among which the undertaking to draw up a Code for legal immigration (to be published between 2013 and

²⁷ A. LO FARO, *Is a Decent Wage Part of a Decent Job? Answers from an Enlarged Europe*, in WP C.S.D.L.E. "Massimo D'Antona". INT-64/2008; 2007; I. DAUGAREILH, *Le travail décent dans les pays en voie de développement, Note d'information pour le Parlemeuropéen*, EXPO/B/DEVE/2006-36, PE 348.608, 2006, Brussels, European Communities.

²⁸ The long series of official declarations and documents produced by the European Commission are listed in S. CARRERA, A. FAURE ATGER, E. GUILD, D. KOSTAKOPOULOU, *Labour Immigration Policy in the EU ...*, spec. 10 ss.

²⁹ M. LIVI BACCI, *Cronaca di due fallimenti. L'Europa, l'Italia e le politiche migratorie*, in *Il Mulino*, 3, p. 432.

³⁰ G. CAGGIANO 2011, *L'insostenibile onere della gestione delle frontiere esterne e della competenza di "paese di primo ingresso" per gli Stati frontalieri nel Mediterraneo*, in *Gli Stranieri*, 2011, 2, p. 45.

³¹ The Stockholm Programme was adopted by the Direction *Justice and Home Affairs* in December 2009. The scheduled plan came the following 20 April: Communication by the Commission to the European Parliament, to the Council, to the European Economic and Social Committee and to the Committee for the Regions, Create a space of freedom, security and justice for the citizens of Europe Action Plan for the realization of the Stockholm Programme (Com(2010) 171).

2014) should not be forgotten. As indicated by the most exact doctrine, which has already publicly proposed a long and thorough draft, the interest in the code seems to lie in the fact that it will be a kind of basic text on the subject (by itself already innovative), intended moreover to consolidate the existing regulations concerning immigration (as explained by point 6.1.4 of the Stockholm Programme) and to impact as quickly as possible, on immigration for economic reasons. It should be noted indeed, that the Council³². At point 6.1.3 of the Programme, invites the Commission, among other tasks «to evaluate the impact and the efficiency of the measures adopted in this sphere so as to determine if it is necessary to strengthen the existing legislation, also in relation to categories of workers presently not covered by the Union's regulations». The specific point is really enigmatic. It seems like an attempt, if not to recover the integrity of the entire migration policy, much less than an open prospective for a renewed initiative of a horizontal type on the employment of foreigners ten years after the failure of the proposal 386 of 2001, interesting in the political dialectic between European Commission and Council (which compared to the 2007-2010 period saw considerable changes in the representatives of the national governments).

An indirect way, perhaps, to repair the defect of the (substantial) fragmentation of the initiative concerning employment also in light of the economic-financial crisis and of the impact produced on the foreign workforce. By comparing the Commission's 2005 Green Paper on economic migration with the 2012 Report on Immigration, some useful suggestion can be found which help to formulate a reply given that the crisis is an integral part of the reasoning about the economic contribution of foreigners in the EU, which remains central. The Commission reaffirms that "economic migration remains (...) an important element to make up for an insufficient workforce, above all in the context of an ageing EU population and in an international market where there is strong competition with non-European countries for talent, these also hit by a lack of skills". It adds that "more than contributing to economic growth, the migrants offer our society a social and cultural contribution". For all these reasons "the Commission proposes to start again concerning economic migration by setting up before the end of 2012 a consultation which promotes a wide debate with the member states, the social institutions and the various interested parties, on the role which European policies should have so as to exploit the potential of economic

³² S. PEERS, *An EU Immigration Code: Towards a Common Immigration Policy*, in *European Journal of Migration and Law*, 2012, 14, p. 33.

migration in a period of crisis in terms of political action by the Commission" [p. 5]. EU harmonization in this specific area limited itself to the approval of several directives (dir. 2008/115, dir. 2009/52), a series of acts intended to regulate 32.5% of almost 2.5 million first stay permits for non-EU citizens for the undertaking of paid employment³³.

