WHERE DOES SOCIAL EUROPE LAY? LOOKING FOR SOCIAL EUROPE AMONG THE WORKER, RESIDENT AND HUMAN BEING STATUSES WITH THE HELP OF THE RIGHT TO ACCOMMODATION IN THE MULTILEVEL SYSTEM

*Alessandro Nato**, *Elisabetta Tatì***

Abstract

Together with the economic crisis (2008) and the sovereign debt crisis (2011), the Covid-19 crisis has highlighted how the dependence of social rights on a formal citizenship status or resident status should be considered as a restriction on the access and effective enjoyment of social rights and comprehensive social protection, especially by vulnerable people (i.e. cross-border EU citizens, migrant citizens of third countries, precarious low-skill and low-income workers). The paper will look specifically to agricultural workers with an irregular work status and/or an illegal immigration status. Focusing on one of the most disadvantaged conditions – illegal immigrants with seasonal jobs in the agricultural sector – the expectation is that a higher number of variables will enter the picture. If a solution can be imagined for the least advantaged, it would presumably work for less disadvantaged people as well, both at the national and supranational levels. The paper will proceed in two steps. In the first, it will analyze the problem of the right to accommodation for seasonal workers in agriculture from the perspective of the supranational level of the European Union, studying in detail the criticalities of the EU legal system. In the second, it will examine the same topic from the perspective of the national level, using Italy as a case-study. In the conclusions, the paper will propose some recommendations to improve the effective enjoyment of social rights more in general and the right to accommodation of transnational seasonal workers in agriculture more specifically.

* Post Doc, University of Rome "LUISS Guido Carli"
** Post Doc, University of Rome "LUISS Guido Carli"

TABLE OF CONTENTS

1. Introduction. Human being-status, worker-status, (legal) resident-status: overcoming clashes versus a European social citizenship

Together with the economic crisis (2008) and the sovereign debt crisis (2011), the Covid-19 crisis has highlighted how the dependence of social rights on a formal citizenship status or resident status should be considered as a restriction on the access and effective enjoyment of social rights and comprehensive social protection, especially by vulnerable people (i.e. cross-border EU citizens, migrant citizens of third countries, precarious low-skill and low-income workers).

This is the case, for instance, of the right to accommodation for seasonal workers and for those cross-border seasonal workers in agriculture, both EU and extra-EU citizens. In fact, the current pandemic affects most those who need to move from their home country for work. The lack of accommodation for seasonal workers, especially in the agricultural sector, has existed for a long time, but the Covid-19 crisis has worsened these already poor conditions for workers. Many do not receive adequate

accommodation from employers and live in substandard housing. The latter does not comply with the minimum health and safety standards in force in the Member States (i.e. social distancing and the health and safety measures applicable in the context of the fight against the Corona virus). These inadequate accommodation conditions have allowed the development of outbreaks of infection among cross-border seasonal workers in agriculture. Infection can cause long periods of inactivity and a drastic drop in income. For these reasons, the European Commission[1] and the Council of the European Union[2] recommended to the Member States that they ensure all necessary measures.

The paper will look specifically to agricultural workers with an irregular work status and/or an illegal immigration status[3]. Focusing on one of the most disadvantaged conditions – illegal immigrants with seasonal jobs in the agricultural sector – the expectation is that a higher number of variables will enter the picture. If a solution can be imagined for the least advantaged, it would presumably work for less disadvantaged people as well, both at the national and supranational levels[4]. As seen, during the Covid-19 crisis, guaranteeing effective social protection to regular and irregular seasonal workers in agriculture, such as the right to accommodation, has become even more urgent. However, it is not only an ethical imperative but has also been necessary for health reasons – to circumscribe the pandemic – and for economic reasons – to support the recovery phase[5]. In fact, how the agri-

[1] Communication COM(2020)4813.

[2] Conclusion 9 October 2020, 11726/2/20.

[3] V. Papa, *Dentro o fuori il mercato? La nuova disciplina del lavoro stagionale degli stranieri tra repressione e integrazione*, 27 Diritto delle Relazioni industriali 368 ff. (2017), according to which the seasonal worker is the ideal type reflecting the major factors of vulnerability and that directive 2014/36/Eu has a double function: securitization/immigration policy and Labor Law. See for other comment J. Fudge, P. Herzfeld Olsson, *The European workers directive: when immigration controls meet labour rights*, 4 Eur. J. Migr Law (2014). Cfr. C. Rijken, *Legal approaches to combating the exploitation of third-country national seasonal workers*, in 4 IJCLLIR 422 ff. (2015).

[4] This is the "max-min" approach, to maximize the conditions of the least advantaged people, following the Rawlsian "Theory of justice".

[5] For example, East European seasonal workers preferred to go to Germany and other Northern countries than to come in Italy, since those countries could guarantee better social and health conditions; or, the functioning of soft mechanisms based on consumer behavior that pull people gently towards production networks needs farms and enterprises that can guarantee – and

food sector and its entire productive chain are suffering from an unsustainable market-oriented system will emerge from the case-study. For example, even the Common Agricultural Policy needs to be reviewed in order to achieve its 2030 goals. This can be done if social and environmental priorities start to be addressed as a prerequisite to a healthy Economy[6].

Hence, the case-study will have the following as an underlined second-level question: does the effective enjoyment of social rights depend on attaining worker-status in the European legal system? And, if so, to what degree does the latter depend on citizenship or legal residency status? Furthermore, in the light of the pandemic experience, are these the best theoretical paths for the future of social rights in Europe? Or should a different perspective be adopted and, above all, is such a change in perspective possible[7]? Perhaps the theoretical solution to the

---

prove – adequate social conditions to their workers. L. Palumbo, A. Corrado (eds.), *Covid-19, Agri-food Systems, and Migrant Labour the Situation in Germany, Italy, The Netherlands, Spain, and Sweden* 3 (2020).

[6] For a theoretical argument in favor of "integrated" sustainable development see M. Bombardelli, *Public Informatics, E-government and sustainable development* and S. Battini, *Policies for sustainable development*, in G. Arena, M. P. Chiti (eds.), *Public Administration, Competitiveness and Sustainable Development* (2003). Cfr., for a recent attempt of balancing economic and social dimensions in the European legal order, G. Marín Durán, *Sustainable development chapters in Eu free trade agreement: emerging compliance issues*, 57 Common Mkt. L. Rev. 1048-1052 (2020). See also D. Damjanovic, *The Eu market rules as social market rules: why the eu can be a social market economy*, 50 CMLR 1658 ff. (2013). Cfr. A. De Witte, *A competence to protect: the pursuit of non-market aims through internal market legislation*, in P. Sypris (ed.), *The judiciary, the legislation and the Eu internal market*, (2012). For the hypothesis of "integrated" sustainable development as a European objective and "sustainability" as a European principle see E. Tatì, *L'Europa delle città. Per una politica europea del diritto urbano* (2020), 241-250.

[7] It is possible to describe the social and legal rhetoric prevalent in the European Union until today as follows: you should have a job; if you have it, you can be considered a worker with a set of social rights that guarantee a minimum living standard. However, the latter depends on the kind of sector you work in and on your starting skills. This also means that pathological situations can arise at any level of this chain. For example: you have a job in the EU and you are a worker; however, you work in the agricultural sector and there is a legislative vacuum both at the EU and National level that cannot guarantee your social rights, indispensable, for example, for having decent living conditions; the "worker status" in a Union based on mobility of people does not work sufficiently well. Or: you are an irregular immigrant (non-legal "resident status") and you are also a worker. However, the second status does not overcome your irregular residency in Europe and you have no social

above-mentioned limitations could be to adopt a "human being" approach[8]. In other words, a European citizenship that is based on a "concrete" social citizenship or on the "reality" of being in the European territory, as part of a community[9].

The previous can be considered a utopian reconstruction, if one chooses to consider utopian the Court of Justice of the European Union (ECJ) case-law as well. In 2014, in the *Tümer* case, the ECJ affirmed that safeguards established by EU law apply to all workers, including third-country nationals in an irregular situation[10]. The worker's residence *status* does not affect them, and immigration considerations should never interfere with the equal treatment of all workers. For the purpose of implementing labor

guarantees even though you work. In the first case, the shortcoming is to put before the social dimension before the economic one, in this way losing the possibility to guarantee fundamental rights (a defective EU legal order) (A. Supiot, *L'esprit de Philadelphie: La justice sociale face au marché total* (2010)); in the second case, the problem derived from putting the legal "resident status" before the "reality" of being in the EU and being a worker. In this second case, a "worker status" could be sufficient (if built on the first case prerequisites) but it is not the case, due to the incoherence of immigration policy. See, on the historical prevalence in Europe of a concept of citizenship based on the idea of "nationality", even though with different national approaches, E. Böckenförde, *Welchen Weg geht Europa?*(1997). See, on the limitation of European citizenship, J. H. Weiler, *To be a European citizen: eros and civilization*, in *id.*, *The Constitution of Europe: "Do the New Clothes Have An Emperor? "And Other Essays on European Integration* (1999), 79 ff. Cfr. S. O-Leary, *The evolving concept of community citizenship. From the free movement of person to Union citizenship* (1996), especially 3-31; S. Kadelbach, *Union Citizenship*, 9 Jean Monnet Working Paper (2003).

[8] The reasoning should follow this order: first of all, you can enter the EU just because you are a human being; secondly, you have the most extensive set of rights (also "positive" rights, mainly social ones, in order to make negative freedoms effective negative); thirdly, you are a worker; lastly, your minimum living conditions do not depend on the kind of sector you are in. See K. Nash, *Between Citizenship and Human Rights*, in 43 Sociology 1067 ff. (2009). Cfr. G. Shafir, A. Brysk, *The Globalization of Rights: From Citizenship to Human Right*s, 10 Citizenship Studies 275-287 (2006). For the position in favor of social rights as (human) rights see C. Barnard, *Are social 'Rights' rights?*, 11 Eur. Labour Law J. 352-363 (2020). Cfr. E. Triggiani, *La complessa vicenda dei diritti sociali fondamentali nell'Unione europea*, 1 St. integr. Eu. 9 ff. (2014).

[9] See for argumentation in favor of a European social citizenship, and its difficulties, A. Nato, *La cittadinanza sociale europea ai tempi della crisi economica* (2020). Cfr., for a European citizenship based on "being" in the European territory and on the importance of "where" you are, E. Tatì, *L'Europa delle città. Per una politica europea del diritto urbano*, cit. at 6, 439 ff.

[10] CJEU, C-311/13, *O. Tümer v. Raad van bestuur van het Uitvoeringinstituut werknemersverzekeringen*, 5 November 2014.

and health and safety standards, migrant workers have to be considered workers, whatever residence status they may have or lack. The ECJ ruled that the power of Member States to limit the application of the directive, object of the case, is subject to satisfying the social objectives of the EU act. Those social objectives do not go as far as to permit exclusion of third-country nationals[11]. The rights of workers are an expression of solidarity among societies[12]. Moreover, in the case-law, the Public Law level – immigration policy – remains separate from the Private Law level – labor policy under the Civil Code. Indeed, this separation guarantees the application of those national provisions in favor of employees[13]. Only in this way, abused migrant workers can be empowered to use complaint mechanisms and other complaint channels against abusive employers or recruiters, without fear of such action triggering consequences for their residence status[14]. In addition to this aspect, it is also true that if ordinary employment law applies to irregular migrants, then they will not challenge the legally resident workforce as employers will lack economic

[11] *Tümer* case, par. 42: «Furthermore, according to the case-law of the Court, the first subparagraph of Article 2(2) of Directive 80/987 must be interpreted in the light of the social objective of that directive, which is to guarantee employees a minimum of protection at EU level in the event of the employer's insolvency through payment of outstanding claims resulting from contracts of employment or employment relationships and relating to pay for a specific period. Member States therefore cannot define at will the term 'employee' in such a way as to undermine the social objective of that directive (see, by analogy, judgment in van Ardennen, C-435/10, EU:C:2011:751, paragraphs 27 and 34)».

[12] European Union Agency for Fundamental Rights, *Protecting migrant workers from exploitation in the EU: workers'perspectives* (2019), 15.

[13] *Tümer* case, par. 49: «In the light of all the above considerations, the answer to the question referred is that Directive 80/987 must be interpreted as precluding national legislation on the protection of employees in the event of the insolvency of their employer, such as that at issue in the main proceedings, under which a third-country national who is not legally resident in the Member State concerned is not to be regarded as an employee with the right to an insolvency benefit — on the basis, in particular, of claims relating to unpaid wages — in the event of his employer's insolvency, even though that third-country national is recognized under the civil law of the Member State as having the status of an 'employee' with an entitlement to pay which could be the subject of an action against his employer before the national courts».

[14] See European Union Agency for Fundamental Rights, *Protecting migrant workers from exploitation in the EU: workers' perspectives*, cit. at 6, 15.

incentive to employ irregular migrants instead of the former[15]. In the case-law, all the above-mentioned layers for the second level question are present: worker status, resident status and the social ("human being") status. In the ECJ decision, the worker status prevails over that of resident. However, and positively enough, the worker status considered is the most ancestral since it takes into consideration its social nature and not only the reasons of the market. This happens because the case involves an EU Directive that has, as its primary scope, a social objective and the appellant's need concerns an infringement of a "linked" right to his worker status.

As it will be affirmed thereof, the European Charter on social rights can be considered a step further along this path. The right to accommodation analyzed in the case-study is only one of the several social rights addressed in EU law and national law. To all these, the abovementioned ECJ approach can be extended in order to render them more effective. This process has many obstacles to overcome, if one considers the number of European directives that still have a limited approach. This is the case of Directive 36/2014/EU on seasonal workers, in which, even though there is an attention to social rights such as that for a decent accommodation, the very objective at the base of the European act remains, mainly, market-oriented (worker status) and suffers, in its effectiveness, of the political *impasse* on immigration policies, both at the EU and national levels.

To sum up, the paper aims to study how cross-border seasonal workers in agriculture could enjoy the social right to accommodation. To achieve this goal, the paper will proceed in two steps. In the first, it will analyze the problem of the right to accommodation for seasonal workers in agriculture from the perspective of the supranational level of the European Union, studying in detail the criticalities of the EU legal system. In the second, it will examine the same topic from the perspective of the national level, using Italy as a case-study. In the conclusions, the paper will propose some recommendations to improve the effective enjoyment of the right to accommodation of transnational seasonal workers in agriculture in the European multilevel

[15] S. Peers, *Irregular migrants and EU employment law*, available at http://eulawanalysis.blogspot.com/2014/11/irregular-migrants-and-eu-employment-law.html (5 February 2020).

system. Finally, it will address the issue also under the second level question.

2. Cross-border seasonal workers in EU: the toolbox

In general terms, seasonal work is a form of temporary employment linked to specific periods of the year and sectors, such as fruit pickers in the agricultural sector or cleaners in holiday resorts in the tourist industry. Cross-border seasonal worker in agriculture can be defined as the person who is required to move temporarily from his or her permanent residence in a country to another one in a different State, in order to do the job for which he has been employed[16]. Hence, they are often employed under temporary work contracts, through temporary work and recruitment agencies or subcontracting chains. Especially when not employed directly by the employer, they are often not provided with enough clarity and protection regarding information, liability, and rights[17]. Furthermore, it is important to underline the fact that cross-border seasonal work in agriculture can be carried out in the European Union by both EU citizens and non-EU citizens. Indeed, the EU attracts many mobile seasonal workers in agriculture from non-EU countries[18].

In theory, Cross-border seasonal workers enjoy a wide range of rights, which may vary depending on whether they are citizens of the Union or third countries. In concrete terms, although the situation differs from Member State to Member State, seasonal workers are often treated less favorably than permanent workers in terms of legal entitlements - for example, dismissal protection; benefits offered by employers, as with pension

[16] See K. Culp, M. Umbarger, *Seasonal and migrant agricultural workers: A neglected work force*, 52 AAOHN J. 383 (2004).

[17]See C. C. Williams, *Tackling undeclared work in the agricultural sector: a learning resource* (2019); C. Faleri, *Il lavoro povero in agricoltura, ovvero sullo sfruttamento del (bisogno di) lavoro*, 33 Lav. e Dir. 149 (2019).; J. Gertel, S. R. Sippel (eds.), *Seasonal workers in Mediterranean agriculture: The social costs of eating fresh* (2014); B. Mesini, *The stakes in the circular mobility of labour: the example of seasonal foreign workers in Mediterranean agriculture*, 11 J. Med. Geo. 105 (2009).

