

Family Reunification in the EU

The Movement and Residence Rights of Third Country National Family Members of EU Citizens

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Introduction

THE EUROPEAN UNION (henceforth the EU or the Union)¹ has developed complex legislation concerning family reunification² of third country national EU family members.³ For the purpose of simplicity it is possible to subdivide the group of families affected by this legislation into three main categories. The first category includes those third country nationals already residing within the territory of one of the Member States wishing to live with a third country national family member. In accordance with the power granted by the Treaty at Article 79(2)(a)(b) TFEU⁴ in the area of immigration, the EU released Directive 2003/86/EC on the right to family reunification, which sets minimum standard conditions for the exercise of

¹ For the purpose of simplicity, in this book the terms European Union, EU or Union will be used also when referring to the European Economic Community (EEC).

² The family reunification legislation does not simply encompass the right of residence of a third country national family member within the EU but also all the other rights connected to it such as employment rights, education rights, right to stay after death or divorce from the EU citizen etc.

³ The necessity of protecting families was understood far back in the past, since the *ius commune* era. On this point see M Antokolskaia, 'The "better law" approach and the harmonization of family law', KB Woelki (ed), in *Perspective for the Unification and Harmonization of Family Law in Europe*, (Oxford, Hart Publishing, 2003) 159, 169–70. After the Second World War, protection was granted to families at international level. State family law is subject to both private international law conventions and public international law. Under the first group we can list the Hague Convention on Child Abduction (25 October 1980, entered into force 1 December 1983), the Hague Convention on Inter-country Adoption (29 May 1993, entered into force 1 May 1995), the Convention on the Law Applicable to Maintenance Obligations towards Children (24 October 1956, entered into force 1 January 1962) and the Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance (23 November 2007, entered into force 1 January 2013). These treaties are binding on state parties and in many states they become enforceable through implementing legislation. As far as public constitutional law is concerned, the major pieces of legislation affecting family law are the Universal Declaration of Human Rights (art 16, 10 December 1948), the European Convention on Human Rights and Fundamental Freedoms (ECHR, Art 8, Art 14 and Protocol 1 Art 1, 4 November 1950, entered into force 3 September 1953), International Covenant on Civil and Political Rights (ICCPR, Art 7, 16 December 1966, entered into force 23 March 1976), the International Covenant on Economic, Social and Cultural Rights (ICESCR, Art 10, 16 December 1966, entered into force 3 January 1976). The first treaties that, at international level, recognised the right to family reunification were Convention on the Elimination of Discrimination Against Women (signed 18 December 1979, entered into force 3 September 1981), the Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) and the Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (approved 18 December 1990, entered into force 1 July 2003). Nevertheless, even when these provisions started to be protected internationally, the treaties and conventions that contained them did not envisage a clear system of enforcement. For example the Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families established, at Art 72, a Committee for the Rights of Migrant Workers. However, this body functions as a body of political pressure and is not able to enforce sanctions.

⁴ Several directives were adopted by taking this article as a legal ground (or the previous Art 63(3)(4) TEC): Dir 2003/86/EC on the right of family reunification; Dir 2003/109/EC concerning the status

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the right to family reunification by third country nationals residing lawfully in the territory of the Member States.⁵ This Directive has consequentially shaped national legislation that has to be applied to this category of family members. The second category covers EU workers or citizens residing in another Member State wishing to live with a third country national family member. Also in this case the right of entry and residence of the third country national is granted in accordance with EU law, although this time owing to Directive 2004/38/EC⁶ on the right of free movement of EU citizens and their family members. Finally, the third category concerns those nationals residing in their EU Member State of origin wishing to live with a third country national family member. The legislation applying to this category is still national. In other words, it is up to the state to decide the conditions and the modality of admission of these specific third country nationals. However, in accordance to the recent jurisprudence of the Court of Justice of the European Union (henceforth the CJEU or the Court), third country national family members of EU non-moving citizens should be allowed to reside in the national Member State of their EU sponsor if the denial of this right would force the latter to leave the territory of the EU. In these cases, family reunification rights are granted not via national rules but by EU law.

This book focuses on the issue of family reunification rights granted to third country nationals within the EU and, in particular, on the two last categories of potential applicants listed above. Leaving aside the numerical importance of this phenomenon,⁷ it is worth focusing on this specific issue because it has been the

of third-country nationals who are long-term residents; Dir 2004/81/EC on the residence permit issued to third-country nationals who are victims of trafficking in human beings; Dir 2004/114/EC on the conditions of admission of third-country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service; Dir 2005/71/EC on a specific procedure for admitting third-country nationals for the purposes of scientific research; Dir 2009/50/EC on the conditions of entry and residence of highly qualified workers.

⁵ Council Dir 2003/86/EC [2003] OJ L 251/12. For an account of this Directive see K Groenendijk, 'Family Reunification as a Right under Community Law' (2006) 10 *European Journal of Migration and Law* 215. Apart from freedom of movement legislation and Dir 2003/86/EC, family reunification provisions can be found in several Association Agreements with third countries. In addition, there are also several special EU law regimes of family reunion with regard to special categories of third country nationals such as Refugees and Blue Card Directive holders. The special rules for refugees are set out in Chapter V of the general Family Reunion Directive. The special rules for Blue Card Directive holders are instead contained in Council Dir 2009/50/EC [2009] OJ L 155/17. For a detailed explanation of these exceptions see S Peers, *EU Justice and Home Affairs Law* (Oxford, Oxford University Press, 2011) 473–78.

⁶ Council Dir 2004/38/EC [2004] OJ L 158/77.

⁷ Family reunification between third country nationals and EU citizens, be they either moving or static, is not an irrelevant phenomenon. In 2010 the total numbers of permits released by the 27 Member States to third country nationals willing to reunite with non-EU citizens was 508,325 (see Green Paper on the right to family reunification of third-country nationals living in the European Union (Dir 2003/86/EC) COM (2011) 735 final, 10) whilst the total numbers of permits released for family reasons to third country nationals regardless of the nationality of the sponsor amounted roughly to 775,000 (see file 'First residence permits issued in the EU-28 by reasons, 2008, 2009, 2010, 2011, 2012, 2013 and 2014.png', data collected from Eurostat available at ec.europa.eu/eurostat/statistics-explained/index.php/File:First_residence_permits_issued_in_the_EU-28_by_reasons_2008_2009_2010_2011_2012_2013_and_2014.png). These data, once combined, suggest that in 2010 roughly 226,675 third country nationals applied for family reunification with EU sponsors.

object of a lively debate, which is still ongoing. Indeed over the years, particularly with regard to cases concerning EU moving citizens and third country nationals, Member States⁸ have often tried to deny family reunification rights to third country national EU family members,⁹ despite the clear indications of the EU Legislator. Moreover, the Court's answer to the challenges that have been raised concerning this issue have not been completely consistent, swinging between liberal and austere positions,¹⁰ and often utilising reasoning that is difficult to reconcile with others.

The object of this book is to analyse the intricate legislative and jurisprudential development of the phenomenon of family reunification between EU citizens and third country nationals. In order to fulfil this aim, the book endorses a historical approach. Through historical analysis the book will show how the phenomenon of family reunification between EU citizens and third country nationals is the fruit of a development that, starting from the legislation of the first post-Second World War era, reached its peak in the more recent judgments of the CJEU. Using a historical perspective, it will be shown that family reunification legislative provisions, their more recent CJEU interpretation and the new application of the concept of EU citizenship to family reunification cases involving EU citizens and third country nationals find their grounds on different but concrete historical trends that influenced the development of the EU approach on this issue.

It is common knowledge that, since its beginning, the main aim of the EU has been the creation of a common market. The Treaty of Rome, in establishing the

⁸ It is worth pointing out that just some Member States raised issues concerning third country national family members. From the cases that will be analysed we can note that those involved in these kinds of dispute most often are Germany, the Netherlands, the UK, Belgium and Ireland, to which one should add also Denmark, Greece, Austria and Poland, which are often listed among the intervening states in the post *Zambrano* cases.

