

HEALTH AND SAFETY AT WORK: LABOUR SECURITY AS A PRIMARY CHALLENGE FOR HUMAN SECURITY**

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Abstract

The matter of accidents at work and occupational diseases falls within the aims of various EU and international rules. This is part of a more general interest of the International community, as well as of the European Union's legislator and judge, for safety and health in the workplace. At this regard, the present paper aims at analyzing the capacity for the implementation and development of an occupational safety and health management approach at the international and European Union's level. The analysis is conducted through the examination of the international and European legal framework governing the matter, as well as through the investigation of the most recent and relevant case law on accidents at work and occupational diseases. From this research an effort emerges, at the European and international level, to ensure safety and health standards. However, such efforts are inadequate with respect to a constantly changing labor market, characterized by less and less stable employment relationships, new working patterns and an ageing workforce. Neither are all the people concerned by those changes adequately covered by the existing health, safety and insurance legislation, as well as the increasing number of temporary workers and workers with atypical contracts.

Keywords: *Health and Safety at Work, Labour Security, Construction Sector, EU, International Labour Organization*

1. Introduction

About 2.3 million people die around the world each year from work-related accidents and diseases, as pointed out by the International Labour Organization (ILO). This means more than 6,000 victims per day. The problem is even more serious in the building industry, which is one of the most affected sectors by safety problems at work. The ILO considers that

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one in six fatal accidents at work occurs on a construction site and that these accidents can be calculated in at least 60,000 fatal accidents each year around the world. That's why several international legal instruments have been adopted to address this problem. We can mention, among others, the *Safety and Health in Construction Convention* (No. 167) and its associated *Recommendation* (No. 175), adopted by the ILO in 1988. As a complement to the standards set up in this *Convention*, the *ILO Code of Practice on Safety and Health in Construction* was approved in 1992. Later, in 2001, the ILO developed the *Guidelines on Occupational Health and Safety Management Systems*, which apply to all economic sectors but are particularly useful in the construction industry as they highlight issues relating to subcontracting.

Provided that we will return later on these and other legal instruments adopted by the ILO over the years, it should be noted that even currently, consultations on this issue are ongoing -both at a regional and at a national level- in the context of the *Post-2015 Development Agenda*, a process led by the United Nations that aims to help define the future global development framework that will succeed the Millennium Development Goals.

Nevertheless, while international attention focuses mainly on developing countries (where very often the costs of the development itself are paid in terms of labor exploitation), we must stress the fact that these countries are not the only ones involved. Concentrating on EU Member States, for example, the problem of health and safety in the construction sector has long been the object of attention of the European institutions, which have intervened both at the normative and jurisprudential level.

At this regard, the present paper aims at analyzing the capacity for the implementation and development of an occupational safety and health management approach, with a particular attention at the construction enterprises.

The research methodology is based on the investigation of the international and European Union's legal framework governing the matter, with special attention to the latest international and EU initiatives in the field. This is accompanied by an analysis of the real possibility for a worker to assert the rights established by the international and European standards recalled. These findings are based on the examination of the procedures to be followed by a worker that suffers from an accident or an occupational disease, especially at the European Union's level. That is why this examination is followed by the analysis of the most relevant and recent case law of the Court of Justice of the European Union on insurance and

compensation of damages for accidents at work and occupational diseases: in order to value if the worker's rights, enshrined in European legislation, are actually guaranteed level of judicial practice.

2. Safety and Health at Work in the International Legal Instruments

The international organization that, for its role and its functions, has mainly dealt with the problem of health and safety at work, has been the International Labour Organization.

As already stated in the preamble to its Constitution, the ILO cites, among the objectives that the Organization intends to pursue, «the protection of the worker against sickness, disease and injury arising out of his employment»¹.

On this basis, the ILO has adopted a large number of legal instruments specifically dealing with occupational safety and health. It deals, in particular, with a series of Conventions providing more than forty "standards", aimed at supplying essential tools for governments, employers, and workers to establish inspection practices and to provide for maximum safety at work. In addition to such Conventions, are to be counted more than forty Codes of Practice, as well as other important legal instruments that will be discussed below. Furthermore, in 2003 the ILO adopted a global strategy to improve occupational safety and health which included the introduction of a preventive safety and health culture, the promotion and development of relevant instruments, and technical assistance.

As it is relevant to this work, the analysis will focus in particular on the relevant instruments in the field of health and safety at work in the construction sector. This was achieved after having briefly retraced the relevant legal framework through the analysis of the legal instruments of general scope. Among the latter, it is definitely to be mentioned the Occupational Safety and Health Convention of 1981 (No. 155) and its Protocol of 2002².

¹ Constitution of the International Labour Organization, preamble.

² Convention 1981 (No. 155) concerning Occupational Safety and Health and the Working Environment, Geneva, 22 June 1981, entered into force on August 11, 1983; Protocol of 2002 to the Occupational Safety and Health Convention, Geneva, 20 June 2002, entered into force on February 09, 2005.