[18] See J. Fudge, P. H. Olsson, *The EU Seasonal Workers Directive: when immigration controls meet labour rights*, 16 Eur. J. Migr. Law 439 (2014).

entitlements; other employment conditions, such as health and safety training[19].

Looking at the legal framework, seasonal EU workers enjoy the protection of Art. 45 TFEU, that is one of the cardinal principles of the European integration process. According to this principle, citizens' rights to work in another Member State are based on the legal framework of the Member State in which the work is carried out. This first type of rights-based labor mobility is increasingly integrated with the temporary labor mobility of posted workers based on the freedom to provide cross-border services and the freedom of establishment.[20]. Secondary EU law, then, protects also posted seasonal workers[21], even though these

[19] See A. F. Constant, O. Nottmeyer & K. F. Zimmermann, *The Economics of Circular Migration*, in A. F. Constant, K. Zimmermann (eds.), *International Handbook on the Economics of Migration* 55 (2013); B. S. Unsal-Akbiyin, K. Cakmak-Otlouglu, K. Ovgu, H. De Witte, *Job insecurity and affective commitment in seasonal versus permanent workers*, 24 Int'l J. Hum. Soc. Scie. 14 (2012).

[20] Workers making use of the freedom of movement under Art. 45 TFEU are subjected to the relevant laws and collective agreements of the host Member State and must be treated in the same way as nationals concerning the conditions of pay, dismissal, occupational health, and safety protection. Furthermore, workers who are EU citizens are entitled to the same social and tax advantages as those granted to nationals of the host Member State. Directive 2014/54/EU also entitles this category of workers to benefit from the assistance of the national bodies of the host Member State responsible for promoting equal treatment and support for workers and their families, to take fair action in the event of discrimination based on nationality, receive the support of trade unions and other subjects in any judicial and/or administrative procedure and be protected against exploitation (Directive 2014/54/EU of the European Parliament and of the Council of 16 April 2014 on measures facilitating the exercise of rights conferred on workers in the context of freedom of movement for workers Text with EEA relevance). In addition, Directive 2014/67/EU provides that the Member States must ensure that posted seasonal workers can use effective mechanisms to directly report their employers in the Member State to which they are or were posted and that trade unions or other third parties can initiate any judicial or administrative on behalf or in support of posted workers. In line with this directive, Member States should take measures to ensure the effective protection of workers' rights in the subcontracting chain. See in literature K. Davies, *Understanding European Union Law* (2019); P. Koutrakos P. (eds.), *Research Handbook on the Law of the EU's Internal Market*, (2017); N. Reich, A. Nordhausen Scholes & J. Scholes, *Understanding EU Internal Market Law* (2015); F. Weiss, C. Kaupa, *EU Internal Market Law* (2014).

[21] According to Art. 1, para. 2, of Directive 96/71/EC, EU seasonal workers employed in a Member State and sent by their employer to work in another Member State are considered posted workers. In addition, third-country nationals who work and legally reside in one Member State can be posted to

provisions do not apply to third-country nationals who reside and work outside the EU and whose employer is established in a third country.

The directive 2014/36/EU was the culmination of the Commission's efforts to harmonize seasonal worker's rights in the EU. The directive seeks to respond to the needs of Member States for a source of labour to fill the low skill, seasonal, and typically, precarious, jobs, that are not attractive to EU residents and citizens, while simultaneously minimizing the possibility of economic and social exploitation of third country migrant workers by providing them with the set of rights, including the employment rights to which resident seasonal workers are entitled. At the same time, the directive 2014/36/EU is designed to promote circular migration and to ensure that these low skilled workers do not become permanent resident of the EU, while also stemming what is perceived to be a flood of irregular migrant workers into the EU. However, it also allows workers to come back for several years in a row to perform seasonal work.[22]. Indeed, this directive applies only to third-country workers normally resident in non-EU Member States[23]. In contrast, the Directive does not apply to usually resident in the EU[24].

---

another Member State by their employer and, in this case, are considered posted workers. See T. Novitz, R. Andrijasevic, *Reform of the posting of workers regime–An assessment of the practical impact on unfree labour relations*, 58 J. Common Mark. Stud. 132 (2020).; P. Van Nuffel, S. Afanasjeva, *The Revised Posting of Workers Directive: Curbing or Ensuring Free Movement?*, in N. Cambien, D. Kochenov & E. Muir, *European Citizenship under Stress*, 271 (2020); P. Van Nuffel, S. Afanasjeva, *The Posting of Workers Directive revised: enhancing the protection of workers in the cross-border provision of services*, 3 Eur. Papers 1401 (2018).

[22] See J. Fudge, P. H. Olsson, *The EU Seasonal Workers Directive,* cit. at 3, 440.

[23] See Art. 2, para. 1, directive 2014/36/EU.

[24] In the EU legal framework, many workers who are nationals of third countries is covered by specific directives. Especially, the directive 2011/98/EU establish employment and social security rights of migrant workers. The Art. 12 Directive 2011/98/EU includes an elaborate provision on the right to equal treatment. Indeed, this article establish that extra-EU national workers – covered by directive 2011/98/EU - shall enjoy equal treatment with national of the Member State where they reside about employment conditions as well as for branches of social security, as defined in Regulation (EC) 883/2004. However, this directive does not create a right for third-country national workers to enter a Member State for the purpose of employment. It introduces a single application procedure and a single permit for both residence and access to employment on the territory of the host State. In addition, the directive

The directive sets out the conditions of both the admission and stay of non-EU citizens entering the EU in order to be employed as seasonal workers[25]. However, the directive itself is limited to new potential labour immigrants as its Art. 2, para. 3 of the directive 2014/36/EU requires residence abroad and, therefore, does not cover those living in a Member State already. Hence, the directive established a common set of rules for the admission, residence, and rights of non-EU seasonal workers. As seen, for example, it ensures decent working and living. Nevertheless, the obligations for the Member States regarding the latter point are rather weakly formulated in the directive so that there could be some doubts as to the attainability of this objective. In fact, it also introduces a controlled admission system that requires workers to have means to support themselves before admission. Indeed, for seasonal workers staying no longer than 90 days, Member States shall require that the seasonal workers will have no recourse to their social assistance system[26]; for those staying more than 90 days, Member States shall require that the seasonal workers will have enough resources during his or her stay to maintain her/himself without having recourse to their social assistance system[27]. These provisions imply that seasonal

2011/98/EU guarantees a set of rights for extra EU nationals' workers legally admitted to the Member States. Indeed, Art. 3 of this directive define a broad personal scope of this normative act. On one hand, the directive includes extra EU national workers who apply to reside in a Member State for the purpose of work and those who have been admitted for reason of work. On the other hand, the directive includes extra-EU nationals who have been admitted for other reasons but are permitted to work in a Member State in accordance with EU and national law. Nevertheless, many categories are excluded from the scope of the directive 2011/98/EU, for examples extra-EU national's family members of EU citizens, posted workers, intra-corporate transferees, seasonal workers, au pairs, asylum-seekers, third-country nationals enjoying temporary or international protection, persons who are long-term residents in accordance with directive 2003/109/EC and self-employed workers. See. H. Verschueren, *Employment and social security rights of third-country nationals under the EU labour migration directives*, 20 Eur. J. Soc. Sec. 106 (2018); S. I. Sanchez, *Single Permit Directive 2011/98/EU*, in K. Hailbronner, D. Thym (eds.), *EU Immigration and Asylum Law* 881 (2016).

[25] See Art. 1 Directive 2014/36/EU and L. Medland, *Misconceiving 'seasons' in global food systems: The case of the EU Seasonal Workers Directive*, 23 Eur. Law J. 157 (2017).

[26] See Art. 5, para. 3, Directive 2014/36/EU.

[27] See Art. 6, para. 3, Directive 2014/36/EU.

workers do not have access to the social assistance systems of the host Member State.

The directive establishes while cross-border seasonal workers enjoy of the equal treatment with national in the host Member State[28]. Art. 23 Directive 2014/36/EU expressly embodies the equal treatment principle, providing that seasonal workers are to be treated equally to nationals at least with regards to nine enumerated categories of rights. For example, seasonal workers are entitled to have the same access to goods, services - apart from housing services - and the supply of goods made available to the public. Moreover, migrant seasonal workers are entitled to equal treatment regarding education and vocational training, recognition of diplomas, certified and other professional qualifications, and tax benefits. Besides, Art. 23, para. 2, Directive 2014/36/EU provides for equal treatment about the right to strike and freedom of association[29]. The Directive 2014/36/EU also pays special attention to control measures and, paradoxically enough, to the implementation of rights[30].

---

[28] See J. Fudge, P. H. Olsson, *The EU Seasonal Workers Directive,* cit. at 3, 457.

[29] Art. 23, para. 1, Directive 2014/36/EU established the equal treatment for non-EU seasonal workers in terms of employment, including the minimum working age, and working conditions, including pay and dismissal, working hours, leave and holidays, as well as health and safety requirements in the workplace. Art. 23, para. 1, of the directive in question provides for various forms of social rights. Indeed, this article provides that migrant seasonal workers are entitled to social security defined in Art. 3 Regulation (EC) 883/2004. Art. 3 of Regulation EC no. 883/2004. Nevertheless, as far as social security is concerned, Art. 23, paragraph 2, letter i), directive 2014/36/EU allows the Member States to restrict equal treatment for social security by excluding family benefits and unemployment benefits. This means that the Member States may deny seasonal workers entitlement to these benefits even if they meet the conditions imposed on nationals of the Member States about these benefits and even if themselves or the employer paid contributions for the financing of the benefits. This provision clearly highlights the circular migration aspect of this Directive: seasonal workers are not supposed to remain in the host Member State after finishing their seasonal work, or to be joined by family members. It is unclear whether this would further deprive seasonal workers of entitlement to social benefits, including health care. See Y. Jorens, F. van Overmeiren, *General Principles of Coordination in Regulation 883/2004*, 14 Eur. J. Soc. Sec. 47 (2009); G. Straban, *Family Benefits in the EU: Is it Still Possible to Coordinate Them?*, 18 Maastricht JECL 775 (2016).

[30] See H. Verschueren, *Employment and social security rights of third-country nationals*, cit. at 9, 110. Indeed, Art. 24 Directive 2014/36/EU obliges Member States to provide for measures to prevent possible abuses and to punish infringements by including a system of monitor, assessment and inspection. In

Despite the normative framework just examined, cross-border seasonal workers remain, *de facto*, a very vulnerable category of workers. Exploitation of cross-border seasonal workers is regularly documented[31], and it includes underpayment and substandard work and living condition[32]. While these abuses are not unique to the seasonal workers, their temporary status and often limited ties to the host society mean they tend to be even more vulnerable to exploitation than other workers. Indeed, seasonal workers experienced different types of exploitation: very little or no pay for very long working hours; working conditions that violate labour standards and compromise – especially irregular – migrant workers' health and safety with access to medical care often denied by authorities; lack or a contract provided in a language that the worker did not understand; accommodation provided by the employer in unsanitary or degradation conditions[33]. For these reasons, the European institutions have often recommended EU Member States to implement measures to improve the working and living conditions of seasonal workers in the EU[34].

addition, Art. 25 Directive 2014/36/EU obliges Member States to ensure that there are effective mechanisms through which seasonal workers may lodge complaints against their employers, either directly or through third parties that have a legitimate interest in ensuring compliance with this directive - such as trade unions and NGOs.

[31] See A. Zawojska, *Exploitation of migrant labour force in the EU agriculture*, Ekon. Org. Gosp. Żyw. 37 (2016). According to the literature, exploitation is defined as an act of taking unfair advantage of another person in order to benefit oneself. Economic theories generally perceive labour exploitation as an act of capturing the fruits of hired labour through wage rate lower than worker's – marginal - contribution to the value of – marginal- output. In legal and practical terms, labour exploitation goes beyond unfair remuneration for work, taking also the forms of deception, debt bondage, abusive working and living conditions, and others.

[32] See L. Palumbo, A. Sciurba, *The Vulnerability to Exploitation of Women Migrant Workers in Agriculture in the EU: The Need for a Human Rights and Gender Based Approach* (2018).

[33] See European Union Agency for Fundamental Rights, *Protecting migrant workers from exploitation in the EU: workers' perspectives* 19 (2019).

[34] See Communication C/2020/4813 of 16 July 2020, from the Commission Guidelines on seasonal workers in the EU in the context of the COVID-19 outbreak.

2.1. Cross-border seasonal workers in agriculture: a vulnerable category

Among the various categories of seasonal workers, those who suffer the most exploitation are seasonal workers in agriculture[35]. In the EU agricultural sector, the exploitation of seasonal workers moving within the EU has become a very profitable but unethical activity[36]. The exploitation of seasonal workers is related to a mode of production that involves several actors along the entire supply chain. This chain is involved multinationals, corporations, large-scale distribution companies, temporary agencies, transport companies, and wholesalers, which aim to reduce production costs to increase profit margins, leading to a squeeze of workers' rights up to cases of severe exploitation and trafficking[37]. Several kinds of research point out worrying cases of exploitation in this sector not only of illegal foreign immigrants but also of persons with their legal status and European citizens[38]. In many Member States, the scarce supply of domestic labor threatens the survival of their agriculture. To compensate for the shortage of domestic workers, farmers legally or illegally procure workers from abroad with the possibility of severe hidden exploitation as workers may be entirely confined to remote rural areas or because there is a lack of workplace controls

[35] See G. G. Lodder, *Protection of Migrants Against Labor Exploitation in the Regulation of Migration in the EU*, in J. Winterdyk, J. Jones (eds.), *The Palgrave International Handbook of Human Trafficking* 1361 (2020); C. De Martino, M. Lozito & D. Schiuma, *Immigrazione, caporalato e lavoro in agricoltura*, Lav. e dir. 313 (2016)

[36] See Z. Rasnaca, *Essential but Unprotected: Highly Mobile Workers in the EU during the COVID-19 Pandemic*, ETUI Res. Paper 9 (2020); L. Șmuleac, *Impact of COVID in Agriculture*, in M. K. Goyal, A. K. Gupta (eds.), *Integrated Risk of Pandemic: Covid-19 Impacts, Resilience and Recommendations* 197 (2020); K. Hooper, C. Le Coz, *Seasonal Worker Programs in Europe Promising practices and ongoing challenges*, Migration Policy Institute-Policy Brief (2020); A. Sommarribas, Z. Rozenberga & B. Nienaber, *Attracting and Protecting Seasonal Workers from third countries in the EU* (2020).

[37] See L. Palumbo, A. Sciurba, *The Vulnerability to Exploitation of Women Migrant Workers in Agriculture in the EU*, cit. at 2, 18; D. Perrotta, *Ben oltre lo sfruttamento. Lavorare da migranti in agricoltura'*, Riv. Mulino 29 (2014).

[38] See C. Costello, M. Freedland, *Seasonal workers and intra-corporate transferees in Eu-Law. Capital's hand maidens?*, in J. Howe, R. Owens (eds.), *Temporary Labour migration in the Global Era. The regulatory challenge* 103 (2016).

by national authorities[39]. Furthermore, in recent years there has been an increase in the number of migrant workers from different parts of the world and from Central and Eastern Europe who have been trafficked into the EU agricultural sectors for exploitation, ending up being exploited as forced labor[40]. In this context, foreign workers with irregular status, usually non-EU citizens, are the most susceptible to extreme exploitation. Indeed, all the significant risk factors for labour exploitation seem to be over-represented in the agricultural sector in EU Member States, especially with respect to migrant workers[41]. The precarious conditions create specific form of vulnerability for seasonal workers which are used and exploited, each one in a way, within the agricultural production system[42].

This happens notwithstanding several EU law instruments are used to contrast labour exploitation. According to Art. 153 TFEU, EU supports and complements the activities of EU Member States in different fields relating to work, including working conditions, social security and social protection of workers, conditions of employments for third-country nationals legally residing in EU, and equality between men and women regarding labour market opportunities and treatment at work. Furthermore,

[39] See K. Strauss, *Unfree Labor and the Regulation of Temporary Agency Work in the UK*, in J. Fudge, K. Strauss (eds.) *Temporary Work, Agencies, and Unfree Labor: Insecurity in the New World of Work* 164 (2013).