Awareness of the failure is not even concealed, the reply to the question just posed does not appear reassuring: ten years later it goes back to the beginning, or almost, demonstrating that the regulatory initiatives concerning labour immigration policy are always below expectations.

The hope is that the Commission might have the force to translate the conclusions of a new consultation into efficient and solid lines and not let itself be overwhelmed by the logic of security which has obliterated the results already achieved in 2005 and some the suggestions already formulated at that time by the Commission. In this respect, a group of researchers³⁴ re-propose a series of guidelines to deal with the topic of immigration, and not only economic immigration. The recommendation n. 1 (*The understanding of immigration*) contains the recurrent statement, repeated but unheard up to today: "*The correlation between employment policy and migration should therefore be taken very seriously and developed further*".

4. The directive permits and equal treatment for regular workers. The first phase of the influence of EU law on national law including labour law

The directives approved on the basis of the dispositions of Title V TFEU (ex Title IV TEC) are a tangible, concrete example of the general policies elaborated in the preceding paragraph, normative binding acts intended to translate general institutional and policy lines into concrete policy lines for economic migration, an opportunity for reflecting not on the social model of the EU citizen but on his double, the reflected image

³³ In the *Third annual report* on immigration and asylum (p. 3) in which the reported data can be found, it is added that the remainder of the entries is divided among family motives (30.2%) and study motives (20.6%), whilst the remaining 17% comprises motives of protection, stay without work permit, ...).

³⁴ S. CARRERA, A. FAURE ATGER, E. GUILD, D. KOSTAKOPOULOU, *Labour Immigration Policy in the EU ...*, spec. 11.

of the non-EU workers. Work is precisely the object of attention, law concerning that work both in terms of market regulation of the foreign workforce and regarding the employment contracts of the foreigner. Such a specific disciplinary attention allows, on the other hand, to make relevant in the present context, only those questions which impact directly or indirectly on the subject in hand, without attending to a minute reconstruction of directives' contents. As for the policy lines so also for the derivative law. The production *before* and *after* Lisbon does not appear to be marked by a substantial interruption between past and present, a break actually recorded in 2001 with a decided change of direction in this topic, marked by support for criminalization and every form of migration control, sustained politically by the struggle against terrorism after the attacks in the month of September. The precise trace of the security relevance can be found in the abandonment of the term circulation from the rubric of Title V of TFEU. Leaving out the sectors of asylum and management of frontiers, to dwell on immigration, indicating for demands of completeness, the dir. 2003/86 concerning family reunifications³⁵ and dir. 2003/109 relating to the status of non-EU citizens living long term in the EU. *After* Lisbon or rather the project desired in the French semester of immigration chosen and concerted, is accompanied to approval by four directives (in substantial continuity with the programmatic acts of 2005 and 2006) and the preparation of another two waiting for approval.

At the present state and leaving out every operation of future regulative consolidation through a European Union immigration code, more or less innovating given regulative arrangements³⁶, the intervention of the European Union legislator for employment can base himself firstly on the fragmentation of the operative model through an internal distinction between the positions of non-EU workers of low and high qualifications (dir. 2009/50); or between seasonal and non-seasonal workers as indicated in the proposal of the directive of 13 July 2010 concerning entry and stay conditions for non-EU citizens for purposes of seasonal work (Com (2010) 379 def.), or again can distinguish mobility outside the company from mobility with a company as inserted in the proposals on the entry and stay conditions for non-EU citizens in the context of a transfer within the company (Com(2010) 378 def.). Dir.

³⁵ P. MOROZZO DELLA ROCCA, *Il diritto all'unità familiare in Europa, tra "allargamento" dei confine e "restringimento" dei diritti*, in *Diritto immigrazione e cittadinanza*, 2004, 1, p. 63; Id. *Gli interventi a protezione dei minori stranieri o appartenenti a gruppi minoritari*, in *Trattato di diritto di famiglia* directed by P. ZATTI, vol. VI, *Tutela civile del minore e diritto sociale della famiglia*, Milan, 2012, p. 457.