The Convention 1981 (No. 155), applying to all branches of economic activity¹, set forth that each Member shall, in the light of national conditions and practice, and in consultation with the most representative organisations of employers and workers, «formulate, implement and periodically review a coherent national policy on occupational safety, occupational health and the working environment»². The aim of this national policy shall be «to prevent accidents and injury to health arising out of, linked with or occurring in the course of work», by minimising, so far as is reasonably practicable, the causes of hazards inherent in the working environment³.

This national policy on occupational safety and health shall be developed by taking into consideration national conditions and practice, and shall be secured by an adequate and appropriate system of inspection, as well as by adequate penalties for violations of the laws and regulations⁴.

To give effect to the mentioned policy, the competent authority shall ensure that a number of functions are progressively carried out. Among these functions there is, first of all, the determination of conditions governing the design, construction and layout of undertakings, the commencement of their operations, major alterations affecting them and changes in their purposes, the safety of technical equipment used at work, as well as the application of procedures defined by the competent authorities⁵. Secondly, the Convention mentions the determination of work processes and of

¹ Article 2, paragraph 1. However, the article 2 itself provides the possibility, for a Member ratifying the Convention, to exclude from its application, in part or in whole, limited categories of workers in respect of which there are particular difficulties.

² Article 4, paragraph 1.

³ Article 4, paragraph 2. As provided in article 5 of the Convention, the national policies set out in article 4 shall take account, in particular, of the following main spheres of action: a) design, testing, choice, substitution, installation, arrangement, use and maintenance of the material elements of work (workplaces, working environment, tools, machinery and equipment, chemical, physical and biological substances and agents, work processes); b) relationships between the material elements of work and the persons who carry out or supervise the work, and adaptation of machinery, equipment, working time, organisation of work and work processes to the physical and mental capacities of the workers; c) training, including necessary further training, qualifications and motivations of persons involved, in one capacity or another, in the achievement of adequate levels of safety and health; d) communication and co-operation at the levels of the working group and the undertaking and at all other appropriate levels up to and including the national level; e) the protection of workers and their representatives from disciplinary measures as a result of actions properly taken by them in conformity with the policy referred to in Article 4 of the Convention.

⁴ Articles 8 and 9.

⁵ Article 11, letter a).

substances and agents the exposure to which is to be prohibited, limited or made subject to authorisation or control by the competent authority¹.

Thirdly, the competent national authority shall guarantee the establishment and application of procedures for the notification of occupational accidents and diseases by employers and, when appropriate, insurance institutions and others directly concerned². The same authority shall provide for the holding of inquiries - where cases of occupational accidents, occupational diseases or any other injuries to health which arise in connection with work appear to reflect situations which are serious - and for the publication, annually, of information on measures taken in pursuance of the Convention and on occupational accidents, occupational diseases and other injuries to health which arise in the course of or in connection with work³.

In addition to the action at the national level, the Convention establishes the actions to be taken at the level of the undertaking. In particular, employers are required to ensure that the workplaces, machinery, equipment and processes under their control are safe and without risk to health⁴.

The Convention stresses the importance of the co-operation between management and workers - or their representatives - within the undertaking. This co-operation is considered as an essential element of

¹ *Idem*, letter b).

² *Idem*, letter c).

³ *Idem*, letter d) and e).

⁴ Article 16. To achieve this objective, the article 19 of the Convention states that there shall be arrangements at the level of the undertaking under which: workers, in the course of performing their work, co-operate in the fulfilment by their employer of the obligations placed upon him; representatives of workers in the undertaking co-operate with the employer in the field of occupational safety and health; representatives of workers in an undertaking are given adequate information on measures taken by the employer to secure occupational safety and health and may consult their representative organisations about such information provided they do not disclose commercial secrets; workers and their representatives in the undertaking are given appropriate training in occupational safety and health; workers or their representatives and, as the case may be, their representative organisations in an undertaking, in accordance with national law and practice, are enabled to enquire into, and are consulted by the employer on, all aspects of occupational safety and health associated with their work; for this purpose technical advisers may, by mutual agreement, be brought in from outside the undertaking; a worker reports forthwith to his immediate supervisor any situation which he has reasonable justification to believe presents an imminent and serious danger to his life or health; until the employer has taken remedial action, if necessary, the employer cannot require workers to return to a work situation where there is continuing imminent and serious danger to life or health.

organisational and other measures taken in pursuance of the Convention itself¹.

As mentioned previously, the Convention 1981 (No. 155) has been integrated by a Protocol in 2002. In particular, this Protocol calls for the establishment and the periodic review of requirements and procedures for the recording and notification of occupational accidents and diseases, and for the publication of related annual statistics.

As for the other ILO legal instruments of general scope in the field of health and safety at work, the Occupational Health Services Convention, 1985 (No. 161), as well as the Promotional Framework for Occupational Safety and Health Convention, 2006 (No. 187), must be recalled.

The Convention 1985 (No. 161) provides for the establishment of enterprise-level occupational health services which are entrusted with essentially preventive functions and which are responsible for advising the employer, the workers and their representatives in the enterprise on maintaining a safe and healthy working environment².