[40] See A. Zawojska, *Exploitation of migrant labour force in the EU agriculture*, cit. at 16, 52. Even though different sources tend to underline the vulnerability to labour exploitation of migrants in an irregular situation, empirical evidence and data from separate EU Member States also increasingly demonstrate how migrants possessing a regular permit to stay, and EU migrants, are not exempted at all from being exposed to sub-standard and exploitative working conditions. For example, is significant that, among the reported victims in the period 2013–2014, 70% of these were EU citizens6. Internal EU trafficking is widely represented, and EU citizenship does not appear to protect migrants from being involved in forms of severe exploitation. See Europol, *Situation Report, trafficking in Human Being in the EU, February, Europol Public Information, Document Ref. No 765175* (2016); ILO, *Fair Migration. Setting an ILO Agenda* 19 (2014); L. Palumbo, A. Sciurba, *The Vulnerability to Exploitation of Women Migrant Workers in Agriculture in the EU*, cit. at 22, 12.

[41] In particular, the risk factor for labour exploitation regards the worker's personal situations; workplaces; the legal and institutional framework; employers' attitudes. See European Union Agency for Fundamental Rights, *Protecting migrant workers*, cit. at 19, 25.

[42] See. L. Palumbo, A. Sciurba, *The Vulnerability to Exploitation of Women Migrant Workers in Agriculture in the EU*, cit. at 22, 16.

Art. 79 TFEU establishes that the EU adopt measures to combat trafficking in human beings, a crime that Art. 83 TFEU contemplates among those criminal offences for which the EU may establish minimum rules[43]. Moreover, the Art. 5 EU Charter of fundamental rights prohibits slavery, forced labour and trafficking in human beings and the Art. 31 EU Charter entitles every worker to fair and just working conditions. Several secondary legislations contain provisions that protect workers from exploitation, including seasonal ones. For example, Directive 2003/88/EC[44] gives workers the right to enjoy an annual rest period and a maximum weekly working time. In addition, Directive 2018/957/EU introduces the principle of equal pay for equal work between posted and local workers. Also applicable to all workers, whether they are EU nationals or not, are those legal instruments which relate to criminal justice. In particular, the directive 2011/36/EU[45] contains several provisions for the protection of victims of trafficking in human beings.

In this context, Directive 2009/52/EC[46] is the one that contributes most to the fight against the exploitation of illegal work. It establishes sanctions and measures against the employers of workers of illegally staying third-country nationals[47]. Firstly, Directive 2009/52/EC prohibits the recruitment of illegally staying third-country nationals and establishes minimum common rules and measures, including criminal and

[43] See S. Carrera, E. Guild, *Addressing Irregular Migration, Facilitation and Human Trafficking: The EU's approach*, in E. Guild, S. Carrera, *Irregular Migration, Trafficking and Smuggling of Human Beings: Policy Dilemmas in the EU*, *Centre for European Policy Studies* 24 (2016).

[44] Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organization of working time.

[45] Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims and replacing Council Framework Decision 2002/629/JHA. See for a comment E. Symeonidou-Kastanidou, *Directive 2011/36/EU on Combating Trafficking in Human Beings: Fundamental Choices and Problems of Implementation*, 7 New J. Eur. Crim. L., 465 (2016).

[46] Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals.

[47] See Art. 2, let. b), Directive 2009/52/EC: "illegally staying third-country national' means a third-country national present on the territory of a Member State, who does not fulfil, or no longer fulfils, the conditions for stay or residence in that Member State":

administrative sanctions, which the Member States must apply against employers, that violate this prohibition[48]. This legislative act aims to make the employment of irregular workers less attractive, an occupation already characterized by low wages, poor working conditions, and even exploitation and non-payment of social security contributions[49]. However, that Directive 2009/52/EC does not contain an equal treatment clause that guarantees the nondiscrimination to this kind of worker in matters of employment and social security rights with nationals of the host Member State. Therefore, the social security rights for these workers is completely dependent on the national law of each of the Member States. Also, national authority shall repatriation of citizens of irregular third-country nationals, in this way, the expulsion measure jeopardizes their rights in employment and social security[50].

It should be emphasized that the link established by Directive 2009/52/EC between illegal work and irregular immigration can be considered both clear and wrong. The fight against irregular immigration is dealt with at the level of employment relationships on the basis that a key factor in the appeal of illegal immigration in the European Union is the possibility of finding work despite not having the required legal status[51]. Considering this, the directive prohibits the employment of illegally staying third-country nationals to combat illegal immigration. To this end, it lays down common minimum rules on penalties and measures applicable in the Member States to employers who violate this prohibition.[52] However, the directive incorrectly chooses the conditions on which to base the fight against the phenomenon of exploitation of illegal workers. Erroneously, it considers illegal work as the cause of the spread of illegal immigration. Instead, illegal employment is caused by restrictions on access to the regular labor market, and this pushes illegal immigration, promoting the exploitation of non-EU

[48] Art. 6 Directive 2009/52/EC concerns back payments to be made by employers.
[49] See H. Verschueren, *Employment and social security rights of third-country nationals*, cit. at 9, 106.
[50] See H. Verschueren, *Employment and social security rights of third-country nationals*, cit. at 9, 107.
[51] See Preamble 2 of the Directive 2009/52/EC.
[52] See Art. 1 of Directive 2009/52/EC.

workers. On these false premises is built, of course, an equally wrong regulatory apparatus.

The crisis caused by Covid-19 has shown the living and working conditions in in which seasonal workers work in the agricultural sector[53]. The Covid-19 pandemic gave more visibility to these conditions, and in some cases exacerbated them. Also, it showed that in some cases such problems can lead to the further spreading of infectious diseases and increase the risk of Covid-19 clusters. They made a crucial contribution to the internal market and continued to do so during the Covid-19 crisis, demonstrating once again the essential role that played in the production of food[54]. Indeed, since the outbreak of the Covid-19 pandemic, a rise in the demand for essential goods has meant that workers in core sectors, such as agri-food, have been recognized as fundamental in the economic and societal functioning of EU Member states. However, since workers face unprecedented mobility barriers, this poses a substantial risk to the agricultural sectors, and as a consequence, to the food supply in Europe. In some sending and hosting countries, steps have been taken to enable mobility for seasonal foreign workers or introduced exceptions to mobility restrictions to allow them in or proposed to regularize those already in the country but in an irregular situation to enable them to take up employment. At the same time, by immobilizing thousands of foreign seasonal workers from EU and non-EU Member states, border and mobility restrictions have caused labour shortages and food production losses in many EU countries. All this has highlighted how agri-food supply chain system rely significantly on migrant labour[55]. Agriculture in EU Member States heavily relies on seasonal workers, and that most of these workers are foreign workers, either coming from within or outside the EU. To respond to the labour shortage, national governments have adopted several to facilitate the mobility and recruitment of seasonal migrant workers. While some actions have consisted in the organization of charter flights to bring migrant workers to the EU, other measures have included short-term

[53] See A. Reid, E. Ronda-Perez & M. B. Schenker, *Migrant workers, essential work, and COVID-19*, 64 Am. J. Ind. Med. 73 (2021).
[54] See S. Olivier, *Free Movement of Workers in the Light of the COVID-19 Sanitary Crisis: From Restrictive Selection to Selective Mobility*, 5 Eur. Papers 613 (2020).
[55] See L. Palumbo, A. Corrado, *Covid-19, Agri-food Systems*, cit. at 5, 5.

solutions[56]. In this framework, governments have envisaged three different strategies, but not mutually exclusive[57]. First, the Member States attract unemployed, inactive students, and other available citizens into the agricultural sector. In addition, the national authority must prolong the stay of regular migrants who are already in the country, regularize those who are not legally present to enlist them in the workforce[58], or enabling asylum seekers with pending applications to take up employment sooner than the normal procedure would entail. Moreover, Member States have activated schemes to bring in seasonal foreign workers, thus enacting exceptions to overall mobility restrictions.

Nevertheless, during the outbreak there have been several complaints by migrant farmworkers concerning wage deductions, housing conditions and violations of their rights. For example, in Spain, the decrease in seasonal workers has resulted in harder and more abusive working conditions[59]. While, in Italy, a lack of inspections due to the covid-19 outbreak prevention measures has contributed to increased recourse to irregular migrant workers working in exploitative conditions, who have offset the labour shortage of Eastern EU citizens[60]. In all EU Member States, very few companies have provided farmworkers with masks or other kinds of safety equipment and information[61].

The European Commission adopted a guidance at the end of July 2020 recommending that Member States improve the work and living conditions of seasonal workers from other Member States, principally in the agricultural sector[62]. In particular, the

[56] See L. Palumbo, A. Corrado, *Covid-19, Agri-food Systems,* cit. at 5, 6.

[57] See K. Hooper, C. Le Coz, *Seasonal Worker Programs in Europe*, cit. at 21, 11.

[58] For example, Italian authorities proposed the regulation scheme for undocumented migrants. See M. G. Giammarinaro, L. Palumbo, *Covid-19 and inequalities protecting the human rights of migrants in a time of pandemic*, 10 Migr. Pol. Prac. 22 (2020).

[59] See B. Mesini, *Seasonal workers in Mediterranean agriculture: flexibility and insecurity in a sector under pressure*, in B. Appay, *Globalization and precarious forms of production and employment: challenges for workers and unions*, 98 (2010).

[60] See A. Polomarkakis, K. Alexandris, *Health and Safety at Work in the Time of COVID-19: A Social Europe Reckoning?*, 11 Eur. J. .Risk Regul. 864 (2020); E. Heikkila, *Foreign seasonal migrants in agriculture and COVID-19*, 17 Migr. Lett. 563 (2020). See S. Kalantaryan, J. Mazza & M. Scipioni, *Meeting labour demand in agriculture in times of COVID 19 pandemic*, in *Publications Office of the European Union* 7 (2020).

[61] See L. Palumbo, A. Corrado, *Covid-19, Agri-food Systems,* cit. at 5, 5.

[62] See Communication C/2020/4813 cit. 4.

Commission invites the Member States to carry out information on obligations in occupational safety materials for seasonal workers. Furthermore, the European institution recommends that national authorities provide practical information to employers on how to implement the relevant legal provisions relating to seasonal workers in all sectors. Employers should carry out an adequate assessment of all possible occupational hazards and consequently establish preventive and protective measures, including the provision of the necessary protective devices, as well as to adapt these measures to changing circumstances. The European Commission invites the Member States to provide practical guidance to smaller companies, including through controls, on the most effective measures to be taken to contain health and safety risks, especially those related to Covid-19, together with information on the incentives that have been introduced. They could also provide specific support to smaller companies in sectors where the risk of spreading Covid-19 is highest. However, the Commission guidelines have an indicative nature and they are not binding for the Member States.

Despite the urgency of the situation and the need to prevent a shortage of seasonal workers, it is also important that their rights and social protection are not overlooked. More than ever, Member States must ensure the strict application of national provisions transposing EU rules on the occupational safety and health of workers, which require that occupational risks are assessed, and adequate preventive and protective measures are in place[63].

Furthermore, the EU Fundamental Rights Agency states that some of the most severe forms of labour exploitation were experienced by workers living at the workplace or at the employer's home, with the worker depending in the employer not only for accommodation, but also for food and for transport. These situations were identified especially among domestic, construction and agriculture workers[64]. These issues esteem not only extra EU national workers, but it regards also posted workers and seasonal workers which are national of EU Member States. According to the EU agency, some of the agricultural workers living in accommodation provided by the employer in France, the

[63] See Communication C/2020/4813 cit. p. 4 and see Z. Rasnaca, *Essential but Unprotected*, cit. at 21, 6.

[64]See European Union Agency for Fundamental Rights, *Protecting migrant workers*, cit. at 19, 54.

Netherland and Portugal, reported staying in places without electricity, with no or very limited access to running water and to sanitary facilities and/or with no bedding, being overcrowded or being accommodated in containers with very high temperatures and poor nutrition. Indeed, data collected by the EU Fundamental Rights Agency shows that malnutrition is one of the main reasons for workers in agriculture to flee from employers. The Agency reports that other issues relating to housing include worker being homeless, living on the street, in train station or in centers for homeless peoples. Moreover, in several cases, seasonal workers housed in illegal properties not connected to gas, water, and electricity. Also, seasonal agricultural workers live segregated within farms, often in derelict shelter without any facilities, despite the fact that farmers deduct the cost of this housing from wages[65]. The EU Fundamental Right Agency collected empirical data showing that seasonal workers, especially those dependent on the employer for food and accommodation, referred to their overall work conditions and treatment by employer as amounting to violence. Complementary data shows that suspected cases of sexual exploitation of migrant women in the rural zones of both Italy and Spain can be linked to the problem of "ghettoization" and inadequate accommodation conditions for migrant workers in rural areas. This kind of isolation often leads women to specific physical and psychological gendered abuses[66]. Data also shows that migrant women's family responsibility, especially for those with dependent children, can lead them not to report these in absence of viable working alternatives. This happens in the case of children left behind in the country of origin and, above all, when migrant women bring their children onto farms with them[67].

Compared to this serious situation, the existing supranational instruments could be able to put an end to these violations.

[65] See P. L. Martin, *Migrant Workers in Commercial Agriculture, in ILO, Sectoral Policies Department, Conditions of Work and Equality Department* (2016).
[66] See. L. Palumbo, A. Sciurba, *The Vulnerability to Exploitation of Women Migrant Workers in Agriculture in the EU*, cit. at 19, 16.
[67] See. L. Palumbo, A. Sciurba, *The Vulnerability to Exploitation of Women Migrant Workers in Agriculture in the EU*, cit. at 19, 17.

2.2. How to guarantee the effective enjoyment of the right to accommodation for seasonal workers in agriculture?

The right to benefit from adequate accommodation for cross-border seasonal migrant workers in agriculture is recognized in various international, European, and national acts[68]. In general, the primary law of the Union provides that the Member States and EU shall have as their objectives the promotion of employment, improved living and working conditions, to make possible their harmonization while the improvement is being maintained[69]. Furthermore, the provisions of the EU Charter of Fundamental Rights provide that, to combat social exclusion and poverty, the European Union recognizes and respects the right to social and housing assistance to ensure a decent existence for all those who lack enough resources, following the rules laid down by Union law and national laws and practices[70]. This principle could also concern the accommodation conditions of cross-border seasonal workers in agriculture, both European citizens and citizens of third countries.

---

[68] See P. Gunderson, J. Dosman, *Safety and health in agriculture*, ILO Res. Report (2011); Z. Turhangullari, O. Özcatalbas, *The importance of extension for occupational health and safety in agricultural sector*, 12 J. Food Agr. & Env. 312 (2014). In particular, the Art. 19 ILO Convention n. 184/2001 "Concerning safety and health in agriculture", affirms that "national laws and regulations or the competent authority shall prescribe, after consultation with the representative organizations of employers and workers concerned: a) the provision of adequate welfare facilities at no cost to the worker; and b) the minimum accommodation standards for workers who are required by the nature of the work to live temporarily or permanently in the undertaking". Unfortunately, still in the EU, not all Member States have ratified the ILO Convention n. 184 on safety and health in agriculture. For example, only Belgium, Luxemburg, Portugal, Slovakia and Sweden have ratified this convention. Furthermore, Art. 19, para. 4, let. c), of the European Social Charter affirms that "to secure for migrant workers lawfully within their territories, insofar as such matters are regulated by law or regulations or are subject to the control of administrative authorities, treatment not less favorable than that of their nationals in respect of the following matters: c) accommodation". This Charter has been ratified by all EU member states.

[69] See Art. 151 TFEU. See H. Verschueren, *Employment and social security rights of third-country labour migrants under EU law: an incomplete patchwork of legal protection*, 18 Eur. J. Migr. Law 373 (2016).

[70] See Art. 34, para. 3, EU Charter of Fundamental Rights. See for a comment R. White, *Article 34–Social Security and Social Assistance*, in S. Peers, T. Hervey, J. Kenner & A. Ward (eds.), *The EU Charter of Fundamental Rights* 936 (2014).

Art. 34 EU Charter contains two different types of social rights: the right to access social security benefits and social services; the right to social and housing assistance. These prerogatives are recognized and must be valued in the manner established by Union law and following national regulations and practices. The article does not provide information on the organizational methods and forms through which to protect these rights, referring to national legislation and EU secondary legislation. According to the classification provided for in Art. 52 EU Charter and Art. 6, para. 2, TEU it should be recalled that in the Explanations to the Charter it is mentioned that Art. 34, para, 2, EU Charter constitutes a right in the proper sense, while para. 1 and 3 of Art. 34 of the Charter recognize principles[71]. Art. 34, para. 3, EU Charter, is dedicated to social assistance benefits and housing assistance, and it aims to ensure a dignified existence for all those who do not have enough resources. Furthermore, the Explanations to the Charter of Fundamental Rights indicate that the article draws inspiration from Art. 13, 30, and 31 European Charter of Social Rights. The first rule concerns the right to social and medical assistance and confirms that this notion includes benefits intended for those who do not benefit from benefits deriving from a social security scheme. Art. 30 and 31 of the European Social Charter concern the right to protection against poverty and social exclusion and the right to housing respectively.