⁹ See Chapters 3 and 4 for an account of the Member States' approach.

¹⁰ A Tryfonidou, 'Family Reunification Rights of (Migrant) Union Citizens: Towards a More Liberal Approach' (2009) 15 *European Law Journal* 634, 634. It was also argued that the Court 'must either endeavour to weave its case law logically together or, if there are good reasons to push the law in a different direction, articulate its reasoning as clearly and explicitly as possible': N Nic Shuibhne, 'Case Law: (Some) of the Kids Are all right' (2012) 49 *Common Market Law Review* 349, 379. As far as family reunification between EU static citizens and third country nationals is concerned, it was also argued that the post-*Zambrano* cases are good examples of how the Court conjured rights, and limits to them, out of nowhere: A Dashwood, 'Judicial Activism and Conferred Powers—Is the CJEU Falling into Bad Habits?', paper presented at the 10th IEL (Institute of European Law) Annual Lecture, Birmingham University, 27 June 2012. On the academic debate addressed by the Court see also in particular S Acierno, 'The *Carpenter* judgment: fundamental rights and the limits of the Community legal order' (2003) 28 *European Law Review* 398, 407; E Spaventa, 'From Gebhard to Carpenter: Towards a (Non-) Economic European Constitution' *Common Market Law Review* (2004) 41 743, 767; A Tryfonidou, 'Jia or "Carpenter II": the edge of reason' (2007) 32 *European Law Review* 908, 917 (in this case comment the author underlined how the Court did not succeed in making explicit whether it was willing to depart from the previous *Akrich* case and to endorse a new family reunification approach); JB Bierbach, 'European citizens' third-country family members and Community law' (2008) 4 *European Constitutional Law Review* 344, 356–57 (in this case comment the author underlines how the CJEU's reasoning was far from providing legal certainty); NG Foster, *Foster on EU Law* (Oxford, Oxford University Press, 2011) 353.

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EU, recognised that certain matters had necessarily to be free from any regulation that would restrict their movement among the Member States. The aim of developing the right of free movement of workers was immediately endorsed by the Court. The CJEU, through its restless activity, immediately from the early sixties started to interpret broadly the provisions on free movement of workers and, later on, to apply the deterrence test to free movement of labour cases in order to eliminate all the obstacles that could hinder Member States' workers from taking advantage of such a crucial right.¹¹ Furthermore, in 1992 the concept of European citizenship (from now on also EU citizenship) was finally introduced in the Maastricht Treaty. The Court interpreted this new concept not only as a way to extend free movement rights to non-economically active people but also as a source of self-standing rights occurring without the presence of a real cross-border element. However, the action of the EU and of the Court soon began to clash with immigration policies adopted by some Member States. Over the last 40 years immigration has become a particularly prominent issue in Europe and it has often generated vehement national political debate. Since the oil crisis of the seventies, passing through the fall of the Berlin Wall, followed by the 9/11 terrorist attacks, the more recent Arab spring and the current immigration crisis stemming from the Syrian civil war, many European states have begun to fear waves of legal and illegal third country nationals and have acted to keep them from crossing their borders.¹² For these reasons the signing of the Schengen Treaty as well as the introduction of the concept of EU citizenship and the enhancement of free movement of workers, which have eased the movements of people throughout the EU, have had a deep impact on the perception of immigration, to the extent that the greater internationalism of Europeans has simultaneously triggered strong Eurocentrism, fear of third country nationals and xenophobia.¹³ The development of the EU approach over family reunification between EU citizens and third country nationals, both legislative and jurisprudential, will be analysed considering these factors in the background. Adopting this approach will allow us to offer a realistic account of this phenomenon relying on factors that clearly influenced the choices of the Legislator and of the Court.

To this end, the book is organised as follows. Chapter 1 focuses on the post-Second World War bilateral agreements period up until the signing of the Treaty of Rome and the creation of the Common Market. This chapter shows that family reunification provisions were introduced within the free movement legislation for the purpose of matching the post-war lack of manpower of Northern European states with the Italian surplus of labour through the establishment of the right

¹¹ On this point see Chapter 2.

¹² Among others see the UN High Commissioner for Refugees, interview of Antonio Guterres, 20 March 2012, available at www.epc.eu/events_rep_details.php?cat_id=6&pub_id=1430.

¹³ D Cesarani and M Fulbrook, *Citizenship, Nationality and Migration in Europe* (London, Taylor & Francis, 2002) 3.

of free movement of people.¹⁴ By looking at the connections between bilateral agreements and the Common Market the book will show how family reunification was introduced not for humanitarian reasons but as an incentive to encourage Italian workers to move towards northern European Member States in order to fill their lack of manpower.

Chapter 2 focuses on the move towards stricter immigration that occurred after the oil crisis. This chapter will show how the sudden drop in economic activity pushed some states to endorse protectionist measures, which included reducing immigration. The ‘other’ started to be stigmatised as a potential threat¹⁵ for the economy and society by the media and within the political arena¹⁶ and this has become part of the common mentality that continues to the present day.

Chapter 3 focuses on the analysis of the secondary legislation and the first case law over the issue of family reunification between EU citizens and third country nationals. It will be shown how the provisions contained in these pieces of legislation found their roots at the interface between free movement of workers and citizens and Member States’ concerns over immigration and how these two currents ended up shaping the reasoning of the Court in applying them. In particular, the chapter is subdivided in three subsections. The first subsection is dedicated to the development of the secondary legislation provisions concerning residence rights of third country national family members and on how the Court applied and interpreted them. The second subsection is dedicated to further provisions inserted since the first secondary legislation such as the requirement, to be fulfilled by the EU worker, of having proper housing available for himself and his family, the consequences faced by EU workers and their family members in case the former cease to work through physical incapacity, retirement age or death, the condition of dependency of the third country national upon the EU worker, the conditions under which EU workers and their family members can be expelled for breach of public policy, public security and public health and the working status, education rights and social and tax advantages of EU workers’ family members. The third subsection is finally dedicated to some provisions inserted in more recent secondary legislation such as the condition on sickness insurance and sufficient economic resources that the EU worker has to fulfil in order to reunite with his family in the host Member State, provisions on the rights of family members in case of separation or divorce from the EU worker and the provision on the right of permanent residence of family members of EU workers. Overall, it will be shown how the approach of the Legislator and of the CJEU has been particularly

¹⁴ Among others see F Pastore and G Sciortino, *Tutori Lontani: il Ruolo degli Stati d’Origine nel Processo di Integrazione degli Immigrati* (2001) Ricerca svolta su incarico della Commissione delle politiche di integrazione degli immigrati presso Centro Studi di Politica Internazionale (Cespi) 10–11, available at www.cespi.it/PASTORE/tutori-lontani.PDF.

¹⁵ KJ Bade, *Migration in European History* (Oxford, Blackwell Publishing, 2003) 280.

¹⁶ *ibid.*

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open towards third country national family members' residence rights although not completely free from the influence of Member States' immigration concerns which have, at times, determined the outcome of the cases.

Chapter 4 will show how the Court's reasoning in cases involving EU static citizens was mainly built around the immigration concerns of some Member States, this time however at the interplay with the development of the EU citizenship status as a source of self-standing rights. Unlike the previous chapter, however, it will be shown that overall the outcome of these cases was shaped around the immigration concerns of the Member States, as is evident in the post *Zambrano*¹⁷ cases up until *Aloka*.¹⁸

Finally, Chapter 5 will be dedicated to some conclusions. It will focus on the potential development of the concept of EU citizenship as a status that protects not just the right to move but also the right to reside. It will be shown that, potentially, an enhanced concept of EU citizenship could reinforce the protection of families composed of EU citizens and third country nationals, both in cases involving EU static and moving citizens.

¹⁷ Case C-34/09 *Ruiz Zambrano v Office national de l'emploi (ONEm)* EU:C:2011:124.

¹⁸ Case C-86/12 *Aloka and Others v Ministre du Travail, de l'Emploi et de l'Immigration* EU:C:2013:645.