The Convention 2006 (No. 187), instead, aims at promoting a preventative safety and health culture and progressively achieving a safe and healthy working environment. It requires ratifying States to develop, in consultation with the most representative organizations of employers and workers, a national policy, national system, and national programme on occupational safety and health³.

Thus, with regard to the further legal instruments concerning health and safety in particular branches of economic activity, the Safety and Health in Construction Convention, 1988 (No. 167), mentioned above, is of particular importance for the present work⁴. The convention provides detailed technical preventive and protective measures giving due regard for the specific requirements of this sector. These measures relate to safety of workplaces, machines and equipment used, work at heights and work executed in compressed air.

¹ Article 20.

² Convention 1985 (No. 161) concerning Occupational Health Services, Geneva, 25 June 1985, entered into force on February 17, 1988.

³ Convention 2006 (No. 187) concerning the promotional framework for occupational safety and health, Geneva, 15 June 2006, entered into force on February 20, 2009.

⁴ Convention 988 (No. 167) concerning Safety and Health in Construction, Geneva, 20 June 1988, entered into force on January 11, 1991.

The ILO Convention so far mentioned - the ones of general scope as well as the Convention 1988 (No. 167) - have represented an undoubted step forward with regard to the fixing, at conventional international law level, health and safety standards at the workplace. However, the true extent of these ILO Conventions can be evaluated only by taking into account their implementation at the level of the workplace. But this depends on a large number of factors. Among these factors, the role of representation and consultation are to be included as essential elements of health and safety application into practice. Worker representation, for example, is a specific form of participation mentioned also by the ILO Convention No. 155. It is important to take into consideration such practices, since research evidence demonstrates that worker representation and consultation effectively improve health and safety outcomes in relation to management practices and safety culture, as well as safety performance in terms of injury rates¹.

Returning to the analysis of the ILO legal instruments concerning safety and health at work, it should be noted that, recently, the Organization has adopted a Plan of action (2010-2016) to achieve widespread ratification and effective implementation of the previous occupational safety and health instruments (Convention No. 155, its 2002 Protocol and Convention No. 187)². The Plan of Action outlines strategies mainly focused on: mapping the current situation at the national level and the readiness to take action; promoting and supporting the development of a preventive safety and health culture; overcoming shortcomings in the implementation of ratified Conventions; and improving occupational safety and health conditions in small and medium-sized enterprises and the informal economy.

Recently, even the United Nations have adopted, as mentioned above, a *Post-2015 Development Agenda*, aimed at defining the future global development framework that will succeed the Millennium Development Goals³. The *Agenda*, focused on the concept of “sustainable development”, embraces the three dimensions of sustainability: economic, social and environmental. In this context, “decent work” is considered a key to sustainable development. In particular, the importance of decent work in achieving sustainable development is highlighted by Goal 8, which aims to

¹ In this sense see Walters, D. (2010). *The Role of Worker Representation and Consultation in Managing Health and Safety in the Construction Industry*, pp. 1-48.

² Plan of action (2010-2016) to achieve widespread ratification and effective implementation of the occupational safety and health instruments (Convention No. 155, its 2002 Protocol and Convention No. 187), adopted by the ILO Governing Body at its 307th Session (March 2010).

³ The *Agenda* was formally adopted by world leaders in September 2015, in New York. It has 17 Sustainable Development Goals that will build on the progress achieved under the Millennium Development Goals.

«promote sustained, inclusive and sustainable economic growth, full and productive employment and decent work for all».

3. The Situation at the EU Level

The issues of work and social security, including the aspects related to health and safety at work, have been the subject of the European Union's attention for a long time. This fits into the historical interest of the European Community - and, then, in that of the European Union - for social security as a functional matter to the free movement of workers. The Community regulations on the free movement of workers, in fact, have played a historic role in the European Union's labour law system, given its instrumental nature to the creation of the Community market. In fact, the right to free movement has always been a cornerstone of the whole European construction, because the objective of implementing the internal market was strictly associated to the full realization of the four fundamental freedoms (free movement of goods, capital and services, alongside with free movement of workers) provided for in Article 3 c of the original TCEE.

As for the secondary EU law, what emerges from the evolution of the right of free movement through the Community regulations governing it (referred to below) is, apart from the specific amendments, the constant importance attributed by the Community legislator to the construction of the single European market, of which the free movement is a key element.

However, the issue of free movement of workers could not be fully disciplined without taking into account the related features of social security. Hence the importance of the regulations, passed in the 1970s and updated several times (as it will be said later), which govern the subject of social security.

The legal framework designed by these regulations is closely linked to the right to free movement of persons, as functional to it. In fact, it seeks to ensure the effectiveness of the right to freedom of movement by eliminating those social security constraints which might restrict it. To this end, it is ensured that workers who have worked in different States are not prejudiced compared to those who have worked in one state.