The right to housing establishes that the Member States should guarantee access to the housing, adjust the cost of the same to the applicant's resources, and gradually overcome the homeless status. This should also include the fundamental right to housing assistance expressly recognized by Art. 34, para. 3, EU Charter[72].

---

[71] R. White, *Article 34–Social Security and Social Assistance*, in S. Peers, T. Hervey, J. Kenner, A. Ward (eds.), *The EU Charter of Fundamental Rights*, 936 (2014). Si vedano, a tale proposito, S. Peers, S. Prechal, *Article 52 – Scope and interpretation of rights and principles*, in S. Peers, T. Hervey, J. Kenner, A. Ward (eds.), cit. at 55, 1506; A. O. Cozzi, *Diritti e principi sociali nella Carta dei diritti fondamentali dell'Unione Europea – Profili costituzionali* (2017).

[72] See G. Orlandini, W. Chiaromonte, *Commento all'art. 34*, in R. Mastroianni, O. Pollicino, S. Allegrezza, F. Pappalardo, O. Razzolini (a cura di), *Carta dei diritti fondamentali dell'Unione europea* 651 (2017). Si veda in questo senso W. Chiaromonte, S. Sciarra, *Migration Status in Labour and Social Security Law. Between Inclusion and Exclusion in Italy*, in C. Costello, M. Freedland (eds.), *Migrants at Work. Immigration and Vulnerability in Labour Law* 128 (2014); R. Nielsen, *The Charter of Fundamental Rights and Migrant Workers' Welfare Rights'*,

In the *Kamberaji*[73] case-law, Art. 34, para. 3, EU Charter was directly used by the Court of Justice to assess the correct application of EU law concerning the issue of equal treatment of long-term resident non-EU nationals. In particular, the Court of Justice clarified that the Member States is required to respect rights and principles enshrined in the EU Charter of Fundamental Rights and by Art 34, para. 3, EU Charter, cannot prejudice the useful effect of the directive in applying the principle of equal treatment[74].

However, EU secondary legislation contains some provisions which partially cover the right to adequate accommodation for cross-border seasonal workers, including those in agriculture. While, as discussed in the literature, the seasonal worker's directive includes rules on accommodation which third-country mobile seasonal workers must comply with to be issued a visa, work permit, or residence permit[75], and the revisited Posting workers directive makes host country rules on the conditions of accommodation, where they exit applicable to posted seasonal workers[76], there is no EU legislation in place to

in U. Neergaard, R. Nielsen, and L. Roseberry (eds.), *Integrating Welfare Functions into EU Law. From Rome to Lisbon* 97 (2009).

[73] Court of Justice, judgement of 24 April 2012, case C-571/10, *Kamberaj*, para. 86 and 87. See for a comment K. De Vries, *Towards Integration and Equality for Third-Country Nationals? Reflections on Kamberaj*, 13 Eur. Law Rev. 248 (2013); E. Bertolini, *Status giuridico dei soggiornanti di lungo periodo e diritto al sussidio per l'alloggio: precisazioni in materia di disparità di trattamento*, 12 Dir. pubbl. comp. Eur. 923 (2012); F. Costamagna, *Diritti fondamentali e prestazioni sociali essenziali tra diritto dell'Unione europea e ordinamenti interni: il caso Kamberaj*, 5 Dir. um. dir. int. 672 (2012).

[74] See G. Orlandini, W. Chiaromonte, *Commento all'art. 34*, cit. at 57, 664. Other important EU acts recognize the right to cross-border seasonal migrant workers in agriculture to enjoy adequate accommodation conditions. For example, the European Pillar of social rights contains a reference in point 8 of the Preamble. While the Community Charter of Fundamental Social Rights of Workers recognizes art. 7 the need to improve the living and working conditions of workers, including seasonal ones.

[75] See Art. 20 directives 2014/36/EU. See J. Fudge, P. H. Olsson, *The EU Seasonal Workers Directive*, cit. 16, 458; F. Breggiannis, *An analysis of the EU Seasonal Workers Directive in the light of two similar regimes: Three dimensions of regulated inequality*, in 15 Eur. Lab. Law J. 9 (2020).

[76] See Art. 1, para. 2, let. h), Directive 2018/957/EU. See P. Van Nuffel, S. Afanasjeva, *The Revised Posting of Workers Directive*, cit. at 6, 275.

guarantee accommodation conditions for other seasonal workers[77].

Nevertheless, Art. 20 Directive 2014/36/EU establishes that accommodation for seasonal workers must be in accordance with an adequate standard of living. According to this rule, EU Member States must require proof that the seasonal workers will benefit from accommodation that guarantees them an adequate standard of living according to national legislation, for the duration of their stay. Also, the competent authority must be informed of any change of accommodation for the seasonal worker. If the accommodation is provided by the employer or through him, on the one hand, the seasonal worker may be required to pay a rent whose cost must not be excessive compared to his salary and compared to the quality of the accommodation. Besides, the rent cannot be automatically deducted from the salary of the seasonal worker and the employer must provide him with a rental contract or equivalent document, which indicates the rental conditions of the accommodation. Also, the employer is required to ensure that the accommodation meets the general health and safety criteria in force in each host Member State. Art. 20 Directive 2014/36/EU is linked to the Art. 6, para. 1, let c). This last Article states that the applications for admission to a Member State under the terms of this Directive for a stay exceeding 90 days shall be accompanied by evidence that the seasonal worker will have adequate accommodation or that adequate accommodation will be provided, under Art. 20. Article 20 of the directive in exam is designed to ensure that employers do not exploit migrant workers through excessive housing charges or providing unacceptable accommodation. It is within the discretion of the EU Member State to determine whether workers are free to arrange their own accommodation or whether it is the employer's responsibility[78]. Moreover, Art. 20 Directive 2014/36/EU reflects a human rights approach because an adequate standard of living is one of the fundamental social rights adopted in international and European conventions[79]. The improvement of living condition and the social

[77] See Communication C/2020/4813, cit., p. 8.

[78] See J. Fudge, P. H. Olsson, *The EU Seasonal Workers Directive*, cit. at 16, 452.

[79] See C. Rijken, *Legal approaches to combating the exploitation of third-country national seasonal workers,* 31 Int'l J. Comp. Lab. Law Ind. Rel. 447 (2015). See, for instance, Art. 11 International Convention on Economic, Social and Cultural Rights, and Art. 31 European Social Charter.

inclusion of seasonal workers in the host EU Member States contributes to the long-term effectiveness of strategies against labour exploitation as part of a human rights approach[80]. However, at EU Member States level, there is great variation in how national authority and national legislation have further defined the concept of adequate living standards, including criteria which focus on living space, sanitation, safety, access to utilities, and the inclusion of basic facilities such as a hob and a toilet. The most often used criteria are sanitation, living space, and safety[81].

To ensure that seasonal workers effectively benefit from the provisions enclosed in Art. 20 of Directive 2014/36/EU, the competent national authorities must carry out intensive monitoring of the accommodation where they reside. The fact that accommodation is not sufficiently monitored is time and time again proven by cases of labour exploitation that come before the Courts, in which the abominable living conditions are an element of the exploitative conditions. National authorities responsible for ensuring labour standards oversee inspecting the accommodation provided to check that it meets the minimum standards. Other authorities, such as police or fire departments, border guards, immigration authorities, trade unions and tax authorities may also conduct inspections[82]. In other words, the effects of Art. 20 Directive 2014/36/EU depend on monitoring and effective enforcement by national authorities.[83] According to Art. 24 Directive 2014/36/EU, the EU Member States should have in place appropriate mechanisms for monitoring and ensure adequate inspections are carried out based on a risk assessment[84]. In addition, EU Member States should set up effective mechanisms by which seasonal workers may seek legal redress and lodge complaints directly or through relevant third parties. Workers should have access to judicial protection against victimization as a result of a complaint being made. However, a

[80] See C. Rijken, *Legal approaches to combating the exploitation*, cit. at 64, p. 447.
[81] See European Migration Network (2020). Attracting and protecting the rights of seasonal workers in the EU and the United Kingdom – Synthesis Report. Brussels: European Migration Network, p. 23.
[82] See European Migration Network (2020). Attracting and protecting the rights of seasonal workers in the EU and the United Kingdom – Synthesis Report. Brussels: European Migration Network, p. 26
[83] See C. Rijken, *Legal approaches to combating the exploitation*, cit. at 64, 448.
[84] See J. Fudge, P. H. Olsson, *The EU Seasonal Workers Directive*, cit. at 16, 461.

strong position for labour inspectors has not been implemented in the seasonal worker's directives[85]. Indeed, Art. 24 Directive 2014/36/EU does not add any substantial obligations for inspectors and other monitoring bodies as it relies on national legislation for its implementation. Hence, this directive does not create new obligations for EU Member States on the monitoring of risk areas, such as housing or wage and working hours. Furthermore, the Directive 2014/36/EU fails to provide that if the employer does provide accommodation the seasonal workers should never be obliged to stay in such accommodation[86].

The directive establishes mechanisms for monitoring, evaluating, and verifying the compliance of employers with national instruments[87]. According to Art. 24, para. 1, Directive 2014/36/EU, Member States must establish measures to prevent possible abuses and to sanction infringements of this Directive, including monitoring, evaluation, and, where appropriate, inspection under national law or administrative practice. In particular, the Directive 2014/36/EU recommends using risk assessments, based on sectors and history of infringements, when selecting employers to inspect[88]. Furthermore, Art. 24, para. 2, Directive 2014/36/EU requires the Member States to ensure that the departments in charge of the labour inspection or the competent authorities and, where provided for by national law for national workers, organizations which represent the interests of workers have access to the workplace and, with the agreement of the worker, to housing.

In this context, the European Labour Authority[89] (ELA) could step up its efforts, effectively enforcing employers' obligations and ensuring suitable accommodation for its workers.

---

[85] See C. Rijken, *Legal approaches to combating the exploitation*, cit. at 64, 448.
[86] See C. Rijken, *Legal approaches to combating the exploitation*, cit. at 64, 448.
[87] See J. Fudge, P. H. Olsson, *The EU Seasonal Workers Directive*, cit. at 16, 462.
[88] See Preamble 49 of Directive 2014/36/EU.
[89] Regulation (EU) 2019/1149 of the European Parliament and of the Council of 20 June 2019 establishing a European Labour Authority, amending Regulations (EC) No 883/2004, (EU) No 492/2011, and (EU) 2016/589 and repealing Decision (EU) 2016/344 (Text with relevance for the EEA and for Switzerland). See for a comment S. Giubboni, *The new European Labour Authority and social security coordination. Some preliminary remarks*, 19 Riv. dir. sic. soc., 521 (2018); S. Fernandes, *What is our ambition for the European labour authority?*, Jacques Delors Institute Policy Papers (2018).

Art. 2 Regulation (EU) 2019/1149 states that the objective of ELA is to contribute to ensuring the fair mobility of workers across the Union and to assist the Member States and the Commission in coordinating social security systems in the Union. To this end, and within the scope of application of Art. 1 Regulation (EU) 2019/1149, the European Authority facilitates and strengthens cooperation between the Member States in the application of the relevant Union legislation throughout the territory of the Union, including through concerted and joint inspections[90]. The European Labour Authority can allow the competent Member State authorities the right to organize and participate in joint cross-border inspection actions. Art. 8 and Art. 9 Regulation (EU) 2019/1149 define the coordination and support responsibilities regarding concerted and joint inspections and the modalities in which these are carried out. To improve the capacities of Member States to ensure the protection of persons exercising their right to free movement and to tackle cross-border irregularities relating to Union law within the scope of this Regulation, ELA may assist national authorities in carrying out concerted and joint inspections, including by facilitating the conduct of inspections following Art. 10 Directive 2014/67/EU. These inspections must take place at the request of the Member States or subject to their consent to the Authority's proposal. The European Authority provides strategic, logistical, and technical support to the Member States participating in concerted or joint inspections in the areas of its competence and with the utmost respect for confidentiality obligations. Inspections should take place with the agreement of the Member States concerned and take place in full compliance with the legislative framework or national practice of the Member States in which they take place. Member States should follow up on the results of concerted or joint inspections under national law or practice. Concerted and joint inspections should not replace or undermine national competencies. National authorities can also be fully involved in such inspections and have full authority.

However, there is no EU-wide mandate comparable to the competence in joint activities of other EU authorities such as the powers of inspection and coordinated action in the areas of antitrust law or consumer protection. Within the entire EU

[90] See Art. 2, let. b), Regulation (EU) 2019/1149.

territory, national compliance authorities carrying out their tasks jointly should be empowered to conduct all necessary company inspections and related investigations[91].

The establishment of ELA does not contribute to improving the sanctioning policy towards violators. Art. 7, para. 1 let. d), Regulation (EU) 2019/1149 states of the task of facilitating and supporting cross-border procedures for the execution of sanctions and fines. However, the internal market rules governing economic freedoms so far have few fine or redress mechanisms in the field of cross-border activities. Indeed, in the context of cross-border labour mobility, the lack of effective and dissuasive sanctions was noted. For example, different types of sanctions are not guaranteed in a transnational context. Furthermore, the detection of fraud or infringements in one Member State does not prejudice the initiation of comparable fraudulent activities in another Member State. The fine policy must fulfill two objectives: to punish and discourage. In this regard, the literature reports that violations damage the economy and long-term violations undermine the principles of free movement. The contribution of ELA could be useful in developing the main rules for a fine policy at EU level and for procedures in case of violation of the law[92].

Now, only the intervention of the national authorities can allow the full enjoyment of the rights of seasonal workers.

3. Accommodation rights in Italy: the extreme example of cross-border seasonal workers in agriculture

The case study here analyzed highlights that unacceptable living conditions exist also in contemporary Europe, for instance in Italy, with a variety of consequences of both legality and fairness. For example, extreme and unfair living conditions of immigrant workers - state of need –, including outside the agricultural sector, can lead to illegal occupations of spaces - criminal aspects -. The severity of these further consequences on human beings and on the system as a whole, of interacting legal and social domains, often depends on some legal prerequisites or on their absence, such as a legal resident or citizen status. This

[91] See J. Cremers, *The European Labour Authority and rights-based labour mobility*, ERA forum 31 (2020).
[92] See J. Cremers, *The European Labour Authority*, cit. at 76, 32.

makes for a sort of "vicious cycle" among systems, which has been already mentioned with respect to the *Tuïmer* case.

Hence, the purpose of this section is to explain how Italian authorities fulfill their obligations concerning the right of accommodation through law and public policies.

In the next subsections, three areas will be presented, since they each affect the condition of less advantaged groups: Immigration policy, Labor Law conditions in the agricultural sector, and the protection of the right to accommodation in Italy. However, their overlap will soon become evident as the argument is developed.

Before proceeding further, two preliminary aspects deserve to be mentioned.

The first is based on the connection between the European and the national contexts. Directive 2014/36/EU has been implemented in the Italian system through Legislative Decree n. 203/2016[93] and the latter has modified what can be called the Immigration Code (*Testo unico sull'immigrazione*, TUI)[94]. These recent normative interventions will be explored further below, but for the moment it is interesting to underline the fact that the only national legal source that received changes from the directive, so implementing EU Law, is that concerning immigration. Above all, this scenario appears notwithstanding that the European directive addresses conditions not only for entering the country but also for periods, more or less long, of permanence in the country[95]. This is

[93] Legislative Decree 29 October 2016, n. 203, *Attuazione della direttiva 2014/36/UE sulle condizioni di ingresso e di soggiorno dei cittadini di Paesi terzi per motivi di impiego in qualità di lavoratori stagionali*.

[94] Legislative Decree 25 July 1998, n. 286 (and following modifications), *Testo unico delle disposizioni concernenti la disciplina dell'immigrazione e norme sulla condizione dello straniero* (since now on, *Testo unico sull'immigrazione*, TUI).

[95] Recital 41, directive 2014/36/EU: «Seasonal workers should all benefit from accommodation that ensures an adequate standard of living. The competent authority should be informed of any change of accommodation. Where the accommodation is arranged by or through the employer the rent should not be excessive compared with the net remuneration of the seasonal worker and compared with the quality of that accommodation, the seasonal worker's rent should not be automatically deducted from his or her wage, the employer should provide the seasonal worker with a rental contract or equivalent document stating the rental conditions for the accommodation, and the employer should ensure that the accommodation meets the general health and safety standards in force in the Member State concerned». Or 43: «Considering the specially vulnerable situation of third-country national seasonal workers

an element in support of the position according to which the protection of social rights still passes through other sectorial policies, mainly immigration and labor ones, with the consequence that this kind of general safeguard appears to be of a second level importance.