Family Reunification at the Time of Bilateral Agreements and the Common Market

1. INTRODUCTION

THE FIRST EU law provision granting family residence rights to family members of EU workers can be found in Council Regulation 15/1961/EEC¹ on free movement of workers. This was the first regulation of a three-step phase that culminated with Regulation 1612/1968/EEC and the full liberalisation of manpower.² Article 10(1) of the latter regulation provided that the spouse, the descendants who are under the age of 21 years or dependants and the dependent relatives in the ascending line of the worker and his spouse have the right, irrespective of their nationality, ‘to install themselves with a worker who is a national of one Member State and who is employed in the territory of another Member State’.

It has been argued that, originally, these provisions were not introduced for humanitarian concerns³ but for economic reasons concerning the Common Market.⁴ As the goal of the EU was in fact the creation of a market in which factors of

¹ Council Reg 15/1961/EEC [1961] OJ L 1073/6. This measure was also accompanied by the Directive of 13 December 1961 on the administration practices concerning settlement, employment and residence OJ 80 1513–16.

² The second step of this three-step phase started with the introduction of Council Reg 38/1964/EEC [1964] OJ L 965/64. The third and last one started in 1968 with Council Reg 1612/1968/EEC OJ Sp Ed 1968, L 257/2. Council Reg 1612/68/EEC was repealed in 2011 by Council Reg 492/2011/EU [2011] OJ L 141/1. The subdivision in different phases was meant to introduce gradually the concept of freedom of movement of workers in order not to negatively affect the domestic markets. For instance, in the first two phases, the priority to take up job offers was given to national workers (if the competent authorities did not propose the name of a national worker within three weeks, only then could the offer be taken up by the worker of another Member State). This limitation was eliminated with Council Reg 1612/68/EEC.

³ A sign that the EU did not intend to create a general legislative protection for family reunifications consists in the fact that these rights were considered residual. Indeed, family members who had the nationality of a Member State and were economically active could rely directly on the free movement provisions in order to have access to the host Member State. On this point see J Handoll, *Free Movement of Persons in the EU* (New York, Wiley, 1995) 249.

⁴ G Barret, ‘Family Matters: European Community Law and Third Country National Family Members’ (2003) 40 *Common Market Law Review* 369, 375–76. The first to explicate this idea was AG Darmon in the *Demirel* case (Case C-12/86 *Demirel v Stadt Schwäbisch Gmünd* EU:C:1987:232).

production (goods, services, capital and labour) could move where the requirements of supply and demand dictated,⁵ residence rights of family members were built as an instrument to avoid hindrances to the free movement of the European worker.

This chapter will look at the origins of the phenomenon of family reunification between European workers and their family members. The chapter will start this historical overview by looking at family residence rights from the time of bilateral agreements between Italy and northern European countries and will show how they played a role in creating an incentive for workers to migrate towards the receiving state. It will then highlight also that the provisions inserted in the first secondary free movement legislation were drafted as a way to create incentives for unemployed Italians to move to the northern European Member States. Finally, it will be noted that the openness of the EU provisions was not just directed towards family members born in one of the EU Member States but also towards third country national family members.

The message conveyed in this chapter is fundamental in order to clarify the background that brought about the first provisions on family reunification and to highlight the reasons behind their development both in terms of legislative changes and jurisprudential interpretation.

2. MOVEMENT RIGHTS OF WORKERS AND THE ROLE OF ITALY: FROM BILATERAL AGREEMENTS TO THE TREATY OF ROME AND THE COMMON MARKET

The years from 1945 to the late sixties were characterised by an increased inflow of immigrants to different European states and from outside and inside Europe.⁶ The rise in the number of immigrants coming to Europe was triggered by two main factors: on one side, strong economic growth in the old continent, on the other, a shortage of workers and the process of decolonisation.⁷ With regard to economic growth, nothing in the history of Europe resembles the experience of the post-war years. The standard of living of all social classes increased continually and rapidly

He pointed out that 'family reunification for example is treated by community law as a necessary element in giving effect to the freedom of movement of workers and does not become a right until the freedom which it presupposed has taken effect'. On this point see also E Guild, *The Legal Elements of European Identity, EU Citizenship and Migration Law* (The Hague, Kluwer Law International, 2004) 98.

⁵ Barret, above n 4 at 375–76.

⁶ KF Zimmerman, 'Tackling the European Migration Problem' (1995) 9 *The Journal of Economic Perspectives* 45, 46–47.

⁷ In particular France and England opened the doors to immigration from some of their colonies (Algeria, the Caribbean, India and Pakistan) and encouraged immigration of ex-colonials back to their motherland. On this point see M Martiniello, 'The new migratory Europe: Towards a proactive immigration policy', in CA Parsons and TM Smeeding (eds), *Immigration and the Transformation of Europe* (Cambridge, Cambridge University Press, 2006) 301.

for more than two decades.⁸ As far as the shortage of workers is concerned, data show that immediately after the war the number of displaced people was around 20 million.⁹ This circumstance made the Federal Republic of Germany (henceforth Germany) and many other states of continental Europe realise that their labour requirements could not be satisfied by their own nationals alone.¹⁰ The realisation that some of the northern states needed labour engendered a significant rise in migration.¹¹ This lack of labour then started to be filled both by immigrants coming from ex-colonies and immigrants coming from southern Europe (Spain, Portugal, Greece, Italy and the Balkans) and North Africa and Turkey.¹² The need for immigrant workers went hand in hand with the relaxation of borders. Indeed, some European states such as Belgium, Luxembourg and the Netherlands began to adopt more friendly policies on immigration like eliminating the stringent passport controls inherited from the inter-war period.¹³

This chapter is only focused on the role of Italy. This is because Italy was the only southern European country involved both in negotiating bilateral agreements and in the drafting of the Common Market and, therefore, it is the link through which it is possible to discover potential connections between the two projects in terms of family reunification policies. From the end of the Second World War, Italy's vast population and lack of capital enhanced a widespread political consensus on the necessity of developing new efficient migration policies. With an official level of unemployment of 2,000,000 people¹⁴ the Italian government considered the emigration of national workers to be a vital necessity.¹⁵ The migratory outflow had to be rapid and as vast as possible and the government's own diplomatic initiatives

⁸ AS Milward, *The European Rescue of the Nation State* (London, Routledge, 1992) 21. The author explains the uniqueness of this period underlining the role of the state as the crucial and most important factor. The successful institutional management of the economy of that time, in his view, was one of the main explanatory factors of the new European economic expansion.

⁹ Zimmerman, above n 6 at 46. On this point see also KJ Bade, *Migration in European History* (Oxford, Blackwell Publishing, 2003) 215.

¹⁰ R Hansen, 'Migration to Europe since 1945: its History and its Lessons' (2003) 74 *The Political Quarterly* 25, 25.

¹¹ LP Moch, 'Foreign Workers in Western Europe: The "Cheaper Hands" in Historical Perspective' in J Klausen and L Tilly (eds), *European Integration in Social and Historical Perspective: 1850 to the Present* (New York, Rowman & Littlefield, 1997) 111.

¹² See Martiniello, above n 7 at 7.

¹³ J Torpey, *The Invention of the Passport* (Cambridge, Cambridge University Press, 1999). The author underlined how, in spite of the generally liberal attitude toward freedom of movement during the late 19th century, governments became increasingly oriented to making distinctions between their own citizens and others on the basis of documents such as ID cards or, more commonly, passports (at 93).

¹⁴ To this critical scenario one has to add nearly one million people, just from the north of Italy, that were previously employed in the war industry and, after the war ended, were left without a job. See C Besana, 'Accordi Internazionali ed Emigrazione della Manodopera Italiana tra Ricostruzione e Sviluppo' in Sergio Zaninelli and M Taccolini (eds), *Il lavoro come fattore produttivo e come risorsa nella storia economica italiana: atti del Convegno di studi, Roma, 24 novembre 2000* (Milano, Vita e pensiero, 2002) 4.