What is to be highlighted in the analysis of the EU framework for the free movement of workers and social security is an essential element of

European legislation: the prevalence that has always been given, in the hierarchy of priorities, to the achievement of the free market and the free competition over social and labour rights. It is with this aim that this legislation (which regulates security and social security in the relations between the countries of the European Union and the European Economic Area and between the countries of the European Union and Switzerland) has been introduced.

Nonetheless, although at a first stage the law - primary and secondary law - of the European Community has dealt with work and social security almost exclusively with the goal to create a European market, it cannot be denied that the Community legislator has, over time, also produced some relevant social results.

In this context, different EU directives and regulations, relevant to the subject dealt with in this paper, are included. They are, in particular, the directives based on Article 118a of the Treaty of Rome, introduced by the Single European Act of 1986. Around the heart constituted by the Directive No. 89/391/EC, regarding the protection of health and safety in the workplace, a series of minor directives (directives with a sectoral or categorical protection) have been adopted. Moreover, some important directives were implemented, such as that on the protection of pregnant or maternity workers (Directive No. 92/85/EC, connected with the problem of the equal treatment for men and women in matters of social security, as derived from the Directive 79/7/EEC) or on the organization of the working time (Directive No. 93/104/EC, transposed in the codification directive No. 2003/88/EC), which will be recalled in the following paragraph.

4. The EU Legal Framework on Safety and Health at Work, Related Accidents and Diseases. The Procedure to be followed by a EU Worker that Suffers from an Accident or an Occupational Disease

The matter of accidents at work and occupational diseases falls within the aims of the various EU rules mentioned above, both at primary and secondary level. However, it is important to note, first and foremost, that it is not only the European Union's law to apply to the matter. Indeed, within the different possible applicable systems, a primary role is played by national legislations and the social security scheme of each member State.

Different aspects are governed by international, European or national law and there are interactions with other compensation schemes¹.

In particular, the role of the national government should be to lay down the overall structure of the scheme and to make sure that the legal framework and the obligations in general are respected. This includes the responsibility for setting or controlling the premiums, the level of claims reserves held by insurers or the whole area of prevention.

The national social security plays an active part in claims handling or in organizing rehabilitation and is responsible for taking recourse against the insurer. The costs of this intervention should be covered by a contribution from the workers' compensation scheme. So, to sum up, the legal obligations are set at a national level and at a European level through competition law, standards for prevention and safety at work and other relevant standards for the protection of workers against discriminations.

Besides the national and European level, the International Labour Organisation (ILO) has also adopted a certain number of principles on: who should be covered in these cases by the insurance system; the definition of a "work accident; the areas for compensation and the overall organization of a workers' compensation scheme.

In practice, the procedure - resulting from interactions between the different regulatory levels - that a worker should follow if he lives and is insured in an EU country (but also in Iceland, Liechtenstein, Norway and Switzerland) and if he suffers from an accident at work or from an occupational disease can be summarised as follows.

The said worker should inform his own insurance institution when the accident at work occurs or when the professional disease is diagnosed for the first time. As each country has different rules, the insurance institution should provide the worker with all the necessary information about the steps to take.

¹ For an overview of the legal framework on safety and health at work see, *inter alia*, J.M. Stellman, *Encyclopaedia of occupational health and safety*, International Labour Office, Geneva 1998; S. C. Lonergan, *Human Security, Environmental Security and Sustainable Development. Environment and Security* (eds. M. Lowi, B. Shaw), MacMillan, London 2000; F. Murie, "Building Safety – An International Perspective", *International Journal of Occupational and Environmental Health*, 1/2007, 5-11; L.S. Robson, J.A. Clarke, K. Cullen, A. Bielecky, C. Severin, P. L. Bigelow, Irvin, E., A. Culyer, Q. Mahood, "The effectiveness of occupational health and safety management system interventions: A systematic review", *Safety Science*, 3/2007, 329-353; J. Ridley, J. Channing, *Safety at Work*, Routledge, London 2008; D. Walters, *The Role of Worker Representation and Consultation in Managing Health and Safety in the Construction Industry*, International Labour Organization, Geneva 2010, pp. 1-48.

About the responsibility for the healthcare, the country responsible is the country where the worker resides. It is this country that is responsible for providing all benefits like healthcare and medicines. If the worker is not insured there, he is requested to ask his insurance institution for a document giving details of the accident or the disease. This document has to be presented to the competent institution of the country where the worker is living or staying, in order to receive the benefits there.

About the country that should pay the worker's cash benefits, it is important to remember that it is the country where the worker is insured to be always responsible for paying the cash benefits in respect of an accident at work or an occupational disease.

Having briefly outlined the procedure that the worker has to follow in the European Union, as the result of the interaction between different levels of regulation, some rules of the Treaty, as well as some regulations and directives relating to the matter should be mentioned.

With respect to primary law, article 31, paragraph 1 of the Charter of Fundamental Rights of the European Union enshrines the right of every worker to working conditions which respect his or her health, safety and dignity. Moreover, according to article 153, paragraph 1, let. a) of the Treaty on the functioning of the European Union (TFEU) the Union shall support and complement the activities of the Member States to improve the working environment to protect workers' health and safety. To that end, the Union may adopt minimum requirements through directives¹.