The second aspect concerns instead the social context and its practical needs, as an available and affordable workforce in the agricultural sector. The starting point for the following intellectual exercise consists in ignoring, for the moment, the social or legal composition of the workforce, for example the distinction by the categories of National/European/third-countries or that of the legal-illegal dichotomy. Simple as a marketing slogan, employers keep what is available at the lowest cost. If this "efficiency" point of view is taken as true, it can be also affirmed the condition that minimum social rights should be the same for all (an "equity" externality or starting point), but it is certainly possible that this same condition does not apply to the real world. In fact, and first of all, it can be more economically convenient to employ illegal immigrants, considering the scale of and number of immigration flows in the last years and migrants' vulnerability in terms of weak protections against breaches of the Law. Secondly, farmers can also hire a worker with a legal status - European or third-country national - but they are incentivized to exploit weaknesses of the social and legal orders, such as a lack of administrative controls and sanctions, to avoid contracting legal workers[96]. In

and the temporary nature of their assignment, there is a need to provide effective protection of the rights of third-country national seasonal workers, also in the social security field, to check regularly for compliance and to fully guarantee respect for the principle of equal treatment with workers who are nationals of the host Member State, abiding by the concept of the same pay for the same work in the same workplace, by applying collective agreements and other arrangements on working conditions which have been concluded at any level or for which there is statutory provision, in accordance with national law and practice, under the same terms as to nationals of the host Member State».

[96] A. Corrado, F.S. Caruso, M. Lo Cascio, M. Nori, L. Palumbo and A. Triandafyllidou, *Is italian agriculture a "pull factor" for irregular migration- and, if so, why?* (2018), 3. In 2015, nearly half of all agricultural workers in Italy were foreigners (both European and third-country workers). In 2015, 50 percent of all workers in the sector (Italian and non) were without a formal contract, but the vast majority (80 percent) were foreigners. Cfr. A. Corrado, *Migrant crop pickers in Italy and Spain*, Heinrich Böll Foundation e-paper 14 (2017): «A restrictive migration policy, together with a complicated, inefficient and bureaucratic system for admitting seasonal workers from abroad, as well as low quotas for

Italy, this reality resulted in paradoxical situations, such as that between 2006-2015, in the Foggia area, migrant farm workers preferred to stay in their existing ghettos, which are dispersed throughout the countryside, despite alternative solutions offered by public authorities[97]. During the Pandemic, the situation has deteriorated and, particularly in the South, thousands of migrant workers have been stuck in makeshift encampments, living without basic protections against Covid-19 (Bari-case, April 2020; Mondragone-case, June 2020)[98]. Now, differently from the pre-Pandemic context, hidden degraded social situations are becoming more easily evident than in the past, of isolated individuals in the countryside during harvest seasons. The sanitary-risk heightens public awareness and concern, hence weakening the urban/rural or center/periphery divide - and the

entering the country and difficulties with renewing work permits, are all factors that encourage irregular immigration or asylum applications by people, who want to enter the country to work. Irregular migrants and asylum seekers are at great risk of being severely exploited when working in agriculture. However, seasonal agricultural workers often also experience difficult working and living conditions because of a lack of housing and transport services». Concerning statistical data, see M. McBritton, *Lavoro extracomunitario, mercato del lavoro, contratti*, in 4 RGL 582-583 (2017). Yearly reports are also available on the official website of *Ministero del lavoro e delle politiche sociali*, https://www.lavoro.gov.it/priorita/Pagine/Pubblicato-il-X-Rapporto-annuale-Gli-stranieri-nel-mercato-del-lavoro-in-Italia.aspx (11 February 2021).

[97] A. Corrado, *Migrant crap pickers in Italy and spain*, cit. at 96, 14: «In 2006, in the province of Foggia (Italy), the Regional Government tried to establish a housing system for seasonal workers through local co-operatives, called "alberghi diffusi per i lavoratori stagionali". Yet cost cutting and delays meant that many such accommodations were converted for other uses (such as housing asylum seekers), and the isolated locations in the countryside, with no transportation available, meant that migrant farm workers had little incentive to stay there. This model was replaced by «emergency measures», and in 2015, three million euros were spent for setting up a camp of tents for 250 people (the number of seasonal farm workers for the tomato harvest is estimated to be around 7500). This camp remained unoccupied during the entire summer season […]».

[98] L. Palumbo, A. Corrado (eds.), *Covid-19, Agri-Food Systems*, cit. at 5, especially the *Italy Chapter*, 10: «In April, a group of workers in an industrial meat processing plant in the province of Bari were infected by the Covid-19 virus. In June, an outbreak hit Bulgarian Roma farmworkers living in degraded buildings in Mondragone (Campania). This situation and the ensuing lockdown of the entire residential area caused protests and clashes with the Italian inhabitants».

favoritism towards the first element of this juxtaposition[99]. Once mobility started to decrease, space as "territory" or *locus* of living has acquired more relevance. The real territory - as a portion of land with its social problems and as a different concept from that of space - has become a more central issue to public opinion since people spend more time where they live. Hence, when in June 2020 an epidemic outbreak hit Bulgarian Roma farmworkers living in degraded buildings in Mondragone (Campania), the lockdown of the entire residential area caused protests and clashes between the Bulgarian Roma and the Italian inhabitants, with a nationalist resonance.

3.1. Prerequisites for a legal resident-status: job and accommodation

The key issue for this section consists in explicating the prerequisites low-skilled workers need to fulfill to enter the country. This includes those in the agricultural sector - especially extra-EU - and mainly regarding affordable living conditions. Consequently, the above-mentioned Immigration Code (TUI) will be analyzed.

First, the discipline of Visas comes into relevance[100]. In order to clarify access conditions to the country, the picture can be simplified by considering the following two elements: job and accommodation. In terms of accommodation, to have *ex ante* access to social housing services is impossible since for this purpose, according to the Italian legal order, a minimum period of legal residency in the country is necessary and the amount of time depends on regional and municipal regulations[101]. Hence, the *ex ante* availability of accommodation depends entirely on the market and on public policies that create it or on personal connections.

Then, to be considered legally resident, apart for obtaining a Visa, third-country nationals (TCNs) must apply for a residency permit (*permesso di soggiorno*) within eight days of their entrance to the country[102]. For foreign workers, the residency permit depends

[99] E. Olivito, *Le diseguaglianze fra centro e periferie: lo sguardo miope sulle città*, 2 Costituzionalismo.it 73-74 (2020).
[100] Art. 4, TUI.
[101] See paragraph n. 3.3. for more information on the point. However, the social housing system is explicitly mentioned among temporary and long-term reception facilities by paragraph 4 and 6, art. 40, TUI.
[102] Art. 5, TUI.

on the work contract (*contratto di soggiorno per lavoro subordinato*)[103]. The latter must guarantee minimum standard accommodation and the payment of a return flight to the employee's country, in order to be considered adequate for requesting a residence permit[104]. "Minimum standard" means that the accommodation respects social housing requisites, according to national legislation[105]. For seasonal workers the residence permit can last no more than nine months. If the worker can demonstrate having had at least one seasonal contract in the last five years, he or she can obtain a multi-annual permit of up to three years for the same kind of job activity. In this case, the migrant must return periodically to his or her country during the off-season as indicated by his or her contract[106].

Regions are obliged to provide short-term reception facilities for immigrants with a legal "residence status" but in temporary economic difficulty, hence unable to aspire to decent living conditions[107]. However, to be equalized to Italian citizens in access to standard social housing services, the immigrant must have a "special" legal "resident-status". This means he or she should have had a residence permit of at least two years validity,

[103] Art. 5-*bis*, TUI.

[104] See specifically for seasonal workers, art. 24, TUI, as modified by Legislative Decree n. 203/2016 that implements directive 36/2014/EU. It establishes the administrative procedure to follow by the employer, in addition to general consequences and specific sanctions in case of irregularities (par. 12 and 15).

[105] See paragraph n. 3.3. for more information on the point.

[106] Art. 5-*bis*, TUI.

[107] Par. 4, art. 40, TUI. Regions should provide these services in collaboration with provinces and municipalities (in addition to voluntary associations). The services to offer can be the same provided to Italian and European citizens and they are subjected to minimum payment conditions. Discrimination in the provision of social assistance, also for short-term immigrant with a legal "resident-status" (less than a year), is forbidden by art. 41, TUI. What is the meaning of "discrimination" is specified by art. 43, TUI, such as under paragraph 2, letter: «c) chiunque illegittimamente imponga condizioni più svantaggiose o si rifiuti di fornire l'accesso all'occupazione, all'alloggio, all'istruzione, alla formazione e ai servizi sociali e socio-assistenziali allo straniero regolarmente soggiornante in Italia soltanto in ragione della sua condizione di straniero o di appartenente ad una determinata razza, religione, etnia o nazionalità;», among which discrimination for the provision of an accommodation by whoever. Art. 40, TUI also provides instruments for guaranteeing legal protection against discrimination.

based on a stable work contract, or a permit card (*carta di soggiorno*)[108].

To sum up, there is not any *ex ante* effective enjoyment of the social right to accommodation, as considered from the perspective of the provision of a public service. Indeed, having access to accommodation is a prerequisite to obtain a Visa, and is the foreign worker's responsibility. Once the TCN worker has accessed the country legally, he can receive temporary support in case of economic difficulties - such as reception in private or public facilities under a sustainable payment regime. This is extremely relevant in the context of low-skilled workers and an employment sector with a high risk of exploitation. In this sense, it is established that a special kind of residence permit can be provided for reasons of social protection, for example when situations of violence and cases of severe exploitation by criminal organizations towards foreign people emerge during administrative and criminal controls. However, this provision has been limited in its application[109]. It is important to point out that a large portion of the immigrant population in the country, for various reasons, does not enjoy a legal resident status[110]. According to TUI, for example, the category of asylum seekers is entitled to temporary accommodation in emergency hotspots[111]. Formally, their situations in terms of access to social

[108] Par.6, art. 40, TUI.

[109] Art. 18, TUI.

[110] Asylum seekers and migrants' vulnerability have been significantly exacerbated by the provisions of the new Law Decree n. 113/2018 on immigration and security (the first so called "Decreto Salvini"), declared partially unconstitutional in 2020 and now partially reversed by Law Decree n. 130/2020. The 2018 Decree abolished residence permits for humanitarian reasons, which were rolled out twenty years ago by Legislative Decree No. 286/98 to protect people in situations of humanitarian need, including vulnerable migrant women and minors as well as victims of torture. A. Corrado, *Is italian agriculture a "pull factor" for irregular migration- and, if so, why?*, cit. at 96, 6: «In Italy, the lack of an effective entry system for foreign workers capable of meeting labor demand in sectors such as agriculture has mainly been offset by the arrival of growing numbers of migrants from Eastern EU countries as well as by non-EU asylum seekers and refugees. In the case of asylum seekers, the interplay between lengthy asylum procedures — which to date take an average of 13-14 months — and a lack of adequate hosting and protection mechanisms in the country increases their vulnerability, thereby heightening the risks of exploitation».

[111] Art. 10-*ter*, TUI.

accommodation will differ once their requests for international protection are accepted or denied[112]. Nevertheless, a percentage of the immigrant population stays and works on the territory irregularly, without any legal status with which to enjoy social services and with a less than effective fundamental rights protection regime. For instance, to have access to standard social housing public services, immigrants need a minimum period of legal residency. It is curious enough to observe that an "accommodation", as a pre-condition, is also necessary in case of a request for a long-term residence permit[113].

3.2. The "default" disadvantaged worker-status in the Italian agricultural sector

At this point, the current section will try to consider "worker-status" independently from that of "resident". An abstract approach to the reasoning could be a fruitful path especially for analyzing seasonal workers in the European agricultural sector. Then, a more legal approach will be adopted.

At least in theory, a labor contract in agriculture should guarantee a set of minimum rights to the worker, for instance a fair salary. In other terms, he should receive a kind of remuneration - also in the form of "in kind" benefits - that can help him to achieve a dignified standard of life, such as decent accommodation. Hence, in applying Labor Law conditions no incongruences should emerge from the very moment that the supply of labor – determined also by free movement in the EU and

[112] Artt. 10-17, TUI. See also Law Decree n. 451/1995 on the control system at the borders; legislative decree n. 251/2007 on the asylum seeker status and on people more in general in need of international protection; legislative decree n. 25/2008 on minimum standards in procedures by Member States for granting and withdrawing refugee status (implementing the that time Council Directive 2005/85/EC and now replaced by directive 2013/32/EU of the European Parliament and of the Council); legislative Decree n. 142/2015 that implements European provisions on laying down standards for the reception of applicants for international protection (directive 2013/33/EU). Art. 22, Legislative Decree n. 142/2015 provides that also asylum seekers can work under certain conditions. However, a residence permit for asylum seekers can not be transformed in a work residence permit. On the Italian system of reception facilities for immigrants (especially with the pending recognition of the "asylum seeker" status) see M. Savino (ed.), *La crisi migratoria tra Italia e Unione Europea* (2017), especially chapters I and II and, specifically on the right to accommodation, chapter VI, 195 ff.

[113] Art. 9, TUI but also for family reunification, *ex* art 29, TUI.

conditions of the immigration policy - fit the labor demand perfectly - need of workers - and that the multilevel legal framework is based on premises of justice and fairness. This being the theory, why do many injustices emerge anyway in practice in contemporary Europe?

To answer the question, at least two "states of the world" must be recalled. On the one side, the market-approach at the supranational level should be taken into consideration, as already presented in section 2 for the European level. One of the main features of the European agri-food sector, which has led to problems related to Labor Law and social and immigration policies, has been the industrialization/digitization of the primary sector, even though this process has created less labor intensiveness. Then, this first element is combined with a second characteristic: a weaker union structure, that also means the contractual position of the worker is less protected than in the industrial sector. The third feature consists instead in the prevalent criteria of efficiency along the entire productive chain - with policies of driving prices down that can affect also the cost of labor. Finally, favoritism for large retailers must be taken into consideration as an element that also causes the depopulation of territories where once there were numerous small and medium-sized enterprises. This last process can evolve into less social control in the absence of local communities, with consequences, for example, on integration processes of immigrants[114].

On the other side, there are specific weaknesses of the Italian agricultural sector. First of all, a large portion of the workforce is foreign and irregular[115]. Secondly, there is a high

[114] For this group of arguments, see C. Faleri, *Il lavoro povero in agricoltura*, cit. at 17, 149-152. Cfr., adding the Italian literature to the European one mentioned in par. 2.2.: I. Canfora, *La filiera agroalimentare tra politiche europee e disciplina dei rapporti contrattuali: i riflessi sul lavoro in agricoltura*, in DLRI 259 ff. (2018); A. Frascarelli, *L'evoluzione della Pac e le imprese agricole: sessant'anni di adattamento*, 50 Agriregionieuropa (2017); M. Giaconi, *Le politiche europee di contrasto al lavoro sommerso. Tra (molto) soft law e (poco) hard law*, LD 439 (2016); A. Riccaboni, S. Cresti, *L'agricoltura nel Mediterraneo di fronte alle questioni globali*, Economia e società 335 (2016); D. Schiuma, *Il caporalato in agricoltura tra modelli nazionali e nuovo approccio europeo per la protezione dei lavoratori immigrati*, 1 RDA 87 (2015).

[115] Since the incidence of irregular working positions on the total working population in agriculture is already strong, considering also Italian citizens. A. Corrado, *Is italian agriculture a "pull factor" for irregular migration- and, if so, why?*, cit. at 96, 3, referring to 2015 CREA report. Cfr. C. Faleri, *Il lavoro povero in agricoltura*, cit. at 17, 151.

incidence of organized criminal activities, especially in the South, that make up the so-called "agromafia" system: control of the flow and type of products as well as to determine their prices and marketing methods, counterfeiting Protected Designation of Origin (PDO) and Geographical Protected Indication (GPI) products, fraud in the management of EU Common Agricultural Policy and, finally, the incidence of illegal recruitment practices and the role of *caporali* or gang leaders[116]. The last point is an issue that overlaps labor with international trafficking in human beings but also with the *de facto* presence of irregular foreign workers. Apart from irregular immigrants that enter the country for humanitarian reasons, to arrive and stay irregularly in the country for a certain period of time can be the only means for economic immigrants to directly establish a fruitful network for future job opportunities with local employers. Once a network has been created, the migrant will leave to then return to the country and stay legally on invite from an employer, considering the conditions required by the national immigration policy.

