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## Premise

This work stems from the awareness of the present difficulties of the Italian administrative system for the procedures governing the access to social services by third-country citizens legally residing. In 1998, with the Law 40, known as Turkish - Napolitano, then incorporated in the legislative decree 286/98, Italy was finally equipped with an organic discipline (and a sure one!) of rights and duties of citizens of Third States, after years of severe lack of legislation. In fact, notwithstanding Article 10 c. 2 of the Constitution reads: "The legal status of foreigners is regulated by law in conformity with international norms and treaties", until the entry into force of Law 40/98, to guarantee fundamental rights, had been used in practice and round without any legal basis, according to a logic emergency situation. In the following years, numerous legislative changes have been superimposed in an inconsistent manner, resulting in apparent contradictions in law and in practice in an environment already under significant stress for the effect of the two main political processes still going on: on the one hand the federal, and the other the integration of the European Union. Access to welfare by migrants is a ground on which cross different and sometimes conflicting responsibilities: regions have a residual jurisdiction in respect of social assistance, while the state has exclusive jurisdiction to determine the minimum essential levels of performance. At the same time, the European Union enter increasingly into immigration, with the definition of particular groups of citizens of third countries, and even more with the Lisbon Treaty and Article. 79 of the Treaty on the Functioning of the European Union (hereinafter TFEU), the basis of a common immigration policy. As regards Italy, the exclusive jurisdiction which the Constitution assigns to the State immigration (Article. 117 c. 2 letter. and b) must necessarily intertwine with the principle of primacy of Union law. These different levels of expertise have produced a fragmentation of administrative and legal status of the immigrants, in a historical - political context of containment of public spending and restructuring of the welfare system. The results are there for all to see: hard practicality of the rights; uncertainty and non-uniform application of administrative procedures; high litigation between state institutions, local and third country nationals; serious repercussions for the credibility of institutions and social cohesion. These same reforms are put to a

severe test by these phenomena, because it is unthinkable that a rule which relates to dealing with fundamental rights or social benefits that are subjective rights of the person, can find an opposite application not only in the same region, but within a province, between neighboring municipalities, including local government offices in the same, without triggering a result of degradation Administrative. We cannot resign ourselves to calls for the allocation of public housing that modulate the access of foreign nationals so profoundly contradictory from a municipality to the other or obligations required for the foreign citizen that in a town provide the normal tax in the contiguous stamps and many other costs, as is happening for suitable housing on a fundamental right as to family unity. While the due autonomy of local authorities clearly cannot translate into forms of “domestic federalism”, the “help yourself”, which represents a parody of the federalist process in place. The purpose of the guide is then run through the process of access to some of the main existing measures of welfare, highlighting the principles, the institutions and the guarantees provided by national and the EU regulations, in the light of the rulings of the Supreme Courts. We will attempt to reconstruct a picture as unitary as possible within the unit which the operator could identify with his own segment of competence and responsibility, and the migrant citizen could raise the awareness of his rights and the available means of protection. While waiting for the legislature to restore order in a sector crucial to the lives of many people.

## 1. Social assistance

Article 41 of Legislative Decree 286/98 provides that the citizens who hold a residence permit for not less than one year, have equal treatment with Italian citizens, “for the enjoyment of the benefits and services, including economic, social assistance, including those for those who are suffering from Hansen’s disease or tuberculosis, for the deaf, the blind civilians, provided for disabled people and the poor ones. This equation of the Italian citizen and the migrant citizen legally residing, undergoes a substantive restriction with subsequent interventions of the national legislature. It is true that the immigrant population identified pursuant to Article 41 of Legislative Decree 286/98 are among the beneficiaries of the measures provided for by law 328/2000 “Framework Law for the implementation of the integrated system of interventions and social services”. However, the entire category of third-country citizens residing legally is excluded from the access to the allowance for families with 3 or more children, introduced by art. 65 of law 448/98, subject to political refugees and holders of subsidiary protection allowed by a circular in January 2010 INPS n. 9. The maternity allowance, established by art. 66 l. 448/98, is extended by art. 74 Legislative Decree 151/2001 for mothers only in possession of a residence permit and then the refugees, as well as welfare benefits and economic benefits that are subjective rights, are conferred by Article 80 c. 19 of law 388/2000 only to eligible holders of EU permit for long-term residents. (further LTR). From 1st of January 2009, Article 20 c. 10 l. 133/2008 introduces as an additional, the requirement for welfare benefits to the continuous residence in Italy for at least 10 years.

## 2. The welfare economic performance

The charitable nature of economic compensations which we refer in this guide are those provided to citizens in possession of certain law requirements (income, age, health, etc.. ), regardless of whether the beneficiaries have paid social security contributions. Measures are therefore financed by general taxation.

Next, we try to explain them briefly, deferring to the competent agencies responsible for the deepening of the requirements.

**Social allowance:** an economic compensation predestinated to people

older than 65 years old and in conditions of severe economic hardship who have an income below the ceiling. From the 1st of January 2009, the additional requirement of ten years residence in Italy was introduced.

**Disability allowance:** an economic compensation predestinated to partial invalids, who are between 18 and 65 years old, with a disability of at least 74% and have an income below the ceiling.

**Disability pension:** an economic compensation predestinated to total disabled persons (100%), who are between 18 and 65 years old and have an income below the ceiling.