¹⁵ F Romero, 'Migration as an issue in European interdependence and integration: the case of Italy' in AS Milward, F Lynch, R Ranieri, F Romero and V Soresen (eds), *The Frontier of National Sovereignty: History and Theory, 1945–1992* (London, Routledge, 1993) 37.

had to be focused on the pursuit of this goal. Hence, the promotion of emigration became the primary purpose of Italy's foreign policy.¹⁶ The exigency of several states to recruit workers and the corresponding need of Italy to find employment for its nationals made everyone realise the necessity of agreeing on an intelligent inter-state policy that had to be capable of allowing workers to move from one part of Europe to another in order to take up employment.¹⁷ This common purpose opened up the golden era of bilateral treaties. As Schmitter highlights, these treaties were the trigger and guidance of Europe after the Second World War.¹⁸ From 1946 onwards Italy signed bilateral agreements with all the European countries that experienced labour shortages, including Belgium, France, Germany, Luxembourg, the Netherlands and the UK. These agreements organised the co-operation between different states' employment services with the aim of promoting the recruitment of specific types of worker. An overall ceiling was usually set to limit the number of immigrant workers that could be admitted every year. The decision on recruitment was left to the expressed demand of the receiving state. Depending on the country, sometimes the concrete process of recruitment was either managed directly by a government agency or left to the employer.¹⁹

Despite their crucial role in finding a temporary answer to the problems of labour shortages and unemployment after the Second World War, it is important to note that bilateral agreements were no more than an appendage to the employment policy, as they did not encompass any vision for a long-term integration of immigrant workers. For example, workers were given work and accommodation for a limited stay, the labour market was limited just to some sectors such as mining, iron and steel, and the recruitment process was only focused on young male workers.²⁰ Moreover, bilateral agreements never really led towards a permanent opening of the foreign markets because the receiving states always used them as 'turn on and off' solutions to immigration. 'When demand (for labour) was very high the economic priorities of the host countries could occasionally coincide with the needs of the sending countries, but the agreements did not assure any irreversible right to the latter.'²¹

The volatility of the northern European demand and the temporary nature of employment offered by the host states triggered many returns and soon made Italy realise that these agreements were an inadequate instrument for the solution of the Italian migratory problems. The Italian government therefore became increasingly persuaded that national barriers to the circulation of manpower had to be brought down another way. The only way to circumvent the problem of national

¹⁶ *ibid.*

¹⁷ F Pastore and G Sciortino, *Tutori Lontani: il Ruolo degli Stati d'Origine nel Processo di Integrazione degli Immigrati*, Ricerca svolta su incarico della Commissione delle politiche di integrazione degli immigrati (2001), available at www.cespi.it/PASTORE/tutori-lontani.PDF, 10–11.

¹⁸ BS Heisler, 'Sending Countries and the Politics of Emigration and Destination' (1985) 19 *International Migration Review* 469, 474.

¹⁹ Romero, above n 15 at 40.

²⁰ Martiniello, above n 7 at 310.

²¹ Romero, above n 15 at 39–40.

barriers was to internationalise the issue of Italian unemployment and deal with it at a multilateral level. The issue of full employment had to transcend national state borders and be placed in the broader backdrop of the economic co-operation within Western Europe.²² Italy, under pressure from the United States, proposed to the OEEC²³ Member States a complete liberalisation on the circulation of manpower. This would have allowed a more efficient utilisation of the available workforces through the total opening of European borders within 10 years. This solution, however, found criticism in some states. In particular France, Belgium and the UK were very much concerned about losing their sovereignty on labour and immigration policies and the proposal was not taken up.²⁴

In the early fifties the French Prime Minister Robert Schuman, tired of the hesitations of the European intellectual environment,²⁵ proposed that the market for coal and steel, of which Europe was witnessing a shortage, had to be controlled by a new supranational authority, which became on 18 April 1951 the European Coal and Steel Community (ECSC).²⁶ During the negotiations, the Italian delegates took the opportunity to argue that, in order to achieve a completely integrated market for coal and steel, freedom of circulation for workers had to be encompassed within the treaty provisions. However, France and Germany made it clear that free circulation could be contemplated just for workers with proven qualifications. The strict Franco-German formulation was finally accepted in the ECSC Treaty.²⁷ Article 69 committed Member States to lift every employment restriction based on nationality, just for a restricted category of workers, by stating that ‘Member States bind themselves to renounce any restriction based on nationality against the employment in the coal and steel industry of workers of proven qualifications for such industries who possess the nationality of one of the Member States; this commitment shall be subject to the limitations imposed by the fundamental needs of health and public order’. The Franco-German approach to the issue of freedom of movement left the Italian diplomats, aiming for a wider interpretation of the ECSC Treaty,²⁸ unsatisfied. Owing to this limited progress, bilateral

²² *ibid.*, 40.

²³ OEEC stands for Organization for European Economic Co-operation. It was founded in 1948 with the aim of continuing a joint economic recovery programme within Europe after the end of the Second World War. Originally the OEEC had 18 participants. In September 1961 the OEEC was superseded by the Organization for Economic Co-operation and Development (OECD), a worldwide body.

²⁴ L Tosi, ‘La tutela internazionale dell’immigrazione’ in P Bevilacqua, A De Clementi and E Franzina (eds), *Storia dell’immigrazione italiana, vol 2, arrivi* (Roma, Donzelli Editore, 2001) 453–56.

²⁵ See DW Urwin, *The Community of Europe, A History of European Integration since 1945* (New York, Longman, 1995) 1–3.

²⁶ Treaty Establishing the European Coal and Steel Community, expired 23 July 2002.

²⁷ Romero, above n 15 at 43.

²⁸ *ibid.* Italy argued that freedom of circulation had to entail the full harmonisation of all the factors and procedures regulating access to the labour market of the six Member States. However, this attempt did not find the approval of the other Member States. France and Luxembourg conceived the free movement of workers within Europe as an aim that had to be achieved when the problem of unemployment in Europe had been completely solved. On the other side Belgium and the Netherlands did not agree to a mutual recognition of qualifications and to harmonisation of social legislation.

agreements still seemed the only way to achieve suitable advantages for the Italian workers. In 1955 Italy signed its last migration bilateral agreement with Germany which, up until then, had been reluctant to engage with Italy.²⁹ With the signing of the German-Italian Treaty all the industrial regions of Western Europe were completely engaged in bilateral migratory schemes with Italy as a counterpart.³⁰

The issue of freedom of movement took an explicit and fuller shape with the negotiations for the Common Market, which began in 1955 in Messina.³¹ On that occasion the Benelux countries suggested that the target to achieve was the creation of a new comprehensive economic community. Surprisingly, they suggested that this new economic community should not encompass limited economic areas of integration³² but had to pursue the aim of achieving a complete common market of goods, services, capital and labour. It is interesting to note how the Benelux countries moved from an initial scepticism to a belief that that a common market was the path to pursue. The forerunner in this change of attitude was the Netherlands. Up until 1955 the Netherlands was a firm opponent of common market schemes. The view that prevailed among the Dutch was that they needed to pursue an Atlantic co-operation with the US rather than belonging to a small continental bloc that had, in their view, very little to offer.³³ The change occurred in 1955 following American pressure on the Netherlands to participate in the European Defence Community, a project that, if it did not fail due to the lack of ratification by the French Parliament, would have established a pan-European military force. On that occasion the Netherlands started to demand economic and not just military co-operation.³⁴ Later on Germany too joined the Netherlands and Italy in asking for a gradual introduction of the free circulation of workers. As a matter of fact, the serious objections put forward by Germany³⁵ on the Common Market project became counterbalanced by the simplified access that they would have

Finally Germany agreed on a common European approach to unemployment but foresaw its solution in a future co-ordination of economic policies and not in the move towards free movement of labour.

²⁹ For example the German government was, for some years, quite reluctant to sign a bilateral migration agreement with Italy. On this point see JD Steinert, 'L'accordo di emigrazione italo-tedesco e il reclutamento di manodopera italiana negli anni cinquanta' in J Petersen (ed), *L'emigrazione tra Italia e Germania* (Bari, Piero Lacaita Editore, 1993) 142–60.