Furthermore, there are specific failings of the corresponding national legal framework. Some solutions offered to face structural peculiarities of agricultural activities contribute to exacerbating the sector weaknesses, to the detriment of EU-citizens as well (such as seasonal workers from Eastern Europe). In this case, the national legal system is unable to guarantee effective equal rights under European Law.

First, there is the *ab origine* discontinuity of the job activity, since it follows the harvest seasons. Hence, a discontinuity in salary follows a natural discontinuity in time (seasonality), with great disadvantages for workers. A public policy in response to this "in time" peculiarity can be the flexibility of the job-market, through special contracts, for example the *voucher* system. The latter has been implemented in Italy but reduced, also recently (2015), to a limited number of sectors and beneficiaries (with specific restrictions in agriculture, where there are already exceptions to the standard discipline of temporary contracts due to the intrinsic seasonality of the working activity)[117]. The reason

[116] A. Corrado, *Is italian agriculture a "pull factor" for irregular migration- and, if so, why?*, cit. at 96, 4.

[117] See C. Faleri, *Il lavoro povero in agricoltura*, cit. at 17, 157-159. The *voucher*, like a *sui generis* form of labor contract, has been established with art. 70, Legislative Decree n. 276/2003. In the first years following the adoption of the norm, the

lies in its not being able to guarantee long-term stability to working conditions, since employers prefer these contracts to more stable, but also more expensive, contract solutions. In addition to this problem, an even worse falling wages process can be added in time of economic crisis, with the concurring event of the increase in cheaper undeclared work in agriculture, where systems of controls, inspections and sanctions are less enforced[118].

Secondly, employers also suffer the consequence of crises, as the pandemic has proved. In the absence of sufficient workflow from abroad, the sector was not able to produce enough for the correspondent external and internal demand[119]. The Italian government adopted measures in March and April 2020 to provide financial support packages during the crisis, also covering

legislator modified the source of law (with Law Decree n. 2003/2005), providing the admissibility of the voucher system in the agricultural sector but with the limitation to carry out only short-term and occasional harvests, by students and pensioners. Later, Law Decree n. 112/2008 expanded the application of the 2003 and 2005 provision to all kinds of working activities with a seasonal feature, always executed by students, retired persons and housewives. Also with the more recent modifications to art. 70, introduced by Law n. 92/2012 and 99/2013 with the intention to intensify the use of the instrument, hence abandoning the enumerative list of activities allowed (the only limit is now the maximum amount of salary paid in a year), the limitations for the agricultural sector has remained in force, with regard to retired persons and young people with less than 25 years old (and enrolled in school or university courses). To sum-up, the intention has always been to reduce the use of the legal tool in the agricultural sector, in order to avoid its substitution with alternative (more guaranteed) forms of subordinate labor contracts. This limitation has been partially confirmed in 2015, with art. 48, Legislative Decree n. 81/2015. Beneficiaries of vouchers are all the operators in productive sectors, hence also the agri-food one, with the limit of 3.000 euro per year by people that are leaving unemployment situations and receiving public economic support. However, the legislator has forbidden the use of vouchers in the execution of works or services procurement contracts, except for specific hypotheses, to be identified by a decree of the Ministry of Labor and Social Policies, after consulting the social partners, thus introducing a limitation which, as far as it affects all productive sectors, it is certainly destined to have a significant impact in the agricultural sector, given the widespread use of these contract instruments.

[118] C. Faleri, *Il lavoro povero in agricoltura*, cit. at 17, 151-152.

[119] L. Palumbo, A. Corrado, *Italy Chapter*, in L. Palumbo, A. Corrado (eds.), *Covid-19, Agri-Food Systems*, cit. at 5, 4: «National farmers' organisations sounded the alarm on labor shortages due to border restrictions, especially of Eastern European workers (mainly Romanians, Poles and Bulgarians). This has highlighted the dependence of the agri-food sector on cheap and exible migrant labor, one of the results of power imbalances in long supply chains».

the agri-food sector[120]. In order to address the labor shortage in the sector, it also adopted a specific Law decree in May, as a post-pandemic economic stimulus. It is a temporary scheme to formalize all kinds of "irregular employment relationships"[121]. However, the provisions were not sufficiently economical for employers and the governmental solution received few applications[122].

---

[120] L. Palumbo, A. Corrado, *Italy Chapter*, in L. Palumbo, A. Corrado (eds.), *Covid-19, Agri-Food* Systems, cit. at 5, 10: «establishing for instance an increase from 50 to 70 percent in advance payments from the Common Agricultural Policy (CAP) as well as incentives for exports. The measures also provided for a two-month €600 transfer to agricultural workers on short-term contracts, subsidised lay-offs for all employees in the sector and rolled out social protection for seasonal workers. However, many migrant farmworkers who were employed informally could not benefit from this aid».

[121] *Ivi*, 10: «The scheme establishes two channels. The first allows employers to apply for a fixed-term employment contract for foreign nationals who were in the country before 8 March 2020 or to declare the existence of an irregular employment relationship with Italian citizens or foreign nationals. Undocumented migrants receive a residence permit for work reasons. The second channel allows foreign citizens with a residence permit that expired after 31 October 2019 and who can prove they worked in the above-mentioned sectors before this date to apply for a six-month temporary residence permit to look for a job in these sectors. The temporary permit can be converted into a longer residence permit for work reasons. In both channels, if the employment relationship ends, foreign nationals have the possibility of applying for a one-year residence permit to seek employment». The so called *sanatorie* must be considered as emergency-measures, similarly to the other instrument known as *Decreto flussi*, even if it is now adopted yearly. The issuance of one or more "flow decrees" by the President of the Council of Ministers is functional to annually plan the maximum quotas of non-EU foreign citizens to be admitted into the Italian territory, divided by subordinate and seasonal work - on the basis of a recruitment proposal name made by an Italian or foreign employer regularly residing.

[122] *Ibidem.* Among the shortcomings, the plan suspended some ongoing criminal and administrative proceedings against employers, but the regularization had a monetary cost and there may not be sufficient advantages to convince employers to regularise employment relationships. In addition to it, the conditions required to apply, especially for the second channel, significantly limit its scope, leaving numerous migrants in situations of irregularity and precariousness. It should be noted that, although the success of the measures adopted in 2020 is questionable, the implementation of the decree nevertheless required some efforts on the part of the public administration, in order to follow up on the requests. 2021, therefore, saw the paradoxical result for which the public administration was apparently not able to fulfill all the requests relating to fixed-term employment contracts before their expiry. Consequently, the Ministry of the Interior, given the difficulties presented by the Ministry of Labor

Thirdly, the incidence of criminality and irregularity in the sector should require a reasonable number of administrative inspections and criminal controls. As has observed in a previous study, in recent years the number of labor inspections in the agricultural sector has dropped from 14,397 in 2006 to 7,265 in 2017 and, hence, the belief in better-targeted controls is statistically unfounded since the percentage ratio between the number of inspections and employment irregularities has essentially remained the same, at around 70 per cent[123]. The labor inspections system is one of the key points addressed by European documents following the adoption of directive 36/2014/EU, for example in addressing another element of weakness in the sector: subcontracting[124]. The 2020 pandemic measures initially undermined the actions of illegal gang leaders (*caporali*) over the recruitment, transport and accommodation of farmworkers. However, police controls have progressively relaxed, mirrored by the corresponding rise in situations of criminality and exploitation[125]. In addition, the insufficiency of labor inspectorate controls in the sector increased during the pandemic[126] and this has contributed to an increase in recourse to irregular workers[127]. Given the original humanitarian residence permit has been withdrawn by TUI with the so-called *Decreto Salvini* of 2018, and

and Social Affairs and many immigration desks (*Sportelli unici per l'immigrazione*), has adopted an internal note stating that, in the event of a deadline of the contract and in case of pending procedure to regularize the position of the immigrant, the government cannot proceed with the issue of the residence permit (Circular no. 3020 of 21 April 2021). At a later stage, the Ministry then adopted a new circular, mitigating the effects of the previous provisions but always with heavy administrative burdens for the immigrant (*Circular no. 3625 of 11 May 2021*).

123 A. Corrado, *Is italian agriculture a "pull factor" for irregular migration- and, if so, why?*, cit. at 96, 6

124 See art. 24, directive 36/2014/EU and, for example, Council Conclusions (9 October 2020), 11726/2/20 REV 2, *Improving the working and living conditions of seasonal and other mobile workers*.

125 However, a National plan for the fight against the so called *caporalato* has been approved in 2020, for the period 2020-2022. See *Piano nazionale di contrasto al caporalato*, available here https://www.lavoro.gov.it/temi-e-priorita/immigrazione/focus-on/Tavolo-caporalato/Documents/Piano-Triennale-post-CU.pdf (Jan 2022).

126 A. Corrado, *Is italian agriculture a "pull factor" for irregular migration- and, if so, why?*, cit. at 96, 7.

127 L. Palumbo, A. Corrado, *Italy Chapter*, in L. Palumbo, A. Corrado (eds.), *Covid-19, Agri-Food Systems*, cit. at 5, 9-10.

that permits were issued mainly where international protection was rejected, the result is that the new legislation will entail an increase in the number of rejected asylum requests as well as of migrants losing their current legal status, which, in turn, will boost the number of irregular migrants that inevitably will remain on the territory, who will be even more vulnerable to exploitation[128].

Finally, the Italian approach to the sector seems quite advanced in terms of repression, even though an efficient prevention strategy seems more suitable to address the previous recalled structural problems[129]. In fact, art. 603-*bis* of the Criminal Code has been modified by the important Act addressing undeclared work and labor-exploitation in agriculture[130]. The article targets both abusive gang leaders and employers who take advantage of workers' precarity and insecurity. The amendment also provided for mandatory arrest *in flagrante delicto* and mandatory confiscation of proceeds and property as well as introducing corporate criminal liability. Moreover, in 2012 new paragraphs were also added to art. 22, TUI. According to this article, employers, who have the intention of calling workers from

[128] A. Corrado, *Is italian agriculture a "pull factor" for irregular migration- and, if so, why?*, cit. at 96, 6.

[129] For example, "regularization" schemes, preferably permanent and not temporary; more efficient systems of inspections and controls; an easier access to the country by foreign people for working reasons, in terms of *ex ante* conditions - since the 2016 modifications to TUI have already started to simplify the system of residence permit for "circular" workers, according to European provisions -.

[130] Law n. 199/2016. See A. Corrado, *Is italian agriculture a "pull factor" for irregular migration- and, if so, why?*, cit. at 96, 7: « […] Law established that victims of labor exploitation may have access to Article 18 of the Consolidated Act on immigration (Legislative-Decree No. 286/98), which provides victims of violence or severe exploitation with a long-term assistance and social integration programme, as well as - in the case of non-EU migrants - a residence permit for social protection, regardless of their cooperation with law enforcement (the so-called 'social route' to protection). […] In addition, Law 199/2016 amended the regulation concerning the Network of Quality Agricultural Work ('Rete del Lavoro agricolo di Qualità), which includes companies that respect fair labor and employment conditions in the agricultural sector. Although the law provides for structuring the Network into 'territorial sections' (local branches) to develop active labor market policies and promote actions to address labor intermediation, cooperation among the state bodies involved and from companies has been very low, with only a handful of them registering to join».

abroad, must present an *ex ante* permission to the territorial immigration office, proving the suitability of the accommodation offered and providing the draft of the contract. The recent modifications regard consequences of crimes committed in the past or irregular behaviors put in practice in view of this procedure by employers. Specifically, if during the preceding the office verifies that the employer was previously involved in illegal trafficking of human beings, was condemned under art. 603-*bis* of the Criminal Code or for employing immigrants without a valid residence permit, the officer must refuse the employer's request of authorization. The procedure must have the same outcome if the office ascertains that the documentation presented by the employer is false or if the foreign worker does not appear at the same office to sign the labor-contract, a precondition for the residence permit[131]. In 2016, with the implementation of directive 36/2014/EU and the new art. 24, TUI, the immigration discipline further specifies consequences for irregular behavior by employers of seasonal workers, referring mainly to the norms established in the above-mentioned art. 22. However, the updated provision enumerated an additional list of conditions that impede the employer from asking for a labor contract in favor of a foreign worker if the employer has been subjected to sanctions for provision of irregular work; if the employer's firm was insolvent or a shell company; if the employer did not respect his legal obligations towards workers in terms of social security, taxes or labor rights as provided by collective labor agreements; if, in the last twelve months, the employer fired workers to hire new ones. Moreover, the new discipline on seasonal work now provides the payment of damages by fraudulent employers in favor of workers[132].

The effectiveness of all these repression provisions depends on the system of inspections and criminal controls[133]. Inspections and control procedures can start *ex officio* or *ex parte*, through complaints, petitions or lawsuits. However, the regulatory

131 Par. 5-*bis* and 5-*ter*, art. 22, TUI, as added by Legislative Decree n. 109/2012, that implement directive 2009/52/EC, providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals.

132 Par. 14, art. 24, TUI (art. 17, directive 36/2014/EU).

133 L. Calafà, *Undocumentes work (by foreigners) and sanctions. The situation in Italy*, 321 Working paper "Massimo d'Antona".it (2017).

vacuum is precisely at both these levels in the national legal system, considering that the European directive has been quite vague on these points (art. 24, on monitoring and inspections, and 25, on petitioning) and that seasonal/foreign workers are normally quite reluctant to denounce. Sanctions and judicial reviews, at a second stage in the process to obtain effective protection of individual and collective rights, cannot work properly without an efficient detection system[134].

In conclusion, workers in the Italian agricultural sector comprise a vulnerable category, regardless of their territorial origin. The main reasons are the diffusion of atypical contracts and the "demand-driven" nature of employment relations. Foreigners are especially vulnerable to extortion if the definition of directive 36/2014/EU counts: "[…] the position of vulnerability […] as a "situation in which the person concerned has no real or acceptable alternative but to submit to the abuse involved". In this sense, Italy has made an evaluation subject to criticism by deciding to condition the Visa and the residence permit to strict job prerequisites (see par. 3.1) and by not providing an efficient mechanism for permanent regularization. Especially if the immigrant is irregular, he will enter the world of undeclared work - often in the hands of organized crime -, where there are no effective means of legal protection and no easy ways to get out.

The result is that the "worker-status" for one of the most disadvantaged human beings in society is not a sufficient theoretical starting point to guarantee legality and human and broader social rights – such as that to accommodation -, especially if the context in which the status of worker is defined, suffers structural abnormalities, mainly the myth of efficiency despite economic and social unsustainability.

3.3. The Right to accommodation in Italy and foreign people: human being-status versus (legal) resident-status and worker-status.

In this section the Italian legal order concerning the social right to accommodation will be analyzed, with the final goal to isolate the group of the most disadvantaged people - irregular seasonal foreign workers - for this paper. The right to accommodation will be looked at in depth mainly in terms of a

[134] V. Papa, *Dentro o fuori il mercato? La nuova disciplina del lavoro stagionale degli stranieri tra repressione e integrazione*, cit. at 3, 386-389.

public service that provides, in the most extensive meaning, social housing facilities (Public Law), even though the relevance of two other aspects must not be forgotten. On one side, the explicit attention paid by the Constitution to promoting homeownership through private savings - i.e. through public policies supporting easier access to credit by families - (art. 47, Cost.) [135]. On the other side, it is useful to underline its nature as an effective right that can guarantee other fundamental rights[136]. This includes a more basic idea of the right to accommodation that is able to balance subjective legal positions in Private Law - i.e. in cases of abusive residency or, on the contrary, of limits to evictions - or to guarantee effective enjoyment of basic freedoms - i.e. the right to private property, to the protection of family and privacy, etc. - [137].

The Italian Constitution does not explicitly mention a right to accommodation, differently to other countries such as Spain or Sweden[138]. However, the Constitutional Court has had many occasions to affirm its nature as a fundamental and a social right, even though it appears conditioned by the availability of public resources when considered in its "social" nature[139]. Hence, at least in a theoretical sense, the right to accommodation applies

[135] F. Bilancia, *Brevi riflessioni sul diritto all'abitazione*, 3-4 Istituzioni del Federalismo) 232-233 (2010).

[136] P. Chiarella, *Il diritto alla casa: un bene per altri beni*, 2 Tigor: rivista di scienze della comunicazione 140 ff. (2010).