**Attendance allowance:** the only benefit provided for the disability, predestinated to the totally disabled civilians or to absolute blind people of different ages who require continuous care, regardless of economic conditions.

**Attendance contribution:** an economic compensation provided for disabled civilians under 18 years old, attending outpatient centers specialized in rehabilitative or therapeutic treatments, schools or professional training centers, and have an income below the ceiling.

**Pension for completely blind persons:** an economic compensation to absolute blind persons who are over 18 years old and have an income below the ceiling.

**Pension for partial blind persons or twentieths:** an economic compensation for partial blind persons of different ages who have an income below the ceiling.

**Special allowance for partial blinds or twentieths:** an economic compensation to partial civil blind persons (twentieths) released by age and by income requirements.

**Non - reversible pension for deaf persons:** it is an economic benefit for the deaf persons between 18 and 65 years old.

**Compensation for communication:** a compensation, that is up to any age for the sole title of the disability, regardless of economic conditions.

**Social allowance replacement:** the monthly assistance and disability pension provided for disabled people, as well as the non - reversible pension for the deaf people, is replaced by the social allowance when reaching 65 years old of the owner, if the income is below the ceiling.

**Maternity grant of the municipalities jurisdiction:** an economic compensation for mothers who do not benefit from any economic or social security benefit for maternity, if certain income requirements are present (threshold ISE).

**Allowance for the family nucleus with at least 3 minor children under the jurisdiction of municipalities:** an economic performance in support of families with minor children living together, in possession of certain income requirements (threshold ISE).

The following table tries to associate these types of providences to third country citizens admitted to beneficiate according to the instructions contained on the websites of charities or bodies responsible for procedures.

<b>Social Economic Performance</b>	<b>What is it</b>	<b>Type of foreigners admitted</b>	<b>Requirements</b>
<b>Social benefits</b>	An economic allowance that is up to individuals over the age of 65 years in conditions of severe economic hardship	PSE EC SLP holders  The political refugee, and the rejoined spouse;  the beneficiaries of international protection and the spouse rejoined.	Continuous residence for at least 10 years of age and income
<b>Disability allowance</b>	An economic allowance that it is for the partial invalids, who are between 18 and 65 years old, with a disability of at least 74%.	PSE EC SLP holders;	Health, income and age
<b>Disability pension</b>	An economic allowance that it is for total disabled persons (100%) who are between 18 and 65 years old.	PSE EC SLP holders;	Health, income and age
<b>Attendance allowance</b>	The only benefit provided for the disability, predestinated to the totally disabled civilians or to	PSE EC SLP holders;	Health

	absolute blind people of different ages who require continuous care, regardless of economic conditions.		
<b>Attendance contribution</b>	An economic compensation provided for disabled civilians under 18 years old, attending outpatient centers specialized in rehabilitative or therapeutic treatments, schools or professional training centers, and have an income below the ceiling.	PSE EC SLP holders;	Health and income
<b>Pension for completely blind persons:</b>	An economic compensation to absolute blind persons who are over 18 years old and have an income below the ceiling.	PSE EC SLP holders	Health, income and age
<b>Pension for partial blind persons or twentieths</b>	An economic compensation for partial blind persons of different ages who have an income below the ceiling.	PSE EC SLP holders	Health and income
<b>Special allowance for partial blinds or twentieths</b>	An economic compensation to partial civil blind persons (twentieths) released by age and by income requirements.	PSE EC SLP holders	Health
<b>Non - reversible pension for deaf persons</b>	An economic benefit for the deaf persons between 18 and 65 years old.	PSE EC SLP holders	Health, income and age

<b>Compensation for communication</b>	A compensation, that is up to any age for the sole title of the disability, regardless of economic conditions.	PSE EC SLP holders	Health
<b>Social allowance replacement</b>	The monthly assistance and disability pension provided for disabled people, as well as the non - reversible pension for the deaf people, is replaced by the social allowance when reaching 65 years old of the owner, if the income is below the ceiling.	PSE EC SLP holders	Health, income and age
<b>Maternity grant of the municipalities jurisdiction</b>	An economic compensation for mothers who do not benefit from any economic or social security benefit for maternity, if certain income requirements are present (threshold ISE).	PSE EC SLP holders;  The political refugee;  the beneficiaries of international protection and the spouse rejoined.	Income (threshold ISE).
<b>Allowance for the family nucleus with at least 3 minor children under the jurisdiction of municipalities</b>	An economic allowance in support of families with minor children living together, in possession of certain income requirements (threshold ISE).	The political refugee;  the beneficiaries of international protection and the spouse rejoined.	Income (threshold ISE).