³⁶ S. PEERS, *An EU Immigration Code ... cit.*, p. 33.

2011/98 needs to be added to the regulative picture; this deals with a single request procedure for issue of a permit which allows non-EU citizens to stay and work in a member state and to a common set of rights for non-EU workers who reside regularly in a member state. That directive seems to be an intervention which renders uniform rights and procedures «reductive proposal in respect of 2001», a cautious attempt to reaffirm the responsibilities (almost exclusive of the member states) and at the same time, to regularize the procedures and affirm a downgraded principle of equal treatment for regular workers. In second place, the same legislator is based on the repressive-punitive logic (of employers: dir. 2009/52) without any concern for the position and/or the vulnerability of the irregular workers³⁷, and to the tactic of expulsion of irregular workers, in general (dir. 2008/15) two directives which correspond to the same logic, as the totality of the doctrine which analyses them concludes³⁸.

There are various reasons for concentrating on the directive dealing with permits and equal treatment for regular workers. The safeguarding of foreigners' employment rights has induced the EU legislator to intervene with the first directive completely approved on the basis of the ordinary procedure regulated by the Treaty³⁹. From the title chosen one understands that immigration is the sphere privileged by the regulation of a «single request procedure for issue of a single permit which allows third country citizens to stay and work in the territory of a member state»; to this prefix is added a mere suffix connected to the first, concerning employment: «and a common set of rights for third country workers who reside regularly in a member state». Along with the opt-out of Great Britain, Ireland and Denmark (Recital 33 and 34), and excluding national responsibility concerning migrant movement (which are guaranteed: art. 1, par. 2), a single procedure is set up for issue of a single stay permit «which includes both stay and work permits in a single administrative act» (Recital 3 and art. 1). The sphere of application, specified by art. 3, includes third-country citizens who seek to reside in a member state for employment purposes, non-EU citizens admitted for non-employment

³⁷ I. DAUGAREILH, *La pénalisation du travail irrégulier ...*, p. 268.

³⁸ L. DUBIN, *Propos introductifs. La lutte contre l'immigration irrégulière par l'Union Européenne*, ...cit; E. DEWHURST, *The Right of Irregular Immigrants to Outstanding Remuneration under the EU Sanctions Directive*, in *European Journal of Migration and Law*, 2011, 13, p. 389; D. GOTTARDI, *La normative e le politiche europee recenti sull'immigrazione. Due volti o solo uno?*, in *Lavoro e Diritto*, 2009, p. 517; E. GUILD, *EU Policy on Labour Migration. A first Look at the Commission's Blue Card Initiative*, Centre for European Policy Studies, Brussels, 2007 www.ceps.eu.

³⁹ S. CARRERA, A. FAURE ATGER, E. GUILD, D. KOSTAKOPOULOU, *Labour Immigration Policy in the EU ...*, spec. 4.

purposes to whom employment is allowed and obviously, non-EU citizens admitted for employment purposes to a member state under EU or national law. Par. 2 contains a long list of exclusions (at least 12, amongst which are seasonal workers, considering their temporary status, even if the respective directive does not seem yet approved: Recital 9) which had motivated the opposition of the EU parliament to passing the proposal in the sphere of a joint-decision procedure⁴⁰.