³⁰ Romero, above n 15 at 43.

³¹ *ibid.*, 52–58. On this point see also Urwin, above n 25 at 74. Some pushes to liberalise the job market came particularly from Nato. Straight after the Korean War Nato started to look suspiciously at the imbalance between countries with full employment and localised shortages of skilled workers and other nations with large groups of available manpower. Initially the US asked the OEEC to liberalise work in Europe. Later on, they started to push for the creation of the Common Market.

³² Jean Monnet was the one who strongly suggested for further sector integration in the field of transport and energy. See Urwin, above n 25 at 62–67.

³³ See Milward, above n 8 at 173.

³⁴ *ibid.*

³⁵ One of these objections was the fact that German exports were not just concentrated on the market of the six but targeted also Austria, Denmark, Norway, Sweden, Switzerland and the UK. A customs union that would introduce an external tariff higher than the one applied so far by Germany was going to be regarded by these states with suspicion. *ibid.*, 196.

had to the French and Italian markets, which were the biggest importers from Germany at the time.³⁶

At the end of the conference the freedom of movement of workers was incorporated among the aims to pursue for the creation of the Common Market in order to launch ‘a fresh advance towards the building of Europe’.³⁷ These aims took the concrete form of an embryonic Common Market proposal, owing to the restless work of the Belgian Prime Minister of the time, Henry Spaak. His first *ad interim* report issued in 1956, known as the Spaak Report,³⁸ referred to unemployment not as a hindrance but rather as a resource for European growth. According to it, unemployment could be better tackled by common action.³⁹ To this end, Chapter III, Title III was completely dedicated to free movement of labour and particular attention was also given to the avoidance of discrimination between nationals and non-nationals when taking up job positions.⁴⁰

The indications contained in the Spaak Report were finally crystallised in the EEC Treaty.⁴¹ Workers were subdivided into salaried, service providers and self-employed⁴² and their right to freely move within the territory of the Union was encompassed in the part of the Treaty dedicated to the Foundations of the Community.⁴³ With regard to salaried workers, Article 48(2) stated that free movement ‘shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment’. Likewise, with regard to the freedom of establishment, Article 53 stated that Member States ‘shall not introduce any new restrictions on the right of establishment in their territories of nationals of other Member States, save as otherwise provided in this Treaty’. Finally, Article 59 on service providers prohibited ‘restrictions on freedom to provide services within the Community’.

The EEC Treaty also set out the basis for the implementation of free movement of workers through secondary legislation. The EEC Treaty stated in fact that ‘for the purpose of establishing a Common Market the activities of the Community shall include ... c) the abolition as between Member States, of obstacles to freedom of movement for persons, services and capital’ and that ‘as soon as this Treaty enters

³⁶ *ibid.*

³⁷ Messina declaration, 3 June 1955.

³⁸ Comité Intergouvernemental créé par la Conférence de Messine, Rapport des Chefs de délégation aux Ministres des Affaires Etrangères, Brussels, 21 April 1956, available at www.cvce.eu/obj/rapport_des_chefs_de_delegation_aux_ministres_des_affaires_etrangeres_bruelles_21_avril_1956-fr-52a08e74-02f5-4912-a667-2ea34b9dcdea.html

³⁹ *ibid.*, 91.

⁴⁰ *ibid.*

⁴¹ Treaty Establishing the European Economic Community, 25 March 1957. On the same day the Treaty Establishing the European Atomic Energy Community (Euratom or EAEC Treaty) was also signed.

⁴² EEC Treaty provisions from Art 48 to Art 66.

⁴³ See Art 3 EEC Treaty. This article lists the fundamental policies of the Community. Its paragraph C includes among these policies ‘the abolition, as between Member States, of obstacles to freedom of movement for persons, services and capital’.

into force, the Council shall, acting on a proposal from the Commission and after consulting the Economic and Social Committee, issue directives or make regulations setting out the measures required to bring about, by progressive stages, freedom of movement for workers, as defined in Article 48'. The secondary legislation concerning free movement of workers, adopted soon after the entry into force of the EEC Treaty and culminating in Council Regulation 1612/68/EEC, worked on a long 'step-by-step' process in order to abolish the limits that could be perceived as a strain on the right of workers to move freely within the Union.⁴⁴ With the three successive community regulations the national priorities for employment were reduced and eventually abolished for all EEC workers and family members.

Despite having avoided the option of an integrated system and having preferred a sort of gradual easing of their interdependence, at no point did any of the Member States obstruct the process of gradual liberalisation of the market. Interestingly, despite all the Italian claims in order to achieve a common market, full integration only came about when its impact on the Italian nation was no longer so crucial.⁴⁵

3. BILATERAL AGREEMENTS AND FAMILY MEMBERS' RESIDENCE RIGHTS

Having pictured the historical background from the bilateral agreements to the Common Market, the book will now focus on the approach of granting family residence rights adopted in the bilateral agreements concluded between northern European states and Italy. This section is divided into five sub-sections. The first four of these will describe the approach adopted by the bilateral agreements concluded by some states with Italy. The last sub-section will explain the reasons why the open approach towards granting residence rights to workers' family members was probably adopted in order to create extra incentives to the Italian movement of labour towards northern Europe.

Before starting this analysis a clarification of method is necessary. As mentioned above, given the fundamental role of Italy both in the drafting of bilateral agreements and in the pursuit of the Common Market this analysis is going to focus just on the bilateral agreements that see this country as one of the counterparts. The northern European states with which Italy concluded bilateral agreements and on which the analysis is going to be focused are Belgium, France, Germany and

⁴⁴ Secondary legislation soon followed the EEC Treaty provisions on freedom of movement. In the first phase, Council Reg 15/1960/EEC tempered the normal priority given to national workers when taking up a job position with a temporal limitation. Art 1 provided that, once passed three weeks from the registration of a vacancy without a national worker having responded to it, the position had to be granted to a worker of another Member State at equal conditions. This provision was completely abolished in the second phase by Council Reg 38/1964/EEC, although even with this second regulation priority was still given to national workers. A complete abolition of any restriction occurred with Council Reg 1612/68/EEC.

⁴⁵ Milward, above n 8 at 59. Towards the end of the 60s Italian migration changed. Figures for departure decreased dramatically. Rates of return grew higher than ever. In the 1970s migration from Italy stopped.

Luxembourg. This choice is triggered by the fact these countries and Italy were not just involved in bilateral agreements but became also the founding fathers of Europe. This coincidence will allow us to draw similarities and connections between the bilateral agreements and the Common Market approach as far as family reunification is concerned. The Netherlands has been left out of this account. The reason lies in the fact that, despite also being one of the six founding fathers of Europe, it had a later history of bilateral agreements with Italy⁴⁶ and therefore the origins of EU provisions on family residence rights cannot be really traced back in the bilateral agreement relationship between Italy and the Netherlands.

3.1. Belgium

From the eighteenth century the economy of 30 municipalities in the Borinage, a region of southern Belgium, was founded on coal mining. After the Second World War this region was a valuable resource, in the worldwide coal shortage, for the rebuilding of Europe. There was no more striking example anywhere in Europe of the post-war concern for employment than the re-establishment and maintenance of the production of coal in the mines of southern Belgium. In fact during the world coal shortage of 1945, when the only coal available on world markets were allocations from the United States, it appeared logical to avoid any sort of reduction in the size of Belgian industries.⁴⁷

The necessity of re-establishing the coal industry made mining a protected occupation during the war and even after. For example, even the lowest skilled group of mining workers were granted good salaries and good pension schemes.⁴⁸ Moreover, the necessity of finding workers in order to revitalise the coal industry convinced the Belgian government to approve a 'statute' for coal miners. This statute provided exceptional advantages to them such as the right to retire before 30 years of work, supplementary holidays and up to 4,200 kg of free coal per year.⁴⁹ Despite such advantages, Belgian citizens still showed little desire to work

⁴⁶ The Netherlands was the last northern European state to start concluding bilateral agreements with southern European and northern African states. The Dutch government concluded bilateral recruitment agreements with Italy, Spain, Portugal, Turkey, Greece, Morocco, Yugoslavia and Tunisia between 1960 and 1970. On this point see S Castles, 'The Guest-Worker in Western Europe—An Obituary' (1986) 20 *International Migration Review* 761, 765. The reason could be rooted in the fact that, unlike the other northern European states, the Netherlands had a very accelerated economic growth to the extent that, by the early fifties, Dutch industry had largely recovered from the Second World War and unemployment reached a very low level (see SK van Walsum, *The Family and the Nation: Dutch Family Migration Policies in the Context of Changing Family Norms* (Newcastle-upon-Tyne, Cambridge Scholar Publishing, 2008) 26–27).