Tab. 1

### **3. The division of legislative powers between State and Regions**

In 2001, the reform of Title V of the Constitution has reversed the policy of the division of legislative powers between State and Regions, by assigning all subjects to the regions that are best left to the State. The regions thus have a general power, defined residual on any matter not expressly reserved to the State - Article. 117 c. 4 Cost. - is a competing authority on all matters listed under c. 3 of the same Article. The social assistance falls within the residual competence of the regions, but the state retains exclusive jurisdiction to determine the basic level of social benefits that should be guaranteed throughout the national territory (Article. 117 c. 2 letter. Cost m. ). The Law 328/2000 has defined the interventions that constitute the minimum level of social benefits. In particular, we recall the measures for the support of family responsibilities, which include the provision of care allowances and interventions in support of motherhood and responsible parenthood; the social benefits for women in distress and the contrast of poverty and income support; the interventions on behalf of children in difficult circumstances (Article. 22 c. Two sixteen c. 3). These are the general performance support to birth, to the family and parenting, which by their nature, and why are descended from explicit constitutional guarantees and international conventions, should necessarily have universal significance and therefore turn to the general population, including foreigners legally resident (Article. 2 c. 1 and 2 of Law 328/2000). Maternity allowance, indicated in Article. 74 Legislative Decree. 151/2001 as a basic service, should therefore fall under the measures in support of responsible motherhood for women who do not qualify for other benefits, while the allowance to the family with at least 3 minor children is the provision of support to the family income and poverty contrast. The system thus conceived was to provide access to all the subjects according to law. 2 c. 1: EU Italian citizens and identified foreigners in accordance with Article. 41 Legislative Decree. 286/98, that is to say, holders of a residence permit valid for at least 1 year. But, the Articles. 65 and 66 l. 448/98, 74 Legislative Decree. 151/2001 and 80 c. 19 l. 388/2000 break the unity of this scheme, going as far as to exclude the entire audience of third country nationals from the allowance for families with at least 3 minor children. Another highly controversial issue, which can take dramatic characters in the future, is whether a region may include two levels of access to social benefits: one for all legally residing citizens, limited to core benefits, the other with additional benefits only

for Italian and EU citizens. The Constitutional Court's recent ruling n. 40/2011, exclude this possibility, because the social laws have as their objective, the support to people who are in serious financial straits, and therefore cannot claim citizenship as a criterion for exclusion. Otherwise, it is just risking to hit the most vulnerable subjects exposed to the hardship that those laws are intended to overcome, in contradiction with the principles of reasonableness and of equality. In other rulings, the Court had already held that the national legislature may limit the access of foreigners, only if present on an occasional or episodic way throughout the country, given the limited financial resources. But when it is established that the presence is not temporary but continuous, then there are reasonable differences of treatment and is liable to the violations of Articles. 2, 3, and 38 of the Constitution. According to the decision C. Cost.40/2011., the citizens of Third Countries must therefore be able to access to all regional measures of welfare, even when they exceed the minimum level.

#### **4. The EU right**

The European Union is intervening with more and more attention even in the field of immigration, in the past left entirely to Member States and their national rules. In the Lisbon Treaty, in force since December 2009, immigration is within the field of Area of Freedom, Security and Justice, sector of which the Union uses a competing competence shared with the Member States. The definition of "competing competence" it means that Member States may legislate to the extent that the Union has not exercised or has decided to cease exercising its own competence (Article. 2 c. 2 TFEU).

Under Article 79 of TFEU, the EU will develop in the coming years, a common immigration policy, not as a summation of national policies but organic, and to ensure fair treatment of third country nationals. Here are briefly some of the Union acts, which have identified, and in some cases created from scratch, the categories of third country citizens admitted to enjoy social rights equal to those of EU citizens. It is made legally binding for EU Member States, pending a more comprehensive intervention with the establishment of the "Single European Permission".

#### **4.1 Directive 2003/109/CE**

This Directive, implemented in Italy by Legislative Decree 3 / 2007 which amended Article 9 of Legislative Decree 286/98, establishing the permanent status of a long-term resident third-country citizen (hereafter LTR) and regulates the methods of use of this status in other Member States. The aim is to ensure that these citizens a set of uniform rights across the EU, as near as possible to those enjoyed by EU citizens. In social matters, the directive recognizes the equality of treatment, while allowing Member States to limit it to essential services. The latter, however, must include at least a minimum income support, assistance in case of sickness or pregnancy, parental assistance, as well as that of long-term assistance. The Italian legislator has not exercised that right, neither in the transposition of the directive, nor later. Therefore, it did not introduce explicit exclusions or restrictions in access to social benefits. For this, the ASGI - Association of Legal Studies on Immigration - has lodged a formal complaint to the European Commission to the exclusion of SLP to the access of allowance for the families with at least 3 minor children, under Article. 65 of Law 448 / 1998. The ASGI believes, in fact, that we are a flagrant breach of EU right as the principle of equal treatment can be derogated exclusively within the limits defined by the same directive. On the April 8, 2011 the European Union has put Italy in default for violation of the right to equal treatment provided for SLP, with reference to regional and local provisions of a social nature, which are outside Our discussion. When it starts, as in this case, an infringement of EU right under ex Article 258 TFEU, the Member State must respond within two months to the findings of the European Commission, which, in the absence of adequate explanations, can open a dispute against the defaulting State to the EU Court of Justice (hereinafter ECJ).

#### **4.2 Directive 2004/83/CE**

This directive was implemented by Legislative Decree 251/07, which in Article 27 provides for holders of refugee status and subsidiary protection status to the same treatment as an Italian citizen on social assistance. From the INPS site results that the access to social allowance have been extended to refugees and holders of subsidiary protection. According to the information found on websites, they fall only for some municipalities,

among the potential beneficiaries of the maternity allowance and for large families (INPS circular n. Message 9 of 22/01/2010 and INPS n, 12712 of 05/21/2007).