The single permit and procedure are governed by guidelines deriving from the reading of the recitals of the directive and consist of references to timeliness, efficiency, flexibility, transparency, impartiality, capacity to guarantee the right especially for legal systems like the Italian one in which procedures are extremely confusing. Art. 4 to 10 include fees to be paid by those seeking a permit a «proportional» sum and «based on the services actually given for dealing with requests and the issue of permits». In this context of procedural matrix, the added part is of extreme interest which deals with respect for rights linked to the existence of the single work permit not without having remembered in the introductory recitals that dir. 2011/98 «respects the basic rights and observes the principles recognised by the EU Charter of Fundamental Rights conforming to art. 6, paragraph 1, TEU» (Recital 31), after recalling the same EU antidiscriminatory right (Recital 29). After remembering that during its period of validity, «the single permit issued under national law authorises the holder much not only to enter, stay and accede to all the national territory to undertake «specific employment activity authorised by the single permit in conformity with national law», but also to be informed of the rights conferred on him by the permit in virtue of the present directive and/or national law» (art. 11); art. 12 following is concerned with the right to equal treatment for regular workers, widely set aside the conformity of which to the Convention ILO 143/75 is needed; this latter shares the same object of regulation but a different field of application. The same Recital 28 recognises that the directive «ought to apply without prejudice the most favourable dispositions contained in the law of the Union and in the applicable national instruments».

By 25 December 2013 Italy will have to adjust its own legal system concerning entry permits to dir. 2011/98 significantly entitled to an application for issue of a combined document which includes both stay permit and work permit, a single administrative act intended to facilitate

⁴⁰ S. CARRERA, A. FAURE ATGER, E. GUILD, D. KOSTAKOPOULOU, *Labour Immigration Policy in the EU ...*, spec. 4.

«simplification and harmonisation of the rules currently in force in member states» (Recital 3). As well as simplification and harmonisation of procedures, interpretative lines emerge from the introductory recitals of the directive which are important for the member states required to transpose the act within the established terms: link between permit and first entry, timescale of the procedures (which must become single), efficiency and practicality of same, transparency and balance «so as to guarantee those affected a sufficient level of certainty about the right» (Recital 4 and 5). The articles strictly concerned with procedure are contained in Title II of the dir. 2011/98 (arts. 4-11). With regard to Italy the part relating to transformation of the permit document and that relating to procedural guarantees for the permit applicant appear to be of extreme interest; the fixing of the fees to be paid the amount of which must be «proportionate and can be based on services actually provided for processing the applications and issue of the permits» (art. 10).

Rights strictly indicated by art. 11 derive from the single permit: that of entry and stay, of free access throughout the member state and to undertake the specific authorised employment «in conformity with national law» (lett. a, b, c). The following lett. d adds also the right «to be informed of the rights conferred by the permit in virtue of the present directive and/or national law». It is confirmed that the quantum of the entries is not subject to harmonisation (the determination of the movements is fixed at national level) and it is also excluded that the EU can intervene in the fixing of an annual entry quota; dir. 2011/98 does not make entry conditions uniform, but only the relative procedures. The Recital 19 admits the «lack of a horizontal normative at Union level» and as a result, «citizens of third countries have different rights according to the member states they work in and according to their citizenship». The fixing of a standard of treatment for the reduction of the disparity of rights between EU citizen workers and those non-EU who do not benefit from the status of long-term residency, « aims to create minimum uniform competitive conditions in the Union». The same Recital 19, which represents the real connecting link between the proposal of dir. 386/2001 and the one in force in the EU legal system, then adds that for «the purposes of the present directive a worker from a third country ought to be defined, bearing in mind the interpretation of the concept of the work relationship in other dispositions of Union law, as a citizen of a third country admitted into a member state who stays there regularly and who is allowed to work in conformity with the law or the usual national procedure in the context of a remunerated work relationship» (text taken exactly from art. 2, lett. b).