⁴⁷ Milward, above n 8 at 51.

⁴⁸ For all the economic advantages applied to the miners see A Martens, *Les Immigrés: Flux et reflux d'une main-d'oeuvre d'appoint, La politique belge de l'immigration de 1945 à 1970* (Louvain, Presses Universitaires de Louvain, 1976) 64.

⁴⁹ *ibid.*

underground.⁵⁰ Moreover, many citizens were still displaced because of the war and Belgium had labour shortages.⁵¹ In order to fill these gaps, initially Belgium retained 64,000 German prisoners for its mines. However, when the prisoners were released in 1947, the crucial question was about who could replace them. Given its structural lack of workers, Belgium looked for men in the country in which it was sure to find them: Italy.⁵²

The first bilateral agreement between Belgium and Italy was signed on 20 June 1946.⁵³ Belgium agreed to supply to Italy five tons of coal per month for each Italian worker. Italy, on its side, agreed to provide Belgium with 2,000 workers per week.⁵⁴ After 1947 immigrants made up about three-quarters of the total underground labour force; of them about three-quarters were Italian.⁵⁵ Apart from this exchange between men and primary resources, the agreement also encompassed some other provisions on the rights of Italian workers. The agreement stated that the Belgian government had to provide Italian workers with appropriate housing, food, employment conditions and a salary that had to be equal to that of Belgian miners.⁵⁶ Despite the attempt to give Italian migrants enhanced protection on certain issues, the legislation remained silent on family residence rights. This is not surprising since the first Belgian national legislation that mentions the concept of family reunification is the Belgian Aliens Act of 15 December 1980.⁵⁷ However, like France, Belgium perceived itself as a country of immigration, needing families to settle both for economic and demographic reasons.⁵⁸ To this aim, the famous French demographer Alfred Sauvy in his report⁵⁹ underlined how Belgium had to adopt, in order to improve production and solve its demographic

⁵⁰ Milward, above n 8 at 51.

⁵¹ Bade, above n 9 at 204. Even five years after the world war ended, Europe's total population was 531 million, about 6 million less than in 1940.

⁵² Milward, above n 8 at 51.

⁵³ The text of this agreement was modified on 23 June 1947. The Italian text of the Bilateral Agreement between Italy and Belgium can be found in *Atti Parlamentari dell'Assemblea Costituente*, Doc No 42, 22 October 1947.

⁵⁴ Section 11 of the Protocol of the Agreement. On this point see A Canovi, 'L'Immagine degli Italiani in Belgio: Appunti Geostorici' (2011) 5 *Dossier: Italia altre. Immagini e Comunità Italiane all'Estero*, available at www.studistorici.com/2011/01/29/canovi_numero_5/2.

⁵⁵ For detailed data see Besana, above n 14 at 26. According to their data, Italian migrants working in Belgian mines numbered 26,000 in 1946 and by 1948 this figure had reached 46,000.

⁵⁶ See Art 3 Bilateral Agreement Belgium-Italy, 20 June 1946. Despite this provision in reality the working and living conditions of Italian miners were quite precarious. On this point see F Cumoli, 'Dai campi al sottosuolo. Reclutamento e strategie di adattamento al lavoro dei minatori italiani in Belgio' in (2009) 5 *Storicamente*, available at www.storicamente.org/07_dossier/emigrazione-italiana-in-belgio.htm.

⁵⁷ Art 10(4) Loi du 15 décembre 1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers, available at dofi.ibz.be/sites/dvzoe/FR/Documents/19801215_F.pdf.

⁵⁸ A John, 'Family Reunification For Migrants and Refugees: a Forgotten Human Right?' *A comparative analysis of family reunification under domestic law and jurisprudence, international and regional instruments, ECHR case law and the EU* (2003), available at www.fd.uc.pt/hrc/working_papers/arturo-john.pdf, 6.

⁵⁹ A Sauvy, *Le rapport Sauvy sur le problème de l'économie et de la population en Wallonie*, Liège, 1962, Conseil Economique Wallon.

problems, a policy of integration and assimilation of the families of the migrant workers. As Belgium had a strong interest for Italian workers to stay in order to develop its coal industry, the authorities made efforts through campaigns⁶⁰ such as its brochures 'Vivre et travailler en Belgique' rather than through legislation, to encourage prospective immigrants to bring their families along. In their view this would have allowed families to lead a normal life, overcome any difficulties in settling in⁶¹ and finally establish themselves in Belgium. According to the chronicles of the time, in many public squares in Italy it was possible to find posters declaring the advantages granted by Belgium to foreign miners, among which there was also the possibility soon to reunite with their families.⁶² One of these advantages granted by the Belgian government, for instance, was the covering of 50 per cent of the travel expenses of the family.⁶³ From 1946 to 1957 140,469 Italian workers, followed by 46,364 family members, reached Belgium.⁶⁴

3.2. France

France has a long tradition of immigration. Since the second half of the nineteenth century thousands of foreigners had been recruited or granted admission in the hope of compensating for the country's insufficient labour supply and low birth rate.⁶⁵ The real problem of immigration arose in France in 1945, in conjunction with the issues of demography and its labour force. To understand their importance as post-war concerns, one must appreciate the situation that existed at the end of the Second World War. As result of the war, France lost a large part of its population.⁶⁶ On top of this issue, France was also experiencing a severe decline in its birth rate. It was again Alfred Sauvy, the eminent demographer who

⁶⁰ Campaigns to recruit Italian workers were organised by the Belgian trade unions. For a deeper account see F Micelli, 'L'emigrazione dal Friuli Venezia Giulia in Belgio' available at www.ammer-fvg.org/ita/paesi/index_tree_d.asp?CCat_ID=BE&CCatS_ID=&Cont_ID=262.

⁶¹ John, above n 58 at 6.

⁶² This was the original content of the poster: 'Approfittate degli speciali vantaggi che il Belgio accorda ai suoi minatori. Il viaggio dall'Italia all'estero e' completamente gratuito per i lavoratori italiani firmatari di un contratto annuale di lavoro per miniere. Il viaggio dall'Italia al Belgio dura in ferrovia solo 18 ore. Compiute le semplici formalita' d'uso la vostra famiglia potra' raggiungervi in Belgio'. See 'Dimensioni e caratteristiche del fenomeno occupazionale della popolazione immigrata in provincia di Latina', available at www.progettostima.it/public/articoli/29/Files/Rapporto%20finale%2009%2006%202010.pdf, 28.

⁶³ Western Europe's Migrant Workers (1974) report 28, 21.

⁶⁴ Micelli, above n 60 at 10. The fact that family reunification was just stimulated through political campaigns and not through the legislation leaves uncertainties on which family members could effectively join the Italian workers and what were effectively the rights granted to them by the host Member State.