### **4.3 Regulations (EC) 883/2004, 987/2009, 988/2009**

These regulations are in force from 1 May 2010 and are involved in the coordination of the welfare systems of the Member States. The aim is to ensure equal treatment under the various national laws to people moving within the European Union. Are applied, with some exceptions expressly provided for in the Annexes, to all social security schemes. For social security means an area which includes all services that are not subject to discretionary assessment by the delivering entity, but whose recognition is based solely on the requirements provided by laws. This concept supercedes the ancient distinction between assistance and insurance, to which we are accustomed. One area, therefore, very broad for Italy includes, for example, care of special measures - disability allowance, disability pension, attendance allowance, social allowance, etc.. - the pensions, the welfare measures to families support and of motherhood.

The target audience are Union citizens and their family members and survivors, including non-EU and stateless persons and refugees residing in a Member State, with their families and survivors.

Below is the list of services affected in accordance with Article 3 of Regulation (EC) 883/2004:

- a) sickness benefits;
- b) the provision of maternity and paternity benefits;
- c) disability benefits;
- d) old-age benefits;
- e) survivors' benefits;
- f) benefits for accidents at work and occupational diseases;
- g) checks in case of death;
- h) unemployment benefits;
- i) early retirement benefits;
- j) family benefits;
- l) the non-contributory cash benefits.

For “*family service*” of letter j), means all benefits intended to meet family expenses, excluding advances of maintenance payments and special child-

birth or adoption, if listed in Annex I to Regulation. In this annex, Italy, however, has not included none of the special childbirth allowance (bonus babies, birth grant, etc..) payable under the inner legislation.

In Annex X to Regulation 988/2009, Italy has shown to be within the cash benefits of non-contributory welfare providences the following:

- Social pensions for persons without means (Law n. 153 of 30 April 1969;
- pensions and allowances for the civilian disabled or invalids (Laws n. 118 of March 30, 1971, n. 18 of 11 en febbraio 1980. 508 of 23 November 1988);
  - Pensions and allowances for the deaf and dumb persons(read n. 381 of May 26, 1970 en. 508 of 23 November 1988);
  - Pensions and allowances for the civilian blind persons(Laws No. 382, May 27, 1970 en. 508 of 23 November 1988);
  - integration of minimum pensions (law n. 218 of April 4, 1952, n. 638 of 11 November 1983rd n. 407 of 29 December 1990);
  - supplementing disability allowances (Law n. 222 of 12 June 1984);
  - Social allowance (Law n. 335 of 8 August 1995);
  - Social increase (Article 1, paragraphs 1 and 12 of Law n. 544 of December 29, 1988, as amended).

The services that are the subject of our discussion thus fall within the scope of these regulations.

#### **4.4 Directive 2004/38/CE**

As for us, this Directive implemented in Italy by Legislative Decree 30/07, extends the right to equal treatment for those who are traveling or staying in one or more Member States and to the families of non-EU citizen of the Union, by virtue of the parental bond.

Therefore, they enjoy equal treatment with nationals in access to social benefits also. This equation is repeated for the field of social security by Regulation (EC) n. 883/2004 in force since 1 May 2010. The regulation establishes a minimum content of the definition of a family, including spouses, minor children and adult dependent children, if not administered by the legislation under which benefits are provided. For Directive 38, however, the definition contemplates a spouse, partner (not for Italy), the direct dependent ascendants and those of the spouse, the direct descendants under the age of 21 years or the dependent ones and those of the spouse.

#### **4.5 The EU Regulation 1231/2010**

This regulation, in force since 1 January 2011, extends the provisions of Regulations 883/2004, 988/2009 987 and also to third-country nationals legally residing in a Member State who find themselves in a situation that is not confined, in all its aspects, within a single State of the Union. These are foreign citizens whose migration route has been developed in 2 or more Member States and by virtue of the Union recognizes that equal treatment with nationals in access to social benefits. The goal is always to enhance and ensure the effectiveness of the principle of free movement of persons and workers.

For example, a Macedonian citizen, who has worked legally in Germany and then moved to Italy where he regularly stays, or an Albanian citizen, who has lived in Greece, before moving to Italy, where he lives and works regularly, are fully title and right beneficiaries of these regulations.

It is worth to emphasize that the regulations are among the most recognized standards of the European Union. They are acts having the force and the force of law “erga omnes”, which bind not only the Member States, but also government offices and individuals. They have immediately effective legislation, by virtue of publication in the Official Journal of the European Union, with no need for transposition into national law. Are directly applicable in all Member States and must therefore be respected by authorities and administrations, social security bodies and judges.

Finally, it must be stressed that in cases of conflict between national or state laws and regulations of the Union, the primacy belongs to the EU rules. In these situations the interested person may apply directly to the application of EU rules, before all the public authorities and competent courts.

#### **4.6 The European Union’s Euro-Mediterranean Agreements with Tunisia, Morocco, Algeria and Turkey.**

The EU has signed agreements with the countries bordering with the Mediterranean that bind both the EU and individual Member States.

Agreements with Tunisia, Morocco, Algeria and Turkey contain a clause prohibiting discrimination in respect of social security for workers in these countries and their families.