To give applications to the aforementioned provisions of the Treaty, one Framework directive and more than twenty individual directives have been adopted in order to set out minimum requirements on the prevention of occupational risks, the protection of workers' safety and health, the elimination of risk and accident factors and the principle of the responsibility of the employer. Furthermore, the directives govern the rights and duties of workers, including the information, consultation, balanced participation and training of workers and of their representatives and health surveillance.

The individual directives specify rules with regards to specific hazards (for example chemical, physical and biological agents), to specific activities (for example manual handling of loads), to sectors with higher risks (for example extractive industries or construction) and to vulnerable workers (for example young workers or pregnant workers).

¹ Article 153, paragraph 2, letter b) TFEU.

In addition to these directives, other regulatory acts are to be mentioned; acts relating to social security, as well as to health and safety at work.

In particular, we have to recall the Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community and the Regulation (EEC) No 574/72 of the Council of 21 March 1972 fixing the procedure for implementing Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons and their families moving within the Community¹.

The discipline so traced ruled the matter until the entry into force of the Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems². In fact, with this Regulation repealed Regulation (EEC) No 1408/71 from the date of entry into force of the new implementing Regulation, No 987/2009 of 16 September 2009³.

The 2009 implementing Regulation has, in turn, replaced the previous implementing Regulation (EEC) n. 574/72, although some of its provisions remain in place to guarantee the legal certainty of certain acts concerning

¹ Respectively in OJ L 149, 5.7.1971, p. 2-50 and in OJ L 74, 27.3.1972, p. 1-83. In the vast References on social security in the European Union law, see, among the others: A. Sinagra, "Competenza e normativa della CEE in tema di sicurezza sociale con particolare riguardo agli infortuni sul lavoro", *Rivista di diritto europeo* 2/1983, 101-128; G. Arrigo, *Principi, fonti, libera circolazione e sicurezza sociale dei lavoratori*, Giuffrè, Milano 1998; S. Giubboni, "Libertà di circolazione e protezione sociale nell'Unione europea", *Giornale di diritto del lavoro e delle relazioni industriali* 1/1998, 87; R. White, *Workers, Establishment, and Services in the European Union*, Oxford University Press, Oxford 2004; M. Cinelli-S. Giubboni, *Il diritto della sicurezza sociale in trasformazione*, Giappichelli, Torino 2005; V. Paskalia, *Free Movement, Social Security and Gender in the EU*, Hart publishing, Oxford-Portland 2007; G. Arrigo, "La sicurezza sociale nel diritto comunitario", in: *I diritti sociali degli stranieri* (ed. A. Di Stasi), Roma 2008, 19; G. Caggiano, "Il coordinamento comunitario delle politiche nazionali per la creazione del modello sociale europeo", in: *Studi in onore di Vincenzo Starace*, Editoriale Scientifica, Napoli 2008, v. II, 909; F. Pennings, *European Social Security Law*, Intersentia, Antwerpen 2010; L. Idot, D. Simon, A. Rigaux, "Libre circulation des travailleurs", *Europe*, 2011, 24.

² Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (text with relevance for the EEA and for Switzerland), in OJ L 166, 30.4.2004, p. 1. For an analysis of the Regulation see, among others, F. Marongiu Buonaiuti, "La legge applicabile alle prestazioni di sicurezza sociale nel regolamento CE n. 883/2004", in *Rivista del diritto della sicurezza sociale* 2010, 537.

³ Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems, in OJ L 284/1, 30.10.2009, p. 1.

non-Community nationals, whose coordination rules have been extended by Regulation (EC) No 859/2003¹.

Also the Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security has to be mentioned².

As for the period following the adoption of the Single European Act, we shall recall the Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work³, but also the Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding⁴.

With specific regard to the construction sector, the discipline is dictated by the Council Directive 92/57/EEC of 24 June 1992⁵. This Directive regulates the implementation of minimum safety and health requirements at temporary or mobile construction sites. It distinguishes different stages of the work project during which safety and health have to be assured (project preparation, project execution) and defines the respective responsibilities for each stage.

Following this approach, article 3 of the Directive provides that, in a preliminary stage, the client or the project supervisor shall appoint one or more coordinators for safety and health matters, for any construction site on which more than one contractor is present. The client or the project supervisor shall ensure that prior to the setting up of a construction site a safety and health plan is drawn up.

In the project preparation stage, the project supervisor, or where appropriate the client, shall take account of the general principles of prevention concerning safety and health during the various stages of designing and preparing the project, in particular: when architectural,

¹ Council Regulation (EC) No 859/2003 of 14 May 2003 extending the provisions of Regulation (EEC) No 1408/71 and Regulation (EEC) No 574/72 to nationals of third countries who are not already covered by those provisions solely on the ground of their nationality, in OJ L 124, 20.05.2003, p. 1-3.

² In OJ L 6, 10.1.1979, p. 24-25.

³ In OJ L 183, 29.6.1989, p. 1-8.

⁴ In OJ L 348, 28.11.1992, p. 1-7.