⁶⁵ G Verbunt, 'France' in T Hammar (ed), *European Immigration Policy: A Comparative Study* (Cambridge, Cambridge University Press, 1985) 127. For a detailed account on this issue see Y Lequin, *Histoire des étrangers et de l'immigration en France* (Paris, Larousse, 1992) 313 *et seq.*

⁶⁶ Apparently 1,500,000 military and civilians died during the First World War. In the second conflict figures were around 2,100,000.

would advise Belgium some years later, who suggested that in order to overcome the post-war economic stagnation a programme of permanent, large-scale immigration was a top priority.⁶⁷

On 2 November 1945, with an *ordonnance*, the National Immigration Office (ONI) was created.⁶⁸ This institution was given a monopoly over the recruitment of foreign labour into France. Although ONI was meant to become the most highly organised system of recruitment for migrants coming to France from every foreign state, within some years after its creation it was left responsible only for migrants coming from Europe.⁶⁹ When the Commissariat Général du Plan⁷⁰ set France the objective of increasing production to 25 per cent above that in 1929 by 1950⁷¹ ONI, with the support of the then Minister of Labour Ambroise Croizat, concentrated all its efforts on Italy. All of a sudden Italy became the cornerstone of the new French migration policy. Geographic and cultural proximity, the presence of former Italian migrants and the absence of political obstacles made Italy the perfect candidate to supply the French with much-needed labour.⁷²

The bilateral agreement between France and Italy was ratified on 21 March 1947.⁷³ According to this agreement, France had to grant the recruitment of 200,000 Italian workers per year.⁷⁴ Prior to leaving, workers had to be subjected

⁶⁷ On this point see A Sauvy, 'Evaluation des besoins de l'immigration française' (1946) 1 *Population* (French edition) 91.

⁶⁸ For more details about ONI see Castles, above n 46 at 763, and G Tapinos, *L'immigration étrangère en France 1946–1973, Travaux et Documents* Cahier n 71 (Paris, Presses Universitaires de France, 1975) 22–23. Before the creation of ONI the recruitment process of immigrants was not state led but private. In particular, it was controlled by the Société générale d'immigration, a consortium of big firms comprising mainly mines and steel companies. On this point see in particular C Wihlto de Wenden, 'The case of France' in G Zincone, R Pennix and M Borkert (eds), *Migration Policy Making in Europe* (Amsterdam, Amsterdam University Press, 2001) 67.

⁶⁹ Castles, above n 46 at 764.

⁷⁰ It was created in 1946 and lasted until 2006. Its main purpose was to plan the economy of France, mainly through five-year plans.

⁷¹ Tapinos, above n 68 at 16.

⁷² *ibid.*, 19.

⁷³ The text of the Bilateral Treaty between Italy and France can be found at Atti parlamentari dell'Assemblea Costituente, Doc No 45, 20 November 1947. Soon after, other bilateral agreements were signed by France with other countries which were experiencing excess of manpower, such as Spain in 1956, Morocco in 1963, Portugal in 1964, former Yugoslavia in 1965, Tunisia and Turkey in 1964 (and came into force in 1969). On this point see H de Lary, 'Bilateral Labour Agreements Concluded by France' in *Migration for Employment: Bilateral Agreements at a Crossroads* (Paris, OECD Publishing, 2004) 43. Each of these agreements specified the number of workers to be admitted each year, the conditions of work guaranteed and the requirements for entry. Every nationality group had its own set of legal rights and duties and its own limits on numbers. On this point see GP Freeman, *Immigrant Labor and Racial Conflict in Industrial Societies: The French and British Experience 1945–1975* (Princeton NJ, Princeton University Press, 1979) 68–74.

⁷⁴ Art 1: 'En vue d'assurer pendant l'année 1947 le recrutement en Italie et la mise au travail en France de 200,000 travailleurs destinés à l'industrie et l'agriculture et désireux de se rendre en France, les deux Gouvernements prendront les mesures nécessaires, chacun en ce qui le concerne, pour que le départ en France de ces immigrants et leur mise au travail aient lieu à la cadence de 17,000 personnes par mois, en moyenne.' The recruitment had to happen with monthly quotas of 17,000 workers each. To this end the Office national d'immigration opened an Italian branch in Milan. Welcome centres were also placed close to the borders between the two states.

to medical checks by the Italian health authorities.⁷⁵ Italian workers could not choose the job position they were going to take, nor the place to which they would be assigned.⁷⁶ Also, unlike the Belgian agreement, in the French one it was not possible to find provisions binding the French government to provide Italian workers with appropriate housing. Despite less generous general terms, a special regime was applied to Italian workers who had families. In fact, in this Treaty it was possible to find provisions that explicitly referred to the possibility of transferring family members to France,⁷⁷ instead of simply granting workers the right of sending allowances to their relatives back in Italy.⁷⁸ Article 14 stated that a special agreement had to determine the conditions under which families of Italian workers could travel to France. The French government, on its side, had to facilitate the arrival of these families to the territory of France by taking up some of their travel expenses. The explicit mention of the issue of family reunification is not surprising because family reunification provisions were already present at national level via Ordonnance no. 45-2658,⁷⁹ showing that France had early sensitivity over such issues. From 1947 to 1949 the total number of families recorded by the ONI included approximately 58,000 people, 48 per cent of which were Italian.⁸⁰

3.3. Germany

Until 1885 Germany was mainly an emigration country.⁸¹ The peak of emigration was reached between 1881 and 1885 when 857,000 migrants left Germany.⁸² After the economic expansion began, the number of emigrants dropped rapidly and, as a consequence, during the late nineteenth century overseas German migration was massively replaced by internal migration from rural to industrialised parts of the country.

After the Second World War, Germany slowly started to turn into an immigration country. During this period Germany began to face massive immigration flows. The first people that entered the country were either refugees from Eastern Europe or expelled persons from the former German territories.⁸³ These voluntary migrants practically covered the vacant places that, during the war, were

⁷⁵ Arts 3, 4, 5.

⁷⁶ Art 7.

⁷⁷ Art 18.

⁷⁸ With regard to the faculty to send allowances back in Italy see Arts 12, 13, 14.

⁷⁹ Art 5(1) Ordonnance No 45-2658 du 2 novembre 1945 relative aux conditions d'entrée et de séjour des étrangers en France, available at www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000699737&dateTexte=19860911.

⁸⁰ Tapinos, above n 68 at 31.

⁸¹ H Esser and H Korte, 'Federal Republic of Germany' in T Hammar (ed), *European Immigration Policy: A Comparative Study* (Cambridge, Cambridge University Press, 1985) 165. Germans emigrated mainly to the United States and, to a lesser extent, to Canada, Australia and South America.

⁸² *ibid*, 166.

⁸³ See T Liebig, 'Recruitment of Foreign Labour in Germany and Switzerland' in *Migration for Employment: Bilateral Agreements at a Crossroads* (Paris, OECD Publishing, 2004), 158.

occupied by war prisoners⁸⁴ and ended up functioning as a large labour reserve. Nevertheless, the almost immediate efforts begun by the allies after the cessation of hostilities to reconstruct the industrial capacity of Germany, together with the currency reform of 1948, triggered such a deep and fast economic recovery that all the labour surpluses were soon absorbed.⁸⁵

West German employers started actively importing foreign labour from 1948. Despite the delay compared to other European countries, the outcome was probably the most organised state recruitment apparatus anywhere in Europe, known as the guestworker system.⁸⁶ Initially, the Federal Labour Office of Germany set up recruitment offices all around the Mediterranean countries. German employers in need of foreign labour had to apply to the Labour Office, which, after receiving payment of a fee, had the task of recruiting suitable workers. Workers had to pass a test that allowed the Labour Office to evaluate their occupational skills. Moreover, workers were subjected to medical tests and police record checks. If all the pre-requisites were fulfilled, they were all accompanied in groups to Germany, where employers had to provide them with proper accommodation.⁸⁷

The first bilateral recruitment agreement was concluded with Italy in 1955.⁸⁸ As early as 1953 Italy had expressed its will to sign a bilateral agreement with Germany. However, it was only in April 1954 that the negotiations started and, after a period of stalemate,⁸⁹ the agreement was signed. The decision to sign this agreement was dictated by economic and historical circumstances. In the early fifties Germany, in order to develop its economy, pushed for a strong liberalisation of international trade. At that time Germany traded intensely with Italy, one of its major coal importers.⁹⁰ At the same time the Italian economy, as previously mentioned, was characterised by high levels of unemployment. When Italy pressured Germany to hire seasonal Italian workers, threatening to adopt a more restrictive importation policy in case of a negative answer, Germany accepted the Italian conditions. This decision was moved surely out of fear of losing its biggest importer of coal⁹¹ and, presumably, also because Germany desperately needed new labour to keep pace with its continuously growing economy.⁹²

⁸⁴ Esser and Korte, above n 81 at 167–69.