Article. 65, c. 1 and 2 of the Euro - Mediterranean Agreement with the

Kingdom of Morocco expressly provides: “... *workers of Moroccan nationality and any members of their families living with them shall enjoy, in the field of social security, treatment free from any discrimination based on nationality relative to nationals of the Member States in which they are employed. The concept of social security shall cover the branches of social security dealing with sickness and maternity benefits, invalidity, old-age and survivors’ benefits, industrial accident and occupational disease benefits and death, unemployment and family benefits*”.

*The same clause is contained in the Agreement with the Republic of Tunisia, while Article 69 of Euro-Mediterranean Agreement with the Republic of Algeria shows equal treatment of beneficiaries as “citizens of states party to the Agreement who reside or work lawfully on the territory of their host countries”.*

Finally, the Association Agreement with Turkey provides for equal treatment of Turkish workers residing legally in a Member State and their family members or survivors with the citizens of that state for access to the fields of social security<sup>1</sup>.

These agreements are directly binding on the Union itself and the Member States, as an integral part of EU law<sup>2</sup>.

For citizens of these states and their families, legally resident in Italy or legally employed, the residence permit is, therefore, a legitimate title to access social security benefits, regardless of its duration.

#### **4.7 First Conclusions**

In summary, the third-country citizens who enjoy equal treatment with nationals of the Union State where they are legally resident are:

- The political refugee, his family members and survivors;
- a stateless person, his family members and survivors;
- the owner of the subsidiary protection;
- citizens who have resided in at least 2 states, their families and survivors;
- non-E. U. family members and survivors of the Union citizen;

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1 Decision n. 3 / 80 Articles. 2, 3, 4, which specifically attract certain provisions of Regulation (EC) n. 1408/71 was replaced by 1 May 2010 by Council Regulation (EC) n. 883/2004.

2 See the European Parliament website: Sources of European Union law. V. and the recent ruling of the ECJ, 26 May 2011, C-485/07, concerning the direct applicability in the Member States of the EEC-Turkey Association Agreement and Decision No. 3 / 80.

- the holder of EC permit for long-term residents;
- citizens / workers from Morocco, Tunisia, Algeria and Turkey, and their families.

We must ask what is the status of implementation of these provisions. The operator checks if these conditions exist or proceed to consider only the ownership of a residence permit EC SLP, as the only parameter to allow access to benefits?

To see this just look at the Web sites and fact sheets of the agencies predestinated to the assistance or application of these procedures.

It is necessary then initiate an appropriate information, including multi-lingual, to improve knowledge of these standards and the access to proceedings by third-country nationals entitled to it, as recipients of the effects of regulations 883/2004, 987 - 988/2004, 1231/2010, the Directives 38/2004, 83/2004 and 109/2003 and the agreements referred to in paragraph 4. 6.

## **5. The non-application of internal rules in conflict with EU right**

As confirmed by numerous rulings of the ECJ and the Constitutional Court, the national legislation on contrary to European rules, if it cannot be interpreted in a consistent manner<sup>3</sup>, must yield to the principle of primacy of the Union right.

In addition, all relevant subjects in our order to give effect to laws - both the national court exercising its jurisdiction, and the same public administration in carrying out its administrative activities - are legally obliged to disapply domestic rules inconsistent with the provisions of the Union (C. Cost. 11. 07. 1989, n. 389).

*"It would also be contradictory to rule that individuals may invoke before national courts the provisions of a directive ..., in order to censor the work of the administration, and yet*

3 First applies the presumption of conformity under the internal law of the Union regulations: among the possible interpretations of the national standard should be chosen that conforms to regulatory requirements of the European Union, and the constitutional dictation, which guarantees the observance of the Treaty and the right derived from it (Article 11 of Const.). When this is not possible, for obvious incompatibility between the internal standard and the Union standard, the latter is, however, to prevail. See Case 176, 177/81 and 170/84 Cost. Court.

*to hold that the administration is not bound to apply the provisions of the directive neglecting the national rules non - conforming to it” (ECJ, June 22, 1989, Cl 03/88,)”.*

So this is not to abrogate or extinguish the internal standard, but not be applied. For what concerns us here, besides the regulations and the rulings of the European Court of Justice that are directly applicable to the internal rules, all EU provisions (directives, agreements, etc.. ), that have value and force of law, unless unconditional and sufficiently precise, can be relied on to oppose any non-conforming internal layout, as against the defaulting Member State (C. Cost. 18. 04. 1991, n. 168).

A provision in an agreement, for example, may be considered directly effective if it contains a clear and a precise obligation whose service and whose effects are not dependent on the adoption of any subsequent measure (ECJ, 26 May 2011, C-485/07)<sup>4</sup>.

The same goes for a directive that is not transposed in one Member State within the prescribed period: its provisions, if clear and precise, are immediately applicable and effective within the legislation of that State in default and can be relied upon by individual citizens to protect their rights protected by the European standard.

In conclusion, the duty to waive the rule to put an internal conflict with the provisions of EU law rests so much on the courts, because of the administrative<sup>5</sup>. This is a highly innovative institute for Italian operators, in order to guarantee the necessary and the immediate application to the Community rule in the presence of inconsistent national or state laws.

As we saw earlier, this principle, without exceptions, value for the discipline made by regulation and the rulings of the Court of Justice, while the directives and other acts having the force and the force of law, is applied only if sufficiently accurate and unconditional (C. Cost. 23. 04. 1985, n. 113).