Employment (and the related contract) represent the final purpose of

the migration or rather the movement of persons entering the EU with the acquisition of the permit to stay there regularly, a situation which is compared to that of someone who has had access for a different purpose other than work, a purpose which later changes; the same theme also includes those already in the national territory for work purposes (at least for the part of the directive relating to the rights arising from the employment relationship on the basis of Title III). The directive does not seem to impact on the national model of entry for work in Italy, the model significantly described as «work and entry»⁴¹: we cannot find indications relating to the drawing up of a contract (or to receiving a job proposal or if such a proposal must be concluded before entry to Italy, taking account of the diverse existing national rules and of the relative normal procedures (arguing from art. 11 rights deriving from the single permit which in lett. c allows the undertaking of «specific employment authorised by the single permit in conformity with national law» recalled also in the preceding lett. a and b, with regard to entry, stay and free access throughout the national territory). No answers can be found in the directive in support of a system such as sponsorship, regulated in Italy before 2002. For the rest the directive has a reduced sphere of application and intervenes only on the single procedure and on the joint document of entry, stay and work and, in a secondary and consequential way, sanctions the right to equal treatment of the worker who is staying regularly.

Notwithstanding that the comparison between the contents of the 2001 proposal and the 2011 intervention is clearly unfavourable to the latter, art. 3 is literally expressed in terms of EU citizens who seek to stay for work purposes, who have been admitted for the same and who have been admitted for non-work purposes but whose right is then changed. There is a very long list of non-EU citizens to whom the directive is not applied (lett. a/l), and for this reason the European parliament did not initially pass the project⁴². Art. 3, par. 3 allows member states not to apply the entire Chapter II, Single Procedure of single request and permit, «to third country citizens with authority to work in a member state for a period not longer than six months or who have been admitted to a member state for study purposes». In terms of capacity of completeness and incisive harmonisation of the national regulative systems, this recent intervention must be subject to an interpretation intended to evaluate the possible effect of simplification and perhaps also

⁴¹ A. GUARISO, *Le incrollabili ipocrisie in tema di lavoro immigrato*, in *D&L*, 2006, 1, p. 35.

⁴² S. CARRERA, A. FAURE ATGER, E. GUILD, D. KOSTAKOPOULOU, *Labour Immigration Policy in the EU ... cit.*

rationalisation of the rules relating to economic migration in Italy. As has already been noted for other directives approved on the basis of Title V TFEU, even a much criticised directive such as the so-called shameful directive (dir. 2008/115), can contribute a real improvement in the national legal system even if not generalised⁴³. In effect, the *El Dridi* and *Achugbalian* cases have allowed the enhancement of the sphere of protection of the rights of non-EU citizens and at the same time have contributed to a clearer distinction between administrative and penal procedure concerning repatriations, requiring member states to determine possible mixing of various levels of intervention and of the relative juridical consequences (in this case relating to administrative and criminal expulsion).

Even from a summary reading of dir. 2011/98, considering the final purposes it is required to achieve and its relative content, it seems that a small improvement in the national procedure concerning admission of foreign workers is not only possible but probable. The muddled steps of national procedure and the sheer number of documents today (*nulla osta* for employment and entry visa) might be transformed, becoming a simpler, more liberal procedure, and altogether easier to obtain the single permit. The transitional phase certainly ought not to be mechanical but rather attentive to monitoring the protection of rights recognised in the directive (such as the right to be informed about the rights derived from the single permit: art. 11 dir. 2011/98). First of all it will be very interesting to see the determination regarding the legality of the double limit to entry for employment in Italy or rather the overlapping of volumes of admission of third-country nationals coming from third countries (art. 21 of the legislative decree 286/1998, Immigration Law and of the conditions foreseen by the concession of the *nulla osta* for purposes of obtaining the entry visa (art. 22 legislative decree), with greatly extended delays for the entry permit. Monitoring an administration's timescale for these procedures gives rise to possible tension between national law and the EU directive which imposes promptness in the issue of single permits (Recital 4 of the directive). Equally interesting could be the check on when equal treatment comes into play and the merely possible checks concerning the correct adjustment of the entire system constructed around art. 5-*bis* of the legislative decree. The most exact national doctrine had confirmed that