⁵ Council Directive 92/57/EEC of 24 June 1992 on the implementation of minimum safety and health requirements at temporary or mobile construction sites (eighth individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC), in OJ L 245, 26 August 1992, p. 6-22.

technical and/or organizational aspects are being decided, in order to plan the various items or stages of work which are to take place simultaneously or in succession; when estimating the period required for completing such work or work stages¹.

Still during the project preparation stage, the Directive defines many duties of coordinators, among which: draw up a safety and health plan setting out the rules applicable to the construction site concerned, taking into account where necessary the industrial activities taking place on the site; prepare a file appropriate to the characteristics of the project containing relevant safety and health information to be taken into account during any subsequent works².

Subsequently, the coordinator for safety and health matters shall, during the project execution stage: coordinate implementation of the general principles of prevention and safety; coordinate implementation of the relevant provisions in order to ensure that employers and, if necessary for the protection of workers, self-employed persons; make any adjustments required to the safety and health plan to take account of the progress of the work and any changes which have occurred; organize cooperation between employers, including successive employers on the same site, coordination of their activities with a view to protecting workers and preventing accidents and occupational health hazards and reciprocal information, ensuring that self-employed persons are brought into this process where necessary; coordinate arrangements to check that the working procedures are being implemented correctly; take the steps necessary to ensure that only authorized person are allowed onto the construction site³.

It is interesting to note that the Directive 92/57/EEC also deals with consultation and participation of workers. Article 12 of the Directive, indeed, provides that consultation and participation of workers and of their representatives shall take place ensuring, whenever necessary, proper coordination between workers and workers' representatives in undertakings carrying out their activities at the workplace, having regard to the degree of risk and the size of the work site.

Even after the Directive 92/57/EEC, so far examined, the EU institutions have returned to deal with safety and health at work. Lately, the Council has adopted Decision (EU) 2015/1848, containing the EU Guidelines for the employment policies of the Member States. The Decision calls for quality

¹ Directive 92/57/EEC, article 4.

² *Idem*, article 5.

³ *Idem*, article 6.

employment to be ensured, among others, in terms of working conditions, including health and safety¹.

5. Relevant Case Law of the Court of Justice of the European Union on Insurance and Compensation of Damages for Accidents at Work and Occupational Diseases

The interpretation, within the EU, of the matter of insurance and compensation of damages for accidents at work and occupational diseases is based on some historical judgments of the European Court of Justice, which we are going to briefly trace back to arrive to some recent important pronouncements.

One of the problematic issues posed at the attention of the Court was the interpretation of the provisions of Article 90(2) of the Treaty (then Article 86(2) EC and 106, TFEU), and if they may be relied on by individuals before national courts in order to obtain review of compliance with the conditions which they lay down. This problem was solved by the Court in a Judgement of 22 January 2002 in Case *Cisal v. INAIL - Istituto nazionale per l'assicurazione contro gli infortuni sul lavoro*².

Another problem faced up by the Court in that Judgement was the concept of an undertaking, within the meaning of Articles 85 and 86 of the EC Treaty (then Articles 81 EC and 82 EC and 101-102 TFEU). According to the Court, this concept does not cover a body which is entrusted by law with the management of a scheme providing compulsory insurance against accidents at work and occupational diseases, where the amount of benefits and the amount of contributions are subject to supervision by the State and the compulsory affiliation which characterises such an insurance scheme is essential for the financial balance of the scheme and for application of the principle of solidarity, which means that benefits paid to insured persons are not strictly proportionate to the contributions paid by them. Such a body fulfils an exclusively social function. Accordingly, its activity is not an economic activity for the purposes of competition law³.

¹Council Decision (EU) 2015/1848 of 5 October 2015 on guidelines for the employment policies of the Member States for 2015, in OJ L 268, 15 October 2015, p. 28-32.

²Judgment of the Court of 22 January 2002 in Case C-218/00, in *Reports of Cases* 2002 I-00691.

³ See paragraphs 44-46 and operative part of the Judgement.

In the particular case, it was the *Tribunale di Vicenza* that referred to the Court for a preliminary ruling under Article 234 EC the two questions on the interpretation of Articles 85, 86 and 90 of the EC Treaty¹. The Court answered by underlining that, according to the settled case-law, Community law does not affect the power of the Member States to organise their social security systems².

In particular, the covering of risks of accidents at work and occupational diseases has for a long time been part of the social protection which Member States afford to all or part of their population.

Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community³, contains specific provisions for coordinating national schemes on accidents at work and occupational diseases, for the application of which, in the case of the Italian Republic, the INAIL is expressly designated as the competent institution, within the meaning of Article 1(o) of that regulation. In summary, the Court states that the amount of benefits and the amount of contributions, which are two essential elements of the scheme managed by the INAIL, are subject to supervision by the State and that the compulsory affiliation which characterises such an insurance scheme is essential for the financial balance of the scheme and for application of the principle of solidarity, which means that benefits paid to insured persons are not strictly proportionate to the contributions paid by them⁴. So, with regard to that specific case, the Court concluded in the sense that in participating in this way in the management of one of the traditional branches of social security (in this case insurance against accidents at work and occupational diseases) the INAIL fulfils an exclusively social function. It follows that "its activity is not an economic activity for the purposes of competition law and that this body does not

¹ The questions have been raised in proceedings between *Cisal di Battistello Venanzio & C. Sas* (hereinafter *Cisal*) and the *Istituto nazionale per l'assicurazione contro gli infortuni sul lavoro* (National Institute for Insurance against Accidents at Work - INAIL), concerning an order to pay the sum of ITL 6 606 890 representing insurance contributions not paid by *Cisal*.

² See, in particular, Case C-158/96 *Kohll* [1998] ECR I-1931, paragraph 17, and Case C-157/99 *Smits and Peerbooms* [2001] ECR I-5473, paragraph 44. For an historical perspective of the Italian situation see, among the others, G. Assennato, V. Navarro, "Workers' participation and control in Italy: the case of occupational medicine", *International Journal of Health Services* 10(2)/1980, 217-232.

³ Modified and updated, at the time of the Judgement, by Council Regulation (EC) No 118/97 of 2 December 1996, in OJ 1997 L 28, p. 1.

⁴ Conclusions of the Court, paragraph 44.

therefore constitute an undertaking within the meaning of Articles 85 and 86 of the Treaty”¹.

Finally, in answer to the questions submitted to it by the Tribunale di Vicenza, the Court ruled that the concept of undertaking, within the meaning of Articles 85 and 86 of the Treaty, does not cover a body entrusted by law with the management of a scheme providing insurance against accidents at work and occupational diseases, such as the INAIL².

Later, with the Judgment of the Court of 3 September 2014 the *Korkein hallinto-oikeus* (Supreme Administrative Court of Finland), the Court of Justice ruled on some important themes such as: the equal treatment for men and women in matters of social security, as derived from the Directive 79/7/EEC³; the accident insurance for workers; the amount of a lump-sum compensation for permanent incapacity; the actuarial calculation based on average life expectancy by sex of the recipient of that compensation; the concept of “sufficiently serious infringement of EU law”⁴. In this Case, the request for a preliminary ruling (under Article 267 TFEU) was made in a dispute between X and the Finnish Ministry of Social Affairs and Health concerning the grant of lump-sum compensation paid following an accident at work. In particular, the request concerned the interpretation of Article 4 of Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security. The Directive, that applies to statutory schemes which provide protection against the risks, *inter alia*, of accidents at work⁵, states, under article 4, paragraph 1, that: “the principle of equal

¹ Conclusions of the Court, paragraph 45.

² Conclusions of the Court, paragraph 46.

³ Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security, in OJ 1979 L 6, p. 24.

⁴ Judgment of the Court of 3 September 2014, case C-318/13, published in OJ C 233 of 10.8.2013. This case originated from a letter sent by X, on 13 October 2008, to the Finnish Ministry of Social Affairs and Health. In this letter X claimed that the lump sum paid to him as compensation for his long-term disability had been determined in disregard of the provisions of EU law on equal treatment of men and women. X therefore claimed an amount that corresponded to the difference between the compensation received by X and that payable to a woman of the same age and in a comparable situation. On 27 May 2009, the Ministry refused to pay the sum claimed. On 17 June 2009, X brought an action before the Helsinki Administrative Court, seeking an order that the Finnish State pay him the sum in question. By a decision of 2 December 2010, this Court declared that action inadmissible on the ground that it did not have jurisdiction. X then brought an appeal against that decision before the Supreme Administrative Court which, on 28 November 2012, set aside the decision of the previous Court.

⁵ Council Directive 79/7/EEC, art. 3.1.a.

treatment means that there shall be no discrimination whatsoever on ground of sex either directly, or indirectly by reference in particular to marital or family status, in particular as concerns: the scope of the schemes and the conditions of access to them; the obligation to contribute and the calculation of contributions; the calculation of benefits including increases due in respect of a spouse and for dependants and the conditions governing the duration and retention of entitlement to benefits”.

As for the Finnish law, the implementation of the accident insurance is a public management task, which, in Finland, is carried out by private insurance companies. Employers, in order to satisfy their obligation to provide for their workers’ safety as regards accidents at work, are required to take out insurance with an insurance company approved to insure the risks covered by the Law on accident insurance of 1992 (‘the Law on accident insurance’). The costs of the statutory accident insurance are covered by the insurance premiums paid by the employers¹.

In deciding on the matter, the Court ruled that the article 4, paragraph 1, of Council Directive 79/7/EEC of 19 December 1978 must be interpreted as precluding national legislation on the basis of which the different life expectancies of men and women are applied as an actuarial factor for the calculation of a statutory social benefit payable due to an accident at work, when, by applying this factor, the lump-sum compensation paid to a man is less than that which would be paid to a woman of the same age and in a similar situation².

Furthermore, the Court of Justice of the European Union ruled that it is for the referring court to assess whether the conditions for the Member State to be deemed liable are met³.