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4 In this recent ruling by the ECJ, 26/05/2011, C-485/07, it is stressed that, according to settled Court case-law, a provision in an agreement or a decision of the association council shall be considered directly effective if it contains a clear and precise and obligate. Since the rule in question lays down a precise and unconditional principle, sufficiently operational, it has direct effect and the interested citizens can use them to set aside the national provision to the contrary.

5 see Ord. Trib. Gorizia n. 212/2011. V. Ord also. Trib. Udine n. 530/2010, very clear about the possibility of action for discrimination under Articles 4 dlgs. 215/2003 and 44 legislative decree 286/98 against the public administration that fails to set aside the national provision incompatible with that of the Union.

It is understood, however, that the national legislator should modify the incompatible internal right with EU rules, because the non-application is a way to resolve the contrasting regulations, however, leaving in force the ones mutually in conflict.

## **6. Other forms of protection<sup>6</sup>**

A citizen protected by an Union rule cannot apply directly to the EU Court of Justice of the European Union, but may present a complaint to the European Commission against a Member State to indicate a measure (legislative, regulatory or administrative) or practice adopted by that State to the contrary, in his opinion, a provision or principle of the Union right. There is no need to prove the existence of an interest in acting, or that the alleged infringement causes significant harm to those who presented the complaint. However, because a complaint is deemed admissible and examined, it is necessary with respect to an infringement of EU law. The Commission has, in fact, the power to end the violation and, where necessary, refer the case to the Court of Justice of the European Union. The Court of Justice plays a vital role in case of doubt on the scope and extent of EU provisions, on applicability to individual cases and on the interpretation under national law.

Therefore, it can also consult the national court to clarify doubts on the interpretation of a specific provision of EU. Therefore, it also refers to the national court, when to clarify aspects of a European standard that may affect its decisions.

For further reading we recommend the site:

[http://ec.europa.eu/eu\\_law/your\\_rights/your\\_rights\\_it.htm#ldepot](http://ec.europa.eu/eu_law/your_rights/your_rights_it.htm#ldepot)

Other information tools and troubleshooting are made available by the following websites:

1) <http://ec.europa.eu/social-security-coordination/>

It is dedicated to EU rules on social security, edited by DG Employment and Social Affairs of the European Commission. In it you can find many of the most frequently asked questions as well as a series of legislative texts

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6 The information is taken from the guide “EU provisions on social security - Your rights when moving within the European Union” organized by the European Commission - General Directorate for Employment, the Social Affairs and the Equal Opportunities, Unit E3.

and explanatory notes.

2) <http://ec.europa.eu/citizensrights>

It provides practical answers to questions and focused on free movement and rights of citizens within the EU. It also provides advice on the paths that people can take to overcome the problems in exercising their rights and, finally, directs them to a body (official or independent, at EU, national or local) which will further help.

3) <http://ec.europa.eu/euopedirect>

Provides information on all matters related to the EU, and also directs those interested in other sources of information or advice at European, national, regional and local levels.

4) <http://europa.eu/solvit/>

It helps to find solutions to the informal complaints about the incorrect application by the public authorities of the European standards. SOLVIT is a network created by the European Commission and the Member States with the aim of solving the problems that arise for individual citizens as a result of the misapplication of EU rules.

Here are other useful websites

For information on coordinating social security in Europe:

<http://ec.europa.eu/social-security-coordination>

<http://ec.europa.eu/social-security-directory>

<http://ehic.europa.eu>

<http://www.tress-network.org>

For information on the free movement of workers:

<http://ec.europa.eu/free-movement-of-workers/>

For information on national systems of social security:

<http://www.ec.europa.eu/missoc>

## **7. The judgments of the Constitutional Court on the legality of Article 80 c. 19 l. 388/2000**

The Supreme Court in recent years has spoken repeatedly of ordinances relating to cases in which nationals of third countries legally resident had been denied access to care providences - attendance allowance, disability pension, disability allowance, attendance allowance - because they do not have the status of long resident citizen, EC SLP or permit holder of a residence card issued under Article 9 dlgs. 286/98<sup>7</sup>.

In all judgments, the Court declared the illegality of Article 80 c. 19 of Law 388/2000, in so far as it requires the possession of a residence permit for violation of Articles 2, 3, 10, 32 and 38 of the Constitution.

The first sentence, as the n. 306/2008 and n. 11/2009, state that it is unconstitutional to link access to welfare benefits in the possession of a residence permit, when this has not been issued solely for lack of minimum income expected, as it is unreasonable to expect an income requirement by people with severe disability and therefore unable to work.

The last one, n. 187/2010, establishes the illegality of Article 80 c. 19 l. 388/2000, because it is inconsistent with Article 14 of the ECHR - European Convention for the Protection of Human Rights and Fundamental Freedoms - and art. 1 of the First Additional Protocol as interpreted by the Strasbourg Court. Article 14 of the ECHR provides for acceding States the prohibition to discriminate the access to rights protected on grounds of nationality, while Article 1 of the First Additional Protocol considers the goods' property as a human right worthy of protection. According to the jurisprudence of the European Court in Strasbourg should be included among the assets of the non-contributory social security. The Guide for invalidating the assumed value of whether the proposed measure, in this case, the disability allowance, go to meet "basic needs" which the livelihood of the individual, not possible otherwise. If so, then any distinction between citizens and legally residing foreign residents is contrary to the provisions of the ECHR<sup>8</sup> cited.