⁴³ S. SLAMA, *La transposition de la directive "retour": vecteur de renforcement ou de regression des droits des irréguliers?* In L. DUBIN (editor) *La légalité de la lutte contre l'immigration irrégulière par l'Union européenne*, Brussels, p. 289, also for an important review of the reactions of the national doctrine in front of so many unexpected consequences.

equal treatment ought to be in force when the (future) worker enters Italy after having received the consular visa from his home country without yet having signed a residence contract⁴⁴. In this respect, the present author had written that «if one wanted to find a restrictive application of the idea of residing regularly», referring it only to the moment of possession of the stay permit, one would run into a kind of irrational short circuit in which the worker would enjoy equal treatment only if residing regularly but would become so only by virtue of a contract drawn up before the principle of equality was applicable to him and which therefore could be drawn up eventually even under unequal conditions⁴⁵. In substance the proposal was linked to the need to find an extensive interpretation of the concept of regular residence so as to deal with, on the one hand, the incompleteness of the employment contract (still merely a proposal) and on the other hand, the absence of the stay permit due to the absence of a job contract. The worker finds himself in limbo because he has no work contract and must return to his home country to obtain the visa before returning to Italy to work. The protection of the migrant's position affirmed by the OIL convention 143/75 cannot exclude him from its sphere of influence especially considering the specific language of rights used in it but this interpretation is only useable in a state, like Italy, which has ratified that Convention.

It seems important to ask what answer (concerning the functioning of the right to equal treatment) might come from EU law confronted by the very merger of the residence contract for employment of a stay document with that for the undertaking of regular work. The moment from which the right to equal treatment (based on dir. 2011/98) can be considered prescribed becomes, therefore, central in the search for systematic balance between the two documents (for entry and for work), a search extendable even to the juridical appraisal of the choice to merge them into a single contract the nature of which the labour law expert questions precisely because of its ambiguity.

Re-reading the final part of Recital 19 (as merged also in art. 2 lett. b, concerning the definition of worker) in the sense of dir. 2011/98, a worker from a third country ought to be defined «as a citizen of a third country who has been admitted to a member state, who stays there regularly and who is allowed to work in conformity with the law or with national procedures in the context of a remunerated employment relationship». The right to equal treatment ex art. 12 of dir. 2011/98,

⁴⁴ A. GUARISO, *Durata del permesso di soggiorno e durata del rapporto di lavoro, il prevedibile tramonto di un mito della Bossi-Fini*, in *D&L*, 2009, 1, p. 166.

⁴⁵ A. GUARISO, *Durata del permesso di soggiorno ...*, p. 167.

moreover, is considered to be applicable to workers indicated by art. 3 lett. b e c, excluding those who are indicated in lett. a, or rather the non-workers, that is to say, those citizens who seek to stay in a member state for work purposes but who are not yet employed.

From the arrangement of the rules just mentioned there might develop a difficult path exactly in the future transposition phase of dir. 2011/98. From the combined provision of art. 12, par. 1 and art. 3, lett. b e c, it can be deduced that the regular stay permit and the completed employment contract are needed in order to obtain recognition of the right to equal treatment. It is like saying that EU law is not concerned about the above-mentioned short circuit in interpretation which could originate with regular entry without having signed the contract resulting in potential violation of the right to equal treatment⁴⁶. In view of the purpose of the directive, this conclusion certainly cannot signify that the employment contracts are permitted to damage the right to equal treatment only because the non-EU citizen does not have the appropriate stay document to make him regularly resident since it is uncompleted. It can only mean that EU law and the right to equal treatment affirmed by dir. 2011/98 could resolve every unclear distinction (even by making national rules illegitimate) between administrative procedure and the foreigner's stay contract for work. The ambiguities of the contract regulated by art. 5-bis of the legislative decree could be resolved by means of a correct appreciation, albeit delayed, of the employee stay permit inspired by (today as yesterday) the harmonising intervention of the EU through a verification (this can be effected in the transposition phase or alternatively through the courts) of the functioning of the complex of the set of dispositions concerning the entry of the foreigner into Italy for work purposes: artt. 5, 5-bis, 21 and 22 of the legislative decree and artt. 8-bis, 35, 36-bis and 37 of the decree 394/1999, the relative implementing regulation. Without forgetting, on the other hand, a further argument to follow, starting from the functioning of the right to equal treatment sanctioned by dir. 2011/98. Starting from the considerations worked out by the constitutionalist doctrine which holds that the right to equal treatment is damaged by the same art. 5-bis by imposing further obligations on the employer for simply taking on a non-EU citizen, it might strengthen the effect of overall non-value of such further obligations signalling the purpose of the directive expressed in Recital 19 backed by a judgment of non-conformity with EU law: the directive contains dispositions which «aim to create conditions of