[137] T. Martines, *Il «diritto alla casa»,* in N. Lipari (ed.), *Tecniche giuridiche e sviluppo della persona umana* (1974), 391-405. Cfr. G. Alpa, *Equo canone e diritto all'abitazione*, Politica del diritto 159 ff. (1979); D. Sorace, *A proposito di "proprietà dell'abitazione", "diritto d'abitazione" e "proprietà (civilistica) della casa"*, Rivista Trimestrale di Diritto Processuale Civile 1177-1778 (1977). A. Pace, *Il convivente* more uxorio*, il «separato in casa» e il c.d. diritto «fondamentale» all'abitazione*, in 1 Giurisprudenza costituzionale 1801 ff. (1988).

[138] G. Marchetti, *La tutela del diritto all'abitazione tra Europa, Stato e Regioni e nella prospettiva del Pilastro europeo dei diritti sociali*, 4 Federalismi.it 7 (2018). Cfr. R. Rolli, *Il diritto all'abitazione nell'Ue*, in A. Bucelli, *L'esigenza abitativa. Forme di fruizioni e tutele giuridiche. Atti del Convegno in onore di Gianni Galli* (2013), 51-61. C. Hunter, *The right to housing in the Uk* and G. G. Alvarez, *El derecho a la vivienda en España*, in 3-4 Federalismi.it 310 and 325 ff. (2010).

[139] Constitutional judgements n. 47/1987, n. 404/1988 but especially n. 252/1989. To remember this approach in the Italian legal order F. Bilancia, *Brevi riflessioni sul diritto all'abitazione*, in *Istituzioni del Federalismo*, cit. at 24, 234 ff. Cfr. G. Marchetti, *La tutela del diritto all'abitazione tra Europa, Stato e Regioni e nella prospettiva del Pilastro europeo dei diritti sociali*, cit. at 137, 9. Traditionally, for the definition of the right to accommodation as a "right of great uncertainties" see F. Modugno, I «*nuovi diritti» nella giurisprudenza costituzionale* (1995).

indistinctly to Italians and foreign people, due to the existence of the principle of equality[140]: what should really matter, in terms of fundamental rights, is the status of human being (and not citizenship or the resident status), as well as, in terms of social rights, the "worker-status", even though a labor perspective does not exhaust the entire range of enjoyable social rights[141].

The following analysis will briefly rebuild the overlap among national, regional and local regulations on the topic. Aspects of immigration policy will also be considered for foreign people. A last brief overview will be dedicated to a judicial review in favor of the latter.

In 2008, a national law decree was adopted, known as the "Housing Plan"[142]. In fact, there is a National legislative competence to establish minimum standards for access to social housing by disadvantaged people. In the past, the regions appealed the Constitutional Court for possible conflicts between national and regional competences[143]. The Court affirmed that social public housing is a "transversal subject" that involves different material segments for which the government and regions share legislative competences[144]. Regions have a complementary role in urban planning, in the management of the public and private real estate at the disposal of social services and in the provision of the latter, taking into consideration also local autonomy[145].

---

[140] F. Modugno, I *«nuovi diritti» nella giurisprudenza costituzionale*, cit. at 134, 61 ff.
[141] See, for a controversial constitutional judgement, the decision n. 32/2008, against which C. Corsi, *Il diritto all'abitazione è ancora un diritto costituzionalmente garantito anche agli stranieri?*, in 3-4 Dir. imm. e citt. 141 ff. (2008). Cfr. P. Bonetti, L. Melica, *L'accesso all'alloggio*, in B. Nascimbene (ed.), *Diritto degli stranieri* (2004), 1017 ss. F. Scuto, *Il diritto sociale alla salute, all'istruzione e all'abitazione degli stranieri «irregolari»: livelli di tutela,* 2 Rassegna parlamentare 381 ff. (2008). M. Meo, *Il diritto all'abitazione degli stranieri quale presupposto per un'effettiva integrazione*, in F. Rimoli (ed.), *Immigrazione e interazione. Dalla prospettiva globale alle realtà locali* (2014), 415-417; F. Pallante, *Gli stranieri e il diritto all'abitazione*, 3 costituzionalismo.it 135 ff. (2016).
[142] Art. 22, Law Decree n. 112/2008.
[143] Constitutional judgment n. 94/2004. See also Constitutional judgment n. 121/2010.
[144] S. Civitarese Matteucci, *L'evoluzione della politica della casa in Italia,* 1 Riv. Trim. dir. pubbl. 163 ff. (2010).
[145] E. Balboni (ed.), *La tutela multilivello dei diritti sociali* (2008), especially chapter V. Valenti, *Il diritto alla casa nelle politiche regionali*.

Differently to the Constitution, many regional statutes and laws explicitly recognize a right to accommodation, hence filling the national legal gap on the point and providing *in melius* conditions[146]. Hence, many plans for social housing have been established territorially, mixing different approaches. However, not all of them have concretely addressed the entire population spectrum, since more detailed regional and local regulations have often conditioned the access to social housing services to a legal permanency in the region or in the municipality for a minimum period, normally in terms of years (within a range of 2-10 years). In some cases, they have established a calculation system for priority lists, giving significant weight to residency variables, instead of considering as prevalent the real difficulties for families. As a result, foreign people suffer institutionalized discrimination since it is precisely the lack of legal regularization or the difficulties to obtain long terms residence permits that can cause the most disadvantaged situations and, at the same time, these factors are the exact impediments for the access to social services[147]. Two events indicate attempts to change this *status quo*. Firstly, in 2014, a national law modified the "Housing Plan", providing a more extensive definition of social housing[148]. Secondly, in the same year, the Constitutional Court declared illegal the term of eight years residency required by *Regione Valle d'Aosta* to have access to social housing[149].

In terms of judicial review, regarding the right to accommodation, the preference will be here for the subjective position of foreign people, since this case-study has shown how their position is one of the most disadvantaged in the country, both as workers, immigrants and human beings, especially in the seasonal agricultural sector. Policy-sectors taken into consideration are often overlapped in terms of jurisdiction. For example, the Italian immigration discipline, that also involves the right to accommodation, divides the jurisdiction between Civil

[146] See for example the statues of Regione Abruzzo, Regione Lazio and Regione Piemonte.
[147] R. Lungarella, *Guerra tra poveri per la casa. Tra italiani e stranieri*, *www.lavoce.info* (2015).
[148] Art. 10, co. 3, Law n. 47/2014.
[149] Constitutional judgment n. 168/2014.

and Administrative tribunals[150]; the doctrine agrees on the fact that clarity lacks in this system of concurring jurisdictions and that traditional parameters able to justify certain administrative judicial powers do not often apply in the sector - with further complications[151]. Moreover, the right to accommodation can be

[150] To rebuild the division between the two jurisdictions is for example M. Noccelli, *Il diritto dell'immigrazione davanti al giudice amministrativo*, 5 *Federalismi.it* 5 ff. (2018). Concerning the civil jurisdiction, new tribunal sections were established in 2017, specialized in immigration, international protection and free movement of European citizens (artt. 1-5, Law Decree n. 13/2017). To sum-up, in terms of extra-Eu voluntary migration (i.e. for economic and working reasons), Civil tribunals have jurisdiction on measures of refoulement, expulsion, execution and on measures concerning family reunifications. Civil tribunals have also competences concerning involuntary migration *ex* art. 35, Legislative Decree n. 25/1988: recognition of the asylum seeker status or of that of subsidiary protection in case of non-recognition of the asylum seeker status but there is a serious risk for personal security in case of refoulement. There was also a status for humanitarian reasons, before the 2018 so-called *Decreto Salvini* (see above in footnotes). In its place, there are temporary residency permits for special reasons (such as medical care, social protection, working exploitation, etc.). Administrative tribunals, on the opposite, have jurisdiction in special case of public power exercise for voluntary migration, with and without discretion, as provided by TUI: all controversies on Visa and residency permit procedures (with the today exception of family reunification); against procedures for the emersion of irregular work conditions, refoulement-expulsion-execution measures for public order and security (art. 13, co. 1, TUI) or for terrorism prevention (Law n. 155/2005). In the subject of involuntary migration, administrative tribunals have jurisdiction, again, on special cases. For example, there is that of temporary residency permit procedures for the following special reasons: wars, natural disasters and other events of particular seriousness in extra-Eu countries (as provided by Legislative Decree n. 88/2003, that implement directive 2001/55/EC); or against decisions of prefects that revoke reception measures in favor of immigrants as a sanction for their not compliance with settled conditions of permanency. Civil tribunals have jurisdiction also on citizenship, except for the one "for concession" (art. 9, Law n. 91/1992).

[151] For example, the distinction between the exercise of discretionary and not discretionary administrative powers; neither the classical distinction between subjective rights and legitimate interests. Hence, both jurisdictions obtain the same results in terms of foreign people protection even though under different legal reasoning and justifications. See M. Noccelli, *Il diritto dell'immigrazione davanti al giudice amministrativo*, cit. at 149, 12. In case of administrative jurisdiction, judicial powers increase, normally, when public administration discretion decreases. However, since the foreign people positions and the guarantee of fundamental rights, administrative judges are called to a different balance in terms of administrative discretion and their power to judge. For example, the author recalls case-law concerning foreign people's "income

observed, as already seen, under other perspectives. These include from within different jurisdictions, for example through Criminal judicial review in the case of substandard residency or through Labor judicial review in the case of irregular contracts without guarantees of a decent accommodation by employers in seasonal agriculture.

However, the choice of this last section has been to prefer the perspective of a right to accommodation as a fundamental social right or a positive freedom that needs a public policy - or a public service - in order to be enforced. As seen, the right to accommodation as a public service is not the only or the prevalent reading key, but probably the most fruitful one if one wants to explore the effectiveness of this social right[152]. Hence, public

capacity" as a proof for the confirmation procedure of residency permits, where the administrative judge has adopted a wide meaning of "income capacity", judging the effective and concrete contribution of immigrants to the national community; or in case of foreign people considered "dangerous" for the community by administrative decisions, hence intended for expulsions; etc. As observed in the essay abovementioned, the administrative judges do not jeopardize the scope of TUI concerning the access to the country. However, once the person is in the country, regularly or irregularly, the tendency is to recognize the fullest set of rights is possible.

[152] Social housing is expressly defined as a service of general economic interest by art. 1, par. 5, Ministerial Decree 22 April 2008, that has been the first to introduce the notion of social housing (*edilizia residenziale sociale*, different from *edilizia residenziale pubblica in* the sense that the first one is a more general category where the second one is included). Also, the Council of State had the occasion to clarify the definition of social housing, even though in a more restricted way to the previous one (Cons. St. Ad. Plen., 30 January 2014 n. 7). In par. 6.1.1., the tribunal has affirmed that social housing, as a (also local) public service of general economic interest, addresses disadvantaged citizens that are unable to afford a market-price rent but that, at the same time, can not have access the *edilizia residenziale pubblica* since they lack of standard conditions requested for traditional public facilities of social housing (in concrete terms, the service provide rents at affordable prices). In the judgment, the application of the Public Procurement Code has been excluded since the service under scrutiny falls in the category of granting a "public service" (*concessione di pubblico servizio*). In the legal science, see P. Saggiani, *La tutela del diritto all'abitazione per le fasce più deboli della popolazione: tra politiche abitative esistenti e alcune proposta per il social housing*, 17 Rivista di Diritto dell'Economia, dei Trasporti e dell'Ambiente 440 (2019), where the author affirms that in the Republic, in its different territorial declinations, the right to accommodation has a "pretensive charge" towards public powers by people, especially disadvantaged ones (since the nature of social housing). Hence, public powers should have a "duty" of doing or providing "something" (a public service) in favor of citizens, or of those assimilated to them, and under reasonable

administrations exercise their powers according to a set of rules and rights in the provision of the public service, at times under a judge's scrutiny. In terms of social housing, jurisdiction is divided, again, between ordinary and administrative courts on the basis of the phase of the procedure: before and after the allocation decision. Before it, the procedure is considered of administrative relevance[153].

In terms of denied access to this public service to foreign people, the jurisdiction is even more unstable. If the issue is amplified in terms of discrimination, it is possible to find judgments by ordinary tribunals even though administrative decisions are involved. For example, the quite recent decision in favor of Mr. Majdi Karbai against *Regione Lombardia*, for the adoption of a discriminatory regulation which impeded access to public real estate to foreign people with an international/humanitarian protection status, with a long-term residency permit but unable to demonstrate their lack of property of a home in their original country, or in absence of a legal residency or of five years working activity[154]. At the same time, it is possible to find judgments by administrative courts on similar

conditions. Cfr. E. Bargelli, *Abitazione (diritto alla)*, in *Enciclopedia del diritto* (2013), 7. See also S. Civitarese Matteucci, *L'evoluzione della politica della casa in Italia*, cit. at 143, 167.

[153] Judgments of the Court of Appeal (ordinary jurisdiction) 14267/2019; n. 9918/2018; n. 3623/2012. Judgments of Regional Administrative Courts: TAR Lazio Roma n.6272/2016; Tar Lazio n. 12307/2016; Tar Puglia n. 315/2017; Tar Puglia n. 401/2017.

[154] Order 27/07/2020, Ordinary court of Milan (Civil section), case n. r.g. 23608/2018. Apart for the object of the controversy, it is interesting that the case arrived in front of the Constitutional Court, which declared unconstitutional the regional regulation (judgment n. 44/2020), and that Regione Lombardia asked for a changing jurisdiction in favor of administrative tribunals, obtaining a rejection. With similar conclusions of the Ordinary Court of Milan, the even more recent Constitutional judgment n. 9/2021, regarding a law adopted by Regione Abruzzo in 2019. The latter provided a further documentary burden to citizens of third countries with the fiscal residency in Italy that wanted to apply for social housing accommodation, hence causing discrimination (specifically, a proof of the lack of property of an adequate home in the original country by all the components of the family). In addition to it, the Regional Law also conditioned unreasonably the score obtained by each applicant to the period of residency in a municipality of the Region. The provision has been considered illegal by the Constitutional Court (as already in the judgments n. 281 and n. 44/2020, n. 166 and n. 107/2018, n. 168/2014, n. 172 and n. 133/2013 and n. 40/2011).

situations and outcomes[155]. Comparable results to those of judicial decisions can be observed in municipal practices as well[156].

In conclusion, concerning the case of foreign seasonal workers discussed in this paper, the analysis in the previous paragraphs has pointed out that the employer must guarantee the provision of adequate accommodation to the worker. This provision applies to European citizens and immigrants with a regular residence permit. In case of irregularities perpetrated by the employer, the worker lacks the effective enjoyment of a social right to accommodation - notwithstanding the new provision of monetary compensation by the employer if the crime/irregularity is detected by the authorities - and in case of workers with a single or double irregularity: in the "resident-status" and in the "worker-status".

What are missing are both the fulfillment of duties by the employer, as prescribed by Law, and public policies in favor of a social right to accommodation open to all, as human-being with existential difficulties[157].

In the first case, the detrimental effect on the enjoyment of an effective social right, with probable consequences on the enjoyment of fundamental freedoms, derives from particularly vulnerable working conditions. Even though a solution has been found in the field of Labor Law, so following the Constitution according to which important social rights depend on the broader worker-status and not on being citizens, the specificity of seasonal workers, especially foreign people, seriously threatens the right to

[155] On the calculation system for priority lists for accessing procedures to *edilizia residenziale pubblica*, the administrative court of Regione Liguria has recognized a discriminatory behavior perpetrated by the Municipality of Genova, considering the additional points for having the Italian citizenship (TAR Liguria, n. 1354/2011).

[156] For example, in 2009, the Municipality of Calenzano (Florence, Regione Toscana) provided subsidies for rents to foreign people notwithstanding they did not respect the prerequisites provided by the national law n. 133/208 (10 years of permanence in Italy and 5 in the Region). The municipal executive decided to allocate part of the resources in favor of foreign people, differently excluded by the procedure. See CONSPE, in collaboration with the *Presidenza del Consiglio dei ministri* (*Dipartimento per le pari opportunità*), *La discriminazione nell'accesso all'alloggio. Analisi dei settori pubblico e privato*, 2010, 28-29.

[157] B. Pezzini, *Una questione che interroga l'uguaglianza: i diritti sociali del non-cittadino*, Associazione italiana dei costituzionalisti. Annuario 2009 (2010), 178 ff. Cfr. G. Bacherini, *Immigrazione e diritti fondamentali. L'esperienza italiana tra storia costituzionale e prospettive europee* (2007), 266 ff.

decent accommodation. In fact, even though the worker-status is not built on a citizenship prerequisite, the idea at the very base is influenced by market-oriented logic, limiting the importance of the social dimension. In addition, the fact that a specific regulation on seasonal work is provided by TUI, makes evident the tendency of the Italian legislator to think in terms of securitization, instead of integration.