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7 see judgements Cost. Court n. 306/2008, 11/2009, 187/2010 and ord. Cost. Court n. 285/2009

8 The Lisbon treaty implies the adhesion to the ECHR (art. 6 of the Treaty on the European Union - TUE). With the adhesion, the fundamental rights stated by the ECHR will become part of the European Union law as general principles.

If performance is a measure for the survival of the person, the difference in treatment between nationals and foreigners are not allowed. All the remedies that are considered essential - even in light of statements by the Court of Strasbourg - are then singled out by the Court as “inescapable parameters of equality” in treatment between citizens and foreigners lawfully present on the territory of the State. No longer referenced to the lack of income requirement.

The Court is reporting the existence of a core of fundamental rights that meet basic needs, to ensure the livelihood of the people, who are in fact unavailable to the national legislature to operate differentiation of access by Nationality. At a time when a state provides for measures to address these needs cannot establish differential treatment on grounds of nationality.

## **8. The disputes continue ...**

Following these rulings, there has been a reshaping of the economic service of the procedures for granting assistance, but rather a proliferation of appeals to the Labour Court who regularly reiterates the right to the grant of the benefits assistance to citizens residing legally in possession of the subject requirements, although without residence permit EC SLP, affirmed by the Guide.

This seems anomalous, and indicates a malfunction, if not pathological, of the system: the citizen must endure the denial of the application for welfare benefits from the public administration, in order to obtain later, through a litigation, a full recognition of the same benefit from the court.

## **9. Some final considerations**

In light of what has been exposed, let's try to revise the categories of citizens allowed to welfare measures, the subject of our discussion, in light of what has been exposed. The following table summarizes the results arising from the legal framework outlined.

<b>Social Economic Performance</b>	<b>What is it</b>	<b>Type of third-country citizens</b>	<b>Requirements</b>
<b>Social benefit</b>	An economic allowance that is up to individuals over the age of 65 years in conditions of severe economic hardship	<p>PSE EC SLP holders;</p> <p>The citizen who has resided legally in at least 2 member states, their families and survivors;</p> <p>Non E.U. families and survivors of the Union citizen;</p> <p>The political refugee, his family members and survivors;</p> <p>The owner of subsidiary protection;</p> <p>A stateless person, his family members and survivors;</p> <p>The citizen/worker of Morocco, Tunisia, Algeria and Turkey, legally resident, and his family.</p>	Continuous residence for at least 10 years of age and income
<b>Disability allowance</b>	An economic allowance that it is for the partial invalids, who are between 18 and 65 years old, with a disability of at least 74%.	Citizens legally residing in a non-episodic or occasional way	Health, income and age
<b>Disability pension</b>	An economic allowance that it is for total disabled persons (100%) who are between 18 and 65 years old	Citizens legally residing in a non-episodic or occasional way	Health, income and age

<b>Attendance allowance</b>	The only benefit provided for the disability, predestinated to the totally disabled civilians or to absolute blind people of different ages who require continuous care, regardless of	Citizens legally residing in a non-episodic or occasional way	Health
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	economic conditions.		
<b>Attendance contribution</b>	An economic compensation provided for disabled civilians under 18 years old, attending outpatient centers specialized in rehabilitative or therapeutic treatments, schools or professional training centers, and have an income below the ceiling.	Minor legal resident	Health, income and age
<b>Pension for completely blind persons:</b>	An economic compensation to absolute blind persons who are over 18 years old and have an income below the ceiling.	PSE CE SLP holders; The citizen who has resided legally in at least 2 member states, their families and survivors; Non E.U. families and survivors of the Union citizen;	Health, income and age

		<p>The political refugee, his family members and survivors;</p> <p>The beneficiaries of international protection;</p> <p>A stateless person, his family members and survivors;</p> <p>The citizen / worker of Morocco, Tunisia, Algeria and Turkey, legally residing, and his family.</p>	
<b>Special allowance for partial blinds or twentieths</b>	An economic compensation to partial civil blind persons (twentieths) released by age and by income requirements.	<p>PSE CE SLP holders;</p> <p>The citizen who has resided legally in at least 2 member states, their families and survivors;</p> <p>Non E.U. families and survivors of the Union citizen;</p> <p>The political refugee, his family members and survivors;</p> <p>The beneficiaries of subsidiary protection;</p> <p>A stateless person, his family members and survivors;</p> <p>The citizen / worker of Morocco, Tunisia, Algeria and Turkey, legally residing, and his family.</p>	Health and income
<b>Special allowance for partial blinds or twentieths</b>	An economic compensation to partial civil blind persons (twentieths) released by age and by income requirements.	<p>PSE CE SLP holders;</p> <p>The citizen who has resided legally in at least 2 member states, their families and survivors;</p> <p>Non E.U. families and survivors of the Union citizen;</p> <p>The political refugee, his family members and survivors;</p>	Health