⁴⁶ A. GUARISO, *Durata del permesso di soggiorno ...*, p. 167.

minimum uniform competition in the Union with their work and tax payments acting as a guarantee to reduce unfair competition between citizens of a member state and the citizens of third countries deriving from the eventual exploitation of the latter».

The first phase of the impact of EU law on national law (including labour law) is bound to produce tangible results in the national system precisely from the set of directives approved on the basis of Title V TFEU. The applications include simplification of seasonal worker access, an examination of the functioning of the equal treatment principle with respect to the regular and irregular foreign worker, a comparison which must be carried out also with regard to the most limited right to retribution and arrears, accompanied by documents regarding social welfare contributions on the basis of art. 2126 Civil Code. Also of great interest is the verification of the employer's discretionary choices whether to have recourse to the eventual procedure of regularisation set up at national level for purposes of legitimation, a possibility very different from wandering in countries like Italy where the real labour market for foreigners is far from the juridical representation of a right only formally in force but substantially ineffective.

The comparison cannot but include the very conformity to the Charter of Fundamental Rights of the EU legislator's choice to exclude the recognition of a right to regularisation for those who denounce irregular employment which might take on the character of «serious labour exploitation», a hypothesis today legislated which requires the constitutive elements to be interpreted correctly for purposes of using the permit ex art. 18 legislative decree immigration (modified on the basis of decree law 109/2012 implemented in dir. 2009/52). Not forgetting that the effect foreseen by the impact of the transposition of dir. 2011/98 will be particularly problematic, a proof which will deal with the dissolving of the contract of stay for employment (or rather the first entry contract) in various phases linked to the carrying out of the procedure of issuing the stay permit⁴⁷.

This new series of reflections arising from labour law appear to originate in EU immigration policy, the double of the social model of the origins in which it has not stopped reflecting itself, also imposing an unavoidable question of method: to overcome the categorisation or the isolation of questions about the employment of foreigners opening juridical considerations within the dimension of 'Social Europe' also to a further balancing in respect of that raised classically between economic dimension and/or of the competition with the social dimensions of the

⁴⁷ Cf. L. CALAFÀ, *La migrazione economica*, cit.

rules (potentially contained in Titles IX and X of TFEU). Even if one discusses the very existence of the European social model, the necessary extra balancing for its final construction is that between security and the prospect of social solidarity for foreigners, not only by taking advantage of the opportunity offered by the link with that slender competence sanctioned by art. 153, lett. g, TFEU, but in more general terms, in respect of the competences implied in Title V regarding labour immigration policy. The search for a social perimeter within which to consider EU labour law matters must include, rather than exclude, questions about non-EU citizens. Such an extension seems to favour inevitably a genealogical re-reading of the community social dimension⁴⁸, between a consolidated past, a far from simple present, but a perhaps less uncertain future of the enhancement of the multi-layered rights of the individual in movement.

⁴⁸ E. ALES *Lo sviluppo della dimensione sociale comunitaria: un'analisi "genealogica"*, in (editor), F. CARINCI, A. PIZZOFERRATO, *Diritto del lavoro dell'Unione europea*, Turin, 2010, p. 131.

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