⁸⁵ RC Rist, *Guestworkers in Germany: The Prospects for Pluralism* (New York, Praeger Publishers, 1978) 61.

⁸⁶ Castles, above n 46 at 768.

⁸⁷ *ibid.*

⁸⁸ The text of the Treaty can be found in *Diritto Internazionale*, vol XVII, 1963, 280. Further recruitment agreements were concluded later on by Germany with Spain (1960), Greece (1960), Turkey (1961), Portugal (1964) and Yugoslavia (1968). See Esser and Korte, above n 81 at 170.

⁸⁹ G Prontera, 'L'emigrazione italiana verso la Repubblica Federale Tedesca. L'accordo bilaterale del 1955, la ricezione sulla stampa, il ruolo dei centri di emigrazione di Milano e Verona' (2008) 4 *Storicamente* available at www.storicamente.org/07_dossier/migrazioni-prontera.htm.

⁹⁰ *ibid.*

⁹¹ *ibid.*

⁹² *ibid.* In September 1955 the unemployment of German workers nearly disappeared. In fact German unemployment reached 2.7% by September 1955.

According to the agreement, Germany had to indicate the number of workers that needed to be recruited and for what kind of jobs.⁹³ Practically, the Federal Labour Office, acting jointly with the Italian Labour Ministry, was responsible for recruitment. From Nuremberg all job requests from German employers had to be sent to the local offices of the Italian Labour Ministry, which was in charge of viewing and choosing the workers.⁹⁴ Once the worker was accepted, he was granted a bilingual job contract⁹⁵ and an authorisation to work, which was the prerequisite to have a work permit issued once in Germany.⁹⁶ The German government also covered the visa and travel expenses for the Italian workers.⁹⁷ They were also granted the same work and housing conditions as German workers.⁹⁸

Looking at the content of the agreement it is also clear how the presence of Italian workers on German territory was meant to be limited in time.⁹⁹ In fact, probably because of the nation's self-perception of not being a country of immigration, German bilateral agreements¹⁰⁰ were characterised by the creation of a rotation system which intended to frequently replace the previous generation of temporary guestworkers with a new one.¹⁰¹

Despite the German temporary job policy towards immigrants and lack of a broader legislation concerning protecting family residence rights¹⁰² the agreement, surprisingly, made reference to family rights and adopted quite an open position on family reunification. Article 15 stated that all the Italian workers that wished to be accompanied by their families had to prove that they were living in

⁹³ Art 4(2).

⁹⁴ Art 5(1)

⁹⁵ Art 9(1).

⁹⁶ Arts 9(3) and 11.

⁹⁷ Art 16.

⁹⁸ Steinert above n 29 at 142–60.

⁹⁹ P Borruso, 'Note sull'emigrazione clandestina italiana 1876–1976' in M Sanfilippo (ed), *Emigrazione e Storia d'Italia* (Cosenza, Luigi Pellegrini Editore, 2003) 265. Art 4(2) of the Treaty shows how Germany looked at the Italian permanence within its territory as temporary. As a matter of fact it states that the job offers had to indicate clearly how long the job would have lasted.

¹⁰⁰ See John, above n 58 at 5.

¹⁰¹ Among all the reasons why importing temporary foreign workers seemed to be the best solution there was the fact it was considered less risky, considering the still uncertain economic recovery of Germany. See H Werner, 'From the German "Guestworker" Programmes of the Sixties to the Current "Green Card" Initiative for IT Specialists' (2001) 43 *Institut für Arbeitsmarkt-und Berufsforschung der Bundesanstalt für Arbeit (IAB)*, available at www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---migrant/documents/publication/wcms_201876.pdf, 7.

¹⁰² See RR Marin, *Immigration as a Democratic Challenge: Citizenship and Inclusion in Germany and the United States* (Cambridge, Cambridge University Press, 2000) 12. The legal regime of aliens reflected this conception of immigrants as temporary guests. During the first years of guestworkers immigration the old Nazi legislation was still applied to govern aliens' presence within the country. In 1965 this regulation was replaced by the Aliens Act (*Ausländergesetz*), which was presented as a break from the past and an expression of liberal policy towards foreigners (on this point see P Gassert and AE Steinweis, *Coping with the Nazi past: West German debates on Nazism and generational conflict*, (New York, Berghan Books, 2006) 111–12). However, despite this manifesto, this statute did not grant permanent residence permits but simply temporary rights to stay. Moreover, this statute did not create any provision on family residence rights. Indeed detailed rules for reuniting foreign families were not instituted until 1981.

proper housing. Workers, when issues of public safety or public order were not occurring, were given residence permits for their families in the shortest possible time. Moreover, requests for residence permits for relatives not belonging to the core family unit were also accepted.¹⁰³ The same article states explicitly that the competent offices also had to examine ‘benevolently’ the admission requests of other family members.¹⁰⁴ Finally, although the bilateral agreement between Italy and Germany did not specify it in any provision, the policy of Germany was that the family member (generally the woman) who was allowed to enter with the foreign worker was also entitled to take up a job position.¹⁰⁵

3.4. Luxembourg

The first migration flows to Luxembourg can be traced back to the last quarter of the nineteenth century. That period was characterised by the industrialisation of the country and the beginning of mining activities. The fast development of the mining and steel industry created the need to import a huge amount of manpower since the need for labour could not be supplied entirely by the native population. Both low- and high-skilled workers were required.¹⁰⁶

The first wave of immigrants to be employed in the steel and coal industry was, once again, Italian.¹⁰⁷ The first Italian wave of migration to Luxembourg occurred in between the last decade of the nineteenth century and the beginning of the First World War. Italian workers used to move to Luxembourg mainly from the northern and central regions of Italy. This first migration flow was characterised by extreme temporariness. Workers stayed for limited periods and generally returned to Italy in winter.¹⁰⁸ Temporariness, with some exceptions in the period before the First World War, continued to characterise the presence of Italian migrants in Luxembourg up until the post-Second World War period.¹⁰⁹ At the end of the

¹⁰³ See Art 15. These provision was applied also to workers that were meant to remain in Germany for a period no longer than nine months.

¹⁰⁴ *ibid.*

¹⁰⁵ The job market was in such need of recruitment that the family member was also encouraged to apply for jobs. See M Mattes, ‘Gender and Migration in Germany: the case of female labour migration from the 1950s to the 1970s’ (2009) available at migrationeducation.de/fileadmin/uploads/Mattes-GenderMigration_01.pdf, 4. The author underlines how, during the 1960s, the German recruitment agencies promised that Italians would receive preferential treatment if they decided to move with or to be joined by their wives. On migration of women after the Second World War see also E Kofman, ‘Female “Birds of Passage” a Decade later: Gender and Immigration in the European Union’ (1999) 33 *International Migration Review* 269, 274.

¹⁰⁶ M Valentova and G Berzoza, ‘Attitudes towards immigrants in Luxembourg: do contacts matter?’ CEPS/INSTEAD working paper (2010) available at www.ceps.lu/pdf/3/art1547.pdf, 3.

¹⁰⁷ *ibid.*

¹⁰⁸ ML Caldognetto, ‘Per una storia dell’emigrazione dal Montefeltro al Lussemburgo: temi, problemi, prospettive’ (2010) 32 *Studi Montefeltrani*, Pesaro, Societa’ di Studi Storici per il Montefeltro, available at www.cdmh.lu/resources/pdf/_base_documents/9983156792.pdf 505, 506.

¹⁰⁹ *ibid.*