		<p>The holder of subsidiary protection;</p> <p>A stateless person, his family members and survivors;</p> <p>The citizen / worker of Morocco, Tunisia, Algeria and Turkey, legally residing, and his family.</p>	
<b>Non - reversible pension for deaf persons</b>	It is an economic benefit for the deaf persons between 18 and 65 years old.	<p>PSE CE SLP holders;</p> <p>The citizen who has resided legally in at least 2 member states, their families and survivors;</p> <p>Non E.U. family members and survivors of the Union citizen;</p> <p>The political refugee, his family members and the survivors;</p> <p>The holder of subsidiary protection;</p> <p>The stateless person, his family members and the survivors;</p> <p>The citizen / worker of Morocco, Tunisia, Algeria and Turkey, legally residing, and his family.</p>	Health, income and age
<b>Compensation for communication</b>	A compensation, that is up to any age for the sole title of the disability, regardless of economic conditions.	<p>PSE CE SLP holders;</p> <p>The citizen who has resided legally in at least 2 member states, their families and survivors;</p> <p>Non E.U. family members and survivors of the Union citizen;</p> <p>The political refugee, his family members and the</p>	Health

		<p>survivors;</p> <p>The holder of subsidiary protection;</p> <p>The stateless person, his family members and the survivors;</p> <p>The citizen / worker of Morocco, Tunisia, Algeria and Turkey, legally residing, and his family.</p>	
<b>Social allowance replacement</b>	<p>The monthly assistance and disability pension provided for disabled people, as well as the non - reversible pension for the deaf people, is replaced by the social allowance when reaching 65 years old of the owner, if the income is below the ceiling.</p>	<p>PSE CE SLP holder;</p> <p>The citizen who has resided legally in at least 2 member states, his family members and the survivors;</p> <p>Non E.U. family members and survivors of the Union citizen;</p> <p>The political refugee, his family members and the survivors;</p> <p>The holders of subsidiary protection;</p> <p>The stateless person, his family members and survivors;</p> <p>The citizen / worker of Morocco, Tunisia, Algeria and Turkey, legally residing, and his family.</p>	<p>Health, income and age</p>
<b>Maternity grant of the municipalities jurisdiction</b>	<p>An economic compensation for mothers who do not benefit from any economic or social security benefit for maternity, if certain income</p>	<p>PSE CE SLP holder;</p> <p>The citizen who has resided legally in at least 2 member states, his family members and the survivors;</p> <p>Non E.U. family members and survivors of the Union citizen;</p> <p>The political refugee, his family members and the survivors;</p>	<p>Income (threshold ISE). residence</p>

	<p>requirements are present (threshold ISE).</p>	<p>The holder of subsidiary protection;</p> <p>The stateless person, his family members and survivors;</p> <p>The citizen / worker of Morocco, Tunisia, Algeria and Turkey, legally residing, and his family.</p>	
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In the table we have given the Consult judgments limiting ourselves to reformulate the list of potential beneficiaries only for services concerning the cases on which the Court ruled: attendance allowance, disability pension, disability allowance and attendance contribution.

In fact we believe that the considerations of the Court, which has removed from our system Article 80 c. 19 l. 388/2000, restricting the scope of Article 41 Legislative Decree 286/98, relate to all welfare benefits, not just those who have then given rise to the judgments.

The ruling 187/2010, also does not encourage us to question on the legitimacy of social benefit's discipline. There are present all the parameters retrieved from the above sentence: the social allowance is a financial benefit for people over sixty in conditions of severe economic hardship, which do not have a pension or would perceive a less than the minimum. The check is undoubtedly an essential means of livelihood for these people not of working age and not receiving other sources of livelihood. In light of this ruling we can make the recognition of this measure to the possession of the SLP EC permit, or in this way we violate Article ECHR and Article 14. 1 of the First Additional Protocol, according to the broad interpretation which has provided the Court of Strasbourg?

In addition, there is another requirement which gives rise to much perplexity: the ten-year continuous residence. According to the jurisprudence of the ECJ's constant, the length of residence, as a condition of access to certain benefits, may represent a form of indirect discrimination. There is an indirect or covert discrimination, when an apparently neutral provision, in fact it tends to foster the national citizens or even local citizens, who can more easily meet that requirement than others. In this case, the residence

requirement of at least ten years in Italy, places in a disadvantaged condition the Union citizens and certain categories of third countries citizens, protected by European standards.

Finally in the box on allowances granted to families with at least 3 minor children pursuant to Article 65 of law 448/98 we have not indicated the permit holders EC SLP, as we believe appropriate to await the outcome of the complaint lodged by ASGI<sup>9</sup>.

Far from wanting to draw conclusions on a subject so complex, however, we feel hope as soon as possible a legislative action to restore order in the field.

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9 See Ord. Trib. Gorizia n. 506/2010; Ord. Trib. Gorizia n.351/2010; Ord. Trib. Monza n.36/2011 which extend to the SLP citizen the cheque for numerous families sets Ord. Trib. Monza 09.03.2011 highlights and raises the issue of the Constitutional rightness to the High Court of the Art.65, l. 448/9.

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## **Acronyms and Abbreviations**

ASGI: Association for Legal Studies on Immigration EC: European Community

ECHR: European Convention for the Protection of Human Rights and Fundamental Freedoms

C. Cost.: Constitutional Court

Cost.: Constitution

ECJ: European Court of Justice

Dlgs. : Legislative Decree INPS: ISE National Institute of Social Security

ISE: The economic situation indicator

L.: Law

PSE: electronic residence permit

LTR: long-term resident

TFEU: Treaty on the Functioning of the European Union

TUE: Treaty on European Union

EU: European Union