In the second case, what prevails in Italian public policies in favor of a social right to accommodation is a lack of attention to real equality and a tendency to excessive legality. Notwithstanding the theoretical debate, the effective enjoyment of adequate accommodation for the least advantaged people depends in practice on the traditional idea of citizenship, as derived by the idea of the Nation.

4. Conclusions

The Covid-19 crisis has sharply exacerbated the structural inequalities that characterize the socio-economic systems of EU Member States, including Italy, disproportionately impacting people most affected by discrimination and social exclusion[158]. This happens, above all, regarding cross-border seasonal workers in the agricultural sector. As the literature has underlined, the recourse to flexible, cheap and low-cost labor in the agriculture sector is driven by an interplay of factors[159]. This system takes advantage of the inadequacies of European and national policies on migration and labor mobility[160]. On the one side, seasonal workers in agriculture, and cross-border workers, have been recognized as essential workers needed to feed EU Member States, during the Pandemic. On the other side, the recent social crisis shows that not even the status of worker allows the enjoyment of access to social rights in the EU multilevel legal system. Cross-border, seasonal workers in agriculture - both EU and non-EU citizens - have difficulty accessing the right to suitable

[158] See M. G. Giammarinaro, L. Palumbo, *Covid-19 and inequalities protecting the human rights of migrants in a time of pandemic*, Migr. Pol. Pract. 21 (2020); D. Mangan, E. Gramano, M. Kullmann, *An unprecedented social solidarity stress test*, 10 Eur. Lab. Law J. 247 (2020).

[159] See A. Corrado,*Is Italian Agriculture a "Pull Factor" for Irregular Migration – And, If So, Why*?, cit. at 96.

[160] See M. G. Giammarinaro, L. Palumbo, *Covid-19 and inequalities protecting the human rights of migrants in a time of pandemic*, cit. at 157, 22.

accommodation in EU Member States. Thus, agricultural seasonal workers in live in unsafe and unhealthy housing such as in shacks near farms. In this way, they are highly exposed to exploitation. Directive 2014/36/EU has established some standards to promote better protections for these workers, but most governments do not invest enough resources in monitoring mechanisms to detect instances where employers break the rules and exploit workers[161]. National and European institutions must take additional steps to support cross-border seasonal workers in agriculture directly, such as investing in pre-departure orientation to ensure they are aware of their rights and the services available to them in the destination Member States. Furthermore, host national authorities could map and design initiatives to address issues facing specific kinds of workers, such as women. Thus, dedicated monitoring, outreach, and support mechanisms for such workers could be provided. Lastly, in concrete terms, the improvement in the access to social rights for seasonal workers in agriculture – both EU citizens and non-EU citizens – depends on a broader access to the labor market, efficient inspection systems, exchange of information on the rights possessed by each category and on the national effort for social public policies and social integration.

Hence, difficulties remain for the enjoyment of social rights by the most vulnerable individuals. No predominant legal status can effectively guarantee access to them. For example, difficult access to the labor market by non-EU citizens fosters irregular immigration and leads to greater exploitation for these vulnerable individuals. At the level of the Member States, social citizenship is understood as an institution that gives citizens the right to enjoy a minimum of economic well-being and inclusion through the sharing of social solidarity created within the community.

EU citizenship, on the contrary, does not offer a similar right to enjoy a level of social security across Member States. Rather, in the European legal framework, the EU social citizenship configures a set of prerogatives that allows European citizens – who make use of the freedom of movement (Art. 21 TFEU) – to access, under certain conditions and without discrimination based on nationality (Art. 18 TFEU), the welfare system of the host Member State. Indeed, these rights are subject to the conditions

[161] See Hooper K., Le Coz C., *Seasonal worker programmes in Europe: promising practices and ongoing challenges* 12 (2020).

established by Directive 2004/38/EC. The European worker is the central element of the single market. For this reason, he or she enjoys full rights of free movement and residence. These rights entail equal treatment between EU migrant workers and workers of the host Member State, as regards employment, remuneration and other working conditions. The right to receive equal treatment means the worker must also have his social rights guaranteed in the host Member State. This is meant to better integrate the EU resident into the host society and allow him or her to fully benefit from the freedom of movement. By contrast, EU economically inactive citizens enjoy freedom of movement and the unconditional right of residence only for a period of three months. It should be noted that social solidarity is shared based on the individual's participation in the market and of her contribution to the financing of the welfare of the host Member State. Therefore, greater sharing brings with it greater enjoyment of social rights in the European legal area. However, European citizens who do not produce wealth enjoy a lesser share of solidarity. On one hand, the Court of Justice's case law – in the aftermath of the economic crisis – confirms this approach. Indeed, the Court of Justice's restrictive interpretation of access by economically inactive EU citizens to the welfare state has strengthened the logic that sharing social solidarity is subordinated to the contribution that the subject provides to the production of economic wealth in the host Member State. On the other hand, the restrictive approach on the sharing of solidarity is confirmed by the situation of low skilled workers, often non-EU citizens. They do not enjoy easily social protection and social security to protect them from the risk of living in poverty. In fact, non-EU citizens access social rights in a different way than EU citizens[162]. Moreover, some categories remain excluded from Directive 2014/36/EU, for example, third-country family members of EU citizens, posted workers, intra-

[162] Directive 2011/98/EU is relevant to the employment and social security rights of migrant workers. It introduces a single application procedure and a single permit for both residence and access to work in the territory of the host State. Furthermore, the directive guarantees some rights for workers who are nationals of third countries legally admitted to the Member States. The art. 3 of Directive 2011/98/EU has a broad scope. Indeed, it includes both workers who are nationals of third countries who apply to reside in a Member State for work reasons and those who have been admitted for work reasons, as well as third-country nationals who have been admitted for other reasons but are authorized to work in a Member State, under Union or national law.

corporate transferees, seasonal workers, au pairs, asylum seekers, third-country nationals enjoying temporary or international protection, persons who are long-term residents under Directive 2003/109/EC and self-employed workers[163]. The employment and social security of third-country nationals are guaranteed by a series of EU directives. They aim to promote and regulate labor migration from third countries to the EU, and they make the EU more attractive for labor migration from outside the EU and to partially harmonize rights and procedures to create a level playing field between the Member States. In particular, the EU directives on labor migration take a sector-by-sector approach. EU institutions have failed to adopt a comprehensive and common EU policy on labor migration and the corresponding legal instruments. For this reason, EU leaves room for the Member States to provide exceptions regarding the right to equal treatment in terms of employment and social security rights.

However, also at the Member States level, social citizenship is living through a period of crisis. In the case-study for Italy, the perspective of the right to accommodation as a fundamental (social) right is probably the most suitable. In the structure of Immigration Law in Italy, what emerges is that the "right to security" is inversely proportional to the "security of rights"; however, when immigration policies (but also policies addressing market failures) are not supported by adequate social interventions, what is obtained is social deconstruction and the "depression" of the Welfare State[164]. On the contrary, the solidarity principle should be always conditioned by a territorial criterion. Hence, foreign people should have access to social

[163] Art. 12, para. 1, let. e), of the directive no. 2011/98/EU, read in conjunction with its art. 3, par. 1, let. c), establishes an equality clause in access to social security, providing that a third-country national admitted for work purposes and third-country nationals admitted for purposes other than worker but who can work benefit from the same treatment reserved for citizens of the Member State in which they reside by social security sectors, as defined in Regulation 883/2004.

[164] See for these argumentations M. Noccelli, *Il diritto dell'immigrazione davanti al giudice amministrativo*, cit. at 149, 36 and M. Ruotolo, *Sicurezza, dignità e lotta alla povertà. Dal "diritto alla sicurezza" alla "sicurezza dei diritti"* 241 (2012). Cfr. G. Tropea, *Homo sacer? Considerazioni perplesse sulla tutela del migrante*, Riv. dir. amm. 861 (2008). On the evolution of the Italian Welfare State, see V. Satta, *Profili evolutivi dello Stato sociale e processo autonomistico nell'ordinamento italiano* (2012), especially chapter III.

services and to minimum standards of care, in equal terms to citizens, just because they are on a shared *locus*, in the same community, and especially if they need assistance as human beings in precarious conditions[165]. Apart for the role of Constitutional and supranational courts in favor of an abstract equality of rights and non-discrimination[166], especially the legislator, public administrations[167] and (ordinary and administrative) tribunals can play an important role in guaranteeing an "effective" enjoyment of fundamental rights to foreign people. In fact, effectiveness is the real core of social rights, in terms of the realization of a social citizenship[168].

Notwithstanding the difficulties observed in the theorization and implementation of a social citizenship at EU and national level[169], some case-law mentioned during the paper, even though limited, can be considered a further step towards an effective social right in both the EU legal order and in the country

[165] Constitutional judgement n. 306/2008, in the comment of A. M. Battista, *Rilevanza del reddito e adeguatezza della prestazione assistenziale per i cittadini e gli stranieri extracomunitari*, Giur. Cost 3338 (2008).

[166] Rebuilding the constitutional jurisprudence on foreign people between citizenship and territoriality, M. Savino, *Lo straniero nella giurisprudenza costituzionale: tra cittadinanza e territorialità*, Quad. cost. 41 (2017).

[167] Interesting policy proposals for the effectiveness of the right to accommodation, but without the reference to foreign people, can be found in P. Saggiani, *La tutela del diritto all'abitazione per le fasce più deboli della popolazione: tra politiche abitative esistenti e alcune proposta per il social housing*, cit. at. 151, 446: private involvement in facilities provision (as in the case of urban regeneration processes, also through the *Community Land Trust,* already experimented with in Belgium or UK), the creation of "social agencies" (already active in different municipalities) to manage supply and demand, or the involvement of social cooperatives or enterprises. See F. Gasparri, *Il social housing nel nuovo diritto delle città*, in *Feder.it,* 21 (2018).

[168] M. Noccelli, *Il diritto dell'immigrazione davanti al giudice amministrativo,* cit. at 149, 39. See G. Repetto, *La dignità umana e la sua dimensione sociale nel diritto costituzionale europeo*, Dir. pubbl. 247 (2016), where the author affirms human dignity has become a pure global formula that establishes and justifies the protection of fundamental rights.

[169] See S. Sciarra, *Solidarity and Conflict: European Social Law in Crisis* (2018); F. Costamagna, *Social Rights in Crisis: Any Role for the Court of Justice of the EU?*, in M. Meccarelli (eds.), *Reading the Crisis: Legal, Philosophical and Literary Perspectives* (2017); M. Ferrara, *The European Social Union: A Missing but Necessary "Political Good"*, in F. Vandenbroucke, C. Bernard & F. De Baere (eds.), *A European Social Union after the Crisis* (2017).

here under scrutiny: Italy[170]. Through jurisprudence, the European social charter and EU Charter of fundamental rights become alive. At the European level there are the already recalled *Tuïner, Kamberaji* and *Martinez Silva* cases. Concerning the right to accommodation, the 2010 decision of the European Committee of Social Rights, in response to complaint n. 58/2009 by the Centre on Housing Rights and Evictions can be recalled, especially since it addresses Italy[171]. At the national level, the above-mentioned case-law concerning specifically the right to accommodation for foreign people comes into relevance (i.e. the *Mr. Majdi Karbai* case). Recent case-law at the national level has further stressed the enforcement of social rights, beyond worker status, legal resident status and citizenship and beyond the example of the right to accommodation (i.e. the *INPS v. WS*[172] and *INPS v. VR*[173], ruled by

[170] On the effectiveness of the right to accomodation in Europe, see G. Guiglia, *Il diritto all'abitazione nella Carta sociale europea: a proposito di una recente condanna dell'Italia da parte del Comitato europeo dei diritto sociali*, *Aic* 1 (2011): «Malgrado il massiccio riconoscimento giuridico apprestato formalmente, sul piano del diritto internazionale e sovranazionale, spesso rafforzato dalle Costituzioni e dalle legislazioni nazionali, nonché dalla giurisprudenza delle Corti europee, costituzionali e dei giudici comuni, il diritto all'abitazione è in realtà scarsamente tutelato. In Europa la crisi abitativa colpisce ormai 70 milioni di persone mal alloggiate, di cui circa 18 milioni sotto sfratto e 3 milioni senza tetto. Tale numero sta ulteriormente aumentando a causa degli effetti della crisi finanziaria globale, che sta facendo perdere casa, a livello europeo, a circa 2 milioni di famiglie, in specie per morosità dei mutui. La crisi è poi aggravata dalla libera circolazione degli investimenti speculativi in seno all'UE, dalle privatizzazioni del settore abitativo pubblico e sociale, dalla mercantilizzazione del mercato abitativo, anche nella maggior parte dei nuovi Stati membri, dalle migrazioni e dagli insediamenti urbani non equilibrati, e ha come risultato, tra l'altro, un enorme approfondimento delle disuguaglianze e della segregazione sociale intra-urbana, che colpiscono i giovani, gli anziani, i disoccupati, i poveri, i migranti, ma anche le famiglie a reddito medio. Questa situazione, esattamente all'opposto dell'inclusione sociale che si vorrebbe ottenere all'interno dell'UE, porta ad emarginazione, precarizzazione e segregazione sociale; sviluppa disuguaglianza, speculazione e corruzione». See L. Ghekiere, *Le développement du logement social dans l'Union européenne. Quand l'intérêt général rencontre l'intérêt communautaire* 239 (2008).

[171] See G. Guiglia, *Il diritto all'abitazione nella Carta sociale europea: a proposito di una recente condanna dell'Italia da parte del Comitato europeo dei diritti sociali*, cit. at 90.

[172] Judgement CJEU, 25 November 2020, case C-302/20, *INPS v. WS*, EU:C:2020:957.

[173] Judgement CJEU, 25 November 2020, case C-303/20, *INPS v. VR*, EU:C:2020:958.

the CJEU, that concern the recognition of public economic benefits – maternity and birth – by the National Welfare Agency in favor of foreign families where one of the main members has a residency permit for work or a long-term residency permit in Italy)[174]. Also worth mention is the national jurisprudential and doctrinal discussion on the cogent role of the European Social Charter in the Italian legal system, under the "*norma interposta*" argument (the same adopted for the Nizza Charter or the European Charter of Fundamental Rights), and on limitations due to the *sui generis* nature of the European Committee of Social Rights' decisions[175].

In the end, it is perhaps possible to affirm that with the new European budget and the parallel Next Generation EU programmes, the implementation of the European pillar of social rights will receive a new impulse in terms of substantial Law. It is relevant, for example, that in the preamble and in the core text of the recent regulation on the establishment of the Recovery and Resilience Facility, the pillar and its implementation – but not the European Social Charter – are mentioned several times in key passages[176].

[174] For a complete presentation of these cases, also in the National legal order, see D. Gallo, A. Nato, *L'accesso agli assegni di natalità e maternità per i cittadini di Paesi terzi titolari di permesso unico nell'ordinanza n. 182/2020 della Corte Costituzionale*, *Eurojus* 308 (2020).

[175] The occasion has come with the Council of State, IV sez., decision to refer to the Constitutional Court, 4 May 2017, n. 2043, in www.giustizia-amministrativa.it (R. O. n. 111 del 2017). Then, Constitutional judgement n. 120/2018. See B. Liberali, *Un nuovo parametro interposto nei giudizi di legittimità costituzionale: la Carta Sociale Europea a una svolta?*, in Feder.it (2017). Cfr. S. Forlati, *Corte costituzionale e controllo internazionale: quale ruolo per la «giurisprudenza» del Comitato europeo per i diritti sociali nel giudizio di costituzionalità delle leggi*?, in *La normativa italiana sui licenziamenti: quale compatibilità con la Costituzione e la Carta sociale europea*, Atti del Seminario di Ferrara del 28 giugno 2018 (2019); S. Sturniolo, *Una porta prima facie aperta ma in realtà ancora «socchiusa» per la Carta sociale europea*, Forum Quad. cost. (2018); G. Monaco, *La Corte costituzionale ridisegna il proprio ruolo nella tutela dei diritti fondamentali tra Carta di Nizza, CEDU e Carta sociale europea,* Aic 146 (2020).

[176] Regulation (EU) 2021/241 establishing the Recovery and Resilience Facility: recital 4, 39 and 42 and art. 4, 18, 19.