Similarly, as regards whether the national legislation at issue in the main proceedings constitutes a ‘sufficiently serious’ infringement of EU law, that court will have to take into consideration the fact that the Court has not yet ruled on the legality of taking into account a factor based on average life expectancy according to sex in the determination of a benefit paid under a statutory social security system and falling within the scope of the Directive

¹ Paragraph 14(1)(1) of that law provides for the payment, in particular, of compensation for an injury or illness caused by an accident at work.

⁸ In particular, the paragraph 18b(1) of the Law of 1992 provides that compensation is paid either as a lump sum or continuously. Under Paragraph 18b(3), the lump sum compensation is calculated in the form of capital corresponding to the value of the disability allowance, taking into account the employee’s age according to criteria approved by the Ministry.

² Conclusions of the Court, paragraph 40.

³ Conclusions of the Court, paragraph 51.

79/7. The national court will also have to take into account the right granted to the Member States by the EU legislature, set out in Article 5, paragraph 2 of the Council Directive 2004/113/EC¹, and Article 9, paragraph 1, letter h, of the Directive 2006/54/EC². In reaching such a decision, the Court confirms its previous case-law, where it had held that the first of those provisions is invalid, since it infringes the principle of equal treatment between men and women³.

In a recent Judgement of 1 February 2017, the Court was requested for a preliminary ruling under Article 267 TFEU from the Supreme Court of the United Kingdom, made by decision of 29 July 2015, received at the Court on 5 August 2015, in the proceedings *Secretary of State for Work and Pensions v. Tolley*⁴. The request for a preliminary ruling concerned the interpretation of Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community (abovementioned).

The request had been made in proceedings between the Secretary of State for Work and Pensions ('the Secretary of State') and Mrs Tolley, who died on 10 May 2011 and acted in the main proceedings by her husband as her personal representative, concerning the withdrawal of her entitlement to the care component of disability living allowance ('DLA') on the ground that she no longer satisfied the conditions as to residence and presence in Great Britain.

On the grounds of a deep analysis of the Council Regulation (EEC) No 1408/71, the Court ruled, first of all, that "a benefit such as the care component of disability living allowance is a sickness benefit for the purposes of Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, in the version amended and updated by Council Regulation (EC) No 118/97 of 2 December 1996, as amended by Council Regulation (EC) No 307/1999 of 8 February 1999"⁵.

¹ Council Directive 2004/113/EC of 13 December 2004, implementing the principle of equal treatment between men and women in the access to and supply of goods and services.

² Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation.

³ Judgment of the Court of 1 March 2011, case C-236/09.

⁴ Judgment of the Court of 1 February 2017, case C-430/15.

⁵ Conclusions of the Court.

Second of all, according to the Court, article 13(2)(f) of Regulation No 1408/71 (in the version amended and updated by Regulation No 118/97, as amended by Regulation No 307/1999), must be interpreted as meaning that the fact that a person has acquired rights to an old-age pension by virtue of the contributions paid during a given period to the social security scheme of a Member State does not preclude the legislation of that Member State from subsequently ceasing to be applicable to that person. It is for the national court to determine, in the light of the circumstances of the case before it and of the provisions of the applicable national law, when that legislation ceased to be applicable to that person. Third of all, article 22(1)(b) of Regulation No 1408/71, in the version amended and updated by Regulation No 118/97, as amended by Regulation No 307/1999, must be interpreted as preventing legislation of the competent State from making entitlement to an allowance such as that at issue in the main proceedings subject to a condition as to residence and presence on the territory of that Member State.

6. Conclusions

From all the foregoing it emerges an effort, both at the universal and at the European- regional level, to ensure safety and health standards at work through important binding legal instruments against accidents at work and occupational diseases.

However, many problems remain, and they are indeed accentuated by a labor market constantly changing. In fact, new challenges arise for health and safety at work from less stable employment relationships, new working patterns and an ageing workforce. Not all people concerned by those changes are adequately covered by the existing health and safety legislation. The increasing numbers of temporary workers and of atypical contracts raise concerns on the degree of coverage of health and safety provisions. Many workers report that they are not well informed about health and safety risks related to their jobs, with a higher share in small and medium-sized workplaces¹.

¹ Oh this issues see C. Mayhew, M. Quintanb, R. Ferrisc, "The effects of subcontracting/ outsourcing on occupational health and safety", *Safety Science*, 1-3/1997, 163-178; G. Papadopoulos, P. Georgiadou, C. Papazoglou, K. Michaliou, "Occupational and public health and safety in a changing work environment: An integrated approach for risk assessment and prevention", *Safety Science*, 8/2010, pp. 943-949.

Furthermore, even if the EU minimum requirements have contributed to deeply focus on the risk management cycle at the national level, the application of the rules varies significantly from one member State to another, entailing different levels of workers' health protection. Thus it remains, among the European States, an unbalanced implementation of the European Union legislation in the field of health and safety at work. Moreover, the protection offered by the different national regulations, as well as the effectiveness and efficiency of the related control systems and the imposition of penalties, remains strongly differentiated.

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